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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SERGIO SANCHEZ FAJARADO, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	}	Case No. CV 15-08074-DFM MEMORANDUM OPINION AND ORDER
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Plaintiff Sergio Sanchez Fajarado (“Plaintiff”) appeals the final decision of the Administrative Law Judge (“ALJ”) denying his application for disability benefits. For the reasons discussed below, the Court concludes that the ALJ erred when concluding that Plaintiff could perform certain jobs despite his inability to reach overhead with his right arm. The ALJ’s decision is therefore reversed and the matter is remanded for further proceedings consistent with this opinion.

I.
BACKGROUND

Plaintiff filed his initial application for benefits on January 28, 2010, alleging disability beginning February 23, 2008. Administrative Record (“AR”)

1 106-12. After Plaintiff's application was denied, he requested a hearing before
2 an ALJ and an ALJ issued a written decision finding that Plaintiff was not
3 disabled. See AR 21-30.

4 After the Appeals Council denied Plaintiff's request for review, Plaintiff
5 appealed to this Court. This Court reversed the ALJ's decision and remanded
6 the case for further administrative proceedings, finding that the ALJ erred in
7 asking a hypothetical question to the vocational expert that did not include
8 Plaintiff's language limitation. AR 518-27. Following this Court's remand, the
9 Appeals Council remanded the case to an ALJ for further proceedings, noting
10 that Plaintiff had filed a new disability application and been found disabled as
11 of September 10, 2013. AR 530-32. The Appeals Council's remand order did
12 not reopen that favorable decision. See AR 431, 531. Therefore, the period at
13 issue on remand was from February 23, 2008 through and including September
14 9, 2013. AR 431.

15 On remand, the ALJ determined that Plaintiff had the severe
16 impairments of "right shoulder and elbow injuries status post right shoulder
17 arthroscopic repair of rotator cuff tear and subacromial decompression, right
18 ulnar nerve transposition, and depressive disorder." AR 433-36. The ALJ
19 found that Plaintiff had the residual functional capacity ("RFC") to perform
20 light work with additional limitations, including a restriction against "any
21 overhead reaching with the right upper extremity." AR 437. The ALJ called a
22 vocational expert ("VE") to testify about what work Plaintiff could perform
23 given his limitations. AR 458-59. The ALJ presented to the VE a hypothetical
24 based on Plaintiff's RFC:

25 Let's take a 52-year-old, six grades of education, work experience
26 as described. Let's say this person's unable to communicate in
27 English; can lift 10 pounds frequently to 20 occasionally; stand six
28 in eight hours, sit six in eight; occasionally bend and/or stoop; no

1 overhead reaching with the right dominant arm and hand; no
2 hazardous environments, usual heights, dangerous equipment,
3 machinery; and limited to simple, routine, tasks. Could such a
4 person perform the job this gentleman performed in the past?

5 AR 458. The VE testified that such an individual could not perform Plaintiff's
6 past relevant work but could work as a small products assembler and fast food
7 worker as described in the Dictionary of Occupational Titles ("DOT" or
8 "DICOT"). AR 458-59; see DICOT 706.684-022, available at 1991 WL
9 679050; DICOT 311.472-010, available at 1991 WL 672682. The ALJ then
10 asked the VE whether there was "[a]nything in your testimony that would vary
11 with the contents of the DOT?" AR 459. The VE answered, "No, sir." Id.

12 On the basis of the VE's testimony, the ALJ found that Plaintiff could
13 perform work that was available in significant numbers in the national
14 economy. AR 442. The ALJ accordingly concluded that Plaintiff was not
15 disabled from February 23, 2008 to September 9, 2013. Id. This second appeal
16 followed.

17 II.

18 DISCUSSION

19 The primary issue presented by Plaintiff's appeal is whether the ALJ
20 correctly determined that Plaintiff could perform other work available in the
21 national economy. Plaintiff contends that the ALJ erred in determining that he
22 was capable of working as a fast food worker and small products assembler
23 because those jobs, as described in the DOT, are incompatible with the ALJ's
24 assessment that Plaintiff could not engage in any overhead reaching with his
25 right arm. JS at 5-11. This Court agrees.¹

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27 ¹ Because this Court concludes that the ALJ erred in finding that Plaintiff
28 was able to perform other work available in the national economy, it will not

1 The ALJ concluded that Plaintiff “cannot engage in any overhead
2 reaching” with his right arm. AR 437. The Social Security Regulations define
3 reaching as “extending the hands and arms in any direction.” Social Security
4 Ruling (“SSR”) 85-15, 1985 WL 56857, at *7 (emphasis added). According to
5 the DOT, the job of small products assembler requires reaching “frequently,”
6 see DOT 706.684-022, available at 1991 WL 679050, and the job of fast food
7 worker requires “constant” reaching, DOT 311.472-010, available at 1991 WL
8 672682. It is apparent to the Court that the DOT’s requirements for these two
9 jobs conflict with a limitation against any overhead reaching.

10 When an expert’s testimony conflicts with a DOT job listing, the ALJ
11 “must elicit a reasonable explanation for the conflict before relying on the
12 [expert’s] evidence to support a determination or decision about whether the
13 claimant is disabled.” SSR 00-4p, 2000 WL 1898704, at *2; see also Massachi
14 v. Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007). An ALJ’s failure to perform
15 this step constitutes procedural error. Id. at 1153-54 & n.19. The Court may
16 find the procedural error to be harmless if the VE provided sufficient support
17 for his conclusion so as to justify any potential conflicts. Id. at 1154 n. 19.

18 Here, the VE did not offer and the ALJ did not elicit an explanation for
19 the conflict. The VE offered no explanation for her conclusion that a person
20 with Plaintiff’s limitation of no overhead reaching with the right arm could
21 perform the jobs of small products assembler or fast food worker, jobs which
22 require frequent and constant reaching, respectively. Moreover, the VE did not
23 provide an evidentiary basis for the ALJ to justify a divergence from the DOT
24 listing in this particular case. As a result, it appears that the Court “ha[s] an
25 apparent conflict with no basis for the vocational expert’s deviation,” a

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27 address Plaintiff’s other argument, that there was not substantial evidence for
28 the ALJ’s finding that Plaintiff was literate in English. JS at 16-25. The ALJ
may wish to address this argument on remand.

1 circumstance that compels a remand so that the ALJ can perform the
2 appropriate inquiry under SSR 00-4p. See Massachi, 486 F.3d at 1154 & n.19.

3 The Court does not find persuasive the Commissioner's contention that
4 Plaintiff can still perform the requirements of the job of assembler of small
5 products despite being limited to no overhead reaching with his right arm
6 because the job description "only refers to work on an assembly line or on a
7 bench, with no suggestion whatsoever that the line or bench can be overhead."
8 JS at 12. But it is not clear from either the DOT or the VE's testimony whether
9 Plaintiff would in fact be able to perform this job while unable to reach
10 overhead with his right arm. The DOT states that a small products assembler
11 "[l]oads and unload previously setup machines, such as arbor presses, drill
12 presses, taps, spot-welding machines, riveting machines, milling machines, or
13 broaches, to perform fastening, force fitting, or light metal-cutting operations
14 on assembly line." Some of these acts may require overhead reaching. "As
15 defined in the [DOT], the plain meaning of 'reaching' encompasses above-the-
16 shoulder reaching." Mkhitaryan v. Astrue, 09-6971, 2010 WL 1752162, *3
17 (C.D. Cal. Apr. 27, 2010).

18 Nor can the Court conclude that any error was harmless. See Molina v.
19 Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) ("We have long recognized that
20 harmless error principles apply in the Social Security Act context." (citing
21 Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006))).
22 The ALJ did not have the VE explain the apparent conflict and give an expert
23 opinion about how Plaintiff can perform these two jobs with his limitations on
24 reaching. Therefore, the Court does not have expert testimony to defer to.

25 Whether to remand for further proceedings or award benefits is within
26 the discretion of the Court. See, e.g., Salvador v. Sullivan, 917 F.2d 13, 15 (9th
27 Cir. 1990); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989); Lewin v.
28 Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Remand is warranted where

1 additional administrative proceedings could remedy defects in the decision.
2 Lewin, 654 F.2d at 635. Based on the foregoing, the Court finds that remand is
3 warranted for clarification as to the impact, if any, of Plaintiff's reaching
4 limitation on his ability to perform the occupations of fast food worker and
5 small products assembler, and to sufficiently explain any deviation from the
6 DOT.

7 **III.**
8 **CONCLUSION**

9 For the reasons stated above, the decision of the Social Security
10 Commissioner is REVERSED and the matter is REMANDED for further
11 proceedings consistent with this opinion.

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13 Dated: August 26, 2016



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15 DOUGLAS F. McCORMICK
16 United States Magistrate Judge
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