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

8 Michael Hickle,  
9

10 Plaintiff,

11 v.

12 Acting Commissioner of the Social Security  
13 Administration,

14 Defendant.  
15  
16

No. CV-16-00623-PHX-ESW

**ORDER**

17  
18 Pending before the Court is Michael Hickle's ("Plaintiff") appeal of the Social  
19 Security Administration's ("Social Security") denial of his application for disability  
20 insurance benefits. The Court has jurisdiction to decide Plaintiff's appeal pursuant to 42  
21 U.S.C. § 405(g). Under 42 U.S.C. § 405(g), the Court has the power to enter, based upon  
22 the pleadings and transcript of the record, a judgment affirming, modifying, or reversing  
23 the decision of the Commissioner of Social Security, with or without remanding the case  
24 for a rehearing. Both parties have consented to the exercise of U.S. Magistrate Judge  
25 jurisdiction. (Doc. 13).

26 After reviewing the Administrative Record ("A.R.") and the parties' briefing  
27 (Docs. 25, 29, 34),<sup>1</sup> the Court finds that the Administrative Law Judge's ("ALJ") decision  
28 contains harmful legal error. For the reasons explained in Section II, the decision is

1 reversed and the case is remanded to the Commissioner of Social Security for an  
2 immediate award of benefits.

### 3 I. LEGAL STANDARDS

#### 4 A. Disability Analysis: Five-Step Evaluation

5 The Social Security Act (the “Act”) provides for disability insurance benefits to  
6 those who have contributed to the Social Security program and who suffer from a  
7 physical or mental disability. 42 U.S.C. § 423(a)(1). To be eligible for benefits based  
8 on an alleged disability, the claimant must show that he or she suffers from a medically  
9 determinable physical or mental impairment that prohibits him or her from engaging in  
10 any substantial gainful activity. 42 U.S.C. § 423(d)(1)(A). The claimant must also show  
11 that the impairment is expected to cause death or last for a continuous period of at least  
12 12 months. *Id.*

13 To decide if a claimant is entitled to Social Security benefits, an ALJ conducts an  
14 analysis consisting of five questions, which are considered in sequential steps. 20 C.F.R.  
15 § 404.1520(a). The claimant has the burden of proof regarding the first four steps:<sup>1</sup>

16 **Step One:** Is the claimant engaged in “substantial gainful  
17 activity”? If so, the analysis ends and disability benefits are  
18 denied. Otherwise, the ALJ proceeds to step two.

19 **Step Two:** Does the claimant have a medically severe  
20 impairment or combination of impairments? A severe  
21 impairment is one which significantly limits the claimant’s  
22 physical or mental ability to do basic work activities. 20  
23 C.F.R. § 404.1520(c). If the claimant does not have a severe  
24 impairment or combination of impairments, disability benefits  
25 are denied at this step. Otherwise, the ALJ proceeds to step  
26 three.

27 **Step Three:** Is the impairment equivalent to one of a number  
28 of listed impairments that the Commissioner acknowledges  
are so severe as to preclude substantial gainful activity? 20

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<sup>1</sup> *Parra v. Astrue*, 481 F.3d 742,746 (9th Cir. 2007).

1 C.F.R. § 404.1520(d). If the impairment meets or equals one  
2 of the listed impairments, the claimant is conclusively  
3 presumed to be disabled. If the impairment is not one that is  
4 presumed to be disabling, the ALJ proceeds to the fourth step  
5 of the analysis.

6 **Step Four:** Does the impairment prevent the claimant from  
7 performing work which the claimant performed in the past?  
8 If not, the claimant is “not disabled” and disability benefits  
9 are denied without continuing the analysis. 20 C.F.R. §  
10 404.1520(f). Otherwise, the ALJ proceeds to the last step.

11 If the analysis proceeds to the final question, the burden of proof shifts to the  
12 Commissioner:<sup>2</sup>

13 **Step Five:** Can the claimant perform other work in the  
14 national economy in light of his or her age, education, and  
15 work experience? The claimant is entitled to disability  
16 benefits only if he or she is unable to perform other work. 20  
17 C.F.R. § 404.1520(g). Social Security is responsible for  
18 providing evidence that demonstrates that other work exists in  
19 significant numbers in the national economy that the claimant  
20 can do, given the claimant’s residual functional capacity, age,  
21 education, and work experience. *Id.*

## 22 **B. Standard of Review Applicable to ALJ’s Determination**

23 The Court must affirm an ALJ’s decision if it is supported by substantial evidence  
24 and is based on correct legal standards. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir.  
25 2012); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). “Substantial evidence” is  
26 less than a preponderance, but more than a “mere scintilla.” *Richardson v. Perales*, 402  
27 U.S. 389, 401 (1971) (quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938)).  
28 It is relevant evidence as a reasonable mind might accept as adequate to support a  
conclusion. *Id.*

In determining whether substantial evidence supports the ALJ’s decision, the  
Court considers the record as a whole, weighing both the evidence that supports and

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<sup>2</sup> *Parra*, 481 F.3d at 746.

1 detracts from the ALJ’s conclusions. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.  
2 1998); *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). If there is sufficient  
3 evidence to support the ALJ’s determination, the Court cannot substitute its own  
4 determination. *See Morgan v. Comm’r of the Social Sec. Admin.*, 169 F.3d 595, 599 (9th  
5 Cir. 1999) (“Where the evidence is susceptible to more than one rational interpretation, it  
6 is the ALJ’s conclusion that must be upheld.”); *Magallanes v. Bowen*, 881 F.2d 747, 750  
7 (9th Cir. 1989). The ALJ, not the Court, is responsible for resolving conflicts and  
8 ambiguities in the evidence and determining credibility. *Magallanes*, 881 F.2d at 750;  
9 *see also Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

10 Finally, the Court considers the harmless error doctrine when reviewing an ALJ’s  
11 decision. An ALJ’s decision need not be remanded or reversed if it is clear from the  
12 record that the error is “inconsequential to the ultimate nondisability determination.”  
13 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations omitted); *Molina*,  
14 674 F.3d at 1115 (an error is harmless so long as there remains substantial evidence  
15 supporting the ALJ’s decision and the error “does not negate the validity of the ALJ’s  
16 ultimate conclusion”) (citations omitted).

## 17 **II. PLAINTIFF’S APPEAL**

### 18 **A. Procedural Background**

19 Plaintiff, who was born in 1960, has been employed as a truck driver and laborer.  
20 (A.R. 59, 120). In April 2013, Plaintiff filed an application for disability insurance  
21 benefits. (A.R. 224-25). Plaintiff’s application alleged that on March 7, 2013, he became  
22 unable to work due to (i) chronic pain in his back, legs, and arms; (ii) left arm injury; (iii)  
23 renal insufficiency; (iv) depression; and (v) anxiety. (A.R. 120-21). Social Security  
24 denied the application on September 27, 2013. (A.R. 161-64). In March 2014, upon  
25 Plaintiff’s request for reconsideration, Social Security affirmed the denial of benefits.  
26 (A.R. 165-69). Plaintiff sought further review by an ALJ, who conducted a hearing in  
27 March 2015. (A.R. 38-65, 170-71).  
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1 In her April 30, 2015 decision, the ALJ found that Plaintiff is not disabled within  
2 the meaning of the Social Security Act. (A.R. 15-31). The Appeals Council denied  
3 Plaintiff's request for review, making the ALJ's decision the final decision of the Social  
4 Security Commissioner. (A.R. 1-6, 10-11). On March 7, 2016, Plaintiff filed a  
5 Complaint (Doc. 1) pursuant to 42 U.S.C. § 405(g) requesting judicial review and  
6 reversal of the ALJ's decision.

7 **B. The ALJ's Application of the Five-Step Disability Analysis**

8 **1. Step One: Engagement in "Substantial Gainful Activity"**

9 The ALJ determined that Plaintiff has not engaged in substantial gainful activity  
10 since March 7, 2013, the alleged disability onset date, through December 31, 2014, the  
11 date last insured. (A.R. 20). Neither party disputes this determination.

12 **2. Step Two: Presence of Medically Severe Impairment/Combination  
13 of Impairments**

14 The ALJ found that Plaintiff has the following severe impairments: (i) coronary  
15 artery disease status post stenting; (ii) affective disorder; and (iii) polysubstance  
16 dependence in remission. (A.R. 20). This determination is undisputed.

17 **3. Step Three: Presence of Listed Impairment(s)**

18 The ALJ determined that Plaintiff does not have an impairment or combination of  
19 impairments that meets or medically equals an impairment listed in 20 C.F.R. Part 404,  
20 Subpart P, Appendix 1 of the Social Security regulations. (A.R. 22). Neither party  
21 challenges the ALJ's determination at this step.

22 **4. Step Four: Capacity to Perform Past Relevant Work**

23 The ALJ found that Plaintiff retained the residual functional capacity ("RFC") to  
24 perform medium work as defined in 20 C.F.R. § 404.1567(c), except that  
25 [Plaintiff] could never climb ladders, ropes, or scaffolds, and  
26 could frequently climb ramps or stairs. [Plaintiff] could  
27 frequently crouch, and could occasionally kneel, and crawl.  
28 [Plaintiff] was required to avoid concentrated exposure to  
dangerous machinery with moving, mechanical parts (except  
vehicles), and was required to avoid concentrated exposure to  
unprotected heights that were high or exposed. [Plaintiff]

1 was limited to tasks that could be learned by demonstration  
2 within 30 days.

3 (A.R. 24). Plaintiff argues that the ALJ improperly weighed the evidence in assessing  
4 Plaintiff's RFC, but the parties do not dispute the ALJ's determination at Step Four that  
5 Plaintiff is unable to perform his past relevant work. (A.R. 29).

### 6 **5. Step Five: Capacity to Perform Other Work**

7 At the administrative hearing, a vocational expert ("VE") testified that based on  
8 Plaintiff's RFC, Plaintiff would be able to perform the requirements of representative  
9 occupations such as a dining room attendant, driver helper, cleaner/housekeeper, marker,  
10 and cashier. (A.R. 61-62). The ALJ found that the VE's testimony was consistent with  
11 the information in the Dictionary of Occupational Titles and that the jobs identified by  
12 the VE existed in significant numbers in the national economy. (A.R. 30). After  
13 considering the VE's testimony, Plaintiff's age, education, work experience, and RFC,  
14 the ALJ determined that Plaintiff can make a successful adjustment to other work and is  
15 therefore not disabled. (*Id.*). Plaintiff asserts that due to restrictions not accounted for in  
16 the ALJ's RFC assessment, he is unable to engage in any work.

### 17 **C. The ALJ Failed to Provide Specific, Clear, and Convincing Reasons for 18 Rejecting Plaintiff's Testimony Regarding his Symptoms**

19 When evaluating the credibility of a plaintiff's testimony regarding subjective pain  
20 or symptoms, the ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d  
21 586, 591 (9th Cir. 2009). In the first step, the ALJ must determine whether the claimant  
22 has presented objective medical evidence of an underlying impairment "which could  
23 reasonably be expected to produce the pain or other symptoms alleged." *Lingenfelter v.*  
24 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The plaintiff does not have to show that the  
25 impairment could reasonably be expected to cause the severity of the symptoms. Rather,  
26 a plaintiff must only show that it could have caused some degree of the symptoms.  
27 *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996).

28 If a plaintiff meets the first step, and there is no affirmative evidence of  
malingering, the ALJ can only reject a plaintiff's testimony about the severity of his or

1 her symptoms by offering specific, clear, and convincing reasons. *Lingenfelter*, 504 F.3d  
2 at 1036. The ALJ cannot rely on general findings. The ALJ must identify specifically  
3 what testimony is not credible and what evidence undermines the plaintiff's complaints.  
4 *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010). In weighing a plaintiff's  
5 credibility, the ALJ can consider many factors including: a plaintiff's reputation for  
6 truthfulness, prior inconsistent statements concerning the symptoms, unexplained or  
7 inadequately explained failure to seek treatment, and the plaintiff's daily activities.  
8 *Smolen*, 80 F.3d at 1284; *see also* 20 C.F.R. § 404.1529(c)(4) (Social Security must  
9 consider whether there are conflicts between a claimant's statements and the rest of the  
10 evidence).

11 In March 2016, the Social Security Administration issued Social Security Ruling  
12 16-3p, 2016 WL 1119029 (March 16, 2016) ("SSR 16-3p"), which provides new  
13 guidance for ALJs to follow when evaluating a disability claimant's statements regarding  
14 the intensity, persistence, and limiting effects of symptoms. SSR 16-3p replaces Social  
15 Security Ruling 96-7p, 1996 WL 374186 (July 2, 1996) ("SSR 96-7p"). SSR 16-3p  
16 eliminates the term "credibility" used in SSR 96-7p in order to "clarify that subjective  
17 symptom evaluation is not an examination of the individual's character." SSR 16-3p,  
18 2016 WL 1119029, at \*1. That is, "[t]he change in wording is meant to clarify that  
19 administrative law judges aren't in the business of impeaching claimants' character," but  
20 "obviously administrative law judges will continue to assess the credibility of pain  
21 *assertions* by applicants, especially as such assertions often cannot be either credited or  
22 rejected on the basis of medical evidence." *Cole v. Colvin*, 831 F.3d 411, 412 (7th Cir.  
23 2016) (emphasis in original).

24 Although SSR 16-3p was issued almost one year after the ALJ's April 2015  
25 decision, it is consistent with Social Security's prior policies and with prior Ninth Circuit  
26 case law. *Compare* SSR 16-3p with SSR 96-7p (both policies set forth a two-step  
27 process to be followed in evaluating a claimant's testimony and contain the same factors  
28 to be considered in determining the intensity and persistence of a claimant's symptoms).

1 Because 16-3p clarifies rather than changes existing law,<sup>3</sup> the Court will consider the  
2 ALJ's evaluation of Plaintiff's subjective complaints in light of SSR 16-3p.

3 Here, the ALJ found that Plaintiff's medically determinable impairments could  
4 reasonably be expected to cause his alleged symptoms, but concluded that Plaintiff's  
5 "statements concerning the intensity, persistence, and limiting effects of these symptoms  
6 are not entirely credible for the reasons explained in this decision." (A.R. 26). As  
7 discussed below, the ALJ committed harmful error in discounting Plaintiff's symptom  
8 testimony.

9 The ALJ gave several reasons for finding Plaintiff's testimony not credible. First,  
10 the ALJ stated that "[o]bjective medical evidence does not support the level of limitation  
11 alleged by the claimant." (A.R. 26). Although an ALJ may consider a lack of objective  
12 evidence as one element in his or her analysis, a claimant's testimony of disabling pain  
13 cannot be discredited "merely because [it is] unsupported by objective evidence." *Lester*  
14 *v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996); *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th  
15 Cir. 1991) ("[O]nce the claimant produces objective medical evidence of an underlying  
16 impairment, [the ALJ] may not reject a claimant's subjective complaints based solely on  
17 a lack of objective medical evidence to fully corroborate the alleged severity of pain.").  
18 As explained below, the ALJ's other reasons for finding Plaintiff's testimony not credible  
19 are not clear and convincing. The lack of objective medical evidence corroborating the  
20 severity of Plaintiff's symptoms is not a sufficient sole reason for rejecting Plaintiff's  
21 testimony.  
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24 <sup>3</sup>Administrative rules will not have retroactive effect unless (i) Congress expressly  
25 authorized the administrative agency to enact retroactive rules and (ii) the new agency  
26 rule states that it is retroactive. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208  
27 (1988). A clarification of a regulation, however, does not raise issues about retroactivity.  
28 *See Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001) (stating that a clarifying rule "can  
be applied to the case at hand just as a judicial determination construing a statute can be  
applied to the case at hand," and does not raise issues of retroactivity); *see also Smolen*,  
80 F.3d at 1281 n.1 ("We need not decide the issue of retroactivity [as to revised  
regulations] because the new regulations are consistent with the Commissioner's prior  
policies and with prior Ninth Circuit case law . . .").



1 As a second reason for discounting Plaintiff's testimony, the ALJ stated that  
2 Plaintiff has "treated his physical symptoms almost exclusively with narcotic pain  
3 medication" and that "[t]his treatment has been effective in improving the claimant's pain  
4 (Exhibits B2F, p. 4; B25F, p. 17)." (A.R. 26). The record indicates that Plaintiff's  
5 narcotic pain medication has provided relief. (A.R. 622) ("Patient reported pain is under  
6 control with Celebrex 200 mg and Norco, and he is requesting refill on them for  
7 management of pain."). However, at the March 9, 2015 administrative hearing, Plaintiff  
8 testified that the medication impacts his memory and ability to focus. (A.R. 43, 55-56).  
9 "[L]ike pain, side effects can be a 'highly idiosyncratic phenomenon' and a claimant's  
10 testimony as to their limiting effects should not be trivialized."  
11 *Varney v. Secretary of HHS*, 846 F.2d 581, 585 (9th Cir. 1987). If an ALJ "chooses to  
12 disregard a claimant's testimony as to the subjective limitations of side effects, he [or  
13 she] must support that decision with specific findings similar to those required for excess  
14 pain testimony, as long as the side effects are in fact associated with the claimant's  
15 medication(s)." *Id.*; *see also Erickson v. Shalala*, 9 F.3d 813, 817-18 (9th Cir. 1993)  
16 (explaining that an "ALJ must consider *all factors* that might have a 'significant impact  
17 on an individual's ability to work' including side effects of medication) (emphasis in  
18 original) (quoting *Varney*, 846 F.2d at 585)); 20 C.F.R. § 404.1529(c)(3)(iv) ("Factors  
19 relevant to your symptoms, such as pain, which we will consider include . . . [t]he type,  
20 dosage, effectiveness, and side effects of any medication you take or have taken to  
21 alleviate your pain or other symptoms[.]").

22 Plaintiff's testimony regarding the alleged side effects from his medication is  
23 consistent with the record. For instance, Plaintiff's treating physician, Dr. Rahul  
24 Malhotra, stated that a side effect of Plaintiff's prescribed medications is memory  
25 problems. (A.R. 807). Another treating physician, Dr. Harslmran Singh, stated that  
26 Plaintiff's pain medication "can cause drowsiness and/or impair judgment." (A.R. 779).  
27 In the context of discussing Plaintiff's mental functioning, the ALJ stated that Plaintiff's  
28 "reports of confusion and memory loss are not supported to the extent alleged." (A.R.

1 26). The ALJ’s decision does not address Plaintiff’s testimony regarding his diminished  
2 ability to focus. The ALJ’s decision also does not specifically address Plaintiff’s  
3 testimony that his diminished memory and ability to focus are a side effect of his  
4 medication. As discussed below, the ALJ did not provide clear and convincing reasons  
5 for discounting Plaintiff’s testimony regarding his confusion and memory issues. The  
6 ALJ erred by failing to properly address the alleged side effects of Plaintiff’s medication.

7 For the above reasons, the Court finds that the ALJ failed to provide clear and  
8 convincing reasons for discounting Plaintiff’s symptom testimony regarding his physical  
9 impairments.

10 With respect to Plaintiff’s mental health, the ALJ stated that:

11 [T]he claimant did not begin formal mental health treatment  
12 until May of 2014, inconsistent with what would be expected,  
13 given the severity alleged throughout the adjudicatory period  
14 (Exhibit B23F). Substantial evidence does not support this  
15 reading of the record. When the claimant finally began  
seeking mental health treatment, his symptoms improved  
(Exhibit B23F, pp. 17, 20, 21, 23).

16 (A.R. 26). The fact that Plaintiff has had limited mental health treatment is not a  
17 sufficient sole reason to discount the alleged severity of Plaintiff’s mental impairments.  
18 *See Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (“[I]t is a questionable  
19 practice to chastise one with a mental impairment for the exercise of poor judgment in  
20 seeking rehabilitation.”) (quoting *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir.  
21 1989)).

22 In rejecting Plaintiff’s testimony regarding the severity of his memory and  
23 confusion issues, the ALJ stated that “Phoenix Heart records and Terros records show no  
24 corroboration for the alleged severity of confusion/memory loss (B14F, B17F, B20F,  
25 B25F, B26F, B23F, and B28F). It is also noted that his brain computed tomography scan  
26 (CT) scan was normal (B30F/3).” (A.R. 26). To reiterate, an ALJ “may not reject a  
27 claimant’s subjective complaints based solely on a lack of objective medical evidence to  
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1 fully corroborate the claimant’s allegations.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554  
2 F.3d 1219, 1227 (9th Cir. 2009).

3 The record reflects that Plaintiff is on prescription antidepressants, has  
4 consistently reported loss of memory, feeling depressed, angry/irritable, fatigued, and has  
5 exhibited moods described as depressed, irritable, dysphoric, and anxious. (*See, e.g.*,  
6 A.R. 572, 598, 600, 601, 693, 726-28, 751, 789, 809, 815, 816, 819). While a few  
7 records indicate an improvement in Plaintiff’s mental health (*e.g.* A.R. 611), “[c]ycles of  
8 improvement and debilitating symptoms are a common occurrence, and in such  
9 circumstances it is error for an ALJ to pick out a few isolated instances of improvement  
10 over a period of months or years and to treat them as a basis for concluding a claimant is  
11 capable of working.” *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014).

12 “The clear and convincing standard is the most demanding required in Social  
13 Security cases.” *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.  
14 2002). “Sheer disbelief” of the severity of a claimant’s symptoms “is no substitute for  
15 substantial evidence.” *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004). The  
16 Court finds that the ALJ failed to provide specific, clear, and convincing reasons  
17 supported by substantial evidence for discounting Plaintiff’s symptom testimony  
18 regarding his mental impairments.

19 **D. The ALJ Failed to Provide Valid Reasons for Discounting the Opinion of**  
20 **Treating Physician Dr. Rahul Malhotra**

21 In weighing medical source opinions in Social Security cases, there are three  
22 categories of physicians: (i) treating physicians, who actually treat the claimant; (2)  
23 examining physicians, who examine but do not treat the claimant; and (3) non-examining  
24 physicians, who neither treat nor examine the claimant. *Lester*, 81 F.3d at 830. An ALJ  
25 must provide clear and convincing reasons that are supported by substantial evidence for  
26 rejecting the uncontradicted opinion of a treating or examining doctor. *Id.* at 830-31;  
27 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). An ALJ cannot reject a  
28 treating or examining physician's opinion in favor of another physician's opinion without

1 first providing specific and legitimate reasons that are supported by substantial evidence.  
2 *Bayliss*, 427 F.3d at 1216; 20 C.F.R. § 404.1527(c)(4) (an ALJ must consider whether an  
3 opinion is consistent with the record as a whole); *see also* *Batson*, 359 F.3d at 1195;  
4 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tommasetti*, 533 F.3d at 1041  
5 (finding it not improper for an ALJ to reject a treating physician’s opinion that is  
6 inconsistent with the record).

7 Plaintiff’s treating cardiologist, Rahul Malhotra, MD, opined that Plaintiff suffers  
8 from shortness of breath, chest pain, leg edema, poor concentration, memory deficit, and  
9 forgetfulness. (A.R. 806). Dr. Malhotra assessed that in an eight-hour workday, Plaintiff  
10 cannot sit for more than two hours, cannot stand/walk for more than two hours, cannot  
11 lift or carry more than ten pounds, can bend and stoop no more than 20% percent of the  
12 day, can reach and use his hands and feet 21% to 33% of the day, and would be off task  
13 greater than 21% of the day. (A.R. 806-07). Dr. Malhotra also stated that Plaintiff “is  
14 limited in activities of daily living and needs to be monitored closely due to his  
15 confusion. He continues to have anginal symptoms with chest pain and shortness of  
16 breath. He has some good days and some bad days but overall is recommended not to  
17 return to work.” (A.R. 808). Because Dr. Malhotra’s opinion is controverted by other  
18 physicians,<sup>4</sup> the ALJ cannot discount Dr. Malhotra’s opinion without providing specific  
19 and legitimate reasons.

20 The ALJ gave Dr. Malhotra’s opinions little weight. (A.R. 27). First, the ALJ  
21 stated that “Dr. Malhotra’s opinion most often indicates confusion and memory loss as  
22 the justification for the limitations assigned. However, Dr. Malhotra is not a specialist in  
23 this area.” (*Id.*). While the opinions of a specialist about medical issues related to his or  
24 her area of specialization are given more weight than the opinions of a non-specialist, it is  
25 improper for the ALJ to discount Dr. Malhotra’s opinions solely because he specializes in  
26 cardiology rather than another area, such as neurology. *See Lester*, 81 F.3d at 833 (ALJ  
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28 <sup>4</sup> For instance, Dr. Malhotra’s opinions are contradicted by Jean Goerss, M.D.,  
who concluded that Plaintiff could perform a range of medium work. (A.R. 130-32).

1 may not disregard a doctor’s opinion as to claimant’s mental functioning for the reason  
2 that the doctor is not a mental health specialist); *Kennelly v. Astrue*, 313 F. App’x 977,  
3 978 (9th Cir. 2009) (ALJ could not discount doctor’s testimony regarding claimant’s  
4 mental impairments solely because the doctor was not a mental health specialist). As the  
5 Ninth Circuit has explained, “the treating physician’s opinion as to the combined impact  
6 of the claimant’s limitations—both physical and mental—is entitled to special weight.”  
7 *Lester*, 81 F.3d at 833. “The treating physician’s continuing relationship with the  
8 claimant makes him especially qualified to evaluate reports from examining doctors, to  
9 integrate the medical information they provide, and to form an overall conclusion as to  
10 functional capacities and limitations, as well as to prescribe or approve the overall course  
11 of treatment.” *Id.*

12 Second, the ALJ stated that Dr. Malhotra “assigns manipulative limitations  
13 without objective neurological testing supporting such limitations.” (A.R. 27). This is  
14 not a specific and legitimate reason for giving Dr. Malhotra’s opinions little weight. An  
15 ALJ “is required to give weight not only to the treating physician’s clinical findings and  
16 interpretation of test results, but also to his subjective judgments.” *Lester*, 81 F.3d at  
17 832-33.

18 Lastly, the ALJ concluded that Dr. Malhotra’s opinion is “inconsistent with the  
19 overall medical record, including his own findings.” (A.R. 27). The ALJ found that two  
20 records in which Dr. Malhotra concluded that Plaintiff’s coronary artery disease was  
21 stable conflicted with Dr. Malhotra’s opinion that “cites angina symptoms as rationale for  
22 the limitations provided (Exhibits B26F, p. 5, 15; B27F, p. 3).” (A.R. 27). “Exhibit  
23 B26F, p. 5” referenced by the ALJ is a February 2015 treatment record in which Dr.  
24 Malhotra concluded that Plaintiff’s coronary artery disease is “[s]table with minimal  
25 anginal symptoms.” (A.R. 793). “Exhibit B26F, p. 15” is a July 2014 treatment record in  
26 which Dr. Malhotra found that Plaintiff’s coronary artery disease is “[s]table however  
27 possible microvascular disease therefore would continue with ranexa.” (A.R. 803).  
28 Because these records do not indicate the complete elimination of anginal symptoms,

1 they do not conflict with Dr. Malhotra’s February 11, 2015 opinion (referenced by the  
2 ALJ as “Exhibit B27, p.3”), which explains that Plaintiff “has an extensive cardiac  
3 history which includes ischemic heart disease, ongoing anginal symptoms, obstructive  
4 sleep apnea, hypertension, dyslipidemia, balance issues, memory loss, intermittent  
5 confusion, dizziness with intermittent vertical.” (A.R. 808). The ALJ’s final reason for  
6 discounting Dr. Malhotra’s opinion does not meet the specific and legitimate standard.

7 For the above reasons, the Court finds that the ALJ failed to provide specific and  
8 legitimate reasons for assigning little weight to Dr. Malhotra’s opinion. The ALJ’s errors  
9 in weighing Plaintiff’s symptom testimony and Dr. Malhotra’s opinion are harmful and  
10 alone require remand. The Court therefore does not address Plaintiff’s arguments  
11 regarding the other alleged errors in the ALJ’s decision.

12 **E. The Case Will Be Remanded for an Award of Benefits**

13 Ninth Circuit jurisprudence “requires remand for further proceedings in all but the  
14 rarest cases.” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 n.5 (9th Cir.  
15 2014). The Ninth Circuit, however, has adopted a test to determine when a case should  
16 be remanded for payment of benefits in cases where an ALJ has improperly rejected  
17 claimant testimony or medical opinion evidence. *Id.* at 1100-01; *Garrison*, 759 F.3d at  
18 1020. This test is commonly referred to as the “credit-as-true” rule, which consists of the  
19 following three factors:

- 20 1. Has the ALJ failed to provide legally sufficient reasons for  
21 rejecting evidence, whether claimant testimony or medical  
22 opinion? *Treichler*, 775 F.3d at 1100-01.
- 23 2. Has the record been fully developed, are there outstanding  
24 issues that must be resolved before a disability  
25 determination can be made, or would further administrative  
26 proceedings be useful? *Id.* at 1101. To clarify this factor,  
27 the Ninth Circuit has stated that “[w]here there is  
28 conflicting evidence, and not all essential factual issues  
have been resolved, a remand for an award of benefits is  
inappropriate.” *Id.*

1                   3. If the improperly discredited evidence were credited as true,  
2                   would the ALJ be required to find the claimant disabled on  
3                   remand? *Id.*; *Garrison*, 759 F.3d at 1020.

4                   Where a court has found that a claimant has failed to satisfy one of the factors of  
5                   the credit-as-true rule, the court does not need to address the remaining factors.  
6                   *Treichler*, 775 F.3d at 1107 (declining to address final step of the rule after determining  
7                   that the claimant has failed to satisfy the second step). Moreover, even if all three factors  
8                   are met, a court retains the discretion to remand a case for additional evidence or to  
9                   award benefits. *Id.* at 1101-02. A court may remand for further proceedings “when the  
10                  record as a whole creates serious doubt as to whether the claimant is, in fact, disabled  
11                  within the meaning of the Social Security Act.” *Garrison*, 759 F.3d at 1021. In  
12                  *Treichler*, the Ninth Circuit noted that “[w]here an ALJ makes a legal error, but the  
13                  record is uncertain and ambiguous, the proper approach is to remand the case to the  
14                  agency.” 775 F.3d at 1105.

15                  After examining the record, the Court finds no outstanding issues of fact to be  
16                  resolved through further proceedings. At the administrative hearing, the VE testified that  
17                  if an individual were to miss three or more days of work a month, he or she would not be  
18                  able to retain employment. (A.R. 97). Dr. Malhotra opined that Plaintiff would miss six  
19                  days of work each month. (A.R. 807). The VE’s testimony establishes that if Dr.  
20                  Malhotra’s opinion was credited-as-true, the ALJ would be required to find that Plaintiff  
21                  is disabled. The Court does not find any material evidence in the record that creates  
22                  serious doubt that Plaintiff is in fact disabled. Therefore, based on the record, the Court  
23                  finds it inappropriate to remand the case for further proceedings. *See Benecke*, 379 F.3d  
24                  at 595 (“Allowing the Commissioner to decide the issue again would create an unfair  
25                  ‘heads we win; tails, let’s play again’ system of disability benefits adjudication.”); *Moisa*  
26                  *v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) (“The Commissioner, having lost this  
27                  appeal, should not have another opportunity to show that Moisa is not credible any more  
28                  than Moisa, had he lost, should have an opportunity for remand and further proceedings

1 to establish his credibility.”) (citation omitted). The Court will remand the case for an  
2 immediate award of benefits effective March 7, 2013 (the disability onset date).

3 **III. CONCLUSION**

4 Based on the foregoing,

5 **IT IS ORDERED** reversing the decision of the Commissioner of Social Security  
6 and remanding this case to the Commissioner for an immediate award of benefits  
7 effective March 7, 2013.

8 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment  
9 accordingly.

10 Dated this 2nd day of May, 2017.

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14 Eileen S. Willett  
15 United States Magistrate Judge  
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