

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 10, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ADAM F.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-3078-LRS

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

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 14) and the Defendant's Motion For Summary Judgment (ECF No. 16).

JURISDICTION

Adam F., Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on September 26, 2014. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on January 30, 2017 before Administrative Law Judge (ALJ) Tom L. Morris. Plaintiff testified at the hearing, as did Vocational Expert (VE) Kimberly Mullinax. On March 24, 2017, 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

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1 appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).
2

3 **STATEMENT OF FACTS**

4 The facts have been presented in the administrative transcript, the ALJ's
5 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At
6 the time of the administrative hearing, Plaintiff was 51 years old. He does not have
7 any past relevant work experience.

8 Plaintiff was previously awarded disability benefits pursuant to an ALJ
9 decision dated July 6, 2011, but these benefits were terminated on May 6, 2014 on the
10 basis of medical improvement.
11

12 **STANDARD OF REVIEW**

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

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1 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

2 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
3 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
4 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
5 F.2d 577, 579 (9th Cir. 1984).

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

11 ISSUES

12 Plaintiff argues: 1) the Appeals Council erred when it failed to consider new
13 and material evidence; 2) the ALJ erred in failing to consider Plaintiff's left upper
14 extremity impairment; 3) the ALJ erred in his evaluation of medical opinion evidence;
15 and 4) the ALJ failed to offer specific, clear and convincing reasons for discounting
16 Plaintiff's testimony regarding his pain and limitations.

19 DISCUSSION

20 SEQUENTIAL EVALUATION PROCESS

21 The Social Security Act defines "disability" as the "inability to engage in any
22 substantial gainful activity by reason of any medically determinable physical or
23 mental impairment which can be expected to result in death or which has lasted or can
24 be expected to last for a continuous period of not less than twelve months." 42
25 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined

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1 to be under a disability only if his impairments are of such severity that the claimant
2 is not only unable to do his previous work but cannot, considering his age, education
3 and work experiences, engage in any other substantial gainful work which exists in
4 the national economy. *Id.*

5 The Commissioner has established a five-step sequential evaluation process for
6 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,
7 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if he is engaged
8 in substantial gainful activities. If he is, benefits are denied. 20 C.F.R. §
9 416.920(a)(4)(i). If he is not, the decision-maker proceeds to step two, which
10 determines whether the claimant has a medically severe impairment or combination
11 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe
12 impairment or combination of impairments, the disability claim is denied. If the
13 impairment is severe, the evaluation proceeds to the third step, which compares the
14 claimant's impairment with a number of listed impairments acknowledged by the
15 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.
16 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
17 equals one of the listed impairments, the claimant is conclusively presumed to be
18 disabled. If the impairment is not one conclusively presumed to be disabling, the
19 evaluation proceeds to the fourth step which determines whether the impairment
20 prevents the claimant from performing work he has performed in the past. If the
21 claimant is able to perform his previous work, he is not disabled. 20 C.F.R. §
22 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step
23 in the process determines whether he is able to perform other work in the national
24 economy in view of his age, education and work experience. 20 C.F.R. §
25 416.920(a)(4)(v).

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1 The initial burden of proof rests upon the claimant to establish a prima facie
2 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
3 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
4 mental impairment prevents him from engaging in his previous occupation. The
5 burden then shifts to the Commissioner to show (1) that the claimant can perform
6 other substantial gainful activity and (2) that a "significant number of jobs exist in the
7 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
8 1498 (9th Cir. 1984).

9 10 **ALJ'S FINDINGS**

11 The ALJ found the following: 1) Plaintiff has "severe" medical impairments,
12 those being bilateral knee osteoarthritis, degenerative disk disease of the spine, and
13 closed dislocation of the right acromioclavicular joint; 2) Plaintiff's impairments do
14 not meet or equal any of the impairments listed in 20 C.F.R. § 404 Subpart P, App.
15 1; 3) Plaintiff has the residual functional capacity (RFC) to perform light work as
16 defined in 20 C.F.R. § 416.967(a), with the ability to lift and/or carry 20 pounds
17 occasionally, and 10 pounds frequently; stand and/or walk with normal breaks for a
18 total of about five hours in an eight hour workday; occasionally climb ladders, ropes
19 and scaffolds; frequently reach with the right upper extremity, including overhead;
20 crouch, kneel and crawl; occasionally climb ramps, stairs, ladders, ropes and
21 scaffolds; avoid concentrated exposure to hazards such as unprotected heights; no
22 vibration; and may be off task about 10% over the course of an eight hour workday;
23 and 4) considering Plaintiff's age, education, work experience and RFC, there are
24 jobs existing in significant numbers in the national economy, identified by the VE,
25 which the Plaintiff is capable of performing, including: cashier II, storage facility

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1 rental clerk, and furniture rental consultant. Accordingly, the ALJ concluded the
2 Plaintiff is not disabled.

3 4 **APPEALS COUNCIL REVIEW**

5 In its denial of review, the Appeals Council acknowledged Plaintiff's
6 submission of "records from Sunnyside Community Hospital dated December 7, 2016
7 through December 30, 2016 (13 pages)." The Appeals Council found this evidence
8 "not material because it is not relevant to [Plaintiff's] claim for disability" and
9 therefore, "did not consider and exhibit this evidence." The Appeals Council noted
10 that Plaintiff also submitted nine pages of records from Sunnyside Community
11 Hospital dated May 8, 2017, but because the ALJ decided the case through March 24,
12 2017, the Appeals Council determined the evidence did not relate to the period at
13 issue and did not affect the decision whether Plaintiff was disabled on or before
14 March 24, 2017. (AR at p. 2). Plaintiff contends all of this additional evidence
15 relates to the period on or before the date of the ALJ's decision and therefore, should
16 have been considered by the Appeals Council.¹ Pursuant to the Ninth Circuit's
17 decision in *Taylor v. Commissioner of Soc. Sec. Admin.*, 659 F.3d 1228 (9th Cir.
18 2011), Plaintiff contends a remand to the ALJ for consideration of this evidence is
19 warranted.

21 ¹ "If new and material evidence is submitted, the Appeals Council shall
22 consider the additional evidence only where it relates to the period on or before
23 the date of the administrative law judge hearing decision." 20 C.F.R. §
24 416.1470(b).
25

1 When the Appeals Council denies a request for review, it is a non-final agency
2 action not subject to judicial review because the ALJ’s decision becomes the final
3 decision of the Commissioner. *Taylor*, 659 F.3d at 1231. In *Taylor*, the plaintiff
4 submitted to the Appeals Council in his request for review a certain psychiatric
5 evaluation. As it turned out, the evaluation got lost “[s]omewhere in the shuffle” and
6 therefore, the Appeals Council never considered the evaluation at all when it denied
7 the request for review. *Id.* at 1233. The Ninth Circuit concluded the evaluation
8 should have been considered by the Appeals Council because it related to the period
9 on or before the date of the ALJ’s hearing decision. *Id.* Accordingly, remand to the
10 ALJ was appropriate so the ALJ could reconsider his/her decision in light of the
11 additional evidence. *Id.* The Ninth Circuit observed that Taylor was not asking for
12 reversal of the Appeals Council’s denial of the request for review, noting that such
13 a request would be barred by *Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996),
14 which does not require the Appeals Council to offer a detailed rationale when faced
15 with new evidence. *Taylor*, 659 F.3d at 1231-32.

16 *Taylor* involved a unique situation which does not exist in the instant case and
17 therefore, a remand is not warranted based on the reasoning offered in *Taylor*. The
18 new evidence presented by Plaintiff’s counsel was examined by the Appeals Council
19 and made part of the administrative record, although it is noted the evidence dating
20 from December 7, 2016 through December 30, 2016 is labeled “Medical Evidence of
21 Record (MER)” (AR at pp. 40-52), whereas the evidence dated May 8, 2017 is
22 labeled “Attorney/Representative-Supplied Evidence” (REPEVID)” (AR at pp. 13-
23 21). The significance of this distinction is not readily apparent as all of this evidence
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1 is part of the administrative record.² This court would be entitled to review the
2 additional evidence to determine whether, in light of the record as a whole, the ALJ's
3 decision is supported by substantial evidence and free of legal error. *Taylor*, 659 F.3d
4 at 1232, citing *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993). The court's
5 review would be of the ALJ's final decision, not the Appeals Council's decision to
6 deny review. *See Warner v. Astrue*, 859 F.Supp.2d 1107, 1115 (C.D. Cal. 2012).

7 While a remand pursuant to *Taylor* is not warranted, for reasons discussed
8 below regarding Plaintiff's left upper extremity, the court is remanding this matter to
9 the ALJ. As part of that remand, the ALJ should consider the additional evidence
10 which was submitted to the Appeals Council.

11 12 **LEFT UPPER EXTREMITY**

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

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18 ² It appears impossible to reconcile the Appeals Council's statement that it
19 was not "considering and exhibiting" the evidence dating from December 7, 2016
20 through December 30, 2016 when that evidence is part of the administrative
21 record and referred to as "Medical Evidence of Record." It is noted that the
22 Appeals Council made no such statement regarding the "Attorney/Representative-
23 Supplied Evidence" dated May 8, 2017.

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

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

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

23 The ALJ found Plaintiff's alleged left shoulder impairment had not been
24 "established as severe during the period at issue." (AR at p. 28). According to the
25 ALJ:

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1 Most references to medical evidence regarding this extremity
2 are dated significantly prior to his application date of 2014,
3 despite reference to his left arm complaints in disability
4 forms discussed below. [Citation omitted]. Also, the claimant
5 indicated that his left shoulder injury was sustained during
6 an “incident with the police.” [Citation omitted]. While no
7 other details are known, the regulations prohibit any impair-
8 ment that arises in connection with the commission of a
9 felony. [20 C.F.R. §] 404.1506].

6 (AR at p. 28).

7 As the Plaintiff notes, in the July 6, 2011 decision finding him disabled, the
8 ALJ there found Plaintiff’s “severe” impairments included “left shoulder rotator cuff
9 tear; left frozen shoulder; [and] rotator cuff tendinitis.” (AR at p. 141). In her RFC
10 determination, the ALJ found the Plaintiff could not lift above shoulder level with the
11 left arm. (*Id.*).

12 20 C.F.R. § 404.1506(a) provides:

13 In determining whether you are under a disability, we
14 will not consider any physical or mental impairment, or
15 any increase in severity (aggravation) of a preexisting
16 impairment, which arises in connection with your
17 commission of a felony after October 19, 1980, if you
18 are subsequently convicted of this crime. Your
19 subsequent conviction will invalidate any prior
20 determination establishing disability if that determination
21 was based upon any impairment, or aggravation, which
22 we must exclude under this rule.

19 This regulation precludes consideration of any physical or mental impairment,
20 severe or non-severe, if it arose in connection with the commission of a felony. There
21 is nothing in the record indicating that Plaintiff’s “incident with the police” involved
22 the commission of a felony. Moreover, this regulation applies to an application for
23 Title II social security disability insurance (SSDI) benefits, whereas Plaintiff’s
24 application is for Title XVI supplemental security income (SSI) benefits. There is no
25 SSI rule (a provision in Part 416) corollary to 20 C.F.R. § 404.1506(a). The ALJ’s

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1 reliance on § 404.1506(a) constitutes error.

2 Plaintiff asserts the ALJ failed to consider the complete record and evidence
3 of ongoing left shoulder impairment and limitation during and after 2014. In
4 response to a medical questionnaire submitted to him by Plaintiff’s counsel, dated
5 August 31, 2015,³ PA-C Jason Redd included left shoulder rotator cuff tendinitis
6 among the Plaintiff’s diagnoses, indicating this was established “on exam.” (AR at
7 p. 459). Redd indicated Plaintiff would miss on average four or more days of work
8 per month “due to pain per patient.” (AR at p. 460). He declined, however, to opine
9 about a specific exertional level, noting all of Plaintiff’s medical problems were
10 managed through an orthopedist whom Redd thought “more qualified to make
11 recommendations.” (AR at p. 461). A progress note from Redd, dated the same date
12 as the questionnaire (August 31, 2015) stated Plaintiff had “bilateral shoulder pain”
13 and “the left [shoulder] had rotator cuff tendinopathy according to the patient.” (AR
14 at p. 577).

15 Plaintiff was last seen by Redd in May 2016, for “right left shoulder pain with
16 recurrent right shoulder dislocations.” Redd noted Plaintiff had been seen for this a
17 year ago and referred to orthopedics. (AR at p. 579). Physical examination revealed
18 both the right and left shoulder to be “normal.” (AR at p. 580). Redd completed
19 another questionnaire submitted to by him by Plaintiff’s counsel in which he
20 indicated one of the diagnoses was left shoulder rotator cuff tendinitis. Plaintiff
21 suggested he would miss four or more days of work per month due to “pain flares.”
22 (AR at p. 468). Redd again, however, declined to comment on Plaintiff’s exertional

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24 ³ The questionnaire, however, appears to have been completed in February
25 2015. (AR at p. 459).

1 capacity, indicating he would refer Plaintiff “back to ortho to determine disability
2 status.” (AR at p. 469).

3 In September 2016, the Plaintiff’s care was transferred to Kristin L. Bond,
4 M.D.. Plaintiff reported pain in his left shoulder. Dr. Bond noted that Plaintiff had
5 been seen by an orthopedist in the past and had been referred again in May 2016, but
6 had lost his insurance and so never went to revisit an orthopedist. (AR. at p. 581).
7 Plaintiff reported that his shoulder accident happened nine years ago in an incident
8 with police and that he had rotator cuff tendinitis since then. (AR at p. 581).

9 On September 28, 2016, Dr. Bond completed a Washington Department of
10 Social & Health Services (DSHS) “Physical Functional Evaluation.” She noted that
11 left shoulder pain was one of Plaintiff’s chief subjective complaints (AR at p. 491),
12 and opined the rotator cuff injury to Plaintiff’s left shoulder had a severity rating
13 between mild (no significant interference with the ability to perform one or more
14 basic work-related activities) and moderate (significant interference). (AR at p. 492).
15 Dr. Bond opined Plaintiff was limited to “light” work (lift 20 pounds maximum and
16 frequently lift or carry up to 10 pounds; walk or stand six out of eight hours per day;
17 able to sit and use pushing or pulling arm or leg movements most of the day). (AR
18 at p. 493).⁴ She recommended an orthopedic referral and considered orthopedic
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21 ⁴ In August 2014, PA-C Redd completed a DSHS “Physical Functional
22 Evaluation” form in which he opined Plaintiff was limited to “sedentary” work,
23 but left shoulder pain was not among the diagnoses considered by Redd.
24 Recommended treatment included an orthopedic evaluation and Reed indicated he
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1 evaluation to be part of the recommended treatment for Plaintiff. (AR at p. 493). In
2 a “Range Of Joint Motion Evaluation Chart” accompanying her DSHS evaluation, Dr.
3 Bond indicated a normal range of motion for Plaintiff’s right shoulder and a normal
4 range of motion for his left shoulder, with the exception of abduction of the left
5 shoulder which was at 110 degrees instead of 150 degrees. (AR at p. 495).

6 In light of the foregoing, the ALJ’s conclusion that Plaintiff did not have a
7 severe medically determinable left shoulder impairment on or after September 26,
8 2014 (date of SSI application) is not “clearly established by medical evidence.”
9 There is, at a minimum, an ambiguity which requires development of the record to
10 resolve. The ALJ has a basic duty to inform himself about facts relevant to his
11 decision. *Heckler v. Campbell*, 461 U.S. 458, 471 n. 1, 103 S.Ct. 1952 (1983). The
12 ALJ’s duty to develop the record exists even when the claimant is represented by
13 counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). The duty is
14 triggered by ambiguous or inadequate evidence in the record and a specific finding
15 of ambiguity or inadequacy by the ALJ is not necessary. *McLeod v. Astrue*, 640 F.3d
16 881, 885 (9th Cir. 2011). Here, the record is ambiguous or inadequate as to whether
17 Plaintiff suffers from a medically determinable left shoulder impairment, whether it
18 is “severe,” and if so, the extent to which it limits Plaintiff’s ability to perform basic
19 work-related activities.

20 Accordingly, the court will remand this matter to the Commissioner to order
21 a consultative orthopedic examination pursuant to 20 C.F.R. §416.919 for the purpose
22 of ascertaining whether Plaintiff suffers from a “severe” medically determinable left
23 shoulder impairment and if so, the extent to which it limits his ability to engage in

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25 intended to make a referral for such. (AR at pp. 358-60).

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1 substantial gainful activity. There is no reason, however, why the examination should
2 be limited to Plaintiff's left shoulder impairment and the court will direct that is also
3 include Plaintiff's right shoulder, his knees, and his back. Neither PA-C Redd or Dr.
4 Bond suggested that an orthopedic referral should be confined to Plaintiff's left
5 shoulder.

6 7 **REMAND**

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

16 In "rare circumstances," the court may reverse and remand for an immediate
17 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).
18 Three elements must be satisfied in order to justify such a remand. The first element
19 is whether the "ALJ has failed to provide legally sufficient reasons for rejecting
20 evidence, whether claimant testimony or medical opinion." *Id.* at 1100, quoting
21 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
22 second element is whether there are "outstanding issues that must be resolved before
23 a determination of disability can be made," and whether further administrative
24 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
25 887 (9th Cir. 2004). "Where there is conflicting evidence, and not all essential factual

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1 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
2 Finally, if it is concluded that no outstanding issues remain and further proceedings
3 would not be useful, the court may find the relevant testimony credible as a matter of
4 law and then determine whether the record, taken as a whole, leaves “not the slightest
5 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
6 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
7 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
8 no outstanding issues that must be resolved, and there is no question the claimant is
9 disabled- the court has discretion to depart from the ordinary remand rule and remand
10 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
11 exist, “[t]he decision whether to remand a case for additional evidence or simply to
12 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
13 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

14 The ALJ failed to provide legally sufficient reasons for finding Plaintiff’s left
15 shoulder impairment to be non-severe. There are, however, “outstanding issues that
16 must be resolved before a determination of disability can be made”- whether Plaintiff
17 has a severe medically determinable left shoulder impairment- and further
18 administrative proceedings would be useful in resolving that question. A review of
19 the current record does not allow the court to conclude there is no question Plaintiff
20 is disabled based on consideration of the other impairments found medically severe
21 by the ALJ: bilateral knee osteoarthritis, degenerative disk disease of the spine, and
22 closed dislocation of the right acromioclavicular joint. Therefore, a remand for
23 further proceedings is warranted.

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1 **CONCLUSION**

2 Plaintiff's Motion For Summary Judgment (ECF No. 14) is **GRANTED** and
3 Defendant's Motion For Summary Judgment (ECF No. 16) is **DENIED**. The
4 Commissioner's decision is **REVERSED**.

5 Pursuant to sentence four of 42 U.S.C. §405(g) and § 1383(c)(3), this matter
6 is **REMANDED** to the Commissioner for further proceedings. The Commissioner
7 shall order a consultative orthopedic examination to include evaluation of Plaintiff's
8 left and right shoulders, his knees and his back.⁵ On remand, the ALJ will consider
9 the additional evidence which was submitted to the Appeals Council. This additional
10 evidence and the results of the orthopedic evaluation will be considered by the ALJ
11 in a renewed assessment of the weight to be accorded to the opinions of PA-C Redd
12 and Dr. Bond, and in a renewed assessment of the weight to be accorded to Plaintiff's
13 testimony regarding the severity of his symptoms and the physical limitations claimed
14 by him. An application for attorney fees may be filed by separate motion.

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22 ⁵ It appears Plaintiff was last seen by an orthopedist in September 2013
23 (Valentin Antoci, M.D., Sunnyside Bone & Joint) for an evaluation of his right
24 shoulder. (AR at pp. 364-66).
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