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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
8 EASTERN DIVISION
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10 CHARLES LUTHER,) Case No. EDCV 10-00228-MLG
11 Plaintiff,) MEMORANDUM OPINION AND ORDER
12 v.)
13 MICHAEL J. ASTRUE,)
14 Commissioner of the Social)
15 Security Administration,)
16 Defendant.)

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18 Plaintiff Charles Luther seeks judicial review of the Social
19 Security Commissioner's denial of his application for disability
20 insurance benefits ("DIB"). For the reasons stated below, the
21 decision of the Commissioner is affirmed and the action is
22 dismissed with prejudice.

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24 **I. Facts and Procedural Background**

25 Plaintiff was born on October 17, 1948. He has a high school
26 education and has work experience as a truck driver for a freight
27 company. (Administrative Record ("AR") 40, 147, 152.) Plaintiff
28 filed an application for DIB on January 12, 2006, alleging

1 disability as of November 26, 1997, due to disorders of the back
2 (discogenic and degenerative), muscle and ligament disorders and
3 Post-Traumatic Stress Disorder ("PTSD"). (AR 10, 40.) Plaintiff had
4 been granted benefits for a closed period of time between June 1,
5 1994 to May 1, 1996, following a November 25, 1997 hearing
6 decision. (AR 42-44.) Plaintiff's date last insured was September
7 30, 2001.¹ (AR 10.)

8 Plaintiff's current application was denied initially and upon
9 reconsideration. (AR 49-53, 57-61.) An administrative hearing was
10 held October 29, 2007, before Administrative Law Judge ("ALJ")
11 Joseph Schloss. (AR 738-750.) On November 17, 2007, ALJ Schloss
12 issued an unfavorable decision. (AR 26-35.)

13 Plaintiff sought judicial review and the parties entered into
14 a stipulated remand in which Plaintiff's PTSD claim would be heard
15 by a different ALJ. (84-88.) On October 26, 2009 a second
16 administrative hearing was held before ALJ Michael Radensky.
17 Plaintiff, represented by attorney Bill LaTour, testified, as did
18 Plaintiff's wife, Rosie Luther, medical expert David Glassmire and
19 vocational expert Sandra Fioretti. (AR 695-737.)

20 ALJ Radensky issued an unfavorable decision on December 7,
21 2009. (AR 5-13.) The ALJ found that Plaintiff had not engaged in
22 substantial gainful activity since the alleged onset date of
23 November 26, 1997. (AR 10.) The ALJ further found that Plaintiff

25 ¹ In order to qualify for disability insurance benefits,
26 Plaintiff is required to establish that he was disabled on or
27 before the date his insured status expired. 20 C.F.R.
28 §404.131(b)(1); *Vincent ex rel. Vincent v. Heckler*, 739 F.2d
1393, 1394 (9th Cir. 1984); *Flaten v. Secretary of Health & Human
Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995).

1 suffered from the following severe impairments: a history of back
2 surgery, post-traumatic stress disorder, and a history of carpal
3 tunnel syndrome. (Id.) The ALJ then determined that Plaintiff's
4 impairments did not meet the requirements of a listed impairment
5 found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Id.) The ALJ
6 also found that there was no medical evidence in the record to
7 support Plaintiff's claim of PTSD prior to his date last insured of
8 September 30, 2001. (AR 12.) The ALJ concluded that Plaintiff was
9 not disabled as defined in the Social Security Act. (Id.)

10 Plaintiff commenced this action on February 22, 2010, and on
11 August 17, 2010, the parties filed a joint stipulation ("Joint
12 Stp.") of disputed facts and issues, including the following: (1)
13 the ALJ failed to properly develop the record because he did not
14 seek Veterans Affairs ("VA") records and (2) the ALJ failed to
15 properly develop the record because he did not seek medical records
16 from the Loma Linda VA. (Joint Stp. 2.) Plaintiff asks the Court to
17 reverse and order an award of benefits, or, in the alternative,
18 remand for further proceedings. (Joint Stp. 6.) The Commissioner
19 requests that the ALJ's decision be affirmed. (Joint Stp. 7.)

21 **II. Standard of Review**

22 Under 42 U.S.C. § 405(g), a district court may review the
23 Commissioner's decision to deny benefits. The Commissioner's
24 decision must be upheld unless "the ALJ's findings are based on
25 legal error or are not supported by substantial evidence in the
26 record as a whole." *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir.
27 1999); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
28 Substantial evidence means more than a scintilla, but less than a

1 preponderance; it is evidence that a reasonable person might accept
2 as adequate to support a conclusion. *Lingenfelter v. Astrue*, 504
3 F.3d 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*,
4 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
5 substantial evidence supports a finding, the reviewing court "must
6 review the administrative record as a whole, weighing both the
7 evidence that supports and the evidence that detracts from the
8 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720
9 (9th Cir. 1996). "If the evidence can support either affirming
10 or reversing the ALJ's conclusion," the court "may not substitute
11 its judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

13 **III. The ALJ Properly Developed the Record**

14 Plaintiff claims that the ALJ abrogated his duty to develop
15 the record because he did not seek VA disability pension records
16 and Loma Linda VA medical records. (Joint Stp. 2.) Plaintiff argues
17 that, because he testified at the administrative hearing that he
18 had been granted a disability pension by the VA in 2004 and because
19 he testified that he received mental health treatment at the Loma
20 Linda VA sometime in the "early 2000's," this triggered the ALJ's
21 duty to develop the record. (Joint Stp. 3, 5; AR 712, 715.) In this
22 regard, it must be noted that Plaintiff's medical evidence
23 regarding his claim of PTSD dates primarily from 2006 to the
24 present, more than five years after his date last insured of
25 September 30, 2001. (AR 195-694.)

26 A disability applicant bears the burden of proving disability
27 and must provide medical evidence demonstrating the existence and
28 severity of an alleged impairment. See *Mayes v. Massanari*, 276 F.3d

1 453, 459 (9th Cir. 2001); 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. §
2 416.912(c). Nonetheless, an ALJ has a "duty to develop the record
3 fully and fairly and to ensure that the claimant's interests are
4 considered, even when the claimant is represented by counsel."
5 *Mayes*, 276 F.3d at 459. An ALJ's duty to augment an existing record
6 is triggered "only when there is ambiguous evidence or when the
7 record is inadequate to allow for proper evaluation of the
8 evidence. *Id.* (citing *Tonapetyen v. Halter*, 242 F.3d 1144, 1150
9 (9th Cir. 2001)).

10 Plaintiff argues that his vague statements regarding his VA
11 pension and mental health treatment at the VA "sometime in the
12 2000's" triggered the ALJ's duty to develop the record. However,
13 there were no ambiguous medical records or conflicting medical
14 findings regarding the existence or severity of Plaintiff's PTSD
15 which would trigger the ALJ's duty to further develop the record.
16 Rather, there simply was no medical evidence at all prior to the
17 date last insured of September 30, 2001 suggesting the existence of
18 such a mental impairment. If medical records existed regarding
19 Plaintiff's PTSD that were relevant to the period of disability,
20 either Plaintiff himself or his attorney could have procured these
21 records, rather than expecting the ALJ to do so. See *Bowen v.*
22 *Yuckert*, 482 U.S. 137, 146 n.5 ("It is not unreasonable to require
23 the claimant, who is in a better position to provide information
24 about his own medical condition, to do so."); *Duenas v. Shalala*, 34
25 F.3d 719, 722 (9th Cir. 1994).

26 Plaintiff appears to be attempting to shift his burden of
27 proving disability to the Commissioner. However, Plaintiff has
28 never asserted, either at the hearing or in this action, a theory

1 upon which his PTSD interferes with his ability to work. The ALJ
2 had adequate evidence to evaluate Plaintiff's testimony regarding
3 his PTSD and did not abrogate his duty to develop the record. See
4 *Grissom v. Astrue*, 2009 WL 1309506, at *5 (C.D.Cal. 2009) (single
5 reference to possible history of mental health treatment did not
6 trigger duty to further develop record where claimant offered no
7 other evidence of such treatment); *Orcutt v. Barnhart*, 2005 WL
8 2387702, at *4 (C.D.Cal. 2005) ("An ALJ does not fail in her duty
9 to develop the record by not seeking evidence or ordering further
10 examination or consultation regarding a physical or mental
11 impairment if no medical evidence indicates that such an impairment
12 exists.").

13 In addition, the ALJ properly relied upon the testimony of
14 medical expert Dr. David Glassmire, Ph.D., who reviewed all of
15 Plaintiff's medical records and determined that there was nothing
16 in the evidence to support a determination of PTSD prior to March
17 2004, when Plaintiff was diagnosed with PTSD by the VA. (AR 12,
18 703-706.) See *Morgan v. Comm. of Social Sec. Admin*, 169 F.3d 595,
19 600 ("Opinions of a nonexamining, testifying medical advisor may
20 serve as substantial evidence when they are supported by other
21 evidence in the record and are consistent with it.").

22 Plaintiff has failed to show that the evidence is ambiguous or
23 that the record is inadequate to allow for proper evaluation of the
24 evidence. The ALJ was under no obligation to further develop the
25 record. See *Mayes*, 276 F.3d at 459-60.

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1 **IV. Conclusion**

2 For the reasons stated above, the decision of the Commissioner
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5 Dated: August 27, 2010

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Marc L. Goldman
United States Magistrate Judge

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