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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ROSIE D. PHAM,
12
13 Plaintiff,
14 v.
15 NANCY A. BERRYHILL, Acting
16 Commissioner of Social Security,
17 Defendant.
18
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Case No.: 15-cv-02107-BAS (DHB)

ORDER:

**(1) GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT (ECF NO. 22);**

**(2) DENYING DEFENDANT’S
CROSS-MOTION FOR SUMMARY
JUDGMENT (ECF NO. 30); AND**

**(3) REMANDING FOR FURTHER
PROCEEDINGS**

21
22 On September 22, 2015, Plaintiff Rosie D. Pham (“Plaintiff”) filed a complaint
23 requesting judicial review of the final administrative decision of the Commissioner of
24 Social Security (“Commissioner” or “Defendant”) regarding denial of Plaintiff’s claim for
25 disability benefits. (ECF No. 1.) On March 22, 2016, Plaintiff filed a First Amended
26 Complaint pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c) of the Social Security
27 Act requesting judicial review of the final administrative decision of the Commissioner
28 regarding denial of Plaintiff’s claims for disability insurance benefits and supplemental

1 security income benefits. (ECF No. 9.) On June 10, 2016, Defendant filed an Answer and
2 the Administrative Record (“A.R.”). (ECF Nos. 14, 15.)

3 On January 17, 2017, Plaintiff filed a motion for summary judgment seeking reversal
4 of the Commissioner’s final decision and ordering the payment of benefits. (ECF No. 22.)
5 In the alternative, Plaintiff asks the Court to remand for further administrative proceedings.
6 (*Id.*) Plaintiff contends the Administrative Law Judge (“ALJ”) committed reversible error
7 by improperly considering the testimony of Plaintiff. (ECF No. 22-1 (“Mot.”) at 2-3.) On
8 May 12, 2017, Defendant filed an opposition to Plaintiff’s motion for summary judgment
9 and a cross-motion for summary judgment. (ECF Nos. 30, 31.)¹

10 For the reasons set forth herein, and after careful consideration of the record and the
11 applicable law, the Court **GRANTS** Plaintiff’s motion for summary judgment, **DENIES**
12 Defendant’s cross-motion for summary judgment, and **ORDERS** the case **REMANDED**
13 to the ALJ for further proceedings.

14 **I. PROCEDURAL BACKGROUND**

15 On April 8, 2011, Plaintiff filed an application for disability insurance benefits and
16 an application for supplemental security income benefits, in which she states her disability
17 began on March 1, 2011. (A.R. 150-166, 192.) In her applications, Plaintiff alleges her
18 disability is due to a brain tumor. (A.R. 204.) Plaintiff’s claims were initially denied on
19 August 24, 2011, and upon reconsideration on March 15, 2012. (A.R. 41-91.) Thereafter,
20 on April 19, 2012, Plaintiff requested a hearing before an ALJ. (A.R. 92-93.) On May 14,
21 2014, ALJ James P. Nguyen held a hearing regarding Plaintiff’s application for benefits.
22 (A.R. 23-40.) On June 13, 2014, the ALJ rendered an unfavorable decision and concluded
23 that Plaintiff was not entitled to benefits. (A.R. 7-21.) The ALJ’s decision became final on
24 July 23, 2015, when the Appeals Council denied Plaintiff’s request for review. (A.R. 1-6.)

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27 ¹ Although filed separately on the docket, Defendant’s cross-motion for
28 summary judgment and Defendant’s opposition to Plaintiff’s motion for summary
judgment are identical.

1 Thereafter, Plaintiff filed a complaint in the above-entitled matter on September 22, 2015.
2 (ECF No. 1.)

3 **II. LEGAL STANDARDS**

4 **A. Determination of Disability**

5 To qualify for disability benefits under the Social Security Act, a claimant must
6 demonstrate the following two things: (1) he suffers from a medically determinable
7 physical or mental impairment that can be expected to last for a continuous period of twelve
8 months or more, or would result in death; and (2) the impairment renders the applicant
9 incapable of performing the work he previously performed or any other substantial gainful
10 employment which exists in the national economy. 42 U.S.C. §§ 423(d)(1)(A), (d)(2)(A).
11 A claimant must meet both requirements to be classified as disabled. *Id.* The
12 Commissioner assesses a claim of disability through a five-step sequential evaluation
13 process. The five steps are:

- 14 1. Is the claimant presently working in a substantially gainful activity? If so,
15 then the claimant is not disabled within the meaning of the Social Security
16 Act. If not, proceed to step two. *See* 20 C.F.R. §§ 404.1520(b),
416.920(b).
- 17 2. Is the claimant's impairment severe? If so, proceed to step three. If not,
18 then the claimant is not disabled. *See* 20 C.F.R. §§ 404.1520(c),
416.920(c).
- 19 3. Does the impairment "meet or equal" one of the list of specific
20 impairments described in 20 C.F.R. Part 220, Appendix 1? If so, the
21 claimant is disabled. If not, proceed to step four. *See* 20 C.F.R. §§
404.1520(d), 416.920(d).
- 22 4. Is the claimant able to do any work that he or she has done in the past? If
23 so, the claimant is not disabled. If not, proceed to step five. *See* 20 C.F.R.
24 §§ 404.1520(e), 416.920(e).
- 25 5. Is the claimant able to do any other work? If so, then the claimant is not
disabled. If not, the claimant is disabled. *See* 20 C.F.R. §§ 404.1520(f),
416.920(f).

26 *Bustamonte v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001) (citing *Tackett v. Apfel*, 180
27 F.3d 1094, 1098-99 (9th Cir. 1999)). If the claimant is able to do other work, then the
28 Commissioner must "show that the claimant can perform some other work that exists in

1 ‘significant numbers’ in the national economy, taking into consideration the claimant’s
2 residual functional capacity (“RFC”),² age, education, and work experience.” *Tackett*, 180
3 F.3d at 1099-00 (citing 20 C.F.R. § 404.1560(b)(3)). If an applicant is found to be disabled
4 or not disabled at any step, there is no need to proceed further. *Ukolov v. Barnhart*, 420
5 F.3d 1002, 1003 (9th Cir. 2005) (citing *Schneider v. Comm’r of Soc. Sec. Admin.*, 223 F.3d
6 968, 974 (9th Cir. 2000)).

7 Although the ALJ must assist the claimant in developing the record, the claimant
8 bears the burden of proof during the first four steps. *Tackett*, 180 F.3d at 1098, n.3 (citing
9 20 C.F.R. § 404.1512(d)). The Commissioner bears the burden of proof at the fifth step.
10 *Id.* at 1100.

11 **B. Scope of Review**

12 The Social Security Act allows unsuccessful claimants to seek judicial review of the
13 Commissioner’s final agency decision. 42 U.S.C. §§ 405(g), 1383(c)(3). The scope of
14 judicial review is limited. The Court must affirm the Commissioner’s decision unless it
15 “is not supported by substantial evidence or it is based upon legal error.” *Tidwell v. Apfel*,
16 161 F.3d 599, 601 (9th Cir. 1999) (citing *Flaten v. Sec’y of Health & Human Servs.*, 44
17 F.3d 1453, 1457 (9th Cir. 1995)); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1
18 (9th Cir. 2005) (“We may reverse the ALJ’s decision to deny benefits only if it is based
19 upon legal error or it is not supported by substantial evidence.”) (citing *Tidwell*, 161 F.3d
20 at 601).

21 “Substantial evidence is more than a mere scintilla but less than a preponderance.”
22 *Tidwell*, 161 F.3d at 601 (citing *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997)).
23 “Substantial evidence is relevant evidence which, considering the record as a whole, a
24 reasonable person might accept as adequate to support a conclusion.” *Flaten*, 44 F.3d at
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27 ² The RFC is “the most [a claimant] can still do despite [his or her] limitations.”
28 20 C.F.R. § 404.1545(a)(1). The RFC is “based on all the relevant evidence” in the case
record. *Id.*

1 1457 (citing *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993)). In considering the
2 record as a whole, the Court must weigh both the evidence that supports and detracts from
3 the ALJ’s conclusions. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing *Vidal*
4 *v. Harris*, 637 F.2d 710, 712 (9th Cir. 1981); *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th
5 Cir. 1975)).

6 The Court must uphold the denial of benefits if the evidence is susceptible to more
7 than one rational interpretation, one of which supports the ALJ’s decision. *Burch v.*
8 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is susceptible to more than
9 one rational interpretation, it is the ALJ’s conclusion that must be upheld.”) (citing
10 *Andrews v. Shalala*, 53 F.3d 1035, 1039-40 (9th Cir. 1995)); *Flaten*, 44 F.3d at 1457 (“If
11 the evidence can reasonably support either affirming or reversing of the Secretary’s
12 conclusion, the court may not substitute its judgment for that of the Secretary.”) (citing
13 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Matney v. Sullivan*, 981 F.2d 1016, 1019
14 (9th Cir. 1992)). The “substantial evidence test for upholding factual findings is ‘extremely
15 deferential to the factfinder.’” *Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1165
16 (9th Cir. 2010) (quoting *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 149 (1997)). The
17 court’s “task is not to reweigh the evidence, but only to determine if substantial evidence
18 supports the ALJ’s findings.” *Id.* (quoting *Metro. Stevedore Co.*, 521 U.S. at 149.)
19 However, even if the Court finds that substantial evidence supports the ALJ’s conclusions,
20 the Court must set aside the decision “if the proper legal standards were not applied in
21 weighing the evidence and making the decision.” *Benitez v. Califano*, 573 F.2d 653, 655
22 (9th Cir. 1978) (quoting *Flake v. Gardner*, 399 F.2d 532, 540 (9th Cir. 1968)).

23 Section 405(g) permits the Court to enter a judgment affirming, modifying or
24 reversing the Commissioner’s decision. 42 U.S.C. § 405(g). The matter may also be
25 remanded to the Social Security Administration for further proceedings. *Id.*

26 **III. FACTUAL BACKGROUND**

27 Plaintiff alleges she became disabled on March 1, 2011. (A.R. 150-166, 192.) In
28 her application, Plaintiff alleges her disability is due to a brain tumor. (A.R. 204.) Prior

1 to her disability, Plaintiff alleges she worked as a caregiver and a cashier at a gas station.
2 (A.R. 205.)

3 **A. Medical Evidence**

4 1. Treating Physicians

5 a. *Sharp Memorial Hospital*

6 Sharp Memorial Hospital provided treatment records from March 25, 2011 to May
7 16, 2011. (A.R. 253-315.) Plaintiff arrived at Sharp Memorial Hospital on March 25, 2011
8 complaining of nausea, as well as one month of constant abdominal pain and intermittent
9 vomiting. (A.R. 306-315.) She was diagnosed with acute colitis, acute abdominal pain,
10 acute dehydration, acute vomiting, and an acute urinary tract infection. (A.R. 308.) She
11 was treated and discharged in stable condition with prescriptions for Cipro, Flagyl, and
12 Phenergan. (A.R. 308.)

13 On April 29, 2011, Plaintiff arrived at the emergency room with an MRI showing a
14 left pontine brain tumor with left to right shift. (A.R. 277-305, 317.) Plaintiff had a large
15 mass in her left pons extending to the right side of her brain that was 3 cm by 3 cm by 2.5
16 cm. (A.R. 277.) She was experiencing facial numbness, slurred speech, nausea and
17 vomiting, difficulty swallowing, a mild left headache, and visual deficits on her left side.
18 (A.R. 277.) The doctors found no evidence for infectious origins of her brain tumor, but
19 found surgical intervention necessary. (A.R. 278, 318-329.) Plaintiff was discharged on
20 May 4, 2011, with brain surgery scheduled for May 11, 2011. (A.R. 278.)

21 Plaintiff was admitted for biopsy and debulking surgery on May 10, 2011 and
22 discharged on May 16, 2011. (A.R. 253-276.) Dr. Donald Blaskiewicz performed the
23 surgery. (A.R. 254.) Although the tumor was significantly reduced in volume, a mass
24 remained. (A.R. 259.) Post-surgery, Plaintiff was given physical therapy and occupational
25 therapy while hospitalized, and progressed well. (A.R. 254.) A radiation-oncology
26 consultation was requested. (A.R. 259.) A pathology report found no malignant features
27 in the tumor. (A.R. 272.) Plaintiff was discharged to her home with home health. (A.R.
28 254.)

1 On July 15, 2011, Plaintiff underwent a soft tissue procedure at Sharp, performed by
2 Dr. Blaskiewicz. (A.R. 360-362.)

3 On July 20, 2011, Plaintiff was seen at Sharp Memorial Hospital complaining of
4 bleeding from her biopsy site. (A.R. 355-359, 362-368.) She was given information for
5 treating a hematoma and discharged the same day with prescriptions for Keflex, Cipro, and
6 Vicodin. (A.R. 355-356, 366.)

7 b. *Le Huong Nguyen M.D.*

8 Plaintiff's primary physician is Dr. Nguyen. She began seeing him in September
9 2010. (A.R. 350.) Dr. Nguyen referred Plaintiff to the emergency room on March 23,
10 2011, noting pain and vomiting and the fact Plaintiff had lost ten pounds since March 9,
11 2011. (A.R. 349.) Dr. Nguyen referred Plaintiff to a clinic on April 24, 2011, as she was
12 continuing to lose weight and was non-responsive to medication. (A.R. 349.)

13 Plaintiff saw Dr. Nguyen in May, June, July and August 2011 for follow-up
14 appointments after her brain surgery, at which she complained of fatigue, mild headaches,
15 left eye and head pain, dizziness, and blurred vision. (A.R. 316, 373-376.) In May 2011,
16 Dr. Nguyen filled out a Doctor's Certificate for Plaintiff's State claim for disability
17 insurance benefits. (A.R. 350.) He stated that Plaintiff's disability began on March 1, 2011
18 and he anticipates releasing her to return to her regular work on July 1, 2011. (A.R. 350.)
19 Plaintiff's disabling conditions included headaches, dizziness, blurred vision, vomiting,
20 and a brain tumor. (A.R. 350.)

21 Plaintiff saw Dr. Nguyen again in November and December 2011, with Plaintiff
22 complaining of left arm, shoulder, leg, and ear pain, and tongue numbness. (A.R. 401.) In
23 November 2011, Dr. Nguyen diagnosed Plaintiff with tendonitis and a frozen shoulder on
24 the left side. (A.R. 401.) In February 2012, Plaintiff saw Dr. Nguyen again, and
25 complained of dizziness, and left arm, neck, and knee pain. (A.R. 400.)

26 In November 2011, Dr. Nguyen filed out a Physician's Supplementary Certificate
27 stating that Plaintiff had been diagnosed with a brain tumor and a frozen shoulder, and was
28 experiencing affects from brain tumor surgery, weakness, stiffness, and pain of the left arm

1 and shoulder, numbness of the face and tongue, and a left frozen shoulder. (A.R. 392.) Dr.
2 Nguyen anticipated that Plaintiff would be able to return to her regular work on February
3 7, 2012. (A.R. 392.)

4 2. Examining Physicians

5 a. *Seagate Medical Group*

6 On February 11, 2012, Plaintiff visited Dr. Philip Wirganowicz, an orthopaedic
7 surgeon, at Seagate Medical Group for a complete orthopedic evaluation. (A.R. 393-397.)
8 Plaintiff complained of left-sided neck and left shoulder pain following her surgery. (A.R.
9 393.) Plaintiff was accompanied by her husband on the visit. (A.R. 393.)

10 Plaintiff reported she was experiencing occasional episodes of radiation of pain
11 down into her left arm. (A.R. 393.) Plaintiff denied any weakness, however she reported
12 feeling numbness and tingling in her left arm. (A.R. 393.) Her symptoms were described
13 as intermittent, and the pain described as “throbbing and electrical in nature.” (A.R. 393.)
14 Plaintiff was not using any braces about her neck, but she reported using a cane for
15 ambulation. (A.R. 393.)

16 Dr. Wirganowicz found that there was no muscular atrophy in Plaintiff’s upper and
17 lower extremities, and that passive range of motion of the left shoulder was full. (A.R.
18 397.) He added that there were confounding factors that made interpretation difficult.
19 (A.R. 397.) He found decreased sensation circumferentially in the left arm in a non-
20 dermatomal pattern, and muscular weakness throughout the entire left arm and shoulder
21 associated with giving way that appears volitional in nature. (A.R. 397.)

22 Ultimately, Dr. Wirganowicz found that Plaintiff should be able to lift twenty-five
23 pounds frequently, or fifty pounds on an occasional basis. (A.R. 397.) Plaintiff should
24 also be able to sit, stand, or walk for a duration of six hours in a normal workday with
25 appropriate breaks. (A.R. 397.) Plaintiff does not require the use of assistive devices for
26 ambulation. (A.R. 397.) Lastly, Dr. Wirganowicz found that Plaintiff may use her upper
27 extremities for gross motor and fine manipulative movements. (A.R. 397.)
28

1 Plaintiff was also given a visual acuity test by Seagate Medical Group using the
2 Snellen chart. (A.R. 398.) The test found that Plaintiff “cannot visually go from one place
3 to another without assistance.” (A.R. 398.)

4 3. Non-Examining Physicians

5 a. *Pamela Ombres, M.D.*

6 Dr. Ombres reviewed Plaintiff’s medical records on her initial disability
7 determination, and provided an opinion dated August 24, 2011. (A.R. 43-47.) Dr. Ombres
8 discussed Plaintiff’s allegations of dizziness on changing positions, as well as an unsteady
9 gait and ataxia. (A.R. 47.) Dr. Ombres found Plaintiff credible for her allegations and
10 limitations at the time. (A.R. 44.) Dr. Ombres further found that one or more of Plaintiff’s
11 medically determinable impairments could reasonably be expected to produce her pain and
12 other symptoms, and that Plaintiff’s statements about the intensity, persistence, and
13 functionally limiting effects of the symptoms were substantiated by the objective medical
14 evidence alone. (A.R. 45.)

15 Dr. Ombres concluded that “durational to light at 4/2012 is appropriate.” (A.R. 47.)
16 She noted that she could not tell whether Plaintiff would still have some ataxia and
17 dizziness a year from her brain tumor surgery. (A.R. 47.) Dr. Ombres found that Plaintiff
18 has the following exertional limitations: (1) occasionally lift and/or carry twenty pounds;
19 (2) frequently lift and/or carry ten pounds; (3) stand and/or walk for a total of six hours in
20 an eight-hour workday; (4) sit for a total of six hours in an eight-hour workday; and (5)
21 push and/or pull in an unlimited amount, other than shown for lift and/or carry. (A.R. 45-
22 46.) Dr. Ombres further found that Plaintiff has the following postural limitations: (1)
23 occasionally climb ramps/stairs; (2) never climb ladders/ropes/scaffolds; (3) occasionally
24 balance; (4) occasionally kneel; (5) occasionally crouch; and (6) occasionally crawl. (A.R.
25 46.) Dr. Ombres added that Plaintiff has no manipulative, visual, or communicative
26 limitations. (A.R. 46-47.) Plaintiff should, however, avoid all exposure to hazards, fumes,
27 odors, dusts, gases, and poor ventilation. (A.R. 47.)

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1 b. *R. Jacobs, M.D.*

2 Dr. Jacobs reviewed Plaintiff's medical records for her disability determination on
3 reconsideration, and provided two opinions dated March 13, 2012. (A.R. 56-60, 66-70.)
4 Dr. Jacobs noted that he had received a new physician's statement stating that Plaintiff
5 could perform regular or customary work by February 7, 2012. (A.R. 56, 66.) Plaintiff
6 also provided an update in August 2011 stating that she was getting better in walking,
7 preparing meals for herself, and bathing; however, she had lost her appetite when eating.
8 (A.R. 53, 63.)

9 While Dr. Jacobs found that one or more of Plaintiff's medically determinable
10 impairments could reasonably be expected to produce her pain and other symptoms, he did
11 not find Plaintiff's statements about the intensity, persistence, and functionally limiting
12 effects of the symptoms to be substantiated by the objective medical evidence alone. (A.R.
13 57, 67.) He also only found Plaintiff's statements regarding her symptoms to be partially
14 credible, noting that she was not fully cooperative during the orthopaedic consultative
15 examination. (A.R. 57, 67.)

16 Dr. Jacobs found that Plaintiff has the following exertional limitations: (1)
17 occasionally lift and/or carry fifty pounds; (2) frequently lift and/or carry twenty-five
18 pounds; (3) stand and/or walk for a total of six hours in an eight-hour workday; (4) sit for
19 a total of six hours in an eight-hour workday; and (5) push and/or pull in an unlimited
20 amount, other than shown for lift and/or carry. (A.R. 58, 68.) Dr. Jacobs further found
21 that Plaintiff has the following postural limitations: (1) occasionally climb ladders/ropes/
22 scaffolds; and (2) frequently balance, stoop, kneel, crouch and crawl. (A.R. 59, 68-69.)
23 Dr. Jacobs added that Plaintiff has no manipulative, visual, communicative, or
24 environmental limitations. (A.R. 59, 69.)

25 c. *R. Mitgang, M.D.*

26 Dr. Mitgang reviewed Plaintiff's medical records and provided an opinion dated on
27 or about June 23, 2012. (A.R. 403-404.) Dr. Mitgang stated that "[g]iven the significant
28 distortion of multiple cranial nns., and the fact that there is residual tumor, the initial RFC

1 dated 08/24/2011 is given greater weight than the recon, and it is affirmed as written.”
2 (A.R. 404.)

3 **B. The Hearing**

4 At the hearing on May 14, 2014, Plaintiff, who was represented by counsel, testified,
5 along with the Alan Cummings, the vocational expert, and counsel. (A.R. 23-40.) Their
6 testimony is summarized below.

7 1. Plaintiff's Testimony

8 On May 14, 2014, Plaintiff testified at a hearing before ALJ Nguyen in San Diego,
9 California. (A.R. 27-37.) Plaintiff testified to the following:

10 Plaintiff was born on March 15, 1951, and lives with her husband and two adult
11 children. (A.R. 27-28.) Plaintiff is right-handed. (A.R. 27.) At home, Plaintiff does just
12 a little cooking or cleaning. (A.R. 28, 29.) If she does it for a long time, she gets very tired
13 and dizzy. (A.R. 28.) Plaintiff sometimes does laundry and cooking, but not much. (A.R.
14 28.) Plaintiff can only stand for ten or fifteen minutes at a time before her legs get tired.
15 (A.R. 28.) Her child does the cooking for the family. (A.R. 28.)

16 Plaintiff has a driver's license, but she has not driven since she got sick in 2011.
17 (A.R. 29.) When she wants to go somewhere, her husband gives her a ride. (A.R. 29-30.)
18 She does not take the bus. (A.R. 30.) Plaintiff cannot stay at home by herself, but her
19 husband, who is retired, stays with her during the day. (A.R. 30.) She does not go grocery
20 shopping by herself. (A.R. 30.)

21 Plaintiff attended one or two years of college in Washington, and took classes in
22 English. (A.R. 30, 36-37.) She is not presently working. (A.R. 30-31.) Plaintiff
23 previously worked as a cashier and took care of two disabled people. (A.R. 31.) When
24 she worked, she could speak English with people. (A.R. 37.) She stopped working when
25 she found out she had a brain tumor. (A.R. 31.) Plaintiff had surgery to remove the tumor.
26 (A.R. 31.) After the surgery, Plaintiff did not have much treatment because she lacked the
27 financial resources. (A.R. 31.) One or two weeks after her initial surgery, Plaintiff had an
28 infection and needed another surgery. (A.R. 32.)

1 Plaintiff's eye still hurts and she vomits, feels dizzy, and sometimes cannot control
2 herself when she wants to go to the restroom. (A.R. 32.) Plaintiff has seen a doctor for
3 these conditions. (A.R. 32-33.) She takes medications on an as-needed basis when she
4 vomits or gets dizzy. (A.R. 33.) Plaintiff also has prescription medications for her eyes.
5 (A.R. 33.) She received the first prescription in April 2014. (A.R. 34.) Plaintiff had
6 cataracts surgery on her right eye last month. (A.R. 34.) Plaintiff will eventually need
7 surgery on her left eye too. (A.R. 34.)

8 Plaintiff cannot go back to work because her head still hurts when she moves and
9 when she concentrates. (A.R. 34-35.) Plaintiff cannot move much. (A.R. 35.) She has
10 had difficulty getting to see a doctor for these issues. (A.R. 35.) She finally saw a doctor
11 at the beginning of the month. (A.R. 35.)

12 Lastly, the ALJ asked Plaintiff whether she can speak and understand English,
13 because it seemed like she was saying she does not understand some of the things he was
14 telling her at the hearing. (A.R. 37.) Plaintiff responded that after the surgery on her brain,
15 she forgets many things and does not understand much now. (A.R. 37.)

16 2. Vocational Expert's Testimony

17 Alan Cummings, a vocational expert, also testified before the ALJ on May 14, 2014.
18 (A.R. 37-39.) The ALJ asked Mr. Cummings three hypotheticals. (A.R. 38-39.) First, the
19 ALJ asked Mr. Cummings to assume a person of the claimant's age, education, and work
20 experience, who can perform work at the medium level of exertion. (A.R. 38.) The ALJ
21 asked Mr. Cummings whether, at the medium level of exertion, past work would be
22 available. (A.R. 38.) Mr. Cummings testified that there would be past work available.
23 (A.R. 38.)

24 Second, the ALJ asked Mr. Cummings to modify the first hypothetical to involve a
25 light level of exertion. (A.R. 39.) Mr. Cumming testified that past work would still be
26 available. (A.R. 39.) Third, the ALJ asked Mr. Cummings to go back to the first
27 hypothetical and assume the cashier position was not available. (A.R. 39.) He then asked
28 whether any other work would be available. (A.R. 39.) Mr. Cummings testified that there

1 would be work available at the medium exertional level, including work as a “packager”
2 and “cleaner.” (A.R. 39.) Mr. Cummings testified that his testimony is consistent with the
3 DOT [Dictionary of Occupational Titles]. (A.R. 39.)

4 Plaintiff’s attorney asked Mr. Cummings whether Plaintiff could do any formal work
5 as an unskilled worker. (A.R. 39.) Mr. Cummings testified that a cashier is unskilled work,
6 so that would remain available. (A.R. 39.)

7 3. Plaintiff’s Counsel’s Testimony

8 When asked by the ALJ if he had anything to add, Plaintiff’s counsel stated that
9 Plaintiff’s medical record supports grid rule 201.02, inability to do past work, based on her
10 headaches and cognitive disorder. (A.R. 39-40.)

11 **C. The ALJ’s Findings**

12 On June 13, 2014, the ALJ rendered an unfavorable decision regarding Plaintiff’s
13 applications for disability insurance benefits and supplemental security income benefits.
14 (A.R. 7-21.) The ALJ first determined that Plaintiff meets the insured status requirements
15 of the Social Security Act through September 30, 2016. (A.R. 12.) The ALJ then followed
16 the five-step, sequential evaluation process in rendering his decision. (A.R. 12-17.) At
17 step one, the ALJ concluded that Plaintiff “has not engaged in substantial gainful activity
18 since March 1, 2011, the alleged onset date.” (A.R. 12.)

19 At step two, the ALJ concluded that Plaintiff has the following severe impairment:
20 “left pontine mass status post craniectomy and debulking surgery.” (A.R. 12.) The ALJ
21 determined this impairment is severe because it more than minimally affects Plaintiff’s
22 ability to perform basic work activities. (A.R. 12.) However, the ALJ determined that the
23 “medical and other evidence establish that [Plaintiff’s] medically determinable impairment
24 of cataracts causes only a slight abnormality that would have no more than a minimal effect
25 on her ability to work” and was non-severe. (A.R. 12-13.) The ALJ also determined that
26 there was a lack of objective evidence to substantiate the existence of a medically
27 determinable impairment as to Plaintiff’s alleged symptoms of dizziness, vomiting, and
28 urinary incontinence. (A.R. 13.) The ALJ found that Plaintiff was not formally evaluated

1 for these symptoms, no medications were prescribed, and no objective medical evidence
2 that documents a diagnoses exists. (A.R. 13.)

3 At step three, the ALJ concluded that Plaintiff does not have an impairment or
4 combination of impairments that meets or medically equals the severity of one of the listed
5 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d),
6 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). (A.R. 13.) The ALJ noted that
7 “[n]o treating or examining physician has recorded findings equivalent in severity to the
8 criteria of any listed impairment, nor does the evidence show medical findings that are the
9 same or equivalent to those of any listed impairment in the Listing of Impairments.” (A.R.
10 13.)

11 The ALJ then found that Plaintiff has the RFC to perform the full range of medium
12 work as defined in 20 C.F.R. §§ 404.1567(c) and 416.967(c). (A.R. 13.) The ALJ
13 considered the Exertion Questionnaire completed by Plaintiff, dated February 6, 2012, in
14 which she describes her symptoms and limitations. (A.R. 14.) Relying on the medical
15 record and Plaintiff’s testimony and statements, the ALJ found Plaintiff’s allegations
16 concerning the intensity, persistence, and limiting effects of her symptoms less than fully
17 credible. (A.R. 14.)

18 The ALJ also reviewed and discussed Plaintiff’s hospital records with regard to her
19 brain tumor, Dr. Wirganowicz’s consultative evaluation, the State agency medical
20 consultants, and Dr. Nguyen’s certifications. (A.R. 14-15.) The ALJ gave significant
21 weight to the opinion of Dr. Wirganowicz and to the State agency medical consultants that
22 opined Plaintiff was able to perform medium work. (A.R. 15.) The ALJ gave little weight
23 to the State agency medical consultants that limited Plaintiff to light work, and the opinions
24 of Dr. Nguyen. (A.R. 15.) In sum, the ALJ found that Plaintiff’s RFC to perform the full
25 range of medium work is supported by the evidence as a whole. (A.R. 15.) The ALJ
26 further found that Plaintiff’s “subjective complaints are less than fully credible and the
27 objective medical evidence does not support the alleged severity of symptoms.” (A.R. 15-
28 16.)

1 The ALJ then proceeded with step four of the sequential evaluation process. At this
2 step, the ALJ concluded that Plaintiff is capable of performing past relevant work as a
3 cashier. (A.R. 16.) The vocational expert testified that Plaintiff's past relevant work as a
4 cashier, is a light, unskilled position, as generally performed pursuant to the DOT and as
5 actually performed by Plaintiff. (A.R. 16.) The vocational expert further testified that a
6 person with the same age, education, and work experience as Plaintiff, and an RFC as
7 determined by the ALJ, could perform the past work of a cashier as actually performed by
8 Plaintiff and as generally performed in the regional and national economy. (A.R. 16.)

9 Although Plaintiff is capable of performing past relevant work, the ALJ alternatively
10 found that there are other jobs existing in the national economy that she is also capable of
11 performing. (A.R. 16.) The ALJ then determined that based on an RFC for the full range
12 of medium work, considering Plaintiff's age, education, and work experience, a finding of
13 "not disabled" is directed by Medical-Vocational Rule 203.14. (A.R. 17.)

14 Therefore, the ALJ concluded that Plaintiff has not been under a disability, as
15 defined in the Social Security Act, from March 1, 2011, through the date of his decision.
16 (A.R. 17.)

17 **IV. DISCUSSION**

18 Plaintiff argues that the ALJ committed reversible error by improperly considering
19 the testimony of Plaintiff. (Mot. at 2-3.) Specifically, Plaintiff argues the ALJ failed to
20 articulate sufficient reasons to find her not credible. (*Id.* at 3.) Defendant counters that the
21 ALJ appropriately found Plaintiff's testimony not fully credible. (ECF No. 30-1 at 4-8.)

22 The credibility of a claimant's testimony regarding subjective pain is analyzed in
23 two steps. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (citing *Lingenfelter v.*
24 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)). First, the ALJ must determine whether
25 the claimant has presented objective medical evidence of an impairment or impairments
26 that could reasonably be expected to produce *some degree* of the pain or other symptoms
27 alleged. *Id.* (citing *Lingenfelter*, 504 F.3d at 1036). Second, if the claimant meets the first
28 step, and there is no affirmative evidence of malingering, the ALJ may reject the claimant's

1 testimony about the severity of the pain or symptoms if he provides “specific, clear and
2 convincing reasons” for doing so. *Id.* (citing *Lingenfelter*, 504 F.3d at 1036).

3 “In order for the ALJ to find [the claimant’s] testimony unreliable, the ALJ must
4 make ‘a credibility determination with findings sufficiently specific to permit the court to
5 conclude that the ALJ did not arbitrarily discredit claimant’s testimony.’” *Turner v.*
6 *Comm’r of Soc. Sec. Admin.*, 613 F.3d 1217, 1224 n.3 (9th Cir. 2010) (quoting *Thomas v.*
7 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)). It is “not sufficient for the ALJ to make only
8 general findings; he must state which pain testimony is not credible and what evidence
9 suggests the complaints are not credible.” *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
10 1993); *see also Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir.
11 2014).

12 Moreover, the ALJ may not discredit a claimant’s testimony of pain solely because
13 the degree of pain alleged is not supported by objective medical evidence. *Rollins v.*
14 *Massanari*, 261 F.3d 853, 856-57 (9th Cir. 2001) (“subjective pain testimony cannot be
15 rejected on the sole ground that it is not fully corroborated by objective medical evidence”).
16 “In weighing a claimant’s credibility, the ALJ may consider his reputation for truthfulness,
17 inconsistencies either in his testimony or between his testimony and his conduct, his daily
18 activities, his work record, and testimony from physicians and third parties concerning the
19 nature, severity, and effect of the symptoms of which he complains.” *Light v. Soc. Sec.*
20 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (citing *Smolen v. Chater*, 80 F.3d 1273, 1284
21 (9th Cir. 1996); *Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995); 20 C.F.R. §
22 404.1529(c)). Even if one or more reasons listed by the ALJ are invalid, so long as the
23 ALJ provides some valid reasons, the ALJ’s credibility determination will be upheld. *Bray*
24 *v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009); *Carmickle v. Comm’r,*
25 *Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008); *Batson v. Comm’r of Soc. Sec.*
26 *Admin.*, 359 F.3d 1190, 1195-97 (9th Cir. 2004).

27 Here, the ALJ found Plaintiff’s “left pontine mass status post craniectomy and
28 debulking surgery” to be a severe impairment. (A.R. 12.) He then found that this

1 impairment “could reasonably be expected to cause some of the alleged symptoms.” (A.R.
2 14.) However, he concluded that Plaintiff’s “statements concerning the intensity,
3 persistence and limiting effects of [her] symptoms are not entirely credible to the extent
4 they are inconsistent with the” RFC as determined by the ALJ. (A.R. 14.) Because the
5 ALJ found Plaintiff met the first step of the test, the issue is whether the ALJ provided
6 “specific, clear and convincing reasons” for the adverse credibility finding. *See Vasquez*,
7 572 F.3d at 591.³ The Court finds he did not do so.

8 First, the ALJ found Plaintiff’s allegations concerning the intensity, persistence and
9 limiting effects of her symptoms less than fully credible because “although the medical
10 record showed evidence of brain tumor, many of [Plaintiff’s] symptoms subsided after
11 surgery.” (A.R. 14.) The ALJ specifically noted that Plaintiff had not required significant
12 treatment after her surgery and that the “medical record does not support the severity of
13 symptoms alleged.” (A.R. 14.) In reviewing Plaintiff’s treatment records, the ALJ noted
14 that her hospital medical records state that after brain surgery in May 2011, Plaintiff did
15 physical and occupational therapy while in the hospital, and was considered to be
16 progressing well and was stable. (A.R. 14.) Plaintiff also reported to be getting better with
17 walking, preparing meals, and bathing in August 2011. (A.R. 14, 53.) The ALJ further
18 gave significant weight to the opinion of consultative examiner Dr. Wirganowicz, dated
19 February 11, 2012, who found that Plaintiff had a minimal limp in her left leg, and left-
20 sided neck and shoulder pain that did not prevent her from lifting or carrying fifty pounds
21 occasionally and twenty-five pounds frequently, and standing, sitting, or walking for six
22 hours in a normal workday with appropriate breaks. (A.R. 15, 397.) The ALJ also gave
23 significant weight to the State agency medical consultants who opined Plaintiff was able
24 to perform medium work, because Plaintiff had no significant treatment after her brain
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26
27 ³ The ALJ did not cite any evidence of malingering. Therefore, his adverse
28 credibility findings may only be supported by “specific, clear and convincing reasons.”
Vasquez, 572 F.3d at 592.

1 surgery, and was able to occasionally cook and do laundry, and little weight to the opinions
2 of the State agency medical consultants that limited Plaintiff to light work and the opinions
3 of Dr. Nguyen. (A.R. 15.)

4 However, the medical record also states that Plaintiff was sent home from the
5 hospital in May 2011 with home health care, not on her own, and after Plaintiff's initial
6 surgery, she had a second surgery in July 2011, with which she experienced complications.
7 (A.R. 32, 254, 360-368.) The medical notes of Dr. Nguyen, Plaintiff's primary treating
8 physician, also show that Plaintiff complained of feeling fatigue and having mild headaches
9 shortly after her surgery, and dizziness when she changed position, blurred vision, and eye
10 pain in the following months. (A.R. 316, 374-375.) Although Dr. Nguyen originally
11 anticipated that Plaintiff would be able to return to work on July 1, 2011, he later changed
12 his diagnosis to February 7, 2012. (A.R. 350, 392.) In November 2011, Plaintiff
13 complained of pain in her left shoulder, arm, leg, and ear, and tongue numbness. (A.R.
14 401.) The left arm pain continued in December 2011. (A.R. 401.) In February 2012,
15 Plaintiff continued to complain of dizziness, and left neck, arm, and knee pain. (A.R. 400.)
16 In addition, although the ALJ indicates otherwise, records indicate Plaintiff is taking, or
17 has taken, prescription medications for her symptoms, including, but not limited to:
18 Keppra, Cyclobenzprine, Meloxicam, Tylenol, Flexeril, and Motrin. (A.R. 13-15, 33, 227,
19 373-376, 400-402.) Therefore, before even considering Plaintiff's testimony, the medical
20 record does not support the finding that Plaintiff's symptoms subsided after surgery.⁴

21 Plaintiff testified before the ALJ and in prior statements that her eye still hurts, her
22 head still hurts when she moves, she cannot concentrate or understand much, she forgets
23 things, and she vomits, feels dizzy and frequently fatigued, and sometimes cannot control
24 herself when she wants to go to the restroom. (AR. 14, 32-35.) She also repeatedly stated
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27 ⁴ Plaintiff further testified that she lacked the financial resources to pursue a lot
28 of treatment after her surgery, and has had trouble getting referrals to see a doctor for her
issues. (A.R. 31-35.)

1 that although she can do minimal housework, she cannot do so for very long before she
2 gets tired and dizzy, and can only stand for ten or fifteen minutes at a time. (A.R. 28-29,
3 225-227.) She added that she cannot drive or be left home alone. (A.R. 29-30.) None of
4 this testimony supports a finding that Plaintiff's symptoms subsided after surgery.

5 In reviewing the ALJ's decision, it appears the ALJ did not consider any of these
6 symptoms to be related to Plaintiff's brain tumor, because he did not consider any of this
7 medical evidence in his opinion. Rather, he made a separate determination that Plaintiff's
8 symptoms following surgery for a brain tumor, including her eye pain, dizziness, vomiting,
9 and urinary incontinence, were not medically determinable impairments. (A.R. 12-13.)
10 He stated that Plaintiff was not formally evaluated for dizziness, although Plaintiff
11 complained of dizziness on several occasions to her treating physician. (A.R. 13.) In
12 addition, although Plaintiff frequently complained of eye pain to her primary physician,
13 the ALJ found this complaint to be unsupported by the record and noted that no aggressive
14 treatment was recommended or anticipated. (A.R. 12-13.)⁵

15 However, as Defendant stated in her cross-motion for summary judgment, Plaintiff
16 was a "healthy individual" prior to her brain surgery. (ECF No. 30-1 at 5.) After her brain
17 surgery, medical documentation shows that she continued to experience headaches, eye
18 pain, dizziness, numbness of face and tongue, and pain on her left side. (A.R. 316, 349-
19 350, 373-376, 392, 400-401.) In her applications for disability insurance benefits and
20 supplemental security income benefits, Plaintiff only listed a brain tumor as her disabling
21 medical condition, thus indicating that she believes these conditions are all linked. (A.R.
22 5, 148-166, 203-209, 236-239.) Moreover, Plaintiff's primary treating physician, Dr.
23 Nguyen, links the pain, dizziness, numbness, and headaches to her brain tumor in his
24 treatment notes and certifications. (A.R. 316, 349-350, 373-376, 392, 400-401.) There is
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27 ⁵ Although Plaintiff testified that she had cataracts surgery in her right eye and
28 requires surgery in her left one, there is no suggestion in the record that Plaintiff's claimed
eye pain is connected to her cataracts. (See A.R. 33-34.)

1 no dispute that doctors did not entirely remove the tumor in her brain, and that Plaintiff's
2 complaints, which are similar to those prior to surgery, have arisen continuously after
3 surgery. (A.R. 259, 277, 404.) Thus, the ALJ's rationale for separating out Plaintiff's
4 symptoms from her brain tumor and failing to fully address them in his analysis is unclear
5 and unsupported by the record.

6 Based on the foregoing, the Court finds the ALJ's determination that Plaintiff's
7 testimony was not credible because "many of [her] symptoms subsided after surgery," to
8 be unsupported by the record and insufficient to meet the second step. (See A.R. 14.)
9 Moreover, as Plaintiff's symptoms appear related to her brain tumor, which the ALJ found
10 to be a severe impairment, he may not reject Plaintiff's "subjective complaints based solely
11 on a lack of objective medical evidence to fully corroborate the alleged severity of the
12 pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991); see also *Rollins*, 261 F.3d
13 at 856-57. The ALJ must specifically make findings which support his conclusion that
14 Plaintiff's allegations of severity are not credible. *Id.*

15 As stated above, "[i]n weighing a claimant's credibility, the ALJ may consider [her]
16 reputation for truthfulness, inconsistencies either in [her] testimony or between [her]
17 testimony and [her] conduct, [her] daily activities, [her] work record, and testimony from
18 physicians and third parties concerning the nature, severity, and effect of the symptoms of
19 which [she] complains." *Light*, 119 F.3d at 792; see also *Tommasetti v. Astrue*, 533 F.3d
20 1035, 1039 (9th Cir. 2008) (an ALJ may consider a claimant's daily activities in weighing
21 the claimant's credibility). Aside from maintaining that the medical record does not
22 support the severity of the symptoms alleged, the ALJ points to Plaintiff's daily activities,
23 stating that Plaintiff "acknowledged she was able to perform activities that were within the
24 residual functional capacity stated [in the ALJ's opinion]." (A.R. 14.) Again, the Court
25 finds that the ALJ failed to provide specific, clear, and convincing reasons for rejecting
26 Plaintiff's testimony.

27 The ALJ specifically noted that Plaintiff admitted she was able to cook, garden, and
28 do laundry, as well as pick up clothes and sweep the floor, and had a driver's license. (A.R.

1 14.) However, in picking these activities, the ALJ ignores the rest of Plaintiff's testimony,
2 much of which the ALJ acknowledges in his opinion. The ALJ states:

3 The claimant testified that she was unable to work because of head pain. She
4 alleged she had difficulty moving and concentrating because her head hurt.
5 She claimed she was unable to do household chores because of dizziness and
6 fatigue. She described being able to stand for 10 to 15 minutes. The claimant
7 reported that she was unable to be home alone, that her husband stayed with
8 her. She also indicated that although she was able to grocery shop, she was
9 unable to go alone. The claimant testified that she was able to do some
10 cooking and laundry. She acknowledged that she had her driver's license.

11 (A.R. 14.)

12 Thus, although Plaintiff did testify that she does some cooking, cleaning, gardening,
13 and laundry, she also repeatedly testified that she cannot do so for very long because she
14 gets tired and dizzy and can only stand for ten or fifteen minutes at a time. (A.R. 28-29,
15 225-227.) This testimony is not inconsistent. Plaintiff also testified that she has near
16 constant eye and head pain and has difficulty moving and concentrating, which the ALJ
17 does not address. None of this testimony is consistent with someone who could perform
18 activities that are within the RFC as determined by the ALJ. *See* 20 C.F.R. §§ 404.1567
19 and 416.967 (defining light and medium work). In addition, the ALJ cites Plaintiff having
20 a driver's license as evidence that Plaintiff's allegations concerning the intensity,
21 persistence, and limiting effects of her symptoms are less than fully credible. (A.R. 14.)
22 However, Plaintiff also testified that although she has a driver's license, she has not driven
23 since her injury, and cannot stay home alone and does not leave the house by herself. (A.R.
24 29-30.) Furthermore, Dr. Wirganowicz, whose opinion the ALJ gave significant weight,
25 opined after administering a Visual Acuity Test, that Plaintiff "cannot visually go from one
26 place to another without assistance." (A.R. 15, 398.)

27 The ALJ did not make any further assessment of Plaintiff's credibility. He did not
28 address the fact that two State agency consultants found Plaintiff credible, or the fact that
even the ALJ himself questioned whether Plaintiff was fully understanding his questions
during the hearing. (*See* A.R. 37, 43-47, 403-404.) Thus, based on the foregoing, the Court

1 finds the ALJ erred by failing to provide “specific, clear and convincing reasons” for his
2 adverse credibility finding. *See Vasquez*, 572 F.3d at 591.

3 **A. Remand for Further Proceedings Is Appropriate**

4 “[T]he decision whether to remand a case for additional evidence or simply to award
5 benefits is within the discretion of the court.” *Reddick v. Chater*, 157 F.3d 715, 728 (9th
6 Cir. 1998) (citing *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989)). If the ALJ’s
7 decision “is not supported by the record, ‘the proper course . . . is to remand to the agency
8 for additional investigation or explanation.’” *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir.
9 2012) (quoting *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)). “If additional
10 proceedings can remedy defects in the original administrative proceedings, a social security
11 case should be remanded. When, however, a rehearing would simply delay receipt of
12 benefits, reversal [and an award of benefits] is appropriate.” *Lewin v. Schweiker*, 654 F.2d
13 631, 635 (9th Cir. 1981) (citations omitted).

14 Here, as indicated above, the ALJ erred by failing to provide specific, clear and
15 convincing reasons for his adverse credibility finding as to Plaintiff. Additional
16 proceedings may be able to remedy this defect. Therefore, the Court finds remand for
17 further proceedings is appropriate.

18 **V. CONCLUSION**

19 After a thorough review of the record in this matter and based on the foregoing
20 analysis, this Court **GRANTS** Plaintiff’s motion for summary judgment and **DENIES**
21 Defendant’s cross-motion for summary judgment, and **ORDERS** the case **REMANDED**
22 to the ALJ for further proceedings.

23 **IT IS SO ORDERED.**

24
25 **DATED: September 18, 2017**

26 
27 **Hon. Cynthia Bashant**
28 **United States District Judge**