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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

DeWayne Curbow,

Plaintiff,

v.

Carolyn W. Colvin, Acting Commissioner  
of the Social Security Administration,

Defendant.

No. CV-14-8222-PCT-ESW

**ORDER**

Pending before the Court is Plaintiff DeWayne Curbow’s (“Plaintiff”) appeal of the Social Security Administration’s (“Social Security”) denial of his claim for disability benefits. Plaintiff filed an application for disability insurance benefits under Title II of the Social Security Act. Plaintiff alleges disability beginning on January 22, 2010.

This Court has jurisdiction to decide Plaintiff’s appeal pursuant to 42 U.S.C. § 405(g). Under 42 U.S.C. § 405(g), the Court has the power to enter, based upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the case for a rehearing. Both parties have consented to the exercise of U.S. Magistrate Judge jurisdiction. (Doc. 15). After reviewing the Administrative Record (“A.R.”), Plaintiff’s Opening Brief (Doc. 20), Defendant’s Response Brief (Doc. 24), and Plaintiff’s Reply (Doc. 25), the Court finds that the Administrative Law Judge’s (“ALJ”) decision contains

1 harmful legal error. For the reasons explained in Section II below, the decision is  
2 reversed and the case is remanded to the Commissioner of Social Security for further  
3 administrative proceedings.  
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## 5 I. LEGAL STANDARDS

### 6 A. Disability Analysis: Five-Step Evaluation

7 The Social Security Act (the “Act”) provides for disability insurance benefits to  
8 those who have contributed to the Social Security program and who suffer from a  
9 physical or mental disability. 42 U.S.C. § 423(a)(1). To be eligible for benefits based  
10 on an alleged disability, the claimant must show that he or she suffers from a medically  
11 determinable physical or mental impairment that prohibits him or her from engaging in  
12 any substantial gainful activity. 42 U.S.C. § 423(d)(1)(A). The claimant must also show  
13 that the impairment is expected to cause death or last for a continuous period of at least  
14 twelve months. *Id.*

15 To decide if a claimant is entitled to Social Security benefits, an ALJ conducts an  
16 analysis consisting of five questions, which are considered in sequential steps. 20 C.F.R.  
17 § 404.1520(a). The claimant has the burden of proof regarding the first four steps:<sup>1</sup>

18 **Step One:** Is the claimant engaged in “substantial gainful  
19 activity”? If so, the analysis ends and disability benefits are  
20 denied. Otherwise, the ALJ proceeds to step two.

21 **Step Two:** Does the claimant have a medically severe  
22 impairment or combination of impairments? A severe  
23 impairment is one which significantly limits the claimant’s  
24 physical or mental ability to do basic work activities. 20  
25 C.F.R. § 404.1520(c). If the claimant does not have a severe  
26 impairment or combination of impairments, disability benefits  
27 are denied at this step. Otherwise, the ALJ proceeds to step  
28 three.

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<sup>1</sup> *Parra v. Astrue*, 481 F.3d 742,746 (9th Cir. 2007).

1           **Step Three:** Is the impairment equivalent to one of a number  
2 of listed impairments that the Commissioner acknowledges  
3 are so severe as to preclude substantial gainful activity? 20  
4 C.F.R. § 404.1520(d). If the impairment meets or equals one  
5 of the listed impairments, the claimant is conclusively  
6 presumed to be disabled. If the impairment is not one that is  
7 presumed to be disabling, the ALJ proceeds to the fourth step  
8 of the analysis.

9           **Step Four:** Does the impairment prevent the claimant from  
10 performing work which the claimant performed in the past?  
11 If not, the claimant is “not disabled” and disability benefits  
12 are denied without continuing the analysis. 20 C.F.R. §  
13 404.1520(f). Otherwise, the ALJ proceeds to the last step.

14           If the analysis proceeds to the final question, the burden of proof shifts to the  
15 Commissioner:<sup>2</sup>

16           **Step Five:** Can the claimant perform other work in the  
17 national economy in light of his or her age, education, and  
18 work experience? The claimant is entitled to disability  
19 benefits only if he or she is unable to perform other work. 20  
20 C.F.R. § 404.1520(g). Social Security is responsible for  
21 providing evidence that demonstrates that other work exists in  
22 significant numbers in the national economy that the claimant  
23 can do, given the claimant’s residual functional capacity, age,  
24 education, and work experience. *Id.*

#### 25           **B. Standard of Review Applicable to ALJ’s Determination**

26           The Court must affirm an ALJ’s decision if it is supported by substantial evidence  
27 and is based on correct legal standards. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir.  
28 2012); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). Although “substantial  
evidence” is less than a preponderance, it is more than a “mere scintilla.” *Richardson v.*  
*Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison v. NLRB*, 305 U.S. 197,  
229 (1938)). It means such relevant evidence as a reasonable mind might accept as  
adequate to support a conclusion. *Id.*

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<sup>2</sup> *Parra*, 481 F.3d at 746.

1 In determining whether substantial evidence supports the ALJ's decision, the  
2 Court considers the record as a whole, weighing both the evidence that supports and  
3 detracts from the ALJ's conclusions. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.  
4 1998); *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). If there is sufficient  
5 evidence to support the ALJ's determination, the Court cannot substitute its own  
6 determination. *See Morgan v. Comm'r of Soc. Sec.*, 169 F.3d 595, 599 (9th Cir. 1999)  
7 ("Where the evidence is susceptible to more than one rational interpretation, it is the  
8 ALJ's conclusion that must be upheld."); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
9 Cir. 1989). This is because the ALJ, not the Court, is responsible for resolving conflicts  
10 and ambiguities in the evidence and determining credibility. *Id.*; *see also Andrews v.*  
11 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

12 The Court also considers the harmless error doctrine when reviewing an ALJ's  
13 decision. This doctrine provides that an ALJ's decision need not be remanded or  
14 reversed if it is clear from the record that the error is "inconsequential to the ultimate  
15 nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)  
16 (citations omitted); *Molina*, 674 F.3d at 1115 (an error is harmless so long as there  
17 remains substantial evidence supporting the ALJ's decision and the error "does not  
18 negate the validity of the ALJ's ultimate conclusion") (citations omitted).

## 20 II. PLAINTIFF'S APPEAL

### 21 A. Procedural Background

22 Plaintiff, who was born in 1963, has worked as a truck driver and grocery store  
23 stocker. (A.R. 61, 70). In early 2011, Plaintiff filed a Title II application for disability  
24 insurance benefits. (A.R. 135-36). Plaintiff's application alleged that on April 27, 2009,<sup>3</sup>  
25 Plaintiff became unable to work due to the following impairments: (i) depression; (ii) five  
26 bad discs in his lower back; and (iii) three bad discs in his neck. (A.R. 70). Social  
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28 <sup>3</sup> Plaintiff later amended his alleged disability onset date to January 22, 2010.  
(A.R. 37, 236).

1 Security denied Plaintiff's application in August 2011. (A.R. 98-101). In January 2012,  
2 upon Plaintiff's request for reconsideration, Social Security affirmed the denial of  
3 Plaintiff's application. (A.R. 105-07). Plaintiff then requested a hearing before an ALJ.  
4 (A.R. 108-09). The ALJ held a video hearing in March 2013. (A.R. 34-68). In her May  
5 2013 decision, the ALJ found that Plaintiff is not disabled. (A.R. 14-21). The Appeals  
6 Council denied Plaintiff's request for review, making the ALJ's decision the final  
7 decision of the Social Security Commissioner. (A.R. 1-6). On November 19, 2014,  
8 Plaintiff filed a Complaint (Doc. 1) pursuant to 42 U.S.C. § 405(g) requesting judicial  
9 review and reversal of the ALJ's decision.

10 **B. The ALJ's Application of the Five-Step Disability Analysis**

11 The ALJ completed all five steps of the disability analysis before finding that  
12 Plaintiff is not disabled and entitled to disability benefits.

13 **1. Step One: Engagement in "Substantial Gainful Activity"**

14 The ALJ determined that Plaintiff has not engaged in substantial gainful activity  
15 since January 22, 2010. (A.R. 16). Neither party disputes this determination.

16 **2. Step Two: Presence of Medically Severe**  
17 **Impairment/Combination of Impairments**

18 The ALJ found that Plaintiff has one severe impairment—cervical multi-level  
19 spondylosis with neural impingement. (A.R. 16). Plaintiff argues that the ALJ erred by  
20 not including Plaintiff's alleged lumbar orthopedic issues and depression in the list of  
21 severe impairments. (Doc. 20 at 5-7).

22 **3. Step Three: Presence of Listed Impairment(s)**

23 The ALJ determined that Plaintiff does not have an impairment or combination of  
24 impairments that meets or medically equals an impairment listed in 20 C.F.R. Part 404,  
25 Subpart P, Appendix 1 of the Social Security regulations. (A.R. 18). Plaintiff disputes  
26 the ALJ's determination at this step. (Doc. 20 at 7-8).

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#### 4. Step Four: Capacity to Perform Past Relevant Work

The ALJ found that Plaintiff has retained the residual functional capacity (“RFC”) to perform light exertional work as defined in 20 C.F.R. §§ 404.1567(b), except that:

[Plaintiff] is limited to performing occupations that require no more than occasional postural maneuvers such as balancing, stooping, kneeling, crouching, crawling and climbing on ramps and stairs. [Plaintiff] must avoid all occupations that require climbing on ladders/ropes/scaffolds.

(A.R. 18). After considering the testimony of a vocational expert (“VE”) and Plaintiff’s RFC, the ALJ determined that Plaintiff is unable to perform his past relevant work as a truck driver and stocker. (A.R. 19-20).

Plaintiff argues that the ALJ erred at step four by improperly weighing the Plaintiff’s Veteran’s Administration (“VA”) medical records and Plaintiff’s 70% VA disability rating. (Doc. 20 at 8-9). The Court finds that the ALJ committed harmful legal error by failing to sufficiently explain the consideration and weight given to Plaintiff’s VA disability rating.

#### 5. Step Five: Capacity to Perform Other Work

At the final step, the ALJ found that Plaintiff is able to perform other jobs existing in significant numbers in the national economy. (A.R. 21-22). Because the ALJ committed harmful legal error at step four, the ALJ’s determination at step five is also erroneous.

#### C. The ALJ Committed Reversible Legal Error by Failing to Properly Weigh Plaintiff’s VA Disability Rating

“No circuit has held that an ALJ is free to disregard a VA disability rating.” *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002). In *McCartey*, the Ninth Circuit Court of Appeals held that an ALJ must ordinarily give great weight to a VA determination of disability. *Id.* at 1076. An ALJ may discount a VA disability rating only if he or she provides persuasive, specific, and valid reasons that are supported by the record. *Id.*

1 Here, the VA assigned Plaintiff a 50% disability rating for major depressive  
2 disorder and a 40% disability rating for intervertebral disc syndrome. (A.R. 17, 878).  
3 Under the VA regulations, this equates to a combined disability rating of 70%. 38 C.F.R.  
4 § 4.25 The ALJ's decision addresses Plaintiff's VA disability rating in a single  
5 paragraph:

6 The undersigned notes that the claimant also has been treated  
7 for a major depressive disorder (MDD) during the  
8 adjudicatory period. In fact, as of November 2012, 50% of  
9 his 70% service-connected disability was for MDD and 40%  
10 was for intervertebral disc syndrome (exhibit 17F/27). Yet,  
11 during much of the adjudicatory period, the claimant was  
12 must less depressed when his physical condition improved.  
13 For example, in September 2010, he was walking daily and  
14 taking care of his friend's two children after school (exhibit  
15 5F/122). Moreover, in July 2010, the claimant underwent a  
16 consultative psychiatric evaluation at the request of the State  
17 agency. The examiner, Doris Javine, Ph.D., a clinical  
18 psychologist, diagnosed the claimant with depression related  
19 to his medical condition. Dr. Javine noted that the claimant  
20 had received good results with treatment, including  
21 counseling and medications. In her medical source statement,  
22 the doctor determined that the claimant has had no significant  
23 mental limitation, which has lasted or is expected to last for  
24 12 continuous months or longer (exhibit 8F).

25 (A.R. 17).

26 Defendant contends that under *Valentine v. Comm'r of Soc. Sec.*, 574 F.3d 685  
27 (9th Cir. 2009), the ALJ was justified in giving little weight<sup>4</sup> to Plaintiff's VA disability  
28 rating by referencing evidence not considered by the VA—Dr. Javine's psychological  
evaluation. (Doc. 24 at 11-12). In *Valentine*, the claimant's VA disability rating was  
increased from 70% to 100% while the claimant's case was pending before the ALJ. *Id.*  
at 688-89. The ALJ's decision discussed the 100% disability rating, but noted that it  
"was not based on a comprehensive evaluation of the evidence available to the

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<sup>4</sup> As discussed below, the ALJ did not explicitly state that she assigned little weight to Plaintiff's disability rating.

1 undersigned [ALJ].” *Id.* at 695. The Ninth Circuit found that the “ALJ was justified in  
2 rejecting the VA’s disability rating on the basis that she had evidence the VA did not,  
3 which undermined the evidence the VA did have.” *Id.* The Ninth Circuit further  
4 concluded that “on this record, the acquisition of new evidence or a properly justified  
5 reevaluation of old evidence constitutes a ‘persuasive, specific, and valid reason[ ] . . .  
6 supported by the record’ under *McCartey* for according little weight to a VA disability  
7 rating.” *Id.* (emphasis added). Three points distinguish this case from *Valentine*.

8  
9 First, while a reviewing court may draw specific and legitimate inferences from an  
10 ALJ’s decision, a court cannot speculate on the ALJ’s reasoning or make “*post hoc*  
11 rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray*  
12 *v. Comm’r of Soc. Sec.*, 554 F.3d 1219, 1225 (9th Cir. 2009); *Magallanes*, 881 F.2d at  
13 755. In *Valentine*, it was clear from the ALJ’s decision that the ALJ rejected the  
14 claimant’s 100% VA disability rating by finding that the claimant was able to work. In  
15 this case, it is not clear that the ALJ discounted Plaintiff’s disability rating. Not only  
16 does the ALJ’s decision not discuss the weight assigned to Plaintiff’s disability rating, but  
17 it does not acknowledge that a VA disability rating is ordinarily entitled to great weight.  
18 In addition, the ALJ’s decision does not provide sufficient analysis in which the Court  
19 may infer the weight assigned to the rating.<sup>5</sup> The Court cannot speculate what the ALJ  
20 may have been thinking with respect to Plaintiff’s disability rating.

21 Second, the ALJ in *Valentine* explicitly stated that Plaintiff’s VA disability rating  
22 was not based on evidence available to the ALJ. The ALJ in this case made no such  
23 explicit statement. Defendant’s argument that the ALJ rejected the disability rating based  
24 on new evidence invites the Court to engage in impermissible speculation as to the ALJ’s

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26 <sup>5</sup> It is possible that the ALJ simply found that Plaintiff’s 70% VA disability rating  
27 was consistent with Plaintiff’s assessed RFC. *See Lewis v. Astrue*, No. CV 08-5669  
28 MHP, 2009 WL 4981142, at \*6-7 (N.D. Cal. Dec. 15, 2009) (claimant argued on appeal  
that the ALJ failed to give proper weight to the claimant’s 70% VA disability rating;  
Social Security contended that the rating was accepted and reflected in the ALJ’s RFC  
assessment).

1 reasoning. *Bray*, 554 F.3d at 1225; *see also see also Stout v. Comm’r of Soc. Sec.*, 454  
2 F.3d 1050, 1054 (9th Cir. 2006) (“[W]e cannot affirm the decision of an agency on a  
3 ground that the agency did not invoke in making its decision.”) (citations omitted).  
4 “Although the ALJ’s analysis need not be extensive, the ALJ must provide some  
5 reasoning in order for [the court] to meaningfully determine whether the ALJ’s  
6 conclusions were supported by substantial evidence.” *Brown-Hunter v. Colvin*, 806 F.3d  
7 487, 495 (9th Cir. 2015) (quoting *Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1103  
8 (9th Cir. 2014). Without additional analysis, the Court cannot meaningfully review the  
9 ALJ’s consideration of Plaintiff’s disability rating.

10 Finally, Plaintiff’s VA disability rating is based on both depression and  
11 intervertebral disc syndrome. Dr. Javine only evaluated Plaintiff’s mental state. The ALJ  
12 does not discuss any evidence regarding Plaintiff’s intervertebral disc syndrome that the  
13 VA did not review. Nor does the ALJ set forth a “properly justified reevaluation of old  
14 evidence.”<sup>6</sup> *Valentine*, 574 F.3d at 695. The Court cannot speculate as to the extent of  
15 the ALJ’s consideration of Plaintiff’s 40% VA disability rating for intervertebral disc  
16 syndrome.

17 For the above reasons, the Court finds that the ALJ failed to properly evaluate  
18 Plaintiff’s VA disability rating. The Court does not find that this error is  
19 “inconsequential to the ultimate nondisability determination.” *Tommasetti*, 533 F.3d at  
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22 <sup>6</sup> The ALJ’s statement that “in September 2010, [Plaintiff] was walking daily and  
23 taking care of his friend’s two children after school” does not constitute a properly  
24 justified reevaluation of old evidence. Plaintiff testified that he was walking daily  
25 pursuant to his doctor’s recommendation and that his legs are almost totally numb by the  
26 end of the walks. (A.R. 54-55). Plaintiff also testified that he only took care of his  
27 friend’s children for six or seven months. (A.R. 44). It is unclear from the record exactly  
28 how much activity was involved in taking care of the children, who were ages 9 and 11.  
(*Id.*). The ALJ has not adequately explained how Plaintiff’s daily walks and babysitting  
translate to the ability to sustain competitive employment on a full-time basis. *Garrison*  
*v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014) (stating that the Ninth Circuit has  
“repeatedly warned that ALJs must be especially cautious in concluding that daily  
activities are inconsistent with testimony about pain, because impairments that would  
unquestionably preclude work and all the pressures of a workplace environment will  
often be consistent with doing more than merely resting in bed all day”).

1 1038. Because the error alone warrants remand, the Court declines to address Plaintiff's  
2 remaining arguments.

3 **D. Remand for Further Proceedings is Appropriate**

4 The Court has discretion to remand a case for further proceedings or for an award  
5 of benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). A court may remand  
6 for an award of benefits if the record has been fully developed and further proceedings  
7 would serve no useful purpose. *Id.*; *McCartey*, 298 F.3d at 1076. The Ninth Circuit has  
8 explained that:

9 Such a circumstance arises when: (1) the ALJ has failed to  
10 provide legally sufficient reasons for rejecting the claimant's  
11 evidence; (2) there are no outstanding issues that must be  
12 resolved before a determination of disability can be made;  
13 and (3) it is clear from the record that the ALJ would be  
required to find the claimant disabled if he considered the  
claimant's evidence.

14 *McCartey*, 298 F.3d at 1076.

15 In *McCartey*, the Ninth Circuit found that the ALJ erroneously disregarded the  
16 claimant's 80% VA disability rating. *Id.* Finding that the claimant's disability rating was  
17 supported by several hundred pages of medical records, the Ninth Circuit ruled that the  
18 case should be remanded to Social Security for payment of benefits. *Id.* at 1077. Here,  
19 while Plaintiff's 70% disability rating is supported by numerous medical records, it is  
20 unclear whether the rating necessarily means that Plaintiff is disabled within the meaning  
21 of the Social Security Act. *See Herron v. Astrue*, 407 F. App'x 139, 141 (9th Cir. 2010)  
22 (finding that ALJ failed to give valid reasons for discounting a claimant's 70% VA  
23 disability rating and remanding to the district court with instructions to further remand to  
24 Social Security for further proceedings rather than an award of benefits). While  
25 Plaintiff's VA records show that Plaintiff suffers from chronic pain, "disability requires  
26 more than mere inability to work without pain." *Brown v. Bowen*, 801 F.2d 361, 362-63  
27 (10th Cir. 1986) (citation and internal quotation marks omitted). Moreover, the Court  
28 notes that the VA denied Plaintiff's request for a 100% unemployable rating. (A.R. 483).

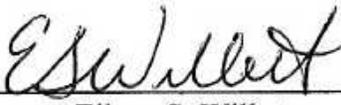
1 This suggests that Plaintiff may be able to perform substantial gainful activity as defined  
2 by Social Security. It is the ALJ's role to resolve conflicts in the medical testimony and  
3 any ambiguities in the record. See *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
4 2001). Accordingly, the court finds it appropriate to remand this action for further  
5 proceedings.

### 6 7 **III. CONCLUSION**

8 Based on the foregoing, the Court finds that the decision of the Commissioner of  
9 Social Security is not supported by substantial evidence in the record as a whole and is  
10 not based on proper legal standards. Accordingly,

11 **IT IS ORDERED** reversing the decision of the Commissioner of Social Security  
12 and remanding the case to the Commissioner for further administrative proceedings  
13 pursuant to sentence four of 42 U.S.C. § 405(g). The ALJ shall issue a new decision that  
14 is consistent with the applicable law as set forth in this Order. The ALJ, however, is not  
15 precluded from reopening the hearing to receive additional evidence if deemed  
16 appropriate. The Clerk of Court is directed to enter judgment accordingly.

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18 Dated this 1st day of February, 2016.

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23 Eileen S. Willett  
24 United States Magistrate Judge  
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