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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MATTHEW WIMBERLY,)	Case No. CV 11-4933-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	AFFIRMING THE COMMISSIONER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
)	

I. PROCEEDINGS

Plaintiff Matthew Wimberly seeks review of the Commissioner's final decision denying his application for Supplemental Security Income benefits ("SSI"). The matter is before the Court on the parties' cross-motions for summary judgment. The Court has taken both motions under submission without oral argument. For the reasons stated below, Plaintiff's motion is denied and Defendant's is granted, the decision of the Commissioner is affirmed, and this action is dismissed with prejudice.

II. BACKGROUND

Plaintiff was born on July 23, 1962. (Administrative Record

1 ("AR") 37.) He has past work experience as a caregiver,
2 construction worker, and laborer. (AR 64.) Plaintiff originally
3 filed an application for SSI benefits on December 7, 2004,
4 alleging disability beginning on April 1, 2004, from injuries to
5 his hands, gunshot wounds in his legs, and arthritis in his hands
6 and legs. (AR 63.) Following a 2006 hearing before an
7 Administrative Law Judge ("ALJ"), the ALJ determined that
8 Plaintiff retained the residual functional capacity ("RFC")¹ to
9 perform a significant number of jobs that existed in the local
10 and national economy. (AR 14.) After a request for review by
11 the Appeals Council was denied, Plaintiff appealed to this Court,
12 which concluded that remand was appropriate because the ALJ had
13 improperly ignored the opinion of a state agency physician. See
14 Wimberly v. Astrue, No. CV 07-1952-JC, 2008 WL 4381617 (C.D. Cal.
15 Sept. 25, 2008).

16 Upon remand, a hearing was held before ALJ Cynthia A. Minter
17 on October 22, 2009. (AR 271.) Plaintiff, who was represented
18 by counsel, testified at the hearing, as did a Vocational Expert,
19 Barbara Miksic ("VE Miksic"). (Id.) The ALJ determined that
20 Plaintiff had a more limited RFC than found by the ALJ in the
21 2006 hearing decision. (AR 273-74.) She nevertheless found that
22 Plaintiff was not disabled and denied the application. (AR 271-
23 79.) On April 6, 2011, the Appeals Council declined review. (AR
24 253-55.)

25
26
27 ¹ RFC is what a claimant can still do despite existing
28 exertional and nonexertional limitations. 20 C.F.R.
§ 416.945(a); see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5
(9th Cir. 1989).

1 Plaintiff contends that the ALJ's determination that
2 Plaintiff could perform gainful work available in the national
3 economy was not supported by substantial evidence. (Pl.'s Mot.
4 at 3-9.) Specifically, Plaintiff challenges the ALJ's finding
5 that he could perform the occupation of "call out operator" as
6 well as her determination that the occupation of "surveillance
7 system monitor" existed in sufficient numbers in the economy
8 suitable to his limitations. (Pl.'s Mot. at 5-7.) Plaintiff
9 also argues that even if he did have the RFC to perform the
10 identified occupations, a finding of disabled was still warranted
11 based on a comparison to the Medical-Vocational Guidelines, 20
12 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201. (Pl.'s Mot. at
13 6-8).

14 **III. STANDARD OF REVIEW**

15 Under 42 U.S.C. § 405(g), a district court may review the
16 decision of the Commissioner (or ALJ) to deny benefits. The
17 Court may set aside the Commissioner's decision when the ALJ's
18 findings are based on legal error or are not supported by
19 substantial evidence in the record as a whole. Aukland v.
20 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v. Chater,
21 80 F.3d 1273, 1279 (9th Cir. 1996). "Substantial evidence is
22 more than a scintilla, but less than a preponderance." Reddick
23 v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). It is "relevant
24 evidence which a reasonable person might accept as adequate to
25 support a conclusion." Id. To determine whether substantial
26 evidence supports a finding, the court must "'consider the record
27 as a whole, weighing both evidence that supports and evidence
28 that detracts from the [Commissioner's] conclusion.'" Aukland,

1 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th
2 Cir. 1993)). If the evidence can reasonably support either
3 affirming or reversing that conclusion, a court may not
4 substitute its judgment for that of the Commissioner, and the
5 ALJ's decision must be upheld. Reddick, 157 F.3d at 720-21.

6 **IV. THE EVALUATION OF DISABILITY**

7 People are "disabled" for purposes of receiving Social
8 Security benefits if they are unable to engage in any substantial
9 gainful activity owing to a severe physical or mental impairment
10 that is expected to result in death or which has lasted, or is
11 expected to last, for a continuous period of at least 12 months.
12 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
13 (9th Cir. 1992).

14 A. The Five-Step Evaluation Process

15 The Commissioner follows a five-step sequential evaluation
16 process in assessing whether a claimant is disabled. 20 C.F.R.
17 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
18 1995) (as amended Apr. 9, 1996). In the first step, the
19 Commissioner must determine whether the claimant is currently
20 engaged in substantial gainful activity; if so, the claimant is
21 not disabled and the claim is denied. § 416.920(a)(4)(i). If
22 the claimant is not engaged in substantial gainful activity, the
23 second step requires the Commissioner to determine whether the
24 claimant has a "severe" impairment or combination of impairments
25 significantly limiting his ability to do basic work activities;
26 if not, a finding of nondisability is made. § 416.920(a)(4)(ii).
27 If the claimant has a "severe" impairment or combination of
28 impairments, the third step requires the Commissioner to

1 determine whether the impairment or combination of impairments
2 meets or equals an impairment in the Listing of Impairments
3 ("Listing") set forth at 20 C.F.R., Part 404, Subpart P, Appendix
4 1; if so, disability is conclusively presumed and benefits are
5 awarded. § 416.920(a)(4)(iii). If the claimant's impairment
6 does not meet an impairment in the Listing, the fourth step
7 requires the Commissioner to determine whether the claimant has
8 sufficient RFC to perform his past work; if so, the claimant is
9 not disabled. § 416.920(a)(4)(iv). The claimant has the burden
10 of proving that he is unable to perform past relevant work.
11 Drouin, 966 F.2d at 1257. If the claimant meets that burden, a
12 prima facie case of disability is established. Id. If that
13 happens or if the claimant has no past relevant work, the
14 Commissioner then bears the burden of establishing that the
15 claimant is not disabled because he can perform other substantial
16 gainful work available in the national economy. § 416.920(a)
17 (4)(v). That determination comprises the fifth and final step in
18 the sequential analysis. § 416.920; Lester, 81 F.3d at 828 n.5;
19 Drouin, 966 F.2d at 1257.

20 B. The ALJ's Application of the Five-Step Process

21 At step one, the ALJ found that Plaintiff had not engaged in
22 any substantial gainful activity since December 7, 2004. (AR
23 273.) At step two, the ALJ concluded that Plaintiff "has the
24 following severe impairments: he is status post a right hand
25 fracture and right elbow injury and he is status post gun shot
26 wound injuries to the bilateral thighs." (Id.) At step three,
27 the ALJ found that Plaintiff did not have an impairment or
28 combination of impairments that met or equaled any of the

1 impairments in the Listing. (Id.) At step four, the ALJ made
2 the following findings:

3 [T]he claimant has the [RFC] to lift and carry 10 pounds
4 frequently and up to 15 pounds occasionally, he requires
5 a job which allows him to alternate between sitting and
6 standing, he is unable to walk and stand more than 2
7 hours in an 8 hour workday and he can sit 6 hours in an
8 8 hour workday. However, after sitting for 30 minutes,
9 he would need to alternate positions to standing so that
10 he can move around in his work area for up to 5 minutes
11 at a time. Additionally, he would be limited to
12 occasional above the shoulder reaching with the right
13 hand and arm, but would be capable of frequent above the
14 shoulder reaching with the left hand and arm. He would
15 have difficulty handling with the right hand with
16 difficulty gasping due locking of the fingers and a grasp
17 which may be incomplete. This may lead to difficulty
18 holding a glass and the claimant might be prone to
19 dropping things due to his grasp. Additionally, he would
20 be limited to occasional fingering with the right hand
21 and fingering with keyboarding may be difficult due to
22 finger locking. Lastly, the claimant would be limited to
23 occasional pushing and pulling with the right upper
24 extremity and left lower extremity, but he is capable of
25 frequent pushing and pulling with the left upper
26 extremity.

27 (AR 273-74.) The ALJ therefore determined that Plaintiff was
28 unable to perform any past relevant work. (AR 277.) At step

1 five, the ALJ found that Plaintiff could perform other work that
2 existed in significant numbers in the national economy. (AR
3 278.) Specifically, the ALJ found that Plaintiff was capable of
4 performing the jobs of surveillance system monitor, based on the
5 testimony of VE Miksic at the October 22, 2009 hearing, and call-
6 out operator, based on evidence from the 2006 hearing. (Id.)

7 At the October 2009 hearing, after VE Miksic testified that
8 Plaintiff could perform the surveillance system monitor job,
9 Plaintiff's counsel asked,

10 [W]e have this person who's 47 years old and if we're
11 going to compare this 47-year-old person who could do the
12 full range of sedentary work who's three years older,
13 someone who was 50, so [your] testimony is telling us
14 that basically that these physical limitations that have
15 been documented are a greater vocational detriment than
16 three years of age, is that correct?

17 (AR 388.) VE Miksic responded, "Yes." (AR 389.) The ALJ then
18 asked,

19 [C]ould you say that again? You kind of lost me. I
20 thought I was on the same wave length but I just want to
21 be sure I understand your argument.

22 (Id.) Counsel then stated,

23 What I was positing was comparing this hypothetical
24 person here with the one job to a person who's 50 years
25 old who has basically the full range of sedentary work.
26 Who's worse off, essentially, this 47-year-old person or
27 someone who's three years older who can do the full range
28 of sedentary work and Ms. Miksic testified that these

1 vocational factors and impairments and limitations are
2 worse vocationally. So, what I'm saying is that if a
3 person who's 50 years old is disabled at sedentary, my
4 client who's limited to the one job would also have to be
5 found disabled.

6 (Id.) The ALJ responded that that was a "creative" argument.

7 (Id.)

8 **V. DISCUSSION**

9 A. The ALJ Properly Found that Sufficient Numbers of
10 Surveillance System Monitor Jobs Existed in the Economy
11 that Plaintiff Could Perform

12 Plaintiff contends that the ALJ erred in adopting the
13 testimony of VE Miksic regarding the number of surveillance
14 system monitor jobs in the economy because the numbers were not
15 supported by substantial evidence. (Pl.'s Mot. at 6.) At the
16 hearing, VE Miksic testified that someone with Plaintiff's RFC
17 would be able to perform the occupation of surveillance system
18 monitor, which involves sedentary work and carries the number
19 379.367-010 in the Dictionary of Occupational Titles ("DOT").
20 See 1991 WL 673244. (AR 385.) She further testified that there
21 were approximately 1500 such jobs locally and 98,000 nationally.

22 (Id.) In response to a question from Plaintiff's counsel
23 regarding the source of this information, the VE testified that
24 she had used data from the U.S. Bureau of Labor Statistics from
25 the first quarter of 2009. (AR 386.)

26 Following the ALJ's decision denying benefits, Plaintiff
27 submitted new evidence to the Appeals Council seemingly
28 undermining VE Miksic's testimony regarding the availability of

1 surveillance system monitor jobs suitable to Plaintiff's RFC.
2 (AR 256-67.) The evidence consisted primarily of two statements
3 from the Occupational Employment Quarterly ("OEQ"), a publication
4 of United States Publishing Company, a private company. The
5 statements were from the third quarter of 2009 and showed that
6 there were no surveillance system monitor positions available in
7 the national or local economy at the sedentary level.² (AR 256-
8 67.) As Plaintiff has an RFC that is even more restrictive than
9 sedentary, the OEQ statements purportedly demonstrated that no
10 surveillance system monitor jobs that Plaintiff could perform
11 existed in the relevant time period. (AR 278.) The Appeals
12 Council denied review, finding that the additional documentation
13 was "insufficient to rebut the testimony of the vocational expert
14 and the [DOT]." (AR 253.)

15 When, as here, "new and material evidence is submitted" to
16 the Appeals Council relating "to the period on or before the date
17 of the [ALJ's] hearing decision," the Appeals Council must
18 consider the additional evidence in determining whether to grant
19 review. See 20 C.F.R. § 416.1470(b). When, as here, the Appeals
20 Council did consider additional evidence but denied review, the
21 additional evidence becomes part of the administrative record for
22 purposes of this Court's analysis. See Harman v. Apfel, 211 F.3d
23 1172, 1179-80 (9th Cir. 2000); Taylor v. Comm'r of Soc. Sec.

24
25 ² The OEQ statements submitted by Plaintiff list employment
26 based on census codes. Each census code comprises a group of
27 codes from the DOT. The DOT code for surveillance system
28 monitor, 379.367-010, falls under census code 392. (AR 261.)
The OEQ statements, which break down employment data for each
census code into exertional levels, state that there are no
"sedentary" positions for census code 392. (AR 265, 267.)

1 Admin., 659 F.3d 1228, 1232 (9th Cir. 2011). This Court then
2 engages in an "overall review" of the ALJ's decision, including
3 the new evidence, to determine whether the decision was
4 "supported by substantial evidence" and was "free of legal
5 error."³ Taylor, 659 F.3d at 1232.

6 The resolution of this case is governed by Gomez v. Chater,
7 74 F.3d 967, 972 (9th Cir. 1996). In that case, the ALJ relied
8 upon the Medical-Vocational Guidelines to find that there were
9 jobs in the national economy that the claimant could perform.
10 Id. In seeking review of the ALJ's decision, the claimant
11 submitted to the Appeals Council a vocational expert's report
12 concluding that there were no jobs she could perform. Id. at
13 971. The Ninth Circuit held that because the ALJ relied on
14 proper evidence in concluding to the contrary, the Appeals
15 Council was "free to reject evidence produced by [the claimant's]
16 vocational expert, evidence which was obtained after an adverse
17 administrative decision." Id. at 972. Moreover, the Appeals
18 Council was not required to make any findings concerning its
19 rejection of the evidence. Id.

20 Here, similarly, the ALJ's decision was supported by
21 substantial evidence and free of legal error because she properly
22 relied on VE Miksic's testimony, as to which Plaintiff has not
23

24 ³ This review comes under "sentence four" of 42 U.S.C.
25 § 405(g), not "sentence six." See, e.g., Boucher v. Astrue, No.
26 C09-1520-JCC, 2010 WL 2635078 (W.D. Wash. June 25, 2010).
27 "Sentence six" review considers whether to compel the
28 Commissioner to accept "additional evidence" not previously
"incorporate[d] . . . into the record." § 405(g). Here, the
Commissioner already incorporated the additional evidence into
the record before the Appeals Council.

1 identified any error, and the DOT. See 20 C.F.R. § 416.966(e)
2 (authorizing ALJs to rely on vocational expert testimony to
3 determine occupational issues); Osenbrock v. Apfel, 240 F.3d
4 1157, 1163 (9th Cir. 2001) (testimony of qualified vocational
5 expert constitutes substantial evidence). Rather, Plaintiff
6 seems to claim only that his evidence, which he likewise did not
7 present until "after an adverse administrative decision," was
8 somehow "better" than VE Miksic's testimony and the DOT's
9 description of the surveillance system monitor job as sedentary.
10 See DICOT 379.367-010, 1991 WL 673244. That is not enough to
11 gain remand. See Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir.
12 2002) ("Where the evidence is susceptible to more than one
13 rational interpretation, one of which supports the ALJ's
14 decision, the ALJ's conclusion must be upheld.").

15 Accordingly, substantial evidence supported the ALJ's finding
16 that Plaintiff could perform the surveillance system monitor job,
17 and that determination was free of legal error.⁴ Thus, remand
18 is not warranted on this basis.⁵

19
20 ⁴ Because the Commissioner properly concluded that Plaintiff
21 could perform the job of surveillance system monitor, the Court
22 does not consider Plaintiff's argument that it erred in finding
23 that he could perform the call-out operator job. Any error was
24 necessarily harmless. See Gray v. Comm'r of Soc. Sec. Admin.,
25 365 F. App'x 60, 63 (9th Cir. 2010) (affirming ALJ's finding that
26 Plaintiff could find work because, "[e]ven assuming, arguendo,
27 that two of the three jobs named by the [vocational expert] . . .
28 were inconsistent with [plaintiff's residual functional
capacity]," third job was not and was enough to support ALJ's
conclusion).

⁵ The Court further notes that Plaintiff has not presented
any reason why he did not proffer his evidence, which presumably
was available at the time of the hearing (if not for the third
quarter of 2009, then for the second quarter), to the ALJ, rather

1 B. Plaintiff's Argument that a Finding of Disabled Was
2 Warranted Based on the Grid Is Without Merit

3 Plaintiff contends that a finding of disabled was warranted
4 based on comparison of the occupational base available to him
5 with the occupational base available to other claimants who are
6 considered disabled under the Medical-Vocational Guidelines, 20
7 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201 ("the grid").
8 (Pl.'s Mot. at 7-8.) According to Plaintiff, he is capable of
9 performing fewer jobs than a person who would have been deemed
10 disabled under Rule 201.12 of the grid and thus was entitled to a
11 "disabled" determination. (Id.); 20 C.F.R. Pt. 404, Subpt. P,
12 App. 2, R. 201.12. Specifically, Plaintiff asserts that he is
13 "worse off vocationally" than a person three years older but
14 capable of performing the full range of sedentary work. (Pl.'s
15 Mot. at 7.) He cites Swenson v. Sullivan, 876 F.2d 683, 689 (9th
16 Cir. 1989), for the proposition that comparison to adjacent grid
17 rules is appropriate. (Id. at 7-8.)

18 Swenson merely stands for the proposition that an ALJ errs
19 _____
20 than waiting to submit it to the Appeals Council. Reviewing
21 administrative records supplemented with information the ALJ did
22 not consider "mire[s]" the federal courts "in an Alice in
23 Wonderland exercise of pretending that evidence the real ALJ
24 didn't know existed was really before him." Angst v. Astrue, 351
25 F. App'x 227, 229-30 (9th Cir. 2009) (Rymer, J., concurring). It
26 also encourages inertia by not penalizing those who, for no
27 reason other than lack of preparation, do not present their best
28 evidence to the ALJ. Taylor relies on Ramirez v. Shalala, 8 F.3d
1449 (9th Cir. 1993), for the proposition that review of such
evidence in these circumstances is proper, see 659 F.3d at 1232,
but in fact Ramirez did not decide the issue. See Angst, 351 F.
App'x at 229; Mayes v. Massanari, 276 F.3d 453, 461 n.3 (9th Cir.
2001). Nonetheless, because Taylor holds that district courts
must consider such evidence and review the "overall record," the
Court does so here.

1 by failing to clarify ambiguous testimony concerning the
2 operation of the grid. 876 F.2d at 688. There is no statute,
3 regulation, or case law holding that an ALJ must carry out a
4 comparison between entries on the grid.

5 In this case, the ALJ did seek clarification of the record.
6 After Plaintiff's counsel asked VE Miksic about whether Plaintiff
7 was in a worse position than someone three years older with fewer
8 RFC limitations and VE Miksic answered that he was, the ALJ
9 asked,

10 [C]ould you say that again? You kind of lost me. I
11 thought I was on the same wave length but I just want to
12 be sure I understand your argument.

13 (AR 389.) Counsel then explained his position further, and the
14 ALJ responded that it was a "creative" argument. (Id.) Thus,
15 the ALJ did all that was required of her. Accordingly, remand is
16 not warranted on this ground.

17 **VI. CONCLUSION**

18 For the reasons stated above, Plaintiff's motion for summary
19 judgment is DENIED, Defendant's motion for summary judgment is
20 GRANTED, the decision of the Social Security Commissioner is
21 AFFIRMED, and the action is DISMISSED with prejudice.

22 

24 DATED: February 21, 2012

25

JEAN ROSENBLUTH
26 U.S. MAGISTRATE JUDGE
27
28