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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 GREGORY W. SUMMERS,

8 Plaintiff,

9 v.

10 CAROLYN W. COLVIN,  
11 Commissioner of Social Security,

12 Defendant.

No. 2:12-CV-00533-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

13  
14 BEFORE THE COURT are cross-Motions for Summary Judgment. ECF  
15 No. 19, 20. Attorney Maureen J. Rosette represents Gregory W. Summers,  
16 (Plaintiff); Special Assistant United States Attorney Richard M. Rodriguez  
17 represents the Commissioner of Social Security (Defendant). The parties have  
18 consented to proceed before a magistrate judge. ECF No. 6. After reviewing the  
19 administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's  
20 Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary  
21 Judgment.

22 **JURISDICTION**

23 On March 20, 2009, Plaintiff filed a Title II application for a period of  
24 disability and disability insurance benefits, alleging disability beginning April 12,  
25 2008.<sup>1</sup> Tr. 48. Plaintiff's claim was denied initially and on reconsideration, and he  
26 requested a hearing before an administrative law judge (ALJ). Tr. 25; 91-129. A  
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<sup>1</sup>At the hearing, Plaintiff amended his onset date to April 12, 2008. Tr. 48.

1 hearing was held on June 9, 2010, at which medical expert Daniel H. Wiseman,  
2 vocational expert Thomas A. Polsin, and Plaintiff, who appeared *pro se*, testified.  
3 Tr. 39-90. ALJ Marie Palachuk presided. Tr. 41. The ALJ denied benefits on July  
4 30, 2010. Tr. 25-33. The Appeals Council denied review. Tr. 1-3. The instant  
5 matter is before this court pursuant to 42 U.S.C. § 405(g).

### 6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript of proceedings  
8 and are briefly summarized here. At the time of the hearing, Plaintiff was 45 years  
9 old, graduated from high school and he lived alone in Spokane, Washington. Tr.  
10 63; 65. Plaintiff was 5'11" and weighed between 205 and 218 pounds. Tr. 76.

11 Plaintiff's past jobs involved custodial work. Tr. 64. He worked in office  
12 buildings where he cleaned offices and restrooms, and he performed tasks such as  
13 vacuuming and emptying garbage cans. Tr. 64.

14 Plaintiff testified that he can no longer work because his breathing is  
15 "severely affected" and he is no longer able to be active. Tr. 69. On his disability  
16 application, Plaintiff stated that he could not work due to asthma, environmental  
17 allergies and lung problems. Tr. 181. He explained that "the chemicals burn my  
18 lungs. My lungs hurt and they seize up when I get exposed to certain items. I am  
19 allergic to dust." Tr. 181.

20 Plaintiff testified that can he walk only about two blocks before he is out of  
21 breath or has a "dizzy spell." Tr. 71. He said that cigarettes, perfumes and car  
22 exhaust bother him, and he tested positive for allergies to pollens, molds, grass and  
23 dust. Tr. 73-74. Finally, Plaintiff said he cannot afford the recommended surgery  
24 on his sinuses, and as a result he has "constant infections." Tr. 75.

### 25 **STANDARD OF REVIEW**

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set  
27 out the standard of review:

28 A district court's order upholding the Commissioner's denial of

1 benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174  
2 (9th Cir. 2000). The decision of the Commissioner may be reversed  
3 only if it is not supported by substantial evidence or if it is based on  
4 legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
5 Substantial evidence is defined as being more than a mere scintilla,  
6 but less than a preponderance. *Id.* at 1098. Put another way,  
7 substantial evidence is such relevant evidence as a reasonable mind  
8 might accept as adequate to support a conclusion. *Richardson v.*  
9 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to  
10 more than one rational interpretation, the court may not substitute its  
11 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
12 *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599  
13 (9th Cir. 1999).

14 The ALJ is responsible for determining credibility, resolving conflicts in  
15 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
16 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,  
17 although deference is owed to a reasonable construction of the applicable statutes.  
18 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

19 It is the role of the trier of fact, not this court, to resolve conflicts in  
20 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one  
21 rational interpretation, the court may not substitute its judgment for that of the  
22 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
23 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will  
24 still be set aside if the proper legal standards were not applied in weighing the  
25 evidence and making the decision. *Brawner v. Secretary of Health and Human*  
26 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to  
27 support the administrative findings, or if conflicting evidence exists that will  
28 support a finding of either disability or non-disability, the Commissioner's  
determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th  
Cir. 1987).

### SEQUENTIAL PROCESS

The Commissioner has established a five-step sequential evaluation process

1 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
2 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
3 through four, the burden of proof rests upon the claimant to establish a prima facie  
4 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
5 burden is met once a claimant establishes that a physical or mental impairment  
6 prevents him from engaging in his previous occupation. 20 C.F.R. §§  
7 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
8 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
9 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist  
10 in the national economy which claimant can perform. *Batson v. Commissioner of*  
11 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an  
12 adjustment to other work in the national economy, a finding of “disabled” is made.  
13 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

#### 14 **ADMINISTRATIVE DECISION**

15 At step one, ALJ Palachuk found that Plaintiff had not engaged in  
16 substantial gainful activity since April 12, 2008. Tr. 27. At step two, she found  
17 Plaintiff had the severe impairments of nasal/bronchial/skin allergies, recurrent  
18 sinusitis, and current asthma-like symptoms. Tr. 27. At step three, the ALJ  
19 determined that Plaintiff does not have an impairment or combination of  
20 impairments that meets or medically equal one of the listed impairments in 20  
21 C.F.R., Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,  
22 416.920(d), 416.925 and 416.926). Tr. 28. The ALJ also found that Plaintiff has  
23 the residual functional capacity (“RFC”) to perform a full range of work at all  
24 exertional levels, with the following limitations: “The claimant should avoid  
25 concentrated exposure to extreme temperatures, wetness, humidity, and hazards  
26 such as unprotected heights and machinery. The claimant should not use ladders,  
27 ropes, or scaffolds. The claimant should avoid even moderate exposure to  
28 respiratory irritants such as dust, odors, fumes, and chemicals.” Tr. 28. At step

1 four, the ALJ found that Plaintiff could not perform past relevant work as a  
2 commercial cleaner. Tr. 32. At step five, the ALJ concluded that considering  
3 Plaintiff's age, education, work experience, and residual functional capacity, jobs  
4 exist in significant numbers in the national economy that Plaintiff can perform,  
5 such as small parts assembler, mail room clerk, and hand packager. Tr. 32-33.  
6 The ALJ concluded Plaintiff was not disabled as defined by the Social Security  
7 Act. Tr. 33.

## 8 ISSUES

9 The question presented is whether substantial evidence exists to support the  
10 ALJ's decision denying benefits and, if so, whether that decision is based on proper  
11 legal standards. Plaintiff contends that the ALJ erred by improperly weighing the  
12 medical evidence. ECF No. 19.

## 13 DISCUSSION

### 14 A. Medical Opinions

15 Plaintiff contends that the ALJ erred by giving little weight to Plaintiff's  
16 treating physician's opinion that he was disabled. ECF No. 19 at 7-10. Plaintiff  
17 also alleges that the ALJ improperly weighed the opinions of non-examining,  
18 testifying physician Daniel H. Wiseman. ECF No. 19 at 11.

19 Because treating physicians are employed to cure and, thus, have a greater  
20 opportunity to know and observe the patient as an individual, their opinions are  
21 given greater weight than the opinions of other physicians. *Smolen v. Chater*, 80  
22 F.3d 1273, 1285 (9th Cir. 1996); *Sprague*, 812 F.2d at 1230. An ALJ may not  
23 reject a treating physician's opinion without providing findings that set forth  
24 "specific, legitimate reasons" based upon "substantial evidence in the record."  
25 *Smolen*, 80 F.3d at 1285; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).  
26 The contrary opinion of a non-examining medical expert does not alone constitute  
27 a specific, legitimate reason for rejecting a treating or examining physician's  
28 opinion." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001), citing

1 *Magallanes*, 881 F.2d at 752; see also *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4  
2 (9th Cir. 1999) ("The nonexamining physicians' conclusion, with nothing more,  
3 does not constitute substantial evidence, particularly in view of the conflicting  
4 observations, opinions, and conclusions of an examining physician.").

5 Peter D. Rinaldi, M.D., was Plaintiff's treating physician beginning in 1993.  
6 Tr. 338. Dr. Rinaldi penned a note on June 12, 2009, that stated Plaintiff was  
7 disabled due to his allergies: "This young man is on maximum medical therapy for  
8 chronic persistent asthma and perennial allergic rhinitis. Clinically, he is totally  
9 disabled [because] of his persistent symptoms of chest tightness, cough, wheezing,  
10 [headaches], sneezing, and nasal congestion." Tr. 323.

11 On April 26, 2010, Dr. Rinaldi wrote a letter stating that Plaintiff's diagnosis  
12 is "severe persistent steroid dependent asthma and chronic allergic rhinitis." Tr.  
13 355. Dr. Rinaldi opined that Plaintiff's employability was poor:

14 In spite of his compliance with his multiple medical therapies the  
15 severity of his ongoing respiratory symptoms has a negative impact on  
16 his employability and due to the failure of all current medical  
17 therapies I think his prognosis for recovery sufficient enough to  
18 improve his employability [sic] is poor.

19 Tr. 355.

20 On June 1, 2010, Dr. Rinaldi wrote a letter indicating that Plaintiff was on  
21 "maximal medical therapy for his asthma" and he suffered from "considerable  
22 functional impairment." Tr. 387.

23 The ALJ gave little weight to the opinions of treating physician Dr. Rinaldi  
24 with a brief explanation:

25 The opinions of Dr. Rinaldi are given little weight as they are  
26 not consistent with the objective medical evidence. The doctor's  
27 opinion is without substantial support from the other evidence of  
28 record, which obviously renders it less persuasive. The possibility

1 always exists that a doctor may express an opinion in an effort to  
2 assist a patient with whom he or she sympathizes for one reason or  
3 another. Another reality which should be mentioned is that patients  
4 can be quite insistent and demanding in seeking supportive notes or  
5 reports from their physicians, who might provide such a note in order  
6 to satisfy their patient[']s requests and avoid unnecessary  
7 doctor/patient tension. While it is difficult to confirm the presence of  
such motives, they are more likely in situations where the opinion in  
question departs substantially from the rest of the evidence of record,  
as in the current case.

8 Tr. 31.

9 Two fatal problems exist with the ALJ's analysis of Plaintiff's treating  
10 physician. First, the ALJ failed to provide analysis and failed to identify the  
11 evidence that contradicts Dr. Rinaldi's opinions. It is insufficient for an ALJ to  
12 reject the opinion of a treating physician by merely stating, without more, that the  
13 opinion is inconsistent with other evidence in the record. *See Embrey v. Bowen*,  
14 849 F.2d 418, 421 (9th Cir. 1988). Inconsistency between doctors' opinions does  
15 not allow the ALJ to simply select one opinion based solely on the fact that an  
16 inconsistency exists, but instead the ALJ must address, explain and resolve the  
17 conflicting evidence by assigning weight to differing opinions based on cogent,  
18 specific, and legitimate reasons. *Morgan*, 169 F.3d at 603; *Reddick v. Chater*, 157  
19 F.3d 715, 722, 725 (9th Cir. 1998). In this case, the ALJ failed to provide analysis  
20 and explanation, supporting her reasoning for rejecting Dr. Rinaldi's opinion. Tr.  
21 31. In the absence of specific and legitimate reasons accompanied by analysis that  
22 explains and resolves the conflicting medical evidence, the ALJ's rejection of Dr.  
23 Rinaldi's opinion is improper.

24 Second, the ALJ relied upon a legally deficient reason for rejecting Dr.  
25 Rinaldi's opinion. It is well-settled that an ALJ "may not assume that doctors  
26 routinely lie in order to help their patients collect disability benefits." *Lester v.*  
27 *Chater*, 81 F.3d 821, 832 (9<sup>th</sup> Cir. 1995) (citation omitted). To support such a  
28 finding, the ALJ should "introduce evidence of actual improprieties." *Id.* (citation

1 omitted). Here, the ALJ points to no evidence of actual impropriety on the part of  
2 Dr. Rinaldi, and instead noted that "it is difficult to confirm the presence of such  
3 motives." Tr. 31; *see Lester*, 81 F.3d at 832 (ALJ "may not assume that doctors  
4 routinely lie in order to help their patients collect disability benefits"); *Reddick*,  
5 157 F.3d at 725-26 (ALJ erred in assuming that the treating physician's opinion  
6 was less credible because his job was to be supportive of the patient).

7 In this case, the record contains no evidence that Dr. Rinaldi embellished his  
8 assessments of Plaintiff's limitations to assist him with his benefits claim. Thus,  
9 the ALJ's rejection of Dr. Rinaldi's opinion on the basis that his opinion was based  
10 upon sympathy instead of sound medical judgment was improper.

#### 11 **B. Remand**

12 Remand is appropriate when, like here, a decision does not adequately  
13 explain how a conclusion was reached, "[a]nd that is so even if [the ALJ] can offer  
14 proper post hoc explanations for such unexplained conclusions," for "the  
15 Commissioner's decision must stand or fall with the reasons set forth in the ALJ's  
16 decision, as adopted by the Appeals Council." *Barbato v. Comm'r of Soc. Sec.*,  
17 923 F. Supp. 1273, 1276 n.2 (C.D. Cal. 1996) (citations omitted). The court notes,  
18 however, that it is not suggesting that the ALJ's ultimate conclusions were  
19 necessarily incorrect -- only that the decision was conclusory and failed to provide  
20 reasons for rejecting, or even accepting, certain opinions. It is the province of the  
21 ALJ, not the Court, to assess the medical evidence. The Court cannot affirm the  
22 ALJ's conclusions on grounds that were not invoked by the ALJ. *Ceguerra v.*  
23 *Secretary of HHS*, 933 F.2d 735, 738 (9th Cir. 1991).

#### 24 **CONCLUSION**

25 Having reviewed the record and the ALJ's findings, the court concludes the  
26 ALJ's decision is based on legal error, and requires remand. On remand, the ALJ  
27 is directed to reevaluate Dr. Rinaldi's opinion, and, if necessary, provide legally  
28 sufficient reasons for rejecting his opinions, as well as legally sufficient reasons



1 supporting the weight accorded to the other medical source and lay opinions. The  
2 decision is therefore **REVERSED** and the case is **REMANDED** for further  
3 proceedings consistent with this opinion. Accordingly,

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is  
6 **GRANTED**.

7 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is  
8 **DENIED**.

9 3. An application for attorney fees may be filed by separate motion.

10 The District Court Executive is directed to file this Order and provide a copy  
11 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and  
12 the file shall be CLOSED.

13 DATED January 13, 2014.

A handwritten signature in black ink, appearing to be "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE