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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LESLIE L. DEGEN,

No. C 15-02677 WHA

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S CROSS-MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

In this social security appeal, the Court finds that the ALJ's decision was supported by substantial evidence. Accordingly, to the extent stated below, plaintiff's motion for summary judgment is **DENIED** and defendant's cross-motion for summary judgment is **GRANTED**.

STATEMENT

1. PROCEDURAL HISTORY.

On May 1, 2012, plaintiff Leslie L. Degen filed concurrent applications for disability insurance benefits and supplemental security income, alleging he was unable to work since January 1, 1973 due to depression and chronic foot pain (AR 476). His application was denied both initially and upon reconsideration (AR 20). An administrative hearing was timely requested (*ibid.*).

1 On March 9, 2014 and on September 18, 2014 plaintiff had hearings before ALJ Richard
2 P. Laverdure (AR 38–70). At the first of two hearings, Degen stipulated to an amended onset
3 date of May 1, 2012 (the date of his application). The ALJ rendered a decision on December 9,
4 2014, finding that plaintiff was not disabled (AR 17–37). Plaintiff requested administrative
5 review (AR 16). The Appeals Council denied the request (AR 1). Plaintiff filed an action
6 before this Court on June 15, 2015, seeking judicial review pursuant to 42 U.S.C. 405(g). The
7 parties now make cross-motions for summary judgment.

8 **2. TESTIMONY AT THE ADMINISTRATIVE HEARING.**

9 At the hearing before the ALJ, Degen testified that he quit his job working as a
10 custodian at a university in 1998, where he had worked since 1986 and had “lifetime
11 employment [and] good benefits.” He then sold his house and “ended up with a large sum of
12 money,” but he eventually “ran out of money from paying rent, and [he] had cars, insurance, all
13 that kind of stuff” (AR 41–42). After Degen ran out of money, he moved in with his uncle,
14 bicycled, visited his half brother, played music, and performed mechanic work on his cars (AR
15 42). Degen stated he sought to relax due to the “tremendous strain” of holding down a job
16 (*ibid.*). Degen eventually left his uncle’s home and became homeless, at least as of 2012 (AR
17 52).

18 Degen testified that he suffered from “extremely excruciating” pain in his feet when he
19 doesn’t “treat [him]self properly.” He saw a podiatrist who gave him orthotics that
20 “immediately helped with the pain” and “reduced the pain by about one-third,” thereby
21 increasing the distance he could walk from two blocks to twelve. Degen testified that keeping
22 away from alcohol and sugar dramatically helped with the pain (AR 50–51).

23 Degen also testified that he suffered from anxiety that could be triggered “[w]hen things
24 are too loud, too bright, or they smell too strong, or taste too strong, or if somebody touches
25 [him]” as well as by crowds and failure in maintaining his own health (AR 51).

1 **3. MEDICAL EVIDENCE.**

2 The medical evidence was summarized in the ALJ’s decision (AR 20–37). This order
3 will also briefly review both plaintiff’s self-reported symptoms and the findings of each
4 physician who examined and treated him.

5 **A. Physical Conditions.**

6 In October 2012, Dr. Rose Lewis, an internist, performed a comprehensive internal
7 medical evaluation of Degen (AR 387–90). Examining Internist Lewis noted that Degen
8 primarily complained of foot pain, which he stated began at age 12 and worsened over time
9 (Degen is now 53). Degen reported he could only walk two or three blocks before he started
10 feeling pain. Examining Internist Lewis reported that Degen took no pain medication, though
11 lying down or soaking his feet in warm water could relieve the pain.

12 Examining Internist Lewis’s report indicated that Degen could take care of his personal
13 and household needs, although he reported that he was homeless. She indicated diagnoses of a
14 “left bunion [and] multiple corns and calluses [on] both feet” but noted Degen “ambulate[d]
15 quite easily without an assistive device, [sat] comfortably and [could] get on and off the exam
16 table with ease. He ha[d] no difficulty taking off his shoes and putting them back on” (AR
17 387–88). Examining Internist Lewis otherwise found generally unremarkable results. She
18 assessed Degen’s maximum standing and walking capacity and his maximum sitting capacity at
19 “up to six hours.” She also assessed Degen’s maximum lifting and carrying capacity at “100
20 pounds occasionally and 50 pounds frequently” (AR 390).

21 Physicians from the state disability determination agency, who reviewed the Degen’s
22 medical records in 2012 and 2013, found no evidence to support severe physical impairments
23 (AR 80, 104).

24 Degen first sought treatment from a podiatrist, Dr. Ted Mihok, in January 2014.
25 Podiatrist Mihok diagnosed Degen with acquired keratadoma, but he made no indication of any
26 physical limitations (AR 479–80).

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1 In April 2014, Degen also sought treatment from a neurologist, Dr. Joshua Kuluva, who
2 conducted a neurologic exam and diagnosed him with hypersensitivity, neuropathy (possibly
3 caused by chronic alcohol abuse), and essential tremor, though found Degen’s physical
4 conditions otherwise normal (AR 578–80). Neurologist Kuluva prescribed Degen with
5 Gabapentin, which he expected to help with the neuropathy and the tremor (AR 579). In July
6 2014, Degen reported to his treating psychiatrist, Dr. Linda Frankel, that the Gabapentin had
7 helped with his symptoms until he ran out of it (AR 568).

8 **B. Mental Conditions.**

9 The record also addressed Degen’s mental conditions. In July 2013, for the first time
10 since the ’80s Degen sought treatment for his reported lifelong depression. He saw Treating
11 Psychiatrist Frankel, who diagnosed Degen with major depression, alcohol abuse, and
12 personality disorder (AR 478). Psychiatrist Frankel prescribed Zoloft, which she later noted led
13 to improved mental status when he adhered to the prescription (AR 575–76). In April 2014,
14 Treating Psychiatrist Frankel noted Degen reported sensitivity to bright lights, strong smells,
15 and temperature.

16 In February 2014, Treating Psychiatrist Frankel submitted a medical impairment
17 questionnaire indicating that Degen suffered from severe mental impairment (AR 452–53)

18 Also in February 2014, Dr. Lesleigh Franklin, a psychologist, examined Degen and
19 noted his hypersensitivity and anxiety and found diagnoses of major depressive disorder, severe
20 and generalized anxiety disorder, alcohol use disorder in sustained remission, and borderline
21 personality traits. Examining Psychologist Franklin found Degen would have moderate
22 difficulty with understanding and remembering instructions or concentrating and marked
23 difficulty completing tasks at an adequate pace, interacting with the public or coworkers, and
24 responding to authority (AR 515–24).

1 ANALYSIS

2 1. LEGAL STANDARD.

3 A decision denying disability benefits must be upheld if it is supported by substantial
4 evidence and free of legal error. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
5 Substantial evidence is “more than a scintilla,” but “less than a preponderance.” *Smolen v.*
6 *Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). It means “such relevant evidence as a reasonable
7 mind might accept as adequate to support a conclusion.” *Ibid*. The Court must “review the
8 administrative record as a whole, weighing both the evidence that supports and that which
9 detracts from the ALJ’s conclusion.” *Andrews*, 53 F.3d at 1039. “The ALJ is responsible for
10 determining credibility, resolving conflicts in medical testimony, and for resolving
11 ambiguities;” thus, where the evidence is susceptible to more than one rational interpretation,
12 the decision of the ALJ must be upheld. *Ibid*.

13 The claimant has the burden of proving disability. *Id.* at 1040. Disability claims are
14 evaluated using a five-step inquiry. 20 C.F.R. 404.1520. In the first four steps, the ALJ must
15 determine: (i) whether the claimant is working, (ii) the medical severity and duration of the
16 claimant’s impairment, (iii) whether the disability meets any of those listed in Appendix 1,
17 Subpart P, Regulations No. 4, and (iv) whether the claimant is capable of performing his or her
18 previous job; step five involves a determination of whether the claimant is capable of making an
19 adjustment to other work. 20 C.F.R. 404.1520(a)(4)(i)–(v). In step five, “the burden shifts to
20 the Secretary to show that the claimant can engage in other types of substantial gainful work
21 that exists in the national economy.” *Andrews*, 53 F.3d at 1040. If the ALJ chooses to use a
22 vocational expert, hypothetical questions asked “must ‘set out all of the claimant’s
23 impairments.’” *Lewis v. Apfel*, 236 F.3d 503, 517 (9th Cir. 2001) (internal citation omitted).

24 The use of the Medical-Vocation Guidelines, at step five is proper “where they
25 *completely and accurately* represent a claimant’s limitations” and the claimant can “perform the
26 *full range of jobs in a given category.*” *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999)
27 (emphasis in original). Although “the fact that a non-exertional limitation is alleged does not
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1 automatically preclude application of the grids,” the ALJ must first determine whether the
2 “claimant’s non-exertional limitations significantly limit the range of work permitted by his
3 exertional limitations.” *Id.* at 1102.

4 **2. THE ALJ’S FIVE-STEP ANALYSIS.**

5 In his decision, the ALJ found at step one of the sequential evaluation process that
6 Degen had not engaged in substantial gainful activity since his application and amended onset
7 date of May 1, 2012 (AR 23). At step two, the ALJ determined that Degen had severe
8 impairments of major depressive disorder, generalized anxiety disorder, borderline personality
9 disorder, and alcohol use disorder. The ALJ found Degen had no severe physical medical
10 disorders (*ibid.*). At step three, the ALJ found Degen did not have an impairment or
11 combination of impairments that met or equaled one of the impairments listed in the regulations
12 (AR 25). At step four, the ALJ found Degen’s residual functional capacity allowed him to
13 perform medium work — which involves lifting no more than fifty pounds at a time with
14 frequent lifting or carrying of objects weighing up to twenty-five pounds — as defined in
15 Sections 404.1567(c) and 416.967(c) of Title 20 of the Code of Federal Regulations, and that he
16 was limited to unskilled, simple, repetitive tasks that did not involve contact with the general
17 public (AR 26). At step five, the ALJ found that Degen had no past relevant work and thus
18 lacked any acquired or transferrable work skills. Nevertheless, considering Degen’s age,
19 education, work experience, and ability to perform medium work, and in light of the medical-
20 vocational guidelines and the testimony of a vocational expert, the ALJ concluded that jobs
21 existed in significant numbers in the national economy that Degen could perform (AR 30).

22 By way of summary, the ALJ concluded (*ibid.*):

23 Overall, it appear [sic] the claimant made a lifestyle choice in the
24 late 1990s, quitting his job and selling his house. His funds ran
25 out. His current financial and living situations are unfortunate, but
26 they do not constitute a basis for a finding of disability. Overall, I
27 find no legitimate basis in the current record to preclude the
28 claimant from performing simple unskilled medium work in a
nonpublic setting.

1 Degen now argues that the ALJ erred at step two in finding the record insufficient to
2 support a severe physical impairment. He argues that the ALJ improperly rejected a portion of
3 the opinion of Treating Psychiatrist Frankel and found that Degen’s self-assessment of his
4 symptoms was not entirely credible. These errors, Degen argues, resulted in an improper
5 assessment of his residual functional capacity at step four.

6 At step two of the sequential evaluation process the ALJ considered whether Degen had
7 a severe medically determinable physical or mental impairment or combination thereof. 20
8 C.F.R. 416.920(a)(4)(ii). In this context, an impairment is “severe” if it “significantly limits
9 [the claimant’s] physical or mental ability to do basic work activities.” 20 C.F.R. 416.920(c).
10 The ALJ found the record generally lacked evidence from treating physicians for Degen’s
11 claimed physical impairments, so the ALJ accorded “primary probative weight to the
12 comprehensive internal medicine consultative evaluation performed by Dr. Lewis,” which
13 found Degen’s physical medical status to be “nonsevere” (AR 23–24). (The ALJ *did* find
14 Degen suffered from severe *mental* impairments.) Degen contends the ALJ erred by failing to
15 give primary weight to Degen’s treating physicians, Drs. Mihok and Herb.

16 Notwithstanding the ALJ’s determination that Degen lacked severe *physical*
17 impairments, the ALJ proceeded along the sequential analysis based on Degen’s severe *mental*
18 impairments. At step four, the ALJ was required to evaluate Degen’s residual capacity based
19 not only on Degen’s severe mental impairments, but *also* based on his nonsevere physical
20 impairments. *See* 20 C.F.R. 416.923. Indeed, the ALJ did consider purported physical
21 impairments at step four (AR 31). In other words, the determination that Degen did not suffer
22 from a severe physical impairment did not prejudice Degen, inasmuch as Degen remained free
23 to argue that his residual functional capacity precluded work due to both physical and mental
24 impairments. The central question, then, is whether the ALJ properly considered the evidence
25 in reaching his assessment of Degen’s residual functional capacity at step four.

26 The ALJ concluded that Degen could perform medium work, ascribing probative weight
27 to the opinion of Examining Internist Lewis (although Lewis opined he could perform heavy
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1 work). Degen contends the ALJ erred in ascribing significant weight to Examining Internist
2 Lewis’s opinion as to his physical limitations, but Degen points to no objective medical
3 evidence that contradicted that conclusion. Instead, Degen simply lists his several diagnoses
4 and then assigns error to the ALJ for finding his subjective assessment of his symptoms not
5 fully credible.

6 The ALJ found Degen was not fully credible as follows (AR 29):

7 First, as indicated above, the claimant has not been consistent in
8 following his treatment regimen. Second, his subjective
9 allegations are significantly out of proportion to the objective
10 medical findings of record. Third, although the claimant has
11 alleged that his depression and “hypersensitivity” have existed for
12 most of his life, he successfully performed years of work while
13 apparently experiencing the same symptomatology. Fourth,
14 although the claimant has alleged that his symptoms significantly
15 restrict his ability to function on a day-to-day basis, he has
16 admitted that until recently, he received no mental health or other
17 care whatsoever “for decades.” . . . Fifth, despite his claim of life-
18 long problems, he said that during “good years” he played music,
19 worked on cars, rode a bike, and visited his uncle and half-brother,
20 although he tried not to expose himself to “too much stimulation.”
21 Finally, the claimant left a good custodial job in UC Santa Cruz.
22 . . . Although he had been drinking for years, including a pint of
23 vodka per day, he apparently had no difficulty successfully
24 completing work activity on a consistent basis until he sold his
25 home and quit work.

17 Accordingly, the ALJ concluded that Degen’s “statements and testimony concerning the
18 intensity, persistence and limiting effects of [his] symptoms are not entirely credible,” and so
19 the record did not establish impairments that would support a finding of disability. Degen
20 contends that constituted error.

21 The ALJ “may not discredit [a] claimant’s testimony as to the severity of symptoms
22 merely because they are unsupported by objective medical evidence,” rather, the ALJ’s
23 “reasons for rejecting the claimant’s testimony must be ‘clear and convincing.’” *Reddick v.*
24 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Each of the ALJ’s bases for finding Degen not fully
25 credible is addressed in turn.

26 Degen contends that any failure to follow his treatment regimen or for failing to seek out
27 mental health treatment for more than two decades followed from his mental health issues, his
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1 economic circumstances, and transportation challenges, but the ALJ specifically noted that
2 Degen very recently sought out healthcare on his own despite these alleged obstacles. Nor do
3 Degen’s economic circumstances explain his sudden discontinuation of his treatment —
4 Degen’s economic circumstances did not change abruptly.

5 Degen argues that the ALJ does not specify which of Degen’s allegations of symptoms
6 fell out of proportion with the medical evidence. He cites Treating Psychiatrist Frankel’s
7 observations of his mental state, indicating that he had some anxiety and depression, that his
8 judgment was poor and that he “expressed suicidal ideation” (though he “denie[d] any plan or
9 intent”). But Treating Psychiatrist Frankel’s assessment of Degen’s condition was always mild.
10 In fact, she only found his judgment was poor once and otherwise assessed it as fair. Degen
11 also cites the opinion of Dr. Frances Herb, his primary care physician, that he appeared
12 “depressed” with “poor hygiene” (AR 496). He cites the findings of an examining psychologist
13 that “his hands were tremulous . . . he had some trouble on formal measures of attention . . .
14 [and his] mood was dysphoric. He was anxious and irritable . . . [and became] overwhelmed
15 under pressure” (AR 518, 520). Finally, Degen points to the opinion of Treating Podiatrist
16 Mihok, who noted that Degen’s foot pain was “painful to palpitation” (AR 480).

17 Far from countering the ALJ’s finding’s that Degen’s self-reported severity of his
18 symptoms was disproportionate compared to the objective findings, the foregoing reports
19 *underscore* that finding. Indeed, the ALJ never disputed that Degen might have some
20 symptoms. Rather, he found that Degen’s claimed severity was too extreme as compared to the
21 objective evidence to ascribe them full weight, particularly in light of the other infirmities
22 discussed herein (and in the ALJ’s decision).

23 Degen contends that the ALJ’s reference to his past ability to work despite his lifelong
24 hypersensitivity, and the fact that he was able to carry on daily activities such as shopping,
25 driving, biking, and exercising after leaving his previous job are not relevant to his current
26 claim of disability, but he cites no authority for that position. He contends that his condition
27 “could have worsened over time and with age” but neither the medical record nor Degen’s own
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1 assessment support that possibility. He also cites *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
2 Cir. 2001), for the proposition that “[o]ne does not need to be ‘utterly incapacitated’ in order to
3 be disabled.” True, but Degen’s ability to carry on those activities nevertheless tends to
4 contradict his assessment of his own impairment.

5 Degen’s activities in the period after he quit working clearly and convincingly conflicted
6 with his contention that his impairments, rather than his lifestyle choice caused him to quit his
7 job.

8 The ALJ did not treat any of these factors discounting Degen’s credibility as dispositive,
9 but rather considered the full record in reaching his conclusion. In light of the totality of the
10 infirmities just addressed, the ALJ found Degen’s assertion of the severity of his symptoms was
11 not fully credible, and could not overcome the objective evidence that he could continue to
12 perform medium work. Taken together, and in light of the much milder objective medical
13 evidence, the ALJ provided clear and convincing reasons for finding Degen’s assessment of his
14 own symptoms not entirely credible.

15 Degen then argues that the ALJ improperly ascribed “great evidentiary weight” to
16 Treating Psychiatrist Frankel’s assessment that his mental status was negative and showed
17 improvement while rejecting Treating Psychiatrist Frankel’s later medical impairment
18 questionnaire in which she asserted Degen had severe mental impairment. The ALJ explained
19 that Treating Psychiatrist Frankel’s questionnaire responses were wholly conclusory and
20 inconsistent with her own records and the rest of the medical record and appeared to have been
21 prepared in connection with Degen’s application for benefits (AR 28–29).

22 Degen contends the ALJ should have deferred to the conclusions of Examining
23 Psychologist Franklin in assessing the opinion of Treating Psychiatrist Frankel, but the Franklin
24 only examined Degen once, which the ALJ found also appeared to be in connection with
25 Degen’s application for benefits.

26 The ALJ’s rejection of Treating Psychiatrist Frankel’s and Examining Psychologist
27 Franklin’s unsupported, inconsistent, and claim-driven conclusions that Degen suffered from
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1 disabling mental impairments was proper. Accordingly, the ALJ's assessment of Degen's
2 residual functional capacity at step four and the subsequent decision that he was not disabled
3 were supported by substantial evidence.

4 **CONCLUSION**

5 To the extent stated above, plaintiff's motion for summary judgment is **DENIED**. and
6 defendant's cross-motion for summary judgment is **GRANTED**. Judgment will be entered
7 accordingly. The Clerk shall please **CLOSE THE FILE**.

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9 **IT IS SO ORDERED.**

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11 Dated: September 30, 2016.

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14 WILLIAM ALSUP
15 UNITED STATES DISTRICT JUDGE
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