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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 CHARLIE KIMMEL,

8 Plaintiff,

9 v.

10 CAROLYN COLVIN, Acting
11 Commissioner of Social Security,

12 Defendant.

No. 4:15-CV-5058-EFS

**ORDER GRANTING DEFENDANT'S MOTION
FOR REMAND AND DENYING
PLAINTIFF'S SUMMARY-JUDGMENT
MOTION**

13 Before the Court, without oral argument, are Plaintiff's Motion
14 for Summary Judgment, ECF No. 13, and Defendant's Motion for Remand,
15 ECF No. 17. Plaintiff Charlie Kimmel appeals the Administrative Law
16 Judge's (ALJ) denial of benefits. ECF No. 1. Plaintiff contends the
17 ALJ failed to properly weigh the medical expert testimony and failed
18 to properly determine whether specific jobs exist in the national
19 economy that Plaintiff could perform. ECF No. 13 at 9-10. Plaintiff
20 seeks an immediate award of benefits. The Commissioner of Social
21 Security ("Commissioner") agrees that the ALJ failed to properly
22 formulate the Plaintiff's residual functional capacity (RFC) but
23 argues that remand is the appropriate remedy. The Court has reviewed
24 the administrative record and the parties' briefing. For the reasons
25 set forth below, the Court remands for further proceedings.

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1 **A. Jurisdiction**

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

4 **B. Standard of Review**

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

18 In reviewing a denial of benefits, a district court may not
19 substitute its judgment for that of the Commissioner. If the evidence
20 in the record "is susceptible to more than one rational
21 interpretation, [the court] must uphold the ALJ's findings if they are
22 supported by inferences reasonably drawn from the record." *Molina v.*
23 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court
24 "may not reverse an ALJ's decision on account of an error that is
25 harmless." *Id.* An error is harmless "where it is inconsequential to
26 the [ALJ's] ultimate nondisability determination." *Id.* at 1115

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

4 **C. Disability Determination: Five-Step Sequential Evaluation**
5 **Process**

6 A claimant must satisfy two conditions to be considered
7 "disabled" within the meaning of the Social Security Act. First, the
8 claimant must be "unable to engage in any substantial gainful
9 activity by reason of any medically determinable physical or mental
10 impairment which can be expected to result in death or which has
11 lasted or can be expected to last for a continuous period of not less
12 than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the
13 claimant's impairment must be "of such severity that he is not only
14 unable to do his previous work[,] but cannot, considering his age,
15 education, and work experience, engage in any other kind of
16 substantial gainful work which exists in the national economy." *Id.* §
17 1382c(a)(3)(B). The decision-maker uses a five-step sequential
18 evaluation process to determine whether a claimant is disabled. 20
19 C.F.R. §§ 404.1520, 416.920.

20 Step one assesses whether the claimant is engaged in substantial
21 gainful activities. *Id.* § 416.920(a)(4)(i). If the claimant is
22 engaged in substantial gainful activities, the claimant is not
23 disabled and benefits are denied. *Id.* §§ 404.1520(b), 416.920(b). If
24 the claimant is not engaged in substantial gainful employment, the
25 decision-maker proceeds to step two.

1 Step two assesses whether the claimant has a medically severe
2 impairment, or combination of impairments, which significantly limits
3 the claimant's physical or mental ability to do basic work
4 activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant
5 does not, the disability claim is denied. If the claimant does, the
6 evaluation proceeds to the third step.

7 Step three compares the claimant's impairment to several
8 impairments recognized by the Commissioner to be so severe as to
9 preclude a person from engaging in substantial gainful activity. 20
10 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1, 416.920(d). If the
11 impairment meets or equals one of the listed impairments, the
12 claimant is conclusively presumed to be disabled. If the impairment
13 does not, the evaluation proceeds to the fourth step.

14 Step four assesses whether the impairment prevents the claimant
15 from performing work he has performed in the past by examining the
16 claimant's residual functional capacity. *Id.* §§ 404.1520(e),
17 416.920(e). If the claimant is able to perform the claimant's
18 previous work, the claimant is not disabled. If the claimant cannot
19 perform this work, the evaluation proceeds to the fifth step.

20 Step five, the final step, assesses whether the claimant can
21 perform other work in the national economy in view of the claimant's
22 age, education, and work experience. 20 C.F.R. §§ 404.1520(f),
23 416.920(f); see *Bowen v. Yuckert*, 482 U.S. 137 (1987). If the
24 claimant can, the disability claim is denied. If the claimant cannot,
25 the disability claim is granted.

1 The burden of proof shifts during this sequential disability
2 analysis. The claimant has the initial burden of establishing
3 entitlement to disability benefits under steps one through four.
4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). The burden then
5 shifts to the Commissioner to show 1) the claimant can perform other
6 substantial gainful activity, and 2) that a "significant number of
7 jobs exist in the national economy," which the claimant can perform.
8 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

9 **D. Procedural History and ALJ Findings¹**

10 Plaintiff filed an application for supplemental security income,
11 dated October 12, 2011, alleging a disability onset date of April 14,
12 2011. Transcript of Record (Tr.) at 22. Plaintiff's claim was
13 initially denied and upon reconsideration. *Id.* Plaintiff requested a
14 hearing before an ALJ, which was held on January 14, 2014, Tr. at 22.
15 On February 13, 2014, the ALJ rendered a decision denying Plaintiff's
16 claim. *Id.*

17 At step one, the ALJ found that Plaintiff has not engaged in
18 substantial gainful activity since April 14, 2011, the alleged onset
19 date. Tr. at 24.

20 At step two, the ALJ found that the Plaintiff has the following
21 severe impairments: post-traumatic stress disorder (PTSD), anxiety,
22 depression, and degenerative disc disease. *Id.*

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24
25 ¹ The facts are only briefly summarized. Detailed facts are
26 contained in the administrative hearing transcript, the ALJ's
decision, and the parties' briefs.

1 At step three, the ALJ found that the Plaintiff did not have an
2 impairment or combination of impairments that meets or medically
3 equals the severity of one of the listed impairments in 20 CFR Part
4 404. Tr. at 26.

5 At step four, the ALJ found:

6 Plaintiff has the residual functional capacity to lift
7 and/or carry up to 20 pounds occasionally and 10 pounds
8 frequently, stand and/or walk up to four hours in an eight
9 hour work day, and sit about six hours in an eight-hour
10 workday, changing position once an hour. The Claimant can
11 perform no more than occasional climbing, stooping, and
12 crawling, and occasional bilateral overhead reaching. The
13 Claimant can occasionally climb ladders, ropes, and
14 scaffolds. The Claimant should avoid operating heavy
equipment and machinery, as well as exposure to extreme
temperatures and humidity. The Claimant can perform simple,
repetitive tasks with no detailed work. The Claimant can
have superficial contact with the public and co-workers,
but cannot perform collaborative work. Tasks should be
routine, with only occasional changes in work setting and
work duties, working with things rather than people.

15 Tr. at 28. In formulating this RFC, the ALJ considered all of the
16 relevant medical evidence but gave less weight to the opinions of four
17 medical sources: Dr. Dinglasan, Dr. Duris, Dr. Corpolongo, and Ms.
18 Sjostrom. Based on this RFC, the ALJ found that the Mr. Kimmel is
19 unable to perform any past relevant work. Tr. at 32.

20 At step five, based on the testimony of a vocational expert
21 (VE), the ALJ found that there are jobs that exist in significant
22 numbers in the national economy that Mr. Kimmel can perform. Tr. at
23 33.

24 The Appeals Council denied Plaintiff's request for review, Tr.
25 at 1, making the ALJ's decision the Commissioner's final decision for
26 purposes of judicial review. 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§

1 416.1481, 422.210. Plaintiff filed this lawsuit on June 25, 2016, ECF
2 No. 1.

3 **E. Analysis**

4 Plaintiff raises the following issues for this Court's review of
5 the Commissioner's final decision: 1) Whether the ALJ failed to
6 properly weigh the opinions of the treating and examining medical
7 experts; and 2) Whether the ALJ improperly identified whether there
8 are jobs that exist in significant numbers in the national economy
9 that Mr. Kimmel can perform, based on an incomplete hypothetical.
10 Defendant agrees that the ALJ did not properly evaluate all of the
11 medical testimony and did not properly formulate the RFC. Defendant,
12 therefore, asks that the Court remand for further proceedings rather
13 than enter judgment awarding benefits to the Plaintiff. ECF No. 17.

14 A district court may "revers[e] the decision of the Commissioner
15 of Social Security, with or without remanding the cause for a
16 rehearing." *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090,
17 1099 (9th Cir. 2014) (citing 42 U.S.C. § 405(g)) (alteration in
18 original). "[T]he proper course," however, "except in rare
19 circumstances, is to remand to the agency for additional investigation
20 or explanation." *Id.* (quoting *Fla. Power & Light Co. v. Lorion*, 470
21 U.S. 729, 744 (1985)). Case law precludes a district court from
22 remanding a case for an award of benefits unless certain prerequisites
23 are met. *Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014). "If
24 the district court does determine that the record has been fully
25 developed and there are no outstanding issues left to be resolved, the
26 district court must next consider whether the ALJ would be required to

1 find the claimant disabled on remand if the improperly discredited
2 evidence were credited as true." *Dominguez v. Colvin*, Case No. 13-1730
3 (9th Cir. 2016) (internal quotations and citations omitted). A
4 district court is generally not required to exercise such discretion,
5 however. *Id.* (quoting *Connett v. Barnhart*, 340 F.3d 871, 874-76 (9th
6 Cir. 2003)). A court may "remand on an open record for further
7 proceedings 'when the record as a whole creates serious doubt as to
8 whether the claimant is, in fact, disabled within the meaning of the
9 Social Security Act.'" *Id.* (quoting *Burrell*, 775 F.3d at 1141).

10 In this case, the Court finds that there are factual
11 deficiencies in the record which prevent the immediate award of
12 benefits. In particular, because the RFC was improperly formulated,
13 the vocational expert's testimony provides no factual support as to
14 whether or not jobs exist in the national economy that the Plaintiff
15 can perform. Without the reliable testimony of a vocational expert,
16 there is no evidence on which to make a proper step-five
17 determination. Furthermore, due to the contradictions in the extensive
18 medical record, it is unclear what Plaintiff's final RFC will
19 ultimately be. It is not the job of this Court to determine
20 Plaintiff's RFC. That is the job of the ALJ. 20 C.F.R. § 404.1546.
21 Given the inconsistencies, conflicts, and gaps in the record, and in
22 view of Defendant's request for remand, the Court finds serious doubt
23 as to whether the claimant is, in fact, disabled within the meaning of
24 the Social Security Act, and that additional administrative
25 proceedings are required. The Court, therefore, remands this case to

1 the ALJ for further factual proceedings, rather than for payment of
2 benefits. See *Dominguez v. Colvin*, Case No. 13-1730 (9th Cir. 2016).

3 **F. Conclusion**

4 In summary, the Court finds that remand is appropriate. The ALJ
5 is directed to reconsider all of the medical evidence, properly
6 formulate Plaintiff's RFC, resubmit a complete hypothetical to a
7 vocational expert, and then make a new determination as to whether the
8 Plaintiff is disabled.

9 Accordingly, **IT IS HEREBY ORDERED:**

- 10 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
11 **DENIED**.
- 12 2. The Commissioner's Motion for Remand, **ECF No. 17**, is
13 **GRANTED**.
- 14 3. This matter is **REMANDED** to the Commissioner for additional
15 proceedings consistent with this Order.
- 16 4. **JUDGMENT** is to be entered in the Plaintiff's favor.
- 17 5. An application for attorney fees may be filed by separate
18 motion by Mr. Kimmel.
- 19 6. The case shall be **CLOSED**.

20 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
21 Order and provide copies to all counsel and to ALJ Caroline Siderius.

22 **DATED** this 28th day of July 2016.

23
24 s/Edward F. Shea
EDWARD F. SHEA
25 Senior United States District Judge
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