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

8
9 Donald Lee Dover,

No. CV-13-00438-PHX-NVW

10 Plaintiff,

ORDER

11 v.

12 Carolyn W. Colvin, Acting Commissioner
13 of Social Security,

14 Defendant.
15

16 Plaintiff Donald Lee Dover seeks review under 42 U.S.C. § 405(g) of the final
17 decision of the Commissioner of Social Security (“the Commissioner”), which denied
18 him disability insurance benefits under sections 216(i) and 223(d) of the Social Security
19 Act. Because the decision of the Administrative Law Judge (“ALJ”) is supported by
20 substantial evidence and is not based on legal error, the Commissioner’s decision will be
21 affirmed.

22 **I. BACKGROUND**

23 **A. Factual Background**

24 Plaintiff was born in November 1957 and was 52 years old on the alleged
25 disability onset date, June 1, 2010. He previously worked as a computer repair
26 technician, user support/help desk technician, and inventory manager. His last job was a
27 temporary position that ended. In February 2011, Plaintiff reported that he spends his
28 day watching television, using the computer, going to necessary appointments, eating,

1 and sleeping. He is able to dress, bathe, shave, care for his hair, wash dishes, and do his
2 laundry. He feeds his dogs and gives them water. He prepares his meals by microwaving
3 foods or eating cereal. He drives a car and goes outside one or two times a week; every
4 other week he shops for groceries. He spends time with other people daily. He said most
5 of his activities are limited by his pain and he has difficulty remembering things and
6 completing tasks.

7 Plaintiff alleges impairment from diabetic neuropathy, neurogenic bladder,
8 degenerative disc disease of the spine, continuing problems after bilateral carpal tunnel
9 surgeries, sleep apnea, and depression. Although Plaintiff expressly does not allege
10 “totally debilitating symptoms,” he testified that he is unable to work a full-time job
11 because he cannot stay awake during the day and cannot sleep at night because of
12 frequent urination and leg cramps.

13 **B. Procedural History**

14 On June 25, 2010, Plaintiff applied for disability insurance benefits, alleging
15 disability beginning June 1, 2010. On July 9, 2012, he appeared with his attorney and
16 testified at a hearing before the ALJ. A vocational expert also testified.

17 On August 20, 2012, the ALJ issued a decision that Plaintiff was not disabled
18 within the meaning of the Social Security Act. The Appeals Council denied Plaintiff’s
19 request for review of the hearing decision, making the ALJ’s decision the
20 Commissioner’s final decision. On March 4, 2013, Plaintiff sought review by this Court.

21 **II. STANDARD OF REVIEW**

22 The district court reviews only those issues raised by the party challenging the
23 ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court
24 may set aside the Commissioner’s disability determination only if the determination is
25 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d
26 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a
27 preponderance, and relevant evidence that a reasonable person might accept as adequate
28 to support a conclusion considering the record as a whole. *Id.* In determining whether

1 substantial evidence supports a decision, the court must consider the record as a whole
2 and may not affirm simply by isolating a “specific quantum of supporting evidence.” *Id.*
3 As a general rule, “[w]here the evidence is susceptible to more than one rational
4 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be
5 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

6 Harmless error principles apply in the Social Security Act context. *Molina v.*
7 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains
8 substantial evidence supporting the ALJ’s decision and the error does not affect the
9 ultimate nondisability determination. *Id.* The claimant usually bears the burden of
10 showing that an error is harmful. *Id.* at 1111.

11 **III. FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

12 To determine whether a claimant is disabled for purposes of the Social Security
13 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears
14 the burden of proof on the first four steps, but the burden shifts to the Commissioner at
15 step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

16 At the first step, the ALJ determines whether the claimant is engaging in
17 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not
18 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant
19 has a “severe” medically determinable physical or mental impairment.
20 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step
21 three, the ALJ considers whether the claimant’s impairment or combination of
22 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P
23 of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to
24 be disabled. *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the
25 claimant’s residual functional capacity and determines whether the claimant is still
26 capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not
27 disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step,
28 where he determines whether the claimant can perform any other work based on the

1 claimant's residual functional capacity, age, education, and work experience.
2 § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is
3 disabled. *Id.*

4 At step one, the ALJ found that Plaintiff meets the insured status requirements of
5 the Social Security Act through March 31, 2013, and that he has not engaged in
6 substantial gainful activity since June 1, 2010. At step two, the ALJ found that Plaintiff
7 has the following severe impairments: bilateral carpal tunnel syndrome, status post
8 surgery; status post left shoulder surgery; degenerative disc disease of the lumbar spine;
9 degenerative disc disease of the cervical spine with moderate stenosis; obesity;
10 hypertension; diabetes mellitus; status post right wrist fracture; obstructive sleep apnea;
11 history of neurogenic bladder; and history of syncope. At step three, the ALJ determined
12 that Plaintiff does not have an impairment or combination of impairments that meets or
13 medically equals the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P,
14 Appendix 1.

15 At step four, the ALJ found that Plaintiff:

16 has the residual functional capacity to perform light work as defined in 20
17 CFR 404.1567(b) except the claimant can occasionally crawl and climb
18 ladders, ropes, and scaffolds. He can frequently climb ramps and stairs, as
19 well as stoop, crouch, and kneel. The claimant can engage in occasional
overhead reaching with the left upper extremity. Further, he should avoid
even moderate exposure to extreme cold.

20 The ALJ further found at step four that Plaintiff is capable of performing past relevant
21 work as a help desk/user support analyst. The ALJ made alternative findings for step five
22 of the sequential evaluation process and concluded that, considering Plaintiff's age,
23 education, work experience, and residual functional capacity, there are other jobs that
24 exist in significant numbers in the national economy that Plaintiff can also perform, such
25 as fast food worker, parking lot cashier, and storage facility rental clerk.

1 **IV. ANALYSIS**

2 **A. The ALJ Did Not Err in Weighing Medical Source Evidence.**

3 **1. Legal Standard**

4 In weighing medical source opinions in Social Security cases, the Ninth Circuit
5 distinguishes among three types of physicians: (1) treating physicians, who actually treat
6 the claimant; (2) examining physicians, who examine but do not treat the claimant; and
7 (3) non-examining physicians, who neither treat nor examine the claimant. *Lester v.*
8 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The Commissioner must give weight to the
9 treating physician’s subjective judgments in addition to his clinical findings and
10 interpretation of test results. *Id.* at 832-33. Generally, more weight should be given to
11 the opinion of a treating physician than to the opinions of non-treating physicians. *Id.* at
12 830. Where a treating physician’s opinion is not contradicted by another physician, it
13 may be rejected only for “clear and convincing” reasons, and where it is contradicted, it
14 may not be rejected without “specific and legitimate reasons” supported by substantial
15 evidence in the record. *Id.*; *Orn*, 495 F.3d at 632 (where there is a conflict between the
16 opinion of a treating physician and an examining physician, the ALJ may not reject the
17 opinion of the treating physician without setting forth specific, legitimate reasons
18 supported by substantial evidence in the record).

19 Further, an examining physician’s opinion generally must be given greater weight
20 than that of a non-examining physician. *Lester*, 81 F.3d at 830. As with a treating
21 physician, there must be clear and convincing reasons for rejecting the uncontradicted
22 opinion of an examining physician, and specific and legitimate reasons, supported by
23 substantial evidence in the record, for rejecting an examining physician’s contradicted
24 opinion. *Id.* at 830-31.

25 The opinion of a non-examining physician is not itself substantial evidence that
26 justifies the rejection of the opinion of either a treating physician or an examining
27 physician. *Id.* at 831. “The opinions of non-treating or non-examining physicians may
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1 also serve as substantial evidence when the opinions are consistent with independent
2 clinical findings or other evidence in the record.” *Thomas*, 278 F.3d at 957.

3 Factors that an ALJ may consider when evaluating any medical opinion include
4 “the amount of relevant evidence that supports the opinion and the quality of the
5 explanation provided; the consistency of the medical opinion with the record as a whole;
6 [and] the specialty of the physician providing the opinion.” *Orn*, 495 F.3d at 631. The
7 ALJ need not accept the opinion of any physician if it is brief, conclusory, and
8 inadequately supported by clinical findings. *Thomas*, 278 F.3d at 957. The ALJ may
9 discount a physician’s opinion that is based only the claimant’s subjective complaints
10 without objective evidence. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195
11 (9th Cir. 2004).

12 Moreover, Social Security Rules expressly require a treating source’s opinion on
13 an issue of a claimant’s impairment be given controlling weight if it is well-supported by
14 medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent
15 with the other substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2). If a
16 treating source’s opinion is not given controlling weight, the weight that it will be given
17 is determined by length of the treatment relationship, frequency of examination, nature
18 and extent of the treatment relationship, relevant evidence supporting the opinion,
19 consistency with the record as a whole, the source’s specialization, and other factors. *Id.*

20 **2. Neurologist, Jason Reinhart, D.O., and Neuropsychologist Brian**
21 **Klinck, Psy.D.**

22 Plaintiff contends that the ALJ erred by assigning little weight to Dr. Reinhart’s
23 two opinions and to the opinion of Dr. Klinck, a neuropsychologist who performed
24 neuropsychological testing at Dr. Reinhart’s request, and instead giving greater weight to
25 the opinions of state agency physicians. The record shows Plaintiff saw Dr. Reinhart
26 three times and Dr. Klinck twice.

27 In January 2012, Plaintiff saw Dr. Reinhart for memory issues and very brief
28 “blackouts.” Plaintiff reported that he had been having memory difficulties for at least a

1 year and they had gotten progressively worse. He also complained of momentary loss of
2 consciousness a few times. Dr. Reinhart ordered a formal cognitive evaluation by Dr.
3 Klinck, EEG/ambulatory EEG, and brain imaging.

4 In March 2012, Plaintiff saw Dr. Reinhart for a routine follow-up visit. Treatment
5 notes indicate the ambulatory EEG and brain imaging results were primarily
6 unremarkable and the EEG showed “rather mild left temporal dysrhythmia.” Plaintiff
7 reported having no further events. Plaintiff’s wife verified his memory difficulties and
8 said he spends time on the computer or watching television.

9 Dr. Klinck conducted a comprehensive neuropsychological evaluation of Plaintiff
10 on March 19 and 28, 2012. Plaintiff scored 29/30 on the Mini-Mental Status Exam.
11 Plaintiff was administered the MMPI-2-RF to obtain a quantitative estimate of his current
12 personality and emotional functioning, but the results were invalid because the validity
13 profile suggested Plaintiff did not answer in an open and honest manner. Dr. Klinck
14 concluded that the results of the comprehensive neuropsychological evaluation combined
15 with behavioral observations, medical history, and Plaintiff’s report of symptoms suggest
16 Plaintiff “is likely suffering from mild cognitive defects which have occurred secondary
17 to ongoing emotional difficulties.” Dr. Klinck further reported that Plaintiff “does not
18 meet criteria for a diagnosable cognitive disorder or a progressive neurodegenerative
19 condition and his best course of treatment will involve psychotherapy to address current
20 emotional functioning.”

21 In April 2012, Plaintiff saw Dr. Reinhart again for a routine follow-up visit.
22 Treatment notes indicate that the neuropsychologist reported mild cognitive deficits, but
23 no cognitive disorder on an organic basis. Dr. Reinhart noted that Plaintiff seemed to
24 have difficulty with coping mechanisms, such as time management and planning, and that
25 he would refer him to cognitive rehab.

26 On June 18, 2012, Dr. Klinck opined that Plaintiff’s mental condition mildly limits
27 his ability to perform simple tasks and moderately limits his ability to understand, carry
28 out, and remember instructions and perform complex tasks.

1 On June 21, 2012, Dr. Reinhart completed a Medical Assessment of Ability to Do
2 Work-Related Physical Activities, even though Dr. Reinhart had not treated Plaintiff for
3 any physical impairment. Dr. Reinhart opined that Plaintiff cannot work 8 hours a day, 5
4 days a week, on a regular and consistent basis because of cognitive deficits and loss of
5 consciousness. Dr. Reinhart opined that, in an 8-hour workday, Plaintiff can sit 4–6
6 hours and stand/walk 3–4 hours. He further opined that Plaintiff can lift and carry 10–15
7 pounds and frequently use both hands and feet, bend, crawl, climb, reach, stoop, balance,
8 crouch, and kneel. Dr. Reinhart indicated that Plaintiff’s activities were moderately
9 restricted with respect to unprotected heights, being around moving machinery, and
10 driving automotive equipment, and mildly restricted with respect to exposure to marked
11 changes in temperature/humidity and to dust, fumes, and gases. Regarding whether there
12 are additional symptoms that further limit Plaintiff’s ability to sustain work activity for 8
13 hours a day, 5 days a week, such as pain, fatigue, or dizziness, Dr. Reinhart gave no
14 response, thus indicating that Plaintiff’s ability to sustain full-time work is not limited by
15 pain, fatigue, or dizziness.

16 About a month later, on July 26, 2012, shortly after the July 9, 2012 administrative
17 hearing, Dr. Reinhart completed a second Medical Assessment of Ability to Do Work-
18 Related Physical Activities in which he said that Plaintiff suffered from cognitive deficits
19 and loss of consciousness 365 days per year. Regarding ancillary symptoms, he checked
20 pain, but did not check fatigue or vertigo/dizziness. He indicated that Plaintiff’s activities
21 were completely restricted with respect to unprotected heights, being around moving
22 machinery, and driving automotive equipment and moderately restricted with respect to
23 exposure to marked changes in temperature/humidity and to dust, fumes, and gases. Dr.
24 Reinhart rated Plaintiff’s degree of restriction as “severe,” defined as “extreme
25 impairment in ability to function.”

26 The ALJ stated she assigned little weight to Dr. Reinhart’s opinions because they
27 were inconsistent with Dr. Reinhart’s findings of mild memory loss and mild temporal
28 dysrhythmia and apparently relied substantially on information reported by Plaintiff,

1 which the ALJ found to be unreliable. These reasons are supported by substantial
2 evidence. Moreover, Dr. Reinhart's June 21, 2012 opinion indicates that Plaintiff can
3 work an 8-hour work day if sitting does not exceed 6 hours and standing or walking does
4 not exceed 4 hours, and Plaintiff can frequently use both hands and feet, bend, crawl,
5 climb, reach, stoop, balance, crouch, and kneel. It further indicates that Plaintiff's ability
6 to work is not limited by pain or fatigue. Dr. Reinhart's July 26, 2012 opinion also
7 indicates that Plaintiff's ability to work is not limited by fatigue. Thus, both of Dr.
8 Reinhart's opinions contradict Plaintiff's testimony.

9 Further, the ALJ stated she gave greater weight to the opinions of the reviewing
10 physicians for the state agency than to Dr. Reinhart's opinions because the state agency
11 opinions are well supported by medically acceptable findings and are consistent with the
12 record when viewed in its entirety. These opinions were that Plaintiff can perform less
13 than the full range of light exertion. On November 30, 2010, a state agency reviewing
14 physician concluded that Plaintiff can sit about 6 hours in an 8-hour work day, stand or
15 walk about 6 hours in an 8-hour work day, never crawl, never climb stairs or ramps,
16 never climb ladders/ropes/scaffolds, and only occasionally stoop, kneel, or crouch. He
17 further concluded that Plaintiff is limited in reaching, pushing, and pulling in both upper
18 and lower extremities. This assessment is more restrictive than Dr. Reinhart's opinions;
19 therefore, giving it greater weight benefits Plaintiff.

20 In April and May 2011, state agency reviewing physicians considered Plaintiff's
21 alleged mental impairment and physical impairments. Mary Downs, Ph.D., concluded
22 that the alleged severity of Plaintiff's mental impairment was not supported by the
23 evidence. Mental impairment posed some restrictions, but none so severe as to be
24 disabling. Michael Keer, D.O., concluded that Plaintiff can sit about 6 hours in an 8-hour
25 work day, stand or walk about 6 hours in an 8-hour work day, occasionally crawl and
26 climb ladders/ropes/scaffolds, and frequently stoop, kneel, crouch, and climb
27 ramps/stairs. He concluded Plaintiff has no manipulative limitations because he drives
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1 and is able to use a computer. The opinions of the state agency physicians are consistent
2 with independent clinical findings and other evidence in the record.

3 The ALJ stated she assigned little weight to Dr. Klinck's opinion because he did
4 not offer any specific work limitations, the opinion is vague and imprecise, and he
5 apparently relied heavily on Plaintiff's subjective report of symptoms and limitations.
6 The opinion describes all of Plaintiff's limitations as mild or moderate without
7 explanation. When asked for an opinion as to the earliest date the same level of severity
8 existed, Dr. Klinck wrote, "Pt reports problems for the past 18 mos." In response to
9 whether allegations of pain are consistent with clinical findings, Dr. Klinck wrote, "N/A."
10 The ALJ's incorrect statement that Dr. Klinck met with Plaintiff once before rendering
11 his opinion is harmless error. Although Dr. Klinck saw Plaintiff on two different days in
12 March 2012, he conducted one assessment in two parts and never treated Plaintiff. Thus,
13 the ALJ's reasons for assigning Dr. Klinck's opinion little weight are supported by
14 substantial evidence. Moreover, even if the ALJ had given Dr. Klinck's opinion great
15 weight, "mild" and "moderate" limitations do not preclude ability to function.

16 Therefore, the ALJ provided clear, convincing, specific, and legitimate reasons
17 supported by substantial evidence for giving Dr. Reinhart's and Dr. Klinck's opinions
18 little weight.

19 **B. The ALJ Did Not Err in Evaluating Plaintiff's Credibility.**

20 In evaluating the credibility of a claimant's testimony regarding subjective pain or
21 other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine
22 whether the claimant presented objective medical evidence of an impairment that could
23 reasonably be expected to produce some degree of the pain or other symptoms alleged;
24 and, if so with no evidence of malingering, (2) reject the claimant's testimony about the
25 severity of the symptoms only by giving specific, clear, and convincing reasons for the
26 rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

27 First, the ALJ found that Plaintiff's medically determinable impairments could
28 reasonably be expected to cause the alleged symptoms. Second, the ALJ found

1 Plaintiff's statements regarding the intensity, persistence, and limiting effects of the
2 symptoms not credible to the extent they are inconsistent with the ALJ's residual
3 functional capacity assessment.

4 Plaintiff testified that his last job was a temporary position that ended, but if he
5 had a job he would likely miss several days a week because he cannot stay awake during
6 the day due to lack of sleep at night. He said he cannot sleep at night because of frequent
7 urination and leg cramps. Plaintiff also testified that he began psychological counseling
8 about a month before the July 9, 2012 administrative hearing. He said it was too soon to
9 tell whether it was helping him.

10 The ALJ identified multiple reasons for finding Plaintiff's statements regarding
11 the severity of his limitations less than fully credible. First, Plaintiff has not received the
12 type of medical treatment one would expect for someone unable to perform light work
13 with the limitations stated in the residual functional capacity. He had surgery for his
14 carpal tunnel syndrome and acknowledged his condition was not bad enough to use
15 splints. Plaintiff had surgery for his left shoulder, reported minimal pain subsequently,
16 performed home exercises, and did not engage in physical therapy. At various times he
17 reported improvement in back-related pain with conservative treatment, such as
18 injections and aquatic therapy. He chose not to get a CPAP machine for his sleep apnea,
19 and instead to get a dental appliance, but then testified he did not get the appliance
20 because he could not afford it, even though his wife uses a similar machine.

21 Second, the ALJ noted that Plaintiff had made inconsistent statements throughout
22 the disability process. He reported continued pain and no adverse effects from pain
23 medications, yet chose not to take pain medications. He reported leg cramps and pain,
24 but the medical evidence does not show diabetic neuropathy of the lower extremities or
25 any basis for lower extremity symptoms as extreme as Plaintiff claims. Third, the ALJ
26 found the treating physicians consistently observed that he appeared healthy and in no
27 acute distress, and Plaintiff was able to testify at the administrative hearing without any
28 overt pain behavior.

1 Fourth, the ALJ concluded that Plaintiff's daily activities were not as limited as
2 one would expect if Plaintiff's symptoms were as severe as he claimed. The ALJ found
3 that he "is able to care for pets, care for his own personal hygiene/grooming needs,
4 prepare simple meals, perform household chores, drive a vehicle, go out alone, shop
5 outside the home, pay bills, count change, handle a savings account, use a checkbook,
6 utilize the computer, and spend time with others on a regular basis."

7 Substantial evidence supports the reasons stated by the ALJ for finding Plaintiff's
8 testimony not fully credible, and substantial evidence supports finding these reasons to be
9 specific, clear, and convincing.

10 **C. Plaintiff's Submission of Evidence to the Appeals Council Was**
11 **Considered by the Commissioner and Does Not Establish a Basis for**
12 **Reversing the ALJ's Decision.**

13 Plaintiff contends that the Commissioner committed legal error because the
14 Appeals Council failed to consider and address additional evidence he submitted after the
15 ALJ's decision was issued on August 20, 2012. However, the Notice of Appeals Council
16 Action dated January 4, 2013, expressly states that the Appeals Council considered the
17 additional evidence listed on the enclosed Order of the Appeals Council, which identifies
18 all six of the exhibits submitted by Plaintiff after the ALJ's decision: (1)
19 Representative's brief dated 10/17/12; (2) Reports from Tom Virden, Ph.D. dated
20 6/27/12-6/29/12; (3) Reports from Midwestern University dated 9/17/12-10/1/12; (4)
21 Reports from Metro Surgery Center dated 10/5/11-10/5/12; (5) Report from Jason
22 Reinhart, D.O. dated 6/29/12; and (6) Report from Arizona Neurology dated 7/9/12.

23 Further, the Appeals Council expressly addressed the additional evidence by
24 stating, "We found that this information does not provide a basis for changing the
25 Administrative Law Judge's decision." The Commissioner is not required to provide a
26 more detailed explanation. *See Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157,
27 1162-63 (9th Cir. 2012).
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1 The issue Plaintiff should have raised is whether the record as a whole, which
2 includes the additional evidence, establishes that the ALJ's denial of benefits is not
3 supported by substantial evidence or is based on legal error. The district court must
4 consider the entire record, including additional evidence submitted to the Appeals
5 Council, when it reviews the ALJ's decision. *Id.* at 1163. Plaintiff does not explain how
6 any of the additional evidence shows that, beginning June 1, 2010, he was unable to
7 perform light work as defined in 20 C.F.R. § 404.1567(b) with the limitations stated in
8 the residual functional capacity. *See Bruton v. Massanari*, 268 F.3d 824, 827 (9th Cir.
9 2001) (new evidence sufficient to warrant remand must bear "directly and substantially
10 on the matter in dispute"). The Court concludes that the decision of the ALJ is supported
11 by substantial evidence and is not based on legal error based on consideration of the
12 entire record, including the additional evidence submitted to the Appeals Council.

13 Additionally, in his Opening Brief, Plaintiff cited *Luna v. Astrue*, 623 F.3d 1032
14 (9th Cir. 2010), in support of his argument regarding the Appeals Council's consideration
15 of the additional evidence, and commented that the case is "relevant because Mr. Dover
16 was awarded benefits within three months of the ALJ decision." He did not identify as
17 an issue on appeal or provide legal argument regarding whether the Court should
18 consider as additional evidence the fact that the Commissioner approved Plaintiff's
19 second application for disability benefits with an onset date of disability of November 1,
20 2012. Nor did Plaintiff submit any evidence regarding the second application. The
21 Commissioner's response brief does not address this question because it was not raised
22 by Plaintiff.

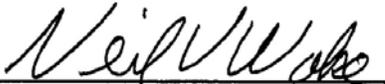
23 In his Reply Brief, Plaintiff stated that "the Social Security Administration's
24 award of benefits to Mr. Dover, with a date of disability a mere 3 months after the date of
25 the ALJ's decision, is relevant and material evidence which would warrant a remand."
26 He stated that the Commissioner found him not capable of performing his past relevant
27 work due to the same medical impairments that are the subject of this claim. But the
28 record of the second application is not in evidence before the Court, and Plaintiff has not

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properly raised any issue regarding it. *See* LRCiv 16.1(a) (opening brief must contain a statement of the issues presented for review, set forth in separate numbered paragraphs).

IT IS THEREFORE ORDERED that the final decision of the Commissioner of Social Security is affirmed. The Clerk shall enter judgment accordingly and shall terminate this case.

Dated this 19th day of May, 2014.



Neil V. Wake
United States District Judge