

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

Jul 17, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORENZO B.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-3186-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. 15).

JURISDICTION

Lorenzo B., Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on April 20, 2015. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on May 16, 2017 before Administrative Law Judge (ALJ) Glenn Meyers. Plaintiff testified at the hearing, as did Vocational Expert (VE) Kimberly Mullinax. On September 29, 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 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 49 years old. He has past
5 relevant work experience as a flagger, material handler and as an industrial truck
6 operator.

7
8 **STANDARD OF REVIEW**

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

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

27 A decision supported by substantial evidence will still be set aside if the proper
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 2**

1 legal standards were not applied in weighing the evidence and making the decision.
2 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
3 1987).

4 5 **ISSUES**

6 Plaintiff argues the ALJ erred in: 1) evaluating the medical opinions of record;
7 2) not giving full credit to Plaintiff's testimony; 3) ignoring lay testimony; and 4)
8 failing to fulfill his Step Five burden.

9 10 **DISCUSSION**

11 **SEQUENTIAL EVALUATION PROCESS**

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

21 The Commissioner has established a five-step sequential evaluation process for
22 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,
23 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if he is engaged
24 in substantial gainful activities. If he is, benefits are denied. 20 C.F.R. §
25 416.920(a)(4)(i). If he is not, the decision-maker proceeds to step two, which
26 determines whether the claimant has a medically severe impairment or combination
27 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe

28 **ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 3**

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

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

23 24 **ALJ'S FINDINGS**

25 The ALJ found the following: 1) Plaintiff has "severe" medical impairments,
26 those being cervical and lumbar degenerative disc disease, substance abuse in
27 remission, depression, post-traumatic stress disorder (PTSD), anxiety, diabetes

28 **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 4**

1 mellitus, and hepatitis C; 2) Plaintiff's impairments do not meet or equal any of the
2 impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff has the residual
3 functional capacity (RFC) to perform light work as defined in 20 C.F.R. § 416.967(b)
4 with the caveat that he is capable of engaging in unskilled, repetitive, routine tasks
5 in two hour increments; he can have superficial, incidental contact with the public;
6 he is capable of working in proximity to, but not in coordination with, coworkers; he
7 can have occasional contact with supervisors; he would be off task at work up to 10
8 percent of the time, but would still meet the minimum production requirements of the
9 job; and he would have up to six unscheduled absences from work per year; 4)
10 Plaintiff's RFC does not allow him to perform his past relevant work, but (5) it does
11 allow him to perform other jobs existing in significant numbers in the national
12 economy as identified by the VE, including assembler, production; cleaner,
13 housekeeping; and packing line worker. Accordingly, the ALJ concluded the
14 Plaintiff is not disabled.

15 16 **MEDICAL OPINIONS**

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). . The opinion of a non-examining medical advisor/expert need

28 **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 5**

1 not be discounted and may serve as substantial evidence when it is supported by other
2 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,
3 53 F.3d 1035, 1041 (9th Cir. 1995).

4 Nurse practitioners, physicians’ assistants, and therapists (physical and mental
5 health) are not “acceptable medical sources” for the purpose of establishing if a
6 claimant has a medically determinable impairment. 20 C.F.R. § 416.913(a). Their
7 opinions are, however, relevant to show the severity of an impairment and how it
8 affects a claimant’s ability to work. 20 C.F.R. § 416.913(d). In order to discount the
9 opinion of a non-acceptable medical source, the ALJ must offer germane reasons for
10 doing so. *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010).

11 The ALJ gave “great weight” to the opinions of the non-examining State
12 agency consultants who work for Disability Determination Services (DDS). Based
13 on his review of the record, Howard Platter, M.D., opined in September 2015 that
14 Plaintiff could occasionally lift and/or carry 20 pounds; frequently lift and/or carry
15 10 pounds; stand and/or walk for 6 hours in an 8 hour workday; sit for 6 hours in an
16 8 hour workday; and that reaching overhead with either arm was limited. (AR at pp.
17 101-102). Dr. Platter attributed the reaching limitation to cervical radiculopathy.
18 (AR at p. 103). The findings of fact upon which Dr. Platter relied included the
19 September 2015 x-ray of Plaintiff’s lumbar spine showing “[t]ransitional anatomy
20 [without] significant spondylosis” and an x-ray of his cervical spine showing
21 “[minimal] spondylosis [with] no acute osseous injury appreciated.” (AR at pp. 99
22 and 366-67). He also relied on the range of motion evaluation results noted by
23 Jeremiah Crank, M.D., who treated the Plaintiff. (AR at pp. 99, 334-35).

24 In June 2015, Dr. Crank of Yakima Neighborhood Health Services (YNHS),
25 completed a Washington State Department of Social and Health Services (DSHS)
26 form in which he indicated that Plaintiff’s diagnosis of neck/lower back radiculopathy
27 was “severe” in that it rendered him unable to perform the following basic work
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 6**

1 activities: sitting, standing, walking, lifting, carrying, handling, pushing, pulling,
2 reaching, stooping and crouching. (AR at p. 284). He opined that Plaintiff was
3 “severely limited” and therefore, unable to meet the demands of sedentary work, and
4 that this limitation would last 12 months. (AR at p. 285). Dr. Crank indicated
5 Plaintiff needed physical therapy, an x-ray/MRI of his cervical and lumbar spine, and
6 possible referral to a neurosurgeon. (*Id.*). In addition to physical therapy as
7 treatment, Dr. Crank indicated other possible forms of treatment included an injection
8 of pain medication or surgical decompression surgery. (*Id.*).

9 The ALJ gave little weight to Dr. Crank’s opinion on the basis that his
10 treatment notes did not document such limitations and that he did not review any
11 imaging prior to forming his opinion which “appear[ed] to be primarily based on the
12 claimant’s self-reports.” (AR at p. 27). Furthermore, according to the ALJ, Dr.
13 Crank, “despite alleging such drastic limitations,” provided the Plaintiff with a
14 physical therapy referral indicating he believed the Plaintiff could benefit from
15 conservative treatment. (*Id.*).

16 It appears June 23, 2015, was the first time Plaintiff was seen by Dr. Crank.
17 In his treatment note of that date, the doctor assessed Plaintiff as suffering from
18 uncontrolled diabetes and cervical and lumbar radiculopathy. The doctor provided
19 Plaintiff with a form to call for an appointment of physical therapy. Dr. Crank also
20 requested prior imaging of Plaintiff’s lower back. (AR at p. 327). What the ALJ
21 failed to note, however, was that what Dr. Crank significantly based his opinion on
22 was the range of motion (ROM) evaluation he performed on Plaintiff. The results of
23 that evaluation revealed the Plaintiff was significantly limited regarding extension
24 and flexion of his back; lateral (flexion) movement of his back; extension and flexion
25 of his neck; lateral bending of his neck; rotation of his neck; backward extension of
26 his hips; flexion of his hips; adduction of his hips; abduction of his hips; flexion of
27 his knees; abduction and adduction of his shoulders; and extension and flexion of his

1 shoulders. (AR at pp. 334-35). In the DSHS form he completed, Dr. Crank
2 specifically singled out the “ROM Sheet.” (AR at p. 284). And in his treatment notes
3 from June 23, 2015, Dr. Crank noted that his musculoskeletal examination of Plaintiff
4 revealed that his back was tender to palpation (TTP) and that he had a positive
5 bilateral straight leg raise test (SLT) indicating nerve root irritation in the back. (AR
6 at p. 333).

7 Although the September 2015 x-rays of Plaintiff’s cervical and lumbar spine
8 seemingly did not reveal anything very significant, those imaging results and earlier
9 imaging results were not wholly devoid of things to which Plaintiff’s back pain could
10 be attributed. Imaging results from 2010 showed sacralization of L5 on the left, early
11 facet arthrosis of L3-4, and broad-based disc bulge with bilateral facet arthrosis on
12 L4-5 producing mild bilateral neural foraminal narrowing and “moderate central canal
13 stenosis with likely contact of the left L5 nerve root in the lateral recess.” (AR at pp.
14 376-77).¹

15 Dr. Crank continued to treat the Plaintiff after June 2015 and after the
16 September 2015 imaging results had been received. On September 23, 2015, Dr.
17 Crank noted that Plaintiff had symptoms of cervical/lumbar radiculopathy and a “trial
18 of physical therapy” would start soon. (AR at p. 577). Dr. Crank again found that
19 Plaintiff had a spine TTP and a positive bilateral SLT. (AR at p. 584). Dr. Crank
20 offered the same assessment on October 28, 2015 (AR at pp. 569 and 575), January
21 29, 2016 (AR at pp. 561 and 568), February 19, 2016 (AR at pp. 553-54 and 560),
22 and May 21, 2016 (AR at pp. 545 and 552).

23 In sum, the ALJ erred in concluding that Dr. Crank relied primarily based on
24 Plaintiff’s self-report. Furthermore, Dr. Crank did not merely provide a physical
25

26 ¹ In 2010, based on these imaging results, Daniel Seltzer, M.D., opined that
27 Plaintiff remained capable of performing medium level work. (AR at p. 382).

1 therapy referral. He suggested other forms of treatment remained a possibility,
2 including an injection of pain medication or surgical decompression surgery.

3 Eventually, Plaintiff started seeing Maryalice R. Hardison, and Advanced
4 Registered Nurse Practitioner (ARNP), at YNHS. In March 2017, Hardison ordered
5 a CT scan which she noted had to be processed through Plaintiff's insurance,
6 although she also advised Plaintiff to try physical therapy "since we don't have any
7 records for you regarding this." (AR at p. 521). She remarked that "[f]urther
8 treatment depends on these results/actions." (*Id.*). Hardison completed a DSHS
9 "Physical Functional Evaluation" form which included a "Range Of Joint Motion
10 Evaluation Chart" indicating ROM limitations similar to those previously reported
11 by Dr. Crank. (AR at pp. 604-06). Hardison, however, also opined, consistent with
12 Dr. Crank's previous opinion, that Plaintiff was unable to perform one or more basic
13 work-related activities such that it rendered him unable to meet the demands of even
14 sedentary work. (AR at pp. 603-04). Like Dr. Crank, Hardison recommended
15 physical therapy, pain medications, or possible surgery. (AR at p. 604). At the same
16 time that she completed the DSHS evaluation, Hardison completed a form prepared
17 by Plaintiff's attorney in which Hardison indicated Plaintiff would miss four or more
18 days of work per month "due to pain and side effects of medication." (AR at p. 439).
19 According to Hardison, Gabapentin, Methocarbamol and Tramadol can cause
20 drowsiness. (AR at p. 438). Hardison indicated the Plaintiff rests all day due to pain.
21 (*Id.*).

22 The ALJ gave little weight to the opinion of ARNP Hardison, finding her
23 opinion not consistent with the objective findings in the medical records in that
24 "[i]maging results show only minor pathology and there is no EMG
25 [electromyography] or NCV [nerve conduction velocity] testing to support the
26 [Plaintiff's] pain complaint." (AR at p. 27). The ALJ also stated the treatment notes
27 showed Plaintiff was generally able to ambulate pretty well and that this was contrary
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 9**

1 to Hardison’s opinion that Plaintiff needed to rest all day due to pain. (*Id.*).

2 The ALJ made no mention of Hardison’s ROM findings. Furthermore, no
3 medical professional (including Dr. Platter) stated that an EMG or NCV was
4 necessary, or that Plaintiff’s imaging results categorically precluded the ROM
5 limitations found by Dr. Crank and ARNP Hardison, and the exertional limitations
6 opined by them. Instead, the ALJ essentially offered his own medical assessment of
7 the imaging results. This is improper. As a lay person, an ALJ is “simply not
8 qualified to interpret raw medical data in functional terms.” *Padilla v. Astrue*, 541
9 F.Supp. 2d 1102, 1106 (C.D. Cal. 2008), quoting *Nguyen v Chater*, 172 F.3d 31, 35
10 (1st Cir. 1999)(per curiam)

11 The ALJ did not provide specific and legitimate reasons for rejecting the
12 opinion of Dr. Crank, nor did he provide germane reasons for rejecting the opinion
13 of ARNP Hardison.

14 15 **TESTIMONY RE SYMPTOMS AND LIMITATIONS**

16 Where, as here, the Plaintiff has produced objective medical evidence of an
17 underlying impairment that could reasonably give rise to some degree of the
18 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ’s
19 reasons for rejecting the Plaintiff’s testimony must be clear and convincing. *Burrell*
20 *v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014); *Garrison v. Colvin*, 759 F.3d 95, 1014
21 (9th Cir. 2014). If an ALJ finds a claimant’s subjective assessment unreliable, “the
22 ALJ must make a credibility determination with findings sufficiently specific to
23 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]
24 claimant’s testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).
25 Among other things, the ALJ may consider: 1) the claimant's reputation for
26 truthfulness; 2) inconsistencies in the claimant's testimony or between his testimony
27 and his conduct; 3) the claimant’s daily living activities; 4) the claimant's work

28 **ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT- 10**

1 record; and 5) testimony from physicians or third parties concerning the nature,
2 severity, and effect of claimant's condition. *Id.*

3 The ALJ found that while Plaintiff complained of “drastic physical limitations
4 due to back pain, the records show no significant treatment for this issue to include
5 never following through with a physical therapy referral.” (AR at p. 24). It is true
6 there are repeated references to Plaintiff awaiting to commence physical therapy and
7 in fact, Dr. Crank’s May 2016 report refers to Plaintiff being on a waiting list. (AR
8 at p. 545). There is no indication that Plaintiff had undergone any physical therapy
9 pursuant to the referral by Dr. Crank at the time of the hearing in May 2017. The
10 question is does the record allow for a reasonable inference that it was Plaintiff who
11 failed to follow through on physical therapy as opposed to there not being an
12 available spot for him. The record does not allow for such an inference, and certainly
13 not a “clear and convincing” one, that it was the Plaintiff who failed to pursue
14 therapy. Furthermore, Plaintiff did receive “significant treatment” for his back pain
15 as evidenced by his numerous visits to YNHS and the pain medications prescribed
16 for him, including Gabapentin, Methocarbamol and Tramadol.

17 The ALJ noted that while incarcerated, Plaintiff was able to work in the kitchen
18 for two hours a day and that he worked with about 50 other people in a production
19 line type setting. (AR at p. 23). The ALJ also noted that Plaintiff had not applied for
20 any jobs since being released from prison. (*Id.*). Plaintiff’s time in prison occurred
21 before his alleged disability onset date of April 20, 2015. Furthermore, working two
22 hours a day in a controlled prison environment is simply not comparable to the
23 exertional and non-exertional demands of a full-time job in the outside world. Not
24 applying for jobs following release from prison is not a “clear and convincing” reason
25 for discounting Plaintiff’s testimony about his symptoms and limitations.

26 The ALJ did not offer “clear and convincing” reasons for discrediting
27 Plaintiff’s testimony about his symptoms and limitations, particularly so when his
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 11**

1 testimony is consistent with the limitations opined by his treating physician and
2 treating ARNP.

3
4 **REMAND**

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

13 In “rare circumstances,” the court may reverse and remand for an immediate
14 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).
15 Three elements must be satisfied in order to justify such a remand. The first element
16 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting
17 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting
18 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
19 second element is whether there are “outstanding issues that must be resolved before
20 a determination of disability can be made,” and whether further administrative
21 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
22 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
23 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
24 Finally, if it is concluded that no outstanding issues remain and further proceedings
25 would not be useful, the court may find the relevant testimony credible as a matter of
26 law and then determine whether the record, taken as a whole, leaves “not the slightest
27 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 12**

1 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
2 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
3 no outstanding issues that must be resolved, and there is no question the claimant is
4 disabled- the court has discretion to depart from the ordinary remand rule and remand
5 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
6 exist, “[t]he decision whether to remand a case for additional evidence or simply to
7 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
8 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

9 In this case, the ALJ did not provide legally sufficient reasons for rejecting the
10 medical opinions of Dr. Crank and ARNP Hardison, and for discounting the
11 Plaintiff’s testimony. There are no outstanding issues which need to be resolved and
12 therefore, further administrative proceedings would not be helpful. Dr. Crank and
13 ARNP Hardison opined that Plaintiff is unable to meet the demands of even sedentary
14 work. The VE acknowledged there are no jobs available for an individual who is
15 unable to meet the exertional demands of sedentary work. (AR at p.77). ARNP
16 Hardison opined the Plaintiff would miss four or more days of work per month due
17 to back pain. The VE testified that an employer will tolerate approximately six
18 unscheduled absences in a year and anymore than that would likely result in
19 termination. (AR at pp. 77-78). There is no question the Plaintiff is physically
20 disabled in that he cannot perform the exertional demands of even sedentary work.²
21

22
23 ² As such, the court deems it unnecessary to address the contentions related
24 to Plaintiff’s mental RFC, including the ALJ’s failure to consider the letter
25 submitted by Plaintiff’s sister. (AR at p. 282). Nor is it necessary to address
26 Plaintiff’s contention related to the availability of other jobs in the national
27

1 Accordingly, the court exercises its discretion to remand this matter for an immediate
2 award of Title XVI SSI benefits.

3
4 **CONCLUSION**

5 Plaintiff's Motion For Summary Judgment (ECF No. 14) is **GRANTED** and
6 Defendant's Motion For Summary Judgment (ECF No. 15) is **DENIED**. The
7 Commissioner's decision is **REVERSED**.

8 Pursuant to sentence four of 42 U.S.C. §405(g), this matter is **REMANDED**
9 for payment of Title XVI SSI benefits to the Plaintiff.

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

13 **DATED** this 17th day of July, 2019.

14
15 *s/Lonny R. Suko*

16

LONNY R. SUKO
17 Senior United States District Judge

18
19
20
21
22
23
24
25
26

economy considering his limited ability to reach overhead (a non-exertional
27 limitation).

28 **ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 14**