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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 Minh Trieu Doan,

12 Plaintiff,

13 v.

14 Nancy Berryhill,

15 Defendant.  
16

Case No.: 16-cv-0841-BAS-AGS

**REPORT AND RECOMMENDATION  
ON SUMMARY JUDGMENT  
MOTIONS (ECF Nos. 16, 22)**

17 In a disability hearing, may a judge cut off cross-examination after just one question?  
18 Perhaps. But not under these circumstances. In this case, the Administrative Law Judge  
19 halted the cross-examination of the key adverse expert after one response—right as he was  
20 about to be confronted with a report that undermined his opinion. That report, which the  
21 expert had never seen, might have changed his opinion altogether. Due process demanded  
22 more.

23 **BACKGROUND**

24 **A. The Missing Lessner Report**

25 This is the case of the incredible vanishing report. On August 21, 2010, Milton  
26 Lessner, Ph.D., wrote a report about five objective psychological tests he conducted on  
27 plaintiff Minh Trieu Doan. Based on these tests, Dr. Lessner concluded that Doan suffered  
28 from major depression with psychotic features, dementia due to head trauma, and post-

1 traumatic stress disorder, all of which made him “appear[] to be unemployable.” (ECF  
2 No. 16-2, at 5, 10.) Based in part on this report, Doan requested a hearing on his Social  
3 Security disability-benefits application.

4 After a 2011 hearing, the Administrative Law Judge ordered further medical  
5 development because the only medical evidence in the record was “a psychological report  
6 dated August 21, 2010 from Dr. Lessner (Exhibit 15).” (AR 90.) By the next hearing in  
7 2013, however, that report went missing and the same ALJ—apparently forgetting he  
8 previously reviewed it—concluded that the report might not exist. (AR 22.)

9 We may never learn how the Lessner report pulled this disappearing act, but Doan’s  
10 attorney suggested in oral argument to this Court that it was lost in the transition to a new  
11 system. It seems that between the 2011 and 2013 hearings, the agency converted Doan’s  
12 case from paper to an electronic file. Doan’s attorney received two discs containing the  
13 digital record—one on the morning of the 2013 hearing and one months beforehand—and  
14 she swears both included the Lessner report. But that report was absent from the ALJ’s  
15 copy of the digital record.

## 16 **B. The Short-Lived Cross-Examination of Dr. McDevitt**

17 This discrepancy was laid bare during the cross-examination of independent medical  
18 expert Robert McDevitt, M.D., who appeared by telephone. (AR 31.) The second question  
19 by Doan’s attorney concerned the Lessner report, but the ALJ cut her off, saying that report  
20 was not in their electronic files. (AR 60-62.) Counsel then tried to present a paper copy,  
21 but the ALJ refused and instead said that “we’ll continue the hearing.”<sup>1</sup> (AR 64.)  
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25 <sup>1</sup> The ALJ was understandably perturbed. He began the proceedings by reciting the  
26 exhibits to be admitted. Although that list omitted the Lessner report, Doan’s attorney did  
27 not object. (AR 22, 32.) Ultimately, Doan’s attorney moved to introduce three exhibits that  
28 she realized were not on the ALJ’s evidence disc. (AR 39, 60-64.) At oral argument before  
this Court, Doan’s attorney recalled that she tried to physically hand the last of these—the  
Lessner report—to the ALJ, but the judge declined.

1 But that continued hearing never occurred. Instead, a few weeks later the ALJ simply  
2 ruled that Doan suffered from depression that was not disabling. (AR 16, 24.) He gave no  
3 weight to the five medical experts who supported Doan’s disability claim. He disregarded  
4 “Dr. Lessner’s alleged medical report,” because it was not in evidence and because he—  
5 incorrectly—presumed that it contained only “subjective complaints . . . without objective  
6 testing.” (AR 22.) And he rejected the opinions of Doan’s other four medical experts on  
7 the ground that there were “no objective psychological tests” to “support [their] conclusory  
8 statements,” although Doan’s treating psychiatrist in fact relied on Dr. Lessner’s testing.  
9 (AR 22.) Instead, the ALJ gave great weight to the opinion of Dr. McDevitt, who never  
10 saw the Lessner report. According to Dr. McDevitt, “without supporting medical records,”  
11 he “could not determine if the claimant was impaired at all.” (AR 23.) The ALJ found this  
12 conclusion compelling, in part, because Dr. McDevitt was able to review “the claimant’s  
13 entire medical record” and “was subject to cross examination by the claimant’s counsel.”  
14 (*Id.*)

## 15 DISCUSSION

16 “[U]nder the Fifth Amendment, procedural due process requires disability claimants  
17 to be afforded a full and fair hearing.” *Martise v. Astrue*, 641 F.3d 909, 921-22 (8th Cir.  
18 2011) (citation omitted). Doan’s primary argument is that he was denied this right in  
19 several ways: (1) he had almost no opportunity to cross-examine the main adverse witness;  
20 (2) the ALJ never considered the keystone to his case, the Lessner report; and (3) he had  
21 no opportunity to cross-examine a vocational expert. In addition, he contends that several  
22 of the ALJ’s findings were not supported by substantial evidence, including: (4) rejecting  
23 the opinions of his five medical experts, including at least two treating doctors; and  
24 (5) rejecting his own testimony as well as his mother’s.

### 25 A. Restricted Cross-Examination

26 “A claimant in a disability hearing is not entitled to unlimited cross-examination, but  
27 is entitled to such cross-examination as may be required for a full and true disclosure of  
28 the facts.” *Copeland v. Brown*, 861 F.2d 536, 539 (9th Cir. 1988) (citations omitted); *see*

1 5 U.S.C. § 556(d) (same). An ALJ’s decision about whether and to what extent  
2 “cross-examination is warranted” is reviewed for abuse of discretion. *See Copeland*, 861  
3 F.2d at 539. In *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983), the Ninth Circuit held that  
4 it was an abuse of discretion to deny a claimant the opportunity to cross-examine a medical  
5 expert—even with written interrogatories as a substitute—“where the physician is a crucial  
6 witness whose findings substantially contradict the other medical testimony[.]” *Id.* at 301.

7 Like *Solis*, this case involves a crucial witness whose adverse testimony contradicted  
8 other medical evidence. That witness was Dr. McDevitt—the sole doctor among six  
9 medical experts who thought that Doan might be able to work. The only relevant difference  
10 between *Solis* and this case is the nature of the court-imposed questioning constraints. In  
11 *Solis*, the claimant submitted written questions, but was not allowed to cross-examine,  
12 whereas Doan was permitted no interrogatories and only the most cursory cross-  
13 examination: one question and answer.

14 Doan’s plight is worse. It is not merely a matter of quantity, but of quality. The  
15 disrupted cross-examination of Dr. McDevitt—set forth in its entirety below—amounts to  
16 one prefatory question and an incomprehensible (and sometimes inaudible) answer:

17 Q[:] Doctor, the date that he applied for disability is July 2010. So you  
18 can opine from that period forward?

19 A[:] I don’t t[hi]nk any—without—there’s available 1998 through that  
20 period—[psychiatrist Dr. Harry] Henderson about in—Henderson was only  
21 relying on—just told him and had records—really that doesn’t document very  
22 clearly what he has done to help this man. If he is actually impaired every two  
23 months is not very helpful and they have that he goes out with friends and  
claims [INAUDIBLE] so it contradicts the fact that he’s fairly adept.

24 Q[:] Well, I am referring you to the evaluation of the Lesner Office  
25 [phonetic]—

26 ALJ: He doesn’t have that, Ms. Manbeck. . . .

27 (AR 60.) Doan’s attorney never got to question Dr. McDevitt about the all-important  
28 Lessner report. After confirming that no one else had a copy of that report, the judge

1 stopped the examination, saying, “[W]e’ll continue the hearing.” (AR 62, 64.) But he never  
2 did.

3 If Doan were given an adequate opportunity for cross-examination, he could have  
4 confronted Dr. McDevitt with the Lessner report—which might have changed his opinion.  
5 Or at least he could have posed hypothetical questions, such as: “Doctor, you testified that  
6 Mr. Doan is not disabled because no medical tests support any impairment. If you learned  
7 that Mr. Doan took the Minnesota Multiphasic Personality Inventory-2 and had an  
8 ‘unusually high F scale score in the Validity profile,’ suggesting serious psychopathology,  
9 would that have any effect on your opinion?” (See ECF No. 16-2, at 6.) At a minimum,  
10 though, Doan was entitled to elicit more than a solitary answer from this key witness.  
11 Furthermore, as in *Solis*, the cross-examination’s insufficiency “was compounded . . . by  
12 [the witness’s] cursory and unilluminating response[.]” 719 F.2d at 302. Restricting Doan  
13 to such a meager inquiry was reversible error.

#### 14 **B. Missing Evidence and Remaining Claims**

15 The Court need not address Doan’s remaining arguments. But since it sheds some  
16 light on the dispositive cross-examination issue, the Court will briefly address the  
17 missing-evidence question. First, the Commissioner correctly points out that the claimant  
18 has the burden of furnishing medical evidence of a disability. See 42 U.S.C. § 423(d)(5)(A);  
19 20 C.F.R. § 416.912. Doan could have done more to satisfy that burden. For instance, he  
20 could have raised the missing Lessner report at the beginning of the hearing when the ALJ  
21 failed to mention it while reviewing the exhibit list.<sup>2</sup> (AR 32.)

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24 <sup>2</sup> Doan may have had good reasons for failing to submit the Lessner report  
25 immediately after the hearing—because he thought it was already in the record and the  
26 ALJ was “figur[ing] out what to do” to get it, or because he was waiting for the continued  
27 hearing to be scheduled, or because the ALJ had already rejected his attempt to offer a  
28 paper copy. (AR 64.) After the ALJ stated in his decision that the Lessner report was “not  
in evidence,” however, Doan was remiss in not making it part of the record before the  
Appeals Council. (AR 22; see AR 1-8.) But by that time, Doan had long lost his opportunity  
for a meaningful cross-examination of Dr. McDevitt.

1 But the ALJ has a shared burden to develop the record. *Webb v. Barnhart*, 433 F.3d  
2 683, 687 (9th Cir. 2005) (“In Social Security cases the ALJ has a special duty to fully and  
3 fairly develop the record and to assure the claimant’s interests are considered.” (citation  
4 omitted)). The Lessner report was simply too important for the ALJ to proceed without it.  
5 The ALJ reviewed it in 2011; the treating psychiatrist referred to it in his opinion; and  
6 Doan’s attorney showed the ALJ a paper copy of it, with a court stamp and exhibit number.  
7 (AR 22, 64, 90.) Thus, the ALJ should have accepted the proffered paper copy at the  
8 hearing, or at least sought it out afterwards. The agency’s two attempts a year earlier to  
9 obtain Dr. Lessner’s records—including one in which the doctor curiously signed the  
10 response form, attached no records, yet did *not* check the blank for “WE DO NOT HAVE  
11 THE INFORMATION REQUESTED”—were simply insufficient, given that the report  
12 was in the 2011 record and Doan’s counsel had a paper copy of it. (AR 64, 90, 280-81.)

### 13 CONCLUSION

14 Because Doan was denied due process, the Court recommends that Doan’s summary  
15 judgment motion (ECF No. 16) be **GRANTED**, defendant’s cross-motion for summary  
16 judgment (ECF No. 22) be **DENIED**, and the case be remanded for further proceedings  
17 consistent with this opinion. The parties must file any objections to this report by  
18 August 18, 2017. *See* Fed. R. Civ. P. 72(b)(2). A party may respond to any such objection  
19 within 14 days of being served with it. *See id.*

20 Dated: August 4, 2017

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23 Hon. Andrew G. Schopler  
24 United States Magistrate Judge  
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