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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 Jane Marie Behling,

9 **Plaintiff,**

10 v.

11 Michael J. Astrue, Commissioner of Social  
12 Security Administration,

13 **Defendant.**

No. CV11-954-PHX-JAT

**ORDER**

14  
15 Plaintiff Jane Behling appeals the Commissioner of Social Security's (the  
16 "Commissioner") denial of disability benefits. The Court now rules on her appeal (Doc.  
17 23.)

18 **I. BACKGROUND**

19 **A. Procedural History**

20 Plaintiff filed for disability insurance pursuant to Title II of the Act on April 17,  
21 2007. She alleged disability since October 28, 2006. Plaintiff's application was denied  
22 initially and on reconsideration. Administrative Law Judge (the "ALJ") Ronald  
23 Dickinson held a hearing on August 7, 2009, which Plaintiff and a vocational expert  
24 attended. The ALJ issued a decision denying Plaintiff's application for benefits on  
25 November 24, 2009. Plaintiff filed her appeal with this Court on May 12, 2011.

26 **B. Medical Background**

27 The following is only a summary of the medical evidence found in the  
28

1 administrative record.<sup>1</sup> Plaintiff's impairments include: cognitive disorder, as a result of  
2 brain aneurysms and aneurysm clipping surgeries; anxiety disorder; and  
3 depression/dysthymic disorder. Plaintiff also has a history of alcohol abuse in partial  
4 remission, but the ALJ did not find alcohol abuse material to the disability determination.

5 In April 2004, Plaintiff underwent aneurysm clipping surgery for two or three  
6 acute brain aneurysms. In 2005, she had a second aneurysm clipping surgery for two  
7 acute brain aneurysms. In November 2006, she had aortic valve replacement surgery to  
8 address heart disease. After her aortic valve replacement surgery, Plaintiff required  
9 surgery for placement of a dual chamber permanent pacemaker.

10 On August 24, 2007, Elizabeth Ottney, D.O., examined Plaintiff at the request of  
11 the state agency. Plaintiff complained of depression and anxiety. She reported her daily  
12 activities as: reading; watching television; and taking care of her 13-year-old daughter.  
13 Plaintiff complained of short-term memory loss and claimed she had to write things down  
14 to remember them. Dr. Ottney found Plaintiff had good hygiene and was not anxious  
15 during the examination. She determined that Plaintiff was alert and oriented times four  
16 with normal speech, cognition, hearing, affect mood, judgment, and intact memory. Dr.  
17 Ottney found that Plaintiff had no physical restrictions and did not appear to have any  
18 short-term memory loss because she could relate the details of her medical history with  
19 good accuracy.

20 Plaintiff presented to John Hopkins, M.D., on September 20, 2007 with complaints  
21 of stress, difficulty adjusting to her new environment, and fatigue. Dr. Hopkins  
22 diagnosed brain aneurysm, benign hypertension, hyperlipidemia, and major depression.  
23 On February 1, 2008, Plaintiff told Dr. Hopkins she was "quite anxious." Dr. Hopkins  
24 found Plaintiff alert, cooperative, and not in any acute distress. Dr. Hopkins adjusted  
25 Plaintiff's medications after noting she had ongoing anxiety that her medication was not  
26 helping. On March 11, 2008, Dr. Hopkins found Plaintiff alert and cooperative without

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28 <sup>1</sup> The summary focuses on Plaintiff's cognitive deficits and mental impairments  
because she claims those are her disabling limitations.

1 acute distress, but she had slurred speech and hesitant thought processing.

2 Brent Geary, Ph.D., examined Plaintiff on March 14, 2008 at the request of the  
3 state agency. Dr. Geary found Plaintiff had satisfactory eye contact and attention span  
4 with normal motor functioning. She denied any abnormalities of thought or perception.  
5 Plaintiff described her mood as good and bad. Dr. Geary noted that Plaintiff was hesitant  
6 to admit she was depressed, saying she was more frustrated than depressed, but she did  
7 acknowledge that she had reduced energy, was withdrawn and unmotivated at times, blue  
8 in mood, and restricted in her range of activities. Dr. Geary found Plaintiff had some  
9 difficulty in executing functioning, most notably when she left her home. Dr. Geary  
10 diagnosed Plaintiff with mild to moderate dysthymic disorder of late onset; possible  
11 cognitive disorder not otherwise specified due to aneurysm with impairment of attention  
12 and concentration and executive functioning; and alcohol dependence in full sustained  
13 reported remission.

14 Dr. Geary completed a "Psychological/Psychiatric Medical Source Statement,"  
15 wherein he opined that Plaintiff's impairments imposed limitations for twelve months.  
16 He found that Plaintiff had no limitations in understanding, mild limitations in memory  
17 and social interaction, and moderate limitations in holding her attention since her brain  
18 aneurysm (flustered and anxious outside her home with diminished concentration and  
19 task orientation) and focusing.

20 On March 25, 2008, Plaintiff presented to Charles Stout, M.D., her treating  
21 cardiologist. Dr. Stout found Plaintiff's pacemaker was functioning normally and that  
22 she had regular heart rate and rhythm. Dr. Stout completed a "Cardiac Residual  
23 Functional Capacity Questionnaire," in which he stated that Plaintiff had palpitations.  
24 Dr. Stout found that Plaintiff's physical limitations and symptoms caused emotional  
25 difficulties such as depression and chronic anxiety. He opined that emotional factors  
26 contributed to the severity of her symptoms and limitations and that she often  
27 experienced symptoms severe enough to interfere with attention and concentration.

28 Brady Dalton, Psy.D., a state agency psychologist, reviewed the evidence and

1 completed a “Psychiatric Review Technique” form. He opined Plaintiff had mild  
2 restriction of her daily living activities; mild difficulties in maintaining social  
3 functioning; moderate difficulties in maintaining concentration, persistence, and pace;  
4 and had no episodes of decompensation. He completed a “Mental Residual Functional  
5 Capacity Assessment” wherein he assigned moderate limitations on Plaintiff’s abilities to  
6 understand, remember, and carry out detailed instructions, maintain attention, complete a  
7 normal workday and workweek, respond appropriately to changes in a work setting, and  
8 set realistic goals or make plans independently of others. He concluded Plaintiff had the  
9 mental residual functional capacity for simple work.

10 On April 28, 2008, Plaintiff presented to Marc Wasserman, M.D., her neurologist,  
11 because she was having difficulty concentrating. He referred her for psychiatric follow-  
12 up because she suffered from depression and anxiety. On July 14, 2008, Dr. Wasserman  
13 found Plaintiff had normal neurological functioning and that she seemed less anxious.  
14 Plaintiff told him was feeling calmer.

15 Plaintiff underwent emergency room treatment for acute alcohol poisoning on  
16 June 29, 2008. Plaintiff was hospitalized on July 6, 2008 after inadvertently taking  
17 approximately eleven Xanax tablets.

18 Will Schultz, Ph.D., examined Plaintiff on October 9, 2008 at the request of Dr.  
19 Wasserman. Dr. Schultz conducted a neurobehavioral status examination and  
20 administered a battery of standardized neuropsychological tests. He found Plaintiff was  
21 alert, generally oriented, appropriately groomed, and appeared to have a right facial  
22 droop. She had normal speech; linear, logical, and coherent thought processes; fair  
23 judgment and insight; full affect (although she seemed to have difficulty recognizing  
24 social cues); and mild impulsivity. Dr. Schultz administered the Wechsler Adult  
25 Intelligence Scale and Wechsler Memory Scale. Plaintiff’s test performance revealed  
26 impairment in executive functioning, visuospatial skills, and bilateral fine motor speed  
27 consistent with ruptured aneurysm and multiple aneurysm clippings. Dr. Schultz found  
28 that Plaintiff’s test results, depression, difficulty in regulating emotional responses, and

1 variability in memory and speed of information processing would likely present  
2 significant challenges to maintaining gainful employment. He recommended that  
3 Plaintiff seek occupational or vocational rehabilitation if she were interested in working.

## 4 **II. LEGAL STANDARD**

5 A district court:

6 may set aside a denial of disability benefits only if it is not  
7 supported by substantial evidence or if it is based on legal  
8 error. Substantial evidence means more than a mere scintilla  
9 but less than a preponderance. Substantial evidence is  
10 relevant evidence, which considering the record as a whole, a  
11 reasonable person might accept as adequate to support a  
12 conclusion. Where the evidence is susceptible to more than  
13 one rational interpretation, one of which supports the ALJ's  
14 decision, the ALJ's decision must be upheld.

15 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation  
16 omitted). This is because “[t]he trier of fact and not the reviewing court must resolve  
17 conflicts in the evidence, and if the evidence can support either outcome, the court may  
18 not substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019  
19 (9th Cir. 1992). Also under this standard, the Court will uphold the ALJ's findings if  
20 supported by inferences reasonably drawn from the record. *Batson v. Comm'r of the Soc.*  
21 *Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the Court must consider the  
22 entire record as a whole and cannot affirm simply by isolating a “specific quantum of  
23 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007)(internal  
24 quotation omitted).

## 25 **III. DISCUSSION**

26 To qualify for disability benefits under the Social Security Act a claimant must  
27 show, among other things, that she is “under a disability.” 42 U.S.C. §423(a)(1)(E). The  
28 Act defines “disability” as the “inability to engage in any substantial gainful activity by  
reason of any medically determinable physical or mental impairment which can be  
expected to result in death or which has lasted or can be expected to last for a continuous  
period of not less than 12 months.” 42 U.S.C. §423(d)(1)(A). A person is:

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2 under a disability only if his physical or mental impairment or  
3 impairments are of such severity that he is not only unable to  
4 do his previous work but cannot, considering his age,  
5 education, and work experience, engage in any other kind of  
6 substantial gainful work which exists in the national  
7 economy.

8 42 U.S.C. §423(d)(2)(A).

9 **A. Five-Step Sequential Process**

10 The Social Security regulations set forth a five-step sequential process for  
11 evaluating disability claims. 20 C.F.R. §404.1520; *see also Reddick v. Chater*, 157 F.3d  
12 715, 721 (9th Cir. 1998). A finding of “not disabled” at any step in the sequential process  
13 will end the inquiry. 20 C.F.R. §404.1520(a)(4). The claimant bears the burden of proof  
14 at the first four steps, but the burden shifts to the Commissioner at the final step.  
15 *Reddick*, 157 F.3d at 721. The five steps are as follows:

16 1. First, the ALJ determines whether the claimant is “doing substantial gainful  
17 activity.” 20 C.F.R. §404.1520(a)(4)(i). If so, the claimant is not disabled.

18 2. If the claimant is not gainfully employed, the ALJ next determines whether the  
19 claimant has a “severe medically determinable physical or mental impairment.” 20  
20 C.F.R. §404.1520(a)(4)(ii). To be considered severe, the impairment must “significantly  
21 limit[] [the claimant's] physical or mental ability to do basic work activities.” 20 C.F.R.  
22 §404.1520(c). Basic work activities are the “abilities and aptitudes to do most jobs,” for  
23 example: lifting; carrying; reaching; understanding, carrying out and remembering simple  
24 instructions; responding appropriately to co-workers; and dealing with changes in  
25 routine. 20 C.F.R. §404.1521(b). Further, the impairment must either be expected “to  
26 result in death” or “to last for a continuous period of twelve months.” 20 C.F.R.  
27 §404.1509 (incorporated by reference in 20 C.F.R. §404.1520(a)(4)(ii)). The “step-two  
28 inquiry is a de minimis screening device to dispose of groundless claims.” *Smolen v.*  
*Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have a severe  
impairment, the claimant is not disabled.

1           3. Having found a severe impairment, the ALJ next determines whether the  
2 impairment “meets or equals” one of the impairments listed in the regulations. 20 C.F.R.  
3 §404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not,  
4 before proceeding to the next step, the ALJ will make a finding regarding the claimant’s  
5 “residual functional capacity based on all the relevant medical and other evidence in [the]  
6 record.” 20 C.F.R. §404.1520(e). A claimant’s “residual functional capacity” (the  
7 “RFC”) is the most she can do despite all her impairments, including those that are not  
8 severe, and any related symptoms. 20 C.F.R. §404.1545(a)(1).

9           4. At step four, the ALJ determines whether, despite the impairments, the  
10 claimant can still perform “past relevant work.” 20 C.F.R. §404.1520(a)(4)(iv). To make  
11 this determination, the ALJ compares its “residual functional capacity assessment . . .  
12 with the physical and mental demands of [the claimant’s] past relevant work.” 20 C.F.R.  
13 §404.1520(f). If the claimant can still perform the kind of work she previously did, the  
14 claimant is not disabled. Otherwise, the ALJ proceeds to the final step.

15           5. At the final step, the ALJ determines whether the claimant “can make an  
16 adjustment to other work” that exists in the national economy. 20 C.F.R.  
17 §404.1520(a)(4)(v). In making this determination, the ALJ considers the claimant’s  
18 “residual functional capacity” and her “age, education, and work experience.” 20 C.F.R.  
19 §404.1520(g)(1). If the claimant can perform other work, she is not disabled. If the  
20 claimant cannot perform other work, she will be found disabled. As previously noted, the  
21 Commissioner has the burden of proving the claimant can perform other work. *Reddick*,  
22 157 F.3d at 721.

23           In this case, the ALJ concluded at step five of the sequential process that Plaintiff  
24 was not disabled. The ALJ found that Plaintiff could not perform any of her past relevant  
25 work as a secretary, store manager, or office manager because it was all skilled labor, but  
26 that Plaintiff had the residual functional capacity to work as an office helper, a  
27 receptionist, and an assembly production worker. The ALJ determined that the Plaintiff  
28 would be limited to light, unskilled work.

1           **B.     Mental Functional Capacity Determination**

2           Plaintiff makes several arguments for reversing the Commissioner’s denial of  
3 benefits, including arguing that the ALJ failed to perform a function-by-function  
4 assessment of Plaintiff’s residual functional capacity. Because the Court is reversing and  
5 remanding for a new hearing on that basis, the Court will not address the remaining  
6 arguments Plaintiff makes on appeal. A new hearing may cure the other alleged errors  
7 listed by Plaintiff.

8           The ALJ found Plaintiff has the ability to perform “unskilled work,” but did not do  
9 a function-by-function residual capacity determination. Social Security Ruling 96-8p  
10 provides that a RFC assessment must first identify an individual’s functional limitations  
11 or restrictions and assess her work-related abilities on a function-by-function basis,  
12 including the functions in paragraphs (b), (c), and (d) of 20 C.F.R. §§404.1545 &  
13 416.945. “Only after that may RFC be expressed in terms of the exertional levels of  
14 work, sedentary, light, medium, heavy and very heavy.” SSR 96-8p.

15          And Social Security Ruling 85-15 provides that an ALJ “must not assume failure to meet  
16 or equal a listed mental impairment equates with capacity to do at least unskilled work.  
17 The decision requires careful consideration of the assessment of RFC.”

18          The ALJ did not perform a function-by-function assessment of Plaintiff’s mental  
19 residual functional capacity as required by the Social Security Rulings. The  
20 Commissioner argues that the ALJ did not err because implicit in the ALJ’s finding that  
21 Plaintiff could perform unskilled work were certain findings regarding Plaintiff’s residual  
22 functional capabilities. But the Court finds that the ALJ must make the explicit findings  
23 required by the Social Security Rulings regarding Plaintiff’s RFC. Because the ALJ did  
24 not do so, the Court will reverse and remand for a new hearing on Plaintiff’s entitlement  
25 to benefits.

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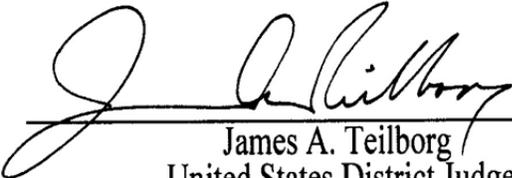
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Accordingly,

**IT IS ORDERED** reversing the Commissioner's denial of benefits and remanding for a new hearing.

Dated this 30th day of July, 2012.

  
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James A. Teilborg  
United States District Judge