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

JOHN JACKSON,

Plaintiff,

No. CIV S-09-2801 EFB

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act. For the reasons discussed below, the court grants defendant’s motion for summary judgment and denies plaintiff’s motion for summary judgment.

I. BACKGROUND

Plaintiff formally applied for SSI on August 19, 2004. Administrative Record (“AR”) 19. His application alleged that he had been disabled since August 31, 2004. *Id.* The application was denied initially and upon reconsideration, and plaintiff requested an administrative hearing. *Id.* On January 12, 2007, a hearing was held before administrative law judge (“ALJ”) Steven D. Slahta. *Id.* Plaintiff was represented by counsel and testified at the hearing, along with vocational expert William R. Harvey. *Id.*

1 The ALJ issued a decision on March 29, 2007, finding that plaintiff was not disabled.<sup>1</sup>

2 *Id.* at 19-30. The ALJ made the following specific findings:

3 1. The claimant has not engaged in substantial gainful activity since August 31,  
4 2004, the alleged onset date (20 CFR 416.920(b) and 416.971 *et seq.*).

5 2. The claimant has the following severe combination of impairments: mild  
6 degenerative joint disease of the thoracic and lumbar spine, chronic obstructive  
7 pulmonary disease, anxiety disorder, and is status post right hip replacement  
8 secondary to remote history of avascular necrosis (20 CFR 416.920(c)).

9 ...

10 3. The claimant does not have an impairment or combination of impairments that  
11 meets or medically equals one of the listed impairments in 20 CFR Part 404,  
12 Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).

13 ...

14 4. The undersigned finds that, giving the claimant generous benefit of the doubt  
15 for hip and leg pain, along with symptoms of anxiety, the claimant retains the  
16 residual functional capacity to perform the exertional demands of sedentary work,  
17 or work which requires maximum occasional lifting of ten pounds, and standing

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18 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
19 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income is paid to  
20 disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Both provisions define disability,  
21 in part, as an “inability to engage in any substantial gainful activity” due to “a medically  
22 determinable physical or mental impairment. . . .” 42 U.S.C. § 1382c(a)(3)(A). A five-step  
23 sequential evaluation governs eligibility for benefits under both programs. *See* 20 C.F.R.  
24 §§ 404.1520, 404.1571-76, 416.920 and 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42  
25 (1987). The following summarizes the sequential evaluation:

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

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.

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

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

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.

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

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. The Commissioner bears the burden if the sequential  
evaluation process proceeds to step five. *Id.*

1 or walking no more than 2 hours per day. Most sedentary jobs are performed  
2 while seated, and those performed in the seated position often require the worker  
3 to operate hand or leg controls (20 C.F.R. §§404.1567 and 416.967). The  
4 evidence supports a finding the claimant is not able to lift and carry more than 10  
5 pounds on a frequent or occasional basis, and cannot stand or walk more than 2  
6 hours per day.

7 The claimant's capacity for sedentary [work] is diminished by significant non-  
8 exertional limitations which make it difficult to sit for prolonged periods.  
9 Claimant must be allowed to alternately sit or stand, at will. Claimant must avoid  
10 working near hazardous machinery, at heights, or in exposure to temperature  
11 extremes. Claimant has occasional limitations for climbing (stairs), balancing,  
12 stooping, crouching, bending, crawling, and kneeling. Due to symptoms of  
13 chronic pain, mild anxiety, and claimant's limited education, the claimant is  
14 limited to performing only entry-level, unskilled, simple, and repetitive 1 or 2  
15 step work tasks, in a low-stress environment, where he works with "things" rather  
16 than people.

17 The claimant has the following degree of limitation in the broad areas of  
18 functioning set out in the disability regulations for evaluating mental disorders  
19 and in the mental disorders listings in 20 CFR, Part 404, Subpart P, Appendix 1:  
20 mild restriction of activities of daily living; mild to moderate difficulties in  
21 maintaining social functioning; mild difficulties in maintaining concentration,  
22 persistence or pace; and no episodes of decompensation.

23 ...

24 5. The claimant is unable to perform any past relevant work (20 CFR 416.965).

25 ...

26 6. The claimant was born on September 4, 1961 and was 42 years old, which is  
defined as a younger individual age 18-44, on the date the application was filed  
(20 CFR 416.963).

7. The claimant has a limited 9<sup>th</sup> grade education and is able to communicate in  
English (20 CFR 416.964).

8. Transferability of job skills is not material to the determination of disability  
because using the Medical-Vocational Rules as a framework supports a finding  
that the claimant is "not disabled," whether or not the claimant has transferable  
job skills (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

9. Considering the claimant's age, education, work experience, and residual  
functional capacity, there are jobs that exist in significant numbers in the national  
economy that the claimant can perform (20 CFR 416.960(c) and 416.966).

...

////

1 10. The claimant has not been under a disability, as defined in the Social Security  
2 Act, since August 18, 2004, the date the application was filed (20 CFR  
3 416.920(g)).

4 *Id.* at 19-30.

5 Plaintiff requested that the Appeals Council review the ALJ's decision. However, on  
6 August 4, 2009, the Appeals Council denied review, leaving the ALJ's decision as the "final  
7 decision of the Commissioner of Social Security." *Id.* at 5-8.

## 8 II. LEGAL STANDARDS

9 The Commissioner's decision that a claimant is not disabled will be upheld if the findings  
10 of fact are supported by substantial evidence in the record and the proper legal standards were  
11 applied. *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);  
12 *Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,  
13 180 F.3d 1094, 1097 (9th Cir. 1999).

14 The findings of the Commissioner as to any fact, if supported by substantial evidence, are  
15 conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is  
16 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521  
17 (9th Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to  
18 support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol.*  
*Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

19 "The ALJ is responsible for determining credibility, resolving conflicts in medical  
20 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
21 2001) (citations omitted). "Where the evidence is susceptible to more than one rational  
22 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."  
23 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

## 24 III. ANALYSIS

25 Plaintiff contends that the ALJ erred in rejecting the statements of Joyce White, his sister,  
26 and his friend and neighbor, Deborah Freeman. Plaintiff also argues that the ALJ erred in failing

1 to credit the testimony of the vocational expert (VE) in response to questions which accurately  
2 reflected plaintiff's functional limitations, and that the jobs identified by the VE were  
3 inconsistent with the Dictionary of Occupational Titles (DOT).

4 White and Freeman are not medical experts but rather testified as lay witnesses.  
5 Nonetheless, "[L]ay witness testimony as to a claimant's symptoms or how an impairment  
6 affects ability to work is competent evidence, and therefore cannot be disregarded without  
7 comment." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996); *see also Dodrill v. Shalala*,  
8 12 F.3d 915, 918-19 (9th Cir. 1993) (friends and family members in a position to observe a  
9 plaintiff's symptoms and daily activities are competent to testify to condition). If an ALJ  
10 disregards the testimony of a lay witness, the ALJ must provide reasons "that are germane to  
11 each witness." *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009). Further, the reasons  
12 "germane to each witness" must be specific. *Id.* at 116; *Stout v. Comm'r of Soc. Sec.*, 454 F.3d  
13 1050, 1054 (9th Cir. 2006) (finding that the ALJ erred by failing to consider the lay testimony of  
14 two witnesses about how the plaintiff's impairments affected his ability to work).

15 In this case, the ALJ addressed White's testimony by writing only:

16 At the hearing, Joyce White, the claimant's witness sister, also appeared and  
17 testified. Ms. White stated that she sees the claimant approximately once or twice  
18 per week. Ms. White's testimony essentially endorsed claimant's testimony of  
19 severe physical and emotional limitations.

19 AR 26. The next part of the opinion found that plaintiff's testimony was not credible, and  
20 explained the reasons for the credibility finding. Thus, the ALJ did not explicitly state what  
21 weight he gave to White's testimony or that it was being rejected for specific and germane  
22 reasons. However, defendant argues that the ALJ implicitly rejected White's testimony for the  
23 same reasons he rejected plaintiff's testimony.

24 White testified at plaintiff's hearing immediately after the plaintiff testified. White stated  
25 that she had observed "everything that [plaintiff] has described in his hearing here. Basically his  
26 limitations that he described to you as getting around, you know, the problem with him getting

1 up and down, the numbness, you know, the mental effectness (sic).” AR 648. This part of  
2 White’s testimony is consistent with the ALJ’s assertion that she “essentially endorsed”  
3 plaintiff’s testimony.

4           However, White also expanded upon plaintiff’s testimony, even disagreeing in part as to  
5 the severity of plaintiff’s anxiety.<sup>2</sup> Plaintiff had testified that he had “severe anxiety and  
6 depression”; that he would get heart palpitations and be shaky and nervous and “want to squeeze  
7 into a ball and just lay there like this.” AR 626. He stated that this occurred “any time.  
8 Sometimes every day, sometimes every other day,” and that the problems were triggered by  
9 being in public or with people he did not know. *Id.* He further stated that his depression made  
10 him “curl up and just lay there” in bed. *Id.* at 637.

11           When asked about plaintiff’s anxiety, White testified, “my observance to it would have to  
12 be not just anxiety. I feel like he does suffer from anxiety, but . . . I feel he’s also having panic  
13 attacks.” *Id.* at 651. She said that when he stayed with her for a couple of nights, she brought  
14 him to the grocery store, but he refused to come into the store and waited in the truck instead.  
15 *Id.* She described plaintiff’s state when she came back to the truck:

16           he seemed like he was almost hyperventilating...when I say panic attacks, his  
17 head, his breathing was very, very heavy....He was sweating, like a cold sweat,  
18 and shaking, his hands were trembling....He had a hard time carrying on a  
19 conversation with me and couldn’t really describe to me what was wrong. So  
when we went home, he went in the room, and he laid down for a few hours  
restlessly...

20 *Id.* at 652. White continued:

21           When my brother stated the fact that he has anxiety when he’s around people he  
22 doesn’t know or more than a few people and family members, I would have to  
23 disagree with that. I would have to say that he has it on a general basis for no  
24 reason. I think it’s uncontrollable. I state that because when he, I’ve been around  
him just he and I even in the car...taking him somewhere just to the store, or even  
being in my own home where I feel like he feels very comfortable, I’ve noticed

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25           <sup>2</sup> White did not merely endorse plaintiff’s testimony. She described her own  
26 observations, and indeed, disagreed with plaintiff’s description of his mental problem as mere  
anxiety, stating that she believed that he experienced “panic attacks” as well.” *Id.* at 653.

1 that...he'll start getting real fidgety...as far as the mental status and the anxiety  
2 and panic attack, yes, I notice that because he can't concentrate for a long period  
3 of time...I notice that he loses his train of thought very easily. We can be into a  
conversation, and this comes and goes I notice with him. Sometimes he can carry  
on a good conversation with me, a very intellectual....

4 *Id.* at 652-53. White testified that plaintiff lacks concentration and at times shakes. Plaintiff's  
5 attorney asked her, "Do you ever notice shaking at other times, other than when he seems to be  
6 anxious?" *Id.* at 654. White responded "yes" and plaintiff's counsel then asked about White's  
7 observations of depression. *Id.* at 655-56. However, the testimony was cutoff by the ALJ who  
8 moved to another subject and called another witness.

9 Defendant argues that the ALJ found that White essentially endorsed plaintiff's  
10 testimony, and therefore the reasons he provided for discrediting plaintiff's opinion constitute  
11 specific, germane reasons for rejecting her opinion as well. It is problematic that the ALJ did not  
12 state what weight he gave to White's testimony, or that he was rejecting it for the same reasons  
13 that he rejected plaintiff's testimony. The ALJ was required to state specific and germane  
14 reasons for rejecting the testimony and he plainly did not do so. This clearly was error.

15 However, it does not appear that White's testimony is material to the outcome here.  
16 White is a lay witness and disregarding her opinions as to whether plaintiff had a condition  
17 beyond depression and anxiety is not the same as ignoring a treating or consulting physician's  
18 opinion in that regard. Given that White is not a medical expert her opinions as to plaintiff's  
19 medical condition is simply not relevant. Her testimony has relevance only as to lay  
20 observations about plaintiff's conduct and activities.

21 In assessing plaintiff's credibility, the ALJ properly took into account his finding that  
22 plaintiff's subjective complaints were inconsistent with the objective medical evidence in the  
23 record (AR 26-28, 627-629, 631, 634-635). *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th  
24 Cir. 2001) (medical evidence may be considered in credibility analysis); *Bunnell v. Sullivan*, 947  
25 F.2d 341, 344 (9th Cir. 1991) (same). As to plaintiff's mental status, the psychological  
26 evaluations do not undermine the ALJ's findings that plaintiff mental limitations were only mild

1 to moderate. AR 28, 402, 477. Likewise, it was proper for the ALJ to consider plaintiff's  
2 manner of testifying at the hearing in assessing credibility as to the severity of any mental  
3 limitations. The ALJ found that plaintiff "was able to demonstrate excellent concentration and  
4 recall throughout his hour-long hearing. He spoke swiftly and nonstop about symptoms and  
5 impairments without hesitation or without evident struggle with his memory." AR 28. Those  
6 reasons for not accepting all of plaintiff's accounts of his limitations would apply to the similar  
7 testimony by White. White's testimony, although more detailed and certainly not identical to  
8 plaintiff's, was not materially different from plaintiff's such that it could make a difference in the  
9 outcome of plaintiff's claim.

10 Plaintiff also argues that the ALJ erred in failing to discuss the statements submitted by  
11 plaintiff's neighbor, Deborah Freeman. Freeman submitted two functional reports regarding  
12 plaintiff's limitations, which the ALJ did not address or acknowledge in his opinion. *Id.* at 95-  
13 103, 121-29. Defendant admits that this was an error, but contends that it was harmless.

14 Clearly, the ALJ should have addressed and made findings as to Freeman's statements.  
15 Where an ALJ fails to "properly discuss competent lay testimony favorable to the claimant, a  
16 reviewing court cannot consider the error harmless unless it can confidently conclude that no  
17 reasonable ALJ, when fully crediting the testimony, could have reached a different disability  
18 determination." *Stout v. Comm'r of Social Security Admin.*, 454 F.3d 1050, 1056 (9th Cir.  
19 2006).

20 Freeman wrote that plaintiff used to be able to, but could no longer, have "a full-time job  
21 and the ability to maintain it." AR 96. She wrote that plaintiff sometimes had to be reminded of  
22 his doctors' appointments, and that it took him 30 minutes to an hour to prepare a meal for  
23 himself, even though he no longer prepared "complete meals that aren't frozen or in a can"  
24 because he "has to take breaks and sit down a lot." *Id.* at 97. She stated that household chores  
25 such as sweeping and cleaning house took him two or three hours because he had to take breaks  
26 and sit down. *Id.* She wrote that it took him "more time than usual" to dress, bathe, care for his



1 hair, shave and feed himself “because of the pain and lack of his movement he has to rest a lot.”  
2 *Id.* at 122. She wrote that plaintiff needed help doing house and yard work in part because he  
3 “usually needs help with everything because he gets frustrated, depressed and just hurt so bad he  
4 can’t do it himself.” *Id.* at 123. She stated that plaintiff did not drive because he was in too  
5 much pain, and that his disabilities affected his ability to complete tasks. *Id.* at 125-26.

6 If Freeman’s testimony were fully credited, the ALJ might have found that plaintiff did  
7 not have the concentration to stay on task for an eight-hour workday. However, the ALJ had  
8 already rejected similar testimony by the plaintiff and provided specific reasons for doing so.  
9 Moreover, Freeman’s lay statements regarding plaintiff’s condition and limited activities do not  
10 undermine the ALJ’s specific RFC findings that expressly took into account plaintiff’s limitation  
11 to sedentary work.<sup>3</sup> The ALJ found that plaintiff must be “allowed to alternatively sit or stand, at  
12 will.” AR 24. Thus, the ALJ’s failure to address Freeman’s statement was harmless error.

13 Finally, plaintiff argues that the hypothetical question the ALJ posed to the VE failed to  
14 account for all of plaintiff’s mental and physical limitations.<sup>4</sup> When testimony from a vocational  
15 expert is used, the hypothetical question posed to the expert “must contain all of the limitations  
16 and restrictions that are supported by substantial evidence.” *Rollins*, 261 F.3d at 857. Plaintiff

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18 <sup>3</sup> Sedentary work is defined as work where “periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday”. SSR 83-10.

19 <sup>4</sup> The VE testified that plaintiff could perform jobs as a medical supplies assembler,  
20 Dictionary of Occupational Titles (DOT) number 559.687-014, and a surveillance system  
21 monitor, DOT number 379.367-010 AR 656-657. Furthermore, contrary to plaintiff’s assertion,  
22 the VE specifically testified that the jobs identified were consistent with the DOT and this  
23 constitutes substantial evidence for the ALJ to rely on in determining that plaintiff had the  
24 capacity to perform other work. Moreover, the limitation to simple repetitive tasks was not per  
25 se inconsistent with the reasoning levels for the jobs identified. *See Salazar v. Astrue*, 2008 WL  
26 4370056 (C.D. Cal. 2008) at \*7 (“Numerous courts in this District and elsewhere have rejected  
the argument made by Plaintiff here, to wit, that a limitation to simple, repetitive tasks is  
inconsistent with Level 2 reasoning ability and is consistent, at most, with Level 1 reasoning”);  
*Meissl v. Barnhart*, 403 F. Supp.2d 981, 984-85, (C.D. Cal. 2005); *Flaherty v. Halter*, 182  
F.Supp.2d 824, 850 (D. Minn. 2001); *Tudino v. Barnhart*, 2008 WL 4161443, \*11 (S.D. Cal.  
Sept. 5, 2008); *Squier v. Astrue*, 2008 WL 2537129, \*5 (C.D. Cal. June 24, 2008). *See also*,  
*Renfrow v. Astrue*, 495 F.3d 918, 921 (8th Cir. 2007); *Terry v. Astrue*, 580 F.3d 471, 478 (7th  
Cir. 2009).

1 claims that the ALJ excluded the limitations described in the testimony of White and written  
2 statements of Freeman. However, the ALJ properly included all of the limitations that he found  
3 to be supported by substantial evidence in the record. As discussed above, the ALJ found that  
4 the testimonies of plaintiff, and necessarily White, overstated the limiting effects of plaintiff's  
5 symptoms when compared to the medical evidence and the plaintiff's appearance, conduct and  
6 manner of testifying at the hearing. Moreover, the statement of Freeman does not raise  
7 limitations not already taken into account by the ALJ's RFC finding that plaintiff was limited to  
8 sedentary work. Thus, "the ALJ did not err in omitting the other limitations that [plaintiff] had  
9 claimed, but had failed to prove." *Rollins*, 261 F.3d at 857.

10 IV. CONCLUSION

11 For the reasons stated above, it is hereby ORDERED that:

- 12 1. Plaintiff's motion for summary judgment is denied;
- 13 2. Defendant's cross-motion for summary judgment is granted; and
- 14 3. The Clerk is directed to enter judgment in defendant's favor.

15 DATED: March 25, 2011.

16   
17 EDMUND F. BRENNAN  
18 UNITED STATES MAGISTRATE JUDGE  
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