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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MATTHEW HOWE,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL,

14 Defendant.

CASE NO. C17-5131JLR

ORDER REVERSING AND
REMANDING FOR AN
IMMEDIATE AWARD OF
BENEFITS

15 **I. INTRODUCTION**

16 Plaintiff Matthew Howe seeks review of the denial of his application for disability
17 insurance benefits. Mr. Howe contends that the Administrative Law Judge (“ALJ”) erred
18 in evaluating the medical evidence in the record, the Department of Veterans Affairs
19 (“VA”) disability determination, Mr. Howe’s severe impairments, and Mr. Howe’s
20 testimony, resulting in a residual functional capacity (“RFC”) and step-five finding that
21 were unsupported by substantial evidence. (Op. Br. (Dkt. # 10) at 1.) Having considered
22 the submissions of the parties, the relevant portions of the record, and the applicable law,

1 the court REVERSES Defendant Commissioner Nancy A. Berryhill's ("the
2 Commissioner") final decision and REMANDS the matter for an immediate award of
3 benefits.

4 II. BACKGROUND

5 On May 22, 2015, Mr. Howe protectively filed an application for disability
6 insurance benefits. (Administrative Record ("AR") (Dkt. # 6) at 20.) Mr. Howe's
7 application was denied initially and on reconsideration. (*Id.*) After the ALJ conducted a
8 hearing on May 9, 2016, the ALJ issued a decision finding Mr. Howe not disabled. (*Id.*
9 at 20-38.)

10 In her decision, the ALJ utilized the five-step disability evaluation process,¹ and
11 the court summarizes the ALJ's findings as follows:

12 **Step one:** Mr. Howe has not engaged in substantial gainful activity since April 6,
13 2015, the alleged onset date.

14 **Step two:** Mr. Howe has the following severe impairments: post-traumatic stress
15 disorder ("PTSD"), traumatic brain injury with mild cognitive disorder,
16 degenerative disc disease, and knee bursitis.

17 **Step three:** Mr. Howe does not have an impairment or combination of
18 impairments that meets or equals the requirements of a listed impairment.²

19 **RFC:** Mr. Howe has the RFC to perform light work as defined in 20 C.F.R.
20 § 404.1567(b) except as follows. He can perform occasional balancing, stooping,
21 kneeling, crouching, crawling, and climbing ramps and stairs, but no climbing
22 ladders, ropes, or scaffolds. He must avoid concentrated exposure to fumes,
odors, dusts, gases, and poor ventilation. He must avoid even moderate exposure
to hazards such as dangerous moving machinery and unprotected heights. He can
perform simple tasks at a reasoning level one to three. He can have superficial

¹ 20 C.F.R. § 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 public contact, in that he can work around the public and interact briefly in
2 activities that do not involve customer service, sales, or the potential for
3 confrontations with the general public. He can adjust to occasional changes in a
4 work setting.

5 **Step four:** Mr. Howe is unable to perform any past relevant work.

6 **Step five:** Because jobs exist in significant numbers in the national economy that
7 Mr. Howe can perform, he has not been disabled from October 1, 2012, through
8 the date of the decision.

9 (See *id.*) The Appeals Council denied Mr. Howe's request for review, making the ALJ's
10 decision the Commissioner's final decision.³ (See *id.* at 1-6.)

11 III. ANALYSIS

12 Pursuant to 42 U.S.C. § 405(g), the court must set aside the Commissioner's
13 denial of social security benefits if the ALJ's findings are based on legal error or not
14 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
15 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
16 1999)).

17 A. Evaluation of the Medical Evidence

18 Mr. Howe argues that the ALJ erred by failing to give a specific and legitimate
19 reason supported by substantial evidence to discount the opinion of examining
20 psychologist Cynthia Collingwood, Ph.D. (See Op. Br. at 4-9.) The court agrees.

21 Where the medical evidence in the record is not conclusive, resolving questions of
22 credibility and conflicts in the evidence is solely the responsibility of the ALJ. See
Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In resolving questions of

³ The court omits the rest of the procedural history in this matter because it is not relevant to the outcome of this review.

1 | credibility and conflicts in the evidence, an ALJ's findings "must be supported by
2 | specific, cogent reasons." See *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). The
3 | ALJ can satisfy this requirement "by setting out a detailed and thorough summary of the
4 | facts and conflicting clinical evidence, stating his interpretation thereof, and making
5 | findings." *Id.* The ALJ may also draw inferences "logically flowing from the evidence."
6 | *Sample*, 694 F.2d at 642. Further, the court itself may draw "specific and legitimate
7 | inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir.
8 | 1989).

9 | The ALJ must provide "clear and convincing" reasons for rejecting the
10 | uncontradicted opinion of either a treating or examining physician. See *Lester v. Chater*,
11 | 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician's opinion
12 | is contradicted, that opinion "can only be rejected for specific and legitimate reasons that
13 | are supported by substantial evidence in the record." *Id.* at 830-31.

14 | In March 2016, Dr. Collingwood examined Mr. Howe and opined that Mr. Howe's
15 | impairments would prevent him from performing the following workplace tasks for up to
16 | 30% of an eight-hour workday: understanding, remembering, and carrying out detailed
17 | instructions; maintaining attention and concentration for extended periods; performing
18 | activities within a schedule; maintaining regular attendance; being punctual within
19 | customary tolerances; making simple work-related decisions; completing a normal
20 | workday without interruptions from psychologically-based symptoms; performing at a
21 | consistent pace without unreasonable rest periods; interacting appropriately with the
22 | public; responding appropriately to changes in the work setting; and traveling in

1 unfamiliar places. (*See* AR at 2550-52.) Dr. Collingwood found that these limitations
2 would ultimately result in Mr. Howe being off task more than 30% of a workday and
3 being absent from work five days or more per month. (*See id.* at 2553.)

4 The ALJ gave little weight to Dr. Collingwood's opinion because it was
5 inconsistent with treatment records showing that Mr. Howe's symptoms were situational
6 and were managed with counseling and medication and because it was inconsistent with
7 the range of activities that Mr. Howe was able to perform.⁴ (*See id.* at 35.) These reasons
8 are not supported by substantial evidence.

9 First, the ALJ found that despite "episodic situational exacerbations," treatment
10 records and mental status examination ("MSE") results indicated that Mr. Howe's
11 symptoms could be managed with counseling and medication compliance. (*See id.*)
12 However, Dr. Collingwood had access to and reviewed all of the treatment records to
13 which the ALJ referred. (*See id.* at 2545.) Dr. Collingwood specifically found that while
14 Mr. Howe was showing some improvement and increased stability from treatment, "his
15 cognitive deficits, which remain severe, are unlikely to improve significantly." (*See id.* at
16 2549.) She accordingly found that Mr. Howe had the aforementioned workplace
17 limitations despite his counseling and medication regimen. (*See id.* at 2550-52.) By
18 examining the same treatment record and determining that it was inconsistent with Dr.
19 Collingwood's opinion, the ALJ improperly substituted her lay opinion for that of a

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22 ⁴ The ALJ also stated that treatment records did not corroborate Mr. Howe's self-reports,
but because the ALJ did not find that Dr. Collingwood improperly relied too heavily on Mr.
Howe's self-reports in forming her opinion, the ALJ's statement does not constitute a reason to
discount Dr. Collingwood's opinion. (*See* AR at 35.)

1 mental health professional. *See Gonzalez Perez v. Sec'y, Health and Human Servs.*, 812
2 F.2d 747, 749 (1st Cir. 1987) (ruling that an ALJ may not substitute her own opinion for
3 the findings and opinion of a physician); *McBrayer v. Sec'y, Health and Human Servs.*,
4 712 F.2d 795, 799 (2nd Cir. 1983) (ruling that an ALJ cannot arbitrarily substitute her
5 own judgment for a competent medical opinion).

6 Moreover, substantial evidence does not support the level of improvement or
7 symptom management that the ALJ states. As noted by the ALJ, Mr. Howe presented
8 with greatly increased anxiety symptoms and near-continuous panic attacks in early April
9 2015. (*See AR at 24 (citing AR at 758-61).*) Though his mood greatly improved and
10 anxiety decreased after starting a new medication regimen, Mr. Howe was again
11 “spending much time in bed” when his anxiety and panic attacks returned weeks later.
12 (*See id. at 739, 755.*) In other treatment records in which Mr. Howe reported “improved”
13 mood, Mr. Howe still indicated having panic attacks that resulted in physical symptoms
14 that could last for over a week. (*See, e.g., id. at 698-99, 729-30.*) One month before the
15 hearing, Mr. Howe continued to report increased PTSD symptoms with episodes of
16 increased anxiety and irritability. (*See id. at 2556.*) Therefore, substantial evidence does
17 not support that ALJ’s finding that Mr. Howe experienced improvement on medication to
18 the degree that Dr. Collingwood’s opinion could be discounted.

19 Next, the ALJ noted that Mr. Howe engaged in a wide range of activities, such as
20 going to the gym and going camping. (*See id. at 35.*) An ALJ may reject a physician’s
21 opinion on the basis that other evidence of the claimant’s ability to function, including
22 reported activities, contradicts that opinion. *See Morgan v. Comm’r of Soc. Sec. Admin.*,

1 169 F.3d 595, 601-02 (9th Cir. 1999). However, Mr. Howe actually testified that he
2 camps no farther than an hour from his house because his panic and anxiety attacks cause
3 him to leave early and without warning. (See AR at 74-75.) He stated that he missed
4 several personal training sessions at the gym because of the difficulty of being there if
5 more than one or two other people are at the gym at the same time. (See *id.* at 75-76.)
6 This testimony tends to support, rather than contradict, Dr. Collingwood's opinion that
7 Mr. Howe would struggle to maintain attendance and complete a normal workday or
8 workweek without interruptions from psychologically-based symptoms. Therefore, the
9 ALJ erred by failing to provide a specific and legitimate reason supported by substantial
10 evidence to discount Dr. Collingwood's opinion.

11 The Ninth Circuit has "recognized that harmless error principles apply in the
12 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
13 (citing *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)). "[I]n
14 each case we look at the record as a whole to determine [if] the error alters the outcome
15 of the case." *Id.* Therefore, "an ALJ's error is harmless where it is 'inconsequential to
16 the ultimate nondisability determination.'" *Id.* (quoting *Carmickle v. Comm'r, Soc. Sec.*
17 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)). Here, because the ALJ improperly
18 discounted Dr. Collingwood's opinion in assessing the RFC and found Mr. Howe capable
19 of performing work based on that RFC, the error affected the ALJ's ultimate disability
20 determination and is not harmless.

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1 **B. Evaluation of the VA Determination**

2 Mr. Howe argues that the ALJ erred by failing to provide a persuasive, specific,
3 and valid reason for discounting the VA's disability determination in the record. (*See*
4 *Op. Br.* at 9-10.) The court agrees.

5 Although a determination by the VA about whether a claimant is disabled is not
6 binding on the Social Security Administration ("SSA"), an ALJ must consider that
7 determination in reaching her decision. *See McCarty v. Massanari*, 298 F.3d 1072,
8 1076 (9th Cir. 2002); 20 C.F.R. § 404.1504. Furthermore, the ALJ "must ordinarily give
9 great weight to a VA determination of disability" because of "the marked similarity"
10 between the two federal disability programs. *See McCarty*, 298 F.3d at 1076. "The VA
11 criteria for evaluating disability are very specific and translate easily into SSA's disability
12 framework." *Id.* However, "[b]ecause the VA and SSA criteria for determining
13 disability are not identical," the ALJ "may give less weight to a VA disability rating if
14 [she] gives persuasive, specific, valid reasons for doing so that are supported by the
15 record." *Id.* (citing *Chambliss v. Massanari*, 269 F.3d 520, 522 (5th Cir. 2001)).

16 Here, the VA's disability determination found Mr. Howe to have an overall rating
17 of 90% disability, paid at the 100% rate because Mr. Howe was unemployable due to
18 service-connected disabilities. (*See AR* at 203.) The ALJ gave the VA's determination
19 only limited weight because the VA's determination uses a different standard of proof
20 and because the VA's assessment did not take into account Mr. Howe's activities of daily
21 living or Mr. Howe's improved condition. (*See id.* at 36.) However, the VA's different
22 standard of proof is not in itself a sufficient reason to discount the VA's determination.

1 | *See McCartney*, 298 F.3d at 1076. The different standard of proof is what allows an ALJ
2 | to give less weight to the VA's determination if she provides persuasive, specific, valid
3 | reasons for doing so that are supported by the record. *See id.* Next, as described above,
4 | the ALJ's characterization of Mr. Howe's daily activities and medical improvement is not
5 | supported by substantial evidence in the record. *See supra* § III.A. Therefore, the ALJ
6 | erred by discounting the VA's determination without providing a sufficient reason.

7 | **C. Remand for an Award of Benefits**

8 | Mr. Howe alleges that the ALJ erred in several other areas. (*See Op. Br.* at 1.)
9 | However, considering the ALJ's errors in evaluating the medical evidence and the VA's
10 | determination, the final question requiring resolution is whether the court should, at its
11 | discretion, remand this case for further proceedings or for an award of benefits.

12 | Under the Social Security Act, "courts are empowered to affirm, modify, or
13 | reverse a decision by the Commissioner 'with or without remanding the cause for a
14 | rehearing.'" *Garrison v. Colvin*, 759 F.3d 995, 1019 (9th Cir. 2014) (quoting 42 U.S.C.
15 | § 405(g)). Although a court should generally remand to the agency for additional
16 | investigation or explanation, a court has discretion to remand for immediate payment of
17 | benefits. *See Treichler v. Comm'r, Soc. Sec. Admin.*, 775 F.3d 1090, 1099-1100 (9th Cir.
18 | 2014). Benefits may be awarded where "the record has been fully developed" and
19 | "further administrative proceedings would serve no useful purpose." *Smolen v. Chater*,
20 | 80 F.3d 1273, 1292 (9th Cir. 1996); *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir.
21 | 2001). Specifically, benefits should be awarded where:

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

6 *Smolen*, 80 F.3d 1273 at 1292; *see also McCartey*, 298 F.3d at 1076-77.

7 First, as discussed above, the ALJ failed to provide legally sufficient reasons for
8 rejecting Dr. Collingwood's opinion and the VA determination. *See supra* § III.A., B.

9 Second, there are no outstanding issues that must be resolved. Dr. Collingwood,
10 the only examining or treating physician in the record to offer a specific functional
11 analysis, found that Mr. Howe's various limitations would ultimately result in Mr. Howe
12 being off task more than 30% of a workday and being absent from work five days or
13 more per month. (*See AR* at 35-36, 2553.) Non-examining state agency consultant Kent
14 Reade, Ph.D., agreed that Mr. Howe may have occasional absences when under
15 significant stress. (*See id.* at 119.) The VA's determination stated that Mr. Howe's
16 mental health impairments prevented him from performing regular job functions because
17 he would require frequent breaks with little notice and frequent absences from work.
18 (*See id.* at 211.)

19 The only medical opinion in the record to which the ALJ gave significant weight
20 in assessing the RFC was that of Mr. Howe's mental health counselor, Jennifer Jaqua,
21 MSW. (*See id.* at 35.) However, the ALJ only gave significant weight to Ms. Jaqua's
22 statement that while Mr. Howe could not perform his past work as a security guard, he
"may still be able to sustain gainful employment in a different line of work." (*See id.*
(citing *id.* at 749).) A medical source's ultimate opinion regarding whether a claimant

1 can work is not an appropriate factor in assessing the RFC, which determines the
2 claimant's specific workplace functional restrictions. See 20 C.F.R. §§ 416.912(b)(7),
3 416.927(e)(1). Because a medical source does not apply the SSA's framework in
4 forming such an opinion, the ultimate question of disability is reserved to the
5 Commissioner after the application of the sequential evaluation process. See *id.*

6 Finally, crediting the improperly discounted opinions as true, Mr. Howe must be
7 found disabled. The vocational expert testified that someone who would need to miss
8 work more than two days a month would not be able to maintain employment. (See AR
9 at 91.) The vocational expert also testified that a person with the RFC assessed who also
10 would be off task for 20% of the workday could not maintain employment. (See *id.*)

11 Accordingly, the court finds that the record has been fully developed in this case,
12 and that remanding for further proceedings "would serve no further purpose." See
13 *Smolen*, 80 F.3d at 1292. Here, allowing the Commissioner to decide these issues again
14 "would create an unfair 'heads, we win; tails, let's play again' system of disability
15 benefits adjudication." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004); see also
16 *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) (noting that the "Commissioner,
17 having lost this appeal, should not have another opportunity . . . any more than [the
18 claimant], had he lost, should have an opportunity for remand and further proceedings").

19 Because review of the record as a whole does not create serious doubt that Mr. Howe is

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1 disabled, the court remands the case for an immediate award of benefits.

2 **IV. CONCLUSION**

3 For the foregoing reasons, the court REVERSES the Commissioner's final
4 decision and REMANDS this case for an immediate award of benefits.

5 Dated this 2nd day of October, 2017.

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7 JAMES L. ROBART
8 United States District Judge
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