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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLYN MARTINEZ,)	NO. EDCV 11-00539-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

Plaintiff filed a Complaint on April 11, 2011, seeking review of the denial of plaintiff's application for supplemental security income ("SSI"). On May 2, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on December 5, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2
3 On August 23, 2007, plaintiff filed an application for SSI.
4 (Administrative Record ("A.R.") 9.) Plaintiff, who was born on May 1,
5 1965 (A.R. 17),¹ claims to have been disabled since December 1, 2006
6 (A.R. 9), due to arthritis, back problems, depression, and vision
7 problems (A.R. 78, 86). Plaintiff has past relevant work experience as
8 a "jogger," material handler, tamale maker, and companion. (A.R. 17.)
9

10 After the Commissioner denied plaintiff's claim initially and upon
11 reconsideration (A.R. 9, 78-82, 86-90), plaintiff requested a hearing
12 (A.R. 91). On January 22, 2010, plaintiff, who was represented by
13 counsel, appeared and testified at a video hearing before Administrative
14 Law Judge John R. Price (the "ALJ").² (A.R. 9, 19-71.) Lay witness
15 Anthony Torres and vocational expert Stephen P. Davis also testified.
16 (*Id.*) On February 10, 2010, the ALJ denied plaintiff's claim (A.R. 9-
17 18), and the Appeals Council subsequently denied plaintiff's request for
18 review of the ALJ's decision (A.R. 1-3). That decision is now at issue
19 in this action.
20

21 **SUMMARY OF ADMINISTRATIVE DECISION**

22
23 The ALJ found that plaintiff has not engaged in substantial gainful
24

25 ¹ On the date the application was filed, plaintiff was 42 years
26 old, which is defined as a younger individual. (A.R. 17; *citing* 20
C.F.R. § 416.963.)

27 ² As noted in the ALJ's decision, plaintiff "appeared in San
28 Bernardino, California [for the video hearing], and [the ALJ] presided
over the [video] hearing from San Francisco, California. (A.R. 9.)

1 activity since August 23, 2007, her application date. (A.R. 11.) The
2 ALJ determined that plaintiff has the following severe impairments:
3 right-eye blindness; bilateral early cataracts; moderate degenerative
4 disc disease of the cervical spine; obesity; major depression; and post-
5 traumatic stress disorder. (*Id.*) The ALJ also determined that
6 plaintiff does not have an impairment or a combination of impairments
7 that meets or medically equals one of the listed impairments in 20
8 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d),
9 416.925, 416.926). (A.R. 12.)

10
11 After reviewing the record, the ALJ determined that plaintiff has
12 the residual functional capacity ("RFC") to perform light work, as
13 defined in 20 C.F.R. § 416.967(b), with the following exceptions:

14
15 [plaintiff] can lift and carry ten pounds frequently and
16 twenty pounds occasionally, walk and stand for six hours in an
17 eight-hour workday, and sit for six hours in an eight-hour
18 workday. [Plaintiff] should not engage in work that requires
19 good visual acuity due to blindness in the right eye and the
20 associated lack of depth perception, no work around hazards
21 such as dangerous heights and machinery, and she can perform
22 simple, repetitive one to two-step job tasks with no
23 interaction with the general public, occasional interaction
24 with co-workers, and little to no change in the work routine
25 from day to day.

26
27 (A.R. 14.)
28

1 Based on his RFC assessment, the ALJ determined that plaintiff is
2 unable to perform her past relevant work. (A.R. 17.) However, having
3 considered plaintiff's age, education,³ work experience, and RFC, the ALJ
4 found that jobs exist in the national economy that plaintiff could
5 perform, including table worker and coater, brake linings.⁴ (A.R. 17-
6 18.) Accordingly, the ALJ concluded that plaintiff has not been under
7 a disability, as defined in the Social Security Act, since August 23,
8 2007, the date her SSI application was filed. (A.R. 18.)

9
10 **STANDARD OF REVIEW**

11
12 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
13 decision to determine whether it is free from legal error and supported
14 by substantial evidence in the record as a whole. Orn v. Astrue, 495
15 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant
16 evidence as a reasonable mind might accept as adequate to support a
17 conclusion." *Id.* (citation omitted). The "evidence must be more than
18 a mere scintilla but not necessarily a preponderance." Connett v.

19
20
21 ³ The ALJ found that plaintiff has a limited education and is
able to communicate in English. (A.R. 17.)

22 ⁴ According to the Dictionary of Occupational Titles ("DOT"), a
23 "coater, brake linings"

24 [t]ends machine that automatically coats inside of brake
25 lining with adhesive preparatory to bonding lining to brake
26 shoe[;] [s]tarts machine and conveyor and feeds brake lining
27 into machine to obtain sample for approval by supervisor[;]
[f]eeds brake linings into machine and observes coating for
conformance to specifications as linings are discharged onto
conveyer[; and] [p]laces linings with coating defects aside
for disposal.

28 DOT § 574.685-010.

1 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
2 record can constitute substantial evidence, only those 'reasonably drawn
3 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
4 1066 (9th Cir. 2006)(citation omitted).

5
6 Although this Court cannot substitute its discretion for that of
7 the Commissioner, the Court nonetheless must review the record as a
8 whole, "weighing both the evidence that supports and the evidence that
9 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
10 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
11 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
12 responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
14 1035, 1039 (9th Cir. 1995).

15
16 The Court will uphold the Commissioner's decision when the evidence
17 is susceptible to more than one rational interpretation. Burch v.
18 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
19 review only the reasons stated by the ALJ in his decision "and may not
20 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
21 at 630; *see also* Connett, 340 F.3d at 874. The Court will not reverse
22 the Commissioner's decision if it is based on harmless error, which
23 exists only when it is "clear from the record that an ALJ's error was
24 'inconsequential to the ultimate nondisability determination.'" Robbins
25 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(*quoting* Stout v.
26 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also* Burch, 400 F.3d
27 at 679.

1 DISCUSSION

2
3 Plaintiff claims that the ALJ did not properly: (1) consider the
4 November 9, 2007 opinion of State agency physician Dr. H. M. Skopec
5 (Joint Stipulation ("Joint Stip.") at 2-5); and (2) assess plaintiff's
6 ability to perform other work in the economy (*Id.* at 3, 7-9).

7
8 **I. The Alleged Failure To Consider Properly The November 29, 2007**
9 **Opinion Of State Agency Physician H. M. Skopec, M.D. Does Not**
10 **Warrant Remand.**

11
12 It is the responsibility of the ALJ to analyze evidence and resolve
13 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750
14 (9th Cir. 1989). In the hierarchy of physician opinions considered in
15 assessing a social security claim, "[g]enerally, a treating physician's
16 opinion carries more weight than an examining physician's, and an
17 examining physician's opinion carries more weight than a reviewing
18 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.
19 2001); 20 C.F.R. § 416.927(d).

20
21 In evaluating opinion evidence, an ALJ is required to consider the
22 opinions and findings of State agency medical consultants. 20 C.F.R.
23 § 416.927(f)(2)(I). Further, "[u]nless a treating source's opinion is
24 given controlling weight, the [ALJ] must explain in the decision the
25 weight given to the opinions of a State agency [consultant]." 20 C.F.R.
26 § 416.927(f)(2)(ii); see SSR 96-6p (1996), 1996 SSR LEXIS 3, at *5, 1996
27 WL 374180, at *2 (stating that an ALJ "may not ignore" the opinions of
28 State agency medical consultants "and must explain the weight given to

1 these opinions in their decision").

2
3 In determining a claimant's RFC, an ALJ will consider all the
4 relevant evidence in the record. 20 C.F.R. § 416.945(a). In so doing,
5 the ALJ will consider all claimant's medically determinable impairments,
6 including those that are not "'severe.'" *Id.*

7
8 On November 29, 2007, Dr. Skopec, a State agency medical
9 consultant, completed a nonexamining, consultative review of plaintiff's
10 medical record. (A.R. 288.) As part of his consultative review, Dr.
11 Skopec completed a Psychiatric Review Technique form in which he opined
12 that plaintiff has: (1) mild restrictions of activities of daily
13 living; (2) moderate difficulties in maintaining social functioning; (3)
14 moderate difficulties in maintaining concentration, persistence, or
15 pace; and (4) no repeated episodes of decompensation of extended
16 duration. (A.R. 283.)

17
18 In addition, Dr. Skopec completed a Mental Functional Capacity
19 Assessment form also dated November 29, 2007 ("Assessment"). (A.R. 286-
20 88.) The Assessment consists of three sections. In Section I of the
21 Assessment, entitled "Summary Conclusions," the evaluator is directed to
22 record "summary conclusions derived from the evidence in file" with
23 respect to "the individual's capacity to sustain [each mental] activity
24 over a normal workday and workweek, on an ongoing basis." (A.R. 286.)
25 The Assessment instructs the evaluator, however, to record a "[d]etailed
26 explanation of the degree of limitation for each [of the four categories
27 of mental functioning], as well as any other assessment information
28 [he/she] deem[s] appropriate, . . . in Section III (Functional Capacity

1 Assessment)." (*Id.*)

2
3 Section II of the Assessment, entitled "Remarks," is to be
4 completed by the evaluator when there is insufficient documentation to
5 perform an accurate functional capacity assessment. (A.R. 286-87.)
6 Assuming there are no such deficiencies, the evaluator completes Section
7 III of the Assessment, entitled "Functional Capacity Assessment." In
8 it, the evaluator explains his or her summary conclusions in narrative
9 form. (A.R. 288.) Section III is to be filled out "only after the
10 Summary Conclusion section has been completed." (*Id.*; emphasis
11 omitted.)
12

13 As explained in the Social Security Program Operations Manual
14 System ("POMS"),⁵ "[t]he purpose of [S]ection I ('Summary Conclusion')
15 . . . is chiefly to have a worksheet to ensure that the [evaluator] has
16 considered each of these pertinent mental activities and the claimant's
17 . . . degree of limitation for sustaining these activities over a normal
18 workday and workweek on an ongoing, appropriate, and independent basis."
19 POMS DI 25020.010(B)(1). Significantly, the POMS notes that "[i]t is
20 **the narrative** written by the [evaluator] **in [S]ection III ('Functional**
21 **Capacity Assessment')** **that adjudicators are to use as the assessment of**
22 **RFC."** (*Id.*) Accordingly, the "[a]djudicators must take the RFC
23 assessment **in [S]ection III** and decide what significance the elements
24 discussed in this RFC assessment have in terms of the [claimant]'s
25 ability to meet the mental demands of past work or other work." *Id.*
26

27 ⁵ The Ninth Circuit has recognized that while the POMS "does not
28 have the force of law," it is "persuasive authority." Warre v. Comm'r
of SSA, 439 F.3d 1001, 1005 (9th Cir. 2006).

1 (emphasis in original).

2
3 In the "Sustained Concentration and Persistence" portion of Section
4 I, Dr. Skopec found plaintiff to be "Moderately Limited," *inter alia*,⁶
5 in her ability to perform activities within a schedule, maintain regular
6 attendance, and be punctual within customary tolerances. (A.R. 286.)
7 After completing Section I and finding no deficiencies in Section II,
8 Dr. Skopec completed Section III of the Assessment. Dr. Skopec opined,
9 *inter alia*, that plaintiff "can sustain simple repetitive tasks with
10 adequate pace and persistence, can adapt and relate to co-workers and
11 supervisors but likely cannot work with the public." (A.R. 288.)
12

13 Contrary to plaintiff's contention, the ALJ committed no reversible
14 error in failing to refer specifically to Dr. Skopec's finding that
15 plaintiff is moderately limited in her ability to perform activities
16 within a schedule, maintain regular attendance, and be punctual within
17 customary tolerances. As an initial matter, the fact that the ALJ did
18 not refer to the above noted limitations does not mean the ALJ failed to
19 consider such evidence. See Black v. Apfel, 143 F.3d 383, 386 (8th Cir.
20 1998)(noting that "[a]n ALJ's failure to cite specific evidence does not
21 indicate that such evidence was not considered"). In fact, in his
22 decision, the ALJ twice referred to Dr. Skopec's November 2007
23 Assessment and gave it "[s]ome weight." (A.R. 12-13, 16.) For example,
24 in assessing whether plaintiff's impairments met or equaled one of the
25 listed impairments, the ALJ noted that Dr. Skopec opined "that
26

27 ⁶ Dr. Skopec found plaintiff to be "Moderately Limited" in other
28 mental activities; however, plaintiff has not claimed that the ALJ
committed any error in considering these mental limitations.

1 [plaintiff] had mild restriction of activities of daily living, moderate
2 difficulties in maintaining social functioning, moderate difficulties in
3 maintaining concentration, persistence, or pace, and no episodes of
4 decompensation." (A.R. 12-13.) The ALJ also referred to Dr. Skopec's
5 mental RFC assessment for plaintiff in which Dr. Skopec opined that
6 plaintiff could "sustain simple repetitive tasks with adequate pace and
7 persistence, and could adapt and relate[] to co-workers and supervisors
8 but that she likely could not work with the public." (A.R. 16.)
9

10 Further, the ALJ properly accounted for Dr. Skopec's above noted
11 moderate limitations in Section I ("Summary Conclusions") by
12 "agree[ing]" with, *inter alia*, Dr. Skopec's mental RFC for plaintiff
13 contained in Section III and finding that plaintiff "can perform simple,
14 repetitive one to two-step job tasks with no interaction with the
15 general public." (A.R. 16.) As noted *supra*, the POMS specifically
16 instructs that Section III, as opposed to Section I, of the Assessment
17 is to be used by the ALJ in assessing plaintiff's RFC. As such, the ALJ
18 properly relied upon Dr. Skopec's Section III narrative interpretation
19 of his Section I summary conclusions.
20

21 Accordingly, for the aforementioned reasons, the ALJ committed no
22 reversible error in considering the opinion of Dr. Skopec.
23

24 **II. Remand Is Necessary So That The ALJ Can Properly Determine What**
25 **Work, If Any, Plaintiff Can Perform.**
26

27 Plaintiff claims that the ALJ committed several errors, as
28 discussed in detail *infra*, in determining that plaintiff has the ability

1 to perform work other than her past relevant work.

2
3 At step five of the sequential evaluation, the burden shifts from
4 the claimant to the ALJ to prove that, based on the claimant's RFC, age,
5 education, and past work experience, the claimant is able to perform
6 work that exists in significant numbers in the national economy. Smolen
7 v. Chater, 80 F.3d 1273, 1291 (9th Cir. 1996); 20 C.F.R. §§
8 416.920(a)(4)(v), 416.960(c), 416.964. The ALJ can meet his burden at
9 step five by either taking the testimony of a vocational expert or by
10 referring to the Grids. See Lounsbury v. Barnhart, 468 F.3d 1111,
11 1114-15 (9th Cir. 2006); see also Tackett v. Apfel, 180 F.3d 1094, 1101
12 (9th Cir. 1999)(describing how the vocational expert's testimony and the
13 Grids are used at step five). If the ALJ chooses, as in this case, to
14 rely upon the testimony of a vocational expert, the hypothetical posed
15 to the vocational expert must be "accurate, detailed, and supported by
16 the medical record." *Id.* If the hypothetical presented to the
17 vocational expert does not reflect all of the claimant's limitations
18 and/or is not supported by evidence in the record, the "[vocational]
19 expert's testimony has no evidentiary value to support a finding that
20 the claimant can perform jobs in the national economy." Matthews v.
21 Shalala, 10 F.3d 678, 681 (9th Cir. 1993)(citation and internal
22 quotations omitted); Embrey v. Bowen, 849 F.2d 418, 422-23 (9th Cir.
23 1988); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984).

24
25 The ALJ has an affirmative responsibility to ask whether a conflict
26 exists between the testimony of a vocational expert and the DOT. SSR
27 00-4p, 2000 SSR LEXIS 8, at *9, 2000 WL 1898704, at *4; Massachi v.
28 Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007). If there is a conflict

1 between the DOT and testimony from the vocational expert, an ALJ may
2 accept testimony from a vocational expert that contradicts the DOT, but
3 "the record must contain 'persuasive evidence to support the
4 deviation.'" Pinto v. Massanari, 249 F.3d 840, 846 (quoting Johnson v.
5 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995)). The ALJ must resolve any
6 conflict by determining whether the vocational expert's explanation is
7 reasonable and provides sufficient support to justify deviating from the
8 DOT. SSR 00-4p, 2000 SSR LEXIS 8, at *9, 2000 WL 1898704, at *4;
9 Massachi, 486 F.3d at 1153. An ALJ's failure to do so, however, can be
10 harmless error when there is no conflict or the vocational expert
11 provides a basis for relying on his or her testimony rather than on the
12 DOT. *Id.* at 1154 n.19.

13
14 1. Dr. Andrea S. Ching's Opinion

15
16 Plaintiff claims that the ALJ erred at step five in failing to
17 include in his assessment of plaintiff's RFC the finding by Dr. Ching
18 that plaintiff had "poor fix [and] follow [and] loses fixation in the
19 [illegible] gaze / r[igh]t gaze" (A.R. 273) -- the inclusion of which
20 may have affected the ALJ's determination that plaintiff can perform
21 "other work" (Joint Stip. at 7).

22
23 On November 15, 2007, Dr. Ching, an ophthalmologist, examined
24 plaintiff. (A.R. 273, 397-98.) In a letter dated November 16, 2007,
25 Dr. Ching detailed the results of her examination of plaintiff. Dr.
26 Ching stated that plaintiff's: (1) "visual acuity with no correction is
27 hand motion on the right eye and 20/40 on the left eye"; (2)
28 "[c]onfrontational visual fields are restricted on the right eye"; (3)

1 "cornea of the right eye shows an epithelial[,] anterior stromal scar[,
2 and] corneal haze"; and (4) "lenses show early cataracts bilaterally."
3 (A.R. 397.) Based on these examination findings, Dr. Ching opined that
4 plaintiff has: (1) a "[c]orneal scar of the right eye with a possible
5 history of a corneal ulcer"; (2) "[d]ry eye syndrome"; (3) [e]arly
6 cataracts [in] both eyes"; and (4) a "[h]istory of amblyopia [in her]
7 right eye." (*Id.*)

8
9 Contrary to plaintiff's contention, the ALJ did not commit
10 reversible error by not including Dr. Ching's findings regarding
11 plaintiff's ability to fixate and follow in his RFC assessment of
12 plaintiff. As an initial matter, the ALJ discussed Dr. Ching opinion in
13 his decision. The ALJ noted, for example, that Dr. Ching found
14 plaintiff to have "visual acuity with no correction of hand motion in
15 the right eye and 20/40 in the left eye." (A.R. 16.) The ALJ also
16 noted Dr. Ching's opinion that plaintiff has "[a] corneal scar of the
17 right eye with a possible history of a corneal ulcer, dry eye syndrome,
18 early cataracts in both eyes, and a history of amblyopia in the right
19 eye." (*Id.*)

20
21 Further, while it is true that the ALJ did not refer specifically
22 to Dr. Ching's finding regarding plaintiff's fixation and follow, the
23 ALJ clearly recognized plaintiff's visual problems in her right eye as
24 evidenced by his finding that plaintiff "should not engage in work that
25 requires good visual acuity due to *blindness in the right eye* and the
26 associated lack of depth perception." (*Id.*; emphasis added.) Indeed,
27 as the Commissioner properly notes, by finding plaintiff to be blind in
28 her right eye -- a finding which exceeds the limitations found by Dr.

1 Ching, the ALJ gave plaintiff every benefit of the doubt.

2
3 Accordingly, the ALJ committed no reversible error in considering
4 the opinion of Dr. Ching.

5
6 2. Visual Acuity

7
8 Plaintiff claims that the ALJ erred at step five in finding that
9 she could perform the jobs of table worker and coater, because such jobs
10 would require plaintiff to have near visual acuity, and the ALJ's
11 assessment of plaintiff's RFC is "ambiguous as to whether [plaintiff]'s
12 visual acuity is near[, as opposed to far,] visual acuity." (Joint
13 Stip. at 8.)

14
15 At the January 22, 2010 administrative hearing, the ALJ asked the
16 vocational expert whether a hypothetical individual who was limited, as
17 is plaintiff, to, *inter alia*, no "work that requires good visual acuity
18 due to blindness in the right [eye]," could perform plaintiff's past
19 relevant work. (A.R. 64.) Before answering the ALJ's question, the
20 vocational expert asked the ALJ to clarify what he meant by "visual
21 acuity." *Id.* The ALJ stated that "[t]he record shows limitations in
22 the visual fields and so both considering that and probably depth
23 perception as well." (A.R. 65.) In response, the vocational expert
24 stated that he thought that plaintiff's depth perception would be
25 affected. *Id.* The vocational expert then asked the ALJ whether
26 plaintiff could "see effectively an object at 20 inches or less." *Id.*
27 The ALJ responded that "[w]ith the left eye [plaintiff] has adequate
28 vision to do that." *Id.* The vocational expert then asked whether

1 plaintiff could read newspapers at 20 inches or less. *Id.* The ALJ
2 responded that he did not "have any evidence that shows otherwise." *Id.*

3
4 Taking into account the ALJ's responses to his questions, the
5 vocational expert stated "[o]kay so it's really [a] depth perception
6 [issue] we're talking about." (A.R. 65.) Accordingly, based upon his
7 understanding of plaintiff's visual problems, the vocational expert
8 testified that plaintiff could perform other jobs in the national
9 economy, including the jobs of table worker and coater. (A.R. 66.) The
10 vocational expert further testified that his testimony was consistent
11 with the DOT. (A.R. 67.)

12
13 In his assessment of plaintiff's RFC, the ALJ found that plaintiff
14 "should not engage in work that requires good visual acuity due to
15 blindness in the right eye and the associated lack of depth perception."
16 (A.R. 14.) The ALJ further found, based on his consideration of, *inter*
17 *alia*, plaintiff's RFC assessment and the vocational expert's testimony,
18 that plaintiff could perform other jobs that exist in significant number
19 in the national economy, including table worker and coater. (A.R. 17-
20 18.)

21
22 While it is true, as plaintiff claims, that the ALJ did not specify
23 in his RFC assessment whether plaintiff has near and/or far visual
24 acuity problems, any error committed by the ALJ in failing to do so was
25 harmless. First, the ALJ properly relied upon the vocational expert's
26 testimony that plaintiff's "visual acuity" problem was really a depth
27 perception problem due to blindness in her right eye. *Tommasetti v.*
28 *Astrue*, 533 F.3d 1035, 1042 (9th Cir. 2008)(noting that an ALJ "may rely

1 on expert testimony which contradicts the DOT [so long as] the record
2 contains persuasive evidence to support the deviation")(citations
3 omitted); see Massachi, 486 F.3d at 1154 n.19 (noting that there is no
4 reversible error if there was no conflict or the vocational expert
5 "provided sufficient support for her conclusions so as to justify any
6 conflicts"). As neither the table worker job nor the coater job has a
7 depth perception requirement, any error committed by the ALJ was
8 harmless.

9
10 Second, plaintiff does not allege, and the Court cannot find, that
11 plaintiff has any near visual acuity problems in her left eye. In fact,
12 as the Commissioner properly notes, Dr. Ching found that plaintiff's
13 vision in her left eye, without any corrective lens, is 20/40 (A.R.
14 397), and plaintiff testified that she can read with her left eye when
15 she wears glasses (A.R. 50). In addition, in responding to the
16 vocational expert's questions regarding plaintiff's visual acuity, the
17 ALJ stated that plaintiff could see an object at 20 inches or less and
18 that there was no evidence to show that plaintiff could not read a
19 newspaper at a distance of 20 inches or less. Significantly, no
20 objections were made in response to the ALJ's statements. Accordingly,
21 in view of the fact that plaintiff neither alleges nor appears to have
22 any near visual acuity problems in her left eye that cannot be corrected
23 with prescription lens, any error committed by the ALJ with respect to
24 plaintiff's visual acuity was harmless.⁷

25
26 ⁷ As this case is being remanded for the reason discussed *infra*,
27 the ALJ should, in an abundance of caution, specify in his RFC
28 assessment and subsequent question(s) to the vocational expert
plaintiff's exact visual acuity problems, and/or lack thereof, with
respect to her right and left eyes.

1 3. Reasoning Level 2 And One- To Two-Step Job Tasks

2
3 Plaintiff claims that the ALJ erred at step five in finding that
4 plaintiff could perform the jobs of table worker and coater, because,
5 according to the DOT, such jobs would require plaintiff to function at
6 reasoning level 2 -- a reasoning level which plaintiff contends is
7 inconsistent with the ALJ's RFC assessment limiting plaintiff to simple,
8 repetitive one- to two-step job tasks.

9
10 "The DOT job descriptions include a 'General Educational
11 Development' ('GED') definition component which 'embraces those aspects
12 of education (formal) and (informal) which are required of the worker
13 for satisfactory job performance.'" Grisby v. Astrue, U.S. Dist. LEXIS
14 5465, 2010 WL 309013, at *2 (C.D. Cal. Jan. 22, 2010). The GED is
15 comprised of three scales, including a scale for "Reasoning
16 Development." *Id.* The GED reasoning development scale ranges from
17 Level 1 (low) to Level 6 (high). *Id.* Levels 1 and 2 are defined as
18 follows:

19
20 LEVEL 1

21
22 Apply commonsense understanding to carry out simple one-
23 or two-step instructions. Deal with standardized situations
24 with occasional or no variables in or from these situations
25 encountered on the job.

26 ///

27 ///

28 ///

1 LEVEL 2

2
3 Apply commonsense understanding to carry out detailed but
4 uninvolved written or oral instructions. Deal with problems
5 involving a few concrete variables in or from standardized
6 situations.

7
8 DOT, Appendix C, 1991 WL 688702 (1991).

9
10 Based on the vocational expert's testimony at the January 22, 2010
11 administrative hearing, the ALJ determined that plaintiff could perform
12 the occupations of table worker and coater, both of which require a
13 reasoning level of 2 according to the DOT. (A.R. 17-18; DOT § 739.687-
14 182 [table worker]; DOT § 574.685-010 [coater, brake linings].)
15 However, although the ALJ relied upon the vocational expert's statement
16 that his testimony was consistent with the DOT, there appears to be an
17 inconsistency between the ALJ's RFC assessment, which limits plaintiff
18 to simple, repetitive one- to two-step job tasks, and his finding that
19 plaintiff can perform jobs which, according to the DOT, require a
20 reasoning level of 2.

21
22 As relevant here, while the "weight of prevailing authority
23 precludes a finding of any inconsistency between a reasoning level of
24 two and a mere limitation to simple, repetitive tasks or unskilled
25 work," Coleman v. Astrue, 2011 U.S. Dist LEXIS 19892, at *12-*14 (C.D.
26 Cal. Feb. 28, 2011)(citing cases in which the courts have rejected the
27 argument that a limitation to simple, repetitive tasks is inconsistent
28 with level two reasoning level), the same cannot be said when the ALJ

1 includes an additional restriction to one- to two-step job tasks, see
2 Cardozo v. Astrue, 2011 U.S. Dist. LEXIS 33821 (C.D. Cal. Mar. 29,
3 2011)(citing cases in which courts found a limitations to one- or two-
4 step instructions to be consistent with reasoning level 1 jobs). That
5 is because the additional language used by the ALJ -- *to wit*, limiting
6 plaintiff to one- to two-step job tasks -- parallels the language
7 contained in the description of reasoning level 1, as opposed to that
8 contained in reasoning level 2. See Coleman, 2011 U.S. Dist LEXIS
9 33821, at *14.

10
11 Accordingly, because a potential conflict exists between the ALJ's
12 determination that plaintiff can perform one- to two-step job tasks and
13 his finding that plaintiff can perform jobs which, according to the DOT,
14 require level 2 reasoning -- a conflict which the vocational expert
15 neither identified nor explained -- the Court cannot determine whether
16 substantial evidence supports the ALJ's ultimate determination that
17 plaintiff can perform other work that exists in significant numbers in
18 the national economy. Remand, therefore, is appropriate.

19
20 4. Dangerous Machinery

21
22 Plaintiff claims that the ALJ erred at step five in finding that
23 she could perform the job of table worker, because it would require
24 plaintiff to work with machinery, and the ALJ's assessment of
25 plaintiff's RFC allegedly precludes plaintiff from working around
26 machinery. (Joint Stip. at 8.)

27
28 In his assessment of plaintiff's RFC, the ALJ limited plaintiff to

1 *inter alia*, "no work around hazards such as dangerous heights and
2 machinery." (A.R. 14.) Critical to the resolution of this alleged
3 claim of error is whether the adjective "dangerous" modifies the word
4 "machinery." As the Commissioner properly notes, at the January 22,
5 2010 administrative hearing, the ALJ asked the vocational expert whether
6 a hypothetical individual with plaintiff's limitations and restrictions,
7 including, *inter alia*, a preclusion from working "around hazards such as
8 heights and *dangerous machinery*," could perform plaintiff's past
9 relevant work. (A.R. 64; emphasis added.) At first blush, it would
10 appear that the ALJ intended the adjective "dangerous" to modify the
11 word "machinery." However, in a later hypothetical to the vocational
12 expert, the ALJ asked the vocational expert whether a hypothetical
13 individual who was limited to, *inter alia*, "no work around hazards such
14 as heights and machinery," could perform other work in the national
15 economy. (A.R. 66.) In this hypothetical question, the ALJ made no
16 mention of the word "dangerous." As such, there appears to be some
17 question as to whether the ALJ intended to preclude plaintiff from
18 working around *dangerous* machinery or machinery in general.

19
20 Accordingly, as the Court has already found remand appropriate to
21 remedy the error described *supra*, the ALJ shall, on remand, ensure that
22 he specifies in both his assessment of plaintiff's RFC and his
23 hypothetical questions to the vocational expert whether plaintiff is
24 precluded from dangerous machinery or, rather, machinery in general.

25
26 **III. Remand Is Required.**

27
28 The decision whether to remand for further proceedings or order an

1 immediate award of benefits is within the district court's discretion.
2 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
3 useful purpose would be served by further administrative proceedings, or
4 where the record has been fully developed, it is appropriate to exercise
5 this discretion to direct an immediate award of benefits. *Id.* at 1179
6 ("[T]he decision of whether to remand for further proceedings turns upon
7 the likely utility of such proceedings."). However, where there are
8 outstanding issues that must be resolved before a determination of
9 disability can be made, and it is not clear from the record that the ALJ
10 would be required to find the claimant disabled if all the evidence were
11 properly evaluated, remand is appropriate. *Id.* at 1179-81.

12
13 Remand is the appropriate remedy to allow the ALJ the opportunity
14 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
15 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
16 further proceedings is appropriate if enhancement of the record would be
17 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)
18 (remand appropriate to remedy defects in the record).

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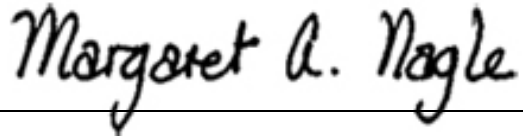
1 **CONCLUSION**

2
3 Accordingly, for the reasons stated above, IT IS ORDERED that the
4 decision of the Commissioner is REVERSED, and this case is REMANDED for
5 further proceedings consistent with this Memorandum Opinion and Order.
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
8 copies of this Memorandum Opinion and Order and the Judgment on counsel
9 for plaintiff and for defendant.
10

11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
12

13 DATED: February 22, 2012

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16 MARGARET A. NAGLE
17 UNITED STATES MAGISTRATE JUDGE
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