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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES HENRY BELL,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:17-cv-1195-KJN

ORDER

Plaintiff Charles Bell seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner”) holding that plaintiff was not disabled for purposes of receiving Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”).¹ Plaintiff filed a motion for summary judgment, which the Commissioner opposed by filing a cross-motion for summary judgment. (ECF Nos. 13, 17.) Thereafter, plaintiff also filed a reply brief. (ECF No. 18.) For the reasons discussed below, the court DENIES plaintiff’s motion for summary judgment, GRANTS the Commissioner’s cross-motion for summary judgment, and AFFIRMS the Commissioner’s final decision.

¹ This action was referred to the undersigned pursuant to Local Rule 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 7, 8.)

1 I. BACKGROUND

2 Plaintiff was born on March 21, 1950; has a twelfth-grade education; can communicate in
3 English; and previously worked as a mental health counselor. (Administrative Transcript (“AT”)
4 182, 198, 200-01.)² On August 18, 2013, plaintiff filed an application for DIB, alleging that he
5 was unable to work as of October 12, 2012, due to an aneurysm, lower back problems, leg
6 problems, poor blood circulation in the left leg, feet problems, arthritis in the left and right wrist,
7 high blood pressure, an enlarged heart, high cholesterol, and poor short-term memory. (AT 26,
8 182, 199.) After plaintiff’s application was denied initially and on reconsideration, plaintiff
9 requested a hearing before an administrative law judge (“ALJ”), which took place on September
10 9, 2015, and at which plaintiff, appearing without counsel, and a vocational expert (“VE”)
11 testified. (AT 26, 38-84.) The ALJ subsequently issued a decision dated December 22, 2015,
12 determining that plaintiff had not been disabled, as defined in the Act, from October 12, 2012,
13 plaintiff’s alleged disability onset date, through the date of the ALJ’s decision. (AT 26-33.) The
14 ALJ’s decision became the final decision of the Commissioner when the Appeals Council denied
15 plaintiff’s request for review on April 6, 2017. (AT 1-6.) Plaintiff subsequently filed this action
16 on June 7, 2017, to obtain judicial review of the Commissioner’s final decision. (ECF No. 1.)

17 II. ISSUES PRESENTED

18 On appeal, plaintiff raises the following issues: whether the ALJ failed to (1) consider the
19 impact of using a cane on plaintiff’s ability to lift; (2) enunciate the frequency and duration of
20 plaintiff’s required breaks; and (3) consider plaintiff’s subjective complaints of pain.

21 III. LEGAL STANDARD

22 The court reviews the Commissioner’s decision to determine whether (1) it is based on
23 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
24 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial

25 _____
26 ² Because the parties are familiar with the factual background of this case, including plaintiff’s
27 medical and mental health history, the court does not exhaustively relate those facts in this order.
28 The facts related to plaintiff’s impairments and treatment will be addressed insofar as they are
relevant to the issues presented by the parties’ respective motions.

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) (citation omitted). “The
7 court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one rational
8 interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

9 IV. DISCUSSION

10 Summary of the ALJ’s Findings

11 The ALJ evaluated plaintiff’s entitlement to DIB pursuant to the Commissioner’s standard
12 five-step analytical framework.³ As an initial matter, the ALJ found that plaintiff met the insured
13

14 ³ Disability Insurance Benefits are paid to disabled persons who have contributed to the Social
15 Security program. 42 U.S.C. §§ 401 et seq. Supplemental Security Income is paid to disabled
16 persons with low income. 42 U.S.C. §§ 1382 et seq. Both provisions define disability, in part, as
17 an “inability to engage in any substantial gainful activity” due to “a medically determinable
18 physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A parallel
19 five-step sequential evaluation governs eligibility for benefits under both programs. See 20
20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-
21 42 (1987). The following summarizes the sequential evaluation:

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

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

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

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

27 Step five: Does the claimant have the residual functional capacity to perform any
28 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).

1 status requirements of the Act for purposes of DIB through December 31, 2015. (AT 28.) At the
2 first step, the ALJ concluded that plaintiff had engaged in substantial gainful activity since
3 October 12, 2012, plaintiff's alleged disability onset date, but nonetheless proceeded through the
4 sequential evaluation process. (Id.) At step two, the ALJ found that plaintiff had the following
5 severe impairments: osteoarthritis of the right hip, degenerative joint disease of bilateral first
6 CMC joints, and lumbar radiculopathy. (Id.) However, at step three, the ALJ determined that
7 plaintiff did not have an impairment or combination of impairments that met or medically equaled
8 the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AT 29.)

9 Before proceeding to step four, the ALJ assessed plaintiff's RFC as follows:

10 After careful consideration of the entire record, the undersigned
11 finds that the claimant has the residual functional capacity to
12 perform light work as defined in 20 CFR 404.1567(b). In
13 particular, the claimant is able to lift/carry 20 pounds occasionally
14 and 10 pounds frequently. He is able to stand and/or walk with
15 breaks up to four hours in an eight-hour workday. Sitting no
16 limitation but with breaks could go to six hours. He is medically
17 necessary to use a cane for long distances, on even or uneven
18 terrain. He can frequently climb stairs, stoop and crawl. He is able
19 to frequently finger and feel. [*typing errors in original*]

20 (AT 29.) At step four, the ALJ determined, based on the VE's testimony, that plaintiff was
21 capable of performing past relevant work as a case aid. (AT 32.) In the alternative, at step five,
22 the ALJ found that, in light of plaintiff's age, education, work experience, RFC, and the VE's
23 testimony, there were other jobs that exist in significant numbers in the national economy that
24 plaintiff could perform. (AT 32-33.) Consequently, the ALJ concluded that plaintiff had not
25 been disabled, as defined in the Act, from October 12, 2012, plaintiff's alleged disability onset
26 date, through December 22, 2015, the date of the ALJ's decision. (AT 33.)

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

1 Plaintiff's Substantive Challenges to the Commissioner's Determinations

2 *Whether the ALJ failed to consider the impact of using a cane on plaintiff's*
3 *ability to lift*

4 Plaintiff first posits that the ALJ failed to consider additional limitations that may result
5 from plaintiff's use of a cane, such as further limitations on plaintiff's ability to lift and carry
6 items while using a cane. That argument lacks merit.

7 The ALJ found that plaintiff had to use a cane for long distances, on even or uneven
8 terrain. (AT 29.) That finding was substantially based on the opinion of consultative examiner
9 Dr. Jonathan Schwartz, who indicated that plaintiff's use of a cane was "medically necessary
10 based upon objective examination findings, for long distances and all terrain." (AT 576.)⁴ Dr.
11 Schwartz found that plaintiff could lift and carry 20 pounds occasionally and 10 pounds
12 frequently, and did not assess any additional limitations attributable to plaintiff's use of a cane.
13 (Id.) In turn, the VE testified that, based on plaintiff's RFC (which included plaintiff's need to
14 use a cane for long distances on all terrain), plaintiff was capable of performing his prior work as
15 a case aid. (AT 32, 75-76.) Notably, the Dictionary of Occupation Titles ("DOT") does not show
16 that the case aid position would require plaintiff to lift and carry objects with both of his hands.
17 See DOT 195.367-010 (case aide), 1991 WL 671595. As the Commissioner points out, there is
18 no evidence that plaintiff could not use one hand to lift or carry, and plaintiff is only required to
19 use a cane for long distances in any event. (ECF No. 17 at 8-9.)

20 Thus, plaintiff's suggestion of additional limitations based on use of a cane is speculative
21 and unsupported by the record, and essentially amounts to an improper attempt by a layperson to
22 play medical and vocational expert.

23 *Whether the ALJ failed to enunciate the frequency and duration of*
24 *plaintiff's required breaks*

25 Plaintiff's contention that the ALJ improperly failed to specify the frequency and duration

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27 ⁴ On appeal, plaintiff does not challenge the ALJ's evaluation of the medical opinion evidence
28 through any substantive briefing or argument. Thus, any such issue is waived. See Carmickle v.
Comm'r, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).

1 of breaks in the RFC is likewise without merit. As noted above, the ALJ found that plaintiff
2 could stand and/or walk with breaks up to four hours and sit with breaks up to six hours in an
3 eight-hour workday. (AT 29.) Normal work breaks consist of a morning break, a lunch period,
4 and an afternoon break at approximately 2-hour intervals. See SSR 96-9p, 1996 WL 374185, at
5 *6. When a claimant’s need to alternate sitting and standing cannot be accommodated by the
6 normal work breaks, an RFC assessment “must be specific as to the frequency of the individual’s
7 need to alternate sitting and standing.” Id. at *7. Here, the ALJ did not assess a sit-stand option,
8 or specifically find that more frequent breaks or alternation between sitting/standing/walking
9 were necessary. As such, the ALJ’s reference to breaks was clearly to the normal work breaks as
10 defined in SSR 96-9p. See Magallanes v. Bowen, 881 F.2d 747, 755 (9th Cir. 1989) (“As a
11 reviewing court, we are not deprived of our faculties for drawing specific and legitimate
12 inferences from the ALJ’s opinion.”).

13 *Whether the ALJ failed to consider plaintiff’s subjective complaints of pain*

14 Finally, plaintiff’s argument that the ALJ failed to consider plaintiff’s subjective
15 complaints of pain is unpersuasive. Here, the ALJ specifically discussed plaintiff’s allegations of
16 pain and related limitations, but found plaintiff’s testimony not fully credible. (AT 30-31.)

17 In Lingenfelter v. Astrue, 504 F.3d 1028 (9th Cir. 2007), the Ninth Circuit Court of
18 Appeals summarized the ALJ’s task with respect to assessing a claimant’s credibility:

19 To determine whether a claimant’s testimony regarding subjective
20 pain or symptoms is credible, an ALJ must engage in a two-step
21 analysis. First, the ALJ must determine whether the claimant has
22 presented objective medical evidence of an underlying impairment
23 which could reasonably be expected to produce the pain or other
24 symptoms alleged. The claimant, however, need not show that her
25 impairment could reasonably be expected to cause the severity of the
26 symptom she has alleged; she need only show that it could
27 reasonably have caused some degree of the symptom. Thus, the ALJ
28 may not reject subjective symptom testimony . . . simply because
there is no showing that the impairment can reasonably produce the
degree of symptom alleged.

Second, if the claimant meets this first test, and there is no evidence
of malingering, the ALJ can reject the claimant’s testimony about the
severity of her symptoms only by offering specific, clear and
convincing reasons for doing so. . . .

Lingenfelter, 504 F.3d at 1035-36 (citations and quotation marks omitted). “At the same time, the

1 ALJ is not required to believe every allegation of disabling pain, or else disability benefits would
2 be available for the asking....” Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).

3 “The ALJ must specifically identify what testimony is credible and what testimony
4 undermines the claimant’s complaints.” Valentine v. Comm’r of Soc. Sec. Admin., 574 F.3d 685,
5 693 (9th Cir. 2009) (quoting Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.
6 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other things, the
7 “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s] testimony or
8 between [her] testimony and [her] conduct, [claimant’s] daily activities, [her] work record, and
9 testimony from physicians and third parties concerning the nature, severity, and effect of the
10 symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
11 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.
12 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the record, the
13 court “may not engage in second-guessing.” Id. at 959.

14 In this case, the ALJ found that plaintiff had presented objective medical evidence of an
15 underlying impairment which could reasonably be expected to produce the pain or other
16 symptoms alleged. (AT 30.) Additionally, the ALJ did not make an affirmative finding of
17 malingering. Nevertheless, the ALJ then proceeded to provide specific, clear, and convincing
18 reasons for discounting plaintiff’s credibility regarding the degree of his symptoms. (AT 30-31.)

19 The ALJ reasonably noted that plaintiff’s allegations regarding the disabling degree of his
20 pain and limitations were inconsistent with the relatively modest clinical findings and
21 conservative routine care plaintiff received. (AT 30.) See Parra v. Astrue, 481 F.3d 742, 751 (9th
22 Cir. 2007) (“We have previously indicated that evidence of conservative treatment is sufficient to
23 discount a claimant’s testimony regarding severity of an impairment”). It was also plainly proper
24 for the ALJ to consider that the “majority of medical opinions in the record,” including the
25 opinions of consultative examiner Dr. Schwartz and the state agency physicians, “show that the
26 claimant has considerable work-related abilities despite his impairments.” (AT 31.) Finally, the
27 ALJ rationally relied on plaintiff’s work history to discount plaintiff’s credibility. (AT 30-31.)
28 As the ALJ observed, plaintiff stopped working in June 2013, several months after his alleged

1 disability onset date of October 12, 2012, due to a business-related layoff rather than because of
2 the allegedly disabling impairments. (AT 28, 30, 46-48, 52-53.) Even though plaintiff claimed at
3 the administrative hearing that he became disabled because of his medical condition in October
4 2013, the ALJ noted that there was no evidence of a significant deterioration in plaintiff's medical
5 condition since plaintiff's layoff in June 2013. (AT 28, 30.) The ALJ thus reasonably inferred
6 that plaintiff's medical condition would not prevent performance of his past work, because
7 plaintiff was performing that job adequately at the time of his layoff despite existence of that
8 medical condition. (AT 31.)

9 In sum, the ALJ's credibility evaluation is supported by the record and by the proper
10 analysis.⁵

11 V. CONCLUSION

12 For the foregoing reasons, the court concludes that the ALJ's decision is free from
13 prejudicial error and supported by substantial evidence in the record as a whole. Accordingly, IT
14 IS HEREBY ORDERED that:


15 1. Plaintiff's motion for summary judgment (ECF No. 13) is DENIED.

16 2. The Commissioner's cross-motion for summary judgment (ECF No. 17) is
17 GRANTED.

18 3. The final decision of the Commissioner is AFFIRMED, and judgment is entered
19 for the Commissioner.

20 4. The Clerk of Court shall close this case.

21 Dated: August 27, 2018

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23 _____
24 KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE

26 ⁵ For the first time in his reply brief, plaintiff also contends that the ALJ failed to properly
27 evaluate the side effects from plaintiff's medications. Because that new issue was not raised in
28 plaintiff's opening brief, and the Commissioner has not had an opportunity to respond, the
argument is waived. Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("on appeal,
arguments not raised by a party in its opening brief are deemed waived").