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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

TIMOTHY MICHAEL PECK,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No: C 09-2600 SBA

**ORDER RE: CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

Dkt. No. 14, 16

Plaintiff Timothy Peck (“Plaintiff” or “Peck”) filed the instant action, pursuant to 42 U.S.C. § 405(g), seeking judicial review of a final decision of the Commissioner of Social Security (“Defendant” or “the Commissioner”). Peck alleges that he was improperly denied supplemental security income disability benefits. The parties are presently before the Court on Plaintiff’s Motion for Summary Judgment (Dkt. 14) and Defendant’s Cross-Motion for Summary Judgment (Dkt. 16). Having read and considered the papers submitted, and having reviewed the record, the Court hereby GRANTS Plaintiff’s motion and DENIES Defendant’s motion. The Court remands the matter to the Commissioner for the immediate award of benefits.

I. BACKGROUND

A. PROCEDURAL HISTORY

On October 25, 2006, Plaintiff filed protective applications for disability insurance benefits under Title II and supplemental security income under Title XVI of the Social Security Act. (Administrative Record (“AR”) 103-106, 107-109.) The Commissioner denied both claims on January 23, 2007. (AR 68-71.) Plaintiff filed a Request for

1 Reconsideration on March 26, 2007. (AR 72.) On July 16, 2007, the Commissioner upheld
2 the denial of benefits. (AR 75-81.)

3 On July 19, 2007, Plaintiff submitted a Request for Hearing by Administrative Law
4 Judge (“ALJ”). (AR 82.) After conducting a hearing, at which Plaintiff was represented by
5 attorney David Linden, the ALJ issued his decision on February 13, 2009. (AR 12-23.)
6 The ALJ determined that Plaintiff is not disabled, and is therefore, ineligible for disability
7 benefits. (AR 23.) The decision became final on or about May 1, 2009, when the Appeals
8 Council denied Plaintiff’s request for review. (AR 1-5.) Plaintiff filed this action on June
9 11, 2009, seeking review of the Commissioner's determination that Plaintiff is not disabled.
10 The parties have filed cross-motions for summary judgment.

11 **B. FACTUAL SUMMARY**

12 **1. The Accident**

13 Plaintiff was born July 31, 1973. (AR 103.) At age 16, he was struck by a car and
14 required medical treatment. (AR 222.) The medical records documenting Plaintiff’s initial
15 injuries and corrective surgeries are dated November 17, 1989 through December 14, 1989.
16 (AR 184-225.) As a result of the accident, Plaintiff incurred closed comminuted left tibial
17 shaft (i.e., shinbone) and fibular shaft (i.e., calf bone) fractures. (AR 190.) He also
18 sustained a closed head injury with an oblique skull fracture. (AR 187.) As a result of that
19 trauma, Plaintiff suffered a hemorrhagic brain contusion (i.e., bruising on the brain),
20 principally over the right hemisphere, and a left-side hemiparesis (i.e., slight paralysis or
21 muscle weakness). (AR 184, 186-187.)

22 **2. Medical Examination**

23 On November 21, 2006, Plaintiff, at the request of the Commissioner, underwent a
24 comprehensive orthopedic examination by Michael Bass, M.D. (AR 226-230.) Dr. Bass
25 diagnosed Plaintiff with the following: (1) status post traumatic tibial and fibular fractures
26 with surgical repairs and subsequent chronic pain syndrome in the left distal tibial region;
27 (2) mild left hemiparesis secondary to old, subdural hematoma (i.e. collection of blood on
28 the brain) and craniotomy (i.e. surgical procedure to open the skull); and (3) chronic

1 headaches secondary to subdural hematoma and craniotomy at the age of 16 years. (AR
2 220.)

3 On December 15, 2006, Plaintiff, again at the request of the Commissioner,
4 underwent a psychological evaluation by Philip Cushman, Ph.D. for an assessment of
5 “cognitive functioning.” (AR 231-236.) Dr. Cushman found that Plaintiff showed
6 deficient performance in “sustained attention and concentration.” (AR 234.) Dr. Cushman
7 opined that this finding was “statistically and clinically significant and tends to reflect the
8 damage from the head injury.” (AR 234.) He also found that “Timothy has moderately
9 impaired functioning due [to] slowness and error,” and “can appear to have slower than
10 normal thinking speed and will be more error prone and slow on more complex tasks.”
11 (AR 235.)

12 Following his evaluation, Dr. Cushman diagnosed Plaintiff with dementia due to
13 head trauma, and provisional chronic pain disorder associated with psychological factors
14 and a general medical condition. (AR 235.)¹ Plaintiff’s Global Assessment of Functioning
15 (“GAF”), which measures a person’s overall ability to function, was 55.² (AR 236.) Based
16 on that diagnosis, Dr. Cushman assessed Plaintiff’s mental residual functional capacity as
17 follows:

18 [Timothy] is capable of working a normal workday and work
19 week, although at times he may show easy fatigue if there is a
20 lot of interpersonal interaction involved. Special or additional
21 supervision may be needed to help him manage interpersonal
22 relationships in a work setting. He is capable of following
23 simple and complex verbal instructions from supervisors. He
may, at times, however, have difficulties getting along with
supervisors, coworkers, and the general public. He may need
assistance dealing with the usual stressors encountered in a
competitive work environment.

24 ¹ The diagnosis is recorded as “R/O” (i.e. “rule out”). This terminology was
25 replaced in DSM-IV with “Provisional Diagnosis.” Carlton Munson, *The Mental Health
Diagnostic Desk Reference*, 2nd ed., at 78.

26 ² This correlates to “moderate” symptoms (e.g., flat affect and circumstantial speech,
27 occasional panic attacks) or moderate difficulty in social, occupational, or school
28 functioning (e.g., few friends, conflicts with peers or co-workers). (See AR 51.)

1
2 **3. State Agency Review**

3 On January 18, 2007, a psychiatric review form was completed by David Gross,
4 M.D., the non-examining, state agency psychiatrist. (AR 242-252.) Dr. Gross indicated
5 that Plaintiff had an “organic mental disorder” and “dementia due to head trauma.” (AR
6 242-243.) Dr. Gross found “moderate” functional limitations in Plaintiff’s “activities of
7 daily living,” “social functioning,” and “concentration, persistence, or pace.” (AR 250.)

8 **4. Expert Testimony**

9 The ALJ also requested testimony from Lloyd Meadow, Ph.D., as a non-evaluating
10 psychological medial expert (“ME”). (AR 47-56.) The ME summarized for the ALJ the
11 substance of the report submitted by Dr. Cushman. (AR 48-51.) The ME stated that a GAF
12 of 55 was “a pretty accurate assessment.” (AR 51.) The ME confirmed Plaintiff’s moderate
13 impairments in “concentration, persistence, and pace,” and “dealing with fellow employees,
14 the public and supervisors,” stressing “particularly with supervisors.” (AR 54, 57.)

15 **5. Plaintiff’s Testimony**

16 At the request of the Commissioner, Plaintiff completed an adult function report.
17 (AR 162-169.) Plaintiff reported that he experiences leg pain and headaches, which keep
18 him from sleeping and prevent him from sitting or standing for extended periods. (AR
19 163.) When asked to identify any abilities affected by his “illness, injuries, or condition,”
20 Plaintiff checked the boxes for, inter alia, memory, concentration, understanding, following
21 instructions, and getting along with others. (AR 167.)

22 Plaintiff also testified at his ALJ hearing (AR 35-47), as follows: His main
23 difficulty with pizza delivery was leg pain. Because interactions with customers were brief,
24 limited exchanges, that aspect of the work did not pose a problem. (AR 35.) Plaintiff did
25 report difficulty with co-workers, in particular that their “mouthing off” made him so angry
26 that he would leave. (AR 36.) Plaintiff stated that the main troubles causing him to “go
27 from job to job” were his “memory” and his “lack of accepting people that discipline
28 [him].” (AR 40.)

1 Plaintiff also testified that he had been prescribed medications, including
2 Gabapentin, Lyrica, and Trazodone, which he described as medication for depression and
3 pain. (AR 43.) He stated that he has trouble sleeping because of pain, but that the
4 Trazadone helps in that respect. (AR 43.) He stated that the Gabapentin and Lyrica were
5 not effective in addressing his anxiety or controlling his temper. (AR 44-45.) Plaintiff
6 testified that he took all of the medication he was given, but had no refills and did not want
7 them because he does not like pills. (AR 43-44.)

8 Plaintiff noted that he continues to see a counselor and seek medical treatment from
9 an orthopedist. (AR 43-45.) In early 2007, he opted to have additional surgery to remove
10 the rod from his leg. (AR 38.) When asked if he underwent surgery because of worsening
11 pain or symptoms, Plaintiff responded, "I thought it would be better if they took it out. I'd
12 had it for like -- 17 years. So they took the pins out, three pins, and they couldn't get the
13 rod out so now, ever since then it's just been worse." (AR 38.)

14 **6. Lay Witness Testimony**

15 At the request of the Commissioner, Plaintiff's mother, Jane Peck, completed a third
16 party function report regarding the adult Plaintiff. (AR 154-161.) Ms. Peck confirmed
17 Plaintiff's chronic leg pain, headaches, sleeplessness, inability to concentrate, and inability
18 to sit or stand for extended periods. (AR 155.) In terms of identifying abilities affected by
19 Plaintiff's "illness, injuries, or condition" Ms. Peck noted, inter alia, that he has difficulty
20 standing, sitting, memory, concentration, understanding, and getting along with others.
21 (AR 159.) Ms. Peck indicated that Plaintiff quit his last job because of an unspecified
22 "problem with a co-worker." (AR 160.) She also testified at the hearing (AR 31-35),
23 stating Plaintiff "couldn't handle" people at his previous job. (AR 34-35.)

24 **7. Vocational Expert Testimony**

25 The ALJ called Lynda Berkley to testify as a vocational expert ("VE"). (AR 57-63.)
26 The first vocational hypothetical posed by the ALJ was whether Plaintiff could perform his
27 prior jobs given the following limitations: (1) he is an individual limited to sedentary work,
28 with a sit or stand option every hour; (2) a limitation to unskilled work; and (3) a limitation

1 to no more than occasional contact with the public. (AR 60.) The VE testified that
2 Plaintiff could not perform past relevant work under those limitations, but was able to
3 identify two unskilled sedentary occupations that Plaintiff could perform (i.e., Stone Setter,
4 Jewelry, Dictionary of Occupational Titles (“DOT”) # 735.687-034 and Final Assembler,
5 Optical Goods, DOT # 713.687-018; AR 61.)

6 The second vocational hypothetical, posed by the ALJ, incorporated the three
7 limitations (1) through (3) above, and added a limitation of no more than “occasional
8 contact with co-workers and supervisors.” (AR 61-62.) “Occasional” was defined as a
9 maximum of one-third of the time. (AR 61-62.) The VE testified that those limitations
10 would “eliminate all jobs that are unskilled . . . because contact with supervisors on an
11 unskilled job is frequent.” (AR 62.)

12 The third vocational hypothetical, posed by Plaintiff’s attorney, incorporated only
13 limitations (1) and (2) above, and added moderate limitations in (a) concentration,
14 persistence, and pace; (b) activities of daily living; and (c) maintaining social functioning.
15 (AR 62-63.) The VE testified that those limitations would “eliminate all work.” (AR 63.)
16 The VE clarified that, by itself, a moderate limitation in concentration, persistence, or pace
17 on an unskilled job “would not allow the person to complete the requirements of the job.”
18 (AR 63.)

19 **8. Determination by the Administrative Law Judge**

20 The ALJ found that Plaintiff has severe impairments, including leg and head
21 injuries, an affective disorder, and a cognitive disorder. (AR 17.) Regarding functional
22 restrictions, the ALJ found that Plaintiff has moderate limitations in “activities of daily
23 living” and “concentration, persistence, or pace,” as well as a mild to moderate limitation in
24 “social functioning.” (AR 19.) The ALJ concluded that Plaintiff has the residual functional
25 capacity to perform sedentary work, with a sit or stand option every 60 minutes, and to
26 perform “simple, repetitive tasks equating to unskilled work.” (AR 20.)
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1 **II. STANDARD OF REVIEW**

2 Pursuant to 42 U.S.C. § 405(g), a district court has authority to review a
3 Commissioner’s decision to deny disability benefits to a claimant. The Court’s review is
4 limited to an adjudication of whether the Commissioner’s findings are supported by
5 substantial evidence and based upon the proper legal standards. Vasquez v. Astrue, 572
6 F.3d 586, 591 (9th Cir. 2009). Substantial evidence is more than a mere scintilla, but less
7 than a preponderance; it is “such relevant evidence as a reasonable mind might accept as
8 adequate to support a conclusion.” Desrosiers v. Sec. of HHS, 846 F.2d 573, 575-76 (9th
9 Cir. 1988). The Court must “review the administrative record as a whole, weighing both
10 the evidence that supports and the evidence that detracts from the Commissioner’s
11 conclusion. Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). “Where the evidence
12 can reasonably support either affirming or reversing the decision, [this Court] may not
13 substitute [its] judgment for that of the Commissioner.” Parra v. Astrue, 481 F.3d 742, 746
14 (9th Cir. 2007).

15 “The decision whether to remand for further proceedings or simply to award
16 benefits is within the discretion of this court.” McAllister v. Sullivan, 888 F.2d 599, 603
17 (9th Cir. 1989). Further proceedings are appropriate where additional proceedings could
18 remedy defects in the Commissioner’s decision. Kail v. Heckler, 722 F.2d 1496, 1497 (9th
19 Cir. 1984). If no useful purpose would be served by further administrative proceedings or
20 when the record has been fully developed and the evidence is not sufficient to support the
21 Commissioner's decision, a remand for benefits is appropriate. Rodriguez v. Bowen, 876
22 F.2d 759, 763 (9th Cir. 1989).

23 **III. DISCUSSION**

24 **A. THE FIVE-STEP DISABILITY DETERMINATION PROCESS**

25 Under Title II of the Social Security Act, disability insurance benefits are available
26 when an eligible claimant is unable to “engage in any substantial gainful activity by reason
27 of any medically determinable physical or mental impairment . . . which has lasted or can
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1 be expected to last for a continuous period of not less than 12 months.” 42 U.S.C.
2 § 423(d)(1)(A).³

3 The ALJ engages in a five-step sequential evaluation process to determine whether a
4 claimant is disabled under the Act. 20 C.F.R. § 404.1520(a). The five steps are as follows:

5 Step one: Is the claimant presently engaged in substantial
6 gainful activity? If so, the claimant is not disabled. If not,
7 proceed to step two.

8 Step two: Is the claimant’s alleged impairment sufficiently
9 severe to limit his or her ability to work? If so, proceed to step
10 three. If not, the claimant is not disabled.

11 Step three: Does the claimant’s impairment, or combination of
12 impairments, meet or equal an impairment listed in 20 C.F.R.,
13 pt. 404, subpt. P, app. 1? If so, the claimant is disabled. If not,
14 proceed to step four.

15 Step four: Does the claimant possess the residual functional
16 capacity (“RFC”) to perform his or her past relevant work? If
17 so, the claimant is not disabled. If not, proceed to step five.

18 Step five: Does the claimant’s RFC, when considered with the
19 claimant’s age, education, and work experience, allow him or
20 her to adjust to other work that exists in significant numbers in
21 the national economy? If so, the claimant is not disabled. If
22 not, the claimant is disabled.

23 Stout v. Comm’r, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520,
24 416.920).

25 The claimant bears the burden of establishing a prima facie case of disability.
26 Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996). “Once the claimant establishes a
27 prima facie case, the burden then shifts to the Commissioner to show that the claimant can
28 perform other types of work that exist in the national economy, given [the claimant’s]
residual functional capacity, age, education, and work experience.” Id. (internal quotation
and citation omitted).

The ALJ employed the five-step sequential framework in assessing Plaintiff’s
disability. At step 1, the ALJ determined that Plaintiff was not engaged in substantial
gainful activity. (AR 17.) At step 2 the ALJ determined that Plaintiff suffers from “severe”

³ Because the Title II and Title XVI regulations relevant hereto are identical, only
the Title II regulations are cited herein.

1 impairments as a result of leg injuries and head trauma, including affective and cognitive
2 disorders. (AR 17.) At step 3, the ALJ determined that the impairments do not equal a
3 listed impairment. (AR 18.) At step 4, the ALJ evaluated Plaintiff’s RFC, and found that
4 Plaintiff could perform sedentary work. He stated:

5 After careful consideration of the entire record, I find that the
6 claimant has the residual functional capacity to perform
7 sedentary work, as defined in 20 C.F.R. 404.1567(a) and
8 416.967(a), except that I find that his medical history and
9 subjective allegations warrant a sit or stand option every 60
10 minutes. As discussed above, he is able to perform simple,
11 repetitive tasks equating to unskilled work.

12 (AR 20.) The ALJ then determined that Plaintiff is unable to perform past relevant work.

13 (AR 21.) At step 5 however, the ALJ determined that Plaintiff is able to perform other jobs
14 in the national economy. (AR 22.) Thus, the ALJ concluded that Plaintiff is “not
15 disabled.” (AR 22.)

16 Plaintiff presently requests that this Court reverse and set aside the Commissioner’s
17 decision, and remand the matter for immediate payment of benefits on the following
18 grounds: (1) the ALJ improperly evaluated Plaintiff’s mental impairments; (2) the RFC
19 fails to capture Plaintiff’s documented impairments; (3) the finding on “social functioning”
20 is not supported by substantial evidence; (4) the ALJ improperly discredited testimony of
21 the Plaintiff; (5) the ALJ improperly rejected medical opinions; (6) the ALJ improperly
22 rejected lay witness testimony; and (7) the disability determination relies on a defective
23 vocational hypothetical.

24 For clarity, Plaintiff’s claims will be addressed in three phases: (1) whether the ALJ
25 properly considered and credited relevant testimony; (2) whether the ALJ properly
26 determined Plaintiff’s RFC; and (3) whether the ALJ properly assessed evidence provided
27 by the VE.

28 **B. FAILURE TO PROPERLY CONSIDER OR CREDIT RELEVANT TESTIMONY**

 RFC measures what a claimant can still do despite existing “exertional” (strength-
related) and “nonexertional” limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th

1 Cir. 1989).⁴ An RFC assessment must be based on all of the relevant evidence in the case
2 record, including medical history and laboratory findings, the effects of treatment, reports
3 of daily activities, *lay evidence, medical source statements, effects of symptoms (including*
4 *pain) that are reasonably attributed to a medically determinable impairment, evidence of*
5 attempts to work, the need for a structured living environment, and available work
6 evaluations. SSR 96-8p, 1996 WL 374184 at *5; 20 C.F.R. §§ 404.1513, 404.1529.

7 **1. Consideration of Lay Witness Testimony**

8 As noted, Jane Peck, Plaintiff’s mother, completed a third party function report and
9 provided testimony at the hearing before the ALJ. Plaintiff asserts that the ALJ failed to
10 properly consider her lay witness testimony. (Pl.’s Mot. at 24.) He further asserts that this
11 is reversible error, and that Ms. Peck’s testimony, if credited, establishes that the Plaintiff is
12 disabled. (*Id.*) The Commissioner responds only that the ALJ demonstrated proper
13 consideration of lay testimony by articulating in the decision: “I have considered opinion
14 evidence in accordance with the requirements of [the relevant regulations].” (Def.’s Mot. at
15 8.)

16 “An ALJ is required to account for all lay witness testimony in the decision of his or
17 her findings.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006) (citation
18 omitted). Lay testimony regarding the claimant’s symptoms or the affect of impairment on
19 the claimant’s ability to work is considered competent evidence and “cannot be disregarded
20 without comment.” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citation
21 omitted); see also *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) (noting that an ALJ
22 wishing to discount lay testimony must give “reasons that are germane to each witness”).
23 “[W]here the ALJ’s error lies in a failure to properly discuss competent lay testimony
24 favorable to the claimant, a reviewing court cannot consider the error harmless unless it can
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27 ⁴ Nonexertional limitations limit ability to work without directly limiting strength,
28 and include mental, sensory, postural, manipulative, and environmental limitations. *Penny*
v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993).

1 confidently conclude that no reasonable ALJ, when fully crediting the testimony, could
2 have reached a different disability determination.” Stout, 454 F.3d at 1055-56.

3 Here, the ALJ’s conclusory statement fails to pass muster under controlling Ninth
4 Circuit precedent. Rather than articulating the reasons for rejecting Ms. Peck’s testimony,
5 the ALJ stated, without exposition, that he was incorporating testimony offered during the
6 hearing, notwithstanding the fact that such testimony contradicted his conclusion.

7 However, the Court finds such error harmless. The ALJ did not disregard any competent
8 lay testimony favorable to Plaintiff. Moreover, Ms. Peck is incompetent to provide
9 testimony regarding Plaintiff’s professional capacity since such testimony is based on
10 hearsay and was made without the benefit of direct observation. (AR 34-35.) While she
11 could properly offer testimony on matters such as Plaintiff’s daily activities and his level of
12 functioning, such testimony is of marginal value given only she saw him only ten to twelve
13 hours per week and did not interact with him on a daily basis. (AR 154, 160.) Moreover,
14 had the ALJ considered her testimony, it would have been merely cumulative of Plaintiff’s
15 own testimony. Even if fully credited, Ms. Peck’s testimony would not justify a different
16 disability determination. Thus, the Court finds no reversible error on the part of the ALJ
17 with respect to this issue.

18 2. Assessment of Plaintiff’s Symptom Testimony

19 Plaintiff next contends that the ALJ failed to properly credit his own symptom
20 testimony. To admit a claimant’s subjective symptom testimony, the ALJ must engage in a
21 two-step analysis. Batson v. Comm’r, 359 F.3d 1190, 1195-96 (9th Cir. 2004) (citing
22 Smolen, 80 F.3d at 1281-1182). First, the claimant must provide objective medical
23 evidence of one or more impairments that could reasonably be expected to produce the
24 alleged symptoms. Id. Second, if an underlying causative impairment is established, and
25 there is no sign of malingering, “the ALJ can reject the claimant’s testimony about the
26 severity of her symptoms only by offering specific, clear and convincing reasons for doing
27 so.” Id. The ALJ must state specifically which symptom testimony is not credible and
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1 facts in the record that support that conclusion. Smolen, 80 F.3d at 1281 (citing Dodrill, 12
2 F.3d at 918).

3 A credibility assessment must be based on the entire case record, and should
4 consider the following factors: (1) the claimant' daily activities; (2) the location, duration,
5 frequency, and intensity of pain or symptoms; (3) factors that aggravate the symptoms;
6 (4) the type, dosage, effectiveness, and side effects of any medication the claimant takes or
7 has taken to alleviate pain or other symptoms; (5) treatment other than medication;
8 (6) measures other than treatment taken to relieve pain or symptoms; and (7) any other
9 factors concerning the individual's functional limitations and restrictions due to pain or
10 other symptoms. See Bunnell v. Sullivan, 947 F.2d 341, 346-47 (9th Cir. 1991); SSR 96-
11 7p, 1996 WL 374186 at *3; 20 C.F.R. § 404.1529.

12 The ALJ cannot reject allegations of pain solely on the basis that they are
13 unsupported by the medical evidence. Robbins, 466 F.3d at 884. The ALJ may consider an
14 unexplained or inadequately explained failure to seek treatment or to follow a prescribed
15 course of treatment. Bunnell, 947 F.2d at 346-47. However, the adjudicator should not
16 draw inferences from a failure to consistently seek or pursue medical treatment without first
17 considering explanations the claimant may provide. SSR 96-7p, 1996 WL 374186 at *7-8.
18 For example, a claimant may discontinue treatment on the advice of a medical professional
19 that no further, effective treatment can be prescribed or undertaken. Id.; see Miller v.
20 Astrue, No. CV-08-3076-JPH, 2009 WL 4110989 at *13 (E.D. Wash. Nov. 23, 2009) (ALJ
21 erred in considering plaintiff's discontinuance of medication in making the credibility
22 determination where plaintiff reported sides effects and fear of side effects as the reason for
23 discontinuing medication) (citing Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,
24 1162 (9th Cir. 2008)).

25 Below, the ALJ determined that the claimant's medically determinable impairments
26 could reasonably be expected to cause the alleged symptoms; however, the ALJ deemed
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1 Plaintiff's testimony concerning the severity of the symptoms not "fully credible to the
2 extent that [it is] inconsistent with the [RFC]." ⁵ (AR 20.) The ALJ explained:

3 The claimant reported that he is not taking any significant pain
4 medication and not any medication consistent with the
5 allegation of disabling pain. The record does not indicate that
6 the claimant requires any special accommodations to relieve his
7 pain or other symptoms. There is very little evidence of the
8 claimant's alleged anxiety and depression. The claimant stated
9 that he was, at one time, taking anti-depressant medication but
 that he went of [sic] it because he felt it was not helping him.
 The claimant also testified that he was seeing a counselor but
 that he had done so for only a few weeks. The claimant's
 course of treatment with respect to his mental impairments has
 reflected a conservative approach. He has not required any
 inpatient psychiatric hospitalization for his mental symptoms.

10 (AR 20.)

11 Plaintiff argues that the ALJ's credibility determination is erroneous. (Pl.'s Mot. 18-
12 19.) He correctly points out that he has taken Gabapentin, Lyrica, and Nortriptyline, which
13 are used to treat neuropathic pain, migraines, and depression, and that he was receiving
14 medical treatment and counseling. (Pl.'s Mot. at 18; AR 42-43, 175.) In response, the
15 Commissioner argues that the ALJ's credibility assessment was justified because Plaintiff
16 stated that he did not intend to renew his prescriptions, and that the failure to follow a
17 prescribed course of treatment is grounds for denying an application of benefits. (Def.'s
18 Mot. at 7.) This contention lacks merit. Witness testimony and medical records indicate
19 that Plaintiff was prescribed various medications, including a prescription for chronic pain.
20 (AR 43, 175.) Plaintiff testified that he took the medicines as prescribed, but had no refills.
21 (AR 42-44.) Though Plaintiff stated that he did not like taking pills, he testified that the
22 medications were ineffective, *even though he took all of the medication prescribed to him.*
23 (AR 43-44.)

24 Without explanation, the ALJ simply discredited Plaintiff's testimony regarding his
25 course of treatment. The ALJ failed to cite evidence in the record responsive to Plaintiff's
26 uncontroverted testimony that the medicines were ineffective. No inference can be drawn
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28 ⁵ The ALJ made no finding that Peck was malingering. (AR 20.)

1 against Plaintiff based on his decision not to continue an ineffective course of treatment.
2 Valadez v. Astrue, 2008 WL 4814913 at *4 (finding that, on remand, the ALJ should
3 determine which medications were intended to alleviate the claimant’s pain and what
4 evidence there was that the medications were working).⁶ As such, the Court finds that the
5 ALJ drew unsupported inferences from the medicinal treatment history, and ignored
6 pertinent non-medicinal treatment.

7 Second, Plaintiff testified that he is unable to sit or stand for extended periods, and
8 that such testimony does, in fact, reflect a need for special accommodation. (Pl.’s Mot. at
9 18:16-24.) While the ALJ denied that Plaintiff requires special accommodation, this is
10 contradicted by Plaintiff’s testimony, which is supported by lay witness testimony, medical
11 opinion, and even the RFC. Each of these sources confirms the need for a sit/stand option.

12 Third, Plaintiff asserts that his credibility cannot be undermined by a “conservative”
13 course of treatment for his mental impairments. (Pl.’s Mot. at 19:8-21.) Plaintiff correctly
14 points out that there is no treatment for his organic mental disorder because the damage to
15 his brain is irreversible. Id. Accordingly, the lack of inpatient psychiatric hospitalization
16 fails to address the credibility of Plaintiff’s complaints because he is not, and did not claim
17 to be, psychotic. Id. Plaintiff’s mental impairments include limitations in memory,
18 concentration and social functioning, which cannot be addressed through psychiatric
19 treatment.

20 The ALJ correctly noted that there is little evidence of “anxiety or depression.” (AR
21 20.) While the finding of a “conservative” course of treatment without inpatient
22 hospitalization may be sufficient with regard to those complaints, the ALJ failed entirely to
23 address Plaintiff’s testimony regarding mental impairment in memory, concentration, and
24 social functioning.

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27 ⁶ It is worth noting that Plaintiff underwent surgery in 2007 to remove a rod from his
28 leg in order to alleviate or lessen his pain. (AR 18, 38.) Thus, the record shows that
Plaintiff was not resigned to his suffering, and made attempts to alleviate his pain.

1 The Court finds that the ALJ failed to specify incredible symptom testimony or to
2 support the credibility determination with facts in the record. The ALJ improperly assessed
3 claimant’s allegations regarding physical impairment, including chronic pain. The ALJ
4 also failed entirely to address Plaintiff’s allegations of mental impairment concerning
5 memory, concentration, and social functioning. As such, Plaintiff’s testimony cannot
6 properly be discredited on the basis provided. Thus, the Court finds reversible error with
7 regard to the ALJ’s determination of Peck's credibility.

8 **3. Consideration of Opinions by Medical Professionals**

9 Next, Plaintiff avers that the ALJ failed to properly consider the testimony of
10 examining physicians Dr. Bass and Dr. Cushman, medical expert Dr. Meadow, and state
11 agency consultant Dr. Gross. The ALJ must provide “clear and convincing” reasons for
12 rejecting the uncontradicted opinion of an examining physician. Lester v. Chater, 81 F.3d
13 821, 830-31 (9th Cir. 1995) (internal citation omitted). At the administrative hearing level,
14 the findings of State agency medical and psychological consultants or other program
15 physicians or psychologists must be considered as expert opinion evidence by a
16 nonexamining source. SSR 96-6p, 1996 WL 374180 at *4; 20 C.F.R. § 404.1527(f)(2).
17 The ALJ may not ignore opinion evidence, and must explain in his decision the weight
18 given to it. Id.

19 Dr. Bass diagnosed Plaintiff with chronic headaches, among other things. Plaintiff
20 argues that the ALJ rejected that portion of Dr. Bass’ diagnosis without reason. (Pl.’s Mot.
21 at 20.) This contention is misplaced. While Plaintiff characterizes the ALJ’s RFC
22 determination as a “rejection” of this diagnosis, the RFC is actually silent on the issue of
23 headaches. The RFC adopts the final findings of Dr. Bass, which are themselves based on
24 his overall diagnoses. (AR 229-30.) Thus, the RFC cannot be said to reject a sub-
25 diagnosis, when it embraces the findings based on that diagnosis.

26 The Court’s conclusion, however, is different with respect to the medical opinions of
27 Dr. Cushman, Dr. Meadow, and Dr. Gross, all of whom found that Plaintiff has moderate
28 limitations in both social functioning and concentration. (AR 54, 236, 250.) Plaintiff

1 argues that the ALJ rejected those findings without reason. (Pl.’s Mot. at 20.) The Court
2 agrees.

3 In the mental RFC assessment, the ALJ noted that “the state agency consultant [Dr.
4 Gross] found that the claimant was capable of simple, repetitive tasks with limited public
5 contact.” (AR 21.) The ALJ purportedly accepted that opinion as to the simple, repetitive
6 tasks, but rejected that opinion with regard to public contact. (AR 21.) The ALJ
7 summarized Dr. Cushman’s social impairment findings, noting that “[a]lthough possible
8 difficulties getting along with others were indicated, these limitations are inconsistent with
9 the weight of the evidence, and, in any event, would not change the findings herein even if
10 accepted.” (AR 21.) The flaw in this analysis is that the ALJ did not consider Dr.
11 Meadow’s testimony at step 4 (i.e., RFC). In support of his social functioning finding, the
12 ALJ stated, “the claimant has delivered pizzas for a substantial period of time and he
13 testified that he has no significant problems with the public.” (AR 21.)

14 As a threshold matter, it is immaterial whether or not a limitation would “change the
15 [disability] findings” of the ALJ. The RFC assessment represents the most that the
16 claimant is able to do, and is a determination both separate and distinct from the ultimate
17 finding of disability. The 5-step process is meant to ensure appropriate consideration of
18 each factor, and to facilitate subsequent review. Thus, the impact on the ultimate outcome
19 is inapposite at this juncture. Moreover, given that the VE explicitly testified that a
20 limitation of no more than occasional contact with co-workers and supervisors would
21 eliminate all work, the Court fails to see how the “social functioning” finding is of no
22 consequence to the ultimate disability determination.

23 In a medical source statement, Dr. Cushman stated explicitly that Plaintiff may
24 “have difficulties getting along with supervisors, coworkers, and the general public,” and
25 require “special or additional supervision . . . to help him manage interpersonal
26 relationships in a work setting.” (AR 236.) At the administrative hearing, Dr. Meadow
27 testified that Plaintiff has a “moderate” limitation in social functioning. (AR 54.) He
28 further testified that Plaintiff has “problems relating to people particularly with supervisors,

1 but even with the public.” (AR 56.) Additionally, Dr. Gross found that Plaintiff has a
2 “moderate” limitation in social functioning, explaining that this extends to the ability to
3 “interact appropriately with the general public,” and “accept instructions and respond
4 appropriately to criticism from supervisors.” (AR 254).

5 Dr. Cushman’s findings regarding social functioning are supported by both Dr.
6 Meadow and Dr. Gross. As such, the ALJ was required, and failed, to provide clear and
7 convincing reasons for rejecting Dr. Cushman’s opinion, as well as to discuss and explain
8 the weight given to the opinions of the other doctors. Instead, the ALJ provides only a
9 mischaracterization of Plaintiff’s testimony regarding his work in pizza delivery. Plaintiff
10 testified that he has had issues interacting with supervisors, co-workers, and the public.
11 (AR 36, 38, 40.) Plaintiff further testified that he was able to engage in brief, limited
12 exchanges of pizza for cash, and therefore did not have problems with customers at that
13 particular job. (AR 35.) That single fact simply fails to overcome the uncontradicted
14 opinions of three medical professionals, the claimant's own additional testimony, and the
15 corroborating testimony of a lay witness.⁷

16 With regard to “concentration, persistence, or pace,” the ALJ actually adopted the
17 finding that Plaintiff has a “moderate” limitation. (AR 19.) However, the ALJ then
18 contradicts that finding, stating, “the claimant has moderate difficulties, but the record as a
19 whole, including his demonstrated abilities, establishes that he is able to perform at least
20 simple, repetitive tasks equating to unskilled work, as found by the consultative
21 psychological examiner and by the state agency.” (AR 19.) While the ALJ purports to find
22 a moderate limitation, he then denies Plaintiff the allowances commensurate with that
23 finding in the RFC. However, the Court finds that the sum of the medical evidence does in
24 fact support the documented impairment.

25
26 ⁷ Plaintiff asserts a separate claim that the ALJ’s finding of only “*mild* to moderate”
27 limitation in “social functioning” is not supported by substantial evidence. (Pl.’s Mot. at
28 15:19-17:28.) Because the Court now finds that the ALJ failed to properly credit medical
opinions finding a “moderate” impairment, it is not now necessary to address that separate
claim.

1 In the medical source statement, Dr. Cushman states that Plaintiff “is capable of
2 performing simple and repetitive tasks of both a verbal and visual-motor nature.” (AR
3 236.) However, that finding is not in conflict with the finding of a moderate impairment,
4 and Dr. Cushman’s assessment is not, as the ALJ seems to assert, an unqualified
5 endorsement of Plaintiff’s ability to perform unskilled work. In fact, Dr. Cushman’s
6 medical source statement contains a number of qualifications, including Plaintiff’s
7 vulnerability to “easy fatigue,” the need for “special supervision,” and the need for
8 “assistance dealing with the usual stressors encountered in a competitive work
9 environment.” (AR 236.) Dr. Cushman also found that Plaintiff’s deficient performance in
10 “sustained attention and concentration” was clinically significant, and that Plaintiff has
11 “moderately impaired functioning due [to] slowness and error.” (AR 234-235.)

12 Dr. Meadow opined that Plaintiff is “moderately” impaired in “concentration,
13 persistence, or pace.” (AR 54.) He explained that Plaintiff is capable of performing a
14 “simple job (INAUDIBLE) under the right circumstances,” but stressed that it would “have
15 to be very much under the right circumstances.” (AR 54.) Additionally, Dr. Gross
16 recorded a “moderate” limitation in “concentration, persistence, or pace,” explaining that
17 this extends to Plaintiff’s ability to “carry out detailed instructions,” “sustain an ordinary
18 routine without special supervision,” and “complete a normal workday and workweek
19 without interruptions from psychologically based symptoms and to perform at a consistent
20 pace without an unreasonable number and length of rest periods.” (AR 253-254).

21 Dr. Cushman’s findings are supported by both Dr. Meadow and Dr. Gross. As
22 such, the ALJ was required, and failed, to provide clear and convincing reasons for
23 rejecting Dr. Cushman’s opinion, or to discuss and weigh the opinions of the other doctors.
24 In fact, the ALJ at step 3 adopts the finding that Plaintiff has a moderate limitation in
25 “concentration, persistence, or pace,” but then attempts to reinterpret its implication in the
26 RFC. As such, it cannot be said that the ALJ provided clear and convincing reasons for
27 rejecting that same finding. Thus, the Court finds reversible error in the ALJ’s failure to
28

1 consider the opinions of medical professionals regarding both “social functioning” and
2 “concentration, persistence, or pace.”

3 **C. RESIDUAL FUNCTIONAL CAPACITY**

4 Pursuant to 20 C.F.R. § 404.1520a(b)-(d), the ALJ must decide whether the claimant
5 has a medically determinable mental impairment, and then rate the degree of functional
6 limitation resulting from any impairment. The degree of limitation is rated in four broad
7 functional areas: (1) activities of daily living; (2) social functioning; (3) concentration,
8 persistence, or pace; and (4) episodes of decompensation. Id. Functional areas (1) through
9 (3) are rated on the scale: none, mild, moderate, marked, and extreme; functional area (4) is
10 rated on the scale: none, one or two, three, four or more. Id. The ALJ then determines the
11 severity of the impairment. Id. If a “severe” impairment exists, the ALJ determines
12 whether the impairment meets or is equivalent to a listed mental disorder, and if it does not,
13 assesses the claimant’s mental residual functional capacity. Id. As noted, residual
14 functional capacity is “the most [the claimant] can still do despite [his] limitations.” 20
15 C.F.R. § 404.1545(a). Physical and mental limitations are established by the claimant’s
16 impairments and any related symptoms. Id. In an RFC assessment, the ALJ considers all
17 of the claimant's medically determinable impairments, including those that are not severe.
18 Id.

19 Pursuant to 20 C.F.R. § 404.1520a(e), the ALJ must document the application of the
20 above technique in the written decision, and must incorporate the pertinent findings and
21 conclusions based thereon. Id. The decision must include not only an RFC, but also a
22 specific finding as to the degree of limitation in each of the four functional areas specified.
23 Id.

24 **1. Documented Application of the Proper Technique**

25 Plaintiff argues that the ALJ failed to comply with agency regulations governing the
26 evaluation of mental impairments, specifically the documentation requirements at the
27 administrative hearing level. (Pl.’s Mot. at 11:1-12:14.) The Court disagrees.
28

1 The ALJ used the sequential technique set forth in 20 C.F.R. § 404.1520a to evaluate
2 Plaintiff's mental impairments, and properly documented the findings in his written
3 decision. (AR 19-20.) The ALJ rated Plaintiff's functional limitations in each of the four
4 specified areas, finding: "moderate" limitation in both "activities of daily living" and
5 "concentration, persistence, or pace"; "no more than mild to moderate" limitation in "social
6 functioning"; and no episodes of decompensation. (AR 19.) The ALJ noted that Plaintiff's
7 impairments were "severe," but not equivalent to a listed disorder. (AR 17-18.) The ALJ
8 then determined the claimant's RFC, finding Plaintiff is "able to perform simple, repetitive
9 tasks equating to unskilled work." (AR 20-21.) While Plaintiff argues that the RFC is
10 inconsistent with the ratings specified in the four functional limitation areas, that error
11 represents, not a failure to apply the technique described in §404.1520a, but rather a failure
12 to properly weigh the findings derived therein. Thus, the Court finds no reversible error
13 regarding the ALJ's documentation of the appropriate technique.

14 **2. The RFC Is Inconsistent with the Documented Impairments**

15 Plaintiff further argues that the ALJ's RFC assessment is inconsistent with the
16 finding of severe mental impairments, and therefore, the RFC is not supported by
17 substantial evidence and is based on legal error. (Pl.'s Mot. at 12:15-14:14.) The Court
18 agrees.

19 In order for a "severe" mental impairment to be reflected in a mental RFC
20 assessment, that assessment must document a significant limitation in the claimant's ability
21 to do basic work activities. Pursuant to 20 C.F.R. § 404.1521, an impairment is "not severe
22 if it does not significantly limit" a claimant's physical or mental ability "to do basic work
23 activities."

24 Pursuant to SSR 85-15, 1985 WL 56857 at *4, the basic mental demands of
25 "competitive, remunerative, unskilled work include the abilities (on a sustained basis) to:
26 understand, carry out, and remember simple instructions; to respond appropriately to
27 supervision, coworkers, and usual work situations; and to deal with changes in a routine
28 work setting." A substantial loss in one's ability to meet any of these basic work-related

1 activities would severely limit the potential occupational base and justify a finding of
2 disability. Id.

3 The ALJ determined Plaintiff has “severe” limitations in mental functioning. (AR
4 19.) Those limitations were rated in four functional areas. (AR 19.) Plaintiff argues,
5 however, that the RFC does not reflect those findings, and fails to indicate documented
6 limitations, whether rising to the level of disability or not, in Plaintiff's mental functioning.
7 (Pl.’s Mot. at 14:9-14.)

8 Plaintiff notes that “unskilled work” is an occupational skill level, not a limitation
9 substantiating the RFC assessment. (Pl.'s Mot. at 12:20-13:6.) “Unskilled” represents one
10 of three work skill levels defined by the specific vocational preparation (“SVP”) time
11 required to learn the job. “Unskilled work” is defined as work where “a person can usually
12 learn to do the job in 30 days, and little specific vocational preparation and judgment are
13 needed.” 20 C.F.R. § 404.1568(a); SSR 00-4p, 2000 WL 1898704 at *3. The Dictionary
14 of Occupational Titles (“DOT”) provides SVP8 times; unskilled work corresponds to an
15 SVP of 1 to 2. Id.

16 As explained above, even unskilled work has basic mental demands. Thus, if a
17 claimant is unable to meet those basic demands, he is deemed disabled. “Because response
18 to the demands of work is highly individualized, the skill level of a position is not
19 necessarily related to the difficulty an individual will have in meeting the demands of the
20 job. A claimant’s [mental] condition may make performance of an unskilled job as difficult
21 as an objectively more demanding job.” SSR 85-15, 1985 WL 56857 at *6.
22 Fundamentally, an occupational training time does not equate to a finding of one’s ability
23 to perform a job once trained, given his particular mental limitations.
24

25 _____
26 ⁸ SVP is defined as the amount of lapsed time required by a typical worker to learn
27 the techniques, acquire the information, and develop the facility needed for average
28 performance in the specific job-worker situation. Employment and Training Admin., U.S.
Dept't of Labor, Dictionary of Occupational Titles, (4th ed. rev. 1991), page 1009. SVP
level 1 is defined as requiring a short demonstration only. SVP level 2 is defined as
requiring anything beyond a short demonstration up to and including one month.

1 The ALJ determined that Plaintiff has severe mental functioning impairments, as
2 evidenced by the finding of moderate limitations in “concentration, persistence, or pace”
3 and “activities of daily living,” and the mild to moderate limitation in “social functioning.”
4 Pursuant to § 404.1545, the RFC must include all impairments. Those impairments should
5 be converted into specific limitations in Plaintiff's ability to perform the necessary
6 functions of unskilled work. As such, the RFC describes the most the claimant can do
7 despite impairment.

8 The RFC at issue states that Plaintiff can perform only those tasks that equate to
9 unskilled work. Yet, medical professionals noted Plaintiff’s difficulty, due to his
10 limitations, with the basic mental demands of unskilled work. Plaintiff’s RFC fails to
11 include a documented limitation in “concentration, persistence, or pace.” The RFC makes
12 no finding as to Plaintiff's ability to perform on a sustained basis, or at a certain
13 productivity level. The finding that Plaintiff is able to perform certain unskilled tasks, does
14 not fully address his employability, given that certain demands will be made with respect to
15 the time and manner in which those tasks are executed. Similarly, the RFC does not
16 mention a limitation in “social functioning,” even in the mild to moderate range. Again,
17 while Plaintiff may be capable of performing unskilled tasks and even follow verbal
18 instructions, that finding does not address his ability to appropriately receive instructions or
19 criticism from a supervisor. Therefore, the Court concurs in the assessment that the
20 limitation to “unskilled work” does not adequately capture Plaintiff's mental RFC.

21 The RFC is inconsistent with Plaintiff’s documented limitations. As such, the Court
22 finds that the RFC is not supported by substantial evidence, and is based on reversible legal
23 error.

24 **D. VOCATIONAL HYPOTHETICAL TO THE VE**

25 **1. The VE Testimony Is Not Procedurally Defective**

26 Plaintiff argues that the ALJ was required but failed to ask the VE whether her
27 testimony was consistent with the DOT (i.e., Dictionary of Occupational Titles). (Pl.’s
28 Mot. at 25.) Plaintiff asserts that the ALJ’s failure to make this inquiry is reversible error.

1 Massachi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007). In Massachi, the Ninth Circuit
2 construed SSR 00-4p as creating an affirmative duty on the part of the ALJ to inquire
3 whether the VE's testimony conflicts with the DOT. Id. at 1153. Plaintiff asserts, and the
4 Commissioner does not dispute, that the ALJ failed to make such an inquiry. (Pl.'s Mot. at
5 25.) However, "[t]his procedural error could have been harmless, were there no conflict, or
6 if the vocational expert had provided sufficient support for her conclusion so as to justify
7 any potential conflicts." Massachi, 486 F.3d at 1154 n.19 (finding reversible error where
8 there was "an apparent conflict with no basis for the vocational expert's deviation"). No
9 evidence of conflict between the DOT and the VE has been proffered by Plaintiff in this
10 case. As such, the Court finds the ALJ's error to be harmless.

11 **2. Inquiry Regarding Plaintiff's Limitations**

12 Plaintiff argues that the ALJ's hypothetical to the VE did not accurately reflect his
13 full limitations. (Pl.'s Mot. at 14-15.) The testimony of the VE may only be relied upon if
14 "the questions posed by the ALJ include all of the claimant's functional limitations, both
15 physical and mental." Flores v. Shalala, 49 F.3d 562, 570-571 (9th Cir. 1995).
16 Specifically, the vocational hypothetical should account for documented limitations in
17 "concentration, persistence, or pace." Thomas v. Barnhart, 278 F.3d 947, 956 (9th Cir.
18 2002). "If the assumptions in the hypothetical are not supported by the record, the
19 vocational expert's opinion that a claimant is capable of working has no evidentiary value."
20 Russell v. Sullivan, 930 F.2d 1443, 1455 (9th Cir. 1991).

21 Here, the ALJ's hypothetical did not account for Plaintiff's deficits in "social
22 functioning" or "concentration, persistence, or pace" nor did it incorporate limitations
23 supported by medical evidence and, in fact, endorsed in the ALJ's own findings at step 3.
24 (AR 19.) This omission is significant, as demonstrated by the VE's testimony. In response
25 to a modified hypothetical, the VE testified imposing a limitation of only occasional contact
26 with co-workers and supervisors would "eliminate all jobs." (AR 61-62.) In response to a
27 hypothetical posed by Plaintiff counsel, the VE also testified "concentration, persistence,
28

1 and pace on [an] unskilled job would not allow the person to complete the requirements of
2 the job,” which thereby would all eliminate or severely limit potential work. (AR 63.)

3 The Commissioner fails to respond directly to Plaintiff’s argument, but instead,
4 argues that the limitations contained in the ALJ’s hypothetical are supported by the record,
5 and therefore, it was permissible for the ALJ to rely on the VE’s testimony that “Appellant
6 could perform her [sic] past relevant work.” (Def.’s Mot. at 5.) The flaw in this argument
7 is that the ALJ did *not* find that Plaintiff could perform past relevant work. To the contrary,
8 the ALJ found that “the claimant is unable to perform past relevant work.” (AR 21.)
9 Setting aside the Commissioner’s misstatement of the record, his response ultimately
10 misses the point. Plaintiff is not alleging that the limitations in the hypothetical were
11 unsupported in the record. Rather, he is arguing that the hypothetical *did not contain all of*
12 *the restrictions supported by the record.*

13 The ALJ found, based on the medical opinions provided, that Plaintiff had moderate
14 limitations. Thus, the ALJ had no clear or convincing reason for omitting those
15 impairments from his inquiry; i.e., limitations in both “social functioning” and
16 “concentration, persistence, or pace” should have formed part of the ALJ’s questions to the
17 VE. The hypothetical relied upon by the ALJ did not include all documented impairments,
18 and therefore, the VE’s statement that the claimant is capable of working lacks evidentiary
19 value. The Court finds that the ALJ, having relied upon a flawed vocational hypothetical,
20 committed reversible error in determining that the Plaintiff is not disabled.

21 **E. REMEDY**

22 As relief, Plaintiff requests that the Court remand for an immediate award of benefits
23 under Lester, 81 F.3d 821, and Varney v. Sec. of HHS, 859 F.2d 1396 (9th Cir. 1988).
24 (Pl.’s Mot. at 25:16-22.) The Commissioner does not respond directly to this point.

25 Where the ALJ fails to provide an adequate reason for discrediting the symptom
26 testimony of the claimant or rejecting the opinion of an examining physician, that testimony
27 or opinion is credited as a matter of law. Lester, 81 F.3d at 834 (citing Varney, 859 F.2d at
28 1401; Hammock v. Bowen, 879 F.2d 498, 502 (9th Cir. 1989)). The Court finds that the

1 ALJ erroneously discredited the claimant’s testimony of difficulties with memory,
2 concentration and social functioning. The Court further finds that the ALJ improperly
3 rejected medical opinions finding Plaintiff “moderately” impaired in both “social
4 functioning” and “concentration, persistence, or pace.” As such, the symptom testimony
5 and medical opinions are credited as true.

6 Moreover, at step 4, the ALJ failed to credit the impairments he himself documented
7 in step 3. In determining the severity of Plaintiff’s impairments, the ALJ made written
8 findings that Plaintiff had moderate impairments, including one in “concentration,
9 persistence, or pace.” Yet, in determining Plaintiff’s capacity to work, the ALJ made an
10 inconsistent RFC determination—one that failed to encompass any limitation associated
11 with Plaintiff’s combined impairments. The Court finds that the impairments documented
12 by the ALJ at step 3 should also be credited as a matter of law.

13 “Where, as here, the record has been thoroughly developed, it is within [the court’s]
14 discretion to award benefits without remanding the case for additional evidence.” Hoffman
15 v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Based on the findings of this Court, there
16 is no need to further develop the record. The evidence, given the effect required by law,
17 demonstrates that Plaintiff is disabled. The VE explicitly testified that the combination of
18 impairments documented by the ALJ at step 3 would eliminate all unskilled work. No
19 purpose would be served by remanding for further proceedings to correct the ALJ's
20 erroneous RFC determination. Thus, the Court REVERSES the disability determination
21 and REMANDS for immediate award of benefits.

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1 **IV. CONCLUSION**


2 For the reasons stated above,

3 IT IS HEREBY ORDERED THAT: Plaintiff's motion for summary judgment is
4 GRANTED and the Commissioner's cross-motion for summary judgment is DENIED. The
5 decision of the ALJ is REVERSED and the action shall be REMANDED for the immediate
6 award of benefits.

7 IT IS SO ORDERED.

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9 Dated: September 24, 2010


SAUNDRA BROWN ARMSTRONG
United States District Judge

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