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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Selahudin Selimovic,

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CIV 13-1248-PHX-MHB

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Plaintiff,

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ORDER

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vs.

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Carolyn W. Colvin, Commissioner of the
Social Security Administration,

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Defendant.

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Pending before the Court is Plaintiff Selahudin Selimovic’s appeal from the Social Security Administration’s final decision to deny his claim for disability insurance benefits and supplemental security income. After reviewing the administrative record and the arguments of the parties, the Court now issues the following ruling.

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I. PROCEDURAL HISTORY

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On July 18, 2008, Plaintiff filed applications for disability insurance benefits and supplemental security income alleging disability beginning January 1, 2006. (Transcript of Administrative Record (“Tr.”) at 17, 288-304.) His applications were denied initially and on reconsideration. (Tr. at 144-46, 152-54.) Thereafter, Plaintiff requested a hearing before an administrative law judge. (Tr. at 155.) Hearings were held on January 18, 2011 and June 30, 2011, (Tr. at 44-93, 94-143), and the ALJ issued a decision finding that Plaintiff was disabled between January 1, 2006 and January 22, 2009, but that as of January 23, 2009, Plaintiff experienced medical improvement to such a degree that he was no longer disabled (Tr. at 12-43). The Appeals Council denied Plaintiff’s request for review (Tr. at 1-6), making

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1 the ALJ's decision the final decision of the Commissioner. Plaintiff then sought judicial
2 review of the ALJ's decision pursuant to 42 U.S.C. § 405(g).

3 **II. STANDARD OF REVIEW**

4 The Court must affirm the ALJ's findings if the findings are supported by substantial
5 evidence and are free from reversible legal error. See Reddick v. Chater, 157 F.3d 715, 720
6 (9th Cir. 1998); Marcia v. Sullivan, 900 F.2d 172, 174 (9th Cir. 1990). Substantial evidence
7 means "more than a mere scintilla" and "such relevant evidence as a reasonable mind might
8 accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
9 (1971); see Reddick, 157 F.3d at 720.

10 In determining whether substantial evidence supports a decision, the Court considers
11 the administrative record as a whole, weighing both the evidence that supports and the
12 evidence that detracts from the ALJ's conclusion. See Reddick, 157 F.3d at 720. "The ALJ
13 is responsible for determining credibility, resolving conflicts in medical testimony, and for
14 resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995); see
15 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). "If the evidence can reasonably
16 support either affirming or reversing the [Commissioner's] conclusion, the court may not
17 substitute its judgment for that of the [Commissioner]." Reddick, 157 F.3d at 720-21.

18 **III. THE ALJ'S FINDINGS**

19 In order to be eligible for disability or social security benefits, a claimant must
20 demonstrate an "inability to engage in any substantial gainful activity by reason of any
21 medically determinable physical or mental impairment which can be expected to result in
22 death or which has lasted or can be expected to last for a continuous period of not less than
23 12 months." 42 U.S.C. § 423(d)(1)(A). An ALJ determines a claimant's eligibility for
24 benefits by following a five-step sequential evaluation:

- 25 (1) determine whether the applicant is engaged in "substantial gainful activity";
- 26 (2) determine whether the applicant has a medically severe impairment or
27 combination of impairments;

1 (3) determine whether the applicant's impairment equals one of a number of listed
2 impairments that the Commissioner acknowledges as so severe as to preclude the
applicant from engaging in substantial gainful activity;

3 (4) if the applicant's impairment does not equal one of the listed impairments,
4 determine whether the applicant is capable of performing his or her past relevant
work;

5 (5) if the applicant is not capable of performing his or her past relevant work,
6 determine whether the applicant is able to perform other work in the national
economy in view of his age, education, and work experience.

7 See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987) (citing 20 C.F.R. §§ 404.1520,
8 416.920). At the fifth stage, the burden of proof shifts to the Commissioner to show that the
9 claimant can perform other substantial gainful work. See Penny v. Sullivan, 2 F.3d 953, 956
10 (9th Cir. 1993).

11 At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful
12 activity since January 1, 2006 – the date Plaintiff became disabled. (Tr. at 21.) At step two,
13 he found that Plaintiff had the following severe impairments from January 1, 2006 through
14 January 22, 2009: pain disorder of right leg, hypertension, posttraumatic stress disorder, and
15 history of alcohol abuse. (Tr. at 21-22.) From January 1, 2006 through January 22, 2009,
16 the ALJ found that Plaintiff's impairments met listing 1.02A of 20 C.F.R. Part 404, Subpart
17 P, Appendix 1 of the Commissioner's regulations. Thus, the ALJ found that Plaintiff was
18 disabled between January 1, 2006 through January 22, 2009. (Tr. at 22-24.)

19 Beginning January 23, 2009, however, the ALJ determined that Plaintiff did not have
20 an impairment or combination of impairments that met or medically equaled an impairment
21 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 of the Commissioner's regulations. (Tr.
22 at 24-25.) After consideration of the entire record, the ALJ found that beginning January 23,
23 2009, Plaintiff retained "the residual functional capacity to perform light work as defined in
24 20 C.F.R. 404.1567(b) and 416.967(b) specifically as follows: the claimant can lift and/or
25 carry 20 pounds occasionally and 10 pounds frequently; he can stand and/or walk for four
26 hours out of an eight-hour workday with regular breaks but not for more than one hour at a
27 time; he can sit for six hours out of an eight-hour workday with regular breaks; he can
28 occasionally bend, stoop, crouch, and kneel; he is restricted from crawling and balancing; he

1 is prohibited from climbing ladders, ropes, or scaffolds; he can occasionally climb ramps and
2 stairs; he can occasionally operate foot controls with the left foot; he should avoid
3 concentrated exposure to unprotected heights; he is limited to simple and repetitive tasks; and
4 he can have no work involving more than occasional contact with coworkers and the
5 public.”¹ (Tr. at 25-33.) The ALJ determined that Plaintiff is unable to perform past relevant
6 work, but found based on Plaintiff’s age, education, work experience, and residual functional
7 capacity there are jobs that exist in significant numbers in the national economy that Plaintiff
8 can perform. (Tr. at 33-34.) Therefore, the ALJ concluded that Plaintiff’s disability ended
9 on January 23, 2009. (Tr. at 34-35.)

10 IV. DISCUSSION

11 In his brief, Plaintiff contends that the ALJ erred by: (1) failing to properly weigh
12 medical source opinion evidence; and (2) failing to find that there were significant numbers
13 of jobs available for him. Plaintiff requests that the Court remand for determination of
14 benefits.

15 A. Medical Source Opinion Evidence

16 Plaintiff contends that the ALJ erred by failing to properly weigh medical source
17 opinion evidence. Specifically, Plaintiff argues that the ALJ erred by rejecting the opinion
18 of his treating physician, Delwyn Worthington, M.D., without giving a “legitimate” reason.
19 Plaintiff states that the “ALJ has erred in law by not giving controlling weight” to Dr.
20 Worthington’s opinion.

21 “The ALJ is responsible for resolving conflicts in the medical record.” Carmickle v.
22 Comm’r, Soc. Sec. Admin., 533 F.3d at 1164. Such conflicts may arise between a treating
23 physician’s medical opinion and other evidence in the claimant’s record. In weighing
24 medical source opinions in Social Security cases, the Ninth Circuit distinguishes among three
25 types of physicians: (1) treating physicians, who actually treat the claimant; (2) examining

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27 ¹ “Residual functional capacity” is defined as the most a claimant can do after
28 considering the effects of physical and/or mental limitations that affect the ability to perform
work-related tasks.

1 physicians, who examine but do not treat the claimant; and (3) non-examining physicians,
2 who neither treat nor examine the claimant. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
3 1995). Generally, more weight is given to a treating physician’s opinion. See id. The ALJ
4 must provide clear and convincing reasons supported by substantial evidence for rejecting
5 a treating or an examining physician’s uncontradicted opinion. See id.; Reddick, 157 F.3d
6 at 725. An ALJ may reject the controverted opinion of a treating or an examining physician
7 by providing specific and legitimate reasons that are supported by substantial evidence in the
8 record. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005); Reddick, 157 F.3d at
9 725.

10 Opinions from non-examining medical sources are entitled to less weight than treating
11 or examining physicians. See Lester, 81 F.3d at 831. Although an ALJ generally gives more
12 weight to an examining physician’s opinion than to a non-examining physician’s opinion,
13 a non-examining physician’s opinion may nonetheless constitute substantial evidence if it
14 is consistent with other independent evidence in the record. See Thomas v. Barnhart, 278
15 F.3d 947, 957 (9th Cir. 2002). When evaluating medical opinion evidence, the ALJ may
16 consider “the amount of relevant evidence that supports the opinion and the quality of the
17 explanation provided; the consistency of the medical opinion with the record as a whole;
18 [and] the specialty of the physician providing the opinion” Orn v. Astrue, 495 F.3d at
19 631.

20 Since the opinion of Dr. Worthington was contradicted by consultative and reviewing
21 doctors’ opinions, as well as, other objective medical evidence, the specific and legitimate
22 standard applies.

23 Historically, the courts have recognized the following as specific, legitimate reasons
24 for disregarding a treating or examining physician’s opinion: conflicting medical evidence;
25 the absence of regular medical treatment during the alleged period of disability; the lack of
26 medical support for doctors’ reports based substantially on a claimant’s subjective complaints
27 of pain; and medical opinions that are brief, conclusory, and inadequately supported by
28 medical evidence. See, e.g., Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005); Flaten

1 v. Secretary of Health and Human Servs., 44 F.3d 1453, 1463-64 (9th Cir. 1995); Fair v.
2 Bowen, 885 F.2d 597, 604 (9th Cir. 1989).

3 In 2003, Plaintiff severely injured his foot and ankle in an auto accident. (Tr. at 436-
4 40.) He had multiple surgeries between the accident and July 2008, when he had a mid-foot
5 fusion. (Tr. at 479-85.)

6 At an October 2008 appointment with Dr. Worthington (an orthopedist), Plaintiff
7 reported that severe pain on the plantar aspect of the right foot and most of his nerve pain
8 were gone after his July 2008 surgery, but he still could not weight bear. (Tr. at 514-16.)
9 Dr. Worthington noted that he suspected Plaintiff was not completely healed and
10 recommended an ankle-foot orthotic to allow the fusion to consolidate. (Tr. at 514-16.)

11 In November, Plaintiff continued to complain of pain to Dr. Worthington and reported
12 that he had not gotten the ordered orthotic. (Tr. at 531-43.) Dr. Worthington noted that if
13 the orthotic was unsuccessful, he would consider amputation below the knee. (Tr. at 531-
14 43.) In December 2008, Plaintiff again reported to Dr. Worthington that he had severe right
15 foot pain, but indicated he could not really use his orthotic because of irritation. (Tr. at 600-
16 15.)

17 In February 2009, Plaintiff returned to Dr. Worthington with complaints of severe
18 pain. (Tr. at 600-15.) Dr. Worthington noted that he was somewhat hypersensitive to pain
19 and indicated that it was out of proportion to the arthrosis that was present. (Tr. at 600-15.)
20 He indicated that Plaintiff may have sympathetic mediated pain disorder. (Tr. at 600-15.)
21 That same month, an electrodiagnostic study of Plaintiff's right leg and foot showed evidence
22 of severe neuropathy of the deep peroneal nerve and acute denervation of the extensor
23 digitorum brevis muscle. (Tr. at 600-15.) There was no evidence of radiculopathy,
24 peripheral neuropathy, plexopathy, myopathy, or myositis. (Tr. at 600-15.)

25 In March 2009, Dr. Worthington described the electrodiagnostic testing as
26 "interesting." (Tr. at 616-21.) He reported that Plaintiff was doing better with a brace but
27 still needed a cane to walk. (Tr. at 616-19.) Dr. Worthington also wrote a letter in which he
28 reported that Plaintiff was not pain-free and was "basically not ambulatory." (Tr. at 600-15.)

1 He reported that Plaintiff had significant nerve damage to his right foot and was considering
2 amputation. (Tr. at 600-15.) Dr. Worthington concluded, “I do not think he is employable
3 at this time.” (Tr. at 600-15.)

4 In a February 2011 appointment with Dr. Worthington, Plaintiff requested having
5 “everything documented” for an upcoming Social Security hearing. (Tr. at 436-40.) Dr.
6 Worthington noted that, while they had discussed left ankle reconstruction, Plaintiff had
7 never had that procedure. (Tr. at 436-40.) He stated that nothing had changed with respect
8 to Plaintiff’s employability, but recommended wearing a brace to improve ankle stability. (Tr.
9 at 436-40.) In June 2011, Dr. Worthington completed a “Physical Capacities Evaluation”
10 form. (Tr. at 908.) On that form he indicated that Plaintiff could not stand or walk, could
11 sit for one hour per day, and had other exertional, positional, and environmental limitations.
12 (Tr. at 908.)

13 Plaintiff was referred to pain management doctor Ramoun Jones, M.D., in May 2009.
14 (Tr. at 622-37.) At his appointment, he was ambulatory without an assistive device and
15 walked with a normal gait. (Tr. at 622-37.) Both legs were normal on inspection with
16 normal range of motion, muscle strength and tone, and stability. (Tr. at 622-37.) Dr. Jones
17 prescribed narcotic pain medication and gave Plaintiff information on a spinal cord
18 stimulator. (Tr. at 622-37.) In follow-up appointments in June, July, and August, Plaintiff
19 reported continued pain and walked with a cane. (Tr. at 656-689.)

20 In December 2009, Plaintiff told Dr. Jones that his pain was more frequent and the
21 episodes lasted longer. (Tr. at 600-15.) He used a cane, and Dr. Jones adjusted his
22 medications. (Tr. at 656-89.) Plaintiff reported to Dr. Jones in January 2010 that his pain
23 was less frequent and episodes were shorter. (Tr. at 656-89.) Dr. Jones noted a
24 moderate-severe limp, but also observed that Plaintiff walked without an assistive device.
25 (Tr. at 656-89.) Plaintiff had monthly appointments with Dr. Jones for most of 2010. (Tr.
26 at 774-808.) He was prescribed a walker in February, but only used it at a single
27 appointment that year (in May). (Tr. at 774-808.) At his appointment in June, Plaintiff used
28 no assistive device. (Tr. at 774-808.)

1 In April 2011, Dr. Jones prepared a letter in which he stated that Plaintiff was “for the
2 most part incapacitated,” including from working, driving, doing meaningful tasks, and
3 operating heavy machinery. (Tr. at 882.) He also indicated that Plaintiff would “essentially
4 not have function of his right lower extremity from this point forward.” (Tr. at 882.)
5 However, just the month before, Plaintiff presented to his appointment with Dr. Jones
6 without an assistive device. (Tr. at 897.) And, at appointments in April and May, Plaintiff
7 was able to walk with a cane. (Tr. at 887-92.)

8 In July 2009 state agency consultant James Hopkins, M.D., completed a Physical
9 Residual Functional Capacity Assessment form. (Tr. at 639-46.) He determined that
10 Plaintiff could lift and carry 10 pounds frequently and 20 pounds occasionally; stand and
11 walk for about six hours in an eight-hour workday; sit for about six hours in an eight-hour
12 workday; push and pull an unlimited amount; never climb ladders, ropes, and scaffolds; and
13 occasionally climb ramps and stairs, kneel, crouch, and crawl; and must avoid concentrated
14 exposure to extreme cold, extreme heat, vibration, environmental irritants, and hazards. (Tr.
15 at 639-46.)

16 In March 2011, Plaintiff had a consultative examination with Jeffrey Levison, M.D.
17 (Tr. at 869-72.) Dr. Levison noted, “I do believe there could be some deception with today’s
18 exam. He is nicely bronzed. He has a wonderful tan. His hands show very thick calluses
19 bilaterally, suggestive of very hard rigorous-type work with his hands.” (Tr. at 870.) Dr.
20 Levison observed that Plaintiff walked with a marked limp, relied heavily on his cane, and
21 fell several times while performing a tandem gait, which he felt was “histrionic” and “for
22 effect.” (Tr. at 870.) On examination, Plaintiff had full range of motions in all joints
23 (including his hips, knees, and ankles), full muscle strength and intact sensation in his upper
24 and lower extremities, full grip strength, and a negative straight leg raise test. (Tr. at 870.)
25 He noted that Plaintiff’s foot injury appeared stable and not limiting and questioned the
26 necessity of a cane. (Tr. at 870.) Dr. Levison also completed a statement regarding Plaintiff
27 abilities, opining that he could do the following: lift and carry up to 20 pounds continually
28 and up to 50 pounds occasionally; sit, stand, or walk for eight hours each per workday; walk

1 for up to one-quarter mile; reach, handle, finger, feel, push, pull, and stoop continuously;
2 operate foot controls frequently with his right foot and continuously with his left foot; climb
3 ramps and stairs and balance frequently; climb ladders and scaffolds, kneel, crouch, and
4 crawl occasionally; and never work around unprotected heights or moving mechanical parts.
5 (Tr. at 860-68.)

6 In addition to the evidence set forth above, the ALJ also discussed the findings of
7 impartial medical expert and board-certified orthopedic surgeon, Arthur Lorber, M.D. Dr.
8 Lorber testified that after January 22, 2009, Plaintiff experienced medical improvement as
9 the result of medical treatment and right foot surgery in July 2008. Dr. Lorber stated that
10 Plaintiff has generally recovered from his injuries, his right lower extremity pain was
11 properly treated, and Plaintiff's pain symptoms significantly lessened after the surgical
12 procedure. (Tr. at 96-117.)

13 In his evaluation of the objective medical evidence, the ALJ first addressed the
14 opinions of Drs. Hopkins and Levison. (Tr. at 31.) The ALJ found that the opinions of these
15 physicians are consistent in that they all assess Plaintiff as able to perform a range of work
16 at the light or medium exertional level with some differences in the degree of specific
17 function-by-function limitations. The ALJ determined that these opinions are reasonable and
18 supported by the record as a whole. Specifically, the ALJ stated that "these opinions are
19 consistent with the physical examination of the consultative examiner, which revealed the
20 claimant had a stable right ankle and full range of motion of the right lower extremity. ...
21 Further, these opinions are corroborated by physical examinations described above that
22 indicate the claimant had a normal gait. Lastly, these opinions are supported by the
23 consultative examiner's observation that the claimant engaged in rigorous work." The ALJ
24 clarified his consideration of these opinions stating, "[n]o single assessment has been
25 completely adopted as the residual functional capacity determined herein. I have adopted
26 those specific restrictions on a function-by-function basis that are best supported by the
27 objective evidence as a whole." (Tr. at 31.)

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1 Next, the ALJ addressed the opinion of medical expert, Dr. Lorber, giving “great
2 weight” to his assessment. (Tr. at 31.) The ALJ found that Dr. Lorber’s opinion regarding
3 Plaintiff’s functional limitations was highly credible because it was well-supported by the
4 objective medical evidence. (Tr. at 31.)

5 The ALJ then discussed Dr. Worthington’s opinion stating, “I have given little weight
6 to [his] opinions because they are brief, conclusory, and inadequately supported by clinical
7 findings. ... [His] opinions inadequately provided an explanation for [his] assessment or any
8 specific functional limitations that prevented the claimant from working. Further, [his]
9 opinions are inconsistent with the objective medical evidence as a whole ... which shows the
10 claimant had full range of motion of the right lower extremity. ... Additionally, [his] opinions
11 are in conflict with the physical examinations described above that indicate the claimant had
12 a normal gait. Lastly, [his] opinions are at odds with the consultative examiner’s observation
13 that the claimant appeared to be engaged in rigorous work. ... Accordingly, I give little
14 weight to [his] opinions because they are inconsistent with substantial evidence.” (Tr. at 31-
15 32.)

16 The Court finds that the ALJ properly weighed the medical source opinion evidence,
17 and gave specific and legitimate reasons, based on substantial evidence in the record, for
18 discounting Dr. Worthington’s opinion. The ALJ properly discredited the medical opinion
19 due to inconsistencies with Plaintiff’s treatment record and the medical evidence as a whole.
20 The ALJ also found that his opinion was vague, conclusory, and lacked supporting clinical
21 findings. See, e.g., Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9th Cir. 2009)
22 (an ALJ “need not accept the opinion of any physician, including a treating physician, if that
23 opinion is brief, conclusory, and inadequately supported by clinical findings”); Tommasetti
24 v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (finding the incongruity between doctor’s
25 questionnaire responses and her medical records provides a specific and legitimate reason
26 for rejecting the opinion); Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir. 2003) (“We hold
27 that the ALJ properly found that [the physician’s] extensive conclusions regarding [the
28 claimant’s] limitations are not supported by his own treatment notes. Nowhere do his notes

1 indicate reasons why [the physician would limit the claimant to a particular level of
2 exertion].”); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (holding that the ALJ
3 properly rejected a physician’s testimony because “it was unsupported by rationale or
4 treatment notes, and offered no objective medical findings to support the existence of [the
5 claimant’s] alleged conditions”). Therefore, the Court finds no error.

6 **B. The ALJ’s Finding Regarding the Significant Number of Jobs**

7 Plaintiff argues that the ALJ’s decision should be overturned because there is not a
8 significant number of jobs available that he could perform. Specifically, Plaintiff claims that
9 the ALJ cannot use the job of “toy stuffer” as possible employment as that job is excluded
10 under 20 C.F.R. Part 404, Subpart P, Appendix 2. In light of the fact that “toy stuffer” would
11 be excluded, Plaintiff further asserts that pursuant to Lounsbury v. Barnhart, 468 F.3d 1111
12 (9th Cir. 2006), the single job availability of “deburrer” does not satisfy the “significant
13 range” requirement.

14 In response, the Commissioner fails to respond and appears to concede Plaintiff’s
15 argument regarding the exclusion of the “toy stuffer” position pursuant to 20 C.F.R. Part 404,
16 Subpart P, Appendix 2. Instead, the Commissioner simply addresses the “deburrer” position
17 contending that 13,110 positions available nationally constitutes a significant number.

18 The burden rests on the Commissioner at the fifth step of the analysis to demonstrate
19 that the claimant is not disabled and can engage in work that exists in significant numbers
20 in the national economy. See 20 C.F.R. § 404.1520(a)(4)(v); Lockwood v. Comm’r of Soc.
21 Sec. Admin., 616 F.3d 1068, 1071 (9th Cir. 2010). “An individual shall be determined to be
22 under a disability only if his physical or mental impairments are of such severity that he is
23 not only unable to do his previous work but cannot, considering his age, education, and work
24 experience, engage in any other kind of substantial gainful work which exists in the national
25 economy” 42 U.S.C. § 423(d)(2)(A). “[W]ork which exists in the national economy’
26 means work which exists in significant numbers either in the region where such individual
27 lives or in several regions of the country.” Id. In determining whether the claimant retains
28 the ability to perform other work, the ALJ may refer to the Medical-Vocational Guidelines

1 promulgated by the SSA (or “grids”). See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00;
2 Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 576-577 (9th Cir.
3 1988).

4 The grids categorize jobs according to their exertional requirements such as sedentary
5 work, light work, or medium work. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00. The
6 grids calculate whether or not the claimant is disabled based on the claimant’s exertional
7 ability, age, education, and work experience. See id. The grids are a valid basis for denying
8 claims where they completely and accurately describe the claimant’s abilities and limitations.
9 See Tackett v. Apfel, 180 F.3d 1094, 1101-02 (9th Cir. 1999). If the claimant has only
10 exertional limitations, the claim may be resolved based only on the grids. See Lounsbury,
11 468 F.3d at 1115.

12 If the claimant has significant nonexertional limitations, the grids do not apply. See
13 Penny, 2 F.3d at 958-59. If significant nonexertional limitations prevent the claimant from
14 performing the full range of work in any exertional category, the ALJ must take the
15 testimony of a vocational expert to deny the claim. See Burkhart v. Bowen, 856 F.2d 1335,
16 1341 (9th Cir. 1988). If the claimant has both exertional and nonexertional limitations, the
17 ALJ must consult the grids first before considering the testimony of a vocational expert at
18 step five. See Lounsbury, 468 F.3d at 1115. If the grids direct a finding of disability, that
19 finding must be adopted by the Commissioner. See id. at 1116.

20 If not, the ALJ must use the grids as a framework for consideration of how much the
21 nonexertional limitations limit the range of work permitted by the exertional limitations. See
22 Tackett, 180 F.3d at 1102. A nonexertional impairment, if significant, may limit the
23 claimant’s functional capacity in ways not contemplated by the Guidelines. See id. In such
24 instances, the ALJ may not rely on the grids alone for the availability of jobs, but must obtain
25 the testimony of a vocational expert. See id.; Thomas, 278 F.3d at 960; Moore v. Apfel, 216
26 F.3d 864, 869-71 (9th Cir. 2000).

27 The ALJ may meet his burden at step five by asking a vocational expert a hypothetical
28 question based on medical assumptions supported by substantial evidence in the record and

1 reflecting all the claimant’s limitations. See Valentine v. Comm’r of Soc. Sec. Admin., 574
2 F.3d 685, 690 (9th Cir. 2009); Thomas, 278 F.3d at 956; Desrosiers, 846 F.2d at 578
3 (Pregerson, J., concurring) (“The ALJ’s depiction of the claimant’s disability must be
4 accurate, detailed, and supported by the medical record.”).

5 As indicated previously, the ALJ found that Plaintiff is unable to perform past relevant
6 work. He also found that since January 23, 2009, Plaintiff is an individual closely
7 approaching advanced age. Plaintiff was 53-years-old at the time of the June 30, 2011
8 hearing and, presumably, 53-years-old on the date of the ALJ’s September 22, 2011
9 decision.² The ALJ stated that “[b]eginning January 23, 2009, transferability of job skills is
10 not material to the determination of disability because using the Medical-Vocational Rules
11 as a framework supports a finding that the claimant is ‘not disabled,’ whether or not the
12 claimant has transferable job skills (See SSR 82-41 and 20 C.F.R. Part 404, Subpart P,
13 Appendix 2).” The ALJ further determined that “if the claimant had the residual functional
14 capacity to perform the full range of light work, a finding of “not disabled” would be directed
15 by Medical-Vocational Rule 202.14.” However, the ALJ found that Plaintiff’s ability to
16 perform all or substantially all of the requirements of light work has been impeded by
17 additional limitations. Thus, in order to determine the extent of erosion of the unskilled light
18 occupational base caused by Plaintiff’s additional limitations, the ALJ asked the vocational
19 expert whether jobs exist in the national economy for an individual with Plaintiff’s age,
20 education, work experience, and residual functional capacity.

21 The vocational expert testified that given all of these factors, Plaintiff would be able
22 to perform the requirements of (1) “toy stuffer” – a sedentary, unskilled occupation

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24
25 ² Age must factor into the ALJ’s disability determination. See 20 C.F.R. §
26 404.1563(a). In assessing a case, the relevant age is plaintiff’s age on the date of the final
27 ALJ decision. See Lockwood, 616 F.3d at 1070-71. The grids factor in age by putting a
28 person into one of “three age categories: younger person (under age 50), person closely
approaching advanced age (age 50-54), and person of advanced age (age 55 or older).” Id.
at 1071 (citing 20 C.F.R. § 404.1563(c)-(e)).

1 consisting of 3,960 positions in the regional economy and 338,920 positions in the national
2 economy, and (2) “deburrer” – a light, unskilled occupation consisting of 113 positions in
3 the regional economy and 13,110 positions in the national economy.

4 As to Plaintiff’s argument regarding the “deburrer” position, the Court first notes that,
5 even assuming the job of “toy stuffer” is excluded, Lounsbury does not apply. In
6 Lounsbury, the claimant was of advanced age (62), retained transferrable skills from her
7 previous employment, and was capable of light work. See id.; 20 C.F.R. Pt. 404, Subpt. P,
8 App. 2. The ALJ found the claimant to be capable of one occupation and concluded that she
9 was not disabled. See Lounsbury, 468 F.3d at 1113.

10 On appeal, the Ninth Circuit held that the ALJ erred by not applying Rule 202.00(c).
11 See id. at 1116; 20 C.F.R. Pt. 404, Subpt. P, App. 2. Rule 202.00(c) provides that “for
12 individuals of advanced age who can no longer perform vocationally relevant past work and
13 who have only skills that are not readily transferable to a significant range of semi-skilled
14 or skilled work that is within the individual’s functional capacity the limitations in vocational
15 adaptability represented by functional restriction to light work warrant a finding of disabled.”
16 Lounsbury, 468 F.3d at 1116; see 20 C.F.R. Pt. 404, Subpt. P, App. 2. The Court held that
17 one job does not satisfy the statute’s “significant range” requirement, and the claimant was,
18 in fact, disabled. See Lounsbury, 468 F.3d at 1116.

19 Plaintiff argues that the “significant range” requirement applies to his case. However,
20 he ignores the plain language of the rule. Rule 202.00(c) speaks only to individuals of
21 advanced age, who retain transferable skills, and are capable of light work. See 20 C.F.R.
22 Pt. 404, Subpt. P, App. 2. The rule does not apply where, as here, Plaintiff is a younger
23 person, with no finding as to transferable skills, and is capable of light work. The facts and
24 holding of Tommasetti v. Astrue, 533 F.3d 1035 (9th Cir. 2008) are instructive on this point.

25 In Tommasetti, the claimant was of advanced age, retained transferrable skills, and
26 was capable of sedentary work. See id. at 1043. The ALJ found him not disabled based on
27 his ability to perform one job. See id. On appeal, the claimant argued that the “significant
28 range” requirement applied to his case. See id. The Ninth Circuit disagreed and “rejected

1 the claimant’s attempt to graft rules applicable to the light exertion grid onto the sedentary
2 exertion grid.” Id. at 1044. Here too, the Court rejects Plaintiff’s attempt to apply rules for
3 individuals of advanced age with transferable skills to younger individuals with no finding
4 as to transferable skills.

5 Although Lounsbury does not apply to the instant case, the Court finds that the ALJ
6 failed to identify a significant number of “light work” jobs available in the national economy
7 that can be performed by Plaintiff. While one job within a relevant category can be
8 sufficient, as long as the one occupation still has a significant number of positions that exist
9 in the national economy, see Udell v. Colvin, 2013 WL 4046465, at *7 (S.D. Cal. Aug. 8,
10 2013); see, e.g., Tommasetti, 533 F.3d at 1044, the Ninth Circuit has “never set out a
11 bright-line rule for what constitutes a ‘significant number’ of jobs,” but instead finds a
12 “comparison to other cases instructive.” Beltran v. Astrue, 700 F.3d 386, 389 (9th Cir. 2012).

13 In Beltran, the court determined that 135 regional jobs and 1,680 national jobs were
14 not a significant number of jobs. See id. at 389-90. In making that determination, the Ninth
15 Circuit considered cases that addressed what constitutes a significant number of jobs. See
16 id. at 389 (citing Barker v. Sec’y of Health & Human Servs., 882 F.2d 1474, 1479 (9th Cir.
17 1989) (1,266 jobs regional jobs significant); Martinez v. Heckler, 807 F.2d 771, 775 (9th Cir.
18 1987) (amended) (3,750 to 4,250 regional jobs significant); Thomas, 278 F.3d at 960 (1,300
19 jobs in the Oregon region and 622,000 in the national economy significant); Johnson v.
20 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995) (30,000 regional jobs significant); Moncada v.
21 Chater, 60 F.3d 521, 524 (9th Cir. 1995) (2,300 regional jobs and 64,000 nationwide jobs
22 significant)).

23 Additionally, Ninth Circuit cases have found 64,000 jobs nationwide to be significant,
24 Moncada, 60 F.3d at 524, as well as larger numbers. See Thomas, 278 F.3d at 960 (622,000
25 jobs in the national economy significant); Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000)
26 (7,700 regional and 125,000 national jobs significant). Further, district courts considering
27 the Ninth Circuit findings have determined that smaller numbers of jobs are not significant.
28 See Coletta v. Massanari, 163 F.Supp.2d 1101, 1106 (N.D. Cal. 2001) (363 jobs in the state

1 economy and 4,752 positions in the national economy not significant); Valencia v. Astrue,
2 No. C 11-06223 LB, 2013 WL 1209353, at *18 (N.D. Cal. Mar. 25, 2013) (114 regional jobs
3 and 14,082 national jobs not significant).

4 Here, the 113 positions in the regional economy is substantially less than the number
5 of regional jobs set forth in the cases that the Ninth Circuit has found to be significant
6 (ranging, as noted above, from 1,266 to 30,000 regional jobs). Further, the 13,110 positions
7 in the national economy is closer to the number of jobs found to be not significant (14,082
8 national jobs identified in Valencia, 2013 WL 1209353, at *18) than significant (64,000
9 national jobs identified by the Ninth Circuit in Moncada, 60 F.3d at 524). Accordingly, the
10 Court finds that the number of jobs available for the “deburrer” position is not significant.

11 The Court notes that the ALJ undoubtedly based his decision regarding significant
12 numbers, in part, by considering the number of jobs for both the “deburrer” position and the
13 “toy stuffer” position. As stated above, however, Plaintiff argues, and the Commissioner
14 appears to concede, that the ALJ cannot use the job of “toy stuffer” as possible employment
15 for Plaintiff as that job is excluded under 20 C.F.R. Part 404, Subpart P, Appendix 2.

16 In this case, the ALJ concluded that Plaintiff has the residual functional capacity to
17 perform light work, but stated that Plaintiff’s ability to perform all or substantially all of the
18 requirements of light work has been impeded by additional limitations. As such, the level
19 dictated by the ALJ’s residual functional capacity assessment presumably falls somewhere
20 between light and sedentary. If a plaintiff’s exertional level falls between two rules which
21 direct opposite conclusions under the grids, i.e., “not disabled” at the higher exertional level
22 and “disabled” at the lower exertional level, the ALJ “is required to call a vocational expert
23 and hear testimony as to whether the claimant can perform enough light jobs in the national
24 economy to warrant a finding of ‘not disabled.’” Desrosiers, 846 F.2d at 579-80.

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1 If a claimant is closely approaching advanced age, has no transferable skills,³ and is
2 limited to sedentary work, the ALJ must find that claimant disabled based on the sedentary
3 grid. However, if a claimant with the same characteristics is able to perform light work, the
4 Medical-Vocational Guidelines direct a conclusion of not disabled. See 20 C.F.R. Pt. 404,
5 Subpt. P, App. 2, § 202.14 (directing a finding of “not disabled” for claimant who is closely
6 approaching advanced age, who has no transferable skills, and who is functionally capable
7 of performing light work); 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(g) (directing a
8 finding of “disabled” for claimant who is closely approaching advanced age, who has no
9 transferable skills, and who is functionally limited to sedentary work).

10 In Distasio v. Shalala, 47 F.3d 348 (9th Cir. 1995), “[t]he ALJ found that [the plaintiff]
11 was capable of light work, but with limitations.” Id. at 349. “The vocational expert testified
12 that [the plaintiff] could only perform what she believed were sedentary jobs [and] [t]he
13 [ALJ] accepted the testimony of the vocational expert without qualification.” Id. Because
14 “[t]he [ALJ] failed to account for the discrepancy between a finding that [the plaintiff] could
15 perform light work and was therefore not disabled, [and] the [vocational expert’s] testimony
16 establishing that, at best, [the plaintiff] could perform jobs that fell within the sedentary
17 category,” the Ninth Circuit reversed and remanded for an award of benefits. Id. at 350. The
18 case at issue resembles Distasio.

19 In particular, the ALJ here also found Plaintiff capable of light work with limitations,
20 and accepted the vocational expert’s testimony regarding the availability of the sedentary
21 “toy stuffer” position and the light “deburrer” position without qualification. However, the
22 Court has found that the ALJ failed to identify a significant number of “light work” jobs
23 available in the national economy that can be performed by Plaintiff.

24 Thus, in order to find that Plaintiff is not disabled at the fifth step of the sequential
25 evaluation process, the ALJ had to provide evidence that light jobs exist in significant
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27 ³ The ALJ did not reach “transferability of job skills,” as he concluded it was “not
28 material.” If necessary on remand, the ALJ should address whether plaintiff has transferable
skills.

1 numbers in the national economy that he can perform, given the residual functional capacity
2 assessment made by the ALJ. See 20 C.F.R. § 404.1560(c)(2). The Court cannot confidently
3 conclude that the ALJ’s step five determination is supported by substantial evidence, and this
4 issue could have a decisive effect on Plaintiff’s disability determination. If Plaintiff is found
5 capable only of sedentary work, the grids may mandate a finding of “disabled.” See 20
6 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(g)

7 “R]emand for further proceedings is appropriate where there are outstanding issues
8 that must be resolved before a determination can be made, and it is not clear from the record
9 that the ALJ would be required to find claimant disabled if all the evidence were properly
10 evaluated.” Hill v. Astrue, 698 F.3d 1153, 1162 (9th Cir. 2012) (citing Vasquez v. Astrue,
11 572 F.3d 586, 593 (9th Cir. 2009)). “[T]he proper course, except in rare circumstances, is
12 remand to the agency for additional investigation or explanation.” INS v. Ventura, 537 U.S.
13 12, 16 (2002) (per curiam). The Ninth Circuit has held that when “additional proceedings
14 can remedy defects in the original administrative proceeding, a social security case should
15 be remanded.” Marcia v.. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990) (remanding “to the
16 Secretary for proper consideration of step three equivalence”). In this case, remand is
17 appropriate for renewed consideration at Step Five as to whether there are a significant
18 number of jobs in the national economy that can be performed by Plaintiff.

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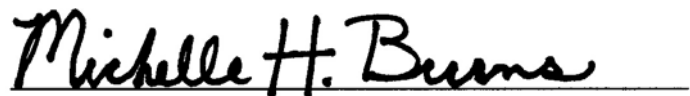
V. CONCLUSION

For the reasons discussed in this Order, the Commissioner’s decision is reversed and this matter is remanded for further administrative proceedings.

Accordingly,

IT IS ORDERED that the Commissioner’s decision is **REVERSED** and this matter is **REMANDED** for further proceedings as set forth in this Order. The Clerk of the Court is **DIRECTED** to enter judgment accordingly.

DATED this 17th day of September, 2014.



Michelle H. Burns
United States Magistrate Judge