

O

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SHERRI LYNN BARTON,)	Case No. EDCV 12-1013-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security)	
Administration,)	
)	
Defendant.)	
_____)	

Plaintiff Sherri Barton seeks judicial review of the Commissioner's final decision denying her applications for disability insurance ("DIB") and Supplemental Security Income ("SSI") benefits. For the reasons stated below, the decision of the Commissioner is REVERSED and the matter REMANDED for further proceedings consistent with this opinion.

I. Background

Plaintiff was born on December 1, 1962, and was 44 years old at the time she filed her applications for benefits. (Administrative Record ("AR") at 224-35.) She has a high school education and has relevant work experience as a house cleaner and title clerk. (AR at 253, 256.) Plaintiff filed her benefits applications on May 22, 2006, alleging

1 disability beginning December 1, 2005, due to fibromyalgia and
2 depression. (AR at 21, 123.)

3 Plaintiff's applications were denied initially on November 2, 2006
4 and upon reconsideration on March 2, 2007 (AR at 139-43, 149-53.) An
5 administrative hearing was held on August 13, 2008, before
6 Administrative Law Judge ("ALJ") Thomas J. Gaye. On September 26, 2008,
7 the ALJ issued an unfavorable decision. (AR at 124-33.) The Appeals
8 Council remanded the case for rehearing on May 5, 2010. (AR at 134-38.)

9 On March 8, 2011, ALJ Sharilyn Hopson held a second administrative
10 hearing, at which Plaintiff testified, as did two medical experts and a
11 vocational expert ("VE"). (AR at 33-87.) On April 7, 2011, ALJ Hopson
12 issued an unfavorable decision. (AR at 16-27.) She found that the
13 medical evidence established that Plaintiff suffered from the following
14 severe impairments: "fibromyalgia that includes overactive bowel and
15 irritable bowel syndromes, major depressive disorder, panic disorder
16 without agoraphobia and she is overweight to obese." (AR at 27.) The ALJ
17 determined that Plaintiff's impairments did not meet, or were not
18 medically equal to, one of the listed impairments in 20 C.F.R., Part
19 404, Subpart P, Appendix 1. (Id.) The ALJ further found that Plaintiff
20 retained the residual functional capacity ("RFC") to perform a range of
21 light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b) with the
22 following exceptions:

23 The claimant is able to stand/walk 6 hours in an 8 hour
24 workday with normal breaks such as every 2 hours and sit 6
25 hours in an 8 hour workday with normal breaks such as every 2
26 hours. She can lift/carry 10 pounds frequently, 20 pounds
27 occasionally and occasionally stoop and bend. She can climb
28 stairs but she cannot climb ladders, work at heights or

1 balance. She should have ready access to restroom facilities.
2 She is limited to simple repetitive tasks with no public
3 interaction and only non intense contact with coworkers and
4 supervisors. No hypervigilance, fast paced work and she cannot
5 be responsible for the safety of others.

6 (AR at 22-23.) The ALJ concluded that Plaintiff was capable of
7 performing her past relevant work as a house cleaner and was therefore
8 not disabled within the meaning of the Social Security Act. See 20
9 C.F.R. § 416.920(f). (AR at 27.)

10 On May 16, 2012, the Appeals Council denied review. (AR at 1-4.)
11 Plaintiff then timely commenced this action for judicial review. On
12 October 29, 2012, the parties filed a Joint Stipulation ("Joint Stip.")
13 of disputed facts and issues. Plaintiff contends that the ALJ erred by:
14 (1) failing to properly consider, at Step Four of the sequential
15 evaluation, whether Plaintiff was capable of performing her past work as
16 a house cleaner as generally performed; (2) failing to properly consider
17 the opinion of Plaintiff's treating physician; and (3) relying upon the
18 opinion of the testifying medical expert. (Joint Stip. at 3.) Plaintiff
19 seeks reversal of the Commissioner's denial of her applications and
20 payment of benefits or, in the alternative, remand for a new
21 administrative hearing. (Joint Stip. at 29.) The Commissioner requests
22 that the ALJ's decision be affirmed. (Joint Stip. at 30.)

23 After reviewing the parties' respective contentions and the record
24 as a whole, the Court concludes that the ALJ erred in finding, at Step
25 Four of the sequential evaluation, that Plaintiff could perform the job
26 of housekeeper. Accordingly, the matter shall be remanded for further
27 proceedings consistent with this opinion.¹

28
¹ The Court does not reach the remaining claims of error and will not decide whether these issues would independently warrant relief. The ALJ may wish to consider these other claims of error upon remand.

1 **II. Standard of Review**

2 Under 42 U.S.C. § 405(g), a district court may review the
3 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
4 decision must be upheld unless "the ALJ's findings are based on legal
5 error or are not supported by substantial evidence in the record as a
6 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson v.*
7 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Parra*
8 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
9 such evidence as a reasonable person might accept as adequate to support
10 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
11 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
12 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
13 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
14 evidence supports a finding, the reviewing court "must review the
15 administrative record as a whole, weighing both the evidence that
16 supports and the evidence that detracts from the Commissioner's
17 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
18 the evidence can support either affirming or reversing the ALJ's
19 conclusion," the reviewing court "may not substitute its judgment for
20 that of the ALJ." *Robbins*, 466 F.3d at 882.

21
22 **III. Discussion**

23 Plaintiff contends that the ALJ erred at Step Four of the
24 sequential evaluation because she determined that Plaintiff could
25 perform her past relevant work as generally performed. (Joint Stip. at
26 3.) As part of her RFC determination, the ALJ concluded that Plaintiff
27 was limited to "no public interaction and only non intense contact with
28 coworkers and supervisors." (AR at 22-23.) When asked to identify any

1 possible jobs that Plaintiff could perform in view of her RFC, the VE
2 testified that Plaintiff could perform her past job of "cleaner,
3 housekeeping" (Dictionary of Occupational Titles ("DOT") 323.687-014),
4 as generally performed. (AR at 27, 83.) Plaintiff argues that the ALJ's
5 determination was erroneous because the functional limitation against
6 having any contact with the public contradicts the DOT's description of
7 the job of "cleaner, housekeeping" as including "render[ing] personal
8 assistance to patrons." (Id.) (Joint Stip. at 3.)

9 Although evidence provided by a VE is generally expected to be
10 consistent with the DOT, "[n]either the DOT nor the VE . . . evidence
11 automatically 'trumps' when there is a conflict." Social Security Ruling
12 ("SSR") 00-4p; *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir. 2007).
13 Rather, the DOT raises a rebuttable presumption as to a job
14 classification, and "[a]n ALJ may rely on expert testimony which
15 contradicts the DOT, but only insofar as the record contains persuasive
16 evidence to support the deviation." *Johnson v. Shalala*, 60 F.3d 1428,
17 1435 (9th Cir. 1995); *Massachi*, 486 F.3d at 1153 (when a conflict
18 between a VE's testimony and the DOT arises, the ALJ must make an
19 inquiry with the VE and then determine whether the VE's "explanation for
20 the conflict is reasonable and whether a basis exists for relying on the
21 expert rather than the [DOT]").


22 Here, neither the VE nor the ALJ attempted to explain or justify
23 the apparent discrepancy between the RFC's lim\itation to no public
24 interaction with the DOT's description of the job as requiring providing
25 personal assistance to patrons. It is unclear from Plaintiff's testimony
26 whether she was providing housekeeping services solely to individual
27 home owners, who perhaps could be considered to be Plaintiff's
28 "supervisors," thus avoiding any contact with the general public.

1 Alternatively, Plaintiff may have been working for a house cleaning
2 service or for a hotel or other commercial establishment, in which case
3 she was required to interact with the general public. Because the ALJ
4 did not clarify the apparent discrepancy, the VE's testimony could not
5 serve as substantial evidence supporting the ALJ's Step Four
6 determination. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (9th Cir.
7 2008) (ALJ erred in finding that the claimant could return to past
8 relevant work based on the VE's testimony that deviated from the DOT
9 because the ALJ "did not identify what aspect of the VE's experience
10 warranted deviation from the DOT, and did not point to any evidence in
11 the record other than the VE's testimony ..."); *Pardue v. Astrue*, 2011
12 WL 5520301 at *5 (C.D. Cal. Nov. 14, 2011)(finding inconsistency
13 between DOT description of job of cleaner and ALJ's finding that
14 claimant should not have contact with public).

15
16 **IV. Conclusion**

17 For the reasons stated above, the decision of the Social Security
18 Commissioner is REVERSED and REMANDED for further proceedings consistent
19 with this opinion.

20
21 DATED: November 8, 2012

22
23 
24 _____
25 Marc L. Goldman
26 United States Magistrate Judge
27
28