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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Dennis Waddell,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-16-00848-PHX-JAT

ORDER

15 Pending before the Court is Plaintiff's appeal of the Commissioner's denial of his
16 application for social security disability benefits. The parties are familiar with Plaintiff's
17 medical history; therefore, the Court will discuss it below only as necessary for the
18 decision.

19 On appeal, Plaintiff claims the Administrative Law Judge (ALJ) committed three
20 errors that require reversal for an award of benefits; specifically, Plaintiff claims the ALJ
21 erred by: 1) finding that Plaintiff could perform jobs that are inconsistent with Plaintiff's
22 residual functional capacity; 2) not finding Plaintiff's knee, wrist, and urinary conditions
23 more severe; and 3) not finding Plaintiff credible. The Court will address each of these
24 claims of error in turn.¹

25 **I. Jobs within Plaintiff's Residual Functional Capacity**

26 The ALJ found a number of limitations impacted Plaintiff. Doc. 8-3 at 17. Based

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28 ¹ The ALJ's decision to deny benefits will be overturned "only if it is not supported by substantial evidence or is based on legal error." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (quotation omitted).

1 on those limitations, the ALJ determined Plaintiff's residual functional capacity.² *Id.*
2 The ALJ then found Plaintiff could perform three jobs that are available in the economy;
3 specifically: 1) Hand Packer; 2) Linen Room Attendant; and 3) Dishwasher. Doc. 8-3 at
4 22.

5 **A. Hand Packer**

6 Plaintiff argues that because the ALJ found he could only frequently use his upper
7 extremities for fine and gross manipulation and feeling (rather than unlimited use),
8 Plaintiff cannot do the hand packer job because the Dictionary of Occupational Titles
9 states that the hand packer job requires "constant" handling, grasping and feeling. Doc. 9
10 at 14. Thus, Plaintiff's issue appears to be a dispute between the meaning of "frequent"
11 and the meaning of "constant."

12 At the hearing, the ALJ specifically asked the vocational expert whether someone
13 with Plaintiff's residual functional capacity (which included frequent use of his upper
14 extremities) could perform any jobs. Doc. 8-3 at 21-22. The vocational expert testified
15 that Plaintiff could perform the job of hand packer. Doc. 8-3 at 22. Relying on this
16 expert testimony, the Court concludes that someone who can "frequently" use his upper
17 extremities can constantly handle, grasp and feel. Accordingly, the Court finds the ALJ
18 did not commit error with respect to the finding that Plaintiff could perform the job of
19 hand packer.

20 **B. Linen Room Attendant**

21 Plaintiff argues that the ALJ's finding that Plaintiff could perform the job of linen
22 room attendant was error for two reasons. First, Plaintiff argues that because the ALJ
23 found that Plaintiff should avoid exposure to gas, dust and fumes, (Doc. 8-3 at 17),
24 Plaintiff cannot be a linen room attendant. Doc. 9 at 14. While Plaintiff concedes that

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26 ² The regulations require that the ALJ make a finding regarding a plaintiff's
27 "residual functional capacity based on all the relevant medical and other evidence in [the]
28 case record." 20 C.F.R. § 404.1520(e). A plaintiff's "residual functional capacity" is the
most he can still do despite all his impairments, including those that are not severe, and
any related symptoms. *Id.* § 404.1545(a)(1).

1 the Dictionary of Occupational Titles does not list dust, gas or fumes as a linen room
2 attendant job hazard (*id*); Plaintiff nonetheless argues, “laundry products and large
3 amounts of linens would necessarily result in dust and fumes.” *Id.* Plaintiff cites nothing
4 for this argument. Conversely, the vocational expert, even considering Plaintiff’s
5 limitation of not being exposed to gas, dust or fumes, testified that Plaintiff could perform
6 this job. Doc. 8-3 at 21-22. And, as Plaintiff concedes, this testimony is consistent with
7 the Dictionary of Occupational Titles. On this record, there is no basis to conclude
8 Plaintiff cannot do this job. Accordingly, the ALJ did not commit error.

9 Second, Plaintiff argues that the ALJ committed error in concluding Plaintiff could
10 be a linen room attendant because the job is too difficult. Doc. 9 at 14. Specifically,
11 Plaintiff lists the components of the job from the Dictionary of Occupational Titles,
12 including segregating, counting and recording the number of linens and uniforms for
13 laundry and mending, conducting monthly and yearly inventories, and maybe some
14 mending. *Id.* Plaintiff notes that the ALJ found that Plaintiff was limited to performing
15 simple tasks. Doc. 8-3 at 17. Plaintiff then concludes, “Conducting inventories and
16 mending clothes are not simple tasks.” Plaintiff cites nothing for this conclusion.
17 Conversely, the vocational expert, who was informed of Plaintiff’s limitations, including
18 performing only simple tasks, testified that Plaintiff could perform this job. Based on
19 this expert testimony, the Court finds the ALJ did not commit error in concluding that
20 Plaintiff could perform this job.

21 **C. Dishwasher/Kitchen Helper**

22 Plaintiff argues two reasons why the ALJ erred in concluding that Plaintiff could
23 perform the job of dishwasher. First, Plaintiff argues that, per the Dictionary of
24 Occupational Titles, the job requires “constant” handling and reaching, but Plaintiff is
25 limited to frequent use of his upper extremities for fine and gross manipulation and
26 feeling. Doc. 9 at 14. As discussed above with respect to the hand packer job, the
27 vocational expert testified that Plaintiff could perform the dishwasher job with his
28 limitations. Relying on this expert opinion, the Court finds the ALJ did not err in

1 concluding Plaintiff could perform this job.

2 Second, while Plaintiff concedes that the Dictionary of Occupational Titles does
3 not list dust, fumes or gas as a hazard of being a dishwasher, it does list weather, cold,
4 heat, wetness, humidity, atmospheric conditions and other environmental conditions.
5 Doc. 9 at 14. Plaintiff argues, without citation, that the humidity and other atmospheric
6 conditions of being a dishwasher would prevent him from doing the job. *Id.* Again, the
7 vocational expert was aware of Plaintiff's limitations and concluded Plaintiff could
8 perform this job. Given this expert testimony, the ALJ did not err in finding Plaintiff
9 could be a dishwasher.

10 **D. Conclusion Regarding Available Jobs**

11 In sum, Plaintiff does not argue that the ALJ incorrectly identified Plaintiff's
12 limitations. Instead, Plaintiff argues that the vocational expert mistakenly concluded that,
13 even with these limitations, Plaintiff could perform the jobs identified in the ALJ's
14 decision. On this record, this Court cannot overturn this expert testimony. Accordingly,
15 the Court finds the ALJ did not commit error in accepting the testimony of the vocational
16 expert after correctly identifying Plaintiff's residual functional capacity.

17 **II. Severity of Plaintiff's Conditions**

18 Next, Plaintiff takes issue with the level of severity the ALJ attributed to
19 Plaintiff's conditions. Plaintiff appears to take issue with the ALJ's assessment of his
20 knee, wrist, and urinary issues. Doc. 11 at 3-4.

21 **A. Knees**

22 The ALJ found that Plaintiff had condralcinois and degenerative arthritis in both
23 knees. Doc. 8-3 at 14. The ALJ found this condition to be severe. *Id.* The ALJ imposed
24 limitations on Plaintiff's ability to work based on this severe condition, including
25 standing 6 out of 8 hours, sitting 6 of 8 hours, frequent climbing, frequent crawling and
26 occasional kneeling. Doc. 8-3 at 17.

27 Plaintiff argues that the ALJ should have found Plaintiff's knee condition to be
28 even more limiting. Doc. 4 at 9. Plaintiff states, without citation, "These are not knees

1 that can stand all day and carry fifty pounds up to one third of the day.” *Id.*

2 The ALJ relied on the medical record of Dr. Zeman to determine the severity of
3 Plaintiff’s knee limitations. Doc. 8-3 at 18. Specifically, the ALJ noted that in 2013
4 Plaintiff saw Dr. Zeman. *Id.* Dr. Zeman noted that Plaintiff can walk half a mile with no
5 difficulty, did not have difficulty getting on and off a table, and did not have difficulty
6 with mobility for household chores. *Id.* Dr. Zeman recommended Plaintiff have physical
7 therapy and cortisone injections, but the ALJ was not given evidence as to whether
8 Plaintiff complied with these recommendations. *Id.* The ALJ concluded based on this
9 medical evidence that, “These support some minor kneeling restrictions and minor
10 restrictions in the time claimant can continuously stand/walk/sit. However, the medical
11 record does not support the claimant is limited beyond this functional capacity.” *Id.*

12 Based on the medical records of Dr. Zeman, who was Plaintiff’s treating
13 physician, the ALJ did not err in determining Plaintiff’s limitations. Although Plaintiff
14 points out additional notes from the medical records, Plaintiff offers no argument as to
15 how or why those notes would lead to further restrictions than those found by the ALJ.
16 Accordingly, the Court finds the ALJ did not err in assessing Plaintiff’s severe knee
17 condition.

18 **B. Wrist**

19 The ALJ found that Plaintiff had severe wrist impairment. Doc. 8-3 at 14. The
20 ALJ noted the medical professionals had concluded that the likely cause of Plaintiff’s
21 wrist issues was a combination of carpal tunnel syndrome and bilateral arthritis, or
22 Plaintiff could have ulnar nerve compression of the wrists. Doc. 8-3 at 19. The ALJ
23 noted that “In April and May of 2012, the claimant had surgery to relieve the carpal
24 tunnel syndrome, on each wrist separately. ... Since the claimant’s carpal tunnel
25 syndrome surgery was successful, he no longer suffers from more than minor limitations
26 from this condition.” *Id.* Plaintiff argues, without citation, “The carpal tunnel surgeries
27 did not solve the problem.” Doc. 11 at 4. However, the Court finds that the ALJ’s
28 findings are consistent with the medical records; thus, the Court finds no error.

1 The ALJ further found that Plaintiff continues to have osteoarthritis in the wrists.
2 Doc. 8-3 at 19. The ALJ assessed limitations based on this finding. Plaintiff argues,
3 “The ALJ did not find appropriate impairments for Plaintiff’s hands and wrists.” Doc. 11
4 at 4-5. However, the ALJ noted that she was finding Plaintiff to be more limited than the
5 medical evidence in finding, “...the claimant’s wrist, whether by whichever possible
6 diagnoses, seems to be more limited than given credit. The undersigned adds frequent
7 use of upper extremities for fine and gross manipulation and feeling, in lieu of unlimited
8 use.” Doc. 8-3 at 20.

9 Thus, based on the medical evidence, the ALJ could have found no limitation in
10 Plaintiff’s residual functional capacity based on his wrists, but nonetheless gave a
11 limitation. Plaintiff’s argument that this Court should substitute its judgment for the
12 ALJ’s judgment and find an even further limitation is not supported by the medical
13 evidence of record. Accordingly, the Court finds no error in the ALJ’s assessment of the
14 severity of Plaintiff’s wrist condition.³

15 **C. Urinary Problems**

16 At Step 2, the ALJ did not find that Plaintiff’s urinary problems were severe. Doc.
17 8-3 at 14. However, at Step 4, the ALJ did consider Plaintiff’s history of urinary
18 problems to determine whether they met the listing. Doc. 8-3 at 16. The ALJ did not
19 include any limitations in Plaintiff’s residual functional capacity based on the urinary
20 issues. Doc. 11 at 3-9.

21 Plaintiff argues that the urinary problems were severe and the ALJ’s failure to list
22 that condition at Step 2 is error that requires reversal. Defendant argues that because the
23 urinary problems/symptoms were included at Step 4, any failure to list them at Step 2 was
24 harmless.

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26 ³ If there is sufficient evidence to support the ALJ’s determination, the Court
27 cannot substitute its own determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th
28 Cir. 1990). Additionally, the ALJ is responsible for resolving conflicts in medical
testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*,
53 F.3d 1035, 1039 (9th Cir. 1995). Thus, if on the whole record before this Court,
substantial evidence supports the Commissioner’s decision, this Court must affirm it. *See*
Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989); *see also* 42 U.S.C. § 405(g).

1 The ALJ found, “The claimant has had a history of urinary/prostate problems.
2 However, he had undergone a successful surgery in November of 2012. He does not
3 have any significant issue voiding, pain, and expresses that he is happy with the results.
4 (Exhibit 13F) Accordingly, the [claimant] does not have a chronic limited function of the
5 genitourinary systems.” Doc. 8-3 at 17.

6 Plaintiff argues that he was not cured by the surgery. Doc. 9 at 17. However, the
7 Court finds that there is substantial medical evidence of record to support the ALJ’s
8 findings. Thus, the ALJ did not commit error in finding that Plaintiff did not have any
9 functional capacity limitations based on his urinary issues.

10 Additionally, Plaintiff’s argument that any error by the ALJ was not harmless,
11 “because Plaintiff is so close to a disability finding,” is not legal error. *See* Doc. 9 at 17.⁴
12 In other words, the Court has not located, and the Plaintiff has not cited, any law that
13 suggests that how “close” Plaintiff is to a disability finding impacts how the ALJ should
14 legally assess a condition. Thus, the Court finds no legal error.

15 **D. Conclusion Regarding Severity of Plaintiff’s Symptoms**

16 Based on the foregoing, the ALJ did not err in assessing the severity of Plaintiff’s
17 conditions. Therefore, this Court will not reverse this decision of the ALJ based on this
18 claim of error.

19 **III. Plaintiff’s Credibility**

20 Plaintiff also argues that the ALJ committed error by failing to find the Plaintiff
21 credible and failing to credit his symptom testimony. Doc. 9 at 17. Plaintiff argues that
22 the ALJ could reject Plaintiff’s testimony only if the ALJ gave specific, clear and
23 convincing reasons for doing so. Doc. 9 at 18. Defendant agrees that under existing
24 circuit law, the ALJ must give clear and convincing reasons to reject Plaintiff’s testimony
25 about the severity of his symptom (although Defendant argues the circuit law is
26 inconsistent with the applicable regulations). Doc. 10 at 8 n. 4. Thus, the Court will

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28 ⁴ The Court is unclear why Plaintiff believes he is “so close” to a disability finding.

1 determine whether the ALJ gave clear and convincing reasons for not crediting Plaintiff's
2 symptom testimony. *See Chaudhry v. Astrue*, 688 F.3d 661, 670-71 (9th Cir. 2012).

3 The ALJ may consider many factors in weighing a claimant's credibility,
4 including "(1) ordinary techniques of credibility evaluation, such as the
5 claimant's reputation for lying, prior inconsistent statements concerning the
6 symptoms, and other testimony by the claimant that appears less than
7 candid; (2) unexplained or inadequately explained failure to seek treatment
8 or to follow a prescribed course of treatment; and (3) the claimant's daily
9 activities." [citation omitted]. If the ALJ's finding is supported by
10 substantial evidence, the court "may not engage in second-guessing."
11 [citation omitted].

12 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

13 The ALJ gave 4 reasons for not crediting Plaintiff's symptom testimony;
14 specifically: 1) Plaintiff's testimony was inconsistent with the medical record; 2)
15 Plaintiff's failed to follow some of the doctor's recommendations; 3) Plaintiff's daily
16 activities were inconsistent with the limitations Plaintiff claimed; and 4) Plaintiff showed
17 signs of improvement following certain treatments. Doc. 8-3 at 18-19.

18 **A. Medical Record**

19 Plaintiff's symptom testimony being inconsistent with the medical evidence is a
20 valid reason not to credit Plaintiff's testimony. *Carmickle v. Comm'r, Soc. Sec. Admin.*,
21 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical record is a
22 sufficient basis for rejecting the claimant's subjective testimony.").

23 Here, the ALJ made very specific findings regarding how the medical evidence
24 conflicted with Plaintiff's symptom testimony. In the first full paragraph of page 17 of
25 the ALJ's opinion, the ALJ lists 5 medical reasons (and cites medical evidence) why
26 Plaintiff's COPD was not as bad as Plaintiff claimed. Doc. 8-3 at 18. These are clear
27 and convincing reasons supported by substantial evidence of record to reject Plaintiff's
28 testimony regarding the severity of his breathing issues; therefore the decision of the
ALJ's decision will not be reversed on this finding.

B. Doctor's Recommendations

Plaintiff failing to seek treatment and failing to follow the doctor's recommended

1 treatment are both valid reasons for the ALJ to not credit Plaintiff's symptom testimony.
2 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (“[U]nexplained, or inadequately
3 explained, failure to seek treatment . . . can cast doubt on the sincerity of [a]
4 claimant's pain testimony.”); *Tommasetti*, 533 F.3d at 1039 (failure to follow a
5 prescribed course of treatment can be a basis to not believe Plaintiff's symptom
6 testimony).

7 Here, with respect to Plaintiff's knee pain, the ALJ noted that Plaintiff did not
8 follow up after surgery for five years. Doc. 8-3 at 18. Plaintiff did not take the
9 recommended anti-inflammatory medication. *Id.* Plaintiff also did not submit evidence
10 that he did the recommended physical therapy or received the recommended cortisone
11 injections. *Id.* Finally, the doctor noted that Plaintiff could walk half a mile with no
12 difficulty, did not have difficulty getting on and off the table, and did not have difficulty
13 with mobility for household shores. *Id.* Thus, Plaintiff's symptom testimony regarding
14 his knees is inconsistent with the medical record. *See Carmickle*, 533 F.3d at 1161.

15 Accordingly, the ALJ gave clear and convincing reasons supported by substantial
16 evidence of record to reject Plaintiff's testimony regarding his knee pain. Therefore, the
17 decision of the ALJ's decision will not be reversed on this finding.

18 **C. Plaintiff's Daily Activities**

19 The ALJ can discredit Plaintiff's symptom testimony if his daily activities are
20 inconsistent with the severity of the symptoms claimed. *Curry v. Sullivan*, 925 F.2d
21 1127, 1130 (9th Cir. 1990) (finding that the claimant's ability to “take care of her
22 personal needs, prepare easy meals, do light housework and shop for some
23 groceries . . . may be seen as inconsistent with the presence of a condition which would
24 preclude all work activity” (citations omitted)).

25 Here, the ALJ noted that Plaintiff has a normal range of motion in his joints and
26 normal grip strength, and is able to ride his motorcycle including using the clutch, which
27 was inconsistent with the severity of the wrist pain and wrist limitations Plaintiff claimed.
28 Doc. 8-3 at 19-20. Further, Plaintiff has no limitation in his mobility for purposes of

1 doing household chores, which was inconsistent with the severity of the knee pain
2 claimed. Doc. 8-3 at 18.

3 Finally, the ALJ found the daily activities as a whole were inconsistent with the
4 severity of the limitations claimed. Specifically, Plaintiff can manage his personal care
5 unassisted, shop, drive, manage medication, manage finances, walk a half mile without
6 assistance, complete chores, watch television, drive (including riding a motorcycle),
7 purchase merchandise, and read. Doc. 8-3 at 15.

8 The Court finds that the scope and strenuousness of Plaintiff's activities are clear
9 and convincing reasons cited by the ALJ and supported by substantial evidence in the
10 record to not credit Plaintiff's testimony regarding the severity of his symptoms. Thus,
11 the Court will not reverse the ALJ on this basis.

12 **D. Improvement**

13 Plaintiff's symptoms improving or being cured is a valid basis to find Plaintiff's
14 testimony about his symptoms not credible. *See Warre v. Comm'r of the Soc. Sec.*
15 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be controlled
16 effectively with medication are not disabling for purposes of determining eligibility for
17 SSI benefits.").

18 Here, the ALJ found, "[i]n April and May of 2012, the claimant had surgery to
19 relieve the carpal tunnel syndrome, on each wrist separately. The claimant reported that
20 he was happy with the results of the surgeries and was able to ride his motorcycle.
21 (Exhibit 6F, 9F, & 10F). Since the claimant's carpel tunnel syndrome surgery was
22 successful, he no longer suffers from more than minor limitations from this condition."
23 Doc. 8-3 at 19. This significant improvement through surgery, coupled with Plaintiff's
24 statements to his doctor about the outcome of the surgery, is a clear and convincing
25 reason to not find credible Plaintiff's testimony about the severity of his symptoms in his
26 wrists.

27 The ALJ further found, "[r]egarding [Plaintiff's] urinary/prostate issues, [Plaintiff]
28 underwent prostate surgery in November of 2012. [Plaintiff] noted that he was very

1 happy with the results. (Exhibit 13F) The prostate surgery was successful and [Plaintiff]
2 is able to void without difficulty or notable pain.” Doc. 8-3 at 19. This lack of symptoms
3 post-surgery is a clear and convincing reason to not find credible Plaintiff’s testimony
4 about the severity of his urinary limitations.

5 **E. Conclusion Regarding Plaintiff’s Credibility**

6 Based on all of the foregoing, the ALJ gave clear and convincing reasons for not
7 finding Plaintiff’s symptom testimony credible. In his appeal, Plaintiff argues that the
8 Function Reports support Plaintiff’s symptom testimony and should have been relied on
9 by the ALJ. Doc. 9 at 19. However, as Defendant notes, these are reports created based
10 on Plaintiff’s self-reported symptoms. Doc. 10 at 12. Moreover, when there are conflicts
11 in the evidence, the ALJ must resolve those conflicts and as long as the ALJ’s decision is
12 supported by substantial evidence, this Court cannot second guess the ALJ’s
13 determination. *See Tommasetti*, 533 F.3d at 1039. Thus, the Court will not reverse the
14 ALJ’s decision to not find credible the severity of Plaintiff’s symptom testimony.

15 **IV. Conclusion**

16 For the reasons stated above,

17 **IT IS ORDERED** that the decision of the ALJ is affirmed and the Clerk of the
18 Court shall enter judgment accordingly.⁵

19 Dated this 21st day of November, 2016.



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⁵ To the extent a mandate is required, the judgment shall serve as the mandate.