UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVEN MCINNIS, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. EDCV 08-1587-RC OPINION AND ORDER

Plaintiff Steven McInnis filed a complaint on November 24, 2009, seeking review of the Commissioner's decision denying his application for disability benefits. On April 20, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on July 2, 2009.

BACKGROUND

On January 30, 2006, plaintiff, who was born December 12, 1962, applied for disability benefits under the Supplemental Security Income program ("SSI") of Title XVI of the Social Security Act ("Act"), claiming an inability to work since September 14, 1999, due to back,

left shoulder and right thumb pain, an "exploding" ulcer, a hole in his intestine, and three "fractured toes that will not heal." Certified Administrative Record ("A.R.") 77-80, 90, 101. The plaintiff's application was initially denied on May, 2006, and was denied again on February 8, 2007, following reconsideration. A.R. 41-52. The plaintiff then requested an administrative hearing, which was held before Administrative Law Judge Jay E. Levine ("the ALJ") on January 9, 2008. A.R. 18-38, 53. On February 28, 2008, the ALJ issued a decision finding plaintiff is not disabled. A.R. 5-17. The plaintiff appealed this decision to the Appeals Council, which denied review on September 15, 2008. A.R. 1-4.

DISCUSSION

I

The Court, pursuant to 42 U.S.C. § 405(g), has the authority to review the Commissioner's decision denying plaintiff disability benefits to determine if his findings are supported by substantial evidence and whether the Commissioner used the proper legal standards in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009). "In determining whether the Commissioner's findings are supported by substantial evidence, [this Court] must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Holohan v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001). "Where the evidence can reasonably support either affirming or reversing the decision, [this Court] may not substitute [its] judgment for that of the

Commissioner." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007), cert. denied, 128 S. Ct. 1068 (2008); Vasquez, 572 F.3d at 591.

The claimant is "disabled" for the purpose of receiving benefits under the Act if he is unable to engage in any substantial gainful activity due to an impairment which has lasted, or is expected to last, for a continuous period of at least twelve months. 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.905(a). "The claimant bears the burden of establishing a prima facie case of disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996).

The Commissioner has promulgated regulations establishing a five-step sequential evaluation process for the ALJ to follow in a disability case. 20 C.F.R. § 416.920. In the **First Step**, the ALJ must determine whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. § 416.920(b). If not, in the **Second Step**, the ALJ must determine whether the claimant has a severe impairment or combination of impairments significantly limiting him from performing basic work activities. 20 C.F.R. § 416.920(c). If so, in the **Third Step**, the ALJ must determine whether the claimant has an impairment or combination of impairments that meets or equals the requirements of the Listing of Impairments ("Listing"), 20 C.F.R. § 404, Subpart P, App. 1. 20 C.F.R. § 416.920(d). If not, in the **Fourth Step**, the ALJ must determine whether the claimant has sufficient residual functional capacity despite the impairment or various limitations to perform his past work. 20 C.F.R. § 416.920(f). If not, in **Step Five**, the burden shifts to the Commissioner to show

the claimant can perform other work that exists in significant numbers in the national economy. 20 C.F.R. § 416.920(g). Moreover, where there is evidence of a mental impairment that may prevent a claimant from working, the Commissioner has supplemented the five-step sequential evaluation process with additional regulations addressing mental impairments.[1] Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir. 1998) (per curiam).

Applying the five-step sequential evaluation process, the ALJ found plaintiff has not engaged in substantial gainful activity since his application date. (Step One). The ALJ then found plaintiff has the following severe impairments: "degenerative disc disease of the cervical spine, a learning disorder in language and reading, status post[-]fractured foot and left thumb" (Step Two); however, he does not have an impairment or combination of impairments that meets or equals a Listing. (Step Three). The ALJ next determined plaintiff is unable

[1] First, the ALJ must determine the presence or absence of certain medical findings relevant to the ability to work. 20 C.F.R. § 416.920a(b)(1). Second, when the claimant establishes these medical findings, the ALJ must rate the degree of functional loss resulting from the impairment by considering four areas of function: (a) activities of daily living; (b) social functioning; (c) concentration, persistence, or pace; and (d) episodes of decompensation. 20 C.F.R. § 416.920a(c)(2-4). Third, after rating the degree of loss, the ALJ must determine whether the claimant has a severe mental impairment. 20 C.F.R. § 416.920a(d). Fourth, when a mental impairment is found to be severe, the ALJ must determine if it meets or equals a Listing. 20 C.F.R. § 416.920a(d)(2). Finally, if a Listing is not met, the ALJ must then perform a residual functional capacity assessment, and the ALJ's decision "must incorporate the pertinent findings and conclusions" regarding plaintiff's mental impairment, including "a specific finding as to the degree of limitation in each of the functional areas described in [§ 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

to perform his past relevant work as a combat signaler in the military or a warehouse worker. (Step Four). Finally, the ALJ determined plaintiff can perform a significant number of jobs in the national economy; therefore, he is not disabled. (Step Five).

II

A claimant's residual functional capacity ("RFC") is what he can still do despite his physical, mental, nonexertional, and other limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001); see also Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685, 689 (9th Cir. 2009) (RFC is "a summary of what the claimant is capable of doing (for example, how much weight he can lift)."). Here, the ALJ found plaintiff has the RFC:

> to perform sedentary work[2] . . . except he cannot work at unprotected heights or around dangerous machinery. He cannot work on uneven ground or with vibrating tools/ equipment. He can occasionally climb, balance, stoop, kneel, crouch and crawl. He cannot do forceful gripping or grasping and can occasionally lift above shoulder level. Mentally, the [plaintiff] can perform entry level work.

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[2] "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 416.967(a).

A.R. 11 (footnote added). However, plaintiff contends the ALJ's RFC determination is not supported by substantial evidence because the ALJ failed to properly consider the opinions of examining psychologist David C. Anderson, Ph.D., nonexamining physician Ann Dew, D.O., and treating physical therapist Jennifer Spurgeon, MFT.[3]

A. Dr. Anderson:

"[T]he ALJ may only reject . . . [an] examining physician's uncontradicted medical opinion based on 'clear and convincing reasons[,]'" Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citation omitted); Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006), and "[e]ven if contradicted by another doctor, the opinion of an examining doctor can be rejected only for specific and legitimate reasons that are supported by substantial evidence in the record." Regennitter v. Comm'r of the Soc. Sec. Admin., 166 F.3d 1294, 1298-99 (9th Cir. 1999); Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008).

In August of 2006, plaintiff underwent psychological testing at Loma Linda Veteran's Administration Medical Center, where, based on

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[3] Although plaintiff's attorney categorizes Drs. Anderson and Dew as treating physicians, see Jt. Stip. at 4:1-22, 11:13-27, that is not so. Rather, the medical records demonstrate Dr. Anderson saw plaintiff one time regarding a possible learning disability, A.R. 325, and Dr. Dew simply reviewed plaintiff's chart and offered an opinion, see A.R. 361 (Plaintiff "is not here for physical examination, just chart review."); thus, Dr. Anderson is an examining physician and Dr. Dew is a nonexamining physician. In any event, even if Drs. Anderson and Dew are considered to be treating physicians, the results would be the same.

"assessment results indicating that [plaintiff's] Verbal Comprehension Index [("VCI")] is in the Borderline range (5th percentile)[,] . . . [his] reading comprehension is in the 3rd percentile, [and] his spelling is in the 1st percentile[,]" Dr. Anderson concluded that plaintiff likely has a language-based learning disability. A.R. 324-30. Dr. Anderson explained that plaintiff's VCI score shows he has poor verbal comprehension when compared to his peers. A.R. 327. Further testing revealed: plaintiff's full scale IQ is 84, which is in the below-average range;[4] plaintiff has appropriate non-verbal reasoning ability when compared to his peers; and plaintiff's ability to hold and process information in short-term memory is in the average range. A.R. 327-28. With regard to the tests, Dr. Anderson explained:

> In making comparisons between [plaintiff's] cognitive abilities, his perceptual organization was significantly higher than his verbal comprehension.[5] This indicates

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[4] Dr. Anderson found that the full scale IQ score "is not a valid measure of [plaintiff's] past and current intellectual functioning." A.R. 329.

[5] Upon testing plaintiff's basic academic skills, Dr. Anderson found:

> On a task that required the [plaintiff] to read a series of single words, [plaintiff's] performance was in the Low range for his age group (5th percentile), with a grade equivalency in 5th grade. This indicates that his ability to read is low when compared to his peers, and is comparable to a student in the 5th grade. His performance in Sentence Comprehension was also in the low range for his age group (3rd percentile), with a grade equivalency at the 6th grade level. This indicates that the [plaintiff's] understanding of what

> that [plaintiff] is much better at processing visually perceived material than he is with verbal information. Furthermore, [plaintiff's] working memory was better than his visual comprehension. This indicates that even though his mental processing ability is intact, he has difficulty processing verbal information and thinking with words.

A.R. 328 (footnote added). Dr. Anderson recommended plaintiff would benefit from remedial reading courses. A.R. 329.

Plaintiff complains that the ALJ did not specifically address his poor spelling when determining in Step Five that he can perform other work in the national economy. The Court disagrees. An ALJ need not set forth verbatim every statement a physician makes; rather, he need only discuss evidence that is significant and probative of a claimant's disability claim. Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003). Here, the ALJ accepted Dr. Anderson's opinions, and, based on those opinions, found plaintiff has a severe learning disorder in language and reading; however, plaintiff can perform entry level work. A.R. 10-11, 14-15. In making these findings, the ALJ

> he has read is low when compared to his peers, and is comparable to a student in the 6th grade. [¶] . . . [¶] Finally, on a task that required him to spell verbally presented words, [plaintiff's] spelling was in the Lower Extreme range for his age (1st percentile), with a grade equivalency at the 3rd grade level. This indicates that his ability to spell is exceptionally low when compared to his peers, and is comparable to a student in the 3rd grade.

A.R. 328.

specifically noted plaintiff "was significantly below the percentile in reading, spelling and verbal comprehension." A.R. 14. However, the ALJ also found that plaintiff's "'severe' learning disorder . . . would not preclude the performance of entry level work" since the medical records "consistently showed no learning barriers, that the [plaintiff] was able to verbalize or demonstrate understanding of post-operative care and instructions," and plaintiff had good understanding of the use and safety of medical equipment, medication and medical procedures. A.R. 14-15; see also A.R. 172, 185-87, 189, 195, 213-14, 349-50. Thus, the ALJ properly assessed plaintiff's learning disability, and his findings are supported by substantial evidence in the record. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (Substantial evidence supports ALJ's determination that claimant has difficulty paying attention, concentrating, and organizing herself without getting overwhelmed where ALJ agreed with physician's assessment but concluded it would not affect claimant's ability to work since, despite these limitations, claimant was able to complete high school, obtain a college degree, finish a certified nurses' aide training program, and participate in military training).

B. Dr. Dew:

On November 20, 2006, Dr. Dew reviewed plaintiff's chart and diagnosed him as having an unspecified finger injury, osteoarthritis, low back pain, and a basic learning disability. A.R. 360-62. Dr. Dew opined:

> It is unlikely that [plaintiff] will be able to return to general labor positions, his learning disability might be

> remediated with proper instruction . . . so that he could do sedentary work[;] however, his dependence on pain medication for musculoskeletal complaints might interfere with his ability to concentrate.

A.R. 362. The plaintiff contends the ALJ erred in rejecting Dr. Dew's opinion that plaintiff's pain medication might interfere with his ability to concentrate.[6] Jt. Stip. at 10:18-12:16, 13:15-21.

The ALJ "may reject the opinion of a nonexamining physician by reference to specific evidence in the medical record." Sousa v. Callahan, 143 F.3d 1240, 1244 (9th Cir. 1998). Here, the ALJ disregarded Dr. Dew's opinion that plaintiff's "dependence on pain medication for musculoskeletal complaints might interfere with his ability to concentrate because the record specifically states his medications caused no excessive sleepiness or drowsiness." A.R. 15 (citations omitted). This is a specific and legitimate reason for rejecting Dr. Dew's speculation, and the ALJ's rationale is supported by substantial evidence in the record. See, e.g., A.R. 359; Batson v. Comm'r of the Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999).

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[6] To the extent plaintiff contends the ALJ erred in failing to consider side effects from his medication, plaintiff's claim is specious since he has not identified any side effects he experienced. See Jt. Stip. at 10:18-12:16, 13:15-21; Greger v. Barnhart, 464 F.3d 968, 973 (9th Cir. 2006).

C. Physical Therapist:

A physical therapist is not an acceptable medical source, 20 C.F.R. § 416.913(a); nevertheless, an ALJ should consider such evidence, at a minimum, as lay testimony which is qualified evidence. 20 C.F.R. § 416.913(d)(1); Sprague v. Bowen, 812 F.2d 1226, 1231-32 (9th Cir. 1987).

Physical therapist Jennifer Spurgeon, MPT, examined plaintiff on November 22, 2006, and noted, among other things, that plaintiff had an antalgic gait[7] and was moderately independent without an assistive device and with a cane.[8] A.R. 357. Ms. Spurgeon started plaintiff on a course of physical therapy, A.R. 356-58, and plaintiff subsequently attended four physical therapy sessions with Ms. Spurgeon. A.R. 443-45. When he was discharged from physical therapy on January 25, 2007, Ms. Spurgeon opined that plaintiff's goals were partially achieved and he "demonstrated no significant antalgia or mobility limitations. . . ." A.R. 444. Nevertheless, plaintiff contends the ALJ did not properly address Ms. Spurgeon's initial comments about his gait and use of a cane. Again, the Court disagrees.

Here, the ALJ specifically noted that plaintiff has, at times, been found to have an antalgic gait. A.R. 12. The ALJ also noted

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[7] An antalgic gait is "a limp adopted so as to avoid pain on weight-bearing structures (as in hip injuries), characterized by a very short stance phase." Dorland's Illustrated Medical Dictionary, 721 (29th ed. 2000).

[8] Plaintiff mischaracterizes Ms. Spurgeon's notation as indicating plaintiff "requires the use of a cane." Jt. Stip. at 13:25-27.

that plaintiff has been prescribed a cane, id.; see also A.R. 192, but opined "its need seems questionable in light of no significant antalgia or mobility limitations. . . ." A.R. 12. Significantly, in reaching this conclusion, the ALJ cited Ms. Spurgeon's opinion that upon discharge from physical therapy plaintiff "demonstrated no significant antalgia or mobility limitations." A.R. 444. Thus, it is clear that the ALJ properly considered the treating physical therapist's opinions.

Moreover, the ALJ also found other evidence supports the finding plaintiff does not need a cane, noting:

> [Plaintiff] . . . [is] . . . weight bearing, . . . ambulate[s] without difficulty and . . . ha[s] a steady gait. [His s]trength has been intact, sensation intact, and deep tendon reflexes intact. At the orthopedic consultative examination of April 2006, [plaintiff's] gait was normal and no assistive devices were used to ambulate. Examination of the [plaintiff's] feet revealed enlargement deformity of the right great toe. There was no evidence of swelling or tenderness. There was 50 percent restriction in range [of] motion of the right toe with no neurological deficits.

A.R. 12 (citations omitted). The ALJ then concluded that a cane "is not medically necessary when [plaintiff is] sitting and performing sedentary work." Id. The ALJ has provided specific and legitimate reasons for finding plaintiff does not need a cane to ambulate, and these findings are supported by substantial evidence in the record.

A.R. 120-21, 178, 357, 367, 412, 444; Batson, 359 F.3d at 1195; Morgan, 169 F.3d at 602.

III

At Step Five, the burden shifts to the Commissioner to show the claimant can perform other jobs that exist in the national economy. Bray v. Astrue, 554 F.3d 1219, 1222 (9th Cir. 2009); Hoopai v. Astrue, 499 F.3d 1071, 1074-75 (9th Cir. 2007). To meet this burden, the Commissioner "must 'identify specific jobs existing in substantial numbers in the national economy that [the] claimant can perform despite her identified limitations.'" Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (quoting Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995)). There are two ways for the Commissioner to meet this burden: "(1) by the testimony of a vocational expert, or (2) by reference to the Medical Vocational Guidelines ["Grids"] at 20 C.F.R. pt. 404, subpt. P, app. 2."[9] Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999); Bray, 554 F.3d at 1223 n.4. However, "[w]hen [the Grids] do not adequately take into account [a] claimant's abilities and limitations, the Grids are to be used only as a framework, and a vocational expert must be consulted." Thomas v. Barnhart, 278 F.3d

[9] The Grids are guidelines setting forth "the types and number of jobs that exist in the national economy for different kinds of claimants. Each rule defines a vocational profile and determines whether sufficient work exists in the national economy. These rules represent the [Commissioner's] determination, arrived at by taking administrative notice of relevant information, that a given number of unskilled jobs exist in the national economy that can be performed by persons with each level of residual functional capacity." Chavez v. Dep't of Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996) (citations omitted).

947, 960 (9th Cir. 2002); Bray, 554 F.3d at 1223 n.4.

Hypothetical questions posed to a vocational expert must consider all of the claimant's limitations, Valentine, 574 F.3d at 690; Thomas, 278 F.3d at 956, and "[t]he ALJ's depiction of the claimant's disability must be accurate, detailed, and supported by the medical record." Tackett, 180 F.3d at 1101. "If a vocational expert's hypothetical does not reflect all the claimant's limitations, then the 'expert's testimony has no evidentiary value to support a finding that the claimant can perform jobs in the national economy.'" Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1995) (quoting Delorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991)); Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001).

Here, the ALJ asked vocational expert Sandra Fioretti the following hypothetical question:

> Assume a hypothetical individual [plaintiff's] age, education, prior work experience. Assume this person is restricted to a sedentary range of work. No work on dangerous machinery. No work [at] unprotected heights. No uneven ground. No vibration. No balancing. Occasional climbing, stooping, kneeling, crouching, crawling. No forceful gripping or grasping. Occasional lifting above shoulder level. And let's say entry level work. Is there work in the regional or national economy such a person could perform?

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A.R. 35. The vocational expert responded that such a person could perform work as an assembler in buttons and notions (Dictionary of Occupational Titles ("DOT")[10] no. 734.687-018, a sorter of small agricultural products such as nuts (DOT no. 521.687-086), and a charge account clerk (DOT no. 205.367-014). A.R. 36. Based on this testimony, the ALJ concluded plaintiff can perform a significant number of jobs in the national economy. A.R. 16. However, plaintiff contends the ALJ's hypothetical question to the vocational expert was incomplete because the ALJ did not include plaintiff's need for a cane to ambulate. Jt. Stip. at 17:1-18:7, 19:4-8. For the reasons discussed above, the ALJ did not need to include this alleged limitation in his hypothetical question to the vocational expert. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); Magallanes v. Bowen, 881 F.2d 747, 756-57 (9th Cir. 1989).

Further, plaintiff contends the ALJ's Step Five determination is not supported by substantial evidence because "it is very clear that the Plaintiff is unable to perform the[] jobs" the vocational expert identified given "writing demands that exceed the Plaintiff's limitations." Jt. Stip. at 7:5-8:14, 10:5-13. There also is no merit to this claim.

The jobs of assembler and sorter of agricultural products have

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[10] The DOT is the Commissioner's primary source of reliable vocational information. Johnson, 60 F.3d at 1434 n.6; Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990).

language development levels of 1[11] -- the lowest level -- which requires the individual to "[p]rint simple sentences containing subject, verb, and object, and series of numbers, names and addresses." Dictionary of Occupational Titles at 351, 757, 1010-11. Here, plaintiff completed high school, A.R. 21, 94, and his past relevant work as a materials handler had a language development level of 1. A.R. 23, 34-35; Dictionary of Occupational Titles at 949-50. There is nothing in the record showing plaintiff is unable to perform simple written tasks despite his learning disability and spelling at a third-grade level.[12] A.R. 328-29. To the contrary, the California content standards for third grade level written and oral language, see California Parents for Equalization of Educ. Materials v. Noonan, 600 F. Supp. 2d 1088, 1097 (E.D. Cal. 2009) ("The Content Standards describe what students should know and be able to do by the end of each grade level."), suggest that, among other skills, a third grade student should be able to "[s]pell correctly one-syllable words that have blends, contractions, compounds, orthographic patterns (e.g., qu,

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[11] Among other features, the DOT sets forth guidelines regarding the General Education Development ("GED") required to perform various occupations. The GED guidelines are subdivided into three categories – reasoning development, mathematical development, and language development – that are rated on a scale from 1 (lowest) to 6 (highest). U.S. Dep't of Labor, Dictionary of Occupational Titles, 1010-11 (4th ed. 1991).

[12] On the other hand, the job of charge account clerk has a language development level of 3, which requires the ability to "[w]rite reports and essays with proper format, punctuation, spelling, and grammar, using all parts of speech." Dictionary of Occupational Titles at 174-75, 1011. This job would appear to be beyond the limitations of plaintiff's learning disability. Nevertheless, any error in this regard is harmless given the other jobs plaintiff can perform. Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

consonant doubling, changing the ending of a work from -y to -ies when forming the plural, and common homophones (e.g., hair-hare)," arrange words in alphabetical order, create a single paragraph, "[r]evise drafts to improve the coherence and logical progression of ideas by using an established rubric[,]" write narratives, "descriptions that use concrete sensory details to present and support unified impressions of people, places, things, or experiences[,]" and personal and formal letters, thank-you notes, and invitations, and "[u]nderstand and be able to use complete and correct declarative, interrogative, imperative, and exclamatory sentences in writing and speaking." See California State Board of Education, Content Standards, English Language Arts at pp. 18-19. (http://www.cde.ca.gov/be/st/ss/documents/elacontentstnds.pdf (last visited February 11, 2010)). Thus, an ability to spell (or write) at the third grade level is not inconsistent with an ability to perform jobs requiring a language development level of 1, and the vocational expert's testimony provides substantial evidence to support the ALJ's Step Five determination.

ORDER

IT IS ORDERED that: (1) plaintiff's request for relief is denied; and (2) the Commissioner's decision is affirmed, and Judgment shall be entered in favor of defendant.

DATE: February 16, 2010

/S/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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