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

8  
9 David M. Betts,

No. CV-16-01579-PHX-NVW

10 Plaintiff,

**ORDER**

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.  
15

16 Plaintiff David M. Betts seeks review under 42 U.S.C. § 405(g) of the final  
17 decision of the Commissioner of Social Security (“the Commissioner”), which denied  
18 him disability insurance benefits and supplemental security income under sections 216(i),  
19 223(d), and 1614(a)(3)(A) of the Social Security Act. Because the decision of the  
20 Administrative Law Judge (“ALJ”) is supported by substantial evidence and is not based  
21 on legal error, the Commissioner’s decision will be affirmed.

22 **I. BACKGROUND**

23 Plaintiff was born in April 1969. He graduated from college and later obtained a  
24 mortgage broker’s license and obtained a certificate for boat brokering. He has worked  
25 as a manager at a marina, a customer associate for an internet bank, a property manager,  
26 general manager at a boat storage and service business, a car salesman, and a boat broker.  
27 Plaintiff stopped working in 2010 as a result of chronic back pain that worsened as a  
28

1 result of an assault in 2002 and another assault on September 7, 2010. Plaintiff testified  
2 that standing or sitting upright causes him to experience intense upper thoracic pain.

3 On August 6, 2012, Plaintiff applied for a period of disability and disability  
4 insurance benefits. On August 15, 2012, Plaintiff applied for supplemental security  
5 income. In both applications, Plaintiff alleges disability beginning September 7, 2010.  
6 On June 2, 2014, he appeared with his attorney and testified at a hearing before the ALJ.  
7 A vocational expert also testified. On August 22, 2014, the ALJ issued a decision that  
8 Plaintiff was not disabled within the meaning of the Social Security Act. The Appeals  
9 Council denied Plaintiff's request for review of the hearing decision, making the ALJ's  
10 decision the Commissioner's final decision. On May 23, 2016, Plaintiff sought review by  
11 this Court.

## 12 **II. STANDARD OF REVIEW**

13 Claims that are not actually argued in an appellant's opening brief are not  
14 considered on appeal. *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929  
15 (9th Cir. 2003). Only issues that are argued specifically and distinctly in a party's  
16 opening brief are reviewed. *Id.* Moreover, "when claimants are represented by counsel,  
17 they must raise all issues and evidence at their administrative hearings to preserve them  
18 on appeal." *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999).

19 A court may set aside the Commissioner's disability determination only if the  
20 determination is not supported by substantial evidence or is based on legal error. *Orn v.*  
21 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Generally, when the evidence is susceptible to  
22 more than one rational interpretation, courts must uphold the ALJ's findings if they are  
23 supported by inferences reasonably drawn from the record. *Molina v. Astrue*, 674 F.3d  
24 1104, 1111 (9th Cir. 2012). "Overall, the standard of review is highly deferential."  
25 *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015).

## 26 **III. FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

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

1 the burden of proof on the first four steps, but the burden shifts to the Commissioner at  
2 step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

3 At the first step, the ALJ determines whether the claimant is engaging in  
4 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
5 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant  
6 has a severe medically determinable physical or mental impairment. § 404.1520(a)(4)(ii).  
7 If not, the claimant is not disabled and the inquiry ends. *Id.* At step three, the ALJ  
8 considers whether the claimant's impairment or combination of impairments meets or  
9 medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404.  
10 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If  
11 not, the ALJ proceeds to step four. At step four, the ALJ assesses the claimant's residual  
12 functional capacity and determines whether the claimant is still capable of performing  
13 past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the  
14 inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step, where he determines  
15 whether the claimant can perform any other work based on the claimant's residual  
16 functional capacity, age, education, and work experience. § 404.1520(a)(4)(v). If so, the  
17 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

18 At step one, the ALJ found that Plaintiff meets the insured status requirements of  
19 the Social Security Act through September 30, 2011, and that he has not engaged in  
20 substantial gainful activity since September 7, 2010. At step two, the ALJ found that  
21 Plaintiff has the following severe impairments: degenerative disc disease of the thoracic  
22 spine. At step three, the ALJ determined that Plaintiff does not have an impairment or  
23 combination of impairments that meets or medically equals an impairment listed in 20  
24 C.F.R. Part 404, Subpart P, Appendix 1.

25 At step four, the ALJ found that Plaintiff:

26 has the residual functional capacity to perform light work as defined in 20  
27 CFR 404.1567(b) and 416.967(b) with the following exceptions: The  
28 claimant can never climb ladders, ropes or scaffolds but can occasionally  
climb ramps and stairs and can occasionally balance, stoop, crouch, kneel  
and crawl.

1 The ALJ further found that Plaintiff is able to perform his past relevant work as a marine  
2 service manager, financial services sales representative, property manager, and motor  
3 vehicle sales representative.

#### 4 **IV. ANALYSIS**

##### 5 **A. The ALJ Did Not Deny Plaintiff Due Process by Denying His Subpoena** 6 **Request.**

7 “When it is reasonably necessary for the full presentation of a case,” an ALJ may  
8 issue subpoenas on his own initiative or at the request of a party. 20 C.F.R.  
9 §§ 404.950(d)(1), 416.1450(d)(1). A request from a party must “state the important facts  
10 that the witness or document is expected to prove; and indicate why these facts could not  
11 be proven without issuing a subpoena.” §§ 404.950(d)(2), 416.1450(d)(2).

12 On February 24, 2014, Plaintiff, who was then unrepresented, requested that the  
13 ALJ issue subpoenas for three witnesses to testify at a hearing set for March 13, 2014:  
14 Paul Wang, D.O.; Todd Doerr, M.D.; and Abram Burgher, M.D. Plaintiff stated,  
15 “Because I have a rare thoracic spinal condition, I need their testimonies at this hearing in  
16 order to prove the timing and severity of the debilitating effects.” This request did not  
17 identify important facts that the witnesses were expected to prove or indicate why these  
18 facts could not be proven without issuing a subpoena. If Plaintiff believed the statements  
19 and records of these medical providers needed to be supplemented, he could have asked  
20 them to provide additional statements for submission to the ALJ.

21 On May 29, 2014, Plaintiff appointed a representative to represent him regarding  
22 his claims for Social Security disability insurance benefits and supplemental security  
23 income.<sup>1</sup> On June 2, 2014, a hearing was held before the ALJ during which the three  
24 witnesses did not appear, and Plaintiff’s counsel did not object. This issue therefore was  
25 not preserved for appeal.

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26 <sup>1</sup> Plaintiff is permitted to engage legal counsel for Social Security Administration  
27 proceedings and judicial appeals, but counsel is not appointed or provided for claimants.  
28 It was not the ALJ’s responsibility to ensure that Plaintiff communicated with the counsel  
that Plaintiff appointed as his representative.

1 In his hearing decision, the ALJ stated:

2 The claimant filed a motion requesting that I subpoena three of his treating  
3 physicians to testify at the hearing on his behalf (Exhibit 18E). As medical  
4 records from all three were submitted and reviewed, I did not find it  
5 necessary to obtain testimony from these witnesses and denied the motion.

6 Even if this issue had not been waived, the ALJ did not err in denying Plaintiff's request  
7 to subpoena medical doctors whose records had been submitted and reviewed in light of  
8 Plaintiff's failure to identify why additional testimony beyond their records was needed  
9 and could not be obtained without subpoenas.

10 **B. Plaintiff's Post-Hearing Evidence Does Not Warrant a Remand for  
11 Further Proceedings.**

12 Plaintiff asks the Court "to remand this matter for further hearing inclusive of  
13 what appears as Exhibit A and any other post hearing medical information that is  
14 available." Exhibit A to Plaintiff's Opening Brief is the transcript of Dr. Burgher's trial  
15 testimony on September 16, 2014, in a civil case brought by Plaintiff in 2012 for the 2010  
16 assault. The Opening Brief also includes Exhibits B through F, which are not mentioned  
17 in the Opening Brief, but might be "other post hearing medical information." Plaintiff's  
18 Reply Brief refers to Exhibits B and D as though they are exhibits to Exhibit A. Exhibit  
19 C appears to be the same as the assessment submitted to the Appeals Council. Out of an  
20 abundance of caution, the Court considers all of the exhibits attached to the Opening  
21 Brief.

22 "The court may . . . at any time order additional evidence to be taken before the  
23 Commissioner of Social Security, but only upon a showing that there is new evidence  
24 which is material and that there is good cause for the failure to incorporate such evidence  
25 into the record in a prior proceeding." 42 U.S.C. § 405(g). Evidence material to Plaintiff  
26 qualifying for Social Security disability insurance must show that Plaintiff was unable to  
27 work from the alleged onset date, September 7, 2010, through the last date insured,  
28 September 30, 2011, and continued to be unable to work through the present. Records  
from 2014 and 2016 do not show that Plaintiff was unable to work in 2010-11.

1 Further, Dr. Burgher began treating Plaintiff for pain in January 2012. He could  
2 have completed the Pain Functional Capacity (RFC) Questionnaire (Exhibit B) and  
3 Medical Assessment of Ability to Do Work Related Physical Activities (Exhibit C), both  
4 dated October 24, 2014, before the ALJ hearing on June 14, 2014. Plaintiff has not  
5 shown good cause for failing to incorporate post-hearing evidence into the record in a  
6 prior proceeding.

7 Moreover, Dr. Burgher's opinions do not demonstrate that Plaintiff is disabled.  
8 On September 21, 2013, Dr. Burgher responded in writing to questions posed by  
9 Plaintiff's attorney. At that time, Dr. Burgher refrained from expressing an opinion  
10 regarding Plaintiff's functional limitations and instead recommended that Plaintiff  
11 undergo a functional capacity evaluation to determine current occupational and other  
12 limitations experienced as a result of pain. He stated that Plaintiff obtains pain relief  
13 from radiofrequency neurolysis (*i.e.*, nerve ablation) of the facet joints. At trial on  
14 September 16, 2014, Dr. Burgher testified that although there is no surgery to treat pain  
15 from the facet joints, Plaintiff has responded significantly to radiofrequency ablation,  
16 which has abated Plaintiff's pain for 6 to 18 months before the nerves have grown back  
17 and must be cauterized again. At trial, Dr. Burgher opined that pain severely impairs a  
18 person's ability to work by causing difficulty in social interactions, mental and emotional  
19 abilities, reaching, and sitting for long periods of time. Although Dr. Burgher completed  
20 a Medical Assessment of Ability to Do Work Related Physical Activities (Exhibit C), the  
21 only findings he identified as support of limitations was: "Documented spine disease in  
22 the medical record." In summary, Dr. Burgher said someone else should evaluate  
23 Plaintiff's functional limitations, the medical record shows a physical condition that  
24 could cause pain, people who experience pain often have difficulty working, and  
25 therefore Plaintiff probably has some functional limitations.

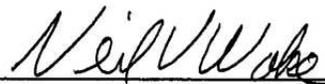
26 The other records Plaintiff attached to his Opening Brief also do not support  
27 Plaintiff's disability claim. They document "minimal" and "mild" degenerative disc  
28 disease, pain relief from facet injections and radiofrequency ablations, and a

1 recommendation on May 10, 2016, to obtain ganglion blocks from T3 to T5 bilaterally.  
2 Physical therapy notes show muscle spasms with stretching were not typical for Plaintiff,  
3 but the previous day “he was working out in the yard hedging.” On another day, physical  
4 therapy notes said, “He has not been diligent with his exercise program.”

5 Therefore, the Court will not order remand for administrative consideration of new  
6 evidence because Plaintiff has not shown that there is new evidence which is material and  
7 that there is good cause for the failure to incorporate such evidence into the record in a  
8 prior proceeding.

9 IT IS THEREFORE ORDERED that the final decision of the Commissioner of  
10 Social Security is affirmed. The Clerk shall enter judgment accordingly and shall  
11 terminate this case.

12 Dated this 27th day of September, 2017.

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16 Neil V. Wake  
17 Senior United States District Judge  
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