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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CYNTHIA ESTRADA,	)	Case No. ED CV 10-1843 PJW
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the Social	)	
Security Administration,	)	
	)	
Defendant.	)	

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I. INTRODUCTION

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying her applications for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). She claims that the Administrative Law Judge ("ALJ") erred by: 1) failing to develop the record regarding her hearing loss; 2) failing to properly rate the severity of her mental impairment; and 3) determining that she could work as an office helper and clerk. For the following reasons, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings consistent with this opinion.

1 II. BACKGROUND

2 Plaintiff applied for SSI and DIB in August 2008, alleging that  
3 she had been unable to work since August 2001, due to carpal tunnel  
4 syndrome and problems with her shoulders, arms and hands. (Admini-  
5 strative Record ("AR") 94-101, 109.) The Agency denied the applica-  
6 tions initially and again on reconsideration. (AR 55-59, 62-66.)  
7 Plaintiff then requested and was granted a hearing before an ALJ. (AR  
8 67-68.) On May 18, 2010, Plaintiff appeared without counsel at the  
9 hearing and testified. (AR 20-46.) On July 20, 2010, the ALJ issued  
10 a decision, denying benefits. (AR 11-19.) After the Appeals Council  
11 denied Plaintiff's request for review (AR 1-3), she commenced this  
12 action.

13 III. ANALYSIS

14 A. Plaintiff's Alleged Hearing Loss

15 In her first claim of error, Plaintiff contends that the ALJ  
16 failed to discharge his duty to fully develop the record because he  
17 did not investigate her alleged hearing loss. (Joint Stip. 2-6.) For  
18 the following reasons, the Court agrees.

19 Plaintiff testified that she is "completely deaf in [her] right  
20 ear." (AR 26.) The ALJ noted Plaintiff's testimony but concluded  
21 that there was no objective evidence to support this claim and,  
22 therefore, her alleged hearing loss was not a medically determinable  
23 impairment. (AR 14.)

24 The ALJ erred in reaching this conclusion. In fact, there was  
25 some arguably objective evidence in the record establishing that  
26 Plaintiff had hearing loss: Plaintiff apparently had a hearing test,  
27 an audiogram, and, after reviewing the findings from this test, her  
28 treating doctor concluded that she was a candidate for a hearing aid.

1 (AR 363.) This evidence provided objective support for Plaintiff's  
2 claim that she was experiencing hearing loss and triggered the ALJ's  
3 duty to develop the record. See *Breen v. Callahan*, 1998 WL 272998, at  
4 \*3 (N.D. Cal. May 22, 1998) ("[T]he presence of some objective  
5 evidence in the record suggesting the existence of a condition which  
6 could have a material impact on the disability decision" generally  
7 triggers the ALJ's duty to develop the record further") (citing *Smolen*  
8 *v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)); *Wainwright v. Sec'y of*  
9 *Health & Human Servs.*, 939 F.2d 680, 682 (9th Cir. 1991)). This is  
10 particularly true here, where Plaintiff was representing herself  
11 before the Agency. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th  
12 Cir. 2001); *Smolen*, 80 F.3d at 1288. Further, the error was not  
13 harmless because the ALJ's ultimate conclusion that Plaintiff could  
14 work as an information clerk is called into question if she is unable  
15 to hear.<sup>1</sup> See *Carmickle v. Comm'r*, 533 F.3d 1155, 1162 (9th Cir.  
16 2008) (holding ALJ's error is harmless if it was inconsequential to  
17 the ultimate nondisability determination).

18 The Agency contends that the ALJ did not err. It cites cases and  
19 regulations which stand for the proposition that the burden is on the  
20 claimant to prove that she is disabled. (Joint Stip. at 7-8.) It  
21 argues that, because Plaintiff failed to submit proof of a hearing  
22 impairment and because there was no ambiguity in the record, the ALJ's  
23 duty to supplement the record was not called into play.

24 Thus, as in many social security cases involving this issue, the  
25 Court is confronted with competing arguments, both supported by

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27 <sup>1</sup> The vocational expert testified that Plaintiff would have  
28 difficulty performing the information clerk job if she could not hear  
in one ear. (AR 43.)

1 seemingly contradictory yet controlling authority, that it was the  
2 other side's obligation to obtain the records supporting the  
3 claimant's alleged impairment. Plaintiff argues that the ALJ has a  
4 duty to fully and fairly develop the record, citing cases like *Smolen*,  
5 80 F.3d at 1288. (Joint Stip. at 5.) And the Agency counters that  
6 Plaintiff has the burden to produce evidence that she is disabled,  
7 citing cases like *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
8 1999). (Joint Stip. at 7.) In the face of these competing claims and  
9 competing authority, the Court sides with Plaintiff here because she  
10 complained that she was hard of hearing, there was objective medical  
11 evidence that this was true, and she was representing herself before  
12 the Agency.

13 B. Plaintiff's Alleged Mental Impairment

14 Plaintiff argues that the ALJ erred in evaluating her alleged  
15 mental impairment, too, by: 1) determining that she did not have a  
16 severe mental impairment; 2) failing to properly rate the severity of  
17 the impairment; and 3) failing to develop the record further regarding  
18 the impairment. (Joint Stip. 9-16.) For the following reasons, the  
19 Court concludes that there is no merit to this claim.

20 Plaintiff testified that she experienced "anxiety attacks"--  
21 caused by pain and worries about her husband not working--but was not  
22 taking any medication to treat her condition. (AR 32, 35.) It also  
23 appears that she had never been treated for anxiety attacks or anxiety  
24 in general. In spite of Plaintiff's testimony about anxiety attacks,  
25 the ALJ found that Plaintiff did not have a medically determinable  
26 severe mental impairment. (AR 13-17.) Plaintiff contends that this  
27 was error. The Court disagrees. The ALJ did not fail to discharge  
28 his duty to develop the record here because Plaintiff did not present

1 any objective medical evidence documenting a mental impairment. See,  
2 e.g., *Breen*, 1998 WL 272998, at \*3. Plaintiff's testimony alone did  
3 not trigger the ALJ's duty to develop the record on this issue,  
4 either, because, unlike the issue of Plaintiff's hearing impairment,  
5 there was no objective evidence that she suffered from anxiety  
6 attacks. Thus, the only arguable "evidence" in the record was  
7 Plaintiff's testimony. But the ALJ found that she was not credible  
8 and Plaintiff has not challenged that finding. As a result, there was  
9 no credible evidence in the record that Plaintiff suffered from  
10 anxiety and the ALJ was not obligated to further develop the record on  
11 this issue. See *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir.  
12 2005); 20 C.F.R. §§ 404.1508, 416.908 ("A physical or mental  
13 impairment must be established by medical evidence consisting of  
14 signs, symptoms, and laboratory findings, not only by your statement  
15 of symptoms . . . ."); Social Security Ruling 96-4p ("[R]egardless of  
16 how many symptoms an individual alleges, or how genuine the  
17 individual's complaints may appear to be, the existence of a medically  
18 determinable physical or mental impairment cannot be established in  
19 the absence of objective medical abnormalities; i.e., medical signs  
20 and laboratory findings."). Nor did the ALJ err in failing to rate  
21 the severity of Plaintiff's alleged mental impairment. The ALJ was  
22 not required to undergo the "special technique" for rating mental  
23 impairments because Plaintiff did not establish that she had a  
24 medically determinable mental impairment. 20 C.F.R. §§ 404.1520a(b),  
25 416.920a(b).

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1 C. The ALJ's Finding That Plaintiff Could Work As An Office Helper  
2 And Reception Information Clerk

3 Plaintiff contends that the ALJ erred when he concluded that she  
4 could work as an office helper and reception information clerk because  
5 these jobs require her to perform functions that she is not capable of  
6 doing. (Joint Stip. 17-22, 24-25.) The Court agrees with Plaintiff  
7 in part, as explained below.

8 At step five of the sequential evaluation process, the Agency has  
9 the burden of establishing that a claimant is capable of performing  
10 jobs. 20 C.F.R. §§ 416.920(f),(g), 416.960(c); see *Johnson v.*  
11 *Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). This burden can be met  
12 through the use of a vocational expert. See 20 C.F.R. §§ 404.1566(e),  
13 416.966(e); see also *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir.  
14 1999). The existence of other jobs may be established by taking  
15 notice of reliable job information contained in various publications,  
16 including the Dictionary of Occupational Titles ("DOT"). 20 C.F.R.  
17 §§ 404.1566(d), 416.966(d). The DOT is the presumptive authority on  
18 the characteristics of jobs in the national economy. *Pinto v.*  
19 *Massanari*, 249 F.3d 840, 845-46 (9th Cir. 2001).

20 Nevertheless, the DOT is not the sole source of this information  
21 and the Agency may rely on the testimony of a vocational expert for  
22 information on jobs. *Johnson*, 60 F.3d at 1435. But, before relying  
23 on a vocational expert's testimony, an ALJ must inquire whether the  
24 testimony conflicts with the DOT. *Massachi v. Astrue*, 486 F.3d 1149,  
25 1152 (9th Cir. 2007); SSR 00-4p. If it does, the vocational expert is  
26 required to provide a persuasive rationale supported by the evidence  
27 to justify the departure. See *Tommasetti v. Astrue*, 533 F.3d 1035,  
28 1042 (9th Cir. 2008).

1 In the case at bar, the ALJ found that Plaintiff could perform  
2 light work with the following limitations:

3 no crawling, unprotected heights, ladders, ropes or  
4 scaffolds; frequent gross manipulation; occasional fine  
5 manipulation with bilateral upper extremities; occasional  
6 reaching at or above shoulder level with the left upper  
7 extremity; no reaching at or above shoulder level with the  
8 right upper extremity; no forceful grasping or torquing.

9 (AR 14.)

10 The ALJ called a vocational expert to testify about what  
11 Plaintiff could still do despite her limitations. (AR 18, 39-43.)  
12 The vocational expert testified that an individual with Plaintiff's  
13 abilities could work as an officer helper (DOT No. 239.567-010) and a  
14 receptionist information clerk (DOT No. 237.367-018). (AR 41.)  
15 Plaintiff claims that this testimony was inconsistent with the DOT and  
16 the vocational expert never explained why. (Joint Stip. 17-22.) In  
17 Plaintiff's view, both jobs exceed her limitations because they  
18 involve fine manipulation, reaching, and forceful grasping or  
19 torquing, which she cannot do. For the following reasons, the Court  
20 concludes that Plaintiff is partially correct.

21 The ALJ determined that Plaintiff was limited to occasional fine  
22 manipulation. (AR 14.) The job of office helper requires frequent  
23 fingering.<sup>2</sup> DOT No. 239.567-010. Like the Agency, the Court  
24 considers fine manipulation to be equivalent to "fingering" in the  
25 DOT. (Joint Stip. 22) Thus, Plaintiff's restriction to only

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26  
27 <sup>2</sup> The job of receptionist information clerk requires only  
28 occasional fingering and therefore does not conflict with Plaintiff's  
ability to perform occasional fine manipulation. DOT No. 237.367-018.

1 occasional fine manipulation, i.e., occasional fingering, precludes  
2 her from performing a job that requires frequent fingering. And the  
3 vocational expert did not provide any explanation for the obvious  
4 contradiction between what Plaintiff can do and what is required to  
5 perform this job. (AR 42.) Accordingly, the ALJ's determination that  
6 Plaintiff could perform the job of office helper is not supported by  
7 substantial evidence. See *Tommasetti*, 533 F.3d at 1042.<sup>3</sup>

8 Plaintiff argues that there are other inherent conflicts between  
9 her residual functional capacity and the DOT job descriptions for the  
10 office helper and information clerk jobs. She argues, for example,  
11 that both require frequent reaching, which conflicts with her  
12 restriction on reaching at or above shoulder level with her right arm  
13 and only occasionally with her left arm. The Court does not see the  
14 inherent conflict. The ability to frequently reach does not encompass  
15 the ability to frequently reach at or above shoulder level. See  
16 *Rodriguez v. Astrue*, 2008 WL 2561961, at \*2 (C.D. Cal. June 25, 2008)  
17 (explaining that "reaching" in the DOT does not necessarily entail  
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22 <sup>3</sup> The Agency urges the Court to affirm the ALJ's decision,  
23 arguing that, even "though the DOT indicated that an office helper  
24 frequently engaged in fine manipulation, substantial evidence in the  
25 record supported a finding that Plaintiff could perform such  
26 activity." (Joint Stip. 23.) It argues further that the ALJ  
27 "apparently intended to adopt the medical expert's assessment that  
28 Plaintiff was capable of 'frequent' fine manipulation." (Joint Stip.  
23 n.6.) The Court declines the Agency's invitation to rewrite the  
ALJ's decision as it can only evaluate the decision for the reasons  
articulated by the ALJ. See *Ceguerra v. Sec'y of Health & Human  
Servs.*, 933 F.2d 735, 738 (9th Cir. 1991).



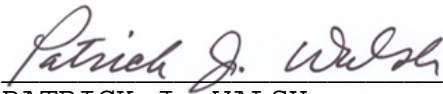
1 reaching "at or above shoulder height"). Thus, the ALJ did not err  
2 here.<sup>4</sup>

3 IV. CONCLUSION

4 For these reasons, the Agency's decision is reversed and the  
5 action is remanded to the Agency for further consideration consistent  
6 with this Memorandum Opinion and Order.<sup>5</sup>

7 IT IS SO ORDERED.

8 DATED: October 18, 2011.

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11 PATRICK J. WALSH  
12 UNITED STATES MAGISTRATE JUDGE

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16 <sup>4</sup> Plaintiff also complains that she is also precluded from  
17 performing these two jobs because she is unable to forcefully grasp or  
18 torque. This issue is better left to the ALJ. On remand, the  
19 vocational expert should explain whether a limitation on forceful  
20 grasping and torquing would limit the number of jobs Plaintiff could  
21 perform and why, or why not.

22  
23 <sup>5</sup> Plaintiff asks the Court to remand the case for an award of  
24 benefits. (Joint Stip. 25.) The Court recognizes it has the  
25 authority to do so, see *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th  
26 Cir. 1989), but concludes that such relief is not warranted here. It  
27 is not clear from the record that Plaintiff is, in fact, disabled. As  
28 the Agency noted, the ALJ may have intended to adopt a less  
restrictive functional capacity for Plaintiff's manipulative  
limitations. In addition, as discussed above, the ultimate disability  
determination may depend on the limitations, if any, stemming from  
Plaintiff's alleged hearing impairment. Thus, further proceedings are  
necessary to resolve the outstanding issues in this case. See *Harman*  
*v. Apfel*, 211 F.3d 1172, 1180-81 (9th Cir. 2000) (holding remand for  
further proceedings was appropriate where the record contained  
additional unanswered questions regarding the applicant's eligibility  
for benefits).