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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KYLE DICKEY,
Plaintiff,

v.

CAROLINE COLVIN,
Acting Commissioner of Social Security,
Defendant.

Case No. 14-cv-00629-WHO

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. Nos. 19, 22

INTRODUCTION

Plaintiff Kyle Dickey seeks disability insurance benefits and supplemental security income because he suffers from astrocytoma, cognitive disorder, depression, and emotional lability. In denying Dickey's claims for benefits, an Administrative Law Judge ("ALJ") relied on a medical opinion from 2003 to improperly discount more recent medical opinions from 2010 and 2011 and effectively ignored the lay testimony of Dickey's step-father, a psychologist. Failing to credit the more recent evidence led the ALJ to disregard the vocational expert's answer to a hypothetical that established Dickey's inability to engage in substantial gainful activity. Because of these errors, I GRANT Dickey's motion for summary judgment, DENY the Commissioner's, and REMAND this matter for an award of benefits.

BACKGROUND

I. PROCEDURAL HISTORY.

On February 25, 2010, Dickey filed an application for DIB under Title II of the Social Security Act, alleging disability since January 1, 2006. Administrative Record ("AR") 149-152. The following day, on February 26, 2010, Dickey filed an application for SSI under Title XVI of the Social Security Act. AR 153-56. In his disability application, Dickey listed "[a]strocytoma

1 [g]rade 1, depression, brain damage, and emotional liability coordination” as physical or mental
2 conditions that limited his ability to work. AR 180. Both applications were denied initially on
3 July 30, 2010 and upon reconsideration on March 22, 2011. AR 89-92, 93-97, 98-102. Dickey
4 filed a request for hearing on May 5, 2011. AR 105-06.

5 On April 19, 2012, the ALJ conducted a hearing where Dickey, Dr. Russell Chapman
6 (Dickey’s stepfather), and Kelly Bartlett (an impartial vocational expert) testified as to Dickey’s
7 alleged disability. AR 37-66. Following the hearing, Dickey submitted additional evidence
8 regarding his disability including records from emergency room visits and a signed affidavit from
9 Dr. Chapman both in his capacity as Dickey’s stepfather and as a licensed counselor and clinical
10 psychologist. AR 253-55. The ALJ rendered a decision on May 23, 2012, finding that Dickey
11 was not disabled and had not been under a disability from January 1, 2006, through the date of the
12 decision. AR 30.

13 On August 1, 2012, Dickey’s attorney submitted a request for review to the Appeals
14 Council. AR 257-264. The Appeals Council declined review and the ALJ’s decision became the
15 Commissioner’s final decision on January 6, 2014. AR 1-6. Dickey filed this action for judicial
16 review pursuant to 42 U.S.C. § 405(g). Dkt. No. 1.

17 **II. DICKEY’S BACKGROUND AND IMPAIRMENTS.**

18 After experiencing episodic vomiting and headaches, Dickey underwent neurosurgery to
19 remove a cerebral tumor on August 19, 1997. AR 350. He was thirteen years old. After the
20 surgery, Dickey experienced emotional disturbance, difficulty concentrating, aggressive outbursts,
21 and immature behavior, but showed no signs of tumor recurrence. AR 334-349. His doctor at that
22 time, Dr. Boutilier, recommended that Dickey be home-schooled until his behavioral symptoms
23 disappeared. AR 344. Dickey completed eighth grade via home school. AR 366.

24 Dickey went back to school on a full time basis at the beginning of ninth grade and initially
25 showed improvement. He began to experience depression in 2000 and was prescribed medication
26 to control his attention and emotional problems. AR 336, 366, 339. In the second semester of
27 ninth grade, he obtained an individualized education program based on eligibility for “Exceptional
28 Children’s Services as Other Health Impaired.” AR 366. As a result, he had increased time for

1 completion of assignments, preferential seating, and rest periods as needed. *Id.* He was still
2 placed in regular academic classes with approximately one hour per day in the curriculum
3 assistance class, and graduated from high school in June 2002. AR 25.

4 Between 1997 and 2002, medical records and MRIs showed no tumor recurrence. Physical
5 examinations only showed a tiny amount of ataxia on the left finger to nose testing. AR 334-350.
6 In 2002, five years after his surgery, Dr. Boutilier noted that Dickey was doing very well and had
7 no signs of headaches; she recommended a neuro-oncology follow up at Duke before Dickey
8 moved to Greensboro, North Carolina. AR 334. Dickey was referred to Dr. Dunn, a clinical
9 neuropsychologist from the Brain Tumor Center at Duke. She performed a neuropsychological
10 evaluation to assess Dickey’s reported behavioral problems, depressed mood, and changes in
11 personality. AR 268. After administering a number of tests, she found, among other things, that
12 Dickey (i) was functioning in the average range with respect to intellectual abilities; (ii) was
13 performing fairly well with respect to visual attention tasks, although on a verbal attention and
14 concentration task, Dickey had significant decreased speed of processing and increased
15 distractibility; and (iii) was well within normal limits on higher level executive task, including
16 abstract reasoning and set-shifting. AR 270. Dr. Dunn noted that the findings argued against any
17 significant organic impairment with respect to frontal lobe abilities. AR 270.

18 The test results indicated that Dickey did not have significant impairment in functional
19 memory. Expressive and receptive language abilities and visuospatial and visuomotor abilities
20 were within normal limits. *Id.* Dr. Dunn also found that Dickey was not reporting symptoms
21 suggestive of significant depressive symptomatology. *Id.* Ultimately, she observed that the
22 evaluation did not suggest significant organic dysfunction with respect to higher level executive or
23 frontal lobe processing and that Dickey’s reported episodes of anger and poorly controlled
24 emotional regulation was more likely “functional in nature” than linked to significant signs of
25 organic sequelae from his brain tumor. *Id.*

26 The only area of concern that Dr. Dunn noted was Dickey’s moderately decreased speed of
27 processing and increased distractibility with respect to verbal attention and concentration testing.
28 AR 271. In that respect, she recommended that Dickey try Ritalin or similar psychostimulant

1 medication to alleviate some of the processing speed deficits in the verbal domain. *Id.* She also
2 recommended that Dickey engage in psychotherapy to address his emotional and mood
3 disturbances. *Id.* Dr. Dunn concluded that so long as Dickey’s brain tumor remained free from
4 progression and “there [were] no significant changes in his neurological status,” repeated
5 neuropsychological testing was warranted at 2-3 year intervals “to track any potential changes in
6 cognitive abilities.” *Id.*

7 In the fall of 2003, Dickey enrolled in five courses at Guilford Technical Community
8 College in Jamestown, North Carolina. AR 251. He received an F in two of the courses, a
9 withdrawal from one course, and no grade for the other two courses. *Id.* No grade point average
10 (“GPA”) was reported for the courses. *Id.* He enrolled in seven other courses, but it does not
11 appear that he completed them. *Id.* From 2001 through 2006, he worked part-time as an usher
12 and ticket seller at a movie theater, a grocery bagger, and table busser at a restaurant, earning a
13 high of \$3,800 (in 2003) and a low of \$600 (in 2005). AR 157-164. There are no reported
14 earnings after 2006, when he earned \$1,300. AR 157.

15 In 2006, Dickey moved to California to live with his mother and stepfather. AR 44-45,
16 275. He claims that his last job was an on-call catering job at the University of California,
17 Berkeley in 2007. AR 44; Plaintiff’s Motion for Summary Judgment (“Pl.’s Mot.”) at 2. The job
18 was part-time and during the week he worked five or ten hours, although there were some weeks
19 when he did not work at all. AR 44; Pl.’s Mot. at 2.

20 Between 2009 and 2010, Dickey completed nine courses at Diablo Valley College in
21 Pleasant Hill, California. AR 250, 43. For the fall semester of 2009, he completed a course in
22 golf and another in U.S. history, receiving an A and a C, respectively. *Id.* In the spring of 2010,
23 he completed four courses: American Cinema (earning an F), Fundamentals of Oceanography
24 (earning a D), Intermediate/Advanced Golf (earning an A), and Flag Football (earning a C).
25 Finally, in the fall of 2010, he completed courses in the Visible Universe (earning a D), Physical
26 Geology (earning a B), and Intermediate/Advanced Golf (earning an A). *Id.* His cumulative GPA
27 was a 1.842. *Id.*

28 There are five medical reports from Dr. Metheney, Dickey’s treating physician, between

1 2004 and 2009. One concerns a repeat MRI of the brain, which showed no recurrence of tumor.
2 Four are family medicine visit reports that Dickey’s emotional lability was at issue. Dr. Metheney
3 prescribed medication for Dickey’s reported manic depressive, anxiety, and occasional anger
4 outburst symptoms. AR 621-27. She specifically noted that she believed Dickey’s emotional
5 lability was “secondary to trauma during the removal of the tumor in 1998.” AR 626.

6 Since 2010, Dickey has visited the hospital on several occasions with complaints of
7 nausea, uncontrollable vomiting, backache, abdominal pain, and headaches. AR 326-27, 562-65,
8 633-645. In January 2010, Dickey obtained a medical marijuana card. AR 628-632.

9 Dickey’s other medical records since 2010 resulted from visits to consultants to assess his
10 neurological issues. The first resulted from a referral from the Department of Social Services. AR
11 272. In June 2010, Dickey met with Dr. Schwartz, a consultative examiner, for a psychological
12 evaluation. AR 272. Dr. Schwartz diagnosed cognitive disorder due to brain tumor and
13 neurosurgery, with depressed mood, history of cerebellar astrocytoma and surgical resection,
14 damage to muscles in right eye, and assigned a Global Assessment of Functioning (GAG) score of
15 37. AR 273-76. She observed symptoms of depression and anxiety; intellectual functioning in the
16 low average range; and strengths in verbal comprehension, working memory, visual motor
17 coordination and reproduction, which fell in the average range. *Id.* She found Dickey: (i) severely
18 impaired in his ability to maintain adequate pace, tolerate work stress, and interact with
19 coworkers, supervisors, and the public; (ii) moderately impaired in maintaining adequate
20 persistence and ability to adapt to changes in work environment; (iii) mildly impaired in following
21 complex instructions; and (iv) not impaired in following simple instructions. AR 276. Dr.
22 Schwartz also noted that Dickey reported he was unable to manage his own funds. *Id.*

23 On July 2010, Dr. Paxton, a non-examining state agency consultant, reviewed the medical
24 evidence and completed a mental residual functional capacity assessment, finding moderate
25 limitations in Dickey’s ability to understand and remember detailed instruction, carry out detailed
26 instructions, and interact appropriately with the general public. AR 282-84. Dr. Paxton further
27 noted that Dickey had “the capacity to do simple level work at two hour intervals in a non public
28 setting [,] [c]oncentrative capacity [was] sufficient [,] [a]daptive capacity [was] also sufficient.”

1 AR 284.

2 In March and April 2011, Dr. Murray, a licensed psychologist, administered a number of
3 tests to Dickey. He concluded that Dickey could not meet the demands of full-time employment,
4 would have great difficulty focusing, maintaining pace, and sticking to task, and that his episodes
5 of rage could be easily triggered by changes in work settings or situations. AR 611. He observed
6 that Dickey became mentally fatigued after two hours, necessitating a second test session, and had
7 difficulty concentrating. AR 608. He opined that some findings were “consistent with an organic
8 hypothesis, but not dementia” and that it was unlikely Dickey was attempting to fake brain
9 damage because Dickey passed a malingering test. AR 610. Dr. Murray diagnosed Dickey with
10 “Cognitive Disorder” as a result of long-term sequelae from his tumor removal and could not rule
11 out organic depression. AR 611. He noted that literature in the field found significant long-term
12 problems for attention, processing speed, interference and uncontrolled temper tantrums in
13 patients who had undergone the type of tumor surgery Dickey had. Dickey exhibited all of these
14 symptoms. *Id.* Dr. Murray also cited other literature finding that pediatric tumor survivors may
15 face many cognitive defects, including decline in intellectual functioning, and that “active
16 involvement in mentally challenging activities [and other activities] might all be helpful in
17 preventing further deterioration.” *Id.*

18 Dr. Murray completed a mental residual functional capacity assessment, noting Dickey’s
19 “marked” limited ability to: deal with the public; maintain concentration and persist in a task;
20 perform activities within a schedule and maintain regular attendance; respond appropriately to
21 changes in a work setting; complete a normal workday and workweek without interruptions from
22 psychologically based symptoms; and perform at a consistent pace without an unreasonable
23 number and length of rest periods. AR 616. According to Dr. Murray, Dickey exhibited
24 “moderate” limitation in the ability to understand and remember technical and/or complex job
25 instructions and to interact appropriately with supervisors and coworkers. Dr. Murray found that
26 Dickey had “mild” limitation in his ability to understand and remember detailed, but
27 uncomplicated instructions, and “no limitation” in his ability to understand, remember, very short
28 and simple job instructions. *Id.*

1 Dickey currently lives with his parents. They help him when he needs assistance due to his
2 alleged impairments, including fatigue, vision, and emotional issues. AR 255. Although Dickey
3 has an unrestricted driver’s license and drives short distances every other day in his parent’s car,
4 AR 42, 254, Dickey is only allowed to drive nearby, to familiar locations, when he is not overly
5 fatigued or angry. AR 254. As a result, Dickey’s mother or stepfather often drive him where he
6 needs or wants to go. Dickey also takes the train to visit his daughter in Modesto. *Id.*

7 At the ALJ hearing, Dickey testified that he drives, hangs out with friends, gets fast foods,
8 vomits if he has too much stress or does not eat enough, has no patience, has a downward gaze, is
9 not fond of people, takes anti-nausea medication, uses medical marijuana for nausea and mood,
10 sleeps a lot, plays video games, shops at thrift stores, and does some chores when he remembers.
11 AR 45-52. He also reported playing sports, watching television, using a computer, and reading the
12 news with one eye closed to counteract his paralyzed eye muscle. AR 51.

13 Dickey’s stepfather, Dr. Chapman, a licensed psychologist, testified at the hearing and also
14 submitted an affidavit after the hearing concerning Dickey’s medical condition. AR 252.
15 According to Dr. Chapman, and contrary to Dickey’s hearing testimony, Dickey has no friends in
16 California, aside from his girlfriend and his brother, and one friend in North Carolina. AR 253.
17 Dr. Chapman noted Dickey’s difficulty with keeping friends because of his rage and emotional
18 issues. He lacks empathy and sympathy. AR 253-54. Dr. Chapman explained Dickey’s mood
19 and emotional issues in more detail, stating that Dickey had “blind rage” and that taking care of
20 basic tasks at home, like making the bed, eating meals, or taking care of hygiene, could cause
21 Dickey enough stress to lead him to an anxiety attack. AR 254. Dr. Chapman stated that Dickey
22 did not receive special accommodations when attending community college because Dickey was
23 unwilling to apply for them due to his false belief that he could do fine without them. AR 253.
24 Lastly, Dr. Chapman contended that Dickey was unable to conform to a normal schedule,
25 understand the ramifications of his own personal interactions, or be self-sufficient. *Id.* As a
26 result, Dr. Chapman underscored that he and Dickey’s mother were “constantly “on call” to
27 support Dickey and/or intervene as necessary—24 hours a day, 7 days a week.” AR 255.
28

1 **III. ALJ'S DECISION.**

2 To assess residual functional capacity, the ALJ gave great weight to Dr. Dunn's 2003
3 opinion, because she had very specific expertise in the type of testing most relevant to Dickey's
4 unique medical impairment. AR 27. Additionally, the ALJ gave some weight to the assessment
5 by the non-examining consultant Dr. Paxton, since it was relatively consistent with psychometric
6 results. *Id.* She gave no weight to the opinion of Dr. Schwartz because it appeared to be based on
7 Dickey's and his mother's subjective complaints and the test results were similar to the test scores
8 Dr. Dunn obtained, except for processing speed, which Dr. Schwartz described as impaired. *Id.*
9 Specifically, she found that the evidence did not show Dickey had significant impairment
10 according to Dr. Schwartz's diagnosis due to evidence that Dickey was able to attend school,
11 drive, hang out with friends, and play sports. *Id.* She believed Dr. Schwartz's opinion was
12 informed by advocacy and not on objective results, and that Dr. Schwartz's evaluation was the
13 result of a referral from Dickey's attorney. AR 28.

14 The ALJ also gave no weight to the opinion of Dr. Murray, whom she believed was
15 similarly attorney-referred. *Id.* She states that Dr. Murray's opinion was not consistent with the
16 actual test results and, following Dr. Dunn's opinion, that Dickey's cognitive impairment was not
17 the result of the tumor resection. *Id.* The ALJ concluded that nothing in the test scores or
18 Dickey's activities of daily living indicated that he had "marked" limitation in the areas Dr.
19 Murray referenced. *Id.*

20 Finally, the ALJ indicated she gave some weight to Dr. Chapman's affidavit as a licensed
21 psychologist. But she gave more weight to Dr. Dunn based on her examining relationship and
22 specific area of specialization. *Id.* Nowhere in the decision does the ALJ discuss Dr. Chapman's
23 testimony about Dickey's psychological conditions and daily living activities.

24 **LEGAL STANDARD**

25 **I. STANDARD OF REVIEW.**

26 Under 42 U.S.C. § 405(g), a court reviews the ALJ's decision to determine whether the
27 ALJ's findings are supported by substantial evidence and free of legal error. *Smolen v. Chater*, 80
28 F.3d 1273, 1279 (9th Cir.1996); *see also DeLorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir. 1991)

1 (“We review the ALJ’s determination ... to determine whether it was supported by substantial
2 evidence and whether it was based on the proper legal standard.”). Substantial evidence means
3 “‘more than a mere scintilla,’ but less than a preponderance.” *See Saelee v. Chater*, 94 F.3d 520,
4 521-22 (9th Cir. 1996) (internal quotations and citation omitted). Substantial evidence is “such
5 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *See*
6 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal quotations and citation omitted).

7 A court must review the record as a whole and consider adverse as well as supporting
8 evidence. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). Where evidence is
9 susceptible to more than one rational interpretation, the ALJ’s decision must be upheld. *See*
10 *Morgan v. Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). “However, a
11 reviewing court must consider the entire record as a whole and may not affirm simply by isolating
12 a ‘specific quantum of supporting evidence.’” *See Robbins*, 466 F.3d at 882 (internal quotations
13 and citation omitted); *see also Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). If the legal error
14 is harmless, then a reversal is unwarranted. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th
15 Cir.2012) (“We may not reverse an ALJ’s decision on account of an error that is harmless.”). An
16 error is harmless when it is “inconsequential to the ultimate nondisability determination.” *Molina*,
17 674 F.3d at 1115 (internal quotations and citation omitted).

18 **II. DISABILITY DETERMINATION.**

19 A claimant is “disabled” as defined by the Social Security Act if: (1) “he is unable to
20 engage in any substantial gainful activity by reason of any medically determinable physical or
21 mental impairment which can be expected to result in death or which has lasted or can be expected
22 to last for a continuous period of not less than twelve months,” and (2) the impairment is “of such
23 severity that he not only unable to do his previous work but cannot, considering his age, education,
24 and work experience, engage in any other kind of substantial gainful work which exists in the
25 national economy.” 42 U.S.C. §§ 1382c(a)(3)(A)-(B); *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th
26 Cir.2012). To determine whether a claimant is disabled, an ALJ engages in a five-step sequential
27 analysis as required under 20 C.F.R § 404.1520(a)(4)(i)-(v).

28 In the first two steps of the evaluation, the ALJ must determine whether (1) the claimant is

1 not performing substantial gainful activity, and (2) is under a “severe” impairment. *Id.* §
 2 416.920(a)(4)(i)-(ii). An impairment must have lasted or be expected to last 12 months in order to
 3 be considered severe. *Id.* § 416.909. In the third step, the ALJ must determine whether the
 4 impairment meets or medically equals a listed impairment described in the administrative
 5 regulations. *Id.* § 416.920(a)(4)(iii). If the claimant’s impairment does not meet or equal one of
 6 the listed impairments, before proceeding to the fourth step, the ALJ has to make a residual
 7 functional capacity determination based on all the evidence in the record; this determination is
 8 used to evaluate the claimant’s work capacity for steps four and five. *Id.* § 416.920(e). In step
 9 four, the ALJ must determine whether the claimant is capable of performing his or her previous
 10 job. *Id.* § 416.920(a)(4)(iv). The claimant bears the burden to prove steps one through four, as
 11 “[a]t all times, the burden is on the claimant to establish [his] entitlement to disability insurance
 12 benefits.” *Id.* (alterations in original).

13 Once the claimant has established a prima facie case, the burden shifts to the
 14 Commissioner to show at the fifth step that the claimant is able to do other work, and that there are
 15 significant number of jobs in the national economy that the claimant can do. *Id.* §§
 16 416.920(a)(4)(v),(g); 416.960(c). There are two ways for the Commissioner to show other jobs in
 17 significant numbers in the national economy: (1) by the testimony of a vocational expert or (2) by
 18 reference to the Medical–Vocational Guidelines at 20 C.F.R., part 404, subpart P, app. 2. If the
 19 ALJ chooses to use a vocational expert, hypothetical questions asked “must set out all of the
 20 claimant’s impairments.” *Lewis v. Apfel*, 236 F.3d 503, 517 (9th Cir.2001) (internal quotations
 21 and citation omitted). The use of the medical-vocation guidelines, at step five is proper “where
 22 they *completely and accurately* represent a claimant’s limitations” and the claimant can “perform
 23 the *full* range of jobs in a given category.” *See Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th
 24 Cir.1999) (emphasis in original). Although “the fact that a non-exertional limitation is alleged
 25 does not automatically preclude application of the grids,” the ALJ must first determine whether
 26 the “claimant’s non-exertional limitations significantly limit the range of work permitted by his
 27 exertional limitations.” *Id.* at 1102. If the Commissioner meets the burden at step five, the
 28 claimant is not disabled. *See Tackett*, 180 F.3d at 1097–98.

1 **DISCUSSION**

2 **I. THE ALJ'S FIVE-STEP ANALYSIS.**

3 At step one, the ALJ found that Dickey had not engaged in substantial gainful activity
4 since January 1, 2006, the alleged onset date. AR 22. At step two, the ALJ determined that
5 Dickey had the following severe impairments: (i) status post resection of astrocytoma (brain
6 tumor) in remote past (August 19, 1997) and (ii) cognitive disorder. *Id.* At step three, the ALJ
7 decided that Dickey did not have an impairment or combination of impairments that met or
8 medically equaled the severity of any of those listed in 20 CFR Part 404, Appendix 1, Subpart P.
9 AR 23. At step four, the ALJ determined that Dickey had the residual functional capacity to
10 perform a full range of work at all exertional levels, that he could make simple work-related
11 decision with occasional workplace changes, and could have only occasional contact with
12 coworkers and no contact with the public. AR 24. At step five, the ALJ determined that Dickey
13 was able to engage in other types of substantial gainful work that exists in the national economy.
14 AR 29. A finding of “not disabled” was directed by the Medical–Vocational Guidelines, section
15 204.00. AR 30.

16 The ALJ, however, also found that Dickey’s ability to perform all, or substantially all, of
17 the requirements of his level of work was impeded by additional limitations. AR 29–30. To
18 determine the extent to which these limitations eroded the unskilled occupational base, through the
19 date of last insured, the ALJ asked a vocational expert whether jobs existed in the national
20 economy for an individual with Dickey’s age, education, work experience, and residual functional
21 capacity. The vocational expert testified that given all of these factors, Dickey would be able to
22 perform the requirements of several unskilled occupations such as: (i) mail clerk/sorter; (ii)
23 photocopy machine operator; (iii) night cleaner; (iv) bench hand; and (v) surveillance system
24 monitor. AR 30. However, when the ALJ asked the vocational expert to assume that Dickey
25 would need to take three fifteen minute unscheduled breaks throughout a day and whether that
26 would preclude all employment, the vocational expert testified in the affirmative, observing that a
27 total of 45 minutes of unscheduled breaks would not be tolerated by employers at the unskilled
28 level. AR 59. The ALJ relied on the first hypothetical but not the second, and found that Dickey

1 was not disabled and not entitled to SSI. AR 30.

2 Dickey argues that: (i) the ALJ failed to consider Dickey’s limitations, as supported by
3 substantial evidence in the record, in determining his RFC and the appropriate hypothetical for the
4 vocations expert, and (ii) the ALJ committed abuse of discretion and legal error by affording no
5 weight to the opinions of Dr. Murray and Dr. Schwartz. Pl’s. Mot. at 1.

6 **II. THE ALJ IMPROPERLY DISCREDITED DRS. MURRAY AND SCHWARTZ IN**
7 **FAVOR OF DR. DUNN AND FAILED TO ACCURATELY ANALYZE DICKEY’S**
8 **ACTIVITIES OF DAILY LIVING.**

9 “The opinion of an examining doctor, even if contradicted by the opinion of another
10 doctor, can only be rejected for specific and legitimate reasons that are supported by the record.”
11 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996) (internal quotations and citation omitted).
12 When an ALJ fails to provide adequate reasons for rejecting the opinion of a treating or examining
13 physician, the Ninth Circuit credits the opinion as true as a matter of law. *Lester v. Chater*, 81
14 F.3d 821 (9th Cir. 1995). The Ninth Circuit has also held that where a claimant’s condition is
15 progressively deteriorating, the most recent medical report is most probative of disability. *See*
16 *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986).

17 Dickey argues that the ALJ (i) committed legal error and abuse of discretion by affording
18 no weight to the opinion of Dr. Murray, an examining source;¹ (ii) erred by omitting material facts
19 from Dr. Dunn’s report, to which she otherwise gave great weight; (iii) committed legal error by
20 giving weight to the opinion of Dr. Paxton, a non-treating, non-examining source; and (iv) erred
21 by rejecting the opinion of examining source, Dr. Schwartz. Pl’s. Mot. at 7–11.

22 The Commissioner contends that the ALJ properly gave no weight to Dr. Schwartz’s
23 opinion because it conflicted with the opinion of Dr. Dunn, which the ALJ gave great weight, and

24 ¹ The Ninth Circuit classifies the three types of physicians that can provide information on a
25 claimant as: “(1) those who treat the claimant (treating physicians); (2) those who examine but do
26 not treat the claimant (examining physicians); and (3) those who neither examine nor treat the
27 claimant (non-examining physicians).” *Lester*, 81 F.3d at 830. Dickey improperly classifies Dr.
28 Murray as a treating source. Pl’s. Mot. at 7. Dickey’s primary care physician, Dr. Daniel Lee,
referred Dickey to Dr. Murray. *Id.* Those who examine but do not treat the claimant are
considered examining physicians. *Lester*, 81 F.3d at 830. Dr. Murray is an examining physician
because there is no evidence in the record to suggest that Dr. Murray treats Dickey. Dr. Murray
only saw Dickey on two occasions to complete the neuropsychological screening. AR 567.

1 because Dr. Schwartz’s opinion appeared to be based on Dickey’s and his mother’s subjective
2 complaints. Opp. at 4; AR 27. Similarly, the Commissioner noted that Dr. Murray’s opinion was
3 given no weight because it speculated that cognitive impairment was the result of tumor resection
4 when Dr. Dunn believed in 2003 that was not the case. Opp. at 6-7.

5 I conclude that the ALJ erred and improperly discredited the opinion of Dr. Schwartz. An
6 ALJ is entitled to draw inferences logically flowing from the evidence. *See Sample v. Schweiker*,
7 694 F.2d 639, 642 (9th Cir.1982). But here, it is unclear how the ALJ drew the inference that Dr.
8 Schwartz’s opinion was tainted by Dickey’s or his mother’s subjective complaints. Dr.
9 Schwartz’s report does not mention Dickey’s mother at all. The report is based on Dr. Schwartz’s
10 tests and observations of Dickey. AR 272-76. The ALJ failed to provide adequate reasons for
11 rejecting the opinion of Dr. Schwartz, an examining physician; as such, I must credit the opinion
12 as true as a matter of law. *See Lester*, 81 F.3d at 821.

13 The ALJ also erred in discrediting Dr. Murray’s report. It is the most recent medical report
14 probative of disability. *See Young*, 803 F.2d at 963. Yet the ALJ dismissed it because it
15 concluded that cognitive impairment was the result of tumor resection, a conclusion that
16 contradicted Dr. Dunn’s opinion. AR 28. However, Dr. Murray’s report in 2011 cited articles that
17 link the behavior issues Dickey exhibited to patients who had undergone posterior fossa tumor
18 resection. AR 611. These were not addressed by Dr. Dunn in 2003. Indeed, Dr. Dunn did not
19 “rule out” then that Dickey’s behavioral issues were not related to the tumor and removal, but
20 found them “more likely to be functional in nature.” AR 270.

21 More significantly, Dr. Dunn acknowledged that Dickey’s condition could deteriorate,
22 noting that as long as “no significant changes in his neurological status” occurred, testing was
23 indicated at only 24-26 month intervals. AR 271. In those circumstances, it was improper for the
24 ALJ to rely on Dr. Dunn’s report, which was nine years old, to dismiss Dr. Murray’s more recent
25 diagnosis of Dickey’s impairments, which had occurred within the previous year, especially when
26 Dr. Murray’s tests showed increased deterioration in Dickey’s functioning.

27 Dr. Murray’s report finds that Dickey had “marked” limited ability to: deal with the public;
28 maintain concentration and persist in a task; perform activities within a schedule and maintain

1 regular attendance; respond appropriately to changes in a work setting; complete a normal
2 workday and workweek without interruptions from psychologically based symptoms; and perform
3 at a consistent pace without an unreasonable number and length of rest periods. AR 616. In
4 addition, Dr. Murray noted that Dickey exhibited “moderate” limitation in the ability to
5 understand, remember, technical and/or complex job instructions, and ability to interact
6 appropriately with supervisors and coworkers; and “mild” limitation in ability to understand,
7 remember, detailed, but uncomplicated instructions. *Id.* These opinions were corroborated in
8 large measure by the testimony of Dr. Chapman, Dickey’s stepfather.

9 The ALJ also rejected Dr. Murray’s report because she did not find that the test scores or
10 Dickey’s daily living activities supported Dr. Murray’s conclusion that Dickey had marked
11 limitations. AR 28. This is not supported by the record. According to the ALJ, Dickey’s daily
12 living activities included playing video games, watching television, driving, and hanging out with
13 friends. But the ALJ overstated Dickey’s ability to accomplish various daily activities. As
14 discussed in Section III, the ALJ did not address the testimony of Dr. Chapman that Dickey’s
15 daily activities were far more limited than Dickey had described and that Dickey was not a reliable
16 source as to his activities and abilities. Moreover, the ALJ did not explain how these activities
17 involved skills that could be transferred to the workplace. *See* AR 28.

18 The Ninth Circuit has held that “the mere fact that a plaintiff has carried on certain daily
19 activities ... does not in any way detract from [his or] her credibility as to [] overall disability.”
20 *Orn*, 495 F.3d at 639 (internal quotations and citation omitted). An adverse credibility finding
21 based on activities may be proper “if a claimant engages in numerous daily activities involving
22 skills that could be transferred to the workplace.” *Id.* “The ALJ must make “specific findings
23 relating to [the daily] activities” and their transferability to conclude that a claimant’s daily
24 activities warrant an adverse credibility determination.” *Id.*

25 The ALJ erred in finding that Dickey’s disability allegations were not credible because of
26 his ability to perform such an “extensive array of activities.” *Id.* To the contrary, the activities
27 described by the ALJ appear “so undemanding that they cannot be said to bear a meaningful
28

1 relationship to the activities of the workplace.” *See Orn*, 495 F.3d at 639.²

2 Finally, the ALJ dismissed Dr. Schwartz’s and Dr. Murray’s reports because she claimed
3 they were “attorney-referred.” She did not explain how she arrived at the conclusion that both
4 doctors were attorney-referred, and it is unclear whether her supposition is accurate.³ More
5 importantly, she did not articulate how that fact, if true, created grounds for suspicion as to the
6 legitimacy and value of the reports themselves. *See Nguyen*, 100 F.3d at 1462 (finding that the
7 fact that evidence in proceeding for SSD and SSI benefits was devoid of any findings or
8 complaints relative to mental disorder of claimant for three years until claimant was examined by
9 psychologist at request of claimant’s attorney was not legitimate basis on which to discount
10 psychologist’s opinion that claimant had severe depressive disorder when psychologist’s opinion
11 was not unsupported and contained no actual improprieties).

12 The ALJ also erred in giving some weight to Dr. Paxton’s assessment, a non-treating, non-
13 examining source. In the context of social security disability determinations, the opinion of an
14 examining physician is entitled to greater weight than the opinion of a non-examining physician.
15 *See Lester*, 81 F.3d at 830. For the reasons previously discussed, the ALJ here could not give
16 more weight to the opinion of Dr. Paxton than to the opinions of examining physicians, Dr.
17 Murray and Dr. Schwartz, unless they were properly discounted. *Id.*

18 In short, the ALJ failed to state sufficient reasons for discrediting the testimony of Dr.
19 Schwartz and Dr. Murray and explain why the reports were not given any weight although they
20 were the most recent medical opinions probative of disability. Reversal on these issues alone is
21

22 ² *See also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (“The Social Security Act does not
23 require that claimants be utterly incapacitated to be eligible for benefits . . . and many home
24 activities are not easily transferable to what may be the more grueling environment of the
25 workplace, where it might be impossible to periodically rest or take medication. Yet if a claimant
26 is able to spend a substantial part of his day engaged in pursuits involving the performance of
27 physical functions that *are* transferable to a work setting, a specific finding as to this fact may be
28 sufficient to discredit an allegation of disabling excess pain.” (internal citations omitted)).

³ There is ambiguity in the record as to whether Dr. Murray was attorney-referred. Dickey claims
Dr. Murray was not attorney-referred because Dickey’s counsel was retained on May 2, 2011.
Pl.’s Reply at 6. However, there is evidence in the record showing that People With Disabilities
Foundation was representing Dickey on January 10, 2011—months before Dickey visited Dr.
Murray. AR 534-36. The ALJ’s decision does not clarify this ambiguity or otherwise explain the
basis for referring to Dr. Murray as attorney-referred.

1 necessary.

2 **III. THE ALJ FAILED TO CONSIDER THE TESTIMONY OF DR. CHAPMAN.**

3 Lay testimony on the claimant’s symptoms is competent evidence that the Commissioner
4 must take into account. If the ALJ expressly determines to disregard it, she must give reasons
5 germane to each witness whose testimony is being rejected. *See Nguyen*, 100 F.3d at 1462. The
6 ALJ has the obligation to evaluate the testimony of witnesses and may not to ignore it. *See Mason*
7 *v. Barnhart*, 63 Fed. Appx. 284, 286 (9th Cir. 2003) (unpublished); *see generally Social Security*
8 *Disability Law & Procedure in Federal Court* § 6:33 (2014). If an ALJ fails to discuss competent
9 lay testimony favorable to the claimant, “a reviewing court cannot consider the error harmless.”
10 *Stout v. Commr., Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). The Ninth Circuit has
11 consistently reversed the Commissioner’s decisions for failure to comment on such competent
12 testimony. *Id.*

13 The ALJ did not adequately discuss Dr. Chapman’s affidavit in her opinion even though
14 she purportedly gave Dr. Chapman’s affidavit “some weight.” AR 28. The ALJ failed to discuss
15 any of Dr. Chapman’s opinions regarding Dickey’s psychological issues or his daily life activities.
16 She failed to explain how Dr. Chapman’s affidavit squared with her residual functional capacity
17 assessment. *Id.* She effectively ignored Dr. Chapman’s detailed testimony concerning Dickey’s
18 mood, emotional issues, and lack of empathy as well as his inability to accurately report his
19 activities and abilities. Because the ALJ failed to evaluate the testimony of Dr. Chapman, remand
20 is appropriate. *See Mason*, 63 Fed. Appx. at 286.

21 **IV. THE ALJ FAILED TO INCORPORATE DICKEY’S LIMITATIONS IN THE RFC**
22 **DETERMINATION AND FAILED TO RELY ON THE CORRECT VOCATIONAL**
23 **EXPERT HYPOTHETICAL.**

24 If a claimant does not have the residual functional capacity to perform past relevant work,
25 then it is the Commissioner’s burden at step five to establish that the claimant can perform other
26 work. *Gamer v. Secretary of Health and Human Servs.*, 815 F.2d 1275, 1278–79 (9th Cir.1987).
27 The ALJ may use a vocational expert, as did the ALJ in this case, to determine whether a claimant
28 can use his work skills in another job. While hypothetical questions asked of the vocational expert
must “set out all of the claimant’s impairments,” it is “proper for an ALJ to limit a hypothetical to

1 those impairments that are supported by substantial evidence in the record.” *See Gamer*, F.2d at
2 1279; *see also Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir.2001) (holding that it is “proper
3 for an ALJ to limit a hypothetical to those impairments that are supported by substantial evidence
4 in the record.”).

5 Dickey contends that the ALJ failed to consider the “limitation in ability to perform at a
6 consistent pace without an unreasonable number of and the length of rest periods.” Pl’s. Mot. at 4.
7 When the ALJ asked the vocational expert whether taking three 15 minute unscheduled breaks
8 throughout the day would preclude all employment, the vocational expert answered that a total of
9 45 minutes of unscheduled breaks would not be tolerated by employers at the unskilled level. AR
10 59. Dickey argues this was the proper hypothetical that the ALJ should have relied on and had the
11 ALJ relied on it, then the ALJ’s conclusion would have been that there were no jobs in the
12 economy for Dickey. Pl’s. Mot. at 4. Dickey also contends that the ALJ failed to consider at the
13 RFC stage and present to the vocational expert his limitation in ability to: (i) interact with
14 supervisor; (ii) tolerate work stress; (iii) maintain adequate pace; (iv) maintain concentration and
15 attention and persist in a task; (v) complete a normal workday or workweek without interruptions
16 from psychologically based symptoms; and (vi) perform activities within a schedule and maintain
17 regular attendance. Pl’s. Mot. at 4-7.

18 The ALJ’s first hypothetical to the vocational expert included only the limitations that the
19 ALJ accepted as true in the residual functional capacity assessment. AR 24. However, she should
20 have included the additional limitations in the hypotheticals to the vocational expert found in
21 medical reports of Dr. Murray and Dr. Schwartz in determining Dickey’s residual functional
22 capacity assessment. *See Samples v. Commr. of Soc. Sec. Admin.*, 466 Fed. Appx. 584, 586 (9th
23 Cir. 2012) (unpublished) (holding that the hypothetical question the ALJ had posed to vocational
24 expert regarding claimant’s ability to find work in national economy was defective when it
25 ignored one of the doctor’s diagnoses of functional limitation on claimant’s ability to accept
26 instructions from supervisors and to respond appropriately to criticism from supervisors).⁴

27 _____
28 ⁴ The ALJ determined that Dr. Murray and Dr. Schwartz’s observations conflicted with the
observations of Dr. Dunn and Dr. Paxton. AR 27-30. As discussed, the ALJ erred in dismissing

1 In her second hypothetical to the vocational expert, the ALJ included the frequent breaks, a
2 conclusion supported by Dr. Murray.⁵ The vocational expert responded that no job would
3 accommodate those limitations. The ALJ also erred in failing to rely on the second hypothetical
4 and failing to explain why a finding of non-disability was still warranted when the vocational
5 expert's testimony was that 45 minutes of unscheduled breaks would not be tolerated by
6 employers at the unskilled level.

7 When Dr. Murray's and Dr. Schwartz's opinions are appropriately credited, the record
8 requires a finding of disability. *See Orn*, 495 F.3d at 640.

9 **V. REMAND FOR AWARD OF BENEFITS IS PROPER.**

10 "The decision whether to remand a case for additional evidence, or simply to award
11 benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
12 1987). Here, there have been multiple legal errors. The ALJ (i) failed to advance legitimate
13 reasons for disregarding the examining physicians' medical findings, reports, and opinion; (ii)
14 impermissibly relied on Dr. Dunn as opposed to Dr. Murray and Dr. Schwartz, despite Dr. Dunn
15 noting that Dickey's condition could deteriorate and testing was indicated every 2-3 years to check
16 for deterioration; (iii) effectively ignored the testimony of Dr. Chapman; and (iv) did not
17 incorporate the vocational expert's limitation in her decision. Crediting the opinions of Dr.
18 Murray and Dr. Schwartz as true, and relying on the second hypothetical given to the vocational
19 expert, I find that this case has a full record and one in which no additional proceedings are
20 necessary to further develop the administrative record, and therefore remand for an immediate
21 award of benefits. *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

22
23 Dr. Murray and Dr. Schwartz's observations in favor of Dr. Paxton and Dr. Dunn. The ALJ
24 should have included the limitations described by Dr. Murray and Dr. Schwartz. *See Samples*, 466
25 Fed. Appx. at 586.

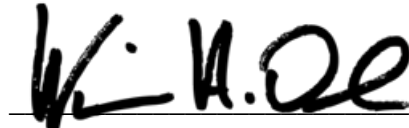
25 ⁵ For example, Dr. Murray's report included a residual functional capacity assessment noting an
26 inability to perform activities within a schedule and maintain regular attendance, complete a
27 normal workday and workweek without interruptions from psychologically based symptoms, and
28 perform at a consistent pace without an unreasonable number and length of rest periods. *See AR*
616. Dr. Schwartz's report noted that Dickey became mentally fatigued after two hours,
necessitating a second test session. *See AR* 608. He opined that Dickey had a marked inability
(30% or greater) to complete a normal workday without "interruptions from psychologically based
symptoms, and perform at a consistent pace without an unreasonable number and length of rest
periods.

1 **CONCLUSION**

2 For the reasons above, I REVERSE and REMAND for payment of benefits. Dickey's
3 motion for summary judgment is GRANTED, and the Commissioner's motion for summary
4 judgment is DENIED.

5 **IT IS SO ORDERED.**

6 Dated: November 19, 2014

7 

8 WILLIAM H. ORRICK
9 United States District Judge