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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Schow v. Astrue, No. 05-35973

O'SCANNLAIN, Circuit Judge, dissenting in part and concurring in the judgment:

While I concur in the judgment, I respectfully suggest that the court fails to accord proper deference to the Administrative Law Judge's ("ALJ") rejection of Schow's testimony concerning his subjective symptoms. The majority would apply a "clear and convincing" standard of review of a credibility determination, but such standard is appropriate only where "there is no affirmative evidence suggesting [Schow] is malingering." *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996).

In *Robbins v. Social Security Administration*, 466 F.3d 880 (9th Cir. 2006), we appeared to hold that the clear and convincing standard is required when an ALJ fails to conclude that a claimant is malingering. However, as the majority's disposition acknowledges, we cited *Smolen* for that proposition, which requires only the existence of "affirmative evidence suggesting" that a claimant is malingering. *Smolen*, 80 F.3d at 1283-84. Our other cases addressing the clear and convincing standard more clearly adopt the *Smolen* test. *See, e.g., Lingenfelter v. Astrue*, 504 F.3d 1028 (9th Cir. 2007) ("[If] there is no evidence of malingering, 'the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so.'" (quoting

Smolen, 80 F.3d at 1281 and citing *Robbins*, 466 F.3d at 883); *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006); *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993) (“If there is medical evidence establishing an objective basis for some degree of pain and related symptoms, and no evidence affirmatively suggesting that claimant was malingering, the Secretary’s reason for rejecting a claimant’s testimony must be clear and convincing.”) (internal quotation marks omitted).

Moreover, our precedent does not require an *express* finding of malingering. Indeed, *Smolen* noted both that the ALJ “made no finding” that the claimant was malingering *and* that none “of the evidence suggest she was doing so.” *Smolen*, 80 F.3d at 1284 n.6. The latter statement, of course, would be superfluous if only an express finding of malingering was required. Here, the ALJ certainly implied that Schow was malingering. After indicating that on March 21, 2000, Schow “requested a note asking that he not have to work so many hours” due to his back pain while incarcerated, “[c]linical findings were inconsistent and [Schow] exhibited non-reproducible physical findings, interesting posturing that is not consistent with his known pathology . . . [Schow] stated that he could not move his arm or neck but when asked to do so during the examination he was able to. His history was noted to be inconsistent about where it hurt and what made it hurt.” The purpose of noting these observations clearly was to imply that Schow had lied

about or exaggerated his back pain to avoid prison work—that is, to point out that Schow had malingered.

In any event, because the mere existence of “affirmative evidence suggesting” that a claimant is malingering vitiates the applicability of a clear and convincing standard of review, such standard is not required here. *Smolen*, 80 F.3d at 1283-84. Three separate medical tests between March 2000 and April 2001 showed either “unremarkable” results as to Schow’s back condition or normal range of motion within Schow’s neck and back; one doctor noted that Schow’s pain began “for no apparent reason.”¹ During a fourth examination by nurse-practitioner Ramirez-Williams on March 21, 2000, Schow initially complained of severe pain every time he was touched, but later in the examination, he was able to tolerate a moderate degree of pressure without any physical discomfort. Ramirez-Williams also concluded that “[t]here are no examination findings consistent with [a history of back pain or degenerative neck changes] at this time.”² Such evidence

¹The majority’s disposition parses through these examinations to determine whether each individually suggests malingering. However, even if the each examination is separately suspect, the fact that they all revealed virtually the same results certainly suggests malingering when taken as a whole.

²The majority’s disposition concludes that the ALJ could not rely on such evidence because the ALJ also concluded that Ramirez-Williams was not an “acceptable medical source.” Of course, the ALJ could reject his medical opinions while crediting his firsthand observations of Schow’s behavior.

affirmatively suggests that Schow was malingering, and on that ground alone I would affirm the ALJ's decision. That some of the ALJ's supporting arguments were in error is, of course, irrelevant; the foregoing grounds were both proper and sufficient.

Moreover, while I disagree with the majority's application of the clear and convincing standard of review, the evidence in the record is sufficiently compelling that I would affirm the ALJ's adverse credibility finding even under that standard. Here, the ALJ properly relied on the fact that Schow appears to have starkly lied to the ALJ about his work history. Schow represented to the ALJ that he had no earnings following 1997, but he in fact earned revenue during that period from a book that he previously had published. Moreover, when Schow saw Dr. Robert Norton on November 5, 1999, he indicated that he "works at several jobs," including as a construction worker; he came to Dr. Norton "with eight days of low back pain which has occurred while he was active at work." Schow made the same representation in forms that he submitted prior to his incarceration for an unrelated offense in January 2000. These evince that Schow had, in fact, been working after 1997 (indeed, that he had worked *several* jobs), despite his representation to the contrary. I respectfully disagree with the majority's conclusion that Schow's failure to report such work history "hardly compels" the ALJ's adverse credibility

determination. *See Orn v. Astrue*, 495 F.3d 625, 630, 636 (9th Cir. 2007) (“Factors that an ALJ may consider in weighing a claimant’s credibility include . . . inconsistencies in testimony or between testimony and conduct.”).

With that said, I agree with the majority’s conclusion that reversal is required in light of the ALJ’s failure properly to discredit the lay witness testimony in this case, and I therefore concur in the judgment. While the ALJ was correct that the testimony could be discredited to the extent that it was founded on Schow’s self-reporting, the testimony in large part was also based upon the witness’ extensive personal observations of Schow. Accordingly, unless the ALJ properly cites alternative grounds for rejecting the lay testimony that are “germane to each witness,” *Dodrill*, 12 F.3d at 919, the ALJ must provide a hypothetical to the vocational expert that accounts for their observations of Schow’s limitations.