UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GRETHER A. D., Plaintiff, v. ANDREW SAUL, Commissioner of Social Security, Defendant.	NO. CV 20-3356-E **MEMORANDUM OPINION**

PROCEEDINGS

Plaintiff filed a complaint on April 9, 2020, seeking review of the Commissioner's denial of benefits. The parties consented to proceed before a United States Magistrate Judge on October 28, 2020. Plaintiff filed a motion for summary judgment on February 3, 2021. Defendant filed a motion for summary judgment on April 19, 2021. The Court has taken the motions under submission without oral argument. See L.R. 7-15; "Order," filed April 13, 2020.

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BACKGROUND

Plaintiff filed an application for supplemental security income on January 30, 2017 (Administrative Record ("A.R.") 203-12). Plaintiff asserts disability since August 11, 2016, based on alleged "mental illness" (i.e., epilepsy and anxiety) (A.R. 51, 203, 238). An Administrative Law Judge ("ALJ") reviewed the record and heard testimony from Plaintiff, Plaintiff's mother and a vocational expert (A.R. 21-34, 39-67).[1]

The ALJ found that Plaintiff has severe epilepsy and anxiety (A.R. 23). However, the ALJ also found that Plaintiff retains the residual functional capacity to perform a range of medium work as defined in 20 C.F.R. § 416.967(c):

> She can lift, carry, push and pull 50 lbs. occasionally and 25 lbs. frequently. She can stand and/or walk for 6 hours in an 8-hour workday and sit for 6 hours in an 8-hour workday. She can never climb ladders, ropes, or scaffolds. She can occasionally climb ramps or stairs. She can occasionally balance, stoop, kneel, crouch, and crawl. She can frequently perform fine and gross manipulation. She

[1] Plaintiff had filed a previous application for benefits, which had been denied. See A.R. 75-86 (prior ALJ's decision), 91-96 (Appeals Council's prior denial of review), 100-08 (order and judgment in Grether A.D. v. Colvin, C.D. Cal. Case No. CV 15-04504-DTB, affirming the administrative decision). As detailed below, the present ALJ found new and material evidence demonstrating "changed circumstances" to rebut any presumption of continuing nondisability, and the ALJ proceeded through the sequential evaluation process (A.R. 21-34).

> should have no exposure to unprotected heights or dangerous machinery. She cannot operate vehicles. She can perform simple, routine, and repetitive tasks, involving no fast paced or production type work. She should have no interaction with the general public and have only occasional interaction with supervisors and coworkers. She cannot perform work that requires teamwork or close collaboration with others.

(A.R. 26). The ALJ found that a person with this residual functional capacity could work as a night cleaner (Dictionary of Occupational Titles ("DOT") "358.687-010," medium work), cleaner (DOT "323.687-014," light work), and advertising material distributor (DOT "230.687-010," light work) (A.R. 33-34 (adopting vocational expert testimony at A.R. 60-62)). Accordingly, the ALJ denied benefits (A.R. 34).

The Appeals Council considered additional evidence, but denied review (A.R. 1-5; see also A.R. 314-74).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,

682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see also Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

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

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

Where, as here, the Appeals Council "considers new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence." Brewes v. Commissioner, 682 F.3d at 1163. "[A]s a practical matter, the final decision of the Commissioner includes the Appeals Council's denial of review, and the additional evidence considered by that body is evidence upon which the findings and decision complained of are based." Id. (citations and quotations

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omitted).[2] Thus, this Court has reviewed the evidence submitted for the first time to the Appeals Council.

DISCUSSION

After consideration of the record as a whole, Defendant's motion is granted and Plaintiff's motion is denied. The Administration's findings are supported by substantial evidence and are free from material[3] legal error. Plaintiff's contrary arguments are unavailing.

I. Relevant Portions of the Record

A. The Treatment Evidence

The record does not contain many treatment records relating to Plaintiff's epilepsy. Plaintiff presented to Bell Medical Clinic in July of 2016, reporting that she had a seizure despite having taken

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[2] And yet, the Ninth Circuit sometimes had stated that there exists "no jurisdiction to review the Appeals Council's decision denying [the claimant's] request for review." See, e.g., Taylor v. Commissioner, 659 F.3d 1228, 1233 (9th Cir. 2011); but see Smith v. Berryhill, 139 S. Ct. 1765 (2019) (court has jurisdiction to review Appeals Council's dismissal of request for review as untimely); see also Warner v. Astrue, 859 F. Supp. 2d 1107, 1115 n.10 (C.D. Cal. 2012) (remarking on the seeming irony of reviewing an ALJ's decision in the light of evidence the ALJ never saw).

[3] The harmless error rule applies to the review of administrative decisions regarding disability. See Garcia v. Commissioner, 768 F.3d 925, 932-33 (9th Cir. 2014); McLeod v. Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011).

her medications daily (A.R. 377; see also A.R. 388 (report of same)). Her medications were continued (A.R. 378).

In October of 2016, Plaintiff presented to neurologist Dr. Munther Hijazin, reporting a history of seizures since age seven, developmental delay, a learning disability, forgetfulness, depression, anxiety and headaches, for which Dr. Hijazin continued Plaintiff's medications (A.R. 381, 384-85). In December of 2016, Plaintiff reportedly was doing well and had not had a seizure since June or July of 2016 (A.R. 381, 383, 565; see also A.R. 388-92, 560-70 (neurology treatment notes in 2016 and 2017 reporting no new seizures)). In May and October of 2018, Plaintiff reported no new seizures since January of 2018 (A.R. 571, 574). The record does not contain any treatment notes regarding any January, 2018 seizure.

Plaintiff returned to the Bell Medical Clinic in May of 2018, complaining of almost daily migraines (A.R. 514-15). Plaintiff then began a trial of Imitrex (A.R. 514-15).

Mental health treatment notes generally suggest that Plaintiff's symptoms of depression and anxiety were adequately controlled with medications. See, e.g., A.R. 407 (February, 2016 note reporting control); A.R. 413 (April, 2016 note reporting Plaintiff was "doing well"); A.R. 416 (June, 2016 note reporting Plaintiff was "doing good in school"); A.R. 419 (August, 2016 note reporting Plaintiff was "doing well on her meds"); A.R. 422 (September, 2016 note reporting Plaintiff was "responding well to meds"); A.R. 485 (September, 2017 note reporting Plaintiff had been taking her medication and

"everything is fine"); A.R. 476 (January, 2018 note reporting Plaintiff was "taking her meds as rx'd and noticing feeling better, no mania, no psychosis, > mood/energy, feeling happy. . . ."); A.R. 494 (April, 2018 note reporting that Plaintiff felt things were "good" and she was happy); A.R. 495 (July, 2018 note reporting that Plaintiff was "ok" and doing well).

Starting in January of 2016, Plaintiff attended mental health treatment by telephone (A.R. 431-47). In March of 2016, Plaintiff reported concern in connection with school and her "SSI appeal" – Plaintiff "[did] not want to affect her eligibility" (A.R. 433). Plaintiff reportedly was encouraged to enroll back in her continuation program to get her GED (A.R. 433). In June and August of 2016, Plaintiff expressed concern over financial stressors and sought help applying for a reduced fare bus pass so she could attend school (A.R. 435-37). Plaintiff's treatment provider went to her home later in August of 2016, due to Plaintiff's isolation and supposed difficulty "motivating self" (A.R. 438). In October of 2016, Plaintiff's provider reported that Plaintiff had symptoms of depressed mood which "display impairments in employment, education and social support" (A.R. 441). However, in November of 2016, Plaintiff reported that things were "good" and she was not having any problems or symptoms at that time (A.R. 442).

A "Community Functioning Evaluation" from October of 2016 asserted that Plaintiff needed assistance with her social skills and her independent/daily living skills in that she: (a) had difficulty developing friendships and interacting with others because of her

anxiety; (b) needed help from her mother with daily activities; and (c) needed reminders due to poor concentration and anxiety (A.R. 406). However, a January, 2017 mental status examination reported results within normal limits (A.R. 400-02). A January, 2018 mental status examination also reported results within normal limits (A.R. 462-64).

In February of 2018, another "Community Functioning Evaluation" asserted that Plaintiff needed assistance with concentration and time management skills because Plaintiff supposedly was having "difficulty concentrating and completing tasks" (A.R. 467). At that time, Plaintiff denied any depressive episodes (A.R. 468). In July of 2018, Plaintiff reported that she needed only two classes to complete her GED and then she might transfer to college (A.R. 496). Plaintiff asked how doing so might affect her SSI appeal (A.R. 496). Plaintiff stated that she wanted to continue with school and, if possible, "get a career," but she was afraid her mother "might get mad" (A.R. 496).

In August of 2018, Plaintiff indicated that she had no major depressive episodes, that she had been denied SSI for her epilepsy and that she was "now using mental health as a reason for SSI application submittal" (A.R. 470; but see A.R. 497 (August, 2018 treatment note indicating that Plaintiff said she had been "fine" and things were good). Her treatment provider noted, "I'm uncertain as to why she & family feel she is unable to work. Family tends to be protective of her, she states that mother has her doing a lot of chores & she is unable to go out or have a BF [boyfriend]" (A.R. 470).

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In September of 2018, Plaintiff reported that she was in the process of ending her classes and that she wanted to start a program to train for a job (A.R. 498). However, she "did not want her case for SSI to be affected by her decision" (id.). In October of 2018, Plaintiff reportedly was interested in applying for a vocational program through the Department of Rehabilitation, but Plaintiff had been informed by a representative of the Department that applying for a vocational program might affect Plaintiff's SSI appeal (A.R. 500).

B. The Opinion Evidence

Consultative examiner Dr. Rosa Colonna examined Plaintiff and prepared a Complete Psychological Evaluation, dated April 12, 2017 (A.R. 450-54). Plaintiff reported having had a seizure disorder since she was seven years old, and depression, anxiety and insomnia since 2008 (A.R. 451). Plaintiff was attending "English as a second language classes" and reported she was able to do her personal care and household chores, use the computer and watch television (A.R. 451). On mental status examination, Plaintiff's effort was "suboptimal," her intellectual functioning was estimated to be in the low average range, she had a euthymic mood, mildly diminished memory, attention and concentration, poor fund of knowledge, and an IQ score of 80 (which Dr. Colonna believed to be an underestimation "particularly on the memory testing due to inconsistencies with reported activities of daily living") (A.R. 452-53). Dr. Colonna diagnosed dysthymia, high borderline to low average intellectual functioning per testing and probable low average intellectual functioning per activities of daily living (A.R. 453). Dr. Colonna

assigned a Global Assessment of Functioning ("GAF") score of 60 (id.).[4] Dr. Colonna opined that Plaintiff would be able to understand, remember and carry out short, simplistic instructions without difficulty, would have mild inability to understand, remember and carry out detailed instructions, could make simplistic work-related decisions without special supervision, could interact appropriately with supervisors, coworkers and peers, and could manage finances on her own (A.R. 453-54).

Consultative psychologist Dr. Steven I. Brawer examined Plaintiff and prepared a Psychological Evaluation, dated January 28, 2019 (A.R. 577-84). Plaintiff appeared slightly withdrawn, with mildly limited receptive and expressive verbal abilities and mild attentional deficits which required that questions and instructions be repeated on occasion (A.R. 577). Plaintiff appeared "to be putting forth an adequate effort" (A.R. 577). Plaintiff reported suffering grand mal seizures approximately once a year (A.R. 578). She last submitted a job application three to four years earlier (A.R. 578). Plaintiff reported that she was depressed because she stays at home and does not study or work (A.R. 578). Plaintiff reportedly was worried by her "depression and future suicidal thoughts" (A.R. 578). Plaintiff said that her problems affect her ability to work "because I'm worried that

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[4] The GAF scale is used by clinicians to report an individual's overall level of functioning. See American Psychological Association, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. 2000) ("DSM"). A GAF of 51-60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork)." Id.

I'll faint and have seizures" (A.R. 578). Plaintiff reportedly was able to manage her personal care, do household chores (but not cooking), go shopping, run errands, exercise at the gym, talk on the telephone, watch television, listen to music and take bus transportation with others (A.R. 579). On mental status examination, Plaintiff had somewhat concrete thinking, slightly withdrawn mood, constricted affect with current symptoms of depression and anxiety reported, and somewhat mildly diminished attention span, but an ability to sustain concentration and to work without distraction "during performance tasks" (A.R. 580). Testing placed Plaintiff in the borderline range of nonverbal intelligence, in the low average range for visual memory, in the borderline range for auditory memory, visual working memory, intermediate memory and delayed memory, in the borderline range for short-term visual memory, and in the borderline range for word reading, sentence comprehension, spelling and math computation (A.R. 581-83). Dr. Brawer diagnosed major depressive disorder (recurrent, moderate per report), and nonverbal intellectual functioning in the borderline to average range (A.R. 583). Dr. Brawer opined that Plaintiff can learn simple, repetitive tasks and likely can perform some detailed, varied or complex nonverbal tasks (A.R. 584). Her ability to sustain attention and concentration for extended periods may be mildly diminished due to emotional factors (A.R. 584). Plaintiff may have moderate limitations in her ability to manage customary work stress and to "persist for a regular workday" (A.R. 584). Plaintiff would be capable of following a routine but may have moderate limitations "in organizing for high level tasks" (A.R. 584). Plaintiff would be able to work independently on basic tasks, and may

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have mild limitations sustaining cooperative relationships with coworkers and supervisors (A.R. 584).

Consultative examiner Dr. Sarah L. Maze Prepared a Neurological Evaluation dated June 15, 2017 (A.R. 457-60). Plaintiff's last reported seizure was in June of 2016 (A.R. 457). Plaintiff complained of monthly headaches for the past year (A.R. 457). On examination, Plaintiff was cooperative with reduced insight and "somewhat simplistic speech" (A.R. 458). She spoke very little English, recalled two out of three items after five minutes, followed simple instructions, and had impaired intelligence which appeared to be in the dull normal to borderline range (A.R. 458-59). Dr. Maze diagnosed seizure disorder and opined that Plaintiff was capable of medium work (i.e., lifting 50 pounds occasionally, 25 pounds frequently, standing and walking six hours in an eight hour day and sitting six hours in an eight hour day), with frequent fine motor activities with her hands and legs (A.R. 459-60).

State agency physicians reviewed the record in May and July of 2017 and opined that Plaintiff's mental impairment(s) were non-severe (A.R. 109-21). According to these physicians, Plaintiff would have no exertional limitations, but she would have some postural and environmental limitations (i.e., no climbing ladders, ropes or scaffolds, no exposure to hazards and no operation of vehicles) (id.).

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C. The Hearing Testimony

At the March, 2019 hearing, Plaintiff testified that she could not work because of her epilepsy and "nerves" (anxiety) (A.R. 51). Plaintiff said her most recent seizure occurred in January of 2018 (A.R. 51). Prior to that seizure, Plaintiff had not suffered a seizure in two years (A.R. 52). Plaintiff was taking anti-seizure medications (A.R. 52). Plaintiff also was seeing a psychologist once every two months for her anxiety (A.R. 52). Her doctor reportedly prescribed anxiety medication (A.R. 52). According to Plaintiff, the medication sometimes worked and sometimes did not work (A.R. 52).

Plaintiff had unsuccessfully applied for jobs at fast food restaurants and at a motel (A.R. 47). Plaintiff claimed she would like to work, but she said employers would not hire her (A.R. 50-51).[5]

Plaintiff testified that she lived with her mother and spent her days watching television, listening to music, sometimes helping with cleaning and doing "the wash," and going to the corner store near her house under her mother's supervision (A.R. 48-50). When Plaintiff was

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[5] Plaintiff reportedly has a developmental delay and borderline intellectual functioning (A.R. 43). At the time of the hearing, she was 27 years old and scheduled to finish her high school education within a few months (A.R. 43). Plaintiff attended adult school - where her classes were in English - and she passed her classes with some difficulty (A.R. 49). Plaintiff's counsel argued that Plaintiff's intellectual functioning would limit her to performing one- and two-step instructions with extra supervision (A.R. 43-45). The vocational expert opined that, if Plaintiff were so limited, there would be no jobs she could perform, given her other limitations (A.R. 61, 64).

going to school, Plaintiff's brother would take Plaintiff to the bus stop, but Plaintiff would take the bus alone, to and from school, Monday through Friday (A.R. 59-60).

Plaintiff's mother testified that Plaintiff helps out in the kitchen at home, but only under the mother's supervision and instruction because Plaintiff has a limited intellect and a history of three suicide attempts (A.R. 53-55). Plaintiff bathes with the door open because her mother was afraid Plaintiff might have a seizure (A.R. 56). Plaintiff's mother said she watches Plaintiff go to the market a block away from where they live because Plaintiff's mental capacity is like that of a little girl (A.R. 56-57). Plaintiff's mother also said Plaintiff cannot be left alone (A.R. 58).

The ALJ asked the vocational expert to consider a person who "could perform medium work" and who:

> . . . should never climb ladders, ropes or scaffolds. They could occasionally climb ramps and stairs. They could frequently balance, stoop, kneel, crouch, and crawl. They could frequently engage in fine gross manipulation. There should be no unprotected heights or dangerous machinery. No operation of a vehicle. They would be limited to simple, routine, repetitive tasks. There should be no work at a fast pace or a production pace. No interaction with the general public, and only occasional interaction with supervisors and coworkers. And no jobs that require teamwork or close collaboration with others.

(A.R. 60-61). The vocational expert purportedly identified one medium job and two light jobs such a person could perform (i.e., night cleaner (DOT 358.687-101 [sic][6] medium work with a Specific Vocational Preparation ("SVP") level two); cleaner (DOT 323.687-014, light); and advertising material distributor (DOT 230.687-010, light)) (A.R. 61-62). After some discussion, the ALJ posed another hypothetical to the vocational expert omitting the frequent manipulation limit and adding a limit to one- and two-step tasks, and the vocational expert asked for clarification regarding what the hypothetical question included (A.R. 63-64). The ALJ replied:

> It's 50, 25, 6 or [sic] 8, 6 of 8, never climb ladders, ropes or scaffolds, occasionally climb ramps and stairs, frequently balance, stoop, kneel, crouch, and crawl. No unprotected heights or dangerous machinery. No operation of a vehicle. Simple routine, repetitive tasks. These would be one and two-step tasks. No fast-paced work. No interaction with the general public. Only occasional interaction with supervisors and coworkers. And no jobs that require teamwork or close collaboration with others.

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[6] This DOT reference appears to have been an error. There is no entry under this number in the current DOT. There is an entry for DOT 358.687-010, Change-House Attendant, which involves medium janitor-type work for locker or shower rooms. See DOT 358.687-010, 1991 WL 672957. It is unclear whether the vocational expert intended to reference Change-House Attendant work in her testimony. A housecleaner, also known as a "night cleaner," is DOT 323.687-018 and is classified as heavy work. See DOT 323.687-018, 1991 WL 672784.

(A.R. 64). The vocational expert did not identify any jobs that a person with that capacity could perform (A.R. 64).

The vocational expert testified that her testimony was consistent with the DOT and the Selected Characteristics Handbook (A.R. 64-65). At the hearing, Plaintiff's counsel did not challenge the vocational expert's testimony (A.R. 65-66).

II. Substantial Evidence Supports the Conclusion that Plaintiff Can Work.

Substantial evidence supports the ALJ's conclusion Plaintiff is not disabled. As summarized above, the consultative examiners endorsed a capacity less than, or equal to, the residual functional capacity for medium work assessed by the ALJ. Compare A.R. 453-54, 459-60, 584 (consultative examiners' opinions finding Plaintiff was capable of medium work performing simple tasks and interacting with others) with A.R. 26-33 (ALJ's assessment). These opinions constitute substantial evidence to support the ALJ's determination of non-disability. See Orn v. Astrue, 495 F.3d 625, 631-32 (9th Cir. 2007) (opinion of examining physician based on independent clinical findings can provide substantial evidence to support administrative conclusion of non-disability). The state agency physicians' opinions that Plaintiff retains a residual functional capacity for work at all exertion levels with no mental limitations provide further substantial evidence supporting the ALJ's decision. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (opinion of non-examining physician "may constitute substantial evidence when it is consistent with other

independent evidence in the record"); Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (where the opinions of non-examining physicians do not contradict "all other evidence in the record" an ALJ properly may rely on these opinions). Significantly, no medical source opined that Plaintiff had materially greater limitations than those the ALJ found to exist. The record contains no treating physician's opinion concerning Plaintiff's functional limitations.

As summarized above, the vocational expert testified that a person who "could perform medium work" with the limitations the ALJ found to exist could work as a night cleaner, cleaner and advertising material distributor (A.R. 61-64). Excluding the night cleaner job (see footnote 6 supra), the vocational expert still identified two jobs that such a person could perform (id.). The ALJ properly relied on the vocational expert's testimony in denying disability benefits. See Barker v. Secretary of Health and Human Services, 882 F.2d 1474, 1478-80 (9th Cir. 1989); Martinez v. Heckler, 807 F.2d 771, 774-75 (9th Cir. 1986).

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III. Plaintiff's Arguments are Unavailing.[7]

Plaintiff argues that the ALJ's hypothetical questioning of the vocational expert was incomplete because the ALJ assertedly did not include a limitation to standing and/or walking six hours in an eight hour workday. See Plaintiff's Motion, pp. 5-7. Plaintiff also argues that the ALJ erred in finding Plaintiff capable of performing a wider range of work than Plaintiff was found capable of performing during Plaintiff's prior application for disability benefits. See Plaintiff's Motion, pp. 8-10.

A. The ALJ Did Not Materially Err in the Hypothetical Questioning of the Vocational Expert.

Social Security Ruling ("SSR") 83-10 defines "medium work" as requiring "standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday," and the same SSR provides that "sitting may occur intermittently during the remaining time." SSR 83-10, 1983 WL 31251, at *6. As detailed above, the ALJ's hypothetical question expressly included a limitation to "medium work," and the ALJ later stated "6 or 8" and "6 of 8," presumably referencing the sitting and standing/walking limitations of medium

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[7] The Court has considered and rejected all of Plaintiff's arguments. The Court discusses Plaintiff's principal arguments herein. Neither Plaintiff's arguments nor the circumstances of this case show any "substantial likelihood of prejudice" resulting from any error allegedly committed by the ALJ. See generally McLeod v. Astrue, 640 F.3d 881, 887-88 (9th Cir. 2011) (discussing the standards applicable to evaluating prejudice).

work (A.R. 60-64). On this record, the ALJ's hypothetical questioning of the vocational expert was not materially incomplete. See Mitzi D. v. Saul, 2019 WL 8112507, at *2 (C.D. Cal. Dec. 13, 2019) ("Given that SSR 83-10 has been in play for over thirty years, there is no reason to think the [vocational expert] understood light work to encompass anything other than approximately six hours of standing or walking."); James T. v. Saul, 2019 WL 3017755, at *2 (C.D. Cal. July 10, 2019) ("SSR 83-10 was published in 1983. Since that time, ALJs and [vocational experts] with experience conducting social security disability benefits hearings have understood medium work as requiring the ability to stand or walk for up to 6 hours. Thus, the ALJ's reference to medium work supplied a 6-hour limitation on walking and standing, and the ALJ did not pose an incomplete hypothetical to the [vocational expert]."); see also Lawson v. Saul, 2020 WL 6055148, at *4 (S.D. Cal. Oct. 13, 2020) ("numerous courts have interpreted SSR 83-10 to entail the ability to stand and walk for only six hours"; collecting cases and rejecting claim that failure to mention standing and walking limitations rendered hypothetical question referencing "medium work" incomplete), appeal filed, No. 20-56205 (9th Cir. Nov. 17, 2020); Christopher P. v. Saul, 2020 WL 551596, at *3 (C.D. Cal. Jan. 31, 2020) ("By definition, a full range of medium work involves . . . standing or walking up to approximately six hours in an eight-hour workday"; "the ALJ's reference to medium work in his hypothetical sufficiently capture[d] the standing and walking limitations"); Bailey v. Astrue, 2010 WL 1233459, at *6 (C.D. Cal. Mar. 22, 2010) (because "both light and medium work by definition require standing or walking approximately six hours of an eight hour day," the ALJ's hypothetical, which referenced light work but not the

standing and walking limitations, was proper); but see Linda H. v. Saul, 2020 WL 1244359, at *5 (C.D. Cal. Mar. 16, 2020) (deeming hypothetical question regarding medium work incomplete where the ALJ did not inquire of the vocational expert whether a person limited to standing and/or walking six hours per day could do a job that the vocational expert said would permit no sitting "at all").

Plaintiff argues that the Court may not conclude on this record that the jobs identified are performable by a person limited to standing/walking for 6 hours out of an 8 hour day. See Plaintiff's Motion, pp. 6-7. In so arguing, Plaintiff purports to rely on: (1) the DOT descriptions for the jobs identified; (2) Occupational Information Network ("ONET") data for the occupations of janitor and cleaner, maid and housekeeping cleaner, and production worker; (3) "Occu Collect" data provided by Plaintiff to the Appeals Council at A.R. 314-74;[8] and (4) "commonsense understanding." Plaintiff's argument is unpersuasive.

First, the DOT does not address standing/walking requirements; the DOT addresses a "strength" requirement in terms of "pounds of

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[8] A colleague of the undersigned recently observed that:

> Occu Collect is a for-profit company and historical archive, for which Plaintiff's attorney [Lawrence D. Rohlfing] is the president and has a 51% financial interest.

See Tommy D. J. v. Saul, 2021 WL 780479, at *3 n. 3 (C.D. Cal. Mar. 1, 2021) (citations and quotations omitted) (Occu Collect is a "non-DOT" source of alternative job information; ALJ need not reconcile conflicts between a vocational expert's testimony and a non-DOT source).

force" exerted. See, e.g., DOT 323.687-010, 1991 WL 672782 (Cleaner, Hospital); DOT 230.687-010, 1991 WL 672162 (Advertising-Material Distributor).

Second, the non-DOT sources Plaintiff cites are not conclusive regarding the standing requirements for the jobs the vocational expert identified. The ALJ was not presented with these sources and, even if the ALJ had been presented with these sources, the ALJ would have had no duty to consider whether the vocational expert's testimony was consistent with these sources. See Shaibi v. Berryhill, 883 F.3d 1102, 1108-10 (9th Cir. 2017) ("Shaibi") (when a claimant who is represented by counsel fails to challenge a vocational expert's job numbers during administrative proceedings, the claimant forfeits such a challenge on appeal;[9] an ALJ need not resolve conflicts between vocational expert testimony and a source other than the DOT, and an ALJ need not inquire sua sponte into the foundation for the expert's opinion), as amended (Feb. 28, 2018); see also Talley v. Saul, 2020 WL 8361923, at *1 (C.D. Cal. Dec. 17, 2020) (collecting cases rejecting claims that vocational expert testimony conflicted with ONET and Occu Collect information; ALJ did not have to consider whether the vocational expert's testimony was consistent with these sources), appeal filed, No. 21-55071 (9th Cir. Jan. 28, 2021). Here, the ALJ properly determined from the testimony of the vocational expert that

[9] Because the administrative decision in the present case is adequately supported for the other reasons discussed herein, this Court need not and does not determine whether Shaibi's forfeiture-related holding survives the United States Supreme Court's recent decision in Carr v. Saul, 2021 WL 1566608 (U.S. April 22, 2021).

the expert's opinions did not conflict with the DOT. There was no obvious conflict between Plaintiff's limitation to standing and walking six hours in an eight-hour day and the jobs the vocational expert identified.

B. The ALJ Did Not Materially Err in Finding Plaintiff Capable of a Greater Residual Functional Capacity than the Capacity Found During the Prior Administrative Proceedings.

Plaintiff argues that the ALJ erred in finding Plaintiff capable of medium work with occasional interaction with supervisors and coworkers and no work involving teamwork or cooperation, because, during prior administrative proceedings, Plaintiff had been found capable of light work with only superficial and incidental contact with others. See Plaintiff's Motion, pp. 8-10 (citing Chavez and Social Security Acquiescence Ruling 97-4(9)).

The prior ALJ found that Plaintiff had severe epilepsy and depression, not otherwise specified, and retained a residual functional capacity for a range of light work which would not require any interaction with others apart from superficial and incidental contact (A.R. 77, 79). The prior ALJ also found Plaintiff not disabled (id.). The prior ALJ's decision was upheld on appeal and is final. See A.R. 91-108 (Appeals Council's denial of review and this Court's order affirming the administrative decision on review).

Acquiescence Ruling 97-4(9), 1997 WL 742758 (adopting Chavez), applies to cases such as this one involving a subsequent disability

claim with an unadjudicated period arising under the same title of the Social Security Act as a prior claim in which there has been a final administrative decision that the claimant is not disabled. A previous final determination of nondisability creates a presumption of continuing nondisablity in the unadjudicated period. Id.; Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995). To overcome the presumption of nondisability, a claimant bears the burden of proving changed circumstances. See Chavez, 844 F.2d at 693. Such changed circumstances include the alleged existence of impairment(s) not previously considered. See Acquiescence Ruling 97-4(9), 1997 WL 742758 at *3; Lester, 81 F.3d at 827 (same; "claimant need not . . . demonstrate that his medical or psychiatric condition has worsened to show changed circumstances").

In the present case, Plaintiff asserted that she was unable to work due in part to her "nerves" (anxiety), an impairment Plaintiff had not alleged specifically during the prior administrative proceedings. Compare A.R. 51 (Plaintiff's allegations) with A.R. 77-83 (prior ALJ's decision discussing Plaintiff's alleged impairments). Accordingly, the ALJ discerned "new and material evidence demonstrating 'changed circumstances'" to overcome the presumption of continued nondisability. See A.R. 21. As summarized above, the ALJ then proceeded through the sequential analysis and found Plaintiff capable of a range of medium work which allowed for occasional contact with supervisors and coworkers (A.R. 22-33). Plaintiff argues that the ALJ thereby erred by assigning a different residual functional capacity, which assessed greater abilities. See Plaintiff's Motion,

p. 8 (citing Chavez[10] and Acquiescence Ruling 97-4(9) to argue that factual findings carry a continuing presumption of application on future claims).

Acquiescence Ruling 97-4(9) provides that where, as here, a claimant rebuts the presumption of continuing nondisability, the adjudicator must give effect to certain findings from the decision on the prior claim while adjudicating the subsequent claim:

> . . . adjudicators then must give effect to certain findings . . . contained in the final decision by an ALJ or the Appeals Council on the prior claim, when adjudicating the subsequent claim. For this purpose, this Ruling applies . . . to a finding of a claimant's residual functional capacity . . . which was made in the final decision on the prior disability claim. Adjudicators must adopt such a finding from the final decision on the prior claim in determining whether the claimant is disabled with respect to the unadjudicated period unless there is new and material evidence relating to such a finding. . . .

Acquiescence Ruling 97-4(9), 1997 WL 742758 at *3. Here, the ALJ generally found there was "new and material" evidence without further discussion of the prior decision. The ALJ then proceeded through the sequential evaluation process, discussing Plaintiff's allegations and the updated record, which included new medical source statements

[10] Plaintiff's subsequent argument that Chavez is "dead," even if correct, would not affect the result herein.

opining that Plaintiff was capable of medium work with some contact with others (A.R. 21-33). Where, as here, an ALJ relies entirely on medical evaluations conducted after a prior adjudication, the ALJ is not required to give preclusive effect to findings from the prior adjudication. See, e.g., Trofimuk v. Commissioner, 2014 WL 794343, at *5 (E.D. Cal. Feb. 27, 2014); see generally Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1173 (9th Cir. 2008) (evaluations presented after a prior nondisability determination necessarily presented "new and material" information not presented to the first ALJ).

Assuming, arguendo, the ALJ erred, any error was harmless. In the prior action, the vocational expert testified, and the ALJ found, that light work jobs could be performed by a person having the limitations the prior ALJ found to exist (A.R. 85). All of those findings were upheld on appeal (A.R. 91-108). If, in the present case, the ALJ had adopted the more restrictive residual functional capacity from the prior decision, Plaintiff still would not have been deemed disabled.

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CONCLUSION

For all of the foregoing reasons, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 28, 2021.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE