

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

| | | |
|---------------------------------|---|-------------------------------|
| MARY A. BANKS, |) | Case No. CV 15-02646-AS |
| |) | |
| Plaintiff, |) | MEMORANDUM OPINION AND |
| |) | |
| v. |) | ORDER OF REMAND |
| |) | |
| CAROLYN W. COLVIN, |) | |
| Acting Commissioner of the |) | |
| Social Security Administration, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On June 8, 2015, Plaintiff filed a Complaint seeking review of the denial of her applications for Disability Insurance Benefits and Supplemental Security Income. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate

1 Judge. (Docket Entry Nos. 11-12). On May 19, 2016, Defendant filed an
2 Answer along with the Administrative Record ("AR"). (Docket Entry Nos.
3 14-15). On November 3, 2016, the parties filed a Joint Stipulation
4 ("Joint Stip.") setting forth their respective positions regarding
5 Plaintiff's claims. (Docket Entry No. 22).
6

7 The Court has taken this matter under submission without oral
8 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
9 Security Case," filed June 9, 2015 (Docket Entry No. 9).
10

11 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
12

13 On May 29, 2012, Plaintiff, formerly employed as an in-home care
14 provider and a restaurant customer service provider (see AR 45, 280-83),
15 filed applications for Disability Insurance Benefits and for
16 Supplemental Security Income, alleging a disability since August 13,
17 2010. (See AR 231-49). On April 11, 2014, the Administrative Law Judge
18 ("ALJ"), Marti Kirby, heard testimony from Plaintiff (represented by
19 counsel) and vocational expert David Rinehart. (See AR 41-65). On
20 August 15, 2014, the ALJ issued a decision denying Plaintiff's
21 applications. (See AR 23-34). After determining that Plaintiff had
22 severe impairments -- "chronic obstructive pulmonary disease; asthma;
23 degenerative joint disease lumbosacral spine; chondrocalcinosis of the
24 right knee with mild degenerative changes with mild medial joint space
25 narrowing; mild degenerative changes in the acetabular region of the
26 right leg; diabetes mellitus; depression; hypertension; obesity;
27
28

1 learning disorder; and obstructive sleep apnea" (AR 25)¹ -- and that
2 Plaintiff did not have an impairment or combination of impairments that
3 met or equaled the severity of one of the Listed Impairments (26-28),
4 the ALJ found that Plaintiff had the residual functional capacity
5 ("RFC")² to perform light work³ with the following limitations:
6 standing/walking for 4 hours out of an 8-hour workday, but no more than
7 10-15 minutes at a time; sitting for 6 hours out of an 8-hour workday,
8 with brief position changes after one hour; occasional bending,
9 stooping, climbing steps and balancing; no kneeling, crawling, squatting
10 or crouching; no climbing ladders, ropes and scaffolds; no working at
11 unprotected heights or around moving machinery or other hazards; can
12 perform unskilled work; avoid concentrated exposure to fumes, odors,
13 gases or other pulmonary irritants and a climate controlled environment;
14 ready access to a restroom (i.e., within the same building); no
15 repetitive or constant pushing/pulling with the lower extremities such
16 as operating foot controls; and avoid concentrated exposure to
17 temperature extremes. (AR 28-32). The ALJ then determined that
18 Plaintiff was unable to perform any past relevant work (AR 32), but that
19 jobs existed in significant numbers in the national economy that
20 Plaintiff can perform, and therefore found that Plaintiff was not

23 ¹ The ALJ determined that some of Plaintiff's impairments --
24 history of diverticulitis, status post colectomy and colostomy which was
25 reversed in 2010; history of substance abuse, history of hernia repair
surgery; and substance abuse disorder -- were not severe. (AR 26).

26 ² A Residual Functional Capacity is what a claimant can still do
27 despite existing exertional and nonexertional limitations. See 20
C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

28 ³ "Light work involves lifting no more than 20 pounds at a time
with frequent lifting or carrying of objects weighing up to 10 pounds."
20 C.F.R. §§ 404.1567(b), 416.967(b).

1 disabled within the meaning of the Social Security Act. (AR 33-34).

2
3 Plaintiff requested that the Appeals Council review the ALJ's
4 decision. (See AR 19). The request was denied on October 30, 2015.
5 (See AR 1-5). The ALJ's decision then became the final decision of the
6 Commissioner, allowing this Court to review the decision. See 42 U.S.C.
7 §§ 405(g), 1383(c).

8
9 **PLAINTIFF'S CONTENTIONS**

10
11 Plaintiff alleges that the ALJ erred in failing to properly: (1)
12 determine whether Plaintiff could perform occupations identified by the
13 vocational expert; (2) determine Plaintiff's mental RFC; and (3)
14 evaluate whether Plaintiff met Listing 12.05C. (See Joint Stip. at 5-
15 11, 16-21, 29-37, 43-44).

16
17 **DISCUSSION**

18
19 After consideration of the record as a whole, the Court finds that
20 Plaintiff's second claim of error warrants a remand for further
21 consideration. Accordingly, the Court will not address Plaintiff's
22 first and third claims of error.

23 //
24 //
25 //

1 **A. The ALJ Erred in Failing to Consider the Effect of Plaintiff's**
2 **Difficulties in Concentration, Persistence or Pace in Determining**
3 **Plaintiff's RFC**

4
5 Plaintiff asserts that the ALJ failed to include in the
6 hypothetical to the vocational expert, and therefore failed to take into
7 account, Plaintiff's moderate difficulties in concentration, persistence
8 or pace in determining Plaintiff's RFC. (See Joint Stip. at 18-21, 29-
9 30). Defendant asserts that the ALJ's determination about Plaintiff's
10 RFC (specifically, that Plaintiff could perform only unskilled work)
11 adequately took into account Plaintiff's benign mental limitations.
12 (See Joint Stip. at 21-29).⁴

13
14 At step three of the sequential evaluation process, the ALJ
15 determined that Plaintiff had moderate difficulties in concentration,
16 persistence or pace. The basis of that determination was the opinion of
17 the psychological consultative examiner, Kathy A. Vandenburg, Ph.D.
18 (see AR 507)⁵. (See AR 27).⁶

19
20 ⁴ Defendant contends that a finding about a claimant's
21 limitations in concentration, persistence or pace is not a RFC
22 determination but rather is related to the determination about whether
23 a claimant has a severe impairment [step two of the sequential
24 evaluation process] and/or met or medically equaled any of the listed
25 impairments [step three of the sequential evaluation process]. (See
26 Joint Stip. at 21-24). The Court does not agree. The statutes and case
27 cited by Defendant do not support that contention.

28 ⁵ In the section labeled "Prognostic Impressions and Medical
Source Statement," Dr. Vandenburg wrote:

- 26 4. Ability to complete simple tasks. Limitations: From a
27 purely psychological perspective, this claimant is likely
28 able to complete a simple repetitive task that does not
involve a significant amount of memory or intellectual
functioning. She does complete tasks slightly slower
(continued...)

1 A hypothetical question to a vocational expert must accurately
2 reflect a claimant's limitations, including any limitations in
3 maintaining concentration, persistence and pace. See Robbins v. Social
4 Sec. Admin., 466 F.3d 880, 886 (9th Cir. 2006)(". . . [I]n hypotheticals
5 posed to a vocational expert, the ALJ must only include those
6 limitations supported by substantial evidence"); Thomas v. Barnhart, 278
7 F.3d 947, 956 (9th Cir. 2002)("In order for the testimony of a VE to be
8 considered reliable, the hypothetical posed must include 'all of the
9 claimant's functional limitations, both physical and mental' supported
10 by the record.")(citations omitted); Embrey v. Bowen, 849 F.2d 418, 422
11 (9th Cir. 1988)("Hypothetical questions posed to the vocational expert
12 must set out *all* the limitations and restrictions of the particular
13 claimant"). Where a hypothetical question fails to "set out all
14 of the claimant's impairments," the vocational expert's answers to the
15 question cannot constitute substantial evidence to support the ALJ's
16 decision. See DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991);

17
18
19 ⁵ (...continued)
20 than others and may have slight to moderate impairment
21 maintaining appropriate pace and persistence. . . .
(AR 507).

22 ⁶ The ALJ wrote:
23 With regard to concentration, persistence or pace, the
24 claimant has moderate difficulties. The claimant alleges some
25 deficiency with her memory, yet the mental status examination
26 of record was fairly benign in this regard (Ex 6F) The
27 claimant's statements of record indicate that she uses the
28 computer, drives, and watches television. These activities
require some degree of sustained attention. However, based on
the reporting of the consultative examiner that the claimant
may have up to a moderate degree of impairment in maintaining
pace and persistence (Ex 6F pg 7), the undersigned assigns
moderate difficulties in this area.
(AR 27).

1 Gamer v. Secretary, 815 F.2d 1275, 1280 (9th Cir. 1987); Gallant v.
2 Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984).

3
4 Here, the ALJ failed to give the vocational expert a hypothetical
5 question that included Plaintiff's moderate difficulties in her ability
6 to maintain concentration, persistence or pace. See Willard v. Colvin,
7 2016 WL 237068, *3 (C.D. Cal. Jan. 20, 2016) ("But the Ninth Circuit has
8 held that when the medical evidence establishes and the ALJ accepts that
9 the claimant has moderate limitation in maintaining concentration,
10 persistence, and pace, that limitation must be reflected in the
11 Plaintiff's RFC and in the hypothetical presented to the vocational
12 expert.") (citing Brink v. Comm'r. Soc. Sec. Admin. 343 Fed.Appx 211,
13 212 (9th Cir. 2009) [rejecting the Commissioner's contention that the
14 phrase "simple, repetitive work" encompasses difficulties with
15 concentration, persistence or pace]); Bentacourt v. Astrue, 2010 WL
16 4916604, *3 (C.D. Cal. Nov. 27, 2010) (the ALJ failed to include the
17 claimant's limitations in concentration, persistence and pace in a
18 hypothetical question to the vocational expert); Lubin v. Comm'r of Soc.
19 Sec. Admin., 507 Fed.Appx 709, 712 (9th Cir. 2012) ("Although the ALJ
20 found that [the claimant] suffered moderate difficulties in maintaining
21 concentration, persistence, or pace, the ALJ erred by not including this
22 limitation in the residual functional capacity determination or in the
23 hypothetical question to the vocational expert.").

24
25 Defendant relies on Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1174
26 (9th Cir. 2008) as support for the assertion that the ALJ's
27 determination that Plaintiff could perform jobs involving unskilled work
28

1 adequately captured Plaintiff's moderate mental limitations. (See Joint
2 Stip. at 26-27). Stubbs-Danielson is distinguishable.

3
4 In Stubbs-Danielson v. Astrue, 539 F.3d at 1174, the Ninth Circuit
5 held that "an ALJ's assessment of a claimant adequately captures
6 restrictions related to concentration, persistence, or pace when the
7 assessment is consistent with restrictions identified in the medical
8 testimony." In Stubbs-Danielson, one doctor found that the plaintiff
9 had a "slow pace, both with thinking and her actions," was moderately
10 limited in her ability "to perform at a consistent pace without an
11 unreasonable number and length of rest periods, and was mildly limited
12 in other mental functioning areas, and another doctor found the
13 plaintiff had a "slow pace, both in thinking & actions" and was
14 moderately limited in other mental functional limitations. Id. at 1173.
15 Based on the fact that there was medical testimony -- the second
16 doctor's opinion, that the plaintiff had the ability to perform simple
17 tasks, the Ninth Circuit found that the ALJ did not err in finding that
18 the plaintiff had the RFC to perform simple, routine work. Id. at 1173-
19 75 ("The ALJ translated Stubbs-Danielson's condition, including the pace
20 and mental limitations, into the only concrete restrictions available to
21 him--Dr. Eather's recommended restriction to 'simple tasks.'"). While
22 in Stubbs-Danielson the ALJ's determination that Plaintiff could perform
23 simple, routine work was supported by one doctor's opinion, the ALJ's
24 finding here that Plaintiff could perform unskilled work was not based
25 on any doctor's opinion.

26
27 The ALJ did not rely on medical evidence in the record, including
28 a medical source statement, establishing that Plaintiff was capable of

1 unskilled work *despite her moderate limitation in concentration,*
2 *persistence, or pace.* Therefore, the ALJ erred in failing to consider
3 and include that limitation in determining Plaintiff's ability to engage
4 in unskilled work. See Brink v. Commissioner Social Sec. Admin., 343
5 Fed.Appx 211, 212 (9th Cir. Aug. 18, 2009)(rejecting Commissioner's
6 contention that the phrase "simple, repetitive work" encompasses
7 difficulties with concentration, persistence or pace); Janovich v.
8 Colvin, 2014 WL 4370673, *7 (E.D. Cal. 2014)(when "the ALJ found at step
9 3 of the sequential evaluation that the medical record of evidence
10 established that plaintiff had moderate difficulties in maintaining
11 concentration, persistence or pace, Stubbs-Danielson is not controlling
12 here"); Feltis v. Astrue, 2012 WL 2684994, *4 (E.D. Cal. July 6,
13 2012)(the RFC failed to reflect the ALJ's stated acceptance of
14 consultative examiner's findings regarding impact of the plaintiff's
15 impairment on pace, endurance and ability to deal with changes in a
16 routine work setting); Lim v. Astrue, 2011 WL 3813100, *7 (E.D. Cal.
17 Aug. 29, 2011)(the ALJ failed to incorporate limitation of sustained
18 concentration into the RFC); Bentancourt v. Astrue, 2010 WL 4916604, *3
19 (C.D. Cal. Nov. 27, 2010)(the ALJ failed to include the plaintiff's
20 limitations in concentration, persistence and pace in the hypothetical
21 question to the vocational expert); see also Valentine v. Comm'r of Soc.
22 Sec. Admin., 574 F.3d 685, 6910 (9th Cir. 2009)("[A]n RFC that fails to
23 take into account a claimant's limitations is defective.").

24 //

25 //

26 //

27

28

1 **B. Remand Is Warranted**

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,
7 or where the record has been fully developed, it is appropriate to
8 exercise this discretion to direct an immediate award of benefits. Id.
9 at 1179 ("[T]he decision of whether to remand for further proceedings
10 turns upon the likely utility of such proceedings."). However, where,
11 as here, the circumstances of the case suggest that further
12 administrative review could remedy the Commissioner's errors, remand is
13 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
14 Harman v. Apfel, supra, 211 F.3d at 1179-81.

15
16 Since the ALJ failed to present a complete hypothetical to the
17 vocational expert, remand is appropriate. Because outstanding issues
18 must be resolved before a determination of disability can be made, and
19 "when the record as a whole creates serious doubt as to whether the
20 [Plaintiff] is, in fact, disabled within the meaning of the Social
21 Security Act," further administrative proceedings would serve a useful
22 purpose and remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th
23 Cir. 2014)(citations omitted).⁷

24
25 ⁷ The Court has not reached any other issue raised by Plaintiff
26 except to determine that reversal with a directive for the immediate
27 payment of benefits would not be appropriate at this time.
28 "[E]valuation of the record as a whole creates serious doubt that
Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claims regarding whether the ALJ properly determined that Plaintiff
(continued...)

1
2
3 **ORDER**

4 For the foregoing reasons, the decision of the Commissioner is
5 reversed, and the matter is remanded for further proceedings pursuant
6 to Sentence 4 of 42 U.S.C. § 405(g).

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8
9 DATED: January 11, 2017
10
11

12 _____ /s/
13 ALKA SAGAR
14 UNITED STATES MAGISTRATE JUDGE
15
16
17
18
19
20
21
22
23
24

25 _____
26 ⁷ (...continued)
27 could perform occupations identified by the vocational expert (see Joint
28 Stip. at 5-11, 16-18) and whether the ALJ properly evaluated whether
Plaintiff's impairments met Listing 12.05C (see Joint Stip. at 31-37,
43-44). Because this matter is being remanded for further
consideration, these issues should also be considered on remand.