

1 His widow, Tondalayo Collins, filed a Substitution of Plaintiff on May 25,
2 2007, to proceed in the name of her deceased spouse regarding the DIB claim.

3 A hearing before an Administrative Law Judge (“ALJ”) was held on August
4 9, 2007.

5 Following receipt of the ALJ Decision denying benefits, plaintiff sought
6 review to the Appeals Council.

7 The Appeals Council declined review on December 28, 2007. This action
8 followed.

9 The parties filed a Joint Stipulation, and have consented to the jurisdiction
10 of the Magistrate Judge. Plaintiff makes four claims of error. For the reasons
11 shown below, the Commissioner’s decision denying benefits is affirmed.

12 II. DISCUSSION

13 ISSUE NO. 1:

14 Plaintiff asserts that the ALJ misrepresented the record and improperly
15 considered the treating physician’s opinions. Although the record indicates multiple
16 physical complaints, plaintiff’s primary complaint was chronic, long-term back pain.
17 (Joint Stipulation at 3). The ALJ indicated in his Decision that no objective evidence
18 supported plaintiff’s claim of disability due to back pain. Plaintiff alleges that there
19 is additional medical evidence in the record that supports the claim, which the ALJ
20 did not properly consider.

21 A DIB claimant is required to prove that he was disabled on or before his date
22 last insured (DLI). Plaintiff was insured for DIB until September 30, 2000, and he
23 alleges an onset date of August 1, 1999. It follows that plaintiff’s primary claim of
24 disability due to back pain needed to be established no later than September 30,
25 2000.

26 A plaintiff bears the burden of proving that an impairment is disabling.
27 Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993), citing Miller v. Heckler, 770
28 F.2d 845, 849 (9th Cir. 1985). A plaintiff must show that his impairment precluded

1 him from engaging in any substantial gainful activity. Matthews, supra; 42 U.S.C.
2 § 423(d)(1)(A). As examples of objective evidence improperly considered by the
3 ALJ, plaintiff points to three medical reports in the record. These reports are clinic
4 progress records from three separate visits to the treating physician at Kaiser
5 Permanente on December 24, 1999, January 30, 2000 and February 22, 2000.
6 (Administrative Record “AR”) 242-246).

7 All three reports are short summaries of the treating physician regarding the
8 visits, containing Mr. Collins’ complaint at the time of his visit, his prior medical
9 history, and medication prescribed. These records are each between one to two
10 pages in length. The reports do not refer to any outside medical data involving x-
11 rays or other imaging. The treating physician did not make a request for x-rays
12 during or after these three visits. In fact, the record as a whole lacks any x-ray
13 evidence concerning plaintiff’s back, either prior or subsequent to his date last
14 insured. None of these three reports contain any assertion of functional limitation
15 caused by the alleged back pain, either by Mr. Collins or the treating physician.

16 It is not necessary for the ALJ to discuss all the evidence of record. Vincent
17 v. Heckler, 739 F.2d 1393, 1394 (9th Cir. 1984). An absence of detailed discussion
18 on any particular matter within an ALJ’s Decision does not necessarily indicate
19 improper consideration of the record. In light of the sparsity of evidence regarding
20 plaintiff’s back pain prior to the DLI, and plaintiff’s failure to properly assert and
21 establish any functional limitations due to back pain, the ALJ has not misrepresented
22 the evidence nor improperly considered the evidence. The ALJ has not erred.

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24 ISSUE NO. 2:

25 Plaintiff asserts that the ALJ improperly considered plaintiff’s testimony
26 regarding a need for a cane and back brace. As applicable evidence from the relevant
27 time period, plaintiff points to a clinic progress record summarizing a visit to the
28 treating physician on September 26, 1999. (AR 252). This report stated that Mr.

1 Collins “requests new back brace and walking cane.” Id. Plaintiff also refers to
2 various references in the record regarding Mr. Collins’ use of a back brace and a
3 walking cane, all of which are reported after the DLI. Plaintiff contends that the
4 dates of these references are irrelevant, since the initial report of the cane and back
5 brace predates the DLI.

6 Among the various subsequent record references, plaintiff points in particular
7 to a “Pain Questionnaire” dated October 18, 2005. This questionnaire is a three-page
8 form preprinted with questions, in which Mr. Collins filled in answers. In his answer
9 to one of the questions, Mr. Collins indicated that he used a cane and back brace as
10 devices to assist in relieving pain or its effects. AR 103. Plaintiff asserts that this
11 questionnaire, dated subsequent to the DLI, supports his prior claim that he needs
12 these devices. Plaintiff further asserts that the ALJ was required to give more
13 consideration to this questionnaire, and that to omit discussion of it in his Decision
14 reflects the lack of proper consideration.

15 Assuming Mr. Collins did rely on a walking cane and a back brace before
16 and after his DLI, and that the 2005 pain questionnaire was relevant to the
17 consideration of his disability, the ALJ did not err by omitting discussion of it in his
18 Decision. First, it appears that Mr. Collins requested and referred to these devices
19 as a means to alleviate back pain. However, there is other evidence in the record
20 which indicates that these devices were, in fact, not especially helpful to him in
21 alleviating pain. In a summary report of an orthopedic evaluation dated December
22 22, 2005, under history of illness it states:

23 “This 58-year-old male stated that he began experiencing pain in his low back
24 in 1986. He received physical therapy, a back brace, and Flexeril and Vicodin
25 medications. He reported little benefit from the treatment... He uses a cane for
26 ambulation when his back pain becomes severe.” (AR 132).

27 Second, the record does not indicate that any treating physician asserted any
28 functional limitations prior to Mr. Collins’ DLI due to the use of a cane and back

1 brace. Plaintiff did not assert that the use of a cane and a back brace contributed to
2 any functional limitations. In light of plaintiff's failure to show how the use of a
3 cane and a back brace were relevant to a functional limitation, it cannot be said that
4 the ALJ materially erred.

5 The ALJ has the final responsibility for deciding issues dispositive to the
6 determination of disability. SSR 96-5p. This responsibility includes the ALJ's duty
7 to make credibility determinations. Fair v. Bowen, 885 F.2d 597, 605 (9th Cir. 1989)
8 (citing Russell v. Bowen, 856 F.2d 81, 83 (9th Cir. 1988)).

9 Citing Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995) plaintiff argues that
10 in making a credibility determination, the ALJ was required to state specific reasons
11 for rejecting plaintiff's claim. However, the claimant in Lester was situated
12 differently to plaintiff in this case for a number of reasons. Relative to plaintiff, the
13 claimant in Lester had documentation and medical evidence supporting the history
14 of impairment that was much more expansive in scope and volume, including two
15 treating physicians who opined regarding the functional limitations caused by
16 Lester's impairment. There was relevant testimony taken at the Lester hearing, and
17 an abundance of relevant evidence that the ALJ should have discussed, none of
18 which is present in this case.

19 Based on the record, due to the sparsity of relevant content, and plaintiff's
20 failure to meet the burden of establishing functional limitation due to impairment,
21 whatever value the ALJ's discussion of the cane and back brace could have
22 contributed would have been minimal. The omission of such discussion, if it was an
23 error, was harmless.

24
25 **ISSUE NO. 3:**

26 Plaintiff asserts that the ALJ did not consider the type, dosage and side effects
27 of Mr. Collins' medications in accordance with SSR 96-7a. Plaintiff notes that the
28 side effects of medication can have a significant impact on the ability to work, and

1 should figure in the disability determination process. Varney v. Secretary of HHA,
2 846 F.2d 581 (9th Cir. 1988). While this is true, it is plaintiff's burden to establish
3 disability, including the contributing effects of medication on ability to work. Miller
4 v. Heckler, 770 F.2d 845, 849 (9th Cir. 1985). In Miller, the claimant testified that
5 she experienced significant side effects from her medications, which she reported
6 to two of her doctors. The doctors told her that she needed the medications and that
7 the side effects were unavoidable. Id.

8 Here, the record indicates that Mr. Collins discussed with his doctor, and
9 understood, the potential of issues related to long-term narcotics use and
10 dependency. Plaintiff then asserted that medication (Vicodin) was the only thing that
11 worked for his pain. (AR 243). Plaintiff also requested a refill of medication
12 (Vicodin) on numerous occasions. (AR 236, 238, 242, 244, 246). In the record,
13 however, prior to the DLI, Mr. Collins never indicated any disabling side effects¹.
14 No physician suggested any. Even in light of the ALJ's duty to consider the
15 potentially disabling side effects of medication, there were no side effects here to
16 consider. Accordingly, the ALJ has properly considered the presented medical
17 evidence and has not erred.

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19 ISSUE NO. 4:

20 Plaintiff asserts that the ALJ did not pose a complete hypothetical question
21 to the vocational expert. Plaintiff asserts that the ALJ should have included Mr.
22 Collins' need to use a cane, as well as the side effects of medication as provisions
23 in the hypothetical.

24 The ALJ may meet his burden at step five of the sequential process
25 through the testimony of a vocational expert as to other work in the economy that

26 _____
27 ¹ In September 2001, plaintiff presented at Kaiser and expressed "desire to get off of Vicodin" and
28 change to some other pain control. AR 228. However, no reason for the desired change is given. The
physician stated "resubmit referral to pain clinic and to HTN prevention class." Id. There is no mention
of any side effects.

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