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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-SOUTHERN DIVISION

TERRY INGHAM,)	SA CV 09-931-SH
	}	
Plaintiff,	}	MEMORANDUM DECISION
	}	
v.	}	
	}	
MICHAEL J. ASTRUE, Commissioner of Social Security Administration,	}	
	}	
Defendant.	}	

I. INTRODUCTION

This matter is before the Court for review of the decision by the Commissioner of the Social Security Administration (“Commissioner”) denying plaintiff’s application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act. 42 U.S.C. § 1381 *et seq.* Pursuant to 28 U.S.C. § 636(c), the parties have consented that the case may be handled by the undersigned. The action arises under 42 U.S.C. § 405(g), which authorizes this Court to enter judgment upon the pleadings and transcript of the record before

1 the Commissioner. The plaintiff and defendant have filed their pleadings and the
2 defendant has filed a certified transcript of the record (“AR”). After reviewing
3 the matter, this Court concludes that the decision of the Commissioner should be
4 affirmed.

5 **II. PROCEEDINGS**

6 On October 12, 2005, plaintiff, Terry Ingham, filed an application for SSI
7 benefits alleging an inability to work since May 1, 2005, due to disability. After
8 his claim was denied initially and upon reconsideration, plaintiff filed a request
9 for a hearing before the Administrative Law Judge (“ALJ”). The ALJ denied the
10 claim in a written decision dated August 9, 2007. In filing a request for review,
11 plaintiff submitted sixty-eight pages of new evidence to the Appeals Council.
12 After considering the new evidence, the Appeals Council denied plaintiff’s
13 request, and the present action was subsequently filed in this Court.

14 Plaintiff raises four issue. Plaintiff alleges that (1) the ALJ erred in failing
15 to properly consider the plaintiff’s subjective complaints; (2) the ALJ erred in
16 failing to properly consider the testimony of plaintiff’s mother, Joan Ingham; (3)
17 the ALJ erred in failing to consider the opinions of two doctors; and (4) the new
18 and material evidence provided to the Appeals Council supports a remand.

19 Each of plaintiff’s contentions will be addressed in turn.

20 **ISSUE No. 1:**

21 Plaintiff argues that the ALJ failed to make proper credibility findings
22 regarding plaintiff’s testimony, and failed to provide legally sufficient reasons for
23 discrediting plaintiff’s testimony regarding the severity of his pain and
24 limitations. In response, defendant argues that the ALJ’s assessment of
25 plaintiff’s testimony and subsequent finding that it was not credible was proper,
26 because the ALJ articulated specific, clear and convincing reasons for
27 discrediting plaintiff’s allegations.

1 The Commissioner's assessment of plaintiff's credibility should be given
2 great weight. Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985). In making a
3 credibility determination of the claimant, unless there is affirmative evidence
4 showing that the claimant is malingering, the ALJ's reasons for rejecting the
5 claimant's testimony must be "clear and convincing." Valentine v. Comm'r
6 Social Sec. Admin., 574 F.3d 685, 693 (9th Cir. 2009); Lester v. Chater, 81 F.3d
7 at 821, 834 (9th Cir. 1995). If an ALJ finds that a claimant's testimony relating
8 to the intensity of his or her pain is unreliable, he must cite the reasons why he
9 found the testimony unpersuasive. See Morgan v. Comm'r of Soc. Sec. Admin.,
10 169 F.3d 595, 599 (9th Cir. 1999). The ALJ must specifically identify what
11 testimony is credible and what testimony undermines the claimant's complaints.
12 See Lester, 81 F.3d at 834; Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

13 Here, the ALJ provided clear and convincing reasons for determining that
14 plaintiff was not credible as to his allegations of pain and limitations. The ALJ
15 concluded that plaintiff's "inconsistencies negatively impact his credibility and
16 do not permit reliance on his statements." (AR 25). The ALJ allocated a
17 considerable portion of his written decision to explaining the basis for his
18 determination. (AR 24-25). Further, the ALJ "pointed to specific evidence in the
19 record" that undermined plaintiff's claims. Morgan, 169 F.3d at 599 (finding the
20 ALJ had provided "clear and convincing reasons" for rejecting the plaintiff's
21 subjective complaints because the ALJ pointed to specific evidence in the record
22 in identifying what testimony was credible and what was not). Specifically, the
23 ALJ pointed out that there was very little evidence that plaintiff had sought
24 treatment for pain or used any home remedies to alleviate the pain. (AR 24).
25 There was no evidence to corroborate plaintiff's statements that he is "practically
26 non-functional", or that he suffered sleep deprivation from pain, nor any
27 concentration, attention, or cognitive deficits from pain. (AR 24). Also, the ALJ
28 found plaintiff's daily activities were inconsistent with his allegations of

1 excessive pain. Plaintiff took care of his own personal needs, did gardening,
2 went grocery shopping, performed household chores, prepared breakfast, and
3 drove a vehicle. (AR 25). See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)
4 (finding that daily activities may be a reason to discredit excess pain allegations
5 if the claimant is able to spend a substantial part of the day performing activities
6 which are transferable to a work setting).

7 Therefore, since the ALJ found plaintiff's complaints of excessive pain
8 and limitations lacked credibility, it was proper for him to reject plaintiff's
9 testimony.

10 **ISSUE No. 2:**

11 Plaintiff asserts that the ALJ committed legal error by failing to properly
12 consider the lay testimony of plaintiff's mother, Joan Ingham. Defendant
13 maintains that the ALJ's failure to explicitly assess Joan Ingham's testimony
14 was, at most, harmless error.

15 The ALJ is required to consider the credibility of lay testimony provided
16 by family members and friends who provide their own statement regarding a
17 claimant's disabling symptoms. Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir.
18 2009). If an ALJ rejects lay witness testimony, the ALJ must provide specific
19 reasons that are germane to each witness whose testimony he rejects. Id. (citing
20 Stout v. Comm'r, Social Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006)).

21 However, where an ALJ fails to properly discuss competent lay testimony
22 favorable to the claimant, a reviewing court may consider the error harmless if it
23 can "confidently conclude that no reasonable ALJ, when fully crediting the
24 testimony, could have reached a different conclusion." Stout, 454 F.3d at 1056.
25 Harmless error has never been found, however, where an ALJ's decision was
26 *completely* silent on his consideration of lay testimony. See id. at 1056 (noting
27 that the Ninth Circuit has never concluded that an ALJ's complete silence and
28 disregard of lay testimony was harmless error); see also Merrill ex rel. Merrill v.

1 Apfel, 224 F.3d 1083, 1085-86 (9th Cir. 2000); Schneider v. Comm’r of Social
2 Sec. Sdmin., 223 F.3d 968, 974 (9th Cir. 2000); Dodrill v. Shalala, 12 F.3d 915,
3 919 (9th Cir. 1993).

4 At the August 1, 2007 hearing, plaintiff’s mother, Joan Ingham, provided
5 lay testimony on plaintiff’s behalf. She stated that plaintiff is not as active or
6 energetic as he used to be; plaintiff’s pain is so severe that, at times, he would lie
7 on the floor; he has difficulty walking, standing, and opening jars; and it was her
8 understanding that plaintiff could only engage in activity for fifteen to twenty
9 minutes at a time. (AR 65-6). In his written decision, the ALJ concluded that
10 Mrs. Ingham’s testimony was not sufficiently persuasive to change his disability
11 determination. (AR 25).

12 This is not the case where the ALJ was *completely silent* in his
13 consideration of Mrs. Ingham’s testimony. Further, Mrs. Ingham’s testimony as
14 to the severity of plaintiff’s pain and limitations is substantially similar to the
15 plaintiff’s own testimony regarding pain and physical limitations which
16 testimony was properly discounted. It is therefore unlikely that, had the ALJ
17 fully credited Mrs. Ingham’s testimony, his disability determination would have
18 changed, and accordingly his failure to do so constitutes harmless error.

19 **ISSUE No. 3:**

20 Plaintiff asserts that the ALJ erred in rejecting the medical opinions of
21 plaintiff’s treating physician, Dr. Piasecki, and examining physician, Dr. Iway.
22 In response, defendant argues that the ALJ was proper to reject both opinions
23 because they were irrelevant.

24 The ALJ is to accord the greatest weight to a treating physician’s medical
25 opinion. See 20 C.F.R. § 404.1527(d)(2). Where the treating physician’s
26 opinion is not contradicted by another physician, it may only be rejected for
27 “clear and convincing” reasons. Lester, 81 F.3d at 830. Even where a treating
28 physician’s opinion is contradicted, the ALJ must provide specific and legitimate

1 reasons for rejecting that opinion, supported by substantial evidence in the
2 record. See id. at 830-31; see also Orn v. Astrue, 495 F.3d 625, 632 (9th Cir.
3 2007). Further, as with a treating physician, the ALJ may reject the opinion of an
4 examining physician only for “specific and legitimate reasons that are supported
5 by substantial evidence.” Lester, 81 F.3d at 830-31. However, the ALJ does not
6 have to discuss all evidence presented. He is only required to explain why
7 *significant probative evidence* has been rejected. See Vincent v. Heckler, 739
8 F.2d 1393, 1394-95 (9th Cir. 1984). Further, medical opinions of any physician,
9 treating or examining, which predate the alleged onset of disability are not
10 considered substantial evidence. See Carmickle v. Comm’r, Social Sec. Admin.,
11 533 F.3d 1155, 1165 (9th Cir. 2008) (“[m]edical opinions that predate the alleged
12 onset of disability are of limited relevance.”).

13 In the case at bar, the ALJ relied on the opinion of examining physician,
14 Dr. Sophon, in concluding that plaintiff had the residual functional capacity to
15 perform light work. (AR 23, 26).

16 Dr. Sophon examined plaintiff on May 22, 2007, and diagnosed him with
17 cervical sprain and laceration of the left wrist and left median nerve. He
18 concluded that plaintiff could lift and carry 20 pounds occasionally and 10
19 pounds frequently with no limitations in standing, walking, sitting or bending.
20 (AR 23). The ALJ accorded significant weight to Dr. Sophon’s medical opinion
21 because his conclusions were not rebutted by plaintiff’s treating physician, Dr.
22 Piasecki, who diagnosed plaintiff with radiculopathy of the lower left extremity,
23 lumbar disk herniation, sprain of the neck and left shoulder, and rotator cuff
24 degeneration in March of 2003. (AR 23).

25 It was within the ALJ’s discretion to give primary weight to Dr. Sophon’s
26 opinion over the opinion of Dr. Piasecki, even though Dr. Piasecki was the
27 treating source, because the reports prepared by Dr. Piasecki reflecting his
28 medical opinion dated back to 2003, (AR 314-22, 338-45), which substantially

1 predated plaintiff's alleged onset of disability on May 1, 2005. See Carmickle,
2 533 F.3d at 1158, 1165 (finding medical opinions limited in relevance because
3 they predated the alleged onset of disability by a few weeks). Therefore, the ALJ
4 was not required to provide "clear and convincing" reasons for rejecting Dr.
5 Piasecki's opinions because they were not considered "significant probative"
6 evidence.

7 Likewise, the ALJ did not err by failing to provide "specific and
8 legitimate" reasons for rejecting the medical opinion of examining physician, Dr.
9 Iway. In 2001, Dr. Iway opined that plaintiff "ha[d] a PERMANENT medical
10 condition and he should have a job that is a SEDENTARY WORK
11 ASSIGNMENT ONLY." (AR 436). Similar to the opinions of Dr. Piasecki, Dr.
12 Iway's opinion substantially predated the alleged onset of disability date and
13 accordingly cannot be considered significant probative evidence.

14 **ISSUE No. 4:**

15 Plaintiff asserts that the new evidence he submitted to the Appeals Council
16 is material and supports a remand because it logically reflected upon conditions
17 evident before the ALJ's unfavorable decision on August 9, 2007. Defendant
18 maintains that the new evidence was properly considered and rejected by the
19 Appeals Council because it concerned a disability that plaintiff sustained after the
20 ALJ's decision.

21 If the plaintiff produces new evidence after the ALJ's disability
22 determination and that new evidence was presented to and considered by the
23 Appeals Council, this Court may also consider it in the context of the record as a
24 whole. See Vasquez v. Astrue, 572 F.3d 586, 594 n.7 (9th Cir. 2009). Because
25 this evidence was submitted to and considered by the Appeals Council, and is
26 part of the administrative record, this Court may consider it in reaching its final
27 decision even though the ALJ did not have the benefit of this information during
28 the hearing.

1 After consideration of new evidence, sentence six of 42 U.S.C. § 405(g)
2 allows this Court to remand a case for the taking of additional evidence if the
3 plaintiff establishes that there is (a) new, non-cumulative evidence; (b) that is
4 relevant and probative so that there is a reasonable possibility that it would
5 change the administrative result; and (c) there is good cause for failure to submit
6 the evidence at the administrative level. To be considered relevant and probative,
7 the new evidence must bear directly on the matter in issue. See Key v. Heckler,
8 754 F.2d 1545, 1551 (9th Cir.1985); Booz v. Secretary of Health and Human
9 Serv's, 734 F.2d 1378, 1380-81 (9th Cir.1984).

10 In this case, after consideration of sixty-eight pages of additional
11 arguments and medical records submitted by plaintiff, the Appeals Council
12 concluded that the new information related to injuries sustained subsequent to the
13 ALJ's disability determination, and therefore it did "not effect the decision about
14 whether [plaintiff was] disabled beginning on or before August 9, 2007." (AR
15 5). Likewise, this Court concludes that all new evidence that relates to post
16 August 9, 2007 disability claims cannot be said to bear directly on plaintiff's
17 medical condition prior to the ALJ's decision.

18 Plaintiff correctly points out that at least one piece of new evidence
19 submitted to the Appeals Council predated the ALJ's decision. Electrodiagnostic
20 testing performed in August of 2002 shows that plaintiff suffered from lumbar
21 radiculopathy, (AR 494), cervical (neck) radiculopathy, (AR 498), and upper
22 extremity abnormality. (AR 496). However, after reviewing these records, this
23 Court finds that this they are not relevant and probative within the meaning of §
24 405(g) of Title 42.

25 First, while such new evidence predated the ALJ's disability determination
26 it also substantially predates the alleged onset of disability date, May 1, 2005,
27 which concomitantly reduces its relevancy. See Carmickle, 533 F.3d at 1165
28 ("[m]edical opinions that predate the alleged onset of disability are of limited

1 relevance.”). Second, there is no reasonable possibility that, upon remand, the
2 results of the electrodiagnostic testing would change the administrative result. In
3 his written decision, the ALJ considered and rejected the medical findings of Dr.
4 Piasecka, who had diagnosed plaintiff with lumbar disk herniation, strain/sprain
5 of the neck and left shoulder, rotator cuff degeneration, and biceps tendonitis.
6 (AR 23). Confronted with even earlier electrodiagnostic test results showing that
7 plaintiff suffered from substantially similar disabilities, it is likely that the ALJ
8 would still have concluded that plaintiff was capable of performing light work as
9 of 2005. Nor has plaintiff shown good cause for failure to introduce such
10 evidence to the ALJ. Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985).
11 Plaintiff simply alleges that the evidence was obtained after the ALJ decision
12 because Mr. Ingham was not able to remember the name of the facility where it
13 was performed. (Plaintiff’s Opening Brief at p. 8).

14 Therefore, neither the new evidence presented by plaintiff that relates to
15 injuries sustained after the ALJ’s decision, or the new evidence that predates the
16 ALJ’s decision, can be considered “relevant and probative so that there is a
17 reasonable possibility that it would change the administrative result.”
18 Accordingly, in its discretion under sentence six of 42 U.S.C. § 405(g) this Court
19 declines to remand the case for the taking of additional evidence.

20 ORDER

21 For the foregoing reasons, the decision of the Commissioner is affirmed,
22 and the Complaint is dismissed.

23 DATE: May 10, 2010

24
25 

26 _____
27 STEPHEN J. HILLMAN
28 UNITED STATES MAGISTRATE JUDGE