

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD A. GARDNER,
Plaintiff,

6:12-CV-00038-BR

OPINION AND ORDER

v.

CAROLYN W. COLVIN, Acting
Commissioner, Social Security
Administration,¹

Defendant.

KATHRYN TASSINARI
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Attorneys for Plaintiff

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin should be substituted for Michael J. Astrue as Defendant in this case. No further action need be taken to continue this case by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405.

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BROWN, Judge.

This matter comes before the Court on the Commissioner's Motion (#16) to Alter Judgment Pursuant to Fed. R. Civ. P 59(e). For the reasons that follow, the Court **DENIES** the Commissioner's Motion.

The Commissioner seeks an order setting aside the Court's Judgment of Remand (#15) entered June 7, 2013. Although the Commissioner concedes the "ALJ did not give proper reasons for rejecting Plaintiff's VA disability rating," the Commissioner contends the ALJ's failure was harmless error. The Commissioner relies on *Molina v. Astrue* to support her argument. 674 F.3d 1104 (9th Cir. 2012).

In *Molina* the court found the ALJ's failure to address lay-witness testimony was harmless error because the lay-witness

testimony did "not describe any limitations not already described by the claimant," who the court had found to be not credible. *Id.* at 1114-22. Here, however, the VA rating decision was made by another federal disability program that considered criteria beyond Plaintiff's complaints. Accordingly, *Molina* is not analogous.

The Court concluded in its Opinion and Order issued June 7, 2013, that the ALJ failed to provide legally sufficient reasons supported by the record for rejecting Plaintiff's VA disability rating. The Court concludes the ALJ's error was not harmless and that the effect of the VA's disability rating must be properly evaluated on remand as directed by the Court in its June 7, 2013, Opinion and Order.

Accordingly, the Court concludes there is not any "clear error" in its Opinion and Order (#14) issued June 7, 2013, or its Judgment entered June 7, 2013, and, therefore, the Court **DENIES** the Commissioner's Motion to Alter Judgment.

CONCLUSION

For these reasons, the Court **DENIES** the Commissioner's

Motion (#16) to Alter Judgment Pursuant to Fed. R. Civ. P 59(e).

IT IS SO ORDERED.

DATED this 30th day of July, 2013.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge