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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REBECCA ANN JARAMILLO,)	NO. CV 17-6036-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
NANCY A. BERRYHILL, ACTING)	
COMMISSIONER OF SOCIAL SECURITY,)	
)	
Defendant.)	
)	

PROCEEDINGS

Plaintiff filed a Complaint on August 14, 2017, seeking review of the Commissioner's denial of benefits. The parties filed a consent to proceed before a United States Magistrate Judge on September 13, 2017.

Plaintiff filed a motion for summary judgment on December 27, 2017. Defendant filed a cross-motion for summary judgment on January 26, 2018. The Court has taken both motions under submission without oral argument. See L.R. 7-15; "Order," filed August 18, 2017.

1 Carillo's role, if any, in Plaintiff's treatment; (2) relying solely
2 on the opinions of the non-examining physicians to determine
3 Plaintiff's residual functional capacity; and (3) failing to order a
4 consultative examination of Plaintiff. See A.R. 638-43.

5
6 On remand, a new ALJ held two administrative hearings, obtained
7 evidence from consultative examiners and a vocational expert, and
8 issued a new, partially-favorable decision. See A.R. 556-70
9 (decision), 582-96 (hearing transcripts), 929-34 (vocational expert
10 interrogatories), 949-51 (vocational expert cross-interrogatories),
11 1061-67 (2014 Internal Medicine Consultation evaluation by Dr. John
12 Sedgh), 1549-55 (2016 Internal Medicine Consultation evaluation by Dr.
13 Sedgh), 1632-39 (2016 Comprehensive Psychological Evaluation by Dr.
14 Michael Cohn). The ALJ found that Plaintiff has suffered from a
15 number of "severe" impairments since her alleged onset date, but has
16 retained a residual functional capacity for a limited range of
17 sedentary work:

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19 [S]he can stand up to two (2) hours and walk up to two (2)
20 hours, cumulatively, and sit up to six (6) hours,
21 cumulatively, in an eight-hour workday; she can lift and
22 carry up to 20 pounds occasionally and ten pounds
23 frequently; she can occasionally climb, balance, bend,
24 stoop, push and pull, finger, handle, and crawl; she may
25 frequently perform complex technical work and can perform a
26 full range of simple, repetitive work at level 7 reasoning;
27 she may exercise frequent concentration and persistence in
28 pace; she may have occasional contact with co-workers and

1 the general public; and she may perform work at stress level
2 5 on a scale of (1) one to (10) ten, one, by example, the
3 work of a night dishwasher and ten being the work of an air
4 traffic controller, as these occupations are generally
5 performed in the national economy.

6
7 See A.R. 561 (emphasis added).
8

9 Given this capacity, the ALJ found Plaintiff disabled as of
10 April 23, 2015 - the date Plaintiff turned 50 and became an individual
11 "closely approaching advanced age." See A.R. 569-70 (citing 20 C.F.R.
12 Pt. 404, subpt. P, App. 2 (the "Grids"), Rule 201.09).¹ However, for
13 the period from Plaintiff's alleged onset date until April 23, 2015,
14 the ALJ found that there were sedentary unskilled jobs existing in
15 significant numbers in the national economy that Plaintiff could
16 perform: Stuffer (DOT 731.685-014), Addresser (DOT 209.587-010), and
17 Ampoule Sealer (DOT 559.687-014). See A.R. 569-70 (adopting
18 vocational expert's opinion at A.R. 932-34, which the ALJ claimed was
19 consistent with the information found in the Dictionary of
20 Occupational Titles ("DOT")).
21

22 STANDARD OF REVIEW

23

24 Under 42 U.S.C. section 405(g), this Court reviews the
25 Administration's decision to determine if: (1) the Administration's
26

27 ¹ A conclusion of disability, when directed by the Grids,
28 is irrebuttable. See Cooper v. Sullivan, 880 F.2d 1152, 1157
(9th Cir. 1989).

1 findings are supported by substantial evidence; and (2) the
2 Administration used correct legal standards. See Carmickle v.
3 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
4 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,
5 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
6 relevant evidence as a reasonable mind might accept as adequate to
7 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
8 (1971) (citation and quotations omitted); see also Widmark v.
9 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

10
11 If the evidence can support either outcome, the court may
12 not substitute its judgment for that of the ALJ. But the
13 Commissioner's decision cannot be affirmed simply by
14 isolating a specific quantum of supporting evidence.
15 Rather, a court must consider the record as a whole,
16 weighing both evidence that supports and evidence that
17 detracts from the [administrative] conclusion.

18
19 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and
20 quotations omitted).

21 22 DISCUSSION

23 24 I. Substantial Evidence Does Not Support the ALJ's Finding that 25 Plaintiff Could Perform Work Before She Turned 50.

26
27 Substantial evidence does not support the ALJ's determination
28 that Plaintiff could perform the identified jobs prior to April 23,

1 2015. In making this determination, the ALJ relied on the vocational
2 expert's opinion. There exists an unexplained inconsistency between
3 this opinion and information found in the DOT.
4

5 "[T]he best source for how a job is generally performed is
6 usually the Dictionary of Occupational Titles." Pinto v. Massanari,
7 249 F.3d 840, 845 (9th Cir. 2001) (citations omitted). However, the
8 DOT "is not the sole source of admissible information concerning
9 jobs"; an ALJ also may rely on the testimony of a vocational expert
10 concerning the requirements of a particular occupation. See Johnson
11 v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995) (citation omitted).
12 Such testimony can furnish substantial evidence to support an ALJ's
13 determination that a claimant is not disabled. See Barker v.
14 Secretary, 882 F.2d 1474, 1478-80 (9th Cir. 1989).
15

16 Before relying on vocational expert testimony concerning the
17 requirements of a particular occupation, "the ALJ must ask the
18 [vocational expert] if his or her testimony is consistent with the
19 DOT." Wentz v. Commissioner Social Sec. Admin., 401 Fed. App'x 189,
20 191 (9th Cir. 2010) (citing Massachi v. Astrue, 486 F.3d 1149, 1152-53
21 (9th Cir. 2007)); see also Zavalin v. Colvin, 778 F.3d 842, 846 (9th
22 Cir. 2015) (discussing the ALJ's duty to resolve an apparent conflict
23 between vocational expert testimony and the DOT; the "failure to
24 resolve an apparent inconsistency may leave. . . a gap in the record
25 that precludes us from determining whether the ALJ's decision is
26 supported by substantial evidence") (citing, inter alia, SSR 00-4p).
27 ///
28 ///

1 SSR 00-4p provides in pertinent part:

2
3 In making disability determinations, we rely primarily
4 on the DOT. . . for information about the requirements of
5 work in the national economy. We use [the DOT] at steps 4
6 and 5 of the sequential evaluation process. We may also use
7 [vocational experts]. . . at these steps to resolve complex
8 vocational issues. . . .

9
10 Occupational evidence provided by a [vocational expert]
11 . . . generally should be consistent with the occupational
12 information supplied by the DOT. When there is an apparent
13 unresolved conflict between [vocational expert]. . .
14 evidence and the DOT, the adjudicator must elicit a
15 reasonable explanation for the conflict before relying on
16 the [vocational expert]. . . evidence to support a
17 determination or decision about whether the claimant is
18 disabled. . . .

19
20 Neither the DOT nor the [vocational expert]. . .
21 evidence automatically "trumps" when there is a conflict.
22 The adjudicator must resolve the conflict by determining if
23 the explanation given by the [vocational expert]. . . is
24 reasonable and provides a basis for relying on the
25 [vocational expert]. . . testimony rather than on the DOT
26 information.

27
28 See SSR 00-4p, 2000 WL 1897804, at *2 (Dec. 4, 2000) (emphasis added);

1 see also Gutierrez v. Colvin, 844 F.3d 804, 808 (9th Cir. Nov. 29,
2 2016) ("For a difference between an expert's testimony and the [DOT's]
3 listings to be fairly characterized as a conflict, it must be obvious
4 or apparent.").

5
6 In the present case, the ALJ defined a residual functional
7 capacity limiting Plaintiff to only occasional handling and fingering.
8 The vocational expert identified three jobs a person with this
9 capacity assertedly could perform: Stuffer, Addresser and Ampoule
10 Sealer. According to the DOT, however, a person with this capacity
11 could not perform any of these three jobs. According to the DOT, each
12 of the three jobs requires frequent (i.e. more than occasional)
13 handling, and two of the three jobs also require frequent fingering.
14 See DOT 731.687-014, 1991 WL 679811 (1991) (Stuffer job requires
15 frequent handling); DOT 209.587-010, 1991 WL 671797 (1991) (Addresser
16 job requires frequent handling and frequent fingering); DOT 559.687-
17 014, 1991 WL 683782 (1991) (Ampoule Sealer requires frequent handling
18 and frequent fingering).

19
20 The ALJ purported to rely on the vocational expert's opinion to
21 find Plaintiff not disabled before her 50th birthday. As a matter of
22 law, the apparent, obvious and unresolved conflict between the
23 vocational expert's opinion and the DOT precludes such reliance. See
24 Social Security Ruling ("SSR") 00-4p;² Light v. Social Sec. Admin.,
25 119 F.3d 789, 794 (9th Cir. 1997) (error that "[n]either the ALJ nor
26 the vocational expert explained the reason for departing from the

27
28 ² Social Security Rulings are "binding on the ALJs."
Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

1 DOT"); Johnson v. Shalala, 60 F.3d at 1435 ("an ALJ may rely on expert
2 testimony which contradicts the DOT, but only insofar as the record
3 contains persuasive evidence to support the deviation").
4

5 At step five of the sequential evaluation process, the burden
6 shifts from the claimant to the Administration to show that the
7 claimant is able to perform other work that exists in significant
8 numbers in the national economy. Tackett v. Apfel, 180 F.3d at 1100;
9 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2). Absent explanation of the
10 apparent conflict between the vocational expert's opinion and the DOT,
11 the vocational expert's opinion cannot constitute substantial evidence
12 to support the conclusion that Plaintiff could work before her 50th
13 birthday. See Zavalin v. Colvin, 778 F.3d at 846; see generally
14 Burkhart v. Bowen, 856 F.2d 1335, 1341 (9th Cir. 1988) (Administration
15 may not speculate concerning the requirements of particular jobs).
16

17 During the administrative proceedings and before this Court,
18 Plaintiff's counsel failed to point out the inconsistency between the
19 vocational expert's opinion and the DOT. To the extent Defendant
20 might argue that this failure effected a waiver of the issue, the
21 argument would not be well taken. First, "an ALJ is required to
22 investigate and resolve any apparent conflict between the [vocational
23 expert's] testimony and the DOT, regardless of whether a claimant
24 raises the conflict before the agency." Shaibi v. Berryhill, 870 F.3d
25 874, 882 (9th Cir. 2017) ("Shaibi") (citing SSR 004-p; distinguishing
26 from situation where claimant waived right to invoke non-DOT sources
27 to challenge vocational expert's job-number estimates because the ALJ
28 had no duty sua sponte to take administrative notice of non-DOT

1 sources); Lamear v. Berryhill, 865 F.3d 1201, 1206 (9th Cir. 2017)
2 (“Lamear”) (“our law is clear that a counsel’s failure [to raise the
3 issue] does not relieve the ALJ of his express duty to reconcile
4 apparent conflicts through questioning: ‘When there is an apparent
5 conflict between the vocational expert’s testimony and the DOT – for
6 example, expert testimony that a claimant can perform an occupation
7 involving DOT requirements that appear more than the claimant can
8 handle – the ALJ is required [under SSR 004-p] to reconcile the
9 inconsistency.’”) (quoting Zavalin v. Colvin, 778 F.3d at 846;
10 emphasis added)); see also Randazzo v. Berryhill, 2017 WL 6374297, at
11 *1 (9th Cir. Dec. 13, 2017) (rejecting argument that claimant waived
12 issue of conflict between vocational expert testimony and the DOT by
13 failing to raise the issue before the ALJ; citing Lamear, 865 F.3d at
14 1205-06, and distinguishing Shaibi, 870 F.3d at 881-83); Alvarenga v.
15 Berryhill, 2018 WL 400740, at *2, *4 (C.D. Cal. Jan. 12, 2018)
16 (rejecting argument that plaintiff waived claim that the ALJ erred by
17 failing to resolve an apparent conflict between the DOT and vocational
18 expert testimony by not raising the claim with the ALJ; citing, inter
19 alia, SSR 00-4p and distinguishing Shaibi); Borutta v. Berryhill, 2018
20 WL 324087, at *5 (C.D. Cal. Jan. 5, 2018) (rejecting identical waiver
21 argument; also noting that “[a]n ALJ cannot simply rely on the
22 [vocational expert’s] testimony that no such conflict exists”)
23 (citations and internal quotation marks omitted).

24
25 Second, the Court must review the administrative decision to
26 determine if the decision is supported by substantial evidence. See
27 Carmickle v. Commissioner, 533 F.3d at 1159. The apparent and
28 unresolved conflict discussed above prevents the vocational expert’s

1 opinion from constituting substantial evidence to support the
2 administrative decision.

3
4 **II. The Court is Unable to Conclude that the ALJ's Error Was**
5 **Harmless.**

6
7 "[A]n ALJ's error is harmless where it is inconsequential to the
8 ultimate nondisability determination." Molina v. Astrue, 674 F.3d
9 1104, 1115 (9th Cir. 2012) (citations and quotations omitted); see
10 Treichler v. Commissioner, 775 F.3d 1090, 1105 (9th Cir. 2014)
11 ("Where, as in this case, an ALJ makes a legal error, but the record
12 is uncertain and ambiguous, the proper approach is to remand the case
13 to the agency"); cf. McLeod v. Astrue, 640 F.3d 881, 887 (9th Cir.
14 2011) (error not harmless where "the reviewing court can determine
15 from the 'circumstances of the case' that further administrative
16 review is needed to determine whether there was prejudice from the
17 error"). Under these standards, the Court is unable to conclude that
18 the ALJ's error was harmless. As previously indicated, substantial
19 evidence fails to support the ALJ's step five determination that
20 Plaintiff can perform the jobs identified.

21
22 **III. Remand for Further Administrative Proceedings is Appropriate.**

23
24 The circumstances of this case warrant remand for further
25 administrative proceedings, which could remedy the ALJ's error. See
26 McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura, 537 U.S.
27 12, 16 (2002) (upon reversal of an administrative determination, the
28 proper course is remand for additional agency investigation or

1 explanation, except in rare circumstances); Leon v. Berryhill, 880
2 F.3d 1041 (9th Cir. 2017) (reversal with a directive for the immediate
3 calculation of benefits is a "rare and prophylactic exception to the
4 well-established ordinary remand rule"); Dominquez v. Colvin, 808 F.3d
5 403, 407 (9th Cir. 2015) ("Unless the district court concludes that
6 further administrative proceedings would serve no useful purpose, it
7 may not remand with a direction to provide benefits"); Treichler v.
8 Commissioner, 775 F.3d at 1101 n.5 (remand for further administrative
9 proceedings is the proper remedy "in all but the rarest cases").
10 Here, it is unclear whether there exists an explanation for the
11 conflict discussed above. It is also unclear whether there may exist
12 other jobs Plaintiff could have performed before her 50th birthday.

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