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I.

DISPUTED ISSUES

As reflected in the Joint Stipulation, the disputed issues raised by Plaintiff as the grounds for reversal and/or remand are as follows:

- (1) Whether the Administrative Law Judge (“ALJ”) properly considered Listing 1.02A;
 - (2) Whether the ALJ properly considered Listing 1.03; and
 - (3) Whether the ALJ properly considered lay witness statements.
- (JS at 3.)³

II.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to determine whether the Commissioner’s findings are supported by substantial evidence and whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec’y of Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at 401 (citation omitted). The Court must review the record as a whole and consider adverse as well as supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation, the Commissioner’s decision must be upheld. Gallant v.

³ Plaintiff sought benefits for a closed period beginning October 2, 2006, and ending upon her return to work on December 15, 2008. (AR at 9, 21-22.)

1 Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984).

2 **III.**

3 **DISCUSSION**

4 **A. The ALJ's Findings.**

5 The ALJ found that Plaintiff has severe physical impairments, including
6 morbid obesity with obstructive sleep apnea, degenerative disc disease of the
7 neck with chronic pain despite surgery, degenerative arthritis of the knees, and
8 prior right ulnar nerve surgery with weak right hand grip. (AR at 11.)⁴ The
9 ALJ further found that Plaintiff had the residual functional capacity (“RFC”) to
10 perform light work, with the following limitations:

11 [T]he claimant can stand and/or walk one hour in an eight hour
12 workday 15 to 30 minutes at a time; she can use a cane as needed;
13 she should avoid uneven surfaces; she can sit eight hours in an eight-
14 hour workday with normal breaks such as every two hours; she can
15 lift and/or carry 20 pounds occasionally and 10 pounds frequently;
16 she can occasionally stoop and bend; she can climb stairs, but she
17 cannot climb ladders, work at heights, or balance; she cannot operate
18 foot pedals or controls; she cannot squat, kneel, crawl, run, or jump;
19 she cannot do forceful gripping, grasping, or twisting, with her left
20 hand only, but she can do occasional fine manipulation such as
21 keyboarding with the left hand; she can do frequent gross
22 manipulation such as operating drawers and carrying files with the
23 left hand and arm; she has no limitations on the right hand; she can
24 do occasional neck motion, but should avoid extremes of motion; her
25 head should be held in a comfortable position most of the time; and

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27 ⁴ The ALJ found that Plaintiff also suffers from depression, but that it
28 did not rise to the level of a severe impairment. (AR at 12.)

1 she can maintain a fixed head position for 15 to 30 minutes at a time,
2 occasionally.

3 (Id. at 13.)

4 Relying on the testimony of a Vocational Expert (“VE”), the ALJ
5 determined that Plaintiff was unable to perform her past relevant work of
6 learning consultant, risk manager, senior product support analyst, and surgery
7 scheduler. (Id. at 16-17.) The ALJ also relied on the VE’s testimony to
8 determine that there were alternative occupations such as Charge Account
9 Clerk (Dictionary of Occupational Titles (“DOT”) No. 205.367-014) and
10 Surveillance System Monitor (DOT No. 379.367-010) that exist in significant
11 numbers in the national economy. (AR at 17-18.)

12 **B. The ALJ’s Consideration of the Listings.**

13 **1. Applicable Law.**

14 If the ALJ concludes at Step Two of the sequential evaluation that the
15 plaintiff’s impairments are “severe” within the meaning of the Act, the ALJ
16 proceeds at Step Three of the sequential evaluation to compare the plaintiff’s
17 impairments to the impairments listed in the “Listing of Impairments” set forth
18 in 20 C.F.R. pt. 404, subpt. P, App.1. See 20 C.F.R. § 416.925. If any “severe”
19 impairment, or combination of “severe” impairments, meets or equals a listed
20 impairment, the plaintiff is deemed disabled. Id.

21 A plaintiff’s impairment need not precisely meet the criteria of the listing
22 in order to obtain benefits. If the plaintiff’s impairment or combination of
23 impairments is medically equivalent to one in the listing, disability is
24 presumed, and benefits are awarded. Id. § 404.1520(d); Barker v. Sec’y of
25 Health & Human Servs., 882 F.2d 1474, 1477 (9th Cir. 1989). Medical
26 equivalence will be found if the medical findings are at least equal in severity
27 and duration to the listed findings. Marcia v. Sullivan, 900 F.2d 172, 175 (9th
28 Cir. 1990). To determine medical equivalence, the Commissioner compares the

1 symptoms, signs, and laboratory findings concerning the alleged impairment
2 with the medical criteria of the listed impairment. 20 C.F.R. §§ 416.929,
3 416.928. The decision is based solely on the medical evidence, which must be
4 supported by medically acceptable clinical and laboratory diagnostic
5 techniques. Id.

6 A plaintiff bears the burden of proving at Step Three of the analysis that
7 her impairment or combination of impairments meets or equals a listing. 20
8 C.F.R. § 404.1520(a)(4)(iii); Bowen v. Yuckert, 482 U.S. 137, 146, 107 S. Ct.
9 2287, 96 L. Ed. 2d 119 (1987). To meet a listed impairment, the plaintiff has
10 the burden of showing that she meets each and every element described in that
11 listing. 20 C.F.R. § 404.1525(d); Sullivan v. Zebley, 493 U.S. 521, 530, 110 S.
12 Ct. 885, 107 L. Ed. 2d 967 (1990).

13 **2. Listing 1.02.**

14 **a. Background.**

15 Plaintiff contends that the ALJ failed to properly consider whether
16 Plaintiff's impairments met or medically equaled Listing 1.02. Specifically,
17 Plaintiff argues that the ALJ erred in finding that Plaintiff's arthritis in her
18 knees did not meet or medically equal Listing 1.02A. (JS at 3-14.) As relevant
19 here, Listing 1.02 requires the "involvement of one major peripheral weight-
20 bearing joint (i.e. hip, knee, or ankle), resulting in inability to ambulate
21 effectively, as defined in 1.00B2b." 20 C.F.R. pt. 404, subpt. P, App. 1, § 1.02.
22 In turn, section 1.00(B)(2)(b) states that "[an] example of ineffective
23 ambulation [is] the inability to walk a block at a reasonable pace on rough or
24 uneven surfaces." Id. § 1.00(B)(2)(b). The basis for Plaintiff's claim is that the
25 finding by the ALJ in his RFC assessment that Plaintiff should avoid walking
26 on uneven surfaces meets the definition under the Listing for an inability to
27 ambulate effectively. (JS at 3-14.)

28 At the hearing before the ALJ, the medical expert testified that Plaintiff

1 “probably has degenerative arthritis in the knees.” (AR at 25.) The expert
2 further testified that Plaintiff did not meet or equal Listing 1.02. (Id.) The
3 expert opined that he would limit Plaintiff to “standing or walking for one
4 hours out of eight, 15 to 30 minutes at a time, using a cane as needed” and that
5 “[u]neven surfaces should be avoided.” (Id. at 26.)

6 In his decision, the ALJ relied on the testimony of the medical expert in
7 concluding that Plaintiff “should avoid uneven surfaces,” but that “[t]he
8 medical evidence does not support a finding that the claimant has the severity
9 of symptoms required either singly or in combination to meet or medically
10 equal listing 1.02 for arthritis of a major joint” (Id. at 10.)

11 **b. Analysis.**

12 Plaintiff’s argument fails to account for the fact that Listing
13 1.00(B)(2)(b) includes distance and temporal components. The fact that the
14 ALJ adopted the medical expert’s recommendation with respect to avoiding
15 uneven surfaces does not establish that Plaintiff is unable to ambulate
16 effectively. Plaintiff’s attempt to bootstrap the ALJ’s imposition of limitations
17 for purposes of the RFC assessment to the Step Three analysis is unpersuasive.
18 Moreover, the ALJ did not conclude in his RFC assessment that Plaintiff was
19 incapable of walking on uneven surfaces, only that she should avoid doing so
20 in her employment. Significantly, none of Plaintiff’s treating physicians
21 reported that she could not walk on uneven terrain or that she was unable to
22 ambulate effectively.

23 To the extent that Plaintiff argues that the ALJ’s consideration of
24 whether Plaintiff’s impairment met or equaled the Listing was deficient in that
25 it was overly conclusory, her claim still fails. The ALJ expressly found that
26 Plaintiff did not meet or equal Listing 1.02. In forming this conclusion, the
27 ALJ relied on the medical expert’s testimony, his review of the medical
28 evidence of record, and the evidence regarding Plaintiff’s activities. (Id. at 12-

1 16.) The record plainly shows that the ALJ considered the Step Three issue in
2 light of all of the evidence presented in the medical record and at the hearing.
3 See Lewis v. Apfel, 236 F.3d 503, 513-14 (9th Cir. 2001) (the lack of a formal
4 analysis and findings at the Step Three level will not constitute reversible error
5 when the ALJ’s subsequent discussion of the relevant medical evidence
6 supports a conclusory Step Three finding).

7 Accordingly, the Court finds that the ALJ’s consideration of Listing
8 1.02A was not deficient. Thus, there was no error.

9 **2. Listing 1.03.**

10 **a. Background.**

11 Plaintiff argues that the ALJ erred in failing to consider whether the
12 arthritis in her knees met or equaled Listing 1.03. (JS at 14-22.) As relevant
13 here, Listing 1.03 involves reconstructive surgery or surgical arthrodesis⁵ of a
14 major weight-bearing joint, with inability to ambulate effectively, as defined in
15 1.00(B)(2)(b). 20 C.F.R. pt. 404, subpt. P, App. 1, § 1.03. As explained above,
16 section 1.00(B)(2)(b) states that “[an] example of ineffective ambulation [is]
17 the inability to walk a block at a reasonable pace on rough or uneven surfaces.”
18 Id. § 1.00(B)(2)(b). Again, Plaintiff argues that her impairment met the Listing
19 because the ALJ found that she should avoid walking on uneven surfaces. (JS
20 at 14-22.)

21 As explained above, the medical expert testified that Plaintiff “probably
22 has degenerative arthritis in the knees” and that “[u]neven surfaces should be
23 avoided.” (AR at 25-26.) Accordingly, the ALJ found that Plaintiff “should
24 avoid uneven surfaces.” (Id. at 10.) Neither the medical expert nor the ALJ

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26 ⁵ “Arthrodesis” is the surgical fixation of a joint by a procedure
27 designed to accomplish fusion of the joint surfaces by promoting the
28 proliferation of bone cells. See Cunningham v. Astrue, Case No. CV 11-144
JC, 2011 WL 5103760, *4 n.3 (C.D. Cal. Oct. 27, 2011).

1 considered whether Plaintiff's impairment met or equaled Listing 1.03.

2 **b. Analysis.**

3 Plaintiff failed to meet her burden at Step Three in two respects. First,
4 Plaintiff provided no proof that her past knee surgeries involved reconstruction
5 or surgical arthrodesis. Rather, to the extent that the record reveals any
6 information regarding Plaintiff's past knee surgeries, the procedures were
7 referred to as arthroscopy and debridement. (Id. at 200, 219, 203, 330.) The
8 record simply does not provide enough evidence regarding Plaintiff's knee
9 surgeries to conclude that she has met this element of Listing 1.03.

10 In addition, as discussed above, the fact that the ALJ found in his RFC
11 assessment that Plaintiff should avoid uneven surfaces is not sufficient for a
12 finding that Plaintiff has an inability to ambulate effectively, as defined by the
13 Listings.

14 In light of Plaintiff's failure to provide sufficient evidence that she met
15 or equaled Listing 1.03, the Court finds that the ALJ did not err in failing to
16 consider Listing 1.03.

17 **C. If the ALJ's Failure to Mention the Lay Witness Statement Was**
18 **Error, the Error Was Harmless.**

19 **1. Background.**

20 Plaintiff claims that the ALJ erred in ignoring the Third Party Function
21 Report completed by Plaintiff's friend, Judith Appleton. (JS at 22-26; see also
22 AR at 164-71.)

23 According to Plaintiff's argument, Ms. Appleton's report furthered
24 Plaintiff's claim by explaining her symptoms and limitations, as follows:

25 On March 31, 2008, Judy Appleton, plaintiff's friend,
26 completed a Function Report – Adult – Third Party. Ms. Appleton
27 indicated in this report that she has known the plaintiff for
28 approximately 4 years and spends 15-20 hours a week with the

1 plaintiff; she stated that plaintiff tries to accomplish at least one
2 chore each day, even after taking a shower, she must rest for a while,
3 that much of her day requires resting otherwise she is hurting;
4 plaintiff does not take care of anyone else but she does take care of
5 her pets or other animals but has help from a friend or neighbor;
6 before her illnesses, injuries, or condition plaintiff was able to do the
7 following which she cannot do now: pick up her cats, walk her dogs,
8 pick up the yard and bathe her dogs; plaintiff's illnesses, injuries, or
9 conditions affect her sleep because she cannot stay in any position
10 (sitting, standing or laying) without her shoulder muscles or leg
11 muscles from spasming and she is not able to sleep more than about
12 4 hours, then the spasms wake her; plaintiff's illnesses, injuries, or
13 condition has affected her personal care because of limited arm and
14 neck movement, it is difficult for her to dress, wash and fix her hair,
15 to shower because she cannot raise her hands or easily reach her back
16 area, she also cannot bend down or over easily without losing her
17 balance which makes shaving difficult and sitting and standing back
18 up from the toilet, it is also difficult for her to sometimes clean
19 herself after using the toilet, twisting is impossible, she now must
20 wear bras that snap in the front only, she cannot wear a shirt or dress
21 that buttons or zip in back without someone helping her because she
22 cannot reach to her back; plaintiff does not need special reminders to
23 take care of personal needs and grooming or to be reminded to take
24 her medicine; plaintiff does household chores but it takes her at least
25 twice as long to do anything as compared to the average person since
26 her movements limit her; plaintiff needs help or encouragement
27 doing housework such as reaching above her shoulders or down on
28 the ground, she needs to be told she is doing well and it is okay that

1 it takes her longer to accomplish a task and now she has to pay
2 someone to do things such as household repairs, window cleaning,
3 hanging pictures or yard work; plaintiff goes outside daily even if she
4 is only sitting; plaintiff can go out alone but uses a cane to steady
5 herself so that she does not fall; plaintiff does drive but needs
6 someone with her to help her at intersections because she cannot turn
7 her head to see side to side; plaintiff shops for foods at least once a
8 week and she uses the electric cart to ride in and she also must have
9 help to reach the upper shelves and it takes her longer than the
10 average shopper; plaintiff does attend social activities but any
11 activity is at best once a week and if she goes she has limited
12 participation; plaintiff sometimes needs someone to accompany her
13 when she goes places because it is very tiring for her and
14 occasionally she may need medication and it is safer for her to not be
15 alone; if plaintiff attends any group get together it is the only thing
16 she can do on that day; plaintiff does not have problems getting
17 along with family, friends, neighbors, or others; the changes in
18 plaintiff's social activities since the illnesses, injuries or conditions
19 began are that it is very stressful for her to rely on others to now help
20 her and it upsets her that her body will not let her do things; the
21 following have been affected by plaintiff's illnesses, injuries or
22 conditions: lifting, squatting, bending, standing, reaching (she must
23 use a tool if above her shoulders or on the floor), walking, kneeling,
24 stair climbing, completing tasks; she can walk 200 feet before
25 needing to rest for 5 minutes or so before she can resume walking;
26 plaintiff does not always finish what she starts because she gets tired;
27 plaintiff does not handle stress well sometimes because she feels
28 overwhelmed that she is unable to complete a task or chore which

1 even causes more stress; changes in routine cause her blood pressure
2 to go up and occasionally she cannot accomplish a change or is gets
3 accomplished very slowly; she has noticed unusual behavior or fears
4 in plaintiff such as it is very difficult for her to no longer be self-
5 sufficient and she has to rely on other people for help, her mind
6 works very well but her body will not let her do like she used to;
7 plaintiff needs use of a cane, brace/splint, glasses and a tool for
8 reaching above her shoulders; she states that plaintiff is trying to do
9 more a little each day but it is a very slow process, she tires very
10 easily, she must try to do activities but then she must lay down for a
11 while and or sit for a while or stand, she cannot do anything without
12 rotating and doing something else because she gets tires or being
13 hurting otherwise, she gets very anxious about things, then become
14 frustrated, stressed and sometimes overwhelmed because she cannot
15 accomplish things, it is hard for plaintiff to see and know that she is
16 physically incapable to support and take care of herself and others.

17 (JS at 22-25.)

18 The ALJ made no mention of Ms. Appleton’s report in his opinion.

19 **2. Applicable Law.**

20 Title 20 C.F.R. §§ 404.1513(d) and 416.913(d) provides that, in addition
21 to medical evidence, the Commissioner “may also use evidence from other
22 sources to show the severity of [an individual’s] impairment(s) and how it
23 affects [her] ability to work,” and the Ninth Circuit has repeatedly held that
24 “[d]escriptions by friends and family members in a position to observe a
25 claimant’s symptoms and daily activities have routinely been treated as
26 competent evidence.” Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987).
27 This applies equally to the sworn hearing testimony of witnesses (see Nguyen
28 v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996)), as well as to unsworn

1 statements and letters of friends and relatives. See Schneider v. Comm’r of
2 Soc. Sec. Admin., 223 F.3d 968, 975 (9th Cir. 2000). If the ALJ chooses to
3 *reject* such evidence from “other sources,” he may not do so without comment.
4 Nguyen, 100 F.3d at 1467. The ALJ must provide “reasons that are germane to
5 each witness.” Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993).

6 The ALJ’s failure to address lay witness testimony generally is not
7 harmless. Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir. 1991). In failing to
8 address a lay witness statement, the error is harmless only if “a reviewing court
9 . . . can confidently conclude that no reasonable ALJ, when fully crediting the
10 testimony, could have reached a different disability determination.” Stout v.
11 Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1056 (9th Cir. 2006); see also
12 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006).

13 **3. Analysis.**

14 Here, the ALJ failed to mention the Function Report completed by
15 Plaintiff’s friend. A review of that report, however, demonstrates that it is not
16 inconsistent with the ALJ’s findings and, therefore, it is not at all clear that the
17 ALJ actually rejected this evidence. Accordingly, there was no need for the
18 ALJ to discuss this evidence.

19 For instance, Ms. Appleton’s statements that Plaintiff cannot stay in one
20 position for a long time, can walk for only 200 feet at a time, and must use a
21 cane, are accommodated by the ALJ’s findings that Plaintiff can walk for 15 to
22 30 minutes at a time, use a cane as needed, and sit with breaks every two hours.
23 Similarly, Ms. Appleton’s statements regarding Plaintiff’s limited ability to
24 squat, bend, and kneel, are consistent with the ALJ’s limitations in these
25 specific areas within his RFC assessment. Finally, the ALJ’s limitations on
26 Plaintiff’s ability to perform neck movement, lift and carry items, and perform
27 hand manipulations, are consistent with Ms. Appleton’s assertions.

28 However, even if the ALJ’s failure to address the opinions of Plaintiff’s

1 friend was error, the error is harmless because no reasonable ALJ would have
2 reached a different disability determination having considered it. Stout, 454
3 F.3d at 1056; Robbins, 466 F.3d at 885. This is because the opinions of
4 Plaintiff's friend mirrored the subjective complaints of Plaintiff. Plaintiff has
5 not alleged that the ALJ failed to properly consider Plaintiff's subjective
6 complaints. Accordingly, the Court finds that even if this testimony was fully
7 considered, no reasonable ALJ could have reached a different disability
8 determination. Thus, any error was harmless.

9 **IV.**

10 **ORDER**

11 Based on the foregoing, IT THEREFORE IS ORDERED that Judgment
12 be entered affirming the decision of the Commissioner, and dismissing this
13 action with prejudice.

14
15 DATED: November 9, 2011



16 **HONORABLE OSWALD PARADA**
17 United States Magistrate Judge