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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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NANCY COOMER, as Personal)
Representative of the Estate and on Behalf)
9 of Danny Coomer, Deceased,

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Plaintiff,

No. CIV 06-629-TUC-CKJ

11

vs.

ORDER

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MICHAEL J. ASTRUE,
Commissioner of the Social
13 Security Administration,

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Defendant.

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On April 11, 2008, Magistrate Judge Jacqueline Marshall issued a Report and
16 Recommendation [Doc. # 28] in which she recommended that Plaintiff's Motion for
17 Summary Judgment [Doc. # 14] be denied and Defendant's Cross-Motion for Summary
18 Judgment [Doc. # 17] be granted. On April 25, 2008, Plaintiff filed Objections to Report and
19 Recommendation. Defendant has not filed a response.

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Magistrate Judge's Statement of the Procedural Background and Factual Assertions

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The Court accepts the procedural background as set forth in the Report and
23 Recommendation.

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The Court accepts the facts as set forth by the magistrate judge except the Court finds
26 that there was usually two employees working at the store during the week and one employee
27 working at the store on the weekends, *see* Administrative Record ("AR"), p. 645A, Coomer
28 hired the services of an accountant to prepare store taxes and a bookkeeper, Linda Franklin

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1 (“Franklin”), to compute payroll. When Franklin took over the duty of preparing daily
2 deposits in March of 1995, the store deposit records were in disarray. AR, p. 668.

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4 *Standard of Review*

5 The findings of the Commissioner are meant to be conclusive, 42 U.S.C. §§ 405(g),
6 1383(c)(3), and a decision to overturn a denial of benefits is appropriate only if the denial “is
7 not supported by substantial evidence or [if the denial] is based on legal error.” *Matney v.*
8 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992), *citations omitted*; *Massachi v. Astrue*, 486 F.3d
9 1149 (9th Cir. 2007). “Substantial evidence is such relevant evidence as a reasonable mind
10 might accept as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
11 Cir. 2007). The standard is less than a “preponderance of the evidence” standard. *Matney*,
12 981 F.2d at 1019. Further, a denial of benefits is to be set aside if the Commissioner has
13 failed to apply the proper legal standards in weighing the evidence even though the findings
14 may be supported by substantial evidence. *Frost v. Barnhart*, 314 F.3d 359, 367 (9th Cir.
15 2002). Indeed, this Court must consider both evidence that supports, and evidence that
16 detracts from, the conclusion of the Administrative Law Judge (“ALJ”). *Frost*, 314 F.3d at
17 366-67.

18
19 *Objections of Plaintiff*

20 The Administrative Law Judge (“ALJ”) determined that Danny Coomer (“Coomer”)
21 had engaged in substantial gainful activity (“SGA”) as the sole proprietor of a feed business.
22 Plaintiff asserts that the ALJ erred in discounting or selectively reading evidence from other
23 persons (i.e., Christopher Stump (“Stump”), Linda Franklin (“Franklin”), and vocational
24 expert David P. Goguen, M.A., C.R.C. (“Goguen”)) for a proper understanding of what
25 constituted management of the business. Plaintiff also asserts that the ALJ misconstrued
26 Coomer’s testimony. Plaintiff asserts that the Report and Recommendation perpetuates these
27 errors.

1 *Substantial Gainful Activity*

2 SGA is work done for pay or profit that involves significant physical or mental
3 activities. 20 C.F.R. § 404.1572(a)-(b). If a claimant is self-employed, the Commissioner
4 is to consider the work activities the claimant performed and their value to the business to
5 determine whether the claimant engaged in SGA. 20 C.F.R. § 404.1575(a)(2). The
6 regulations set forth three alternative tests for determining whether a person is engaged in
7 SGA:

8 Test one: You have engaged in substantial gainful activity if you render services that
9 are significant to the operation of the business and receive a substantial income from
the business . . .

10 Test two: You have engaged in substantial gainful activity if your work activity, in
11 terms of factors such as hours, skills, energy output, efficiency, duties, and
responsibilities, is comparable to that of unimpaired individual in your community
12 who are in the same or similar businesses as their means of livelihood.

13 Test Three: You have engaged in substantial gainful activity if your work activity,
14 although not comparable to that of unimpaired individuals, is clearly worth the
amount shown in [the Commissioner’s Earnings Guidelines] when considered in
15 terms of its value to the business, or when compared to the salary that an owner would
16 pay to an employee to do the work you are doing.

17 20 C.F.R. § 404.1575(a)(2)(i)-(iii). Under test one, services are considered significant to a
18 business that involves more than one person “if [the claimant] contribute[s] more than half
19 the total time required for the management of the business, or [the claimant] render[s]
20 management services for more than 45 hours a month regardless of the total management
time required by the business.” 20 C.F.R. § 404.1575(b)(1).

21 *Vocational Expert Evidence*

22 Plaintiff asserts that the ALJ erred in failing to consider the uncontradicted report of
23 vocational expert Goguen. Goguen analyzed what constituted “management of the business”
24 in connection with Coomer’s feed store by reviewing testimony, affidavits, and the
25 Dictionary of Occupational Titles (“DOT”). Plaintiff asserts that 20 C.F.R. § 404.1566(d)
26 indicates the Commissioner takes administrative notice of the reliability of job data
27

1 information in the DOT. Plaintiff argues that the DOT cannot be summarily dismissed and
2 that vocational expert testimony must be considered. *Lester v. Chater*, 81 F.3d 821, 830-31
3 (9th Cir. 1995). That regulation states:

4 (d) Administrative notice of job data. When we determine that unskilled, sedentary,
5 light, and medium jobs exist in the national economy (in significant numbers either
6 in the region where you live or in several regions of the county), we will take
administrative notice of reliable job information available from various governmental
and other publications. For example, we will take notice of --

7 (1) Dictionary of Occupational Titles, published by the Department of Labor

8 * * * * *

9 20 C.F.R. § 404.1566(d)(1). The “for example” language of the C.F.R. implies that
10 administrative notice of reliable job information *will* be taken, but that information *may* be
11 taken from various sources, including those listed as examples. At least one other court has
12 found that the Commissioner *may* take notice of the DOT. *See McBurrows v. Commissioner*
13 *of Social Security*, 928 F.Supp. 724, 728 (E.D.Mich. 1996). Further, the Ninth Circuit has
14 stated that the “Secretary may rely on the general job categories of the *Dictionary*, with its
15 supplementary *Selected Characteristics*, as presumptively applicable to a claimant’s prior
16 work. *Villa v. Heckler*, 797 F.2d 704, 798 (9th Cir. 1986). Although *Villa* did not address
17 whether the Commissioner shall or may consider the DOT, it did state that the Commissioner
18 was not required to rely on the DOT. In this case, the ALJ considered the plain and simple
19 meaning of the word “management” in assigning a meaning to its use in the regulations. The
20 ALJ considered Goguen’s memorandum and determined that little weight should be afforded
21 to the memorandum because it relied heavily on Stump’s statements, which were vague and
22 ambiguous, that contradicted Coomer’s testimony. In other words, the ALJ considered the
23 DOT as set forth in the memorandum yet determined it was entitled to little weight. The ALJ
24 determined that Coomer’s testimony, given, at a time closer to the time of the events, was
25 more probative.

26 Plaintiff further asserts that 20 C.F.R. § 404.1560(b)(2) notes that the Commissioner
27 will consider the DOT and vocational expert testimony in determining whether a claimant

1 can perform his past work. However, the issue before the ALJ was not whether Coomer
2 could perform his past work, but whether he was engaged in SGA.

3 The Court finds that the ALJ was not required to consider the DOT. Nonetheless, the
4 ALJ did consider the DOT as set forth in Goguen's memorandum and determined it was
5 entitled to little weight. Additionally, the Court notes that the ALJ set forth the reasons for
6 giving the memorandum little weight. The Court finds there is substantial evidence to
7 support the ALJ's conclusion to afford the memorandum little weight. Furthermore, the
8 ALJ's consideration is not based on legal error.

9
10 *Consideration of the Evidence as a Whole*

11 Plaintiff asserts that the ALJ erred by failing to consider the evidence as a whole. *Day*
12 *v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975), *see also* 20 C.F.R. § 404.1520(a)(3)
13 (“We will consider all evidence in your case record when we make a determination or
14 decision whether you are disabled.”). Plaintiff asserts that the ALJ needed to consider
15 evidence from lay witnesses regarding the management activities at the feed store. The ALJ
16 stated:

17 The claimant was the sole proprietor of his feed business which accounted for
18 substantial income to him. He performed all management duties, including hiring and
19 paying employees, ordering feed to replenish his stock, paying bills, banking, keeping
records, setting prices, hiring an accountant, setting the hours of operation, and the
overall supervision of employees, who worked fairly independently.

20 Administrative Record, pp. 574-75. The ALJ further stated:

21 [The claimant's ex-wife] confirmed that the employees operated fairly independently
22 at work, but she did not contradict the claimant's testimony that he had the
responsibility for such management decisions as hiring employees, paying the bills,
23 setting the hours of operation, hiring the accountant, and approving all tax filings.

24 Similarly, the affidavit of Christopher Stump does not contradict the claimant in this
respect . . . Mr. Stump, who worked as store manager from August 1994 to August
1996, opined that such “management” tasks included closing the cash register at
25 night, determining changes to standard orders, and arranging for changes to the
employees' schedules. He does not say, however, that employees could do such
26 things as hire and fire themselves, set their own wages, determine the retail prices,
adjust the hours of operation, and withdraw funds from the business's accounts at
27 will. . .

1 Similarly, the affidavit of former employee Linda Franklin (Exhibit B55) [indicates
2 that she] worked as a bookkeeper for the claimant from March 1995 to March 1997.

3 *Id.*, at 575-76.

4 The ALJ considered the management activities conducted by Coomer. The ALJ also
5 considered the activities of the employees. In arguing that the accountant and bookkeeper
6 performed payroll, tax, and bank deposit preparation, Plaintiff does not provide any authority
7 that these activities are managerial rather than clerical. Contrary to Plaintiff's assertion, the
8 ALJ considered the evidence as a whole, but clearly did not accept Plaintiff's argument that
9 certain functions completed by employees were managerial in nature. The ALJ's conclusion
10 that Coomer engaged in SGA by rendering services that were significant to the business and
11 by receiving a substantial income from the business, 20 C.F.R. § 404.1575(a)(1), is supported
12 by substantial evidence and is not based on legal error.

13
14 *Summary Dismissal of Coomer's Medical Impairments*

15 Plaintiff argues that the ALJ failed to consider that Coomer's medical impairments
16 affected Coomer's ability to consistently be involved with the business. However, the
17 regulations provide that "[i]f you are doing [SGA], we will find that you are not disabled."
18 20 C.F.R. § 404.1520(a)(4)(I). Indeed, the Ninth Circuit has stated that "if a beneficiary is
19 engaged in SGA he is no longer entitled to benefits." *Katz v. Sec'y of Health & Human*
20 *Services*, 972 F.2d 290, 293 (9th Cir. 1992). Plaintiff has provided no authority for her
21 assertion that the medical condition should be considered in determining whether a claimant
22 is engaged in SGA.

23 Moreover, Plaintiff's objection is based on Coomer being confined to a hospital or his
24 home for extended periods of time in which, Plaintiff asserts that management functions were
25 performed by others. Coomer had approximately two Crohn's disease related episodes that
26 required hospitalizations per year. *See* AR, p. 85. The evidence establishes that Coomer was
27 not able to be present in the store for periods of time. *See e.g.*, AR, p. 668. However, this
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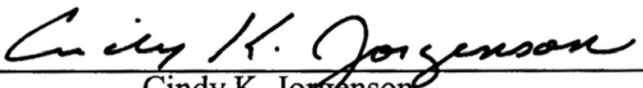
1 fails to establish that Coomer did not hire and pay employees, order the feed to replenish the
2 stock, set the prices, set the hours of operation, and supervise the employees who worked
3 fairly independently. Although the affidavit of Franklin indicates that Franklin would pay
4 bills, make bank deposits and maintain the books, Plaintiff has not presented any authority
5 that these functions were managerial as opposed to clerical. The Court notes that the DOT
6 indicates that reconciling cash with receipts is a managerial function. *See* Plaintiff's MSJ,
7 p. 9. Nonetheless, as discussed by the magistrate judge, the majority of the managerial
8 functions set forth in the DOT were performed by Coomer or did not need to be performed
9 by anyone. The ALJ noted that Franklin did not spend even close to 45 hours a month
10 working at the business. However, the ALJ considered that Franklin did not state that
11 employees were permitted to hire and fire, set wages, determine retail prices, etc. In other
12 words, the ALJ was considering the managerial functions conducted by Coomer rather than
13 the amount of time he expended in performing those functions.

14 The Court finds that substantial evidence supports the ALJ's determination that
15 Coomer engaged in SGA under test one of 20 C.F.R. § 404.1575(a)(2)(i),
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17 Accordingly, after an independent review, IT IS ORDERED:

- 18 1. The Report and Recommendation [Doc. # 28] is ADOPTED;
- 19 2. Plaintiff's Motion for Summary Judgment [Doc. # 14] is DENIED;
- 20 3. Defendant's Cross-Motion for Summary Judgment [Doc. # 17] is GRANTED;
- 21 4. Summary judgment is awarded in favor of Defendant and against Plaintiff;
- 22 5. The decision of the ALJ is AFFIRMED;
- 23 6. The Clerk of the Court shall enter judgment in this case and shall then close
24 its file in this matter.

25 DATED this 22nd day of October, 2008.

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27 
28 Cindy K. Jorgenson
United States District Judge