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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Ricardo Enrique Luna,)

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Plaintiff,)

No. CV-12-0384-TUC-DTF

10

ORDER

vs.)

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Carolyn W. Colvin,)

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Acting Commissioner of)

Social Security Administration,)

13

Defendant.)

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_____)

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Plaintiff Ricardo Luna brought this action pursuant to 42 U.S.C. § 405(g), seeking

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judicial review of a final decision by the Commissioner of Social Security (Commissioner).

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Before the Court are Plaintiff’s opening brief, Defendant’s Response and a Reply (Docs. 17,

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20, 23.) The parties consented to exercise of jurisdiction by a Magistrate Judge, pursuant to

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28 U.S.C. § 636(c)(1). (Docs. 8, 11.) The Court finds this case should be remanded for

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further proceedings.

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PROCEDURAL HISTORY

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Luna filed an application for Supplemental Security Income (SSI) on March 11,

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2009.¹ (Administrative Record (AR) 133.) Luna alleged disability from March 1, 2009. (AR

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133.) Luna’s application was denied upon initial review (AR 69) and on reconsideration (AR

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¹ At the hearing, Plaintiff’s counsel and the ALJ discussed Plaintiff’s possible eligibility for Disability Insurance Benefits (DIB), in addition to SSI. (AR 42-44.) In his brief, Plaintiff notes the issue is irrelevant unless the case is remanded. There is no record that Plaintiff has, to date, sought DIB; therefore, the Court evaluates only the application for SSI currently before it. Plaintiff can address this further on remand.

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1 74). A hearing was held on September 30, 2009 (AR 39-66), after which ALJ Larry E.
2 Johnson found that Luna was not disabled (AR 10-17). The Appeals Council denied Luna's
3 request to review the ALJ's decision. (AR 1.)

4 FACTUAL HISTORY

5 Luna was born on December 14, 1966, making him 42 at the alleged onset date of his
6 disability. (AR 133.) From 1993 to 2005, Luna worked in construction and as a cook, earning
7 negligible amounts some years up to approximately \$11,000 for a few of the years. (AR 141,
8 154, 156.) Luna stopped working in May 2005, due to surgery for ulcers. (AR 154.) Luna
9 alleges he is unable to work due to psychological impairments. He has received all of his
10 mental health services from La Frontera, with records spanning from January 2009 to
11 September 2011.

12 The ALJ found that Luna had one severe impairment, affective disorder. (AR 12.) The
13 ALJ noted that Luna alleged additional mental health issues, PTSD, mood swings, auditory
14 hallucinations and lack of concentration, but determined that these were not severe in light
15 of his lack of participation in treatment and/or the fact that they were resolved with
16 medication. (AR 12-13.) The ALJ determined that Luna had the capacity to perform work
17 at all exertional levels with limited exposure to co-workers, supervisors and the general
18 public. (AR 15.) The ALJ ultimately concluded Luna could perform his past relevant work
19 as a cook and, based on the Medical-Vocational Rules, Luna could perform other work
20 available in the national economy. (AR 16-17.)

21 STANDARD OF REVIEW

22 The Commissioner employs a five-step sequential process to evaluate SSI claims. 20
23 C.F.R. § 416.920; *see also Heckler v. Campbell*, 461 U.S. 458, 460-462 (1983). To establish
24 disability the claimant bears the burden of showing he (1) is not working; (2) has a severe
25 physical or mental impairment; (3) the impairment meets or equals the requirements of a
26 listed impairment; and (4) claimant's RFC precludes him from performing his past work. 20
27 C.F.R. § 416.920(a)(4). At Step Five, the burden shifts to the Commissioner to show that the
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1 claimant has the RFC to perform other work that exists in substantial numbers in the national
2 economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007). If the Commissioner
3 conclusively finds the claimant “disabled” or “not disabled” at any point in the five-step
4 process, he does not proceed to the next step. 20 C.F.R. § 416.920(a)(4).

5 “The ALJ is responsible for determining credibility, resolving conflicts in medical
6 testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
7 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)). The findings of the
8 Commissioner are meant to be conclusive if supported by substantial evidence. 42 U.S.C.
9 § 405(g). Substantial evidence is “more than a mere scintilla but less than a preponderance.”
10 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (quoting *Matney v. Sullivan*, 981 F.2d
11 1016, 1018 (9th Cir. 1992)). The court may overturn the decision to deny benefits only
12 “when the ALJ’s findings are based on legal error or are not supported by substantial
13 evidence in the record as a whole.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.
14 2001). This is so because the ALJ “and not the reviewing court must resolve conflicts in the
15 evidence, and if the evidence can support either outcome, the court may not substitute its
16 judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019 (quoting *Richardson v. Perales*, 402
17 U.S. 389, 400 (1971)); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir.
18 2004). The Commissioner’s decision, however, “cannot be affirmed simply by isolating a
19 specific quantum of supporting evidence.” *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir.
20 1998) (citing *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)). Reviewing courts must
21 consider the evidence that supports as well as detracts from the Commissioner’s conclusion.
22 *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975).

23 DISCUSSION

24 Luna alleges the ALJ committed four errors, that he failed to properly evaluate the
25 opinions of Luna’s treating providers; failed to properly evaluate lay witness testimony;
26 failed to properly evaluate Luna’s credibility; and improperly relied upon the vocational
27 guidelines at Step Five.

1 **Treating Providers**

2 Plaintiff argues the ALJ failed to give weight to the favorable medical evidence from
3 his treating records. Plaintiff also argues there was no basis to dismiss the opinions of his
4 treating medical professionals. However, Plaintiff does not point to any “medical source
5 opinions,” and there are none in the records. See 20 C.F.R. § 416.913(c) (discussing medical
6 source opinions about the claimant’s abilities to work). Therefore, the Court evaluates solely
7 how the ALJ treated Luna’s medical records from La Frontera.

8 Plaintiff contends the ALJ discounted his medical records on improper grounds. The
9 ALJ found that Plaintiff had one severe impairment, an affective disorder. (AR 12.) The ALJ
10 failed to explain his dismissal of the uncontradicted diagnoses by Dr. Hanlon, an acceptable
11 medical source, as defined in the Social Security Administration regulations, 20 C.F.R.
12 § 416.913(a). In an initial psychiatric diagnostic interview, Dr. Hanlon diagnosed Luna with
13 generalized anxiety, a psychotic disorder NOS, and PTSD. (AR 314.) Upon remand, the ALJ
14 must reconsider these diagnoses and what severe impairments Plaintiff has established.

15 The ALJ stated that he was discounting Plaintiff’s allegations of other mental
16 impairments – PTSD, mood swings and auditory hallucinations – because: (1) Plaintiff’s
17 treatment was solely through a court-ordered program, (2) his participation in therapy was
18 sporadic and he missed numerous sessions, (3) his nightmares, auditory hallucinations and
19 depression were resolved with medication, and he was stable when compliant with
20 medication, and (4) his setbacks were primarily related to alcohol relapse. (AR 12-13, 15-16.)
21 The Court finds this is not an accurate representation of the record as a whole and is not
22 supported by substantial evidence.

23 First, although Plaintiff appears to have begun treatment because it was required, he
24 completed the mandatory program in January 2010 (AR 480) and he was still receiving
25 treatment and medication through the same provider in July 2011 (AR 636). Second, it is
26 accurate that Plaintiff missed numerous therapy sessions but he continued to request therapy
27 and medication, including affirmatively requesting that therapy be reinstated when his
28 therapist dropped him for excessive missed appointments. (AR 269, 454.) An ALJ may not

1 draw inferences based on a failure to seek treatment without inquiring for an explanation by
2 the claimant or considering other record evidence that may explain the lack of care. SSR 96-
3 7p. The ALJ did not seek an explanation for lack of treatment during the hearing or from the
4 record. (AR 28-42.) Additionally, lack of treatment is a questionable basis on which to reject
5 mental health claims because mental illness may impair judgment resulting in failure to seek
6 assistance. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996); *Pate-Fires v. Astrue*, 564
7 F.3d 935, 945-46 (8th Cir. 2009). Unlike an assertion of pain, for which failure to seek
8 treatment is incongruous with a disabling condition, not seeking mental health treatment is
9 consistent with the impairment. This is evidenced in this case by Luna's anxiety and paranoia
10 which often prevented him from leaving his house.

11 Third, the record does not demonstrate that Plaintiff was consistently stable when he
12 complied with his prescribed medication. The record indicates that even when Luna did
13 follow the prescribed medication regimen, the drugs were not consistently effective in
14 relieving his symptoms.² In March 2009, Luna indicated his nightmares were relieved and
15 he was having few hallucinations but he was still anxious; in May and June 2009, he was
16 anxious, having a hard time leaving his house, depressed, hearing voices, and requested a
17 medication change; in August 2009, Luna was depressed and hearing voices but
18 volunteering, however, he had quit by the following month because he was paranoid and
19 afraid to leave his house, and the doctor altered his medication again; in January and
20 February 2010, Luna indicated his medications were not working well and they were
21 changed because many of his symptoms were not controlled; in March and April, he reported
22 some improvement from the switch to Prozac; by May, he felt the medications were not
23 working well and he was depressed; in June and July 2010, he had been inconsistent with his

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25 ² It is difficult to decipher from the record when Plaintiff was in full compliance with
26 his prescribed medication. For example, on September 22, 2010, Luna reported running out
27 of his medication and a bridge prescription was provided, but on October 8, 2010, he stated
28 that he had not taken his medication for two and a half months. (AR 405, 599, 603.) Also on
October 8, he told a different La Frontera employee that he felt his medications were not
working well at that time but did not indicate that he was not taking them. (AR 612.)

1 medication and he was very anxious and depressed; in August and October 2010, Luna
2 indicated medication was not effective (and he may have been not compliant in taking them)
3 and they were changed; in November 2010, when he was having hallucinations, restless sleep
4 and racing thoughts, his medications were changed again; and after running out of
5 medication and restarting, they were changed again in June and July 2011. (AR 275, 277,
6 289, 291, 295, 305, 351, 356, 359, 366, 369, 371, 372, 379, 387, 405, 412, 426, 433, 476,
7 477, 486, 489, 491, 493, 495, 512, 514, 581, 584, 612, 636, 639, 660.) There is no extended
8 period of time during which Luna’s symptoms were controlled by medication, and his mental
9 health providers continued to alter his prescriptions because they were not wholly effective.

10 Additionally, Plaintiff was assigned a Global Assessment of Functioning (GAF) score
11 of 48 at the time of intake, January 2009, and it was found to be 50 in January 2011, and 48
12 in April 2011.³ (AR 327, 646, 657.) Luna also was determined to be seriously mentally ill
13 for purposes of Arizona’s behavioral health system, based on a diagnosis of schizophrenia.
14 (AR 337.) The ALJ failed to consider this evidence.

15 Fourth, Luna’s setbacks were not primarily related to a relapse with alcohol. The
16 medical records span from January 2009 to September 2011. (AR 321, 633.) The references
17 to alcohol consumption are limited to three or four specific instances during a few month
18 period, December 2009 to March 2010. (AR 355, 468, 491, 493, 495, 504.) In April 2010,
19 Luna requested medication to decrease his craving for alcohol and the record does not reveal
20 any subsequent issues with alcohol. (AR 359.) The severity of Luna’s symptoms do not
21 appear connected to his consumption of alcohol, with the exception of an increase in suicidal
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24 ³ The GAF is a 100-point scale that measures a person’s overall level of psychological,
25 social and occupational functioning on a hypothetical continuum. *See* American Psychiatric
26 Ass’n, *Diagnostic & Statistical Manual of Mental Disorders* (“*DSM IV*”), at 32, 34 (4th ed.
27 2000). Lower numbers indicate more severe symptoms. A rating of 41 to 50 indicates
28 serious symptoms or “serious impairment in social, occupational, or school functioning.” *Id.*
at 34; *see also* *Brueggemann v. Barnhart*, 348 F.3d 689, 695 (8th Cir. 2003) (noting that a
GAF of 50 reflects serious limitations and the vocational expert believed it precluded finding
work).

1 ideation during that time period. (AR 468, 502, 504, 506.) Rather, it appears that when his
2 symptoms were particularly exacerbated he would turn to alcohol to relieve them.

3 In sum, the Court finds the ALJ failed to give sufficient weight to Luna’s medical
4 records or to support his decision with substantial evidence. Upon remand, the ALJ must
5 consider the entirety of the medical record when evaluating Steps Two and Three and
6 Plaintiff’s RFC.

7 **Plaintiff’s Credibility**

8 The ALJ found Plaintiff’s statements concerning the severity of his symptoms not
9 credible to the extent inconsistent with the ALJ’s RFC finding.⁴ (AR 16.)

10 In general, “questions of credibility and resolution of conflicts in the testimony are
11 functions solely” for the ALJ. *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007) (quoting
12 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982)). However, “[w]hile an ALJ may
13 certainly find testimony not credible and disregard it . . . [the court] cannot affirm such a
14 determination unless it is supported by specific findings and reasoning.” *Robbins v. Soc. Sec.*
15 *Admin.*, 466 F.3d 880, 884-85 (9th Cir. 2006); *Bunnell v. Sullivan*, 947 F.2d 341, 345-346
16 (9th Cir. 1995) (requiring specificity to ensure a reviewing court the ALJ did not arbitrarily
17 reject a claimant’s subjective testimony); SSR 96-7p. “To determine whether a claimant’s
18 testimony regarding subjective pain or symptoms is credible, an ALJ must engage in a two-
19 step analysis.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007).

20 “First, the ALJ must determine whether the claimant has presented objective medical
21 evidence of an underlying impairment ‘which could reasonably be expected to produce the
22 pain or other symptoms alleged.’” *Id.* at 1036 (quoting *Bunnell*, 947 F.2d at 344). ALJ
23 Johnson found Luna had satisfied part one of the test by proving an impairment that could

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25 ⁴ The Commissioner argues that the ALJ found Luna’s activities of daily living (ADL)
26 inconsistent with his alleged symptoms. (Doc. 20 at 8.) The ALJ made no finding of
27 inconsistency. When evaluating Step Three, the ALJ determined that Luna had no restrictions
28 in ADL (AR 14) but did not relate this finding to his subsequent credibility assessment (AR
15-16). Further, as discussed below in relation to lay witness testimony, the ALJ’s finding
regarding ADL was not supported by substantial evidence.

1 produce the symptoms alleged. (AR 16.) Second, if “there is no affirmative evidence of
2 malingering, the ALJ can reject the claimant’s testimony about the severity of her symptoms
3 only by offering specific, clear and convincing reasons for doing so.” *Tommasetti v. Astrue*,
4 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1281, 1283-84
5 (9th Cir. 1996)). The ALJ did not find, and the record does not reveal, any evidence of
6 malingering; therefore, to support his discounting of Luna’s credibility regarding the severity
7 of his symptoms, the ALJ had to provide clear and convincing, specific reasons. *See Vasquez*
8 *v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2008) (quoting *Lingenfelter*, 504 F.3d at 1036).

9 The ALJ’s conclusion that Luna was not entirely credible was based on his finding
10 that when Luna was compliant with his medication he could function and was stable. (AR
11 15.) Further, the ALJ noted that Luna did not seek consistent therapeutic treatment, but
12 maintained his prescriptions, suggesting he was stable with medication. (AR 16.)

13 As addressed extensively above, the Court determined that the ALJ’s finding – that
14 Plaintiff was stable when taking his medication – was not supported by substantial evidence.
15 This finding is not a clear and convincing reason to reject Plaintiff’s credibility. Also
16 discussed above, the ALJ failed to make any inquiry regarding Luna’s lack of treatment;
17 therefore, he cannot rely upon it when resolving his claims. As illustrated by Luna’s
18 difficulty in leaving his house due to his impairment, lack of treatment for mental illness is
19 not a well-founded reason to reject such claims. *See Nguyen v. Chater*, 100 F.3d at 1465;
20 *Pate-Fires*, 564 F.3d at 945-46. Additionally, Luna never left treatment for an extended
21 period of time. Despite some gaps in therapy, he always sought further medical care. The
22 ALJ erred in his evaluation of Plaintiff’s credibility.

23 **Lay Witness Testimony**

24 In March 2009, Natalia Luna, Plaintiff’s mother, completed a function report about
25 Luna. (AR 164-71.) She stated that “at times” Plaintiff would help out at home and with his
26 grandchild, and on a “good day” he did laundry and household chores. (AR 165, 166.) She
27 stated that he would only go to the grocery store when she was available and that he was too
28 nervous to drive. (AR 167.) She affirmed that Plaintiff needed reminders to go to therapy or

1 doctor's appointments. (AR 168.) She indicated he had problems with his memory,
2 completing tasks, concentration and following instructions. (AR 169.) At the October 2010
3 hearing, she testified that he was paranoid, couldn't function, had memory lapses and forgot
4 things like food in the oven. (AR 60-61.) She felt some of the symptoms might be aggravated
5 by the medication not working properly or Luna not getting the right dosages. (AR 61, 62.)

6 Luna's wife also testified at the hearing, stating that she removed a gun from his hand
7 when he was trying to shoot himself in the head. (AR 63.) She stated that Luna thinks his
8 family members are trying to hurt him, that he's paranoid and psychotic. (AR 63-64.) She
9 noted that on the medications he takes he does not really function and she has to make him
10 take a shower and get dressed. (AR 64.) She also stated that he will not leave the house
11 without her or his mother. (*Id.*) She indicated that, at that time, she and Luna's mother were
12 doing the housework and cooking for him. (AR 64-65.)

13 The ALJ discussed Luna's mother's statement only when evaluating Plaintiff's
14 activities of daily living for Step Three of the analysis. (AR 14.) He mentioned solely the
15 function report and summarized it as establishing that Plaintiff cared for his wife, five
16 children and grandchild, including preparing meals, doing laundry, chores and yard work.
17 (*Id.*) This is not a complete representation of the lay witness testimony, which indicated that,
18 as of March 2009, Luna did some household chores on days he felt good. However, at the
19 time of the hearing, his wife indicated he was not doing any of those activities and his mother
20 said that things caught on fire in the oven because he forgot them. Further, they both stated
21 he was not functional and he would not leave the house without his wife or mother. The ALJ
22 erred in implicitly rejecting this testimony without providing reasons specific to each witness.
23 *Stout v. Comm'r, Social Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006).

24 **Nonexertional Limitations**

25 Luna argues that the ALJ failed to fully consider his nonexertional limitations, which
26 would require the testimony of a vocational expert. Because the Court already is remanding
27 this matter for further proceedings, it does not reach this issue. After the ALJ reconsiders the
28 medical record, Luna's credibility, lay witness testimony, Steps Two and Three, and Luna's

1 RFC, he will have to reassess Steps Four and/or Five. If appropriate at that time, he should
2 obtain the testimony of a vocational expert.

3 **CONCLUSION**

4 A federal court may affirm, modify, reverse, or remand a social security case. 42
5 U.S.C. § 405(g). When a court finds that an administrative decision is flawed, the remedy
6 should generally be remand for “additional investigation or explanation.” *INS v. Ventura*, 537
7 U.S. 12, 16 (2006) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985));
8 *see also Moisa v. Barnhart*, 367 F.3d 882, 886 (9th Cir. 2004). However, if there are no
9 outstanding issues because “the record has been developed fully and further administrative
10 proceedings would serve no useful purpose, the . . . court should remand for an immediate
11 award of benefits.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). Here,
12 outstanding issues remain because after the ALJ reassesses Luna’s severe impairments at
13 Step Two, he must evaluate the remaining steps and Luna’s RFC. *See Kent v. Astrue*, 335 F.
14 App’x 673, 675 (9th Cir. 2009). This process may include again scheduling a consultative
15 exam and obtaining vocational testimony as necessary. On remand, Plaintiff should clarify
16 if he is also seeking DIB and, if so, should complete any necessary steps to pursue such
17 benefits.

18 Accordingly,

19 **IT IS ORDERED** that this case is remanded to the ALJ for a new hearing and further
20 proceedings, pursuant to sentence four of 42 U.S.C. § 405(g). The Clerk of Court should
21 enter judgment and close this case.

22 DATED this 28th day of May, 2013.

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D. Thomas Ferraro
United States Magistrate Judge