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

MARIA CASTRO DE JESUS,	)	NO. EDCV 10-01522-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on October 14, 2010, seeking review of the denial by the Social Security Commissioner (the "Commissioner") of plaintiff's application for supplemental security income ("SSI"). On October 28, 2010, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on June 17, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and defendant requests that the Commissioner's decision be affirmed or, alternatively, remanded for further administrative proceedings. The Court has taken the parties'

1 Joint Stipulation under submission without oral argument.

2  
3 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
4

5 On November 20, 2008, plaintiff filed an application for SSI.<sup>1</sup>  
6 (Administrative Record ("A.R.") 14, 16.) Plaintiff, who was born on  
7 January 28, 1958,<sup>2</sup> claims to have been disabled since May 17, 2003, due  
8 to depression, bipolar disorder, and arthritis in her shoulders and  
9 joints. (A.R. 14-19, 171, 199.) Plaintiff has no past relevant work  
10 experience. (A.R. 22.)  
11

12 After the Commissioner denied plaintiff's claim initially and upon  
13 reconsideration (A.R. 14, 64-68, 74-78), plaintiff requested a hearing  
14 (A.R. 80-82). On March 9, 2010, plaintiff, who was represented by  
15 counsel, appeared and testified, with the help of a Spanish interpreter,  
16 at a hearing before Administrative Law Judge David M. Ganly (the "ALJ").  
17 (A.R. 24-46.) Vocational expert Sandra M. Fioretti and medical experts  
18 Samuel Landau, M.D., a specialist in internal medicine, and David  
19  
20  
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22  
23 <sup>1</sup> In his decision, the ALJ noted that plaintiff "filed a prior  
24 application for [SSI] on March 8, 2005. Subsequently, a hearing was  
25 held and a decision was issued by an Administrative Law Judge on or  
26 about March 29, 2007, denying [plaintiff] benefits." (A.R. 14.) While  
that final decision created a presumption of continuing non-disability  
(A.R. 14, 21), the ALJ found that plaintiff overcame the presumption by  
"provid[ing] persuasive evidence of significant 'changed circumstances'"  
(A.R. 21).

27 <sup>2</sup> On the date the application for SSI was filed, plaintiff was  
28 50 years old, which is defined as an individual "closely approaching  
advanced age." (A.R. 22 (citing 20 C.F.R. § 416.963).)

1 Glassmire, Ph.D., a psychologist, also testified.<sup>3</sup> (*Id.*) On May 19,  
2 2010, the ALJ denied plaintiff's claim (A.R. 14-23), and the Appeals  
3 Council subsequently denied plaintiff's request for review of the ALJ's  
4 decision (A.R. 1-5). That decision is now at issue in this action.

5  
6 **SUMMARY OF ADMINISTRATIVE DECISION**  
7

8 The ALJ found that plaintiff has not engaged in substantial gainful  
9 activity since November 20, 2008, her application date. (A.R. 16.) The  
10 ALJ determined that plaintiff has the following severe impairments:  
11 "mood disorder, not otherwise specified; and a psychotic disorder, not  
12 otherwise specified." (*Id.*) The ALJ also determined that plaintiff  
13 does not have any severe physical impairment. (A.R. 16-17.) The ALJ  
14 further determined that plaintiff does not have an impairment or  
15 combination of impairments that meets or medically equals one of the  
16 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20  
17 C.F.R. §§ 416.920(d), 416.925, 416.926). (A.R. 17.)  
18

19 After reviewing the record, the ALJ determined that plaintiff has  
20 the residual functional capacity ("RFC") to:

21  
22 perform a full range of work at all exertional levels but with  
23 the following nonexertional limitations: [plaintiff] is able  
24 to perform simple repetitive tasks and do work that is object  
25

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26 <sup>3</sup> There are discrepancies in the record with respect to the  
27 spelling of the names of the vocational and medical experts. (*Compare*  
28 *A.R. 14, with A.R. 24-46.*) For purposes of this memorandum opinion and  
order, the Court has adopted the spelling used by the ALJ in his  
decision.

1 oriented with no interaction with the general public and only  
2 non-intense interactions with co-workers and supervisors;  
3 [plaintiff] cannot do work that requires hypervigilance.  
4

5 (A.R. 18.)  
6

7 The ALJ found that plaintiff "is not able to communicate in  
8 English, and is considered in the same way as an individual who is  
9 illiterate in English." (A.R. 22.) The ALJ also found that  
10 "[t]ransferability of job skills is not an issue because [plaintiff]  
11 does not have past relevant work [experience]." (*Id.*)  
12

13 Having considered plaintiff's age, education, work experience, and  
14 RFC, as well as the testimony of the vocational expert, the ALJ found  
15 that jobs exist in significant numbers in the national economy that  
16 plaintiff could perform, including those of kitchen helper, industrial  
17 cleaner, and bench assembler. (A.R. 22-23.) Accordingly, the ALJ  
18 concluded that plaintiff has not been under a disability, as defined in  
19 the Social Security Act, since November 20, 2008, the date the  
20 application was filed. (A.R. 23.)  
21

#### 22 STANDARD OF REVIEW 23

24 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
25 decision to determine whether it is free from legal error and supported  
26 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
27 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant  
28 evidence as a reasonable mind might accept as adequate to support a

1 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
2 a mere scintilla but not necessarily a preponderance." Connett v.  
3 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
4 record can constitute substantial evidence, only those 'reasonably drawn  
5 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
6 1066 (9th Cir. 2006)(citation omitted).

7  
8 Although this Court cannot substitute its discretion for that of  
9 the Commissioner, the Court nonetheless must review the record as a  
10 whole, "weighing both the evidence that supports and the evidence that  
11 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
12 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
13 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
14 responsible for determining credibility, resolving conflicts in medical  
15 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
16 1035, 1039 (9th Cir. 1995).

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

1 at 679.

2  
3 **DISCUSSION**  
4

5 Plaintiff asserts the following claims: (1) the ALJ failed to meet  
6 his burden at step five in determining that plaintiff is capable of  
7 performing the jobs of kitchen helper, industrial cleaner, and bench  
8 assembler; and (2) the ALJ posed an incomplete hypothetical to the  
9 vocational expert.<sup>4</sup> (Joint Stipulation ("Joint Stip.") at 1-11.) As  
10 plaintiff's claims are interrelated, the Court will address them  
11 together.  
12

13 **I. The ALJ Did Not Meet His Burden At Step Five, Because He Improperly**  
14 **Relied Upon The Testimony Of The Vocational Expert In Response To**  
15 **An Incomplete Hypothetical Question That Did Not Include**  
16 **Plaintiff's Language Limitations.**  
17

18 At step five of the sequential evaluation, the burden shifts from  
19 the claimant to the ALJ to prove that, based on the claimant's RFC, age,  
20 education, and past work experience, the claimant is able to perform  
21 work that exists in significant numbers in the national economy. Smolen  
22 v. Chater, 80 F.3d 1273, 1291 (9th Cir. 1996); 20 C.F.R. §§  
23 416.920(a)(4)(v), 416.960(c), 416.964. Pursuant to the regulations, a  
24 claimant's educational level refers to, *inter alia*, "formal schooling or  
25 other training which contributes to [a claimant's] ability to meet  
26

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27 <sup>4</sup> In the Joint Stipulation, plaintiff states that the  
28 contentions section for the second claim was inadvertently left blank.  
However, plaintiff contends, and the Court agrees, that plaintiff  
subsumed her second claim within her first claim.

1 vocational requirements," and "how well [a claimant is] able to  
2 communicate in English since this ability is often acquired or improved  
3 by education." 20 C.F.R. § 416.964. In evaluating a claimant's  
4 educational level, the Commissioner uses categories that include, *inter*  
5 *alia*, "[i]lliteracy" and "[i]nability to communicate in English." *Id.*  
6 The category of illiteracy is defined as "the inability to read or  
7 write. We consider someone illiterate if the person cannot read or  
8 write a simple message such as instructions or inventory lists even  
9 though the person can sign his or her name. Generally, an illiterate  
10 person has had little or no formal schooling." 20 C.F.R. §  
11 416.964(b)(1). With respect to the category of "[i]nability to  
12 communicate in English," the regulations provide that, "[b]ecause  
13 English is the dominant language of the country, it may be difficult for  
14 someone who doesn't speak and understand English to do a job . . . .  
15 Therefore, we consider a person's ability to communicate in English when  
16 we evaluate what work, if any, he or she can do." 20 C.F.R. §  
17 416.964(b)(5).

18

19 The ALJ can meet his burden at step five by either taking the  
20 testimony of a vocational expert or by referring to the Grids. See  
21 Lounsbury v. Barnhart, 468 F.3d 1111, 1114-15 (9th Cir. 2006); see also  
22 Tackett v. Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999) (describing how the  
23 vocational expert's testimony and the Grids are used at step five). If  
24 the ALJ chooses, as in this case, to rely upon the testimony of a  
25 vocational expert, the hypothetical posed to the vocational expert must  
26 be "accurate, detailed, and supported by the medical record." *Id.* If  
27 the hypothetical presented to the vocational expert does not reflect all  
28 of the claimant's limitations and/or is not supported by evidence in the

1 record, the "[vocational] expert's testimony has no evidentiary value to  
2 support a finding that the claimant can perform jobs in the national  
3 economy." Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir.  
4 1993)(citation and internal quotations omitted); Embrey v. Bowen, 849  
5 F.2d 418, 422-23 (9th Cir. 1988); Gallant v. Heckler, 753 F.2d 1450,  
6 1456 (9th Cir. 1984). To ensure the validity of the vocational expert's  
7 hypothetical, the ALJ should base it upon evidence appearing in the  
8 record, whether disputed or not. *Id.*

9 At the administrative hearing, the ALJ elicited the following  
10 testimony from the vocational expert:

11  
12 Q . . . Okay. I'm going to give you one or more  
13 hypotheticals . . . . For each of these we'd like you to  
14 consider a lady of the same age, education and prior work  
15 experience as [plaintiff]. For the first hypothetical I'd  
16 like you to assume that there are no physical impairments, and  
17 accordingly no physical limitations. For psychological  
18 limitations I'd like you to assume that the individual could  
19 perform simple repetitive tasks that were object oriented.  
20 She should not have any interaction with the general public,  
21 and should not have any intense interaction with either  
22 coworkers or supervisors. Additionally she should not be  
23 required to exercise any hypervigilance on the job. Okay,  
24 given those limitations, would she be able to perform any of  
25 -- well forget that. She didn't have any prior relevant work.  
26 Would she be able to -- would there be some jobs she would be  
27 able to perform?  
28



1 A There would be work as a kitchen helper, DOT code 318.687-  
2 010. That work is medium, unskilled, SVP:2. Regionally there  
3 are 5,000 positions. Nationally in excess of 100,000  
4 positions. There would be work as an industrial cleaner, DOT  
5 code 381.687-018. That work is medium, unskilled, SVP:2.  
6 Regionally there are 2,000 positions. Nationally there are  
7 30,000 positions. There would be a variety of assembly  
8 positions. An example in that category would be bench  
9 assembler, DOT code 706.684-042. That work is light,  
10 unskilled, SVP:2. Regionally there are 2,500 positions.  
11 Nationally in excess of 35,000 positions.

12 . . . .

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14  
15 Q . . . Are these jobs that you've given us all consistent  
16 with the Dictionary of Occupational Titles?

17  
18 A Yes, they would be.

19  
20 (A.R. 42-43.)

21  
22 Based upon the above testimony of the vocational expert as well as  
23 the ALJ's consideration of plaintiff's age, education, work experience,  
24 and RFC, the ALJ found that jobs exist in significant numbers in the  
25 national economy that plaintiff could perform. (A.R. 22-23.) The ALJ  
26 specifically cited the jobs of kitchen helper, industrial cleaner, and  
27 bench assembler as examples of such jobs. (*Id.*)

1           However, as plaintiff properly contends, the ALJ failed to include  
2 in his hypothetical to the vocational expert the ALJ's finding that  
3 plaintiff "is not able to communicate in English, and is considered in  
4 the same way as an individual who is illiterate in English." (A.R. 22.)  
5 The ALJ's failure to include plaintiff's inability to communicate in  
6 English in his hypothetical to the vocational expert is not without  
7 consequence. As an initial matter, the three jobs cited by the  
8 vocational expert and adopted by the ALJ in his step five determination  
9 require either a Language Level of 1 or 2 -- language levels that appear  
10 to be inconsistent with plaintiff's inability to communicate and  
11 illiteracy in English.<sup>5</sup> Moreover, and significantly, because the

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13           <sup>5</sup> The DOT indicates that the job of kitchen helper requires a  
14 Language Level of 1. A Level 1 Language Level requires the following  
reading, writing, and speaking skills:

15           READING: Recognize meaning of 2,500 (two- or three-  
16 syllable) words. Read at rate of 95-120 words per  
17 minute. Compare similarities and differences  
between words and between series of numbers.

18           WRITING: Print simple sentences containing subject,  
19 verb, and object, and series of numbers, names, and  
addresses.

20           SPEAKING: Speak simple sentences, using normal word  
21 order, and present and past tenses.

22           See, e.g., DOT No. 318.687-010, 1991 WL 672755 (1991)(kitchen helper).

23           The DOT indicates that the jobs of industrial cleaner and  
24 bench assembler require a Language Level of 2. A Level 2 Language Level  
25 requires the following reading, writing, and speaking skills:

26           READING: Passive vocabulary of 5,000-6,000 words. Read at  
27 rate of 190-215 words per minute. Read adventure stories and  
28 comic books, looking up unfamiliar words in dictionary for  
meaning, spelling, and pronunciation. Read instructions for  
assembling model cars and airplanes.

          WRITING: Write compound and complex sentences, using cursive  
style, proper end pronunciation, and employing adjectives and  
adverbs.

1 hypothetical posed to the vocational expert did not reflect all of  
2 plaintiff's limitations, the vocational expert's testimony has no  
3 evidentiary value with respect to plaintiff's ability to perform other  
4 work in the national economy.

5  
6 Accordingly, because the ALJ relied upon the testimony given by the  
7 vocational expert in response to an incomplete hypothetical -- *i.e.*, a  
8 hypothetical that did not include plaintiff's inability to communicate  
9 and illiteracy in English -- the Court cannot find the ALJ's step five  
10 determination -- that plaintiff can perform work available in the  
11 national economy -- to be supported by substantial evidence. Therefore,  
12 the matter must be remanded to the ALJ to determine whether jobs exist  
13 in significant numbers in the national economy that plaintiff could  
14 perform, even with her inability to communicate and illiteracy in  
15 English.<sup>6</sup>

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17 SPEAKING: Speak clearly and distinctly with appropriate pauses  
18 and emphasis, correct punctuation, variations in word order,  
using present, perfect, and future tenses.

19 See, *e.g.*, DOT No. 381.687-018, 1991 WL 673258 (1991)(industrial  
20 cleaner); DOT No. 706.684-042, 1991 WL 679055 (1991)(bench assembler).

21 <sup>6</sup> Defendant contends that the ALJ did not commit error at step  
22 five because: (1) the vocational expert was aware of plaintiff's  
23 limited English ability; (2) under the Grids, plaintiff's inability to  
24 communicate in English would have "little effect on her ability to  
25 work"; and (3) "there is significant evidence that [plaintiff] has more  
26 than minimal English ability." (Joint Stip. at 6-8.) Defendant's first  
27 ground is unpersuasive, because, while the vocational expert may have  
28 been aware of plaintiff's inability to communicate in English, the ALJ's  
hypothetical to the vocational expert did not include any language  
limitations, and there is no indication that the vocational expert took  
into account such limitations when determining that plaintiff could  
perform jobs in the national economy. The ALJ's second ground is  
equally unavailing, because when, as in this case, "a claimant suffers  
only non-exertional limitations, the [G]rids are inappropriate."  
Lounsbury, 468 F.3d at 1115. Accordingly, defendant's reference to the  
Grids is unpersuasive. Defendant's third reason is also unpersuasive,

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 ("[T]he 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.* at 1179-81.

15  
16 Remand is the appropriate remedy to allow the ALJ the opportunity  
17 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*  
18 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. 1989)  
21 (remand appropriate to remedy defects in the record). On remand, the

22 \_\_\_\_\_  
23 because the ALJ specifically found that plaintiff "is unable to  
24 communicate in English," and there is no evidence that plaintiff's  
25 limited English abilities rise to the language levels required by the  
26 jobs identified by the ALJ as those plaintiff could perform. Moreover,  
27 the Court cannot entertain post hoc rationalizations. *See, e.g., Orn*,  
28 495 F.3d at 630 (noting that a court may "review only the reasons  
provided by the ALJ in the disability determination and may not affirm  
the ALJ on a ground upon which he did not rely"); Connett, 340 F.3d at  
874 (stating "[w]e are constrained to review the reasons the ALJ  
asserts" and "[i]t was error for the district court to affirm the ALJ's  
. . . decision based on evidence that the ALJ did not discuss").

1 ALJ must correct the above-mentioned deficiencies and errors.  
2 Specifically, the ALJ must pose a complete hypothetical to a vocational  
3 expert, which includes, among other things, plaintiff's English language  
4 limitations, to determine what work, if any, plaintiff can perform.  
5

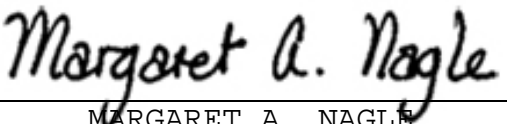
6 **CONCLUSION**  
7

8 Accordingly, for the reasons stated above, IT IS ORDERED that the  
9 decision of the Commissioner is REVERSED, and this case is REMANDED for  
10 further proceedings consistent with this Memorandum Opinion and Order.  
11

12 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
13 copies of this Memorandum Opinion and Order and the Judgment on counsel  
14 for plaintiff and for defendant.  
15

16 **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
17

18 DATED: July 26, 2011  
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21 \_\_\_\_\_  
MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE  
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