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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 DAVID REGALIA,

12 Plaintiff,

13 v.

14 CAROLYN COLVIN, Acting
15 Commissioner of Social Security,

16 Defendant.

) Case No. CV 12-10869-DFM

) MEMORANDUM OPINION AND
17) ORDER

18 Plaintiff David Regalia ("Plaintiff") appeals from the denial of his
19 application for Social Security benefits. On appeal, the Court determines that
20 the Appeals Council did not err in reassessing Plaintiff's residual functional
21 capacity ("RFC") and that its decision was supported by substantial evidence.
22 Therefore, the Court affirms the Appeals Council's decision.

23 **I.**

24 **FACTUAL AND PROCEDURAL BACKGROUND**

25 Plaintiff filed his application for SSI benefits on February 25, 2010,
26 alleging disability beginning November 11, 1988. After a hearing before the
27 ALJ on August 2, 2011, the ALJ concluded that Plaintiff retained the RFC to
28 perform light work as defined in 20 C.F.R. § 416.967(b), including lifting

1 and/or carrying ten pounds frequently and twenty pounds occasionally, but
2 with the following limitations: “standing and/or walking no more than two
3 hours in an eight-hour day; sitting six hours in an eight-hour day; pushing and
4 pulling ten pounds frequently and twenty pounds occasionally with the
5 bilateral lower extremities; and occasional climbing, balancing, bending,
6 stooping, kneeling, crouching, and crawling.” AR 35. Based upon this
7 assessment of Plaintiff’s RFC and the testimony of a vocational expert (“VE”),
8 the ALJ concluded that Petitioner was capable of performing various jobs only
9 at the sedentary exertional level. AR 37-38. The ALJ then concluded that
10 Plaintiff was not disabled because he was capable of making a successful
11 adjustment to other work that exists in significant numbers in the national
12 economy. AR 38.

13 Plaintiff appealed to the Appeals Council. AR 19-22. Plaintiff argued
14 that the ALJ erred in finding Plaintiff not disabled because the ALJ’s finding
15 that he was limited to sedentary work should have warranted a finding of
16 disability in light of the circumstances that he was approaching advanced age,
17 had a limited education, and had no previous work experience. Id.

18 The Appeals Council granted the request for review. AR 12-15. On
19 November 14, 2012, the Appeals Council issued its own decision, also denying
20 Plaintiff’s application for benefits, but concluding that the ALJ had improperly
21 assessed Plaintiff’s RFC. The Appeals Council determined that the ALJ’s RFC
22 limitation to no more than two hours of standing and/or walking in an eight-
23 hour day was not supported by substantial evidence in the record. AR 5. The
24 Appeals Council concluded that, based upon the evidence of record, Plaintiff
25 was capable of standing and/or walking for six hours out of an eight-hour
26 work day, and was therefore capable of performing a reduced range of light
27 work. AR 7. The Appeals Council concluded that Plaintiff was not disabled
28 because he could perform a reduced range of light work, and there were jobs

1 existing in significant numbers in the national economy that Plaintiff could
2 perform. Id. By rejecting the ALJ’s conclusion that Plaintiff’s RFC limited him
3 to sedentary work, the Appeals Council avoided the finding of disability that
4 such a finding may have warranted.

5 **II.**

6 **ISSUE PRESENTED**

7 The parties dispute whether the Appeals Council erred in reassessing
8 Plaintiff’s RFC. See Joint Stipulation (“JS”) at 5.

9 **III.**

10 **STANDARD OF REVIEW**

11 Under 42 U.S.C. § 405(g), a district court may review the
12 Commissioner’s decision to deny benefits. The ALJ’s findings and decision
13 should be upheld if they are free from legal error and are supported by
14 substantial evidence based on the record as a whole. 42 U.S.C. § 405(g);
15 Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481 F.3d
16 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as
17 a reasonable person might accept as adequate to support a conclusion.
18 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th
19 Cir. 2007). It is more than a scintilla, but less than a preponderance.
20 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d
21 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports
22 a finding, the reviewing court “must review the administrative record as a
23 whole, weighing both the evidence that supports and the evidence that detracts
24 from the Commissioner’s conclusion.” Reddick v. Chater, 157 F.3d 715, 720
25 (9th Cir. 1996). “If the evidence can reasonably support either affirming or
26 reversing,” the reviewing court “may not substitute its judgment” for that of
27 the Commissioner. Id. at 720-21.

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IV.
DISCUSSION

Plaintiff contends that the Appeals Council improperly reassessed the ALJ's RFC determination that Plaintiff was limited to sedentary work. JS 6-10, 17-18. Because the ALJ's RFC assessment limiting Plaintiff to sedentary work would lead to a finding of disability, Plaintiff urges the Court to adopt the ALJ's RFC assessment. JS 11.

Where, as here, the decision of the Appeals Council is the final decision of the Commissioner, the Court must review the decision of the Appeals Council to determine whether that decision is supported by substantial evidence, not the decision of the ALJ. See Howard v. Heckler, 782 F.2d 1484, 1486-87 (9th Cir. 1986).

Here, the Court finds that the Appeals Council's decision was supported by substantial evidence in the record. The Court agrees with the Appeals Council's finding that the ALJ's determination that Plaintiff was capable of standing and/or walking for only two hours out of an eight-hour work day was not supported by the medical evidence. AR 5. Dr. Thomas J. Sabourin, M.D., who performed a consultative orthopedic examination of Plaintiff on May 18, 2010, concluded that Plaintiff was capable of standing and/or walking for up to six hours in an eight-hour day. AR 239. Similarly, J. Hartman, M.D., a State Agency reviewing physician, determined that Plaintiff was capable of performing light work based upon the same finding that Plaintiff was capable of standing and/or walking for about six hours in an eight-hour workday. AR 243.

The only evidence in the record to support Plaintiff's assertion that his and neck impairments prevented him from prolonged standing and walking was his own testimony. See AR 53-54, 60-62, 64-65, 68. In fact, Plaintiff did not have any medical treatment for his impairments between 1997 and the

1 consultative examination in 2010. AR 36. Despite the lack of any medical
2 evidence in the record, the ALJ stated that she had given Plaintiff “the benefit
3 of the doubt and limited his ability to push and pull with the bilateral lower
4 extremities to ten pounds frequently and twenty pounds occasionally, based
5 upon [Plaintiff’s] subjective complaints of pain and numbness in the bilateral
6 lower extremities.” AR 37. As noted by the Commissioner, it appears that the
7 ALJ extended this “benefit of the doubt” to Plaintiff’s standing and walking
8 limitations as well. See JS at 13. Regardless of whether the ALJ purposefully
9 intended to give Plaintiff the “benefit of the doubt” with respect to his standing
10 and walking limitations, these limitations are not supported by any objective
11 medical evidence in the record.

12 Moreover, Plaintiff’s testimony regarding his standing and walking
13 limitations was rejected by the ALJ, see AR 36, an adverse credibility
14 determination adopted by the Appeals Council. AR 7. The Court finds that the
15 ALJ’s adverse credibility determination was supported by “specific, clear, and
16 convincing reasons.” Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009). As
17 already noted above, Plaintiff received no medical treatment for 13 years, until
18 after he filed his application for benefits. An ALJ may properly rely on an
19 “unexplained or inadequately explained failure to seek treatment or to follow a
20 course of treatment” when assessing credibility. Tommasetti v. Astrue, 533
21 F.3d 1035, 1039 (9th Cir. 2008). Even when he was being treated in 1997,
22 Plaintiff received conservative treatment and turned down a recommendation
23 for epidural injections. See AR 36, 59, 231-32. A claimant’s decision not to
24 pursue available treatment is a factor that can be relied upon in assessing the
25 claimant’s credibility. See Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989)
26 (finding that the claimant’s allegations of persistent, severe pain and discomfort
27 were belied by “minimal conservative treatment” and failure to follow doctor’s
28 advice). The ALJ also noted that Plaintiff’s testimony that he could not walk

1 for half a block or stand for more than five to ten minutes was contradicted by
2 his statements that he had worked as a carpenter in 2005 and that he had
3 recently done some painting and performed occasional odd jobs. See AR 36,
4 57, 237. An ALJ may consider whether a claimant engaged in daily activities
5 that are inconsistent with the alleged symptoms. Molina v. Astrue, 674 F.3d
6 1104, 1112-13 (9th Cir. 2012); see also Morgan v. Comm'r Soc. Sec. Admin.,
7 169 F.3d 595, 600 (9th Cir. 1999) (finding that the ALJ may discredit a
8 claimant's testimony when the claimant reports participation in everyday
9 activities that are transferable to a work setting). Finally, the ALJ noted that
10 there were no clinical findings to support Plaintiff's alleged limitations. AR 36-
11 37.

12 In reviewing the decision of the Appeals Council under the standard
13 articulated in Howard, 782 F.2d at 1487, the Court finds that the
14 determination by the Appeals Council that Petitioner retained the RFC to
15 perform light work with certain postural limitations was supported by
16 substantial evidence in the record. Based upon the Appeals Council's RFC
17 assessment, Plaintiff is not disabled under the Social Security Regulations.
18 Accordingly, Plaintiff is not entitled to relief with respect to this claim of error.

19 V.

20 **CONCLUSION**

21 The Appeals Council's assessment of Plaintiff's RFC was supported by
22 substantial evidence in the record and contained no legal error. Accordingly,
23 the Court AFFIRMS the Commissioner's decision.

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25 Dated: November 21, 2013



26
27 DOUGLAS F. McCORMICK
28 United States Magistrate Judge