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

ROBERT ALVAREZ,
Plaintiff,
v.
MICHAEL A. ASTRUE,
Commissioner of Social Security
Defendant.

No. EDCV 09-1169 AGR
MEMORANDUM OPINION AND ORDER

Plaintiff Robert Alvarez (“Alvarez”) filed a Complaint on June 24, 2009. Pursuant to 28 U.S.C. § 636(c), the parties filed Consents to proceed before Magistrate Judge Rosenberg on July 16 and 17, 2009. (Dkt. Nos. 7, 9.) The parties filed a Joint Stipulation (“JS”) on January 26, 2010, that addressed the disputed issues. The commissioner filed the certified administrative record (“AR”). The Court has taken the Joint Stipulation under submission without oral argument.

Having reviewed the entire file, the Court affirms the decision of the Commissioner.

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I.

PROCEDURAL BACKGROUND

In January 2007, Alvarez filed an application for supplemental security income benefits and disability insurance benefits. AR 9, 165-67, 170-73. Both applications alleged an onset date of May 1, 2005. AR 9. The applications were denied initially and on reconsideration. AR 69-72. Alvarez requested a hearing. AR 85. On September 12, 2008, an Administrative Law Judge (“ALJ”) conducted a hearing at which Alvarez testified. AR 18-43. On October 28, 2008, the ALJ conducted an additional hearing at which Alvarez, a medical expert (“ME”) and a vocational expert testified. AR 44-68. On January 15, 2009, the ALJ issued a decision denying benefits. AR 6-17. Alvarez requested review. AR 5. On April 17, 2009, the Appeals Council denied the request for review. AR 1-3. This lawsuit followed.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, “substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009); *Moncada*, 60 F.3d at 523; see also *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). When determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. Where the evidence is susceptible to more than one rational interpretation, the Court must defer to the decision of the Commissioner. *Moncada*, 60 F.3d at 523.

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III.

EVALUATION OF DISABILITY

A. Disability

A person qualifies as disabled and is eligible for benefits, "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

B. The ALJ's Findings

The ALJ found that Alvarez met the insured status requirements through September 30, 2008. AR 11. Alvarez has the following medically determinable severe impairments: "substance induced psychosis and mood disorder, personality disorder not otherwise specified, mixed substance abuse in reported remission for 12-15 months, attention deficit disorder." AR 12. Alvarez's impairments meet a listing. AR 13.

The ALJ found that if Alvarez stopped the substance abuse, he would continue to have severe impairments. AR 14. Alvarez would have the residual functional capacity ("RFC") "to perform a full range of work at all exertional levels but with the following nonexertional limitations: He can perform work involving moderately complex tasks, in a habituated setting, that is object-oriented. He can do a job that does not involve public contact requiring emotionally-charted interactions, or safety operations." AR 14-15. Alvarez would not be able to perform past relevant work. AR 15. However, "there would be a significant number of jobs in the national economy that the claimant could perform," such as kitchen helper or industrial cleaner. AR 16. The ALJ found that Alvarez's substance abuse disorders are contributing factors material to the determination of disability. AR 17.

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1 **C. Treating Psychiatrist**

2 “An individual shall not be considered to be disabled . . . if alcoholism or drug
3 addiction would . . . be a contributing factor material to the Commissioner’s
4 determination that the individual is disabled.” 42 U.S.C. § 423(d)(2)(C). The purpose of
5 the statute was “to discourage alcohol and drug abuse, or at least not to encourage it
6 with a permanent government subsidy.” *Ball v. Massanari*, 254 F.3d 817, 824 (9th Cir.
7 2001).

8 In *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007), the Ninth Circuit described the
9 implementing regulations as requiring the ALJ to “conduct a drug abuse and alcoholism
10 analysis (‘DAA Analysis’) by determining which of the claimant’s disabling limitations
11 would remain if the claimant stopped using drugs or alcohol.” *Parra*, 481 F.3d at 747
12 (citing 20 C.F.R. §§ 404.1535(b)). “If the remaining limitations would still be disabling,
13 then the claimant’s drug addiction or alcoholism is not a contributing factor material to
14 his disability. If the remaining limitations would not be disabling, then the claimant’s
15 substance abuse is material and benefits must be denied.” *Id.*

16 The ALJ found that Alvarez’s impairments, including substance abuse disorders,
17 met a listing. AR 13. However, the ALJ found that if Alvarez stopped the substance
18 abuse, he would have the RFC to perform a full range of work at all exertional levels but
19 with certain nonexertional limitations. AR 14-15.

20 Alvarez argues that the ALJ ignored Dr. Salanga’s opinion, which “never opined
21 that drugs or alcohol was the primary cause of Plaintiff’s mental impairment.” JS 4.

22 Dr. Salanga practiced at the San Bernardino County Department of Behavioral
23 Health. *E.g.*, AR 430. She saw Alvarez for “monthly medication support services.” AR
24 427. The medical records contain a referral form that notes a diagnosis of “mood
25 disorder NOS (not otherwise specified); polysubstance dependence,” and contains a

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1 prognosis of “guarded, depends on his abstinence.”¹ AR 443. Prior to arriving at that
2 facility, the ALJ noted Alvarez’s medical records indicated drugs and/or alcohol abuse
3 on August 13-16, 2006, November 19, 2006, and March 22, 2007. AR 12, 364 (in
4 March 2007, patient denied substance use but toxicology screen was positive for
5 methamphetamines and marijuana; diagnosing polysubstance dependence), 280, 284,
6 286 (diagnosis in November 2006 includes alcohol, cannabis and methamphetamine
7 abuse; patient reported using pot and alcohol that day, meth yesterday, and regular use
8 of all three substances), 267-68, 274 (in August 2006, diagnosing amphetamine
9 dependence).

10 The Ninth Circuit has held that “the claimant bears the burden of proving that
11 drug or alcohol addiction is not a contributing factor material to his disability.” *Parra*,
12 481 F.3d at 748. Alvarez’s argument that Dr. Salanga does not mention drugs or
13 alcohol is incorrect, as discussed below, but in any event would not be sufficient. In
14 *Parra*, the claimant argued that inconclusive evidence was sufficient to satisfy a
15 claimant’s burden. The Ninth Circuit rejected that argument, which “effectively shifts the
16 burden to the Commissioner to prove materiality.”² *Id.* at 749. The Ninth Circuit
17 concluded that “Parra bore the burden of proving that his alcoholism was not a
18 contributing factor material to his cirrhosis-related disability.” *Id.* at 750.

19 More significantly, the ALJ accepted the ME’s testimony as credible and
20 supported by substantial evidence. AR 13. “Based on his review, the medical expert,
21 Dr. Malancharuvil, indicated that if the claimant were clean and sober there would be no
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24 ¹ In addition, the screening form indicates Alvarez reported alcohol as a substance
25 problem. AR 439.

26 ² “An alcoholic claimant who presents inconclusive evidence of materiality has no
27 incentive to stop drinking, because abstinence may resolve his disabling limitations and
28 cause his claim to be rejected or his benefits terminated. His claim would be
guaranteed only as long as his substance abuse continues – a scheme that effectively
subsidizes substance abuse in contravention of the statute’s purpose.” *Parra*, 481 F.3d
at 750.

1 reason he could not function within the limits of the residual functional capacity set forth
2 above.” AR 15. The ME’s opinion expressly relied on Dr. Salanga’s medical records to
3 conclude that Alvarez’s condition greatly improved. AR 60. The ME expressly stated
4 that the early notes in May 2007 indicated that Alvarez had been drinking yesterday.
5 AR 61, 439; see *also* AR 436 (noting alcohol on Alvarez’s breach in June 2007). By
6 contrast, the later notes, particularly during the period February–August 2008, indicated
7 that Alvarez was “able to maintain himself without any significant symptoms.” AR 61,
8 428, 448-54.

9 Alvarez does not identify any error in the ALJ’s analysis or the ME’s testimony on
10 which the ALJ relied. Alvarez relies solely on a mental status examination on August 2,
11 2007, in which a physician reviewed Alvarez’s chart including his hospital records at
12 Riverside and concluded “he’s not a reliable historian.” AR 431. The physician noted
13 alcohol use. *Id.* Alvarez’s reliance on a mental status examination while he is drinking
14 is misplaced. The issue is which of the disabling limitations would remain if he stopped
15 using drugs or alcohol. See *Parra*, 481 F.3d at 747. Even assuming it would have
16 been better for the ALJ to expressly state the ME’s reasoning rather than simply
17 incorporate the ME’s opinion, any error is harmless. See *Magallanes v. Bowen*, 881
18 F.2d 747, 755 (9th Cir. 1989) (“As a reviewing court, we are not deprived of our faculties
19 for drawing specific and legitimate inferences from the ALJ’s opinion.”).

20 **D. Lay Witness Testimony**

21 “In determining whether a claimant is disabled, an ALJ must consider lay witness
22 testimony concerning a claimant’s ability to work.” *Stout v. Comm’r*, 454 F.3d 1050,
23 1053 (9th Cir. 2006). “When an ALJ discounts the testimony of lay witnesses, ‘he [or
24 she] must give reasons that are germane to each witness.’” *Valentine v. Comm’r, Soc.*
25 *Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (citation omitted).

26 The ALJ did not mention a Function Report Adult – Third Party form completed by
27 Alvarez’s wife on February 1, 2007. JS 8; AR 211-18. The Commissioner argues that
28 any error is harmless.

1 “[W]here the ALJ’s error lies in a failure to properly discuss competent lay
2 testimony favorable to the claimant, a reviewing court cannot consider the error
3 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
4 the testimony, could have reached a different disability determination.” *Stout*, 454 F.3d
5 at 1056.

6 As the ALJ noted, Alvarez’s medical records indicate regular drug and/or alcohol
7 use in August 13-16, 2006, November 19, 2006, and March 22, 2007. AR 12, 268
8 (“patient indicated that he generally gets this way when he abuses drugs”), 286 (admits
9 daily use of alcohol, daily use of marijuana, use of methamphetamines once a week
10 and last used two days earlier), 364. On March 22, 2007, approximately one month and
11 a half after Alvarez’s wife filled out the form, Alvarez’s toxicology screen was positive for
12 methamphetamines and marijuana. AR 12, 364.

13 The ALJ found that Alvarez met a listing when his substance abuse was
14 considered. AR 13. Alvarez’s wife completed her form on February 1, 2007, during the
15 period of time Alvarez was abusing drugs and alcohol. Again, the issue is which of the
16 disabling limitations would remain if Alvarez stopped using drugs or alcohol. *See Parra*,
17 481 F.3d at 747. Even fully crediting her statements, no reasonable ALJ could have
18 reached a different disability determination.

19 **E. Side Effects**

20 Alvarez argues that the ALJ ignored reports of side effects on August 13-16, 2006
21 and on January 31, 2008. JS 12-13.

22 The ALJ noted Alvarez’s medications. AR 13. At the hearing, Alvarez testified
23 that the medication “calms me down and, and takes the voices away and, and, you
24 know, the depression away.” AR 26. Alvarez argues that a January 31, 2008 record
25 means that he was given medication for EPS (extrapyramidal side effects). JS 13; AR
26 427. However, Dr. Salanga subsequently noted that Alvarez experienced no side
27 effects during the period February 28, 2008 through the last record on August 29, 2008.
28 AR 448 (“reports no side effects”), 450 (“no medication side effects. No EPS or TD”),

1 451 (same), 452 (same), 453 (same), 454 (same). The ALJ did not err. "There were
2 passing mentions of the side effects of [plaintiff's] medication in some of the medical
3 records, but there was no evidence of side effects severe enough to interfere with [his]
4 ability to work." *Osenbrock v. Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001); see also
5 *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir.1985) ("[Plaintiff] produced no clinical
6 evidence showing that narcotics use impaired his ability to work").

7 **IV.**

8 **CONCLUSION**

9 IT IS HEREBY ORDERED that the decision of the Commissioner is affirmed.

10 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order
11 and the Judgment herein on all parties or their counsel.

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14 DATED: August 3, 2010



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16 ALICIA G. ROSENBERG
17 UNITED STATES MAGISTRATE JUDGE
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