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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LUIS VELIS,

Plaintiff,

v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. CV 16-006691-RAO

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

Plaintiff Luis Velis (“Plaintiff”) challenges the Commissioner’s denial of his application for disability insurance benefits (“DIB”). The parties have filed a Joint Stipulation. After reviewing the matter, the Court concludes that the decision of the Commissioner should be affirmed.

Plaintiff filed an application for DIB on July 10, 2013.¹ (AR 208.) The Social Security Administration denied the application both initially and on reconsideration, and Plaintiff then proceeded to an administrative hearing. After

¹ The Administrative Law Judge’s January 13, 2015 decision lists June 26, 2013 as the application date. (AR 23.) The exact date is not determinative of the outcome of this matter.

1 the hearing, the Administrative Law Judge (ALJ) determined that Plaintiff was not
2 disabled. The Appeals Council denied review (AR 1-2), making the decision of the
3 ALJ the decision of the Commissioner.

4 At step two of the five-step sequential evaluation process, the ALJ found that
5 Plaintiff had the following severe impairments: bilateral knee disorder;
6 degenerative disc disease of the lumbar spine; cardiac disorder; and obesity. (AR
7 25.) The ALJ found Plaintiff's mental impairments of depression, anxiety, and
8 history of alcohol abuse not severe. (*Id.* at 25-26.) The ALJ concluded that
9 Plaintiff's mental condition was not severe because it would cause mild or no
10 limitations in the four functional areas set out in the Listings, known as the
11 "paragraph B" criteria: (1) activities of daily living; (2) social functioning; (3)
12 concentration, persistence, or pace; and (4) episodes of decompensation. (*Id.* at 26.)

13 On appeal, Plaintiff challenges the ALJ's non-severity findings with respect to
14 his mental impairments.

15 **II. DISCUSSION**

16 At the second step of the five-step sequential evaluation process used in
17 social security cases, *see* 20 CFR § 404.1520, the ALJ must determine whether the
18 claimant has a "severe" impairment. If a claimant does not have a severe mental
19 impairment, then he or she is not eligible for disability payments. 20 CFR
20 § 404.1521a.

21 The existence of a severe impairment is satisfied when the evidence shows
22 that an impairment has more than a minimal effect on an individual's ability to
23 perform basic work activities. 20 CFR § 404.1521(a); *Smolen v. Chater*, 80 F.3d
24 1273, 1290 (9th Cir. 1996). At step two, the ALJ identifies a claimant's severe
25 impairments, *i.e.*, impairments that significantly limit his or her ability to do basic
26 work activities.² 20 C.F.R. § 404.1520(a)(4)(ii); *Smolen*, 80 F.3d at 1290. A

27 ² Basic work activities are "the abilities and aptitudes necessary to do most jobs[.]"
28 20 C.F.R. § 404.1521(b).

1 determination that an impairment is not severe requires evaluation of medical
2 findings describing the impairment, and an informed judgment as to its limiting
3 effects on a claimant’s ability to do basic work activities. Social Security Ruling
4 (“SSR”) 85–28, 1985 WL 56856, at *4 (Jan. 1, 1985).³

5 The ALJ must take into account subjective symptoms in assessing severity,
6 *Smolen*, 80 F.3d at 1290, but “medical evidence alone is evaluated ... to assess the
7 effects of the impairment(s) on ability to do basic work activities.” SSR 85-28 at
8 *4. An impairment or combination thereof may properly be found not severe if the
9 clearly established objective medical evidence shows only slight abnormalities that
10 minimally affect a claimant’s ability to do basic work activities. *Webb v. Barnhart*,
11 433 F.3d 683, 687 (9th Cir. 2005); *Smolen*, 80 F.3d at 1290. Finally, a diagnosis
12 does not establish a severe impairment. *Febach v. Colvin*, 580 F. App’x 530, 531
13 (9th Cir. 2014).

14 The step two inquiry is meant to be “a *de minimis* screening device to dispose
15 of groundless claims.” *Smolen*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S.
16 137, 153–54, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987)).

17 As noted in the ALJ’s decision, a mental impairment is not severe if the
18 degree of limitation in the three functional areas of activities of daily living, social
19 functioning, and concentration, persistence or pace is rated as “none” or “mild” and
20 there have been no episodes of decompensation. *See* 20 C.F.R. § 404.1520a(d).

21 Plaintiff contends that in finding that he had a non-severe mental impairment,
22 the ALJ improperly rejected the opinion of Dr. Lee and improperly relied on
23 Plaintiff’s lack of significant mental health treatment. Joint Stip. at 6-12.

24 Dr. Lee saw Plaintiff on one occasion in April 2013 for a medical-legal
25 examination. (AR 380-410, 382.) Dr. Lee concluded that Plaintiff “has evidence of
26 depression, anxiety, and somatic difficulties due to his orthopedic industrial injury

27 ³ SSRs do not have the force of law, but a reviewing court generally accords them
28 some deference. *Holohan v. Massanari*, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001).

1 and its impact on his life.” (*Id.* at 406.) Further, Dr. Lee found that his exam
2 findings were consistent with a depressive disorder, NOS. (*Id.*) Dr. Lee assessed a
3 Global Assessment of Functioning (GAF) of 60, the high end of the range of 51-60,
4 “consistent with ‘moderate’ symptoms or ‘moderate difficulty’ in social,
5 occupational, or school functioning.” (*Id.* at 408.)

6 The ALJ gave “little weight” to Dr. Lee’s opinion because the examination
7 occurred in the context of a workers’ compensation claim, and because “his opinion
8 is belied by [Plaintiff’s] lack of mental health treatment and by the evidence
9 demonstrating no more than mild difficulties with [Plaintiff’s] functioning.” (AR
10 27.) Plaintiff notes that the ALJ can reject the opinion of an examining physician
11 only for specific and legitimate reasons supported by substantial evidence, but
12 contends that the ALJ’s reasons are neither specific nor legitimate. Joint Stip. at
13 10-11; *see also Lester*, 81 F.3d at 830-31 (an examining physician’s opinion that is
14 contradicted by another doctor may be rejected for specific and legitimate reasons
15 that are based on substantial evidence in the record)⁴.

16 Here, on the whole, the reasons provided by the ALJ for rejecting the opinion
17 of Dr. Lee, an examining physician, were specific and legitimate. The ALJ noted
18 that Dr. Lee’s opinion was in conflict with substantial evidence in the record, which
19 reveals no psychologically-related limitations and no mental health treatment. *See*,
20 *e.g.*, AR 259 (no exam findings of anxiety or depression), AR 276 (no exam
21 findings of anxiety), 366 (Patient denies anxiety, depression, substance abuse,
22 suicidal thoughts, feeling irritable, anger, reduced concentration, mood swings and
23 nervousness), AR 538 (negative for psychiatric symptoms), AR 549 ([Plaintiff]

24
25 ⁴ The parties do not discuss whether Dr. Lee’s opinion is contradicted by the
26 opinion of another physician. If his opinion is not contradicted, then the
27 Commissioner must provide “clear and convincing” reasons for rejecting Dr. Lee’s
28 opinion. *See Lester*, 81 F.3d at 830-31. While the applicable standard does not
appear to be in dispute between the parties, nevertheless, the Court finds that the
ALJ’s reasons satisfy the higher standard of “clear and convincing.”

1 denies psychological or emotional difficulties), AR 553 (negative for psychiatric
2 symptoms); *see also Montes v. Astrue*, CV 08-6668 CW, 2009 WL 3672551, at *6
3 (C.D. Cal. Nov. 2, 2009) (citing *Batson v. Commissioner of Social Sec. Admin.*, 359
4 F.3d 1190, 1195 (9th Cir. 2004) (holding that ALJ may discredit medical opinion
5 regarding degree of impairment that is conclusory, brief, and unsupported by the
6 record as a whole).

7 Plaintiff also cites to his described fear of not seeking mental health
8 treatment to support his argument that the lack of mental health treatment does not
9 mean he does not have a severe mental impairment. Joint Stip. at 7-8. As noted
10 above, however, the ALJ identified specific and legitimate reasons for finding
11 Plaintiff's mental impairments not severe. While Plaintiff's interpretation of the
12 evidence regarding lack of mental health treatment is not unreasonable, neither is
13 the ALJ's interpretation. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
14 ("Where evidence is susceptible to more than one rational interpretation, it is the
15 ALJ's conclusion that must be upheld."); *see also Fischer v. Astrue*, 429 Fed.
16 App'x 649, 652 (9th Cir. 2011) ("Although [claimant's] interpretation of the
17 evidence is not unreasonable, neither is the ALJ's. His determination that her level
18 of functionality is consistent with an ability to perform the kind of work described
19 in the residual functional capacity assessment is a permissible interpretation of the
20 evidence.")

21 Even assuming the ALJ incorrectly found that Plaintiff's mental impairments
22 were not severe, any error was harmless.

23 First, step two was resolved in Plaintiff's favor, *i.e.*, the ALJ found Plaintiff's
24 bilateral knee disorder, degenerative disc disease of the lumbar spine, cardiac
25 disorder and obesity to be severe, and properly continued the sequential evaluation
26 process until finding that Plaintiff was able to perform "jobs that exist in significant
27 numbers in the national economy" at step five. *Hickman v. Comm'r Soc. Sec.*
28 *Admin.*, 399 F. App'x 300, 301 (9th Cir. 2010) (any error in the ALJ's failure to

1 find an impairment severe was harmless, in part, because the ALJ found that
2 claimant “suffered from other severe impairments and, thus, step two was ...
3 resolved in [her] favor”); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005)
4 (“Assuming without deciding that [omitting obesity at step two] constituted legal
5 error, it could only have prejudiced [claimant] in step three (listing impairment
6 determination) or step five (RFC) because the other steps ... were resolved in her
7 favor.”).

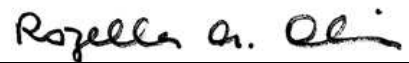
8 Second, the ALJ considered all of Plaintiff’s impairments during her analysis
9 later in the sequential evaluation process. *See, e.g.*, AR 27 (“the following residual
10 functional capacity assessment reflects the degree of limitation I have found in the
11 ‘paragraph B’ mental function analysis”); AR 28 (“I have considered all symptoms
12 and the extent to which these symptoms can reasonably be accepted as consistent
13 with the objective medical evidence and other evidence[.]”); AR 28 (“[Plaintiff]
14 further testified that his cane helps him walk on uneven surfaces and that his mental
15 issues leave him in a constant state of worry”); AR 32 (“In comparing [Plaintiff’s]
16 residual functional capacity with the physical and mental demands of this past
17 relevant work, I conclude that [Plaintiff] is not able to perform such work”);
18 *see also Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (even if the ALJ erred
19 by not including an impairment at step two, any error was harmless because the
20 ALJ considered the limitations posed thereby at step four).

21 Thus, the ALJ’s supposed step two error does not warrant reversal.

22 IT IS ORDERED that Judgment shall be entered AFFIRMING the decision
23 of the Commissioner denying benefits.

24 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
25 Order and the Judgment on counsel for both parties.

26 DATED: July 31, 2017



27 ROZELLA A. OLIVER
28 UNITED STATES MAGISTRATE JUDGE

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NOTICE

**THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,
LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**