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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JENNY A. HOBBS,

9 Plaintiff,

10 v.

11 MICHAEL J. ASTRUE,

12 Defendant.

C11-2023 TSZ

ORDER

13 THIS MATTER comes before the Court on Objections by Defendant Michael J.
14 Astrue (“Defendant”), docket no. 24, to the Report and Recommendation (“R&R”) of
15 United States Magistrate Judge James P. Donohue, docket no. 23. The R&R
16 recommends reversal and remand of the Commissioner’s decision denying plaintiff Jenny
17 A. Hobbs’s (“Plaintiff”) appeal from a final decision of the Commissioner of the Social
18 Security Administration (“Commissioner”) of her application for Disability Insurance
19 Benefits and Supplement Security Income under Titles II and XVI, respectively, of the
20 Social Security Act, 42 U.S.C. §§ 401–433 and 1381–1383F based on three errors in the
21 conclusions of the Administrative Law Judge (“ALJ”). Having reviewed the R&R,
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1 Defendant's Objections, Plaintiff's Response, and the Administrative Record ("AR"), the
2 Court ADOPTS IN PART and MODIFIES IN PART the R&R.

3 **Facts and Procedural History**

4 The Court adopts the recitation of facts and procedural history in the R&R.

5 **Discussion**

6 The Court adopts the analysis of the R&R, with the following modifications. The
7 Court agrees that the R&R applied an impermissible "heightened harmless error
8 standard." Def. Objections, docket no. 24, at 2. A heightened harmless error standard
9 does not apply to a Social Security case. *See Molina v. Astrue*, 674 F.3d 1104, 1118 (9th
10 Cir. 2012).

11 The harmless error rule in civil cases, which applies to Social Security cases,
12 *McLeod v. Astrue*, 640 F.3d 881, 887 (9th Cir. 2011), states that courts are to review
13 cases for errors of law "without regard to errors" that do not affect the parties' substantial
14 rights. *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009). Nor may the courts make use of
15 presumptions in determining harmless error. *Id.* at 408. Thus, reversal because of error
16 is not automatic, but requires a determination of prejudice. *Id.* at 407. Determination of
17 prejudice requires "case-specific application of judgment, based upon examination of the
18 record," not "mandatory presumptions and rigid rules." *Id.*

19 Under the harmless error standard, the Court finds that the ALJ's errors in
20 discounting and failing to address lay witness testimony were not harmless. In the
21 context of Social Security appeals, an ALJ is allowed "inconsequential" errors if they are
22 immaterial to the ultimate disability determination. *Molina*, 674 F.3d at 1117;

1 Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008); Stout v. Comm’r, Soc. Sec.
2 Admin., 454 F.3d 1050, 1055 (9th Cir. 2006).¹ Although the lay witness testimony is
3 consistent with Plaintiff’s complaints in that the testimony supports the Plaintiff’s claim,
4 the testimony provides details and examples that are not cumulative of Plaintiff’s
5 complaints or based on Plaintiff’s self-reported symptoms. Compare AR 238–45 (letters
6 from lay witnesses); 83–89 (hearing testimony), with AR 25–27 (Plaintiff’s testimony
7 regarding symptoms), 31–43 (additional Plaintiff testimony), 186–93 (Plaintiff’s 2008
8 Social Security function report). The testimony of the lay witnesses constitutes
9 competent evidence that can show “severity of impairment(s) and how it affects ability to
10 work.” 20 C.F.R. § 404.1513(d); see also Lewis, 236 F.3d at 511. To interpret this
11 supporting evidence as “cumulative” is incompatible with a reasonable interpretation of
12 Social Security regulations and case law, which considers lay witness testimony
13 competent as to the severity of the symptoms. See 20 C.F.R. § 404.1513(d); Lewis, 236
14 F.3d at 511.

15 Defendant also argues that the errors are harmless because the ALJ properly
16 credited medical source opinions, which are entitled to more weight, and support the
17 ALJ’s nondisability finding. Def. Objections at 4. Defendant’s argument ignores the
18 interconnected findings by the ALJ in this case. The failure to properly address the lay

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20 ¹ Defendant suggests that Stout is incompatible with the holding of Sanders. Def. Objections at 3.
21 Molina, on which Defendant heavily relies, discusses Stout at length but does not conclude that Stout is
22 no longer good law. Molina, 674 F.3d at 1115–22. Molina did reject an “interpretation of Stout” that
23 would create a “per se prejudicial” rule inconsistent with Sanders. Id. at 1117–18. This Court, following
the guidance of the Ninth Circuit, interprets Stout within the broader context of the harmless error
doctrine in social security cases as consistent with Sanders prohibition of presumptions in harmless error
analysis. Id. at 1117. Thus, Stout, when properly interpreted, remains good law.

1 witness testimony affected the ALJ's assessment of Plaintiff's credibility, which in turn
2 influenced at least some of the ALJ's determinations regarding medical source opinions.
3 See AR 22–28. In this case, because of the causal relationship, the failure to properly
4 consider any of the lay witnesses cannot be considered inconsequential to the ultimate
5 determination. See Molina, 674 F.3d at 1117.

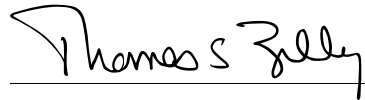
6 **Conclusion**

7 For the foregoing reasons, the R&R, docket no. 23, is ADOPTED IN PART and
8 MODIFIED IN PART. The R&R's conclusions that the ALJ erred in discounting or
9 ignoring the lay witness testimony, discounting Plaintiff's credibility, and discounting the
10 opinions of Dr. Widlan and Dr. Washburn are hereby ADOPTED. The R&R's
11 recommendation that the ALJ's errors are not harmless is MODIFIED to apply the
12 correct harmless error standard. Under the proper harmless error analysis, the ALJ's
13 errors are still harmful. This matter is hereby REVERSED and REMANDED to the
14 Commissioner for further proceedings as to step five of the sequential process for
15 determining whether Plaintiff is disabled. On remand, the ALJ is free to re-evaluate the
16 probative value of the lay witness testimony, to re-examine Plaintiff and re-evaluate her
17 credibility, to re-evaluate the weight of the opinions of Dr. Widlan and Dr. Washburn, to
18 obtain additional medical evidence and/or supplement testimony, and to consider anew
19 whether the Commissioner has met the burden of establishing that Plaintiff can make an
20 adjustment to other work.

1 IT IS SO ORDERED.

2 The Clerk is directed to send a copy of this Order to all counsel of record and
3 Magistrate Judge Donohue.

4 Dated this 17th day of December, 2012.

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6 THOMAS S. ZILLY
7 United States District Judge
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