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

KEVIN M. SMITH,
Plaintiff,
v.
MICHAEL J. ASTRUE,
Commissioner of the Social
Security Administration,
Defendant.

) NO. EDCV 09-2014 SS
)
)
) **MEMORANDUM DECISION AND ORDER**
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**I.
INTRODUCTION**

Plaintiff Kevin M. Smith ("Plaintiff") brings this action seeking to reverse and remand the decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for Supplemental Security Income ("SSI") benefits. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is AFFIRMED.

\\

1 III.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

3
4 To qualify for disability benefits, a claimant must demonstrate
5 a medically determinable physical or mental impairment that prevents him
6 from engaging in substantial gainful activity¹ and that is expected to
7 result in death or to last for a continuous period of at least twelve
8 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
9 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
10 incapable of performing the work he previously performed and incapable
11 of performing any other substantial gainful employment that exists in
12 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
13 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

14
15 To decide if a claimant is entitled to benefits, an ALJ conducts
16 a five-step inquiry. 20 C.F.R. § 404.1520. The steps are:

- 17
18 (1) Is the claimant presently engaged in substantial gainful
19 activity? If so, the claimant is found not disabled.
20 If not, proceed to step two.
21 (2) Is the claimant's impairment severe? If not, the
22 claimant is found not disabled. If so, proceed to step
23 three.
24 (3) Does the claimant's impairment meet or equal one of a
25 list of specific impairments described in 20 C.F.R. Part
26

27 ¹ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. § 404.1510.

1 404, Subpart P, Appendix 1? If so, the claimant is
2 found disabled. If not, proceed to step four.

3 (4) Is the claimant capable of performing his past work? If
4 so, the claimant is found not disabled. If not, proceed
5 to step five.

6 (5) Is the claimant able to do any other work? If not, the
7 claimant is found disabled. If so, the claimant is
8 found not disabled.

9
10 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
11 949, 953-54 (9th Cir. 2001) (citing Tackett); 20 C.F.R. §
12 404.1520(a)(4).

13
14 The claimant has the burden of proof at steps one through four, and
15 the Commissioner has the burden of proof at step five. Bustamante, 262
16 F.3d at 953-54 (citing Tackett). Additionally, the ALJ has an
17 affirmative duty to assist the claimant in developing the record at
18 every step of the inquiry. Id. at 954. If, at step four, the claimant
19 meets his burden of establishing an inability to perform past work, the
20 Commissioner must show that the claimant can perform some other work
21 that exists in "significant numbers" in the national economy, taking
22 into account the claimant's residual functional capacity,² age,
23 education, and work experience. Tackett, 180 F.3d at 1098, 1100;
24 Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520(g). The Commissioner may
25 do so by the testimony of a vocational expert or by reference to the

26
27 _____
28 ² Residual functional capacity is "the most [one] can still do
despite [his] limitations" and represents an assessment "based on all
the relevant evidence." 20 C.F.R. § 404.1545(a).

1 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart
2 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240
3 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett). When a claimant has
4 both exertional (strength-related) and nonexertional limitations, the
5 Grids are inapplicable, and the ALJ must take the testimony of a
6 vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000)
7 (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

8
9 **IV.**

10 **THE ALJ'S DECISION**

11
12 At the first step of the sequential evaluation process, the ALJ
13 observed that Plaintiff had not engaged in substantial gainful activity
14 since the alleged onset date of his disability. (AR 11). Next, the ALJ
15 found that Plaintiff had the following severe impairments: a seizure
16 disorder, a "right knee disorder," hepatitis C, morbid obesity,
17 polysubstance abuse and dependence, depressive disorder, anxiety
18 disorder, and antisocial personality traits. (Id.).

19
20 At the third step, the ALJ found that Plaintiff's impairments,
21 including the substance use disorders, met sections 12.04, 12.06, and
22 12.09 of the "Listing of Impairments" set forth in 20 C.F.R. Part 404,
23 Subpart P, Appendix 1. (AR 12). The "paragraph A" criteria were
24 satisfied because Plaintiff has depressive disorder, anxiety disorder,
25 antisocial personality traits, and substance abuse. (Id.). The
26 "paragraph B" criteria were satisfied because Plaintiff's mental
27 impairments, including substance abuse, cause marked limitations in two
28 functional areas; social functioning and concentration, persistence, and

1 pace; and repeated episodes of decompensation. (AR 13). However, the
2 ALJ determined that Plaintiff's abuse of heroin and cocaine was
3 "material to his disability," (id.), and that if Plaintiff stopped his
4 substance using these substances, his remaining limitations would be
5 "severe," but would not meet or equal any listed impairment in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1. (AR 13-14).

7
8 In the fourth step of his analysis, the ALJ weighed the medical
9 evidence to determine Plaintiff's RFC. (AR 15-19). The ALJ concluded
10 that Plaintiff was capable of performing "medium work"³ with several
11 limitations. (AR 15). The ALJ found Plaintiff occasionally able to
12 climb ramps and stairs but not ladders, ropes, or scaffolds; balance,
13 bend, stoop, crouch, and kneel; and push and pull foot controls with the
14 right leg. (Id.). Additionally, the ALJ determined Plaintiff should
15 avoid exposure to hazards such as unprotected heights, fast-moving
16 machinery, and pools of water; should not perform any work requiring
17 binocular vision or depth perception; and not perform any work involving
18 safety operations or responsibility for the safety of others. (Id.).

19
20 In analyzing Plaintiff's RFC, the ALJ considered Plaintiff's
21 subjective allegations, but did not find them fully credible, as
22 Plaintiff had a history of substance abuse and was a recidivist felon.
23 (AR 16-17). Plaintiff had been arrested "about 30 times" and
24 incarcerated on four separate occasions for drug possession. (AR 16,
25 161). Furthermore, Plaintiff was repeatedly inconsistent about
26

27 ³ The Agency's formulation of "medium work" involves "lifting no
28 more than 50 pounds at a time with frequent lifting or carrying of
objects weighing up to 25 pounds." 20 C.F.R. § 416.967(c).

1 reporting his drug use. On July 22, 2008, Plaintiff reported that he
2 had been sober for seventeen months. (AR 477). However, four months
3 earlier, on March 31, 2008, Plaintiff reported that he was currently
4 using heroin and cocaine on the weekends. (AR 433). Plaintiff further
5 claimed that "he was clean except for 2 times, in December 2008/January
6 2009 and May/June 2007." (AR 16). The ALJ pointed out that the record
7 did not support this claim, as evidence showed that Plaintiff was also
8 using drugs in July, August, and September 2008, only a few months
9 before Plaintiff's March 2009 hearing. (Id.; AR 366, 352, 374, 377,
10 382). The ALJ noted that Plaintiff admitted using heroin four months
11 prior to the hearing. (AR 15).

12
13 The ALJ rejected the need for greater restrictions recommended by
14 Plaintiff's treating physician, Dr. Gillian Friedman, because "the
15 doctor failed to cite any medical testing results or objective
16 observations to support her conclusions as to [Plaintiff's] residual
17 functional capacity. The doctor mentions 'past' X-ray imaging showing
18 severe arthritis, but those film results are not part of the record.
19 In fact, none of Dr. Friedman's files are part of the record." (AR 18).

20
21 In the fifth step, the ALJ determined, based on testimony by the
22 VE, that Plaintiff was able to perform his past work as a warehouse
23 laborer. (AR 19). According to the ALJ, the work "does not require the
24 performance of work-related activities precluded by the residual
25 functional capacity Plaintiff would have if he stopped his substance
26 abuse." (Id.). Because the ALJ determined that Plaintiff would not be
27 disabled if he stopped the substance use, he found Plaintiff was not
28

1 disabled within the meaning of the Social Security Act at any time since
2 his application. (Id.).

3
4 **V.**

5 **STANDARD OF REVIEW**

6
7 Under 42 U.S.C. § 405(g), a district court may review the
8 Commissioner's decision to deny benefits. The court may set aside the
9 Commissioner's decision when the ALJ's findings are based on legal error
10 or are not supported by substantial evidence in the record as a whole.
11 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing
12 Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th
13 Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).
14

15 "Substantial evidence is more than a scintilla, but less than a
16 preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater,
17 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which
18 a reasonable person might accept as adequate to support a conclusion."
19 Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279). To
20 determine whether substantial evidence supports a finding, the court
21 must "consider the record as a whole, weighing both evidence that
22 supports and evidence that detracts from the [Commissioner's]
23 conclusion.'" Aukland, 257 F.3d at 1035 (citing Penny v. Sullivan, 2
24 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support
25 either affirming or reversing that conclusion, the court may not
26 substitute its judgment for that of the Commissioner. Reddick, 157 F.3d
27 at 720-21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).
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VI.

DISCUSSION

Plaintiff claims that the ALJ's decision should be reversed for four reasons. (See Memorandum in Support of Plaintiff's Complaint ("Complaint Memo.") at 2, 4, 7, 8). First, Plaintiff contends that the ALJ failed to properly develop the record, as despite his finding that "none of Dr. Friedman's files are part of the record," the ALJ did not contact Dr. Friedman to attempt to acquire these records. (Id. at 2; AR 18). Second, Plaintiff contends that remand is required because the ALJ failed to properly consider the opinion of Dr. Friedman, Plaintiff's treating physician. (Id. at 4). Third, Plaintiff contends that the ALJ failed to properly assess Plaintiff's RFC. (Id. at 7). Finally, Plaintiff contends that the ALJ erred by finding Plaintiff capable of performing his past relevant work. (Id. at 8). For the reasons discussed below, the Court disagrees with each of Plaintiff's contentions.

A. The ALJ's Rejection Of The Treating Physician's Opinion Is Supported By Substantial Evidence In The Record

Plaintiff's first and second claims are related. Plaintiff's first claim, that the ALJ failed to develop the record by not attempting to obtain Dr. Friedman's files, and Plaintiff's second claim, that the ALJ failed to properly consider Dr. Friedman's opinion, both hinge on the ALJ's erroneous statement that "none of Dr. Friedman's files are part of the record." (See Complaint Memo. at 3, 4; AR 18). The Court agrees that this statement was erroneous, but finds that it was harmless error.

1 Although a treating physician's opinion is entitled to great
2 deference, it is "not necessarily conclusive as to either the physical
3 condition or the ultimate issue of disability." Lester v. Chater, 81
4 F.3d 821, 830 (9th Cir. 1995); Morgan v. Comm'r of Soc. Sec. Admin.,
5 169 F.3d 595, 600 (9th Cir. 1999). If the treating physician's opinion
6 is contradicted by another doctor, the ALJ may reject this opinion after
7 providing specific, legitimate reasons, supported by substantial
8 evidence in the record. Lester, 81 F.3d at 830. When they are
9 properly supported, the opinions of physicians other than treating
10 physicians, such as examining physicians and nonexamining medical
11 experts, may constitute substantial evidence upon which an ALJ may rely.
12 See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)
13 (consultative examiner's opinion on its own constituted substantial
14 evidence, because it rested on independent examination of claimant).
15 "When there is conflicting medical evidence, the Secretary must
16 determine credibility and resolve the conflict." Matney v. Sullivan,
17 981 F.2d 1016, 1019 (9th Cir. 1992).

18
19 Here, Plaintiff takes issue with the ALJ's statement that "none of
20 Dr. Friedman's files are part of the record." Both parties agree that
21 this statement was erroneous because Dr. Friedman's records "were
22 included in the transcript and reviewed by the ALJ." (Memorandum in
23 Support of Defendant's Answer ("Defendant's Memo.") at 3; see also AR
24 340-344, 347, 348, 386 (Dr. Friedman's records)). It appears that this
25 comment by the ALJ was an inadvertent misstatement, because the ALJ did,
26 in fact, look at Dr. Friedman's records and addressed them elsewhere in
27 his decision. (See ALJ Decision at 18-19). This error was therefore
28

1 harmless. Carmickle v. Commissioner of the Social Security
2 Administration, 533 F.3d 1155, 1162 (9th Cir. 2008).

3
4 The ALJ gave specific and legitimate reasons to discount Dr.
5 Friedman's decision. The ALJ observed that Dr. Friedman "failed to cite
6 any medical testing results or objective observations to support her
7 conclusions," and her opinion "conflict[ed] with the substantial
8 evidence of record." (AR 18). These two reasons are supported by the
9 record. Accordingly, they are specific and legitimate reasons.

10
11 The ALJ determined that if Plaintiff stopped his repeated substance
12 abuse, his mental limitations would be non-severe and he would not have
13 a physical impairment that would meet or equal any listing. (AR 13-14).
14 Dr. Friedman, on the other hand, limited Plaintiff to lifting 10 pounds
15 occasionally and frequently, and standing or walking less than two hours
16 a day in an eight hour workday. (AR 531). Furthermore, Dr. Friedman
17 stated that Plaintiff had moderate to marked limitations in every mental
18 work capacity category. (AR 528-29). Dr. Friedman based this
19 assessment on Plaintiff's representations that by August 28, 2008
20 Plaintiff's drug addiction was in "substantial full remission." (AR
21 342, 531). However, in a counseling interview with a different doctor
22 on August 29, 2008, Plaintiff's drug use was described as "current."
23 (AR 352). In September 2008, Plaintiff's social worker informed the
24 court that Plaintiff had admitted to using heroin and cocaine regularly
25 since his last court appearance. (AR 16, 374). This evidence
26 undermines Dr. Friedman's statement that Plaintiff's drug addiction was
27 in "substantial full remission," which formed the basis of her
28

1 assessment of Plaintiff's capabilities. (AR 342). Thus, it was not
2 error for the ALJ to give Dr. Friedman's opinion little weight.

3
4 The ALJ specifically discusses the findings of five doctors in its
5 opinion: Dr. Smith, an examining psychologist; Dr. Konia, an examining
6 psychologist who testified at the hearing; Dr. Lin, a consultative
7 internal medical examiner; Dr. Ross, a state medical consultant; and Dr.
8 Friedman, Plaintiff's treating physician. (AR 17-18). Both Dr. Smith
9 and Dr. Konia found Plaintiff would have "no limitations and no
10 impairments" if he abstained from drug use. (AR 17-18, 36). Dr. Lin
11 stated that Plaintiff could "stand or walk for 4 hours in an 8 hour
12 workday" and "lift or carry 50 pounds occasionally and 25 pounds
13 frequently." (AR 17). Dr. Ross reported that Plaintiff could lift "20
14 pounds occasionally and 10 pounds frequently" and "stand and walk 6
15 hours in an 8 hour workday." (AR 18). Dr. Friedman, on the other hand,
16 limited Plaintiff to lifting 10 pounds occasionally and frequently, and
17 standing or walking less than two hours a day in an eight hour workday.
18 (Id.).

19
20 The ALJ is responsible for reviewing the evidence and resolving
21 conflicts or ambiguities in the evidence. Magallanes v. Bowen, 881 F.2d
22 747, 751 (9th Cir. 1989). This Court may not substitute its own
23 judgment for that of the ALJ as long as the ALJ's determination is
24 supported by substantial evidence. 42 U.S.C. § 405(g). In this case,
25 the ALJ could properly have given the opinion of Dr. Friedman "little
26 weight" based solely on the "substantial evidence" of the conflicting
27 medical evidence of three of the five medical experts. See, e.g.,
28 Tonapetyan, 242 F.3d at 1149.

1 In sum, Plaintiff's first contention, that the ALJ failed to
2 properly develop the record, is contradicted by the fact that the ALJ
3 simply misspoke when he said that "none of Dr. Friedman's files are part
4 of the record." (AR 18). Although this statement was erroneous, the
5 ALJ's error was ultimately harmless. In giving Dr. Friedman's opinion
6 little weight, the ALJ permissibly resolved the conflict between the
7 medical experts based on the substantial evidence of record. Therefore,
8 the Court disagrees with Plaintiff's first and second claims. No remand
9 is required.

10
11 **B. The ALJ Properly Determined Plaintiff's Residual Functional**
12 **Capacity**

13
14 Plaintiff's third claim is that the ALJ improperly assessed
15 Plaintiff's RFC by omitting aspects of Dr. Lin's findings from the RFC.
16 (Complaint Memo. at 7). Specifically, Plaintiff contends that the ALJ
17 erred by not including Dr. Lin's RFC limitation that Plaintiff can only
18 "stand or walk for 4 hours in an 8 hour workday" (Id.; AR 17). This
19 Court disagrees.

20
21 The ALJ gave significant weight to the opinion of Dr. Lin. (AR
22 17). As Dr. Lin recommended, the ALJ's RFC stated Plaintiff was capable
23 of lifting or carrying 50 pounds frequently and 25 pounds occasionally.
24 (AR 15, 17, 191). However, the ALJ did not adopt the further limitation
25 that Dr. Lin recommended: that Plaintiff could only stand or walk for
26 four hours in an eight hour workday. (AR 15, 17, 192).

1 In this case, the ALJ adopted that portion of Dr. Lin's opinion
2 that he found was "well-supported by the medical evidence" and "not
3 inconsistent with other substantial evidence of record." (AR 18).
4 Three of the five medical experts, Dr. Smith, Dr. Ross, and Dr. Konia,
5 rejected Dr. Lin's standing and walking limitation. (AR 17-18).
6 Therefore, the ALJ could properly find that this portion of Dr. Lin's
7 opinion was not supported by the record and give it little weight.

8
9 It is not necessary for the ALJ to agree with everything an expert
10 witness says in order to hold that his testimony contains substantial
11 evidence, where the bases for the opinion were supported by objective
12 medical evidence. Magallanes, 881 F.2d at 753. The ALJ is the "final
13 arbiter with respect to resolving ambiguities in the evidence."
14 Tommasetti v. Astrue, 533 F.3d 1035, 1041-42 (9th Cir. 1995).
15 Therefore, the ALJ did not err in disregarding portions of Dr. Lin's
16 opinion when assessing the Plaintiff's RFC.

17
18 **C. The ALJ Properly Determined That Plaintiff Could Perform His Past**
19 **Relevant Work**

20
21 In his forth claim, Plaintiff contends that the ALJ erred in
22 concluding that Plaintiff could perform his past relevant work. (See
23 Complaint Memo. at 8). According to Plaintiff, the ALJ "improperly
24 relied on the vocational expert's (VE) testimony" and "failed to
25 properly consider the actual physical and mental demands of Plaintiff's
26 past relevant work as a warehouse laborer." (Id.). This Court
27 disagrees.

1 Plaintiff has the burden of showing that he could not perform the
2 job as actually performed or as generally performed. See Villa v.
3 Heckler, 797 F.2d 794, 798 (9th Cir. 1986) (at step four of the
4 sequential evaluation process, claimant has burden of proving an
5 inability to return to his former "type of work" and not just to his
6 former job). However, the ALJ still has a duty "to make the requisite
7 factual findings to support his conclusion." Pinto v. Massanari, 249
8 F.3d 840, 844 (9th Cir. 2001). The ALJ performs this duty by comparing
9 the claimant's RFC to the physical and mental demands of the claimant's
10 past relevant work. Id. at 844-45; 20 C.F.R. §§ 404.1520(f),
11 416.920(f). To determine the general demands of the claimant's past
12 relevant work, the ALJ should refer to the Dictionary of Occupational
13 Titles ("DOT"). Id. at 845 (citing Johnson v. Shalala, 60 F.3d 1428,
14 1435 (9th Cir. 1995)). Although the ALJ may rely on a vocational expert
15 to determine the actual demands of the claimant's past relevant work,
16 it should be noted that if an ALJ determines that an individual can
17 return to his past relevant work, no VE testimony is necessary. See
18 Pinto, 249 F.3d at 844; Crane v. Shalala, 76 F.3d 251, 255 (9th Cir.
19 1996).

20
21 Here, the ALJ made all requisite findings. The ALJ first
22 determined that, based on all of the evidence, Plaintiff had the RFC to
23 perform medium work with some environmental restrictions. (AR 15). The
24 ALJ then properly relied on the VE, who used the DOT to determine the
25 physical and mental demands of Plaintiff's past work as a warehouse
26 laborer. The VE stated that based on the Dictionary of Occupational
27 Titles ("DOT"), Plaintiff's past work as a warehouse laborer was
28 unskilled and required light to medium exertion. (AR 146; DOT No.

1 922.687.058). Plaintiff, on the other had, contends that his past work
2 actually required him to walk for seven hours and stand for six hours
3 in an eight hour day. (AR 116).
4

5 However, even if a plaintiff cannot perform the functional demands
6 and duties actually required by his former job, if he can perform the
7 demands and duties as generally required by employers, he is not
8 disabled. See 20 C.F.R. § 416.960(b)(2) (“[A] vocational expert or
9 specialist may offer expert opinion testimony in response to a
10 hypothetical question about whether a person with the physical and
11 mental limitations imposed by the claimant’s medical impairment(s) can
12 meet the demands of the claimant’s previous work, either as the claimant
13 actually performed it or as generally performed in the national
14 economy.”); SSR 82-61 (“Under this test, if the claimant cannot perform
15 the excessive functional demands and/or job duties actually required in
16 the former job but can perform the functional demands and job duties as
17 generally required by employers throughout the economy, the claimant
18 should be found to be ‘not disabled.’”).
19

20 Accordingly, based on the testimony of the VE, the ALJ properly
21 found that Plaintiff is capable of performing his past relevant work as
22 a warehouse laborer as generally performed in the economy, and thus is
23 not disabled. (AR 19-20).
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VII.

CONCLUSION

Pursuant to sentence four of 42 U.S.C. § 405(g),⁴ IT IS ORDERED that Judgment be entered AFFIRMING the decision of the Commissioner and dismissing this action with prejudice. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: August 6, 2010.

/s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

⁴ This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."