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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

THETA TAYLOR,	)	Case No. CV 10-03328-JEM
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	AFFIRMING DECISION OF THE
	)	COMMISSIONER OF SOCIAL SECURITY
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

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**PROCEEDINGS**

On May 5, 2010, Theta Taylor (“Plaintiff” or “Claimant” or “Taylor”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability and disability insurance benefits. The Commissioner filed an Answer on December 2, 2010. On March 7, 2011, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before the Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be affirmed and the case dismissed with prejudice.

1 **BACKGROUND**

2 Plaintiff is a 50 year old female who was found to have the medically determinable  
3 severe combination of impairments of morbid obesity with satisfactorily controlled diabetes  
4 mellitus II, treated hypertension, treated hyperthyroidism, bilateral calcaneal spurs,  
5 degenerative and joint disc disease of the lumbar spine with low back pain, ischemic heart  
6 disease, depressive disorder, and personality disorder. (AR 50.) Plaintiff alleged disability  
7 beginning March 6, 2005. (AR 48.)

8 Plaintiff's claim was denied initially on August 15, 2005, and on reconsideration on  
9 February 3, 2006. (AR 48.) Plaintiff filed a written request for hearing, which was held  
10 before Administrative Law Judge ("ALJ") Mason D. Harrell, Jr. on May 4, 2006, July 17,  
11 2007, and August 29, 2007, in San Bernardino, California. (AR 48.) Claimant was  
12 represented by Attorney Tina Laine. (AR 48.) Medical experts David M. Glassmire and  
13 Samuel Landau as well as Sandra M. Fioretti, a vocational expert ("VE"), also testified. (AR  
14 48.)

15 The ALJ issued an unfavorable decision on September 13, 2007. (AR 58.) The  
16 Appeals Council denied review on January 27, 2010. (AR 3, 3A, 4.)

17 **DISPUTED ISSUES**

18 As reflected in the Joint Stipulation, Plaintiff raises but one disputed issue as a ground  
19 for reversal:

- 20 1. Whether the ALJ's step five determination is supported by substantial evidence.

21 **STANDARD OF REVIEW**

22 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
23 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
24 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846  
25 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
26 based on the proper legal standards).

27 Substantial evidence means "more than a mere scintilla' . . . but less than a  
28 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson

1 v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a  
2 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S.  
3 at 401 (internal quotations and citation omitted).

4 This Court must review the record as a whole and consider adverse as well as  
5 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
6 Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision  
7 must be upheld. Morgan v. Comm’r, 169 F.3d 595, 599 (9th Cir. 1999). “However, a  
8 reviewing court must consider the entire record as a whole and may not affirm simply by  
9 isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting  
10 Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d  
11 625, 630 (9th Cir. 2007).

## 12 SEQUENTIAL EVALUATION

13 The Social Security Act defines disability as the “inability to engage in any substantial  
14 gainful activity by reason of any medically determinable physical or mental impairment which  
15 can be expected to result in death or . . . can be expected to last for a continuous period of  
16 not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner  
17 has established a five-step sequential process to determine whether a claimant is disabled.  
18 20 C.F.R. §§ 404.1520, 416.920.

19 The first step is to determine whether the claimant is presently engaging in substantial  
20 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is  
21 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,  
22 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a  
23 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is  
24 not severe if it does not significantly limit the claimant’s ability to work. Smolen v. Chater, 80  
25 F.3d 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is  
26 listed, or equivalent to an impairment listed, in Appendix I of the regulations. Id. If the  
27 impediment meets or equals one of the listed impairments, the claimant is presumptively  
28 disabled. Bowen v. Yuckert, 482 U.S. at 141. Fourth, the ALJ must determine whether the

1 impairment prevents the claimant from doing past relevant work. Pinto v. Massanari, 249  
2 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four determination, the ALJ first  
3 must determine the claimant’s residual functional capacity (“RFC”).<sup>1</sup> 20 C.F.R. § 416.920(e).  
4 The RFC must consider all of the claimant’s impairments, including those that are not  
5 severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling (“SSR”) 96-8p. If the  
6 claimant cannot perform his or her past relevant work or has no past relevant work, the ALJ  
7 proceeds to the fifth step and must determine whether the impairment prevents the claimant  
8 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th  
9 Cir. 2000).

10 The claimant bears the burden of proving steps one through four, consistent with the  
11 general rule that at all times the burden is on the claimant to establish his or her entitlement  
12 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the  
13 claimant, the burden shifts to the Commissioner to show that the claimant may perform other  
14 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a  
15 finding that a claimant is not disabled at step five, the Commissioner must provide evidence  
16 demonstrating that other work exists in significant numbers in the national economy that the  
17 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.  
18 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled  
19 and entitled to benefits. Id.

## 20 THE ALJ DECISION

21 In this case, the ALJ determined at step one of the sequential evaluation process that  
22 Plaintiff has not engaged in substantial gainful activity since March 6, 2006, the alleged onset  
23 date. (AR 50.)

24 At step two, the ALJ determined that Plaintiff has the following severe combination of  
25 medically determinable impairments: morbid obesity with satisfactorily controlled diabetes

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27 <sup>1</sup> Residual functional capacity (“RFC”) is what one “can still do despite [his or her]  
28 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R.  
§§ 404.1545(a)(1), 416.945(a)(1).

1 mellitus II, treated hypertension, treated hyperthyroidism, bilateral calcaneal spurs,  
2 degenerative and joint disc disease of the lumbar spine with low back pain, ischemic heart  
3 disease treated since March 2005, depressive disorder, and personality disorder. (AR 50.)

4 At step three, the ALJ found that Plaintiff does not have an impairment or combination  
5 of impairments that meets or medically equals one of the listed impairments. (AR 50.)

6 The ALJ found that Taylor had the residual functional capacity to perform light work  
7 except:

8 stand or walk occasionally, two out of eight hours, sit frequently, six out of  
9 eight hours, with customary breaks, stoop, crouch, or climb stairs  
10 occasionally, no exposure to hazards such as ladder climbing,  
11 unprotected heights, dangerous machinery, or balancing, need to work in  
12 an air-conditioned work environment, perform little more than simple  
13 repetitive tasks in an object oriented work setting involving no  
14 hypervigilance, no interaction [with] the public, only occasional non-  
15 intensive interaction with co-workers or supervisors, and no fast paced  
16 work such [as] rapid production lines. She would miss work once a month  
17 due to her impairments.

18 (AR 51.) In determining Plaintiff's RFC, the ALJ made an adverse credibility finding. (AR  
19 55.)

20 At step four, the ALJ found that the Claimant was unable to perform her past relevant  
21 work as a telephone operator. (AR 56.)

22 At step five, with the aid of VE testimony, the ALJ determined that there are jobs that  
23 exist in significant numbers in the national economy that Claimant can perform. (AR 57.)

24 These jobs include office helper, bench assembler and hand packager-inspector. (AR 57.)

25 Hence, the ALJ concluded that Plaintiff was not disabled within the meaning of the  
26 Social Security Act. (AR 57.)

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## DISCUSSION

1  
2 Claimant contends that the ALJ's step five determination that Plaintiff can perform  
3 jobs in the national economy is erroneous and not supported by substantial evidence.  
4 Specifically, Taylor alleges that the VE's testimony that Plaintiff could perform the jobs of  
5 office helper, bench assembler and hand packager/inspector was inconsistent with the  
6 Dictionary of Occupational Titles ("DICOT"). Taylor further alleges that the ALJ erred by not  
7 obtaining from the VE a reasonable explanation for the inconsistency.

8 The Court disagrees. The VE did provide a reasonable explanation for the  
9 inconsistency between her testimony and DICOT. The ALJ was entitled to rely on the VE's  
10 testimony. The ALJ decision is supported by substantial evidence and free of legal error and  
11 must be affirmed.

### A. Applicable Federal Law

12  
13 DICOT raises a presumption as to job classification requirements. Johnson v.  
14 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ may accept VE testimony that varies  
15 from the DICOT but the record must contain "persuasive evidence to support the deviation."  
16 Id. The ALJ has an affirmative responsibility to ask whether a conflict exists between a VE's  
17 testimony and the DICOT. SSR 00-4p, 2000 WL 189704 \*4 (S.S.A.); Massachi v. Astrue,  
18 486 F.3d 1149, 1153 (9th Cir. 2007). If there is a conflict, the ALJ must obtain a reasonable  
19 explanation for the conflict and then must decide whether to rely on the VE or DICOT. Id.  
20 Failure to do so, however, can be harmless error where there is no actual conflict or the VE  
21 provides sufficient support to justify a variation from DICOT. Id. at 1154 n.19.

### B. The ALJ Properly Relied On The VE's Testimony

22  
23 In this case, the ALJ could not rely on the Medical-Vocational Guidelines ("grids") in  
24 making his step five determination because of nonexertional limitations. Moore, 216 F.3d at  
25 869. The ALJ was required to take the testimony of a VE and did. Id.

26 An ALJ may rely on a VE's response to a hypothetical question containing all of a  
27 claimant's RFC limitations found credible by the ALJ and supported by substantial evidence.  
28 Bayliss v. Barnhart, 427 F.3d 1211, 1217-18 (9th Cir. 2005). Here, the ALJ presented the

1 VE with all of the Plaintiff's RFC limitations. (AR 614-15.) The VE found that Claimant could  
2 perform the jobs of office helper, bench assembler and inspector/hand packager. (AR 615-  
3 16.)

4 The ALJ asked the VE if her testimony was consistent with DICOT. (AR 616.) The  
5 VE answered yes. (AR 616.) The ALJ in his decision, however, determined that there was  
6 an inconsistency between the VE's testimony and DICOT but also that there was a  
7 reasonable explanation for the inconsistency:

8 Although the vocational expert's testimony is inconsistent with the  
9 information contained in the Dictionary of Occupational Titles, there is a  
10 reasonable explanation for the discrepancy. As generally performed such  
11 work often requires more than occasional standing and walking, but the  
12 vocational expert based on her experience as a vocational rehabilitation  
13 specialist credibly testified that half of the identified jobs could be  
14 performed with only occasional standing and walking and that the  
15 Claimant's nonexertional limitations, physical and mental, would not  
16 otherwise limit her ability to perform such unskilled work.

17 (AR 57.)

18 Plaintiff's RFC limits her to standing and walking for no more than 2 hours of an 8  
19 hour workday. (AR 51.) The full range of light work requires one to stand and walk  
20 frequently, i.e., for 6 hours of an 8 hour workday. SSR 83-10. Thus, the ALJ found that  
21 there was an inconsistency between the VE's testimony and DICOT. (AR 57.)

22 Plaintiff contends that the ALJ did not obtain a reasonable explanation for the  
23 inconsistency, or even seek one. Plaintiff is incorrect. The ALJ incorporated the occasional  
24 (sedentary) 2 hour standing limitation in his hypothetical (AR 614) and then asked the VE if  
25 there were "any unskilled jobs that could be done with those limitations in the light or  
26 sedentary range or I should say limited light or sedentary range?" (AR 615.) The VE then  
27 listed the jobs of office helper, bench assembler and inspector/hand packager, but in doing  
28 so she eroded the job base for each occupation by 50 percent, based on her past expertise.

1 (AR 615-16.) A VE's recognized expertise provides the necessary foundation for his or her  
2 testimony. Bayliss, 427 F.3d at 1218. No additional foundation is required. Id.

3 Because the ALJ incorporated the 2 hour standing limitation in his RFC and the VE  
4 took that into account by eroding the job base of each of the proffered occupations by 50  
5 percent, the VE in effect did provide a basis for the departure from DICOT. There is no  
6 requirement for the ALJ to use any "magic words." See, e.g., Magallanes v. Bowen, 881  
7 F.2d 747, 755 (9th Cir. 1989). Also, the ALJ is entitled to draw inferences from the evidence  
8 and did so properly here. Macri v. Chater, 93 F.3d 540, 544 (9th Cir. 1996).

9 The ALJ's decision comports with SSR 00-4p, 2000 WL 1898704 \*2-\*3 (S.S.A.), which  
10 provides as follows:

11 Neither the DOT [DICOT] nor the VE or VS evidence automatically  
12 "trumps" when there is a conflict. The adjudicator must resolve the  
13 conflict by determining if the explanation given by the VE or VS is  
14 reasonable and provides a basis for relying on the VE or VS testimony  
15 rather than the DOT information.

16 . . . .

17 A VE, VS, or other reliable source of occupational information may  
18 be able to provide more specific information about jobs or occupations  
19 than the DOT.

20 Id. (emphasis added). That is exactly what the VE did in this case.

21 Nonetheless, Plaintiff challenges the VE's opinion as legally insufficient under the  
22 Federal Rules of Evidence for expert testimony, as set forth in Daubert v. Merrell Dow  
23 Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S.  
24 137, 147 (1999). The Ninth Circuit, however, definitively rejected the applicability of the  
25 Federal Rules of Evidence to Social Security administrative proceedings in Bayliss:

26 Bayliss relies on the requirements for the admissibility of expert testimony  
27 under Federal Rule of Evidence 702, established in Daubert v. Merrell  
28 Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469



1 (1993). See *id.* (establishing a gatekeeping function to screen expert  
2 scientific testimony for relevance and reliability); see also *Kumho Tire Co.*  
3 *v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)  
4 (applying the *Daubert* rule to all expert testimony, not merely to scientific  
5 testimony). The Federal Rules of Evidence do not apply to the admission  
6 of evidence in Social Security administrative proceedings. See 42 U.S.C.  
7 § 405(b)(1); 20 C.F.R. §§ 409. 950(c), 416.1450(c) (“The administrative  
8 law judge may receive evidence at the hearing even though the evidence  
9 would not be admissible in court under the rules of evidence used by the  
10 court.”); *Richardson v. Perales*, 402 U.S. 389, 400, 91 S.Ct. 1420, 28  
11 L.Ed.2d 842 (1971) (“[S]trict rules of evidence, applicable in the  
12 courtroom, are not to operate at social security hearings so as to bar the  
13 admission of evidence otherwise pertinent. . . .”); *Banks v. Schweiker*, 654  
14 F.2d 637, 640 (9th Cir. 1981). It is clear that the *Daubert* decision rests  
15 on an interpretation of Federal Rule of Evidence 702. See *Daubert*, 509  
16 U.S. at 589-92, 113 S.Ct. 2786. The requirements established in Federal  
17 Rule of Evidence 702, *Daubert*, and *Kumho* do not govern the  
18 admissibility of evidence before the ALJ in the administrative proceeding  
19 in this Social Security case.

20 Bayliss, 427 F.3d at 1218 n.4.

21 The VE’s experience and expertise enabled her to justify credibly that 50 percent of  
22 light exertional jobs can be performed with only occasional standing and walking. The VE’s  
23 opinion is substantial evidence on which the ALJ properly relied in making his step five  
24 determination.

25 Plaintiff does not challenge the ALJ’s RFC of limited light work or his adverse  
26 credibility finding in regard to the RFC. On that assessment, one cannot argue reasonably  
27 that Plaintiff is unable to do any work. There was no prejudice here.

1 The Commissioner met his burden at step five to demonstrate that jobs exist in the  
2 national economy in significant numbers that the Claimant can perform. The ALJ's non-  
3 disability decision is supported by substantial evidence and free of legal error.

4 **ORDER**

5 IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is  
6 affirmed and that this action is dismissed with prejudice.

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: March 18, 2011

/s/ John E. McDermott  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE

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