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

Oct 01, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIM M.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-CV-03267-JTR

ORDER GRANTING IN PART
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 17. Attorney D. James Tree represents Tim M. (Plaintiff); Special Assistant United States Attorney Stephen Dmetruk represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff’s Motion for Summary Judgment; **DENIES** Defendant’s Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

1 **JURISDICTION**

2 Plaintiff filed applications for Disability Insurance Benefits and
3 Supplemental Security Income on October 13, 2011, alleging disability since July
4 1, 2008,¹ due to obesity, back pain, diabetes, high blood pressure, high cholesterol,
5 depression, and weakness in his legs. Tr. 68. The applications were denied initially
6 and upon reconsideration. Tr. 144-61, 164-77. Administrative Law Judge (ALJ)
7 Ilene Sloan held a hearing June 20, 2013, Tr. 33-67, and issued an unfavorable
8 decision on October 24, 2013, Tr. 16-27. Plaintiff requested review by the Appeals
9 Council. The Appeals Council denied Plaintiff's request for review on January 27,
10 2015. Tr. 1-5. Plaintiff filed an action with this court and on March 30, 2016, the
11 Court remanded the claim for further proceedings. Tr. 586-97.

12 On remand, ALJ Raymond Souza held a hearing on January 28, 2019, which
13 was postponed in order to obtain additional evidence. Tr. 603-14. Judge Souza held
14 another hearing on July 19, 2019 and received testimony from Plaintiff, a medical
15 expert, and a vocational expert. Tr. 615-40. On July 31, 2019, Judge Souza issued
16 an unfavorable decision. Tr. 556-73. Plaintiff did not file written exceptions with
17 the Appeals Council, and the Appeals Council did not take its own review of the
18 decision. The ALJ's July 2019 decision thus became the final decision of the
19 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
20 405(g). Plaintiff filed this action for judicial review on November 12, 2019. ECF
21 No. 1.

22 **STATEMENT OF FACTS**

23 Plaintiff was born in 1970 and was 41 years old as of the amended alleged
24 onset date. Tr. 572. He did not complete high school and has a work history
25 primarily consisting of restaurant work. Tr. 38-39, 60, 349, 355, 1458. Plaintiff has
26

27 ¹ Plaintiff later amended his alleged onset date to September 1, 2011. Tr.
28 407.

1 been treated primarily for diabetes and a large hernia that has caused urinary issues
2 and kidney disease.

3 **STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in
5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
6 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
7 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
8 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
9 only if it is not supported by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
11 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
12 1098. Put another way, substantial evidence is such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
15 rational interpretation, the Court may not substitute its judgment for that of the
16 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
17 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
18 administrative findings, or if conflicting evidence supports a finding of either
19 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
20 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
21 supported by substantial evidence will be set aside if the proper legal standards
22 were not applied in weighing the evidence and making the decision. *Brawner v.*
23 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
27 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
28 four, the burden of proof rests upon the claimant to establish a prima facie case of

1 entitlement to disability benefits. Tackett, 180 F.3d at 1098-1099. This burden is
2 met once a claimant establishes that a physical or mental impairment prevents the
3 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
4 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
5 to step five, and the burden shifts to the Commissioner to show (1) the claimant
6 can make an adjustment to other work; and (2) the claimant can perform specific
7 jobs that exist in the national economy. Batson v. Commissioner of Social Sec.
8 Admin., 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an
9 adjustment to other work in the national economy, the claimant will be found
10 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

11 **ADMINISTRATIVE DECISION**

12 On July 31, 2019, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since July 1, 2008. Tr. 562.²

16 At step two, the ALJ determined Plaintiff had the following severe
17 impairments: hernia; substance abuse; alcohol abuse; and diabetes mellitus. Id.

18 At step three, the ALJ found Plaintiff did not have an impairment or
19 combination of impairments that met or medically equaled the severity of one of
20 the listed impairments. Tr. 566-67.

21 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
22 he could perform light exertion level work with the following additional
23 limitations:

24 _____

25 ² Despite noting the amended alleged onset date in the Jurisdiction and
26 Procedural History section, Tr. 559, the ALJ adjudicated the claim from the
27 original 2008 alleged onset date. Tr. 562, 573. Therefore, the Court will review the
28 determination from July 1, 2008 through the date of the ALJ's decision.

1 The claimant cannot climb ladders, ropes, or scaffolds, can
2 occasionally stoop, kneel, crouch, crawl, and climb ramps and stairs,
3 and can have no exposure to excessive vibration, no use of hazardous
4 machinery, and no exposure to unprotected heights. The claimant is
5 limited to occupations that require frequent reading of newspapers or
6 ordinary book print and ordinary hazards in the workplace, such as
7 boxes on the floor, doors ajar, etc. The claimant is able to understand,
8 remember, and carry out simple and routine instructions and tasks
9 consistent with SVP levels one and two type jobs with no strict
10 production quotas, with the emphasis being on a per shift rather than a
11 per hour basis.

12 Tr. 567.

13 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 572.

14 At step five the ALJ found that, considering Plaintiff's age, education, work
15 experience, and residual functional capacity, there were other jobs that existed in
16 significant numbers in the national economy that Plaintiff could perform,
17 specifically identifying the representative occupations of cashier II; cleaner,
18 housekeeping; and garment sorter. Tr. 572-73.

19 The ALJ thus concluded Plaintiff was not under a disability within the
20 meaning of the Social Security Act at any time from July 1, 2008 through the date
21 of the decision. Tr. 573.

22 ISSUES

23 The question presented is whether substantial evidence supports the ALJ's
24 decision denying benefits and, if so, whether that decision is based on proper legal
25 standards.

26 Plaintiff contends the ALJ erred by (1) failing to follow the remand
27 instructions; (2) improperly rejecting Plaintiff's symptom testimony; (3)
28 improperly weighing the medical opinion evidence; and (4) improperly
determining Plaintiff's severe impairments.

DISCUSSION

1. Medical opinion evidence

1 Plaintiff argues the ALJ erred by improperly rejecting the medical opinion
2 evidence from Dr. Merrill, Dr. Crank, and the state agency reviewing doctors. ECF
3 No. 16 at 6-10.

4 When an examining physician’s opinion is contradicted by another
5 physician, the ALJ is required to provide “specific and legitimate reasons” to reject
6 the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific
7 and legitimate standard can be met by the ALJ setting out a detailed and thorough
8 summary of the facts and conflicting clinical evidence, stating his interpretation
9 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
10 1989). The ALJ is required to do more than offer his conclusions, he “must set
11 forth his interpretations and explain why they, rather than the doctors’, are
12 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

13 The Commissioner may reject the opinion of a non-examining physician by
14 reference to specific evidence in the medical record. *Sousa v. Callahan*, 143 F.3d
15 1240, 1244 (9th Cir. 1998).

16 a. Dr. Merrill

17 On May 1, 2013, Plaintiff presented to Dr. Jeffrey Merrill for a disability
18 exam for Washington State DSHS benefits. Tr. 535-40. Dr. Merrill assessed
19 uncontrolled type 2 diabetes, right inguinal hernia, pulmonary nodule, and
20 lumbago. Tr. 535. He completed DSHS disability certification paperwork, opining
21 Plaintiff was severely impaired by his diabetes and massive hernia, and was unable
22 to perform even sedentary work, and that the limitations were likely to last six
23 months. Tr. 542-43. He opined Plaintiff would “definitely improve with treatment”
24 but that it would not be an overnight project. Tr. 535. Finally, Dr. Merrill noted
25 that even though Plaintiff had just presented for an evaluation, he felt obliged to
26 treat him acutely, given his uncontrolled diabetes, and noting Plaintiff was in
27 imminent danger of slipping into diabetic ketoacidosis. *Id.*

28 ///

1 The ALJ gave this opinion little weight, noting the exam notes from the
2 same day documented minimal findings and the opinion was for a limited duration.
3 Tr. 570. The ALJ stated the findings that Dr. Merrill did document regarding
4 Plaintiff's hernia and his ill appearance were inconsistent with the record,
5 including minimal physical exam findings, the lack of observations of Plaintiff
6 presenting in any significant distress, and Plaintiff's minimal engagement with
7 treatment. Id.

8 Plaintiff argues the ALJ's analysis is insufficient, as Dr. Merrill noted
9 findings on exam that supported the limitations due to uncontrolled diabetes and
10 Plaintiff's massive hernia, and the normal findings regarding his spine and
11 musculoskeletal exams were irrelevant to the opinion. ECF No. 16 at 7. He further
12 argued that the six-month duration was an estimate and the record contained no
13 evidence that Plaintiff actually improved within the expected six months. Id. at 8.
14 Finally, Plaintiff argues that the ALJ misinterpreted the meaning of the medical
15 record notations of no acute distress. Id. at 12.³ Defendant argues the ALJ
16 reasonably interpreted Dr. Merrill's exam findings as inconsistent with the severity
17 of the opinion, and that the remainder of the record showed Plaintiff's diabetes was
18 not as poorly controlled as Dr. Merrill believed based on his normal blood sugar
19 levels later in the record. ECF No. 17 at 9-11.

20 The Court finds the ALJ's analysis to be insufficient. A conflict between
21 treatment notes and a treating provider's opinion may constitute an adequate
22 reason to discredit the opinion of a treating physician or another treating provider.
23 *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir. 2009)
24 (holding that a conflict with treatment notes is a specific and legitimate reason to

25
26 ³ Plaintiff included this argument in his challenge to the ALJ's rejection of
27 Plaintiff's subjective complaints, and cross referenced the same argument within
28 his discussion of the medical opinions. ECF No. 16 at 12-19.

1 reject a treating physician’s opinion). Here, however, substantial evidence does not
2 support the ALJ’s conclusion. Dr. Merrill’s exam findings the day of his opinion
3 showed Plaintiff’s glucose level at 415 and A1c at greater than 14%, leading Dr.
4 Merrill to prescribe insulin and Metformin as Plaintiff was in “imminent danger”
5 of slipping into diabetic ketoacidosis (DKA). Tr. 535, 538. He also documented his
6 inspection of Plaintiff’s hernia, which the doctor described as “mammoth.” Tr.
7 535. The fact that some other body system inspections were normal does not
8 detract from the abnormal findings documented by Dr. Merrill.

9 Similarly, in the ALJ’s general discussion of the lack of objective findings
10 supportive of Plaintiff’s claim, the ALJ noted normal musculoskeletal findings that
11 do not contradict the abnormal findings regarding diabetes and hernia. Tr. 568-69.
12 The ALJ’s reference to Plaintiff’s improved A1c readings more than two years
13 after Dr. Merrill’s exam does not negate the findings at the time of the exam.
14 While the ALJ referenced numerous times in the record when Plaintiff appeared in
15 no acute distress or with normal constitutional observations, Dr. Merrill noted
16 Plaintiff to be ill appearing, and attributed this to his long uncontrolled diabetes.
17 Tr. 535, 537.

18 Finally, with respect to the limited duration, Dr. Merrill’s statement was
19 only an estimate of how he would expect Plaintiff’s condition to progress with
20 treatment. The next treatment record was from over seven months later when
21 Plaintiff was taken to the ER for hypoglycemia after taking his fast-acting insulin
22 without eating. Tr. 1376. The record does not reflect any improvement in his
23 diabetes until his June 2014 hospitalization. Tr. 1184-85. Additionally, records for
24 the two years preceding Dr. Merrill’s exam document a lack of control of his
25 diabetes. Tr. 436 (glucose level over 600, but not in DKA); 472 (hyperglycemic in
26 the ER, but not acidotic); 475-79 (glucose level over 600); 494 (glucose level over
27 700); 517 (uncontrolled diabetes); 522 (poor control of diabetes). Therefore, this
28 was not a specific and legitimate reason to disregard Dr. Merrill’s opinion.

1 Whether Plaintiff's failure to engage in treatment was justifiable or explained was
2 not an issue the ALJ addressed with any specificity, a fact that Defendant admits.
3 ECF No. 17 at 2-3.

4 On remand, the ALJ shall reconsider Dr. Merrill's opinion and offer specific
5 and legitimate reasons for the weight assigned.

6 b. Dr. Crank

7 In July 2015, Plaintiff was seen by Dr. Jeremiah Crank, who completed a
8 DSHS disability form. Tr. 1443-56. Dr. Crank noted a primary diagnosis of a large
9 hernia that was causing urinary retention and likely chronic kidney disease (CKD).
10 Tr. 1443. He opined Plaintiff had severe impairment in all physical activities and
11 was unable to meet the demands of even sedentary work. Tr. 1445. He opined
12 Plaintiff needed referrals to a urologist and nephrologist, and a general surgeon for
13 repair of the hernia. Id.

14 The ALJ gave this opinion little weight, noting Dr. Crank had not previously
15 treated Plaintiff, and largely relied on Plaintiff's subjective statements regarding
16 urinary retention. Tr. 571. The ALJ found this assertion inconsistent with other
17 evidence in the record and Plaintiff's refusal of treatment for this condition. Id. The
18 ALJ also found the opinion inconsistent with minimal physical exam findings, the
19 lack of observations of significant distress, and Plaintiff's minimal engagement
20 with treatment. Id.

21 Plaintiff argues the record does not indicate Dr. Crank unduly relied on
22 Plaintiff's subjective reports, and that the record indicates ongoing urinary
23 problems. ECF No. 16 at 8-9. Defendant argues the ALJ reasonably interpreted the
24 record and that the Court should not reweigh the evidence.

25 The Court finds the ALJ's analysis was insufficient. As with the analysis of
26 Dr. Merrill's opinion, the ALJ's references to the lack of objective findings are
27 irrelevant to Dr. Crank's assessment. The record clearly documents Plaintiff's
28 massive hernia and the resulting kidney dysfunction and urinary issues. While

1 urinary retention was not always the specific problem, the record documents
2 persistent kidney and bladder problems resulting from Plaintiff's hernia, both
3 before and after Dr. Crank's opinion. Tr. 1122 (reports kidney pain); 1170-77
4 (hospitalized for urine retention, bladder obstruction, catheter placement); 1229
5 (referred to a nephrologist for kidney disease "which appears to be progressing,"
6 may need dialysis in near future); 1258 (informed urinary retention may be lethal
7 due to kidney failure or bladder rupture, needs to follow up with nephrology and
8 urology); 1263 (informed chronic kidney disease is likely advanced, but should
9 improve with removal of bladder obstruction); 1329 (creatinine levels steadily
10 increasing over past several years, likely due to diabetes and post-renal obstruction,
11 needs catheter placement, may need dialysis within six months); 1510 (hernia
12 causing urinary blockage and likely chronic kidney disease, able to urinate okay
13 but likely still some obstruction); 1582 (having trouble urinating due to size of
14 hernia); 1589-90 (recently in ER due to creatinine concentration and high urine
15 residual volume, renal function stable). Therefore, the ALJ's implication that Dr.
16 Crank's opinion is inconsistent with the record is not supported.

17 Because this claim is being remanded for further consideration of Dr.
18 Merrill's opinion, the ALJ will also reconsider Dr. Crank's opinion and the
19 limitations stemming from Plaintiff's hernia and resultant urinary problems.

20 b. DSHS reviewing doctors

21 Two reviewing doctors, Dr. Dalton and Dr. Palasi, reviewed Dr. Crank's
22 opinion and concurred with the limitations. Tr. 1458, 1467. The ALJ gave these
23 opinions no weight for the same reasons he discounted Plaintiff's subjective
24 reports and due to their reliance on Dr. Crank. Tr. 571.

25 Because the ALJ must reconsider other medical evidence, including Dr.
26 Crank's opinion, he shall also reevaluate the opinions of the reviewing doctors.

27 **2. Plaintiff's subjective complaints**

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1 Plaintiff contends the ALJ erred by improperly rejecting his subjective
2 statements. ECF No. 16 at 10-19.

3 It is the province of the ALJ to evaluate a claimant's statements. *Andrews v.*
4 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
5 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
6 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for
7 rejecting the claimant's testimony must be "specific, clear and convincing."
8 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d
9 821, 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must
10 identify what testimony is not credible and what evidence undermines the
11 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
12 918 (9th Cir. 1993).

13 The ALJ concluded Plaintiff's medically determinable impairments could
14 reasonably be expected to cause some of the alleged symptoms; however,
15 Plaintiff's statements concerning the intensity, persistence and limiting effects of
16 those symptoms were not entirely consistent with the medical evidence and other
17 evidence in the record for the reasons explained in the decision. Tr. 568. The ALJ
18 specifically found Plaintiff's allegations were inconsistent with his statements to
19 treating providers, the record contained minimal physical examination findings and
20 a lack of observations of Plaintiff being in distress or discomfort, and Plaintiff
21 received minimal treatment. Tr. 568-70.

22 Because this claim is being remanded for reevaluation of the medical
23 evidence as discussed above, the ALJ shall also reconsider Plaintiff's subjective
24 statements. The Court notes the ALJ failed to consider with any specificity whether
25 there were justifiable explanations for Plaintiff's minimal treatment. Tr. 570.
26 Defendant does not dispute that the ALJ failed to consider any such justifications.
27 ECF No. 17 at 2-3. On remand, to the extent the ALJ relies on the premise that
28

1 Plaintiff failed to follow prescribed treatment, the ALJ must explore potential
2 reasons for the failure. Social Security Ruling 16-3p.

3 **3. Step two findings**

4 Plaintiff argues the ALJ erred at step two by failing to find chronic kidney
5 disease and depression to be severe impairments. ECF No. 16 at 20-21.

6 At step two of the sequential evaluation process, the ALJ must determine
7 whether the claimant has any medically determinable severe impairments. 20
8 C.F.R. §§ 404.1520(a)(ii), 416.920(a)(ii). An impairment is “not severe” if it does
9 not “significantly limit” the ability to conduct “basic work activities.” 20 C.F.R.
10 §§ 404.1522(a), 416.922(a). Basic work activities are “abilities and aptitudes
11 necessary to do most jobs.” 20 C.F.R. §§ 404.1522(b), 416.922(b). “An
12 impairment or combination of impairments can be found not severe only if the
13 evidence establishes a slight abnormality that has no more than a minimal effect on
14 an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
15 1996) (internal quotation marks omitted). The step-two analysis is “a de minimis
16 screening device used to dispose of groundless claims.” *Webb v. Barnhart*, 433
17 F.3d 683, 687 (9th Cir. 2005).

18 a. Kidney disease

19 The ALJ found Plaintiff’s chronic kidney failure not to be a severe
20 impairment, noting Plaintiff’s failure to follow through with treatment and that
21 there was little evidence of the condition causing any significant limitations on
22 Plaintiff’s ability to perform work-related activities for a continuous 12-month
23 period. Tr. 563.

24 Plaintiff argues the ALJ erred in failing to find his chronic kidney disease to
25 be a severe impairment. ECF No. 16 at 20-21. Plaintiff asserts the evidence
26 supports a finding of severe limitations and that the record indicates the condition
27 met Listing 6.09 due to three hospitalizations for kidney disease. *Id.* Defendant
28 argues the ALJ considered all of Plaintiff’s supported symptoms in formulating the

1 RFC, and argues the record does not document sufficient hospitalizations for
2 kidney disease to reach listing level. ECF No. 17 at 15-18.

3 The Court finds the record does not establish sufficient hospitalizations to
4 satisfy the requirements of Listing 6.09. The Listing requires “at least three
5 hospitalizations within a consecutive 12-month period and occurring at least 30
6 days apart. Each hospitalization must last at least 48 hours, including hours in a
7 hospital emergency department immediately before the hospitalization.” 20 C.F.R.
8 Part 404, Subpart P, Appendix 1, §6.09. Plaintiff points to his hospitalizations in
9 June 2014, September 2014, and January 2015 as satisfying the requirements. ECF
10 No. 16 at 21. However, the September 2014 hospitalization did not last for 48
11 hours. Tr. 1257 (admitted 9/29/14 at 14:11, discharged 9/30/14 at 23:23).⁴
12 Therefore, the requirements of the Listing are not met.

13 However, because this claim is being remanded for reconsideration of the
14 medical evidence, including Dr. Crank’s opinion related to Plaintiff’s hernia and
15 resultant kidney disease, the ALJ shall reconsider whether kidney disease is a
16 severe impairment.

17 b. Depression

18 Plaintiff additionally argues the ALJ erred in failing to find his depressive
19 disorder to be a severe impairment and in rejecting the opinions of all reviewing
20 and examining doctors who assessed a severe mood disorder. ECF No. 16 at 21.
21 Plaintiff argues the ALJ improperly separated the effects of his depressive disorder
22

23
24 ⁴ Plaintiff notes in his reply brief that the hours spent in the emergency room
25 must be counted as well, but does not cite to any evidence that Plaintiff spent an
26 additional 15 hours in the emergency room to reach the 48 hour requirement. ECF
27 No. 18 at 11. The Court can find no evidence of an ER visit prior to Plaintiff’s
28 admission to the hospital on September 29.

1 from his substance use and assumed that all effects were due only to substances.
2 Id.

3 The Court finds any error is harmless. Plaintiff has failed to identify any
4 credited limitations attributable to depression that the ALJ did not include in the
5 RFC. While the ALJ found Plaintiff's mental limitations were the result of
6 substance use, he found Plaintiff capable of no more than simple, routine tasks
7 with no strict production quotas. Tr. 567. The limitations included in the RFC are
8 more extensive than those recommended by any examining or reviewing source.
9 Tr. 75, 123, 442, 565.

10 However, on remand, the ALJ will consider any additional records
11 submitted in reevaluating step two.

12 CONCLUSION

13 Plaintiff argues the ALJ's decision should be reversed and remanded for the
14 payment of benefits. The Court has the discretion to remand the case for additional
15 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
16 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
17 further administrative proceedings would serve no useful purpose. *Id.* Remand is
18 appropriate when additional administrative proceedings could remedy defects.
19 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
20 finds that further development is necessary for a proper determination to be made.

21 The ALJ's RFC determination is not supported by substantial evidence in
22 this case and must be reevaluated. On remand, the ALJ shall reevaluate the medical
23 evidence and Plaintiff's subjective complaints, and take into consideration any
24 other evidence or testimony relevant to Plaintiff's disability claim in completing
25 the five-step analysis. Additionally, as discussed above, the ALJ should consider
26 and make specific findings regarding any exacerbation or improvement in
27 functioning over the years or failure to comply with prescribed treatment.

28 ///

1 Accordingly, **IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
3 **GRANTED IN PART.**

4 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
5 **DENIED.**

6 3. The matter is **REMANDED** to the Commissioner for additional
7 proceedings consistent with this Order.

8 4. An 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 and
11 the file shall be **CLOSED.**

12 **IT IS SO ORDERED.**

13 DATED October 1, 2020.



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

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE