

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHNNY L. HILL,

CASE NO. 1:09-cv-00073-SMS

Plaintiff,

v.

ORDER RE PLAINTIFF'S
SOCIAL SECURITY COMPLAINT

COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

Plaintiff Johnny L. Hill seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying his application for supplemental security income ("SSI"), pursuant to Title XVI of the Social Security Act (42 U.S.C. § 301 *et seq.*) (the "Act"). The matter is currently before the Court on the parties' cross-briefs, which were submitted, without oral argument, to the Honorable Sandra M. Snyder, United States Magistrate Judge.¹ Following a review of the complete record, this Court finds the decision of the Administrative Law Judge ("ALJ") to be supported by substantial evidence in the record as a whole and based on proper legal standards. Accordingly, this Court denies Plaintiff's appeal.

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¹ In February 2009, both parties consented to the jurisdiction of a United States Magistrate Judge (Docs. 9 & 10).

1 **I. Administrative Record**

2 **A. Procedural History**

3 On April 27, 2006, Plaintiff applied for SSI disability benefits, alleging disability
4 beginning April 1, 1998. AR 9. On August 26, 2008, Administrative Law Judge Bert C.
5 Hoffman, Jr., denied Plaintiff's application. AR 6-14. Plaintiff sought review of the ALJ's
6 decision, contending that it was not based on substantial evidence in the record. AR 4. The
7 Appeals Council denied review on November 24, 2008. AR 1-3. Plaintiff filed a complaint
8 seeking this Court's review on January 12, 2009 (Doc. 1).

9 **B. Factual Record**

10 At the administrative hearing on February 19, 2008, Plaintiff (born March 25, 1988)
11 testified that he experienced petit mal seizures as frequently as four to six times per week and
12 grand mal seizures three to twelve times a month. AR 25-30, and 32. His mother, Shelley
13 Davis, testified that Plaintiff may have up to nine petit mal seizures per day, some lasting just
14 seconds. AR 46. Davis also described what she called the "blank stares," during which Plaintiff
15 is not aware of her speaking and chews as if something were in his empty mouth. AR 47.
16 Plaintiff's seizures may be triggered by stress, flashing lights, and certain odors. AR 51.

17 When Plaintiff experiences grand mal seizures, he loses consciousness and falls to the
18 floor. AR 27, 48. At other times, he is able to protect himself by sitting on an open floor. AR
19 27. Plaintiff's longest seizure lasted twenty-five minutes; he estimated the usual duration is
20 fifteen or twenty minutes, but Davis testified the usual seizure was four to ten minutes. AR 31,
21 48. Plaintiff is usually not aware when he is seizing, although he has had the experience of being
22 conscious but unable to control his bodily movements. AR 31. He may bite his tongue or lose
23 bladder or bowel control. AR 31-32, 139. Plaintiff has experienced seizures during sleep. AR
24 133, 139. Thereafter, his muscles may be sore from contractions, or he may have a headache or
25 other injuries from falling. AR 31, 52-53.

26 After a small seizure, Plaintiff may feel lightheaded or nauseous, and may require up to
27 an hour, at most, to recover. AR 28-29. After a grand mal seizure, he may sleep from two to
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1 three hours. AR 31. Since his seizures have been uncontrolled, Plaintiff's memory has
2 deteriorated. AR 32, 133. Plaintiff also reported speech problems and fatigue. AR 133.

3 When Plaintiff experiences petit mal seizures, he throws up his arms and gasps for air,
4 sometimes creating a loud shrieking sound. AR 26. Being aware that others find his seizures
5 frightening, if he senses the onset of a seizure, Plaintiff attempts to go somewhere without many
6 people. AR 28.

7 Plaintiff's medical records confirm his ongoing seizure disorder. AR 160-177, 179-185,
8 206. An EEG report dated February 28, 2006, identified abnormal spiking brain waves,
9 recurring on some, but not all, prior EEG reports. AR 173, 182. Prior to February 2005,
10 Plaintiff's seizure activity was well controlled. AR 185.

11 On September 23, 2005, Plaintiff was taken to Community Medical Center, Clovis,
12 following a seizure. AR 151-158. Blood testing indicated a low valproic acid level (13.0
13 ug/mL). AR 158. Valproic acid is "a simple eight-carbon branched-chain fatty acid used in the
14 treatment of epileptic seizures, particularly absence seizures,; administered orally." Dorland's
15 Illustrated Medical Dictionary at 1791 (28th ed. 1994). The level of valproic acid generally
16 corresponds to the level of antiseizure medications in a patient's blood. The normal range for
17 valproic acid is 50-150 mcg/mL. AR 158.

18 Seizure activity increased after Plaintiff was struck by a car in early February 2006. AR
19 175-177, 182. As a result, Plaintiff was unable to attend school from February 3 through June
20 30, 2006, and his doctor requested that he be provided with a home school program. AR 181.

21 Kaiser Permanente records noted reports of more than one seizure per month from
22 February through July 2006. AR 160-162. Valproic acid level was also low on February 10,
23 2006 (17.3 mcg/mL) and March 17, 2006 (34.8 mcg/mL). AR 171, 172.

24 Plaintiff testified that he took 800 mg. of Lamictal daily, the maximum dose. AR 32-33.
25 Lamictal sometimes makes him drowsy and causes him to perceive an unpleasant, but
26 nonexistent, smell. AR 33-34. His application also indicated prescription of two other

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1 anti-seizure medications: Depakote and Keppra. AR 119. Davis testified that the antiseizure
2 medicines were often more effective when first prescribed and became less effective over time.
3 AR 50.

4 Plaintiff acknowledged that he sometimes forgot to take his medications. AR 43. Davis
5 testified that she was not aware that Plaintiff had ever gone long periods without medication. AR
6 55. Although she had previously been unsure about Plaintiff's compliance, by the time of the
7 hearing, she made sure that Plaintiff took his medication, waking him to take medication before
8 she leaves for work. AR 55.

9 In a July 2008 medical history, Dr. Yoshimura reported that, as a young child, Plaintiff
10 had experienced early learning difficulties with significant speech delays, and was considered to
11 have a cognitive disability. AR 221. Although Plaintiff attended regular school classes, he
12 completed high school but did not receive a diploma. AR 22. Thereafter, he enrolled in a GED
13 program, but because his shrieking seizures disrupted the classes, Plaintiff withdrew without
14 completing the GED. AR 22.

15 Plaintiff testified that he could work full time if any one were willing to hire him. AR 24.
16 Davis disagreed, citing the frequency of Plaintiff's seizures. AR 55. Except for occasional work
17 raking yards, Plaintiff has been unable to secure a job. AR 23. He testified that employers did
18 not want to hire some one whose seizures might expose them to liability or frighten their
19 customers. AR 23.

20 Plaintiff lives with Davis. AR 106. He helps with such household chores as vacuuming,
21 taking out trash, and washing dishes. AR 38. His uncontrolled seizures preclude his having a
22 driver's license. AR 20.

23 Plaintiff does not ride a bike, skateboard, or roller blade, perceiving such activities as too
24 risky. AR 36. He cannot participate in contact sports or swimming. AR 53. He does not bathe
25 or shower when no one is home. AR 38. Similarly, his mother forbid his cooking when she is
26 away because of the risk of a fire. AR 38.

27 After agency physicians reviewed Plaintiff's medical records, they concluded that
28 Plaintiff had a seizure disorder that did not reach the severity of the listing level. AR 191-92.

1 Dr. Ocrant noted noting that the agency had “no corroboration of compliance or of frequency”
2 and no report after 3 months treatment on current regimen.” AR 192.

3 Because of his seizures, Plaintiff is subject to postural and hazard limitations. AR 187-
4 189. In a physical residual functional analysis, consultant G. Friedman noted that, because of
5 Plaintiff’s epilepsy, he should not use ladders, ropes or scaffolds, be on unprotected heights, or
6 work with dangerous machinery or near open flames. AR 195, 197. Friedman reported that
7 Plaintiff’s symptoms were under control as of June 26, 2006. AR194.

8 In a report dated July 24, 2007, Plaintiff’s neurologist, Dr. Bankar, characterized
9 Plaintiff’s seizures as “unpredictable despite medical intervention.” AR 202. Seizure activity
10 had recently increased. AR 202. Plaintiff’s medication made him drowsy. AR 202. Bankar
11 limited Plaintiff to no driving, ladder use or use of powered equipment. AR 202.

12 Kaiser Permanente records documented Plaintiff’s reported seizures in 2007. AR 211-
13 220. Davis testified that those records were incomplete since she did not call the doctor’s office
14 each time Plaintiff experienced a seizure. AR 52.

15 In a January 15, 2008 treatment note, Dr. Yoshimura ordered testing in response to a
16 recent increase in seizure frequency, including a generalized tonic-clonic seizure the prior night.
17 AR 207. Yoshimura diagnosed Plaintiff with probable idiopathic primary generalized seizures,
18 incompletely controlled on current medications. AR 221.

19 In a letter dated March 18, 2008, Plaintiff’s pediatric neurologist Dr. Dwarka Philip
20 Sankar wrote:

21 I have been the neurologist for Johnny Hill from age 13 until age 18 years (last
22 seen in 2006). During that time Johnny had a seizure disorder that has been
23 difficult to control. He has been on multiple medications during that time and he
24 has variable drug levels from subtherapeutic to high therapeutic levels. His
25 persistently poorly controlled epilepsy has affected his ability to care for himself
26 after a seizure, and his cognitive ability. A consequence is the type of
27 employment he will be able to maintain.

28 Drug therapeutic levels provide guidelines for accepted range of therapy but do
not define whether a person is taking the correct dosage of medication. Efficacy
of medication (in this case antiepileptic) is based primarily on how a person
responds (ie lack of seizures).

Employment for people with epilepsy is based upon their cognitive ability and
control of seizures; in Johnny’s case, although he is strong, he cannot be

1 employed in a capacity that requires lifting heavy objects or operating machinery
2 because of his unpredictable seizures.

3 AR 230.

4 **II. Discussion**

5 **A. Scope of Review**

6 Congress has provided a limited scope of judicial review of the Commissioner's decision
7 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
8 a court must determine whether substantial evidence supports the Commissioner's decision. 42
9 U.S.C. § 405(g). Substantial evidence means "more than a mere scintilla" (*Richardson v.*
10 *Perales*, 402 U.S. 389, 402 (1971)), but less than a preponderance. *Sorenson v. Weinberger*, 514
11 F.2d 1112, 1119 n. 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might
12 accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The record as a
13 whole must be considered, weighing both the evidence that supports and the evidence that
14 detracts from the Commissioner's decision. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).
15 In weighing the evidence and making findings, the Commissioner must apply the proper legal
16 standards. *See, e.g., Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must
17 uphold the ALJ's determination that the claimant is not disabled if the ALJ applied the proper
18 legal standards, and if the ALJ's findings are supported by substantial evidence. *See Sanchez v.*
19 *Secretary of Health and Human Services*, 812 F.2d 509, 510 (9th Cir. 1987).

20 **B. Legal Standards**

21 To qualify for benefits, a claimant must establish that he or she is unable to engage in
22 substantial gainful activity because of a medically determinable physical or mental impairment
23 which has lasted or can be expected to last for a continuous period of not less than twelve
24 months. 42 U.S.C. § 1382c (a)(3)(A). A claimant must demonstrate a physical or mental
25 impairment of such severity that he or she is not only unable to do his or her previous work, but
26 cannot, considering age, education, and work experience, engage in any other substantial gainful
27 work existing in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir.
28 1989).

1 To encourage uniformity in decision making, the Commissioner has promulgated
2 regulations prescribing a five-step sequential process for evaluating an alleged disability. 20
3 C.F.R. §§ 404.1520 (a)-(f); 416.920 (a)-(f). The process requires consideration of the following
4 questions:

- 5 Step one: Is the claimant engaging in substantial gainful activity? If so, the
6 claimant is found not disabled. If not, proceed to step two.
- 7 Step two: Does the claimant have a “severe” impairment? If so, proceed to
8 step three. If not, then a finding of not disabled is appropriate.
- 9 Step three: Does the claimant’s impairment or combination of impairments
10 meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P,
11 App. 1? If so, the claimant is automatically determined disabled.
12 If not, proceed to step four.
- 13 Step four: Is the claimant capable of performing his past work? If so, the
14 claimant is not disabled. If not, proceed to step five.
- 15 Step five: Does the claimant have the residual functional capacity to perform
16 any other work? Is do, the claimant is not disabled. If not, the
17 claimant is disabled.

18 *Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9th Cir. 1995).

19 The ALJ found that Plaintiff had not engaged in substantial gainful activity since he
20 applied for disability benefits on April 27, 2006. AR 11. His seizure disorder is a severe
21 impairment. AR 11. The ALJ concluded, however, that Plaintiff’s impairment did not meet the
22 listed impairments in 20 C.F.R. Part 404, Subpart P. Appendix 1 (20 C.F.R. §§ 416.920(d),
23 416.925, and 416.926). AR 11.

24 Since Hill, who had recently completed high school, had not worked previously, the ALJ
25 did not evaluate step four. At step five, the ALJ found that Plaintiff has residual functional
26 capacity to perform a full range of work that did not involve working at unprotected heights,
27 operating automotive equipment, or working around dangerous machinery. AR 11.

28 **C. Plaintiff’s Claims**

Plaintiff contends that the ALJ failed (1) to properly assess his seizure disorder; (2) to
credit Plaintiff’s cognitive impairment; (3) to properly assess Plaintiff’s testimony; and (4) to
properly assess Davis’s testimony.

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1 **1. Plaintiff's Seizure Disorder**

2 Plaintiff contends that the ALJ erred in failing to recognize that Plaintiff's impairment or
3 combination of impairments met or equaled an impairment listed in 20 C.F.R., Pt. 404, Subpt. P,
4 App. 1. The categories of seizure impairments recognized by the regulations include:

- 5 11.02 *Epilepsy—convulsive epilepsy, (grand mal or psychomotor), documented*
6 *by detailed description of a typical seizure pattern, including all*
7 *associated phenomena; occurring more frequently than once a month in*
8 *spite of at least 3 months of prescribed treatment. With:*
9 A. Daytime episodes (loss of consciousness and convulsive
 seizures) or
 B. Nocturnal episodes manifesting residuals which interfere
 significantly with activity during the day.

10 20 C.F.R., Pt. 404, Subpt. P, App. 1, §11.02.

- 11 11.03 *Epilepsy—nonconvulsive epilepsy (petit mal, psychomotor, or focal),*
12 *documented by detailed description of typical seizure pattern, including all*
13 *associated phenomena; occurring more frequently than once weekly in spite of at*
14 *least 3 months of prescribed treatment. With alteration of awareness or loss of*
15 *consciousness and transient postictal manifestations or significant interference*
16 *with activity during the day.*

17 20 C.F.R., Pt. 404, Subpt. P, App. 1, §11.03.

18 The regulations prescribe demanding standards of proof in determining whether a
19 claimant condition qualifies as a listed impairment. For §§ 11.02 and 11.03, they provide, in
20 pertinent part:

21 In epilepsy, regardless of etiology, degree of impairment will be determined
22 according to type, frequency, duration, and sequelae of seizures. At least one
23 detailed description of a typical seizure is required. Such description includes the
24 presence or absence of aura, tongue bites, sphincter control, injuries associated
25 with the attack, and postictal phenomena. The reporting physician should indicate
26 the extent to which description of seizures reflects his own observations and the
27 source of ancillary information. Testimony of persons other than the claimant is
28 essential for description of type and frequency of 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. Determination of blood levels of phenytoin
 sodium or other antiepileptic drugs may serve to indicate whether the prescribed
 medication is being taken. When seizures are occurring at the frequency stated in
 11.02 or 11.03, evaluation of the severity of the impairment must include
 consideration of the serum drug levels. Should serum drug levels appear
 therapeutically inadequate, consideration should be given to whether this is caused
 by individual idiosyncrasy in absorption of [sic] metabolism of the drug. Blood

1 drug levels should be evaluated in conjunction with all the other evidence to
2 determine the extent of compliance. When the reported drug levels are low,
3 therefore, the information obtained from the treating source should include the
4 physician's statement as to why the levels are low and the results of any relevant
diagnostic studies concerning the blood levels. Where adequate seizure control is
obtained only through unusually large doses, the possibility of impairment
resulting from the side effects of this medication must also be assessed.

5 20 C.F.R., Pt. 404, Subpt. P, App. 1, §11.00 A.

6 This means that a claimant seeking to qualify for a listed disability based on a seizure disorder
7 must document the persistence of his seizures despite his conforming to his prescribed treatment
8 regimen.

9 The ALJ found that Hill's seizure disorder was a severe impairment but not an
10 impairment that met or medically equaled one of the listed impairments in 20 C.F.R. Part 404.
11 Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925, 416.926). AR 11. Although
12 Plaintiff's medically determinable impairment could reasonably be expected to produce the
13 alleged symptoms, the ALJ concluded that Plaintiff's statements about the intensity, persistence,
14 and limiting effects of his symptoms were not credible. AR12. Although Kaiser's records for
15 the period from February 2005 to June 2008 document their treatment of Plaintiff's seizure
16 disorder and provide laboratory and imaging records showing the medical basis for Plaintiff's
17 medically condition, notes throughout the records repeatedly question Plaintiff's compliance with
18 his medications, report that Davis admitted her inability to attest to Plaintiff's compliance, and
19 indicate that tests do not consistently show Plaintiff's medication levels to be therapeutic. In
20 addition, Plaintiff's physician, Dr. Sankar, reported that lab tests could not document whether
21 Plaintiff was consistently taken the correct dosages of his medications.

22 The scope of this Court's review of disability determinations is limited by 42 U.S.C. §
23 405(g), which provides, "The findings of the Secretary as to any fact, if supported by substantial
24 evidence, shall be conclusive " *See Chavies v. Finch*, 443 F.2d 356, 357 (9th Cir. 1971);
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). Substantial evidence is relevant evidence
26 that a reasonable mind would accept as adequate to support a conclusion. *Key v. Heckler*, 754
27 F.2d 1545, 1549 (9th Cir. 1985). Even if the evidence is susceptible to more than one reasonable
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1 interpretation, a reviewing court must uphold the ALJ's determination. *Magallanes v. Bowen*,
2 881 F.2d 747, 750 (9th Cir. 1989).

3 The ALJ outlined the substantial evidence in the record supporting his conclusion that
4 Plaintiff was not consistently compliant with his prescribed medication. In addition, Plaintiff
5 himself acknowledged that he sometimes forgot to take his medications. AR 43. And, although
6 his mother testified that she tried to make sure that Plaintiff took his medication, she was not
7 aware whether he had ever gone an extended period of time without taking it. When an ALJ has
8 made specific findings, supported by substantial evidence in the record, justifying his or her
9 determination to believe or disbelieve a claim, this Court will not second-guess his or her
10 decision. *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989); *Sample v. Schweiker*, 694 F.2d 639,
11 642 (9th Cir. 1982).

12 **2. Plaintiff's Cognitive Impairment**

13 In the course of his contention that the ALJ erred in concluding that Plaintiff did not meet
14 the impairments listed in the record, Plaintiff contends that the ALJ had the duty to develop the
15 record regarding Plaintiff's cognitive impairment, particularly whether the cognitive impairment
16 itself or exacerbation of the cognitive impairment as a side effect of the anti-seizure medications
17 rendered Plaintiff unable to protect his own interest. Plaintiff relies on case law imposing a
18 greater duty to develop the record where a claimant may be mentally ill and unable to protect his
19 own interest. Since nothing in this case suggests that Plaintiff is mentally ill and Plaintiff never
20 argued below that his early cognitive impairment related to his disability in any way, this
21 argument lacks merit.

22 Ambiguous evidence, especially when a claimant proceeds pro se or represented by a lay
23 person rather than an attorney, triggers an ALJ's duty to conduct a further inquiry. *Tonapetyan v.*
24 *Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). In *Tonapetyan*, the reviewing court concluded that,
25 because the non-examining psychological expert testified that the evidence from the claimant's
26 treating psychiatrist was "confusing," recommended that a more detailed opinion be secured,
27 and opined that whether the record was sufficient for the ALJ to reach a conclusion was "difficult
28 to say," the ALJ erred in not making further inquiry. *Id.* at 1150-51.

1 In *Armstrong*, the ALJ and the district court struggled to determine the onset date of the
2 claimant's severe depression in the face of insufficient evidence documenting that the claimant
3 had been depressed prior to his last insured date. *Armstrong v. Commissioner of Social Security*
4 *Admin.*, 160 F.3d 587, 589 (9th Cir. 1998). Although the record indicated that the claimant had
5 experienced depression for many years prior to the last insured date, it included no evidence from
6 which the date of disability could be determined. *Id.* at 590. Accordingly, the Ninth Circuit held
7 that SSR 83-20 (governing onset of disability) required the ALJ to call a medical expert to create
8 a record that would provide a basis for determining the disability onset date from the existing
9 evidence. *Id.* The Court added, however, that its holding did not relieve a claimant of the
10 ultimate burden of proving that he or she was disabled before their disability insured status
11 expired. *Id.*

12 Nothing in the record suggest that Plaintiff ever contended that his cognitive impairments
13 disabled him. The sole mention of his cognitive impairments was their inclusion in the medical
14 history set forth in Dr. Yoshimura's report. Unlike *Tonapetayan*, no witness ever suggested that
15 further evidence on the cognitive impairments was appropriate. Nor did a body of evidence exist
16 that presented an ambiguity or uncertainty requiring further information for its resolution, as was
17 the case in *Armstrong*. The ALJ was not required to further develop the factual record to
18 determine whether Plaintiff was disabled by a cognitive impairment.

19 **3. Proper Assessment of Plaintiff's Testimony**

20 Plaintiff contends that the ALJ erred in rejecting Plaintiff's testimony that he experienced
21 frequent disabling seizures. Plaintiff's contention appears to be that the ALJ erred in concluding
22 that Plaintiff's statements about the intensity, persistence, and limiting effects of his symptoms
23 were not credible. Although the ALJ did question the credibility of Plaintiff's testimony about
24 his symptoms, Plaintiff's contention is unpersuasive.

25 To the extent that the ALJ's determined that Plaintiff did not consistently comply with his
26 medication protocol, whether the ALJ believed Plaintiff's statements regarding the intensity,
27 persistence and frequency of his seizures is immaterial. As discussed in point one, the record

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1 supported that ALJ's conclusion that Plaintiff was not compliant; indeed, Plaintiff himself
2 testified that he sometimes forgot to take his medication.

3 In addition, Plaintiff himself testified that he would be able to work at any of several jobs
4 if employers were not concerned about liability for Plaintiff's injury or the negative effect of
5 customer's witnessing Plaintiff's seizures. Plaintiff's testimony in that regard was buttressed by
6 the opinion of Plaintiff's pediatric neurologist, Dr. Sankar, that Plaintiff could be employed
7 based on his cognitive abilities and the control of his seizures so long as Plaintiff was not
8 employed lifting heavy objects or operating machinery. AR 230. Consultant Friedman agreed,
9 opining that Plaintiff could be employed in positions that did not expose him to unprotected
10 heights, open flames, or dangerous machinery. AR 195, 197. Accordingly, the ALJ did not err
11 in concluding that Plaintiff retained sufficient residual functional ability to be employed in an
12 appropriate position.

13 **4. Proper Assessment of Davis's Testimony**

14 Plaintiff contends that the ALJ erred in failing to consider Davis's log of Plaintiff's
15 seizures, which appears in the record at AR 147-148. This Court disagrees. Davis's log is
16 inadequate to overcome the evidence on which the ALJ relied. The log includes entries for only
17 25 days between August 23, 2007, and January 24, 2008, ending with the note that Plaintiff's
18 medication was increased in February 2008. It lacks detail regarding the times of many of the
19 seizures and the circumstances under which all of the seizures occurred. And it is inconsistent
20 with Davis's testimony the Plaintiff experienced daily petit mal seizures up to nine per day and
21 omits any record of the "blank stare" or absence seizures. Because the log would not have
22 overcome the evidence on which the ALJ relied, the ALJ's failure to include it in his decision or
23 even to comment on it is, at best, harmless error.

24 **D. Conclusion**

25 Based on the foregoing, the Court finds that the ALJ's decision is supported by
26 substantial evidence in the record as a whole and is based on proper legal standards.
27 Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the

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1 Commissioner of Social Security. The Clerk of Court is DIRECTED to enter judgment in favor
2 of the Commissioner and against Plaintiff.

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4 IT IS SO ORDERED.

5 **Dated: June 25, 2010**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE