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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Paul Mitchell Cotton,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Acting Commissioner
13 of Social Security,

14 Defendant.

No. CV-16-2230-PHX DGC

ORDER

15 Plaintiff Paul Mitchell Cotton seeks review under 42 U.S.C. § 405(g) of the final
16 decision of the Commissioner of Social Security (“the Commissioner”), which denied
17 him disability insurance benefits and supplemental security income under sections 216(i),
18 223(d), and 1614(a)(3)(A) of the Social Security Act. Because the decision of the
19 Administrative Law Judge (“ALJ”) is based on legal error, the Commissioner’s decision
20 will be vacated and the matter remanded for further administrative proceedings.

21 **I. Background.**

22 On August 5, 2009, Plaintiff applied for disability insurance benefits and
23 supplemental security income, alleging disability beginning December 21, 2008.
24 Plaintiff subsequently amended his claim to a closed period of disability, from
25 September 6, 2008 through June 30, 2010. In March 2012, the ALJ issued an
26 unfavorable decision. In May 2013, the Social Security Administration Appeals Council
27 vacated and remanded. A second hearing occurred on October 17, 2014, where Plaintiff
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1 appeared by video with his attorney and testified before the ALJ. A vocational expert
2 also testified. On January 23, 2015, the ALJ found that Plaintiff was not disabled within
3 the meaning of the Social Security Act. The Appeals Council denied Plaintiff's request
4 for review, making the ALJ's decision the Commissioner's final decision.

5 **II. Legal Standard.**

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

18 Harmless error principles apply in the Social Security Act context. *Molina v.*
19 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains
20 substantial evidence supporting the ALJ's decision and the error does not affect the
21 ultimate nondisability determination. *Id.* The claimant usually bears the burden of
22 showing that an error is harmful. *Id.* at 1111.

23 **III. The ALJ's Five-Step Evaluation Process.**

24 To determine whether a claimant is disabled for purposes of the Social Security
25 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears
26 the burden of proof on the first four steps and the burden shifts to the Commissioner at
27 step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

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

16 At step one, the ALJ found that Plaintiff meets the insured status requirements of
17 the Social Security Act through March 31, 2014, and that he has not engaged in
18 substantial gainful activity during the period of September 6, 2008 through June 30,
19 2010. At step two, the ALJ found that Plaintiff has the following severe impairments:
20 lumbar degenerative disc disease, hepatitis C, coronary atherosclerosis status post stent,
21 and history of methamphetamine, crack cocaine, LSD, alcohol, and marijuana use. At
22 step three, the ALJ determined that Plaintiff does not have an impairment or combination
23 of impairments that meets or medically equals an impairment listed in Appendix 1 to
24 Subpart P of 20 C.F.R. Pt. 404. At step four, the ALJ found that Plaintiff has the RFC to
25 perform “the full range of medium work as defined in 20 CFR 404.1567(c).” A.R. 17.
26 The ALJ further found that Plaintiff has no past relevant work. At step five, the ALJ
27 concluded that, considering Plaintiff’s age, education, work experience, and residual
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1 functional capacity between September 6, 2008 and June 30, 2010, there were jobs that
2 existed in significant numbers in the national economy that Plaintiff could have
3 performed.

4 **IV. Analysis.**

5 Plaintiff argues the ALJ's decision is defective for four reasons: (1) the ALJ erred
6 in rejecting the assessment of Plaintiff's treating physician, Kyle Norris, M.D., by
7 conflating his assessment with one of a treating physician assistant; (2) the ALJ erred in
8 finding that Plaintiff was "not entirely credible" in the absence of specific, clear, and
9 convincing reasons supported by substantial evidence; (3) the ALJ erred in determining
10 Plaintiff's work capacities without articulated reasons supported by substantial evidence;
11 and (4) the ALJ erred in relying on the medical vocational guidelines in Appendix 2 of
12 the regulations, commonly known as the "grids," to determine that Plaintiff could have
13 performed a significant number of jobs in the national economy.

14 **A. Weighing of Medical Source Evidence.**

15 Plaintiff argues that the ALJ improperly weighed the medical opinions of Dr. Kyle
16 Norris and Mr. Greg Harris, PAC, by conflating the two opinions and failing to even
17 mention the latter by name.

18 **1. Legal Standard**

19 The Ninth Circuit distinguishes between the opinions of treating physicians,
20 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,
21 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating
22 physician's opinion and more weight to the opinion of an examining physician than a
23 non-examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th Cir.
24 1995); *see also* 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when
25 evaluating opinion evidence, including length of examining or treating relationship,
26 frequency of examination, consistency with the record, and support from objective
27 evidence). If it is not contradicted by another doctor's opinion, the opinion of a treating
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1 or examining physician can be rejected only for clear and convincing reasons. *Lester*, 81
2 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)).

3 A contradicted opinion of a treating or examining physician can be rejected only
4 for “specific and legitimate reasons that are supported by substantial evidence in the
5 record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043). An ALJ meets this
6 standard “by setting out a detailed and thorough summary of the facts and conflicting
7 clinical evidence, stating his interpretation thereof, and making findings.” *Cotton v.*
8 *Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986). “The ALJ must do more than offer his
9 conclusions. He must set forth his own interpretations and explain why they, rather than
10 the doctors’, are correct.” *Embrey*, 849 F.2d at 421-22.

11 **2. Kyle Norris, M.D. and Gregory Harris, PAC.**

12 Dr. Norris’ medical opinion is not contradicted by any other medical opinion
13 referenced by the ALJ in the opinion. Thus, the ALJ could discount his opinion only for
14 clear and convincing reasons. *Lester*, 81 F.3d at 830. The ALJ could discount the
15 opinion of Mr. Harris by providing “germane reasons” that are “substantiated by the
16 record.” *See Molina*, 674 F.3d at 1111.

17 The ALJ’s analysis of the medical opinion evidence is brief and mentions only
18 two opinions: one from Dr. Jane Dill and the other from a “Mr. Norris.” A.R. 20.
19 Between December 2008 and January 2009, Dr. Dill examined Plaintiff on four separate
20 occasions in response to his application for workers’ compensation. *Id.* Each time, Dr.
21 Dill placed Plaintiff on some level of temporary work restriction, ranging from no
22 activity for two days to not lifting over 15 pounds or push/pull over 30 pounds for a
23 week. *Id.*

24 According to the ALJ’s opinion, “Mr. Norris” provided Plaintiff with four work
25 status assessments between April and June of 2009. The ALJ summarized as follows:

26 On April 1, 2009 to April 5, 2009, Mr. Norris completed a workers
27 compensation assessment and opined that the claimant was unable to work.
28 In May 2009, Mr. Norris reported the claimant could return to work on a

1 part time basis and could use stairs as tolerated. However, in June 3 and
2 June 18, 2009, Mr. Norris opined the claimant was unable to work. It must
3 be noted that Mr. Norris, as a physician's assistant, is not an "acceptable
4 medical source", and his opinions are considered "other evidence" (20 CFR
5 404.1513(d)(1) and 416.913(d)(1), and Social Security Ruling 06-03p).

6 A.R. 20.

7 The ALJ clearly confused and conflated the opinions of Dr. Kyle Norris and Mr.
8 Gregory Harris, PAC. The record shows that Mr. Harris filled out three of the four work
9 status forms – April 1-5 (A.R. 867), June 3 (A.R. 865), and June 18, 2009 (A.R. 864) –
10 and recommended no work for Plaintiff each time. Dr. Norris completed only the "May
11 2009" work status form, where he recommended that claimant could return to work for
12 four hours each day and could use the stairs as tolerated. A.R. 386, 866. The ALJ
13 mentions the May 2009 recommendation only as the work of "Mr. Norris," combines it
14 with the three evaluations done by Mr. Harris, and completely ignores the fact that Dr.
15 Norris recommended that Plaintiff be restricted from working more than four hours per
16 day. A.R. 20, 866.

17 The Commissioner concedes that the ALJ confused Dr. Norris and Mr. Harris.
18 Doc. 11 at 5. The Commissioner argues that the error was not prejudicial, however,
19 because their work status updates "do not establish that Plaintiff was unable to work full-
20 time for at least 12 consecutive months. Therefore, any error in the ALJ's evaluation of
21 these opinions did not likely affect the ALJ's decision that Plaintiff was not disabled."
22 Doc. 11 at 5-6. The Commissioner also argues that "the authors of the work status
23 evaluations did not specifically link their assessment of Plaintiff's ability to perform work
24 activities to their medical findings. . . . Thus, the ALJ reasonably found that the work
25 status updates are contradicted by the provider's records." *Id.* at 6.

26 The Commissioner's argument is unpersuasive. Even if the Court were to assume
27 that the work status updates from April through June of 2009 do not establish that
28 Plaintiff would have been disabled for a period of 12 consecutive months, or were not

1 linked to medical findings, the ALJ did not rely on that reasoning in her opinion. It is
2 well settled that the Court may review the ALJ's decision only on the basis of reasoning
3 provided by the ALJ. The Court – and the Commissioner – cannot find other reasons to
4 support the ALJ's decision. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
5 1225 (9th Cir. 2009) (Court must “review the ALJ's decision based on the reasoning and
6 factual findings offered by the ALJ – not *post hoc* rationalizations that attempt to intuit
7 what the adjudicator may have been thinking”).

8 Besides confusing Norris and Harris, the ALJ provided these reasons for
9 discounting their opinions:

10 Medical reports generated in the context of a workers' compensation claim
11 are adversarial in nature. The claimant's treating physician in the context
12 of a workers' compensation claim often serves as an advocate for the
13 claimant and describes excessive limitations to enhance the claimant's
14 financial recovery. In addition, the definition of disability in a workers'
15 compensation case is not the same as a Social Security disability case.
16 Workers' compensation cases look only at the claimant's ability to return to
17 the job being performed at the time of the injury. Finally, whether the
18 claimant is “disabled” is a determination reserved to the Commissioner (20
19 CFR 404.1527(e) and 416.927(e); and SSR 96-5p). Therefore, the
20 credibility and relevance of the opinions of Dr. Dill and Mr. Norris are
21 limited because of his status as treating sources in the claimant's workers'
22 compensation claim and their contradictory opinion with that of other
23 examining and non-examining physicians of record including their own
24 records and the claimant's reports that only note minimal limitations.

25 A.R. 20.

26 Discounting the medical opinions of Dr. Norris and Mr. Harris on the basis of their
27 *assumed* motivations amounts to speculation. It does not constitute a clear and
28 convincing reason for rejecting Norris or a germane reason for rejecting Harris. As the
Ninth Circuit has explained, “[t]he purpose for which medical reports are obtained does
not provide a legitimate basis for rejecting them[,]” and “[t]he Secretary may not assume

1 that doctors routinely lie in order to help their patients collect disability benefits.” *Lester*,
2 81 F.3d at 832.¹

3 The ALJ also states that the opinions of Dr. Norris and Mr. Harris contradict
4 “other examining and non-examining physicians of record including their own records
5 and the claimant’s reports” (A.R. 20), but she fails to provide any citation to these other
6 physicians or their records. Such a general and ambiguous justification falls far short of
7 providing “clear and convincing” reasons for discounting a treating physician’s opinion.
8 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 884 (9th Cir. 2006).

9 The Commissioner argues that any error the ALJ made is ultimately harmless
10 because Plaintiff refused to attend a physical consultative examination scheduled by the
11 Commissioner on November 23, 2009, and “[t]he refusal to attend a consultative
12 examination is grounds to find a claimant not disabled.” Doc. 11 at 7; *see* A.R. 18, 82-
13 83, 86, 113, 121-122, 492. But this was not the basis for the ALJ’s decision, and the
14 Court therefore may not rely on it. *See Bray*, 554 F.3d at 1225. The ALJ’s opinion does
15 mention Plaintiff’s missed consultative exam in passing, but she never cited it as a factor
16 for discounting the medical opinions of Dr. Norris and Mr. Harris. *See* A.R. 19, 21. The
17 Ninth Circuit has made clear that the harmless error rule can apply “where the ALJ
18 provided one or more invalid reasons for disbelieving a claimant’s testimony, but also
19 provided valid reasons that were supported by the record.” *See Molina*, 674 F.3d at 1115.
20 Here, the ALJ failed to provide any valid reason for discounting the opinions of Dr.
21 Norris and Mr. Harris.

22 The ALJ committed legal error in discounting the opinions of Dr. Norris and Mr.
23 Harris, and error was not harmless.

24 ¹ Plaintiff asserts Dr. Norris was retained to review the workers’ compensation
25 claim after Plaintiff filed it, not to make the claim on Plaintiff’s behalf. Doc. 10 at 12.
26 Plaintiff provides no cite to the record, but the Court notes that several documents signed
27 by Dr. Norris or Mr. Harris are copied to “Workman’s Comp Carrier” (A.R. 382, 385,
28 387, 389).

1 Fourth, Plaintiff refused to attend the scheduled physical consultative examination
2 scheduled by the Commissioner on November 23, 2009.

3 These reasons are specific, and the Court particularly finds the fourth reason to be
4 clear and convincing. Relevant regulations provide that the Commissioner can find a
5 claimant not disabled when the claimant fails to appear for a consultative examination.
6 20 C.F.R. § 404.1518. The same failure constitutes a clear and convincing reason for
7 disbelieving Plaintiff's claims of serious disability. The Court therefore concludes that
8 the ALJ met the necessary standard in discounting Plaintiff's testimony. *Molina*, 674
9 F.3d at 1112 ("In evaluating the claimant's testimony, the ALJ may use ordinary
10 techniques of credibility evaluation[,] including consideration of "inconsistencies either
11 in the claimant's testimony or between the testimony and the claimant's conduct,
12 unexplained or inadequately explained failure to seek treatment or to follow a prescribed
13 course of treatment, and whether the claimant engages in daily activities inconsistent with
14 the alleged symptoms.").

15 To be sure, there are portions of the medical record that support Plaintiff's
16 testimony, including physical examinations showing an antalgic gait, pain with palpation
17 over the lower lumbar spine, and a diagnosis of degenerative disc disease, lumbar
18 displacement, and back pain. Plaintiff also has undergone several procedures for his
19 back, underwent cardiac cauterization on June 23, 2010 for his coronary artery disease,
20 and had significant medication side-effects while undergoing two separate 48-week long
21 interferon treatments for hepatitis C. *Id.* at 18-19. This evidence provides some support
22 for Plaintiff's claims, but "[w]here the evidence is susceptible to more than one rational
23 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be
24 upheld." *Thomas*, 278 F.3d at 954.

25 The Court finds that the ALJ provided sufficient reasons to justify her credibility
26 assessment of Plaintiff's testimony.

1 case, the guidelines would be inapplicable.” *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th
2 Cir. 1999).²

3 “The Commissioner’s need for efficiency justifies use of the grids at step five
4 where they *completely and accurately* represent a claimant’s limitations.” *Id.* at 1102
5 (emphasis in original). “The fact that a non-exertional limitation is alleged does not
6 automatically preclude application of the grids. The ALJ should first determine if a
7 claimant’s non-exertional limitations significantly limit the range of work permitted by
8 his exertional limitations.” *Id.* “[A] vocational expert is required only when there are
9 significant and sufficiently severe non-exertional limitations not accounted for in the
10 grid.” *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007).

11 Plaintiff alleges that the ALJ’s reliance on the grids was inappropriate because
12 Plaintiff “suffered nonexertional impairments sufficiently severe as to impact his ability
13 to work,” including “pain and associated limitations related to his orthopedic
14 impairments.” Doc. 10 at 22. The Commissioner argues that Plaintiff has failed to
15 demonstrate prejudicial error because Plaintiff has not identified evidence establishing a
16 nonexertional limitation that the ALJ erroneously disregarded. Doc. 11 at 12.

17 As discussed above, the Court has found legal error elsewhere in the ALJ’s
18 decision, and will remand for further proceedings. Thus, like the determination of
19 Plaintiff’s RFC, this issue will necessarily be revisited. The Court notes that the ALJ
20 failed to include *any discussion* of Plaintiff’s nonexertional limitations in her step five

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22 ² Nonexertional limitations are defined in 20 C.F.R. § 404.1569a (c), and include
23 “limitations and restrictions imposed by your impairment(s) and related symptoms, such
24 as pain, affect only your ability to meet the demands of jobs other than the strength
25 demands[.]” Examples of nonexertional limitations include having difficulty with the
26 following areas: functioning because of nerves, anxiety, or depression; concentrating;
27 understanding or remembering detailed instructions; seeing or hearing; tolerating some
28 physical feature of certain work settings, such as dust or fumes; or performing a postural
function such as reaching, handling, stooping, climbing, crawling, or crouching. 20
C.F.R. § 404.1569a (c) (i)-(vi).

1 analysis. *See* A.R. 21-22. On remand, prior to relying on the grids in step five, the ALJ
2 must provide analysis of why Plaintiff’s nonexertional limitations do not preclude their
3 use. *See Tackett*, 180 F.3d at 1102.

4 **E. Remand.**

5 Where an ALJ fails to provide adequate reasons for rejecting the opinion of a
6 physician, the Court must credit that opinion as true. *Lester*, 81 F.3d at 834. An action
7 should be remanded for an immediate award of benefits when the following three factors
8 are satisfied: (1) the record has been fully developed and further administrative
9 proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally
10 sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion;
11 and (3) if the improperly discredited evidence were credited as true, the ALJ would be
12 required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995,
13 1020 (9th Cir. 2014) (citing *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1202 (9th Cir.
14 2008), *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 (9th Cir. 2007), *Orn*, 495 F.3d at 640,
15 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004), and *Smolen v. Chater*, 80 F.3d
16 1273, 1292 (9th Cir. 1996)). There is “flexibility” which allows “courts to remand for
17 further proceedings when, even though all conditions of the credit-as-true rule are
18 satisfied, an evaluation of the record as a whole creates serious doubt that a claimant is, in
19 fact, disabled.” *Garrison*, 759 F.3d at 1020.

20 The first two factors are satisfied. Further development of the medical record is
21 impossible because Plaintiff alleges a closed date of disability. And in her decision, the
22 ALJ failed to provide legally sufficient reasons for rejecting the treating opinions of Dr.
23 Norris and Mr. Harris. The third factor is a close call. The only improperly discredited
24 evidence was the medical opinions of Dr. Norris and Mr. Harris, and even when those
25 opinions are credited as true, they do not appear to establish that Plaintiff was unable to
26 work full-time for at least 12 consecutive months.

1 Even if all three factors are satisfied, there is substantial reason in the record to
2 doubt Plaintiff was disabled. For example, as just mentioned, it is unclear whether
3 Plaintiff was unable to work full-time for at least 12 consecutive months. Additionally,
4 Mr. Harris recommended that Plaintiff complete a functional capacity evaluation with a
5 physical therapy group, but Plaintiff seems to have never followed through as the record
6 contains no such evaluation. A.R. 838. What is more, Plaintiff refused to attend a
7 consultative examination, which is sufficient reason alone to find that a claimant is not
8 disabled. 20 C.F.R. § 404.1518. These facts were not relied on by the ALJ in her
9 decision, and thus the Court may not rely on them now to uphold the ALJ's decision. *See*
10 *Bray*, 554 F.3d at 1225. But when considering the record as a whole, these facts "create
11 serious doubt that [Plaintiff was], in fact, disabled" during the time period alleged.
12 *Garrison*, 759 F.3d at 1020. Accordingly, the Court will exercise its discretion to remand
13 for further proceedings.

14 **IV. Conclusion.**

15 The ALJ committed legal error by discounting the medical opinion of Dr. Norris
16 without providing clear and convincing reasons for doing so. The ALJ also committed
17 legal error by discounting the opinion of Mr. Harris without providing germane reasons
18 for doing so. The error was not harmless. The Court will vacate the ALJ's decision and
19 remand.

