

1 WO
2
3
4
5

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

9 Willie Douglas Rhodus,

10 Plaintiff,

11 v.

12 Nancy A. Berryhill,

13 Defendant.
14

No. CV-16-00238-TUC-LCK

ORDER

15 Plaintiff Willie Rhodus filed this action pursuant to 42 U.S.C. § 405(g) seeking
16 judicial review of a final decision by the Commissioner of Social Security
17 (Commissioner). (Doc. 1.) Before the Court are Rhodus's Opening Brief and Defendant's
18 Brief. (Docs. 18, 19.) The parties have consented to Magistrate Judge jurisdiction. (Doc.
19 10.) Based on the pleadings and the administrative record submitted to the Court, the
20 Commissioner's decision is affirmed.

21 **FACTUAL AND PROCEDURAL HISTORY**

22 Rhodus filed an application for Disability Insurance Benefits (DIB) and
23 Supplemental Security Income (SSI) on August 29, 2012. (Administrative Record (AR)
24 175.) He alleged disability from January 1, 2009. (*Id.*) Rhodus's application was denied
25 upon initial review (AR 45-74) and on reconsideration (AR 75-110). A hearing was held
26 on July 16, 2014 (AR 22-44), after which the ALJ found that Rhodus was not disabled
27 because he could perform his past relevant work (AR 9-17). The Appeals Council denied
28 Rhodus's request to review the ALJ's decision. (AR 1.)

1 Rhodus was born on November 14, 1950, making him 58 years of age at the onset
2 date of his alleged disability. (AR 175.) From 1998 to 2009, Rhodus worked as an officer
3 at an insurance company and as an investment advisor. (AR 190.)

4 The ALJ found Rhodus had two severe impairments, degenerative joint disease
5 (knees) and osteoarthritis. (AR 11.) The ALJ determined Rhodus had the Residual
6 Functional Capacity (RFC) to perform sedentary work except he could sit for up to six
7 hours and stand for up to two hours; lift/carry 10 pounds frequently; occasionally climb,
8 balance, stoop, kneel, crouch, and crawl; and should avoid unprotected heights and
9 dangerous machinery. (AR 14.) The ALJ concluded at Step Four, based on the testimony
10 of a Vocational Expert, that Rhodus could perform his past work (as generally
11 performed) as an investment representative or director of insurance. (AR 17.)

12 **STANDARD OF REVIEW**

13 The Commissioner employs a five-step sequential process to evaluate SSI and
14 DIB claims. 20 C.F.R. §§ 404.1520; 416.920; *see also Heckler v. Campbell*, 461 U.S.
15 458, 460-462 (1983). To establish disability the claimant bears the burden of showing he
16 (1) is not working; (2) has a severe physical or mental impairment; (3) the impairment
17 meets or equals the requirements of a listed impairment; and (4) claimant's RFC
18 precludes him from performing his past work. 20 C.F.R. §§ 404.1520(a)(4),
19 416.920(a)(4). At Step Five, the burden shifts to the Commissioner to show that the
20 claimant has the RFC to perform other work that exists in substantial numbers in the
21 national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007). If the
22 Commissioner conclusively finds the claimant "disabled" or "not disabled" at any point
23 in the five-step process, she does not proceed to the next step. 20 C.F.R.
24 §§ 404.1520(a)(4), 416.920(a)(4).

25 "The ALJ is responsible for determining credibility, resolving conflicts in medical
26 testimony, and for resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
27 Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)). The findings
28 of the Commissioner are meant to be conclusive if supported by substantial evidence. 42

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

16 **DISCUSSION**

17 Rhodus argues the ALJ erred in not finding his mental impairments severe at Step
18 Two. Alternatively, Rhodus argues the ALJ erred in not evaluating the effect of his non-
19 severe depression on his ability to work.

20 **Step Two**

21 Rhodus argues the ALJ failed to find, at Step Two, that his depression was a
22 severe impairment. A finding of disability requires an “inability to do any substantial
23 gainful activity by reason of any medically determinable physical or mental impairment.”
24 20 C.F.R. §§ 404.1505, 416.905. An impairment is “not severe if it does not significantly
25 limit your physical or mental ability to do basic work activities.” 20 C.F.R. §§ 404.1521,
26 416.921.

27 The ALJ found that Rhodus had a medically determinable impairment of
28 depressive disorder but concluded it was not severe because it did not cause “more than

1 minimal limitation in the claimant’s ability to perform basic mental work activities.” (AR
2 12.) In particular, the ALJ determined Rhodus had only mild limitations in activities of
3 daily living, social functioning, and concentration, persistence, and pace. (*Id.*)

4 To resolve this claim, the Court must examine the medical opinions regarding
5 Rhodus’s functional limitations arising from his mental impairment.¹ The record
6 regarding how depression affects Rhodus’s ability to work consists of (a) reports from
7 two psychologists that examined Rhodus in December 2012 (Dr. Rau) and August 2014
8 (Dr. Glenn Marks); and (b) mental residual functional capacity assessments from January
9 2013 by a psychiatrist (Dr. Jack Marks) and June 2013 by a psychologist (Dr. Garland).
10 (AR 57, 89.) Rhodus has no mental health treatment records. (AR 10.) The ALJ gave
11 great weight to the 2014 assessment of examining psychologist Dr. Glenn Marks. The
12 ALJ gave little weight to the opinion of examining psychologist Dr. Rau and rejected the
13 opinions of the non-examining State agency physicians.

14 As an initial matter, Rhodus contends the ALJ failed to consider the factors set
15 forth in 20 C.F.R. §§ 404.1527(c)(1)-(6), 416.927(c)(1)-(6) for weighing medical opinion
16 evidence. The regulations do not require the ALJ to discuss these factors, only to consider
17 them; there is no reason to believe the ALJ did not consider these factors as required. As
18 discussed below, the ALJ explicitly discounted Dr. Rau’s opinion as not well-supported
19 by the evidence, one of the applicable factors. *See* 20 C.F.R. §§ 404.1527(c)(3),
20 416.927(c)(3). Review of the other §§ 404.1527(c), 416.927(c) factors reveals little
21 material distinction between the opinions of Dr. Rau and Dr. Glenn Marks. They both
22 examined Rhodus one time but had no treating relationship with him, and they are both
23 experts in psychology and the Social Security disability program. *See* 20 C.F.R. §§
24 404.1527(c)(1), (2), (5), (6), 416.927(c)(1), (2), (5), (6). Although Dr. Rau’s opinion was
25 consistent with the opinions of Drs. Garland and Jack Marks (while Dr. Glenn Marks’s
26

27
28 ¹ The Court does not rely upon Dr. Melvyn Weinberg’s diagnosis of depression
and observation of Rhodus’s depressed affect (AR 280-81) because he evaluated only
Rhodus’s physical, not mental, limitations (AR 284).

1 opinion was not), *see* 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4), that holds little weight
2 as the two latter opinions were based solely on Dr. Rau’s report.

3 Next, Plaintiff argues that the ALJ erred in rejecting the opinions of Drs. Rau,
4 Garland, and Jack Marks. The opinion of an examining physician generally is afforded
5 more weight than a non-examining or reviewing physician’s opinion. *Lester v. Chater*, 81
6 F.3d 821, 830 (9th Cir. 1995). Here, these three opinions were contradicted by that of
7 psychologist Glenn Marks. When there are contradictory medical opinions, to reject an
8 examining physician’s opinion, the ALJ must provide “specific and legitimate reasons
9 that are supported by substantial evidence.” *Id.*

10 Dr. Rau, a licensed psychologist, examined Rhodus in December 2012 and
11 diagnosed major depressive disorder, moderate, without psychosis. (AR 291.) Dr. Rau
12 found that Rhodus’s understanding and memory were not significantly limited and he
13 could remember simple instructions with repetition. (AR 292.) Dr. Rau stated that
14 Rhodus was moderately limited in sustained concentration and persistence, and would
15 frequently struggle with carrying out detailed instructions, staying focused for an
16 extended period of time, and maintaining a consistent pace (due to pain, internal agitation
17 and dysphoria, or frustration). (*Id.*) He also concluded that Rhodus was moderately
18 limited in the area of social interaction – he may have difficulty with criticism and
19 struggle being around others, and his stern and dysphoric presence may put others ill at
20 ease. (AR 293.) The ALJ gave this opinion little weight finding it to be “unsupported by
21 any evidence, objective findings, and [] inconsistent with other opinion evidence.” (AR
22 16.)

23 The ALJ was accurate in finding Dr. Rau’s opinion inconsistent with at least one
24 other opinion, that of Dr. Glenn Marks. Dr. Marks noted that Rhodus exhibited almost no
25 evidence of cognitive difficulties, and he scored 28 out of 30 on the Mini-mental status
26 examination (MMSE) (failing to recall two of three words on delayed recall). (AR 322.)
27 In his medical source statements, Dr. Marks opined that Rhodus had no impairment in
28 concentration/persistence, social interaction, or adapting to change. (*Id.*) He also

1 determined that Rhodus’s depression did not affect his ability to understand, remember
2 and carry out instructions; interact appropriately with supervisors, co-workers, or the
3 public; or respond to changes in the work setting. (AR 326-27.) In his report, he noted
4 that Rhodus’s depression could possibly cause cognition problems that might interfere
5 with highly cognitively demanding work; however, he found him fully capable of
6 learning and retaining new information and information for which he was familiar from
7 past work. (AR 324.)

8 The Court examines Dr. Rau’s report to evaluate the ALJ’s finding that Dr. Rau’s
9 opinion was unsupported by evidence and objective findings. His forty-five minute exam
10 is the only substantive evidence he relied upon in making his findings.²

11 The Court finds there is substantial evidence to support the ALJ’s rejection of Dr.
12 Rau’s opinion because it is not supported by the evidence of record. *See Valentine v.*
13 *Comm’r Social Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) (defining substantial
14 evidence as “such relevant evidence as a reasonable mind might accept as adequate to
15 support a conclusion.”); *Batson*, 359 F.3d at 1196 (“When evidence reasonably supports
16 either confirming or reversing the ALJ’s decision, we may not substitute our judgment
17 for that of the ALJ.”). On the MMSE, Rhodus scored 27 out of 30 (missing one of three
18 words on a brief delay), only one point less than when administered two years later by
19 Dr. Glenn Marks. (AR 290.) Dr. Rau found Rhodus had moderate limitations in
20 concentration, focus, and pace, and in carrying out detailed instructions. (AR 292.)
21 However, upon exam, Dr. Rau found Rhodus’s attention, orientation, and effort
22 unremarkable, and Rhodus described his concentration as non-problematic and stated that
23 he had good recollection of personal interactions and activities. (AR 287, 288.) Dr. Rau
24 also found Rhodus had moderate limitations in social interaction. (AR 293.) However,
25 Dr. Rau recorded Rhodus’s cooperation, rapport, insight, and judgment as unremarkable
26 (AR 287), noted that he did well socializing with family, and recognized he had no

27
28 ² Dr. Rau stated that, prior to the exam, he reviewed only “a medical note and a
self-report note.” (AR 287.)

1 history of acting out. (AR 290.) Rhodus reported normal conversational abilities (AR
2 288) and that he has always gotten along well with others (AR 289). Finally, Dr. Rau
3 noted that Rhodus was “active behaviorally day-to-day in a healthy way.” (AR 290.)
4 Although there is some evidence to support Dr. Rau’s opinion and, in turn, Rhodus’s
5 argument, “the key question is not whether there is substantial evidence that could
6 support a finding of disability, but whether there is substantial evidence to support the
7 Commissioner’s actual finding that the claimant is not disabled.” *Jamerson v. Chater*,
8 112 F.3d 1064, 1067 (9th Cir. 1997). Here, specific and legitimate reasons, and
9 substantial evidence, support the ALJ’s rejection of Dr. Rau’s opinion.

10 Finally, the Court looks at the opinions of Drs. Garland and Jack Marks, which
11 were contradicted by the opinion of Dr. Glenn Marks. These doctors found very similar,
12 but slightly more restrictive, limitations as Dr. Rau. They both concluded that Rhodus
13 was moderately limited in understanding, remembering and carrying out detailed
14 instructions, and maintaining attention and concentration for extended periods. They both
15 found Rhodus moderately limited in interacting with coworkers, while Dr. Garland found
16 the same limitation for the general public. Dr. Garland found Rhodus moderately limited
17 in accepting instructions and criticism, while Dr. Marks found a marked limitation in this
18 area. Additionally, Dr. Garland found a moderate limitation in completing a normal
19 workweek without psychological interruptions and maintaining pace without
20 unreasonable rest periods. They both concluded Rhodus could perform the basic mental
21 demands of competitive, remunerative, unskilled work, particularly if it required only low
22 social contact. (AR 55-57, 88-90.)

23 The ALJ rejected these opinions as not supported by the record as a whole and
24 because these doctors did not review updated medical records, see Rhodus in person, or
25 hear his testimony.³ (AR 16.) The ALJ was correct in noting that these doctors saw only
26 the evaluation by Dr. Rau and were not able to compare the opinion of Dr. Rau with the

27
28 ³ The Court does not rely on the fact that these doctors did not see Rhodus in person or hear his testimony, as that is true for all non-examining State agency physicians.

1 later evaluation of Dr. Glenn Marks. In contrast, the ALJ had the entirety of Rhodus's
2 records and it was her job to resolve conflicts in medical testimony. *See Andrews*, 53 F.3d
3 at 1039. Drs. Garland and Jack Marks noted that their opinions were based solely on the
4 report of Dr. Rau. (AR 57, 89.) Therefore, for the same reasons discussed above with
5 respect to Dr. Rau's opinion, the Court finds there is substantial evidence to support the
6 ALJ's conclusion that these opinions were not in line with the record as a whole.

7 **Residual Functional Capacity**

8 First, Rhodus argues the ALJ failed to include, in the RFC, limitations found by
9 Dr. Glenn Marks. Specifically, Dr. Marks stated that Rhodus's "possible cognitive
10 problems might interfere with highly cognitively demanding work"; however, he found
11 him fully capable of learning and retaining new information and information for which he
12 was familiar from past work. (AR 324.) The equivocal statement quoted above is not a
13 direct assessment of Rhodus's functional limitations. *See Griffith v. Colvin*, No. 3:13-cv-
14 00585-HZ, 2014 WL 1303102, at *5 n.3 (D. Or. Mar. 30, 2014) (finding doctor's
15 statements that claimant "may have difficulty completing work without interference from
16 her mental impairments or performing work activities on a consistent basis without
17 additional instructions do not represent 'work-related limitation[s] of function that nee[d]
18 to be reflected in the RFC.'" Dr. Marks completed a separate mental medical source
19 statement of Rhodus's ability to do work-related activities. He found no impairment in
20 understanding, remembering, and carrying out instructions, including no impairment in
21 remembering and carrying out complex instructions and making judgments on complex
22 work-related decisions. (AR 326.) Therefore, in finding no mental limitations, the RFC
23 fully accounted for Dr. Glenn Marks's functional limitation findings. *See Valentine*, 574
24 F.3d at 691 (upholding RFC that incorporated doctor's detailed mental residual functional
25 capacity assessment rather than more generalized statements of functional abilities).

26 Second, Rhodus argues that because the ALJ found, in evaluating the paragraph B
27 criteria, that Rhodus had mild limitations in daily living, social functioning, and
28

1 concentration, persistence and pace (AR 12), the ALJ was obligated to include mental
2 limitations in the RFC.

3 Mild limitations, as found by the ALJ in Rhodus's case, do not necessarily
4 translate to a restriction in ability to perform specific work functions. *See Foster v.*
5 *Colvin*, No. 6:12-cv-00698-HZ, 2013 WL 3994652, at *4 (D. Or. Aug. 2, 2013) (rejecting
6 argument that mild limitation in social functioning, found at Step Three, must be
7 incorporated into subsequent detailed RFC evaluation). Even a severe mental impairment
8 finding at Step Two does not mandate a corresponding RFC limitation in a claimant's
9 ability to perform basic work activities. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554
10 F.3d 1219, 1228-29 (9th Cir. 2009). Further, the paragraph B criteria are not an RFC
11 assessment; rather, they are used to rate the severity of a mental impairment at Steps Two
12 and Three. SSR 96-8p; *Israel v. Astrue*, 494 F. App'x 794, 796 (9th Cir. 2012) (holding
13 that Step Two and Three findings must be considered with "all of the relevant evidence"
14 to form the RFC). The ALJ stated that the RFC "reflects the degree of limitation the
15 undersigned has found in the 'paragraph B' mental function analysis." (AR 13.) The ALJ
16 cited specifically to the opinion of Dr. Glenn Marks, who found no impairment in the
17 more specific RFC categories of maintaining attention, concentration, and attendance;
18 understanding, remembering, and carrying out instructions; interacting appropriately with
19 supervisors, co-workers, and the public; and adapting to work situations and changes in
20 the work setting. (AR 324, 326-27.) Because the RFC is consistent with the opinion of
21 Dr. Glenn Marks, regardless of the paragraph B functional assessment, it sufficiently
22 captures Rhodus's limitations. *Rogers v. Comm'r of Soc. Sec. Admin.*, 490 F. App'x 15,
23 17-18 (9th Cir. 2012) (upholding RFC based on medical source opinions, which did not
24 incorporate paragraph B finding of moderate limitation in social functioning).

25 Rhodus has not established the ALJ erred in formulating his RFC.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

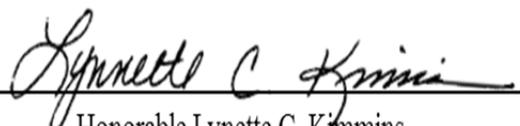
CONCLUSION

The Court concludes the ALJ did not err as to any of the claims raised by Rhodus. Therefore, Rhodus is not entitled to relief and his appeal is denied.

Accordingly,

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

Dated this 18th day of September, 2017.



Honorable Lynette C. Kimmins
United States Magistrate Judge