

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL KICK,)	Case No. ED CV 13-1444-PJW
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
CAROLYN W. COLVIN,)	
ACTING COMMISSIONER OF THE)	
SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying his application for Widower's Insurance Benefits ("WIB"). He claims that the Administrative Law Judge ("ALJ") erred when he found that Plaintiff was not credible, failed to contact the treating doctors to further develop the record, and determined Plaintiff's residual functional capacity. For the reasons explained below, the Court concludes that the ALJ did not err.

II. SUMMARY OF PROCEEDINGS

In February 2010, Plaintiff applied for WIB based on chronic pain in his neck, shoulder, elbow, and hands; nerve surgeries; post-laminectomy syndrome; osteoarthritis; fibromyalgia; lumbar disc

1 degeneration; triglyceride anemia; and depression. (Administrative
2 Record ("AR") 96, 103, 130, 175.) His application was denied
3 initially and on reconsideration and he requested and was granted a
4 hearing before an ALJ. (AR 60-61, 65, 68-79, 84-86.) On November 17,
5 2011, he appeared with counsel and testified at the hearing. (AR 33-
6 59.) On December 29, 2011, the ALJ issued a decision denying
7 benefits. (AR 11-21.) Plaintiff appealed to the Appeals Council,
8 which denied review. (AR 1-7.) He then commenced this action.

9 III. ANALYSIS

10 A. The Development of the Record

11 Plaintiff contends that the ALJ erred when he failed to obtain
12 additional medical records from his treating physicians. (Joint Stip.
13 at 3-5.) For the following reasons, the Court concludes that the ALJ
14 did not err.

15 ALJs have a duty to fully and fairly develop the record, which
16 duty is triggered by inadequate or ambiguous evidence that impedes an
17 ALJ's ability to properly evaluate a claim. *Tonapetyan v. Halter*, 242
18 F.3d 1144, 1150 (9th Cir. 2001); see also 20 C.F.R. §§ 404.1512(e),
19 416.912(e). A claimant has a corresponding duty to perfect the record
20 because he bears the burden of proving his entitlement to benefits,
21 see *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005), and
22 cannot meet that burden if he does not provide the medical records to
23 support his claims. Furthermore, even when the ALJ errs in failing to
24 develop the record, the claimant has the burden of proving that he was
25 prejudiced by the error. See *McLeod v. Astrue*, 640 F.3d 881, 887 (9th
26 Cir. 2010) ("Where harmfulness of the error is not apparent from the
27 circumstances, the party seeking reversal must explain how the error
28 caused harm.") (citing *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

1 In his decision, the ALJ observed:

2 The claimant's doctors have noted that they prepared documents
3 for the claimant's lawyer to use to support his disability
4 application, however since they do not appear to have been
5 submitted, and considering the related treatment notes reveal
6 good functioning, they would not have bolstered the claimant's
7 application.

8 (AR 19.)

9 Plaintiff argues that, because the ALJ knew that these documents
10 existed, he had a duty to ask about them and, by failing to do so, he
11 failed to protect Plaintiff's interests. The Court disagrees. First,
12 Plaintiff and his counsel were obviously aware of these documents and
13 they never submitted them before the hearing. At the end of the
14 hearing, the ALJ asked counsel if there was anything else for him to
15 consider and counsel told him "no." (AR 58.) The ALJ was free to
16 rely on this representation. After the hearing, Plaintiff and his
17 counsel did not submit these records to the ALJ or the Appeals
18 Council. Nor have they submitted them to the Court so that the Court
19 could consider their significance in reaching its decision in this
20 appeal. The inference the Court draws from Plaintiff's and his
21 counsel's actions (or lack thereof) is that there are no records from
22 the treating doctors that would establish that Plaintiff was disabled
23 during the relevant period. As such, the Court concludes that the ALJ
24 did not err by failing to pursue these records and that, even if he
25 did, any error was harmless.¹

26 _____
27 ¹ Plaintiff failed to direct the Court where to look in the
28 almost 1500-page record for information about the additional records.
After combing through the record, the Court located a reference to

1 B. The ALJ's Credibility Determination

2 Plaintiff testified at the administrative hearing that he
3 suffered from constant pain all over his body that prevented him from
4 engaging in most physical activities. (AR 40-50.) The ALJ rejected
5 this testimony because Plaintiff's reported activities were
6 inconsistent with his alleged limitations. (AR 17.) Plaintiff
7 contends that this was not a clear and convincing reason for rejecting
8 his testimony. (Joint Stip. at 14-15.) For the following reasons,
9 the Court disagrees.

10 ALJs are tasked with judging the credibility of the claimants.
11 In making these determinations, they may employ ordinary credibility
12 evaluation techniques. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
13 1996). But, where a claimant has produced objective medical evidence
14 of an impairment which could reasonably be expected to produce the
15 symptoms alleged and there is no evidence of malingering, the ALJ can
16 only reject the claimant's testimony for specific, clear, and
17 convincing reasons, *id.* at 1283-84, that are supported by substantial
18 evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th
19 Cir. 2002).

20 Plaintiff testified at the hearing that he suffered from constant
21 pain throughout his body, could not lift more than a gallon of milk,
22 could not sit or stand for more than five or ten minutes at a time,
23 and spent 95% of his time lying down. (AR 41-46.) He also testified
24

25 _____
26 "paperwork" in May 2011, six months before the hearing, by Plaintiff's
27 therapist, who notes that Plaintiff had brought in a form from his
28 lawyer for his therapist or psychiatrist to fill out. (AR 1249.)
There is no evidence that this paperwork was ever completed or that,
if it was, it would have bolstered Plaintiff's case.

1 that he could barely walk 100 feet to his mailbox and needed help
2 caring for himself. (AR 48, 49-50.)

3 In rejecting this testimony, the ALJ pointed to Plaintiff's
4 medical records, which he found inconsistent with Plaintiff's
5 testimony. (AR 17.) They revealed, for example, that, in 2008--the
6 most relevant period due to the fact that Plaintiff's date last
7 insured was July 3, 2008--Plaintiff reported to his therapist that he
8 had gone swimming, fishing, and walking around his neighborhood,
9 activities which conflicted with his testimony that he could barely do
10 anything except lie down. (AR 317-24.) In April 2009, he reported,
11 among other things, that he was being "harassed" by a new ranger at
12 his "regular fishing place." (AR 349.) In August 2009, he reported
13 that he had been walking more and had lost weight. (AR 357.) In
14 September 2009, he told his therapist that he was continuing to get
15 out of the house to walk. (AR 361.)

16 The ALJ's rejection of Plaintiff's testimony on the ground that
17 it was inconsistent with his statements to his doctor is supported by
18 the record and is affirmed. *See, e.g., Molina v. Astrue*, 674 F.3d
19 1104, 1113 (9th Cir. 2012) ("Even where [a claimant's] activities
20 suggest some difficulty functioning, they may be grounds for
21 discrediting the claimant's testimony to the extent that they
22 contradict claims of a totally debilitating impairment.") (citing
23 *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1225 (9th Cir. 2010)).

24 C. The ALJ's Residual Functional Capacity Determination

25 Plaintiff contends that the ALJ erred when he did not include any
26 exertional limitations in the residual functional capacity finding or
27 in the hypothetical question to the vocational expert despite the fact
28 that he had concluded that Plaintiff suffered from numerous severe

1 physical impairments. (Joint Stip. at 12-14.) This claim, too, is
2 rejected.

3 The ALJ found that Plaintiff's spinal disorders, fibromyalgia,
4 anemia, chronic pain syndrome with long term opioid use, history of
5 multiple surgeries, and obesity were severe impairments. He did not
6 include any limitations based on these impairments, however, because
7 he concluded that they did not limit Plaintiff's functioning. For
8 example, he noted that Plaintiff's fibromyalgia was well treated with
9 medication. (AR 18.) He also found that Plaintiff's alleged level of
10 opioid use was not supported by the medical evidence. (AR 18.) And
11 he found no evidence that Plaintiff's obesity significantly interfered
12 with his ability to work. (AR 19.) As for Plaintiff's orthopedic
13 issues, the ALJ concluded that the objective evidence did not support
14 Plaintiff's claim that they limited him. (AR 20.)

15 Because the ALJ concluded that these impairments did not impact
16 Plaintiff's ability to work, a finding Plaintiff has not challenged,
17 he was not required to include any limitations based on them in the
18 residual functional capacity finding or the hypothetical question to
19 the vocational expert. *Osenbrock v. Apfel*, 240 F.3d 1157, 1163-64
20 (9th Cir. 2001) (explaining ALJ only required to include limitations
21 in residual functional capacity and hypothetical question to
22 vocational expert that are supported by substantial evidence in the
23 record).

1 IV. CONCLUSION

2 For these reasons, the Agency's decision is affirmed and the case
3 is dismissed with prejudice.

4 IT IS SO ORDERED.

5 DATED: March 9, 2015.

6
7
8 

9 PATRICK J. WALSH
10 UNITED STATES MAGISTRATE JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27