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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARLOS S. MIRANDA,)	NO. EDCV 08-00462-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

Plaintiff filed a Complaint on April 11, 2008, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's applications for a period of disability ("POD"), disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On June 12, 2008, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on December 19, 2008, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 9, 2007, the Appeals Council remanded the case to a different
2 Administrative Law Judge for compliance with this Court's Order. (A.R.
3 480-82.)

4
5 On November 27, 2007, a remand hearing was held before
6 Administrative Law Judge Jay E. Levine ("ALJ"). (A.R. 500-30.) On
7 January 11, 2008, the ALJ denied plaintiff's claims; that decision is
8 now at issue. (A.R. 456-63.)

9
10 **SUMMARY OF ADMINISTRATIVE DECISION**

11
12 In his written decision, the ALJ found that plaintiff meets the
13 insured status requirements of the Social Security Act through December
14 31, 2007, and has not engaged in substantial gainful activity since
15 December 20, 2000, plaintiff's alleged disability onset date. (A.R.
16 458.) The ALJ further found that plaintiff suffers from the following
17 "severe" impairments: blindness in the left eye and depression. (*Id.*)

18
19 The ALJ determined that plaintiff has the residual functional
20 capacity to "perform heavy work except no work at unprotected heights or
21 around dangerous unguarded moving machinery or work requiring binocular
22 vision. There are no mental limitations." (A.R. 460.) The ALJ also
23 determined that, although plaintiff was "a generally credible witness,"
24 plaintiff's "statements concerning the intensity, persistence and
25 limiting effects of [his] symptoms are not entirely credible." (A.R.

26 _____
27 if necessary, obtain supplemental vocational expert testimony to clarify
28 the effects of the assessed limitations on plaintiff's occupational
base. (A.R. 484.)

1 461.) In reliance on the opinion of the medical expert, the ALJ gave
2 "little weight" to the opinion of Romeo D. Villar, M.D., plaintiff's
3 treating physician. (A.R. 461-62.)
4

5 The ALJ determined that plaintiff is unable to perform his past
6 relevant work, but having considered plaintiff's age, education, work
7 experience, and residual functional capacity, and in reliance on
8 testimony from a vocational expert, the ALJ found that jobs exist in
9 significant numbers in the national economy that plaintiff can perform,
10 such as a hand packager, cleaner, and kitchen helper. (A.R. 462-63.)
11 Accordingly, the ALJ concluded that plaintiff has not been under a
12 disability, as defined in the Social Security Act, since December 30,
13 2000, through the date of his decision. (A.R. 463.)
14

15 **STANDARD OF REVIEW**
16

17 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
18 decision to determine whether it is free from legal error and supported
19 by substantial evidence in the record as a whole. Orn v. Astrue, 495
20 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
21 evidence as a reasonable mind might accept as adequate to support a
22 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
23 a mere scintilla but not necessarily a preponderance." Connett v.
24 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
25 record can constitute substantial evidence, only those "'reasonably
26 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
27 1063, 1066 (9th Cir. 2006)(citation omitted).
28

1 testimony; (3) whether the ALJ considered the lay witness statements;
2 (4) whether the ALJ considered the findings of the State agency
3 psychiatrist; and (5) whether the ALJ posed a complete hypothetical
4 question to the vocational expert. (Joint Stipulation ("Joint Stip.")
5 at 3.)

6
7 **I. The ALJ Failed To Comply With The Remand Orders Directing Proper**
8 **Consideration Of The Opinion Of Plaintiff's Treating Physician,**
9 **Romeo D. Villar, M.D.**

10
11 A treating physician's conclusions "must be given substantial
12 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Even when
13 the treating physician's opinions are contradicted, "if the ALJ wishes
14 to disregard the opinion[s] of the treating physician he . . . must make
15 findings setting forth specific, legitimate reasons for doing so that
16 are based on substantial evidence in the record." Winans v. Bowen, 853
17 F.2d 643, 647 (9th Cir. 1987); see also McAllister v. Sullivan, 888 F.2d
18 599, 602 (9th Cir. 1989) ("broad and vague" reasons for rejecting the
19 treating physician's opinion do not suffice). The ALJ can meet this
20 burden "by setting out a detailed and thorough summary of the facts and
21 conflicting clinical evidence, stating his interpretation thereof, and
22 making findings." Magallanes v. Brown, 881 F.2d 747, 751 (9th Cir.
23 1989).

24
25 Pursuant to 20 C.F.R. § 416.912(e)(1), the Commissioner "will seek
26 additional evidence or clarification from your medical source when the
27 report from your medical source contains a conflict or ambiguity that
28 must be resolved, the report does not contain all the necessary

1 information, or does not appear to be based on medically acceptable
2 clinical and laboratory diagnostic techniques." Thus, the Commissioner
3 has a duty to develop the record in appropriate circumstances. See
4 Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996) ("If the ALJ thought
5 he needed to know the basis of the treating physician's opinions in
6 order to evaluate them, he had a duty to conduct an appropriate inquiry,
7 for example, by subpoenaing the physicians or submitting further
8 questions to them.")(citations omitted). Moreover, it is well-settled
9 that, pursuant to the Commissioner's Regulations, an ALJ is bound to
10 follow the Appeals Council's order and "may take any additional action
11 that is not inconsistent with the Appeals Council's remand order." 20
12 C.F.R. § 416.1477(b). (See 20 C.F.R. § 416.1483 providing that the
13 procedures in 20 C.F.R. § 416.1477 should be followed if the Appeals
14 Council returns a court-remanded case to an ALJ).

15
16 The Court remanded this case on April 4, 2007, pursuant to a
17 stipulation of the parties, and ordered the ALJ to evaluate the opinion
18 of plaintiff's treating physician, Dr. Villar, and provide reasons for
19 the weight assigned to his opinion. (A.R. 484.) In effectuating the
20 Court's Order, the Appeals Council explicitly stated in its June 9, 2007
21 Order:

22
23 This matter was previously remanded by the U.S. District Court
24 for reevaluation and weighing of the opinion of [plaintiff's]
25 treating physician, Dr. Romeo D. Villar (Exhibits 10F, 11F,
26 14F and 22F). The [May 26, 2006] hearing decision again does
27 not contain an adequate evaluation of Dr. Villar's opinion.
28 The Administrative Law Judge concluded that [plaintiff] has

1 the residual functional capacity to perform work with the
2 limitation of monocular vision and the limitation to the
3 performance of only "simple, routine, repetitive and non-
4 public tasks" (Tr. 245). On July 14, 2003, Dr. Villar
5 diagnosed major depression and assessed the claimant with a
6 Global Assessment of Functioning Scale score of 58, which is
7 indicative of moderate symptoms or moderate limitations in
8 functioning (Diagnostic and Statistical Manual of Mental
9 Disorders, Fourth Edition, 1994), and prescribed Zoloft and
10 Wellbutrin (Tr. 216-217). On August 12, 2003, Dr. Villar
11 reported that [plaintiff] was expected to be incapacitated
12 from work until March 31, 2004 (Tr. 218). Also, Dr. Villar
13 stated that [plaintiff] had poor concentration and memory (Tr.
14 376, 378), would have difficulty completing tasks (Tr. 378),
15 and that [plaintiff's] depression would interfere with his
16 ability to work (Tr. 378). The Administrative Law Judge
17 summarized some portions of Dr. Villar's assessments, but did
18 not address the foregoing aspects of his opinion and did not
19 evaluate or state the weight accorded to Villar's opinion as
20 required by 20 CFR 404.1527(d) and 416.927(d). . . .
21 Therefore, further evaluation of Dr. Villar's opinion and the
22 claimant's mental impairment is warranted.

23
24 (A.R. 480-81.)
25

26 The Appeals Council stated further that, upon remand, the
27 Administrative Law Judge shall:
28

1 Give further consideration to the treating source's opinion
2 pursuant to the provisions of 20 CFR 404.1527 and 416.927 and
3 Social Security Rulings 96-2p and 96-5p, and explain the
4 weight given to such opinion evidence. As appropriate, the
5 Administrative Law Judge may request the treating source to
6 provide additional evidence and/or further clarification of
7 the opinions and medical source statements about what
8 [plaintiff] can still do despite the impairments (20 CFR
9 404.1512 and 416.912). The Administrative Law Judge may also
10 enlist the aid and cooperation of [plaintiff's] representative
11 in developing evidence from [plaintiff's] treating source.
12

13 In his subsequent decision, however, the ALJ failed to address with
14 particularity Dr. Villa's assessments in accordance with this Court's
15 April 4, 2007 Order and the Appeals Council's June 9, 2007 Order. The
16 entirety of the ALJ's "compliance" with these remand orders is as
17 follows:
18

19 Addressing the court remand directly, I give little weight to
20 the opinions of [plaintiff's] treating doctors. He has been
21 treated with medications only. The medical expert testified
22 that [plaintiff] had only the following limitations: mild
23 limitations in activities of daily living, mild to moderate
24 limitations in social functioning, mild limitations and [sic]
25 concentration, persistence and pace and one episode of
26 deterioration and the time of his eye injury in 2000. I
27 concur.... The medical expert also testified that [plaintiff]
28 has a reactive depression that could be alleviated by

1 counseling and therapy. Although [plaintiff] has been
2 somewhat depressed by the loss of his eye seven years ago, he
3 has been treated only with medication and without therapy....
4 The medical expert testified and I agree that the treating
5 physician's opinion of [plaintiff's] ability to work should be
6 given little credit. All they did was prescribe medication
7 and did not perform the mental status examinations, counseling
8 or hospitalization. Exhibit 25 [a September 19, 2007 Work
9 Capacity Evaluation (Mental) two-page form signed by Ochuko G.
10 Diamreyan, M.D.] is given no weight. As the medical expert
11 testified, there is no evidence that [plaintiff] is extremely
12 limited in every category checked on the form. The medical
13 expert testified that a person who is so limited would not be
14 sitting in the hearing but would be hospitalized because of
15 severe mental problems. I agree.²

16
17 (A.R. 461-62.)
18

19 Although the ALJ stated that he "address[ed] the court remand
20 directly," and gave "little weight to the opinions of [plaintiff's]
21 treating doctors," the ALJ did not address the various aspects of Dr.
22 Villar's opinion, as required by this Court's Order and explicitly
23 directed by the Appeals Council. Indeed, the ALJ failed to discuss Dr.
24 Villar's opinion that: (1) as of July 14, 2003, plaintiff suffered from

25
26 ² In rejecting plaintiff's treating physicians' opinions, the ALJ did
27 not specifically reject or address with any particularity Dr. Villar's
28 opinion. Instead, the ALJ lumped together the opinions of several of
plaintiff's treating physicians. While the ALJ specifically addressed
Exhibit 25, and provided reasons for the rejection of it, the author of
Exhibit 25 was Dr. Diamreyan, not Dr. Villar. (A.R. 497-98.)

1 major depression and was assessed with a Global Assessment of
2 Functioning Scale score of 58, which is indicative of moderate
3 limitations in functioning; (2) plaintiff was expected to be
4 incapacitated from work for approximately six months from August 12,
5 2003, through March 31, 2004; (3) and plaintiff had poor concentration
6 and memory, would have difficulty completing tasks, and his depression
7 would interfere with his ability to work. (A.R. 480.) The ALJ must
8 address these particular aspects of Dr. Villar's opinion on remand.

9
10 Accordingly, remand is required to allow the ALJ the opportunity to
11 provide legally sufficient reasons, if such reasons exist, for rejecting
12 the opinion of Dr. Villar.

13
14 **II. The ALJ Failed To Provide The Requisite Clear And Convincing**
15 **Reasons For Rejecting Plaintiff's Subjective Pain Testimony.**

16
17 Plaintiff alleges that the ALJ erred in his consideration of
18 plaintiff's subjective symptom testimony. (Joint Stip. at 8-10.) For
19 the reasons set forth below, the Court agrees.

20
21 Once a disability claimant produces objective evidence of an
22 underlying physical impairment that is reasonably likely to be the
23 source of his subjective symptom(s), all subjective testimony as to the
24 severity of the symptoms must be considered. Moisa v. Barnhart, 367
25 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
26 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 416.929(a)(explaining how
27 pain and other symptoms are evaluated). "[U]nless an ALJ makes a
28 finding of malingering based on affirmative evidence thereof, he or she

1 may only find an applicant not credible by making specific findings as
2 to credibility and stating clear and convincing reasons for each."
3 Robbins, 466 F.3d at 883. Further, an ALJ may not rely solely on the
4 absence of objective medical evidence supporting the *degree* of pain
5 alleged as a basis for finding that a plaintiff's testimony regarding
6 subjective symptoms is not credible. Fair v. Bowen, 885 F.2d 597,
7 601-02 (9th Cir. 1989); Stewart v. Sullivan, 881 F.2d 740, 743-44 (9th
8 Cir. 1989).

9
10 Both in his filings with the Commissioner and in his testimony,
11 plaintiff described various subjective symptoms from which he claims to
12 suffer. Plaintiff testified that he was undergoing regular treatment
13 for depression and anxiety and is taking medication, including Lomictal,
14 Wellbutrin, and Clopremazine. (A.R. 508-09.) Plaintiff further
15 testified that sometimes he hears voices and feels suicidal. (A.R. 447-
16 49.) Plaintiff stated that, because of his depression, it is "very hard
17 for [him] to concentrate," he has no "desire to take care of [his]
18 needs," he "do[esn't] want to do activities," and "all [he] want[s] to
19 do is be alone." (A.R. 326, 330.) Plaintiff further stated that he does
20 "not have trouble sleeping, as a matter of fact, all [he] want[s] to do
21 is sleep because of all the medications." (A.R. 307.)

22
23 In his written decision, the ALJ found that plaintiff suffers from
24 "severe" depression and blindness in the left eye, both of which are
25 medically determinable impairments that reasonably could cause the
26 subjective limitations about which plaintiff complains. (A.R. 458.)
27 However, the ALJ rejected plaintiff's statements concerning the
28 "intensity, persistence and limiting effects" of his limitations. (A.R.

1 461.) The ALJ stated that:

2
3 [Plaintiff] was a generally credible witness. He
4 testified that he helps his wife care for his children and
5 grandchildren with whom he resides. He testified that he was
6 depressed because of the loss of his eye. He said he wanted
7 to go back to work at his old job but they would not hire him
8 back. He said that he has looked for other work but no one
9 will hire him because he is blind in one eye. He has been
10 treated with medication for depression for several years but
11 no doctor has given him psychotherapy or sent him for
12 counseling. Other than his eyesight, he said he has no other
13 physical problems.

14
15 After considering the evidence of record, the undersigned
16 finds that [plaintiff's] medically determinable impairments
17 could reasonably be expected to produce the alleged symptoms,
18 but that [plaintiff's] statements concerning the intensity,
19 persistence and limiting effects of these symptoms are not
20 entirely credible.

21
22

23
24 ... [Plaintiff] testified that he assists his wife in caring
25 for their four grandchildren and they are compensated by their
26 children for performing those services.... Although
27 [plaintiff] has been somewhat depressed by the loss of his eye
28 seven years ago, he has been treated only with medication and

1 without therapy. . . . [Plaintiff] testified that he wanted
2 only to do his previous work and that he did not think anyone
3 will hire him for any other type of work. Although
4 [plaintiff] may believe that no one will hire him because of
5 his lack of slight [*sic*] in one eye, it belies common sense
6 that he could [not] find a manual labor job in the local or
7 national economy. Simply stated, he has elected not to look
8 for work.

9
10 (A.R. 461-62.) When examined in the light of the record as a whole,
11 these reasons do not withstand scrutiny.

12
13 The ALJ's reliance on plaintiff's ability to engage in limited
14 daily activities, such as assisting his wife in caring for his
15 grandchildren, as being inconsistent with his claims of debilitating
16 symptoms (A.R. 461) is not a convincing basis upon which to reject
17 plaintiff's testimony. There is, however, no evidence of record
18 regarding how little or how much plaintiff actually does to assist his
19 wife in caring for their grandchildren. The ALJ's casual reference to
20 plaintiff's daily activities to support his adverse credibility finding
21 fails, therefore, to demonstrate how whatever plaintiff may do to care
22 for his grandchildren, with whom he resides, translates into the ability
23 to engage in full-time work. See Reddick v. Chater, 157 F.3d 715, 722
24 (9th Cir. 1998)(only if the level of activity were inconsistent with
25 claimant's claimed limitations would these activities have any bearing
26 on claimant's credibility); Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir.
27 1987)(disability claimant need not "vegetate in dark room" to be deemed
28 eligible for benefits); Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th

1 Cir. 1990)(daily activities may not be relied upon to support an adverse
2 credibility decision where those activities do not affect the claimant's
3 ability to perform appropriate work activities on an ongoing and daily
4 basis); Fair, 885 F.2d at 602 ("The Social Security Act does not require
5 that an individual be utterly incapacitated to be eligible for benefits,
6 and many home activities may not be easily transferable to a work
7 environment where it might be impossible to rest periodically or take
8 medication.").

9
10 Further, the ALJ's rejection of plaintiff's subjective complaints
11 based, in part, on the fact that plaintiff's symptoms are managed
12 conservatively, primarily with medications, is not a convincing reason
13 to reject plaintiff's credibility. There is no substantial evidence in
14 the record to support the ALJ's belief that more aggressive treatment
15 would alleviate plaintiff's symptoms to a degree rendering him able to
16 work.³ While it is permissible for an ALJ to evaluate the credibility
17 of a claimant's subjective limitations based, in part, on plaintiff's
18 record of receiving minimal and conservative treatment, he must make
19 detailed findings of fact so that a reviewing court may determine
20 whether substantial evidence supports the ALJ's conclusion. The ALJ
21 failed to meet his burden here. See Fair, 885 F.2d at 601-02; Lewin v.
22 Schwieker, 654 F.2d 631, 634-635 (9th Cir. 1981).

23
24
25 ³ While the medical expert opined that plaintiff needed to receive
26 cognitive restructuring therapy in addition to medication, the expert
27 conceded that none of plaintiff's treating doctors had found any such
28 treatment warranted. In addition, the record showed that plaintiff
lacked medical insurance and, as the medical expert conceded,
plaintiff's ability to receive such therapy, even had his doctors
prescribed it, was a "resource issue." (A.R. 511, 515, 517-18.)

1 Defendant contends that the ALJ's rejection of plaintiff's
2 subjective complaints was permissible, because "there was a lack of
3 objective medical evidence to support [p]laintiff's subjective
4 complaints." (Joint Stip. at 10.) However, it is well-settled that an
5 ALJ may not discredit a claimant's subjective claims of disabling
6 limitations for the sole reason that the alleged degree of his
7 limitation is not fully supported by objective medical evidence. See
8 Fair, 885 F.2d at 601-02; Stewart, 881 F.2d at 743-44. Thus, the ALJ
9 erred by requiring plaintiff to adduce medical evidence sufficient to
10 corroborate the severity of his alleged depression limitations and other
11 symptoms. See Bunnell, 947 F.2d at 346.

12
13 Accordingly, the ALJ's rejection of plaintiff's credibility without
14 setting forth clear and convincing reasons for the rejection constitutes
15 reversible error.⁴ On remand, the ALJ must provide reasons, if they
16 exist and in accordance with the requisite legal standards, for
17 discrediting plaintiff's pain testimony.

18
19 **III. The ALJ Should Consider The Lay Witness Statements On Remand.**

20
21 In evaluating the credibility of a claimant's assertions of
22 functional limitations, the ALJ must consider lay witnesses' reported
23 observations of the claimant. Stout, 454 F.3d at 1053. "[F]riends and
24 family members in a position to observe a claimant's symptoms and daily

25
26 _____
27 ⁴ Another reason stated by the ALJ for rejecting plaintiff's
28 credibility was that, in the ALJ's view, plaintiff "has elected not to
look for work." (A.R. 462.) While the ALJ's opinion regarding
plaintiff's motivation to find work is entitled to some deference, this
reason alone is not sufficient to reject plaintiff's credibility.

1 activities are competent to testify as to [the claimant's] condition."
2 Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. §
3 416.913(d)(4) ("we may also use evidence from other sources to show the
4 severity of your impairment(s).... Other sources include, but are not
5 limited to ... spouses, parents and other care-givers, siblings, other
6 relatives, friends, neighbors, and clergy"). "If an ALJ disregards the
7 testimony of a lay witness, the ALJ must provide reasons 'that are
8 germane to each witness.'" Bruce v. Astrue, 557 F.3d 1113, 1114 (9th
9 Cir. 2009)(citation omitted). Further, the reasons "germane to each
10 witness" must be specific. Stout, 454 F.3d at 1054 (explaining that
11 "the ALJ, not the district court, is required to provide specific
12 reasons for rejecting lay testimony").

13
14 An ALJ may "properly discount lay testimony that conflict[s] with
15 the available medical evidence" (Vincent v. Heckler, 739 F.2d 1393, 1395
16 (9th Cir. 1984)), particularly, when, as in Vincent, "lay witnesses
17 [are] making medical *diagnoses*," because "[s]uch medical diagnoses are
18 beyond the competence of lay witnesses and therefore do not constitute
19 competent evidence." Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir.
20 1996) (original emphasis). When, as here, however, a lay witness
21 testifies about a claimant's symptoms, such testimony *is* competent
22 evidence and cannot be disregarded without comment. *Id.* Under Stout,
23 454 F.3d at 1055, "where the ALJ's error lies in a failure to properly
24 discuss competent lay testimony favorable to the claimant, a reviewing
25 court cannot consider the error harmless unless it can confidently
26 conclude that no reasonable ALJ, when fully crediting the testimony,
27 could have reached a different disability determination."

28

1 Plaintiff contends that the ALJ improperly ignored the lay witness
2 statements of his daughter, Nancy Miranda. (Joint Stip at 13-15.) In
3 a Function Report-Adult Third Party Questionnaire dated February 3, 2004
4 (the "Questionnaire"), Ms. Miranda provided observations regarding
5 plaintiff's alleged impairments and their impact on plaintiff's daily
6 activities and ability to work. (A.R. 298-306.) Ms. Miranda stated
7 that she "spend[s] quite a lot of time with [her] father since [he]
8 lives with [her]." (A.R. 298.) Ms. Miranda further stated that
9 plaintiff is limited in his ability to: "remember"; "concentrate";
10 "complete tasks"; "understand"; "follow instructions"; and "get along
11 with others." (A.R. 303.) In addition, Ms. Miranda explained that
12 plaintiff is "a stressful [sic] man since the accident happen[ed]," and
13 "he gets upset [with] any routine changes." (A.R. 304.) Finally, Ms.
14 Miranda stated that she "feel[s] that [her] father is in a state of
15 depression that he could take his life at any time." (*Id.*)

16
17 Nowhere in the ALJ's decision does he mention Ms. Miranda's
18 observations, which both corroborate and expand upon plaintiff's symptom
19 testimony. The ALJ's failure to do so constitutes error. Specifically,
20 the ALJ should have addressed Ms. Miranda's observations regarding
21 plaintiff's memory lapses, difficulty concentrating, and trouble
22 following instructions, because such observations are neither "medical
23 diagnoses," as in Vincent, nor are they entirely consistent with the
24 ALJ's residual functional capacity assessment, as defendant contends.
25 (Joint Stip. at 15.) Further, if Ms. Miranda's observations of
26 plaintiff's memory lapses, difficulty concentrating, and trouble
27 following instructions are fully credited in conducting a harmless error
28 analysis, as required by Stout, then the Court cannot confidently

1 conclude that "no reasonable ALJ ... could have reached a different
2 disability determination." Stout, 454 F.3d at 1056. Therefore, the
3 ALJ's failure to address the observations of Ms. Miranda, which if not
4 rejected for proper reasons may require the inclusion of additional
5 limitations in the hypothetical posed to the vocational expert, cannot
6 simply be dismissed as harmless error.

7
8 On remand, the ALJ must provide proper reasons, if they exist, for
9 rejecting Ms. Miranda's statements regarding her observations of the
10 nature and extent of plaintiff's alleged impairments and attendant
11 limitations as discussed above, so that a reviewing court may know the
12 basis for the ALJ's decision and have the ability to assess the
13 propriety of that decision.

14
15 **IV. The ALJ Should Consider The Opinion Of The State Agency Physician**
16 **On Remand.**

17
18 Pursuant to the Commissioner's regulations:

19
20 (I) Administrative law judges are not bound by any findings
21 made by State agency medical or psychological consultants, or
22 other program physicians or psychologists. However, State
23 agency medical psychological consultants and other program
24 physicians and psychologists are highly qualified physicians
25 and psychologists who are also experts in Social Security
26 disability evaluation. Therefore, administrative law judges
27 must consider findings of State agency medical and
28 psychological consultants or other program physicians or

1 psychologists as opinion evidence....

2
3 (ii) ... Unless the treating source's opinion is given
4 controlling weight, the administrative law judge must explain
5 in the decision the weight given to the opinions of a State
6 agency medical or psychological consultant or other program
7 physician or psychologist, as the administrative law judge
8 must do for any opinions from treating sources, nontreating
9 sources, and other nonexamining sources who do not work for
10 us.

11
12 20 C.F.R. § 416.927(f)(2)(I) and (ii).

13
14 Social Security Ruling ("SSR") 96-6p makes plain that, although
15 administrative law judges and the Appeals Council are not bound by
16 findings made by State agency or other program physicians and
17 psychologists, both administrative law judges and the Appeals Council
18 "*may not ignore these opinions and must explain the weight given to the*
19 *opinions in their decisions.*" *Id.* (emphasis added).

20
21 Here, plaintiff contends that the ALJ erred in failing to discuss
22 the findings of the State agency psychiatrist, M. Becraft, M.D. (Joint
23 Stip. at 17.) On April 23, 2004, Dr. Becraft completed a mental
24 residual functional capacity assessment of plaintiff, in which he
25 indicated that plaintiff is moderately limited in his ability to:
26 understand and remember detailed instructions; carry out detailed
27 instructions; interact appropriately with the general public; and get
28 along with coworkers or peers without distracting them or exhibiting

1 behavioral extremes. (A.R. 393-94.)

2
3 The ALJ's decision is devoid of any mention, much less any
4 discussion or meaningful evaluation, of Dr. Becraft's findings. As the
5 ALJ provided no reason(s) for omitting Dr. Becraft's conclusions, it is
6 unclear whether the ALJ properly considered Dr. Becraft's opinion in
7 accordance with 20 C.F.R. § 416.927(f)(2)(I) and (ii).

8
9 Defendant contends that the ALJ's silence with respect to Dr.
10 Becraft's findings was justified, as "the omission was harmless error
11 because Dr. Becraft's opinion was still consistent with the ALJ's
12 residual functional capacity assessment." (Joint Stip. at 18.)
13 Contrary to defendant's contention, it is unclear to the Court whether
14 the ALJ's omission was indeed harmless. The ALJ is bound by 20 C.F.R.
15 § 416.927(f)(2)(I) and (ii), as well as SSR 96-6p, to explain how he
16 reached his conclusions.

17
18 Accordingly, remand is required for the ALJ to set forth legally
19 sufficient reasons, if any, for rejecting Dr. Becraft's opinion.

20
21 **V. Until The ALJ Has Considered Properly The Opinions Of Dr. Villar**
22 **And Dr. Becraft, Plaintiff's Subjective Complaints, And The Lay**
23 **Witness Statements, The Court Cannot Assess The Propriety Of The**
24 **Hypothetical Posed To The Vocational Expert.**

25
26 "If a vocational expert's hypothetical does not reflect all the
27 claimant's limitations, then the 'expert's testimony has no evidentiary
28 value to support a finding that the claimant can perform jobs in the

1 national economy.'" Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir.
2 1993)(citation omitted). In posing a hypothetical to a vocational
3 expert, the ALJ must accurately reflect all of the claimant's
4 limitations. Embrey, 849 F.2d at 422-24. For the vocational expert's
5 testimony to constitute substantial evidence, the hypothetical question
6 must "consider all of the claimant's limitations." Andrews, 53 F.3d at
7 1044 (holding that hypothetical questions that do not include all of
8 plaintiff's limitations are insufficient and warrant remand).

9
10 Here, the hypothetical *may* be incomplete to the extent that it does
11 not reflect appropriately, in whole or in part, the opinions of Drs.
12 Villar and Becraft, plaintiff's subjective complaints, and the
13 observations of plaintiff's daughter regarding plaintiff's limitations.

14
15 On remand, the ALJ should either properly reject the opinions of
16 Drs. Villar and Becraft, plaintiff's subjective complaints, and the
17 observations of Ms. Martinez, in accordance with the appropriate legal
18 standards, or the ALJ must incorporate additional limitations into the
19 hypothetical posed to the vocational expert.

20
21 **VI. Remand Is Required.**

22
23 The decision whether to remand for further proceedings or order an
24 immediate award of benefits is within the district court's discretion.
25 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
26 useful purpose would be served by further administrative proceedings, or
27 where the record has been fully developed, it is appropriate to exercise
28 this discretion to direct an immediate award of benefits. *Id.* at 1179

1 ("the decision of whether to remand for further proceedings turns upon
2 the likely utility of such proceedings"). However, where there are
3 outstanding issues that must be resolved before a determination of
4 disability can be made, and it is not clear from the record that the ALJ
5 would be required to find the claimant disabled if all the evidence were
6 properly evaluated, remand is appropriate. *Id.*

7
8 Here, the Court concludes, with some hesitation, that remand is the
9 appropriate remedy to allow the ALJ one *final opportunity* to remedy the
10 above-mentioned deficiencies and errors. See, e.g., Benecke v.
11 Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for further
12 proceedings is appropriate if enhancement of the record would be
13 useful); McAllister, 888 F.2d at 603 (remand appropriate to remedy
14 defects in the record). It is, however, deeply troubling to the Court
15 that this case has twice been remanded for further consideration and
16 most recently with very detailed direction from the Appeals Council,
17 which the ALJ made scant effort to follow.

18
19 **CONCLUSION**

20
21 Accordingly, for the reasons stated above, IT IS ORDERED that the
22 decision of the Commissioner is REVERSED, and this case is REMANDED for
23 further proceedings consistent with this Memorandum Opinion and Order.

24
25 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
26 copies of this Memorandum Opinion and Order and the Judgment on counsel
27 for plaintiff and for defendant.

1 LET JUDGMENT BE ENTERED ACCORDINGLY.

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3 DATED: September 4, 2009

Margaret A. Nagle

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6 MARGARET A. NAGLE
7 UNITED STATES MAGISTRATE JUDGE
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