

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

**Teresa Diane Baker v. Leland Dudek, Acting Commissioner of Social
Security**

Baker v. Dudek · No. 1:24-cv-00899-SKO · Decided March 24, 2025

SUMMARY

The United States District Court for the Eastern District of California reviewed Teresa Diane Baker’s challenge to the denial of Supplemental Security Income benefits. The court held that the Administrative Law Judge failed to adequately address consultative psychologist Dr. Lance Portnoff’s opinion regarding Baker’s moderate limitations in completing a normal workday or workweek and handling workplace stress. The court vacated the Commissioner’s decision and remanded the matter for further administrative proceedings.

OPINION

1 2 3 4 5 6 UNITED STATES DISTRICT COURT 7 EASTERN DISTRICT OF CALIFORNIA 8
TERESA DIANE BAKER, 9 Case No. 1:24-cv-00899-SKO Plaintiff, 10 v. ORDER ON
PLAINTIFF’S SOCIAL 11 SECURITY COMPLAINT LELAND DUDEK, 12 Acting
Commissioner of Social Security1, 13 Defendant. (Doc. 1) 14

_____/ 15 16 I. INTRODUCTION 17 18 Plaintiff Teresa
Diane Baker (“Plaintiff”) seeks judicial review of a final decision of the 19 Commissioner of
Social Security (the “Commissioner” or “Defendant”) denying her application 20 for
Supplemental Security Income (SSI) under the Social Security Act (the “Act”).

(Doc. 1.) The 21 matter is currently before the Court on the parties’ briefs, which were submitted,
without oral 22 argument, to the Honorable Sheila K. Oberto, United States Magistrate Judge.2 23

II. FACTUAL BACKGROUND 24 Plaintiff was born in 1967, has a limited education, and
previously worked as an adult 25 26 1 On February 19, 2025, Leland Dudek was appointed the
Acting Commissioner of the Social Security Administration.

See <https://blog.ssa.gov/statement-from-acting-commissioner-dudek/> (last visited by the Court on
27 February 24, 2025). He is therefore substituted as the defendant in this action. See 42 U.S.C. §
405(g) (referring to the “Commissioner’s Answer”); 20 C.F.R. § 422.210(d) (“the person holding
the Office of the Commissioner shall, 28 in his official capacity, be the proper defendant”).

1 caregiver. (Administrative Record (“AR”) 39, 79, 87, 88, 249, 253, 254, 261.) Plaintiff filed a 2
claim for SSI payments on May 31, 2016, alleging she became disabled on August 1, 2015, due to

3 microcytic anemia and acute kidney injury. (AR 25,79, 80, 87, 249, 252, 278, 287.) 4 Following a hearing, an Administrative Law Judge (ALJ) issued a written decision on April 5 27, 2020, finding Plaintiff not disabled.

(AR 29–40.) On February 11, 2021, Plaintiff filed 6 another SSI application alleging disability as of April 29, 2020, due to scoliosis, PTSD and “[being 7 a] slow learner,” and on March 9, 2021, also appealed the ALJ’s 2020 decision to the district court. 8 (AR 563, 588, 613, 818–824.)

The parties thereafter voluntarily remanded the case for further 9 proceedings for the ALJ to “further evaluate the evidence, including evidence related to Plaintiff’s 10 obesity.” (AR 617–19.) Upon remand, the Appeals Council consolidated Plaintiff’s two SSI 11 claims and directed the assigned ALJ to, among other things, “[e]valuate [Plaintiff’s] medically 12 determinable impairments including obesity to determine to what extent they limit the claimant’s 13 ability to perform basic work activities.” (AR 623–24.)

See also AR 423.) The ALJ thereafter 14 conducted a hearing and issued a “partially favorable” decision on May 4, 2024, finding Plaintiff 15 “was not disabled prior to May 17, 2022, but became disabled on that date and has continued to be 16 disabled through the date of this decision.” (AR 423–38.) 17 A. Relevant Evidence of Record 3 18 In August 2019, Plaintiff presented for a mental evaluation by Lance A. Portnoff, Ph.D.

19 (AR 407–14.) Following an examination, Dr. Portnoff opined, among other things, that Plaintiff 20 “is able to perform simple and repetitive tasks.” (AR 413.) Dr. Portnoff found that Plaintiff had 21 “moderate limitations in her ability to complete a normal workday or workweek without 22 interruptions from a psychiatric condition due to combined neurocognitive and affective 23 symptoms.” (AR 413.)

He further opined that Plaintiff’s “ability to deal with the stress 24 encountered in a competitive work environment is moderately impaired due to unspecified 25 depressive disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and impaired 26 mental flexibility.” (AR 414.) 27 28 3 Because the parties are familiar with the medical evidence, it is summarized here only to the extent relevant to the 1 B. Administrative Proceedings 2 The Commissioner denied Plaintiff’s application for benefits initially on October 3, 2016, 3 and again on reconsideration on January 10, 2017.

(AR 29, 103–107, 109–114.) Following a 4 hearing, an Administrative Law Judge (ALJ) issued a written decision on April 27, 2020, finding 5 Plaintiff not disabled. (AR 29–40.) Plaintiff appealed the decision to the district court and the 6 parties thereafter voluntarily remanded the case for further proceedings for the ALJ to “further 7 evaluate the evidence, including evidence related to Plaintiff’s obesity.” (AR 617–19.)

Upon 8 remand, the Appeals Council directed the assigned ALJ to, among other things, “[e]valuate 9 [Plaintiff’s] medically determinable impairments including obesity to determine to what extent 10 they limit the claimant’s ability to perform basic work activities.” (AR 623. See also AR 423.) 11 At a hearing held on February 8, 2024, Plaintiff appeared with counsel and testified before 12 an ALJ as to her alleged disabling conditions.

(AR 467–78.) A medical expert and a vocational 13 expert also testified at the hearing. (AR 456–62, 478–82.) 14 C. The ALJ’s Decision 15 In a decision dated May 4, 2024, the ALJ issued a “partially favorable” decision, finding 16 Plaintiff “was not disabled prior to May 17, 2022, but became disabled on that date and has 17 continued to be disabled through the date of this decision.” (AR 423–38.)

The ALJ conducted the 18 five-step disability analysis set forth in 20 C.F.R. § 416.920. (AR 426–38.) The ALJ decided that 19 Plaintiff had not engaged in substantial gainful activity since the date of the application (step one). 20 (AR 426.) At step two, the ALJ found Plaintiff’s following impairments to be severe since the 21 date of application, May 31, 2016: unspecified depressive disorder; post-traumatic stress disorder; 22 obsessive compulsive disorder with trichotillomania; unspecified learning disorder; Attention 23 Deficit Hyperactivity Disorder, inattentive type; and borderline intellectual functioning.

(AR 426– 24 27.) Since May 31, 2016, Plaintiff did not have an impairment or combination of impairments that 25 met or medically equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 26 1 (“the Listings”) (step three). (AR 427–29.) 27 28 1 The ALJ then assessed Plaintiff’s residual functional capacity (RFC)4 and applied the 2 assessment at steps four and five.

See 20 C.F.R. § 416.920(a)(4) (“Before we go from step three to 3 step four, we assess your residual functional capacity.... We use this residual functional capacity 4 assessment at both step four and step five when we evaluate your claim at these steps.”).

The ALJ 5 determined that, prior to May 17, 2022, Plaintiff had the RFC: 6 to perform a full range of work at all exertional levels but with the following nonexertional limitations: they would be limited to simple and routine tasks, 7 routine work-related decision making and can have only occasional interactions with supervisors, coworkers, and the general public.

8 9 (AR 429–36.) Although the ALJ recognized that Plaintiff’s impairments “could reasonably be 10 expected to cause the alleged symptoms[,]” the ALJ rejected Plaintiff’s subjective testimony as 11 “not fully supported prior to May 17, 2022, for the reasons explained in this decision.” (AR 436.) 12 The ALJ determined that Plaintiff had no past relevant work (step four) but that, given her 13 RFC, she could perform a significant number of jobs in the national economy (step five).

(AR 14 436–38.) The ALJ concluded Plaintiff “was not disabled prior to May 17, 2022, but became 15 disabled on that date and has continued to be disabled through the date of this decision.” (AR 16 438.) 17 III. LEGAL STANDARD 18 A. Applicable Law 19 An individual is considered “disabled” for purposes of disability benefits if they are unable 20 “to engage in any substantial gainful activity by reason of any medically determinable physical or 21 mental impairment which can be expected to result in death or which has lasted or can be expected 22 to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

However, 23 “[a]n individual shall be determined to be under a disability only if [their] physical or mental 24 25 4 RFC is an assessment of an individual’s ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis of 8 hours a day, for 5 days a week, or an equivalent work schedule. 26 TITLES II & XVI: ASSESSING RESIDUAL FUNCTIONAL CAPACITY IN INITIAL CLAIMS, Social Security Ruling (“SSR”) 96-8P (S.S.A.

July 2, 1996). The RFC assessment considers only functional limitations and restrictions that result 27 from an individual’s medically determinable impairment or combination of impairments. Id. “In determining a claimant’s RFC, an ALJ must consider all relevant evidence in the record including, inter alia, medical records, lay 28 evidence, and ‘the effects of symptoms, including pain, that are reasonably attributed to a medically determinable 1 impairment or impairments are of such severity that [they] are not only unable to do [their] 2 previous work but cannot, considering [their] age, education, and work experience, engage in any 3 other kind of substantial gainful work which exists in the national economy.” Id. § 423(d)(2)(A).

4 “The Social Security Regulations set out a five-step sequential process for determining 5 whether a claimant is disabled within the meaning of the Social Security Act.” *Tackett v. Apfel*, 6 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 20 C.F.R. § 404.1520); see also 20 C.F.R. § 416.920. 7 The Ninth Circuit has provided the following description of the sequential evaluation analysis: 8 In step one, the ALJ determines whether a claimant is currently engaged in 9 substantial gainful activity.

If so, the claimant is not disabled. If not, the ALJ proceeds to step two and evaluates whether the claimant has a medically severe 10 impairment or combination of impairments. If not, the claimant is not disabled. If so, the ALJ proceeds to step three and considers whether the impairment or 11 combination of impairments meets or equals a listed impairment under 20 C.F.R. pt.

404, subpt. P, [a]pp. 1. If so, the claimant is automatically presumed disabled. 12 If not, the ALJ proceeds to step four and assesses whether the claimant is capable 13 of performing [their] past relevant work. If so, the claimant is not disabled. If not, the ALJ proceeds to step five and examines whether the claimant has the [RFC]..

14. to perform any other substantial gainful activity in the national economy. If so, the claimant is not disabled. If not, the claimant is disabled. 15 16 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); see, e.g., 20 C.F.R. § 416.920(a)(4) 17 (providing the “five-step sequential evaluation process” for SSI claimants). “If a claimant is found 18 to be ‘disabled’ or ‘not disabled’ at any step in the sequence, there is no need to consider 19 subsequent steps.” Tackett, 180 F.3d at 1098 (citing 20 C.F.R. § 404.1520); 20 C.F.R. § 416.920.

20 “The claimant carries the initial burden of proving a disability in steps one through four of 21 the analysis.” *Burch*, 400 F.3d at 679 (citing *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 22 1989)). “However, if a claimant establishes an inability to continue [their] past work, the burden 23 shifts to the Commissioner in step five to show that the claimant can perform other substantial 24 gainful work.” *Id.* (citing *Swenson*, 876 F.2d at 687).

25 B. Scope of Review 26 “This court may set aside the Commissioner’s denial of [social security] benefits [only] 27 when the ALJ’s findings are based on legal error or are not supported by substantial evidence in 28 the record as a whole.” Tackett, 180 F.3d at 1097 (citation omitted). “Substantial evidence... is 1 ‘more than a mere scintilla,’” and means only “such relevant evidence as a reasonable mind might 2 accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct.

1148, 1154 (2019) 3 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). See also *Ford v. Saul*, 950 F.3d 4 1141, 1154 (9th Cir. 2020). 5 “This is a highly deferential standard of review....” *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). “The ALJ’s findings will be upheld if supported by 7 inferences reasonably drawn from the record.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th 8 Cir.

2008) (citation omitted). Additionally, “[t]he court will uphold the ALJ’s conclusion when the 9 evidence is susceptible to more than one rational interpretation.” *Id.*; see, e.g., *Edlund v. 10 Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (“If the evidence is susceptible to more than one 11 rational interpretation, the court may not substitute its judgment for that of the Commissioner.” 12 (citations omitted)).

13 Nonetheless, “the Commissioner’s decision ‘cannot be affirmed simply by isolating a 14 specific quantum of supporting evidence.’” Tackett, 180 F.3d at 1098 (quoting *Sousa v. Callahan*, 15 143 F.3d 1240, 1243 (9th Cir. 1998)). “Rather, a court must ‘consider the record as a whole, 16 weighing both evidence that supports and evidence that detracts from the [Commissioner’s] 17 conclusion.’” *Id.* (quoting *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir.

1993)). 18 Finally, courts “may not reverse an ALJ’s decision on account of an error that is harmless.” 19 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 20 454 F.3d 1050, 1055–56 (9th Cir. 2006)). Harmless error “exists when it is clear

from the record 21 that ‘the ALJ’s error was inconsequential to the ultimate nondisability determination.’” 22 Tommasetti, 533 F.3d at 1038 (quoting Robbins v. Soc.

Sec. Admin., 466 F.3d 880, 885 (9th Cir. 23 2006)). “[T]he burden of showing that an error is harmful normally falls upon the party attacking 24 the agency’s determination.” Shinseki v. Sanders, 556 U.S. 396, 409 (2009) (citations omitted). 25 IV. DISCUSSION 26 Plaintiff contends that the ALJ’s RFC assessment is erroneous because, among other 27 things, the ALJ failed to provide specific and legitimate reasons, supported by substantial 28 evidence, for implicitly rejecting the opinion of consultative examiner Dr. Portnoff that Plaintiff 1 would have moderate limitations in her ability to complete a normal workday or workweek 2 without interruptions from a psychiatric condition, and a moderate impairment in her ability to deal 3 with the stress encountered in a competitive work environment.

(Doc. 20 at 5–10; Doc. 23 at 2–5.) 4 The Court agrees. 5 A. The ALJ Did Not Properly Account for the Consultative Psychologist’s Opinion in Determining Plaintiff’s Residual Functional Capacity 6 1. Legal Standard 7 8 The weight given to medical source opinions depends in part on whether they are proffered 9 by treating, examining, or non-examining professionals.⁵ Holohan v. Massanari, 246 F.3d 1195, 10 1201–02 (9th Cir.

2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally, a treating 11 physician’s opinion carries more weight than an examining physician’s opinion, and an examining 12 physician’s opinion carries more weight than a non-examining physician’s opinion. Holohan, 246 13 F.3d at 1202. 14 An ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted 15 opinion of either a treating or examining physician.

Lester, 81 F.3d at 830; Pitzer v. Sullivan, 908 16 F.2d 502, 506 (9th Cir. 1990); Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Even if a 17 treating or examining physician’s opinion is contradicted, that opinion can be rejected only “for 18 specific and legitimate reasons that are supported by substantial evidence in the record.” Lester, 19 81 F.3d at 830–31.

The ALJ can meet this burden by “setting out a detailed and thorough 20 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and 21 making findings.” Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998). 22 2. Analysis 23 In his decision, the ALJ purported to give “weight” Dr. Portnoff’s opinion, which included 24 Plaintiff’s moderate limitations completing a normal workday or workweek due to her psychiatric 25 condition, and a moderate impairment in her ability to deal with the stress encountered in a 26 competitive work environment.

(AR 433–34.) The ALJ explained that he gave the opinion such 27 5 Plaintiff filed her initial SSI claim before March 27, 2017, so Section 416.927, not Section 416.920c, governs the 28 ALJ’s evaluation of medical opinions. See 20 C.F.R. § 416.920c; 82 Fed. Reg. 5844-01, 2017 WL

168819 (Jan. 18, 1 weight because it was “supported by direct examination findings and is consistent with the other 2 evidence of record.” (AR 434.)

However, nothing in the ALJ’s RFC—including the limitation to 3 “simple and routine tasks [and] routine work-related decision making... and [] only occasional 4 interactions with supervisors, coworkers, and the general public.” (AR 429)—accommodates these 5 opined moderate impairments. While the ALJ need not accept the full extent of Dr. Portnoff’s 6 opinion, the ALJ may not reject it, or significant parts of it, without giving specific and legitimate 7 reasons for doing so.

See Lester, 81 F.3d at 830–31. Accordingly, the ALJ erred by not providing 8 specific and legitimate reasons, supported by substantial evidence, for implicitly rejecting 9 significant portions of Dr. Portnoff’s opinion. See, e.g., *Bain v. Astrue*, 319 F. App’x. 543, 545–46 10 (9th Cir. 2009) (finding ALJ erred in not including consultative examining psychologist’s 11 moderate limitations in the RFC, despite crediting the limitations in the decision); *Barnes v. 12 Colvin*, Case No. 5:16-CV-01183-SK, 2017 WL 8220233, at *3 (C.D.

Cal. Apr. 17, 2017) (finding 13 ALJ erred in failing to explain why RFC assessment did not adopt consultative psychiatrist’s 14 moderate difficulties performing work activities on a consistent basis without special or additional 15 supervision and moderate limitations completing a normal workday or workweek due to his mental 16 condition); *Jackson v. Colvin*, No. EDCV 12–00606–MAN, at *5 (C.D.

Cal. May 2, 2013) (finding 17 ALJ erred in failing to proffer any reason for failing to explain the rejection of consultative 18 psychiatrist’s opinion that claimant would have mild to moderate limitations with respect to 19 handling normal stresses at work). See also TITLES II & XVI: CAPABILITY TO DO OTHER WORK- 20 THE MEDICAL-VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING SOLELY NONEXERTIONAL 21 IMPAIRMENTS, SSR 85-15, 1985 WL 56857, at *5–6 (S.S.A.

1985) (emphasizing that mentally 22 impaired people often “have difficulty accommodating to the demands of work and work-like 23 settings” and thus “[a]ny impairment-related limitations created by an individual’s response to 24 demands of work... must be reflected in the RFC assessment”). 25 Defendant’s claim that the ALJ properly accounted for Dr. Portnoff’s endorsed moderate 26 limitations by restricting Plaintiff to simple work is unavailing.

(Doc. 22 at 6–8.) Defendant 27 primarily relies on *Stubbs-Danielson v. Astrue*, in which Ninth Circuit held that an ALJ 28 appropriately translated “pace and the other mental limitations regarding attention, concentration, 1 and adaption” into “the only concrete restrictions available to him,” namely a limitation to simple 2 tasks. See *id.* 539 F.3d 1169, 1174 (9th Cir.

2008). Stubbs did not specifically address the extent to which a limitation to simple and routine tasks appropriately accounts for the limitations identified by Dr. Portnoff here, and opinions at issue in Stubbs were distinct from the opinion at issue here.

The court's discussion in Stubbs reveals only that the physicians opined on the claimant's mental functioning in the areas of pace, attention, concentration and adaptation. Here, by contrast, Dr. Portnoff identified comparatively more concrete restrictions, namely directed to the ability to handle the usual stressors encountered in the workplace and complete a normal workday or workweek without interruption from psychiatric conditions.

Stubbs is therefore inapposite, as other courts have held under similar circumstances. See, e.g., *Ferguson v. Comm'r of Soc. Sec.*, No. 1:18-CV-01585-EPG, 2019 WL 6341034, at *6 (E.D. Cal. Nov. 27, 2019) ("Moreover, even under the Stubbs-Danielson analysis, the ALJ's RFC fails to account for specific concrete work restrictions given by the doctors, including 'The claimant has a fair ability to accept instructions from supervisors and interact with co-workers and the public,' 'The claimant is not able to perform work activities on a consistent basis without special or additional instruction,' and 'The claimant is not able to deal with the usual stress encountered in a competitive work place.' These are concrete restrictions, not statements about mental function generally.") (emphasis added).

As for the unpublished district court case law on which Defendant also relies, this Court has observed that "the weight of more recent case law [] tends to refute the argument that a limitation to simple, routine tasks in the RFC adequately accounts for moderate limitations in the ability to complete a normal workday and the ability to handle stress." *Slover v. Kijakazi*, No. 23-1:21-cv-01089-ADA-BAM, 2023 WL 5488416, at *4 (E.D.

Cal. Aug. 24, 2023); *Harrell v. Kijakazi*, No. 1:20-cv-00614-GSA, 2021 WL 4429416, at *6–7 (E.D. Cal. Sept. 27, 2021) (collecting cases); *Ramirez v. Kijakazi*, No. 1:22-cv-00445, GSA, 2023 WL 4409853, at *5 (E.D. Cal. Jul. 7, 2023) (explaining that "case law in this circuit is split but tends to favor the view that a restriction to simple/routine tasks is not a catchall and does not account for all moderate limitations"); *Berenisia Madrigal v. Saul*, No. 1:18-cv-01129-SKO, 2020 WL 58289, at *5 (E.D.

Cal. Jan. 6, 2020) (finding that a restriction to simple, routine tasks does not account for mental limitations in the ability to complete a normal workday or workweek without interruptions from a psychiatric condition and the ability to deal with stress and changes encountered in the workplace); *Sahyoun v. Saul*, No. 2:18-cv-576-EFB, 2020 WL 1492661, at *4 (E.D.

Cal. Mar. 27, 2020) (rejecting argument that the RFC determination that plaintiff could sustain work involving simple, repetitive tasks adequately captured moderate limitations in maintaining

regular attendance, 7 completing a normal workday or work week without interruption from a psychiatric condition, and 8 handling normal work-related stress).

The Court finds, consistent with the foregoing, that the 9 ALJ's decision to limit Plaintiff to work consisting of "simple and routine tasks [and] routine 10 work-related decision making" did not adequately address or account for Dr. Portnoff's moderate 11 limitations as to Plaintiff's ability to complete a normal workday or workweek without 12 interruptions and her ability to deal with the usual stress encountered in the workplace.

13 On the present record, the Court cannot determine whether the ALJ's error in failing to 14 discuss the reasons they rejected these limitations was harmless. See *Molina*, 674 F.3d at 1115 15 ("[A]n ALJ's error is harmless where it is inconsequential to the ultimate nondisability 16 determination.") (citations and quotations omitted); see also *Thompson v. Astrue*, No. ED CV 12–17 265–E, 2012 WL 4513724, at *4 (C.D.

Cal. Oct. 2, 2012) (holding ALJ's error in failing to discuss 18 consultative psychiatrist's opinions regarding mild to moderate limitations completing complex 19 tasks, handling normal stresses at work, and completing a normal work week without interruption 20 not harmless where RFC was limited to moderately complex tasks up to four to five steps). While 21 moderate limitations are not per se disabling, they may translate into concrete work restrictions 22 that, when considered in connection with Plaintiff's other restrictions, may render her disabled.

23 See *Macquarrie v. Comm'r of Soc. Sec.*, No. 1:21-CV-00072-CDB, 2023 WL 8242069, at *7 (E.D. 24 Cal. Nov. 28, 2023) (citations omitted). The vocational expert did not testify that a person could 25 work with the moderate limitations Dr. Portnoff opined. (See AR 478–82 (vocational expert's 26 testimony).)

However, the vocational expert did testify that if a person with the ALJ's assessed 27 RFC would also be absent from work two days per month on an unscheduled basis, would need 28 two additional 15-minute breaks per day, or were off task 15% of the workday, that person would 1 not be able to perform any jobs in the labor market. (AR 480–81.)

Accordingly, remand is 2 warranted on this issue. See, e.g., *Devery v. Colvin*, Case No. CV 15–08503-RAO, 2016 WL 3 3452487, at *5 (C.D. Cal. June 22, 2016) (court could not determine harmlessness of ALJ's failure 4 to discuss reasons she rejected limitations because VE did not testify that a hypothetical person 5 with those limitations could work); *Dunlap v. Astrue*, No. CIV S–09–3446 EFB, 2011 WL 6 1135357, at *6 (E.D.

Cal. Mar. 25, 2011) (court could not determine harmlessness of error because 7 it was unable to "determine how the VE would have responded if he had been given a hypothetical 8 containing [examining physician]'s actual opinion."). 9 B. The Court Declines to Determine Plaintiff's Remaining Assertion of Error 10 Having found that remand is warranted, the Court declines to

address Plaintiff's remaining 11 argument that the ALJ failed to follow the Appeals Council's remand order (Doc.

20 at 10–11; 12 Doc. 23 at 5–7). See *Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) (“Because we remand 13 the case to the ALJ for the reasons stated, we decline to reach [plaintiff's] alternative ground for 14 remand.”); *Marcia v. Sullivan*, 900 F.2d 172, 177 n.6 (9th Cir. 1990) (“Because we remand for 15 reconsideration of step three, we do not reach the other arguments raised.”).

See also *Newton v. 16 Colvin*, No. 2:13–cv–2458–GEB–EFB, 2015 WL 1136477, at *6 n.4 (E.D. Cal. Mar. 12, 2015) 17 (“As the matter must be remanded for further consideration of the medical evidence, the court 18 declines to address plaintiff's remaining arguments.”); *Augustine ex rel. Ramirez v. Astrue*, 536 F. 19 Supp. 2d 1147, 1153 n.7 (C.D. Cal. 2008) (“[The] Court need not address the other claims plaintiff 20 raises, none of which would provide plaintiff with any further relief than granted, and all of which 21 can be addressed on remand.”).

22 C. Remand for Further Proceedings is Appropriate 23 When an ALJ commits error that is not harmless, “[t]he decision whether to remand for 24 further proceedings or simply to award benefits is within the discretion of [the] court.” *McAllister 25 v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989) (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 26 1987)).

Because further administrative review could remedy the ALJ's error, remand for further 27 administrative proceedings, rather than an award of benefits, is warranted here.⁶ See *Brown- 28 1 Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (remanding for an award of benefits is 2 appropriate in rare circumstances). See also *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir.

1981) 3 (“If additional proceedings can remedy defects in the original administrative proceeding, a social 4 security case should be remanded.”); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) 5 (“Remand for further administrative proceedings is appropriate if enhancement of the record 6 would be useful.”).

Before ordering remand for an award of benefits, three requirements must be 7 met: (1) the Court must conclude that the ALJ failed to provide legally sufficient reasons for 8 rejecting evidence; (2) the Court must conclude that the record has been fully developed and 9 further administrative proceedings would serve no useful purpose; and (3) the Court must conclude 10 that if the improperly discredited evidence were credited as true, the ALJ would be required to find 11 the claimant disabled on remand.

Brown-Hunter, 806 F.3d at 495 (citations omitted). Even if all 12 three requirements are met, the Court retains flexibility to remand for further proceedings “when 13 the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within 14 the meaning of the Social

Security Act.” Id. (citation omitted). 15 Here, remand for further administrative proceedings is appropriate.

See, e.g., Slover, 2023 16 WL 5488416, at *5. On remand, the ALJ shall reconsider the opinion of Dr. Portnoff regarding 17 Plaintiff’s moderate limitations, and either credit his opinion or provide specific and legitimate 18 reasons supported by substantial evidence for rejecting it.

The ALJ shall also consider the medical 19 evidence of Plaintiff’s alleged medical determinable impairments and, if necessary, reassess 20 Plaintiff’s RFC, considering the entirety of Dr. Portnoff’s opinion, as well as the other medical 21 evidence (including Plaintiff’s obesity).

The ALJ shall then proceed through steps four and five to 22 determine what work, if any, Plaintiff can perform prior to May 17, 2022, the date on which the 23 ALJ has already found Plaintiff became disabled. (See AR 438.) 24 V. CONCLUSION AND ORDER 25 Based on the foregoing, the Court finds that the ALJ’s decision is not supported by 26 substantial evidence and is, therefore, VACATED and the case REMANDED to the ALJ for 27 further proceedings consistent with this Order.

The Clerk of Court is DIRECTED to enter 28 1 judgment in favor of Plaintiff Teresa Diane Baker and against Defendant Leland Dudek, Acting 2 Commissioner of Social Security. 3 IT IS SO ORDERED. 4 5 Dated: March 24, 2025 /s/ Sheila K. Oberto. UNITED STATES MAGISTRATE JUDGE 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28