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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|---------------------------------|---|------------------------------|
| RONDA A. HUBLEIN, |) | |
| |) | No. CV-07-3108-CI |
| Plaintiff, |) | |
| |) | ORDER GRANTING PLAINTIFF'S |
| v. |) | MOTION FOR SUMMARY JUDGMENT |
| |) | AND REMANDING FOR ADDITIONAL |
| MICHAEL J. ASTRUE, Commissioner |) | PROCEEDINGS |
| of Social Security, |) | |
| |) | |
| Defendant. |) | |
| |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15). Attorney D. James Tree represents Ronda Hublein (Plaintiff); Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the case to the Commissioner for additional proceedings pursuant to 42 U.S.C. §405(g).

JURISDICTION

On September 12, 2003, Plaintiff protectively filed her application for Social Security Income (SSI) benefits. (Tr. 266.) She alleged disability due to peripheral neuropathy, diabetes, high blood pressure, asthma, and depression, with an alleged onset date

1 of December 20, 1998. (Tr. 68-69.) Benefits were denied initially
2 and on reconsideration. (Tr. 39.) Plaintiff requested a hearing
3 before an administrative law judge (ALJ), which was held on July 25,
4 2007, before ALJ Paul Gaughen. (Tr. 263-89.) Plaintiff, who was
5 represented by counsel, medical expert George Rodkey, M.D., and
6 vocational expert William Weiss testified. (Tr. 264.) The ALJ
7 denied benefits. The Appeals Council denied review. (Tr. 4-6.)
8 The instant matter is before this court pursuant to 42 U.S.C. §
9 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. At the time of the
13 hearing, Plaintiff was 47 years old with an eleventh-grade
14 education. (Tr. 505, 509, 528.) She was separated and had two
15 daughters; she and her 13 year old daughter were living with her
16 adult daughter. (Tr. 161.) She had past work experience as a
17 kitchen helper and teacher's aide. (Tr. 69.) In disability
18 reports, she stated she could not work because she could not lift or
19 stand, had trouble with concentration and memory and pain and
20 numbness in her extremities due to diabetes. (Tr. 68-69.) At the
21 hearing, she testified she had lost 80 pounds over the last five to
22 six months. (Tr. 280.) She testified she had a hard time standing
23 or doing anything with her hands for long periods of time, and had
24 no feeling in her fingertips. She could sit for 30 minutes before
25 she needed to move around, she walked to the store about ten minutes
26 from her house and could carry a gallon of milk. She stated she had
27 no trouble reading if there were other distractions. (Tr. 275-76,
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1 280.)

2 **ADMINISTRATIVE DECISION**

3 At step one of the sequential evaluation, ALJ Gaughen found
4 Plaintiff had not engaged in substantial gainful activity since June
5 5, 2005. (Tr. 21.) After a detailed discussion of the medical
6 record, he found at step two that Plaintiff had the severe
7 impairment of diabetes mellitus and non-severe impairments of "mild
8 hearing loss, reflux esophagitis, hypertension, depression and eye
9 problems." (Tr. 24.) At step three, he determined these
10 impairments alone or in combination did not meet or medically equal
11 one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P,
12 Regulations No. 4 (Listings). (*Id.*) The ALJ found Plaintiff's
13 allegations regarding the intensity of her pain and other
14 limitations were not totally credible. (Tr. 26-27.) At step four,
15 he determined Plaintiff had a residual functional capacity (RFC) to
16 perform light work "except she can only be on her feet for 2 hours
17 out of an 8 hour day and sit for six hours out of an 8 hour day.
18 She should avoid dangerous work conditions or temperature extremes.
19 She can occasionally make postural adjustment." (Tr. 25.) The ALJ
20 concluded Plaintiff was unable to perform past relevant work. (Tr.
21 28.) Proceeding to step five, the ALJ considered vocational expert
22 testimony and found Plaintiff could perform other jobs that exist in
23 significant numbers in the national economy and, therefore, was not
24 under a "disability" as defined by the Social Security Act. (Tr.
25 29.)

26 **STANDARD OF REVIEW**

27 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
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1 court set out the standard of review:

2 A district court's order upholding the Commissioner's
3 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
4 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
5 Commissioner may be reversed only if it is not supported
6 by substantial evidence or if it is based on legal error.
7 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
8 Substantial evidence is defined as being more than a mere
9 scintilla, but less than a preponderance. *Id.* at 1098.
10 Put another way, substantial evidence is such relevant
11 evidence as a reasonable mind might accept as adequate to
12 support a conclusion. *Richardson v. Perales*, 402 U.S.
13 389, 401 (1971). If the evidence is susceptible to more
14 than one rational interpretation, the court may not
15 substitute its judgment for that of the Commissioner.
16 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
17 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

18 The ALJ is responsible for determining credibility,
19 resolving conflicts in medical testimony, and resolving
20 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
21 Cir. 1995). The ALJ's determinations of law are reviewed
22 *de novo*, although deference is owed to a reasonable
23 construction of the applicable statutes. *McNatt v. Apfel*,
24 201 F.3d 1084, 1087 (9th Cir. 2000).

25 **SEQUENTIAL PROCESS**

26 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
27 requirements necessary to establish disability:

28 Under the Social Security Act, individuals who are
"under a disability" are eligible to receive benefits. 42
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."
42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

1 In evaluating whether a claimant suffers from a
2 disability, an ALJ must apply a five-step sequential
3 inquiry addressing both components of the definition,
4 until a question is answered affirmatively or negatively
5 in such a way that an ultimate determination can be made.
6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
7 claimant bears the burden of proving that [s]he is
8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
9 1999). This requires the presentation of "complete and
10 detailed objective medical reports of h[is] condition from
11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
12 404.1512(a)-(b), 404.1513(d)).

13 It is the role of the trier of fact, not this court, to resolve
14 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
15 supports more than one rational interpretation, the court may not
16 substitute its judgment for that of the Commissioner. *Tackett*, 180
17 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
18 Nevertheless, a decision supported by substantial evidence will
19 still be set aside if the proper legal standards were not applied in
20 weighing the evidence and making the decision. *Browner v. Secretary*
21 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
22 there is substantial evidence to support the administrative
23 findings, or if there is conflicting evidence that will support a
24 finding of either disability or non-disability, the finding of the
25 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
26 1230 (9th Cir. 1987).

27 **ISSUES**

28 The question is whether the ALJ's decision is supported by
substantial evidence and free of legal error. Plaintiff argues the
ALJ erred when he: (1) improperly rejected treating physicians'
opinions; (2) failed to consider the combined effects of her
impairments; (3) failed to consider evidence from non-medical

1 sources; and (4) did not meet the Commissioner's burden at step
2 five. (Ct. Rec. 14 at 11.)

3 **DISCUSSION**

4 **A. Consideration of Obesity**

5 The ALJ must consider the combined effect of a claimant's
6 impairments, severe and non-severe, on the ability to function,
7 without regard to whether each alone is sufficiently severe. See 42
8 U.S.C. § 423(d)(2)(B)(Supp. III 1991). Plaintiff argues the ALJ
9 failed to consider properly the effects of obesity at steps two and
10 four.¹ (Ct. Rec. 14 at 16-17.) Under prior Regulations, a woman of
11 Plaintiff's height (65 inches) was considered obese for purposes of
12 disability if she weighed 266 pounds or more. 20 C.F.R. Pt. 404
13 Subpt. P, App.1, Section 9.00 Table II (April 1999). The Social
14 Security Administration removed obesity from the Listings in August
15 1999. However, *Social Security Ruling (SSR) 00-3p* and *SSR 02-1p*
16 still permit an ALJ to equate obesity--alone or with other
17 impairments--with a listed impairment, e.g., a musculoskeletal
18 impairment, when a claimant is unable to ambulate effectively. *SSR*
19 *02-1p; SSR 00-3p; see 20 C.F.R. § 404, Subpt. P, App. 1, 1.00B(2)(b)*
20 *(defining function level for musculoskeletal impairments).*

21 Weight gain alone does not evidence impaired functionality;
22 that is why *SSR 00-3p* and *SSR 02-1p* direct an ALJ to evaluate the

23 _____
24 ¹ The ALJ specifically found Plaintiff's non-severe
25 impairments, including situational depression, were controlled by
26 medication or were not being treated, and were not causing
27 significant or continuing problems. (Tr. 24.) Plaintiff does not
28 challenge this finding.

1 effect of a claimant's obesity with reference to a listed impairment
2 and not to make assumptions about the severity or functional effects
3 of obesity. SSR 02-1p at 1 & 6; SSR 00-3p at 6. The listing for
4 musculoskeletal impairment specifically notes the potential impact
5 of obesity on that condition. 20 C.F.R. § 404 App. 1 at 1.00(Q).

6 On June 17, 2005, treating physician John Anderson, M.D., at
7 the Cle Elum Family Medicine Clinic (CEFMC), indicated Plaintiff was
8 65 inches and weighed 214 pounds which he considered "significantly
9 overweight." As noted by the ALJ, Dr. Anderson observed Plaintiff
10 "moves about fairly easily," appeared to be doing fairly well and
11 commented her "sense of disability is out of proportion to any
12 objective findings." (Tr. 21, 180.)

13 Although it was reported by her physicians that she was
14 overweight and needed to lose weight to mitigate symptoms of her
15 diabetes mellitus, there is no evidence from treatment or examining
16 physicians that obesity is a cause of exertional limitations. For
17 example, in July 2005, examining physician Marie Ho, M.D., observed
18 Plaintiff was able take off her shoes, get on and off the examining
19 table without difficulty, tandem walk, hop, squat for a short time,
20 bend, reach, grip and release. She had a slight decrease in hand
21 grip in her right hand, but normal muscle bulk and tone in lower and
22 upper extremities. (Tr. 22, 156-57.) Dr. Ho opined Plaintiff could
23 sit six hours a day, stand six hours with normal breaks "due to
24 peripheral neuropathy of the lower legs." She also opined Plaintiff
25 was limited to occasional kneeling and crouching. Obesity was not
26 indicated as a diagnosis or cause of functional limitations.

27 Treatment notes from Dr. Owens indicate Plaintiff fell down the
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1 stairs in July 2006. She reported the fall was caused by her
2 diabetic neuropathy. (Tr. 241.) Dr. Owens noted Plaintiff refused
3 to monitor her blood sugar; peripheral neuropathy and frequent falls
4 were considered related to the poorly controlled diabetes. Dr.
5 Owens prescribed a walker to prevent future falls. (*Id.*) In August
6 2006, Plaintiff reported losing 19 pounds, was more compliant with
7 medication and diet and indicated she was "doing a lot of heavy
8 work" which caused an arthritis flare up. (Tr. 242.) Plaintiff
9 stated she had not received the prescribed walker, indicating she
10 was able to move and do "heavy work" without the device. (Tr. 23,
11 242.) Plaintiff did not report any falls while she was without the
12 walker. (Tr. 242.) At that time, Dr. Owens noted "obesity with
13 good weight loss," and poorly controlled diabetes. (Tr. 242.)
14 There are no treatment notes from Dr. Owens after this date. In
15 July 2007, Dr. Owens completed a form report listing Plaintiff's
16 diagnoses as "severe peripheral neuropathy, type 2 diabetes,
17 osteoarthritis." She indicated Plaintiff would miss four to five
18 days a month due to medical impairments, but did not explain the
19 basis for this opinion. (Tr. 261.)

20 Contrary to Plaintiff's argument, the evidence does not support
21 a finding that Plaintiff's weight caused functional impairments.
22 Her weight did not equal the prior Listing requirements, and she
23 lost considerable weight during the relevant period. Further, the
24 ALJ properly considered those limitations caused by Plaintiff's
25 diabetes-related peripheral neuropathy, combined with other
26 impairments when he determined she was capable of a limited level of
27 light work. Specifically, he restricted her ability to stand in an
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1 eight-hour day to two hours, rather than six, as opined by Dr. Ho,
2 (Tr. 158), and included the need for postural adjustments to
3 accommodate problems with crouching and kneeling. (Tr. 284.) Dr.
4 Ho, Dr. Anderson, and Dr. Owens specifically attributed Plaintiff's
5 exertional and non-exertional limitations to her poorly controlled
6 diabetes and resultant peripheral neuropathy.² The ALJ did not err
7 in his consideration of severe and non-severe impairments.

8 **B. Treating Physician Medical Opinions**

9 Plaintiff claims the ALJ improperly rejected the opinions of
10 her treating physicians, Dr. Anderson and Dr. Owens. (Ct. Rec. 14
11 at 13.) In a disability proceeding, it is the role of the ALJ to
12 resolve conflicts in medical evidence. A treating physician's
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14 ² Plaintiff asserts the medical expert testimony supports her
15 argument that obesity should have been considered with other
16 impairments. Medical expert Dr. Rodkey appeared at the hearing
17 telephonically; he was not present when Plaintiff testified she had
18 lost 80 pounds in five to six months. (Tr. 265, 280.) He summarized
19 the record, interpreted the medical records and opined Plaintiff was
20 capable of light work with standing and walking reduced to two hours
21 in an eight-hour day. (Tr. 273.) At the end of his testimony, Dr.
22 Rodkey commented that obesity was one of Plaintiff's biggest
23 problems. (*Id.*) In the context of uncontrolled diabetes, and
24 resultant neuropathy, Dr. Rodkey's conclusion is accurate, but this
25 comment alone, without explanation, does not establish obesity as an
26 impairment for disability purposes, and it is insufficient to
27 support a finding that Plaintiff's weight caused the identified
28 functional limitations.

1 opinion is given special weight because of his familiarity with the
2 claimant and her physical condition. See *Fair v. Bowen*, 885 F.2d
3 597, 604-05 (9th Cir. 1989). If the treating physician's opinion is
4 not contradicted, it can be rejected only with "clear and
5 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
6 1995). If contradicted, the ALJ may reject the opinion if he states
7 specific, legitimate reasons that are supported by substantial
8 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
9 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. Furthermore, a
10 treating physician's opinion "on the ultimate issue of disability"
11 must itself be credited if uncontroverted and supported by medically
12 accepted diagnostic techniques unless it is rejected with "clear and
13 convincing" reasons. *Holohan v. Massanari*, 246 F.3d 1195, 1202-03
14 (9th Cir. 2001).

15 To meet this burden, the ALJ can set out a detailed and
16 thorough summary of the facts and conflicting clinical evidence,
17 state his interpretation of the evidence, and make findings. *Thomas*
18 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Magallanes v. Bowen*,
19 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is not required to accept
20 the opinion of a treating or examining physician if that opinion is
21 brief, conclusory and inadequately supported by clinical findings.
22 *Id.* Further, a plaintiff's credibility is an appropriate factor to
23 consider when evaluating medical evidence. See *Webb v. Barnhart*,
24 433 F.3d 683, 688 (9th Cir. 2005). Where a claimant alleges a
25 disabling pain, an ALJ "may not discredit a claimant's testimony of
26 pain and deny disability benefits solely because the degree of pain
27 alleged by the claimant is not supported by objective medical
28 evidence." *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir.

1 1991); *Cotton v. Bowen*, 799 F.2d 1403 (9th Cir. 1986); 20 C.F.R. §§
2 404.1529(c)(2), 416.929(c)(2). Nonetheless, where the claimant
3 introduces medical evidence showing that she has an ailment
4 reasonably expected to produce pain, an ALJ is not required to
5 believe the allegations of severity; many medical conditions produce
6 pain not severe enough to preclude gainful employment. *Fair*, 885
7 F.2d at 603.

8 Here, Plaintiff submitted treatment records and reports from
9 CEFMC, dated September 2003 to June 2006. (Tr. 174-86, 238-49.) In
10 addition to treatment notes, Dr. Anderson and Dr. Owens completed
11 form reports, opining Plaintiff was unable to work. (Tr. 228-29;
12 260-64.) In June 2005, Dr. Anderson stated he did not think
13 Plaintiff was permanently disabled; in December 2005, he stated she
14 could not tolerate prolonged standing or walking or do fine
15 manipulation. He concluded she was "disabled for any types of work
16 for which she is trained." (Tr. 174-75.) As discussed above, in
17 July 2007, Dr. Owens (who became Plaintiff's treating physician
18 after Dr. Anderson), stated Plaintiff was at risk for falling and
19 would miss an average of four or more days a month due to her
20 neuropathy condition. (Tr. 260-61.) Plaintiff argues these
21 opinions should have been given controlling weight, resulting in a
22 finding of disability.

23 The ALJ thoroughly summarized the medical records from CEFMC,
24 including Dr. Anderson's letter and Dr. Owens' form. (Tr. 21-24.)
25 In assigning little weight to the form opinions relied upon by
26 Plaintiff, the ALJ reasoned Dr. Owens' conclusions were based on
27 Plaintiff's unreliable self-report, were not supported by reference
28 to clinical notes or objective testing, and were not consistent with

1 treatment notes. He found Dr. Anderson's brief opinions were not
2 supported by his own treatment records, which revealed concerns by
3 Dr. Anderson that Plaintiff had a "disability mindset" and her
4 complaints were not consistent with objective findings. (*Id.*; Tr.
5 174.) The ALJ specifically referenced Dr. Anderson's December 2005
6 opinion letter which was refuted by an opinion letter written in
7 June 2005, stating Plaintiff would be employable in six months (Tr.
8 27, 174-75.) Finally, he reasoned both treating physician opinions
9 were inconsistent with Dr. Ho's comprehensive evaluation and Dr.
10 Rodkey's testimony. (Tr. 27.) These are specific and legitimate
11 reasons which are supported by the record. *Morgan*, 169 F.3d at 600-
12 02. Further, the ALJ is not required to accept the opinion of a
13 treating or examining physician if that opinion is brief, conclusory
14 and inadequately supported by clinical findings. *Thomas*, 278 F.3d
15 at 957 (*citing Magallanes*, 881 F.2d at 751). The ALJ did not err in
16 rejecting the conclusory opinions of Dr. Anderson and Dr. Owens that
17 Plaintiff was unable to perform any type of work.

18 **C. Lay Testimony**

19 Plaintiff argues the ALJ erred because he did not consider
20 evidence from Plaintiff's social worker and vocational consultant.
21 (Ct. Rec. 14 at 18.) Lay witness testimony as to a claimant's
22 symptoms or how an impairment affects her ability to work is
23 competent evidence and must be considered by the ALJ. If lay
24 testimony is rejected, the ALJ must give reasons that are germane to
25 each witness. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
26 However, evidence from non-medical sources can never establish
27 disability absent corroborating competent medical evidence. *Id.*
28 Social worker Tish Jongeward from the Department of Social and

1 Health Services submitted a letter stating Plaintiff's mobility has
2 decreased and "she appears in pain." Her observations are
3 consistent with evidence in the record, e.g., she is on multiple
4 medications, she has decreased mobility, she has situational
5 depression, her peripheral neuropathy is due to diabetes. (Tr.
6 118.) Her opinion that Plaintiff is "disabled" because of these
7 symptoms, however, does not establish disability under the Social
8 Security Act. Vocational consultant William Wright submitted a
9 general statement, dated October 23, 1998, regarding general sick-
10 leave policies for "typical employers." (Tr. 14.) Mr. Wright did
11 not express opinions based on Plaintiff's record or his observations
12 of Plaintiff's symptoms. The ALJ was not obliged by the Regulations
13 to consider Mr. Wright's non-probative statement.

14 **D. Step Five: Vocational Expert Testimony**

15 At step five, the burden shifts to the Commissioner to show
16 there is a significant number of jobs in the national economy that
17 the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
18 Cir. 1984). The ALJ may use the testimony of a vocational expert to
19 identify appropriate jobs. SSR 00-4p. The hypothetical posed to
20 the vocational expert must accurately reflect a claimant's
21 limitations determined credible and supported by the record.
22 *Osenbrock v. Apfel*, 240 F.3d 1157, 1162-63 (9th Cir. 2001); *Embrey*
23 *v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988); *DeLorme v. Sullivan*, 924
24 F.2d 841, 850 (9th Cir. 1991).

25 Here, the hypothetical and the final RFC determination do not
26 fully reflect non-exertional limitations supported by the record,
27 specifically the effects of diabetes-related peripheral neuropathy
28 on Plaintiff's extremities. (*Id.*) Plaintiff testified, and the ALJ

1 found, that her medical condition caused pain and numbness in her
2 feet, hands and finger tips. Plaintiff testified when she was
3 working with her hands, she would have to stop due to the symptoms.
4 (Tr. 27, 276.) Although the ALJ specified Plaintiff could sit for
5 six hours in an eight-hour day if given an alternating sit-stand
6 option, he included only the following non-exertional restrictions:
7 "Shouldn't work on dangerous work conditions, or where there is
8 temperature extremes either going hot or cold. She can occasionally
9 make postural adjustments." (Tr. 285.) Plaintiff's complaints of
10 pain and numbness in her hands caused by neuropathy are supported by
11 medical evidence. (Tr. 222, 238.) In discounting her testimony,
12 the ALJ found her ability to work part-time at Meals on Wheels in
13 2004 (Tr. 282), was inconsistent with her claimed limitations from
14 numbness in her fingertips. (Tr. 27.) This reason is not
15 sufficient to totally reject symptoms from established neuropathy.
16 Further, the degree of pain and numbness in her fingers and other
17 extremities, and the symptoms' effect on Plaintiff's ability for
18 sustained work, were not addressed in the hypothetical, or the RFC.
19 (Tr. 25, 284-85.) Because total rejection of these limitations is
20 not supported reasonably by the medical diagnosis and treatment in
21 the record, and because the ALJ made no findings relative to pain
22 and numbness supported by the record, the hypothetical to the VE was
23 incomplete. Where the hypothetical posed to a VE is not complete,
24 the VE's testimony is not substantial evidence. *Osenbrock*, 240 F.3d
25 at 1162-63.

26 In response to the ALJ's hypothetical, the VE found there were
27 light level and sedentary level jobs in Washington State that
28 Plaintiff could perform: bench assembler (light), semi-conductor

1 bonder (sedentary), and call-out operator (sedentary). (Tr. 285-
2 86.) The VE also testified that with a limitation in finger
3 manipulation (as propounded by Plaintiff's representative), the only
4 job the hypothetical individual could perform was the sedentary job
5 of call-out operator, *Dictionary of Occupational Titles (DICOT)*
6 number 237.367-014. (Tr. 285.) Plaintiff's counsel did not
7 propound numbness or pain in the hands and fingers. Further, on
8 independent review it is noted the *DICOT* definition describes the
9 call-out operator job as:

10 Compiles credit information, such as status of credit
11 accounts, personal references, and bank accounts to fulfil
12 subscribers' requests, using telephone. Copies information
13 onto form to update information for credit record on file
or for computer input. Telephones subscriber to relay
requested information or submits data obtained for
typewritten report to subscriber.

14 United States Department of Labor, *DICOT*, (4th Ed., Rev. 1991). The
15 job requires "significant" compiling, a medium degree of motor
16 coordination, a medium degree of finger dexterity, and occasional
17 fingering (up to 1/3 of the time). It is also noted that the *DICOT*
18 information is dated 1991, and the VE did not provide information
19 regarding how the one job identified (call-out operator) was
20 actually performed, and how much computer work involving repetitive
21 hand work is currently involved. As to the opinions expressed by
22 the ALJ's expert, it is the Government's responsibility to ensure
23 the credibility, completeness, and quality of the resulting report.
24 *Gallant v. Heckler*, 753 F.2d 1450, 1454 (9th Cir. 1984). Because the
25 hypothetical question did not include limitations in Plaintiff's
26 fingers caused by neuropathy, and the VE testimony is not conclusive
27 that Plaintiff could perform the only job identified at the hearing,
28 the Commissioner did not meet his burden at step five. Remand is

1 necessary for additional proceedings, including a new RFC
2 determination and vocational expert testimony. On remand, Plaintiff
3 may present additional evidence. Accordingly,

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
6 **GRANTED**. The matter is remanded to the Commissioner for additional
7 proceedings in accordance with the decision above and sentence four
8 of 42 U.S.C. § 405(g);

9 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
10 **DENIED**;

11 3. Application for attorney's fees may be filed by separate
12 motion.

13 The District Court Executive is directed to file this Order and
14 provide a copy to counsel for Plaintiff and Defendant. Judgment
15 shall be entered for Plaintiff, and the file shall be **CLOSED**.

16 DATED December 30, 2008.

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18 S/ CYNTHIA IMBROGNO
19 UNITED STATES MAGISTRATE JUDGE
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