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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY WAYNE COMBS	)	No. CV 16-02580-AS
	)	
Plaintiff,	)	<b>MEMORANDUM OPINION</b>
v.	)	
	)	
NANCY A. BERRYHILL, <sup>1</sup>	)	
Acting Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	

PROCEEDINGS

On December 16, 2016, Plaintiff Anthony Wayne Combs ("Plaintiff") filed a Complaint seeking review of the Commissioner's denial of Plaintiff's application for Social Security Disability Insurance benefits ("DIB") and Supplemental Security Income benefits ("SSI") for lack of disability. (Docket Entry No. 1). On May 3,

<sup>1</sup> Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for Acting Commissioner Carolyn W. Colvin in this case. See Fed. R. Civ. P. 25(d).

1 2017, Defendant filed an Answer to the Complaint along with the  
2 Certified Administrative Record ("AR"). (Docket Entry Nos. 21-22).  
3 The parties have consented to proceed before a United States  
4 Magistrate Judge. (Docket Entry Nos. 13, 27). The parties filed a  
5 Joint Stipulation ("Joint Stip.") on August 2, 2017, setting forth  
6 their respective positions on Plaintiff's claims. (Docket Entry No.  
7 26).

8  
9 For the reasons discussed below, the decision of the  
10 Administrative Law Judge is AFFIRMED.

11  
12 **SUMMARY OF ADMINISTRATIVE DECISION**

13  
14 On September 9, 2013, Plaintiff, formerly employed as a  
15 cashier, driller, convenient store porter, and retail store stocker,  
16 filed an application for DIB, alleging disability beginning on  
17 October 20, 2012. (AR 270, 236). On September 16, 2013, Plaintiff  
18 filed an application for SSI, similarly alleging disability  
19 beginning on October 20, 2012 due to traumatic brain injury,  
20 seizures, and blindness in the right eye. (238-246). On March 13,  
21 2015, Administrative Law Judge ("ALJ") Dante M. Alegre held a  
22 hearing at which he heard testimony from Plaintiff and vocational  
23 expert ("VE") Ruth Arnush. (AR 48-67). On August 5, 2015, the ALJ  
24 denied Plaintiff's application. (AR 33-41).

25  
26 The ALJ applied the five-step process in evaluating Plaintiff's  
27 case. At step one, the ALJ found that Plaintiff meets the insured  
28 status requirements of the Social Security Act through September 6,

1 2014 and has not engaged in substantial gainful activity since  
2 October 20, 2012, the alleged onset date. (AR 36). At step two,  
3 the ALJ found that Plaintiff had the following severe impairments:  
4 seizure disorder and right eye blindness (Id.). At step three, the  
5 ALJ determined that Plaintiff's impairments did not meet or equal a  
6 Listing found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 36-  
7 37).

8  
9 The ALJ then found that Plaintiff had the residual functional  
10 capacity ("RFC")<sup>2</sup> to perform a full range of work at all exertional  
11 levels but with the following non-exertional limitations: "the  
12 [plaintiff] should not climb ladders, ropes, or scaffolds; the  
13 [plaintiff] should avoid working with moving machinery and  
14 unprotected heights; and the [plaintiff] has monocular vision." (AR  
15 37).

16  
17 In arriving at his conclusion, the ALJ found that Plaintiff's  
18 medically determinable impairments could reasonably be expected to  
19 cause some of the alleged symptoms; however, Plaintiff's statements  
20 concerning the intensity, persistence and limiting effects of these  
21 symptoms are not entirely credible. (AR 38).

22  
23 At step four, the ALJ determined that Plaintiff was capable of  
24 performing past relevant work as a commercial cleaner and stock  
25 clerk, as this work does not require the performance of work-related  
26

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27 <sup>2</sup> A Residual Functional Capacity is what a claimant can  
28 still do despite existing exertional and nonexertional limitations.  
See 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

1 activities precluded by Plaintiff's RFC. (AR 39). At step five,  
2 the ALJ found that, in the alternative and considering Plaintiff's  
3 age, education, work experience, and RFC, there were jobs that  
4 existed in significant numbers in the national economy that  
5 Plaintiff could also perform. (AR 40).

6  
7 **STANDARD OF REVIEW**  
8

9 This court reviews the Administration's decision to determine  
10 if it is free of legal error and supported by substantial evidence.  
11 See Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1161 (9th  
12 Cir. 2012). "Substantial evidence" is more than a mere scintilla,  
13 but less than a preponderance. Garrison v. Colvin, 759 F.3d 995,  
14 1009 (9th Cir. 2014). To determine whether substantial evidence  
15 supports a finding, "a court must consider the record as a whole,  
16 weighing both evidence that supports and evidence that detracts from  
17 the [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d  
18 1033, 1035 (9th Cir. 2001). As a result, "[i]f the evidence can  
19 reasonably support either affirming or reversing the ALJ's  
20 conclusion, [a court] may not substitute [its] judgment for that of  
21 the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.  
22 2006).

23  
24 **PLAINTIFF'S CONTENTIONS**  
25

26 Plaintiff alleges that: (1) the ALJ failed to develop the  
27 record by not obtaining treating or examining source opinion  
28 evidence; (2) the ALJ failed to properly consider Plaintiff's

1 seizure disorder under the Listings; and (3) the ALJ's credibility  
2 determination is not supported by substantial evidence. (Joint  
3 Stip. at 2).

4  
5 **DISCUSSION**

6  
7 After reviewing the record, the Court finds that the  
8 Commissioner's findings are supported by substantial evidence and  
9 are free from material legal error.<sup>3</sup>

10  
11 **A. The ALJ Did Not Fail To Fulfill His Duty To Fully And Fairly**  
12 **Develop The Record**

13  
14 Plaintiff claims that the ALJ failed to fulfill his duty to  
15 fully and fairly develop the record. (Joint Stip. at 13).  
16 Specifically, Plaintiff argues that the ALJ should have obtained  
17 physical and cognitive opinion evidence from an examining or  
18 treating source. (Id.). Defendant counters that the record was  
19 fully developed and that substantial evidence throughout the record  
20 supports the ALJ's RFC finding as well as his finding that  
21 Plaintiff's condition could be controlled if he was compliant with  
22 his treatment regimen. (Joint Stip. at 16, 18). The Court agrees.

23  
24 Although Plaintiff bears the burden of proving disability, an  
25 ALJ has an affirmative duty to assist the claimant in developing the

26 <sup>3</sup> The harmless error rule applies to the review of  
27 administrative decisions regarding disability. See McLeod v.  
28 Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400  
F.3d 676, 679 (9th Cir. 2005) (an ALJ's decision will not be  
reversed for errors that are harmless).

1 record at every step of the sequential evaluation process.  
2 Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir.2001); see also  
3 Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir.2005). The ALJ's duty  
4 to develop the record is triggered, however, only "when there is  
5 ambiguous evidence or when the record is inadequate to allow for  
6 proper evaluation of the evidence." Mayes v. Massanari, 276 F.3d  
7 453, 459-60 (9th Cir.2001).

8  
9 Here, the ALJ did not state, and the record does not reflect,  
10 that the medical evidence was ambiguous or otherwise inadequate to  
11 allow for proper evaluation of the evidence. See AR 36-40. To the  
12 contrary, the record included significant medical evidence as well  
13 as the opinions of two State agency medical consultants who found  
14 Plaintiff was not disabled, explaining that, "[a]lthough you have a  
15 history of seizures, you are able to perform work that does not  
16 involve a great deal of climbing, balancing or exposure to  
17 workplace hazards. Although you suffered a brain injury, that  
18 condition is not considered severe. Your vision allows you to do  
19 normal daily activities. There is no evidence of any other disabling  
20 medical conditions." (AR 124, 133, 145, 155). With regard to the  
21 consultants' opinions, Plaintiff contends that "there were only non-  
22 examining physician opinions in the record, and they occurred prior  
23 to seizure frequency in March 2014 . . . [t]here were simply a number  
24 of records these doctors did not see . . . failure to get a  
25 consultative examination, or failure to recontact any of  
26 [Plaintiff's] treating sources, was harmful error." (Joint Stip. at  
27 14). While the non-examining consultant physicians did not have  
28 access to medical records dated after their reviews (conducted on  
November 4, 2013 and January 16, 2014), Plaintiff fails to

1 articulate what new and impactful information these records provide,  
2 how they demonstrate that his condition significantly worsened, or  
3 how their inclusion would have impacted the physicians' review.  
4 Plaintiff has failed to show that the inclusion of these records  
5 would have altered the reviewing physicians' assessment of his  
6 medical conditions.

7  
8 Moreover, as discussed more thoroughly below, the ALJ  
9 specifically addressed Plaintiff's claims that his seizures had  
10 become more frequent since the non-examining physicians' review,  
11 stating "the record documents the [plaintiff's] reports of varying  
12 degrees of frequency to his doctors. Additionally ... his seizures  
13 coincided with lab results indicating low levels of his anti-seizure  
14 medications, which is suggestive of noncompliance . . . ." (AR 38).

15  
16 With regard to the other significant medical evidence in the  
17 record, Plaintiff contends that the ALJ is unqualified to "play  
18 doctor" and "turn the raw medical data into functional terms."  
19 (Joint Stip. 21). However, the ALJ did not rely on his own  
20 interpretation of "raw data." The ALJ cited to the medical  
21 personnel's interpretation of Plaintiff's records in support of his  
22 decision. For example, in determining that Plaintiff's seizures  
23 coincided with lab results indicating low levels of anti-seizure  
24 medications, which is suggestive of non-compliance, the ALJ cited to  
25 medical reports stating "most recent dilantin drug level was May 14,  
26 2014 (low) 6.4mcg/ml" and that Plaintiff "developed SZ disorder  
27 which seem to be under control when comply with dilantin meds 100 mg  
28 po id and most recent level was 6.4mcg/ml". (AR 463, 465).

1 Thus, the Court finds that the ALJ did not fail to fulfill his  
2 duty to fully and fairly develop the record. Contrary to  
3 Plaintiff's assertion, the record was fully developed and included  
4 substantial evidence to support the ALJ's RFC finding as well as his  
5 finding that Plaintiff's condition could be controlled if he was  
6 compliant with his treatment regimen.

7  
8 **B. The ALJ Properly Considered Plaintiff's Seizure Disorder Under**  
9 **The Listings**

10  
11  
12 Plaintiff asserts that the ALJ improperly evaluated whether  
13 Plaintiff's impairment met or medically equaled the criteria of any  
14 medical listing. (Joint Stip. at 22). Specifically, Plaintiff  
15 claims that the ALJ offered "no comparison of evidence as to why  
16 Plaintiff did not meeting Listing 11.02."<sup>4</sup> (Id.). Defendant

17 <sup>4</sup> At the time of the ALJ's decision, the Listing of  
18 Impairments stated: "In epilepsy, regardless of etiology, degree of  
19 impairment will be determined according to type, frequency,  
20 duration, and sequelae of seizures. At least one detailed  
21 description of a typical seizure is required. Such description  
22 includes the presence or absence of aura, tongue bites, sphincter  
23 control, injuries associated with the attack, and postictal  
24 phenomena. The reporting physician should indicate the extent to  
25 which description of seizures reflects his own observations and the  
26 source of ancillary information. Testimony of persons other than the  
27 claimant is essential for description of type and frequency of  
28 seizures if professional observation is not available.

Under 11.02 and 11.03, the criteria can be applied only if the  
impairment persists despite the fact that the individual is  
following prescribed antiepileptic treatment. Adherence to  
prescribed antiepileptic therapy can ordinarily be determined from  
objective clinical findings in the report of the physician currently  
providing treatment for epilepsy." See  
<https://secure.ssa.gov/poms.nsf/lnx/0434131013>.



1 counters that, because Plaintiff failed to adhere to his prescribed  
2 treatment, the ALJ reasonably found that he did not meet all the  
3 requirements of Listing 11.02, and was therefore not *per se*  
4 disabled. (Joint Stip. at 24). The Court agrees.

5  
6 A claimant's impairment does not meet the epilepsy listing  
7 unless it "persists despite the fact that the individual is  
8 following prescribed anticonvulsive treatment." 20 C.F.R. Pt. 404,  
9 Subpt. P, App. 1, § 11.00A. An ALJ can ordinarily determine whether  
10 a claimant is adhering to his or her prescribed therapy from  
11 objective clinical findings in the treating physician's report. Id.  
12 An ALJ cannot allow a claim under the epilepsy listing without a  
13 record of anticonvulsant blood levels. Social Security Ruling 87-6  
14 (1987). The ALJ must evaluate blood drug levels along with all  
15 other evidence to determine the extent of the claimant's compliance  
16 with treatment. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 11.00A.

17 Here, the ALJ evaluated Plaintiff's medical record as well as  
18 evidence regarding blood drug levels and concluded that they  
19 suggested non-compliance. (AR 38). The ALJ stated that Plaintiff's  
20 seizures "coincided with lab results indicating low levels of his  
21 anti-seizure medications, which is suggestive of noncompliance. . ."  
22 (Id.). The ALJ later noted that certain of Plaintiff's alleged  
23 seizure episodes "coincided with low levels of the claimant's anti-  
24 seizure medications or drug use." (Id.). Indeed, medical records  
25 indicate that a level between 10 and 20 is an effective medication  
26 level, but that Plaintiff consistently had lower levels in his  
27 system. (see e.g., AR 493). In March 2014, Plaintiff suffered a  
28 seizure and his Dilantin level was recorded at "0.1." (AR 488, 493).

1 The medical record indicates that Plaintiff's sister "reports  
2 patient not take Dilantin." (AR 488). Again, in May 2014,  
3 Plaintiff reported to the Emergency Department following three back  
4 to back seizures. Lab results indicated a Dilantin level of 6.3.  
5 (AR 472-474).

6  
7 Thus, because significant evidence indicates that Plaintiff  
8 failed to adhere to his prescribed treatment, the ALJ reasonably  
9 found that he did not meet all the requirements of Listing 11.02,  
10 and was not *per se* disabled.

11 **C. The ALJ's Credibility Determination Is Supported By Substantial**  
12 **Evidence**

13  
14 Plaintiff contends that the ALJ's credibility determination is  
15 not supported by substantial evidence because Plaintiff's testimony  
16 directly comports with the medical evidence of record and no  
17 examining or treating physician endorsed Plaintiff's functional  
18 limitations or the assertion that Plaintiff underwent "conservative  
19 treatment." (Joint Stip. at 30). Defendant counters that there is  
20 evidence throughout the record that Plaintiff's physicians measured  
21 his anti-seizure medication at sub-therapeutic levels and, thus, the  
22 ALJ reasonably found Plaintiff's subjective symptom allegations not  
23 fully credible. (Joint Stip. at 31). The Court agrees.

24  
25 The ALJ rejected Plaintiff's testimony as to the disabling  
26 nature of his limitations in part due to his non-compliance with  
27 treatment. (AR 38-39). Failure to seek treatment or follow a  
28 prescribed course of treatment is a relevant credibility

1 consideration. Orn v. Astrue, 495 F.3d 625, 636 (9th Cir. 2007);  
2 see also id. at 638 ("Our case law is clear that if a claimant  
3 complains about disabling pain but fails to seek treatment, or fails  
4 to follow prescribed treatment, for the pain, an ALJ may use such  
5 failure as a basis for finding the complaint unjustified or  
6 exaggerated.").

7  
8 The ALJ further noted that Plaintiff's treatment was  
9 conservative and that he failed to seek more aggressive treatment.  
10 (AR 38). Plaintiff claims that the record "overwhelming[ly]  
11 indicates financial struggles, to the point where he required  
12 referrals from emergency departments after treatments of seizures  
13 due to lack of insurance." (Joint Stip. at 30). However, even if  
14 financial constraints were an obstacle to treatment, Plaintiff's  
15 non-compliance support the ALJ's credibility determination. The  
16 record indicates that a social worker stated that she "talked with  
17 the patient [] about coverage, but when he leaves the hospital he  
18 refuses to answer or return calls," and that "[t]hey have also given  
19 him numerous business cards and brochures." (AR 498). A separate  
20 medical report indicates that when Plaintiff was asked if he has  
21 "attempted to get Medi-Cal or Arrowcare, he responded 'No.'" (AR  
22 505). Thus, it was reasonable for the ALJ to consider Plaintiff's  
23 failure to seek treatment, non compliance with prescribed  
24 medication, and conservative care when evaluating his credibility.

25 The Ninth Circuit has made clear that when the evidence is  
26 subject to more than one interpretation, the ALJ's interpretation is  
27 entitled to deference as long as it is reasonable. See, e.g., Thomas  
28

1 v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002) ("Where the evidence  
2 is susceptible to more than one rational interpretation, one of  
3 which supports the ALJ's decision, the ALJ's conclusion must be  
4 upheld.") On this record, the Court finds the ALJ's interpretation  
5 of the evidence to be reasonable. Accordingly, the ALJ's findings  
6 are free of legal error and will not be disturbed.

7

8

**CONCLUSION**

9

10 For the foregoing reasons, the decision of the Commissioner is  
11 AFFIRMED.

12

13 LET JUDGMENT BE ENTERED ACCORDINGLY.

14

15 Dated: August 29, 2017

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\_\_\_\_\_/s/\_\_\_\_\_  
ALKA SAGAR  
UNITED STATES MAGISTRATE JUDGE

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