

1 I.

2 BACKGROUND

3 Plaintiff filed her applications for benefits on October 22, 2010, alleging
4 disability beginning February 2, 2008. Administrative Record (“AR”) 167;
5 178. The ALJ found that Plaintiff had the severe impairments of “cervical
6 spine degenerative disc disease with disc herniation at the C4-5 and C5-6
7 levels; mild C5 and C6 radiculopathy; lumbar spine degenerative disc disease
8 with spinal stenosis at the L2-3 and L3-4 levels; mild right ulnar neuropathy at
9 the elbow; left arm cubital tunnel syndrome; history of bilateral carpal tunnel
10 syndrome (CTS), status-post right CTS release surgery; diabetes mellitus;
11 diabetic neuropathy; and depression.” AR 15. The ALJ determined that
12 Plaintiff retained the residual functional capacity (“RFC”) to perform
13 sedentary work with additional mental and physical limitations, including a
14 mental limitation to “simple repetitive tasks involving one to two-step job
15 instructions; and . . . occasional[] interaction with the public, supervisors and
16 coworkers.” AR 17.

17 At the hearing, the ALJ gave the VE a hypothetical based upon the
18 ALJ’s RFC. AR 64-65. The VE testified that Plaintiff could perform the jobs of
19 “order clerk,” Dictionary of Occupational Titles (“DOT”) 209.567-014;
20 “inspector,” DOT 669.687-014; and “assembler,” DOT 706.684-030. AR 68-
21 69. The VE testified that there were 211,000 order clerk jobs nationally and
22 5,900 regionally; 410,000 inspector jobs nationally and 24,000 regionally; and
23 229,000 assembler jobs nationally and 10,000 regionally. AR 65-66. The VE
24 averred that his source for the number of jobs available was the DOT along
25 with the companion publication, Selected Characteristics of Occupations
26 Defined in the Revised Dictionary of Occupational Titles (“SCO”), as required
27 under Social Security Ruling 00-4P. See AR 66. The VE did not claim that he
28 was reducing or modifying the numbers of available jobs in those categories

1 based on Plaintiff's non-exertional limits. See AR 65-66. Plaintiff's counsel did
2 not ask the VE any questions on cross-examination. AR 67.

3 Based on the Plaintiff's RFC, the ALJ concluded that Plaintiff could not
4 perform her past relevant work as a systems analyst, computer operator, or
5 data entry operator. AR 23-24. Relying upon the VE's testimony, however, the
6 ALJ concluded that Plaintiff was not disabled because there were significant
7 jobs available in the regional and national economies that she could still
8 perform despite her impairments. AR 25.

9 II.

10 ISSUES PRESENTED

11 The parties dispute whether the ALJ: (1) properly considered the VE's
12 identification of work available for Plaintiff; and (2) properly considered the
13 VE's testimony about the number of jobs in the national and regional
14 economies. See Joint Stipulation ("JS") at 4.

15 III.

16 DISCUSSION

17 The ALJ concluded that Plaintiff could, notwithstanding her RFC, make
18 a successful adjustment to employment as an order clerk, inspector, or
19 assembler as those jobs were defined within specific portions of the DOT. As
20 set forth below, the Court finds that the ALJ erred in two ways: first, by not
21 addressing a conflict between the DOT listing for "order clerk" and Plaintiff's
22 limitations to occasional interaction with the public; and second, by relying on
23 fundamentally flawed testimony from the VE about the availability of
24 inspector and assembler jobs in the national and regional economies. Because
25 these errors together affect all three jobs the ALJ concluded that Plaintiff could
26 perform, the ALJ's decision must be reversed and this case remanded for
27 further proceedings.

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1 **A. The ALJ Did Not Address the Conflict Between the DOT Listing for**
2 **Order Clerk and Plaintiff's Limitations**

3 **1. Applicable Law**

4 At the fifth step of the five-step claims evaluation process, the agency
5 bears the burden of showing that a claimant can perform work that exists in
6 “significant numbers” in the national economy, taking into account the
7 claimant’s RFC, age, education, and work experience. Tackett v. Apfel, 180
8 F.3d 1094, 1098, 1100 (9th Cir. 1999). A VE’s testimony may be sufficient to
9 carry that burden; however, the expert’s opinion must reflect all limitations the
10 ALJ includes in the RFC. Osenbrock v. Apfel, 240 F.3d 1157, 1163 (9th Cir.
11 2001).

12 When an expert’s testimony conflicts with a DOT job listing, the ALJ
13 “must elicit a reasonable explanation for the conflict before relying on the
14 [expert’s] evidence to support a determination or decision about whether the
15 claimant is disabled.” SSR 00-4p, 2000 WL 1898704, at *2 (Dec. 4, 2000).
16 Thus, if there is a conflict between the expert’s opinion and the DOT
17 parameters, the ALJ must determine that the expert has a “reasonable
18 explanation” for this conflict. Massachi v. Astrue, 486 F.3d 1149, 1153-54 (9th
19 Cir. 2007). Where an ALJ fails to do this, this Court cannot determine whether
20 there is substantial evidence to support the ALJ’s step-five finding and must
21 remand for further proceedings. Id. at 1154.

22 **2. Analysis**

23 The VE testified that Plaintiff could perform the position of “order clerk”
24 as described in DOT 209.567-014. AR 68. The position described by that DOT
25 code is actually entitled “order clerk, food and beverage,” and the position is
26 described as someone who “[t]akes food and beverage orders over telephone or
27 intercom system and records order on ticket Suggests menu items, and
28 substitutions for items not available, and answers questions regarding food or

1 service. Distributes order tickets or calls out order to kitchen employees.”
2 DICOT 209.567-014, 1991 WL 671794 (1991). As relevant here, the ALJ’s
3 RFC assessment determined that Plaintiff was able to perform sedentary work
4 with a limitation to “occasional[] interaction with the public, supervisors and
5 coworkers.” AR 17. Plaintiff contends that this limitation precludes her from
6 work as a food and beverage order clerk because that job requires frequent
7 communication with other people. JS at 6.

8 After reviewing the DOT description of the responsibilities of a food and
9 beverage order clerk, the Court is unable to reconcile how a person limited to
10 occasional interaction with the public and coworkers would be able to perform
11 the job. Indeed, the Commissioner admits that “the DOT’s narrative
12 description suggests that the order clerk occupation may require more than
13 occasional interaction with customers and kitchen employees.” JS at 15.

14 To the extent the VE had a basis for concluding that Plaintiff could
15 perform this job notwithstanding the DOT classifications, the VE was required
16 to express those reasons for the ALJ to consider. Massachi, 486 F.3d at 1153-
17 54. But the VE’s only statement was to confirm that his testimony was
18 “consistent with” the DOT. AR 66. The VE offered no explanation for his
19 conclusion that a person with Plaintiff’s limitation to “occasional[] interaction
20 with the public, supervisors and coworkers” could perform the job of order
21 clerk, which requires frequent communication with the public and coworkers
22 as an integral part of the job. Moreover, the VE did not provide an evidentiary
23 basis for the ALJ to justify a divergence from the DOT listing in this particular
24 case. See AR 64-67. The disparity between the DOT listing and the VE’s
25 testimony required a “reasonable explanation” from the VE in order for the
26 ALJ to properly rely on the testimony. Where no such explanation has been
27 given, the Court must remand to the agency for further proceedings. See
28 Massachi, 486 F.3d at 1154.

1 **B. The ALJ Relied on Fundamentally Flawed Testimony from the VE**
2 **about the Number of Inspector and Assembler Jobs in the Economy**

3 **1. Applicable Law**

4 An individual is not disabled if she can engage in work that exists in the
5 national economy. The Commissioner must demonstrate that such jobs exist
6 “in significant numbers either in the region where such individual lives or in
7 several regions of the country.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3) (B); see
8 Gutierrez v. Comm’r of Soc. Sec., 740 F.3d 519, 523-25 (9th Cir. 2014). “The
9 burden of establishing that there exists other work in significant numbers”—
10 either nationally or regionally—“lies with the Commissioner.” Beltran v.
11 Astrue, 700 F.3d 386, 389 (9th Cir. 2012). If a reviewing court finds the
12 number of jobs at either the regional or national level significant, the ALJ’s
13 decision must be upheld. Id. at 390.

14 An ALJ may properly rely on a VE’s “testimony regarding the number
15 of relevant jobs in the national economy,” as agency regulations allow an ALJ
16 to “take administrative notice of any reliable job information.” Bayliss v.
17 Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005). There is no “bright-line rule for
18 what constitutes a significant number of jobs” in a region or in the national.
19 Beltran, 700 F.3d at 389.

20 An ALJ’s decision regarding the numerosity of an alternative occupation
21 must be supported by substantial evidence. The “substantial evidence”
22 standard involves a quantum of proof “more than a mere scintilla but less than
23 a preponderance” of the evidence presented to the adjudicator. Orn v. Astrue,
24 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is such that “a
25 reasonable mind might accept as adequate to support a conclusion.” Burch v.
26 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). A reasonable mind need not
27 accept obvious errors in a VE’s testimony that lead to implausible results. See
28 Farias v. Colvin, 519 F. App’x 439, 440 (9th Cir. 2013) (“A reasonable mind

1 would not accept the VE's testimony that there are 3,600 head dance hall
2 hostess positions in the local economy and 342,000 in the national
3 economy."). Moreover, a reviewing court should "weigh both the evidence
4 that supports and the evidence that detracts from the ALJ's factual
5 conclusions." Gutierrez, 740 F.3d at 523.

6 **2. Analysis**

7 The VE testified that Plaintiff could perform the position of "inspector"
8 as described in DOT 669.687-014. The position described by that DOT code is
9 actually entitled "dowel inspector," and the position is described as someone
10 in the woodworking industry who "[i]nspects dowel pins for flaws, such as
11 square ends, knots, or splits, and discards defective dowels." DICOT 669.687-
12 014, 1991 WL 686074 (1991). The VE also testified that Plaintiff could
13 perform the position of "assembler" as described in DOT 706.684-030. The
14 position described by the DOT code is actually entitled "atomizer assembler,"
15 which the DOT describes as someone who "[a]ssembles component parts of
16 perfume atomizers, such as stems, washers, springs, and plungers, using
17 handtools. Screws completed atomizers onto empty glass containers and places
18 them in boxes." DICOT 706.684-030, 1991 WL 679052 (1991).

19 The VE stated that his testimony was consistent with the DOT and the
20 SCO regarding how many jobs were available in the referenced occupations.
21 AR 66. Unfortunately, the Bureau of Labor Statistics ("BLS") Occupational
22 Employment Statistics program ("OES") does not compile data by DOT code,
23 but rather by Standard Occupational Classification System code ("SOC"), a
24 new system adopted by the BLS.¹ The DOT code identified by the VE for

25
26 ¹ BLS uses the SOC to "classify workers into occupational categories for
27 the purpose of collecting, calculating, or disseminating data." See
28 <http://www.bls.gov/soc/>.

1 “inspector” appears in the larger category of “Inspectors, Testers, Sorters,
2 Samplers, and Weighers” at SOC 51-9061. In May 2010, OES estimated that
3 for SOC 51-9061 there were 410,750 total jobs available in the nation with
4 13,710 of those jobs located in the Los Angeles-Long Beach-Glendale, CA
5 Metropolitan Division and another 7,050 in the Santa Ana-Anaheim-Irvine
6 Metropolitan Division.² Seemingly in reliance on these numbers, the VE
7 testified at the May 2012 hearing that there were 410,000 jobs nationally and
8 24,000 regionally for the occupation of “inspector” as defined in DOT
9 669.687-014. AR 65-66.

10 The DOT code identified by the VE for “assembler” appears in the larger
11 category of “Production Workers, All Other” at SOC 51-9199. In May 2009,
12 OES estimated that for SOC 51-9199 there were 239,550 jobs available in the
13 nation. No data is available through OES for the number of jobs available in
14 51-9199 in 2010; however, the OES did estimate the number of jobs available
15 for “Production Workers, All Other,” at 51-9399 for 2010.³ In May 2010, OES
16 estimated that for SOC 51-9399 there were 229,240 total jobs available in the
17 nation with 5,380 of those jobs located in the Los Angeles-Long Beach-
18 Glendale, CA Metropolitan Division and another 3,560 in the Santa Ana-
19 Anaheim-Irvine Metropolitan Division.⁴ Seemingly in reliance on these
20 numbers, the VE testified at the May 2012 hearing that there were
21 approximately 229,000 jobs nationally and 10,000 regionally for the

22 ² See <http://www.bls.gov/oes/2010/may/oes519061.htm>. The VE
23 offered no definition of the geographic boundaries of the region he used; the
24 Court uses the above metropolitan areas.

25 ³ It appears as though job code 51-9199 was changed in 2010 to job code
26 51-9399. Regardless, the job numbers available for 51-9199 in 2009 and 51-
27 9399 in 2010 are roughly equivalent.

28 ⁴ See <http://www.bls.gov/oes/2010/may/oes519399.htm>.

1 occupation of “assembler” as defined in DOT 669.687-014. AR 66.

2 The Court sees an error in the VE’s analysis, an error which is significant
3 enough to give the Court reason to believe that the VE’s conclusion is not only
4 implausible but just plain wrong. The error arises from the fact that the
5 occupation described in DOT 669.687-014 is but one of the 782 occupations in
6 SOC 51-9061. See JS, Exh. 3. Additionally, the occupation described in DOT
7 706.684-030 is but one of the 1,592 occupations in SOC 51-9199.⁵ See JS, Exh.
8 5. It is not clear how the VE determined that all of the jobs available in SOC
9 51-9061 were “inspectors” as described in DOT 669.687-014 or how roughly
10 all of the jobs available in SOC 51-9199 were “assemblers” as described in
11 DOT 706.684-030.⁶ It strains credulity to accept the VE’s testimony that there
12 are 410,000 people nationally and 24,000 people in the region making a living
13 by inspecting wooden dowels, or that there are 229,000 people nationally and
14 10,000 in the region making a living assembling perfume bottle atomizers, yet
15 that was what the ALJ seemed to conclude in reliance on the VE’s flawed
16 testimony. See AR 25.

17 The Court’s concern about the VE’s testimony is heightened because it is
18 apparent that many of the jobs in SOC 51-9061 and SOC 51-9199 would be
19 outside the limitations imposed by Plaintiff’s RFC. Given that the title of SOC
20 51-9061 is “Inspectors, Testers, Sorters, Samplers, and Weighers,” it is no
21 surprise that there are other “inspector” jobs among the 782 in SOC Code 51-

23 ⁵ See [http://www.onetonline.org/link/result/51-](http://www.onetonline.org/link/result/51-9199.00?c=cw&s_cw=DOT&g=Go)
24 [9199.00?c=cw&s_cw=DOT&g=Go](http://www.onetonline.org/link/result/51-9199.00?c=cw&s_cw=DOT&g=Go).

25 ⁶ At least one court has identified the difficulty in applying the numerical
26 data available by SOC codes to a particular DOT title, noting that such “many-
27 to-one mapping . . . necessarily creates information loss.” Brault v. Soc. Sec.
28 Admin., Comm’r., 683 F.3d 443, 447 n.4 (2d Cir. 2012).

1 9061. DOT 622.281-010 identifies the occupation of “locomotive inspector” as
2 a job requiring light work from a worker who “inspects railroad locomotives in
3 roundhouse or shop to determine extent of wear and needed repairs, using
4 handtools and measuring instruments.” DICOT 622.281-101 1991 WL 685304
5 (1991). DOT 529.367-018 identifies the occupation of “quality-control
6 inspector,” or someone who “[w]eighs and tests cookies and crackers for
7 conformance to quality and weight standards.” Both these inspector
8 occupations require light work, a classification beyond Plaintiff’s RFC of
9 sedentary work.

10 Likewise, there are numerous “assembler” jobs in SOC Code 51-9199,
11 “Production Workers, All Other.” DOT 518.684-022 identifies the occupation
12 of “wax-pattern assembler” as someone who “[a]ssembles wax components of
13 patterns used in lost-wax casting process: Melts edges of wax components,
14 using heated knife, and manually positions and joins components.” DICOT
15 518.684-022, 1991 WL 673867 (1991). DOT 556.687-010 identifies the
16 occupation of “bowling-ball-mold assembler,” as someone who “[c]oats
17 bowling ball molds components with parting agent, installs ball cores, and
18 assembles and seals molds preparatory to filling and curing: Inspects parts to
19 ensure clean and dry condition and applies parting agent, using brush or spray
20 gun.” DICOT 556.687-010, 1991 WL 683500 (1991). Both these assembler
21 occupations require medium work, a classification beyond Plaintiff’s RFC of
22 sedentary work.

23 Remand is appropriate where “no reasonable mind could accept the
24 employment numbers proffered by the VE as substantial evidence.” Farias, 519
25 F. App’x at 440-41. Here, “no reasonable mind” could believe that, of the
26 approximately 410,000 people employed in the national economy as
27 “Inspectors, Testers, Sorters, Samplers, and Weighers,” all of these are
28 wooden dowel inspectors; likewise, no reasonable mind could believe that of

1 the approximately 229,000 to 239,000 people employed in the national
2 economy as “Production Workers, All Other,” all to almost all are perfume
3 bottle atomizer assemblers. See, e.g., Daniels v. Colvin, No. 13-654, 2014 WL
4 794498, at *5-*6 (C.D. Cal. Feb. 26, 2014) (remanding because VE’s testimony
5 regarding the total number of available jobs was based on an unexplained
6 conclusion “that roughly one-third of all people employed in the broad
7 Counter and Rental Clerks category of jobs served as photofinishing clerks”);
8 Darling v. Colvin, No. 13-266, 2013 WL 4768038, at *5-*6 (C.D. Cal. Sept. 4,
9 2013) (remanding for further proceedings because “the employment numbers
10 the [VE] provided at the hearing may have erroneously pertained to entire . . .
11 statistical groups rather than the individual representative occupations
12 encompassed therein”); Direaux v. Colvin, No. 13-0061, 2013 WL 6239327, at
13 *3-*5 (C.D. Cal. Dec. 3, 2013) (remanding because VE’s opinion regarding
14 availability of jobs in national and regional economies job was “fundamentally
15 flawed”) (citing Farias, 519 F. App’x at 440-41).

16 The Commissioner argues that the Court should not second-guess the
17 ALJ’s reliance on the VE’s testimony. See JS at 36. Yet the Court is required,
18 even under the cases cited by the Commissioner, to determine whether the
19 VE’s testimony is “fundamentally flawed.” See, e.g., Dunn v. Colvin, No. 13-
20 1219, 2014 WL 2159275, at *9 (S.D. Cal. May 23, 2014) (“[T]his Court
21 interprets Farias to allow a district court to remand a case when the vocational
22 expert’s testimony is fundamentally flawed.”). The Commissioner offers no
23 explanation, much less a persuasive one, for how the VE’s testimony can be
24 squared with the objective data. Where OES data show that there are (1)
25 approximately 410,000 people employed in 782 different occupations, and (2)
26 approximately 229,000 to 239,000 people employed in 1,592 different
27 occupations, the VE must explain how he came to conclude that the two
28 occupations he referenced comprised effectively all of those employed. This is

1 particularly true where, as here, it appears from the description of those
2 occupations and the application of common sense that those occupations
3 would comprise a much smaller proportion.

4 In sum, because the VE provided no information as to the methodology
5 and source of his testimony regarding the availability of the individual
6 representative jobs, remand is appropriate. Upon remand the VE must provide
7 sufficient, detailed evidence, including accurate information regarding the
8 number of available jobs, to allow the ALJ to determine whether there are jobs
9 that exist in significant numbers in the regional and national economies which
10 Plaintiff can perform given her RFC.

11 **IV.**

12 **CONCLUSION**

13 For the reasons stated above, the decision of the Social Security
14 Commissioner is REVERSED and the action is REMANDED for further
15 proceedings consistent with this opinion.

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17 Dated: March 24, 2015



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19
20 **DOUGLAS F. McCORMICK**
21 United States Magistrate Judge
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