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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JESUS C.,

12 Plaintiff,

13 v.

14 ANDREW M. SAUL, Commissioner of
15 Social Security Administration,

16 Defendant.
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Case No. CV 19-1651-SP

MEMORANDUM OPINION AND
ORDER

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19 I.

20 INTRODUCTION

21 On March 6, 2019, plaintiff Jesus C. filed a complaint against defendant, the
22 Commissioner of the Social Security Administration (“Commissioner”), seeking a
23 review of a denial of a period of disability, disability insurance benefits (“DIB”),
24 and supplemental security income (“SSI”). The parties have fully briefed the
25 matters in dispute, and the court deems the matter suitable for adjudication without
26 oral argument.

27 Plaintiff presents one issue for decision, whether the Administrative Law
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1 Judge (“ALJ”) erred at step five by failing to resolve an inconsistency between the
2 vocational expert’s testimony and the Dictionary of Occupational Titles (“DOT”).
3 *See* Memorandum in Support of Plaintiff’s Complaint (“P. Mem.”) at 4-11;
4 Memorandum in Support of Defendant’s Answer (“D. Mem.”) at 4-7.

5 Having carefully studied the parties’ moving and opposing papers, the
6 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
7 that, as detailed herein, the ALJ did err at step five, but the error was harmless.
8 Consequently, the court affirms the decision of the Commissioner denying
9 benefits.

10 II.

11 **FACTUAL AND PROCEDURAL BACKGROUND**

12 Plaintiff, who was 23 years old on the alleged disability onset date, attended
13 some college. AR at 52, 123. Plaintiff has past relevant work as a teacher’s aide
14 and fast-food cook. *Id.* at 52-53, 68.

15 On October 21, 2015, plaintiff filed an application for a period of disability
16 and DIB, and on October 23, 2015, plaintiff filed an application for SSI, both
17 applications alleging disability beginning May 30, 2015 due to plaintiff’s inability
18 to move his right arm and neck, back and shoulder pain, nerve “misalignment,” and
19 head trauma, all from a motorcycle accident which left him in a coma for over a
20 month. *Id.* at 123-24, 137-38. The Commissioner denied plaintiff’s applications
21 initially, and upon reconsideration, after which he filed a request for a hearing. *Id.*
22 at 153-160.

23 On November 27, 2017, plaintiff, represented by counsel, appeared and
24 testified at a hearing before the ALJ. *Id.* at 51-64, 65-68. The ALJ also heard
25 testimony from Elizabeth Brown Ramos, a vocational expert (“VE”). *Id.* at 64-65,
26 68-71. On March 21, 2018, the ALJ denied plaintiff’s claim for benefits. *Id.* at 31-
27 44.

1 Applying the well-known five-step sequential evaluation process, the ALJ
2 found, at step one, that plaintiff had not engaged in substantial gainful activity
3 since May 30, 2015, the alleged onset date. *Id.* at 33.

4 At step two, the ALJ found plaintiff suffered from the following severe
5 impairments: status post motorcycle accident with subarachnoid hemorrhage
6 (SAH), subdural hematoma (SDH), temporal contusion and other injuries; right
7 brachial plexus traction injury; cognitive disorder; and depressive disorder. *Id.*

8 At step three, the ALJ found plaintiff's impairments, whether individually or
9 in combination, did not meet or medically equal one of the listed impairments set
10 forth in 20 C.F.R. part 404, Subpart P, Appendix 1. *Id.* at 34.

11 The ALJ then assessed plaintiff's residual functional capacity ("RFC"),¹ and
12 determined he had the RFC to: lift and carry twenty pounds occasionally and ten
13 pounds frequently with the left upper (non-dominant) extremity only; sit for six
14 hours in an eight-hour day; and stand and walk for six hours in an eight-hour day.
15 *Id.* at 36. But the ALJ found plaintiff was unable to use the right upper extremity
16 for reaching, handling, fingering, or feeling, and was limited to simple tasks. *Id.*

17 The ALJ found, at step four, that plaintiff was unable to perform his past
18 relevant work as a teacher's aide and fast-food cook. *Id.* at 41.

19 At step five, the ALJ found there were jobs that existed in significant
20 numbers in the national economy that plaintiff could perform, including counter
21 clerk and conveyor belt bakery worker. *Id.* at 42-43. Consequently, the ALJ
22 concluded plaintiff did not suffer from a disability as defined by the Social
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

1 Security Act. *Id.* at 43.

2 Plaintiff filed a timely request for review of the ALJ's decision, which was
3 denied by the Appeals Council. *Id.* at 1-7. The ALJ's decision stands as the final
4 decision of the Commissioner.

5 III.

6 STANDARD OF REVIEW

7 This court is empowered to review decisions by the Commissioner to deny
8 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
9 Administration must be upheld if they are free of legal error and supported by
10 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
11 (as amended). But if the court determines that the ALJ's findings are based on
12 legal error or are not supported by substantial evidence in the record, the court may
13 reject the findings and set aside the decision to deny benefits. *Aukland v.*
14 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
15 1144, 1147 (9th Cir. 2001).

16 "Substantial evidence is more than a mere scintilla, but less than a
17 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such
18 "relevant evidence which a reasonable person might accept as adequate to support
19 a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
20 F.3d at 459. To determine whether substantial evidence supports the ALJ's
21 finding, the reviewing court must review the administrative record as a whole,
22 "weighing both the evidence that supports and the evidence that detracts from the
23 ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "cannot be
24 affirmed simply by isolating a specific quantum of supporting evidence."
25 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
26 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
27 the ALJ's decision, the reviewing court "may not substitute its judgment for that
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1 of the ALJ.’’ *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
2 1992)).

3 IV.

4 DISCUSSION

5 Plaintiff contends the ALJ erred at step five because she improperly relied
6 on the testimony of the vocational expert, who identified jobs that were
7 inconsistent with plaintiff’s RFC. *See* P. Mem. at 4-7. Specifically, plaintiff
8 argues the ALJ erred by failing to resolve a conflict between the VE’s testimony
9 and the Dictionary of Occupational Titles. *See id.* at 7-11.

10 At step five, the burden shifts to the Commissioner to show that the claimant
11 retains the ability to perform other gainful activity. *Lounsbury v. Barnhart*, 468
12 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a claimant is not
13 disabled at step five, the Commissioner must provide evidence demonstrating that
14 other work exists in significant numbers in the national economy that the claimant
15 can perform, given his or her age, education, work experience, and RFC. 20
16 C.F.R. § 416.912(b)(3).

17 ALJs routinely rely on the DOT “in evaluating whether the claimant is able
18 to perform other work in the national economy.” *Terry v. Sullivan*, 903 F.2d 1273,
19 1276 (9th Cir. 1990) (citations omitted); *see also* 20 C.F.R. § 416.966(d)(1)
20 (stating the DOT is a source of reliable job information). The DOT is the
21 rebuttable presumptive authority on job classifications. *Johnson v. Shalala*, 60
22 F.3d 1428, 1435 (9th Cir. 1995). An ALJ may not rely on a VE’s testimony
23 regarding the requirements of a particular job without first inquiring whether the
24 testimony conflicts with the DOT, and if so, the reasons therefor. *Massachi*, 486
25 F.3d at 1152-53 (citing Social Security Ruling (“SSR”) 00-4p). An ALJ’s failure
26 to do so is procedural error, but the error can be deemed harmless if no actual
27 conflict exists or the VE provided sufficient support to justify deviation from the
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1 DOT. *Id.* at 1154 n.19.

2 In order for an ALJ to accept a VE's testimony that contradicts the DOT, the
3 record must contain "persuasive evidence to support the deviation." *Id.* at 1153
4 (quoting *Johnson*, 60 F.3d at 1435). Evidence sufficient to permit such a deviation
5 may be either specific findings of fact regarding the claimant's residual
6 functionality, or inferences drawn from the context of the expert's testimony.
7 *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997) (citations omitted).

8 Here, during the November 27, 2017 hearing, the ALJ asked the VE whether
9 jobs exist in the national economy for a hypothetical person with the same RFC as
10 plaintiff, including his inability to use the right upper extremity for reaching,
11 handling, fingering, or feeling. AR at 69. In response, the VE testified that a
12 person with plaintiff's RFC could perform work existing in the national economy
13 as a counter clerk (DOT 249.366-010) and conveyor belt bakery worker (DOT
14 524.687-022). *Id.* The VE further testified that both jobs would be eroded by ten
15 percent to account for plaintiff's inability to use his right upper extremity, but that
16 with the ten percent erosion, there would be 27,000 jobs nationally for the counter
17 clerk position and 32,000 jobs nationally for the conveyor belt bakery worker
18 position. *Id.* at 69-70.

19 In the hearing decision, the ALJ accepted the VE's identification of eroded
20 job numbers as a reasonable explanation for the VE's opinion about the availability
21 of jobs in the national economy "for an individual with, essentially, only use of one
22 hand." *Id.* at 43. But during the hearing, the ALJ did not ask whether the VE's
23 testimony was consistent with the DOT. *See id.* at 69-71. The ALJ thus erred in
24 failing to inquire whether the VE's testimony was consistent with the DOT. *See*
25 *Massachi*, 486 F.3d at 1152-53 (citing SSR 00-4p). Nonetheless, the ALJ's error is
26 harmless since, as discussed below, there is no conflict between the VE's
27 testimony and the DOT. *See id.* at 1154 n.19; SSR 00-4p.

1 Plaintiff argues the ALJ erred in failing to resolve a conflict between the
2 VE's testimony that plaintiff could perform the jobs of counter clerk and conveyor
3 belt bakery worker despite his inability to use his right upper extremity and the
4 DOT job descriptions. *See* P. Mem. at 7-11. According to the DOT, the
5 occupation of counter clerk requires occasional reaching, handling, and fingering,
6 and the occupation of conveyor belt bakery worker requires occasional reaching
7 and handling. *Id.* at 5-6; DOT 249.366-010, 524.687-022. Plaintiff argues these
8 jobs require "occasional use of both upper extremities," because reaching is
9 defined as "extending the hands and arms in any direction," and handling is
10 defined as "seizing, holding, grasping, turning, or otherwise working primarily
11 with the whole hand or hands." *See* P. Mem. at 6-7 (quoting *The Revised*
12 *Handbook for Analyzing Jobs* and SSR 85-15). As such, plaintiff contends the
13 DOT descriptions of these jobs, which require "bilateral reaching and handling,"
14 are inconsistent with the ALJ's RFC assessment precluding him from using his
15 right upper extremity for reaching, handling, fingering, or feeling, and the ALJ
16 erred in failing to resolve this conflict. *Id.* at 7-11.

17 Here, as defendant points out, although the two challenged jobs do require
18 occasional reaching and handling, there is no indication in the DOT that either of
19 these jobs require the use of both arms or hands. *See* D. Mem. at 4-6 (citing DOT
20 249.366-010; DOT 524.687-022). Plaintiff's argument that the positions of
21 counter clerk and conveyor belt bakery worker are inconsistent with the ALJ's
22 RFC precluding him from using his right arm and hand is premised on the
23 erroneous assumption that these jobs require the use of "both upper extremities."
24 *See* P. Mem. at 6-7. But the DOT does not expressly contain a bilateral reaching
25 and handling requirement, and indeed, courts have routinely held that a job
26 requiring reaching, handling, or fingering does not necessarily require the use of
27 both arms absent affirmative evidence to the contrary. *See Carey v. Apfel*, 230
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1 F.3d 131, 146 (5th Cir. 2000) (noting that person with use of one arm could
2 perform jobs requiring fingering and handling since the DOT does not require
3 bilateral fingering and handling); *Palomares v. Astrue*, 887 F. Supp. 2d 906, 920
4 (N.D. Cal. 2012) (finding that because the DOT does not require reaching with
5 both arms, plaintiff's limitation to occasional reaching and overhead reaching on
6 his left side did not conflict with the DOT's requirement of "constant reaching");
7 *Slye v. Astrue*, 2012 WL 425266, *4-5 (C.D. Cal. Feb. 9, 2012) (finding no conflict
8 between the DOT job description requiring frequent reaching and plaintiff's
9 limitation to only occasional reaching with the left arm because the DOT does not
10 require bilateral reaching); *McConnell v. Astrue*, 2010 WL 1946728, *6-7 (C.D.
11 Cal. May 10, 2010) (holding that jobs requiring reaching and handling did not
12 exceed plaintiff's limitation to work with one hand when there was no express
13 bilateral requirement in the DOT for those positions).

14 Because the DOT does not contain a bilateral reaching and handling
15 requirement, the DOT does not indicate that plaintiff would be unable to perform
16 the occasional reaching and handling requirements identified in the DOT for the
17 counter clerk and conveyor belt bakery positions. Thus, the court finds there is no
18 conflict between the VE's testimony that plaintiff could perform these jobs despite
19 plaintiff's inability to use his right upper extremity and the occasional reaching and
20 handling requirements identified in the DOT. The ALJ's error in not asking the
21 VE about a potential conflict was harmless.

22 Moreover, the ALJ explicitly "recognize[d] that the DOT does not
23 distinguish between the use of one or both hands for activities such as lifting,
24 carrying, reaching, handling, fingering, or feeling," and thus appropriately relied
25 on the VE's "personal experience and expertise" to identify jobs that could be
26 performed with one hand. AR at 43; see *Fuller v. Astrue*, 2009 WL 4980273, *3
27 (C.D. Cal. Dec. 15, 2009) (where nature of particular action required in
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1 performance of job is not specified in DOT, ALJ may properly rely on testimony
2 from VE to determine whether claimant can perform job in question despite
3 claimant's limitations); *see also* SSR 85-15 ("Reaching . . . and handling . . . are
4 activities required in almost all jobs. Significant limitations of reaching or
5 handling, therefore, may eliminate a large number of occupations a person could
6 otherwise do. Varying degrees of limitations would have different effects, and the
7 assistance of a VE may be needed to determine the effects of the limitations.").

8 In testifying that a claimant with all of plaintiff's limitations, including the
9 inability to use the right dominant hand, could perform the jobs of counter clerk
10 and conveyor belt bakery worker, the VE specifically explained that the number of
11 these jobs available were eroded by ten percent to account for plaintiff's inability
12 to use his right upper extremity, but that with the ten percent erosion, there would
13 still be 27,000 national jobs for the counter clerk position and 32,000 national jobs
14 for the conveyor belt bakery worker position. AR at 69-70 As such, the VE used
15 her experience and expertise to fill in any gap in the DOT with respect to the need
16 for use of both upper extremities in the jobs identified, and this testimony
17 constituted substantial evidence supporting the ALJ's finding. *See Tackett v. Apfel*,
18 180 F.3d 1094, 1101 (9th Cir. 1999) (VE's testimony may constitute substantial
19 evidence of a claimant's ability to perform work which exists in significant
20 numbers in the national economy when the ALJ poses a hypothetical question that
21 accurately describes all of the claimant's limitations that are supported by the
22 record); *see also Johnson*, 60 F.3d at 1435 ("[A]n ALJ may rely on expert
23 testimony which contradicts the DOT, but only insofar as the record contains
24 persuasive evidence to support the deviation."). The ALJ thus properly relied on
25 the VE's testimony.

26 Accordingly, although the ALJ erred in failing to ask the VE about any
27 potential conflicts with the DOT, the ALJ's error was harmless because there was
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1 no conflict between the VE's testimony and the DOT, and the VE provided a
2 sufficient explanation such that it was reasonable for the ALJ to rely on the VE's
3 testimony at step five.

4 V.

5 **CONCLUSION**

6 IT IS THEREFORE ORDERED that Judgment shall be entered
7 AFFIRMING the decision of the Commissioner denying benefits, and dismissing
8 the complaint with prejudice.

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10 DATED: November 25, 2020

A handwritten signature in black ink, appearing to read 'SHERI PYM', written over a horizontal line.

11 SHERI PYM
12 United States Magistrate Judge
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