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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GINNY BURNS,)	Case No. EDCV 09-1686-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	REVERSING DECISION OF
)	COMMISSIONER AND REMANDING
MICHAEL J. ASTRUE,)	FOR FURTHER PROCEEDINGS
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

On September 15, 2009, Ginny Burns (“Plaintiff” or “Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Supplemental Social Security income (“SSI”) benefits. The Commissioner filed an Answer on April 6, 2010. On June 15, 2010, the parties filed a Joint Stipulation (“JS”).

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before the Magistrate Judge. The matter is now ready for decision. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and remanded for further proceedings in accordance with law and with this Memorandum Opinion and Order.

1 **BACKGROUND**

2 Plaintiff is a 33 year old female who was determined to have the medically
3 determinable severe impairment of mood disorder. (AR 11.) Plaintiff has not engaged in
4 substantial gainful activity since August 9, 2007, the application date. (AR 11.)

5 Plaintiff’s claim for SSI benefits was denied initially and on reconsideration on May
6 12, 2008. (AR 9.) She filed a timely request for hearing, which was held before
7 Administrative Law Judge (“ALJ”) Joseph Schloss on March 16, 2009, in San Bernardino,
8 California. (AR 9.) Claimant appeared and testified. (AR 9.) So did vocational expert
9 Corinne Porter. (AR 9.)

10 The ALJ issued an unfavorable decision on June 2, 2009. (AR 9-16.) The ALJ
11 determined that Plaintiff has the residual functional capacity (“RFC”)¹ to perform a full range
12 of work at all exertional levels but with the following nonexertion limitation: the Claimant can
13 perform short, repetitive tasks. (AR 12.) Based on this RFC, the ALJ found that Claimant
14 could perform her prior relevant work as a janitor and, therefore, was not disabled within the
15 meaning of the Social Security Act. (AR 15-16.)

16 **DISPUTED ISSUES**

17 As reflected in the Joint Stipulation, the sole disputed issue that Plaintiff is raising as
18 a ground for reversal is as follows:

- 19 1. Whether the ALJ’s Residual Functional Capacity (“RFC”) limitation to simple,
20 repetitive work was consistent with a Reasoning Level 3 job.

21 **STANDARD OF REVIEW**

22 Under 42 U.S.C. § 405(g), this Court reviews the ALJ’s decision to determine
23 whether the ALJ’s findings are supported by substantial evidence and whether the proper
24 legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991).
25 Substantial evidence means “more than a mere scintilla’ but less than a preponderance.”

26 _____
27 ¹ Residual functional capacity is what one “can still do despite [his or her] limitations”
28 and represents an assessment “based on all the relevant evidence.” 20 C.F.R. §§
404.1545(a)(1), 416.945(a)(1).

1 Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402
2 U.S. 389, 401 (1971)).

3 Substantial evidence is “such relevant evidence as a reasonable mind might accept
4 as adequate to support a conclusion.” Richardson, 402 U.S. at 401 (internal quotations and
5 citations omitted). This Court must review the record as a whole and consider adverse as
6 well as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.
7 2006). Where evidence is susceptible to more than one rational interpretation, the ALJ’s
8 decision must be upheld. Morgan v. Comm’r, 169 F.3d 595, 599 (9th Cir. 1999). “However,
9 a reviewing court must consider the entire record as a whole and may not affirm simply by
10 isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting
11 Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d
12 625, 630 (9th Cir. 2007).

13 **SEQUENTIAL EVALUATION**

14 The Social Security Act defines disability as the “inability to engage in any substantial
15 gainful activity by reason of any medically determinable physical or mental impairment
16 which can be expected to result in death or . . . can be expected to last for a continuous
17 period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
18 Commissioner has established a five-step sequential process to determine whether a
19 claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

20 The first step is to determine whether the claimant is presently engaging in
21 substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
22 claimant is engaging in substantially gainful activity, disability benefits will be denied.
23 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the
24 claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at 746.
25 Third, the ALJ must determine whether the impairment is listed, or equivalent to an
26 impairment listed, in Appendix I of the regulations. Id. If the impediment meets or equals
27 one of the listed impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at
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1 141. Fourth, the ALJ must determine whether the impairment prevents the claimant from
2 doing past relevant work (PRW). Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).
3 Before making the step four determination, the ALJ first must determine the claimant's RFC.
4 20 C.F.R. § 416.920(e). The RFC must consider all of the claimant's impairments, including
5 those that are not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling
6 ("SSR") 96-8p. If the claimant cannot perform his or her past relevant work, the ALJ
7 proceeds to the fifth step and must determine whether the impairment prevents the claimant
8 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869
9 (9th Cir. 2000).

10 The claimant bears the burden of proving steps one through four, consistent with the
11 general rule that at all times the burden is on the claimant to establish his or her entitlement
12 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the
13 claimant, the burden shifts to the Commissioner to show that the claimant may perform
14 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). If the
15 Commissioner cannot meet this burden, then the claimant is disabled and entitled to
16 benefits. Id.

17 In this case, the ALJ concluded at step four of the sequential process that Plaintiff
18 can perform her prior relevant work as a janitor as actually and generally performed and
19 therefore is not disabled within the meaning of the Social Security Act. (AR 15-16.)

20 **DISCUSSION**

21 The ALJ failed to develop the record adequately regarding Claimant's PRW and in
22 not resolving obvious ambiguities that make meaningful review of the ALJ's decision
23 impossible. The ALJ also failed to make appropriate findings regarding Claimant's past
24 relevant work as a janitor as both actually and generally performed. The ALJ's short, two
25 paragraph discussion of PRW is conclusory and unsupported by factual findings grounded
26 in substantial evidence. The ALJ's PRW determinations cannot stand.

1 **A. Medical And Procedural Background**

2 Plaintiff alleged “mental impairment, bipolar, paranoia, schizophrenia, personality
3 disorder and antisocial personality disorder.” (AR 13, 103.) She claims that she paces, gets
4 agitated with employers, believes people are talking about her, and hears voices. (AR 13,
5 103.)

6 Plaintiff has a long and troubled psychiatric and criminal history. She had a
7 psychiatric admission at age 11. (AR 13.) Her juvenile legal history includes assault and
8 battery, threatening phone calls, assault on a police officer, vehicle theft, assault on a
9 custodial officer, and voluntary manslaughter. (AR 14.) At age 13, she stabbed a man who
10 sexually molested her. (AR 14.) Her adult legal history includes battery, assault with a
11 deadly weapon, threatening a crime with intent to terrorize, battery by a prisoner, burglary,
12 prostitution, passing a fallacious check, under the influence of controlled substances, and
13 false identification to a police officer. (AR 14.)

14 While incarcerated, she received treatment for a psychiatric disorder or
15 schizoaffective disorder and post-traumatic stress disorder. (AR 14.) She was in Patton
16 State Hospital from May, 2007, to August 8, 2007. (AR 14.) She was diagnosed with
17 bipolar disorder and cocaine dependence. (AR 14.)

18 The ALJ gave considerable weight to the consulting psychiatric evaluation of
19 Dr. Shireen Damania conducted on November 6, 2007. (AR 147-150.) On mental status
20 examination, Dr. Damania found that there was no thought disorder (AR 149), but insight
21 and judgment were mildly impaired. (AR 150.) Claimant had discontinued psychotropic
22 drugs. (AR 150.) Dr. Damiana diagnosed Claimant with mood disorder, psychotic disorder
23 and cocaine dependence in remission. (AR 150.) She also observed that Claimant is able
24 to understand, carry out and remember three and four step job instructions, but would have
25 difficulty with detailed and complex job instructions. (AR 150.) State agency review
26 psychiatrists also diagnosed psychotic disorder, mood disorder, and cocaine dependence in
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1 remission. (AR 150.) They concluded that Claimant could perform “simple, repetitive”
2 tasks. (AR 15.)

3 The ALJ also relied on a January 17, 2008, mental status examination that indicated
4 the Claimant’s “memory and cognitive functioning seemed to be fairly intact.” (AR 15.)
5 Judgment and insight were moderately to severely impaired and, according to the ALJ,
6 Claimant was diagnosed with a psychotic disorder. The diagnosis also included personality
7 disorder. (AR 172.) Claimant was given a Global Assessment of Functioning (“GAF”) score
8 of 69, indicating some difficulty in functioning. (AR 15.) The ALJ does not indicate in his
9 decision that the author of this mental assessment was a social worker. (AR 173.)

10 Notwithstanding these diagnoses of psychotic disorder, personality disorder, bipolar
11 disorder, and substance disorder, the ALJ found only that the mood disorder was severe.
12 (AR 11.) The ALJ also determined that none of the impairments, severe or nonsevere, met
13 or equaled a listing. (AR 11-12.) Plaintiff does not challenge the ALJ’s step two and three
14 determinations.

15 Based on the various assessments of her mental impairments described above, the
16 ALJ at step four of the sequential process determined that Claimant had the residual
17 functional capacity to perform a full range of work at all exertional levels, subject to a
18 nonexertional limitation to “short, repetitive tasks.” (AR 12.) Claimant does not challenge
19 the ALJ’s RFC determination.

20 Based on Claimant’s assessed RFC, the ALJ determined that Claimant could perform
21 her past relevant work as a janitor as actually performed. (AR 15.) It is this step four
22 determination that Plaintiff challenges.

23 **B. Applicable Law Regarding Past Relevant Work (“PRW”)**

24 A claimant has the burden of proving that he or she no longer can perform past
25 relevant work. Pinto, 249 F.3d at 844. The ALJ, however, has a duty to make the requisite
26 factual findings to support his conclusion on PRW. Id. This is done by examining a
27 claimant’s RFC and the physical and mental demands of the claimant’s PRW. Id. at
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1 844-45.

2 A claimant must be able to perform: (1) the functional demands and job duties of a
3 particular past relevant job as he or she actually performed it, or (2) the functional demands
4 and job duties of the occupation as generally required by employers throughout the national
5 economy. SSR 82-61; Pinto, 249 F.3d at 845. In making this determination, the ALJ must
6 make the following findings of fact:

- 7 1. A finding of fact as to the individual's RFC.
- 8 2. A finding of fact as to the physical and mental demands of the
9 past job/occupation.
- 10 3. A finding of fact that the individual's RFC would permit a return to
11 his or her past job or occupation.

12 SSR 82-62. Past work experience "must be considered carefully to assure that the
13 available facts support a conclusion regarding the claimant's ability or inability" to perform
14 the functional activities of past work. Id. The ALJ's decision "must be developed and
15 explained fully in the disability decision." Id.

16 Social Security regulations advise the ALJ to consider first whether the individual still
17 can do PRW as he or she actually performed it because individual jobs within a category
18 may not entail all of the requirements of a job in that category set forth in the Dictionary of
19 Occupational Titles ("DICOT"). SSR 96-8p; Pinto, 249 F.3d at 845. The claimant is an
20 important source of information about his or her PRW. SSR 82-41; Pinto, id. Other sources
21 of information that may be consulted include vocational expert ("VE") testimony and DICOT.
22 20 C.F.R. § 404.1560 (b)(2) and § 416.960 (b)(2); SSR 82-61.

23 The ALJ then can proceed to determine whether a claimant can perform his or her
24 PRW as generally performed. Id. Typically, the best source of how a job is generally
25 performed in the national economy is the DICOT. Id. An ALJ may accept vocational expert
26 testimony that varies from the DICOT, but the record must contain "persuasive evidence to
27 support the deviation." Id. at 846 (quoting Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir.
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1 1995)). The ALJ has an affirmative responsibility to ask whether a conflict exists between a
2 VE's testimony and the DICOT. SSR OO-4p; Massachi v. Astrue, 486 F.3d 1149, 1153 (9th
3 Cir. 2007). If there is a conflict the ALJ must obtain a reasonable explanation for the conflict
4 and then must decide whether to rely on the VE or DICOT. Id.; Massachi, 486 F.3d at 1153.
5 Failure to do so, however, can be harmless error where there is no conflict or the VE
6 provides sufficient support to justify variation from DICOT. Id. at 1154 n.19.

7 Adequate documentation of past work includes factual information about those work
8 demands bearing on medically established limitations. SSR 82-62. Detailed information
9 about mental demands must be obtained as appropriate. Id. For a claim involving a mental
10 impairment, "care must be taken to obtain a precise description of the particular job duties
11 which are likely to produce tension and anxiety, e.g., speed, precision, complexity of tasks,
12 independent judgment, working with other people, etc." Id. (emphasis added).

13 **C. The ALJ Failed To Develop The Record Adequately**

14 Other than noting that Claimant had prior work as a janitor, the ALJ fails to present
15 any details about or identify the actual job functions of her past work as a janitor as she
16 actually performed it. Claimant's only significant past employment was as a janitor at
17 Walmart for nine months in 1998-1999. (AR 23, 93-94, 104.) She described the job as
18 "floor waxing, sweeping, cleaning spills." (AR 104.) She used machines, tools, and
19 equipment. (AR 104.) Exertionally, Claimant stated that she lifted and carried mops and
20 dust brooms all day, she had to wax floors, buff floors, strip the floor, vacuum floors, and
21 sometimes cleaned the bathroom. (AR 104.)

22 At the hearing, when the VE Ms. Porter took the stand, the ALJ began by asking her
23 to make sure her testimony was consistent with the DICOT and if she disagreed with the
24 DICOT "to let us know." (AR 30.) Ms. Porter never answered or got the chance to answer
25 because the ALJ immediately began another colloquy:
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1 Q: Please make sure that your testimony is consistent with the
2 Dictionary of Occupational Titles, if you disagree with the DOT let us know.
3 Give me exertional and skill level of past relevant jobs?

4 A: There are a number of short duration jobs under \$100, the
5 longest job was as, per the record and her testimony, janitor, which is 382-
6 664-110, medium, semiskilled, SVP three.

7 (AR 30.) Ms. Porter obviously was referencing the DICOT job classification and limitations
8 specified therein for the job of janitor. DICOT, 1991 WL 673265 (G.P.O.). SVP three is the
9 specific vocational preparation needed for the job, which is 1 to 3 months. Id.; see also
10 DICOT App. C, 1991 WL 688702 (G.P.O.); Meissl v. Barnhart, 403 F. Supp. 2d 981, 983
11 (C.D. Cal. 2005). The VE did not mention the specific job functions of Claimant's Walmart
12 job.

13 The VE in the comment above also made no mention of the mental demands of the
14 janitor job, either as actually performed or as generally performed, perhaps because the
15 ALJ never asked for them in his question. DICOT 382.664-010 indicates that a janitor is a
16 Reasoning Level 3 occupation, which means that an individual must: "Apply commonsense
17 understanding to carry out instructions furnished in written, oral or diagrammatic form. Deal
18 with the problems involving several concrete variables in or from standardized situations."
19 Id.; see also DICOT App. C setting forth General Educational Development ("GED")
20 reasoning levels; Meissl, 403 F. Supp. 2d at 983.

21 The ALJ then posed a hypothetical question to the VE incorporating no exertional
22 limitations, moderate mental limitations but able to function satisfactorily, and "limited to
23 short, repetitive tasks":

24 Q: What jobs could that do . . . could that person do if she couldn't
25 do her past relevant job or can she do her past relevant?
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1 A: I think that past work is performable, it's an SVP of three, but it's,
2 but it is short durational repetitive cleaning type functions.

3 (AR 30.)

4 The VE once again began by referencing the DICOT. The VE did not appear to
5 address Claimant's PRW as actually performed, or at least did not distinguish between
6 PRW as actually performed and generally performed. The VE does not specifically mention
7 the mental demands of the job of janitor. The VE's characterization of the janitor job as
8 comprising "short durational repetitive cleaning type functions" is more a description of the
9 job functions, than an assessment of the mental demands of those job functions. The VE
10 does not discuss or address GED reasoning levels. The VE also does not mention the
11 specific job functions of the Walmart job or its mental demands. The VE does not indicate
12 whether the job functions of the Walmart job differ from the DICOT janitor classification.

13 Although the Ninth Circuit has not addressed the issue yet, district courts in this
14 Circuit have held that a limitation to simple, repetitive tasks is consistent with GED
15 Reasoning Level Two. Bagshaw v. Astrue, 2010 WL 256544, *6 (C.D. Cal. 2010); Etter v.
16 Astrue, 2010 WL 4314415, *4 (C.D. Cal. 2010); Pak v. Astrue, 2009 WL 2151361, *7 (C.D.
17 Cal. 2009); Tudino v. Barnhart, 2008 WL 4161443, *10-*11 (S.D. Cal. 2008); Torrez v.
18 Astrue, 2010 WL 2555847, *7-*9 (E.D. Cal. 2010). That means, "Apply commonsense
19 understanding to carry out detailed but uninvolved written or oral instructions. Deal with
20 problems involving a few concrete variables in or from standardized situations." DICOT
21 App. C, 1991 WL 688702 (G.P.O.). District court authorities in this Circuit have held that a
22 limitation to simple, repetitive instructions is inconsistent with Reasoning Level 3 jobs.
23 Bagshaw; Etter; Pak; Tudino; Torrez, supra. Thus, absent persuasive evidence to justify a
24 variation from the DICOT job functions, the ALJ's limitation to simple, repetitive tasks would
25 mean Claimant could not perform her PRW as a janitor, which requires a Reasoning
26 Level 3.

1 The record before the Court on Plaintiff's PRW is ambiguous and not developed
2 adequately. The VE never discussed the mental demands of the job of janitor, either as
3 actually performed or generally performed. There is no discussion of the GED Reasoning
4 Levels. The ALJ never received an answer from the VE whether she was varying from the
5 DICOT, much less an adequate explanation for the conflict or any evidence that would
6 support varying from the DICOT. The VE's testimony is so ambiguous one cannot tell
7 whether the VE is addressing Plaintiff's PRW as actually or generally performed or both, nor
8 can one tell whether the VE simply means to characterize the DICOT job functions as they
9 are or to vary from them.

10 In Social Security cases, the ALJ has a special, independent duty to develop the
11 record fully and fairly and to assure that the claimant's interests are considered.
12 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001); Smolen v. Chater, 80 F.3d 1273,
13 1288 (9th Cir. 1996). Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ has a
14 basic duty to inform himself about facts relevant to his decision. Heckler v. Campbell, 461
15 U.S. 458, 471 n.1 (1983) (Brennan, J., concurring). The ALJ's duty to develop the record
16 exists even when the claimant is represented by counsel. Tonapetyan, 242 F.3d at 1150.

17 Ambiguous evidence or the ALJ's own finding that the record is inadequate to allow
18 for proper evaluation of the evidence triggers the ALJ's duty to conduct an appropriate
19 inquiry. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ may discharge
20 this duty by subpoenaing the claimant's physicians, submitting questions to them, continuing
21 the hearing or keeping the record open after the hearing to allow supplementation of the
22 record. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150.

23 Here, the ALJ failed to develop the record adequately by failing to resolve the
24 obvious ambiguities described above.

1 **D. The ALJ's Determination Of PRW As Actually Performed**
2 **Must Be Reversed**

3 The ALJ decision begins with Plaintiff's PRW as generally performed. Social Security
4 regulations and Ninth Circuit cases, however, indicate that step four PRW determinations
5 should begin with past work as it was actually performed in a particular job. Accordingly, the
6 Court will begin with the ALJ's determination of PRW as actually performed:

7 In comparing the claimant's residual functional capacity with the
8 mental demands of this work [her past relevant work as a janitor], the
9 undersigned finds that the claimant is able to perform it as actually
10 performed. The latest Global Assessment of Functioning was 69 (Exhibit
11 6F, p. 5). According to the Diagnostic and Statistical Manual of Mental
12 Disorders (DSM-IV) (4th ed. 1994), a GAF score between 61-70 indicates
13 some mild symptoms or some difficulty in social, occupational, or school
14 functioning, but generally functioning pretty well. Memory and cognitive
15 function appear fairly intact. (Exhibit F 6F, p. 5).

16 (AR 15-16.) The above analysis is plainly inadequate to support the ALJ's determination.

17 The only evidence presented is the social worker's GAF assessment and evaluation
18 of memory and cognitive function, which are relevant only to RFC and already cited in the
19 ALJ's RFC determination that included a limitation to simple, repetitive tasks. (AR 13.) The
20 RFC addressed Plaintiff's mental limitations, not the mental demands of the janitor job. The
21 ALJ was required to make findings of fact as to the physical and mental demands of the
22 past job/occupation. SSR 82-62.

23 The ALJ's purported "finding" that, comparing Claimant's RFC "with the mental
24 demands of this work," Claimant can perform his PRW as actually performed (AR 15) is
25 nothing more than a bare conclusion with no factual support. As already noted, the ALJ
26 never mentioned or discussed the specific job functions or mental demands of the Walmart
27 janitor job. The VE also never mentioned or discussed the specific job functions or mental
28 demands of the Walmart job.

1 Neither the ALJ nor the VE discuss the DICOT's GED Reasoning Level 3 for janitors.
2 By the authority in this Circuit, the ALJ's limitation to simple repetitive tasks would conflict
3 with the DICOT's specification of Reasoning Level 3 for janitor positions. The ALJ never
4 obtained an answer from the VE whether her opinion on PRW varied from the DICOT. The
5 VE did not testify that the mental demands of the Walmart job were less than those in janitor
6 jobs as generally performed in the economy. There is no evidence that the mental
7 demands of the Walmart job are less than Reasoning Level 3.

8 The Commissioner argues that the DICOT plays no part in the determination of PRW
9 as actually performed, but cites no authority to support that contention. Two Ninth Circuit
10 decisions do name two sources of claimant information that "may be used," the claimant's
11 testimony and a vocational or work history report, but these cases do not preclude use of
12 other sources of information. Pinto, 249 F.3d at 845 (emphasis added); Lewis v. Barnhart,
13 281 F.3d 1081, 1083 (9th Cir. 2002). The holdings in both Pinto and Lewis are based on
14 Social Security regulations. In 2003, the Social Security Administration amended two
15 regulations that now expressly provide for use of vocational expert testimony and the
16 DICOT in making determinations of PRW both as actually performed and as generally
17 performed. 20 C.F.R. § 404.1560 (b)(2) and § 416.960 (b)(2); see Daniels v. Astrue, 2007
18 WL 2126395, *5 n.7 (W.D. Va. 2007). An even earlier regulation makes reference to
19 "significant variations between a claimant's description and the description shown" in the
20 DICOT. SSR 82-61. Several cases in this Circuit have applied the DICOT reasoning levels
21 to past jobs as actually performed, although these cases did not distinguish PRW as
22 generally performed from actually performed. See Pak, Etter, Torrez, supra. The Court
23 sees nothing inappropriate in embracing GED Reasoning Level 3 as the level required for
24 the Walmart janitor job in the absence of any evidence or opinion that the mental demands
25 of the Walmart job differ from those of the janitor classification in the DICOT.

26 The Commissioner also cites Dr. Damania's conclusion that Plaintiff was able to
27 understand, remember, and carry out three and four step instructions. (AR 14-15, 150.)
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1 Again, however, this information is relevant to RFC and already incorporated into Claimant's
2 RFC with a limitation to simple, repetitive tasks that are consistent with Reasoning Level 2.
3 Reasoning Level 1 provides that a claimant must apply common sense understanding to
4 carry out "simple one-or-two step instructions." DICOT App. C, 1991 WL 688702 (G.D.O.).
5 This implies that, at Reasoning Level 2, a claimant can carry out three and four step
6 instructions. The ALJ's reference to three and four step instructions does not mean that
7 Claimant can perform Reasoning Level 3 jobs.²

8 The ALJ, in determining Claimant's PRW as actually performed, failed to obtain
9 detailed information about the mental demands of the job of janitor and to make requisite
10 findings of fact as required by SSR 82-62. The ALJ did not carefully consider past work
11 experience or even discuss it. Id. The ALJ decision was not developed and explained fully.
12 Id. The ALJ's decision must be reversed because it is not based on substantial evidence.

13 **E. The ALJ's Determination Of PRW As Generally Performed**
14 **Also Must Be Reversed**

15 The ALJ's PRW determination as generally performed is short, conclusory,
16 ambiguous, lacking in factual support and requisite factual findings.

17 Here is the ALJ's determination:

18 The vocational expert testified that the job of janitor (Dictionary of
19 Occupation Titles 382.664-010) is medium in exertion and semi-skilled with
20 an SVP of 3. The job tasks are of short duration and repetitive in nature.
21 With the residual functional capacity assessed herein, the claimant could
22 perform her past relevant work as a janitor.

23
24 ² Another important omission in the ALJ decision is any assessment of how
25 Claimant's extensive psychiatric history has affected her ability to perform her prior job.
26 Claimant's Walmart job experience occurred over 10 years ago in 1998-99 when she was
27 21 or 22 years old. There is no record evidence of how successfully or unsuccessfully she
28 performed that job. There is no assessment of her psychiatric limitations then or now, or
how her intervening psychiatric disturbances have affected her. These concerns, of course,
go to RFC which was not disputed by Claimant.

1 (AR 15.) The parties express some inconsistency on whether the ALJ's determination even
2 addresses PRW as generally performed but nonetheless litigate the issue fully. The Court
3 is satisfied from the language above and the heading, "The claimant is capable of
4 performing past relevant work as a janitor" (AR 15), that the ALJ decided PRW both as
5 generally performed as well as actually performed.

6 The ALJ's decision references the DICOT physical demands for the job of janitor but
7 never discusses or mentions that DICOT specifies Reasoning Level 3 for the mental
8 demands of the job. The Commissioner suggests that the VE's characterization of the
9 janitor job as consisting of job tasks that are "of short duration and repetitive in nature" was
10 meant to express variation from DICOT and is 15a sufficient explanation for the variance.
11 As already noted, the Court does not believe the VE's testimony is clear. The Court cannot
12 discern whether the VE was simply describing the job functions of a janitor as generally
13 performed, which includes a Reasoning Level of 3 inconsistent with Claimant's RFC, or
14 reclassifying those job functions in a way that would be consistent with Reasoning Level 2.
15 If the latter, the ALJ did not obtain an explanation for the deviation. The decision reflects no
16 awareness that there was any deviation. The fact that neither the ALJ nor VE ever mention
17 the GED reasoning levels lead the Court to believe that neither was aware of the case law in
18 this Circuit regarding the inconsistency between a limitation to simple, repetitive tasks and
19 Reasoning Level 3 jobs.

20 The ALJ failed to obtain adequate information about the mental demands of the
21 janitor job as generally performed and to make findings of fact about those mental demands
22 based on substantial evidence. Even assuming the VE's testimony conflicted with the
23 DICOT, there is no meaningful explanation or factual support offered for the variation. The
24 ALJ's determination of generally performed PRW is not developed and explained fully. The
25 ALJ's decision must be reversed.

ORDER

IT IS HEREBY ORDERED that Judgment be entered reversing the step four decision of the Commissioner of Social Security and remanding for further proceedings in accordance with law and with this Memorandum Opinion and Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: November 18, 2010

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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