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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Richard Lon Alter,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-01887-PHX-DGC

ORDER

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16 Plaintiff Richard Alter seeks review under 42 U.S.C. § 405(g) of the final decision
17 of the Commissioner of Social Security, which denied him disability insurance benefits
18 and supplemental security income under §§ 216(i) and 223(d) of the Social Security Act.
19 Defendant concedes that the administrative law judge's ("ALJ") decision is based on
20 reversible legal error (Doc. 18), but the parties dispute whether the Court should remand
21 for further administrative proceedings (Docs. 18, 19). The Court will vacate the
22 Commissioner's decision and remand for further proceedings.

23 **I. Background.**

24 Plaintiff is a 54 year old male who previously worked as an irrigation technician,
25 irrigation sales installer, and counter sales person. A.R. 30. Plaintiff applied for
26 disability insurance benefits and supplemental security income on February 22, 2013,
27 alleging disability beginning on February 24, 2011. A.R. 20. On October 23, 2015,
28 Plaintiff testified at a hearing before the ALJ. *Id.* A vocational expert also testified. *Id.*

1 On February 18, 2016, the ALJ issued a decision that Plaintiff was not disabled within
2 the meaning of the Social Security Act. A.R. 20-32. This became the Commissioner’s
3 final decision when the Appeals Council denied Plaintiff’s request for review on
4 April 21, 2017. A.R. 1-6.

5 **II. Legal Standard.**

6 “When the ALJ denies benefits and the court finds error, the court ordinarily must
7 remand to the agency for further proceedings before directing an award of benefits.”
8 *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Under a “rare exception” to this
9 rule, the Court may remand for an immediate award of benefits after conducting a three-
10 part inquiry. *Id.* The Ninth Circuit recently explained:

11 The three-part analysis . . . is known as the “credit-as-true” rule. First, we
12 ask whether the ALJ failed to provide legally sufficient reasons for
13 rejecting evidence, whether claimant testimony or medical opinion. Next,
14 we determine whether there are outstanding issues that must be resolved
15 before a disability determination can be made, and whether further
16 administrative proceedings would be useful. When these first two
17 conditions are satisfied, we then credit the discredited testimony as true for
18 the purpose of determining whether, on the record taken as a whole, there is
19 no doubt as to disability.

20 *Id.* (internal quotation marks and citations omitted). *Leon* emphasized that the Court has
21 discretion to remand for further proceedings even if it reaches the third step in the
22 process. *Id.* “Where an ALJ makes a legal error, but the record is uncertain and
23 ambiguous, the proper approach is to remand the case to the agency.” *Id.* (quotation
24 marks omitted).

25 **III. The ALJ’s Five-Step Evaluation Process.**

26 To determine whether a claimant is disabled for purposes of the Social Security
27 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears
28 the burden of proof on the first four steps, and the burden shifts to the Commissioner at
step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). To establish disability,
the claimant must show that (1) he is not currently working, (2) he has a severe

1 impairment, and (3) this impairment meets or equals a listed impairment or (4) his
2 residual functional capacity (“RFC”) prevents his performance of any past relevant work.
3 If the claimant meets his burden through step three, the Commissioner must find him
4 disabled. If the inquiry proceeds to step four and the claimant shows that he is incapable
5 of performing past relevant work, the Commissioner must show in the fifth step that the
6 claimant is capable of other work suitable for his RFC, age, education, and work
7 experience. 20 C.F.R. § 404.1520(a)(4).

8 At step one, the ALJ found that Plaintiff met the insured status requirements of the
9 Social Security Act through September 30, 2015, and has not engaged in substantial
10 gainful activity since February 24, 2011. A.R. 22. At step two, the ALJ found that
11 Plaintiff had the following severe impairments: degenerative disc disease of the cervical
12 and lumbar spine, status post microdiscectomy at L4-5; and left upper extremity
13 epicondylosis. A.R. 23. The ALJ acknowledged that the record contained evidence of
14 hyperlipidemia, hypertension, and depressive disorder, but found that these were not
15 severe impairments. A.R. 23-24. At step three, the ALJ determined that Plaintiff did not
16 have an impairment or combination of impairments that meets or medically equals a
17 listed impairment. A.R. 25. At step four, the ALJ found that Plaintiff had the RFC to
18 perform less than the full range of light work, and was unable to perform any past
19 relevant work. A.R. 25, 30. At step five, the ALJ found that, considering Plaintiff’s age,
20 education, work experience, and RFC, there were jobs that existed in significant numbers
21 in the national economy that Plaintiff could have performed before the date last insured.
22 A.R. 31.

23 **IV. Analysis.**

24 **A. Credit-as-True Rule.**

25 Applying the three-part credit-as-true test, the Court concludes that it must remand
26 to the Commissioner for further proceedings. First, Defendant concedes that the ALJ
27 made two reversible errors: (1) she erroneously discredited the medical opinion of
28 treating physician Julian Grove, and (2) she erroneously discredited Plaintiff’s symptom

1 testimony. Doc. 18 at 4.

2 Second, outstanding issues must be resolved before a disability determination can
3 be made. For this second step, the parties focus their arguments on four issues.

4 Defendant first contends that Dr. Grove's opinions are internally inconsistent,
5 requiring a remand for further review. Doc. 18 at 6-7. Defendant supports this argument
6 with citations to the record that appear to reflect at least some inconsistent findings on the
7 nature and severity of Plaintiff's physical impairments. *Id.* Plaintiff counters that narrow
8 excerpts from Dr. Grove's treatment notes are insufficient to establish inconsistency in
9 his assessment of Plaintiff's ability to work (Doc. 19 at 4), but Plaintiff cites no evidence
10 in the record to show that Dr. Grove's notes, read as a whole, reflect a clear, consistent
11 opinion regarding Plaintiff's condition. The Court finds that further administrative
12 proceedings would be helpful to assess the weight of Dr. Grove's opinions.¹

13 Defendant next contends that Dr. Grove's opinions conflict with that of other
14 physicians, requiring remand to properly weigh the medical opinion evidence. Doc. 18
15 at 7. Defendant supports this argument with citations to the conflicting opinions of a
16 non-examining physician and a medical expert. *Id.* Plaintiff counters that Dr. Grove's
17 opinion is uncontested insofar as it is the only opinion that addressed the effect of
18 Plaintiff's pain on his ability to work. Doc. 19 at 3. But both the non-examining
19 physician and the medical expert specifically noted Plaintiff's pain when forming their
20 opinions. A.R. 113, 593-94. Plaintiff further argues that these opinions are insufficient
21 to require remand because they were based on an "incomplete view of the record" or
22 formed without considering Plaintiff's symptom testimony. Doc. 19 at 5. But the
23 medical expert indicated that he had reviewed sufficient data to render an opinion
24 (A.R. 593), and the non-examining physician reviewed voluminous records
25 (A.R. 101-17). Plaintiff articulates no specific argument regarding what records were
26 missing and why that would require the Court to disregard the entire opinions. Nor does

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28 ¹ Plaintiff also emphasizes that Dr. Grove opined that Plaintiff's disability existed
before the last insured date. Doc. 19 at 4. Because outstanding issues remain in the
record, the Commissioner must decide on remand whether to credit this opinion.

1 Plaintiff cite any controlling authority for his broad proposition that conflicting opinions
2 of non-examining physicians are insufficient as a matter of law to create a conflict.
3 Doc. 19 at 5. The Court concludes that further administrative proceedings are required to
4 weigh these conflicting medical opinions.²

5 Defendant contends that Plaintiff's own statements about his condition are
6 internally inconsistent, requiring further administrative proceedings. Doc. 18 at 7-8.
7 Defendant supports this argument with specific citations to the record. *Id.* Plaintiff
8 neither responds to this argument nor offers his own evidence to establish the absence of
9 outstanding issues regarding Plaintiff's symptom testimony. Doc. 19.

10 Defendant finally argues that Plaintiff's failure to follow prescribed medical
11 treatment creates doubt as to whether he was actually disabled. Doc. 18 at 8.
12 Specifically, Defendant emphasizes that Plaintiff declined to engage in a regimen of
13 home exercise to improve his condition. *Id.* Plaintiff characterizes this as a "minor
14 lapse," especially in light of his epidural steroid injections, spinal surgery, and
15 prescription drugs. Doc. 19 at 6. The Court finds that this is a conflict in the record that
16 warrants further review. Although Plaintiff apparently did not follow Dr. Grove's
17 recommendation to develop a home exercise program, the probative value of this point is
18 unclear in light of the more serious treatment he received.

19 For these reasons, the Court does not reach the third step and will remand to the
20 Commissioner for further proceedings. This case does not present rare circumstances in
21 which an immediate award of benefits might be appropriate.

22 **B. Other Arguments.**

23 Plaintiff makes two additional arguments for the first time in his reply brief.
24 Doc. 19 at 7-8. The Court will not consider arguments made for the first time in a reply
25 brief. *See Gadda v. State Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th Cir. 2007).

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28 ² Plaintiff also appears to argue that the ALJ erred by relying on the opinions of
non-examining physicians to discredit Dr. Grove's opinion. Doc. 19 at 5-6. Defendant
concedes that the ALJ erred when she discredited Dr. Grove's opinion. Doc. 18 at 4.

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IT IS ORDERED that the final decision of the Commissioner of Social Security is **vacated** and this case is **remanded** for further proceedings consistent with this opinion. The Clerk shall enter judgment accordingly and **terminate** this action.

Dated this 29th day of May, 2018.



David G. Campbell
United States District Judge