

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 18 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSEPH L. SMITH,

Plaintiff-Appellant,

v.

NANCY A. BERRYHILL, Commissioner of
Social Security,

Defendant-Appellee.

No. 17-55735

D.C. No. 5:14-cv-01911-VEB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Victor E. Bianchini, Magistrate Judge, Presiding

Submitted February 8, 2019**
Pasadena, California

Before: WARDLAW and BEA, Circuit Judges, and MURPHY,*** District Judge.

Joseph Smith appeals the district court's affirmance of the Social Security Commissioner's ("the Commissioner") denial of his application for disability

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

insurance benefits under the Social Security Act. Because the parties are familiar with the facts of this case, we recite them only as necessary to explain our decision. Smith claims to have become disabled August 1, 2009, and his disability insurance coverage lapsed eight months later on March 31, 2010. Whether he is eligible for disability insurance benefits hinges on whether Smith had a medically determinable impairment that prevented him from performing substantial gainful activity between August 1, 2009, and March 31, 2010 (the “relevant disability period”).

I.

To receive Social Security disability benefits, a claimant must prove that he had a medically determinable impairment that prevented him from performing substantial gainful activity for at least a consecutive twelve-month period. *See* 42 U.S.C. § 423(a)(1)(A), (c)(1), (d)(1); 20 C.F.R. §§ 404.131, 404.1505; *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998). The claimant must also prove that he had such an impairment *before* the expiration of his disability insurance coverage, and that the impairment has existed *continuously* since some time before or on the date that his disability insurance coverage lapsed. *See Flaten v. Sec’y of Health and Human Servs.*, 44 F.3d 1453, 1458 (9th Cir. 1995).

A district court order upholding the Commissioner’s denial of benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The Commissioner’s final decision denying disability benefits (here, the ALJ’s decision)

must be upheld if it is supported by substantial evidence and free of reversible legal error. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401 (1971). “Substantial evidence means more than a scintilla but less than a preponderance.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). “Where evidence is susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Thomas*, 278 F.3d at 954.

II.

Smith first argues that the ALJ erred by finding that he was not per se disabled. A claimant can prove that he is disabled by showing that his medical condition meets or equals all of the criteria for a medical condition listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, which is considered to be a “per se disabling” condition. *Flores v. Shalala*, 49 F.3d 562, 565 n.2 (9th Cir. 1995).

The ALJ properly found that Smith failed to prove that he had a medical condition that was per se disabling during the relevant disability period. Smith admits that his condition does not meet all of the criteria of Listing 5.06A (Inflammatory Bowel Disease)—the most similar listed impairment. Therefore, the only way that his condition can be considered “per se disabling” is if it *equals* all of the required elements of the listing. Instead of articulating how his condition equals all aspects of Listing 5.06A (or any other listed condition), Smith simply repeats a

generalized description of his symptoms—conflating his symptoms from before, during, and after the relevant disability period—before concluding that his condition is equal in severity to a listed condition. Because Smith did not meet his burden of proving that his condition met or equaled the severity of any listed condition, the ALJ’s decision was not erroneous.

III.

Smith next argues that the ALJ erred by finding that he had the residual functional capacity to perform his past relevant work, and was therefore not disabled. Smith’s arguments on this point rely on unnecessarily graphic descriptions of his condition with little basis in the record, and conflate evidence of Smith’s symptoms from before, during, and after the relevant disability period. The relevant medical evidence shows that up until the last several weeks of the relevant disability period, Smith experienced some gastrointestinal and urological issues, but they were managed with routine and conservative treatment, and did not cause any functional limitations. Smith suffered a serious and sudden health scare in March 2010, several weeks before the end of the relevant disability period. But the relevant medical evidence—and Smith’s own testimony—suggests that he recovered well from his March 2010 colostomy surgery. Indeed, Smith stated that he had no problems during that period, and that his colostomy bag was “working well” several months after the

March 2010 surgery.¹

In determining that Smith had the residual functional capacity to perform his past relevant work, the ALJ properly discounted Smith’s subjective statements about his symptoms after laying out several clear and convincing reasons that Smith’s testimony was not credible (e.g., because it was internally inconsistent and conflicted with available medical evidence).

The ALJ also properly relied on the vocational expert’s testimony regarding Smith’s residual functional capacity. “In determining a claimant’s residual functional capacity, the ALJ must consider all of a claimant’s medically determinable impairments.” *Ghanim v. Colvin*, 763 F.3d 1154, 1166 (9th Cir. 2014). But it was proper for the ALJ to consider only those impairments “for which there was record support that [does] not depend on [the claimant]’s subjective complaints.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005). Smith argues that the vocational expert’s hypothetical analysis should have included a bevy of limitations that Smith alleges existed during the relevant period, but which are not

¹ Smith ultimately elected to have his colostomy surgically reversed in November 2011—seven months *after* the relevant disability period ended. That elective surgical procedure caused a number of serious health complications that have had lasting negative impacts on Smith’s life. But our inquiry is limited to whether Smith suffered a medically determinable impairment *during the relevant disability period*. The health complications from Smith’s second surgery, though unfortunate, are irrelevant to that inquiry.

supported by objective evidence in the record.² The ALJ properly included all of Smith's limitations during the relevant period that were supported by the medical evidence in posing hypotheticals to the vocational expert, and in coming to a determination on Smith's residual functional capacity.

Therefore, the ALJ did not err in determining that Smith was not disabled during the relevant disability period, because he had the residual functional capacity to perform his past relevant work during that period.

IV.

Smith argues that the panel should remand the case for the ALJ to consider new evidence, which Smith first introduced before the district court, regarding his hospitalization in Colorado for diverticulitis in August 2009. Under 42 U.S.C. § 405(g), a reviewing court may remand a case for the Commissioner to review new evidence “upon a showing that [the new evidence] . . . is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” 42 U.S.C. § 405(g). “To be material under section 405(g), the new evidence must bear ‘directly and substantially on the matter in dispute’” and the

² Many of the alleged limitations that Smith argues should have been included in the hypotheticals posed to the vocational expert come from Judy Deertrack's letter describing Smith's convalescence after his *second* elective surgery in November 2011. But none of Deertrack's descriptions relate back to the relevant disability period—indeed, Deertrack did not meet Smith until six months *after* the relevant disability period ended.

claimant “must additionally demonstrate that there is a ‘reasonable possibility’ that the new evidence would have changed the outcome of the administrative hearing.”

Mayes v. Massanari, 276 F.3d 453, 462 (9th Cir. 2001).

Even if Smith could establish good cause, there is no reasonable probability that the evidence would have changed the outcome of the administrative hearing. The ALJ acknowledged that Smith suffered from gastrointestinal and urinary tract issues during the relevant disability period, but found that these issues did not substantially impair his functional capacity during that period. The Colorado hospitalization provides further evidence that Smith suffered gastrointestinal issues during the relevant disability period, but does not show that Smith suffered any lasting functional impairments. This new evidence, therefore, has no probability of changing the outcome of the administrative hearing, and does not require remand. For the same reasons, Smith’s motion to take judicial notice and supplement the record with this new evidence [Dkt. 18] is denied.

AFFIRMED.