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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JOHN WRIGHT,	)	NO. EDCV 10-400 SS
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM DECISION AND ORDER</b>
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff John Wright ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Supplemental Security Income ("SSI") disability benefits. Alternatively, he asks for a remand. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. Pursuant to the Court's Order Regarding Further Proceedings, the parties filed separate memoranda in support of their respective positions. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further administrative proceedings.



1 Subpart P, Appendix 1 (the "Listings")? If so, the  
2 claimant is found disabled. If not, proceed to step  
3 four.

4 (4) Is the claimant capable of performing his past work? If  
5 so, the claimant is found not disabled. If not, proceed  
6 to step five.

7 (5) Is the claimant able to do any other work? If not, the  
8 claimant is found disabled. If so, the claimant is  
9 found not disabled.

10  
11 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d  
12 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098-99); 20  
13 C.F.R. §§ 404.1520(b) - 404.1520(g)(1) and 416.920(b) - 416.920(g)(1).  
14

15 The claimant has the burden of proof at steps one through four, and  
16 the Commissioner has the burden of proof at step five. Bustamante, 262  
17 F.3d at 953-54 (citing Tackett, 180 F.3d at 1098). Additionally, the  
18 ALJ has an affirmative duty to assist the claimant in developing the  
19 record at every step of the inquiry. Id. at 954. If, at step four, the  
20 claimant meets his burden of establishing an inability to perform past  
21 work, the Commissioner must show that the claimant can perform some  
22 other work that exists in "significant numbers" in the national economy,  
23 taking into account the claimant's residual functional capacity  
24 ("RFC"),<sup>2</sup> age, education, and work experience. Tackett, 180 F.3d at  
25 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1),  
26

27 <sup>2</sup> Residual functional capacity is "what [one] can still do  
28 despite [his] limitations" and represents an "assessment based upon all  
of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 416.920(g) (1). The Commissioner may do so by the testimony of a  
2 vocational expert ("VE") or by reference to the Medical-Vocational  
3 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2  
4 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157,  
5 1162 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1100-01). When a  
6 claimant has both exertional (strength-related) and nonexertional  
7 limitations, the Grids are inapplicable and the ALJ must take the  
8 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869  
9 (9th Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.  
10 1988)).

11  
12 **THE ALJ'S DECISION**  
13

14 The ALJ applied the five-step sequential evaluation process. At  
15 the first step of the evaluation process, the ALJ found that Plaintiff  
16 had not engaged in substantial gainful activity since his application  
17 date. (Administrative Record ("AR") 12). At step two, the ALJ found  
18 that Plaintiff's lumbar sprain/strain, lumbar degenerative disc disease,  
19 cervical sprain/strain and affective disorder were severe impairments.  
20 (Id.). At step three, the ALJ found that the impairments, individually  
21 or in combination, did not meet or equal any of the Listings. (Id.).  
22 After considering Plaintiff's symptoms and the medical opinions, the ALJ  
23 concluded that Plaintiff had the RFC "to perform light work" as defined  
24 in 20 C.F.R. § 416.967(b) with certain limitations. (AR 13-16). The  
25 ALJ found that Plaintiff could stand or walk only two hours out of an  
26 eight-hour day, fifteen to thirty minutes at a time, using a cane as  
27 needed. (AR 13). Plaintiff could sit for six hours out of an eight-  
28 hour day, with normal breaks every two hours and the allowance to stand

1 and stretch for three minutes every hour. (Id.). Plaintiff could  
2 occasionally stoop and bend, but could not climb ladders, work at  
3 heights, or balance. (Id.). Plaintiff could engage in occasional neck  
4 motion, with his head in a comfortable position most of the time, but  
5 was precluded from extremes of motion and could only occasionally  
6 maintain a fixed head position for fifteen to thirty minutes at a time.  
7 (Id.). Plaintiff was limited to simple, repetitive goal-oriented work  
8 with no production rate pace work. (Id.). At step four, the ALJ found  
9 that Plaintiff was incapable of performing any past relevant work. (AR  
10 16). At step five, the ALJ found that Plaintiff could perform other  
11 work as a charge account clerk (Dictionary of Occupational Titles  
12 ("DOT") 205.367-014) and was therefore not disabled within the meaning  
13 of the Social Security Act. (AR 17).

14  
15 **STANDARD OF REVIEW**  
16

17 Under 42 U.S.C. § 405(g), a district court may review the  
18 Commissioner's decision to deny benefits. The court may set aside the  
19 Commissioner's decision when the ALJ's findings are based on legal error  
20 or are not supported by substantial evidence in the record as a whole.  
21 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing  
22 Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th  
23 Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).  
24

25 "Substantial evidence is more than a scintilla, but less than a  
26 preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater,  
27 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which  
28 a reasonable person might accept as adequate to support a conclusion."

1 Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279). To  
2 determine whether substantial evidence supports a finding, the court  
3 must “consider the record as a whole, weighing both evidence that  
4 supports and evidence that detracts from the [Commissioner’s]  
5 conclusion.” Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2  
6 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support  
7 either affirming or reversing that conclusion, the court may not  
8 substitute its judgment for that of the Commissioner. Reddick, 157 F.3d  
9 at 720-21 (citing Flaten v. Sec’y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

10  
11 **DISCUSSION**  
12

13 Plaintiff contends that the ALJ erred for three reasons: (1) the  
14 ALJ’s reliance on the VE’s testimony that Plaintiff was capable of  
15 performing other work as a charge account clerk was improper because the  
16 VE’s opinion deviated from the DOT and the VE did not explain the  
17 deviation; (2) the ALJ did not properly consider the treating doctors’  
18 findings; and (3) the ALJ did not properly consider the consultative  
19 examiner’s opinion. (Memorandum in Support of Plaintiff’s Complaint at  
20 2-10). This Court agrees that the ALJ’s failure to explain the  
21 deviation between the VE’s testimony and the DOT description of the  
22 requirements of a charge account clerk created an unresolved potential  
23 inconsistency in the evidence and remands this action on that basis.  
24 As the Court determines that remand is required on this basis alone, the  
25 Court declines to address Plaintiff’s alternative arguments.

1           **The ALJ Erred By Failing Explain The Deviation Between The**  
2           **VE's Testimony And The DOT Description Of Charge Account**  
3           **Clerk In Determining That Plaintiff Could Perform Other Work**  
4

5           Plaintiff contends that the ALJ improperly relied on the VE's  
6 opinion that he was capable of performing other work as a charge account  
7 clerk.     (Memorandum in Support of Plaintiff's Complaint at 2).  
8 Specifically, Plaintiff argues that the reasoning skills required of a  
9 charge account clerk as defined in the DOT exceed the ALJ's RFC  
10 assessment limiting Plaintiff to simple, repetitive tasks. (Id. at 2).  
11 Plaintiff concludes that because neither the ALJ nor the VE explained  
12 this deviation from the DOT, reversal or remand is appropriate. (Id.  
13 at 5). The Court agrees and remands.

14  
15           Social Security regulations provide that DOT classifications are  
16 rebuttable by recognizing "vocational experts and several published  
17 sources other than the DOT as authoritative." Johnson v. Shalala, 60  
18 F.3d 1428, 1435-36 (9th Cir. 1995); see also 20 C.F.R.  
19 §§ 404.1566(d)(2)-(5), (e) (the use of vocational experts is  
20 particularly important where "the issue in determining whether you are  
21 disabled is whether your work skills can be used in other work and the  
22 specific occupations in which they can be used, or there is a similarly  
23 complex issue"). Although evidence provided by a VE is generally  
24 expected to be consistent with the DOT, "[n]either the DOT nor the VE  
25 evidence automatically 'trumps' when there is a conflict." Social  
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1 Security Ruling ("SSR") 00-4p;<sup>3</sup> Massachi v. Astrue, 486 F.3d 1149, 1153  
2 (9th Cir. 2007). The ALJ may rely on expert testimony that contradicts  
3 the DOT if the record contains persuasive evidence to support the  
4 deviation. See Tommasetti v. Astrue, 533 F.3d 1035, 1042 (9th Cir.  
5 2008). Furthermore, the ALJ must definitively explain the deviation.  
6 Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001). Evidence  
7 sufficient to permit deviation may be "either specific findings of fact  
8 regarding claimant's residual functionality, or inferences drawn from  
9 the context of the expert's testimony." Light v. Social Sec. Admin.,  
10 119 F.3d 789, 793 (9th Cir. 1997) (internal citations omitted).

11  
12 At the hearing, the ALJ posed a hypothetical to the VE that  
13 included the assumption that the person would be limited to simple,  
14 repetitive tasks. (AR 107). In response, the VE testified that  
15 Plaintiff was not capable of performing any past relevant work and that  
16 the only other work Plaintiff could perform was as a charge account  
17 clerk, DOT 205.367-014. (AR 108). The VE further affirmed that his  
18 testimony complied with the DOT. (AR 109). The ALJ relied on the VE's  
19 representation and did not question the VE about any apparent deviations  
20 between his testimony and the DOT. (Id.).

21  
22 According to the DOT, the position of charge account clerk requires  
23 level three reasoning skills on the scale of General Education  
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25 <sup>3</sup> Social Security Rulings do not have the force of law.  
26 Nevertheless, they "constitute Social Security Administration  
27 interpretations of the statute it administers and of its own  
28 regulations," and are given deference "unless they are plainly erroneous  
or inconsistent with the Act or regulations." Han v. Bowen, 882 F.2d  
1453, 1457 (9th Cir. 1989).



1 Development ("GED"). DOT 205.367-014, 1991 WL 671715. The DOT defines  
2 level three reasoning skills as the ability to "[a]pply commonsense  
3 understanding to carry out instructions furnished in written, oral, or  
4 diagrammatic form. Deal with problems involving several concrete  
5 variables in or from standardized situations." DOT Appendix C, Section  
6 III, 1991 WL 688702. The weight of authority in the Ninth Circuit holds  
7 that level three reasoning skills as defined in the DOT are incompatible  
8 with a limitation to simple, repetitive tasks. As the court in Torrez  
9 v. Astrue, 2010 WL 2555847 (E.D. Cal. June 21, 2010) noted:

10  
11 Several district court cases in this circuit question whether  
12 a claimant limited to simple, repetitive tasks, is capable of  
13 performing jobs requiring level three reasoning under the DOT.  
14 In McGensy v. Astrue, 2010 WL 1875810 (C.D. Cal. May 11,  
15 2010), the Court noted that while case law has held that "a  
16 limitation to 'simple, repetitive tasks' is consistent with  
17 level two reasoning," this restriction is "inconsistent" with  
18 the requirements for level three reasoning, in particular the  
19 job of mail clerk. Id. at \*3 (citing Pak v. Astrue, 2009 WL  
20 2151361 at \*7 (C.D. Cal. July 14, 2009) ("The Court finds that  
21 the DOT's Reasoning Level three requirement conflicts with the  
22 ALJ's prescribed limitation that Plaintiff could perform only  
23 simple, repetitive work."); Tudino v. Barnhart, 2008 WL  
24 4161443 at \*11 (S.D. Cal. Sept. 5, 2008) ("[l]evel-two  
25 reasoning appears to be the breaking point for those  
26 individuals limited to performing only simple repetitive  
27 tasks"; remand to ALJ to "address the conflict between  
28 Plaintiff's limitation to 'simple, repetitive tasks' and the

1 level-three reasoning"); Squier v. Astrue, 2008 WL 2537129 at  
2 \*5 (C.D. Cal. June 24, 2008) (reasoning level three is  
3 "inconsistent with a limitation to simple repetitive work").  
4 In addition, in Bagshaw v. Astrue, 2010 WL 256544 at \*5 (C.D.  
5 Cal. January 20, 2010), the court expressly cited Hackett [v.  
6 Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005)] in concluding  
7 that a mail clerk job, which requires level three reasoning  
8 under the DOT, was "inconsistent with [the plaintiff's]  
9 intellectual functional capacity limitation to simple, routine  
10 work."<sup>4</sup>

11  
12 Id. at \*8 (concluding that "the DOT precludes a person restricted to  
13 simple, repetitive tasks, from performing work . . . that requires level  
14 three reasoning"); see also Lara v. Astrue, 305 Fed. Appx. 324, 325 (9th  
15 Cir. 2008) (finding that reasoning levels one and two are commensurate  
16 with a limitation to simple, repetitive tasks).

17  
18 The VE's determination that Plaintiff is capable of working as a  
19 charge account clerk, which according to the DOT requires level three  
20 reasoning ability, therefore conflicts with decisions that find that  
21 level three reasoning skills are generally beyond the capacity of  
22 persons limited to simple, repetitive tasks. When there is an apparent  
23 conflict between the testimony of the VE and the definitions contained  
24 in the DOT, the ALJ must ask the VE to explain the deviation. Massachi,  
25 486 F.3d at 1153 (citing Social Security Ruling 00-4p). Here,

26 \_\_\_\_\_  
27 <sup>4</sup> In Hackett, the Tenth Circuit stated that a restriction to  
28 "simple and routine work tasks . . . seems inconsistent with the demands  
of level-three reasoning." Hackett, 395 F.3d at 1176.

1 notwithstanding the apparent conflict, the ALJ did not seek an  
2 explanation from the VE. Consequently, the ALJ's written determination  
3 provides no explanation as to how to resolve the conflict created by the  
4 vocational expert's identification of a potential occupation which the  
5 DOT indicates requires reasoning abilities beyond the capacity of a  
6 person limited to simple, repetitive tasks. As a result, the Court  
7 cannot accept the ALJ's determination, which relies on the vocational  
8 expert's testimony, that there are positions in the national economy  
9 available to Plaintiff. Without more, the Court cannot determine  
10 whether substantial evidence supports the ALJ's decision.

11  
12 Remand for further proceedings is appropriate where additional  
13 proceedings could remedy defects in the Commissioner's decision. See  
14 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000). Upon remand, the  
15 ALJ must either address the conflict between the VE's determination that  
16 Plaintiff is capable of working as a charge account clerk and the DOT's  
17 description of that position as requiring level three reasoning skills,  
18 which are normally beyond the capabilities of a person restricted to  
19 simple, repetitive tasks, or obtain further VE testimony regarding  
20 alternative occupations that Plaintiff could perform.

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