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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Dalton Timothy Conway,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.

No. CV-19-05795-PHX-MTL

**ORDER**

15 Before the Court is Plaintiff Dalton Conway’s appeal of an Administrative Law  
16 Judge’s (“ALJ”) denial of his applications for certain social security benefits. The Court  
17 has reviewed the Opening Brief (Doc. 12, Pl. Br.), the Response (Doc. 15, Def. Br.) and  
18 the Reply (Doc. 16, Reply) as well as the Administrative Record (“R.”). For the reasons  
19 expressed herein, the Court reverses the administrative law judge’s decision and remands  
20 for additional proceedings.

21 **I. BACKGROUND**

22 Mr. Conway has endured many hardships. His birth mother allegedly abused him.  
23 (R. at 1489.) A family later adopted him, but he still struggles with a number of ailments,  
24 some of which are linked to his prior abuse. (*Id.* at 1490.) The ALJ found that Mr.  
25 Conway has these severe impairments: autism, depression, generalized anxiety disorder  
26 and an unspecified cognitive disorder. (*Id.* at 18.) Despite this, the ALJ found that Mr.  
27 Conway could perform certain jobs and did not qualify as disabled under the social  
28 security regulations. (R. at 27-28.) The Social Security Administration’s (the “SSA”)

1 Appeals Council denied review, making the ALJ’s ruling the final decision of the  
2 Commissioner of Social Security (the “Commissioner”). (*Id.* at 1.) Mr. Conway filed  
3 suit arguing that the ALJ did not follow the proper procedures for denying his claims.  
4 (Doc. 1; Pl. Br. at 1.) The Commissioner concedes that the ALJ’s decision is not  
5 supported by substantial evidence. (Def. Br. at 3.) The key dispute is whether an ALJ  
6 should engage in further proceedings to determine Mr. Conway’s disability status or the  
7 Court should declare him disabled and order an ALJ to determine the amount to which he  
8 is entitled.

## 9 **II. LEGAL STANDARD**

10 The Court only reviews the challenged portions of an ALJ’s decision. *Carmickle*  
11 *v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008); *see also Kim v.*  
12 *Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (“[The Court] will not ordinarily consider  
13 matters on appeal that are not specifically and distinctly argued in appellant’s opening  
14 brief.”). The Court may set aside the decision only when it is not supported by  
15 “substantial evidence” or is based on legal error. *Trevizo v. Berryhill*, 871 F.3d 664, 674  
16 (9th Cir. 2017). “Substantial evidence means more than a mere scintilla, but less than a  
17 preponderance. It means such relevant evidence as a reasonable mind might accept as  
18 adequate to support a conclusion.” *Id.* “Where evidence is susceptible to more than one  
19 rational interpretation, the ALJ’s decision should be upheld.” *Id.* at 674–75; *see also*  
20 *Jamerson v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997) (“[T]he key question is not  
21 whether there is substantial evidence that could support a finding of disability, but  
22 whether there is substantial evidence to support the Commissioner’s actual finding that  
23 claimant is not disabled.”). “Yet [the Court] must consider the entire record as a whole,  
24 weighing both the evidence that supports and the evidence that detracts from the  
25 Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum  
26 of supporting evidence.” *Trevizo*, 871 F.3d at 675. “[The Court] review[s] only the  
27 reasons provided by the ALJ in the disability determination and may not affirm the ALJ  
28 on a ground upon which he did not rely.” *Id.* “Finally, [the Court] may not reverse an

1 ALJ’s decision on account of an error that is harmless.” *Molina v. Astrue*, 674 F.3d 1104,  
2 1111 (9th Cir. 2012).

3 To determine whether a claimant is disabled under the Social Security Act, the  
4 ALJ engages in a five-step sequential analysis. 20 C.F.R. § 404.1520(a)(4). The burden  
5 of proof is on the claimant for the first four steps but shifts to the Commissioner at the  
6 fifth. *Molina*, 674 F.3d at 1110. At step one, the ALJ determines whether the claimant is  
7 presently engaging in substantial gainful activity. *Id.* § 404.1520(a)(4)(i). If so, the  
8 claimant is not disabled, and the inquiry ends. *Id.* At step two, the ALJ determines  
9 whether the claimant has a “severe” medically determinable physical or mental  
10 impairment. *Id.* § 404.1520(a)(4)(ii). If not, the claimant is not disabled, and the inquiry  
11 ends. *Id.* At step three, the ALJ considers whether the claimant’s impairment or  
12 combination of impairments meets or medically equals an impairment listed in a certain  
13 federal regulatory provision. *Id.* § 404.1520(a)(4)(iii). If so, the claimant is disabled. *Id.*  
14 If not, the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant’s  
15 residual functional capacity (“RFC”) and determines whether the claimant is capable of  
16 performing past relevant work.\* *Id.* § 404.1520(a)(4)(iv). If so, the claimant is not  
17 disabled, and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step and  
18 determines whether the claimant can perform any other work in the national economy  
19 based on the claimant’s RFC, age, education, and work experience. *Id.*  
20 § 404.1520(a)(4)(v). If so, the claimant is not disabled; if not, he is disabled. *Id.*

### 21 **III. DISCUSSION**

#### 22 **A. ALJ’s Improper Discounting**

23 Mr. Conway argues that the ALJ did not follow the appropriate regulations for  
24 weighing medical opinion evidence. Specifically, the ALJ did not give sufficient reason  
25 for assigning little weight to the examining psychiatrist, Dr. Greg Peetoom. (Pl. Br. 11-  
26 13.) Further, the ALJ assigned great weight to the opinions of Dr. Tim Layton and Dr.  
27 Hillary Weiss but did not address certain aspects of their reports. (*Id.* at 7-8).

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28 \* “[R]esidual functional capacity is the most [a claimant] can still do despite [his or her]  
limitations.” 20 C.F.R. § 404.1545(a)(1).

1 Additionally, the ALJ assigned little weight to the vocational expert’s opinion (*Id.* at 8-  
2 11) and discredited the subjective testimony of Mr. Conway and his mother (*Id.* at 13-  
3 17). Mr. Conway argues that the ALJ did not satisfy the applicable requirements for  
4 discounting that evidence either. The Commissioner concedes that the ALJ’s decision  
5 was improper at the very least because it purportedly gave Dr. Layton’s opinion great  
6 weight but did not explain why the RFC finding was inconsistent with that opinion. (Def.  
7 Br. at 13-14.) That concession does not end the matter. The parties disagree over how to  
8 proceed in light of the ALJ’s error.

9 **B. Proper Remedy**

10 Mr. Conway’s preferred remedy is for the Court to remand this case for a  
11 computation of benefits under what is sometimes called the credit-as-true rule. (Pl. Br.  
12 at 23.) This remedy is rare and discretionary. *Treichler v. Comm’r of Soc. Sec. Admin.*,  
13 775 F.3d 1090, 1101 (9th Cir. 2014). It is a departure from the norm of remanding for  
14 further proceedings prior to a disability determination. In order for the Court to apply the  
15 credit-as-true rule, three factors must be present: (1) the ALJ must have rejected evidence  
16 for legally insufficient reasons; (2) the record has to be fully developed without any  
17 outstanding issues necessary to determine whether a claimant is disabled under the social  
18 security regulations; (3) the record must, with certainty, reflect that a remand should  
19 result in a finding that the claimant is disabled. *Id.* at 1100–1101. Here, the Court agrees  
20 with the Commissioner that this case is not appropriate for application of the credit-as-  
21 true rule.

22 All parties agree that the decision was legally insufficient, thus satisfying factor  
23 one. However, the other two factors preclude a remand for computation of benefits.  
24 First, the record is not fully developed. Mr. Conway implicitly admits this by noting  
25 what he calls new and material evidence that the ALJ did not have an opportunity to  
26 consider. (Pl. Br. at 20-23.) Secondly, the record contains ambiguities and discrepancies  
27 better resolved by an ALJ. For example, Dr. Peetoom noted that Mr. Conway was a slow  
28 worker during tests and may require “a higher level of supervision to facilitate consistent

1 completion of instructions.” (R. at 1247.) On the other hand “he was generally able to  
2 complete tasks . . . .” (*Id.*) A vocational expert can help an ALJ determine whether Mr.  
3 Conway can find competitive employment in light of these restrictions. Dr. Layton  
4 opined that Mr. Conway could only perform routine tasks with little change. (Pl. Br. at  
5 7.) Dr. Weiss said that Mr. Conway could perform less demanding work in a low-stress  
6 environment. (*Id.* at 8.) Again, the Court agrees with the Commissioner it is not clear  
7 that the ALJ would have found Mr. Conway disabled even if these limitations had been  
8 incorporated. (Def. Br. at 19-20.)

9 The subjective testimony also contains discrepancies. Mr. Conway’s mother’s  
10 testimony is at odds with certain medical evidence. For example, she said that her son  
11 has seizures almost every day, but clinical notes do not support that assertion. (R. at 633,  
12 1446.) Mr. Conway argues that the ALJ already questioned the mother about the  
13 inconsistencies and the Commissioner should not get a second bite at the apple. (Reply at  
14 2-3.) The Court, in its discretion, disagrees and concludes that these issues should be  
15 sorted out by an ALJ.

16 Finally, the Court turns to the vocational expert’s testimony and vocational  
17 evaluator’s opinion. Mr. Conway argues that the ALJ did not properly account for the  
18 testimony of vocational expert Kristian Cicero. She testified that he could not sustain  
19 competitive employment if he were off task more than 15 percent of the day. (Pr. Br. at 5  
20 (citing R. at 640).) But Mr. Conway does not point to a statement in the record that he  
21 would indeed be off task for that long. Mr. Conway also argues that the ALJ improperly  
22 discounted the opinion of vocational evaluator, Joseph Burridge. (Pl. Br. at 8-11.)  
23 Ultimately, however, Mr. Burridge concluded that “further insights of appropriate  
24 medical or behavioral health professionals” would be needed to assess his ability to  
25 perform work-related activities. (R. at 1287.) Mr. Conway’s arguments thus do not  
26 show, as required, that an ALJ would, on remand, find him disabled.

27 The Court concludes that outstanding issues and ambiguity as to whether Mr.  
28 Conway would be found disabled on remand preclude application of the credit-as-true

1 rule. Alternatively, the Court, in its discretion, concludes that a new hearing to examine  
2 the merits of this claim is appropriate.

3 **IV. CONCLUSION**

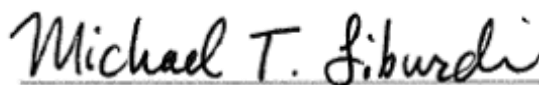
4 Accordingly,

5 **IT IS ORDERED** reversing the November 20, 2018 decision of the  
6 Commissioner, as upheld by the Appeals Council.

7 **IT IS FURTHER ORDERED** remanding this case to the Social Security  
8 Administration for further proceedings consistent with this Order.

9 **IT IS FURTHER ORDERED** directing the Clerk to enter final judgment  
10 consistent with this Order and close this case.

11 Dated this 10th day of September, 2020.

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15 Michael T. Liburdi  
16 United States District Judge  
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