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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN POTTLE, Plaintiff - Appellant, v. MICHAEL J. ASTRUE, Commissioner of the Social Security Administration,** Defendant - Appellee.	No. 05-36041 D.C. No. CV-04-00600-MRH/JPC MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Submitted December 5, 2007***
Portland, Oregon

Before: O'SCANNLAIN, GRABER, and CALLAHAN, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Michael J. Astrue is substituted for his predecessor Jo Anne Barnhart as Commissioner of the Social Security Administration. Fed. R. App. P. 43(c)(2).

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. Civ. P. 34(a)(2).

John Pottle appeals the district court's order affirming the Commissioner of Social Security's final decision, which denied Pottle's application for supplementary social security income and disability benefits under Title XVI of the Social Security Act. 42 U.S.C. §§ 401–33, 1381–83f. Because the parties are familiar with the facts of this case, we recount them here only as necessary.

On January 12, 2004, an Administrative Law Judge ("ALJ") determined at step five of the five-step evaluation process that Pottle was not disabled. 20 C.F.R. § 416.920. That decision became the final decision of the Commissioner. We conclude that the ALJ's decision was supported by substantial evidence. 42 U.S.C. § 405(g); *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003).

Two examining physicians presented conflicting opinions regarding Pottle's capacity for work. The ALJ gave substantial weight to the opinion of Dr. Robinann Cogburn, Ph.D., who concluded that Pottle's psychological impairments would not prevent him from functioning in an employment setting, and gave little weight to the opinion of Dr. James Bryan, Ph.D., who concluded that long-term employment was not feasible for Pottle. The ALJ provided "specific and legitimate" reasons for resolving the conflict in this manner. *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995) ("[T]he opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate

reasons that are supported by substantial evidence in the record." (citation omitted)). The ALJ determined that Dr. Bryan's opinion was based primarily on his diagnosis of Pottle as suffering from mixed personality disorder and that such diagnosis was not supported by the treatment record. *See Magallenes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) ("The ALJ is responsible for determining credibility and resolving conflicts in medical testimony."). First, the ALJ noted that no other physician, including Pottle's treating psychiatrist, established such a diagnosis. Second, the ALJ explained that the objective examinations conducted on Pottle, a Minnesota Multiphasic Personality Inventory 2 test and a Personality Assessment Inventory, yielded invalid results because of Pottle's over-reporting of his symptoms. Finally, the ALJ found that Dr. Bryan's own notes indicated that Pottle exaggerated his symptoms during Dr. Bryan's examination. *See Connett*, 340 F.3d at 875 (holding that the ALJ properly rejected a treating physician's testimony in favor of an examining physician's statements because the treating physician's "extensive conclusions regarding [claimant's] limitations are not supported by his own treatment notes"). Although the embellishment of symptoms may be consistent with personality disorder, the lack of support for such a diagnosis elsewhere in the treatment record was a specific and legitimate reason for the ALJ to give Dr. Bryan's opinion little weight in favor of Dr. Cogburn's.

In addition, the ALJ did not err in failing to discuss a portion of the testimony offered by therapist Chris Hill, who suggested that Pottle's psychological limitations would eventually cause him to experience difficulties in the workplace. An ALJ is not required to provide reasons for failing to discuss the speculation of a lay witness. *See Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to a claimant's *symptoms* is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." (emphasis added)).

Finally, the ALJ did not err in finding that Pottle did not meet or equal the listing criteria for Listing 12.05C. 20 C.F.R Part 404, Subpart P, Appendix 1, § 12.05C. As the ALJ noted, no physician ever found that Pottle met the criteria for Listing 12.05C and Pottle did not offer any evidence suggestive of mental retardation before he reached the age of 22. Pottle's arguments that he also meets or equals the criteria for Listing 12.07 and 12.08 are waived because he failed to raise them in the district court. *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006).

Accordingly, the district court's decision affirming the Commissioner's denial of Pottle's application is

AFFIRMED.