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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Scott Aaron Breitenstein,

10 Plaintiff,

11 v.

12 Carolyn W Colvin,

13 Defendant.
14

No. CV-16-08016-PCT-DLR

ORDER

15
16 Plaintiff Scott Breitenstein appeals from the final decision of the Commissioner of
17 Social Security (Commissioner), which denied his applications for disability insurance
18 benefits and supplemental security income. The Court affirms because the decision of
19 the Administrative Law Judge (ALJ) is free of legal error and supported by substantial
20 evidence.

21 **BACKGROUND**

22 Breitenstein graduated high school and worked in construction until September
23 2007, when he sustained a back injury. (A.R. 38, 53, 84.) He filed an application for a
24 period of disability and disability insurance benefits on March 13, 2009, but was found
25 not disabled in a March 18, 2011 decision. (*Id.* at 26.) On May 10, 2011, Breitenstein
26 filed a second application for a period of disability and disability insurance benefits. (*Id.*)
27 He also applied for supplemental security income on September 26, 2011. (*Id.*) In both
28 applications, he alleged disability beginning March 19, 2011, when he was 36 years old,

1 due to lumbar degenerative disc disease, status post laminectomy. (*Id.* at 26, 38.)

2 After Breitenstein’s applications were denied on initial review and upon
3 reconsideration, he requested a hearing. (*Id.* at 26.) On February 10, 2014, Breitenstein
4 appeared with his non-attorney representative and testified at a video hearing before the
5 ALJ. (*Id.*) A vocational expert also testified. (*Id.*) On March 7, 2014, the ALJ issued a
6 decision that Breitenstein was not disabled within the meaning of the Social Security Act.
7 (*Id.* at 23.) Thereafter, Breitenstein submitted new evidence and requested review of the
8 ALJ’s decision by the Appeals Council. (*Id.* at 1.) The Appeals Council considered the
9 new evidence but denied Breitenstein’s request for review, making the ALJ’s decision the
10 Commissioner’s final decision. (*Id.*) On February 1, 2016, Breitenstein sought review
11 by this Court. (Doc. 1.)

12 **LEGAL STANDARD**

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

23 **DISCUSSION**

24 To determine whether a claimant is disabled for purposes of the Social Security
25 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). At the first step, the
26 ALJ determines whether the claimant is engaging in substantial gainful activity. 20
27 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.*
28 At step two, the ALJ determines whether the claimant has a “severe” medically

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

13 At step one, the ALJ found that Breitenstein meets the insured status requirements
14 of the Social Security Act through December 31, 2012, and that he has not engaged in
15 substantial gainful activity since March 19, 2011. (A.R. 29.) At step two, the ALJ found
16 that Breitenstein has the following severe impairment: degenerative disc disease of the
17 lumbar spine, status post laminectomy. (*Id.*) At step three, the ALJ determined that
18 Breitenstein does not have an impairment or combination of impairments that meets or
19 medically equals the severity of one of the listed impairments in Appendix 1 to Subpart P
20 of 20 C.F.R. Pt. 404. (*Id.* at 31.) At step four, the ALJ found that Breitenstein:

21 has the [RFC] to perform sedentary work . . . except [he] can
22 occasionally climb ramps and stairs, but he cannot climb
23 ladders, ropes, or scaffolds; [he] can occasionally balance,
24 stoop, kneel, crouch, and crawl; [he] should avoid
concentrated exposure to extreme cold, vibrations, and
hazards, including moving machinery and heights.

25 (*Id.*) The ALJ also found that Breitenstein is unable to perform any of his past relevant
26 work. (*Id.* at 37.) At step five, however, the ALJ concluded that jobs exist in significant
27 numbers in the national economy that Breitenstein could perform, considering his age,
28 education, work experience, and RFC. (*Id.* at 38.)

1 On appeal, Breitenstein makes four arguments: (1) the ALJ erred by finding that
2 *Chavez v. Bowen*, 844 F.2d 691 (9th Cir. 1988) requires adoption of findings from the
3 March 18, 2011 nondisability decision; (2) the ALJ improperly weighed medical opinion
4 evidence; (3) the ALJ improperly evaluated his credibility; and (4) the new evidence he
5 submitted to the Appeals Council requires remand. (Doc. 10.) The Court addresses each
6 in turn.

7 **I. The ALJ Did Not Err in Applying *Chavez***

8 When there has been a final agency decision of nondisability and the claimant
9 subsequently files a new application, the prior administrative decision creates a
10 presumption of continuing nondisability. *See Chavez*, 844 F.2d at 693. To overcome this
11 presumption, the claimant “must prove ‘changed circumstances’ indicating greater
12 disability.” *Id.* Social Security Acquiescence Ruling 97-4(9) provides guidance on the
13 *Chavez* decision:

14 In order to rebut the presumption of continuing nondisability,
15 a claimant “must prove ‘changed circumstances’ indicating a
16 greater disability.” In addition, the court indicated that where
17 the claimant rebuts the presumption by proving a “changed
18 circumstance,” principles of res judicata require that certain
19 findings contained in the final decision by the ALJ on the
20 prior claim be given some res judicata consideration in
21 determining whether the claimant is disabled The court
22 concluded that where the final decision by the ALJ on the
23 prior claim, which found the claimant not disabled, contained
24 findings of the claimant’s residual functional capacity,
25 education, and work experience, SSA may not make different
26 findings in adjudicating the subsequent disability claim unless
27 there is new and material evidence relating to the claimant’s
28 residual functional capacity, education or work experience.

22 AR-97-4(9), 1997 WL 742758 at *2. Changed circumstances may include: (1) a change
23 in the claimant’s age category, (2) an increase in the severity of impairments, (3) newly
24 alleged impairments, or (4) a change in the Commissioner’s disability criteria. *Id.* at *3;
25 *Chavez*, 844 F.2d at 693.

26 Breitenstein argues that the severity of his impairments has increased since his
27 prior disability application. (Doc. 10 at 15.) The ALJ, however, noted the existence of a
28 prior unfavorable administrative decision and, applying *Chavez* and AR-97-4(9),

1 concluded that Breitenstein had not shown changed circumstances material to the
2 determination of disability. (A.R. 26, 32.) Despite Breitenstein’s allegations of
3 worsening conditions, the ALJ noted that the record showed the same routine,
4 conservative treatment and found “the lack of more aggressive treatment or surgical
5 intervention suggests that [Breitenstein’s] symptoms and limitations were not as severe as
6 he alleged.” (*Id.* at 32.) Finding that Breitenstein had not overcome the presumption of
7 continuing nondisability, the ALJ gave significant weight to the state agency medical
8 consultants from the prior application and found that the objective medical evidence did
9 not support the alleged severity of Breitenstein’s symptoms. (*Id.* at 37.)

10 The ALJ’s decision is supported by substantial evidence. In Breitenstein’s prior
11 disability claim, evidence showed that he underwent a laminectomy procedure in June
12 2008 to treat a herniated disc in his lower back. (*Id.* at 33.) After surgery, Breitenstein
13 reported continued back pain but he treated his condition conservatively with physical
14 therapy, injections, and pain management. (*Id.*) Since then, Breitenstein’s symptoms and
15 the objective medical findings remained essentially the same. His doctors maintained
16 medication management and have not recommended more aggressive treatment. (*Id.* at
17 34.) At follow up appointments between 2011 and 2013, Breitenstein’s physical
18 examinations and objective imaging findings showed his condition was unchanged; his
19 pain was under reasonable control and he did not want to change his medication dosages.
20 (*Id.* at 35.) Although Breitenstein complained in late 2011 of neck pain, no changes were
21 made to his treatment plan. (*Id.*) Moreover, during the hearing on his second disability
22 claim, Breitenstein did not complain that his functional capacity was limited by neck
23 pain. (*Id.* at 58-59.)

24 Further, Breitenstein testified that he participated to a limited extent in daily
25 activities such as grocery shopping, driving, cooking, washing dishes, walking to the
26 mailbox, using the computer, and watching television. (*Id.* at 32.) He also reported that
27 he occasionally went fishing, and that his most recent fishing trip was one month before
28 the hearing. (*Id.*) The ALJ properly found that this evidence was inconsistent with a

1 material increase in the severity of Breitenstein's symptoms since March 2011, and
2 consistent with Breitenstein's ability to perform sedentary work as stated in his previous
3 RFC assessment. (*Id.* at 31.) The Court finds no error.

4 **II. The ALJ Did Not Err in Weighing Medical Source Evidence**

5 Breitenstein next contends that the ALJ improperly discounted the opinion of Dr.
6 Kazmi, his treating physician. (Doc. 10 at 18.) In weighing medical source opinions, the
7 Ninth Circuit distinguishes among three types of physicians: (1) treating physicians, who
8 actually treat the claimant; (2) examining physicians, who examine but do not treat the
9 claimant; and (3) non-examining physicians, who neither treat nor examine the claimant.
10 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, more weight should be
11 given to the opinion of a treating physician than to the opinions of non-treating
12 physicians. *Id.* However, a treating physician's opinion is entitled to controlling weight
13 only if the opinion is well-supported by medically acceptable diagnostic techniques and is
14 not inconsistent with other substantial evidence in the case record. 20 C.F.R. §§
15 404.1527(d)(2), 416.927(c)(2). Where a treating physician's opinion is contradicted, it
16 may not be rejected without "specific and legitimate reasons" supported by substantial
17 evidence in the record. *Lester*, 81 F.3d at 830. However, the ALJ "need not accept the
18 opinion of any physician if that opinion is brief, conclusory, and inadequately supported
19 by clinical findings." *Thomas*, 278 F.3d at 957.

20 On April 21, 2011, during his first visit with Breitenstein, Dr. Kazmi opined that
21 Breitenstein "is unable to work in any capacity." (A.R. 483.) He noted that Breitenstein
22 was "unable to do activities because of the pain. He is not sleeping well because of the
23 pain. He has avoided driving for two years because of the numbness and pain. Cortisone
24 injections failed [and] [p]ain medication has not helped, including Oxycontin and
25 morphine." (*Id.*) In a follow-up appointment on June 2, 2011, Dr. Kazmi stated that, due
26 to chronic pain and sciatica, Breitenstein was limited to sitting or standing for one hour
27 each per eight-hour shift and he would be absent from work more than three days per
28 month. (*Id.* at 483-91.)

1 The ALJ properly assigned little weight to Dr. Kazmi's opinion about
2 Breitenstein's inability to work because that conclusion was "an opinion on an issue
3 reserved to the Commissioner." (*Id.* at 35); *see* 20 C.F.R. § 416.927(d). Additionally,
4 the ALJ gave little weight to the remainder of Dr. Kazmi's opinion because it was not
5 supported by objective evidence and was inconsistent with the record as a whole. (A.R.
6 35.) For example, Dr. Kazmi's treatment notes from November 6, 2012 state that
7 Breitenstein's pain is "under reasonable control" and that "patient does not want to
8 change the dosage." (*Id.* at 569.) In November 2013, Dr. Kazmi noted again that
9 Breitenstein's pain was "under reasonable control." (*Id.* at 1127.) The ALJ found that
10 Dr. Kazmi primarily summarized Breitenstein's subjective complaints but did not provide
11 objective findings to support his assessments. (*Id.* at 36.) The ALJ offered specific and
12 legitimate reasons, supported by substantial evidence, for discounting Dr. Kazmi's
13 opinions, and the Court finds no error.

14 **III. The ALJ Did Not Err in Evaluating Breitenstein's Credibility**

15 Breitenstein argues that the ALJ erred in evaluating the credibility of his symptom
16 testimony. (Doc. 10 at 20.) In evaluating the credibility of a claimant's testimony
17 regarding subjective pain or other symptoms, the ALJ is required to engage in a two-step
18 analysis: (1) determine whether the claimant presented objective medical evidence of an
19 impairment that could reasonably be expected to produce some degree of the pain or
20 other symptoms alleged; and, (2) if there is no evidence of malingering, reject the
21 claimant's testimony about the severity of the symptoms only by giving specific, clear,
22 and convincing reasons for the rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir.
23 2009).

24 Breitenstein testified that any movement provoked pain and numbness down his
25 legs and back, which prevented him from cooking and engaging in hobbies. (A.R. 32.)
26 He reported debilitating back and leg pain and said his medications caused headaches and
27 memory loss. (*Id.*) The ALJ gave little weight this testimony. (*Id.*) The ALJ found that
28 Breitenstein's symptom testimony conflicted with his reported daily activities, medical

1 records, and treatment plans. “One strong indication of the credibility of an individual’s
2 statements is their consistency, both internally and with other information in the case
3 record.” SSR 96-7p, 1996 WL 374186 at *5. Breitenstein testified that he occasionally
4 went grocery shopping, drove a car, cooked, washed dishes, walked to the mailbox, used
5 a computer, watched television, and went fishing. (A.R. 32.) Breitenstein also told Dr.
6 Kazmi that he experienced no side effects from his medication. (*Id.*) Additionally,
7 Breitenstein’s imaging studies showed only minor degenerative changes and no
8 significant malalignment, no compression fracture, and otherwise normal upper facet
9 joint. (*Id.* at 34-35.) Lastly, Breitenstein refused referrals to physical therapy and a pain
10 management specialist. (*Id.* at 515.) The ALJ therefore concluded that Breitenstein’s
11 testimony was not credible and that evidence undermined his complaints. (*Id.* at 34.)
12 The ALJ gave specific, clear, and convincing reasons for this conclusion, which is
13 supported by substantial evidence. The Court finds no error.

14 **IV. New Evidence Submitted to the Appeals Council Does Not Require Remand**

15 After a final agency determination of nondisability, if “a claimant submits
16 evidence for the first time to the Appeals Council, which considers that evidence in
17 denying review of the ALJ’s decision, the new evidence is part of the administrative
18 record, which the district court must consider in determining whether the Commissioner’s
19 decision is supported by substantial evidence.” *Brewes v. Comm’r of Soc. Sec. Admin.*,
20 682 F.3d 1157, 1159-60 (9th Cir. 2012). “Under 42 U.S.C. § 405(g), in determining
21 whether to remand a case in light of new evidence, the court examines both whether the
22 new evidence is material to a disability determination and whether a claimant has shown
23 good cause for having failed to present the new evidence to the ALJ earlier.” *Mayes v.*
24 *Massanari*, 276 F.3d 453, 461 (9th Cir. 2001). New evidence is material if it bears
25 “directly and substantially on the matter in dispute.” *Ward v. Schweiker*, 686 F.2d 762,
26 764 (9th Cir. 1982) (internal quotation and citation omitted). The claimant must also
27 demonstrate “a reasonable possibility that the new evidence would have changed the
28 outcome of the administrative hearing.” *Mayes*, 276 F.3d at 462. To meet the good

1 cause requirement, the claimant must demonstrate that the new evidence was unavailable
2 at the time of the administrative proceeding and explain why he did not seek the expert's
3 opinion earlier. *Id.* at 463; *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985) ("If new
4 information surfaces after the Secretary's final decision and the claimant could not have
5 obtained that evidence at the time of the administrative proceeding, the good cause
6 requirement is satisfied); *Sanchez v. Sec. of Health and Human Servs.*, 812 F.2d 509, 512
7 (9th Cir. 1987) (holding that the applicant lacked good cause to remand for consideration
8 of two psychological examinations prepared after the applicant's disability determination
9 when the attorney knew of the applicant's memory loss but failed to explain why the
10 applicant had not requested a mental evaluation or pressed his mental impairment claim
11 at the hearing before ALJ).

12 Breitenstein submitted to the Appeals Council a six-page spinal impairment
13 questionnaire completed by Dr. Chad Hartley in July 2014. (A.R. 1172-77.) The report
14 indicated that Dr. Hartley treated Breitenstein for neck problems between May and July
15 2014. (*Id.*) It also showed that Dr. Hartley was in the process of scheduling Breitenstein
16 for surgery. (*Id.*) Breitenstein submitted this report to the Appeals Council in August
17 2014. (*Id.* at 1171.) The Appeals Council considered this information and made it part
18 of the administrative record. (*Id.* at 3.) The Appeals Council also reviewed medical
19 records from Panacea Brain and Spine dated May 30, 2014 through June 2, 2015, medical
20 records from Havasu Regional Medical Center dated August 25, 2014 through February
21 10, 2015, and medical records from Dr. Kazmi dated May 4, 2015. (*Id.*)

22 The Appeals Council found that Breitenstein did not show the new evidence was
23 material to the disability determination because the new evidence pertains to treatment
24 occurring after the ALJ's March 7, 2014 decision. (*Id.*) The new evidence did not
25 concern the relevant time between the alleged disability onset date in March 2011 and the
26 March 2014 decision date; therefore it did not provide a basis for changing the ALJ's
27 decision because it would not have changed the outcome of the administrative hearing.
28 (*Id.*) Furthermore, Breitenstein lacks good cause to remand because his neck

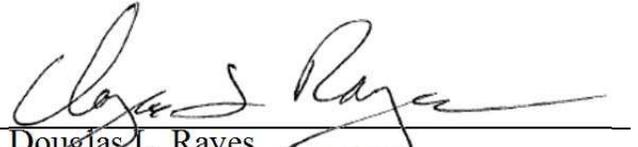
1 examinations were prepared after his disability determination, and he fails to explain why
2 he did not request a neck evaluation or press his neck impairment claim at the hearing
3 before the ALJ. The Court finds no error.

4 **CONCLUSION**

5 For the foregoing reasons, the ALJ's decision is free of harmful legal error and
6 supported by substantial evidence.

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

9 Dated this 30th day of November, 2016.

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14 Douglas L. Rayes
15 United States District Judge
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