

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
3 1383(c)(3).

4 **STANDARD OF REVIEW**

5 A district court’s review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
7 limited; the Commissioner’s decision will be disturbed “only if it is not supported
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
9 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
11 (quotation and citation omitted). Stated differently, substantial evidence equates to
12 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
13 citation omitted). In determining whether the standard has been satisfied, a
14 reviewing court must consider the entire record as a whole rather than searching
15 for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record “is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ’s findings if they are supported by inferences reasonably drawn from the
20 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
12 §§ 404.1520(c); 416.920(c).

13 At step three, the Commissioner compares the claimant’s impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§
16 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
17 severe than one of the enumerated impairments, the Commissioner must find the
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
2 defined generally as the claimant’s ability to perform physical and mental work
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
4 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
5 analysis.

6 At step four, the Commissioner considers whether, in view of the claimant’s
7 RFC, the claimant is capable of performing work that he or she has performed in
8 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
9 If the claimant is capable of performing past relevant work, the Commissioner
10 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
11 If the claimant is incapable of performing such work, the analysis proceeds to step
12 five.

13 At step five, the Commissioner considers whether, in view of the claimant’s
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
16 the Commissioner must also consider vocational factors such as the claimant’s age,
17 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
18 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant
7 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);
8 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

9 **PROCEDURAL HISTORY**

10 Plaintiff applied for Title II disability insurance benefits and Title XVI
11 supplemental security income on February 23, 2004, alleging onset beginning June
12 1, 2001. Tr. 20. The applications were denied initially, Tr. 20, 896, and upon
13 reconsideration, Tr. 20, 901. Plaintiff appeared for a hearing before an
14 administrative law judge (ALJ) on May 25, and December 12, 2007. Tr. 20, 571-
15 594, 595-599. ALJ Say issued a partially favorable decision on March 12, 2008,
16 awarding Plaintiff supplemental security income but denying her claim for
17 disability insurance benefits because she did not become disabled until December
18 15, 2003, some 14 months after her date last insured (DLI). Tr. 20-23.

19 On March 21, 2008, Plaintiff appealed the ALJ’s decision denying her
20 disability insurance benefits. Tr. 559-560. The Appeals Council accepted review

1 in 2010 and, upon review, revised Plaintiff's disability date from December 15,
2 2003, to December 9, 2004. Tr. 13-15.

3 Plaintiff appealed the Commissioner's decision to this Court and, after
4 briefing by Plaintiff, the parties stipulated to remand. Tr. 622-623. The Court
5 granted the parties' motion on February 9, 2012, and directed the ALJ to evaluate a
6 2007 medical opinion, further evaluate Plaintiff's alleged mental impairments,
7 reassess her credibility and residual functional capacity, and obtain medical expert
8 testimony. Tr. 624-626.

9 In October 2012, ALJ Dethloff held a hearing to determine whether Plaintiff
10 was disabled at some point prior to December 8, 2004. Tr. 604-605. At the
11 hearing, Plaintiff amended her alleged onset date to her DLI: September 30, 2002.
12 Tr. 604. ALJ Dethloff found Plaintiff was not disabled prior to December 9, 2004.
13 Tr. 618. Because this was after Plaintiff's DLI, he denied her claim for disability
14 insurance benefits. *Id.* He also denied Plaintiff's claim for supplemental security
15 income prior to December 2004. *Id.*

16 In January 2013, Plaintiff again appealed. Tr. 772-779. After briefing, the
17 parties stipulated to remand. *Camacho v. Colvin*, 13-CV-3002 (E.D. Wa. Oct. 17,
18 2013) ECF No. 24. "Based on the parties' stipulation," this Court reversed and
19 remanded the Commissioner's decision "to the Commissioner of Social Security
20 for a *de novo* hearing pursuant to sentence four of 42 U.S.C. § 405(g)." *Camacho*

1 *v. Colvin*, 13-CV-3002 (E.D. Wa. Oct. 17, 2013) ECF No. 25 at 1-2 (Remand
2 Order). Further, the Court ordered:

3 On remand, the administrative law judge (ALJ) will further develop
4 the record with a *de novo* hearing, and Plaintiff may raise any issue;
5 the ALJ will only consider the period prior to the established onset
6 date of December 9, 2004; the ALJ will take testimony from a
7 medical expert, who can opine on the onset date of Plaintiff's
8 disabling heart condition, and continue the sequential evaluation
9 process, obtaining supplemental vocational expert testimony as
10 necessary; the ALJ will issue a new decision.

11 *Id.*

12 On remand ALJ Martz conducted a hearing on February 17, 2015, where
13 Plaintiff testified along with impartial medical expert and cardiac specialist
14 Subramaniam Krishnamurth, M.D., and vocational expert Kimberly Mullinax. Tr.
15 761. Because ALJ Martz found "the issue on remand is very narrow, limited only
16 to the onset date of the claimant's disabling heart condition, [she] adopted ALJ
17 Dethloff's October 19, 2012 decision in its entirety, to the extent it is not
18 inconsistent with the order of the Appeals Council and [her] following decision."
19 Tr. 761.

20 As a threshold matter, the ALJ found Plaintiff met the insured status
requirement through September 30, 2002. Tr. 761. At step one, the ALJ found
Plaintiff has not engaged in substantial gainful activity since September 30, 2002.

Id. At step two, the ALJ found Plaintiff had the following severe impairments:
obesity and rheumatic aortal and mitral valve disease with status, post-

1 replacements in 1999. *Id.* At step three, the ALJ found that Plaintiff does not have
2 an impairment or combination of impairments that meets or medically equals a
3 listed impairment. Tr. 765. The ALJ then concluded that the Plaintiff had the RFC
4 to perform light work, with additional limitations. *Id.* At step four, the ALJ found
5 Plaintiff could not perform any past relevant work. Tr. 769. At step-five, the ALJ
6 found that, considering Plaintiff's age, education, work experience, and RFC, there
7 were jobs in significant numbers in the national economy that Plaintiff could have
8 performed, such as storage facility rental clerk, furniture rental consultant, and
9 document preparer. Tr. 770. On that basis, the ALJ concluded that Plaintiff was
10 not disabled as defined in the Social Security Act from September 30, 2002,
11 through December 9, 2004. Tr. 770.

12 The Appeals Council did not assume jurisdiction of the case, making ALJ
13 Martz's decision the Commissioner's final decision for purposes of judicial review.
14 *See* 42 U.S.C. § 1383(c)(3); 20 C.F.R. § 416.1484.

15 ISSUES

16 Plaintiff seeks judicial review of the Commissioner's final decision denying
17 her disability insurance benefits under Title II of the Social Security Act and
18 supplemental security income under Title XVI of the Social Security Act. ECF
19 No. 16. Plaintiff raises the following issues for this Court's review:
20

1 1. Whether the ALJ erred by failing to conduct a *de novo hearing* as
2 Chief Judge Thomas O. Rice ordered; and

3 2. Whether the ALJ properly weighed the medical opinion evidence;
4 ECF No. 16 at 2.

5 **A. De Novo Hearing**

6 Plaintiff contends the ALJ erred by failing to conduct a *de novo* hearing as
7 Chief Judge Rice ordered. ECF No. 16 at 2.

8 The rule of mandate requires that, upon receiving the mandate of a
9 reviewing court, a lower court cannot vary it or examine it for any other purpose
10 than execution. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1996)
11 (citations omitted). The lower court’s actions must be consistent with both the
12 letter and the spirit of the higher court’s decision. *See Quern v. Jordan*, 440 U.S.
13 332, 347 n.18 (1979) (looking to whether post-mandate conduct of lower court was
14 consistent “with either the spirit or the express terms of our decision”).

15 Chief Judge Rice reversed and remanded the Commissioner’s prior decision
16 and ordered the Commissioner to conduct a *de novo* hearing and issue a new
17 decision. Remand Order at 1-2.

18 A *de novo* hearing means “all issues of law and fact must be determined
19 anew and are not affected by the initial disposition.” *Costarelli v. Massachusetts*,
20 421 U.S. 193, 194 (1975); *see also Black’s Law Dictionary* (10th ed. 2014) (“1. A

1 reviewing court’s decision of a matter anew, giving no deference to a lower court’s
2 findings. 2. A new hearing of a matter, conducted as if the original hearing had not
3 taken place.”) This requires the matter to be considered anew, “as if it had not be
4 heard before, and no decision was previously rendered.” *Ness v. Comm’r*, 954
5 F.2d 1495, 1497 (9th Cir. 1992) (citing *United States v. Silverman*, 861 F.2d 571,
6 576 (9th Cir. 1988)); *see also Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir.
7 2009) (requiring consideration of the issues without deference to the prior
8 decision).

9 ALJ Martz failed to comply with the remand order. ALJ Martz found “the
10 issue on remand is very narrow, limited only to the onset date of the claimant’s
11 disabling heart condition” Tr. 761. Therefore, she, “adopted ALJ Dethloff’s
12 October 19, 2012 decision in its entirety, to the extent it is not inconsistent with the
13 order of the Appeals Council” and her decision. *Id.* This is not consistent with the
14 spirit or express terms of the Remand Order because, rather than considering the
15 issue anew, she relied on ALJ Dethloff’s findings. *Id.*

16 The Commissioner contests this reading of the remand order, contending
17 “[u]nder Plaintiff’s theory of what constitutes a *de novo* review, the ALJ could
18 have reviewed her award for SSI payments, and found her not disabled for the
19 entire period.” ECF No. 20 at 8. Even if true, it is unclear why that would militate
20 against Plaintiff’s and this Court’s interpretation of a *de novo* hearing. Regardless,

1 the Commissioner is wrong. Chief Judge Rice limited the *de novo* hearing,
2 permitting the ALJ to “only consider the period prior to the established onset date
3 of December 9, 2004.” Remand Order at 2. Accordingly, the Remand Order did
4 not and will not permit the ALJ to find Plaintiff “not disabled for the entire
5 period.” ECF No. 20 at 8.

6 The Commissioner next defends the ALJ’s interpretation of the Remand
7 Order by citing law of the case. The Commissioner contends the prior findings
8 became law of the case when this Court remanded the case without expressly
9 addressing ALJ Dethloff’s findings. ECF No. 20 at 9 (citing *Stacy v. Colvin*, ___
10 F.3d ___, 2016 WL 3165597 (9th Cir. June 7, 2016)). The *Stacy* Court expressly
11 held that the rule of mandate and law of the case doctrines apply in social security
12 cases. *Id.* But it is the Court’s remand instructions which constitute the law of the
13 case. *See Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1217 (C.D. Cal. 2005) (“ALJs
14 have acknowledged throughout the years that the remand instructions they receive
15 from the federal district court are the law of the case.”); *Holst v. Bowen*, 637 F.
16 Supp. 145, 147 n.3 (E.D. Wa. 1986) (noting the ALJ’s acknowledgment that the
17 doctrine of the law of the case bound him to follow the district court’s remand
18 orders). Here, the Court’s Remand Order instructed the ALJ to conduct a *de novo*
19 hearing, which required the matter to be considered anew, “as if it had not be heard
20 before, and no decision was previously rendered.” *Ness*, 954 F.2d at 1497.

1 ALJ Martz conducted a new hearing, but did not decide the issues as if no
2 decision had previously been issued. As the Commissioner acknowledges, ALJ
3 Martz incorporated ALJ Dethloff's findings into her decision by reference. ECF
4 No. 20 at 9. This was error and requires reversal and remand. *Sullivan v. Hudson*,
5 490 U.S. 877, 886 (1989) (deviation from the court's remand order in the
6 subsequent administrative proceedings is itself legal error, subject to reversal).

7 The appropriate remedy for failure to follow the district court's mandate is
8 remand. *Strauss v. Comm'r of Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir.
9 2011).

10 On remand, the administrative law judge (ALJ) will further develop the
11 record with a *de novo* hearing, and Plaintiff may raise any issue; the ALJ will only
12 consider the period prior to the established onset date of December 9, 2004; the
13 ALJ will take testimony from a medical expert, who can opine on the onset date of
14 Plaintiff's disabling heart condition, and continue the sequential evaluation
15 process, obtaining supplemental vocational expert testimony as necessary; the ALJ
16 will issue a new decision.

17 18 **CONCLUSION**

19 The ALJ's decision is not supported by substantial evidence or free of legal
20 error.

1 **IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (ECF No. 18) is
3 **GRANTED** and the matter is remanded to the Commissioner for a *de novo* hearing
4 pursuant to sentence four of 42 U.S.C. § 405(g). On remand, the administrative
5 law judge (ALJ) will further develop the record with a *de novo* hearing, and
6 Plaintiff may raise any issue; the ALJ will only consider the period prior to the
7 established onset date of December 9, 2004; the ALJ will take testimony from a
8 medical expert, who can opine on the onset date of Plaintiff's disabling heart
9 condition, and continue the sequential evaluation process, obtaining supplemental
10 vocational expert testimony as necessary; the ALJ will issue a new decision.

11 2. Defendant's Motion for Summary Judgment (ECF No. 22) is
12 **DENIED.**

13 3. An application for attorney's fee may be filed by separate motion.
14 The District Court Executive is directed to file this Order, enter
15 **JUDGMENT FOR THE PLAINTIFF, REMAND THE CASE FOR A DE**
16 **NOVO HEARING**, provide copies to counsel, and **CLOSE** the file.

17 DATED this Monday, August 15, 2016.

18 s/ Mary K. Dimke
19 MARY K. DIMKE
20 UNITED STATES MAGISTRATE JUDGE