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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 MARK J. THUN, ) NO. CV 11-2329-E  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 MICHAEL J. ASTRUE, COMMISSIONER ) AND ORDER OF REMAND  
18 OF SOCIAL SECURITY ADMINISTRATION, )  
19 )  
20 Defendant. )  
21 )  
22 )  
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18  
19 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
20 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
21 judgment are denied and this matter is remanded for further  
22 administrative action consistent with this Opinion.  
23

24 PROCEEDINGS  
25

26 Plaintiff filed a complaint on March 18, 2011, seeking review of  
27 the Commissioner's denial of benefits. The parties filed a consent to  
28 proceed before a United States Magistrate Judge on April 4, 2011.

1 Plaintiff filed a motion for summary judgment on September 14, 2011.  
2 Defendant filed a motion for summary judgment on November 10, 2011.  
3 The Court has taken both motions under submission without oral  
4 argument. See L.R. 7-15; "Order," filed March 22, 2011.

## 5 6 **BACKGROUND**

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8 Plaintiff, a former general contractor and concrete mason,  
9 asserted disability based on, inter alia, arthritis in all of his  
10 joints, shoulder problems, a skin condition, and pain (Administrative  
11 Record ("A.R.") 137-39, 146-48). An Administrative Law Judge ("ALJ")  
12 found that Plaintiff suffered from severe psoriasis, degenerative  
13 arthritis in his left shoulder, depression (not otherwise specified),  
14 discogenic disease of the lumbosacral spine and psoriatic arthritis  
15 (A.R. 18-19). However, the ALJ also found that these impairments were  
16 not disabling (A.R. 20-32).

17  
18 The ALJ determined that Plaintiff retained the residual  
19 functional capacity for medium work with the following limits:

20  
21 [Plaintiff] can stand or walk no more than 5 hours in an 8  
22 hour day; he can sit no more than 6 hours in an 8 hour day;  
23 he can lift no more than 20 pounds frequently and 40 pounds  
24 occasionally; he can do only occasional overhead reaching  
25 with the left, non-dominant arm; his fine fingering and  
26 gross handling abilities are limited to frequent, not  
27 constant; he must avoid unprotected heights and dangerous  
28 machinery; and he can handle simple and complex

1 instructions.

2  
3 (A.R. 24, 26 (emphasis added); see also A.R. 86-88 (Plaintiff  
4 testifying that he could lift and carry 20 to 40 pounds, stand and  
5 walk "probably five hours" in an eight-hour workday, and sit without  
6 limitation)).<sup>1</sup> Relying on vocational expert testimony, the ALJ  
7 concluded that a person retaining this capacity could perform  
8 Plaintiff's past relevant work as a masonry contractor (A.R. 30-31  
9 (adopting vocational expert testimony at A.R. 91-92)). The Appeals  
10 Council considered additional medical records submitted by Plaintiff,  
11 but denied review (A.R. 1-4, 271-369).

#### 12 13 STANDARD OF REVIEW

14  
15 Under 42 U.S.C. section 405(g), this Court reviews the  
16 Administration's decision to determine if: (1) the Administration's  
17 findings are supported by substantial evidence; and (2) the  
18 Administration used correct legal standards. See Carmickle v.  
19 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
20 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such  
21 relevant evidence as a reasonable mind might accept as adequate to  
22 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401

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23  
24 <sup>1</sup> SSR 83-10 instructs that a full range of medium work  
25 "requires standing or walking, off and on, for a total of  
26 approximately 6 hours in an 8-hour workday in order to meet the  
27 requirements of frequent lifting or carrying objects weighing up to  
28 25 pounds." See SSR 83-10; see also 20 C.F.R. § 404.1567(c)  
(defining medium work as requiring "frequent lifting or carrying of  
objects weighing up to 25 pounds"). Social Security rulings are  
binding on the Administration. Terry v. Sullivan, 903 F.2d 1273,  
1275 n. 1 (9th Cir. 1990).

1 (1971) (citation and quotations omitted); see Widmark v. Barnhart,  
2 454 F.3d 1063, 1067 (9th Cir. 2006).

3  
4 Where, as here, the Appeals Council considered additional  
5 evidence but denied review, the additional evidence becomes part of  
6 the Administrative Record for purposes of the Court's analysis. See  
7 Harman v. Apfel, 211 F.3d 1172, 1180 (9th Cir.), cert. denied, 531  
8 U.S. 1038 (2000) (in remanding administrative decision, the Ninth  
9 Circuit relied on treatment records submitted for the first time to  
10 the Appeals Council, which had considered the records in the context  
11 of denying review); Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir.  
12 1993) ("[A]lthough the Appeals Council declined to review the decision  
13 of the ALJ, it reached this ruling after considering the case on the  
14 merits; examining the entire record, including the additional  
15 material; and concluding that the ALJ's decision was proper and that  
16 the additional material failed to provide a basis for changing the  
17 hearing decision. For these reasons, we consider on appeal both the  
18 ALJ's decision and the additional material submitted to the Appeals  
19 Council") (citations and quotations omitted); Penny v. Sullivan, 2  
20 F.3d 953, 957 n.7 (9th Cir. 1993) ("the Appeals Council considered  
21 this information [a doctor's opinion] and it became part of the record  
22 we are required to review as a whole"); accord Lingenfelter v. Astrue,  
23 504 F.3d 1028, 1030 n.2 (9th Cir. 2007); Healy v. Astrue, 379 Fed.  
24 App'x 643, 646 (9th Cir. May 18, 2010); see generally 20 C.F.R. §§  
25 404.970(b), 416.1470(b).

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## DISCUSSION

Plaintiff contends, inter alia, that the ALJ erred by failing to include in the hypothetical questioning of the vocational expert all of the limitations the ALJ found to exist. See Plaintiff's Motion at 9-10. The ALJ appears to have adopted a residual functional capacity based at least in part on Plaintiff's testimony concerning his limitations. Compare A.R. 24 (Plaintiff's residual functional capacity) with A.R. 26 (ALJ's description of Plaintiff's similar testimony) and A.R. 86-88 (Plaintiff's testimony). In finding that Plaintiff could perform his past relevant work notwithstanding these limitations, the ALJ relied on the opinion of a vocational expert who was present during Plaintiff's testimony (A.R. 31). The vocational expert opined that a person having "the limitations and work restrictions. . . [Plaintiff] alleges he has and has had since the time . . . he stop[ped] work" could perform Plaintiff's past relevant work as a masonry contractor, provided that the person could nap during breaks or at lunch (A.R. 91-92; see also A.R. 87 (Plaintiff testifying that he naps at noon time)). Neither the ALJ nor the vocational expert precisely delineated those functional limitations the vocational expert assumed in offering such opinion (A.R. 91-92).

The vocational expert described Plaintiff's past relevant work as a masonry contractor as performed at the "light level" and agreed with the ALJ that Plaintiff could do light work (A.R. 91-92; see also A.R. 187 (expert's past relevant work analysis)). The relevant Dictionary of Occupational Titles ("DOT") listing for masonry contractor (DOT 182.167-010), lists the job as light work. See DOT 182.167-010; see

1 also A.R. 187 (identifying DOT section and noting an "occupationally  
2 significant characteristic" of "extensive standing and walking")  
3 (emphasis added). Social Security Ruling 83-10 instructs that "the  
4 full range of light work requires standing or walking, off and on, for  
5 a total of approximately 6 hours of an 8-hour workday. Sitting may  
6 occur intermittently during the remaining time." See SSR 83-10  
7 (emphasis added). In the present case, however, Plaintiff testified  
8 (and the ALJ found) that Plaintiff could stand for only five hours in  
9 an eight-hour day (A.R. 24, 87).

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11 Where a hypothetical question fails to "set out all of the  
12 claimant's impairments," the vocational expert's answers to the  
13 question cannot constitute substantial evidence to support the ALJ's  
14 decision. See, e.g., Gamer v. Secretary, 815 F.2d 1275, 1280 (9th  
15 Cir. 1987); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984).  
16 Assuming, arguendo, the hypothetical question "set out" (through  
17 incorporation by reference) all of Plaintiff's limitations the ALJ  
18 found to exist, including the limitation of no more than five hours of  
19 standing, the vocational expert's opinion appears to have been in  
20 conflict with the DOT. See, e.g., Pearce v. Astrue, 2009 WL 3698514,  
21 at \*4 (W.D. Wash. Nov. 3, 2009) (vocational expert's testimony that  
22 plaintiff, who was limited to standing for four hours, could perform  
23 job requiring standing for six hours was "at odds" with the DOT).  
24 Social Security Ruling 00-4p provides:

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26 Occupational evidence provided by a [vocational expert]  
27 generally should be consistent with the occupational  
28 information supplied by the DOT. When there is an apparent

1       unresolved conflict between [vocational expert] evidence and  
2       the DOT, the adjudicator must elicit a reasonable  
3       explanation for the conflict before relying on the  
4       [vocational expert] evidence to support a determination or  
5       decision about whether the claimant is disabled. At the  
6       hearings level, as part of the adjudicator's duty to fully  
7       develop the record, the adjudicator will inquire on the  
8       record, as to whether or not there is such consistency.

9  
10       Neither the DOT nor the [vocational expert] evidence  
11       automatically "trumps" when there is a conflict. The  
12       adjudicator must resolve the conflict by determining if the  
13       explanation given by the [vocational expert] is reasonable  
14       and provides a basis for relying on the [vocational expert]  
15       testimony rather than on the DOT information.

16  
17       In Plaintiff's case, the ALJ did not inquire of the vocational  
18       expert whether the expert's testimony was consistent with the  
19       information in the DOT. See A.R. 91-93.<sup>2</sup> Nor did the ALJ seek an  
20       explanation for preferring the vocational expert's testimony over the  
21       conflicting information in the DOT. This was error. See SSR 00-4p;

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23       <sup>2</sup>       A second hypothetical posed to the expert questioned  
24       whether a person who, inter alia, could stand and/or walk six hours  
25       out of an eight-hour day with other limitations could perform  
26       Plaintiff's past relevant work (A.R. 92-93). In response to that  
27       question, the vocational expert testified that the person could  
28       perform the work as a masonry contractor consistent with how the  
      job is performed in the national economy per the Dictionary of  
Occupational Titles (A.R. 93). This testimony cannot support the  
ALJ's decision because the second hypothetical question manifestly  
failed to "set out" at least one of Plaintiff's limitations, i.e.,  
the limitation to no more than five hours of standing.

1 Light v. Social Security Administration, 119 F.3d 789, 794 (9th Cir.  
2 1997) (error that "[n]either the ALJ nor the vocational expert  
3 explained the reason for departing from the DOT"); Johnson v. Shalala,  
4 60 F.3d 1428, 1435 (9th Cir. 1995) ("an ALJ may rely on expert  
5 testimony which contradicts the DOT, but only insofar as the record  
6 contains persuasive evidence to support the deviation"); Thompson v.  
7 Astrue, 2011 WL 643109, at \*12 (W.D. Wash. Jan. 28, 2011), adopted,  
8 2011 WL 686757 (W.D. Wash. Feb. 18, 2011) (finding that ALJ erred by:  
9 (1) failing to inquire of the vocational expert whether the expert's  
10 testimony was consistent with the DOT, where the claimant was able to  
11 stand and/or walk for only two hours in an eight-hour day and the DOT  
12 described the relevant jobs identified by the expert as "light"; and  
13 (2) failing to elicit from the expert a reasonable explanation for  
14 conflict with the DOT).

15  
16 The ALJ's errors with respect to the vocational expert testimony  
17 may have been material. The vocational expert did not explain how a  
18 limited ability to stand and/or walk would impact Plaintiff's past  
19 relevant work as a masonry contractor, and did not offer an opinion  
20 concerning whether there were any other jobs that a person with  
21 Plaintiff's limitations could perform. Because the circumstances of  
22 the case suggest that further administrative review is needed to  
23 determine whether Plaintiff has been prejudiced by the ALJ's failure  
24 properly to question the vocational expert, remand is appropriate.  
25 See McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see generally  
26 INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an  
27 administrative determination, the proper course is remand for  
28 additional agency investigation or explanation, except in rare



1 circumstances).

2  
3 **CONCLUSION**  
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5 For all of the foregoing reasons,<sup>3</sup> Plaintiff's and Defendant's  
6 motions for summary judgment are denied and this matter is remanded  
7 for further administrative action consistent with this Opinion.  
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9 LET JUDGMENT BE ENTERED ACCORDINGLY.  
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11 DATED: November 14, 2011.  
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14 \_\_\_\_\_/S/\_\_\_\_\_  
15 CHARLES F. EICK  
16 UNITED STATES MAGISTRATE JUDGE  
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27 <sup>3</sup> The Court has not reached any other issue raised by  
28 Plaintiff except insofar as to determine that reversal with a  
directive for the payment of benefits would not be appropriate at  
this time.