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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARC HORST RAULFS,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:17-cv-1805 DB

ORDER

This social security action was submitted to the court without oral argument for ruling on plaintiff’s motion for summary judgment and defendant’s cross-motion for summary judgment.¹ Plaintiff argues that the ALJ’s erred at steps two and three of the sequential evaluation, and improperly rejected plaintiff’s subjective testimony. For the reasons explained below, plaintiff’s motion is granted, the decision of the Commissioner of Social Security (“Commissioner”) is reversed, and the matter is remanded for further proceedings consistent with this order.

PROCEDURAL BACKGROUND

In September of 2014, plaintiff filed an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“the Act”) alleging disability beginning on

¹ Both parties have previously consented to Magistrate Judge jurisdiction in this action pursuant to 28 U.S.C. § 636(c). (See ECF Nos. 7 & 8.)

1 March 27, 2014. (Transcript (“Tr.”) at 18, 217-26.) Plaintiff’s alleged impairments included
2 hepatitis C, herniated discs, carpal tunnel syndrome, anxiety, and posttraumatic stress disorder.
3 (Id. at 218.) Plaintiff’s application was denied initially, (id. at 144-48), and upon reconsideration.
4 (Id. at 153-57.)

5 Thereafter, plaintiff requested a hearing which was held before an Administrative Law
6 Judge (“ALJ”) on August 30, 2016. (Id. at 33-54.) Plaintiff was represented by an attorney and
7 testified at the administrative hearing. (Id. at 33-36.) In a decision issued on November 25, 2016,
8 the ALJ found that plaintiff was not disabled. (Id. at 28.) The ALJ entered the following
9 findings:

10 1. The claimant has not engaged in substantial gainful activity since
11 September 14, 2014, the application date (20 CFR 416.971 *et seq.*).

12 2. The claimant has the following severe impairments: degenerative
13 disc disease of the cervical and lumbar spine, status post left clavicle
14 fracture, minimal degenerative joint disease of the right shoulder,
15 bilateral carpal tunnel syndrome, anxiety disorder, attention deficit
16 hyperactivity disorder (ADHD), depression, bipolar disorder and
17 posttraumatic stress disorder (PTSD) (20 CFR 416.920(c)).

18 3. The claimant does not have an impairment or combination of
19 impairments that meets or medically equals the severity of one of the
20 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20
21 CFR 416.920(d), 416.925 and 416.926).

22 4. After careful consideration of the entire record, the undersigned
23 finds that the claimant has the residual functional capacity to perform
24 light work as defined in 20 CFR 416.967(b) except the claimant
25 cannot climb ladders, ropes or scaffolds, can frequently balance,
26 stoop, kneel, crouch and/or crawl, can occasionally reach overhead
27 with the bilateral upper extremities, can frequently handle and/or
28 finger with the bilateral upper extremities, must avoid concentrated
 exposure to extreme heat and vibration and can perform simple and
 detailed tasks in an environment with occasional public contact and
 no team work assignments.

 5. The claimant is unable to perform any past relevant work (20 CFR
 416.965).

 6. The claimant was born on October 1, 1965 and was 48 years old,
 which is defined as a younger individual age 18-49, on the date the
 application was filed. The claimant subsequently changed age
 category to closely approaching advanced age (20 CFR 416.963).

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

1 8. Transferability of job skills is not material to the determination of
2 disability because using the Medical-Vocational Rules as a
3 framework supports a finding that the claimant is “not disabled,”
4 whether or not the claimant has transferable job skills (See SSR 82-
5 41 and 20 CFR Part 404, Subpart P, Appendix 2).

6 9. Considering the claimant’s age, education, work experience, and
7 residual functional capacity, there are jobs that exist in significant
8 numbers in the national economy that the claimant can perform (20
9 CFR 416.969 and 416.969(a)).

10 10. The claimant has not been under a disability, as defined in the
11 Social Security Act, since September 14, 2014, the date the
12 application was filed (20 CFR 416.920(g)).

13 (Id. at 20-28.)

14 On June 30, 2017, the Appeals Council denied plaintiff’s request for review of the ALJ’s
15 November 25, 2016 decision. (Id. at 1-5.) Plaintiff sought judicial review pursuant to 42 U.S.C.
16 § 405(g) by filing the complaint in this action on August 29, 2017. (ECF No. 1.)

17 **LEGAL STANDARD**

18 “The district court reviews the Commissioner’s final decision for substantial evidence,
19 and the Commissioner’s decision will be disturbed only if it is not supported by substantial
20 evidence or is based on legal error.” Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012).
21 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
22 support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v.
23 Chater, 108 F.3d 978, 980 (9th Cir. 1997).

24 “[A] reviewing court must consider the entire record as a whole and may not affirm
25 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins v. Soc. Sec. Admin.,
26 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
27 1989)). If, however, “the record considered as a whole can reasonably support either affirming or
28 reversing the Commissioner’s decision, we must affirm.” McCartey v. Massanari, 298 F.3d
1072, 1075 (9th Cir. 2002).

29 A five-step evaluation process is used to determine whether a claimant is disabled. 20
30 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step
31 process has been summarized as follows:

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

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

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

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

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

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

16 The claimant bears the burden of proof in the first four steps of the sequential evaluation
17 process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden
18 if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094,
19 1098 (9th Cir. 1999).

20 APPLICATION

21 Plaintiff’s pending motion argues that the ALJ committed the following three principal
22 errors: (1) the ALJ erred at step two of the sequential evaluation; (2) the ALJ’s treatment of
23 plaintiff’s subjective testimony constituted error; and (3) the ALJ erred at step three of the
24 sequential evaluation.² (Pl.’s MSJ (ECF No. 19) at 15-21.³)

25 I. Step Two Error

26 At step two of the sequential evaluation, the ALJ must determine if the claimant has a
27 medically severe impairment or combination of impairments. Smolen v. Chater, 80 F.3d 1273,
28 1289-90 (9th Cir. 1996) (citing Yuckert, 482 U.S. at 140-41). The Commissioner’s regulations
provide that “[a]n impairment or combination of impairments is not severe if it does not

² The court has reordered plaintiff’s claims for purposes of clarity and efficiency.

³ Page number citations such as this one are to the page number reflected on the court’s CM/ECF system and not to page numbers assigned by the parties.

1 significantly limit [the claimant's] physical or mental ability to do basic work activities.” 20
2 C.F.R. §§ 404.1521(a) & 416.921(a). Basic work activities are “the abilities and aptitudes
3 necessary to do most jobs,” and those abilities and aptitudes include: (1) physical functions such
4 as walking, standing, sitting, lifting, and carrying; (2) capacities for seeing, hearing, and speaking;
5 (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5)
6 responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing
7 with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b) & 416.921(b).

8 The Supreme Court has recognized that the Commissioner’s “severity regulation increases
9 the efficiency and reliability of the evaluation process by identifying at an early stage those
10 claimants whose medical impairments are so slight that it is unlikely they would be found to be
11 disabled even if their age, education, and experience were taken into account.” Yuckert, 482 U.S.
12 at 153. However, the regulation must not be used to prematurely disqualify a claimant. Id. at 158
13 (O’Connor, J., concurring). “An impairment or combination of impairments can be found not
14 severe only if the evidence establishes a slight abnormality that has no more than a minimal effect
15 on an individual[’]s ability to work.” Smolen, 80 F.3d at 1290 (internal quotation marks and
16 citation omitted).

17 “[A]n ALJ may find that a claimant lacks a medically severe impairment or combination
18 of impairments only when his conclusion is ‘clearly established by medical evidence.’” Webb v.
19 Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (quoting Social Security Ruling (“SSR”) 85-28); see
20 also Ukolov v. Barnhart, 420 F.3d 1002, 1006 (9th Cir. 2005) (claimant failed to satisfy step two
21 burden where “none of the medical opinions included a finding of impairment, a diagnosis, or
22 objective test results”). “Step two, then, is ‘a de minimis screening device [used] to dispose of
23 groundless claims[.]’” Webb, 433 F.3d at 687 (quoting Smolen, 80 F.3d at 1290); see also
24 Edlund v. Massanari, 253 F.3d 1152, 1158-59 (9th Cir. 2001) (discussing this “de minimis
25 standard”); Tomasek v. Astrue, No. C-06-07805 JCS, 2008 WL 361129, at *13 (N.D. Cal.
26 Feb.11, 2008) (describing claimant’s burden at step two as “low”).

27 Here, in connection with a previous application, a prior ALJ found that plaintiff’s severe
28 impairments included hepatitis C, sleep apnea, and obesity. (Pl.’s MSJ (ECF No. 19) at 15.) The

1 ALJ in this action found plaintiff’s hepatitis C and sleep apnea to be non-severe and did not
2 discuss plaintiff’s obesity. (Tr. at 20-22.)

3 “The principles of res judicata apply to administrative decisions . . . [and] in order to
4 overcome the presumption of continuing nondisability arising from the first administrative law
5 judge’s findings of nondisability, [the claimant] must prove ‘changed circumstances’ indicating a
6 greater disability.” Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988) (quoting Taylor v.
7 Heckler, 765 F.2d 872, 875 (9th Cir. 1985)). Here, the ALJ found that plaintiff did show
8 “changed circumstances sufficient to overcome the presumption of continuing non-disability, by
9 alleging new impairments and submitting additional medical records.” (Tr. at 18.)

10 However, even “[w]hen a claimant overcomes the presumption of continuing non-
11 disability . . . a prior ALJ’s individual findings are still entitled to some res judicata consideration
12 absent new information not presented to the earlier adjudicator.” Draiman v. Berryhill, No. CV
13 17-747 KS, 2018 WL 895445, at *4 (C.D. Cal. Feb. 13, 2018); see also Stubbs-Danielson v.
14 Astrue, 539 F.3d 1169, 1173 (9th Cir. 2008) (“previous ALJ’s findings concerning residual
15 functional capacity, education, and work experience are entitled to some res judicata
16 consideration and such findings cannot be reconsidered by a subsequent judge absent new
17 information not presented to the first judge”).

18 In finding plaintiff’s hepatitis C and sleep apnea non-severe, the ALJ cited only to
19 evidence that was presented to the prior ALJ. (Tr. at 21-22.) Moreover, the ALJ failed to discuss
20 plaintiff’s obesity entirely. The ALJ must consider a claimant’s obesity at steps two through five
21 of the sequential evaluation. SSR 02-1p, 2002 WL 34686281 (2002). And the ALJ must also
22 consider obesity in combination with the individual’s other impairments. Id.

23 Social Security Ruling (“SSR”) 02-1p directs that “[the ALJ] will not make assumptions
24 about the severity or functional effects of obesity combined with other impairments.” Id.
25 Instead, “[the ALJ] will evaluate each case based on the information in the case record.” Id. In
26 this regard, “[i]n determining whether a claimant’s obesity is a severe impairment, an ALJ must
27 ‘do an individualized assessment of the impact of obesity on an individual’s functioning.’” Burch
28 v. Barnhart, 400 F.3d 676, 682 (9th Cir. 2005) (quoting SSR 02-1P)); see also Browning v.

1 Colvin, 228 F.Supp.3d 932, 944 (N.D. Cal. 2017) (“the total omission of a claimant’s obesity
2 from the disability analysis may constitute reversible error”).

3 Accordingly, for the reasons stated above, the court finds that plaintiff is entitled to
4 summary judgment on the claim that the ALJ erred at step two of the sequential evaluation.⁴

5 **II. Plaintiff’s Subjective Testimony**

6 Plaintiff next challenges the ALJ’s treatment of plaintiff’s subjective testimony. (Pl.’s
7 MSJ (ECF No. 19) at 18-21.) The Ninth Circuit has summarized the ALJ’s task with respect to
8 assessing a claimant’s credibility as follows:

9 To determine whether a claimant’s testimony regarding subjective
10 pain or symptoms is credible, an ALJ must engage in a two-step
11 analysis. First, the ALJ must determine whether the claimant has
12 presented objective medical evidence of an underlying impairment
13 which could reasonably be expected to produce the pain or other
14 symptoms alleged. The claimant, however, need not show that her
15 impairment could reasonably be expected to cause the severity of the
16 symptom she has alleged; she need only show that it could
17 reasonably have caused some degree of the symptom. Thus, the ALJ
18 may not reject subjective symptom testimony . . . simply because
19 there is no showing that the impairment can reasonably produce the
20 degree of symptom alleged.

21 Second, if the claimant meets this first test, and there is no evidence
22 of malingering, the ALJ can reject the claimant’s testimony about the
23 severity of her symptoms only by offering specific, clear and
24 convincing reasons for doing so[.]

25 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks
26 omitted). “The clear and convincing standard is the most demanding required in Social Security
27 cases.” Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). “At
28 the same time, the ALJ is not required to believe every allegation of disabling pain, or else
disability benefits would be available for the asking[.]” Molina v. Astrue, 674 F.3d 1104, 1112
(9th Cir. 2012).

“The ALJ must specifically identify what testimony is credible and what testimony
undermines the claimant’s complaints.”⁵ Valentine v. Commissioner Social Sec. Admin., 574

⁴ In light of the ALJ’s other error, addressed below, the court need not address defendant’s
argument that any step two error was harmless. (Def.’s MSJ (ECF No. 24) at 21-22.)

⁵ In March 2016, Social Security Ruling (“SSR”) 16-3p went into effect. “This ruling makes

1 F.3d 685, 693 (9th Cir. 2009) (quoting Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595,
2 599 (9th Cir. 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other
3 things, the “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s]
4 testimony or between [her] testimony and [her] conduct, [claimant’s] daily activities, [her] work
5 record, and testimony from physicians and third parties concerning the nature, severity, and effect
6 of the symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958-59
7 (9th Cir. 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792
8 (9th Cir. 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the
9 record, the court “may not engage in second-guessing.” Id.

10 Here, the ALJ found that plaintiff’s medically determinable impairments could reasonably
11 be expected to cause the symptoms alleged, but that plaintiff’s statements concerning the
12 intensity, persistence, and limiting effects of those symptoms were “not entirely consistent with
13 the medical evidence and other evidence in the record for the reason explained in [the] decision.”
14 (Tr. at 25.) The ALJ then specifically identified what testimony was credible and what testimony
15 undermined plaintiff’s complaints. (Id. at 25-27.) Portions of the ALJ’s analysis, however, are
16 flawed.

17 In this regard, the ALJ found plaintiff “registered a global assessment of functioning
18 (GAF) score of 65,” which “described an individual with . . . some mild symptoms[.]” (Id. at 25.)
19 But the ALJ also acknowledged that plaintiff “registered GAF scores of 51 and 55.” (Id. at 26.)
20 A GAF score of 51-60 indicates “moderate symptoms (e.g., flat affect and circumstantial speech,
21 occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning
22 (e.g., few friends, conflict with peers or co-workers).” American Psychiatric Association,
23 Diagnostic and Statistical Manual of Mental Disorders, 34 (4th ed.) (“DSM-IV).

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26 clear what our precedent already required: that assessments of an individual’s testimony by an
27 ALJ are designed to ‘evaluate the intensity and persistence of symptoms after the ALJ finds that
28 the individual has a medically determinable impairment(s) that could reasonably be expected to
produce those symptoms,’ and not to delve into wide-ranging scrutiny of the claimant’s character
and apparent truthfulness.” Trevizo v. Berryhill, 871 F.3d 664, 679 (9th Cir. 2017) (quoting SSR
16-3p) (alterations omitted).

1 The ALJ found these scores to be “unpersuasive because the mental status examination
2 was essentially normal.” (Tr. at 26.) However, a GAF score is determined by a hundred-point
3 scale, consisting of ten categories, measuring a clinician’s subjective judgment of a claimant’s
4 overall level of psychological, social, and occupational functioning. See American Psychiatric
5 Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) 34 (4th ed. 2005).

6 The ALJ went on to find that plaintiff’s “allegations of severe back impairment are
7 partially supported by the medical evidence.” (Tr. at 26.) One reason the ALJ found plaintiff’s
8 allegations only partially supported was the ALJ’s finding that plaintiff’s “treatment has been
9 essentially routine and/or conservative in nature.” (Id.)

10 Plaintiff’s treatment, however, included narcotic pain medication and spinal injections.
11 (Id. at 396, 624.) Such treatment cannot be characterized as conservative in nature. See Hydat
12 Yang v. Colvin, No. CV 14-2138 PLA, 2015 WL 248056, at *6 (C.D. Cal. Jan. 20, 2015) (“This
13 Court has previously found that spinal epidural injections are not ‘conservative’ treatment.”);
14 Christie v. Astrue, No. CV 10-3448-PJW, 2011 WL 4368189, at *4 (C.D. Cal. Sept. 16, 2011)
15 (“narcotic pain medication, steroid injections, trigger point injections, epidural shots, and cervical
16 traction . . . are certainly not what the Court would categorize as conservative”).

17 Moreover, the ALJ repeatedly discredited portions of plaintiff’s testimony due to a lack of
18 medical evidence to support plaintiff’s allegations. However, “after a claimant produces
19 objective medical evidence of an underlying impairment, an ALJ may not reject a claimant’s
20 subjective complaints based solely on a lack of medical evidence to fully corroborate the alleged
21 severity” of the symptoms. Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005); see also Putz v.
22 Astrue, 371 Fed. Appx. 801, 802-03 (9th Cir. 2010) (“Putz need not present objective medical
23 evidence to demonstrate the severity of her fatigue.”); Bunnell v. Sullivan, 947 F.2d 341, 347 (9th
24 Cir. 1991) (“If an adjudicator could reject a claim for disability simply because a claimant fails to
25 produce medical evidence supporting the severity of the pain, there would be no reason for an
26 adjudicator to consider anything other than medical findings.”).

27 For the reasons stated above, the court finds that the ALJ failed to offer clear and
28 convincing reasons for rejecting all of plaintiff’s testimony. Accordingly, plaintiff is also entitled

1 to summary judgment on the claim that the ALJ’s treatment of plaintiff’s testimony constituted
2 error.

3 CONCLUSION

4 After having found error, “[t]he decision whether to remand a case for additional
5 evidence, or simply to award benefits[,] is within the discretion of the court.”⁶ Trevizo v.
6 Berryhill, 871 F.3d 664, 682 (9th Cir. 2017) (quoting Sprague v. Bowen, 812 F.2d 1226, 1232
7 (9th Cir. 1987)). A case may be remanded under the “credit-as-true” rule for an award of benefits
8 where:

9 (1) the record has been fully developed and further administrative
10 proceedings would serve no useful purpose; (2) the ALJ has failed to
11 provide legally sufficient reasons for rejecting evidence, whether
12 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.

13 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014).

14 Even where all the conditions for the “credit-as-true” rule are met, the court retains
15 “flexibility to remand for further proceedings when the record as a whole creates serious doubt as
16 to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.” Id. at
17 1021; see also Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court
18 concludes that further administrative proceedings would serve no useful purpose, it may not
19 remand with a direction to provide benefits.”); Treichler v. Commissioner of Social Sec. Admin.,
20 775 F.3d 1090, 1105 (9th Cir. 2014) (“Where . . . an ALJ makes a legal error, but the record is
21 uncertain and ambiguous, the proper approach is to remand the case to the agency.”).

22 Here, plaintiff asks that this matter be remanded for further administrative proceedings.
23 (Pl.’s MSJ (ECF No. 19) at 22.) Plaintiff’s request will be granted.

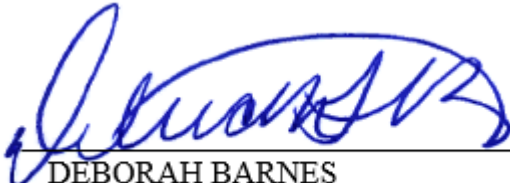
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25 ⁶ Given the errors already identified the court finds it unnecessary to reach plaintiff’s remaining
26 claim. See Janovich v. Colvin, No. 2:13-cv-0096 DAD, 2014 WL 4370673, at *7 (E.D. Cal.
27 Sept. 2, 2014) (“In light of the analysis and conclusions set forth above, the court need not
28 address plaintiff’s remaining claims of error.”); Manning v. Colvin, No. CV 13-4853 DFM, 2014
WL 2002213, at *2 (C.D. Cal. May 15, 2014) (“Because the Court finds that the decision of the
ALJ must be reversed on the basis of the stooping limitation, the Court need not address
Plaintiff’s remaining contentions.”).

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff’s motion for summary judgment (ECF No. 19) is granted;
2. Defendant’s cross-motion for summary judgment (ECF No. 24) is denied;
3. The Commissioner’s decision is reversed;
4. This matter is remanded for further proceedings consistent with the order; and
5. The Clerk of the Court shall enter judgment for plaintiff and close this case.

Dated: March 20, 2019



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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