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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LATOSHA L. C.,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. 2:18-cv-03042-KES

MEMORANDUM OPINION
AND ORDER

I.
BACKGROUND

Plaintiff Latosha L. C. (“Plaintiff”) applied for disability benefits back in 2007 alleging that she became disabled and unable to work on August 10, 2006. Administrative Record (“AR”) 240-51. The parties’ Joint Stipulation (“JS” at Dkt. 25) recites the lengthy history of her application, including numerous errors and remands. (JS at 2-3.) The instant appeal concerns the decision of an Administrative Law Judge (“ALJ”) to deny benefits dated January 25, 2018 (AR

¹ Effective November 17, 2017, Ms. Berryhill’s new title is “Deputy Commissioner for Operations, performing the duties and functions not reserved to the Commissioner of Social Security.”

1 804-24) following a fourth hearing on October 10, 2017 (AR 835-62).

2 The ALJ found that Plaintiff suffered from the medically determinable
3 impairments of lumbar degenerative disc disease, morbid obesity, and depressive
4 disorder. AR 806. The ALJ determined that Plaintiff had the residual functional
5 capacity (“RFC”) to perform light work with additional exertional limitations and
6 some mental limitations including the following:

7 Due [to] a depressive disorder, she is limited to unskilled work learned
8 by simple instructions. The work is simple and repetitive in nature.

9 There is no judgment or choice involved in performing the work.

10 AR 813.

11 Based on her RFC and the testimony of a Vocational Expert (“VE”), the
12 ALJ found that Plaintiff could work as mail clerk, Dictionary of Occupational
13 Titles (“DOT”) 209.687-026, or surveillance-system monitor, DOT 379.367-010.
14 AR 823. The ALJ concluded that Plaintiff was not disabled. AR 823.

15 II.

16 ISSUE PRESENTED

17 This appeal presents the sole issue of whether the ALJ erred in finding that
18 Plaintiff could work as a mail clerk or surveillance-system monitor. Plaintiff
19 contends that (1) the DOT describes these jobs as requiring mental abilities that
20 exceed her RFC, and (2) the VE testified contrary to the DOT without explaining
21 the inconsistency.

22 III.

23 RELEVANT ADMINISTRATIVE MATTERS

24 A. Hearing Testimony.

25 Plaintiff testified that she worked as a school cafeteria attendant for about
26 ten years before quitting in 2005 due to a conflict with her supervisor. AR 841-42.
27 After that, she worked as a home healthcare certified nursing assistant (“CNA”)
28 until August 2006 when she injured herself lifting a patient. AR 842. To obtain

1 the CNA job, she “barely” completed a certification course. AR 846. The VE
2 classified these jobs as DOT 355.674-014 (nurse assistant) and DOT 311.677-010
3 (cafeteria attendant). AR 856.

4 The ALJ asked the VE what jobs would be available to a hypothetical
5 worker with Plaintiff’s RFC. AR 857. The VE testified that such a worker could
6 not do Plaintiff’s past relevant work. AR 858. The VE did not explain what
7 aspects of Plaintiff’s past relevant work were inconsistent with her RFC.

8 She then consulted some reference material and opined that the jobs of mail
9 clerk and surveillance-system monitor would be available. AR 858-59. In
10 response to questioning by Plaintiff’s counsel and the ALJ, the VE testified that
11 she was “sure” someone with all the mental limitations set forth in Plaintiff’s RFC
12 could do those two jobs. AR 860. The ALJ never asked the VE if her testimony
13 was consistent with the DOT, and the VE never volunteered that it was. AR 854-
14 62.

15 The ALJ found that the VE’s testimony was consistent with the DOT
16 without explaining that finding. AR 823. Relying on the VE’s testimony, the ALJ
17 found that Plaintiff could work as a mail clerk and surveillance-system monitor.

18 Id.

19 **B. DOT Ratings.**

20 The DOT lists a specific vocational preparation time (“SVP”) for each
21 described occupation, which is defined as “the amount of lapsed time required by a
22 typical worker to learn the techniques, acquire the information, and develop the
23 facility needed for average performance in a specific job-worker situation.” DOT,
24 App. C, 1991 WL 688702. Using the skill level definitions in 20 CFR §§ 404.1568
25 and 416.968, unskilled work corresponds to an SVP of 1-2; semi-skilled work
26 corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9. See
27 Social Security Ruling 00-4p, 2000 WL 1765299 (Dec. 4, 2000).

28 A job’s level of simplicity is also addressed by its DOT general educational

1 development (“GED”) rating for reasoning development.² The GED reasoning
2 scale ranges from level 1 (lowest) to level 6 (highest). The DOT defines the
3 reasoning abilities corresponding with each of the first four levels, as follows:

4 Level One: Apply commonsense understanding to carry out simple
5 one- or two-step instructions. Deal with standardized situations with
6 occasional or no variables in or from these situations encountered on
7 the job.

8 Level Two: Apply commonsense understanding to carry out detailed
9 but uninvolved written or oral instructions. Deal with problems
10 involving a few concrete variables in or from standardized situations.

11 Level Three: Apply commonsense understanding to carry out
12 instructions furnished in written, oral, or diagrammatic form. Deal
13 with problems involving several concrete variables in or from
14 standardized situations.

15 Level Four: Apply principles of rational systems* to solve practical
16 problems and deal with a variety of concrete variables in situations
17 where only limited standardization exists. Interpret a variety of
18 instructions furnished in written, oral, diagrammatic, or schedule
19 form.

20 *Examples of rational systems include: bookkeeping, internal
21 combustion engines, electric wiring systems, house building, farm
22 management, and navigation.

23 See DOT, App. C, 1991 WL 688702.

24 Based on the DOT occupations assigned by the VE, the DOT rates
25 Plaintiff’s past work as a CNA as requiring SVP 4 and reasoning level 3. DOT

26
27 ² The GED also includes a scale for mathematical development and language
28 development. See DOT, App. C, 1991 WL 688702.

1 355.674-014. The DOT rates Plaintiff's past work as a cafeteria attendant as SVP
2 2 with reasoning level 2. DOT 311.677-010.

3 The DOT rates the job of mail clerk—one of the jobs the VE opined Plaintiff
4 could perform—as requiring SVP 2 and reasoning level 3. The DOT describes the
5 duties of a mail clerk as follow:

6 Sorts incoming mail for distribution and dispatches outgoing mail:
7 Opens envelopes by hand or machine. Stamps date and time of
8 receipt on incoming mail. Sorts mail according to destination and
9 type, such as returned letters, adjustments, bills, orders, and
10 payments. Readdresses undeliverable mail bearing incomplete or
11 incorrect address. Examines outgoing mail for appearance and seals
12 envelopes by hand or machine. Stamps outgoing mail by hand or
13 with postage meter. May fold letters or circulars and insert in
14 envelopes May distribute and collect mail. May weigh mail to
15 determine that postage is correct. May keep record of registered
16 mail. May address mail, using addressing machine

17 DOT 209.687-026 (omitting cross-references to other jobs with different DOT
18 codes).

19 The DOT rates the job of surveillance-system monitor—the other job that
20 the VE opined Plaintiff could perform—as requiring SVP 2 and reasoning level 3.

21 The DOT describes the duties of a surveillance-system monitor as follow:

22 Monitors premises of public transportation terminals to detect crimes
23 or disturbances, using closed circuit television monitors, and notifies
24 authorities by telephone of need for corrective action: Observes
25 television screens that transmit in sequence views of transportation
26 facility sites. Pushes hold button to maintain surveillance of location
27 where incident is developing, and telephones police or other
28 designated agency to notify authorities of location of disruptive

1 activity. Adjusts monitor controls when required to improve
2 reception, and notifies repair service of equipment malfunctions.

3 DOT 379.367-010.

4 III.

5 DISCUSSION

6 In Zavalin v. Colvin, 778 F.3d 842 (9th Cir. 2015), the Ninth Circuit held
7 that a claimant limited to “simple, routine, or repetitive tasks” could presumptively
8 not do work rated by the DOT as requiring reasoning level 3. Id. at 847. The
9 Ninth Circuit ruled, “In sum, because the ALJ failed to recognize an inconsistency
10 [between simple work and GED 3], she did not ask the expert to explain why a
11 person with Zavalin’s limitation could nevertheless meet the demands of Level 3
12 Reasoning. We conclude that the ALJ erred in failing to reconcile this apparent
13 conflict.” Id.

14 The Commissioner attempts to distinguish Zavalin by summarizing evidence
15 concerning Plaintiff’s mental abilities (JS at 11-15) and concluding, “Substantial
16 evidence shows Plaintiff could perform a job requiring level three reasoning.” (JS
17 at 15.) The problem with this argument is that the ALJ found that Plaintiff was
18 only capable of “simple and repetitive” work with “no judgment or choice
19 involved.” AR 813. Per Zavalin, such work is inconsistent with a DOT GED
20 reasoning level rating of 3, but nothing in the present record explains that
21 inconsistency.

22 The Commissioner argues that the ALJ’s failure to explain the inconsistency
23 was “harmless error” because ample evidence demonstrates that Plaintiff has the
24 mental ability to work as a mail clerk or surveillance-system monitor. (JS at 15.)
25 The Court disagrees. This argument essentially asks the Court, in the guise of a
26 harmless error analysis, to find that the RFC’s limitations to “simple and
27 repetitive” work with “no judgment or choice involved” are erroneous because
28 they lack substantial evidentiary support – an inquiry beyond the scope of this

1 appeal. 42 U.S.C. §§ 405(g), 1383(c) (authorizing appeals to the district court by
2 claimants, not by the Commissioner).

3 If, as the ALJ found, Plaintiff cannot do work that involves “judgment or
4 choice,” then she cannot work as a surveillance-system monitor. A surveillance-
5 system monitor, as described by the DOT, must use judgment to determine how to
6 respond to possible emergencies and security threats. As the Ninth Circuit has
7 recognized, “a surveillance system monitor may be called upon to use discretion
8 and judgment in rapidly evolving scenarios, including deciding when a situation
9 requires the authorities to be notified, all while continuing to maintain
10 surveillance.” Zavalin, 778 F.3d at 848.

11 As described by the DOT, the mail clerk position requires workers to
12 understand the nature of mail received sufficiently well to sort it. A mail clerk
13 cannot sort “adjustments, bills, orders, and payments” without recognizing what
14 constitutes each type of mail. See Barbee v. Berryhill, No. 16-1779, 2017 WL
15 3034531 at *16, 2017 U.S. Dist. LEXIS 111821 at *42-43 (S.D. Cal. July 18,
16 2017) (“Based on the reasoning of Zavalin, the Court finds there was an apparent
17 conflict between the VE’s testimony that Plaintiff could perform the job of mail
18 clerk and the DOT, which the ALJ failed to address.”); Bagshaw v. Astrue, 2010
19 U.S. Dist. LEXIS 8976 at *16, 2010 WL 256544 at *5 (C.D. Cal. Jan. 20, 2010)
20 (holding that a mail clerk’s requirement of reasoning level 3 is inconsistent with
21 RFC for simple, routine work).

22 For all these reasons, the ALJ erred by relying on the VE’s testimony that a
23 person with Plaintiff’s RFC could work as a mail clerk or surveillance system
24 monitor without recognizing and inquiring about the apparent conflict between the
25 VE’s testimony and the DOT.

26 IV.

27 DISPOSITION

28 Plaintiff asks the Court to reverse the decision of the Commissioner and

1 award benefits, rather than remanding the case for further administrative
2 proceedings. (JS at 20.) In deciding between a remand to award benefits or to
3 conduct further administrative proceedings, the “required analysis centers on what
4 the record evidence shows about the existence or non-existence of a disability.”
5 Strauss v. Comm’r of the Soc. Sec. Admin., 635 F.3d 1135, 1138 (9th Cir. 2011).
6 Courts should consider whether “the record has been fully developed and further
7 administrative proceedings would serve no useful purpose.” Garrison v. Colvin,
8 759 F.3d 995, 1020 (9th Cir. 2014) (discussing the “credit as true” doctrine, which
9 is not the basis of Plaintiff’s request for an order awarding benefits). Ultimately,
10 courts should “remand for further [administrative] proceedings when the record as
11 a whole creates serious doubt as to whether the claimant is, in fact, disabled within
12 the meaning of the Social Security Act.” Id. at 1021.

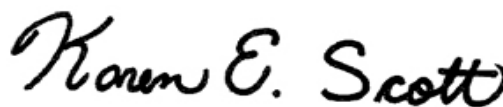
13 Here, the record has been developed over the course of more than a decade.
14 The ALJ found that Plaintiff can only do “simple and repetitive” work with “no
15 judgment or choice involved.” AR 813. A VE testified that the only jobs
16 compatible with Plaintiff’s RFC were two jobs that are not, in fact, compatible.
17 This record does not create a serious doubt as to whether Plaintiff is disabled.

18 **V.**

19 **CONCLUSION**

20 For the reasons stated above, IT IS ORDERED that judgment shall be
21 entered REVERSING the Commissioner’s final decision and REMANDING the
22 case for a calculation and award of benefits.

23
24 DATED: February 28, 2019

25 

26 KAREN E. SCOTT
27 United States Magistrate Judge
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