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

6 SUSAN MARIE BATEY,

7 Plaintiff,

8 v.

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

11 Defendant.

Case No. 3:16-cv-05602-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 her  
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.  
18

19 FACTUAL AND PROCEDURAL HISTORY

20 On July 24, 2009, plaintiff filed an application for disability insurance benefits and on  
21 another one for SSI benefits, alleging in both applications that she became disabled beginning  
22 September 16, 2008. Dkt. 7, Administrative Record (AR), 1211. Both applications were denied  
23 on initial administrative review and on reconsideration. *Id.* At a hearing held before an  
24 Administrative Law Judge (ALJ), plaintiff appeared and testified, as did a vocational expert. AR  
25 37-70.  
26

ORDER - 1

1 In a written decision dated March 22, 2011, the ALJ found that plaintiff could perform  
2 her past relevant work, and therefore that she was not disabled. AR 21-31. Following the  
3 Appeals Council's denial of her request for review of the ALJ's decision, plaintiff appealed to  
4 this Court, which on January 16, 2013, remanded the matter to the Commissioner for further  
5 administrative proceedings. AR 1, 625-39. On remand, the Appeals Council vacated the ALJ's  
6 decision, and consolidated plaintiff's claims with two other applications for disability insurance  
7 and SSI benefits she had filed. AR 1211-1212.

9 Plaintiff appeared and testified at a second hearing held before the same ALJ, as did a  
10 vocational expert and a medical expert. AR 550-77. In a decision dated November 29, 2013, the  
11 ALJ found that plaintiff could perform other jobs existing in significant numbers in the national  
12 economy, and therefore that she was noted disabled. AR 519-40. Plaintiff appealed that decision  
13 to this Court, which on October 17, 2014, again remanded this matter for further administrative  
14 proceedings. AR 1384-1393.

16 On remand, plaintiff appeared and testified at a third hearing held before a different ALJ.  
17 AR 1308-1345. In a written decision dated March 8, 2016, that ALJ also found that plaintiff  
18 could perform other jobs existing in significant numbers in the national economy, and therefore  
19 that she was not disabled. AR 1211-1234. It appears that the Appeals Council did not assume  
20 jurisdiction of the matter, making the ALJ's decision the final decision of the Commissioner,  
21 which plaintiff once more appealed to this Court. Dkt. 1; 20 C.F.R. § 404.984, § 416.1484.

23 Plaintiff seeks reversal of the ALJ's decision and remand for an award of benefits,  
24 arguing the ALJ erred:

25 (1) in evaluating the opinions of James Nakashima, M.D., Lisa Doherty,  
26 M.D., and Robert Schneider, Ph.D.;

(2) in discounting plaintiff's credibility; and

1 (3) in finding plaintiff could perform other jobs existing in significant  
2 numbers in the national economy.

3 For the reasons set forth below, the Court agrees the ALJ erred in evaluating the opinion of Dr.  
4 Schneider and thus in finding plaintiff could perform other jobs. Also for the reasons set forth  
5 below, the Court finds that Dr. Schneider's opinion should be credited as true, but that remand  
6 for further administrative proceedings is nevertheless warranted.  
7

### 8 DISCUSSION

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

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

5 I. The ALJ’s Evaluation of Dr. Schneider’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  
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1 only be rejected for specific and legitimate reasons that are supported by substantial evidence in  
2 the record.” *Id.* at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him or  
3 her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citation  
4 omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence  
5 has been rejected.” *Id.*; *see also Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd Cir. 1981); *Garfield*  
6 *v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984).

7  
8 In general, more weight is given to a treating physician’s opinion than to the opinions of  
9 those who do not treat the claimant. *See Lester*, 81 F.3d at 830. On the other hand, an ALJ need  
10 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and  
11 inadequately supported by clinical findings” or “by the record as a whole.” *Batson v. Comm’r of*  
12 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also Thomas v. Barnhart*, 278 F.3d  
13 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). An  
14 examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining  
15 physician.” *Lester*, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute  
16 substantial evidence if “it is consistent with other independent evidence in the record.” *Id.* at  
17 830-31; *Tonapetyan*, 242 F.3d at 1149.

18  
19 Dr. Schneider conducted a psychological evaluation of plaintiff in mid-June, 2009,  
20 opining that she “would probably have difficulty tolerating the typical demands of employment  
21 or maintaining adequate pace and persistence.” AR 290. Dr. Schneider also opined that “[w]ithin  
22 medical probability, it is expected that she will be able to perform gainful employment once she  
23 is stabilized on appropriate medications.” *Id.* The ALJ gave Dr. Schneider’s opinion “[l]ittle  
24 weight” because it was “phrased equivocally,” which “reveals a lack of confidence in making an  
25 opinion, and renders his opinion unpersuasive.” AR 1226.  
26

1 Plaintiff argues this was not a valid basis for rejecting Dr. Schneider’s opinion. The Court  
2 agrees. The phrase “would probably” is hardly equivocal. Rather, it indicates that Dr. Schneider  
3 felt plaintiff most likely would have difficulty tolerating the typical demands of employment or  
4 maintaining adequate pace and persistence. Similarly, although “[w]ithin medical probability” is  
5 not the same as certainty, again it does indicate Dr. Schneider believed plaintiff would be able to  
6 perform gainful employment once she is stabilized on at least a more likely than not basis. Thus,  
7 here too, there was nothing equivocal about Dr. Schneider’s opinion. Given that this was the only  
8 basis for the ALJ’s rejection of these limitations, the ALJ erred.  
9

## 10 II. The ALJ’s Step Five Determination

11 The Commissioner employs a five-step “sequential evaluation process” to determine  
12 whether a claimant is disabled. 20 C.F.R. § 404.1520, § 416.920. If the claimant is found  
13 disabled or not disabled at any particular step thereof, the disability determination is made at that  
14 step, and the sequential evaluation process ends. *See id.* A claimant’s residual functional capacity  
15 (RFC) assessment is used at step four of the process to determine whether he or she can do his or  
16 her past relevant work, and at step five to determine whether he or she can do other work. SSR  
17 96-8p, 1996 WL 374184 \*2. It is what the claimant “can still do despite his or her limitations.”  
18 *Id.*  
19

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

2       The ALJ found plaintiff had the mental RFC to perform limited to simple, entry-level  
3 work in a routine environment. AR 1218. But because as discussed above the ALJ failed to  
4 provide a valid basis for rejecting Dr. Schneider’s opinion, the ALJ’s RFC assessment cannot be  
5 said to completely and accurately describe all of plaintiff’s functional limitations. If a claimant  
6 cannot perform his or her past relevant work, at step five of the sequential disability evaluation  
7 process the ALJ must show there are a significant number of jobs in the national economy the  
8 claimant is able to do. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. §  
9 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert. *Osenbrock v.*  
10 *Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2000); *Tackett*, 180 F.3d at 1100-1101.

12       An ALJ’s step five determination will be upheld if the weight of the medical evidence  
13 supports the hypothetical posed to the vocational expert. *Martinez v. Heckler*, 807 F.2d 771, 774  
14 (9th Cir. 1987); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert’s  
15 testimony therefore must be reliable in light of the medical evidence to qualify as substantial  
16 evidence. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ’s  
17 description of the claimant’s functional limitations “must be accurate, detailed, and supported by  
18 the medical record.” *Id.* (citations omitted).

19  
20       Here, the ALJ found plaintiff could perform other jobs existing in significant numbers in  
21 the national economy, based on the vocational expert’s testimony offered at the second hearing  
22 in response to a hypothetical question concerning an individual with the same age, education,  
23 work experience and RFC as plaintiff. AR 1233-1234. But because as discussed above the ALJ  
24 erred in assessing plaintiff’s RFC, the hypothetical question the ALJ posed – and thus the  
25 vocational expert’s testimony and the ALJ’s reliance on that testimony – also cannot be said to  
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1 be supported by substantial evidence or free of error.

2 IV. Remand for Further Administrative Proceedings

3 The Court may remand this case “either for additional evidence and findings or to award  
4 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
5 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the  
6 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
7 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record  
8 that the claimant is unable to perform gainful employment in the national economy,” that  
9 “remand for an immediate award of benefits is appropriate.” *Id.*

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

15 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
16 claimant’s] evidence, (2) there are no outstanding issues that must be resolved  
17 before a determination of disability 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.

18 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).  
19 Because issues remain in regard to plaintiff’s mental RFC, as well as her ability to perform other  
20 jobs existing in significant numbers in the national economy, remand for further consideration of  
21 those issues is warranted.

23 Plaintiff argues that the record has been fully developed, that further proceedings would  
24 serve no useful purpose, and therefore that the Court should remand this matter for an immediate  
25 award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). As plaintiff notes,  
26 this matter has been pending for a number of years – indeed, this is the third time this case has



1 been appealed to this Court – and such delay can be very harmful to a claimant.<sup>1</sup> As such, and as  
2 plaintiff further notes, at some point it is unfair to allow the Commissioner another bite at the  
3 apple on remand. *See id.* (“Allowing the Commissioner to decide the issue again would create an  
4 unfair ‘heads we win; tails, let’s play again’ system of disability benefits adjudication.”) (citation  
5 omitted).

6  
7 In *Benecke*, however, it was clear that there were no outstanding issues to be resolved and  
8 that the ALJ was required to find the claimant disabled. *Id.* at 596. Plaintiff argues it is clear here  
9 as well, in light of Dr. Schneider’s opinion regarding her ability to tolerate the typical demands  
10 of employment or maintain adequate pace and persistence, and vocational expert testimony in the  
11 record that an individual who had reduced productivity of no more than 80 percent of a normal  
12 employee, would not be able to maintain employment. But while Dr. Schneider did opine that  
13 plaintiff would have difficulty in the above areas, he gave no indication by exactly how much.  
14 He also felt plaintiff could be expected to perform gainful employment with proper medication,  
15 but again offered no suggestion as to how long that might take.  
16

17 It is far from clear, therefore, whether plaintiff would in fact be disabled based on Dr.  
18 Schneider’s opinion. That being said, the Court finds it appropriate to credit that opinion as true.  
19 Where the ALJ has failed “to provide adequate reasons for rejecting the opinion of a treating or  
20 examining physician,” that opinion generally is credited “as a matter of law.” *Lester*, 81 F.3d at  
21 834 (citation omitted). This is the third time that the Commissioner has failed to provide valid  
22 reasons for rejecting Dr. Schneider’s opinion. *See* AR 636-38, 1387-90. Following the first  
23 remand no reason for rejecting that opinion was offered (AR 1387-90), and as just discussed the  
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26 <sup>1</sup> *See id.* at 595 (“Remanding a disability claim for further proceedings can delay much needed income for claimants who are unable to work and are entitled to benefits, often subjecting them to ‘tremendous financial difficulties while awaiting the outcome of their appeals and proceedings on remand.’”) (citation omitted).

1 most recently offered basis for doing so was little better.

2 Three chances to get it right is more than enough, particularly given the amount of time  
3 plaintiff has had to wait in order to have her claims properly considered. Accordingly, on remand  
4 the Commissioner shall accept the opinion evidence from Dr. Schneider as true. Again, however,  
5 because for the reasons discussed above it is uncertain whether that evidence sufficiently shows  
6 plaintiff to be disabled, remand for the purpose of resolving that issue is warranted. *Garrison v.*  
7 *Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (courts should “remand for further proceedings when,  
8 even though all conditions of the credit-as-true rule are satisfied, an evaluation of the record as a  
9 whole creates serious doubt that a claimant is, in fact, disabled”).  
10

11 CONCLUSION

12 Based on the foregoing discussion, the Court finds the ALJ improperly determined  
13 plaintiff to be not disabled. Defendant’s decision to deny benefits therefore is REVERSED and  
14 this matter is REMANDED for further administrative proceedings.  
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16 DATED this 21st day of December, 2016.

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20 Karen L. Strombom  
21 United States Magistrate Judge  
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