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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Christopher Stewart,  
  
Plaintiff,  
  
v.  
  
Carolyn W. Colvin, Acting Commissioner  
of Social Security,  
  
Defendant.

No. CV-13-00779-PHX-DGC

**ORDER**

Plaintiff Christopher Stewart seeks review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security (“the Commissioner”), which denied his request for disability insurance benefits and supplemental security income under sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act. For the reasons that follow, the Court will affirm the Commissioner’s decision.

**I. BACKGROUND.**

**A. Factual Background.**

Plaintiff testified at his hearing that he was 46 years old. A.R. 15. Plaintiff also testified that he had a tenth grade education and had received some vocational training in refrigerator repair. *Id.* Plaintiff has worked in the past as a construction and fast food laborer. Doc. 13 at 2. His last full-time position was fast food cashier. A.R. 15. The ALJ found that Plaintiff suffered from the following impairments: degenerative disc disease of the cervical and lumbar spine; cervical spondylosis; cervical and lumbar

1 foraminal stenosis; obesity; and mild degenerative joint disease of both hands. A.R. 13.  
2 The ALJ also found that the impairments precluded Plaintiff from performing past  
3 relevant work. A.R. 17.

4 **B. Procedural History.**

5 On February 2, 2010, Plaintiff applied for disability insurance benefits and  
6 supplemental security income. A.R. 11. On February 16, 2010, he also filed a Title II  
7 application for a period of disability and disability insurance benefits. *Id.* In both  
8 applications, Plaintiff alleged disability beginning on December 1, 1990. *Id.* The claims  
9 were denied initially on May 17, 2010, and upon reconsideration on August 2, 2010. *Id.*  
10 Plaintiff filed a written request for hearing on August 9, 2010. 20 C.F.R. §§ 404.929 *et*  
11 *seq.*, 416.1429 *et seq.* *Id.* On January 10, 2012, he appeared and testified at a hearing  
12 before the ALJ. A.R. 11. A vocational expert also testified. *Id.*

13 On February 8, 2012, the ALJ issued a decision that Plaintiff was not disabled  
14 within the meaning of the Social Security Act. A.R. 19. The Appeals Council denied  
15 Plaintiff's request for review of the hearing decision, making the ALJ's decision final.  
16 A.R. 1.

17 **II. STANDARD OF REVIEW.**

18 The district court reviews only those issues raised by the party challenging the  
19 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court  
20 may set aside the Commissioner's disability determination only if the determination is  
21 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d  
22 625, 630 (9th Cir. 2007). As a general rule, "[w]here the evidence is susceptible to more  
23 than one rational interpretation, one of which supports the ALJ's decision, the ALJ's  
24 conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002)  
25 (citations omitted).

26 **III. FIVE-STEP SEQUENTIAL EVALUATION.**

27 To determine whether a claimant is disabled for purposes of the Social Security  
28 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears

1 the burden of proof on the first four steps, with the burden shifting to the Commissioner  
2 at step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

3 At the first step, the ALJ determines whether the claimant is engaging in  
4 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
5 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant  
6 has a “severe” medically determinable physical or mental impairment.  
7 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step  
8 three, the ALJ considers whether the claimant’s impairment or combination of  
9 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P  
10 of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to  
11 be disabled. *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the  
12 claimant’s residual functional capacity and determines whether the claimant is still  
13 capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not  
14 disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step,  
15 where he determines whether the claimant can perform any other work based on the  
16 claimant’s residual functional capacity, age, education, and work experience.  
17 § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is  
18 disabled. *Id.*

19 At step one, the ALJ found that Plaintiff met the insured status requirements of the  
20 Social Security Act through September 30, 1994, and that he has not engaged in  
21 substantial gainful activity since December 1, 1990. A.R. 13. At step two, the ALJ  
22 found that Plaintiff had the following severe impairments: degenerative disc disease of  
23 the cervical and lumbar spine; cervical spondylosis; cervical and lumbar foraminal  
24 stenosis; obesity; and mild degenerative joint disease of both hands. *Id.* At step three,  
25 the ALJ determined that Plaintiff did not have an impairment or combination of  
26 impairments that meets or medically equals an impairment listed in Appendix 1 to  
27 Subpart P of 20 C.F.R. Pt. 404. A.R. 14.

1 At step four, the ALJ found that Plaintiff:

2 Ha[d] the residual functional capacity to perform light work  
3 as defined in 20 CFR 404.1567(b) and 416.967(b) subject to  
4 the following. He is able to lift and carry up to 20 lbs  
5 occasionally, and 10 lbs frequently; he can sit up to 6 hours,  
6 and stand or walk up to 6 hours in an 8-hour workday, with  
7 the option to alternate as needed between seated and standing  
8 positions; he can frequently climb ramps or stairs, and  
occasionally climb ladders, ropes, or scaffolds; and he can  
frequently balance, stoop, kneel, crouch, and crawl.

9 *Id.* The ALJ further found that Plaintiff was unable to perform any of his past relevant  
10 work. A.R. 17. At step five, the ALJ concluded that, considering Plaintiff's age,  
11 education, work experience, and residual functional capacity, there were jobs that exist in  
12 significant numbers in the national economy that Plaintiff could perform. A.R. 18.

13 **IV. ANALYSIS.**

14 Plaintiff argues the ALJ's decision is defective for three reasons: (1) the ALJ  
15 erroneously weighed medical source evidence; (2) the ALJ improperly evaluated  
16 Plaintiff's credibility and discounted his subjective testimony; and (3) the ALJ  
17 erroneously failed to consider the third party report of Plaintiff's mother, Carol Stewart.  
18 The Court will address each argument below.

19 **A. Weighing of Medical Source Evidence.**

20 Plaintiff argues that the ALJ failed to articulate sufficient reasons for giving  
21 limited weight to the opinion of his treating physician, Dr. Philo Rogers, D.O. Doc. 13 at  
22 11. Dr. Rogers treated Plaintiff from February 2008 through at least December 2011. *Id.*  
23 at 12. On December 17, 2009, Dr. Rogers completed a check-the-box form opining that,  
24 due to back pain, degenerative disc disease, lumbar and cervical neuropathy, and  
25 herniated discs, Plaintiff was unable to perform work eight hours a day for five days a  
26 week. A.R. 479-80. Dr. Rogers opined that Plaintiff could sit less than two hours, lift  
27 less than ten pounds, stand or walk less than two hours, and carry less than ten pounds  
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1 during an eight hour work day. *Id.* Dr. Rogers submitted three check-the-box forms with  
2 substantially identical opinions on June 22, 2010, December 15, 2010, and  
3 December 8, 2011. A.R. 461-62, 477-78, 520-21. A vocational expert testified at  
4 Plaintiff’s administrative hearing that an individual with such limitations would be unable  
5 to sustain full time competitive work. A.R. 50-51. The ALJ accorded Dr. Rogers’  
6 opinion little weight. A.R. 17.

7 The Ninth Circuit distinguishes between the opinions of treating physicians,  
8 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,  
9 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating  
10 physician’s opinion and more weight to the opinion of an examining physician than to  
11 one of a non-examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th  
12 Cir. 1995); *see also* 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when  
13 evaluating opinion evidence, including length of examining or treating relationship,  
14 frequency of examination, consistency with the record, and support from objective  
15 evidence). The opinion of a treating or examining physician can be rejected only for  
16 “clear and convincing” reasons if it is not contradicted by another doctor’s opinion.  
17 *Lester*, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). A  
18 contradicted opinion of a treating or examining physician “can only be rejected for  
19 specific and legitimate reasons that are supported by substantial evidence in the record.”  
20 *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043).

21 Dr. Rogers’ medical opinion was contradicted by the opinions of Drs. Bijpuria,  
22 Goodrich, and Woodard, each of whom are non-examining physicians who opined that  
23 Plaintiff had abilities that were at least consistent with light work. A.R. 17. The ALJ  
24 therefore could discount Dr. Rogers’ opinion for specific and legitimate reasons  
25 supported by substantial evidence in the record.<sup>1</sup> *Lester*, 81 F.3d at 830-31.

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27 <sup>1</sup> It is unclear what standard Plaintiff believes is applicable. Plaintiff’s brief  
28 appears to argue both the “clear and convincing” and the “specific and legitimate”  
standards. Doc. 13 at 13. Because the Court finds that Dr. Rogers’ medical opinion is

1 An ALJ can meet the “specific and legitimate reasons” standard “by setting out a  
2 detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
3 interpretation thereof, and making findings.” *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th  
4 Cir. 1986). But “[t]he ALJ must do more than offer [her] conclusions. [She] must set  
5 forth [her] own interpretations and explain why they, rather than the doctors’, are  
6 correct.” *Embrey*, 849 F.2d at 421-22. In according Dr. Rogers’ opinion little weight,  
7 the ALJ stated that it was not consistent with the “longitudinal evidence” which has  
8 “consistently reported the claimant with full use of his upper and lower extremities, no  
9 difficulty walking, no limits in range of motion, and no abnormalities in muscle strength,  
10 reflexes, or sensation of the extremities.” A.R. 17. The ALJ’s blanket reference to “the  
11 longitudinal evidence” is not specific and therefore falls short of the “specific and  
12 legitimate reasons” standard of *Embrey* and *Lester*. The Court finds, however, that the  
13 other reasons that the ALJ proffered for discounting Dr. Rogers’ medical opinion are  
14 specific and legitimate. As explained below, the Court also finds that they are supported  
15 by substantial evidence.

16 The ALJ found that the medical evidence indicates that Plaintiff’s spinal  
17 impairments are less than totally disabling and that “[Plaintiff’s] spinal impairments can  
18 be fairly described as stable.” A.R. 16. In reaching this conclusion, the ALJ consulted  
19 records of physical examinations (A.R. 248) and MRIs (A.R. 283, 286, 288, 361-62, 512-  
20 17) that spanned from October 18, 2004, to October 26, 2011. These medical records  
21 suggest that Plaintiff’s spinal health, although not ideal, has been stable and is non-  
22 disabling. A.R. 16. The ALJ also found the medical evidence indicates that Plaintiff is  
23 “neurologically intact, with full range of motion in the extremities.” *Id.* In reaching this  
24 conclusion, the ALJ consulted Dr. Rogers’ medical notes (A.R. 337, 393, 467, 481). The  
25 ALJ also noted that although Dr. Rogers diagnosed Plaintiff with cervical and lumbar  
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27 contradicted by the opinions of other doctors, the more lenient “specific and legitimate  
28 reasons” standard applies.

1 neuropathy, there are no electromyogram or nerve conduction velocity studies in the  
2 record that substantiate these assessments. A.R. 16. The ALJ also indicated that in a  
3 2008 examination, a physician found that Plaintiff had “5/5 strength in the extremities,  
4 normal grip strength, normal reflexes and coordination” (*See* A.R. 303), and that Plaintiff  
5 “was also able to ambulate without assistance, and could perform a heel/toe, tandem  
6 walk, hop and squat” (*Id.*), which support the ALJ’s finding. To further bolster this  
7 finding, X-ray imaging of Plaintiff’s hands and knees reported only “small,” “minimal,”  
8 and “mild” degenerative disease at the DIP joints, and suprapatellar effusions and  
9 degenerative disease of the knees. A.R. 364-67.

10 The ALJ’s statements regarding the weight she accorded Dr. Rogers’ opinion are  
11 found on page 7 of her decision (AR 17), and her detailed discussion of the medical  
12 evidence is found primarily on page 6 (AR 16). Although this organization is not ideal,  
13 the decision makes clear that the ALJ relied on record evidence that “consistently  
14 reported the claimant with full use of his upper and lower extremities, no difficulty  
15 walking, no limits in range of motion, and no abnormalities in muscle strength, reflexes,  
16 or sensation of the extremities.” A.R. 17. The discussion of the medical records on  
17 page 6 addressed these very findings in detail, with numerous citations to the record.  
18 AR 16. The Court finds the ALJ’s explanation to be sufficiently clear to understand the  
19 basis for her decision.

20 The ALJ’s detailed treatment of the medical evidence confirms that the specific  
21 and legitimate reasons she identified are supported by substantial evidence. Plaintiff  
22 vigorously argues that the ALJ committed legal error by relying primarily on the medical  
23 opinions of non-treating physicians who did not testify at Plaintiff’s hearing. Doc. 13 at  
24 18. Although Plaintiff is correct that ALJs must generally accord greatest weight to the  
25 medical opinion of a treating physician and must accord reduced weight to non-treating  
26 and non-examining physicians, the contradicted opinions of treating physicians can be  
27 discounted for specific and legitimate reasons supported by substantial evidence. The  
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1 Court concludes for the reasons outlined above that the ALJ’s decision to discount Dr.  
2 Rogers’ medical opinion was not legal error.

3 **B. The ALJ Did not Err in Evaluating Plaintiff’s Credibility.**

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

11 First, the ALJ found that Plaintiff’s medically determinable impairments could  
12 reasonably be expected to cause the alleged symptoms. A.R. 15. Second, the ALJ found  
13 Plaintiff’s statements regarding the intensity, persistence, and limiting effects of the  
14 symptoms not credible to the extent they are inconsistent with the ALJ’s residual  
15 functional capacity assessment. *Id.*

16 The ALJ gave specific, clear, and convincing reasons for discrediting Plaintiff’s  
17 testimony. First, the ALJ noted “the fact that [Plaintiff] has used narcotics during the  
18 period under review, and served a substantial prison sentence related to the same, reflects  
19 poorly on his overall credibility.” A.R. 15. Second, the ALJ found that Plaintiff had lied  
20 during the application process because he had originally stated that he stopped work due  
21 to his “condition(s).” A.R. 182. At his hearing, however, Plaintiff testified that he was  
22 actually fired from his last employment in 1990, and did not leave for impairment-related  
23 reasons. A.R. 31-32.

24 Plaintiff argues that both of these reasons are illegitimate. First, Plaintiff asserts  
25 that previous drug use and incarceration are not clear and convincing reasons to discredit  
26 his testimony. Doc. 13 at 21. Plaintiff asserts that although a lack of candor regarding  
27 substance abuse and past incarceration may constitute a clear and convincing reason to  
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1 reject Plaintiff's testimony, *see Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002),  
2 there must be more than a mere history of substance abuse or past incarceration, *see*  
3 *Hinojos v. Astrue*, No. 1:11-cv-01530-SKO, 2012 WL 6738224, at \*12-13 (E.D. Cal.  
4 Dec. 28, 2012) (citing *Woodsum v. Astrue*, 711 F. Supp. 2d 1239, 1262 (W.D. Wash.  
5 2010)). The Court disagrees. Although some district courts have held otherwise,  
6 evidence of prior incarceration, particularly for a crime of moral turpitude, is a clear and  
7 convincing reason for discounting a social security claimant's testimony. *McKnight v.*  
8 *Comm'r of Social Sec.*, No. 1:12-cv-00726-AWI-JLT, 2013 WL 3773864, at \*10 (E.D.  
9 Cal. Jul. 17, 2013) ("An ALJ may rely upon a claimant's convictions for crimes of moral  
10 turpitude as part of a credibility determination.") (citation omitted); *see also Hardisty v.*  
11 *Astrue*, 592 F.3d 1072, 1080 (9th Cir. 2010) (in ruling on an Equal Access to Justice Act  
12 request, the Court held the ALJ's credibility determination was substantially justified  
13 when it was based, among other factors, on the claimant's prior criminal convictions).  
14 Plaintiff testified that he was convicted and imprisoned for selling methamphetamine  
15 (A.R. 33), which is a crime of moral turpitude. *See Cole v. Hedgpeth*, No. 2:09-cv-2549-  
16 LKK TJB, 2012 WL 78389, at \*7 (E.D. Cal. Jan. 10, 2012). Consequently, the ALJ's  
17 consideration of Plaintiff's criminal history was proper and supports the ALJ's adverse  
18 credibility determination.

19 Second, Plaintiff argues that any inconsistency between his testimony and a  
20 statement contained in a form submitted as part of his application for benefits is not a  
21 clear and convincing reason to discredit his testimony. Doc. 13 at 22. In his application,  
22 Plaintiff claimed disability beginning on December 1, 1990. A.R. 177. Because Plaintiff  
23 was fired 20 years before his application for social security insurance benefits and the  
24 ALJ found that Plaintiff could not perform any past relevant work, Plaintiff argues that  
25 the circumstances surrounding his separation from the formal work force do not logically  
26 detract from his credibility. Doc. 13 at 23. The Court disagrees. Plaintiff gave  
27 contradictory answers, in the disability application process, for why he left his last  
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1 employment. Clearly inconsistent answers given in the very process of seeking benefits  
2 surely are relevant on the issue of credibility.

3 **C. The ALJ Did not Err in Evaluating Third Party Credibility.**

4 If an ALJ wishes to discount the testimony of a lay witness, she must give reasons  
5 that are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).  
6 Plaintiff argues that the ALJ committed legal error by failing to consider the report  
7 submitted to Defendant by Carole Stewart, Plaintiff's mother. Doc. 13 at 24.

8 The ALJ failed to explain her reasons for rejecting the opinions in Stewart's  
9 report. In fact, the ALJ did not address Stewart's report at all in her decision. The ALJ's  
10 failure to discuss Stewart's report is not legal error, however, because the report was  
11 "inconsequential to the ultimate nondisability determination" in the context of the record  
12 as a whole. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)  
13 (citing *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006)).

14 Stewart's report contains no opinions or facts regarding Plaintiff's restrictions that  
15 are not already contained in either Plaintiff's testimony or in Dr. Rogers' medical  
16 opinions. For example, Stewart opined that Plaintiff was unable to lift more than ten  
17 pounds and that he could not sit or stand for prolonged periods. A.R. 237. As discussed  
18 above, Dr. Rogers' medical opinions assessed Plaintiff with those exact restrictions and  
19 the ALJ provided specific and legitimate reasons supported by substantial evidence for  
20 rejecting them. The same reasons are germane to Stewart and undermine her report. The  
21 Court is "confident that the ALJ's failure to give specific witness-by-witness reasons for  
22 rejecting the lay testimony did not alter the ultimate nondisability determination."  
23 *Molina v. Astrue*, 674 F.3d 1104, 1122 (9th Cir. 2012). As such, the Court concludes that  
24 the ALJ did not commit legal error.

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**IT IS 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 7th day of April, 2014.



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David G. Campbell  
United States District Judge