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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Ramon Aguilar,

10 Plaintiff,

11 vs.

12 Michael J. Astrue, Commissioner of Social  
13 Security,

14 Defendant.

No. 10-0528-TUC-BPV

**ORDER**

15 Plaintiff, Ramon Aguilar, suffers from the impairments of right shoulder pain,  
16 knee pain, hand pain, carpal tunnel syndrome and diabetes mellitus type II. In addition,  
17 Plaintiff suffers from hypertension, asthma and depression. Plaintiff applied for Disability  
18 Insurance Benefits (DIB) and Supplemental Security Income (SSI) on September 4,  
19 2007, alleging disability since August 20, 2007. Tr. 118-29. The applications were denied  
20 initially, (Tr. 52-53), on reconsideration (Tr. 54-55), and after an administrative hearing  
21 before an Administrative Law Judge (ALJ) held on June 11, 2009 (Tr. 7-51). The ALJ  
22 issued a written decision on July 23, 2009, finding Plaintiff, age 53 at the time of  
23 decision, not disabled within the meaning of the Social Security Act. Tr. 15-25. This  
24 decision became the final decision for purposes of judicial review under 42 U.S.C. §  
25 405(g) when the Appeals Council denied review. Tr. 1-6.

26 Plaintiff now brings this action for review of the final decision of the  
27 Commissioner for Social Security pursuant to 42 U.S.C. §§ 405(g). The United States  
28 Magistrate Judge has received the written consent of both parties, and, accordingly,

1 presides over this case pursuant to 28 U.S.C. § 636 (c) and Fed.R.Civ.P. 73.

2 After considering the record before the Court and the parties' briefing of the  
3 issues, the Court affirms Defendant's decision.

#### 4 **I. STANDARD OF REVIEW**

5 The Court has the "power to enter, upon the pleadings and transcript of the record,  
6 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
7 Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The  
8 court will set aside a denial of benefits only if the Commissioner's findings are based on  
9 legal error or are not supported by substantial evidence in the record as a whole. *Kail v.*  
10 *Heckler*, 722 F.2d 1496, 1497 (9<sup>th</sup> Cir. 1984) (citing *Sample v. Schweiker*, 694 F.2d 639,  
11 642 (9<sup>th</sup> Cir.1982), *Thompson v. Schweiker*, 665 F.2d 936, 939 (9<sup>th</sup> Cir, 1982)); 42 U.S.C.  
12 § 405(g)). In determining whether there is substantial evidence, the Court must consider  
13 the evidence as a whole, weighing both the evidence that supports and the evidence that  
14 detracts from the Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
15 Cir. 1985).

#### 16 **II. DISCUSSION**

17 Whether a claimant is disabled is determined using a five-step evaluation process.  
18 To establish disability, the claimant must show (1) he has not worked since the alleged  
19 disability onset date, (2) he has a severe impairment, and (3) his impairment meets or  
20 equals a listed impairment or (4) his residual functional capacity (RFC) precludes him  
21 from performing his past work. At step five, the Commissioner must show that the  
22 claimant is able to perform other work. *See* 20 C.F.R. §§ 404.1520, 416.920.

23 Plaintiff has met his burden. He has not worked since August 20, 2007. Tr. 17, ¶ 2.  
24 He has five severe impairments: right shoulder pain; knee pain; hand pain; carpal tunnel  
25 syndrome; and diabetes mellitus type II. Tr. 17, ¶ 3. While those impairments do not meet  
26 or equal a listed impairment (Tr. 19, ¶ 4), they do preclude Plaintiff from performing his  
27 past work as a construction laborer and as a mine mill supervisor (Tr. 23, ¶ 6). At step  
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1 five, the ALJ concluded that Plaintiff is not disabled because he has the RFC to perform a  
2 range of light work with some limitations in lifting, working above shoulder height, and  
3 exposure to dust fumes and gases, and, considering Plaintiff's age, education, work  
4 experience and RFC, that there are jobs that exist in significant numbers in the national  
5 economy that Plaintiff can perform. Tr. 20-25, ¶¶ 5, 9[2]<sup>1</sup>-10.

6 Plaintiff contends that the ALJ erred by failing to give controlling weight to the  
7 treating physician's RFC assessment; failing to find Plaintiff disabled under Rule 202.01  
8 of the Medical Vocational Guidelines (Grids); and failing to remand the claim for  
9 consideration of new and material evidence in the form of an award of benefits in a  
10 subsequently filed claim. (Doc. 17) Defendant contends that the ALJ did not err and that  
11 the ALJ's decision is supported by substantial evidence. (Doc. 18)

12 The medical evidence of record indicates Plaintiff was treated at El Rio Health  
13 Center by primary care physicians Dr. Lisa Soltani from August 2006 to October 2008,  
14 and Dr. Rama Dasari from January to April, 2009. Tr. 266-299, 388-394, 420-456.

15 Dr. Dasari completed an RFC opining that Plaintiff could lift and carry less than  
16 10 pounds, sit and walk for less than one hour each at a time (for less than a total of two  
17 hours each in an eight-hour day), and sit for more than two hours at a time (for less than  
18 six hours total in an eight-hour day). Tr. 417. Dr. Dasari also indicated that Plaintiff's  
19 limitations included the requirement that he lie down during the day and alternate sitting  
20 and standing. *Id.* The ALJ considered the treating source opinion, but gave limited weight  
21 to the opinion, finding it "too restrictive in light of the medical evidence and not well  
22 supported by treating records and other clinical reports." *Id.*

23 In support of his argument, Plaintiff relies on new evidence submitted to the  
24 Appeals Council consisting of a letter written by Plaintiff's attorney (Tr. 458); medical  
25 records from the emergency department at University Physicians Hospital from  
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27 <sup>1</sup> The ALJ's memorandum decision contains two paragraphs numbered 9. The  
28 Court will refer to them as paragraphs 9[1] and 9[2] sequentially.

1 December 1, 2009, describing admission of Plaintiff for chest pain, a subsequent cardiac  
2 catheterization, and diagnosis of coronary artery disease, unstable angina, right-sided  
3 pectoral chest pain, diabetes mellitus 2, and hypertension (Tr. 460-66). Plaintiff further  
4 relies on the additional treatment records from December, 2009, consisting of a physical  
5 therapy order for lower back pain and peripheral neuropathy (Tr. 471); a prescription for  
6 Fenofibrate to reduce blood cholesterol (Tr. 468); and a third party letter from Plaintiff's  
7 daughter indicating that, in addition to his other diagnoses, she has been told that her  
8 father has second stage dementia. (Tr. 475). Plaintiff maintains that "his current  
9 conditions were a direct result of his diabetes mellitus, which is now affecting his heart  
10 and brain." (Doc. 17, at 7.)

11 The Government responds, first, that additional evidence submitted to the Appeals  
12 Council after the ALJ's decision should be considered only under sentence six of 42  
13 U.S.C. § 405(g), citing *Mayes v. Massanari*, 276 F.3d 453 (9<sup>th</sup> Cir. 2001). *Mayes*,  
14 however, addressed a Plaintiff's request to remand a case to the ALJ for consideration of  
15 new evidence, and did not address the distinction between a sentence four claim of  
16 substantive error based on new evidence and a sentence six request for consideration of  
17 new evidence. Section 405(g) "authorizes district courts to review administrative  
18 decisions in Social Security benefit cases." *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9<sup>th</sup>  
19 Cir. 2002). If a claimant is not asking for a substantive ruling, but only for a remand to  
20 consider new evidence, it is a sentence six remand and good cause must be shown. If  
21 claimant is seeking a substantive ruling on alleged errors in the decision, it is under  
22 sentence four of section 405(g). As to Plaintiff's first argument, that the ALJ improperly  
23 weighed Dr. Dasari's opinion, Plaintiff is seeking a substantive ruling on an alleged error  
24 in the decision, and this issue is reviewed under sentence four of section 405(g).  
25 Plaintiff's brief requesting a sentence four reversal and award of benefits supports this  
26 interpretation. *See* Doc. 17, at 11.

27 Applicable regulations provide that, if "new and material evidence is submitted,"  
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1 the Appeals Council “shall evaluate the entire record including the new and material  
2 evidence submitted if it relates to the period on or before the date of the administrative  
3 law judge hearing decision. It will then review the case if it finds that the administrative  
4 law judge’s action, findings, or conclusion is contrary to the weight of the evidence  
5 currently of record.” 20 C.F.R. § § 404.970(b), 416.1470(b).

6 The Appeals Council considered the additional material submitted, which  
7 concerns medical treatment and additional diagnoses and third party statements received  
8 after July 23, 2009, the date of the ALJ’s decision denying benefits in this case, and  
9 concluded the “additional evidence ... does not provide a basis for changing the  
10 Administrative Law Judge's decision.” Tr. 2. Where the claimant submits evidence after  
11 the ALJ's decision and the Appeals Council specifically considers that evidence, “we  
12 consider the rulings of both the ALJ and the Appeals Council,” and the record for review  
13 includes the new evidence. *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9<sup>th</sup> Cir.1993); 20  
14 C.F.R. § 404.970(b) (providing that the Appeals Council shall evaluate the entire record,  
15 including new relevant evidence); *see also Vasquez v. Astrue*, 572 F.3d 586, 595 n.7 (9<sup>th</sup>  
16 Cir. 2009)(“Because this evidence was submitted to and considered by the Appeals  
17 Council, and is part of the administrative record, this Court may consider it in reaching its  
18 final decision even though the ALJ did not have the benefit of this information during the  
19 initial hearing.”); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1030 n.2 (9<sup>th</sup> Cir. 2007) (quoting  
20 *Ramirez*, court considers new evidence presented to the Appeals Council); *Harman v.*  
21 *Apfel*, 211 F.3d 1172, 1180 (9<sup>th</sup> Cir. 2000)(“We properly may consider the additional  
22 material because the Appeals Council addressed them in the context of denying  
23 appellant’s request for review.”); *Gomez v. Chater*, 74 F.3d 967, 971 (9<sup>th</sup> Cir.  
24 1996)(“Although the Appeals Council affirmed the decision of the ALJ denying benefits  
25 to Gomez, this evidence is part of the record on review to this court.”). If the new  
26 evidence is material, then we must remand the case to the ALJ for reconsideration. *Booz*  
27 *v. Secretary of Health and Human Serv.*, 734 F.2d 1378, 1380 (9<sup>th</sup> Cir.1984). The new  
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1 evidence is material if there is a “reasonable possibility” that it would have changed the  
2 outcome of the administrative proceedings. *Id.*

3 Here, Plaintiff has not met his burden of showing that the additional evidence is  
4 material to the question of whether he was disabled on or before July 23, 2009. The  
5 additional evidence concerns medical diagnoses and treatment received after July 23,  
6 2009. Plaintiff maintains that his current condition was a direct result of his diabetes and  
7 argues that the new evidence shows 30 years of a history of “not particularly well-  
8 controlled” diabetes, diabetic polyneuropathy, and, in December, 2009, a recent diagnosis  
9 of dementia. As the Ninth Circuit instructed in *Mayes*, however, where there is no  
10 evidence in the record supporting a conclusion that a condition has developed into a  
11 disabling condition, the Court should not speculate to reach such a conclusion. *See*  
12 *Mayes*, 276 F.3d at 462, n.4. The burden is on the Plaintiff to show that the two  
13 conditions are related. *Id.* Plaintiff’s heart condition and dementia (which even now has  
14 not been demonstrated by any medical evidence) was not at issue in the ALJ hearing.  
15 Furthermore, because the new evidence did not relate to the relevant period, it is not  
16 material to this determination.

17 As Plaintiff’s treating physician, Dr. Dasari’s opinion is entitled to “special  
18 weight,” and if the ALJ chooses to disregard it, he must, at a minimum, “set forth  
19 specific, legitimate reasons for doing so, and this decision must itself be based on  
20 substantial evidence.” *Embrey v. Bowen*, 849 F.2d 418, 421 (9<sup>th</sup> Cir. 1988) (quoting  
21 *Cotton v. Bowen*, 799 F.2d 1403, 1408 (1986)). However, “[t]he ALJ need not accept the  
22 opinion of any physician, including a treating physician, if that opinion is brief,  
23 conclusory, and inadequately supported by clinical findings.” *Thomas v. Barnhart*, 278  
24 F.3d 947, 957 (9<sup>th</sup> Cir.2002).

25 The ALJ's interpretation of the conflicting medical evidence is supported by  
26 substantial evidence included in his factual findings. Although Dr. Dasari opined in the  
27 RFC that Plaintiff was substantially limited, both Dr. Dasari’s treatment notes and the  
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1 treatment notes from Plaintiff's other treating physicians of record at El Rio Health  
2 Center, Drs. Soltani and Short, contradict Dr Dasari's opinions. Dr. Short, a podiatrist, in  
3 Plaintiff's last examination of record found "[n]o activity modifications or restrictions  
4 recommended at this time." Tr. 443. Dr. Dasari's treatment notes, contemporaneous with  
5 her RFC assessment, indicates right shoulder pain, with reduced range of motion and  
6 moderately severe pain, but no other musculoskeletal complaints or observations that  
7 would explain the restrictions in Dr. Dasari's RFC limiting Plaintiff in his ability to stand,  
8 sit or the need to lie down during the day. Tr. 420-22. The pain and limitations caused by  
9 the shoulder problems as noted by Dr. Dasari in her treatment notes were incorporated  
10 into the ALJ's RFC assessment. Tr. 20, ¶ 5. Accordingly, because it was not adequately  
11 supported by clinical findings, the ALJ did not err by rejecting Dr. Dasari's conclusory  
12 opinion.

13 Plaintiff argues that the ALJ should have found him disabled under Rule 202.01<sup>2</sup>  
14 of the Medical Vocational Guidelines (Grids). Under the Grids, a claimant who is closely  
15 approaching advanced age (*i.e.* 50 to 54) and is found to have a residual functional  
16 capacity which is limited to light work will generally not be considered to be disabled  
17 when they cannot return to their past relevant work unless they are illiterate and have had  
18 only unskilled or no previous work experience. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2,  
19 Table No. 2, Rules 202.09.

20 The ALJ determined that Plaintiff has a limited education but is able to  
21 communicate in English. Tr. 23, ¶ 8. Though Plaintiff requested to testify at the hearing  
22 through an interpreter (Tr. 26, 190), and testified that he spoke "no" or "very little"  
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25 <sup>2</sup> Plaintiff argues that according to Grid Rule 202.01 a claimant must be  
26 determined disabled if he is approaching advanced age, can perform only light duty  
27 activities, and is illiterate or unable to communicate in English. (Doc. 17, at 3.) Grid Rule  
28 202.01, however, applies to claimants of "advanced age," but does not apply to claimants  
such as Plaintiff, who are only "*approaching* advanced age." Accordingly, Grid Rule  
202.01 does not apply to Plaintiff. Presumably, Plaintiff intended to cite Grid Rule  
202.09, which applies to claimants "approaching advanced age" and the Court will  
analyze the argument accordingly.

1 English (Tr. 30), Plaintiff's Disability Report states that Plaintiff can speak, understand,  
2 and read English. (Tr. 140) Plaintiff did not assert that the Disability Report, which is  
3 completed in a field office through a face-to-face interview process (see Tr. 137), was  
4 completed incorrectly. Furthermore, Plaintiff completed handwritten responses in English  
5 to the English language "Exertional Daily Activities Questionnaire," suggesting that  
6 Plaintiff is literate to some degree. (Tr. 148) Finally, Plaintiff completed a consultative  
7 examination with a psychologist, Francisco Sanchez, Ph.D., and Dr. Sanchez's report  
8 indicates that Plaintiff undertook the exam in Plaintiff's primary language, which Dr.  
9 Sanchez indicated was "English." Tr. 347.

10 The Commissioner, not the court, is charged with the duty to weigh the evidence,  
11 resolve material conflicts in the evidence and determine the case accordingly. Reviewing  
12 courts must consider the evidence that supports as well as detracts from the examiner's  
13 conclusion. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975). "When the  
14 evidence before the ALJ is subject to more than one rational interpretation, we must defer  
15 to the ALJ's conclusion." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198  
16 (9th Cir. 2004). This is so because "[t]he [ALJ] and not the reviewing court must resolve  
17 conflicts in the evidence, moreover, "if the evidence can support either outcome, the  
18 court may not substitute its judgment for that of the ALJ." *Matney v. Sullivan*, 981 F.2d  
19 1016,1019 (9th Cir. 1992)(citations omitted). At the same time, the Court "must consider  
20 the entire record as a whole and may not affirm simply by isolating a 'specific quantum of  
21 supporting evidence.'" *Batson*, 359 F.3d at 1198 (citing *Hammock v. Bowen*, 879 F.2d  
22 498, 501 (9th Cir.1989)).

23 The ALJ did not err in finding that Plaintiff was able to communicate in English.  
24 Plaintiff did not, in fact, claim an inability to speak English in his first field interview  
25 Disability Report, and no interpreter was requested. Tr. 136. This was consistent with the  
26 medical evidence of record overall, which, though not conclusive, does not indicate any  
27 need for interpretation during medical appointments, and does indicate that interviews  
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1 were not conducted in English, and does indicate that English was Plaintiff's primary  
2 language, and that despite Plaintiff's self-serving testimony that he was unable to speak  
3 any English at all, or only very little (Tr. 30), he was able to read and fill in written  
4 answers to an English language form of daily activities questionnaire. Tr. 148.

5 Finally, Grid Rule 202.09 applies to an individual with unskilled, or no work  
6 experience. In this case, Plaintiff had semi-skilled work experience (Tr. 41-42), thus,  
7 Grid Rule 202.09 does not apply, and the ALJ did not err in finding that Plaintiff did not  
8 meet a grid rule.

9 Last, Plaintiff argues that remand is appropriate in light of a subsequent favorable  
10 decision granting benefits as of July 24, 2009.

11 In this instance, Plaintiff seeks remand to consider new evidence, and thus, is  
12 requesting relief pursuant to 42 U.S.C. § 405(g), sentence six. Remand for  
13 reconsideration under sentence six of 42 U.S.C. ¶ 405(g) is appropriate only where a  
14 plaintiff submits new evidence and further shows that: (1) the new evidence is material to  
15 his disability; and (2) he had good cause for failing to submit the evidence earlier. *See*  
16 *Mayes*, 276 F.3d at 462; *see also* 42 U.S.C. ¶ 405(g) (sentence six: a court may "order  
17 additional evidence to be taken before the Commissioner of Social Security, but only  
18 upon a showing that there is new evidence which is material and that there is good cause  
19 for the failure to incorporate such evidence into the record"). To be material, the new  
20 evidence must bear "directly and substantially on the matter in dispute," and the plaintiff  
21 must show a "reasonable probability" that the new evidence would have changed the  
22 outcome of the administrative hearing. *See Mayes*, 276 F.3d at 462.

23 Plaintiff asserts that the agency's subsequent decision in February 2010, finding  
24 disability and awarding benefits as of July 24, 2009, which Plaintiff submitted to the  
25 Appeals Council, was new and material evidence warranting remand in this case.  
26 Plaintiff, citing a district court case out of the Southern District of West Virginia, argues  
27 that remand is warranted when an award is based on an onset date coming in immediate  
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1 proximity to an earlier denial of benefits. *Bradley v. Barnhart*, 463 F.Supp.2d 577, 581  
2 (S.D.W.Va. 2006). The District Court in *Bradley*, however, distinguished that case from a  
3 Ninth Circuit case which controls the outcome in this case, and which Plaintiff did not  
4 cite, which states:

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6 Under 42 U.S.C. § 405(g), remand is warranted only if there is new  
7 evidence that is material and good cause for the late submission of the  
8 evidence. New evidence is material if it “bear[s] directly and substantially  
9 on the matter in dispute,” and if there is a “reasonabl[e] possibility that the  
10 new evidence would have changed the outcome of the ... determination.”  
11 *Booz v. Sec’y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th  
12 Cir.1984) (internal quotation marks and citations omitted) (emphasis  
13 omitted).

14 In this case, Bruton's second application involved different medical  
15 evidence, a different time period, and a different age classification. For  
16 these reasons, the second ALJ's subsequent decision to award benefits [] is  
17 not inconsistent with the first ALJ's denial of Bruton's initial application.  
18 We therefore hold that the district court did not err in denying Bruton's  
19 motion to remand.

20 *Bruton v. Massanari*, 268 F.3d 824, 827 (9<sup>th</sup> Cir. 2001).

21 Here, the subsequent decision is not material because it concerns a different time  
22 period and different medical evidence. The ALJ decision under review in this case is  
23 dated July 23, 2009, and concerns the period from August 20, 2007 through July 23, 2009  
24 (Tr. 25). By contrast, the subsequent decision finds disability between July 24, 2009, and  
25 February 1, 2010. Tr. 482-83. The subsequent decision specifically states that Plaintiff  
26 became eligible for Social Security benefits after the date of the first ALJ's decision. Tr.  
27 482. Thus, the two periods do not overlap and there is nothing inconsistent about the two  
28 decisions. Further, though this Court is not definitively aware of what evidence supported  
the agency's decision to award benefits, as discussed above, the medical evidence  
submitted concerning Plaintiff's condition at least as of December 2009, indicated the  
development of heart conditions and possible dementia, two conditions which were not at  
issue prior to the ALJ's decision. Thus, Plaintiff has not met the burden of showing

1 materiality.

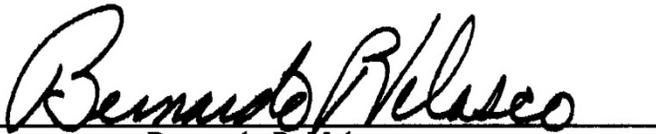
2 **III. CONCLUSION**

3 Because the Court finds that the ALJ's interpretation of the medical opinions is a  
4 rational one supported by the evidence, and because the ALJ did not err in failing to find  
5 Plaintiff disabled under the Grids, and because Plaintiff did not meet his burden in  
6 demonstrating the materiality of either the new evidence or the subsequent award of  
7 benefits in order to demonstrate cause for remand, the Court will not reverse the agency's  
8 denial of benefits.

9 IT IS ORDERED:

- 10 1. Defendant's administrative decision denying benefits is affirmed.  
11 2. The Clerk is directed to terminate this action.

12 Dated this 6th day of March, 2012.

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16 Bernardo P. Velasco  
17 United States Magistrate Judge  
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