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

6 JERRY D. MYERS, SR.,

7 Plaintiff,

8 v.

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

11 Defendant.

Case No. 3:16-cv-05590-KLS

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

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

20 On December 17, 2012, plaintiff filed an application for disability insurance benefits, and  
21 on November 25, 2013, he filed another one for SSI benefits, alleging in both applications that  
22 he became disabled beginning April 10, 2007. Dkt. 7, Administrative Record (AR), 12. Both  
23 applications were denied on initial administrative review and on reconsideration. *Id.* At a hearing  
24 held before an Administrative Law Judge (ALJ), plaintiff, represented by counsel, appeared and  
25 testified, as did a vocational expert. AR 32-68.  
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ORDER - 1

1 In a written decision, the ALJ found that plaintiff could perform other jobs existing in  
2 significant numbers in the national economy, and therefore that he was not disabled. AR 12-27.  
3 The Appeals Council denied plaintiff's request for review of the ALJ's decision, making that  
4 decision the final decision of the Commissioner, which plaintiff then appealed to this Court. AR  
5 1; Dkt. 1; 20 C.F.R. § 404.981, § 416.1481.

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7 Plaintiff seeks reversal of the ALJ's decision, arguing the ALJ erred (1) in failing to find  
8 his right hand impairment to be severe, and (2) in rejecting the opinion of Ron Nielsen, M.D.,  
9 and E. Andrea Shadrach, Psy.D. For the reasons set forth below, the Court agrees the ALJ erred  
10 in failing to find plaintiff had a severe right hand impairment and in rejecting the opinion of Dr.  
11 Nielsen, and thus in assessing plaintiff's residual functional capacity (RFC )and in finding he  
12 could perform other jobs. Remand for further administrative proceedings, therefore, is warranted.

### 13 DISCUSSION

14  
15 The Commissioner's determination that a claimant is not disabled must be upheld if the  
16 "proper legal standards" have been applied, and the "substantial evidence in the record as a  
17 whole supports" that determination. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986);  
18 *see also Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v.*  
19 *Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991). "A decision supported by substantial  
20 evidence nevertheless will be set aside if the proper legal standards were not applied in weighing  
21 the evidence and making the decision." *Carr*, 772 F.Supp. at 525 (citing *Browner v. Sec'y of*  
22 *Health and Human Sers.*, 839 F.2d 432, 433 (9th Cir. 1987)). Substantial evidence is "such  
23 relevant evidence as a reasonable mind might accept as adequate to support a conclusion."  
24 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted); *see also Batson*, 359 F.3d at  
25 1193.  
26

1 The Commissioner’s findings will be upheld “if supported by inferences reasonably  
2 drawn from the record.” *Batson*, 359 F.3d at 1193. Substantial evidence requires the Court to  
3 determine whether the Commissioner’s determination is “supported by more than a scintilla of  
4 evidence, although less than a preponderance of the evidence is required.” *Sorenson v.*  
5 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence admits of more than one  
6 rational interpretation,” that decision must be upheld. *Allen v. Heckler*, 749 F.2d 577, 579 (9th  
7 Cir. 1984). That is, “[w]here there is conflicting evidence sufficient to support either outcome,”  
8 the Court “must affirm the decision actually made.” *Allen*, 749 F.2d at 579 (quoting *Rhinehart v.*  
9 *Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).

11 I. The ALJ’s Step Two Determination

12 Defendant employs a five-step “sequential evaluation process” to determine whether a  
13 claimant is disabled. 20 C.F.R. § 404.1520, § 416.920. If the claimant is found disabled or not  
14 disabled at any step thereof, the disability determination is made at that step, and the sequential  
15 evaluation process ends. *Id.* At step two of the evaluation process, the ALJ must determine if an  
16 impairment is “severe.” 20 C.F.R. § 404.1520, § 416.920. An impairment is “not severe” if it  
17 does not “significantly limit” a claimant’s mental or physical abilities to do basic work activities.  
18 20 C.F.R. § 404.1520(a)(4)(iii), § 416.920(a)(4)(iii); Social Security Ruling (SSR) 96-3p, 1996  
19 WL 374181, at \*1. Basic work activities are those “abilities and aptitudes necessary to do most  
20 jobs.” 20 C.F.R. § 404.1521(b), § 416.921(b); SSR 85- 28, 1985 WL 56856, at \*3.

23 An impairment is not severe only if the evidence establishes a slight abnormality that has  
24 “no more than a minimal effect on an individual[’]s ability to work.” SSR 85-28, 1985 WL  
25 56856, at \*3; *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841 F.2d  
26 303, 306 (9th Cir.1988). Plaintiff must prove that his “impairments or their symptoms affect her

1 ability to perform basic work activities.” *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir.  
2 2001); *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998). The step two inquiry described above,  
3 however, is a *de minimis* screening device used to dispose of groundless claims. *Smolen*, 80 F.3d  
4 at 1290.

5 At step two in this case, the ALJ found plaintiff had severe impairments consisting of a  
6 major depressive disorder, an anxiety disorder, and alcohol abuse by history. AR 15. Also at this  
7 step, the ALJ found plaintiff “was generally able to move his extremities well and he had full-  
8 strength.” *Id.* Plaintiff argues the ALJ erred in not also finding that he had a severe right hand  
9 impairment as well. The Court agrees.

10 Plaintiff bases his argument on the evaluation of plaintiff performed by Dr. Nielsen, who  
11 found he could “manipulate his clothing” and “touch his thumb to all fingers with the right hand,  
12 but the grip [was] very weak with limited coordination.” AR 465. Plaintiff had normal wrist  
13 range of motion, but “[l]imited flexion” of the thumb and fingers. *Id.* Although plaintiff had full  
14 hand strength, his right hand grip was “compromised by his injury.” *Id.* Dr. Nielsen diagnosed  
15 plaintiff with “[c]hronic contractures of the right hand,” which was “a prominent and stable  
16 condition.” AR 466. Dr. Nielsen opined that plaintiff was not limited with respect to lifting and  
17 carrying capacity, or in regard to reaching, handling, fingering and feeling with his left hand. AR  
18 466-67. Dr. Nielsen did find, however, that he had “significant limitations with the right hand to  
19 both strength and coordination.” AR 467.

20 The ALJ declined to fully accept Dr. Nielsen’s opinion, because it was “inconsistent with  
21 every other medical examination in the treatment record.” AR 23. The ALJ went on to state:

22 [T]he claimant had various physical exams when he reported to emergency  
23 rooms. No right hand deficits were observed by medical personnel.  
24 Furthermore, the claimant did not seek treatment for his right hand during the  
25 relevant period, including that it did not cause the claimant limitations. Even if  
26

1 the claimant had some right hand deficits at the time of the exam, the claimant  
2 has not sought any treatment or established that any right hand deficits have  
3 persisted for a continuous 12-month period.

4 *Id.* The Court agrees with plaintiff that these do not constitute valid reasons for discounting Dr.  
5 Nielsen's opinion.

6 The ALJ is responsible for determining credibility and resolving ambiguities and  
7 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Where  
8 the evidence is inconclusive, "questions of credibility and resolution of conflicts are functions  
9 solely of the [ALJ]." *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). In such situations,  
10 "the ALJ's conclusion must be upheld." *Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d  
11 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the evidence "are material (or  
12 are in fact inconsistencies at all) and whether certain factors are relevant to discount" medical  
13 opinions "falls within this responsibility." *Id.* at 603.

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

21 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted  
22 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
23 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can  
24 only be rejected for specific and legitimate reasons that are supported by substantial evidence in  
25  
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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.2d 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 v. Comm’r of*  
11 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also Thomas v. Barnhart*, 278 F.3d  
12 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). An  
13 examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining  
14 physician.” *Lester*, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute  
15 substantial evidence if “it is consistent with other independent evidence in the record.” *Id.* at  
16 830-31; *Tonapetyan*, 242 F.3d at 1149.

17  
18 First, while it may be that no other medical personnel observed any deficits in plaintiff’s  
19 right hand, as plaintiff points out Dr. Nielsen is the only medical source that specifically focused  
20 on that hand. Dr. Nielsen also appears to have been the only physician to have performed a full  
21 examination in relation to plaintiff’s ability to perform work-related activities. Indeed, there is no  
22 indication that any other medical source actually examined plaintiff’s hand, let alone whether or  
23 not plaintiff had any functional limitations with regard thereto.  
24

25 As for plaintiff’s failure to seek treatment for his right hand, it is not at all clear why he  
26 has not sought greater treatment, and the ALJ did not look any further into the matter. *See SSR*

1 96-7p, 1996 WL 374186, at \*7 (an ALJ must not draw any inferences about a claimant's  
2 symptoms and their functional effects from the failure to follow prescribed treatment, without  
3 first considering any explanations provided or other information which may explain that failure).  
4 Nor does the Court find this to be a valid reason for discounting Dr. Nielsen's opinion in this  
5 instance – even if the ALJ had expressly considered any explanations on plaintiff's part – given  
6 that Dr. Nielsen performed an extensive examination, and provided his own objective findings  
7 that are supportive of his opinion.  
8

9 II. The ALJ's RFC Assessment

10 The Commissioner employs a five-step “sequential evaluation process” to determine  
11 whether a claimant is disabled. 20 C.F.R. § 404.1520, § 416.920. If the claimant is found  
12 disabled or not disabled at any particular step thereof, the disability determination is made at that  
13 step, and the sequential evaluation process ends. *See id.* A claimant's RFC assessment is used at  
14 step four of the process to determine whether he or she can do his or her past relevant work, and  
15 at step five to determine whether he or she can do other work. SSR 96-8p, 1996 WL 374184 \*2.  
16 It is what the claimant “can still do despite his or her limitations.” *Id.*  
17

18 A claimant's RFC is the maximum amount of work the claimant is able to perform based  
19 on all of the relevant evidence in the record. *Id.* However, an inability to work must result from  
20 the claimant's “physical or mental impairment(s).” *Id.* Thus, the ALJ must consider only those  
21 limitations and restrictions “attributable to medically determinable impairments.” *Id.* In assessing  
22 a claimant's RFC, the ALJ also is required to discuss why the claimant's “symptom-related  
23 functional limitations and restrictions can or cannot reasonably be accepted as consistent with the  
24 medical or other evidence.” *Id.* at \*7.  
25

26 The ALJ found plaintiff had the RFC:

1           **to perform a full range of work at all exertional levels that does not**  
2           **require exposure to hazards such as open machinery or unprotected**  
3           **heights; that does not require exposure to pulmonary irritants; that**  
4           **consists of simple, routine, repetitive tasks; that does not require more**  
5           **than occasional interaction with coworkers or the general public; and**  
6           **that does not require more than occasional adaptation to changes in the**  
7           **work setting or work processes**

8 AR 17 (emphasis in the original). But because as discussed above the ALJ erred in not properly  
9 evaluating the medical evidence in the record concerning plaintiff's right hand impairment, the  
10 ALJ's RFC assessment cannot be said to completely and accurately describe all of plaintiff's  
11 functional limitations. Accordingly, the ALJ erred here as well.

### 12 III.    The ALJ's Step Five Determination

13           If a claimant cannot perform his or her past relevant work, at step five of the sequential  
14 disability evaluation process the ALJ must show there are a significant number of jobs in the  
15 national economy the claimant is able to do. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir.  
16 1999); 20 C.F.R. § 416.920(d), (e). The ALJ can do this through the testimony of a vocational  
17 expert. *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2000); *Tackett*, 180 F.3d at 1100-1101.  
18 An ALJ's step five determination will be upheld if the weight of the medical evidence supports  
19 the hypothetical posed to the vocational expert. *Martinez v. Heckler*, 807 F.2d 771, 774 (9th Cir.  
20 1987); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's  
21 testimony therefore must be reliable in light of the medical evidence to qualify as substantial  
22 evidence. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's  
23 description of the claimant's functional limitations "must be accurate, detailed, and supported by  
24 the medical record." *Id.* (citations omitted).

25           The ALJ found plaintiff could perform other jobs existing in significant numbers in the  
26 national economy, based on the vocational expert's testimony offered at the hearing in response

1 to a hypothetical question concerning an individual with the same age, education, work  
2 experience and RFC as plaintiff. AR 26-27. But because as discussed above the ALJ erred in  
3 assessing plaintiff's RFC, the hypothetical question the ALJ posed to the vocational expert – and  
4 thus that expert's testimony and the ALJ's reliance thereon – also cannot be said to be supported  
5 by substantial evidence or free of error.

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7 IV. Remand for Further Administrative Proceedings

8 The Court may remand this case “either for additional evidence and findings or to award  
9 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
10 reverses an ALJ's decision, “the proper course, except in rare circumstances, is to remand to the  
11 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
12 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record  
13 that the claimant is unable to perform gainful employment in the national economy,” that  
14 “remand for an immediate 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 rejecting [the  
20 claimant's] evidence, (2) there are no outstanding issues that must be resolved  
21 before a determination of disability can be made, and (3) it is clear from the  
22 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 Because issues remain in regard to the medical evidence in the record concerning plaintiff's right  
25 hand impairment, as well as plaintiff's RFC and his ability to perform other jobs existing in  
26 significant numbers in the national economy, remand for further consideration of those issues is

1 warranted.

2 CONCLUSION

3 Based on the foregoing discussion, the Court finds the ALJ improperly determined  
4 plaintiff to be not disabled. Defendant's decision to deny benefits therefore is REVERSED and  
5 this matter is REMANDED for further administrative proceedings.

6 DATED this 20th day of December, 2016.

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11 Karen L. Strombom  
12 United States Magistrate Judge  
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