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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KATHRYN HAMILTON,	)	NO. EDCV 08-1843-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on December 24, 2008, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for supplemental security income ("SSI"). On February 26, 2009, 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 August 10, 2009, 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 Varni's decision and remanded the case to an Administrative Law Judge.  
2 (A.R. 266-67.)

3  
4 On July 3, 2008, Administrative Law Judge Phillip E. Moulaison  
5 ("ALJ") held a hearing, at which plaintiff and others testified. (A.R.  
6 285-318.) On August 22, 2007, the ALJ issued a decision that was  
7 partially favorable in that the ALJ found plaintiff to be disabled and  
8 entitled to receive SSI as of December 27, 2007, but found she was not  
9 disabled prior to that date. (A.R. 237-44.)

10  
11 **SUMMARY OF THE COMMISSIONER'S DECISION**

12  
13 The ALJ found that plaintiff has not engaged in substantial gainful  
14 activity since September 1, 1991, the alleged onset date. (A.R. 239.)  
15 The ALJ determined that plaintiff has a combination of severe  
16 impairments consisting of: a history of chronic lower back, right hip,  
17 pelvic, and left shoulder pain; diabetes mellitus; peripheral  
18 neuropathy; hypertension; history of hepatitis; history of right eye  
19 injury; and obesity. (A.R. 239.) Relying on the December 10, 2002  
20 report of Dr. Linda M. Smith, a psychiatrist who performed a  
21 consultative psychiatric evaluation of plaintiff, the ALJ concluded that  
22 plaintiff's mood disorder is non-severe. (*Id.*) The ALJ further  
23 determined that plaintiff's impairments, singly or in combination, do  
24 not meet or equal any of the impairments listed in 20 C.F.R. Part 404,  
25 Subpart P, Appendix 1. (A.R. 240.)

1 The ALJ determined that, as of December 27, 2007,<sup>2</sup> plaintiff's  
2 residual functional capacity ("RFC") was for unskilled sedentary work as  
3 defined in 20 C.F.R. § 416.967(a), because she needed a cane to walk.  
4 (A.R. 240.) The ALJ concluded that, as of December 27, 2007, plaintiff  
5 was unable to perform her past relevant work as a clothes tagger or a  
6 prep cook (A.R. 243), and based on her age, education, work experience,  
7 and RFC, there was not a significant number of jobs in the national  
8 economy that she could perform (A.R. 244). Accordingly, a finding of  
9 "disabled," as of December 27, 2007, was warranted. (*Id.*)

10  
11 With respect to the pre-December 27, 2007 time frame, the ALJ  
12 concluded that plaintiff had the RFC to perform unskilled light work  
13 with certain limitations. (A.R. 242.) Specifically, the ALJ concluded  
14 that plaintiff was able to engage in the following activities with the  
15 indicated limitations: sit for six hours in an eight-hour workday;  
16 stand and/or walk for six hours in an eight-hour workday; lift and/or  
17 carry and push and/or pull 10 pounds frequently and 20 pounds  
18 occasionally; climb, balance, stoop, kneel, crouch, and crawl  
19 occasionally; reach overhead with the left arm occasionally; and engage  
20 in unlimited handling, fingering, and feeling. (A.R. 240.) The ALJ  
21 found that, although plaintiff's color vision is unlimited, her right  
22 eye vision was limited in near acuity, far acuity, depth perception,  
23 accommodation, and field of vision. (*Id.*) He further found that  
24 plaintiff had no communicative or environmental limitations. (*Id.*)

25  
26 The ALJ found that, prior to December 27, 2007, there was a

27  
28 <sup>2</sup> On December 27, 2007, plaintiff's age category changed from younger  
individual to individual approaching advanced age. (A.R. 243.)

1 significant number of jobs in the national economy that plaintiff could  
2 have performed.<sup>3</sup> (A.R. 243-44.) The ALJ relied on the Medical-  
3 Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2 (the  
4 "Grids"), as the basis for concluding that, given plaintiff's age,  
5 education, work experience, and RFC for light work prior to December 27,  
6 2007, a finding of "not disabled" was warranted for the period prior to  
7 December 27, 2007. (A.R. 244.)

8  
9 **STANDARD OF REVIEW**

10  
11 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
12 decision to determine whether it is free from legal error and supported  
13 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
14 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
15 evidence as a reasonable mind might accept as adequate to support a  
16 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
17 a mere scintilla but not necessarily a preponderance." Connett v.  
18 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
19 record can constitute substantial evidence, only those 'reasonably drawn  
20 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
21 1066 (9th Cir. 2006)(citation omitted).

22  
23  
24 <sup>3</sup> It is unclear whether the ALJ was referring to plaintiff's past  
25 relevant work or different jobs or both. At Step Four, the ALJ made the  
26 express finding that plaintiff "is unable to perform any past relevant  
27 work"; however, his attendant Step Four discussion focused *only* on the  
28 relationship between the light RFC required for plaintiff's past  
relevant work and her sedentary RFC post-December 27, 2007. (A.R. 243.)  
In his Step Five finding, the ALJ failed to identify *what* jobs in the  
national economy he had determined plaintiff could perform prior to  
December 27, 2007. (A.R. 243-44.)

1           Although this Court cannot substitute its discretion for that of  
2 the Commissioner, the Court nonetheless must review the record as a  
3 whole, "weighing both the evidence that supports and the evidence that  
4 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
5 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
6 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
7 responsible for determining credibility, resolving conflicts in medical  
8 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
9 1035, 1039-40 (9th Cir. 1995). "Where the evidence as a whole can  
10 support either a grant or a denial, [a federal court] may not substitute  
11 [its] judgment for the ALJ's." Bray v. Comm'r of Soc. Sec. Admin., 554  
12 F.3d 1219, 1222 (9th Cir. 2009)(citation and internal punctuation  
13 omitted).

14  
15           The Court will uphold the Commissioner's decision when the evidence  
16 is susceptible to more than one rational interpretation. Tommasetti v.  
17 Astrue, 553 F.3d 1035, 1038 (9th Cir. 2008); Burch v. Barnhart, 400 F.3d  
18 676, 679 (9th Cir. 2005); see also Batson v. Comm'r of Soc. Sec. Admin.,  
19 359 F.3d 1190, 1193 (9th Cir. 2004)("if evidence exists to support more  
20 than one rational interpretation, we must defer to the Commissioner's  
21 decision"). However, the Court may review only the reasons stated by  
22 the ALJ in his decision "and may not affirm the ALJ on a ground upon  
23 which he did not rely." Orn, 495 F.3d at 630; see also Connett, 340  
24 F.3d at 874. The Court will not reverse the Commissioner's decision if  
25 it is based on harmless error, which exists only when it is "clear from  
26 the record that an ALJ's error was 'inconsequential to the ultimate  
27 nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d  
28 880, 885 (9th Cir. 2006)(quoting Stout v. Comm'r, 454 F.3d 1050, 1055-56

1 (9th Cir. 2006)); see also Tommasetti, 533 F.3d at 1038; Burch, 400 F.3d  
2 at 679.

3  
4 **DISCUSSION**

5  
6 Plaintiff alleges the following three issues: (1) whether the ALJ  
7 properly considered the vocational expert's testimony; (2) whether the  
8 ALJ properly analyzed plaintiff's combination of impairments to  
9 determine whether her impairments meet or medically equal an impairment  
10 set forth in the Listing of Impairments, 20 C.F.R. Pt. 404, Subpt. A,  
11 App. 1 (the "Listings"); and (3) whether the ALJ properly considered  
12 plaintiff's obesity. (Joint Stipulation ("Joint Stip.") at 2-3.)

13  
14 I. No Step Three Error Warranting Reversal Has Been Shown.

15  
16 A. The Listings

17  
18 At Step Three of the five-part sequential evaluation for  
19 determining whether a claimant is disabled, the Commissioner must  
20 determine whether a claimant's impairment or impairments meet or equal  
21 one of the specific impairments set forth in the Listings. 20 C.F.R. §  
22 416.920(a)(4)(iii). The physical and mental conditions contained in the  
23 Listings are considered so severe that "they are irrebuttably presumed  
24 disabling, without any specific finding as to the claimant's ability to  
25 perform his past relevant work or any other jobs." Lester v. Chater, 81  
26 F.3d 821, 828 (9th Cir. 1995). The Listings were "designed to operate  
27 as a presumption of disability that makes further inquiry unnecessary."  
28 Sullivan v. Zebley, 493 U.S. 521, 532, 110 S. Ct. 865, 892 (1990); see

1 also Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001). If a claimant  
2 shows that her impairments meet or equal a Listing, she will be found  
3 presumptively disabled. 20 C.F.R. §§ 416.925-416.926.

4  
5 For an impairment or combination of impairments to *meet* a Listing,  
6 all of the criteria of that Listing must be satisfied for the requisite  
7 durational period. Zebley, 493 U.S. at 530, 110 S. Ct. at 891 (the  
8 impairment "must meet *all* of the specified medical criteria" in the  
9 Listing)(emphasis in original); see also 20 C.F.R. §§ 416.909 and  
10 416.925(c)(3); Social Security Ruling ("SSR") 83-19 ("[a]n impairment  
11 'meets' a listed condition in the Listing of Impairments only when it  
12 manifests the specific findings described in the set of medical criteria  
13 for that listed impairment").

14  
15 For an impairment or combination of impairments to *equal* a Listing,  
16 the claimant "must present medical findings equal in severity to *all* the  
17 criteria for the one most similar listed impairment." Zebley, 493 U.S.  
18 at 531. 110 S. Ct. at 891 (emphasis in original); see also 20 C.F.R. §  
19 416.926(a)-(b); SSR 83-19 (an impairment is "equivalent" to a Listing  
20 only if a claimant's symptoms, signs, and laboratory findings are "at  
21 least equivalent in severity" to the criteria for the listed impairment  
22 most like the claimant's impairment). In making an equivalence  
23 assessment, the claimant's impairments "'must be considered in  
24 combination and must not be fragmentized in evaluating their effects.'" Lester,  
25 81 F.3d at 829 (citation omitted). A determination of medical  
26 equivalence must rest on objective medical evidence. See Lewis, 236  
27 F.3d at 614 ("[a] finding of equivalence must be based on medical  
28 evidence only"); Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999)



1 ("[a] generalized assertion of functional problems is not enough to  
2 establish disability at step three," because "[m]edical equivalence  
3 must be based on medical findings"; citation omitted); 20 C.F.R. §  
4 416.929(d)(3) ("In considering whether your symptoms, signs, and  
5 laboratory findings are medically equal to the symptoms, signs, and  
6 laboratory findings of a listed impairment, we will look to see whether  
7 your symptoms, signs, and laboratory findings are at least equal in  
8 severity to the listed criteria. However, we will not substitute your  
9 allegations of pain or other symptoms for a missing or deficient sign or  
10 laboratory finding to raise the severity of your impairment(s) to that  
11 of a listed impairment.").

12  
13 At Step Three, the claimant bears the burden of proving that her  
14 impairment or combination of impairments meets or equals the criteria of  
15 a Listing. Tackett, 180 F.3d at 1098-99. In addition, "[a]n ALJ is not  
16 required to discuss the combined effects of a claimant's impairments or  
17 compare them to any listing in an equivalency determination, unless the  
18 claimant presents evidence in an effort to establish equivalence."  
19 Burch, 400 F.3d at 683; see also Lewis, 236 F.3d at 514 (finding that  
20 the ALJ's failure to discuss equivalence did not warrant reversal,  
21 because the claimant had not offered any theory, plausible or otherwise,  
22 that might show how the combined effect of his impairments equaled a  
23 Listing).

24  
25 "An ALJ must evaluate the relevant evidence before concluding that  
26 a claimant's impairments do not meet or equal a listed impairment."  
27 Lewis, 236 F.3d at 512. A "boilerplate finding [at Step Three] is  
28 insufficient to support a conclusion that a claimant's impairment" does

1 not meet or equal a listing. *Id.* In Marcia v. Sullivan, 900 F.2d 172,  
2 176 (9th Cir. 1990), the Ninth Circuit held that: an ALJ must explain  
3 and evaluate the evidence that supports his Step Three finding; and an  
4 ALJ's unexplicated finding at Step Three -- *to wit*, "[t]he claimant has  
5 failed to provide evidence of medically determinable impairments that  
6 meet or equal the Listings" -- was reversible error, because the ALJ  
7 failed to explain adequately his evaluation of why certain medical  
8 evidence of record and/or the combined effects of the claimant's  
9 impairments did not equal the Listing in question. *Id.* However, in  
10 Lewis, the Ninth Circuit clarified that the lack of a formal analysis  
11 and findings at the Step Three level will not constitute reversible  
12 error when: the ALJ's subsequent discussion of the relevant medical  
13 evidence supports a conclusory Step Three finding; and with respect to  
14 equivalency, the claimant fails to proffer a theory or evidence showing  
15 that his combined impairments equal a Listing. 236 F.3d at 513-14.

16  
17 B. The ALJ's Step Three Finding  
18

19 As plaintiff correctly notes, the ALJ, in his decision, did not  
20 "provide an analytical discussion at the step three sequential  
21 evaluation process that addressed the combined effect of Plaintiff's  
22 multiple impairments." (Joint Stip. at 8.) The ALJ simply concluded  
23 that no impairment or combination of impairments met or equaled a  
24 Listing, because "[t]he objective medical evidence does not support a  
25 conclusion that the claimant has had limitations of listing level  
26 severity." (A.R. 240.)  
27

28 Plaintiff argues that the ALJ's Step Three finding was erroneous,

1 because her combined impairments meet or equal three Listings --  
2 specifically, No. 1.02A, 2.02, and 14.09A. She contends that the ALJ  
3 failed to analyze properly the combined effect of her "osteoarthritis,  
4 chronic left hip and leg pain, and visual limitation" with respect to  
5 these three Listings.<sup>4</sup> (Joint Stip. at 9-13.)

6  
7 1. Listing 1.02A

8  
9 Plaintiff first argues that the medical evidence establishes that  
10 she met or equaled Listing 1.02A, which governs the major dysfunction of  
11 a joint due to any cause. The Listing requires three findings -- a  
12 gross anatomical deformity and chronic joint pain and stiffness, *with*  
13 signs of limitation of motion or other abnormal motion of the affected  
14 joint, *and* medical imaging showing narrowing, destruction, or ankylosis  
15 of the affected joint -- *plus* a further finding of the involvement of a  
16 major peripheral weight-bearing joint, resulting in the inability to  
17 ambulate effectively, as defined in 1.00B2b.

18  
19 Plaintiff argues that her treating records are replete with  
20 evidence that she has complained, on an ongoing basis, of chronic  
21 shoulder, back, hip, knee, and lower extremity pain. Plaintiff relies

22  
23 <sup>4</sup> Relying on a physician's "impression" that plaintiff may have  
24 fibromyalgia (A.R. 183), plaintiff asserts that she has received a  
25 "diagnosis" of fibromyalgia as a "medically determinable impairment,"  
26 which the ALJ should have considered at Step Three as part of her  
27 "collective" impairments. (Joint Stip. at 13.) In the proceedings  
28 before the Commissioner, plaintiff did not claim to suffer from  
fibromyalgia. She did not include fibromyalgia among the ailments she  
reported to the numerous consulting physicians who examined her.  
Plaintiff has not cited any evidence indicating that any clinical  
testing was performed and elicited positive findings that she has  
fibromyalgia. Accordingly, plaintiff's fibromyalgia argument is not  
persuasive.

1 on 2002 and 2003 physician notes indicating that, based on plaintiff's  
2 complaints of hip and leg pain, she might have osteoarthritis. However,  
3 medical imaging performed in 2001, 2004, and 2005 was negative for  
4 osteoarthritis or bone or joint abnormalities in her knees or hips.  
5 (A.R. 134-35, 379, 384-86.) A 2004 diagnostic image of plaintiff's left  
6 shoulder did show moderate degenerative changes in her left shoulder  
7 (glenohumeral joint). (A.R. 387.) On July 14, 2008, a treating  
8 physician at Arrowhead Regional Medical Center ("ARMC") noted that  
9 plaintiff has left shoulder weakness and pain, with a decreased range of  
10 motion. (A.R. 468-69.)

11  
12 Thus, there was some medical evidence of record supportive of the  
13 first three findings required for Listing 1.02A based on plaintiff's  
14 left shoulder impairment, but not as to her lower extremities.  
15 Plaintiff argues that the further required finding of Listing 1.02A --  
16 involvement of a weight-bearing joint resulting in an inability to  
17 ambulate effectively as defined in 1.00B2B -- is met by evidence that:  
18 in February 2001, a nurse observed that plaintiff walks slowly using a  
19 cane and with a slight limp (A.R. 137); in February 2005, an ARMC  
20 physician noted that plaintiff complained of a burning sensation on the  
21 bottom of her feet, numbness, and an inability to ambulate as  
22 effectively for the past two weeks as she previously had been, and the  
23 physician further noted, without explanation, "diminished strength" in  
24 lower extremities and "unable to ambulate without cane"<sup>5</sup> (A.R. 375); and  
25 in December 2007, a consultative orthopedist (Dr. Conaty) observed that

26  
27 <sup>5</sup> It is unclear if this latter observation was a finding by the  
28 physician or was based on plaintiff's self-report. There is no evidence  
of any clinical testing and findings attendant to this observation.  
(A.R. 375.)

1 plaintiff's "[w]eight-bearing gait, walking on toes, and walking on  
2 heels are done with difficulty" (A.R. 439).

3  
4 Dr. Conaty, however, also found that there was no evidence of any  
5 instability in plaintiff's joints, she had a normal range of motion and  
6 muscle strength in her lower extremities, she did not use an ambulatory  
7 device to walk, and she had the capacity to stand and walk for six hours  
8 in an eight-hour day. (A.R. 438-40.) Another consultative physician  
9 (Dr. Clements), who examined plaintiff in April 2006, also found that  
10 there is no evidence of instability in plaintiff's knees, her range of  
11 motion in her lower extremities was normal, and she could stand and walk  
12 for six hours in an eight-hour day. (A.R. 432-34.) Dr. Clements noted  
13 that plaintiff had difficulty standing on her heels and toes but stated  
14 that "some of the difficulties with balance" are related to plaintiff's  
15 visual deficit in her right eye. (A.R. 433.) Similarly, another  
16 consultative physician (Dr. Lin), who examined plaintiff in November  
17 2007, noted that plaintiff: denied using an assistive device on a  
18 regular basis; did not need an assistive device to ambulate across the  
19 room and had a gait within normal limits; had slight difficulty standing  
20 on toes and heels and performing a tandem gait; and could stand or walk  
21 for six hours in an eight-hour day. (A.R. 455.) In December 2002,  
22 plaintiff told an examining physician (Dr. Klein) that she does not use  
23 a cane, and he found no instability in her knees and that she had a  
24 normal range of motion in her hips, knees, and ankles and a normal gait  
25 with unaffected heel to toe walking. (A.R. 121, 124-25.)

26  
27 Section 1.00B2B of the Listings states that an "inability to  
28 ambulate effectively" means an "extreme limitation of the ability to

1 walk; *i.e.*, an impairment(s) that interferes very seriously with the  
2 individual's ability to independently initiate, sustain, or complete  
3 activities." Ineffective ambulation is "defined generally as having  
4 insufficient lower extremity functioning . . . to permit independent  
5 ambulation without the use of a hand-held assistive device(s) that  
6 limits the functioning of *both* upper extremities." See Section  
7 1.00B2B(1) (emphasis added). This provision cites as "examples," *inter*  
8 *alia*, an "inability to walk without the use of a walker, two crutches or  
9 two canes" or an "inability to use standard public transportation" or an  
10 "inability to carry out routine ambulatory activities, such as shopping"  
11 or an "inability to climb a few steps at a reasonable pace with the use  
12 of a single hand rail." See Section 1.00B2b(2).

13  
14 Plaintiff did not proffer in the proceedings before the  
15 Commissioner (and does not do so now) objective medical evidence  
16 indicating, or tending to indicate, that any of her impairments  
17 establish an inability to ambulate effectively that is equal in severity  
18 to the requirements of 1.00B2B and 1.02A of the Listings. The medical  
19 evidence of record does not contain any such finding. Rather, plaintiff  
20 relies only on her self-reports of symptoms, conflicting evidence  
21 regarding her possible use of a single cane, and observations by medical  
22 personnel that plaintiff has some difficulty with balance and weight-  
23 bearing gait. Her proffered evidence does not meet her burden at Step  
24 Three.

25  
26 Plaintiff's self-reports of symptoms and functional limitations  
27 based on hip and joint pain cannot suffice to raise the severity of her  
28 related impairment to that of Listing 1.02A. 20 C.F.R. § 416.929(d)(3);

1 see also Lewis, 236 F.3d at 614; Tackett, 180 F.3d at 1100. Moreover,  
2 even crediting the conflicting evidence regarding her intermittent use  
3 of a cane,<sup>6</sup> her use of a single cane does not limit the functioning of  
4 both of her upper extremities, and there is no evidence that plaintiff  
5 requires the use of two canes. The testimony elicited at the hearing  
6 also does not support plaintiff's claim of Step Three error. Plaintiff  
7 testified that: when her feet "burn" and "swell up" periodically, she  
8 can "barely walk on them at times"; she can walk up a flight of stairs  
9 if her feet are not burning, but her feet are "always burning"; and she  
10 can walk half a block without having to rest. (A.R. 290, 294.) The  
11 ALJ, however, rendered an adverse credibility finding with respect to  
12 plaintiff's statements concerning the intensity, persistence, and  
13 limiting effects of her symptoms. (A.R. 242.) Plaintiff does not  
14 challenge that credibility finding here.<sup>7</sup> But even if she had, no  
15 objective medical evidence supports plaintiff's contention that a  
16 "burning" sensation prevents her from walking, and moreover, she  
17 conceded that she can walk up a flight of stairs when her feet are not  
18 "burning" -- a concession which militates against finding that  
19 plaintiff's claimed impairments prevent her from ambulating effectively  
20 within the meaning of Section 1.00B2b(2). Moreover, plaintiff's  
21 daughter testified that plaintiff takes the bus by herself to go to  
22 doctor's appointments several times a month and goes shopping at the  
23 grocery store and mall with her daughter, although plaintiff will "walk

---

24  
25 <sup>6</sup> As noted above, plaintiff told two consultative examiners that she  
26 does not use a cane.

27 <sup>7</sup> The Court notes that, on July 10, 2007, nerve conduction studies  
28 were conducted on plaintiff's lower extremities. The finding was normal  
and "[n]o evidence of peripheral neuropathy or entrapment neuropathy  
[wa]s noted." (A.R. 515.)

1 a little bit" at the mall and then sit on a bench, rather than walking  
2 "the whole mall." (A.R. 306, 309.) Plaintiff's ability to use public  
3 transportation without assistance and engage in shopping indicates that  
4 plaintiff does not have the requisite extreme limitation on ambulation  
5 contemplated by Section 1.00B2B(2), and thus, by Listing 1.02A.

6  
7 While there is medical evidence indicating that plaintiff has some  
8 difficulty with her weight-bearing gait and her ability to stand on her  
9 heels and toes, and possibly some diminished strength in her lower  
10 extremities, there is no evidence that these symptoms have an extreme  
11 limitation on plaintiff's ability to walk and that she is unable to  
12 ambulate effectively, within the meaning of the relevant portions of the  
13 Listings. Hence, plaintiff has not shown that there is any basis for  
14 finding that she meets or equals Listing 1.02A.

15  
16 2. Listing 14.09A1

17  
18 Plaintiff asserts that she also meets or equals Listing 14.09A1 due  
19 to asserted "persistent inflammation" in her left shoulder, left hip,  
20 and knees. (Joint Stip. at 12.) Listing 14.09A1 governs "inflammatory  
21 arthritis," as the condition is defined in Section 14.00D6. As distinct  
22 from osteoarthritis, a mechanical disorder governed by Listing 1.02A,  
23 inflammatory arthritis includes a "vast array of disorders" that are  
24 immunological in nature. Section 14.00D6(d) states that "the diagnosis  
25 of inflammatory arthritis is based on the clinical features and  
26 serologic findings described in the most recent edition of the Primer on  
27 the Rheumatic Diseases published by the Arthritis Foundation."



1 Listing 14.09A1 requires findings of an inflammatory arthritis  
2 disorder within the meaning of Section 14.00D6 (*i.e.*, the existence of  
3 an immune disorder) *with* persistent inflammation or persistent deformity  
4 of a major peripheral weight-bearing joint, which results in an  
5 inability to ambulate effectively within the meaning of Section 1.00B2b  
6 as described above. See Section 14.00C6 (stating that, for purposes of  
7 Listing 14,09A1, "inability to ambulate effectively" has the same  
8 meaning as that proscribed by Section 1.00B2B).

9  
10 Although the record contains evidence of osteoarthritis in  
11 plaintiff's left shoulder, plaintiff cites no evidence of record that  
12 she has been diagnosed with inflammatory arthritis in either shoulder or  
13 her hips or knees or that any physician has suspected that she has such  
14 an immunological disease in any of these body parts. There is no  
15 medical evidence of record establishing that plaintiff, in fact, has  
16 "persistent inflammation" in these body parts -- the first requisite for  
17 application of Listing 14.09A1. Moreover, for the reasons set forth  
18 above, there is no basis for finding that the "inability to ambulate  
19 effectively" requirement for this Listing could be satisfied.

20  
21 3. Listing 2.02

22  
23 Plaintiff also contends that she meets or equals Listing 2.02.  
24 (Joint Stip. at 12-13.) Listing 2.02 relates to loss of visual acuity,  
25 and applies when a claimant's remaining vision in the better eye after  
26 best correction is 20/200 or less.

27  
28 As plaintiff concedes, "documentation is scant in regards to

1 Plaintiff's best corrected vision in the better eye." (Joint Stip. at  
2 13.) A November 14, 2005 note by Dr. Blanchard indicates that he  
3 assessed plaintiff as having a visual acuity of 20/80; there is no  
4 indication whether that assessment was for corrected or uncorrected  
5 vision. (A.R. 337.) Dr. Clements performed a visual acuity test on  
6 April 17, 2006, and found that, "[w]ithout glasses, both eyes showed  
7 20/50, right eye showed 20/70 and the left eye showed 20/70." (A.R.  
8 431.) On November 30, 2007, Dr. Lin, or someone at his office,  
9 performed a visual acuity test that showed a visual acuity of 20/100 in  
10 both eyes without glasses, with 10/100 in the right eye and 10/70 in the  
11 left eye. (A.R. 457.) On December 4, 2007, Dr. Conaty, or someone at  
12 his office, performed a visual acuity test, which showed a visual acuity  
13 of 20/100 in both eyes without glasses, with <20/200 in the right eye  
14 and 20/70 in the left eye.<sup>8</sup> (A.R. 442.)

15  
16 Besides her own self-report of "some blurred vision" (A.R. 190),  
17 plaintiff points to no evidence of record bearing on her assertedly  
18 Listing-level visual impairment other than the above-described test  
19 results. These results do not establish the finding required by Listing  
20 2.02. The record, thus, does not provide any basis for finding that  
21 plaintiff meets or equals Listing 2.02.

22  
23  
24  
25 <sup>8</sup> Plaintiff notes the reference in the test results to a visual  
26 acuity of <20/200 with pinhole correction, but fails to acknowledge that  
27 the test results stated that plaintiff claimed "can't see nothing"  
28 through the pin hole and her effort was "poor." (A.R. 442.) In any  
event, pin hole testing is not an acceptable method of determining best-  
corrected visual acuity for purposes of Listing 2.02. See Section  
2.00A5b.

1           4.    No Reversible Error Exists.

2  
3           For the reasons set forth above, the evidence of record does not  
4 support a finding that the plaintiff's physical impairments, whether on  
5 their own or in combination, meet or equal Listings 1.02A, 2.02, and/or  
6 14.09A. Even though the ALJ's Step Three Finding was conclusory,  
7 elsewhere in his decision, the ALJ discussed the objective medical  
8 evidence bearing on plaintiff's claimed physical impairments. (A.R.  
9 241-43.) Given plaintiff's failure to meet her burden of presenting  
10 evidence establishing that her impairments or combination of impairments  
11 meets or equals the criteria of a Listing (Tackett, 180 F.3d at 1098-  
12 99), the Court concludes that the ALJ's discussion of the medical  
13 evidence in his decision sufficed to adequately support his Step Three  
14 finding that the objective medical evidence did not establish that  
15 plaintiff's impairments meet or equal the severity of any Listing. See  
16 Lewis, 236 F.3d at 513; see also Burch, 400 F.3d at 683. In addition,  
17 as in Lewis, 236 F.3d at 514, given plaintiff's failure to set forth a  
18 plausible theory of how the evidence shows that the combination of her  
19 impairments equals any Listing, the ALJ's failure to explicitly analyze  
20 the equivalence issue does not warrant reversal.

21  
22 II.   The ALJ's Consideration Of Plaintiff's Obesity Does Not Warrant  
23       Reversal.

24  
25       The ALJ found, at Step Two, that plaintiff has a severe impairment  
26  
27  
28

1 of obesity.<sup>9</sup> (A.R. 239.) At the commencement of his Step Four analysis,  
2 the ALJ noted SSR 02-1p and stated that plaintiff's obesity "has been  
3 taken into consideration in arriving at" the RFC assessed. (A.R. 240.)  
4 As plaintiff observes, other than the unexplained finding that  
5 plaintiff's obesity is a severe impairment, the ALJ's decision does not  
6 contain any further mention or analysis of plaintiff's obesity.  
7 Plaintiff complains that the ALJ failed to determine the effect of her  
8 obesity, in combination with her other impairments, at Step Three and  
9 that he failed to adequately assess the effect of her obesity at the  
10 remaining steps of the sequential evaluation. (Joint Stip. at 18-19.)  
11

12 Obesity was removed as a listed impairment from the Listings in  
13 1999. Nonetheless, as a general rule, when there is evidence of  
14 obesity, the Commissioner is required to determine the effects of the  
15 claimant's obesity at various points in the sequential evaluation. SSR  
16 02-01p.  
17

18 For example, in Celaya v. Halter, 332 F.3d 1177 (9th Cir. 2003),  
19 the claimant was illiterate and pro se, and the evidence established  
20 that she had the impairments of diabetes and hypertension. In addition,  
21

---

22 <sup>9</sup> The record shows that plaintiff is 5'5" and has weighed, at various  
23 times, 168, 174, 177, or 180 pounds. (See A.R. 289, 301, 431, 438,  
452.)

24 The Court notes that, at the hearing, plaintiff testified that she  
25 weighs 174 pounds, and this has been her normal weight, without much  
26 variance, for the past six years. (A.R. 289, 301.) A weight of 174 for  
27 a person of her height constitutes a Body Mass Index (BMI) of 29.0,  
28 which falls within the Overweight, rather than Obese, category. See,  
e.g., BMI calculator and information provided by the National Institute  
of Health at [www.nhlbisupport.com/bmi/](http://www.nhlbisupport.com/bmi/). Even at 180 pounds, plaintiff's  
BMI would be 30.00, the very bottom range of Level I of the Obese  
category. See SSR 02-01p.

1 although she had not alleged that she was disabled based on obesity,  
2 there was evidence that she was 4'9" (if not shorter) and her weight  
3 fluctuated between 205 and 213 pounds. *Id.* at 1179. The Ninth Circuit  
4 held that the administrative law judge erred in failing to consider the  
5 effect of claimant's obesity on her diabetes and hypertension for three  
6 reasons. First, the Ninth Circuit concluded that obesity had been  
7 raised as a disability "implicitly in [the claimant's] report of  
8 symptoms." *Id.* at 1182. Second, the Ninth Circuit concluded that the  
9 claimant's level of obesity was significant, was close to the former  
10 Listing criterion for a disabling impairment, and was a condition that  
11 could have exacerbated her diabetes and hypertension.<sup>10</sup> *Id.* Third, the  
12 Ninth Circuit concluded that, in view of the claimant's pro se status  
13 and the evidence of her obesity, the ALJ should have developed the  
14 record regarding her obesity. *Id.* at 1182-83.

15  
16 Plaintiff cites Celaya for the proposition that an ALJ always "must  
17 determine the effect of the claimant's obesity upon his other  
18 impairments, his ability to work, and his general health." (Joint Stip.  
19 at 17-18.) Plaintiff, however, overlooks the Ninth Circuit's subsequent  
20 decision in Burch, *supra*, which clarified that Celaya does not establish  
21 an absolute mandate that, in every case, an administrative law judge  
22 specifically consider the interactive effects that obesity has on a  
23 claimant's other impairments throughout the five-step sequential  
24 disability analysis.

25  
26  
27 <sup>10</sup> Celaya was a 2-1 decision. The majority calculated the claimant's  
28 BMI as being at least 44, which it described as being "extremely obese"  
within the meaning of the categories used by the Social Security  
Administration. 332 F.3d at 1179 (*citing* SSR 00-3p).

1 In Burch, the claimant, who was represented by counsel, alleged  
2 that she was disabled based on breast cancer, asthma, back pain,  
3 weakness, and depression. The medical evidence contained a notation  
4 that she was "'slightly obese'" and had gained 25 pounds in the past  
5 year, and one physician recommended that she join a medically-supervised  
6 weight loss program. 400 F.3d at 678. At the hearing, the claimant  
7 testified that she was 5'4" and weighed 215 pounds, but stated her  
8 "'normal'" weight was 185. *Id.* The administrative law judge did not  
9 find the claimant's obesity to be a severe impairment. *Id.* at 682. On  
10 appeal, relying on Celaya, the claimant argued that the administrative  
11 law judge had erred in failing to consider her obesity throughout the  
12 sequential disability analysis, including its interactive effects with  
13 respect to her other impairments. *Id.* at 681-82.

14  
15 The Ninth Circuit, in Burch, distinguished Celaya on two bases.  
16 First, the record did not demonstrate that, with the possible exception  
17 of her back pain, the claimant's obesity exacerbated her other  
18 impairments. 400 F.3d at 682. Second, and "[m]ore significantly," the  
19 claimant was represented by counsel. *Id.* The Ninth Circuit then  
20 addressed whether, assuming the administrative law judge erred at Step  
21 Two in failing to find the claimant's obesity to be a severe impairment,  
22 there was any error at the remaining steps of the sequential evaluation.  
23 The Ninth Circuit noted that, under SSR 02-01p, an administrative law  
24 judge is precluded from making assumptions about the severity or  
25 functional effects of obesity combined with other impairments, and each  
26 case must be evaluated on the information in the case record. *Id.* at  
27 682-83. The Ninth Circuit further noted that there was no evidence that  
28 the claimant's obesity limited her functioning, as there were no

1 treatment notes or diagnoses that addressed any limitations due to her  
2 obesity, and the medical record was "silent" regarding whether and how  
3 her obesity exacerbated her other impairments. In addition, the  
4 claimant did not present evidence or testify that her obesity impaired  
5 her ability to work. *Id.* at 683. Given the claimant's failure to  
6 proffer evidence of functional limitations due to obesity, the Ninth  
7 Circuit concluded that the administrative law judge did not commit  
8 reversible error at Step Three in failing to consider the claimant's  
9 obesity. The Ninth Circuit further found that the administrative law  
10 judge thereafter adequately considered the claimant's obesity in  
11 addressing her RFC and vocational ability, because he: acknowledged the  
12 above-noted doctor notes; recognized that her obesity likely contributed  
13 to her back discomfort; and after weighing the evidence, assessed her  
14 with an RFC to perform a somewhat limited range of light work. *Id.* at  
15 683-84.

16  
17 As in Burch, although the physicians who examined plaintiff noted  
18 her weight, plaintiff cites no evidence that any physician or other  
19 medical provider indicated that her obesity exacerbated her impairments  
20 or resulted in any functional limitation. Also as in Burch, plaintiff  
21 did not claim to be disabled based on obesity when she applied for  
22 benefits and, although represented by counsel when she testified before  
23 the ALJ, did not raise her obesity in her testimony, whether as an  
24 impairment or a source of functional limitations. (See A.R. 66,74, 107,  
25 113, 288-303.) Further, as in Burch, plaintiff has not presented any  
26 evidence that her obesity limited her functioning, exacerbated her other  
27 impairments, or was otherwise disabling. Indeed, the consultative  
28 physicians who examined plaintiff in April 2006, and November 2007, were

1 cognizant of her height and weight, as well as her other claimed  
2 impairments, and nonetheless concluded that she retained the functional  
3 capacity to perform work at a light exertional level with limitations.  
4 (A.R. 429, 431, 434, 450-52, 455.) Moreover, as in Burch, the ALJ  
5 expressly stated that he did take plaintiff's obesity into consideration  
6 when he assessed her RFC consistently with the foregoing consultative  
7 physician opinions. (A.R. 240.)

8  
9 This case differs in one material, and critical, respect from  
10 Burch. Unlike in that case, the ALJ here *did* find that plaintiff's  
11 obesity constituted a severe impairment at Step Three. Thus, unlike in  
12 Burch, it is not clear that the ALJ actually failed to consider  
13 plaintiff's obesity, in combined effect with her other impairments, in  
14 making his Step Three finding. Even if, *arguendo*, he failed to do so,  
15 however, given plaintiff's failure to present evidence regarding the  
16 effect of her obesity when combined with her other impairments, the  
17 Court would not find reversible error at Step Three, based on the  
18 rationale set forth in Burch. As in that decision, plaintiff simply has  
19 not offered any evidence, or plausible theory, showing that her obesity,  
20 alone or in combination with her other impairments, met or equaled any  
21 Listing. See Burch, 400 F.3d at 683 (an ALJ is not required to discuss  
22 the combined effects of an impairment unless the claimant presents  
23 evidence to establish equivalence). There also is no basis for finding  
24 reversible error in the ALJ's consideration of the subsequent Steps. As  
25 in Burch, there was no evidence presented to the ALJ of any functional  
26 limitations due to plaintiff's obesity that detract from the ALJ's RFC  
27 assessment and/or that he failed to consider.



1           Accordingly, the Court concludes that there was no reversible error  
2 committed by the ALJ in connection with his consideration of plaintiff's  
3 obesity.

4  
5 III. The ALJ Erred At Step Five.

6  
7           As noted earlier, the ALJ adopted the RFC assessment of Dr.  
8 Clements, namely, for light work with additional limitations, with  
9 respect to plaintiff's RFC prior to December 27, 2007. (A.R. 242.) At  
10 the hearing, the ALJ asked the testifying vocational expert ("VE")  
11 whether, assuming the RFC assessed by Dr. Clements, plaintiff could  
12 perform her past relevant work; the VE testified that plaintiff could do  
13 so, along with a wide range of other light, unskilled work in the areas  
14 of assembly, inspection, and sorting. (A.R. 315-16.) Upon further  
15 questioning, the VE *sua sponte* noted that the medical records indicated  
16 plaintiff "may require a cane to ambulate for prolonged periods of  
17 time," and the VE opined that this would preclude plaintiff's past work  
18 as a prep cook. (A.R. 316-17.) The VE clarified that, with the cane  
19 usage, plaintiff's RFC would remain set at light, unskilled work, and  
20 her past relevant work as a clothes tagger, as well as some assembly,  
21 bench work, and sorting jobs, would not be precluded, but there would be  
22 some erosion as to jobs that require prolonged standing. (A.R. 317.)

23  
24           Im his decision, the ALJ found that, prior to December 27, 2007,  
25 there were a significant number of jobs in the national economy that  
26 plaintiff could have performed, although he did not identify any such  
27 jobs. (A.R. 243.) In his supporting discussion for this Step Five  
28 finding, the ALJ did not mention the VE's testimony and focused only on

1 application of the Grids. (A.R. 243-44.) After a general discussion of  
2 how the Grids are used when a claimant has only exertional limitations,  
3 only non-exertional limitations, or a combination thereof, the ALJ  
4 concluded that, prior to December 27, 2007, "based on a residual  
5 functional capacity for light work, considering [plaintiff's] age,  
6 education, and work experience, a finding of 'not disabled' is reached  
7 by direct application of Medical-Vocational Rule 202.17." (A.R. 244.)  
8

9 At Step Five of the sequential evaluation, the burden shifts from  
10 the claimant to the ALJ to show that the claimant is able to perform  
11 other work that exists in the national economy. Osenbrock v. Apfel, 240  
12 F.3d 1157, 1162 (9th Cir. 2000). The ALJ can meet this burden by either  
13 taking the testimony of a vocational expert or by referring to the  
14 Grids. *Id.*; see also Tackett, 180 F.3d at 1101 (describing how VE  
15 testimony and the Grids are used at Step Five). The Grids are tables  
16 that are used "for determining the availability and number of suitable  
17 jobs for a claimant." Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th  
18 Cir. 2006). The Grids categorize jobs by their physical-exertional  
19 requirements.<sup>11</sup> *Id.*  
20

21 Reliance on the Grids alone to meet the Commissioner's burden at  
22 Step Five is proper only when they completely and accurately represent  
23 a claimant's limitations. Bruton v. Massanari, 268 F.3d 824, 827 (9th  
24

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25 <sup>11</sup> Exertional limitations are strength related limitations, such as  
26 limitations on sitting, standing, walking, lifting, carrying, pushing,  
27 and pulling. Non-exertional limitations are non-strength related  
28 limitations, such as pain and mental, sensory, postural, manipulative,  
visual, and environmental limitations. See, e.g., Tackett, 180 F.3d at  
1102; Cooper v. Sullivan, 880 F.2d 1152, 1156 n.6-n.7 (9th Cir. 1989);  
Desrosiers, 846 F.2d at 577 (Pregerson, J., concurring); 20 C.F.R. §  
416.967.

1 Cir. 2001); Tackett, 180 F.3d at 1101. “‘In other words, a claimant  
2 must be able to perform the full range of jobs in a given category’ in  
3 order for the Commissioner to appropriately rely on the grids.” Bruton,  
4 268 F.3d at 827-28 (quoting Tackett). When a claimant has both  
5 exertional and non-exertional limitations and the non-exertional  
6 limitations significantly limit the range of work he can perform,  
7 mechanical application of the Grids is inappropriate. Tackett, 180 F.3d  
8 at 1102, 1104. The ALJ must first determine whether the exertional  
9 limitations alone warrant a finding of disability under the Grids; if  
10 not, further evidence must be adduced, namely, the testimony of a VE.  
11 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000); Cooper, 880 F.2d at  
12 1155.

13  
14 At the hearing, the ALJ elicited the above-described testimony by  
15 the VE. However, as plaintiff observes, the ALJ failed to direct the VE  
16 to consider all of plaintiff’s impairments. The ALJ simply asked the VE  
17 to look at the paragraphs in the opinions of Drs. Clements and Lin  
18 setting forth their specific RFC assessments; he did not ask the VE to  
19 consider what effect plaintiff’s severe impairments of chronic pain and  
20 right eye injury might have on plaintiff’s ability to perform her past  
21 relevant work or any other jobs in the national economy.<sup>12</sup>

22  
23 In posing a hypothetical to a vocational expert, the ALJ must  
24 accurately reflect all of the claimant’s limitations. Embrey v. Bowen,  
25 849 F.2d 418, 422-23 (9th Cir. 1988). “The ALJ’s depiction of the  
26

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27 <sup>12</sup> The ALJ also did not ask the VE to consider what effect plaintiff’s  
28 use of a cane would have, but the VE nevertheless raised that issue and  
discussed the effect of the cane, as mentioned above.

1 claimant's disability [to the VE] must be accurate, detailed, and  
2 supported by the medical record." Tackett, 180 F.3d at 1101. The ALJ,  
3 however, is not required to include all limitations asserted by the  
4 claimant. Magallanes v. Bowen, 881 F.2d 747, 756 (9th Cir. 1989).  
5 Instead, it is proper for the ALJ to limit a hypothetical to those  
6 impairments that are supported by substantial evidence in the record.  
7 Osenbrock, 240 F.3d at 1163-64.

8  
9 The ALJ specifically found that plaintiff has the severe  
10 impairments of a history of chronic lower back, right hip, pelvic, and  
11 left shoulder pain, and a history of right eye injury. (A.R. 239.) The  
12 ALJ further found that plaintiff had numerous non-exertional  
13 limitations, including postural and visual limitations. (A.R. 240.)  
14 Presumably, he would not have found those impairments and non-exertional  
15 limitations to exist unless he believed they were supported by  
16 substantial evidence.<sup>13</sup> Accordingly, he was obligated to include them  
17 in the hypotheticals posed to the VE, yet he failed to do so. The  
18 record here shows that, while the ALJ paid lip service to the  
19 requirement that he elicit VE testimony in view of plaintiff's non-  
20 exertional limitations, he failed to fulfill that requirement  
21 meaningfully.

22  
23 The ALJ's error with respect to the VE testimony elicited is

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24  
25 <sup>13</sup> The Commissioner's attempt to brush the ALJ's findings in this  
26 respect aside by the comment that the ALJ's adverse credibility finding  
27 is not challenged (Joint Stip. at 7) is not persuasive. While the ALJ  
28 may have found that plaintiff's statements regarding the "intensity,  
persistence, and limiting effects of" her symptoms to be not credible  
(A.R. 242), this adverse finding is distinct from, and does not negate,  
his extant findings that plaintiff has the severe impairments found at  
Step Two and is subject to a host of non-exertional limitations.

1 compounded by his apparent disregard of the VE's testimony entirely when  
2 he rendered his decision. Although, at the outset of his decision, the  
3 ALJ acknowledged that the VE had testified, the ALJ made no further  
4 mention of that testimony, and at Step Five, he relied solely on a  
5 "direct application of" the Grids to find that plaintiff could perform  
6 a substantial number of unidentified jobs in the national economy prior  
7 to December 27, 2007. Given the significant non-exertional limitations  
8 found by the ALJ, the ALJ's reliance solely on the Grids was improper.  
9 Moreover, given the VE's testimony that plaintiff's use of a cane would  
10 erode the jobs available in the light, unskilled category, the ALJ's  
11 sole reliance on the Grids was improper, because use of the Grids is  
12 appropriate only when the claimant is able to perform the full range of  
13 work in a given category. Tackett, 180 F.3d at 1101.

14  
15 The ALJ's failure to properly adduce and consider vocational expert  
16 testimony, and his reliance solely on the Grids, at Step Five  
17 constitutes error. The Court does not find this error to be harmless,  
18 because even though the VE testified that plaintiff can perform one of  
19 her prior jobs with the use of a cane and can perform a wide range of  
20 light, unskilled work, the VE was not asked whether plaintiff can  
21 perform such jobs in the light of her other impairments and limitations.  
22 As a result of this error, the Commissioner failed to meet his burden at  
23 Step Five. Accordingly, reversal is required.

24  
25 IV. Remand For Limited Further Proceedings Is Appropriate.

26  
27 For the reasons noted above, the Commissioner's decision is  
28 affirmed with respect to the second and third issues raised by

1 plaintiff, but is reversed with respect to the first issue raised by  
2 plaintiff. The question, thus, is whether to reverse and remand for  
3 further proceedings, or reverse and remand for an award of benefits.  
4

5 The decision whether to remand for further proceedings or order an  
6 immediate award of benefits is within the district court's discretion.  
7 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
8 useful purpose would be served by further administrative proceedings, or  
9 where the record has been fully developed, it is appropriate to exercise  
10 this discretion to direct an immediate award of benefits. *Id.* at 1179  
11 ("[T]he decision of whether to remand for further proceedings turns upon  
12 the likely utility of such proceedings."). However, where there are  
13 outstanding issues that must be resolved before a determination of  
14 disability can be made, and it is not clear from the record that the ALJ  
15 would be required to find the claimant disabled if all the evidence were  
16 properly evaluated, remand is appropriate. *Id.* at 1179-81.  
17

18 Here, a critical issue remains, namely, whether plaintiff could  
19 have performed any work prior to December 27, 2007, if her impairments  
20 and non-exertional limitations are properly considered as a part of that  
21 determination. On the record before the Court, it is not clear that the  
22 ALJ would be required to find plaintiff disabled prior to that date,  
23 even if the appropriate Step Five inquiry had been made. Accordingly,  
24 this case must be remanded to the Commissioner *solely* for the purpose of  
25 resolving this issue. On remand, the Commissioner must adduce the  
26 necessary vocational expert testimony and consider it properly in making  
27 the Step Five determination. In addition, should the Commissioner again  
28 conclude that there was a significant number of jobs in the national

1 economy that plaintiff could have performed prior to December 27, 2007,  
2 the Commissioner must identify such jobs; a vague allusion to  
3 unidentified "jobs," as was made by the ALJ, will not suffice to meet  
4 the Commissioner's burden.

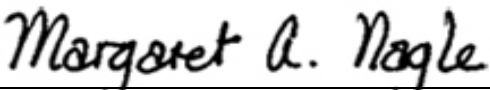
5  
6 **CONCLUSION**

7  
8 Accordingly, for the reasons stated above, the Commissioner's  
9 decision is REVERSED, and this case is remanded to the Commissioner for  
10 the further proceedings specified above.

11  
12 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
13 copies of this Memorandum Opinion and Order and the Judgment on counsel  
14 for plaintiff and for defendant.

15  
16 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

17  
18 DATED: September 22, 2010

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21 

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MARGARET A. NAGLE  
22 UNITED STATES MAGISTRATE JUDGE  
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25  
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28