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

11 DONALD L. SKEENS JR.,

12 Plaintiff,

13 v.

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

Defendant.

CASE NO. 14-cv-05754 JRC

ORDER ON PLAINTIFF'S
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, Dkt. 5; Consent to Proceed Before a United States
20 Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 18, 19, 20).

21 After considering and reviewing the record, the Court concludes that the ALJ
22 erred in discounting the opinion of an evaluating physician without providing any
23 specific and legitimate reasons supported by substantial evidence. Because the residual
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1 functional capacity (“RFC”) should have included additional limitations, and because
2 these additional limitations may have affected the ultimate disability determination, the
3 error is not harmless.

4 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
5 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

6 BACKGROUND

7 Plaintiff, DONALD L. SKEENS, JR., was born in 1964 and was 37 years old on
8 the alleged date of disability onset of October 19, 2001 (*see* AR. 159-65). Plaintiff
9 completed high school with some special education classes (AR. 419). He has some work
10 experience as a handyman/helper and copier operator (AR. 539-40). He was let go from
11 his last job when he relapsed on drugs (AR. 420-21, 540).
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13 According to the ALJ, plaintiff has at least the severe impairments of “right index
14 finger contraction flexure residuals from neurovascular injury; right shoulder
15 osteoarthritis; cognitive disorder and depression (20 CFR 404.1520(c) and 416.920(c))”
16 (AR. 386).

17 At the time of the hearing, plaintiff was living in a trailer with his girlfriend (AR.
18 425).

19 PROCEDURAL HISTORY

20 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42
21 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
22 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
23 following reconsideration (*see* AR. 77-81). Plaintiff was found to be not disabled by an
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1 ALJ, and after the Appeals Council declined review, he filed a complaint in this Court
2 (*see* AR. 14-31, 485-90, 491-92). The Court then remanded his claims for a new hearing
3 (*see* AR. 493-525). Plaintiff’s second hearing was held before Administrative Law Judge
4 Kimberly Boyce (“the ALJ”) on March 26, 2014 (*see* AR. 410-60). On May 22, 2014, the
5 ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled
6 pursuant to the Social Security Act (*see* AR. 380-409).

7
8 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether or
9 not the ALJ properly evaluated the medical evidence; (2) Whether or not the ALJ
10 properly evaluated plaintiff’s testimony; (3) Whether or not the ALJ properly evaluated
11 the lay evidence; (4) Whether or not the ALJ properly assessed plaintiff’s RFC; and (5)
12 Whether or not the ALJ erred by basing her step four and step five findings on an RFC
13 assessment that did not include all of plaintiff’s limitations (*see* Dkt. 18, p. 2). Because
14 this Court reverses and remands the case based on issues 1, 4, and 5, the Court need not
15 further review other issues and expects the ALJ to reevaluate the record as a whole in
16 light of the direction provided below.

17 STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s
19 denial of social security benefits if the ALJ’s findings are based on legal error or not
20 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
21 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
22 1999)).
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1 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for
2 disregarding [such] evidence.” *Flores, supra*, 49 F.3d at 571.

3 Here, the ALJ did not incorporate the grasping restriction opined by Dr.
4 Bednarczyk into the RFC (*see* AR. 391). However, the ALJ failed to provide any
5 explanation for rejecting this significant probative evidence (*see* AR. 397-99). The ALJ
6 made no findings regarding Dr. Bednarczyk’s opinion, did not assign weight to the
7 opinion, and offered no specific and legitimate reasons for rejecting the opinion (*see id.*).
8

9 Defendant argues that the ALJ did acknowledge the opinion by including in her
10 summary of the medical evidence that in October of 2005, “the claimant continued to
11 show decreased range of motion of his right index finger, and inability to grasp with his
12 right hand (7F5-6)” (*see* AR. 392; Defendant’s Brief, Dkt. 19, p. 7). However, this
13 acknowledgement is insufficient for the ALJ to reject the opinion without further
14 discussion and interpretation of the conflicting evidence.

15 Defendant also argues that the ALJ did not err because Dr. Bednarczyk’s opinion
16 was short and conclusory, because the opinion of Dr. Mark Heilbrunn, M.D., is rightfully
17 entitled to greater weight, and because plaintiff’s daily activities were inconsistent with
18 Dr. Bednarczyk’s opinion (*see* Defendant’s Brief, Dkt. 19, pp. 7-8). However, these are
19 all *post hoc* rationalizations, not stated anywhere in the opinion by the ALJ. *See Bray v.*
20 *Comm’r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (“Long-standing principles of
21 administrative law require us to review the ALJ’s decision based on the reasoning and
22 actual findings offered by the ALJ – not *post hoc* rationalizations that attempt to intuit
23 what the adjudicator may have been thinking.”) (*citing SEC v. Chenery Corp.*, 332 U.S.
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1 194, 196 (1947) (other citation omitted)). To the extent that defendant is arguing that the
2 ALJ could rightfully reject Dr. Bednarczyk’s opinion without explanation because it is
3 not significant, probative evidence, this argument also fails. The opinion is that of an
4 examining physician who assessed a specific, work-related limitation that would affect
5 plaintiff’s RFC. The ALJ did not provide the necessary specific and legitimate reasons to
6 discount this evidence.

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8 The Ninth Circuit has “recognized that harmless error principles apply in the
9 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
10 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
11 Cir. 2006) (collecting cases)). The Ninth Circuit noted that “in each case we look at the
12 record as a whole to determine [if] the error alters the outcome of the case.” *Id.* The court
13 also noted that the Ninth Circuit has “adhered to the general principle that an ALJ’s error
14 is harmless where it is ‘inconsequential to the ultimate nondisability determination.’” *Id.*
15 (quoting *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
16 (other citations omitted).

17 Here, because the ALJ improperly rejected the opinion of Dr. Bednarczyk in
18 assessing plaintiff’s RFC and plaintiff was found to be capable of performing work based
19 on that RFC, the error affected the ultimate disability determination and is not harmless.
20 Defendant does not contend that plaintiff still would be able to perform the jobs identified
21 by the ALJ at steps four and five if the limitation opined by Dr. Bednarczyk had been
22 included into the hypothetical presented to the vocational expert. Furthermore, it does not
23 appear likely that plaintiff could perform these jobs, given that the Dictionary of
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1 Occupational Titles (“DOT”) indicates that the jobs of photocopy machine operator, hotel
2 motel housekeeper, folder, and table worker each require frequent handling, which
3 includes grasping. *See* Selected Characteristics of Occupations Defined in the Revised
4 DOT, <http://onlineresources.wnylc.net/docs/SelectedCharacteristicsSearch121110.pdf>,
5 last visited July 21, 2015, pp. 132, 134, 203, 313, C-3.

6 The Court may remand this case “either for additional evidence and findings or to
7 award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when
8 the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is
9 to remand to the agency for additional investigation or explanation.” *Benecke v.*
10 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual
11 case in which it is clear from the record that the claimant is unable to perform gainful
12 employment in the national economy,” and that “remand for an immediate award of
13 benefits is appropriate.” *Id.* Here, the outstanding issue is whether or not a vocational
14 expert may still find an ability to perform other jobs existing in significant numbers in the
15 national economy despite additional limitations. Accordingly, remand for further
16 consideration is warranted in this matter.

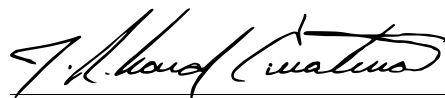
17 18 19 CONCLUSION

20 Based on these reasons and the relevant record, the Court **ORDERS** that this
21 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
22 405(g) to the Acting Commissioner for further consideration consistent with this order.

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1 **JUDGMENT** should be for plaintiff and the case should be closed.

2 Dated this 21st day of July, 2015.

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5 J. Richard Creatura
6 United States Magistrate Judge
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