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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES JEFFREY AKER,)	Case No. EDCV 11-1374 JC
Plaintiff,)	
v.)	MEMORANDUM OPINION
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
Defendant.)	

I. SUMMARY

On September 9, 2011, plaintiff James Jeffrey Aker (“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; September 12, 2011 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 February 29, 2008, plaintiff filed an application for Supplemental
7 Security Income (“SSI”) benefits. (Administrative Record (“AR”) 13, 62).
8 Plaintiff asserted that he became disabled on April 9, 1997, due to paranoia,
9 schizophrenia, bi polar disorder, manic depression, and insomnia. (AR 75). The
10 ALJ examined the medical record and heard testimony from plaintiff (who was
11 represented by counsel), a medical expert, and a vocational expert on May 19,
12 2010. (AR 778-97).

13 On September 3, 2010, the ALJ determined that plaintiff was disabled
14 through the date of the decision, but was not eligible to receive benefits because
15 plaintiff’s substance use disorder was a contributing factor material to any
16 disability caused by plaintiff’s severe impairments. (AR 13, 20). Specifically, the
17 ALJ found: (1) plaintiff suffered from the following severe impairments:
18 schizoaffective disorder and polysubstance abuse (AR 15); (2) plaintiff would
19 continue to suffer from a severe impairment or combination of impairments if he
20 discontinued substance use (AR 16); (3) plaintiff’s impairments, including the
21 substance abuse disorder, met the listed impairments in sections 12.03, 12.04 and
22 12.09 of 20 C.F.R. Part 404, Subpart P, Appendix 1 (AR 15-16); (4) if plaintiff
23 discontinued substance use, he would not suffer from an impairment or
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26 ¹The harmless error rule applies to the review of administrative decisions regarding
27 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
28 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of application of harmless error standard in social security cases).

1 combination of impairments that would meet or medically equal any of the listed
2 impairments (AR 16-17); (5) if plaintiff discontinued substance use, he would
3 have the residual functional capacity to perform a full range of work at all
4 exertional levels with certain nonexertional limitations² (AR 17); (6) plaintiff had
5 no past relevant work (AR 19); (7) if plaintiff discontinued substance use, there
6 are jobs that exist in significant numbers in the national economy that plaintiff
7 could perform, specifically industrial cleaner, landscape worker, and vehicle
8 cleaner (AR 19-20); and (8) plaintiff's allegations regarding his limitations apart
9 from those related to substance use were not credible to the extent they were
10 inconsistent with the ALJ's residual functional capacity assessment (AR 16, 18).

11 The Appeals Council denied plaintiff's application for review. (AR 4).

12 **III. APPLICABLE LEGAL STANDARDS**

13 **A. Sequential Evaluation Process**

14 To qualify for disability benefits, a claimant must show that the claimant is
15 unable to engage in any substantial gainful activity by reason of a medically
16 determinable physical or mental impairment which can be expected to result in
17 death or which has lasted or can be expected to last for a continuous period of at
18 least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing
19 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of
20 performing the work claimant previously performed and incapable of performing
21 any other substantial gainful employment that exists in the national economy.
22 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
23 § 423(d)(2)(A)).

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26 ²Specifically, the ALJ determined that plaintiff (i) could not work at unprotected heights
27 or with dangerous machinery; (ii) could perform only nonpublic (*i.e.*, no intense communication
28 with the public), object-oriented work; and (iii) could not perform fast-paced work (*e.g.*,
conveyor belt work or piece work). (AR 17).

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

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

20 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
21 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

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

26 **B. Standard of Review**

27 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
28 benefits only if it is not supported by substantial evidence or if it is based on legal

1 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
2 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
3 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
4 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
5 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
6 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
7 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

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

15 **IV. DISCUSSION**

16 **A. The ALJ Did Not Materially Err in Developing the Record**

17 Plaintiff argues that a reversal or remand is warranted essentially because
18 the ALJ failed to obtain records from the Social Security Administration which
19 reflect that plaintiff received SSI benefits from approximately 1999 until plaintiff
20 was incarcerated in January 2007. (Plaintiff’s Motion at 3-13). The Court
21 disagrees.

22 **1. Applicable Law**

23 Although plaintiff bears the burden of proving disability, an ALJ has an
24 affirmative duty to assist the claimant in developing the record at every step of the
25 sequential evaluation process. Bustamante, 262 F.3d at 954; see also Webb v.
26 Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (ALJ has special duty fully and fairly
27 to develop record and to assure that claimant’s interests are considered). “The
28 ALJ’s duty to develop the record fully is [] heightened where the claimant may be

1 mentally ill and thus unable to protect [his] own interests.” Tonapetyan v. Halter,
2 242 F.3d 1144, 1150 (9th Cir. 2001) (citation omitted). The ALJ’s duty is
3 triggered “when there is ambiguous evidence or when the record is inadequate to
4 allow for proper evaluation of the evidence.” Mayes v. Massanari, 276 F.3d 453,
5 459-60 (9th Cir. 2001) (citation omitted). An ALJ may discharge his duty to
6 develop the record in several ways, including: subpoenaing the plaintiff’s
7 physician, submitting questions to the physician, continuing the hearing, or
8 keeping the record open after the hearing to allow for supplementation of the
9 record. Tonapetyan, 242 F.3d at 1150 (citations omitted) .

10 The ALJ is not obliged to undertake the independent exploration of every
11 conceivable condition or impairment a claimant might assert. Therefore, an ALJ
12 does not fail in his duty to develop the record by not seeking evidence or ordering
13 further examination or consultation regarding a physical or mental impairment if
14 no medical evidence indicates that such an impairment exists. See Breen v.
15 Callahan, 1998 WL 272998, *3 (N.D. Cal. May 22, 1998) (noting that, in the
16 Ninth Circuit, the ALJ’s obligation to develop the record is triggered by “the
17 presence of some objective evidence in the record suggesting the existence of a
18 condition which could have a material impact on the disability decision”) (citing
19 Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); Wainwright v. Secretary of
20 Health and Human Services, 939 F.2d 680, 682 (9th Cir. 1991)); see also Pearson
21 v. Bowen, 866 F.2d 809, 812 (5th Cir. 1989) (requiring that claimant must “raise a
22 suspicion concerning such an impairment” before ALJ is required to discharge
23 duty of full inquiry by ordering a consultative examination).

24 **2. Analysis**

25 Plaintiff fails to demonstrate that the ALJ materially erred relative to the
26 development of the record.

27 First, the ALJ’s duty to develop the record further was not triggered.
28 Plaintiff points to no specific medical evidence in plaintiff’s prior SSI claim file

1 which reflected any impairment that is relevant to plaintiff's instant SSI claim. In
2 fact, at the hearing, plaintiff's attorney essentially stated that he had "no idea"
3 what impairment formed the basis for plaintiff's prior award of benefits. (AR 780-
4 81). Plaintiff's speculation that such prior records might reflect some continuing
5 impairment, and conclusory assertion that "[plaintiff] is to this day still disabled
6 for the same [unidentified] reasons" was insufficient to trigger the ALJ's duty to
7 develop the record in this case. See Breen, 1998 WL 272998 at *3. Moreover, the
8 ALJ did not find, nor does the record reflect, that the evidence of plaintiff's
9 impairments is ambiguous, or that the record as a whole was inadequate to allow
10 for proper evaluation of the evidence. To the contrary, the record contains reports
11 from Dr. Reynaldo Abejuela, a consultative examining psychiatrist, and Dr. Kelly
12 J. Loomis, a state agency reviewing physician, on which the ALJ properly relied to
13 assess plaintiff's residual functional capacity and determine disability apart from
14 plaintiff's substance use. (AR 18) (citing Exhibit B6F [AR 454-64]; Exhibit B7F
15 [AR 465-72]); see, e.g., Tonapetyan, 242 F.3d at 1149 (consultative examiner's
16 opinion on its own constituted substantial evidence supporting ALJ's disability
17 determination, because it rested on independent examination of claimant);
18 Andrews, 53 F.3d at 1041 ("reports of the nonexamining advisor need not be
19 discounted and may serve as substantial evidence when they are supported by
20 other evidence in the record and are consistent with it").

21 Second, even assuming that the ALJ erroneously failed to obtain and add
22 documentation from plaintiff's prior SSI claim to the current record of exhibits,
23 any such error was harmless as the ALJ was permitted to disregard such evidence
24 without explanation. An ALJ must provide an explanation only when he rejects
25 "significant probative evidence." See Vincent v. Heckler, 739 F.2d 1393, 1394-95
26 (9th Cir. 1984) (citation omitted). Here, as essentially noted above, plaintiff does
27 not demonstrate that any records from his prior SSI claim constituted significant or

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1 probative evidence of plaintiff’s limitations and/or medical condition in the instant
2 case.

3 In light of the foregoing, a remand or reversal on this basis is not warranted.

4 **B. The ALJ Properly Evaluated the Medical Evidence**

5 Plaintiff contends that a reversal or remand is warranted because the ALJ:
6 (1) failed properly to evaluate the medical opinions of plaintiff’s treating
7 psychiatrist, Dr. T. Petersen (Plaintiff’s Motion at 10) (citing Exhibit B5E at 11
8 [AR 111]; Exhibit B1F at 160 [AR 321]); and (2) failed properly to “address the
9 entire period of [plaintiff’s] alleged disability” (Plaintiff’s Motion at 13). The
10 Court disagrees.

11 **1. Pertinent Facts**

12 In a Verification of Physical or Mental Disability (Food Stamp Program)
13 report dated April 6, 1998 (“April 1998 Report”), Dr. Petersen opined that plaintiff
14 “is mentally and/or physically unfit for gainful employment” due to “Bipolar
15 Affective Disorder, Type I,” and that he expected plaintiff’s inability to engage in
16 “gainful employment” to continue for “6 months to 1 year.” (AR 111).

17 In a narrative report dated November 18, 2002 (“November 2002 Notes”),
18 Dr. Petersen commented that (1) plaintiff had a “long history of intermittent
19 substance abuse” which would “complicate[] full control of symptoms”;
20 (2) plaintiff “[a]ppears to have severe mood cycles independent of substance
21 abuse”; and (3) “[c]ompliance with medications may be a factor.” (AR 321).

22 **2. Analysis**

23 First, the ALJ was not required to provide any explanation for disregarding
24 the April 1998 Report. See Vincent, 739 F.2d at 1394-95 (ALJ need not provide
25 explanation unless rejecting “significant probative evidence”). Such report is
26 conclusory and, in any event, essentially fails to identify any impairment which
27 satisfies the durational requirement – *i.e.*, a disabling impairment expected to last
28 for *at least* twelve months during the relevant time period commencing on

1 February 29, 2008 (when plaintiff filed his claim in this case). See 42 U.S.C.
2 § 423(d)(1)(A); Burch, 400 F.3d at 679; Matthews v. Shalala, 10 F.3d 678, 680
3 (9th Cir. 1993) (in upholding the Commissioner’s decision, the Court emphasized:
4 “None of the doctors who examined [claimant] expressed the opinion that he was
5 totally disabled”); accord Curry v. Sullivan, 925 F.2d 1127, 1130 n.1 (9th Cir.
6 1990) (upholding Commissioner and noting that after surgery, no doctor suggested
7 claimant was disabled). Even so, plaintiff fails to demonstrate that Dr. Petersen’s
8 diagnosis in 1998 that plaintiff had Bipolar Affective Disorder reflects that in
9 2008 or later plaintiff had additional functional limitations that were not already
10 accounted for in the ALJ’s residual functional capacity assessment.

11 Second, the ALJ was not required to discuss at length medical evidence
12 which he did not reject, and which was cumulative. See Howard ex rel. Wolff v.
13 Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003) (citations omitted); see also Black
14 v. Apfel, 143 F.3d 383, 386 (8th Cir. 1998) (“An ALJ’s failure to cite specific
15 evidence does not indicate that such evidence was not considered[.]”). Here,
16 although Dr. Petersen stated in the November 2002 Notes that plaintiff had
17 “severe mood cycles independent of substance abuse,” he also noted that
18 plaintiff’s substance abuse complicated full control of plaintiff’s symptoms and
19 that “compliance with medications may be a factor” in plaintiff’s mental
20 impairment. (AR 321). Plaintiff fails to demonstrate that such notes reflect
21 significant or probative evidence that was not already accounted for by the ALJ
22 who essentially found that plaintiff had few work restrictions when plaintiff
23 refrained from substance use and was compliant with his medication. (AR 18).
24 While plaintiff suggests that Dr. Petersen’s opinions reflect more significant
25 limitations in plaintiff’s work-related mental functioning, the Court will not
26 second guess the ALJ’s reasonable interpretation that they do not. Robbins, 466
27 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

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1 Finally, with respect to plaintiff’s general allegation that the ALJ “fail[ed] to
2 properly address the entire period of alleged disability” (*i.e.* from April 9, 1997,
3 plaintiff’s alleged onset date, to February 29, 2008, when plaintiff filed his
4 application) (Plaintiff’s Motion at 13), any claim of error based on such
5 conclusory pleading does not merit relief. Cf. Carmickle v. Commissioner, Social
6 Security Administration, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (courts
7 “ordinarily will not consider matters on appeal that are not specifically and
8 distinctly argued in an appellant’s opening brief”) (citation and internal quotation
9 marks omitted).

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

11 **C. The ALJ Properly Considered Lay Witness Evidence**

12 Plaintiff contends that the ALJ failed properly to consider statements
13 provided by plaintiff’s mother, Linda Sue Aker, and failed to provide sufficient
14 reasons for disregarding her statements. (Plaintiff’s Motion at 13-15). This Court
15 disagrees.

16 **1. Pertinent Law**

17 Lay testimony as to a claimant’s symptoms is competent evidence that an
18 ALJ must take into account, unless he expressly determines to disregard such
19 testimony and gives reasons germane to each witness for doing so. Stout, 454
20 F.3d at 1056 (citations omitted); Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
21 2001); see also Robbins, 466 F.3d at 885 (ALJ required to account for all lay
22 witness testimony in discussion of findings) (citation omitted); Regennitter v.
23 Commissioner of Social Security Administration, 166 F.3d 1294, 1298 (9th Cir.
24 1999) (testimony by lay witness who has observed claimant is important source of
25 information about claimant’s impairments); Nguyen v. Chater, 100 F.3d 1462,
26 1467 (9th Cir. 1996) (lay witness testimony as to claimant’s symptoms or how
27 impairment affects ability to work is competent evidence and therefore cannot be
28 disregarded without comment) (citations omitted); Sprague v. Bowen, 812 F.2d

1 1226, 1232 (9th Cir. 1987) (ALJ must consider observations of non-medical
2 sources, *e.g.*, lay witnesses, as to how impairment affects claimant’s ability to
3 work). The standards discussed in these authorities appear equally applicable to
4 written statements. Cf. Schneider v. Commissioner of Social Security
5 Administration, 223 F.3d 968, 974-75 (9th Cir. 2000) (ALJ erred in failing to
6 consider letters submitted by claimant’s friends and ex-employers in evaluating
7 severity of claimant’s functional limitations).

8 In cases in which “the ALJ’s error lies in a failure to properly discuss
9 competent lay testimony favorable to the claimant, a reviewing court cannot
10 consider the error harmless unless it can confidently conclude that no reasonable
11 ALJ, when fully crediting the testimony, could have reached a different disability
12 determination.” Robbins, 466 F.3d at 885 (quoting Stout, 454 F.3d at 1055-56).

13 **2. Analysis**

14 First, although plaintiff asserts that “[n]owhere within his [decision] . . . did
15 the ALJ ever mention” function reports provided by plaintiff’s mother (Plaintiff’s
16 Motion at 13), plaintiff’s assertion is belied by the record. In his decision the ALJ
17 expressly referenced both of plaintiff’s mother’s third party function reports, and
18 noted that plaintiff’s mother had stated that she reminds plaintiff to groom himself
19 and to take his medication, and that plaintiff would usually stay at home most of
20 the day sleeping, reading, watching television, playing with their dogs, and sitting
21 outside. (AR 17) (citing Exhibit B4E [AR 93-100]; B11E [AR 138-45]).

22 Second, to the extent the ALJ failed expressly to mention other statements
23 from plaintiff’s mother that simply corroborated limitations the ALJ already
24 accounted for in his decision, any error was harmless. See, e.g., Zerba v.
25 Commissioner of Social Security Administration, 279 Fed. Appx. 438, 440 (9th
26 Cir. 2008) (failure to address husband’s cumulative lay testimony harmless error);
27 Rohrer v. Astrue, 279 Fed. Appx. 437, 437 (9th Cir. 2008) (rejecting claimant’s
28 contention that ALJ improperly rejected lay witness statement of claimant’s

1 girlfriend where such statement was cumulative of statements by claimant which
2 ALJ accepted).³ Simply because the ALJ did not expressly reference cumulative
3 symptom evidence does not mean he failed to consider such evidence. See Black,
4 143 F.3d at 386. The ALJ was not required to discuss every piece of evidence in
5 the record. See Howard, 341 F.3d at 1012 (citations omitted).

6 Here, plaintiff alleges in a conclusory manner that the ALJ ignored
7 statements from plaintiff’s mother regarding “symptoms and limitations” plaintiff
8 experienced “as a result of his underlying mental disorders.”⁴ (Plaintiff’s Motion
9 at 13). While the ALJ did not expressly mention the mother’s statements that
10 plaintiff’s condition affects his ability to complete tasks, concentrate, remember
11 things, understand, follow directions and get along with others (AR 98, 143),
12 plaintiff fails to demonstrate that such alleged limitations impaired his ability to
13 work beyond the ALJ’s residual functional capacity assessment which limits
14 plaintiff to “nonpublic . . . object-oriented work” and precludes plaintiff from
15 working around dangerous machinery, at unprotected heights, or in a “fast-paced”
16 environment. (AR 17).

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

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24 ³The Court may cite unpublished Ninth Circuit opinions issued on or after January 1,
25 2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

26 ⁴In her third party statements, plaintiff’s mother states that plaintiff has “severe paranoia,”
27 “severe depression” and “manic swings,” suffers from “agitation,” “anger issues,” and
28 “irritability,” sometimes hears voices and has suicidal thoughts, and as a result has difficulty with
memory, completing tasks, concentrating, understanding, following directions, and getting along
with others. (AR 98-100, 142-44).

1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is affirmed.

4 LET JUDGMENT BE ENTERED ACCORDINGLY.

5 DATED: May 8, 2012

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7 /s/
8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE

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