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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
**May 09, 2018**  
SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT HARVEY EWING, JR.,  
  
Plaintiff,  
  
v.  
  
COMMISSIONER OF SOCIAL  
SECURITY,  
  
Defendant.

No.2:17-CV-00169-JTR  
  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 16, 17. Attorney David L. Lybbert represents Robert Harvey Ewing, Jr. (Plaintiff); Special Assistant United States Attorney Ryan Ta Lu 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 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 protectively filed applications for Supplemental Security Income  
3 (SSI) and Disability Insurance Benefits (DIB) on July 26, 2013, Tr. 130-31,  
4 alleging disability since January 1, 2008, Tr. 265, 274, due to bulging disks, right  
5 shoulder rotator cuff, carpel tunnel, obesity, right knee problems, and cellulitis, Tr.  
6 305. The applications were denied initially and upon reconsideration. Tr. 171-86,  
7 189-99. Administrative Law Judge (ALJ) Caroline Siderius held hearings on May  
8 21, 2015 and November 5, 2015 and heard testimony from Plaintiff, medical  
9 experts, Richard Hutson, M.D. and Holland Neil Levine, M.D., and vocational  
10 expert, Kimberly Mullinax. Tr. 42-129. At the second hearing, Plaintiff agreed to  
11 amend his onset date to the date he was last insured for DIB, which was June 30,  
12 2009. Tr. 120, 302. On December 30, 2015, Plaintiff again amended his date of  
13 onset to November 23, 2011. Tr. 297-300. The ALJ issued an unfavorable  
14 decision on January 27, 2016 dismissing the DIB claim based on the second  
15 amended onset date and finding Plaintiff failed to establish disability in the SSI  
16 claim. Tr. 20-35. The Appeals Council denied review on March 31, 2017. Tr. 1-  
17 6. The ALJ's January 27, 2016 decision became the final decision of the  
18 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §§  
19 405(g), 1383(c). Plaintiff filed this action for judicial review on May 22, 2017.  
20 ECF Nos. 1, 4.

21 **STATEMENT OF FACTS**

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

25 Plaintiff was 49 years old at the amended date of onset. Tr. 265. He  
26 completed his GED in 1980. Tr. 306. He completed training in wildlife and  
27 conservation in 1995 and AUTOCAD in 1997. Id. His reported work history  
28 includes the jobs of crowd management, laborer, and truck driver. Tr. 306, 312.

1 Plaintiff reported that he stopped working on December 1, 2008 due to his  
2 conditions. Tr. 305.

### 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 Court reviews the ALJ's determinations of law de novo,  
7 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
8 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
9 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
10 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
11 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
12 another way, substantial evidence is such relevant evidence as a reasonable mind  
13 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
14 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
15 interpretation, the court may not substitute its judgment for that of the ALJ.  
16 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
17 findings, or if conflicting evidence supports a finding of either disability or non-  
18 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
19 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
20 evidence will be set aside if the proper legal standards were not applied in  
21 weighing the evidence and making the decision. *Brawner v. Secretary of Health*  
22 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 23 **SEQUENTIAL EVALUATION PROCESS**

24 The Commissioner has established a five-step sequential evaluation process  
25 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
26 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
27 through four, the burden of proof rests upon the claimant to establish a prima facie  
28 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This

1 burden is met once the claimant establishes that physical or mental impairments  
2 prevent him from engaging in his previous occupations. 20 C.F.R. §§  
3 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,  
4 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
5 that (1) the claimant can make an adjustment to other work, and (2) specific jobs  
6 which the claimant can perform exist in the national economy. *Batson v. Comm’r*  
7 of Soc. Sec. Admin., 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant  
8 cannot make an adjustment to other work in the national economy, a finding of  
9 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 10 ADMINISTRATIVE DECISION

11 On January 27, 2016, the ALJ issued a decision finding Plaintiff was not  
12 disabled as defined in the Social Security Act.

13 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
14 activity since November 23, 2011, the alleged date of onset. Tr. 21.

15 At step two, the ALJ determined Plaintiff had the following severe  
16 impairments: degenerative disc disease – lumbar and cervical spine; degenerative  
17 joint disease – right shoulder, status post rotator cuff repair; carpal tunnel  
18 syndrome, status post release surgery; degenerative joint disease of both knees,  
19 status post total right knee arthroscopy; and morbid obesity. Tr. 21.

20 At step three, the ALJ found Plaintiff did not have an impairment or  
21 combination of impairments that met or medically equaled the severity of one of  
22 the listed impairments. Tr. 24.

23 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
24 determined he could perform a range of light work with the following limitations:

25 he could lift up to 30 pounds occasionally and 10 pounds frequently; he  
26 could carry up to 10 pounds occasionally; he could sit up to one hour at  
27 a time and six hours total in an eight-hour day; he could stand up to one  
28 hour at a time and two hours total in an eight-hour day; he could walk

1 up to one hour total; he could not ambulate on uneven surfaces; he  
2 should avoid unprotected heights, industrial vibration, and extreme  
3 cold; he could occasionally climb ramps or stairs but never ladders,  
4 ropes, or scaffolds; he could engage in occasional, but not repetitive,  
5 crouching, stooping, and bending; and he could not reach overhead with  
6 his right upper extremity.

7 Tr. 26. The ALJ identified Plaintiff's past relevant work as tractor operator and  
8 security guard and concluded that Plaintiff was not able to perform this past  
9 relevant work. Tr. 33.

10 At step five, the ALJ determined that, considering Plaintiff's age, education,  
11 work experience and residual functional capacity, and based on the testimony of  
12 the vocational expert, there were other jobs that exist in significant numbers in the  
13 national economy Plaintiff could perform, including the jobs of assembler (button  
14 and notion) and document preparer. Tr. 34. The ALJ concluded Plaintiff was not  
15 under a disability within the meaning of the Social Security Act at any time from  
16 November 23, 2011, through the date of the ALJ's decision. Tr. 34-35.

## 17 ISSUES

18 The question presented is whether substantial evidence supports the ALJ's  
19 decision denying benefits and, if so, whether that decision is based on proper legal  
20 standards. Plaintiff contends the ALJ erred by (1) failing to address all of  
21 Plaintiff's severe impairments at step two; (2) failing to properly weigh the opinion  
22 evidence; (3) failing to properly address Plaintiff's symptom statements; (4) failing  
23 to properly apply the grid rules; and (5) failing to make a proper step five  
24 determination.

## 25 DISCUSSION

### 26 1. Step Two

27 Plaintiff challenges the ALJ's step two determination by asserting that the  
28 ALJ failed to address the deep vein thrombosis (DVT) or chronic venous stasis, the  
carpal tunnel syndrome on the left, the degenerative joint disease on the left

1 shoulder, and the degenerative joint disease of the hip. ECF No. 16 at 5-6.

2 Step two of the sequential evaluation process requires the ALJ to determine  
3 whether or not the claimant “has a medically severe impairment or combination of  
4 impairments.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation  
5 omitted). “An impairment or combination of impairments can be found ‘not  
6 severe’ only if the evidence establishes a slight abnormality that has ‘no more than  
7 a minimal effect on an individual[’]s ability to work.’” *Id.* at 1290. The step two  
8 analysis is “a de minimis screening device to dispose of groundless claims.”  
9 *Smolen*, 80 F.3d at 1290.

10 **A. DVT and Venous Stasis**

11 Plaintiff challenged the ALJ’s determination omitting his cardiovascular  
12 impairments, specifically DVT and venous stasis, from the step two determination.  
13 ECF No. 16 at 5, 7-8.

14 The medical expert at the second hearing, Dr. Levine, testified that “the  
15 records do reflect and document a venous insufficiency with a stasis dermatitis of  
16 the lower extremities and recent cellulites which would be the infection that was  
17 mentioned earlier so there is documentation of that. That really is not an  
18 orthopedic malady.” Tr. 71. Dr. Levine went on to state that he was not a  
19 cardiovascular specialist, but that the claimant “may need a cardiovascular CE.  
20 It’s possible that he could meet 4.11(A) or (B).” Tr. 83. However, Dr. Levine  
21 testified that he did not know how to deal with the medical evidence as compared  
22 to Plaintiff’s reported activities in the record: “looking at the functionality of the  
23 activity level, it does not appear that that - - those things were significant, but with  
24 that there may well be a need to elevate at least that extremity from 10 to 15  
25 minutes every hour or so.” Tr. 83-84. He clarified that by elevation, he meant the  
26 foot higher than the knee and the knee higher than the hip. Tr. 90. Again he  
27 highlighted the need for additional information: “Perhaps a cardiovascular  
28 specialist would be, would be indicated but with the fact that at least as of

1 12/12/2014 he's still working weekends would against [sic.] suggest there's no at  
2 least objective findings in the medical record that suggest a need for evaluation."

3 Tr. 84. Plaintiff then testified that he did not perform the activities Dr. Levine  
4 relied upon in his conclusion that the activity level was inconsistent with the  
5 medical evidence, i.e. working weekends, walking 25 miles, and lifting bales of  
6 hay. Tr. 84.

7 In her decision, the ALJ found Plaintiff's DVT and left lower extremity  
8 cellulitis resolved prior to the start of the relevant period:

9 Philip Levine, M.D., the medical expert at the hearing testified that the  
10 record contained instances of deep vein thrombosis and dermatitis. He  
11 noted that the claimant might need to elevate his legs every hour for 15  
12 minutes, but any evidence supporting such a limitation is dated prior to  
13 the relevant period. Further, Dr. Levine noted that any such limitation  
14 was outside his area of expertise. The medical evidence after  
15 November 23, 2011 does not include further cellulitis treatment or  
16 recommendations to keep the left leg elevated. Accordingly, the  
undersigned does not consider the claimant's cellulitis or deep vein  
thrombosis severe for the purposes of this decision."

17 Tr. 24.

18 In coming to her conclusion, the ALJ was accurate that there is the evidence  
19 regarding Plaintiff's DVT and the infection from the cellulitis that predate the  
20 November 23, 2011 amended onset date. See Tr. 24 citing Tr. 382 (December 22,  
21 2010 diagnosis of left leg cellulitis); Tr. 396-97 (January 20, 2011 opinion that  
22 Plaintiff would need to keep his leg elevated throughout the workday and required  
23 long term antibiotics for his chronic cellulitis.). However, the ALJ erred in  
24 limiting her analysis of the medical record to just those two diagnoses and these  
25 two records.

26 First, Dr. Levine's testimony was actually regarding Plaintiff's venous  
27 insufficiency and not DVT. Tr. 71. In fact, Dr. Levine never referenced Plaintiff's  
28 DVT in his testimony. Therefore, the ALJ's statement that Dr. Levine provided

1 any testimony regarding limitations from DVT is a misrepresentation of the record.

2 Second, as Plaintiff identified in his briefing, ECF No. 16 at 8, when the  
3 medical evidence surrounding Plaintiff's cardiovascular symptoms is read as a  
4 whole, including the records of venous insufficiency, there are symptoms  
5 persisting after the November 23, 2011 amended onset date: On September 5,  
6 2012, October 7, 2012, November 2, 2012, May 3, 2013, July 24, 2013, July 29,  
7 2013, January 9, 2014 exams revealed venous stasis changes in the right lower  
8 extremity. Tr. 421, 428, 433, 441, 443, 456, 520. On January 26, 2014 Plaintiff  
9 was admitted to the emergency room due to right lower leg cellulitis where he has  
10 chronic venous stasis skin changes. Tr. 1737, 1786. By April 2, 2014, an exam  
11 showed venous stasis disease prominently in the right lower extremity but also  
12 present in the left lower extremity. Tr. 533. During exams on May 20, 2014, June  
13 4, 2014, July 2, 2014, and August 5, 2014 the right lower extremity continued to  
14 show venous stasis changes. Tr. 558, 560, 562, 591. By August 21, 2014, it was  
15 noted that his venous insufficiency was delaying his healing from other procedures  
16 and he was encouraged to elevate his leg. Tr. 593. By February 25, 2015 an exam  
17 found venous stasis disease present in both lower extremities. Tr. 605. On  
18 December 2, 2015 Plaintiff had bilateral cellulitis and presented with edema. Tr.  
19 1848-49. Additionally, Plaintiff presented with edema in his lower extremity  
20 repeatedly during the relevant time period. Tr. 694, 727, 959, 1102, 1136, 1308,  
21 1318, 1341, 1729, 1791.

22 The ALJ commits error by failing to look at the cardiovascular system as a  
23 whole throughout the record. Instead, she isolates DVT and cellulitis to the  
24 exclusion of the evidence surrounding venous insufficiency, which was actually  
25 the subject of Dr. Levine's testimony. As discussed above, there is evidence of  
26 venous insufficiency throughout the relevant time period. Furthermore, Dr. Levine  
27 testified that this was beyond his expertise and a cardiovascular expert may be  
28 necessary. Tr. 83.



1           Therefore, the ALJ’s determination that there was no treatment for cellulitis  
2 after the November 23, 2011 onset date is not supported by substantial evidence,  
3 and the rejection of all cardiovascular symptoms at step two was an error. This  
4 error resulted in Plaintiff’s residual functional capacity determination being void of  
5 consideration of symptoms and resulting limitations from an entire body system.  
6 The vocational expert testified that limitations consistent with Dr. Levine’s opinion  
7 that Plaintiff would be required to elevate his legs so that his foot was above his  
8 hip due to his cardiovascular impairments would require an accommodation from  
9 an employer. Tr. 126. Therefore, leaving out these impairments constitutes  
10 harmful error. As requested by Plaintiff, the case is remanded to develop the  
11 record pertaining to Plaintiff’s cardiovascular impairments. ECF No. 16 at 9. The  
12 ALJ will send Plaintiff for a cardiovascular consultative examination and, if  
13 necessary, take testimony from a cardiovascular expert at remand proceedings  
14 regarding functional limitations resulting from Plaintiff’s cardiovascular  
15 impairments including the need to elevate his lower extremities.

16           **B.     Bilateral Carpal Tunnel**

17           Plaintiff argues that the ALJ failed to attribute Plaintiff’s carpal tunnel  
18 syndrome to both upper extremities. ECF No. 16 at 5. Defendant asserts that the  
19 ALJ did not error because her step two determination did not limit Plaintiff’s  
20 carpal tunnel syndrome to just one extremity. ECF No. 17 at 8. Defendant is  
21 accurate that the ALJ did not limit the carpal tunnel syndrome to one specific side.  
22 Tr. 21. However, for the sake of clarity, upon remand, the ALJ will address  
23 specifically whether her findings regarding carpal tunnel syndrome are bilateral or  
24 limited to a specific side.

25           **C.     Degenerative Joint Disease – Left Shoulder**

26           Plaintiff argues that the ALJ erred by failing to find his degenerative joint  
27 disease in the left shoulder severe. ECF No. 16 at 15, 10. The ALJ’s discussion at  
28 step two includes an entire paragraph regarding the right shoulder impairment with

1 only a single mention of the left shoulder: “Leona Hays, ARNP, a nurse  
2 specializing in orthopedics, examined him in April 2013 and diagnosed him with  
3 bilateral degenerative joint disease symptomatically affecting the right greater than  
4 left.” Tr. 23.

5 There is evidence of a bilateral shoulder impingement from 2012. See Tr.  
6 406 (a diagnosis by Leona Hays, ARNP). Daniel Canfield diagnosed Plaintiff with  
7 bilateral shoulder rotator cuff impingement in July 2013 citing an MRI showing  
8 arthrosis in the left shoulder. Tr. 425. Therefore, the ALJ’s failure to discuss the  
9 left shoulder impairment in depth at step two is an error. Upon remand, the ALJ  
10 will address Plaintiff’s left shoulder at step two.

#### 11 **D. Degenerative Joint Disease – Hip**

12 While Plaintiff alleges that the ALJ failed to consider his degenerative joint  
13 disease of the hip, ECF No. 16 at 5, he did not present evidence in his briefing to  
14 support his assertion that this is a severe impairment, *Id.* at 5-11. However, since  
15 the case is being remanded for a new step two determination, the ALJ will consider  
16 whether the medical evidence supports a finding of a medically determinable  
17 impairment of the hips and if that impairment is severe.

#### 18 **2. Opinion Evidence**

19 Plaintiff argues that the ALJ failed to properly consider and weigh the  
20 opinion of Ben Murrell, PAC and that his opinion supports a less than sedentary  
21 residual functional capacity determination. ECF No. 16 at 12-13.

22 Plaintiff submitted Mr. Murrell’s opinion to the Appeals Council, Tr. 4,  
23 meaning the opinion was not part of the file before the ALJ at the time of her  
24 opinion. The administrative record before the district court includes evidence  
25 submitted to and considered for the first time by the Appeals Council. *Brewes v.*  
26 *Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1162-63 (9th Cir. 2012). Since it is  
27 now a part of the administrative record, the ALJ will address this opinion on  
28 remand.

1           Additionally, Plaintiff challenges the ALJ’s rejection of Dr. Levine’s  
2 opinion that Plaintiff would need to elevate his lower extremities throughout the  
3 day. ECF No. 16 at 16-17. As addressed at length above, the case is being  
4 remanded for the ALJ to properly address Plaintiff’s cardiovascular impairments  
5 and their resulting limitations. This would require the ALJ to readdress Dr.  
6 Levine’s statements on remand.

7 **3. Plaintiff’s Symptom Statements**

8           Plaintiff contests the ALJ’s determination that Plaintiff’s symptom  
9 statements were not entirely credible. ECF No. 16 at 13-14, 17-22.

10           A new residual functional capacity determination will be necessary in light  
11 of the ALJ’s error at step two and the new opinion evidence in the administrative  
12 record. A residual functional capacity determination requires the ALJ to address  
13 the reliability of Plaintiff’s symptom statements. S.S.R. 16-3p. Therefore, upon  
14 remand the ALJ will readdress the consistency of Plaintiff’s symptom statements  
15 with medical evidence and other evidence in the record in accord with S.S.R. 16-  
16 3p.

17 **4. Grid Rules**

18           Plaintiff asserts that the ALJ erred by failing to apply grid rule 201.10 at step  
19 five. ECF No. 16 at 11-12.

20           The grids are an administrative tool on which the Commissioner must rely  
21 when considering claimants with substantially equivalent levels of impairment.  
22 *Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988). The Ninth Circuit has  
23 recognized that significant non-exertional impairments may make reliance on the  
24 grids inappropriate. *Desrosiers v. Sec. of Health and Human Services*, 846 F.2d  
25 573, 577 (9th Cir. 1988). The fact that a non-exertional limitation has been alleged  
26 does not automatically preclude the application of the grids. *Id.* “The ALJ should  
27 first determine if a claimant’s non-exertional limitations significantly limit the  
28 range of work permitted by his exertional limitations.” *Id.*

1 Here, the ALJ found Plaintiff capable of a limited range of light work with  
2 some non-exertional limitations. Tr. 26. At step five, the ALJ considered grid  
3 rules 202.21 and 202.14 and stated that she took testimony from a vocational  
4 expert to determine the extent to which the nonexertional limitations eroded the  
5 unskilled light occupational base. Tr. 34.

6 Rule 202.21 addresses a light residual functional capacity with a high school  
7 diploma or more and skilled or semiskilled previous work experience with no  
8 transferable skills. 20 C.F.R. Part 404, Subpart P, Appendix 2. Rule 202.14  
9 addresses a light residual functional capacity with a high school diploma or more  
10 and unskilled or no previous work experience. Id. Both of these rules result in a  
11 finding of “not disabled.” Id. Rule 201.10, which Plaintiff argues should have  
12 been applied, addresses a sedentary residual functional capacity with a limited  
13 education, with skilled or semiskilled previous work but skills that are not  
14 transferable. Id. Application of this rule results in a finding of “disabled.” Id.  
15 However, as address above, the ALJ found Plaintiff capable of a light residual  
16 functional capacity determination. Tr. 26. Therefore, based on the residual  
17 functional capacity determination in the ALJ’s decision the application of Rule  
18 201.10 would have been inappropriate.

19 This case is being remanded for the ALJ to make a new step two  
20 determination and consider the new opinion evidence, which means a new residual  
21 functional capacity determination will be necessary. The ALJ will then address the  
22 grids at step five and apply the rule that corresponds with the new residual  
23 functional capacity determination.

#### 24 **5. Step Five**

25 Plaintiff argues that the ALJ’s step five determination was rendered invalid  
26 by his error at step two resulting in an inaccurate residual functional capacity  
27 determination. ECF No. 16 at 14-15. The case is being remanded for a new step  
28 two determination and the consideration of new opinion evidence. The ALJ will

1 also make a new step five determination upon remand.

## 2 **REMEDY**

3 The decision whether to remand for further proceedings or reverse and  
4 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
5 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
6 where “no useful purpose would be served by further administrative proceedings,  
7 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
8 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
9 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
10 (9th Cir. 1990); see also *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
11 (noting that a district court may abuse its discretion not to remand for benefits  
12 when all of these conditions are met). This policy is based on the “need to  
13 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are  
14 outstanding issues that must be resolved before a determination can be made, and it  
15 is not clear from the record that the ALJ would be required to find a claimant  
16 disabled if all the evidence were properly evaluated, remand is appropriate. See  
17 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
18 F.3d 1172, 1179-80 (9th Cir. 2000).

19 In this case, it is not clear from the record that the ALJ would be required to  
20 find Plaintiff disabled if all the evidence were properly evaluated. Further  
21 proceedings are necessary for the ALJ to address all Plaintiff’s severe impairments  
22 at step two, address the opinion evidence in the file, form a new residual functional  
23 capacity determination to include a consideration of Plaintiff’s symptom  
24 statements, and make a new step five determination. The ALJ will supplement the  
25 record with any outstanding evidence, send Plaintiff for a cardiovascular  
26 consultative examination, and, if necessary, call a cardiovascular expert to testify  
27 at remand proceedings.

28 //

1 **CONCLUSION**

2 Accordingly, **IT IS ORDERED:**

3 1. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is  
4 **DENIED.**

5 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, 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 May 9, 2018.

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

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE