

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 FRANK ANTONE ALFAMA III,
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,
16 Defendant.

Case No.: 17-cv-01002-MMA (RNB)

**REPORT AND
RECOMMENDATION REGARDING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

(ECF Nos. 14, 21)

17
18 This Report and Recommendation is submitted to the Honorable Michael M. Anello,
19 United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule
20 72.1(c) of the United States District Court for the Southern District of California.

21 On October 20, 2016, plaintiff Frank Antone Alfama III filed a Complaint pursuant
22 to 42 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social
23 Security denying his application for a period of disability and disability insurance benefits.
24 (ECF No. 1.)

25 Now pending before the Court and ready for decision are the parties' cross-motions
26 for summary judgment. For the reasons set forth herein, the Court **RECOMMENDS** that
27 plaintiff's motion for summary judgment be **DENIED**, that the Commissioner's cross-
28

1 motion for summary judgment be **GRANTED**, and that Judgment be entered affirming the
2 decision of the Commissioner and dismissing this action with prejudice.

4 **PROCEDURAL BACKGROUND**

5 On March 19, 2013, plaintiff protectively filed an application for a period of
6 disability and disability insurance benefits under Title II of the Social Security Act, alleging
7 disability beginning on December 24, 2011. (Certified Administrative Record [“AR”] 177-
8 78.) After his application was denied initially and upon reconsideration (AR 95-99, 101-
9 06), plaintiff requested an administrative hearing before an administrative law judge
10 (“ALJ”). (AR 107-08.) An administrative hearing was held on July 13, 2015. Plaintiff
11 appeared at the hearing with counsel, and testimony was taken from him and a vocational
12 expert (“VE”). (AR 32-59.)

13 As reflected in his August 8, 2015 hearing decision, the ALJ found that plaintiff had
14 not been under a disability, as defined in the Social Security Act, from his alleged onset
15 date through June 30, 2015, his date last insured. (AR 9-24.) The ALJ’s decision became
16 final on March 20, 2017, when the Appeals Council denied plaintiff’s request for review.
17 (AR 1-5.) This timely civil action followed.

19 **SUMMARY OF THE ALJ’S FINDINGS**

20 In rendering his decision, the ALJ followed the Commissioner’s five-step sequential
21 evaluation process. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found that
22 plaintiff did not engage in substantial gainful activity from December 24, 2011, his alleged
23 onset date, through June 30, 2015, his date last insured. (AR 11.)

24 At step two, the ALJ found that plaintiff had the following severe impairments
25 through the date last insured: history of cervical discectomy and fusion, degenerative disc
26 disease, depression, anxiety, personality disorder (NOS), and epilepsy. (AR 11.)
27
28

1 At step three, the ALJ found that plaintiff did not have an impairment or combination
2 of impairments that met or medically equaled one of the impairments listed in the
3 Commissioner’s Listing of Impairments. (AR 12.)

4 Next, the ALJ determined that plaintiff had the residual functional capacity (“RFC”)
5 to perform light work as defined in 20 C.F.R. § 404.1567(b), except that plaintiff could not
6 work on unprotected heights or on dangerous machinery and could not climb ladders.
7 Plaintiff could occasionally climb ramps and stairs; could occasionally stoop and bend; and
8 could occasionally lift above shoulder level. Plaintiff could engage in routine, noncomplex
9 tasks and could work in a non-public setting. Plaintiff could have no sustained, interaction
10 with coworkers or supervisors, but was not precluded from incidental or brief social
11 conversation. (AR 14.)

12 At step four, the ALJ determined that plaintiff was not able to perform any of his
13 past relevant work as a stock clerk, mail truck driver, or parts clerk due to their exertional
14 levels. (AR 22.)

15 For purposes of his Step Five determination, the ALJ adduced and accepted the VE’s
16 testimony that a hypothetical person with plaintiff’s vocational profile could make a
17 successful adjustment to other work that existed in significant numbers in the national
18 economy (*i.e.*, mail room clerk and garment folder). (AR 23.) Accordingly, the ALJ found
19 that plaintiff was not disabled. (AR 24.)
20

21 **DISPUTED ISSUES**

22 As reflected in plaintiff’s cross-motion for summary judgment, the disputed issues
23 that plaintiff is raising as the grounds for reversal and remand are as follows:

24 1. Whether the ALJ failed to properly evaluate the opinions of two examining
25 physicians, Dr. Lyons and Dr. Paul.

26 2. Whether the ALJ failed to properly evaluate the lay witness testimony of
27 plaintiff’s wife.
28

1 plaintiff's contention, the ALJ did discuss Dr. Lyons' initial November 7, 2012
2 psychological evaluation report (AR 391-413) in his decision. (See AR 16.) While Dr.
3 Lyons diagnosed that plaintiff suffered various mental impairments, diagnosis alone does
4 not establish disability under the Act. See *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir.
5 1995). Plaintiff has failed to specify which opinions regarding plaintiff's work-related
6 limitations by Dr. Lyons the ALJ supposedly rejected in making his RFC determination,
7 which is not surprising because Dr. Lyons did not specifically opine that plaintiff's mental
8 impairments caused any work-related limitations. Indeed, Dr. Lyons assessed plaintiff's
9 Global Assessment of Functioning ("GAF") score at 61, which is indicative of only mild
10 symptoms.¹ Nor has plaintiff specified in what respects the ALJ's RFC determination,
11 which included limitations based on plaintiff's mental impairments, supposedly was
12 inconsistent with Dr. Lyons' opinions.

13 The Court finds that there is no need for the ALJ to discuss Dr. Lyons' March 26,
14 2013 supplemental report (AR 563-65) or his August 26, 2013 supplemental report (AR
15 642-44) because Dr. Lyons stated in both that his findings remained unchanged from his
16 earlier report. (See AR 564, 643.) See *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006,
17 1012 (9th Cir. 2003) ("[I]n interpreting the evidence and developing the record, the ALJ
18 does not need to 'discuss every piece of evidence.'").

19
20
21
22
23
24 ¹ The GAF range for "absent or minimal symptoms" is 81–90, and the GAF range for
25 "no more than slight impairment in social, occupational, or school functioning" is 71–80.
26 A GAF score in the range of 61–70 is indicative of "[s]ome mild symptoms (e.g., *depressed*
27 *mood and mild insomnia*) OR some difficulty in social, occupational, or school functioning
28 (e.g., *occasional truancy, or theft within household*), but generally functioning pretty well,
has some meaningful interpersonal relationships." See American Psychiatric Association,
Diagnostic and Statistical Manual of Mental Disorders, 32 (4th ed.).

1 Plaintiff further contends that the ALJ erred by not discussing the September 23,
2 2010² evaluation report by examining workers' compensation psychiatrist Robindra Paul,
3 M.D., wherein Dr. Paul opined that plaintiff was temporarily totally disabled. (*See* ECF
4 No. 14 at 18-19.) However, this evaluation report (AR 328-65) was issued more than 15
5 months prior to the alleged onset date of December 24, 2011. (ECF No. 21-1 at 18, citing
6 AR 362.) The Court also notes that, in the accompanying "Qualified Medical Evaluator's
7 Findings Summary Form," also dated September 23, 2010, in response to the question,
8 "Can this employee now return to his/her usual job," Dr. Paul checked off the "Yes" box
9 and indicated that his answer was "yes" as of September 23, 2010 with unspecified
10 restrictions. (*See* AR 324.) Plaintiff has failed to articulate how these conflicting opinions
11 by Dr. Paul, rendered more than 15 months prior to plaintiff's alleged onset date of
12 December 24, 2011, were relevant to the ALJ's determination of whether plaintiff was
13 disabled during the period December 24, 2011 through June 30, 2015 or probative of
14 plaintiff's RFC during that period. *See Howard*, 341 F.3d at 1012 (an ALJ need only
15 discuss evidence that is significant and probative).

16 Moreover, the Court disagrees with plaintiff the ALJ erred in not giving proper
17 weight to Dr. Paul's February 20, 2014 supplemental report (AR 574-613), and in not
18 mentioning Dr. Paul's April 30, 2014 supplemental report (AR 628-39). (*See* ECF No. 14
19 at 18-19.) Neither supplemental report contained any opinions regarding plaintiff's work-
20 related limitations. Both of these 2014 supplemental reports by Dr. Paul merely related
21 plaintiff's complaints, contained more detailed descriptions of his condition, included
22 conclusions about whether plaintiff had established causation between his employment and
23 his injury in the workers' compensation claim context, and reflected Dr. Paul's
24 disagreement with Dr. Lyons on this point and others. Plaintiff has failed to convince the
25

26
27 ² Although plaintiff referred to this report as dated October 18, 2010, the signature
28 date on the report was September 23, 2010. (*See* AR 365.) October 10, 2010 was the date
of the cover letter to the Workers Compensation Judge. (*See* AR 310-13.)

1 Court that either of Dr. Paul’s 2014 supplemental reports contained any opinions that were
2 relevant to the ALJ’s determination of plaintiff’s RFC that the ALJ needed to evaluate.

3 The Court therefore finds that reversal is not warranted based on the ALJ’s alleged
4 failure to properly evaluate the opinions of Dr. Lyons and Dr. Paul.

5
6 **B. Reversal is not warranted based on the ALJ’s alleged failure to properly
evaluate the lay witness testimony of plaintiff’s wife.**

7 The law is well-established in this Circuit that lay witness testimony as to how a
8 claimant’s symptoms affect the claimant’s ability to work is competent evidence and
9 cannot be disregarded without providing specific reasons germane to the testimony
10 rejected. *See, e.g., Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996); *Smolen v.*
11 *Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
12 Cir. 1993).

13 Here, plaintiff’s wife completed a Third Party Function Report in which she stated
14 *inter alia* that plaintiff rarely went out and seldom left the house. (*See* AR 258-66.) In his
15 decision, the ALJ stated that plaintiff’s wife’s “opinion” was “given little weight” as she
16 “is not an acceptable medical source and her opinion is similar to the claimant’s testimony.”
17 (AR 22.)

18 The Court finds that the first reason proffered by the ALJ is not a legally sufficient
19 reason on which the ALJ could properly rely to find that plaintiff’s wife’s testimony was
20 not credible. A lay witness’s lack of medical training does not disqualify him or her from
21 proffering a probative opinion about the severity of a claimant’s impairments and his ability
22 to work. *See Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009) (“A lay person, . . .
23 though not a vocational or medical expert, was not disqualified from rendering an opinion
24 as to how [a claimant]’s condition affects his ability to perform basic work activities.”); 20
25 C.F.R. § 404.1513(d)(4) (evidence provided by lay witnesses may be used to show “the
26 severity of [a claimant]’s impairment(s) and how it affects [the claimant]’s ability to
27 work”).

28

1 The other reason proffered by the ALJ was that plaintiff's wife's testimony was
2 similar to plaintiff's testimony. (See AR 22.) Based on its comparison of plaintiff's wife's
3 testimony as reflected in the Third Party Function Report (AR 258-66) to plaintiff's
4 testimony as reflected in the Adult Function Report (AR 245-53), the Court concurs. The
5 Court notes that the ALJ also made an adverse credibility determination with respect to
6 plaintiff's subjective symptom testimony, citing among other reasons plaintiff's non-
7 compliance with his treatment regimen, his opting to not participate in group therapy
8 recommended by his treatment providers, his looking for work during the relevant
9 disability period, his reporting that he would only work in a position that paid him what he
10 wanted and was conveniently located, and evidence in the record of apparent symptom
11 exaggeration. (See AR 14-15.) The Court finds that these constituted sufficiently specific
12 reasons on which the ALJ could properly rely in support of his adverse credibility
13 determination with respect to plaintiff's subjective symptom testimony.³ See *Molina v.*
14 *Astrue*, 674 F.3d 1104, 1113-14 (9th Cir. 2012) (concluding that an ALJ may discredit
15 claimant testimony based on an unexplained or inadequately explained failure to complete
16 a course of treatment); *Thomas v. Barnhart*, 278 F.3d 947, 960 (9th Cir. 2002) (ALJ
17 properly discredited subjective symptom testimony based on finding that claimant engaged
18 in exaggeration); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (same where
19 claimant had "tendency to exaggerate"); see also *Fair v. Bowen*, 885 F.2d 597, 604 n.5
20 (9th Cir. 1989) (ordinary techniques of credibility evaluation apply in social security
21
22
23

24 ³ The Court notes that an ALJ is only required to provide clear and convincing reasons
25 for rejecting a claimant's testimony when there is no evidence of malingering. See *Smolen*
26 *v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). Here, the ALJ did make a finding and
27 cite evidence in the record of symptom exaggeration and possible malingering (see AR 15,
28 citing AR 723, 751); therefore, the ALJ was not required to provide clear and convincing
reasons for rejecting plaintiff's subjective symptom testimony, but rather merely reasons
that were sufficiently specific to support the ALJ's adverse credibility determination.

1 cases). Indeed, plaintiff is not even challenging the ALJ's adverse credibility
2 determination with respect to his subjective symptom testimony.

3 It follows that the ALJ's legally sufficient reasons for rejecting plaintiff's subjective
4 symptom testimony also constituted legally sufficient reasons for rejecting plaintiff's
5 wife's lay witness testimony. *See Valentine v. Commissioner_Social Sec. Admin.*, 574 F.3d
6 685, 694 (9th Cir. 2009) ("In light of our conclusion that the ALJ provided clear and
7 convincing reasons for rejecting Valentine's own subjective complaints, and because Ms.
8 Valentine's testimony was similar to such complaints, it follows that the ALJ gave germane
9 reasons for rejecting her testimony."); *see also Molina*, 674 F.3d at 1122 (even where ALJ
10 completely failed to discuss lay witness testimony, "given that the lay witness testimony
11 described the same limitations as Molina's own testimony, . . . the ALJ's reasons for
12 rejecting Molina's testimony apply with equal force to the lay testimony").

13 In conclusion, the Court finds that, even if the ALJ did err in relying on one of his
14 two stated reasons in support of his adverse credibility determination with respect to
15 plaintiff's wife's lay witness testimony, the error was harmless because the ALJ's other
16 reason and ultimate adverse credibility determination was supported by substantial
17 evidence. *See Valentine*, 574 F.3d at 694 (ALJ's improper rejection of testimony of
18 claimant's wife because she was an interested party who never saw claimant at work was
19 harmless error because there were other germane reasons for rejecting her testimony);
20 *Williams v. Astrue*, 493 Fed. Appx. 866, 869 (9th Cir. 2012) (now citable for its persuasive
21 value per Ninth Circuit Rule 36-3) (where ALJ provided germane reason to discredit lay
22 opinion, "under *Valentine* the ALJ properly discredited their testimony and the other
23 improper reasons cited by the ALJ for discrediting their lay opinions were harmless.").

24 25 **CONCLUSION AND RECOMMENDATION**

26 For the foregoing reasons, this Court **RECOMMENDS** that plaintiff's motion for
27 summary judgment be **DENIED**, that the Commissioner's cross-motion for summary
28

1 judgment be **GRANTED**, and that Judgment be entered affirming the decision of the
2 Commissioner and dismissing this action with prejudice.

3 Any party having objections to the Court’s proposed findings and recommendations
4 shall serve and file specific written objections within 14 days after being served with a
5 copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections
6 should be captioned “Objections to Report and Recommendation.” A party may respond
7 to the other party’s objections within 14 days after being served with a copy of the
8 objections. *See* Fed. R. Civ. P. 72(b)(2). *See id.*

9 IT IS SO ORDERED.

10
11 Dated: June 4, 2018



12 ROBERT N. BLOCK
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28