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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

DENNIS L. HAMPTON,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. [17-cv-02004-LB](#)**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Re: ECF No. 16

INTRODUCTION

Plaintiff Dennis L. Hampton seeks judicial review of a final decision by the Commissioner of the Social Security Administration (“Commissioner”) denying his claim for disability benefits under Title II of the Social Security Act.¹ Mr. Hampton moved for summary judgment;² the Commissioner opposed the motion and filed a cross-motion for summary judgment.³ Under Civil Local Rule 16-5, the case is submitted for decision without oral argument. All parties have

¹ Compl. – ECF No. 1 at 2 (¶ 9). Record citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

² Mot. – ECF No. 16.

³ Mot. – ECF No. 19.

1 consented to magistrate jurisdiction.⁴ The court grants the plaintiff’s motion, denies the
2 Commissioner’s cross-motion, and remands for further proceedings.

3
4 **STATEMENT**

5 **1. Procedural History and Prior Administrative and Judicial Rulings**

6 In 2004, Mr. Hampton, then age 35, filed an application for Social Security disability
7 insurance (“SSDI”) benefits under Title II of the Social Security Act, alleging a back injury,
8 arthritis in his back, and depression.⁵ He also filed a claim for supplemental security income
9 (“SSI”) benefits under Title XVI.⁶ The Commissioner denied his SSDI and SSI claims,⁷ and Mr.
10 Hampton timely requested a hearing before an Administrative Law Judge (“ALJ”).⁸ On August
11 30, 2005, the ALJ heard testimony from Mr. Hampton.⁹ On December 29, 2005, the ALJ found
12 that Mr. Hampton was not disabled because he could perform his past work as an office worker.¹⁰

13 Mr. Hampton reapplied for SSDI benefits on February 2, 2007 and December 31, 2008.¹¹ The
14 Commissioner denied those applications.¹²

15 On July 7, 2010, Mr. Hampton, then age 41, filed another application for SSDI benefits,
16 alleging back and neck injury, arthritis, fibromyalgia, bipolar, severe depression, and anxiety.¹³ He
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22 ⁴ Consents – ECF Nos. 4, 8.

23 ⁵ AR 110, 849.

24 ⁶ *Id.*

25 ⁷ AR 110.

26 ⁸ AR 110, 849.

27 ⁹ AR 110.

28 ¹⁰ AR 119, 121.

¹¹ AR 181.

¹² *Id.*

¹³ AR 123, 126, 178. The application was filed on July 7, 2010 (AR 123) and completed on July 19, 2010 (AR 178).

1 alleged an onset date of December 26, 2006.¹⁴ On December 3, 2010, the Commissioner denied
2 his claim.¹⁵

3 Mr. Hampton timely appealed the Commissioner’s decision and requested an ALJ hearing.¹⁶
4 On September 19, 2011, ALJ K. Kwon held the hearing and heard testimony from Mr. Hampton
5 and a vocational expert.¹⁷ On November 5, 2011, the ALJ issued an unfavorable decision (“2011
6 ALJ decision”), holding that Mr. Hampton was not disabled because despite his limitations, he
7 was capable of working at jobs that exist in the national economy.¹⁸ The Appeals Council denied
8 Mr. Hampton’s request for review on June 19, 2013.¹⁹

9 On October 4, 2013, Mr. Hampton appealed the 2011 ALJ decision to this court.²⁰ Mr.
10 Hampton argued that the ALJ erred by (1) improperly rejecting the medical evidence from the
11 examining psychologist, Dr. Zipperle, and (2) failing to provide legally sufficient reasons to reject
12 Mr. Hampton’s testimony.²¹ On August 12, 2014, the district judge remanded the case for further
13 administrative proceedings. *Hampton v. Colvin*, No. 13-cv-04624-MEJ, 2014 WL 3962618 (N.D.
14 Cal. Aug. 12, 2014) (“*Hampton P*”). For the first issue (the “limited weight” that the ALJ gave to
15 examining psychologist Dr. Zipperle’s opinion), the court held that the ALJ provided “a specific
16 and legitimate reason to discount Dr. Zipperle’s opinion.” *Id.* at *7. For the second issue (the
17 ALJ’s assessment of the credibility of Mr. Hampton’s testimony about his symptoms), the court
18 held that the ALJ “failed to provide legally sufficient reasons to reject . . . [Mr. Hampton]’s
19 testimony.”²² The court observed that in evaluating Mr. Hampton’s credibility, the ALJ could
20 discredit Mr. Hampton’s testimony based on his reported activities, his treatment records, and his
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22 ¹⁴ AR 178.

23 ¹⁵ AR 123, 126–30.

24 ¹⁶ AR 110, 145–46, 849.

25 ¹⁷ AR 38–105, 849.

26 ¹⁸ AR 23–33.

27 ¹⁹ AR 7–9.

28 ²⁰ AR 871–73.

²¹ *Id.*; AR 891.

²² *Id.*

1 treatment-seeking history; the court held, however, that the ALJ, “was required to provide clear
2 and convincing reasons for discrediting [Mr. Hampton’s] subjective complaints” about the
3 severity of his symptoms and had not done so.²³ The court directed the following: “on remand the
4 ALJ must reassess the evidence in the record, and if the ALJ continues to discount any of
5 Plaintiff’s subjective complaints, must provide clear and convincing reasons for doing so
6 consistent with this order.”²⁴

7 On August 10, 2015, ALJ Kwon held a supplemental hearing on remand.²⁵ Mr. Hampton and
8 vocational expert Stephen P. Davis testified at the hearing.²⁶ On November 23, 2015, the ALJ
9 issued her decision (“2015 ALJ decision”).²⁷ The ALJ noted that the Social Security Act required
10 Mr. Hampton to establish his disability on or before the expiration of his coverage on December
11 31, 2011 (and sometime after his alleged onset date of December 26, 2006) (the “relevant
12 period”).²⁸ The ALJ denied Mr. Hampton disability benefits because his impairments during the
13 relevant period were not severe enough to keep him from performing his past relevant work as a
14 vending machine attendant.²⁹ In the alternative, the ALJ found that “[b]ased on the testimony of
15 the vocational expert” and “considering [Mr. Hampton’s] age, education, work experience, and
16 residual functional capacity (“RFC”), [Mr. Hampton] was capable of making a successful
17 adjustment to other work that existed in significant numbers in the national economy” during the
18 relevant period. The Appeals Council denied Mr. Hampton’s request for review.³⁰ Mr. Hampton

23 *Id.*

24 *Id.*

25 AR 806–45.

26 *Id.*

27 AR 788–99.

28 AR 789, 791.

29 AR 797–99.

30 AR 776–79, 784.

1 timely appealed the 2015 ALJ decision and moved for summary judgment.³¹ The Commissioner
2 opposed the motion and filed a cross-motion for summary judgment.³²

3

4 **2. Summary of Medical Evidence**

5 **2.1.1 Dr. John Pendleton: Primary-Care Physician — Treating**

6 Mr. Hampton began seeing Dr. John Pendleton at the Petaluma Health Center in 2005.³³ Dr.
7 Pendleton’s treatment notes show a history of depression, chronic pain, insomnia fibromyalgia,
8 syncope (fainting), degenerative disc disease, anxiety, and hypertension.³⁴

9 In 2008, Mr. Hampton was struggling with obesity, insomnia, chronic pain, and anxiety.³⁵ Dr.
10 Pendleton prescribed the following medications: Effexor, Remeron, Ambien, and Klonopin.³⁶ In
11 late 2009, Dr. Pendleton reported that Mr. Hampton was using marijuana twice a day for his
12 anxiety and depression.³⁷ Dr. Pendleton started Mr. Hampton on Vistaril and Xanax to treat his
13 anxiety.³⁸

14 In early 2010, Dr. Pendleton began treating Mr. Hampton for fibromyalgia, irritable-bowel
15 syndrome, hypertension, and lower-back syndrome (in addition to treating Mr. Hampton’s chronic
16 pain, anxiety disorder, and bipolar disorder).³⁹ Dr. Pendleton prescribed Mr. Hampton the
17 following medications: Dilaudid, Methadone, Klefex, and Baclofen for pain management; Ambien
18 for insomnia; Albuterol; Xanax or Cymbalta for anxiety; Terazosin; Phenegran, Indomethacin;

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22 ³¹ Mot. – ECF No. 16.

23 ³² Mot. – ECF No. 19.

24 ³³ AR 472.

25 ³⁴ AR 296–367, 436–60, 1296–1304.

26 ³⁵ AR 340–48.

27 ³⁶ *Id.*

28 ³⁷ AR 315.

³⁸ *Id.*

³⁹ AR 297–309.

1 Lyrica; Lisinopril; Klonopin; Donnatal; Effexor or Tegretol for bipolar; and Metropolol for
2 hypertension.⁴⁰

3 Dr. Pendleton’s notes from June 2010 indicate a “red flag” when Mr. Hampton was “unable to
4 give [a] urine sample” and were notated to: “follow opiate use carefully.”⁴¹ In August 2010, Dr.
5 Pendleton stated that Mr. Hampton was “not sleeping well,” had “increased depression,” and was
6 “trying to do on-line school.”⁴²

7 On March 3, 2011, Dr. Pendleton completed a Cervical Spine Residual Functional Capacity
8 Questionnaire⁴³ and diagnosed Mr. Hampton with degenerative-disc disease and chronic neck-
9 and-back pain.⁴⁴ Dr. Pendleton noted that Mr. Hampton was “quite impaired by chronic insomnia,
10 anxiety, [and] depression.”⁴⁵ He described the severity of Mr. Hampton’s pain as “daily pain for
11 most of the day.”⁴⁶ Mr. Hampton experienced side effects of dizziness and drowsiness from
12 Dilaudid/Klonopin that “may have implications for working.”⁴⁷ Dr. Pendleton said that Mr.
13 Hampton could sit, stand, or walk for a total of two hours within an eight-hour working day⁴⁸ and
14 must include five minutes of walking every 30 minutes during his work day.⁴⁹ Dr. Pendleton noted
15 that he would need to do an “O.T. evaluation” to answer the questions about how much weight
16 Mr. Hampton could carry in a competitive work situation or how long Mr. Hampton could sit or
17 stand at one time.⁵⁰ Dr. Pendleton stated that the description of symptoms and limitations applied
18 as early as 2007.⁵¹

19 _____
20 ⁴⁰ AR 297–309.

21 ⁴¹ AR 440.

22 ⁴² AR 299.

23 ⁴³ AR 472–76.

24 ⁴⁴ AR 472.

25 ⁴⁵ AR 476.

26 ⁴⁶ AR 472.

27 ⁴⁷ AR 473.

28 ⁴⁸ AR 475.

⁴⁹ *Id.*

⁵⁰ AR 474–75.

⁵¹ AR 476.

1 **2.1.2 Dr. Ken Weinstock: Psychiatrist — Treating**

2 Dr. Ken Weinstock is a psychiatrist at Petaluma Health Center and is Dr. Pendleton’s
3 colleague. Dr. Weinstock saw Mr. Hampton on October 19, 2011⁵² and April 11, 2012⁵³ (after the
4 November 2011 ALJ hearing). In his October 2011 notes, Dr. Weinstock indicated that Mr.
5 Hampton had a history of bipolar disorder, had an assessment of personality disorder, and was in
6 remission for amphetamine dependency.⁵⁴ Dr. Weinstock noted that Mr. Hampton’s mood was
7 “irritable and frustrated” and that his demeanor was “friendly, calm, and not at all sedated.”⁵⁵ He
8 reported that Mr. Hampton was irritated by his wife’s “change in personality” when she returned
9 from rehab.⁵⁶ Mr. Hampton was taking Metroprolo, Listinopril, Ventolin, Ambien, Tenezosin,
10 Remeron, Klonopin, Tegretol, Carbmarsepine, Pentanyl, and Percocet.⁵⁷ Mr. Hampton’s
11 “medications and general affect [were] well regulated to his baseline.”⁵⁸ Dr. Weinstock had no
12 acute psychiatric concerns that day.⁵⁹

13 In April 2012, Dr. Weinstock noted that Mr. Hampton “recently filed divorce papers” from his
14 fourth wife and was “smoking [marijuana] occasionally.”⁶⁰ Dr. Weinstock’s psychiatric exam
15 noted that Mr. Hampton had a “friendly and calm” demeanor and a “frustrated” mood. Dr.
16 Weinstock recommended that Mr. Hampton “continue Remeron, Effexor, [and] Tegretol.”⁶¹

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21 ⁵² AR 1191.

22 ⁵³ AR 1187.

23 ⁵⁴ AR 1191.

24 ⁵⁵ *Id.*

25 ⁵⁶ *Id.*

26 ⁵⁷ *Id.*

27 ⁵⁸ *Id.*

28 ⁵⁹ *Id.*

⁶⁰ AR 1187.

⁶¹ *Id.*

1 **2.1.3 Dr. John Alchemy: Family Practitioner — Examining**

2 On October 24, 2010, Dr. John Alchemy completed a comprehensive internal-medicine
3 evaluation.⁶² He diagnosed Mr. Hampton with “chronic low back and neck pain, uncontrolled
4 substance, . . . [h]ypertension, not controlled, . . . [and] [o]ngoing tobacco abuse.”⁶³ Dr. Alchemy
5 did not evaluate Mr. Hampton’s history of bipolar, depression, and anxiety.⁶⁴ Dr. Alchemy found
6 that Mr. Hampton had “[n]o limitations” for “sitting, walking, standing, or lifting,”⁶⁵ but he noted
7 that Mr. Hampton “walk[ed] in a slightly flexed posture with a cane . . . [and] moans when he
8 stands up from a chair.”⁶⁶

9 While Dr. Alchemy was testing Mr. Hampton’s range of motion, Mr. Hampton momentarily
10 lost consciousness when he “turn[ed] his head to the right side and titlt[ed] back.”⁶⁷ Mr. Hampton
11 “close[d] his eyes and list[ed] backward.”⁶⁸ During this episode, Mr. Hampton “[was] easily
12 supported and his eyes open[ed] within 2–3 seconds.”⁶⁹ Mr. Hampton and his wife reported that
13 “this [was] [a] normal event [for Mr. Hampton] with neck motion.”⁷⁰ Dr. Alchemy could not
14 provide a reason “related to an objective documented condition” for Mr. Hampton’s “brief
15 momentary loss of consciousness.”⁷¹ Dr. Alchemy found that Mr. Hampton should “no[t] work at
16 heights, around heavy machinery, at extreme temperatures, or in safety-sensitive work
17 environments.”⁷² Dr. Alchemy imposed “workplace environmental activity limitations” due to Mr.
18 Hampton’s “stated loss of consciousness.”⁷³ Dr. Alchemy concluded that Mr. Hampton should

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20 ⁶² AR 379–83, 459–64.

21 ⁶³ AR 382, 463.

22 ⁶⁴ *Id.*

23 ⁶⁵ AR 382-83, 464.

24 ⁶⁶ AR 381, 462.

25 ⁶⁷ AR 381.

26 ⁶⁸ *Id.*

27 ⁶⁹ AR 381, 462.

28 ⁷⁰ *Id.*

⁷¹ *Id.*

⁷² AR 383, 464.

⁷³ *Id.*

1 “no[t] climb[] or balance[]” and should “continue using the cane” for comfort, but he could not
2 “document a condition [] which would necessitate the use of a cane.”⁷⁴

3 **2.1.4 Dr. Marion-Isabelle Zipperle: Psychologist — Examining**

4 On October 28, 2010, Dr. Marion-Isabelle Zipperle, a clinical psychologist, performed a
5 comprehensive psychiatric evaluation of Mr. Hampton.⁷⁵ During the examination, Mr. Hampton
6 claimed that he was “in chronic pain, [] depressed[,] and moody.”⁷⁶ Dr. Zipperle reported that Mr.
7 Hampton “need[ed] help to bathe and dress”⁷⁷ and did not perform yard work or help clean the
8 house because “he c[ould] not bend.”⁷⁸ Mr. Hampton also stated that he “very rarely dr[ove],” but
9 Dr. Zipperle’s staff saw Mr. Hampton drive himself away after the examination.⁷⁹ Mr. Hampton
10 had trouble walking and brought a cane to the examination.⁸⁰ Mr. Hampton was cooperative and
11 “[d]epressed, quiet, coherent, and logical” and “despairing.”⁸¹ Dr. Zipperle noted no deficits in
12 intellectual functioning.⁸²

13 Dr. Zipperle diagnosed Mr. Hampton with a “pain disorder, post-traumatic stress disorder,
14 bipolar disorder, panic disorder with agoraphobia, amphetamine dependence in remission, and a
15 personality disorder.”⁸³ Dr. Zipperle gave the following prognosis:

16 The claimant’s prognosis is poor due to the fact that he has mood swing keeping him
17 from functioning correctly. He is expansive, has racing thoughts, is impulsive, does
18 things he regrets, has poor judgment, had an accident in which that he re-lives,
19 flashbacks, nightmares, intrusive thoughts, becomes equally depressed, no
20 motivation, no energy, withdrawn, crying, helpless, hopeless, feeling self-esteem,
self-confidence, suicidal with no plan, nightmares, anxiety about going out and being
in crowds and open spaces. He does not have any apparent cognitive impairment.

21 ⁷⁴ AR 383.

22 ⁷⁵ AR 386–89.

23 ⁷⁶ AR 386.

24 ⁷⁷ AR 387.

25 ⁷⁸ *Id.*

26 ⁷⁹ AR 386.

27 ⁸⁰ AR 387.

28 ⁸¹ AR 387–88.

⁸² AR 388.

⁸³ *Id.*

1 His impairments are emotional, psychological, and they would not improve in 12
2 months. He is in therapy periodically.⁸⁴

3 Dr. Zipperle described Mr. Hampton’s functional assessment as follows:

4 The claimant can manage his own money.

5 The claimant can perform simple and repetitive tasks.

6 The claimant could not accept instructions from supervisors or interact with
7 coworkers and the public.

8 The claimant would need special or additional instructions to work. He could not
9 maintain regular attendance in a workplace and he would have problems completing
10 a workday because of his performance issue from his psychiatric problems.

11 The claimant has impaired ability to handle stress in a workplace.⁸⁵

12 **2.1.5 Dr. Norman Zukowsky: Psychiatric Consultant (PhD) — Consulting**

13 On November 17, 2010, Dr. Norman Zukowsky, PhD, the state-agency psychiatric consultant,
14 completed two checklist forms, a Psychiatric Review Technique and a Mental Residual Functional
15 Capacity Assessment.⁸⁶ In the Psychiatric Review Technique, Dr. Zukowsky found that Mr.
16 Hampton had mild restriction of activities in daily living, moderate difficulties in maintaining
17 social functioning, moderate difficulties maintaining concentration, persistence, and pace, and no
18 repeated episodes of decompensation.⁸⁷

19 In the Mental Residual Functional Capacity Assessment, Dr. Zukowsky found that Mr.
20 Hampton was moderately limited in the following: “ability to understand and remember detailed
21 instructions;” “ability to carry out detailed instructions;” and “ability to interact appropriately with
22 the general public.”⁸⁸ Dr. Zukowsky said that Mr. Hampton could “understand and remember 1-
23 and 2-step instructions,” “accept supervision[,] and generally get along with others.”⁸⁹ He noted
24 that Mr. Hampton’s “psychiatric symptoms may interfere with interactions with others at times, so

25 ⁸⁴ AR 389.

26 ⁸⁵ *Id.*

27 ⁸⁶ AR 393–406.

28 ⁸⁷ AR 401.

⁸⁸ AR 404–05.

⁸⁹ AR 406.

1 [Mr. Hampton] should not interact with the public consistently.”⁹⁰ Dr. Zukowsky said that Mr.
2 Hampton was “most likely” to have “employment success . . . if assigned 1- or 2-step duties in a
3 non-public setting.”⁹¹

4 As part of Mr. Hampton’s case analysis, Dr. D. Pong, MD, reported that Dr. Zukowsky had
5 noted that (1) the accuracy of Mr. Hampton’s (and his wife’s) “ADL” (Activities of Daily Living)
6 questionnaire was uncertain based in part on Mr. Hampton’s claim that he did not drive but was
7 seen driving away from his appointment with Dr. Zipperle;⁹² (2) Dr. Zipperle’s assessment
8 “confuses what [Mr. Hampton] has reported and what she [Dr. Zipperle] observe[d] or
9 conclude[d],” (3) the “diagnoses and deficits in [Mr. Hampton’s] work abilities appear largely
10 unsupported except by [Mr. Hampton’s] allegation[s],”⁹³ and (4) “because [Mr. Hampton] [was]
11 able to drive/travel independently when necessary, [was] fulfilling requirements of an online
12 school, and interact[ed] with others in an acceptable fashion,” Mr. Hampton “c[ould] at least
13 perform duties of a few steps in a competitive, nonpublic work setting.”⁹⁴

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15 **3. Mr. Hampton’s Testimony — 2011 and 2015 Hearings**

16 At the September 19, 2011 hearing, Mr. Hampton testified that he worked as a truck driver
17 from 1999 to December 26, 2006, the date of a syncope-related accident, and had not worked
18 since.⁹⁵ At the time of the hearing, Mr. Hampton was living with his third wife,⁹⁶ “living off of
19 family loans, [his] wife’s trust fund, and [a] worker’s comp claim.”⁹⁷ In 2010, Mr. Hampton
20 enrolled in online classes at the Art Institute in Pittsburg and took one class every six weeks.⁹⁸ Mr.

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22 ⁹⁰ *Id.*

23 ⁹¹ *Id.*

24 ⁹² AR 409. The attribution to Dr. Zukowsky of these obstacles is in a report signed by “D. Pong MD.”

25 ⁹³ *Id.*

26 ⁹⁴ *Id.*

27 ⁹⁵ AR 934–35.

28 ⁹⁶ AR 934.

⁹⁷ AR 936.

⁹⁸ AR 939.

1 Hampton testified that he had four to five assignments per week and spent roughly ten hours a
2 week on his assignments — roughly an hour and a half a day.⁹⁹ He failed a class “due to an
3 inability to spend that much time on a computer,”¹⁰⁰ and his prescribed medication made him
4 drowsy.¹⁰¹

5 The ALJ asked Mr. Hampton what was keeping him from working.¹⁰² Mr. Hampton testified
6 that his back and neck caused him a lot of pain so he “constantly had to change [his] position,
7 can’t sit upright in a chair for very long, [and] had to be able to get up and walk around . . . about
8 every 10 to 20 minutes . . . or lean against a wall . . . and then lay down . . . at least a half an hour
9 of every hour.”¹⁰³ Mr. Hampton testified that he saw his primary care physician, Dr. Pendleton,
10 once a month.¹⁰⁴ Dr. Pendleton prescribed his medications “for the last couple of years.”¹⁰⁵ Mr.
11 Hampton reported that the medications “cover about 75% of the pain.”¹⁰⁶ Mr. Hampton
12 acknowledged that he had not sought treatment for the rest of the pain.¹⁰⁷ He reported that an
13 average day consisted of his waking up at “10 or 10:30 a.m.,” taking his medication, sitting “in
14 bed for two hours [un]til the medicine takes effect,” “get[ting] out of bed . . . [to] sit in his recliner
15 for part of the day, . . . and then, about halfway through the day, I end up back in the bedroom
16 again laying down because the recliner started to hurt my back, so I need to change positions.”¹⁰⁸
17 If it is a “good day,” Mr. Hampton would get dressed and goes with his wife to the grocery
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21 ⁹⁹ AR 940–41, 943.

22 ¹⁰⁰ AR 944.

23 ¹⁰¹ AR 960.

24 ¹⁰² AR 946.

25 ¹⁰³ AR 946–47.

26 ¹⁰⁴ AR 950.

27 ¹⁰⁵ AR 960.

28 ¹⁰⁶ AR 947.

¹⁰⁷ AR 948.

¹⁰⁸ AR 961.

1 store.¹⁰⁹ Mr. Hampton testified about the side effects from the medications, such as his being
2 “lethargic, sleepy, dizzy” and having “diarrhea.”¹¹⁰

3 Regarding his syncope, Mr. Hampton said that he passed out “once every two, three days,”¹¹¹
4 requiring either trips to the emergency room (mostly) or crawling back into bed (sometimes)
5 because¹¹² “it’s not worth sitting in the emergency room for seven hours.”¹¹³ Mr. Hampton
6 testified that he could carry up to 10 pounds,¹¹⁴ was pursuing a hobby in photography,¹¹⁵ and
7 “visit[ed] his parents weekly.”¹¹⁶ He said that he did not drive except for in “a rare emergency”
8 such as when his wife was really sick.¹¹⁷

9 On August 10, 2015, Mr. Hampton testified on remand before ALJ Kwon at a supplemental
10 hearing.¹¹⁸ The ALJ questioned Mr. Hampton about matters including his marital status, living
11 situation, education level, daily living activities, medical conditions, and work history.¹¹⁹ Mr.
12 Hampton testified that he was now divorced and living with his parents (but had been living with
13 his ex-wife during the relevant period).¹²⁰ Mr. Hampton completed high school and a year and a
14 half of college credits as a part-time student but was unable to finish his degree because of the side
15 effects of his medications, which “fuzz[ed] his brain.”¹²¹

16 Mr. Hampton testified that he last worked as commercial truck driver but had not worked since
17 December 26, 2006, when he was in a traffic accident after a syncope episode where he “blacked
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19 ¹⁰⁹ AR 962.

20 ¹¹⁰ AR 960.

21 ¹¹¹ AR 950–51.

22 ¹¹² *Id.*

23 ¹¹³ AR 951.

24 ¹¹⁴ AR 964.

25 ¹¹⁵ AR 965.

26 ¹¹⁶ AR 967.

27 ¹¹⁷ AR 938.

28 ¹¹⁸ AR 806–08.

¹¹⁹ AR 811–36.

¹²⁰ AR 811.

¹²¹ AR 811, 822–23, 840.

1 out behind the wheel and hit a guy head-on” in his truck and lost his commercial driver’s license;
2 he eventually lost his regular driver’s license too because of his medical condition.¹²² Mr.
3 Hampton testified that he had blacked out a few times before the accident¹²³ and “once every two
4 to three months” after the accident.¹²⁴ Mr. Hampton described a syncope episode as “hit[ting] the
5 floor and out cold for . . . 30 seconds.”¹²⁵ Mr. Hampton said that he was now better able to
6 recognize an upcoming syncope episode, which includes “tingling up the back of [his] neck” and
7 “lightheadedness.”¹²⁶ He testified that his current medications stabilized his syncope and bipolar
8 symptoms and that he had not had an episode for approximately one year or more.¹²⁷

9 Mr. Hampton testified that he spent most of his time at home¹²⁸ and that his parents assisted
10 him with laundry and cooking¹²⁹ (although he did “laundry a couple times” and “occasionally
11 cook[ed] a meal.”¹³⁰ Mr. Hampton said that he did not now do any grocery shopping¹³¹ but made
12 his bed and took care of personal care: “dressing, showering and all that. . . .”¹³² Mr. Hampton
13 testified that he had a girlfriend and occasionally saw friends.¹³³

14 Mr. Hampton testified that he had not driven since 2006, except for once when he “drove [his]
15 girlfriend home because she had a little too much to drink.”¹³⁴ Family members gave him rides,
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19 ¹²² AR 811–14.

20 ¹²³ AR 813.

21 ¹²⁴ AR 814–15.

22 ¹²⁵ AR 816.

23 ¹²⁶ AR 817.

24 ¹²⁷ AR 815, 818.

25 ¹²⁸ AR 826.

26 ¹²⁹ *Id.*

27 ¹³⁰ *Id.*

28 ¹³¹ AR 827.

¹³² AR 826.

¹³³ AR 827.

¹³⁴ AR 813–14.

1 and he took the bus.¹³⁵ Mr. Hampton testified he did photography “occasionally . . . once every
2 two to three months” between 2006 and 2011.¹³⁶

3 He testified that a psychiatrist at Petaluma Health Center first prescribed him medication, but
4 he could not recall her name.¹³⁷ Then, Mr. Hampton’s primary-care physician, Dr. Pendleton,
5 started monitoring Mr. Hampton’s medications because Mr. Hampton did not have a good
6 relationship with the psychiatrist.¹³⁸ The ALJ asked Mr. Hampton how he managed his pain.¹³⁹
7 Mr. Hampton responded that from 2006 to 2011, he took Dilauded, Percocet, Tegretol, and
8 Morphine for pain management.¹⁴⁰ He said that he spent lots of time in bed and was often fatigued
9 during the day,¹⁴¹ napping between two to four hours every day.¹⁴² Mr. Hampton tried physical
10 therapy unsuccessfully for six months.¹⁴³ He tried acupuncture, which gave him temporary relief
11 for one to two hours after each appointment.¹⁴⁴ Mr. Hampton testified that he started using a
12 fentanyl pain patch on his back in October 2011,¹⁴⁵ which was more effective for pain
13 management than pills, which he described as a “pill rollercoaster.”¹⁴⁶ Mr. Hampton testified that
14 he changed positions often throughout the day to manage the pain.¹⁴⁷

15 The ALJ asked Mr. Hampton about his experience “ghost hunting” in 2008.¹⁴⁸ Mr. Hampton
16 explained he got into “ghost hunting” in early 2008 through a friend and “quit going four months
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18 ¹³⁵ AR 827.

19 ¹³⁶ AR 828.

20 ¹³⁷ AR 820.

21 ¹³⁸ AR 820–21.

22 ¹³⁹ AR 831.

23 ¹⁴⁰ AR 838.

24 ¹⁴¹ *Id.*

25 ¹⁴² AR 839.

26 ¹⁴³ AR 830.

27 ¹⁴⁴ AR 831.

28 ¹⁴⁵ *Id.*

¹⁴⁶ AR 831, 1303.

¹⁴⁷ AR 831.

¹⁴⁸ AR 831–32.

1 later.”¹⁴⁹ He described “ghost hunting” as answering house calls for people who believe that their
2 house is haunted¹⁵⁰ and using monitoring equipment to detect paranormal activity.¹⁵¹ Mr.
3 Hampton’s role was watch the monitor to give the group members bathroom or other breaks, and
4 he was an active participant for 10 to 15 minutes at a time.¹⁵²

5
6 **4. Vocational Expert Stephen P. Davis’s Testimony — 2015**

7 Stephen P. Davis, a vocational expert (“VE”), testified at the ALJ hearing on remand on
8 August 10, 2015.¹⁵³ The ALJ asked Mr. Davis to classify Mr. Hampton’s past work.¹⁵⁴ Mr. Davis
9 stated that Mr. Hampton had been a truck driver, dump-truck driver, warehouse worker, title clerk,
10 vending machine attendant, and dishwasher.¹⁵⁵ The ALJ posed a hypothetical question to the VE:
11 whether an individual of Mr. Hampton’s age, education, and vocational history could perform any
12 of his past relevant work if that person had the following limitations: could “perform light work;”
13 was precluded from “jobs that require climbing ladders, ropes, and scaffolding;” could do “no
14 work at heights or with heavy and hazardous machinery or driving;” was restricted to jobs that
15 “remain simple and routine with a maximum [Special Vocational Preparation] SVP of 2;” could
16 perform no jobs with “interaction with the general public in terms of the primary duties of the
17 job;” and could not do “teamwork projects.”¹⁵⁶ Mr. Davis testified that such a person could
18 perform Mr. Hampton’s past work as a “vending machine vendor.”¹⁵⁷ The ALJ then asked the VE
19 to “give three [additional] examples that would fit [the] hypothetical.”¹⁵⁸ Mr. Davis stated that
20

21 _____
¹⁴⁹ AR 832.

22 ¹⁵⁰ AR 831–833.

23 ¹⁵¹ *Id.*

24 ¹⁵² AR 834.

25 ¹⁵³ AR 806, 841–45.

26 ¹⁵⁴ AR 842.

27 ¹⁵⁵ AR 852.

28 ¹⁵⁶ AR 842–43.

¹⁵⁷ AR 843.

¹⁵⁸ *Id.*

1 such a person also could work as an “assembler of electrical equipment,” a “shipping and
2 receiving weigher,” and a “lamination inspector.”¹⁵⁹

3 Then the ALJ posed a second hypothetical, adding that the person would either “miss work
4 three days or more every single month or be off task while they are at work, one or the other, on a
5 25% or more chronic basis.”¹⁶⁰ Mr. Davis testified that a person with those limitations could not
6 perform the above-mentioned work, and the limitations “would rule out all work” in the national
7 economy.¹⁶¹

8 Mr. McCaskell, Mr. Hampton’s representative, asked the VE, “if the person [from the first
9 hypothetical] was unable to concentrate for two-hour windows at a time to do simple repetitive
10 tasks, would they be able to perform any of that work.”¹⁶² Mr. Davis testified, “no.”¹⁶³

12 ANALYSIS

13 1. Standard of Review

14 Under 42 U.S.C. § 405(g), district courts have jurisdiction to review any final decision of the
15 Commissioner if the claimant initiates a suit within sixty days of the decision. A court may set
16 aside the Commissioner’s denial of benefits only if the ALJ’s “findings are based on legal error or
17 are not supported by substantial evidence in the record as a whole.” *Vasquez v. Astrue*, 572 F.3d
18 586, 591 (9th Cir. 2009) (internal citation and quotation marks omitted); 42 U.S.C. § 405(g).
19 “Substantial evidence means more than a mere scintilla but less than a preponderance; it is such
20 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
21 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The reviewing court should uphold “such
22 inferences and conclusions as the [Commissioner] may reasonably draw from the evidence.” *Mark*
23 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). If the evidence in the administrative record

25 ¹⁵⁹ AR 843–44.

26 ¹⁶⁰ AR 844.

27 ¹⁶¹ *Id.*

27 ¹⁶² *Id.*

28 ¹⁶³ *Id.*

1 supports the ALJ’s decision and a different outcome, the court must defer to the ALJ’s decision
2 and may not substitute its own decision. *Tackett v. Apfel*, 180 F.3d 1094, 1097–98 (9th Cir. 1999).
3 “Finally, [a court] may not reverse an ALJ’s decision on account of an error that is harmless.”
4 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

5
6 **2. Applicable Law**

7 A claimant is considered disabled if (1) he or she suffers from a “medically determinable
8 physical or mental impairment which can be expected to result in death or which has lasted or can
9 be expected to last for a continuous period of not less than twelve months,” and (2) the
10 “impairment or impairments are of such severity that he or she is not only unable to do his
11 previous work but cannot, considering his age, education, and work experience, engage in any
12 other kind of substantial gainful work which exists in the national economy. . . .” 42 U.S.C.
13 § 1382c(a)(3)(A) & (B). “To determine whether or not a claimant is disabled, [the] ALJ follows a
14 five-step evaluation.” *Zavalin v. Colvin*, 778 F.3d 842, 846 n.1 (9th Cir. 2015) (citing 20 C.F.R. §
15 416.920(a)(4)). This five-step analysis is as follows. *Tackett*, 180 F.3d at 1098 (citing 20 C.F.R. §
16 404.1520).

17 **Step One.** Is the claimant presently working in a substantially gainful activity? If so,
18 then the claimant is “not disabled” and is not entitled to benefits. If the claimant is
19 not working in a substantially gainful activity, then the claimant case cannot be
20 resolved at step one, and the evaluation proceeds to step two. *See* 20 C.F.R.
21 § 404.1520(a)(4)(i).

22 **Step Two.** Is the claimant’s impairment (or combination of impairments) severe? If
23 not, the claimant is not disabled. If so, the evaluation proceeds to step three. *See* 20
24 C.F.R. § 404.1520(a)(4)(ii).

25 **Step Three.** Does the impairment “meet or equal” one of a list of specified
26 impairments described in the regulations? If so, the claimant is disabled and is
27 entitled to benefits. If the claimant’s impairment does not meet or equal one of the
28 impairments listed in the regulations, then the case cannot be resolved at step three,
and the evaluation proceeds to step four. *See* 20 C.F.R. § 404.1520(a)(4)(iii).

Step Four. Considering the claimant’s RFC, is the claimant able to do any work that
he or she has done in the past? If so, then the claimant is not disabled and is not
entitled to benefits. If the claimant cannot do any work he or she did in the past, then
the case cannot be resolved at step four, and the case proceeds to the fifth and final
step. *See* 20 C.F.R. § 404.1520(a)(4)(iv).

1 **Step Five.** Considering the claimant’s RFC, age, education, and work experience, is
2 the claimant able to “make an adjustment to other work?” If not, then the claimant is
3 disabled and entitled to benefits. *See* 20 C.F.R. § 404.1520(a)(4)(v). If the claimant
4 is able to do other work, the Commissioner must establish that there are a significant
5 number of jobs in the national economy that the claimant can do. There are two ways
6 for the Commissioner to show other jobs in significant numbers in the national
7 economy: (1) by the testimony of a vocational expert or (2) by reference to the
8 Medical-Vocational Guidelines at 20 C.F.R., part 404, subpart P, app. 2.

9 For steps one through four, the burden of proof is on the claimant. At step five, the burden
10 shifts to the Commissioner. *Gonzales v. Sec’y of Health & Human Servs.*, 784 F.2d 1417, 1419
11 (9th Cir. 1986).

12 **3. Application**

13 On remand, the ALJ followed the five-step sequential evaluation process to determine whether
14 Mr. Hampton was disabled and concluded that he was not.¹⁶⁴

15 At step one, the ALJ found the Mr. Hampton did not engage in substantial gainful activity
16 during the relevant period (from his alleged onset date of December 26, 2006 through his last day
17 of coverage on December 31, 2011).¹⁶⁵

18 At step two, the ALJ found that Mr. Hampton had the following severe impairments: “arthritis,
19 headaches, fibromyalgia, obesity, depressive disorder, [and] anxiety disorder.”¹⁶⁶ The ALJ found
20 that Mr. Hampton’s “medically established disorders more than minimally affect[ed] [his] ability
21 to perform work related activities, and . . . [were] severe.”¹⁶⁷ The ALJ noted there was evidence of
22 other impairments in Mr. Hampton’s medical records, such as, “hypertension, asthma, bronchitis,
23 appendicitis, and obesity” but found that there was “no evidence [that the] impairments
24 interfere[d] with [Mr. Hampton]’s ability to work.”¹⁶⁸

25 ¹⁶⁴ AR 789; *see also* 20 CFR 404.1520(a).

26 ¹⁶⁵ AR 791.

27 ¹⁶⁶ *Id.*

28 ¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

1 At step three, the ALJ found that Mr. Hampton did not have an impairment or combination of
2 impairments that met or medically equaled a listed impairment.¹⁶⁹ The ALJ found that the record
3 did not support the existence of any such functional limitations, and “no treating or examining
4 physician [] reported findings, which either [met] or [were] equivalent in severity to the criteria of
5 any listed impairment.”¹⁷⁰ The ALJ found that Mr. Hampton’s mental impairments — individually
6 and combined — did not meet Listings 12.04 and 12.06 because Mr. Hampton did not have
7 “marked” limitations in daily living, social functioning, or concentration, persistence, or pace.¹⁷¹

8 The ALJ found only mild restrictions in daily living because Mr. Hampton “testified he [was]
9 able to pursue his hobby of photographing families and landscapes from his car, use[d] Photoshop
10 to edit pictures, . . . and [was] able to cook, do laundry, and carry light groceries.”¹⁷² The ALJ
11 noted that Mr. Hampton “was actively part of a ghost hunting group, enrolled as a part time
12 student for most of the period at issue, and was able to drive independently.”¹⁷³

13 The ALJ found mild to moderate difficulties in social functioning based on the assessment of
14 Mr. Hampton’s examining psychologist.¹⁷⁴ In addition, giving Mr. Hampton the “benefit of the
15 doubt,” the ALJ found “moderate limitations” with concentration, persistence and pace even
16 though Mr. Hampton “testified he is able to read, watch TV, and take online university classes for
17 photography”¹⁷⁵ and — according to his examining and non-examining psychiatric evaluations —
18 was “able to carry out simple instructions without difficulties.”¹⁷⁶ The ALJ found no episodes of
19 decompensation of an extended duration.¹⁷⁷

22 ¹⁶⁹ *Id.*

23 ¹⁷⁰ *Id.*

24 ¹⁷¹ AR 792.

25 ¹⁷² *Id.*

26 ¹⁷³ *Id.*

27 ¹⁷⁴ *Id.*

28 ¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

1 Before considering whether Mr. Hampton was able to do any work that he had done in the past
2 under step four of the evaluation process, the ALJ followed a two-step process to determine (1)
3 “whether there [was] an underlying medically determinable physical or mental impairment(s) . . .
4 that could reasonably be expected to produce [Mr. Hampton’s] pain or other symptoms” and (2)
5 the extent to which “the intensity, persistence, or functionally limiting effects of pain or other
6 symptoms” limit Mr. Hampton’s functioning.¹⁷⁸ In doing so, the ALJ found that Mr. Hampton’s
7 “medically determinable impairments could reasonably be expected to cause his symptoms;
8 however [his] statements concerning the intensity, persistence, and limiting effects of [his]
9 symptoms [were] not entirely credible.”¹⁷⁹

10 Specifically, the ALJ found that Mr. Hampton’s testimony was inconsistent with his
11 “treatment-seeking history, mild findings on examination, and activities of daily living.”¹⁸⁰ The
12 ALJ said that Mr. Hampton’s allegations that he was “in constant pain, unable to do most daily
13 activities,” and “pass[ing] out every 2–3 days” were “belied by the medical record.”¹⁸¹ The ALJ
14 observed that “despite regular office visits, [Mr. Hampton] did not report frequent syncope
15 episodes at any of his appointments in 2009, 2010 or 2011.”¹⁸² The ALJ noted that Mr. Hampton
16 was an active participant in a “ghost hunting group . . . which likely required physical and mental
17 activity inconsistent with the level of pain and fatigue [Mr. Hampton] allege[d].”¹⁸³ The ALJ
18 stated that Mr. Hampton had “generally reported good relief from pain medication” and testified
19 that he “visit[ed] his parents weekly and [was] able to cook, shop, do laundry, and carry groceries
20 weighing less than 10 pounds, as well as drive.”¹⁸⁴ The ALJ noted that Mr. Hampton had told the
21 consultative psychiatric examiner, Dr. Zipperle, that “he very rarely drives;” “however, after the
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23 ¹⁷⁸ AR 793.
24 ¹⁷⁹ AR 794.
25 ¹⁸⁰ *Id.*
26 ¹⁸¹ AR 795.
27 ¹⁸² *Id.*
28 ¹⁸³ *Id.*
¹⁸⁴ *Id.*

1 examination, [Mr. Hampton] was observed driving away in his truck.”¹⁸⁵ The ALJ determined that
2 Mr. Hampton’s symptoms were not “as severe and limiting as alleged” and were not supported by
3 the medical record.¹⁸⁶

4 The ALJ determined that Mr. Hampton had the RFC
5 to perform light work as defined in 20 C.F.R. 404.1567(b) except the claimant cannot
6 climb ladders, ropes or scaffolding, no work at heights, or around heavy or hazardous
7 machinery or driving. The claimant *can perform work that is simple and routine with*
8 *a maximum Specific Vocational Preparation (SVP) of 2*. The claimant should avoid
interaction with the general public as a primary duty of the job and no teamwork
projects with coworkers.¹⁸⁷

9 Applying this RFC and the other factors at step four, the ALJ found that Mr. Hampton was
10 “capable of performing past relevant work as a vending machine attendant.”¹⁸⁸ The ALJ noted that
11 such a finding was sufficient to find Mr. Hampton “not disabled” but nevertheless also analyzed
12 his claim under step five as an “alternative” basis for her decision finding no disability.¹⁸⁹

13 At step five, the ALJ found that “[b]ased on the testimony of the vocational expert” and
14 “considering [Mr. Hampton’s] age, education, work experience, and RFC, [Mr. Hampton] was
15 capable of making a successful adjustment to other work that existed in significant numbers in the
16 national economy,”¹⁹⁰ specifically as an electrical equipment assembler, shipping-and-receiving
17 weigher, or laminator inspector.¹⁹¹ Ultimately, the ALJ found that Mr. Hampton was not disabled
18 any time during the relevant period from December 26, 2006 through December 31, 2011.¹⁹²

21 _____
¹⁸⁵ *Id.*

22 ¹⁸⁶ *Id.*

23 ¹⁸⁷ AR 793 (emphasis added). Special Vocational Preparation (“SVP”) is defined “as the amount of
24 lapsed time required by a typical worker to learn the techniques, acquire the information, and develop
the facility needed for average performance in a specific job-worker situation.” Dictionary of
Occupational Titles (“DOT”), App. C, 1991 WL 688702 (4th ed. 1991).

25 ¹⁸⁸ AR 797–98.

26 ¹⁸⁹ AR 798.

27 ¹⁹⁰ AR 799.

28 ¹⁹¹ *Id.*

¹⁹² *Id.*

1 In his pending motion for summary judgment, Mr. Hampton contends that the ALJ’s decision
 2 is not supported by substantial evidence because the ALJ “implicitly” rejected the opinion of state-
 3 agency psychiatric consultant, Dr. Norman Zukowsky (PhD), despite the ALJ’s purporting to give
 4 it “great weight.”¹⁹³ Specifically, Mr. Hampton contends that the ALJ erred by effectively
 5 equating Dr. Zukowsky’s assessment that Mr. Hampton could “understand and remember 1- and
 6 2-step instructions” with the ALJ’s RFC determination that Mr. Hampton “can perform work that
 7 is simple and routine.”¹⁹⁴

8 Before reviewing the merits of this contention, the court addresses whether Mr. Hampton is
 9 barred from raising this issue because the court conclusively adjudicated it in *Hampton I*.

10 **3.1 Law of the Case Doctrine Does Not Bar Mr. Hampton’s Action**

11 In its cross-motion for summary judgment, the Commissioner contends that Mr. Hampton is
 12 barred from raising his challenge to the ALJ’s decision based on principles of “*res judicata* (or
 13 claim preclusion)”¹⁹⁵ because the district court’s prior decision in *Hampton I* “resulted in a final
 14 decision on the merits” that affirmed the ALJ’s weighting and assessment of the medical evidence,
 15 including Dr. Zukowsky’s assessment.¹⁹⁶

16 Although couched as an issue of *res judicata* or claim preclusion, the Commissioner’s
 17 argument is based in the doctrine of the “law of the case.” Under the law-of-the-case doctrine, a
 18 court is precluded from revisiting issues that have been decided — either explicitly or implicitly
 19 — in a previous decision of the same court or a higher court. *Hall v. City of L.A.*, 697 F.3d 1059,
 20 1067 (9th Cir. 2012); *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993). Thus, under the law-of-
 21 the-case doctrine, “the decision of an appellate court on a legal issue must be followed in all
 22 subsequent proceedings in the same case.” *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995)

25 ¹⁹³ Mot. – ECF No. 16 at 6.

26 ¹⁹⁴ *Id.* at 5–9.

27 ¹⁹⁵ The Supreme Court uses the term “*res judicata*” to refer collectively to claim preclusion and issue
 preclusion. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

28 ¹⁹⁶ Mot. – ECF No. 19 at 6-7.

1 (quoting *Herrington v. Cty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (internal quotations
2 omitted)).

3 In the context of Social Security benefits determinations, the Ninth Circuit has held that the
4 law-of-the-case doctrine applies. *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). Moreover,
5 “as a general principle, the United States Supreme Court has recognized that an administrative
6 agency is bound on remand to apply the legal principles laid down by the reviewing court.” *Ischay*
7 *v. Barnhart*, 383 F.Supp.2d 1199, 1213–14 (C.D. Cal. 2005) (citations omitted); see *Sullivan v.*
8 *Hudson*, 490 U.S. 877, 886 (1989) (deviation from the court’s remand order in a subsequent
9 administrative proceedings is itself legal error, subject to reversal on further judicial review).
10 Thus, “[w]hen acting under an appellate court’s mandate, an inferior court is bound by the decree
11 as the law of the case.” *Vizcaino v. U. S. Dist. Court*, 173 F.3d 713, 719 (9th Cir. 1999) (internal
12 quotation marks omitted). In *Smith v. Berryhill*, No. 2:17-CV-00873-DWC, 2018 WL 1633822, at
13 *2–3 (W.D. Wash. Apr. 5, 2018), the district court summarized the relevant Social Security
14 regulations as follows:

15 When a Federal court remands a case to the Commissioner for further consideration,
16 the Appeals Council, acting on behalf of the Commissioner, may make a decision,
17 or *it may remand the case to an administrative law judge with instructions to take*
18 *action and issue a decision* or return the case to the Appeals Council with a
19 recommended decision. If the case is remanded by the Appeals Council, the
20 procedures explained in [20 C.F.R.] § 404.977 will be followed. 20 C.F.R. § 404.983
21 (emphasis added).

22 Under 20 C.F.R. § 404.977, when the Appeals Council remands a case to the ALJ,
23 the ALJ “shall take any action that is ordered by the Appeals Council and may take
24 any action that is not inconsistent with the Appeals Council’s remand order.”
25 Accordingly, on remand, the ALJ must follow the specific instructions of the
26 reviewing court. See *Stacy*, 825 F.3d at 567-69.

27 The Ninth Circuit has described the law-of-the-case doctrine as “a judicial invention designed
28 to aid in the efficient operation of court affairs Further, the doctrine serves to advance the
29 principle that in order to maintain consistency during the course of a single lawsuit,
30 reconsideration of legal questions previously decided should be avoided.” *United States v. Smith*,
31 389 F.3d 944, 948 (9th Cir. 2004) (citations and internal quotation marks omitted). Moreover, in
32 *Stacy*, the Ninth Circuit explained that the doctrine of the law of the case “is concerned primarily

1 with efficiency, and should not be applied when the evidence on remand is substantially different,
2 when the controlling law has changed, or when applying the doctrine would be unjust.” 825 F.3d
3 at 567.

4 In *Hampton I*, Mr. Hampton challenged the ALJ decision on the grounds that (1) the ALJ
5 improperly gave “limited weight” to medical evidence opinion given by the examining
6 psychologist, Dr. Zipperle, and (2) the ALJ failed to provide legally sufficient reasons to reject
7 Mr. Hampton’s testimony.¹⁹⁷ 2014 WL 3962618, at *6.

8 On the first issue, the court upheld the ALJ’s decision to give only “limited weight” to Dr.
9 Zipperle’s opinion, finding that it was supported by “specific and legitimate reason[s].” 2014 WL
10 3962618, at *9. As such, this determination is now law of the case. *See Stacy*, 825 F.3d at 567;
11 *Hall*, 697 F.3d at 1067. Likewise, on the second issue, the court found that the ALJ had “failed to
12 provide “clear and convincing reasons for discrediting [Mr. Hampton’s] subjective complaints”
13 about the severity of his symptoms and remanded the case to allow the ALJ to “reassess the
14 evidence in the record, and if the ALJ continues to discount any of Plaintiff’s subjective
15 complaints, ... [to] provide clear and convincing reasons for doing so consistent with this order.”
16 2014 WL 3962618, at *10-11.

17 Accordingly, this court must determine whether these determinations (or any determinations
18 implicit in them) bar either party from pursuing any particular challenge to or defense of the
19 subsequent 2015 ALJ decision. *See Stacy*, 825 F.3d at 567; *Hall*, 697 F.3d at 1067.

20 In the present action, Mr. Hampton’s only argument is his contention that the ALJ erred by
21 failing to explain or provide a legally sufficient basis to support her RFC determination that Mr.
22 Hampton “can perform work that is simple and routine,” given Dr. Zukowsky’s assessment that
23 Mr. Hampton could “understand and remember 1- and 2-step instructions,” which Mr. Hampton
24 contends is a lower functional limitation than the “simple and routine” limitation in the ALJ’s
25 RFC.¹⁹⁸ In *Hampton I*, the court reviewed and discussed Dr. Zukowsky’s opinion, but only in the
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27 ¹⁹⁷ AR 891.

28 ¹⁹⁸ Mot. – ECF No. 16 at 5-9.

1 context of the extent to which the ALJ could appropriately rely on Dr. Zukowsky’s opinion as a
 2 contradictory medical opinion to support her decision to give only limited weight to Dr. Zipperle’s
 3 medical opinion. 2014 WL 3962618, at *6–9. In these circumstances, the court declines to find
 4 that Mr. Hampton’s current issue on review (relating to Dr. Zukowsky’s opinion regarding Mr.
 5 Hampton’s ability to “understand and remember 1- and 2-step instructions”) is barred under the
 6 doctrine of the law of the case, given that that element was not a substantive part of the court’s
 7 decision in *Hampton I*. See *Ortega v. O’Connor*, 50 F.3d 778, 780 (9th Cir. 1995) (“[A] judgment
 8 of reversal by an appellate court is an adjudication only of matters expressly discussed and
 9 decided.”) quoting *Hansen & Rowland v. C.F. Lytle Co.*, 167 F.2d 998, 999 (9th Cir. 1948).

10 The court now turns to the merits of Mr. Hampton’s argument in this action.

11 **3.2 Inconsistency between ALJ’s RFC and Dr. Zukowsky’s Assessment**

12 “[T]he ALJ is responsible for translating and incorporating clinical findings into a succinct
 13 RFC.” *Rounds v. Com’r of Social Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015); see also
 14 *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001) (“it is the responsibility of the ALJ, not
 15 [a] physician, to determine residual functional capacity [RFC]”). The ALJ’s determination of a
 16 claimant’s RFC must be based on the medical opinions and the totality of the record. 20 C.F.R. §§
 17 404.1527(d), 404.1546(c). Moreover, the ALJ is responsible for “resolving conflicts in medical
 18 testimony, and for resolving ambiguities.” *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014)
 19 (quoting *Andrews*, 53 F.3d at 1039). In weighing and evaluating the evidence, the ALJ must
 20 consider the entire case record, including each medical opinion in the record, together with the rest
 21 of the relevant evidence. 20 C.F.R. § 416.927(b); see also *Orn v. Astrue*, 495 F.3d 625, 630 (9th
 22 Cir. 2007) (“[A] reviewing court must consider the entire record as a whole and may not affirm
 23 simply by isolating a specific quantum of supporting evidence.”) (internal quotation marks and
 24 citation omitted).

25 As noted above, Mr. Hampton contends that the ALJ erred in formulating her RFC assessment
 26 because the ALJ “implicitly” rejected the medical opinion of the non-examining psychiatric
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1 consultant, Dr. Zukowsky.¹⁹⁹ Specifically, Mr. Hampton argues that although the ALJ stated that
 2 she gave “great weight” to Dr. Zukowsky’s opinion, her RFC assessment (finding that Mr.
 3 Hampton could perform work that is “simple and routine within a maximum Specific Vocational
 4 Preparation (SVP) of 2”) was not supported by Dr. Zukowsky’s medical opinion (which assessed
 5 Mr. Hampton as being able to “understand and remember 1- and 2-step instructions” and
 6 concluded that “[e]mployment success [is] most likely if assigned 1- or 2-step duties in a non-
 7 public setting”).²⁰⁰ Mr. Hampton asserts that while these two assessments (in the ALJ’s RFC and
 8 in Dr. Zukowsky’s report) “may seem consistent,” they are “not the same.”²⁰¹ The court agrees.

9 As a preliminary matter, Mr. Hampton notes that the ALJ’s finding that Mr. Hampton was
 10 limited to work with a “maximum SVP of 2”²⁰² “is not the determinative factor in assessing
 11 whether the ALJ’s RFC determination is consistent with Dr. Zukowsky’s opinion.”²⁰³ The court
 12 agrees. “The SVP level is not [] synonymous with the simplicity of a task.” *Ferguson v. Colvin*,
 13 No. 3:15-CV-01532-SU, 2016 WL 7042076, at *2–3 (D. Or. Dec. 2, 2016) (citing *Smith v. Colvin*,
 14 No. 3:14-cv-01210-PA, 2016 WL 680535, at *11 (D. Or. Feb. 19, 2016) (finding that the “ALJ
 15 conflated two separate vocational considerations in formulating the RFC ...: the SVP level and the
 16 simplicity or complexity of the task”).

17 Instead, Mr. Hampton contends, the DOT’s general education development (“GED”)
 18 Reasoning Level is the “relevant vocational factor” by which to assess a claimant’s ability to

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¹⁹⁹ *Id.* at 5–6.

²⁰⁰ *Id.* at 5–6 (quoting AR 793 & 406).

²⁰¹ *Id.* at 6.

²⁰² The Social Security Administration uses (and has taken administrative notice of) the DOT, which gives detailed physical requirements for a variety of jobs. See 20 C.F.R. §§ 416.966(d)(1), 15666(d)(1). The DOT defines “significant vocational preparation” or “SVP” as the “amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.” DOT, App. C, § 2, 1991 WL 688702 (4th ed. 1991). “The higher the SVP rating, the more time it takes to equal average performance in that occupation.” *Nava v. Colvin*, No. 3:14-cv-01348-AA, 2015 WL 5854074, at *5 (D. Or. Oct. 6, 2015). An SVP of 2 means “anything beyond a short demonstration up to and including 1 month.” See *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1230 (9th Cir. 2009).

²⁰³ Mot. – ECF No. 16 at 6.

1 perform a given job.²⁰⁴ In support of his argument, he cites *Hiblar v. Colvin*, No. C15-5093-BJR-
2 MAT, 2015 WL 5254276, at *6 (W.D. Wash. Aug. 11, 2015), report and recommendation
3 adopted, No. C15-5093-BJR, 2015 WL 5285806 (W.D. Wash. Sept. 9, 2015) (finding that “[t]he
4 relevant vocational factor would be, instead [of the SVP level], the general education development
5 reasoning level, which measures the level of general education required to perform particular job
6 tasks”).

7 The Ninth Circuit took a similar approach in *Rounds* and observed:

8 There are six GED Reasoning Levels that range from Level One (simplest) to Level
9 Six (most complex). The lowest two levels are:

10 Level 1: Apply commonsense understanding to carry out simple one- or two-
11 step instructions. Deal with standardized situations with occasional or no
12 variables in or from these situations encountered on the job.

13 Level 2: Apply commonsense understanding to carry out detailed but
14 uninvolved written or oral instructions. Deal with problems involving a few
15 concrete variables in or from standardized situations.

16 807 F.3d at 1002–03 (citations omitted).

17 In *Rounds*, the Ninth Circuit remanded an appeal from the denial of disability when the ALJ
18 (and the VE) failed to “address[] whether Rounds’ limitation to one- to two-step tasks [as stated in
19 the RFC] was consistent with jobs requiring Level Two reasoning and, if so, why.” 807 F.3d at
20 1003. The court noted that “[t]here was an apparent conflict between Rounds’ RFC, which limits
21 her to performing one- and two-step tasks, and the demands of Level Two reasoning, which
22 requires a person to ‘[a]pply commonsense understanding to [carry out detailed but uninvolved
23 written or oral instructions;’” the court noted that “[t]he conflict between Rounds’ RFC and Level
24 Two reasoning is brought into relief by the close similarity between Rounds’ RFC and Level One
25 reasoning. Level One reasoning requires a person to apply commonsense understanding to carry
26 out simple one- or two-step instructions.” 807 F.3d at 1003 (internal quotation marks and citation
27 omitted).

28 ²⁰⁴ *Id.* at 7.

1 Here, Mr. Hampton’s contention is a similar, but slightly precursor, argument. Mr. Hampton
 2 contends that the ALJ erred because she gave “great weight” to Dr. Zukowsky’s assessment,
 3 including specifically noting Dr. Zukowsky’s assessment that Mr. Hampton could “understand and
 4 remember to one- and two-step instructions,” but failed to explicitly consider or reflect that in her
 5 RFC (or explain with appropriate reasons why she was not incorporating that medical assessment
 6 into her RFC).²⁰⁵ The court agrees. Specifically, Mr. Hampton, relying on *Rounds*, argues that (1)
 7 Dr. Zukowsky’s assessment of Mr. Hampton’s ability to “understand and remember 1- and 2-step
 8 instructions” matches the Level 1 standard of “carry[ing] out simple one- or two-step instructions”
 9 and is exceeded by the Level 2 standard of “carry[ing] out detailed but uninvolved written or oral
 10 instructions,” and (2) the jobs that the ALJ determined (in consultation with the VE) that Mr.
 11 Hampton was capable of performing were all GED Level 2 or even Level 3 positions (an assertion
 12 that the Commissioner does not dispute).²⁰⁶

13 Applicable regulations, rulings, and case law require that an ALJ’s determination of a
 14 claimant’s RFC must be based on the medical opinions and the totality of the record and that if the
 15 ALJ’s RFC assessment “conflicts with an opinion from a medical source, the adjudicator must
 16 explain why the opinion was not adopted.” Social Security Ruling 96–8p;²⁰⁷ 20 C.F.R. §§
 17 404.1546(c), 416.927(b) (ALJ must consider the entire case record, including each medical
 18 opinion in the record, together with the rest of the relevant evidence); *Lubin v. Comm’r of Soc.*
 19 *Sec. Admin.*, 507 Fed. Appx. 709, 712 (9th Cir. 2013) (“ALJ must include all restrictions in the
 20 residual functional capacity [RFC] determination”); *see Lusardi v. Astrue*, 350 Fed. Appx. 169,
 21 173 (9th Cir. 2009) (in determining claimant’s RFC, the ALJ must not reject “significant probative
 22 evidence” without explanation); *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996) (an ALJ
 23

24 _____
 25 ²⁰⁵ *Id.* at 6 (citing AR 797).

26 ²⁰⁶ *Id.* at 6-9; *see generally* Mot. – ECF No. 19.

27 ²⁰⁷ “Social Security Rulings (SSRs) ‘do not carry the “force of law,” but they are binding on ALJs
 28 nonetheless.’ *Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir.2009). They “reflect the
 official interpretation of the [SSA] and are entitled to some deference as long as they are consistent
 with the Social Security Act and regulations.” *Id.* (alteration in original) (quoting *Avenetti v.*
Barnhart, 456 F.3d 1122, 1124 (9th Cir. 2006)).” *Molina*, 674 F.3d at 1114.

1 errs when he rejects a medical opinion by ignoring it or failing to provide specific and legitimate
2 reasons for crediting a different opinion over the one in question); *Rounds*, 807 F.3d at 1006 (ALJ
3 is responsible for reviewing and incorporating medical “findings into a succinct RFC”); *Garrison*,
4 759 F.3d at 1010 (ALJ is responsible “for resolving ambiguities” in the record and errs if she
5 “rejects a medical opinion or assigns it little weight” without explanation or without explaining
6 why) (internal quotation marks and citation omitted); *see also Huntsberry v. Berryhill*, 2017 WL
7 2438527, at *9 (N.D. Cal. June 6, 2017) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir.
8 1989) (ALJ, however, “is not required ‘to agree with everything [that a non-treating, non-
9 examining physician] says in order to find that his testimony contains ‘substantial evidence’
10 supporting the ALJ’s determination”). Moreover, the Ninth Circuit has held:

11 A hypothetical question [to the VE] should set out all of the claimant’s impairments.
12 If the [RFC and] the “assumptions [upon which] the hypothetical are [based are] not
13 supported by the record, the opinion of the vocational expert that claimant has a
14 residual working capacity has no evidentiary value. The most appropriate way to
15 insure the validity of the hypothetical question posed to the vocational expert is to
16 base it upon evidence appearing in the record, whether it is disputed or not. . . . Unless
17 there is record evidence to adequately support this assumption, the opinion expressed
18 by the vocational expert is meaningless. [If] neither the hypothetical nor the answer
19 properly set forth all of [the claimant’s] impairments, the vocational expert’s
20 testimony cannot constitute substantial evidence to support the ALJ’s findings.

18 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (internal quotation marks and citation
19 omitted); *Lubin v. Comm’r of Soc. Sec. Admin*, 507 Fed. Appx. 709, 712 (9th Cir. 2013) (“ALJ
20 must include all restrictions in . . . the hypothetical question posed to the vocational expert [VE]”).

21 Here, the Commissioner resists the obvious similarity between Dr. Zukowsky’s assessment
22 and the GED Reasoning Level 1 and the apparent discrepancy between Dr. Zukowsky’s “1- and 2-
23 step instructions” assessment and the ALJ’s RFC assessment by raising various counter-
24 arguments, including, *inter alia*, the following: (1) Dr. Zukowsky “merely” found that Mr.
25 Hampton could follow “1- and 2-step instructions,” not that this was necessarily the limit of his
26 capability; (2) other evidence in the record as a whole supports the ALJ’s RFC, including Dr.
27 Zipperle’s assessment (that Mr. Hampton could “perform simple and repetitive tasks,” an
28 assessment previously given only “limited weight” by the ALJ); and (3) Dr. Zukowsky found that

1 Mr. Hampton could ““at least perform duties of a few steps in a competitive, nonpublic work
 2 setting,””²⁰⁸ implying that Mr. Hampton could “perform[] at least three step tasks.”²⁰⁹ While these
 3 various explanations and rationales offered by the Commissioner may or may not have merit, the
 4 ALJ did not adopt or reference them or otherwise adequately articulate her reasonings. The court
 5 declines the Commissioner’s entreat to undertake such an endeavor on behalf of the ALJ. The
 6 court instead finds that the ALJ failed to articulate an adequate reason for her decision to
 7 incorporate (or not) this part of Dr. Zukowsky’s assessment into her RFC assessment and that her
 8 failure to do so in these circumstances was an error. *See generally Garrison*, 759 F.3d at 1012–13.
 9 On remand, the ALJ may be able to offer reasons, but the court “cannot affirm the decision of an
 10 agency on a ground that the agency did not invoke in making its decision.” *Rounds*, 807 F.3d 996,
 11 1003–04 (9th Cir. 2015) (internal quotation marks and citations omitted). An ALJ does not have to
 12 address all grounds for its decision for a court to uphold the ALJ’s decision as supported by
 13 substantial evidence in the record as a whole. *Molina*, 674 F.3d at 1122 (failure to discuss certain
 14 evidence was inconsequential to the ultimate disability determination). And an error — viewed in
 15 the context of the record as a whole — can be harmless. *Id.* at 1111, 1122. But the omitted
 16 considerations here — the interplay between Dr. Zukowsky’s assessment of Mr. Hampton’s
 17 ability and the jobs that the ALJ identified (after consulting with the VE) that appear to be GED
 18 Reasoning Level 2 or higher — are material considerations, and the court cannot find the ALJ’s
 19 failure to consider them explicitly to be harmless. *See id.* at 1115; *see also Zavalin v. Colvin*, 778
 20 F.3d 842, 848 (9th Cir. 2015); *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir.
 21 2006) (holding that the ALJ’s failure to reconcile apparent conflict between the RFC and DOT
 22 was not harmless error). It is the ALJ’s job to determine the RFC based on the medical opinions
 23 and the totality of the record and to resolve any ambiguities. 20 C.F.R. § 404.1527(d),
 24

25 ²⁰⁸ Mot. – ECF No. 19 at 8 (quoting from AR 409). The court finds some ambiguity regarding whether
 26 it is appropriate to attribute this finding (and others from this same AR citation) to Dr. Zukowsky. The
 27 Commissioner and the district court in *Hampton I* all attributed it to Dr. Zukowsky. *See e.g.*, AR 896.
 28 The document itself appears to be a summary of various medical evidence that was signed by a “D.
 Pong, MD.” On remand, it may be possible to clarify and resolve this ambiguity and determine to what
 extent, if any, this affects the analysis of Mr. Hampton’s claim.

²⁰⁹ Mot. – ECF No. 19 at 8.

1 404.1546(c); *Garrison*, 759 F.3d at 1010.

2 **3.3 The ALJ’s Failure to Consider All of Mr. Hampton’s Limitations in the RFC**

3 Finally, the ALJ concluded, based on the medical evidence, that Mr. Hampton has “moderate
4 difficulties” with regard to “concentration, persistence or pace.”²¹⁰ The ALJ did not address this
5 limitation in her RFC analysis or her questions to the VE,²¹¹ and it is an additional basis for
6 remand.

7 As previously discussed, the ALJ concluded that Mr. Hampton can perform “light work” that
8 is “simple and routine with a maximum Specific Vocational Preparation (SVP) of 2.”²¹² This RFC
9 does not explicitly account for the moderate limitations that the ALJ assigned to Mr. Hampton
10 regarding concentration, persistence, and pace. *See Friesth v. Berryhill*, 2017 WL 901882, at *5
11 (C.D. Cal. Mar. 7, 2017) (the ALJ erred when the ALJ determined that the claimant was
12 moderately limited in maintaining concentration, persistence, or pace, but the RFC only limited
13 the claimant to simple, repetitive work); *Jahnsen v. Berryhill*, 265 F. Supp. 3d 992, 999 (D. Alaska
14 July 13, 2017). Similarly, in her first hypothetical question to the VE, the ALJ did not explicitly
15 incorporate any limitations in concentration, persistence, or pace.²¹³ *See Brink v. Comm’r of Soc.*
16 *Sec. Admin.*, 343 Fed. Appx. 211, 212 (9th Cir. 2009) (accepting medical evidence that claimant
17 had moderate difficulty maintaining concentration, persistence, or pace and holding that posing the
18 hypothetical question to vocational expert referencing “simple, repetitive work” was error).

19

20

21 ²¹⁰ AR 792.

22 ²¹¹ Mr. Hampton does not raise this issue explicitly in his summary-judgment motion. Ordinarily, a
23 court “will not consider any claims that were not actually argued in appellant’s opening brief.” *Indep.*
24 *Towers of Wash. v. Washington*, 350 F.3d 925,929 (9th Cir. 2003). But the “court [has a] duty to make
25 ‘a full review of the facts’ and ‘an independent determination as to whether the [Commissioner’s]
26 findings are supported by substantial evidence.’” *Farley v. Colvin*, 231 F. Supp. 3d 335, 339 & n.5
(N.D. Cal. 2017) (quoting *Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985) (In *Farely*, the district
27 court raised an issue *sua sponte* in a Social Security denial-of-benefits case despite the normal
28 presumptions against the court’s *sua sponte* raising non-jurisdictional claims and provided a summary
of other similar decisions in other districts); *Vasquez*, 572 F.3d at 591 (court has the obligation to
review the record for findings that are based on legal error or that are not supported by substantial
evidence in the record as a whole).

27 ²¹² AR 793.

28 ²¹³ AR 842–44.

1 An ALJ’s failure to explicitly consider concentration, persistence, and pace limitations is not
2 necessarily error. *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2015). In *Stubbs-*
3 *Danielson*, for example, the Ninth Circuit held that the ALJ translated the plaintiff’s condition —
4 including the pace and mental limitations — into a physician’s assessment of a restriction to
5 “simple tasks.” *Id.* (following other circuits and holding that an ALJ’s assessment of a claimant
6 adequately captures restrictions related to concentration, persistence, or pace where the assessment
7 is consistent with restrictions identified in the medical testimony). But here, given the omission
8 regarding the interplay between Dr. Zukowsky’s assessment of Mr. Hampton’s ability and the jobs
9 identified by the ALJ that appear to be GED Reasoning Level 2 or higher (considerations that the
10 court deems material), the ALJ on remand should specifically address the limitations related to
11 concentration, persistence, or pace in the RFC determination and the questions posed to the VE.
12 *See Lubin v. Comm’r of Soc. Sec. Admin.*, 507 Fed. Appx. 709, 712 (9th Cir. 2013) (“ALJ must
13 include all restrictions in the residual functional capacity [RFC] determination and the
14 hypothetical question posed to the vocational expert [VE], including moderate limitations in
15 concentration, persistence, or pace”); *Brink v. Comm’r of Soc. Sec. Admin.*, 343 Fed. Appx. 211,
16 212 (9th Cir. 2009). On this record, the court does not find the error harmless. *See Molina*, 674
17 F.3d at 1115.

18 CONCLUSION

19 The court grants Mr. Hampton’s summary-judgment motion, denies the Commissioner’s
20 cross-motion, and remands this case for further proceedings consistent with this order.²¹⁴

21 **IT IS SO ORDERED.**

22 Dated: June 8, 2018



23 LAUREL BEELER
24 United States Magistrate Judge

25 ²¹⁴ The court has “discretion to remand a case either for additional evidence and findings or for an
26 award of benefits.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v.*
27 *Charter*, 80 F.3d 1273, 1292 (9th Cir. 1996); *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989))
28 (“[t]he decision whether to remand for further proceedings or simply to award benefits is within the
discretion of [the] court”). Generally, “[i]f additional proceedings can remedy defects in the original
administrative proceeding, a social security case should be remanded.” *Garrison*, 759 F.3d at 1019
(quoting *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981)) (alteration in original).