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4 **UNITED STATES DISTRICT COURT**  
5 **EASTERN DISTRICT OF WASHINGTON**

6 Case No. CV-13-34-JPH

7  
8 WAYNE ROBERT LOETSCHER,

9 Plaintiff,

10 vs.

11 CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

12 Defendant.

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

13  
14 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
15 Nos. 17 and 19. Attorney Paul Clark represents plaintiff (Loetscher). Special  
16 Assistant United States Attorney Jeffrey E. Staples represents defendant  
17 (Commissioner). The parties consented to proceed before a magistrate judge. ECF  
18 No. 6. After reviewing the administrative record and the briefs filed by the parties,  
19 the court **grants** plaintiff's motion for summary judgment, **ECF No. 17**, reverses the  
20 ALJ's decision and remands for further administrative proceedings pursuant to  
sentence four. Defendant's motion for summary judgment, ECF No. 19, is denied.

ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT ~ 1

1 **JURISDICTION**

2 Loetscher protectively applied for disability insurance benefits (DIB) on  
3 March 25, 2009, alleging onset as of December 1, 2008 (Tr. 153-59). The claim was  
4 denied initially and on reconsideration (Tr. 92-100).

5 Administrative Law Judge Marie Palachuk held a hearing July 6, 2011.  
6 Medical and vocational experts, as well as Mr. Loetscher, testified (Tr. 52-89). On  
7 July 27, 2011, the ALJ entered a partially favorable decision finding Loetscher’s  
8 impairments medially equaled Listing 11.16 from onset through June 14, 2010. The  
9 ALJ found that thereafter Loetscher no longer met or equaled a Listing based on  
10 medical improvement. He was unable to perform past relevant work, but could  
11 perform other work (Tr. 21-36). On November 23, 2012, the Appeals Council denied  
12 review. Later, they set aside the denial to consider additional evidence. After  
13 considering the new evidence the council decided it did not provide a basis for  
14 changing the ALJ’s decision, and on November 28, 2013 they denied review (Tr. 1-  
15 12). Loetscher filed this appeal pursuant to 42 U.S.C. §§ 405(g) on January 18,  
16 2013. ECF No. 1, 5.

17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing transcript, the  
19 ALJ’s decision and the parties’ briefs. They are only briefly summarized here and  
20 throughout this order as necessary to explain the Court’s decision.

1 Loetscher was 26 years old at onset and 29 at the hearing (Tr. 79-80). He  
2 completed high school and three years of college. He has worked as a chemical  
3 processing laborer, kitchen helper, stock clerk, bagger, microcomputer support  
4 specialist and home attendant (Tr. 82-84, 173, 179). In the past he abused nitrous  
5 oxide, with some relapses. This caused neuropathy which impaired the ability to  
6 walk. It also caused weakness, numbness, pain, fatigue and lack of stamina (Tr.  
7 526).

### 8 SEQUENTIAL EVALUATION PROCESS

9 The Social Security Act (the Act) defines disability as the “inability to engage  
10 in any substantial gainful activity by reason of any medically determinable physical  
11 or mental impairment which can be expected to result in death or which has lasted or  
12 can be expected to last for a continuous period of not less than twelve months.” 42  
13 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall  
14 be determined to be under a disability only if any impairments are of such severity  
15 that a plaintiff is not only unable to do previous work but cannot, considering  
16 plaintiff’s age, education and work experiences, engage in any other substantial  
17 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
18 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and  
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

20 The Commissioner has established a five-step sequential evaluation process

1 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
2 one determines if the person is engaged in substantial gainful activities. If so,  
3 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
4 decision maker proceeds to step two, which determines whether plaintiff has a  
5 medically severe impairment or combination of impairments. 20 C.F.R. §§  
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination of impairments,  
8 the disability claim is denied. If the impairment is severe, the evaluation proceeds to  
9 the third step, which compares plaintiff's impairment with a number of listed  
10 impairments acknowledged by the Commissioner to be so severe as to preclude  
11 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20  
12 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
13 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
14 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth  
15 step, which determines whether the impairment prevents plaintiff from performing  
16 work which was performed in the past. If a plaintiff is able to perform previous work  
17 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
18 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is  
19 considered. If plaintiff cannot perform past relevant work, the fifth and final step in  
20 the process determines whether plaintiff is able to perform other work in the national

1 economy in view of plaintiff’s residual functional capacity, age, education and past  
2 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
3 *Yuckert*, 482 U.S. 137 (1987).

4 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
5 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
6 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
7 met once plaintiff establishes that a mental or physical impairment prevents the  
8 performance of previous work. The burden then shifts, at step five, to the  
9 Commissioner to show that (1) plaintiff can perform other substantial gainful  
10 activity and (2) a “significant number of jobs exist in the national economy” which  
11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

### 12 **PARTIALLY FAVORABLE DECISION**

13 If the claimant is found disabled at any point in the process, the ALJ must also  
14 decide if disability continues through the date of the decision. In making this  
15 determination, the ALJ must follow an eight-step evaluation process (20 C.F.R.  
16 404.1594). If the ALJ can make a decision at any step, the evaluation does not  
17 proceed to the next step.

18 At step one, the ALJ must determine if the claimant is engaging in substantial  
19 gainful activity. If the claimant is performing SGA and any applicable trial work  
20 period has been completed, the claimant is no longer disabled. C.F.R.

1 404.1594(f)(1)).

2 At step two, the ALJ must determine whether the claimant has an impairment  
3 or combination of impairments which meets or medically equals the criteria of an  
4 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R.  
5 404.1520(d), 404.1525 and 404.1526). If the claimant does, his disability continues  
6 (20 C.F.R. 404.1594(f)(2)).

7 At step three, the ALJ must determine whether medical improvement has  
8 occurred (20 C.F.R. 404.1594(f)(3)). Medical improvement is any decrease in  
9 medical severity of the impairment(s) as established by improvement in symptoms,  
10 signs and/or laboratory findings (20 C.F.R. 404.1594(b)(1)). If medical improvement  
11 has occurred, the analysis proceeds to the fourth step. If not, the analysis proceeds to  
12 the fifth step.

13 At step four, the ALJ must determine whether medical improvement is related  
14 to the ability to work (20 C.F.R. 404.2594(f)(4)). Medical improvement is related to  
15 the ability to work if it results in an increase in the claimant's capacity to perform  
16 basic work activities (20 C.F.R. 404.1594(b)(3)). If it does, the analysis proceeds to  
17 the sixth step.

18 At step five, the ALJ must determine if an exception to medical improvement  
19 applies (20 C.F.R. 404.1594(f)(5)). There are two groups of exceptions (20 C.F.R.  
20 404.1594(d) and (e)). If one of the first group of exceptions applies, the analysis

1 proceeds to the next step. If one of the second group of exceptions applies, the  
2 claimant's disability ends. If none apply, the claimant's disability continues.

3 At step six, the ALJ must determine whether all the claimant's current  
4 impairments in combination are severe (20 C.F.R. 404.1594(f)(6)). If all current  
5 impairments in combination do not significantly limit the claimant's ability to do  
6 basic work activities, the claimant is no longer disabled. If they do, the analysis  
7 proceeds to the next step.

8 At step seven, the ALJ must assess the claimant's residual functional capacity  
9 based on the current impairments and determine if the claimant can perform past  
10 relevant work, given his or her residual functional capacity and considering the  
11 claimant's age, education, and past work experience (20 C.F.R. 404.1594(f)(7)). If  
12 the claimant has the capacity to perform past relevant work, disability has ended. If  
13 not, the analysis proceeds to the last step.

14 At the last step, the ALJ must determine whether other work exists that the  
15 claimant can perform, given the assessed residual functional capacity and  
16 considering claimant's age, education, and past work experience (C.F.R. 404.  
17 1594(f)(8)). If the claimant can perform other work, the claimant is no longer  
18 disabled. If the claimant cannot perform other work, disability continues. Although  
19 the claimant generally continues to have the burden of proving disability at this step,  
20 the Social Security Administration is responsible for providing evidence that

1 demonstrates that other work exists in significant numbers in the national economy  
2 that the claimant can do, given the residual functional capacity, age, education and  
3 work experience.

4 If it is found that the claimant is disabled and there is medical evidence of a  
5 substance abuse disorder(s), the ALJ must determine if the disorder is contributing  
6 factor material to the determination of disability. In making this determination, the  
7 undersigned must evaluate the extent to which the claimant's mental and physical  
8 limitations would remain if the claimant stopped the substance abuse. If the  
9 remaining limitations would not be disabling, the substance abuse disorder(s) is a  
10 contributing factor material to the determination of disability (20 C.F.R. 404.1535).  
11 If so, the claimant is deemed not entitled to benefits and therefore not disabled.

## 12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a Commissioner's  
14 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,  
15 made through an ALJ, when the determination is not based on legal error and is  
16 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
17 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's]  
18 determination that a plaintiff is not disabled will be upheld if the findings of fact are  
19 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir.  
20 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,



1 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a  
2 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989).  
3 Substantial evidence “means such evidence as a reasonable mind might accept as  
4 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401  
5 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]  
6 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,  
7 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a  
8 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*  
9 *v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,  
10 526 (9<sup>th</sup> Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.  
12 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
13 interpretation, the Court may not substitute its judgment for that of the  
14 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
15 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
16 set aside if the proper legal standards were not applied in weighing the evidence and  
17 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
18 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
19 administrative findings, or if there is conflicting evidence that will support a finding

1 of either disability or nondisability, the finding of the Commissioner is conclusive.  
2 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### 3 **ALJ'S FINDINGS**

4 ALJ Palachuk found Loetscher met the insured status requirements of the Act  
5 and was insured through June 30, 2014 (Tr. 21, 24). At step one, she found  
6 Loetscher worked after onset but at less than SGA levels (Tr. 25). At step two, the  
7 ALJ found Loetscher suffers from toxicity syndrome from nitrous oxide inhalation  
8 causing polyneuropathy and demyelination, and substance abuse (Tr. 25). At step  
9 three, the ALJ found Loetscher's impairments equaled Listing 11. 16 from onset  
10 through June 14, 2010, meaning he was disabled (Tr. 26, 28). The ALJ proceeded to  
11 determine whether Loetscher was still disabled as of the decision date. Significantly,  
12 she determined medical improvement occurred as of June 15, 2010, the  
13 improvement was related to the ability to work and Loetscher continued to suffer  
14 severe impairments although they no longer met or equaled a Listed impairment.  
15 The ALJ assessed an RFC for a range of light work and determined Loetscher is  
16 unable to perform any of his past relevant work (Tr. 28-29, 34). The ALJ found he  
17 can perform other jobs, such as office helper, parking lot attendant and outside  
18 delivery driver (Tr. 35). Alternatively, the ALJ found an RFC for a range of  
19 sedentary work meant Loetscher could work as a telemarketer, sewing machine  
20 operator and production assembler (*Id.*). Accordingly, the ALJ found Loetscher was

1 not disabled as defined by the Act beginning June 15, 2010 (Tr. 36).

2 The ALJ found substance abuse disorder was not a contributing factor  
3 material to disability (Tr. 28).

#### 4 **ISSUES**

5 Loetscher alleges the ALJ should have found him credible after June 14, 2010  
6 and erred when she weighed the medical evidence. ECF No. 17 at 2. The  
7 Commissioner responds that the ALJ's findings are factually supported and free of  
8 harmful legal error. She asks the Court to affirm. ECF No. 18 at 2.

#### 9 **DISCUSSION**

##### 10 *A. Credibility*

11 Loetscher alleges the ALJ erred when she found him less than credible after  
12 June 14, 2010. ECF No. 17 at 22-28. He is correct.

13 When presented with conflicting medical opinions, the ALJ must determine  
14 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
15 1190, 1195 (9<sup>th</sup> Cir. 2004) (citation omitted). The ALJ's credibility findings must be  
16 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup>  
17 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
18 rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*,  
19 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient: rather the ALJ  
20 must identify what testimony is not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918  
2 (9<sup>th</sup> Cir. 1993).

3         There is no evidence of malingering. Loetscher alleges the ALJ failed to give  
4 clear and convincing reasons for her credibility assessment. The Court is required to  
5 evaluate whether the determination is supported by substantial evidence, *i.e.*,  
6 relevant evidence that a reasonable mind might accept as adequate to support a  
7 conclusion. *Orn v. Astrue*, 495 F.3d 625, 630 (9<sup>th</sup> Cir. 2007). The Commissioner  
8 admits the ALJ may have erred when she relied on Loetscher's use of marijuana,  
9 apparent ability to climb stairs to his third-floor apartment and his non-use of a cane  
10 (Tr. 30), but any error is harmless because substantial evidence supports the remain  
11 clear and convincing reasons. ECF No. 19 at 11-12.

12         The court agrees these three reasons are not clear, convincing and supported  
13 by substantial evidence. Loetscher used marijuana during the period the ALJ found  
14 him largely credible, before June 15, 2010 (*see e.g.*, Tr. 485), meaning marijuana use  
15 by itself should not diminish Loetscher's credibility after he medically improved  
16 (Tr. 444). Next, the Court finds no support in the record for the ALJ's finding  
17 Loetscher climbed stairs to a third floor apartment. There is simply no testimony or  
18 evidence supporting this finding. Third, the fact that Loetscher brought a cane to the  
19 hearing but did not use it hardly compels an adverse credibility finding as it is  
20 undisputed that neuropathy symptoms vary.

1 In the Court's view the errors are harmful because some of the ALJ's  
2 additional reasons are also unsupported by the record. For example, the ALJ relied  
3 on Loetscher's statements inconsistent with conduct, and achieving good pain  
4 control with medication (Tr. 30-31). These are not borne out by the record as a  
5 whole. Loetscher has rather consistently complained of pain with standing. The  
6 ability at times to ride a bike is not necessarily inconsistent with his complaint. Pain  
7 control with medication has varied, as evidenced by several changes of medication  
8 and prescribed dosage.

9 The ALJ is correct, however, that some objective evidence may be  
10 inconsistent with claimed limitations. Loetscher testified he could not focus. He  
11 earned a grade point average of 3.5 at WSU (Tr. 494). The record also shows,  
12 however, he was given attendance accommodations by the university (Tr. 496). The  
13 ALJ notes imaging studies did not reveal significant abnormalities (*but see* Tr. 323  
14 "data suggests a severe condition"). Dr. Spence opined Loetscher was  
15 deconditioned, and this contributed to back pain. Although lack of supporting  
16 medical evidence cannot form the sole basis for discounting pain testimony, it is a  
17 factor the ALJ can consider when analyzing credibility. *Burch v. Barnhart*, 400 F.3d  
18 676, 680 (9<sup>th</sup> Cir. 2005). Dr. Spence failed to account for the use of prescribed pain  
19 medication, which undermines confidence in his opinions.

20 The ALJ notes Loetscher carried a walking cane to the hearing. He did not use

1 it either entering or leaving the hearing (Tr. 30). Although an ALJ's personal  
2 observations, standing alone, cannot support a determination that a claimant is not  
3 credible, they may form part of that determination. *Fair v. Bowen*, 885 F.2d 597, 602  
4 (9<sup>th</sup> Cir. 1989). Loetscher inconsistently reported his drug use, a factor generally  
5 appropriate for consideration. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir.  
6 1999). Loetscher said he stopped using substances in December 2008, but evidence  
7 showed he continued to use in January, February and May 2009, and used marijuana  
8 from 2009-11 (Tr. 30, 237, 310, 315-17, 357, 420, 444, 486). The record also shows  
9 marijuana was medically prescribed on February 6, 2011—five months before the  
10 hearing (Tr. 482), and this record was sent to the ALJ a little over a month before  
11 her decision.

12         The ALJ clearly erred when she assessed the use of pain medication. She  
13 notes “there is nowhere in the record where pain medications were a normal course”  
14 of Loetscher's treatment. She also states he obtained good pain control with  
15 tramadol (Tr. 31). Neither is accurate in context. On May 7, 2009 treating source  
16 Linda Wray, M.D., opined a non-narcotic such as gabapentin or amitriptyline could  
17 be prescribed for pain and sleep problems (Tr. 310). On June 4, 2009, treating source  
18 Suzanne Skinner, M.D., prescribed a trial of gabapentin (Tr. 362). Two weeks later  
19 it is noted to be somewhat helpful. It was prescribed through October 2009 (Tr. 363,  
20 371). Loetscher used amitriptyline in February 2010. Side effects from gabapentin

1 were noted (Tr. 400), and tramadol was added for pain (Tr. 402). Pain medication  
2 was changed to hydrocodone in August 2011, after the ALJ's decision (Tr. 259). The  
3 record shows that on the hearing date, Loetscher indicated he took prescribed  
4 medications for pain: tramadol and amitriptyline (Tr. 237). Although one record  
5 indicates good pain control on tramadol (Tr. 446), other records indicate negative  
6 side effects and other drugs were added at different times for pain control. The ALJ  
7 erred when she indicated "there were no stated adverse side effects noted by the  
8 claimant" with respect to medication. Loetscher testified he gets fatigue "from the  
9 medications" (Tr. 31, 78, 237, 400).

10 On this record the evidence of credibility after June 14, 2010 is somewhat  
11 ambiguous. It is clear, however, that the record does not support most of the ALJ's  
12 cited reasons for finding Loetscher less credible after June 14, 2010. These errors  
13 appear harmful, especially when considered in connection with the testimony of the  
14 medical expert on whom the ALJ relied (below).

15 *B. Medical expert*

16 Loetscher alleges the ALJ gave too much credit to the opinion of William  
17 Spence, M.D., who testified at the hearing. ECF No. 17 at 15-17. The Commissioner  
18 concedes Dr. Spence may have made errors and lacked clarity, but this does not  
19 require remand. ECF No. 19 at 5-6.

1           The Court agrees with Loetscher that Dr. Spence’s testimony contained error,  
2 and it appears harmful.

3           Significantly, Dr. Spence testified Loetscher was on no pain medications and  
4 he saw no record of it (Tr. 63-64). The record contains *numerous* references to  
5 prescribed pain medications (*see e.g.*, Tr. 237, 310, 362-63, 371, 425-26, 428-29,  
6 438-39, 441-42, 444-47, 463, 474, 478, 484-86, 501-02). When counsel advised Dr.  
7 Spence that Loetscher takes prescribed tramadol, Dr. Spence indicated he was  
8 unfamiliar with the drug but stated, “if the pain were severe enough I’d be looking  
9 for things such as opiates that are required for pain, something like that” (Tr. 64).  
10 Tramadol is a synthetic opiate, meaning it would be consistent with what Dr. Spence  
11 described as “severe enough pain” (Tr. 64). The ALJ relied on Dr. Spence’s opinion  
12 when she found medical improvement as of June 15, 2010, but at least part of Dr.  
13 Spence’s opinion does not appear to be based on an accurate review of the record.

14           Dr. Spence opined Listing 11.16 was met through June 14, 2010 (Tr. 26-28).  
15 Loetscher’s primary allegation appears to be that the ALJ should not have relied on  
16 Dr. Spence’s opinion that he had medically improved and was no longer disabled as  
17 of June 15, 2010. Because of errors in Dr. Spence’s testimony and the credibility  
18 analysis, remand is appropriate.

19           Loetscher alleges the ALJ erred when she relied on Dr. Spence’s extensive  
20 and extremely qualified credentials. ECF No. 17 at 17. However, at the hearing.



1 counsel agreed to the doctor's qualifications. Dr. Spence is board certified in internal  
2 medicine, pulmonary disease and critical care. As the Commissioner accurately  
3 observes, counsel specifically stated he had no objection to Dr. Spence as an expert,  
4 thereby waiving this issue on appeal. ECF No. 19 at 5; Tr. 54-55; *see Meanel v.*  
5 *Apfel*, 172 F.3d 1111, 1115 (9<sup>th</sup> Cir. 1999).

6 *C. Treating doctors and Appeals Council evidence*

7 Loetscher alleges the ALJ failed to properly credit, and misread, the opinions  
8 of treating doctor Mulloy Hansen, M.D. ECF No. 17 at 18-22. In February 2010, Dr.  
9 Hansen opined Loetscher was severely limited (Tr. 396). Because the ALJ found  
10 Loetscher was disabled until June 15, 2010, Loetscher is unable to show prejudice.  
11 Interestingly, Dr. Hansen also opined treatment was unlikely to improve Loetscher's  
12 employability (Tr. 397).

13 In March 2011, Dr. Hansen offered another opinion. The ALJ summarizes Dr.  
14 Hansen's assessed RFC as consistent with sedentary work. Loetscher alleges this is  
15 error, as Dr. Hansen found he is more limited. ECF No. 17 at 18; 33, 499-500.  
16 According to the Commissioner, the ALJ properly rejected Dr. Hansen's opinion  
17 that Loetscher could perform less than a full range of sedentary work. ECF No. 19 at  
18 12-15.

19 Dr. Hansen opined in 2011 that Loetscher's work function is impaired. He  
20 opined Loetscher is able to stand for 30 minutes, sit 20-30 minutes (for a total of two

1 hours) and lift ten pounds occasionally; he has significant lower limb impairment  
2 and is unable to climb, crouch, stoop, or bend and has gross motor extremity  
3 restrictions (Tr. 499-500). The ALJ rejected this opinion, in part because she found it  
4 was based on Loetscher's unreliable self-report, and in part because it was  
5 contradicted by the opinion of the medical expert (Tr. 33). For the reasons stated  
6 above, both are erroneous.

7         On January 20, 2010, just five months before the ALJ found Loetscher was  
8 no longer disabled, treating Dr. Keane reviewed test results and opined there was  
9 "significant bilateral lower extremity polyneuropathy" (Tr. 399). As noted, the  
10 Appeals Council accepted and considered evidence related to Loetscher's condition  
11 after the hearing, meaning it is part of the record on review. *Brewes v. Comm'r of*  
12 *Soc. Sec. Admin.*, 682 F.3d 1157 (9<sup>th</sup> Cir. 2012). A record dated August 3, 2011,  
13 shows Dr. Keane changed Loetscher's pain medication from tramadol to  
14 hydrocodone because of side effects (Tr. 259). The ALJ should consider the new  
15 evidence from treating Drs. Keane and Hansen on remand, and give it whatever  
16 weight the ALJ determines is appropriate with respect to whether Loetscher's  
17 condition medially improved after June 14, 2010. The ALJ may also wish to  
18 consider other additional medical evidence on remand.

1            *D. Remand*

2            The Court is unable to tell from this record whether Loetscher medically  
3 improved enough by June 15, 2010 to perform other work existing in the national  
4 economy, and if so, whether continued drug abuse might disqualify him from  
5 receiving benefits. *See Harman v. Apfel*, 211 F.3d 1172, 1180-81 (9<sup>th</sup> Cir. 2000).  
6 Because issues remain to be resolved with respect to Loetscher's condition after  
7 June 14, 2010, the Court exercises its discretion and orders remand for further  
8 proceedings rather than for an award of benefits.

9            The Court wishes to make clear it expresses no opinion as to what the ultimate  
10 outcome on remand will or should be. The Commissioner is free to give whatever  
11 weight to the additional evidence he or she deems appropriate. “[Q]uestions of  
12 credibility and resolution of conflicts in the testimony are functions solely of the  
13 Secretary.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9<sup>th</sup> Cir. 1982).

14            **CONCLUSION**

15            After review the Court finds the ALJ's decision is not supported by substantial  
16 evidence and free of harmful legal error.

17            **IT IS ORDERED:**

- 18            1. Plaintiff's motion for summary judgment, **ECF No. 17, is granted**. The ALJ's  
19            decision is **reversed and the case remanded pursuant to sentence four** for  
20            further proceedings.

1 2. The Defendant's motion for summary judgment, **ECF No. 19**, is **denied**.

2 The District Court Executive is directed to file this Order, provide copies to  
3 counsel, enter judgment in favor of plaintiff and **CLOSE** the file.

4 DATED this 14th day of March, 2014.

5 *S/ James P. Hutton*

6 JAMES P. HUTTON  
7 UNITED STATES MAGISTRATE JUDGE  
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