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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 DEWEY LEE HOLLINGSHEAD,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 14-cv-05334 JRC

ORDER ON PLAINTIFFS
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United
20 States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos.
21 13, 14, 15).

22 After considering and reviewing the record, the Court concludes that the ALJ
23 erred when evaluating whether or not plaintiff's Multiple Sclerosis satisfies Listing
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1 section 11.09 and erred when evaluating the medical evidence provided by plaintiff's
2 treating neurologist. Nevertheless, issues remain that only the ALJ can resolve.

3 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
4 U.S.C. § 405(g) for further proceedings consistent with this Order.

5 BACKGROUND

6 Plaintiff, DEWEY HOLLINGSHEAD, was born in 1979 and was 31 years old on
7 the alleged date of disability onset of January 6, 2011 (*see* Tr. 139-42). Plaintiff has a
8 tenth grade education and has not obtained his GED (Tr. 37). Plaintiff has worked in a
9 warehouse stacking pallets; had a job building fences; has cashiered and stocked shelves;
10 has delivered appliances and has done maintenance in an apartment complex. He works
11 seasonally for a fair, where he is able to take breaks (Tr. 40-41).

12 According to the ALJ, plaintiff has at least the severe impairments of "multiple
13 sclerosis (M.S.); major depressive disorder; amphetamine dependence in remission;
14 psychological factors (anxiety) affecting a medical condition (seizures); restless leg
15 syndrome; and seizure disorder (20 CFR 404.1520(c) and 416.920(c))" (Tr. 14).

16 At the time of the hearing, plaintiff was living with his girlfriend (Tr. 39).

17 PROCEDURAL HISTORY

18 Plaintiff's applications for disability insurance ("DIB") benefits pursuant to 42 U.S.C.
19 § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to 42 U.S.C. §
20 1382(a) (Title XVI) of the Social Security Act were denied initially and following
21 reconsideration (*see* Tr. 68-79, 81-94). Plaintiff's requested hearing was held before
22 Administrative Law Judge David Johnson ("the ALJ") on November 9, 2012 (*see* Tr. 30-
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1 66). On November 30, 2012, the ALJ issued a written decision in which the ALJ
2 concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr. 9-
3 29).

4 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the ALJ
5 err by failing to find that plaintiff's Multiple Sclerosis satisfies Listing section 11.09 or to
6 address medical equivalency for that listing section; (2) Did the ALJ err by improperly
7 rejecting opinions from the treating M.S. specialist and adopting opinions from the non-
8 examining physician who did not review the entire record; (3) Did the ALJ provide "clear
9 and convincing" reasons to reject plaintiff's testimony; (4) Did the ALJ provide specific
10 and valid reasons to reject lay witness evidence; and (5) Did the ALJ consider all of the
11 evidence when assessing the RFC and are the step 5 findings based on that RFC
12 supported by law and fact (*see* ECF No. 13, p. 1). Because the Court concludes that
13 issues number (1) and (2) are dispositive, the remainder of the issues raised will not be
14 discussed herein.
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16 STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
18 denial of social security benefits if the ALJ's findings are based on legal error or not
19 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
20 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
21 1999)).
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DISCUSSION

(1) **Did the ALJ err by failing to find that plaintiff’s Multiple Sclerosis satisfies Listing section 11.09 or address medical equivalency for that listing section?**

Plaintiff argues that the ALJ erred in not finding that he met Listing 11.09A¹, and provides a list of the evidence in the record that supports his argument (*see* Opening Brief, ECF No. 13, pp. 13-14). Defendant summarizes the standard; acknowledges plaintiff’s argument and replies that ‘Plaintiff’s argument is misplaced because he has not specifically satisfied his burden of showing that even with the evidence in the record he cites to that he meets each one of the requirements of Listing 11.09(A), which refers to listing 11.09B² (which then refers to 11.00C³) for the duration requirement of 12 months’

¹ Listing 11.09. Multiple sclerosis. With:
A. Disorganization of motor function as described in 11.04B; or
20 C.F.R. pt. 404, subpt. P, app. 1, 11.09.

² Listing 11.04. Central nervous system vascular accident. With one of the following more than three months post vascular accident: B. significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movement, or gait and station (see 11.00C).
20 C.F.R. pt. 404, subpt. P, app. 1, 11.04.

³ Listing 11.00C. Neurological.
C. Persistent disorganization of motor function in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral, cerebellar, brainstem, spinal cord, or peripheral nerve dysfunction) which occur singly or in various combinations, frequently provide sole or partial basis for decision in cases of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers, hands, and arms.
20 C.F.R. pt. 404, subpt. P, app. 1, 11.00C.

1 (see Response, ECF No. 14, p. 5). This is the entirety of defendant's response to plaintiff's
2 argument regarding if plaintiff met the listing (see id., pp. 5-6). Defendant has not
3 indicated which one of the requirements plaintiff has not established, or if defendant's
4 response rests on a lack of demonstrated duration by plaintiff (see id.). This basically
5 equates to no substantive argument at all and is completely unhelpful to the Court.

6 At step-three of the administrative process, if the administration finds that the
7 claimant has an impairment(s) that has lasted or can be expected to last for not less than
8 twelve months and is included in Appendix 1 of the Listings of Impairments, or is equal
9 to a listed impairment, the claimant will be considered disabled without considering age,
10 education and work experience. 20 C.F.R. § 404.1520(d). The claimant bears the
11 burden of proof regarding whether or not she 'has an impairment that meets or equals the
12 criteria of an impairment listed' in 20 C.F.R. pt. 404, subpt. P, app. 1 ('the Listings').

13 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005), as modified to render a published
14 opinion by 2005 U.S. App. LEXIS 3756 (9th Cir. 2005).

15 As the evidence cited by plaintiff encompasses a time period from February 10,
16 2011 to October 31, 2012, plaintiff evidences duration of some difficulties persisting for
17 at least the duration of twelve months. However, the Court notes that the relevant listing
18 refers to section 11.04 and to 11.00C, which provides, in relevant part, that the
19 'assessment of impairment depends on the degree of interference with locomotion and/or
20 interference with the use of fingers, hands and arms.' 20 C.F.R. pt. 404, subpt. P, app. 1,
21 11.00C, see supra, fn.3. Although plaintiff demonstrated balance difficulties on
22 September 6, 2011, as well as inability to perform tandem gait or walk on his heels or
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1 toes (Tr. 374-75), and on December 30, 2011 demonstrated “Sensory examination 20% of
2 normal sensation in the feet’ with diminished tandem walk (Tr. 426), it is unclear from the
3 medical record when the degree of interference with locomotion was sufficiently
4 established; or at what point in time the disturbance of gait was sustained. What is clear is
5 that the question of whether or not plaintiff met or medically equaled this Listing requires
6 further evaluation by the ALJ, perhaps with the assistance of a medical expert.

7
8 Regarding the issue of equivalence, the Court notes that in his opening statement
9 at plaintiff’s administrative hearing, plaintiff’s attorney pointed out to the ALJ that:

10 [Plaintiff’s] doctor at the Multicare Neuroscience Center has submitted a
11 medical source statement at 12–F, this is Dr. Huddleston, stating that
12 the claimant is incapable of sustaining even part-time employment on a
13 full-time -- or on a regular sustained basis because of his impairments;
14 so I’d urge you to find that the record does support a finding of disability
15 based on a combination of all his impairments.

16 (Tr. 34-35).

17 Plaintiff submitted multiple medical records with findings and test results
18 supporting the doctor’s opinion and supporting the argument that plaintiff’s impairments
19 met Listing 11.09A or that plaintiff’s limitations resulting from his impairments medically
20 equaled Listing 11.09A. The only discussion by the ALJ regarding Listing 11.09 includes
21 the following: “Regarding the claimants, (sic) multiple sclerosis, the evidence does not
22 establish the requisite severity of disorganization of motor function, visual or mental
23 impairment, or fatigue required under Listing 11.09’ (Tr. 15). This “discussion” by the ALJ
24 is insufficient. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990) (where claimant
offered evidence in an effort to establish equivalence and the ALJ included only one

1 | conclusory statement regarding that “claimant has failed to provide evidence of medically
2 | determinable impairments that meet or equal the Listings or the duration
3 | requirements of the Act” such a finding “is insufficient to show that the ALJ
4 | actually considered equivalence”). Here, the ALJ not only made a conclusory finding that
5 | the evidence did not establish the requirements pursuant to Listing 11.09, but also, the
6 | ALJ made no indication at all that he considered the issue of equivalence. As held by the
7 | Ninth Circuit, when determining if “a claimant equals a listing under step three of the
8 | Secretary’s disability evaluation process the ALJ must explain adequately his evaluation
9 | of alternative tests and the combined effects of the impairments.” *See id.* Here, the ALJ
10 | provided no explanation and does not appear to have evaluated the combined effects of
11 | plaintiff’s impairments when evaluating Listing 11.09, but instead refers only to plaintiff’s
12 | multiple sclerosis (“MS”) (*see* Tr. 15). As found by the ALJ, in addition to MS, plaintiff
13 | also suffered from the severe impairments of “major depressive disorder; amphetamine
14 | dependence in remission; psychological factors (anxiety) affecting a medical condition
15 | (seizures); restless leg syndrome; and seizure disorder” (*see* Tr. 14). Considering the facts
16 | of this case and the medical record as a whole, the Court concludes that the ALJ’s
17 | “explanation” is insufficient. *See Marcia, supra*, 900 F.2d at 176.

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19 | Also, the Court notes plaintiff’s argument the ALJ failed to obtain an updated
20 | medical opinion about medical equivalency when the non-examining State agency
21 | physician did not have the benefit of significant medical evidence after 2011, including
22 | the evidence provided by the MS specialist (*see* ECF No. 13, p. 15 (*citing* SSR 96-6p; 20
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1 C.F.R. 404.1526(c); *Rogers v. Colvin*, No. 13cv5627 at ECF No. 27-8 (W.D. Wash.
2 2014) (unpublished opinion))).

3 Based on the record as a whole, the Court concludes that this matter must be
4 reversed and remanded for further administrative proceedings. Following remand, the
5 issues of both meeting Listing 11.09A, as well as medically equivalence to Listing
6 11.09A, should be evaluated anew by the ALJ.

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8 **(2) Did the ALJ err by improperly rejecting opinions from the treating
9 M.S. specialist and adopting opinions from the non-examining
10 physician who did not review the entire record?**

11 Plaintiff contends that the ALJ erred by rejecting the opinions of plaintiff's treating
12 MS specialist and instead adopting opinions of a non-examining state agency physician
13 who did not review the complete record and did not review all of the evidence from the
14 MS specialist. Defendant acknowledges that the opinion of a treating source "merits great
15 deference" (*see* ECF No. 14, p. 8 (*citing Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326,
16 1337 (2013); *Tibble v. Edison Int'l*, 729 F.3d 1110, 1133 (9th Cir. 2013))).

17 "A treating physician's medical opinion as to the nature and severity of an
18 individual's impairment must be given controlling weight if that opinion is well-supported
19 and not inconsistent with the other substantial evidence in the case record." *Edlund v.*
20 *Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at *14 (9th
21 Cir. 2001) (*citing* SSR 96-2p, 1996 SSR LEXIS 9); *see also Smolen v. Chater*, 80 F.3d
22 1273, 1285 (9th Cir. 1996). When a treating or examining physician's opinion is
23 contradicted, that opinion can be rejected "for specific and legitimate reasons that are
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1 supported by substantial evidence in the record.” *Lester v. Chater*, 81 F.3d 821, 830-31
2 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v.*
3 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out
4 a detailed and thorough summary of the facts and conflicting clinical evidence, stating his
5 interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th
6 Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

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8 In general, more weight is given to a treating medical source’s opinion than to the
9 opinions of those who do not treat the claimant. *Lester, supra*, 81 F.3d at 830 (citing
10 *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). According to the Ninth Circuit,
11 “[b]ecause treating physicians are employed to cure and thus have a greater opportunity to
12 know and observe the patient as an individual, their opinions are given greater weight
13 than the opinion of other physicians.” *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir.
14 1996) (citing *Rodriguez v. Bowen*, 876 F.2d 759, 761-762 (9th Cir. 1989); *Sprague v.*
15 *Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987)). In addition, an examining physician’s
16 opinion is “entitled to greater weight than the opinion of a non-examining physician.”
17 *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also* 20 C.F.R. §
18 404.1527(c)(1) (“Generally, we give more weight to the opinion of a source who has
19 examined you than to the opinion of a source who has not examined you”).

20
21 Defendant contends that plaintiff’s arguments regarding the medical opinions are
22 misplaced because the ALJ’s finding that Dr. John R. Huddleston, M.D.’s last visit with
23 plaintiff occurred on July 30, 2012 is supported by the response in the negative of
24 plaintiff’s attorney at the hearing when the ALJ asked if any evidence had been withheld

1 or omitted or not submitted (*see id.* (*citing* Tr. 33)). The Court does not find persuasive
2 defendant's argument that the answer from plaintiff's attorney to the ALJ's general question
3 that no evidence was withheld or not submitted relieved the ALJ of his duty to develop
4 the record. The Court also notes that the ALJ did not rely on this introductory remark
5 when failing to credit fully Dr. Huddleston's opinion and according to the Ninth Circuit,
6 '[l]ong-standing principles of administrative law require us to review the ALJ's decision
7 based on the reasoning and actual findings offered by the ALJ - - not *post hoc*
8 rationalizations that attempt to intuit what the adjudicator may have been thinking.'" *Bray*
9 *v. Comm'r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*,
10 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina v. Astrue*, 674 F.3d
11 1104, 1121 (9th Cir. 2012) ('we may not uphold an agency's decision on a ground not
12 actually relied on by the agency') (*citing Chenery Corp, supra*, 332 U.S. at 196).

14 Dr. Huddleston was a treating physician of plaintiff, and furthermore was a
15 specialist in MS. The ALJ rejected opinions from Dr. Huddleston, and instead relied on
16 the opinions of a non-examining physician who did not review all of the record, and did
17 not even review all of the opinions from plaintiff's treating MS specialist, Dr.
18 Huddleston. Although the ALJ also indicated some reliance on the opinion of Dr.
19 Surinder Singh, M.D. when determining the RFC, the ALJ did not adopt the limitation
20 opined by Dr. Singh regarding standing for only two hours in an eight hour workday (*see*
21 *Tr. 16, 21*).

23 On October 31, 2012, Dr. Huddleston opined that plaintiff had "an expanded
24 disability status scale of approximately 5 at this time" (Tr. 428). He noted that plaintiff's

1 deficits“include significant fatigue, lower extremity weakness, and hyperthesia, and
2 diminished ability to walk” (*id.*). Dr. Huddleston also indicated his opinion that because
3 of plaintiff’s“neurologic deficits attributable to MS he is not able to work even part-time
4 on a permanent job” (*see id.*).

5
6 The ALJ, in his written opinion, indicated that plaintiff’s“last visit with Dr.
7 Huddleston [was] on July 30, 2012’ (Tr. 20). This finding is contradicted by the letter
8 from Dr. Huddleston on October 31, 2012, in which he indicated his contemporaneous
9 opinion that“at this time’ plaintiff suffered from an expanded disability status scale of
10 approximately five (*see* Tr. 428). Plaintiff’s treatment records from Dr. Huddleston were
11 printed on October 2, 2012 (*see* Tr. 410). It also is clear from the record that Dr.
12 Huddleston, subsequent to this date, provided an updated opinion in which he changed
13 his assessment of plaintiff’s disability status scale rating (*see* Tr. 428).

14
15 It is not a logical inference from the record that Dr. Huddleston would alter his
16 opinion regarding plaintiff’s expanded disability status scale rating without examining
17 plaintiff. Although an ALJ may“draw inferences logically flowing from the evidence,”
18 *Sample, supra*, 694 F.2d at 642 (*citing Beane v. Richardson*, 457 F.2d 758 (9th Cir.
19 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)), an ALJ may not speculate.
20 *See* SSR 86-8, 1986 SSR LEXIS 15 at *22.

21 Here, when failing to credit fully the opinions from Dr. Huddleston, the ALJ
22 relied on a finding that Dr. Huddleston’s“last visit with the claimant [was] on July 30,
23 2012’ (Tr. 22). However, this finding is not based on substantial evidence in the record,
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1 but more closely resembles speculation. Therefore, the Court concludes that the ALJ's
2 finding that Dr. Huddleston last examined plaintiff on July 30, 2012 is a finding not
3 supported by substantial evidence in the record as a whole.

4 The Court also notes that the ALJ's reference to Dr. Huddleston's opinion with
5 respect to the ultimate conclusion regarding disability does not mean that all of his
6 opinions can be disregarded. Although it is the ALJ's responsibility to make the ultimate
7 determination regarding disability, this opinion from Dr. Huddleston nevertheless
8 reflects his opinion regarding the severity of plaintiff's limitations and should be assessed.
9 Regarding the ALJ's indication that the deficits opined by Dr. Huddleston were
10 "accommodated by the RFC," this finding is not supported by substantial evidence in the
11 record (*see* Tr. 16, 428).

13 Finally, regarding the ALJ's reliance on the opinion of non-examining state agency
14 physician Dr. Robert Hoskins, M.D., the Court finds persuasive plaintiff's argument as
15 follows:

16 [S]ince a medical opinion is required to establish that a claimant equals a
17 listing section and there are no medical opinions which address this issue
18 from a physician who has reviewed the complete record, an ALJ is
19 required to further develop the record. [*citing*] SSR 96-6p; *Rogers v.*
Colvin, No. 3:13-cv-5627 RSL, [2014 WL 2478518] (W.D. Wash. May
16, 2014) at p. [*3]. As the court in *Rogers*, *supra*, at [*3], noted:

20 The Court recognizes that the ALJ has broad discretion in
21 determining whether to call a medical expert to testify. SSR
22 96-6p requires the ALJ to obtain an updated medical expert
23 opinion if, 'in the opinion of the administrative law judge'
24 additional medical evidence may change the state agency
consultant's finding on equivalence. Here, where the state
agency consultants had no finding on equivalence due to
insufficient evidence, and the additional evidence was
sufficient to establish the existence of mental impairments, it

1 is impossible to conclude that the additional medical evidence
2 would not change the consultants' findings. The ALJ's failure
3 to obtain updated medical expert opinion was in violation of
4 SSR 96-6p.

5 The ALJ herein erred by failing to obtain an updated medical opinion
6 about medical equivalency when non-examining Dr. Hoskins did not
7 address medical equivalency [*citing*] (Tr. 80-94) and did not have the
8 benefit of significant medical evidence after 2011 [], contrary to SSR 96-
9 6p. [*citing*] *Rogers, supra*.

10 (ECF No. 15, pp. 2-3 (internal citation omitted)). Although the case cited is not directly
11 on point and only is analogous, a similar principal applies here, as the state agency
12 consultant rendered his opinion without the benefit of significant, probative evidence
13 from plaintiff's treating neurologist, and a review of such evidence clearly may have
14 changed the opinion of non-examining physician Dr. Hoskins. *See Rogers v. Colvin*, No.
15 3:13-cv-5627 RSL, 2014 WL 2478518 at *3 (W.D. Wash. May 16, 2014).

16 Based on a review of the record as a whole, the Court concludes that the ALJ erred
17 in his review of the medical evidence, and erred when rejecting the opinions from Dr.
18 Huddleston.

19 **(3) Did the ALJ provide “clear and convincing” reasons to reject
20 plaintiff’s testimony?**

21 The Court already has concluded that the ALJ erred in reviewing the medical
22 evidence and that this matter should be reversed and remanded for further consideration,
23 *see supra*, sections 1 and 2. In addition, a determination of a claimant's credibility relies in
24 part on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). The Court
also notes that defendant's argument that clear and convincing reasons do not need to be

1 provided in order to reject a claimant's testimony is directly contrary to Ninth Circuit
2 precedent, recently re-affirmed in July, 2014. *See Garrison v. Colvin*, 759 F.3d 995, 1015
3 n.18 (9th Cir. July 14, 2014) ('The government's suggestion that we should apply a lesser
4 standard than 'clear and convincing' lacks any support in precedent and must be rejected');
5 *see also Smolen, supra*, at 1284 (if an ALJ rejects the testimony of a claimant once an
6 underlying impairment has been established, the ALJ must support the rejection 'by
7 offering specific, clear and convincing reasons for doing so') (*citing Dodrill v. Shalala*, 12
8 F.3d 915, 918 (9th Cir.1993)). This Court will follow Ninth Circuit precedent. For the
9 reasons stated, plaintiffs credibility should be assessed anew following remand of this
10 matter.
11

12 **(4) Did the ALJ provide specific and valid reasons to reject lay witness
13 evidence?**

14 Similarly, the lay evidence should be assessed anew following a reexamination of
15 the medical evidence and of plaintiff's allegations, *see supra*, sections 1 and 2.

16 **(5) Did the ALJ consider all of the evidence when assessing the RFC and
17 are the step 5 findings based on that RFC supported by law and fact?**

18 Because the medical evidence must be evaluated anew, the RFC and the step five
19 findings must be determined anew, as necessary.

20 **(6) Should this matter be remanded for an award of benefits or for further
21 administrative proceedings?**

22 Generally when the Social Security Administration does not determine a
23 claimant's application properly, "the proper course, except in rare circumstances, is to
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1 remand to the agency for additional investigation or explanation.” *Benecke v.*
2 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth
3 Circuit has put forth a “test for determining when [improperly rejected] evidence
4 should be credited and an immediate award of benefits directed.” *Harman v. Apfel*,
5 211 F.3d 1172, 1178 (9th Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292
6 (9th Cir. 1996)). It is appropriate when:

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

11 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

12 Here, outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292.

13 Although plaintiff argues that it is clear that Listing 11.09A is met, even if the Court were
14 to agree, MS is a progressive impairment, and it is not entirely clear from the record
15 when plaintiff’s limitations had progressed sufficiently to met or equal the Listed
16 impairment, *see supra*, section 1.

