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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRIZEL WILLIAMS, JR.,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No. CV 15-5212 JC
MEMORANDUM OPINION AND
ORDER OF REMAND

I. SUMMARY

On July 10, 2015, Frizel Williams, Jr. (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before the undersigned United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; July 14, 2015 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum Opinion and Order of Remand.

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

6 On April 18, 2012, plaintiff filed an application for Supplemental Security
7 Income alleging disability on August 14, 2004, due to back pain, shoulder pain,
8 arm pain, and leg and knee problems. (Administrative Record (“AR”) 25, 172,
9 192). The Administrative Law Judge (“ALJ”) examined the medical record and
10 heard testimony from plaintiff (who was represented by counsel) and a vocational
11 expert on December 3, 2013. (AR 37-60).

12 On January 23, 2014, the ALJ determined that plaintiff was not disabled
13 through the date of the decision. (AR 25-32). Specifically, the ALJ found:
14 (1) plaintiff suffered from the following severe impairments: low back pain
15 without radiculopathy and chronic obstructive pulmonary disease (COPD) (AR
16 27); (2) plaintiff’s impairments, considered singly or in combination, did not meet
17 or medically equal a listed impairment (AR 27); (3) plaintiff retained the residual
18 functional capacity to perform sedentary work (20 C.F.R. § 416.967(a)) with
19 additional limitations¹ (AR 28); (4) plaintiff could not perform any past relevant
20 work (AR 30); (5) there are jobs that exist in significant numbers in the national
21 economy that plaintiff could perform, specifically sorter, inspector, and assembler

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24 ¹The ALJ determined that plaintiff: (i) could lift and carry objects that weigh up to ten
25 pounds occasionally and less than ten pounds frequently; (ii) could stand and walk for up to four
26 of eight hours, cumulatively; (iii) could sit for no more than six of eight hours, cumulatively;
27 (iv) required a sit/stand option at least 30 minutes at a time; (v) had unlimited capacity for
28 pushing or pulling, except weight restrictions for lifting and carrying; (vi) could no more than
occasionally climb ramps or stairs, balance, stoop, kneel, or crouch; (vii) could never crawl,
kneel, or climb ladders or ropes; and (viii) could not tolerate concentrated exposure to poor
ventilation, fumes, dangerous machines or unprotected heights. (AR 28).

1 (AR 31); and (6) plaintiff’s allegations regarding the intensity, persistence, and
2 limiting effects of subjective symptoms were not entirely credible (AR 28).

3 The Appeals Council denied plaintiff’s application for review. (AR 1).

4 **III. APPLICABLE LEGAL STANDARDS**

5 **A. Sequential Evaluation Process**

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

16 In assessing whether a claimant is disabled, an ALJ is required to use the
17 following five-step sequential evaluation process:

- 18 (1) Is the claimant presently engaged in substantial gainful activity? If
19 so, the claimant is not disabled. If not, proceed to step two.
- 20 (2) Is the claimant’s alleged impairment sufficiently severe to limit
21 the claimant’s ability to work? If not, the claimant is not
22 disabled. If so, proceed to step three.
- 23 (3) Does the claimant’s impairment, or combination of
24 impairments, meet or equal an impairment listed in 20 C.F.R.
25 Part 404, Subpart P, Appendix 1? If so, the claimant is
26 disabled. If not, proceed to step four.

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1 (4) Does the claimant possess the residual functional capacity to
2 perform claimant’s past relevant work? If so, the claimant is
3 not disabled. If not, proceed to step five.

4 (5) Does the claimant’s residual functional capacity, when
5 considered with the claimant’s age, education, and work
6 experience, allow the claimant to adjust to other work that
7 exists in significant numbers in the national economy? If so,
8 the claimant is not disabled. If not, the claimant is disabled.

9 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
10 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

11 The claimant has the burden of proof at steps one through four, and the
12 Commissioner has the burden of proof at step five. See Bustamante v. Massanari,
13 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also
14 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial
15 burden of proving disability).

16 **B. Standard of Review**

17 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
18 benefits only if it is not supported by substantial evidence or if it is based on legal
19 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
20 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
21 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
22 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
23 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
24 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
25 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

26 Federal courts may review only the reasoning in the administrative decision
27 itself, and may affirm a denial of benefits only for those reasons upon which the
28 ALJ actually relied. Garrison v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014)

1 (citation omitted); see also Molina, 674 F.3d at 1121 (citing Securities and
2 Exchange Commission v. Chenery Corp., 332 U.S. 194, 196 (1947)) (“[courts]
3 may not uphold an agency’s decision on a ground not actually relied on by the
4 agency”). Even when an ALJ’s decision contains error, it must still be affirmed if
5 the error was harmless. Treichler v. Commissioner of Social Security
6 Administration, 775 F.3d 1090, 1099 (9th Cir. 2014).

7 **IV. DISCUSSION**

8 Plaintiff asserts that the ALJ erred at step five in finding that plaintiff could
9 perform the representative occupations of sorter, inspector, and assembler
10 (collectively “representative occupations”) based on testimony from the vocational
11 expert which, without explanation, deviated from the Dictionary of Occupational
12 Titles (“DOT”). (Plaintiff’s Motion at 4-10). As the Court cannot find that the
13 ALJ’s decision is supported by substantial evidence or that any error was
14 harmless, a remand is warranted.

15 First, there is an apparent conflict between the vocational expert’s testimony
16 and the DOT’s requirements for the representative occupations. In response to a
17 hypothetical question posed by the ALJ at the hearing, the vocational expert
18 opined that a hypothetical individual like plaintiff² would be able to perform any
19 of the three representative occupations. (AR 56-57). According to the DOT,
20 however, each of the representative occupations are at the sedentary exertional
21 level, and thus could require, among other things, “sitting most of the time” and
22 walking or standing for only “brief periods of time.” See DOT §§ 521.687-086
23 [“Nut Sorter”], 669.687-014 [“Dowel Inspector”], 706.684-030 [“Atomizer

24
25 ²It is unclear whether the hypothetical question the ALJ posed at the hearing – which
26 stated, in part, that “every 30 minutes [the hypothetical claimant needed] to [sic] free to
27 reposition himself to relief [sic] discomfort although would not have to leave the work station” –
28 adequately accounted for the ALJ’s finding in the administrative decision that plaintiff “requires
a sit/stand option at least 30 minutes at a time[.]” (Compare AR 56 [hypothetical question at
hearing] with AR 28 [residual functional capacity in ALJ’s decision]).

1 Assembler”]; see also 20 C.F.R. § 416.967(a) (“Although a sedentary job is
2 defined as one which involves sitting, a certain amount of walking and standing is
3 often necessary in carrying out job duties.”); Social Security Ruling (“SSR”)
4 83-10 at *5 (noting, in part, that sedentary work is “performed primarily in a
5 seated position”). Such requirements appear to be inconsistent with plaintiff’s
6 need for “a sit/stand option at least 30 minutes at a time” as the ALJ stated in the
7 administrative decision. (AR 28). The vocational expert affirmed that his opinion
8 was “consistent with the [DOT]” and “[was not] modified at all by [the expert’s]
9 own experience[.]” (AR 59). Nonetheless, the DOT is silent regarding sit/stand
10 options. See Buckner-Larkin v. Astrue, 450 Fed. Appx. 626, 628 (9th Cir. 2011)
11 (noting “the DOT does not discuss a sit-stand option. . . .”).

12 While district courts in this Circuit are split on the issue,³ unpublished Ninth
13 Circuit cases suggest that there is an apparent conflict between the DOT and
14 vocational expert testimony where, like here, the vocational expert testifies that
15 there are jobs available at the light or sedentary exertional level for a claimant who
16 needs a sit-stand option. See, e.g., id. at 628-29 (noting conflict between DOT and
17 vocational expert’s testimony that representative sedentary jobs “would allow for
18 an at-will sit-stand option”); Coleman v. Astrue, 423 Fed. Appx. 754, 756 (9th Cir.
19 2011) (finding apparent conflict between DOT and vocational expert testimony
20 that claimant could perform certain sedentary and light occupations, many of
21 which “could not accommodate [a claimant’s] need to switch between sitting,
22 standing, and walking on an hourly basis”) (citations omitted). This Court is
23 persuaded that there is an apparent conflict between the DOT requirements for
24 jobs at the sedentary exertional level and vocational expert testimony that such

26 ³See, e.g., Wester v. Colvin, 2015 WL 4608139, *5 (C.D. Cal. July 31, 2015) (noting
27 “District courts in the Ninth Circuit are divided on whether a conflict exists for limitations not
28 addressed by the DOT, including sit/stand options.”) (citing cases); King v. Colvin, 2016 WL
1255592, *5 (D. Idaho Mar. 28, 2016) (same; citing cases).

1 jobs can still be performed by a claimant who requires a sit-stand option at 30
2 minute intervals. See, e.g., McCullough v. Colvin, 2016 WL 1239209, *3 (C.D.
3 Cal. Mar. 29, 2016) (finding sit-stand limitation “inconsistent with [] DOT”);
4 Clark v. Colvin, 2015 WL 5601406, *5 (E.D. Cal. Sept. 22, 2015) (noting, in part,
5 the weight of authority in Circuit (holds) absence from the DOT of limitation on
6 need to be able to switch between sitting and standing or walking frequently
7 “creates an ‘apparent unresolved conflict’ within the meaning of SSR 00-4p.)
8 (citations omitted); Cato v. Colvin, 2015 WL 1481646, *8 (N.D. Cal. Mar. 31,
9 2015) (noting conflict between vocational expert testimony and DOT where
10 claimant required, but “DOT does not explicitly provide for,” a sit-stand option);
11 Lorigo v. Colvin, 2014 WL 1577317, *11 (E.D. Cal. Apr. 18, 2014) (since “the
12 DOT does not discuss the availability of a sit/stand option,” and vocational expert
13 expressly relied on the DOT, vocational expert’s testimony that available jobs
14 would allow for a sit-stand option “automatically deviated from the DOT”) (citing
15 Buckner-Larkin, 450 Fed. Appx. at 628-29).

16 Second, since neither the vocational expert nor the ALJ acknowledged that
17 there was an apparent conflict between the vocational expert’s testimony and the
18 DOT’s requirements for the representative occupations, neither made any attempt
19 to explain or justify the deviation with respect to such occupations. (AR 31, 55-
20 59). Accordingly, the vocational expert’s testimony, which the ALJ adopted,
21 could not serve as substantial evidence supporting the ALJ’s determination at step
22 five that plaintiff could perform the representative jobs. Pinto v. Massanari, 249
23 F.3d 840, 846 (9th Cir. 2001); see also Rawlings v. Astrue, 318 Fed. Appx. 593,
24 595 (9th Cir. 2009) (“Only after determining whether the vocational expert has
25 deviated from the [DOT] and whether any deviation is reasonable can an ALJ
26 properly rely on the vocational expert’s testimony as substantial evidence to
27 support a disability determination.”) (citing Massachi v. Astrue, 486 F.3d 1149,
28 1153-54 (9th Cir. 2007)); see, e.g., Wester v. Colvin, 2015 WL 4608139, *5 (C.D.

1 Cal. July 31, 2015) (“[W]ere a [vocational expert] to testify that a claimant
2 requiring an at-will sit/stand option could perform jobs demanding six hours of
3 standing without explicitly addressing whether those jobs would accommodate her
4 at-will sit/stand requirement, that testimony might be inadequate to satisfy the
5 Commissioner’s burden, particularly if the jobs at issue were unskilled work.”)
6 (citing SSR 83-12 (recognizing that although certain jobs permit an employee
7 some choice regarding sitting and standing, “[u]nskilled types of jobs are
8 particularly structured so that a person cannot ordinarily sit or stand at will”)); cf.,
9 e.g., Buckner-Larkin, 450 Fed. Appx. at 628-29 (conflict between DOT and
10 vocational expert testimony adequately addressed where vocational expert
11 reasonably explained that deviation “was based on his own labor market surveys,
12 experience, and research” and ALJ addressed the explanation in the decision).

13 As defendant correctly notes (Defendant’s Motion at 5), as a general
14 proposition no foundation is required for a vocational expert’s testimony other
15 than the vocational expert’s “recognized expertise” itself. See Bayliss v. Barnhart,
16 427 F.3d 1211, 1218 (9th Cir. 2005). Here, however, the vocational expert
17 expressly affirmed that his opinion was “[not] modified at all by [his] own
18 experience.” (AR 59). Since the vocational expert’s opinion was based solely on
19 the DOT (AR 57-59), the failure to address the apparent conflict was erroneous.
20 See, e.g., Lorigo, 2014 WL 1577317, at *12 (ALJ erred by relying on vocational
21 expert testimony regarding jobs available that claimant could perform because
22 “the [vocational expert’s] testimony that encapsulated a sit/stand option
23 automatically deviated from the DOT,” the vocational expert “did not specifically
24 cite to or note that her opinion was based on anything other than the DOT in
25 determining that [representative] occupations were performable in light of a
26 sit/stand option,” and the vocational expert “did not include in her testimony any
27 explanation of how she arrived at or reduced available job numbers to account for
28 the necessary sit/stand option”).

1 Finally, the Court cannot find that the ALJ’s error was harmless since
2 defendant points to no persuasive evidence in the record which supports the
3 vocational expert’s apparent deviation from the DOT or could otherwise support
4 the ALJ’s non-disability determination at Step Five. Cf. Tommasetti v. Astrue,
5 533 F.3d 1035, 1042 (9th Cir. 2008) (ALJ erred in finding that claimant could
6 return to past relevant work based on vocational expert’s testimony that deviated
7 from DOT because ALJ “did not identify what aspect of the [vocational expert’s]
8 experience warranted deviation from the DOT, and did not point to any evidence
9 in the record other than the [vocational expert’s] sparse testimony” to support the
10 deviation, but error was harmless in light of ALJ’s alternative finding at step five,
11 which was supported by substantial evidence, that claimant could still perform
12 other work in the national and local economies that existed in significant
13 numbers).

14 **V. CONCLUSION⁴**

15 For the foregoing reasons, the decision of the Commissioner of Social
16 Security is reversed in part, and this matter is remanded for further administrative
17 action consistent with this Opinion.⁵

18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19 DATED: July 26, 2016

/s/

20 Honorable Jacqueline Chooljian
21 UNITED STATES MAGISTRATE JUDGE

22 _____
23 ⁴The Court need not, and has not adjudicated plaintiff’s other challenges to the ALJ’s
24 decision, except insofar as to determine that a reversal and remand for immediate payment of
benefits would not be appropriate.

25 ⁵When a court reverses an administrative determination, “the proper course, except in rare
26 circumstances, is to remand to the agency for additional investigation or explanation.”
27 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
28 quotations omitted). Remand is proper where, as here, “additional proceedings can remedy
defects in the original administrative proceeding. . . .” Garrison v. Colvin, 759 F.3d 995, 1019
(9th Cir. 2014) (citation and internal quotation marks omitted).