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

10 MICHAEL LEE SCHWITZKE JR,

11 Plaintiff,

12 v.

13 NANCY A BERRYHILL, Acting
Commissioner of Social Security,

14 Defendant.
15

CASE NO. 3:16-CV-06019-DWC

ORDER REVERSING AND
REMANDING THE
COMMISSIONER'S DECISION TO
DENY BENEFITS

16 Plaintiff Michael Lee Schwitzke, Jr. filed this action, pursuant to 42 U.S.C. § 405(g), for
17 judicial review of Defendant's denial of his applications for supplemental security income
18 ("SSI") and disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule
19 of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter
20 heard by the undersigned Magistrate Judge. *See* Dkt. 5.

21 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
22 erred when he failed to discuss significant and probative evidence contained in Dr. Christmas
23 Covell's opinion. Further, the ALJ failed to provide specific, legitimate reasons supported by
24 substantial evidence for giving less weight to the opinions of Drs. Charles Quinci and Randy

ORDER REVERSING AND REMANDING THE
COMMISSIONER'S DECISION TO DENY
BENEFITS - 1

1 Hurst. Had the ALJ properly considered the opinions of these three doctors, the residual
2 functional capacity (“RFC”) may have included additional limitations. The ALJ’s error is
3 therefore not harmless, and this matter is reversed and remanded pursuant to sentence four of 42
4 U.S.C. § 405(g) to the Acting Commissioner of Social Security (“Commissioner”) for further
5 proceedings consistent with this Order.

6 FACTUAL AND PROCEDURAL HISTORY

7 On August 15, 2012, Plaintiff filed applications for SSI and DIB, alleging disability as of
8 February 10, 2012. *See* Dkt. 10, Administrative Record (“AR”) 19. The applications were denied
9 upon initial administrative review and on reconsideration. *See id.* A hearing was held before ALJ
10 Riley J. Atkins on September 8, 2014. *See* AR 46-77. The ALJ held a supplemental hearing on
11 March 30, 2015. AR 78-99. In a decision dated April 15, 2015, the ALJ determined Plaintiff to
12 be not disabled. *See* AR 19-38. Plaintiff’s request for review of the ALJ’s decision was denied by
13 the Appeals Council, making the ALJ’s decision the final decision of the Commissioner. *See* AR
14 1-3; 20 C.F.R. § 404.981, § 416.1481.

15 In the Opening Brief, Plaintiff maintains the ALJ failed to: (1) include all limitations
16 opined to by Dr. Christmas Covell; (2) properly consider the opinions of Drs. Charles Quinci and
17 Randy Hurst; (3) properly reject the lay witness evidence; and (4) properly reject Plaintiff’s
18 subjective symptom testimony. Dkt. 15, pp. 1-2. Plaintiff asks the Court to remand for award of
19 benefits.

20 STANDARD OF REVIEW

21 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
22 social security benefits if the ALJ’s findings are based on legal error or not supported by
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1 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
2 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

3 DISCUSSION

4 **I. Whether the ALJ properly considered the medical opinion evidence.**

5 Plaintiff contends the ALJ erred in her evaluation of the opinion evidence submitted by
6 Drs. Covell, Quinci, and Hurst. Dkt. 15, pp. 3-13.

7 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
8 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
9 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d
10 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the
11 opinion can be rejected “for specific and legitimate reasons that are supported by substantial
12 evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,
13 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
14 accomplish this by “setting out a detailed and thorough summary of the facts and conflicting
15 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
16 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

17 The ALJ “may reject the opinion of a non-examining physician by reference to specific
18 evidence in the medical record.” *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998) (citing
19 *Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996)); *Andrews*, 53 F.3d at 1041). However, all of
20 the determinative findings by the ALJ must be supported by substantial evidence. *See Bayliss*,
21 427 F.3d at 1214 n.1 (citing *Tidwell*, 161 F.3d at 601); *see also Magallanes*, 881 F.2d at 750
22 (“Substantial evidence” is more than a scintilla, less than a preponderance, and is such “relevant
23 evidence as a reasonable mind might accept as adequate to support a conclusion”).

1 A. Dr. Covell

2 Plaintiff maintains the ALJ erred when he failed to include in the RFC assessment all
3 limitations assessed by consulting psychologist Dr. Christmas Covell, Ph.D. Dkt. 15, pp. 3-5.
4 Specifically, Plaintiff asserts the ALJ gave moderate weight to Dr. Covell’s opinion and included
5 many of the opined limitations in the RFC, but did not include Dr. Covell’s finding that Plaintiff
6 would have occasional lapses in concentration, persistence, and pace in the RFC and did not
7 provide specific and legitimate reasons supported by substantial evidence for discounting this
8 limitation. *See id.*

9 The ALJ “need not discuss all evidence presented.” *Vincent ex rel. Vincent v. Heckler*,
10 739 F.3d 1393, 1394-95 (9th Cir. 1984). However, the ALJ “may not reject ‘significant probative
11 evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (*quoting*
12 *Vincent*, 739 F.2d at 1395). The “ALJ’s written decision must state reasons for disregarding
13 [such] evidence.” *Flores*, 49 F.3d at 571.

14 Dr. Covell completed a Mental RFC assessment as a portion of the Disability
15 Determination Explanation. AR 130-47. Dr. Covell opined Plaintiff is able to understand and
16 remember simple instructions and well-learned semi-detailed tasks, carry out simple, routine
17 tasks and well-learned semi-complex tasks that are not fast-paced, and adjust to routine
18 workplace changes and carry out goals set by others. AR 142-43. She found Plaintiff functions
19 best in smaller group settings with superficial public interaction and has the ability to maintain
20 cooperative interactions with supervisors and coworkers. AR 143. Dr. Covell also opined
21 Plaintiff will have occasional lapses in concentration, persistence, and pace due to his anxiety,
22 difficulty with concentration under pressure, and slowed processing, “through should be able to
23 remain within tolerable levels.” AR 142.

1 The ALJ gave moderate weight to Dr. Covell’s opinion, determining Plaintiff’s
2 interactions with coworkers and supervisors should be further limited. AR 32. In his decision, the
3 ALJ did not include a discussion regarding Dr. Covell’s opinion as to Plaintiff’s occasional
4 lapses in concentration, persistence, and pace due to anxiety, difficulty with concentration under
5 pressure, and slowed processing. *See* AR 32. Further, the ALJ did not include a limitation in the
6 RFC specific to Dr. Covell’s opinion that Plaintiff will have occasional lapses in concentration,
7 persistence, and pace. *See* AR 25. The RFC states, in relevant part, Plaintiff “can maintain
8 concentration, persistence or pace for routine repetitive work, and occasionally more complex
9 work, but would not likely be able to sustain concentration for complex work.” AR 25.

10 Plaintiff’s lapses in concentration, persistence, and pace are related to his ability to be
11 employed and is therefore significant, probative evidence. While the ALJ accounted for some
12 limitations in Plaintiff’s concentration, persistence, and pace, he does not explain if he
13 considered Dr. Covell’s opinion that Plaintiff will have lapses in concentration persistence and
14 pace. *See* AR 25, 32. Additionally, the RFC does not expressly contain a limitation concerning
15 lapses in Plaintiff’s concentration, persistence, and pace. *See* AR 25, 32. The Court notes, when
16 discussing Plaintiff’s limitations, Dr. Covell’s opinion states Plaintiff should be able “to remain
17 within tolerable limits”. AR 142. It, however, is unclear if Dr. Covell is discussing Plaintiff’s
18 lapses in concentration, persistence, and pace or if Dr. Covell found Plaintiff would remain
19 within tolerable limits despite his difficulty concentrating under pressure and his slowed
20 processing. The ALJ did not provide any explanation as to his interpretation of Dr. Covell’s
21 opinion and it is unclear from the ALJ decision why the ALJ did not include “lapses in
22 concentration, persistence, or pace” as a limitation in the RFC. *See* AR 32.

1 As the Court cannot determine if the ALJ properly included Dr. Covell’s opined
2 limitation regarding Plaintiff’s lapses in concentration, persistence, and pace in the RFC or
3 simply ignored the limitation, the Court finds the ALJ erred. *See Blakes v. Barnhart*, 331 F.3d
4 565, 569 (7th Cir. 2003) (“We require the ALJ to build an accurate and logical bridge from the
5 evidence to her conclusions so that we may afford the claimant meaningful review of the SSA’s
6 ultimate findings.”).

7 “[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*, 674
8 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
9 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*
10 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
11 F.3d at 1115. The determination as to whether an error is harmless requires a “case-specific
12 application of judgment” by the reviewing court, based on an examination of the record made
13 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at
14 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

15 Had the ALJ properly considered all of Dr. Covell’s opined limitations, the RFC may
16 have included a limitation that Plaintiff would have lapses in concentration, persistence, and
17 pace. Therefore, if Dr. Covell’s opinion as to Plaintiff’s limitations in concentration, persistence,
18 and pace were included in the RFC and in the hypothetical questions posed to the vocational
19 expert, Steven R. Cardinal, the ultimate disability determination may have changed.
20 Accordingly, ALJ’s failure to discuss Dr. Covell’s opinion regarding Plaintiff’s lapses in
21 concentration, persistence, and pace is not harmless and requires reversal.

1 B. Dr. Quinci

2 Plaintiff next argues the ALJ failed to provide specific and legitimate reasons supported
3 by substantial evidence for rejecting the opinion of examining psychologist Dr. Charles Quinci,
4 Ph.D. Dkt. 15, pp. 5-8.

5 Dr. Quinci completed Psychological/Psychiatric Evaluations of Plaintiff in September
6 2013 and March 2014. AR 534-41. In September 2013, Dr. Quinci opined Plaintiff was
7 moderately limited in his ability to understand, remember, and persist in tasks by following
8 detailed instructions, adapt to changes in a routine work setting, maintain appropriate behavior in
9 a work setting, communicate and perform effectively in a work setting, and set realistic goals and
10 plan independently. AR 536. He found Plaintiff had marked limitations in his ability to perform
11 activities within a schedule, maintain regular attendance, be punctual within customary
12 tolerances without special supervision, learn new tasks, and complete a normal work day and
13 work week without interruptions from psychologically based symptoms. AR 536. Dr. Quinci
14 determined Plaintiff had a Global Assessment of Functioning (“GAF”) score of 47. AR 535.

15 In March of 2014, Dr. Quinci opined Plaintiff had moderate limitations in his ability to
16 understand, remember, and persist in tasks by following detailed instructions, learn new tasks,
17 maintain appropriate behavior in a work setting, communicate and perform effectively in a work
18 setting, and set realistic goals and plan independently. AR 540. He found Plaintiff had marked
19 limitations in his ability to perform activities within a schedule, maintain regular attendance, be
20 punctual within customary tolerances without special supervision, and complete a normal work
21 day and work week without interruptions from psychologically based symptoms. AR 540. Dr.
22 Quinci determined Plaintiff’s GAF score was now 48-50. AR 539.

1 The ALJ discussed Dr. Quinci's September 2013 and March 2014 opinions, and then
2 stated:

3 I give little weight to Dr. Quinci's opinions for several reasons. **First**, the doctor
4 did not take into account the claimant's potential if he followed up with consistent
5 medical and psychological treatment and took his medications as prescribed.
6 **Second**, the doctor's opinions are not consistent with the claimant's wide variety
7 of daily activities. For example, he reports he cleans his fish tank, washes laundry,
8 shops in stores for groceries, prepares meals, and rides his mountain bike around
9 local lakes.

10 **Third**, the doctor's opinions are not consistent with claimant's work activities
11 during the period he is alleging disability. The claimant reports working as a
12 certified nurse's assistant (CNA), caregiver, and janitor. **Fourth**, the doctor's
13 opinions of the claimant's GAF score are vague and do not contain specific
14 vocational limitations. **Lastly**, the doctor's opinions are not consistent with the
15 record as a whole.

16 AR 33 (internal citations omitted, emphasis added).

17 First, the ALJ gave little weight to Dr. Quinci's opinions because Dr. Quinci did not take
18 into account Plaintiff's potential if he followed up with consistent medical and psychological
19 treatment and took his medications as prescribed. AR 33. The ALJ fails to cite to any evidence in
20 the record showing Plaintiff's potential. *See* AR 33. The ALJ also fails to cite to any portion of
21 the record which indicates Dr. Quinci failed to consider Plaintiff's potential if Plaintiff had
22 consistent treatment. Further, Dr. Quinci's March 2014 opinion recommends Plaintiff continue
23 with his "psych meds," which implies Plaintiff was taking medications at the time of Dr.
24 Quinci's second opinion. AR 540. Here, it appears the ALJ attempted to assume the role of a
medical professional by making his own medical findings, rather than rely on the medical
evidence, when he determined Plaintiff would be less limited with additional treatment. This is
improper. Thus, the Court finds the ALJ's first reason for giving little weight to Dr. Quinci's
opinions is not specific and legitimate and supported by substantial evidence. *See, e.g., Rohan v.*

1 | *Chater*, 98 F.3d 966, 970 (7th Cir. 1996) (“... ALJs must not succumb to the temptation to play
2 | doctor and make their own independent medical findings”).

3 | Second, the ALJ gave little weight to Dr. Quinci’s opinions because the opinions are not
4 | consistent with Plaintiff’s daily activities. AR 33. While the ALJ lists several of Plaintiff’s daily
5 | activities, the ALJ fails to explain how Plaintiff’s ability to clean a fish tank, do laundry, prepare
6 | meals, shop for groceries, and ride his mountain bike are inconsistent with Dr. Quinci’s opinions.
7 | *See* AR 33. Without an explanation regarding what portions of Dr. Quinci’s opinions are
8 | inconsistent with Plaintiff’s daily activities, the Court finds this is not a valid reason for
9 | discounting Dr. Quinci’s opinions. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
10 | 2015) (“the agency [must] set forth the reasoning behind its decisions in a way that allows for
11 | meaningful review”); *Blakes*, 331 F.3d at 569. Further, the record shows Plaintiff’s activities of
12 | daily living are more limited than noted by the ALJ. For example, Plaintiff states he spends only
13 | eight hours weekly cleaning, eating, and doing laundry. AR 348. He states he lets the dishes or
14 | laundry pile up because he feels depressed. AR 348. He also only shops one to two times per
15 | month for one to two hours. AR 349.¹ As such, the Court concludes the ALJ’s second reason for
16 | giving little weight to Dr. Quinci’s opinions is not specific and legitimate and supported by
17 | substantial evidence. *See Popa v. Berryhill*, -- F.3d --, 2017 WL 3567827, *4 (9th Cir. Aug. 18,
18 | 2017) (finding the ALJ erred when he failed to explain why the claimant’s daily activities were
19 | inconsistent with the doctor’s opinion).

20 | Third, the ALJ gave little weight to Dr. Quinci’s opinions because the opinions are not
21 | consistent with Plaintiff’s work activities during the period he is alleging disability. AR 33.
22 | Specifically, the ALJ cites Plaintiff’s reports of working as a CNA, caregiver, and janitor. AR

23 |
24 | ¹ The Court notes the ALJ does not cite to any records indicating Plaintiff rides a mountain bike. *See* AR
33.

1 33. The Court again finds the ALJ failed to adequately explain how Plaintiff’s work activities are
2 inconsistent with Dr. Quinci’s opinions. *See* AR 33. Further, the record does not support the
3 ALJ’s conclusion. Plaintiff’s work did not rise to the level of substantial gainful activity. AR 21.
4 The record shows Plaintiff worked as a CNA from February to May of 2012 and a janitor from
5 May – September 2012. AR 399. Plaintiff could not handle work as a CNA and the job lasted
6 only four months. *See* AR 534. Plaintiff worked as a janitor 8 hours per week for five months
7 before he was fired. *See* AR 327, 695. Plaintiff also reported he was a care provider for his
8 grandmother in July 2014; however, there is no information regarding how long he did this or the
9 extent of his work. AR 649. Moreover, the fact Plaintiff attempted to work, but did not succeed,
10 is not a sufficient reason to discredit Dr. Quinci’s opinions. *See Lingenfelter v. Astrue*, 504 F.3d
11 1028, 1038 (9th Cir. 2007) (“[i]t does not follow from the fact that a claimant tried to work for a
12 short period of time and, because of his impairments, *failed*, that he did not then experience
13 [symptoms] and limitations severe enough to preclude him from *maintaining* substantial gainful
14 employment” and may support allegations of disabling symptoms). Accordingly, the Court finds
15 the ALJ’s third reason for giving little weight to Dr. Quinci’s opinions is not specific and
16 legitimate and supported by substantial evidence.

17 Fourth, the ALJ gave little weight to Dr. Quinci’s opinions because the GAF scores are
18 vague and do not contain vocational limitations. AR 33. The ALJ’s finding is conclusory. He
19 does not explain why he finds the GAF scores vague. *See* AR 33. Further, Dr. Quinci’s opined
20 limitations are separate from the GAF scores; the GAF scores were included in the diagnoses
21 section of Dr. Quinci’s evaluations, rather than the section opining to Plaintiff’s functional
22 limitations. *See* AR 535-36, 539-40. Thus, the GAF scores do not impact Dr. Quinci’s opinions
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1 as to Plaintiff's functional limitations and the ALJ's fourth reason for giving little weight to Dr.
2 Quinci's opinions is not specific and legitimate and supported by substantial evidence.

3 Fifth, the ALJ gave little weight to Dr. Quinci's opinions because the opinions are not
4 consistent with the record as a whole. AR 33. An ALJ need not accept an opinion which is
5 inadequately supported "by the record as a whole." *See Batson v. Commissioner of Soc. Sec.*
6 *Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). However, a conclusory statement finding an
7 opinion is inconsistent with the overall record is insufficient to reject the opinion. *See Embrey*,
8 849 F.2d at 421-22. Here, the ALJ failed to identify any specific evidence contained within the
9 record which contradicts Dr. Quinci's opinions. *See AR 33*. Without more, the ALJ has failed to
10 meet the level of specificity required, and the ALJ's conclusory statement finding "the record as
11 a whole" as inconsistent with Dr. Quinci's opinions is not sufficient. *See Garrison v. Colvin*, 759
12 F.3d 995, 1012-13 (9th Cir. 2014) ("an ALJ errs when he rejects a medical opinion or assigns
13 it little weight while doing nothing more than ignoring it, asserting without explanation that
14 another medical opinion is more persuasive, or criticizing it with boilerplate language that fails
15 to offer a substantive basis for his conclusion").

16 For the above stated reasons, the Court finds the ALJ failed to provide specific and
17 legitimate reasons supported by substantial evidence for giving little weight to Dr. Quinci's
18 opinions. Therefore, the ALJ erred. Had the ALJ properly considered the opinions of Dr. Quinci,
19 the RFC and hypothetical question may have included additional mental limitations. As the
20 ultimate disability decision may have changed, the ALJ's error is not harmless. *See Molina*, 674
21 F.3d at 1115.

1 C. Dr. Hurst

2 Plaintiff also argues the ALJ failed to provide specific and legitimate reasons supported
3 by substantial evidence for rejecting the opinion of examining psychologist Dr. Randy Hurst,
4 Psy.D. Dkt. 15, pp. 5-13.

5 On March 10, 2015, Dr. Hurst completed a DSHS Psychological Evaluation. AR 694-
6 705. Dr. Hurst opined Plaintiff has mild to moderate limitations in his ability to understand,
7 remember, and persist in tasks by following very short and simple instructions, and moderate
8 limitations in his ability to perform routine tasks without special supervision, adapt to changes in
9 a routine work setting, make simple work-related decisions, ask simple questions or request
10 assistance, communicate and perform effectively in a work setting, maintain appropriate
11 behavior in a work setting, and set realistic goals and plan independently. AR 702. He also found
12 Plaintiff has moderate to marked limitations in performing activities within a schedule,
13 maintaining regular attendance, being punctual without special supervision, learning new tasks,
14 being aware of normal hazards and taking appropriate precautions, and completing a normal
15 workday and work week without interruptions from psychologically based symptoms, and has
16 marked limitations in his ability to understand, remember, and persist in tasks by following
17 detailed instructions. AR 702.

18 The ALJ discussed Dr. Hurst's examination of Plaintiff and his diagnoses. AR 29-30. The
19 ALJ then stated:

20 I give limited weight to Dr. Hurst's diagnoses and opinions for several reasons.
21 **First**, several of the doctor's opinions are inconsistent with the claimant's job
22 activities. For example, the claimant reports he worked as a caregiver during the
23 period he is alleging disability. He also stated he completed firefighter training,
24 and completed certification as a certified nurse's assistant (CNA). **Second**, the
doctor did not take into account the claimant's potential if he took medication to
treat his attention deficit hyperactivity disorder. The claimant reports he has never
taken medication to treat his attention deficit hyperactivity disorder.

1 **Third**, the doctor’s opinions are not consistent with the claimant’s wide range of
2 daily activities. For instance, the claimant reports he cleans his fish tank, washes
3 laundry, shops in stores for groceries, goes mountain biking. **Fourth**, the doctor
4 did not take into account the claimant’s potential if he followed up with consistent
5 medical and psychological treatment for his impairments, and took his
6 medications are prescribed. **Fifth**, the doctor appears to base his opinions on the
7 claimant’s subject complaints rather than on his results on intellectual testing.
8 **Sixth**, the doctor appears to be advocating for the claimant in the evaluation
report and medical source statement. **Seventh**, several of the doctor’s opinions are
vague and do not contain specific vocational limitations. **Eighth**, Dr. Hurst is a
psychologist, who is not qualified to provide opinions about the claimant’s
physical limitations (e.g. lifting/carrying, walking/standing, etc.) caused by his
medical impairments. **Lastly**, most of the doctor’s opinions are not consistent
with the record as a whole.

9 AR 30-31 (internal citations omitted, emphasis added).

10 Initially, the Court notes four of the reasons provided for rejecting Dr. Hurst’s opinion are
11 the same reasons given for rejecting Dr. Quinci’s opinions. The ALJ rejected both Drs. Hurst’s
12 and Quinci’s opinions because: (1) the opinions are inconsistent with Plaintiff’s work activities;
13 (2) the opinions are inconsistent with Plaintiff’s activities of daily living; (3) the doctors did not
14 consider Plaintiff’s potential if he followed up with treatment and took his medications; and (4)
15 the opinions are inconsistent with the record as a whole. AR 30-31, 33. The Court finds these
16 four reasons for rejecting Dr. Hurst’s opinion are invalid for the reasons set forth above. *See*
17 Section I, B, *supra*.²

18 There are five additional reasons the ALJ provided for giving limited weight to Dr.
19 Hurst’s opinion.

20 Fifth, the ALJ found Dr. Hurst’s opinion was entitled to limited weight because Dr. Hurst
21 did not take into account Plaintiff’s potential if he took medication to treat his attention deficit
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23 ² The Court finds additional discussion regarding the four reasons the ALJ used for rejecting both opinions
24 is unnecessary and notes Defendant asserts that ALJ provided “largely the same reasons” for rejecting the opinions
of Drs. Hurst and Quinci and provided a combined argument section for these two doctors. Dkt. 19, p. 7.

1 hyperactivity disorder (“ADHD”). AR 30. The ALJ fails to cite to any evidence in the record
2 showing Plaintiff’s potential if he took the proposed medications. *See* AR 30. Further, the ALJ
3 fails to explain what evidence shows Dr. Hurst did not consider Plaintiff’s potential if he took
4 ADHD medication. While the ALJ cites to a record showing Plaintiff has not taken medication to
5 treat his ADHD, the record cited does not show Plaintiff reported he had never taken ADHD
6 medication or show Plaintiff’s potential if he took the medication. Rather, the record shows a
7 different examining psychologist noted Plaintiff’s test results appeared to be a result of his
8 ADHD and recommended medication management for Plaintiff. AR 654. The Court finds Dr.
9 Hurst’s alleged failure to consider Plaintiff’s potential if he took ADHD medication is not a
10 specific and legitimate reason supported by substantial evidence for discounting the opinion.

11 Sixth, the ALJ gave limited weight to Dr. Hurst’s opinion because he based his opinion
12 on Plaintiff’s subjective complaints. AR 30. An ALJ may reject a physician’s opinion “if it is
13 based ‘to a large extent’ on a claimant’s self-reports that have been properly discounted as
14 incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (*quoting Morgan v.*
15 *Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999)). This situation is distinguishable
16 from one in which the doctor provides his own observations in support of his assessments and
17 opinions. *See Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008)
18 (“an ALJ does not provide clear and convincing reasons for rejecting an examining physician’s
19 opinion by questioning the credibility of the patient’s complaints where the doctor does not
20 discredit those complaints and supports his ultimate opinion with his own observations”); *see*
21 *also Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001). “[W]hen an opinion is not more
22 heavily based on a patient’s self-reports than on clinical observations, there is no evidentiary
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1 basis for rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (citing
2 *Ryan*, 528 F.3d at 1199-1200).

3 In reaching his opinion, Dr. Hurst reviewed medical records, observed Plaintiff, and
4 conducted a diagnostic interview, a mental status examination, and IQ testing. *See* AR 694-705.
5 Dr. Hurst did not discredit Plaintiff’s subjective reports, and supported his ultimate opinions with
6 the objective testing, personal observations, and a diagnostic interview. The Court finds Dr.
7 Hurst’s opinion was not more heavily based on Plaintiff’s self-reports. Therefore, this is not a
8 specific and legitimate reason supported by substantial evidence for giving little weight to Dr.
9 Hurst’s opinion. *See Buck v. Berryhill*, -- F.3d ---, 2017 WL 3862450, * 6 (9th Cir. Sept. 5,
10 2017) (finding a clinical interview and mental status evaluation are objective measures and
11 cannot be discounted as a “self-report”).

12 Seventh, the ALJ found Dr. Hurst’s opinion was entitled to limited weight because Dr.
13 Hurst appeared to be advocating for Plaintiff. AR 30. The ALJ failed to explain how Dr. Hurst is
14 advocating for Plaintiff and offered no facts to support his conclusion. *See* AR 30. Further, an
15 ALJ “may not assume that doctors routinely lie in order to help their patients collect disability
16 benefits.” *Lester*, 81 F.3d at 832 (quoting *Ratto v. Secretary*, 839 F.Supp. 1415, 1426 (D. Or.
17 1993)). As the ALJ failed to adequately explain his conclusion that Dr. Hurst is advocating for
18 Plaintiff, this is not a specific, legitimate reasons supported by substantial evidence. *See Popa*, --
19 F.3d --, 2017 WL 3567827, *5 (finding the ALJ erred when she noted the doctor’s opinion was
20 based on sympathy for the claimant, but offered no facts to support her conclusion).

21 Eighth, the ALJ gave limited weight to Dr. Hurst’s opinion because several of his
22 opinions are vague and do not contain vocational limitations. AR 30. The ALJ does not identify
23 what opinions are vague. Without more, the ALJ has failed to meet the level of specificity
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1 required, and the ALJ's conclusory statement finding "several of [Dr. Hurst's] opinions are
2 vague and do not contain vocational limitations" is not a sufficient reason to reject Dr. Hurst's
3 opinion. *See Brown-Hunter*, 806 F.3d at 492.

4 Ninth, the ALJ gave limited weight to Dr. Hurst's opinion because he is not qualified to
5 provide opinions about Plaintiff's physical limitations. AR 30-31. Dr. Hurst is not a medical
6 doctor. Thus, the ALJ could discount Dr. Hurst's limitations regarding Plaintiff's physical
7 limitations. *See* 20 C.F.R. § 404.1527(c)(5) ("We generally give more weight to the opinion of a
8 specialist about medical issues related to his or her area of specialty than to the opinion of a
9 source who is not a specialist."). However, this reasoning is not applicable to Dr. Hurst's
10 conclusion regarding Plaintiff's psychological conditions. *See Anderson v. Colvin*, 223 F. Supp.
11 3d 1108, 1121 (D. Or. 2016). Further, Dr. Hurst stated Plaintiff has physical limitations per
12 Plaintiff's report, but the physical limitations would need to be assessed by medical specialists.
13 AR 702. The Court also notes, when discussing Dr. Hurst's findings, the ALJ does not discuss
14 any physical limitations opined to by Dr. Hurst. *See* AR 29-30. The Court, therefore, finds this is
15 not a specific, legitimate reason supported by substantial evidence for giving limited weight to
16 Dr. Hurst's opinion.

17 For the above stated reasons, the Court concludes the ALJ has failed to provide specific,
18 legitimate reasons supported by substantial evidence for giving limited weight to Dr. Hurst's
19 opinion. Therefore, the ALJ erred. Had the ALJ properly considered Dr. Hurst's opinion, the
20 RFC and hypothetical question posed to the vocational expert may have included additional
21 mental limitations. As the ultimate disability decision may have changed, the ALJ's error is not
22 harmless. *See Molina*, 674 F.3d at 1115.

1 **II. Whether the ALJ provided proper reasons for discounting Plaintiff’s**
2 **subjective symptom testimony and the lay witness evidence.**

3 Plaintiff contends the ALJ failed to give clear and convincing reasons for rejecting
4 Plaintiff’s testimony about his symptoms and limitations and alleges the ALJ failed to provide
5 germane reasons for discounting the lay witness testimony of Plaintiff’s roommate, Macleo V.
6 Canda. Dkt. 15, pp. 13-18. The Court concludes the ALJ committed harmful error in assessing
7 the medical opinions of Drs. Covell, Quinci, and Hurst. *See* Section I, *supra*. Because the ALJ’s
8 reconsideration of the medical evidence may impact his assessment of Plaintiff’s subjective
9 testimony and Mr. Canda’s testimony, on remand, the ALJ must reconsider Plaintiff’s subjective
10 testimony and Mr. Canda’s testimony.

11 **III. Whether the case should be remanded for an award of benefits.**

12 Plaintiff argues this matter should be remanded with a direction to award benefits. *See*
13 Dkt. 15. The Court may remand a case “either for additional evidence and findings or to award
14 benefits.” *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the
15 proper course, except in rare circumstances, is to remand to the agency for additional
16 investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations
17 omitted). However, the Ninth Circuit created a “test for determining when evidence should be
18 credited and an immediate award of benefits directed[.]” *Harman v. Apfel*, 211 F.3d 1172, 1178
19 (9th Cir. 2000). Specifically, benefits should be awarded where:

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

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

1 The Court has determined, on remand, the ALJ must re-evaluate the medical opinion
2 evidence, Plaintiff's symptom testimony, and Mr. Canda's testimony to determine if Plaintiff is
3 capable of performing jobs existing in significant numbers in the national economy. Therefore,
4 there are outstanding issues which must be resolved and remand for further administrative
5 proceedings is appropriate.

6 CONCLUSION

7 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
8 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
9 this matter is remanded for further administrative proceedings in accordance with the findings
10 contained herein.

11 Dated this 8th day of September, 2017.

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14 David W. Christel
15 United States Magistrate Judge
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