UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SUSAN M. JOHNSON,

Plaintiff,

v.

NANCY A. BERRYHILL,[1] Acting Commissioner of Social Security,

Defendant.

Case No.: EDCV 16-01891-JDE

MEMORANDUM OPINION AND ORDER

Plaintiff Susan M. Johnson ("Plaintiff") filed a Complaint on September 6, 2016, seeking review of the Commissioner's denial of her applications for disability insurance benefits ("DIB") and supplemental security income ("SSI"). The parties filed consents to proceed before the undersigned Magistrate Judge. In accordance with the Court's Case Management Order, the parties filed a Joint Stipulation ("Jt. Stip.") on June 20, 2017, addressing their respective positions. The Court has taken the Joint Stipulation under

[1] Nancy A. Berryhill, now the Acting Commissioner of Social Security ("Defendant" or "Commissioner"), is substituted in as defendant. See 42 U.S.C. § 405(g).

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submission without oral argument. As set forth in the Case Management Order, this decision is being made on the basis of the pleadings, the Administrative Record ("AR"), and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court will determine which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

I.

BACKGROUND

On June 26, 2012, a prior Administrative Law Judge ("prior ALJ") found Plaintiff not disabled in connection with prior applications for benefits. (AR 21, 93-107.)

On March 25, 2013, Plaintiff applied for DIB and SSI, alleging disability beginning June 27, 2012. (AR 266-78.) After her application was denied initially (AR 171-75), and on reconsideration (AR 181-92), Plaintiff requested an administrative hearing, which was held on June 1, 2015 and September 28, 2015. (AR 46-92, 193-95.) Plaintiff, represented by counsel, appeared and testified at the hearing before an Administrative Law Judge ("ALJ"), as did Dr. Wayne Kidder, medical expert, and Sandra Fioretti, vocational expert ("VE"). (AR 46-92.)

On November 3, 2015, the ALJ issued a written decision finding Plaintiff was not disabled. (AR 18-37.) The ALJ found that there had not been a showing of a changed circumstance material to the determination of disability and the presumption of continuing nondisability had not been rebutted. The ALJ adopted the findings of the prior ALJ decision. [2] (AR 22.)

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[2] A prior final determination that a claimant is not disabled creates a presumption of continuing non-disability with respect to any subsequent unadjudicated period of alleged disability. See Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988); Social Security Acquiescence Ruling 97-4(9). A claimant can rebut this presumption by

The ALJ found that Plaintiff had not engaged in substantial gainful activity since the alleged onset date. (AR 24.) The ALJ determined that Plaintiff suffered from the following severe impairments: chest pain with shortness of breath; possible angina; rule out coronary artery disease; history of tachycardia; rule out valvular heart disease; chronic pain syndrome of the left foot; edema of the left leg; internal derangement of the left ankle and left knee; lumbar spine strain; rule out herniated lumbar disc; disc protrusion from T12 to L3; spondylosis; and disc dessication at L4-S1 with mild hypertrophic facet changes. (Id.) The ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled a listed impairment. (AR 28.) The ALJ found that Plaintiff had the residual functional capacity ("RFC") to perform sedentary work with the following limitations: (1) occasionally lift and carry 10 pounds and frequently lift and carry less than 10 pounds; (2) stand and walk for two hours in an eight-hour workday; (3) sit for six hours in an eight-hour workday with an option to change positions at 15-

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proving "changed circumstances," i.e., existence of an impairment not previously considered, increase in the severity of an existing impairment, change in claimant's age category, or a change in the criteria for determining disability. See Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995) (as amended); Acquiescence Ruling 97-4(9). In addition, the Commissioner does not apply res judicata "where the claimant was unrepresented by counsel at the time of the prior claim." Lester, 81 F.3d at 827-28. Here, although it appears Plaintiff was not represented at the prior administrative hearing, (AR 96), she does not challenge the ALJ's finding on this issue (nor did she raise it before the Appeals Council) and as such, this issue is not before the Court. (See Case Management Order at 4, 6 (instructing Plaintiff to identify each of the disputed issues she is raising and explaining that "[a]ny issue not raised in the Joint Stipulation may be deemed to have been waived")); see also Crawford v. Gould, 56 F.3d 1162, 1169 (9th Cir. 1995) (as amended) (vacating a portion of the district court's order because the court did not have the authority to address an issue the parties did not raise); Pottle v. Astrue, 266 F. App'x 526, 528-29 (9th Cir. 2008) (arguments that ALJ erred in finding that the plaintiff did not meet or equal the listing criteria for Listing 12.05C were waived because the plaintiff failed to raise these arguments in the district court).

minute intervals; (4) occasionally climb stairs, balance, and stoop; (5) no crawling, kneeling, crouching, or climbing ladders, ropes, or scaffolds; (6) no use of foot controls with the left lower extremity; (7) should avoid concentrated exposure to fumes, odors, dusts, gases, and poor ventilation; (8) occasionally perform fingering and handling activities; and (9) should avoid unprotected machinery and heights. (AR 29.) The ALJ further found that Plaintiff was unable to perform any past relevant work (AR 34), but considering her age, education, work experience, and RFC, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, including work as (1) an election clerk, (Dictionary of Occupational Titles ["DOT"] 205.367-030); and (2) call out operator, (DOT 237.367-014). (AR 36.) The ALJ concluded that Plaintiff was not under a "disability" as defined by the Social Security Act. (AR 36-37.)

Plaintiff filed a request with the Appeals Council for review of the ALJ's decision. (AR 16-17.) On July 7, 2016, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision the Commissioner's final decision. (AR 1-3.) This action followed.

II.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The ALJ's findings and decision should be upheld if they are free from legal error and supported by substantial evidence based on the record as a whole. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less than a preponderance. Id. To determine whether substantial evidence supports

a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21; see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) ("Even when the evidence is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record."). However, a court may review only the reasons stated by the ALJ in his decision "and may not affirm the ALJ on a ground upon which he did not rely." Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

Lastly, even when the ALJ commits legal error, the Court upholds the decision where that error is harmless. Molina, 674 F.3d at 1115. An error is harmless if it is "inconsequential to the ultimate nondisability determination," or if "the agency's path may reasonably be discerned, even if the agency explains its decision with less than ideal clarity." Brown-Hunter, 806 F.3d at 492 (citation omitted).

III.

DISCUSSION

Plaintiff contends that the ALJ's finding at step five of the sequential evaluation process was not supported by substantial evidence because the hypothetical posed to the VE was "hopelessly vague." (Jt. Stip. at 5.) In particular, Plaintiff maintains that the ALJ's limitation of "[sitting] for six hours in an eight-hour workday with an option to change positions at 15-minute intervals" is vague because it does not specify whether the option is to stand at 15 minute intervals or shift her body weight in her seat. (Id. at 5, 10.)

Defendant argues that Plaintiff waived this issue on appeal because

Plaintiff, who was represented by counsel at the administrative hearing, did not raise this issue at the hearing, citing to Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999). (Jt. Stip. at 13.) Alternatively, Defendant argues that this contention fails on the merits and any error was harmless. (Id. at 13-14.) Plaintiff does not respond to either the waiver or harmless error arguments. Because the Court concludes that the ALJ's hypothetical was sufficiently clear, the Court does not resolve the issue of waiver.

At step five, the ALJ has the burden of establishing, through the testimony of a VE or by reference to the Medical-Vocational Guidelines, that the claimant can perform alternative jobs that exist in substantial numbers in the national economy. See Gutierrez v. Colvin, 844 F.3d 804, 806-07 (9th Cir. 2016); Bruton v. Massanari, 268 F.3d 824, 827 n.1 (9th Cir. 2001) (as amended). When using the testimony of a VE at step five, "the VE must identify a specific job or jobs in the national economy having requirements that the claimant's physical and mental abilities and vocational qualifications would satisfy." Osenbrock v. Apfel, 240 F.3d 1157, 1162-63 (9th Cir. 2001).

In this case, the ALJ asked the VE the following hypothetical question at the administrative hearing (AR 78-79 (emphasis added)):

> Assuming a 48-year-old individual with one year of college that's then only done the three jobs, the punch-press operator, grocery bagger, and a change person. This individual has the following hypothetical limitations. Can perform a range of sedentary work; can lift and carry occasionally ten pounds, frequently less than ten pounds; can stand and walk for two hours out of an eight-hour day; *sit for six hours with an option to change positions at 15-minute intervals* . . . .[o]ccasional stairs, balance, stoop; no crawling, kneeling, crouching or climbing ladders, ropes or scaffolds. . . . No foot controls with left lower extremity only; should avoid

> concentrated exposure to fumes, odors, dust, gases, and poor ventilation; can occasionally do fingering and handling; should avoid unprotected machinery and heights. Would that person be able to do any of the past relevant work of that done by the claimant and/or per the DOT?

After the VE testified that an individual with these functional limitations would not be able to do her past relevant work, the VE indicated that this hypothetical individual would be able to do the jobs of an election clerk and call out operator. (AR 79-80.)

Plaintiff maintains that the phrase "change positions" is vague, and as such, the VE's testimony "upon which the ALJ's determination at Step 5 is based is without evidentiary value that [Plaintiff] can perform either occupation." (Jt. Stip. at 12.) As explained below, the Court disagrees.

Here, the ALJ sufficiently described Plaintiff's functional abilities in his hypothetical question to the VE. Although the ALJ did not define what he meant by "change positions" in his hypothetical question, this phrase is used frequently in social security cases to describe the need to alternate between sitting and standing. Plaintiff has not cited to any cases where this phrase was used to describe shifting weight while seated, or that the need to shift weight while seated would have any impact on the availability of jobs, such that it would be included in an RFC assessment. Indeed, the Court has found only a single instance in this Circuit where the ALJ used the phrase "change positions" to describe shifting weight. Even in that case, the phrase did not merely refer to shifting weight, but also encompassed the need to move around. Spellman v. Astrue, 2008 WL 2945481, at *6 (E.D. Wash. July 28, 2008) (describing hypothetical individual who would "find it necessary to change positions from time to time to relieve his symptoms, perhaps shifting weight or and moving around").

In this case, the ALJ otherwise described Plaintiff's functional abilities by including in his hypothetical question a limitation to "sedentary work"—a term of art used in Social Security disability cases to describe, by function, a specific set of work-related abilities. See 20 C.F.R. §§ 404.1567(a), 416.967; Social Security Ruling ("SSR") 96-9p, 1996 WL 374185. SSR 96-9p, which explains "the Social Security Administration's policies regarding the impact of a residual functional capacity (RFC) assessment for less than a full range of sedentary work on an individual's ability to do other work," contains specific guidelines on how the Administration will evaluate the impact of the need to "alternate sitting and standing" on a claimant's ability to perform sedentary work. No such guidelines are provided to address the need to shift one's body weight in the seated position or "wiggle in her seat." Determining whether an individual retains the ability to do other work specifically contemplates a discussion of an individual's need to alternate between sitting and standing, but provides no similar discussion based on the need to shift one's weight in a seated position. Thus, Plaintiff's proposed interpretation of "change positions" is not consistent with SSR 96-9p.

Additionally, the ALJ's hypothetical was consistent with the prior ALJ's RFC assessment. As explained, the ALJ adopted the findings of the prior ALJ decision. (AR 22.) The ALJ specifically discussed these findings in the administrative hearing, asking the medical expert regarding the ALJ's prior RFC assessment, which included "need[ing] the sit and stand options every 15-minute[s] . . . ." (AR 68.) The record reflects that the VE clearly understood, based on her professional background, the meaning of the ALJ's limitation on "chang[ing] positions." Further, although represented by counsel, Plaintiff did not object to the hypothetical question posed by the ALJ or request clarification.

Moreover, although Plaintiff contends that alternating between sitting

and standing would preclude the election clerk and call out operator positions, Plaintiff does not provide any specific language in the DOT to support her position. (Jt. Stip. at 11.) Plaintiff maintains that these positions are performed at a desk, and if the desk is at seated level, standing every 15 minutes would preclude these positions. (Id.) The Court has reviewed the DOT description of election clerk (DOT 205.367-030) and call out operator (DOT 237.367-014) and finds neither description references a requirement that the duties must be performed at a desk "at seated level," as contemplated by Plaintiff. Indeed, Plaintiff's contention is directly contradicted by the prior ALJ's finding that Plaintiff could perform the job of election clerk with the alternating sit-stand limitation. The prior VE, like the VE in this proceeding, found that Plaintiff would be able to perform work as an election clerk. Based on the testimony of the prior VE, the prior ALJ concluded that Plaintiff was capable of making a successful adjustment to other work that existed in significant numbers in the national economy, including that of an election clerk. (AR 106-07.)

After reviewing the parties' respective contentions and the record as a whole, the Court concludes that the ALJ's finding at step five was supported by substantial evidence. Remand is not warranted.

IV.

ORDER

IT IS ORDERED that Judgment be entered affirming the decision of the Commissioner and dismissing this action with prejudice.

Dated: July 28, 2017

JOHN D. EARLY
United States Magistrate Judge