

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

Feb 23, 2018

SEAN F. McAVOY, CLERK

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

NOAH W. BLANDI,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:17-cv-00033-MKD

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 20, 21

BEFORE THE COURT are the parties’ cross-motions for summary judgment. ECF Nos. 20, 21. The parties consented to proceed before a magistrate judge. ECF No. 9. The Court, having reviewed the administrative record and the parties’ briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff’s motion (ECF No. 20) and denies Defendant’s motion (ECF No. 21).

JURISDICTION

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

1 **STANDARD OF REVIEW**

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

13 In reviewing a denial of benefits, a district court may not substitute its
14 judgment for that of the Commissioner. If the evidence in the record “is
15 susceptible to more than one rational interpretation, [the court] must uphold the
16 ALJ’s findings if they are supported by inferences reasonably drawn from the
17 record.” Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
18 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
19 Id. An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
20 nondisability determination.” Id. at 1115 (quotation and citation omitted). The

1 party appealing the ALJ’s decision generally bears the burden of establishing that
2 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

3 **FIVE-STEP EVALUATION PROCESS**

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

14 The Commissioner has established a five-step sequential analysis to
15 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§
16 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
17 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
18 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(b); 416.920(b).

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

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

16 If the severity of the claimant's impairment does not meet or exceed the
17 severity of the enumerated impairments, the Commissioner must pause to assess
18 the claimant's "residual functional capacity." Residual functional capacity (RFC),
19 defined generally as the claimant's ability to perform physical and mental work
20 activities on a sustained basis despite his limitations, 20 C.F.R. §§ 404.1545(a)(1);

1 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

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

8 At step five, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing other work in the national economy.
10 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
11 the Commissioner must also consider vocational factors such as the claimant's age,
12 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
13 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
15 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
16 work, the analysis concludes with a finding that the claimant is disabled and is
17 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);
3 Beltran v. Astrue, 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 Plaintiff protectively filed an application for Title II disability insurance
6 benefits and Title XVI supplemental security income benefits on March 5, 2013,
7 alleging a disability onset date of January 31, 2012. Tr. 211-19, 260. The
8 applications were denied initially, Tr. 155-58, and on reconsideration, Tr. 163-69.
9 Plaintiff appeared at a hearing before an Administrative Law Judge (ALJ) on July
10 30, 2015. Tr. 37-91. On August 12, 2015, the ALJ denied Plaintiff’s claim. Tr.
11 19-31.

12 At step one, the ALJ found that Plaintiff has not engaged in substantial
13 gainful activity since January 31, 2012. Tr. 21. At step two, the ALJ found
14 Plaintiff has the following severe impairments: cardiomyopathy and obesity. Id.
15 At step three, the ALJ found that Plaintiff does not have an impairment or
16 combination of impairments that meets or medically equals a listed impairment.
17 Tr. 22. The ALJ then concluded that Plaintiff has the RFC to perform sedentary
18 work, with the following limitations: “he cannot climb ladders/ropes/scaffolding,
19 and can only occasionally climb stairs/ramps, balance stoop, kneel, crouch, and
20 crawl; and he must avoid concentrated exposure to extreme cold and heat,

1 pulmonary irritants, and hazards (unprotected heights and moving mechanical
2 parts).” Id. At step four, the ALJ found that Plaintiff is able to his perform
3 relevant past work as a loan officer. Tr. 29. As an alternative to finding Plaintiff
4 ineligible at step four, the ALJ made a step five determination that there are other
5 jobs that exists in significant numbers in the national economy that Plaintiff could
6 perform within his assessed RFC, such as addresser, final assembler, and cashier.
7 Tr. 30. The ALJ concluded that Plaintiff was not disabled as defined in the Social
8 Security Act during the adjudicative period, defined as January 31, 2012 through
9 the date of his decision. Id.

10 On November 21, 2016, the Appeals Council denied review, Tr. 1-6, making
11 the Commissioner’s decision final for purposes of judicial review. See 42 U.S.C.
12 1383(c)(3); 20 C.F.R. §§ 416.1481; 422.210.

13 ISSUES

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

- 18 1. Whether the ALJ properly evaluated Plaintiff’s symptoms complaints;
- 19 2. Whether the ALJ properly evaluated the medical opinion evidence;
- 20 3. Whether the ALJ properly evaluated the lay witness statements;

1 4. Whether the ALJ made proper determinations at steps four and five; and

2 5. Whether the ALJ erred by not reopening Plaintiff's prior applications.

3 ECF No. 20.

4 **DISCUSSION**

5 **A. Plaintiff's Symptom Complaints**

6 Plaintiff faults the ALJ for failing to rely on reasons that were specific, clear
7 and convincing in "discrediting" Plaintiff's symptom claims. ECF No. 20 at 11-

8 15. An ALJ engages in a two-step analysis to determine whether a claimant's

9 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must

10 determine whether there is objective medical evidence of an underlying

11 impairment which could reasonably be expected to produce the pain or other

12 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).

13 "The claimant is not required to show that [his] impairment could reasonably be

14 expected to cause the severity of the symptom [he] has alleged; [he] need only

15 show that it could reasonably have caused some degree of the symptom." *Vasquez*

16 *v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

17 Second, "[i]f the claimant meets the first test and there is no evidence of

18 malingering, the ALJ can only reject the claimant's testimony about the severity of

19 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the

20 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal

1 citations and quotations omitted). “General findings are insufficient; rather, the
2 ALJ must identify what testimony is not credible and what evidence undermines
3 the claimant's complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
4 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ
5 must make a credibility determination with findings sufficiently specific to permit
6 the court to conclude that the ALJ did not arbitrarily discredit claimant’s
7 testimony.”). “The clear and convincing [evidence] standard is the most
8 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
9 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
10 924 (9th Cir. 2002)).

11 In making an adverse credibility determination, the ALJ may consider, *inter*
12 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
13 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
14 daily living activities; (4) the claimant’s work record; and (5) testimony from
15 physicians or third parties concerning the nature, severity, and effect of the
16 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

17 The ALJ determined that Plaintiff’s medically determinable impairments
18 could reasonably be expected to cause some of his alleged symptoms, but he found
19 that Plaintiff’s allegations of disability not entirely credible for two reasons: (1)
20 Plaintiff’s reported activities are inconsistent with his allegations and (2) Plaintiff’s

1 alleged symptoms were not supported by the objective medical evidence. Tr. 23-
2 24, 26.

3 1. Daily Activities

4 The ALJ found that Plaintiff's "reported range of activities and daily
5 functioning are inconsistent with allegations of more limiting symptoms." Tr. 26.
6 A claimant's daily activities may support an adverse credibility finding if (1) the
7 claimant's activities contradict his other testimony, or (2) the claimant "is able to
8 spend a substantial part of his day engaged in pursuits involving performance of
9 physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d
10 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).
11 "The ALJ must make 'specific findings relating to [the daily] activities' and their
12 transferability to conclude that a claimant's daily activities warrant an adverse
13 credibility determination." *Orn*, 495 F.3d at 639 (quoting *Burch v. Barnhart*, 400
14 F.3d 676, 681 (9th Cir. 2005)). A claimant need not be "utterly incapacitated" to
15 be eligible for benefits. *Fair*, 885 F.2d at 603.

16 First, the ALJ found that Plaintiff's ability to attend to his self-care/hygiene,
17 prepare his own meals, and perform light household chores "albeit with some
18 reported difficulty," was evidence that Plaintiff's symptoms were not as severe as
19 alleged. Tr. 26. The ALJ then noted Plaintiff's reports of shopping in stores,
20 loading and unloading his groceries, attending church and medical appointments,

1 walking for 30 minutes per day, volunteering at an elementary school by listening
2 to children read, and performing video editing a few hours at a time supported this
3 finding. Id. Finally, the ALJ cited to records in which Plaintiff reported
4 assembling an entertainment center, which took him all day, and becoming dizzy
5 while fighting with his two new dogs as he was thinking of walking them. Tr. 24,
6 26 (citing Tr. 372, 434). The ALJ concluded that “[s]uch a range of activity
7 strongly indicates that the claimant is capable of performing limited sedentary
8 work.” Tr. 26.

9 The ALJ did not identify how Plaintiff’s activities contradicted his testimony
10 regarding his alleged symptoms and did not make any specific findings that these
11 activities are transferable to a work setting. Tr. 26. Therefore, the ALJ’s reliance
12 on Plaintiff’s activities in rejecting his reported severity of symptoms fails to meet
13 the specific, clear and convincing standard. See Garrison, 759 F.3d at 1016 (citing
14 Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998) (“Recognizing that ‘disability
15 claimants should not be penalized for attempting to lead normal lives in the face of
16 their limitations,’ we have held that ‘[o]nly if [his] level of activity were

1 inconsistent with [a claimant's] claimed limitations would these activities have any
2 bearing on [his] credibility.'')).

3 2. Objective Medical Evidence

4 The ALJ found that the "objective medical evidence of record does not
5 support finding a more restrictive [RFC] than for a limited range of sedentary
6 work." Tr. 23. An ALJ may not discredit a claimant's symptom testimony and
7 deny benefits solely because the degree of the symptoms alleged is not supported
8 by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
9 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at
10 601. However, the medical evidence is a relevant factor in determining the
11 severity of a claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20
12 C.F.R. §§ 404.1529(c)(2); 416.929(c)(2). Minimal objective evidence is a factor
13 which may be relied upon in discrediting a claimant's testimony, although it may
14 not be the only factor. See *Burch*, 400 F.3d at 680.

15 In his decision, the ALJ set forth Plaintiff's testimony and medical evidence
16 from the record demonstrating a lack of support for the severity of symptoms
17 Plaintiff alleged. Tr. 23-25. However, because the ALJ's other reason failed to
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1 meet the specific, clear and convincing standard, see supra, this reason alone is
2 insufficient to support his determination.

3 Defendant identifies three additional reasons that the ALJ relied upon in
4 making his determination regarding Plaintiff's symptom claims: (1) "Treating
5 records indicated that Blandi had good recovery after initial onset with improved
6 symptoms and heart function"; (2) "Subsequent cardiac evaluations/studies and
7 treatment records reflected continued, substantial improvement in heart function,
8 and progress notes indicated that his overall condition had significantly improved
9 and stabilized with medications and increased exercise"; and (3) "Treating records
10 also reflected reports of increase activities and ability to perform activities of daily
11 living without symptoms." ECF No. 21 at 8-9. However, the first two of these
12 three reasons are simply a restatement of the ALJ's conclusion that the objective
13 medical evidence did not support Plaintiff's symptom claims, and the third reason
14 is a restatement of the ALJ's conclusion that Plaintiff's activities were inconsistent
15 with his symptom claims. Even the ALJ restates his reliance on reports of Plaintiff
16 building furniture and walking his dogs when discussing how treating records
17 reflected increased activities. Tr. 24. Again, the ALJ failed to state how these

1 activities were inconsistent with his symptom claims or how they transferred to
2 work as required in Orn. Id.

3 In conclusion, the ALJ failed to properly support his determination that
4 Plaintiff's symptoms complaints were less than fully credible. Therefore, this case
5 is remanded for the ALJ to hold additional proceedings and properly address
6 Plaintiff's symptom statements.

7 **B. Medical Opinion Evidence**

8 Plaintiff contends the ALJ improperly weighed the medical opinions of
9 treating cardiologist Stuart Cavalieri, M.D. ECF No. 20 at 16-18.

10 There are three types of physicians: “(1) those who treat the claimant
11 (treating physicians); (2) those who examine but do not treat the claimant
12 (examining physicians); and (3) those who neither examine nor treat the claimant
13 but who review the claimant’s file (nonexamining or reviewing physicians).”
14 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).
15 “Generally, a treating physician’s opinion carries more weight than an examining
16 physician’s, and an examining physician’s opinion carries more weight than a
17 reviewing physician’s.” Id. “In addition, the regulations give more weight to
18 opinions that are explained than to those that are not, and to the opinions of
19 specialists concerning matters relating to their specialty over that of
20 nonspecialists.” Id. (citations omitted).

1 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
2 reject it only by offering “clear and convincing reasons that are supported by
3 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
4 “However, the ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory and inadequately supported
6 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
8 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
9 may only reject it by providing specific and legitimate reasons that are supported
10 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
11 31).

12 Dr. Cavalieri completed a medical source statement in June of 2015 opining
13 limitations much more restrictive than the ALJ’s residual functional capacity
14 determination. Tr. 560-65. The ALJ gave this opinion little weight for multiple
15 reasons, including the determination that Dr. Cavalieri relied on Plaintiff’s reports,
16 which the ALJ had deemed not credible. Tr. 27-28. Since the case is being
17 remanded to readdress the Plaintiff’s symptom claims, the ALJ will also readdress
18 the medical source opinions on remand, including that of Dr. Cavalieri.

19 **C. Lay Testimony**

20 Plaintiff contends the ALJ did not properly consider the statement of his

1 parents. ECF No. 20 at 19.

2 An ALJ must consider the testimony of lay witnesses in determining
3 whether a claimant is disabled. *Stout v. Comm'r of Social Security*, 454 F.3d 1050,
4 1053 (9th Cir. 2006). Lay witness testimony regarding a claimant's symptoms or
5 how an impairment affects ability to work is competent evidence and must be
6 considered by the ALJ. If lay testimony is rejected, the ALJ must provide reasons
7 that are germane to each witness. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir.
8 1996).

9 Plaintiff's father submitted a June 2015 statement in support of his
10 application. Tr. 311. Plaintiff's mother submitted a July 2015 statement in support
11 of his application, Tr. 312, and testified at the hearing, Tr. 79-85. The ALJ
12 rejected portions of the statements submitted by Plaintiff's parents. Tr. 28. He
13 specifically rejected a portion of the Plaintiff's mother's statement because it
14 "essentially reiterate[d] claimant's allegations." Tr. 28. Therefore, upon remand,
15 the ALJ will also readdress the lay witness statements from Plaintiff's parents.

16 **D. Steps Four and Five**

17 Because the ALJ's RFC determination contains error, as discussed above, it
18 cannot be relied upon in steps four and five. Therefore upon remand, the ALJ will
19 make a new RFC determination and new determinations at steps four and five.

1 **E. Reopening Prior Application**

2 Plaintiff faults the ALJ for not reopening his prior application because his
3 current application was made within twelve months of the initial denial of his prior
4 application as set forth in 20 C.F.R. § 404.988. ECF No. 20 at 20.

5 While the denial of a request to reopen is not a final decision of the
6 Commissioner made after a hearing, and thus is not subject to judicial review,
7 *Krumpelman v. Heckler*, 767 F.2d 586, 588 (9th Cir. 1985), Defendant concedes
8 that a de facto reopening of the prior application has occurred, ECF No. 21 at 19,
9 making it subject to judicial review. *Lewis v. Apfel*, 236 F. 3d 503, 510 (9th Cir.
10 2001). Here, Plaintiff's current application was filed within twelve months of the
11 initial denial in the prior application. Tr. 150, 260. Therefore, upon remand, the
12 ALJ will address the prior application specifically and make a finding that it has
13 been reopened.

14 **F. Remand**

15 The decision whether to remand for further proceedings or reverse and
16 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
17 888 F.2d 599, 603 (9th Cir. 1989). To reverse and award of benefits, the Court
18 must find that the record has been fully developed and further administrative
19 proceedings would not be useful. *Garrison*, 759 F.3dat 1019-20; *Varney v. Sec. of*
20 *Health and Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988). But where there

1 are outstanding issues that must be resolved before a determination can be made,
2 and it is not clear from the record that the ALJ would be required to find a claimant
3 disabled if all the evidence were properly evaluated, remand is appropriate. See
4 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
5 F.3d 1172, 1179-80 (9th Cir. 2000).

6 Here, it is not clear from the record that the ALJ would be required to find
7 Plaintiff disabled if all the evidence were properly evaluated. Further proceedings
8 are necessary for the ALJ to properly address Plaintiff's symptom claims, the
9 opinion of the treating cardiologist, and the lay witness statements. The ALJ is
10 instructed to supplement the record with any outstanding evidence and take
11 testimony from a medical and a vocational expert at a remand hearing.

12 CONCLUSION

13 IT IS ORDERED:

14 1. Plaintiff's motion for summary judgment (ECF No. 20) is **GRANTED**
15 and the matter is **REMANDED** to the Commissioner for additional proceedings
16 consistent with this order.

17 2. Defendant's motion for summary judgment (ECF No. 21) is **DENIED**.

18 3. Application for attorney fees may be filed by separate motion.

19 The District Court Executive is directed to file this Order, enter
20 **JUDGMENT FOR THE PLAINTIFF**, provide copies to counsel, and **CLOSE**

1 **THE FILE.**

2 DATED February 23, 2018.

3 s/Mary K. Dimke
4 MARY K. DIMKE
5 UNITED STATES MAGISTRATE JUDGE
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