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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS NGUYEN,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No. 13-2575 JC
MEMORANDUM OPINION

I. SUMMARY

On April 16, 2013, plaintiff Thomas Nguyen (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; April 17, 2013 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On October 26, 2010, plaintiff filed applications for Supplemental Security
7 Income and Disability Insurance Benefits. (Administrative Record (“AR”) 124,
8 129). Plaintiff asserted that he became disabled on January 1, 2010, due to a torn
9 right shoulder tendon, depression, a sleep disorder, high blood pressure, a calcified
10 spinal joint, and pain and numbness in his shoulder, arm and leg. (AR 144). The
11 ALJ examined the medical record and heard testimony from plaintiff (who was
12 represented by counsel and assisted by an interpreter) and a vocational expert on
13 November 14, 2011. (AR 49-68).

14 On November 30, 2011, the ALJ determined that plaintiff was not disabled
15 through the date of the decision. (AR 27-34). Specifically, the ALJ found:
16 (1) plaintiff suffered from the following severe impairments: degenerative disc
17 disease of the cervical and lumbar spine and right shoulder rotator cuff tear (AR
18 29); (2) plaintiff’s impairments, considered singly or in combination, did not meet
19 or medically equal a listed impairment (AR 29-30); (3) plaintiff retained the
20 residual functional capacity to perform the full range of medium work as defined
21 in 20 C.F.R. §§ 404.1567(c), 416.967(c)² (AR 30); (4) plaintiff could perform his
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23 ¹The harmless error rule applies to the review of administrative decisions regarding
24 disability. See Molina v. Astrue, 674 F.3d 1104, 1115-22 (9th Cir. 2012) (discussing contours of
25 application of harmless error standard in social security cases) (citing, *inter alia*, Stout v.
Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006)).

26 ²“Medium work involves lifting no more than 50 pounds at a time with frequent lifting or
27 carrying of objects weighing up to 25 pounds.” 20 C.F.R. §§ 404.1567(c), 416.967(c). “A full
28 range of medium work requires standing or walking, off and on, for a total of approximately 6
hours in an 8-hour workday in order to meet the requirements of frequent lifting or carrying

(continued...)

1 past relevant work as a deliveryman and handyman (AR 33); and (5) plaintiff's
2 allegations regarding his limitations were not credible to the extent they were
3 inconsistent with the ALJ's residual functional capacity assessment (AR 32).

4 The Appeals Council denied plaintiff's application for review. (AR 4).

5 **III. APPLICABLE LEGAL STANDARDS**

6 **A. Sequential Evaluation Process**

7 To qualify for disability benefits, a claimant must show that the claimant is
8 unable "to engage in any substantial gainful activity by reason of any medically
9 determinable physical or mental impairment which can be expected to result in
10 death or which has lasted or can be expected to last for a continuous period of not
11 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
12 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
13 impairment must render the claimant incapable of performing the work claimant
14 previously performed and incapable of performing any other substantial gainful
15 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,
16 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

17 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
18 sequential evaluation process:

- 19 (1) Is the claimant presently engaged in substantial gainful activity? If
20 so, the claimant is not disabled. If not, proceed to step two.
- 21 (2) Is the claimant's alleged impairment sufficiently severe to limit
22 the claimant's ability to work? If not, the claimant is not
23 disabled. If so, proceed to step three.

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26 ²(...continued)

27 objects weighing up to 25 pounds. . . . [S]itting may occur intermittently during the remaining
28 time." Social Security Rule ("SSR") 83-10. Social Security rulings are binding on the
Administration. Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

- 1 (3) Does the claimant’s impairment, or combination of
2 impairments, meet or equal an impairment listed in 20 C.F.R.
3 Part 404, Subpart P, Appendix 1? If so, the claimant is
4 disabled. If not, proceed to step four.
- 5 (4) Does the claimant possess the residual functional capacity to
6 perform claimant’s past relevant work? If so, the claimant is
7 not disabled. If not, proceed to step five.
- 8 (5) Does the claimant’s residual functional capacity, when
9 considered with the claimant’s age, education, and work
10 experience, allow the claimant to adjust to other work that
11 exists in significant numbers in the national economy? If so,
12 the claimant is not disabled. If not, the claimant is disabled.

13 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
14 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at
15 1110 (same).

16 The claimant has the burden of proof at steps one through four, and the
17 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
18 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch
19 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of
20 proving disability).

21 **B. Standard of Review**

22 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
23 benefits only if it is not supported by substantial evidence or if it is based on legal
24 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
25 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
26 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
27 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
28 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a

1 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
2 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

3 To determine whether substantial evidence supports a finding, a court must
4 “consider the record as a whole, weighing both evidence that supports and
5 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
6 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
7 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
8 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
9 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

10 **IV. DISCUSSION**

11 Plaintiff contends that a reversal or remand is warranted because the ALJ’s
12 residual functional capacity assessment was not supported by substantial evidence.
13 (Plaintiff’s Motion at 3-7). More specifically, plaintiff essentially argues that, in
14 assessing plaintiff’s residual functional capacity, the ALJ erroneously relied on
15 medical opinion evidence that failed to considered plaintiff’s severe impairment of
16 degenerative disc disease of the cervical spine. (Plaintiff’s Motion at 3-7). The
17 Court disagrees.

18 **A. Pertinent Law**

19 At step four of the sequential evaluation process, the Commissioner may
20 deny benefits if a claimant possesses the residual functional capacity to perform
21 his past relevant work. 20 C.F.R. §§ 404.1520(e), (f), 416.920(e), (f); see also
22 Pinto v. Massanari, 249 F.3d 840, 845 (2001) (“At step four, claimants have the
23 burden of showing that they can no longer perform their past relevant work.”)
24 (citations omitted). Residual functional capacity represents “the most [a claimant]
25 can still do despite [his or her] limitations.” 20 C.F.R. §§ 404.1545(a)(1),
26 416.945(a)(1). In determining a claimant’s residual functional capacity, an ALJ is
27 required to consider all relevant evidence in the record, including medical records,
28 lay evidence, and the effects of symptoms, including pain, that are reasonably

1 attributed to a medically determinable impairment. Robbins, 466 F.3d at 883
2 (citations omitted); see 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1) (residual
3 functional capacity is assessed “based on all of the relevant evidence in [the]
4 record.”).

5 **B. Analysis**

6 First, substantial evidence supports the ALJ’s assessment that plaintiff has
7 the residual functional capacity to perform a full range of medium work. On
8 February 15, 2011, Dr. Michael S. Wallack, a consultative examining physician,
9 completed an Internal Medicine Evaluation which included a physical examination
10 of plaintiff. (AR 307-13). Based on his examination of plaintiff and review of
11 plaintiff’s medical records, Dr. Wallack diagnosed plaintiff with Hepatitis B, right
12 shoulder pain, and back/hip pain, and opined, among other things, that plaintiff
13 could basically do medium work (*i.e.*, lift/carry 50 pounds occasionally and 25
14 pounds frequently, stand/walk for six hours and sit for eight hours in a work day)
15 with “frequent” postural limitations. (AR 307, 312). In a March 1, 2011 Physical
16 Residual Functional Capacity Assessment, Dr. B. Harris, a medical consultant,
17 opined based on plaintiff’s medical records that plaintiff had the physical residual
18 functional capacity to do medium work (*i.e.*, lift/carry 50 pounds occasionally and
19 25 pounds frequently, stand/walk for six hours and sit for six hours in a work day)
20 with no additional limitations. (AR 316-20). Dr. Wallack’s opinions were
21 supported by his independent examination of plaintiff, and thus, even without
22 more, constituted substantial evidence supporting the ALJ’s residual functional
23 capacity assessment. See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th
24 Cir. 2001) (consultative examiner’s opinion on its own constituted substantial
25 evidence, because it rested on independent examination of claimant); Andrews v.
26 Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995). The opinions of Dr. Harris, the
27 reviewing medical consultant, also constituted substantial evidence supporting the
28 ALJ’s decision since they are consistent with the examining physician’s opinions

1 and underlying independent examination, as well as the other medical evidence in
2 the record. See Tonapetyan, 242 F.3d at 1149 (holding that opinions of
3 nontreating or nonexamining doctors may serve as substantial evidence when
4 consistent with independent clinical findings or other evidence in the record);
5 Andrews, 53 F.3d at 1041 (“reports of the nonexamining advisor need not be
6 discounted and may serve as substantial evidence when they are supported by
7 other evidence in the record and are consistent with it”).

8 Second, the record belies plaintiff’s assertion that Drs. Wallack and Harris
9 failed properly to consider plaintiff’s severe impairment of cervical spine
10 degenerative disc disease. The report of Dr. Wallack’s complete internal medicine
11 evaluation of plaintiff reflects, in pertinent part, that (1) Dr. Wallack reviewed
12 plaintiff’s medical records which “includ[ed] an x-ray report showing multilevel
13 *degenerative disease* involving the . . . *neck*”; (2) Dr. Wallack examined plaintiff’s
14 neck but found no abnormalities and range of motion “within normal limits”; and
15 (3) during the evaluation plaintiff did not report neck pain or any impairment
16 related to his neck. (AR 307-13) (emphasis added). Dr. Harris reviewed all of
17 plaintiff’s medical records and, by inference, considered plaintiff’s severe cervical
18 spine impairment to the same extent as Dr. Wallack’s examining source statement.
19 (AR 320). Therefore, the absence of any findings related to plaintiff’s cervical
20 spine does not, as plaintiff suggests, appear to be an oversight by either doctor but
21 instead reflects the apparent lack of any medical signs, laboratory findings or
22 documented symptoms in the record that would have justified finding any
23 functional limitation related to plaintiff’s neck impairment.

24 Third, even so, in light of the medical expertise of Drs. Wallack and Harris,
25 it was wholly appropriate for the ALJ to rely on such doctors’ opinions regarding
26 functional limitations, if any, related to plaintiff’s cervical spine impairment, as
27 opposed to adopting plaintiff’s currently asserted lay assessment of the medical
28 evidence. See Gonzalez Perez v. Secretary of Health & Human Services, 812 F.2d

1 747, 749 (1st Cir. 1987) (ALJ may not “substitute his own layman’s opinion for
2 the findings and opinion of a physician”); Ferguson v. Schweiker, 765 F.2d 31, 37
3 (3d Cir. 1985) (ALJ may not substitute his interpretation of laboratory reports for
4 that of a physician); Winters v. Barnhart, 2003 WL 22384784, at *6 (N.D. Cal.
5 Oct.15, 2003) (“The ALJ is not allowed to use his own medical judgment in lieu of
6 that of a medical expert.”).

7 Finally, contrary to plaintiff’s contention, the ALJ did not fail in her duty to
8 develop the record because she did not re-contact plaintiff’s neurosurgeon (who
9 had recommended surgery for plaintiff’s cervical spine), order a second
10 consultative examination, or obtain testimony from a medical expert at the
11 hearing. (Plaintiff’s Motion at 7). Although plaintiff bears the burden of proving
12 disability, the ALJ has an affirmative duty to assist a claimant in developing the
13 record “when there is ambiguous evidence or when the record is inadequate to
14 allow for proper evaluation of the evidence.” Mayes v. Massanari, 276 F.3d 453,
15 459-60 (9th Cir. 2001) (citation omitted); Bustamante, 262 F.3d at 954; see also
16 Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (ALJ has special duty fully
17 and fairly to develop record and to assure that claimant’s interests are considered).
18 Where it is necessary to enable the ALJ to resolve an issue of disability, the duty
19 to develop the record may require consulting a medical expert or ordering a
20 consultative examination. See 20 C.F.R. §§ 404.1519a, 416.919a; Reed v.
21 Massanari, 270 F.3d 838, 842 (9th Cir. 2001) (citing id.; 20 C.F.R.
22 §§ 404.1517-1519t, 416.917-919t); Carrillo Marin v. Secretary of Health and
23 Human Services, 758 F.2d 14, 17 (1st Cir. 1985) (“[I]f the Secretary is doubtful as
24 to the severity of [a claimant’s] disorder the appropriate course is to request a
25 consultative evaluation. . . .”); see also Wren v. Sullivan, 925 F.2d 123, 128 (5th
26 Cir. 1991) (decision to order consultative examination rests within ALJ’s
27 discretion) (citation omitted).

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1 Here, the ALJ did not state, nor does the record reflect, that the medical
2 evidence was ambiguous or that the record was otherwise inadequate to allow for
3 proper evaluation of plaintiff's disability. To the contrary, the ALJ properly relied
4 on the opinions of Drs. Wallack and Harris which, as discussed above, constituted
5 substantial evidence supporting the ALJ's non-disability determination. Plaintiff's
6 conclusory assertion that there was a "dearth of medical source statements based
7 on the totality of [plaintiff's] impairments" is inadequate to trigger the ALJ's duty
8 to develop the record. See, e.g., Reed, 270 F.3d at 842 ("The government is not
9 required to bear the expense of [a consultative] examination for every claimant.")
10 (citations omitted).

11 **V. CONCLUSION**

12 For the foregoing reasons, the decision of the Commissioner of Social
13 Security is affirmed.

14 LET JUDGMENT BE ENTERED ACCORDINGLY.

15 DATED: September 27, 2013

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/s/

17 Honorable Jacqueline Chooljian
18 UNITED STATES MAGISTRATE JUDGE
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