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

6 MARCI M. KERR,

7 Plaintiff,

8 v.

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

11 Defendant.

Case No. 3:14-cv-05753-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 her
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 the
19 remaining record, the Court hereby finds that for the reasons set forth below, defendant's
20 decision to deny benefits should be reversed and this matter should be remanded for further
21 administrative proceedings.

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23 FACTUAL AND PROCEDURAL HISTORY

24 On November 14, 2011, plaintiff filed an application for SSI benefits, alleging disability
25 beginning November 4, 2011. *See* Dkt. 10, Administrative Record ("AR") 12. The application
26 was denied upon initial administrative review on January 11, 2012 and on reconsideration on

1 April 9, 2012. *See* AR 85-91, 94-107. A hearing was held before an administrative law judge
2 (“ALJ”) on January 13, 2013, at which plaintiff, represented by an attorney, appeared and
3 testified, as did a vocational expert. *See* AR 33-84.

4 In a decision dated February 21, 2013, the ALJ determined plaintiff to be not disabled.
5 *See* AR 9-32. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals
6 Council on July 18, 2014, making that decision the final decision of the Commissioner of Social
7 Security (the “Commissioner”). *See* AR 1-6; 20 C.F.R. § 404.981, § 416.1481. On September 22,
8 2014, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s final
9 decision. *See* Dkts. 1, 3. The administrative record was filed with the Court on February 17,
10 2015. *See* Dkt. 10. The parties have completed their briefing, and thus this matter is now ripe for
11 the Court’s review.
12

13 Plaintiff argues defendant’s decision to deny benefits should be reversed and remanded
14 for an award of benefits, or in the alternative for further administrative proceedings, because the
15 ALJ erred: (1) in improperly evaluating the medical evidence; (2) in improperly evaluating
16 plaintiff’s testimony; (3) in improperly evaluating the lay evidence; (4) in improperly assessing
17 plaintiff’s residual functional capacity (“RFC”); and (5) in basing his step five finding on a
18 residual functional capacity assessment that did not include all of plaintiff’s limitations and on
19 vocational expert testimony that was inconsistent with the Dictionary of Occupational Titles. For
20 the reasons set forth below, the Court agrees the ALJ erred in assessing the medical evidence, in
21 assessing plaintiff’s RFC, and in basing his step five hypothetical questions on an incorrect RFC,
22 and therefore erred in determining plaintiff to be not disabled. Also for the reasons set forth
23 below, the Court finds that while defendant’s decision to deny benefits should be reversed on
24 these bases, this matter should be remanded for further administrative proceedings.
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1 DISCUSSION

2 The determination of the Commissioner that a claimant is not disabled must be upheld by
3 the Court, if the “proper legal standards” have been applied by the Commissioner, and the
4 “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*,
5 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*,
6 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991)
7 (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the decision.”) (citing *Browner*
9 *v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).
10

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

26 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
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

1 I. The ALJ's Evaluation of the Medical Evidence in the Record

2 The ALJ is responsible for determining credibility and resolving ambiguities and
3 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
4 Where the medical evidence in the record is not conclusive, "questions of credibility and
5 resolution of conflicts" are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639,
6 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." *Morgan v.*
7 *Commissioner of the Social Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining
8 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at
9 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls
10 within this responsibility." *Id.* at 603.

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

20 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
21 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
22 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can
23 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
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26 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 the record.” *Id.* at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him or
2 her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation
3 omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence
4 has been rejected.” *Id.*; *see also Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd Cir. 1981); *Garfield*
5 *v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984).

6
7 In general, more weight is given to a treating physician’s opinion than to the opinions of
8 those who do not treat the claimant. *See Lester*, 81 F.3d at 830. On the other hand, an ALJ need
9 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
10 inadequately supported by clinical findings” or “by the record as a whole.” *Batson*, 359 F.3d at
11 1195; *see also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*,
12 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater
13 weight than the opinion of a nonexamining physician.” *Lester*, 81 F.3d at 830-31. A non-
14 examining physician’s opinion may constitute substantial evidence if “it is consistent with other
15 independent evidence in the record.” *Id.* at 830-31; *Tonapetyan*, 242 F.3d at 1149. “In order to
16 discount the opinion of an examining physician in favor of the opinion of a nonexamining
17 medical advisor, the ALJ must set forth specific, legitimate reasons that are supported by
18 substantial evidence in the record.” *Van Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996)
19 (*citing Lester, supra*, 81 F.3d at 831).

20
21 A. *Examining psychiatrist Dr. Mary Lemberg, M.D.*

22
23 Plaintiff maintains the ALJ improperly rejected the opinion of examining psychiatrist Dr.
24 Mary Lemberg, M.D. *See* Dkt. 13, pp. 3-5. Dr. Lemberg submitted a Comprehensive Psychiatric
25 Evaluation based on an interview with plaintiff, Dr. Lemberg’s general observations of plaintiff,
26 a mental status examination (“MSE”), and a review of a portion of the record. AR 622-27. Dr.

1 Lemberg opined that plaintiff

2 does have the ability to perform simple and repetitive tasks, and
3 would not have more difficulty completing detailed and complex
4 tasks. However, she would not be able to perform tasks
5 consistently over a longer period of time due to her poor energy
6 and depression. She would have some difficulties adapting to new
7 environments based on our interview today and mental status
8 exam.

9 She may have difficulty attending to instructions from supervisors,
10 and would have some difficulty interacting with co-workers and
11 the public based upon her presentation today. She may not be able
12 to perform work activities on a consistent basis or maintain regular
13 attendance in the workplace, due to her fatigue, depression and
14 substance use. She was previously doing ok in school prior to the
15 onset of her medical problems. She would have some difficulty
16 responding to work-related stressors.

17 AR 627.

18 The ALJ gave little weight to Dr. Lemberg's opinion because

19 her opinion regarding the claimant's lack of mental endurance to
20 perform work activity on a regular basis is grossly undermined by
21 the overall medical evidence of record. The claimant's
22 performance on the mental status examinations, as well as her
23 activities of daily living, showed a level of mental activity in
24 excess of what this opinion allows. The claimant also reported on a
25 patient health questionnaire that her depressive symptoms did not
26 impact her ability to work, take care of things at home, or get along
with people, despite experiencing the symptoms nearly every day.
The doctor did not have an opportunity to review subsequent
records showing improvement.

AR 24-25 (internal citations omitted).

The ALJ has failed to identify the specific evidence contained within the "the overall
medical evidence of record" that conflicts with Dr. Lemberg's opinion. Specifically, the ALJ
cites to plaintiff's performance on the MSE and her activities of daily living, yet fails to
elaborate on what portion of the MSE or what activities of daily living contradict Dr. Lemberg's
opinion. The ALJ also fails to cite to any evidence which shows that plaintiff's improvement

1 undermines Dr. Lemberg’s opinion. The ALJ provided only conclusory statements that the MSE
2 results, plaintiff’s daily activities, and records showing plaintiff’s subsequent improvement do
3 not support Dr. Lemberg’s findings, which is insufficient to reject the opinion. *See Embry v.*
4 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) (conclusory reasons do “not achieve the level of
5 specificity” required to justify an ALJ’s rejection of an opinion); *McAllister v. Sullivan*, 888 F.2d
6 599, 602 (9th Cir. 1989) (an ALJ’s rejection of a physician’s opinion on the ground that it was
7 contrary to clinical findings in the record was “broad and vague, failing to specify why the ALJ
8 felt the treating physician’s opinion was flawed”).

10 Furthermore, the MSE and plaintiff’s activities of daily living do not undermine Dr.
11 Lemberg’s findings. Plaintiff did well in the intellectual functioning/sensorium portion of the
12 MSE. AR 625. However, during the examination, plaintiff’s mood was “tired” and her affect was
13 “depressed and fatigued.” AR 625. Plaintiff’s speech was slowed, she became tearful at one
14 point, and appeared fatigued and moved slowly. AR 624. She also told Dr. Lemberg that she
15 spends her day sleeping, grocery shops only when she has to, rarely cooks, bathes a couple times
16 per week, and thinks her father does the dishes. *Id.* Plaintiff also scrapbooks and spends time
17 with her father; she does not go out socially. AR 205. The MSE and plaintiff’s activities of daily
18 living do not “grossly” undermine Dr. Lemberg’s opinion. *See* AR 24. Rather, the record cited
19 by the ALJ supports Dr. Lemberg’s findings that plaintiff lacks mental endurance to perform
20 work activity on a regular basis due to her fatigue, depression, and substance abuse.

23 The ALJ also incorrectly relied on a patient health questionnaire wherein plaintiff
24 reported that her depression does not make it difficult for her to do her work, take care of things
25 at home, or get along with other people. AR 24, 663-64. Plaintiff completed a patient health
26 questionnaire during a doctor visit. AR 663-64. She scored in the high range of “moderately

1 severe depression” on the questionnaire. AR 663-64. While plaintiff stated that her depression
2 did not make it difficult for her to do her work or take care of things at home, Dr. Lemberg’s
3 findings were based on plaintiff’s fatigue, depression, and substance abuse, rather than on her
4 depression alone. Therefore, this single patient health questionnaire does not undermine Dr.
5 Lemberg’s opinion.

6
7 For the above stated reasons, the ALJ’s decision to give little weight to Dr. Lemberg’s
8 opinion is not specific and legitimate and supported by substantial evidence. Accordingly, the
9 ALJ improperly rejected the opinion of Dr. Lemberg.

10 The Ninth Circuit has “recognized that harmless error principles apply in the Social
11 Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v.*
12 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting
13 cases)). The Ninth Circuit noted that “in each case we look at the record as a whole to determine
14 [if] the error alters the outcome of the case.” *Id.* The Ninth Circuit has “adhered to the general
15 principle that an ALJ’s error is harmless where it is ‘inconsequential to the ultimate nondisability
16 determination.’” *Id.* (quoting *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th
17 Cir. 2008)) (other citations omitted). Additionally, the Ninth Circuit recognized the necessity to
18 follow the rule that courts must review cases “‘without regard to errors’ that do not affect the
19 parties’ ‘substantial rights.’” *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009)
20 (quoting 28 U.S.C. § 2111) (codification of the harmless error rule)).

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22
23 Had the ALJ properly considered Dr. Lemberg’s opinion, he may have included
24 additional limitations in the residual functional capacity (“RFC”) and in the hypothetical
25 questions posed to the vocational expert. As the ultimate disability decision may have changed,
26 this error is not harmless.

1 B. *Consultative Examiner Dr. Dan Phan, M.D.*

2 Plaintiff contends that the ALJ erred by failing to include all the limitations opined by
3 examining physician Dr. Dan Phan, M.D. after assigning significant weight to Dr. Phan's
4 opinion. *See* Dkt. 13, p.6. Dr. Phan submitted a report in January of 2013. AR 636-38. The report
5 was based on information obtained from a clinical examination of plaintiff, as well as a review of
6 a portion of plaintiff's medical records. *See id.* Dr. Phan found plaintiff has a blood disorder,
7 kidney problems, thrombocytopenic purpura ("TTP"), high blood pressure, and concentration
8 problems. AR 638. Further, he found "[t]here is non-pitting edema in [plaintiff's] hands and feet.
9 Dorsolumbar range of joint motion is reduced due to flank pain." *Id.*

11 Dr. Phan opined that in a typical eight hour work day plaintiff can sit up to four hours
12 cumulatively, stand and walk up to four hours cumulatively, and lift and carry 20 pounds
13 occasionally and 10 pounds frequently. *Id.* Dr. Phan also opined that plaintiff's fatigue and
14 breathing problems associated with her TTP and congestive heart failure will limit her exertional
15 capacity. *Id.* Dr. Phan found plaintiff can work with small objects and files frequently, needs
16 corrective lenses, and has no postural or manipulative limitations. *Id.*

18 The ALJ gave significant weight to the opinion of Dr. Phan, and stated, in relevant part,
19 that Dr. Phan

20 opined that the claimant can sit four hours and standing/walk four
21 hours in an eight-hour workday. The doctor opined that she can
22 lift/carry 20 pounds occasionally and 10 pounds frequently. He
23 opined that she can work with small files and objects frequently.
He opined that she does not have any other limitations.

24 AR 23 (internal citations omitted).

25 The ALJ discussed many of Dr. Phan's opined limitations, including limitations in
26 sitting, standing/walking, and lifting/carrying. AR 23. However, the ALJ failed to discuss Dr.

1 Phan's finding that plaintiff's fatigue and breathing problems would limit her exertional
2 capacity. *Id.*

3 The Commissioner "may not reject 'significant probative evidence' without explanation."
4 *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d
5 1393, 1395 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981))). The
6 "ALJ's written decision must state reasons for disregarding [such] evidence." *Flores*, 49 F.3d at
7 571. While the ALJ gave significant weight to Dr. Phan's opinion, he did not discuss the
8 exertional limitation, and the Court therefore cannot determine if the ALJ gave significant weight
9 to this limitation and incorporated this limitation into the RFC assessment or rejected the
10 limitation. The ALJ failed to explain why his interpretation of plaintiff's exertional limitations
11 resulting from plaintiff's fatigue and breathing problems associated with her TTP and congestive
12 heart failure, rather than Dr. Phan's opinion, is correct. *See Reddick v. Chater*, 157 F.3d 715, 725
13 (9th Cir. 1998) (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Therefore, the
14 ALJ erred in his assessment of Dr. Phan's opinion.
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17 The Ninth Circuit has concluded that it is not harmless error for the ALJ to fail to discuss
18 a medical opinion. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012) ("the ALJ's disregard for
19 Dr. Johnson's medical opinion was not harmless error and Dr. Johnson's opinion should have
20 been considered") (citing 20 C.F.R. § 404.1527(c) (noting that this Ruling requires the
21 evaluation of "every medical opinion" received)). According to the Ninth Circuit, when the ALJ
22 ignores significant and probative evidence in the record favorable to a claimant's position, such
23 as an opinion from an examining or treating doctor, the ALJ "thereby provide[s] an incomplete
24 residual functional capacity [RFC] determination." *See id.* at 1161. Furthermore, when the RFC
25 is incomplete, the hypothetical question presented to the vocational expert relied on at step five
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1 necessarily also is incomplete, “and therefore the ALJ’s reliance on the vocational expert’s
2 answers [is] improper.” *See id.* at 1162. Such is the case here.

3 As the ALJ failed to properly considered Dr. Phan’s opinion, he provided an incomplete
4 RFC and therefore presented an incomplete hypothetical question to the vocational expert at step
5 five. As the ultimate disability decision may have changed, this error is not harmless.

6 C. *State agency consultant Dr. Jerry Gardner, Ph.D.*

7 Plaintiff also argues that the ALJ erred by giving “some weight” to the opinion of non-
8 examining psychologist Dr. Jerry Gardner, Ph.D. Dkt. 13, p. 8. Specifically, plaintiff contends
9 the ALJ erred by rejecting Dr. Gardner’s opinion that plaintiff can concentrate for up to two
10 hours. *Id.*

11 Dr. Gardner opined, in relevant part, that plaintiff is moderately limited in her ability to
12 maintain attention and concentration for extended periods. AR 103. Dr. Gardner stated that
13 plaintiff can concentrate for up to two hours with occasional lapses due to her condition, and her
14 concentration would also be dependent on her sobriety. *Id.* The ALJ found that

15 the doctor’s opinion regarding the claimant only concentrating for
16 up to two hours is undermined by her performance on the mental
17 status examination as well as her activities of daily living of
18 scrapbooking. Accordingly, the undersigned gives Dr. Gardner’s
19 opinion some weight.

20 AR 24 (internal citations omitted). To support his findings, the ALJ cited to the MSE completed
21 by Dr. Lemberg and plaintiff’s Adult Function Report. *Id.*

22 The ALJ does not provide a specific explanation as to why the two referenced pieces of
23 evidence undermine Dr. Gardner’s opinion regarding plaintiff’s ability to concentrate for up to
24 two hours. *See* AR 24. The ALJ does not point to why, in his opinion, the MSE and plaintiff’s
25 ability to scrapbook contradict Dr. Gardner’s finding. The ALJ merely provides a conclusory
26

1 statement that the evidence undermines Dr. Gardner’s opinion, which is insufficient. *See Embry*,
2 849 F.2d at 421-22 (conclusory reasons do “not achieve the level of specificity” required to
3 justify an ALJ’s rejection of an opinion).

4 Furthermore, the evidence cited to by the ALJ does not undermine Dr. Gardner’s opinion.
5 During the MSE, plaintiff correctly followed a 3-step command with a score of 3/3 and correctly
6 spelled the word “world” backward with a score of 5/5. AR 625. In the area of
7 concentration/persistence/pace, it is noted that plaintiff no longer reads, never uses the computer,
8 walks up to one block, and watches television all day. AR 626. In her Adult Function Report,
9 plaintiff stated that she scrapbooks and spends time with her dog daily. AR 205. Plaintiff
10 reported that she has some concentration problems with projects. *Id.*

12 The evidence contained in the MSE and the Adult Function Report fails to undermine Dr.
13 Gardner’s opinion regarding plaintiff’s ability to concentrate for up to two hours. Rather, it
14 appears plaintiff was able to concentrate for the period of time necessary to complete the
15 concentration questions during the MSE and admitted to having difficulty with concentration
16 while working on projects. The evidence does not show that plaintiff is performing tasks wherein
17 she is able to concentrate for more than two hours at a time. *See* AR 103, 205, 625.

19 The evidence cited to by the ALJ does not undermine Dr. Gardner’s opinion regarding
20 plaintiff’s ability to concentrate for up two hours with occasional lapses. Further, the ALJ failed
21 to provide more than a conclusory opinion regarding why, in his opinion, the evidence
22 undermines Dr. Gardner’s opinion. Accordingly, the ALJ has failed to provide specific and
23 legitimate reasons supported by substantial evidence for giving “some weight” to Dr. Gardner’s
24 opinion, and thus has erred.

26 The ALJ may have included additional limitations in the RFC and in the hypothetical

1 questions posed to the vocational expert if he had properly considered Dr. Gardner’s opinion
2 regarding plaintiff’s concentration abilities. Thus, the error is not harmless. *See Molina*, 674 F.3d
3 at 1115.

4 II. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity and Step Five
5 Analysis

6 If a disability determination “cannot be made on the basis of medical factors alone at step
7 three of the evaluation process,” the ALJ must identify the claimant’s “functional limitations and
8 restrictions” and assess his or her “remaining capacities for work-related activities.” SSR 96-8p,
9 1996 WL 374184 *2. A claimant’s residual functional capacity (“RFC”) assessment is used at
10 step four to determine whether he or she can do his or her past relevant work, and at step five to
11 determine whether he or she can do other work. *Id.* It thus is what the claimant “can still do
12 despite his or her limitations.” *Id.*

14 A claimant’s RFC is the maximum amount of work the claimant is able to perform based
15 on all of the relevant evidence in the record. *Id.* However, a claimant’s inability to work must
16 result from his or her “physical or mental impairment(s).” *Id.* Thus, the ALJ must consider only
17 those limitations and restrictions “attributable to medically determinable impairments.” *Id.* In
18 assessing a claimant’s RFC, the ALJ also is required to discuss why the claimant’s “symptom-
19 related functional limitations and restrictions can or cannot reasonably be accepted as consistent
20 with the medical or other evidence.” *Id.* at *7.

22 Plaintiff argues that because the ALJ erred in his evaluation of the medical evidence, the
23 ALJ erred in his assessment of plaintiff’s RFC. *See* Dkt. 13, p. 18. The ALJ committed harmful
24 error in his consideration of the opinions of Drs. Lemberg, Phan, and Gardner. *See supra* Section
25 I. As a result of the ALJ’s error, the RFC provided by the ALJ is incomplete. Accordingly, on
26 remand, the ALJ must reassess plaintiff’s RFC.

1 Plaintiff also alleges the ALJ erred in his step five analysis because he based the
2 hypothetical questions on an incomplete RFC. *See* Dkt. 13, pp. 18-19. Because the ALJ’s RFC
3 assessment was incomplete, the question posed to the vocational expert was also incomplete.
4 Accordingly, on remand the ALJ must apply the new RFC when determining if there are other
5 jobs in the national economy plaintiff can perform at step five.

6
7 III. This Matter Should Be Remanded for Further Administrative Proceedings

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

15
16 Benefits may be awarded where “the record has been fully developed” and “further
17 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at 1292; *Holohan v.*
18 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

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

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

24 Issues still remain regarding the evidence in the record concerning plaintiff’s functional
25 capabilities and her ability to perform other jobs existing in significant numbers in the national
26 economy. Accordingly, remand for further consideration is warranted in this matter.

1 CONCLUSION

2 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded
3 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is REVERSED
4 and this matter is REMANDED for further administrative proceedings in accordance with the
5 findings contained herein.

6 DATED this 10th day of August, 2015.
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11 Karen L. Strombom
12 Karen L. Strombom
13 United States Magistrate Judge
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