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NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Robert Duran,

No. CV-07-2317-PHX-FJM

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Plaintiff,

ORDER

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vs.

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Michael J. Astrue, Commissioner of Social
Security Administration,

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Defendant.

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Plaintiff brought this action seeking judicial review of the Social Security Administration’s decision that he is not eligible for disability benefits. The court now has before it plaintiff’s motion for summary judgment (doc. 19), and defendant’s response and cross-motion for summary judgment (doc. 22). No other briefs were filed. For the reasons set forth below, we affirm the Commissioner’s ruling.

Plaintiff applied for disability benefits and supplemental security income on August 4, 2004, alleging a disability onset date of July 20, 2004, due to vertebral fracture, disc disease, and bulging, causing chronic neck and back pain. The Administrative Law Judge (“ALJ”) denied the application for benefits. Tr. 17. This decision became the final decision of the Commissioner when the Appeals Council denied plaintiff’s request for review. Plaintiff commenced this action for judicial review pursuant to 42 U.S.C. § 405(g).

1 An ALJ's decision to deny benefits will be overturned "only if it is not supported by
2 substantial evidence or is based on legal error." Morgan v. Comm'r of Soc. Sec. Admin.,
3 169 F.3d 595, 599 (9th Cir. 1999). Substantial evidence is "such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion." Id. Under this standard,
5 an ALJ's findings must be upheld "if supported by inferences reasonably drawn from the
6 record," even where "evidence exists to support more than one rational interpretation."
7 Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004).

8 The ALJ concluded that plaintiff was not disabled, finding that he retained the residual
9 functional capacity ("RFC") to perform light work, including lifting or carrying 20 pounds
10 occasionally and 10 pounds frequently; sitting, standing or walking up to six hours per day;
11 and bending, crouching, crawling, kneeling, and climbing only occasionally. He further
12 concluded that plaintiff is capable of performing the requirements of his past relevant work
13 as a semi-skilled cashier, and alternatively, that plaintiff has transferable skills from his past
14 work as a mechanic that are transferable to a position as a small parts assembler. Tr. at 23.
15 The ALJ relied primarily on the opinion of medical expert Vincent Russo, M.D., who
16 concluded that plaintiff is capable of performing the exertional activities of light work. Tr.
17 at 241. The ALJ also relied on the opinion of a state agency physician who also concluded
18 that, despite his back pain, plaintiff is capable of performing a light work. Tr. at 192.

19 Plaintiff now challenges the ALJ's RFC determination because it did not include a
20 sit/stand limitation. Neither Dr. Russo, nor the state agency physician prescribed a sit/stand
21 option. Tr. 241, 187, 192. Instead, both doctors concluded that plaintiff was capable of
22 performing a full range of light work. However, during the hearing before the ALJ, Dr.
23 Russo testified that "it would be appropriate" for plaintiff to "stretch, walk around for three,
24 four minutes . . . every hour or two." Tr. at 282. Plaintiff now contends that this statement
25 was tantamount to Dr. Russo prescribing a sit/stand option, which then should have been
26 included in the ALJ's RFC assessment and hypothetical question presented to the vocational
27 expert. We disagree. Dr. Russo consistently opined that plaintiff was capable of a full range
28 of light work. He did not include in his medical assessment that plaintiff needed a sit/stand

1 option. Tr. at 241. His agreement with plaintiff's counsel that it would be "appropriate" for
2 plaintiff to stretch or walk around for three or four minutes every hour or two is not the same
3 as imposing a sit/stand option. Moreover, the ALJ posited to the vocational expert a
4 hypothetical that involved a claimant who required the "ability to stand up and stretch" every
5 hour or two. The vocational expert stated that, even with this limitation, the claimant could
6 perform all of plaintiff's past relevant work. Tr. at 286-87. The ALJ properly included, in
7 both the RFC assessment and the hypothetical question, all the functional limitations that he
8 found to be supported by substantial evidence.

9 Moreover, even if a sit/stand option was appropriate, we nevertheless conclude that
10 the ALJ's decision that plaintiff is not disabled is based on substantial evidence in the record.
11 First, the ALJ found that plaintiff was capable of performing his past relevant work as a
12 cashier, which he performed at a semi-skilled level. That conclusion is supported by the
13 vocational expert's testimony that a claimant with plaintiff's RFC could perform the duties
14 of a semi-skilled cashier, and if that claimant needed a sit/stand option, he could perform the
15 duties of a cashier at an unskilled level. Tr. at 286.

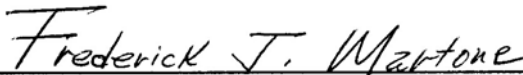
16 Because the ALJ determined that plaintiff was capable of performing his past relevant
17 work at step four, he was not required to determine at step five whether plaintiff can perform
18 other work that exists in significant numbers in the national economy. 20 C.F.R. §
19 404.1520(g). Nevertheless, the ALJ alternatively determined that, based on the testimony
20 of the vocational expert, plaintiff has skills from his past work that are transferable to other
21 positions that are available in significant numbers in the national economy. The vocational
22 expert testified that plaintiff's past work as a small engine mechanic involved mechanical
23 skills in assembling small products in a manufacturing environment, that are transferable to
24 other positions, such as bearing ring assembler and bench assembler. Tr. at 288-89. This
25 evidence is sufficient to support the ALJ's step five determination.

26 Finally, plaintiff contends that the ALJ erred in discounting his subjective complaints
27 of pain. The ALJ found that plaintiff's medically determinable impairments could
28 reasonably be expected to produce the alleged symptoms, but that plaintiff's statements

1 concerning the intensity, persistence and limiting effects of these symptoms are not entirely
2 credible to the extent alleged. The ALJ noted that plaintiff's credibility is diminished by the
3 fact that the medical evidence does not support his allegations regarding the severity of his
4 pain. The ALJ found significant that plaintiff's own treating physician reported that his
5 alleged pain was "out of proportion" to the results of the physical exam. Tr. at 201. The
6 state agency physician also opined that the severity or duration of the symptoms is
7 disproportionate to plaintiff's medically determinable impairment. Tr. at 191. A physical
8 therapist reported "fair prognosis for return to full function given the fact that subjective
9 complaints do not correlate with objective findings." Tr. at 182. The ALJ also found
10 significant the fact that plaintiff experiences no negative side effects from his pain
11 medication, and that he can perform daily activities including caring for his four-year old
12 daughter three days a week. These specific findings are sufficient to support the ALJ's
13 decision to discount plaintiff's subjective complaints.

14 Based on the foregoing, we conclude that the ALJ's determination that plaintiff is not
15 disabled, and therefore not eligible for benefits, is supported by substantial evidence in the
16 record. Therefore, **IT IS ORDERED GRANTING** defendant's motion for summary
17 judgment (doc. 22) and **DENYING** plaintiff's motion for summary judgment (doc. 19).

18 DATED this 28th day of January, 2009.

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24 Frederick J. Martone
25 United States District Judge
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