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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DEBORAH A. SIEGEL,

Plaintiff,

No. CIV S-08-0801 GGH

vs.

MICHAEL J. ASTRUE,  
Commissioner of  
Social Security,

ORDER

Defendant.

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Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). For the reasons that follow, Plaintiff’s Motion for Summary Judgment or Remand is granted in part, the Commissioner’s Cross Motion for Summary Judgment is denied, and this matter is remanded to the ALJ for further findings as directed in this opinion. The Clerk is directed to enter judgment for plaintiff.

BACKGROUND

Plaintiff, born October 13, 1956, applied on December 4, 2003 for disability benefits. (Tr. at 79.) Plaintiff alleged she was unable to work due to headaches, depression, arthritis, back and neck injuries. (Tr. at 53.)

1 In a decision dated September 26, 2006, ALJ Mark C. Ramsey determined  
2 plaintiff was not disabled. The ALJ made the following findings:<sup>1</sup>

- 3 1. The claimant has not engaged in substantial gainful activity  
4 since July 31, 2001, the alleged onset date (20 CFR  
416.920(b) and 416.971 *et seq.*).
- 5 2. The claimant has the following severe combination of  
6 impairments: chronic low back pain, degenerative  
7 osteoarthritis of the cervical and lumbar spine and hips, and  
adjustment disorder with mixed anxiety and depressive  
features (20 CFR 416.920(c)).
- 8 3. The claimant does not have an impairment or combination  
9 of impairments that meets or medically equals one of the  
10 listed impairments in 20 CFR Part 404, Subpart P,  
Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).
- 11 4. After careful consideration of the entire record, the  
undersigned finds that the claimant has the residual

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12 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
13 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to  
14 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in  
15 part, as an “inability to engage in any substantial gainful activity” due to “a medically  
16 determinable physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).  
A parallel five-step sequential evaluation governs eligibility for benefits under both programs.  
See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.  
137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

17 Step one: Is the claimant engaging in substantial gainful  
activity? If so, the claimant is found not disabled. If not, proceed  
18 to step two.

19 Step two: Does the claimant have a “severe” impairment?  
If so, proceed to step three. If not, then a finding of not disabled is  
appropriate.

20 Step three: Does the claimant’s impairment or combination  
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
21 404, Subpt. P, App.1? If so, the claimant is automatically  
determined disabled. If not, proceed to step four.

22 Step four: Is the claimant capable of performing his past  
work? If so, the claimant is not disabled. If not, proceed to step  
23 five.

24 Step five: Does the claimant have the residual functional  
capacity to perform any other work? If so, the claimant is not  
disabled. If not, the claimant is disabled.

25 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

26 The claimant bears the burden of proof in the first four steps of the sequential evaluation  
process. Bowen, 482 U.S. at 146 n.5, 107 S. Ct. at 2294 n.5. The Commissioner bears the  
burden if the sequential evaluation process proceeds to step five. Id.

1 functional capacity to lift 20 pounds occasionally and 10  
2 pounds frequently, walk/stand six hours, sit six hours,  
3 occasionally perform postural activities reach overhead  
4 occasionally (these are supported by her chronic low back  
5 pain, degenerative osteoarthritis of the cervical and lumbar  
6 spine and hips, coupled with her partially credible pain  
7 complaints as discussed below), and mentally perform  
8 simple routine tasks (this is supported by her adjustment  
9 disorder with mixed anxiety and depressive features).

6 5. The claimant has no past relevant work (20 CFR 416.965).

7 6. The claimant was born on October 13, 1956 and was 47  
8 years old on the date the application was filed, which is  
9 defined as a younger individual age 45-49 (20 CFR  
10 416.963).

11 7. The claimant has a limited education and is able to  
12 communicate in English (20 CFR 416.964).

13 8. Transferability of job skills is not an issue because the  
14 claimant does not have past relevant work (20 CFR  
15 416.968).

16 9. Considering the claimant's age, education, work  
17 experience, and residual functional capacity, there are jobs  
18 that exist in significant numbers in the national economy  
19 that the claimant can perform (20 CFR 416.960(c) and  
20 416.966).

21 10. The claimant has not been under a "disability," as defined  
22 in the Social Security Act, since October 16, 2003 (20 CFR  
23 416.920(g)), the date the application was filed.

24 (Tr. at 26-33.)

#### 25 ISSUES PRESENTED

26 Plaintiff has raised the following issues: A. Whether the ALJ Failed to Fully and  
Fairly Develop the Record Regarding Plaintiff's Spinal Impairments; B. Whether the ALJ Erred  
in Determining That Plaintiff Was Not Fully Credible; C. Whether the ALJ's Residual  
Functional Capacity Assessment That Plaintiff's Non-exertional Impairments Did not  
Significantly Limit Her from Performing the Full Range of Light Work is Not Supported by  
Substantial Evidence; and D. Whether the Appeals Council Erred in Failing to Review  
Plaintiff's Case After Receiving New and Material Evidence.

1 LEGAL STANDARDS

2 The court reviews the Commissioner’s decision to determine whether (1) it is  
3 based on proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in  
4 the record as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir.1999).  
5 Substantial evidence is more than a mere scintilla, but less than a preponderance. Connett v.  
6 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence  
7 as a reasonable mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d  
8 625, 630 (9<sup>th</sup> Cir. 2007), *quoting* Burch v. Barnhart, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005). “The ALJ  
9 is responsible for determining credibility, resolving conflicts in medical testimony, and resolving  
10 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).  
11 “The court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one  
12 rational interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

13 ANALYSIS

14 A. Development of the Record and Evidence Submitted to Appeals Council Regarding  
15 Plaintiff’s Spinal Impairments

16 Plaintiff first contends that the ALJ failed to fully develop the record because he  
17 did not obtain records of the results of the recommended EMG/NVC testing of plaintiff’s lower  
18 extremities to determine whether there was evidence of neurological impairment. Instead, he  
19 concluded only that she had orthopedic degenerative impairments. She claims that pain and  
20 muscle spasms in her legs and feet causing her to be unable to sit or stand for more than twenty  
21 minutes are attributable to a neurological cause.<sup>2</sup>

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23 <sup>2</sup> Plaintiff also complains that the ALJ failed to address certain treatment records  
24 indicating that plaintiff was treated at the Emergency Room for pain, and that the ALJ only noted  
25 part of the MRI results of plaintiff’s cervical spine in his decision. Pl.’s Mot. at 15-16. Although  
26 the ALJ is not required to discuss every piece of evidence, the record does need to demonstrate  
that he considered all of the evidence, and in this case it does. Clifton v. Chater, 79 F.3d 1007,  
1009-10 (10<sup>th</sup> Cir. 1996) (finding ALJ’s summary conclusion that appellant’s impairments did  
not meet or equal any Listed Impairment was a bare conclusion beyond meaningful judicial

1           The records to which plaintiff refers are a prescription by John Stack, Physician's  
2 Assistant, on April 13, 2005, for "EMG/NCV bilat LE 2 peripheral neuropathy." (Id. at 364.)  
3 The only record indicating that the EMG/NCV was conducted is a chart note on April 29, 2005,  
4 which states, "leg pain etiology unclear had EMG/NCV exam WNL (within normal limits)." (Id.  
5 at 362.) The ALJ was not required to obtain the 2005 EMG/NCV as Mr. Stack's description of  
6 the result of this study was normal and did not explain the cause of plaintiff's leg pain. It does  
7 not appear that the study itself would have shed further light on plaintiff's condition.

8           More importantly, there is a later record reflecting an electromyogram/nerve  
9 conduction study which was performed on June 19, 2007. The results were within normal limits  
10 for the nerve conduction studies, and in regard to the EMG, the finding was "decreased  
11 recruitment, increased amplitude and polyphasic motor units in the vastus medialis, tensor fascia  
12 lata and the lower lumbar paraspinal muscles bilaterally." (Tr. at 390-91.) The study showed  
13 evidence of "bilateral chronic L4 radiculopathy, without ongoing denervation." There was no  
14 evidence of peripheral neuropathy. (Id. at 391.)

15           With this more recent study in the record, it is not clear why plaintiff chooses to  
16 focus on a 2005 study that is not in the record. Although the 2007 study was not before the ALJ,  
17 it was considered by the Appeals Council and therefore is properly before this court.

18           The Appeals Council denied plaintiff's request for review on March 14, 2008, and  
19 wrote that it considered the newly admitted evidence, but found it did not provide a basis for  
20 changing the ALJ's decision. (Tr. at 6-7.) Plaintiff argues that the Appeals Council erred by  
21 failing to find this electrodiagnostic testing and other evidence to be material in regard to  
22 neurological abnormalities.

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25 review). The ALJ referred to the cervical MRI from April 16, 2003, and set forth its impressions  
26 in full. (Tr. at 28, 298.) He was not required to recite the entirety of the MRI analysis.

          The court finds that the ALJ carefully considered those records which were before him.  
Therefore, this court will focus only on those records not before the ALJ directly.

1 Here, the Appeals Council “declined to review” the ALJ’s decision after  
2 considering the case on the merits, examining the entire record, including the additional material,  
3 and concluding that the ALJ’s decision was proper. If the Appeals Council denies review, the  
4 decision of the ALJ is the final decision of the Secretary. If the Appeals Council accepts review  
5 and renders a decision, the final decision of the Secretary is that of the Appeals Council. 20  
6 C.F.R. § 404.981; Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988). The situation here is a  
7 hybrid of the usual situation where the Appeals Council has denied review, but has nevertheless  
8 ruled upon the newly submitted evidence. In these circumstances, the district court reviews the  
9 decision of the ALJ as supplemented by the Appeal Council’s comments about the new evidence.  
10 This “new” evidence is part of the record before the court. See Harman v. Apfel, 211 F.3d 1172,  
11 1180 (9th Cir. 2000) (additional materials are properly considered where the Appeals Council  
12 addressed them in the context of denying claimant’s request for review).

13 This 2007 EMG report, which was not before the ALJ, indicates radiculopathy for  
14 the first time where prior records had definitively shown no radiculopathy. Therefore, fairness  
15 dictates that the ALJ be given the opportunity to review these records for a new determination.

16 The record before the ALJ was otherwise fully developed in regard to plaintiff’s  
17 back and leg pain. The ALJ discussed plaintiff’s April 16, 2003 MRI of the cervical spine which  
18 indicated no neural foraminal stenosis throughout. At C2-3, there was no disc protrusion or  
19 spinal stenosis. At C3-4 there was “mild posterior central disc protrusion, tracking inferiorly a  
20 few mm along the posterior C4 vertebral body margin and indenting the ventral aspect of the  
21 cecal sac and touching the ventral aspect of the spinal cord, but without any spinal cord  
22 displacement of compression and with a few mm of CSF posterior to the cord.”<sup>3</sup> The remainder  
23 of the cervical spine was normal except for a mild disc osteophyte complex at C5-6. (Tr. at 298.)

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25 <sup>3</sup> This description of C3-4 is part of what plaintiff claims the ALJ failed to discuss. See  
26 discussion *supra* n. 2.

1           The ALJ relied in particular on two evaluations by consulting neurologist Dr.  
2 McIntire who had at his disposal several medical records. (Id. at 305, 178.) His first exam on  
3 March 27, 2004, found a pelvic deformity and diagnosed degenerative osteoarthritis of the  
4 cervical and lumbar spine and hips. (Id. at 181.) At this time, Dr. McIntire opined that although  
5 plaintiff described a history of cervical and lumbar pains, there were no findings suggesting  
6 cervical or lumbar *radiculopathy* or myelopathy. (emphasis added). Plaintiff did have loss of  
7 range of motion of the lumbar and cervical spine, however. Consequently, this neurologist  
8 limited plaintiff to lifting or carrying 15 pounds frequently and 30 pounds occasionally. There  
9 were no other limitations. (Id. at 181.) The ALJ fully discussed this report. (Id. at 27.)

10           On October 24, 2004, Dr. McIntire again examined plaintiff with the benefit of  
11 her lumbar CT scan<sup>4</sup> and a bone scan report. He found mild loss of range of motion of the  
12 lumbar spine, normal motor strength, normal sensory exam, and normal deep tendon reflexes.  
13 He questioned plaintiff's history of lumbar strain. He described her subjective lumbar pain as  
14 "nonradicular in character." He once again opined that objectively, there were no findings of  
15 lumbar *radiculopathy* or myelopathy. (emphasis added). Based on the mild loss of range of  
16 motion, however, he would restrict plaintiff to lifting and carrying only 25 pounds frequently and  
17 50 pounds occasionally. There were no other functional limitations. (Id. at 307.)

18           It would seem that Dr. McIntire, a neurologist, would have understood the  
19 significance of a later report noting bilateral chronic radiculopathy, and it may have affected his  
20 opinion.

21           Exam by another neurologist, Dr. Engel, on March 4, 2003, revealed "no  
22 *radicular* symptoms either cervical or lumbar." (Tr. at 328.) (emphasis added). Therefore, based  
23 on all these prior records indicating no radiculopathy, this new evidence is material in that it may  
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25           <sup>4</sup> The lumbar CT scan, dated July 9, 2004, showed mild to moderate broad based disc  
26 bulge at L3-4 and L4-5. There was no disc bulge at L5-S1. There was no disc protrusion or  
canal stenosis. (Tr. at 292.)

1 affect the outcome of the case. The case will be remanded for consideration of these records by  
2 the ALJ.

3 Other records submitted to the Appeals Council also warrant remand for the  
4 ALJ's consideration as they indicate other changes in addition to radiculopathy. For example, on  
5 December 7, 2006, another CT scan of plaintiff's cervical spine was taken. The impression was  
6 "moderate neural foraminal compromise of uncinatate spurring on the right at C5-6, unchanged.  
7 Interval new process or evidence of disc herniation is not proven." (Id. at 421.)

8 Plaintiff points to other records in support of her request for remand; however, not  
9 all of the records appear to be material. On December 11, 2006, an electrodiagnostic medicine  
10 consultation was performed. At this time, nerve conduction studies of the upper extremities were  
11 normal "with the exception of minimal prolongation of the distal sensory latencies on the right.  
12 Possibly this is an effect of temperature despite warming prior to testing." (Id. at 392-93.) There  
13 was no evidence of ongoing cervical radiculopathy, peripheral neuropathy, ulnar neuropathy or  
14 significant carpal tunnel syndrome. Dr. Filbrandt recommended correlating this study with other  
15 diagnostic test results, and suggested physical therapy. (Id. at 393.)

16 This study was repeated on October 26, 2007, and showed a normal EMG of the  
17 right upper extremity; however, the nerve conduction study showed a very mild median sensory  
18 conduction delay across the wrists. The conclusion was very mild bilateral carpal tunnel  
19 syndrome, which was marginally worse than the December 11, 2006 study. Nevertheless, there  
20 was no evidence of cervical radiculopathy, plexopathy, peripheral neuropathy or ulnar  
21 neuropathy. It was recommended that plaintiff undergo physical therapy and regular physical  
22 exercise. (Id. at 388-89.)

23 The aforementioned records are only a few of the approximately forty pages of  
24 records submitted to the Appeals Council. Of course, it is up to the ALJ to determine the  
25 significance of these records and whether further medical evaluation is necessary.

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1           B. Whether the ALJ Erred in Determining That Plaintiff Was Not Fully Credible

2           Plaintiff contends that the ALJ's finding that plaintiff was not fully credible is not  
3 supported by substantial evidence.

4           The ALJ determines whether a disability applicant is credible, and the court defers  
5 to the ALJ who used the proper process and provided proper reasons. See, e.g., Saelee v. Chater,  
6 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make an explicit  
7 credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad v.  
8 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be  
9 supported by "a specific, cogent reason for the disbelief").

10           In evaluating whether subjective complaints are credible, the ALJ should first  
11 consider objective medical evidence and then consider other factors. Vasquez v. Astrue, 547  
12 F.3d 1101 (9<sup>th</sup> Cir. 2008); Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.1991) (en banc). The  
13 ALJ may not find subjective complaints incredible solely because objective medical evidence  
14 does not quantify them. Bunnell at 345-46. If the record contains objective medical evidence of  
15 an impairment possibly expected to cause pain, the ALJ then considers the nature of the alleged  
16 symptoms, including aggravating factors, medication, treatment, and functional restrictions. See  
17 id. at 345-47. The ALJ also may consider the applicant's: (1) reputation for truthfulness or prior  
18 inconsistent statements; (2) unexplained or inadequately explained failure to seek treatment or to  
19 follow a prescribed course of treatment; and (3) daily activities.<sup>5</sup> Smolen v. Chater, 80 F.3d  
20 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR  
21 55406-01; SSR 88-13. Work records, physician and third party testimony about nature, severity,  
22 and effect of symptoms, and inconsistencies between testimony and conduct, may also be

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23           <sup>5</sup> Daily activities which consume a substantial part of an applicants day are relevant.  
24 "This court has repeatedly asserted that the mere fact that a plaintiff has carried on certain daily  
25 activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in  
26 any way detract from her credibility as to her overall disability. One does not need to be utterly  
incapacitated in order to be disabled." Vertigan v. Halter, 260 F.3d 1044, 1049 (9th Cir. 2001)  
(quotation and citation omitted).

1 relevant. Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ  
2 may rely, in part, on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453,  
3 1458 (9th Cir. 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900  
4 F.2d 172, 177, n.6 (9th Cir. 1990). Plaintiff is required to show only that her impairment “could  
5 reasonably have caused some degree of the symptom.” Vasquez, 547 F.3d at 1104, *quoting*  
6 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9<sup>th</sup> Cir. 2007, Smolen, 80 F.3d at 1282. Absent  
7 affirmative evidence demonstrating malingering, the reasons for rejecting applicant testimony  
8 must be clear and convincing, and supported by reference to specific facts in the record.  
9 Vasquez, 547 F.3d at 1104-05.

10           Here, the ALJ analyzed plaintiff’s credibility both in terms of her mental  
11 complaints and her pain testimony. His analysis of each area was quite developed, with a full  
12 page devoted to each of these areas. In regard to mental complaints, he found plaintiff to be not  
13 fully credible. The ALJ referred to Dr. Kalman’s report which noted the lack of hospitalizations  
14 or outpatient treatment for depression. (Tr. at 29.) He also listed plaintiff’s daily activities which  
15 were quite social in nature, and included visiting with family, having a few friends, and talking  
16 on the telephone daily. The mental status exam was normal, and plaintiff’s GAF was 65.<sup>6</sup> Dr.  
17 Kalman’s opinion was that plaintiff could deal with others, concentrate and withstand pressure  
18 and stress of daily work activities. (Id., 183-85.) The ALJ additionally noted that plaintiff had  
19 not been hospitalized for her mental problems, and records indicated that she was doing well  
20 without medications. She did not receive individual or group therapy and was not referred to  
21 mental health professionals. Her diagnosis of bipolar disorder was not made by a psychologist or  
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23           <sup>6</sup> Plaintiff’s GAF was 63 at this time. GAF is a scale reflecting the “psychological,  
24 social, and occupational functioning on a hypothetical continuum of mental health-illness.”  
25 Diagnostic and Statistical Manual of Mental Disorders 32 (4th ed.1994) (“DSM IV”).  
26 According to the DSM IV, A GAF of 61-70 indicates “some mild symptoms (e.g., depressed  
mood and mild insomnia) or some difficulty in social, occupational, or school functioning (e.g.,  
occasional truancy, or theft within the household), but generally functioning pretty well, has  
some meaningful interpersonal relationships.” DSM IV at 32.

1 psychiatrist. (Id. at 30.)

2 In regard to plaintiff's complaints of pain, the ALJ also fully analyzed her  
3 credibility on the record before him. With a full page of analysis, he first noted that the SA  
4 physicians found that plaintiff could do light work and Dr. McIntire thought she could do  
5 medium work, based on almost normal examination findings. (Id. at 30-31.) The ALJ also noted  
6 that the treating records from Oroville Hospital documented only mild conditions in objective  
7 testing. Further, the ALJ outlined the findings of Mr. Stack, PA, and Dr. Engel, explaining that  
8 they did not support the degree of pain alleged by plaintiff. Finally, the ALJ noted the lack of  
9 surgery, chiropractor treatment, pain clinic treatment, and steroid injections. (Id. at 31.)

10 Nevertheless, due to the new evidence submitted after the ALJ's decision, there is  
11 a real possibility that the findings of radiculopathy could change the ALJ's credibility analysis.  
12 On remand, the ALJ shall reconsider plaintiff's credibility in light of the newly submitted  
13 evidence.

#### 14 C. Residual Functional Capacity

15 Plaintiff also claims that the ALJ erred in applying the grids where the state  
16 agency physician found that she was limited in reaching to one third of a work day. Plaintiff  
17 contends that when this limitation is combined with Dr. Kalman's finding that plaintiff was  
18 moderately limited in her ability to maintain concentration, persistence and pace, she can not do  
19 the full range of unskilled light work, and the ALJ erred in so finding.

20 The new evidence which the ALJ will be required to consider on remand may also  
21 affect this step of the sequential analysis. Therefore, the ALJ shall make a further determination  
22 of the type of work plaintiff can do after he has reconsidered plaintiff's limitations based on the  
23 new evidence.

#### 24 CONCLUSION

25 For the foregoing reasons, plaintiff's motion for summary judgment or remand is  
26 granted in part; defendant's motion for summary judgment is denied. This case is remanded to

1 the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for consideration of medical  
2 evidence presented to the Appeals Council, and its effect on plaintiff's residual functional  
3 capacity. The Clerk is directed to enter Judgment for plaintiff.

4 DATED: 07/30/09

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWS  
U.S. MAGISTRATE JUDGE

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