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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

FITZGERALD FIELDS SR.,)	No. EDCV 09-7177 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned magistrate judge. Plaintiff seeks review of the denial of supplemental security income. The court finds that judgment should be granted in favor of defendant, affirming the Commissioner's decision.

I. BACKGROUND

Plaintiff Fitzgerald Fields Sr. was born on April 15, 1964, and was forty-five years old at the time of his administrative hearing. [Administrative Record ("AR") 154.] He has a high school education and past relevant work as a construction laborer. [AR 39-40, 175.]

1 Plaintiff alleges disability on the basis of sleep apnea, problems
2 with his knee and hip, and seizures. [AR 169.]

3 **II. PROCEEDINGS IN THIS COURT**

4 Plaintiff's complaint was lodged on October 1, 2009, and filed on
5 October 8, 2009. On April 16, 2010, Defendant filed an answer and the
6 Administrative Record. On June 15, 2010, the parties filed their
7 Joint Stipulation ("JS") identifying matters not in dispute, issues in
8 dispute, the positions of the parties, and the relief sought by each
9 party. This matter has been taken under submission without oral
10 argument.

11 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

12 Plaintiff applied for supplemental security income on January 17,
13 2008, alleging disability since August 1, 2004.¹ [AR 154.] After the
14 application was denied initially and upon reconsideration, Plaintiff
15 requested an administrative hearing, which was held on April 1, 2009,
16 before Administrative Law Judge Robert A. Evans ("ALJ"). [AR 36-55,
17 61-65, 67-71.] Plaintiff appeared with counsel and gave testimony.
18 [AR 36-55.] The ALJ denied benefits in a decision issued on June 19,
19 2009. [AR 28-35.] When the Appeals Council denied review on August
20 27, 2009, the ALJ's decision became the Commissioner's final decision.
21 [AR 2-4.]

22 **IV. STANDARD OF REVIEW**

23 Under 42 U.S.C. § 405(g), a district court may review the
24 Commissioner's decision to deny benefits. The Commissioner's (or
25 ALJ's) findings and decision should be upheld if they are free of

26
27 ¹ Because Supplemental Security Income payments are not
28 retroactive, the relevant time period for plaintiff's current
application begins on plaintiff's protective filing date of January
31, 2008. See 42 U.S.C. § 1382(c)(7); 20 C.F.R. § 416.501.

1 legal error and supported by substantial evidence. However, if the
2 court determines that a finding is based on legal error or is not
3 supported by substantial evidence in the record, the court may reject
4 the finding and set aside the decision to deny benefits. See Aukland
5 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
6 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
7 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097
8 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998);
9 Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v.
10 Chater, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam).

11 "Substantial evidence is more than a scintilla, but less than a
12 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
13 which a reasonable person might accept as adequate to support a
14 conclusion." Id. To determine whether substantial evidence supports
15 a finding, a court must review the administrative record as a whole,
16 "weighing both the evidence that supports and the evidence that
17 detracts from the Commissioner's conclusion." Id. "If the evidence
18 can reasonably support either affirming or reversing," the reviewing
19 court "may not substitute its judgment" for that of the Commissioner.
20 Id. at 720-21; see also Osenbrock, 240 F.3d at 1162.

21 **V. DISCUSSION**

22 **A. THE FIVE-STEP EVALUATION**

23 To be eligible for disability benefits a claimant must
24 demonstrate a medically determinable impairment which prevents the
25 claimant from engaging in substantial gainful activity and which is
26 expected to result in death or to last for a continuous period of at
27 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
28 721; 42 U.S.C. § 423(d)(1)(A).

1 Disability claims are evaluated using a five-step test:

2 Step one: Is the claimant engaging in substantial
3 gainful activity? If so, the claimant is found not
4 disabled. If not, proceed to step two.

5 Step two: Does the claimant have a "severe" impairment?
6 If so, proceed to step three. If not, then a finding of not
7 disabled is appropriate.

8 Step three: Does the claimant's impairment or
9 combination of impairments meet or equal an impairment
10 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
11 so, the claimant is automatically determined disabled. If
12 not, proceed to step four.

13 Step four: Is the claimant capable of performing his
14 past work? If so, the claimant is not disabled. If not,
15 proceed to step five.

16 Step five: Does the claimant have the residual
17 functional capacity to perform any other work? If so, the
18 claimant is not disabled. If not, the claimant is disabled.

19 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
20 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
21 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
22 C.F.R. § 416.920. If a claimant is found "disabled" or "not disabled"
23 at any step, there is no need to complete further steps. Tackett, 180
24 F.3d 1098; 20 C.F.R. § 416.920.

25 Claimants have the burden of proof at steps one through four,
26 subject to the presumption that Social Security hearings are non-
27 adversarial, and to the Commissioner's affirmative duty to assist
28 claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to
prove that, considering residual functional capacity ("RFC")², age,

² Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5-6 (9th Cir. 1989). Nonexertional limitations limit ability to

1 education, and work experience, a claimant can perform other work
2 which is available in significant numbers. Tackett, 180 F.3d at 1099-
3 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 416.920.

4 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

5 Here, the ALJ found that Plaintiff had not engaged in substantial
6 gainful activity since January 31, 2008, the protective filing date of
7 Plaintiff's application (step one); that Plaintiff had the "severe"
8 impairments of seizure disorder vs. asystole and status post left knee
9 surgery (step two); and that Plaintiff did not have an impairment or
10 combination of impairments that met or equaled a "listing" (step
11 three). [AR 30.] The ALJ determined that Plaintiff had the RFC to
12 lift and carry fifty pounds occasionally and twenty-five pounds
13 frequently, stand/walk six hours in an eight-hour workday provided he
14 can sit every two hours as needed for alleged right hip or right knee
15 pain, and sit six hours in an eight-hour workday. [Id.] Plaintiff
16 was restricted from working at heights or near hazardous machinery.
17 [Id.] Plaintiff was unable to perform his past relevant work (step
18 four). [AR 33.] Based on testimony from the vocational expert, the
19 ALJ determined that Plaintiff could perform certain jobs existing in
20 significant numbers in the national economy, including janitor (step
21 five). [AR 33-34.] Accordingly, Plaintiff was found not "disabled"
22 as defined by the Social Security Act. [AR 34.]

23 **C. ISSUES IN DISPUTE**

24 The parties' Joint Stipulation identifies the following disputed
25 issues:

26 _____
27 work without directly limiting strength, and include mental, sensory,
28 postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1156
n.7; 20 C.F.R. § 404.969a(c).

- 1 1. Whether the ALJ properly held that Plaintiff can perform the
2 job of janitor;
- 3 2. Whether the ALJ's finding that Plaintiff is limited to
4 standing and/or walking for six hours out of an eight-hour
5 workday provided he can sit for two hours as needed for
6 right hip or right knee pain is consistent with the ALJ's
7 finding that Plaintiff is capable of performing the
8 exertional demands of medium work as a janitor;
- 9 3. Whether the ALJ properly considered if Plaintiff meets or
10 equals listing 11.02B³; and
- 11 4. Whether the ALJ properly considered Plaintiff's testimony
12 and made proper credibility findings.

13 [JS 2-3.]

14 **D. ISSUES ONE AND TWO: STEP FIVE FINDING**

15 Background

16 Plaintiff alleges that he experienced episodes of seizures from
17 2004-2008. [AR 41.] According to Plaintiff, in 2004, Dr. Richard
18 Kay, a treating internist, diagnosed Plaintiff with a seizure disorder
19 and prescribed seizure medication. [Id.]

20 On April 2, 2008, Dr. Barry Gordon Gwartz, a consultative
21 examiner, concluded that Plaintiff was capable of lifting and/or
22 carrying fifty pounds occasionally and twenty-five pounds frequently,
23 standing and/or walking for six hours out of an eight-hour workday
24 provided he can sit every two hours as needed, and sit for six hours
25 out of an eight-hour workday. [AR 254-59.] Dr. Gwartz imposed no

26
27 ³ The parties incorrectly state in the Joint Stipulation that
28 the issue is whether Plaintiff meets or equals listing 13.10. [JS 3.]
Listing 13.10 concerns breast cancer, not one of the impairments at
issue here. 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 13.10.

1 other limitations except to preclude Plaintiff from working at heights
2 or near hazardous machinery "because of his history of alleged seizure
3 disorder." [AR 259.] Dr. Gwartz did not diagnose Plaintiff with a
4 seizure disorder. Rather, he noted that Plaintiff had a normal
5 neurological examination, but that Plaintiff reported a history of
6 nighttime seizure disorder. [AR 258.] Dr. Elliot L. Gilpeer, a State
7 Agency review physician, agreed with Dr. Gwartz's exertional
8 limitations. [AR 263.]

9 In November 2008, Plaintiff checked into USC University Hospital
10 ("USC") for an epilepsy study. [AR 50-51, 365-67.] While monitoring
11 Plaintiff, USC doctors learned that Plaintiff was actually
12 experiencing periods of syncope⁴ and asystole⁵ and recommended a
13 pacemaker. [AR 368-70.] Dr. Laura Ann Kalayjian, a treating
14 neurologist at USC, verified that Plaintiff was not experiencing
15 seizures. [AR 298.] On November 13, 2008, doctors implanted a
16 pacemaker in Plaintiff. [AR 353-54.] On November 14, 2008, Dr.
17 Kalayjian wrote that Plaintiff was likely misdiagnosed with a seizure
18 disorder. [AR 314.] Dr. Kalayjian explained that Plaintiff had
19 syncope, which caused the loss of consciousness. [Id.] Dr. Kalayjian
20 explained that due to the implantation of a pacemaker, Plaintiff
21 should no longer experience any syncopal episodes. [Id.] Dr.
22 Kalayjian discontinued Plaintiff's seizure medications. [Id.]

24
25 ⁴ Syncope is the temporary partial or complete loss
26 consciousness with interruption of awareness of oneself and one's
27 surroundings. Syncope can be caused by heart problems. See
28 <http://www.medterms.com/script/main/art.asp?articlekey=5612>.

⁵ Asystole is defined as cardiac standstill or arrest; absence
of heartbeat. See
<http://medical-dictionary.thefreedictionary.com/asystole>.

1 Plaintiff stopped experiencing seizures or episodes when he lost
2 consciousness, whether synocopal or seizure-related, after the
3 procedure and was informed the previous seizure diagnosis was
4 incorrect. [AR 51, 458.]

5 At the April 1, 2009, administrative hearing, the ALJ asked the
6 vocational expert whether a person with Plaintiff's limitations,
7 including the need to sit every two hours and preclusion from working
8 around heights and around dangerous machinery, could perform any range
9 of medium exertion jobs in the national economy. [AR 53-54.] The
10 vocational expert responded that the person could perform the job of a
11 janitor (Dictionary of Occupational Titles ("DOT") code 381.687-018).
12 [AR 54.] The ALJ adopted the vocational expert's testimony to find
13 that Plaintiff was not disabled. [AR 33-34.]

14 **Plaintiff's Claim**

15 Plaintiff argues that the ALJ erred in finding that he can
16 perform the job of janitor because the job is inconsistent with his
17 RFC. [JS 3-6, 11-13.] First, Plaintiff asserts that the job of
18 janitor would require him to work around hazardous machinery. [AR 3-
19 6.] Second, Plaintiff argues that the job of janitor would require
20 him to stand or walk "for a total of approximately [six] hours in an
21 [eight]-hour workday," which does not meet the requirement that he can
22 sit every two hours as needed. [AR 11-13.] Accordingly, Plaintiff
23 argues that the ALJ's decision at step five was based on reversible
24 error. [AR 6, 13.]

25 Because these arguments both concern the step five analysis and
26 inconsistency with Plaintiff's RFC, the Court will address them
27 together.

1 **Discussion**

2 At step five of the sequential evaluation, the burden of proof
3 shifts to the Commissioner to identify specific jobs existing in
4 substantial numbers in the national economy that claimant can perform
5 despite his identified limitations. Johnson v. Shalala, 60 F.3d 1428,
6 1432 (9th Cir. 1995). One method of demonstrating the existence of
7 these jobs is through the testimony of a vocational expert, who can
8 assess the effect of any limitation on the range of work at issue,
9 identify jobs which are within the RFC, if they exist, and provide a
10 statement of the incidence of such jobs in the region where the
11 claimant lives or in several regions of the country. Social Security
12 Ruling ("SSR") 83-12, 1983 WL 31253 at *3.

13 Pursuant to SSR 00-4p, 2000 WL 1898704 at *4, when a vocational
14 expert provides evidence about the requirements of a job or
15 occupation, the ALJ has "an affirmative responsibility to ask about
16 any possible conflict" between that testimony and the Dictionary of
17 Occupational Titles ("DOT") and to obtain a reasonable explanation for
18 any conflict. In light of the requirements of SSR 00-4p, the Ninth
19 Circuit has held that an ALJ may not rely on a vocational expert's
20 testimony without first inquiring whether the testimony conflicts with
21 the DOT. Massachi v. Astrue, 486 F.3d 1149, 1152-53 (9th Cir. 2007).
22 The failure to expressly follow this procedural error can be harmless
23 when there is no conflict or if the vocational expert "provided
24 sufficient support for her conclusion." Id. at 1154, n.19; Burch v.
25 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) ("A decision of the ALJ
26 will not be reversed for errors that are harmless.").

27 The Court finds that the ALJ committed a procedural error when he
28 failed to expressly ask the vocational expert if her testimony was

1 consistent with the DOT⁶, but that the error is harmless for multiple
2 reasons.

3 First, there is sufficient support for the vocational expert's
4 conclusion. See Massachi, 486 F.3d at 1154, n.19. The ALJ expressly
5 incorporated both restrictions - the need to sit every two hours and
6 preclusion from working around heights and hazardous machinery - in
7 his hypothetical to the vocational expert. [AR 53-54.] The
8 vocational expert responded to the ALJ's hypothetical and determined
9 that in spite of those limitations, there were medium work⁷ jobs that
10 Plaintiff could perform. [AR 54.] In addition, the vocational expert
11 expressly explained that a janitor would be given a ten to fifteen-
12 minute break every two hours. [Id.]

13 Second, the ALJ's actions amount to harmless error because there
14 is no conflict between the vocational expert's testimony and the DOT
15 description. Massachi, 486 F.3d at 1154, n.19 (stating that the
16 failure to ask if there is a conflict can be harmless when there is no
17 conflict). A DOT description lists duties that may be required of a
18 janitor but this does not mean that every listed duty is mandatory to
19 the position. See Johnson, 60 F.3d at 1435 (stating that the DOT
20 "provides only occupational information on jobs as they have been
21 found to occur, but they do not coincide in every respect with the
22 contents of jobs as performed in particular establishments or at
23 _____

24 ⁶ In the decision, the ALJ wrote that the testimony of the
25 vocational expert was consistent with the information contained in the
26 DOT. [AR 34.] The ALJ, however, did not actually ask the vocational
27 expert whether her testimony conflicted with the DOT. [AR 53-55.]

28 ⁷ Medium work involves lifting no more than 50 pounds at a time
with frequent lifting or carrying of objects weighing up to 25 pounds.
If someone can do medium work, we determine that he or she can also do
sedentary and light work. 20 C.F.R. § 416.967(c).

1 certain localities") (citation omitted). While some janitors may work
2 with incinerators, lawnmowers, handtrucks, or industrial trucks,
3 others do not.⁸ Thus, the ALJ's finding and the vocational expert's
4 testimony do not deviate from the DOT job description or conflict with
5 Plaintiff's RFC.

6 Third, Plaintiff's RFC was based upon a misdiagnosis. [AR 51,
7 314.] When the consultative examiner and State Agency review
8 physician offered their opinions as to Plaintiff's RFC, they
9 restricted him from working at heights or near hazardous machinery due
10 to his "history of alleged seizure disorder." [AR 259.] Neither the
11 consultative examiner nor State Agency review physician diagnosed
12 Plaintiff with a seizure disorder or verified the diagnosis with
13 Plaintiff's medical records, but rather relied on Plaintiff's own
14 reporting. [AR 258.] Given the subsequent discovery that Plaintiff
15 was incorrectly diagnosed with a seizure disorder and no longer
16 suffers from any syncopal episodes, the limitations restricting him
17 from working around heights and dangerous machinery are inappropriate
18 and should not have been included in the RFC. Substantial evidence
19 supports the finding that there is no medical basis for including
20 these limitations in any future RFC determination. [AR 458.]

21 Finally, even if the job of janitor conflicted with Plaintiff's
22 RFC limitations, there are other jobs that he can perform. The ALJ
23 concluded that Plaintiff can perform medium work, which includes light
24 and sedentary work. [AR 30.] 20 C.F.R. § 416.967(c). Sedentary work

25
26 ⁸ Even if Plaintiff had to transport items with a handtruck or
27 industrial truck as listed in the DOT description, Plaintiff was able
28 to operate both safely. On November 14, 2008, Plaintiff's treating
physician reported to the Department of Motor Vehicles that
Plaintiff's condition, syncope, would not affect Plaintiff's ability
to engage in safe driving. [AR 311.]

1 involves sitting and requires only occasional walking and standing.
2 20 C.F.R. § 416.967(a). There are few unskilled sedentary jobs which
3 require work around hazardous machinery. SSR 96-9p, 1996 WL 374185 at
4 *9. Sedentary work should accommodate Plaintiff's limitations.

5 Accordingly, the ALJ did not commit reversible error when he
6 failed to expressly ask the vocational expert as to whether her
7 testimony conflicted with the DOT description.

8 **E. ISSUE THREE: STEP THREE FINDING**

9 At step three of the sequential evaluation, plaintiff has the
10 burden to show that his impairment, or combination of impairments,
11 meets or equals a listing. Lester, 81 F.3d at 828, n.5; Tackett, 180
12 F.3d at 1098. In order to meet a listing, the impairment must meet
13 all of the specified medical criteria in the listing. Tackett, 180
14 F.3d at 1099. In order to equal a listing, a plaintiff must establish
15 "symptoms, signs and laboratory findings 'at least equal in severity
16 and duration' to the characteristics of a relevant listed impairment."
17 Id. (quoting 20 C.F.R. § 404.1526).

18 Plaintiff argues that the ALJ failed to properly consider whether
19 he met or equaled listing 11.02B. [JS 15-18.] Listing 11.02B
20 provides, in relevant part:

21 Epilepsy - convulsive epilepsy, (grand mal or psychomotor),
22 documented by detailed description of a typical seizure pattern,
23 including all associated phenomena; occurring more frequently
24 than once a month, in spite of at least 3 months of prescribed
25 treatment. With:

1 B. Nocturnal episodes manifesting residuals which interfere
2 significantly with activity during the day.

3 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 11.02.

4 The ALJ properly found that Plaintiff did not meet or equal
5 listing 11.02B. As the ALJ discussed, the record does not adequately
6 support Plaintiff's contention that he has a seizure disorder. [AR
7 32.] Although prior to 2008, Plaintiff was diagnosed with a seizure
8 disorder, Plaintiff was informed in November 2008 that he had been
9 previously misdiagnosed and actually suffered from asystole and
10 syncope. [AR 32, 51, 314.] After surgery to implant a pacemaker in
11 Plaintiff, doctors discontinued Plaintiff's anti-seizure medication.
12 [AR 314.] On February 4, 2009, Plaintiff reported to his doctor
13 during a routine followup of his pacemaker that he had no further
14 syncopal episodes. [AR 458.] Despite Plaintiff's acknowledgment of
15 his misdiagnosis during the hearing, he fails to mention it in his
16 argument. [AR 51.]

17 Even if Plaintiff did have a seizure disorder, the ALJ adequately
18 explained in his decision why Plaintiff did not meet or equal a
19 listing. The listing requires a "detailed description of a typical
20 seizure pattern" by a reporting physician or testimony of persons
21 other than the claimant. 20 C.F.R. Part 404, Subpart P, Appendix 1,
22 Listing 11.00A. The ALJ noted that the record is bereft of any such
23 description as it contains no records of doctor's visits, emergency
24 room visits or hospitalization documenting the alleged seizure
25 activity. [AR 32.] Dr. Kay, the doctor who diagnosed Plaintiff with
26 a seizure disorder, simply indicates in his treatment notes that
27 Plaintiff has a seizure disorder. [AR 231-48.] Plaintiff alleges
28 that his wife and others have witnessed these seizures but none have

1 provided any testimony or statements as required when no physician has
2 provided a description of the seizure activity. [AR 179.] Indeed,
3 the doctors at USC who were studying Plaintiff for an epilepsy study
4 concluded that he had syncope and not a seizure disorder. [AR 32,
5 314.] Moreover, the listing also requires that an individual
6 "follow[] prescribed antiepileptic treatment." 20 C.F.R. Part 404,
7 Subpart P, Appendix 1, Listing 11.00A. The ALJ noted that Plaintiff
8 was not fully compliant with his treatment plan. [AR 33, 228-30.]
9 Accordingly, the ALJ correctly concluded that Plaintiff's impairment
10 did not meet Listing 11.02B.

11 The ALJ also correctly found that Plaintiff's impairment, or
12 combination of impairments, did not equal listing 11.02B. Plaintiff
13 cites his Seizure Questionnaire, where he describes his seizures, as
14 an example of how he meets or equals listing 11.02B. [AR 177-179.]
15 Plaintiff, however, fails to even mention his subsequent diagnosis of
16 syncope, treatment for syncope, and the lack of further episodes of
17 syncope after treatment. Unless Plaintiff presents evidence of an
18 equivalence or offers a theory which includes discussion of the
19 subsequent diagnosis and lack of symptoms, the ALJ was not required to
20 explain his finding and discuss the combined effects of the
21 impairments. See Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001)
22 (rejecting claimant's argument that the ALJ failed to adequately
23 explain his finding that his impairments did not equal a listing
24 because claimant failed to offer a theory as to how the impairments
25 equaled a listing). As such, Plaintiff failed to satisfy listing
26 11.02B and no remand is required.

1 **F. ISSUE FOUR: CREDIBILITY**

2 During the hearing, Plaintiff testified that his seizures
3 prevented him from working. [AR 41.] Plaintiff testified that he
4 took anti-seizure medication from 2004 through 2008. [Id.] Plaintiff
5 explained that in November 2008, doctors at USC who were monitoring
6 him told him that he was not having any seizures but rather had
7 congestive heart failure and required a pacemaker. [Id.] Plaintiff
8 testified that the doctors explained to him that he was misdiagnosed
9 with seizures. [AR 51.]

10 The ALJ found that Plaintiff's statements "concerning the
11 intensity, persistence and limiting effects of [his] symptoms are not
12 credible to the extent that they are inconsistent with" his RFC. [AR
13 33.] With regard to Plaintiff's knee and hip problems, the ALJ
14 determined that there was no evidence of disuse muscle trophy that
15 would be compatible with Plaintiff's alleged level of inactivity.
16 [Id.] As for Plaintiff's complaint and limitations regarding his
17 seizures, the ALJ concluded that they were inconsistent with the
18 treatment he received. [Id.] The record contained no evidence of
19 doctor's visits, emergency room visits, or hospitalizations for
20 seizures. [Id.] Further, contrary to Plaintiff's contentions, the
21 record showed that Plaintiff was not fully compliant with his
22 medication protocol. [Id.] The ALJ also noted that Plaintiff takes
23 care of his two children and disabled wife. [Id.] Plaintiff asserts
24 that the ALJ did not provide clear and convincing reasons for
25 discrediting his testimony and "failed to specifically explain which
26 parts of [his] statements" were credible and which were not. [JS 21-
27 25.]

1 Questions of credibility and resolution of conflicts in the
2 testimony are functions solely for the ALJ. Parra v. Astrue, 481 F.3d
3 742, 750 (9th Cir. 2007) (citing Sample v. Schweiker, 694 F.2d 639,
4 642 (9th Cir. 1982)). To determine whether a claimant's subjective
5 symptom testimony is credible, the ALJ must engage in a two-step
6 analysis. Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir.
7 2007). First, the ALJ must determine whether the claimant has
8 presented objective medical evidence of an underlying impairment
9 "which could reasonably be expected to produce the pain or other
10 symptoms alleged.'" Id. at 1036 (quoting Bunnell v. Sullivan, 947
11 F.2d 341, 344 (9th Cir. 1991)). Second, if the claimant meets this
12 first test, and there is no evidence of malingering, "the ALJ can
13 reject the claimant's testimony about the severity of her symptoms
14 only by offering specific, clear and convincing reasons for doing so."
15 Id. (quoting Smolen, 80 F.3d at 1281); see also Parra, 481 F.3d at
16 750; Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001). An
17 ALJ must "specifically identify" the testimony found not credible, the
18 ALJ must explain what evidence undermines the testimony, and the
19 evidence on which the ALJ relies must be "substantial." Parra, 481
20 F.3d at 750; Tonapetyan, 242 F.3d at 1148 ("The ALJ must give
21 specific, convincing reasons for rejecting the claimant's subjective
22 statements."); Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.
23 1997).

24 Plaintiff's contention that the ALJ failed to specify which parts
25 of his testimony were not credible and provide clear and convincing
26 reasons for rejecting them is without merit. Although the ALJ did not
27 expressly specify at the outset of each paragraph which reason applied
28

1 to which impairment and its symptoms, it is clear from the decision to
2 which he is referring.

3 Contrary to Plaintiff's argument, a review of the record
4 indicates that the ALJ provided clear and convincing reasons under the
5 Ninth Circuit standard. An ALJ "may rely on ordinary techniques of
6 credibility evaluation," including a plaintiff's reputation for
7 truthfulness and inconsistencies between a plaintiff's testimony and
8 conduct. See Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir.
9 2008); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002).

10 First, the ALJ noted that the objective medical evidence did not
11 support Plaintiff's alleged symptoms. [AR 31.] Although the lack of
12 objective medicine cannot be the sole basis for rejecting a
13 plaintiff's credibility, "it is a factor that the ALJ can consider in
14 his credibility analysis." Burch, 400 F.3d at 681. Here, in addition
15 to the lack of objective medical evidence, the ALJ noted additional
16 reasons for finding Plaintiff less than credible. First, the ALJ
17 noted that the level of care for Plaintiff's seizures was inconsistent
18 with Plaintiff's complaints. [AR 33.] Plaintiff alleged that he had
19 seven to eight seizures a month, where he would foam at the mouth,
20 urinate on himself, have spasms, stiffen up, and become nauseous and
21 lightheaded. [AR 44-46.] Yet, Plaintiff never sought treatment any
22 sort of emergency treatment. [AR 33.] His medical records show that
23 he made only about fourteen visits to his doctor over a four-year
24 period and these visits were not directly seizure-related. [AR 33,
25 231-48.] Rather, Plaintiff primarily visited Dr. Kay to have
26 "paperwork" filled out. [AR 231-48.] See Burch, 400 F.3d at 681
27 (stating that the "ALJ is permitted to consider lack of treatment in
28 his credibility determination"). Second, contrary to Plaintiff's

1 contention that he takes his medication as prescribed, the record
2 shows that Plaintiff is not always fully compliant. [AR 33, 45, 228-
3 30.] See Montalvo v. Astrue, 237 Fed. Appx. 259, 262 (9th Cir. 2007)
4 (finding that plaintiff's failure to comply with certain aspects of
5 her treatment plan was a clear and convincing reason to reject her
6 testimony); Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) (noting
7 that the failure to follow a prescribed treatment plan without good
8 reason can cast doubt on credibility). The ALJ reasonably concluded
9 that if Plaintiff's symptoms were as alleged, both he would have
10 required more aggressive treatment and been more compliant with his
11 medication. See Parra, 481 F.3d at 751 (noting that conservative
12 treatment is a clear and convincing reason for finding a plaintiff not
13 credible).


14 Accordingly, this issue is without merit.

15 **V. ORDERS**

16 Accordingly, **IT IS ORDERED** that:

- 17 1. The decision of the Commissioner is **AFFIRMED**.
- 18 2. This action is **DISMISSED WITH PREJUDICE**.
- 19 3. The Clerk of the Court shall serve this Decision and Order
20 and the Judgment herein on all parties or counsel.

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22 DATED: October 4, 2010

23 
24 CARLA M. WOHRLE
25 United States Magistrate Judge
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