

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**

LYNN DURON,
Plaintiff,
v.
CAROLYN W. COLVIN, ACTING
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,^{1/}
Defendant.

) Case No. ED CV 11-1791 JCG

**MEMORANDUM OPINION AND
ORDER**

Lynn Duron (“Plaintiff”) challenges the Social Security Commissioner’s (“Defendant”) decision denying her application for disability benefits. Specifically, Plaintiff contends that the Administrative Law Judge (“ALJ”) erred at step five in relying on the testimony of the Vocational Expert (“VE”) and finding that Plaintiff can perform the positions of order clerk, charge account clerk, and surveillance systems monitor. (Joint Stip. at 3-13, 19); *see Dictionary of Occupational Titles* (“DOT”) 205.367-014, 209.567-014, 379.367-010. Because these positions all require a reasoning level of 3 under the DOT, Plaintiff argues that they conflict with

^{1/} Following the resignation of Michael J. Astrue, Carolyn W. Colvin is substituted as the proper defendant herein. *See* Fed. R. Civ. P. 25(d).

1 her limitation to simple, repetitive tasks.^{2/} (Joint Stip. at 3-13, 19.) As discussed
2 below, the Court finds in favor of Plaintiff, albeit on different grounds.

3 The Ninth Circuit has yet to address the question of whether an occupation
4 with a reasoning level of 3 can involve simple, repetitive tasks. As both parties have
5 demonstrated, district courts within our circuit are split on this issue for a variety of
6 reasons, but the majority do find a conflict. *See Torres v. Astrue*, 2012 WL
7 1032897, at *3 (C.D. Cal. Mar. 27, 2012) (reviewing district court opinions).

8 For present purposes, however, the Court need not determine whether such an
9 inconsistency exists. Instead, the Court finds error here on two other grounds.

10 First, the Court recalls the applicable burden of proof at step five. There, the
11 Commissioner bears the burden to identify jobs that a claimant can perform despite
12 her identified limitations. *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995).
13 Without consensus as to whether a reasoning level of 3 is inconsistent with simple,
14 repetitive tasks, it is unclear whether the positions identified by Defendant are
15 actually viable. In light of this ambiguity, the Court cannot conclude that Defendant
16 met its step five burden.^{3/}

17 Second, the ALJ has “an affirmative responsibility to ask about any *possible*
18 conflict” between a VE’s testimony and the DOT. Social Security Ruling (“SSR”)
19 00-4p, 2000 WL 1898704, at *4 (emphasis added). As explained above, a conflict
20
21

22 ^{2/} A reasoning level of 3 requires an employee to “[a]pply commonsense
23 understanding to carry out instructions furnished in written, oral, or diagrammatic
24 form” and to “[d]eal with problems involving several concrete variables in or from
25 standardized situations.” DOT, Appendix C, 1991 WL 688702.

26 ^{3/} Tellingly, some minority courts have ruled in favor of the Commissioner, at
27 least in part, because the alleged error occurred at step four (*i.e.*, when Plaintiff bears
28 the burden of proof). *See, e.g., Leon v. Astrue*, 830 F. Supp. 2d 844, 850 (C.D. Cal.
2011), *Megliorino v. Astrue*, 2012 WL 2847705, at *10 (C.D. Cal. July 10, 2012).

1 arguably exists here in the absence of conclusive legal authority.^{4/} Despite this
2 possibility, however, the ALJ failed to obtain a reasonable explanation for such a
3 conflict, and thus error must be found under SSR 00-4p. *See McGensy v. Astrue*,
4 2010 WL 1875810, at *4 (C.D. Cal. May 11, 2010).

5 Accordingly, for the reasons stated above, the Court determines that the ALJ
6 erred at step five.

7 C. Remand is Warranted

8 With error established, this Court has discretion to remand or reverse and
9 award benefits. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Where no
10 useful purpose would be served by further proceedings, or where the record has been
11 fully developed, it is appropriate to exercise this discretion to direct an immediate
12 award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004).
13 But where there are outstanding issues that must be resolved before a determination
14 can be made, or it is not clear from the record that the ALJ would be required to find
15 plaintiff disabled if all the evidence were properly evaluated, remand is appropriate.
16 *See id.* at 594.

17 Here, in light of the error described above, the ALJ shall reevaluate the
18 testimony of the VE, and obtain a reasonable explanation for any conflict between
19

20 ^{4/} Defendant contends that no conflict exists because mental complexity is best
21 gauged by a job’s skill level, not its reasoning level. (Joint Stip. at 18.) But *Meissl*
22 *v. Barnhart* – a case upon which Defendant relies – aptly rejects this very argument:
23 A job’s [skill level] is focused on “the amount of lapsed time” it
24 takes for a typical worker to learn the job’s duties. A job’s
25 reasoning level, by contrast, gauges the minimal ability a
26 worker needs to complete the job’s tasks themselves. . . . “[Skill
27 level] speak[s] to the issue of the level of vocational preparation
28 necessary to perform the job, not directly to the issue of a job’s
simplicity, which appears to be more squarely addressed by [its
reasoning level].”

Meissl v. Barnhart, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005) (citations omitted).

1 that testimony and the DOT, specifically with respect to Plaintiff's limitation to
2 simple, repetitive tasks.

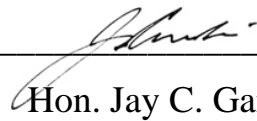
3 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
4 **REVERSING** the decision of the Commissioner denying benefits and
5 **REMANDING** the matter for further administrative action consistent with this
6 decision.^{5/}

7

8 Dated: February 20, 2013

9

10



Hon. Jay C. Gandhi
United States Magistrate Judge

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

^{5/} In light of the Court's remand instructions, it is unnecessary to address Plaintiff's remaining contention. (See Joint Stip. at 19-24, 27.)