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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Stephen Thompson, Jr.

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.

No. CV-14-2375-TUC-DTF

ORDER

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15 Plaintiff Stephen Thompson, Jr., brought this action pursuant to 42 U.S.C.
16 §§ 405(g) and 1383(c)(3), seeking judicial review of a final decision by the
17 Commissioner of Social Security (Commissioner). Plaintiff filed his opening brief. (Doc.
18 18.) In response, the Commissioner moved to remand the case to the ALJ. (Doc. 28.)
19 Plaintiff opposes a remand for further proceedings because he contends he is entitled to
20 an immediate award of benefits. (Doc. 29.) The parties have consented to Magistrate
21 Judge jurisdiction. (Doc. 13.) Based on the pleadings and the administrative record
22 submitted to the Court, this matter is remanded for further proceedings.

23 **PROCEDURAL HISTORY**

24 Thompson filed an application for Disability Insurance Benefits (DIB) on June 16,
25 2010, and Supplemental Security Income (SSI) on July 16, 2010. (Administrative Record
26 (AR) 354, 361.) He alleged disability from October 4, 2009. (AR 354, 361.) Thompson's
27 application was denied upon initial review (AR 114-49) and on reconsideration (AR 150-
28 93). A hearing was held on July 17, 2012, at which Thompson and vocational expert John

1 Kilcher testified. (AR 38-81.) On November 27, 2012, the ALJ held a second hearing.
2 (AR 84.) Thompson testified a second time and vocational expert Kathleen McAlpine
3 testified. (AR 84-113.) Subsequently, the ALJ found that Thompson was not disabled
4 (AR 23-31). The Appeals Council denied Thompson's request to review the ALJ's
5 decision. (AR 1-3.)

6 **FACTUAL HISTORY**

7 Thompson was born on October 9, 1958, making him 51 years of age at the time
8 he applied for disability. (AR 354.) Thompson had a long history working as a registered
9 nurse and he taught seminars for a catheter manufacturer. (AR 85, 382.) In early 2008,
10 Thompson began abusing opiates that he obtained at the hospital where he worked
11 (something he also had done during prior periods of his life). (AR 506.) In August 2009,
12 after being confronted at work about his behavior, he attempted suicide. (AR 506, 513.)
13 In early October 2009, Thompson attempted suicide a second time. (AR 513-14.)

14 The ALJ found Plaintiff had several severe impairments: history of a left rotator
15 cuff tear, improved; diabetes mellitus, type II; diabetic neuropathy, lower extremity,
16 sensory; history of sleep apnea, improved with weight loss; drug overdose induced
17 bilateral sensorineural hearing loss; and polysubstance addiction disorder. (AR 23.) The
18 ALJ concluded that, considering Plaintiff's substance use disorder, he met a listing and
19 was disabled at Step Three. (AR 23.) However, the ALJ concluded that if Thompson
20 stopped the substance use, he could perform other work available in the national
21 economy and was not disabled at Step Five. (AR 27, 30.)

22 **STANDARD OF REVIEW**

23 The Commissioner employs a five-step sequential process to evaluate SSI and
24 DIB claims. 20 C.F.R. §§ 404.1520; 416.920; *see also Heckler v. Campbell*, 461 U.S.
25 458, 460-462 (1983). To establish disability the claimant bears the burden of showing he
26 (1) is not working; (2) has a severe physical or mental impairment; and (3) the
27 impairment meets or equals the requirements of a listed impairment; or (4) claimant's
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1 RFC precludes him from performing his past work. 20 C.F.R. §§ 404.1520(a)(4),
2 416.920(a)(4). At Step Five, the burden shifts to the Commissioner to show that the
3 claimant has the RFC to perform other work that exists in substantial numbers in the
4 national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007). If the
5 Commissioner conclusively finds the claimant “disabled” or “not disabled” at any point
6 in the five-step process, she does not proceed to the next step. 20 C.F.R.
7 §§ 404.1520(a)(4), 416.920(a)(4).

8 “The ALJ is responsible for determining credibility, resolving conflicts in medical
9 testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
10 Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)). The findings
11 of the Commissioner are meant to be conclusive if supported by substantial evidence. 42
12 U.S.C. § 405(g). Substantial evidence is “more than a mere scintilla but less than a
13 preponderance.” *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (quoting *Matney v.*
14 *Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)). The court may overturn the decision to
15 deny benefits only “when the ALJ’s findings are based on legal error or are not supported
16 by substantial evidence in the record as a whole.” *Aukland v. Massanari*, 257 F.3d 1033,
17 1035 (9th Cir. 2001). This is so because the ALJ “and not the reviewing court must
18 resolve conflicts in the evidence, and if the evidence can support either outcome, the
19 court may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019
20 (quoting *Richardson v. Perales*, 402 U.S. 389, 400 (1971)); *Batson v. Comm’r of Soc.*
21 *Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). The Commissioner’s decision,
22 however, “cannot be affirmed simply by isolating a specific quantum of supporting
23 evidence.” *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998) (citing *Hammock v.*
24 *Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)). Reviewing courts must consider the evidence
25 that supports as well as detracts from the Commissioner’s conclusion. *Day v.*
26 *Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975).

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DISCUSSION

Thompson alleges the ALJ erred in giving the greatest weight to Dr. Onate, which caused the ALJ to err in determining which of Thompson's impairments were severe at Step Two and in finding that Thompson had a substance addiction disorder that met the listings at Step Three. Thompson also alleges the ALJ erred at Step Five in concluding there were other jobs in the national economy that he could perform.

The Commissioner requests a remand because the ALJ failed to address the medical source opinions of the State Agency doctors (Drs. Estes, Penner and Dodson) and Dr. Karin Ahlstrand (neuropsychologist). Plaintiff asks instead for an immediate award of benefits arguing that he is so entitled based on the credit as true rule. In light of conceded error by Defendant, this case will be remanded. The question is whether Plaintiff is entitled to an award of benefits with no further proceedings.

In an effort to expeditiously answer that question, the Court first evaluates the possible application of the credit as true rule in this case. The Ninth Circuit has held that a district court should credit as true evidence that was improperly rejected by the ALJ and remand for benefits if:

- (1) the ALJ failed to provide legally sufficient reasons for rejecting the testimony;
- (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and
- (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004); *see Garrison v. Colvin*, 759 F.3d 995, 1019-20 (9th Cir. 2014). The Court concludes credit as true is not warranted in this case because there are outstanding issues that must be resolved before a disability decision can be reached.

The medical opinions that the ALJ failed to consider and those that Thompson alleges the ALJ erroneously discounted are not consistent. For example Drs. Estes and Penner (non-examining physicians) concluded Thompson had some moderate limitations

1 but could perform unskilled work. (AR 129, 168-69.) Dr. Rau (examining physician)
2 found moderate limitations in sustained concentration and persistence but did not opine
3 that Thompson could not work. (AR 1357.) In contrast, Dr. Ahlstrand (examining
4 physician) concluded Thompson could not return to nursing and cognitive impairments
5 would interfere with his work abilities. (AR 607.) And, Dr. Sora (examining physician)
6 and Nurse Practitioner Hess (an “other” treating medical source) both offered the opinion
7 that Thompson could not work due to cognitive and emotional impairments. (AR 1466,
8 1495, 1638.) It is for the ALJ to resolve such conflicts in medical testimony. *Andrews*, 53
9 F.3d at 1039.

10 The Court also finds that this matter needs to be remanded in light of the ALJ’s
11 treatment of Thompson’s substance abuse. The ALJ conducted a substance abuse
12 disorder analysis without citing any record evidence that Thompson had abused alcohol
13 or drugs since his alleged disability onset date. The ALJ discounted Thompson’s
14 credibility and found that his reporting regarding his drug abuse was inconsistent. (AR
15 24.) While that finding is well-supported as to Thompson’s historic abuse of substances,
16 the ALJ cites no evidence of current drug use only evidence of drug cravings.¹ (AR 25.)
17 There is no question that Thompson had an addiction at the time of onset and he was just
18 beginning remission; however, neither the ALJ nor either party cited any evidence of
19 substance abuse after Thompson’s October 2009 second suicide attempt. Although the
20 ALJ relies upon Dr. Onate’s diagnosis of an opioid dependence (active) in October 2010,
21 the doctor documented without question Thompson’s report that he had been “clean” for
22 a year. (AR 1488, 1490.) No other medical source diagnosed Thompson as having an
23 active substance abuse disorder after the onset date.

24 The ALJ determined Thompson would be disabled at Step Three while using
25 substances but would not be disabled if he stopped the use of substances. There is little
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27 ¹ The ALJ stated Thompson engaged in drug-seeking behavior, but the ALJ
28 cited no record evidence for that finding. (AR 25.) Regardless, unsuccessful drug seeking
does not equate to drug use.

1 record evidence to support this distinction. A finding at Step Three for Substance
2 Addiction Disorders requires an initial finding of behavioral or physical changes
3 associated with “the regular use of substances.” 20 C.F.R. Pt. 404, Subpt. P, App. 1,
4 12.09. The ALJ did not make this finding. In evaluating the paragraph B criteria, the ALJ
5 found marked limitations in social functioning and in concentration, persistence or pace.
6 (AR 24.) In support, the ALJ relied primarily upon family reports from August 2010 and
7 June 2012 (AR 394, 437-442), as well as Dr. Rau’s March 2011 exam (AR 1350).²
8 Although there is no evidence Thompson was abusing substances in 2010, 2011, or 2012,
9 the ALJ concluded that if Thompson stopped substance abuse he would have only a mild
10 difficulty in social functioning and a moderate difficulty in concentration, persistence or
11 pace. (AR 28.) The ALJ cites no record evidence for this conclusion. (*Id.*) No medical
12 sources offered an opinion distinguishing Thompson’s limitations when abusing
13 substances and when not using substances.³

14 The Court determines that the ALJ must reconsider his substance abuse analysis in
15 light of the above identified inconsistencies. This may require the ALJ to obtain
16 additional medical testimony, which Defendant acknowledged (Doc. 28 at 21). Because
17 the ALJ’s evaluation regarding Thompson’s substance abuse is a central issue in his
18 analysis, further proceedings are required before a final determination can be reached.

19 One matter related to substance abuse is Thompson’s credibility. Thompson did
20 not in his opening brief challenge the ALJ’s credibility finding. In his reply brief,
21 however, Thompson argued the ALJ’s credibility finding was tainted by his rejection of
22 other evidence. The Court agrees that upon remand the ALJ must reconsider his
23 credibility finding in light of all the evidence and this Order.

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25 ² It is worthy of note that later in his opinion, the ALJ stated that he gave
26 limited weight to the lay witness testimony and the opinion of Dr. Rau. (AR 25.) The
ALJ did not reconcile this inconsistency.

27 ³ If, upon remand, the ALJ determines that Thompson has a cognitive
28 disorder, a major depressive disorder, and/or an anxiety disorder, he will have to
reconsider whether Thompson meets any of the related listings at Step Three.

1 The Court recognizes that this case has been ongoing for 5 years and that
2 Thompson has not contributed to the delay. Review of the record reveals numerous errors
3 in the ALJ's decision, some of which Defendant concedes. However, this is not the rare
4 case where further proceedings would not be useful and the Court can award benefits. *See*
5 *Treichler v. Comm'r of Social. Sec. Admin.*, 775 F.3d 1090, 1099-1100 (9th Cir. 2014).
6 After the ALJ considers all of the medical opinions and the other record evidence it
7 remains to be determined if Thompson has other severe impairments at Step Two; what,
8 if any, listings Thompson meets at Step Three; whether Thompson had an active
9 substance abuse disorder during the relevant time; and his RFC. Therefore, Thompson is
10 not entitled to a remand for the award of benefits based on the current record.

11 For guidance upon remand, the Court turns to the other issues Thompson raised.

12 Dr. Ahlstrand and Agency Non-Examining Physicians

13 The ALJ failed to consider with explanation the opinions of Dr. Ahlstrand, Dr.
14 Estes, Dr. Penner, and Dr. Dodson. This was error, as conceded by Defendant. *See* SSR
15 96-8p (requiring the ALJ's RFC to consider and address all medical source opinions).

16 Dr. Onate

17 The ALJ gave great weight to the October and November 2010 treatment notes of
18 Dr. Onate, finding his findings well-reasoned and supported by prior evaluations. (AR
19 25.) One of the prior exams was conducted by Dr. Ahlstrand. Her December 2009
20 diagnoses for Thompson, cognitive disorder NOS, major depressive disorder (recurrent,
21 severe) and opioid dependence (early full remission) (AR 606), are not in accord with Dr.
22 Onate's singular diagnosis of opioid dependence (active) (AR 1486). Similarly, NP Hess
23 diagnosed Thompson, in November 2009, with major depressive disorder (recurrent) and
24 opiate abuse (currently clean) and, in November 2010, with a mood disorder. (AR 1138,
25 1154.) Other than in the period immediately following Thompson's October 2009 second
26 suicide attempt, no other physician diagnosed Thompson with an active opioid
27 dependence. (AR 1355 (Dr. Rau diagnosed cognitive disorder NOS, major depressive
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1 disorder mild without psychosis), AR 122-23, 183 (Drs. Estes and Penner diagnosed
2 organic brain syndrome, affective disorders, anxiety-related disorders), AR 1637 (Dr.
3 Sora diagnosed major depression recurrent severe without psychotic features, cognitive
4 disorder NOS, opiate dependence in early remission). Therefore, Dr. Onate's singular
5 diagnosis was not well supported by other providers.

6 The ALJ relied upon the fact that Dr. Onate found Thompson exhibited no signs of
7 depression or anxiety and his mental status was essentially normal (no cognitive
8 difficulty, memory intact, and normal attention span). (AR 25, 1486, 1490.) Dr. Onate's
9 findings were not supported by the findings of other providers, nor did he opine on
10 Thompson's working abilities as did other physicians. Dr. Ahlstrand's testing revealed
11 compromised memory and visuospatial perception, and she found elevated levels of
12 depression and anxiety (AR 606); from November 2009 to May 2012, NP Hess
13 repeatedly found Thompson had symptoms of anxiety and depression (AR 1137, 1140,
14 1142, 1146, 1150, 1153, 1154, 1450, 1454, 1456, 1469, 1492, 1494); Dr. Rau found
15 "some inefficiency with his working memory and processing speed and with nonverbal
16 reasoning," and concluded Thompson would have days when it would be difficult to stay
17 focused and he would get off task (AR 1355, 1357); Dr. Sora found Thompson had a
18 marked cognitive decline, presented as more than mildly depressed, and experienced
19 significant impairments in immediate and short term memory as well as in executive
20 functioning (AR 1637-1638). Also, Dr. Onate prescribed Thompson medication for
21 depression, which is inconsistent with his finding that Thompson was not experiencing
22 symptoms of depression. (AR 1486, 1490.)

23 Additionally, the ALJ assigned Dr. Onate the greatest weight but without
24 explanation he made findings that contradicted Dr. Onate's records. The ALJ concluded
25 that, while using substances (as Dr. Onate's diagnosis indicates Thompson was doing),
26 Thompson met the listing criteria for an affective disorder because he had a medically
27 documented depressive syndrome with "anhedonia, sleep disturbance, decreased energy,
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1 difficulty concentrating, and thoughts of suicide,” and an anxiety related disorder
2 evidenced by recurrent and severe panic attacks (AR 23). *See* 20 C.F.R. Pt. 404, Subpt. P,
3 App. 1, 12.04, 12.06. Dr. Onate did not make findings that support this conclusion.

4 The ALJ must reconsider Dr. Onate’s opinion on remand in light of this Order,
5 with particular focus on the medical sources the ALJ failed to address.

6 Step Two

7 At Step Two, the ALJ did not find major depressive disorder or a cognitive
8 disorder to be a serious impairment. It appears the ALJ never reached the question of
9 severity; rather, he concluded Thompson did not have a medically determinable
10 impairment of major depressive disorder or cognitive disorder. As discussed above, Dr.
11 Onate stood as the lone medical opinion that Thompson did not have a depressive
12 disorder and/or a cognitive disorder. Additionally, at the first of two appointments, Dr.
13 Onate diagnosed Thompson with major depressive disorder, unipolar, severe, chronic,
14 recurrent, without psychosis. (AR 516.) The ALJ must reconsider Step Two taking
15 account of all the medical opinions of record.

16 Dr. Rau

17 The ALJ stated that he gave limited weight to the opinion of Dr. Rau because he
18 had not had the opportunity to review the treatment notes of Dr. Onate. (AR 25.) In fact,
19 Dr. Rau stated that he had reviewed “psychologic and medical notes,” covering the
20 period December 2009 to January 2011. (AR 1350, 1353.) Thompson saw Dr. Onate in
21 October and November 2010, and Dr. Rau did not specify which records he reviewed.
22 Thus, there is not substantial evidence in the record to support the ALJ’s finding that Dr.
23 Rau did not see the records from Dr. Onate; rather, it is unknown whether he reviewed
24 those records.

25 The ALJ focused primarily on the fact that Dr. Rau’s March 24, 2011 exam
26 occurred shortly after Thompson experienced an extremely debilitating hospitalization
27 (January 26 to February 15, 2011). (AR 25.) The ALJ relied upon the fact that Dr. Onate
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1 did not find concentration limitations in November 2010, and NP Hess found only mild
2 difficulties in social and occupational functioning (as evidenced by a GAF of 65) in May
3 2011. Therefore, the ALJ concluded that Dr. Rau’s findings were limited to Thompson’s
4 abilities on the date of the exam. (AR 25, 26-27.) The Court has instructed the ALJ to
5 reconsider his reliance upon the opinion of Dr. Onate. Further, by August 2011, six
6 months after the hospitalization, NP Hess found Thompson had a GAF of 40-50. (AR
7 1459.) The GAF score of 65 in May 2011, does not reflect the variability in this score in
8 the months before and after that date. (AR 1450 (July 2010, GAF 50), AR 1453 (October
9 2010, GAF 65), AR 1454 (November 2010, GAF 55), AR 1456 (March 2011, GAF 50).)

10 In light of the numerous errors identified in this Order, particularly the ALJ’s
11 failure to address several medical opinions, Dr. Rau’s opinion should be reconsidered
12 upon remand. Further, Thompson requested a subpoena for Dr. Rau, which the ALJ
13 denied. (Doc. 20 n.1.) After his exam, Dr. Rau opined that Thompson would experience
14 “days when he will have difficulty staying focused due to variability downward with his
15 processing speed and due to getting off of task at times due to dysphoria or depression or
16 frustration.” (AR 1357.) Thompson’s counsel sought to ask the vocational expert whether
17 this limitation would prevent a person from working, but the ALJ disallowed the inquiry
18 as too imprecise. (AR 97-99.) This ambiguity in Dr. Rau’s opinion is precisely the reason
19 counsel sought additional testimony from him. In reconsidering Dr. Rau’s opinions, the
20 ALJ should consider obtaining the additional testimony Thompson seeks from Dr. Rau.

21 Dr. Sora

22 The ALJ discounted the opinion of Dr. Sora for two reasons. He found it was a
23 one-time examination for purposes of litigation. (AR 26.) Defendant concedes this is not
24 a proper basis for discounting a physician’s opinion. *See Lester v. Chater*, 81 F.3d 821,
25 832 (9th Cir. 1995). Defendant tries to recast the ALJ’s reasoning as an in artful way of
26 noting Dr. Sora’s lack of treating relationship with Thompson. If the ALJ intended to rely
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1 upon the relationship between Dr. Sora and Thompson, he could easily have done so.
2 Instead, he relied on the purpose of the exam, which was improper.

3 The ALJ also found that Dr. Sora's opinion did not undermine the findings of Dr.
4 Onate (a substance addiction specialist). (AR 26.) Contrary to Dr. Sora's opinion, Dr.
5 Onate did not make any findings about Thompson's ability to work. The ALJ should
6 reconsider Dr. Sora's opinion in light of this Order and the entirety of the record upon
7 remand.

8 Nurse Practitioner Hess

9 Nurse Practitioner Hess opined that Thompson had impairments in memory,
10 concentration/persistence, social interaction and adaptation to change. (AR 1466.) For
11 support, she referred to the evaluation by Dr. Ahlstrand. (*Id.*) She later opined that
12 Thompson was disabled and unlikely to return to work. (AR 1495.) Because the opinion
13 of a nurse practitioner is not entitled to the deference given the opinion of an acceptable
14 medical source, 20 C.F.R. §§ 404.1513(a) & (d), to discount her testimony as an "other"
15 medical source an ALJ need provide only germane reasons. *Molina v. Astrue*, 674 F.3d
16 1104, 1111 (9th Cir. 2012) (contrasting the requirement that a treating physician's
17 opinion can be rejected only with specific, legitimate reasons). An ALJ is allowed to give
18 additional weight to a medical doctor that is an acceptable medical source. *Johnson v.*
19 *Astrue*, 303 F. App'x 543, 545 (9th Cir. 2008).

20 The ALJ stated that he gave limited weight to NP Hess's opinion because she
21 attempted to transfer care to an opiate detox specialist, noted Thompson's cravings were
22 increasing as of November 2010, and her treatment did not change his opioid dependence
23 diagnosis nor treat it. (AR 25-26.) The ALJ's justifications regarding the weight he
24 assigned to NP Hess's opinions are merely observations but provide no basis for
25 discounting her opinion. The ALJ must reconsider the opinion of NP Hess in light of this
26 Order, particularly the discussion regarding substance abuse, and the entire record on
27 remand.
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1 Lay Witnesses

2 The ALJ gave limited weight to the statements from Thompson’s mother, father,
3 wife, and aunt because they assumed Thompson’s limitations arose from brain damage
4 and mental health disorders, but they were unaware of his current polysubstance abuse.
5 (AR 25.) In support of his finding, the ALJ cites a record from August 2009, in which
6 Thompson reported that his wife was not aware of his current drug use. (AR 506.) The
7 ALJ extrapolated with no record support that, therefore, his other family members were
8 “presumably” also not aware of his drug use. (AR 25.) More importantly, there is no
9 evidence in the record that, after October 2009, Thompson was abusing any substances.
10 In his July 2012 testimony, Thompson stated that he had verbal contracts with his wife
11 and parents about not abusing the narcotics he was prescribed for neuropathic pain; thus,
12 they had knowledge of his problem with drug addiction. There is no record support for
13 the ALJ’s rejection of the lay witness testimony on the basis that the witnesses mis-
14 attributed Thompson’s limitations to something other than substance use. Because the
15 ALJ rejected this testimony without providing a germane reason, he erred. *Stout v.*
16 *Comm’r Soc. Sec. Admin.* 454 F.3d 1050, 1056 (9th Cir. 2006).

17 Accordingly,

18 **IT IS ORDERED** that this case is remanded to the ALJ for a new hearing and
19 further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g). The Clerk of Court
20 should enter judgment and close this case.

21 Dated this 29th day of September, 2015.

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D. Thomas Ferraro
United States Magistrate Judge