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

8
9 John Schoeneman,

No. CV-14-08135-PCT-NVW

10 Plaintiff,

ORDER

11 v.

12 Carolyn W. Colvin, Acting Commissioner
13 of Social Security,

14 Defendant.
15

16 Plaintiff John Schoeneman seeks review under 42 U.S.C. § 405(g) of the final
17 decision of the Commissioner of Social Security (“the Commissioner”), which decided
18 that his disability under sections 216(i) and 223(d) of the Social Security Act ended as of
19 March 1, 2010. Because the decision of the Administrative Law Judge (“ALJ”) is
20 supported by substantial evidence and is not based on legal error, the Commissioner’s
21 decision will be affirmed.

22 **I. BACKGROUND**

23 Plaintiff was born in September 1965 and completed the ninth grade. Plaintiff
24 worked loading trucks and was injured on the job. On July 30, 1992, Plaintiff was found
25 disabled as of January 1, 1992. On November 3, 1999, it was determined that Plaintiff’s
26 disability continued due to a lumbar spine disorder. Plaintiff is diabetic and morbidly
27 obese, and he continues to have lumbar spine degenerative disc disease. Plaintiff claims
28 he is unable to work because of extreme back pain.

1 Plaintiff obtained a commercial driver's license and received truck driver training
2 from 2005 through 2008. In 2006 and 2007, Plaintiff earned more than \$50,000 annually.
3 In 2008, Plaintiff earned \$12,266. It does not appear that he continued to work after
4 2008. A hearing was held regarding overpayment, Plaintiff was found at fault in causing
5 the overpayment, and the issue was resolved. Plaintiff testified that he was receiving
6 Social Security disability benefits at the time of the ALJ hearing on February 19, 2013.

7 On April 14, 2010, it was determined that Plaintiff was no longer disabled as of
8 March 1, 2010. A hearing by video teleconferencing scheduled for January 11, 2013, in
9 Phoenix, Arizona, was rescheduled for February 20, 2013, in Phoenix because Plaintiff
10 wanted to appear in person. On February 19, 2013, Plaintiff requested a video hearing
11 because he did not have transportation to the hearing office in Phoenix. On February 20,
12 2013, Plaintiff appeared in Prescott, Arizona, and testified by video teleconferencing at
13 the hearing before the ALJ who was located in Phoenix. A vocational expert also
14 testified. Plaintiff was informed of his right to representation, but chose to appear and
15 testify without the assistance of an attorney or other representative.

16 Because Plaintiff had indicated that he would attend the hearing in Phoenix in
17 person, the digital copy of the administrative record prepared for him was not mailed to
18 him in advance of the hearing. Also, at the time of the hearing, the last records in the
19 case were from October 2010, and Plaintiff had not responded to January 2013 requests
20 for any updated medical records. Plaintiff stated that he had received additional medical
21 evaluations and an MRI in the past month and provided the ALJ with information and
22 consent to obtain those records. Post-hearing medical evidence was obtained and a copy
23 provided to Plaintiff with opportunity to file a responsive statement.

24 On June 14, 2013, the ALJ issued a decision that Plaintiff's disability ended as of
25 March 1, 2010. The Appeals Council denied Plaintiff's request for review of the hearing
26 decision, making the ALJ's decision the Commissioner's final decision. On July 25,
27 2014, Plaintiff sought review by this Court.

28

1 **II. STANDARD OF REVIEW**

2 The district court reviews only those issues raised by the party challenging the
3 ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court
4 may set aside the Commissioner’s disability determination only if the determination is
5 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d
6 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a
7 preponderance, and relevant evidence that a reasonable person might accept as adequate
8 to support a conclusion considering the record as a whole. *Id.* As a general rule,
9 “[w]here the evidence is susceptible to more than one rational interpretation, one of
10 which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” *Thomas v.*
11 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted); *accord Molina v. Astrue*,
12 674 F.3d 1104, 1111 (9th Cir. 2012) (“Even when the evidence is susceptible to more
13 than one rational interpretation, we must uphold the ALJ’s findings if they are supported
14 by inferences reasonably drawn from the record.”).

15 Harmless error principles apply in the Social Security Act context. *Molina v.*
16 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains
17 substantial evidence supporting the ALJ’s decision and the error does not affect the
18 ultimate nondisability determination. *Id.* The claimant usually bears the burden of
19 showing that an error is harmful. *Id.* at 1111.

20 **III. ADMINISTRATIVE FINDINGS**

21 If an individual is entitled to disability benefits, his continued entitlement to such
22 benefits must be reviewed periodically. 20 C.F.R. § 404.1594(a). Disability benefits
23 may be discontinued if there has been medical improvement related to the claimant’s
24 ability to work and the claimant is currently able to engage in substantial gainful activity.
25 Disability benefits also may be discontinued if there has been no medical improvement
26 but other circumstances exist, such as the claimant is currently engaging in substantial
27 gainful activity, does not cooperate in providing evidence or submitting to a medical
28 examination, or fails to follow prescribed treatment expected to restore the claimant’s

1 ability to engage in substantial gainful activity. To determine whether a claimant
2 continues to be disabled, the Commissioner uses an eight-step process. 20 C.F.R.
3 § 404.1594(f).

4 The ALJ found the most recent favorable medical decision finding that Plaintiff
5 continued to be disabled is the decision dated November 3, 1999. The ALJ found that on
6 November 3, 1999, Plaintiff had the following medically determinable impairment: back
7 disorder. As of November 3, 1999, the impairment was found to result in the inability to
8 perform work activity at any exertion level on a regular and sustained basis. The ALJ
9 found that through March 1, 2010, Plaintiff had engaged in substantial gainful activity.
10 Because Plaintiff apparently did not continue to work after 2008, the ALJ continued the
11 sequential evaluation to determine whether Plaintiff's disability had ended.

12 The ALJ found that Plaintiff continued to have the same lumbar spine impairment
13 that he had on November 3, 1999. The ALJ also found that Plaintiff's morbid obesity is
14 severe and factored that into determining his ability to function. The ALJ determined
15 that since March 1, 2010, Plaintiff did not have an impairment or combination of
16 impairments that met or medically equaled the severity of an impairment listed in 20
17 C.F.R. Part 404, Subpart P, Appendix 1. The ALJ found that as of March 1, 2010, the
18 medical severity of Plaintiff's back impairment had decreased, medical improvement had
19 occurred, Plaintiff's impairments (back disorder and obesity) were severe, Plaintiff had
20 the residual functional capacity to perform the full range of sedentary work as defined in
21 20 C.F.R. 404.1567(a), and Plaintiff was unable to perform past relevant work. The ALJ
22 concluded that as of March 1, 2010, considering Plaintiff's age, education, work
23 experience, and residual functional capacity, Plaintiff was able to perform a significant
24 number of jobs in the national economy.

1 **IV. ANALYSIS**

2 **A. Plaintiff Was Not Prejudiced by Not Viewing the Administrative**
3 **Record Before the Hearing.**

4 Plaintiff contends his due process rights were violated because he did not have
5 opportunity to view the administrative record before the ALJ hearing. Plaintiff
6 postponed a hearing in which he would have participated by video teleconferencing from
7 Prescott, Arizona, because he wanted to attend the hearing in person in Phoenix, Arizona.
8 The day before the rescheduled hearing he notified the ALJ that he would not be
9 attending the hearing in Phoenix, which was too late to deliver the digital copy of the
10 record to Plaintiff in Prescott before the hearing. During the hearing, the ALJ named the
11 source of each exhibit included in the record and asked Plaintiff whether he had any
12 objection. Post-hearing medical evidence was obtained and proffered to Plaintiff. The
13 ALJ gave Plaintiff opportunity to review all of the evidence of record and make a
14 responsive statement before the ALJ issued her decision.

15 Contrary to Plaintiff's assertion, the ALJ stated on the record that "the disc for
16 your hearing is here in this office" and did not say that "she was unable to prepare a CD
17 of the administrative record prior to the hearing." It can be inferred that the disc was
18 mailed to Plaintiff shortly after the February 20, 2013 hearing. On October 25, 2013, a
19 representative for Plaintiff was appointed, and he requested a copy of the tapes of the
20 hearings and all exhibits. The representative requested review by the Appeals Council
21 and submitted additional documents on Plaintiff's behalf. He remained Plaintiff's
22 representative until April 17, 2014, and did not object to any of the evidence in the
23 administrative record. Plaintiff does not assert, and the record does not show, any
24 prejudice caused by not viewing the administrative record before the ALJ hearing.

25 **B. The ALJ Did Not Err in Evaluating Plaintiff's Credibility.**

26 In evaluating the credibility of a claimant's testimony regarding subjective pain or
27 other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine
28 whether the claimant presented objective medical evidence of an impairment that could

1 reasonably be expected to produce some degree of the pain or other symptoms alleged;
2 and, if so with no evidence of malingering, (2) reject the claimant's testimony about the
3 severity of the symptoms only by giving specific, clear, and convincing reasons for the
4 rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). In making a credibility
5 determination, an ALJ "may not reject a claimant's subjective complaints based solely on
6 a lack of objective medical evidence to fully corroborate the claimant's allegations."
7 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (internal
8 quotation marks and citation omitted). But "an ALJ may weigh inconsistencies between
9 the claimant's testimony and his or her conduct, daily activities, and work record, among
10 other factors." *Id.* The ALJ must make findings "sufficiently specific to permit the court
11 to conclude that the ALJ did not arbitrarily discredit claimant's testimony." *Thomas v.*
12 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002); accord *Tommasetti v. Astrue*, 533 F.3d
13 1035, 1039 (9th Cir. 2008).

14 Plaintiff testified that he has back pain, cannot feel his legs, uses a wheelchair
15 whenever he is out of bed, and needs supplemental oxygen 14 to 16 hours a day. He
16 testified that he cannot take narcotic pain medication because it makes him sick, but he
17 takes non-narcotic pain medication daily and has been given approximately 30 short
18 courses (about four days each) of steroid medication when the pain becomes almost
19 unbearable. Plaintiff also testified that his diabetes is uncontrolled and he takes insulin
20 injections.¹ He said he is able to walk without a wheelchair about a block or half a block
21 before his leg goes numb or he gets sharp pains down his leg. He also said that he needs
22 his wife to help him with showering, dressing, combing his hair, and putting on shoes.
23 Plaintiff testified that it is dangerous for him to drive because he cannot feel his left leg,

24 ¹ Plaintiff also said several times that his diabetes causes his fibromyalgia, and
25 perhaps he meant diabetic neuropathy. However, the record does not include any
26 evidence of either fibromyalgia or diabetic neuropathy. Further, the record does not
27 include any evidence that diabetes caused Plaintiff any functional limitation, and
28 treatment notes indicate Plaintiff refused diabetic or nutritional counseling related to
diabetes management.

1 but he does drive occasionally if he feels good. When asked whether he would be able to
2 do a job where he sat in his wheelchair, Plaintiff responded he would not because of back
3 pain.

4 First, the ALJ found that Plaintiff's medically determinable impairments could
5 reasonably be expected to cause the alleged symptoms. Second, the ALJ found
6 Plaintiff's statements regarding the intensity, persistence, and limiting effects of the
7 symptoms not credible to the extent they are inconsistent with the ALJ's residual
8 functional capacity assessment for the following reasons: (1) Plaintiff's work at
9 substantial gainful activity levels in 2006 and 2007 is inconsistent with continuing
10 disability; (2) Plaintiff failed to report his work and earnings; (3) Plaintiff testified he was
11 paid more than \$50,000/year for learning to drive a truck; (4) Plaintiff's driving over a
12 five-state area is inconsistent with inability to sit for prolonged periods; (5) Plaintiff
13 testified he failed to appear for consultative examinations and the disability hearing
14 officer's hearing in April 2011 because he was recovering from thyroid cancer surgery
15 performed in October 2010; (6) Plaintiff claimed to be on prescribed oxygen 14 to 16
16 hours a day, but admitted he does not have a portable oxygen tank; (7) there is no
17 documentation of a prescription or need to be on supplemental oxygen (his reports of
18 using oxygen at night with a CPAP for sleep apnea); (8) medical records do not show any
19 prescription for steroids² or record of pain medications making Plaintiff sick; and (9)
20 Plaintiff testified he can walk only a block or half a block, but reported walking a mile
21 twice a day in April 2012 and walking about a mile a day in March 2012.

22 Thus, substantial evidence supports the ALJ's credibility determination and
23 supports finding that the ALJ provided specific, clear, and convincing reasons for
24 discrediting Plaintiff's subjective symptom testimony.

25 ² The record shows Plaintiff had a steroid injection in his right elbow, not that he
26 was prescribed on multiple occasions four-day courses of oral steroids to manage his
27 back pain. On December 26, 2012, however, Plaintiff was prescribed prednisone, a
28 corticosteroid, for his right elbow tendonitis.

1 **C. The ALJ Did Not Err in Determining Plaintiff’s Residual Functional**
2 **Capacity or in Discrediting the Nurse Practitioner’s Opinion.**

3 Plaintiff contends the ALJ abused her discretion in finding Plaintiff capable of
4 sedentary work with no medical evidence in support of this assertion and the ALJ
5 erroneously dismissed a medical source statement by treating Nurse Practitioner Heidi
6 Read.

7 A residual functional capacity finding involves a detailed assessment of how a
8 claimant’s medical impairments affect his ability to work. In determining a claimant’s
9 residual functional capacity, the ALJ “must consider all relevant evidence in the record,
10 including, inter alia, medical records, lay evidence, and ‘the effects of all symptoms,
11 including pain, that are reasonably attributed to a medically determinable impairment.’”
12 *Robbins v. SSA*, 466 F.3d 880, 883 (9th Cir. 2006). The ALJ must consider the combined
13 effect of multiple conditions, including those that are not severe. *See* 20 C.F.R.
14 § 404.1545(a)(2). The Commissioner is responsible for determining whether a claimant
15 meets the statutory definition of disability and does not give significance to a statement
16 by a medical source that the claimant is “disabled” or “unable to work.” 20 C.F.R.
17 § 416.927(d).

18 Under 20 C.F.R. § 404.1513(a), only licensed physicians, licensed or certified
19 psychologists, licensed optometrists, licensed podiatrists, and qualified speech-language
20 pathologists are considered “acceptable medical sources.” *Molina v. Astrue*, 674 F.3d
21 1104, 1111 (9th Cir. 2012). “Other sources” are not entitled to the same deference as
22 “acceptable medical sources.” *Id.* The ALJ may discount testimony from “other
23 sources” if the ALJ gives reasons germane to the witness for doing so. *Id.* Under 20
24 C.F.R. 404.1513(d), “other sources” include nurse practitioners and physicians’ assistants
25 as well as non-medical sources, such as family members. Only “acceptable medical
26 sources” can provide medical opinions, and only “acceptable medical sources” can be
27 considered treating sources. SSR 06-03p, 2006 WL 2329939. Information from “other
28 sources” cannot establish the existence of a medically determinable impairment, but it

1 may be used to show the severity of the individual's impairment and how the impairment
2 affects the individual's ability to function. *Id.*

3 In weighing the opinions of "acceptable medical sources," the Ninth Circuit
4 distinguishes among three types of physicians: (1) treating physicians, who actually treat
5 the claimant; (2) examining physicians, who examine but do not treat the claimant; and
6 (3) non-examining physicians, who neither treat nor examine the claimant. *Lester v.*
7 *Chater*, 81 F.3d 821, 830-32 (9th Cir. 1995). Generally, greater weight is given to the
8 opinions of treating physicians than those of examining physicians, and greater weight is
9 given to the opinions of examining physicians than those of non-examining physicians.
10 *Id.* "The opinions of non-treating or non-examining physicians may also serve as
11 substantial evidence when the opinions are consistent with independent clinical findings
12 or other evidence in the record." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).
13 The ALJ may discount a physician's opinion that is based only the claimant's subjective
14 complaints without objective evidence. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
15 1190, 1195 (9th Cir. 2004).

16 The ALJ found there were no treating physician statements in the record regarding
17 Plaintiff's ability to function in a work setting as of March 1, 2010. Because Plaintiff
18 repeatedly failed to appear for scheduled consultative examinations, there were no
19 opinions by state agency examining physicians regarding Plaintiff's ability to function in
20 a work setting as of March 1, 2010. The ALJ considered the statement of Family Nurse
21 Practitioner Heidi Read as testimony from an "other source."

22 On February 18, 2013, Ms. Read wrote a letter stating that Plaintiff had been
23 under her care since October 3, 2012, and she was treating him for ankylosing spondylitis
24 (arthritis of the spine), obesity, congestive heart failure, and uncontrolled diabetes. Ms.
25 Read's treatment notes for October 3, 2012, show that Plaintiff denied having back pain,
26 and the results of examination of his back were "unremarkable, no tenderness."
27 Prescriptions were written to refill all of his medications, none of which were for pain.
28 On November 8, 2012, Ms. Read treated Plaintiff for a sinus infection. Again, Plaintiff

1 denied having back pain, and the results of examination of his back were “unremarkable,
2 no tenderness.” On December 26, 2012, Ms. Read treated Plaintiff for another sinus
3 infection and right elbow pain. She prescribed Naproxen and prednisone for the elbow
4 pain and noted she would order an X-ray and refer Plaintiff to pain management for
5 steroid injections for his right elbow. Plaintiff denied having back pain, and the results of
6 examination of his back were “unremarkable, no tenderness.” On January 25, 2013, the
7 results of physical examination were limited range of motion of the right elbow with no
8 swelling or discoloration but “pain upon lifting anything over 2 lbs.” Ms. Read also
9 noted “L1-S1 point tenderness.” She noted the X-ray was negative, but she would order
10 an MRI because Plaintiff “can still not move his arm or lift anything” and “is having
11 sharp stabbing pain” in his right elbow. For the first time, Ms. Read indicated a diagnosis
12 of ankylosing spondylitis and noted:

13 Pt has ankylosing spondylitis and was dx in 1999 by Dr. Cunningham, this
14 certified him for disability. He is now being denied disability due to lack of
15 documentation. Will do a spinal MRI to check pts current condition and
16 consider a referral to a rheumatologist. Pt is refusing to take narcotics and
will stay on anti-inflammatories only.

17 On February 18, 2013, Ms. Read’s notes state that Plaintiff’s wife “is here today to go
18 over her husband’s long term disability,” she “needs to get a letter to his social security
19 about his disabilities,” and she “states that she had brought a disc of his MRI on his
20 Thoracic and Lumbar.” The notes indicate that Ms. Read saw only Plaintiff’s wife and
21 she did not see Plaintiff on February 18, 2013. Ms. Read’s February 18, 2013 letter
22 states:

23 He is not being treated with heavy opiate pain medication due to him
24 fearing “loss of control,” but considering his diagnosis anti-inflammatory
25 medications are best and he has been taking Naproxen effectively. Patient
26 is suffering from intermittent severe weakness and paralysis-like symptoms
27 in his legs from time to time which is made worse by his obese condition
28 and Spondylitis. He is often short of breath when walking and can only
walk short distances, but often times he is using an electric wheelchair if he
goes shopping and is unable to drive consistently. Patient did participate in

1 physical therapy in the past but found it not helpful to his condition. He is
2 unable to tie his shoes, go up and down the stairs, and lift over 20 lbs. He
3 is able to care for himself as far as activities of daily living with the
4 exception of driving. MRIs were done recently that confirmed patient's
5 spondylitis, bulging discs and severe stenosis at L5-S1. Surgery would be
6 appropriate for this patient if he is ready to consider this as an alternative,
7 we are currently discussing this as an option. Most recently patient was
8 referred to a rheumatologist for continued treatment for his spondylitis, and
9 a cardiologist for his heart failure.

10 It is my professional opinion that this patient qualifies for disability
11 given his numerous limitations and continued state of debilitation.

12 On February 28, 2013, Plaintiff saw Ms. Read for right elbow pain and to learn the
13 results of the MRI of his elbow. Ms. Read advised Plaintiff to use an immobilizer sling
14 and noted she would refer him to an orthopedic specialist. Ms. Read's treatment notes do
15 not mention ankylosing spondylitis or back pain.

16 The ALJ did not "dismiss" Ms. Read's statement, but did give reasons germane to
17 the statement and the witness for not adopting Ms. Read's disability conclusion and
18 functional limitations. The reasons include: (1) whether Plaintiff qualifies for disability
19 is an issue reserved to the Commissioner; (2) nurse practitioners are not acceptable
20 medical sources for purposes of establishing the existence of a medically determinable
21 impairment; (3) the length of the treatment relationship was only four months; and (4)
22 although a nurse practitioner may opine regarding functional limitations, Ms. Read's
23 functional assessment appears to be based primarily on Plaintiff's subjective complaints,
24 was requested by Plaintiff's wife two days before the ALJ hearing, and was not supported
25 by Ms. Read's treatment notes or the greater objective record. Moreover, Ms. Read's
26 functional limitations do not exclude sedentary work as defined in 20 C.F.R. 404.1567(a).

27 Substantial evidence supports the ALJ's determination that Plaintiff has the
28 residual functional capacity to perform the full range of sedentary work as defined in 20
C.F.R. 404.1567(a). Although the record does not support any functional limitation
caused by Plaintiff's back impairment, the ALJ expressly considered Plaintiff's severe

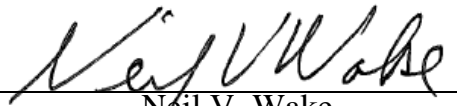
1 morbid obesity in combination with a lumbar spine disorder and did not err by limiting
2 Plaintiff to sedentary work.

3 **D. Determination of Overpayment Is Not Before the Court.**

4 Plaintiff contends that the determination of overpayment was improper because he
5 is educationally limited and probably did not receive access to the administrative record
6 prior to the overpayment hearing. No records regarding the overpayment determination
7 have been submitted in this case. Regardless of how the overpayment issue was resolved,
8 it was not raised on appeal and is not before the Court now. Moreover, during the
9 hearing regarding Plaintiff's continued disability, he said he earned more than \$50,000
10 annually in 2006 and 2007 and that he and his family were continuing to receive
11 disability benefits as of February 20, 2013.

12 IT IS THEREFORE ORDERED that the final decision of the Commissioner of
13 Social Security is affirmed. The Clerk shall enter judgment accordingly and shall
14 terminate this case.

15 Dated this 7th day of May, 2015.

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18 _____
19 Neil V. Wake
20 United States District Judge
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