

1 on June 13, 2007, and denied benefits on July 2, 2007. AR 11-25, 411-439. The Appeals
2 Council denied review on January 14, 2009. AR 4-6.

3 Hearing Testimony

4 ALJ Hogg held a hearing on June 13, 2007, in Sacramento, California. Plaintiff appeared
5 by telephone and was represented by Geoffrey Hayden. AR 411.

6 Plaintiff testified that he has been incarcerated since July 2005 and was currently housed
7 at Mule Creek State Prison. AR 418, 420. He testified that he was 30 years old at the time of the
8 hearing and completed the second grade. AR 417. Plaintiff has never been able to read or write.
9 AR 423.

10 Plaintiff explained that he could not work because of lower back problems and
11 depression. AR 424. He rated his back pain at a six and testified that he uses a cane to walk.
12 AR 428. He was taking medication for seizures and depression, and to help him sleep. Dilantin
13 helps control his seizures, though he last had a grand mal seizure three months ago. AR 424-425.
14 He testified that he was considered mildly mentally retarded as a child. AR 425.

15 Plaintiff also testified that he sometimes has problems with his ankles, shoulders and
16 hands. He also gets headaches often and takes aspirin. AR 427. He thought he could stand for
17 about 30 minutes and could not kneel, stoop or squat to the ground without pain. AR 429.

18 Plaintiff did not believe he was getting better and explained that he has lost interest in
19 things and often feels worthless and hopeless. He has attempted suicide. AR 429-480. Plaintiff
20 is also paranoid and has crying spells and hallucinations. AR 430. He attends mental health
21 groups in prison. AR 433.

22 Medical Record

23 Plaintiff received treatment between December 2000 and March 2003 while incarcerated
24 through the California Department of Corrections. AR 114-214. In February 2002, Plaintiff was
25 restricted from work around moving machinery, heights and other hazards because of his seizure
26 disorder. He was also restricted to lower bunk/low tier housing. AR 140. In August 2002,
27 Plaintiff reported that he was mildly mentally retarded and that he “burnt [his] school at eight
28 years old.” On examination, he was described as charming and friendly with a euthymic mood

1 and no evidence of mild mental retardation. His memory and attention were within normal
2 limits. AR 126. The evaluator concluded that Plaintiff no longer met the criteria for inclusion in
3 the mental health treatment population. AR 125.

4 On June 7, 2003, Plaintiff saw Emanuel Dozier, M.D., for a consultive physical
5 examination. He complained of chronic low back pain and a seizure disorder. On examination,
6 Plaintiff walked with no signs of pain and was able to sit during the interview without
7 discomfort. He had normal muscle tone in his back though there was point tenderness in the
8 lumbar back area in the paravertebral muscles. Straight leg raising was positive at 30 degrees
9 and in the sitting position. Plaintiff had pain on range of motion testing of his lumbar back.
10 Motor strength and grip strength were normal. Dr. Dozier diagnosed back pain and a history of a
11 seizure disorder. He opined that Plaintiff would be restricted to occasional bending, stooping or
12 crouching. Plaintiff could not work on scaffolding or around moving machinery. Plaintiff could
13 lift and carry 50 pounds occasionally and 20 pounds frequently and could stand and/or walk for
14 six hours. AR 215-219.

15 A lumbar spine x-ray taken on June 7, 2003, was normal. AR 220.

16 On June 17, 2003, Plaintiff saw Shailesh C. Patel for a psychiatric examination. He
17 reported problems with depression and explained that he was abused as a child. Plaintiff also
18 complained of anxiety when he goes to sleep, and reported hearing voices that tell him to hurt
19 other people. During the day, he sometimes sits and talks to himself. He has never worked. AR
20 221. On mental status examination, Plaintiff's affect was appropriate and he described his mood
21 "confused and depressed." He was alert and oriented to all spheres and his recent and remote
22 memories were fair. Plaintiff was uncooperative during the examination, however.

23 Dr. Patel diagnosed a history of alcohol abuse, history of ADHD, history of conduct
24 disorder, antisocial personality disorder and rule out mild mental retardation. Dr. Patel found
25 minimal evidence suggesting that Plaintiff had any other psychiatric illness that affected his
26 ability to function, though he needed psychological testing to rule out mild mental retardation
27 and to get more information about his current IQ, which may be affecting his ability to function.
28

1 Dr. Patel believed that Plaintiff needed substance abuse treatment and could benefit from
2 vocational training. Plaintiff could not handle his funds. AR 222-223.

3 On September 12, 2003, Plaintiff saw Kimball Hawkins, Ph.D., for a psychological
4 evaluation. Plaintiff reported physical and sexual abuse as a child and indicated that he spent
5 time in the California Youth Authority. Plaintiff also reported interrupted thought processes,
6 flashbacks and periodic nightmares. On mental status examination, there were no hallucinations
7 though some depressive symptoms were noted. His mood was depressed and his affect was dull.
8 Plaintiff had an “impulsive” performance and had poor mental calculation skills and trouble with
9 multiplication and division. He demonstrated a limited fund of educational knowledge and Dr.
10 Hawkins suspected partial malingering. AR 228-229.

11 Plaintiff’s testing revealed scores in the significant sub-average range of intellectual
12 functioning, though his specific level of functioning was uncertain because of suspected periodic
13 malingering. Plaintiff had symptoms of a personality disorder with antisocial features and
14 reported symptoms typical of post-traumatic stress disorder. Dr. Hawkins believed that Plaintiff
15 needed ongoing psychiatric treatment, medical follow-up, assignment of a payee to manage his
16 finances and perhaps a referral to the Department of Rehabilitation. Dr. Hawkins diagnosed
17 suspected partial malingering, rule out post-traumatic stress disorder, personality disorder with
18 antisocial features, rule out mild mental retardation. AR 231.

19 He believed that Plaintiff’s ability to understand, remember and carry out complex
20 instructions was poor, though his ability to understand, remember and carry out simple
21 instructions was good. Plaintiff’s ability to maintain attention, concentration and persistence was
22 fair. Plaintiff’s ability to perform activities within a schedule and maintain regular attendance
23 was good. His ability to complete a normal workday and workweek without interruptions from
24 psychologically based symptoms was adequate during the examination, but probably variable.
25 Plaintiff could adequately respond to changes in the work setting. His ability to manage his own
26 money was uncertain. AR 231.

27 On October 1, 2003, State Agency physician Lavanya Bobba, M.D., completed a Physical
28 Residual Functional Capacity Assessment form. Dr. Bobba opined that Plaintiff could

1 occasionally lift 50 pounds, 25 pound frequently, stand and/or walk about six hours and sit for
2 about six hours. Plaintiff could never climb ladders, ropes or scaffolds and could never balance.
3 He also had to avoid concentrated exposure to hazards. AR 253-260.

4 On October 20, 2003, State Agency physician Marina C. Veal, M.D., completed a Mental
5 Residual Functional Capacity Assessment form. She opined that Plaintiff had moderate
6 limitations in his ability to understand, remember and carry out detailed instructions and in his
7 ability to interact appropriately with the public. Plaintiff retained the ability to understand,
8 remember and carry out simple job instructions, with limited public contact. AR 247-249.

9 From February 2004 through March 2005, Plaintiff received psychiatric treatment and
10 medication through the Parole Outpatient Clinic. AR 379-387.

11 Plaintiff received medication and treatment for seizures through the California
12 Department of Corrections from July 2005 through July 2007. AR 266-378. In March 2006, he
13 received a cane for an unsteady gait. AR 301.

14 On April 26, 2006, Plaintiff underwent a neurologic consultation for uncontrolled
15 epilepsy. Plaintiff had three grand mal seizures back to back on April 18, as well as a number of
16 episodes in the infirmary requiring intravenous Ativan. On examination, Plaintiff stuttered
17 constantly. He was mentally alert, appropriate and pleasant. Reflexes were +1, with toes
18 downgoing. Sensation was intact to light touch, pinprick and vibration. His coordination was
19 unremarkable, though he walked with a cane. Gregorio S. Pineda, M.D., diagnosed epilepsy,
20 posttraumatic, primary generalized versus partial complex with secondary generalization. He
21 ordered a repeat sleep EEG. AR 355-356.

22 ALJ's Findings

23 The ALJ determined that Plaintiff had the severe impairments of a depressive disorder,
24 not otherwise specified, a personality disorder with antisocial features, and a history of a seizure
25 disorder, under fair control. AR 19. He found that Plaintiff retained the residual functional
26 capacity ("RFC") to lift 50 pounds occasionally, 25 pounds frequently. He would be limited to
27 occasional bending, stooping and crouching. Plaintiff could not work at unprotected heights or
28 around dangerous machinery, and could not drive for employment purposes. Plaintiff was also

1 limited to simple, routine tasks with limited public contact. AR 21. Plaintiff had no past
2 relevant work, but the ALJ found that with this RFC, Plaintiff could perform a significant
3 number of jobs in the national economy. AR 23-25.

4 SCOPE OF REVIEW

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

20 REVIEW

21 In order to qualify for benefits, a claimant must establish that he is unable to engage in
22 substantial gainful activity due to a medically determinable physical or mental impairment which
23 has lasted or can be expected to last for a continuous period of not less than 12 months. [42](#)
24 [U.S.C. § 1382c](#) (a)(3)(A). A claimant must show that he has a physical or mental impairment of
25 such severity that he is not only unable to do her previous work, but cannot, considering his age,
26 education, and work experience, engage in any other kind of substantial gainful work which
27 exists in the national economy. [Quang Van Han v. Bowen, 882 F.2d 1453, 1456 \(9th Cir. 1989\)](#).

1 The burden is on the claimant to establish disability. [Terry v. Sullivan, 903 F.2d 1273, 1275 \(9th](#)
2 [Cir. 1990\)](#).

3 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
4 regulations which contain, inter alia, a five-step sequential disability evaluation process. [20](#)
5 [C.F.R. §§ 404.1520](#) (a)-(f), 416.920 (a)-(f). Applying this process in this case, the ALJ found
6 that Plaintiff: (1) had not engaged in substantial gainful activity since the alleged onset of his
7 disability; (2) has an impairment or a combination of impairments that is considered “severe” (a
8 depressive disorder, not otherwise specified, a personality disorder with antisocial features, and a
9 history of a seizure disorder, under fair control) based on the requirements in the [Regulations \(20](#)
10 [CFR §§ 416.920\(b\)](#)); (3) does not have an impairment or combination of impairments which
11 meets or equals one of the impairments set forth in Appendix 1, Subpart P, Regulations No. 4;
12 (4) had no past relevant work; (5) but retained the RFC to perform a significant number of jobs.
13 AR 19-25.

14 Plaintiff argues that the ALJ erred at step five in finding that Plaintiff could perform a
15 significant number of jobs in the national economy.

16 **DISCUSSION**

17 Plaintiff contends that the ALJ erred at step five when he adopted the finding of the
18 Disability Determination Service analyst in determining that a significant number of jobs existed.
19 Plaintiff also argues that the ALJ incorrectly applied SSR 85-15 and should have used a
20 vocational expert (“VE”).

21 If a claimant cannot perform his past relevant work, the burden of proof shifts to the
22 agency at step five to demonstrate that “the claimant can perform a significant number of other
23 jobs in the national economy.” [Hoopai v. Astrue, 499 F.3d 1071, 1074 \(9th Cir. 2007\)](#) (internal
24 citations omitted). “Work which exists in the national economy” denotes work which exists in
25 significant numbers either in the region where the person lives or in several regions of the
26 country, and one is disabled if significant work exists regardless of whether such work exists in
27 the immediate area in which the person lives, whether a specific job vacancy exists for the
28

1 person, or whether the person would be hired if he applied for work. [42 U.S.C. §§ 423\(d\)\(2\),](#)
2 1382c(3); [20 C.F.R. §§ 404.1566\(b\),](#) 416.966(b). The regulations provide:

3 Work exists in the national economy when there is a significant number of jobs (in one or
4 more occupations) having requirements which you are able to meet with your physical or
5 mental abilities and vocational qualifications. Isolated jobs that exist only in very limited
6 numbers in relatively few locations outside of the region where you live are not
7 considered work which exists in the national economy. We will not deny you disability
8 benefits on the basis of the existence of these kinds of jobs. If work that you can do does
9 not exist in the national economy, we will determine that you are disabled. However, if
10 work that you can do does exist in the national economy, we will determine that you are
11 not disabled.

12 [20 C.F.R. §§ 404.1566\(b\),](#) 416.966(b).

13 Whether there are a significant number of jobs a claimant is able to perform with his
14 limitations is a question of fact to be determined by a judicial officer. [Martinez v. Heckler, 807](#)
15 [F.2d 771, 775 \(9th Cir. 1986\).](#)

16 To assist in the step-five determination, the Social Security Administration established
17 the Medical-Vocational Guidelines (the Grids), which “consist of a matrix of [the four factors]
18 and set forth rules that identify whether jobs requiring a specific combination of these factors
19 exist in significant numbers in the national economy.” [Hoopai, 499 F.3d at 1075](#) (citing [Heckler](#)
20 [v. Campbell, 461 U.S. 458, 461-62 \(1983\)](#)). When the grids match the claimant’s qualifications,
21 “the guidelines direct a conclusion as to whether work exists that the claimant could perform.”

22 [Id.](#) When the grids do not match the claimant’s qualifications, the ALJ can either (1) use the
23 grids as a framework and make a determination of what work exists that the claimant can
24 perform, or (2) rely on a vocational expert when the claimant has significant non-exertional
25 limitations. [Desrosiers v. Sec’y of Health and Human Servs., 846 F.2d 573, 577 \(9th Cir.1988\).](#)

26 The determination of whether a non-exertional limitation significantly limits the range of work
27 the claimant is able to perform is left to the ALJ. [Id.](#)

28 At step five, the ALJ determined that Plaintiff’s non-exertional impairments “had little or
no effect on the occupational base of unskilled light and medium work.” AR 24. Plaintiff’s non-
exertional impairments included a limitation to occasional bending, stooping and crouching, a
prohibition against working at unprotected heights, around dangerous machinery, or driving, and
a limitation to simple, routine tasks with limited public contact. Indeed, given that Plaintiff

1 could perform both medium and light unskilled work, the ALJ reasonably concluded that
2 Plaintiff's non-exertional limitations did not significantly erode the occupational base.
3 Moreover, the Grids recognize that the ability to perform light work also includes the functional
4 capacity to perform sedentary work. [20 C.F.R. pt. 404](#) subpt. P, app. 2, § 202.00(a). The ALJ
5 explained:

6 Section 202.00 of Appendix 2, provides that approximately 1600 separate
7 sedentary and light unskilled occupations can be identified in eight broad occupational
8 categories, each occupation representing numerous jobs in the national economy which
9 can be performed after a short demonstration or within 30 days, and do not require special
10 skills or experience. The functional capacity to perform a wide or full range of light work
11 represents a substantial work capability compatible with making a work adjustment to
12 substantial numbers of unskilled jobs, and thus generally provides sufficient occupational
13 mobility even for severely impaired individuals who are not of advanced age and have the
14 capability for engaging in unskilled work activity.

15 Section 203.00 of Appendix 2, provides that approximately 2500 separate
16 sedentary, light and medium occupations can be identified, with each occupation
17 representing numerous jobs in the national economy which do not require skills or
18 previous experience and which can be performed after a short demonstration or within 30
19 days.

20 AR 24.

21 The ALJ therefore determined, pursuant to *Desrosiers*, that Plaintiff's non-exertional
22 limitations did not significantly erode the occupational base and did not preclude reliance on the
23 Grids as a framework for determining disability. Based on the nature of Plaintiff's non-
24 exertional limitations and the fact that he could perform work at the medium, light and sedentary
25 level, the ALJ's determination was supported by substantial evidence.

26 Plaintiff suggests that the ALJ erred in concluding that his non-exertional limitations did
27 not significantly limit the range of work available because he improperly relied on SSR 85-15.
28 As Plaintiff explains, SSR 85-15 applies to "persons who have only nonexertional limitation(s)
of function or environmental restriction(s)."

 However, the ALJ did not rely specifically on SSR 85-15 to find Plaintiff not disabled.
Rather, he read Rules 202.00 and 203.00 "in conjunction with" SSR 85-15 to conclude that the
occupational base was not significantly eroded by Plaintiff's environmental limitations and his
limitation to simple, unskilled work with limited public contact. AR 24. While Plaintiff had an
exertional limitation to lifting 50 pounds occasionally and 25 pounds frequently, his limitations

1 were mainly non-exertional in nature. The ALJ consulted the examples set forth in SSR 85-15 of
2 the impacts of non-exertional impairments as part of his analysis in deciding the main issue of
3 whether to apply the Grids.

4 The ALJ therefore correctly relied on the Grids as a framework to direct a finding of non-
5 disability. Having relied on the Grids, then, the ALJ was not required to give specific examples
6 of potential positions and the number of such positions in the national economy. This renders
7 Plaintiff's argument that the ALJ improperly cited the analyst's findings moot. Contrary to
8 Plaintiff's suggestion, the ALJ did not rely solely on the positions identified by the analyst, but
9 instead used the occupational information to support the conclusion directed by the Grids. He
10 explained, "[i]n addition, this conclusion is based on the vocational evidence of record which
11 shows that with these same limitations, jobs exist in significant numbers that the claimant can
12 perform." AR 24. The positions included blending-tank helper, basket filler and route aide. AR
13 24, 261-262. The ALJ was entitled to rely on this information. When determining that unskilled
14 sedentary, light or medium jobs exist in significant numbers in the national economy, the ALJ
15 may take administrative notice of job data from many sources, including occupational analyses
16 prepared for the Social Security Administration by various State employment agencies. [20](#)
17 [C.F.R. § 416.966\(d\)](#).

18 The Court therefore finds that the ALJ's step five determination was supported by
19 substantial evidence and free of legal error.

20 CONCLUSION

21 Based on the foregoing, the Court finds that the ALJ's decision is supported by
22 substantial evidence in the record as a whole and is based on proper legal standards.
23 Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the
24 Commissioner of Social Security. The clerk of this Court is DIRECTED to enter judgment in
25 favor of Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff,
26 Deshone Lee Smith.

27 IT IS SO ORDERED.

28 **Dated: April 16, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE