UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JENNIE P. BELTRAN, Plaintiff, v. MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant.	NO. CV 08-2386-RGK(E) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable R. Gary Klausner, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff filed a complaint on April 11, 2008, seeking review of the Commissioner's denial of benefits. Plaintiff filed a motion for summary judgment on August 20, 2008. Defendant filed a cross-motion for summary judgment on September 23, 2008. The Court has

taken the motions under submission without oral argument. See Fed. R. Civ. P. 78(b); L.R. 7-15; "Order," filed April 14, 2008.

BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

Plaintiff asserted disability since June 30, 2000, based on multiple alleged physical and mental impairments (Administrative Record ("A.R.") 46-858). Following a previous Court-ordered remand, the Administrative Law Judge ("ALJ") examined the medical record and heard testimony from Plaintiff and from a vocational expert (A.R. 506-858).

The ALJ found Plaintiff disabled beginning January 9, 2006, but not prior thereto (A.R. 514-15). In reliance on the Dictionary of Occupational Titles ("D.O.T.") and the testimony of the vocational expert, the ALJ determined that, but for Plaintiff's ongoing alcohol abuse, Plaintiff retained the residual functional capacity to work as a surveillance system monitor at all times prior to January 9, 2006 (A.R. 514-15). In reliance on the vocational expert's testimony that there exist 135 such jobs regionally and 1,680 jobs nationally, the ALJ concluded that these surveillance system monitor jobs existed in "significant numbers," within the meaning of 20 C.F.R. section 404.1566 (A.R. 514).

SUMMARY OF PLAINTIFF'S CONTENTIONS

Plaintiff contends:

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1. Surveillance system monitor jobs do not exist in sufficiently "significant numbers" to support the denial of disability benefits;

2. Surveillance system monitor jobs require skills Plaintiff never possessed; and

3. The opinion of a consultative medical expert shows Plaintiff was disabled during the relevant time frame.

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Commissioner's decision to determine if: (1) the Commissioner's findings are supported by substantial evidence; and (2) the Commissioner used proper legal standards. See Swanson v. Secretary, 763 F.2d 1061, 1064 (9th Cir. 1985). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted).

This Court "may not affirm [the Administration's] decision simply by isolating a specific quantum of supporting evidence, but must also consider evidence that detracts from [the Administration's] conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir. 1987) (citation and quotations omitted). However, the Court cannot disturb findings supported by substantial evidence, even though there may exist other evidence supporting Plaintiff's claim. See Torske v.

Richardson, 484 F.2d 59, 60 (9th Cir. 1973), cert. denied, 417 U.S. 933 (1974); Harvey v. Richardson, 451 F.2d 589, 590 (9th Cir. 1971).

The harmless error rule applies to the review of administrative decisions regarding disability. See Curry v. Sullivan, 925 F.2d 1127, 1129 (9th Cir. 1991); see also Batson v. Commissioner, 359 F.3d 1190, 1196 (9th Cir. 2004); Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001).

DISCUSSION

After consideration of the record as a whole, the Magistrate Judge recommends that Defendant's motion be granted and Plaintiff's motion be denied. The Administration's findings are supported by substantial evidence and are free from material legal error.

I. The ALJ Did Not Err in Concluding There Existed "Significant Numbers" of Surveillance System Monitor Jobs.

When an individual can perform work "which exists in the national economy," the individual is deemed not disabled. 42 U.S.C. § 423(d)(2)(A). "'[W]ork which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." Id.; accord 20 C.F.R. § 404.1560(c); 20 C.F.R. § 416.961(c). If work exists in such numbers, it is legally irrelevant whether "such work exists in the immediate area in which [the individual] lives, or whether a specific job vacancy exists for him [or her], or whether he

[or she] would be hired if he [or she] applied for work." 42 U.S.C. § 423(d)(2)(A). The Ninth Circuit "has never clearly established the minimum number of jobs necessary to constitute a 'significant number.'" Barker v. Secretary, 882 F.2d 1474, 1478 (9th Cir. 1989). Whether there exists a significant number of jobs "in the national economy," is a question of fact to be determined by the administrative law judge. See Martinez v. Heckler, 807 F.2d 771, 775 (9th Cir. 1986).

The vocational expert's testimony furnished substantial evidence there existed 135 surveillance system monitor jobs regionally and 1,680 such jobs nationally. See Russell v. Bowen, 856 F.2d 81, 83 (9th Cir. 1988) (vocational expert's testimony can constitute "substantial evidence"). The ALJ did not err in concluding these numbers are "significant." In Barker v. Secretary, 882 F.2d 1474, 1478-79 (9th Cir. 1989), the Ninth Circuit cited with approval: (1) an Eighth Circuit decision holding that as few as 500 jobs constituted significant numbers; (2) a District Court decision holding that 600 jobs constituted significant numbers; and (3) another District Court decision appearing to hold that as few as 150 jobs constituted significant numbers. Other courts similarly have found to be "significant" numbers that are on or close to the order of the numbers in the present case. See Long v. Chater, 108 F.3d 185, 188-89 (8th Cir. 1997) (650 surveillance monitoring jobs in the state of Iowa); Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (650 to 900 jobs in the state); Jenkins v. Bowen, 861 F.2d 1083, 1087 (8th Cir. 1988) (500 sedentary security guard jobs in region); Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987) (174 jobs in the local economy);

Johnson v. Barnhart, 2004 WL 1529296 *4 (D. Me. June 24, 2004), adopted, 2004 WL 1572705 (D. Me. July 13, 2004) (30 jobs in the state, "three hundred in the region and 3,000 nationally"); Rogers v. Barnhart, 2003 WL 22052204 *3 (S.D. Iowa Mar. 6, 2003) (300 jobs in the state); Mercer v. Halter, 2001 WL 257842 *5 (N.D. Tex. Mar. 7, 2001) (500 jobs in the state and 5,000 jobs nationally); Nix v. Sullivan, 744 F. Supp. 855, 863 (N.D. Ind. 1990, aff'd, 936 F.2d 575 (7th Cir. 1991) (675 jobs in the region).

"Isolated jobs that exist only in very limited numbers and relatively few locations outside of the region where [the claimant] live[s] are not considered 'work which exists in the national economy.'" 20 C.F.R. § 404.1566(b); 20 C.F.R. § 416.966(b). In the present case, however, there is no indication that the surveillance system monitor jobs found to exist in the national economy fall within this exclusion. Compare DeLorme v. Sullivan, 924 F.2d 841, 851 (9th Cir. 1991) (where there were only four or five taxicab starter jobs in the area where the claimant lived, and only four to five thousand in the national economy, the Ninth Circuit expressed doubt that the existence of such jobs would suffice to deny disability benefits). In the instant case, on the basis of the adequate record presented, a reasonable mind could conclude that "significant numbers" of jobs Plaintiff could perform existed both in the "region" where Plaintiff lives and "in several regions of the country," within the meaning of 42 U.S.C. section 423(d)(2)(A). See Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001) (ALJ is responsible for determining credibility and resolving ambiguities in the evidence presented). Accordingly, Plaintiff's contrary contention fails.

II. Substantial Evidence Supports the Conclusion that the Surveillance System Monitor Job is Unskilled Work.

Contrary to Plaintiff's contention, substantial evidence supports the ALJ's determination that the surveillance system monitor job would not have required skills Plaintiff lacked. The vocational expert testified that the surveillance system monitor jobs the expert had in mind were unskilled jobs, not requiring any kind of computer, typing, or other skills (A.R. 856-57). The D.O.T. assigns to the surveillance system monitor job a specific vocational preparation ("SVP") rating of 2 (D.O.T. 379.367-010). A job with an SVP rating of 2 is considered unskilled work. See Terry v. Sullivan, 903 F.2d 1273, 1276-78 (9th Cir. 1990). "The DOT's occupational definitions are the result of comprehensive studies of how similar jobs are performed in different workplaces." Social Security Ruling 00-4p (also characterizing the information in the D.O.T. as "reliable").

Plaintiff largely predicates her argument on supposedly conflicting information contained in the "O*NET," a vocational compilation reportedly utilized by the Bureau of Labor Statistics of the United States Department of Labor. The fact, if it is a fact, that there may be particular skilled surveillance monitor jobs (such as "gaming surveillance officer" or "gaming investigator") does not conflict with the vocational expert's testimony that unskilled surveillance monitor jobs also exist. See Merrill v. Astrue, 2007 WL 922254 *3-4 (D. Me. Mar. 26, 2007) (affirming based on existence of unskilled surveillance system monitor jobs despite testimony by a vocational expert "that the description of the job of surveillance

system monitor in the DOT 'has been expanded to include' other settings and that a new system used by the Department of Labor 'might' include security guards under the title of surveillance system monitor"). Moreover, even conflicting evidence would not merit reversal of the ALJ's decision. As previously indicated, the ALJ has discretion to resolve conflicts and ambiguities in the evidence. See Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001). Where, as here, the evidence "admits of more than one rational interpretation," the Court must uphold the administrative decision. Andrews v. Shalala, 53 F.3d 1035, 1039-40 (9th Cir. 1995); accord Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002); Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997).

III. Plaintiff's Citation of a Consultative Medical Opinion Does Not Demonstrate Any Material Error.

Plaintiff argues that a report by a non-treating, consultative physician suggests, contrary to the ALJ's findings, that certain of Plaintiff's functional limitations would have persisted even if Plaintiff had abstained from alcohol. The argument fails to demonstrate material error.

First, Plaintiff's interpretation of the report in question, though plausible, is not the only interpretation to which the report is susceptible. The consultative physician never clearly opined regarding the extent to which abstinence from alcohol might improve

Plaintiff's functioning (A.R. 268-72).[1]

Second, even if Plaintiff has correctly interpreted the consultative physician's opinion, the opinion is not binding on the ALJ. Indeed, the ALJ may implicitly disregard the opinions of non-treating, consultative physicians. Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1986); see generally Torske v. Richardson, 484 F.2d 59, 60 (9th Cir. 1973), cert. denied, 417 U.S. 933 (1974) (if the evidence is in conflict, the Administration's findings are conclusive when supported by substantial evidence).

Accordingly, Plaintiff's argument regarding the consultative medical opinion lacks merit. Substantial evidence supports the conclusion that, had Plaintiff discontinued her alcohol abuse, Plaintiff would have been able to work during the relevant time period.[2]

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[1] The ALJ was not required to, and apparently did not, accept Plaintiff's 2000 report to the Kern Medical Center that she was "down to 1-2 glasses of wine" per day. The ALJ concluded, on substantial evidence, that Plaintiff "has never been in remission from alcohol abuse" (A.R. 512).

[2] "An individual shall not be considered to be disabled . . . if alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C).

RECOMMENDATION

For all of the reasons discussed herein, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) denying Plaintiff's motion for summary judgment; (3) granting Defendant's motion for summary judgment; and (4) directing that Judgment be entered in favor of Defendant.

DATED: October 14, 2008.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.