Shamah Moody v. Michael J. Astrue Doc. 20

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHAMAH MOODY,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner of Social Security,
Defendant.

Case No. CV 08-1607 JC

MEMORANDUM OPINION

I. SUMMARY

On November 19, 2008, plaintiff Shamah Moody ("plaintiff") filed a Complaint seeking review of the Commissioner of Social Security's denial of plaintiff's application for benefits. The parties have filed a consent 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; November 25, 2008 Case Management Order ¶ 5.

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

II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On October 15, 2003, plaintiff filed applications for Supplemental Security Income benefits and Disability Insurance Benefits. (Administrative Record ("AR") 13, 60-62). Plaintiff asserted that he[2] became disabled on July 1, 2002, due to severe manic depression, psychosis, memory loss, and anxiety attacks. (AR 84). An ALJ examined the record and heard testimony from plaintiff (who was represented by counsel), medical expert Dr. Joseph Malancharuvil (who testified telephonically), and a vocational expert on February 16, 2006 ("Pre-Remand Hearing"). (AR 13, 323-60).

On April 27, 2006, the ALJ determined that plaintiff was not disabled through the date of the decision ("Pre-Remand Decision"). (AR 13-19). The Appeals Council denied plaintiff's application for review of the ALJ's Pre-Remand Decision. (AR 5-9).

On September 12, 2007, this Court entered judgment reversing and remanding the case for further proceedings because the articulated basis upon which the ALJ discounted the opinion of plaintiff's treating physician was not supported by substantial evidence. (AR 373, 375-76). The Appeals Council in

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[1]The harmless error rule applies to the review of administrative decisions regarding disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of application of harmless error standard in social security cases).

[2]Although Plaintiff's Motion indicates that plaintiff is female (Plaintiff's Motion at 2), the record reflects that plaintiff's middle name is David and that he is male. (See, e.g., AR 60 (Social Security Application referencing plaintiff's middle name]; AR 113-21 [Plaintiff's mother's function report in which plaintiff's mother refers to plaintiff as "he" and "him"]).

turn remanded the case for a new hearing. (AR 387-88). On remand the ALJ heard testimony from plaintiff (who again appeared with counsel), medical expert Dr. William Soltz, and a vocational expert on April 7, 2008 ("Post-Remand Hearing"). (AR 364, 568-98).

On July 22, 2008, the ALJ again determined that plaintiff was not disabled through the date of the decision ("Post-Remand Decision").[3] (AR 13-19, 364-370). The ALJ found, *inter alia*, that plaintiff was not disabled at any time through the date of the decision. (AR 365, 370). Specifically, the ALJ found: (1) plaintiff suffered from the following severe impairments: major depressive disorder and polysubstance abuse (AR 366); (2) plaintiff's impairments or combination of impairments, did not meet or medically equal one of the listed impairments (AR 366-67); (3) plaintiff could perform a full range of work at all exertional levels, but was limited to only moderately complex tasks up to 4 to 5 steps, should not work around dangerous machinery or in jobs that involve high stress or the safety of others, and should avoid intense interaction with co-workers, supervisors and the public (AR 367, 368); (4) plaintiff had no past relevant work (AR 369); (5) there are jobs that exist in significant numbers in the national economy that plaintiff could perform (AR 369-70); and (6) plaintiff's allegations regarding his limitations were not credible (AR 368).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that he is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.

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[3]The ALJ stated that his April 27, 2006 decision was incorporated by reference into, and thus supplemented by, his July 22, 2008 decision. (AR 364).

§ 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

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

(1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

(2) Is the claimant's alleged impairment sufficiently severe to limit his ability to work? If not, the claimant is not disabled. If so, proceed to step three.

(3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.

(4) Does the claimant possess the residual functional capacity to perform his past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow him to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-

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54 (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

In addition, a claimant who otherwise meets the definition of disability under the Social Security Act is not eligible to receive disability benefits if drug addiction or alcoholism is a “contributing factor material to the determination of disability.” 20 C.F.R. §§ 404.1535(a), 416.935(a). Such claimant has the burden to demonstrate that he would be disabled even if his substance abuse stopped. Parra v. Astrue, 481 F.3d 742, 748 (9th Cir. 2007), cert. denied, 128 S. Ct. 1068 (2008).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

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

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IV. DISCUSSION

A. The ALJ Properly Evaluated the Opinions of Plaintiff's Treating Physician

1. Pertinent Facts

a. Opinions of Plaintiff's Treating Physician

On February 15, 2006, plaintiff's treating physician at the Swift-Phoenix Clinic, Dr. Gurmit Sekhon, completed a Mental Work Capacity Evaluation. (AR 321-22). The Mental Work Capacity Evaluation stated in its instructions on the first page: "*Please make your assessment apart from the effects of drug or alcohol use or abuse.*" (AR 321) (emphasis in original). The Mental Work Capacity Evaluation reflects that Dr. Sekhon: (i) diagnosed plaintiff with bipolar disorder and schizoaffective disorder (AR 322); (ii) checked the boxes indicating that plaintiff had severe limitations in his ability to: (a) perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; (b) sustain an ordinary routine without supervision; (c) work in coordination with or in proximity to others without being distracted by them; (d) make simple work-related decisions; (e) interact appropriately with the general public; (f) ask simple questions or request assistance; (g) accept instructions and respond appropriately to criticism from supervisors; (h) get along with co-workers or peers without distracting them or exhibiting behavioral extremes; (i) maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness; (j) respond appropriately to changes in the work setting; (k) be aware of normal hazards and take appropriate precautions; and (l) set realistic goals or make plans independently of others (AR 321-22); (iii) checked the box indicating that plaintiff had marked limitations in his ability to: (a) remember locations and work-like procedures; (b) understand and remember very short and simple instructions; and (c) maintain attention and concentration for extended periods (AR 321); (iv) checked the box indicating that plaintiff had moderate limitations

in his ability to carry out very simple and short instructions (AR 321); (v) checked the box indicating that plaintiff was not a malingerer (AR 322); (vi) checked the box indicating that plaintiff's impairment lasted or could be expected to last at least twelve months (AR 322); and (vii) checked the box indicating that plaintiff would be expected to miss work at least three times a month. (AR 322).

The record contains outpatient notes from the Swift-Phoenix Clinic concerning plaintiff's ongoing psychiatric treatment by Dr. Sekhon and other treating medical personnel. (AR 270-79, 281-91, 293-99, 301-19, 412-13, 443-53, 455-56, 464-68, 470-72, 479-84, 487-501).[4] The notes span the time period of February 18, 2004 to January 25, 2008, and reflect that plaintiff met with a physician approximately once a month. (AR 270-79, 281-91, 293-99, 301-19, 412-13, 443-53, 455-56, 464-68, 470-72, 479-84, 487-501).

b. Other Pertinent Medical Opinion Evidence

On February 5, 2004, Dr. K. Gregg, a non-examining consultative physician, completed a Psychiatric Review Technique form. (AR 198-214). Dr. Gregg concluded, in pertinent part, that plaintiff's medical records revealed no evidence of cognitive defects, but that plaintiff was limited in his ability to interact with the public. (AR 214).

On October 6, 2006, Dr. Linda Smith, an examining consultative psychiatrist, conducted a complete psychiatric evaluation of plaintiff. (AR 414-22). Dr. Smith found, in pertinent part, that there was "no evidence at all" of plaintiff's claimed mental impairments, that plaintiff was not credible, and that plaintiff was not limited in his ability to work. (AR 421). Dr. Smith stated that plaintiff's previous psychological problems were likely due to plaintiff's drug use, which plaintiff claimed he had discontinued. (AR 421).

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[4]The Administrative Record contains duplicate copies of medical reports from the Swift-Phoenix Clinic. (AR 270-74, 276, 278-79, 296-99, 307-19, 464, 470, 472, 481, 487-90, 493-501).

On October 18, 2006, Dr. H. Amado, a non-examining consultative physician, completed a Psychiatric Review Technique form (AR 424-35), and a related Mental Residual Functional Capacity Assessment (AR 436-38). Dr. Amado concluded, in pertinent part, that plaintiff had a medically determinable impairment of polysubstance abuse, but stated that he was unable to tell whether it was in remission given that plaintiff's records showed plaintiff had a history of drug use, yet plaintiff denied drug use when Dr. Smith examined him. (AR 430). Dr. Amado's Mental Residual Functional Capacity Assessment showed plaintiff had moderate limitations in his ability to understand, remember, and carry out detailed instructions, but otherwise had no other significant mental limitations. (AR 436-38).

c. Plaintiff's Pertinent Testimony

At the Pre-Remand Hearing, plaintiff testified to the following: He rarely drank alcohol. He did not use marijuana often. He had last used methamphetamine in 2003. His doctor had not told plaintiff it was acceptable to drink while taking his prescribed medication. Plaintiff saw Dr. Sekhon[5] every four to five weeks. Plaintiff told Dr. Sekhon that he drank once in a while and smoked marijuana, but the doctor "didn't suggest it." (AR 331-32, 336, 338).

At the Post-Remand hearing, plaintiff testified to the following: He then drank alcohol three to four times a week to the point of becoming drunk, and then used methamphetamine two or three times a week. (AR 579). Since July 2002, he had not remained off all drugs or alcohol for more than a six month continuous period of time. (AR 592).

d. Medical Expert Testimony

At the Post-Remand Hearing, the ALJ called William Soltz, Ph.D. to testify as a medical expert with respect to plaintiff's mental impairments. (AR 364, 368,

[5]The transcript of the Pre-Remand Hearing incorrectly reflects that plaintiff's treating physician's name is spelled "Dr. Chicon." (AR 333).

573-89). Dr. Soltz thoroughly reviewed plaintiff's psychological records and questioned plaintiff about his drug and alcohol use. (AR 573-77). In light of plaintiff's testimony and the medical evidence in the record, Dr. Soltz opined: Plaintiff had medically determinable psychological impairments of depressive disorder and polysubstance abuse. (AR 577, 579). Due to the combined effects of plaintiff's two impairments, plaintiff (i) should not work around heights, dangerous equipment, automobiles or similar hazards, or in jobs where the security of others is involved (AR 581, 584-85); (ii) should not work in high stress positions (*e.g.* armed security, bill collector) (AR 581, 585); (iii) could perform only moderately complex tasks up to four to five steps (AR 585); and (iv) should avoid intense interaction with co-workers, supervisors and the public (AR 585).

Dr. Soltz further opined: It was very difficult accurately to discern whether plaintiff's functional limitations were due primarily to one or both of plaintiff's medically determinable impairments. (AR 577-79). Optimally a person should be allowed to detoxify from alcohol and drugs for at least nine months before an accurate diagnosis of any underlying psychological condition could be made apart from symptoms related to substance abuse. (AR 578, 581). Here, although there were "intermittent periods" during which plaintiff had stopped using drugs and alcohol, no such period had lasted longer than seven months. (AR 580-81). The record did, however, reflect that when plaintiff reduced his drug and alcohol use, plaintiff's symptoms improved. (AR 580). Thus, based on the existing records, plaintiff's substance abuse likely was the primary cause of plaintiff's depressive disorder and any hallucinations and paranoia plaintiff may have experienced, and plaintiff's participation in a substance abuse program could eliminate 50 to 75 percent of his functional limitations "pathology."[6] (AR 577-78, 582, 587).

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[6]Dr. Soltz also testified: When a person has not sufficiently detoxified, the most common cause of depression is drug and/or alcohol use. (AR 578). Heavy abuse of alcohol and drugs mimic a major depressive type disorder. Methamphetamine use could cause both hallucinations and delusions. (AR 577, 582).

Dr. Soltz further testified: The severe functional limitations stated in Dr. Sekhon's opinions were unsupported by any other medical evidence in the record. (AR 580-83). However, Dr. Soltz was unable to tell whether Dr. Sekhon's own examinations of plaintiff supported such substantial limitations, since Dr. Sekhon's treatment notes were mostly unintelligible. (AR 581-82, 588-89). While Dr. Sekhon's opinions could be correct, Dr. Soltz did not believe they were. (AR 581, 588).

e. ALJ's Residual Functional Capacity Assessment

In the Post-Remand Decision, the ALJ summarized the medical evaluations, the treatment records and the testimony of plaintiff and medical expert Dr. Soltz, and gave "careful consideration [to] the entire record." (AR 367-69). As noted above, the ALJ determined that, even when accounting for the effects of plaintiff's drug and alcohol use, plaintiff had the residual functional capacity to perform a full range of work at all exertional levels, but was limited to only moderately complex tasks up to 4 to 5 steps, should not work around dangerous machinery, or in jobs that involve high stress or the safety of others, and should avoid intense interaction with co-workers, supervisors and the public. (AR 367). The ALJ based his residual functional capacity assessment on, *inter alia*, Dr. Soltz's testimony regarding plaintiff's functional limitations, and plaintiff's own testimony regarding his drug and alcohol use. (AR 368).

The ALJ rejected almost all of the opinions expressed in Dr. Sekhon's Mental Work Capacity Evaluation of plaintiff, giving the following reasons:

> Regarding Exhibit 10F [AR 320-22], Dr. Sekhom's evaluation indicates [plaintiff] is extremely limited in almost all activities although he noted [plaintiff] is only moderately limited in his ability to carry out short and simple instructions. There is virtually no evidence in the record to support this evaluation. Granted, Dr. Sekhom's records are unreadable, but there is no treatment found for

> drug/alcohol abuse, indicating that [plaintiff] did not admit drug use. At the hearing, [plaintiff] admitted drug use throughout the relevant period. Social Security disability [] claimants have the burden of proving disability and [plaintiff] bears the burden of proving that drug or alcohol addiction is not a contributing factor material to his disability.

(AR 369).

2. Pertinent Law

In Social Security cases, courts employ a hierarchy of deference to medical opinions depending on the nature of the services provided. Courts distinguish among the opinions of three types of physicians: those who treat the claimant ("treating physicians") and two categories of "nontreating physicians," namely those who examine but do not treat the claimant ("examining physicians") and those who neither examine nor treat the claimant ("nonexamining physicians"). Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995), as amended (9th Cir. 1996) (footnote reference omitted). A treating physician's opinion is entitled to more weight than an examining physician's opinion, and an examining physician's opinion is entitled to more weight than a nonexamining physician's opinion.[7] See id. In general, the opinion of a treating physician is entitled to greater weight than that of a non-treating physician because the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." Morgan v. Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir. 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

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[7]Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to draw bright line distinguishing treating physicians from non-treating physicians; relationship is better viewed as series of points on a continuum reflecting the duration of the treatment relationship and frequency and nature of the contact) (citation omitted).

The treating physician's opinion is not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician's opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal quotations omitted). The ALJ can reject the opinion of a treating physician in favor of a conflicting opinion of another examining physician if the ALJ makes findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record. Id. (citation and internal quotations omitted); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out detailed and thorough summary of facts and conflicting clinical evidence, stating his interpretation thereof, and making findings) (citations and quotations omitted); Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite "magic words" to reject a treating physician opinion – court may draw specific and legitimate inferences from ALJ's opinion). "The ALJ must do more than offer his conclusions." Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). "He must set forth his own interpretations and explain why they, rather than the [physician's], are correct." Id. "Broad and vague" reasons for rejecting the treating physician's opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989).

When they are properly supported, the opinions of physicians other than treating physicians, such as examining physicians and non-examining medical experts, may constitute substantial evidence upon which an ALJ may rely. See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative examiner's opinion on its own constituted substantial evidence, because it rested on independent examination of claimant); Morgan, 169 F.3d at 600 (testifying medical expert opinions may serve as substantial evidence when "they are

supported by other evidence in the record and are consistent with it"). Where, as here, a conflict exists between the assessment of a non-examining, testifying physician based on objective clinical findings and the assessment of a treating physician, the non-examining physician's opinion may itself constitute substantial evidence warranting rejection of the treating doctor's opinion, and it is the sole province of the ALJ to resolve the conflict. Morgan, 169 F.3d at 600; Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

3. Analysis

Plaintiff contends that the ALJ failed adequately to consider the opinions expressed in Dr. Sekhon's Mental Work Capacity Evaluation. (Plaintiff's Motion at 3-6). More specifically, plaintiff alleges that the ALJ inadequately addressed and/or ignored evidence that Dr. Sekhon reached his opinions without including the effects of plaintiff's substance abuse. (Plaintiff's Motion at 5-6). This Court concludes that the ALJ did not materially err in evaluating the record medical evidence.

First, the ALJ properly discredited Dr. Sekhon's opinions as unsupported by the record as a whole. Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004). Dr. Sekhon diagnosed plaintiff with bipolar disorder and schizoaffective disorder and concluded that plaintiff was severely limited in almost all ability to function in a work environment. (AR 321-22). As the ALJ correctly noted, however, no medical evidence in the record supports such significant functional limitations. Dr. Soltz testified that he also found no support in the record for the treating physician's limitations, even when symptoms related to plaintiff's drug and alcohol use were considered. (AR 577-88). Other medical opinion evidence in the record is in accord with Dr. Soltz's findings. (AR 214, 421, 436-38). Dr. Soltz's assessment, supported by and consistent with the bulk of plaintiff's medical evidence, constitutes substantial evidence in support of the

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ALJ's decision to reject Dr. Sekhon's conflicting opinions. Morgan, 169 F.3d at 600.

Second, even though the Mental Work Capacity Evaluation form completed by Dr. Sekhon instructed him to make an assessment apart from the effects of drug or alcohol use or abuse, this Court concludes based on the current record, and particularly plaintiff's testimony at the Post-Remand Hearing regarding his alcohol and drug use, that the ALJ did not materially err in rejecting Dr. Sekhon's opinions, as the record does not reflect that Dr. Sekhon was ever aware of the extent of plaintiff's drug and alcohol use and abuse and thus in a position to discount such use and abuse in making an assessment as the form instructed. The record reflects that plaintiff has a significant history of drug and alcohol use. (AR 368, 417-18, 430, 573-76). Dr. Soltz testified that plaintiff likely had not been candid with medical personnel about the true extent of his drug and alcohol use, since none of plaintiff's medical records – including those from other physicians at the Swift-Phoenix clinic where Dr. Sekhon practiced – reflects that plaintiff had ever been referred for substance abuse treatment. (AR 586). Similarly, Dr. Sekhon's failure to diagnose plaintiff with substance abuse suggests that plaintiff had not been candid with his treating physician about the magnitude of his drug and alcohol use. (AR 587). In fact, plaintiff's testimony suggests that plaintiff admitted to Dr. Sekhon only nominal drug and alcohol use. (AR 331-32, 336, 338). Accordingly, this Court now concludes that the ALJ reasonably inferred that Dr. Sekhon was unaware of the extent of plaintiff's drug use, and thus could not have rendered his opinions apart from the effects of plaintiff's drug or alcohol use on plaintiff's ability to work despite the instructions on the form to do so.

Accordingly, the ALJ's rejection of Dr. Sekhon's opinions is supported by substantial evidence and is free from material error.

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B. The ALJ Did Not Materially Err in Developing the Record

Plaintiff contends that the ALJ failed properly to develop the record by declining plaintiff's request for an orthopedic consultative examination of his ankle. (Plaintiff's Motion at 6). The Court finds harmless any error in the ALJ's decision to decline plaintiff's request.

1. Pertinent Facts

At the Post-Remand Hearing, plaintiff stated that ten months earlier he had sustained a "minor" break in his right ankle which had subsequently become infected. (AR 572). At the end of such hearing, plaintiff's attorney asked the ALJ to order an orthopedic consultative examination, stating that plaintiff's injury and confinement to a wheelchair could be probative of disability. (AR 596). The ALJ declined the request, and instead asked the vocational expert to testify to whether plaintiff's confinement to a wheelchair changed the expert's earlier conclusion that jobs existed in significant numbers in the national economy which plaintiff could do. (AR 596-97). The vocational expert testified that it did not. (AR 596-97).

In his Post-Remand Decision, the ALJ stated that he had declined plaintiff's request for a consultative examination due to the "lack of objective evidence." (AR 368-69). The ALJ noted that "there was no evidence in the record of [plaintiff's] break or of the prescription for a wheelchair." (AR 368). The ALJ also stated that medical records submitted at the hearing reflected that plaintiff had undergone ankle surgery on June 5, 2007, but that subsequent x-rays showed that plaintiff's condition was stable. (AR 369) (citing Ex. 19F [AR 541]). The ALJ rejected plaintiff's suggestion that plaintiff met listings 1.02A or 1.03, stating that the evidence did not support such a finding or a finding that any impairment could be expected to last more than 12 months. (AR 369).

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2. Pertinent Law

Although plaintiff bears the burden of proving disability, the ALJ has an affirmative duty to assist the claimant in developing the record "when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (citation omitted); Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001); see also Webb, 433 F.3d at 687 (ALJ has special duty fully and fairly to develop record and to assure that claimant's interests are considered). Where it is necessary to enable the ALJ to resolve an issue of disability, the duty to develop the record may require consulting a medical expert or ordering a consultative examination. See 20 C.F.R. §§ 404.1519a, 416.919a; see, e.g., Armstrong v. Commissioner of Social Security Administration, 160 F.3d 587, 590 (9th Cir. 1998) (where there were diagnoses of mental disorders prior to the date of disability found by the ALJ, and evidence of those disorders even prior to the diagnoses, the ALJ was required to call a medical expert to assist in determining when the plaintiff's impairments became disabling).

The ALJ is not obliged to undertake the independent exploration of every conceivable condition or impairment a claimant might assert. Therefore, an ALJ does not fail in his duty to develop the record by not seeking evidence or ordering further examination or consultation regarding a physical or mental impairment if no medical evidence indicates that such an impairment exists. See Breen v. Callahan, 1998 WL 272998, at *3 (N.D. Cal. May 22, 1998) (noting that, in the Ninth Circuit, the ALJ's obligation to develop the record is triggered by "the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision") (citing Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); Wainwright v. Secretary of Health and Human Services, 939 F.2d 680, 682 (9th Cir. 1991)); see also Pearson v. Bowen, 866 F.2d 809, 812 (5th Cir. 1989) (requiring that claimant must "raise a

suspicion concerning such an impairment" before ALJ is required to discharge duty of full inquiry by ordering a consultative examination).

3. Analysis

The Court rejects plaintiff's contention that the ALJ's decision to decline plaintiff's request for a consultative examination warrants a reversal or remand.

First, plaintiff was obligated to provide the ALJ with *some* objective medical evidence of a condition which could have a material impact on the ALJ's disability decision. Breen, 1998 WL 272998, at *3. However, as reflected in the Post-Remand Decision, the ALJ reviewed the medical records plaintiff submitted at the hearing and concluded that there was no objective evidence that plaintiff continued to suffer from an ankle break, that he had a prescription for a wheelchair, or that any impairment from the alleged injury would last more than twelve months. (AR 368-69). Plaintiff fails to point to any objective evidence in the record to suggest the contrary. In fact, plaintiff appears to concede as much, stating: "[T]he purpose for a consultative examination was to provide objective evidence regarding [plaintiff's] ankle break and the prescription for a wheelchair." (Plaintiff's Motion at 7 (emphasis added)). Absent such objective evidence, however, the ALJ had no duty to order a consultative examination for plaintiff at government expense. See Diaz v. Secretary of Health and Human Services, 898 F.2d 774, 778 (10th Cir. 1990) (ALJ has broad discretion to deny request for consultative examination where claimant fails to present objective evidence supporting claimed impairment); see also Reed v. Massanari, 270 F.3d 838, 842 (9th Cir. 2001) ("The government is not required to bear the expense of [a consultative] examination for every claimant) (citing id.; 20 C.F.R. §§ 404.1517-1519t, 416.917-919t); Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991) (decision to order consultative examination rests within ALJ's discretion) (citation omitted).

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Second, the decision to call a medical expert for additional evidence on the nature and severity of impairments is required only "[w]hen . . . in the opinion of the [ALJ] or the Appeals Council the symptoms, signs and laboratory findings reported in the case record suggest that a judgment of equivalence may be reasonable." SSR 96-6p. Here, the ALJ reasonably determined that the medical records did not suggest that plaintiff's ankle injury met a Listing, and plaintiff offers no plausible theory of equivalency. See Sullivan v. Zebly, 493 U.S. 521, 530-31 (1990) (For a claimant to show that his impairment matches [or is equivalent to] a listing, it must meet all of the specified medical criteria [of the listed impairment].").

Finally, even assuming, *arguendo*, that the ALJ's decision not to order a consultative examination was erroneous, any such error was harmless. The vocational expert testified that there were still jobs that existed in significant numbers in the national economy that plaintiff could perform even assuming he was confined to a wheelchair. (AR 596-97).

In light of the foregoing, a remand or reversal on this basis is not warranted.

C. The ALJ Properly Evaluated Plaintiff's Credibility

1. Additional Pertinent Facts

In written statements submitted in support of his application for benefits, plaintiff stated: He had difficulty sleeping and concentrating, was restless, suffered from anxiety attacks, paranoia, depression, psychosis, and had memory loss. (AR 78, 82, 84, 105-11, 122, 126, 128-29).

At the Pre-Remand Hearing, plaintiff testified that he had experienced auditory hallucinations. (AR 349-51).

In his written decisions, the ALJ noted that plaintiff's symptoms included hallucinations, psychosis, confusion and depression. (AR 14, 368). The ALJ found that plaintiff's medically determinable impairments could reasonably be expected to produce such symptoms, but determined that plaintiff's statements

concerning the intensity, persistence and limiting effects of his subjective complaints were not credible. (AR 15, 368). The ALJ provided three reasons for discounting plaintiff's subjective complaints.

First, the ALJ pointed out that plaintiff's subjective complaints were inconsistent with plaintiff's failure to seek treatment for his substance abuse. Specifically, the ALJ stated:

> Any attempt to dismiss [plaintiff's] history of substance abuse as "self medication for his mental illness" does not negate the fact that [plaintiff] continued to engage in substance abuse. There is evidence of continued substance abuse up to the present. It is reasonable to assume that were [plaintiff] suffering from the disabling mental problems alleged, he would stop substance abuse and he would receive ongoing, aggressive substance rehabilitation.

(AR 15).

Second, the ALJ noted several occasions when plaintiff gave conflicting statements regarding his drug and alcohol use. (AR 368). Specifically, the ALJ stated the following about plaintiff's answers to the medical expert's questions at the Post-Remand Hearing:

> At the hearing, . . . [plaintiff] stated that he last used drugs in 2002 and in 2003 he used methamphetamine. At the time he started on Seroquel and has not used since. Then, [plaintiff] testified he last used drugs on January 16, 2004, was using drugs in 2004, and in 2005 there is a blood test lab result that shows drug use. He stated he still uses drugs when he gets flustered and when his meds are not working which happens 3 or 4 times a week. The medical expert noted that on October 6, 2006, [plaintiff] reported to [] Dr. Smith at a psychiatric evaluation that he was drinking up to 24 ounces of malt liquor about 3 times a week. He said he used to drink more but had

> decreased drinking in 2003. His last drink was the previous night (see Exhibit 11F p.4) [AR 417]. [Plaintiff] admitted at the hearing that he did drink 3 times a week but not so much anymore. He stated that . . . when his medication was not working he used drugs and alcohol.

(AR 368).

Finally, the ALJ cited plaintiff's poor work history as evidence of plaintiff's lack of credibility: "I note that [plaintiff] has not performed any substantial gainful activity in the past 15 years. This lack of work history indicates that [plaintiff's] pursuit of disability status may be motivated by a desire to finance his chosen lifestyle, rather than motivated by an actual disability." (AR 15)

2. Pertinent Law

An ALJ is not required to believe every allegation of disabling pain or other non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes the existence of a medically determinable impairment that could reasonably give rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as to the credibility of the claimant's statements about the symptoms and their functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the record includes objective medical evidence that the claimant suffers from an impairment that could reasonably produce the symptoms of which the claimant complains, an adverse credibility finding must be based on clear and convincing reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does not apply is when there is affirmative evidence of malingering. Id. The ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible grounds and

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did not arbitrarily discredit the claimant's testimony." Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004).

To find the claimant not credible, an ALJ must rely either on reasons unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal contradictions in the testimony, or conflicts between the claimant's testimony and the claimant's conduct (*e.g.*, daily activities, work record, unexplained or inadequately explained failure to seek treatment or to follow prescribed course of treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant's testimony solely because it is not substantiated affirmatively by objective medical evidence, the lack of medical evidence is a factor that the ALJ can consider in his credibility assessment. Burch, 400 F.3d at 681.

Questions of credibility and resolutions of conflicts in the testimony are functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). If the ALJ's interpretation of the claimant's testimony is reasonable and is supported by substantial evidence, it is not the court's role to "second-guess" it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

3. Analysis

Plaintiff contends that the ALJ improperly evaluated his credibility. (Plaintiff's Motion at 8-10). The Court concludes that the ALJ stated clear and convincing reasons for discounting plaintiff's statements which are supported by substantial evidence. Accordingly, a reversal or remand based upon the ALJ's assessment of plaintiff's credibility is not warranted.

First, the ALJ reasonably discredited plaintiff's subjective complaints as inconsistent with the level of treatment he received. The ALJ noted that plaintiff had a significant history of drug and alcohol use, and plaintiff himself testified that he had been unable to remain clean and sober for more than four or five months at

a time, yet plaintiff sought no treatment for drug or alcohol abuse.[8] (AR 368). The medical expert testified that (i) plaintiff's subjective symptoms were most accurately attributed to plaintiff's substance abuse (AR 577-78, 582, 587); (ii) evidence in the record reflects that when plaintiff reduced his drug and alcohol use, plaintiff's symptoms improved (AR 580); (iii) plaintiff needed to be in a substance abuse program to address those symptoms (AR 587); and (iv) plaintiff had received no such treatment (AR 586). It was reasonable for the ALJ to infer that if plaintiff's mental problems were as severe as he expressed, he would have sought and been prescribed substance abuse treatment. In assessing credibility, the ALJ may properly rely on plaintiff's unexplained failure to request treatment consistent with the alleged severity of his symptoms. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc) (ALJ may discredit plaintiff's subjective complaints based on "unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of treatment.") (citation omitted); Tidwell v. Apfel, 161 F.3d 599, 602 (9th Cir. 1999) (lack of treatment and reliance upon nonprescription pain medication "clear and convincing reasons for partially rejecting [claimant's] pain testimony"); cf. Wodtli v. Astrue, 2008 WL 4104216, at *6 (N.D. Cal. Sept. 2, 2008) (ALJ properly discredited plaintiff's testimony in light of plaintiff's failure to follow doctor's instruction to discontinue using alcohol).

Second, the ALJ could properly discredit plaintiff's subjective complaints due to plaintiff's conflicting statements and testimony regarding his drug and alcohol use. See Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir.), as amended (1997) (in weighing plaintiff's credibility, ALJ may consider "inconsistencies either in [plaintiff's] testimony or between his testimony and his conduct"); see also Fair, 885 F.2d at 604 n.5 (9th Cir.1989) (ALJ can reject pain

[8]Plaintiff also testified that he did not attend meetings of Alcoholics Anonymous or Narcotics Anonymous. (AR 333).

testimony based on contradictions in plaintiff's testimony). At the Post-Remand Hearing, plaintiff testified that he had had a significant problem with methamphetamine in 2002 and 2003, but after being placed on medication, he had stopped using the drug. (AR 573-74). However, upon further questioning by the medical expert, plaintiff testified that he had actually stopped using methamphetamine and marijuana by the end of 2004. (AR 574). When confronted with a blood test that showed that he had used drugs in 2005, plaintiff admitted that he had been using drugs and alcohol through the date of the hearing. (AR 575). Plaintiff testified that he used methamphetamine "three or four times a week," and drank alcohol three times a week "until [he was] drunk." (AR 575). In addition, plaintiff told Dr. Smith that he drank less than 24-ounces of malt liquor about three times a week, that he smoked marijuana "a little bit," and did not use any other drugs at that time, even though his testimony indicates otherwise. (AR 368). The ALJ properly discounted plaintiff's subjective complaints due to plaintiff's obvious lack of candor regarding his drug and alcohol use. See Thomas, 278 F.3d at 959 (holding that the ALJ did not err in using the claimant's conflicting statements about her alcohol and drug use to discredit her testimony) (citing Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999)).

Finally, the ALJ discounted plaintiff's subjective complaints, in part due to plaintiff's failure to perform substantial gainful activity in the 15 years preceding the ALJ's April 27, 2006 decision. (AR 15). An ALJ may discredit a claimant's testimony in light of a poor work history. Thomas, 278 F.3d at 959 (claimant's "extremely poor work history" and demonstrated lack of "propensity to work in her lifetime" constituted clear and convincing reasons for discounting claimant's credibility); see SSR 96-7P (when assessing credibility ALJ may consider, *inter alia*, "[claimant's] prior work record and efforts to work."). Here, however, the this reason for discounting plaintiff's testimony is not clear and convincing, since plaintiff was 27 years old at the time of Pre-Remand Decision, and thus could not

likely have had a prior legal work history that spanned 15 years. (AR 14, 15). Nonetheless, even if this basis for the ALJ's credibility determination was deficient, any such error was harmless because the ALJ's remaining reasons for discrediting plaintiff's subjective symptom testimony are supported by substantial evidence and the foregoing error does not negate the validity of the ALJ's ultimate credibility conclusion in this case. See Carmickle, 533 F.3d at 1162 (Where some reasons supporting an ALJ's credibility analysis are found invalid, the error is harmless if (1) the remaining reasons provide substantial evidence to support the ALJ's credibility conclusions, and (2) "the error does not negate the validity of the ALJ's ultimate credibility conclusion.") (quoting Batson, 359 F.3d at 1195) (citation and internal quotation marks omitted).

Accordingly, plaintiff is not entitled to a reversal or remand on this basis.

V. CONCLUSION

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

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 25, 2010

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE