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

8
9 Jerry J. Lucey,

10 Plaintiff,

11 v.

12 Michael J. Astrue, Commissioner of Social
13 Security Administration,

14 Defendant.

No. CV11-950-PHX-JAT

ORDER

15 Plaintiff Jerry Lucey appeals the Commissioner of Social Security's (the
16 "Commissioner") denial of disability benefits. The Court now rules on his appeal (Doc.
17 17.)

18 **I. BACKGROUND**

19 On April 25, 2007, Plaintiff filed Title II and Title XVI applications for a period of
20 disability, disability insurance benefits, and supplemental security income benefits with a
21 January 14, 2007 onset date. Plaintiff later changed his onset date to December 1, 2008.
22 After the Commissioner denied Plaintiff's application initially and upon reconsideration,
23 Plaintiff testified at a hearing before Administrative Law Judge Philip Moulaison (the
24 "ALJ") on July 8, 2009. The ALJ issued an unfavorable decision on November 24, 2009.
25 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the
26 final decision of the Commissioner. Plaintiff filed this appeal pursuant to 42 U.S.C.
27 §405(b) on May 12, 2011. Plaintiff has the following impairments: atrial fibrillation;
28 diabetes; hypertension; and adhesive capsulitis.

1 **II. LEGAL STANDARD**

2 A district court:

3 may set aside a denial of disability benefits only if it is not
4 supported by substantial evidence or if it is based on legal
5 error. Substantial evidence means more than a mere scintilla
6 but less than a preponderance. Substantial evidence is
7 relevant evidence, which considering the record as a whole, a
8 reasonable person might accept as adequate to support a
 conclusion. Where the evidence is susceptible to more than
 one rational interpretation, one of which supports the ALJ's
 decision, the ALJ's decision must be upheld.

9 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation
10 omitted). This is because “[t]he trier of fact and not the reviewing court must resolve
11 conflicts in the evidence, and if the evidence can support either outcome, the court may
12 not substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019
13 (9th Cir. 1992). Also under this standard, the Court will uphold the ALJ's findings if
14 supported by inferences reasonably drawn from the record. *Batson v. Comm’r of the Soc.*
15 *Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the Court must consider the
16 entire record as a whole and cannot affirm simply by isolating a “specific quantum of
17 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007)(internal
18 quotation omitted).

19 **III. DISCUSSION**

20 To qualify for disability benefits under the Social Security Act a claimant must
21 show, among other things, that he is “under a disability.” 42 U.S.C. §423(a)(1)(E). The
22 Act defines “disability” as the “inability to engage in any substantial gainful activity by
23 reason of any medically determinable physical or mental impairment which can be
24 expected to result in death or which has lasted or can be expected to last for a continuous
25 period of not less than 12 months.” 42 U.S.C. §423(d)(1)(A). A person is:

26 under a disability only if his physical or mental impairment or
27 impairments are of such severity that he is not only unable to
28 do his previous work but cannot, considering his age,

1 education, and work experience, engage in any other kind of
2 substantial gainful work which exists in the national
3 economy.

4 42 U.S.C. §423(d)(2)(A).

5 The Social Security regulations set forth a five-step sequential process for
6 evaluating disability claims. 20 C.F.R. §404.1520; *see also Reddick v. Chater*, 157 F.3d
7 715, 721 (9th Cir. 1998). A finding of “not disabled” at any step in the sequential process
8 will end the inquiry. 20 C.F.R. §404.1520(a)(4). The claimant bears the burden of proof
9 at the first four steps, but the burden shifts to the Commissioner at the final step.
10 *Reddick*, 157 F.3d at 721. The five steps are as follows:

11 1. First, the ALJ determines whether the claimant is “doing substantial gainful
12 activity.” 20 C.F.R. §404.1520(a)(4)(i). If so, the claimant is not disabled.

13 2. If the claimant is not gainfully employed, the ALJ next determines whether the
14 claimant has a “severe medically determinable physical or mental impairment.” 20
15 C.F.R. §404.1520(a)(4)(ii). To be considered severe, the impairment must “significantly
16 limit[] [the claimant's] physical or mental ability to do basic work activities.” 20 C.F.R.
17 §404.1520(c). Basic work activities are the “abilities and aptitudes to do most jobs,” for
18 example: lifting; carrying; reaching; understanding, carrying out and remembering simple
19 instructions; responding appropriately to co-workers; and dealing with changes in
20 routine. 20 C.F.R. §404.1521(b). Further, the impairment must either be expected “to
21 result in death” or “to last for a continuous period of twelve months.” 20 C.F.R.
22 §404.1509 (incorporated by reference in 20 C.F.R. §404.1520(a)(4)(ii)). The “step-two
23 inquiry is a de minimis screening device to dispose of groundless claims.” *Smolen v.*
24 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have a severe
25 impairment, the claimant is not disabled.

26 3. Having found a severe impairment, the ALJ next determines whether the
27 impairment “meets or equals” one of the impairments listed in the regulations. 20 C.F.R.
28 §404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not,
before proceeding to the next step, the ALJ will make a finding regarding the claimant's

1 “residual functional capacity based on all the relevant medical and other evidence in [the]
2 record.” 20 C.F.R. §404.1520(e). A claimant's “residual functional capacity” (the
3 “RFC”) is the most he can do despite all his impairments, including those that are not
4 severe, and any related symptoms. 20 C.F.R. §404.1545(a)(1).

5 4. At step four, the ALJ determines whether, despite the impairments, the
6 claimant can still perform “past relevant work.” 20 C.F.R. §404.1520(a)(4)(iv). To make
7 this determination, the ALJ compares its “residual functional capacity assessment . . .
8 with the physical and mental demands of [the claimant’s] past relevant work.” 20 C.F.R.
9 §404.1520(f). If the claimant can still perform the kind of work he previously did, the
10 claimant is not disabled. Otherwise, the ALJ proceeds to the final step.

11 5. At the final step, the ALJ determines whether the claimant “can make an
12 adjustment to other work” that exists in the national economy. 20 C.F.R.
13 §404.1520(a)(4)(v). In making this determination, the ALJ considers the claimant’s
14 “residual functional capacity” and his “age, education, and work experience.” 20 C.F.R.
15 §404.1520(g)(1). If the claimant can perform other work, he is not disabled. If the
16 claimant cannot perform other work, he will be found disabled. As previously noted, the
17 Commissioner has the burden of proving the claimant can perform other work. *Reddick*,
18 157 F.3d at 721.

19 In this case, the ALJ concluded at step four of the sequential process that Plaintiff
20 was not disabled. The ALJ found that Plaintiff had the residual functional capacity to
21 perform light level physical exertion and should avoid exposure to cold environments.
22 The ALJ determined that Plaintiff was capable of performing his past relevant work as a
23 driver, cannery laborer, and assembler.

24 **A. Credibility Determination**

25 The ALJ did not accept Plaintiff’s complaints regarding his level of symptoms and
26 limitation during the relevant time. (Tr. 298.) If a claimant produces objective medical
27 evidence of an underlying impairment, as Plaintiff did here, then the ALJ cannot reject
28 the claimant’s subjective complaints based solely on a lack of objective medical support

1 for the alleged severity of the pain. *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.
2 2001). If the ALJ finds the claimant’s subjective testimony not credible, the ALJ must
3 make findings sufficiently specific to allow the reviewing court to conclude that the ALJ
4 rejected the testimony on permissible grounds and did not arbitrarily discredit the
5 claimant’s testimony. *Id.* at 856-57. If no affirmative evidence of malingering exists,
6 then the ALJ must provide clear and convincing reasons for rejecting the claimant’s
7 testimony about the severity of his symptoms. *Id.* at 857.

8 The Commissioner argues that the ALJ did not have to give clear and convincing
9 reasons for disbelieving Plaintiff’s testimony because the standard found in *Bunnell v.*
10 *Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)(en banc), which does not mention the
11 clear and convincing reasons test, has not been overturned by an *en banc* Ninth Circuit
12 Court of Appeals decision. The Commissioner contends that the “clear and convincing
13 reasons” standard is found only in subsequent panel opinions. The Commissioner offers
14 the following as the appropriate standard: whether the ALJ’s credibility findings are
15 “supported by the record” and “sufficiently specific to allow a reviewing court to
16 conclude that the adjudicator rejected the claimant’s testimony on permissible grounds.”
17 *Id.*

18 The Commissioner is correct that it would take another *en banc* decision from the
19 Ninth Circuit to overturn its earlier en banc decision in *Bunnell*. But it would not take an
20 *en banc* court to elaborate on the earlier holding. The Ninth Circuit Court of Appeals
21 seemingly has accepted the “clear and convincing” reasons test as further development of
22 the *Bunnell* standard, not a repudiation of it. Regardless of whether the clear and
23 convincing reasons test applies, the ALJ provided clear and convincing reasons for
24 partially discrediting the subjective reporting of Plaintiff.

25 After reviewing the evidence, the ALJ found that Plaintiff’s statements regarding
26 the intensity, persistence, and limiting effects of his symptoms were not credible to the
27 extent that they conflicted with the ALJ’s residual functional capacity assessment finding
28 Plaintiff capable of sustaining work activities at the light exertional level. In support of

1 that conclusion, the ALJ recounted Plaintiff's hearing testimony that he could walk up to
2 one to two miles, stand for a few hours, sit for a few hours, and lift and carry 20 to 30
3 pounds a short distance, which was inconsistent with allegations of total disability.

4 The ALJ also noted that Plaintiff stopped working at his last job in November of
5 2008 for reasons unrelated to his impairments and that the record did not indicate
6 significant deterioration of Plaintiff's condition after November 2008. Plaintiff stopped
7 working his last job because his employer went bankrupt. The ALJ wrote, "The fact that
8 the claimant's impairments did not prevent work prior to December 1, 2008, would
9 strongly suggest that they would not presently prevent the claimant from sustaining work
10 activity." (Tr. 21.)

11 In making his credibility determination, the ALJ considered Plaintiff's earnings
12 records for the second and third quarters of 2009, which indicated that Plaintiff received
13 unemployment benefits after the alleged onset of disability. To receive unemployment
14 benefits, Plaintiff had to have attested that he was physically and mentally able to work
15 and that he was actively seeking work. The ALJ found that Plaintiff's receipt of
16 disability benefits was "clearly in conflict with the allegation that he was disabled and
17 unable to work at that time." (Tr. 21.)

18 Plaintiff testified at the hearing that he left his last employment because the
19 company went bankrupt. (Tr. 47.) A claimant's testimony that he left his last
20 employment for reasons other than his impairment provides a specific and cogent reason
21 for rejecting the claimant's subjective symptom testimony. *Bruton v. Massanari*, 268
22 F.3d 824, 828 (9th Cir. 2001)("[T]he ALJ satisfied the *Bunnell* standard by providing
23 specific, cogent reasons for disregarding [claimant's] testimony. For example, the ALJ
24 stated that she found Bruton's subjective pain complaints not credible because, *inter alia*:
25 (1) Bruton stated at the administrative hearing and to at least one of his doctors that he
26 left his job because he was laid off . . .").

27 Plaintiff argues the ALJ erred in relying on his testimony regarding the bankruptcy
28 of his last employer because Plaintiff also testified that even if the company had not gone

1 bankrupt, the company had a point system for attendance and “When you get so many
2 days of missing, they fire you. And I was right there anyway.” (Tr. 47.) But Plaintiff did
3 not testify that his alleged attendance issues resulted from his impairments. Moreover,
4 “right there” is not “there.” In any case, it is not this Court’s function to reweigh the
5 evidence that was before the ALJ. Plaintiff’s undisputed testimony is that he left his last
6 employment because his employer went bankrupt,¹ which was a valid reason for doubting
7 his credibility.

8 Plaintiff also argues, citing *Carmickle v. Commissioner, Social Security*
9 *Administration*, 533 F.3d 1155 (9th Cir. 2008), that the ALJ erred in discrediting his
10 subjective symptom testimony based on his receipt of unemployment benefits after his
11 alleged disability onset date. In *Carmickle*, the ALJ gave less weight to the claimant’s
12 testimony, in part, because he received unemployment benefits during the time of his
13 alleged disability. *Id.* at 1161. The Ninth Circuit Court of Appeals noted that receipt of
14 unemployment benefits can undermine a claimant’s alleged inability to work full time.
15 *Id.* at 1161-62 (citing *Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir. 1988)). But the
16 appellate court found that the record did not establish whether the claimant had held
17 himself out as available for full-time or part-time work, and only the former would be
18 inconsistent with the claimant’s disability allegations. *Id.* at 1162. The appellate court
19 therefore found that substantial evidence did not support that particular basis for the
20 ALJ’s credibility determination. *Id.*

21 Here, however, the Commissioner points out in his response brief that Arizona
22 unemployment law requires a claimant to hold himself out as available for full-time work
23 to receive unemployment insurance. (Doc. 18, p. 8.) Plaintiff does not deny in his reply
24 brief that he had to hold himself out as available to do full-time work in order to receive
25 his Arizona unemployment benefits. The Court therefore finds *Carmickle* inapposite and

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27 ¹ Although Plaintiff’s last employment ended shortly before his amended onset
28 date, as the ALJ points out, nothing in the record indicates that Plaintiff’s condition
deteriorated significantly in the months following the amended alleged onset date and his
former employer’s bankruptcy.

1 further finds that the ALJ did not err in considering Plaintiff's receipt of unemployment
2 benefits when making his credibility finding.

3 The Court holds that the ALJ provided clear and convincing reasons for rejecting
4 Plaintiff's testimony regarding the severity of his symptoms. The Court therefore will
5 not reverse the Commissioner on that basis.

6 **B. Medical Source Opinion**

7 Plaintiff argues the ALJ erred in weighing the medical source opinion evidence.
8 Plaintiff contends the ALJ incorrectly gave great weight to the fact that no treating
9 physician gave opinion evidence regarding Plaintiff's level of restriction. Plaintiff further
10 argues the ALJ erred in giving great weight to the Commissioner's consultative examiner
11 because the consultation took place before Plaintiff's amended onset date and the
12 examiner therefore did not have all the pertinent medical records. Plaintiff finally argues
13 that despite giving great consideration to the RFC conclusions reached by state agency
14 physicians, the ALJ did not address or resolve the disparity between his RFC (without
15 limitations due to shoulder pain and reduced range of motion) and the RFC of the state-
16 agency physician, which included such restrictions.

17 No medical source ever opined that Plaintiff suffered from any work limitations.
18 The ALJ did not err in giving great weight to the fact that no medical source ever
19 suggested that Plaintiff suffered from disabling limitations. Nor did the ALJ err in giving
20 weight to the opinion of the examining physician who examined Plaintiff in 2007 where
21 the ALJ notes that the record did not establish a significant change in circumstances from
22 July 2007 to the time of the hearing. Finally, Plaintiff's last argument regarding the RFC
23 of the state-agency physician does not relate to the proper weight to give reviewing state-
24 agency physicians, but instead involves the adequacy of the ALJ's RFC. The Court
25 therefore finds that the ALJ did not err in weighing the medical source opinions.

1 **C. RFC Errors**

2 Plaintiff argues that the ALJ’s RFC was deficient for a few reasons: 1) it did not
3 include shoulder limitations with respect to reaching, pushing, and pulling; 2) it did not
4 properly assess Plaintiff’s exertional capacity because it did not set forth exertional
5 limitations in terms of a sustained eight-hour work day; and 3) it did not account for the
6 impaired ability to sustain functioning over the course of a month due to the nature and
7 frequency of atrial fibrillation episodes.

8 The ALJ did not include shoulder limitations with respect to reaching, pushing,
9 and pulling in his RFC and therefore did not consider those limitations when determining
10 whether Plaintiff could perform his past work. The record, including the opinions of the
11 state-agency physicians, supports the existence of left shoulder limitations.

12 The Commissioner seems to concede the ALJ erred in not including shoulder
13 limitations in the RFC, but asserts the error was harmless because adding the limitation
14 would not have changed the ALJ’s decision. *Stout v. Comm’r, Soc. Sec. Admin.*, 454
15 F.3d 1050, 1055 (9th Cir. 2006)(error is harmless if inconsequential to the ultimate
16 nondisability determination). The Commissioner first argues the error was harmless
17 because two of the jobs identified as Plaintiff’s past work “do not seem to require
18 pushing or pulling, as described by the *Dictionary of Occupational Titles (DOT)*,
19 assembler, production, *DOT 706.687-010*, and driver, *DOT 919.683-014*.” (Doc. 18,
20 p.14.) The Commissioner next argues that the job of assembler, as Plaintiff described he
21 performed it, did not require more than occasional pushing or pulling. The
22 Commissioner finally argues that because Plaintiff did not have any limitations using his
23 dominant, upper-right extremity, it “is reasonable to conclude that, even if his past work
24 did require more than occasional pushing or pulling, he could perform that function with
25 his right hand exclusively.” (Doc. 18, p. 14.)

26 The Commissioner’s harmless error arguments invite this Court to usurp the role
27 of the ALJ. It is not for the Court or the Commissioner, in later briefing, to find facts
28 regarding the claimant’s impairments and the impact of those impairments on the

1 claimant's residual functional capacity. Nor can the Court determine that certain past
2 jobs "do not seem to require pushing or pulling" or that a claimant probably could have
3 performed his past work duties using only his dominant hand. It is the ALJ's job to
4 consider all impairments, including those that are not severe, and any related symptoms
5 when assessing the claimant's RFC. 20 C.F.R. §404.1545(a)(1). The ALJ's failure to
6 consider Plaintiff's shoulder limitations when assessing his RFC and his ability to do past
7 work was error, and the Court cannot say that the error was harmless.

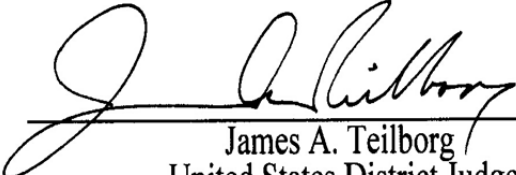
8 Because the Court finds the ALJ erred in not considering all of Plaintiff's
9 limitations when assessing his RFC and will remand on that basis for further proceedings,
10 the Court need not address Plaintiff's remaining arguments regarding the RFC. But the
11 Court notes that on remand the ALJ should assess Plaintiff's exertional capacity in terms
12 of a sustained eight-hour work day, five days a week, or equivalent schedule.

13 Accordingly,

14 **IT IS ORDERED** Affirming in part and reversing in part the Commissioner's
15 denial of disability benefits.

16 **IT IS FURTHER ORDERED** remanding for further administrative proceedings
17 in accordance with this Order.

18 Dated this 30th day of July, 2012.

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23 James A. Teilborg
24 United States District Judge
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