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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Robert L. Pickering,

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No. CV 11-00919-PHX-FJM

10

Plaintiff,

)

**ORDER**

11

vs.

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Michael J. Astrue, Commissioner of Social Security,

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Defendant.

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16 We have before us plaintiff's opening brief (doc. 14), defendant's response (doc. 15),  
17 and plaintiff's reply (doc. 18). Plaintiff filed an application for disability insurance benefits  
18 on April 3, 2007, alleging onset of disability of March 5, 2007. His application was denied  
19 initially and upon reconsideration. He then filed a request for a hearing before an  
20 Administrative Law Judge ("ALJ") and a hearing was held November 12, 2009. The ALJ  
21 concluded plaintiff was not disabled and denied his application for benefits. The ALJ's  
22 decision became the Commissioner's final decision when the Appeals Council denied  
23 plaintiff's request for review. Plaintiff now seeks judicial review.

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**I**

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26 We "disturb the denial of benefits only if the decision 'contains legal error or is not  
27 supported by substantial evidence.'" Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir.  
28 2008) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable  
mind might accept as adequate to support a conclusion." Id. (internal quotation marks and

1 citations omitted). The "evidence must be more than a mere scintilla but not necessarily a  
2 preponderance." Connett v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "Where evidence  
3 is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be  
4 upheld." Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). We must "review the  
5 administrative record as a whole, weighing both the evidence that supports and that which  
6 detracts from the ALJ's conclusion." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.  
7 1995).

## 8 II

9 Plaintiff was born in 1954. He has been diagnosed with familial adenomatous  
10 polyposis ("FAP") and Gardner's syndrome. In 1971, he underwent surgery to remove his  
11 colon and create an ileostomy, an opening in the belly wall used to deliver waste out of the  
12 body. He had additional surgeries to create ileostomies in 1976 and 2002 and uses an  
13 ileostomy bag. In 1996, half of plaintiff's stomach and the first section of his small intestine  
14 were removed.

15 Plaintiff has a high school education, no college or vocational training, and worked  
16 as an electrician until March 2007, when he complained that he was in too much pain to  
17 continue working. At that time, Dr. Susan Briones opined that plaintiff was limited to sitting,  
18 standing, and walking for less than three hours each in an 8-hour workday because of FAP  
19 and uncontrolled hypertension. She also opined that plaintiff's lifting and carrying was  
20 limited to less than 20 pounds and he could not climb at all. In addition, she found plaintiff  
21 had severe medication side effects and suffered from moderately severe pain, fatigue,  
22 dizziness, and cramping. In December 2008, Dr. Briones evaluated plaintiff again and  
23 opined that he had the same limitations she identified in March 2007 due to FAP and  
24 uncontrolled diabetes.

## 25 III

26 The ALJ followed the required five-step procedure to evaluate whether plaintiff is  
27 disabled within the meaning of the Social Security Act. See 20 C.F.R. § 416.920(a)(4). At  
28 step one, the ALJ determined that plaintiff had not engaged in substantial gainful activity

1 since the date of his application. At step two, the ALJ found that plaintiff has the following  
2 severe impairments: familial adenomatous polyposis coli, status-post total proctocolectomy  
3 and ileostomy; Garner's syndrome, status-post partial gastrectomy and partial  
4 pancreatectomy, and status-post Whipple procedure with ileostomy; diabetes mellitus; and  
5 hypertension. Consequently, the ALJ proceeded to step three, where she concluded that  
6 plaintiff's impairments did not meet or equal one of the listed impairments in 20 CFR Part  
7 4, Subpart P, Appendix 1.

8 To show that an impairment matches a listed impairment, a claimant "must meet *all*  
9 of the specified medical criteria." Sullivan v. Zebley, 493 U.S. 521, 530, 110 S. Ct. 885, 891  
10 (1990). If a claimant has an impairment that meets or equals a listed impairment, he is  
11 "conclusively presumed to be disabled" regardless of his age, education, or work experience.  
12 Bowen v. Yuckert, 482 U.S. 137, 141, 107 S. Ct. 2287, 2291 (1987); Marcia v. Sullivan, 900  
13 F.2d 172, 174 (9th Cir. 1990); 20 C.F.R. § 416.920(a)(4)(iii). Because the ALJ found  
14 plaintiff did not meet or equal a listed impairment, she assessed plaintiff's residual functional  
15 capacity and past relevant work at step four and found that plaintiff could perform light work,  
16 with some specific limitations. Finally, at step five, the ALJ considered plaintiff's residual  
17 functional capacity, age, education, and work experience and determined plaintiff is not  
18 disabled because he could perform a reduced range of light work and has skills from past  
19 relevant work that are transferable to other occupations with jobs existing in significant  
20 numbers in the national economy. The ALJ determined that plaintiff could work as an  
21 electrical assembler and therefore plaintiff is not disabled.

22 In making the determination at step three, the ALJ found plaintiff's statements  
23 concerning the intensity, persistence and limiting effects of his alleged symptoms were not  
24 credible in light of objective medical evidence.

25 Without affirmative evidence showing that the claimant is malingering, the  
26 Commissioner's reasons for rejecting the claimant's testimony must be clear  
27 and convincing. If an ALJ finds that a claimant's testimony relating to the  
28 intensity of his pain and other limitations is unreliable, the ALJ must make a  
credibility determination citing the reasons why the testimony is unpersuasive.  
The ALJ must specifically identify what testimony is credible and what  
testimony undermines the claimant's complaints.

1 Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999) (citations  
2 omitted). The ALJ concluded that plaintiff's credibility was undermined by objective  
3 medical evidence, golf outings, a vacation to Mexico, and the fact that his impairments were  
4 present at the same level of severity prior to the alleged onset date. When weighing  
5 credibility, the ALJ may consider inconsistencies in plaintiff's testimony or between his  
6 testimony and his conduct, daily activities, and work record. Thomas v. Barnhart, 278 F.3d  
7 947, 958-59 (9th Cir. 2002). "If the ALJ's credibility finding is supported by substantial  
8 evidence in the record, we may not engage in second-guessing." Id. at 959.

9         The ALJ found that plaintiff could not perform his past work as of the alleged onset  
10 date. This appears to preclude the contention that his impairments were equally severe  
11 before and after that date. Plaintiff's credibility is favorably impacted by the fact that he  
12 worked as an electrician for thirty years before his alleged onset date. Cf. id. (claimant's  
13 extremely poor work history negatively affected her credibility regarding her inability to  
14 work). On the other hand, there are inconsistencies between plaintiff's testimony and notes  
15 from his doctor's appointments. On March 13, 2007 a physician noted that he had "done  
16 quite well" and "basically has not had any problem" with his ileostomy. Tr. at 178. On June  
17 29, 2007, he reported to Dr. Briones that he was "doing alright." Tr. at 242. On November  
18 29, 2007, he again reported that was "doing alright." Tr. at 248. On August 1, 2008, he  
19 reported being more bothered by his chronic abdominal pain, and the doctor noted that his  
20 Vicodin seemed not to be working anymore. Tr. at 313. But on August 29, 2008, he was  
21 doing well with his abdominal pain and looking forward to a trip to Mexico. Tr. at 312. On  
22 October 27, 2008, he was "doing well." Tr. at 309. On March 10, 2009 he reported doing  
23 alright with his pain. Tr. at 304. On November 10, 2009, he reported that he was doing well  
24 with his present dose of pain medication and had "no complaints." Tr. at 293. These prior  
25 inconsistent statements provide specific, clear and convincing reasons for rejecting plaintiff's  
26 testimony about the severity of his symptoms. See Tommasetti v. Astrue, 533 F.3d 1035,  
27 1039 (9th Cir. 2008) (ALJ may weigh claimant's credibility using many factors, including  
28 prior inconsistent statements concerning the symptoms).

1 Plaintiff also faults the ALJ for assigning limited weight to the opinion of his treating  
2 physician, Dr. Briones. The ALJ may not reject the contradicted opinion of a treating  
3 physician without providing specific and legitimate reasons supported by substantial  
4 evidence in the record. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). In this  
5 case, the ALJ noted that Dr. Briones' progress notes contained little more than "very general  
6 statements that the claimant's complaints of abdominal pain are generally controlled with  
7 medication, and at other times indicate that the claimant's condition is improving." Tr. at 14.  
8 The ALJ also found Dr. Briones' assessment to be "inconsistent with the bulk of the evidence  
9 of record" and provided specific examples to support this finding. Tr. at 14.

10 While there is some evidence in the record to support plaintiff's contention that he is  
11 disabled, there is also ample evidence supporting the ALJ's conclusion that he is not. "If the  
12 evidence can reasonably support either affirming or reversing the Secretary's conclusion, the  
13 court may not substitute its judgment for that of the Secretary." Reddick v. Chater, 157 F.3d  
14 715, 720-21 (9th Cir. 1998). We will not second guess the ALJ's conclusion because it is  
15 supported by substantial evidence in the record.

#### 16 IV

17 The ALJ did not err in finding plaintiff's skills as an electrician are transferable to the  
18 job of electrical assembler. Transferability is most probable among jobs in which the same  
19 or a lesser degree of skill is required, the same or similar tools and machines are used, and  
20 the same or similar raw materials, products, processes, or services are involved. 20 C.F.R.  
21 § 404.1568(d)(2). These factors suggest that plaintiff does possess transferable skills.  
22 Electrician is a skilled job, whereas electrical assembler is semiskilled. Tr. at 45-46. Both  
23 jobs involve working with tools, and the vocational expert testified that similar tools are  
24 used. Tr. at 49-50. And both jobs involve working with similar raw materials, namely wires.  
25 The skills of an electrician are not so specialized that they are not readily usable in other  
26 industries, jobs, or work settings. The ALJ's finding that plaintiff could adjust to other work  
27 was not in error.

#### 28 V

