



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

**I.**

**DISPUTED ISSUES**

As reflected in the Joint Stipulation, the disputed issues which Plaintiff raises as the grounds for reversal and/or remand are as follows:

1. Whether the ALJ properly determined that Plaintiff could perform the work of a hand packer;
2. Whether the ALJ properly considered the severity of Plaintiff's mental impairment; and
3. Whether the ALJ properly considered the consultative examiner's findings.

(JS at 3.)

**II.**

**STANDARD OF REVIEW**

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether the Commissioner's findings are supported by substantial evidence and whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at 401 (citation omitted). The Court must review the record as a whole and consider adverse as well as supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation, the Commissioner's decision must be upheld. Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984).

1 III.

2 **DISCUSSION**

3 **A. The ALJ’s Findings and Residual Functional Capacity (“RFC”)**  
4 **Assessment.**

5 The ALJ found that Plaintiff had the following severe impairments:  
6 impairment of the musculoskeletal system, from obesity and from diabetes  
7 mellitus. (AR at 285.) He found, however that these did not meet or equal a  
8 listing. (Id. at 286.)

9 The ALJ found that Plaintiff had the residual functional capacity (“RFC”)  
10 to perform a range of medium work as follows: able to lift and carry fifty pounds  
11 occasionally and twenty-five pounds frequently; able to stand and walk for six  
12 hours, and sit for six hours during an eight-hour workday; can occasionally climb;  
13 can frequently balance, stoop, kneel, crouch and crawl; must avoid concentrated  
14 exposure to extreme cold and heat; must avoid concentrated exposure to fumes,  
15 odors, dusts, gases, poor ventilation, and other respiratory irritants; and can  
16 perform unskilled, entry level, object-oriented, non-public work. (Id. at 287  
17 (emphasis added).)

18 The ALJ also found that:

19 According to the Dictionary of Occupational Titles, the job of  
20 packer is an unskilled (SVP 2) position performed at the medium  
21 exertional level (DOT#: 920.587-018) and information provided by the  
22 claimant suggests she performed this job consistent with the way it is  
23 performed nationally (see Exhibit 5-E, p.2). In comparing the demands  
24 of the claimant’s past jobs with her residual functional capacity, I  
25 conclude she is capable of returning to her past relevant work both as  
26 this job is generally performed and as she actually performed it.

27 (Id. at 290.)

1 **B. Plaintiff’s Past Relevant Work.**

2 **1. Background.**

3 Plaintiff contends that the ALJ improperly determined that she can perform  
4 her past relevant work as a packer. (JS at 3-5, 6.) Specifically, Plaintiff argues  
5 that according to the Dictionary of Occupational Titles (“DOT”),<sup>3</sup> a Packager,  
6 Hand (DOT 920.587-018) requires an employee to be around extreme heat on a  
7 frequent basis, i.e., such a condition exists from 1/3 to 2/3 of the time. (Id. at 4);  
8 see also DOT No. 920.587-018 (Fourth Ed., Revised 1991), 1991 WL 687916.  
9 Because the ALJ found that Plaintiff must avoid concentrated exposure to  
10 extreme heat, and the job as generally performed in the national economy requires  
11 such exposure, Plaintiff contends she is precluded from performing the duties of a  
12 Hand Packager, and the case should be reversed or remanded.

13 **2. Analysis.**

14 At step-four of the sequential evaluation process, a claimant must establish  
15 that her severe impairment or impairments prevent her from doing past relevant  
16 work. Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001). The regulations  
17 explain the step-four evaluation: “If we cannot make a decision based on your  
18 current work activity or on medical facts alone, and you have a severe  
19 impairment(s), we then review your residual functional capacity and the physical  
20

---

21 <sup>3</sup> The DOT, along with its supplementary Selected Characteristics of  
22 Occupations Defined in the DOT, contains relevant information concerning  
23 various types of work as well as detailed descriptions of the skills, tasks, and  
24 conditions involved in most jobs in the economy. Madrigal v. Sullivan, 917 F.2d  
25 1307 (9th Cir. 1990). The Secretary routinely relies on these publications in  
26 determining the skill level of a claimant’s past work, and in evaluating whether  
27 the claimant is able to perform other work in the national economy. See Villa v.  
28 Heckler, 797 F.2d 794, 798 (9th Cir. 1986 (“The Secretary may rely on the  
general job categories of the [*DOT*], with its supplementary *Selected*  
*Characteristics*, as presumptively applicable to a claimant’s prior work.”))

1 and mental demands of the work you have done in the past. If you can still do  
2 this kind of work, we will find that you are not disabled.” 20 C.F.R. §§  
3 404.1520(e); 416.920(e). The claimant has the burden of showing that she can no  
4 longer perform her past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e);  
5 Clem v. Sullivan, 894 F.2d 328, 331-32 (9th Cir. 1990). Although the burden of  
6 proof lies with the claimant, the ALJ still has a duty to make the requisite factual  
7 findings to support his conclusion. Pinto, 249 F.3d at 844-45; see also Henrie v.  
8 U.S. Dept. of Health & Human Serv., 13 F.3d 359 (10th Cir. 1993) (recognizing  
9 the tension created between the mandate of SSR 82-62 and the claimant’s burden  
10 of proof, and finding that the ALJ’s duty is one of inquiry and factual  
11 development while the claimant continues to bear the ultimate burden of proving  
12 disability).

13 In order to determine whether a claimant has the residual functional  
14 capacity to perform her past relevant work, the ALJ must evaluate the work  
15 demands of the past relevant work and compare them to the claimant’s present  
16 capacity. Villa, 797 F.2d at 797. Social Security Ruling (“SSR”)<sup>4</sup> 82-62 states  
17 that a determination that a claimant has the capacity to perform a past relevant job  
18 must contain among the findings the following specific findings of fact: (1) a  
19 finding of fact as to the claimant’s residual functional capacity; (2) a finding of  
20 fact as to the physical and mental demands of the past job or occupation; and (3) a  
21 finding of fact that the claimant’s residual functional capacity permits her to  
22 return to the past job or occupation. See SSR 82-62; see also Pinto, 249 F.3d at  
23

---

24 <sup>4</sup> Social Security Rulings are issued by the Commissioner to clarify the  
25 Commissioner’s regulations and policies. Bunnell v. Sullivan, 947 F.2d 341, 346  
26 n.3 (9th Cir. 1991). Although they do not have the force of law, they are  
27 nevertheless given deference “unless they are plainly erroneous or inconsistent  
28 with the Act or regulations.” Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir.  
1989).

1 844-45.

2 A finding that a claimant is able to return to her past relevant work must be  
3 based on adequate documentation and a careful appraisal. Dealmeida v. Bowen,  
4 699 F. Supp. 806, 807 (N.D. Cal. 1988) (“Without the proper foundation as to  
5 what plaintiff’s past relevant work entailed, the ALJ’s subsequent determination  
6 that plaintiff retained the residual functional capacity to perform that job is not  
7 supported by substantial evidence.”). This determination requires a careful  
8 appraisal of the claimant’s statements, the medical evidence, and, in some cases,  
9 corroborative information such as the DOT. SSR 82-62. Adequate  
10 documentation must be obtained to support the decision, including “factual  
11 information about those work demands which have a bearing on the medically  
12 established limitations.” Id. Thus, “[d]etailed information about . . . mental  
13 demands and other job requirements must be obtained as appropriate.” Id.; see  
14 Sivilay v. Apfel, 143 F.3d 1298, 1299 (9th Cir. 1998) (remanding to ALJ to  
15 “investigate fully the demands of the applicant’s past work and compare them to  
16 the applicant’s residual mental and physical capabilities”). Any determination  
17 regarding a claimant’s ability to perform past work “must be developed and  
18 explained fully in the disability decision” and “every effort must be made to  
19 secure evidence that resolves the issue as clearly and explicitly as circumstances  
20 permit.” SSR 82-62.

21 In this case, the ALJ satisfied the first requirement above in that he made  
22 sufficiently specific findings of fact regarding Plaintiff’s RFC. The ALJ,  
23 however, failed to make the requisite findings of fact regarding (1) the physical  
24 demands of Plaintiff’s past work as a hand packager; and (2) whether Plaintiff’s  
25 RFC actually permits her to return to her past job as a hand packager as she  
26 performed it or as it is performed generally, given his RFC finding that she avoid  
27 concentrated exposure to extreme heat. See SSR 82-62.

1 In support of his conclusion that Plaintiff is capable of performing her past  
2 relevant work as a hand packer, the ALJ noted only that information provided by  
3 Plaintiff “suggests” that she performed the job consistent with the way it is  
4 performed nationally as described in DOT 920.587-018. (AR at 290 (citing to  
5 AR Ex. 5-E at 2.) In reaching this determination, he relied on a Work History  
6 Report prepared by the person in the Administration who initially interviewed  
7 Plaintiff regarding her claims. (See AR at 102-03.) Plaintiff reported to the  
8 interviewer that her job description included (i) packing perfumes and soaps into  
9 boxes for shipping via an assembly belt process; (ii) assembling the boxes used  
10 for shipping; (iii) carrying the filled boxes to a pallet; and (iv) putting nozzles into  
11 sprinklers. (Id. at 102.) In response to a series of questions, she indicated that  
12 each day she walked for eight hours, stood for eight hours, did not sit, climb,  
13 kneel, crawl, or handle big objects, stooped for eight hours, crouched for eight  
14 hours, reached for eight hours, and handled small objects for eight hours. (Id. at  
15 103.) She noted that she sometimes lifted boxes up to forty pounds, frequently  
16 lifted boxes up to twenty pounds, and had to lift and carry the boxes  
17 approximately six feet from the work area to the pallet. (Id.) There was no  
18 question asked regarding the environmental conditions of Plaintiff’s job. (Id. at  
19 102-03.)

20 The Court searched in the record for any description regarding the level of  
21 environmental heat or cold to which Plaintiff was exposed in her past relevant  
22 work as a packager. As noted, the report relied on by the ALJ included  
23 information about various demands of Plaintiff’s work as a hand packer, but there  
24 was no reference regarding prolonged exposure to heat on the job. (Id. at 102-  
25 03.) Plaintiff also testified at the hearing and did not mention heat or cold as a  
26 factor in her past work. (AR at 592-93, 601.) In fact, there was no discussion at  
27 the hearing about Plaintiff’s past relevant work. (See AR at 579-606.) The ALJ  
28

1 was required to develop an adequate record on Plaintiff's past relevant work and  
2 the demands of her past relevant work regarding exposure to heat and failed to do  
3 so. See Villa, 797 F.2d at 797.

4 Because the ALJ relied on the DOT's definition of hand packager to  
5 determine that Plaintiff was able to perform that job as it was generally performed  
6 and as she performed it, yet failed to develop the record regarding the  
7 environmental conditions of Plaintiff's past work as she performed it, or to  
8 reconcile the environmental limitation with the job as generally performed, there  
9 is an ambiguity in the record makes it difficult for this Court to review and affirm  
10 his decision. Thus, the Court finds that there is a "gap in [the ALJ's reasoning  
11 that must be filled on remand." See Villa, 797 F.2d at 799 (internal quotation  
12 marks omitted).

13 Accordingly, this Court finds the case should be remanded to the  
14 Commissioner for further clarification on this issue.

15 **C. The ALJ Properly Considered the Severity of Plaintiff's Mental**  
16 **Impairment.**

17 Plaintiff contends the ALJ failed to properly consider the 2004 opinion of  
18 consultative examining psychiatrist, Linda M. Smith, M.D., that Plaintiff is  
19 mildly impaired in many of her mental abilities. (JS at 7.) She contends that the  
20 many mild limitations recognized by Dr. Smith resulted in a more than minimal  
21 effect on Plaintiff's ability to do basic work activities. (Id. at 8.) This Court does  
22 not agree.

23 Although in a prior decision the ALJ found Plaintiff's mental impairment  
24 severe, he changed his finding from his earlier decision after reviewing the  
25 relevant evidence. (AR at 285-86; see also id. at 16-17, 299.) Here, he found that  
26 Plaintiff's functional limitations were no more than "slight." (Id. at 285.) He  
27 cited treating, examining, and non-examining medical source evidence in support  
28



1 of this finding, including a 2007 report by consulting psychiatrist, Dr. Smith.  
2 (Id.) Dr. Smith's more recent examination found less impairment than her prior  
3 examination and report, and noted Plaintiff's lack of treatment since 2003. (Id. at  
4 285, 453.) Based on the foregoing, the Court finds that the ALJ's finding was  
5 supported by substantial evidence.

6 **D. The Consultative Examiner's Opinion.**

7 Plaintiff contends that the ALJ failed to properly consider the opinion of  
8 Dr. Kimberly R. Clements, who conducted a June 28, 2006, internal medicine  
9 evaluation of Plaintiff. (AR at 262.) Dr. Clements found only mild limitations  
10 and opined that Plaintiff may have some communicative limitations because of  
11 her memory problems and work place limitations relating to those limitations.  
12 (Id.)

13 With respect to Dr. Clement's evaluation, the ALJ stated:

14 I have also given weight to the opinion of Kimberly R. Clements,  
15 M.D., board certified in internal medicine, who evaluated the claimant  
16 on June 28, 2006 at the request of the Department of Social Services.  
17 The claimant told Dr. Clements she had been diagnosed with diabetes  
18 and hypertension and had also been increasingly forgetful. She also  
19 related having asthma, poor vision, and difficulty controlling her  
20 bladder. On examination, the claimant was observed to be  
21 well-developed, well-nourished, and in no acute distress. She showed  
22 no ataxia or dyspnea and was able to get on and off the examination  
23 table without difficulty. The claimant's vision was 20/25 in both eyes  
24 without glasses and she was visually able to move about the office  
25 without any help. Her breath sounds were symmetric, there were no  
26 rhonchi or rales, and her expiratory phase was within normal limits.  
27 Examination of her abdomen was positive for bowel sounds, it was soft,  
28

1 non-tender, without hepatosplenomegaly or masses, and with no  
2 evidence of rebound or guarding. The claimant did have some  
3 discomfort in her lower back and tenderness in the paraspinal areas in  
4 the lumbar region bilaterally, but maintained full range of motion.  
5 Examination of her extremities and joints revealed no abnormalities and  
6 full range of motion. Her pulses were 2+ bilaterally. Neurologically,  
7 the claimant's motor tone was good bilaterally with good active motion  
8 and 5/5 strength in all extremities. Her sensation was intact to light  
9 touch, pinprick, vibration, and position. Her reflexes were normal and  
10 her gait was normal. Dr. Clements concluded the claimant had several  
11 chronic conditions, but was able to follow instructions and was  
12 physically capable of performing work within the limitations set forth  
13 above (Exhibit 8-F). I give weight to her assessment as it is  
14 well-supported by objective findings and generally consistent with the  
15 medical evidence of record.

16 (AR at 287.)

17 Plaintiff contends that although the ALJ extensively discussed Dr.  
18 Clement's findings and afforded them considerable weight, he failed to mention  
19 Dr. Clements' opinion regarding Plaintiff's mild difficulty communicating  
20 because of her memory and work place limitations that may be related to that  
21 difficulty. (JS at 11.)

22 Because the ALJ's error in failing to make the requisite factual findings  
23 regarding Plaintiff's past relevant work constitutes sufficient reason to remand the  
24 case, depending on the outcome of the remand proceedings, the ALJ will have an  
25 opportunity to address this again and should consider this issue when determining  
26 the merits of Plaintiff's case on remand.

27 **E. This Case Should Be Remanded for Further Administrative**

