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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JULIA MORA,	)	NO. EDCV 07-1527-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on November 27, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of her application for supplemental security income ("SSI"). On January 1, 2008, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on August 13, 2008, in which: Plaintiff seeks an order reversing the Commissioner's decision and directing the immediate payment of benefits or, in the alternative, remanding the matter for a new administrative hearing; and Defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2  
3 Plaintiff claims to have been disabled since March 1, 1994, because  
4 of back pain. (Administrative Record ("A.R.") 23, 67.) She has past  
5 relevant work experience as a hotel maid. (A.R. 68.)  
6

7 Plaintiff filed an application for SSI on August 17, 2005. (A.R.  
8 58.) The Commissioner denied Plaintiff's claim initially and upon  
9 reconsideration. (A.R. 37, 44.) On May 2, 2007, Plaintiff, who was  
10 represented by counsel, testified at a hearing before Administrative Law  
11 Judge Mason D. Harrell ("ALJ"). (A.R. 23.) On May 14, 2007, the ALJ  
12 denied Plaintiff's claim. (A.R. 23-28.) The Appeals Council  
13 subsequently denied Plaintiff's request for review of that decision.  
14 (A.R. 4.)  
15

16 **SUMMARY OF ADMINISTRATIVE DECISION**

17  
18 The ALJ found that Plaintiff has the following severe impairments:  
19 (1) cervical sprain/strain; (2) lumbosacral sprain/strain; and (3) a  
20 history of polymyalgia and arthralgia. (A.R. 25.) However, the ALJ  
21 concluded that such impairments do not meet or medically equal one of  
22 the listed impairments in Appendix 1, Subpart P, Regulation No. 4.  
23 (*Id.*) Based on Plaintiff's medical records and the testimony of a  
24 vocational expert ("VE"), the ALJ determined that Plaintiff has the  
25 residual functional capacity<sup>1</sup> to perform medium work.<sup>2</sup> As a result, the  
26

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27 <sup>1</sup> "The residual functional capacity assessment considers only  
28 functional limitations and restrictions that result from an individual's  
medically determinable impairment or combination of impairments,

1 ALJ found that Plaintiff can perform her past relevant work as a hotel  
2 maid. (A.R. 27.) Additionally, the ALJ found that Plaintiff's  
3 statements concerning her disability were not entirely credible. (*Id.*)  
4 Accordingly, the ALJ found that Plaintiff was not disabled within the  
5 meaning of the Social Security Act during the time period at issue.  
6 (A.R. 28.)

7  
8 **STANDARD OF REVIEW**  
9

10 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
11 decision to determine whether it is free from legal error and supported  
12 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
13 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant  
14 evidence as a reasonable mind might accept as adequate to support a  
15 conclusion." *Id.* (citation omitted). The "evidence must be more than  
16 a mere scintilla but not necessarily a preponderance." Connett v.  
17 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the  
18 record can constitute substantial evidence, only those "reasonably  
19 drawn from the record" will suffice. Widmark v. Barnhart, 454 F.3d  
20 1063, 1066 (9th Cir. 2006)(citation omitted).

21  
22 Although this Court cannot substitute its discretion for that of  
23 the Commissioner, the Court nonetheless must review the record as a

24 \_\_\_\_\_  
25 including the impact of any related symptoms." Social Security Ruling  
26 96-8p.

27 <sup>2</sup> Medium work involves lifting no more than 50 pounds at a time with  
28 frequent lifting or carrying of objects weighing up to 25 pounds. If  
someone can do medium work, he or she can also do light work. 20 C.F.R.  
§ 416.967.

1 whole, "weighing both the evidence that supports and the evidence that  
2 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
3 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
4 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
5 responsible for determining credibility, resolving conflicts in medical  
6 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
7 1035, 1039-40 (9th Cir. 1995).

8  
9 The Court will uphold the Commissioner's decision when the evidence  
10 is susceptible to more than one rational interpretation. Burch v.  
11 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
12 review only the reasons stated by the ALJ in his decision "and may not  
13 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
14 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
15 the Commissioner's decision if it is based on harmless error, which  
16 exists only when it is "clear from the record that an ALJ's error was  
17 'inconsequential to the ultimate nondisability determination.'" Robbins  
18 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
19 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400  
20 F.3d at 679.

## 21 22 DISCUSSION

23  
24 Plaintiff alleges the following issue: whether Plaintiff retains  
25 the residual functional capacity to perform either her past relevant  
26 work as a hotel maid or identified alternative work. (Joint Stip. at  
27 4.)

1 I. The ALJ Improperly Relied On The Testimony Of The Vocational  
2 Expert.

3  
4 At step four of the Social Security disability determination, the  
5 claimant has the burden of showing that she can no longer perform her  
6 past relevant work. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th  
7 Cir. 2001). The claimant must be able to perform the job as she  
8 actually performed it, or as it is generally performed in the national  
9 economy. Social Security Ruling 82-61; Pinto v. Massanari, 249 F.3d  
10 840, 844 (9th Cir. 2001). Although the burden of proof lies with the  
11 claimant at step four, the ALJ "still has a duty to make the requisite  
12 factual findings to support his conclusion." *Id.* (citing Social  
13 Security Ruling 82-62). Information from the Dictionary of Occupational  
14 Titles ("DOT") or the testimony of a VE may be used to ascertain the  
15 demands of an occupation as ordinarily required by employers throughout  
16 the national economy. Social Security Ruling 82-61.

17  
18 According to DOT section 323.687-014, Plaintiff's occupation as a  
19 hotel maid requires a Strength Level of light work<sup>3</sup> and a Language Level  
20 of 1. Language Level 1 specifically requires that a person have the  
21 following skills:

22  
23 Reading: Recognize meaning of 2,500 (two-or three-syllable  
24 words. Read at rate of 95-120 words per minute. Compare  
25 similarities and differences between words and between series

26  
27 <sup>3</sup> Light work involves lifting no more than 20 pounds at a time with  
28 frequent lifting or carrying of objects weighing up to 10 pounds. 20  
C.F.R. § 416.967.

1 of numbers.

2  
3 Writing: Print simple sentences containing subject, verb, and  
4 object, and series of numbers, names, and addresses.

5  
6 Speaking: Speak simple sentences, using normal word order, and  
7 present and past tenses.

8  
9 Dictionary of Occupational Titles, 4th ed., Appendix C.

10  
11 If the ALJ chooses, as in this case, to rely on the testimony of a  
12 VE, the hypothetical posed to the VE must be "accurate, detailed, [and]  
13 supported by the record." Tackett v. Apfel, 180 F.3d 1094, 1101 (9th  
14 Cir. 1999). However, if the hypothetical presented to the VE does not  
15 reflect all of the claimant's limitations and/or is not supported by  
16 evidence in the record, the VE's testimony has no evidentiary value.  
17 Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993); Embrey v. Bowen,  
18 849 F.2d 418, 422-23 (9th Cir. 1988); Gallant v. Heckler, 753 F.2d 1450,  
19 1456 (9th Cir. 1984). To ensure the validity of the VE hypothetical,  
20 the ALJ should base it upon evidence appearing in the record, whether  
21 disputed or not. *Id.*

22  
23 In this case, the following exchange took place between the ALJ and  
24 the VE:

25  
26 Q: Okay. Mr. Scott, let's suppose there's an individual who  
27 is illiterate in English and has the following limitations --  
28 lifting is limited to -- pulling -- pushing, pulling, lifting

1 and carrying is limited to 50 pounds occasionally and 10 -- 25  
2 pounds frequently -- it's 50 occasionally and 25 frequently.  
3 Walking and standing are unrestricted. Sitting is  
4 unrestricted. Bending, kneeling, stooping, crawling and  
5 crouching can be done on an occasional basis. Walking on  
6 uneven terrain, climbing ladders or working at heights can be  
7 done on a frequent basis. . . . [T]he individual is right  
8 handed and on the left side . . . as far as manipulative  
9 movements go -- she's limited to above shoulder level  
10 activities to occasional on the left, but otherwise has  
11 unlimited reaching in the upper extremities. Unlimited  
12 handling, fingering and feeling both sides. With those  
13 limitations could someone perform the claimant's prior work as  
14 a housekeeper in a motel?

15  
16 A: Yes, Your Honor.

17  
18 . . . .

19  
20 Q: Okay. And your testimony is consistent with the Dictionary  
21 of Occupational Titles?

22  
23 A: Yes, Your Honor.

24  
25 (A.R. 242-45.) Basing his decision on the above exchange and on  
26  
27  
28

1 Plaintiff's medical reports,<sup>4</sup> the ALJ concluded that Plaintiff has the  
2 residual functional capacity to perform medium work with limitations,<sup>5</sup>  
3 and therefore, she can perform her past relevant work as a hotel maid.  
4 (A.R. 25.)

5  
6 Plaintiff, relying primarily on Pinto, *supra*, contends she does not  
7 have the ability to perform her past relevant work, as it is generally  
8 performed, because she is illiterate,<sup>6</sup> and therefore, she does not meet  
9

10 <sup>4</sup> Because Plaintiff offered very few medical records regarding her  
11 physical well-being, the ALJ relied on the consultative orthopedic  
12 evaluation ordered by the State Agency and performed by Dr. Johnson on  
October 27, 2005. (A.R. 111-15). Dr. Johnson found that Plaintiff  
could perform medium work with the following limitations:

13 Pushing, pulling, lifting, and carrying and limited to 50  
14 pounds occasionally and 25 pounds frequently.

15 Walking and standing are unrestricted.

16 Postural, i.e., bending, kneeling, stooping, crawling, and  
crouching can be done on an occasional basis.

17 Walking on uneven terrain, climbing ladders, or working at  
18 heights can be done on a frequent basis.

19 Sitting is unrestricted.

20 Assisted ambulatory devices are not required.

21 Manipulative movements; she has limited function above  
22 shoulder level to occasionally on the left, otherwise  
unlimited reaching in the upper extremities . . . handling,  
fingering, and feeling are all unlimited bilaterally.

23 (A.R. 114.)

24 <sup>5</sup> Specifically, the ALJ found that Plaintiff could push, pull, lift,  
25 and carry 50 pounds occasionally and 25 pounds frequently; sit, stand,  
and walk without restriction; bend, kneel, stoop, crawl, and crouch no  
26 more than occasionally and no more than occasional work above the  
shoulder level on left side. (A.R. 25.)

27 <sup>6</sup> Pursuant to 20 C.F.R. § 416.964(b)(1), "illiteracy" is defined as  
28 the inability to read or write." A claimant may be found "illiterate"  
or "unable to communicate in English" if she is "either illiterate in



1 the Language Level 1 requirement.<sup>7</sup> (Joint Stip. at 7.) In Pinto, at the  
2 claimant's disability hearing, the ALJ set forth in his hypothetical to  
3 the VE that the claimant was illiterate in English and could perform  
4 medium work with limitations. 249 F.3d at 843. Based on the  
5 hypothetical presented, the VE found that the claimant could perform her  
6 past relevant work as a hand packager. *Id.* at 844. However, the  
7 definition of a hand packager in the DOT requires a Language Level 1.  
8 *Id.* at 844-45. The Ninth Circuit found that the ALJ's failure to  
9 explain how claimant's illiteracy limitation related to his finding that  
10 the claimant could perform her past relevant work as generally performed  
11 constituted reversible error. *Id.* at 847. The Ninth Circuit recognized  
12 that a person's ability to communicate in English must be considered  
13 when evaluating what work a claimant can perform in the national  
14 economy. *Id.* at 846; see also 20 C.F.R. § 416.964(b)(5).

15  
16 Although it is appropriate for an ALJ to rely on a VE's testimony  
17 that contradicts the requirements in the DOT, the ALJ can do so only in  
18 instances where "the record contains persuasive evidence to support the

19 \_\_\_\_\_  
20 English or unable to communicate in English or both." Silveira v.  
21 Apfel, 204 F.3d 1257, 1261 (9th Cir. 2000).

22 <sup>7</sup> Additionally, Plaintiff claims she cannot perform her prior work as  
23 she performed it, because she would need to be capable of lifting more  
24 than 50 pounds. (Joint Stip. at 7.) As described by Plaintiff in her  
25 application for disability benefits, her past relevant work as a hotel  
26 maid required her to lift up to 70 pounds. (*Id.* at 6; A.R. 68.) Thus,  
27 Plaintiff contends that her past relevant work was performed at the  
28 heavy level of exertion, and therefore, she cannot perform her past  
relevant work as she performed it, because she cannot lift greater than  
50 pounds. Although Plaintiff asserts she cannot perform her work as  
she previously performed it, she can perform such work as it is  
generally performed at a light level of exertion. Since Plaintiff does  
not dispute that she can do medium level work, she can necessarily  
perform her past relevant work as a maid, because it is generally  
performed at a light level of exertion.

1 deviation." See Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995).  
2 When there is a conflict between the testimony of the VE and the DOT,  
3 the ALJ must elicit a reasonable explanation for the conflict before  
4 relying on the VE's testimony to support a decision about whether the  
5 claimant is disabled. Social Security Ruling 00-4p; Light v. Soc. Sec.  
6 Admin., 119 F.3d 789, 793-94 (9th Cir. 1997)(remanding where  
7 discrepancies between findings on residual functional capacity and the  
8 DOT were not explained by the ALJ of the VE).

9  
10 Here, as in Pinto, the ALJ included in his hypothetical posed to  
11 the VE the fact that Plaintiff was illiterate. (A.R. 242.) However,  
12 the VE failed to explain the impact Plaintiff's illiteracy has on her  
13 ability to perform her prior work and failed to account for the  
14 deviation from the Language Level 1 requirement set forth in the DOT for  
15 the job of a hotel maid. In the Joint Stipulation, the Commissioner  
16 asserts that plaintiff's ability "to perform almost the same job despite  
17 illiteracy reasonably shows that she would be able to perform this very  
18 similar light level job, despite illiteracy." (J.S. 12.) Such a  
19 conclusory statement is not persuasive evidence to support a deviation  
20 from a DOT requirement. Although "a claimant is not per se disabled if  
21 he or she is illiterate," the ALJ must definitively explain why he or  
22 she deviates from the DOT's language requirements when finding that  
23 claimant can perform her past relevant work. See Pinto, 249 F.3d at  
24 847. Accordingly, the VE failed to provide persuasive evidence to  
25 demonstrate that Plaintiff is capable of performing her past relevant  
26 work as a hotel maid, despite the ALJ's determination that she is  
27 illiterate.

1 **II. Remand Is Required.**

2  
3 The decision whether to remand for further proceedings or order an  
4 immediate award of benefits is within the district court's discretion.  
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
6 useful purpose would be served by further administrative proceedings, or  
7 where the record has been fully developed, it is appropriate to exercise  
8 this discretion to direct an immediate award of benefits. *Id.* at 1179  
9 ("the decision of whether to remand for further proceedings turns upon  
10 the likely utility of such proceedings"). However, where there are  
11 outstanding issues that must be resolved before a determination of  
12 disability can be made, and it is not clear from the record that the ALJ  
13 would be required to find the claimant disabled if all the evidence were  
14 properly evaluated, remand is appropriate. *Id.*

15  
16 Here, remand is the appropriate remedy to allow the ALJ the  
17 opportunity to remedy the above-mentioned deficiencies and errors. See,  
18 e.g., Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
19 further proceedings is appropriate if enhancement of the record would be  
20 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
21 1989)(remand appropriate to remedy defects in the record).  
22 Specifically, in the hypothetical to the VE, the ALJ must ask why the VE  
23 has deviated from the DOT when finding that Plaintiff can perform her  
24 past relevant work as a hotel maid.

25  
26 **CONCLUSION**

27  
28 Accordingly, for the reasons stated above, IT IS ORDERED that the

