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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

YVONNE ALMAREZ,	)	NO. EDCV 09-00140-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on February 2, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for supplemental security income ("SSI"). On March 11, 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 September 22, 2009 ("Joint Stip."), in which: plaintiff seeks an order reversing the Commissioner's decision and 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 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2  
3 Plaintiff filed her application for SSI on August 1, 2001.  
4 (Administrative Record ("A.R.") 103-04.) Plaintiff claims to have been  
5 disabled since April 27, 2001, due to carpal tunnel syndrome, shoulder  
6 and knee pain, arthritis, asthma, and a head injury. (A.R. 113-25, 130-  
7 31, 134.)

8  
9 Plaintiff's application was denied initially and upon  
10 reconsideration (A.R. 21-22, 33-42), and she requested a hearing (A.R.  
11 43). On May 22, 2003, plaintiff, who was unrepresented, testified at a  
12 hearing before Administrative Law Judge Jacqueline Drucker.<sup>1</sup> (A.R.  
13 348-91.) In a September 26, 2003 written decision, Administrative Law  
14 Judge Drucker denied plaintiff's claim. (A.R. 26-32.) Plaintiff sought  
15 review. (A.R. 76.) On February 1, 2005, the Appeals Council granted  
16 review, vacated the September 2003 decision, remanded the case to an  
17 ALJ, and directed the ALJ to: (1) assess the credibility of plaintiff's  
18 subjective complaints; (2) address the consultative examiner's opinion  
19 regarding the amount of weight plaintiff could lift with her right upper  
20 extremity; (3) address the effect of plaintiff's mental impairment,  
21 including memory problems, on her residual functional capacity ("RFC");  
22 and (4) if plaintiff was found disabled, consider the materiality of  
23 plaintiff's chronic alcohol abuse and conduct any further appropriate  
24 inquiry. (A.R. 88-89.)

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26 \_\_\_\_\_  
27 <sup>1</sup> Plaintiff had appeared for hearing initially on October 29, 2002,  
28 but that hearing was continued so that plaintiff could obtain counsel.  
(A.R. 334-37.) On March 31, 2003, plaintiff again appeared for hearing  
without counsel; the ALJ again continued the hearing to afford plaintiff  
an additional opportunity to obtain counsel. (A.R. 338-47.)

1 On May 4, 2005, plaintiff, who then was represented by counsel,  
2 appeared at a hearing before Administrative Law Judge Jay Levine (the  
3 "ALJ"). (A.R. 392-425.) In a September 22, 2005 decision, the ALJ  
4 denied plaintiff's claim. (A.R. 12-16.) The Appeals Council  
5 subsequently denied plaintiff's request for review of that decision.  
6 (A.R. 4-6.)

7  
8 On February 8, 2006, plaintiff filed an action in this district  
9 court -- Case No. EDCV 06-00150-MAN -- seeking judicial review of the  
10 ALJ's September 22, 2005 decision. (A.R. 467.) On September 28, 2007,  
11 the Court reversed the ALJ's decision and remanded the case for further  
12 proceedings consistent with the Court's Order, as discussed *infra* (the  
13 "2007 Order"). (A.R. 467-84.) On October 15, 2007, the Appeals Council  
14 vacated the ALJ's decision and remanded the case for further proceedings  
15 consistent with the 2007 Order. (A.R. 487.)

16  
17 On April 30, 2008, plaintiff, who was represented by counsel,  
18 testified at a hearing before the ALJ. (A.R. 436-52.) On October 16,  
19 2008, the ALJ again denied plaintiff's claim. (A.R. 429-35.)

#### 20 21 **STANDARD OF REVIEW**

22  
23 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
24 decision to determine whether it is free from legal error and supported  
25 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
26 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
27 evidence as a reasonable mind might accept as adequate to support a  
28 conclusion.'" *Id.* (citation omitted). The "evidence must be more than

1 a mere scintilla but not necessarily a preponderance." Connett v.  
2 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
3 record can constitute substantial evidence, only those 'reasonably drawn  
4 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
5 1066 (9th Cir. 2006)(citation omitted).

6  
7 Although this Court cannot substitute its discretion for that of  
8 the Commissioner, the Court nonetheless must review the record as a  
9 whole, "weighing both the evidence that supports and the evidence that  
10 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
11 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
12 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
13 responsible for determining credibility, resolving conflicts in medical  
14 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
15 1035, 1039-40 (9th Cir. 1995). "Where the evidence as a whole can  
16 support either a grant or a denial, [a federal court] may not substitute  
17 [its] judgment for the ALJ's." Bray v. Comm'r of Soc. Sec. Admin., 554  
18 F.3d 1219, 1222 (9th Cir. 2009)(citation and internal punctuation  
19 omitted).

20  
21 The Court will uphold the Commissioner's decision when the evidence  
22 is susceptible to more than one rational interpretation. Tommasetti v.  
23 Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008); Burch v. Barnhart, 400 F.3d  
24 676, 679 (9th Cir. 2005); *see also* Batson v. Comm'r of Soc. Sec. Admin.,  
25 359 F.3d 1190, 1193 (9th Cir. 2004)("if evidence exists to support more  
26 than one rational interpretation, we must defer to the Commissioner's  
27 decision"). However, the Court may review only the reasons stated by  
28 the ALJ in his decision "and may not affirm the ALJ on a ground upon

1 which he did not rely." Orn, 495 F.3d at 630; see also Connett, 340  
2 F.3d at 874. The Court will not reverse the Commissioner's decision if  
3 it is based on harmless error, which exists only when it is "clear from  
4 the record that an ALJ's error was 'inconsequential to the ultimate  
5 nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d  
6 880, 885 (9th Cir. 2006)(quoting Stout v. Comm'r, 454 F.3d 1050, 1055-56  
7 (9th Cir. 2006)); see also Tommasetti, 533 F.3d at 1038; Burch, 400 F.3d  
8 at 679.

9  
10 **DISCUSSION**

11  
12 Plaintiff alleges that the ALJ failed to comply with the 2007 Order  
13 and properly consider the relevant medical evidence of record. (Joint  
14 Stip. at 4.) As discussed below, plaintiff contends that the ALJ erred  
15 in three respects. First, plaintiff argues that the ALJ failed to  
16 comply with this Court's directive to consider and analyze adequately a  
17 "frequent rests" limitation and a lifting limitation imposed by Dr.  
18 Tariq Jamil, a consultative examining physician.<sup>2</sup> (*Id.* at 4-7.) Second,  
19 plaintiff complains that the ALJ, without explanation, altered his prior  
20 RFC assessment in a manner unfavorable to plaintiff, *i.e.*, the ALJ  
21 omitted certain manipulation limitations he previously had found to be  
22 supported by the evidence of record. (*Id.* at 7-8.) Third, plaintiff  
23 contends that the ALJ misstated and ignored the medical expert's  
24 testimony in concluding that plaintiff did not meet or equal a listed  
25 impairment for a one-year period of time. (*Id.* at 5.)

26 \_\_\_\_\_  
27 <sup>2</sup> Plaintiff also notes that the ALJ failed to indicate whether he  
28 considered the lifting limitations expressed earlier by a different  
consultative examiner, Dr. Rocely Ella-Tamayo. (Joint Stip. at 6.)

1  
2 I. The ALJ Erred By Failing To Comply With, And Exceeding The  
3 Scope Of, The 2007 Order.  
4

5 In the 2007 Order, the Court found that “[t]he ALJ offered no  
6 reason for his implicit rejection of” two functional limitations noted  
7 by Dr. Jamil. (A.R. 476.) Specifically, Dr. Jamil opined that  
8 plaintiff is limited to lifting 10 pounds occasionally and frequently,  
9 and standing and walking up to 4 hours in an 8-hour workday with  
10 frequent rests. (A.R. 297, 475.) In his 2005 decision, the ALJ found  
11 that plaintiff has the RFC to perform a limited range of light work  
12 (A.R. 13), a category that requires the ability to lift up to 20 pounds  
13 occasionally,<sup>3</sup> as well as sedentary work, a category that would encompass  
14 Dr. Jamil’s 10-pound lifting limitation.<sup>4</sup> Although the ALJ acknowledged  
15 Dr. Jamil’s 10-pound lifting limitation (A.R. 14), the ALJ failed to  
16 address it further and implicitly rejected it, given the light work RFC  
17 assessment he made (A.R. 13-15). The ALJ also found that plaintiff is  
18 limited to walking no more than 4 hours out of an 8-hour workday,  
19 without limitation. (A.R. 13.) Again, although the ALJ acknowledged  
20 Dr. Jamil’s “frequent rests” limitation (A.R. 14), the ALJ omitted it  
21 from plaintiff’s RFC without explanation and, thus, implicitly rejected  
22 it (A.R. 13-15).  
23

24 The Court concluded that the “ALJ’s failure to address clearly and  
25 either accept and reject” both the 10-pound lifting limitation and the  
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27 <sup>3</sup> See 20 C.F.R. § 416.967(b).

28 <sup>4</sup> See 20 C.F.R. § 416.967(a).

1 "frequent rests" limitation imposed by Dr. Jamil constituted reversible  
2 error. (A.R. 476-77.) Accordingly, pursuant to the 2007 Order, the  
3 Court remanded the case "to allow the ALJ the opportunity to correct the  
4 above errors." (A.R. 483.) In its subsequent order of remand, the  
5 Appeals Council vacated the ALJ's decision and remanded the case "for  
6 further proceedings consistent with the" 2007 Order. (A.R. 487.)

7  
8 A. The Law Of The Case And Rule Of Mandate Doctrines

9  
10 In Sullivan v. Hudson, 490 U.S. 877, 109 S. Ct. 2248 (1989), the  
11 Supreme Court observed:

12  
13 Where a court finds that the [Commissioner] has committed  
14 a legal or factual error in evaluating a particular claim, the  
15 district court's remand order will often include detailed  
16 instructions concerning the scope of the remand, the evidence  
17 to be adduced, and the legal or factual issues to be  
18 addressed. . . . Deviation from the court's remand order in  
19 the subsequent administrative proceedings is itself legal  
20 error, subject to reversal on further judicial review.

21  
22 *Id.* at 885-86, 109 S. Ct. at 2254-55 (citations omitted). Citing the  
23 Supreme Court's observation and other precedent, district courts in the  
24 Ninth Circuit and elsewhere have applied the law of the case doctrine  
25 and the rule of mandate doctrine<sup>5</sup> in the social security context to find

26  
27 <sup>5</sup> Under the *law of the case doctrine*, the decision of an appellate  
28 court on a legal issue must be followed in all subsequent proceedings in  
the same case. See, e.g., United States v. Lewis, 611 F.3d 1172, 1179

1 reversal warranted when ALJ decisions exceed the scope of and/or  
2 contravene district court remand orders.

3  
4 In Holst v. Bowen, 637 F. Supp. 145 (E.D. Wash. 1986), the ALJ  
5 found the claimant disabled for a closed period but not disabled  
6 thereafter. The claimant filed a federal action challenging the finding  
7 that he was not disabled for the subsequent period. The district court  
8 remanded the case for the consideration of several recent Ninth Circuit  
9 decisions. *Id.* at 145-46 & n.1. On remand, the ALJ proceeded through  
10 the full five-step sequential evaluation and, based on new evidence  
11 considered, found that the claimant had never been disabled. *Id.* at  
12 146. On appeal, the district court observed that "[n]o one appealed  
13 that portion of the decision which held that claimant fully met the  
14 disability requirements for the closed period," and "[t]he unambiguous  
15 tenor of the order of remand necessarily assumed the validity of the  
16 finding that claimant was disabled" during the closed period as  
17 previously found by the ALJ. *Id.* at 146-47. The Court concluded that

18  
19 (9th Cir. 2010); see also Thomas v. Bible, 983 F.2d 152, 154 (9th Cir.  
20 1993)(under the law of the case doctrine, "a court is generally  
21 precluded from reconsidering an issue that has already been decided by  
22 the same court, or a higher court in the identical case"). "[A]n  
23 inferior court 'is bound by the [appellate court's] decree as the law of  
24 the case; and must carry it into execution, according to the mandate.'" Vizcaino v. U.S. District Court, 173 F.3d 713, 719 (9th Cir.  
25 1999)(quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S.  
26 Ct. 281 (1895)).

27 The *rule of mandate doctrine* is a variant of the law of the case  
28 doctrine. Ischay v. Barnhart, 383 F. Supp. 2d 1199, 1214 (C.D. Cal.  
2005). Under the rule of mandate doctrine, a lower court receiving a  
mandate "'cannot vary it or examine it for any other purpose than  
execution.'" United States v. Cote, 51 F.3d 178, 181 (9th Cir.  
1996)(citation omitted). "The rule of mandate requires that, on remand,  
the lower court's actions must be consistent with both the letter and  
the spirit of the higher court's decision." Ischay, 383 F. Supp. 2d at  
1214 (emphasis in original; citing Quern v. Jordan, 440 U.S. 332, 347  
n.18, 99 S. Ct. 1139 (1979)).



1 "[t]he fact of [claimant's] disability during that period thereby became  
2 the law of the case and not subject to tampering in further  
3 administrative proceedings."<sup>6</sup> *Id.* at 147.

4  
5 In Ruiz v. Apfel, 24 F. Supp. 2d 1045 (C.D. Cal. 1998), an ALJ  
6 found that the claimant could not perform her past relevant work and, at  
7 step five after applying the grids, found that she was not disabled.  
8 After plaintiff sought judicial review, the district court remanded the  
9 case for two limited purposes, namely, for the ALJ to provide further  
10 findings with respect to his credibility assessment and determine the  
11 propriety of the use of the grids at step five. On remand, following a  
12 supplemental hearing, the ALJ found that the claimant could perform her  
13 past relevant work and, thus, found her not disabled at step four. *Id.*  
14 at 1047. After again seeking judicial review, the claimant argued that  
15 the ALJ had erred in reviewing, and redetermining, the step four issue  
16 previously found in her favor, which had not been appealed. The Court  
17 agreed, observing that the "remand order did not authorize the Appeals  
18 Council or the ALJ to revisit the previous step-four determination that  
19 plaintiff could not perform her past relevant work" and that:

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20  
21 <sup>6</sup> The Court noted the Sixth Circuit's decision in Mefford v. Gardner,  
22 383 F.2d 748 (6th Cir. 1967)(reversing an adverse decision by an ALJ  
following a remand), and quoted from it as follows:

23 The Hearing Examiner was bound to obey the directions of  
24 the mandate without variation; and failure to follow the  
25 instructions therein given was error. He failed to follow the  
26 instructions of the District Court, and, instead, introduced  
27 a mass of evidence with the purpose of holding, contrary to  
the decision of the District Court, that appellee was not  
suffering from a heart condition which prevented him from  
carrying out the work in which he was previously engaged. In  
so doing, and in creating a new case, the Hearing Examiner  
committed error.

28 Holst, 637 F. Supp. at 147 (quoting Mefford, 383 F.2d at 756).

1 [T]he Appeals Council order vacating the prior decision and  
2 remanding the case "for further proceedings consistent with  
3 the order of the court" [did not] suggest that review beyond  
4 the scope of the court's order was permitted or contemplated.  
5 There was, accordingly, no basis for the ALJ to review issues  
6 that had been determined in plaintiff's favor.

7  
8 *Id.* at 1050 (record citation omitted).

9  
10 More recently, in Ischay, *supra*, the district court reached a  
11 similar result through express application of the law of the case/rule  
12 of mandate doctrines. Following the first remand by the district court,  
13 the ALJ found that the plaintiff was limited to light exertional work,  
14 could not perform his past relevant work, and was not disabled at step  
15 five, because he had transferrable skills and/or could perform other  
16 jobs. The second remand was pursuant to a stipulation of the parties,  
17 and the district court's remand order directed the ALJ to obtain  
18 testimony from a vocational expert regarding the step five issue of  
19 vocational adjustment. 383 F. Supp. 2d at 1208. Following the second  
20 remand, the ALJ made new findings at the various steps of the sequential  
21 evaluation, finding at step four that the plaintiff was not disabled and  
22 concluding that he could perform his past relevant work. *Id.* at 1212.  
23 The district court held that, based on the rationale of Holst, *supra*,  
24 the law of the case and rule of mandate doctrines apply to cases  
25 remanded to the Commissioner for further proceedings.<sup>7</sup> *Id.* at 1216-17.

26  
27 <sup>7</sup> The Court expressly rejected the Commissioner's argument that 20  
28 C.F.R. § 404.983 -- which, like 20 C.F.R. § 416.1483, states that, on  
remand, "[a]ny issues may be considered by the administrative law judge

1 The district court found that the ALJ had violated the law of the case  
2 doctrine and exceeded the scope of the mandate by reconsidering his  
3 prior step one through step four findings.<sup>8</sup> *Id.* at 1218-19.

4  
5 Similarly, in Calderon v. Astrue, 683 F. Supp. 2d 273 (E.D.N.Y.  
6 2010), the district court initially remanded based on error at step  
7 five, namely, due to a failure to state what weight a treating  
8 physician's opinion had been given on the step five issue of whether the  
9 claimant could perform other jobs in the national economy. Following  
10 that remand, the ALJ removed certain previously-determined fine  
11 manipulation limitations from his RFC assessment without explanation and

12 \_\_\_\_\_  
13 whether or not they were raised in the [prior] administrative  
14 proceedings" -- precludes application of the doctrines. Ischay, 383 F.  
15 Supp. 2d at 1217. The Court noted that, as in the instant case, the  
16 Appeals Council remanded the matter to the ALJ "for further proceedings  
17 consistent with the order of the [federal] court," and 20 C.F.R. §  
18 404.977(b) -- like 20 C.F.R. § 416.1477(b) -- states that ALJs may "take  
19 any additional action that is not inconsistent with the Appeals  
20 Council's remand order." *Id.* The Court reasoned that the language of  
21 the Appeals Council's remand order bound the ALJ to follow the district  
22 court's remand instructions, and thus, the law of the case doctrine was  
23 applicable. *Id.*

24 <sup>8</sup> Other recent decisions issued in this district court have reached  
25 similar conclusions -- viz., that ALJ actions on remand violated the law  
26 of the case and/or rule of mandate doctrines -- including, *inter alia*:  
27 Loeung v. Astrue, 2010 WL 3365799 (C.D. Cal. Aug. 24, 2010)(although  
28 remand had been for the purpose of positing a new hypothetical to the  
vocational expert, the ALJ purported to "clarify" his prior RFC finding  
by changing it; however, this error was found to be harmless); Gallagher  
v. Astrue, 2009 WL 57033 (C.D. Cal. Jan. 6, 2009)(although remand was  
limited to step four and step five issues regarding plaintiff's past  
relevant work and alternate work, the ALJ made a redetermination of the  
plaintiff's severe impairments at step two, reassessed the plaintiff's  
RFC at step four, and eliminated moderate limitations previously found);  
White v. Astrue, 2009 WL 363620 (C.D. Cal. Feb. 13, 2009)(although  
remand was based on the ALJ's erroneous reliance solely on the grids at  
step five and was for the purpose of adducing vocational expert  
testimony, the ALJ rendered a less restrictive RFC finding on remand);  
Coto v. Astrue, 2008 WL 4642965 (C.D. Cal. Oct. 20, 2008)(the ALJ  
conducted "an entirely new RFC analysis" following a remand limited to  
two specific issues).

1 concluded at step four that the claimant could perform his past relevant  
2 work. *Id.* at 276. The Court found that the ALJ violated the law of the  
3 case doctrine by reconsidering the step four determinations made in  
4 prior decisions. *Id.* at 276-77. The Court concluded that it was  
5 irrelevant that, in the prior federal action, there had not been an  
6 explicit determination regarding the validity of the prior step four  
7 findings, because the law of the case doctrine applies to all matters  
8 decided directly or by necessary implication. *Id.* at 276. The Court  
9 observed:

10  
11 The point is particularly important in Social Security appeals  
12 because a district court is never called upon to address  
13 issues resolved in the claimant's favor; the claimant  
14 obviously cannot challenge such determinations, and the  
15 Commissioner cannot challenge them because they were made by  
16 him (or his delegate) in the first place. . . . [I]t follows  
17 from this procedural anomaly that when a district court passes  
18 judgment on, for example, an ALJ's step-five determination, it  
19 has implicitly affirmed the determinations at all prior steps.

20  
21 *Id.* at 276-77.<sup>9</sup>  
22

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23  
24 <sup>9</sup> The Court rejected the Commissioner's argument that the law of the  
25 case doctrine cannot apply, because its operating procedures require an  
26 ALJ to redetermine all issues on remand. The Court noted that the  
27 procedures state only that the ALJ must consider all *pertinent* issues de  
28 novo. Calderon, 683 F. Supp. 2d at 277 (*citing* Soc. Sec. Admin.,  
Hearings, Appeals & Litig. Law Manual (HALLEX) at § I-2-8-18 (2008)).  
As the Court reasoned, when the Appeals Council remands a matter for  
further proceedings consistent with the federal court's order, the  
Appeals Council has limited the pertinent issues to those identified by  
the district court in its order of remand. *Id.*

1 The foregoing authorities persuasively explain why the law of the  
2 case and law of mandate doctrines should apply in the Social Security  
3 context, and the Court agrees with, and adopts, their reasoning and  
4 rationales.<sup>10</sup> Accordingly, the Court concludes that the question of  
5 whether the ALJ complied with the 2007 Order and/or exceeded its scope  
6 must be considered in view of these doctrines.

7  
8 B. The ALJ's Modification Of Plaintiff's RFC To Remove  
9 Previously-Imposed Manipulation Limitations Exceeded The  
10 Scope Of The 2007 Order  
11

12 Plaintiff complains that the ALJ reassessed plaintiff's RFC to omit  
13 certain manipulation limitations that he previously found necessary.  
14 Specifically, in his September 22, 2005 decision, ALJ Levine found that  
15 plaintiff is precluded from work requiring, *inter alia*: continuous  
16 keyboarding in excess of 2 hours per day total or greater than 15  
17 minutes at one time; and greater than occasional lifting above shoulder  
18 level. (A.R. 13.) In his post-remand October 16, 2008 decision,  
19 however, ALJ Levine omitted these limitations without providing any  
20 explanation for their omission. (A.R. 432.) Defendant concedes that  
21 these limitations were omitted by the ALJ without explanation but  
22 dismisses the omission as inconsequential, arguing that the ALJ "was not  
23 bound by the prior ALJs' RFC assessments and was not required to explain  
24

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25 <sup>10</sup> As the Court observed in *Ischay*, "[n]o published opinion of the  
26 Ninth Circuit has applied the doctrine of the law of the case or the  
27 rule of mandate to preclude ALJs from relitigating issues settled in  
28 district court orders." 383 F. Supp. 2d at 1215. However, other  
Circuit Courts "have held that the doctrine of the law of the case and  
the rule of mandate apply to Social Security proceedings." *Id.* at 1216  
n.7 (discussing Fourth, Sixth, and Seventh Circuit decisions).

1 that he found different manipulative limitations than the prior ALJs."  
2 (Joint Stip. at 12.) Defendant, of course, overlooks that the *same* ALJ  
3 rendered both decisions in issue and, thus, omitted his *own* previously-  
4 imposed limitations (see A.R. 16 and 435), but in any event, even if  
5 decisions by different ALJs were involved, defendant's argument  
6 nevertheless would fail.

7  
8 The Court, through its 2007 Order, remanded this matter for the  
9 proper consideration by the ALJ of two specific items of evidence --  
10 namely, Dr. Jamil's lifting restriction and his "frequent rests"  
11 restriction -- and to afford the ALJ the opportunity to rectify his  
12 error in failing to consider these limitations properly and either  
13 reject them, if warranted, or incorporate them into plaintiff's RFC.  
14 The 2007 Order did not contemplate any revisiting and elimination of  
15 unrelated limitations<sup>11</sup> that the ALJ had found warranted by the evidence  
16 of record in his 2005 decision. Any limitations found by the ALJ in his  
17 2005 decision that favored plaintiff were not appealed; they were not  
18 disturbed by the 2007 Order and, thus, were implicitly affirmed, for the  
19 reasons outlined in Calderon, 683 F. Supp. at 276-77. The Appeals  
20 Council, through its remand order, explicitly remanded the matter to the  
21 ALJ "for further proceedings consistent with the" 2007 Order, and thus,  
22 it limited the "pertinent" issues for determination on remand to the two  
23 issues set forth in the 2007 Order.

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24  
25 <sup>11</sup> The need for the ALJ to clarify his consideration of Dr. Jamil's  
26 lifting limitations and properly consider Dr. Jamil's "frequent rests"  
27 limitation had nothing to do with the manipulative limitations found by  
28 the ALJ in his 2005 decision. Put otherwise, because the manipulation  
limitations and Dr. Jamil's two limitations in issue were unrelated,  
whatever conclusion the ALJ reached on remand with respect to Dr.  
Jamil's two inadequately-addressed limitations would not have had any  
effect on the previously-determined manipulation limitations.

1 The ALJ, therefore, was not authorized to revisit his 2005 RFC  
2 determination *in toto*, much less to render a new RFC finding that was  
3 less favorable to plaintiff through the omission of the above-noted  
4 limitations, which the ALJ previously had found to be warranted. The  
5 ALJ's decision to reconsider plaintiff's limitations entirely and to  
6 remove certain limitations from her newly assessed RFC exceeded not only  
7 the scope of the 2007 Order, in violation of the law of the case and  
8 rule of mandate doctrines, but also the Appeals Council's order of  
9 remand, in contravention of 20 C.F.R. § 416.1477(b).

10  
11 The ALJ's error in this respect cannot be found to be harmless. In  
12 the hypothetical he posed to the vocational expert at the April 30, 2008  
13 hearing, the ALJ omitted the manipulation limitations and stated only  
14 the amended RFC and the light work category<sup>12</sup> he subsequently set forth  
15 in his 2008 decision. (A.R. 449.) The vocational expert identified a  
16 number of light, unskilled positions that a person with such an RFC  
17 could perform. (*Id.*) When plaintiff's counsel asked the vocational  
18 expert to include in the hypothetical the additional limitations of  
19 "occasional fingering and occasional twisting, flexion extension and so  
20 forth of the wrists," the vocational expert stated that the inclusion of  
21 such limitations "would delete all those jobs," because they "all  
22 require frequent to continuous use of the hands" and "handling." (A.R.  
23 450.)

24  
25 Accordingly, the ALJ's error in exceeding the scope of the 2007

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26  
27 <sup>12</sup> The hypothetical that the ALJ posed to the vocational expert was  
28 premised on a claimant having the ability to perform light work; the ALJ  
did not pose any hypothetical premised on the ability to perform only  
sedentary work.

1 Order, by the omission of limitations previously found to be warranted,  
2 constitutes reversible error.

3  
4 C. The ALJ Failed To Comply With The Directive Of The 2007  
5 Order To Properly Consider The Two Additional Limitations  
6 Found By Dr. Jamil.

7  
8 In the 2007 Order, the Court concluded that the ALJ, by his  
9 assessment of an RFC for light work, implicitly had rejected Dr. Jamil's  
10 lifting limitation of 10 pounds occasionally and frequently. The Court  
11 noted, additionally, the uncertainty engendered by the ALJ's subsequent  
12 reference to an RFC finding for a narrow range of light and sedentary  
13 work. (A.R. 476.) Regardless of that uncertainty, given the ALJ's  
14 failure to indicate what consideration (if any) he gave to Dr. Jamil's  
15 lifting limitation, the Court held that the ALJ's failure to address Dr.  
16 Jamil's lifting limitation, and clearly either accept or reject it,  
17 constituted error. (A.R. 476-77.) The Court concluded that the ALJ  
18 also had implicitly rejected Dr. Jamil's "frequent rests" limitation,  
19 given that the ALJ's RFC assessment failed to include this limitation.  
20 (A.R. 476.) The Court held that the ALJ's failure to state any reason  
21 for the rejection of this portion of Dr. Jamil's opinion also  
22 constituted error. (A.R. 476-77.)

23  
24 The 2007 Order remanded the matter "to allow the ALJ the  
25 opportunity to correct the above errors." (A.R. 479, 483.) The Appeals  
26 Council remanded the case to the ALJ "for further proceedings consistent  
27 with the [2007 Order]." (A.R. 487.) Thus, on remand, the ALJ was  
28 obligated to address and rectify the two errors identified in the 2007



1 Order with respect to the lifting and "frequent rests" limitations found  
2 by Dr. Jamil. The ALJ, however, has failed in both respects.

3  
4 1. Dr. Jamil's Lifting Limitation

5  
6 At the 2008 hearing, Dr. Arthur Lorber, a medical expert, testified  
7 telephonically, without objection from plaintiff's counsel. (A.R. 438-  
8 39.) Dr. Lorber opined that, following an unspecified date in April  
9 2002, plaintiff had the RFC to occasionally lift 20 pounds and  
10 frequently lift 10 pounds. (A.R. 440-41.) The ALJ did not ask Dr.  
11 Lorber why he had imposed a less restrictive lifting limitation than  
12 that imposed by Dr. Jamil or, previously, by Dr. Ella-Tamayo.<sup>13</sup> (A.R.  
13 440-42.) The only lifting limitation utilized by the ALJ in the  
14 hypotheticals he posed to the vocational expert was the less restrictive  
15 limitation found by Dr. Lorber; the ALJ did not pose a hypothetical  
16 utilizing the more restricted lifting limitations assessed by Dr. Jamil  
17 or Dr. Ella-Tamayo. (A.R. 449-50.) In connection with the RFC  
18 assessment set forth in his 2008 decision, the ALJ relied only on, and  
19 adopted, Dr. Lorber's opinion, which included the above-noted lifting  
20 limitation consistent with light work -- a less restrictive limitation  
21 than that imposed by Dr. Jamil. (Compare A.R. 432 with 441.) The ALJ's  
22 decision did not mention Dr. Jamil's lifting limitation at all. (A.R.  
23 429-35.)

24  
25 The 2007 Order, plainly, required the ALJ to accept or reject Dr.

26  
27 <sup>13</sup> In October 2001, Dr. Ella-Tamayo opined that plaintiff was  
28 restricted to lifting 5 pounds on the right side, due to her right  
shoulder arthritis, and 10 pounds frequently and 25 pounds occasionally  
on her left side. (A.R. 223.)

1 Jamil's lifting limitation and, if the ALJ decided to reject it, to set  
2 forth adequate reasons for doing so in compliance with the governing  
3 legal standards. The ALJ clearly contravened that directive. The ALJ's  
4 2008 decision ignores Dr. Jamil's lifting limitation entirely and fails  
5 to set forth any reason whatsoever for rejecting it. The ALJ, thus, has  
6 repeated the same error that the 2007 Order directed be rectified. The  
7 ALJ's disregard of the duty imposed by the 2007 Order to consider  
8 properly the lifting limitation imposed by Dr. Jamil and, if a rejection  
9 of that limitation was in order, to state legally valid reasons for  
10 rejecting Dr. Jamil's opinion, was improper under the rule of mandate  
11 doctrine. The ALJ was not entitled to simply sidestep this aspect of  
12 the 2007 Order by ignoring it; his failure to even mention Dr. Jamil's  
13 lifting limitation is inexplicable. The ALJ's failure to comply with  
14 this portion of the 2007 Order, therefore, clearly constitutes error.

15  
16 On top of the foregoing reversible error, the ALJ committed an  
17 additional, and related, error. By adopting the lifting limitation  
18 found by Dr. Lorber, a non-examining physician, the ALJ rejected the  
19 contrary opinions of Dr. Jamil and Dr. Ella-Tamayo, both consultative,  
20 examining physicians. "The opinion of a nonexamining physician cannot  
21 by itself constitute substantial evidence that justifies the rejection  
22 of the opinion of either an examining physician or a treating  
23 physician." Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1996)(emphasis  
24 in original); see also, e.g., Morgan v. Comm'r. of Social Sec. Admin.,  
25 169 F.3d 595, 600 (9th Cir. 1999); Pitzer v. Sullivan, 908 F.2d 502, 506  
26 n.4 (9th Cir. 1990). The opinion of a non-examining physician normally  
27 is entitled to less weight than that of an examining physician, as the  
28 former has not had the opportunity to conduct an independent examination

1 of the claimant. See, e.g., Ryan v. Comm'r. of Social Sec., 528 F.3d  
2 1194, 1198 (9th Cir. 2008)("the opinion of an examining physician is  
3 entitled to greater weight than the opinion of a non-examining  
4 physician"); Pitzer, 908 F.2d at 506 n.4 ("the conclusion of a  
5 non-examining physician is entitled to less weight than the conclusion  
6 of an examining physician"). "In order to discount the opinion of an  
7 examining physician in favor of the opinion of a nonexamining medical  
8 advisor, the ALJ must set forth specific, *legitimate* reasons that are  
9 supported by substantial evidence in the record." Nguyen v. Chater, 100  
10 F.3d 1462, 1466 (9th Cir. 1996)(emphasis in original); see also Andrews,  
11 53 F.3d at 1041 (when a nontreating source's opinion contradicts that of  
12 the treating or examining physician but is not based on independent  
13 clinical findings, or rests on clinical findings also considered by the  
14 treating or examining physician, the opinion of the treating or  
15 examining physician "may be rejected only if the ALJ gives specific,  
16 legitimate reasons for doing so that are based on substantial evidence  
17 in the record").

18  
19 Given that Dr. Lorber's opinion regarding plaintiff's lifting  
20 capability contradicted that of two examining physicians and lacked any  
21 independent clinical support, the different conclusion drawn by the  
22 medical expert regarding plaintiff's lifting capability cannot  
23 constitute substantial evidence. Moreover, and critically, the ALJ did  
24 not proffer a single reason, much less the requisite specific and  
25 legitimate reasons, for rejecting the opinions of the examining  
26 physicians and for deferring, instead, to the medical expert's opinion.  
27 The ALJ's failure to explicitly reject the opinions of Dr. Jamil and Dr.  
28 Ella-Tamayo regarding plaintiff's lifting limitations, and the ALJ's

1 failure to set forth specific and legitimate reasons for crediting Dr.  
2 Lorber's opinion on this issue over the opinions of two examining  
3 physicians, constitutes an independent reversible error above and beyond  
4 his noncompliance with the 2007 Order.

5  
6           2.   Dr. Jamil's "Frequent Rests" Limitation

7  
8           The ALJ did note Dr. Jamil's "frequent rests" limitation in his  
9 2008 decision but rejected the "frequent rests" limitation for the  
10 stated reasons that: Dr. Jamil failed to "specifically define" what he  
11 meant by "'frequent rests' in terms of frequency or duration"; "there is  
12 no demonstrated medical pathology which would specifically address the  
13 need for such frequent breaks"; Dr. Lorber did not "specify the need for  
14 any type of 'frequent rest'"; and the ALJ would limit plaintiff to  
15 standing and/or walking for no more than one hour at a time, "at which  
16 time it would be reasonable for the claimant to change position." (A.R.  
17 433.) None of these reasons is a tenable basis for rejecting Dr.  
18 Jamil's "frequent rests" limitations.

19  
20           The ALJ's reliance on Dr. Lorber's failure to include this same  
21 limitation in his opinion is neither legitimate nor convincing. Dr.  
22 Lorber was not asked if any such limitation was appropriate or why he  
23 disagreed with Dr. Jamil in this respect. (A.R. 440-42.) A limitation  
24 assessed by an examining physician cannot be rejected simply because a  
25 non-examining physician did not mention such a limitation, as the  
26 authorities discussed previously make clear.

27  
28           The ALJ's second and third stated reasons are variants on the same

1 theme, namely, that Dr. Jamil's opinion was uncertain and the ALJ did  
2 not find "medical pathology" to support it. Rather than serving as a  
3 basis for summarily dismissing Dr. Jamil's opinion, however, the ALJ's  
4 conclusions gave rise to a duty on his part to obtain clarification of  
5 Dr. Jamil's opinion.

6  
7 In Social Security cases, the law is well-settled that the ALJ has  
8 an affirmative "'duty to fully and fairly develop the record and to  
9 assure that the claimant's interests are considered . . . even when the  
10 claimant is represented by counsel.'" Celaya v. Halter, 332 F.3d 1177,  
11 1183 (9th Cir. 2003)(ellipsis in original; quoting Brown v. Heckler, 713  
12 F.2d 441, 443 (9th Cir. 1983)); Smolen v. Chater, 80 F.3d 1273, 1273  
13 (9th Cir. 1279). "The ALJ's duty to supplement a claimant's record is  
14 triggered by ambiguous evidence, the ALJ's own finding that the record  
15 is inadequate or the ALJ's reliance on an expert's conclusion that the  
16 evidence is ambiguous." Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir.  
17 2005)(citing Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001)).  
18 An ALJ can discharge his or her duty to develop the record "in several  
19 ways, including: subpoenaing the claimant's physicians, submitting  
20 questions to the claimant's physicians, continuing the hearing, or  
21 keeping the record open after the hearing to allow supplementation of  
22 the record." Tonapetyan, 242 F.3d at 1150; see also Smolen, 80 F.3d at  
23 1288; 20 C.F.R. § 416.1444 (stating that the ALJ may continue the  
24 hearing if he believes material evidence is missing, and may reopen the  
25 hearing at any time prior to mailing a notice of decision to receive new  
26 and material evidence); 20 C.F.R. § 416.1450(d)(providing that the ALJ  
27 may issue subpoenas on his own initiative or at the request of a party).

1           Thus, an ALJ has a duty "to scrupulously and conscientiously probe  
2 into, inquire of, and explore for all the relevant facts" by procuring  
3 the necessary, relevant treatment records. Higbee v. Sullivan, 975 F.2d  
4 558, 561-62 (9th Cir. 1991)(citation omitted). Thus, for example, in  
5 Smolen, *supra*, the Ninth Circuit held that the ALJ erred in rejecting  
6 the uncontroverted opinion of a treating physician on the ground, *inter*  
7 *alia*, that the physician did not explain the basis for his "yes-or-no"  
8 answers to questions. The Ninth Circuit found that the ALJ had failed  
9 to meet his duty of stating clear and convincing reasons for rejecting  
10 the opinions, and "[i]f the ALJ thought he needed to know the basis of  
11 [the treating physician's] opinions in order to evaluate them, he had a  
12 duty to conduct an appropriate inquiry, for example, by subpoenaing the  
13 physicians or submitting further questions to them." 80 F.3d at 1288.  
14 "Having failed to fully develop the record regarding the basis for [the  
15 physician's] opinions, the ALJ could not then reject those opinions --  
16 which were uncontroverted and corroborated -- because they were given in  
17 response to leading, hypothetical questions." *Id.*

18  
19           Here as well, the ALJ's assertion -- that Dr. Jamil's "frequent  
20 rests" limitation was rejected, because Dr. Jamil failed to  
21 "specifically define" what he meant in this respect -- was not a clear  
22 and convincing reason for flatly rejecting the examining physician's  
23 opinion. The ALJ's statement constituted an acknowledgment that he  
24 found Dr. Jamil's "frequent rests" opinion to be ambiguous. If, as the  
25 ALJ expressly stated, he needed clarification as to the meaning of Dr.  
26 Jamil's opinion regarding "frequent rests," the ALJ should have obtained  
27 such clarification through the several means available to him for doing  
28 so. Having failed to meet his duty to "conduct an appropriate inquiry,"

1 the ALJ's stated reason for rejecting Dr. Jamil's opinion was neither  
2 clear not convincing. Smolen, 80 F.3d at 1288.

3  
4 The ALJ's related stated reason -- "there is no demonstrated  
5 medical pathology documented anywhere in the record which would  
6 specifically address the need for such frequent breaks" (A.R. 433) -- is  
7 also not convincing. The ALJ found that plaintiff has severe orthopedic  
8 impairments and further, based on Dr. Lorber's opinion, that she cannot  
9 walk for greater than 4 hours out of 8 and for no more than 1 hour at a  
10 time. (A.R. 431-32.) When the ALJ asked Dr. Lorber the basis for this  
11 limitation, Dr. Lorber cited to multiple items of objective medical  
12 evidence, including: a December 19, 2004 x-ray that demonstrated  
13 degenerative arthritis in plaintiff's left knee (A.R. 237-38); a  
14 September 17, 2003 MRI showing probable right anterior cruciate ligament  
15 tear at the femoral attachment and a lateral meniscus tear (A.R. 332);  
16 an August 14, 2003 medical note indicating that plaintiff knee surgery  
17 performed on October 8, 1999, for a right lateral meniscus tear (A.R.  
18 326); and March 23, 2005 x-rays that demonstrated plaintiff has  
19 osteoarthritis in her knees (A.R. 329).<sup>14</sup> (A.R. 441.) Dr. Lorber opined  
20 that he limited plaintiff's standing and walking based on osteoarthritis  
21 in both of her knees. (A.R. 441-42.) Given the ALJ's adoption of Dr.  
22 Lorber's limitation, the ALJ necessarily determined that the above-noted  
23 medical evidence was demonstrative of the need for a stand/walk  
24 limitation with a significant durational cap. Hence, the ALJ's finding  
25 that there is no "medical pathology" that might support Dr. Jamil's  
26

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27  
28 <sup>14</sup> The March 23, 2005 x-rays also revealed mild arthritic changes in  
both of plaintiff's hips. (A.R. 330.)

1 opinion is not supported by substantial evidence.<sup>15</sup>

2  
3 The ALJ's assertion that his allowance of a one-hour limit on  
4 standing and/or walking prior to a change of position was a more  
5 "reasonable" limitation than a "frequent rests" limitation also is not  
6 a legitimate basis for rejecting Dr. Jamil's opinion. An ALJ is not  
7 permitted to substitute his own medical judgment for that of a  
8 physician. See Tackett v. Apfel, 180 F.3d 1094, 1102-03 (9th Cir.  
9 1999)(finding that the ALJ erred in concluding that the claimant could  
10 sit for two hours without changing position, based on the claimant's  
11 testimony regarding a lengthy driving trip, when the treating physicians  
12 and the medical expert opined that the claimant needed to change  
13 position every half hour); see also Clifford v. Apfel, 227 F.3d 863, 870  
14 (7th Cir. 2000)(observing that "'ALJs must not succumb to the temptation  
15 to play doctor and make their own independent medical findings'"  
16 (citation omitted); and finding that an ALJ's RFC finding that the  
17 claimant could stand or walk for up to six hours, notwithstanding a  
18 treating physician's opinion that the claimant's knee arthritis limited  
19 her ability to stand or walk on a sustained basis, was an erroneous  
20 substitution by the ALJ of his medical judgment for that of the  
21 physician). While the ALJ apparently did not pluck this one-hour  
22 limitation out of thin air and premised it on Dr. Lorber's opinion, as  
23 discussed herein, the ALJ has not stated any tenable basis for rejecting  
24 Dr. Jamil's opinion. Hence, the ALJ's rejection of Dr. Jamil's opinion

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25  
26 <sup>15</sup> Dr. Jamil stated that he had reviewed a December 19, 2001 x-ray of  
27 plaintiff's knees, which showed mild degenerative arthritis. (A.R. 297;  
28 see also A.R. 268.) The subsequent x-rays and the MRI on which Dr.  
Lorber relied were consistent, and thus, they did not detract from Dr.  
Jamil's opinion.



1 in favor of Dr. Lorber's opinion was improper and did not serve as a  
2 legitimate reason for disregarding Dr. Jamil's opinion.

3  
4       Significantly, the medical record before the ALJ following remand  
5 stopped in March 2005. Indeed, at the hearing, the medical expert  
6 specifically questioned the lack of updated records, asking "why is it  
7 that we have no records for the past three years?" (A.R. 439.) The ALJ  
8 asked plaintiff's counsel about the lack of updated records, and counsel  
9 responded that he had requested them from "the county two months ago"  
10 but had not received them. (*Id.*) The medical evidence of record  
11 indicated that plaintiff's lower extremity orthopedic impairments may  
12 have been getting worse. Three and a half years after Dr. Ella-Tamayo  
13 rendered her consultative opinion, Dr. Jamil found more restrictive  
14 limitations warranted, and in the intervening years, x-rays and an MRI  
15 repeatedly showed degenerative changes in plaintiff's knees. Given the  
16 lack of updated medical records for the three years preceding the 2008  
17 hearing, and the ALJ's professed inability to understand the nature and  
18 scope of Dr. Jamil's "frequent rests" limitation, it was incumbent upon  
19 the ALJ to obtain some clarification of Dr. Jamil's opinion rather than  
20 just deferring to Dr. Lorber's testimony.

21  
22       Given the 2007 Order's directive that the ALJ appropriately  
23 consider Dr. Jamil's "frequent rests" limitation on remand, "including  
24 [conducting] any further proceedings . . . as may be needed" (A.R.  
25 479)), the ALJ's rejection of this portion of Dr. Jamil's opinion  
26 without first attempting to obtain clarification was improper. The ALJ,  
27 thus, failed to comply with the 2007 Order in this respect. The Court  
28 cannot find this error be harmless.

1           In the 2007 Order, the Court noted that, at the 2005 hearing, the  
2 ALJ propounded a hypothetical to the vocational expert positing a  
3 sedentary level of work and that the claimant would be "off task 20  
4 percent of the time due to" orthopedic and/or focus/concentration  
5 problems; in response, the vocational expert opined that there is no  
6 work that could be performed by the claimant. (A.R. 418, 478.) The  
7 Court observed that it was unclear whether or not the "off task"  
8 limitation included in the hypothetical correlated to Dr. Jamil's  
9 "frequent rests" limitation. (A.R. 478.) At the 2008 hearing, the  
10 vocational expert testified that, based on Dr. Lorber's RFC opinion,  
11 there were light, unskilled positions available that plaintiff could  
12 perform. The ALJ then asked the vocational expert to assume that the  
13 claimant would be "off task at least 20% of the time due to pain," and  
14 the vocational expert responded that "there would not be any work,"  
15 because the claimant would not be "working at a competitive rate for  
16 full-time employment." (A.R. 449-50.) Once again, it is unclear  
17 whether the ALJ's "off task" reference was intended to encompass Dr.  
18 Jamil's "frequent rests" limitation or not; if it was, then the ALJ's  
19 error plainly was not harmless.

20

21           Accordingly, the Court finds that the ALJ did not comply with the  
22 2007 Order with respect to the consideration of Dr. Jamil's lifting  
23 limitation and "frequent rests" limitation. For the reasons set forth  
24 above, that error warrants reversal.

25 ///

26 ///

27 ///

28 ///

1 II. The ALJ Did Not Properly Consider The Medical Expert's  
2 Testimony Indicating That Plaintiff Met Or Equaled A Listing  
3 For A Closed Period.  
4

5 At the 2008 hearing, the ALJ asked Dr. Lorber: "[B]ased on the  
6 records that you have reviewed, do you have an opinion as to whether  
7 during the time frame after 4-27-01 up to and including today, whether  
8 the claimant met or equaled a listing?" (A.R. 440.) Dr. Lorber  
9 responded: "Between the onset of April 27 '01 and April of '02 she met  
10 listing 1. [sic], 11.04 peripheral neuropathy regarding bilateral carpal  
11 tunnel syndrome. Subsequent to that she no longer met or equaled a  
12 listing." (*Id.*) In his 2008 decision, the ALJ stated that Dr. Lorber  
13 had opined that plaintiff "may have met a listed impairment but did not  
14 satisfy the durational one year period." (A.R. 433.)  
15

16 Plaintiff contends that the ALJ misstated Dr. Lorber's testimony,  
17 because Dr. Lorber's testimony indicated a finding that, "for at least  
18 a 12 month period of time from April of 2001 through April of 2002 this  
19 Plaintiff met listing 11.04 regarding her upper extremity impairments."  
20 (Joint Stip. at 5.) Defendant argues that Dr. Lorber did not testify  
21 that plaintiff met the indicated listing "for the entire period from  
22 April 2001 to April 2002, but simply that she met a listing between  
23 those dates." (*Id.* at 11; emphasis in original.) Defendants cites  
24 portions of the medical evidence and asserts that: plaintiff did not  
25 complain of bilateral wrist pain until May 16, 2001, had carpal tunnel  
26 release surgery on March 6, 2002, and had her sutures removed on March  
27 22, 2002; and thus, her disabling condition lasted only from May 16,  
28 2001, through March 22, 2002, which was less than 12 months. (*Id.*)

1 Defendant's argument fails for several reasons. First, defendant  
2 overlooks the fact that these same medical records show that, on April  
3 10, 2001, plaintiff complained to her treating physician of "numbness  
4 and tingling of both hands." (A.R. 207.) She returned for a follow-up  
5 visit on May 16, 2001, at which time she again complained of bilateral  
6 numbness and tingling, as well as wrist and hand pain. (A.R. 206.)  
7 When plaintiff did have her surgery sutures removed on March 22, 2002,  
8 her impairment did not disappear at that moment *ipso facto*. Plaintiff  
9 still complained of throbbing pain as of that date, and her medical  
10 notes indicate that she should return in a month for a re-check to  
11 determine whether she had the full use of her hands. (A.R. 257.) On  
12 April 23, 2002, plaintiff reported to her treating physician that she  
13 was experiencing right wrist swelling and pain. (A.R. 256.) In short,  
14 defendant's argument that plaintiff's carpal tunnel-based impairment  
15 lasted for less than 12 months is not supported by the record.

16  
17 Even if defendant's argument did not fail factually, it would fail  
18 legally, because it rests on an improper post hoc rationale. The ALJ  
19 did not cite the medical evidence on which defendant relies to support  
20 his step three finding; rather, the ALJ relied only on his above-quoted  
21 description of Dr. Lorber's testimony. A reviewing court cannot affirm  
22 the denial of benefits based on a reason not stated or a finding not  
23 made by the ALJ, and the Commissioner's after-the fact attempt to supply  
24 an acceptable basis for the ALJ's decision is unavailing. *See, e.g.,*  
25 Connett, 340 F.3d at 874; Pinto v. Massanari, 249 F.3d 840, 847-48 (9th  
26 Cir. 2001)(an agency decision cannot be affirmed on the basis of a  
27 ground the agency did not invoke in making its decision); Barbato v.  
28 Comm'r of Soc. Sec. Admin., 923 F. Supp. 1273, 1276 n. 2 (C.D. Cal.

1 1996)(remand is appropriate when a decision does not adequately explain  
2 how a decision was reached, "[a]nd that is so even if [the Commissioner]  
3 can offer proper post hoc explanations for such unexplained  
4 conclusions," for "the Commissioner's decision must stand or fall with  
5 the reasons set forth in the ALJ's decision, as adopted by the Appeals  
6 Council")(citation omitted).

7  
8       Regardless of the flaws in defendant's argument, the Court would be  
9 constrained to find error, because the ALJ mischaracterized Dr. Lorber's  
10 testimony. Dr. Lorber did not testify, as the ALJ asserts, that  
11 plaintiff "did not satisfy the durational one year period." (A.R. 433.)  
12 Rather, Dr. Lorber simply stated that plaintiff met or equaled a listing  
13 "[b]etween" April 27, 2001, and April 2002, but thereafter, she did not.  
14 (A.R. 440.) While Dr. Lorber's testimony regarding the specific  
15 beginning and end dates of plaintiff's listed impairment is imprecise,  
16 it is unlikely that he meant that she met or equaled the listing for  
17 less than a year's time, given his failure to so indicate and his  
18 clarification that, after April 2002, she no longer met or equaled the  
19 listing. The only reasonable interpretation of Dr. Lorber's testimony  
20 is that plaintiff met or equaled listing 11.04 through April 2002, which  
21 would satisfy the 12 month durational requirement.

22  
23       The ALJ's characterization of Dr. Lorber's testimony in this  
24 respect was error. See Reddick v. Chater, 157 F.3d 715, 722-723 (9th  
25 Cir. 1998)(misleading paraphrasing of the record constitutes error, and  
26 it is impermissible for the ALJ to develop an evidentiary basis by "not  
27 fully accounting for the context of materials or all parts of the  
28 testimony and reports"). Although the ALJ was prepared to rely

1 exclusively on Dr. Lorber's testimony to the extent it supported a less  
2 restrictive RFC than that which the ALJ previously found to be supported  
3 by the evidence of record, the ALJ inexplicably, and impermissibly,  
4 rejected the one aspect of Dr. Lorber's testimony that was substantially  
5 favorable to plaintiff. The ALJ was not permitted to cull only those  
6 portions of Dr. Lorber's opinion that the ALJ wished to utilize to  
7 support his decision. See *id.* Given that Dr. Lorber's testimony, if  
8 properly construed, required finding plaintiff to have been disabled for  
9 a closed one-year period, the ALJ's error cannot be considered harmless.

10  
11 III. Remand For Both The Payment Of Benefits For A One Year Closed  
12 Period Of Disability And Further Proceedings Is Appropriate.

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

26  
27 Plaintiff asserts that this matter should be remanded to the  
28 Commissioner for further proceedings, namely, for a proper consideration

1 and resolution of the foregoing issues. (Joint Stip. at 13.) The Court  
2 concludes that there is no reason to remand this case for further  
3 administrative proceedings with respect to the closed period identified  
4 by Dr. Lorber. Given Dr. Lorber's uncontradicted testimony that  
5 plaintiff met or equaled listing 11.04 from April 27, 2001, through  
6 April 2002, and the substantial evidence of record supporting that  
7 conclusion (*see discussion supra* at p. 28, lns. 5-19), the Court finds  
8 that plaintiff was disabled throughout that closed period. Accordingly,  
9 a reversal and remand for an award of benefits for that closed period is  
10 warranted.

11  
12 However, with respect to the claim period after April 2002, a  
13 remand for further proceedings is appropriate, so that the ALJ may  
14 rectify the above-mentioned deficiencies and errors.<sup>16</sup> On remand, the  
15 ALJ should attempt to recontact Dr. Jamil for clarification of the  
16 "frequent rests" limitation he found warranted. If such clarification  
17 is obtained, the ALJ must properly consider Dr. Jamil's opinion, and  
18 accord it the appropriate weight vis-a-vis Dr. Lorber's testimony, when  
19 assessing plaintiff's RFC. If such clarification cannot be obtained, a  
20 new consultative examination should be ordered for the limited purpose  
21 of determining whether a "frequent rests" limitation is required. The  
22 ALJ also must properly consider the lifting limitation propounded by Dr.

---

23  
24 <sup>16</sup> The Court reaches this conclusion somewhat reluctantly. It has  
25 been nine years since plaintiff filed her SSI application. Although  
26 this matter was remanded for the consideration of only two limited  
27 issues, the ALJ failed to comply with the 2007 Order and the directive  
28 of the Appeals Council that he do so. With that said, it is not clear  
to the Court that, if the ALJ had complied with the 2007 Order, a  
finding of disability would have been required with respect to the  
closed period of disability. Accordingly, and given that plaintiff  
herself seeks a remand for further proceedings, that remedy appears to  
be the appropriate one here.

1 Jamil, and accord it the appropriate weight vis-a-vis Dr. Lorber's  
2 testimony, when assessing plaintiff's RFC. Should further testimony  
3 from a vocational expert be adduced, the hypothetical(s) posed to the  
4 vocational expert must clearly and accurately reflect all of the  
5 limitations determined by the ALJ to affect plaintiff's ability to work.

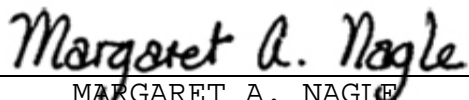
6  
7 **CONCLUSION**  
8

9 Accordingly, for the reasons stated above, the Commissioner's  
10 decision is REVERSED, and this case is remanded to the Commissioner for  
11 the further proceedings specified above, including the payment of  
12 benefits for the closed period.

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

17  
18 **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
19

20 DATED: September 30, 2010

21   
22 MARGARET A. NAGLE  
23 UNITED STATES MAGISTRATE JUDGE  
24  
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26  
27  
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