

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

THO VAN HA,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security.

Defendant.

CASE NO. 13cv1211-LAB (BLM)

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

Tho Van Ha, an applicant for Supplemental Security Income benefits, seeks review of an unfavorable decision by the Commissioner of Social Security. This matter was referred to Magistrate Judge Major for a Report and Recommendation (R&R). The parties filed cross motions for summary judgment, and Judge Major issued an R&R recommending that Ha's motion for summary judgment be denied and that the Commissioner's cross-motion for summary judgment be granted. (Docket no. 40.) Ha objects to the R&R. (Docket no. 42.)

I. Background

The background facts are well known to the parties so the Court doesn't repeat them in full here. Ha alleges that he endures recurrent pain, including pain on the left side of his face, rendering him eligible for Social Security Income benefits. (See Docket no 1 at ¶ 4); (AR 30.) In May 2009, Ha underwent surgery to correct trigeminal neuralgia—a chronic pain that causes extreme, sporadic, face pain. (AR 30.) The record suggests that the surgery

1 was successful, leaving Ha "pain free with respect to trigeminal neuralgia." (AR 241.) While
2 Ha complained of some pain after the surgery, the record indicates that medication and
3 physical therapy combated it effectively. (AR 239-40, 290-92, 403.)

4 **A. Dr. Janese's Testimony**

5 Dr. Janese testified that he would diagnose Ha with "atypical left-sided facial pain,"
6 but not trigeminal neuralgia. (AR 37-40.) He concluded Ha's trigeminal neuralgia "was
7 treated successfully" because Ha no longer had any of the condition's symptoms. (AR
8 37-40.) Dr. Janese described Ha's problems as "subjective." (AR 37-39.) He concluded that
9 Ha didn't satisfy any listed impairments for neurological disorder (AR 38) and found no basis
10 for a residual functional capacity limitation. (AR 39.) He explained "I'm not sure what the
11 basis would be for me to give him some type of residual functional capacity, but with his size
12 and he's a male, 50, I would say probably medium." (*Id.*) Ha's attorney asked Dr. Janese
13 if the records supported a possible occipital neuralgia—a form of intense headache. (AR 40.)
14 Dr. Janese dismissed this suggestion, explaining "that would be different . . ." (*Id.*) He then
15 defined occipital neuralgia and explained that it "should be debilitating." (*Id.*)

16 **B. The ALJ's Decision and Evidence Submitted to the Appeals Council**

17 The ALJ determined Ha isn't disabled. (AR 15-21). She noted that he had "a very
18 poor work record" before he allegedly became unable to work, and his "failure to work for
19 years when he could have done so reflects poorly on his motivation for gainful employment."
20 (AR 20.) She relied heavily on evidence that Ha's surgery was successful and medications
21 helped alleviate post-surgery pain. (AR 19-21.) After the ALJ issued her decision, Ha
22 submitted additional evidence to the Appeals Council. (AR 10-11.) But the Appeals Council
23 rejected it, finding the "information does not provide a basis for changing the [ALJ's]
24 decision." (AR 2.)

25 **II. Request for Judicial Notice and Consideration of the Mitchell Declaration**

26 In support of his objections, Ha submits a declaration by attorney Mary Mitchell, which
27 was drafted in support of a different Social Security claimant—Tim Ta—and filed in a different
28 // /

1 Social Security case—*Ta v. Colvin*, 14cv2487. (Docket no. 41.) In her declaration, Mitchell
2 denounces the entire Social Security adjudicative process as biased. She declares:

- 3 • She's a former Social Security Administration (SSA) attorney;
- 4 • "[T]he SSA has been searching numerous Vietnamese claimants, in effect
5 terrifying the Vietnamese community due to the claimants' past persecution by
the Communists";
- 6 • "[T]he ALJs[engage in] ex parte discussions with medical expert witnesses at
[the SSA's Office of Disability Adjudication and Review (ODAR)] prior to the
7 administrative hearings, subvert[ing] justice and compromis[ing] the claimants'
civil rights";
- 8 • "[I]t is well-known among the ALJs and the Social Security bar that Seagate
9 [Medical Group] exists solely as a contractor paid by SSA to provide medical
reports which are biased in favor of finding the claimants not disabled."; and
- 10 • "The adjudicative process at ODAR is thus totally corrupted by the ALJs'
11 conduct. . . . Thus combined with biased Seagate reports, the tailored
testimonies of SSA medical expert witnesses at ODAR hearings tip the scales
12 in favor of a finding of non-disability against claimants. . . ."

13 (Docket no. 41-1 at ¶¶ 1-3, 8.)

14 **A. Consideration of the Mitchell Declaration**

15 Ha seeks judicial notice of Mitchell's declaration, and argues that the Court should
16 consider it even though it wasn't submitted to the SSA. "Social Security claimants usually
17 have one opportunity to prove their disability. If this were not the case, the administrative
18 proceedings would become an unending merry-go-round." *Coulbourn v. Astrue*, 2008 WL
19 2413169, at *8 (E.D. Cal. June 12, 2008) (internal quotation marks omitted). But, the district
20 court may remand a case for the SSA to consider new evidence if it's *material* and if *good*
21 *cause* exists for its absence from the prior record. 42 U.S.C. § 405(g).

22 **B. Good Cause**

23 To establish good cause, Ha must show that the new evidence was previously
24 unavailable. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985). Ha argues there's good
25 cause because the new evidence only recently became available. He apparently contends
26 it's new because Mitchell's declaration is dated April 8, 2015. But, he doesn't reveal when
27 Mitchell left the employment of the SSA, when she became aware of her "new" information
28

///

1 about the SSA, or when she informed Ha of it. Thus, Ha hasn't shown that the information
2 in Mitchell's declaration only recently became available. He hasn't established good cause.

3 **C. Materiality**

4 To establish materiality, Ha must show that the evidence bears "directly and
5 substantially on the matter in dispute" and that there's a reasonable possibility that the new
6 evidence would have changed the outcome of the administrative hearing. *Mayes v.*
7 *Massanari*, 276 F.3d 453, 462 (9th Cir. 2001). At most, Mitchell's declaration indicates that
8 one Social Security claimants' attorney thinks that other unnamed Social Security attorneys
9 consider Seagate biased. The evidence has very little evidentiary value, doesn't bear
10 "substantially on the matter in dispute," and doesn't present a reasonable possibility that it
11 would change the ALJ's determination. Thus, Ha hasn't established materiality.

12 **D. Judicial Notice**

13 Ha also hasn't shown that the facts alleged in Mitchell's declaration are a proper
14 subject for judicial notice. *Hurd v. Garcia*, 454 F. Supp. 2d 1032, 1055 (S.D. Cal. 2006)
15 (holding that the party requesting judicial notice bears the burden to establish it's proper).
16 To be judicially noticeable, facts must be "(1) generally known within the territorial jurisdiction
17 of the trial court or (2) capable of accurate and ready determination by resort to sources
18 whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201. Mitchell's declaration
19 includes her opinions, and the government disputes them. (Docket no. 43 at 3.) Mitchell's
20 opinions aren't "generally known" or "capable of accurate and ready determination." Thus,
21 Ha hasn't shown that they're judicially noticeable.

22 **III. Discussion**

23 **A. Legal Standard**

24 A district court has jurisdiction to review a magistrate judge's R&R on dispositive
25 matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the
26 magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court
27 may accept, reject, or modify, in whole or in part, the findings or recommendations made by
28 the magistrate judge." 28 U.S.C. § 636(b)(1). The court reviews de novo those portions of

1 the R&R to which specific written objection is made. *United States v. Reyna-Tapia*, 328 F.3d
2 1114, 1121 (9th Cir. 2003). Although review of an R&R is de novo, the Court must defer to
3 the ALJ's factual findings and may set aside the Commissioner's denial of benefits only if the
4 ALJ's findings are based on legal error or not supported by substantial evidence in the
5 record. 42 U.S.C. § 405(g); *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005).

6 **B. Ha's Objections**

7 In his objection, Ha argues: (1) the R&R relied on erroneous findings by Seagate,
8 which is biased against Social Security claimants; (2) evidence of occipital neuralgia
9 undermines the R&R's finding of non-severe impairment; (3) the R&R improperly discounted
10 Dr. Janese's testimony regarding severe impairment; (4) the R&R improperly found no good
11 cause for submitting post-hearing evidence to the Appeals Council; and (5) the R&R didn't
12 set aside the ALJ's improper reliance on lack of work history.

13 **1. Seagate's Involvement**

14 Based on Mitchell's declaration, Ha argues that Seagate's involvement has tainted the
15 evaluation of his claim. (Docket no. 42 at 1-5, 9-10.) Ha contends Dr. Sabourin's report is
16 unreliable because he works for Seagate, and that the conclusions of Drs. Jacobs, Haaland,
17 and Janese are unreliable because they reviewed Dr. Sabourin's report. (*Id.*); (AR 37-40,
18 295, 298, 303, 312.) This objection fails for two reasons. First, Mitchell's declaration is the
19 only evidence Ha offers regarding Seagate's alleged bias, and it's inadmissible. Second,
20 Ha's hasn't shown that Seagate's alleged bias affected Dr. Sabourin's opinion in *this* case,
21 much less the opinions of the other non-Seagate physicians that the ALJ relied on. See,
22 e.g., *Alzayadie v. Astrue*, 2010 WL 3169592, at *16 (S.D. Cal. July 26, 2010) (rejecting the
23 argument that Seagate had "been discredited in the past by numerous claimants and their
24 attorneys" and finding no evidence that Seagate should be discredited in that case). Thus,
25 Ha's objection to Seagate's involvement is overruled.

26 **2. Evidence of Occipital Neuralgia**

27 Drs. Pham, Khamishon, and Alksne diagnosed Ha with occipital neuralgia (AR 340,
28 403, 420), and Dr. Janese testified that the condition "should be debilitating," (AR 40.) Thus,

1 Ha argues, the combination of this evidence establishes debilitating occipital neuralgia, and
2 the ALJ erred by finding otherwise. (Docket no. 42 at 5-6.)

3 While the ALJ could have found a severe impairment based on this combination of
4 evidence, she wasn't required to do so in light of the other evidence in the record. See
5 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (noting it's the ALJ's role to resolve
6 conflicting medical reports and opinions); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.
7 1989) (noting it's the ALJ's responsibility to resolve conflicts or ambiguities in the evidence).
8 Drs. Pham, Khamishon, Alksne, and Janese didn't find Ha's impairments severe. And, as
9 the ALJ notes, evidence in the record undermines Ha's argument that it is. Dr. Pham asked
10 Ha to return only on an as needed basis, "suggesting no need for regular and continuing
11 treatment of any medical problem." (Docket no. 40 at 4); (AR 19.) The record indicates that
12 Ha's surgery was successful, and medication and physical therapy were effective. (AR
13 239-40, 290-92, 403); *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.
14 2006) ("Impairments that can be controlled effectively with medication are not disabling for
15 the purpose of determining eligibility for SSI benefits."). Dr. Janese's testimony dismissed
16 Ha's alleged injury as "subjective." (AR 38.) The ALJ didn't commit error in resolving the
17 conflicts and ambiguities in the evidence against Ha. This objection is overruled.

18 **3. Dr. Janese's Testimony Regarding Severe Impairment**

19 Ha contends that Dr. Janese found he has a "severe impairment resulting in a residual
20 functional capacity of medium." (Docket no. 42 at 6-7.) His argument appears to be that,
21 since Dr. Janese discussed residual functional capacity, residual functional capacity is
22 considered after the third step of the five-step Social Security disability evaluation, and
23 there's no reason to pass the second step if the claimant isn't severely impaired, Dr. Janese
24 necessarily concluded Ha was severely impaired. 20 C.F.R. § 404.1520(a)(4). The full
25 context of Dr. Janese's testimony refutes Ha's argument. Dr. Janese prefaced his remarks
26 by explaining he was "not sure what the basis would be" for a residual functional capacity,
27 he described Ha's problems as "subjective," and his testimony suggests he was explaining
28 that a male of Ha's age and size could probably perform medium exertion work. (AR 38-39.)

1 As the R&R correctly explained, Dr. Janese's testimony regarding residual functional
2 capacity and occipital neuralgia doesn't contradict the ALJ's conclusions. (Docket no. 40 at
3 27-28.) Thus, the Court overrules this objection.

4 **4. Post Hearing Evidence Submitted to the Appeals Council**

5 Ha contends the Appeals Council should have accepted his post-hearing evidence,
6 and objects to the R&R's conclusion that there was no good cause for his failure to submit
7 it sooner. (Docket no. 42 at 7.) He argues that his former attorney's ineffective assistance
8 establishes good cause. (*Id.*) "However, ineffective assistance of counsel does not satisfy
9 the requirement of 'good cause.'" *Leitz v. Astrue*, 2012 WL 1340495, at *16 (E.D. Mich. Mar.
10 21, 2012). And even if it did, good cause alone isn't enough—new evidence must also be
11 material. *Fryer v. Astrue*, 2011 WL 717284, at *2 (C.D. Cal. Feb. 18, 2011). The Court
12 agrees with the R&R's conclusion that the new evidence isn't material. Thus, the Court
13 overrules Ha's objection regarding post-hearing evidence.

14 **5. ALJ's Reliance on Ha's Work History**

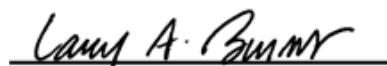
15 Ha contends the ALJ erred in drawing negative inferences from his work history, and
16 objects to the R&R's conclusion that there's no error. (Docket no. 42 at 8-9.) But, poor work
17 history is a relevant consideration in determining the credibility of Social Security claimants.
18 See *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002). And the record supports the
19 ALJ's conclusion that Ha's work history is poor. Indeed, Ha admitted he stopped working in
20 1993 even though his health didn't prevent him from working until 2002. (AR 175.) Thus,
21 the ALJ didn't err in considering Ha's work history. This objection to the R&R is overruled.

22 **IV. Conclusion**

23 The Court **ADOPTS** the R&R. Ha's motion for summary judgment is **DENIED** and the
24 Commissioner's cross-motion for summary judgment is **GRANTED**.

25 **IT IS SO ORDERED.**

26 DATED: August 14, 2015

27 

28 **HONORABLE LARRY ALAN BURNS**
United States District Judge