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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SALVADOR J. LLAMAS,
Plaintiff,

vs.

CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,
Defendant.

No. 1:16-CV-3012-LRS

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
JUDGMENT, *INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 15) and the Defendant's Motion For Summary Judgment (ECF No. 16).

JURISDICTION

Salvador J. Llamas, Plaintiff, applied for Title II Disability Insurance benefits (DIB) and Title XVI Supplemental Security Income benefits (SSI) on November 28, 2011. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on March 18, 2014 before Administrative Law Judge (ALJ) Glenn Meyers. Plaintiff testified at the hearing, as did Vocational Expert (VE) Trevor Duncan. On April 11, 2014, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 1**

1 **STATEMENT OF FACTS**

2 The facts have been presented in the administrative transcript, the ALJ's
3 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At
4 the time of the administrative hearing, Plaintiff was 52 years old. He has past
5 relevant work experience as a material handler and as a farm worker. Plaintiff alleges
6 disability since October 1, 2011, on which date he was 49 years old. At the hearing,
7 Plaintiff requested a closed period of disability from October 1, 2011 until February
8 10, 2013.

9
10 **STANDARD OF REVIEW**

11 "The [Commissioner's] determination that a claimant is not disabled will be
12 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
13 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
14 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
15 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
16 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
17 1988). "It means such relevant evidence as a reasonable mind might accept as
18 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91
19 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
20 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
21 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
22 On review, the court considers the record as a whole, not just the evidence supporting
23 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
24 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

25 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
26 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational

27 ///

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1 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
2 F.2d 577, 579 (9th Cir. 1984).

3 A decision supported by substantial evidence will still be set aside if the proper
4 legal standards were not applied in weighing the evidence and making the decision.
5 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
6 1987).

8 ISSUES

9 Plaintiff argues the ALJ erred in: 1) evaluating the medical opinions of record;
10 2) discounting Plaintiff's credibility; and 3) finding that Plaintiff's mental
11 impairments are not "severe."

13 DISCUSSION

14 SEQUENTIAL EVALUATION PROCESS

15 The Social Security Act defines "disability" as the "inability to engage in any
16 substantial gainful activity by reason of any medically determinable physical or
17 mental impairment which can be expected to result in death or which has lasted or can
18 be expected to last for a continuous period of not less than twelve months." 42
19 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined
20 to be under a disability only if her impairments are of such severity that the claimant
21 is not only unable to do her previous work but cannot, considering her age, education
22 and work experiences, engage in any other substantial gainful work which exists in
23 the national economy. *Id.*

24 The Commissioner has established a five-step sequential evaluation process for
25 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
26 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines
27 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20

28 ORDER GRANTING PLAINTIFF'S

MOTION FOR SUMMARY JUDGMENT- 3

1 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker
2 proceeds to step two, which determines whether the claimant has a medically severe
3 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and
4 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment is severe, the
6 evaluation proceeds to the third step, which compares the claimant's impairment with
7 a number of listed impairments acknowledged by the Commissioner to be so severe
8 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and
9 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
10 equals one of the listed impairments, the claimant is conclusively presumed to be
11 disabled. If the impairment is not one conclusively presumed to be disabling, the
12 evaluation proceeds to the fourth step which determines whether the impairment
13 prevents the claimant from performing work she has performed in the past. If the
14 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§
15 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,
16 the fifth and final step in the process determines whether she is able to perform other
17 work in the national economy in view of her age, education and work experience. 20
18 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

19 The initial burden of proof rests upon the claimant to establish a prima facie
20 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
21 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
22 mental impairment prevents her from engaging in her previous occupation. The
23 burden then shifts to the Commissioner to show (1) that the claimant can perform
24 other substantial gainful activity and (2) that a "significant number of jobs exist in the
25 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
26 1498 (9th Cir. 1984).

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1 **ALJ'S FINDINGS**

2 The ALJ found the following: 1) Plaintiff had a “severe” medical impairment,
3 that being lymphoma, during the alleged closed period of disability; 2) Plaintiff’s
4 lymphoma was not an impairment that met or equaled any of the impairments listed
5 in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff had the residual functional capacity
6 (RFC) during the alleged closed period of disability to perform the full range of light
7 work as defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a); 4) Plaintiff’s RFC did
8 not allow him to perform his past relevant work during the alleged closed period of
9 disability; but (5) the Medical-Vocational Guidelines (“grids”), Rules 202.14 and
10 202.21, directed a finding of “not disabled” for someone of Plaintiff’s age, education,
11 work experience and RFC, indicating there were a significant number of jobs in the
12 national economy which the Plaintiff was capable of performing during the alleged
13 closed period of disability. Accordingly, the ALJ concluded the Plaintiff was not
14 disabled during that period of time.

15
16 **PHYSICIAN OPINIONS/CREDIBILITY**

17 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion
18 of a licensed treating or examining physician or psychologist is given special weight
19 because of his/her familiarity with the claimant and his/her condition. If the treating
20 or examining physician's or psychologist’s opinion is not contradicted, it can be
21 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725
22 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the
23 ALJ may reject the opinion if specific, legitimate reasons that are supported by
24 substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions,
25 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,
26 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,
27 1216 (9th Cir. 2005).

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1 It appears Plaintiff was first seen by Carolyn Wild, M.D., in early November
2 2011. In a “Discharge Summary” signed by her on November 16, 2011, she noted
3 that Plaintiff “had 2 months of swelling in his tongue with pain as well as left ear
4 pain.” (AR at p. 315). A transoral biopsy of the large tongue base mass on
5 November 2, 2011 revealed the presence of large B-cell lymphoma. (*Id.*).
6 Chemotherapy was started promptly. (*Id.*). Dr. Wild noted she was planning to do
7 3 to 4 months of chemotherapy to be followed by radiation treatment. (*Id.*). She also
8 noted that Plaintiff was “unlikely to be able to work for the next 6 months due to his
9 intense therapy.” (AR at p. 316).

10 In a Washington Department of Social and Health Services (DSHS) form she
11 completed on November 18, 2011, Dr. Wild reiterated that Plaintiff’s condition was
12 expected to impair his work function for six months. (AR at p. 457). While she
13 checked a box indicating Plaintiff could “sit for most of the day” and engage in
14 “walking or standing for brief periods,” she also checked a box indicating it was not
15 appropriate for Plaintiff to participate in training or employment activities at this
16 time. (AR at pp. 457-58). Dr. Wild rated Plaintiff’s lymphoma as “severe,” meaning
17 the “[i]nability to perform one or more basic work-related activities.” (AR at p. 464).
18 She indicated that the affected work activities included sitting, standing, walking,
19 lifting, handling and carrying. (*Id.*). She further indicated that Plaintiff had restricted
20 mobility, agility or flexibility in the following areas: balancing, bending, climbing,
21 crouching, handling, kneeling, pulling, pushing, reaching, sitting and stooping. (*Id.*).
22 She opined that because of “severe weakness, fatigue [and] poor stamina,” Plaintiff
23 was unable to work. (*Id.*).

24 On January 9, 2012, Dr. Wild assigned Plaintiff a score of “1” on the Eastern
25 Cooperative Oncology Group (ECOG) Performance Scale which equates to “[n]o
26 physically strenuous activity, but ambulatory and able to carry out light or sedentary
27 work (e.g. office work, light house work).” (AR at p. 389). She noted that Plaintiff

1 had undergone two cycles of chemotherapy, was scheduled for a third, and that his
2 radiation treatment was likely to begin in February 2012. (*Id.*). She also noted that
3 he had applied for disability because “he has intense treatment planned” and
4 furthermore, his “ongoing pain and fatigue . . . will make it very difficult to work for
5 the next 6 months.” (AR at p. 390). In a report dated January 30, 2012, Dr. Wild
6 repeated her ECOG Performance Scale Score of “1” and noted that Plaintiff wanted
7 to transfer his medical oncology care from Tacoma to Yakima and therefore, he
8 would be referred for radiation treatment in Yakima. (AR at p. 408).

9 Plaintiff was first seen by Cheryl Davison, M.D., a radiation oncologist at
10 Northstar Lodge in Yakima, for consultation on February 15, 2012. (AR at pp. 427-
11 29). A March 7, 2012 “Progress Note” from Yakima Valley Farm Workers Clinic
12 confirms that Plaintiff’s chemotherapy in Tacoma ended in February and that he was
13 now being followed by Dr. Davison for radiation treatment. (AR at p. 419).

14 A May 3, 2012 report by Dr. Davison indicates Plaintiff was seen in February
15 “to consider consolidative radiotherapy for areas of initial bulk disease,” but because
16 he needed his teeth extracted and “some missed appointments,” he returned on May
17 3, 2012, “somewhat later than expected.” (AR at p. 424). She noted that Plaintiff’s
18 “teeth were in poor repair, and he needed dental extractions prior to initiation of
19 radiotherapy which unfortunately resulted in scheduling difficulties and a delay in
20 returning for radiotherapy.” (AR at p. 425).

21 It appears Plaintiff received radiation treatment from May 21 to June 18, 2012.
22 (AR at p. 445). On August 4, 2012, Dr. Davison indicated she had requested a
23 follow up for mid-August with the medical oncologist and a follow up with her in
24 four months, if not sooner. (*Id.*).

25 On November 2, 2012, Plaintiff was seen by Goldy Bansal, M.D., a medical
26 oncologist at Washington Hematology-Oncology, for a “scan followup.” A CT scan
27 of Plaintiff’s neck and chest done the previous week (October 23, 2012) did not

1 “show any evidence of disease recurrence.” (AR at p. 449). Plaintiff’s ECOG
2 Performance Status was scored at “1.” (AR at p. 450).

3 On January 7, 2013, Plaintiff returned to Dr. Davison for a followup
4 appointment. He was “feeling much better generally” and “no longer experiencing
5 pain with reference to history of malignancy or treatment.” (AR at p. 508). Dr.
6 Davison’s impression was that Plaintiff was “clinically doing well, without obvious
7 evidence of persistent or recurrent disease.” (*Id.*).

8 In his decision, the ALJ found that Plaintiff “was limited to sedentary exertion
9 for the period during which he was undergoing cancer treatment and for a short time
10 thereafter; however, this lasted less than 12 months before the claimant became
11 capable of light exertion.” (AR at p. 26). He found this conclusion was “generally
12 consistent with the opinion of Dr. Wild, which I have assigned significant weight.”
13 (*Id.*).

14 There is not substantial evidence in the record supporting the conclusion that
15 Plaintiff was capable of sedentary exertion while he was undergoing cancer treatment
16 and for a short time thereafter. Dr. Wild certainly did not explicitly opine that
17 Plaintiff was capable of sedentary exertion, as defined by Social Security regulations¹,
18 within 12 months after his diagnosis and treatment, and it is not reasonable to infer
19 based on anything she stated, that she thought Plaintiff was capable of such exertion
20 within that time period. The ECOG Scale of Performance Status is a measurement
21 of how cancer impacts a patient’s daily living abilities. It was developed by the
22

23 ¹ Pursuant to 20 C.F.R. §§ 404.1567(a) and 416.967(a), sedentary work
24 involves lifting no more than 10 pounds at a time and occasionally lifting or
25 carrying articles like docket files, ledgers and small tools. Although a sedentary
26 job is defined as one which involves sitting, walking and standing are required
27 “occasionally.”
28

1 Eastern Cooperative Oncology Group, now part of the ECOG-ACRIN Cancer
2 Research Group, and published in 1982. See [http://ecog-agrin.org/resources/ecog-
4 performance-status](http://ecog-agrin.org/resources/ecog-
3 performance-status). There is nothing to suggest that the “work of a light or sedentary
5 nature” referred to in an ECOG Performance Status Grade of “1” equates to the ability
6 to meet all of the exertional requirements of **substantial gainful activity** sedentary
7 work as defined in the Social Security regulations.²

8 Where, as here, the Plaintiff has produced objective medical evidence of an
9 underlying impairment that could reasonably give rise to some degree of the
10 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ’s
11 reasons for rejecting the Plaintiff’s testimony must be clear and convincing. *Garrison*
12 *v. Colvin*, 759 F.3d 95, 1014 (9th Cir. 2014); *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th
13 Cir. 2014).

14 One of the reasons the ALJ stated for discounting Plaintiff’s credibility
15 regarding alleged limitations from lymphoma and treatment thereof was that after he
16 finished radiation treatment in June 2012, he “did not return for oncology follow up
17 until October, eight months after his last oncology appointment” (AR at p. 25).
18 The record does not support this statement. It is true that Plaintiff did not see Dr.
19 Bansal for a period of approximately eight months between February and October
20 2012, but this was because he was referred to Dr. Davison for radiation treatment in
21 the interim. (AR at p. 452). As set forth above, Plaintiff saw Dr. Davison on a
22 number of occasions between February and August 2012, prior to being seen again
23 by Dr. Bansal in October 2012. (AR at pp. 434-444; 449-454).

24 ///

25 ² “Substantial gainful activity” means work that (a) involves doing
26 significant and productive physical or mental duties and (b) is done (or) intended
27 for pay or profit. 20 C.F.R. §§ 404.1510 and 416.910.

1 The ALJ also pointed to evidence in the record of Plaintiff abusing prescription
2 narcotics and using illegal substances (AR at p. 24), but this is not a clear and
3 convincing reason for discounting Plaintiff's credibility. Although in January 2012,
4 Dr. Wild declined to refill Plaintiff's oxycontin because he had been taking it
5 "inappropriately" (AR at p. 390), it is clear that this in no way altered Dr. Wild's
6 opinion about Plaintiff's exertional capacity and ability to work. His admission of
7 methamphetamine use to the pain management doctor, Daniel M. Kwon, M.D., at
8 North Star Lodge in Yakima, and Dr. Kwon's observation that Plaintiff was taking
9 more oxycodone than he probably should (AR at p. 417), are likewise not clear and
10 convincing reasons to discount Plaintiff's credibility considering the diagnosis of
11 lymphoma, the treatment for the same, and Dr. Wild's opinion about Plaintiff's
12 exertional capacity and his ability to work. There is no indication in the record that
13 Plaintiff tried to hide his use of methamphetamine or his abuse of prescription
14 narcotics. There is no indication he was untruthful about these things.

15 If the ALJ actually intended to reject the opinion of Dr. Wild, Plaintiff's
16 treating physician, he did not offer clear and convincing reasons for doing so.
17 Plaintiff did not do or fail to do anything contrary to the limitations opined by Dr.
18 Wild. The ALJ did not offer clear and convincing reasons to discount Plaintiff's
19 credibility about limitations arising from his lymphoma and treatment of the same.
20 Accordingly, as discussed *infra*, Plaintiff was disabled for a period of at least twelve
21 months as a result of his lymphoma.

22 23 **SEVERE IMPAIRMENT**

24 A "severe" impairment is one which significantly limits physical or mental
25 ability to do basic work-related activities. 20 C.F.R. §§ 404.1520(c) and 416.920(c).
26 It must result from anatomical, physiological, or psychological abnormalities which
27 can be shown by medically acceptable clinical and laboratory diagnostic techniques.

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1 It must be established by medical evidence consisting of signs, symptoms, and
2 laboratory findings, not just the claimant's statement of symptoms. 20 C.F.R. §§
3 404.1508 and 416.908.

4 Step two is a *de minimis* inquiry designed to weed out nonmeritorious claims
5 at an early stage in the sequential evaluation process. *Smolen v. Chater*, 80 F.3d
6 1273, 1290 (9th Cir. 1996), citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)
7 ("[S]tep two inquiry is a *de minimis* screening device to dispose of groundless
8 claims"). "[O]nly those claimants with slight abnormalities that do not significantly
9 limit any basic work activity can be denied benefits" at step two. *Bowen*, 482 U.S.
10 at 158 (concurring opinion). "Basic work activities" are the abilities and aptitudes to
11 do most jobs, including: 1) physical functions such as walking, standing, sitting,
12 lifting, pushing, pulling, reaching, carrying, or handling; 2) capacities for seeing,
13 hearing, and speaking; 3) understanding, carrying out, and remembering simple
14 instructions; 4) use of judgment; 5) responding appropriately to supervision, co-
15 workers and usual work situations; and 6) dealing with changes in a routine work
16 setting. 20 C.F.R. §§ 404.1521(b) and 416.921(b).

17 The Commissioner has stated that "[i]f an adjudicator is unable to determine
18 clearly the effect of an impairment or combination of impairments on the individual's
19 ability to do basic work activities, the sequential evaluation should not end with the
20 not severe evaluation step." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005),
21 citing S.S.R. No. 85-28 (1985). An ALJ may find that a claimant lacks a medically
22 severe impairment or combination of impairments only when his conclusion is
23 "clearly established by medical evidence." *Id.*

24 Here, the ALJ did not find that Plaintiff had a "severe" mental impairment,
25 reasoning as follows:

26 While the claimant has been diagnosed with mental health
27 conditions, these appear to be related to his physical impairment
28 [Citation omitted]. He received no formal mental health
treatment, as treatment was limited to prescriptions, primarily

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1 benzodiazepines, written by various providers. Further, later
2 oncology notes indicate no complaints of anxiety or depression.
3 The claimant testified that he had mood problems and, at times,
4 wanted to “give up.” However, he no longer experienced
5 these symptoms. There is also no indication that the claimant
6 pursued mental health treatment after his oncology treatment
7 ended either.

8 I note that the State agency medical consultant, Beth Fitterer,
9 Ph.D., opined that the claimant’s mental conditions caused
10 limitations; however, her opinion was rendered in May 2012,
11 well before the claimant’s completion of chemotherapy and
12 radiation treatment. [Citation omitted]. She also did not have
13 a chance to review the rest of the record, which included no
14 treatment for mental health complaints following remission
15 of his cancer. For these reasons, I did not find this opinion
16 persuasive and assigned it minimal weight.

17 (AR at p. 23).

18 The medical evidence in the record does not “clearly establish” that Plaintiff
19 did not suffer from a “severe” mental impairment for a twelve month period. There
20 is not a “total absence of objective evidence” of a “severe” mental health impairment
21 lasting for that period of time. *Webb*, 433 F.3d at 687. On April 5, 2012, Plaintiff
22 underwent a psychological evaluation by Paul L. Schneider, Ph.D., as part of
23 interdisciplinary treatment for chronic pain. Dr. Schneider diagnosed Plaintiff with
24 “[p]ain disorder associated with both psychological factors and general medical
25 condition” and with “[a]djustment disorder with mixed anxiety and depressed mood.”
26 (AR at p. 412). Dr. Schneider noted that Plaintiff had experienced “great” anxiety
27 because of his lymphoma diagnosis and the resulting treatment, and that he had been
28 prescribed lorazepam for the anxiety. (AR at p. 411). Dr. Schneider thought it would
be a good idea to get Plaintiff off the lorazepam and on an antidepressant that would
be helpful with pain, depression and anxiety. (*Id.*). On or about the same date as Dr.
Schneider’s evaluation, a change was made to Plaintiff’s medication so that his
lorazepam dosage was decreased and he was started on venlafaxine, an
antidepressant. (AR at p. 414).

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1 Based on her review of the record, Dr. Fitterer found that Plaintiff had
2 medically determinable impairments, including somatoform and affective disorders
3 which were “severe,” causing “mild” restrictions in activities of daily living, and
4 “moderate” difficulties in maintaining social functioning and in maintaining
5 concentration, persistence or pace. (AR at pp. 105-06).

6 Contrary to the ALJ’s statement, the Plaintiff did receive mental health
7 treatment while he was undergoing treatment for lymphoma. He was prescribed an
8 antidepressant for his anxiety and depression. Furthermore, the fact later oncology
9 notes do not indicate any complaints of anxiety and depression does not constitute
10 substantial evidence that Plaintiff did not have a “severe” mental impairment for a
11 period of twelve months which commenced upon his learning of his diagnosis of
12 lymphoma and lasted through its remission.

13 In any event, even if Plaintiff did not have a “severe” mental impairment, he
14 did have a “severe” physical impairment lasting at least twelve months in duration
15 which rendered him “disabled,” as discussed *infra*.

16 17 **REMAND**

18 Social security cases are subject to the ordinary remand rule which is that when
19 “the record before the agency does not support the agency action, . . . the agency has
20 not considered all the relevant factors, or . . . the reviewing court simply cannot
21 evaluate the challenged agency action on the basis of the record before it, the proper
22 course, except in rare circumstances, is to remand to the agency for additional
23 investigation or explanation.” *Treichler v. Commissioner of Social Security*
24 *Administration*, 775 F.3d 1090, 1099 (9th Cir. 2014), quoting *Fla. Power & Light Co.*
25 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

26 In “rare circumstances,” the court may reverse and remand for an immediate
27 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).

28
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1 Three elements must be satisfied in order to justify such a remand. The first element
2 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting
3 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting
4 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
5 second element is whether there are “outstanding issues that must be resolved before
6 a determination of disability can be made,” and whether further administrative
7 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
8 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
9 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
10 Finally, if it is concluded that no outstanding issues remain and further proceedings
11 would not be useful, the court may find the relevant testimony credible as a matter of
12 law and then determine whether the record, taken as a whole, leaves “not the slightest
13 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
14 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
15 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
16 no outstanding issues that must be resolved, and there is no question the claimant is
17 disabled- the court has discretion to depart from the ordinary remand rule and remand
18 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
19 exist, “[t]he decision whether to remand a case for additional evidence or simply to
20 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
21 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

22 Here, the three elements for an award of immediate benefits are satisfied. The
23 ALJ failed to provide legally sufficient reasons for rejecting evidence, whether
24 claimant testimony or medical opinion; no outstanding issues remain to be resolved
25 before a determination of disability can be made; further administrative proceedings
26 would not be useful; and the record, taken as a whole, leaves not the slightest
27 uncertainty as to the outcome of the proceedings.

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1 Plaintiff was disabled for in excess of twelve months from October 1, 2011,
2 when he first started experiencing pain from what was subsequently determined to be
3 lymphoma, to December 31, 2012. Dr. Wild indicated that Plaintiff was “unlikely to
4 be able to work for the next 6 months due to his intense therapy.” Radiation therapy
5 was not completed until June 18, 2012 (AR at p. 316). Approximately six months
6 later, on January 7, 2013, Dr. Davison noted that Plaintiff was doing well, without
7 evidence of persistent or recurrent disease, confirming what Dr. Bansal had reported
8 on November 2, 2012. The Plaintiff reported to Dr. Davison that he was feeling
9 much better and no longer experiencing pain.³

10 There is not substantial evidence in the record supporting a conclusion that
11 Plaintiff had the residual functional capacity (RFC) during the alleged closed period
12 of disability to perform the full range of light work as defined in 20 C.F.R. §§
13 404.1567(a) and 416.967(a). Dr. Wild’s opinion does not support a conclusion that
14 Plaintiff had the RFC to perform a full range of sedentary work during this period, but
15 even if it did, it appears the Medical-Vocational Guidelines, Rule 201.14, would
16 dictate a finding of “disabled” for the Plaintiff based on his age (closely approaching
17 advanced age as of March 8, 2012 when he turned 50), education (completion of high

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22 ³ The Commissioner contends the Plaintiff did not finish treatment due to
23 his incarceration for driving without a license. (ECF No. 16 at p. 8). The record
24 does not support this contention. Plaintiff’s hearing testimony indicates he was
25 incarcerated from October through December of **2013** (the “last year” before the
26 year of the administrative hearing), not 2012. (AR at pp. 42-43). Plaintiff worked
27 for Labor Ready starting in February/March 2013, prior to his incarceration. (AR
28 at pp. 43-44; pp. 213-248).

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 15**

1 school and ability to communicate in English), and the skills from his previous semi-
2 skilled work as a material handler not being transferable to other work.⁴

3
4 **CONCLUSION**

5 Plaintiff's Motion For Summary Judgment (ECF No. 15) is **GRANTED** and
6 Defendant's Motion For Summary Judgment (ECF No. 16) is **DENIED**. The
7 Commissioner's decision is **REVERSED**. Pursuant to sentence four of 42 U.S.C.
8 §405(g) and § 1383(c)(3), this matter is **REMANDED** to the Commissioner for an
9 immediate award of disability benefits for the period from October 1, 2011 to
10 December 31, 2012. An application for attorney fees may be filed by separate
11 motion.

12 **IT IS SO ORDERED.** The District Executive shall enter judgment
13 accordingly and forward copies of the judgment and this order to counsel of record.

14 **DATED** this 18th day of November, 2016.

15
16 *s/Lonny R. Suko*

17 _____
18 LONNY R. SUKO
19 Senior United States District Judge

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27 _____
28 ⁴ See testimony of vocational expert, AR at pp. 67-69.