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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 28, 2019

SEAN F. McAVOY, CLERK

MOISES D.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-CV-03187-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 12, 13. Attorney Nicholas David Jordan represents Moises D. (Plaintiff); Special Assistant United States Attorney Danielle R. Mroczek represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **DENIES** Defendant's Motion for Summary Judgment; **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits under Title II of the Social Security Act on March 24, 2014, Tr. 71, alleging disability since July

1 23, 2008, Tr. 156, due to hernias in his lower back and a surgery on the left side of
2 his back. Tr. 346. The application was denied initially and upon reconsideration.
3 Tr. 95-97, 101-106. Administrative Law Judge (ALJ) Kimberly Boyce held a
4 hearing on January 7, 2016 and heard testimony from Plaintiff and vocational
5 expert Paul Prachyl. Tr. 49-70. The ALJ issued an unfavorable decision on March
6 2, 2016. Tr. 29-40. The Appeals Council denied review on September 5, 2017.
7 Tr. 1-8. The ALJ's March 2, 2016 decision became the final decision of the
8 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
9 405(g). Plaintiff filed this action for judicial review on October 26, 2017. ECF
10 Nos. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 42 years old at the alleged date of onset. Tr. 156. He reported
16 that the highest level of education he completed was the sixth grade. Tr. 347. He
17 completed training for his commercial driver's license in 2013. Id. His reported
18 work history includes the jobs of agricultural laborer and agricultural truck
19 driver/machine operator. Id. Plaintiff reported that he stopped working on July 23,
20 2008 due to his conditions. Tr. 346.

21 **STANDARD OF REVIEW**

22 The ALJ is responsible for determining credibility, resolving conflicts in
23 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
24 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
25 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
26 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
27 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
28 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as

1 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
2 another way, substantial evidence is such relevant evidence as a reasonable mind
3 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
4 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
5 interpretation, the court may not substitute its judgment for that of the ALJ.
6 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
7 findings, or if conflicting evidence supports a finding of either disability or non-
8 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
9 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
10 evidence will be set aside if the proper legal standards were not applied in
11 weighing the evidence and making the decision. *Browner v. Secretary of Health*
12 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

13 **SEQUENTIAL EVALUATION PROCESS**

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); see *Bowen*
16 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
17 proof rests upon the claimant to establish a prima facie case of entitlement to
18 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
19 claimant establishes that physical or mental impairments prevent him from
20 engaging in his previous occupations. 20 C.F.R. § 404.1520(a)(4). If the claimant
21 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
22 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
23 other work, and (2) specific jobs which the claimant can perform exist in the
24 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
25 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
26 national economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(4)(v).

27 **ADMINISTRATIVE DECISION**

28 On March 2, 2016, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act.

2 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
3 activity between the alleged onset date of July 23, 2008 and the date last insured of
4 December 31, 2013. Tr. 31.

5 At step two, the ALJ determined Plaintiff had the following severe
6 impairments through the date last insured: degenerative disc disease of the lumbar
7 spine with history of fusion and residual L5 radiculopathy on the left side with foot
8 drop and obesity. Tr. 31.

9 At step three, the ALJ found that through the date last insured Plaintiff did
10 not have an impairment or combination of impairments that met or medically
11 equaled the severity of one of the listed impairments. Tr. 32.

12 At step four, the ALJ assessed Plaintiff's residual function capacity through
13 the date last insured and determined he could perform a range of light work with
14 the following limitations:

15
16 The claimant could never climb ladders, ropes, or scaffolds, and he
17 could not work at unprotected heights, or with or in proximity to
18 hazards. He could occasionally climb ramps and stairs, and he could
19 frequently balance, but he is limited to occasional stooping, kneeling,
20 crouching, and crawling. He was able to perform work in which
concentrated exposure to vibration was not present.

21 Tr. 32. The ALJ identified Plaintiff's past relevant work as farm machine operator
22 and general farm worker and concluded that Plaintiff was not able to perform this
23 past relevant work through the date last insured. Tr. 38.

24 At step five, the ALJ determined that, considering Plaintiff's age, education,
25 work experience and residual functional capacity, and based on the testimony of
26 the vocational expert, there were other jobs that exist in significant numbers in the
27 national economy Plaintiff could perform through the date last insured, including
28 the jobs of small products assembler, housekeeper/cleaner, dye loader, and final

1 assembler. Tr. 38-39. The ALJ concluded Plaintiff was not under a disability
2 within the meaning of the Social Security Act at any time from the alleged onset
3 date of July 23, 2008 through the date last insured of December 31, 2013. Tr. 39.

4 **ISSUES**

5 The question presented is whether substantial evidence supports the ALJ's
6 decision denying benefits and, if so, whether that decision is based on proper legal
7 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
8 medical source opinions, (2) failing to properly address Plaintiff's symptom
9 statements, and (3) failing to make a proper step five determination.

10 **DISCUSSION¹**

11 **1. Medical Opinions**

12 Plaintiff argues the ALJ failed to properly consider and weigh the medical
13 opinions expressed by Larry Lefors, D.O., Anjan Sen, M.D., and Daniel Brzusek,
14 D.O. ECF No. 12 at 9-12.

15 In weighing medical source opinions, the ALJ should distinguish between
16 three different types of physicians: (1) treating physicians, who actually treat the
17 claimant; (2) examining physicians, who examine but do not treat the claimant;
18 and, (3) nonexamining physicians who neither treat nor examine the claimant.
19 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
20 weight to the opinion of a treating physician than to the opinion of an examining
21

22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
2 should give more weight to the opinion of an examining physician than to the
3 opinion of a nonexamining physician. *Id.*

4 When a treating physician’s opinion is not contradicted by another
5 physician, the ALJ may reject the opinion only for “clear and convincing” reasons.
6 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
7 physician’s opinion is contradicted by another physician, the ALJ is only required
8 to provide “specific and legitimate reasons” for rejecting the opinion. *Murray v.*
9 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
10 physician’s opinion is not contradicted by another physician, the ALJ may reject
11 the opinion only for “clear and convincing” reasons, and when an examining
12 physician’s opinion is contradicted by another physician, the ALJ is only required
13 to provide “specific and legitimate reasons” to reject the opinion. *Lester*, 81 F.3d
14 at 830-31.

15 The specific and legitimate standard can be met by the ALJ setting out a
16 detailed and thorough summary of the facts and conflicting clinical evidence,
17 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
18 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
19 conclusions, she “must set forth [her] interpretations and explain why they, rather
20 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
21 1988).

22 **A. Larry Lefors, D.O.**

23 Dr. Lefors saw Plaintiff 27 times from August 2010 through November of
24 2012. Tr. 826-903. Beginning on September 3, 2010, Dr. Lefors stated that
25 Plaintiff had the following limitations: “Limited time on feet, work on level
26 surfaces, sit stand move around if needed, limited walking.” Tr. 899. He repeated
27 these limitations at the end of his treatment report for the next 25 visits. Tr. 827,
28 831, 834, 836, 840, 842-43, 845, 848, 851, 854, 856, 859, 862, 865, 867, 869, 871,

1 874, 878, 881, 883, 886, 889, 891, 894. On September 28, 2010, Dr. Lefors added
2 an addendum to Plaintiff's file with a subject line of "Voc consult," and stated the
3 following:

4 We discussed his condition and limitations. He will not be able to do
5 things on uneven surfaces, no ladders, steps ect. [sic.] Bending lifting
6 squatting will be limited because of the foot drop and maintaining
7 balance. Work hardening reported noted increasing symptoms as the
8 program continued. He will need something that is primarily sitting.

9 Tr. 896.

10 The ALJ gave the opinions that Plaintiff's limitations included "[l]imited
11 time on feet, work on level surfaces, sit stand move around if needed, limited
12 walking," "little weight, as Dr. Lefors did not change these limitations over the
13 course of two years, despite noting improvement at the time with the claimant's
14 physical findings. (Exhibit 23F)." Tr. 35. She did not discuss the opinion
15 expressed on the September 28, 2010 addendum. Id.

16 Neither party asserts which standard the ALJ was required to meet in
17 rejecting Dr. Lefors' opinions. ECF No. 12 at 9-11, 13 at 8-9. However, which
18 standard applies is immaterial as the Court finds that the ALJ's reason for rejecting
19 Dr. Lefors' opinions does not meet the standard of specific and legitimate and is
20 not supported by substantial evidence.

21 The ALJ's conclusion that Dr. Lefors noted improvement in Plaintiff's
22 physical findings over the course of two years is not specific and legitimate and is
23 not supported by substantial evidence. First, the ALJ supported her general
24 conclusion that the physical findings improved with a citation to a 78 page exhibit.
25 Tr. 35 citing Exhibit 23F (Exhibit 23F is Tr. 826-903). This lacks the specificity
26 addressed in Embrey. 849 F.2d at 421-22 (The ALJ is required to do more than
27 offer her conclusions, she "must set forth [her] interpretations and explain why
28 they, rather than the doctors', are correct.").

1 Second, the ALJ's assertion that Dr. Lefors' records showed that the
2 physical findings improved is not supported by substantial evidence. At the
3 September 3, 2010 appointment, when Dr. Lefors first included the limitations in
4 his reports, the evaluation revealed poor QROM spine with hypertonus and
5 tenderness to palpation, decreased strength in the left leg, toe, and heel, difficulty
6 heal toe walking, deep tendon reflexes in the left ankle of ½ to 1, and left foot
7 drop. Tr. 898. The physical findings were identical on September 30, 2010 and
8 October 25, 2010. Tr. 891, 894. On November 23, 2010, the musculoskeletal
9 findings were "[u]nchanged" and the Neurological findings continued to show the
10 decreased strength on the left, difficulty heel toe walking, and reduced deep tendon
11 reflexes. Tr. 888. Dr. Lefors noted that "[i]mprovement will be difficult to
12 obtain." Id. On December 16, 2010, the physical findings are the same, and Dr.
13 Lefors stated that "[h]is objective findings and functional abilities are unchanged.
14 Improvement will be difficult to obtain." Tr. 885. On January 18, 2011, the
15 musculoskeletal findings were listed as "[e]ssentially the same" and the
16 neurological findings are listed as "[u]nchanged." Tr. 883. Dr. Lefors stated that
17 Plaintiff's "objective findings are unchanged." Id. This statement was repeated
18 again on February 15, 2011 and March 29, 2011. Tr. 877, 880. On April 26, 2011,
19 Dr. Lefors' findings included poor QROM spine with hypertonus and tenderness to
20 palpation, decreased strength in the left leg, toe, and heel, difficulty heel toe
21 walking, and ½ to 1 deep tendon reflexes on the left. Tr. 874. He stated that
22 Plaintiff's "objective findings and functional abilities are essentially the same." Id.
23 This statement was repeated on May 3, 2011 and May 31, 2011. Tr. 869, 871. On
24 June 27, 2011, Dr. Lefors stated that Plaintiff had started a work hardening
25 program, but the musculoskeletal and neurological findings stated there was no
26 change. Tr. 867. By July 28, 2011, Dr. Lefors stated that "[t]here has been no
27 substantial change in his objective findings." Tr. 865. On September 19, 2011,
28 almost one year since the functional limitations were first opined, the

1 musculoskeletal findings were “[e]ssentially the same” and the neurological
2 findings were the same. Tr. 862. Again on November 3, 2011, Dr. Lefors stated
3 “[t]here has been no substantial change in his objective findings.” Tr. 859. Dr.
4 Lefors consistently stated that there had been no change in the objective findings
5 on November 29, 2011, January 10, 2012, February 14, 2012, and March 15, 2012.
6 Tr. 848, 851, 854, 856. By April 26, 2012 Dr. Lefors again found that the
7 objective findings were unchanged, but also stated that “improvement is not
8 anticipated.” Tr. 845. This is repeated on May 22, 2012, July 23, 2012, and
9 August 14, 2012. Tr. 836, 839, 842. By September 11, 2012, nearly two years
10 from the functional limitations first being opined, Dr. Lefors stated again that the
11 functional findings remained unchanged, but also that there was an increase in
12 symptoms. Tr. 833. This was repeated on October 8, 2012 and November 6, 2012.
13 Tr. 827, 830. Essentially, Dr. Lefors saw Plaintiff once a month for over two years
14 and the physical findings remained the same while Plaintiff experienced an
15 increase in symptoms. Therefore, the ALJ’s assertion that Dr. Lefors noted
16 improvement in Plaintiff’s physical findings is not supported by the record.

17 This case is to be remanded for the ALJ to properly address the opinions of
18 Dr. Lefors, including the more detailed opinion expressed in the September 28,
19 2010 addendum.

20 **B. Anjan Sen, M.D.**

21 On March 31, 2010, Dr. Sen completed an Insurer Activity Prescription
22 Form stating that Plaintiff could sit frequently, stand/walk occasionally, climb
23 ladders/stairs, twist, bend/stoop seldom, squat/kneel, never crawl, frequently reach
24 and work above his shoulders occasionally, keyboard, wrist flexion/extension,
25 grasp, and fine manipulation constantly, operate foot controls on the left seldom,
26 exposure to high impact vibratory tasks occasionally, and exposure to low impact
27 vibratory tasks frequently. Tr. 570. He was limited to lifting and carrying twenty-
28 five pounds occasionally and ten pounds frequently. Id. Pushing and pulling was

1 limited to fifty pounds occasionally and twenty-five pounds frequently. *Id.* He
2 indicated Plaintiff may perform modified duty work once he had received the
3 appropriate brace. *Id.*

4 The ALJ gave the opinion “great weight in terms of the lifting and sitting
5 limitations.” Tr. 36. She gave “less weight to his opinion regarding
6 standing/walking limitations” for two reasons: (1) the treatment records showed
7 improvement in strength in Plaintiff’s lower extremities and (2) the residual
8 functional capacity determination should represent the most a person can do. *Id.*

9 Once again, the parties fail to allege which standard applies to the ALJ’s
10 reasons for rejecting the opinion. ECF No. 12 at 11-12, 13 at 9-10. However, the
11 Court finds the applicable standard immaterial as the ALJ’s reasons were either not
12 supported by substantial evidence or failed to meet the lesser standard of specific
13 and legitimate.

14 The ALJ’s first reason for rejecting Dr. Sen’s opinion regarding standing
15 and walking, that treatment records demonstrated an improvement in the strength
16 of the lower extremities, is not supported by substantial evidence. The ALJ
17 supported her conclusion by citing the October 21, 2010 letter from Dr. Brzusek to
18 Dr. Lefors. Tr. 36 (citing Tr. 573-74). The ALJ summarized the objective findings
19 as “the claimant had full strength, intact reflexes, negative straight-leg raising,
20 normal sensation, with left foot drop and weakness, and no evidence of an assistive
21 device.” *Id.* However a review of the cited evidence fails to show how this
22 demonstrates an improvement in the strength of Plaintiff’s lower extremities. All
23 of the normal results and negative testing listed by the ALJ were a part of the
24 lumbar examination, and not the lower extremity examination. Tr. 573-74.
25 Following an exam of the left lower extremity, Dr. Brzusek stated that Plaintiff
26 “had obvious weakness in the leg with foot drop. He has a very altered gait due to
27 weakness in the left foot with a flat foot.” Tr. 574. An electrodiagnostic study of
28 the left lower extremity showed “Chronic findings of positive waves and

1 fibrillation potentials, decreased recruitment patter in the muscles of the L5
2 enervation in the left lower extremity.” Id. He diagnosed Plaintiff with “residual
3 radiculopathy with significant weakness” of the left lower extremity. Id.
4 Furthermore, he stated that “It will be a challenge to get him back to any type of
5 competitive employing given his history, educational background, work
6 experience, etc.” Id. Therefore, the ALJ’s assertion that this letter demonstrated
7 an increase in strength in Plaintiff’s left lower extremity is not supported by the
8 record.

9 The ALJ’s second reason for rejecting Dr. Sen’s walking and standing
10 limitations, that the residual functional capacity is the most a claimant can perform,
11 is not specific and legitimate. The ALJ stated that she “adopted the high end of the
12 standing/walking range as the residual functional capacity is meant to reflect the
13 most that the claimant can do.” Tr. 36. Dr. Sen limited Plaintiff to occasional
14 standing/walking, which is defined on the form as 11% to 33% or 1 to 3 hours in a
15 work day. Tr. 570. The residual functional capacity determination by the ALJ
16 found Plaintiff capable of light work, Tr. 32, which the regulations define as
17 follows:

18 lifting no more than 20 pounds at a time with frequent lifting or carrying
19 of objects weighing up to 10 pounds. Even though the weight lifted
20 may be very little, a job is in this category when it requires a good deal
21 of walking or standing, or when it involves sitting most of the time with
22 some pushing and pulling of arm or leg controls. To be considered
23 capable of performing a full or wide range of light work, you must have
the ability to do substantially all of these activities.

24 20 C.F.R. 404.1567(b). The Agency has further stated that “the full range of light
25 work requires standing or walking, or and on, for a total of approximately 6 hours
26 of an 8-hour workday.” S.S.R. 83-10. In her decision, the ALJ failed to reconcile
27 one to three hours of walking and standing with “a good deal of walking or
28 standing,” or “approximately 6 hours of an 8-hour workday.” Therefore, this

1 reason fails to meet the specific and legitimate standard.

2 Defendant argues that this error is harmless because, accepting the
3 vocational expert's testimony, the ALJ found that with a limitation to sedentary
4 work further limited by nonexertional factors, Claimant nevertheless retained the
5 residual functional capacity to perform some jobs. ECF No. 13 at 9-10. However,
6 the ALJ's residual functional capacity determination failed to account for the
7 seldom use of foot controls on the left, the preclusion from crawling, and the
8 seldom twisting, bending, stooping, squatting, and kneeling. Tr. 32, 570.

9 Therefore, there were nonexertional limitations addressed in Dr. Sen's opinion that
10 the ALJ failed to address in the residual functional capacity determination and
11 failed to provide an explanation as to why she did not include such limitation.
12 Social Security Ruling (S.S.R.) 96-8p states that the residual functional capacity
13 assessment "must always consider and address medical source opinions. If the
14 [residual functional capacity] assessment conflicts with an opinion from a medical
15 source, the adjudicator must explain why the opinion was not adopted." Without
16 such an explanation, the ALJ erred in the treatment of the opinion regardless of the
17 alternative testimony by the vocational expert regarding an exertional limitation to
18 sedentary work.

19 Upon remand the ALJ will readdress Dr. Sen's opinion in full.

20 **C. Daniel Brzusek, D.O.**

21 As discussed above, Dr. Brzusek wrote a letter to Dr. Lefors on October 21,
22 2010 summarizing his evaluation of Plaintiff and providing recommendations. Tr.
23 571-74. In the letter, Dr. Brzusek stated "It will be a challenge to get him back to
24 any type of competitive employment given his history, educational background,
25 work experience, etc." Tr. 574. The ALJ's decision includes citations to the
26 October 21, 2010 letter, but it does not discuss Dr. Brzusek's impression that
27 Plaintiff would have difficulty returning to any competitive employment. Tr. 29-
28 40.

1 Defendant argues that the ALJ considered the evidence from Dr. Brzusek as
2 shown by the ALJ citing the letter when summarizing the medical evidence and
3 when discussing Dr. Sen’s opinion, and that since Dr. Brzusek did not set forth
4 specific functional limitations, the ALJ was not required to address the opinion.
5 ECF No. 13 at 10 (citing Tr. 34, 36). As discussed above, the ALJ misstated Dr.
6 Brzusek’s objective findings when she referenced the letter in regards to Dr. Sen’s
7 opinion. Therefore, upon remand, the ALJ will properly address the letter and
8 discuss Dr. Brzusek’s statement regarding Plaintiff’s challenges to competitive
9 employment.

10 **2. Plaintiff’s Symptom Statements**

11 Plaintiff argues that the ALJ failed to provide specific, clear and convincing
12 reasons to reject his symptom statements. ECF No. 12 at 7-9.

13 It is generally the province of the ALJ to make credibility determinations,
14 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific
15 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
16 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s
17 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d
18 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. “General findings are
19 insufficient: rather the ALJ must identify what testimony is not credible and what
20 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834.

21 The evaluation of a claimant’s symptom statements and their resulting
22 limitations relies, in part, on the assessment of the medical evidence. See 20
23 C.F.R. § 404.1529(c); S.S.R. 16-3p. Therefore, in light of the case being remanded
24 for the ALJ to address the medical source opinions in the file, a new assessment of
25 Plaintiff’s subjective symptom statements is necessary.

26 **3. Step Five**

27 Plaintiff argues that the ALJ failed to properly determine his residual
28 functional capacity; therefore, presenting an incomplete hypothetical to the

1 vocational expert and failing to meet her burden at step five. ECF No. 12 at 12-14.

2 This case is being remanded for the ALJ to address the medical opinions of
3 Dr. Lefors, Dr. Sen, and Dr. Brzusek. Upon remand, the ALJ will readdress
4 Plaintiff's residual functional capacity and make a new determination at steps four
5 and five.

6 **REMEDY**

7 The decision whether to remand for further proceedings or reverse and
8 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
9 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
10 where "no useful purpose would be served by further administrative proceedings,
11 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
12 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
13 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
14 (9th Cir. 1990); see also *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
15 (noting that a district court may abuse its discretion not to remand for benefits
16 when all of these conditions are met). This policy is based on the "need to
17 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
18 outstanding issues that must be resolved before a determination can be made, and it
19 is not clear from the record that the ALJ would be required to find a claimant
20 disabled if all the evidence were properly evaluated, remand is appropriate. See
21 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
22 F.3d 1172, 1179-80 (9th Cir. 2000).

23 In this case, it is not clear from the record that the ALJ would be required to
24 find Plaintiff disabled if all the evidence were properly evaluated. Further
25 proceedings are necessary for the ALJ to properly address the medical opinions of
26 Dr. Lefors, Dr. Sen, and Dr. Brzusek, to properly consider Plaintiff's symptom
27 statements, and to make new determinations at steps four and five. Additionally,
28 the ALJ will call a vocational expert to testify at a remand hearing.

1 **CONCLUSION**

2 Accordingly, **IT IS ORDERED:**

3 1. Defendant’s Motion for Summary Judgment, **ECF No. 13**, is
4 **DENIED.**

5 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is
6 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
7 additional proceedings consistent with this Order.

8 3. Application for attorney fees may be filed by separate motion.

9 The District Court Executive is directed to file this Order and provide a copy
10 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
11 **and the file shall be CLOSED.**

12 DATED January 28, 2019.

A handwritten signature in black ink, appearing to read "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE