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

9 Thomas John Metros,
10 Plaintiff,

No. CV-16-04423-PHX-DLR

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,
14 Defendant.

15
16 Plaintiff Thomas Metros applied for a period of disability, disability insurance
17 benefits, and supplemental security income (“SSI”) in September 2012, alleging that he
18 became disabled in October 2008. After state agency denials, Metros appeared and
19 testified at a hearing before an Administrative Law Judge (“ALJ”). A vocational expert
20 also testified. It was determined that an additional hearing was necessary for a full and
21 fair presentation of the case. Metros appeared and testified at this second hearing, along
22 with a different vocational expert. At the hearing, Metros amended his disability onset
23 date to September 26, 2012, and voluntarily withdrew his application for a period of
24 disability and disability insurance benefits, leaving only his application for SSI.

25 On November 30, 2015, the ALJ issued a decision finding Metros not disabled
26 within the meaning of the Social Security Act (“SSA”). This decision became Defendant
27 the Commissioner of the Social Security Administration’s (“Commissioner”) final
28 decision when the Appeals Council denied review. Metros now challenges the

1 Commissioner's decision pursuant to 42 U.S.C. § 405(g). The Court reverses the
2 Commissioner's decision and remands for an award of benefits.

3 **I. Overview of the Administrative Process**

4 To determine whether a claimant is disabled, the ALJ follows a five-step process.
5 20 C.F.R. § 404.1520(a). The claimant bears the burden of proof on the first four steps,
6 but at step five, the burden shifts to the Commissioner. *Tackett v. Apfel*, 180 F.3d 1094,
7 1098 (9th Cir. 1999). At the first step, the ALJ determines whether the claimant is
8 engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the
9 claimant is not disabled and the inquiry ends. At step two, the ALJ determines whether
10 the claimant has a "severe" medically determinable physical or mental impairment.
11 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. At step
12 three, the ALJ considers whether the claimant's impairment or combination of
13 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P
14 of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to
15 be disabled. If not, the ALJ proceeds to step four. At step four, the ALJ assesses the
16 claimant's residual functional capacity ("RFC") and determines whether the claimant is
17 still capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant
18 is not disabled and the inquiry ends. If not, the ALJ proceeds to the fifth and final step,
19 where she determines whether the claimant can perform any other work based on the
20 claimant's RFC, age, education, and work experience. § 404.1520(a)(4)(v). If so, the
21 claimant is not disabled. If not, the claimant is disabled.

22 **II. The ALJ's Decision**

23 At step one, the ALJ determined that Metros meets the insured status requirements
24 of the SSA through December 31, 2008, and has not engaged in substantial gainful
25 activity since his alleged disability onset date. (A.R. 32.) The ALJ found at step two that
26 Metros' obesity, degenerative disc disease of the lumbar and cervical spine, and status
27 post total bilateral knee replacement are severe impairments, but concluded at step three
28 that they do not meet or medically equal the severity of an impairment listed in Appendix

1 1 to Subpart P of 20 C.F.R. Pt. 404. (*Id.* at 32-34.) At step four, the ALJ assessed
2 Metros' RFC as follows:

3 The claimant is able to lift and carry up to ten pounds
4 frequently and up to 20 pounds occasionally. The claimant
5 can sit up to one hour at a time and up to six hours per
6 workday. The claimant can stand up to two hours, and walk
7 up to two hours, per eight-hour workday. The claimant
8 requires a cane to ambulate. The cane is medically necessary.
9 When using a cane, the claimant can use his free hand to
10 carry small objects. The claimant can occasionally reach
11 overhead bilaterally. The claimant can reach in all other
12 directions with either hand continuously (more than two-
13 thirds of the day). The claimant can handle, finger, feel push,
14 and pull continuously with both arms. The claimant can
15 frequently use each of his feet for operation of foot controls.
16 The claimant can never climb ladders, ropes, scaffolds,
17 ramps, or stairs. The claimant can occasionally balance,
18 stoop, and crouch. The claimant can never kneel or crawl.
19 The claimant must never be exposed to unprotected heights,
20 or dust, odors, fumes, or pulmonary irritants. The claimant
21 can occasionally be exposed to extreme heat and extreme
22 cold. The claimant can frequently be exposed to vibration.
23 The claimant can continuously be exposed to moving or
24 mechanical parts. The claimant is limited to working in
25 environments with no more than loud noise levels, equivalent
26 to the sound of heavy traffic. The claimant can perform acts
27 such as shopping. The claimant can travel without a
28 companion. The claimant can ambulate without the
assistance of a wheelchair, walker, or two canes or two
crutches. The claimant can walk one block at a reasonable
pace on rough or uneven surfaces. The claimant can climb a
few steps at a reasonable pace with the use of one handrail.
The claimant can prepare simple meals and feed himself. The
claimant can sort, handle, and use paper files. As for mental
limitations, the ability to understand, remember, and carryout
instructions is not affected and the ability to interact
appropriately with supervisors, coworkers and the public, as
well as the ability to respond to changes in the routine work
setting is not affected by the impairment.

22 (*Id.* at 34-35.) Based on this RFC, the ALJ found that Metros can perform his past
23 relevant work as a mortgage loan officer and, therefore, concluded that he is not disabled
24 within the meaning of the SSA. (*Id.* at 38-39.)

25 **III. Standard of Review**

26 On appeal, the district court does not review the ALJ's decision de novo or
27 otherwise determine whether the claimant is disabled. Rather, the court reviews only
28 those issues raised by the party challenging the ALJ's decision and may reverse only if

1 the decision is not supported by substantial evidence or is based on legal error. *Orn v.*
2 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th
3 Cir. 2001). Substantial evidence is more than a scintilla, less than a preponderance, and
4 relevant evidence that a reasonable person might accept as adequate to support a
5 conclusion considering the record as a whole. *Orn*, 495 F.3d at 630. “Where the
6 evidence is susceptible to more than one rational interpretation, one of which supports the
7 ALJ’s decision, the ALJ’s conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d
8 947, 954 (9th Cir. 2002). The court, however, “must consider the entire record as a
9 whole and may not affirm simply by isolating a specific quantum of supporting
10 evidence.” *Orn*, 495 F.3d at 630 (internal quotations and citation omitted). Nor may the
11 court “affirm the ALJ on a ground upon which he did not rely.” *Id.*

12 **IV. Discussion**

13 Metros argues that the ALJ improperly rejected the sitting limitations assessed by
14 consultative examiner Dr. Keith Cunningham and improperly evaluated Metros’ pain and
15 symptom testimony. (Doc. 15 at 3.) The Court reaches only the first issue because its
16 resolution is dispositive.

17 Dr. Cunningham administered a consultative examination in June 2015. (A.R.
18 1195-1206.) He opined that Metros could lift up to twenty pounds occasionally, up to ten
19 pounds frequently, could sit for up to four hours, stand for up to two hours, and walk up
20 to two hours per workday. (*Id.* at 1199-1200.) Though Dr. Cunningham indicated that
21 Metros needed to use a cane, he opined that Metros still could use his free hand to carry
22 small objects. (*Id.* at 1200.) He also assessed postural, manipulative, feet usage, and
23 environmental limitations. (*Id.* at 1201-04.) Dr. Cunningham based his opinion on his
24 own examination of Metros, which revealed significant gait, station, and range of motion
25 deficiencies. (*Id.* at 1195-96.)

26 The ALJ found that “Dr. Cunningham’s opinion is largely consistent with the
27 medical evidence,” assigned it “great weight,” and adopted “the majority of the
28 limitations assigned.” (*Id.* at 37.) The lone exception was Dr. Cunningham’s opinion

1 that Metros could sit for up to four hours in a workday, which the ALJ found to be
2 inconsistent with Metros' level of daily activity and the conservative medication he used
3 to treat his pain. (*Id.*) Instead, the ALJ found that Metros could sit for up to six hours in
4 a workday. (*Id.* at 35.)

5 As Metros acknowledges, an ALJ may discount an examining physician's opinion
6 (or, in this case, a portion thereof) "by providing specific and legitimate reasons that are
7 supported by substantial evidence."¹ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir.
8 2014) (quotation and citation omitted). "This can be done by setting out a detailed and
9 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
10 thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998).
11 Although the ALJ's stated reasons for not adopting Dr. Cunningham's full opinion can be
12 specific and legitimate, *see* 20 C.F.R. § 404.1527(c)(4); *Rollins v. Massanari*, 261 F.3d
13 853, 857 (9th Cir. 2001), the ALJ did not satisfy this standard because he did not explain
14 how Metros' daily activities or his conservative pain medication regiment show that he
15 can sit for more than four hours in a workday.

16 With respect to Metros' daily activities, the ALJ relied on the following summary
17 of those activities contained within the psychological report of Dr. Michael Rabara:

18 Upon arising, [Metros] first tends to his personal hygiene. He
19 bathes in the afternoons. He needs no assistance with
20 personal hygiene, grooming and dressing. He skips breakfast.
21 In the mornings he will "drink coffee and read the news. I
go[] outside and sit with the birds." He eats lunch. During
the afternoons, [Metros] does "the same thing." For dinner,

22 ¹ More specifically, the "specific and legitimate reasons" standard applies to
23 examining physician opinions that are contradicted by another doctor's opinion.
Garrison, 759 F.3d at 1012. Dr. Cunningham's opinion regarding Metros' sitting
24 limitations is contradicted by the opinions of treating physician Dr. Ayaz Biviji, who
opined that Metros could sit for up to five hours in a workday, and state agency reviewer
25 Dr. B. Vaghaiwalla, who opined that Metros could sit for up to six hours per work day.
(A.R. 37-38.) In the Ninth Circuit, rejection of an un-contradicted treating or examining
26 physician's opinion must be justified by clear and convincing reasons supported by
substantial evidence. *See Lester v. Colvin*, 81 F.3d 821, 830-31 (9th Cir. 1995). Though
27 the "clear and convincing" reasons standard ostensibly is more demanding, this Court has
on prior occasions questioned whether "the line between specific and clear or between
28 legitimate and convincing is more abstract than practical," especially when the same
quantum of evidence is required under both standards. *Moore v. Comm'r of Soc. Sec.
Admin.*, No. CV-16-03445-PHX-DLR, 2017 WL 6379920, at *4-5 (D. Ariz. Dec. 14,
2017).

1 he usually eats a self-prepared meal. In the evening he will
2 “do the same routine.”

3 [Metros] sometimes picks up his room and makes his bed.
4 He does not [do] his own laundry. He prepares his own
5 meals. He tries to keep a neat and clean household. He is
6 able to initiate phone calls and does so rarely. [Metros]
leaves the house 1-2 times per week. He is able to drive a
car. He is not able to shop at nearby stores within walking
distance. He does not attend church regularly. He cares for a
cat. He does not maintain a yard or garden.

7 (A.R. 36, 1209.) The Commissioner argues that these “activities do not suggest a
8 significant amount of walking,” and it therefore “was reasonable for the ALJ to infer . . .
9 that [Metros] sits for more than four hours per day.” (Doc. 16 at 15.) The Court
10 disagrees. Though Metros admittedly sits during the day, the cited records do not
11 elucidate the frequency or duration in which he does so. Moreover, it is not reasonable to
12 assume that Metros is sitting whenever he is not walking. Indeed, Metros testified that he
13 lies down to alleviate pain five times per day for one-half hour each time. (A.R. 36, 81,
14 122-23.)

15 As for Metros’ pain medication regiment, the ALJ noted that Metros takes
16 tramadol, Tylenol, and ibuprofen for pain, but does not take prescribed narcotic
17 medications out of preference. (*Id.* at 36.) The ALJ reasoned that Metros’ “election to
18 forego narcotic medications reasonably leads to the conclusion that [his] symptoms are
19 adequately alleviated by the conservative medications he currently takes.” (A.R. 36.)
20 But, as both Metros and the Commissioner acknowledge in their briefs, tramadol is an
21 opioid/narcotic used to treat moderate to moderately severe pain. (Docs. 15 at 13; 16 at
22 17.) The ALJ did not explain how taking medication to alleviate moderate to moderately
23 severe pain is inconsistent with Dr. Cunningham’s assessed sitting limitations.
24 Furthermore, the evidence indicates that Metros chose not to take stronger narcotic
25 medications because of the adverse side effects and his past issues with addiction. (A.R.
26 517, 603, 970, 1131-32.) It therefore was not reasonable for the ALJ to infer from
27 Metros’ decision to take tramadol instead of a stronger narcotic that he could sit for a
28 longer period than Dr. Cunningham opined.

1 In her response brief, the Commissioner raises a number of post hoc
2 rationalizations for the ALJ's decision to reject the sitting limitations assessed by Dr.
3 Cunningham. The Court does not consider these arguments because, as previously noted,
4 it cannot "affirm the ALJ on a ground upon which he did not rely." *Orn*, 495 F.3d at 630.

5 **V. Scope of Remand**

6 When the Commissioner's decision is tainted by legal error or not supported by
7 substantial evidence, the Court has discretion to reverse and remand either for further
8 proceedings or for an award of benefits. 42 U.S.C. § 405(g). With that said, "[a]n
9 automatic award of benefits in a disability case is a rare and prophylactic exception to the
10 well-established ordinary remand rule." *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir.
11 2017). In deciding whether to remand for an award of benefits, the Court considers the
12 following three factors: (1) did the ALJ fail to provide legally sufficient reasons for
13 rejecting evidence, (2) has the record has been fully developed and would further
14 proceedings serve no useful purpose, and (3) is it clear from the record that the ALJ
15 would be required to find the claimant disabled were such evidence credited? *Triechler*
16 *v. Comm'r of Soc. Sec.*, 775 F.3d 1090, 1100-01 (9th Cir. 2014). The Court need not
17 apply this so-called "credit-as-true" rule if evaluation of the record as a whole creates
18 serious doubt that the claimant is, in fact, disabled. *See Garrison*, 759 F.3d at 1021.

19 Here, the ALJ did not provide legally sufficient reasons for rejecting the sitting
20 limitations assessed by Dr. Cunningham. The Commissioner argues that further
21 proceedings are necessary so the ALJ can consider whether the Commissioner's post hoc
22 rationalizations offer a basis for rejecting Dr. Cunningham's opinion. (Doc. 16 at 19.)
23 But Ninth Circuit "precedent and the objectives of the credit-as-true rule foreclose the
24 argument that a remand for the purpose of allowing the ALJ to have a mulligan qualifies
25 as a remand for a 'useful purpose.'"² *Garrison*, 759 F.3d at 1021-22 (collecting cases).

26
27 ² The Commissioner also argues that a remand for further proceedings is
28 appropriate because there are conflicts in the medical evidence. (Doc. 16 at 19.) But the
ALJ already considered these conflicts and, in almost all respects, found Dr.
Cunningham's opinions about Metros' physical limitations to be the most credible out of
all those submitted.

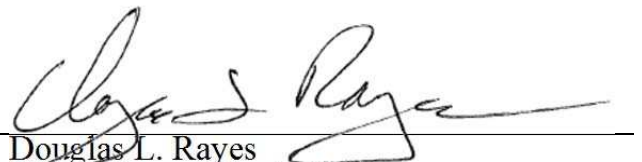
1 Lastly, the vocational expert opined that someone with the limitations assessed by Dr.
2 Cunningham could not perform past relevant work and could not transfer to other work.
3 (A.R. 114-17.) It is clear, then, that had the ALJ adopted Dr. Cunningham's opinion in
4 full, he would have found Metros to be disabled.

5 **VI. Conclusion**

6 For the most part, the ALJ issued a thorough, clear, and well-reasoned decision.
7 The ALJ did not, however, supply legally adequate reasons for rejecting the sitting
8 limitations assessed by Dr. Cunningham. Had Dr. Cunningham's opinion been accepted
9 in full, the ALJ would have found Metros disabled. Therefore,

10 **IT IS ORDERED** that the Commissioner's decision is **REVERSED** and this
11 matter **REMANDED** for an award of benefits. The Clerk of the Court shall terminate
12 this case.

13 Dated this 22nd day of March, 2018.

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18 Douglas L. Rayes
19 United States District Judge
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