

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARGO NESBIT,)	Case No. CV 12-3778-PJW
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
CAROLYN W. COLVIN,)	
ACTING COMMISSIONER OF THE)	
SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). She claims that the Administrative Law Judge ("ALJ") erred in relying on the vocational expert's testimony to conclude that she could perform the jobs of usher, greeter, and storage facility clerk. For the following reasons, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings consistent with this decision.

1 II. SUMMARY OF PROCEEDINGS

2 In January 2009, Plaintiff applied for DIB and SSI, alleging that
3 she was disabled due to carpal tunnel syndrome in both wrists,
4 tendonitis in her left shoulder, a bulge in her neck, lower back
5 problems, and depression. (Administrative Record ("AR") 76-78, 141.)
6 After her applications were denied initially, Plaintiff requested and
7 was granted a hearing before an ALJ. (AR 76-78, 83-96.) On August
8 18, 2010, she appeared without counsel for the hearing. (AR 34-74.)
9 On January 25, 2011, the ALJ issued a decision denying benefits. (AR
10 18-27.) Plaintiff appealed to the Appeals Council, which denied
11 review. (AR 1-6, 11-12.) This action followed.

12 III. ANALYSIS

13 Plaintiff contends that the ALJ's determination that she could
14 work as a greeter, usher, and storage facility clerk is not supported
15 by substantial evidence because: (1) the vocational expert testified
16 that Plaintiff could not work as a greeter or an usher based on her
17 limitations; and (2) the reasoning ability necessary to perform the
18 storage facility clerk job exceeds Plaintiff's residual functional
19 capacity. (Joint Stip. at 5-10.) For the following reasons, the
20 Court agrees.

21 Once a disability claimant has established that she can no longer
22 perform her past work, the burden shifts to the Agency to show that
23 she can perform other jobs that exist in substantial numbers in the
24 national economy. *Bray v. Astrue*, 554 F.3d 1219, 1222-23 (9th Cir.
25 2009). To meet this burden, the Agency can call upon a vocational
26 expert to testify about the types of jobs that a claimant could
27 perform despite her limitations and the number of such jobs in the
28 economy. *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999).

1 The ALJ determined that Plaintiff had the residual functional
2 capacity to perform simple, repetitive, light work if allowed to,
3 among other things, alternately sit and stand. (AR 21.) After
4 concluding that Plaintiff's limitations would prevent her from
5 returning to her past work, the ALJ determined--purportedly based on
6 the vocational expert's testimony--that Plaintiff could nevertheless
7 work as a greeter, usher, and storage facility clerk. (AR 25-26.) In
8 doing so, the ALJ misinterpreted the vocational expert's testimony, a
9 point the Agency appears to concede in its brief as it does not
10 contest Plaintiff's position. (Joint Stip. at 11-19.¹) The
11 vocational expert testified that an individual who was required to
12 have a sit and stand option could not work as either a greeter or an
13 usher. (AR 69.) According to the vocational expert, these are
14 "standing jobs, with some walking" and not really tailored to sitting.
15 (AR 69.) Thus, the ALJ's conclusion that Plaintiff could perform
16 these jobs was contradicted by the evidence and is reversed.

17 What remains, is the ALJ's conclusion that Plaintiff could
18 perform the job of storage facility clerk. Although this job is one
19 that can be performed with a sit and stand option, Plaintiff argues
20 that she does not have the mental capacity to perform it because she
21 is limited to simple, repetitive tasks and this job requires more
22 advanced reasoning. For the following reasons, the Court finds that
23 the ALJ erred here.

24 The ALJ determined that Plaintiff was limited to simple,
25 repetitive work. (AR 21, 24-25.) The vocational expert testified
26

27
28 ¹ The Court requests that, in the future, the Agency merely
state in its brief that it agrees with Plaintiff that the ALJ erred.

1 that, despite this limitation, Plaintiff could work as a storage
2 facility clerk. (AR 67.) This job requires an ability to reason at
3 level 3. *Dictionary of Occupational Titles* ("DOT") No. 295.367-026.
4 Reasoning level 3 requires a worker to "apply commonsense under-
5 standing to carry out instructions furnished in written, oral, or
6 diagrammatic form. Deal with problems involving several concrete
7 variables in or from standardized situations." DOT No. 295.367-026.
8 The ALJ, however, failed to ask the vocational expert whether her
9 testimony was consistent with the DOT, which she was required to do.
10 Social Security Ruling 00-4p ("When a [vocational expert] ... provides
11 evidence about the requirements of a job or occupation, the
12 adjudicator has an affirmative responsibility to ask about any
13 possible conflict between that [vocational expert] ... evidence and
14 information provided in the [Dictionary of Occupational Titles].").
15 This failure mandates reversal. *See Massachi v. Astrue*, 486 F.3d
16 1149, 1152 (9th Cir. 2007) (holding ALJ's failure to ask vocational
17 expert if testimony was consistent with DOT mandates reversal because
18 court cannot determine if decision is supported by substantial
19 evidence). This is particularly true here where the issue is whether
20 a claimant limited to simple and repetitive tasks can perform level 3
21 work. *See, e.g., Signavong v. Astrue*, 2011 WL 5075609, at *7 (C.D.
22 Cal. Oct. 25, 2011) ("[T]he weight of authority in this Circuit holds
23 that a limitation to simple, repetitive tasks is incompatible with a
24 reasoning level of three.") (italics and footnote omitted); *Grimes v.*
25 *Astrue*, 2011 WL 164537, at *4 (C.D. Cal. Jan. 18, 2011) ("The weight
26 of authority is firmly of the view that Reasoning Level 3 jobs are
27 inconsistent with limitations to simple repetitive tasks."); c.f.,
28 *Dahl v. Astrue*, 2011 WL 2837660 (C.D. Cal. July 18, 2011).

1 The Agency disagrees. It contends that there is no need to send
2 the case back to the ALJ because, in its view, a claimant with the
3 ability to perform simple, repetitive tasks can perform the job of
4 storage facility clerk because the Specific Vocational Preparation
5 ("SVP") rating for this job is 2. The Agency argues that an SVP of 2
6 is tantamount to simple, repetitive work. (Joint Stip. at 14.) This
7 argument is rejected. The Agency's argument conflates two different
8 vocational considerations. The SVP rating sets forth how long it
9 takes a typical worker to learn a particular job. *Meissl v. Barnhart*,
10 403 F.Supp.2d 981, 983 (C.D. Cal. 2005). The reasoning level on the
11 other hand quantifies the level of cognition required to perform the
12 job once learned. *See also Carney v. Astrue*, 2010 WL 5060488, at *4
13 (C.D. Cal. Dec. 6, 2010) ("A job's simplicity level is more squarely
14 addressed by . . . reasoning level ratings."). Though there is
15 obviously some overlap in the two, they are not so similar as to be
16 interchangeable.

17 The Agency argues that the record as a whole demonstrates that
18 Plaintiff is able to perform reasoning level 3 work. It points out,
19 for example, that Plaintiff graduated from high school and performed
20 semi-skilled and skilled work in the past. (AR 17-18.) Even assuming
21 that these were valid reasons for concluding that Plaintiff could
22 perform this work, the Court would not be allowed to rely on them
23 because the ALJ did not purport to rely on them in concluding that
24 Plaintiff could work as a clerk. *See Bray*, 554 F.3d at 1225 ("Long-
25 standing principles of administrative law require us to review the
26 ALJ's decision based on the reasoning and factual findings offered by
27 the ALJ--not post hoc rationalizations that attempt to intuit what the
28 adjudicator may have been thinking.").

1 IV. CONCLUSION

2 For these reasons, the Agency's decision is reversed and the case
3 is remanded for further proceedings consistent with this memorandum
4 opinion and order.²

5 IT IS SO ORDERED.

6 DATED: May 6, 2013

7 

8

9 PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24 S:\PJW\Cases-Soc Sec\NESBIT, 3778\memo opinion and order.wpd

25
26

27 ² The Court has considered Plaintiff's request that the case be
28 remanded for an award of benefits. This request is denied because it
is not clear from this record whether Plaintiff is disabled and,
therefore, entitled to benefits.