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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Tamra Ann Jolley,

) No. CV 12-2447-PHX-JAT

10

Plaintiff,

) **ORDER**

11

vs.

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Carolyn W. Colvin,

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Defendant.

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I. Defendant's motion to remand

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As this Court noted in the Order of December 19, 2013:

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Plaintiff in this case applied for and was denied social security disability benefits. Plaintiff appealed that denial to this Court. On appeal, Defendant has conceded error and asked this Court to remand to the agency for further findings. Plaintiff argues that remand should be for an immediate award of benefits and not for further findings.

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Doc. 24.

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The Court ordered supplemental briefing on the parties' respective positions as

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follows:

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[T]he motion to remand claims that the Administrative Law Judge (ALJ) erred in several respects regarding Plaintiff's mental limitations. Conversely, the response argues that regardless of the errors the ALJ committed on the mental limitations, the ALJ's errors regarding Plaintiff's physical limitations (as recounted by her treating physicians, herself, and third parties) alone justify a remand for award of benefits. Plaintiff then argues that the ALJ's errors as admitted by Defendant regarding mental limitations do not justify remand for a completely new determination on the physical limitations. Again, Defendant did not file a reply to address any of these arguments.

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1 *Id.*

2 Consistent with the Court's Order, the parties filed supplemental briefs on the physical
3 limitations and whether a remand for a new determination or benefits is appropriate. As
4 discussed above, Defendant has moved for remand for the ALJ to properly consider
5 Plaintiff's mental limitation. In the supplemental briefing, Defendant argues that the ALJ's
6 determination that Plaintiff's physical limitations do not entitle her to benefits should be
7 affirmed. However, Defendant states, "In any event, on remand, Plaintiff will receive a de
8 novo hearing and will have the opportunity to present all the evidence related to both her
9 physical and mental impairments to the ALJ, who will re-evaluate her residual functional
10 capacity based on the record as a whole." Doc. 25 at 7. In her sur-reply, Plaintiff continues
11 to argue that based on her physical limitations alone, she is entitled to a remand for an award
12 of benefits.

13 **A. Plaintiff's physical limitations**

14 **1. Treating physicians**

15 The ALJ can reject the opinion of a treating physician in favor of the conflicting
16 opinion of another examining physician "if the ALJ makes 'findings setting forth specific,
17 legitimate reasons for doing so that are based on substantial evidence in the record.' "
18 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (quoting *Magallanes v. Bowen*, 881
19 F.2d 747, 751 (9th Cir.1989)). Here, Plaintiff argues that the ALJ did not give specific and
20 legitimate reasons for discrediting the testimony of Drs. Bhatka, Bernstein, and Yonan. Doc.
21 21 at 2.

22 Drs. Bhatka and Bernstein diagnosed Plaintiff with degenerative disc disease and
23 fibromyalgia. Doc. 21 at 2. The ALJ articulated the following reasons for rejecting these
24 diagnoses as disabling:

- 25 1. A May 2008 normal MRI with no fracture or subluxation or evidence of herniated
disc, spinal stenosis, neural foraminal narrowing, or marrow edem.
- 26 2. An April 2008 self report of improvement with steroid injections.
- 27 3. An October 2008 MRI with only mild degenerative change and minimal disc bulge.

- 1 4. A December 2008 clinical finding of normal gait, and normal walking, negative
2 Romberg, 3+ reflexes, good range of motion, ability to flex well beyond 90 degrees,
3 and straight leg raising and hip range of motion being negative.
- 4 5. A June 2009 physical examination of the musculoskeletal system with no joint pain,
5 swelling, injury, limitation on motion; no muscle weakness, pain, cramps; and a full
6 range of motion with good muscle tone and no joint inflammation.
- 7 6. January 2010 progress notes documented normal gait and station, and Plaintiff had
8 a full range of motion in all extremities.
- 9 7. In 2007 through 2009 Plaintiff's diagnosed fibromyalgia was successfully managed
10 with medication.
- 11 8. In 2010, Dr. Bhatka's own records indicated that fibromyalgia was a past medical
12 condition, not a current condition.

13 Doc. 10-3 at 23-24.

14 The ALJ further explicitly discounted Dr. Bhatka's endorsement of disability because
15 Dr. Bhatka's own treatment notes were consistent with only a mild impairment. Doc. 10-3
16 at 28. Finally, the ALJ explicitly reject the disability finding of Nurse Practitioner Leisky,
17 which was endorsed by Dr. Bernstein, because the finding that the fibromyalgia was
18 disabling was inconsistent with the medical records that showed it was managed and
19 improved with pain medication. Doc. 10-3 at 28. The Court finds the above list, together
20 with the ALJ's explicit findings as to these doctors, to be specific and legitimate reasons
21 based on substantial evidence of record to the reject the testimony of Drs. Bhatka and
22 Bernstein.

23 Dr. Yonan diagnosed Plaintiff with pulmonary symptoms, shortness of breath, sleep
24 apnea, and hypersomnolence syndrom. Doc. 21 at 2; Doc. 13 at 4. The ALJ articulated the
25 following reasons for rejecting these diagnoses as disabling:

- 26 1. An August 5, 2009 sleep study of claimant failed to demonstrate significant sleep
27 breathing disorders.
- 28 2. An August 25, 2009 split night report, Plaintiff's oxygen intake was assisted by a by
a CPAC mask.
3. A September 2009, self report that Plaintiff's sleep apnea was aided by servo
ventilation.
4. By March 2010, Plaintiff's sleep apnea had improved, with only occasional episodes

- 1 and there was improvement by using the CPAC machine.
- 2 5. By April 2010, Plaintiff had stopped using the CPAC device, which evidenced that
3 the sleep apnea had resolved and/or was not disabling.
- 4 6. In April 2008 and May 2008 exams, Plaintiff's chest and lungs were normal and clear.
- 5 7. In August 2008 when Plaintiff had bronchitis, Plaintiff was negative for Sjogren's
6 syndrome, various inflammatory markers, pneumonia and infective etiology.
- 7 8. In September 2008, Plaintiff had only mild shortness of breath and was negative for
8 hemoptysis and sputum production; Plaintiff's chest was within normal limits, and her
9 condition was aided by nebulized medication and a pulmonary functioning test
10 disclosed only mild abnormality.
- 11 9. In November 2008 Plaintiff's pulmonary status was stable and Plaintiff had no
12 wheezing, coughing, congestion, hemoptysis, respiratory infections, tuberculosis, or
13 chest wall pain.
- 14 10. In December 2008, Plaintiff's lungs were clear to auscultation and pulmonary
15 function testing revealed only mild bronchial abnormality. By April 2009, Plaintiff
16 was "doing well" as to her asthma.
- 17 11. In April 2009, treating physician Bhatka's notes state that Plaintiff's respiratory
18 system was normal and that her lungs were clear to auscultation in all fields with no
19 rales, rhonchi, or wheezes.
- 20 12. In August 2009, a pulmonary examination revealed no wheezing, cough, congestion,
21 hemoptysis, respiratory infections, tuberculosis or chest wall pain.
- 22 13. In October and November 2009, Dr. Yonan's own notes document that Plaintiff's
23 pulmonary status was stable and that her pulmonary function testing showed no
24 significant restrictive or obstructive pulmonary pathologies.
- 25 14. In March 2010, Plaintiff self reported that she was okay and did not have shortness
26 of breath, wheezing, cough, or congestion and that her asthma was improved.
- 27 15. A July 2010 treatment record characterized Plaintiff's pulmonary status as stable.

28 Doc. 10-3 at 24-26.

Finally, the ALJ explicitly discounted Dr. Yonan's conclusion of disability because
Dr. Yonan's own notes consistently established that Plaintiff's pulmonary status was stable.
Doc. 10-3 at 28. The Court finds the above list, with the ALJ's explicit finding as to Dr.
Yonan, to be specific and legitimate reasons based on substantial evidence of record to reject
the testimony of Dr. Yonan.

Accordingly, the Court affirms the ALJ's decision of non-disability based Plaintiff's

1 physical limitations.

2 **2. Plaintiff's subjective complaints**

3 An ALJ must engage in a two-step analysis to determine
4 whether a claimant's testimony regarding subjective pain or
5 symptoms is credible. *Lingenfelter*, 504 F.3d at 1035–36. First,
6 as a threshold matter, “the ALJ must determine whether the
7 claimant has presented objective medical evidence of an
8 underlying impairment ‘which could reasonably be expected to
9 produce the pain or other symptoms alleged.’ ” *Id.* at 1036
10 (quoting *Bunnell*, 947 F.2d at 344). The claimant is not required
11 to show objective medical evidence of the pain itself or of a
12 causal relationship between the impairment and the symptom.
13 *Smolen*, 80 F.3d 1273, 1282 (9th Cir. 1996). Instead, the
14 claimant must only show that an objectively verifiable
15 impairment “could reasonably be expected” to produce the
16 claimed pain. *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*,
17 80 F.3d at 1282); *see also* SSR 96–7p at 2; *Carmickle*, 533 F.3d
18 at 1160–61 (“reasonable inference, not a medically proven
19 phenomenon”). If the claimant fails this threshold test, then the
20 ALJ may reject the claimant's subjective complaints. *See*,
21 *Smolen*, 80 F.3d at 1281 (citing *Cotton v. Bowen*, 799 F.2d 1403
22 (9th Cir. 1986) (reaffirmed in *Bunnell*, 947 F.2d 341)).

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24 Second, if the claimant meets the first test, then the ALJ “ ‘may
25 not discredit a claimant's testimony of pain and deny disability
26 benefits solely because the degree of pain alleged by the
27 claimant is not supported by objective medical evidence.’ ”
28 *Orteza v. Shalala*, 50 F.3d 748, 749–750 (9th Cir. 1995)
(quoting *Bunnell*, 947 F.2d at 346–47). Rather, “unless an ALJ
makes a finding of malingering based on affirmative evidence
thereof,” the ALJ may only find the claimant not credible by
making specific findings supported by the record that provide
clear and convincing reasons to explain his credibility
evaluation. *Robbins*, 466 F.3d at 883 (citing *Smolen*, 80 F.3d at
1283–84 (“Once a claimant meets [step one] and there is no
affirmative evidence suggesting she is malingering, the ALJ
may reject the claimant's testimony regarding the severity of her
symptoms only if he makes specific findings stating clear and
convincing reasons for doing so.”)); *see also, e.g., Lingenfelter*,
504 F.3d at 1036 (if the ALJ has found no evidence of
malingering, then the ALJ may reject the claimant's testimony
“only by offering specific, clear and convincing reasons for
doing so”).

24 *Trembulak v. Colvin*, No. CV-12-02420-PHX-JAT, 2014 WL 523007, at *8–9 (D. Ariz. Feb.
25 10, 2014)).

26 Plaintiff argues that the ALJ failed to provide clear and convincing reasons to explain
27 the ALJ's credibility evaluation of Plaintiff. At one point in the opinion, the ALJ states:

1 After careful consideration of the evidence, the undersigned finds that the
2 claimant's medically determinable impairments could reasonably be expected
3 to cause the alleged symptoms; however, the claimant's statements concerning
4 the intensity, persistence and limited effects of these symptoms are not
5 credible to the extent they are inconsistent with the above residual functional
6 capacity.

7 Doc. 10-3 at 27. Plaintiff argues this reasoning is inadequate because it is circular. Doc. 21
8 at 6 ("The ALJ rejected [Plaintiff's] testimony to the extent it conflicted with his RFC
9 assessment, but the RFC assessment is supposed to be informed by a claimant's testimony.").

10 Beyond the above quoted language, the ALJ made other findings regarding Plaintiff's
11 self-reported symptoms and credibility. Specifically, the ALJ stated:

12 The claimant reports problems with focus, memory and concentration. She
13 also reports that she is unable to count change, pay bills, or handle a savings
14 account or check book. On the other hand, the claimant states she is able to
15 read and knit, which require focus and concentration. The claimant also
16 reportedly knows how to use a computer, and enjoys working on puzzles.

17 Doc. 10-3 at 22 (internal citations to the record omitted). Thus, the ALJ gave the additional
18 reason for discounting Plaintiff's symptom testimony that the Plaintiff's own self-reported
19 symptoms were not consistent.

20 Additionally, the ALJ noted Plaintiff's narcotic dependency, which included stealing,
21 in detail. Specifically, the ALJ recounted:

22 Lastly, the record is significant for narcotic dependency. Medical records
23 document a history of high dose narcotic medication, including the drugs
24 morphine and Percocet. In October 2008, the claimant's pain management
25 speciality, Dr. Jain, reportedly was "uncomfortable" giving the claimant
26 further pain medications. In April 2010, the claimant reportedly was abusing
27 Percocet on a regular basis. On October 2, 2009, the claimant's mother
28 reported year-long addiction behavior, and advised the claimant's therapist at
Terros that the claimant had been admitted to Banner Thunderbird after an
accidental overdose on the anti-anxiety medication Ativan. The claimant
reportedly admitted stealing and taking her mother's Soma pain medications.
In November 2009, claimant's pulmonologist, Dr. Abdullah Yonan, diagnosed
the claimant with narcotic dependence.

Doc. 10-3 at 27 (internal citations to the record omitted).

Evidence of a plaintiff's drug seeking behavior can be a reason to find the plaintiff not
credible. *See Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001) (upholding the
rejection on a doctor's opinion that was premised on the plaintiff's non-credible self-reported

1 symptoms). In this case, the ALJ found that the claimant exhibited significant narcotic
2 dependency, including stealing to obtain drugs, and that her own symptom testimony was
3 inconsistent. The Court finds that these reasons are clear and convincing reasons supported
4 by substantial evidence of record for the ALJ to have discounted Plaintiff's credibility and
5 symptom testimony.

6 **3. Third party lay witness testimony**

7 Next, Plaintiff argues that the ALJ "failed to even mention" Plaintiff's mother's
8 reporting of Plaintiff's symptoms. Doc. 21 at 7. However, the ALJ addressed Plaintiff's
9 mother's testimony in two places in his opinion.

10 First, the ALJ noted that he had a Third Party Function Report from Plaintiff's mother
11 which indicated that Plaintiff is able to independently shop for groceries. Doc. 10-3 at 22.
12 Second, the ALJ noted that in 2009, Plaintiff's mother reported year-long addiction behavior,
13 including an accidental overdose. *Id.* at 27.

14 Plaintiff's mother's Third Party Function Report has more information in it than the
15 two items specifically identified by the ALJ. For example, it says that Plaintiff bathes several
16 times per day and at night to try to relax. Doc. 10-7 at 18.

17 Under *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993), "[i]f the ALJ wishes to
18 discount the testimony of the lay witness[], he must give reasons that are germane to each
19 witness." In this case, while the ALJ clearly considered Plaintiff's mother's Third Party
20 Function report, he did not articulate a specific "germane" reason why he was rejecting the
21 report.

22 This Court too has reviewed the report as a whole. Doc. 10-7 at 16-23. The Court
23 notes that in the report, Plaintiff's mother opined, "now she can not work, needs help w/
24 cleaning , laundry, meals, bills". Doc. 10-7 at 17. This third-party-lay opinion would favor
25 a remand for an award of benefits. However, even when an ALJ has failed to give germane
26 reasons for discounting a lay witness's testimony, this Court can affirm if the error was
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1 harmless.¹ *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). Specifically, the Court in
2 *Molina* stated:

3 [I]f an ALJ has provided well-supported grounds for rejecting testimony
4 regarding specified limitations, we cannot ignore the ALJ’s reasoning and
5 reverse the agency merely because the ALJ did not expressly discredit each
6 witness who described the same limitations. Further, where the ALJ rejects a
7 witness’s testimony without providing germane reasons, but has already
8 provided germane reasons for rejecting similar testimony, we cannot reverse
9 the agency merely because the ALJ did not “clearly link his determination to
10 those reasons.” *Lewis*, 236 F.3d at 512.

11 *Molina*, 674 F.3d at 1121.

12 Here, the ALJ rejected the same symptom and limitation testimony offered by
13 Plaintiff’s mother in rejecting Plaintiff’s own complaints and Plaintiff’s doctor’s testimony.
14 Accordingly, the ALJ was not required to “link” his rejections of those same symptoms to
15 Plaintiff’s mother’s report. Additionally, the ALJ is not required to give deference to
16 Plaintiff’s mother’s legal conclusion about whether Plaintiff is disabled. *See generally*
17 *McLeod v. Astrue*, 640 F.3d 881, 884-85 (9th Cir. 2011) (holding that the ALJ does not have
18 to give deference to a witness’s opinion on “the ultimate determination of disability”).

19 Thus, based on all of the foregoing, the Court finds that the ALJ’s failure to give
20 specific, germane reasons for discrediting Plaintiff’s mother’s report was harmless error.
21 Nonetheless, the Court will remand this case for a de novo determination, at which point
22 Plaintiff can argue that the ALJ should rely more heavily on Plaintiff’s mother’s report.²

23 ¹ Because the Government has conceded error regarding Plaintiff’s mental limitations,
24 remand will be the ultimate result in this case. However, the Court will nonetheless apply
25 the harmless error standard to determine whether remand for award of immediate benefits
26 is appropriate.

27 ² Further, on de novo review, the ALJ should assess Plaintiff’s mother’s credibility
28 considering that Plaintiff’s therapist noted that Plaintiff was concerned about her mother’s
motivations. Doc. 10-19 at 28. Specifically, the therapist noted: “CLIENT VENTED
ABOUT CONTINUOUS ISSUES IN LIVING WITH HER PARENTS.... CLIENT
INDICATED SHE HAS A SSN APPLICATION PENDING.... CLIENT HOPES TO
MOVE OUT ON HER OWN IF SHE IS APPROVED. CLIENT STATED SHE KNOWS
THAT IF SHE GETS APPROVED THEN SHE WILL GET A LUMP SUM AND HER

1 **B. Combination of Impairments**

2 Plaintiff also argues that the ALJ erred in considering her medical evidence by
3 considering each of her symptoms separately and not as a combination of symptoms. Doc.
4 21 at 4. In his opinion, the ALJ stated, “In sum, after a careful review of the record, the
5 undersigned finds the claimant does not have an impairment, **or combination of**
6 **impairments**, that limits her ability to perform basic work activity.” Doc. 10-3 at 28
7 (emphasis added). Thus, the Court finds that the ALJ did review the Plaintiff’s symptoms
8 together. Nonetheless, on remand for de novo review, Plaintiff may further explain to the
9 ALJ her argument of how her combination of impairments compels a finding a disability.

10 **C. Plaintiff’s mental impairments**

11 As discussed above, Defendant moved to remand to allow the ALJ, “to further
12 evaluate Plaintiff’s mental impairments, reassess Plaintiff’s residual capacity (RFC), and re-
13 determine whether Plaintiff can perform the physical and mental demands of her past
14 relevant work, or alternatively whether she can perform other occupations existing in
15 significant numbers in the national economy.” Doc. 18 at 1.

16 In her response, Plaintiff did not dispute that the record required a remand to address
17 Plaintiff’s mental impairments. Doc. 21. Instead, Plaintiff argued that benefits should be
18 awarded based on Plaintiff’s physical limitations, self-reported symptoms, and third party
19 reports. However, the Court has rejected each of these arguments above.

20 In her sur-reply, Plaintiff argues that her psychological/mental impairments, alone,
21 entitle her to a remand for an award of benefits. Doc. 31 at 11. Specifically, Plaintiff argues
22 that if her doctors’ testimony is credited as true, she would be entitled to benefits. *Id.*
23 Plaintiff seeks to have this Court credit Dr. Peetoom’s opinion that Plaintiff needed extra

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25 **MOTHER WILL WANT TO CONTROL THE MONEY. CLIENT REPORTED THAT**
26 **SHE ALSO FEELS THAT HER PARENTS WILL DEMAND THAT THEY GET**
27 **REIMBURSED FOR ALLOWING HER TO STAY WITH THEM ALL THIS TIME.”**
28 *Id.* (emphasis added).

1 time and attention to adapt to changes in environment and routine and that Plaintiff needed
2 consistent exposure to information to facilitate retention. Doc. 31 at 11. Plaintiff also seeks
3 to have this Court credit Dr. Allen's opinion that Plaintiff had problems with persistence and
4 that her trembling and crying would likely cause problems. *Id.* Finally, Plaintiff seeks to
5 have the Court credit Dr. Allen's opinion that benefits for one year would be appropriate.
6 *Id.*

7 While Defendant has conceded that this case should be remanded for further
8 development of the record relating to Plaintiff's psychological/mental impairments,
9 Defendant has not conceded that the ALJ did not give adequate reasons for discrediting
10 Plaintiff's examining physicians. Instead, Defendant conceded that the ALJ did not
11 incorporate his findings regarding Plaintiff's limitations regarding concentration, persistence
12 and pace into Plaintiff's RFC, and thus the ALJ did not include these limitations in his
13 hypothetical to the vocational expert. Doc. 18 at 3. Further, Defendant argues that a remand
14 for benefits would be inappropriate because there was conflicting testimony regarding the
15 limitations caused by Plaintiff's mental impairments. *Id.* at 5. Thus, Defendant seeks
16 remand to resolve these factual disputes and to determine what impact, if any, the limitations
17 have on Plaintiff's RFC.

18 As indicated above, Plaintiff asks this Court to credit as true the testimony of Drs.
19 Allen and Peetoom, each of whom saw Plaintiff once. Doc. 31 at 11; Doc. 10-3 at 28. First,
20 the Court agrees with the ALJ that these doctors are properly characterized as examining
21 physicians, rather than treating physicians, because they each only saw Plaintiff once. Doc.
22 10-3 at 28. Next, the ALJ noted that he gave their findings little weight because they each
23 only saw Plaintiff once and because their opinions were inconsistent with the weight of the
24 evidence. *Id.*

25 The ALJ further recounted in detail the various notes regarding Plaintiff's mental state
26 from her various doctors. Doc. 10-3 at 26-27. The Court agrees with Defendant that the
27 various doctors' notes are inconsistent with respect to the severity of Plaintiff's symptoms

1 as well as the impact of those symptoms. Given these conflicting reports, including the
2 report of Plaintiff's treating physician, Dr. Bhatka, who indicated that Plaintiff was feeling
3 much better in June of 2009 due to a new medication, the Court will not credit the examining
4 physicians statements as true. Indeed, the Court finds that the ALJ gave specific and
5 legitimate reasons for discrediting the findings of these examining physicians; specifically,
6 the ALJ recounted three paragraphs of medical testimony which reported significantly less
7 severe mental limitations for Plaintiff than her examining physicians' findings. *See* Doc. 10-
8 3 at 26-27.

9 Based on the foregoing, the Court will remand this case to the agency as requested by
10 Defendant. The Court denies Plaintiff's request for an immediate award of benefits.

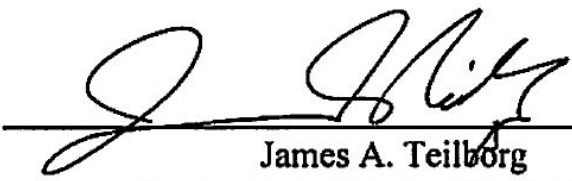
11 **II. Conclusion**

12 Based on the foregoing,

13 **IT IS ORDERED** that Defendant's motion to remand is granted (Doc. 17) pursuant
14 to sentence 4 of 42 U.S.C. § 405(g); this case is remanded to the agency and the Clerk of the
15 Court shall enter judgment accordingly.

16 DATED this 25th day of March, 2014.

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James A. Teilborg
Senior United States District Judge