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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Joseph C. Rocko, Jr.,

10 Plaintiff,

11 v.

12 Michael Astrue, Commissioner of Social
13 Security Administration,

14 Defendant.

No. CV-11-830-PHX-GMS

ORDER

15 Pending before the Court is the appeal of Plaintiff, Joseph C. Rocko, Jr., which
16 challenges the Social Security Administration's decision to deny benefits. (Doc. 1). For
17 the reasons set forth below, the Court affirms the decision in part, vacates the decision in
18 part, and remands for further proceedings.
19

20 **BACKGROUND**

21 The evidence contained in the administrative record includes the following.
22 Plaintiff who was born in November, 1965, alleges that he has been disabled since
23 December 22, 2006. (R. at 124). Prior to the alleged onset of his disability, Rocko had
24 relevant work experience as a kitchen manager and cook. (R. at 135).
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26 From May 2003 until June 2009, Plaintiff sought treatment from Dr. Bill Evans
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1 with Spectrum Health Center. (R. at 309–10, 314–17, 320–23, 363–87). Dr. Evans
2 expressed concern for Plaintiff’s cardiac health and noted that he suffered from fatigue,
3 anxiety, insomnia, HLA-B27, and chronic pain. (R. at 309, 348).
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5 In late 2006, Plaintiff stopped working because of fatigue and shortness of breath.
6 (R. at 134, 157). He also complained of palpitations, feeling his heart racing, and having
7 occasional numbness and tingling in his left arm. (R. at 209). Plaintiff underwent an
8 echocardiogram that showed global left ventricular dysfunction and an ejection fraction
9 of approximately thirty-five percent. (R. at 183).
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11 In January 2007, Plaintiff began treatment with Dr. Mitchell Ross, of the Arizona
12 Cardiology Group. Dr. M. Ross recommended he submit to a sleep study to diagnose his
13 sleep disorders and have an electrical cardioversion performed. (R. at 201). After
14 several attempted cardioversions failed to restore sinus rhythm, Plaintiff declined
15 admission into St. Joseph’s Hospital because of a poker tournament commitment. (R. at
16 198). On January 30, 2007, Plaintiff followed up with Dr. Thomas Ross, also of the
17 Arizona Cardiology Group, who became his treating cardiologist from this point on. (R.
18 at 196). He was diagnosed with continuous atrial fibrillation with rapid ventricular rates
19 refractory to medical management, hypertension, possible sleep apnea, and a dilated
20 aortic root. (R. at 197). The next day, Plaintiff underwent another electrical
21 cardioversion which also proved unsuccessful. (R. at 282). Plaintiff again declined
22 recommended inpatient treatment due to a poker tournament. (R. at 283).
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27 In February 2007, Plaintiff was hospitalized at St. Joseph’s Hospital, under the
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1 treatment of Dr. Youngsoo Cho, due to rapid heart rates and shortness of breath. He
2 came into the emergency room with a heart rate of 270 beats per minute. (R. at 250). He
3 had a resting rate of 80–100, but simply speaking with Dr. Cho would cause his heart rate
4 to increase to 130–140. *Id.* His ejection fraction had dropped to fifteen percent the week
5 before hospitalization. *Id.*

6
7 On February 8, 2007, Plaintiff protectively filed his application for disability
8 insurance benefits and supplemental security income, alleging a disability onset date of
9 December 22, 2006. (R. at 104). Plaintiff’s date last insured (“DLI”) for disability
10 insurance benefits, and thus the date on or before which he must have been disabled, was
11 December 31, 2010. (R. at 16).

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13 On February 13, 2007, Plaintiff underwent an AV node ablation and surgical
14 implantation of a permanent transvenous biventricular pacemaker-defibrillator, lead
15 system, and generator. (R. at 256). The next day, Plaintiff was discharged in stable
16 condition with plans to investigate his sleep disorders as an outpatient. (R. at 233).

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18 On March 9, 2007, Plaintiff returned to Dr. T. Ross for follow up. His condition
19 was improving, but he still struggled with exertional dyspnea. (R. 331). Dr. T. Ross
20 discussed how the improvement process can take a number of months. *Id.* Between
21 March and June 2007, Plaintiff lost his insurance and his home, was noncompliant in
22 following up, and did not keep several appointments he made. (R. at 325).

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24 On June 13, 2007, Plaintiff returned to Dr. M. Ross. He was diagnosed with status
25 post AV node ablation for refractory atrial fibrillation with rapid ventricular rates
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1 (complete heart block), congestive heart failure (functional class II), dilated
2 cardiomyopathy, hypertension, and possible sleep apnea. (R. at 325–26). Prior to his
3 surgery, he had severe class III or class IV heart failure. (R. at 330). Plaintiff’s
4 ventricular function improved (his ejection fraction was up to thirty-eight percent), but
5 there was “still the unanswered issue of his sleep apnea.” (R. at 326, 333).
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8 On August 15, 2007, Plaintiff returned to Dr. Evans of Spectrum Health Center for
9 treatment for his degenerative disc disease, essential hypertension, and insomnia. (R. at
10 376–87). He complained of continued dyspnea on exertion, pain in his back and right
11 leg, and trouble sleeping. (R. at 376). Dr. Evans stated Plaintiff was “completely
12 disabled” and prescribed ongoing treatment plans for these complaints. (R. at 384–86).
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14 On November 5, 2007, Dr. T. Ross treated Plaintiff again, and noted Plaintiff’s
15 perpetual noncompliance in follow up. (R. at 334). His ventricular functions were
16 stabilized with his pacemaker defibrillator showing excellent pacing thresholds. (R. at
17 335). Dr. T. Ross cleared him for hernia repair surgery, and mentioned, “[h]e still
18 probably has sleep apnea, but he still has not gotten around to having the sleep study
19 performed despite several referrals.” *Id.* Plaintiff was encouraged again to undergo a
20 sleep study. *Id.*
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23 In December 2007, Dr. Erika Wavak, a state agency physician, completed a
24 “Physical Residual Functional Capacity Assessment” wherein she concluded Plaintiff
25 could perform light work that did not require climbing of ladders, ropes, or scaffolds or
26 more than occasional climbing of ramps or stairs and crawling. (R. at 338–42). After
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1 reviewing Plaintiff's medical records, she also noted that the alleged severity of his
2 symptoms was not supported by the medical evidence. (R. at 343).

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4 A month later, Dr. Evans submitted a statement on Plaintiff's behalf. He wrote,
5 "[Plaintiff] has multiple medical problems which have not allowed him to maintain
6 gainful employment." (R. at 348). Dr. Evans then enumerated Plaintiff's conditions as
7 follows: severe back pain related to a positive HLA-B27 arthropathy, anxiety disorder,
8 and cardiomyopathy. *Id.*

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10 On June 12, 2009, Dr. Evans completed a "Medical Assessment of Ability to do
11 Work-Related Physical Activities." (R. at 402). He assessed Plaintiff could not work an
12 eight-hour day. He wrote that Plaintiff could only lift less than ten pounds, sit for two
13 hours, and stand or walk for less than two hours each. (R. at 402-03). He also
14 commented that Plaintiff had moderately severe medication side effects and pain,
15 depression, and anxiety that severely limit his ability to sustain work activity for eight
16 hours a day. (R. at 403).

17
18 On June 22, 2009, Administrative Law Judge, Joan G. Knight, conducted a
19 hearing to review the Social Security Administration's denial of Plaintiff's application for
20 benefits. Plaintiff testified to his impairment as follows. He complained of hip and knee
21 pain which required a prescribed cane for mobility. (R. at 31-32). He stated he could
22 only stand for ten to fifteen minutes, sit for ten to fifteen minutes, and walk for five to ten
23 minutes. (R. at 33-34). Plaintiff said he could only sleep four hours a night, due to
24 dyspnea, and therefore needed to take three or four naps a day. (R. at 33). Furthermore,
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1 Plaintiff testified that he had difficulty performing everyday tasks. For instance, he stays
2 at home most days, has his sister help with household chores, and becomes breathless
3 when performing menial tasks, such as taking a shower. (R. at 33, 38).

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5 Dr. George Bluth, a vocational expert, also testified at the hearing. He testified
6 that a person of Plaintiff's limitations would not be able to perform the past relevant
7 work, but that there is unskilled work available (including cashier, assembly worker, and
8 quality control inspector). (R. at 44). However, he also testified that, if the Plaintiff
9 needed a cane or needed to nap, there would be no work available for him. (R. at 45).
10 Dr. Bluth's testimony was based on the number of light unskilled positions available that
11 offer "sit, stand" options. These numbers were not consistent with the U.S. Department
12 of Labor's Dictionary of Occupational Titles ("DOT"), but were extrapolated from his
13 expertise, familiarity with the workplace, and observations of how these jobs are
14 performed in the workplace. (R. at 48-49). He stated there was nothing else in his
15 testimony that was not consistent with the DOT. (R. at 49).

16 ANALYSIS

17 Plaintiff's claim was denied both initially and upon reconsideration. (R. at 55,
18 65). Plaintiff then appealed to an Administrative Law Judge ("ALJ"). (R. at 68). The
19 ALJ conducted a hearing on the matter on June 22, 2009. (R. at 25-51).

20 In evaluating whether Plaintiff was disabled, the ALJ undertook the five-step

1 sequential evaluation for determining disability.¹ (R. at 14–22). At step one, the ALJ
2 determined that Plaintiff had not engaged in substantial gainful activity since the alleged
3 onset date. (R. at 16). At step two, the ALJ determined that Plaintiff suffered from the
4 severe impairments of lumbar degenerative disc disease/osteophytic spurring,
5 cardiomyopathy with defibrillator implant, status post hernia repair and obesity. *Id.* At
6 step three, the ALJ determined that none of these impairments, either alone or in
7 combination, met or equaled any of the Social Security Administration’s listed
8 impairments. *Id.*

11 At that point, the ALJ made a determination of Plaintiff’s residual functional
12 capacity (“RFC”),² concluding that Plaintiff could perform sedentary work as defined in
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15 ¹ The five-step sequential evaluation of disability is set out in 20 C.F.R.
16 § 404.1520 (governing disability insurance benefits) and 20 C.F.R. § 416.920 (governing
supplemental security income). Under the test:

17 A claimant must be found disabled if he proves: (1) that he is
18 not presently engaged in a substantial gainful activity[,] (2)
19 that his disability is severe, and (3) that his impairment meets
20 or equals one of the specific impairments described in the
21 regulations. If the impairment does not meet or equal one of
22 the specific impairments described in the regulations, the
23 claimant can still establish a prima facie case of disability by
24 proving at step four that in addition to the first two
25 requirements, he is not able to perform any work that he has
done in the past. Once the claimant establishes a prima facie
case, the burden of proof shifts to the agency at step five to
demonstrate that the claimant can perform a significant
number of other jobs in the national economy. This step-five
determination is made on the basis of four factors: the
claimant’s residual functional capacity, age, work experience
and education.

26 *Hoopai v. Astrue*, 499 F.3d 1071, 1074–75 (9th Cir. 2007) (internal citations and
quotations omitted).

27 ² RFC is the most a claimant can do despite the limitations caused by his
28 impairments. See S.S.R. 96–8p (July 2, 1996).

1 20 CFR § 404.1567(a). *Id.* The ALJ thus determined at step four that Plaintiff did not
2 retain the RFC to perform his past relevant work as a kitchen manager and cook. (R. at
3 21). The ALJ also reached step five, determining that Plaintiff could perform a
4 significant number of other jobs in the national economy that met his RFC limitations.
5 *Id.* Given this analysis, the ALJ concluded that Plaintiff was not disabled. (R. at 22). On
6 February 24, 2011, the Appeals Council declined to review the decision, leaving the
7 ALJ's decision as the Commissioner of Social Security's final decision. (R. at 1–5).

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10 On April 25, 2011, Plaintiff filed suit in this Court.³ (Doc. 1) The matter is now
11 fully briefed before this Court. (Doc. 13; Doc. 16; Doc. 20)

12 13 **I. Standard of Review**

14 A reviewing federal court will only address the issues raised by the claimant in the
15 appeal from the ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.
16 2001). A federal court may set aside a denial of disability benefits only if that denial is
17 either unsupported by substantial evidence or based on legal error. *Thomas v. Barnhart*,
18 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is “more than a scintilla but less
19 than a preponderance.” *Id.* (quotation omitted). “Substantial evidence is relevant
20 evidence which, considering the record as a whole, a reasonable person might accept as
21 adequate to support a conclusion.” *Id.* (quotation omitted)

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24 However, the ALJ is responsible for resolving conflicts in testimony, determining

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26 ³ Plaintiff was authorized to file this action by 42 U.S.C. § 405(g) (“Any
27 individual, after any final decision of the Commissioner of Social Security made after a
28 hearing to which he was a party . . . may obtain a review of such decision by a civil
action . . .”).

1 credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
2 Cir. 1995). “When the evidence before the ALJ is subject to more than one rational
3 interpretation, we must defer to the ALJ’s conclusion.” *Batson v. Comm’r of Soc. Sec.*
4 *Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). This is so because “[t]he [ALJ] and not the
5 reviewing court must resolve conflicts in evidence, and if the evidence can support either
6 outcome, the court may not substitute its judgment for that of the ALJ.” *Matney v.*
7 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (citations omitted).

10 **II. Analysis**

11 Plaintiff argues that the ALJ erred by: (A) improperly weighing medical source
12 opinion (Doc. 13 at 9–15); (B) failing to consider Plaintiff’s impairments in combination
13 (*id.* at 22–24); (C) rejecting Plaintiff’s subjective complaint testimony without
14 articulating clear and convincing reasons for doing so (*id.* at 15–22); and (D) using
15 vocational expert testimony that did not meet Plaintiff’s residual functional capacity
16 limitations (*id.* at 24). Plaintiff’s first three arguments allege error in the ALJ’s
17 calculation of his residual functional capacity. Plaintiff’s final argument relates to the
18 ALJ’s application of the RFC in her step-five analysis. The Court will address each
19 argument in turn.

23 A residual functional capacity (“RFC”) is “an assessment of an individual’s ability
24 to do sustained work-related physical and mental activities in a work setting on a regular
25 and continuing basis.” SSR 96–8p. In particular, the RFC assessment must describe the
26 maximum amount of each work-related activity the individual can perform based on the
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1 evidence available in the case record. *Id.* The RFC determination may be based on a
2 wide variety of evidence in the record—the claimant’s medical history, laboratory
3 findings, the effects of treatment, reports of daily activities, lay evidence, recorded
4 observations, medical source statements, effects of symptoms that are reasonably
5 attributable to a medically determinable impairment, evidence from attempts to work, the
6 need for a structured living environment, and work evaluations. *Id.*

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9 **A. Treating Source Opinion**

10 Plaintiff contends that the ALJ improperly rejected the opinion of his treating
11 physician, Dr. Evans, when assessing his RFC. Despite the Plaintiff’s contention that the
12 ALJ only rejected Dr. Evans’s opinion because it contradicted a non-examining
13 physician’s finding, the ALJ in fact provided several reasons for rejecting Dr. Evans’s
14 opinions and alternatively relying on the findings of other treating and non-examining
15 physicians.
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18 When evidence in the record contradicts the opinion of a treating physician, the
19 ALJ must present “specific and legitimate reasons” for discounting the treating
20 physician’s opinion, supported by substantial evidence. *Lester v. Chater*, 81 F.3d 821,
21 830 (9th Cir. 1995). When presented with conflicting medical opinions, the ALJ must
22 determine credibility and resolve the conflict. *Batson*, 359 F.3d at 1195. Greater weight
23 must be given to the opinion of treating physicians, and where there is a conflict “the ALJ
24 must give specific, legitimate reasons for disregarding the opinion of the treating
25 physician.” *Id.*
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1 In this case, the ALJ gave specific and legitimate reasons to discount the opinion
2 of Dr. Evans regarding the degree of Plaintiff's impairment. First, Dr. Evans' opinions
3 were not consistent with his own treatment notes. (R. at 17). The same day Dr. Evans
4 concluded Mr. Rocko was "completely disabled," his treatment notes show Plaintiff as
5 only moderately obese, with normal strength, heart rate, range of motion and sensation in
6 the musculoskeletal findings. (R. at 376—84). See *Tommasetti v. Astrue*, 533 F.3d 1035,
7 1041 (9th Cir. 2007) (reasoning that an inconsistency between a doctor's questionnaire
8 and medical records is a sufficient reason for rejecting the doctor's opinion).

11 Second, because the ALJ had legitimately discredited the conclusory opinions
12 found in Dr. Evans's August 2007 treatment notes, she justifiably chose to reject his RFC
13 assessment. An ALJ may discredit treating physicians' opinions that are unsupported by
14 the record as a whole. *Batson*, 359 F.3d at 1195. The opinions of treating, examining
15 and non-examining physicians all serve as substantial evidence in the record. See
16 *Thomas*, 278 F.3d at 957. Plaintiff's cardiologist, Dr. T. Ross, treated him as frequently
17 as "consistent with accepted medical practice for the type of treatment [] required for
18 [Plaintiff's] medical condition." 20 CFR § 404.1502. Dr. T. Ross is therefore a treating
19 physician whose conclusions contradicted those of Dr. Evans. Specifically, in March
20 2007, Dr. T. Ross noted Plaintiff was functional class II, his ventricular function was
21 continuing to improve, and he was not displaying signs of edema. (R. at 192). Again, in
22 June and November 2007, Dr. T. Ross noted signs of improvement in Plaintiff's
23 conditions. (R. at 333—35). The ALJ relied on both Dr. T. Ross's treatment notes and
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1 Dr. Wavak's RFC assessment when rejecting the opinions stated in Dr. Evans's
2 assessment. (R. at 20). The ALJ justifiably concluded Dr. Evans's conclusions were not
3 supported by the record as a whole.
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5 Although a treating physician's opinion is generally afforded the greatest weight,
6 it is not binding on an ALJ with respect to the ultimate determination of disability.
7 *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011). The ALJ did not err in rejecting
8 Dr. Evans's opinion. The ALJ's weighing of medical source opinion was rational, and
9 "[w]hen the evidence before the ALJ is subject to more than one rational interpretation,
10 we must defer to the ALJ's conclusion." *Batson*, 359 F.3d at 1198.
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13 **B. Obesity**

14 Plaintiff also avers that the ALJ failed to consider his maladies in combination by
15 ignoring the incremental effect his obesity has on his symptoms. *See* SSR 02-1p. This
16 argument is without merit.
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18 In deciding an application for social security disability benefits, the ALJ must
19 consider the impact of claimant's obesity on his impairments and RFC where claimant
20 presented evidence that reasonably alerted the ALJ to the fact that obesity was
21 exacerbating his other symptoms. *See Edwards-Alexander v. Astrue*, 336 F. Appx. 634,
22 637 (9th Cir. 2009). "The fact that obesity is a risk factor for other impairments does not
23 mean that individuals with obesity necessarily have any of these impairments." SSR 02-
24 01p.
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27 Plaintiff argues the ALJ "appears to discuss each impairment in isolation." (Pl.'s
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1 Br. at 23). However, the ALJ specifically considered Plaintiff's obesity in determining
2 that he was capable only of performing sedentary work (R. at 21), listed his obesity in
3 step three of her analysis (R. at 16), and referenced all of the physicians' medical records
4 noting Plaintiff's obesity (R. at 17–20). *See Prochaska v. Barnhart*, 454 F.3d 731, 737
5 (7th Cir. 2006) (suggesting an ALJ sufficiently considers claimant's obesity by arriving
6 at a final decision predicated on the medical opinions of physicians familiar with the
7 claimant's obesity).
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10 Plaintiff also avers the ALJ failed to specifically analyze the impact of his obesity
11 on his ability to work. To the contrary, the ALJ provided a reasonably thorough review
12 and discussion of Plaintiff's medical history. She observed Plaintiff had experienced
13 heart, back, knee, and shortness-of-breath problems in the past, his edema was no longer
14 present and he was now functional class II. (R. at 17–20). She concluded this permitted
15 him to perform sedentary work that did not involve heavy lifting. (R. at 20).
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18 Further, neither the medical reports nor Plaintiff's contentions suggest his obesity
19 aggravated his other impairments before the December 2006 onset date of his disability.
20 The Plaintiff's weight was not the reason he stopped working at the alleged disability
21 onset date (R. at 31, 40), he had worked at this weight for years prior (R. at 317), and the
22 ALJ noted his significant weight loss after this date. (R. at 20). The ALJ's assessment of
23 Plaintiff's obesity is rational and supported by substantial evidence.
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1 **C. Subjective Complaint Testimony**

2 Plaintiff argues that the ALJ failed to give proper credit to his subjective
3 complaint testimony. However, the ALJ provided several clear and convincing reasons
4 for partially rejecting his testimony.
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6 When determining the severity of symptoms from alleged impairments, the ALJ
7 must determine whether the impairment or combination of impairments “could
8 reasonably be expected to produce pain or other symptoms.” *Batson*, 359 F.3d at 1196
9 (quotation omitted). If the ALJ determines that the claimant’s alleged impairments
10 reasonably could be expected to produce the alleged symptoms, and if the “claimant’s
11 testimony shows no malingering, then the ALJ may reject the claimant’s testimony about
12 severity of symptoms only with ‘specific findings stating clear and convincing reasons
13 for doing so.’” *Id.* (quoting *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)). The
14 ALJ may consider “at least” the following factors when weighing the claimant’s
15 credibility:
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17 claimant’s reputation for truthfulness, inconsistencies either
18 in claimant’s testimony or between his testimony and his
19 conduct, claimant’s daily activities, his work record, and
20 testimony from physicians and third parties concerning the
21 nature, severity, and effect of the symptoms of which
22 claimant complains.
23

24 *Thomas*, 278 F.3d at 958–59. In weighing these factors, an “ALJ cannot be required to
25 believe every allegation of disabling pain, [because] many medical conditions produce
26 pain not severe enough to preclude gainful employment.” *Fair v. Bowen*, 885 F.2d 597,
27 603 (9th Cir. 1989). At the same time, “[o]nce the claimant produces objective medical
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1 evidence of an underlying impairment, an adjudicator may not reject a claimant's
2 subjective complaints based solely on a lack of objective medical evidence to fully
3 corroborate" the claimant's allegations. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d
4 1219, 1226–27 (9th Cir. 2009) (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th
5 Cir. 1997)).

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7 The ALJ found that Plaintiff suffered from the severe impairments of lumbar
8 degenerative disc disease/osteophytic spurring, cardiomyopathy with defibrillator
9 implant, status post hernia repair, and obesity. (R. at 16). She also found these
10 impairments could reasonably be expected to cause the alleged symptoms, yet discredited
11 some of Plaintiff's statements concerning the intensity, persistence, and limiting effects
12 of the symptoms. (R. at 20). Plaintiff testified to hip and knee pain which required a
13 prescribed cane for mobility. (R. at 31–32). He stated he could only stand for ten to
14 fifteen minutes, sit for ten to fifteen minutes, and walk for five to ten minutes. (R. at 33–
15 34). Plaintiff said he could only sleep four hours a night, due to dyspnea, and therefore
16 needed to take three or four naps a day. (R. at 33). Furthermore, Plaintiff testified that he
17 had difficulty performing everyday tasks. For instance, he stays at home most days, has
18 his sister help with household chores, and becomes breathless when performing menial
19 tasks, such as taking a shower. (R. at 33, 38).

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21 Because the ALJ concluded that Plaintiff's impairments reasonably could cause
22 the alleged symptoms and because she made no finding of malingering, the Court may
23 affirm her decision rejecting the subjective complaint testimony only if she stated clear
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1 and convincing reasons for rejecting Plaintiff's testimony. *See Tommasetti v. Astrue*, 533
2 F.3d at 1039. Contrary to Plaintiff's assertion, the ALJ did not rely solely on the lack of
3 corroborating medical evidence and history of substance abuse, but offered several clear
4 and convincing reasons for partially rejecting his testimony with respect to the severity of
5 his cardiomyopathy and other impairments.
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7 With respect to Plaintiff's cardiomyopathy, the ALJ explained there was marked
8 improvement after ongoing treatment and surgical implantation of a biventricular
9 pacemaker defibrillator. (R. at 18–20). For instance, in March 2007, Plaintiff reported to
10 Dr. T. Ross that he had no problems sleeping at night with dyspnea, no edema, and only
11 had incisional discomfort. (R. at 191). Also, prior to the surgery, Plaintiff had class III
12 or class IV heart failure with continuous atrial fibrillation and flutter with rapid
13 ventricular rates. *Id.* In June 2007, he was functional class II. (R. at 325). An
14 echocardiogram performed the same month showed "marked improvement in ventricular
15 function" with an ejection fraction of thirty-eight percent. (R. at 333). Alternatively, in
16 August 2007, Dr. Evans concluded Plaintiff's cardiomyopathy left him "completely
17 disabled." (R. at 384). Nevertheless, it is within the ALJ's province, not the Court's, to
18 weigh medical testimony. *See Andrews*, 53 F.3d at 1039 (deferring to the ALJ's
19 weighing of medical evidence). Further, despite the medical records, Plaintiff testified to
20 the ineffectiveness of the pacemaker and defibrillator. (R. at 20, 39–40). Plaintiff's
21 marked improvement, along with conflicting testimony claiming the pacemaker did not
22 help, provided the ALJ with a clear and convincing reason for partially discrediting his
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1 testimony.

2 Furthermore, The ALJ discredited Plaintiff's testimony of lower extremity edema
3 (swelling) because this symptom was "not documented as alleged." (R. at 21). The
4 medical records show "some" lower extremity edema prior to the implantation of his
5 pacemaker, in February 2007, but no edema documented thereafter in March or
6 November 2007. (R. at 251, 330, 335). Although lack of medical evidence cannot form
7 the sole basis for discounting pain testimony, it is a factor the ALJ can consider in her
8 credibility analysis. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

11 The ALJ also made note of Plaintiff's noncompliance with prescribed follow-up
12 procedures. In Dr. T. Ross's final examination, he noted Plaintiff continued to be
13 noncompliant with follow-up procedures, remained a functional class II with significant
14 improvement in ventricular function, and had never followed up for his sleep study. (R.
15 at 334-35). Although Plaintiff avers that his noncompliance in follow up was the result
16 of losing his health care insurance, the record does not support this argument. (Doc. 13 at
17 18). Dr. T. Ross's June 2007 report noted Plaintiff had made several appointments which
18 he did not keep. (R. at 325). In November 2007, Dr. T. Ross noted Plaintiff's continued
19 noncompliance in follow up despite having assistance through Arizona Health Care Cost
20 Containment System ("AHCCCS"). (R. at 334). The ALJ may consider many factors in
21 weighing a claimant's credibility, including "unexplained or inadequately explained
22 failure to seek treatment or to follow a prescribed course of treatment." *Tommasetti*, 533
23 F.3d at 1039. Further, Plaintiff never sought treatment for his sleep apnea and failed to
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1 submit to a sleep study despite several referrals by his cardiologist. (R. at 18, 20, 334–
2 35). The ALJ is permitted to consider a claimant’s failure to pursue treatment in her
3 credibility determination. *See Burch*, 400 F.3d at 681. The ALJ thus did not err in
4 partially rejecting Plaintiff’s subjective complaint testimony because the record contains
5 documented medical improvement, undocumented edema as alleged, and an inadequately
6 explained failure to comply with follow up procedures and seek treatment for his sleep
7 apnea. Based on the clear and convincing reasons for a partially adverse credibility
8 finding and the substantial evidence to support her determination, the Court affirms the
9 ALJ’s evaluation of Plaintiff’s testimony.
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12 **D. Vocational Expert Testimony**

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14 Plaintiff asserts that reliance on the vocational expert’s (“VE’s”) testimony, which
15 conflicted with the U.S. Department of Labor’s Dictionary of Occupational Titles
16 (“DOT”), was improper because the ALJ did not adequately resolve the conflict between
17 the VE’s findings and the information in the DOT. *See SSR 00-4p*. Plaintiff also avers
18 the ALJ erred by failing to obtain vocational expert testimony that comports with his
19 RFC. The Court finds merit in both allegations; however, only the latter constitutes
20 harmful legal error.
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23 The ALJ erred by claiming the VE’s testimony is consistent with the information
24 contained in the DOT, when in fact his testimony was in conflict with the DOT. (R. at
25 22). This constitutes harmless error, because the VE testified to this conflict in the
26 hearing. (R. at 48–49). The ALJ properly inquired as to whether an inconsistency
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1 existed. (R. at 48). Dr. Bluth admitted his conclusions were not based on the DOT, but
2 were arrived at through direct observations of the relevant jobs as performed in the local
3 economy. *Id.* “Neither the DOT nor the VE evidence automatically ‘trumps’ when there
4 is a conflict.” SSR 00–4p; *see also McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th
5 Cir. 2002) (noting an ALJ may properly rely on a VE’s testimony). Thus the ALJ’s
6 failure to adequately explain the basis for her reliance on the VE’s testimony in her
7 decision was harmless.
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10 Nonetheless, the ALJ also erred when she posed a hypothetical to the VE that did
11 not meet the Plaintiff’s RFC. (R. at 44–45). The ALJ asked Dr. Bluth to assume a
12 hypothetical individual of Plaintiff’s age, education, and work experience with the
13 following limitations: he “could frequently lift and carry 10 pounds, occasionally 20
14 pounds, stand and or walk with normal breaks about *four* out of eight hours, sit with
15 normal breaks about four out of eight hours, no limits in pushing or pulling...” (R. at 44)
16 (emphasis added). The ALJ’s subsequent set of questions involved a hypothetical
17 individual who is limited to lifting only ten pounds, but with all other limitations,
18 including the time during which he can stand and or walk, remained unadjusted. (R. at
19 45). These hypotheticals were posed without regard to Plaintiff’s RFC that limits his
20 ability to “stand and/or walk [to] two hours in an 8-hour period and sit 6 hours.” (R. at
21 16) (emphasis added). Dr. Bluth did not consider a hypothetical individual with a
22 maximum capacity to stand and or walk for only two hours in an eight-hour work day.
23 (R. at 44–45, 47). The VE’s testimony did not establish that a significant number of jobs
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1 exist that meet his RFC limitations. Therefore, the government did not meet its burden of
2 proof in establishing the Plaintiff is not disabled. *See Hoopai*, 499 F.3d at 1074–75.
3 Accordingly, the Court finds the ALJ erred in assessing Plaintiff’s ability to perform a
4 significant number of jobs in the national economy. Her step-five finding is not
5 supported by substantial evidence.
6

7 **III. Remedy**

8
9 Having decided to vacate the ALJ’s decision, the Court has the discretion to
10 remand the case either for further proceedings or for an award of benefits. *See Reddick*,
11 157 F.3d at 728. The rule in this Circuit is that the Court should:

12
13 credit[] evidence and remand[] for an award of benefits where
14 (1) the ALJ has failed to provide legally sufficient reasons for
15 rejecting [certain] evidence, (2) there are no outstanding
16 issues that must be resolved before a determination of
17 disability can be made, and (3) it is clear from the record that
the ALJ would be required to find the claimant disabled were
such evidence credited.

18 *Smolen*, 80 F.3d at 1292. Here, the ALJ has provided legally sufficient reasons for
19 rejecting certain testimony and evidence, but failed to adequately support her step-five
20 finding. The record does not resolve the issue whether Plaintiff is able to perform a
21 significant number of jobs with the limitation of standing and or walking for only two
22 hours in an eight-hour work day.
23

24 Thus, it is not “clear from the record that the ALJ would be required to find the
25 claimant disabled,” and there remain “outstanding issues that must be resolved before a
26 determination of disability can be made.” *Smolen*, 80 F.3d at 1292. Under these
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1 circumstances, the Court will remand for further proceedings.

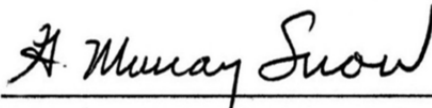
2 **CONCLUSION**

3
4 The ALJ erred by failing to accurately use Plaintiff's residual functional capacity
5 to determine whether he can perform a significant number of jobs in the national
6 economy. Therefore, the Court finds there is not substantial evidence to support the
7 ALJ's denial of benefits.
8

9 **IT IS THEREFORE ORDERED** that the ALJ's decision is **AFFIRMED IN**
10 **PART AND VACATED IN PART.**

11 **IT IS FURTHER ORDERED** that this case is **REMANDED** for further
12 proceedings.
13

14 Dated this 22nd day of June, 2012.

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17 _____
18 G. Murray Snow
19 United States District Judge
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