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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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10 Michael Stucker,

11 Plaintiff,

12 vs.

13 Michael J. Astrue, Commissioner of Social  
14 Security,

15 Defendant.

No. CV-10-2293-PHX-DGC

**ORDER**

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17 Plaintiff suffers from low back pain and arthritis in his right knee, and has had  
18 multiple knee surgeries. He applied for disability insurance benefits in November 2007,  
19 claiming to be disabled since May 1, 2006. Doc. 11, Tr. 100-02, 152. The application  
20 was denied. Tr. 53-63. A hearing before an Administrative Law Judge (ALJ) was held  
21 on January 19, 2010. Tr. 24-52. The ALJ issued a written decision on February 16,  
22 2010, finding Plaintiff not disabled within the meaning of the Social Security Act.  
23 Tr. 11-18. This decision became Defendant's final decision when the Appeals Council  
denied review. Tr. 1-3.

24  
25 Plaintiff then commenced this action for judicial review pursuant to 42 U.S.C.  
26 § 405(g). Doc. 1. The issues are fully briefed. Docs. 12, 13, 15. Oral argument has not  
27 been requested. For reasons that follow, the Court will reverse Defendant's decision and  
28 remand for further proceedings.

1     **I.     Standard of Review.**

2             The Court has the “power to enter, upon the pleadings and transcript of record, a  
3 judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
4 Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The  
5 Commissioner’s decision to deny benefits “should be upheld unless it is based on legal  
6 error or is not supported by substantial evidence.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d  
7 1194, 1198 (9th Cir. 2008). In determining whether the decision is supported by  
8 substantial evidence, the Court “must consider the entire record as a whole and may not  
9 affirm simply by isolating a ‘specific quantum of supporting evidence.’” *Id.*

10    **II.    Discussion.**

11             Whether a claimant is disabled is determined using a five-step evaluation process.  
12 To establish disability, the claimant must show (1) he has not worked since the alleged  
13 disability onset date, (2) he has a severe impairment, and (3) his impairment meets or  
14 equals a listed impairment or (4) his residual functional capacity (RFC) precludes him  
15 from performing his past work. At step five, the Commissioner must show that the  
16 claimant is able to perform other work. *See* 20 C.F.R. § 404.1520.

17             Plaintiff has met his burden. He has not worked since May 1, 2006. Tr. 13, ¶ 2.  
18 He has severe degenerative disc disease of the lumbar spine, patellofemoral arthritis of  
19 the right knee, and status post partial medial menisectomy. Tr. 13, ¶ 3. While those  
20 impairments do not meet or equal a listed impairment (Tr. 13, ¶ 4), they do preclude  
21 Plaintiff from performing his past work as a printer (Tr. 17, ¶ 6). At step five, the ALJ  
22 concluded that Plaintiff is not disabled because he has the RFC to perform sedentary  
23 work with certain limitations. Tr. 13-17, ¶¶ 5, 9-11. Specifically, the ALJ found that  
24 Plaintiff experiences only moderate pain and has the RFC to lift and carry up to 20  
25 pounds occasionally and 10 pounds frequently, to stand or walk 2 hours and sit 6 hours in  
26 an 8-hour workday with the ability to alternate positions, and to occasionally climb stairs,  
27 crouch, crawl, squat, balance, and stoop. Tr. 13-14, ¶ 5.

1 Plaintiff contends that the ALJ erred in three respects: rejecting the opinions of  
2 treating physicians, finding Plaintiff's symptom testimony not entirely credible, and  
3 failing to consider lay witness testimony. Doc. 12. Defendant contends that the ALJ did  
4 not err and his decision is supported by substantial evidence. Doc. 13.

5 **A. The Treating Physicians' Opinions.**

6 On January 4, 2010, Drs. Benjamin Venger and Jeffrey Carls opined that Plaintiff  
7 is unable to work due to right knee problems, chronic pain, and side-effects from pain  
8 medication. Tr. 319, 332. The ALJ erred in rejecting those opinions, Plaintiff contends,  
9 because he failed to provide specific, legitimate reasons supported by substantial  
10 evidence. Doc. 12 at 5-6. The Court does not agree.

11 The ALJ need not accept the opinion of any medical source, including a treating  
12 physician, "if that opinion is brief, conclusory, and inadequately supported by clinical  
13 findings." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). The ALJ found,  
14 correctly, that Drs. Venger and Carls' opinions of disability are conclusory and not  
15 supported by their own clinical findings. Tr. 15-16; *see* Tr. 319-82. Nowhere in their  
16 opinions do the doctors assess Plaintiff's RFC or provide examples of how Plaintiff's  
17 impairments limit his work-related abilities. "The ALJ's rejection of [the treating  
18 physicians'] opinion[s] is supported by substantial evidence and was based on a  
19 permissible determination within the ALJ's province." *Bayliss v. Barnhart*, 427 F.3d  
20 1211, 1216 (9th Cir. 2005); *see Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003).

21 **B. Plaintiff's Testimony.**

22 Plaintiff testified at the hearing that he is able to stand for only a few minutes  
23 before needing to sit down (Tr. 29), that he can sit for five minutes at a time (Tr. 30), that  
24 he barely can walk around the house (Tr. 30), and that at least once a month his right  
25 knee locks up causing debilitating pain (Tr. 38-39).

26 The ALJ found not credible Plaintiff's testimony concerning the intensity,  
27 persistence, and limiting effects of his symptoms to the extent the testimony is  
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1 inconsistent with the ALJ's RFC assessment. Tr. 14. There is no dispute that Plaintiff's  
2 impairments could reasonably produce some symptoms. Given this fact, and because  
3 there is no evidence of malingering, the ALJ was required to present "specific, clear and  
4 convincing reasons" for his adverse credibility finding. *See Smolen v. Chater*, 80 F.3d  
5 1273, 1281 (9th Cir. 1996).

6 Plaintiff asserts that the ALJ erred by "implicitly" finding him not credible  
7 (Doc. 12 at 7), but there is nothing implicit about the ALJ's credibility finding. The ALJ  
8 noted (Tr. 14-15) that in November 2006, Plaintiff complained of only moderate knee  
9 and low back pain and that a physical exam at the time was relatively unremarkable (Tr.  
10 252-54). After successful knee surgery in August 2007, Dr. Theron Tilgner found  
11 Plaintiff to be "very apprehensive subjectively with any knee mobility" and opined that  
12 Plaintiff "obviously was mentally blocking his progress and his mobility." Tr. 238-39.  
13 Following surgery by Dr. Daniel Heiner in February 2008, Plaintiff was doing well, had  
14 no problems or complications, and had regained full range of motion in his right knee.  
15 Tr. 292. Plaintiff reported in December 2008 that he "walks a mile daily and is moving  
16 more quickly." Tr. 326. In March 2009, Plaintiff was able to play softball with his  
17 children, though with some difficulty. Tr. 316.

18 The ALJ also noted (Tr. 15) that Plaintiff was receiving pain medication from both  
19 Dr. Heiner and nurse Susan Dockins, but told each of them that he was getting  
20 medication only from them (Tr. 273-74). Given Plaintiff's "drug seeking behavior,"  
21 Dockins decided that only Dr. Heiner should prescribe pain medication to Plaintiff.  
22 Tr. 274. The ALJ explicitly found that these documented concerns over suspected drug  
23 abuse suggests Plaintiff's "allegations regarding the intensity of his pain are not entirely  
24 credible." Tr. 16. That finding was not erroneous. *See Thomas*, 278 F.3d at 959  
25 (upholding adverse credibility finding where the claimant made inconsistent statements  
26 about drug use); *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001) (claimant's  
27 drug-seeking behavior was a sufficient reason to discount his credibility about pain).  
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1 In summary, the ALJ “gave specific, clear and convincing reasons for discounting  
2 [Plaintiff’s] testimony.” *Thomas*, 278 F.3d at 959. Because those reasons are supported  
3 by substantial evidence in the record, the Court “may not engage in second-guessing.”  
4 *Id.*

5 **C. Lay Witness Testimony.**

6 “In determining whether a claimant is disabled, an ALJ must consider lay witness  
7 testimony concerning a claimant’s ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*,  
8 454 F.3d 1050, 1053 (9th Cir. 2006); *see* 20 C.F.R. §§ 404.1513(d)(4), 404.1545(a)(3).  
9 Indeed, because statements from family members and friends may provide insight into  
10 the severity of the impairments and how they affect the claimant’s ability to function, *see*  
11 SSR 06-03p, 2006 WL 2329939, at \*2 (Aug. 9, 2006), such statements constitute  
12 “competent evidence and therefore *cannot* be disregarded without comment.” *Stout*,  
13 454 F.3d at 1053 (quoting *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)  
14 (emphasis in original)); *see Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (the ALJ  
15 must consider lay witness testimony unless he “expressly determines to disregard such  
16 testimony and gives reasons germane to each witness for doing so”).

17 In December 2009, Plaintiff’s girlfriend provided a sworn statement describing the  
18 severe pain Plaintiff experiences and the debilitating nature of his knee problems.  
19 Tr. 200. Similar statements were provided by a friend and a medical assistant.  
20 Tr. 201-02. The ALJ committed reversible error in failing to consider this evidence.  
21 *Stout*, 454 F.3d at 1056 (“[W]e, along with our sister circuits, have consistently reversed  
22 the Commissioner’s decision for failure to comment on [lay witness] testimony.”);  
23 *Nguyen*, 100 F.3d at 1467 (“By failing to include in the hypothetical the physical  
24 manifestations that were described by the witnesses or expressly rejecting the testimony  
25 for legitimate reasons, the ALJ erred.”); *Smolen*, 80 F.3d at 1288 (“Disregard of the  
26 testimony of friends and family members violates 20 C.F.R. § 404.1513[.]”).

27 Defendant asserts that the daily activities described by the lay witnesses actually  
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1 support the ALJ’s decision. Doc. 13 at 30. But the Court “cannot affirm the decision of  
2 an agency on a ground that the agency did not invoke in making its decision.” *Pinto v.*  
3 *Massanari*, 249 F.3d 840, 847 (9th Cir. 2001). The ALJ, not this Court, “is required to  
4 provide specific reasons for rejecting lay testimony.” *Stout*, 454 F.3d at 1054.

5 **D. Remedy.**

6 The Court has discretion to remand for further development of the record or for an  
7 award benefits. 42 U.S.C. § 405(g); *see Harman v. Apfel*, 211 F.3d 1172, 1173-74 (9th  
8 Cir. 2000). Plaintiff asks the Court to consider granting him disability status based upon  
9 the opinions of his treating physicians. Doc. 12 at 9. As explained more fully above,  
10 however, the ALJ did not err in rejecting those opinions.

11 This Circuit has held that evidence should be credited as true, and an action  
12 remanded for an award of benefits, where three conditions are met: the ALJ has failed to  
13 provide legally sufficient reasons for rejecting evidence, no outstanding issue remains  
14 that must be resolved before a determination of disability can be made, and it is clear  
15 from the record that the ALJ would be required to find the claimant disabled were the  
16 rejected evidence credited as true. *See, e.g., Varney v. Sec’y of HHS*, 859 F.2d 1396,  
17 1400 (9th Cir. 1988).

18 In cases where the testimony of the vocational expert has failed to address  
19 functional limitations as established by improperly discredited evidence, this Circuit  
20 “consistently [has] remanded for further proceedings rather than payment of benefits.”  
21 *Harman*, 211 F.3d at 1180 (citation omitted). In this case, the vocational expert offered  
22 no opinion as to Plaintiff’s ability to work based on the pain and functional limitations  
23 described by the lay witnesses. A remand for further proceedings is therefore  
24 appropriate. *See Stout*, 454 F.3d at 1056-57.

25 **IT IS ORDERED:**

- 26 1. Defendant’s decision denying disability insurance benefits is **reversed**.  
27 2. The case is **remanded** to Defendant for further proceedings.

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3. The Clerk is directed to enter judgment accordingly.

Dated this 20th day of June, 2011.



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David G. Campbell  
United States District Judge