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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 HERBERT C. GRIFFIN,

8 Plaintiff,

Case No. C17-308 RAJ

9 v.

10 NANCY A. BERRYHILL, Deputy
11 Commissioner of Social Security for Operations,

12 Defendant.

**ORDER REVERSING AND
REMANDING THE CASE FOR
FURTHER ADMINISTRATIVE
PROCEEDINGS**

13 Plaintiff Herbert C. Griffin filed a pro se complaint requesting the Court reverse the
14 Commissioner's decision finding him not disabled. Dkt. 4. After scrutinizing the record, the
15 Court finds the Commissioner harmfully erred by failing to provide any reason to reject Mr.
16 Griffin's testimony that he cannot sit, stand, or walk for more than one hour at a time.
17 Accordingly, as discussed below, the Court **REVERSES** the Commissioner's final decision and
18 **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. §
19 405(g).

20 **BACKGROUND**

21 Mr. Griffin is currently 49 years old and has worked as a truck driver. Tr. 33. He applied
22 for benefits, alleging disability as of August 3, 2013. Tr. 27. His applications were denied
23 initially and on reconsideration, and he requested a hearing before an Administrative Law Judge

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1 (ALJ). Tr. 27.

2 **A. The ALJ's Decision**

3 After the ALJ conducted a hearing on January 6, 2015, the ALJ issued a decision finding
4 Mr. Griffin not disabled. Tr. 27-34. Using the five-step disability evaluation process described in
5 20 C.F.R. §§ 404.1520, 416.920, the ALJ found:

6 **Step one:** Mr. Griffin has not worked since August 3, 2013, the alleged onset date.

7 **Step two:** He has the following severe impairments: diabetes with neuropathy, chronic
8 pain, depression and adjustment disorder.

9 **Step three:** These impairments do not meet or equal the requirements of a listed
10 impairment as defined in 20 C.F.R. Part 404, Subpart P. Appendix 1.

11 **Residual Functional Capacity (RFC):** Mr. Griffin can perform sedentary work, but
12 with these limits: frequent overhead reaching bilaterally, occasional postural activities, no
13 climbing ladders, ropes or scaffolds, avoid concentrated exposure to hazards. He can
14 learn, understand, remember and carry out simple routine repetitive tasks in two hour
15 increments. He can walk with a cane in his right hand, as needed.

16 **Step four:** Mr. Griffin cannot perform his past relevant work as a truck driver.

17 **Step five:** As there are other jobs that exist in significant numbers in the national
18 economy that he can perform, Mr. Griffin is not disabled.

19 Tr. 29-34.

20 **B. The Appeals Council Decision**

21 Mr. Griffin apparently obtained counsel only for his appeal to the Appeals Council. *See*
22 Tr. 269-72. The Appeals Council granted Mr. Griffin's request for review, clarified the ALJ's
23 findings at steps two, four, and five, but still found Mr. Griffin was not disabled. Tr. 5-6. At
step two, the Council clarified the "chronic pain" finding as "impingement syndrome with partial
rotator cuff tear" but noted that the ALJ had, in any case, already "considered the effects of the
claimant's severe shoulder impairment." Tr. 6. The Council also noted the ALJ had erroneously
listed light jobs Mr. Griffin could perform, while his RFC was limited to sedentary. Tr. 6. The

1 Council adopted the sedentary RFC and found at step four that Mr. Griffin could not perform his
2 past work. *Id.* Using the vocational expert’s testimony at the ALJ’s hearing to conclude that Mr.
3 Griffin could perform the sedentary unskilled jobs of assembler, sorter, and visual inspector, the
4 Council found at step five that Mr. Griffin could perform jobs found in significant numbers and
5 thus was not disabled. Tr. 6-7. The Appeal Council’s decision modifying the ALJ’s decision is
6 thus the Commissioner’s final decision, which the Court now reviews. Tr. 5-8.

7 **DISCUSSION**

8 Mr. Griffin asks the Court to reverse the Commissioner’s final decision and remand for
9 payment of benefits or for further administrative proceedings before an ALJ. Dkt. 18 at 6. In his
10 pro se complaint, Mr. Griffin alleges the ALJ “overlooked” what he and his doctors explained.
11 Dkt. 4 at 3, ¶ 6. The Court noted in the Scheduling Order that the Court understands Mr.
12 Griffin’s complaint to “challenge the ALJ and the Appeal’s Council’s evaluation of the medical
13 evidence and his own testimony” with respect to his shoulder and diabetes impairments. Dkt. 15
14 at 2.

15 The Court may reverse the ALJ’s decision finding a person not disabled “only if it is not
16 supported by substantial evidence or is based on legal error.” *Andrews v. Shalala*, 53 F.3d 1035,
17 1039 (9th Cir. 1995). Substantial evidence means such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion. *Id.* The Court cannot make its own findings,
19 but must consider the entire record as a whole in determining whether the Commissioner’s
20 conclusions have a reasonable basis. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003);
21 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). Additionally, where a party
22 proceeds pro se, the Court must construe the allegations of the pleading liberally and afford him
23 the benefit of any doubt. *See Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en

1 banc).

2 **A. Mr. Griffin’s Testimony**

3 Mr. Griffin contends the ALJ erred in deeming his testimony “partially credible,” arguing
4 that he has “never lie[d]” in any courtroom. Dkt. 18 at 4. The ALJ largely accepted Mr.
5 Griffin’s testimony, concluding that “the allegations of disabling symptoms and limitations from
6 pain are credible and that a reduced RFC is appropriate.” Tr. 32. The ALJ found that “his
7 allegations of painful feet requiring use of a cane to assist are supported by the evidence” and
8 included cane use in the RFC. Tr. 31, 32. Mr. Griffin testified that he can lift 35 pounds, which
9 the ALJ accepted. Tr. 32. The ALJ found that Mr. Griffin complained of “loss of concentration”
10 and accordingly imposed limitations in the RFC of only simple, routine, repetitive tasks. Tr. 31,
11 32.

12 **1. Sit/Walk/Stand Limitations**

13 Mr. Griffin testified he can sit, stand, or walk for up to one hour each. Tr. 69-70. The
14 ALJ implicitly discounted this testimony by determining that he has the RFC to work in two-
15 hour increments. Tr. 31, 32.

16 Where, as here, the ALJ finds the claimant’s impairments could reasonably be expected
17 to cause his symptoms and there is no affirmative evidence of malingering, the ALJ can only
18 reject the claimant’s testimony for specific, clear and convincing reasons. *Garrison v. Colvin*,
19 759 F.3d 995, 1014-15 (9th Cir. 2014).

20 The ALJ did not provide any reason to discount Mr. Griffin’s testimony that he can only
21 sit, stand, or walk for an hour.¹ Nor did the ALJ make a generalized finding of credibility, other

22 ¹ While the ALJ gave “some weight” to state agency nonexamining physicians who opined in
23 September 2013 that Mr. Griffin could sit, stand, or walk for six hours each total in an 8-hour
work day with normal breaks, the ALJ did not cite these opinions as a reason to discount Mr.

1 than a boilerplate statement that his testimony is “partially credible.” Tr. 32; *see Light v. Soc.*
2 *Sec. Admin.*, 119 F.3d 789, 793 (finding error because “the ALJ failed to articulate an acceptable
3 reason either for disbelieving Light’s testimony in general or for discrediting his pain testimony
4 specifically”). The ALJ’s entire analysis of Mr. Griffin’s testimony was as follows:

5 The claimant’s testimony is partially credible. He testified that he could stand one
6 hour, walk 30 to 60 minutes depending on his foot pain and sit for an hour. He
7 can lift/carry 35 pounds occasionally, or 17 with his dominant right arm and 12
8 with his left. This level of exertional capacity belies the allegation of a severe
9 residual shoulder impairment. He underwent debridement and MRIs show a
10 remaining partial tear, but he evinces no limitations related to it. At the same
11 time, his allegations of painful feet requiring use of a cane to assist are supported
12 by the evidence. In addition to the supportive medical findings, consideration of
13 regulatory factors leads to a conclusion that the allegations of disabling symptoms
14 and limitations from pain are credible and that a reduced RFC is appropriate. 20
15 CFR 404.1529(c)(3); SSR 96-7p. Overall, his diabetes is accompanied by
16 hyperglycemia, loss of sensation and neuropathy. His toe problems appear to
17 have resolved, with removal of two toenails and re-growth without incident.
18 There is not nephropathy, retinopathy or other complications. The diagnosis of
19 depression is not supported by actual treatment and he does not complain of
20 functional limitations beyond the loss of concentration caused by his medications.

21 Tr. 32. The Appeals Council adopted the ALJ’s analysis. Tr. 7. The Commissioner’s briefing
22 does not address the issue of Mr. Griffin’s testimony.

23 The Court concludes the ALJ erred by failing to provide any reason, much less a specific,
clear and convincing reason, to discount Mr. Griffin’s testimony. The error is harmful because
the RFC, and hypothetical questions to a vocational expert, must include all of the claimant’s
limitations, and did not. *See* 20 C.F.R. § 416.945(a); *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th
Cir. 2002). On remand, the ALJ must reevaluate Mr. Griffin’s testimony.

2. Vision

Mr. Griffin argues his “blurry vision” is a severe impairment that the ALJ failed to take

Griffin’s testimony. Tr. 32 (citing Tr. 86, 93).

1 into account. Dkt. 16 at 4. At the hearing, Mr. Griffin had two pairs of glasses with him. Tr. 60.
2 He testified that with one pair he could see far away (“right now you’re perfectly focused”) and
3 with the other pair he could see near (paperwork “is all perfectly legible”). Tr. 61. “Impairments
4 that can be controlled effectively with [treatment] are not disabling for the purpose of
5 determining eligibility for SSI benefits.” *Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001,
6 1006 (9th Cir. 2006). Because his vision is correctable with glasses, Mr. Griffin does not have a
7 severe vision impairment for purposes of the disability determination, and thus the Court finds
8 no error.

9 **3. Assistive Devices**

10 Mr. Griffin also argues that the ALJ erred by failing to take into account evidence that his
11 cane, “Extra Depth Type Shoes” and walker are all prescribed, not merely suggested, by his
12 doctors. Dkt. 16 at 1-2. The Court disagrees. The ALJ included use of the cane in the RFC and
13 thus any error is harmless. While use of a cane might create a limitation because it may reduce
14 an employee’s capabilities (for example, an employee cannot carry anything in his right hand
15 while walking), there is no indication that use of special shoes creates a limitation. Lastly, it
16 appears that Mr. Griffin began using the walker sometime after the ALJ’s decision on April 24,
17 2015, and thus it is not relevant to the disability determination that the Court is reviewing.

18 **B. Medical Evidence**

19 The medical record is remarkably sparse—as the ALJ noted, there are no medical
20 opinions from any treating or examining physician. Tr. 32. The only medical opinions are from
21 two state agency physicians who did not examine Mr. Griffin. *Id.* In addition, Mr. Griffin’s pro
22 bono counsel requested the Appeals Council obtain additional treatment records from 2013. Tr.
23 273 (citing Tr. 252-53). It is unclear whether the request was granted or all relevant records have

1 now been received and considered. *See* Tr. 5. An ALJ has a duty to fully and fairly develop the
2 record and ensure that the claimant’s interests are considered, being especially diligent when as
3 here the claimant is unrepresented. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).
4 On remand, the ALJ should consider whether to further develop the medical evidence.

5 **C. RFC Determination**

6 Mr. Griffin contends the ALJ erred by using three different RFC determinations in her
7 decision. Dkt. 16 at 4. Mr. Griffin is correct; however, the Appeals Council recognized and
8 corrected the error. Tr. 6. The ALJ defined a sedentary RFC, which the Appeals Council
9 adopted and is the RFC at issue in this case. Tr. 31. However, at step four, the ALJ mistakenly
10 referred to a light RFC as the reason that Mr. Griffin could not perform his past medium-duty
11 work as a truck driver. Tr. 33. The Appeals Council noted that, with the correct sedentary RFC,
12 Mr. Griffin is still unable to perform his past work. Tr. 6. Again at step five, the ALJ
13 erroneously referred to an RFC to perform light work with additional limitations. Tr. 33. The
14 Appeals Council revised this finding, using the correct sedentary RFC, and found that Mr.
15 Griffin could perform sedentary jobs that the vocational expert testified existed in significant
16 numbers. Tr. 6-7. Thus, while the ALJ did err, the error was harmless because it did not affect
17 the outcome of the disability determination. *See Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d
18 1050, 1055 (9th Cir. 2006) (error is harmless if “inconsequential to the ultimate nondisability
19 determination”).

20 Mr. Griffin further argues the Commissioner erred by not including all of his limitations
21 in the sedentary RFC. The RFC at issue states:

22 [T]he claimant has the RFC to perform sedentary work as defined in 20 CFR
23 404.1567(c) and 416.967(c)² except frequent overhead reaching bilaterally;

² The ALJ presumably meant subsections (a) in both regulations, because subsections (c) refer to
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1 occasional postural activities, no climbing of ladders, ropes or scaffolds; need to
2 avoid concentrated exposure to hazards (i.e., unprotected heights and moving
3 dangerous machinery); he can learn, understand, remember and carry out simple
4 routine repetitive tasks in two hour increments. Additionally, he can ambulate
5 with a cane in his right hand, as needed.

6 Tr. 31. “Jobs are sedentary if walking and standing are required occasionally” only. 20 C.F.R.
7 §§ 404.1567(a), 416.967(a). “‘Occasionally’ means occurring from very little up to one-third of
8 the time.” SSR 83-10, available at 1983 WL 31251, at *5.

9 Mr. Griffin argues that the evidence supports a sedentary RFC with additional
10 “limitations in both upper and lower extremities.” Dkt. 16 at 4. The RFC does limit upper
11 extremity overhead reaching bilaterally, and it does impose limits regarding lower extremities by
12 requiring that he be permitted to use a cane when walking. Mr. Griffin does not explain how the
13 evidence supports any greater limitations on upper³ or lower extremity use, and thus the Court
14 finds no error. *See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (plaintiff bears the
15 burden of proving he is disabled). In any case, on remand the ALJ must reevaluate Mr. Griffin’s
16 testimony and consider whether to further develop the record, and thus will have the opportunity
17 to reconsider the RFC.

18 **D. Vocational Expert**

19 Mr. Griffin argues that the ALJ and Appeals Council erred in relying on the vocational
20 expert’s testimony at step five. Dkt. 16 at 3. The hearing transcript shows that the ALJ posed
21 several hypotheticals to the vocational expert, including one that matched the sedentary RFC in
22 the ALJ’s decision. Tr. 79. The expert testified that such a hypothetical person could perform
23 the jobs of assembler, sorter, and visual inspector. Tr. 80. The Appeals Council relied on this

medium work.

³ Mr. Griffin testified that he can lift 35 pounds, which is well above the 10-pound limit for
sedentary work. See 20 C.F.R. §§ 404.1567(a), 414.967(a).

1 testimony to conclude that Mr. Griffin could perform jobs that existed in significant numbers and
2 thus was not disabled. Tr. 6, 8. The Court concludes the Commissioner did not err in relying on
3 the vocational expert's testimony. However, as discussed above, on remand the ALJ will
4 reconsider Mr. Griffin's testimony and the medical record and, if the RFC is reformulated, may
5 require additional vocational expert testimony.

6 **E. Scope of Remand**

7 In general, the Court has discretion to remand for further proceedings or to award
8 benefits. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1100 (9th Cir. 2014). The
9 Court may remand for further proceedings if enhancement of the record would be useful. *See*
10 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 1990). The Court may remand for benefits
11 where (1) the record is fully developed and further administrative proceedings would serve no
12 useful purpose; (2) the ALJ fails to provide legally sufficient reasons for rejecting evidence,
13 whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence
14 were credited as true, the ALJ would be required to find the claimant disabled on remand.
15 *Garrison*, 759 F.3d at 1020. "Where there is conflicting evidence, and not all essential factual
16 issues have been resolved, a remand for an award of benefits is inappropriate." *Treichler*, 775
17 F.3d at 1101.

18 Here, there is conflicting evidence in the record and it is not clear that the ALJ would be
19 required to find Mr. Griffin disabled if his testimony were properly considered. It is also unclear
20 whether relevant medical evidence is missing and whether the ALJ should further develop the
21 record. Because the record as it stands does not compel a finding of disability, the Court finds it
22 appropriate to remand this case for further administrative proceedings. *See Treichler*, 775 F.3d
23 at 1107.

1 **CONCLUSION**

2 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
3 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
4 405(g).

5 On remand, the ALJ shall reevaluate Mr. Griffin’s testimony, develop the record as
6 needed, reassess the RFC and continue to step five as necessary.

7 DATED this 2nd day of July, 2018.

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10 The Honorable Richard A. Jones
11 United States District Judge