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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Susan Mixon,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-16-02712-PHX-DLR

ORDER

15
16 Plaintiff applied for a period of disability, disability insurance benefits, and
17 supplemental security income on October 24, 2012, alleging disability beginning January
18 1, 2009. (A.R. 22.) Her claim was denied initially on February 1, 2013, and upon
19 reconsideration on July 30, 2013. (*Id.*) Plaintiff then requested a hearing. (*Id.*) On April
20 24, 2014, Plaintiff and a vocational expert (VE) appeared and testified at a hearing before
21 the Administrative Law Judge (ALJ). (*Id.*) At the hearing, Plaintiff amended her onset
22 date to February 18, 2013. (*Id.*)

23 On September 26, 2014, the ALJ issued a decision that Plaintiff was not disabled
24 within the meaning of the Social Security Act. (*Id.* at 32.) Thereafter, Plaintiff requested
25 review of the ALJ's decision by the Appeals Council. (*Id.* at 15-16.) The Appeals
26 Council denied Plaintiff's request for review, making the ALJ's decision the
27 Commissioner's final decision. (*Id.* at 1.) On August 10, 2016, Plaintiff sought review
28 by this Court. (Doc. 1.)

1 **LEGAL STANDARD**

2 It is not the district court’s role to review the ALJ’s decision de novo or otherwise
3 determine whether the claimant is disabled. Rather, the court is limited to reviewing the
4 ALJ’s decision to determine whether it “contains legal error or is not supported by
5 substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial
6 evidence is more than a scintilla but less than a preponderance, and “such relevant
7 evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.*
8 “Where evidence is susceptible to more than one rational interpretation, the ALJ’s
9 decision should be upheld.” *Id.* The court, however, “must consider the entire record as
10 a whole and may not affirm simply by isolating a ‘specific quantum of supporting
11 evidence.’” *Id.* Nor may the court “affirm the ALJ on a ground upon which he did not
12 rely.” *Id.*

13 **DISCUSSION**

14 To determine whether a claimant is disabled for purposes of the Social Security
15 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). At the first step, the
16 ALJ determines whether the claimant is engaging in substantial gainful activity. §
17 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.* At step
18 two, the ALJ determines whether the claimant has a “severe” medically determinable
19 physical or mental impairment. § 404.1520(a)(4)(ii). If not, the claimant is not disabled
20 and the inquiry ends. *Id.* At step three, the ALJ considers whether the claimant’s
21 impairment or combination of impairments meets or medically equals an impairment
22 listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the
23 claimant is automatically found to be disabled. *Id.* If not, the ALJ proceeds to step four.
24 At step four, the ALJ assesses the claimant’s residual functional capacity (RFC) and
25 determines whether the claimant is still capable of performing past relevant work. §
26 404.1520(a)(4)(iv). If so, the claimant is not disabled and the inquiry ends. *Id.* If not,
27 the ALJ proceeds to the fifth and final step, where he determines whether the claimant
28 can perform any other work based on the claimant’s RFC, age, education, and work

1 experience. § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the
2 claimant is disabled. *Id.*

3 At step one, the ALJ found that Plaintiff meets the insured status requirements of
4 the Social Security Act through March 31, 2014, and that she has not engaged in
5 substantial gainful activity since February 18, 2013. (A.R. 24.) At step two, the ALJ
6 found that Plaintiff has the following severe impairments: bipolar disorder with
7 psychosis, post-traumatic stress disorder, paranoid schizophrenia, substance-induced
8 mood disorder and psychotic disorder, borderline personality disorder, obesity status, and
9 polysubstance abuse. (*Id.*) At step three, the ALJ determined that Plaintiff does not have
10 an impairment or combination of impairments that meets or medically equals the severity
11 of one of the listed impairments in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404. (*Id.* at
12 26-27.) At step four, the ALJ found that Plaintiff:

13 has the [RFC] to perform light work . . . except [she] can
14 occasionally climb ramps and stairs, can never climb ladders,
15 ropes, or scaffolds; [she] can occasionally balance, stoop,
16 kneel, crouch, [and] can occasionally crawl; [she] must avoid
17 concentrated exposure to extreme temperatures, wet or humid
18 environments, and hazardous environments, [she] is limited to
simple, routine, repetitive tasks that are simple unskilled work
that requires only occasional changes in the work setting, and
[she] is limited to occasional interaction with the public and
co-workers with no crowd contact.

19 (*Id.* at 27-28.) The ALJ also found that Plaintiff is unable to perform any of her past
20 relevant work. (*Id.* at 31.) At step five, however, the ALJ concluded that jobs exist in
21 significant numbers in the national economy that Plaintiff could perform, considering her
22 age, education, work experience, and RFC. (*Id.*)

23 On appeal, Plaintiff argues that the ALJ erred: (1) at step two by not finding
24 Plaintiff's chronic obstructive pulmonary disease (COPD) and kidney stones severe; and
25 (2) at step three by finding that Plaintiff's schizoaffective disorder did not meet or equal
26 the severity of a listed impairment. (Doc. 14.) The Court addresses each in turn.

27 **I. The ALJ Erred at Step Two**

28 The step two inquiry is a *de minimis* screening device to dispose of groundless

1 claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987). Agency regulations provide that
2 “[a]n impairment or combination of impairments is not severe if it does not significantly
3 limit a claimant’s physical or mental ability to do basic work activities.” §§ 404.1521(a),
4 416.921(a). Basic work activities are “the abilities and aptitudes necessary to do most
5 jobs,” including: (1) physical functions such as walking, standing, sitting, lifting, and
6 carrying; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out,
7 and remembering simple instructions; (4) use of judgment; (5) responding appropriately
8 to supervision, co-workers, and usual work situations; and (6) dealing with changes in a
9 routine work setting. §§ 404.1521(b), 416.921(b). “[A]n ALJ may find that a claimant
10 lacks a medically severe impairment or combination of impairments only when his
11 conclusion is ‘clearly established by medical evidence.’” *Webb v. Barnhart*, 433 F.3d
12 683, 687 (9th Cir. 2005). The Court therefore must determine whether substantial
13 evidence supports the ALJ’s finding that the medical evidence clearly established that
14 Plaintiff did not have a medically severe impairment or combination of impairments. *Id.*

15 **A. COPD**

16 Plaintiff initially was diagnosed with COPD in October 2012. (A.R. 521-22.)
17 Thereafter, Plaintiff restarted the medication Albuterol. (*Id.*) In December 2012,
18 Plaintiff still was taking Albuterol breathing treatments. (*Id.* at 319.) In January 2013, an
19 x-ray of Plaintiff’s chest showed no evidence of acute cardiopulmonary process. (*Id.* at
20 464.) Then, in May 2013, Plaintiff again was prescribed Albuterol to treat her COPD.
21 (*Id.* at 669-78.) As of the date of Plaintiff’s hearing, she still was taking breathing
22 treatments, three times a day for thirty minutes, for the condition. (*Id.* at 97-98.)

23 Given this evidence, the ALJ’s finding that Plaintiff’s COPD was not a medically
24 severe impairment is not supportable. The only medical evidence supporting the non-
25 severe finding is the clear x-ray in 2011, which is not, alone, substantial evidence
26 outweighing the overwhelming evidence of the duration and severity of Plaintiff’s
27 condition. *See Webb*, 433 F.3d at 687 (“Although the medical record paints an
28 incomplete picture of Webb’s overall health during the relevant period, it includes

1 evidence of problems sufficient to pass the de minimis threshold of step two.”). The
2 ALJ’s error is harmless, however, because at step four the ALJ concluded that Plaintiff
3 should be limited to light work and, in so doing, considered the limitations caused by
4 Plaintiff’s COPD and breathing treatments. (*Id.* at 27-31); *see Lewis v. Astrue*, 498 F.3d
5 909, 911 (9th Cir. 2007) (holding that when an ALJ accounts for limitations later in the
6 sequential evaluation process, any error in finding the impairment non-severe at step two
7 is harmless).

8 **B. Kidney Stones**

9 Plaintiff has a lengthy history of being treated for kidney stones. Although most
10 of the relevant records predate the onset of disability, Plaintiff’s problem persisted
11 throughout 2013 and 2014. (*Id.* at 461, 676, 681, 693.) Given the frequency of the issue
12 and its reported severity (*See, e.g., id.* at 672-73 (describing pain as “severe” and at a
13 level nine out of ten when Plaintiff goes without medication)), the ALJ erred in not
14 finding kidney stones a severe condition. *See Ortiz v. Comm’r of Soc. Sec.*, 425 Fed.
15 App’x 653, 655 (9th Cir. 2011) (“This is not the total absence of objective evidence of
16 severe medical impairment that would permit us to affirm a finding of no disability at
17 step two.”).

18 Unlike the prior error, the ALJ’s non-severity finding is not harmless because the
19 ALJ failed to consider the kidney stones later in the sequential evaluation process. (A.R.
20 28-30.) Because the ALJ failed to consider the effect of Plaintiff’s kidney stones on her
21 RFC, this case must be remanded for further proceedings. *See Meinecke v. Colvin*, No.
22 2:14-cv-2210, 2016 WL 995515, at * 4 (E.D. Cal. Mar. 14, 2016) (finding that in failing
23 to reference plaintiff’s impairment at step four or five of the sequential evaluation, the
24 ALJ committed harmful error).

25 **II. The ALJ Erred at Step Three**

26 At step three, the ALJ considers whether claimant’s impairments meet or equal the
27 severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. If a
28 claimant’s impairments rise to the level of a listed impairment, the claimant is disabled.

1 Here, the ALJ determined that Plaintiff’s impairments did not meet or medically
2 equal the criteria of listings 12.03, 12.04, 12.06, 12.08, and 12.09. (A.R. 26.) Plaintiff
3 takes issue with the ALJ’s 12.03 finding. This listing provides three paragraphs of
4 symptoms—paragraphs A, B, and C (discussed further below)—that guide the ALJ’s
5 analysis. A claimant can establish that her impairments meet the listing by showing
6 either that the requirements in paragraphs A and B are satisfied, or the requirements of
7 paragraph C are satisfied. 20 C.F.R. Part 404 Subpart P App’x 1 (Listings) 12.03. The
8 ALJ found that Plaintiff did not meet the requirements of paragraph B and, therefore did
9 not discuss the requirements of paragraph A. He also found that Plaintiff did not meet
10 the requirements of paragraph C. Plaintiff challenges both findings.

11 **A. Evaluation under Paragraphs A and B**

12 To satisfy paragraph B, a claimant’s “mental impairments must result in at least
13 two of the following: marked restriction of activities of daily living; marked difficulties
14 in maintaining social functioning; marked difficulties in maintaining concentration,
15 persistence, or pace; or repeated episodes of decompensation, each for extended
16 duration.” (A.R. 27.) “A marked limitation means more than moderate but less than
17 extreme.” Part 404 Subpart P Appx 1 (Listings) 12.00. In order to find “repeated
18 episodes of decompensation” the record must show “three episodes within 1 year, or an
19 average of once every 4 months, each lasting for at least 2 weeks.” *Id.*

20 The ALJ found that Plaintiff neither met the marked limitation criteria nor
21 experienced the requisite number of episodes of decompensation. (A.R. 27.) Instead, the
22 ALJ found Plaintiff’s limitations in concentration, persistence, or pace and social
23 functioning to be moderate. (*Id.*) Plaintiff argues that the ALJ’s evaluation is not
24 sufficiently detailed, and the Court agrees.

25 To support his concentration finding, the ALJ noted only that “[i]n testing, among
26 other problems, the claimant could only recollect two of three unrelated words after a
27 five-minute delay.” (*Id.*) As for Plaintiff’s social function, the ALJ noted only that
28 “[Plaintiff] stated that she experienced anxiety around people and especially around men.

1 She testified that she was a loner.” (*Id.*) Although ALJs are not required “to state why a
2 claimant failed to satisfy every different section of the listing of impairments,” *Gonzalez*
3 *v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990), the ALJ must “discuss and evaluate the
4 evidence that supports . . . [his] conclusion,” *Lewis v. Apfel*, 236 F.3d 503, 513 (9th Cir.
5 2001). Here, the ALJ explanation is inadequate. See *Laborin v. Berryhill*, -- Fed. App’x
6 --, No. 15-15776, 2017 WL 3508828, at *2 (9th Cir. Aug. 16, 2017) (“A bare statement
7 that [the claimant] does not meet a listing, without appropriate evaluation or discussion of
8 the medical evidence, is insufficient to conclude that [the claimant’s] impairment does
9 not meet or medically equal a listed condition.”).¹

10 **B. Evaluation under Paragraph C**

11 Under paragraph C, a claimant must show a “[m]edically documented history of a
12 chronic schizophrenic . . . disorder of at least 2 years’ duration that has caused more than
13 a minimal limitation of ability to do basic work activities, with symptoms or signs
14 currently attenuated by medication or psychosocial support.” Part 404 Subpart P App’x 1
15 (Listings) 12.03(C). In addition, a claimant must also show:

- 16 1. Repeated episodes of decompensation, each of extended
17 duration; or
- 18 2. A residual disease process that has resulted in such
19 marginal adjustment that even a minimal increase in mental
20 demands or change in the environment would be predicted to
21 cause the individual to decompensate; or
- 22 3. Current history of 1 or more years’ inability to function
23 outside a highly supportive living arrangement, with an
24 indication of continued need for such an arrangement.

25 ¹ Plaintiff raises two additional arguments that warrant little discussion. First, the
26 ALJ did not err in using the word “moderate” to describe Plaintiff’s limitations. In rating
27 a claimant’s degree of limitation, ALJs are to “use the following five point scale: None,
28 mild, moderate, marked, and extreme.” § 404.1520a(c)(4). The ALJ used moderate, as
required and defined by the regulations. See § 404.1520a; Part 404 Subpart P App’x 1
(Listings) 12.00. Plaintiff also asserts that the ALJ erred by not discussing paragraph A,
ostensibly because he found that she failed to satisfy paragraph B. Because the Court
remands for further proceedings, the ALJ will have the opportunity to discuss paragraph
A in the first instance.

1 *Id.* at 12.03(C)(1)-(3).

2 Plaintiff does not identify any specific error by the ALJ. Instead, she makes the
3 general assertion that she meets both the “repeated episodes” and “even a minimal
4 increase in mental demands” requirements. (Doc. 14 at 13-14.) In support of her claim,
5 Plaintiff cites to two episodes of alleged decompensation: (1) January 2012
6 hospitalization; and (2) a change in her medication dosage from her treating provider in
7 response to increased symptoms in June and July of 2013. (*Id.* at 13.) Plaintiff also
8 offers isolated statements from her medical records: “suffers from severe psychosis,”
9 “she has a friend no one else can see,” and “she hallucinates and self-harms.” (*Id.*)

10 Plaintiff essentially asks the Court to reweigh the evidence more favorably to her.
11 “While the Court is required to examine the record as a whole, it may neither reweigh the
12 evidence nor substitute its judgment for that of the [ALJ].” *Flaten v. Sec’y of Health &*
13 *Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). “When the evidence is susceptible to
14 more than one rational interpretation, and the [ALJ’s] conclusion is one such rational
15 interpretation, that interpretation must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947,
16 954 (9th Cir. 2002).

17 Here, substantial evidence supports the ALJ’s finding. For example, in order to
18 find “repeated episodes of decompensation” the record must show “three episodes within
19 1 year, or an average of once every 4 months, each lasting for at least 2 weeks.” Part 404
20 Subpart P App’x 1 (Listings) 12.00(C)(4). The January hospitalization fails to meet the
21 two week durational requirement as it only lasted three days. (A.R. 388-411.) The
22 medical records from the summer of 2013 offer no indication of the length of the period
23 of decompensation, but, assuming that it lasted longer than two weeks, this single
24 decompensation fails to satisfy the requirement that Plaintiff experience three episodes
25 within one year. (*Id.* at 632, 634). Additionally, Plaintiff’s selective reading of the
26 medical record ignores the fact that the records contain substantial evidence that she
27 overstated her symptoms. (*See, e.g., id.* at 529-535 (Plaintiff offering inconsistent
28 information in regards to her drug and alcohol use; Plaintiff showing poor effort

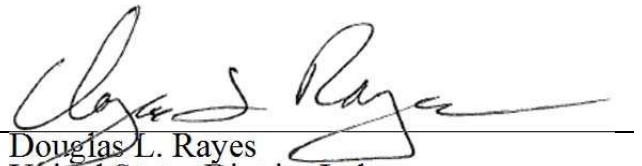
1 throughout her examination, particularly on her mental status exam; Plaintiff's
2 descriptions of her symptoms are vague, and she admits that she is not currently having
3 auditory hallucinations); 682-690 (concerns that malingering is likely; concern over
4 Plaintiff's "unreliability" and continued "inconsistencies".) The ALJ's determination
5 that Plaintiff's schizoaffective condition did not meet paragraph C is supported by
6 substantial evidence in the record as whole. The Court finds no error.

7 **CONCLUSION**

8 For the foregoing reasons, the ALJ erred at steps two and three, and those errors
9 are not harmless. Because further proceedings would serve a useful purpose and might
10 remedy the defects, this matter is remanded for proper consideration of steps two and
11 three. *See Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981); *McAllister v. Sullivan*,
12 888 F.2d 599, 603 (9th Cir. 1989).

13 **IT IS ORDERED** that the final decision of the Commissioner of Social Security
14 is **REVERSED**, and the case **REMANDED** for further proceedings. The Clerk shall
15 enter judgment accordingly and terminate the case.

16 Dated this 27th day of September, 2017.

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21 Douglas L. Rayes
22 United States District Judge
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