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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT ZUEGER,)	Case No. EDCV 09-2267-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	REVERSING DECISION OF THE
)	COMMISSIONER OF SOCIAL SECURITY
MICHAEL J. ASTRUE,)	AND REMANDING FOR FURTHER
Commissioner of Social Security,)	PROCEEDINGS
)	
Defendant.)	
_____)	

PROCEEDINGS

On December 22, 2009, Robert Zueger (“Plaintiff” or “Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Supplemental Security Income (“SSI”) benefits. The Commissioner filed an Answer on June 22, 2010. On August 31, 2010, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before the Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and the case remanded for further proceedings in accordance with law and with this Memorandum Opinion and Order.

1 **BACKGROUND**

2 Plaintiff was 52 years old when he filed his application for SSI benefits on May 21,
3 2007. (AR 8, 99.) He was found to have the medically determinable severe impairments of
4 schizoaffective disorder, personality disorder, anxiety disorder, and a history of
5 methamphetamine abuse. (AR 10.) Plaintiff has not engaged in substantial gainful activity
6 since the application date. (Id.)

7 Plaintiff's claim was denied initially and on reconsideration. (AR 45-51, 54-58.) He
8 filed a timely request for hearing (AR 60), which was held before Administrative Law Judge
9 ("ALJ") Jay E. Levine on May 21, 2009, in San Bernardino, California. (AR 15-44.) Claimant
10 appeared and testified. (AR 18-26, 36-42.) Medical expert Dr. Joseph Malancharuvil and
11 vocational expert ("VE") Troy Scott also appeared and testified. (AR 26-36, 42-43.)

12 The ALJ issued an unfavorable decision on August 19, 2009. (AR 8-14.) The ALJ
13 determined that Plaintiff had the residual functional capacity ("RFC")¹ "to perform the full
14 range of work at all exertional levels but with the following nonexertional limitations: no work
15 at unprotected heights or around dangerous unguarded moving machinery and mentally,
16 work which is routine, repetitive, entry level, object oriented and not involving production
17 quotas such as conveyor belt or piece work." (AR 11.) Based on the testimony of the VE,
18 the ALJ also found that Plaintiff can perform his past relevant work as a maintenance worker
19 and can perform other jobs that exist in significant numbers in the national economy. (AR
20 13.)

21 Plaintiff filed a timely Request for Review of Hearing Decision. (AR 4.) The Appeals
22 Council denied review on November 9, 2009. (AR 5-7.) Thereafter, Plaintiff commenced the
23 present action.

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¹ Residual functional capacity is what one "can still do despite [his or her] limitations"
28 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§
404.1545(a)(1), 416.945(a)(1).

1 **DISPUTED ISSUES**

2 As reflected in the Joint Stipulation, the disputed issues that Plaintiff raises as grounds
3 for reversal are:

- 4 1. Whether the ALJ properly evaluated Plaintiff’s ability to perform past work as a
5 maintenance worker.
- 6 2. Whether the ALJ properly considered the lay witness’s statement.
- 7 3. Whether the ALJ properly considered the consultative examiner’s opinion.
- 8 4. Whether the ALJ properly evaluated Plaintiff’s residual functional capacity.
- 9 5. Whether the ALJ posed a complete hypothetical question to the vocational
10 expert.

11 **STANDARD OF REVIEW**

12 Under 42 U.S.C. § 405(g), this Court reviews the ALJ’s decision to determine whether
13 the ALJ’s findings are supported by substantial evidence and whether the proper legal
14 standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991).
15 Substantial evidence means “‘more than a mere scintilla’. . . but less than a preponderance.”
16 Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402
17 U.S. 389, 401 (1971)).

18 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
19 adequate to support a conclusion.” Richardson, 402 U.S. at 401 (internal quotations and
20 citation omitted). This Court must review the record as a whole and consider adverse as well
21 as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
22 Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision
23 must be upheld. Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
24 “However, a reviewing court must consider the entire record as a whole and may not affirm
25 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882
26 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
27 F.3d 625, 630 (9th Cir. 2007).

SEQUENTIAL EVALUATION

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2 The Social Security Act defines disability as the “inability to engage in any substantial
3 gainful activity by reason of any medically determinable physical or mental impairment which
4 can be expected to result in death or . . . can be expected to last for a continuous period of
5 not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner
6 has established a five-step sequential process to determine whether a claimant is disabled.
7 20 C.F.R. §§ 404.1520, 416.920.

8 The first step is to determine whether the claimant is presently engaging in
9 substantially gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
10 claimant is engaging in substantially gainful activity, disability benefits will be denied. Bowen
11 v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant
12 has a severe impairment or combination of impairments. Parra, 481 F.3d at 746. Third, the
13 ALJ must determine whether the impairment is listed, or equivalent to an impairment listed,
14 in Appendix I of the regulations. Id. If the impediment meets or equals one of the listed
15 impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141. Fourth, the
16 ALJ must determine whether the impairment prevents the claimant from doing past relevant
17 work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four
18 determination, the ALJ first must determine the claimant’s RFC. 20 C.F.R. § 416.920(e).
19 The RFC must consider all of the claimant’s impairments, including those that are not
20 severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling (“SSR”) 96-8p. If the
21 claimant cannot perform his or her past relevant work or has no past relevant work, the ALJ
22 proceeds to the fifth step and must determine whether the impairment prevents the claimant
23 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th
24 Cir. 2000).

25 The claimant bears the burden of proving steps one through four, consistent with the
26 general rule that at all times the burden is on the claimant to establish his or her entitlement
27 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the
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1 claimant, the burden shifts to the Commissioner to show that the claimant may perform other
2 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a
3 finding that a claimant is not disabled at step five, the Commissioner must provide evidence
4 demonstrating that other work exists in significant numbers in the national economy that the
5 claimant can do, given the RFC, age, education, and work experience. 20 C.F.R. §
6 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
7 entitled to benefits. Id.

8 DISCUSSION

9 A. The ALJ Failed to Consider Properly the Lay Witness's Statement

10 On June 7, 2007, Plaintiff's girlfriend Juanita Hamlin completed a third party function
11 report, in which she stated that she had known Plaintiff for six to seven years and that they
12 spent most of their time together. (AR 111.) Ms. Hamlin reported that Plaintiff "lays awake all
13 night long" and that she sometimes has "to tell him to shower and change his clothes" and
14 take his medication. (AR 112-113.) Ms. Hamlin does all of the cooking and housework for
15 Plaintiff. (AR 113-114.) She stated that Plaintiff "has problems remembering," watches TV
16 "[m]ost all the time," "doesn't really go anywhere," cannot pay attention for more than five
17 minutes, and has problems with understanding and following instructions and completing
18 tasks. (AR 114-116.) Ms. Hamlin further stated that Plaintiff is paranoid, has panic attacks,
19 has "real bad mood swings," and hears voices which scare him. (AR 116-117.)

20 Plaintiff correctly contends that the ALJ erred in failing to discuss Ms. Hamlin's
21 statement. Lay witness testimony regarding a claimant's symptoms "is competent evidence
22 that an ALJ must take into account," unless the ALJ "expressly determines to disregard such
23 testimony and gives reasons germane to each witness for doing so." Lewis v. Apfel, 236
24 F.3d 503, 511 (9th Cir. 2001). Lay witness testimony cannot be disregarded without
25 comment. Stout v. Comm'r, 454 F.3d 1050, 1053 (9th Cir. 2006). In rejecting lay witness
26 testimony, the ALJ need not cite the specific record as long as "arguably germane reasons"
27 for dismissing the testimony are noted, even though the ALJ does "not clearly link his
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1 determination to those reasons,” and substantial evidence supports the ALJ’s decision.
2 Lewis, 236 F.3d at 512. The ALJ also may “draw inferences logically flowing from the
3 evidence.” Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).

4 Here, the ALJ did not discuss or acknowledge Ms. Hamlin’s third-party lay witness
5 statement. This was legal error. Ms. Hamlin’s statement pertained to Plaintiff’s ability to
6 work, including his difficulties concentrating, interacting with other people, and understanding
7 or following instructions. (AR 115-117.)

8 The Commissioner argues that the ALJ did not actually reject Ms. Hamlin’s statement
9 because it was not necessarily inconsistent with the ALJ’s finding that Plaintiff was capable
10 of routine, repetitive, entry-level object-oriented work that did not involve production quotas.
11 (JS 11.) The Commissioner argues that “[t]he ALJ accounted for most of Ms. Hamlin’s
12 opinion.” (Id.) However, accounting for “most of Ms. Hamlin’s opinion” is not sufficient.
13 Again, Ms. Hamlin testified to severe limitations on Plaintiff’s ability to concentrate,
14 remember, follow instructions, and interact with others. Ms. Hamlin’s statement was
15 probative and was not fully accounted for in the ALJ’s RFC assessment. Thus, it effectively
16 was rejected and the ALJ was required to give reasons for doing so. See Stout, 454 F.3d at
17 1053.

18 The Commissioner also argues that the ALJ’s failure to discuss Ms. Hamlin’s
19 testimony was harmless error. (JS 12.) The failure to address lay witness evidence is not
20 harmless unless the Court can conclude confidently that no reasonable ALJ, on crediting the
21 testimony, would reach a different disability determination. Stout, 454 F.3d at 1054-56.
22 Here, Ms. Hamlin testified that Plaintiff cannot concentrate, cannot understand or follow
23 instructions, is forgetful, and cannot be around other people. The VE testified, *inter alia*, that
24 Plaintiff would not be able to work if he “would be off-task at least 20 percent of the time due
25 to psychological based symptoms.” (AR 43.) Ms. Hamlin’s statement clearly pertains to
26 Plaintiff’s ability to remain “on-task” and, therefore, was relevant to the disability
27 determination. If her testimony is credited in its entirety, the Court cannot conclude that no
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1 reasonable ALJ would have reached a different disability determination. Thus, the ALJ's
2 failure to discuss Ms. Hamlin's testimony was not harmless error.

3 **B. The ALJ Properly Considered the Consultative Examiner's Opinion**

4 On July 29, 2007, Sohini P. Parikh, M.D., performed a Complete Psychiatric
5 Evaluation of Plaintiff. (AR 179-185.) Dr. Parikh diagnosed Plaintiff with schizophrenia-
6 paranoia and assigned a Global Assessment of Functioning ("GAF") score of 50 to 55.² (AR
7 184.) Dr. Parikh made the following assessments: (1) no mental restrictions in the claimant's
8 daily activities; (2) moderate mental difficulties in maintaining social functioning; (3)
9 concentration, persistence, and pace are not impaired; (4) repeated episodes of moderate
10 emotional deterioration in work-like situations; (5) ability to understand, carryout, and
11 remember simple instructions is not impaired; (6) ability to understand, carryout and
12 remember complex instructions is not impaired; (7) response to coworkers, supervisors, and
13 the general public is moderately impaired; (8) ability to respond appropriately to usual work
14 situations is moderately impaired; (9) ability to deal with changes in a routine work setting is
15 moderately impaired. (AR 184-185.)

16 The ALJ discussed Dr. Parikh's report in detail:

17 At the consultative psychiatric examination, the claimant seemed to be evasive
18 and guarded during the interview. He was oriented in all spheres and was depressed
19 and anxious. The claimant denied any feelings of hopelessness, helplessness or
20 worthlessness and affect was blunted. He reported having paranoid ideations but was
21 not preoccupied with suicidal or homicidal ideation. The claimant recalled three out of
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23 ² A GAF score of 41-50 indicates: "Serious symptoms (e.g., suicidal ideation, severe
24 obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational,
25 or school functioning (e.g., no friends, unable to keep a job)." Diagnostic and Statistical
Manual of Mental Disorders-IV-TR (4th ed. 2000) at 34.

26 A GAF score of 51-60 indicates: "Moderate symptoms (e.g., flat affect and
27 circumstantial speech, occasional panic attacks) OR moderate difficulty in social,
28 occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)."
Id.

1 three words in one minute and two out of three in five minutes. He could not perform
2 serial sevens but could perform serial threes. He was diagnosed with schizophrenia
3 and methamphetamine abuse in the past but no mental restrictions in activities of
4 daily living or in concentration, persistence and pace were found. Moderate mental
5 limitations in maintaining social functioning were found but the claimant [was] able to
6 understand, carryout and remember simple instructions as well as complex
7 instructions (Exhibit 2F).

8 (AR 12.) Plaintiff argues that the ALJ failed to consider properly Dr. Parikh's opinion
9 because he did not specifically address Dr. Parikh's assessment "that Plaintiff has repeated
10 episodes of moderate emotional deterioration in the work setting, and that he is moderately
11 impaired in his ability to respond appropriately to usual work situations, deal with changes in
12 a routine setting, and respond to co-workers, supervisors and the public." (JS 14.)

13 Plaintiff's argument is without merit. The ALJ specifically discussed and appropriately
14 considered Dr. Parikh's opinion regarding Plaintiff's moderate impairments, along with the
15 rest of the medical evidence, in determining Plaintiff's RFC. The ALJ did not reject Dr.
16 Parikh's findings. Rather, Dr. Parikh's assessment was consistent with the RFC. (AR 12-13,
17 179-185.) Dr. Parikh never stated that Plaintiff's moderate limitations rendered Plaintiff
18 unable to work. Rather, Dr. Parikh stated that Plaintiff "*might* have some moderate
19 impairment in the ability to reason and make social, occupational, and personal adjustments"
20 based on the nine items included in his assessment. (AR 184 (emphasis added).) Dr.
21 Parikh stated that Plaintiff had moderate difficulties in maintaining social functioning,
22 responding to co-workers, supervisors and the public, responding to usual work situations
23 and dealing with changes in routine work situations. (AR 184-85.) These moderate non-
24 exertional limitations do not necessarily preclude Plaintiff from working. Rather, the ALJ
25 accounted for them in the RFC, which limited Plaintiff to routine, repetitive, entry-level,
26 object-oriented work, that did not involve production quotas or working with people. (AR 11,
27 42.)

1 In addition, the ALJ properly relied on the opinion of the medical expert Dr.
2 Malancharuvil in making his RFC assessment. The opinions of non-examining physicians
3 and medical experts, when properly supported, may constitute substantial evidence upon
4 which an ALJ may rely. See Morgan v. Comm’r of Social Security, 169 F.3d 595, 600 (9th
5 Cir. 1999) (testifying medical expert opinions may serve as substantial evidence when
6 supported by other evidence in the record and consistent with it). Dr. Malancharuvil
7 reviewed the record, including Dr. Parikh’s opinion. (AR 29.) He testified that Plaintiff’s past
8 methamphetamine abuse was “somewhat heavy” and may account for his hallucinations.
9 (AR 27.) Dr. Malancharuvil diagnosed Plaintiff with a psychotic disorder, not otherwise
10 specified, with auditory hallucinations mitigated by medication and a personality disorder.
11 (AR 27-28.) Dr. Malancharuvil testified that Plaintiff was capable of performing more than
12 simple work, in an object-oriented setting, and that he should avoid dealing with the public.
13 (AR 28-29.) This assessment was consistent with Dr. Parikh’s assessment. On cross-
14 examination, Plaintiff’s attorney questioned Dr. Malancharuvil about Dr. Parikh’s moderate
15 limitations and whether Plaintiff could work despite these limitations. (AR 34-35.) Dr.
16 Malancharuvil answered affirmatively. (Id.)

17 Accordingly, the ALJ adequately and properly considered Dr. Parikh’s evaluation and
18 incorporated it into his RFC assessment.

19 **C. Further Proceedings**

20 The Court has concluded that the ALJ erred in failing either to accept or to give
21 germane reasons for rejecting the statement of the lay witness. In these circumstances, it is
22 appropriate to remand this matter for further administrative proceedings. “Remand for further
23 administrative proceedings is appropriate if enhancement of the record would be useful.”
24 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); see also Harman v. Apfel, 211 F.3d
25 1172, 1178 (9th Cir. 2000). Where there are outstanding issues that must be resolved
26 before a determination of disability can be made, and it is not clear from the record that the
27 ALJ would be required to find the claimant disabled if all the evidence were properly
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1 evaluated, remand is appropriate. Id. Here, remand is appropriate because the ALJ must
2 address the lay witness opinion before a proper disability determination can be made. See
3 Vasquez v. Astrue, 572 F.3d 586, 593 (9th Cir. 2009).

4 There is no need to address the other disputed issues. If the lay witness testimony is
5 credited, the ALJ may determine that Plaintiff's RFC should be revised to reflect additional
6 limitations. This, in turn, may affect the ALJ's assessment of Plaintiff's ability to perform past
7 relevant work and may require the ALJ to pose new hypothetical questions to the VE that
8 reflect fully Plaintiff's limitations.

9 **ORDER**

10 IT IS HEREBY ORDERED that the Decision of the Commissioner of Social Security is
11 reversed and remanded for further proceedings consistent with law and this Memorandum
12 Opinion and Order.

13 LET JUDGMENT BE ENTERED ACCORDINGLY.

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15 DATED: October 12, 2010

16 /s/ John E. McDermott
17 JOHN E. MCDERMOTT
18 UNITED STATES MAGISTRATE JUDGE
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