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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES HENDRICKS,

Plaintiff,

No. CIV S-09-2295 GGH

vs.

MICHAEL J. ASTRUE,
Commissioner of
Social Security,

ORDER

Defendant.

_____/

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”). For the reasons that follow, plaintiff’s Motion for Summary Judgment and/or Remand is granted in part, and the Commissioner’s Motion for Summary Judgment is denied. The Clerk is directed to enter judgment for plaintiff. This case is remanded for further findings pursuant to sentence four of 42 U.S.C. §405(g).

BACKGROUND

Plaintiff, born April 22, 1947, applied for disability benefits on April 12, 2001. (Tr. at 70.) Plaintiff alleged he was unable to work since January 7, 2001, due to late effects of cerebrovascular disease and essential hypertension. (Tr. at 70, 26.) Plaintiff was granted benefits

1 on his application and received them from 2001 to February 21, 2006, when he was notified that
2 he was no longer eligible due to substantial work starting in 2002. (Tr. at 29-32.) After the
3 decision was affirmed on reconsideration, plaintiff received a hearing. In a decision dated
4 December 23, 2008, ALJ Marilyn S. Mauer determined that plaintiff's earnings after completing
5 a trial work period exceeded the amount required for substantial gainful activity and that he was
6 no longer entitled to benefit payments as of July 2002.¹ The ALJ made the following findings:

- 7 1. Mr. Hendricks was found disabled as of January 7, 2001,
8 and was thereby entitled to disability insurance benefits as
of that date.
- 9 2. Mr. Hendricks completed a trial work period in March
10 2002.
- 11 3. Mr. Hendricks' earnings after completing his trial work
period exceeded the amount demonstrating substantial

12 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
13 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
14 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
15 part, as an "inability to engage in any substantial gainful activity" due to "a medically
16 determinable physical or mental impairment. . . ." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).
A parallel five-step sequential evaluation governs eligibility for benefits under both programs.
See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.
137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

17 Step one: Is the claimant engaging in substantial gainful
activity? If so, the claimant is found not disabled. If not, proceed
18 to step two.

19 Step two: Does the claimant have a "severe" impairment?
If so, proceed to step three. If not, then a finding of not disabled is
appropriate.

20 Step three: Does the claimant's impairment or combination
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
21 404, Subpt. P, App.1? If so, the claimant is automatically
determined disabled. If not, proceed to step four.

22 Step four: Is the claimant capable of performing his past
work? If so, the claimant is not disabled. If not, proceed to step
23 five.

24 Step five: Does the claimant have the residual functional
capacity to perform any other work? If so, the claimant is not
disabled. If not, the claimant is disabled.

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

26 The claimant bears the burden of proof in the first four steps of the sequential evaluation
process. Bowen, 482 U.S. at 146 n.5, 107 S. Ct. at 2294 n.5. The Commissioner bears the
burden if the sequential evaluation process proceeds to step five. Id.

1 gainful activity.

- 2 4. Mr. Hendricks' earnings reasonably represent the value of
3 the work he performed.

4 (Tr. at 15-18.)

5 ISSUES PRESENTED

6 Plaintiff has raised the following issues: A. Whether the ALJ Failed to Properly
7 Apply the "Substantial Gainful Activity" Standard Prior to Summarily Concluding that the
8 Claimant was Performing Unsubsidized "Substantial Gainful Activity;" and B. Whether the ALJ
9 Improperly Rejected Lay Witness Testimony.

10 LEGAL STANDARDS

11 The court reviews the Commissioner's decision to determine whether (1) it is
12 based on proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in
13 the record as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
14 Substantial evidence is more than a mere scintilla, but less than a preponderance. Connett v.
15 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means "such relevant evidence
16 as a reasonable mind might accept as adequate to support a conclusion." Orn v. Astrue, 495 F.3d
17 625, 630 (9th Cir. 2007), *quoting* Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). "The ALJ
18 is responsible for determining credibility, resolving conflicts in medical testimony, and resolving
19 ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).
20 "The court will uphold the ALJ's conclusion when the evidence is susceptible to more than one
21 rational interpretation." Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

22 ANALYSIS

23 Plaintiff contends that his work as a major owner in a corporation constitutes
24 sheltered work and does not qualify as substantial gainful activity. "'Substantial gainful activity'
25 is: ... work activity that 'involves doing significant physical or mental activities' on a full or
26 part-time basis, and is the 'kind of work usually done for pay or profit, whether or not a profit is

1 realized.” 20 C.F.R. §§ 416.972(a) & (b). Byington v. Chater, 76 F.3d 246, 248 (9th Cir. 1995)
2 citing Katz v. Sec. HHS, 972 F.2d 290, 292 (9th Cir. 1990).

3 The concept of substantial gainful activity involves the amount of
4 compensation and the substantiality and gainfulness of the activity
5 itself. 20 C.F.R. § 404.1532(b); Chicager v. Califano, 574 F.2d
6 161, 163 (3d Cir.1978). The mere existence of earnings over the
7 statutory minimum is not dispositive. Chicager, 574 F.2d at 163.
8 However, there is a presumption of substantial gainful
9 employment if the applicant earns over the amount specified in the
10 guidelines. 20 C.F.R. §§ 404.1574(b)(2), 404.1575(b)(2);
11 Josefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir.1987). The
12 claimant may rebut a presumption based on earnings with evidence
13 of his inability to be self-employed or to perform the job well,
14 without special assistance, or for only brief periods of time.
15 Anderson v. Heckler, 726 F.2d 455, 456 (8th Cir.1984).

16 Keyes v. Sullivan, 894 F.2d 1053, 1056 (9th Cir. 1990).

17 Code of Federal Regulations § 404.1573 provides in pertinent part:

18 We consider how well you do your work when we determine
19 whether or not you are doing substantial gainful activity. If you do
20 your work satisfactorily, this may show that you are working at the
21 substantial gainful activity level. If you are unable, because of
22 your impairments, to do ordinary or simple tasks satisfactorily
23 without more supervision or assistance than is usually given other
24 people doing similar work, this may show that you are not working
25 at the substantial gainful activity level. If you are doing work that
26 involves minimal duties that make little or no demands on you and
that are of little or no use to your employer, or to the operation of a
business if you are self-employed, this does not show that you are
working at the substantial gainful activity level.

20 C.F.R. § 404.1573(b).

 The Code also states that the above considerations will be weighed
notwithstanding the fact that plaintiff may spend as much time at work as others who are not
disabled. 20 C.F.R § 404.1573(e).

 The Social Security Act describes sheltered work as work “done under special
conditions,” including simple tasks by a handicapped person under close and continuous
supervision, or where the employer pays more for the work than the value of the work that is
performed, in effect subsidizing the work. 20 C.F.R. § 404.1574(a)(2), § 416.974(a)(2) (“[w]e

1 consider your work to be subsidized if the true value of your work, when compared with the
2 same or similar work done by unimpaired persons, is less than the actual amount of earnings paid
3 to you for your work”). Evidence of sheltered work does not indicate an ability to engage in
4 substantial gainful activity. Iamarino v. Heckler, 795 F.2d 59, 60 (8th Cir. 1986); Thompson v.
5 Schweiker, 665 F.2d 936, 939 (9th Cir. 1982). However, the ALJ may consider sheltered work to
6 determine plaintiff’s skills and abilities in analyzing whether plaintiff can perform substantial
7 gainful activity. 20 C.F.R. § 1573(c).

8 When your earnings exceed the reasonable value of the work you
9 perform, we consider only that part of your pay which you actually
10 earn. If your earnings are being subsidized, we do not consider the
11 amount of the subsidy when we determine if your earnings show
12 that you have done substantial gainful activity. We consider your
13 work to be subsidized if the true value of your work, when
14 compared with the same or similar work done by unimpaired
15 persons, is less than the actual amount of earnings paid to you for
16 your work. ... We will first determine whether the person received
17 a subsidy; that is, we will determine whether the person was being
18 paid more than the reasonable value of the actual services
19 performed. We will then subtract the value of the subsidy from the
20 person's gross earnings to determine the earnings we will use to
21 determine if he or she has done substantial gainful activity.

22 20 C.F.R. § 404.1574(a)(2). “Earnings can be a presumptive, but not conclusive, sign of whether
23 a job is substantial gainful activity.” Lewis v. Apfel, 236 F.3d 503, 515 (9th Cir. 2001). Other
24 information aside from earnings may be considered in evaluating SGA, such as where the
25 plaintiff is “in a position to control when earnings are paid” or “the amount of wages paid,” as in
26 where someone works for a small corporation owned by a relative. 20 C.F.R. §
404.1574(b)(3)(ii). Moreover, there are other ways to establish substantial gainful activity.
Substantial work activity involves doing significant physical or mental activity, even if it is done
on a part time basis. 20 CFR § 404.1572(a); Keyes, 894 F.2d at 1056.

 Here, plaintiff alleges that the ALJ failed to properly apply Regulation 404.1574
and Social Security Rulings 83-33 and 83-34 in finding that plaintiff could do substantial gainful
activity. The ALJ found that plaintiff’s work as Chairman of the Board of Directors of Siskiyou

1 Telephone Company constituted substantial gainful activity based on plaintiff's apparently
2 limited recovery from a stroke in 2001, relying on a letter from the President of the company
3 which described plaintiff as attending regular management team meetings wherein he contributes
4 "valuable comments, insights and suggestions based on his years of experience. Whenever
5 anyone at the company seeks his assistance in a particular matter, he gives it." (Tr. at 17, 110.)

6 The ALJ acknowledged a letter from plaintiff's wife, indicating he had lapses in
7 concentration and difficulty reading, and also noted plaintiff's former assistant's testimony
8 indicating that she used to read documents for him and assist him with correspondence but no
9 longer does so. (Id. at 17.) The ALJ chose to rely on the President's letter, however, to
10 determine that plaintiff's work constituted substantial gainful activity, and made no other
11 reference to the personal assistant's testimony, which the undersigned finds quite enlightening.

12 It appears that plaintiff had worked for Siskiyou Telephone since 1970, and had
13 been on the Board of Directors for over twenty years. At the time of his stroke in 2001, he was
14 President of the company. (Id. at 110.) Plaintiff is a major owner of the company, and owns
15 100% of the common stock. (Pl.'s Mot. at 8.) He earns \$220,988 per year. (Id. at 110.)

16 The bulk of lay testimony which the ALJ ignored came from Shanna Farmer,
17 plaintiff's personal assistant. She is an account and property manager for plaintiff and had
18 worked for him since 1993. (Tr. at 481.) Up until a year and a half prior to the October, 2008
19 hearing, Ms. Farmer accompanied plaintiff to work at the phone company, and worked right next
20 to his office. She helped him go to breakfast, helped feed him, and helped him get up and out of
21 chairs due to his instability and tendency to fall. She also made sure if he went to the bathroom
22 that he came back out. (Id. at 482.) Ms. Farmer testified that plaintiff attended board meetings
23 quarterly, an engineering meeting once a week, and a staff meeting every other week. She made
24 sure to get him up, out the door and onto the elevator for these meetings. There would be other
25 personnel at the other end of the elevator to make sure he arrived. (Id. at 483.) Although she did
26 not attend the meetings with him, she read the minutes of those meetings and testified that most

1 of the time he made no comment at the meetings. Once in a while he would state that a light
2 bulb had gone out in the hallway or something else of similar insignificance. (Id. at 483, 485.)
3 She further testified that his average day at the office was an hour or two, and he mostly just sat.
4 (Id. at 483.) He also watched the news on his office television, read newspapers and magazines,
5 and slept for an hour. Then he would go home. (Id. at 484.) Periodically someone would come
6 in with a board issue, but “on a daily basis, nobody came in.” (Id.) She said that since his stroke,
7 he has not touched his desk work or his computer. (Id. at 485, 486.)

8 The ALJ discussed none of the above testimony. An ALJ is required to “consider
9 observations by non-medical sources as to how an impairment affects a claimant’s ability to
10 work.” Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987). “Lay testimony as to a
11 claimant’s symptoms is competent evidence that an ALJ must take into account, unless he or she
12 expressly determines to disregard such testimony and gives reasons germane to each witness for
13 doing so.” Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001) (citing Nguyen v. Chater, 100 F.3d
14 1462, 1467 (9th Cir. 1996)). Similar to the ALJ’s role in evaluating the testimony of a claimant,
15 when evaluating the testimony of a lay witness “[t]he ALJ is responsible for determining
16 credibility, resolving conflicts in medical testimony, and for resolving ambiguities.” Sousa v.
17 Callahan, 143 F.3d 1240, 1243 (9th Cir. 1998) (quoting Andrews v. Shalala, 53 F.3d 1035, 1039
18 (9th Cir. 1995)).

19 The Ninth Circuit has held that the ALJ must properly discuss lay witness
20 testimony, and that any failure to do so is not harmless unless no reasonable ALJ, when fully
21 crediting the testimony, could have come to a different disability determination. Stout v.
22 Commissioner, 454 F.3d 1050, 1053 (9th Cir. 2006).

23 Here, the ALJ erred in declining to discuss Ms. Farmer’s testimony and such error
24 was not harmless as a reasonable ALJ could have come to a different disability determination
25 based on that testimony. The issue of substantial gainful activity cannot be determined until the
26 ALJ has considered this testimony under the standards set forth above, and in contrast with the

1 other evidence. Once the ALJ makes a determination as to the weight given this lay testimony,
2 she shall then re-evaluate the issue of substantial gainful activity in light of the standards set forth
3 above.

4 CONCLUSION

5 Accordingly, the court finds the ALJ's assessment is not fully supported by
6 substantial evidence in the record. Plaintiff's Motion for Summary Judgment and/or Remand is
7 granted in part, the Commissioner's Cross Motion for Summary Judgment is denied, and the
8 Clerk is directed to enter Judgment for the plaintiff. This case is remanded for further findings
9 pursuant to sentence four of 42 U.S.C. § 405(g).

10 DATED: 06/08/10

/s/ Gregory G. Hollows

11 _____
12 GREGORY G. HOLLOWS
13 U.S. MAGISTRATE JUDGE

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