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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUANA BARRERA,)	NO. ED CV 12-764-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
MICHAEL J. ASTRUE, COMMISSIONER)	AND ORDER OF REMAND
OF SOCIAL SECURITY,)	
)	
Defendant.)	
)	
_____)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
judgment are denied and this matter is remanded for further
administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on May 17, 2012, seeking review of
the Commissioner's denial of benefits. The parties filed a consent to
proceed before a United States Magistrate Judge on June 15, 2012.

1 Plaintiff filed a motion for summary judgment on October 19, 2012.
2 Defendant filed a motion for summary judgment on October 29, 2012.
3 The Court has taken the motions under submission without oral
4 argument. See L.R. 7-15; "Order," filed May 21, 2012.
5

6 **BACKGROUND**

7

8 Plaintiff, a former healthcare worker and carpet packer, asserts
9 disability since November 1, 1998, based on a combination of alleged
10 impairments (Administrative Record ("A.R.") 36-194). At an
11 administrative hearing, counsel for Plaintiff invited the
12 Administrative Law Judge ("ALJ") to consider Rule 202.09 of the
13 Medical Vocational Guidelines ("the Grids")¹ (A.R. 51). Given
14 Plaintiff's vocational factors and residual functional capacity, Rule
15 202.09 would direct a finding of disability as of late 1998 if and
16 only if Plaintiff is "illiterate," within the meaning of the Grids.
17

18 At the administrative hearing, Plaintiff testified that she can
19 read and write in Spanish but not in English (A.R. 45). The ALJ then
20 asked, "How about short, simple words, like 'go,' 'stop'?", to which
21 Plaintiff responded "Yeah, some." (Id.). One of Plaintiff's forms in
22 the Administrative Record contains handwriting stating: "Priscilla
23 Carbajal completed this form for me because I don't read english
24 [sic]" (A.R. 137). The record contains some evidence of Plaintiff's
25 ability to understand spoken English (A.R. 42-43) (ALJ questioned
26 Plaintiff without translation during part of the administrative
27

28 ¹ The Grids may be found in 20 C.F.R. Part 404, Subpart
P, Appendix 2.

1 hearing). Plaintiff also testified that she used English at work "a
2 little" and that she went to "classes in my work [as a caregiver] for
3 the people" (A.R. 42, 44). The record is silent regarding whether
4 Plaintiff's work or "classes" required reading and writing in English.
5
6

7 The ALJ declined to apply Grid Rule 202.09, finding that
8 Plaintiff is not illiterate (A.R. 20-21). The ALJ reportedly based
9 this finding "on [Plaintiff's] responding to questions before they
10 were translated, and her own testimony in English for a while, and her
11 having attended classes in English for work and using some English at
12 work" (A.R. 20).
13

14 The ALJ found Plaintiff not disabled (A.R. 17-22). The Appeals
15 Council denied review (A.R. 1-3).
16

17 **STANDARD OF REVIEW**

18

19 Under 42 U.S.C. section 405(g), this Court reviews the
20 Administration's decision to determine if: (1) the Administration's
21 findings are supported by substantial evidence; and (2) the
22 Administration used correct legal standards. See Carmickle v.
23 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
24 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such
25 relevant evidence as a reasonable mind might accept as adequate to
26 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
27 (1971) (citation and quotations omitted); see Widmark v. Barnhart,
28 454 F.3d 1063, 1067 (9th Cir. 2006).

1 DISCUSSION

2
3 "Illiteracy means the inability to read or write." 20 C.F.R.
4 404.1564(b)(1). "We consider someone illiterate if the person cannot
5 read or write a simple message such as instructions or inventory lists
6 even though the person can sign his or her name." Id. Under the
7 regulations, "illiteracy" means illiteracy in English. See Silveira
8 v. Apfel, 204 F.3d 1257, 1261 (9th Cir. 2000); Chavez v. Department of
9 Health and Human Services, 103 F.3d 849, 852 (9th Cir. 1996). The
10 Administration "bears the burden of establishing that [the claimant]
11 is literate." Silveira v. Apfel, 204 F.3d at 1261. A claimant's
12 ability orally to communicate in English does not mean that the
13 claimant is literate. Id.

14
15 In the present case, the record contains scant evidence of
16 Plaintiff's literacy. The only direct evidence that Plaintiff can
17 read and write in English (despite her denials of such ability)
18 consists of Plaintiff's vague response "Yeah, some" to the ALJ's
19 question regarding whether Plaintiff can read or write "short, simple
20 words, like 'go,' [and] 'stop'" (A.R. 45). The evidence Plaintiff
21 used some English at work and went to English-speaking "classes" in
22 her work may or may not betray literacy, depending on the nature of
23 the work and the nature of the classes. However, the record does not
24 disclose whether Plaintiff's work or her classes required reading and
25 writing.

26
27 Courts have concluded that similarly scant evidence of reading
28 and writing falls short of carrying the Administration's burden of

1 establishing literacy. See, e.g., Obispo v. Astrue, 2012 WL 4711763,
2 at *4 (C.D. Cal. Oct. 3, 2012) ("plaintiff testified that he can read
3 and speak 'a little bit' of English . . . [but] it is unclear what
4 plaintiff meant by 'a little bit,' or how significant this evidence is
5 in relation to the other evidence of plaintiff's English skills, which
6 reflects that plaintiff consistently required the assistance of an
7 interpreter"); Franco v. Astrue, 2012 WL 3638609, at *13-14 (C.D. Cal.
8 Aug. 23, 2012) (the plaintiff reportedly "was able to answer questions
9 at the hearing before the interpreter could interpret the questions"
10 but "speaking English does not pertain to [the claimant's] literacy
11 ability in reading and writing. When asked if plaintiff can read in
12 English, plaintiff stated, '[a] little bit yes, but I don't write it -
13 I write it in my form of Spanish'"); Calderon v. Astrue, 2009 WL
14 3790008, at *9-10 (E.D. Cal. Nov. 10, 2009) (the plaintiff testified,
15 "I can read a little bit and I can write a little bit, not much"; the
16 court reasoned that "a vague response of '[a] little bit' in response
17 to whether or not a claimant can read or write English is insufficient
18 to establish that plaintiff can read or write a simple message in the
19 English language . . . Perhaps indeed he can, but the record is far
20 from clear"); Delgado v. Barnhart, 305 F. Supp. 2d 704, 715-17 (S.D.
21 Tex. Feb. 19, 2004) ("The Plaintiff's writing abilities in English are
22 not clear from the record. The Plaintiff initially offered
23 contradictory assessments of his abilities and then concurred with the
24 ALJ's suggestion of '[a] little bit' . . . Unfortunately '[a] little
25 bit' remains unqualified and undefined. Is the plaintiff able, for
26 example, to 'write a simple message such as instructions or inventory
27 lists'? Such a determination is critical to an assessment of
28 literacy") (citations omitted).

1 "The ALJ has a special duty to fully and fairly develop the
2 record and assure that the claimant's interests are considered."
3 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). "This duty
4 exists even when the claimant is represented by counsel." Id. Given
5 this duty, given the Administration's burden of proof, and given the
6 determinations of other courts on similar facts, this Court finds that
7 the present record does not contain substantial evidence to support
8 the ALJ's finding on the literacy issue.²

9
10 Defendant appears to suggest that any Grid-related error
11 concerning literacy was harmless because "the vocational expert
12 considered Plaintiff's limited English in eroding the numbers of the
13 representative occupations by 90 percent" (Defendant's Motion at 4).
14 Defendant thereby references expert testimony on which the ALJ relied
15 in finding that there exist jobs Plaintiff could perform
16 notwithstanding her limitations. Defendant's apparent suggestion of
17 harmless error is not well taken. A conclusion of disability, when
18 directed by the Grids, is irrebuttable. See Lounsbury v. Barnhart,
19 468 F.3d 1111, 1115-16 (9th Cir. 2006); Cooper v. Sullivan, 880 F.2d
20 1152, 1157 (9th Cir. 1989). Thus, if the Administration concludes
21 after fuller development of the record that Plaintiff is illiterate,

22
23 ² Defendant appears to suggest that the ALJ's "adverse
24 credibility finding" furnishes substantial evidence to support
25 the ALJ's finding on the literacy issue. Any such suggestion
26 lacks merit. The ALJ's adverse credibility finding expressly
27 concerned only the accuracy of Plaintiff's "statements concerning
28 the intensity, persistence and limiting effects of these
symptoms" (*i.e.*, the symptoms resulting from Plaintiff's
"medically determinable impairments") (A.R. 19). In any event,
an adverse credibility finding, by itself, would rarely if ever
furnish affirmative evidence sufficient to carry a burden of
proof on a contested issue.

1 the Administration must find Plaintiff disabled under Grid Rule
2 202.09, regardless of any vocational evidence that Plaintiff could
3 perform work. See id.

4
5 Because the circumstances of the case suggest that further
6 administrative review could remedy the ALJ's error, remand is
7 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
8 generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an
9 administrative determination, the proper course is remand for
10 additional agency investigation or explanation, except in rare
11 circumstances).

12
13 **CONCLUSION**

14
15 For all of the foregoing reasons,³ Plaintiff's and Defendant's
16 motions for summary judgment are denied and this matter is remanded
17 for further administrative action consistent with this Opinion.

18
19 LET JUDGMENT BE ENTERED ACCORDINGLY.

20
21 DATED: November 1, 2012.

22
23 _____/S/_____
24 CHARLES F. EICK
25 UNITED STATES MAGISTRATE JUDGE

26 _____
27 ³ The Court has not reached any other issue raised by
28 Plaintiff except insofar as to determine that reversal with a
directive for the payment of benefits would not be appropriate at
this time.