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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BOUAPHAN PHETCHUMPORN,)	1:08-cv-01474-SMS
)	
Plaintiff,)	DECISION AND ORDER DENYING
v.)	PLAINTIFF'S SOCIAL SECURITY
)	COMPLAINT (DOC. 2)
MICHAEL J. ASTRUE,)	
COMMISSIONER OF SOCIAL)	ORDER DIRECTING THE ENTRY OF
SECURITY,)	JUDGMENT FOR DEFENDANT MICHAEL J.
)	ASTRUE, COMMISSIONER OF SOCIAL
Defendant.)	SECURITY, AND AGAINST PLAINTIFF
)	BOUAPHAN PHETCHUMPORN
)	

Plaintiff is proceeding in forma pauperis and with counsel with an action seeking judicial review of a final decision of the Commissioner of Social Security (Commissioner) denying Plaintiff's application of May 2, 2006,¹ made pursuant to Title XVI of the Social Security Act, for Supplemental Security Income (SSI), in which he alleged he had been disabled since April 1, 1990, due to emotional problems, angering easily, sleeping disorders, nightmares, depression, forgetfulness, and lower back

¹A previous application for benefits resulted in an unfavorable decision dated June 6, 2003, and the Appeals Council denied review. (A.R. 134.) As Defendant notes, it does not appear that in the decision under review, the ALJ applied any presumption of continuing non-disability pursuant to Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988) (A.R. 12-18), and this would be to Plaintiff's benefit. (Brief p. 2 n. 2.)

1 pain. (A.R. 12, 81-93, 82.) The parties have consented to the
2 jurisdiction of the United States Magistrate Judge pursuant to 28
3 U.S.C. § 636(c)(1), and pursuant to the order of Judge Anthony W.
4 Ishii filed on October 22, 2008, the matter has been assigned to
5 the Magistrate Judge to conduct all further proceedings in this
6 case, including entry of final judgment.

7 The decision under review is that of Social Security
8 Administration (SSA) Administrative Law Judge (ALJ) Bert C.
9 Hoffman, Jr., dated March 20, 2008 (A.R. 12-18), rendered after a
10 hearing held on December 18, 2007, at which Plaintiff appeared
11 and testified with the assistance of a Laotian interpreter and an
12 attorney. (A.R. 12, 33-52).

13 The Appeals Council denied Plaintiff's request for review of
14 the ALJ's decision, and thereafter it extended time for Plaintiff
15 to file a civil action until approximately November 8, 2008.
16 (A.R. 2-3.) Plaintiff filed the complaint in this Court on
17 September 23, 2008. Plaintiff's amended opening brief was filed
18 on August 27, 2009, and Defendant's responsive brief was filed on
19 September 11, 2009. Briefing was completed with the filing of
20 Plaintiff's reply brief on September 24, 2009. The matter has
21 been submitted without oral argument to the Magistrate Judge.

22 I. Jurisdiction

23 The Court has jurisdiction over the subject matter of this
24 action pursuant to 42 U.S.C. §§ 1383(c)(3) and 405(g), which
25 provide that an applicant suffering an adverse final
26 determination of the Commissioner of Social Security with respect
27 to SSI benefits after a hearing may obtain judicial review by
28 initiating a civil action in the district court within sixty days

1 of the mailing of the notice of decision. Title 20 C.F.R. §
2 422.210 provides that the Appeals Council is authorized to extend
3 the time for filing a civil action for judicial review of a
4 decision of the Commissioner. Plaintiff timely filed his
5 complaint on September 23, 2008, within the period of extended
6 time granted by the Appeals Council for filing the action.

7 II. Standard and Scope of Review

8 Congress has provided a limited scope of judicial review of
9 the Commissioner's decision to deny benefits under the Act. In
10 reviewing findings of fact with respect to such determinations,
11 the Court must determine whether the decision of the Commissioner
12 is supported by substantial evidence. 42 U.S.C. § 405(g).
13 Substantial evidence means "more than a mere scintilla,"
14 Richardson v. Perales, 402 U.S. 389, 402 (1971), but less than a
15 preponderance, Sorenson v. Weinberger, 514 F.2d 1112, 1119, n. 10
16 (9th Cir. 1975). It is "such relevant evidence as a reasonable
17 mind might accept as adequate to support a conclusion."
18 Richardson, 402 U.S. at 401. The Court must consider the record
19 as a whole, weighing both the evidence that supports and the
20 evidence that detracts from the Commissioner's conclusion; it may
21 not simply isolate a portion of evidence that supports the
22 decision. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.
23 2006); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985).
24 It is immaterial that the evidence would support a finding
25 contrary to that reached by the Commissioner; the determination
26 of the Commissioner as to a factual matter will stand if
27 supported by substantial evidence because it is the
28 Commissioner's job, and not the Court's, to resolve conflicts in

1 the evidence. Sorenson v. Weinberger, 514 F.2d 1112, 1119 (9th
2 Cir. 1975).

3 In weighing the evidence and making findings, the
4 Commissioner must apply the proper legal standards. Burkhart v.
5 Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must
6 review the whole record and uphold the Commissioner's
7 determination that the claimant is not disabled if the
8 Commissioner applied the proper legal standards, and if the
9 Commissioner's findings are supported by substantial evidence.
10 See, Sanchez v. Secretary of Health and Human Services, 812 F.2d
11 509, 510 (9th Cir. 1987); Jones v. Heckler, 760 F.2d at 995. If
12 the Court concludes that the ALJ did not use the proper legal
13 standard, the matter will be remanded to permit application of
14 the appropriate standard. Cooper v. Bowen, 885 F.2d 557, 561 (9th
15 Cir. 1987).

16 III. Disability

17 A. Legal Standards

18 In order to qualify for benefits, a claimant must establish
19 that she is unable to engage in substantial gainful activity due
20 to a medically determinable physical or mental impairment which
21 has lasted or can be expected to last for a continuous period of
22 not less than twelve months. 42 U.S.C. §§ 416(i), 1382c(a)(3)(A).
23 A claimant must demonstrate a physical or mental impairment of
24 such severity that the claimant is not only unable to do the
25 claimant's previous work, but cannot, considering age, education,
26 and work experience, engage in any other kind of substantial
27 gainful work which exists in the national economy. 42 U.S.C.
28 1382c(a)(3)(B); Quang Van Han v. Bowen, 882 F.2d 1453, 1456 (9th

1 Cir. 1989). The burden of establishing a disability is initially
2 on the claimant, who must prove that the claimant is unable to
3 return to his or her former type of work; the burden then shifts
4 to the Commissioner to identify other jobs that the claimant is
5 capable of performing considering the claimant's residual
6 functional capacity, as well as her age, education and last
7 fifteen years of work experience. Terry v. Sullivan, 903 F.2d
8 1273, 1275 (9th Cir. 1990).

9 In order to qualify for benefits, a claimant must establish
10 that she is unable to engage in substantial gainful activity due
11 to a medically determinable physical or mental impairment which
12 has lasted or can be expected to last for a continuous period of
13 not less than twelve months. 42 U.S.C. § 1382c(a)(3)(A). A
14 claimant must demonstrate a physical or mental impairment of such
15 severity that the claimant is not only unable to do the
16 claimant's previous work, but cannot, considering age, education,
17 and work experience, engage in any other kind of substantial
18 gainful work which exists in the national economy. 42 U.S.C.
19 1382c(a)(3)(B); Quang Van Han v. Bowen, 882 F.2d 1453, 1456 (9th
20 Cir. 1989). The burden of establishing a disability is initially
21 on the claimant, who must prove that the claimant is unable to
22 return to his or her former type of work; the burden then shifts
23 to the Commissioner to identify other jobs that the claimant is
24 capable of performing considering the claimant's residual
25 functional capacity, as well as her age, education and last
26 fifteen years of work experience. Terry v. Sullivan, 903 F.2d
27 1273, 1275 (9th Cir. 1990).

28 The regulations provide that the ALJ must make specific

1 sequential determinations in the process of evaluating a
2 disability: 1) whether the applicant engaged in substantial
3 gainful activity since the alleged date of the onset of the
4 impairment, 2) whether solely on the basis of the medical
5 evidence the claimed impairment is severe, that is, of a
6 magnitude sufficient to limit significantly the individual's
7 physical or mental ability to do basic work activities; 3)
8 whether solely on the basis of medical evidence the impairment
9 equals or exceeds in severity certain impairments described in
10 Appendix I of the regulations; 4) whether the applicant has
11 sufficient residual functional capacity, defined as what an
12 individual can still do despite limitations, to perform the
13 applicant's past work; and 5) whether on the basis of the
14 applicant's age, education, work experience, and residual
15 functional capacity, the applicant can perform any other gainful
16 and substantial work within the economy. See 20 C.F.R. § 416.920.²

17 B. The ALJ's Findings

18 The ALJ found that Plaintiff had medically determinable
19 impairments of low back pain and an adjustment disorder, but
20 Plaintiff had no impairment or combination of impairments that
21 significantly limited or was expected to limit significantly his
22 ability to perform basic, work-related activities for twelve
23 consecutive months; therefore, Plaintiff did not have a severe
24 impairment or combination of impairments. (A.R. 14.) Accordingly,
25 Plaintiff was not under a disability since May 2, 2006. (A.R.
26 18.)

27
28 ²All references to the Code of Federal Regulations are to the 2008
version unless otherwise stated.

1 C. Plaintiff's Contentions

2 Plaintiff argues that the ALJ failed to provide sufficient
3 credibility findings with a statement of clear and convincing
4 reasons. Plaintiff contends that the treatment record,
5 Plaintiff's statements to consultative examiners, and
6 observations of third parties were consistent with Plaintiff's
7 subjective complaints. The ALJ improperly relied on the absence
8 of objective medical evidence in making his credibility findings.

9 Further, with respect to the medical evidence, Plaintiff
10 argues that the opinions of Dr. Spindell and the state agency
11 physician, relied upon by the ALJ, did not constitute substantial
12 evidence.

13 IV. Medical Evidence

14 Patient database notes from the office of V.S. Kaleka, M.D.,
15 reflect treatment of Plaintiff from 2002 through 2007, with
16 visits of frequency varying from three to six visits annually.
17 (A.R. 156-57.) The notes reflect diagnoses of depression, PTSD,
18 and arthritis in March 2002, with treatment in the form of
19 medications through July 2004. (A.R. 157.) In September 2004,
20 diagnoses of depression, PTSD, and arthritis are recorded, with
21 treatment by medication from 2004 through 2007. (A.R. 156, 186.)
22 Progress notes from Dr. Kaleka's office reflect gaps with
23 treatment periods from September 2004 through September 2006, and
24 between January and November 2007, in which Plaintiff visited
25 about every two months. (A.R. 150-55, 183-86.) On one occasion,
26 no notes were made. (A.R. 155.) On the other occasions,
27 essentially the same notations were made, including pain,
28 tenderness, and stiffness in the joints, muscles, and low back;

1 insomnia; depression; anxiety; guilt feeling; changes in mood;
2 nightmares; and anxious/depressed mood or affect. The impression
3 was depression, PTSD, arthritis, IFG, asthma, and anemia in 2007.
4 (A.R. 150-54, 183-86.) In 2004 and 2006, the impressions were
5 depression, arthritis, asthma, and PTSD. (A.R. 183-86.) The
6 records reflect that Plaintiff saw a physician's assistant, with
7 a signature by a medical doctor in 2004. (A.R. 186.) In 2007,
8 there were initials of an M.D., but the capacity or involvement
9 of the doctor is unclear. (A.R. 150-54.) The records from Dr.
10 Kaleka's office do not reflect any assessment of Plaintiff's
11 functional capacities.

12 On August 24, 2006, consulting examiner Dr. Rustom F.
13 Damania, M.D., who was board-eligible in internal medicine,
14 evaluated Plaintiff, who complained of localized, non-radiating
15 body and back pain that was not associated with paresthesias and
16 did not change on coughing or sneezing. (A.R. 194-97.) This had a
17 gradual onset and had been experienced for six years. (A.R. 194.)
18 Plaintiff also complained of chronic pain in the left foot where
19 a bullet went through his foot; he had experienced this since the
20 war. (A.R. 194.) His medications were Prozac, Atarax, and
21 Remeron. He reported doing no household chores.

22 Plaintiff was in no acute distress or discomfort; he was
23 well-built and well-nourished. Pulse was seventy and regular, and
24 blood pressure was 110 over seventy. He was very cooperative and
25 pleasant; he answered questions and followed instructions. The
26 physical exam was essentially normal. The joints of the upper and
27 lower extremities were all normal. Gross ranges of motions were
28 normal; there was no ankylosis, deformities, contractures, or

1 subluxations; and there were no signs of acute or chronic
2 inflammation such as tenderness, swelling, crepitations, or
3 redness. The hands were dirty, and there were multiple callouses.
4 (A.R. 195.) Cervical, thoracic, and lumbosacral spine were normal
5 with normal range of motion. Gait, reflexes, full squat, and
6 coordination were normal; power was grade 5/5 in both upper and
7 lower extremities; there was no motor or sensory deficiency; and
8 Romberg was negative. (A.R. 196.) The diagnosis was low back pain
9 by history with no clinical evidence of radiculopathy. (A.R.
10 196.) Dr. Damania opined that Plaintiff should be able to lift
11 and carry fifty pounds occasionally and twenty-five pounds
12 frequently, stand and walk for six hours, and sit without
13 restriction without any further limitations and with no need to
14 use any assistive devices for ambulation. (A.R. 196.)

15 In September 2006, Plaintiff's blood glucose was high, and
16 hematocrit and hemoglobin were low. (A.R. 176-77.)

17 On September 15, 2006, consulting psychologist William A.
18 Spindell, Ph.D., reviewed background data and examined Plaintiff
19 in the course of completing a psychological disability
20 evaluation. (A.R. 188-93.) He administered the Bender Gestalt II
21 and TONI-III. Plaintiff reported that he was a father of six who
22 had farmed in Laos and Thailand; he lived in Fresno, where he
23 performed light household activities, did a little farming, took
24 care of whatever he could, and was the non-legal ward of his six
25 children. He tried to do some vegetable work, and his hands
26 clearly showed some "outside wear." An adult daughter cooked and
27 shopped. He watched TV aimlessly, was relatively isolated, had no
28 friends, and communicated only occasionally with an uncle. (A.R.

1 188.) Plaintiff reported having been exposed to a variety of
2 chemicals in Laos, Thailand, and the San Joaquin Valley. He
3 reported serious musculoskeletal pain in the low back, left leg
4 injury, heart problems, and depression with non-specific
5 complaints. He seemed to be able to understand and carry out one-
6 step and two-step instructions. He had worked until a car
7 accident eight to nine years before.

8 Plaintiff ambulated reasonably well but slowly. He was
9 appropriately dressed and poorly groomed. He had written
10 language, but it was Laotian. His affect was flat, but he did not
11 appear to be overly depressed. He made poor eye contact and
12 volunteered little information. He could copy drawings with a
13 pencil and look at figures and say what was missing without
14 evidence of pressured speech or neologisms. Remote and recent
15 memory functions were meager but within normal limits. (A.R. 188-
16 89.) The result on the Bender Visual Motor Gestalt II was in the
17 normal zone, with a global score estimated to be about twenty-
18 six, without evidence of angulation, rotation, perseveration, or
19 fragmentation; the profile was not neurologically impaired. (A.R.
20 189.) On the TONI III, the quotient was calculated at eighty-
21 three, or in the thirteenth percentile in intelligence, or the
22 70-80 region of mild mental retardation. However, Dr. Spindell
23 opined that this test was extremely unreliable as to persons with
24 Plaintiff's background. (A.R. 189.)

25 Dr. Spindell's diagnostic impression was adult adjustment
26 disorder with mixed emotional features. (A.R. 189.) Dr. Spindell
27 opined that although isolated, Plaintiff was not clinically
28 depressed; he continued to perform chores around the house and

1 outside chores associated with backyard farming, and he could
2 "continue to address the labor market in the capacities that he
3 is in now." (A.R. 190.) He could not perform detailed and complex
4 tasks, but he could perform simple, repetitive tasks, maintain
5 regular attendance and perform activities on a consistent basis
6 without special supervision, complete normal workdays and
7 workweeks without interruptions from symptoms, accept
8 instructions from supervisors and interact with coworkers and the
9 public, and deal with the usual stresses of competitive work.
10 (A.R. 191.) He was able to perform activities of daily living,
11 maintain social relationships, and sustain concentration,
12 persistence, and pace; he could function outside highly
13 supportive arrangements. (A.R. 191.) Dr. Spindell further noted
14 that Plaintiff's isolation was in name only because Plaintiff had
15 good interaction with his children and occasional interaction
16 with his male sibling. (A.R. 190.)

17 In November 2006, non-examining state agency medical
18 consultant Evelyn Aquino-Caro, M.D., opined that Plaintiff's
19 affective or adjustment disorder was not severe, and there was
20 insufficient evidence to substantiate the presence of other
21 disorders. (A.R. 159-68.) Plaintiff had mild restriction of
22 activities of daily living, mild difficulties in maintaining
23 social functioning and concentration, persistence, or pace, and
24 no episodes of decompensation. (A.R. 16-72.) Plaintiff's
25 psychiatric condition was not severe. (A.R. 173-75.) Dr. Wesley
26 G. Jackson, M.D., opined that Plaintiff's physical impairments
27 were not severe. (A.R. 175.)

28 In April 2007, non-examining state agency medical

1 consultants Durell Sharbaugh, M.D., and Allen Middleton, Ph.D.,
2 reviewed the prior consultation of November 2006 and concluded
3 that follow-up care records did not reflect any significant
4 changes in the findings or establish a worsening of Plaintiff's
5 condition or functioning; thus, Plaintiff's physical and mental
6 problems continued to be not severe. (A.R. 158-159.)

7 In September 2007, Plaintiff reported taking Fluoxetine,
8 Hydroxyzine, and Mirtazapine for depression, Naproxen for pain,
9 and Albuteral inhaler for asthma. (A.R. 97.)

10 V. Plaintiff's Testimony

11 Plaintiff, born in 1956, had six children between the ages
12 of sixteen and twenty-five; he lived with his wife, three of his
13 children, a son-in-law, and one grandchild. (A.R. 36-38.) He
14 lived in a shack in the back of the house and sometimes slept in
15 the house. He tore papers, burned bonfires, took out trash,
16 straightened out the back yard and the shack, watched TV, and had
17 a stove. He sometimes went to the store with his family. (A.R.
18 49-51.)

19 Plaintiff's only schooling was three years of English study
20 at adult school when he arrived in the United States (A.R. 40-
21 41.) He could not say anything but could listen and maybe
22 understand a little; Plaintiff could not retain vocabulary in his
23 memory, and he could only use basic words, buy things at the
24 store, and read road and traffic signs. (A.R. 41.)

25 He had never worked at all; he never farmed or took care of
26 anyone for money. When asked about his history of yearly earnings
27 in 1997 through 1999 of \$8,000 to \$9,000 per year, he maintained
28 that he had never worked. (A.R. 42.) He was unable to work

1 because he was depressed, would get angry easily if someone
2 turned on music or made noise, wanted to fight when he got mad
3 and was violent with his family, could not follow any
4 instructions, had no memory, and had to separate himself from
5 other people, including separating from his family in the house.
6 (A.R. 42, 44-46.) It had been a long time since the family called
7 the police on him. (A.R. 46.) He had backache, one leg that was
8 not good due to bullet wounds, and asthma. (A.R. 44.)

9 Plaintiff had a police record for involvement in a fight
10 with a friend in 1994 in which Plaintiff beat up the friend for
11 making fun of him. (A.R. 42-43.)

12 Plaintiff took medication daily to help him not get angry
13 and for sleep; his family gave it to him in the morning and
14 evening. The anger medication prevented him from getting angry.
15 (A.R. 48.) He suffered no side-effects. He used an inhaler for
16 asthma, which he had two to three times a night, and it took care
17 of his asthma. (A.R. 46-48.) His pain medication took his pain
18 away completely. (A.R. 48.)

19 Plaintiff had seen Dr. Kaleka once; when Plaintiff went to
20 his office, he saw physician's assistant "Bumney," who examined
21 and counseled Plaintiff. (A.R. 48.)

22 Plaintiff claimed to have a valid California driver's
23 license but then explained that he had not understood the
24 question and admitted that his license had been revoked for
25 failure to pay a fine relating to an inoperative vehicle that had
26 been towed. (A.R. 39-40.)

27 VI. Plaintiff's Reports

28 On May 8, 2006, Plaintiff reported with the assistance of

1 James Phetphouvong that he could not read or write, and his
2 depression limited him from work because he angered easily, could
3 not concentrate or think, was forgetful and sad, cried, and
4 suffered low back pain, a wounded left leg, and heart problems,
5 which all rendered him disabled as of 1990. (A.R. 139-48.) After
6 having been a soldier from 1969 through 1975, he was captured and
7 sent to a labor camp for more than five years, where he was
8 bitten many times and worked hard for almost ten to twelve hours
9 a day. He saw many of his friends killed. In 1980, he escaped to
10 Thailand, and while in the refugee camp he fought back with the
11 Lao Communist government for ten years. He brought his family to
12 settle in the United States in 1990. He believed that his mental
13 problems started when he was captured and put in the camp. His
14 situation worsened every day. He also reported that he had never
15 worked. He listed his medications and reported no side-effects.
16 He had completed only the first grade in school. (Id.)

17 On August 8, 2006, James Phetphouvong completed an adult
18 function report concerning Plaintiff, which purported to be in
19 the first person and to contain Plaintiff's responses to the
20 queries on the form. (A.R. 126-33.) Plaintiff reported that he
21 had been a soldier with the CIA in southern Laos from 1969
22 through 1975 and suffered wounds to both legs. After 1975, he
23 escaped to Thailand and continued to fight with the Communist
24 government until 1990, when his family resettled in the USA. His
25 medications, which then also included Zyprexa for depression,
26 could help, but his mental condition was worsening and was never
27 gone from him. His report was otherwise almost identical with
28 James Phetphouvong's third party function report of the same

1 date. Plaintiff described his daily activities as walking around
2 in the back yard and the house, watching TV, sitting on the sofa,
3 and napping. His nightmares or bad dreams caused difficulty
4 sleeping. Plaintiff reported that he needed help dressing,
5 bathing, caring for his hair, and shaving; he needed to be
6 reminded to groom and to take his medication. He did not cook and
7 could not perform any indoor or outdoor chores. He stated that he
8 could not work because most of the time he had sadness, crying,
9 anger, headache, dizziness, heart problem, and asthma. He went
10 out several times a month with someone else, shopped two to three
11 times a month, and was able to count change but not pay bills,
12 handle a savings account, or use a check book because he had no
13 English. He had no hobbies, but before his problems he had been a
14 hardworking person who fished and hunted and had many friends. He
15 no longer spent time with others; he angered easily, disliked
16 noise, and did not want to talk with others. His condition
17 affected lifting, bending, standing, reaching, walking, kneeling,
18 talking, hearing, climbing stairs, memory and concentration,
19 understanding and following instructions, and getting along with
20 others. He could walk about one-half block without needing to
21 rest for about half an hour. He could not pay attention, did not
22 finish what he started, and did not follow written or spoken
23 instructions. He just let his stress go and took medications, and
24 he was scared about bad dreams after awakening at night. (Id.)

25 On February 12, 2007, Plaintiff reported in connection with
26 a disability appeal that his depression, memory, weakness in the
27 left leg, and anger had worsened. (A.R. 110-17.) He had also
28 developed difficulty breathing, and shaking. He had no problems

1 caring for his personal needs. He had previously done farm work,
2 but he was no longer able to do that; he did not want to see
3 anyone, and he was isolated from the community and friends. He
4 reported taking Nabumetone for arthritis pain and Tactinal for
5 pain with no side-effects, Hydroxyzine and Mirtazapine for
6 sleeping with side-effects of drowsiness, and Fluoxetine for
7 depression with a side-effect of drowsiness. (Id.)

8 In May 2007, Plaintiff reported that the Fluoxetine he took
9 for depression caused side-effects of drowsiness, his Hydroxyzine
10 for anxiety caused drowsiness, the Naproxen caused stomach
11 problems, and the Albuterol caused fatigue. (A.R. 105-07.)

12 VII. Third Parties' Reports

13 Plaintiff's daughter, Sychanh Phethumporn, who lived with
14 her parents and took care of them, reported in an undated letter
15 that her father was a soldier for more than five years during the
16 war and sustained a wound on his lower left leg, resulting in a
17 weaker left leg and arm that a Thai doctor had said was
18 disabling. Her father also had a heart problem that was
19 worsening. However, the most serious problem was depression from
20 war and his health problems, and related problems such as weight
21 loss, sleeping ("slipping") disorder, nightmares and bad dreams,
22 sadness, headaches, dizziness, memory loss, fear of noises, and
23 inability to do anything. His daily activities included sitting
24 on the sofa, watching TV but not understanding anything, napping,
25 walking in the back yard, sometimes skipping lunch, eating at
26 night, retiring late, and awakening early. Sometimes Sychanh
27 drove her father and mother to shopping and food shopping. Her
28 father mostly did not care about his life at all, did not want to

1 see anybody, and sometimes cried out loud for nothing. She stated
2 that it was very hard to take care of both her mother and father,
3 but she tried her best. (A.R. 96.)

4 James Phetphouvong completed a third party function report
5 on August 8, 2006, in which he stated he had known Plaintiff for
6 more than fifteen years and spent four to five days a week with
7 him. Plaintiff escaped to Thailand after the Viet Nam war in 1975
8 and fought with the Lao-Communist government for fifteen years
9 before settling in the United States in 1990. Plaintiff's health
10 problems, war depression, homesickness, heart problem, asthma,
11 headache, dizziness, low back pain, and weakness were getting
12 worse. Plaintiff had trouble sleeping and awoke in the middle of
13 the night. He needed help to choose clothing to wear, prompting
14 to bathe, and help with shaving, cleaning, and combing his hair.
15 Plaintiff needed help with taking his medicines. He never cooked
16 and could not perform any indoor or outdoor household chores.
17 Plaintiff could not concentrate on any work. It was reported that
18 Plaintiff spent time in the back yard, rested, watched TV, and
19 walked around. He went out with family members two to three times
20 per month; before his illnesses, he was a hardworking, friendly
21 person with a driver's license who liked to fish and hunt, but
22 now he did nothing. He did not spend time with others; he had
23 problems getting along with family and others because he easily
24 got angry. He had serious low back pain, asthma, heart problems,
25 and sadness, so he could not lift, bend, reach, walk, kneel,
26 talk, hear, climb stairs, use his memory and concentration,
27 understand and follow instructions, or get along with others. He
28 could walk about half a block without needing to rest for a half

1 an hour before resuming. He could not pay attention for any time
2 at all, did not complete what he started, and did not follow
3 written or spoken instructions. He let his stress go and took
4 medications; his unusual fear was being scared at night upon
5 awakening after a bad dream. Many years ago he needed glasses and
6 a hearing aid, but he never saw a doctor. (A.R. 118-25.)

7 VIII. The ALJ's Findings Concerning Plaintiff's Credibility

8 Plaintiff argues that the ALJ failed to state clear and
9 convincing reasons for his findings concerning Plaintiff's
10 credibility. Plaintiff contends that the treatment record,
11 Plaintiff's statements to consultative examiners, and
12 observations of third parties were consistent with Plaintiff's
13 subjective complaints. The ALJ improperly relied on the absence
14 of objective medical evidence in making his credibility findings.

15 A. Legal Standards

16 It is established that unless there is affirmative evidence
17 that the applicant is malingering, then where the record includes
18 objective medical evidence establishing that the claimant suffers
19 from an impairment that could reasonably produce the symptoms of
20 which the applicant complains, an adverse credibility finding
21 must be based on clear and convincing reasons. Carmickle v.
22 Commissioner, Social Security Administration,, 533 F.3d 1155,
23 1160 (9th Cir. 2008). In Orn v. Astrue, 495 F.3d 625, 635 (9th Cir.
24 2007), the court summarized the pertinent standards for
25 evaluating the sufficiency of an ALJ's reasoning in rejecting a
26 claimant's subjective complaints:

27 An ALJ is not "required to believe every
28 allegation of disabling pain" or other non-exertional
impairment. See Fair v. Bowen, 885 F.2d 597, 603 (9th

1 Cir.1989). However, to discredit a claimant's testimony
2 when a medical impairment has been established, the ALJ
3 must provide "'specific, cogent reasons for the
4 disbelief.'" Morgan, 169 F.3d at 599 (quoting Lester,
5 81 F.3d at 834). The ALJ must "cit[e] the reasons why
6 the [claimant's] testimony is unpersuasive." Id. Where,
7 as here, the ALJ did not find "affirmative evidence"
8 that the claimant was a malingerer, those "reasons for
9 rejecting the claimant's testimony must be clear and
10 convincing." Id.

11 Social Security Administration rulings specify the
12 proper bases for rejection of a claimant's testimony.
13 See S.S.R. 02-1p (Cum. Ed.2002), available at Policy
14 Interpretation Ruling Titles II and XVI: Evaluation of
15 Obesity, 67 Fed.Reg. 57,859-02 (Sept. 12, 2002); S.S.R.
16 96-7p (Cum. Ed.1996), available at 61 Fed.Reg.
17 34,483-01 (July 2, 1996). An ALJ's decision to reject a
18 claimant's testimony cannot be supported by reasons
19 that do not comport with the agency's rules. See 67
20 Fed.Reg. at 57860 ("Although Social Security Rulings do
21 not have the same force and effect as the statute or
22 regulations, they are binding on all components of the
23 Social Security Administration, ... and are to be
24 relied upon as precedents in adjudicating cases."); see
25 Daniels v. Apfel, 154 F.3d 1129, 1131 (10th Cir.1998)
26 (concluding that ALJ's decision at step three of the
27 disability determination was contrary to agency
28 regulations and rulings and therefore warranted
remand). Factors that an ALJ may consider in weighing a
claimant's credibility include reputation for
truthfulness, inconsistencies in testimony or between
testimony and conduct, daily activities, and
"unexplained, or inadequately explained, failure to
seek treatment or follow a prescribed course of
treatment." Fair, 885 F.2d at 603; see also Thomas, 278
F.3d at 958-59.

Additional factors to be considered in weighing credibility
include the location, duration, frequency, and intensity of the
claimant's pain or other symptoms; factors that precipitate and
aggravate the symptoms; the type, dosage, effectiveness, and side
effects of any medication the claimant takes or has taken to
alleviate the symptoms; treatment, other than medication, the
person receives or has received for relief of the symptoms; any
measures other than treatment the claimant uses or has used to
relieve the symptoms; and any other factors concerning the

1 claimant's functional limitations and restrictions due to pain or
2 other symptoms. 20 C.F.R. § 416.929; S.S.R. 96-7p.

3 B. Analysis

4 The ALJ detailed Plaintiff's claims of disability due to a
5 bad leg, depression, anger, violence, inability to remember and
6 follow directions, and dislike of being around people. (A.R. 16.)
7 The ALJ noted that medications helped without adverse side-
8 effects, and that although Plaintiff had no friends, he could
9 watch television, pick up trash, clean the house, and do what he
10 wanted to do. (A.R. 16.) The ALJ then found that although
11 Plaintiff's medically determinable impairments could reasonably
12 be expected to produce the symptoms alleged by Plaintiff in his
13 testimony and reports, Plaintiff's statements concerning the
14 intensity, persistence, and limiting effects of those symptoms
15 were not entirely credible. (A.R. 16.)

16 As previously noted, the effects and an absence of side-
17 effects of medication are appropriately considered in evaluating
18 Plaintiff's subjective complaints. Here, Plaintiff's own
19 testimony reflected that his medications took care of his
20 symptoms and produced no side-effects. The Court concludes that
21 the ALJ's reasoning concerning Plaintiff's medications helping
22 without side-effects was clear and convincing.

23 The reasons stated by the ALJ included inconsistencies in
24 Plaintiff's testimony concerning his work history and his
25 earnings records, which showed earnings between 1997 and 1999;
26 Plaintiff's inconsistent testimony concerning having a valid
27 driver's license; and the inconsistency of Plaintiff's claim of
28 never having worked with his hands with the appearance of his

1 hands as dirty and bearing multiple callouses. (A.R. 16.)

2 Inconsistent statements are matters generally considered in
3 evaluating credibility and are properly factored in evaluating
4 the credibility of a claimant with respect to subjective
5 complaints. In rejecting testimony regarding subjective symptoms,
6 permissible grounds include a reputation for dishonesty,
7 conflicts or inconsistencies between the claimant's testimony and
8 his conduct or work record, or internal contradictions in the
9 testimony; and testimony from physicians and third parties
10 concerning the nature, severity, and effect of the symptoms of
11 which the claimant complains. Moisa v. Barnhart, 367 F.3d 882,
12 885 (9th Cir. 2004); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th
13 Cir. 2002). The ALJ may consider whether the Plaintiff's
14 testimony is believable or not. Verduzco v. Apfel, 188 F.3d 1087,
15 1090 (9th Cir. 1999).

16 Here, the record supports the various inconsistencies noted
17 by the ALJ, which permitted an inference of unreliability. The
18 ALJ's reasoning was clear and convincing.

19 The ALJ also noted Plaintiff's daily activities. (A.R. 16.)
20 He interpreted the dirt and callouses on Plaintiff's hands as
21 suggesting that Plaintiff engaged in some type of physical
22 activity. (Id.) The ALJ also noted the history of nothing more
23 than routine treatment for vague complaints coupled with
24 Plaintiff's reports of improvement with treatment, and the
25 absence of any record of treatment for heart-related complaints.
26 (Id.) He mentioned the absence of any treating source's
27 imposition or recognition of any functional limitations. (A.R.
28 16-17.)

1 In this circuit, valid criteria for evaluating subjective
2 complaints include weak objective support for claims,
3 inconsistent reporting, infrequent treatment, helpful
4 medications, conservative care, and daily activities inconsistent
5 with disability. Tidwell v. Apfel, 161 F.3d 599, 601-02 (9th Cir.
6 1998). A claimant's ability to engage in activities of daily
7 living to the extent that he or she spends a substantial part of
8 his day engaged in pursuits involving the performance of physical
9 functions that are transferable to the work setting is relevant;
10 a specific finding as to this fact may be sufficient to discredit
11 a claimant's allegations. Morgan v. Commissioner of Social Sec.
12 Admin., 169 F.3d 595, 600 (9th Cir. 1999); Thomas v. Barnhart, 278
13 F.3d 947, 959 (9th Cir. 2002). Inconsistent reports to various
14 doctors, as reflected in the records, or inconsistencies between
15 a plaintiff's claims and the observations of medical staff, can
16 constitute clear and convincing reasons for discounting claims of
17 incapacity. Morgan v. Commissioner, 169 F.3d 595, 599-600 (9th
18 Cir. 1999). It is permissible to rely upon opinions of physicians
19 concerning the nature, severity, and effect of the symptoms of
20 which the claimant complains. Thomas v. Barnhart, 278 F.3d 947,
21 958-59 (9th Cir. 2002). A doctor's opinion that a claimant can
22 work is appropriately considered. Moncada v. Chater, 60 F.3d 521,
23 524 (9th Cir. 1995).

24 With respect to Plaintiff's mental impairment, the ALJ noted
25 the absence of any significant difficulty in activities of daily
26 living, social functioning, or concentration, persistence or
27 pace. (A.R. 17-18.) The totality of the evidence of Plaintiff's
28 daily activities supported the ALJ's reasoning that Plaintiff

1 functioned productively within the household, took care of his
2 personal needs, did household chores and farming on home
3 property, and engaged in some physical labor despite
4 protestations to the contrary. (A.R. 17.) Dr. Spindell had noted
5 Plaintiff's stable interaction with family and friends; and the
6 ALJ further mentioned the absence of any difficulty in social
7 functioning during consultative exams or during the hearing.
8 (A.R. 18.) Although an ALJ's observations may not be the sole
9 reason for rejecting subjective complaints, S.S.R. 96-7p at 8, an
10 ALJ may use ordinary techniques of credibility evaluation and may
11 consider specific observations of the claimant at the hearing as
12 part of an overall credibility determination. See, Tonapetyan v.
13 Halter, 242 F.3d 1144, 1148 (9th Cri. 2001).

14 As to concentration, the ALJ noted Plaintiff's concentration
15 in watching television and cleaning, as well as Dr. Spindell's
16 report that Plaintiff was able to understand and carry out one-
17 step and two-step instructions. (A.R. 18.)

18 The absence of treatment or only routine treatment was also
19 reflected in the record and was validly considered in connection
20 with determining the nature and severity of Plaintiff's symptoms.
21 Further, the ALJ appropriately considered the absence of
22 consistent expert opinion. The ALJ noted the opinion of Dr.
23 Damania that Plaintiff could work and the opinion of Dr. Spindell
24 that was consistent with work activity. (A.R. 16-17.) All these
25 reasons were clear and convincing and were supported by
26 substantial evidence.

27 Finally, the ALJ relied on the absence of objective evidence
28 of limitations as severe as those claimed by Plaintiff. The ALJ

1 noted Dr. Damania's finding of an absence of any clinical
2 findings of radiculopathy as well as his observation of dirt and
3 multiple callouses on the hands, suggesting a capacity for
4 physical activity. The ALJ characterized Dr. Damania's opinion of
5 limitation to tasks consistent with medium exertion as based on
6 Plaintiff's allegations of pain and not any objective findings.
7 (A.R. 16.) The normal findings upon Dr. Damania's examination
8 support this reasoning. Further, the reasoning was clear and
9 convincing. Where the record supports an ALJ's rejection of the
10 claimant's credibility as to subjective complaints, the ALJ is
11 free to disregard a doctor's opinion that was premised upon the
12 claimant's subjective complaints. Tonapetyan v. Halter, 242 F.3d
13 1144, 1149 (9th Cir. 2001).

14 The ALJ noted the absence of any laboratory or x-ray
15 findings to support a finding of a severe physical impairment.
16 Again, the record supports this observation.

17 In addition to the opinion of consulting, psychological
18 examiner Dr. Spindell, the opinions to which the ALJ gave
19 considerable weight were the consulting examiners' opinions and
20 the state agency consultants' opinions. (A.R. 17.) The basis for
21 this weighing was the ALJ's reasoning that these opinions were
22 consistent with the objective findings of record and not
23 inconsistent with the treatment records. (A.R. 17.) As the
24 foregoing summary of the findings of records demonstrates, there
25 was an absence of objective findings that would have suggested
26 restrictions or functional limitations as severe as those claimed
27 by Plaintiff.

28 Although the inconsistency of objective findings with

1 subjective claims may not be the sole reason for rejecting
2 subjective complaints of pain, Light v. Chater, 119 F.3d 789, 792
3 (9th Cir. 1997), it is one factor which may be considered with
4 others, Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004);
5 Morgan v. Commissioner 169 F.3d 595, 600 (9th Cir. 1999). The ALJ
6 relied on multiple, clear and convincing reasons, and thus his
7 consideration of the inconsistency of objective findings was
8 appropriate.

9 The ALJ also expressly considered but rejected the third-
10 party reports and the opinions of Plaintiff, but he gave them
11 little weight because they were not entirely consistent with the
12 objective medical findings contained in the record. (A.R. 17.)
13 This reasoning was specific and germane to the witnesses. Dodrill
14 v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993). It was based on
15 the inconsistency of the medical evidence, which was
16 appropriately considered. Lewis v. Apfel, 236 F.3d 503, 511-12
17 (9th Cir. 2001); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
18 2002).

19 Plaintiff's reliance upon evidence in the record that would
20 have supported conclusions different from those reached by the
21 ALJ is unavailing. Although there might have been factors
22 supporting Plaintiff's credibility, the ALJ nevertheless
23 articulated clear and convincing reasons, supported by
24 substantial evidence, for discrediting Plaintiff's subjective
25 complaints. Cf. Batson v. Commissioner of the Social Security
26 Administration, 359 F.3d 1190, 1196 (9th Cir. 2004). It is not the
27 role of this Court to redetermine Plaintiff's credibility de
28 novo; although evidence supporting an ALJ's conclusions might

1 also permit an interpretation more favorable to the claimant, if
2 the ALJ's interpretation of evidence was rational, this Court
3 must uphold the ALJ's decision where the evidence is susceptible
4 to more than one rational interpretation. Burch v. Barnhart, 400
5 F.3d 676, 680-81 (9th Cir. 2005).

6 Accordingly, the Court concludes that the ALJ cited clear
7 and convincing reasons for rejecting Plaintiff's subjective
8 complaints regarding the intensity, duration, and limiting
9 effects of his symptoms, and that the ALJ's reasons were properly
10 supported by the record and sufficiently specific to allow this
11 Court to conclude that the ALJ rejected the claimant's testimony
12 on permissible grounds and did not arbitrarily discredit
13 Plaintiff's testimony.

14 IX. Expert Opinions

15 Plaintiff attacks the ALJ's conclusion concerning the
16 severity of Plaintiff's impairments as unsupported by substantial
17 evidence.

18 Plaintiff argues that because there was no functional
19 assessment in the record from Dr. Kaleka or any other treating
20 source, the ALJ erred in not recontacting Dr. Kaleka for him to
21 address Plaintiff's functional limitations, and the ALJ erred in
22 not developing the record in this respect.

23 Plaintiff also argues that the state agency physician, who
24 in turn relied on the opinions of Dr. Spindell, had not reviewed
25 the entire record because he had not reviewed the additional
26 records from Dr. Kaleka submitted in November 2007 (A.R. 149-57).
27 Thus, such opinion evidence did not constitute substantial
28 evidence.

1 A. Legal Standards

2 1. Severity of Impairments

3 At step two, the Secretary considers if claimant has "an
4 impairment or combination of impairments which significantly
5 limits his physical or mental ability to do basic work
6 activities." 20 C.F.R. § 416.920(c). This is referred to as the
7 "severity" requirement and does not involve consideration of the
8 claimant's age, education, or work experience. Id. The step-two
9 inquiry is a de minimis screening device to dispose of groundless
10 claims. Bowen v. Yuckert, 482 U.S. 153-54 (1987). The Secretary
11 is required to "consider the combined effect of all of the
12 individual's impairments without regard to whether any such
13 impairment, if considered separately, would be of [sufficient
14 medical] severity." 42 U.S.C. § 1382c(a)(3)(F).

15 Basic work activities include the abilities and aptitudes
16 necessary to do most jobs, such as physical functions of walking,
17 standing, sitting, lifting, pushing, pulling, reaching, carrying,
18 or handling; capacities for seeing, hearing, and speaking;
19 understanding, carrying out, and remembering simple instructions;
20 use of judgment; responding appropriately to supervision, co-
21 workers and usual work situations; and dealing with changes in a
22 routine work setting. 20 C.F.R. § 416.921(b).

23 An impairment or combination thereof is not severe when
24 medical evidence establishes only a slight abnormality or a
25 combination of slight abnormalities which would have no more than
26 a minimal effect on an individual's ability to work. An
27 impairment is not severe if it does not significantly limit a
28 claimant's physical or mental ability to do basic work

1 activities. 20 C.F.R. § 416.921(a); Soc. Sec. Ruling 85-28;
2 Smolen v. Chater, 80 F.3d 1273, 1289-90 (9th Cir. 1996).

3 2. Evaluation of Expert Opinions

4 The Court defers to the opinion of a treating physician
5 because of a greater opportunity to know and observe the patient
6 as an individual and because the purpose of the employment is to
7 cure the patient. Morgan v. Commissioner of Social Sec. Admin.,
8 169 F.3d 595, 600 (9th Cir. 1999). However, an ALJ may disregard a
9 treating physician's opinion whether or not it is contradicted.
10 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). For
11 example, an ALJ may reject a treating physician's opinion that is
12 brief and conclusory in form with little in the way of
13 clinical findings to support its conclusion. Id.

14 The medical opinion of a nontreating doctor may be relied
15 upon instead of that of a treating physician only if the ALJ
16 provides specific and legitimate reasons supported by substantial
17 evidence in the record. Holohan v. Massanari, 246 F.3d 1195, 1202
18 (9th Cir. 2001) (citing Lester v. Chater, 81 F.3d 821, 830 (9th
19 Cir. 1995)). The contradictory opinion of a nontreating but
20 examining physician constitutes substantial evidence, and may be
21 relied upon instead of that of a treating physician, where it is
22 based on independent clinical findings that differ from those of
23 the treating physician. Andrews v. Shalala, 53 F.3d 1035, 1041
24 (9th Cir. 1995). The opinion of a nontreating, nonexamining
25 physician can amount to substantial evidence as long as it is
26 supported by other evidence in the record, such as the opinions
27 of other examining and consulting physicians, which are in turn
28 based on independent clinical findings. Andrews v. Shalala, 53

1 F.3d 1035, 1041 (9th Cir. 1995).

2 3. Duty to Develop the Record

3 The duty to develop the record arises where the record
4 before the ALJ is ambiguous or inadequate to allow for proper
5 evaluation of the evidence. 20 C.F.R. §§ 404.1512(e) and
6 416.912(e); Mayes v. Massanari, 262 F.3d 963, 968 (9th Cir. 2001).

7 B. Analysis

8 First, the Court rejects Plaintiff's contention concerning
9 the need for the ALJ to recontact Dr. Kaleka to obtain a report
10 of functional capacity. It is not necessary for a treating
11 source's functional assessment to be in the record unless the
12 record is unclear or inadequate to permit evaluation of the
13 evidence. Here, the ALJ had multiple assessments of Plaintiff's
14 capacity for basic work activities, and he evaluated those
15 assessments and stated his reasoning; with respect to the state
16 of the record, he did not find any inadequacy or ambiguity. The
17 Court notes that the record was supplemented with additional
18 records from Dr. Kaleka; it is clear that Plaintiff had an
19 opportunity to submit an opinion from Dr. Kaleka but did not do
20 so. As Defendant notes, at this step, it is Plaintiff's burden to
21 provide evidence of disability. The Court concludes that the ALJ
22 did not breach any duty to develop the record.

23 The fact that Drs. Aquino-Caro, Jackson, Sharbaugh, and
24 Middleton did not have the records of Dr. Kaleka's treatment in
25 2007 before them when they stated their opinions in November 2006
26 and April 2007 does not render their opinions insubstantial. One
27 important factor in evaluating an expert opinion is the extent to
28 which an acceptable medical source is familiar with the other

1 information in the case record; an opinion should be based on the
2 Plaintiff's condition as a whole. 20 C.F.R. § 416.927(d)(6).
3 Also, a more recent opinion may in some circumstances be entitled
4 to greater weight. Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir.
5 1993). However, here, the opining sources had the earlier records
6 from Dr. Kaleka, and there is nothing in the later batch of
7 records that was inconsistent with the earlier records. Plaintiff
8 does not suggest how the continuation of the same symptom and
9 treatment history could have invalidated the earlier opinions or
10 otherwise brought them into question. The same absence of
11 objective medical signs was reflected in both batches of notes.

12 To the contrary, the state agency physicians' opinions were
13 based on the focused findings of the consulting examiners. They
14 thus constituted substantial evidence supporting the ALJ's
15 findings that Plaintiff's medically determinable mental and
16 physical impairments were not severe.

17 X. Disposition

18 Based on the foregoing, the Court concludes that the ALJ's
19 decision was supported by substantial evidence in the record as a
20 whole and was based on the application of correct legal
21 standards.

22 Accordingly, the Court AFFIRMS the administrative decision
23 of the Defendant Commissioner of Social Security and DENIES
24 Plaintiff's Social Security complaint.

25 The Clerk of the Court IS DIRECTED to enter judgment for
26 /////
27 ///////////
28 //////////////////////

1 Defendant Michael J. Astrue, Commissioner of Social Security,
2 and against Plaintiff Bouaphan Phetchumporn.

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4 IT IS SO ORDERED.

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6 Dated: February 25, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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