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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NEAL B.,<sup>1</sup>

Plaintiff,

v.

ANDREW M. SAUL,<sup>2</sup>  
Commissioner of Social Security,  
Defendant.

Case No. 2:19-cv-03283-MAA

**MEMORANDUM DECISION AND  
ORDER REVERSING DECISION OF  
THE COMMISSIONER AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE PROCEEDINGS**

On April 24, 2019, Plaintiff filed a Complaint seeking review of the Social Security Commissioner's final decision denying his application for a period of disability and disability insurance benefits pursuant to Title II of the Social Security Act. This matter is fully briefed and ready for decision. For the reasons discussed below, the Commissioner's final decision is reversed, and this action is remanded for further administrative proceedings.

<sup>1</sup> Plaintiff's name is partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

<sup>2</sup> The Commissioner of Social Security is substituted as the Defendant pursuant to Federal Rule of Civil Procedure 25(d).

## PROCEDURAL HISTORY

1  
2 On April 30, 2015, Plaintiff protectively filed an application for a period of  
3 disability and disability insurance benefits, alleging disability beginning on April 2,  
4 2015. (Administrative Record [AR] 23, 90, 250-53.) Plaintiff alleged disability  
5 because of “depression; anxiety; [and] neurology problems.” (AR 108.) After the  
6 application was denied initially and on reconsideration, Plaintiff requested a hearing  
7 before an Administrative Law Judge (“ALJ”). (AR 138-39.) At the initial hearing  
8 on October 17, 2017, the ALJ continued the proceeding so Plaintiff could obtain  
9 counsel. (AR 83-89.) At the continued hearing on February 15, 2018, at which  
10 Plaintiff appeared with counsel, the ALJ heard testimony from Plaintiff, a  
11 vocational expert, and Plaintiff’s roommate. (AR 40-82.)

12 In a decision issued on May 2, 2018, the ALJ denied Plaintiff’s application  
13 after making the following findings pursuant to the Commissioner’s five-step  
14 evaluation. (AR 23-32.) Plaintiff had not engaged in substantial gainful activity  
15 since his alleged disability onset date of April 2, 2015. (AR 26.) He had severe  
16 impairments consisting of “possible multiple sclerosis; degenerative disc disease,  
17 cervical spine; [and] affective disorder.” (*Id.*) He did not have an impairment or  
18 combination of impairments that met or medically equaled the requirements of one  
19 of the impairments from the Commissioner’s Listing of Impairments. (AR 26.) He  
20 had a residual functional capacity for medium work with a limitation to simple,  
21 repetitive tasks. (AR 28.) He could not perform his past relevant work as a  
22 plumber. (AR 30; *see also* AR 69.) However, he could perform other work in the  
23 national economy, in the occupations of dish washer; grocery bagger; and laborer,  
24 stores. (AR 31.) Thus, the ALJ concluded that Plaintiff was not disabled as  
25 defined by the Social Security Act. (AR 32.)

26 Plaintiff requested review by the Appeals Council. (AR 249.) As part of the  
27 request, Plaintiff submitted new evidence relating to multiple sclerosis. (AR 7-10,  
28 38-39.) On March 12, 2019, the Appeals Council denied review. (AR 1-6.) The

1 Appeals Council also found that the new evidence did not show a reasonable  
2 probability of changing the outcome of the ALJ's decision. (AR 2.) Thus, the  
3 ALJ's decision became the final decision of the Commissioner.

#### 4 5 **DISPUTED ISSUES**

6 The parties raise the following disputed issues:

7 1. Whether the ALJ's step two, step three, residual functional capacity,  
8 and step five findings contain legal errors and are supported by substantial  
9 evidence; and

10 2. Whether the ALJ improperly discredited Plaintiff testimony.  
11 (ECF No. 18, Parties' Joint Stipulation ["Joint Stip."] at 2.)  
12

#### 13 **STANDARD OF REVIEW**

14 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's final  
15 decision to determine whether the Commissioner's findings are supported by  
16 substantial evidence and whether the proper legal standards were applied. *See*  
17 *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir.  
18 2014). Substantial evidence means "more than a mere scintilla" but less than a  
19 preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter*  
20 *v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is "such  
21 relevant evidence as a reasonable mind might accept as adequate to support a  
22 conclusion." *Richardson*, 402 U.S. at 401. The Court must review the record as a  
23 whole, weighing both the evidence that supports and the evidence that detracts from  
24 the Commissioner's conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is  
25 susceptible of more than one rational interpretation, the Commissioner's  
26 interpretation must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.  
27 2007).

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1           **B.     Background.**

2           The primary basis for Plaintiff’s alleged disability is multiple sclerosis  
3 (“MS”). (AR 45-46.) The record before the ALJ had conflicting evidence as to  
4 whether Plaintiff had a diagnosis of MS. In May 2015, Dr. Germin, a neurologist,  
5 diagnosed Plaintiff with MS in part because of a magnetic resonance image  
6 (“MRI”) of the brain showing “Dawson’s fingers.” (AR 373.) However, in July  
7 2015, Dr. Corazza, a neurologist who had not seen an MRI, stated that “I do not see  
8 much on examination to support [the MS diagnosis].” (AR 393.) Other physicians  
9 also apparently thought Plaintiff might have MS (AR 414, 462), but the only  
10 neurologists who opined on the matter, in the record before the ALJ, were Dr.  
11 Germin and Dr. Corazza. The ALJ noted the evidentiary conflict regarding the MS  
12 diagnosis (AR 29) and found that Plaintiff had “possible multiple sclerosis” (AR  
13 26). The ALJ also found that Plaintiff was capable of medium work (AR 28), while  
14 noting that no physician had imposed greater limitations (AR 30).

15           As part of his request that the Appeals Council review the ALJ’s decision,  
16 Plaintiff submitted two pieces of evidence relating to MS. First, he submitted a  
17 January 2018 MRI of his brain showing that, in pertinent part, “[e]xtensive cerebral  
18 white matter plaques are present consistent with history of multiple sclerosis.” (AR  
19 38.)<sup>3</sup> Second, Plaintiff submitted an October 2018 questionnaire completed by Dr.  
20 Galan, a neurologist, describing Plaintiff’s limitations because of MS. (AR 7-10.)  
21 Dr. Galan wrote that Plaintiff’s condition displayed, *inter alia*, motor weakness, the  
22 need for a cane and occasional rest periods while walking, weakness and instability  
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24 \_\_\_\_\_  
25 <sup>3</sup> This MRI was duplicative of evidence that was before the ALJ (AR 487-88), but  
26 the Appeals Council accepted it as new evidence (AR 2). It makes no difference  
27 whether the ALJ saw the MRI in the first instance, because the Court must “review  
28 all the evidence submitted to the Appeals Council as if it had been before the ALJ.”  
*See Burrell v. Colvin*, 775 F.3d 1133, 1139 n.4 (9th Cir. 2014) (citing *Brewes*, 682  
F.3d at 1163).

1 in the lower extremities, weakness in the upper extremities, and an overall  
2 progressive worsening of his symptoms. (AR 7-8.)

3 In its order denying review, the Appeals Council considered this evidence but  
4 found that it did not show a reasonable probability of changing the outcome of the  
5 ALJ's decision. (AR 2.)

6  
7 **C. Analysis.**

8 As an initial matter, the Commissioner contends that Dr. Galan's October  
9 2018 questionnaire is not significant and probative evidence because it post-dated  
10 the ALJ's May 2018 decision by five months. (Joint Stip. at 34.) The Court  
11 disagrees. The Appeals Council did not reject the filing of Dr. Galan's  
12 questionnaire because it post-dated the ALJ's decision, but instead accepted the  
13 questionnaire and incorporated it into the record. (AR 2.) Moreover, the fact that  
14 the questionnaire post-dated the ALJ's decision by five months does not mean that  
15 the questionnaire is not significant and probative evidence. *See Smith v. Bowen*,  
16 849 F.2d 1222, 1225 (9th Cir. 1988) ("It is obvious that medical reports are  
17 inevitably rendered retrospectively and should not be disregarded solely on that  
18 basis.") (citing *Bilby v. Schweiker*, 762 F.2d 716, 719 (9th Cir. 1985)). Finally,  
19 although Dr. Galan's questionnaire post-dated the ALJ's May 2018 decision, the  
20 medical basis for Dr. Galan's questionnaire, the January 2018 MRI, did not. For  
21 these reasons, the Court must consider Dr. Galan's questionnaire when reviewing  
22 the ALJ's decision for substantial evidence. *See Brewes*, 682 F.3d at 1163.

23 Based on the evidence considered by the Appeals Council, two of the ALJ's  
24 findings were unsupported by substantial evidence. First, the ALJ found that  
25 Plaintiff had a "possible" diagnosis of MS. (AR 26.) The apparent basis for this  
26 finding was the assessment of Dr. Corazza, a neurologist who declined to diagnose  
27 MS yet had been unable to review Plaintiff's MRI. (AR 393.) The full record,  
28 however, shows that two other neurologists, Dr. Germin and Dr. Galan, believed

1 Plaintiff had MS after reviewing Plaintiff's MRI. (AR 7, 373.) Because the ALJ's  
2 doubts about an MS diagnosis apparently affected his non-disability determination,  
3 it cannot be upheld for substantial evidence in light of the full record. *See*  
4 *Carmickle v. Colvin*, 645 F. App'x 575, 576 (9th Cir. 2016) (holding that an ALJ's  
5 finding that a claimant did not have a mental impairment was unsupported by  
6 substantial evidence where evidence considered by the Appeals Council showed  
7 that he did); *Cantrell v. Commissioner of Social Sec. Admin.*, 543 F. App'x 653,  
8 654 (9th Cir. 2013) (holding that an ALJ's finding that a claimant's back condition  
9 lacked medical support was unsupported by substantial evidence where an x-ray  
10 considered by the Appeals Council showed marked multilevel degenerative changes  
11 of the cervical spine).

12 Second, and more significantly, the ALJ found that Plaintiff's residual  
13 functional capacity ("RFC") allowed him to perform work at the medium exertional  
14 level (AR 28), while noting that no physician had imposed more restrictive  
15 limitations (AR 30). However, the questionnaire completed by Dr. Galan indicated  
16 that Plaintiff's MS imposed significant strength-based, exertional limitations  
17 affecting his ability to lift, stand, and walk. (AR 7-8.) Thus, the ALJ's RFC  
18 assessment for work at the medium exertional level cannot be upheld for substantial  
19 evidence in light of the full record. *See Hall v. Berryhill*, 717 F. App'x 708, 711  
20 (9th Cir. 2017) (holding that an ALJ's RFC assessment was unsupported by  
21 substantial evidence where evidence considered by the Appeals Council showed  
22 additional mental limitations); *see also Borrelli v. Commissioner of Social Sec.*, 570  
23 F. App'x 651, 652 (9th Cir. 2014) (holding that an ALJ's findings as to a claimant's  
24 abilities and limitations was unsupported by substantial evidence where evidence  
25 considered by the Appeals Council showed claimant's efforts to resolve arthritis  
26 symptoms).

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1 In sum, the evidence presented to the Appeals Council rendered unsupported  
2 by substantial evidence the ALJ's findings as to Plaintiff's allegation of disability  
3 premised on multiple sclerosis. Accordingly, reversal is warranted.  
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## 5 **II. Remand for Further Administrative Proceedings.**

6 Ninth Circuit case law "precludes a district court from remanding a case for  
7 an award of benefits unless certain prerequisites are met." *Dominguez v. Colvin*,  
8 808 F.3d 403, 407 (9th Cir. 2015) (citations omitted). "The district court must first  
9 determine that the ALJ made a legal error, such as failing to provide legally  
10 sufficient reasons for rejecting evidence." *Id.* "If the court finds such an error, it  
11 must next review the record as a whole and determine whether it is fully developed,  
12 is free from conflicts and ambiguities, and all essential factual issues have been  
13 resolved." *Id.* (citation and internal quotation marks omitted).

14 Here, all essential factual issues have not been resolved. The record raises  
15 factual conflicts about Plaintiff's level of functioning that "should be resolved  
16 through further proceedings on an open record before a proper disability  
17 determination can be made by the ALJ in the first instance." *See Brown-Hunter*,  
18 806 F.3d at 496; *see also Treichler*, 775 F.3d at 1101 (stating that remand for an  
19 award of benefits is inappropriate where "there is conflicting evidence, and not all  
20 essential factual issues have been resolved") (citation omitted); *Strauss v.*  
21 *Commissioner of the Social Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011)  
22 (same where the existing record does not clearly demonstrate that the claimant is  
23 disabled within the meaning of the Social Security Act). Moreover, the ALJ should  
24 have an opportunity to consider, and the Commissioner should have an opportunity  
25 to rebut, the evidence that was presented to the Appeals Council in the first  
26 instance. *See Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000) (where  
27 evidence is considered by the Appeals Council in the first instance, the "appropriate  
28 remedy in this situation is to remand this case to the ALJ; the ALJ may then



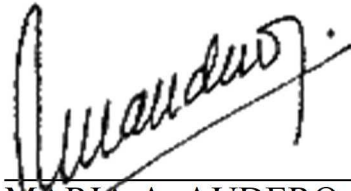
1 consider, the Commissioner then may seek to rebut and the [vocational expert] then  
2 may answer questions with respect to the additional evidence”).

3 Therefore, based on its review and consideration of the entire record, the  
4 Court has concluded on balance that a remand for further administrative  
5 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) is warranted here. It is  
6 not the Court’s intent to limit the scope of the remand.

7  
8 **ORDER**

9 It is ordered that Judgment be entered reversing the final decision of the  
10 Commissioner of Social Security and remanding this matter for further  
11 administrative proceedings.

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13 DATED: May 13, 2020



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16 MARIA A. AUDERO  
17 UNITED STATES MAGISTRATE JUDGE  
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