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

10 BRIAN C. PHILLIPS,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 3:17-cv-05356-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

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18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
20 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States
21 Magistrate Judge, Dkt. 8). This matter has been fully briefed. *See* Dkt. 15, 19, 20.
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1 Plaintiff has traumatic brain injuries from playing tackle football, evidenced by an
2 MRI demonstrating a frontal lobe lesion. A clinical neuropsychologist who conducted
3 extremely extensive testing and examination of plaintiff included the following summary:

4 Consistent with his neurological findings, [plaintiff] demonstrates a
5 pattern of deficits often associated with the right frontal brain lesion. The
6 highly significant discrepancy between verbal and nonverbal abilities is
7 strongly associated with right hemisphere lateralization, and the
8 particular weakness in spatial organization, phonemic verbal fluency,
9 and reading efficiency suggests a more frontal involvement. Perhaps
10 even more significant is [plaintiff's] described behavioral passivity.
11 Although he appears to respond well to structured prompts for a given
12 behavior, he does not usually initiate these on his own. This is a serious
13 deficit in adaptive behavioral functioning, which has a major impact
14 upon his capacity to resume fully independent living.

15 AR. 414. The examining neuropsychologist also concluded that if plaintiff did not receive
16 effective rehabilitation, he would be “unlikely to demonstrate the pace or persistence for
17 any form of competitive employment or academic achievement, and may become
18 permanently disabled.” AR. 415. The ALJ rejected this opinion, and also failed to discuss
19 the opinion from an examining neurologist who opined that plaintiff should be enrolled
20 as disabled. AR. 30, 462.

21 After considering and reviewing the record, the Court concludes that the ALJ
22 erred when evaluating the medical evidence. For example, the ALJ failed to discuss the
23 only opinion from the neurologist, Dr. Yoder, provided during the relevant assessed
24 period of time. As Dr. Yoder agreed that plaintiff should be “enrolled as disabled,” the
failure to acknowledge this opinion is not harmless error.

Therefore, this matter is reversed and remanded for further administrative
proceedings consistent with this Order.

1 BACKGROUND

2 Plaintiff, BRIAN C. PHILLIPS, was born in 1993 and was 18 years old on the
3 alleged date of disability onset of September 12, 2012. *See* AR. 166-75. Plaintiff
4 graduated from high school and started college, but dropped out when it became difficult
5 to concentrate. AR. 42-43. He has some work history as a cashier/attendant in a gym,
6 construction laborer, changing oil in vehicles and sheet metal fabricator. AR. 205-16.
7 Plaintiff was fired from his last job for being angry and disrespectful and for being a no
8 call/no show though he thought he'd been given the day off. AR. 54.

9
10 According to the ALJ, plaintiff has at least the severe impairments of “cognitive
11 disorder status-post traumatic brain injuries, mood disorder, and headaches (20 CFR
12 416.920(c)).” AR. 22.

13 At the time of the hearing, plaintiff was living half the time with his dad and half
14 the time with his mom. AR. 48.

15 PROCEDURAL HISTORY

16 Plaintiff’s application for Supplemental Security Income (“SSI”) benefits pursuant
17 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
18 following reconsideration. *See* AR. 77-86, 88-98. Plaintiff’s requested hearing was held
19 before Administrative Law Judge Joanne E. Dantonio (“the ALJ”) on May 29, 2015. *See*
20 AR. 38-75. On September 21, 2015, the ALJ issued a written decision concluding that
21 plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 17-37.
22

23 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether the
24 ALJ provided legally sufficient reasons to reject Dr. Yoder’s October 2014 Clinical

1 Progress (SOAP) Notes and Opinion; (2) Whether the ALJ provided legally sufficient
2 reasons to reject Dr. Powell's opinion; (3) Whether the ALJ provided legally sufficient
3 reasons to reject plaintiff's subjective claims; (4) Whether the ALJ provided legally
4 sufficient reasons to reject the lay testimony; and (5) Whether in light of these errors, the
5 RFC, hypothetical questions, and steps four and five findings remain supported by
6 substantial evidence. *See* Dkt. 15, p. 1.

7 STANDARD OF REVIEW

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
9 denial of social security benefits if the ALJ's findings are based on legal error or not
10 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
11 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
12 1999)).

13 DISCUSSION

14 (1) **Whether the ALJ provided legally sufficient reasons to reject Dr. 15 Yoder's October 2014 Clinical Progress (SOAP) Notes and Opinion.**

16 Plaintiff contends that the ALJ erred when failing to credit fully the medical
17 opinion of neurologist, Dr. Carl Yoder, M.D. Although the ALJ rejected Dr. Yoder's
18 earlier opinions issued prior to the period of time relevant to the disability analysis
19 (August 16, 2013, the application date), the ALJ did not provide any rationale to reject
20 Dr. Yoder's SOAP notes, and failed to note his opinion that plaintiff was disabled, which
21 were provided on October 6, 2014. Defendant contends that the ALJ actually cited the
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1 relevant treatment record, and cites to some of plaintiff's reports and to the diagnosis
2 noted within the ALJ's written decision. *See* Dkt. 19, pp. 3-5.

3 When an opinion from an examining or treating doctor is contradicted by other
4 medical opinions, the treating or examining doctor's opinion can be rejected only "for
5 specific and legitimate reasons that are supported by substantial evidence in the record."
6 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d
7 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see*
8 *also* 20 C.F.R. §§ 404.1527(a)(2).

9 Dr. Carl Yoder, M.D. examined plaintiff on more than one occasion and also
10 appears to have been involved in recommending a referral for further care and helping to
11 ensure that plaintiff received such care. *See* AR. 458-60. Therefore, Dr. Yoder likely
12 qualifies as a treating physician; however, based on the Court's review of the record, the
13 Court is not applying a higher standard to the ALJ's rejection of Dr. Yoder's opinion, as
14 the Court concludes that she erred even with a lower standard.

15 Dr. Yoder examined plaintiff on October 6, 2014, after plaintiff's August 16, 2013
16 application date. *See* AR. 20, 461. Dr. Yoder observed that plaintiff had a flat affect, and
17 also observed following neurological examination that plaintiff demonstrated a
18 "decreasing concentrating ability." AR. 461. Although plaintiff "was able to say the
19 months of the year in reverse [], he was very slow in the process." *Id.* Dr. Yoder observed
20 that plaintiff was not oriented as to time, place, and person. *Id.* After conducting brief
21 memory tests, Dr. Yoder indicated that plaintiff's short term memory is impaired. *Id.*
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1 Dr. Yoder diagnosed plaintiff with mild memory disturbance following organic
2 brain damage; history of traumatic brain injury; headache syndromes; insomnia; and
3 depression. AR. 462. In his concluding note, Dr. Yoder indicated that “a residential
4 intensive rehabilitation program with both cognitive and behavioral components is what
5 is needed to maximize his recovery, however until that time I agree with trying to get him
6 enrolled in the outpatient rehabilitation treatment program for head trauma.” *Id.* Dr.
7 Yoder also indicated that he agreed with getting plaintiff as many resources as available,
8 including the example of “enrolling him as disabled.” *Id.*
9

10 Defendant concedes that the ALJ failed to note Dr. Yoder’s opinion that he agreed
11 with enrolling plaintiff “as disabled.” *See* Dkt. 19, pp. 4-5. However, because the ALJ
12 discussed Dr. Yoder’s earlier opinions, and because plaintiff failed to challenge the ALJ’s
13 rejection of the earlier opinions, defendant contends that “[t]hus, the ALJ’s valid
14 reasoning applies equally to Dr. Yoder’s conclusory statement from October 2014 that
15 plaintiff should be ‘enroll[ed] as disabled.’” *Id.* at 5. However, the logic of defendant’s
16 argument is not obvious; defendant fails to explain how the fact that plaintiff did not
17 challenge the rejection of the 2013 opinion means that the reasons offered by the ALJ for
18 the failure to credit fully Dr. Yoder’s 2013 opinion apply equally to Dr. Yoder’s 2014
19 opinion.
20

21 Furthermore, Dr. Yoder’s 2014 opinion includes Dr. Yoder’s agreement that
22 plaintiff should be “enroll[ed] as disabled,” an opinion that does not seem to appear in
23 any of the 2013 examinations. *See* AR. 462. Clearly the ALJ’s rationale for failing to
24 credit fully the 2013 opinions does not necessarily apply to an opinion that is new and not

1 included within the 2013 treatment record. In addition, as the ALJ failed to discuss the
2 notation from Dr. Yoder's 2014 treatment record regarding plaintiff being enrolled as
3 disabled, the ALJ did not herself find that any of the rationale she relied on when failing
4 to credit fully Dr. Yoder's 2013 opinions applied to the 2014 opinions. According to the
5 Ninth Circuit, "[l]ong-standing principles of administrative law require us to review the
6 ALJ's decision based on the reasoning and actual findings offered by the ALJ - - not *post*
7 *hoc* rationalizations that attempt to intuit what the adjudicator may [or would] have been
8 thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (citing *SEC v.*
9 *Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina v.*
10 *Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) ("we may not uphold an agency's decision
11 on a ground not actually relied on by the agency") (citing *Chenery Corp, supra*, 332 U.S.
12 at 196).

14 Defendant also contends that, "as a matter of law, the ALJ was not required to
15 credit Dr. Yoder's conclusion on an issue ultimately reserved to the Commissioner," that
16 is, the question of whether plaintiff is disabled. Dkt. 19, p. 4. However, the fact that the
17 ALJ was not required to credit fully this conclusion does not mean that she was free to
18 ignore it.

19 According to the Ninth Circuit, "physicians may render medical, clinical
20 opinions, or they may render opinions on the ultimate issue of disability - the claimant's
21 ability to perform work." *Garrison v Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)
22 (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). Although "the
23 administrative law judge is not bound by the uncontroverted opinions of the claimant's
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1 physicians on the ultimate issue of disability, [] he cannot reject them without presenting
2 clear and convincing reasons for doing so.” *Reddick, supra*, 157 F.3d at 725 (quoting
3 *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993) (other citations omitted)). “A
4 treating physician’s opinion on disability, even if controverted, can be rejected only with
5 specific and legitimate reasons supported by substantial evidence in the record.” *Id.*
6 (citing *Lester*, 81 F.3d at 830). Furthermore, for “treating sources, the rules also require
7 that [the Social Security Administration makes] every reasonable effort to recontact such
8 sources for clarification when they provide opinions on issues reserved to the
9 Commissioner and the bases for such opinions are not clear to us.” Social Security Ruling
10 (SSR) 96-5p, 1996 SSR LEXIS 2 at *6. This Ruling indicates that “opinions from any
11 medical source on issues reserved to the Commissioner must never be ignored.” *See id.*

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13 In addition, although defendant is correct that the ALJ noted certain aspects of Dr.
14 Yoder’s 2014 opinion, defendant fails to acknowledge that the ALJ offered no rationale
15 for failing to credit fully the aspects of the record cited. For example, although it is true
16 that the ALJ noted that plaintiff demonstrated “a decreasing concentrating ability,” the
17 ALJ offered no reason for failing to credit fully this opinion or include it within
18 plaintiff’s residual functional capacity (“RFC”). *See* AR. 25. Likewise, the ALJ failed to
19 note that although plaintiff was able to say the months of the year in reverse, Dr. Yoder
20 observed that “he was very slow in the process.” AR. 461.

21
22 Given plaintiff’s application date, the ALJ failed to discuss what is likely the most
23 relevant opinion from plaintiff’s neurologist Dr. Yoder. But, the Commissioner “may not
24 reject ‘significant probative evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d

1 562, 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir.
2 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s
3 written decision must state reasons for disregarding [such] evidence.” *Flores, supra*, 49
4 F.3d at 571. Therefore, the Court concludes that the ALJ erred.

5 The Ninth Circuit has “recognized that harmless error principles apply in the
6 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
7 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
8 Cir. 2006) (collecting cases)). The Ninth Circuit has reaffirmed the explanation in *Stout*
9 that “ALJ errors in social security are harmless if they are ‘inconsequential to the ultimate
10 nondisability determination’ and that ‘a reviewing court cannot consider [an] error
11 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
12 the testimony, could have reached a different disability determination.’” *Marsh v. Colvin*,
13 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In *Marsh*, even
14 though “the district court gave persuasive reasons to determine harmlessness,” the Ninth
15 Circuit reversed and remanded for further administrative proceedings, noting that “the
16 decision on disability rests with the ALJ and the Commissioner of the Social Security
17 Administration in the first instance, not with a district court.” *Id.* (citing 20 C.F.R. §
18 404.1527(d)(1)-(3)).
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20 In his concluding note, Dr. Yoder opined that plaintiff needed “a residential
21 intensive rehabilitation program with both cognitive and behavioral components,” and
22 indicated that he agreed with getting plaintiff as many resources as available, including
23 the example of “enrolling him as disabled.” AR. 462. The Court cannot conclude with
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1 confidence “that no reasonable ALJ, when fully crediting [Dr. Yoder’s 2014 opinion],
2 could have reached a different disability determination.” *Marsh*, 792 F.3d at 1173 (citing
3 *Stout*, 454 F.3d at 1055-56). This matter requires further administrative proceedings.
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5 **(2) Whether the ALJ provided legally sufficient reasons to reject the**
6 **opinion of Dr. John Powell, Ph.D.**

7 The Court already has concluded that the ALJ erred in reviewing the medical
8 evidence and that this matter should be reversed and remanded for further consideration,
9 *see supra*, section 1. Therefore, the remainder of the medical evidence should be assessed
10 anew following remand of this matter. However, the Court notes that the ALJ failed to
11 credit fully Dr. Powell’s opinion in part based in part on a finding that his opinion “is a
12 vocational decision and relates to a legal conclusion reserved for the Commissioner,”
13 which the Court already has concluded is insufficient rationale, *see supra*, section 1.

14 The Court also finds persuasive plaintiff’s argument that the ALJ’s failure to credit
15 fully Dr. Powell’s opinion based on the general finding that “it is not consistent with the
16 overall record” impermissibly leaves “the court to sift through the record to find the
17 evidence to refute Dr. Powell.” Dkt. 15, p. 7 (citation omitted). Although defendant cites
18 three pages of the ALJ’s written decision in support of a finding of an inconsistency, even
19 if there is support for the ALJ’s finding within these three pages, the Court still is left to
20 guess at which aspects of these three pages of the decision reflects the rationale that is
21 relied on for the failure to credit fully Dr. Powell’s opinion. Furthermore, following this
22 Court’s review of the ALJ’s discussion of the medical evidence as well as of Dr. Powell’s
23 opinion, the Court concludes that a finding of inconsistency is not based on substantial
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1 evidence in the record as a whole. For example, Dr. Powell opined as follows: “The key
2 to [plaintiff’s] adaptive functioning may be to structure his activities wherever possible.
3 When prompted, he performs reasonably well in most areas. Without prompting, or when
4 trusted to follow through on his own, he often does not initiate the necessary behavior.”
5 AR. 415. This is consistent with the lay statement from plaintiff’s mother that he can do
6 household chores and yard work, but he requires reminders. *See* AR. 196. The Court also
7 notes that neither the ALJ in her written decision, nor defendant in the response brief,
8 have directed the Court to any evidence in the record that contradicts this opinion from
9 the examining psychological specialist, corroborated by a lay statement from someone
10 who sees him regularly. This opinion of the need for prompting, coexistent with many
11 normal cognitive functions, also appears entirely consistent with research data on
12 problematic symptoms following traumatic brain injury due to concussion or brain lesion:
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15 Executive dysfunction is an important component of neurobehavioral
16 disruption following traumatic brain injury (TBI), often leading to
17 significant functional impairment even in cases defined as “mild” TBI by
18 commonly used medical criteria. Furthermore, the integrity of executive
19 functions following TBI demonstrate significant associations with
20 critical life outcomes such as vocational success and social autonomy,
21 even when evaluated many years after injury. The majority of cases of
22 TBI involves some level of disruption in frontal-subcortical systems
23 functioning, potentially resulting in impaired executive capacities. Such
24 injuries include not only direct insult to the frontal lobes, such as through
contusion resulting from coup or contre-coup injuries, but also indirect
damage due to lesions. . . . Cognitive and behavioral impairments
resulting from executive dysfunction are often among the most persistent
and prominent sequelae following TBI, despite otherwise good
neurological recovery. . . . executive functions [can be characterized] as
consisting of four components: (1) volition; (2) planning; (3) purposive
action; (4) effective performance.

1 Brenna C. McDonald, Laura A. Flashman, and Andrew J. Saykin, Executive
2 dysfunction following traumatic brain injury: Neural substrates and treatment
3 strategies, 17 Neural Rehabilitation 323-34, 333 (2002) (available at:
4 <https://content.iospress.com/articles/neurorehabilitation/nre00166>, last visited
5 January 25, 2018). The Court notes that the relevant types of injuries regularly
6 found to result in the discussed executive dysfunction include not only certain
7 types of contusions (coup countre-coup) but also certain types of lesions
8 (entailing frontal connectivity), and plaintiff has both of these. *See id.*
9

10 Furthermore, some of these symptoms of executive dysfunction “may not
11 be apparent on standardized testing.” *Id.* at 333. Therefore, regarding some lack
12 of limitation in certain cognitive areas following some mini-mental status
13 examinations, the Court notes the examinations performed by Dr. Powell, which
14 he indicates took approximately 10 hours:

15 Shipley Institute of Living Scale
16 Wechsler Adult Intelligence Scale-3rd Edition (WAIS-III)
17 Wechsler memory scale-3rd Edition (WMS-III)(Select Subtests)
18 Ray Complex Figure Test (RCFT)
19 Hooper Visual Organization Task (HBOT)
20 Aphasia Screening Test (AST)
21 Sensory-Perceptual Exam (SPE)
22 Controlled Oral Word Association Test (COWAT)
23 Animal Naming Tests (AND)
24 Boston Naming Test (BNT)
Iowa-Chapman Reading Comprehension Tests (ICRT)
Trail-Making Tests, A & B (TNT)
Symbol Digit Modalities Test (SDMT): Written & Oral
Stroop Test
Connors’ Continuous Performance Test-2nd Edition (CPT-2)
Finger Tapping Test
Grip Strength Test

1 Grooved Pegboard Test (GPT)
2 Tower of London Test (TOL)
3 Green's Medical Symptom Validity Test (MCT)
4 Personality Assessment Inventory (PAI)

5 AR. 410-11. The ALJ's generally referring to "the overall record," even after
6 discussing some reports indicating some normal mini mental status examination
7 results, is not a legitimate basis for failing to credit fully Dr. Powell's opinion.
8 This opinion likely should be credited in full.

9 **(3) Whether the ALJ provided legally sufficient reasons to reject
10 plaintiff's subjective claims.**

11 The Court already has concluded that the ALJ erred in reviewing the medical
12 evidence and that this matter should be reversed and remanded for further consideration,
13 *see supra*, sections 1 and 2. In addition, the evaluation of a claimant's statements
14 regarding limitations relies in part on the assessment of the medical evidence. *See* 20
15 C.F.R. § 404.1529(c); SSR 16-3p, 2016 SSR LEXIS 4. Therefore, plaintiff's testimony
16 and statements should be assessed anew following remand of this matter.

17 **(4) Whether the ALJ erred when rejecting the lay testimony.**

18 Similarly, the Court concludes that the lay evidence should be assessed anew
19 following remand of this matter. However, the Court notes that the ALJ rejected the
20 evidence provided by plaintiff's mother in part because she "does not possess the medical
21 training necessary to make exacting observations as to dates, frequencies, types and
22 degrees of medical signs and symptoms." AR. 31. However, as argued by plaintiff, the
23 fact that she "was not medically trained only meant she was a lay witness," and therefore
24 simply set the standard of germane rationale required for the failure to credit fully her

1 observations. Dkt. 15, p. 9 (citing *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)).
2 The ALJ's failure to credit fully evidence from the lay witness regarding the moods and
3 mannerisms of her son because she does not possess special training is not an appropriate
4 basis to "question[] the accuracy of [her] statements." AR. 31. In addition, although the
5 ALJ failed to credit fully her statements because the ALJ could not consider her "to be a
6 disinterested third party due to her relationship with the claimant," this rationale, too, is
7 inappropriate as lay evidence may not be disregarded simply because of the relationship
8 to the claimant or because of any potential financial interest in the claimant's disability
9 benefits. *Valentine v. Comm'r SSA*, 574 F.3d 685, 694 (9th Cir. 2009) (citing *Dodrill v.*
10 *Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993)). Finally, although the ALJ also found that
11 her opinion is inconsistent "with the preponderance of the opinions and observations by
12 medical doctors," not only is this extremely vague, but also, her discarded testimony
13 appears very consistent with the medical opinions of Drs. Yoder and Powell.
14

15 Following a proper consideration of the medical evidence on remand of this
16 matter, the ALJ should assess anew the lay evidence provided by plaintiff's mother.

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18 **(5) Whether in light of these errors, the RFC, hypothetical questions, and
19 steps four and five findings remain supported by substantial evidence.**

20 Similarly, the remainder of the sequential disability evaluation process should be
21 completed anew following remand of this matter.

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1 (6) **Should this matter be reversed and remanded for further**
2 **administrative proceedings or with a direction to award benefits.**

3 Generally, when the Social Security Administration does not determine a
4 claimant’s application properly, “the proper course, except in rare circumstances, is to
5 remand to the agency for additional investigation or explanation.” *Benecke v. Barnhart*,
6 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
7 forth a “test for determining when [improperly rejected] evidence should be credited and
8 an immediate award of benefits directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
9 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

10 The first step entails the court’s determination that the ALJ erred when rejecting
11 evidence. *Smolen, supra*, 80 F.3d at 1292 (citations omitted); *see also, supra*, sections I
12 and II. Next, as stated recently by the Ninth Circuit:

13 Second, we turn to the question whether further administrative
14 proceedings would be useful. In evaluating this issue, we consider
15 whether the record as a whole is free from conflicts, ambiguities, or
16 gaps, whether all factual issues have been resolved, and whether the
 claimant’s entitlement to benefits is clear under the applicable legal
 rules.

17 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)
18 (citations omitted).

19 Here, based on the record as a whole, the Court concludes that "further
20 administrative proceedings would be useful.” *Id.* This case contains ambiguities. As
21 noted previously, some of the more subtle symptoms of executive dysfunction “may not
22 be apparent on standardized testing.” McDonald, B.C., *et al., supra*, at 333. The
23 examining clinical neuropsychologist who performed ten hours of rigorous
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1 neuropsychological testing opined that plaintiff needs to be prompted and requires
2 effective rehabilitation. AR. 415. The exact vocational effects are unclear.


3 Therefore, further administrative proceedings would be useful and the ALJ may
4 wish to call a medical expert in this case; recontact Dr. Powell, who appears to have
5 conducted the most rigorous neuropsychological testing; and/or recontact Dr. Yoder, who
6 was unable to provide a function by function opinion (for which the ALJ in part failed to
7 credit fully Dr. Yoder's earlier opinions) until his hospital lawyers contacted plaintiff's
8 lawyer "to clarify the appropriate format." AR. 462.

9
10 CONCLUSION

11 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
12 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
13 405(g) to the Acting Commissioner for further consideration consistent with this order.

14 **JUDGMENT** should be for plaintiff and the case should be closed.

15 Dated this 26th day of January, 2018.

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18 J. Richard Creatura
19 United States Magistrate Judge
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