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5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Brian Bergin,

No. CV-16-2762-PHX-DGC

10 Plaintiff,

ORDER

11 v.

12 Nancy A. Berryhill, Acting Commissioner,
13 Social Security Administration,

14 Defendant.

15 Plaintiff Brian Bergin seeks review under 42 U.S.C. § 405(g) of the final decision
16 of the Commissioner of Social Security (“the Commissioner”), which denied him
17 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 not supported by substantial evidence and is based
20 on legal error, the Commissioner’s decision will be vacated and the matter remanded for
21 further administrative proceedings.

22 **I. Background.**

23 On April 23, 2012, Plaintiff applied for disability insurance benefits and
24 supplemental security income, alleging disability beginning August 1, 2011. On
25 September 11, 2014, he appeared with his attorney and testified at a hearing before an
26 administrative law judge (“ALJ”). A vocational expert also testified. On January 23,
27 2015, the ALJ issued a decision that Plaintiff was not disabled within the meaning of the
28

1 Social Security Act. The Appeals Council denied review, making the ALJ's decision the
2 Commissioner's final decision.

3 **II. Legal Standard.**

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

16 Harmless error principles apply in this context. *Molina v. Astrue*, 674 F.3d 1104,
17 1115 (9th Cir. 2012). An error is harmless if there remains substantial evidence
18 supporting the ALJ's decision and the error does not affect the ultimate nondisability
19 determination. *Id.* The claimant usually bears the burden of showing that an error is
20 harmful. *Id.* at 1111.

21 The ALJ is responsible for resolving conflicts in medical testimony, determining
22 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
23 1995). In reviewing the ALJ's reasoning, the court is "not deprived of [its] faculties for
24 drawing specific and legitimate inferences from the ALJ's opinion." *Magallanes v.*
25 *Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

26 **III. The ALJ's Five-Step 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 at step five, the burden shifts to the
2 Commissioner. *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.
7 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step
8 three, the ALJ considers whether the claimant’s impairment or combination of
9 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P
10 of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to
11 be disabled. *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the
12 claimant’s residual functional capacity (“RFC”) and determines whether the claimant is
13 still capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant
14 is not disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final
15 step, where he determines whether the claimant can perform any other work based on the
16 claimant’s RFC, 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 March 31, 2012, and that he has not engaged in
20 substantial gainful activity since August 1, 2011. At step two, the ALJ found that
21 Plaintiff has the following severe impairments: “lumbar degenerative disc disease, history
22 of pulmonary hypertension, coronary artery disease, obesity, copd, status post lumbar
23 surgeries, hypertension, degenerative joint disease of the knees, hypothyroidism,
24 hypogonadism, diverticular disease, and anemia.” A.R. 24.

25 At step three, the ALJ determined that Plaintiff does not have an impairment or
26 combination of impairments that meets or medically equals an impairment listed in
27 Appendix 1 to Subpart P of 20 C.F.R. Pt. 404.

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1 At step four, the ALJ found that Plaintiff has the “residual functional capacity to
2 perform the full range of sedentary work as defined in 20 CFR 404.1567(a) and
3 416.967(a).” A.R. 28. The ALJ further found that Plaintiff is capable of performing past
4 relevant work as a customer service clerk. A.R. 32.

5 At step five, the ALJ concluded, without explanation, “claimant has not been
6 under a disability, as defined in the Social Security Act, from August 1, 2011, through the
7 date of this decision.” A.R. 32.

8 **IV. Analysis.**

9 Plaintiff argues that the ALJ’s decision is defective for four reasons: (1) she
10 assigned less weight to the opinion of Plaintiff’s treating physician, Dr. Hassan Kahn,
11 than was proper; (2) she erred in weighing opinion evidence from Dr. Walter Bell, a non-
12 examining, non-treating physician; (3) she erred in weighing Plaintiff’s symptom
13 testimony; and (4) she erred by rejecting the report of Plaintiff’s mother. *See* Doc. 14.

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

15 **1. Legal Standard**

16 The Commissioner is responsible for determining whether a claimant meets the
17 statutory definition of disability, and need not credit a physician’s conclusion that the
18 claimant is “disabled” or “unable to work.” 20 C.F.R. § 404.1527(d)(1). But the
19 Commissioner generally must defer to a physician’s medical opinion, such as statements
20 concerning the nature or severity of the claimant’s impairments, what the claimant can
21 do, and the claimant’s physical or mental restrictions. § 404.1527(a)(2), (c).

22 In determining how much deference to give a physician’s medical opinion, the
23 Ninth Circuit distinguishes between the opinions of treating physicians, examining
24 physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821, 830 (9th
25 Cir. 1995). Generally, an ALJ should give the greatest weight to a treating physician’s
26 opinion and more weight to the opinion of an examining physician than a non-examining
27 physician. *See Andrews*, 53 F.3d at 1040-41; *see also* 20 C.F.R. § 404.1527(c)(2)-(6)
28 (listing factors to be considered when evaluating opinion evidence, including length of

1 examining or treating relationship, frequency of examination, consistency with the
2 record, and support from objective evidence).

3 If a treating or examining physician's medical opinion is not contradicted by
4 another doctor, the opinion can be rejected only for clear and convincing reasons. *Lester*,
5 81 F.3d at 830 (citation omitted). Under this standard, the ALJ may reject a treating or
6 examining physician's opinion if it is "conclusory, brief, and unsupported by the record
7 as a whole[] or by objective medical findings," *Batson v. Commissioner*, 359 F.3d 1190,
8 1195 (9th Cir. 2004), or if there are significant discrepancies between the physician's
9 opinion and her clinical records, *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
10 2005).

11 When a treating or examining physician's opinion is contradicted by another
12 doctor, it can be rejected "for specific and legitimate reasons that are supported by
13 substantial evidence in the record." *Lester*, 81 F.3d at 830-31 (citation omitted). To
14 satisfy this requirement, the ALJ must set out "a detailed and thorough summary of the
15 facts and conflicting clinical evidence, stating his interpretation thereof, and making
16 findings." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986). Under either standard,
17 "[t]he ALJ must do more than offer his conclusions. He must set forth his own
18 interpretations and explain why they, rather than the doctors', are correct." *Embrey v.*
19 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

20 **2. Hassan Kahn, M.D.**

21 Dr. Kahn has been Plaintiff's treating physician since at least 2010. A.R. 317
22 (August 2010 Treatment Record for Plaintiff completed by Dr. Kahn). On April 24,
23 2014, Dr. Kahn provided a medical source statement and opined that, in an eight hour
24 work day, Plaintiff is limited to two hours of sitting, less than two hours standing or
25 walking, and lifting or carrying less than ten pounds. A.R. 480-81. Dr. Kahn also opined
26 that it is necessary for Plaintiff to alternate positions roughly every 20 minutes, and that
27 each position change would require a rest period of 5-9 minutes. *Id.* Additionally, he
28 concluded that Plaintiff would suffer moderately severe additional limitations due to pain

1 and fatigue, and that he would miss over six days per month as a result of his medical
2 condition. *Id.* Dr. Kahn stated that he had reviewed treatment notes from other
3 providers. *Id.*

4 The ALJ assigned “minimal weight” to Dr. Kahn’s opinion. His entire
5 explanation was as follows: “Although Dr. Kahn was a treating source, his opinion was
6 not supported by the medical evidence of record, and was certainly not supported by the
7 claimant’s reported activities of daily living. Dr. Kahn’s opinion would render the
8 claimant bedridden, which was not supported by treatment records, the course of
9 treatment was not consistent with such limiting restrictions.” A.R. 31.

10 Dr. Kahn’s medical opinion was contradicted by the opinions of state physicians,
11 Dr. Walter Bell and Dr. Richard Palmer. Therefore, the ALJ could discount Dr. Kahn’s
12 opinion for specific and legitimate reasons supported by substantial evidence.
13 *Lester*, 81 F.3d at 830-31.

14 **a. Consistency with the Medical Record.**

15 The Commissioner argues that “[t]he ALJ reasonably found that the extreme
16 limitations Dr. Kahn opined were inconsistent with Dr. Kahn’s treatment notes and the
17 medical record as a whole.” Doc. 16 at 17. In support, the Commissioner summarizes a
18 portion of Plaintiff’s treatment record, noting that “Dr. Kahn’s treatment notes often
19 simply note back pain complaints that he attributed to muscle spasms or lumbago[,]” and
20 that “Dr. Kahn’s own treatment records do not include any significant abnormalities on
21 examination that would reasonably explain the extreme limitations he assessed.”
22 *Id.* at 16. The Commissioner then argues that “[o]ther treatment and examination records
23 are inconsistent with the extreme limitations Dr. Kahn assessed, as well[,]” including Dr.
24 Palmer’s May 2013 examination and the examinations of Drs. Detemple, Taylor, Chang,
25 and Bahdahman. *Id.* at 16-17. These justifications by the Commissioner, however,
26 cannot be found in the ALJ’s decision. *See* A.R. 31. The Court must look to the ALJ’s
27 stated reasons, not later arguments provided by the Commissioner. *See Bray v. Comm’r*
28 *of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) (The Court must “review the

1 ALJ’s decision based on the reasoning and factual findings offered by the ALJ—not *post*
2 *hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking”);
3 *Cotton v. Colvin*, No. CV-16-2230-PHX DGC, 2017 WL 914617, at *4 (D. Ariz. Mar. 8,
4 2017).

5 In discounting the opinion of Dr. Kahn, the ALJ did not mention any contradictory
6 medical professionals by name, but cited only to the “medical evidence of record.”
7 Doc. 31. This finding is vague and conclusory, not a specific and legitimate reason for
8 rejecting the medical opinion of a treating physician. *See Brown-Hunter v. Colvin*, 806
9 F.3d 487, 494 (9th Cir. 2015) (holding that an ALJ commits legal error when she “failed
10 to identify the testimony she found not credible [because] she did not link that testimony
11 to the particular parts of the record supporting her non-credibility determination.”
12 (emphasis in original)). “[W]e are constrained to *review* the reasons the ALJ asserts” and
13 “we may not take a general finding . . . and comb the administrative record to find
14 specific conflicts.” *Id.*

15 The Court concludes that the ALJ erred in rejecting Dr. Kahn’s opinion because it
16 was “not supported by the medical evidence of record” and “not supported by treatment
17 records.” A.R. 31.

18 **b. Consistency with Activities of Daily Living.**

19 The ALJ also found that Dr. Kahn’s opinion “was certainly not supported by the
20 claimant’s reported activities of daily living.” A.R. 31. While the ALJ makes no
21 citations to the record to support this particular assertion, she does discuss inconsistencies
22 between Plaintiff’s alleged limitations and his reported daily activities elsewhere in the
23 record. A.R. 26 (noting that Plaintiff’s daily activities include fixing meals, watching
24 television, completing household chores, reading, playing guitar, and occasionally
25 driving to the grocery store to shop, or to his children’s homes to visit). There, the ALJ
26 concludes that Plaintiff has “no limitation in activities of daily living.” *Id.*

27 But the ALJ does not explain how Plaintiff’s daily living activities detract from
28 the opinion of Dr. Kahn. She provides no analysis of why Plaintiff’s daily activities

1 could not be accomplished with the limitations found by Dr. Kahn. The Court finds that
2 this reason for discounting Dr. Kahn's opinion is not specific, as it must be to reject a
3 treating physician's contradicted opinion. *Lester*, 81 F.3d at 830-31.

4 **c. Consistency with Course of Treatment.**

5 The ALJ also discounted Dr. Kahn's opinion because "the course of treatment was
6 not consistent with such limiting restrictions." A.R. 31. But the ALJ provided no
7 explanation of why Dr. Kahn's course of treatment was not consistent with his
8 recommended limitations. *Id.* The Commissioner argues that "Dr. Kahn's treatment
9 records do not include any significant abnormalities that would reasonably explain the
10 extreme limitations he assessed," and that "he was unable to find a definitive cause for
11 Plaintiff's back pain complaints." Doc. 16 at 15. The Commissioner also argues that Dr.
12 Kahn's "treatment of Plaintiff's back pain largely consisted of medication refills and
13 recommendations for conservative treatment like heat therapy and weight loss." *Id.*
14 (citing A.R. 379-83, 450, 453). But the ALJ does not provide these reasons, and the
15 Court must look to her decision, not the Commissioner's arguments, in resolving this
16 appeal. *See Bray*, 554 F.3d at 1225. The ALJ's conclusory assertion that the course of
17 treatment was inconsistent with Dr. Kahn's opinion is not a specific and legitimate reason
18 for discounting Dr. Kahn's testimony. *Lester*, 81 F.3d at 830-31.

19 **3. Crediting Non-Examining Physician.**

20 Plaintiff argues that the ALJ committed legal error when weighing the opinion of
21 Dr. Bell. *See* Doc. 14 at 12 & n.13; Doc. 17 at 6. The ALJ assigned partial weight to Dr.
22 Bell's opinion, but Plaintiff asserts that "the ALJ did not state which limitations were
23 accepted, which were rejected, and why." *Id.* (citing A.R. 30-31). Plaintiff also argues
24 that Dr. Bell's opinion does not meet AMA or statutory guidelines. *Id.* Specifically, Dr.
25 Bell's opinion "(1) was not based on a comprehensive record review, (2) was not based
26 on an examination, and (3) did not contain a detailed explanation." *Id.* At the time of Dr.
27 Bell's June 2013 opinion, only a fraction of the record had been developed. Plaintiff
28 notes that almost two hundred additional pages of primary care and specialist care

1 records later became available, including physical therapy and pain management records.
2 *Id.* at 7 (citing A.R. 445-634).

3 The Commissioner makes little argument in response, stating only that:

4 Dr. Kahn's opinion is contradicted by Dr. Palmer's opinion and the opinion
5 of State agency consultative physician [Dr. Bell]. Although the ALJ
6 ultimately assessed a residual functional capacity that did not directly
7 reflect Dr. Palmer's or Dr. Bell's opined limitations, the ALJ noted that
8 these opinions supported the conclusion that Plaintiff could sustain some
9 work activity, nonetheless.

10 Doc. 16 at 14 (citing A.R. 31). The Commissioner makes no attempt to address
11 Plaintiff's argument that the opinion of Dr. Bell fails to satisfy guideline and statutory
12 standards. *Id.* Nor does the Commissioner contest that the ALJ failed to specify which
13 portions of Dr. Bell's opinion she accepted. *See id.*

14 The Court finds that the ALJ erred by failing to identify the portions of Dr. Bell's
15 opinion to which she assigned weight. *Lester*, 81 F.3d at 830-31. Because the ALJ erred
16 in crediting the opinion of Dr. Bell, the Court need not assess whether Dr. Bell's opinion
17 satisfies guideline and statutory standards. On remand, however, the ALJ should
18 consider the extent of the record Dr. Bell was able to review, and whether Dr. Bell's
19 opinion complies with the requirements of 20 C.F.R. § 404.1519p and 20 § C.F.R.
20 404.1519n (c)(3)-(4).

21 **B. The ALJ Erred in Evaluating Plaintiff's Credibility.**

22 In evaluating the credibility of a claimant's testimony regarding subjective pain or
23 other symptoms, the ALJ must engage in a two-step analysis: (1) determine whether the
24 claimant presented objective medical evidence of an impairment that could reasonably be
25 expected to produce some degree of the pain or other symptoms alleged; and, if so with
26 no evidence of malingering, (2) reject the claimant's testimony about the severity of the
27 symptoms only by giving specific, clear, and convincing reasons for the rejection.
28 *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

1 At the first step, the ALJ found that Plaintiff's medically determinable
2 impairments could reasonably be expected to cause the alleged symptoms. At the
3 second, the ALJ found that Plaintiff's statements regarding the intensity, persistence, and
4 limiting effects of the symptoms were not credible to the extent they were inconsistent
5 with the ALJ's residual functional capacity assessment. In other words, the ALJ found
6 Plaintiff's statements not credible to the extent he claimed that he cannot perform in a
7 competitive work environment. The ALJ also found that "the claimant's long history of
8 low and inconsistent earnings prior to the alleged onset date, inconsistent reporting,
9 objective medical evidence, reported activities, and the opinions of examining and
10 nonexamining sources did not support the claimant's allegations." A.R. 28.

11 Plaintiff testified that he had debilitating symptoms as a result of his knee and
12 back pain, and sleep apnea. He also described high anxiety and effects of depression. He
13 testified that he could walk 50 feet at one time with a cane, but only 10 to 15 feet without
14 a cane. He acknowledged that he has never been prescribed a cane by a doctor. Plaintiff
15 testified that he could lift or carry 20 pounds at most. He also testified that alcohol
16 helped with the pain better than medications, but that he had signed a form with the pain
17 centers saying he would not drink. Plaintiff stated that he had pain in his left knee
18 constantly and pain in his back about 85% of the time.

19 **1. Inconsistent Statements in the Record.**

20 The ALJ noted that the record contained conflicting reports from Plaintiff
21 regarding his anxiety and depression. A.R. 27-28. "In determining credibility, an ALJ
22 may engage in ordinary techniques of credibility evaluation, such as considering . . .
23 inconsistencies in claimant's testimony." *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir.
24 2005). In evaluating whether Plaintiff's reported psychological conditions, anxiety and
25 depression limited his ability to perform basic mental work activities, the ALJ stated that:

26 Despite the claimant's testimony at the hearing, in which he stated he was
27 fired [from his last job in 2010] for not being able to focus on what he was
28 doing or remember people's names, and he had high anxiety when dealing
with an irate customer the claimant's own reported [sic], as discussed

1 above, and treatment records demonstrated the claimant's anxiety was
2 much better with his prescribed treatment. [A.R. 403]. In addition, the
3 results of a Beck Anxiety Inventory from August 5, 2013 showed the
4 claimant obtained a score of 18, which indicated very low anxiety.
5 [A.R. 456]. Office treatment records also demonstrated the claimant's
6 reporting of depression and anxiety were inconsistent. Multiple visit notes
7 showed the claimant denied anxiety or depression. [A.R. 443, 494, 544].

8 A.R. 27. Later in her decision, the ALJ referenced the above analysis when assessing the
9 credibility of Plaintiff's symptom testimony. A.R. 29. Specifically, she stated that, "[a]s
10 discussed above, the claimant's inconsistent reporting with regard to his anxiety and
11 depression negatively affected his credibility with the undersigned." *Id.*

12 The inconsistency in Plaintiff's testimony, supported by those portions of the
13 record cited by the ALJ, is a specific reason for discounting Plaintiff's credibility. But
14 Plaintiff's testimony regarding his anxiety and depression was not inconsistent with the
15 medical record as a whole. The ALJ's citations appear to be highly selective, and do not
16 comport with the record as a whole. For instance, the ALJ cites a treatment note from Dr.
17 Kahn dated August 10, 2012, in which Plaintiff reported "anxiety much better with
18 valium." A.R. 403. But that reported improvement is outside the work place context.
19 The ALJ does not find that Plaintiff's treatment notes indicate his medication would
20 make him "much better" in a work setting. The ALJ next cites the results of a self-
21 completed questionnaire that placed Plaintiff's anxiety level at "very low." A.R. 456.
22 But again, the questionnaire involved Plaintiff's environment outside of the work place,
23 and the ALJ fails to explain why such evidence is inconsistent with Plaintiff's testimony.

24 The ALJ states that "multiple visit notes" document instances where Plaintiff
25 denied having anxiety or depression. A.R. 443, 494, 544. But the citation of those
26 isolated records is a bit misleading. In each instance, Plaintiff was either being seen for
27 another pressing physical issue, or the checkbox form was inconsistent with the
28 remaining analysis in the visit's report. For example, A.R. 443 is a treatment record from
Id. Plaintiff's pain specialist who was seeing him for knee pain, back pain, and osteoarthritis.
Id. The record indicates that Plaintiff's "Mood and affect" consisted of "no depression,

1 anxiety, or agitation,” but the same record, on the prior page, states that Plaintiff was
2 “Positive for anxiety, depression.” A.R. 442.

3 The next record cited by the ALJ is an emergency room report where Plaintiff was
4 admitted to the hospital with “GI [gastrointestinal] bleeding.” A.R. 494. In that report
5 under the “Review of Symptoms” heading, it does indeed indicate that Plaintiff reported
6 “no anxiety, no depression.” *Id.* But that document hardly seems a fair assessment of
7 Plaintiff’s reporting, given that he purportedly denied the existence of any symptoms
8 other than the GI bleeding for which he was being seen. *Id.* Directly above this
9 disclosure Plaintiff also reported that he had no musculoskeletal symptoms, including no
10 back, muscle, or joint pain (*id.*), but neither the ALJ nor the Commissioner asserts that
11 those symptoms are inconsistent with the record (*see* A.R. 28-29; Doc. 16).

12 The final note cited by the ALJ is a handwritten treatment report for April 24,
13 2014. A.R. 544. The document contains approximately a dozen hastily drawn circles
14 imprecisely placed over what appears to be a “Review of Symptoms” section. *Id.* There
15 is no circle directly above the label for either “anxiety” or “depression.” *Id.* But on the
16 very next page of the report is the Doctor’s handwritten list of five medical symptoms,
17 and “anxiety” is among them. A.R. 545.

18 When contrasted with the other documents in the record where Plaintiff
19 consistently asserts symptoms of anxiety and depression, and seeks treatment for those
20 symptoms, these isolated examples do not clearly or convincingly support the ALJ’s
21 conclusion that Plaintiff’s testimony should be discounted. *See, e.g.*, A.R. 318 (August
22 24, 2010 “History and Physical Admission and Discharge Summary” for Mercy Gilbert
23 Medical Center reporting anxiety as part of his medical history, and as a positive
24 symptom), 331 (February 1, 2013 progress note from Trinity Ent and Facial Aesthetics
25 reporting anxiety and depression as part of Plaintiff’s past medical history), 333 (same,
26 January 22, 2013), 342 (May 5, 2013 report of Dr. Palmer, reporting depression as part of
27 Plaintiff’s past medical history), 396 (August 20, 2012 treatment record from Dr. Kahn
28 where Plaintiff reported mild depression), 417 (August 26, 2010 health history report for

1 Vista Medical Group in which Plaintiff reports a history of depression), 439 (February
2 17, 2014 treatment notes from The Pain Center of Arizona reporting Plaintiff as positive
3 for anxiety, depression), 442 (same, February 7, 2014), 534 (June 16, 2014 treatment note
4 from The CORE Institute reporting anxiety as part of Plaintiff’s past medical history),
5 599 (July 24, 2014 treatment notes from The Pain Center of Arizona reporting Plaintiff as
6 positive for anxiety), 603 (June 26, 2014 treatment notes from The Pain Center of
7 Arizona reporting Plaintiff as positive for anxiety, depression), 612 (March 3, 2014
8 treatment notes from The Pain Center of Arizona reporting Plaintiff as positive for
9 anxiety, depression).

10 **2. Objective Medical Evidence.**

11 While an ALJ may reject a Plaintiff’s testimony about the severity of her
12 symptoms, he must “point to specific facts in the record which demonstrate that [the
13 claimant] is in less pain than she claims.” *Vasquez*, 572 F.3d at 592 (citation omitted).
14 And as the Ninth Circuit has made clear, if “the claimant produces objective medical
15 evidence of an underlying impairment, an adjudicator may not reject a claimant’s
16 subjective complaints based solely on a lack of objective medical evidence to fully
17 corroborate the alleged severity of pain.” *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
18 1991).

19 The ALJ discussed the medical evidence in the administrative record and
20 ultimately concluded that “minimal findings in combination with the claimant’s denial of
21 symptoms which he testified were present 85 percent to constant certainly undermined
22 the claimant’s allegations of disabling pain and limitations as a result of his
23 impairments.” A.R. 29-30. The ALJ evaluated the objective studies in the record,
24 summarizing the technical findings from a 2013 Chest X-ray examination and a 2011
25 Echocardiograph examination. A.R. 29.

26 The ALJ also noted that “the claimant has not had a sleep study to substantiate his
27 self-diagnosis of obstructive sleep apnea.” *Id.* She found that “[t]hese objective studies
28 and findings in combination with treatment notes, which demonstrated the claimant was

1 in no acute distress, undermined the claimant’s allegations of disabling pain. [A.R. 443,
2 486, 489, 491, 520, 527, 535, 596, 600, 604].” A.R. 29.

3 The ALJ also reviewed Plaintiff’s treatment records and examination results.
4 A.R. 29. The ALJ summarized portions of the record from Dr. Richard Palmer’s
5 examination. A.R. 30. Finally, the ALJ identified evidence from the record that
6 supported her conclusion that Plaintiff’s allegations of disabling pain were not credible.
7 *Id.*

8 The Court finds the ALJ’s analysis to be legal error for several reasons. First, to
9 the extent the ALJ finds that Plaintiff lacked credibility, that analysis was improper. *See*
10 *SSR 16-3p* (superseding *SSR 96-7p*) (noting that the Agency “eliminate[ed] the use of
11 the term ‘credibility’ from [its] sub-regulatory policy, as [the] regulations do not use the
12 term. In doing so, [the Administration] clarif[ies] that subjective symptom evaluation is
13 not an examination of an individual’s character.”). Second, the ALJ’s conclusion that
14 Plaintiff’s testimony is not consistent with the medical evidence of record is erroneous
15 because the ALJ’s decision failed to make a comparison between Plaintiff’s testimony
16 and the medical evidence the decision summarized. This failure alone shows that the
17 ALJ did not satisfy her burden of providing clear and convincing reasons supported by
18 substantial evidence for rejecting Plaintiff’s symptom testimony. *Vasquez*, 572 F.3d
19 at 591.

20 What is more, the Court finds that the ALJ selectively chose evidence that
21 disfavored Plaintiff’s claims. The ALJ cited several treatment records “which
22 demonstrated the claimant was in no acute distress” and “undermined the claimant’s
23 allegations of disabling pain.” A.R. 29. But the ALJ failed to explain why these records
24 undermine Plaintiff’s testimony. There is no discussion of what is meant by “no acute
25 distress,” and no explanation of why such entries are necessarily inconsistent with
26 disabling pain. It would seem that a person could experience chronic, disabling pain and
27 yet not be in acute distress at a particular moment. The ALJ does not address this.
28

1 Other evidence in the record that was disregarded by the ALJ clearly supports
2 Plaintiffs claim. *See* A.R. 328 (showing Plaintiff has a herniated disc, degenerative disc
3 disease, and spondylosis), 351 (same), 352-53 (knee imaging from 2013, showing
4 tricompartmental degenerative joint disease and osteophytes on the right, and
5 tricompartmental degenerative joint disease, heterotopic calcifications, soft tissue edema,
6 and a small joint effusion on the left). Furthermore, numerous primary care and pain
7 management providers noted ongoing symptoms of neck, low back, and bilateral knee
8 impairments, including chronic pain, swelling, muscle spasm, antalgic gait, and fatigue.
9 *See* Doc. 17 at 8 n.4. After a thorough review of the record, the Court concludes that a
10 substantial amount of evidence supports Plaintiff testimony of ongoing symptoms and
11 that the ALJ's citations were selective and inconsistent with the overall weight of the
12 records. *See* A.R. 410 (February 23, 2011 treatment note from Vista Medical Group
13 supporting Plaintiff's alleged symptoms), 406 (same, May 3, 2012), 402 (same, August
14 10, 2012), 395-98 (same), 391-94 (same, October 12, 2012), 386-90 (same, December 17,
15 2012), 383 (same, January 21, 2013), 381 (same, March 14, 2013), 380 (same, May 14,
16 2013), 379 (same, June 19, 2013), 455 (same, August 6, 2013), 453-54 (same, September
17 24, 2013), 452 (same, November 14, 2013), 449-50 (same, January 21, 2014), 438-39
18 (February 17, 2014, treatment note from The Pain Center of Arizona supporting
19 Plaintiff's alleged symptoms), 441-44 (same, February 7, 2014), 611-13 (same, March 3,
20 2014), 608-10 (same, March 19, 2014), 581-82 (March 25, 2014 Physical Therapy
21 treatment note supporting Plaintiff's alleged symptoms), 544 (April 14, 2014 treatment
22 note from Vista Medical Group supporting Plaintiff's alleged symptoms), 605-06 (June
23 26, 2014, treatment note from The Pain Center of Arizona supporting Plaintiff's alleged
24 symptoms), 599-602 (same, July 24, 2014), 595-98 (same, August 21, 2014).

25 In further support of his claims, Plaintiff notes that he has also tried a number of
26 medications to treat his pain, including hydrocodone, Soma, Diazepam, and bilateral knee
27 injections. *See, e.g.*, Doc. 14 at 4; A.R. 304, 439-40, 612-13. The record also shows that
28 Plaintiff has engaged consistently in physical therapy. A.R. 575-76, 566-69, 478-79, 579.

1 The Court finds that the ALJ’s finding that Plaintiff’s testimony is inconsistent
2 with the objective medical evidence is not supported by substantial evidence in the record
3 as a whole. The ALJ’s reasoning contained selectively chosen evidence and did not
4 fairly include the record as a whole. *See, e.g., Garrison, 759 F.3d at 1018; Lester, 81*
5 *F.3d 821, 829.*

6 **3. Daily Activities.**

7 An ALJ may reject a claimant’s symptom testimony if it is inconsistent with the
8 claimant’s daily activities. *See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).*
9 But “ALJs must be especially cautious in concluding that daily activities are inconsistent
10 with testimony about pain, because impairments that would unquestionably preclude
11 work and all the pressures of a workplace environment will often be consistent with
12 doing more than merely resting in bed all day.” *Garrison, 759 F.3d at 1016.* Thus, an
13 ALJ may use a claimant’s daily activities to discredit symptom testimony only if the
14 claimant “spend[s] a *substantial part* of [her] day engaged in pursuits involving the
15 performance of physical functions that are transferable to a work setting.” *Orn, 495 F.3d*
16 *at 639 (emphasis added); Reddick, 157 F.3d at 722 (“Only if the level of activity were*
17 *inconsistent with Claimant’s claimed limitations would these activities have any bearing*
18 *on Claimant’s credibility.”).*

19 The ALJ failed to explain how Plaintiff’s daily living activities detract from
20 Plaintiff’s testimony. A.R. 28-30. She provided no analysis of why Plaintiff’s reported
21 daily activities are inconsistent with the limitations asserted by Plaintiff in his testimony.
22 This lack of explanation is error.

23 **4. Other Reasons.**

24 The ALJ also discredited Plaintiff’s testimony based on his work history. *See*
25 *A.R. 28 (“the claimant’s long history of low and inconsistent earnings prior to the alleged*
26 *onset date . . . did not support the claimant’s allegations.”).* But the ALJ cited no records,
27 earnings statements, or other evidence in support of this finding.

1 Lastly, the ALJ discredited Plaintiff's testimony because he denied using drugs at
2 his hearing, a fact that is contradicted in the record where Plaintiff reported marijuana use
3 to treating medical professionals. A.R. 28-29. But the transcript of the hearing does not
4 show that Plaintiff denied marijuana use. *See* A.R. 62. The transcript reads as follows:

5 ALJ: Do you use any non-prescription medications --

6 Plaintiff: No.

7 ALJ: -- or drugs? No? With the treatment that you've had and the
8 medication that you take, have you continued to experience
9 pain?

10 Plaintiff: Yes.

11 *Id.* The ALJ did not clarify whether Plaintiff considered marijuana to be a medication,
12 and from the transcript alone, it is unclear whether Plaintiff's answer was dependent on
13 that distinction. Without more, the Court cannot conclude that Plaintiff was answering
14 untruthfully. Because the ALJ did not clarify her question, and there appears to be a
15 facially legitimate explanation for Plaintiff's answer – that Plaintiff considers marijuana a
16 prescription medication – the Court is unable to review the legitimacy of Plaintiff's
17 statement. Accordingly, the Court cannot find that Plaintiff's symptom testimony should
18 be discredited based on that statement alone. On remand, the ALJ will have an
19 opportunity to clarify the inquiry.

20 **5. ALJ erred in discounting Plaintiff's Testimony.**

21 For the reasons discussed above, the Court does not find that the ALJ provided
22 specific, clear, and convincing reasons, supported by substantial evidence, for
23 discounting Plaintiff's testimony concerning the severity of his conditions. *Vasquez*, 572
24 F.3d at 591.

25 **C. The ALJ Erred in Evaluating Third Party Credibility.**

26 If an ALJ wishes to discount the testimony of a lay witness, he must give reasons
27 that are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).
28 Plaintiff's mother, Alversa Lucille Hale, provided a statement concerning Plaintiff's level

1 of functioning. A.R. 297-303. Her statement was largely consistent with Plaintiff's
2 testimony: he lives in constant, debilitating pain; needs frequent rest periods; and lies
3 down during the day to relieve his pain. The ALJ rejected Ms. Hale's statement as
4 follows:

5 The statement in question does corroborate the claimant's testimony
6 regarding their daily activities. However, as Ms. Hale is not a medical
7 source and did not observe the claimant in a professional capacity, the
8 statement in question is of little if any value in determining the extent to
9 which the claimant's limited daily activities are a result of their medical
impairments. As discussed in this decision, the medical evidence does not
support the limitations claimed by the claimant.

10 A.R. 31. The Commissioner argues that the ALJ was not required to give additional
11 explanation because the lay witness testimony was similar to Plaintiff's own testimony
12 and the ALJ provided sufficient reasons for rejecting Plaintiff's testimony. Doc. 16 at 25-
13 26. But as discussed above, the ALJ did not provide sufficient reasons for discounting
14 Plaintiff's testimony. And the ALJ provided no other reasons for finding the lay opinion
15 evidence not credible. The ALJ failed to provide germane reasons for discounting the
16 third-party testimony.

17 **D. Remand.**

18 Where an ALJ fails to provide adequate reasons for rejecting the opinion of a
19 physician, the Court must credit that opinion as true. *Lester*, 81 F.3d at 834. An action
20 should be remanded for an immediate award of benefits when the following three factors
21 are satisfied: (1) the record has been fully developed and further administrative
22 proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally
23 sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion;
24 and (3) if the improperly discredited evidence were credited as true, the ALJ would be
25 required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995,
26 1020 (9th Cir. 2014) (citing *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1202 (9th Cir.
27 2008), *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 (9th Cir. 2007), *Orn*, 495 F.3d at 640,
28 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004), and *Smolen v. Chater*, 80 F.3d

1 1273, 1292 (9th Cir. 1996)). There is “flexibility” which allows “courts to remand for
2 further proceedings when, even though all conditions of the credit-as-true rule are
3 satisfied, an evaluation of the record as a whole creates serious doubt that a claimant is, in
4 fact, disabled.” *Garrison*, 759 F.3d at 1020.

5 The second factor is clearly satisfied. In his decision, the ALJ failed to provide
6 legally sufficient reasons for rejecting Plaintiff’s testimony and the opinion of Dr. Kahn.

7 The third factor also appears to be satisfied. The vocational expert testified that no
8 jobs would be available for someone in Plaintiff’s past employment that would allow the
9 limitations described by Dr. Kahn. A.R. 77-79. Taking Plaintiff’s testimony and Dr.
10 Kahn’s opinion as true, jobs in Plaintiff’s past employment are no longer viable options.

11 The only remaining issue is whether the first factor is satisfied. When considering
12 the first factor – the completeness of the record – courts must “review the record as a
13 whole and determine whether it is fully developed, is free from conflicts and ambiguities,
14 and all essential factual issues have been resolved.” *Dominguez v. Colvin*, 808 F.3d 403,
15 407 (9th Cir. 2015) (quotation marks and citation omitted). This includes determining
16 “whether there are outstanding issues that must be resolved before a determination of
17 disability can be made, and whether further administrative proceedings would be
18 useful[.]” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014)
19 (quotation marks and citations omitted).

20 The Court finds that the record is not fully developed. There is an outstanding
21 issue that must be resolved before disability can be determined. Specifically, much of
22 Plaintiff’s testimony surrounds his chronic knee pain. Evidence in the record suggests
23 that Plaintiff had surgery to replace both knees shortly after his hearing. *See* A.R. 30, 57.
24 The Commissioner argues that Plaintiff has never submitted evidence that the surgeries
25 were unsuccessful. Doc. 16 at 24. The Court concludes that further findings are
26 necessary to determine what effect the surgeries have had on Plaintiff’s ability to work,
27 including vocational expert testimony. Because the first factor is not satisfied, the Court
28 will exercise its discretion to remand for further proceedings.

