

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Rodney Burky,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-15-08190-PCT-DLR

ORDER

15
16 Plaintiff Rodney Burky seeks review under 42 U.S.C. § 405(g) of the final
17 decision of the Commissioner of Social Security (Commissioner) denying his application
18 for supplemental security income and disability insurance benefits. Because the decision
19 of the Administrative Law Judge (ALJ) is supported by substantial evidence and is not
20 based on legal error, the Commissioner's decision is affirmed.

21 **I. Background**

22 **A. Factual Background**

23 Burky is 49 years old and has a ninth grade education. (A.R. 33.) He previously
24 worked as donation taker, groundskeeper, car washer, stone polisher, and painter. Burky
25 has been diagnosed as bipolar and schizophrenic. He last worked in 2011. (*Id.* at 221.)

26 **B. Procedural History**

27 On August 29, 2012, Burky applied for disability insurance benefits and
28 supplemental security income, alleging disability beginning June 25, 2012. (*Id.* at 15.)

1 On June 17, 2014, he appeared with his attorney and testified at a hearing before the ALJ.
2 A vocational expert also testified.

3 On October 14, 2014, the ALJ issued a decision that Burky was not disabled
4 within the meaning of the Social Security Act. The Appeals Counsel denied Burky's
5 request for review of the hearing decision, making the ALJ's decision the
6 Commissioner's final decision. On September 28, 2015, Burky sought review by this
7 Court.

8 **II. Legal Standard**

9 The district court reviews only those issues raised by the party challenging the
10 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court
11 may set aside the Commissioner's disability determination only if the determination is
12 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d
13 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a
14 preponderance, and relevant evidence that a reasonable person might accept as adequate
15 to support a conclusion considering the record as a whole. *Id.* In determining whether
16 substantial evidence supports a decision, the court must consider the record as a whole
17 and may not affirm simply by isolating a "specific quantum of supporting evidence." *Id.*
18 As a general rule, "[w]here the evidence is susceptible to more than one rational
19 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be
20 upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

21 **III. Five-Step Sequential Evaluation Process**

22 To determine whether a claimant is disabled for purposes of the Social Security
23 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears
24 the burden of proof on the first four steps, but at step five, the burden shifts to the
25 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

26 At the first step, the ALJ determines whether the claimant is engaging in
27 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not
28 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant

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

13 At step one, the ALJ found that Burky meets the insured status requirements of the
14 Social Security Act through December 31, 2013, and that he has not engaged in
15 substantial gainful activity since June 25, 2012. (A.R. 17.) At step two, the ALJ found
16 that Burky has the following severe impairments: bipolar disorder, schizophrenia, panic
17 disorder with agoraphobia, and antisocial personality disorder. (*Id.*) At step three, the
18 ALJ determined that Burky does not have an impairment or combination of impairments
19 that meets or medically equals an impairment listed in Appendix 1 to Subpart P of 20
20 C.F.R. Pt. 404. (*Id.* at 18.)

21 At step four, the ALJ found that Burky has the RFC to perform “a full range of
22 work at all exertional levels but with the following nonexertional limitations: he is
23 limited to work requiring only occasional interaction with co-workers and supervisors,
24 and no direct contact with the public.” (*Id.* at 20.) Accordingly, given his RFC, the ALJ
25 concluded that Burky is capable of performing his past relevant work as a painter and
26 stone polisher. (*Id.* at 23.)

27 **IV. Analysis**

28 Burky argues the ALJ’s decision is unsupported by substantial evidence because

1 the ALJ (1) improperly discounted the medical opinion of Dr. Lisa Parsons, (2) erred in
2 finding that Burky’s work as a painter and stone polisher qualified as past relevant work,
3 and (3) improperly discounted Burky’s credibility regarding the severity of his
4 symptoms. (Doc. 16 at 4-5.) The Court will address each in turn.

5 **A. The ALJ Did Not Err in Evaluating the Medical Source Evidence**

6 The ALJ is responsible for resolving conflicts in medical testimony. *Andrews v.*
7 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Generally, more weight should be given to
8 the opinion of a treating physician than to the opinions of non-treating physicians. *Lester*
9 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where a treating physician’s opinion is not
10 contradicted by another physician, it may be rejected only for “clear and convincing”
11 reasons, and where it is contradicted, it may not be rejected without “specific and
12 legitimate reasons” supported by substantial evidence in the record. *Id.* Likewise, an
13 examining physician’s opinion generally must be given greater weight than that of a non-
14 examining physician. *Id.* at 830. As with a treating physician, there must be clear and
15 convincing reasons for rejecting the uncontradicted opinion of an examining physician,
16 and specific and legitimate reasons, supported by substantial evidence in the record, for
17 rejecting an examining physician’s contradicted opinion. *Id.* at 830-31.

18 Dr. Parsons, a psychiatrist, treated Burky for approximately two years. (A.R. 21.)
19 In support of Burky’s claim, Dr. Parsons completed a “Mental Ability to Do Work-
20 Related Activities Form.” (*Id.* at 323-24.) Therein, she concluded that Burky had a poor
21 ability to follow work rules; relate to co-workers; deal with the public; interact with
22 supervisors; deal with work stresses; function independently; maintain attention and
23 concentration; understand, remember and carry out detailed, but not complex, job
24 instructions; and understand, remember and carry out simple job instructions. (*Id.*) Dr.
25 Parsons cited “severe anxiety with panic attacks that lead to agoraphobia” and “extreme
26 anxiety” as the findings that supported her assessment. (*Id.*) In addition, the assessment
27 covered the period from June 25, 2016, the date in which Burky first saw Dr. Parsons,
28 through January 31, 2013. (*Id.* at 324.)

1 Dr. Parsons' opinion was contradicted by the opinion of Dr. Shannon Tromp, who
2 assessed less severe mental limitations. (*Id.* at 311-16.) Unlike Dr. Parsons, Dr. Tromp
3 found that Burky had no impairment in his ability to understand and remember simple
4 instructions, detailed instructions, and work-like procedures or responding appropriately
5 to changes in the workplace. (*Id.*) Therefore, the ALJ was required to provide specific
6 and legitimate reasons supported by substantial evidence for discounting Dr. Parsons'
7 opinions. *See Lester*, 81 F.3d at 830.¹

8 The ALJ did not give significant weight to Dr. Parsons' opinion because it was
9 inconsistent with the medical evidence in the record and failed to account for Burky's
10 recent improvement. (A.R. 22.) Inconsistency with the medical record is a sufficient
11 basis for discounting medical source evidence. *Batson v. Comm'r of Social Sec. Admin.*,
12 359 F.3d 1190, 1195 (9th Cir. 2004). The ALJ concluded that the assessment conflicted
13 with Dr. Parsons' treatment notes. Specifically, Dr. Parsons noted that Burky has
14 extreme anxiety, which would made concentration difficult. But prior to the assessment,
15 she "consistently noted a lack of cognitive defects on the mental status examinations."
16 (A.R. 22.) Indeed, in June, August, and October of 2012, Dr. Parsons noted Burky had
17 "immediate recall," "intelligence equals fund of knowledge," logical thought process, and
18 no problems with recent or remote memory. (*Id.* at 300, 305, 394.) Yet in the
19 assessment, she concluded that Burky had poor ability to remember, understand, and
20 carry out simple and complex work instructions. (*Id.* at 324.) Moreover, the same day
21 she completed the assessment, her treatment notes indicate no problems with cognition.
22 (*Id.* at 389.)²

23 In addition, Dr. Parsons found that Burky had poor ability to relate to coworkers
24

25 ¹ Burky argues Dr. Parsons' opinion was uncontradicted, and therefore the clear
26 and convincing reasons standard applies. (Doc. 21 at 3.) But Dr. Tromp's conclusions
27 regarding memory, understanding, and adapting to change contradict Dr. Parsons'
28 conclusion that Burky has poor ability in those areas.

² Moreover, Dr. Tromp found no cognitive impairments. (A.R. 314.) Burky's
thought process was logical and goal directed, comprehension was good, and he had no
perceptual abnormalities. (*Id.*)

1 and interact with supervisors. (*Id.* at 323.) But her treatment notes consistently indicate
2 that Burky was “at ease,” “calm,” “relaxed,” and “cooperative” during the examinations.
3 (*Id.* at 300, 305, 394, 389.) She also noted that Burky was “engaging,” “interested,” had
4 appropriate eye contact, laughed appropriately, and had “relaxed posture.” (*Id.* at 300,
5 305, 394.) These observations are inconsistent with someone who is incapable of
6 working because they cannot interact with coworkers or supervisors.

7 The ALJ also concluded that the assessment was inconsistent with Burky’s
8 apparent improvement, which is evidenced by Dr. Parsons’ treatment notes. (*Id.* at 22.)
9 In May 2013, after the assessment was completed, Burky reported that he was “doing
10 good actually,” his mood was “alright,” and that he was “handling things ok.” (*Id.* at
11 385.) In August 2013, Burky appears to have taken a step back, noting that he is upset
12 from being denied social security. (*Id.* at 456.) Nonetheless, Dr. Parsons noted that he
13 was “mak[ing] progress towards treatment goals.” (*Id.* at 457.) In January 2014, Burky
14 claimed he was enjoying life, that his anxiety was “not too bad,” and that he was doing “a
15 little better than normal.” (*Id.* at 479.) The treatment notes are inconsistent with Dr.
16 Parsons’ 2013 assessment and evidence at least some improvement in Burky’s condition.

17 Burky argues that Dr. Parsons’ opinion is consistent with the record, and therefore
18 should have been afforded great weight. (Doc. 16 at 13.) But Burky merely offers his
19 own interpretation of the evidence. This is the ALJ’s responsibility, *see Andrews*, 53
20 F.3d at 1039 (noting that it is the ALJ’s duty to interpret and resolve inconsistencies in
21 the medical evidence), and the Court will not disturb the ALJ’s findings where his
22 interpretation of the evidence is reasonable given the evidence in the record. *See Batson*
23 *v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004) (noting that “the
24 Commissioner’s findings are upheld if supported by inferences reasonably drawn from
25 the record, and if evidence exists to support more than one rational interpretation, we
26 must defer to the Commissioner’s decision”). Accordingly, the Court finds the ALJ set
27 forth specific and legitimate reasons supported by substantial evidence for discounting
28

1 Dr. Parsons' opinion. *See Lester*, 81 F.3d at 830.³

2 **B. The ALJ Did Not Err In Finding Burky Could Perform Past Work**

3 At step four, the ALJ found that, given his RFC, Burky could perform his past
4 relevant work. (A.R. 23.) Burky argues the ALJ erred by finding that his previous work
5 as a stone polisher and painter constituted past relevant work because he did not earn
6 enough for a sufficient duration. (Doc. 16 at 14.) The Commissioner appears to concede
7 that Burky's past work as a stone polisher does not qualify as past relevant work. (Doc.
8 20 at 7-8.) It argues, however, that this error is harmless because Burky's past work as a
9 painter qualifies as past relevant work.

10 Past relevant work is defined as "work that you have done within the past 15
11 years, that was substantial gainful activity, and that lasted long enough for you to learn to
12 do it." 20 C.F.R. § 404.1560(b)(1). "The [SSA] grants to the Secretary the authority to
13 determine when labor performed or earnings derived from labor constitute the ability to
14 engage in substantial gainful activity." *Byington v. Chater*, 76 F.3d 246, 248 (9th Cir.
15 1996) (citing 42 U.S.C. § 423(d)(4)). "[E]arnings are a factor in a determination of
16 whether [a claimant's] work amounted to substantial gainful activity, but as the
17 regulations make clear, are not determinative." *Id.* at 250 (citing 20 C.F.R. §
18 404.1575(a)). If monthly earnings fall below a certain threshold, a rebuttable
19 presumption exists that the activity did not constitute substantial gainful employment.
20 *Baxla v. Colvin*, 45 F. Supp. 3d 1116, 1136 (D. Ariz. 2014).

21 Burky worked as a painter throughout 2003, earning \$14,141.25, or \$1,178.44 per
22 month. Throughout 2004, he worked at two different painting companies and earned a
23 total of \$17,979.50, or \$1,498.29 per month. Throughout 2005, Burky earned
24 \$21,047.75, or \$1,753.98 per month. Burky also appears to have worked as a painter
25 from 2006 through 2008, however, he earned far less during those years, and thus it is

26
27 ³ The Court also notes that Dr. Parsons' findings appear to be based largely on
28 Burky's description of his symptoms. There are no clinical tests that support the
diagnoses, which makes it difficult to distinguish Burky's self-reports from actual clinical
findings.

1 likely this work does not qualify as substantial gainful activity. (A.R. 198-99.) As such,
2 the Court will analyze only whether Burky's work as a painter from 2003 to 2005
3 qualifies as past relevant work.

4 The Dictionary of Occupational Titles assigns a specific vocational preparation
5 level of 7 to a painter. DOT 840.381-010. This means that it takes over two years and up
6 to four years to learn the job. *Id.* In addition, in order to constitute substantial gainful
7 employment, Burky must have earned at least \$800 per month in 2003, \$810 per month
8 in 2004, and \$830 per month in 2005. *See Substantial Gainful Activity*, Social Security
9 Administration, available at <https://www.ssa.gov/oact/cola/sga.html>, last visited July 19,
10 2016.

11 The Court finds that Burky's work as a painter qualifies as past relevant work.
12 From 2003 to 2005, Burky's earnings far exceeded the monthly threshold, and thus the
13 work qualifies as substantial gainful activity. Furthermore, Burky performed this work
14 for three years as substantial gainful activity, which falls squarely within the time period
15 deemed necessary to learn the job. Burky argues that he must have worked at a
16 substantial gainful level for four years in order for his work as a painter to qualify as past
17 relevant work. (Doc. 21 at 6.) But Burky cites no authority that a claimant must perform
18 the job for the full recommended duration in order to learn it. In any event, Burky
19 continued to work intermittently as a painter for during the next three years, which
20 suggests he fully learned the job and could have performed such work at a substantial
21 gainful level. Accordingly, the Court finds the ALJ did not err in concluding that Burky
22 could perform his past relevant work as a painter.⁴

23 **C. The ALJ Did Not Err In Evaluating Burky's Credibility**

24 Burky argues the ALJ erred in evaluating the credibility of his testimony regarding
25

26 ⁴ This finding renders the ALJ's decision that Burky could perform past relevant
27 work as a stone polisher harmless. *See Maydanis v. Colvin*, 119 F. Supp. 3d 969, 973 (D.
28 Ariz. 2015) ("An error is harmless if there remains substantial evidence supporting the
ALJ's decision and the error does not affect the ultimate nondisability determination.").
Here, because Burky can perform past relevant work as a painter, the ALJ's nondisability
determination is still supported by substantial evidence.

1 the severity of his symptoms. (Doc. 16 at 18.) In evaluating credibility, the ALJ is
2 required to engage in a two-step analysis: (1) determine whether the claimant presented
3 objective medical evidence of an impairment that could reasonably be expected to
4 produce some degree of the pain or other symptoms alleged; and, if so with no evidence
5 of malingering, (2) reject the claimant’s testimony about the severity of the symptoms
6 only by giving specific, clear, and convincing reasons for the rejection. *Vasquez v.*
7 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). “In reaching a credibility determination, an
8 ALJ may weigh inconsistencies between the claimant’s testimony and his or her conduct,
9 daily activities, and work record, among other factors.” *Bray v. Comm’r of Soc. Sec.*
10 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009).

11 At the hearing, Burky testified that he was let go from his last job because of
12 depression and mood swings. (A.R. 36.) He stated that he has lived alone in an
13 apartment for eight years and that his father takes care of his bills and supports him. (*Id.*
14 at 39-40.) Burky is able to take care of his hygiene, cook meals, and has a cat. (*Id.* at
15 43.) During the day, he drinks his coffee, plays with his cat, calls his father, and watches
16 TV. (*Id.* at 43.) His hobbies include watching baseball and playing guitar, which he
17 plays twice a week. (*Id.* at 43-44.) He does not have any friends or a significant other,
18 does not attend church, does not have a computer, and does not go out. (*Id.* at 44-45.)
19 He does his own laundry, dishes, and other household cleaning. (*Id.* at 45.) He testified
20 that he quit smoking and using alcohol three years ago. (*Id.* at 45-46.)⁵

21 When asked why he was unable to work, Burky stated: “I get racing thoughts.
22 My depression, sometimes I – if it’s not an angry mood swing, I’ll just start breaking out
23 into tears for no reason at all. It’s really kind of hard to function when this goes on.” (*Id.*
24 at 47.) He stated that this occurs a couple times a week and that he is taking medication,
25 which helps him most of the time. (*Id.*) Burky further stated that his condition
26 prevented him from “[f]ollowing instructions, talking with bosses, having difference of

27
28 ⁵ This testimony appears to be untruthful. In January 2014, five months before he testified at the hearing, Burky reported to Dr. Parsons that he was continuing to smoke ten cigarettes per day. (A.R. 479.)

1 opinions the way things should be done and shouldn't be done." (*Id.*) Burky testified
2 that he feared leaving his house and has hallucinations. (*Id.* at 48.) When he is on
3 medication, he only experiences one mood swing each week. (*Id.* at 49.) He stated that
4 he has dyslexia, which makes him easily distracted. (*Id.*)

5 The ALJ found Burky's statements regarding the intensity, persistence and limited
6 effects of his symptoms not fully credible because they were inconsistent with his
7 activities of daily living and inconsistent with objective medical evidence in the record.
8 (*Id.* at 20-21.) "[W]hether the claimant engaged in daily activities inconsistent with the
9 alleged symptoms" is relevant to a claimant's credibility. *Molina v. Astrue*, 674 F.3d
10 1104, 1112 (9th Cir. 2012) (internal quotation marks omitted). Here, the ALJ noted that
11 Burky "manage[d] well on his own" considering he handled his personal care, did
12 laundry, household chores, cared for his cat, and prepared his own meals. (A.R. 20-21.)
13 In addition, he noted that Burky is capable of handling his own finances, including
14 paying bills, counting change, and using a savings account and checkbook, which
15 undermines his claims that he cannot concentrate or carry out simple instructions. (*Id.* at
16 232.) But these activities are done in isolation, without any work pressure, and involve
17 little concentration. Consequently, the Court finds that these reasons, standing alone, are
18 insufficient to discount Burky's credibility.⁶

19 This error is harmless, however, because the ALJ provided another sufficient
20 reason. An ALJ may discount a claimant's credibility if the "statements at [his] hearing
21 do not comport with objective evidence in [his] medical record." *Bray*, 554 F.3d at 1227.
22 In making this finding, the ALJ cited Dr. Parsons' treatment notes, discussed in length
23 above, which document Burky's improvement and demonstrate that he was doing well in
24 treatment. (A.R. 21.) The ALJ also noted that, in Dr. Parsons' opinion, Burky was

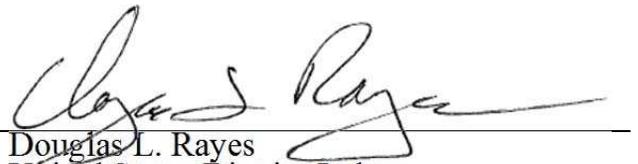
25
26 ⁶ The ALJ correctly concluded that one of Burky's statements regarding his daily
27 activities is inconsistent with his severe anxiety. For example, in a self-assessment form
28 completed in October 2012, Burky stated that he only goes outside of his house once or
twice a month for appointments and grocery shopping because he lost his driver's license
due to DUI, (*Id.*), not because of anxiety, as was his testimony, (*Id.* at 47). This is at least
partially inconsistent with his claim that his impairments are so debilitating that he cannot
work. This reason is sufficient to partially discount Burky's testimony.

1 consistently making progress in treatment and showing improvement. (*Id.*) Indeed, on
2 several occasions during the latter stages of his treatment, Burky stated that he was doing
3 well and that his medication was helping. In addition, the ALJ cited Dr. Tromp's report,
4 which found that Burky's symptoms were less frequent after he began taking medication
5 and that Burky exhibited stable mood, adequate memory, attention, concentration, and
6 acted socially appropriate during his exams. (*Id.* at 314-15.) This evidence suggests
7 Burky is able to interact with people one-on-one or in small group settings. It also
8 undermines his testimony that his mood swings cause him to be unable to interact at all
9 with coworkers or supervisors. The ALJ's interpretation of the medical evidence is
10 reasonable, and this reason is sufficient.⁷

11 Accordingly, the Court finds the ALJ provided specific, clear, and convincing
12 reasons for discounting Burky's credibility regarding the severity of his symptoms, and
13 that those reasons are supported by substantial evidence. *Vasquez*, 572 F.3d at 591.

14 **IT IS ORDERED** that the final decision of the Commissioner of Social Security
15 is **AFFIRMED**. The Clerk shall enter judgment accordingly and terminate this case.

16 Dated this 27th day of July, 2016.

17
18
19
20
21
22
23
24
25
26


Douglas L. Rayes
United States District Judge

27
28

⁷ Notably, the ALJ did not completely discredit Burky's testimony. The RFC precludes Burky from interacting with the general public, but permits occasional contact with coworkers and supervisors. (A.R. 20.) This finding is consistent with Burky's testimony that he gets anxious in large crowds as well as his behavior exhibited during his medical examinations. (*Id.* at 44).