

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

REBECCA J. SHERMAN,

Plaintiff,

vs.

NANCY A. BERRYHILL,
Acting Commissioner of Social
Security,

Defendant.

} No. 1:15-CV-03112-FVS
}
}
}
}
}
}
}
}
}
}

**ORDER GRANTING
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT,
INTER ALIA**

BEFORE THE COURT are Rebecca J. Sherman’s Motion For Substitution Of Party (ECF No. 22), Plaintiff’s Motion For Summary Judgment (ECF No. 12) and the Defendant's Motion For Summary Judgment (ECF No. 17).

SUBSTITUTION

Rebecca J. Sherman, the adult daughter of the claimant, David Barry Sherman, seeks to be substituted as Plaintiff. In her declaration (ECF No. 23), she advises that Mr. Sherman died on July 5, 2015. The court considers this declaration to constitute the “service of a statement noting the death” as required by Fed. R. Civ. P. 25(a)(1). In its Order To Show Cause (ECF No. 19), this court indicated it had reason to believe Mr. Sherman was deceased, but Ms. Sherman’s declaration confirms this is so. Ms. Sherman’s Motion For Substitution Of Party (ECF No. 22) is filed contemporaneously with “the statement noting the death” and therefore, within 90 days after the service of a statement noting the death, as required by Fed. R. Civ. P. 25(a)(1). As a surviving

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 1**

1 family member of the claimant, Ms. Sherman and her brother, Adam Sherman, the
2 adult son of the claimant, are eligible, pursuant to 20 C.F.R. §404.503(b)(5), to inherit
3 equal shares of any Title II benefits that might be awarded.¹

4 Ms. Sherman's Motion For Substitution Of Party (ECF No. 22) is **GRANTED**
5 and she is substituted for David Barry Sherman as the Plaintiff in the captioned matter.
6
7

8 **JURISDICTION**

9 David Barry Sherman protectively applied for Title II Disability Insurance
10 benefits (DIB) on January 5, 2012. The application was denied initially and on
11 reconsideration. Plaintiff timely requested a hearing which was held on July 23, 2013,
12 before Administrative Law Judge (ALJ) Stephanie Martz. Plaintiff testified at the
13 hearing, as did Vocational Expert (VE) Scott Whitmer. On October 30, 2013, the ALJ
14 issued a decision finding the Plaintiff not disabled. The Appeals Council denied a
15 request for review of the ALJ's decision, making that decision the Commissioner's
16 final decision subject to judicial review. The Commissioner's final decision is
17 appealable to district court pursuant to 42 U.S.C. §405(g).
18

19 **STATEMENT OF FACTS**

20 The facts have been presented in the administrative transcript, the ALJ's
21 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At
22

23 ¹ They do not qualify under 20 C.F.R. §404.503(b)(2) because they are not
24 under 18, there is no indication they became disabled prior to age 22, and no
25 indication they qualify as full-time students under 20 C.F.R. §404.367. See 20
26 C.F.R. §404.350(a).
27
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 2**

1 the time of the administrative hearing, claimant was 58 years old. He had past
2 relevant work experience as an attorney. Claimant alleged disability since July 1,
3 2005, on which date he was 50 years old. His date last insured for Title II benefits
4 was December 31, 2007.

5 6 **STANDARD OF REVIEW**

7 "The [Commissioner's] determination that a claimant is not disabled will be
8 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
9 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
10 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
11 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
12 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
13 1988). "It means such relevant evidence as a reasonable mind might accept as
14 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct.
15 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
16 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
17 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
18 On review, the court considers the record as a whole, not just the evidence supporting
19 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
20 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

21 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
22 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
23 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
24 F.2d 577, 579 (9th Cir. 1984).

25 A decision supported by substantial evidence will still be set aside if the proper
26 legal standards were not applied in weighing the evidence and making the decision.
27 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.

28
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 3**

1 1987).

3 ISSUES

4 Plaintiff argues the ALJ erred in: 1) failing to determine whether claimant was
5 disabled following his date last insured and failing to determine an onset date for
6 claimant's mental health impairments; and 2) not providing specific, clear and
7 convincing reasons to discount claimant's credibility.

9 DISCUSSION

10 SEQUENTIAL EVALUATION PROCESS

11 The Social Security Act defines "disability" as the "inability to engage in any
12 substantial gainful activity by reason of any medically determinable physical or
13 mental impairment which can be expected to result in death or which has lasted or can
14 be expected to last for a continuous period of not less than twelve months." 42 U.S.C.
15 § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be
16 under a disability only if her impairments are of such severity that the claimant is not
17 only unable to do her previous work but cannot, considering her age, education and
18 work experiences, engage in any other substantial gainful work which exists in the
19 national economy. *Id.*

20 The Commissioner has established a five-step sequential evaluation process for
21 determining whether a person is disabled. 20 C.F.R. § 404.1520; *Bowen v. Yuckert*,
22 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged
23 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §
24 404.1520(a)(4)(i). If she is not, the decision-maker proceeds to step two, which
25 determines whether the claimant has a medically severe impairment or combination
26 of impairments. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant does not have a
27 severe impairment or combination of impairments, the disability claim is denied. If

28 **ORDER GRANTING PLAINTIFF'S**

MOTION FOR SUMMARY JUDGMENT- 4

1 the impairment is severe, the evaluation proceeds to the third step, which compares
2 the claimant's impairment with a number of listed impairments acknowledged by the
3 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.
4 § 404.1520(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
5 equals one of the listed impairments, the claimant is conclusively presumed to be
6 disabled. If the impairment is not one conclusively presumed to be disabling, the
7 evaluation proceeds to the fourth step which determines whether the impairment
8 prevents the claimant from performing work she has performed in the past. If the
9 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §
10 404.1520(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step
11 in the process determines whether she is able to perform other work in the national
12 economy in view of her age, education and work experience. 20 C.F.R. §
13 404.1520(a)(4)(v).

14 The initial burden of proof rests upon the claimant to establish a prima facie
15 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
16 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
17 mental impairment prevents her from engaging in her previous occupation. The
18 burden then shifts to the Commissioner to show (1) that the claimant can perform
19 other substantial gainful activity and (2) that a "significant number of jobs exist in the
20 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
21 (9th Cir. 1984).

22 23 **ALJ'S FINDINGS**

24 The ALJ found that through the date last insured (December 31, 2007), claimant
25 had the following medically determinable impairments, none of which were "severe:"
26 hypertension; hyperlipidemia; benign prostatic hypertrophy; chronic osteoarthritis;
27 chronic diarrhea; and history of mitral valve prolapse. Accordingly, the ALJ

28
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 5**

1 concluded the claimant was not disabled for a period of 12 months at anytime between
2 July 1, 2005 and December 31, 2007.

3
4 **MENTAL HEALTH IMPAIRMENT/DEVELOPMENT OF RECORD**

5 Plaintiff asserts that pursuant to Social Security Ruling (SSR) 83-20, the ALJ
6 was obliged to determine whether the claimant was disabled following his date last
7 insured (December 31, 2007) and that instead of doing so, she disregarded the medical
8 evidence after that date and failed to determine an onset date for the claimant's mental
9 health impairments.

10 After discussing the medical record applying to the period prior to December
11 31, 2007, the ALJ said this about the post-December 31, 2007 record:

12 The remaining materials in the record fall beyond the period
13 at issue, and details (sic) complaints for various mental health
14 diagnoses including bipolar disorder, rule out diagnosis of
15 attention deficit disorder; and reported history of depression.
16 [Citations omitted]. Notably, the first mention of these
17 impairments is in 2010, three years beyond the date last
18 insured. [Citations omitted]. There is no evidence that
19 these diagnoses relate to the period at issue, and the claimant
20 had no regular mental health treatment prior to July of 2010.
21 [Citations omitted]. At no time did anyone who treated the
22 claimant relate these diagnoses back to the time at issue,
23 and treatment notes do not indicate that the claimant had
24 prior mental health problems. The claimant saw doctors,
25 albeit infrequently, but did not mention any mental health
26 symptoms or complaints. His providers noted no symptoms
27 consistent with his complaints in 2010. Therefore, I find
28 that the claimant did not have a medically determinable
impairment prior to his date last insured in December 2007.

.....

As for the opinion evidence, the record contains notes and
opinions regarding the claimant's functioning outside the
applicable time period. [Citations omitted]. I afford these
opinions little weight because they do not discuss the
claimant's level of functioning during the period at issue.

(AR at p. 24).

SSR 83-20 sets forth guidelines for determining the onset date of disability. It

1 directs that a judgment regarding the onset date of disability “must have a legitimate
2 medical basis” and that the ALJ “should call on the services of a medical advisor
3 when onset must be inferred.” *Sam v. Astrue*, 550 F.3d 808, 810 (9th Cir. 2008), citing
4 SSR 83-20. “In the event that the medical evidence is not definite concerning the
5 onset date and medical inferences need to be made, SSR 83-20 requires the [ALJ] to
6 call upon the services of a medical advisor and to obtain all evidence which is
7 available to make the determination.” *Id.*, quoting *DeLorme v. Sullivan*, 924 F.2d 841,
8 848 (9th Cir. 1991). In *Sam*, the Ninth Circuit rejected the plaintiff’s contention that
9 SSR 83-20 applied to his case. It noted that SSR-83-20 defines the disability onset
10 date as “the first day an individual is disabled as defined in the Act and the
11 regulations.” SSR 83-20. 550 F.3d at 810. Because the ALJ found Sam was not
12 disabled “‘at any time through the date of [the] decision’ the question of *when* he
13 became disabled did not arise and the procedures prescribed in SSR 83-20 did not
14 apply.” *Id.* (emphasis in original).

15 In the case at bar, the court agrees that, at this juncture, SSR 83-20 does not
16 apply because that rule addresses the situation in which the ALJ makes a finding that
17 a person is disabled and the question arises when the disability arose. Obviously here,
18 the ALJ did not make a finding that claimant was disabled. She found the claimant
19 not disabled because he did not suffer from a “severe” medically determinable
20 impairment (physical or mental) during the period between July 1, 2005 and
21 December 31, 2007.² As indicated above, the fact that a medically determinable
22 impairment is “severe” does not equate to disability as “severity” means only that the
23 claimant has satisfied his burden at Step Two of the sequential evaluation process. It
24 would still have to be established that the claimant’s “severe” medically determinable

25
26 ² She found the claimant had medically determinable physical impairments
27 during that period, but that they were not “severe.”

1 impairments precluded him from substantial gainful activity during a continuous 12
2 months period between July 1, 2005 and December 31, 2017.

3 A “severe” impairment is one which significantly limits physical or mental
4 ability to do basic work-related activities. 20 C.F.R. § 404.1520(c). It must result
5 from anatomical, physiological, or psychological abnormalities which can be shown
6 by medically acceptable clinical and laboratory diagnostic techniques. It must be
7 established by medical evidence consisting of signs, symptoms, and laboratory
8 findings, not just the claimant's statement of symptoms. 20 C.F.R. § 404.1508.

9 Step two is a *de minimis* inquiry designed to weed out nonmeritorious claims
10 at an early stage in the sequential evaluation process. *Smolen v. Chater*, 80 F.3d 1273,
11 1290 (9th Cir. 1996), citing *Bowen*, 482 U.S. at 153-54 (“[S]tep two inquiry is a *de*
12 *minimis* screening device to dispose of groundless claims”). “[O]nly those claimants
13 with slight abnormalities that do not significantly limit any basic work activity can be
14 denied benefits” at step two. *Bowen*, 482 U.S. at 158 (concurring opinion). “Basic
15 work activities” are the abilities and aptitudes to do most jobs, including: 1) physical
16 functions such as walking, standing, sitting, lifting, pushing, pulling, reaching,
17 carrying, or handling; 2) capacities for seeing, hearing, and speaking; 3)
18 understanding, carrying out, and remembering simple instructions; 4) use of judgment;
19 5) responding appropriately to supervision, co-workers and usual work situations; and
20 6) dealing with changes in a routine work setting. 20 C.F.R.
21 § 404.1521(b).

22 The Commissioner has stated that “[i]f an adjudicator is unable to determine
23 clearly the effect of an impairment or combination of impairments on the individual’s
24 ability to do basic work activities, the sequential evaluation should not end with the
25 not severe evaluation step.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005),
26 citing SSR 85-28 (1985). An ALJ may find that a claimant lacks a medically severe
27 impairment or combination of impairments only when her conclusion is “clearly
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 8**

1 established by medical evidence.” *Id.* In *Webb*, the Ninth Circuit found that although
2 the medical record painted an incomplete picture of the plaintiff’s overall health
3 during the relevant period, it included evidence of problems sufficient to pass the *de*
4 *minimis* threshold of step two. *Id.* Furthermore, although the plaintiff ultimately bore
5 the burden of establishing his disability, the ALJ had an affirmative duty to
6 supplement the plaintiff’s medical record, to the extent it was incomplete, before
7 rejecting the plaintiff’s application at such an early stage in the analysis. *Id.* The
8 circuit noted:

9 “In Social Security cases, the ALJ has a special duty to fully
10 and fairly develop the record and to assure that the claimant’s
11 interests are considered.” *Brown v. Heckler*, 713 F.3d 441,
12 443 (9th Cir. 1983) (*per curiam*). The ALJ’s duty to supplement
13 a claimant’s record is triggered by ambiguous evidence, the
14 ALJ’s own finding that the record is inadequate or the ALJ’s
15 reliance on an expert’s conclusion that the evidence is
16 inadequate. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150
17 (9th Cir. 2001).

14 *Id.*³

15 Here, the ALJ’s conclusion that the claimant did not have a medically
16 determinable mental health impairment between July 1, 2005 and December 31, 2007,

17 ³ The ALJ has a basic duty to inform himself about facts relevant to his
18 decision. *Heckler v. Campbell*, 461 U.S. 458, 471 n. 1, 103 S.Ct. 1952 (1983).

19 The ALJ’s duty to develop the record exists even when the claimant is represented
20 by counsel. *Tonapetyan*, 242 F.3d at 1150. The duty is triggered by ambiguous or
21 inadequate evidence in the record and a specific finding of ambiguity or
22 inadequacy by the ALJ is not necessary. *McLeod v. Astrue*, 640 F.3d 881, 885 (9th
23 Cir. 2011).

24
25
26
27
28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 9**

1 is not “clearly established by medical evidence,” specifically the medical evidence
2 after December 31, 2007. The record is not unequivocal that Plaintiff’s post-
3 December 31, 2007 mental health diagnoses do not relate to the period between July
4 1, 2005 and December 31, 2007, nor is the record unequivocal that no medical
5 provider related these diagnoses “back to the time at issue” and did not indicate the
6 claimant had prior mental health problems.⁴

7 Claimant first met with psychiatrist Philip Rodenberger, M.D., in July 2010.
8 Dr. Rodenberger diagnosed the claimant with bipolar disorder, “currently manic,” but
9 qualified his diagnosis as follows: “I do believe that this gentleman is bipolar,
10 although due to his past use of amphetamines, it is difficult to be absolutely certain
11 that this is not related to drug abuse and dependency.” (AR at p. 416). Dr.
12 Rodenberger’s second visit with the claimant occurred in October 2011. At that time,
13 Dr. Rodenberger wrote: “It is **significant** that although this gentleman has a law
14 degree, he has not been able to practice for at least three years and on a sustained basis
15 for many years.” (AR at p. 415) (emphasis added). Dr. Rodenberger continued to
16 consider the claimant “as being a bipolar disordered individual,” although reiterating
17 that it was “difficult to know to what extent his past use of illicit substances has
18 affected his brain function.” (AR at p. 415). Following his third meeting with the
19 claimant in November 2011, Dr. Rodenberger referred to a “possible diagnosis of
20 bipolar disorder mixed type or attention deficit disorder.” (AR at p. 413). In
21 December 2011, Dr. Rodenberger had the claimant transported to Acute Care Services

22
23 ⁴ There is no indication that State Agency Medical Consultants Edward
24 Beaty, Ph.D., and Thomas Clifford, Ph.D., reviewed and considered the record
25 after December 31, 2007. (AR at pp. 68-69 and 75-76).
26
27

1 at Central Washington Comprehensive Mental Health (CWCMH) for an assessment.
2 (AR at p. 412). This assessment resulted in the claimant being psychiatrically
3 hospitalized (involuntarily committed) on December 14, 2011, because of “grave
4 disability.” (AR at p. 481). He was discharged to a “Less Restrictive Alternative”
5 (LRA) under the supervision of CWCMH on January 4, 2012, with a diagnosis of
6 “Bipolar I Disorder, most recent episode manic severe” and a Global Assessment
7 Functioning (GAF) score of 25.⁵ (AR at p. 482). Claimant returned to see Dr.
8 Rodenberger in March 2013. The doctor continued to diagnose him with bipolar
9 disorder, but currently “hypomanic” and assigned him a current GAF of 55.⁶

10 Dr. Rodenberger was not asked to opine, and never explicitly opined, whether

11
12 ⁵ A GAF score of 25 indicates “[b]ehavior is considerably influenced by
13 delusions or hallucinations or serious impairment in communication or judgment
14 (e.g. sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) or
15 inability to function in almost all areas (e.g., stay in bed all day; no job, home or
16 friends).” *American Psychiatric Ass’n, Diagnostic & Statistical Manual of Mental*
17 *Disorders*, (4th ed. Text Revision 2000)(DSM-IV-TR at p. 34).
18

19
20 ⁶ A GAF score of 55 indicates “moderate symptoms (e.g. flat affect and
21 circumstantial speech, occasional panic attacks) or moderate difficulty in social,
22 occupational, or school functioning (e.g., few friends, conflicts with peers or co-
23 workers).” *American Psychiatric Ass’n, Diagnostic & Statistical Manual of*
24 *Mental Disorders*, (4th ed. Text Revision 2000)(DSM-IV-TR at p. 34).
25
26
27

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 11**

1 the claimant suffered from bipolar disorder or some other medically determinable
2 mental health impairment prior to December 31, 2007. There is nothing in his reports
3 suggesting he ruled out that possibility and indeed, at least one of his reports from
4 October 2011 suggests the contrary: “It is **significant** that although this gentleman
5 has a law degree, he has not been able to practice for at least three years and on a
6 sustained basis for many years.” Claimant’s job history (AR at p. 169) and earnings
7 record (AR at p. 159) corroborate that he had not practiced law since June 2005. His
8 earnings record shows 2003 as the last year in which any earnings were reported for
9 him. (AR at p. 159). Claimant testified that the last time he practiced law was in the
10 middle of 2005, and that he had one brief writing project in the eight years following.
11 (AR at pp. 40-41).⁷ Accordingly, the current record does not permit the unequivocal
12 conclusion that claimant did not have a medically determinable mental health
13 impairment prior to December 31, 2007, notwithstanding the fact the record appears
14 not to contain a mental health diagnosis from an “acceptable medical source” between
15 July 1, 2005 and December 31, 2007.⁸

17
18 ⁷ While the claimant reported in July 2006 that he had “opened a new
19 independent office” (AR at p. 223), and in June 2008 that he was “pursuing his
20 career,” (AR at p. 578), the record simply does not establish that the claimant
21
22 resumed the practice of law after June 2005.

23 ⁸Nurse practitioners, physicians’ assistants, and therapists (physical and
24 mental health) are not “acceptable medical sources” for the purpose of establishing
25 if a claimant has a medically determinable impairment. 20 C.F.R. §404.1513(a).
26
27

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 12**

1 Here, there is ambiguous evidence whether claimant suffered from a “severe”
2 medically determinable mental health impairment between July 1, 2005 and December
3 31, 2007, and the evidence of record is currently inadequate to permit a determination
4 whether he did suffer from such an impairment during that period. Accordingly, this
5 case will be remanded for further development of the record for the ALJ to determine
6 whether, considering the record after December 31, 2007, the claimant had a “severe”
7 medically determinable mental health impairment during the period between July 1,
8 2005 and December 31, 2007, and if so, whether it precluded him from performing
9 substantial gainful activity for a 12 months period.

10
11 **REMAND**

12 Social security cases are subject to the ordinary remand rule which is that when
13 “the record before the agency does not support the agency action, . . . the agency has
14 not considered all the relevant factors, or . . . the reviewing court simply cannot
15 evaluate the challenged agency action on the basis of the record before it, the proper
16 course, except in rare circumstances, is to remand to the agency for additional
17 investigation or explanation.” *Treichler v. Commissioner of Social Security*
18 *Administration*, 775 F.3d 1090, 1099 (9th Cir. 2014), quoting *Fla. Power & Light Co.*
19 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

20 In “rare circumstances,” the court may reverse and remand for an immediate
21 award of benefits instead of for additional proceedings. *Treichler*, 775 F.3d at 1099,
22 citing 42 U.S.C. §405(g). Three elements must be satisfied in order to justify such a

23
24
25 _____
26 Their opinions are, however, relevant to show the severity of an impairment and
27 how it affects a claimant’s ability to work. 20 C.F.R. §404.1513(d).

28
ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 13

1 remand. The first element is whether the “ALJ has failed to provide legally sufficient
2 reasons for rejecting evidence, whether claimant testimony or medical opinion.” *Id.*
3 at 1100, quoting *Garrison*, 759 F.3d at 1020. If the ALJ has so erred, the second
4 element is whether there are “outstanding issues that must be resolved before a
5 determination of disability can be made,” and whether further administrative
6 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
7 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
8 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
9 Finally, if it is concluded that no outstanding issues remain and further proceedings
10 would not be useful, the court may find the relevant testimony credible as a matter of
11 law and then determine whether the record, taken as a whole, leaves “not the slightest
12 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
13 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
14 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
15 no outstanding issues that must be resolved, and there is no question the claimant is
16 disabled- the court has discretion to depart from the ordinary remand rule and remand
17 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
18 exist, “[t]he decision whether to remand a case for additional evidence or simply to
19 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v. Sullivan*,
20 876 F.2d 683, 689 (9th Cir. 1989).

21 In the case at bar, outstanding issues remain to be resolved and further
22 proceedings would be useful. The court will direct on remand that the ALJ call on
23 the services of a medical advisor (an acceptable medical source) to assist in the
24 determination of whether the claimant suffered from a medically determinable mental
25 heath impairment between July 1, 2005 and December 31, 2007. Should the ALJ
26 conclude the claimant suffered from a medically determinable mental health
27
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 14**

1 impairment, but that there is a question about its severity, she should further develop
2 the record as necessary to assist in answering that question. That question, of course,
3 need not be limited to consideration of evidence from an acceptable medical source,
4 but can include consideration of evidence from other medical sources, as well as lay
5 evidence.

6 There is evidence in the record of alcohol and/or substance abuse by the
7 claimant both during and after the period of July 1, 2005 to December 31, 2007.
8 When there is medical evidence of drug or alcohol addiction, the ALJ must determine
9 whether the addiction is a material factor contributing to the disability. 20 C.F.R.
10 §404.1535(a). In order to determine whether the addiction is a material factor
11 contributing to the disability, the ALJ must evaluate which of the current mental
12 limitations would remain if the claimant stopped using drugs or alcohol, then
13 determine whether any or all of the remaining limitations would be disabling. 20
14 C.F.R. §404.1535(b)(2). If the remaining limitations would not be disabling, drug or
15 alcohol addiction is a contributing factor material to the determination of disability.
16 *Id.* If the remaining limitations would be disabling, the claimant is disabled
17 independent of the drug or alcohol addiction and the addiction is not a contributing
18 factor material to the disability. *Id.* The claimant has the burden of showing that drug
19 and alcohol addiction is not a contributing factor material to the disability. *Parra v.*
20 *Astrue*, 481 F.3d 742, 748 (9th Cir. 2007).⁹

23 ⁹ Under the process outlined in *Bustamante v. Massanari*, 262 F.3d 949, 955
24 (9th Cir. 2001), and explained in Social Security Ruling (SSR) 13-2p, 2013 WL
25 621536 (Feb. 20, 2013), in a case where there is DAA (Drug and Alcohol Abuse)
26
27

1
2 **CONCLUSION**

3 Plaintiff's Motion For Summary Judgment (ECF No. 12) is **GRANTED** and
4 Defendant's Motion For Summary Judgment (ECF No. 17) is **DENIED**. The
5 Commissioner's decision is **REVERSED** and pursuant to sentence four of 42 U.S.C.
6 §405(g), this matter is **REMANDED** to the Commissioner for additional proceedings
7
8

9 _____
10 evidence, an ALJ must consider all evidence at Step Two, including the evidence
11 of DAA, to determine the severity of the claimant's impairments. If the claimant's
12 impairments are disabling with DAA included, and substance abuse disorder is not
13 the only severe impairment, then the ALJ must proceed through the sequential
14 the only severe impairment, then the ALJ must proceed through the sequential
15 evaluation process twice, first including DAA, and then second, separating out the
16 DAA. 2013 WL 621536 at * 7. An ALJ is only compelled to engage in a DAA
17 analysis if she finds the claimant disabled. *Bustamante*, 262 F.3d at 955, citing
18 *Drapeau v. Massanari*, 255 F.3d 1211, 1214 (10th Cir. 2001). In other words, if the
19 ALJ concludes the claimant is not disabled, even with DAA taken into account,
20 then the claimant is not entitled to benefits and the ALJ need not go through the
21 sequential evaluation process a second time under 20 C.F.R. § 404.1535.
22
23
24
25
26
27
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 16**

1 and findings consistent with this order.¹⁰ An application for attorney fees may be filed
2 by separate motion.

3 **IT IS SO ORDERED.** The District Executive shall enter judgment
4 accordingly and forward copies of the judgment and this order to counsel of record.

5 **DATED** this 13th day of March, 2017.

6
7 

8 FRED L. VAN SICKLE
9 Senior United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22 ¹⁰ The court will not address the ALJ's credibility analysis at this time. In
23 the event, the ALJ determines the claimant had a "severe" medically determinable
24 mental impairment during the relevant period, she will have to revisit her
25 credibility analysis in light of that finding.
26
27

28 **ORDER GRANTING PLAINTIFF'S**
MOTION FOR SUMMARY JUDGMENT- 17