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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

7 ISAAC ACOSTA-ESPINOSA,

8 Plaintiff,

Case No. C16-5831-JCC

9 v.

10 NANCY A. BERRYHILL, Acting  
11 Commissioner of Social Security,<sup>1</sup>

12 Defendant.

**ORDER REVERSING AND  
REMANDING CASE FOR  
FURTHER ADMINISTRATIVE  
PROCEEDINGS**

13 Isaac Acosta-Espinoza seeks review of the denial of his application for Supplemental  
14 Security Income and Disability Insurance Benefits. The parties agree this matter must be  
15 remanded but disagree as to the scope of the remand. Mr. Acosta-Espinoza contends the ALJ  
16 erred in: (1) failing to consider degenerative disc disease of the cervical and thoracic spine and  
17 degenerative joint disease of the hips at step two; (2) failing to consider whether he met Listing  
18 1.04 at step three; (3) evaluating the medical opinions of Huong Lakin, D.O. and Nancy  
19 Armstrong, ARNP; (4) failing to include visual limitations in the residual functional capacity  
20 (RFC); and (5) evaluating his own symptom testimony. Dkt. 17 at 1. Mr. Acosta-Espinoza also

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22 <sup>1</sup> Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to  
23 Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as  
defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties  
should reflect this change.

ORDER REVERSING AND REMANDING  
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PROCEEDINGS - 1

1 notes that his subsequent application for benefits was granted during the pendency of the instant  
2 appeal with a disability onset date of the day following the ALJ's decision denying benefits in  
3 the instant case. Dkt. 17-1. He contends that, given the ALJ's finding of disability on the  
4 subsequent application, "there is no serious doubt that [he] is disabled" and the only question is  
5 as to the onset date of his disability. Dkt. 17 at 2, 18. He argues that the evidence the ALJ  
6 allegedly erred in considering should be credited as true and the matter should be remanded for  
7 an award of benefits. Dkt. 17 at 18. Alternatively, he requests that the case be remanded for  
8 further administrative proceedings.

9 The Commissioner, in response, concedes the ALJ erred at step three in failing to  
10 consider whether Mr. Acosta-Espinoza met Listing 1.04 at step three and moves to remand the  
11 case for further administrative proceedings. Dkt. 20 at 2. The Commissioner further contends  
12 that the subsequent ALJ decision granting benefits should also be considered on remand to  
13 determine whether the instant decision denying benefits and the subsequent decision awarding  
14 benefits can be reconciled. *Id.* The Commissioner disputes all of Mr. Acosta-Espinoza's other  
15 assignments of error. *Id.* at 4-18. As discussed below, the Court **REVERSES** the  
16 Commissioner's final decision and **REMANDS** the matter for further administrative proceedings  
17 under sentence four of 42 U.S.C. § 405(g).

## 18 **BACKGROUND**

19 On May 7, 2013, Mr. Acosta-Espinoza applied for benefits, alleging disability as of  
20 September 21, 2011. Tr. 12. Mr. Acosta-Espinoza's applications were denied initially and on  
21 reconsideration. Tr. 12, 134-73. The ALJ conducted a hearing on March 5, 2015, as well as a  
22 supplemental hearing on August 7, 2015, at which time Mr. Acosta-Espinoza moved to amend

1 his alleged disability onset date to October 7, 2013.<sup>2</sup> Tr. 30-131. On December 28, 2015, the  
2 ALJ issued a decision finding Mr. Acosta-Espinoza not disabled. Tr. 12-23. Both parties  
3 acknowledge that subsequent to that decision, and while the instant appeal was pending, Mr.  
4 Acosta-Espinoza filed a new claim for benefits and was found disabled with an onset date of  
5 December 29, 2015. Dkts. 17, 17-1, 20.

### 6 THE ALJ'S DECISION

7 Utilizing the five-step disability evaluation process,<sup>3</sup> the ALJ found:

8 **Step one:** Mr. Acosta-Espinoza has not engaged in substantial gainful activity since his  
9 alleged onset date of September 21, 2011.

10 **Step two:** Mr. Acosta-Espinoza has the following severe impairments: diabetes mellitus  
11 with peripheral neuropathy, degenerative disc disease of the lumbar spine,  
12 acromioclavicular joint arthritis of the left shoulder, traction detachment of the right  
13 retina, status post-surgery, bilateral vitreous hemorrhages of the eyes, and proliferative  
14 diabetic retinopathy.

15 **Step three:** These impairments do not meet or equal the requirements of a listed  
16 impairment.<sup>4</sup>

17 **Residual Functional Capacity:** Mr. Acosta-Espinoza can perform light work subject to  
18 the following additional limitations: he can frequently balance, stoop, kneel, crouch, and  
19 crawl; he can occasionally climb ramps, stairs, ladders, ropes, or scaffolds; and he should  
20 have no greater than frequent exposure to vibrations and to hazards as defined by the  
21 Dictionary of Occupational Titles (DOT).

22 **Step four:** As Mr. Acosta-Espinoza can perform past relevant work he is not disabled.

23 **Step five:** In the alternative, as there are jobs that exist in significant numbers in the  
national economy that Mr. Acosta-Espinoza can perform, he is not disabled.

Tr. 12-23. The Appeals Council denied Mr. Acosta-Espinoza's request for review making the

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<sup>2</sup> In his decision, the ALJ only discusses the original alleged onset date and does not mention Mr. Acosta-Espinoza's motion to amend the alleged onset date. Although it is not ultimately relevant to the Court's decision here, this issue should also be clarified by the ALJ on remand.

<sup>3</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>4</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 ALJ's decision the Commissioner's final decision. Tr. 1-4.<sup>5</sup>

## 2 DISCUSSION

### 3 A. Step Three

4 At step three, the ALJ must determine whether a claimant's impairments meet or equal a  
5 listed impairment. 20 C.F.R. §§ 404.1520(a), 416.920(a). The listings describe specific  
6 impairments that are considered "severe enough to prevent an individual from doing any gainful  
7 activity regardless of his or her age, education, or work experience." 20 C.F.R. §§ 404.1525(a),  
8 416.925(a). A claimant whose impairments either meet or equal a listing is presumptively  
9 disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a).

10 Here, the parties agree the ALJ erred at step three in failing to evaluate whether Mr.  
11 Acosta-Espinoza met or equaled Listing 1.04. Mr. Acosta-Espinoza specifically argued at the  
12 hearing, as well as in his opening brief, that his impairments met Listing 1.04A. Dkt. 17 at 7-9;  
13 Tr. 120. Listing 1.04 provides:

14 Disorders of the spine (e.g., herniated nucleus pulposus, spinal  
15 arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease,  
16 facet arthritis, vertebral fracture), resulting in compromise of a nerve root  
(including the cauda equina) or the spinal cord. With:

17 A. Evidence of nerve root compression characterized by neuro-anatomic  
18 distribution of pain, limitation of motion of the spine, motor loss  
(atrophy with associated muscle weakness or muscle weakness)  
accompanied by sensory or reflex loss and, if there is involvement of  
the lower back, positive straight-leg raising test (sitting and  
supine)[.]

19 20 C.F.R. Part 404, Subpart P. Appendix 1. Mr. Acosta-Espinoza specifically pointed to the  
20 evaluation by Patrick J. Halpin, M.D. as evidence that he met the requirements of the listing.  
21 Dkt. 17 at 7-9; Tr. 120. The ALJ did not address Dr. Halpin's evaluation in his opinion and the  
22 Commissioner does not dispute the ALJ erred at step three in failing to consider Listing 1.04.

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<sup>5</sup> The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 Because the ALJ made no findings with respect to Listing 1.04 at step three, and the parties  
2 agree this was error, the Court finds remand for further proceedings is necessary for the ALJ to  
3 address this issue. On remand, the ALJ should evaluate whether Mr. Acosta-Espinoza met or  
4 equaled Listing 1.04 at step three.

5 **B. Step Two**

6 Mr. Acosta-Espinoza also argues the ALJ erred by failing to consider cervical and  
7 thoracic degenerative disc disease and degenerative joint disease of the hip at step two. Dkt. 17  
8 at 10.

9 At step two of the sequential evaluation, the Commissioner must determine “whether the  
10 claimant has a medically severe impairment or combination of impairments.” *Smolen v. Chater*,  
11 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. §§ 404.1520(a), 416.920(a). The claimant has the  
12 burden to show that (1) she has a medically determinable physical or mental impairment, and (2)  
13 the medically determinable impairment is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146  
14 (1987). The step-two inquiry is a “*de minimis* screening device to dispose of groundless claims.”  
15 *Smolen*, 80 F.3d at 1290. An impairment is medically determinable if it results from anatomical,  
16 physiological, or psychological abnormalities which can be shown by medically acceptable  
17 clinical and laboratory diagnostic techniques. 20 C.F.R. §§§§ 404.1527(a), 404.1508(a),  
18 416.927(a), 416.908(a). An impairment or combination of impairments is severe if it  
19 significantly limits the claimant’s physical or mental ability to do basic work activities. 20  
20 C.F.R. §§§§ 404.1520, 404.1521(a), 416.920, 416.921(a). An impairment or combination of  
21 impairments may be found “‘not severe’ only if the evidence establishes a slight abnormality that  
22 has ‘no more than a minimal effect on an individual’s ability to work.’” *Smolen*, 80 F.3d at 1290  
23 (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)). The claimant has the burden of

1 proving his “impairments or their symptoms affect his ability to perform basic work activities.”  
2 *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001).

3 With respect to his thoracic spine, Mr. Acosta-Espinoza points to evidence that x-rays  
4 revealed abnormalities in the spine at the mid-back, with anterior wedging at T11, T12 and L1.  
5 Dkt. 17 at 5. However, Mr. Acosta-Espinoza fails to point to any evidence that this impairment  
6 produced symptoms that affected his ability to perform basic work activities. A diagnosis alone  
7 is not sufficient to establish a severe impairment. Accordingly, Mr. Acosta-Espinoza fails to  
8 establish the ALJ erred in failing to consider degenerative disc disease of the thoracic spine at  
9 step two.

10 However, with respect to Mr. Acosta-Espinoza’s cervical spine the ALJ points out, albeit  
11 with less than ideal clarity, that Mr. Acosta-Espinoza was not only diagnosed with cervical  
12 degenerative disc disease but he complained of neck pain and was found to have “very  
13 diminished reflexes” attributable to cervical spondylosis. Dkt. 17 at 6-7; *see* Tr. 775 (Dr. Snow  
14 noting evidence of cervical spondylosis and very diminished reflexes); 773 (Dr. Abbott noting x-  
15 ray showed “prominent C7 transverse process as well as multilevel osteophytes throughout the  
16 cervical spine. [...] multilevel DDD present as well.”). Furthermore, with respect to hip  
17 degenerative joint disease, Mr. Acosta-Espinoza points to x-rays indicating degenerative changes  
18 of the right hip and prominent vascular calcifications suggesting atherosclerotic disease, out of  
19 proportion with the patient’s age. Dkt. 21 at 6-7; Tr. 473-74, 579. He also points to treatment  
20 notes indicating right hip range of motion causing pain with flexion, persistent hip and back pain,  
21 right hip, leg and foot pain causing problems with walking, standing, twisting and sitting. Dkt.  
22 21 at 6-7; Dkt. 17 at 5; Tr. 584, 624-85, 684-85. He further notes that his hip impairment is part  
23 of the basis for Dr. Lakin’s opinion limiting him to sedentary level work. Dkt. 21 at 6-7; Dkt. 17

1 at 5; Tr. 579-81. This evidence was sufficient to present a colorable claim that cervical  
2 degenerative disc disease and hip degenerative joint disease were severe impairments.

3 The Commissioner argues any step two errors were harmless because the ALJ proceeded  
4 beyond step two and Mr. Acosta-Espinoza did not identify a limitation omitted from the RFC  
5 assessment. Dkt. 20 at 13-15. An ALJ's failure to properly consider an impairment at step two  
6 may be harmless where the ALJ considered the functional limitations caused by that impairment  
7 later in the decision. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). However, here, the  
8 ALJ failed to even mention cervical degenerative disc disease or hip degenerative joint disease  
9 anywhere in the decision, leaving no means for the Court to determine whether the ALJ  
10 considered the effects of these impairments at the later steps. Moreover, the ALJ is required to  
11 consider the combined effects of a claimant's impairments, even if an impairment by itself would  
12 not rise to the level of a severe impairment. 20 C.F.R. §§ 404.1523, 416.923. If a combination  
13 of impairments is medically severe, the ALJ must consider the combined impact throughout the  
14 disability determination process. *Id.* The claimant's impairments "'must not be fragmentized in  
15 evaluating their effects.'" *Lester v. Chater*, 81 F.3d 821, 828 (9th Cir. 1995) (quoting *Beecher v.*  
16 *Heckler*, 756 F.2d 693, 694-95 (9th Cir.1985)). Here, there is nothing to indicate that the ALJ  
17 considered degenerative disc disease of the cervical spine and degenerative joint disease of the  
18 hips in combination with any other impairments.

19 Because the ALJ erred at step two, and the error was not harmless, remand is appropriate.  
20 On remand, the ALJ should evaluate cervical degenerative disc disease and hip degenerative  
21 joint disease and determine whether they are medically determinable severe impairments and, if  
22 they are, whether alone or in combination with other impairments they meet or equal a listing.

23 **C. Scope of Remand**

1 Mr. Acosta-Espinoza asks the Court to remand the case with directions that the medical  
2 opinions of Huong Lakin, D.O. and Nancy Armstrong, ARNP, and his own testimony be  
3 credited as true and benefits be awarded. Dkt. 17 at 18. Alternatively, Mr. Acosta-Espinoza  
4 asks the Court to remand the case for further proceedings. *Id.*

5 In general, the Court has “discretion to remand for further proceedings or to award  
6 benefits.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may remand for  
7 further proceedings if enhancement of the record would be useful. *See Harman v. Apfel*, 211  
8 F.3d 1172, 1178 (9th Cir. 2000). The Court may remand for benefits where (1) the record is  
9 fully developed and further administrative proceedings would serve no useful purpose; (2) the  
10 ALJ fails to provide legally sufficient reasons for rejecting evidence, whether claimant testimony  
11 or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ  
12 would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995,  
13 1020 (9th Cir. 2014). “Where there is conflicting evidence, and not all essential factual issues  
14 have been resolved, a remand for an award of benefits is inappropriate.” *Treichler v. Comm’r of*  
15 *Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014). The application of the “credit-as-true”  
16 rule for a direct award of benefits “is a rare exception” to the ordinary remand rule. *Leon v.*  
17 *Berryhill*, --- F.3d --- (9th Cir. Nov. 7, 2017), 2017 WL 5150294 at \*2. “Where ... an ALJ makes  
18 a legal error, but the record is uncertain and ambiguous, the proper approach is to remand the  
19 case to the agency.” *Treichler*, 775 F.3d at 1105.

20 The Court finds that here, where the ALJ failed to address issues in the first instance both  
21 at step two and at step three, not all factual issues have been resolved and remand for further  
22 proceedings is appropriate. Because the Court finds that remand for further proceedings is  
23 necessary at step two, and the parties agree the ALJ erred in failing to consider Listing 1.04 at



1 step three, the Court does not address the other issues Mr. Acosta-Espinoza raises at later steps.  
2 The ALJ's evaluation of the evidence at later steps may change or become moot based on his  
3 step two and step three findings. The Court also notes that even if it were appropriate to reach  
4 the other issues raised by Mr. Acosta-Espinoza, which it does not, and even if the ALJ did err  
5 with respect to those issues, there is other conflicting evidence in the record and the record, as it  
6 stands, does not compel a finding of disability during the period in question. Accordingly,  
7 remand for further proceedings is appropriate.

### 8 **CONCLUSION**

9 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this  
10 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §  
11 405(g). On remand, the ALJ should: (1) reevaluate the severity of cervical degenerative disc  
12 disease and hip degenerative joint disease at step two; (2) reevaluate the combined effects of all  
13 of Mr. Acosta-Espinoza's impairments and evaluate whether his impairments, alone or in  
14 combination, meet or equal a listing at step three; (3) specifically evaluate whether Mr. Acosta-  
15 Espinoza meets Listing 1.04 at step three; (4) develop the record as necessary and consider any  
16 other evidence he or she deems appropriate, including but not limited to the subsequent finding  
17 of disability which the Commissioner herself acknowledges should be considered on remand;  
18 and, (4) if necessary, reassess Mr. Acosta-Espinoza's symptom testimony, the medical opinion  
19 evidence, and his residual functional capacity, and proceed with steps four and five with the  
20 assistance of a vocational expert if warranted.

21 DATED this 27<sup>th</sup> day of November, 2017.

22   
23 **JOHN C. COUGHENOUR**  
United States District Judge