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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S. LEINER,)	Case No. CV 12-6231 JC
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

I. SUMMARY

On August 4, 2012, plaintiff Michael S. Leiner (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; August 8, 2012 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On September 22, 2009, plaintiff filed an application for Disability
7 Insurance Benefits. (Administrative Record (“AR”) 146). Plaintiff asserted that
8 he became disabled on May 10, 2009, due to panic disorder, diabetes, depression,
9 hernias, left drop foot, sleep apnea, left and right adhesive capsulitis,
10 neuropathy of left leg and ankle, and anxiety. (AR 191). The ALJ examined the
11 medical record and heard testimony from plaintiff (who was represented by
12 counsel), a medical expert, and a vocational expert on November 30, 2010. (AR
13 56-96).

14 On December 29, 2010, the ALJ determined that plaintiff was not disabled
15 through the date of the decision. (AR 20-29). Specifically, the ALJ found:
16 (1) plaintiff suffered from the following severe impairments: diabetes, hernia, left
17 foot drop, neuropathy, and depression (AR 22); (2) plaintiff’s impairments,
18 considered singly or in combination, did not meet or medically equal a listed
19 impairment (AR 22); (3) plaintiff retained the residual functional capacity to
20 perform sedentary work (20 C.F.R. § 404.1567(a)) with certain additional
21 limitations² (AR 23-24); (4) plaintiff could not perform his past relevant work (AR

23 ¹The harmless error rule applies to the review of administrative decisions regarding
24 disability. See Molina v. Astrue, 674 F.3d 1104, 1115-22 (9th Cir. 2012) (discussing contours of
25 application of harmless error standard in social security cases) (citing, *inter alia*, Stout v.
Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006)).

26 ²The ALJ determined that plaintiff: (i) could perform sedentary work; (ii) could lift/carry
27 10 pounds occasionally and frequently; (iii) could occasionally use the bilateral feet; (iv) could
28 not climb ladders, ropes or scaffolds; (v) could do no more than occasional climbing of
ramps/stairs, balancing, crouching, crawling, kneeling, or stooping; (vi) could do no more than
(continued...)

1 27); (5) there are jobs that exist in significant numbers in the national economy
2 that plaintiff could perform, specifically addresser and bench assembler (AR 28);
3 and (6) plaintiff's allegations regarding his limitations were not credible to the
4 extent they were inconsistent with the ALJ's residual functional capacity
5 assessment (AR 24).

6 The Appeals Council denied plaintiff's application for review. (AR 1).

7 **III. APPLICABLE LEGAL STANDARDS**

8 **A. Sequential Evaluation Process**

9 To qualify for disability benefits, a claimant must show that the claimant is
10 unable "to engage in any substantial gainful activity by reason of any medically
11 determinable physical or mental impairment which can be expected to result in
12 death or which has lasted or can be expected to last for a continuous period of not
13 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
14 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
15 impairment must render the claimant incapable of performing the work claimant
16 previously performed and incapable of performing any other substantial gainful
17 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,
18 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

19 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
20 sequential evaluation process:

- 21 (1) Is the claimant presently engaged in substantial gainful activity? If
22 so, the claimant is not disabled. If not, proceed to step two.

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26 ²(...continued)

27 occasional overhead reaching bilaterally; (vii) needed to avoid concentrated exposure to extreme
28 heat/cold, wetness, humidity and noise; (viii) needed to avoid moderate exposure to vibration;
(ix) could not work at heights; and (x) could have no more than occasional contact with
coworkers, and could have no public contact. (AR 23-24).

- 1 (2) Is the claimant's alleged impairment sufficiently severe to limit
2 the claimant's ability to work? If not, the claimant is not
3 disabled. If so, proceed to step three.
- 4 (3) Does the claimant's impairment, or combination of
5 impairments, meet or equal an impairment listed in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1? If so, the claimant is
7 disabled. If not, proceed to step four.
- 8 (4) Does the claimant possess the residual functional capacity to
9 perform claimant's past relevant work? If so, the claimant is
10 not disabled. If not, proceed to step five.
- 11 (5) Does the claimant's residual functional capacity, when
12 considered with the claimant's age, education, and work
13 experience, allow the claimant to adjust to other work that
14 exists in significant numbers in the national economy? If so,
15 the claimant is not disabled. If not, the claimant is disabled.

16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
17 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at
18 1110 (same).

19 The claimant has the burden of proof at steps one through four, and the
20 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
21 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch
22 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of
23 proving disability).

24 **B. Standard of Review**

25 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
26 benefits only if it is not supported by substantial evidence or if it is based on legal
27 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
28 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457

1 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
2 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
3 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
4 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
5 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

6 To determine whether substantial evidence supports a finding, a court must
7 “consider the record as a whole, weighing both evidence that supports and
8 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
9 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
10 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
11 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
12 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

13 **IV. DISCUSSION**

14 **A. The ALJ Properly Evaluated the Medical Opinion Evidence**

15 **1. Pertinent Law**

16 In Social Security cases, courts employ a hierarchy of deference to medical
17 opinions depending on the nature of the services provided. Courts distinguish
18 among the opinions of three types of physicians: those who treat the claimant
19 (“treating physicians”) and two categories of “nontreating physicians,” namely
20 those who examine but do not treat the claimant (“examining physicians”) and
21 those who neither examine nor treat the claimant (“nonexamining physicians”).
22 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (footnote reference omitted). A
23 treating physician’s opinion is entitled to more weight than an examining
24 physician’s opinion, and an examining physician’s opinion is entitled to more

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1 weight than a nonexamining physician’s opinion.³ See id. In general, the opinion
2 of a treating physician is entitled to greater weight than that of a non-treating
3 physician because the treating physician “is employed to cure and has a greater
4 opportunity to know and observe the patient as an individual.” Morgan v.
5 Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir.
6 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

7 The treating physician’s opinion is not, however, necessarily conclusive as
8 to either a physical condition or the ultimate issue of disability. Magallanes v.
9 Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d
10 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician’s opinion is not
11 contradicted by another doctor, it may be rejected only for clear and convincing
12 reasons. Orn, 495 F.3d at 632 (citation and internal quotations omitted). The ALJ
13 can reject the opinion of a treating physician in favor of a conflicting opinion of
14 another examining physician if the ALJ makes findings setting forth specific,
15 legitimate reasons for doing so that are based on substantial evidence in the
16 record. Id. (citation and internal quotations omitted). “The ALJ must do more
17 than offer his conclusions.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir.
18 1988). “He must set forth his own interpretations and explain why they, rather
19 than the [physician’s], are correct.” Id. “Broad and vague” reasons for rejecting
20 the treating physician’s opinion do not suffice. McAllister v. Sullivan, 888 F.2d
21 599, 602 (9th Cir. 1989). These standards also apply to opinions of examining
22 physicians. See Carmickle v. Commissioner, Social Security Administration, 533
23 F.3d 1155, 1164 (9th Cir. 2008) (quoting Lester, 81 F.3d at 830-31); Andrews v.
24 Shalala, 53 F.3d 1035, 1042-44 (9th Cir. 1995).

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26 ³Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to
27 draw bright line distinguishing treating physicians from non-treating physicians; relationship is
28 better viewed as series of points on a continuum reflecting the duration of the treatment
relationship and frequency and nature of the contact) (citation omitted).

1 **2. Analysis**

2 On January 14, 2010, Dr. Michael S. Wallack, a consultative examining
3 physician, conducted a Complete Internal Medicine Evaluation which included a
4 physical examination of plaintiff. (AR 390-96). Dr. Wallack diagnosed plaintiff
5 with, *inter alia*, “diabetes mellitus type I [in] fair control,” and opined that plaintiff
6 (1) could lift and carry 50 pounds occasionally and 25 pounds frequently;
7 (2) could occasionally do postural activities; and (3) needed to work in an
8 environment “where he [could] check his sugars regularly and receive insulin as
9 needed.” (AR 395-96).

10 Plaintiff contends that a remand or reversal is required because the ALJ
11 failed properly to consider Dr. Wallack’s specific opinion regarding plaintiff’s
12 limitations related to diabetes (*i.e.*, that plaintiff could only work in an
13 environment where he could check his sugars regularly and receive insulin as
14 needed) and, as a result, the ALJ failed properly to assess plaintiff’s residual
15 functional capacity. (Plaintiff’s Motion at 3-8) (citing, *inter alia*, AR 396). The
16 Court disagrees.

17 First, in the administrative decision, the ALJ expressly noted Dr. Wallack’s
18 opinion that plaintiff “could . . . work [only] in an environment where he could
19 check his sugars regularly and receive insulin as needed.” (AR 25) (citing Exhibit
20 4F at 7 [AR 396]). The ALJ gave less weight to Dr. Wallack’s overall opinions
21 regarding plaintiff’s abilities, however, since the examining physician’s
22 assessment that plaintiff essentially retained “medium residual functional
23 capacity” was not supported by the objective medical evidence. (AR 27). Plaintiff
24 concedes that some portions of Dr. Wallack’s opinions regarding plaintiff’s
25 physical limitations “were properly rejected as inconsistent with the record.”
26 (Plaintiff’s Motion at 3). In light of the foregoing, and the ALJ’s detailed
27 discussion of the medical evidence in general, it is reasonable to infer that the
28 ALJ’s residual functional capacity assessment – which essentially limited plaintiff

1 to no more than sedentary work – accounted for any “medium” functional
2 limitation related to plaintiff’s diabetes found by Dr. Wallack. See Thomas v.
3 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out
4 detailed and thorough summary of facts and conflicting clinical evidence, stating
5 his interpretation thereof, and making findings) (citations and quotations omitted);
6 Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite “magic words” to
7 reject a physician’s opinion – court may draw specific and legitimate inferences
8 from ALJ’s opinion).

9 Second, plaintiff fails to demonstrate that his diabetes caused any significant
10 work limitations beyond those already accounted for in the ALJ’s residual
11 functional capacity assessment. As the ALJ noted, both Dr. Wallack and at least
12 one other physician found that plaintiff’s diabetes was adequately controlled by
13 plaintiff’s insulin. (AR 25-26) (citing Exhibits 4F at 7 [AR 396], 11F at 27 [AR
14 455]). Impairments that can be controlled effectively with medication are not
15 disabling for the purpose of determining eligibility for benefits. Warre v.
16 Commissioner of Social Security Administration, 439 F.3d 1001, 1006 (9th Cir.
17 2006) (citation omitted). Plaintiff’s lay assessment that his limitations related to
18 diabetes would have “significant vocational ramifications and could seriously
19 erode and/or completely diminish the occupational base” (Plaintiff’s Motion at 6)
20 is insufficient to satisfy plaintiff’s burden to establish disability. Cf. Gonzalez
21 Perez v. Secretary of Health & Human Services, 812 F.2d 747, 749 (1st Cir. 1987)
22 (ALJ may not “substitute his own layman’s opinion for the findings and opinion of
23 a physician”); Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985) (ALJ may
24 not substitute his interpretation of laboratory reports for that of a physician);
25 Winters v. Barnhart, 2003 WL 22384784, at *6 (N.D. Cal. Oct.15, 2003) (“The
26 ALJ is not allowed to use his own medical judgment in lieu of that of a medical
27 expert.”).

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1 Finally, to the extent the ALJ erred by not expressly rejecting Dr. Wallack’s
2 opinion regarding plaintiff’s limitations related to diabetes, or to include such
3 limitations in the residual functional capacity assessment for plaintiff, the Court
4 concludes that any such error was harmless since neither Dr. Wallack, nor any
5 other physician in the record, opined that plaintiff could not work for any twelve-
6 month period. See Matthews v. Shalala, 10 F.3d 678, 680-81 (9th Cir. 1993) (in
7 upholding the Commissioner’s non-disability decision, the Court emphasized:
8 “None of the doctors who examined [claimant] expressed the opinion that he was
9 totally disabled”); accord Curry v. Sullivan, 925 F.2d 1127, 1130 n.1 (9th Cir.
10 1990) (upholding Commissioner and noting that after surgery, no doctor suggested
11 claimant was disabled).

12 Accordingly, a remand or reversal on this basis is not warranted.

13 **B. The ALJ Posed a Complete Hypothetical Question to the**
14 **Vocational Expert**

15 Plaintiff contends that a reversal or remand is appropriate because the ALJ
16 erroneously omitted from the hypothetical question posed to the vocational expert
17 Dr. Wallack’s finding that plaintiff was limited to work that would permit plaintiff
18 to check his sugar levels and administer insulin as needed. (Plaintiff’s Motion at
19 8-10). The Court disagrees.

20 A hypothetical question posed by an ALJ to a vocational expert must set out
21 all the limitations and restrictions of the particular claimant. Light v. Social
22 Security Administration, 119 F.3d 789, 793 (9th Cir. 1997) (citing Andrews, 53
23 F.3d at 1044); Embrey, 849 F.2d at 422 (“Hypothetical questions posed to the
24 vocational expert must set out *all* the limitations and restrictions of the particular
25 claimant”) (emphasis in original; citation omitted). However, an ALJ’s
26 hypothetical question need not include limitations not supported by substantial
27 evidence in the record. Osenbrock v. Apfel, 240 F.3d 1157, 1163-64 (9th Cir.
28 2001) (citation omitted).

1 As discussed above, the ALJ properly gave little weight to Dr. Wallack's
2 "medium" residual functional capacity assessment for plaintiff. Accordingly, the
3 ALJ properly omitted any limitation related to plaintiff's severe impairment of
4 diabetes from the hypothetical questions posed to the vocational expert.
5 Moreover, plaintiff fails to demonstrate any limitations stemming from plaintiff's
6 diabetes beyond those already accounted for in the ALJ's residual functional
7 capacity assessment. See Burch, 400 F.3d at 679 (plaintiff bears burden to
8 establish disability).

9 Accordingly, a remand or reversal on this basis is not warranted.

10 **V. CONCLUSION**

11 For the foregoing reasons, the decision of the Commissioner of Social
12 Security is affirmed.

13 LET JUDGMENT BE ENTERED ACCORDINGLY.

14 DATED: January 7, 2013

15 /s/

16 _____
17 Honorable Jacqueline Chooljian
18 UNITED STATES MAGISTRATE JUDGE
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