

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MICKEY C. WEBB, )  
 ) No. CV 08-1067-HU  
Plaintiff, )  
 )  
v. )  
 ) FINDINGS AND  
MICHAEL J. ASTRUE, ) RECOMMENDATION  
Commissioner, Social )  
Security Administration, )  
 )  
Defendant. )  
\_\_\_\_\_ )

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FINDINGS AND RECOMMENDATION Page 1

1 HUBEL, Magistrate Judge:

2 Mickey Webb brings this action pursuant to Section 205(g) of  
3 the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain  
4 judicial review of a final decision of the Commissioner of the  
5 Social Security Administration (Commissioner) denying his  
6 application for Disability Insurance benefits under Title II of the  
7 Social Security Act.

8 **Procedural Background**

9 Mr. Webb filed an application for benefits on July 18, 2000,  
10 with an alleged onset date of August 1, 1991.<sup>1</sup> Mr. Webb met the  
11 insured status requirements of the Social Security Act through  
12 September 30, 1997, so that the period under which his claim must  
13 be evaluated is May 1991-September 1997. His application was denied  
14 initially and upon reconsideration. Mr. Webb requested a hearing,  
15 which was held on January 14, 2002. Administrative Law Judge (ALJ)  
16 John Madden issued a decision on February 4, 2002, finding Mr. Webb  
17 not disabled. The ALJ's decision became the final decision of the  
18 Commissioner after the Appeals Council denied review.

19 Mr. Webb appealed to this court, which affirmed the  
20 Commissioner's decision on March 9, 2004. Webb v. Barnhart, Civ.  
21 No. 03-15-AA. Mr. Webb appealed, and the Court of Appeals for the  
22 Ninth Circuit handed down a published opinion remanding the case.  
23 Webb v. Barnhart, 433 F.3d 683 (9<sup>th</sup> Cir. 2005).

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26 <sup>1</sup> Mr. Webb subsequently amended his alleged onset date to  
27 May 1991.

1       Upon remand, the claim returned to ALJ Madden, who conducted  
2 another hearing on December 6, 2006, and issued a new decision on  
3 February 16, 2007, again finding Mr. Webb not disabled. The ALJ  
4 noted in the decision that Mr. Webb had amended his alleged onset  
5 date to May 1, 1991. When the Appeals Council denied review, the  
6 ALJ's decision became the final decision of the Commissioner. This  
7 request for judicial review followed.

8       At the time of the ALJ's decision, Mr. Webb was a few days  
9 short of 55 years old. He has a college degree in business, and had  
10 previously worked as a retail manager. He has not engaged in  
11 substantial gainful activity since August 1991. Mr. Webb alleges  
12 disability based primarily on hypertension and degenerative disc  
13 disease of the thoracic and lumbar spine.

#### 14                               **Medical Evidence**

15       The medical records contain several significant gaps of time.  
16 All medical evidence in the record relevant to Mr. Webb's insured  
17 period, 1991-1997, is reviewed here.

18       On June 27, 1987, Mr. Webb was admitted to the hospital after  
19 an off-road vehicle accident. Tr. 165. He was diagnosed with  
20 multiple rib fractures, possible right facial bone fracture, and  
21 hematuria. Id.

22       On March 21, 1989, Mr. Webb was seen in the emergency room for  
23 weakness, shortness of breath, and numbness in the left arm. Tr.  
24 166. Upon examination, he was found to have a blood pressure of  
25 150/110; upon repetition, it was 160/110. Id. Mr. Webb said he had  
26 not had breakfast or lunch that day. The physician advised him to  
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1 return in a week for another blood pressure check, eat breakfast  
2 and lunch every day, and check his blood sugar. Id.

3 On February 19, 1990, Mr. Webb was seen for complaints about  
4 gastrointestinal discomfort. Tr. 258. The doctor thought he  
5 probably had mild costochondritis, as well as probable  
6 hypertension. Id. Mr. Webb was asked to get his blood pressure  
7 checked when possible and to continue with Metamucil. Id.

8 On August 21, 1990, Mr. Webb was seen for upper back pain,  
9 after moving concrete approximately six weeks before. Tr. 257.  
10 Examination showed some mild tenderness in the upper back, but no  
11 other significant changes. He was given Feldene. His blood pressure  
12 was still elevated. Id.

13 On January 3, 1991, Mr. Webb reported that he was feeling  
14 better, but that the day before he "had an episode for about 20  
15 minutes where he couldn't recall names," had a headache, and a  
16 "fluttering sensation off the periphery of his right eye." Id. He  
17 checked his blood pressure and it was 174/110. Id. Examination  
18 showed elevated blood pressure. Id. On February 1, 1991, Mr. Webb  
19 reported that he was "feeling very well" after taking Tenax. Tr.  
20 255. His blood pressure was found to be "much improved." Id.

21 On May 28, 1991, Mr. Webb again reported "generally feeling  
22 good," and his blood pressure remained under good control. Tr. 255.  
23 On October 22, 1991, Mr. Webb reported having "one of his visual  
24 episodes where part of his vision just blanks out for a short  
25 period of time." Id. His blood pressure was elevated, but  
26 examination of his eyes was unremarkable. Id. A CT scan of Mr.

1 Webb's head on October 22, 1991, was unremarkable, with no evidence  
2 seen of hypertensive bleed or other intraparenchymal abnormalities.  
3 Tr. 180.

4 On April 9, 1992, Mr. Webb was seen for a checkup, reporting  
5 that he had "generally been doing quite well with no problems with  
6 headaches or visual discomfort or TIA symptoms since his blood  
7 pressure has been under good control." Tr. 256. Mr. Webb said he  
8 had quit his job. Id.

9 On December 7, 1993, Mr. Webb was seen in the emergency room  
10 for a metallic foreign object in his eye, the result of working  
11 with a table saw. Tr. 172. The foreign body was removed. Id.

12 On October 27, 1994, Mr. Webb saw Robert Naymik, M.D., for  
13 lower back pain when raising his arms and stiffness in the arms.  
14 Tr. 187. Examination revealed stiffness to abduction in the right  
15 arm and tenderness to palpation of the biceps tendons. Right biceps  
16 reflex was somewhat blunted. Id. Dr. Naymik noted that Mr. Webb's  
17 hypertension was poorly controlled, and he was started on Dilacor.  
18 Mr. Webb was prescribed Relafen for the back pain. Id. Dr. Naymik  
19 discussed an MRI and/or a neurosurgical evaluation, but Mr. Webb  
20 said he wanted to think it over. Id.

21 On November 7, 1994, Mr. Webb saw Dr. Naymik, reporting that  
22 he was feeling better with regard to his upper extremity pain, his  
23 back pain and his blood pressure, but that he "now wants to deal  
24 with his low back pain." Tr. 186. Mr. Webb said his back "gives  
25 way" sometimes if he is standing in one place," and that  
26 occasionally he "just falls down." Id. He reported that Relafen did  
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1 not seem to be helping with the pain. Id. Upon examination, his  
2 blood pressure was much improved. Id. His back was straight to  
3 palpation. Deep tendon reflexes were symmetrical. Id. Straight leg  
4 raising was negative. Upper extremity left arm deep tendon reflexes  
5 were good. X-rays of the lower back showed disc space narrowing at  
6 L4-5.

7 On February 3, 1995, Mr. Webb was seen for complaints of  
8 severe non-radiating left mid-buttock pain. Tr. 184. Mr. Webb said  
9 the symptoms began one week earlier as he was helping a friend  
10 build garage doors. Id. Mr. Webb said he had similar symptoms a few  
11 months earlier when getting in and out of small cars. He also  
12 complained of chronic low back pain, but reported that his left  
13 shoulder, arm and mid-thoracic back pain were resolved. Id.  
14 Otherwise, Mr. Webb described his general health as good, and said  
15 he spent his days working around the house. Id. He also reported  
16 walking five miles twice a week. Id.

17 On April 29, 1996, Mr. Webb saw Dr. Naymik for blisters on his  
18 right hand from weeding and putting brakes on a car. Tr. 176. The  
19 blisters were positive for staph. Tr. 175. On May 29, 1996, Mr.  
20 Webb saw Dr. Naymik for left knee pain and swelling. Id. Fluid was  
21 withdrawn from the knee. Id. X-rays of the knee taken on May 31,  
22 1996, showed minimal degenerative changes, both medially and  
23 laterally, and a large joint effusion. Tr. 178. On June 3, 1996,  
24 Mr. Webb reported that his knee was improved, but complained of  
25 back pain when reclining. A lumbar x-ray was within normal limits.  
26 Tr. 173-74.

1 On July 8, 1996, Mr. Webb was seen for complaints of back  
2 pain. Tr. 174. Dr. Naymik wrote that he had discontinued Mr. Webb's  
3 Dilacor for hypertension, and given him samples of Norvasc. Id. X-  
4 rays of Mr. Webb's lumbar spine were negative. Tr. 177, 173. A  
5 chart note dated July 17, 1996, showed blood pressure of 124/100  
6 and notes that Mr. Webb "seems to be tolerating Norvasc pretty  
7 well," and that it seemed to be lowering his blood pressure  
8 adequately. Tr. 173. The note also stated that Mr. Webb's  
9 "arthritis generally is controlled and improving," although he  
10 still had back pain which was controlled by Relafen. Id. Dr. Naymik  
11 thought the back pain was "presumably muscular ligamentous [sic] in  
12 origin." Tr. 173.

13 On November 15, 1996, Mr. Webb was seen for abdominal cramping  
14 which appeared to be an episode of diverticulitis. Tr. 173. Mr.  
15 Webb cancelled a follow-up appointment, saying he was feeling  
16 better and didn't need it. Tr. 173. There are no medical records  
17 for the year 1997. Mr. Webb's insured status expired on September  
18 30, 1997.

19 On January 14, 1998, chest x-rays were normal, with no active  
20 cardiopulmonary disease seen. Tr. 243. On January 27, 1998, an x-  
21 ray of the thoracic spine showed minimal degenerative changes. Tr.  
22 241-42. An MRI of the thoracic spine on June 30, 1998, showed "very  
23 mild" posterior degenerative marginal osteophytes and disk bulge at  
24 T10-11, but no cord impingement, no central canal stenosis. Tr.  
25 238. Remaining thoracic levels were negative, with the thoracic  
26 spinal cord appearing normal and the rest of the study negative.

1 Id. On July 13, 1998, Mr. Webb was given a treadmill test after  
2 complaints of bilateral aching in the forearms occurring at rest.  
3 Tr. 181. The examination was negative. Tr. 182.

#### 4 **Hearing Testimony**

5 At the hearing, held in 2006, Mr. Webb's attorney moved to  
6 adopt Mr. Webb's earlier testimony, in January 2002, as well as his  
7 current testimony. Tr. 530-31.

8 At the first hearing, Mr. Webb testified that in 1982 or 1983,  
9 he stood up from a chair and "fell on my face;" ever since that  
10 time he has been unable to stand in one spot or sit on a soft couch  
11 or chair without having his back go out. Tr. 411-12. In January  
12 1991, he was suddenly unable to remember his manager's name and was  
13 unable to recall certain other words and the names of fellow  
14 employees. Tr. 413. This was attributed to hypertension by his  
15 doctor, but the hypertension medication made him tired and weak.  
16 Tr. 413-14. He discontinued the blood pressure medication about  
17 three months after he quit his job, but in October 1991, he had  
18 "another episode with my vision and my memory" because his blood  
19 pressure got too high. Tr. 417. He restarted blood pressure  
20 medication, saying he had tried "probably ... 20 different  
21 medications over the years," but none had helped the feelings of  
22 fatigue and weakness. Tr. 418. Mr. Webb stated that when his blood  
23 pressure was high, he felt physically good, but if it got too high,  
24 he would lose his memory. Id.

25 Mr. Webb said his mid-back had hurt every day since the ATV  
26 accident, and that to limit the pain, he avoided bending over,  
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1 reaching, reaching overhead, and sitting. Tr. 420. He said, "I  
2 can't sit so I recline or I lay." Id. However, he also testified  
3 that he gets his worst pain when he is lying down, and that the  
4 most comfortable positions for him were reclining and walking. Tr.  
5 427. He then added that he used to walk, but lately did not feel  
6 like doing so. Id.

7 Mr. Webb said his arms hurt, with his left arm "bothering me  
8 badly in '98 ... when it got worse." Tr. 422. He was unable to say  
9 what kinds of activities would cause his arms to hurt, but said "a  
10 lot of times now the pain pill will hurt my left arm." Tr. 422.

11 His left knee hurts him when he is lying down, tr. 423, and in  
12 fact, "I basically hurt the worst when I lay down." Id., 427. His  
13 hands became weak when his blood pressure got too low. Id. Mr. Webb  
14 said he could not work because the only way he could stay awake was  
15 to drink a lot of caffeine, but "then I lose my memory." Tr. 426.

16 At the second hearing, Mr. Webb testified that when he was  
17 working, for about three months before he quit in August 1991, he  
18 took naps in the warehouse because the blood pressure pills made  
19 him sleepy. Tr. 547, 550. When he was working, the arm pain was  
20 "okay," and that it did not "disable me; it just aggravated me."  
21 Tr. 544. He testified that during the relevant time period, his  
22 back began to hurt after 30 minutes of sitting in a soft chair, so  
23 that he would have to get up and move around or lie down. Tr. 547.  
24 However, at that time, he was able to walk a couple of miles  
25 without his back hurting. Tr. 548.

26 Gary Hall, Mr. Webb's former supervisor at his last job,  
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1 testified at the second hearing that after the ATV accident, Mr.  
2 Webb became "more withdrawn" and that he was "not around as much,"  
3 but that he was unaware Mr. Webb was taking naps in the warehouse.  
4 Tr. 554-56.

5 The ALJ called a vocational expert (VE), Lynn Jones. Tr. 567.  
6 On the basis of the VE's testimony, the ALJ concluded that Mr. Webb  
7 was able to return to his past relevant work as a retail manager.

### 8 **Standard**

9 The court must affirm the Commissioner's decision if it is  
10 based on proper legal standards and the findings are supported by  
11 substantial evidence in the record. Meanel v. Apfel, 172 F.3d 1111,  
12 1113 (9<sup>th</sup> Cir. 1999). Substantial evidence is such relevant evidence  
13 as a reasonable mind might accept as adequate to support a  
14 conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971);  
15 Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). In  
16 determining whether the Commissioner's findings are supported by  
17 substantial evidence, the court must review the administrative  
18 record as a whole, weighing both the evidence that supports and the  
19 evidence that detracts from the Commissioner's conclusion. Reddick  
20 v. Chater, 157 F.3d 715, 720 (9<sup>th</sup> Cir. 1998). However, the  
21 Commissioner's decision must be upheld even if "the evidence is  
22 susceptible to more than one rational interpretation." Andrews, 53  
23 F.3d at 1039-40.

24 The initial burden of proving disability rests on the  
25 claimant. Meanel, 172 F.3d at 1113; Johnson v. Shalala, 60 F.3d  
26 1428, 1432 (9<sup>th</sup> Cir. 1995). To meet this burden, the claimant must  
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1 demonstrate an "inability to engage in any substantial gainful  
2 activity by reason of any medically determinable physical or mental  
3 impairment which ... has lasted or can be expected to last for a  
4 continuous period of not less than 12 months[.]" 42 U.S.C. §  
5 423(d) (1) (A). A claimant must establish that the current disability  
6 began on or before the date last insured. Tidwell v. Apfel, 161  
7 F.3d 599, 601 (9<sup>th</sup> Cir. 1995); Flaten v. Secretary, 44 F.3d 1453,  
8 1458 (9<sup>th</sup> Cir. 1995).

9 A physical or mental impairment is "an impairment that results  
10 from anatomical, physiological, or psychological abnormalities  
11 which are demonstrable by medically acceptable clinical and  
12 laboratory diagnostic techniques." 42 U.S.C. § 423(d) (3). This  
13 means an impairment must be medically determinable before it is  
14 considered disabling.

15 The Commissioner has established a five-step sequential  
16 process for determining whether a person is disabled. Bowen v.  
17 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920.

18 In step one, the Commissioner determines whether the claimant  
19 has engaged in any substantial gainful activity. 20 C.F.R. §§  
20 404.1520(b), 416.920(b). If not, the Commissioner goes to step two,  
21 to determine whether the claimant has a "medically severe  
22 impairment or combination of impairments." Yuckert, 482 U.S. at  
23 140-41; 20 C.F.R. §§ 404.1520(c), 416.920(c). That determination is  
24 governed by the "severity regulation," which provides:

25 If you do not have any impairment or combination of  
26 impairments which significantly limits your physical or  
27 mental ability to do basic work activities, we will find  
that you do not have a severe impairment and are,

therefore, not disabled. We will not consider your age, education, and work experience.

§§ 404.1520(c), 416.920(c). If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step. Yuckert, 482 U.S. at 141.

In step three, the Commissioner determines whether the impairment meets or equals "one of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." Yuckert, 482 U.S. at 140-41. If a claimant's impairment meets or equals one of the listed impairments, he is considered disabled without consideration of her age, education or work experience. 20 C.F.R. s 404.1520(d), 416.920(d).

If the impairment is considered severe, but does not meet or equal a listed impairment, the Commissioner considers, at step four, whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can do so, he is not considered disabled. Yuckert, 482 U.S. at 141-42. If the claimant shows an inability to perform his past work, the burden shifts to the Commissioner to show, in step five, that the claimant has the residual functional capacity to do other work in consideration of the claimant's age, education and past work experience. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520(f), 416.920(f).

## ALJ's Decision

The ALJ found that Mr. Webb had the "severe" impairments of

1 hypertension and minimal degenerative disc disease of the lumbar  
2 spine, but that he retained the residual functional capacity to  
3 sit, stand or walk for six hours in an eight hour day, and lift 50  
4 pounds occasionally and 25 pounds frequently. Tr. 453. These are  
5 the exertional requirements for medium work.

6       The ALJ discounted Mr. Webb's testimony about back pain based  
7 on the following evidence: 1) unremarkable x-rays and MRIs of the  
8 cervical, thoracic and lumbar spine from 1987-1998, showing only  
9 very mild disc changes; 2) Dr. Naymik's note of July 17, 1996 that  
10 Mr. Webb's back pain was controlled with Relafen; 3) medical  
11 evidence indicating that Mr. Webb was physically active during his  
12 alleged period of disability, engaging in such activities as  
13 working with a table saw, building garage doors, weeding, digging,  
14 and installing brakes on a car; 4) Mr. Webb's report in 1999 that  
15 for the previous nine years he had performed household duties and  
16 car and house maintenance; 5) a third party report dated August  
17 2000 indicating that Mr. Webb left home twice a day to shop or  
18 visit friends and that he walked three times a week, drove every  
19 day, attended movies twice a month, and laundered, dusted, vacuumed  
20 and removed trash twice a week and did yard work daily; 6) Dr.  
21 Goodwin's "unremarkable" neurological examination and spinal  
22 examination in 1999; and 7) chart notes recording that Mr. Webb  
23 sometimes complained of excruciating back pain and at other times  
24 said he was not experiencing back pain.

25       The ALJ found no objective clinical basis for Mr. Webb's  
26 complaints of arm pain and weakness, citing 1) Dr. O'Sullivan's  
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1 findings in 2001 that joint motion and motor strength were intact  
2 in all areas, including the arms, and that there were no reflex or  
3 sensory deficits; 2) Dr. O'Sullivan's notes finding no clinical  
4 explanation for Mr. Webb's complaints of arm pain and weakness  
5 based on MRIs, x-rays and an arterial ultrasound; and 3) the  
6 reports of Mr. Webb's daily activities described above.

7 With respect to the hypertension symptoms, such as memory  
8 loss, the ALJ referred to evidence showing 1) failures to follow up  
9 on the diagnosis of hypertension and, later, discontinuing his  
10 hypertension medications, despite Dr. Naymik's chart notes that Mr.  
11 Webb's blood pressure was improved, without side effects, when he  
12 used Norvasc; and 2) a normal CT scan of the brain.

### 13 Discussion

14 Mr. Webb asserts that the ALJ's credibility findings are  
15 erroneous because the Court of Appeals "expressly found Mr. Webb to  
16 be credible," Plaintiff's Opening Brief, p. 27, and "the ALJ must  
17 accept this." Id. at 28-29. He argues that the Court of Appeals  
18 refuted the ALJ's later characterization of the medical evidence  
19 and accepted Mr. Webb's testimony in the first hearing about  
20 medication intolerance. Id. at p. 27. He asserts that the Court of  
21 Appeals's statement that "no inconsistency between Webb's  
22 complaints and his doctors' diagnoses" would be sufficient to  
23 justify ending the inquiry at Step two, as the ALJ did in his first  
24 decision, precluded the ALJ from finding any such inconsistencies  
25 in his second decision. Id. In his reply brief, Mr. Webb asserts  
26 that the primary reason for reversing the Commissioner's decision

1 is that Mr. Webb has been found credible by the Court of Appeals,  
2 and that this constitutes the law of the case.

3 This argument is not persuasive. The Court of Appeals's  
4 holding in Webb was only that "the ALJ's reasons for rejecting  
5 Webb's complaints *at step two* are not substantial enough to meet  
6 the 'clear and convincing' standard when balanced against Webb's  
7 doctors' contemporaneous observations, some objective tests and  
8 Webb's subjective complaints," 433 F.3d at 687, and that "there is  
9 no inconsistency between Webb's complaints and his doctors'  
10 diagnoses sufficient to doom his claim as *groundless* under the *de*  
11 *minimis* standard of step two." Id. at 688 (emphasis added). The  
12 court clarified its holding by saying,

13 We do not intimate that Webb will succeed in proving that he  
14 is disabled and entitled to disability insurance benefits. But  
15 we do hold that the ALJ lacked substantial evidence to find  
16 that the medical evidence clearly established Webb's lack of  
17 a medically severe impairment or combination of impairments.  
The ALJ should have continued the sequential analysis beyond  
step two because there was not substantial evidence to show  
that Webb's claim was 'groundless.'" [citation omitted]

18 Id. The Court of Appeals decision in Webb does not purport to make  
19 credibility findings in Mr. Webb's favor; it merely applies the  
20 rule that an impairment or combination of impairments can be found  
21 not severe only if the evidence establishes a slight abnormality  
22 that has no more than a minimal effect on individual's ability to  
23 work. See, e.g., Smolen v. Chater, 80 F.3d 1273, 1290 (9<sup>th</sup> Cir.  
24 1996). Step two is a "*de minimis* screening device used to dispose  
25 of groundless claims." Id., Under this standard, the Court of  
26 Appeals held that the medical evidence in the record did not  
27 "clearly establish" that Mr. Webb lacked "a medically severe

1 impairment or combination of impairments." Webb, 433 F.3d at 687,  
2 citing Social Security Ruling 85-28.

3 2. Failure to call medical expert

4 Mr. Webb also asserts that the ALJ erred by not calling an  
5 orthopedic medical expert at the hearing, thereby failing to  
6 develop the record, which resulted in an unfair hearing. However,  
7 the ALJ's duty to develop the record is triggered "only when there  
8 is ambiguous evidence or when the record is inadequate to allow for  
9 proper evaluation of the evidence." Mayes v. Massanari, 262 F.3d  
10 963, 968 (9<sup>th</sup> Cir. 2001), *as amended*, 276 F.3d 453 (9<sup>th</sup> Cir. 2002).  
11 The duty does not extend to a silent record that does not support  
12 disability. Armstrong v. Commissioner, 160 F.3d 587, 589 (9<sup>th</sup> Cir.  
13 1998).

14 The medical evidence in this case was both unambiguous and  
15 adequate to allow for proper evaluation. Mr. Webb was given many  
16 diagnostic tests, all of which produced relatively benign results,  
17 and providing no objective evidence to substantiate Mr. Webb's  
18 subjective reports. I disagree with Mr. Webb that the ALJ's failure  
19 to call an orthopedic medical expert made his hearing inadequate or  
20 unfair.

21 3. Rejection of lay witness testimony and statement

22 Mr. Webb asserts that the ALJ improperly rejected the lay  
23 witness testimony of Gary Hall and an undated letter in the record  
24 from Chris Jacobsen, tr. 290, because the ALJ did not provide  
25 reasons germane to each witness. While lay witnesses are not  
26 competent to testify to medical diagnoses, Nguyen v. Chater, 100



1 F.3d 1462 (9<sup>th</sup> Cir. 1996), they may testify about a claimant's  
2 symptoms or how an impairment affects an ability to work; the ALJ  
3 cannot reject such testimony about symptoms unless he expressly  
4 determines to disregard such testimony, in which case he must give  
5 reasons germane to each witness. Dodrill v. Shalala, 12 F.3d 915,  
6 919 (9<sup>th</sup> Cir. 1993).

7 In Stout v. Commissioner, 454 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2006),  
8 the court held that ALJ's failure to comment on competent lay  
9 testimony required reversal unless the court could "confidently  
10 conclude" that no reasonable ALJ, when fully crediting the  
11 testimony, could have reached a different disability determination.

12 \_\_\_\_\_With respect to Mr. Hall's testimony, Mr. Webb argues that the  
13 ALJ should have accepted as true Mr. Hall's statements that 1)  
14 there were long periods of time when Mr. Webb disappeared, 2) he  
15 later learned Mr. Webb was sleeping in the warehouse, 3) he would  
16 not hire someone who slept on the job, and 4) he noticed Mr. Webb  
17 declining over the years; had he done so, the evidence would  
18 support a finding of disability. I do not find this argument  
19 persuasive, because Mr. Hall's first three statements could apply  
20 equally to someone not disabled, and the fourth statement is too  
21 vague and inconclusive to require a conclusion that Mr. Webb was  
22 disabled during the period at issue.

23 Mr. Jacobsen wrote a "To Whom It May Concern" letter  
24 explaining that he was with Mr. Webb helping him to build a cabinet  
25 when a chip from his table saw flew into Mr. Webb's eye, and that  
26 on the occasion when Mr. Webb injured his hip, he did so by holding  
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1 a garage door up while Mr. Jacobsen installed a garage door opener.  
2 Tr. 290. Mr. Jacobsen added that he has known Mr. Webb for  
3 "approximately eighteen years," and has "seen his health dwindle  
4 over the years." Id. Again, the first two statements do not  
5 suggest disability, and the third statement suffers from the same  
6 vagueness and lack of specificity as Mr. Hall's. None of these  
7 statements, even if credited as true, supports a finding of  
8 disability on the record before the court.

9 I recommend that the Commissioner's decision be affirmed.

#### 10 **Scheduling Order**

11 These Findings and Recommendation will be referred to a  
12 district judge. Objections, if any, are due December 16, 2009. If  
13 no objections are filed, then the Findings and Recommendation will  
14 go under advisement on that date.

15 If objections are filed, then a response is due December 30,  
16 2009. When the response is due or filed, whichever date is earlier,  
17 the Findings and Recommendation will go under advisement.

18  
19  
20 Dated this 1<sup>st</sup> day of December, 2009.

21  
22 /s/ Dennis James Hubel

23 Dennis James Hubel  
24 United States Magistrate Judge  
25  
26  
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