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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Victor R Gracia,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.

No. CV-17-02331-PHX-DLR

**ORDER**

15  
16 Plaintiff Victor Gracia<sup>1</sup> applied for Social Security Disability Insurance Benefits  
17 on April 4, 2013, alleging disability beginning March 25, 2013. After state agency  
18 denials, Gracia appeared and testified at a hearing before an Administrative Law Judge  
19 (“ALJ”). A vocational expert also testified. Following the hearing, the ALJ issued a  
20 written decision finding that Gracia is not disabled within the meaning of the Social  
21 Security Act (“SSA”). The ALJ’s decision became the Commissioner of Social Security  
22 Administration’s (“Commissioner”) final decision when the Social Security  
23 Administration Appeals Council denied Gracia’s request for review. This appeal  
24 followed. For the following reasons, the Court reverses the Commissioner’s decision and  
25 remands this matter for further proceedings.

26 **I. Background**

27 To determine whether a claimant is disabled for purposes of the SSA, the ALJ

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<sup>1</sup> The docket incorrectly identifies Gracia’s last name as “Garcia.”

1 follows a five-step process. 20 C.F.R. § 404.1520(a). At the first step, the ALJ  
2 determines whether the claimant is engaging in substantial gainful activity. §  
3 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. At step two,  
4 the ALJ determines whether the claimant has a “severe” medically determinable physical  
5 or mental impairment. § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the  
6 inquiry ends. At step three, the ALJ considers whether the claimant’s impairment or  
7 combination of impairments meets or medically equals an impairment listed in Appendix  
8 1 to Subpart P of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is  
9 automatically found to be disabled. If not, the ALJ proceeds to step four. At step four,  
10 the ALJ assesses the claimant’s residual functional capacity (“RFC”) and determines  
11 whether the claimant is still capable of performing past relevant work. §  
12 404.1520(a)(4)(iv). If so, the claimant is not disabled and the inquiry ends. If not, the  
13 ALJ proceeds to the fifth and final step, where she determines whether the claimant can  
14 perform any other work based on the claimant’s RFC, age, education, and work  
15 experience. § 404.1520(a)(4)(v). If so, the claimant is not disabled. If not, the claimant  
16 is disabled.

17 Here, the ALJ found at step one that Gracia meets the insured status requirements  
18 of the SSA through December 31, 2018, and has not engaged in substantial gainful  
19 activity since his alleged disability onset date. (A.R. 17.) At step two, the ALJ found  
20 that Gracia has the following severe impairments: residuals of cervical fusion, congenital  
21 abnormalities of the thoracic spine, mild degenerative changes of the lumbar spine, a  
22 history of obesity, and restrictive lung disease/asthma. (*Id.*) At step three, the ALJ  
23 determined that Gracia’s listed impairments do not meet or equal the severity of one of  
24 the listed impairments in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404. (*Id.* at 18.) At  
25 step four, the ALJ found that Gracia:

26 has the [RFC] to perform light work . . . except [he] can lift  
27 20 pounds occasionally and ten pounds frequently; [he] can  
28 stand/walk for six hours in an eight-hour workday and sit for  
six hours in an eight-hour workday; [he] can occasionally  
stoop, kneel, crouch, crawl, and climb ramps and stairs, but  
never climb ladders, ropes, and scaffolds; [he] is limited to

1 occasional overhead reaching; and [he] should avoid  
2 concentrated exposure to extreme cold, fumes, odors, dust,  
3 gases, moving and dangerous machinery, and unprotected  
4 heights.

5 (*Id.* at 19.) Based on this RFC, the ALJ found at step five that Gracia is capable of  
6 performing past relevant work as a quality control technician and, alternatively, that he  
7 can perform other jobs that exist in significant numbers in the national economy. (*Id.* at  
8 32-33.) Accordingly, the ALJ found Gracia not disabled within the meaning of the SSA.  
9 (*Id.* at 34.)

## 10 **II. Standard of Review**

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

## 22 **III. Discussion**

23 On appeal, Gracia argues that the ALJ erred by (1) rejecting the opinion of  
24 consultative psychological examiner Dr. Frizzell, (2) basing his non-disability decision  
25 on non-examining state agency reviewers' opinions along with the opinion of a  
26 consultative examiner who did not review Gracia's medical records, and (3) discounting  
27 Gracia's testimony about the severity of his symptoms.

28 To the first point, the Court concludes that the ALJ reasonably rejected the opinion  
of Dr. Frizzell, who opined that Gracia was poorly adjusted, markedly depressed and

1 irritable, would be unable to maintain regular attendance, and would require substantial  
2 supervision. (A.R. 590-91.) The ALJ gave this opinion little weight because Gracia had  
3 not received any psychiatric care or taken any psychiatric medications, and indicated at  
4 the hearing only that he had difficulty with stress. (*Id.* at 51-52, 57.) The ALJ also found  
5 that the opinion was inconsistent with Dr. Frizzell’s own examination findings, including  
6 that Gracia displayed no bizarre or unusual thought processes and had intact  
7 concentration, judgment, and insight. (*Id.* at 30-31, 587-592.) Finally, the ALJ found Dr.  
8 Frizzell’s opinion less reliable because Gracia’s wife provided most of the information  
9 during the evaluation, ostensibly because Gracia “appeared to speak broken English to  
10 some degree.” (*Id.* at 30-31, 587.) Yet during the hearing, Gracia communicated clearly  
11 in English without the aid of an interpreter. Moreover, the ALJ noted that Gracia’s wife  
12 provided some inaccurate information to Dr. Frizzell. Collectively, these concerns  
13 adequately supported the ALJ’s decision to reject Dr. Frizzell’s opinion.

14 As to the second point, the Court is troubled by the fact that neither of the  
15 consultative examiners, Drs. Hunter and Gomez, was provided copies of Gracias’  
16 medical records before their examinations. (*Id.* at 1293, 1301.) Social Security  
17 regulations require the agency to provide consultative examiners with “any necessary  
18 background information about [the claimant’s] condition,” 20 C.F.R. § 404.1517, and  
19 some courts have viewed with skepticism consultative examiner opinions rendered  
20 without a review of relevant medical records, *see, e.g., McKenna v. Chater*, 893 F. Supp.  
21 163, 170 (E.D.N.Y. 1995). Notably, there are no treating physician assessments in this  
22 record, and because non-examining state agency reviewer opinions are not, in and of  
23 themselves, substantial evidence, the opinions of the consultative examiners take on  
24 additional importance.

25 Here, Drs. Gomez and Hunter offered drastically different opinions concerning  
26 Gracia’s limitations. Dr. Gomez found that Gracia has noticeable postural instability,  
27 uses knee braces and a four-wheeled walker for stability, is unable to perform “the toe  
28 walk, heel walk, [or] tandem walk” even with the help of his walker, and “does not

1 appear to be able to keep his balance for more than a few seconds without the walker.”  
2 (A.R. 1292.) Dr. Gomez also found that Gracia has diminished sensation and weakness  
3 throughout his body, and opined that Gracia would be unable to lift almost anything  
4 while standing. (*Id.* at 1291-93.)

5 Dr. Hunter, in contrast, found that Gracia has “normal gait with a normal station,”  
6 is able to walk on toes and heels “without difficulty,” and has intact sensation in all four  
7 extremities. (*Id.* at 1304.) Dr. Hunter also found that Gracia’s knees “appear stable on  
8 examination despite the fact that he has extensive bracing about both knees,” noted “it is  
9 unclear . . . why he requires such extensive assistive devices,” and observed that Gracia  
10 appears to have good strength. (*Id.* at 1305.) Dr. Hunter opined that Gracia “is able to do  
11 significantly more than he wishes this examiner to appreciate.” (*Id.*)

12 Under the circumstances, the Court concludes that the ALJ should have resolved  
13 these conflicting opinions by soliciting an opinion from a consultative examiner who had  
14 reviewed Gracia’s medical records prior to rendering a decision. Indeed, without such an  
15 opinion, the ALJ is left with his own interpretation of the medical records and the  
16 opinions of non-examining state agency reviewers who reviewed partial sets of records.  
17 Accordingly, the Court will reverse the ALJ’s decision and remand with instructions to  
18 solicit the opinion of a consultative examiner who has been provided copies of Gracia’s  
19 medical records for review prior to the examination.<sup>2</sup>

20 Lastly, the ALJ discounted Gracia’s subjective symptom complaints, in part  
21 because the ALJ found they were inconsistent with the overall medical record. The Court  
22 declines to opine on the ALJ’s credibility determination in light of its decision to remand  
23 for further proceedings. Indeed, the opinion of a consultative examiner who has  
24 reviewed Gracia’s medical records might bear on the extent to which Gracia’s symptom  
25 testimony is consistent with the medical evidence. Accordingly, on remand the ALJ is

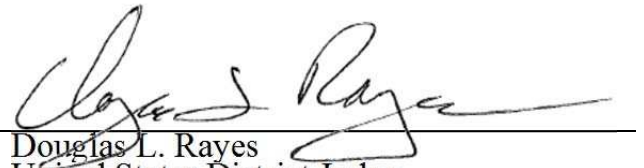
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27 <sup>2</sup> Contrary to Gracia’s argument, this is not a case appropriate for application of  
28 the credit-as-true rule. There quite clearly are conflicts in the medical opinion testimony  
and further proceedings would serve a useful purpose: namely, providing an opportunity  
for the ALJ to solicit the type of opinion Gracia contends is required by agency  
regulations.

1 free to reconsider Gracia's symptom testimony in light of whatever opinions might be  
2 rendered by a consultative examiner who has reviewed Gracia's medical records prior to  
3 examination.

4 **IT IS ORDERED** that the Commissioner's decision is **REVERSED** and this  
5 matter **REMANDED** for further proceedings consistent with this decision. The Clerk of  
6 the Court shall terminate this case.

7 Dated this 14th day of September, 2018.

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13 Douglas L. Rayes  
14 United States District Judge  
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