

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICK FAGUNDES,
Plaintiff,
v.
NANCY BERRYHILL,¹
Defendant.

Case No.16-cv-03462-JST

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Re: ECF Nos. 14, 19

Plaintiff Patrick Fagundes appeals Defendant Social Security Commissioner Nancy Berryhill's final decision denying his application for disability insurance benefits. Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 19. The matter is deemed fully briefed and submitted without oral argument pursuant to Civil Local Rule 16-5. The Court will deny Fagundes's motion and grant the Commissioner's cross-motion.

I. BACKGROUND

Plaintiff Patrick Fagundes is a resident of Brisbane, California. Administrative Record ("AR") 253. He was born on May 16, 1970, and claims he became disabled on March 30, 2009, based on stage 3 chronic obstructive pulmonary disorder ("COPD"), seizures, depression, and alcohol abuse disorder. AR 252, 285.

Fagundes applied for Supplemental Security Income ("SSI") disability benefits and Supplemental Security Income Disability Insurance ("SSDI") on June 20, 2012. AR 252-64. The Commissioner denied his application on February 15, 2013, AR 159, and denied his request for reconsideration on October 18, 2013, AR 171. Fagundes appealed the denial and appeared before Administrative Law Judge ("ALJ") Judson Scott for a hearing on December 10, 2014. AR 22.

¹ Acting Social Security Commissioner Nancy Berryhill is substituted for Carolyn Colvin as Defendant pursuant to Federal Rule of Civil Procedure 25(d).

1 The ALJ denied Fagundes’s appeal on January 26, 2015. AR 19-32.

2 In making his disability determination, the ALJ followed the five-step process set out by
3 the Social Security Act.² First, the ALJ found that Fagundes had not engaged in substantial
4 gainful activity since March 30, 2009. AR 25. Second, the ALJ found that Fagundes suffered
5 from COPD, personality disorder, mood disorder, posttraumatic stress disorder (“PTSD”), and
6 alcohol abuse disorder, and that these impairments were severe. *Id.* Third, the ALJ found that
7 Fagundes’s impairments met the criteria for Listings 12.08 (Personality Disorders) and 12.09
8 (Substance Addiction Disorders) included in the regulations, 20 C.F.R. Part 404, Subpart P,
9 Appendix 1. AR 26. As required by 20 C.F.R. § 404.1535, the ALJ further found that if
10 Fagundes stopped his substance use, he would continue to have a severe impairment or
11 combination of impairments, but that he would not meet any Listings for disabilities and would
12 have the residual functional capacity to perform a full range of work at all exertional levels with
13 some non-exertional limitations. AR 27-31. Fourth, the ALJ found that Fagundes would be
14 unable to perform his past relevant work. AR 31. Fifth, the ALJ found that even though Fagundes
15 could not complete his past work, there would be a significant number of jobs in the national
16 economy that Fagundes could perform. AR 31-32. The ALJ ultimately found that, “[b]ecause the
17 substance use disorder is a contributing factor material to the determination of disability,
18 [Fagundes] has not been disabled within the meaning of the Social Security Act at any time from
19 the alleged onset date through the date of this decision.” AR 32.

20 Fagundes filed a request for review of the ALJ decision, but the Appeals Council denied
21 his request on April 29, 2016. AR 1-3. On June 21, 2016, Fagundes filed his appeal before this
22 Court, asking that the ALJ’s decision be set aside and the case remanded for another hearing. ECF

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24 ² Social Security regulations set out a five-step process for determining whether a claimant is
25 disabled within the meaning of the Social Security Act. *Tackett v. Apfel*, 180 F.3d 1094, 1098
26 (9th Cir. 1999) (citing 20 C.F.R. § 404.1520). The process is sequential, meaning that if a
27 claimant is found to be either disabled or not disabled at any step, there is no need to consider
28 subsequent steps. *Id.* The five steps are: (1) “Is the claimant presently working in a substantially
gainful activity?”; (2) “Is the claimant’s impairment severe?”; (3) “Does the impairment ‘meet or
equal’ one of a list of specific impairments described in the regulations?”; (4) “Is the claimant able
to do any work that he or she has done in the past?”; and (5) “Is the claimant able to do any other
work? If the claimant is able to do other work, the Commissioner must establish that there are
a significant number of jobs in the national economy that claimant can do.” *Id.* at 1098-99.

1 No. 1. The parties have filed cross-motions for summary judgment. ECF Nos. 14, 19.

2 Of relevance to the parties' current dispute, the ALJ heard testimony from Dr. Daniel
3 Wiseman, a pulmonologist who reviewed the record as a medical expert but did not personally
4 examine Fagundes.³ When the ALJ asked Dr. Wiseman if there was a "pulmonary function test"
5 in the record, Dr. Wiseman replied, "I couldn't find any, no." AR 44. But the record did contain
6 an arterial blood gas test from Fagundes's June 21, 2012 hospital admission, as well as the results
7 of an office spirometry. AR 362, 384. The ALJ did not ask Dr. Wiseman about either of these
8 tests, nor did he mention the arterial blood gas test in his decision. Fagundes contends that the
9 ALJ's decision was therefore erroneous and not supported by substantial evidence.

10 **II. LEGAL STANDARD**

11 A district court has jurisdiction to review final decisions of the Commissioner pursuant to
12 42 U.S.C. § 405(g).

13 "The Court may set aside a denial of benefits only if [it is] not supported by substantial
14 evidence in the record or if it is based on legal error." Merrill ex rel. Merrill v. Apfel, 224 F.3d
15 1083, 1084-85 (9th Cir. 2000). The court "review[s] the administrative record in its entirety to
16 decide whether substantial evidence to support the ALJ's decision exists, weighing evidence that
17 supports and evidence that detracts from the ALJ's determination." Drouin v. Sullivan, 966 F.2d
18 1255, 1257 (9th Cir. 1992). "Substantial evidence is relevant evidence which, considering the
19 record as a whole, a reasonable person might accept as adequate to support a conclusion." Flaten
20 v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995). It is "more than a
21 scintilla but less than a preponderance." Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997).
22 "Where evidence exists to support more than one rational interpretation, the Court must defer to
23 the decision of the ALJ." Drouin, 966 F.2d at 1258. "[T]he key question is not whether there is
24 substantial evidence that could support a finding of disability, but whether there is substantial
25 evidence to support the Commissioner's actual finding that claimant is not disabled." Jamerson,
26 112 F.3d at 1067.

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28 ³ The hearing transcript identifies the expert as "Dr. Weisman." AR 42. The Court uses
"Dr. Wiseman," as the ALJ used throughout his decision. E.g., AR 22, 29-30.

1 In evaluating a disability claim, the ALJ must “consider all of the available evidence,
2 including [the claimant’s] medical history, the medical signs and laboratory findings, and
3 statements about [the claimant’s] symptoms.” 20 C.F.R. §§ 404.1529 (a), 416.929 (a). “[T]he
4 ALJ must develop the record and interpret the medical evidence,” Howard ex rel. Wolff v.
5 Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003), and is responsible for determining credibility,
6 resolving conflicts in medical testimony, and resolving all other ambiguities, Magallanes v.
7 Bowen, 881 F.2d 747, 750 (9th Cir. 1989). However, the ALJ need not “discuss every piece of
8 evidence” and, in particular, “is not required to discuss evidence that is neither significant or
9 probative.” Id.; see also Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (noting that
10 “[a]n ALJ must explain why he has rejected uncontroverted medical evidence” but finding no
11 error where the ALJ failed to discuss a psychiatric diagnosis that was controverted by other
12 medical evidence).

13 Moreover, even if the ALJ erred, any error “is harmless where it is inconsequential to the
14 ultimate nondisability determination. In other words, in each case we look at the record as a
15 whole to determine whether the error alters the outcome of the case.” Molina v. Astrue, 674 F.3d
16 1104, 1115 (9th Cir. 2012) (citations and internal quotation marks omitted). Thus, for example,
17 “where the ALJ’s error lies in a failure to properly discuss competent lay testimony favorable to
18 the claimant, a reviewing court cannot consider the error harmless unless it can confidently
19 conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a
20 different disability determination.” Stout v. Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1056 (9th
21 Cir. 2006).

22 **III. DISCUSSION**

23 Fagundes argues that the ALJ erred by failing to cite the arterial blood gas test and by
24 failing to discuss that test or Fagundes’s spirometry results with Dr. Wiseman at the hearing. He
25 contends that a reasonable ALJ considering these two test results might have reached a different
26 disability determination, and that the ALJ’s decision is not supported by substantial evidence. The
27 Court disagrees.

28 The ALJ considered Fagundes’s spirometry results, but he concluded that the results were

1 outweighed by Fagundes’s x-ray studies: “The claimant had significant obstruction upon
2 spirometry testing, but x-ray studies of his chest revealed clear lungs and no acute focal
3 abnormality (Exhibit 5F/4, 7F6, 26, 10F/8).” AR 27. The record contains an October 1, 2012 note
4 stating, “office spirometry performed which showed significant obstruction and no reversibility
5 with albuterol.” AR 384. But the record also contains notes that a June 12, 2013 chest x-ray was
6 “normal,” AR 399, and showed that “[t]he lungs are clear without evidence of acute pleural or
7 parenchymal disease,” AR 419. The record further contains notes from August 16, 2013, that
8 Fagundes’s “[l]ungs are clear,” and from December 2, 2013, that “[t]he lungs are clear and without
9 focal consolidation, pneumothorax or pleural effusion.” AR 524. The ALJ’s discounting of
10 Fagundes’s spirometry results is therefore supported by substantial evidence, and the Court finds
11 no legal error in the manner in which the ALJ considered Fagundes’s spirometry results.

12 Fagundes correctly notes that the ALJ’s decision contains no mention of the “abnormal”
13 results from Fagundes’s June 2012 arterial blood gas test: a pCO₂ value of 47.1, when the normal
14 range is 35-45 mm(hg), and a PO₂ value of 67, when the normal range is 80-105 mm (hg). AR
15 362. However, one of the State agency physicians who reviewed Fagundes’s case described these
16 results as not “bad”:

[Fagundes] clearly has some degree of Chronic lung disease – he
17 does have periodic exacerbations during which he wheezes and
18 coughs more than usual and needs brief hospitalization. When he
19 was in-patient at SFGH in June 2012 with an [exacerbation] of
chronic lung dx, he was slightly hypoxemic, pO₂ 65 and slightly
hypercarbic, pCO₂ 47 – but neither of these is bad.

20 AR 130. In addition, although Dr. Wiseman testified that he did not know of any pulmonary
21 function tests, he did reference the June 2012 “significant” hospital admission – at which time
22 Fagundes was given the arterial blood gas test – and described Fagundes as having had “borderline
23 respiratory failure” at that time. AR 43. Dr. Wiseman further noted that Fagundes’s respiratory
24 problems were a “constant part of the record.” *Id.* Nonetheless, he concluded that Fagundes’s
25 problems were primarily behavioral, and that his asthma and COPD symptoms would not prevent
26 him from engaging in physical activity. AR 43-45. Dr. Wiseman opined that Fagundes could
27 work with limited restrictions related to environmental respiratory agitators such as dusts, gases,
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1 and fumes.⁴ AR 47.

2 The ALJ gave “great weight” to the opinions of Dr. Wiseman and a psychiatric expert,
3 Dr. Herbert Tanenhaus, “because they had the opportunity to review the record, hear claimant’s
4 testimony, and they are familiar with the disability program.” AR 30. The ALJ also gave
5 “significant weight” to the opinion of Dr. John Maris, a psychologist who examined Fagundes. Id.
6 Like Dr. Wiseman, Drs. Tanenhaus and Maris opined that Fagundes was able to work –
7 specifically, that he could “perform 1-2 step simple repetitive tasks” and “interact with others and
8 maintain a work schedule.” AR 29-30. Fagundes does not challenge either of these opinions.

9 In addition, the ALJ reviewed Fagundes’s treatment notes and reasoned that, “[w]hile the
10 claimant had episodes of COPD exacerbation, his condition quickly resolved with medication,
11 which suggests that he did not use inhalers as prescribed. (Exhibit 1F, 4F) The claimant has
12 received limited and conservative treatment and he continues to smoke.” AR 29 (citing two of
13 Fagundes’s medical records). The ALJ concluded that “the record indicates that medication
14 controls the claimant’s COPD.” AR 30. Although Fagundes testified that he was unable to work,
15 AR 28, the ALJ concluded that “[n]umerous factors undermine [his] credibility concerning his
16 reported symptoms and limitations,” AR 30. The ALJ further observed that “no treating source
17 has completed a medical source statement that endorses the extent of the claimant’s alleged
18 functional limitations or that suggests functional limitations more restrictive than the residual
19 functional capacity found in this decision.” Id.

20 The arterial blood gas test and spirometry results do not undermine any of the ALJ’s
21 conclusions. Fagundes points to no evidence that his COPD could not be controlled with
22 treatment or that he lacked the residual functional capacity found by the ALJ. Moreover, although
23 Fagundes makes much of Dr. Wiseman’s comments that he wished the record included more
24 evidence, AR 51, Dr. Wiseman was still comfortable making a determination that Fagundes could
25 work based on his review of the entire record. For instance, Dr. Wiseman opined that Fagundes’s

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27 ⁴ Two State agency physicians reached similar conclusions concerning Fagundes’s ability to work,
28 AR 107-10, 134-39, but the ALJ gave those opinions “little weight because the record does not
support their determination that the claimant has severe epilepsy and nonsevere mental health
impairments.” AR 30.

1 history of getting into fights shows that, in terms of level of exertion, he also had the ability to
2 work. AR 43-47. He further testified that, “most of the time [Fagundes is] able to pretty much
3 carry out anything he wants to do,” with only “intermittent” positional limitations, “if any,” AR
4 48, and that “what we do know is that this is a man that is leading an active life, who is not having
5 the intermittent difficulties, which are the evidence of chronic and advanced pulmonary disease,
6 who could have much of this pulmonary problem improved significantly if he were to be to stay
7 on a regimen[] but there is no regimen.” AR 51.

8 In light of all of the above, the Court concludes that substantial evidence supported the
9 ALJ’s decision. Additionally, the ALJ did not commit legal error by failing to discuss the arterial
10 blood gas test results in his decision because that test was not significant or probative when
11 considering the entire record.

12 Even if the ALJ did err, any error was harmless. Fagundes relies on Stout, 454 F.3d 1050,
13 to argue that the ALJ’s failure to consider the arterial blood gas testing was not harmless, but that
14 case is distinguishable. In Stout, the ALJ failed to consider “uncontradicted lay testimony . . .
15 about Stout’s inability to deal with the demands of work” that was “consistent with medical
16 evidence.” Id. at 1053. The Ninth Circuit held that the error was not harmless because, “[i]f fully
17 credited, the lay testimony supports a conclusion that Stout’s mental impairments render him in
18 need of a special working environment which, particularly when considering the [vocational
19 expert’s] testimony, a reasonable ALJ could find precludes Stout from returning to gainful
20 employment.” Id. at 1056. Here, by contrast, fully crediting the arterial blood gas test results
21 would not lead any reasonable ALJ to reach a different conclusion. All of the medical opinions
22 agreed that Fagundes’s respiratory issues would not impede his ability to work. AR 99-110
23 (Dr. Greene’s assessment); AR 124-39 (Dr. Coleman’s assessment); AR 43-47 (Dr. Wiseman’s
24 assessment). One physician explicitly characterized the test results as “slightly hypoxemic” and
25 “slightly hypercarbic,” and that “neither of these is bad.” AR 130 (emphases added). The record
26 contains no evidence to the contrary – i.e., that Fagundes’s arterial blood gas values would support
27 additional limitations on his residual functional capacity. This Court can therefore “confidently
28 conclude that no reasonable ALJ, when fully crediting [the test results], could have reached a

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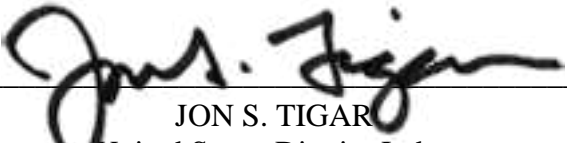
different disability determination.” Stout, 454 F.3d at 1056. Thus, any error was harmless.

CONCLUSION

The ALJ’s decision is affirmed. The Court denies Fagundes’s motion for summary judgment and grants the Commissioner’s cross-motion for summary judgment. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: November 17, 2017



JON S. TIGAR
United States District Judge