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

Jon Brian McConnell,
Plaintiff,
v.
Commissioner of Social Security,
Defendant.

No. CV-15-02386-PHX-BSB

ORDER

Pro se Plaintiff Jon Brian McConnell seeks judicial review of the final decision of the Commissioner of Social Security (the Commissioner) denying his application for benefits under the Social Security Act (the Act). The parties have consented to proceed before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and have filed briefs in accordance with Local Rule of Civil Procedure 16.1. For the following reasons, the Court reverses the Commissioner’s decision and remands for a determination of benefits.

I. Procedural Background

On July 25, 2012, Plaintiff filed an application for a period of disability and disability insurance benefits under Title II of the Act. (Tr. 13.)¹ Plaintiff alleged disability beginning October 14, 2007. (*Id.*) After the Social Security Administration (SSA) denied Plaintiff’s initial application and his request for reconsideration, he requested a hearing before an administrative law judge (ALJ). (*Id.*) During the hearing,

¹ Citations to Tr. are to the certified administrative transcript of record. (Doc 10.)

1 Plaintiff amended the alleged disability onset date to March 2011. (Tr. 33-34.) After
2 conducting a hearing, the ALJ issued a decision finding Plaintiff not disabled under the
3 Act. (Tr. 13-25.) This decision became the final decision of the Commissioner when the
4 Social Security Administration Appeals Council denied Plaintiff's request for review.
5 (Tr. 1-6; *see* 20 C.F.R. § 404.981 (explaining the effect of a disposition by the Appeals
6 Council).) Plaintiff now seeks judicial review of this decision pursuant to
7 42 U.S.C. § 405(g).

8 **II. Administrative Record**

9 The record before the Court establishes the following history of diagnoses and
10 treatment related to Plaintiff's alleged impairments. The record also includes opinions
11 from Plaintiff's treating physician and state agency physicians who reviewed the records
12 related to his impairments, but who did not examine Plaintiff or provide treatment.

13 **A. Treatment History**

14 The parties do not discuss Plaintiff's treatment history in detail. (Docs. 11, 12.)
15 Rather, they rely on the ALJ's discussion of Plaintiff's treatment history. The record
16 reflects that Plaintiff received ongoing treatment for chronic back pain before and after he
17 had back surgery in 2006. (Tr. 227-36; Tr. 363, Tr. 382-401, Tr. 404-43, Tr. 452-70.)
18 Plaintiff had lumbar fusion surgery at L3-4 and L4-5 on January 6, 2006. (Tr. 454.)
19 Plaintiff reported that surgery helped his pain until 2010, when his symptoms began to
20 recur. (Tr. 458.) Plaintiff also had chiropractic treatment, physical therapy, and epidural
21 injections. (Tr. 382, 387, 392-401, 454.) Plaintiff saw Kenneth Fisher, M.D. regularly
22 for his chronic back pain. (Tr. 404-43, 534-46, 606-14.)

23 Plaintiff was treated for depression at West Valley Behavioral Health. (Tr. 475-
24 94) Plaintiff was assessed with depression and assessed a Global Assessment of
25 Functioning (GAF) score of 54. (Tr. 479, 567.) An April 4, 2013 treatment note states
26 that Plaintiff was angry with the world and felt hopeless and frustrated. (Tr. 561.)

1 **B. Opinion Evidence**

2 **1. Dr. Fisher’s Opinions**

3 **a. March 4, 2013 Opinion**

4 On March 4, 2013, Dr. Fisher completed a medical source statement. (Tr. 562-
5 65.) He stated that he had been Plaintiff’s primary care physician since December 18,
6 2002, and had treated Plaintiff for back issues and other primary care needs. He
7 identified Plaintiff’s diagnoses as “failed back syndrome with associated fatigue, sleep
8 disturbance, and depression of a chronic nature.” (Tr. 563.) Dr. Fisher stated that
9 Plaintiff had pain in his lumbar, sacral, and thoracic spine. (Tr. 562.) He also stated that
10 Plaintiff was always in pain and that “simple activities” exacerbated his pain. (*Id.*)
11 Dr. Fisher opined that Plaintiff’s condition had declined over the past two years and that
12 he was unable to perform gainful work due to chronic back pain. (*Id.*)

13 Dr. Fisher further opined that Plaintiff could not stand continuously for six hours.
14 (Tr. 563.) If Plaintiff were stationary, pain would set in within about ten to fifteen
15 minutes of standing. (*Id.*) Plaintiff’s pain would persist, but be more tolerable with mild
16 activity and he could tolerate up to an hour of standing under those conditions. (*Id.*)
17 Dr. Fisher opined that Plaintiff could sit for one to two hours “until his pain level
18 [reached] a 9 or 10 on a scale of 1 to 10.” (Tr. 564.) He opined that changing positions
19 from sitting to standing seemed to help, but Plaintiff could not endure sitting or standing
20 for the length of time required for “adequate job performance.” (*Id.*)

21 Dr. Fisher opined that Plaintiff had to lie down during the day. (*Id.*) He also
22 opined that some days Plaintiff could walk several blocks, and other days he could not
23 walk at all depending on his level of pain and fatigue. Dr. Fisher opined that Plaintiff
24 could frequently lift ten to twenty pounds and could frequently carry eleven to twenty
25 pounds. (*Id.*) Dr. Fisher found that Plaintiff was unable to push or pull “anything that
26 has resistance.” (*Id.*) He found Plaintiff “severely limited” in his abilities to bend, squat,
27 kneel, and to perform “torsional movements of his body.” (*Id.*) Dr. Fisher stated that
28 Plaintiff “was constantly observed getting up, sitting down, and moving in a deliberate

1 and paced manner that is consistent with chronic back pain.” (Tr. 565.) Dr. Fisher
2 concluded that Plaintiff could not return to his past job because it required seventy miles
3 of travel each way and Plaintiff could not safely drive or travel as a passenger that
4 distance without requiring a period of rest such as lying down or napping. (*Id.*) He also
5 explained that Plaintiff would have trouble sitting or standing more than thirty minutes to
6 an hour before having to change positions. (*Id.*) Dr. Fisher did not expect Plaintiff’s
7 condition to change. (*Id.*)

8 **b. April 4, 2013 Opinion**

9 On April 4, 2013, Dr. Fisher completed a Medical Source Statement of Ability to
10 do Work-Related Activities (Physical). (Tr. 530-32.) He identified Plaintiff’s diagnoses
11 as chronic lumbago, sciatica, and spondylosis. (Tr. 530.) Dr. Fisher opined that Plaintiff
12 could occasionally and frequently lift or carry ten pounds. (*Id.*) He opined that because
13 of his chronic back pain and sciatica, Plaintiff could stand or walk less than two hours in
14 an eight hour even if the “activity may be intermittent throughout the day.” (Tr. 531.)
15 Dr. Fisher opined that Plaintiff could sit for less than six hours in an eight hour day and
16 specified that Plaintiff could sit for thirty minutes during that time period. (*Id.*) He stated
17 that Plaintiff was unable to sit and unable to drive “due to pain that is immediate and that
18 increases with duration.” (*Id.*) Dr. Fisher further found that Plaintiff could occasionally
19 balance, stoop, kneel, crouch, crawl, and climb ramps, stairs, ladders, ropes and scaffolds.
20 (Tr. 532.) He found that Plaintiff could occasionally reach, handle, finger, and feel. (*Id.*)
21 Dr. Fisher opined that Plaintiff should avoid working around excessive noise. (*Id.*)

22 **c. February 11, 2014 Opinion**

23 On February 11, 2014, Dr. Fisher completed a Treating Physician’s Statement.
24 (Tr. 599.) He stated the he continued to treat Plaintiff and opined that his limitations
25 were “essentially the same as in March/April 2013 when [he] previously provided
26 functional information” about Plaintiff. (*Id.*) He opined that Plaintiff needed to lie down
27 periodically throughout the day to relieve his pain, Plaintiff’s symptoms would likely
28 increase in a sustained working environment for eight hours a day, and Plaintiff’s

1 impairments would produce better days and worse days. (Tr. 599.) Dr. Fisher estimated
2 that Plaintiff would be absent, tardy, or need to leave work early more than three times a
3 month. (*Id.*) He indicated that Plaintiff's condition had declined over the past two years
4 and stated that Plaintiff had been unable to sustain work since 2011, "definitely since his
5 reinjury [of his back] in 2012." (*Id.*)

6 **2. D. Rowse, M.D., and Ernest Griffith, M.D.**

7 On December 8, 2012, state agency physician Dr. Rowse reviewed the record and
8 completed a medical source statement. (Tr. 91-96.) Dr. Rowse opined that Plaintiff
9 could occasionally lift or carry twenty pounds, frequently lift or carry ten pounds, stand
10 or walk (with normal breaks) for six hours in an eight hour day, and sit (with normal
11 breaks) for a total of six hours. (Tr. 93.) She opined that Plaintiff's need to alternate
12 sitting and standing could be accommodated by a brief stretch break every hour. (Tr. 93-
13 94.) On May 28, 2013, Ernest Griffith, M.D., reviewed the record and concurred in
14 Dr. Rowse's assessment. (Tr. 105.)

15 **3. Nicole Lazowitz, Psy.D**

16 On May 23, 2013, Dr. Lazowitz reviewed the record and completed a medical
17 source statement. (Tr. 105-17.) Dr. Lazowitz opined that Plaintiff could carry out
18 simple instructions, follow simple work-like procedures, and make simple work-like
19 decisions. (Tr. 115.) She opined that Plaintiff had a fair ability to sustain attention up to
20 two hours at a time, and a fair ability to perform at a consistent pace if he were engaged
21 in a simple, repetitive task. (*Id.*) She opined that Plaintiff had an adequate ability to
22 maintain a regular work schedule and a fair ability to respond to basic work setting
23 changes. (*Id.*) Plaintiff also had a fair to good ability to organize himself independently
24 and set goals. (*Id.*)

25 **4. James Tuggle, M.D.**

26 On February 6, 2014, Dr. Tuggle wrote a letter on Plaintiff's behalf. (Tr. 644.)
27 He stated that he was treating Plaintiff at Desert Sierra Medical. He stated that a sleep
28 study indicated that Plaintiff had sleep apnea and low oxygen saturation throughout the

1 night. (*Id.*) He opined that these issues could exacerbate Plaintiff's pain. (*Id.*) He did
2 not assess Plaintiff's functional abilities. (*Id.*)

3 **III. Administrative Hearing Testimony**

4 Plaintiff was in his early fifties at the time of his amended alleged disability onset
5 date and on the date his insurance coverage expired. (Tr. 15, 197.) He had a high school
6 education and had attended but not completed college. (Tr. 38.) He had past relevant
7 work as a sales person. (Tr. 15-25.)

8 Plaintiff testified at the administrative hearing that he stopped working in 2007
9 due to low and mid back pain. (Tr. 42) Plaintiff had spinal fusion in 2006 that had
10 helped his pain for a period of time. (Tr. 43-44.) However, his job at that time required
11 a long commute and he was having increased back pain. (Tr. 45, 51, 61.) In 2011,
12 Plaintiff's back went out when he was doing "core strengthening." (Tr. 45.) Plaintiff
13 testified that he tried various treatment modalities including physical therapy,
14 chiropractic care, traction, acupuncture, epidural injections, and hot yoga. (Tr. 46.)
15 Plaintiff, however, continued to have pain. (Tr. 46, 49.) In April 2012, Plaintiff's back
16 went out again when he was doing some painting for a friend. (Tr. 47-48.)

17 Plaintiff testified that hydrocodone helped his pain, but that his symptoms varied
18 from day to day even when taking the medication. (Tr. 50.) He stated that medication
19 "take[s] the edge off, but [the pain] doesn't completely go away." (Tr. 55, 62. 65.)
20 Plaintiff testified that even with pain medication, he had trouble performing at a
21 persistent pace or completing projects. (Tr. 62.) He testified that he lies down in a zero
22 gravity chair throughout the day to relieve his pain. (Tr. 51, 53, 65.) Plaintiff testified
23 that he could not sit or stand for eight hours a day even if he were allowed to alternate
24 positions. (Tr. 54.) He explained that he gets some pain relief the first time he changes
25 positions, but the pain builds over time. (*Id.*) Plaintiff stated that he gets pain after about
26 fifteen or twenty minutes of standing. (Tr. 64.) Plaintiff testified that he is
27 uncomfortable sitting. (Tr. 56.) He testified that he can sit at a computer for thirty
28 minutes at a time, but just a few times throughout the day. (Tr. 52-53.) He testified that

1 he can drive, but not for very long because the pain builds the longer he sits. (Tr. 61.) As
2 an example, Plaintiff stated that during a trip he took with his wife, he was uncomfortable
3 “every five minutes,” and had pain in thirty minutes, “bad pain” in an hour, and had to
4 pull over to take medication after two hours. (Tr. 61-62.) Plaintiff testified that his low
5 and mid back pain is “not going away,” and that it is a “365-day-a-year thing.” (*Id.* at 54,
6 56.) Plaintiff testified that he has sleep problems. (Tr. 56-57.) Plaintiff also testified that
7 he had depression and became agitated. (Tr. 59-60.)

8 Plaintiff testified that he was self-employed as a singer, but that it had “gotten to
9 be too much” because of his back pain. (Tr. 38-39, 55.) Plaintiff testified that he did
10 some grocery shopping, mowed his lawn with a power mower for a duration of five to six
11 minutes, and did other light yard work with his wife’s help. (Tr. 68-69.)

12 A vocational expert testified that an individual with the residual functional
13 capacity (RFC) that the ALJ assessed could not perform Plaintiff’s past work.² (Tr. 18,
14 76-77.) However, such an individual could perform work as a cashier, marker, or routing
15 clerk, (Tr. 77-78.) The vocational expert testified that a person with the RFC the ALJ
16 assessed, who would also be absent more than three times a month, or tardy, or have to
17 leave work early more than three times a week, would not be able to sustain employment.
18 (Tr. 79-80.) The vocational expert also testified that there would be no work for an
19 individual who had to lie down during the work day. (Tr. 81.) The vocational expert
20 further testified that a person who would be off-task for ten percent of a workday would
21 be unable to sustain employment. (Tr. 85.)

22 **IV. The ALJ’s Decision**

23 A claimant is considered disabled under the Social Security Act if he is unable “to
24 engage in any substantial gainful activity by reason of any medically determinable
25 physical or mental impairment which can be expected to result in death or which has
26 lasted or can be expected to last for a continuous period of not less than 12 months.”
27 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(a)(3)(A) (nearly identical standard

28 ² *See infra* p. 9.

1 for supplemental security income disability insurance benefits). To determine whether a
2 claimant is disabled, the ALJ uses a five-step sequential evaluation process.
3 *See* 20 C.F.R. §§ 404.1520, 416.920.

4 **A. The Five-Step Sequential Evaluation Process**

5 In the first two steps, a claimant seeking disability benefits must initially
6 demonstrate (1) that he is not presently engaged in a substantial gainful activity, and
7 (2) that his medically determinable impairment or combinations of impairments is severe.
8 20 C.F.R. §§ 404.1520(b) and (c), 416.920(b) and (c). If a claimant meets steps one and
9 two, there are two ways in which he may be found disabled at steps three through five.
10 At step three, he may prove that his impairment or combination of impairments meets or
11 equals an impairment in the Listing of Impairments found in Appendix 1 to Subpart P of
12 20 C.F.R. Part 404. 20 C.F.R. §§ 404.1520(a)(4)(iii) and (d), 416.920(d). If so, the
13 claimant is presumptively disabled. If not, the ALJ determines the claimant's RFC.
14 20 C.F.R. §§ 404.1520(e), 416.920(e). At step four, the ALJ determines whether a
15 claimant's RFC precludes him from performing his past relevant work.
16 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant establishes this prima facie case,
17 the burden shifts to the government at step five to establish that the claimant can perform
18 other jobs that exist in significant numbers in the national economy, considering the
19 claimant's RFC, age, work experience, and education. 20 C.F.R. §§ 404.1520(g),
20 416.920(g). If the government does not meet this burden, then the claimant is considered
21 disabled within the meaning of the Act.

22 **B. The ALJ's Application of the Five-Step Evaluation Process**

23 Applying the five-step sequential evaluation process, the ALJ found that Plaintiff
24 had not engaged in substantial gainful activity since the amended disability onset date,
25 March 2011. (Tr. 15.) At step two, the ALJ found that Plaintiff had the following severe
26 impairments: "lumbar degenerative disc disease; failed back syndrome; depression;
27 obesity; and thoracic spine degenerative disc disease (20 CFR § 404.1520(c))." (*Id.*) At
28

1 step three, the ALJ found that Plaintiff did not have an impairment or combination of
2 impairments that met or equaled the severity of a listed impairment. (Tr. 16.)

3 The ALJ found that Plaintiff had the RFC to “perform light work as defined in
4 20 CFR 404.1567(a),” subject to several limitations. (Tr. 18.) The ALJ clarified that
5 Plaintiff could “frequently lift and carry weights of ten pounds [and] occasionally lift and
6 carry weights of 20 pounds.” (*Id.*) He could stand or walk for a total of six hours in an
7 eight hour day, “sit for a total of six out of eight hours; he must change positions of
8 sitting and standing and could not be in either position for more than 30 minutes at one
9 time.” (*Id.*) The ALJ also found that Plaintiff had no limits on pushing and pulling
10 within the assessed weight limits. (*Id.*) He could “frequently balance; frequently climb
11 ramps and stairs; occasional[ly] climb[] ladders, ropes and scaffolds; occasional[ly]
12 stoop[], kneel[], crouch[] and crawl[].” (*Id.*) He should “avoid concentrated exposure to
13 hazards.” (*Id.*) Additionally, the ALJ concluded that Plaintiff could “understand,
14 remember and carry out simple work tasks.” (*Id.*)

15 The ALJ found that Plaintiff could not perform his past relevant work, but could
16 perform other work that existed in significant numbers in the national economy. (Tr. 22-
17 24.) She concluded that Plaintiff was not under a disability as defined in the Act from
18 October 14, 2007 through September 30, 2013, his date last insured. (Tr. 25.) Therefore,
19 the ALJ denied Plaintiff’s application for a period of disability and disability insurance
20 benefits. (*Id.*)

21 **V. Standard of Review**

22 The district court has the “power to enter, upon the pleadings and transcript of
23 record, a judgment affirming, modifying, or reversing the decision of the Commissioner,
24 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The district
25 court reviews the Commissioner’s final decision under the substantial evidence standard
26 and must affirm the Commissioner’s decision if it is supported by substantial evidence
27 and it is free from legal error. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996);
28 *Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Even if the

1 ALJ erred, however, “[a] decision of the ALJ will not be reversed for errors that are
2 harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

3 Substantial evidence means more than a mere scintilla, but less than a
4 preponderance; it is “such relevant evidence as a reasonable mind might accept as
5 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
6 (citations omitted); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). In
7 determining whether substantial evidence supports a decision, the court considers the
8 record as a whole and “may not affirm simply by isolating a specific quantum of
9 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (internal
10 quotation and citation omitted). The ALJ is responsible for resolving conflicts in
11 testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*,
12 53 F.3d 1035, 1039 (9th Cir. 1995). “When the evidence before the ALJ is subject to
13 more than one rational interpretation, [the court] must defer to the ALJ’s conclusion.”
14 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004) (citing
15 *Andrews*, 53 F.3d at 1041).

16 **VI. Plaintiff’s Claims**

17 Plaintiff’s opening brief includes the following claims: (1) there is new evidence
18 of Plaintiff’s conditions and the Court should remand for consideration of the evidence;
19 (2) the ALJ erred by assigning little weight to the opinions of Plaintiff’s treating
20 physician; and (3) the ALJ erred by discounting Plaintiff’s credibility.³ (Doc. 11.) The
21 Commissioner argues that the alleged new evidence does not require a remand and that
22 the ALJ’s decision is free from harmful error and is supported by substantial evidence.
23 (Doc. 12.) The Court considers Plaintiff’s claims below.

24 **A. New Evidence**

25 Plaintiff alleges that he was diagnosed with somatoform disorder and pudendal
26 neuralgia after his date last insured and that these diagnoses require a remand because he

27 ³ Plaintiff asserts several other errors. (Doc. 11.) Because the Court can resolve
28 this matter based on the issues discussed in the order, the Court does not consider these
other issues.

1 likely had these impairments before his disability insurance coverage expired. (Doc. 11
2 at 8.)

3 “‘[I]n cases involving submission of supplemental evidence subsequent to the
4 ALJ’s decision, the record includes that evidence submitted after the hearing and
5 considered by the Appeals Council.’” *Bergmann v. Apfel*, 207 F.3d 1065, 1068 (8th Cir.
6 2000) (emphasis added); *see also Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000)
7 (“We properly may consider the additional materials because the Appeals Council
8 addressed them in the context of denying Appellant’s request for review.”) Here,
9 Plaintiff provided the 2014 and 2015 letters to the Appeals Council, but they were not
10 included in the administrative record and, therefore are new evidence. (Tr. 2, 6.)
11 Plaintiff argues that the Court should remand this matter for consideration of the new
12 evidence.

13 In accordance with *Mayes v. Massanari*, 276 F.3d 453, 460-62 (9th Cir. 2001),
14 and sentence six of § 405(g), the court may remand to the Commissioner for
15 consideration of additional evidence only if a plaintiff shows that: (1) new evidence is
16 material to his disability; and (2) he has good cause for failing to submit the evidence
17 earlier. *See Burton v. Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984) (applying same test
18 to records that were submitted to the Appeals Council, but which the Appeals Council did
19 not appear to consider). To satisfy the materiality requirement, a plaintiff must show
20 “that the new evidence is material to and probative of his condition as it existed at the
21 relevant time — at or before the disability hearing.” *Sanchez v. Sec’y of Health and*
22 *Human Servs.*, 812 F.2d 509, 511 (9th Cir. 1987). “[T]he new evidence offered must
23 bear directly and substantially on the matter in dispute.” *Burton v. Heckler*, 724 F.2d
24 1415, 1417 (9th Cir. 1984) (new evidence was material when the issue had been
25 expressly considered by the ALJ and was “squarely before the Appeals Council”).

26 **1. Evidence of Somatoform Disorder (2014 and 2015 Letters)**

27 As evidence of a somatoform disorder diagnosis, Plaintiff has submitted letters
28 from two treatment providers dated December 19, 2014 (letter from Kim DiRE LPC,

1 SEP, DBH with Healthy Futures), and January 8, 2015 (letter from Dr. Denise
2 Glassmoyer, Psy.D. with Pinnacle Peak Psychology). (Doc. 11 at 23-25.) These letters
3 are dated after the ALJ's decision, but before the Appeals Council's September 25, 2015
4 decision. The Appeals Council "looked at" those letters but did not make them part of
5 the administrative record and did not consider them. (Tr. 2, 6); *See Rocha v. Astrue*,
6 2012 WL 748260, at *4 (D. Ariz. Mar. 7, 2012) (stating that the Appeals Council did not
7 "consider" evidence when it stated that it looked at evidence but did not make it part of
8 the administrative record). The Appeals Council explained that the ALJ decided
9 Plaintiff's case through September 30, 2013, the date Plaintiff was last insured for
10 disability benefits, but the "new information [was] about a different time. Therefore, it
11 does not affect the decision about whether [Plaintiff] was disabled at the time [he] was
12 last insured for disability benefits." (Tr. 2.)

13 Plaintiff has not shown that the 2014 or 2015 letters are material. First, in the
14 December 19, 2014 letter, treatment provider Kim DiRe stated that Plaintiff had been her
15 patient for the past several months. (Doc. 11 at 25.) She stated that Plaintiff came to her
16 for "information and therapy regarding somatic disorders, due to issues that stem from
17 years of injuries, surgeries, and chronic pain." (*Id.*) She noted that Plaintiff
18 "complain[ed] of symptoms including gastrointestinal [issues], sleep disturbances,
19 lethargy and fatigue problems, which can all be tied to somatization and/or pain
20 disorders." (*Id.*) She concluded that Plaintiff's "issues and symptoms [were] consistent
21 with those of a somatization disorder." (*Id.*) She opined that Plaintiff "is at a level of
22 disability where he is incapable of participating in the workforce." (*Id.*) She further
23 stated that "[g]iven his history, it is likely that the condition has existed for some time,
24 and could persist indefinitely." (*Id.*)

25 As the Appeals Council noted, the ALJ considered whether Plaintiff was disabled
26 at any time from the alleged onset date through September 30, 2013, the date last insured.
27 (Tr. 2, 25.) Ms. Di Re's December 2014 letter does not specifically address that period.
28 Rather, it pertains to the time of the letter (Doc. 11 at 25 (concluding that Plaintiff "is at a

1 level of disability)), and opines that Plaintiff’s “condition” has likely “existed for
2 some time.” (Doc. 11 at 25.) Other than speculating that Plaintiff’s conditions has likely
3 existed for “some time,” the 2014 letter does not further describe the temporal reach of
4 Plaintiff’s somatization disorder. To satisfy the materiality requirement, a plaintiff must
5 show “that the new evidence is material to and probative of his condition as it existed at
6 the relevant time — at or before the disability hearing.” *Sanchez v. Sec’y of Health and*
7 *Human Servs.*, 812 F.2d 509, 511 (9th Cir. 1987). Because the 2014 letter does not
8 specifically address the time period at issue in the ALJ’s decision, it is not material to that
9 decision. Moreover, the 2014 letter concludes that Plaintiff could not “participat[e] in the
10 workforce,” but does not assess any specific work-related functional limitations.

11 Similarly, Plaintiff has not shown that the 2015 letter is material. In that letter,
12 Dr. Glassmoyer discussed her psychological evaluation of Plaintiff. (Doc. 11 at 23-24.)
13 She observed that Plaintiff had difficulty sitting for the fifty-minute session, he was
14 tearful at times, and appeared hopeless. (*Id.* at 23.) She administered two psychological
15 assessments. (*Id.*) Dr. Glassmoyer concluded that Plaintiff had “significant emotional
16 symptoms of Major Depression including sadness, tearfulness, hopelessness, sleep
17 disturbances, fatigue, and concentration and memory problems.” (*Id.*) She found that
18 Plaintiff’s “profile suggest[ed] that he suffer[ed] from various somatic symptoms
19 including gastrointestinal distress as well as chronic pain.” (*Id.*) Dr. Glassmoyer did not
20 assess any specific functional limitations, but opined that it “was unlikely that Plaintiff
21 could maintain consistent employment now or for the foreseeable future.” (*Id.*)

22 Dr. Glassmoyer’s 2015 letter does not address the period that the ALJ considered,
23 October 14, 2007 through September 31, 2013. Rather, it pertains to the time of the letter
24 and to the “foreseeable future.” (Doc. 11 at 23 (stating that Plaintiff’s “chronic pain and
25 emotional distress would make it unlikely that [Plaintiff] could maintain consistent
26 employment now or for the foreseeable future.”).) Because the 2015 letter does not
27 address the time period at issue in the ALJ’s decision, it is not material to that decision.
28 *See Sanchez*, 812 F.2d at 511.

1 In addition to containing opinions that are not specific to the time period under
2 consideration in the ALJ's decision, the 2014 and 2015 letters contain information that is
3 similar to information that was before the ALJ. The administrative record did not include
4 a statement from a treatment provider assessing Plaintiff with somatoform disorder.
5 However, the non-examining physicians who reviewed the medical record on behalf of
6 the Agency recognized that the record contained evidence that Plaintiff had somatic
7 issues. For example, the reviewing physicians considered whether Plaintiff met "any
8 somatic listing" at step three of the sequential evaluation process. (Tr. 95, 113.) The
9 reviewing physicians conducted a "somatic review" of the medical record. (Tr. 108.)
10 The reviewing physicians note a history of "somatic concerns." (Tr. 110.) When
11 evaluating Dr. Treegoob's opinion, the reviewing physicians noted that Dr. Treegoob did
12 not separate somatic issues from other psychological concerns.⁴ (Tr. 111, 116.) The
13 opinions of the state agency physicians indicate that they were aware of evidence of
14 somatic issues even in the absence of a diagnosis of somatoform disorder.

15 Plaintiff does not allege that somatoform disorder resulted in functional limitations
16 beyond those that are included in the administrative record. Plaintiff has not shown that
17 evidence of a diagnosis of somatoform disorder in the 2014 and 2015 letters would create
18 a "reasonable probability" of changing the outcome of the administrative decision and
19 therefore these letters do not warrant remand. *See Mayes*, 276 F.3d at 462.

20 **2. Evidence of Diagnosis of Pudendal Neuralgia**

21 Plaintiff claims that he has new evidence that shortly after his date last insured for
22 disability benefits he was diagnosed with pudendal neuralgia, which he describes as a
23 "debilitating sitting disorder that causes considerable chronic pain and discomfort."
24 (Doc. 11 at 8.) Plaintiff states that if the matter is remanded to the Agency, he can
25 provide medical evidence of a diagnosis of pudendal neuralgia in the form of a medical
26 report from Dr. Michael Castillo. (*Id.* at 9.) Plaintiff has not provided that report to the

27
28 ⁴ Mark Treegoob PHd provided an opinion for the Agency on reconsideration of
the initial denial of Plaintiff's application for benefits. (Tr. 111.)

1 Court or submitted other evidence to support his assertion that he was diagnosed with
2 pudendal neuralgia. (Doc. 11.) There is no indication in the record that Plaintiff
3 submitted evidence of that diagnosis to the Appeals Council. (Tr. 1-6.)

4 Plaintiff claims that evidence of a diagnosis of pudendal neuralgia indicates that
5 his “symptoms and complaints” that were thought to relate to his spine also relate to
6 pudendal neuralgia. (Doc. 11 at 8.) Plaintiff, however, has not shown that evidence of a
7 diagnosis of pudendal neuralgia is material. Plaintiff does not allege that pudendal
8 neuralgia resulted in functional limitations other than those limitations that are already
9 included in the administrative record. Plaintiff alleges that pudendal neuralgia is a sitting
10 disorder. During the administrative hearing, Plaintiff testified that he could not sit for
11 longer than thirty minutes at a time. (Tr. 62.) He also testified that he could not sit for
12 eight hours a day even if allowed to change positions. (Tr. 54.) The ALJ partially
13 credited this testimony and assessed an RFC finding that Plaintiff could not sit for longer
14 than thirty minutes at one time and must be able to change positions of sitting and
15 standing. (Tr. 18.) Plaintiff does not explain how a diagnosis of pudendal neuralgia
16 would alter the assessed RFC or the outcome of the administrative proceedings.

17 Therefore, Plaintiff has not shown that an alleged diagnosis of pudendal neuralgia
18 is material because he has not shown a “reasonable probability” that the new evidence
19 would have changed the outcome of the administrative hearing. *See Mayes*, 276 F.3d at
20 462. Accordingly, new evidence of a diagnosis of pudendal neuralgia does not require
21 remand.

22 **B. Weight Assigned Medical Source Opinions**

23 Plaintiff argues that the ALJ erred by assigning little weight to the opinions of
24 treating physician Kenneth Fisher, M.D. (Doc. 11 at 7.) In weighing medical source
25 opinion evidence, the Ninth Circuit distinguishes between three types of physicians:
26 (1) treating physicians, who treat the claimant; (2) examining physicians, who examine
27 but do not treat the claimant; and (3) non-examining physicians, who neither treat nor
28 examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally,

1 more weight is given to a treating physician’s opinion. *Id.* The ALJ must provide clear
2 and convincing reasons supported by substantial evidence for rejecting a treating or an
3 examining physician’s uncontradicted opinion. *Id.*; *see also Reddick v. Chater*, 157 F.3d
4 715, 725 (9th Cir. 1998). An ALJ may reject the controverted opinion of a treating or an
5 examining physician by providing specific and legitimate reasons that are supported by
6 substantial evidence in the record. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
7 2005); *Reddick*, 157 F.3d at 725.

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

18 **1. Dr. Fisher’s Opinions**

19 On March 4, 2013, Dr. Fisher opined that Plaintiff could not stand continuously
20 for six hours. (Tr. 563.) If Plaintiff were stationary, pain would set in within about ten to
21 fifteen minutes of standing. (*Id.*) Plaintiff’s pain would be present, but more tolerable
22 with mild activity and he could tolerate up to an hour of standing under those conditions.
23 (*Id.*) Dr. Fisher also opined that Plaintiff could sit for one to two hours “until his pain
24 level [reached] a 9 or 10 on a scale of 1 to 10.” (Tr. 564.) He opined that changing
25 positions from sitting to standing seemed to help, but Plaintiff could not endure sitting or
26 standing for a length of time required for “adequate job performance.” (*Id.*) In April
27 2013, Dr. Fisher opined that Plaintiff could stand or walk less than two hours in an eight
28 hour day, and that Plaintiff could only sit for thirty minutes a day. (Tr. 530-31.) In

1 February 2014, Dr. Fisher opined that Plaintiff needed to lie down periodically
2 throughout the day and that he would be absent, tardy, or need to leave work early more
3 than three times a month.⁵ (Tr. 599.)

4 **2. The ALJ's Assessment of Dr. Fisher's Opinions**

5 The ALJ gave Dr. Fisher's March 2013 opinion "little weight" because it was
6 based on Plaintiff's subjective complaints. (Tr. 21.) The ALJ gave Dr. Fisher's April
7 2013 and February 2014 opinions little weight because they were completed on check-
8 box forms. (Tr. 21.) Finally, the ALJ gave little weight to all three of Dr. Fisher's
9 opinions because she concluded that they were overly restrictive because the limitations
10 were inconsistent with the medical evidence. (*Id.*) Plaintiff challenges only the ALJ's
11 conclusion that Dr. Fisher's opinions were inconsistent with the medical record.
12 (Doc. 11.) The Commissioner responds to Plaintiff's argument, but does not defend the
13 ALJ's other reasons for rejecting Dr. Fisher's opinions. (Doc. 12.) Accordingly, the
14 Court only considers whether the ALJ erred by rejecting Dr. Fisher's opinions as
15 inconsistent with the medical record.⁶

16 To support the conclusion that Dr. Fisher's opinions were not supported by the
17 treatment record, the ALJ cited Dr. Fisher's March 21, 2013 treatment note and an April
18 2, 2013 treatment note from Physician Assistant (PA) Michael Peterik. (Tr. 21 (citing
19 Admin. Hrg. Exs. 11F at 9, 12; 10F at 4).) The ALJ stated that during the March 21,

21 ⁵ Dr. Fisher also opined that Plaintiff was unable to drive. (Tr. 531.) The Court
22 does not need to consider that limitation because the vocational expert testified that
23 Plaintiff could perform jobs that did not involve driving. (Tr. 77-78.)

24 ⁶ Although the Court does not need to resolve this issue, the ALJ improperly
25 rejected Dr. Fisher's opinions on the ground that his April 2013 and February 2014 were
26 completed on check-box forms because those opinions were based on his multi-year
27 treatment history with Plaintiff and his treatment notes. *See Mansour v. Astrue*, 2009 WL
28 272865, at *6 n.14 (C.D. Cal. Feb. 2, 2009) (rejecting contention that a treating
physician's opinion on a "check-the-box" form lacked supporting evidence to
substantiate the responses on the form because the physician's treatment notes in the
record supported his finding on the opinion form). The ALJ also improperly rejected
Dr. Fisher's opinions based on her conclusion that those opinions were based on
Plaintiff's subjective complaints because the ALJ did not provide legitimate reasons for
discounting Plaintiff's subjective complaints, and Dr. Fisher did not question Plaintiff's
credibility.

1 2013 appointment, Plaintiff had a normal examination of his spine, normal range of
2 motion in his extremities, and denied neck pain, back pain, myalgias, arthralgias, gait
3 abnormality, and muscle weakness. (Tr. 21.) The ALJ stated that the April 2, 2013
4 treatment note indicated that Plaintiff had grossly normal strength and tone. (*Id.*)

5 Plaintiff asserts that the ALJ erred by rejecting Dr. Fisher's opinions as
6 inconsistent with these two treatment notes. Plaintiff argues that Dr. Fisher did not
7 conduct a physical examination during the March 21, 2013 appointment. (Doc. 11 at 5.)
8 Plaintiff states that he saw Dr. Fisher on that day for a medication refill and Dr. Fisher's
9 treatment notes for that day are a "template" of a normal examination, but do not reflect
10 findings from an actual physical examination. (*Id.*) Dr. Fisher's March 21, 2013
11 treatment note states that Plaintiff "presented with ~ generic. Pt. [patient] here for RX
12 refills." (Tr. 536.) The Commissioner does not dispute Plaintiff's assertion that the
13 March 21, 2013 treatment note is a template and that it does not indicate that Dr. Fisher
14 conducted a physical examination on that date. (Doc. 12 at 9.) Rather, she asserts that it
15 was reasonable for the ALJ to rely on that medical record. (*Id.*)

16 An ALJ may reject the controverted opinion of a treating or an examining
17 physician by providing specific and legitimate reasons that are supported by substantial
18 evidence in the record. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). The
19 ALJ properly rejects a treating or examining physician's opinion when it "is not well-
20 supported" or "is inconsistent with other substantial evidence in the record." *Orn v.*
21 *Astrue*, 495 F.3d 625, 631 (9th Cir. 2007.) Dr. Fisher's treatment note from March 21,
22 2013 appears to be a form that does not include specific examination findings and
23 therefore it does not constitute substantial evidence to support the ALJ's rejection of
24 Dr. Fisher's March 4, 2013 opinion.

25 The ALJ also discounted Dr. Fisher's opinions because she found them
26 inconsistent with an April 2, 2013 treatment note indicating that Plaintiff had grossly
27 normal strength and tone. (Tr. 21.) The record reflects that Dr. Fisher referred Plaintiff
28 to PA Peterik at Arizona Arthritis & Rheumatology Associates for an evaluation of back

1 pain in April 2013. (*Id.* (citing Tr. 510-13).) During an April 2, 2013 appointment,
2 PA Peterik performed a physical examination and found that Plaintiff had grossly normal
3 strength and tone. (Doc. 12 at 9 (citing Tr. 511-12).) Plaintiff argues that the ALJ erred
4 by relying on this treatment note to reject Dr. Fisher’s opinions because the April 2, 2013
5 treatment note was completed by PA Peterik, not Dr. Fisher. (Doc. 11 at 6.) The
6 Commissioner argues that the ALJ properly considered PA Peterik’s medical findings
7 when assigning weight to Dr. Fisher’s opinions and that PA Peterik’s April 2, 2013
8 treatment note constitutes substantial evidence to support the ALJ’s conclusion that
9 Dr. Fisher’s opinions was “overly restrictive” and not supported by objective medical
10 evidence. (Doc. 12 at 9.)

11 As the Commissioner argues, because an ALJ must consider the record as a whole,
12 the ALJ did not err by considering PA Peterik’s findings when determining how much
13 weight to afford Dr. Fisher’s opinions. *See Batson v. Comm’r of Soc. Sec. Admin.*, 359
14 F.3d 1190, 95 (9th Cir. 2004) (affirming the ALJ’s rejection of a treating physician’s
15 opinions based on a conclusion that they conflicted with a consulting physician’s
16 examination findings). However, a single treatment note does not constitute substantial
17 evidence to support the ALJ’s rejection of Dr. Fisher’s opinions. Additionally, the ALJ
18 did not explain how PA Peterik’s findings of grossly normal strength and tone detracted
19 from Dr. Fisher’s opinions regarding Plaintiff’s limited ability to sit due to pain, his need
20 to lie down during the day, and the number of times he would be absent, tardy, or leave
21 work early. Therefore, the Court determines that the ALJ’s reasons for discounting
22 Dr. Fisher’s opinions are not supported by substantial evidence.

23 **C. The ALJ’s Credibility Determination**

24 Plaintiff also asserts that the ALJ erred by discounting his credibility without
25 providing clear and convincing reasons. (Doc. 11 at 7.) An ALJ engages in a two-step
26 analysis to determine whether a claimant’s testimony regarding his pain or other
27 symptoms is credible. *See Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th
28

1 Cir. 2014); *see also Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014) (citing
2 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)).

3 “First, the ALJ must determine whether the claimant has presented objective
4 medical evidence of an underlying impairment ‘which could reasonably be expected to
5 produce the pain or other symptoms alleged.’” *Lingenfelter*, 504 F.3d at 1036 (quoting
6 *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). The claimant is not
7 required to show objective medical evidence of the pain itself or of a causal relationship
8 between the impairment and the symptom. *Smolen*, 80 F.3d at 1282. Instead, the
9 claimant must only show that an objectively verifiable impairment “could reasonably be
10 expected” to produce his pain. *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d
11 at 1282); *see also Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d at 1160–61 (9th Cir. 2008)
12 (“requiring that the medical impairment ‘could reasonably be expected to produce’ pain
13 or another symptom . . . requires only that the causal relationship be a reasonable
14 inference, not a medically proven phenomenon”).

15 Second, if a claimant shows that he suffers from an underlying medical
16 impairment that could reasonably be expected to produce her pain or other symptoms, the
17 ALJ must “evaluate the intensity and persistence of [the] symptoms” to determine how
18 the symptoms, including pain, limit the claimant’s ability to work.
19 *See* 20 C.F.R. § 404.1529(c)(1). In making this evaluation, the ALJ may consider the
20 objective medical evidence, the claimant’s daily activities, the location, duration,
21 frequency, and intensity of the claimant’s pain or other symptoms, precipitating and
22 aggravating factors, medication taken, and treatments for relief of pain or other
23 symptoms. *See* 20 C.F.R. § 404.1529(c); *Bunnell*, 947 F.2d at 346.

24 At this second evaluative step, the ALJ may reject a claimant’s testimony
25 regarding the severity of his symptoms only if the ALJ “makes a finding of malingering
26 based on affirmative evidence,” *Lingenfelter*, 504 F.3d at 1036 (quoting *Robbins v. Soc.*
27 *Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006)), or if the ALJ offers “clear and
28 convincing reasons” for finding the claimant not credible. *Carmickle*, 533 F.3d at 1160

1 (quoting *Lingenfelter*, 504 F.3d at 1036). Because the ALJ did not specifically find
2 evidence of malingering, the ALJ was required to provide clear and convincing reasons
3 for concluding that Plaintiff’s subjective complaints were not wholly credible.

4 The ALJ discounted Plaintiff’s symptom testimony because she found that:
5 (1) the severity of Plaintiff’s reported symptoms was not supported by normal findings in
6 the medical record; (2) Plaintiff’s “daily activities were not as limited as one would
7 expect considering the complaints of disabling symptoms”; (3) treatment was “generally
8 successful” in controlling Plaintiff’s symptoms; (4) Plaintiff worked after the alleged
9 disability onset date; and (5) Plaintiff took computer animation classes. (Tr. 22-23.)

10 **1. Not Supported by the Medical Evidence**

11 The ALJ discounted Plaintiff’s credibility because she found that the medical
12 record included “normal findings on examination,” which did not support his reported
13 symptoms. (Tr. 22.) The absence of fully corroborative medical evidence cannot form
14 the sole basis for rejecting the credibility of a claimant’s subjective complaints. *See*
15 *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986) (it is legal error for “an ALJ to
16 discredit excess pain testimony solely on the ground that it is not fully corroborated by
17 objective medical findings”), *superseded by statute on other grounds as stated in Bunnell*
18 *v. Sullivan*, 912 F.2d 1149 (9th Cir. 1990); *see also Burch*, 400 F.3d at 681 (explaining
19 that the “lack of medical evidence” can be “a factor” in rejecting credibility, but cannot
20 “form the sole basis”); *Rollins v. Massanari*, 261 F.3d 853, 856–57 (9th Cir. 2001)
21 (same). Thus, absent some other stated legally sufficient reason, this ground for the
22 ALJ’s credibility determination cannot stand. As discussed below, although the ALJ
23 provided several other reasons for discrediting Plaintiff’s subjective complaints that could
24 constitute clear and convincing reasons in support of a credibility determination, these
25 reasons are not supported by substantial evidence in the record and, therefore, do not
26 support the ALJ’s credibility determination in this case.

27 ///

1 **2. Daily Activities**

2 In discounting Plaintiff’s credibility, the ALJ noted that Plaintiff runs errands,
3 goes to the grocery store, uses an elliptical machine, does light yard work, cares for a pet
4 dog, drives a car, took a trip, does yoga, goes to movies, sings at restaurants, has gone out
5 to dinner, checks email, and can manage his own finances. (Tr. 22.) An ALJ may rely
6 on activities that “contradict claims of a totally debilitating impairment” to find a
7 claimant less than credible. *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012).

8 Plaintiff asserts that the ALJ incorrectly stated that Plaintiff did hot yoga
9 throughout the period of his disability claim. (Doc. 11 at 6.) When assessing Plaintiff’s
10 credibility, the ALJ referred to a March 31, 2011 treatment note which states that Plaintiff
11 was “doing hot yoga.” (Tr. 22 (citing Admin. Hrg. Ex. 22F at 1); Tr. 645.) That
12 treatment note does not indicate how frequently Plaintiff did hot yoga and the ALJ did
13 not cite any other record evidence indicating that Plaintiff continued doing hot yoga after
14 March 2011. During the administrative hearing, Plaintiff testified that one of his doctors
15 recommend he try hot yoga for his back pain. (Tr. 46.) Plaintiff testified that yoga
16 helped for a little bit, but later made his pain worse so he stopped doing it. (Tr. 46-47.)
17 The ALJ did not discuss these details about Plaintiff’s participation in hot yoga. (Tr. 22.)
18 A single treatment note indicating that Plaintiff did hot yoga in March 2011 does not
19 constitute a clear and convincing reason for discounting Plaintiff’s credibility.

20 Plaintiff also asserts that the ALJ erred by relying on evidence that he took a trip
21 to discount his credibility because the ALJ referred to a 2008 trip. (Doc. 11 at 5, Tr. 23
22 (citing Admin. Hrg. Ex. 5F at 2).) A January 21, 2008 treatment note states that Plaintiff
23 was going to Europe. (Tr. 452.) Plaintiff does not dispute that he went to Europe, but
24 argues that the 2008 trip is not relevant because it was before the amended disability
25 onset date. As the ALJ noted, a trip to Europe requires “long intercontinental travel.”
26 (Tr. 23.) Evidence that Plaintiff took such a trip is inconsistent with his reported inability
27 to sit for extended periods of time. However, because evidence of the trip is from 2008
28

1 and the record indicates that Plaintiff’s condition worsened in subsequent years (Tr. 563),
2 the 2008 trip is not a clear and convincing reason for discounting Plaintiff’s credibility.

3 Plaintiff does not challenge the ALJ’s determination that he participated in the
4 other activities identified in her opinion. (Tr. 22.) The Commissioner argues that even if
5 yoga and the trip to Europe are excluded from Plaintiff’s activities, “the ALJ’s finding
6 that Plaintiff’s activities of daily living were inconsistent with his claims of disability
7 from back pain and depression is supported by substantial evidence.” (Doc. 12 at 13.)
8 As set forth below, the Court disagrees. The Ninth Circuit “has repeatedly asserted that
9 the mere fact that a plaintiff has carried on certain daily activities, such as grocery
10 shopping, driving a car, or limited walking for exercise, does not in any way detract from
11 [his] credibility as to [his] overall disability. One does not need to be ‘utterly
12 incapacitated’ in order to be disabled.” *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.
13 2001) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). However, a
14 claimant’s reported daily activities can form the basis for an adverse credibility
15 determination if they consist of activities that “contradict [the claimant’s] other
16 testimony,” or that are “transferable work skills.” *Orn*, 495 F.3d at 639; *Smolen v.*
17 *Chater*, 80 F.3d 1273, 1284 n. 7 (9th Cir. 1996).

18 The ALJ’s decision lists Plaintiff’s daily activities and concludes that he is not
19 credible because the extent of these activities “is not as limited as one would expect
20 considering the complaints of disabling symptoms.” (Tr. 22.) But the ALJ fails to
21 identify any specific contradictions between Plaintiff’s reported symptom testimony and
22 his activities. *But see Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (concluding
23 that the ALJ properly found claimant’s claimed inability to “tolerate even minimal human
24 interaction was inconsistent with her daily activities . . . including walking her two
25 children to and from school, attending church, shopping, and taking walks . . .”).

26 Additionally, the ALJ did make any findings on the transferability of the activities
27 at issue to a work setting, which is the only other acceptable grounds for using daily
28 activities to form the basis of an adverse credibility determination. *See Orn*, 495 F.3d at

1 639. The ALJ must make “specific findings relating to [the daily] activities” and their
2 transferability to conclude that a claimant’s daily activities warrant an adverse credibility
3 determination. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). Because the ALJ
4 did not identify inconsistencies between Plaintiff’s symptom testimony and his activities,
5 or make any findings on the transferability of Plaintiff’s activities to a work setting,
6 Plaintiff’s daily activities do not constitute a clear and convincing reason to discount his
7 credibility.

8 **3. Symptoms Controlled by Treatment**

9 The ALJ also discredited Plaintiff’s subjective complaint testimony based on her
10 conclusion that the record reflected that treatment had been “generally successful in
11 controlling [Plaintiff’s] symptoms.” (Tr. 22.) The ALJ noted that on May 16, 2012,
12 Plaintiff reported that “Vicodin worked” and he testified that he did not have side effects
13 from his medications. (*Id.*) The ALJ further noted that on July 15, 2013, Plaintiff
14 “denied depression, anxiety, or panic attacks” (*Id.*)

15 Evidence that treatment can effectively control an impairment may be a clear and
16 convincing reason to find a claimant less credible. *See* 20 C.F.R. §§ 404.1529(c)(3)(iv),
17 416.929(c)(3)(iv); *Warre v. Comm’r, of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.
18 2006) (stating that “[i]mpairments that can be controlled effectively with medication are
19 not disabling for purposes of determining eligibility for SSI benefits.”). Here, however,
20 substantial evidence in the record does not support the ALJ’s conclusion. Although a
21 single treatment note indicates that Vicodin “still work[ed]” in May 2012, (Tr. 486), other
22 treatment records reflect that Plaintiff consistently reported chronic back pain (Tr. 363,
23 382, 385, 387, 388-89, 391, 404-05, 411-12, 417-18, 423-24, 431-33, 441, 510, 532, 546,
24 566, 606, 610, 646), and in December 26, 2012, Plaintiff reported that Vicodin was no
25 longer working. (Tr. 546.) *See Lankford v. Astrue*, 2013 WL 416221, at *5 (N.D. Cal.
26 Jan. 31, 2013) (concluding that the ALJ’s finding that a claimant’s pain was controlled
27 did not support his credibility assessment because the ALJ failed to recognize that the
28 medication did not resolve the problem and claimant continued to complain of chronic

1 pain). Considering the consistent evidence of Plaintiff's back pain, a single notation that
2 Vicodin worked is not a clear and convincing reason to discount Plaintiff's credibility.

3 The ALJ also concluded that treatment controlled Plaintiff's symptoms related to
4 depression because he denied depression, anxiety, or panic attacks on July 15, 2013.
5 (Tr. 22 (citing Admin. Hrg. Ex.19F at 12).) Plaintiff asserts that Dr. Fisher's July 15,
6 2013 treatment note is on a template that includes standard findings that Dr. Fisher did
7 not change because he was not treating Plaintiff for depression. (Doc. 11 at 6.) The
8 Commissioner responds that Dr. Fisher's treatment notes regularly note such denials and
9 that the ALJ reasonably relied upon those treatment notes. (Doc. 12 at 10 (citing Tr. 412,
10 424, 441, 535, 537, 542, 547, 602, 607).) The Court agrees that the ALJ reasonably
11 relied on Dr. Fisher's treatment notes indicating that Plaintiff denied depression.
12 Accordingly, the ALJ gave a legally sufficient reason for concluding that Plaintiff's
13 depression was controlled with treatment. However, the ALJ did not indicate which
14 portion of Plaintiff's subjective complaints she discredited based on this conclusion.
15 (Tr. 22.)

16 **4. Work after Disability Onset Date**

17 The ALJ also discounted Plaintiff's credibility because there was evidence that he
18 worked as a singer after the disability onset date. (Tr. 17 (citing Admin. Hrg. Ex. 14E at
19 5); Tr. 22, 23.) The ALJ concludes that singing "involves considerable physical and
20 mental activity" but does not cite any evidence indicating the amount of physical or
21 mental effort required for Plaintiff's singing engagements. (Tr. 23.) In making this
22 determination, the ALJ cited a Function Report that Plaintiff completed in April 2013.
23 (Tr. 17 (citing Admin. Hrg. Ex. 14E at 5); Tr. 302-310). In that report, Plaintiff stated
24 that "I used to sing at restaurants but it has become a challenge." (Tr. 306.) He
25 explained that he planned to "fulfill a couple of commitments this year, but [was] not
26 accepting new gigs. I have up to four nights I am hoping to do all year." (*Id.*) The ALJ
27 stated that Plaintiff performed for two to three hours (Tr. 17), but the portion of the
28

1 record that ALJ references does not indicate the duration of Plaintiff's singing
2 engagements. (Tr. 306.)

3 However, during the 2014 administrative hearing Plaintiff testified that since 2011
4 he has been self-employed as a singer and his performances usually lasted two to three
5 hours. (Tr. 38-39.) He testified that the performances used to be therapeutic for him, but
6 that recently after thirty minutes of singing his back burned and he took medication.
7 (Tr. 39.) Plaintiff also testified that his wife drove him to his performances and helped
8 with the equipment. (*Id.*) The ALJ did not discuss Plaintiff's testimony regarding his
9 singing engagements and did not cite any evidence regarding the frequency of the singing
10 engagements. (Tr. 17, 22, 23.)

11 The Function Report that the ALJ cites states that Plaintiff planned to do four
12 singing engagements in 2013 and that he was not accepting further engagements.
13 (Tr. 305.) During the administrative hearing, Plaintiff testified that he did about six
14 singing engagements in 2013. (Tr. 38-39.) Evidence that Plaintiff engaged in about six
15 singing engagements in 2013 that lasted two to three hours is not a clear and convincing
16 reason to discount his credibility because this work was intermittent. *See McBriety v.*
17 *Colvin*, 2014 WL 3778552, at *6 (D. Or. Jul. 30, 2014) (concluding that the ALJ erred by
18 discounting the plaintiff's credibility based on her "intermittent, less-than full time"
19 work.)

20 **5. Computer Animation Classes**

21 The ALJ also discounted Plaintiff's credibility because he "had taken classes in
22 computer animation." (Tr. 23.) To support his conclusion, the ALJ cites an April 2012
23 progress note from Dr. Treegoob stating that Plaintiff "took classes on computer
24 animation, which he can do at home, loves it."⁷ (Tr. 489-90.) That same progress notes
25 indicates that Plaintiff had severe back pain, was "rapidly deteriorating," was stressed,
26 and depressed. (Tr. 490.) Plaintiff does not dispute that he took computer animation
27 classes. (Doc. 11.) However, the ALJ did not cite any evidence regarding the frequency

28 ⁷ Dr. Treegoob treated Plaintiff at West Valley Behavioral Health. (Tr. 475-94.)

1 or duration of these classes. (Tr. 23.) Plaintiff's apparent attempt to find an activity he
2 could do at home despite his reported symptoms, *see* Tr. 490 (stating that Plaintiff "trying
3 things he was passionate about"), does not undermine his credibility considering the lack
4 of evidence that taking computer animation classes contradicted any of Plaintiff's
5 specific reported symptoms.

6 Based on the Court's review of the record, with the exception of her conclusion
7 the Plaintiff's depression was controlled with treatment, the ALJ did not provide legally
8 sufficient reasons that are supported by substantial evidence to support her adverse
9 credibility determination. Therefore, the ALJ erred in discounting Plaintiff's subjective
10 complaints related to his back pain.

11 **VII. Summary and Remedy**

12 Considering the record as a whole, the Court concludes that the ALJ erred in
13 rejecting Dr. Fisher's opinions and Plaintiff's subjective complaints. These errors were
14 not harmless because the vocational expert testified that an individual with the limitations
15 that Dr. Fisher and Plaintiff identified would be unable to sustain work. (Tr. 79-81.)
16 Therefore, the Court reverses the Commissioner's disability determination.

17 Because the Court has decided to vacate the Commissioner's decision, it has the
18 discretion to remand the case for further development of the record or for an award
19 benefits. *See Reddick v. Chater*, 157 F.3d 715, 728 (9th Cir. 1998). Plaintiff asks the
20 Court to remand for a determination for benefits, or in the alternative, for further
21 proceedings. (Doc. 11 at 10-11.) The Commissioner does not address this issue.
22 (Doc. 12.)

23 The decision to remand for benefits is controlled by the Ninth Circuit's "three-part
24 credit-as-true standard." *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). Under
25 that standard, evidence should be credited as true and an action remanded for an
26 immediate award of benefits when each of the following factors are present: "(1) the
27 record has been fully developed and further administrative proceedings would serve no
28 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting

1 evidence, whether claimant’s testimony or medical opinion; and (3) if the improperly
2 discredited evidence were credited as true, the ALJ would be required to find the
3 claimant disabled on remand.” *Id.* (citing *Ryan v. Comm’r Soc. Sec.*, 528 F.3d 1194,
4 1202 (9th Cir. 2008)); *see also Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004).
5 As discussed below, Plaintiff has satisfied all three factors of the credit-as-true standard.

6 On the first factor, there is no need to further develop the record. *See Garrison*,
7 759 F.3d at 1021 (citing *Benecke*, 379 F.3d at 595) (“Allowing the Commissioner to
8 decide the issue again would create an unfair ‘heads we win; tails, let’s play again’
9 system of disability benefits adjudication.”). On the second factor, the Court has
10 concluded that the ALJ failed to provide legally sufficient reasons that are supported by
11 substantial evidence in the record for rejecting the Dr. Fisher’s opinions and failed to
12 provide legally sufficient reasons for rejecting Plaintiff’s subjective complaints. On the
13 third factor, if the discredited evidence were credited as true, the ALJ would be required
14 to find Plaintiff disabled on remand because the vocational expert testified that a person
15 with the limitations that Dr. Fisher identified and to which Plaintiff testified, would be
16 incapable of sustained full-time work. Therefore, based on this evidence, Plaintiff is
17 disabled. *See Garrison*, 759 F.3d at 1022, n.28 (stating that when the vocational expert
18 testified that a person with the plaintiff’s RFC would be unable to work, “we can
19 conclude that [the plaintiff] is disabled without remanding for further proceedings to
20 determine anew her RFC.”).

21 Having concluded that Plaintiff meets the three criteria of the credit-as-true
22 standard, the Court considers “the relevant testimony [and opinion evidence] to be
23 established as true and remand[s] for an award of benefits[.]” *Benecke*, 379 F.3d at 593
24 (citations omitted), unless “the record as a whole creates serious doubt as to whether the
25 claimant is, in fact, disabled with the meaning of the Social Security Act.” *Garrison*, 759
26 F.3d at 1021) (citations omitted). Considering the record as a whole, there is no reason
27 for serious doubt as to whether Plaintiff is disabled. *See Garrison*, 759 F.3d at 1021
28 (stating that that when the court conclude “that a claimant is otherwise entitled to an

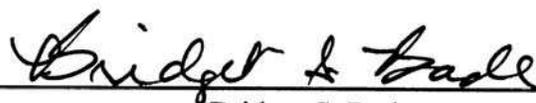
1 immediate award of benefits under the credit-as-true analysis, [the court has] flexibility to
2 remand for further proceedings when the record as a whole creates serious doubt as to
3 whether the claimant is, in fact, disabled within the meaning of the Social Security Act.”).
4 The ALJ failed to set forth specific and legitimate reasons supported by substantial
5 evidence for rejecting Dr. Fisher’s opinions and failed to provide clear and convincing
6 reasons for discounting Plaintiff’s credibility. When a hypothetical question was posed
7 to the vocational expert incorporating the limitations included in Dr. Fisher’s opinions
8 and Plaintiff’s testimony, the vocational expert testified that such limitations would
9 preclude an individual from sustained work activity. (Tr. 79-81.) On the record before
10 the Court, Dr. Fisher’s opinions and Plaintiff’s subjective complaints should be credited
11 as true and the case remanded for an award of benefits.

12 Accordingly,

13 **IT IS ORDERED** that the Commissioner’s decision denying benefits is reversed
14 and this matter is remanded for a determination of benefits.

15 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment in
16 favor of Plaintiff and terminate this case.

17 Dated this 22nd day of June, 2016.

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Bridget S. Bade
22 United States Magistrate Judge
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