

O

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE E. SAIZ,	)	NO. EDCV 11-00290-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
	)	

Plaintiff filed a Complaint on February 22, 2011, seeking review of the denial of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On March 23, 2011, 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 February 1, 2012, 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 the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings.

1 On March 6, 2012, this Court issued a minute order ("Minute Order")  
2 requesting that the Commissioner submit: "(1) an improved transcript of  
3 the hearing, if possible, which establishes that all appropriate  
4 limitations were included in the hypothetical question to the vocational  
5 expert; and/or (2) supplemental briefing that supports the claim of  
6 harmless error." (Minute Order at 1-2.) On April 2, 2012, the parties  
7 stipulated to withdraw Disputed Issue I ("Whether The ALJ Properly  
8 Propounded A Complete Hypothetical To the Vocational Expert") from their  
9 February 1, 2012 Joint Stipulation. (Docket No. 26.) The Court  
10 thereafter took the remaining issue presented under submission without  
11 oral argument.

12  
13 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
14

15 On January 24, 2008, plaintiff filed an application for a period of  
16 disability, DIB, and SSI. (Administrative Record ("A.R.") 18.)  
17 Plaintiff, who was born on September 7, 1958 (A.R. 28),<sup>1</sup> claims to have  
18 been disabled since December 18, 2007 (A.R. 18, 149), due to colon  
19 cancer and depression (A.R. 88, 92).

20  
21 After the Commissioner denied plaintiff's claim initially and upon  
22 reconsideration (A.R. 18, 88-96), plaintiff requested a hearing (A.R.  
23 100). On October 27, 2009, plaintiff, who was represented by counsel,  
24 appeared and testified at a hearing before Administrative Law Judge  
25 Mason Harrell, Jr. (the "ALJ"). (A.R. 18, 37-83.) Plaintiff's brother-

26  
27 <sup>1</sup> On the alleged disability onset date, plaintiff was 49 years  
28 old, which is defined as a younger individual. (A.R. 17; citing 20  
C.F.R. §§ 404.1563, 416.963.) Plaintiff is now in the closely  
approaching advanced age category. (*Id.*)

1 in-law, Frank Chavez, and a vocational expert, Sandra Fioretti, also  
2 testified. (*Id.*) On December 9, 2009, the ALJ denied plaintiff's claim  
3 (A.R. 18-30), and the Appeals Council subsequently denied plaintiff's  
4 request for review of the ALJ's decision (A.R. 4-6). That decision is  
5 now at issue in this action.

6  
7 **SUMMARY OF ADMINISTRATIVE DECISION**  
8

9 The ALJ found that plaintiff meets the insured status requirements  
10 of the Social Security Act through December 31, 2011. (A.R. 20.) The  
11 ALJ also found that plaintiff has no past relevant work experience<sup>2</sup> (A.R.  
12 28) and has not engaged in substantial gainful activity since December  
13 18, 2007, the alleged onset date (A.R. 20). The ALJ determined that  
14 plaintiff has the following severe impairments: "depression, not  
15 otherwise specified; antisocial traits; alcohol abuse and a history of  
16 methamphetamine abuse, but not since December 2007; colon cancer; and  
17 status post hernia operation." (A.R. 20.) He also determined that  
18 plaintiff does not have an impairment or combination of impairments that  
19 meets or medically equals one of the listed impairments in 20 C.F.R.  
20 Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525,  
21 404.1526, 416.920(d), 416.925, 416.926). (*Id.*)  
22

23 After reviewing the record, the ALJ determined that plaintiff has  
24 the residual functional capacity ("RFC") to perform a limited range of  
25 light work, as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), with  
26

---

27 <sup>2</sup> Although the ALJ found that plaintiff has no past relevant  
28 work experience, it does appear that plaintiff has prior work  
experience. (*See, e.g.*, A.R. 165.)

1 the following limitations:  
2

3 [plaintiff can] lift and/or carry 20 pounds occasionally and  
4 10 pounds frequently; walk three to four blocks; stand and/or  
5 walk for four hours out of an eight-hour workday; and perform  
6 simple repetitive tasks in a nonpublic setting. [Plaintiff]  
7 is precluded from intense interactions with coworkers and  
8 supervisors; jobs that require hypervigilance; and jobs that  
9 have safety operations.

10  
11 (A.R. 21.)  
12

13 Based on his RFC assessment and after having considered plaintiff's  
14 age, education,<sup>3</sup> work experience, and the testimony of the vocational  
15 expert, the ALJ found that jobs exist in the national economy that  
16 plaintiff could perform, including bench assembler and small products  
17 assembler II. (A.R. 29-30.) In so finding, the ALJ specifically noted  
18 that, because plaintiff could not perform the full range of light work,  
19 the testimony of a vocational expert was necessary to determine the  
20 extent to which plaintiff's limitations eroded the occupational base for  
21 light work. (A.R. 29.) Even with a 50 percent erosion of that  
22 occupational base, the vocational expert testified that an individual  
23 with plaintiff's limitations could perform the above-listed jobs. (*Id.*)  
24 She further testified that her testimony was consistent with the  
25 Dictionary of Occupational Titles ("DOT"). (*Id.*) Accordingly, the ALJ  
26 concluded that plaintiff has not been under a disability, as defined in

---

27  
28 <sup>3</sup> The ALJ found that plaintiff has a limited education and is  
able to communicate in English. (A.R. 28.)

1 the Social Security Act, from December 18, 2007, through the date of his  
2 decision. (A.R. 30.)

3  
4 **STANDARD OF REVIEW**

5  
6 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
7 decision to determine whether it is free from legal error and supported  
8 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
9 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
10 evidence as a reasonable mind might accept as adequate to support a  
11 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
12 a mere scintilla but not necessarily a preponderance." Connett v.  
13 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
14 record can constitute substantial evidence, only those 'reasonably drawn  
15 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
16 1066 (9th Cir. 2006)(citation omitted).

17  
18 Although this Court cannot substitute its discretion for that of  
19 the Commissioner, the Court nonetheless must review the record as a  
20 whole, "weighing both the evidence that supports and the evidence that  
21 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
22 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
23 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
24 responsible for determining credibility, resolving conflicts in medical  
25 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
26 1035, 1039 (9th Cir. 1995).

27  
28 The Court will uphold the Commissioner's decision when the evidence

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

#### 12 13 **DISCUSSION**

14  
15 Plaintiff claims that the ALJ erred at step five of the sequential  
16 evaluation in determining that plaintiff could perform other work in the  
17 national economy. (Joint Stipulation ("Joint Stip.") at 4, 11.)  
18 Specifically, plaintiff claims that, pursuant to the descriptions of  
19 light work provided by the DOT and the Commissioner, the jobs identified  
20 by the vocational expert "require six hours of standing and walking."  
21 (Joint Stip. at 12.) As such, plaintiff claims that the ALJ committed  
22 legal error, because he offered "no explanation [as to] how an  
23 individual who is precluded from standing . . . more than four hours can  
24 perform the alternative work which requires six hours of  
25 standing/walking." (*Id.* )

26  
27 At step five, the burden shifts from the claimant to the ALJ to  
28 prove that, based on the claimant's RFC, age, education, and past work

1 experience, the claimant is able to perform work that exists in  
2 significant numbers in the national economy. Smolen v. Chater, 80 F.3d  
3 1273, 1291 (9th Cir. 1996); 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1560(c),  
4 416.920(a)(4)(v), 416.960(c). The ALJ can meet his burden at step five  
5 by either taking the testimony of a vocational expert or by referring to  
6 the Grids. See Tackett v. Apfel, 180 F.3d 1094, 1100-01 (9th Cir.  
7 1999)(describing how the vocational expert's testimony and the Grids are  
8 used at step five). If the ALJ chooses, as he did in this case, to rely  
9 upon the testimony of a vocational expert, the hypothetical posed to the  
10 vocational expert must be "accurate, detailed, and supported by the  
11 medical record." *Id.* at 1101. If the hypothetical presented to the  
12 vocational expert does not reflect all the claimant's limitations and/or  
13 is not supported by evidence in the record, the "[vocational] expert's  
14 testimony has no evidentiary value to support a finding that the  
15 claimant can perform jobs in the national economy." Matthews v.  
16 Shalala, 10 F.3d 678, 681 (9th Cir. 1993)(citation and internal  
17 quotations omitted).

18  
19 The ALJ has an affirmative responsibility to ask whether a conflict  
20 exists between the testimony of a vocational expert and the DOT. SSR  
21 00-4p, 2000 SSR LEXIS 8, at \*9; Massachi v. Astrue, 486 F.3d 1149, 1152-  
22 53 (9th Cir. 2007). If there is a conflict between the DOT and  
23 testimony from the vocational expert, an ALJ may accept testimony from  
24 a vocational expert that contradicts the DOT, but "the record must  
25 contain 'persuasive evidence to support the deviation.'" Pinto v.  
26 Massanari, 249 F.3d 840, 846 (9th Cir. 2001)(quoting Johnson v. Shalala,  
27 60 F.3d 1428, 1435 (9th Cir. 1995)). The ALJ must resolve any conflict  
28 by determining whether the vocational expert's explanation is reasonable

1 and provides sufficient support to justify deviating from the DOT. SSR  
2 00-4p, 2000 SSR LEXIS 8, at \*9; Massachi, 486 F.3d at 1153. An ALJ's  
3 failure to do so, however, can be harmless error when there is no  
4 conflict or the vocational expert provides a basis for relying on the  
5 his or her testimony rather than on the DOT. *Id.* at 1154 n.19.

6  
7 At the October 27, 2009 administrative hearing, the ALJ asked the  
8 vocational expert whether a hypothetical individual who was limited, as  
9 is plaintiff, to, *inter alia*, walking three to four blocks at a time,  
10 standing/walking for four hours out of an eight-hour workday, lifting up  
11 to 20 pounds occasionally and 10 pounds frequently, no work with the  
12 public, no intense interactions with co-workers and supervisors, and no  
13 responsibility for safety operations, could perform plaintiff's prior  
14 work. (A.R. 81.) The vocational expert testified that such an  
15 individual could not perform plaintiff's prior work. (A.R. 82.) The  
16 vocational expert testified, however, that such an individual, with the  
17 additional limitation to simple repetitive tasks, could perform the jobs  
18 of bench assembler and small products assembler II, after a 50 percent  
19 erosion. (*Id.*) When asked by the ALJ if her testimony was "consistent  
20 with the DOT," the vocational expert answered, "Yes." (*Id.*)

21  
22 The ALJ relied on the vocational expert's testimony in finding that  
23 "there are jobs that exist in significant numbers in the national  
24 economy that [plaintiff] can perform." (A.R. 29.) In so finding, the  
25 ALJ noted that "[plaintiff]'s ability to perform all or substantially  
26 all of the requirements of [the full range of light work] has been  
27 impeded by additional limitations." (*Id.*) Accordingly, "[t]o determine  
28 the extent to which these limitations erode the unskilled light



1 occupational base, the [ALJ] asked the vocational expert whether jobs  
2 exist in the national economy for an individual with [plaintiff]'s age,  
3 education, work experience, and [RFC]." (*Id.*) The ALJ noted that,  
4 after considering the above factors, the vocational expert testified  
5 that such an individual would be able to perform other work, such as  
6 bench assembler and small products assembler II. (*Id.*)

7  
8 The ALJ did not err in relying on the vocational expert's testimony  
9 that plaintiff could perform other work in the national economy. As an  
10 initial matter, the ALJ complied with his affirmative duty to confirm  
11 that the vocational expert's testimony was consistent with the  
12 information provided in the DOT. SSR 00-4p, 2000 SSR LEXIS 8, at \*8-9  
13 ("When a [vocational expert] provides evidence about the requirements of  
14 a job or occupation, the [ALJ] has an affirmative responsibility to ask  
15 about any possible conflict between that [vocational expert's] evidence  
16 and information provided in the DOT. In these situations, the [ALJ]  
17 will: Ask the [vocational expert] if the evidence he or she has  
18 provided conflicts with information provided in the DOT"). Here, after  
19 the vocational expert testified that a hypothetical individual with  
20 plaintiff's limitations could perform jobs such as bench assembler and  
21 small parts assembler II, the ALJ asked the vocational expert whether  
22 her testimony was consistent with the DOT. The vocational expert  
23 replied, "Yes."

24  
25 Further, contrary to plaintiff's claim, there does not appear to be  
26 a "clear and apparent conflict" between the DOT and the vocational  
27 expert's testimony with respect to the standing/walking requirements.  
28 Plaintiff claims that the "light" jobs identified by the vocational

1 expert "require six hours of standing and walking." (A.R. 12.) While  
2 it is true that "the *full range* of light work requires standing and  
3 walking, off and on, for a total of approximately [six] hours of an  
4 [eight]-hour workday," SSR 83-10, 1983 SSR LEXIS 30 (emphasis added),  
5 not all light work jobs require standing or walking for that amount of  
6 time, see 20 C.F.R. §§ 404.1567(b), 416.967(b) (noting that job may be  
7 classified as light "when it involves sitting most of the time with some  
8 pushing and pulling of arm or leg controls"). Indeed, as noted in the  
9 DOT description for the alternative jobs identified by the vocational  
10 expert -- *to wit*, bench assembler and small products assembler II -- a  
11 job can be classified as light when "it requires sitting most of the  
12 time but entails pushing and/or pulling of arm or leg controls" and/or  
13 "the job requires working at a production rate pace entailing the  
14 constant pushing and/or pulling of materials even though the weight of  
15 those materials is negligible." See DOT 706.684-042 (bench assembler);  
16 DOT 739.687-030 (assembler, small products II). Accordingly, because  
17 there does not appear to be a clear inconsistency between the DOT and  
18 the vocational expert's testimony, the ALJ was under no duty to make  
19 additional inquiries. See Michelson-Wurm v. Comm'r SSA, 285 Fed. Appx.  
20 482, 486 (9th Cir. 2008)(stating that "the ALJ must clarify the  
21 discrepancy . . . *only where there is an apparent unresolved conflict*  
22 *that arises between the vocational expert's testimony and the*  
23 *DOT*")(emphasis in original).

24  
25       Moreover, even assuming *arguendo*, that there was a "clear and  
26 apparent" conflict between the vocational expert's testimony and the  
27 DOT, as plaintiff contends, an ALJ "may rely on expert testimony which  
28 contradicts the DOT [so long as] the record contains persuasive evidence

1 to support the deviation." Tommasetti v. Astrue, 533 F.3d 1035, 1042  
2 (9th Cir. 2008)(citations omitted); see Massachi, 486 F.3d at 1154 n.19  
3 (noting that there is no reversible error if there was no conflict or  
4 the vocational expert "provided sufficient support for her conclusion so  
5 as to justify any potential conflicts"); Johnson, 60 F.3d at 1435-36  
6 (noting that DOT classifications are rebuttable and are not the sole  
7 source of admissible information concerning jobs). Evidence sufficient  
8 to permit such a deviation may be provided either through specific  
9 findings of fact regarding plaintiff's RFC or through inferences  
10 reasonably drawn from the context of the expert's testimony. Light v.  
11 SSA, 119 F.3d 789, 793 (9th Cir. 1997).

12  
13 The vocational expert's testimony provides sufficient support for  
14 any alleged deviation from the DOT. As noted above, the vocational  
15 expert testified that a hypothetical individual with plaintiff's  
16 limitations, including, *inter alia*, standing/walking for not more than  
17 four hours out of an eight-hour day, could perform other jobs in the  
18 national economy. Specifically, after reducing the occupational base by  
19 50 percent based on plaintiff's limitations,<sup>4</sup> the vocational expert  
20 testified, based on her expertise, that such an individual could perform  
21 the jobs of bench assembler and small products assembler II. See  
22 Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005)(noting that a  
23 vocational expert's "recognized expertise provides the necessary  
24 foundation for his or her testimony[,] . . . no additional foundation is

---

25  
26 <sup>4</sup> Although the vocational expert did not specifically state  
27 that the 50 percent erosion in the occupational base was due to  
28 plaintiff's various limitations, such a conclusion is reasonably  
inferred. See Light, 119 F.3d at 793; see also Sample v. Schweiker, 694  
F.2d 639, 642 (9th Cir. 1982)(noting that an ALJ is entitled to draw  
inferences logically flowing from the evidence).

1 required") In other words, because the vocational expert took into  
2 account plaintiff's various limitations by eroding the occupation base  
3 of each proffered job by 50 percent, the vocational expert provided a  
4 sufficient rationale to support any purported deviation/inconsistency  
5 with the DOT. See SSR 00-04p, 2000 SSR LEXIS 8, at \*6 (noting that a  
6 DOT listing indicates the maximum requirements of occupations as they  
7 are generally performed, and a vocational expert can provide more  
8 specific information about jobs or occupations than the DOT). As such,  
9 any error committed by the ALJ in failing to address any apparent  
10 conflict was harmless.

11  
12 Accordingly, the ALJ did not commit reversible error in relying on  
13 the vocational expert's testimony concerning plaintiff's ability to  
14 perform other work.

15  
16 ///  
17 ///  
18 ///  
19 ///  
20 ///  
21 ///  
22 ///  
23 ///  
24 ///  
25 ///  
26 ///  
27 ///  
28

1 **CONCLUSION**

2

3 For the foregoing reasons, the Court finds that the Commissioner's  
4 decision is supported by substantial evidence and is free from material  
5 legal error. Neither reversal of the Commissioner's decision nor remand  
6 is warranted.

7

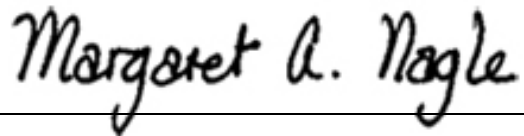
8 Accordingly, IT IS ORDERED that Judgment shall be entered affirming  
9 the decision of the Commissioner of the Social Security Administration.  
10 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of  
11 this Memorandum Opinion and Order and the Judgment on counsel for  
12 plaintiff and for defendant.

13

14 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

15

16 DATED: April 6, 2012

17 

18 \_\_\_\_\_  
19 MARGARET A. NAGLE  
20 UNITED STATES MAGISTRATE JUDGE