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NOT FOR PUBLICATION

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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

8

9 John Joseph Sahlberg,

No. CV-15-01815-PHX-JJT

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Plaintiff,

**ORDER**

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v.

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Commissioner of Social Security  
Administration,

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Defendant.

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At issue is the denial of Plaintiff John Joseph Sahlberg's Application for Disability Insurance Benefits by the Social Security Administration ("SSA") under the Social Security Act ("the Act"). Plaintiff filed a Complaint (Doc. 1) with this Court seeking judicial review of that denial, and the Court now addresses Plaintiff's Opening Brief (Doc. 15, "Pl.'s Br."), Defendant Social Security Administration Commissioner's Opposition (Doc. 19, "Def.'s Br."), and Plaintiff's Reply (Doc. 20, "Reply"). The Court has reviewed the briefs and Administrative Record (Doc. 11, R.) and now reverses the Administrative Law Judge's decision (R. at 23-42) as upheld by the Appeals Council (R. at 1-7).

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**I. BACKGROUND**

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Plaintiff filed an application for Disability Insurance on June 30, 2011, for a period beginning May 8, 2008. (R. at 177-78.) Plaintiff's claims were denied initially on November 8, 2011 (R. at 59-73), and on reconsideration on May 8, 2012 (R. at 76-94). Plaintiff then testified at a hearing held before an Administrative Law Judge ("ALJ") on

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1 March 20, 2014. (R. at 43-58.) On April 4, 2014, the ALJ denied Plaintiff’s claims. (R. at  
2 23-42.) On July 14, 2015, the Appeals Council upheld the ALJ’s decision. (R. at 1-7.)  
3 The present appeal followed.

4 The Court has reviewed the voluminous medical evidence in its entirety and finds  
5 it unnecessary to provide a complete summary here. The pertinent medical evidence will  
6 be discussed in addressing the issues raised by the parties. In short, upon considering  
7 medical records and opinions from Dr. Anup Rai, Dr. Girolamo Arpino, Dr. Jose  
8 Pierrend, Dr. Hadi Najatian, Dr. Savitha Kayla, non-examining state agency reviewers  
9 Dr. Elliott Goytia and Dr. Maritja Orenstein, and state agency consulting examiner  
10 Dr. Brian Biggs, the ALJ found that Plaintiff has severe impairments that include chronic  
11 kidney disease with a history of kidney stones, obesity, osteoarthritis of the hips, history  
12 of diverticulitis, and obstructive sleep apnea. (R. at 28.)

13 **II. ANALYSIS**

14 In determining whether to reverse an ALJ’s decision, the district court reviews  
15 only those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236  
16 F.3d 503, 517 n.13 (9th Cir. 2001). The court may set aside the Commissioner’s  
17 disability determination only if the determination is not supported by substantial evidence  
18 or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial  
19 evidence is more than a scintilla, but less than a preponderance; it is relevant evidence  
20 that a reasonable person might accept as adequate to support a conclusion considering the  
21 record as a whole. *Id.* To determine whether substantial evidence supports a decision, the  
22 court must consider the record as a whole and may not affirm simply by isolating a  
23 “specific quantum of supporting evidence.” *Id.* As a general rule, “[w]here the evidence  
24 is susceptible to more than one rational interpretation, one of which supports the ALJ’s  
25 decision, the ALJ’s conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954  
26 (9th Cir. 2002) (citations omitted).

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

1 proof on the first four steps, but the burden shifts to the Commissioner at step five.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ  
3 determines whether the claimant is presently engaging in substantial gainful activity.  
4 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.*  
5 At step two, the ALJ determines whether the claimant has a “severe” medically  
6 determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the  
7 claimant is not disabled and the inquiry ends. *Id.* At step three, the ALJ considers whether  
8 the claimant’s impairment or combination of impairments meets or medically equals an  
9 impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R.  
10 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If not,  
11 the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant’s residual  
12 functional capacity (“RFC”) and determines whether the claimant is still capable of  
13 performing past relevant work. 20 C.F.R. § 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 in the national  
16 economy based on the claimant’s RFC, age, education, and work experience. 20 C.F.R.  
17 § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is disabled.  
18 *Id.*

19 Plaintiff alleges two primary ALJ errors: (1) improperly rejecting the medical  
20 assessment of a treating physician, Dr. Arpino, and (2) improperly rejecting Plaintiff’s  
21 symptom testimony without clear and convincing reasons. (Pl.’s Br. at 1.)

22 **A. The ALJ Erred in Rejecting Dr. Arpino’s Opinions**

23 Plaintiff alleges that each of the five reasons the ALJ provided for rejecting  
24 Dr. Arpino’s opinion were insufficient. (Pl.’s Br. at 13.) Specifically, Plaintiff alleges that  
25 the ALJ’s reasons were conclusory, cherry-picked—rather than holistic—  
26 mischaracterized the relevant evidence, or were otherwise legally improper or illogical.  
27 (Pl.’s Br. at 13-18.) In response, Defendant either conclusorily states that the ALJ’s  
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1 reasoning is sufficient or reiterates much of the limited reasoning the ALJ provided.  
2 (Def.'s Br. at 9-10.) For various reasons, the Court agrees with Plaintiff.

3 An ALJ "may only reject a treating or examining physician's uncontradicted  
4 medical opinion based on clear and convincing reasons." *Carmickle v. Comm'r of Soc.*  
5 *Sec.*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citation and quotation omitted). "Where such  
6 an opinion is contradicted, however, it may be rejected for specific and legitimate reasons  
7 that are supported by substantial evidence in the record." *Id.* Even when contradicted, a  
8 treating physician's opinion is still owed deference and may be "entitled to the greatest  
9 weight . . . even if it does not meet the test for controlling weight." *Garrison v. Colvin*,  
10 759 F.3d 995, 1012 (9th Cir. 2014) (quoting *Orn*, 495 F.3d at 633).

11 Although the parties devote substantial portions of their filings to the applicable  
12 standard, it is clear that Dr. Arpino's assessment was at least partially contradicted by  
13 state agency doctors. (*See R.* at 789-93.) Accordingly, the ALJ must provide specific and  
14 legitimate reasons for rejecting Dr. Arpino's assessment and support those reasons with  
15 substantial evidence in the record. *See Carmickle*, 533 F.3d 1164.

16 While the ALJ stated that Dr. Arpino's opinion was not supported by his own  
17 clinical findings or other objective evidence, he did not cite to any portion of the record  
18 or illustrate any inconsistencies therein. (*R.* at 34); *Montoya v. Colvin*, 649 F. App'x 429,  
19 430 (9th Cir. 2016) (noting that ALJ did not provide any examples or cite any part of the  
20 record to support assertion that opinion was not substantiated by clinical findings but was  
21 required to provide a thorough summary of conflicting facts and clinical evidence);  
22 *Binford v. Colvin*, 113 F. Supp. 3d 1067 (W.D. Wash. 2015) (finding the ALJ failed to  
23 provide specific and legitimate reasoning for its conclusion by stating that the provider's  
24 opinions were inconsistent with the medical evidence and providing little to no further  
25 detail). While the ALJ noted that Dr. Arpino did not "explain what objective evidence he  
26 relied on in reaching the specific conclusion that the Plaintiff needs to lie down during  
27 the work day," the lack of evidence is generally not evidence itself. Moreover, the  
28 primary purpose of medical records is not to document a disability, and a physician,

1 unlike an ALJ, is not required to provide specific citation for each opinion, particularly  
2 those supported by the record as a whole. *See Orn*, 495 F.3d at 634 (“The primary  
3 function of medical records is to promote communication and recordkeeping for health  
4 care personnel—not to provide evidence for disability determinations. We therefore do  
5 not require that a medical condition be mentioned in every report to conclude that a  
6 physician’s opinion is supported by the record.”). Even when the ALJ provided  
7 specificity—only citing to two instances wherein the record contradicted Dr. Arpino’s  
8 assessment—he only found that the cited instances belied Dr. Arpino’s assessment of  
9 pain precipitated by movement/overuse that would interfere with attention and  
10 concentration, not Dr. Arpino’s entire assessment. (R. at 34.) The ALJ’s limited  
11 references to the medical record and conclusory statements are insufficient to reject  
12 Dr. Arpino’s opinion, giving it lesser weight. While unclear if Plaintiff alleges further  
13 mistake by the ALJ regarding Dr. Arpino’s opinion, the Court only finds error as set forth  
14 above.

15 **B. The ALJ Erred in Rejecting Plaintiff’s Symptom Testimony**

16 Plaintiff argues that the ALJ erred by failing to provide clear and convincing  
17 reasons for rejecting portions of Plaintiff’s symptom testimony. (Pl.’s Br. at 18-22.)  
18 Defendant argues that the ALJ’s finding that Plaintiff was not entirely credible was  
19 supported by the evidence, primarily due to Plaintiff’s work and travel history, internal  
20 inconsistencies, and lack of medical support. (Def.’s Br. at 4-7.) Again, the Court agrees  
21 with Plaintiff.

22 “[U]nless an ALJ makes a finding of malingering based on affirmative evidence  
23 thereof, he or she may only find an applicant not credible by making specific findings as  
24 to credibility and stating clear and convincing reasons for each.” *Robbins v. Soc. Sec.*  
25 *Admin.*, 466 F.3d 880, 883 (9th Cir. 2006). “The clear and convincing standard is the  
26 most demanding required in Social Security cases.” *Moore v. Comm’r of Soc. Sec.*  
27 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002). When evaluating a claimant’s pain testimony  
28 where the claimant has produced objective medical evidence of an underlying

1 impairment, “an ALJ may not reject a claimant’s subjective complaints based solely on a  
2 lack of medical evidence to fully corroborate the alleged severity of pain.” *Burch v.*  
3 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). “General findings are insufficient; rather,  
4 the ALJ must identify what testimony is not credible and what evidence undermines the  
5 claimant’s complaints.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
6 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)).

7 At the outset, the Court must address the most glaring insufficiency that the ALJ  
8 provided in rejecting Plaintiff’s symptom testimony—that Plaintiff continued to work  
9 until August 2009, long after his May 8, 2008 alleged onset date. (R. at 31.) The ALJ  
10 provided no citation to the record in support of this statement and Plaintiff affirmatively  
11 alleges—and provides evidence—that it is inaccurate. (Pl.’s Br. at 19; Reply at 7.)  
12 Plaintiff testified that he stopped working as a medical assistant in May 2008, which  
13 coincides with his alleged onset date. (R. at 47.) Indeed, Plaintiff had no earnings in  
14 2009. (R. at 182.) While the ALJ contradictorily acknowledged that Plaintiff was not  
15 substantially gainfully employed during the alleged disability period, the ALJ’s reliance  
16 and citation to an incorrect employment date, alone, warrants remand for a correct  
17 determination of disability based on Plaintiff’s actual employment history. Curiously,  
18 Defendant fails to respond to this mistake in its Response. (*See* Def.’s Resp. at 4-5.)  
19 Instead, Defendant simply states that Plaintiff “continued to work as a medical assistant  
20 in August 2009,” without at all addressing the discrepancy. (Def.’s Resp. at 4.)  
21 Accordingly, Plaintiff’s incorrect employment history cannot serve as a reason to  
22 discredit Plaintiff’s symptom testimony under any standard.

23 The ALJ also failed to provide citation to the record or any specific reasoning in  
24 rejecting Plaintiff’s symptom testimony. (*See* R. at 30 (“the claimant’s statements  
25 concerning the intensity, persistence and limiting effects of these symptoms are not  
26 entirely credible for the reasons explained in this decision” without providing those  
27 explanations).) Although the ALJ does address Plaintiff’s limited work activity and  
28 ability to travel (R. at 31), neither provide clear and convincing reasons for rejecting

1 Plaintiff's testimony. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("The  
2 Social Security Act does not require that claimants be utterly incapacitated to be eligible  
3 for benefits . . . and many home activities are not easily transferable to what may be the  
4 more grueling environment of the workplace, where it might be impossible to  
5 periodically rest or take medication."). Plaintiff's sporadic work, which the ALJ admitted  
6 was "well below" substantial gainful activity (R. at 31), does not suggest the ability to  
7 perform substantial gainful activity, nor is it at odds with any of Plaintiff's symptom  
8 testimony. Intermittent cleaning of a church bathroom once a week or occasional random  
9 handyman assignments do not belie any of Plaintiff's testimony and the ALJ fails to  
10 explain the conflict. *See Lester*, 81 F.3d at 833 ("even the sporadic ability to work [is] not  
11 inconsistent with disability") Nor did the ALJ explain how Plaintiff's daily activities—  
12 cooking or shopping for two hours, or a singular trip to Illinois during the disability  
13 period—contradicts Plaintiff's alleged symptoms. Although Defendant argues that these  
14 activities are at odds with the testimony that Plaintiff could not stand or walk for more  
15 than short periods of time, it is unclear if or how those activities would require activity in  
16 contravention of either stated limitation. (Def.'s Br. at 6; R. at 31, 52-54, 225-26.) The  
17 ALJ equally fails to provide medical evidence that would serve to discount Plaintiff's  
18 testimony. While the ALJ summarized portions of the medical records that were alleged  
19 to contradict Plaintiff's testimony, several of those portions support Plaintiff's claims.  
20 Elsewhere, the ALJ has discounted that very same treatment. Simultaneous reliance on  
21 and rejection of certain evidence can result in circular analysis impossible for any  
22 claimant to meet. *Binford*, 113 F. Supp. 3d at 1075. Thus, Plaintiff's employment history,  
23 travel, reported daily activities, and medical treatment do not provide clear and  
24 convincing evidence for discounting his symptom testimony.

25 Finally, the ALJ also seemingly rejected Plaintiff's testimony because he "came to  
26 the hearing wearing supplemental oxygen," for which there is no medical  
27 recommendation. (R. at 31.) Once again, Plaintiff alleges—and provides evidence—that  
28 the statement is inaccurate. (Pl.'s Br. at 21.) Plaintiff testified that the device was a "med

1 back pump” used in response to complications from surgery. (R. at 51-52.) In his brief,  
2 Plaintiff asserts that the device was used in conjunction with in-home care with a special  
3 ostomy nurse post-surgery, which is also reflected in the medical record. (Pl.’s Br. at 21  
4 (citing R. at 932).) Any discrediting of Plaintiff or Plaintiff’s testimony based on this  
5 erroneous observation is also error.

6 The ALJ’s finding that Plaintiff’s symptoms testimony conflicted with the medical  
7 evidence and work history is unsupported by specific, clear, and convincing reasons.  
8 Instead, the ALJ mischaracterized the record in describing Plaintiff’s employment  
9 history, medical records, daily activities, and testimony. Each cited instance, as is evident  
10 from the record, does not conflict with Plaintiff’s testimony, and thus does not provide a  
11 basis for discounting Plaintiff’s symptom testimony.

12 **C. The Credit-As-True Rule Does Not Apply**

13 Plaintiff asks that the Court apply the “credit-as-true” rule which would result in  
14 remand of Plaintiff’s case for payment of benefits rather than remand for further  
15 proceedings. (Pl.’s Br. at 22.) The credit-as-true rule only applies in cases that raise “rare  
16 circumstances” which permit the Court to depart from the ordinary remand rule under  
17 which the case is remanded for additional investigation or explanation. *Treichler v.*  
18 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099–1102 (9th Cir. 2014). These rare  
19 circumstances arise when three elements are present. First, the ALJ fails to provide  
20 legally sufficient reasons for rejecting medical evidence. *Id.* at 1100. Second, the record  
21 must be fully developed, there must be no outstanding issues that must be resolved before  
22 a determination of disability can be made, and further administrative proceedings would  
23 not be useful. *Id.* at 1101. Further proceedings are considered useful when there are  
24 conflicts and ambiguities that must be resolved. *Id.* Third, if the above elements are met,  
25 the Court may “find[] the relevant testimony credible as a matter of law . . . and then  
26 determine whether the record, taken as a whole, leaves ‘not the slightest uncertainty as to  
27 the outcome of [the] proceeding.’” *Id.* (citations omitted).

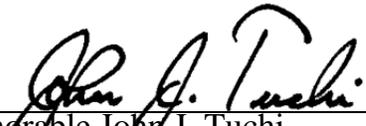
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1 Here, the ordinary remand rule applies. Plaintiff's claims involve evidentiary  
2 conflicts that must be resolved, particularly in light of this Court's determination that the  
3 ALJ erred in rejecting Plaintiff's symptom testimony and assigning little weight to the  
4 treating physician's opinion. Given these outstanding issues, it is evident that there is still  
5 uncertainty as to the outcome of the proceeding and the ALJ must re-determine Plaintiff's  
6 status based on, *inter alia*, Plaintiff's accurate employment and medical history and  
7 giving proper weight (or sufficient citation to the contrary) to Plaintiff's treating  
8 physician's opinion. Accordingly, the ordinary remand rule, not the credit-as-true rule,  
9 applies.

10 **IT IS THEREFORE ORDERED** reversing the April 4, 2014, decision of the  
11 Administrative Law Judge, (R. at 23-42), and remanding this matter for further  
12 proceedings consistent with this Order.

13 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment  
14 accordingly and close this matter.

15 Dated this 27<sup>th</sup> day of March, 2017.

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19 Honorable John J. Tuchi  
20 United States District Judge  
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