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

RICARDO CHAVEZ,	)	NO. EDCV 11-00125 SS
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM DECISION AND ORDER</b>
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the Social	)	
Security Administration,	)	
	)	
Defendant.	)	
	)	

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**I.  
INTRODUCTION**

Ricardo Chavez ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration ("Commissioner" or the "Agency") denying his application for Supplemental Security Income ("SSI"). The parties consented, pursuant to 28 U.S.C. § 636, to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Agency is REVERSED and REMANDED for further proceedings.

1 **II.**

2 **PROCEDURAL HISTORY**

3  
4 Plaintiff filed an application for SSI on March 8, 2007 alleging  
5 a disability onset date of March 1, 2007, due to affective mood  
6 disorders and a learning disorder. (Administrative Record ("AR") 73).  
7 The Agency initially denied Plaintiff's claim on April 10, 2007. (Id.).  
8 When the Agency denied Plaintiff's application on reconsideration,  
9 Plaintiff requested a hearing. (AR 115). On October 31, 2008,  
10 Plaintiff appeared and testified at a hearing before an Administrative  
11 Law Judge ("ALJ"). (AR 18-50). He also appeared and testified at a  
12 supplemental hearing held before the same ALJ on January 23, 2009. (AR  
13 51-72). On April 23, 2009, the ALJ issued a decision denying benefits.  
14 (AR 5-17). The Appeals Council denied Plaintiff's request for review  
15 on November 20, 2010 (AR 1-3) making the ALJ's decision the final  
16 decision of the Agency. Plaintiff subsequently commenced the instant  
17 action.

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19 **III.**

20 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

21  
22 To qualify for disability benefits, a claimant must demonstrate a  
23 medically determinable physical or mental impairment that prevents him  
24 from engaging in substantial gainful activity,<sup>1</sup> which is expected to  
25 result in death or last for a continuous period of at least twelve  
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27 <sup>1</sup> Substantial gainful activity means work that involves doing  
28 significant and productive physical or mental duties done for pay or  
profit. 20 C.F.R. § 416.910.

1 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing  
2 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant  
3 incapable of performing the work he previously performed, and render  
4 claimant incapable of performing any other substantial gainful  
5 employment existing in the national economy. Tackett v. Apfel, 180 F.3d  
6 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(D)(2)(A)).

7  
8 To decide if a claimant is entitled to benefits, an ALJ conducts  
9 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

- 10  
11 (1) Is the claimant presently engaged in substantial gainful  
12 activity? If so, the claimant is not found disabled. If  
13 not, proceed to step two.
- 14 (2) Is claimant's impairment severe? If not, the claimant is  
15 found not disabled. If so, proceed to step three.
- 16 (3) Does claimant's impairment meet or equal the requirements for  
17 any impairment listed at 20 C.F.R. Part 404, Subpart P,  
18 Appendix 1? If so, the claimant is found disabled. If not,  
19 proceed to step four.
- 20 (4) Is the claimant capable of performing his past work? If so,  
21 the claimant is found not disabled. If not, proceed to step  
22 five.
- 23 (5) Is the claimant able to do any other work? If not, the  
24 claimant is found disabled. If so, the claimant is found not  
25 disabled.

26  
27 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d  
28 949, 953-54 (9th Cir. 2001); 20 C.F.R. § 416.920(b)-(g)(1).

1 The claimant has the burden of proof at steps one through four, and  
2 the Commissioner has the burden of proof at step five. Bustamante, 262  
3 F.3d at 953-54. If, at step four, the claimant meets his burden of  
4 establishing an inability to perform his past work, the Commissioner  
5 must show that the claimant can perform some other work that exists in  
6 "significant numbers" in the national economy, taking into account the  
7 claimant's residual functional capacity ("RFC"),<sup>2</sup> age, education, and  
8 work experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1).  
9 The Commissioner may do so by the testimony of a vocational expert or  
10 by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R.  
11 Part 404, Subpart P, Appendix 2 (commonly known as "the Grids").  
12 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a  
13 claimant has both exertional (strength-related) and nonexertional  
14 limitations, the Grids are inapplicable and the ALJ must take testimony  
15 from a vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.  
16 2000).

#### 17 18 IV.

#### 19 STANDARD OF REVIEW

20

21 Under 41 U.S.C. § 405(g), a district court may review the  
22 Commissioner's decision to deny benefits. The court may set aside the  
23 Commissioner's decision when the ALJ's findings are based on legal error  
24 or are not supported by substantial evidence in the record as a whole.  
25 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001)(citing  
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27 <sup>2</sup> Residual functional capacity is "the most [one] can still do  
28 despite [his] limitations" and represents an assessment "based on all  
relevant evidence." 20 C.F.R. § 416.945(a).

1 Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th  
2 Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

3  
4 "Substantial evidence is more than a scintilla, but less than a  
5 preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater,  
6 112 F.3d 1064, 1066 (9th Cir. 1997). Specifically, it is "relevant  
7 evidence which a reasonable person might accept as adequate to support  
8 a conclusion." Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d  
9 at 1279). To determine whether substantial evidence supports a finding,  
10 the court must "'consider the record as a whole, weighing both evidence  
11 that supports and evidence that detracts from the [Commissioner's]  
12 conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2  
13 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support  
14 either affirming or reversing that conclusion, the court may not  
15 substitute its judgment for that of the Commissioner. Reddick, 157 F.3d  
16 at 720-21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

17  
18 **V.**

19 **DISCUSSION**

20  
21 Plaintiff contends that the ALJ erred because he failed to identify  
22 specific, legitimate reasons for rejecting Dr. Sekhorn's opinion.  
23 (Complaint at 2); and 2). Additionally, Plaintiff argues that the ALJ  
24 erred by finding that Plaintiff could work as a cleaner, hospital  
25 cleaner, and mail clerk because the requirements of the jobs are  
26 inconsistent with Plaintiff's Residual Functional Capacity ("RFC").  
27 (Id. at 5). The Court agrees.

28 \\

1 **A. The ALJ Failed to Provide Specific And Legitimate Reasons To**  
2 **Reject Dr. Sekhorn's Opinion**

3  
4 Where a treating physician's opinion is contradicted "the [ALJ]  
5 must determine credibility and resolve the conflict." Valentine v.  
6 Comm'r, 574 F.3d 685, 692 (9th Cir. 2009) (quoting Lester v. Chater, 81  
7 F.3d 821, 830 (9th Cir. 1995)). "However, to reject the opinion of a  
8 treating physician in favor of a conflicting opinion . . . an ALJ must  
9 make findings setting forth specific, legitimate reasons for doing so  
10 that are based on substantial evidence in the record." Id. (internal  
11 quotation marks omitted). "The ALJ must do more than offer his  
12 conclusions. He must set forth his own interpretations and explain why  
13 they, rather than the [physician's] are correct." Orn v. Astrue, 495  
14 F.3d 625, 632 (9th Cir. 2007) (internal citation omitted).

15  
16 Here, Plaintiff's treating physician, Dr. Sekhorn, treated  
17 Plaintiff for over five years and stated his diagnosis was "298.9  
18 Psychotic disorders." (AR 396). According to Dr. Sekhorn, Plaintiff  
19 "experiences episodes of auditory hallucinations and paranoia episodes"  
20 despite complying with his medication requirements. (Id.). Plaintiff's  
21 medications include "Haldol, Zyprexa and Cogentin." (Id.). Dr. Sekhorn  
22 concluded that Plaintiff is "unable to work and may be eligible for SSI  
23 benefits." (Id.).

24  
25 While the ALJ was correct in asserting that a finding of disability  
26 is "reserved to the Commissioner" (AR 15), he nevertheless had a duty  
27 to provide specific and legitimate reasons, based upon evidence in the  
28 record, for rejecting Dr. Sekhorn's opinion. Valentine, 574 F.3d at

1 692. However, the ALJ merely dismissed Dr. Sekhorn's conclusions  
2 without pointing to evidence in the record to support such a finding.  
3 Cf. Orn, 495 F.3d at 633-34. The ALJ did not address or refute  
4 Plaintiff's "episodes of auditory hallucinations and paranoia." (AR  
5 396). Additionally, he did not address or refute Plaintiff's diagnosis  
6 of "298.9 Psychotic disorders." (Id.). Thus, the ALJ failed to provide  
7 specific, legitimate reasons based on substantial evidence in the record  
8 to reject Dr. Sekhorn's opinion. Upon remand, the ALJ must either  
9 provide specific, legitimate reasons, based upon factual evidence in the  
10 record, for rejecting Dr. Sekhorn's opinion or incorporate Dr. Sekhorn's  
11 limitations into the RFC determination.

12  
13 **B. The ALJ Did Not Address The Deviation Between Plaintiff's RFC And**  
14 **The DOT Requirements Of Jobs The VE Said Plaintiff Could Perform**

15  
16 In order for an ALJ to rely on job descriptions in the Dictionary  
17 of Occupational Titles ("DOT") that fails to comport with a Plaintiff's  
18 limitations, the ALJ must "definitely explain this deviation." Pinto  
19 v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001). The ALJ may rely on  
20 expert testimony that contradicts the DOT if the record contains  
21 persuasive evidence supporting the deviation. Tommasetti v. Astrue, 533  
22 F.3d 1035, 1042 (9th Cir. 2008); Johnson v. Shalala, 60 F.3d 1428, 1435  
23 (9th Cir. 1995). However, an ALJ may not rely on personal speculation  
24 or incomplete VE testimony. See Tommasetti, 533 F.3d at 1042.

25  
26 Here, the ALJ did not definitively explain the deviation between  
27 his Residual Functional Capacity ("RFC") finding of "no contact with the  
28 public" and "no reading past basic sentences" (AR 12) and the job

1 requirements of cleaner, hospital cleaner, and mail clerk. Pinto, 249  
2 F.3d at 847.

3  
4 First, both cleaner and hospital cleaner positions require  
5 Plaintiff to interact with the public and read past basic sentences.  
6 The cleaner reading requirement of "passive vocabulary of 5,000 to 6,000  
7 words" at "a rate of 190-215 words per minute" deviates from Plaintiff's  
8 "reading basic sentences" limitation. DICOT 381.687-018, 1991 WL  
9 673258. Additionally, the duties of a cleaner consisting of keeping  
10 production areas clean, transporting materials between buildings, and  
11 maintaining outside areas by "cutting grass or shoveling snow" are  
12 deviations because they place Plaintiff in contact with the public. Id.  
13 Moreover, the hospital cleaner duties requiring cleaning various  
14 hospital areas also places Plaintiff in contact with the public. DICOT  
15 323.687-010, 1991 WL 673265. The reading requirements are identical to  
16 the cleaner reading requirements, which deviates from the "reading basic  
17 sentences" limitation. Id. Further, the requirement of "deal[ing] with  
18 several concrete variables" is inconsistent with Plaintiff's limitation  
19 to perform simple repetitive tasks. Id. Therefore, the ALJ's finding  
20 that Plaintiff can perform the the cleaner and hospital cleaner  
21 positions requires a deviation from the DOT description of these  
22 positions.

23  
24 Second, the mail clerk position requires Plaintiff to "read[] past  
25 basic sentences" and perform more than "simple repetitive tasks." (AR  
26 12). The mail clerk position also requires reading with a "passive  
27 vocabulary of 5,000 to 6,000 words" at a rate of 190-215 words per  
28 minute, which is inconsistent with Plaintiff's reading limitation.



1 DICOT 209.687-026, 1991 WL 671813. Mail clerk duties consisting of  
2 sorting, time-stamping, examining, collecting, and distributing mail  
3 exceed Plaintiff's limitation to perform simple repetitive tasks. Id.  
4 Moreover, the requirement that Plaintiff "deal with problems involving  
5 several concrete variables" is also inconsistent with Plaintiff's  
6 limitations. Id.

7  
8 The ALJ failed to definitively explain the deviations from the DOT  
9 requirements and his RFC finding. Pinto, 249 F.3d at 847. In fact, he  
10 never acknowledged the deviations in his opinion. Further, the ALJ did  
11 not have expert testimony to justify the deviation from DOT because he  
12 never asked the VE to testify about the deviations. Tommasetti, 533  
13 F.3d at 1042. This error was not harmless because there were deviations  
14 between Plaintiff's limitations and every position the VE found he could  
15 perform. Cf. Massachi v. Astrue, 486 F.3d 1149, 1154 n. 19 (9th Cir.  
16 2007). Therefore, remand is required. On remand, the ALJ must either  
17 definitively explain the deviations from the DOT, or reevaluate the work  
18 that Plaintiff can perform.

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**VI.**  
**CONCLUSION**

Pursuant to sentence four of 42 U.S.C. § 405(g),<sup>3</sup> IT IS ORDERED that Judgment be entered REVERSING and REMANDING the decision of the Commissioner for further administrative proceedings consistent with this decision. The Clerk of the Court shall serve copies of this Order and the Judgment on counsel for both parties.

DATED: October 7, 2011

\_\_\_\_\_  
/S/  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

**THIS MEMORANDUM IS NOT INTENDED FOR PUBLICATION NOR IS IT INTENDED TO BE INCLUDED IN OR SUBMITTED TO ANY ONLINE SERVICE SUCH AS WESTLAW OR LEXIS.**

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<sup>3</sup> This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing, the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."