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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

12	RONALD SUSCHANK,)	Case No. CV 11-3620-MLG
)	
13	Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
14	v.)	
)	
15	MICHAEL J. ASTRUE,)	
	Commissioner of Social)	
16	Security,)	
)	
17)	
	Defendant.)	
18	_____)	

Plaintiff Ronald Suschank seeks judicial review of the Commissioner's denial of his application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") benefits under the Social Security Act. For the reasons discussed below, the decision of the Commissioner is affirmed and the action is dismissed with prejudice.

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1 **I. Factual and Procedural History**

2 Plaintiff was born on November 10, 1961. (Administrative Record
3 ("AR") at 38.) He has a high school education and has work experience as
4 a sheet metal fabricator and maintenance worker. (AR at 121, 125.)
5 Plaintiff filed an application for DIB and SSI benefits on August 16,
6 2004, alleging that he had been disabled since July 1, 2002, due to a
7 heart condition, seizures, lung and breathing problems and
8 hernia/testicle surgeries. (AR at 120.) Plaintiff's application was
9 denied initially on March 15, 2005 and upon reconsideration on May 19,
10 2005. (AR at 43-47, 52-56.)

11 An administrative hearing was held on October 4, 2006 before
12 Administrative Law Judge ("ALJ") Peggy M. Zirlin. (AR at 345-371.) ALJ
13 Zirlin issued an unfavorable decision on October 24, 2006. (AR at 12-
14 30.) Upon the stipulation of the parties, the matter was remanded to the
15 ALJ on April 25, 2008. (AR at 410-417.) A second administrative hearing
16 was held on July 1, 2009. (AR at 530-540.)

17 On August 27, 2009, ALJ Zirlin again denied Plaintiff's
18 applications for benefits. (AR at 378-404.) The ALJ found that Plaintiff
19 had not engaged in substantial gainful activity during the relevant time
20 period. (AR at 400.) The ALJ further found that the medical evidence
21 established that Plaintiff suffered from the following severe
22 impairments: status post myocardial infarction with stent placement in
23 2000, early onset arteriosclerotic cardiovascular disease, status post
24 bilateral inguinal hernias, recurrent cysts in the testicles with
25 multiple surgical treatment, seizure disorder, obesity, and chronic
26 bronchitis secondary to cigarette smoking. (Id.) However, the ALJ
27 concluded that Plaintiff's impairments did not meet, or were not
28 medically equal to, one of the impairments listed in 20 C.F.R., Part

1 404, Subpart P, Appendix 1. (AR 17.)

2 The ALJ concluded that Plaintiff retained the residual functional
3 capacity ("RFC") to perform light/sedentary work as defined in 20 CFR
4 404.1567(b) and 416.967(b) as follows: "lift and carry less than 5
5 pounds frequently and occasionally, stand and walk 6/8 hours, sit 6/8
6 hours, occasionally climb, balance, stoop, kneel, crouch and crawl and
7 no exposure to unprotected heights or hazardous machinery. Given the
8 smoking history and his lung testing, I also find that he should avoid
9 concentrated exposure to fumes, odors, dusts, gasses and poor
10 ventilation." (AR at 400-401.)

11 The ALJ found that Plaintiff was unable to perform his past
12 relevant work as a sheet metal fabricator and maintenance worker. (AR at
13 403.) However, the ALJ further found, based on the vocational expert's
14 ("VE") testimony at the first administrative hearing, that there were
15 jobs that exist in significant numbers in the national economy that
16 Plaintiff could perform, such as assembler, reception/information clerk,
17 cashier II and information clerk. (AR at 404.) Accordingly, the ALJ
18 concluded that Plaintiff was not disabled within the meaning of the
19 Social Security Act. (Id.)

20 On February 28, 2011, the Appeals Council denied review (AR at 372-
21 374), and Plaintiff timely commenced this action for judicial review. On
22 May 11, 2012, the parties filed a Joint Stipulation ("Joint Stip.") of
23 disputed facts and issues. Plaintiff contends that the ALJ erred at step
24 5 of the sequential evaluation by finding that Plaintiff could perform
25 the jobs of assembler, reception/information clerk, cashier II and
26 information clerk. (Joint Stip. at 3.) Plaintiff asks the Court to
27 reverse and award benefits, or in the alternative, remand for further
28 administrative proceedings. (Joint Stip. at 19.) The Commissioner

1 requests that the ALJ's decision be affirmed. (Joint Stip. at 20.)

3 **II. Standard of Review**

4 Under 42 U.S.C. § 405(g), a district court may review the Social
5 Security Commissioner's decision to deny benefits. The Court must uphold
6 the Social Security Administration's disability determination unless it
7 is not supported by substantial evidence or is based on legal error.
8 *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)(citing
9 *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
10 2006)). Substantial evidence means more than a scintilla, but less than
11 a preponderance; it is evidence that "a reasonable person might accept
12 as adequate to support a conclusion." *Lingenfelter v. Astrue*, 504 F.3d
13 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d
14 880, 882 (9th Cir. 2006)). To determine whether substantial evidence
15 supports a finding, the reviewing court "must review the administrative
16 record as a whole, weighing both the evidence that supports and the
17 evidence that detracts from the Commissioner's conclusion." *Reddick v.*
18 *Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support
19 either affirming or reversing the ALJ's conclusion," the reviewing court
20 "may not substitute [its] judgment for that of the ALJ." *Robbins*, 466
21 F.3d at 882.

23 **III. Discussion**

24 Plaintiff contends that the ALJ improperly relied upon the VE's
25 testimony that Plaintiff could perform the identified jobs because those
26 jobs, as defined by the Dictionary of Occupational Titles ("DOT"),
27 require lifting a greater amount of weight than the ALJ found Plaintiff
28 capable of lifting in the ALJ's assessment of Plaintiff's RFC. (Joint

1 Stip. at 4.) The ALJ based her conclusion that Plaintiff could perform
2 a significant number of jobs in the economy on the testimony of the VE.
3 (AR at 366-367.)

4 At the administrative hearing, the ALJ posed the following
5 hypothetical question to the VE, preceded by a caveat:

6 [A]ny job you identify in any hypothetical must be consistent
7 with the job as it is described in the DOT. If there is any
8 difference, you must explain the discrepancy or reason for the
9 discrepancy and your source of information. Please assume the
10 existence of an individual who is the same age as the
11 Claimant, who has the same educational background, and the
12 same past work experience. Assume further this individual can,
13 as indicated, in Exhibits 5F and 6F, lift and carry up to five
14 pounds frequently and occasionally, stand and/or walk about
15 six hours in an eight-hour workday, sit about six hours in an
16 eight-hour workday both with normal breaks. Occasional
17 climbing, balancing, stooping, kneeling, crouching and
18 crawling. Avoid all exposure to unprotected heights and
19 hazardous machinery. Would such an individual be able to do
20 the past work?

21 (AR at 366.)

22 The VE responded that Plaintiff would not be able to perform his
23 past relevant work but concluded that Plaintiff would be able to
24 perform several jobs in the national economy, including the sedentary
25 jobs of assembler (DOT 734.687-018) and reception/information clerk
26 (DOT 237.367-046) and the light jobs of cashier II (DOT 211.462-010)
27 and information clerk (DOT 237.367-018). (AR at 366-367.)

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1 Plaintiff correctly claims that the VE's testimony is
2 inconsistent with the DOT.¹ However, the ALJ questioned the VE about
3 the apparent inconsistency between the VE's testimony and the DOT. When
4 the VE was questioned regarding whether the two light jobs require
5 lifting at least ten pounds, the VE stated, "[T]he jobs that I am
6 providing in the light duty while they are considered light duty, they
7 are also jobs that intrinsically do not require much in the way of any
8 lifting and carrying and certainly would be well within the five pound
9 limitation." (AR at 367.) Similarly, when the ALJ asked whether the two
10 sedentary jobs require lifting up to ten pounds, the VE replied, "No,
11 that would be - while the Dictionary of Occupational Titles say [sic]
12 that you may lift up to 10 pounds, the vast majority of jobs that are
13 considered sedentary do not require any lifting whatsoever, Your
14 Honor." (Id.)

15 Although evidence provided by a VE is generally expected to be
16 consistent with the DOT, "[n]either the DOT nor the VE . . . evidence
17 automatically 'trumps' when there is a conflict." Social Security
18 Ruling ("SSR") 00-4p; *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir.
19 2007). Rather, the DOT raises a rebuttable presumption as to a job
20 classification, and "[a]n ALJ may rely on expert testimony which
21 contradicts the DOT, but only insofar as the record contains persuasive
22 evidence to support the deviation." *Johnson v. Shalala*, 60 F.3d 1428,
23 1435 (9th Cir. 1995); *Massachi*, 486 F.3d at 1153 (when a conflict
24 between a VE's testimony and the DOT arises, the ALJ must make an

25
26 ¹ Plaintiff also claims that the ALJ erred in relying on the VE
27 testimony from the 2006 hearing. However, Plaintiff has failed to
28 demonstrate that this was legal error or that circumstances had changed
between the hearings that would have led to a different result had a VE
testified at the 2009 hearing.

1 inquiry with the VE and then determine whether the VE's "explanation
2 for the conflict is reasonable and whether a basis exists for relying
3 on the expert rather than the [DOT]").

4 Here, the ALJ specifically questioned the VE about whether any of
5 the requirements of the four jobs identified by the VE conflicted with
6 the DOT. (AR at 366.) The VE explained the deviation, noting that
7 although the DOT classified the jobs as requiring lifting more than
8 five pounds, the jobs he identified involved very little lifting in
9 actual practice, a conclusion based upon his expert knowledge of the
10 specific characteristics and requirements of each of these jobs. (AR
11 at 366, 367.) See *Johnson*, 60 F.3d at 1435 ("Introduction of evidence
12 of the characteristics of specific jobs available in the local area
13 through the testimony of a vocational expert is appropriate, even
14 though the job traits may vary from the way the job title is classified
15 in the DOT.") The ALJ was entitled to rely on the VE's expertise and
16 persuasive testimony in deviating from the DOT. See *Sample v.*
17 *Schweiker*, 694 F.2d 639, 643 (9th Cir. 1982) (essential role of a VE
18 is to "translate[] factual scenarios into realistic job market
19 probabilities"). There was no error.

20 Plaintiff also claims that because of his limitation to lifting
21 less than five pounds, the VE should have further eroded the number of
22 jobs available in response to the ALJ's hypothetical question. (Joint
23 Stip. at 9.) The VE noted the number of jobs available in the local and
24 national economy: (1) assembler with 2,800 jobs locally and 67,000 jobs
25 nationally; (2) reception/information clerk with 6,500 jobs locally and
26 102,000 jobs nationally; (3) information clerk with 550 jobs locally
27 and 10,100 jobs nationally; and (4) cashier II with 21,200 jobs locally
28 and 500,000 jobs nationally (eroded 50% by the VE due to the RFC's

1 limitation to no concentrated exposure to fumes, odors, dusts, gasses
2 or poor ventilation). (AR at 366, 367.)

3 As discussed above, the VE explained the deviation from the DOT,
4 explaining that the jobs he identified involved lifting little, if any,
5 weight. Therefore, there was no need for the VE to erode those jobs to
6 accommodate Plaintiff's limitation of lifting less than five pounds
7 because those jobs in practice do not require lifting any greater
8 weight. However, even assuming without deciding that the VE should have
9 further eroded the job base, there were still significant numbers of
10 jobs that Plaintiff could perform in the local and national economy.
11 *See, e.g., Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995) (finding
12 that 2,300 jobs in San Diego County constitutes a significant number
13 within the region so as to meet the requirements of 42 U.S.C. §
14 423(d)(2)(A)); *Barker v. Secretary*, 882 F.2d 1474, 1478-79 (9th Cir.
15 1989) (finding that 1,266 jobs in the Los Angeles/Orange County area
16 constitutes a significant number); *but see Beltran v. Astrue*, --- F.3d
17 ---, 2012 WL 1526257 at *3 (9th Cir. May 2, 2012)(finding 135 jobs
18 regionally and 1,680 jobs nationally not to be a significant number).
19 Thus, any possible error was harmless, *see Burch v. Barnhart*, 400 F.3d
20 676, 679 (9th Cir. 2005), and the ALJ properly deferred to the VE in
21 determining the existence and number of jobs that Plaintiff could
22 perform.

23 Accordingly, the ALJ's finding at step five of the sequential
24 process that Plaintiff is capable of performing other substantial
25 gainful activity is supported by substantial evidence in the record,
26 and Plaintiff is not entitled to relief.

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1 **IV. Conclusion**

2 For the reasons stated above, the decision of the Social Security
3 Commissioner is **AFFIRMED** and the action is **DISMISSED** with prejudice.
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5 DATED: May 22, 2012
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9 MARC L. GOLDMAN
United States Magistrate Judge
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