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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LAKESHA S. HARRISON,	)	NO. ED CV 15-1362-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
CAROLYN W. COLVIN, Acting	)	<b>AND ORDER OF REMAND</b>
Commissioner of Social Security,	)	
	)	
Defendant.	)	
	)	

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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 July 8, 2015, seeking review of  
the Commissioner's denial of disability benefits. The parties filed a  
consent to proceed before a United States Magistrate Judge on  
August 28, 2015. Plaintiff filed a motion for summary judgment on

1 January 8, 2016. Defendant filed a motion for summary judgment on  
2 March 10, 2016. The Court has taken the motions under submission  
3 without oral argument. See L.R. 7-15; "Order," filed July 14, 2015.  
4

5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**  
6

7 Plaintiff, a former "cashier II," asserts disability since  
8 January 31, 2010, based on a combination of alleged physical and  
9 mental impairments (Administrative Record ("A.R.") 24-210, 217-769).  
10 An Administrative Law Judge ("ALJ") found Plaintiff has severe  
11 physical impairments that restrict Plaintiff to a limited range of  
12 light work not requiring more than occasional reaching above the  
13 shoulder bilaterally (A.R. 26-27).  
14

15 A vocational expert testified that a person restricted to this  
16 limited range of light work could perform Plaintiff's past relevant  
17 work as a "cashier II; D.O.T. [Dictionary of Occupational Titles] code  
18 211.462-010" (A.R. 57). The vocational expert also testified that a  
19 person with the residual functional capacity the ALJ found Plaintiff  
20 to retain also could perform the job of "counter clerk" (A.R. 58).  
21 The vocational expert indicated that there are approximately 6,000  
22 "counter clerk" positions nationally (id.).<sup>1</sup>

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26 <sup>1</sup> The vocational expert actually testified that 3,000  
27 positions nationally would exist after a 50 percent erosion for a  
28 vocational restriction Plaintiff apparently does not require  
(A.R. 58). Hence, there appear to be 6,000 positions nationally,  
according to the vocational expert.

1 The ALJ asked the vocational expert, "Is your testimony  
2 consistent with the Dictionary of Occupational Titles?" (A.R. 59).  
3 The vocational expert responded:  
4

5 The Dictionary of Occupational Titles doesn't address  
6 absenteeism or position changing. My testimony, with  
7 respect to those factors, is based on my experience (A.R.  
8 59).  
9

10 At the end of the administrative hearing, Plaintiff's counsel argued,  
11 inter alia, that the national job numbers claimed by the vocational  
12 expert were not "significant" numbers (A.R. 60).  
13

14 In the subsequent decision denying benefits, the ALJ found  
15 Plaintiff could perform her past relevant work "as generally  
16 performed" (A.R. 32). The ALJ neither recognized nor explained any  
17 inconsistency between the Dictionary of Occupational Titles ("DOT")  
18 and the testimony of the vocational expert. The ALJ did not identify  
19 any other job Plaintiff assertedly could perform, and did not rule on  
20 the issue of whether any such job existed in "significant" numbers  
21 nationally (A.R. 31-32). The Appeals Council denied review (A.R. 1-  
22 3).  
23

#### 24 STANDARD OF REVIEW

25

26 Under 42 U.S.C. section 405(g), this Court reviews the  
27 Administration's decision to determine if: (1) the Administration's  
28 findings are supported by substantial evidence; and (2) the

1 Administration used correct legal standards. See Carmickle v.  
2 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
3 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,  
4 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
5 relevant evidence as a reasonable mind might accept as adequate to  
6 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
7 (1971) (citation and quotations omitted); see also Widmark v.  
8 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

9  
10 If the evidence can support either outcome, the court may  
11 not substitute its judgment for that of the ALJ. But the  
12 Commissioner's decision cannot be affirmed simply by  
13 isolating a specific quantum of supporting evidence.  
14 Rather, a court must consider the record as a whole,  
15 weighing both evidence that supports and evidence that  
16 detracts from the [administrative] conclusion.

17  
18 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and  
19 quotations omitted).

## 20 21 DISCUSSION

### 22 23 I. Substantial Evidence Does Not Support the ALJ's Finding that 24 Plaintiff Can Perform her Past Relevant Work "As Generally 25 Performed."

26  
27 "[T]he best source for how a job is generally performed is  
28 usually the Dictionary of Occupational Titles." Pinto v. Massanari,

1 249 F.3d 840, 845 (9th Cir. 2001). Although the matter is somewhat  
2 unclear, the DOT appears to provide that a person restricted to  
3 occasional reaching above the shoulder could not perform Plaintiff's  
4 past relevant work "as generally performed." According to the DOT,  
5 the job of "cashier II" requires "reaching" "frequently." DOT  
6 211.462-010. "Reaching" means "extending the hands and arms in any  
7 direction." SSR 85-15 (emphasis added); see Mkhitarian v. Astrue,  
8 2010 WL 1752162, at \*3 (C.D. Cal. April 27, 2010) (citing the  
9 "Selected Characteristics of Occupations Defined in the Revised  
10 Dictionary of Occupational Titles," Appendix C). "Any direction"  
11 would appear to include above the shoulder. See id. Consequently,  
12 many courts have discerned a conflict between the requirement of  
13 frequent reaching and a preclusion or restriction on reaching overhead  
14 or above the shoulder. See, e.g., Bochat v. Colvin, 2016 WL 1125549,  
15 at \*2 (C.D. Cal. March 22, 2016); Hernandez v. Colvin, 2016 WL  
16 1071565, at \*5 (C.D. Cal. March 14, 2016); Imran v. Colvin, 2015 WL  
17 5708500, at \*5 (C.D. Cal. Sept. 28, 2015); Carpenter v. Colvin, 2014  
18 WL 4795037, at \*7-8 (E.D. Cal. Sept. 25, 2014); Skelton v.  
19 Commissioner, 2014 WL 4162536, at \*13 (D. Or. Aug. 18, 2014); Lamb v.  
20 Colvin, 2014 WL 3894919, at \*5-6 (E.D. Cal. Aug. 4, 2014); Riffner v.  
21 Colvin, 2014 WL 3737963, at \*4-5 (C.D. Cal. July 29, 2014); Nguyen v.  
22 Colvin, 2014 WL 2207058, at \*2-3 (C.D. Cal. May 28, 2014); Barnes v.  
23 Colvin, 2014 WL 931123, at \*7-8 (W.D. Wash. March 10, 2014); Giles v.  
24 Colvin, 2013 WL 4832723, at \*4 (C.D. Cal. Sept. 10, 2013); Winder v.  
25 Astrue, 2013 WL 489611, at \*2-3 (C.D. Cal. Feb. 6, 2013); Duff v.  
26 Astrue, 2012 WL 3711079, at \*3-4 (C.D. Cal. Aug. 28, 2012); McQuone v.  
27 Astrue, 2012 WL 3704795, at \*3-4 (E.D. Cal. Aug. 24, 2012); Newman v.  
28 Astrue, 2012 WL 1884892, at \*5 (C.D. Cal. May 23, 2012); Richardson v.

1 Astrue, 2012 WL 1425130, at \*4-5 (C.D. Cal. April 25, 2012); Bentley  
2 v. Astrue, 2011 WL 2785023, at \*3-4 (C.D. Cal. July 14, 2011);  
3 Hernandez v. Astrue, 2011 WL 223595, at \*5 (C.D. Cal. Jan. 21, 2011);  
4 Mkhitaryan v. Astrue, 2010 WL 1752162, at \*3; Caruso v. Astrue, 2008  
5 WL 1995119, at \*7 (N.D. N.Y. May 6, 2008); see also Prochaska v.  
6 Barnhart, 454 F.3d 731, 736 (7th Cir. 2006) ("It is not clear to us  
7 whether the DOT's requirements include reaching above shoulder level  
8 and this is exactly the sort of inconsistency the ALJ should have  
9 resolved with the expert's help").<sup>2</sup>

10  
11 Although an ALJ sometimes properly may rely on vocational expert  
12 testimony in conflict with the information in the DOT, social security  
13 rulings and case law require recognition of the conflict and an  
14 explanation for the reliance.

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21 <sup>2</sup> Case law on this issue is not uniform. Several courts  
22 have discerned no conflict between the requirement of frequent  
23 reaching and a preclusion or restriction on reaching overhead or  
24 above the shoulder. See Parker v. Colvin, 2014 WL 4662095, at \*9  
25 (W.D. Pa. Sept. 18, 2014); King v. Commissioner, 2013 WL 3456957,  
26 at \*3 (E.D. Mich. July 9, 2013); Brister v. Colvin, 2013 WL  
27 2318842, at \*11-13 (D. Or. May 27, 2013); Alarcon v. Astrue, 2013  
28 WL 1315968, at \*4 (S.D. Cal. March 28, 2013); Lidster v. Astrue,  
2012 WL 13731, at \*3 (S.D. Cal. Jan. 3, 2012); Provenzano v.  
Astrue, 2009 WL 4906679, at \*5 (C.D. Cal. Dec. 17, 2009); Fuller  
v. Astrue, 2009 WL 4980273, at \*2 (C.D. Cal. Dec. 15, 2009);  
Rodriguez v. Astrue, 2008 WL 2561961, at \*2 (C.D. Cal. June 25,  
2008).

1 Social Security Ruling 00-4p<sup>3</sup> provides:

2  
3 When a [vocational expert] provides evidence about the  
4 requirements of a job or occupation, the [ALJ] has an  
5 affirmative responsibility to ask about any possible  
6 conflict between that [vocational expert] evidence and  
7 information provided in the DOT. . . .<sup>4</sup>

8  
9 If the [vocational expert's] evidence appears to  
10 conflict with the DOT, the [ALJ] will obtain a reasonable  
11 explanation for the apparent conflict.

12  
13 When vocational evidence provided by a [vocational  
14 expert] is not consistent with information in the DOT, the  
15 [ALJ] must resolve this conflict before relying on the  
16 [vocational expert] evidence to support a determination or  
17 decision that the individual is or is not disabled. The  
18 [ALJ] will explain in the determination or decision how he  
19 or she resolved the conflict. The adjudicator must explain  
20 the resolution of the conflict irrespective of how the  
21 conflict was identified (emphasis added).

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25 <sup>3</sup> Social Security rulings are "binding on ALJs." Terry  
v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

26 <sup>4</sup> For this purpose, the "information provided in the DOT"  
27 includes the information provided in the DOT's "companion  
28 publication," the "Selected Characteristics of Occupations  
Defined in the Revised Dictionary of Occupational Titles (SCO)."  
See SSR 00-4p.

1           Elsewhere, SSR 00-4p similarly provides that “[w]hen there is an  
2 apparent unresolved conflict between [vocational expert] evidence and  
3 the DOT, the [ALJ] must elicit a reasonable explanation for the  
4 conflict before relying on the [vocational expert] evidence to support  
5 a determination or decision about whether the claimant is disabled.”  
6 (emphasis added). “The procedural requirements of SSR 00-4p ensure  
7 that the record is clear as to why an ALJ relied on a vocational  
8 expert’s testimony, particularly in cases where the expert’s testimony  
9 conflicts with the [DOT].” Massachi v. Astrue, 486 F.3d 1149, 1153  
10 (9th Cir. 2007).

11  
12           In the present case, the ALJ asked whether the vocational  
13 expert’s testimony was consistent with the DOT. The vocational  
14 expert’s answer, which was only partially responsive, focused  
15 exclusively on absenteeism and the alternating of positions between  
16 sitting and standing (A.R. 57-59). The vocational expert’s answer  
17 said nothing about the testimony’s consistency or inconsistency with  
18 the DOT’s reaching requirements. Neither the vocational expert nor  
19 the ALJ recognized the possible conflict between the vocational  
20 expert’s testimony and the DOT’s reaching requirements for Plaintiff’s  
21 past relevant work. Consequently, neither the vocational expert nor  
22 the ALJ provided any explanation that might support preferring the  
23 vocational expert’s testimony over the arguably conflicting  
24 information in the DOT. This was error. See SSR 00-4p; Light v.  
25 Social Security Administration, 119 F.3d 789, 794 (9th Cir. 1997)  
26 (error that “[n]either the ALJ nor the vocational expert explained the  
27 reason for departing from the DOT”); Johnson v. Shalala, 60 F.3d 1428,  
28 1435 (9th Cir. 1995) (“an ALJ may rely on expert testimony which

1 contradicts the DOT, but only insofar as the record contains  
2 persuasive evidence to support the deviation").<sup>5</sup>

3  
4 It is true that the claimant has the burden of proving an  
5 inability to perform his or her past relevant work. See Sanchez v.  
6 Secretary, 812 F.2d 509, 511 (9th Cir. 1987). It is also true that an  
7 ALJ need not always consult a vocational expert to find that a  
8 claimant can perform the claimant's past relevant work. See Matthews  
9 v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993); Miller v. Heckler, 770  
10 F.2d 845, 850 (9th Cir. 1985). Absent the vocational expert's  
11 testimony in the present case, however, the record lacks substantial  
12 evidence that a person with Plaintiff's limitations could perform  
13 Plaintiff's past relevant work. See Burkhart v. Bowen, 856 F.2d 1335,  
14 1341 (9th Cir. 1988) (administration may not speculate concerning the  
15 requirements of particular jobs); Pinto v. Massanari, 249 F.3d at 844  
16 (although the claimant has the burden of proving an inability to  
17 perform his or her past relevant work, "the ALJ still has a duty to  
18 make the requisite factual findings to support his [or her]  
19 conclusion"); Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983)  
20 ("the ALJ has a special duty to fully and fairly develop the record  
21 and to assure the claimant's interests are considered . . .").

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27 <sup>5</sup> The Court also observes that it is not at all clear  
28 from the ALJ's decision that the ALJ actually relied on the  
vocational expert's testimony in finding Plaintiff could perform  
Plaintiff's past relevant work as generally performed (A.R. 32).

1 Defendant appears to argue that the failure by Plaintiff's  
2 counsel to point out these errors at the time of the administrative  
3 hearing should bar Plaintiff from raising these errors now  
4 (Defendant's Motion at 9-10). If Defendant is suggesting that a  
5 disability claimant waives an error by failing to raise the error at  
6 the administrative level, the suggestion lacks merit. See Sims v.  
7 Apfel, 530 U.S. 103 (2000) ("Sims") (claimant may raise for the first  
8 time before the court arguments not raised before the Appeals  
9 Council); see also Hackett v. Barnhart, 395 F.3d 1168, 1176 (10th Cir.  
10 2005) (court discerned error in the ALJ's failure to address an  
11 apparent conflict between the DOT and the testimony of the vocational  
12 expert, even though plaintiff's counsel had failed to argue the error  
13 at the administrative level; "a plaintiff challenging a denial of  
14 disability benefits under 42 U.S.C. § 405(g) need not preserve issues  
15 in the proceedings before the Commissioner or her delegates" [citing  
16 Sims]); Harris v. Apfel, 2001 WL 204836, at \*1 (D. Or. Feb. 19, 2001),  
17 aff'd, 40 Fed. App'x 581 (2002) (Commissioner conceded that Sims  
18 "requires" the conclusion that a claimant does not waive his or her  
19 argument by failing to raise the argument before the ALJ). "Social  
20 security proceedings are inquisitorial rather than adversarial. It is  
21 the ALJ's duty to investigate the facts and develop the arguments both  
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1 for and against granting benefits. . . ." Sims, 530 U.S. at 110-11.<sup>6</sup>

2  
3 **II. The Court is Unable to Conclude that the ALJ's Errors Were**  
4 **Harmless.**

5  
6 Defendant argues that any error concerning Plaintiff's past  
7 relevant work was harmless because the vocational expert testified:  
8 (1) a person with Plaintiff's limitations could also perform the job  
9 of "counter clerk"; and (2) there exist 6,000 "counter clerk"  
10 positions nationally. "[A]n ALJ's error is harmless where it is  
11 inconsequential to the ultimate nondisability determination." Molina  
12 v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (citations and  
13 quotations omitted); see Treichler v. Commissioner, 775 F.3d 1090,  
14 1105 (9th Cir. 2014) ("Where, as in this case, an ALJ makes a legal  
15 error, but the record is uncertain and ambiguous, the proper approach  
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18 <sup>6</sup> Defendant cites the unpublished decisions of Wentz v.  
19 Commissioner, 401 Fed. App'x 189 (9th Cir. Oct. 26, 2010) and  
20 Solorzano v. Astrue, 2012 WL 84527 (C.D. Cal. Jan. 10, 2012).  
21 Neither decision constitutes controlling authority. Moreover,  
22 like the United States District Court for the Eastern District of  
23 California, this Court "does not interpret Wentz as holding that,  
24 whenever a VE states that there is no conflict between the VE's  
25 testimony and the DOT, that testimony must be accepted by the ALJ  
26 regardless of whether there is an unexplained apparent conflict,  
27 or that the ALJ may rely on testimony that appears to conflict  
28 with the DOT so long as the VE offers a mere conclusion that  
there is no conflict." Gonzales v. Astrue, 2012 WL 2064947, at  
\*4 (E.D. Cal. June 7, 2012); accord Marquez v. Astrue, 2012 WL  
3011779, at \*2-3 (D. Ariz. July 23, 2012). In light of Sims,  
this Court also agrees with the Eastern District that "[t]o the  
extent [cases such as Solorzano] stand for the proposition that a  
plaintiff is barred from seeking reversal of an erroneous ALJ  
decision when they neglect to object to said errors at the  
hearing, they are unconvincing." Clark v. Colvin, 2015 WL  
5601406, at \*6 (E.D. Cal. Sept. 22, 2015).

1 is to remand the case to the agency"); cf. McLeod v. Astrue, 640 F.3d  
2 881, 887 (9th Cir. 2011) (error not harmless where "the reviewing  
3 court can determine from the 'circumstances of the case' that further  
4 administrative review is needed to determine whether there was  
5 prejudice from the error"). Under these standards, the Court is  
6 unable to conclude that the ALJ's errors were harmless.

7  
8 First, the ALJ never adopted, or even evaluated, the vocational  
9 expert's testimony concerning the "counter clerk" job. In particular,  
10 the ALJ did not decide whether 6,000 positions nationally constitute a  
11 "significant" number of positions. Whether there exists a significant  
12 number of positions nationally is a question of fact to be determined  
13 in the first instance by the ALJ. See Martinez v. Heckler, 807 F.2d  
14 771, 775 (9th Cir. 1986). Furthermore, recent case law within the  
15 Ninth Circuit may render dubious any conclusion that 6,000 positions  
16 nationally constitute a "significant" number of positions. See  
17 Gutierrez v. Commissioner, 740 F.3d 519, 529 (9th Cir. 2014) ("the  
18 ALJ's finding that 25,000 national jobs is sufficient presents a close  
19 call"); Branch v. Colvin, 2015 WL 5225951, at \*7 (D. Nev. Sept. 8,  
20 2015) (8,500 jobs nationally not significant); Baker v. Commissioner,  
21 2014 WL 3615497, at \*8 (E.D. Cal. July 21, 2014) (14,500 jobs  
22 nationally not significant); but see Evans v. Colvin, 2014 WL 3845046,  
23 at \*1 (C.D. Cal. Aug. 4, 2014) (6,200 jobs nationally deemed  
24 significant).

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1 **III. Remand for Further Administrative Proceedings is Appropriate.**

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3 The circumstances of this case warrant remand for further  
4 administrative proceedings, which could remedy the ALJ's errors. See  
5 McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura, 537 U.S.  
6 12, 16 (2002) (upon reversal of an administrative determination, the  
7 proper course is remand for additional agency investigation or  
8 explanation, except in rare circumstances); Dominguez v. Colvin, 808  
9 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court concludes  
10 that further administrative proceedings would serve no useful purpose,  
11 it may not remand with a direction to provide benefits"); Treichler v.  
12 Commissioner, 775 F.3d at 1101 n.5 (remand for further administrative  
13 proceedings is the proper remedy "in all but the rarest cases").

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