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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CHRISTOPHER KELLER,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social
Security,

Defendant.

Case No. CV 16-5042 (SS)

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Plaintiff Christopher Keller ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (the "Commissioner" or "Agency") denying his application for Disability Insurance Benefits ("DIB"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further proceedings.

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II.

PROCEDURAL HISTORY

Plaintiff filed an application for Title II DIB on July 22, 2013. (Administrative Record ("AR") 144-45). In the application, Plaintiff alleged a disability onset date of January 1, 2012. (AR 144). The Agency denied Plaintiff's application initially on October 21, 2013. (AR 90-101, 98-101). On December 7, 2013, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR 109-10). Plaintiff testified before the ALJ, John D. Moreen, on October 21, 2014. (AR 44, 48-81). On October 31, 2014, the ALJ issued a decision denying Plaintiff benefits. (AR 19-40). Plaintiff timely requested review of the ALJ's decision, which the Appeals Council denied on May 19, 2016. (AR 1-4). Plaintiff filed the instant action on July 10, 2016.

III.

FACTUAL BACKGROUND

A. Plaintiff's History

Plaintiff was born on February 13, 1955. (AR 48, 144). Plaintiff was 56 years old at the time of his alleged disability onset date of January 1, 2012 (AR 117), and 59 years old at the time of his hearing before the ALJ (AR 35, 48). Plaintiff completed more than four years of college and earned degrees in history and management/business administration. (AR 48, 158). Plaintiff worked in the past as a claims adjuster (AR 57, 174), security

1 guard (AR 54, 174, 181), and private investigator (AR 55). With
2 the exception of working one day in 2010, Plaintiff has not worked
3 since December 31, 2008. (AR 49, 61). Plaintiff alleges disability
4 due to anxiety, high blood sugar, sciatica, morbid
5 obesity/metabolic syndrome, depression, carpal tunnel/tendonitis,
6 pre-diabetes, and back pain. (AR 157).

7
8 **B. Vocational Expert's Testimony**

9
10 Vocational Expert ("VE") Jane Hale testified at Plaintiff's
11 hearing on October 21, 2014. (AR 81-86). The ALJ asked the VE
12 whether a hypothetical individual with Plaintiff's characteristics
13 and the limitation of occasional contact with others could perform
14 Plaintiff's past work as a security guard. (AR 82). The VE
15 testified that this hypothetical person's characteristics and
16 limitations would "still allow the security guard job," but the
17 limitation "may [erode] the labor market." (AR 83). The VE
18 explained that because the hypothetical person "would be limited
19 to taking assignments that were away from the public," the security
20 guard job market would be eroded by "at least" 50 percent. (AR
21 83).

22
23 After the VE testified about job erosion, the ALJ asked
24 whether the VE's testimony was in conformance with the Dictionary
25 of Occupational Titles ("DOT"). (AR 83). The VE answered by
26 stating "Yes." (AR 83).

27 //

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1 IV.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

3
4 To qualify for disability benefits, a claimant must
5 demonstrate a medically determinable physical or mental impairment
6 that prevents the claimant from engaging in substantial gainful
7 activity and that is expected to result in death or to last for a
8 continuous period of at least twelve months. Reddick v. Chater,
9 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)).
10 The impairment must render the claimant incapable of performing
11 the work she previously performed and incapable of performing any
12 other substantial gainful employment that exists in the national
13 economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999)
14 (citing 42 U.S.C. § 423(d)(2)(A)).

15
16 To decide if a claimant is entitled to benefits, an ALJ
17 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The
18 steps are:

- 19
- 20 (1) Is the claimant presently engaged in substantial gainful
21 activity? If so, the claimant is found not disabled. If
22 not, proceed to step two.
 - 23 (2) Is the claimant's impairment severe? If not, the
24 claimant is found not disabled. If so, proceed to step
25 three.
 - 26 (3) Does the claimant's impairment meet or equal one of the
27 specific impairments described in 20 C.F.R. Part 404,
28 Subpart P, Appendix 1? If so, the claimant is found

1 disabled. If not, proceed to step four.

2 (4) Is the claimant capable of performing his past work? If
3 so, the claimant is found not disabled. If not, proceed
4 to step five.

5 (5) Is the claimant able to do any other work? If not, the
6 claimant is found disabled. If so, the claimant is found
7 not disabled.

8

9 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
10 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-
11 (g) (1) & 416.920(b)-(g) (1).

12

13 The claimant has the burden of proof at steps one through four
14 and the Commissioner has the burden of proof at step five.
15 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
16 affirmative duty to assist the claimant in developing the record
17 at every step of the inquiry. Id. at 954. If, at step four, the
18 claimant meets his or her burden of establishing an inability to
19 perform past work, the Commissioner must show that the claimant
20 can perform some other work that exists in "significant numbers"
21 in the national economy, taking into account the claimant's
22 residual functional capacity ("RFC"), age, education, and work
23 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
24 721; 20 C.F.R. §§ 404.1520(g) (1), 416.920(g) (1). The Commissioner
25 may do so by the testimony of a VE or by reference to the Medical-
26 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,
27 Appendix 2 (commonly known as "the grids"). Osenbrock v. Apfel,
28 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both

1 exertional (strength-related) and non-exertional limitations, the
2 Grids are inapplicable and the ALJ must take the testimony of a
3 VE. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing
4 Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

5
6 **V.**

7 **THE ALJ'S DECISION**

8
9 The ALJ employed the five-step sequential evaluation process
10 and concluded that Plaintiff was not disabled within the meaning
11 of the Social Security Act. (AR 40). At step one, the ALJ found
12 that Plaintiff had not engaged in substantial gainful activity
13 during the period from alleged disability onset of January 1, 2012,
14 through date last insured of December 31, 2013. (AR 25). At step
15 two, the ALJ found that Plaintiff had the severe medically
16 determinable impairments of a history of carpal tunnel syndrome on
17 the right, essential tremor of the left upper extremity, mild
18 degenerative changes of both knees, mild degenerative changes of
19 both hips, degenerative changes of the lumbar spine, sciatica,
20 obesity, and obstructive sleep apnea. (Id.). At the third step,
21 the ALJ found that the severe impairments at step two did not meet
22 or medically equal a listed impairment. (AR 31).

23
24 At step four, the ALJ found that Plaintiff had the RFC to
25 perform light work as defined in 20 C.F.R. § 404.1567(b) except
26 that the job could require no more than occasional contact with
27 others. (AR 32). The ALJ assessed this limitation to occasional
28 contact with others based on Plaintiff's demeanor at the hearing

1 and because he credibly testified that he was let go from his last
2 job due to interpersonal discord. (AR 38). The ALJ found that
3 through the date last insured Plaintiff was capable of performing
4 his past relevant work as a security guard. The ALJ determined
5 that this past work did not require the performance of work-related
6 activities precluded by Plaintiff's RFC. (Id.).

7
8 The ALJ concluded that Plaintiff had failed to establish
9 disability at any time from the date of onset of January 1, 2012,
10 through the date last insured of December 31, 2013. (AR 40).
11 Accordingly, the ALJ found that Plaintiff was not under a
12 disability as defined by the Social Security Act. (Id.).

13 14 VI.

15 STANDARD OF REVIEW

16
17 Under 42 U.S.C. § 405(g), a district court may review the
18 Commissioner's decision to deny benefits. "[The] court may set
19 aside the Commissioner's denial of benefits when the ALJ's findings
20 are based on legal error or are not supported by substantial
21 evidence in the record as a whole." Aukland v. Massanari, 257 F.3d
22 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see
23 also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing
24 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

25
26 "Substantial evidence is more than a scintilla, but less than
27 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.
28 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant

1 evidence which a reasonable person might accept as adequate to
2 support a conclusion." (Id.). To determine whether substantial
3 evidence supports a finding, the court must "'consider the record
4 as a whole, weighing both evidence that supports and evidence that
5 detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d
6 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
7 1993)). If the evidence can reasonably support either affirming
8 or reversing that conclusion, the court may not substitute its
9 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-
10 21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,
11 1457 (9th Cir. 1995)).

12 13 VII.

14 DISCUSSION

15
16 Plaintiff challenges the ALJ's decision on the ground that
17 the evidence fails to establish that Plaintiff can perform his past
18 work of security guard with the limitation of occasional contact
19 with others. (Plaintiff's Memorandum in Support of Complaint at
20 4). The Court agrees. Accordingly, for the reasons discussed
21 below, the decision is REVERSED and REMANDED for further
22 proceedings consistent with this decision.

23 24 **A. The ALJ Improperly Evaluated Plaintiff's Ability To Perform** 25 **Past Relevant Work At Step Four**

26
27 Plaintiff argues that the ALJ erred by concluding that he can
28 perform his past relevant work as a security guard with the RFC

1 limitation of occasional contact with others. (Id. at 4). At step
2 four, the claimant carries the burden of proving that he cannot
3 return to a position similar to his past work. Pinto v. Massanari,
4 249 F.3d 840, 844 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520(e),
5 416.920(e); Clem v. Sullivan, 894 F.2d 328, 330 (9th Cir. 1990)).
6 “Although the burden of proof lies with the claimant at step four,
7 the ALJ still has a duty to make the requisite factual findings to
8 support his conclusion.” Id. (citing SSR 82-62, 1982 WL 31386
9 (1982) (“SSR 82-62)) (additional citations omitted). “This is done
10 by looking at the residual functional capacity and the physical
11 and mental demands of the claimant’s past relevant work.” Id. at
12 844-45 (citing 20 C.F.R. §§ 20 C.F.R. §§ 404.1520(e), 416.920(e)
13 (internal quotation marks omitted)).

14
15 A claimant has the ability to return to previous work if he
16 can perform the “‘actual functional demands and job duties of a
17 particular past relevant job’” or “‘[t]he functional demands and
18 job duties of the [past] occupation as generally required by
19 employers throughout the national economy.’” Id. at 845 (quoting
20 SSR 82-61, 1982 WL 31387 (“SSR 82-61”). “This requires specific
21 findings as to the claimant’s residual functional capacity, the
22 physical and mental demands of the past relevant work, and the
23 relation of the residual functional capacity to the past work.”
24 Id. (citing SSR 82-62).

25
26 The ALJ found that, “[b]ased on the [VE]’s testimony,
27 [Plaintiff] can perform the physical requirements of all of his
28 past relevant work, as it is generally performed if not as actually

1 performed."¹ (AR 39). "[T]he best source for how a job is generally
2 performed is usually the [DOT]." Pinto, 249 F.3d at 845 (citing
3 Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995)); 20 C.F.R.
4 §§ 1566(d), 416.1566(d); SSR 82-61).

5
6 The ALJ was required to make specific findings regarding "the
7 relation of [Plaintiff's] residual functional capacity to [his]
8 past work." Pinto, 249 F.3d at 845. This required the ALJ to
9 compare the job duties of security guard as generally performed
10 and defined by the DOT with Plaintiff's RFC. Cf. id.; 20 C.F.R. §
11 404.1520(e).

12
13 The ALJ found that Plaintiff had the RFC to perform light work
14 except that the job could require no more than "occasional contact
15 with others." (AR 32). The DOT defines the temperaments necessary
16 to perform the job of security guard as including the temperament
17 of "P: Dealing with PEOPLE." DOT 372.667-034 (4th rev. ed. 1991),
18 1991 WL 673100 ("DOT 372.667-034"); see also Revised Handbook for
19 Analyzing Jobs, ch. 10 ¶ 2 (1991) (defining "Temperaments," of
20 which there are eleven, as "a component of Work Characteristics"
21 and the "adaptability requirement made on the worker by specific
22 types of jobs"). This DOT temperament "P", i.e., "dealing with
23 people," conflicts with the ALJ's assessed limitation of occasional
24 contact with others.

25 //

26 _____
27 ¹ The ALJ found that Plaintiff could perform his past work as
28 generally required but not as actually performed. For this reason,
the Court does not address Plaintiff's contention that he cannot
perform the actual demands of his past work.

1 “[F]or an ALJ to rely on a job description in the [DOT] that
2 fails to comport with a claimant’s noted limitations, the ALJ must
3 definitively explain this deviation.” Pinto, 249 F.3d at 847
4 (citing Johnson, 60 F.3d at 1435). Here, the ALJ erred because he
5 offered no explanation for his deviation from the DOT.

6
7 In addition, the ALJ erroneously relied on the VE’s testimony
8 to conclude that Plaintiff could perform the physical requirements
9 of his past work of security guard. (AR 39). The record did not
10 contain the necessary evidence to support a deviation from the DOT.
11 Cf. Pinto, 249 F.3d at 846 (for an ALJ to accept VE testimony that
12 contradicts the DOT, the “record must contain ‘persuasive evidence
13 to support the deviation’”) (quoting Johnson, 60 F.3d at 1435).

14
15 Moreover, the ALJ was required to elicit a reasonable
16 explanation for the conflict between the VE and DOT prior to relying
17 on the VE’s testimony. Cf. Massachi v. Astrue, 486 F.3d 1149,
18 1152-53 (9th Cir. 2007) (ALJ’s duty to develop the record requires
19 ALJ to reconcile apparent conflicts by “determin[ing] whether
20 [VE’s] explanation for the conflict is reasonable and whether a
21 basis exists for relying on the expert rather than the [DOT]”);
22 see also SSR 00-4p, 2000 WL 1898704 (2000). However, the ALJ
23 accepted the VE’s answer that her testimony was consistent with
24 the DOT without obtaining the required explanation. The ALJ did
25 not inquire, and the VE did not offer, any explanation of how a
26 hypothetical person with the limitation of occasional contact with
27 others could perform the job of security guard requiring the
28 temperament of dealing with people. The ALJ erred by failing to

1 reconcile this conflict. Cf. Massachi, 486 F.3d at 1153-54 (ALJ
2 erred by failing to ask VE whether testimony conflicted with DOT
3 and, if so, whether there was a reasonable explanation for the
4 conflict).

5
6 The Agency contends that there is no conflict because the DOT
7 does not discuss frequency of contact with others and a "common
8 sense reading" of the DOT reveals that some jobs take place in
9 closed establishments. (Agency's Mem. in Support of Answer at 5).
10 However, the DOT's security guard job requirement of dealing with
11 people presumptively applies absent persuasive evidence supporting
12 a deviation from the DOT. Cf. Johnson, 60 F.3d at 1435. Here,
13 the ALJ failed to identify or rely upon any evidence to support
14 the deviation.

15
16 Finally, the VE testified that approximately 50 percent of
17 the jobs of security guard would be eroded for a hypothetical
18 person with the limitation of occasional contact with others. (AR
19 82-83). Contrary to the Commissioner's contention, this testimony
20 did not reconcile the conflict with the DOT. (AR 83). Neither
21 the VE nor ALJ acknowledged the DOT's defined temperament of
22 dealing with people.

23
24 For these reasons, the ALJ failed to develop the record and
25 support his decision with substantial evidence. Cf. Pinto, 249
26 F.3d at 847-48 (ALJ's decision not supported by substantial
27 evidence where the DOT required a language ability above
28 plaintiff's and neither ALJ nor VE addressed impact of plaintiff's

1 illiteracy on her ability to find and perform past work).
2 Accordingly, the ALJ erred at step four by concluding that
3 Plaintiff could perform his past relevant work.

4
5 **B. Remand Is Required**

6
7 In sum, the ALJ's decision at step four was not supported by
8 substantial evidence. In addition, the ALJ failed to develop the
9 record by reconciling the conflict between the VE and DOT, and this
10 failure was not "inconsequential to the ultimate nondisability
11 determination.'" Molina v. Astrue, 674 F.3d 1104, 1117 (9th Cir.
12 2012) (quoting Stout v. Comm'r, 454 F.3d 1050, 1055-56 (9th Cir.
13 2006)). Accordingly, the case must be remanded to remedy these
14 defects.

15
16 On remand, the ALJ must fully develop the record and determine
17 whether sufficient evidence supports the conclusion that Plaintiff
18 is capable of finding and performing his past relevant work. If
19 not, the ALJ must decide, based upon VE testimony, whether other
20 jobs exist in the national or local economy that Plaintiff can
21 perform.

