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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY L. ANDERSON,)	NO. EDCV 09-00545-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on March 27, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for supplemental security income ("SSI"). On April 14, 2009, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on October 30, 2009, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 musculoskeletal and genitourinary systems,² but she does not have any
2 impairment or combination of impairments that meet or medically equal
3 one of the listed impairments in Appendix 1, Subpart P, Regulations No.
4 4. (A.R. 10-11.) The ALJ found that plaintiff does not have a "severe"
5 mental impairment. (A.R. 10.)

6
7 In setting forth plaintiff's residual functional capacity ("RFC"),
8 the ALJ relied on the opinion of a non-examining State agency review
9 physician, who found that plaintiff retains the ability to:

10
11 perform light work as defined in 20 C.F.R. 416.967(b) except
12 postural limitations (i.e., climbing ramps/stairs, balancing,
13 stooping, kneeling, crouching and crawling) can be done on an
14 occasional basis [and plaintiff] cannot climb ladders, ropes
15 or scaffolds.

16
17 (A.R. 11, 13.) The ALJ found that plaintiff is unable to perform any of
18 her past relevant work, but using the Medical-Vocational Rules (the
19 "Grids") as a framework, the ALJ determined that jobs exist in
20 significant numbers in the national economy that plaintiff can perform.
21 (A.R. 15.)

22
23 Accordingly, the ALJ concluded that plaintiff was not under a
24 disability, as defined in the Social Security Act, since October 31,
25 2006, the date the application was filed. (A.R. 15.)

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² The genitourinary system pertains to the genital and urinary
systems. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 782 (31st ed. 2007).

1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
3 the Commissioner's decision if it is based on harmless error, which
4 exists only when it is "clear from the record that an ALJ's error was
5 'inconsequential to the ultimate nondisability determination.'" Robbins
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
7 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
8 F.3d at 679.

9 10 DISCUSSION

11
12 Plaintiff alleges the following five issues: (1) whether the ALJ
13 properly considered the opinion of examining physician George Watkin,
14 M.D.; (2) whether the ALJ properly considered the opinion of examining
15 physician Bijan Zardouz, M.D., regarding plaintiff's temporary total
16 disability; (3) whether the ALJ properly considered plaintiff's mental
17 impairment; (4) whether the ALJ properly complied with the SSR 96-7p
18 requirement that he consider the type, dosage, effectiveness, and side
19 effects of plaintiff's medications; and (5) whether the ALJ erred in not
20 obtaining the testimony of a vocational expert. (Joint Stipulation
21 ("Joint Stip.") at 2-3.)

22 23 **I. The ALJ Failed To Consider Properly The Opinions Of Examining** 24 **Orthopaedist George Watkin, M.D., and Examining Neurologist Bijan** 25 **Zardouz, M.D.**

26
27 In the hierarchy of physician opinions considered in assessing a
28 social security claim, "[g]enerally, a treating physician's opinion

1 carries more weight than an examining physician's, and an examining
2 physician's opinion carries more weight than a reviewing physician's."
3 Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. §
4 416.927(d)(1). The opinions of examining physicians may constitute
5 substantial evidence upon which an ALJ may rely in assessing a
6 claimant's RFC when they are properly supported by the medical evidence.
7 See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)
8 (consultative examiner's opinion on its own constituted substantial
9 evidence, because it rested on independent examination of claimant).
10 When the opinion of a treating or examining physician is contradicted,
11 it may be rejected by an ALJ only for specific and legitimate reasons
12 supported by substantial evidence in the record. Widmark v. Barnhart,
13 454 F.3d at 1066-67; Andrews v. Shalala, 53 F.3d at 1043.

14
15 *Doctor Watkin:*

16
17 On July 16, 2002, Dr. Watkin, an orthopaedist, examined plaintiff
18 in connection with plaintiff's worker's compensation case.³ (A.R. 160-
19 180.) Dr. Watkin diagnosed plaintiff with: strain/sprain of the
20 cervical spine, superimposed over multiple degenerative changes,
21 spondylolisthesis and anterolisthesis of C3 on C4; status post-bilateral
22 carpal tunnel releases; and strain/sprain of the thoracic and lumbar
23 spine, superimposed on multiple degenerative changes. (A.R. 168.)

24
25 In a 20-page permanent and stationary report, Dr. Watkin noted
26 plaintiff's complaints of "shooting, stabbing low back pain, radiating

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³ Dr. Watkin reviewed and summarized all of plaintiff's available
medical records. (A.R. 160.)

1 throughout the mid and upper back, [and which] radiates to the neck."
2 (A.R. 160.) Dr. Watkin noted "aching, knotting and stiffness in the
3 neck, [and] [w]ith bending, stooping, kneeling and squatting there is
4 pain radiating to the pelvic area." (*Id.*) Dr. Watkin further noted
5 plaintiff's complaints of "pain in both wrists [and] weakness in both
6 hands, though more prominent in the right hand," and her inability to
7 "grip or grasp objects for a long period of time." (*Id.*) In addition,
8 Dr. Watkin noted decreased grip strength in plaintiff's bilateral upper
9 extremities and reduced range of motion in plaintiff's lumbar spine.
10 (A.R. 169.)

11
12 Critically, Dr. Watkin opined that, due to plaintiff's lumbar spine
13 condition, she should be precluded from "heavy lifting, repeated bending
14 and stooping, as well as from prolonged sitting and standing." (A.R.
15 170.) Dr. Watkin further opined that, due to plaintiff's bilateral
16 carpal tunnel syndrome, plaintiff should be precluded from "repetitive
17 gripping and grasping and from repetitive manipulation." (*Id.*)

18
19 In his decision, the ALJ summarized Dr. Watkin's opinion but failed
20 to indicate whether he accepted or rejected it. (A.R. 12.) While it is
21 not entirely clear, it appears that the ALJ implicitly rejected Dr.
22 Watkins' opinion, at least in part, because the ALJ's RFC assessment
23 does not reflect work restrictions consistent with Dr. Watkin's opinion
24 with respect to repetitive gripping, grasping, or manipulation, and
25 prolonged sitting and standing.⁴ (A.R. 12, 170.) The ALJ's implicit

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27 ⁴ Defendant contends that the ALJ's implicit rejection Dr. Watkin's
28 "prophylactic restrictions," imposed in 2002, was proper, because later
reports of Lawrence A. Freiwell, M.D., and Nicholas N. Lin, M.D.,

1 rejection of Dr. Watkin's opinion does not meet the specific and
2 legitimate standard contemplated by Ninth Circuit precedent. See
3 Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990)(mere summarization
4 and implicit rejection of physician's opinion does not suffice).

5
6 *Doctor Zardouz:*

7
8 Dr. Zardouz examined plaintiff at least five times from September
9 22, 2005, to May 8, 2006, in connection with injuries sustained as a
10 result of her work-related accident. (A.R. 240-83.) Each examination
11 consisted of thorough physical and neurological assessments, as well as
12 a review and summary of plaintiff's laboratory results and medical
13 records. (*Id.*) Dr. Zardouz dictated extensive reports of his
14 examinations of plaintiff, which included Dr. Zardouz's impressions and
15 comments with respect to plaintiff's physical impairments and disability
16 status. (A.R. 256-73.)

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19 indicated no restrictions with respect to plaintiff's bilateral hands,
20 and the restrictions imposed on plaintiff's ability to sit and stand
21 were not as restrictive as those imposed by Dr. Watkin. (Joint Stip. at
22 5-6.) However, a reviewing court cannot affirm the denial of benefits
23 based on a reason not stated or finding not made by the ALJ, and
24 defendant's after-the-fact attempt to supply an acceptable basis for the
25 ALJ's decision is unavailing. See, e.g., Connett, 340 F.3d at 874
26 (noting that a reviewing court is "constrained to review the reasons the
27 ALJ asserts," and an ALJ's decision cannot be affirmed on the basis of
28 evidence he did not discuss); Pinto v. Massanari, 249 F.3d 840, 847-48
(9th Cir. 2001)(an agency decision cannot be affirmed on the basis of a
ground that the agency did not invoke in making its decision); see also
Barbato v. Comm'r of Soc. Sec. Admin., 923 F. Supp. 1273, 1276 n.2 (C.D.
Cal. 1996)(remand is appropriate when a decision does not adequately
explain how a decision was reached, "[a]nd that is so even if [the
Commissioner] can offer proper post hoc explanations for such
unexplained conclusions," because "the Commissioner's decision must
stand or fall with the reasons set forth in the ALJ's decision, as
adopted by the Appeals Council")(citation omitted).

1 On September 22, 2005, Dr. Zardouz performed an initial
2 neurological evaluation of plaintiff. (A.R. 273-82.) Dr. Zardouz noted
3 pain in plaintiff's: neck, which extends to her shoulders; mid and low
4 back, which extends to her entire lower extremities, down to her feet,
5 causing numbness in her lower extremities; and both buttocks, which
6 extends to the lower abdomen and groin area on both sides. (A.R. 274-
7 75.) Plaintiff reported that her pain and numbness are worse if she
8 "does too much lifting, carrying, bending, stooping, standing, sitting,
9 lying down, and even minor household duties." (*Id.*) Dr. Zardouz made
10 the following diagnoses: (1) musculoligamentous sprain/strain syndrome
11 of the mid-thoracic region; (2) musculoligamentous sprain/strain
12 syndrome of the lumbosacral region; (3) unobtainable right ankle jerk,
13 suggestive of right S1 root dysfunction; (4) musculoligamentous
14 sprain/strain syndrome of the cervical region; and (5) left
15 temporomandibular joint dysfunction; and (6) presbyopia. (A.R. 279-80.)
16 Dr. Zardouz also noted the following aspects of plaintiff's medical
17 history and her subjective complaints: (1) subjective complaint of pain
18 in the upper and lower extremities; (2) history of cervical fusion in
19 July 2003; (3) subjective complaints of headaches, dizziness, blurred
20 vision, and hearing problems on the left side; (4) occasional chest pain
21 and shortness of breath; (5) difficulty with bowel and bladder control
22 for the past five years; and (6) recent memory difficulty. (*Id.*) Dr.
23 Zardouz opined that plaintiff would be temporarily totally disabled for
24 six weeks, or until November 3, 2005. (A.R. 281.)

25
26 On October 24, 2005, Dr. Zardouz performed a follow-up neurological
27 evaluation of plaintiff. (A.R. 256-71.) Plaintiff again presented with
28 complaints of pain in her neck, lower back and buttocks, as well as pain

1 in her upper and mid-back. (A.R. 257.) Dr. Zardouz prescribed Vicodin
2 and Soma for plaintiff's pain. (A.R. 271.) Dr. Zardouz again opined
3 that plaintiff would remain temporarily totally disabled for six weeks,
4 or until December 5, 2005. (*Id.*)

5
6 On December 19, 2005, plaintiff underwent another follow-up
7 neurological examination by Dr. Zardouz. (A.R. 246-49.) Plaintiff's
8 pain persisted in her neck and upper and mid-back, off and on. (A.R.
9 246-47.) Plaintiff reported that her low back pain is "worse with
10 carrying objects and sometimes with driving." (A.R. 247.) Plaintiff
11 reported that, at times, she experiences "shooting pain and numbness to
12 her lower extremities, down to her feet." (*Id.*) Upon examination, Dr.
13 Zardouz determined that there was "tenderness in the cervical region
14 with range of movement." (A.R. 247-48.)

15
16 On May 8, 2006, Dr. Zardouz examined plaintiff and noted mid and
17 lower back pain, as well as occasional pain in her left cervical
18 shoulder region. (A.R. 241.) Dr. Zardouz noted that plaintiff
19 underwent surgery to the cervical area in June 2003, and she was
20 referred to an orthopedic group due to the scoliosis in her back. (*Id.*)
21 Dr. Zardouz opined that plaintiff would remain temporarily totally
22 disabled for the next month, or until June 8, 2006. (A.R. 243.)

23
24 Plaintiff contends that, while the ALJ "summarized Dr. Zardouz's
25 neurological examination findings and acknowledged Dr. Zardouz's opinion
26 that [p]laintiff remained temporarily totally disabled . . . the ALJ
27 failed to indicate if he accepted or rejected Dr. Zardouz's findings."
28 (Joint Stip. at 8.) Defendant argues that the ALJ "accurately

1 summarized Dr. Zardouz' findings" and suggests that this Court may
2 "infer the ALJ accepted [Dr. Zardouz's] opinion," because "nothing in
3 the ALJ's decision was contrary to Dr. Zardouz's findings" and "because
4 [p]laintiff's RFC was not necessarily inconsistent with Dr. Zardouz'
5 opinion." (*Id.*)

6
7 First, the Court cannot infer that the ALJ accepted Dr. Zardouz's
8 opinion, as defendant suggests. The ALJ's RFC determination is not
9 consistent with Dr. Zardouz's findings. Indeed, Dr. Zardouz found
10 significant musculoligamentous sprain/strain in plaintiff's mid-
11 thoracic, lumbosacral, and cervical regions, along with attendant pain,
12 tenderness, and limited range of movement. (A.R. 247-48, 279-80.) Yet,
13 the ALJ's RFC assessment does not adequately account for plaintiff's
14 spinal limitations. Second, while the ALJ is not bound by a physician's
15 opinion regarding the ultimate issue of disability, *i.e.*, Dr. Zardouz's
16 opinion that plaintiff "remained temporarily totally disabled," the ALJ
17 must set forth specific and legitimate reasons supported by substantial
18 evidence in the record if rejecting the opinion.⁵ See Reddick v. Chater,
19 157 F.3d 715, 725 (9th Cir. 1998)(the reasons for rejecting a
20 physician's opinion regarding disability must be comparable to those
21 required for rejecting a doctor's medical opinion, and those reasons
22 must be specific and legitimate). The ALJ's summary of Dr. Zardouz's
23 opinion, without any specific reference as to why or whether he rejected

24
25 ⁵ The Court does note that, even if fully credited, Dr. Zardouz's
26 opinions regarding plaintiff's temporary total disability would not, in
27 and of themselves, establish her entitlement to benefits. As noted
28 above, Dr. Zardouz opined only that plaintiff was and would "remain[]
temporarily totally disabled" from September 2005, through June 2006, a
period of approximately nine months, which is less than the threshold
durational requirement of a "continuous period [of disability] of not
less than 12 months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 416.905.

1 it, is not a sufficient statement of reasons for his rejection of Dr.
2 Zardouz's opinion.

3
4 Accordingly, remand is required for proper consideration of the
5 opinions of Drs. Watkin and Zardouz in accordance with the governing
6 legal standards and for reassessment of plaintiff's RFC.

7
8 **II. The ALJ Did Not Err With Respect To His Consideration Of**
9 **Plaintiff's Alleged Mental Impairment.**

10
11 "An impairment or combination of impairments can be found 'not
12 severe' only if the evidence establishes a slight abnormality that has
13 'no more than a minimal effect on [a claimant's] ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing Social Security Ruling ("SSR") 85-28 and *Yuckert v. Bowen*, 841 F.2d 303 (9th Cir. 1988)); 20 C.F.R. § 416.921 ("[a]n impairment or combination of
14
15 impairments is not severe if it does not significantly limit your
16 physical or mental ability to do basic work activities").
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18

19
20 In his decision, the ALJ concluded that "there is no basis for
21 finding that [plaintiff] has a 'severe' mental impairment for the
22 imposition of any mental limitations." (A.R. 10.) The ALJ correctly
23 observed that "there was no evidence of a longitudinal history of a
24 psychiatric impairment, of repeated hospitalizations, or of prolonged
25 outpatient treatment. [Plaintiff] has neither requested nor received
26 extensive psychiatric treatment other than the use of mild anti-
27 depressant medication." (*Id.*)
28

1 Here, plaintiff bore the burden of proving that her alleged mental
2 impairment was disabling, and plaintiff failed to meet that burden. See
3 Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1999); 20 C.F.R. § 416.912
4 ("In general, you have to prove to us that you are blind or disabled.")
5 The only evidence submitted by plaintiff in support of her claimed
6 mental impairment was a one-page note from the McKee Clinic dated
7 September 8, 2006, in which a nurse assessed plaintiff with "tooth pain"
8 and "depression." (A.R. 287.) In support of her allegation of a mental
9 disability, plaintiff asserts that this note "revealed that [p]laintiff
10 complained of 'getting quite frustrated,' and expressed that she felt
11 'very hopeless.'" (Joint Stipulation at 11; A.R. 287.) However, when
12 read in context, plaintiff actually reported to the nurse that she had
13 been involved in a workman's compensation case since April 2006, and was
14 "getting quite frustrated" because "she d[id] not feel like any progress
15 [was] being made," and she was "feeling very hopeless because the bills
16 are adding up." (A.R. 287.) This one-page clinic note appears to be
17 the only evidence of record of any possible mental impairment and is it
18 inadequate to meet plaintiff's burden of establishing a disabling mental
19 impairment. See 20 C.F.R. § 416.921 ("[a]n impairment or combination of
20 impairments is not severe if it does not significantly limit your
21 physical or mental ability to do basic work activities").

22
23 Moreover, at a psychiatric consultative examination with Linda M.
24 Smith, M.D., on February 8, 2007, plaintiff reported that she "doesn't
25 think she has emotional or mental problems," but if she is depressed,
26 then "she might be depressed because of physical problems and not being
27 able to work again." (A.R. 310.) Plaintiff "denie[d] any other
28 symptoms of depression, and she, herself, isn't sure whether she would

1 call this depression, because it is closely related to her physical
2 problems." (*Id.*) Plaintiff reported that she has never received any
3 outpatient psychiatric treatment and has never been hospitalized in a
4 psychiatric ward. (A.R. 311.) Indeed, at the hearing, plaintiff
5 testified that, although she takes Paxil, she does not see a doctor for
6 any mental health treatment. (A.R. 42.) According to Dr. Smith,
7 plaintiff performed "very well in the mental status exam," and "she did
8 very well interpersonally." (A.R. 314.) Dr. Smith made no psychiatric
9 diagnosis and concluded that plaintiff is not impaired, from a
10 psychiatric standpoint, in her ability to work. (*Id.*)

11
12 In her portion of the Joint Stipulation, plaintiff contends that
13 the ALJ "failed to use the proper legal standards" in evaluating
14 plaintiff's mental impairment. (Joint Stip. at 11.) Specifically,
15 plaintiff argues that:

16
17 [w]hen there is a colorable claim of a mental impairment ...
18 the ALJ now must rate the claimant's functional limitations in
19 three areas (activities of daily living; social functioning;
20 and concentration, persistence, or pace) as being none, mild,
21 moderate, marked, or extreme, and also rate the episodes of
22 decompensation as either none, one or two, three, or four or
23 more, and such ratings must be included in the ALJ's written
24 decision.

25
26 (Joint Stip. at 10.) Plaintiff is mistaken.

27
28 As defendant correctly points out, "the ALJ was only required to

1 rate [p]laintiff's degree of limitations in the functional areas of
2 activities of daily living, social functioning, and concentration,
3 persistence, or pace *if* [p]laintiff established a medically determinable
4 impairment." (Joint Stip. at 11; emphasis added); see 416.920a(b) and
5 416.920a(b)(2) ("If we determine that you have a medically determinable
6 mental impairment . . . [w]e must then rate the degree of functional
7 limitation resulting from the impairment(s)"). Plaintiff failed to
8 prove that she had a medically determinable mental impairment, and
9 therefore, the ALJ was not required to rate plaintiff's degree of
10 limitations in any functional area.

11
12 Accordingly, the ALJ did not err in his consideration of
13 plaintiff's alleged mental impairment.

14
15 **III. There Is No Reversible Error With Respect To The ALJ's**
16 **Consideration Of The Side Effects Of Plaintiff's Medications.**

17
18 Pursuant to SSR 96-7p, an ALJ must consider the "type, dosage,
19 effectiveness, and side effects of any medication the individual takes
20 or has taken to alleviate pain or other symptoms." However, an ALJ need
21 only consider those medication side effects that have a "significant
22 impact on an individual's ability to work." Erickson v. Shalala, 9 F.3d
23 813, 817-18 (9th Cir. 1993)(*citation omitted*).

24
25 Plaintiff contends that the ALJ failed to consider the type,
26 dosage, and side effects of plaintiff's medications properly. (Joint
27 Stip. at 13-14.) Plaintiff, however, has not met her burden to show
28 that the use of medications, and any side effects therefrom, had a

1 negative effect on her ability to work. At the hearing, plaintiff
2 testified that she was taking, as medications, Norco, Soma, Paxil, and
3 an occasional aspirin. (A.R. 41-42.) However, plaintiff did not
4 testify that she experienced any side effects from these medications,
5 and there is no medical evidence that she did.

6
7 In fact, in the Disability Report-Adult form (A.R. 108) and
8 Disability Report-Appeal form (A.R. 142), plaintiff listed the
9 medications she was taking and reported that the side effects she
10 experienced were "NONE." In her portion of the Joint Stipulation,
11 plaintiff lists the possible side effects that, according to
12 www.webmd.com, one may experience when taking these medications. But
13 plaintiff fails to cite any medical evidence, or any evidence
14 whatsoever, showing that, or otherwise to explain how and to what
15 extent, these general side effects affected plaintiff's ability to work
16 or caused plaintiff any functional limitations. See Osenbrock v. Apfel,
17 240 F.3d 1157, 1164 (9th Cir. 2001)(side effects not severe enough to
18 impair ability to work are not relevant).

19
20 Accordingly, the ALJ did not err in his consideration of the side
21 effects of plaintiff's medication.

22
23 **IV. Because The ALJ's Findings Regarding Plaintiff's RFC Must Be**
24 **Reassessed On Remand, Vocational Expert Testimony May Be Required.**

25
26 Plaintiff contends that the ALJ erred in using the Grids as a
27 framework to determine that plaintiff was capable of performing other
28 work in the national economy, rather than seeking testimony from a

1 vocational expert. (Joint Stip. at 16-17.) It is well-settled that
2 when a claimant suffers only from exertional limitations, but not non-
3 exertional limitations such as manipulative limitations and pain, the
4 ALJ may apply the Grids, at step five, to match the claimant with
5 appropriate work. Holohan, 246 F.3d at 1208; Reddick, 157 F.3d at 729;
6 Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988). However, an ALJ
7 "may apply the [G]rids in lieu of taking testimony of a vocational
8 expert only when the [G]rids accurately and completely describe the
9 claimant's abilities and limitations" and not in cases where the Grids
10 do not accurately account for a claimant's limitations. Reddick, 157
11 F.3d at 729 (emphasis added); see also Holohan, 246 F.3d at 1208 (as the
12 Grids "are based only on strength factors," they are sufficient to meet
13 the Commissioner's burden at step five "only when a claimant suffers
14 only from exertional limitations").

15
16 Based on the fact that the ALJ's findings regarding the medical
17 opinion evidence must be reevaluated on remand, the ALJ's ultimate RFC
18 assessment may change. If, on remand, the ALJ finds that plaintiff's
19 non-exertional limitations significantly limit the range of work
20 permitted by her exertional limitations, the ALJ must seek testimony
21 from a vocational expert. See Reddick, 157 F.3d at 729 (because the
22 claimant had non-exertional limitations, it was error not to seek the
23 testimony of a vocational expert); Desrosiers, 846 F.2d at 580
24 (Pregerson, J., concurring)(stating that postural limitations barring
25 repeated stooping or bending prevented the claimant from performing the
26 full range of light work, making use of the Grids inappropriate).

1 **V. Remand Is Required.**

2
3 The decision whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's discretion.
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
6 useful purpose would be served by further administrative proceedings, or
7 where the record has been fully developed, it is appropriate to exercise
8 this discretion to direct an immediate award of benefits. *Id.* at 1179
9 ("the decision of whether to remand for further proceedings turns upon
10 the likely utility of such proceedings"). However, where there are
11 outstanding issues that must be resolved before a determination of
12 disability can be made, and it is not clear from the record that the ALJ
13 would be required to find the claimant disabled if all the evidence were
14 properly evaluated, remand is appropriate. *Id.* Here, remand is the
15 appropriate remedy to allow the ALJ the opportunity to remedy the above-
16 mentioned deficiencies and errors. See, e.g., Benecke v. Barnhart, 379
17 F.3d 587, 593 (9th Cir. 2004)(remand for further proceedings is
18 appropriate if enhancement of the record would be useful); McAllister v.
19 Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)(remand appropriate to remedy
20 defects in the record).

21
22 **CONCLUSION**

23
24 Accordingly, for the reasons stated above, IT IS ORDERED that the
25 decision of the Commissioner is REVERSED, and this case is REMANDED for
26 further proceedings consistent with this Memorandum Opinion and Order.

27
28 IT IS FURTHER ORDERED that the Clerk of the Court shall serve

1 copies of this Memorandum Opinion and Order and the Judgment on counsel
2 for plaintiff and for defendant.

3

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LET JUDGMENT BE ENTERED ACCORDINGLY.

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DATED: June 23, 2010

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Margaret A. Nagle

MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

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