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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

LINDA JOYCE PEREZ, )  
 ) NO. CV 10-06589 CW  
 )  
 ) Plaintiff, )  
 )  
 ) v. ) **DECISION AND ORDER**  
 )  
 ) MICHAEL J. ASTRUE, )  
 ) Commissioner of Social )  
 ) Security, )  
 )  
 ) Defendant. )

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The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the Court finds that the Commissioner's decision should be reversed and this matter remanded for further proceedings.

**I. BACKGROUND**

Plaintiff Linda Perez was born on August 24, 1954, and was fifty-four years old at the time of her administrative hearing. [Administrative Record ("AR") 44, 27-43.] Plaintiff alleges

1 disability due to migraine headaches, depression rheumatoid  
2 arthritis, neck pain, fibromyalgia, lumbar and cervical  
3 radiculitis, cervical spine degenerative disc disease, sleeping  
4 problems, fatigue, and numbness in her left leg. [AR 47, 85,  
5 115.] She has past relevant work as a teacher's aide. [AR 86.]

6 **II. PROCEEDINGS IN THIS COURT**

7 Plaintiff filed a complaint on September 2, 2010. On March  
8 10, 2011, Defendant filed an answer and Plaintiff's  
9 Administrative Record ("AR"). On June 15, 2011, the parties  
10 filed their Joint Stipulation ("JS") identifying matters not in  
11 dispute, issues in dispute, positions of the parties, and the  
12 relief sought by each party. This matter has been taken under  
13 submission without oral argument.

14 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

15 Plaintiff filed for a period of disability and disability  
16 insurance benefits ("DIB") on February 13, 2007, alleging  
17 disability since December 15, 2006. [AR 44, 85.] After  
18 Plaintiff's application was initially denied on September 19,  
19 2007, she requested an administrative hearing, which was held  
20 before an Administrative Law Judge ("ALJ") on May 11, 2009.<sup>1</sup> [AR  
21 27-43, 47-52, 55.] Plaintiff appeared with counsel, and  
22 testimony was taken from Plaintiff and vocational expert Gregory  
23 Jones. [AR 27-43.] The ALJ issued a decision denying benefits on  
24 August 21, 2009. [AR 11-22.] On September 18, 2009, Plaintiff  
25 sought review with the Appeals Council and submitted additional  
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27 <sup>1</sup> This is a prototype case which allows a claimant to go  
28 directly to a hearing from an initial denial thereby skipping the  
reconsideration stage. [AR 44]; see 20 C.F.R. § 404.906(b)(4).

1 evidence. [AR 5-7.] When the Appeals Council denied review on  
2 July 30, 2010, the ALJ's decision became the Commissioner's final  
3 decision. [AR 1-4.]

#### 4 **IV. STANDARD OF REVIEW**

5 Under 42 U.S.C. § 405(g), a district court may review the  
6 Commissioner's decision to deny benefits. The Commissioner's (or  
7 ALJ's) findings and decision should be upheld if they are free of  
8 legal error and supported by substantial evidence. However, if  
9 the court determines that a finding is based on legal error or is  
10 not supported by substantial evidence in the record, the court  
11 may reject the finding and set aside the decision to deny  
12 benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th  
13 Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir.  
14 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001);  
15 Tackett v. Apfel, 180 F.3d 1094,1097 (9th Cir. 1999); Reddick v.  
16 Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80  
17 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521,  
18 523 (9th Cir. 1995)(per curiam).

19 "Substantial evidence is more than a scintilla, but less  
20 than a preponderance." Reddick, 157 F.3d at 720. It is  
21 "relevant evidence which a reasonable person might accept as  
22 adequate to support a conclusion." Id. To determine whether  
23 substantial evidence supports a finding, a court must review the  
24 administrative record as a whole, "weighing both the evidence that  
25 supports and the evidence that detracts from the Commissioner's  
26 conclusion." Id. "If the evidence can reasonably support either  
27 affirming or reversing," the reviewing court "may not substitute  
28 its judgment" for that of the Commissioner. Reddick, 157 F.3d at

1 720-721; see also Osenbrock, 240 F.3d at 1162.

2 **V. DISCUSSION**

3 **A. THE FIVE-STEP EVALUATION**

4 To be eligible for disability benefits a claimant must  
5 demonstrate a medically determinable impairment which prevents  
6 the claimant from engaging in substantial gainful activity and  
7 which is expected to result in death or to last for a continuous  
8 period of at least twelve months. Tackett, 180 F.3d at 1098;  
9 Reddick, 157 F.3d at 721; 42 U.S.C. § 423(d)(1)(A).

10 Disability claims are evaluated using a five-step test:

11 Step one: Is the claimant engaging in substantial  
12 gainful activity? If so, the claimant is found not  
13 disabled. If not, proceed to step two.

14 Step two: Does the claimant have a "severe" impairment?  
15 If so, proceed to step three. If not, then a finding of not  
16 disabled is appropriate.

17 Step three: Does the claimant's impairment or  
18 combination of impairments meet or equal an impairment  
19 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If  
20 so, the claimant is automatically determined disabled. If  
21 not, proceed to step four.

22 Step four: Is the claimant capable of performing his  
23 past work? If so, the claimant is not disabled. If not,  
24 proceed to step five.

25 Step five: Does the claimant have the residual  
26 functional capacity to perform any other work? If so, the  
27 claimant is not disabled. If not, the claimant is disabled.

28 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended

1 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142,  
2 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at  
3 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found  
4 "disabled" or "not disabled" at any step, there is no need to  
5 complete further steps. Tackett, 180 F.3d 1098; 20 C.F.R. §  
6 404.1520.

7 Claimants have the burden of proof at steps one through  
8 four, subject to the presumption that Social Security hearings  
9 are nonadversarial, and to the Commissioner's affirmative duty to  
10 assist claimants in fully developing the record even if they are  
11 represented by counsel. Tackett, 180 F.3d at 1098 and n.3;  
12 Smolen, 80 F.3d at 1288. If this burden is met, a prima facie  
13 case of disability is made, and the burden shifts to the  
14 Commissioner (at step five) to prove that, considering residual  
15 functional capacity ("RFC")<sup>2</sup>, age, education, and work  
16 experience, a claimant can perform other work which is available  
17 in significant numbers. Tackett, 180 F.3d at 1098, 1100;  
18 Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

#### 19 B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE

20 The ALJ found that Plaintiff had not engaged in substantial  
21 gainful activity since her alleged disability onset date of  
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23 <sup>2</sup> Residual functional capacity measures what a claimant can  
24 still do despite existing "exertional" (strength-related) and  
25 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152,  
26 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit  
27 ability to work without directly limiting strength, and include  
28 mental, sensory, postural, manipulative, and environmental  
limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993);  
Cooper, 800 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). Pain may  
be either an exertional or a nonexertional limitation. Penny, 2  
F.3d at 959; Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir.  
1985); 20 C.F.R. § 404.1569a(c).

1 December 15, 2006 (step one); that Plaintiff had "severe"  
2 impairments, namely migraine headaches, rheumatoid arthritis,  
3 neck pain, fibromyalgia, lumbar and cervical radiculitis,  
4 cervical spine degenerative disc disease, and numbness in her  
5 left leg (step two); and that Plaintiff did not have an  
6 impairment or combination of impairments that met or equaled a  
7 "listing" (step three). [AR 13-16.] The ALJ determined that  
8 Plaintiff had an RFC to perform medium work<sup>3</sup> with no more than  
9 occasional stooping, kneeling, balancing and climbing ladders,  
10 and no more than frequent climbing of stairs. [AR 17.]  
11 Plaintiff's RFC did not preclude her from performing her past  
12 work as a teacher's aide (step four). [AR 21.] Accordingly,  
13 Plaintiff was not "disabled" within the meaning of the Social  
14 Security Act. [AR 22.]

15 **C. PLAINTIFF'S PRESENT CLAIMS**

16 The parties' Joint Stipulation identifies the following  
17 disputed issues:

- 18 1. "Whether the ALJ complied with her duty to fully and  
19 fairly develop the record when she failed to hold a  
20 supplemental hearing and allow Plaintiff to respond to  
21 newly admitted evidence in the record";
- 22 2. "Whether the ALJ erred when she failed to find  
23 Plaintiff's depression and Post Traumatic Stress Disorder  
24 (PTSD) to be severe impairments";
- 25 3. "Whether the ALJ properly assessed Plaintiff's  
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27 <sup>3</sup> Medium work involves lifting no more than 50 pounds at a  
28 time with frequent lifting or carrying of objects weighting up to  
25 pounds." 20 C.F.R. § 416.967(c).

1           credibility”;

2           4. “Whether the ALJ properly considered the opinions of  
3           Plaintiff’s treating physicians, Susan Hua, M.D. and  
4           Faustino Bernadette, M.D.”<sup>4</sup>

5 [JS 3.]

6           As discussed below, Issue One is dispositive.

7           **D.    ISSUE ONE: DEVELOPMENT OF THE RECORD**

8                 **1.    Background**

9           At the close of the hearing on May 11, 2009, the ALJ  
10          requested Plaintiff to undergo consultative psychiatric and  
11          neurological evaluations to further assist her in evaluating  
12          Plaintiff’s limitations. [AR 42.] On June 29, 2009, Dr. Robert  
13          Moore performed a neurological evaluation of Plaintiff, and on  
14          July 6, 2009, Dr. Miriam Staub performed a psychiatric evaluation  
15          of Plaintiff. [AR 566-75, 576-87.] Neither of these evaluations  
16          supported the degree of Plaintiff’s alleged functional  
17          limitations.

18          Dr. Moore opined that Plaintiff is limited to lifting or  
19          carrying fifty pounds occasionally and twenty-five pounds  
20          frequently with no more than frequent reaching, pushing, and  
21          pulling in both hands, no more than frequent climbing of stairs,  
22          no climbing ladders, and occasional stooping, kneeling, crawling  
23          and crouching. [AR 576-87.] Dr. Moore did not restrict  
24          Plaintiff in her ability to sit, stand or walk in an eight-hour  
25          work day. [Id.] With respect to Plaintiff’s mental RFC, Dr.

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27                 <sup>4</sup> Defendant did not stipulate that the disputed issue  
28                 statements were framed in a neutral fashion pursuant to section  
                  VIII(C) of the case management order. [JS 3.]

1 Staub opined that Plaintiff did not have any mental limitations.  
2 [AR 566-75].

3 On July 24, 2009, the ALJ sent Plaintiff's counsel a letter,  
4 enclosing copies of Plaintiff's psychiatric and neurological  
5 evaluations from Drs. Staub and Moore, and indicating that she  
6 intended to enter the reports into the record as evidence. [AR  
7 26.] In the letter, the ALJ informed Plaintiff's counsel that  
8 Plaintiff had the right to submit any written comments concerning  
9 the enclosed reports, "a written statement as to the facts and  
10 law" applicable to the case in light of the reports, and any  
11 additional records Plaintiff wanted the ALJ to consider,  
12 including "a report from [Plaintiff's] treating physician." [Id.]  
13 The ALJ also indicated that if Plaintiff did not submit a  
14 response "within 10 days of the date [Plaintiff] receives this  
15 notice," then she would assume that Plaintiff did not wish to  
16 submit any written statements or records, and would then enter  
17 the enclosed reports into the evidence in the record. [Id.]

18 Plaintiff's counsel received the ALJ's letter on July 27,  
19 2009. [AR 134.] Within the ten day deadline, on August 5, 2009,  
20 Plaintiff's counsel electronically submitted a written response  
21 objecting to the admission of the evaluation reports as evidence  
22 into the record. [AR 135-38.] In addition, counsel requested the  
23 ALJ to conduct a supplemental hearing to be able to cross-examine  
24 Drs. Staub and Moore, or in the event Drs. Staub or Moore could  
25 not appear and testify, the presence of a medical expert to  
26 provide testimony as to whether the opinions of Drs. Staub and  
27 Moore were consistent with the objective medical evidence in the  
28 record. [AR 137.]



1           Notwithstanding Plaintiff's August 5, 2009 letter to the  
2 ALJ, objecting to the reports and requesting a supplemental  
3 hearing, the ALJ - in her August 21, 2009, written decision  
4 denying benefits - stated that "[t]he Social Security  
5 Administration did not receive a response from the [plaintiff's]  
6 counsel to submit any written statements or records concerning  
7 the evaluations within the prescribed 10 day period." [AR 11.]  
8 Accordingly, the opinions of Drs. Staub and Moore were entered  
9 into evidence in the record, the written statement submitted by  
10 Plaintiff's counsel objecting to these opinions apparently was  
11 not considered, and a supplemental hearing was not held.

12           Subsequently, Plaintiff filed a request for Appellate  
13 Council review of the hearing decision [AR 5], attaching a letter  
14 that detailed the legal arguments she made to the ALJ regarding  
15 the opinions of Drs. Straub and Moore [AR 6-7], and a copy of an  
16 opinion by her treating physician that likewise addresses those  
17 reports [AR 140]. The record reflects that Plaintiff solicited  
18 her treating physician's analysis promptly after she received  
19 those reports. [AR 139.] On July 30, 2010, the Appeals Council  
20 made this additional evidence part of the Administrative Record.<sup>5</sup>  
21 [AR 4.]

## 22           **2. Discussion**

23           An ALJ "has an independent duty to fully and fairly develop  
24 the record and to assure that the claimant's interests are  
25 considered," even when a claimant is represented by counsel.

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26           <sup>5</sup> Evidence submitted to the Appeals Council is a part the  
27 administrative record and can be considered by the courts on  
28 appeal. Ramirez v. Shalala, 8 F.3d 1449, 1451-52 (9th Cir.  
1993); Harmen v. Apfel, 211 F.3d 1172, 1180 (9th Cir. 2000).

1 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001)  
2 (citations and quotation marks omitted). The ALJ's obligation to  
3 develop the record is triggered whenever the evidence is  
4 ambiguous or when the ALJ has found the record is "inadequate to  
5 allow for proper evaluation." Mayes v. Massanari, 276 F.3d 453,  
6 459-60 (9th Cir. 2001). The ALJ may discharge this duty by, for  
7 example, keeping the record open to allow for supplementation of  
8 the record. Tonapetyan, 242 F.3d at 1150. When the Commissioner  
9 fails to adequately meet this duty, the claimant is denied the  
10 "full and fair hearing] to which she was entitled." McLeod v.  
11 Astrue, 640 F.3d 881, 886 (9th Cir. 2011).

12 Here, the ALJ evidently determined the record before her at  
13 Plaintiff's hearing was inadequate to allow for proper evaluation  
14 of her claim and, consequently, sent Plaintiff for further  
15 examination. She offered Plaintiff some opportunity to respond  
16 to the resulting reports by suggesting she would hold the record  
17 open for a brief period of time for a response. [AR 26.] The  
18 Commissioner did not, however, ultimately satisfy this duty with  
19 respect to consideration of a fully developed record.

20 Plaintiff timely submitted a written statement to the ALJ  
21 objecting to the findings of Drs. Staub and Moore and requesting  
22 a supplemental hearing.<sup>6</sup> [AR 26, 134-38.] Although she did not  
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24 <sup>6</sup> Plaintiff cites the Hearings, Appeals and Litigation Law  
25 Manual ("HALLEX") to support her position that the ALJ should  
26 have scheduled a supplemental hearing. [JS 5]. However, "HALLEX  
27 does not have the force and effect of law," and is therefore,  
28 "not binding on the Commissioner. . . ." Moore v. Apfel, 216  
F.3d 864, 869 (9th Cir. 2000); see also Western Radio Services  
Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996) ("we will not  
review allegations of noncompliance with an agency statement that  
is not binding on the agency.").

1 submit any medical support for her statement at that time, and  
2 her statement is somewhat vague with respect to whether she  
3 intended to provide any further records to the ALJ, the record  
4 indicates that she sent her treating physician, Celedonia X. Yue,  
5 M.D., a letter on July 30, 2009, asking Dr. Yue to provide a  
6 written statement in response to the opinions of Drs. Staub and  
7 Moore; Dr. Yue submitted her assessment on September 4, 2009.<sup>7</sup>  
8 [AR 139-140.] Plaintiff then promptly forwarded Dr. Yue's  
9 assessment to the Appeals Council, which received it into  
10 evidence. [AR 4.]

11 In the hearing decision, however, the ALJ stated that "[t]he  
12 Social Security Administration did not receive a response from  
13 the [plaintiff's] counsel to submit any written statements or  
14 records concerning the evaluations within the prescribed 10 day  
15 period." [AR 11.] Although the ALJ was not provided with a copy  
16 of Dr. Yue's assessment, it is unclear from the hearing decision  
17 whether the ALJ received and considered even the written argument  
18 submitted by Plaintiff's attorney. Furthermore, while it is  
19 apparent that the Appeals Council received both Plaintiff's  
20 statement and Dr. Yue's assessment, the Appeals Council did not  
21 specifically address or discount either of these documents. [See  
22 AR 1-3.]

23 This oversight is particularly troubling given that the  
24 report Plaintiff submitted reflects the opinion of a treating

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25 <sup>7</sup> Contrary to the opinions of Drs. Staub and Moore, Dr. Yue  
26 opined that she is doubtful that Plaintiff could ever be able to  
27 return to full-time work as she can only stand for twenty minutes  
28 at a time and is able to lift less than five pounds. [AR 140.]  
Dr. Yue explained that Plaintiff would miss more than three days  
of work due to her medical conditions. [Id.]

1 physician. [See AR 21.] The Commissioner may reject a treating  
2 physician's assessment only by articulating clear and convincing  
3 reasons for so doing, if uncontroverted, and specific, legitimate  
4 reasons even if controverted. Lester v. Chater, 81 F.3d 821, 830  
5 (9th Cir. 1996). The Commissioner did not meet this standard  
6 and, in thus failing to fully develop the record and weigh the  
7 evidence appropriately, denied Plaintiff her right to a full and  
8 fair hearing. Reversal is warranted on this basis.

9 **E. REMAND FOR FURTHER PROCEEDINGS**

10 The decision whether to remand for further proceedings is  
11 within the discretion of the district court. Harman v. Apfel,  
12 211 F.3d 1172, 1175-1178 (9th Cir. 2000). Where no useful  
13 purpose would be served by further proceedings, or where the  
14 record has been fully developed, it is appropriate to exercise  
15 this discretion to direct an immediate award of benefits.  
16 Harman, 211 F.3d at 1179 (decision whether to remand for further  
17 proceedings turns upon their likely utility). However, where  
18 there are outstanding issues that must be resolved before a  
19 determination can be made, and it is not clear from the record  
20 that the ALJ would be required to find the claimant disabled if  
21 all the evidence were properly evaluated, remand is appropriate.  
22 Id. Here, as set out above, outstanding issues remain before a  
23 finding of disability can be made.<sup>8</sup> Accordingly, remand is

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25 <sup>8</sup> None of the remaining issues raised by Plaintiff in the  
26 Joint Stipulation mandate a finding of disability on the basis of  
27 the current record - particularly given that no step five  
28 findings were made in this case [see AR 21] - even if resolved in  
Plaintiff's favor. Accordingly, remand is the appropriate  
disposition of this appeal, and the Court does not need to reach  
the remaining disputed issues.

1 required.

2 **VI. ORDERS**

3 Accordingly, **IT IS ORDERED** that:

4 1. The decision of the Commissioner is **REVERSED**.

5 2. This action is **REMANDED** to defendant, pursuant to  
6 Sentence Four of 42 U.S.C. § 405 (g), for further proceedings as  
7 discussed above.

8 3. The Clerk of the Court shall serve this Decision and  
9 Order and the Judgment herein on all parties or counsel.

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12 DATED: July 20, 2011



13 CARLA M. WOHRLE  
14 United States Magistrate Judge  
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