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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 DARYL LEE SCHEIB,

9 Plaintiff,

10 v.
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12 CAROLYN W. COLVIN,
13 Commissioner of Social Security,

14 Defendant.
15

No. 2:14-CV-00337-JTR

ORDER GRANTING
DEFENDANT'S MOTION TO
ALTER OR AMEND JUDGMENT
AND AMENDING ORDER ON
SUMMARY JUDGMENT

16 **BEFORE THE COURT** is Defendant's Motion to Alter or Amend
17 Judgment. ECF No. 19. Attorney David L. Lybbert represents Daryl L. Scheib
18 (Plaintiff); Special Assistant United States Attorney Christopher J. Brackett
19 represents the Commissioner of Social Security (Defendant). The Court previously
20 granted Plaintiff's Motion for Summary Judgment and remanded the case for
21 further proceedings. ECF No. 17. Defendant does not challenge the Court's
22 finding that further proceedings are necessary, but argues that the Court clearly
23 erred by ordering the ALJ, on remand, to include certain nonexertional limitations
24 in the ALJ's residual functional capacity (RFC) assessment and hypothetical
25 questions to a vocational expert (VE). In response, Plaintiff argues that the Court's
26 instructions were proper. ECF No. 20. After reviewing the administrative record,
27 Defendant's motion, and Plaintiff's response, the Court **GRANTS** Defendant's
28 Motion to Alter or Amend Judgment.

ORDER GRANTING DEFENDANT'S MOTION
TO ALTER OR AMEND JUDGMENT . . . - 1

1 **BACKGROUND**

2 Plaintiff applied for supplemental security income on February 14, 2011.
3 Plaintiff’s application was denied initially and on reconsideration. After a hearing
4 on April 11, 2013, administrative law judge (ALJ) R.J. Payne denied benefits and
5 the Appeals Council subsequently denied review. Plaintiff filed a civil action in
6 district court to obtain judicial review of the agency’s decision. Plaintiff and
7 Defendant filed cross-Motions for Summary Judgment. On July 21, 2015, the
8 Court entered an Order Granting Plaintiff’s Motion for Summary Judgment and
9 remanded the case for additional proceedings. ECF No. 17.

10 The Court found the ALJ erred by failing to include all of Plaintiff’s non-
11 exertional limitations in the ALJ’s RFC determination. *Id.* at 16. The Court found
12 that substantial evidence supported that:

- 13 • Plaintiff is moderately limited in his ability to maintain appropriate
14 behavior in a work setting. *See* Tr. 136, 153, 474;
- 15 • Plaintiff is moderately limited in his ability to complete a normal
16 workday and workweek without interruptions from
17 psychologically based symptoms. *See* Tr. 136, 153, 474; and,
- 18 • Plaintiff is moderately limited in his ability to communicate and
19 perform effectively in a work setting with public contact. *See* Tr.
20 136, 153, 452.

21 *Id.* The Court noted that these limitations were supported by the assessments of
22 State agency reviewing physicians Sean Mee, Ph.D., and Jerry Gardner, Ph.D., and
23 examining psychiatrists Aaron Burdge, Ph.D., and Mark Duris, Ph.D. *See id.* at 9-
24 14. On remand, the Court ordered that “the ALJ should include the [the above
25 referenced] limitations in his RFC determination.” *Id.* at 16.

26 Defendant timely filed a Motion to Alter or Amend Judgment on July 31,
27 2015. ECF No. 19. Plaintiff filed a response to Defendant’s motion on August 18,
28 2015. ECF No. 20.

1 **ISSUE**

2 Defendant argues that the Court clearly erred by requiring the ALJ, on
3 remand, to incorporate certain moderate, nonexertional limitations into the ALJ’s
4 RFC assessment and hypothetical questions to the VE. Defendant argues that the
5 Court should amend its Order Granting Plaintiff’s Motion for Summary Judgment
6 to omit the Court’s instructions for the ALJ to credit particular evidence as true.

7 **LEGAL STANDARD**

8 Under Federal Rule of Civil Procedure 59(e), it is appropriate to alter or
9 amend a judgment if “(1) the district court is presented with newly discovered
10 evidence, (2) the district court committed clear error or made an initial decision
11 that was manifestly unjust, or (3) there was an intervening change in controlling
12 law.” *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th
13 Cir. 2009) (citation omitted).

14 **DISCUSSION**

15 A district court may “enter, upon the pleadings and transcript of the record, a
16 judgment affirming, modifying, or reversing the decision of the Commissioner of
17 Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. §
18 405(g). “A District Court issuing a remand order is vested with equity powers and,
19 while it may not intrude upon the administrative process, it may adjust its relief to
20 the demands of the case in accordance with the equitable principles governing
21 judicial action.” 4 Social Security Law and Practice § 55:85 (2015) (citing
22 *Zambrana v. Califano*, 651 F.2d 842 (2d Cir. 1981)).

23 In certain circumstances, the reviewing court can order the ALJ, on remand,
24 to credit-as-true certain evidence, including the claimant’s testimony or medical
25 evidence. The court should generally only apply the credit-as-true rule when three
26 criteria are met:

- 27 (1) the record has been fully developed and further administrative
28 proceedings would serve no useful purpose; (2) the ALJ has failed to

1 provide legally sufficient reasons for rejecting evidence, whether
2 claimant testimony or medical opinion; and (3) if the improperly
3 discredited evidence were credited as true, the ALJ would be required
4 to find the claimant disabled on remand.

5 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). The credit-as-true rule is
6 usually applied when the reviewing court remands a case with instructions to
7 calculate and award benefits. *Id.*

8 In some cases, however, the Ninth Circuit has remanded cases for further
9 proceedings with instructions that the ALJ credit-as true certain evidence. For
10 example, in *Williamson v. Commissioner of Social Security*, 438 F. App'x 609,
11 611-612 (9th Cir. 2011), the Ninth Circuit found the ALJ erred by not considering
12 a doctor's opinion that the claimant was moderately limited in concentration,
13 persistence, and pace. The Ninth Circuit remanded the case for further
14 administrative proceedings with the instructions that "the ALJ *shall include*
15 *Williamson's* concentration, pace, and persistence limitations in its RFC
16 assessment and its inquiries to the VE." *Id.* at 612 (emphasis added). In *Vasquez*
17 *v. Astrue*, 572 F.3d 586, 594 (9th Cir. 2008), the Ninth Circuit found that the ALJ
18 erred in discrediting the claimant and remanded for further proceedings with
19 instructions that the ALJ credit the claimant's pain testimony as well as consider
20 other issues, such as whether the claimant had a severe mental impairment.

21 Given the holdings of *Williamson* and *Vasquez*, the Court disagrees with
22 Defendant that it clearly erred by requiring the ALJ, on remand, to include certain
23 nonexertional, moderate limitations in the ALJ's RFC assessment and inquiries to
24 the VE.

25 Nevertheless, the Court agrees with Defendant that it is generally not
26 appropriate to require the ALJ to credit-as-true certain evidence because such
27 directives would unnecessarily intrude on the administrative process. In a well-
28 reasoned opinion from the District of Arizona, the district court analyzed an issue
similar to the issue presented by Defendant in this case. *See Agnew-Currie v.*

1 *Astrue*, 875 F. Supp. 2d 967, 974-975 (D. Ariz. 2012) *aff'd sub nom. Agnew-*
2 *Currie v. Colvin*, 579 F. App'x 578 (9th Cir. 2014). In *Agnew-Currie*, the
3 Defendant argued that the Court “cannot usurp the ALJ’s fact finding role by
4 directing the ALJ on remand to credit as true testimony that the ALJ has a variety
5 of reasons to discredit.” 875 F. Supp. 2d at 974. The district court discussed the
6 discretionary nature of the credit-as-true rule and noted circumstances where it
7 might be appropriate to credit-as-true certain evidence on remand, including when
8 the claimant is of an advanced age, has suffered a long delay in the application
9 process, or has a need for the income. *Id.* The district court concluded it would
10 not order the ALJ to credit any of the doctor’s findings or Plaintiff’s
11 pain testimony as true on remand. The ALJ should reconsider all
12 evidence in this case, pose the necessary questions to the vocational
13 expert based on that evidence, and make a new determination, de
14 novo, regarding Plaintiff’s entitlement to benefits.

14 *Id.* at 975.

15 In this case, Plaintiff has not shown that there are circumstances, such as
16 advanced age, undue delay, or need for income, that might justify the application
17 of the credit-as-true rule. Like the district court in *Agnew-Currie*, the Court agrees
18 with Defendant that requiring the ALJ to credit-as-true certain medical evidence
19 creates the potential for the Court to usurp the ALJ’s fact finding role. Thus, the
20 Court will amend its Order Granting Plaintiff’s Motion for Summary Judgment to
21 instruct the ALJ to make a de novo determination regarding Plaintiff’s entitlement
22 to benefits.

23 The Court disagrees with Plaintiff that this case presents circumstances
24 where the Court should be flexible in applying the credit-as-true rule. ECF No. 20
25 at 4 (citing *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003)). Plaintiff
26 argues that the Court may credit certain evidence on remand but still require the
27 ALJ to make other findings. But the “flexibility” described in *Connett* seems more
28 limited than argued by Plaintiff, and a court’s exercise of this flexibility would

1 generally result in courts *not* crediting certain evidence. In *Garrison*, the Ninth
2 Circuit explained that even when all three parts of the credit-as-true rule are met,
3 courts should still be wary about applying the credit-as-true rule when “the record
4 as a whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*,
5 759 F.3d at 1021.

6 That interpretation best aligns the credit-as-true rule, which preserves
7 efficiency and fairness in a process that can sometimes take years
8 before benefits are awarded to needy claimants, with the basic
9 requirement that a claimant be disabled in order to receive benefits.
10 Thus, when we conclude that a claimant is otherwise entitled to an
11 immediate award of benefits under the credit-as-true analysis, *Connett*
12 allows flexibility to remand for further proceedings when the record
as a whole creates serious doubt as to whether the claimant is, in fact,
disabled within the meaning of the Social Security Act.

13 *Id.* As described in *Garrison*, flexibility in applying the credit-as-true rule does not
14 mean that the Court should use the rule to selectively credit certain evidence and
15 otherwise intrude upon the administrative process.

16 CONCLUSION

17 Upon reconsideration, the Court finds that it did not clearly err by instructing
18 the ALJ to include certain nonexertional, moderate limitations in the ALJ’s RFC
19 assessment and inquiries to the VE. Nevertheless, the Court concludes that the
20 relief requested by Defendant is appropriate in this case.

21 Accordingly, **IT IS ORDERED:**

22 1. Defendant’s Motion to Alter or Amend Judgment, **ECF No. 19**, is
23 **GRANTED**.

24 2. The Court’s Order Granting Plaintiff’s Motion for Summary
25 Judgment dated July 21, 2015, **ECF No. 17**, is **AMENDED** to reflect that the ALJ
26 need not credit-as-true the nonexertional, moderate limitations that the Court
27 previously ordered the ALJ to incorporate into the ALJ’s RFC assessment and
28 inquiries to the VE. *See* ECF No. 17 at 11, 14, 16-17. Instead, the ALJ shall

1 conduct a de novo determination regarding Plaintiff's entitlement to benefits
2 otherwise consistent with the Court's previous Order, which identified errors in the
3 ALJ's evaluation of the opinions of Dr. Burdge, Dr. Duris, and Mr. Hoyer.

4 The District Court Executive is directed to file this Order and provide a copy
5 to counsel for Plaintiff and Defendant.

6 DATED September 1, 2015.

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

10 JOHN T. RODGERS
11 UNITED STATES MAGISTRATE JUDGE
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