

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On September 9, 2009, plaintiff filed an application for Supplemental
7 Security Income benefits. (Administrative Record (“AR”) 123). Plaintiff asserted
8 that she became disabled on December 1, 2008, due to a tumor on her left pinky
9 finger, morbid obesity, and diabetes. (AR 132). The ALJ examined the medical
10 record and heard testimony from plaintiff (who was represented by counsel) and a
11 vocational expert on October 27, 2011. (AR 19-63).

12 On January 13, 2012, the ALJ determined that plaintiff was not disabled
13 through the date of the decision. (AR 9-15). Specifically, the ALJ found:
14 (1) plaintiff suffered from the following severe impairments: morbid obesity with
15 treated chronic obstructive sleep apnea and degenerative joint disease of the distal
16 interphalangeal joints of the left hand (AR 11); (2) plaintiff’s impairments,
17 considered singly or in combination, did not meet or medically equal a listed
18 impairment (AR 12); (3) plaintiff retained the residual functional capacity to
19 perform light work (20 C.F.R. § 416.967(b)) with additional limitations² (AR 12);
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21 ¹The harmless error rule applies to the review of administrative decisions regarding
22 disability. See Molina v. Astrue, 674 F.3d 1104, 1115-22 (9th Cir. 2012) (discussing contours of
23 application of harmless error standard in social security cases) (citing, *inter alia*, Stout v.
Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006)).

24 ²The ALJ determined that plaintiff: (i) could lift up to twenty pounds occasionally, and
25 lift or carry up to ten pounds frequently; (ii) could stand or walk for approximately six hours per
26 eight-hour work day with normal breaks; (iii) could sit for approximately six hours per eight-hour
27 work day with normal breaks; (iv) could push and/or pull (including operation of hand/foot
28 controls) without limitation other than the lift/carry limits noted above; (v) could occasionally
climb ramps/stairs, balance, stoop, kneel, crouch, and crawl; (vi) could not climb ladders, ropes
or scaffolds; (vii) had no limitations on handling and fingering with the right hand, but could
only occasionally perform handling and fingering with the left hand; (viii) needed to avoid

(continued...)

1 (4) plaintiff could perform her past relevant work as a cashier (AR 14);
2 (5) alternatively, there are jobs that exist in significant numbers in the national
3 economy that plaintiff could perform, specifically cleaner (housekeeping), hand
4 packager-inspector, and office helper (AR 14-15); and (6) plaintiff's allegations
5 regarding her limitations were not credible to the extent they were inconsistent
6 with the ALJ's residual functional capacity assessment (AR 13).

7 The Appeals Council denied plaintiff's application for review. (AR 1).

8 **III. APPLICABLE LEGAL STANDARDS**

9 **A. Sequential Evaluation Process**

10 To qualify for disability benefits, a claimant must show that the claimant is
11 unable "to engage in any substantial gainful activity by reason of any medically
12 determinable physical or mental impairment which can be expected to result in
13 death or which has lasted or can be expected to last for a continuous period of not
14 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
15 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
16 impairment must render the claimant incapable of performing the work claimant
17 previously performed and incapable of performing any other substantial gainful
18 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,
19 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

20 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
21 sequential evaluation process:

- 22 (1) Is the claimant presently engaged in substantial gainful activity? If
23 so, the claimant is not disabled. If not, proceed to step two.

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26 ²(...continued)

27 concentrated exposure to extreme heat, humidity, and workplace hazards such as unprotected
28 machinery and unprotected heights; and (ix) had no other manipulative, visual or communicative
limitations. (AR 12).

- 1 (2) Is the claimant's alleged impairment sufficiently severe to limit
2 the claimant's ability to work? If not, the claimant is not
3 disabled. If so, proceed to step three.
- 4 (3) Does the claimant's impairment, or combination of
5 impairments, meet or equal an impairment listed in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1? If so, the claimant is
7 disabled. If not, proceed to step four.
- 8 (4) Does the claimant possess the residual functional capacity to
9 perform claimant's past relevant work? If so, the claimant is
10 not disabled. If not, proceed to step five.
- 11 (5) Does the claimant's residual functional capacity, when
12 considered with the claimant's age, education, and work
13 experience, allow the claimant to adjust to other work that
14 exists in significant numbers in the national economy? If so,
15 the claimant is not disabled. If not, the claimant is disabled.

16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
17 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at
18 1110 (same).

19 The claimant has the burden of proof at steps one through four, and the
20 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
21 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch
22 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of
23 proving disability).

24 **B. Standard of Review**

25 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
26 benefits only if it is not supported by substantial evidence or if it is based on legal
27 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
28 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457

1 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
2 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
3 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
4 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
5 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

6 To determine whether substantial evidence supports a finding, a court must
7 “consider the record as a whole, weighing both evidence that supports and
8 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
9 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
10 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
11 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
12 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

13 **IV. DISCUSSION**

14 Plaintiff contends that the ALJ’s finding that plaintiff could perform her
15 past relevant work as a cashier, or alternatively, that plaintiff could perform the
16 representative jobs of “cleaner (housekeeping),” “hand packager-inspector,” and
17 “office helper” are erroneous because the requirements of each such job exceed
18 plaintiff’s abilities. (Plaintiff’s Motion at 2-6). Plaintiff is not entitled to a
19 reversal or remand on this basis.

20 **A. Pertinent Law**

21 At step four of the sequential evaluation process, the Commissioner may
22 deny benefits when the claimant can perform the claimant’s past relevant work as
23 “actually performed,” or as “generally” performed. Pinto v. Massanari, 249 F.3d
24 840, 845 (2001).

25 If, at step four, the claimant meets her burden of establishing an inability to
26 perform past work, the Commissioner must show, at step five, that the claimant
27 can perform some other work that exists in “significant numbers” in the national
28 economy (whether in the region where such individual lives or in several regions

1 of the country), taking into account the claimant’s residual functional capacity,
2 age, education, and work experience. Tackett, 180 F.3d at 1100 (citing 20 C.F.R.
3 § 404.1560(b)(3)); 42 U.S.C. § 423(d)(2)(A).

4 ALJs routinely rely on the Dictionary of Occupational Titles (“DOT”) “in
5 determining the skill level of a claimant’s past work, and in evaluating whether the
6 claimant is able to perform other work in the national economy.” Terry v.
7 Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990) (citations omitted); see also
8 20 C.F.R. § 416.966(d)(1) (DOT is source of reliable job information); Johnson v.
9 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995) (DOT presumptive authority on job
10 classifications). An ALJ may also rely on testimony from a vocational expert to
11 assist in determining whether a claimant’s residual functional capacity would
12 permit a return to the claimant’s past type of work, Pinto, 249 F.3d at 845-46, and
13 depending upon the circumstances, to satisfy the Commissioner’s burden at step
14 five, Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett,
15 180 F.3d at 1100-1101).

16 An ALJ may not rely on a vocational expert’s testimony regarding the
17 requirements of a particular job, however, without first inquiring whether the
18 testimony conflicts with the DOT, and if so, the reasons therefor. Massachi v.
19 Astrue, 486 F.3d 1149, 1152-53 (9th Cir. 2007) (citing Social Security Ruling 00-
20 4p). In order for an ALJ to accept vocational expert testimony that contradicts the
21 DOT, the record must contain “persuasive evidence to support the deviation.”
22 Pinto, 249 F.3d at 846 (quoting Johnson, 60 F.3d at 1435). Evidence sufficient to
23 permit such a deviation may be either specific findings of fact regarding the
24 claimant’s residual functionality, or inferences drawn from the context of the
25 expert’s testimony. Light v. Social Security Administration, 119 F.3d 789, 793
26 (9th Cir.), as amended (1997) (citations omitted).

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1 **B. Analysis**

2 As plaintiff correctly notes, the DOT states that the positions of cashier,
3 hand packager-inspector, and office helper require frequent handling and
4 fingering, and the position of cleaner (housekeeping) requires frequent handling.
5 See §§ 211.462-010 [Cashier II], 239.567-010 [Office Helper], 323.687-014
6 [Cleaner, Housekeeping], 559.687-074 [Inspector and Hand Packager]. Plaintiff
7 argues that such requirements exceed her abilities because, as the ALJ noted in
8 determining residual functional capacity, plaintiff is limited to “occasional
9 handling and fingering with the left hand.” (Plaintiff’s Motion at 3-4) (citing AR
10 12).

11 A reversal or remand is not required on this basis, however, because the
12 Court finds no actual conflict between plaintiff’s abilities and the DOT
13 requirements identified for the challenged positions. While such jobs do require,
14 *inter alia*, frequent handling and/or fingering, plaintiff has no limitations in
15 handling or fingering in her right (dominant) hand, and thus would be capable of
16 performing such requirements. The vocational expert confirmed as much when
17 she testified that such jobs could be performed consistent with DOT requirements
18 despite plaintiff’s left hand limitations. (AR 56-59).

19 Plaintiff’s conclusion that the challenged jobs exceed her abilities is
20 erroneously premised on the unsupported assumption that the handling and/or
21 fingering required by such jobs necessarily involves the use of both hands.
22 However, the DOT does not expressly contain such a requirement. See, e.g.,
23 Carey v. Apfel, 230 F.3d 131, 146 (5th Cir. 2000) (person with use of one arm
24 could perform the jobs of cashier and ticket taker, even though jobs required
25 fingering and handling abilities; “The DOT does not contain any requirement of
26 bilateral fingering ability or dexterity. . . .”); Feibusch v. Astrue, 2008 WL
27 583554, *5 (D. Haw. Mar. 4, 2008) (citations omitted) (“[T]he use of two arms is
28 not necessarily required for jobs that require reaching and handling.”); Diehl v.

1 Barnhart, 357 F. Supp. 2d 804, 822 (E.D. Pa. 2005) (person with limited use of
2 one arm could perform jobs requiring frequent reaching, handling, and fingering,
3 and therefore there was no conflict between DOT and vocational expert’s
4 testimony to that effect).

5 Moreover, since the DOT does not expressly state that the challenged jobs
6 can be performed by a claimant who lacks the use of one arm, the ALJ
7 appropriately obtained the testimony of a vocational expert to assist in the step
8 four and five determinations. See Carey, 230 F.3d at 146 (Resolution of “factual
9 disagreement about whether a person with one arm can perform a job requiring
10 some degree of manual dexterity and fingering . . . requires expert testimony” from
11 a vocational expert); Fuller v. Astrue, 2009 WL 4980273, *3 (C.D. Cal. Dec. 15,
12 2009) (Where nature of particular action required in performance of job not
13 specified in DOT, ALJ may properly rely on testimony from vocational expert to
14 determine whether claimant can perform job in question despite claimant’s
15 limitations). The ALJ posed a hypothetical question to the vocational expert
16 which included all of the limitations on plaintiff’s left hand noted in the ALJ’s
17 residual functional capacity assessment. (AR 12, 56-59). In response, the
18 vocational expert testified that a claimant with the stated limitations could still
19 perform the jobs of cashier II, cleaner (housekeeping), inspector and hand
20 packager, and office helper. (AR 56-59). The vocational expert’s testimony
21 constitutes substantial evidence supporting the ALJ’s determination that plaintiff
22 could perform such jobs. Tackett, 180 F.3d at 1101. The Court will not second-
23 guess the ALJ’s reasonable interpretation of such evidence, even if such evidence
24 could give rise to contrary inferences.

25 Accordingly, a reversal or remand on this basis is not warranted.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is affirmed.

4 LET JUDGMENT BE ENTERED ACCORDINGLY.

5 DATED: January 17, 2013

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7 /s/
8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE
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