

1  
2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 JOHN P. JONES,

7 Plaintiff,

8 v.

9 MICHAEL J. ASTRUE, Commissioner of  
10 Social Security,

11 Defendant.

Case No. 3:12-cv-05241-KLS

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

12 Plaintiff has brought this matter for judicial review of defendant's denial of his  
13 applications for disability insurance and supplemental security income ("SSI") benefits.  
14 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the  
15 parties have consented to have this matter heard by the undersigned Magistrate Judge. After  
16 reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons  
17 set forth below, defendant's decision to deny benefits should be reversed and that this matter  
18 should be remanded for further administrative proceedings.  
19

20 FACTUAL AND PROCEDURAL HISTORY

21 On August 6, 2008, plaintiff filed an application for disability insurance benefits, and on  
22 August 12, 2008, he filed another one for SSI benefits, alleging in both applications that he  
23 became disabled beginning April 1, 2006, due to an attention deficit hyperactivity disorder and a  
24 bipolar disorder. See Administrative Record ("AR") 14, 150, 154, 181. Both applications were  
25 denied upon initial administrative review on October 20, 2008, and on reconsideration on  
26

ORDER - 1

1 January 26, 2009. See AR 14, 80, 84, 90, 92. A hearing was held before an administrative law  
2 judge (“ALJ”) on June 24, 2010, at which plaintiff, represented by counsel, appeared and  
3 testified, as did a medical expert and a vocational expert. See AR 33-75.

4 On August 24, 2010, the ALJ issued a decision in which plaintiff was determined to be  
5 not disabled. See AR 14-27. Plaintiff’s request for review of the ALJ’s decision was denied by  
6 the Appeals Council on January 17, 2012, making the ALJ’s decision defendant’s final decision.  
7 See AR 1; see also 20 C.F.R. § 404.981, § 416.1481. On March 21, 2012, plaintiff filed a  
8 complaint in this Court seeking judicial review of defendant’s decision. See ECF #3. The  
9 administrative record was filed with the Court on June 4, 2012. See ECF #9. The parties have  
10 completed their briefing, and thus this matter is now ripe for the Court’s review.

11 Plaintiff argues defendant’s decision should be reversed and remanded for further  
12 administrative proceedings, because the ALJ erred: (1) in discounting plaintiff’s credibility; (2)  
13 in assessing her residual functional capacity; and (3) in posing an incomplete hypothetical  
14 question to the vocational expert at the hearing. For the reasons set forth below, the Court agrees  
15 the ALJ erred in assessing plaintiff’s residual functional capacity and thus in determining  
16 plaintiff to be not disabled. The Court therefore finds that defendant’s decision should be  
17 reversed, this matter should be remanded for further administrative proceedings.

#### 18 DISCUSSION

19 The determination of the Commissioner of Social Security (the “Commissioner”) that a  
20 claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been  
21 applied by the Commissioner, and the “substantial evidence in the record as a whole supports”  
22 that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v.  
23 Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan,

1 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will,  
2 nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence  
3 and making the decision.”) (citing Brawner v. Secretary of Health and Human Services, 839 F.2d  
4 432, 433 (9th Cir. 1987)).

5 Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
6 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation  
7 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if  
8 supported by inferences reasonably drawn from the record.”). “The substantial evidence test  
9 requires that the reviewing court determine” whether the Commissioner’s decision is “supported  
10 by more than a scintilla of evidence, although less than a preponderance of the evidence is  
11 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence  
12 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.  
13 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence  
14 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting  
15 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

#### 18 I. The ALJ’s Assessment of Plaintiff’s Credibility

19 Questions of credibility are solely within the control of the ALJ. See Sample, 694 F.2d at  
20 642. The Court should not “second-guess” this credibility determination. Allen, 749 F.2d at 580.

---

22 <sup>1</sup> As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by  
25 substantial evidence, the courts are required to accept them. It is the function of the  
26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may  
not try the case de novo, neither may it abdicate its traditional function of review. It must  
scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are  
rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

1 In addition, the Court may not reverse a credibility determination where that determination is  
2 based on contradictory or ambiguous evidence. See id. at 579. That some of the reasons for  
3 discrediting a claimant’s testimony should properly be discounted does not render the ALJ’s  
4 determination invalid, as long as that determination is supported by substantial evidence.  
5 Tonapetyan , 242 F.3d at 1148.

6  
7 To reject a claimant’s subjective complaints, the ALJ must provide “specific, cogent  
8 reasons for the disbelief.” Lester, 81 F.3d at 834 (citation omitted). The ALJ “must identify what  
9 testimony is not credible and what evidence undermines the claimant’s complaints.” Id.; see also  
10 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the  
11 claimant is malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “clear  
12 and convincing.” Lester, 81 F.2d at 834. The evidence as a whole must support a finding of  
13 malingering. See O’Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

14  
15 In determining a claimant’s credibility, the ALJ may consider “ordinary techniques of  
16 credibility evaluation,” such as reputation for lying, prior inconsistent statements concerning  
17 symptoms, and other testimony that “appears less than candid.” Smolen v. Chater, 80 F.3d 1273,  
18 1284 (9th Cir. 1996). The ALJ also may consider a claimant’s work record and observations of  
19 physicians and other third parties regarding the nature, onset, duration, and frequency of  
20 symptoms. See id.

21  
22 The ALJ in this case found “[t]he overall record and objective medical evidence do not  
23 support the alleged severity of [plaintiff’s] symptoms and limitations.” AR 22. A determination  
24 that a claimant’s subjective complaints are “inconsistent with clinical observations” can satisfy  
25 the above clear and convincing requirement. Regennitter v. Commissioner of SSA, 166 F.3d  
26 1294, 1297 (9th Cir. 1998). Plaintiff argues this should not be seen as a clear and convincing

1 reason for discounting his credibility, because “the ALJ simply summarized the approximately  
2 500 pages of medical records in six short paragraphs.” ECF #12, p. 6. The Court does not agree  
3 that this is what the ALJ *simply* did here.

4 An ALJ may resolve questions of credibility and conflicts in the evidence in the record,  
5 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,  
6 stating his interpretation thereof, and making findings.” Reddick v. Chater, 157 F.3d 715, 725  
7 (9th Cir. 1998). This is what the ALJ did in this case. Specifically, rather than just summarize  
8 all of the medical evidence in the record as plaintiff asserts, the ALJ noted mental and physical  
9 symptoms and limitations plaintiff alleged to be disabling (see AR 22), and then explained how  
10 the clinical findings and other objective medical evidence in the record contradicted them (see  
11 AR 22-23). This was sufficient.

12  
13 Plaintiff further complains that the ALJ “did not make specific findings that explained  
14 what testimony was being disregarded or what evidence undermined it,” and in particular that the  
15 ALJ’s “general discussion of the medical evidence was never related to any specific testimony  
16 that the ALJ was finding not credible,” including the testimony regarding “the severity of his  
17 memory and concentration problems.” ECF #12, p. 6. As just noted, however, after noting the  
18 allegations of disabling symptoms and limitations plaintiff made in his testimony and self-reports  
19 (see AR 22), the ALJ set forth the specific medical evidence in the record that contradicted them.  
20 For example, despite plaintiff’s claim that he was always in pain, the medical evidence listed by  
21 the ALJ showed mostly unremarkable findings. See AR 22-23.

22  
23  
24 As for plaintiff’s alleged memory and concentration problems, the ALJ summarized the  
25 mental status examination findings resulting from the psychological evaluation performed by  
26 Allison Schechter, Psy.D., in late September 2008, which revealed no difficulties in completing

1 “serial 3s and serial 7s” or spelling the word “world” forward and backward, and which showed  
2 a “good” ability in calculation. AR 22 (citing AR 465-70). While it appears plaintiff was unable  
3 to fully complete the memory tasks given him (see AR 467), Dr. Schechter did not find he had  
4 any work-related limitation due to memory problems (see AR 469-70). Further, although Dr.  
5 Schechter opined that plaintiff “may not be able to perform detailed and complex tasks because  
6 of his inattention and concentration,” and therefore limited him to performing only simple and  
7 repetitive tasks (AR 469), the ALJ did not disagree with this (see AR 21). Plaintiff, therefore,  
8 has failed to show any harmful error here.<sup>2</sup>

10 It is true that to find a claimant’s “allegations of severity to be not credible,” the ALJ  
11 “must specifically make findings which support this conclusion.” Bunnell v. Sullivan, 947 F.2d  
12 341, 345 (9th Cir. 1991). There is no requirement, however, that the ALJ refute each and every  
13 allegation a claimant makes, but rather is only “required to make ‘a credibility determination  
14 with findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily  
15 discredit claimant’s testimony.’” Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008)  
16 (quoting Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir.2002)); see also Bunell, 947 F.2d at  
17 345-46 (noting that “a reviewing court should not be forced to *speculate* as to the grounds for an  
18 adjudicator’s rejection of a claimant’s allegations of disabling pain”) (emphasis added). In this  
19 case, as explained above, the Court has not had to speculate as to the grounds on which the ALJ  
20 discounted plaintiff’s credibility, as they are sufficiently specific.

23 A claimant’s pain testimony though may not be rejected “*solely* because the degree of  
24 pain alleged is not supported by objective medical evidence.” Orteza v. Shalala, 50 F.3d 748,

---

26 <sup>2</sup> See Parra v. Astrue, 481 F.3d 742, 747 (9th Cir. 2007) (finding any error on part of ALJ would not have affected  
“ALJ’s ultimate decision.”); Stout v. Commissioner, Social Security Admin., 454 F.3d 1050, 1055 (9th Cir. 2006)  
(error harmless where it is non-prejudicial to claimant or irrelevant to ALJ’s ultimate disability conclusion); see also  
Ludwig v. Astrue, 681 F.3d 1047, 1054 (burden on party claiming error to demonstrate its harmfulness).

1 749-50 (9th Cir. 1995) (quoting Bunnell, 947 F.2d at 346-47) (emphasis added); see also Rollins  
2 v. Massanari, 261 F.3d 853, 856 (9th Cir.2001); Fair v. Bowen, 885 F.2d 597, 601 (9th Cir.  
3 1989). The same is true with respect to a claimant’s other subjective complaints. See Byrnes v.  
4 Shalala, 60 F.3d 639, 641-42 (9th Cir. 1995) (finding that while Bunnell was couched in terms of  
5 subjective complaints of pain, its reasoning extended to non-pain complaints as well).

6 The ALJ in this case did provide other clear and convincing reasons for discounting  
7 plaintiff’s credibility. For example, the ALJ found in relevant part that:

8  
9 An April 23, 2009 treatment note from Group Health Behavioral Health  
10 shows that the claimant had returned to daily NA meetings and was going  
11 [sic] much better; “a 180” since his previous session. He was managing his  
12 anxiety and his appetite improved and he had gained weight. He was getting  
up in the morning rather than wanting to stay in bed. He also said that praying  
and attending helped him, and he would continue both. Exhibit 16F/4-5.

13 AR 23. The ALJ may discount a claimant’s credibility on the basis of medical improvement. See  
14 Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); Tidwell v.  
15 Apfel, 161 F.3d 599, 601 (9th Cir. 1998). Plaintiff has not challenged this basis for finding him  
16 to be not entirely credible, nor does the Court find it to be improper.

17 The ALJ also found as follows:

18 Further undermining the claimant’s credibility, an April 13, 2009 treatment  
19 note from Group Health Behavioral Health shows that Agape wanted the  
20 claimant to “get on Social Security,” but he did “not believe he [was]  
disabled.” Exhibit 16F/6.

21 AR 23. As noted above, the ALJ may consider “ordinary techniques of credibility evaluation,”  
22 such as prior inconsistent statements concerning symptoms and other testimony that “appears  
23 less than candid.” Smolen, 80 F.3d at 1284. This includes an ALJ’s reliance on the claimant’s  
24 testimony that his or her alleged impairment “was not a ‘disabling problem.’” Tommasetti, 533  
25 F.3d at 1040. Plaintiff argues that at the time he made the above statement, he simply was not  
26

1 able to accept the severity of his symptoms and the fact that he was unable to work. But as noted  
2 by defendant, plaintiff's argument holds no water here, given that back in early August 2008, he  
3 filed his applications for disability insurance and SSI benefits, expressly alleging he first became  
4 disabled on April 1, 2006. See AR 14, 150, 154.

5 II. The ALJ's Assessment of Plaintiff's Residual Functional Capacity

6 Defendant employs a five-step "sequential evaluation process" to determine whether a  
7 claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found  
8 disabled or not disabled at any particular step thereof, the disability determination is made at that  
9 step, and the sequential evaluation process ends. See id. If a disability determination "cannot be  
10 made on the basis of medical factors alone at step three of that process," the ALJ must identify  
11 the claimant's "functional limitations and restrictions" and assess his or her "remaining  
12 capacities for work-related activities." Social Security Ruling ("SSR") 96-8p, 1996 WL 374184  
13 \*2. A claimant's residual functional capacity ("RFC") assessment is used at step four to  
14 determine whether he or she can do his or her past relevant work, and at step five to determine  
15 whether he or she can do other work. See id.

16 Residual functional capacity thus is what the claimant "can still do despite his or her  
17 limitations." Id. It is the maximum amount of work the claimant is able to perform based on all  
18 of the relevant evidence in the record. See id. However, an inability to work must result from the  
19 claimant's "physical or mental impairment(s)." Id. Thus, the ALJ must consider only those  
20 limitations and restrictions "attributable to medically determinable impairments." Id. In  
21 assessing a claimant's RFC, the ALJ also is required to discuss why the claimant's "symptom-  
22 related functional limitations and restrictions can or cannot reasonably be accepted as consistent  
23 with the medical or other evidence." Id. at \*7.



1 In this case, the ALJ found plaintiff had the residual functional capacity:

2 . . . to perform light work . . . He can lift and/or carry 20 pounds  
3 occasionally and 10 pounds frequently. He can stand and/or walk with  
4 normal breaks for a total of about six hours in an eight-hour workday.  
5 He can sit with normal breaks for a total of about six hours in an eight-  
6 hour workday. He can occasionally stoop, crouch, crawl, and climb  
7 ladders, ropes or scaffolds. He does not have any manipulative or visual  
8 limitations and there is not [sic] evidence of any other physical limitations  
9 or restrictions. The claimant's nonexertional limitations limit him to the  
10 performance of simple, routine, repetitive tasks. He can make judgment  
11 and exercise discretion in the performance of those simple, repetitive, and  
12 routine tasks. He can accept instructions from supervisors as long as  
13 those instructions are clearly explained. He can interact appropriately  
14 with coworkers as would be required in a routine work setting and with  
15 members of the public. The claimant can perform his work activities and  
16 needs supervision that would require more than a brief demonstration or  
17 explanation of his work duties, at least initially.

18 AR 21 (emphasis in original). Plaintiff argues this RFC assessment is not completely accurate,  
19 because while the ALJ gave "substantial weight" to the opinion of Dr. Schechter (AR 23), she  
20 did not fully adopt all of the functional limitations Dr. Schechter found. Specifically, plaintiff  
21 notes that whereas Dr. Schechter opined that he "should be able to maintain work activities on a  
22 consistent basis with additional supervision" (AR 470), the ALJ found, as noted above that he  
23 "needs supervision that would require more than a brief demonstration or explanation of  
24 his work duties, at least initially" (AR 21), without any explanation for this discrepancy, and  
25 despite giving Dr. Schechter's opinion substantial weight.

26 The Court agrees the ALJ erred here. Defendant defends the ALJ's residual functional  
capacity assessment as follows:

Plaintiff argues that the restriction assessed by the ALJ was  
inconsistent with Dr. Schechter's opinion that Plaintiff would need additional  
supervision ([ECF #12, p.] 10). Plaintiff premises the argument on the  
assumption that "additional" supervision is synonymous with "con[tinued]"  
supervision (id.). However, Plaintiff's alternative interpretation is not the  
only rational way to interpret Dr. Schechter's opinion. "[T]he ALJ is the final  
arbiter with respect to resolving ambiguities in the medical evidence."

1 *Tommasetti*, 533 F.3d at 1041. “Where evidence is susceptible to more than  
2 one rational interpretation, it is the ALJ’s conclusion that must be upheld.”  
3 *Burch*[ *v. Barnhart*], 400 F.3d [676,] 679 [(9th Cir. 2005)]. The ALJ  
4 interpreted Dr. Schechter’s opinion that Plaintiff required “additional  
5 supervision” as a specific need for additional help learning the job. This is  
6 consistent with Dr. Schechter’s observation that Plaintiff’s concentration was  
7 poor, but his persistence and pace were adequate ([AR] 469). It is also  
8 consistent with the GAF score of 65<sup>[3]</sup> assessed by Dr. Schechter, which  
9 indicates only a mild degree of symptoms overall ([*id.*]). Mild symptoms are  
10 more consistent with a requirement for some additional demonstration of job  
11 duties than with Plaintiff’s suggested need for “con[tinued]” supervision.  
12 Thus, the ALJ rationally interpreted Dr. Schechter’s opinion and assessed an  
13 appropriate limitation that reflected Plaintiff’s specific workplace needs and  
14 limitations.

15 ECF #13, p. 11. While defendant provides one possible explanation as to how the ALJ’s RFC  
16 assessment could be seen as a rational interpretation of Dr. Schechter’s opinion, the problem is  
17 that the ALJ herself did not provide it. Accordingly, the Court cannot uphold the ALJ’s RFC  
18 assessment on this basis.<sup>4</sup> See Stout, 454 F.3d at 1054 (refusing to dismiss error as harmless if  
19 doing so would require affirming denial of benefits on ground not invoked by Commissioner in  
20 denying benefits originally); Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.2003) (error to  
21 affirm ALJ’s credibility decision based on evidence ALJ did not discuss); Pinto v. Massanari,  
22 249 F.3d 840 (9th Cir. 2001) (“[W]e cannot affirm the decision of an agency on a ground that the  
23 agency did not invoke in making its decision.”). It is unclear, therefore, whether the assessment  
24 of plaintiff’s residual functional capacity made by the ALJ completely and accurately reflects all  
25 of plaintiff’s mental functional limitations.

26 <sup>3</sup> A GAF score is “a subjective determination based on a scale of 100 to 1 of ‘the [mental health] clinician’s  
judgment of [a claimant’s] overall level of functioning.’” Pisciotta v. Astrue, 500 F.3d 1074, 1076 n.1 (10th Cir.  
2007) (citation omitted). It is “relevant evidence” of the claimant’s ability to function mentally. England v. Astrue,  
490 F.3d 1017, 1023, n.8 (8th Cir. 2007). “A GAF score of 61-70 reflects mild symptoms or “some difficulty[in  
social, occupational, or school functioning], but the individual ‘generally function[s] pretty well.’” Sims v. Barnhart,  
309 F.3d 424, 427 n.5 (7th Cir. 2002) (quoting American Psychiatric Association, *Diagnostic & Statistical Manual*  
of Mental Disorders at 30 (4th ed. 1994)).

<sup>4</sup> The Court, though, also finds the record does not necessarily support plaintiff’s assertion that Dr. Schechter opined  
he would need “continued” supervision, as Dr. Schechter did not further define the phrase “additional” supervision.  
AR 470.

1 III. The Hypothetical Question the ALJ Posed to the Vocational Expert

2 If a claimant cannot perform his or her past relevant work, at step five of the disability  
3 evaluation process the ALJ must show there are a significant number of jobs in the national  
4 economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.  
5 1999); 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this through the  
6 testimony of a vocational expert or by reference to defendant’s Medical-Vocational Guidelines  
7 (the “Grids”). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th  
8 Cir. 2000).

9  
10 An ALJ’s findings will be upheld if the weight of the medical evidence supports the  
11 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);  
12 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert’s testimony  
13 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See  
14 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ’s description of the  
15 claimant’s disability “must be accurate, detailed, and supported by the medical record.” Id.  
16 (citations omitted). The ALJ, however, may omit from that description those limitations he or  
17 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

18  
19 At the hearing, the ALJ posed a hypothetical question to the vocational expert containing  
20 substantially the same limitations as were included in the ALJ’s assessment of plaintiff’s residual  
21 functional capacity. See AR 66-67. In response to that question, the vocational expert testified  
22 that an individual with those limitations – and with the same age, education and work experience  
23 as plaintiff – would be able to perform other jobs. See AR 69-70. Based on the testimony of the  
24 vocational expert, the ALJ found plaintiff would be capable of performing other jobs existing in  
25 significant numbers in the national economy. See AR 25-26.

1 As discussed above, however, the ALJ's assessment of plaintiff's residual functional  
2 capacity, upon which the ALJ based her hypothetical question, cannot be upheld, because it is  
3 not clear that that assessment completely and accurately reflects all of his mental limitations.  
4 The hypothetical question, therefore, also cannot be seen as being complete and accurate. The  
5 Court thus agrees with plaintiff that it was improper for the ALJ to rely on the testimony of the  
6 vocational expert to find plaintiff not disabled, given that it in turn was based on an incomplete  
7 and inaccurate hypothetical question.  
8

9 VIII. This Matter Should Be Remanded for Further Administrative Proceedings

10 The Court may remand this case "either for additional evidence and findings or to award  
11 benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the  
12 proper course, except in rare circumstances, is to remand to the agency for additional  
13 investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations  
14 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is  
15 unable to perform gainful employment in the national economy," that "remand for an immediate  
16 award of benefits is appropriate." Id.

17 Benefits may be awarded where "the record has been fully developed" and "further  
18 administrative proceedings would serve no useful purpose." Smolen, 80 F.3d at 1292; Holohan  
19 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
20 where:  
21

22 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
23 claimant's] evidence, (2) there are no outstanding issues that must be resolved  
24 before a determination of disability can be made, and (3) it is clear from the  
25 record that the ALJ would be required to find the claimant disabled were such  
evidence credited.

26 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

1 Because issues still remain with respect to plaintiff's residual functional capacity, and therefore  
2 her ability to perform other jobs existing in significant numbers in the national economy, remand  
3 for further consideration of those issues is proper. Plaintiff's request for an award of attorney's  
4 fees and expenses is rejected at this time, however, as a request therefor must be made by way of  
5 separate motion.

6  
7 CONCLUSION

8 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded  
9 plaintiff was not disabled. Accordingly, defendant's decision is REVERSED and this matter is  
10 REMANDED for further administrative proceedings in accordance with the findings contained  
11 herein.

12 DATED this 6th day of December, 2012.

13  
14  
15   
16 Karen L. Strombom  
17 United States Magistrate Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26