UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Mark J. v. Leland Dudek

Mark J. v. Dudek · No. 3:23-cv-02173-VET · Decided March 14, 2025

OPINION

1 2 3 4 5 6 7 8 9 UNITED STATES DISTRICT COURT 10 SOUTHERN DISTRICT OF CALIFORNIA 11 12 MARK J.,1 Case No.: 3:23-cv-02173-VET 13 Plaintiff, ORDER AFFIRMING THE FINAL 14 v. DECISION OF THE COMMISSIONER OF SOCIAL 15 LELAND DUDEK, Acting Commissioner SECURITY of the Social Security Administration,2 16 Defendant. 17 18 19 20 21 22 23 24 25 26 27 1 Partially redacted in compliance with Civil Local Rule 7.1(e)(6)(b).

28 2 1 I. INTRODUCTION 2 On November 28, 2023, Plaintiff Mark J. filed a complaint challenging Defendant 3 Commissioner's ("Commissioner" or "Agency") denial of his application for disability 4 insurance benefits and supplemental security income. Doc. No. 1.

In accordance with the 5 Court's Scheduling Order, the parties timely filed opening and responsive briefs. See Doc. 6 Nos. 16, 18, 21. Having considered the parties' arguments, applicable law, and the record 7 before it, and for the reasons discussed below, the Court AFFIRMS the Commissioner's 8 final decision. 9 II. BACKGROUND 10 A. Procedural History 11 On February 25, 2021, Plaintiff filed applications for disability insurance benefits 12 and supplemental security income under the Social Security Act.

AR 270–274, 275–285, 13 290–292.3 Plaintiff alleged a disability since January 19, 2019. The Agency denied 14 Plaintiff's application on initial review and on reconsideration. AR 143–148, 152–158. 15 Plaintiff timely requested a hearing before an Administrative Law Judge ("ALJ"), and on 16 September 29, 2022, the ALJ held a hearing. AR 14–44.

On November 14, 2022, the ALJ 17 found that Plaintiff was not disabled from January 19, 2019 through the date of his decision. 18 AR 120–131. Plaintiff requested a review of the ALJ's decision, and the Appeals Council 19 denied the request on October 3, 2023. AR 1–3. Plaintiff commenced this action seeking 20 judicial review pursuant to 42 U.S.C. § 405(g). Doc.

No. 1. 21 22 23 24 25 3 "AR" refers to the Administrative Record filed on January 29, 2024. Doc. Nos. 9, 10, 26 11. The Court's citations to the AR reference pages on the original document rather than the page numbers designated by the Court's case management/electronic case 27 filing system ("CM/ECF").

For all other documents, the Court's citations are to the page 28 numbers affixed by CM/ECF. 1 B. Summary of the ALJ's Decision 2 In rendering his decision, the ALJ followed the Commissioner's five-step sequential 3 evaluation process. See 20 C.F.R. § 404.1520(a). At step one, the ALJ determined that 4 Plaintiff had not engaged in substantial gainful activity since January 19, 2019, the alleged 5 onset date.

AR 122–123. At step two, the ALJ found that Plaintiff's severe impairments 6 included morbid obesity, diabetes mellitus, varicose veins, and status-post varicose vein 7 surgery. Id. The ALJ further found that the following impairments were non-severe: 8 cataracts and status-post cataract surgery, status-post left wrist surgery, iron deficiency 9 anemia, nausea, secondary polycythemia, foot issues, hypertension, hyperlipidemia, 10 benign pulmonary nodules, small hiatal hernia, asthma, sleep apnea, acid reflex, depressive 11 disorder, and anxiety disorder.

AR 123–124. At step three, the ALJ determined that 12 Plaintiff did not have an impairment or combination of impairments that met or was 13 medically equivalent to those in the Commissioner's Listing of Impairments. AR 125–126. 14 Before proceeding to step four, the ALJ further determined that Plaintiff's impairments left 15 him with the residual functional capacity ("RFC") to perform light work except the 16 claimant can never climb ladders, ropes, or scaffolds, can frequently climb ramps and 17 stairs, and can frequently balance, stoop, kneel, crouch, and crawl.

AR 126. The ALJ 18 further determined that Plaintiff should avoid concentrated exposure to work hazards such 19 as dangerous, moving machinery and should avoid all exposure to unprotected heights. Id. 20 Finally, the ALJ found that Plaintiff should avoid concentrated exposure to dusts, gases, 21 pollens, poorly ventilated areas, and other pulmonary irritants.

Id. 22 At step four, relying on the testimony of a vocational expert ("VE"), the ALJ 23 determined that Plaintiff could perform his past relevant work as a composite job consisting 24 of a hotel clerk and night auditor. AR 128–129.

The VE testified that, "if an individual had 25 the claimant's residual functional capacity, such an individual could perform the claimant's 26 past relevant work." AR 129. The ALJ continued to step five and found that Plaintiff could 27 perform other jobs that exist in the national economy such as rental clerk, marker, and 28 1 router. AR 129–130.

Accordingly, the ALJ concluded that Plaintiff was not disabled as 2 defined in the Social Security Act. AR 130. 3 III. STANDARD OF REVIEW 4 A court may set aside the Commissioner's denial of benefits "only if the ALJ's 5 decision was not supported by substantial evidence in the record as a whole or if the ALJ 6 applied the wrong legal standard." Coleman v. Saul, 979 F.3d 751, 755 (9th Cir.

2020); see 7 42 U.S.C. § 405(g). Substantial evidence is “more than a mere scintilla,” and “means only 8... such relevant evidence as a reasonable mind might accept as adequate to support a 9 conclusion.” Biestek v. Berryhill, 587 U.S. 97, 103 (2019) (quoting Consolidated Edison 10 Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Lingenfelter v. Astrue, 504 F.3d 1028, 11 1035 (9th Cir.

2007) (substantial evidence is “more than a mere scintilla, but less than a 12 preponderance”). A court “must review the administrative record as a whole, weighing 13 both the evidence that supports and the evidence that detracts from the Commissioner’s 14 conclusion.” Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). 15 The Court may not impose its own reasoning to affirm the ALJ’s decision.

Garrison 16 v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014). “If the evidence is susceptible to more than 17 one rational interpretation, it is the ALJ’s conclusion that must be upheld.” Ford v. Saul, 18 950 F.3d 1141, 1154 (9th Cir. 2020) (internal quotations omitted).

Thus, “review of an 19 ALJ’s fact-finding for substantial evidence is deferential, and the threshold for such 20 evidentiary sufficiency is not high.” Id. at 1159 (internal quotations omitted) (quoting 21 Biestek, 587 U.S. at 103); Kitchen v. Kijakazi, 82 F.4th 732, 738 (9th Cir. 2023) (“Overall, 22 the standard of review is highly deferential.”). 23 Lastly, the Court will not reverse for harmless error.

Marsh v. Colvin, 792 F.3d 1170, 24 1173 (9th Cir. 2015). “An error is harmless only if it is inconsequential to the ultimate 25 nondisability determination.” Lambert v. Saul, 980 F.3d 1266, 1278 (9th Cir. 2020) 26 (internal quotations omitted). 27 28 1 IV. DISCUSSION 2 Plaintiff contends that the ALJ erred in two respects.

First, Plaintiff argues that the 3 ALJ failed to properly address the severity of Plaintiff’s foot issues. Second, Plaintiff 4 asserts that the ALJ failed to evaluate the “opinion” of Plaintiff’s treating sources at the 5 Kafri Heart and Vascular Clinic. See generally Doc. No. 16.

The Court addresses each in 6 turn. 7 A. The ALJ’s Analysis of Plaintiff’s Foot Issues 8 Per Plaintiff, the ALJ erred in concluding that Plaintiff’s foot issues were non-severe 9 because he failed to address medical records noting diagnoses of left and right heel fissures, 10 foot pain, severe pronation deformity of the left and right foot, and Plaintiff’s use of a cane 11 for ambulation.

Doc. No. 16 at 4. Plaintiff also contends that his bilateral foot issues in 12 combination with his morbid obesity should have resulted in further limitations on his 13 ability to walk and stand when the ALJ was making the RFC determination. Id. at 5. 14 Defendant argues in response that the ALJ reasonably determined that physical 15 examinations did not show signs of significant musculoskeletal deficits, supporting that 16 Plaintiff’s foot issues were not severe.

Doc. No. 19 at 1. 17 1. Applicable Standard 18 Step two of the Commissioner's five-step evaluation process requires the ALJ to 19 determine whether an impairment is severe or not severe. See 20 C.F.R. §§ 404.1520(a), 20 416.920(a). "[A]n ALJ may find an impairment or combination of impairments 'not severe' 21 at step two only if the evidence establishes a slight abnormality that has no more than a 22 minimal effect on an individual's ability to work." Glanden v. Kijakazi, 86 F.4th 838, 844 23 (9th Cir.

2023) (citing Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005)); see also 20 24 C.F.R. §§ 404.1520(c), 416.920(c). "[T]he step-two inquiry is a de minimis screening 25 device to dispose of groundless claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 26 1996) (citing Bowen v. Yuckert, 482 U.S. 137, 153–54 (1987)).

The purpose is to identify 27 at an early stage those claimants whose medical impairments are so slight that it is unlikely 28 1 they are disabled even if their age, education, and experience is considered. Bowen, 482 2 U.S. at 153. 3 2. Analysis 4 The ALJ found that Plaintiff's foot issues were non-severe based on Plaintiff's 5 physical examinations, which showed no significant musculoskeletal or extremity deficits.

6 AR 123 (citing AR 568, 658, 718, 857). Plaintiff cites medical records from Dr. Rana 7 Mansour regarding bilateral foot issues and use of a cane to suggest this conclusion is 8 erroneous. Doc. No. 16 at 4–5. 9 However, the evidence that Plaintiff identifies pertains to routine treatment provided 10 by Dr. Mansour for debridement of toenails, heels, and calluses, along with removal of 11 ingrown nails.4 AR 976–991, 1004–1005.

None of these treatment records state or suggest 12 that Plaintiff suffers from any significant limitations as a result of his foot issues or any 13 limitations that were not otherwise resolved by the prescribed treatment. See id. 14 Furthermore, the records cited by the ALJ support his conclusion that the foot issues are 15 not severe.

For instance, those records show a normal diabetic foot evaluation in April 16 2021, no pedal edema and normal nails and digits as of May 2021, and normal extremities 17 again in March 2022. See AR 568, 718, 857. Indeed, other than on a "busy day," Plaintiff 18 denies having pain in his feet. AR 31 ("Q: Okay. Now, do you have any pain in your feet? 19 A: Not unless I'm -- my -- I've been -- has -- had a busy day or something, but no, not -- 20 not usually.").

To the extent Plaintiff suggests that his foot issues, in combination with his 21 morbid obesity, require a finding of severity, beyond the argument of counsel, Plaintiff 22 cites no records or evidence to support this conclusion. See Doc. No. 16 at 5. 23 Plaintiff also emphasizes that these same records note Plaintiff's use of a cane. Id. at 24 4–5. A hand-held assistive device represents a functional limitation only if it is medically 25 26 27 4 In explaining why he sees a podiatrist, Plaintiff testified that he has trouble clipping his 28 toenails and his right foot leans to the right.

AR 30. 1 required. See Sou v. Saul, 799 F. App'x 563, 564 (9th Cir. 2020); Beatrice D. A. v. Kijakazi, 2 Case No. 2:22-cv-01207-RAO, 2023 U.S. Dist. LEXIS 68797, at *3 (C.D. Cal. Apr. 19, 3 2023) ("The use of a hand-held device such as a cane is a functional limitation only if it is 4 medically required."); Quintero v. Colvin, Case No. 2:13-cv-00478-SKO, 2014 U.S. Dist.

5 LEXIS 137518, at *10 (E.D. Cal. Sept. 29, 2014) (same). And "[t]o find that a hand-held 6 assistive device is medically required, there must be medical documentation establishing 7 the need for a hand-held assistive device to aid in walking or standing, and describing the 8 circumstances for which it is needed (i.e., whether all the time, periodically, or only in 9 certain situations; distance and terrain; and any other relevant information)." SSR 96-9p, 11 Here, Dr. Mansour's records do not indicate that the cane is medically necessary or 12 describe the circumstances when it must be used.

Nor does Plaintiff point to any other 13 record that provides such information. And Dr. Mansour's observations that Plaintiff used 14 a cane during his visits is not sufficient. See Cashin v. Astrue, No. EDCV 09-161 JC, 2010 15 U.S. Dist. LEXIS 16809, at *43 (C.D. Cal. Feb. 24, 2010) (a doctor's observation of 16 claimant's use of cane during examination was not "an objective finding that plaintiff's 17 cane was medically required"); Flores v. Colvin, No. 1:14-cv-02096-SKO, 2016 U.S. Dist.

18 LEXIS 62544, at *47 (E.D. Cal. May 10, 2016) (finding "no medical documentation 19 establishing the need for an assistive device" where all references to claimant's use of cane 20 were "traceable to Plaintiff's self-reports and to his medical sources' observations that he 21 presented with an assistive device"). 22 Moreover, the Court notes that the ALJ addressed Plaintiff's use of an assistive 23 device in the context of discussing Plaintiff's claim that he was severely limited in his 24 ability to walk and used a walker for ambulation.

AR 128. Specifically, the ALJ noted that 25 while Plaintiff reported use of a walker to his treatment provider on isolated occasions, 26 there was no indication in the record that a medical provider prescribed or recommended 27 28 1 use of a walker. Id. Further, the ALJ found that physical examinations "showed normal 2 strength, range of motion, use of extremities, and normal gait." Id. 3 Lastly, even if the ALJ erred, the Court finds that any error at step two was harmless.

4 The ALJ concluded at step two that Plaintiff suffered from severe physical impairments, 5 allowing the sequential evaluation process to continue to the next steps. Hence, once 6 Plaintiff prevailed at step two, it made no difference for the ALJ's ensuing analysis whether 7 his medically determinable impairments were previously considered "severe" since the 8 ALJ was required to consider all impairments—severe and non-severe—in his RFC 9 analysis.

Loader v. Berryhill, 722 F. App'x 653, 655 (9th Cir. 2018); see also Buck v. 10 Berryhill, 869 F.3d 1040, 1048–49 (9th Cir. 2017) ("Step two is merely a threshold 11 determination meant to screen

out weak claims. It is not meant to identify the impairments 12 that should be taken into account when determining the RFC.

In fact, [i]n assessing RFC, 13 the adjudicator must consider limitations and restrictions imposed by all of an individual's 14 impairments, even those that are not severe.") (internal quotations and citation omitted); 15 Jennifer T. v. O'Malley, No. 2:23-cv-03587-MAA, 2024 U.S. Dist. LEXIS 18998, at *9– 16 *10 (C.D. Cal. Feb. 2, 2024) (holding that ALJ's finding that mental impairments were 17 non-severe did not warrant reversal because "the ALJ resolved the severity step in 18 Plaintiff's favor by finding that Plaintiff did have other severe impairments," and therefore 19 "the classification of Plaintiff's mental impairments as non-severe could not have 20 prejudiced her") (internal citation omitted).

And the ALJ did just that—he considered all 21 severe and non-severe impairments when determining the RFC. AR 123, 127–128 22 ("limitations are supported by the claimant's diagnosed obesity and diabetes mellitus, but 23 with intact musculoskeletal, extremity, cardiovascular, and neurological findings 24 throughout the period at issue").

In short, where a claimant prevails at step two and the 25 ALJ considers all impairments—regardless of severity—in the subsequent steps, an ALJ's 26 failure to consider an impairment "severe" is harmless. See Lewis v. Astrue, 498 F.3d 909, 27 911 (9th Cir. 2007). 28 1 B. Evidence from Treating Sources at The Kafri Heart and Vascular Clinic 2 Plaintiff also contends that the ALJ erred in his evaluation of the "opinions" 3 purportedly offered by treating sources at the Kafri Heart and Vascular Clinic.

Doc. No. 4 16 at 5. Plaintiff refers to notes from several visits to Kafri Heart and Vascular Clinic, 5 during which "treating sources" recommended that Plaintiff keep his legs elevated, use 6 compression stockings, and engage in regular walking. Doc. No. 16 at 6 (citing AR 819, 7 718, 940).

The ALJ did not directly address each of these visits and associated 8 recommendations. See generally AR 122–128. Plaintiff argues this was a harmful error 9 because the recommendations reflect limitations that have "vocational ramifications," and 10 were not included in the RFC assessment or presented as hypothetical questions to the VE. 11 Doc. No. 16 at 7–8.

Defendant argues that the notes constitute "other medical evidence," 12 not medical opinions, and therefore did not need to be evaluated for persuasiveness. Doc. 13 No. 18 at 6. The Court agrees with the Commissioner. 14 1. Applicable Standard 15 Applicable Agency regulations provide that a "medical opinion" is a statement from 16 a medical source about (i) what a claimant can still do despite his or her impairment(s) and 17 (ii) whether the claimant has one or more impairment-related limitations or restrictions in 18 the ability to perform certain demands of work activities, i.e., physical, mental, etc. 20 19 C.F.R § 404.1513(a)(2).

In contrast, “other medical evidence” is “evidence from a medical 20 source that is not objective medical evidence or a medical opinion,” including judgments 21 about the nature and severity of a claimant’s impairments, medical history, clinical 22 findings, diagnosis, treatment prescribed with response, or prognosis. 20 C.F.R 23 § 404.1513(a)(3). 24 With respect to medical opinions, an ALJ must evaluate their persuasiveness by 25 considering specified factors.

20 C.F.R. §§ 404.1520c(c)(1)-(5); 416.920c(c)(1)-(5). 26 Supportability and consistency are the two most important factors. 20 C.F.R. 27 §§ 404.1520c(b)(2); 416.920c(b)(2). “Consistency means the extent to which a medical 28 1 opinion is consistent with the evidence from other medical sources and nonmedical sources 2 in the claim.” Stiffler v. O’Malley, 102 F.4th 1102, 1106 (9th Cir.

2024) (quoting Woods v. 3 Kijakazi, 32 F.4th 785, 792 (9th Cir. 2022)). “Supportability focuses on whether a medical 4 source supports a medical opinion by explaining the relevant objective medical evidence.” 5 Id. An ALJ “must articulate how persuasive it finds all of the medical opinions from each 6 doctor or other source, and explain how it considered the supportability and consistency 7 factors in reaching these findings.” Id. 8 2.

Analysis 9 The Court finds that the evidence cited by Plaintiff from the Kafri Heart and 10 Vascular Clinic constitutes “other medical evidence” and not “medical opinion” as that 11 term is defined by applicable Agency regulations. See 20 C.F.R § 404.1513(a)(2)–(3).

For 12 instance, Plaintiff cites records that show: (1) a stress echocardiograph and related findings 13 (AR 726–727); (2) consult notes recommending that Plaintiff continue to take blood 14 pressure medication and emphasizing the importance of a low-sodium diet and exercise 15 (AR 734–739); (3) consult notes recommending continued use of a CPAP machine and a 16 healthy diet and exercise (AR 728–730); and (4) consult notes indicating Plaintiff will 17 proceed with a radiofrequency vein ablation procedure in the right leg and left leg, 18 respectively (AR 722–724; 731–733).

Additionally, the Kafri Heart and Vascular Clinic 19 records from May 2021, September 2021, and November 2021 are treatment notes by 20 various treating sources that examined Plaintiff and recommended leg elevation, 21 compression stockings, exercise, and weight loss following the vein ablation procedures 22 and to manage symptoms. See AR 718–719, 818–820, 939–941.

None of the treating 23 sources at the Kafri Heart and Vascular Clinic comment, let alone opine, on what Plaintiff 24 can still do despite any specified impairments or whether Plaintiff suffers from limitations 25 or restrictions that impact his ability to perform the physical, mental, or other demands of 26 work. 27 28 1 Also, the Court finds Plaintiff’s reliance on Allen T. v. Comm’r of Soc.

Sec., No. 2 C20-1257-MLP, 2021 U.S. Dist. LEXIS 89396, at *8 (W.D. Wash. May 11, 2021), 3 unpersuasive. In Allen T., the examination notes at issue were prepared by a doctor that 4 examined and completed a form opinion describing the plaintiff's symptoms and 5 limitations, including what work the plaintiff could still do. Id. at *7.

The ALJ evaluated 6 the doctor's opinions and found them to be consistent with and supported by examination 7 notes. The issue in Allen T. was not whether the ALJ failed to consider the persuasiveness 8 of the doctor's opinions, but rather whether the ALJ should have also evaluated the notes 9 prepared by that same doctor.

Thus, the scenario presented in Allen T. is markedly different 10 from the circumstances here, where there is no medical opinion by any doctor and instead 11 only treatment notes from various sources. 12 In sum, the ALJ was not required to evaluate the persuasiveness of the Kafri Heart 13 and Vascular Clinic records because they represent "other medical evidence." See Janice 14 H. v. O'Malley, No. 22-cv-1833 W (MSB), 2024 U.S. Dist.

LEXIS 47588, at *3 (S.D. Cal. 15 Mar. 18, 2024) (adopting report and recommendation finding that medical treatment notes 16 that do not address judgment about Plaintiff's work limitations or restrictions are not 17 evaluated as "medical opinions"); see also Rodin v. Comm'r of Soc. Sec., No. 1:21-cv- 18 00900-SAB, 2023 U.S. Dist. LEXIS 78913, at *37 (E.D. Cal. May 4, 2023) (finding 19 records were "other medical evidence" due to the "absence of sufficient specified 20 statements about what Plaintiff can still do or specified functional limitations").

21 22 23 24 25 26 27 28 1 ||}V. CONCLUSION 2 Based on the foregoing reasons, the Court AFFIRMS the Commissioner's final 3 || decision. Accordingly, IT IS HEREBY ORDERED that judgment be entered in favor of 4 || Defendant Commissioner of the Social Security Administration and against Plaintiff.

The 5 || Clerk of the Court is directed to close this action. 6 IT IS SO ORDERED. 7 Dated: March 14, 2025 (Wr Sh 8 Honorable Valene E. Torres 9 United States Magistrate Judge 10 1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 12