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NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Timothy J. Megyesi,

No. CV-16-02140-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

15 At issue is the denial of Plaintiff Timothy J. Megyesi's Applications for Disability
16 Insurance Benefits and Supplemental Security Income by the Social Security
17 Administration ("SSA") under the Social Security Act ("the Act"). Plaintiff filed a
18 Complaint (Doc. 1) with this Court seeking judicial review of that denial, and the Court
19 now addresses Plaintiff's Opening Brief (Doc. 14, "Pl.'s Br."), Defendant SSA
20 Commissioner's Opposition (Doc. 16, "Def.'s Br."), and Plaintiff's Reply (Doc. 19,
21 "Reply"). The Court has reviewed the briefs and Administrative Record (Doc. 11, R.) and
22 now affirms the latest decision of the Administrative Law Judge ("ALJ") (R. at 23-37) as
23 upheld by the Appeals Council (R. at 1-4).

24 **I. BACKGROUND**

25 Plaintiff filed his Applications on May 22, 2009, for a period of disability
26 beginning May 19, 2009. (R. at 203.) Plaintiff's claim was denied initially on September
27 30, 2009, and on reconsideration on October 21, 2010. (R. at 203.) Plaintiff then testified
28 at a hearing held before an ALJ on October 19, 2011. (R. at 55-97.) On November 28,

1 2011, the ALJ denied Plaintiff’s Applications. (R. at 203-12.) On March 7, 2013, the
2 Appeals Council remanded the denial to the ALJ to obtain additional evidence and
3 provide additional rationale regarding the determination of Plaintiff’s Residual
4 Functional Capacity (“RFC”), including weighing Plaintiff’s subjective complaints and
5 taking additional evidence from a Vocational Expert (“VE”) as necessary. (R. at 226.)

6 Plaintiff testified at two more hearings before an ALJ, on October 13, 2013 and
7 December 17, 2013. (R. at 98-156.) On January 2, 2014, the ALJ again denied Plaintiff’s
8 Applications. (R. at 226-36.) On February 12, 2015, the Appeals Council again remanded
9 the denial to the ALJ to further evaluate Plaintiff’s impairment of carpal tunnel syndrome
10 and provide additional rationale regarding the determination of Plaintiff’s RFC, including
11 weighing the treating and non-treating doctors’ opinions and taking additional evidence
12 from a VE as necessary. (R. at 244-47.)

13 Plaintiff testified at another hearing on September 21, 2015 (R. at 157-196), at
14 which he amended his onset date to May 25, 2010—the last date he received
15 unemployment benefits (R. at 160-61). On November 27, 2015, the ALJ again denied
16 Plaintiff’s Applications. (R. at 23-37.) On May 5, 2016, the Appeals Council upheld the
17 ALJ’s decision. (R. at 1-4.) The present appeal followed.

18 The Court has reviewed the medical evidence in its entirety and finds it
19 unnecessary to provide a complete summary here. The pertinent medical evidence will be
20 discussed in addressing the issues raised by the parties. In short, upon considering the
21 medical records and opinions, the ALJ found in her November 27, 2015 decision¹ that
22 Plaintiff has severe impairments of degenerative disc disease (“DDD”), carpal tunnel
23 syndrome, and chronic pain syndrome (R. at 26), but that Plaintiff has the RFC to
24 perform his past work of “appointment scheduler” or “travel sales,” such that Plaintiff is
25 not disabled under the Act (R. at 28-37).

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28 ¹ The Court will henceforth refer to the final ALJ decision on November 27,
2015—which was upheld by the Appeals Council and was thus the final decision of the
SSA—unless otherwise indicated.

1 **II. LEGAL STANDARD**

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

15 To determine whether a claimant is disabled for purposes of the Act, the ALJ
16 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of
17 proof on the first four steps, but the burden shifts to the Commissioner at step five.
18 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ
19 determines whether the claimant is presently engaging in substantial gainful activity.
20 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.*
21 At step two, the ALJ determines whether the claimant has a “severe” medically
22 determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the
23 claimant is not disabled and the inquiry ends. *Id.* At step three, the ALJ considers whether
24 the claimant’s impairment or combination of impairments meets or medically equals an
25 impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R.
26 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If not,
27 the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant’s RFC and
28 determines whether the claimant is still capable of performing past relevant work.

1 20 C.F.R. § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the inquiry ends.
2 *Id.* If not, the ALJ proceeds to the fifth and final step, where he determines whether the
3 claimant can perform any other work in the national economy based on the claimant's
4 RFC, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If so, the
5 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

6 **III. ANALYSIS**

7 Plaintiff raises four arguments for the Court's consideration, and the Court will
8 address two of those at the outset. Plaintiff first argues that the ALJ improperly
9 adjudicated the claim as of May 19, 2009—Plaintiff's original alleged onset date (R. at
10 428)—and should have adjudicated the claim as of May 25, 2010—the new onset date
11 alleged by Plaintiff in the fourth hearing (R. at 160-61). (Pl.'s Br. at 2.) The ALJ may
12 consider evidence that pre-dates the alleged onset date if it is probative in determining
13 Plaintiff's RFC at the time of the onset date, so the ALJ's consideration of pre-onset date
14 evidence is not by itself error—particularly where the evidence was provided to support
15 an earlier onset date alleged by Plaintiff in support of two prior ALJ decisions in this
16 case, and Plaintiff only amended his alleged onset date in 2015, six years after his initial
17 Applications. The Court will evaluate more fully below whether the ALJ's opinion with
18 regard to the amended onset date was supported by substantial, relevant evidence in the
19 record.

20 Second, Plaintiff argues that the ALJ did not follow the Appeals Council's remand
21 order. (Pl.'s Br. at 7-9.) But, as Defendant points out, the Appeals Council affirmed the
22 ALJ's opinion in the subsequent appeal, and so the Appeals Council itself must have
23 concluded that the ALJ satisfactorily addressed its concerns as stated in the prior remand
24 order. (Def.'s Br. at 3-4.) Furthermore, the Court only has jurisdiction to evaluate final
25 decisions of the SSA—here, the Appeals Council's final notice (R. at 1-4)—and not the
26 decisions made within the SSA before the Appeals Council entered its final disposition.
27 *See Tyler v. Astrue*, 305 F. App'x 331, 332 (9th Cir. 2008); 42 U.S.C. §§ 405(g),
28 1383(c)(3).

1 That leaves two arguments for the Court’s consideration: (1) whether the ALJ
2 erred in weighing certain medical opinions; and (2) whether the ALJ erred in finding
3 Plaintiff’s testimony less than fully credible. (Pl.’s Br. at 9-25.)

4 **A. The ALJ Assigned Proper Weight to the Assessments of Physicians**
5 **and Properly Considered the Record as a Whole**

6 Plaintiff first argues the ALJ committed reversible error by assigning inadequate
7 weight to the assessment of treating physician Dr. Brian Page and examining physician
8 Dr. John Peachey. (Pl.’s Br. at 9-12.) An ALJ “may only reject a treating or examining
9 physician’s uncontradicted medical opinion based on ‘clear and convincing reasons.’”
10 *Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Lester v.*
11 *Chater*, 81 F. 3d 821, 830-31 (9th Cir. 1996)). “Where such an opinion is contradicted,
12 however, it may be rejected for specific and legitimate reasons that are supported by
13 substantial evidence in the record.” *Id.* Here, the findings of Drs. Page and Peachey were
14 contradicted by the findings of at least two examining physicians, Dr. Omer Ahmed and
15 Dr. Jeffrey Levison (R. at 31-35), so the ALJ was required to provide specific and
16 legitimate reasons supported by substantial evidence to discount the opinions of
17 Drs. Page and Peachey.

18 Plaintiff would prefer that the ALJ disregarded the 2009 examination and
19 evaluation conducted by Dr. Ahmed and, although the Court finds no testimony from
20 Plaintiff in the hearing transcripts that his condition deteriorated from 2009 to 2010,² he
21 amended his alleged onset date from 2009 to 2010, presumably so that the 2009
22 evaluation would fall outside the alleged period of disability. But Plaintiff argues the ALJ
23 should have given full credit to Dr. Peachey’s evaluation, which was conducted in 2013,
24 three years after the amended onset date. This smacks of gamesmanship with the
25 evaluations—particularly in the absence of corroborating testimony of deterioration from
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28 ² Indeed, in the 2015 hearing, Plaintiff testified as to how he described his
disability in his 2009 application for unemployment benefits, and he then testified that he
felt the same “pains and symptoms” in May 2010. (See R. at 166-68.)

1 2009 to 2010—and in any event, the ALJ properly took into account both evaluations in
2 conjunction with all of the evidence, medical and non-medical.

3 To the extent that Dr. Page’s 2011 assessment of Plaintiff (R. at 1011-12)
4 concluded that he had an inability to stand/walk for more than two to three hours in an
5 eight-hour workday, Dr. Page’s assessment was inconsistent with Dr. Ahmed’s 2009
6 assessment (R. at 827-30) and Dr. Levison’s 2013 assessment (R. at 1133-42). In his
7 report, Dr. Ahmed stated that Plaintiff’s examination findings were normal, including full
8 strength and normal flexion, and Plaintiff could, among other things, walk normally, sit
9 comfortably, stand on his toes and heels, and perform a full squat. (R. at 31, 827-30.) In
10 his 2013 report, Dr. Levison also observed that Plaintiff’s gait, range of motion and
11 strength was normal and he had no need for an assistive device to walk. (R. at 32-33,
12 1133-42.) Dr. Levison also reported that claimant performed certain movements “with
13 many theatrics, falling to the side, etc. Intermittently he would yell ‘ouch’ for unclear
14 reasons, and he will perform a flinching type motion with each and every ‘ouch’ that he
15 screams.” (R. at 32-33, 1133-42.) Although he was able to eventually observe the full
16 range of strength, motion and flexion from Plaintiff, he concluded Plaintiff “was
17 obviously putting forth a less than honest exam. In my opinion, he should not be
18 considered a trustworthy examinee.” (R. at 33, 1133-42.)

19 Although she credited much of Dr. Page’s assessment of Plaintiff, the ALJ found
20 the assessment of Plaintiff’s capacity to stand/walk was inconsistent with reliable
21 portions of the medical record, including the reports noted above as well as the
22 observations of treating physicians Dr. Jacob Amrani (R. at 1156-59), and Physician’s
23 Assistant James Alli (R. at 1045, 1047, 1049, 1055, 1057, 1063). (R. at 34-35.) Likewise,
24 the ALJ discounted similar parts of Dr. Peachey’s assessment—those pertaining to
25 Plaintiff’s capacity to sit, stand and walk—as inconsistent with reliable portions of the
26 medical record, including all of the examination reports noted above. (R. at 35.) The ALJ
27 thus provided specific and legitimate reasons supported by the record to discount certain
28 portions of the assessments of Drs. Page and Peachey, and the Court finds no error. *See*

1 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (citing *Magallanes v. Bowen*,
2 881 F.2d 747, 752 (9th Cir. 1989)) (finding that the ALJ gave sufficiently specific and
3 legitimate reasons for rejecting a treating physician’s assessment by noting that the
4 assessment was not supported by clinical findings and was based on the claimant’s
5 subjective complaints).

6 Plaintiff also argues that the ALJ erred in crediting the impairment assessments of
7 Dr. N. Tella and Dr. Charles Fina, state examining physicians, who opined after
8 reviewing Plaintiff’s medical record that Plaintiff had the RFC to perform light work with
9 no upper extremity limitations.³ (Pl.’s Br. a 12-16.) Although Drs. Tella and Fina did not
10 examine Plaintiff, they did review the medical record. And, although there is no question
11 that Plaintiff has medical test results—including MRIs, x-rays, and electromyography
12 results—that support a finding that he has severe impairments of DDD, carpal tunnel
13 syndrome, and chronic pain syndrome, as noted by the ALJ, the reports of Drs. Tella and
14 Fina were geared toward an assessment of Plaintiff’s RFC, which involves more than just
15 the medical test results. They also considered medical opinions regarding Plaintiff’s
16 symptoms and functional capacity. (R. at 34.) Because the ALJ identified specific aspects
17 in which the reports of Drs. Tella and Fina were “supported by the bulk of the medical
18 evidence” (R. at 34), the ALJ did not err in giving the reports great weight. *See*
19 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040-42 (9th Cir. 2008); *Tonapetyan*, 242 F.3d at
20 1149.

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22 ³ Plaintiff again makes the specious argument that the ALJ and Court should
23 disregard Dr. Tella’s report because it was prepared in 2009, before the amended onset
24 date. (Pl.’s Br. at 13.) As noted above, Plaintiff alleged his onset date was 2009 for six
25 years within the SSA before amending it to 2010, and Plaintiff never testified that his
26 symptoms deteriorated from 2009 to 2010—indeed, the evidence demonstrates the
27 opposite. In addition, Plaintiff makes the even worse argument that the ALJ and Court
28 should disregard Dr. Fina’s March 2010 report because it was prepared “before the date
of disability and five years prior to the hearing.” (Pl.’s Br. at 13.) The amended onset date
is May 2010, two months after Dr. Fina’s report. And a report prepared around the time
of the alleged onset date is just as, if not more, probative to a disability determination as a
report prepared five years later, near the time of the fourth hearing in this matter. Indeed,
Plaintiff repeatedly asks the Court to credit Dr. Page’s report, which was prepared in
2011, four years prior to the hearing. In short, Plaintiff’s arguments as to the timing of the
state examining physicians’ reports are meritless.

1 **B. The ALJ Properly Weighed Plaintiff’s Testimony**

2 Plaintiff also argues that the ALJ erred in her consideration of Plaintiff’s symptom
3 testimony. (Pl.’s Br. at 18-23.) While credibility is the province of the ALJ, an adverse
4 credibility determination requires the ALJ to provide “specific, clear and convincing
5 reasons for rejecting the claimant’s testimony regarding the severity of the claimant’s
6 symptoms.” *Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th Cir. 2014)
7 (citing *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)). “In evaluating the
8 credibility of pain testimony after a claimant produces objective medical evidence of an
9 underlying impairment, an ALJ may not reject a claimant’s subjective complaints based
10 solely on a lack of medical evidence to fully corroborate the alleged severity of pain.”
11 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). This is because “pain testimony
12 may establish greater limitations than can medical evidence alone.” *Id.* The ALJ may
13 properly consider that the medical record lacks evidence to support certain symptom
14 testimony, but that cannot form the sole basis for discounting the testimony. *Id.* at 681.
15 The ALJ may also properly consider inconsistencies in the claimant’s testimony,
16 including inconsistencies between the claimant’s testimony of daily activities and
17 symptom testimony.

18 As the ALJ noted, Plaintiff has testified that “he suffers from medical conditions
19 that cause him to experience radiating pain, numbness, stinging, cramping, trembling,
20 headaches, and difficulty using his hands, sleeping, standing, sitting, and lifting.” (R. at
21 29.) “Specifically, the claimant alleged that he can sit for only fifteen to twenty minutes,
22 stand for twenty to thirty minutes, and lift ten to fifteen pounds at most.” (R. at 29.)

23 While the ALJ took into account certain aspects of Plaintiff’s testimony in
24 formulating Plaintiff’s RFC, the ALJ discounted certain subjective symptom testimony
25 on account of inconsistencies between his subjective reports and the objective treatment
26 and examination records. For example, while Plaintiff has reported difficulty walking,
27 objective observations and clinical examinations have not corroborated that report. (R. at
28 29-30.) He reported in one instance he was able to walk one to two miles, in another

1 instance he walked five blocks to his examination, and objective medical examinations
2 by Drs. Ahmed (2009), Levison (2013), and Amrani (2015) revealed a normal gait and
3 full strength. (R. at 29-30, 32-33.) The ALJ also provided a detailed review of Plaintiff’s
4 medical test results, which supported findings that Plaintiff has mild to moderate DDD
5 but showed Plaintiff’s improvement with treatment and surgery. (R. at 30-35.) In
6 assessing Plaintiff’s symptom testimony, the ALJ also noted Dr. Levison’s finding that
7 Plaintiff was malingering (or “should not be considered a trustworthy examinee”),
8 inconsistencies over time in Plaintiff’s complaints of pain and reporting of his medical
9 history, and instances in which urinary drug screens revealed no prescribed pain
10 medication—which would not be expected if Plaintiff suffered constant, chronic pain, as
11 he has reported. (R. at 32-33.)

12 Similarly, with regard to Plaintiff’s carpal tunnel syndrome, the ALJ reported the
13 medical record included “no evidence of ulnar neuropathy⁴” and little to no evidence
14 after the alleged onset date of any limitations resulting from carpal tunnel syndrome.
15 (R. at 34.) Indeed, the ALJ noted that, upon examination, Plaintiff “generally had good
16 grip strength, good coordination, and normal sensation and motor strength.” (R. at 34.)

17 By identifying myriad inconsistencies as a factor in her credibility determination,
18 the ALJ provided clear and convincing reasons to discount certain symptom testimony.
19 *See Tommasetti*, 533 F.3d at 1039-40; *Burch*, 400 F.3d at 680-81.

20 Likewise, the ALJ’s comparison of Plaintiff’s testimony regarding performing
21 daily tasks and his symptom testimony was not improper. The ALJ specifically noted
22 inconsistencies in Plaintiff’s reports regarding his ability to walk, do grocery shopping,
23 sweep and mop floors, ride a bicycle, cook, and drive and his reports of his symptoms
24 resulting from DDD and carpal tunnel syndrome. (R. at 29-30.) These inconsistencies are
25 also a specific, clear and convincing reason for the ALJ to discount certain symptom
26 testimony. *See Tommasetti*, 533 F.3d at 1039-40; *Burch*, 400 F.3d at 680-81. As a result,

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28 ⁴ Neuropathy is weakness, numbness, and pain from nerve damage.

1 the ALJ did not err in weighing Plaintiff's testimony in determining his functional
2 capacity.

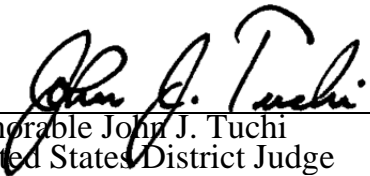
3 **IV. CONCLUSION**

4 Plaintiff raises no error on the part of the ALJ, and the SSA's decision denying
5 Plaintiff's Application for Supplemental Security Income benefits under the Act was
6 supported by substantial evidence in the record.

7 IT IS THEREFORE ORDERED affirming the November 27, 2015 decision of the
8 Administrative Law Judge, (R. at 23-37), as upheld by the Appeals Council on May 5,
9 2016, (R. at 1-4).

10 IT IS FURTHER ORDERED directing the Clerk to enter final judgment
11 consistent with this Order and close this case.

12 Dated this 28th day of September, 2017.

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16 Honorable John J. Tuchi
17 United States District Judge
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