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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

MARK HOOD,	)	Case No. EDCV 09-00509-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security	)	
Administration,	)	
	)	
Defendant.	)	
_____	)	

**I. Background**

Mark Hood filed an application for Social Security Disability Insurance Benefits on July 25, 2005, alleging that he had become disabled and unable to work on December 9, 2002, due to lower back pain, depression, dyslexia, illiteracy, hypertension, and bilateral shoulder pain. (Administrative Record ("AR") at 26, 51-53). His application was denied initially and upon reconsideration. (AR at 21, 29, 36). An administrative hearing was held on August 8, 2007, before Administrative Law Judge ("ALJ") Keith Varni. (AR at 160-184).

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1 Plaintiff, who was represented by counsel, testified that he was  
2 born on April 18, 1959, and was then forty-eight years old. (AR at  
3 163). Plaintiff has a ninth grade education. (AR at 163). Plaintiff  
4 stated that he cannot read or write. (AR 174). His work experience  
5 includes employment as power pole installer. (AR at 165). Plaintiff  
6 last worked in December 2002, when he was injured on the job. (AR 165-  
7 66). In 2006, Plaintiff attempted work as a mail sorter, but that job  
8 ended after a month because of his dyslexia. (AR at 169). He has not  
9 worked since that time.

10 Plaintiff testified that he is unable to work because of  
11 depression; back, knee, and shoulder pain; and high blood pressure. (AR  
12 169). The pain and swelling keeps him from lifting heavy objects and  
13 walking long distances. (AR 172-74). He claims to suffer from daily  
14 headaches. *Id.* He takes Vicodin for pain and Paxil for depression. (AR  
15 177-78).

16 On August 24, 2007, the ALJ issued a decision unfavorable to  
17 Plaintiff. (AR at 11-19). The ALJ found that during the relevant time  
18 period, Plaintiff suffered from severe impairments of the  
19 musculoskeletal system and while the evidence was somewhat questionable,  
20 he also suffered from depression. (AR at 13). He found that Plaintiff  
21 could perform his past work, but can perform unskilled medium work,  
22 except for that involving complex or detailed work. (AR 14). Using the  
23 Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, App. 2,  
24 Rule 201 ("the grids"), as a framework for decision, as well as a report  
25 from the state reviewing agency, (AR at 64-65), the ALJ found that  
26 Plaintiff there were a substantial number of jobs Plaintiff could  
27 perform, including jobs as an addresser, nut sorter or cuff folder. (AR  
28 at 19).

1 Plaintiff's request for review was denied by the Appeals Council on  
2 January 23 (AR at 3-5). Plaintiff now seeks judicial review of the ALJ's  
3 final decision denying his application for benefits. On October 14,  
4 2009, the parties filed a Joint Stipulation of disputed issues. For the  
5 reasons stated below, the matter shall be remanded for further  
6 proceedings.

## 7

### 8 **II. Plaintiff's Claims**

9 Plaintiff asserts the following claims: (1) the ALJ improperly  
10 evaluated the opinion of a consultative medical examiner; (2) the ALJ  
11 erred by failing to secure the testimony of a vocational expert; and (3)  
12 the ALJ made improper credibility findings. Joint Stipulation ("JS") at  
13 2). Plaintiff seeks reversal of the Commissioner's decision and a  
14 remand for an award of benefits or a new hearing. Defendant requests  
15 that the ALJ's decision be affirmed. Because the Court finds that the  
16 ALJ erred in failing to obtain vocational expert testimony, the court  
17 will only address that issue.<sup>1</sup>

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### 19 **III. Standard of Review**

20 Under 42 U.S.C. § 405(g), a district court may review the Social  
21 Security Commissioner's decision to deny benefits. The Commissioner's  
22 decision must be upheld unless "the ALJ's findings are based on legal  
23 error or are not supported by substantial evidence in the record as a  
24 whole." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Parra v.*  
25 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007); *Tackett v. Apfel*, 180 F.3d  
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27 <sup>1</sup> The Court assumes that on remand, a new decision will be reached  
28 with a reassessment of Plaintiff's depression on his ability to work as  
well as a new credibility determination.

1 1094 (9th Cir. 1999). Substantial evidence means more than a scintilla,  
2 but less than a preponderance; it is evidence that a reasonable person  
3 might accept as adequate to support a conclusion. *Richardson*, 402 U.S.  
4 at 401; *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). To  
5 determine whether substantial evidence supports a finding, the reviewing  
6 court "must review the administrative record as a whole, weighing both  
7 the evidence that supports and the evidence that detracts from the  
8 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th  
9 Cir. 1996). "If the evidence can support either affirming or  
10 reversing the ALJ's conclusion," the reviewing court "may not substitute  
11 its judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

#### 12 13 **IV. Discussion**

##### 14 **A. The ALJ Erred in Relying on the Medical Vocational Guidelines in** 15 **light of Plaintiff's Non-Exertional Limitations**

16 Plaintiff contends that the ALJ erred in utilizing the Medical-  
17 Vocational Guidelines<sup>2</sup> to reach a determination that there existed work  
18 in the economy that Plaintiff could perform. According to Plaintiff, he  
19 suffers a significant non-exertional limitation, specifically  
20 depression. He claims that the ALJ assumed the role of the vocational  
21 expert in determining that Plaintiff's nonexertional limitations did not  
22 prevent him from doing other work. Plaintiff's argument is correct.

23 The consultative examiner, Dr. Adam Cash, found that Plaintiff  
24 suffered from depression and mild mental retardation that would  
25 moderately impair Plaintiff in concentration, persistence and pace, as  
26 well as moderately impair his social functioning in the workplace and

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<sup>2</sup> 20 C.F.R., Part 404, Subpart P, Appendix 2.

1 tolerance for stress. (AR at 135). Based on this report, the ALJ  
2 specifically found that Plaintiff's depression would limit his ability  
3 to perform a full range of medium work in that it would limit his to the  
4 work that was not complex or detailed. Rather than question a VE who  
5 has the expertise to evaluate the availability of such work, the ALJ  
6 employed the grids "as a framework" for concluding that Plaintiff's  
7 limitations would not preclude him from performing a significant number  
8 of jobs in the national economy. In doing so, the ALJ reached his own  
9 independent evaluation of the additional consequences resulting from the  
10 non-exertional impairments. Thus, the ALJ erroneously resorted to the  
11 grids and relied upon them as more than just a "framework." (AR at 15).  
12 This was error.

13       When a claimant suffers from both exertional and non-exertional  
14 impairments, the ALJ must first consult the grids to determine whether  
15 a finding of disability can be based on the exertional impairments  
16 alone. 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(e)(2). If  
17 the grids direct a finding of disability, benefits must be awarded.  
18 *Cooper v. Sullivan*, 880 F.2d 1152, 1155 (9th Cir. 1989). If the  
19 exertional impairments alone are insufficient to direct a finding of  
20 disability, the grids may be used as a framework, but the ALJ must  
21 independently examine the additional consequences resulting from the  
22 non-exertional impairments. *Id.* at 1156.

23       In *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999), the court  
24 held that an ALJ's use of the grids is justified where the grids  
25 "completely and accurately represent a claimant's limitations . . . In  
26 other words, a claimant must be able to perform the *full range* of jobs  
27 in a given category". (Emphasis in original). *See also Lounsbury v.*  
28 *Barnhart*, 468 F.3d 1111, 1115 (9th Cir. 2006). However, in *Polney v.*

1 *Bowen*, 864 F.2d 661, 663-64 (9th Cir. 1988), the Ninth Circuit held that  
2 "where . . . a claimant's nonexertional limitations are in themselves  
3 enough to limit [the claimant's] range of work, the Grids do not apply,  
4 and the testimony of a vocational expert is required". See also *Thomas*  
5 *v. Barnhart*, 278 F.3d 947, 960 (9<sup>th</sup> Cir. 2002)(holding that vocational  
6 expert must be consulted when Grids do not "adequately take into account  
7 claimant's abilities and limitations"). Because the ALJ found that  
8 Plaintiff's depression would limit his ability to perform a full range  
9 of work at the medium exertional level, the grids are inapplicable and  
10 the ALJ should have taken testimony from a vocational expert as to  
11 whether there were jobs Plaintiff could perform in light of the non-  
12 exertional limitations. *Moore v. Apfel*, 216 F.3d 863, 869 (9th Cir.  
13 2000). The case shall be remanded for this purpose.

14 **Conclusion**

15 For the reasons stated above, the Court finds that the ALJ's  
16 decision is not supported by substantial evidence. Accordingly, it is  
17 **ORDERED** that this case be remanded to the Commissioner for further  
18 proceedings consistent with this opinion.

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20 DATED: October 28, 2009



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23 MARC L. GOLDMAN  
United States Magistrate Judge  
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