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

9 Arthur James Beighley, Jr.,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-08203-PCT-SMB

ORDER

15 Pending before the Court is Plaintiff Arthur James Beighley, Jr.'s appeal of the
16 Social Security Administration's decision to deny his application for benefits under the
17 Social Security Act. Plaintiff filed a Complaint (Doc. 1) with this Court seeking judicial
18 review of that denial pursuant to 42 U.S.C. § 405(g), and the Court now addresses
19 Plaintiff's Opening Brief (Doc. 12), Defendant Commissioner of Social Security
20 Administration's Opposition (Doc. 13), and Plaintiff's Reply (Doc. 14). The Court has
21 reviewed the briefs and Administrative Record (Doc. 11, "AR") and now **AFFIRMS** the
22 Administrative Law Judge's ("ALJ") decision (AR 29–36).

23 **I. BACKGROUND**

24 The parties are familiar with the background information in this case, and it is
25 summarized in the ALJ's decision. (AR 29). Accordingly, the Court will reference the
26 background only as necessary to the analysis below.

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1 **II. LEGAL STANDARD**

2 In determining whether to reverse an ALJ’s decision, the district court reviews
3 only those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236
4 F.3d 503, 517 n.13 (9th Cir. 2001). The district court may set aside the Commissioner’s
5 disability determination only if the determination is not supported by substantial evidence
6 or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial
7 evidence is more than a scintilla, but less than a preponderance; it is relevant evidence that
8 a reasonable person might accept as adequate to support a conclusion. *Id.* If the evidence
9 is susceptible to more than one rational interpretation, the court should uphold the ALJ’s
10 findings if they are supported by inferences reasonably drawn from the record. *Molina v.*
11 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also Andrews v. Shalala*, 53 F.3d 1035,
12 1039 (9th Cir. 1995) (noting that the ALJ is responsible for resolving conflicts in medical
13 testimony, determining credibility, and resolving ambiguities). But the Court is tasked
14 with considering “the entire record as a whole and may not affirm simply by isolating a
15 specific quantum of supporting evidence.” *Orn*, 495 F.3d at 630 (citation and internal
16 quotation marks omitted). “Finally, [courts] may not reverse an ALJ’s decision on account
17 of an error that is harmless.” *Molina*, 674 F.3d at 1111. An error is harmless if there
18 remains substantial evidence supporting the ALJ’s decision and the error does not affect
19 the ultimate non-disability determination. *Id.* at 1115. The “burden of showing that an
20 error is harmful normally falls upon the party attacking the agency’s determination.” *Id.*
21 at 1111 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

22 **III. FIVE-STEP EVALUATION**

23 To determine whether a claimant is disabled for purposes of the Social Security Act,
24 the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the
25 burden of proof on the first four steps, but the burden shifts to the Commissioner at step
26 five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). To establish disability, the
27 claimant must show that (1) he is not presently engaged in substantial gainful activity; (2)
28 he has a “severe” medically determinable physical or mental impairment; and (3) his

1 impairment or combination of impairments meets or medically equals a listed impairment.
2 20 C.F.R. § 404.1520(a). If the claimant meets his burden through step three, the
3 Commissioner must find him disabled. *Id.* If the claimant does not meet his burden at step
4 three, the ALJ moves to step four which is whether claimant can show that (4) his residual
5 functional capacity (“RFC”) prevents his performance of any past relevant work. *Id.* If
6 the inquiry proceeds to step four and the claimant shows that he is incapable of performing
7 past relevant work, the Commissioner must show at step five that (5) the claimant is capable
8 of other work suitable for his RFC, age, education, and work experience. *Id.*

9 Here, at step one, the ALJ found that Plaintiff had not engaged in substantial gainful
10 activity since October 28, 2013. (AR 31). At step two, the ALJ found chronic obstructive
11 pulmonary disease (“COPD”) to be a severe impairment. (AR 31). At step three, the ALJ
12 determined that Plaintiff’s impairments did not meet or equal a listed impairment. (AR 32).
13 The ALJ then found that Plaintiff had the RFC to perform “light” work as defined in 20
14 C.F.R. § 416.967(b), except the Plaintiff is limited to (1) lifting and/or carrying a maximum
15 of 20 pounds occasionally and ten pounds frequently; (2) standing and/or walking six hours
16 out of eight; (3) sitting six hours; (4) occasionally climbing stairs and/or ramps, but never
17 ladders, ropes, or scaffolds; (5) occasionally stooping, kneeling, crouching, and crawling;
18 and the Plaintiff (6) should avoid concentrated exposure to fumes, odors, dusts, gases, and
19 unprotected heights. (AR 32). At step four, the ALJ found that Plaintiff could perform
20 past relevant work as a driver. (AR 35–36). The ALJ therefore did not proceed to step
21 five.

22 **IV. ANALYSIS**

23 Plaintiff raises only one argument for the Court’s consideration—whether the RFC
24 is supported by substantial evidence because the ALJ failed to properly evaluate the
25 opinion evidence, specifically the February 23, 2015 residual functional capacity
26 questionnaire (the “Questionnaire”). (Doc. 12 at 1, 8) (AR 432–435). The argument is
27 based primarily on Plaintiff’s assertion that the ALJ erroneously attributed the
28 Questionnaire as being issued by Dr. Cardone instead of Dr. Aslam. (Doc. 12 at 8).

1 **A. Applicable Law**

2 The Ninth Circuit distinguishes between the opinions of treating physicians,
3 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,
4 830 (9th Cir. 1995). Generally, an ALJ should give the greatest weight to a treating
5 physician’s opinion and more weight to the opinion of an examining physician than a
6 non-examining physician. *See Andrews*, 53 F.3d at 1040–41; *see also* 20 C.F.R.
7 § 404.1527(c)(2)–(6) (listing factors to be considered when evaluating opinion evidence,
8 including length of examining or treating relationship, frequency of examination, and
9 consistency with the record). If it is not contradicted by another doctor’s opinion, the
10 opinion of a treating or examining physician can be rejected only for “clear and
11 convincing” reasons. *Lester*, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422
12 (9th Cir. 1988)). Under this standard, the ALJ may reject a treating or examining
13 physician’s opinion if it is “conclusory, brief, and unsupported by the record as a whole or
14 by objective medical findings,” *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1195
15 (9th Cir. 2004) (citations omitted), or if there are significant discrepancies between the
16 physician’s opinion and claimant’s clinical records. *Bayliss v. Barnhart*, 427 F.3d 1211,
17 1216 (9th Cir. 2005).

18 When a treating or examining physician’s opinion is contradicted by another doctor,
19 it can be rejected only for “specific and legitimate reasons that are supported by substantial
20 evidence in the record.” *Lester*, 81 F.3d at 830–31. To satisfy this requirement, the ALJ
21 must set out “a detailed and thorough summary of the facts and conflicting clinical
22 evidence, stating his interpretation thereof, and making findings.” *Revels v. Berryhill*, 874
23 F.3d 648, 654 (9th Cir. 2017) (citation omitted). Under either standard, “[t]he ALJ must
24 do more than state conclusions. He must set forth his own interpretations and explain why
25 they, rather than the doctors’, are correct.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th
26 Cir. 2014) (citation omitted).

27 **B. Opinion Evidence in the Record**

28 The ALJ issued the RFC assessment considering the following opinion evidence:

1 (1) opinion of Efren Cano, D.O., who administered a consultative exam, and to which the
2 ALJ gave “partial weight”; (2) the opinion of Richard Cardone, M.D., treating physician,
3 to which the ALJ gave “no weight”; and (3) the state agency medical consultants, to which
4 the ALJ gave “little weight.” (AR 34–35). The ALJ further stated that the RFC was based
5 on findings of the state medical consultants, but noted that neither of the consultants
6 assigned an RFC. (AR 35).

7 In assessing the opinion of Dr. Cardone, the ALJ referenced the February 23, 2015
8 Questionnaire. The ALJ found that Dr. Cardone’s opinion was “significantly incongruent
9 and contradicted by the available evidence.” (AR 35). The ALJ further provided the
10 following explanation for his finding:

11 Dr. Cardone relied too heavily on the subjective complaints of
12 the claimant. Dr. Cardone provided this assessment on
13 February 23, 2015. Dr. Cardone last physically examined
14 claimant on April 18, 2014. Additionally, the last physical
15 examination Dr. Cardone administered in 2014 showed normal
16 findings. In addition, claimant alleged no complaints during
17 this examination. However, another physical examination of
18 claimant on December 15, 2014 [sic]. During that examination
19 claimant was “well-appearing and in no acute distress” and
20 there was no noted edema and well-controlled blood pressure.
21 Claimant also denied acute palpitations, fatigue, or shortness
22 of breath during the examination. There was no wheezing,
23 bronchi, or crepitation. The only support for any restriction
24 was the avoidance of concentrated exposure to respiratory
25 irritants.

26 (AR 35) (citations omitted).

27 Plaintiff now asserts that the ALJ erred because the Questionnaire was not issued
28 by Dr. Cardone, but rather by another of Plaintiff’s treating physicians at Western
Mountain Medical Center, Dr. Nabila Aslam (through Dadiki Sherpa, PA). (Doc. 12 at 8).
Defendant asserts that the ALJ attributed the Questionnaire to Dr. Cardone because the
transmittal cover sheet sent to the SSA by Plaintiff’s representative stated that the
Questionnaire was from “Richard Cardone.” (Doc. 13 at 2). Plaintiff does not contest that
the transmittal cover sheet stated that the Questionnaire was from “Richard Cardone,” and

1 attributes this to a “simple mistake by a case manager[.]” (Doc. 14 at 4).

2 In spite of the cover sheet stating that the Questionnaire was completed by Dr.
3 Cardone, Plaintiff contends that “a review of the medical record shows that [the
4 Questionnaire] was provided by Dr. Nabila Aslam through Dadiki Sherpa, PA.” (Doc. 12
5 at 8). Plaintiff points to a February 9, 2015 report completed by Ms. Sherpa, in which Ms.
6 Sherpa explained to Plaintiff that the paperwork would be completed in two weeks at
7 Plaintiff’s next appointment. (Doc. 12 at 8). The February 9, 2015 report states in relevant
8 part as follows:

9 In last time he had left up for work here for me to fill for
10 disability[.] I have told him that he will not qualify for
11 disability for his back problem, he is requesting simply
12 disability given his COPD. I explained to patient to come back
in 2 weeks, we will try to do the paperwork at that time.

13 (AR 581). Plaintiff then points to the treatment notes of Ms. Sherpa completed on February
14 23, 2015, (Doc. 12 at 8), which read in relevant part as follows:

15 Patient is requesting [] disability paperwork filled for his
16 COPD. I explained to patient that he most likely would not
17 qualify for the disability because [his] COPD symptom is only
18 on exertion, he could work which requires sitting as he does
19 not have any problem sitting for 7–8 hours, in fact he tells me
20 that he [can sit down] for 7–8 hours without any issues. I have
21 filled the paperwork with Dr. Aslam, but [re-explained] to
patient that most likely he would not qualify for disability.
Patient was examined and evaluated with Dr. Aslam, dictation
done by []Dadiki.

22 (AR 577). The Court also notes that the record shows that Plaintiff did indeed see Dr.
23 Cardone on April 18, 2014 for a colonoscopy. (AR 440). Further, Dr. Cardone’s 2014
24 progress notes for Plaintiff indicate that Dr. Aslam referred Plaintiff to Dr. Cardone for a
25 colonoscopy, (AR 437), and progress notes from Ms. Sherpa on Dec. 16, 2013 indicate that
26 Plaintiff was referred to “Gen. surgery for a colonoscopy.” (AR 426). But during the
27 hearing with the ALJ, Plaintiff’s attorney specifically discussed Dr. Cardone with Plaintiff.

28 Q And who’s Dr. Cardone [PHONETIC] or Cardone?

1 A He's the one that referred me to go see -- possibility to get
2 surgery. He got a colostomy bag put on me.
3 Q Now is he like a primary care physician?
4 A No, he's a specialist in this field.
5 Q Now in 2015, he had filled out some paperwork for you in
6 February of 2015. Dr. Richard Cardone?
7 A Yeah, that's when he had me do a colon test.
8 Q Okay. And he had mentioned the diagnosis was COPD.
9 Does he treat you at all for your –
10 A Yeah.
11 Q -- COPD?
12 A Yeah, I see him every so often, but I mainly see my primary
13 doctor.
14 Q Is he at Western Mountain Medical?
15 A Yes, he is.
16 Q Okay. At the same place, Dr. Obarka [PHONETIC] is?
17 A Yeah.
18 Q And you see them both?
19 A Right.

20 (AR 53–54) (alterations in original). Additionally, Plaintiff's counsel attributed the
21 Questionnaire to Dr. Cardone when requesting review by the Appeals Council. (AR 228–
22 29).

23 C. Analysis

24 The issue before the Court is whether the ALJ provided specific and legitimate
25 reasons supported by substantial evidence in the record for his decision to afford the
26 opinion in the Questionnaire no weight. As an initial matter, while the evidence presented
27 does appear to be susceptible to more than one rational interpretation, the court is required
28 to uphold the ALJ's findings "if they are supported by inferences reasonably drawn from
the record." *Molina*, 674 F.3d at 1111. In looking at the whole record, the Court finds it
rational to conclude that the Questionnaire was completed by Dr. Cardone. *See Orn*, 495
F.3d at 630 ("[T]he court is tasked with considering the entire record as a whole and may
not affirm simply by isolating a specific quantum of supporting evidence."). Nothing on
the Questionnaire itself indicates the name of the doctor issuing the opinion, and the
transmittal cover sheet clearly states that the document attached is from Dr. Cardone.

1 (AR 432). While there is also evidence in the record, as Plaintiff notes, that Dr. Aslam
2 might have completed the form, testimony from Plaintiff at the hearing provides further
3 evidence as to why the ALJ may have concluded that the Questionnaire was completed by
4 Dr. Cardone. (AR 53–54). In his testimony, Plaintiff testified that Dr. Cardone has treated
5 Plaintiff for COPD, and not just for the 2014 colonoscopy. (AR 53). Plaintiff’s attorney
6 questioned Plaintiff specifically about paperwork completed in February 2015, and
7 Plaintiff confirmed that Dr. Cardone completed paperwork at that time. (AR 53). There
8 is no other paperwork in the record completed by Dr. Cardone in February 2015. Plaintiff
9 also testified that Dr. Cardone has treated him at Western Mountain Medical Center, which
10 is the same group through which Plaintiff has seen Dr. Aslam. (AR 53). This is not a case
11 where the record clearly shows that a clerical error was unsupported by substantial
12 evidence in the record. *See, e.g., Browne v. Astrue*, No. CV-11-1740-PHX-SMM, 2012
13 WL 5868824, at *6 (D. Ariz. Nov. 19, 2012) (clerical error on one page of doctor’s form
14 regarding date form was completed led ALJ to conclude that doctor had only seen patient
15 for one month; court found this reason unsupported by substantial evidence when the
16 doctor’s form also listed a later date of completion in another location and the record
17 contained treatment notes for seven visits up until the date doctor actually completed form).
18 The Court also notes that neither Plaintiff nor Plaintiff’s attorney asserted that the
19 Questionnaire was completed by anyone other than Dr. Cardone until this appeal. *See* AR
20 228–29 (requesting review by the Appeals Council without asserting the alternate
21 interpretation). Even though Plaintiff’s opening brief provides another possible
22 interpretation of the evidence, the Court will not second-guess the ALJ’s determination
23 that the paperwork was completed by Dr. Cardone.

24 Because Dr. Cardone is a treating doctor, and his opinion is contradicted by other
25 doctors, the ALJ could only discount the opinion for specific and legitimate reasons
26 supported by substantial evidence in the record.¹ *See Lester*, 81 F.3d at 830–31. The ALJ
27 found that the opinion in the Questionnaire was “significantly incongruent and contradicted

28 ¹ The same standard would be applied if the ALJ attributed the Questionnaire to Dr. Aslam, as Dr. Aslam was also a treating doctor.

1 by the available evidence.” (AR 35). Some of the ALJ’s reasons were specifically based
2 on the determination that the Questionnaire was attributable to Dr. Cardone and not to
3 another doctor. For example, the ALJ gave the reason that the Questionnaire was
4 completed on February 23, 2015, but Dr. Cardone had not examined Plaintiff since April
5 18, 2014. *Id.* The ALJ also noted inconsistency between Dr. Cardone’s April 18, 2014
6 report and the February 23, 2015 Questionnaire. *Id.* Specifically, the ALJ noted that Dr.
7 Cardone’s 2014 examination of Plaintiff showed normal findings, and Plaintiff did not
8 allege any complaints during that examination. *Id.* But other reasons provided by the ALJ
9 for not giving weight to the Questionnaire would be applicable no matter which doctor
10 issued the Questionnaire.² For example, the ALJ noted that Dr. Cardone relied too heavily
11 on the subjective complaints of the Plaintiff. *Id.* While this assertion could partially be
12 based on Dr. Cardone not having examined patient since April 2014, it appears that the
13 issuing doctor recognized in the Questionnaire that some of the answers were “per patient,”
14 which Plaintiff and Defendant have both acknowledged. (Doc. 12 at 9; Doc. 13 at 4).
15 Additionally, the ALJ compared the February 23, 2015 Questionnaire with records from
16 Plaintiff’s examination on December 15, 2014, in which Plaintiff was “well-appearing and
17 in no acute distress”; there was no noted edema and well-controlled blood pressure;
18 Plaintiff denied acute palpitations, fatigue, or shortness of breath; and there was no
19 wheezing, bronchi, or crepitation. (AR 35). Courts have found similar reasons offered by
20 ALJs to be sufficiently specific and legitimate. *See, e.g., Dean v. Comm’r of Soc. Sec.*, 504
21 F. App’x 563, 565 (9th Cir. 2013) (ALJ discounted the doctor’s report because (1) doctor
22 filled out only a standardized form, (2) appeared to rely mostly on patient’s subjective
23 reporting, and (3) findings were inconsistent with those of the State’s physicians);
24 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (ALJ’s reasons included that
25 the doctor’s questionnaire responses were inconsistent with the medical records); *Sheffer*
26 *v. Barnhart*, 45 F. App’x 644, 645 (9th Cir. 2002) (ALJ’s reasons included that the doctor’s

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28 ² Even if the ALJ incorrectly attributed the Questionnaire to Dr. Cardone, such error was
harmless because the ALJ also considered Dr. Cardone a treating physician and identified
substantial evidence that justified giving the opinion no weight.

1 conclusions were based primarily on plaintiff's less-than-credible subjective complaints,
2 and were contradicted by a considerable amount of objective medical evidence); *Weger v.*
3 *Colvin*, No. CV-12-8029-PCT-SMM, 2013 WL 1789475, at *5 (D. Ariz. Apr. 26, 2013)
4 (ALJ's reasons included that the doctor himself noted that the opinion was based on
5 Plaintiff's subjective complaints); *Mezquita v. Comm'r of Soc. Sec. Admin.*, No. CV-16-
6 01763-PHX-NVW, 2017 WL 4250606, at *4 (D. Ariz. Sept. 26, 2017) (ALJ assigned no
7 weight to doctor's opinion because it was, *inter alia*, not consistent with the medical
8 records and objective tests; based upon Plaintiff's subjective complaints; and contradicted
9 by opinions of the consultative examiners, the State agency evaluators, and a treating
10 doctor).

11 The Court concludes that the ALJ provided specific and legitimate reasons which
12 were supported by substantial evidence in the record as to why he rejected the February
13 23, 2015 Questionnaire. "It is not the role of this Court to second-guess the ALJ's
14 determinations concerning the weight he gave to each report and his decisions sorting out
15 conflicts in the record, so long as the ALJ applied the correct legal standards and properly
16 set forth specific and legitimate reasons in support of those decisions, as he did here."
17 *Weger*, 2013 WL 1789475, at *6. Therefore, the ALJ's decision will be upheld.

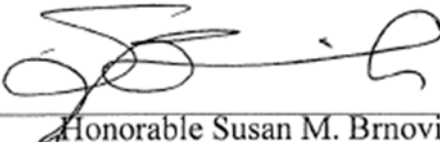
18 **V. CONCLUSION**

19 For the reasons stated above,

20 **IT IS ORDERED** that the final decision of the Commissioner of Social Security is
21 **AFFIRMED.**

22 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
23 accordingly and terminate this case.

24 Dated this 11th day of March, 2019.

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Honorable Susan M. Brnovich
United States District Judge