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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Manuel Damiano,)

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Plaintiff,)

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vs.)

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Carolyn W. Colvin, Acting)
Commissioner of Social Security,)

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Defendant.)

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Plaintiff Manuel Damiano brought this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of a final decision by the Commissioner of Social Security (Commissioner). Before the Court are Plaintiff’s opening brief and Defendant’s Response. (Docs. 14, 14-1, 17.)¹ The parties consented to exercise of jurisdiction by a Magistrate Judge, pursuant to 28 U.S.C. § 636(c)(1). (Docs. 8, 10.) The Court finds that Plaintiff is not entitled to relief.

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PROCEDURAL HISTORY

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¹ The Court notes that Plaintiff’s Opening Brief is 30 pages in length and he submitted a separate 20-page statement of facts. This violates Local Rule Civil 16.1(d), which allows 25 pages for the opening brief inclusive of the facts. Because Defendant has not objected and the matter is fully briefed, the Court will allow the additional pages.

1 Five, that Damiano was not disabled (AR 20-28). The Appeals Council denied Damiano's
2 request to review the ALJ's decision. (AR 1.)

3 FACTUAL HISTORY

4 Damiano was born on November 6, 1968, making him 35 at the alleged onset date of
5 her disability. (AR 157.) He left school around fifth grade and is illiterate. (AR 56, 206.) His
6 work experience is as a laborer and metal framer. (AR 208, 219.) At the age of 19 or 20, he
7 was shot in the hip. (AR 53, 62.) He broke his right ankle in approximately 2001, and he
8 testified it causes him a lot of pain and to fall regularly. (AR 53-54, 55.) He was laid off from
9 his last job because he could not carry a necessary amount, he could not move fast enough
10 and he would fall. (AR 55, 56.) He was hired for some lighter work for short periods but also
11 was laid off from those jobs. (AR 56, 59.)

12 The ALJ determined Damiano had two severe impairments: borderline intellectual
13 functioning and history of back pain. (AR 22.) The ALJ found that Damiano could perform
14 light work but was limited to unskilled work (AR 27) due to the following nonexertional
15 limitations: markedly limited in ability to make judgments on complex work-related
16 decisions; moderately limited in ability to understand, remember and carry out complex
17 instructions, and respond appropriately to usual work situations and changes in routine work
18 setting; and mildly limited in ability to make judgments on simple work-related decisions,
19 understand and remember simple instructions, and interact appropriately with the public,
20 supervisors and co-workers. (AR 24.) The ALJ concluded Damiano could not perform his
21 past relevant work, which required a higher exertional level, but based on the Medical-
22 Vocational Guidelines, he could perform other work available in the national economy. (AR
23 27.)

24 STANDARD OF REVIEW

25 The Commissioner employs a five-step sequential process to evaluate SSI and DIB
26 claims. 20 C.F.R. §§ 404.920, 416.1520; *see also Heckler v. Campbell*, 461 U.S. 458, 460-
27 462 (1983). To establish disability the claimant bears the burden of showing he (1) is not
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1 working; (2) has a severe physical or mental impairment; (3) the impairment meets or equals
2 the requirements of a listed impairment; and (4) claimant’s residual functional capacity
3 (RFC) precludes him from performing his past work. 20 C.F.R. §§ 404.920(a)(4),
4 416.1520(a)(4). At Step Five, the burden shifts to the Commissioner to show that the
5 claimant has the RFC to perform other work that exists in substantial numbers in the national
6 economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007). If the Commissioner
7 conclusively finds the claimant “disabled” or “not disabled” at any point in the five-step
8 process, he does not proceed to the next step. 20 C.F.R. §§ 404.920(a)(4), 416.1520(a)(4).

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

23 **DISCUSSION**

24 Damiano alleges the ALJ committed three errors, that he failed to give proper weight
25 to his treating physician; erred in giving great weight to an examining physician; and
26 improperly relied upon the guidelines at Step Five.

1 **Treating Physician, Dr. Churchill**

2 Plaintiff argues the ALJ failed to weigh properly the opinion of his primary care
3 doctor Patrice Churchill.² On August 20, 2010, Dr. Churchill completed a Physical Residual
4 Functional Capacity Assessment. (AR 318.) She concluded Damiano could stand for 2 hours
5 of an 8-hour day, sit for 15-30 minutes without changing positions and walk one block
6 without stopping; could occasionally lift 10 pounds but never lift 20 pounds; frequently reach
7 and constantly finger and grasp; must lie down during the day and alternate sitting and
8 standing; and, more than 5 days per month, would be unable to work due to physical
9 problems. (*Id.*)

10 After providing his summary of the record evidence, the ALJ accorded no weight to
11 the opinion of Dr. Churchill because he found it was “simply not supported by the balance
12 of the medical evidence of record, which indicates minor, if any, findings.” (AR 26.) To
13 evaluate the ALJ’s finding regarding Dr. Churchill’s opinion, the Court reviewed the totality
14 of the record and summarizes below the medical evidence central to this issue.

15 In October 2009, Damiano presented at the ER with 4 days of abdominal pain. (AR
16 308.) He was diagnosed with a right inguinal hernia and cholelithiasis (gallstone disease).
17 (*Id.*) Subsequently, he had two surgeries, one to remove his gallbladder (November 2009)
18 and one to repair the hernia (February 2010). (AR 267, 298.) After the hernia surgery
19 Damiano was admitted to the hospital overnight due to pain but requested discharge the
20 following day feeling well. (AR 296.) There is no record evidence that these surgeries
21 imposed extended physical restrictions.

22 Damiano first saw Dr. Churchill on March 23, 2010, and her records continue until
23 the hearing before the ALJ. At the first appointment, Dr. Churchill gave Damiano a 30-day
24 prescription for Omeprazole for reflux. (AR 334.) Her records do not reflect any further
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26 ² Plaintiff mentions other arguments in the introduction to this claim but, because he
27 did not develop them in his brief, the Court does not address them. *See Carmickle v. Comm,*
28 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to address an issue not
argued with any specificity).

1 complaints of abdominal pain or treatment for any gastrointestinal issues. Dr. Churchill's
2 records document Damiano's complaints about back and ankle problems, however, they
3 provide limited medical findings to verify these reported symptoms. The abnormal findings
4 by Dr. Churchill were limited and non-acute: on July 29, 2010, Damiano had a mild stiff gait
5 and mild stiffness of his hip flexors (AR 341); on August 24, 2010, his gait and stance were
6 abnormal but there were no acute findings (AR 345); on September 21, 2010, he had a
7 decreased range of motion, particularly in flexion and extension, and the "usual" chronic
8 lumbar spasm, but there were no acute palpatory findings (AR 350); and on November 4,
9 2010, he presented with mild chronic spasm of upper and lower back muscles but no acute
10 findings (AR 353). Dr. Churchill prescribed a variety of medications in various combinations
11 for Damiano's muscle pain, including Cyclobenzaprine, Diclofenac Sodium, Piroxicam,
12 Naproxen and Cymbalta. (AR 337, 342, 345, 350, 352, 354, 356, 357.) In November, 2010,
13 she gave him an injection of Ketorolac in the left upper outer quadrant (AR 358), and
14 subsequently referred him for steroid injections (AR 359).

15 Many of Dr. Churchill's findings were normal: on April 13, 2010, full range of motion
16 and no tenderness in musculoskeletal system (AR 337); on August 24, 2010, back normal on
17 exam with no costo vertebral angle tenderness (AR 344); and on November 4, 2010, full
18 range of motion, no limping and absence of pain (AR 353). Further, x-rays taken of
19 Damiano's hips, lumbar spine and feet were negative (AR 335, 374) and preliminary labs
20 covering arthritis were negative and normal (AR 335). An MRI of the lumbar spine revealed
21 bulging discs at L4-L5 and L5-S1 with mild spondylosis. (AR 376.) However, the
22 neurosurgeon to whom Damiano was referred, Dr. Brian Callahan, found only mild disc
23 disease that did not require surgery and did not explain Damiano's stated pain. (AR 323.)
24 Subsequent nerve conduction studies, as recommended by Dr. Callahan, were normal. (AR
25 323, 324.) Dr. Callahan's physical exam revealed normal muscle strength and reflexes, no
26 Babinski sign, normal gait and coordination, and intact sensation. (AR 322-23.)

27 Damiano was sent for two consultative physical examinations. He was examined by
28 Dr. Enrique Suarez on December 29, 2009, who found that Damiano had normal range of

1 motion, reflexes, ambulation and x-rays. (AR 286.) After summarizing the exam as normal,
2 Dr. Suarez concluded that Damiano had no limitations on his activities. (AR 282, 286.)

3 He was examined again on June 27, 2011, by Dr. Amna Yaqoob. Dr. Yaqoob
4 performed a straight leg raise test bilaterally and a Romberg test, both of which were
5 negative. (AR 389.) Damiano's strength was normal with good muscle tone, and his gait,
6 sensory examination, deep tendon reflexes and cranial nerves were unremarkable. (*Id.*) There
7 was no paravertebral muscle spasm or tenderness and all tested range of motion was normal,
8 but Damiano resisted examination of his lumbar range of motion. (*Id.*) Dr. Yaqoob noted that
9 he squatted, bent forward and extended his back and moved laterally without restriction, took
10 his shoes off and put them back on, and he got on and off the examination table and sat
11 comfortably. (AR 388-89.) His general physical movement was unremarkable, which the
12 doctor found inconsistent with Damiano's reported experiences. (AR 388.) Dr. Yaqoob
13 diagnosed back pain with normal cervical examination; right ankle pain secondary to mild
14 osteoarthritis post-traumatic with normal range of motion and no limitations; and abdominal
15 pain secondary to gastroesophageal reflux disease with no limitations to physical activity.
16 (AR 389.) She found no 12-month limitations on Damiano's activity. (AR 390, 396-401.)

17 Damiano argues, first, that Dr. Churchill's opinion should have been accorded
18 controlling weight as his treating physician. The governing regulations provide:

19 When a treating physician's opinion on the issue(s) of the nature and severity
20 of your impairment(s) is well-supported by medically acceptable clinical and
21 laboratory diagnostic techniques and is not inconsistent with the other
substantial evidence in your case record, we will give it controlling weight.

22 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). Dr. Churchill's opinion that Damiano was
23 significantly restricted in his ability to work was not well-supported by clinical and
24 laboratory techniques. Over the course of treating Damiano for a year, she periodically
25 documented mild non-acute abnormalities such as stiff gait, decreased range of motion or
26 muscular spasms in the back. (AR 341, 345, 350, 353.) During other exams he exhibited full
27 range of motion, absence of tenderness and no pain. (AR 337, 344, 353.) All laboratory
28 findings, including x-rays, blood testing and nerve conduction studies, were negative with

1 the exception of a lumbar MRI (AR 323, 324, 335, 374, 376), which revealed such minor
2 impairment that Dr. Churchill acknowledged there was “no real disc disease” (AR 356).

3 Further, Dr. Churchill’s opinion is inconsistent with the other medical record
4 evidence. Dr. Callahan, a neurosurgical specialist, found no abnormalities during his exam
5 of Damiano and concluded the disc disease did not explain Damiano’s pain. (AR 322-24.)
6 Similarly, Drs. Suarez and Yaqoob, practitioners in internal medicine, examined and tested
7 Damiano a year-and-a-half apart and all of the results were normal. (AR 286, 389.) These
8 doctors concluded that Damiano was not physically restricted in his ability to work. (AR 282,
9 396-401.) In light of the record in entirety, Dr. Churchill’s opinion was not entitled to
10 controlling weight.

11 Second, Damiano argues the ALJ failed to provide specific reasons for rejecting Dr.
12 Churchill’s opinion and to apply the factors set forth in the regulations for weighing medical
13 opinions: examining relationship, treatment relationship, supportability, consistency,
14 specialization, and other factors. 20 C.F.R. §§ 404.1527(c), 416.927(c). The ALJ discussed
15 some of these factors, acknowledging Dr. Churchill’s treating relationship with Damiano and
16 finding her opinion inconsistent with the record as a whole. However, there are no Ninth
17 Circuit cases finding reversible legal error solely because an ALJ does not discuss each factor
18 listed in §§ 404.1527(c), 416.927(c). The regulations provide that the ALJ is to apply the
19 factors and provide “good reasons” for the weight given to the treating source. 20 C.F.R.
20 §§ 404.1527(c)(2), 416.927(c)(2). Thus, it is legal error if the ALJ fails to provide “specific
21 and legitimate reasons,” supported by substantial evidence, to reject even a contradicted
22 opinion of a treating physician. *See Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995);
23 *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (upholding ALJ’s rejection of
24 treating physician’s opinion in favor of contradictory examining physician based on
25 inconsistency with doctor’s notes and other sources).

26 While the claimant might have liked the ALJ to engage in a lengthier discussion
27 regarding his rejection of Dr. Churchill’s opinion, before the ALJ discounted the opinion he
28 provided a synopsis of the record and made findings regarding the other medical opinions

1 of record. (AR 25-26.) Ultimately, the ALJ provided a specific, legitimate reason for his
2 conclusion regarding Dr. Churchill’s opinion. As detailed above, after review of the record
3 as a whole, the Court finds substantial evidence to support the ALJ’s finding. The other
4 medical opinions all concluded that Damiano had no significant physical restrictions. (AR
5 90, 286, 292, 390, 396-401.) Further, the physical examinations and laboratory tests yielded
6 no acute abnormal results.

7 In light of the above summary of the medical record, there is substantial evidence to
8 support the ALJ’s finding that Dr. Churchill’s opinion about Damiano’s limitations was not
9 supported by the medical evidence. The ALJ did not err in giving her opinion no weight.

10 **Examining Physician, Dr. Yaqoob**

11 Damiano argues the ALJ erred in giving great weight to the opinion of Dr. Yaqoob
12 because her opinion was based on incomplete information, in that she lacked any medical
13 records or diagnostic findings. He contends the medical records are inconsistent with her
14 findings and that her opinion could not constitute substantial evidence to reject the opinion
15 of Dr. Churchill.

16 Dr. Yaqoob examined Damiano on June 27, 2011. (AR 387-89.) She gathered a
17 history from him, conducted a physical examination, provided diagnoses and opined on his
18 ability to do work-related activities. (AR 387-90.) She concluded his only limitation was that
19 he could not continually operate foot controls with his right foot. (AR 396-401.)

20 An ALJ may “reject the opinion of a treating physician in favor of a conflicting
21 opinion of an examining physician if the ALJ makes ‘findings setting forth specific,
22 legitimate reasons for doing so that are based on substantial evidence in the record.’” *Thomas*
23 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (*Magallanes v. Bowen*, 881 F.2d 747, 751
24 (9th Cir. 1989)). If the examining physician relies upon her own clinical findings, diagnoses
25 or objective medical tests that differ from the treating physician, those findings constitute
26 substantial evidence. *Orn v. Astrue*, 497 F.3d 625, 632 (9th Cir. 2007).

27 As found above, the ALJ made a specific finding for rejecting the opinion of Dr.
28 Churchill, which the Court finds was based on substantial evidence. In turn, the ALJ

1 provided specific reasons to give weight to the opinion of Dr. Yaqoob. After noting that she
2 examined him, evaluated his work history and performed tests to evaluate his level of
3 functioning, the ALJ found her opinion “consistent with the majority of the medical evidence
4 of record insofar as they show that the claimant is not precluded from performing work-
5 related activities.” (AR 26.) As set forth above, Dr. Yaqoob offered her own diagnoses,
6 distinct from those of Dr. Churchill, and conducted her own objective medical testing.
7 Therefore, her findings can constitute substantial evidence to reject a treating physician’s
8 opinion. More importantly, as discussed above, exclusive of Dr. Churchill’s opinion, the
9 opinion of Dr. Yaqoob is consistent with the remainder of the medical record. The ALJ’s
10 adoption of it is, therefore, supported by substantial record evidence.

11 Damiano’s specific arguments do not undermine this finding. First, Plaintiff contends
12 the medical records indicate a significant history of abdominal pain and treatment that were
13 not considered by Dr. Yaqoob. Specifically, Damiano had an abdominal gunshot wound, two
14 hernia surgeries, and removal of his gallbladder. Dr. Yaqoob recorded Damiano’s statements
15 that he had abdominal pain, with intermittent reflux-type symptoms that are worst when lying
16 down. (AR 388.) He informed her of his gunshot wound and ventral hernia, which she
17 confirmed upon physical examination. (AR 388, 389.) Contrary to his argument, Dr. Yaqoob
18 did more than “visualize the scars,” she also performed an exam and found that his abdomen
19 was “soft, nontender, not distended.” (AR 389.) Additionally, her observations revealed no
20 limitations in his movement. (AR 388-89.) She diagnosed him with abdominal pain
21 secondary to gastroesophageal reflux disease. (*Id.*) She further noted that he does not take
22 any medication and needs treatment, but found this did not limit his physical activity. (*Id.*)

23 The remainder of the record is not to the contrary. The gunshot wound occurred when
24 Damiano was approximately 20, which required repair of an abdominal wall hernia, and he
25 continued to work after that. (AR 62, 277.) As summarized in the section above, there is no
26 medical record evidence suggesting that Damiano suffered from long-term impairments
27 resulting from his gallbladder and hernia surgery. Further, Damiano sought and received
28 treatment only once from Dr. Churchill for issues related to his gastrointestinal system. (AR

1 334.) Thus, Dr. Yaqoob's conclusions regarding Damiano's abdominal complaints are
2 consistent with the remainder of the record and the ALJ's adoption of her opinion is
3 supported by substantial evidence.

4 Second, Damiano contends that Dr. Yaqoob did not take into account his significant
5 musculoskeletal problems. As discussed extensively in the section above addressing the
6 opinion of Dr. Churchill, all laboratory findings relative to Damiano's musculoskeletal
7 system were negative with the exception of mild lumbar disc degeneration, which the
8 specialist concluded was not the source of pain. (AR 323, 324, 335, 356, 374, 376.) Further,
9 over the course of eighteen months, numerous physical examinations by four different
10 doctors revealed only intermittent, limited, non-acute abnormalities. Again, Dr. Yaqoob's
11 findings are consistent with the record. The ALJ's decision to give her opinion great weight
12 was not error and is supported by substantial evidence.

13 **Medical-Vocational Guidelines**

14 Damiano argues, initially, that it was error for the ALJ to rely on the Medical-
15 Vocational Guidelines and not obtain the testimony of a vocational expert because Plaintiff
16 has nonexertional impairments that prevent him from performing the full range of light or
17 sedentary work. The ALJ found that Damiano's non-exertional limitations (as set forth in the
18 ALJ's RFC) had little or no effect on the occupational base of unskilled light work; therefore,
19 he found application of the Guidelines appropriate. (AR 27.) Plaintiff does not contend that
20 finding was in error. Rather, he contends that the ALJ's RFC finding is erroneous because
21 it did not encompass the limitations found by Dr. Churchill or his ankle weakness and back
22 and foot pain. He argues that if the ALJ had adopted these additional limitations then
23 application of the Guidelines would have been improper.

24 First, as discussed above, the Court found no error with respect to the ALJ's treatment
25 of Dr. Churchill's opinion or the other medical opinions. Second, Plaintiff's reported ankle,
26 back and foot problems were not substantiated by objective medical evidence and Plaintiff
27 has not challenged successfully any of the findings on that point. Further, the ALJ found
28 Damiano not entirely credible regarding his subjective complaints (AR 25), and Plaintiff did

1 not dispute that finding. Therefore, the underlying premise of this claim – Plaintiff’s
2 challenge to the RFC – fails and so does the claim.

3 **CONCLUSION**

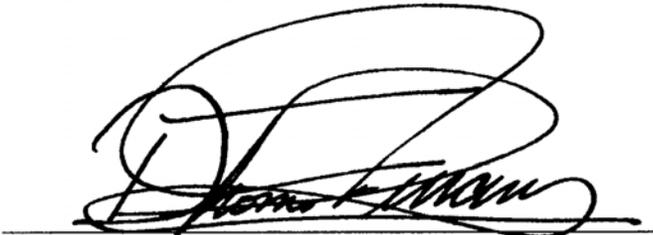
4 A federal court may affirm, modify, reverse, or remand a social security case. 42
5 U.S.C. § 405(g). Plaintiff has not established that the ALJ’s decision was based on legal error
6 or was not supported by substantial evidence. Therefore, the Commissioner’s decision is
7 affirmed.

8 Accordingly,

9 **IT IS ORDERED** that Plaintiff’s case is **DISMISSED** and the Clerk of Court shall
10 enter judgment.

11 DATED this 22nd day of October, 2013.

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D. Thomas Ferraro
United States Magistrate Judge