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

6 MARK STEVEN GALLEAR,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Commissioner of
10 Social Security,

11 Defendant.

Case No. 3:13-cv-05299-KLS

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

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

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23 FACTUAL AND PROCEDURAL HISTORY

24 On November 16, 2009, plaintiff filed an application for SSI benefits, alleging disability
25 as of May 31, 2002. See ECF #9, Administrative Record ("AR") 18, 141.¹ That application was
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¹ Plaintiff subsequently amended his alleged onset date of disability to November 16, 2009. See AR 18.

1 denied upon initial administrative review on April 2, 2010, and on reconsideration on June 15,
2 2010. See AR 18. A hearing was held before an administrative law judge (“ALJ”) on July 13,
3 2011, at which plaintiff, represented by counsel, appeared and testified, as did a vocational
4 expert. See AR 32-71.

5 In a decision dated August 25, 2011, the ALJ determined plaintiff to be not disabled. See
6 AR 18-27. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals
7 Council on February 28, 2013, making that decision the final decision of the Commissioner of
8 Social Security (the “Commissioner”). See AR 1; see also 20 C.F.R. § 416.1481. On April 19,
9 2013, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s final
10 decision. See ECF #1. The administrative record was filed with the Court on July 12, 2013. See
11 ECF #9. The parties have completed their briefing, and thus this matter is now ripe for the
12 Court’s review.
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14 Plaintiff argues defendant’s decision to deny benefits should be reversed and remanded
15 for an award of benefits, because the ALJ erred: (1) in finding his depressive and learning
16 disorders to be non-severe impairments; (2) in evaluating the opinions of Jan Johnson, Ph.D., and
17 Sophie Hoptowitz, M.D.; and (3) in discounting plaintiff’s credibility. For the reasons set forth
18 below, the Court agrees the ALJ erred in finding plaintiff’s depressive and learning disorders to
19 be non-severe impairments and in evaluating the opinion of Dr. Johnson, and thus in determining
20 plaintiff to be not disabled. Also for the reasons set forth below, however, while the Court finds
21 defendant’s decision to deny benefits should be reversed on this basis, this matter instead should
22 be remanded for further administrative proceedings.
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25 DISCUSSION

26 The determination of the Commissioner that a claimant is not disabled must be upheld by

1 the Court, if the “proper legal standards” have been applied by the Commissioner, and the
2 “substantial evidence in the record as a whole supports” that determination. Hoffman v. Heckler,
3 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v. Commissioner of Social Security
4 Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp. 522, 525 (E.D.
5 Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the
6 proper legal standards were not applied in weighing the evidence and making the decision.”)
7 (citing Browner v. Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)).
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9 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
10 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation
11 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
12 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
13 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
14 by more than a scintilla of evidence, although less than a preponderance of the evidence is
15 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
16 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
17 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
18 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
19 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).²
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23 ² As the Ninth Circuit has further explained:

24 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
25 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
26 substantial evidence, the courts are required to accept them. It is the function of the
 [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 I. The ALJ's Step Two Determination

2 Defendant employs a five-step "sequential evaluation process" to determine whether a
3 claimant is disabled. See 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled
4 at any particular step thereof, the disability determination is made at that step, and the sequential
5 evaluation process ends. See id. At step two of the evaluation process, the ALJ must determine
6 if an impairment is "severe." 20 C.F.R. § 416.920. An impairment is "not severe" if it does not
7 "significantly limit" a claimant's mental or physical abilities to do basic work activities. 20 §
8 416.920(a)(4)(iii), (c); see also Social Security Ruling ("SSR") 96-3p, 1996 WL 374181 *1.
9 Basic work activities are those "abilities and aptitudes necessary to do most jobs." 20 C.F.R. §
10 416.921(b); SSR 85- 28, 1985 WL 56856 *3.

11 An impairment is not severe only if the evidence establishes a slight abnormality that has
12 "no more than a minimal effect on an individual[']s ability to work." SSR 85-28, 1985 WL
13 56856 *3; see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841
14 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that his "impairments or their
15 symptoms affect [his] ability to perform basic work activities." Edlund v. Massanari, 253 F.3d
16 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). The step
17 two inquiry described above, however, is a *de minimis* screening device used to dispose of
18 groundless claims. See Smolen, 80 F.3d at 1290.

19 The ALJ in this case found plaintiff had severe impairments consisting of degenerative
20 disc disease of the cervical and lumbar spine, drug abuse and a history of alcohol abuse. See AR

21 21. The ALJ further found in relevant part at step two:

22 The claimant has also been treated or evaluated for other symptoms and
23 complaints, which appear periodically throughout the record. These include
24 . . . a mood disorder, a mild cognitive disorder, and a learning disorder. . . .
25 Jan Johnson, Ph.D. completed a [state agency] psychological report, and
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1 diagnosed the claimant with a depressive disorder, NOS; a learning disorder,
2 NOS; and, a rule-out cognitive disorder, perhaps mild retardation to
3 borderline intellectual functioning (Ex. 12F, p. 2). However, [the] claimant
4 did not allege any psychological impairments. These other conditions,
5 considered singly or together, have caused only transient and mild
6 symptoms and limitations, are well controlled with treatment or are
7 otherwise not adequately supported by the medical evidence in the record.
8 Accordingly, these conditions do not constitute severe medically
9 determinable impairments.

10 AR 21. Plaintiff argues the ALJ erred in finding his depressive and learning disorders were not
11 severe impairments. The Court agrees.

12 First, while it may be true that plaintiff did not allege in his application for SSI benefits
13 that he had a psychological impairment, he did admit to having a pretty depressed mood at the
14 hearing. See AR 61. Plaintiff also reported a number of potential depression-related symptoms –
15 such as poor motivation and difficulties in regard to sleep, appetite and energy – and exhibited
16 tearfulness during the evaluation by Dr. Johnson, who noted signs of problems in plaintiff’s
17 cognitive functioning as well. See AR 343-44, 346-47. Thus, given the ALJ’s duty “to fully and
18 fairly develop the record and to assure that the claimant’s interests are considered,” the mere fact
19 that plaintiff did not initially allege a mental impairment should not have prevented the ALJ from
20 determining whether in fact such an impairment existed. See Tonapetyan v. Halter, 242 F.3d
21 1144, 1150 (9th Cir. 2001) (citations omitted).

22 As discussed in greater detail below, furthermore, Dr. Johnson assessed plaintiff with
23 several moderate to marked work-related mental functional limitations based at least in part on
24 the diagnoses of a depressive disorder and a learning disorder.³ See AR 343-45. The ALJ’s error

25 ³ The ALJ’s additional statement that plaintiff’s “other conditions” had caused “only transient and mild symptoms,
26 are well controlled with treatment or are otherwise not adequately supported by the medical evidence in the record,”
the Court finds to be impermissibly vague as it references no portion of the record as support therefor or otherwise
provide any specific discussion as to why that is the case. See Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir.
1988) (holding that it is insufficient for ALJ to merely state medical opinion is unsupported by sufficient objective
findings, and that “ALJ must do more than offer his conclusions”).

1 here also is not harmless, given that as also discussed in greater detail below she did not provide
2 valid reasons for according only some weight to those assessed limitations, and therefore erred as
3 well in assessing plaintiff's residual functional capacity and in finding him to be capable of
4 performing other work existing in significant numbers in the national economy at step five of the
5 sequential evaluation process. See Burch v. Barnhart, 400 F.3d 676, 682 (9th Cir. 2005) (any
6 error by ALJ in failing to consider plaintiff's obesity at step two harmless, because ALJ did not
7 err in evaluating plaintiff's impairments at later steps).

9 II. The ALJ's Evaluation of Dr. Johnson's Opinions

10 The ALJ is responsible for determining credibility and resolving ambiguities and
11 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).

12 Where the medical evidence in the record is not conclusive, "questions of credibility and
13 resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,
14 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v.
15 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining
16 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at
17 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls
18 within this responsibility." Id. at 603.

19 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
20 "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this
21 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
22 stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences
23 "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may
24 draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881
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1 F.2d 747, 755, (9th Cir. 1989).

2 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
3 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
4 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can
5 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
6 the record.” Id. at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him
7 or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984)
8 (citation omitted) (emphasis in original). The ALJ must only explain why “significant probative
9 evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981);
10 Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

12 In general, more weight is given to a treating physician’s opinion than to the opinions of
13 those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need
14 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
15 inadequately supported by clinical findings” or “by the record as a whole.” Thomas v. Barnhart,
16 278 F.3d 947, 957 (9th Cir. 2002); Batson v. Commissioner of Social Sec. Admin., 359 F.3d
17 1190, 1195 (9th Cir. 2004); see also Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001);
18 Matney on Behalf of Matney v. Sullivan, 981 F.2d 1016, 1019 (9th Cir. 1992). An examining
19 physician’s opinion is “entitled to greater weight than the opinion of a nonexamining physician.”
20 Lester, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute substantial
21 evidence if “it is consistent with other independent evidence in the record.” Id. at 830-31;
22 Tonapetyan, 242 F.3d at 1149.

25 In addition to addressing at step two the diagnoses Dr. Johnson provided as noted above,
26 the ALJ went on to further address that medical source’s opinion as follows:

1 A [state agency] evaluation was completed by Jan Johnson, Ph.D., in June
2 2011. Dr. Johnson opined the claimant has no limitations in understanding,
3 remembering and persistence in following simple instructions, but has marked
4 limitations performing complex instructions; he has moderate limitations in
5 learning new tasks and performing tasks without supervision; he has mild
6 limitations regarding being aware of workplace hazards; he has moderate
7 limitations communicating effectively in a work setting with public contact;
8 and, he has moderate limitations working with the public^[4] (Ex. 12F, p. 3).
9 The doctor opined the claimant has a global assessment of functioning (GAF)
10 score of 55^[5] (Ex. 12F, p. 3). The undersigned gives some weight to Dr.
11 Johnson’s opinions because she is a psychologist, who personally examined
12 the claimant. However, the doctor was vague as to [the] claimant’s diagnoses
13 and apparently did not see treatment records. The basis for some of her
14 diagnoses is not clear because she did no psychological testing of [the]
15 claimant except to conduct a mental status examination (Ex. 12F, pp. 4-6) and
16 the claimant did not tell her he felt depressed. In her report, the doctor said
17 [the] claimant “appeared to have adequate attention/concentration abilities,”
18 he successfully spelled world forward and backward and repeated five digits
19 backwards. However, he did not want to talk about whether he had been
20 feeling depressed. (Ex. 12F, p. 6). At the hearing, he testified he has 12 years
21 of education. Thus, the report is vague and lacking in objective or even
22 subjective bases for conclusions reached by the doctor. It is given little
23 weight because of those factors but has been considered in arriving at the
24 claimant’s [residual] functional capacity . . .

15 AR 24-25. Plaintiff argues, and again the Court agrees, the ALJ failed to provide valid reasons
16 for discounting the opinion of Dr. Johnson.

17 As plaintiff notes, there is nothing vague about the diagnoses Dr. Johnson provided. See
18 AR 343 (assessing plaintiff with, among diagnoses of drug and alcohol dependence in reported
19 sustained full to partial remission, “Depressive Disorder Not Otherwise Specified [(“NOS”)],
20 “Learning Disorder NOS” and “Rule out cognitive limitations perhaps of a mild retardation to
21 borderline intellectual functioning”). In addition, while Dr. Johnson may not have reviewed any
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25 ⁴ As noted by plaintiff, Dr. Johnson also found he had a marked limitation in his ability to maintain appropriate
26 behavior in a work setting. See AR 345.

⁵ In a footnote the ALJ further stated: “Based on the Diagnostic and Statistical Manual of Mental Disorders, Fourth
Edition-Text Revision (DSM-IV-TR), a GAF rating of 51-60 constitutes moderate symptoms or moderate difficulty
in social, occupational, or school functioning.” AR 24 n.1.

1 treatment records, as an evaluating psychologist there is no requirement that she actually do so,⁶
2 and in any event the ALJ does not point to any such records that call into question the diagnoses,
3 findings and opinions she offered.

4 The fact that Dr. Johnson did not conduct psychological testing, furthermore, is not itself
5 a valid basis for rejecting that source's opinions. While it is true that such testing can constitute
6 objective clinical support therefor, so too can the results of both a mental status examination and
7 the evaluating psychologist's own observations, which as plaintiff noted Dr. Johnson provided in
8 her report. See AR 343-47; Sanchez v. Apfel, 85 F. Supp.2d 986, 992 (C.D. Cal. 2000) (“[W]hen
9 mental illness is the basis of a disability claim, clinical and laboratory data may consist of the
10 diagnoses and observations of professionals trained in the field of psychopathology.”) (quoting
11 Christensen v. Bowen, 633 F.Supp. 1214, 1220-21 (N.D.Cal.1986)); Sprague v. Bowen, 812
12 F.2d 1226, 1232 (9th Cir. 1987) (opinion based on clinical observations supporting diagnosis of
13 mental impairment is competent evidence).

14 The ALJ also bases her rejection of Dr. Johnson's opinions on the fact that plaintiff “did
15 not tell her he felt depressed.” AR 25. But as noted above, Dr. Johnson observed plaintiff being
16 “tearful at times during the interview,” and stated that he appeared to have poor motivation and
17 energy, all of which are potential symptoms of a depressive disorder. AR 343, 346-47. Plaintiff
18 also reported a history of complaints of depression and alleged suicidal ideation. See AR 342. In
19 addition, the substantial evidence in the record does not support the ALJ's assumption that the
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23 ⁶ Defendant cites Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005), for the proposition that an ALJ may
24 reject a psychological assessment from an examining medical source who does not review objective medical data or
25 reports from treating physicians or counselors. See ECF #13, p. 6. But the psychological assessment at issue in that
26 case appears to have come from a non-examining medical source, and therefore clearly the failure to review medical
evidence in the record would be a valid basis for rejecting that assessment. See Bayliss, 427 F.3d at 1215, 1217
(referring to doctor, whose opinion ALJ properly rejected for failing to review “objective medical data or reports
from treating physicians or counselors” as “reviewing doctor”). In regard to examining medical sources, however,
the clinical findings the examining medical source obtained from the evaluation itself may constitute objective
medical support for the assessments or opinions that source provides. See Batson, 359 F.3d at 1195 (ALJ need not
accept opinion of even treating physician's opinion if inadequately supported by clinical findings).

1 statement “I don’t want to talk about it” plaintiff made in response to the question as to whether
2 he had been feeling depressed lately, necessarily indicates an absence of depression.⁷ AR 347.
3 Indeed, in the very same paragraph Dr. Johnson notes plaintiff reported “having difficulty with
4 sleep, appetite, and energy,” and “experiencing suicidal ideation” – albeit “of a vague nature” –
5 again, all potential signs of a depressive disorder. Id.

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7 The Court agrees as well that the ALJ appears to have focused solely on those aspects of
8 Dr. Johnson’s mental status examination results that supported her view that plaintiff lacked any
9 actual objective indicia of a mental health impairment. For example, while it is true that plaintiff
10 appeared to have adequate attention and concentration abilities, Dr. Johnson also noted brief and
11 concrete speech, “significant limitations in his abstract ability” and at least “some limitations in
12 his insight/judgment abilities.” AR 346-47. Dr. Johnson based her diagnoses and assessment of
13 functioning it seems at least part on these findings, and the ALJ has failed to adequately explain
14 why her interpretation thereof is more reliable. See McBryer v. Secretary of Health and Human
15 Services, 712 F.2d 795, 799 (2nd Cir. 1983) (ALJ cannot arbitrarily substitute own judgment for
16 competent medical opinion).

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18 Lastly, defendant argues any error on the part of the ALJ was harmless here, because Dr.
19 Johnson estimated that the length of time plaintiff would be subject to the limitations she found
20 would be only six to nine months. See AR 345. As noted by plaintiff, however, the ALJ did not
21 give this as a reason for discounting Dr. Johnson’s opinions. See Pinto v. Massanari, 249 F.3d
22 840, 847 (9th Cir. 2001) (court “cannot affirm the decision of an agency on a ground that the
23 agency did not invoke in making its decision”); Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
24 2003) (error to affirm ALJ’s decision based on evidence ALJ did not discuss). Thus while it is

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⁷ See Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) (noting those with depression often do not recognize their condition reflects potentially serious mental illness).

1 true that to be found disabled plaintiff must show his impairment “has lasted or can be expected
2 to last for a continuous period of not less than 12 months,” the Court itself cannot offer a reason
3 for rejecting a medical source’s opinion that the ALJ did not provide, particularly where the ALJ
4 discusses in detail that source’s opinion but does not mention the time duration issue. 42 U.S.C.
5 § 423(d)(1)(A); Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). In other words, the Court
6 must presume the ALJ was aware of that issue, but chose not to address it.
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8 III. This Matter Should Be Remanded for Further Administrative Proceedings

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

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

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

25 Because issues still remain in regard to the medical evidence in the record concerning plaintiff’s
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1 mental impairments and limitations, and therefore in regard to his residual functional capacity⁸
2 and her ability to perform other jobs existing in significant numbers in the national economy,⁹
3 remand for further consideration thereof is warranted.

4 CONCLUSION

5 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded
6 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is REVERSED
7 and this matter is REMANDED for further administrative proceedings in accordance with the
8 findings contained herein.
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10 DATED this 31st day of March, 2014.

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14 Karen L. Strombom
15 United States Magistrate Judge

16 ⁸ If a disability determination “cannot be made on the basis of medical factors alone at step three of the [sequential]
17 evaluation process,” the ALJ must identify the claimant’s “functional limitations and restrictions” and assess his or
18 her “remaining capacities for work-related activities.” SSR 96-8p, 1996 WL 374184 *2. A claimant’s residual
19 functional capacity (“RFC”) assessment is used at step four to determine whether he or she can do his or her past
20 relevant work, and at step five to determine whether he or she can do other work. See id. It thus is what the claimant
21 “can still do despite his or her limitations.” Id. The ALJ in this case found plaintiff had the mental RFC to perform
22 simple repetitive tasks involving minimal interaction with the public and little problem solving activity. See AR 22.
23 But because as discussed above the ALJ erred in rejecting the greater functional limitations Dr. Johnson found, it is
24 far from clear that the ALJ’s RFC assessment is supported by substantial evidence and therefore free of error.

25 ⁹ If a claimant cannot perform his or her past relevant work, at step five of the sequential disability evaluation
26 process, the ALJ must show there are a significant number of jobs in the national economy the claimant is able to
do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e).
The ALJ can do this through the testimony of a vocational expert or by reference to defendant’s Medical-Vocational
Guidelines (the “Grids”). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).
An ALJ’s findings will be upheld if the weight of the medical evidence supports the hypothetical posed by the ALJ.
See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.
1984). The vocational expert’s testimony therefore must be reliable in light of the medical evidence to qualify as
substantial evidence. See Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ’s description
of the claimant’s disability “must be accurate, detailed, and supported by the medical record.” Id. (citations omitted).
But because the ALJ found plaintiff to be capable of performing other jobs existing in significant numbers in the
national economy based on vocational expert testimony offered in response to a hypothetical question containing
substantially the same limitations as were included in the ALJ’s RFC assessment (see AR 26-27), that finding also
cannot be said to be supported by substantial evidence and free of error at this time.