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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARIA H. GUTIERREZ,)	No. ED CV 12-01845-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issue:

1. Whether there is a DOT inconsistency in the Administrative

1 Law Judge's ("ALJ") holding that Plaintiff can perform the
2 jobs of maid, electronic worker, and packing machine
3 operator. (JS at 3.)
4

5 This Memorandum Opinion will constitute the Court's findings of
6 fact and conclusions of law. After reviewing the matter, the Court
7 concludes that for the reasons set forth, the decision of the
8 Commissioner must be reversed and the matter remanded for further
9 hearing.
10

11 I

12 **THE ALJ FAILED TO ASCERTAIN WHETHER THE VOCATIONAL EXPERT**
13 **DEVIATED FROM DOT REQUIREMENTS IN IDENTIFYING AVAILABLE JOBS**
14 **AT STEP FIVE OF THE SEQUENTIAL EVALUATION PROCESS**

15 Plaintiff contends there is a Dictionary of Occupational Titles
16 ("DOT") inconsistency in the ALJ's determination at Step Five that
17 Plaintiff can perform the jobs of maid, electronic worker and packing
18 machine operator.

19 At the hearing (AR 36-44), the ALJ utilized a vocational expert
20 ("VE"). Prior to posing a hypothetical, the ALJ instructed the VE to
21 testify according to the DOT "or explain why you're not testifying
22 according to the [DOT] and state what your testimony is based upon."
23 (AR 24.) The VE agreed to do that (Id.). The ALJ's hypothetical
24 concerned an individual who, in pertinent part, has the exertional
25 ability to perform light work with restrictions, with nonexertional
26 limitations to "simple, repetitive tasks, no public contact, only non-
27 intense contact with coworkers and supervisors, no jobs requiring
28 hypervigilance and no jobs in which he is responsible for the safety

1 of others." (AR 62.)

2 Based on this hypothetical, the VE testified that Plaintiff could
3 not perform any jobs constituting her past relevant work, and had no
4 transferrable skills. The VE did identify three jobs which Plaintiff
5 could perform, including maid (DOT 323.687-014); electronic worker
6 (DOT 726.687-010); and packing machine operator (DOT 920.685-078). (AR
7 25.)

8 In her Decision, the ALJ adopted the VE's testimony and found
9 that Plaintiff can perform these three jobs, and she noted that
10 pursuant to Social Security Ruling ("SSR") 00-4p, "The vocational
11 expert's testimony is consistent with the information contained in the
12 [DOT]." (AR 30.)

13
14 **A. Applicable Law and Analysis.**

15 As assessed by Plaintiff, the error in this case inheres in the
16 unexplained deviation between the Dictionary of Occupational Titles'
17 ("DOT") requirements of the identified jobs, and the VE's testimony,
18 given the limitations of the hypothetical, that Plaintiff could
19 perform these jobs. Plaintiff argues that there is a conflict and
20 deviation between the DOT and the testimony of the VE, and that the
21 ALJ did not solicit an explanation from the VE to allow for such
22 deviation. The Commissioner argues that the DOT is a rebuttable
23 source on which the ALJ may rely "when evidence of record supports the
24 deviation" (JS at 8, citing Light v. Social Sec. Admin., 119 F.3d 789,
25 at 753; Johnson v. Shalala, 60 F.3d 1928, 1435-36 (9th Cir. 1995).

26 SSR 00-4p specifically provides that when a [VE] provides
27 evidence about the requirements of a job or occupation, the
28 adjudicator has an affirmative responsibility to ask about possible

1 conflict between "that [VE] ... evidence and information provided in
2 the [DOT]." Social Security Regulations mandate that Social Security
3 Rulings are binding precedent. (See 20 C.F.R. §402.35(b)(1).)

4 Although, as noted, the ALJ in this case instructed the VE to
5 testify according to the DOT, and obtained the VE's agreement to do
6 so, that pro forma interchange, which corresponds to the requirements
7 of SSR 00-4p, does not fully discharge the ALJ's obligation. As the
8 Commissioner concedes, an ALJ may rely on VE testimony that
9 contradicts the DOT only when evidence of record supports the
10 deviation. (JS at 8.) Although the Commissioner cites this well-
11 established principle, he then veers from it by later arguing that,
12 "the VE was clearly aware of the ALJ's limitation to non-public work
13 and no hypervigilance, and nevertheless suggested these two
14 occupations [maid and electronics worker] that such a person could
15 perform." (JS at 9, citing AR 62.) Effectively, this argument
16 proposes that if given a proper hypothetical, a VE's identification of
17 available jobs must be accepted by the ALJ, even if there is an
18 unexplained DOT deviation. In fact, that is what occurred in this
19 case, when the ALJ agreed with the VE's identification of a job which
20 requires medium exertion (packing machine operator) as being within
21 Plaintiff's residual functional capacity ("RFC") (see Decision, AR at
22 30.) The VE clearly erred in identifying this job, because it
23 requires a level of exertion in excess of that available to Plaintiff;
24 yet, the Commissioner still argues that, "However, the VE is just that
25 - an expert - and he would know if this occupation could also be
26 performed at the light exertional level." (JS at 9.) One can only
27 speculate if the VE would still have identified this job is he were
28 aware (as he should have been) that it required medium exertion, or,

1 whether he would have provided some explanation for the deviation.
2 The record provides no evidence of this, and the Commissioner is left
3 to argue that the VE must have factored in some unstated reasons why
4 this occupation could be performed by the Plaintiff.

5 The VE's misidentification of the job of packing machine operator
6 as being within the given hypothetical limitation to light work gives
7 pause to the Court as to the overall reliability of the VE's
8 testimony. The Commissioner asserts that if this job was identified
9 erroneously, it was harmless error. (JS at 9.) That argument is
10 rejected; no explanation for the obvious deviation was given. But
11 Plaintiff also makes persuasive points about the other jobs
12 identified. With regard to the job of maid, the DOT requirements are
13 that to perform this occupation, a person must, in combination,
14 perform "any" of certain tasks, which include rendering personal
15 assistance to patrons. The job description identifies that it
16 encompasses work in commercial establishments "such as hotels,
17 restaurants, clubs, beauty parlors and dormitories." While the Court
18 does not pretend that it has expertise in this area, nevertheless, it
19 is difficult to conceive that a maid who works in a commercial
20 establishment can perform that job without any interaction with the
21 public. Yet, this Plaintiff was specifically limited to non-public,
22 simple, repetitive tasks. There may well be a deviation here which
23 should have been explained.

24 The other job identified, that of electronics worker, requires
25 that the individual must "clean[s] and degloss[es] parts, using
26 cleaning devices, solutions, and abrasives." (DOT 726-687-010.) This
27 occupation also requires that the individual apply "primers, plastics,
28 adhesives, and other coatings to designated surfaces, using

