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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Sharon Powers,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-16-03427-PHX-GMS

ORDER

15 Pending before the Court is Plaintiff Sharon Powers's appeal of the Social
16 Security Administration's (SSA) decision to deny disability insurance benefits (Doc. 14).
17 For the following reasons, the Court vacates the ALJ's decision and remands for
18 consideration in accordance with this opinion.

19 **BACKGROUND**

20 Sharon Powers filed for disability benefits on July 11, 2012, alleging a disability
21 date of May 23, 2012. Ms. Powers's application for SSA disability benefits asserts a
22 strained lumbar region, asthma, left-side hip pain, numbness on left leg, learning
23 disability, lower back spurs, and mild rotair scoliosis of the lumbar spine. (Tr. 230). Her
24 claim was denied on November 29, 2012; reconsideration was denied on September 11,
25 2013. Ms. Powers requested a hearing from an administrative law judge (ALJ), which
26 was held on February 5, 2015. The ALJ determined that Ms. Powers had severe
27 impairments of: degenerative disc disease of the cervical spine, lumbar spine disease,
28 paroxysmal atrial fibrillation, and knee osteoarthritis. (Tr. 20). With these impairments

1 taken into account, the ALJ found that Ms. Powers had the residual functional capacity
2 (RFC) to perform light work with restrictions on the activities that could be performed.
3 (Tr. 23). Because the ALJ determined that Ms. Powers could perform her past relevant
4 work or other work that exists in the national economy, the ALJ found that Ms. Powers
5 was not disabled under the Social Security Act. (Tr. 26–28). The Appeals Council denied
6 the request to review, making the Commissioner’s decision final. (Tr. 1–4). Ms. Powers
7 now seeks judicial review of this decision pursuant to 42 U.S.C. § 405(g).

8 DISCUSSION

9 I. Legal Standard

10 A reviewing federal court will address only the issues raised by the claimant in the
11 appeal from the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n. 13 (9th Cir.
12 2001). A federal court may set aside a denial of disability benefits when that denial is
13 either unsupported by substantial evidence or based on legal error. *Thomas v. Barnhart*,
14 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is “more than a scintilla but less
15 than a preponderance.” *Id.* (quotation omitted). It is “relevant evidence which,
16 considering the record as a whole, a reasonable person might accept as adequate to
17 support a conclusion.” *Id.* (quotation omitted).

18 The ALJ is responsible for resolving conflicts in testimony, determining
19 credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
20 Cir. 1995). When evidence is “subject to more than one rational interpretation, [courts]
21 must defer to the ALJ’s conclusion.” *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d
22 1190, 1198 (9th Cir. 2004). This is so because “[t]he [ALJ] and not the reviewing court
23 must resolve conflicts in evidence, and if the evidence can support either outcome, the
24 court may not substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981, F.2d
25 1016, 1019 (9th Cir. 1992) (citations omitted).

26 II. Analysis

27 Plaintiff alleges that the ALJ erred by (1) discounting the weight afforded to
28 Ms. Powers’s treating physicians; (2) discounting Ms. Powers’s credibility with regards

1 to her symptoms and their severity; (3) denying Ms. Power’s request to subpoena the
2 consultative examiner; and (4) discounting the weight afforded to a third-party report by
3 Gary Powers.¹

4 **A. Weight Afforded to Treating Physicians**

5 A “treating physician” is one who actually treats the claimant. *Lester v. Chater*, 81
6 F.3d 821, 830 (9th Cir. 1995). When a treating doctor’s opinion is not contradicted by
7 another doctor, it may only be rejected for clear and convincing reasons. *Id.* If a treating
8 doctor’s opinion is contradicted by another doctor, it may only be rejected for “specific
9 and legitimate reasons supported by substantial evidence in the record for so doing.” *Id.*
10 (citations omitted). Ms. Powers’s treating physician—Doctor Mark Goldberg and
11 Physician Assistant Kurt Giles²—submitted reports opining that Ms. Powers was disabled
12 and unable to work. (Tr. 439–44, 485–86, 800–01). The ALJ gave both opinions “less
13 weight” for a number of reasons: (1) failure to discuss that pain medication relieves pain;
14 (2) the relatively mild treatment that was accepted by the Claimant; (3) the record’s
15 failure to “indicate significant physical findings on examination;” and (4) the lack of
16 support for the opinion that the claimant can only stand or walk less than two hours a day.
17 (Tr. 25–26).

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19 ¹ In the Reply, Ms. Powers requests that the Court remand the case for a
20 computation of benefits under the credit-as-true rule. (Doc. 21, p. 10). Because
21 Ms. Powers raised this for the first time in the Reply, the Court will not consider this
22 argument. Further, there appears to be evidence in the record from which the ALJ could
23 make a determination that the Claimant is not in fact disabled.

24 ² P.A. Giles is referred to as “Dr. G. Kurt,” “Dr. Kurt,” or “Dr. Kirk” throughout
25 the ALJ’s opinion. (Tr. 25). This is incorrect. Mr. Giles is a Physician Assistant, and his
26 last name is “Giles,” not “Kurt” or “Kirk.” The regulations in place at the time of the
27 Claimant’s filing and the ALJ’s decision classify physician assistants as “other sources.”
28 SSR 06-03p. As such, “[i]nformation from these ‘other sources’ cannot establish the
existence of a medically determinable impairment[;] there must be evidence from an
‘acceptable medical source’ for this purpose.” *Id.* “Other sources” could provide “special
knowledge of the individual and [] insight into the severity of the impairment(s) and how
it affects the individual’s ability to function.” *Id.* Courts, therefore, held that physician
assistants “are not entitled to the same deference” and that the “ALJ may discount
testimony from these other sources if the ALJ gives reasons germane to each witness for
doing so.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (quoting *Turner v.*
Comm’r of Soc. Sec. Admin., 613 F.3d 1217, 1224 (9th Cir. 2010)) (internal quotations
omitted). This regulation was rescinded effective March 27, 2017.

1 The ALJ's determinations may be supported by substantial evidence in the record,
2 but the ALJ did not properly explain the basis for her rejection of Dr. Goldberg and P.A.
3 Giles's opinions. A Claimant's improvement due to medication can be a reason to
4 discount the credibility of a treating physician. *See Warre v. Comm'r of Soc. Sec. Admin.*,
5 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be controlled effectively
6 with medication are not disabling for the purpose of determining eligibility for SSI
7 benefits."). In this case, however, while there is considerable support in the record for
8 the fact that pain medication alleviated at least some of Ms. Powers's pain, (Tr. 587, 608,
9 610, 620, 622, 674, 677, 681, 687, 693), the same records indicate a continued level of
10 pain despite the medication and therapy. Thus, in this instance the ALJ cannot simply
11 discount the doctor's opinion by noting that he failed to account for the fact that his
12 records indicate that therapy and medication relieved the pain, when that is an
13 oversimplification of the doctor's records to the point of misstatement. To use the
14 positive affect of medication and therapy as a basis for discounting the doctor's opinion,
15 the ALJ must demonstrate that she has correctly characterized the doctor's medical
16 records as a whole and adequately explain why the medical records demonstrate the
17 treating physician's opinion should be afforded less weight.

18 Similarly, the record reflects that a surgical treatment was offered to Ms. Powers
19 but she elected to decline it. (Tr. 563, 822, 828). The ALJ found that Ms. Powers's choice
20 to decline the surgery demonstrated a conservative treatment plan inconsistent with
21 permanent disability. *See Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir.) ("We have
22 previously indicated that evidence of 'conservative treatment' is sufficient to discount a
23 claimant's testimony regarding severity of an impairment."). The ALJ failed to discuss
24 that there were significant risks associated with the surgery. Without more explanation
25 from the ALJ, the assertion that the choice to decline a risky surgery necessarily results in
26 a finding of non-disability is error. *See Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989)
27 ("Neither may an ALJ rely on the claimant's failure to take pain medication where
28 evidence suggests the claimant had a good reason for not taking medication.").

1 The ALJ also noted that the record did not “indicate significant physical findings
2 on examination” and that there was little support in examinations and throughout the
3 record to limit Ms. Powers to less than two hours of standing or walking in a day. The
4 ALJ’s vague statement that the record does not “indicate significant physical findings on
5 examination” is insufficient to find Ms. Powers is not disabled. *See Garrison v. Colvin*,
6 759 F.3d 995, 1012–13 (9th Cir. 2014) (“[A]n ALJ errs when he rejects a medical
7 opinion or assigns it little weight while doing nothing more than ignoring it, asserting
8 without explanation that another medical opinion is more persuasive, or criticizing it with
9 boilerplate language that fails to offer a substantive basis for his conclusion.”). The ALJ
10 must state with at least some clarity how the results of the examinations led to her
11 conclusion that the treating physician’s opinion should be discredited. The ALJ’s
12 statement that there is no support for the opinion that Ms. Powers can only stand or walk
13 less than two hours a day is similarly insufficient. If there is evidence in the record that
14 Ms. Powers can in fact stand and walk for more than two hours in a day, then the ALJ
15 must cite that evidence and explain how it supports her findings. Dr. Cunningham, the
16 consultative examiner, disagreed with Dr. Goldberg and P.A. Giles’s opinions on how
17 long Ms. Powers could stand or walk. Dr. Cunningham found that Ms. Powers had no
18 restrictions on standing or walking. (Tr. 665). When the opinions of a treating physician
19 conflict with another doctor’s opinion, “the [ALJ] may not reject this opinion without
20 providing ‘specific and legitimate reasons’ supported by substantial evidence in the
21 record.” *Lester*, 81 F.3d at 830. Even assuming the ALJ considered and relied on Dr.
22 Cunningham’s findings in discounting Dr. Goldberg and P.A. Giles’s opinions, the ALJ
23 did not meet the required standard.³ The ALJ’s statement that there is “no support” for
24 the treating physicians’ opinions does not constitute specific and legitimate reasons
25 supported by substantial evidence.

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27 ³ By contrast, where the “treating doctor’s opinion is not contradicted by another
28 doctor, it may be rejected only for ‘clear and convincing’ reasons.” *Lester*, 81 F.3d at
830. As the ALJ did not meet the lower standard of “specific and legitimate,” the ALJ
would also be unable to meet this standard.

1 Finally, ALJ also rejected Dr. Goldberg’s conclusion that Ms. Powers’s ability to
2 lift was limited. In doing so, the ALJ stated that “[i]t is unreasonable to find that the
3 claimant can only lift between 0-10 pounds given that the claimant has minimal
4 impairments in the upper extremities.” (Tr. 26). The ALJ cites nothing to support the
5 finding that an ability to lift is uniquely connected to impairments in the upper
6 extremities. An ALJ may not substitute her own medical judgment for that of a medical
7 expert. *See Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999) (stating that the ALJ is “not
8 at liberty to ignore medical evidence or substitute his own views for uncontroverted
9 medical opinion” and that the ALJ is “simply not qualified to interpret raw medical data
10 in functional terms”); *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996) (noting that
11 ALJs “must not succumb to the temptation to play doctor and make their own
12 independent medical findings”). The ALJ did not sufficiently support her determination
13 that the opinions of Dr. Goldberg and P.A. Giles were due less weight.

14 **B. Claimant’s Credibility**

15 When a claimant alleges subjective symptoms, like pain, the ALJ must follow a
16 two-step analysis to decide whether to credit the claimant’s testimony. First, the claimant
17 “must produce objective medical evidence of an underlying impairment which could
18 reasonably be expected to produce the pain or other symptoms alleged.” *Smolen v.*
19 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996) (quoting *Bunnell v. Sullivan*, 947 F.2d 341,
20 344 (9th Cir. 1991)) (quotation marks omitted). The claimant does not need to show “that
21 her impairment could reasonably be expected to cause the severity of the symptom she
22 has alleged; she need only show that it could reasonably have caused some degree of the
23 symptom.” *Smolen*, 80 F.3d at 1282. Second, if the claimant can make the showing
24 required in the first step and the ALJ does not find any evidence of malingering, “the ALJ
25 can reject the claimant’s testimony about the severity of her symptoms only by offering
26 specific, clear and convincing reasons for doing so.” *Id.* at 1281.

27 The ALJ found that Ms. Powers was “not fully credible,” but did not make any
28 findings of malingering. (Tr. 26). First, the ALJ stated that the “objective evidence [did]

1 not support the claimant’s allegations of severity of pain.” *Id.* In making this finding, the
2 ALJ relied on the fact that the Ms. Powers received only mild treatment, her quality of
3 life was improving, and physical examinations generally found only mild limitations.⁴
4 (Tr. 24). Second, the ALJ noted that the Ms. Powers underwent surgery for abdominal
5 reconstruction and breast lift in December 2014. The ALJ determined that this was an
6 elective, cosmetic surgery, and as such, “it is unreasonable for the claimant to undergo
7 elective surgery if the claimant believes she has debilitating medical conditions that
8 render her disabled.” (Tr. 24).

9 Ms. Powers was found to suffer from the severe impairments of disc disease of the
10 cervical spine, lumbar spine disease, and knee osteoarthritis. These impairments could
11 reasonably be expected to produce the pain and difficulty of movement that Ms. Powers
12 alleges is disabling. Ms. Powers, therefore, satisfied the first step of the analysis. At the
13 second step, if the “evidence reasonably supports either confirming or reversing the
14 ALJ’s decision, [the Court] may not substitute [its] judgment for that of the ALJ. *Batson*
15 *v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (citing *Tackett v.*
16 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999)). But, the Court “may not affirm [the ALJ’s
17 decision] simply by isolating a specific quantum of supporting evidence.” *Jones v.*
18 *Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). The ALJ did not offer specific, clear and
19 convincing reasons for rejecting Ms. Powers’s testimony about the severity of her
20 symptoms. The ALJ “must state which pain testimony is not credible and what evidence
21 suggests the complaints are not credible.” *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
22 1993). The ALJ noted Ms. Powers’s mild treatment, her relief due to pain medications,
23 improvement from physical therapy, her weight loss, and the mild nature of many of her
24 ailments. (Tr. 24–25). Here, however, the ALJ made these determinations about the
25 evidence in the record generally. The ALJ did not discuss which parts of Ms. Powers’s
26 testimony were not credible and what medical evidence contradicted her testimony.

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28 ⁴ The Court determined in prior Sections that the ALJ failed to properly explain
her bases for rejecting the physicians’ opinions. That deficiency, which was repeated by
the ALJ in rejecting the claimant’s symptom testimony, presents the same problems here.

1 Additionally, the ALJ noted that Ms. Powers underwent surgery to remove excess
2 skin after a successful gastric bypass procedure and resulting weight loss. The ALJ's
3 statement that this surgery was cosmetic is not supported by the record. Rather, the
4 excess skin caused rashes and lesions along skin folds that were not responsive to more
5 conservative treatment by using creams. (Tr. 817). The surgery was deemed "medically
6 necessary" and doctors believed it would aid in "improvement in her neck, back and
7 shoulder pain." (Tr. 818). The ALJ also stated a belief that it is "unreasonable" for a
8 claimant to undergo elective surgery if the claimant has a disabling condition. The ALJ
9 cites no medical opinion for this assumption.

10 **C. Denial of Subpoena⁵**

11 The consultative examiner, Doctor Keith Cunningham, opined that Ms. Powers
12 was not disabled and limited her to a light-work RFC. (Tr. 659–61, 664–66). The ALJ
13 gave Dr. Cunningham's opinion great weight. (Tr. 25). Ms. Powers requested a subpoena
14 to enable a cross-examination of Dr. Cunningham at the hearing. (Tr. 311–16). Although
15 a claimant is "not entitled to unlimited cross-examination," some "cross-examination []
16 may be required for a full and true disclosure of the facts." *Solis v. Schweiker*, 719 F.2d
17 301, 302 (9th Cir. 1983) (quoting 5 U.S.C. § 556(d)). Generally, the ALJ has discretion to
18 determine whether cross-examination is warranted. *Solis*, 719 F.2d at 302. However,
19 when a claimant has "availed himself of the right to request cross examination, and
20 [when] the report [is] so crucial to the ALJ's decision, . . . denial of [the claimant's]
21 request [is] an abuse of discretion." *Id.* This is particularly true when "the physician is a
22 crucial witness whose findings substantially contradict the other medical testimony." *Id.*
23 at 301. *See also Bello v. Asture*, 241 Fed. Appx. 426, (9th Cir. 2007) (holding that where
24 the consultative examiner's opinion was the primary basis for the ALJ's denial of

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26 ⁵ Plaintiff's Opening Brief seems to challenge the other two consultative
27 physicians, Drs. Wright and Hopkins. (Doc. 14, p. 24). In Plaintiff's Reply Brief,
28 however, Plaintiff asserts that she does not challenge the weight given to these doctors'
opinions or that error was committed by denying her ability to cross-examine them. (Doc.
24, p. 2, n. 3). The Court, therefore, only evaluates the ALJ's actions with respect to
Dr. Cunningham.

1 benefits and it “substantially contradicted” the opinion of treating physicians, the ALJ
2 abused her discretion by denying the motion to subpoena the consultative examiner).

3 Here, Dr. Cunningham’s opinion played a large role in the ALJ’s determination. It
4 is the only opinion that the ALJ gave great weight to, and the ALJ adopted
5 Dr. Cunningham’s determination of Ms. Powers’s RFC. (Tr. 25). Dr. Cunningham’s
6 evaluations conflicted with those of both of Ms. Powers’s treating physicians. Moreover,
7 Dr. Cunningham’s own reports contain inconsistencies. He notes that although
8 Ms. Powers “can come into the hallway and stand[,] [s]he is in pain the entire time. She
9 has high pain behavior.” (Tr. 660). Ms. Powers would not “stand on each leg
10 independently or heels and toes” because “she feels like her left leg will give out on her.”
11 (Tr. 661). Dr. Cunningham noted that there was a “[l]imited examination due to pain.” *Id.*
12 However, in his report to the SSA, Dr. Cunningham marked “no” in answer to whether
13 the claimant has any limitations standing or walking.” (Tr. 665). Dr. Cunningham gives
14 no discussion of what evidence he used to reach any of his medical conclusions. Because
15 Dr. Cunningham’s opinion substantially contradicted the treating physicians, was given
16 great weight by the ALJ, and contains inconsistencies, it was error for the ALJ to not
17 grant Ms. Powers’s subpoena request.

18 **D. Weight Afforded to Third-Party Report**

19 Ms. Powers’s nephew, Gary Powers, submitted a report opining that Ms. Powers
20 suffered from severe pain which limited her physical abilities. (Tr. 274–81). The ALJ
21 gave partial weight to the report, crediting Mr. Powers’s discussion of Ms. Powers’s
22 activities. But, the ALJ did not find the discussion of the severity of Ms. Powers’s
23 impairments entirely credible because they were inconsistent with the objective medical
24 evidence. Further, the ALJ noted that because of Mr. Powers’s familial relationship to
25 Ms. Powers, “he cannot be considered a disinterested third party whose allegations would
26 not tend to be colored by affection for the claimant.” (Tr. 26).

27 ALJ’s may consider evidence from nonmedical sources. 20 C.F.R.
28 § 404.1513(a)(4), § 404.1529(c), § 404.1545(e); SSR 16-3p. This testimony is

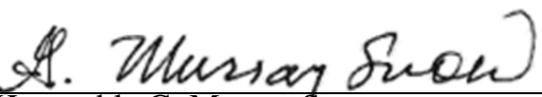
1 “competent evidence . . . and therefore cannot be disregarded without comment.” *Nguyen*
2 *v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citations and emphasis omitted). To
3 discount the testimony of a lay witness, the ALJ “must give reasons that are germane to
4 each witness.” *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). To the extent that, in
5 rejecting Mr. Powers’s testimony the ALJ merely repeated the reasons above that have
6 been deemed insufficient, they are similarly insufficient to reject the testimony of
7 Mr. Powers.

8 CONCLUSION

9 The ALJ erred in weighing the opinions of Dr. Goldberg and P.A. Giles,
10 Ms. Powers’s credibility, and the opinion of her nephew, Gary Powers. The ALJ also
11 erred by not granting the subpoena for Dr. Cunningham, since his opinion was heavily
12 relied on and varied significantly from the treating physicians’ opinions. Therefore, the
13 Court remands to the ALJ for further consideration in line with this decision.

14 **IT IS THEREFORE ORDERED** that the ALJ’s decision is vacated and
15 remanded for consideration in accordance with this opinion. The Clerk of Court is
16 directed to remand this matter.

17 Dated this 7th day of March, 2018.

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19 

20 Honorable G. Murray Snow
21 United States District Judge