

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
FOR THE EASTERN DISTRICT OF CALIFORNIA

SCOTT A. MAGNUSON,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:16-cv-02653 CKD

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). Defendant concedes that the ALJ committed reversible error and moves to remand this case for further proceedings. (ECF No. 24.) Plaintiff opposes the motion, arguing that the proper remedy is the reinstatement of benefits or, alternatively, a narrowly tailored remand. (ECF No. 25.) For the reasons discussed below, the court will recommend that plaintiff’s motion for summary judgment be granted and this matter remanded for further proceedings on disputed issues.

BACKGROUND

On September 1, 2012, when he was 45 years old, plaintiff – who had worked as an electrician, truck driver, roofer, and licensed contractor – was in a head-on automobile crash

1 when the truck in which he was a restrained passenger was hit on the passenger side. He suffered
2 traumatic brain injury and a fractured pelvis, among other injuries. Administrative Transcript
3 (“AT”) 43-46, 313, 345. Plaintiff was unresponsive at the scene and transported to the
4 emergency room, where he was intubated and discovered to have a left thalamic brain bleed. AT
5 345-347. The next day, plaintiff underwent brain surgery to insert a right frontal and intercranial
6 pressure monitor. AT 366. Days later, he underwent surgery for his fractured pelvis. AT 363.
7 On September 28, 2012, plaintiff began acute inpatient rehabilitation that included physical
8 therapy, occupational therapy, and speech therapy. AT 313-317, 345. On October 10, 2012,
9 plaintiff was discharged home with instructions to be supervised 24 hours a day and use a
10 prescribed walker. AT 313-314, 474, 715-716. Over the next two years, plaintiff received
11 extensive medical treatment related to his traumatic brain injury.

12 Plaintiff applied on April 18, 2013 for disability and disability insurance benefits, alleging
13 disability beginning September 21, 2012. See AT 14. In a decision dated April 16, 2015, the
14 ALJ determined that plaintiff was not disabled¹ at any time from September 21, 2012 through

15 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
16 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
17 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
18 part, as an “inability to engage in any substantial gainful activity” due to “a medically
19 determinable physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).
20 A parallel five-step sequential evaluation governs eligibility for benefits under both programs.
21 See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.
22 137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

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

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

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

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

1 December 31, 2013, the date last insured. AT 31. The ALJ made the following findings
2 (citations to 20 C.F.R. omitted):

3 1. The claimant last met the insured status requirements of the
4 Social Security Act on December 31, 2013.

5 2. The claimant did not engage in substantial gainful activity
6 during the period from his alleged onset date of September 12, 2012
7 through his date last insured of December 31, 2013.

8 3. Through the date last insured, the claimant had the following
9 severe impairments: traumatic brain injury post motor vehicle
10 accident; status post pelvic and right fibular fractures; history of
11 degenerative disc disease of the cervical spine; sleep apnea
12 syndrome; right knee meniscal tear; depression; narcotic addiction
13 in remission.

14 4. Through the date last insured, the claimant did not have an
15 impairment or combination of impairments that met or medically
16 equaled the severity of one of the listed impairments in 20 CFR Part
17 404, Subpart P, Appendix 1.

18 5. After careful consideration of the entire record, the undersigned
19 finds that, through the date last insured, the claimant had the
20 residual functional capacity to perform light work in that he can lift
21 and carry twenty pounds occasionally and ten pounds frequently; he
22 can sit for six hours of an eight hour day with normal breaks; he can
23 stand and walk for up to six hours of an eight hour day with normal
24 breaks except he can never climb ladders, ropes or scaffolds; he can
25 occasionally balance, bend, climb ramps/stairs, crawl, crouch, kneel
26 and stoop; he must avoid even moderate exposure to hazards
27 (dangerous machinery, unprotected heights, etc.). He is able to
28 perform simple and detailed tasks that are repetitive. He should
avoid doing complex tasks. He is able to maintain concentration,
persistence and pace as it pertains to simple tasks and routine
detailed tasks. He can perform low stress non-competitive type
jobs. Interactions with supervisors, co-workers and the public can
be done on a frequent basis.

6. Through the date last insured, the claimant was unable to
perform any past relevant work.

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.

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

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 7. The claimant was born on April 7, 1967 and was 46 years old,
2 which is defined as a younger individual age 18-49, on the date last
insured.

3 8. The claimant has a limited education and is able to communicate
4 in English.

5 9. Transferability of job skills is not material to the determination
6 of disability because using the Medical-Vocational Rules as a
framework supports a finding that the claimant is not 'not disabled,'
whether or not the claimant has transferable job skills.

7 10. Through the date last insured, considering the claimant's age,
8 education, work experience, and residual functional capacity, there
were jobs that existed in significant numbers in the national
9 economy that the claimant could have performed.²

10 11. The claimant was not under a disability, as defined in the
11 Social Security Act, at any time from September 21, 2012, the
alleged onset date, through December 31, 2013, the date last
insured.

12 AT 16-32 (emphasis added).

13 The ALJ summarized her findings and conclusions with respect to the RFC analysis,
14 writing in part:

15 The record demonstrates the claimant's allegations are partially
16 supported – he has clearly suffered severe injuries from a motor
17 vehicle accident that took him months to recover from, on a steady
18 course of multiple modalities of treatment, including narcotics for
19 pain control. He continues to experience some level of chronic
20 cognitive limitations in executive and memory functioning,
21 psychiatric testing indicating a mild cognitive impairment. He
demonstrates occasional findings of memory loss, rambling
22 tangential conversation, depression or irritability. He must sleep
23 with a CPAP unit to control his sleep apnea. As well, his
24 complaints of physical and mental symptoms to treating sources
25 along with long-term speech and cognitive therapy treatment
support his severe impairments.

26 However . . . the weight of the evidence demonstrates his
27 allegations are out of proportion to the objective findings and
28 testings as well as imageries. It shows his underlying symptoms are
well controlled with treatment, and that he still has the capacity to
perform a wide range of unskilled, detailed work that is repetitive,
routine, non-competitive, and low stress.

² The ALJ found that plaintiff could perform unskilled light exertional work as a marker, a housecleaner, or a car wash attendant: jobs which she characterized as “less competitive” than others, though competitive “to a degree.” AT 31.

1 AT 27-28 (emphasis added).

2 ISSUE PRESENTED

3 In his motion for summary judgment, plaintiff alleges four separate errors by the
4 Commissioner in upholding the ALJ's decision:

5 1. The Commissioner denied plaintiff's claim despite the ALJ's
6 affirmative finding that plaintiff's RFC limits him to "non-
7 competitive" work;

8 2. The ALJ erred at step five by posing an incomplete hypothetical
9 question to the vocational expert ("VE"), whose testimony the ALJ
10 relied on in finding plaintiff could perform available work;

11 3. The ALJ erred at step five due to an unexplained conflict
12 between the VE's testimony and the Dictionary of Occupational
13 Titles; and

14 4. The ALJ's decision was not supported by substantial evidence in
15 light of plaintiff's submission to the Appeals Council of additional
16 medical evidence and opinions from neuropsychologist M. Melanie
17 Sapienza, Ph.D.

18 (ECF No. 21; ECF No. 25 at 2.)

19 In her motion for remand, the Commissioner "concedes her final decision was not
20 supported by substantial evidence and judgment for Plaintiff is appropriate." (ECF No. 24 at 3.)

21 LEGAL STANDARDS

22 With error established, the court has the discretion to remand or reverse and award
23 benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). A case may be remanded
24 under the "credit-as-true" rule for an award of benefits where:

25 (1) the record has been fully developed and further administrative
26 proceedings would serve no useful purpose; (2) the ALJ has failed
27 to provide legally sufficient reasons for rejecting evidence, whether
28 claimant testimony or medical opinion; and (3) if the improperly
discredited evidence were credited as true, the ALJ would be
required to find the claimant disabled on remand.

29 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014). Even where all the conditions for the
30 "credit-as-true" rule are met, the court retains "flexibility to remand for further proceedings when
31 the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within
32 the meaning of the Social Security Act." Id. at 1021; see also Dominguez v. Colvin, 808 F.3d

1 403, 407 (9th Cir. 2015) (“Unless the district court concludes that further administrative
2 proceedings would serve no useful purpose, it may not remand with a direction to provide
3 benefits.”); Treichler v. Commissioner of Social Sec. Admin., 775 F.3d 1090, 1105 (9th Cir.
4 2014) (“Where . . . an ALJ makes a legal error, but the record is uncertain and ambiguous, the
5 proper approach is to remand the case to the agency.”).

6 ANALYSIS

7 Plaintiff argues that because the ALJ explicitly found plaintiff limited to “non-competitive
8 work,” there is no reasonable dispute that he is disabled, thus he is entitled to an award of
9 benefits. (ECF No. 25.) Both parties agree that “competitive” is a term of art in the agency’s
10 regulations, which distinguish competitive work from work performed in structured or sheltered
11 settings. See, e.g., Social Security Ruling (“SSR”) 96-8p (setting forth “[w]ork-related mental
12 activities generally required by competitive, remunerative work”); 20 C.F.R. § 404.157 (work
13 done under special conditions may not constitute substantial gainful activity). (See ECF Nos. 24
14 at 5, n.1 & 25 at 3.)

15 When the VE stated that certain light jobs – marker³, housecleaner, and car wash
16 attendant – would be available to plaintiff under a given hypothetical, plaintiff’s attorney
17 asked “if all these jobs aren’t a certain kind of competitive.” AT 70. The VE replied:

18 A: Well, and if you can [inaudible] define competitive because,
19 yeah, there – there’s going to be a quota for people who clean
20 rooms . . . they have to do so many rooms . . . [As to] car washer,
depends on how fast the cars can come through the machine[.]

21 . . .

22 Q: There’s probably bosses in the house cleaning and marker
23 industry that make sure you’re keeping up with the other workers
and –

24 A: No, [in] my opinion there’s really no job that doesn’t have some
25 degree of that because that’s how business operates anymore, but
compare it to a fast-foods worker, you can see the drive is a lot
more, obvious –

26 Q: All right.

27
28 ³ Per the VE, “[a] marker is a person that marks and affixes price tags to merchandise.” AT 69.

1 A. – or an assembly line worker. So I try to stay away from those.
2 Parking lot attendant would be more. Got to run and get that car.
3 Or a screw driver operator. . . . So that’s about the best I can do.

3 Q: Okay. Good. Thank you.

4 AT 70-71.

5 As noted above, the ALJ repeatedly found that plaintiff was limited to “non-competitive”
6 work, but it is not clear how she meant that term or how it related to the VE’s testimony that the
7 jobs of marker, housecleaner, and car wash attendant were “less competitive” than other types of
8 work. See AT 31. In fact, the ALJ found plaintiff able to perform these jobs during the alleged
9 period of disability. Id.

10 Plaintiff argues that the ALJ’s finding that plaintiff was limited to non-competitive work
11 is tantamount to a finding of disability which should not be reconsidered in further proceedings.
12 (ECF No. 25 at 5.) However, an ALJ’s finding that a claimant is limited to “non-competitive
13 work” is not necessarily equivalent to a finding of disability. See Braswell v. Berryhill, 2017 WL
14 1198507 (E.D. Cal. March 31, 2017) (noting ALJ’s finding that claimant could do “simple
15 repetitive tasks in a non-competitive work environment” and concluding that ALJ’s finding that
16 claimant could work as a cleaner was supported by substantial evidence). Defendant argues that
17 in reassessing plaintiff’s RFC, “the ALJ would need to reconsider whether jobs exist in
18 significant numbers that Plaintiff could perform, including obtaining additional vocational expert
19 testimony if appropriate.” (ECF No. 24 at 6.)

20 Having reviewed the record, the undersigned agrees that further testimony by a vocational
21 expert is needed. Moreover, any remand proceeding should consider evidence of
22 neuropsychological treatment plaintiff received following the ALJ hearing in October 2014.
23 Neuropsychologist Dr. M. Melanie Sapienza’s 23-page report on plaintiff’s medical history and
24 functional abilities was submitted to the Appeals Council along with plaintiff’s request for review
25 of the ALJ decision, which was denied.⁴ AT 2. (See ECF No. 21 at 17.) Dr. Sapienza based her

26 _____
27 ⁴ While Dr. Sapienza’s findings were not made part of the administrative record in this action,
28 plaintiff filed them as an attachment to his motion for summary judgment. (ECF No. 21-1.)

1 assessment in part on medical evidence from the alleged period of disability, and it thus appears
2 relevant to the RFC analysis. See ECF No. 24 at 5 (“[O]n remand, Plaintiff would be permitted to
3 submit any additional evidence that he believes is relevant to his case.”).

4 The issues raised on appeal concern the ALJ’s step five determination. Thus, on remand,
5 the ALJ will consider the medical records from Dr. Sapienza, which plaintiff previously
6 submitted to the Appeals Council and filed with the court in this action; redetermine plaintiff’s
7 RFC in light of the medical evidence in the record, including Dr. Sapienza’s report; and obtain
8 supplemental testimony from a vocational expert that is based on all plaintiff’s assessed
9 limitations.

10 CONCLUSION

11 For the reasons stated herein, IT IS HEREBY ORDERED that:

- 12 1. Plaintiff’s motion for summary judgment (ECF No. 21) is granted;
- 13 2. The Commissioner’s decision is reversed;
- 14 3. Defendant’s motion for remand (ECF No. 24) is granted in part and denied in part;
- 15 4. This matter is remanded for further proceedings consistent with this order; and
- 16 5. The Clerk of the Court shall enter judgment for plaintiff and close this case.

17 Dated: November 1, 2017

18 
19 _____
20 CAROLYN K. DELANEY
21 UNITED STATES MAGISTRATE JUDGE

22
23 2/.ssi.fr
24
25
26
27
28