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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

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|------------------------|---|------------------------------|
| KENNETH OH, |) | Case No. EDCV 10-1076-MLG |
| |) | |
| Plaintiff, |) | MEMORANDUM OPINION AND ORDER |
| |) | |
| v. |) | |
| |) | |
| MICHAEL J. ASTRUE, |) | |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Plaintiff Kenneth Oh seeks judicial review of the Commissioner's denial of his application for Supplemental Security Income ("SSI") benefits under the Social Security Act. For the reasons discussed below, the decision of the Commissioner is affirmed and the action is dismissed with prejudice.

I. Factual and Procedural History

Plaintiff was born on September 29, 1964. He has a seventh grade education and no relevant work experience. (Administrative Record ("AR") 97, 191, 210.)

1 Plaintiff filed an application for SSI benefits on August 22, 2006,
2 alleging that he had been disabled since August 22, 2006, due to seizure
3 disorder. (AR 8, 181.) Plaintiff's application was denied initially and
4 upon reconsideration (AR 99-103, 105-109.) Administrative hearings were
5 held on May 9, 2008 (AR 57-96) and again on January 30, 2009 (AR 19-56)
6 before Administrative Law Judge ("ALJ") David M. Ganly. Plaintiff,
7 represented by counsel, appeared but did not testify. Medical Expert
8 ("ME") Dr. Nafoosei and lay witness Sang Bin Park testified. (AR 23-54.)

9 On October 14, 2009, ALJ Ganly denied Plaintiff's application for
10 benefits. (AR 8-18.) The ALJ found that Plaintiff suffered from the
11 severe impairment, a seizure disorder, but that the impairment did not
12 meet, or was not medically equal to, one of the impairments listed in 20
13 C.F.R., Part 404, Subpart P, Appendix 1. (Id.) The ALJ further found
14 that Plaintiff retained the residual functional capacity ("RFC") to
15 "perform a full range of work at all exertional levels but the claimant
16 is limited by seizure precautions to include no climbing ladders, ropes
17 or scaffolds, no working at unprotected heights, no working with
18 machinery, and no working around open pools of water or other hazards."
19 (AR 11.)

20 The ALJ concluded that there were jobs that exist in significant
21 numbers in the national economy that Plaintiff could perform at all
22 exertional levels and that the seizure precautions did not have a
23 significant effect on the work that existed in the national economy.
24 (Id.) Accordingly, it was determined that Plaintiff was not disabled
25 within the meaning of the Social Security Act. (AR 18.)

26 On June 30, 2010, the Appeals Council denied review (AR 1-3).
27 Plaintiff then commenced this action for judicial review. On January 22,
28 2011, the parties filed a Joint Stipulation ("Joint Stip.") of disputed

1 facts and issues. Plaintiff contends that the ALJ erred by (1) failing
2 to properly consider the testimony of the lay witness and (2) failing to
3 properly develop the record. (Joint Stip. at 2.) Plaintiff requests that
4 the Court reverse and remand for an award of benefits, or in the
5 alternative, reverse and remand for a new administrative hearing. (Joint
6 Stip. 14.) The Commissioner requests that the ALJ's decision be
7 affirmed. (Joint Stip. 15.)

8 9 **II. Standard of Review**

10 Under 42 U.S.C. § 405(g), a district court may review the Social
11 Security Commissioner's decision to deny benefits. The Court must uphold
12 the Social Security Administration's disability determination unless it
13 is not supported by substantial evidence or is based on legal error.
14 *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)(citing
15 *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
16 2006)). Substantial evidence means more than a scintilla, but less than
17 a preponderance; it is evidence that "a reasonable person might accept
18 as adequate to support a conclusion." *Lingenfelter v. Astrue*, 504 F.3d
19 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d
20 880, 882 (9th Cir. 2006)). To determine whether substantial evidence
21 supports a finding, the reviewing court "must review the administrative
22 record as a whole, weighing both the evidence that supports and the
23 evidence that detracts from the Commissioner's conclusion." *Reddick v.*
24 *Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support
25 either affirming or reversing the ALJ's conclusion," the reviewing court
26 "may not substitute [its] judgment for that of the ALJ." *Robbins*, 466
27 F.3d at 882.

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1 **III. Discussion**

2 **A. The ALJ Properly Evaluated the Testimony of the Lay Witness**

3 Plaintiff contends that the ALJ improperly discounted the testimony
4 of lay witness San Bin Park. (Joint Stip. 3.) The ALJ found that Mr.
5 Park was not fully credible because (1) Mr. Park had a financial
6 interest in Plaintiff receiving benefits because Plaintiff, who had no
7 other source of income lived with Mr. Park; (2) Mr. Park testified that
8 he had taken Plaintiff to the emergency room at Bear Valley Community
9 Hospital on multiple occasions but there was no record of Plaintiff
10 being treated there; and (3) Mr. Park's description of Plaintiff's
11 seizures was vague and contradictory. (AR 16.)

12 A lay witness can provide testimony about Plaintiff's symptoms and
13 limitations. See *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
14 "Lay testimony as to a claimant's symptoms is competent evidence that an
15 ALJ must take into account, unless he or she expressly determines to
16 disregard such testimony and gives reasons germane to each witness for
17 doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); see also
18 *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). Appropriate
19 reasons include testimony unsupported by the medical record or other
20 evidence and inconsistent testimony. *Lewis*, 236 F.3d at 512.

21 The ALJ found Mr. Park's testimony not credible because he had a
22 financial interest in seeing Plaintiff receive benefits given that "the
23 claimant lives with Mr. Park ... [and] had no apparent source of income
24 from which he could contribute to household expenses." (AR 16.) Under
25 prevailing law, it was improper for the ALJ to discredit Mr. Park's
26 testimony on the ground that he stands to gain financially from
27 Plaintiff's receipt of SSI benefits. While some courts have held that an
28 ALJ may consider a witness' financial interest in the award of benefits

1 in evaluating their credibility,¹ courts in the Ninth Circuit have
2 consistently held that bias cannot be presumed from a familial or
3 personal relationship. See, e.g., *Regennitter v. Comm'r of Soc. Sec.*
4 *Admin.*, 166 F.3d 1294, 1298 (9th Cir. 1999), see also *Hall v. Astrue*,
5 2010 WL 5128335 at *8 (C.D. Cal. 2010); *Traister v. Astrue*, 2010 WL
6 1462118, at *4 (C.D. Cal. 2010). This is because a personal relationship
7 is a necessity for lay witness testimony since it is provided by people
8 "in a position to observe a claimant's symptoms and daily activities."
9 *Dodrill*, 12 F.3d at 918. The ALJ's reasoning that witnesses who live
10 with or support a plaintiff are not credible for reasons of bias cannot
11 be considered legally proper, since the same rationale could be used to
12 reject lay witness testimony in almost every case. *Id.*

13 Although the ALJ improperly rejected Mr. Park's testimony on the
14 basis of his alleged financial interest in Plaintiff obtaining SSI
15 benefits, the ALJ also provided legitimate reasons for his credibility
16 determination. The ALJ found that medical records did not support Mr.
17 Park's testimony that he had taken Plaintiff to the emergency room at
18 Bear Valley Hospital on at least five occasions in two years. (AR 16,
19 28-30, 382.) A certificate from Bear Valley Hospital demonstrated that
20 Plaintiff had not been treated there.² (AR 382.) The fact that medical
21 records did not support Mr. Park's testimony was a proper reason to
22 discount his credibility.

23 In addition, the ALJ found that Mr. Park's "description of the
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25 ¹ See, e.g., *Buckner v. Apfel*, 213 F.3d 1006, 1013 (8th Cir. 2000);
26 *Rautio v. Bowen*, 862 F.2d 176, 180 (8th Cir. 1988).

27 ² Plaintiff now claims that the witness actually meant Desert
28 Valley Community Hospital rather than Bear Valley Hospital. (Joint Stip.
4.) This claim will be addressed in greater detail below.

1 seizures he allegedly witnessed was so vague that it was not clear what
2 type of seizure he witnessed or if the behavior he witnessed was seizure
3 activity at all." (AR 16.) After reviewing Mr. Park's testimony, the
4 Court agrees that his description of Plaintiff's alleged seizures was
5 vague and confusing.³ (AR 43-46.) Furthermore, Mr. Park gave conflicting
6 testimony regarding the frequency of Plaintiff's seizures. For example,
7 Mr. Park testified that he witnessed Plaintiff having two to three
8 seizures a day. (AR 28.) However, he also testified that Plaintiff's
9 last seizure occurred three days before the hearing and also testified
10 that he witnessed fifteen seizures per month. (AR 43, 44.)

11 Where one of the ALJ's several reasons supporting an adverse
12 credibility finding is invalid, the Court applies a harmless error
13 standard. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155,
14 1162 (9th Cir. 2008) (citing *Batson v. Comm'r of Soc. Sec. Admin.*, 359
15 F.3d 1190, 1195-1197 (9th Cir. 2004)). As long as there remains
16 "substantial evidence supporting the ALJ's conclusions on ...
17 credibility" and the error "does not negate the validity of the ALJ's
18 ultimate [credibility] conclusion," the error is deemed harmless and
19 does not warrant reversal. *Id.* at 1197; see also *Stout v. Comm'r of Soc.*
20 *Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (defining harmless error
21 as such error that is "irrelevant to the ALJ's ultimate disability
22 conclusion"). Here, because the ALJ provided specific, legitimate
23 reasons for discrediting Mr. Park's testimony, any error in improperly
24 considering his supposed financial interest in Plaintiff obtaining SSI
25 benefits was harmless. Therefore, relief is not warranted on this issue.

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28 ³ The Court notes that some of this lack of clarity could be
attributable to Mr. Park's apparent difficulty in speaking English.

1 **B. The ALJ Properly Developed the Record**

2 Plaintiff claims that the ALJ abrogated his duty to develop the
3 record because he did not seek medical records from Desert Valley
4 Community Hospital. (Joint Stip. 12.) At the administrative hearing, lay
5 witness San Bin Park testified that he had taken Plaintiff to the
6 emergency room at Bear Valley Community Hospital in Victorville
7 approximately five times between 2006 and 2008. (AR 28-29.) However,
8 Bear Valley Community Hospital had no record of Plaintiff being treated
9 there. (AR 382.)

10 A disability applicant bears the burden of proving disability and
11 must provide medical evidence demonstrating the existence and severity
12 of an alleged impairment. See *Mayes v. Massanari*, 276 F.3d 453, 459 (9th
13 Cir. 2001); 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. § 416.912(c).
14 Nonetheless, an ALJ has a "duty to develop the record fully and fairly
15 and to ensure that the claimant's interests are considered, even when
16 the claimant is represented by counsel." *Mayes*, 276 F.3d at 459. An
17 ALJ's duty to augment an existing record is triggered "only when there
18 is ambiguous evidence or when the record is inadequate to allow for
19 proper evaluation of the evidence. *Id.* (citing *Tonapetyen v. Halter*, 242
20 F.3d 1144, 1150 (9th Cir. 2001)).

21 Plaintiff argues that the ALJ failed to properly develop the record
22 because he did not obtain medical records from Desert Valley Hospital.
23 (Joint Stip. 12-13.) However, there were no ambiguous medical records or
24 conflicting medical findings that would trigger the ALJ's duty to
25 develop the record. During the administrative hearing, lay witness Sang
26 Bin Park stated on multiple occasions that he had taken Plaintiff to the
27 emergency room at Bear Valley Hospital. (AR 28, 29, 30, 53.) Mr. Park
28 never testified that he had taken Plaintiff to Desert Valley Community

1 Hospital. It is unclear to the Court how the ALJ could have been
2 expected to realize that Mr. Park actually meant Desert Valley Community
3 Hospital when he repeatedly referred to Bear Valley Hospital.

4 If medical records existed from Desert Valley Community Hospital
5 showing multiple visits to the emergency room during the period at
6 issue,⁴ either Plaintiff himself or his attorney could have procured
7 these records, rather than expecting the ALJ to do so. See *Bowen v.*
8 *Yuckert*, 482 U.S. 137, 146 n.5 ("It is not unreasonable to require the
9 claimant, who is in a better position to provide information about his
10 own medical condition, to do so."); *Duenas v. Shalala*, 34 F.3d 719, 722
11 (9th Cir. 1994). In fact, in response to a direct request by the ALJ to
12 obtain Plaintiff's emergency room and other records, Plaintiff's counsel
13 specifically stated that he would make a request for Plaintiff's medical
14 records. (AR 51, 55.) Thereafter, the only record that the ALJ received
15 from counsel regarding Plaintiff's emergency room visits was a
16 "certificate of no records" from Bear Valley Community Hospital. (AR
17 381-382.) Plaintiff is impermissibly attempting to shift his burden of
18 proving disability to the Commissioner.

19 Plaintiff has failed to show that the evidence was ambiguous or
20 that the record was inadequate to allow for proper evaluation of the
21 evidence. The ALJ was under no obligation to further develop the record.
22 See *Mayer*, 276 F.3d at 459-60.

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26 ⁴ The Court notes that there is evidence in the record of only one
27 emergency room visit by Plaintiff to Desert Valley Hospital during the
28 period at issue. (AR 237-252.) In addition, Plaintiff testified at the
first administrative hearing held on May 9, 2008 that he had only
visited the emergency room once in two years because he could not afford
any additional visits. (AR 78-79.)

1 **IV. Conclusion**

2 For the reasons stated above, the decision of the Commissioner is
3 affirmed.

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5 DATED: February 3, 2011

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MARC L. GOLDMAN
United States Magistrate Judge

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