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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Francisco Javier Ramos,

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No. CV-13-02368-TUC-BGM

10

Plaintiff,

)

11

vs.

)

ORDER

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Carolyn W. Colvin,
Acting Commissioner of Social Security,

)

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Defendant.

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Currently pending before the Court is Plaintiff’s Opening Brief (Doc. 15). Defendant filed her Opposition to Plaintiff’s Opening Brief (“Response”) (Doc. 16), and Plaintiff filed his reply (Doc. 17). Plaintiff brings this cause of action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. § 405(g). The United States Magistrate Judge has received the written consent of both parties, and presides over this case pursuant to 28 U.S.C. § 636(c) and Rule 73, Federal Rules of Civil Procedure.

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I. BACKGROUND

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A. Procedural History

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On June 14, 2011, Plaintiff filed an application for Social Security Disability Insurance Benefits (“DIB”) alleging disability as of July 5, 2009 due to left ear loss of hearing, gout in his fingers, diabetes, high blood pressure, and right and left Achilles tendon injuries. See Administrative Record (“AR”) at 23, 25, 39, 59, 71, 85, 92, 148, 150, 180, 197, 206, 256. Plaintiff’s date last insured was September 30, 2014. *Id.* at 59, 71, 180, 206, 256.

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1 The Social Security Administration (“SSA”) denied this application on October 21, 2011.
2 *Id.* at 23, 58-69, 85-88. On November 29, 2011, Plaintiff filed a request for reconsideration,
3 and on March 14, 2012, SSA denied Plaintiff’s request. *Id.* at 23, 70-84, 89, 92-94. On April
4 11, 2012, Plaintiff filed his request for hearing.¹ *Id.* at 23, 95. On October 4, 2012, a hearing
5 was held before Administrative Law Judge (“ALJ”) Laura Havens.² AR at 23, 35-57. The
6 ALJ issued an unfavorable decision on October 19, 2012. *Id.* at 20-30. On December 6,
7 2012, Plaintiff requested review of the ALJ’s decision by the Appeals Council, and on
8 November 13, 2013, review was denied. *Id.* at 2-5, 19. On December 19, 2013, Plaintiff
9 filed this cause of action. Compl. (Doc. 1).

10 ***B. Factual History***

11 Plaintiff was sixty-one (61) years old at the time of the administrative hearing and
12 fifty-eight (58) at the time of the alleged onset of his disability. AR at 39, 59, 71, 150, 180,
13 206, 256. Plaintiff has a high school diploma, and has taken two years of college. *Id.* at 39,
14 58, 70. Currently, Plaintiff works part-time as a cashier at Circle K. *Id.* at 25, 40-41, 156,
15 172, 177. Prior to his alleged disability, Plaintiff owned a gift shop, and worked as a retail
16 sales clerk, and a produce inventory control clerk. *Id.* at 41-42, 68, 82, 160-67, 184-87, 198,
17 235, 245-46.

18 On December 23, 2011, Estela O. Felix, a long time friend of Plaintiff, filled out a
19 Function Report regarding Plaintiff. *Id.* at 217-24. Ms. Felix described Plaintiff’s daily
20 activities as “gets up[,], showers, goes shopping, pays bills, has breakfast, lunch, [and] dinner,
21 works 4 to 5 hr. a day, takes wife to [doctor] appointment, take care of wife that [sic] is 100%
22 disable[d].” AR at 217. Ms. Felix stated that Plaintiff cares for his wife. *Id.* at 218. Ms.
23 Felix further described Plaintiff prior to his disability as “[a] very active person at work [and]

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25 ¹Plaintiff filled out a form “Request for Hearing by Administrative Law Judge” and signed
26 it April 9, 2012, but it appears to have been filed on April 11, 2012.

27 ²The ALJ’s decision states that the hearing was held on October 3, 2012; however, the
28 hearing transcript is dated October 4, 2012.

1 with the community and sports.” *Id.* She also stated that Plaintiff has pain and “need[s] to
2 take medication to be able to sleep [and] control pain[.]” *Id.* Ms. Felix stated that Plaintiff
3 does not need any help with his personal care. *Id.* at 218-19. Ms. Felix further indicated that
4 Plaintiff does not cook, unless his wife is unable to do so. AR at 219. Ms. Felix stated that
5 Plaintiff does laundry and vacuums approximately two (2) hours per week. *Id.* She also
6 reported that Plaintiff goes outside every day, and can go out alone, as well as drive. *Id.* at
7 220. In addition, Ms. Felix stated that Plaintiff goes out twice per week for a couple of hours
8 to shop for groceries, prescriptions, and clothes. *Id.* Ms. Felix further reported that Plaintiff
9 can pay bills, count change, handle a savings account, and use a checkbook. *Id.* at 220. Ms.
10 Felix stated that Plaintiff watches news on television, as well as sports, for short periods. AR
11 at 221. Ms. Felix also reported that although Plaintiff has “slow[ed] down in all of his
12 activities about 70%[,]” “he does well with his limitations[.]” *Id.* Ms. Felix said that Plaintiff
13 spends times with other people, talking with customers, going to work and church, visiting
14 his family, although she estimates that Plaintiff has decreased such activities by
15 approximately 70%. *Id.* at 221-22. Ms. Felix reported that Plaintiff has difficulty lifting,
16 squatting, bending, standing, reaching, walking, sitting, kneeling, hearing, climbing stairs,
17 seeing, and using his hands. *Id.* at 222. Ms. Felix explained that gout affected Plaintiff’s
18 joints, he lost hearing, 90% on the left and 58% on the right, he has issues with his Achilles
19 tendons, and cataracts in both eyes. *Id.* Ms. Felix reported that Plaintiff is right handed, can
20 walk for fifteen (15) minutes and then requires a fifteen (15) minute rest before resuming
21 walking. AR at 222. Ms. Felix also reported that Plaintiff has no trouble paying attention
22 or following instructions, handles stress well, and can adapt to changes in routine. *Id.* at 222-
23 23. Ms. Felix reports that Plaintiff uses a cane, and has glasses and a hearing aid, all
24 prescribed by a doctor. *Id.* at 223. Finally, Ms. Felix stated that despite Plaintiff’s pain, he
25 does not complain. *Id.* at 224.

26 On January 15, 2012, Plaintiff’s son, Francisco J. Ramos, Jr., filled out a Function
27 Report on his behalf. *Id.* at 227-34. Mr. Ramos described his father’s day as starting “by
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1 taking a bath, go out shopping, pay bills, have lunch, go out and work 4-5 hours a day, come
2 home, watch the news and go to sleep.” AR at 227. Mr. Ramos indicated that Plaintiff takes
3 care of his wife, taking her to doctor’s appointments and out shopping. *Id.* at 228. Mr.
4 Ramos reported that “[b]efore 2009 he was able to work 70 [hours] a week[,] [but] [n]ow
5 with his disability he can’t works [sic] those hours.” *Id.* Mr. Ramos further reported that
6 “[t]he pain in [Plaintiff’s] joints does not allow him to sleep well at night[,] [and] [h]e is
7 taking medication right now but it doesn’t seem to help with the pain.” *Id.* Mr. Ramos stated
8 that Plaintiff does not have any problems with personal care, or need help remembering to
9 do things like take his medication. *Id.* at 229. Mr. Ramos also stated that his mother cooks
10 for Plaintiff, because [h]e cannot be standing for long period[s] of time and his constant pain
11 with his joints.” AR at 229. Mr. Ramos reported that Plaintiff “is able to do minor work
12 [and] assist [Mr. Ramos’s] mother with the laundry and dusting around the house.” *Id.* Mr.
13 Ramos further reported that Plaintiff goes out every day, can drive a car, and can go out
14 unaccompanied. *Id.* at 230. Mr. Ramos also reported that during Plaintiff’s trips out, he buys
15 groceries and picks up prescriptions. *Id.* Mr. Ramos stated that Plaintiff can pay bills, count
16 change, handle a savings account, and use a checkbook. *Id.* Mr. Ramos further stated that
17 Plaintiff “enjoys reading and watch[ing] the TV news[,] [which] . . . [h]e does [] every
18 evening for a couple of hours depending of [sic] how he feels.” AR at 231. Mr. Ramos also
19 stated that previously Plaintiff “was able to enjoy TV for a longer period of time, but with
20 his hearing problem and joints he tends to watch less TV and read less because of the pain.”
21 *Id.* Mr. Ramos reported that Plaintiff “attends Sunday Mass.” *Id.* Mr. Ramos observed that
22 Plaintiff “limits himself with the family now and on the phone due to his hearing loss.” *Id.*
23 at 232. Mr. Ramos reported that Plaintiff’s conditions affect his lifting, squatting, bending,
24 standing, reaching, walking, sitting, kneeling, hearing, stair climbing, seeing, understanding,
25 and using his hands. *Id.* Mr. Ramos stated that Plaintiff “is able to carry at least 10 pounds
26 due to his pain in his hands and joints[,] [h]e is not able to stand for a long period of time due
27 to his [A]chilles tendonitis [sic] and now with hearing problem[,] [h]e has a hard time hearing
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1 others.” AR at 232. Mr. Ramos reported that Plaintiff is right handed, can walk a “couple
2 of hundred yards” before he needs to stop, and must rest 5-10 minutes before resuming
3 walking. *Id.* Mr. Ramos stated that Plaintiff has not problem paying attention, and can
4 follow written and verbal directions. *Id.* Mr. Ramos further stated that Plaintiff handles
5 stress and change very well. *Id.* at 233. Mr. Ramos reported that Plaintiff “is less active due
6 to his pain and hearing problem[,] [and] . . . has been more quiet with the family.” *Id.* Mr.
7 Ramos further reported that Plaintiff uses a cane, hearing aid, and glasses, all of which were
8 prescribed by a doctor. AR at 233. Finally, Mr. Ramos reported that Plaintiff “constantly
9 complain[s] about pain[,] [and] [m]edication doesn’t seem to be helping.” *Id.* at 234.

10 On February 13, 2012, Plaintiff reported that he lived in a house with family. *Id.* at
11 247. Plaintiff stated that he “used to work 7 days/wk – 70 [hours][,] [and] [i]n 2008 due to
12 health reduced [hours] 20-28 a week.” *Id.* Plaintiff further stated that his Achilles tendon
13 and gout affect his standing, and high blood pressure and diabetes limits physical work. *Id.*
14 Plaintiff described his day as “getting up early – shower, shave, go to work a few hours, then
15 come home [and] take wife (disabled) for shopping, [doctor’s] [appointments], pay bills, etc.”
16 AR at 248. Plaintiff reported caring for his wife, and doing laundry. *Id.* Plaintiff further
17 reported that prior to his illness he was able to “work more [hours], play baseball, [and]
18 swim.” *Id.* Plaintiff also reported that his conditions affect his sleep, and he uses Tylenol
19 PM to get to sleep. *Id.* Plaintiff stated that he has no problems with personal care, and his
20 wife does the cooking, although he will cook on days that she is not able. *Id.* at 249.
21 Plaintiff also stated that he does laundry, small repairs on the house, and vacuums. AR at
22 250. He does not require encouragement or assistance to do these tasks, goes out every day,
23 can drive a car, and go out unaccompanied. *Id.* Plaintiff reported that he goes to the store
24 and buys groceries and prescriptions or other items needed. *Id.* Plaintiff further reported that
25 he is able to pay bills, count change, handle a savings account, and use a checkbook. *Id.* at
26 251. Plaintiff stated that his television viewing is limited due to his sight and hearing,
27 although he does watch television daily. *Id.* Plaintiff stated that he spends time with others

1 daily, but his hearing problem affects socializing. AR at 251. Plaintiff further stated that he
2 attends church regularly. *Id.* Plaintiff reports no problems getting along with others,
3 although he is more reserved socially. *Id.* at 252. Plaintiff reported that his conditions affect
4 his lifting, squatting, bending, standing, reaching, walking, kneeling, hearing, stair climbing,
5 seeing, and using hands. *Id.* Plaintiff further reported that he is right handed, and he can
6 walk 200-300 yards before he needs to rest for a few minutes. *Id.* Plaintiff stated that he had
7 no limitations on his ability to pay attention, follow written or spoken instructions, handle
8 stress, or changes in routine. AR at 252-53. Plaintiff indicated that his hearing loss has
9 caused a fear of a fire or other problem occurring. *Id.* at 253. Plaintiff stated that he has a
10 cane, hearing aid, and glasses, all prescribed by a doctor. *Id.* Plaintiff indicates that although
11 he is on several medications, they do not have side effects, and that he needs cataract surgery,
12 but does not have insurance. *Id.* at 254.

13 **1. Plaintiff's Testimony**

14 At the administrative hearing, Plaintiff testified that the pain of the Achilles tendon
15 in his right foot, kidney stones, and gout, became increasingly worse resulting in his inability
16 to work as of July 5, 2009. AR at 39-40. Plaintiff further testified that he returned to work
17 at Circle K on March 15, 2011, part time, because he and his wife needed money for medical
18 bills. *Id.* at 40-41. Plaintiff also testified that he suffers from diabetes, high blood pressure,
19 gout, Achilles tendinitis, cataracts, lumbar degenerative disc disease, osteoarthritis, kidney
20 stones, and arthritis in his hands. *Id.* at 41.

21 Plaintiff testified that he lives in a house with his wife of forty plus years. *Id.* at 42,
22 247. Plaintiff further testified that he wakes up around 10:00 or 11:00 a.m., bathes, gets
23 dressed, does household chores including cooking, washing dishes, mopping or sweeping,
24 laundry, and grocery shopping. *Id.* at 43, 51. Plaintiff testified that he does not have any
25 hobbies other than watching the news on television. AR at 43. Plaintiff further testified that
26 although he is in motion "all the time[,]" he does not exercise. *Id.* Plaintiff testified that he
27 drives, and can probably go a couple of hours in the car. *Id.* Plaintiff further testified that

1 he does not have any problem eating, but does have problems sleeping. *Id.* at 43-44.
2 Plaintiff testified that he takes Tylenol P.M. to help him with the pain and to fall asleep. *Id.*;
3 *see also* AR at 248. Plaintiff stated that although he spends about twelve (12) hours in bed,
4 he is only sleeping between six (6) and seven (7) hours per night. AR at 44.

5 Plaintiff testified that he sees a doctor approximately every three (3) months at
6 Mariposa Community Health Center for prescription refills and laboratory analyses. *Id.* at
7 44-45. Plaintiff reported that the medications cause sleeplessness, diarrhea, and sunburn –
8 as if he is “allergic to the sun.” *Id.* at 45. Plaintiff testified that he has been on his feet for
9 his work for eight hours, and he does not like to sit, “because if I’m sitting down for so long
10 it’s like my body gets stiff or uptight.” *Id.* at 45. Plaintiff further testified that the twenty-
11 four (24) hours per week he works is in eight (8) hour shifts; however, his employer
12 accommodates his needs by scheduling Plaintiff in a way that maximizes his ability to rest
13 and recover after a shift. *Id.* at 45-46.

14 Plaintiff testified that he has not been able to lift more than twenty (20) pounds since
15 1988. *Id.* at 46. Plaintiff also testified that he is able to grasp a book or a cup, use a register,
16 and sense hot and cold in his hands. AR at 46. Plaintiff further testified that he has “bad
17 days and . . . worse day[s,]” because he has pain every day. *Id.* at 47. Plaintiff testified that
18 on a scale of one (1) to ten (10), with ten (10) being the most severe, his daily pain is
19 between a four (4) and seven (7), averaging approximately six (6). *Id.* Plaintiff explained
20 that the pain from his Achilles tendon is as if someone were “nailing something on the
21 bottom of [his] tendon[,] . . . in [his] knee it comes from the side[,] . . . in [his] back, lower
22 back it’s just something right under [him] that’s burning and . . . it’s like a baseball side here
23 in [his] back that it hurts and the ones over here from the beginning of the rib cage to the
24 middle, right here which is the kidney pain . . . [a]nd [his] right shoulder . . . [he] cannot lift
25 [his] hand all the way up because that hurts.” *Id.* at 47-48. Plaintiff testified that he has had
26 four (4) surgeries in each hand, an appendectomy, surgical procedures for his kidney stones,
27 and surgeries on his Achilles tendons. *Id.* at 49. Plaintiff further testified that he did not
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1 have surgery when he broke his clavicle, and they healed slightly overlapped. AR at 49.

2 Plaintiff testified that he originally went to work at Circle K as a full time employee
3 in March 2011. *Id.* at 50. Plaintiff further testified that the forty (40) hours was too much,
4 so his employer reduced his hours, and moved him to a lower traffic store in an effort to
5 accommodate Plaintiff's health issues. *Id.* at 50. Plaintiff also testified that the fatigue
6 increases his pain. *Id.* Plaintiff testified that on his "worse days" he spends a lot of time
7 napping and resting. *Id.* at 51. Plaintiff further testified that sitting for too long causes his
8 body to get stiff. AR at 51.

9 **2. Vocational Expert Tracy Young's Testimony**

10 Tracy Young testified as the vocational expert at the administrative hearing. *Id.* at 52-
11 56. Ms. Young described Plaintiff's prior substantial gainful activity as a small business
12 owner, Dictionary of Occupational Titles ("DOT") number 185.167-046, a light, skilled job,
13 with a Specific Vocational Preparation ("SVP") of 7, although Plaintiff performed it as at
14 least medium. *Id.* at 52. Ms. Young described Plaintiff's prior work as a wholesale sales
15 representative of food products as DOT number 260.357-014, a light, skilled job, with an
16 SVP of 5. *Id.* at 52-53. Ms. Young described Plaintiff's prior work as an inventory control
17 clerk as DOT number 219.387-030, a light, skilled job, with an SVP of 5. *Id.* at 53. The ALJ
18 asked if "these jobs [held] any transferable skills to sedentary work." *Id.* Ms. Young
19 testified that possibly sales skills would transfer to sedentary work. AR at 53. The job Ms.
20 Young suggested as using transferable skill would be a customer order clerk, DOT code
21 249.362-026, sedentary, semiskilled, with an SVP of 4. *Id.* Ms. Young testified that there
22 are about 90,600 such jobs nationally, and approximately 1,630 jobs in Arizona. *Id.* at 54.

23 The ALJ asked the VE a hypothetical regarding an individual of the same age,
24 education, and vocational background as the Plaintiff. *See id.* at 54. In the hypothetical, the
25 ALJ asked about someone who could "sit six hours out of an eight hour day, stand four hours
26 out of an eight hour day and walk four hours out of an eight hour day, requires a sit, stand
27 option to perform a job, can occasionally lift and carry 20 pounds, frequently lift and carry
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1 10 pounds, can only occasionally climb stairs, never climb ladders, occasionally balance,
2 stoop, kneel, crouch and crawl[,] and . . . must avoid concentrated exposure to heights,
3 moving machinery and excessive noise.” *Id.* at 54. The ALJ inquired whether such an
4 individual could perform “any of the jobs performed by [Plaintiff] in the past either as he
5 performed them or as they’re performed in the national economy.” AR at 54. Ms. Young
6 testified that small business owner would be eliminated, but the inventory control clerk and
7 sales representative food products jobs would be available. *Id.* at 54-55. Ms. Young further
8 testified that although this would be a deviation from the DOT, she based her opinion on her
9 personal experience as a vocational rehabilitation counselor since 1983. *Id.* at 55. Plaintiff’s
10 counsel asked if the hypothetical person could not do the work “more than three days in a
11 row would that erode th[e] position.” *Id.* at 56. Ms. Young testified that “it would eliminate
12 those positions.” *Id.*

13 **3. Plaintiff’s Medical Records**

14 On February 25, 2004, Plaintiff was referred to physical therapy for Achilles tendinitis
15 on his right side. AR at 296. On July 7, 2008, Plaintiff was seen by Benjamin Douglas,
16 M.D. regarding ringing in his ears. *Id.* at 279-80. Dr. Douglas reported that “[a]udio shows
17 sensorineural hearing loss sharply falling above 2000 Hz.” *Id.* at 280. Dr. Douglas further
18 noted that there may be “some component of allergic rhinitis contributing to the ear fullness
19 and the severity of his tinnitus symptoms[,] [and] [t]he problem, however, is noise-induced
20 hearing loss, which would be difficult to amplify given the current profile.” *Id.* at 280.

21 On July 1, 2009, Plaintiff had a chest x-ray, which indicated “[n]o acute intrathoracic
22 abnormality. *Id.* at 344. On July 3, 2009, Plaintiff was seen by Frank VanMiddlesworth,
23 M.D. for his six month check up on diabetes and blood pressure. AR at 301-03. Dr.
24 VanMiddlesworth noted that Plaintiff had “not taken care of [him]self in [the] past 6
25 [months], stress with wife having surgeries total knee replacement and cataract surgeries and
26 total pelvic reconstruction surgery[.]” *Id.* at 301. Dr. VanMiddlesworth further noted that
27 Plaintiff’s hypertension is “[v]ery difficult to treat; intolerant of most medications[.]” *Id.* Dr.
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1 VanMiddlesworth's assessment included Type 2 diabetes, renal calculus, malignant
2 hypertension, and microalbuminuria. *Id.* at 302. On July 7, 2009, Plaintiff underwent a left
3 side lithotripsy with double J stent placement. AR at 328-34, 341-42. On July 10, 2009,
4 Plaintiff had the stent removed. *Id.* at 327. An x-ray showed "only a few small stone
5 fragments around the stent" remaining. AR at 327, 343.

6 On August 6, 2009, Plaintiff underwent a kidney-ureter-bladder x-ray. *Id.* at 339.
7 Upon comparison with his July 10, 2009 x-ray, this x-ray showed that "[t]he calcifications
8 dated in the distal left ureter at the level of the ureterovesical junction persists, unchanged."
9 *Id.* On August 12, 2009, Plaintiff saw Jerome M. Marchuk, M.D. for a follow-up one month
10 after a stent placement and removal. *Id.* at 326. On August 24, 2009, Plaintiff had laboratory
11 tests regarding the kidney stones. *Id.* at 345-50.

12 On September 14, 2009, Plaintiff saw Dr. Marchuk "to go over his metabolic stone
13 work up." AR at 323-25. Dr. Marchuk's assessment noted "recurrent renal stone disease[,]
14 [and] [e]levated urinary uric acid levels." *Id.* at 323. Dr. Marchuk stated that "[t]he stone
15 studies suggest that the patient would benefit from allopurinol on daily basis, as well as a
16 reduced oxalate diet." *Id.* On December 31, 2009, Plaintiff saw Dr. VanMiddlesworth for
17 a check up. AR at 304-06. Dr. VanMiddlesworth physical examination was unremarkable.
18 *Id.* at 305-06.

19 On May 18, 2010, Plaintiff was seen by Richard Hoodenpyle, D.M.D. for an
20 evaluation. AR at 282. Dr. Hoodenpyle performed deep scaling of each of the four (4)
21 quadrants of Plaintiff's mouth. *Id.* On July 22, 2010, Plaintiff saw Mark R. Hendrick, M.D.,
22 and was evaluated for left heel pain. AR at 289, 293-95. Dr. Hendrick noted that Plaintiff
23 "was last seen at Blue Ridge Bone & Joint Clinic in 08/2004 for postoperative followup for
24 a right posterior heel procedure by Dr. Mangone on 12/02/2003." *Id.* at 289. Plaintiff's left
25 heel pain had been "present for quite some time with no trauma, associated with some minor
26 swelling, difficulty with shoe wear and activity[,] [i]t has progressed." *Id.* Dr. Hendrick
27 reviewed Plaintiff's x-rays and noted "a small calcific spur at the Achilles tendon insertion,
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1 mild Haglund’s deformity and no other bony abnormalities.” AR at 289. Dr. Hendrick
2 diagnosed “[l]eft posterior heel syndrome with insertional Achilles tendinitis and tendinosis,
3 retrocalcaneal bursitis and Haglund’s deformity.” *Id.*

4 On August 6, 2010, Plaintiff had laboratory work performed. *Id.* at 354-62, 369-76.
5 On August 19, 2010, Plaintiff saw Dr. Hendrick for “his preoperative evaluation prior to his
6 left Achilles tenosynovectomy, retrocalcaneal bursectomy, [and] calcaneal exostectomy.”
7 *Id.* at 288. There were “no significant findings” on physical examination. *Id.* On August
8 30, 2010, Plaintiff saw Dr. VanMiddlesworth for a check-up. AR at 307-09. Dr.
9 VanMiddlesworth’s physical examination of Plaintiff was unremarkable. *Id.* at 308-09.

10 On September 10, 2010, Plaintiff underwent a left insertional Achilles
11 tenosynovectomy and retrocalcaneal bursectomy, and left calcaneal exostectomy. *Id.* at 290-
12 91. Plaintiff opted for “surgical intervention in an attempt to improve his pain.” *Id.* at 290.
13 There were no complications during the surgical procedure. *Id.* at 291. On September 16,
14 2010, Plaintiff had his Prostate-Specific Antigen (“PSA”) levels analyzed. AR at 352, 368,
15 425. On September 20, 2010, Plaintiff saw Dr. Hendrick for a postoperative follow-up. *Id.*
16 at 287. Dr. Hendrick noted that he was “[h]ealing very nicely without evidence of continuing
17 problems or infection.” *Id.* On September 15, 2010, Plaintiff saw Dr. Marchuk for a follow
18 up regarding his kidney stones. *Id.* at 320-22. Dr. Marchuk reported that Plaintiff’s
19 “[u]rinalysis is completely unremarkable[,]” as was his physical examination. *Id.* at 320. Dr.
20 Marchuk also noted that Plaintiff “has not had any systemic gouty flare-ups since he has been
21 on allopurinol[.]” AR at 320.

22 On January 5, 2011, Plaintiff was seen by Elsi Diaz, M.D. for a physical examination,
23 which was unremarkable. *Id.* at 406-08. On the same date, Plaintiff also had his Vitamin D
24 level checked. *Id.* at 424. On January 26, 2011, Plaintiff again saw Dr. Diaz. *Id.* at 403-05.
25 Dr. Diaz reported an unremarkable physical examination. *Id.* at 404. The following day,
26 Plaintiff had laboratory analyses performed. AR at 420-24.

27 On February 16, 2011, Plaintiff saw Dr. Diaz to discuss his lab results. *Id.* at 400-02.
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1 Plaintiff's physical examination was unremarkable. *Id.* at 401. On February 23, 2011,
2 Plaintiff saw Dr. Diaz with ear discomfort. *Id.* at 397-99. Plaintiff's physical examination
3 was unremarkable; however, Plaintiff reported that his hearing was getting worse. *Id.* at 397-
4 98. On February 28, 2011, Plaintiff saw William Kuo, M.D. for a new patient consult
5 regarding his kidney stones. AR at 379-81; 415-17. Dr. Kuo's physical examination was
6 unremarkable. *Id.* at 380, 416. Plaintiff's urinalysis was also normal. *Id.* On the same date,
7 Plaintiff was examined by Thomas J. Tilsner, M.D. regarding his tinnitus. *Id.* at 414.
8 Plaintiff reported to Dr. Tilsner that four (4) weeks prior, he had been "given a new blood
9 pressure medication, and then he began to note increased tinnitus as well as congestion in the
10 left ear." *Id.* Dr. Tilsner's examination was normal, and he gave Plaintiff samples of Medrol
11 Dosepak and Lipoflavinoid. *Id.*

12 On March 14, 2011, Plaintiff was seen in the Emergency Department at Holy Cross
13 Hospital regarding right flank pain. AR at 473-75. Plaintiff was in mild distress, and a
14 kidney stone was indicated. *Id.* at 475. On the same date, Plaintiff had a Computed
15 Tomography ("CT") scan of his abdomen without contrast. *Id.* at 366-67. The CT
16 demonstrated "[d]iffuse fatty infiltration of the liver . . . no nephro or ureterolithiasis[,] . . .
17 aortic atherosclerosis without evidence of aneurysm[,] . . . small fat containing inguinal
18 hernias bilaterally, slightly larger [on the] left than right." *Id.* at 366. On April 21, 2011,
19 Plaintiff had blood work analyzed. *Id.* at 419.

20 On May 12, 2011, Plaintiff was seen by James Gordon, M.D. for an "evaluation of
21 sudden sensorineural hearing loss." AR at 384-85. Dr. Gordon reported "[s]udden
22 sensorineural hearing loss in the left ear with poor speech discrimination, which would be
23 concerning for retrocochlear pathology." *Id.* at 384. Dr. Gordon further indicated that
24 Plaintiff "definitely necessitates an M[agnetic] R[esonance] I[maging] [("MRI")]" of the
25 internal auditory canal." *Id.* On May, 19, 2011, Plaintiff saw Dr. Diaz for a follow-up. *Id.*
26 at 394-96. Dr. Diaz reported that Plaintiff was "adamant to change medications at this
27 moment." *Id.* at 394-95. Plaintiff's physical examination was unremarkable. AR at 395.

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1 On June 14, 2011, Plaintiff was evaluated by Randall Cohen, M.D. for “sudden left-
2 sided hearing loss.” *Id.* at 388-89, 409-12, 526-29. Dr. Cohen’s physical examination was
3 unremarkable. *Id.* at 388, 411-12, 528-29. Dr. Cohen reported that Plaintiff had poor speech
4 discrimination on the left side, and audiologic testing indicated “[a]symmetrical,
5 sensorineural hearing loss with the right ear mild to severe high-frequency; left ear moderate
6 to severe.” *Id.* at 388, 412, 529; *see also* AR at 390-91; 413. Audiological testing was
7 performed by Heather Nair, M.S. *Id.* at 390-91, 413, 530.

8 On July 6, 2011, Plaintiff underwent an MRI of his brain. AR at 387, 525. The MRI
9 showed “[p]rominent cerebrospinal fluid intensity noted in the left middle cranial fossa,
10 anterior left temporal lobe measuring approximately 29 mm transverse x 17 mm
11 anteroposterior likely reflecting arachnoid cyst[,] [and] [n]o evidence of abnormal
12 parenchymal or meningeal enhancement.” *Id.* Additionally, “[r]esolution images through
13 the posterior fossa demonstrate[d] symmetric internal auditory canals with no evidence of
14 abnormal enhancement or mass.” *Id.* On August 9, 2011, Plaintiff had blood work analyzed.
15 *Id.* at 418, 452.

16 On September 15, 2011, Plaintiff followed up with Dr. Cohen regarding his hearing
17 loss. *Id.* at 521-24. Dr. Cohen’s physical examination of Plaintiff was unremarkable. AR
18 at 523-24. Dr. Cohen noted “[t]ympanometry consistent with normal middle ear function
19 bilaterally.” *Id.* at 524. Dr. Cohen further noted that “[o]toacoustic emissions show right
20 high frequency cochlear dysfunction; left broad spectrum cochlear dysfunction.” *Id.* Dr.
21 Cohen also reported that “on our testing the hearing discrimination increased by 20%[,] . .
22 . a significant improvement.” *Id.* As such, Dr. Cohen found that “the hearing in this ear now
23 is potentially amenable to amplification with a hearing assistive device.” *Id.* On the same
24 date, Plaintiff saw Ms. Nair for a hearing aid consult. AR at 519-20. On September 29,
25 2011, Plaintiff saw Dr. Diaz regarding bilateral hand pain, a rash on his pain, and heel pain.
26 *Id.* at 446-48. Plaintiff’s physical examination was otherwise unremarkable. *Id.* at 447. Dr.
27 Diaz referred Plaintiff to Neurology for a consult, and Orthopedics for evaluation and
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1 treatment. *Id.* at 448. On the same date, Plaintiff had blood work analyzed. *Id.* at 450-51.

2 On October 6, 2011, Plaintiff was seen by Ms. Nair “for fitting of left unilateral
3 hearing aid.” AR at 517-18. Ms. Nair reported that Plaintiff “has a bilateral loss but has
4 chosen to aid the poorer ear first with an advanced level hearing aid.” *Id.* at 517. Ms. Nair
5 further reported that Plaintiff “also chose the left ear first due to bothersome tinnitus that will
6 hopefully be masked by the high frequency amplification.” *Id.*

7 Pursuant to request by the Arizona Department of Economic Security (“AZDES”),
8 Plaintiff was examined by Jerome Rothbaum, M.D. on October 14, 2011. *Id.* at 426-33. Dr.
9 Rothbaum indicated that he had reviewed Plaintiff’s medical records as part of his
10 examination. *Id.* at 426. Dr. Rothbaum reported Plaintiff’s chief complaints as “diffuse joint
11 pains, problems with his ankles, status post multiple surgical procedures, diabetes mellitus,
12 history of gout, [and] low back pain with sciatica.” AR at 426. Dr. Rothbaum noted that
13 Plaintiff indicated that “he has had low back pain for many years[,] [i]t is primarily in the left
14 paralumbar area but he also gets intermittent radicular type pain.” *Id.* In addition to the
15 surgeries noted in Plaintiff’s medical records, Dr. Rothbaum indicated that Plaintiff had
16 undergone surgery for glaucoma in both eyes in 1998. *Id.* at 427. Dr. Rothbaum noted
17 Plaintiff’s substantial hearing loss, and reported that he had “acquired [a] hearing aid for the
18 left ear only during the past week[,] [and] [h]e is not certain if it is helpful.” *Id.* at 427.
19 Plaintiff’s physical examination was unremarkable. AR at 427-28. Dr. Rothbaum noted that
20 Plaintiff “does tend to at least partially read lips.” *Id.* at 427. Dr. Rothbaum further noted
21 that although Plaintiff walks normally and was able to “get[] up and down from the
22 examining table without difficulty[,] . . . [h]e is unable to squat . . . due to [the] condition of
23 his ankles.” *Id.* at 428.

24 Dr. Rothbaum also completed a “Medical Source Statement of Ability to Do Work-
25 Related Activities (Physical)” regarding Plaintiff. *Id.* at 429-31. Dr. Rothbaum diagnosed
26 Plaintiff with diabetes mellitus type 2, status post tenosynovectomy, Achilles tendinitis,
27 degenerative disc disease lumbar, hearing loss. *Id.* at 429. Dr. Rothbaum opined that these

1 would impose a limitation for twelve (12) continuous months. *Id.* Dr. Rothbaum further
2 opined that Plaintiff was limited in his ability to lift and/or carry to twenty (20) pounds
3 occasionally, and 10 pounds frequently. AR at 429-30. Dr. Rothbaum noted Plaintiff would
4 be limited in his ability to stand and/or walk, concluding that Plaintiff “should be capable of
5 standing and walking 4 to 5 hours per day, 1 hour at a time, 5 minute break due to lumbar
6 degenerative disc disease, status post tenosynovectomy, Achilles tendinitis.” *Id.* at 430. Dr.
7 Rothbaum further opined that Plaintiff had no limitation in sitting, and was unlimited in
8 seeing and speaking, but limited in hearing. *Id.* Dr. Rothbaum stated that Plaintiff has
9 “rather significant hearing loss, worse on the left than the right[,] . . . [and] [has]
10 amplification on the right which does not appear to be optimal at this time.” *Id.* at 430. Dr.
11 Rothbaum indicated that Plaintiff could never climb ladders, ropes or scaffolds; could
12 occasionally climb ramps and stairs, stoop, kneel, crouch, and crawl; and had no limitation
13 on reaching, handling, fingering or feeling. *Id.* at 431. Dr. Rothbaum also indicated that
14 Plaintiff was restricted in working around heights, moving machinery, and excessive noise,
15 but was unrestricted with regard to working around extremes in temperature, chemicals, dust,
16 fumes, or gases. AR at 431.

17 On October 18, 2011, Plaintiff followed up with Ms. Nair. *Id.* at 515-16. Plaintiff had
18 been fit with a left aid, but stated that “the left aid just makes the distortion worse and
19 provides no improved communication or tinnitus relief.” *Id.* at 515. Ms. Nair reported that
20 Plaintiff was directed to “use alternative programs to optimize speech discrimination[,]” and
21 planned to “aid the right ear [upon follow-up] . . . to see if it improves [Plaintiff’s] preception
22 [sic].” *Id.* On October 20, 2011, Plaintiff again saw Ms. Nair for a follow-up. *Id.* at 513-14.
23 Plaintiff was having “difficulty with [the] left receiver ‘popping out’ of ear[,]” despite a
24 previous refitting. *Id.* at 513. Ms. Nair further reported that Plaintiff did not have any
25 “improved speech clarity or understanding from the left ear aiding.” AR at 513. On the
26 same date, pursuant to request by the Commissioner, Plaintiff’s medical records were
27 reviewed by Charles Fina, M.D. *See id.* at 58-69. On October 25, 2011, Plaintiff seen at
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1 Southwestern Eye Center for an intraocular pressure check. *Id.* at 440-42. Glaucomatous
2 features were noted on the Optic Nerve. *Id.* at 442.

3 On January 26, 2012, Plaintiff had blood work analyzed. *Id.* at 449, 472. On
4 February 21, 2012, Plaintiff saw Dr. Diaz for a follow-up visit. AR at 462-64. Dr. Diaz's
5 physical examination was unremarkable, but she noted "[o]steoarthritis, generalized,
6 involving multiple sites" and "[a]cute gastritis" in her assessment. *Id.* at 463. On the same
7 date, Plaintiff had laboratory work performed. *Id.* at 468-71.

8 Pursuant to request by the Commissioner, on March 13, 2012, Plaintiff's medical
9 records were reviewed on reconsideration by John B. Kurtin, M.D. *See id.* at 70-84. On
10 March 26, 2012, Plaintiff saw Dr. Diaz regarding blood in his urine three (3) days prior. *Id.*
11 at 476-78. Plaintiff reported that upon starting ampicillin, the blood disappeared. AR at 476.
12 Dr. Diaz's physical examination of Plaintiff was otherwise unremarkable. *Id.* at 478. On the
13 same date, Plaintiff had laboratory work performed. *Id.* at 466-67.

14 On June 14, 2012, Plaintiff had blood work analyzed. *Id.* at 465. On June 26, 2012,
15 Plaintiff saw Dr. Diaz for a follow-up after hospitalization with kidney stones. *Id.* at 479-82.
16 Plaintiff's physical examination was unremarkable. *Id.* at 481-82. On June 28, 2012,
17 Plaintiff saw Alfredo Guevara, Jr., M.D. "for evaluation of right ureteral colic." AR at 509.
18 Plaintiff was instructed to have kidney-ureter-bladder films taken, and to return the following
19 day. *Id.* at 509. Plaintiff's films showed "a 5 mm calculus between the right L2 and L3
20 transverse processes." *Id.* at 510-12. Upon comparison to a prior CT from June 15, 2012,
21 "[t]he position [did] not appear significantly changed from the previous exam." *Id.* at 510.
22 Degenerative changes in the lumbar spine were also noted. *Id.* On June 29, 2012, Plaintiff
23 returned to Dr. Guevara regarding the "5 x 4 mm stone in the right upper ureter." AR at 508.
24 Dr. Guevara assessed Plaintiff with "[r]ight ureter colic associated with right hydronephrosis
25 secondary to [the stone]." *Id.* Dr. Guevara further assessed minimal bladder outlet
26 obstruction and lower urinary tract symptomatology secondary to benign prostatic
27 hyperplasia. *Id.* Dr. Guevara's plan included a cystogram and extracorporeal shock wave
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1 lithotripsy (“ESWL”) of the right kidney. *Id.*

2 On July 5, 2012, Plaintiff was seen at Holy Cross Hospital for ESWL of his right
3 kidney stone. *Id.* at 485-93, 506-07. On July 16, 2012, Plaintiff followed up with Dr.
4 Guevara after the ESWL. AR at 505. On July 28, 2012, Plaintiff saw Dr. Guevara for
5 removal of the stent. *Id.* at 504.

6 7 **II. STANDARD OF REVIEW**

8 The factual findings of the Commissioner shall be conclusive so long as they are
9 based upon substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g), 1383(c)(3);
10 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may “set aside the
11 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based
12 on legal error or are not supported by substantial evidence in the record as a whole.” *Tackett*
13 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted); *see also Treichler v.*
14 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014).

15 Substantial evidence is “more than a mere scintilla[,] but not necessarily a
16 preponderance.” *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d 871,
17 873 (9th Cir. 2003)); *see also Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014).
18 Further, substantial evidence is “such relevant evidence as a reasonable mind might accept
19 as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
20 Where “the evidence can support either outcome, the court may not substitute its judgment
21 for that of the ALJ.” *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016,
22 1019 (9th Cir. 1992)); *see also Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007).
23 Moreover, the court may not focus on an isolated piece of supporting evidence, rather it must
24 consider the entirety of the record weighing both evidence that supports as well as that which
25 detracts from the Secretary’s conclusion. *Tackett*, 180 F.3d at 1098 (citations omitted).

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1 **III. ANALYSIS**

2 The Commissioner follows a five-step sequential evaluation process to assess whether
3 a claimant is disabled. 20 C.F.R. § 404.1520(a)(4). This process is defined as follows:

4 Step one asks is the claimant “doing substantial gainful activity[?]” If yes, the claimant is not
5 disabled; step two considers if the claimant has a “severe medically determinable physical
6 or mental impairment[.]” If not, the claimant is not disabled; step three determines whether
7 the claimant’s impairments or combination thereof meet or equal an impairment listed in 20
8 C.F.R. Pt. 404, Subpt. P, App. 1. If not, the claimant is not disabled; step four considers the
9 claimant’s residual functional capacity and past relevant work. If claimant can still do past
10 relevant work, then he or she is not disabled; step five assesses the claimant’s residual
11 functional capacity, age, education, and work experience. If it is determined that the
12 claimant can make an adjustment to other work, then he or she is not disabled. 20 C.F.R. §
13 404.1520(a)(4)(i)-(v).

14 In the instant case, the ALJ found that Plaintiff met the insured status requirements
15 of the Social Security Act through September 30, 2015, and was not engaged in substantial
16 gainful activity since July 5, 2009. AR at 25. At step two of the sequential evaluation, the
17 ALJ found that “[t]he claimant has the following severe impairments: diabetes, degenerative
18 disc disease, hearing loss, and status post bilateral [A]chilles tendonitis (20 CFR
19 404.1520(c)).” *Id.* At step three, the ALJ found that Plaintiff does “not have an impairment
20 or combination of impairments that meets or medically equals the severity of one of the listed
21 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and
22 404.1526).” *Id.* At step four, the ALJ found that Plaintiff had:

23 the residual functional capacity (RFC) to perform light work as defined in 20
24 CFR 404.1567(b) except that the claimant is able to lift and carry 20 pounds
25 occasionally and 10 pounds frequently; is able to sit 6 hours in an 8 hour day;
26 is able to stand 4 hours in an 8 hour day; is able to walk 4 hours in an 8 hour
27 day; requires a sit/stand option; is able to occasionally climb stairs; is unable
28 to climb ladders; is able to occasionally balance, stoop, kneel, crouch, and
crawl; must avoid concentrated exposure to heights, moving machinery, and
excessive noise.

1 *Id.* at 26. Accordingly, the ALJ found, based in part upon the Vocational Expert’s testimony,
2 that “[t]he claimant is capable of performing past relevant work as an inventory control clerk
3 and sales representative of food products, . . . [because] [t]his work does not require the
4 performance of work-related activities precluded by the claimant’s residual functional
5 capacity (20 CFR 404.1565).”³ *Id.* at 30. As such, the ALJ found that Plaintiff was “not
6 under a disability, as defined in the Social Security Act, from July 5, 2009, through the date
7 of this decision (20 CFR 404.1520(f)).” AR at 30. Plaintiff asserts that the ALJ erred in 1)
8 finding that Plaintiff needs a “sit/stand option” because it is ambiguous and unreviewable;
9 and 2) finding that Plaintiff could perform his past relevant work as an inventory control
10 clerk or sales representative. Pl.’s Opening Brief (Doc. 15) at 5-11.

11 **A. *Sit/Stand Option***

12 Plaintiff asserts that the ALJ’s inclusion of a “sit/stand option” in her RFC
13 determination is materially ambiguous and not supported by substantial evidence. Pl.’s
14 Opening Br. (Doc. 15) at 5-8. The Commissioner argues that “[a]lthough the ALJ did not
15 specify the frequency and length of time Plaintiff would need to stand, the finding was
16 sufficient.” Def.’s Response (Doc. 17) at 4.

17 Plaintiff cites SSR 96-9p to support his argument that the ALJ’s finding that he needs
18 a “sit/stand option is materially ambiguous and thus unreviewable.” Pl.’s Opening Br. (Doc.
19 15) at 4. The stated purpose of SSR 96-9p is as follows:

20 To explain the Social Security Administration’s policies regarding the impact
21 of a residual functional capacity (RFC) assessment for less than a full range of
22 sedentary work on an individual’s ability to do other work. In particular, to
emphasize that:

- 23 1. An RFC for less than a full range of sedentary work reflects very serious
24 limitations resulting from an individual’s medical impairment(s) and is
expected to be relatively rare.

25 ³The ALJ also mentions food preparer as Plaintiff’s past relevant work; however, this
26 appears to be an error, as this job does not appear anywhere in the Administrative Record.
27 Defendant concedes the error, but asserts that such error is harmless. Def.’s Response (Doc.
28 17) at 7.

1 2. However, a finding that an individual has the ability to do less than a full
2 range of sedentary work does not necessarily equate with a decision of
3 “disabled.” If the performance of past relevant work is precluded by an
4 RFC for less than the full range of sedentary work, consideration must still
5 be given to whether there is other work in the national economy that the
6 individual is able to do, considering age, education, and work experience.

7 SSR 96-9p. Plaintiff cites *Barrera v. Astrue*, 2012 WL 4361416 (D. Ariz. Sept. 25, 2012)
8 and *Arnett v. Astrue*, 676 F.3d 586 (7th Cir. 2012), both of which relied on SSR 96-9p to
9 hold that an ALJ must specify the frequency of the claimant’s need to alternate sitting and
10 standing. *See* Pl.’s Opening Br. (Doc. 15) at 7. Plaintiff further asserts that the
11 Defendant “neglected the principle of SSR 96-9p” in arguing that it does not apply in the
12 instant case. Pl.’s Reply (Doc. 18) at 7. Plaintiff’s contention is without merit.

13 Here, the ALJ found that Plaintiff is capable of performing a range of light work.
14 AR at 26. In reaching this conclusion, the ALJ “did exactly what the caselaw and SSR
15 83-12 direct him to do – he consulted a VE.” *Moore v. Apfel*, 216 F.3d 864, 870 (9th Cir.
16 2000). SSR 83-12 provides “a framework for adjudicating claims in which an individual
17 has only exertional limitations, and no specific rule applies because the individual’s
18 residual functional capacity (RFC) does not coincide with any one of the defined
19 exertional ranges of work.” SSR 83-12. Similar to the Plaintiff in the instant case, the
20 claimant in *Moore* had both exertional and non-exertional limitations. The court in
21 *Moore*, found that SSR 83-12 and the presence of both exertional and non-exertional
22 limitations mandate the use of a VE, and where the ALJ followed this procedure, there
23 was no error. *Moore*, 216 F.3d at 870; *see also* *Burkhart v. Bowen*, 856 F.2d 1335, 1340
24 (9th Cir. 1988). Therefore, the erosion of the occupational base of light work options was
25 sufficiently addressed by the VE.

26 **B. ALJ’s Step Four Findings**

27 Plaintiff asserts that “substantial evidence does not support the ALJ’s as-actually-
28 performed step-four findings.” Pl.’s Opening Br. (Doc. 5) at 8. Plaintiff further asserts
that the ALJ’s alleged error in relying on a sit/stand option vitiated her as-generally-

1 performed step four findings. *Id.* The Commissioner argues that substantial evidence
2 supports the ALJ’s findings, and her error in stating Plaintiff had past relevant work as a
3 food preparer is harmless. Def.’s Response (Doc. 17) at 6-7.

4 Here, the ALJ asked the VE a hypothetical regarding an individual of the same
5 age, education, and vocational background as the Plaintiff. *See id.* at 54. In the
6 hypothetical, the ALJ asked about someone who could “sit six hours out of an eight hour
7 day, stand four hours out of an eight hour day and walk four hours out of an eight hour
8 day, requires a sit, stand option to perform a job, can occasionally lift and carry 20
9 pounds, frequently lift and carry 10 pounds, can only occasionally climb stairs, never
10 climb ladders, occasionally balance, stoop, kneel, crouch and crawl[,] and . . . must avoid
11 concentrated exposure to heights, moving machinery and excessive noise.” *Id.* at 54. The
12 ALJ inquired whether such an individual could perform “any of the jobs performed by
13 [Plaintiff] in the past either as he performed them or as they’re performed in the national
14 economy.” AR at 54. Ms. Young testified that small business owner would be
15 eliminated, but the inventory control clerk and sales representative food products jobs
16 would be available. *Id.* at 54-55. Ms. Young further testified that although this would be
17 a deviation from the DOT, she based her opinion on her personal experience as a
18 vocational rehabilitation counselor since 1983. *Id.* at 55. Plaintiff’s counsel asked the
19 VE, “so if I understand what you’re saying is that the he [sic] can perform the past
20 relevant work of the two jobs because they don’t require as much walking or standing?”
21 *Id.* at 56. The VE responded, “I believe that the walking or standing, walking for up to
22 four hours, standing for up to two hours then sitting for six to eight would, those jobs
23 could be done with that particular set of limitations.” *Id.* As such, the ALJ’s reliance on
24 the VE supports her Step Four finding, and there is no error. Additionally, the Court
25 finds that the ALJ’s error in referring to food preparer as past relevant work was
26 harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

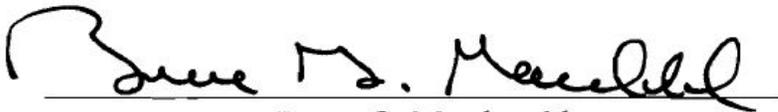
1 **V. CONCLUSION**

2 In light of the foregoing, the Court affirms the Commissioner's decision.

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4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1) Plaintiff's Opening Brief (Doc. 15) is DENIED;
- 6 2) The Commissioner's decision is AFFIRMED; and
- 7 3) The Clerk of the Court shall enter judgment, and close its file in this matter.

8 DATED this 30th day of March, 2015.

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11 Bruce G. Macdonald
12 United States Magistrate Judge

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