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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Adam Dominguez,  
Plaintiff,  
vs.  
Carolyn W. Colvin, Acting Commissioner  
of the Social Security Administration,  
Defendant.

No. CV 12-691-TUC-CRP  
**ORDER**

Plaintiff has filed the instant action seeking review of the final decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The Magistrate Judge has jurisdiction over this matter pursuant to the parties’ consent. *See* 28 U.S.C. § 636(c). Pending before the Court are Plaintiff’s Opening Brief (“Plaintiff’s Brief”) (Doc. 16), Defendant’s Opposition to Plaintiff’s Opening Brief (“Defendant’s Brief”) (Doc. 19), and Plaintiff’s Reply (Doc. 20). For the following reasons, the Court remands this matter for an immediate calculation and award of benefits.

**BACKGROUND**

Plaintiff was born on January 7, 1978. (Administrative Record (“AR.”), 8). In 1993, when Plaintiff was 15 years of age, he attempted suicide by shooting himself in the head. (AR. 146, 823; *see also* AR. 685 (CT scan reflects “residual fragment in the right frontal lobe.”); AR. 817 (“the bullet remains in his skull.”)). Since that incident, Plaintiff completed high school at 20 years of age and after having been placed in special education courses.

1 (AR. 21, 87, 468, 479, 511; *see also* AR. 817 (“he was placed in special education after his  
2 gunshot.”)).

3 Plaintiff last worked as a stocker at a Walmart Store from 1999 until 2006. (AR. 69,  
4 84, 106-07). Prior to that, he worked as a cook from 1997 until 1998. (AR. 60, 84). Plaintiff  
5 is right-hand dominant. (AR. 21).

6 In October 2006, Plaintiff filed an applications for disability insurance benefits and  
7 supplemental security income alleging inability to work since October 24, 2006 due to: “lots  
8 of headaches, left arm/hand gets tired easy, back always hurts, left side disabled.[.] In 1993  
9 [I] was shot in the head, [I] did get [SSI] for a while, but then got a job, for me the job got  
10 harder over the years. I was gettin[g] tired of the hard work [I] was going through daily.  
11 Partial paralysis on right side/arm.” (AR. 53-68, 83). After Plaintiff’s applications were  
12 denied initially and on reconsideration, he appeared unrepresented for a hearing before  
13 Administrative Law Judge (“ALJ”) Normal Buls, and the ALJ subsequently issued a decision  
14 in January 2009 (“the 2009 Decision”) finding Plaintiff was not disabled because although  
15 he could not do his past work, he could perform other work. (AR. 6-16, 17-27, 28-25, 37-  
16 43). Plaintiff ultimately appealed the ALJ’s decision to the District Court for the District of  
17 Arizona, and the Court, upon stipulation of the parties, remanded the matter for further  
18 proceedings.<sup>1</sup> (AR. 530-31). On remand, two hearings were held and Plaintiff, who was  
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20 <sup>1</sup>The Court reversed the Commissioner’s decision and remanded the matter for further  
21 administrative proceedings directing, in pertinent part, that

22 upon remand, the administrative judge will:

- 23 • conduct another hearing and issue a de novo decision;
- 24 • reassess Plaintiff’s residual functional capacity;
- 25 • reevaluate Plaintiff’s credibility;
- 26 • give further consideration to the examining neurologist’s opinion;
- 27 • obtain vocational expert testimony to determine what jobs, if any, Plaintiff  
28 could perform given his exertional and non-exertional limitations.

On remand, the Plaintiff may submit additional evidence and arguments to the  
ALJ. Those aspects of the ALJ’s prior decision not specifically addressed here  
are not specifically affirmed.

(AR. 530-31).

1 represented by counsel, testified at both. (AR. 464-66 (July 6, 2011); 500-18 (May 24,  
2 2011)). Additionally, Vocational Expert (“VE”) Kathleen McAlpine also testified at the July  
3 6, 2011 hearing. On August 18, 2011, the ALJ issued his decision denying benefits. (AR.  
4 391-77). On September 10, 2012, the ALJ’s decision became the Commissioner’s final  
5 decision when the Appeals Council denied Plaintiff’s request for review. (AR. 183).

6 Plaintiff then filed the instant action raising the following grounds: (1) the ALJ  
7 improperly evaluated opinions from Dr. Petronella, the examining neurologist; (2) the ALJ  
8 improperly evaluated opinions from examining physician Dr. Hassman; (3) the ALJ’s  
9 hypothetical question was not accurate; (4) the ALJ failed to comply with Social Security  
10 Ruling (“SSR”) 00-4p; (5) substantial evidence did not support the ALJ’s credibility finding;  
11 (6) substantial evidence did not support the ALJ’s evaluation of Plaintiff’s education; and (7)  
12 substantial evidence did not support the ALJ’s evaluation of vocational evaluator Weaver’s  
13 report.

#### 14 **STANDARD**

15 The Court has the “power to enter, upon the pleadings and transcript of the record, a  
16 judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
17 Security, with or without remanding the cause for a rehearing.” 42 U.S.C. §405(g). The  
18 factual findings of the Commissioner shall be conclusive so long as they are based upon  
19 substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g), 1383(c)(3); *Tommasetti*  
20 *v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may “set aside the  
21 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based  
22 on legal error or are not supported by substantial evidence in the record as a whole.” *Tackett*  
23 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted).

24 Substantial evidence is ““more than a mere scintilla[,] but not necessarily a  
25 preponderance.”” *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d 871,  
26 873 (9th Cir. 2003)); *see also Tackett*, 180 F.3d at 1098. Further, substantial evidence is  
27 “such relevant evidence as a reasonable mind might accept as adequate to support a  
28 conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Where “the evidence can

1 support either outcome, the court may not substitute its judgment for that of the ALJ.”  
2 *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992)).  
3 Moreover, the Commissioner, not the court, is charged with the duty to weigh the evidence,  
4 resolve material conflicts in the evidence and determine the case accordingly. *Matney*, 981  
5 F.2d at 1019. However, the Commissioner's decision “cannot be affirmed simply by  
6 isolating a specific quantum of supporting evidence.” *Tackett*, 180 F.3d at 1098 (quoting  
7 *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9<sup>th</sup> Cir.1998)). Rather, the Court must “consider  
8 the record as a whole, weighing both evidence that supports and evidence that detracts from  
9 the [Commissioner’s] conclusion.” *Id.* (quoting *Penny v. Sullivan*, 2 F.3d 953, 956 (9<sup>th</sup> Cir.  
10 1993)).

## 11 **DISCUSSION**

12 SSA regulations require the ALJ to evaluate disability claims pursuant to a five-step  
13 sequential process. 20 C.F.R. §§404.1520, 416.920. To establish disability, the claimant  
14 must show he has not worked since the alleged disability onset date, he has a severe  
15 impairment, and his impairment meets or equals a listed impairment or his residual functional  
16 capacity (“RFC”)<sup>2</sup> precludes him from performing past work. Where the claimant meets his  
17 burden, the analysis progresses to step five where the Commissioner must show that the  
18 claimant is able to perform other work, which requires consideration of the claimant’s RFC  
19 to perform other substantial gainful work in the national economy in view of claimant’s age,  
20 education, and work experience.

21 **SUMMARY OF THE ALJ’S PERTINENT FINDINGS.** Except to the extent indicated in the  
22 2011 Decision, the ALJ “incorporate[d] by reference the exhibits/testimony in the record as  
23 well as the credibility/weight given that evidence as of...” his earlier 2009 Decision. (AR.  
24 389).

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27 <sup>2</sup>RFC is defined as that which an individual can still do despite his or her limitations.  
28 20 C.F.R. §§ 404.1545, 416.945.

1 In 2011, the ALJ found that Plaintiff “has the following impairments: headache;  
2 weakness of the left upper extremity secondary to gunshot wound to the right side of the  
3 head; back disorder; affective disorder; and generalized anxiety disorder....” (AR. 391). The  
4 ALJ determined that Plaintiff had the RFC to perform the full range of light work as defined  
5 in 20 C.F.R. §§404.1567(a) and 416.967(a) subject to the following:

6 He is restricted from handling, fingering and feeling with the left upper  
7 extremity, although he testified that he could move the left arm, bend the left  
8 arm at the wrist, use the left arm as a guide for the right arm and extend the  
9 fingers occasionally. He is right-hand dominant, and has no restrictions with  
10 using the right upper extremity. He has no restrictions with sitting, standing or  
11 walking. He does not require an assistive device. He has no restrictions with  
12 seeing, hearing and speaking. He is restricted from climbing  
13 ladder/rope/scaffolds due to left hemi-paresis. He can occasionally climb  
14 ramp/stairs, kneel, crouch and crawl, and has no limitations with stooping. He  
15 should avoid working at unprotected heights due to left hemi-paresis. Due to  
16 his mental impairment, the claimant can perform simple repetitive unskilled  
17 work. He can respond appropriately to supervision, coworkers and usual work  
18 situations; deal with changes in a routine work setting; and sustain the pace  
19 and concentration required in an ordinary work setting on a reasonably  
20 sustained basis.

21 (AR. 393). Relying on the Medical Vocational Guidelines (“Grids”) as a “framework” with  
22 VE testimony that Plaintiff could work as a janitor/housekeeper, usher/ticket taker, and  
23 escort, the ALJ decided that Plaintiff was not disabled from October 24, 2006 though the date  
24 of the decision. (AR. 396).

#### 25 **EXAMINING DR. PETRONELLA**

26 In contrast to the ALJ’s 2011 Decision finding that Plaintiff could perform the full  
27 range of light work subject to the limitations indicated by the ALJ, the ALJ’s 2009 Decision  
28 assessed an RFC limiting Plaintiff to the full range of sedentary work as defined in 20 C.F.R.  
§§ 404.1567(a), 416.967(a). (AR. 13).

In reaching his 2009 Decision, the ALJ gave “significant weight” to the opinions of  
examining psychiatrist Hunter Yost, M.D., examining specialist in family practice and  
occupational medicine, Susan Courtney, M.D., and examining neurologist Richard  
Petronella, M.D. (AR. 14-15). The ALJ found the opinions were “well-supported by the  
medical evidence...are not inconsistent with other substantial evidence of record....In  
addition, these physicians are examining sources who are familiar with Social Security Rules

1 and Regulations and legal standards set forth therein and best able to provide a superior  
2 analysis of the claimant's impairments and resulting limitations." (AR. 15).

3       Significantly, the ALJ did not discuss Dr. Petronella's opinion in 2011 Decision after  
4 remand. Plaintiff takes issue with the fact that although the ALJ accorded significant weight  
5 to Dr. Petronella's opinion in the 2009 Decision, the ALJ adopted Dr. Hassman's primarily  
6 less restrictive findings in the 2011 Decision without specifically rejecting Dr. Petronella's  
7 opinion.

8       Upon examination of Plaintiff in March 2008, Dr. Petronella's impression was left  
9 hemiparesis post gunshot wound to the head. (AR. 182). He opined that Plaintiff could:  
10 occasionally lift up to 20 pounds; carry up to 20 pounds; sit for 8 hours at one time without  
11 interruption; stand for 2 hours at one time without interruption; and walk for 10 minutes at  
12 one time without interruption; sit for a total of 8 hours; walk for a total of one hour;<sup>3</sup>  
13 frequently use his right hand to reach, including reaching overhead; occasionally use his left  
14 hand to reach, including reaching overhead; frequently handle, finger, feel and push/pull with  
15 his right hand; occasionally handle, finger, feel and push/pull with his left hand; frequently  
16 operate foot controls with his right foot and occasionally with his left foot; never climb  
17 ladders or scaffolds, kneel, or crawl; and occasionally climb stairs and ramps, stoop, and  
18 crouch; never work around unprotected heights, moving machinery, extreme cold or heat;  
19 occasionally operate a motor vehicle; and occasionally work around dust, odors, fumes and  
20 pulmonary irritants and vibrations. (AR. 174-79; *see also* AR. 180-182).

21       Upon an August 2010 examination of Plaintiff, Jerri Hassman, M.D., diagnosed:  
22 "[s]tatus post gunshot wound to the right side of his head, causing hyperreflexia on the left,  
23 minimal motor weakness of the left upper extremity, and very minimal weakness at the left  
24 ankle, but profound hemisensory loss on the left side, also decreased coordination of the left  
25 upper extremity, especially noted for finger-nose-finger and rapid alternating movements."

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27       <sup>3</sup>Although the Medical Source Statement of Ability to Do Work-Related Activities  
28 (Physical) form contained a space to indicate the total time Plaintiff could stand in a work  
day, Dr. Petronella left that portion of the form blank. (AR. 175).

1 (AR. 825). Dr. Hassman opined that Plaintiff: could occasionally lift and carry 20 pounds  
2 and frequently carry 10 pounds; had no limitations in walking, standing or sitting; could  
3 occasionally climb ramps and stairs, kneel, crouch, crawl, and reach on the left; never climb  
4 ladders, ropes or scaffolds, and handle, finger and feel on the left; was not limited in  
5 reaching, handling, fingering, or feeling on the right; and could not work around moving  
6 machinery, extremes in temperature, dust, fumes, gases, excessive noise, or work with or  
7 around chemicals. (AR. 826-829: *see also* AR. 823-25).

8 In his 2011 Decision, the ALJ gave “great weight to...” Dr. Hassman’s opinion as that  
9 opinion together with the examining psychologist’s opinion “support the RFC in this  
10 decision.” (AR. 395). The ALJ’s 2011 Decision did not discuss Dr. Petronella’s decision.  
11 Instead, the ALJ stated in his 2011 Decision that “except as otherwise provided...[he]  
12 incorporates the exhibits/testimony in the record as well the credibility/weight given that  
13 evidence as of January 16, 2009.” (AR. 389).

14 Plaintiff argues that the ALJ improperly rejected Dr. Petronella’s opinion—an opinion  
15 to which he had given significant weight in 2009. Additionally, the Court’s Order remanding  
16 this matter specifically instructed that Dr. Petronella’s opinion was to be reevaluated on  
17 remand. (*See* AR. 531). Moreover, in vacating the 2009 Decision and remanding the matter  
18 to the ALJ for further proceedings pursuant to the Court’s remand Order, the Appeals  
19 Council stated:

20 The Administrative Law Judge found that the claimant had severe impairments  
21 but that he could perform the full range of sedentary work. In so finding, the  
22 Administrative Law Judge stated that he accorded great weight to the medical  
23 opinions of record, including that of Richard Petronella, M.D. *However, Dr.*  
24 *Petronella indicated that the claimant had limitations with regard to his ability*  
25 *to reach, handle, finger, feel, and push/pull; and that he had limitations with*  
*regard to exposure to dusts, odors, fumes, and (other) pulmonary irritants, and*  
*exposure to loud noise (Exhibit 13F). The Administrative Law Judge did not*  
*set forth a basis for the apparent rejection of Dr. Petronella's opinions in those*  
*regards. Upon remand the Administrative Law Judge will:*

- Give further consideration to the claimant's maximum residual functional capacity and provide appropriate rationale with specific references to evidence of record in support of the assessed limitations (20 CFR 404.1545 and 416.945 and Social Security Ruling 96-8p). In so doing, evaluate the examining source opinion pursuant to the provisions of 20 CFR 404.1527

1 and 416.927, and Social Security Ruling 96-5p, and explain the  
2 weight given to such opinion evidence. As appropriate, the  
3 Administrative Law Judge may request the examining source to  
provide additional evidence and/or further clarification of the  
opinion....

4 (AR. 534-35) (emphasis added).

5 ““To reject [the] uncontradicted opinion of a treating or examining doctor, an ALJ  
6 must state clear and convincing reasons that are supported by substantial evidence.”” *Ryan*  
7 *v. Commissioner of Social Security*, 528 F.3d 1194, 1198 (9<sup>th</sup> Cir. 2008) (quoting *Bayliss v.*  
8 *Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir.2005); *see also Lester v. Chater*, 81 F.3d 821,  
9 830–31 (9<sup>th</sup> Cir.1995)). ““If a treating or examining doctor's opinion is contradicted by  
10 another doctor's opinion, an ALJ may only reject it by providing specific and legitimate  
11 reasons that are supported by substantial evidence.”” *Ryan*, 528 F.3d at 1198 (quoting  
12 *Bayliss*, 427 F.3d at 1216).

13 Ignoring this standard, Defendant contends that the ALJ “by stating that he carefully  
14 considered the entire record in making his findings ([AR.] 391),...implicitly rejected...[Dr.  
15 Petronella’s] opinion.” (Defendant’s Brief, p. 10). Defendant also points out that not all of  
16 the ALJ’s findings were inconsistent with Dr. Petronella’s assessed limitations, and that, in  
17 some instances the ALJ’s RFC was more restrictive than Dr. Petronella’s. (*See id.* at pp. 10-  
18 11). Finally, Defendant presents a host of reasons why Dr. Petronella’s opinion should be  
19 rejected. (*Id.* at pp. 11-13).

20 It is undisputed that the ALJ’s 2011 Decision is silent as to Dr. Petronella’s 2008  
21 opinion. Accordingly, to the extent that Defendant posits reasons why the ALJ may have  
22 rejected Dr. Petronella’s opinion, the Ninth Circuit has been clear that “[l]ong-standing  
23 principles of administrative law require us to review the ALJ's decision based on the  
24 reasoning and actual findings offered by the ALJ—not post hoc rationalizations that attempt  
25 to intuit what the adjudicator may have been thinking.” *Bray v. Commissioner of Social*  
26 *Security Admin.*, 554 F.3d 1219, 1226–27 (9<sup>th</sup> Cir.2009) (citations omitted); *see also Stout*  
27 *v. Commissioner of Social Security*, 454 F.3d 1050, 1054 (9<sup>th</sup> Cir.2006) (“we cannot affirm  
28 the decision of an agency on a ground that the agency did not invoke in making its decision”)

1 (citations omitted). Further, even though the ALJ may not have rejected *all* of Dr.  
2 Petronella’s opinion, the ALJ’s decision is still devoid of his reasons why he rejected some  
3 of Dr. Petronella’s limitations, and without such an explanation, the Court is unable to assess  
4 whether the ALJ’s decision was erroneous. This is especially troublesome given that in  
5 remanding the matter, the Appeals Council specifically directed the ALJ to consider Dr.  
6 Petronella’s assessed limitations. Moreover, as Plaintiff persuasively points out, “[i]f the  
7 Commissioner did not believe that Dr. Petronella’s opinion warranted reevaluation, the  
8 Commissioner should not have stipulated in [Plaintiff’s] first civil action to that reevaluation.  
9 Having agreed to that reevaluation adopted by the court, the Commissioner cannot properly  
10 protest.” (Plaintiff’s Reply, p. 2).

11       Indeed, “[a]n administrative agency is bound to follow the instructions of the  
12 reviewing court on remand.” *Nolte v. Astrue*, 2012 WL 4466558, \*2 (D.Ariz. Sept. 27, 2002)  
13 (citing *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989), *abrogated on other grounds as*  
14 *discussed in Shalala v. Schafer*, 509 U.S. 292 (1993)). Consequently, “[d]eviation from the  
15 court’s remand order in the subsequent administrative proceedings is itself legal error, subject  
16 to reversal on further judicial review.” *Sullivan*, 490 U.S. at 886.

17       On the instant record, the Court cannot agree with Defendant that any error in  
18 rejecting Dr. Petronella’s opinion was harmless. First, failure to comply with the remand  
19 order can constitute reversible error. *See Sullivan*, 490 U.S. at 886. Further, an ALJ’s error  
20 may be only deemed harmless “where it is inconsequential to the ultimate nondisability  
21 determination.” *Molina v Astrue*, 674 F.3d 1104, 1115 (9<sup>th</sup> Cir. 2012) (internal quotation  
22 marks and citations omitted). Other than giving Dr. Hassman’s opinion great weight, the  
23 ALJ provided absolutely no reason whatsoever that could be construed in any way to support  
24 rejection of Dr. Petronella’s opinion. *Cf. Id.* at 1118-1119 (noting that ALJ’s properly  
25 supported rejection of testimony can render harmless the ALJ’s failure to discuss and reject  
26 similar testimony from other witnesses). The ALJ’s failure to discuss Dr. Petronella’s  
27 opinion is also troubling because he gave that opinion significant weight in his 2009  
28 Decision, finding it consistent with the substantial evidence of record. (AR. 15). Yet, now

1 Dr. Petronella’s opinion precludes the ALJ’s 2011 finding that Plaintiff can perform light  
2 work. (*See* AR. 880). Finally, “where the [Commissioner] has failed to advance any  
3 legitimate reasons for disregarding the examining physicians’ medical findings, reports, and  
4 opinion, we hold that substantial evidence does not support the [Commissioner’s] decision.”  
5 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990).

6 **EXAMINING DR. HASSMAN’S OPINION REGARDING REACHING.** In the 2011 Decision, the  
7 ALJ accorded great weight to examining Dr. Hassman’s opinion and incorporated the  
8 majority of Dr. Hassman’s assessed limitations into the RFC. (AR. 395). However, the ALJ  
9 omitted from the RFC assessment, without discussion, Dr. Hassman’s opinion that Plaintiff  
10 was restricted to occasional left-arm reaching. (AR. 828; *see also* SSR 83-10 (occasionally  
11 means up to one-third of the workday)). While Defendant does not dispute that the ALJ did  
12 not include Dr. Hassman’s restriction on left-arm reaching, Defendant argues that the ALJ’s  
13 RFC was more restrictive than Dr. Hassman’s assessment “given the ALJ’s finding that  
14 Plaintiff could use his left arm only as a guide for his right arm...” (Defendant’s Brief, p. 13).

15 Because both Drs. Hassman and Petronella opined that Plaintiff was limited to  
16 occasional left-arm reaching, (*see* AR. 175, 828), this limitation does not appear to be  
17 contradicted. Yet, the ALJ did not set forth any reason for rejecting it. *See Ryan*, 528 F.3d  
18 at 1198 (the ALJ must set forth clear and convincing reasons for rejecting uncontradicted  
19 opinion of examining doctor and must set forth specific and legitimate reasons for rejecting  
20 contradicted opinion of examining doctor).

21 “Reaching” is defined as “extending the hands and arms in any direction.” SSR 85-  
22 15. As Plaintiff points out, without inclusion of Dr. Hassman’s restriction of occasional left-  
23 arm reaching, the ALJ’s RFC assessment limiting Plaintiff to using his left arm as a guide  
24 in any direction means without any limitation as to how often he could do this. The ALJ’s  
25 failure to address Dr. Hassman’s reaching limitation also arguably impacted the VE  
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1 testimony given that the ALJ’s hypothetical posed to the VE included that Plaintiff “can use  
2 his left arm but not his left hand.”<sup>4</sup> (AR. 488).

3 To rebut the VE’s testimony that Plaintiff could work as a janitor/housekeeper, escort,  
4 and ticket taker, Plaintiff submitted a statement from vocational consultant Tracy Young,  
5 MA, CRC, CLCP, who, upon review of the record, opined that Plaintiff would be unable to  
6 perform the jobs considering, *inter alia*, that Plaintiff does not have use of his non-dominant  
7 left hand. (AR. 874-80). Young pointed out that the *Dictionary of Occupational Titles*  
8 (“DOT”) “did not delineate whether the[] particular demands require on [sic] or both  
9 hands....” (AR. 875). Young opined that the jobs of janitor and ticket taker would require  
10 use of both hands. (AR. 876). She also stated that the job of escort required frequent  
11 reaching and handling and occasional fingering and that the DOT did not delineate between  
12 unilateral or bilateral activity. (AR. 877). According to Young, “the reaching, handling, and  
13 fingering requirements [of all three jobs] exceed the physical restrictions outlined by Dr.  
14 Hassman. In addition, the manner in which the [sic] all the jobs are actually performed  
15 require bilateral abilities in handling and fingering.” (AR. 878).

16 Young further stated that the DOT requirements on handling and reaching exceeded  
17 the limitations assessed by Dr. Petronella. (AR. 880). Moreover, Dr. Petronella indicated  
18 that Mr. Dominguez can only walk for 10 minutes at a time with a total of one hour in an 8  
19 hour day; yet, all three jobs are at the light level per the DOT, and as performed, would  
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22 <sup>4</sup>At one point the ALJ asked Plaintiff: “[S]o you can use that [left] hand as guide for  
23 your right, for what you do with your right hand? Is that right?...If you pick something up  
24 that requires two hands might you do that? You have to use the left hand as a guide?” (AR.  
25 485) To which Plaintiff responded: “I can use the arm[,] yes.” (*Id.*). The ALJ went on to  
26 state to the VE that Plaintiff “can use the left arm but not the left hand.” (AR. 488). As  
27 Defendant points out, the ALJ felt Plaintiff’s ability to use his left arm as a guide without  
28 limitation was significant enough to include in the RFC assessment. The ALJ relied on the  
finding that Plaintiff could “use his left upper extremity to guide his right upper extremity  
for lifting, carrying, *reaching* or other activities (Testimony) which substantiates the  
claimant’s ability to perform the RFC reached in this decision.” (AR. 396 (rejecting the  
opinion of Plaintiff’s vocational expert for this reason)) (emphasis added).

1 require more than one hour total walking. (*Id.*). Thus, “[i]n individual with the restrictions  
2 outlined by Dr. Petronella would not be able to perform these jobs.” (*Id.*).

3 The ALJ rejected Young’s opinion because she “failed to consider the claimant’s  
4 testimony regarding his ability to use his left upper extremity to guide his right upper  
5 extremity for lifting, carrying, reaching or other activities....” (AR. 396). Yet, this rejection  
6 of Young’s testimony is premised on the ALJ’s unsupported rejection of Dr. Petronella’s  
7 opinion as well as Dr. Hassman’s opinion regarding left-arm reaching. Moreover, it baffles  
8 the Court as to how Plaintiff’s ability to use his left arm as a guide would enable him to  
9 perform bilateral hand functions, such as folding, making beds, hanging drapes, and rolling  
10 carpets as required by the housekeeping/janitor job (*see* AR. 246) or to tear tickets or affix  
11 admission bracelets in performing duties as a ticket taker as identified by Young. (*see* AR.  
12 876; *see also* Plaintiff’s Brief, p. 14 (citing Young’s opinion)). Although the ALJ may reject  
13 a lay witness’ testimony “upon giving a reason germane to that witness,” *Parra*, 481 F.3d at  
14 750, the ALJ’s reason for rejecting Young’s testimony cannot be deemed to be germane to  
15 her opinion on this record given that the ALJ’s reasoning has no direct correlation to  
16 Young’s opinion.

17 At bottom, the Commissioner bears the burden of showing that Plaintiff can do other  
18 work. *See Tackett*, 180 F.3d at 1095. Here, the ALJ relied on an RFC assessment that is not  
19 supported by substantial evidence in the record given the ALJ’s failure to address Dr.  
20 Petronella’s opinion and Dr. Hassman’s opinion regarding left-arm reaching. *See e.g. Pitzer*  
21 *v. Sullivan*, 908 F.2d at 506 (where the Commissioner has failed to advance any legitimate  
22 reasons for disregarding the examining physician’s opinion, “we hold that substantial  
23 evidence does not support the [Commissioner’s] decision.”). Because the ALJ’s RFC  
24 assessment was unsupported by substantial evidence, it follows that his hypothetical  
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1 questions posed to the VE relying on the RFC assessment is also unsupported by substantial  
2 evidence.<sup>5</sup>

### 3 **PLAINTIFF’S CREDIBILITY**

4 Plaintiff challenges the ALJ’s finding that Plaintiff’s “testimony with regard to the  
5 severity and functional consequences of his symptoms is not fully credible....” (AR. 395).

6 When assessing a claimant’s credibility, the “ALJ is not required to believe every  
7 allegation of disabling pain or other non-exertional impairment.” *Orn v. Astrue*, 495 F.3d  
8 625, 635 (9<sup>th</sup> Cir. 2007) (internal quotation marks and citation omitted). However, where, as  
9 here, the claimant has produced objective medical evidence of an underlying impairment that  
10 could reasonably give rise to the symptoms and there is no affirmative finding of  
11 malingering, the ALJ’s reasons for rejecting the claimant’s symptom testimony must be clear  
12 and convincing.<sup>6</sup> *Carmickle v. Commissioner, Social Security Admin.*, 533 F.3d 1155, 1160-

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14 <sup>5</sup>Because the Court finds that the ALJ’s erroneous rejection of Dr. Petronella’s  
15 opinion, Dr. Hassman’s opinion regarding left-arm reaching, invalidated the ALJ’s RFC  
16 assessment and subsequent VE testimony, the Court does not address Plaintiff’s further  
17 objections to the VE testimony and resulting ALJ findings based on VE testimony as such  
objections are moot.

18 <sup>6</sup>Defendant argues that the “clear and convincing reasons” standard for discounting  
19 credibility is inconsistent with the standard articulated in *Bunnell v. Sullivan*, 947 F.2d 341,  
20 345-346 (9<sup>th</sup> Cir. 1991) (*en banc*), that an ALJ’s credibility findings must be supported by  
21 the record and “‘must be sufficiently specific to allow a reviewing court to conclude the  
22 adjudicator rejected the claimant’s testimony on permissible grounds...’ and did not  
23 arbitrarily discredit a claimant’s testimony regarding pain. (Defendant’s Brief, pp.19-20  
24 (quoting *Bunnell*, 947 F.2d at 345-346 (internal quotation marks and citations omitted)).  
25 Defendant’s position is unavailing. First, “a requirement of ‘clear and convincing reasons’  
26 is distinct from a clear [and] convincing evidentiary standard. *Cf. Bayliss v. Barnhart*, 427  
27 F.3d 1211, 1216) (9<sup>th</sup> Cir.2005) (‘To reject an uncontradicted opinion of a treating or  
28 examining doctor, an ALJ must state clear and convincing reasons that are supported by  
substantial evidence.’ ...).” *Provencio v. Astrue*, 2012 WL 2344072, \*11 n. 5 (D.Ariz. June  
20, 2012). Second, as Defendant points out, *Bunnell* itself requires that the ALJ “‘specifically  
make findings...’ that are supported by the record, to support the conclusion that the  
claimant’s allegations of severity are not credible. *Bunnell*, 947 F.2d at 345. Further, these  
findings must be “‘sufficiently specific to allow a reviewing court to conclude the...’ ALJ  
rejected the testimony on permissible grounds. *Id.* at 345-346. The District Court for the

1 61 (9<sup>th</sup> Cir. 2008). “The ALJ must state specifically which symptom testimony is not credible  
2 and what facts in the record lead to that conclusion.” *Smolen v Chater*, 80 F.3d 1273, 1284  
3 (1996); *see also Orn*, 495 F.3d at 635 (the ALJ must provide cogent reasons for the disbelief  
4 and cite the reasons why the testimony is unpersuasive). The ALJ may consider ordinary  
5 techniques of credibility evaluation, such as the claimant’s reputation for lying, prior  
6 inconsistent statements about the symptoms, and other testimony from the claimant that  
7 appears less than candid; unexplained or inadequately explained failure to seek or follow a  
8 prescribed course of treatment; the claimant’s daily activities; the claimant’s work record;  
9 observations of treating and examining physicians and other third parties; precipitating and  
10 aggravating factors; and functional restrictions caused by the symptoms. *Lingenfelter v.*  
11 *Astrue* , 504 F.3d 1028, 1040 (9<sup>th</sup> Cir. 2007); *Robbins v. Social Sec. Admin.*, 466 F.3d 880,  
12 884 (9<sup>th</sup> Cir. 2006); *Smolen*, 80 F.3d at 1284.

13 The ALJ discounted Plaintiff’s credibility by finding Plaintiff was not motivated to  
14 work, he improved with treatment and no longer takes medication for headaches; “he uses  
15 his left upper extremity to guide his right upper extremity...” (AR. 394); he “can watch  
16 television, grocery shop, vacuum, and help with the dishes[]”; he had very little medical

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17  
18 District of Arizona has noted that “[subsequent cases have explained that ‘unless an ALJ  
19 makes a finding of malingering based on affirmative evidence thereof, he or she may only  
20 find an applicant not credible by making specific findings as to credibility and stating clear  
21 and convincing reasons for each.’ *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9<sup>th</sup>  
22 Cir.2006) (emphasis added); *see also Lingenfelter v. Astrue*, 504 F.3d 102[8], 1036 (9<sup>th</sup>  
23 Cir.2007). Thus, the cases applying the ‘clear and convincing’ standard in no way overturn  
24 *Bunnell*. Numerous cases have applied the ‘clear and convincing’ standard, and this Court  
25 is in no position to overrule them. *See, e.g., Taylor v. Camber of Soc. Sec. Admin.*, [659 F.3d]  
26 1228, 1234 (9<sup>th</sup> Cir.2011); *Vasquez v. Astrue*, 572 F.3d...[586, 591 (9<sup>th</sup> Cir. 2009)];  
27 *Lingenfelter*, 504 F.3d at 1036; *Orn*, 495 F.3d at 635; *Robbins*, 466 F.3d at 883; *Smolen v.*  
28 *Chater*, 80 F.3d [1273,]...1281 [(9<sup>th</sup> Cir. 1996)]; *Dodrill [v. Shalala]*, 12 F.3d [915,]... 918  
[(9<sup>th</sup> Cir. 1993)].” *Provencio*, 2012 WL 2344072 at \*11 n.5. Moreover, as discussed below,  
although the ALJ set forth specific reasons for rejecting Plaintiff’s credibility, those reasons  
are not permissible and/or supported by the record. Thus, the ALJ’s credibility finding fails  
under Defendant’s proposed standard as well as the “clear and convincing reasons” standard.

1 treatment; he did not lose his job because he could not work, but because he was fired for  
2 misconduct; and he “believed there were jobs, other than his past relevant work, that he could  
3 do.” (AR. 13-14).

4 The credibility assessment is not supported by clear and convincing evidence. For  
5 example, the ALJ accorded “great weight” to the opinion of examining psychologist Noelle  
6 Rohen who diagnosed: Major Depressive Disorder, Single Episode, Chronic, Moderate to  
7 Severe; Generalized Anxiety Disorder; Rule out Mild Cognitive Disorder Secondary to  
8 Traumatic Brain Injury; Pain Disorder Associated with Both Psychological Factors and a  
9 General Medical Condition. (AR. 395, 819). Dr. Rohen also found that Plaintiff presented  
10 “as quite depressed, and complain[ing] of anxiety as well.” (AR. 820). She opined that  
11 Plaintiff’s “depression is expected to impact his ability to work, to the extent that it dampens  
12 his motivation and impairs his ability to present himself as somebody who can motivate and  
13 get the job done.” (AR. 820).

14 Defendant defends the ALJ’s finding that Plaintiff was not motivated to work, arguing  
15 that all of Plaintiff’s bills were paid by his girlfriend. (Defendant’s Brief, p. 21). Yet,  
16 Defendant omits any discussion of Dr. Rohen’s opinion, which was afforded great weight  
17 by the ALJ. Moreover, Defendant also states, when supporting the ALJ’s finding that  
18 Plaintiff did not quit work because of disability, that “Plaintiff had looked for other work.”  
19 (*Id.* at p. 21). Defendant cannot have it both ways. Regardless, in light of Dr. Rohen’s  
20 opinion that lack of motivation correlated directly to Plaintiff’s depression, the Court finds  
21 it was improper for the ALJ to use a symptom of Plaintiff’s depression, verified by a  
22 psychologist whose opinion the ALJ has accorded great weight, to discount Plaintiff’s  
23 credibility. This same conclusion also undermines the ALJ’s rejection of Plaintiff’s  
24 credibility based on the fact that Plaintiff relied on others for support.

25 There is no dispute that Plaintiff experienced improvement with headaches using  
26 medication. (*See e.g.* AR. 830 (Plaintiff’s headaches improved with Elavil, Fiorinal, and  
27 Amitriptyline)). The ALJ discounted Plaintiff’s testimony because Plaintiff was no longer  
28 taking the medication. Generally, a plaintiff’s failure to “seek treatment or to follow a

1 prescribed course of treatment” is a relevant factor in assessing credibility. *See Smolen*, 80  
2 F.3d at 1284. However, the ALJ ““must not draw any inferences about an individual’s  
3 symptoms and their functional effects from a failure to seek or pursue regular medical  
4 treatment without first considering any explanations that the individual may provide, or other  
5 information in the case record, that my explain infrequent or irregular medical visits or  
6 failure to seek medical treatment’ including inability to pay....” *Orn*, 495 F.3d at 638  
7 (quoting SSR 96-7p). Here, Plaintiff testified that he stopped taking headache medication  
8 because “my doctor said I am having kidney and liver issues. And I have to cut down.”  
9 (AR. 512). Further, although the record supports the conclusion that Plaintiff has not had  
10 consistent treatment for depression, Dr. Rohen emphasized that Plaintiff was “in true need  
11 of treatment.” (AR. 820). Yet, despite the provisions of SSR 96-7p, no attempt was made  
12 to develop the record as to why Plaintiff had not sought such treatment. That a person with  
13 moderate to severe chronic depression (*see* AR. 819), who has previously attempted suicide  
14 by shooting himself in the head, and whose depression results in lack of motivation (AR.  
15 820) may not be motivated to seek mental health treatment can be viewed as entirely  
16 consistent with Plaintiff’s allegations of depression and Dr. Rohen’s assessment of same.  
17 *Cf. Burch v. Burkhart*, 400 F.3d 676, (9<sup>th</sup> Cir. 2005) (ALJ properly considered lack of  
18 treatment where plaintiff had not been diagnosed with depression and there were no  
19 documented episodes of decompensation). Finally, as Plaintiff points out, there is no  
20 showing on the instant record that there was any type of treatment that Plaintiff should have  
21 sought for hemiparesis due to status post gunshot wound to the head.

22       The record supports the conclusion that Plaintiff was terminated from his last job after  
23 an incident at work involving a gun. Regardless, “the fact that a person holds down a job  
24 doesn't prove that he isn't disabled, because he may have a careless or indulgent employer  
25 or be working beyond his capacity out of desperation.” *Henderson v. Barnhart*, 349 F.3d  
26 434, 435 (7<sup>th</sup> Cir.2003). Although Plaintiff testified that he thought there should be work he  
27 could do, he was clear that he could not perform his past work; and, the ALJ, in essence,  
28

1 agreed with this assessment given the ALJ's finding that Plaintiff could not return to his past  
2 work.

3 Defendant does not challenge Plaintiff's assertion that the ALJ's rejection of  
4 Plaintiff's credibility based on his activities was improper on this record. *See e.g. Vertigan*  
5 *v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001) ("the mere fact that a plaintiff has carried on  
6 certain daily activities such as grocery shopping, driving a car, or limited walking for  
7 exercise, does not in any way detract from [his or] her credibility as to [his or] her overall  
8 disability. One does not need to be [utterly incapacitated] in order to be disabled.")  
9 (internal quotation marks and citation omitted). Finally, the ALJ's conclusion that Plaintiff  
10 "uses his left upper extremity to guide his right upper extremity (right hand dominant)" in  
11 no way detracts from Plaintiff's credibility and Defendant has not argued otherwise.  
12 Consequently, on the instant record, the ALJ has failed to set forth clear and convincing  
13 reasons to discount Plaintiff's credibility.

#### 14 **CONCLUSION**

15 For the foregoing reasons, Plaintiff has established that the ALJ's Decision cannot  
16 stand. Plaintiff requests remand for an immediate award of benefits or, alternatively remand  
17 for further proceedings.

18 Plaintiff filed his application for benefits in October 2006—almost eight years ago.  
19 The Commissioner received two opportunities—once in 2009 and, again, on remand in 2011—  
20 to satisfy her step-five burden of establishing that Plaintiff could perform other work, and  
21 has twice failed to do so. Not only did the ALJ's 2011 Decision fail to comply with the  
22 remand order from the Court and the directions from the Appeals Council, but the ALJ relied  
23 on an RFC assessment that is not supported by substantial evidence in the record given the  
24 ALJ's failure to address Dr. Petronella's opinion and Dr. Hassman's opinion regarding left-  
25 arm reaching. The ALJ also erroneously rejected Young's testimony. The ALJ erroneously  
26 discounted Plaintiff's credibility, and a good portion of the ALJ's credibility finding ignored  
27 the reality of Plaintiff's life-long, profound depression.

28

1           The Ninth Circuit has recognized that "[r]emanding a disability claim for further  
2 proceedings can delay much needed income for claimants who are unable to work and are  
3 entitled to benefits, often subjecting them to 'tremendous financial difficulties while awaiting  
4 the outcome of their appeals and proceedings on remand.'" *Benecke v. Barnhart*, 379 F.3d  
5 587, 595 (9<sup>th</sup> Cir. 2004) (quoting *Varney v. Secretary of Health and Human Services*, 859  
6 F.2d 1396, 1398 (9<sup>th</sup> Cir. 1988)); *see also Terry v. Sullivan*, 903 F.2d 1273 (9<sup>th</sup> Cir. 1990)  
7 (remanding for an award of benefits where the plaintiff applied almost four years prior);  
8 *Erickson v. Shalala*, 9 F.3d 813 (9<sup>th</sup> Cir. 1993) (remanding for an award of benefits where  
9 plaintiff, who was disabled under the Act, "ha[d] been waiting for well over four years for  
10 his disability benefits"). Acknowledging that the decision whether to remand for further  
11 proceedings or an award of benefits is within the court's discretion, the Ninth Circuit has  
12 remanded for payment of benefits where the ALJ's decision was unsupported by substantial  
13 evidence. *See Pitzer*, 908 F.2d at 506 (remanding for payment of benefits where the ALJ  
14 did not provide adequate reasons for disregarding examining physician's opinion); *Winans*  
15 *v. Bowen*, 853 F.2d 643, 647 (9<sup>th</sup> Cir. 1987) (remanding for award of benefits where the court  
16 was "convinced that substantial evidence does not support the [Commissioner's] decision.").  
17 On the instant record, remand for an award of benefits is appropriate.

18           Accordingly,

19           IT IS ORDERED that this matter is REMANDED to the Commissioner for immediate  
20 calculation and award of benefits.

21           The Clerk of Court is DIRECTED to enter judgment accordingly and to close its file  
22 in this matter.

23           DATED this 30<sup>th</sup> day of September, 2014.

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26           

27           **CHARLES R. PYLE**  
28           **UNITED STATES MAGISTRATE JUDGE**