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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH CASTILLO,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:16-cv-00953 CKD P

ORDER

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

BACKGROUND

Plaintiff, born October 15, 1992, applied on April 26, 2011 for SSI, alleging disability beginning May 1, 2006. Administrative Transcript (“AT”) 18, 249. Plaintiff alleged he was unable to work due to mental retardation. AT 109. The Social Security Administration denied this claim both initially and on reconsideration. AT 18. In a decision dated April 10, 2013, the

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1 ALJ determined that plaintiff was not disabled.¹ AT 120-124. On March 15, 2014, the Appeals
2 Council granted plaintiff's request for review and vacated the ALJ's April 2013 decision. AT
3 145-148. The Appeals Council also remanded plaintiff's SSI claim to the ALJ for a new hearing,
4 further development of the record, and a new decision. AT 148.

5 On remand, in a decision dated September 8, 2014, the ALJ again found plaintiff not
6 disabled. AT 14-41. The ALJ made the following findings (citations to 20 C.F.R. omitted):

- 7 1. The claimant has not engaged in substantial gainful activity
8 since April 26, 2011, the application date.
- 9 2. The claimant has the following severe impairment: borderline
intellectual functioning. The claimant has the following medically

10 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
11 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
12 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
13 part, as an "inability to engage in any substantial gainful activity" due to "a medically
14 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:

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

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

19 Step three: Does the claimant's impairment or combination
20 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
21 determined disabled. If not, proceed to step four.

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

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

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

27 The claimant bears the burden of proof in the first four steps of the sequential evaluation
28 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 determinable impairments that are not severe: depression, anxiety
2 and obesity.

3 3. The claimant does not have an impairment or combination of
4 impairments that meets or medically equals one of the listed
5 impairments in 20 CFR Part 404, Subpart P, Appendix 1.

6 4. After careful consideration of the entire record, the undersigned
7 finds that the claimant has the residual functional capacity to
8 perform a full range of work at all exertional levels but with the
9 following nonexertional limitations: the claimant is able to
10 understand, remember and carry out no more than one to two step
11 job instructions but can maintain concentration, persistence and
12 pace for simple job tasks and can interact appropriately with
13 supervisors, coworkers and the public.

14 5. The claimant is unable to perform any past relevant work.

15 6. The claimant was born on October 15, 1992 and was 18 years
16 old, which is defined as a younger individual age 18-49, on the date
17 the application was filed.

18 7. The claimant has at least a high-school education and is able to
19 communicate in English.

20 8. Transferability of job skills is not an issue in this case because
21 the claimant does not have past relevant work.

22 9. Considering the claimant's age, education, work experience, and
23 residual functional capacity, there are jobs that exist in significant
24 numbers in the national economy that the claimant can perform.

25 10. The claimant has not been under a disability, as defined in the
26 Social Security Act, since April 26, 2011, the date the application
27 was filed.

28 AT 22-41.

29 ISSUES PRESENTED

30 Plaintiff argues that the ALJ committed the following errors in finding plaintiff not
31 disabled: (1) the ALJ erred in finding that plaintiff did not have a presumptively disabling
32 impairment, as she improperly evaluated the medical evidence; and (2) the ALJ failed to base her
33 step five finding on the correct hypothetical limitations.

34 LEGAL STANDARDS

35 The court reviews the Commissioner's decision to determine whether (1) it is based on
36 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
37 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
38 evidence is that which a reasonable mind might accept as adequate to support a conclusion.

1 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340
2 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence as a reasonable
3 mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d 625, 630 (9th
4 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). “The ALJ is
5 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
6 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).
7 “The court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one
8 rational interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

9 The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th
10 Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ’s
11 conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not
12 affirm the ALJ’s decision simply by isolating a specific quantum of supporting evidence. Id.; see
13 also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the
14 administrative findings, or if there is conflicting evidence supporting a finding of either disability
15 or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226,
16 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
17 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

18 ANALYSIS

19 A. Presumptively Disabling Impairment

20 Plaintiff states his claim in terms of the ALJ’s improper rejection of certain medical
21 evidence. However, he essentially contends that the ALJ erred in her step three finding that
22 plaintiff did not meet Listing 12.05C and therefore was not presumptively disabled. Plaintiff
23 takes issue with the ALJ’s reliance on the medical opinions of Dr. Finkel and Dr. Walter in
24 reaching this conclusion. Specifically, he argues that the ALJ “should not have relied on Dr.
25 Finkel’s report as it was done in the absence of treating records and should not have relied upon
26 Dr. Walter’s testimony as he repeatedly contradicts himself.” (ECF No. 20-1 at 13.)

27 The Social Security Regulations “Listing of Impairments” is comprised of impairments to
28 certain categories of body systems that are severe enough to preclude a person from performing

1 gainful activity. Young v. Sullivan, 911 F.2d 180, 183-84 (9th Cir. 1990); 20 C.F.R. §
2 404.1520(d). Conditions described in the listings are considered so severe that they are
3 irrebuttably presumed disabling. 20 C.F.R. § 404.1520(d). In meeting or equaling a listing, all
4 the requirements of that listing must be met. Key v. Heckler, 754 F.2d 1545, 1550 (9th Cir.
5 1985). It is the disability claimant's burden of proving that his or her impairments meet or equal
6 the required elements of a Listing. Tackett v. Apfel, 180 F. 3d 1094, 1099 (9th Cir. 1999).

7 To meet a listed impairment, a claimant must establish that he meets each characteristic of
8 a listed impairment relevant to his claim. To equal a listed impairment, a claimant must establish
9 symptoms, signs and laboratory findings "at least equal in severity and duration" to the
10 characteristics of a relevant listed impairment, or, if a claimant's impairment is not listed, then to
11 the listed impairment "most like" the claimant's impairment. 20 C.F.R. § 404.1526. A finding of
12 equivalence must be based on medical evidence only. 20 C.F.R. § 404.1529(d)(3).

13 The Listings under 12.05 describe intellectual disabilities consisting of a "significant
14 subaverage general intellectual functioning with deficits in adaptive functioning initially
15 manifested during the developmental period," i.e. the onset of the impairment occurred before the
16 individual was age 22. 20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.05. The manifested deficit in
17 adaptive functioning is a prerequisite that must be met by Listings 12.05A-D, along with the
18 individual requirements for each subdivision. Listing 12.05C requires a valid verbal,
19 performance, or full scale IQ of 60 through 70 and a physical or other mental impairment
20 imposing an additional and significant work-related limitation of function. Plaintiff cites his
21 severe depression as a mental impairment under Listing 12.05(C).

22 In her step three analysis, the ALJ noted that plaintiff "had been diagnosed with cognitive
23 problems at an early age"; however, the record "also shows that he has dealt with his cognitive
24 problems without much medical treatment." AT 23. In the absence of regular mental health
25 records, the ALJ gave "much consideration" to consultative psychological evaluations in order to
26 determine the severity of plaintiff's problems. AT 24. Dr. Barry Finkel conducted one such
27 evaluation of plaintiff in June 2011, administering a battery of psychological tests and an IQ test.
28 AT 24. He determined that plaintiff had an IQ of 69, found him polite and cooperative, and

1 diagnosed him with Borderline Intellectual Functioning at Axis II. AT 24.

2 As to plaintiff's depression, the ALJ cited Dr. Finkel's report as follows:

3 With respect to whether the claimant has depression that is severe,
4 the undersigned gives much weight to Dr. Finkel's evaluation in
5 determining that the claimant does not have depression that is
6 severe within the meaning of applicable regulations and rulings. As
7 noted above, Dr. Finkel diagnosed the claimant with only
8 borderline intellectual functioning at Axis II with 'no diagnosis or
9 condition' at Axis I. The claimant reported some feelings of
sadness and worry about his financial situation, and he noted that he
could be down for a day or two, but he also said that he feels better
once he goes to the gym and works out. The undersigned also notes
that Dr. Finkel specifically reported that the claimant denied
neurovegetative signs of depression, and that he had no mental
health history.

10 AT 26.

11 Dr. Sydney Walter testified at the hearing based on a review of plaintiff's medical record,
12 including plaintiff's 2011 evaluation by Dr. Finkel, his 2014 psychological evaluation by Dr.
13 Deborah Schmidt, and his 2012 and 2013 treatment reports with Dr. Daniel McCrimons. AT 59-
14 70. In her step three analysis, the ALJ gave "much weight" to Dr. Walter's testimony. AT 33.
15 Per the ALJ's summary, Dr. Walter testified that plaintiff's "symptoms of depression and anxiety,
16 particularly his lack of motivation, were associated more with his low IQ and underlying
17 diagnosis of borderline intellectual functioning and that his depression and anxiety were
18 otherwise mild." AT 27. As to step three, "Dr. Walter indicated that the record does not support
19 a finding that the severity of the claimant's condition reached a listing level." AT 33.

20 Plaintiff argues that Dr. Finkel's and Dr. Walter's conclusions were flawed for various
21 reasons. However, defendant argues that, as a threshold matter, plaintiff has not met his burden
22 to establish that he met the criteria of Listing 12.05(C) or any other sub-part of Listing 12.05. In
23 other words, defendant contends, plaintiff has not shown "significantly subaverage general
24 intellectual functioning with deficits in adaptive functioning" that manifested before he turned
25 twenty-two. 20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.05.

26 Defendant points to record evidence of plaintiff's "capacity to engage in a wide range of
27 daily activities and appropriately fulfill his work responsibilities at Pride Industries," a training
28 environment for the developmentally disabled, where plaintiff worked beginning in 2012. Citing

1 plaintiff's work history and medical evidence of mild or moderate (as opposed to severe)
2 depression, defendant argues that plaintiff cannot satisfy the Listing 12.05 criteria.

3 As noted by the ALJ, plaintiff's case manager at Pride Industries

4 advised that the claimant was able to work in small or large groups,
5 that he adjusted well to changes in his daily routine, work
6 environment or supervisor without difficulty, and that he could
7 happily speak with others when spoken to first. The case manager
8 also noted that . . . the claimant could correctly follow instructions
9 once he was trained on specific jobs, that he kept his work area neat
and organized, that he followed safety policies and showed
excellent grooming and hygiene, that he did his best to show a good
attitude even when things in his life were not going well, that he
never argued or complained with staff, and that he could
independently care for his personal needs.

10 AT 26. Plaintiff worked at Pride Industries for two years cleaning floors. He took the bus to
11 work and worked with around fifty other people. AT 26. Plaintiff also testified that he missed
12 work a lot due to stress and depression. AT 26. At the time of the hearing, plaintiff was on leave
13 from his job, as he had started arguments with coworkers during a month when he was angry and
14 sad. AT 50-51.

15 Dr. McCrimon's treatment records also shed light on plaintiff's mental health and ability
16 to function in a work setting. Dr. McCrimon diagnosed plaintiff with depression in 2012 and
17 prescribed Prozac, but noted in follow-up visits that plaintiff's depressive symptoms were
18 moderate and "relieved by medication." AT 26-27, 437-438. In follow-up visits in 2012 and
19 2013, plaintiff's behavior and affect were normal, and he showed no signs of anhedonia,
20 agitation, hallucinations, paranoia, or suicidal ideation. (AT 323, 325, 425),

21 In Kennedy v. Colvin, 738 F.3d 1172, 1178 (9th Cir. 2013), the Ninth Circuit held that a
22 plaintiff who challenged an ALJ's step three finding "was required to demonstrate that he
23 medically equaled each of the individual criteria under Listing 12.05C and failed to do so." In
24 that case, "the ALJ adequately addressed the third step of the evaluation . . . [and] appropriately
25 addressed the issues that [the claimant] raised and determined that [the claimant] did not meet or
26 equal any listing." Id. Similarly here, the undersigned concludes that the ALJ's step three
27 determination is supported by substantial evidence in the record as a whole, and that plaintiff has
28 not shown a presumptively disabling impairment.

1 B. Hypothetical Limitations

2 Plaintiff next claims that the ALJ's hypothetical questions to vocational expert David
3 Dettmer did not include all plaintiff's impairments as reflected in the record.

4 "At Step Five . . . , the Commissioner bears the burden of proving that the claimant can
5 perform other jobs that exist in substantial numbers in the national economy. 20 C.F.R. §
6 416.920(f). There are two ways for the Commissioner to meet this burden: (1) by the testimony
7 of a vocational expert or (2) by reference to the grids." Bruton v. Massanari, 268 F.3d 824, 828
8 n.1 (9th Cir. 2001) (internal citations omitted). In this case, the Commissioner employed the
9 testimony of a vocational expert. Hypothetical questions posed to a vocational expert must set
10 out all the substantial, supported limitations and restrictions of the particular claimant.
11 Magallanes v. Bowen, 881 F.2d 747, 756 (9th Cir. 1989). If a hypothetical does not reflect all the
12 claimant's limitations, the expert's testimony as to jobs in the national economy the claimant can
13 perform has no evidentiary value. DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991).
14 While the ALJ may pose to the expert a range of hypothetical questions, based on alternate
15 interpretations of the evidence, the hypothetical that ultimately serves as the basis for the ALJ's
16 determination must be supported by substantial evidence in the record as a whole. Embrey v.
17 Bowen, 849 F.2d 418, 422-23 (9th Cir. 1988).

18 Dettmer testified that a person who could understand, remember, and carry out simple
19 one-to-two-step job instructions; could maintain concentration, persistence and pace for simple
20 job tasks; and could interact appropriately with supervisors, coworkers and the public, could work
21 in production assembly as an agricultural sorter, for example. AT 25-26. The ALJ questioned
22 him as follows:

23 Q: And if I add absences once per week, would such an individual
24 be retained in any of those jobs?

25 A: They would not be retained, particularly in those sorts of entry-
26 level jobs where people are easy replaced[.]

27 AT 97. Questioned by plaintiff's attorney, Dettmer further testified that, if the claimant also
28 required "a supervisor to remind them to stay on task twice an hour," he likely would not be
employable. AT 97.

1 Plaintiff argues the ALJ should have relied on certain records that showed these last two
2 hypotheticals applied to plaintiff and, as a result, no jobs were available for him. However, the
3 hypothetical that ultimately served as the basis for the ALJ’s determination was based on
4 plaintiff’s “identical vocational background and residual functional capacity[.]”² AT 40. Plaintiff
5 does not dispute the ALJ’s RFC finding.

6 Plaintiff cites records from Alta California Regional Center, which evaluated plaintiff in
7 2013, and his employer Pride Industries, as support for the contention that plaintiff required a job
8 that allowed him to be absent once a week and a supervisor who reminded him twice an hour to
9 stay on task. Alta’s report stated : “Due to his disruptive social behaviors, emotional outbursts
10 and work ethics, Joseph is not ready for off site employment opportunities.” AT 429. The report
11 noted that plaintiff “struggles with attendance,” and that his productivity at Pride was 55%. AT
12 429. However, his case manager “noticed a positive difference at work” when plaintiff was
13 “taking medication for his moods.” AT 429.

14 Following a largely positive summary of plaintiff’s history at Pride (noted above), the
15 ALJ stated that she “also recognizes that the claimant testified at the initial hearing that he missed
16 work a lot due to stress and depression.” AT 25-26. A December 2012 record of plaintiff’s
17 attendance at Pride between November 2011 and November 2012 shows it ranging between 31%
18 and 77%. AT 327. At the hearing, Dr. Walter opined that, based on his review of the record,
19 plaintiff was “capable of simple work but has a serious problem in work ethics and responsibility.
20 . . . I think the main problem is he doesn’t feel like attending, he doesn’t, and the structural work
21 rules, he seems to disregard.” AT 60. Asked if he had a “diagnosis” based on the record, Dr.
22 Walter testified: “Well, there is no diagnosis for someone who’s indifferent to work . . . but it can
23 probably fall into a personality problem. But there’s no objective diagnosis for that.” RT 60-61.

24 Based on the foregoing, the undersigned finds that hypothetical that ultimately served as
25 the basis for the ALJ’s determination was supported by substantial evidence in the record as a

26 ² In the step four RFC finding, the ALJ found that plaintiff was “able to understand, remember
27 and carry out no more than one to two step job instructions but can maintain concentration,
28 persistence and pace for simple job tasks and can interact appropriately with supervisors,
coworkers, and the public.” AT 34.

1 whole.

2 CONCLUSION

3 For the reasons stated herein, IT IS HEREBY ORDERED that:

- 4 1. Plaintiff's motion for summary judgment (ECF No. 20) is denied;
- 5 2. The Commissioner's cross-motion for summary judgment (ECF No. 23 is granted; and
- 6 3. Judgment is entered for the Commissioner.

7 Dated: July 27, 2017



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9 CAROLYN K. DELANEY
10 UNITED STATES MAGISTRATE JUDGE

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