

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 12, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSE V.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO. 1:18-CV-03196-RHW

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING
FOR FURTHER PROCEEDINGS**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 13 & 18. Plaintiff brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision, which denied his application for Supplemental Security Income under Title XVI of the Social Security Act, 42 U.S.C §§ 1381-1383F. *See* Administrative Record ("AR") at 1167-1172 and 994-1016. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the reasons set forth below, the Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

I. JURISDICTION

Plaintiff filed his application for Supplemental Security Income on October 2, 2007. AR 994. He alleged a disability onset date of July 1, 2007. *Id.* Plaintiff's application was initially denied on December 20, 2007; thereafter, Plaintiff filed a written request for a hearing. *Id.*

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1 Administrative Law Judge (“ALJ”) Kim Parrish held a hearing on April 16,
2 2010, and heard testimony from Plaintiff and vocational expert Scott A. Whitmer.
3 AR 106 and 994. On May 28, 2010, the ALJ issued a decision finding Plaintiff
4 ineligible for disability benefits. *Id.* In February 2012, the Appeals Council found
5 remanded the case back to an ALJ for further consideration and proceedings. AR
6 994. ALJ Virginia M. Robinson held a hearing on July 30, 2013, and heard
7 testimony from Plaintiff and vocational expert Kimberly Mullinax. *Id.* ALJ
8 Robinson later issued a decision finding Plaintiff capable of performing past
9 relevant work. The Appeals Council denied Plaintiff’s request for review and
10 thereafter, he filed a federal civil action in the Eastern District of Washington.

11 On May 11, 2016, the District Court issued an order and remanded the case
12 for further proceedings consistent with the Court’s findings and instructions. AR
13 1144-61. Subsequently, the Appeals Council vacated the prior ALJ decision and
14 remanded the matter for additional proceedings consistent with the District Court’s
15 order. AR 994-95. On January 11, 2018, ALJ Robinson held another hearing and
16 heard testimony from Plaintiff and vocational expert Sonia Stratton. The ALJ
17 issued a decision on August 8, 2018, finding Plaintiff capable of past relevant work
18 and thus, ineligible for benefits, which is the final decision of the Commissioner.
19 AR 996-1016. then sought judicial review by this Court on October 10, 2018. ECF
20 No. 1. Accordingly, Plaintiff’s claims are properly before this Court pursuant to 42
21 U.S.C. § 405(g).

22 II. SEQUENTIAL EVALUATION PROCESS

23 The Social Security Act defines disability as the “inability to engage in any
24 substantial gainful activity by reason of any medically determinable physical or
25 mental impairment which can be expected to result in death or which has lasted or
26 can be expected to last for a continuous period of not less than twelve months.” 42
27 U.S.C. § 423(d)(1)(A).

1 The Commissioner has established a five-step sequential evaluation process
2 for determining whether a claimant is disabled within the meaning of the Social
3 Security Act. 20 C.F.R. § 404.1520(a)(4); *Lounsbury v. Barnhart*, 468 F.3d 1111,
4 1114 (9th Cir. 2006). In steps one through four, the burden of proof rests upon the
5 claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*
6 *v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). This burden is met once the
7 claimant establishes that physical or mental impairments prevent her from
8 engaging in her previous occupations. 20 C.F.R. § 404.1520(a). If the claimant
9 cannot engage in her previous occupations, the ALJ proceeds to step five and the
10 burden shifts to the Commissioner to demonstrate that (1) the claimant is capable
11 of performing other work; and (2) such work exists in “significant numbers in the
12 national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386,
13 388-89 (9th Cir. 2012).

14 III. STANDARD OF REVIEW

15 A district court’s review of a final decision of the Commissioner is governed
16 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
17 Commissioner’s decision will be disturbed “only if it is not supported by
18 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
19 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means “more than a
20 mere scintilla but less than a preponderance; it is such relevant evidence as a
21 reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v.*
22 *Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (quoting *Andrews v. Shalala*, 53 F.3d
23 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
24 whether the Commissioner’s findings are supported by substantial evidence, “a
25 reviewing court must consider the entire record as a whole and may not affirm
26 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*
27 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
28 F.2d 498, 501 (9th Cir. 1989)).

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
3 1992). If the evidence in the record “is susceptible to more than one rational
4 interpretation, [the court] must uphold the ALJ’s findings if they are supported by
5 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
6 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
7 2002) (if the “evidence is susceptible to more than one rational interpretation, one
8 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
9 a district court “may not reverse an ALJ’s decision on account of an error that is
10 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
11 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115.
12 The burden of showing that an error is harmful generally falls upon the party
13 appealing the ALJ’s decision. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

14 IV. STATEMENT OF FACTS

15 The facts of the case are set forth in detail in the transcript of proceedings
16 and only briefly summarized here. At the time of the hearing, on January 11, 2018,
17 Plaintiff was 55 years old. In 1985 he received his high school diploma in Puerto
18 Rico. It is unclear whether Plaintiff is able to communicate in English. Plaintiff has
19 past relevant work as construction worker, kitchen helper, and industrial truck
20 operator.

21 V. THE ALJ’S FINDINGS

22 The ALJ determined that Plaintiff has not been under a disability within the
23 meaning of the Act at any time from October 2, 2007, the date Plaintiff’s
24 application was filed, through August 8, 2018, the date the ALJ issued her
25 decision. AR 994-1016.

26 **At step one**, the ALJ found that Plaintiff has not engaged in substantial
27 gainful activity since October 2, 2007, the application date. (citing 20 C.F.R. §
28 416.971 *et seq.*). AR 998.

1 **VII. DISCUSSION**

2 **A. The ALJ Erred by Failing to Comply with the District Court’s**
3 **Mandate.**

4 On May 11, 2016, the District Court issued an order in the above-captioned
5 matter granting Plaintiff’s Motion for Summary Judgment and remanding the case
6 for further proceedings. AR 1144-61. In its order, the District Court determined
7 that:

8 The ALJ failed to consider Plaintiff’s ability to read and write in
9 English sufficiently to be considered literate, i.e., understand and draft
10 instructions or inventory lists as discussed in 20 C.F.R. §
11 416.964(b)(1). Therefore, the ALJ’s determination that Plaintiff was
12 able to communicate in English was in error. This error requires that
13 that case be remanded.

14 AR 1151 and 1152.

15 Along with this determination, the District Court provided these specific
16 instructions for the remand proceedings:

17 Further proceedings are necessary for the ALJ to determine Plaintiff’s
18 capability to communicate in English... make a new step four and
19 step five determination considering Plaintiff’s ability to communicate
20 in English and literacy. The ALJ is further instructed to send Plaintiff
21 to a psychological evaluation to test for literacy and to take testimony
22 from a vocational expert. At a new hearing, when presenting
23 hypotheticals to the vocational expert, the ALJ is instructed to present
24 Plaintiff’s education level including the ALJ’s findings of the ability
25 to communicate in English and literacy as a part of the hypothetical.

26 AR 1160. Plaintiff argues that on remand, the ALJ failed to comply with the
27 District Court’s previous order by failing to obtain a psychological evaluation of
28 Plaintiff’s literacy and ability to communicate in English; thus, violating the “rule
of mandate.”

Under the “law of the case doctrine,” “a court is generally precluded from
reconsidering an issue that has already been decided by the same court, or a higher
court in the identical case.” *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.1993).

1 The rule of mandate “presents a specific and more binding variant of the law of the
2 case doctrine.” *See Magnesystems, Inc. v. Nikken, Inc.*, 933 F.Supp. 944, 949
3 (C.D.Cal.1996). The rule of mandate requires that, on remand, the lower court’s
4 actions must be consistent with both the letter and the spirit of the higher court’s
5 decision. *See Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (looking to whether
6 post-mandate conduct of lower court was consistent “with either the spirit or the
7 express terms of our decision”). The Ninth Circuit has explained the
8 interrelationship between the doctrine of the law of the case and the rule of
9 mandate succinctly: “When acting under an appellate court’s mandate, an inferior
10 court is bound by the decree as the law of the case[.]” *See Vizcaino v. United States*
11 *District Court*, 173 F.3d 713, 719 (9th Cir.1999).

12 In accordance with the rule of mandate and the law of the case doctrine, the
13 United States Supreme Court has recognized that an administrative agency is
14 bound on remand to apply the legal principles laid down by the reviewing court.
15 *See F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *see also*
16 *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 406 (1965)
17 (explaining that the agency must act upon the court’s correction on remand). More
18 recently, the Supreme Court has recognized that the Agency is not free to disregard
19 its marching orders on remand:

20 Where a court finds that the Secretary has committed a legal or factual
21 error in evaluating a particular claim, the district court’s remand order
22 will often include detailed instructions concerning the scope of the
23 remand, the evidence to be adduced, and the legal or factual issues to
24 be addressed. Often, complex legal issues are involved, including
25 classification of the claimant's alleged disability or his or her prior
26 work experience within the Secretary's guidelines or “grids” used for
27 determining claimant disability. Deviation from the court’s remand
order in the subsequent administrative proceedings is itself legal error,
subject to reversal on further judicial review.

28 *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (citations omitted).

1 Accordingly, in Social Security proceedings, the district court’s position to
2 the Appeals Council (and indirectly, the ALJ) is analogous to that of the court of
3 appeals’ position with respect to a trial court. Further, 20 C.F.R. § 404.977(b)
4 provides: “[t]he [ALJ] shall take any action that is ordered by the Appeals Council
5 and may take any additional action that is not inconsistent with the Appeals
6 Council’s remand order.”

7 Here, upon remand from the District Court, the Appeals Council “vacate[d]
8 the final decision of the Commissioner of Social Security and remand[ed] this case
9 to an [ALJ] for further proceedings *consistent with the order of the court.*” See AR
10 1171 (emphasis added). In light of the Appeals Council’s unambiguous order, any
11 argument that the law of the case did not bind the ALJ to follow the District
12 Court’s remand instructions would be contrary to the Appeals Council’s order.
13 Thus, the Court must determine (1) whether the ALJ followed the District Court’s
14 remand instructions; and (2) in the event that the ALJ did not follow the remand
15 instructions, whether the ALJ had discretion to depart from the law of the case.

16 At the beginning of her decision, the ALJ indicates that:

17 “Prior to the claimant’s hearing on January 11, 2018, I attempted to
18 comply with the District Court’s indication that further proceedings
19 were necessary to determine the claimant’s capability to communicate
20 in English, including instructions to send the claimant to a
21 psychological evaluation to test for literacy. The claimant was sent to
22 a psychological consultative examiner, with a specific request to
23 evaluate the claimant’s English literacy. However, the consultative
24 examiner did not make any such assessment. There is no test available
25 to determine whether someone is able to read and write English if that
26 person says he or she cannot and does not want to establish otherwise.
27 One’s maximum ability to read or write cannot be tested if an
28 individual does not want to show his or her maximum ability, because
if he or she does not want to show such an ability, the individual need
simply indicate he or she cannot.”

AR 995 (citations omitted).

1 While the Plaintiff was sent to a psychological evaluation to assess his
2 literacy in English, AR 1648, it is unclear whether the evaluation actually
3 attempted to assess Plaintiff's literacy and ability to communicate in English
4 because the evaluation report is devoid of any comments or findings regarding
5 these abilities. Because there are tests for assessing an individual's literacy, the
6 ALJ's conclusion that there is no test available to determine whether a malingering
7 individual is able to read and write in English would require expert testimony
8 verifying that such is true; further, the expert's verification would need to be
9 specific to this case and this Plaintiff.¹

10 Here, the record shows that on October 10, 2017, Jenifer Schultz evaluated
11 Plaintiff. AR 1641-44. Her opinion is titled "Mental Evaluation." *Id.* Throughout
12 Dr. Schultz's evaluation report, there is no mention of literacy or ability to
13 communicate in English; nor does the report indicate that either of these were
14 assessed during the evaluation. In her decision, the ALJ acknowledged that
15 Plaintiff's English literacy was not evaluated as instructed, but she attempted to
16 excuse this failure to follow instructions by indicating that Dr. Schultz's report
17 suggested malingering, and by stating that there is no test available to determine
18 whether someone can read and write in English if the person does not wish to show
19 his maximum ability.

20 Although Dr. Schultz does suggest potential malingering, such malingering
21 is in reference to Plaintiff's physical ability to walk, not his mental ability to
22 communicate, read, or write English. Further, Dr. Schultz also stated that Plaintiff
23 was cooperative during the evaluation. Under the section labeled Attitude and
24 General Behavior, Dr. Schultz remarked, "[h]e was cooperative and in the
25 beginning and when he was walking, he indicated he was being very deliberate
26

27 ¹ As noted by Plaintiff, there are tests available to determine an individual's literacy, such as the
28 WRAT-4. *See* <http://stelar.edc.org/instruments/wide-range-achievement-test-fourth-edition-wrat-4>;
ECF No. 13 at 4.

1 demonstrating his suggesting a tendency to malingering.” AR 1642. More
2 importantly,
3 despite the evaluation’s failure to assess Plaintiff’s literacy and ability to
4 communicate in English, the ALJ did not order any further evaluations or tests to
5 determine these abilities; or in the alternative, offer an expert opinion regarding
6 Plaintiff’s malingering during the assessment of these abilities. Instead, the ALJ
7 simply assigned little weight to Dr. Schultz opinion, in part because the evaluation
8 did not assess Plaintiff’s suggested tendency to malingering with regard to his mental
9 health limitations. AR 1003. As such, the ALJ failed to follow the remand
10 instructions in the District Court’s order, and in turn, failed to follow the rule of
11 mandate.

12 The Ninth Circuit has identified only five circumstances under which a court
13 may have discretion to depart from the law of the case: “(1) the first decision was
14 clearly erroneous; 2) an intervening change in the law has occurred; 3) the
15 evidence on remand is substantially different; 4) other changed circumstances
16 exist; or 5) a manifest injustice would otherwise result.” *United States v.*
17 *Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). “Failure to apply the doctrine of the
18 law of the case absent one of the requisite conditions constitutes an abuse of
19 discretion.” *Id.* The ALJ did not identify any of these circumstances as a valid
20 reason for departing from the District Court’s remand instructions. Further, none of
21 these circumstances apply to the issue at hand. Thus, the Court finds that the ALJ
22 reversibly erred by failing to follow and complete the remand instructions in the
23 District Court’s previous order.

24 **B. The ALJ Further Erred by Failing to Resolve the Conflict Between the**
25 **Vocational Expert’s Testimony and the Dictionary of Occupational**
26 **Titles.**

1 In her decision, the ALJ determined that Plaintiff was capable of performing
2 past relevant work as an industrial truck operator, both generally and as actually
3 performed. AR 1015-16.

4 In assessing whether a claimant is capable of doing his past relevant work as
5 actually performed, Social Security Regulations name two sources of information
6 that may be used: a properly completed vocational report, SSR 82–61, and the
7 claimant's own testimony, SSR 82–41. *Pinto v. Massanari*, 249 F.3d 840, 845 (9th
8 Cir. 2001). In determining if an individual can perform past relevant work as it is
9 generally performed, the best source for how a job is generally performed is
10 usually the Dictionary of Occupational Titles (“DOT”). *Pinto*, 249 F.3d at 845–46
11 (citing *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir.1995); 20 C.F.R. §§
12 404.1566(d) and 416.966(d); SSR 82–61). 20 C.F.R. § 416.964 explains that an
13 ALJ must consider education to assess one’s ability to meet vocational
14 requirements. The ability to read and write, as well as the ability to communicate
15 in English are part of these educational factors.

16 As stated above, the ALJ was instructed to submit Plaintiff for an English
17 literacy evaluation and relay those findings when presenting each hypothetical to
18 the vocational expert. Although the ALJ did not follow-through on a literacy
19 evaluation for Plaintiff, when she presented the hypotheticals to the vocational
20 expert, she presented two of them to reflect that “the individual can speak and
21 understand English but cannot read or write in English.” AR 1087. Given this
22 information, the vocational expert testified that work as an industrial truck operator
23 and kitchen helper (the DOT titles which most closely correspond with Plaintiff’s
24 past relevant work) would still be viable for this individual.

25 At the hearing, the ALJ asked the vocational expert “[a]nd the opinion
26 regarding doing these jobs [industrial truck operator and kitchen helper], being
27 able to speak and understand English but not read, what is that based on?” AR
28

1 for the conflict is reasonable and substantiated before relying on the vocational
2 expert's opinion rather than the DOT. *Id.* The court in *Massachi* noted, "In
3 *Johnson*, which predated SSR 00-4p, we held that "an ALJ may rely on expert
4 testimony which contradicts the [Dictionary of Occupational Titles], but only
5 insofar as the record contains persuasive evidence to support the deviation." *Id.*

6 In *Diaz v. Berryhill*, No. 2:17-CV-04216-JDE, 2018 WL 1187530, at *5
7 (C.D. Cal. Mar. 7, 2018), Plaintiff argued that the commissioner relied on the
8 vocational expert's testimony that the claimant could perform a job with a
9 language level of 1 by DOT standards, but it was unclear if claimant possessed
10 level 1 capabilities. The case was remanded and the ALJ was instructed to present
11 the literacy limitations to the vocational expert, and then have the expert address
12 how those literacy levels, coupled with the plaintiff's other limitations, would
13 impact the plaintiff's ability to perform any available jobs. *Id.* at 13–14.

14 Here, the ALJ did ask the vocational expert if her opinion conflicted with the
15 DOT; the vocational expert responded that it did not. AR 1089-90. However, there
16 is an apparent conflict between an individual not being able to read or write in
17 English and an individual being able to perform work which includes the DOT's
18 description of a language level one. The ALJ did not identify this conflict, and as
19 such, the vocational expert did not offer any explanation or reasoning to reconcile
20 the conflict.

21 The Commissioner argues that any error in the ALJ's conclusions related to
22 Plaintiff's literacy and a return to past relevant work would be harmless because
23 Plaintiff testified that he performed the job in the past at his current linguistic level.
24 However, in *Diaz* the court rejected a similar argument, noting that "the Ninth
25 Circuit has 'resoundingly rejected' the argument that a claimant's prior work
26 would excuse an ALJ from explaining how the claimant's language limitations
27 would impact her ability to perform jobs identified by the VE." *Id.* at 7–8. (citing
28 *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001).

1 Therefore, the ALJ erred in determining Plaintiff had the ability to perform
2 past relevant work as an industrial truck operator because she did not address the
3 conflict between Plaintiff’s ability to communicate in English and his ability to
4 perform past relevant work, and therefore not requesting the vocational expert to
5 offer explanation to reasonably resolve the conflict.

6 **C. Remand is Appropriate.**

7 The Court has the discretion to remand the case for additional evidence and
8 findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court may award
9 benefits if the record is fully developed and further administrative proceedings
10 would serve no useful purpose. *Id.* Remand is appropriate when additional
11 administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d
12 759, 763 (9th Cir. 1989). In this case, the Court finds that further proceedings are
13 necessary for a proper determination to be made. *Taylor v. Comm’r of Soc. Sec.*
14 *Admin.*, 659 F.3d 1228, 1235 (9th Cir. 2011) (“Remand for further proceedings is
15 appropriate where there are outstanding issues that must be resolved before a
16 disability determination can be made, and it is not clear from the record that the
17 ALJ would be required to find the claimant disabled if all the evidence were
18 properly evaluated.”). As the Court finds that remand for additional findings is
19 appropriate, the Court need not address Plaintiff’s additional allegations of error.
20 Further, Plaintiff’s request for an immediate award of benefits is denied as further
21 proceedings are necessary to correct and develop the record.

22 Upon remand, the ALJ will issue a new decision that is consistent with the
23 District Court’s previous order, AR 1144-1161, as well as the applicable law and
24 instructions set forth in this Order. The ALJ is instructed to send Plaintiff to a
25 psychological evaluation to test for literacy and the ability to communicate in
26 English; and if necessary, further develop the record, reevaluate the medical
27 opinion evidence, obtain supplemental evidence from a vocational expert, present
28 new hypotheticals which include a psychological evaluation’s assessment of

1 Plaintiff's literacy and ability to communicate in English, and re-evaluate the
2 claimant's credibility. The ALJ shall recalculate the residual functional capacity,
3 considering all impairments, and then evaluate, based on this updated residual
4 functional capacity, Plaintiff's ability to perform past relevant work, as well as
5 work available in the national economy. Further, in the event there is a conflict
6 between the vocational expert's testimony and the DOT, the ALJ shall identify the
7 conflict and explain why such conflict is reasonable.

8 **VIII. CONCLUSION**

9 Having reviewed the record, the Court finds that the ALJ's decision contains
10 legal error. Therefore, this matter shall be remanded to the Commissioner for
11 further proceedings consistent with this Order.

12 Accordingly, **IT IS HEREBY ORDERED:**

- 13 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.
- 14 2. Defendant's Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.
- 15 3. This matter is **REMANDED** to the Commissioner for further proceedings
16 consistent with this Order.
- 17 4. Judgment shall be entered in favor of Plaintiff and the file shall be
18 **CLOSED**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
20 enter this Order, provide copies to counsel, and **close the file**.

21 **DATED** this 12th day of June, 2020.

22
23
24 *s/ Robert H. Whaley*

25 ROBERT H. WHALEY
26 Sr. United States District Judge
27
28