

1 Brief) and the defendant has filed the certified transcript of record. After
2 reviewing the matter, the Court concludes that the Decision of the Commissioner
3 should be reversed and remanded.

4 On January 28, 2010, plaintiff Sergio Fajardo filed an application for a
5 period of disability and Disability Insurance Benefits, alleging an inability to
6 work since February 23, 2008. (See Administrative Record [“AR”] 106-112).
7 On March 14, 2011, after being denied initially and upon reconsideration,
8 plaintiff requested a hearing on his claim. (AR 76). Following a hearing on May
9 7, 2012 (see AR 35-54), the Administrative Law Judge (“ALJ”) issued an
10 unfavorable Decision on June 17, 2012. (See AR 21-30). The ALJ determined
11 that plaintiff had several severe impairments -- right shoulder and elbow injuries
12 post right shoulder arthroscopic repair of rotator cuff tear and subacromial
13 decompression, right ulnar nerve transposition, and depressive disorder;
14 however, the ALJ found plaintiff was not disabled. (See AR 23-26, 30).

15 This became the final decision of the Commissioner of Social Security
16 when the Appeals Council denied review. (See AR 1-8). Plaintiff then
17 commenced this action for judicial review pursuant to 42 U.S.C § 405(g).

18 Although plaintiff characterizes his claim as one claim, plaintiff actually is
19 making two challenges to the ALJ’s Decision. Plaintiff alleges the ALJ erred in:
20 (1) asking an insufficient hypothetical question to the vocational expert by
21 failing to include plaintiff’s language barrier, and (2) failing to consider
22 plaintiff’s age.

23 For the reason discussed below, the Court finds that plaintiff’s first claim
24 of error has merit. Since the case will be remanded for further proceedings
25 regarding plaintiff’s first claim of error, the Court will not address plaintiff’s
26 second claim of error.

1 **DISCUSSION**

2 **ISSUE NO: 1**

3 Plaintiff asserts that the ALJ erred by posing to the vocational expert
4 (“VE”) a hypothetical question that did not properly reflect plaintiff’s English
5 language barrier. Defendant contends that this error was harmless because the
6 vocational expert stated on cross-examination that the inability to communicate
7 in English would not interfere with the jobs available to plaintiff in the national
8 economy.¹

9 At the administrative hearing, the ALJ asked the VE a hypothetical
10 question with the following limitations: “a 49-year-old with a six grade
11 education” and with several physical limitations. AR 48. When the VE asked for
12 clarification regarding the hypothetical person’s ability to communicate in
13 English, the ALJ responded, “[He] cannot speak English but [can] communicate
14 in English”. (AR 49). The Court finds that statement incomprehensible. The VE
15 then testified that the hypothetical person could perform the occupations of fast
16 food worker (DOT 311.472-010), laundry worker (DOT 302.685-010), bench
17 hand assembler of small parts (DOT 715.684-026), and escort vehicle driver
18 (DOT 919.663-022). Id.

19 During cross-examination of the VE, plaintiff’s counsel clarified the
20 hypothetical question by stating the limitation that the “individual cannot
21 communicate in English.” (AR 50). Focusing on the physical limitations, rather
22 than on the language limitation, the VE stated that plaintiff could not perform the
23 laundry worker job. (AR 51-52). The ALJ then commented that with these

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26 ¹ Social Security claims are evaluated according to a five-step sequential analysis. Reddick
27 v. Chater, 157 F.3d 715, 721 (9th Cir. 1998). At step five, the ALJ bears the burden to establish
28 that, even though the plaintiff cannot return to his or her prior type of work, there are other jobs
that exist in substantial numbers in the national economy that the plaintiff can still perform,
considering his or her residual functional capacity, age, education and work experience. See 20
C.F.R § 404.1520 (a)(i)-(v).

1 additional limitations “we’d find no jobs such a person could do who was so
2 restricted.”(AR 50).

3 In the Decision, the ALJ determined that, with respect to plaintiff’s
4 residual functional capacity, plaintiff “was not able to communicate in English,
5 and is considered in the same way as an individual who is illiterate in English.”
6 (AR 29). Relying on the VE’s testimony following the *initial* hypothetical
7 question (where the person *was* able to “communicate in English”), the ALJ
8 determined there were jobs in the national economy that plaintiff could perform,
9 specifically, fast food worker, laundry worker, bench hand assembler of small
10 parts, and escort vehicle driver. (AR 29).

11 Here, the ALJ’s initial hypothetical question to the VE was
12 incomprehensible because it did not clearly take into account plaintiff’s lack of
13 ability to communicate in English, as found by the ALJ. See Embrey v. Bowen,
14 849 F.2d 418, 422 (9th Cir. 1988) (“Hypothetical questions posed to the
15 vocational expert must set out all limitation and restrictions of the particular
16 claimant....”); Gamer v. Secretary of Health and Human Services, 815 F.2d
17 1275, 1279-80 (9th Cir. 1987).

18 Although defendant admits the ALJ erred in his hypothetical question to
19 the VE, defendant contends the error was harmless because the VE during cross-
20 examination did not focus on plaintiff’s English language limitations when
21 testifying about plaintiff’s ability to perform the laundry worker job. However,
22 as noted above, the ALJ ignored the VE’s testimony during cross-examination in
23 making the determination about the jobs available to plaintiff in the national
24 economy. It is clear to the Court that the VE actually considered plaintiff’s lack
25 of ability to communicate in English when he testified about the jobs available to
26 plaintiff in the national economy. Therefore, the ALJ’s error was not harmless.
27 See Molina v. Astrue, 674 F.3d 1104, 1117 (9th Cir. 2012)(holding that an error
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1 cannot be deemed harmless if it is not “inconsequential to the ultimate
2 nondisability determination.”).

3 **ORDER**

4 For the foregoing reasons, the Decision of the Commissioner is reversed,
5 and the matter is remanded for further proceedings in accordance with this
6 Decision, pursuant to Sentence 4 of 42 U.S.C §405(g). The hypothetical
7 question to the vocational expert should reflect plaintiff’s language limitation.
8 See Hill v. Astrue, 698 F.3d 1153, 1162 (9th Cir. 2012)(“Because the overall
9 record shows these additional assumptions should have been incorporated into
10 the ALJ’s hypothetical, remand is appropriate.”)

11 Dated: June 18, 2014

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16 STEPHEN J. HILLMAN
17 United States Magistrate Judge
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