UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARIA CABALLERO, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security Administration, Defendant.	Case No. ED CV 14-1266-SP MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION

On June 23, 2014, plaintiff Maria Caballero filed a complaint against defendant, the Commissioner of the Social Security Administration ("Commissioner"), seeking a review of a denial of disability insurance benefits ("DIB") and supplemental security income ("SSI"). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents one issue for decision: whether there is a conflict between the testimony of the vocational expert ("VE") and the Dictionary of Occupational Titles ("DOT"), such that the Administrative Law Judge ("ALJ") erred at step five in relying on the VE's testimony. Memorandum in Support of Plaintiff's Complaint ("P. Mem.") at 3-7; Memorandum in Support of Defendant's Answer ("D. Mem.") at 1-7.

Having carefully studied the parties' moving and opposing papers, the Administrative Record ("AR"), and the decision of the ALJ, the court concludes that, as detailed herein, the ALJ did not err at step five. Consequently, the court affirms the decision of the Commissioner denying benefits.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who was forty-four years old on the alleged disability onset date, has a twelfth grade education. AR at 25, 120, 130. Plaintiff has past relevant work experience as a child care attendant, which is considered an unskilled job. *Id.* at 125, 166, 328-29.

On April 28, 2009, plaintiff filed applications for DIB and SSI, alleging that she had been disabled since October 1, 2008 due to a heart attack and injured right ankle. *Id.* at 112, 116, 124. The Commissioner denied plaintiff's application initially and upon reconsideration, after which she filed a request for a hearing. *Id.* at 46-56. Plaintiff, represented by counsel, appeared and testified at a hearing before ALJ Mason D. Harrell Jr. *Id.* at 21-41. The ALJ denied plaintiff's claim for benefits on April 13, 2011. *Id.* at 11-17.

Plaintiff filed a complaint in this court. *Id.* at 366. On May 14, 2013, this court reversed the Commissioner's decision and remanded the case to the Commissioner with an order to "reconsider plaintiff's subjective complaints," appropriately crediting or rejecting them, prior to assessing plaintiff's residual functional capacity ("RFC") and determining whether plaintiff can perform her

past relevant work or perform other jobs that existed in significant numbers in the national economy. *Id.* at 366-75.

The Appeals Council vacated the Commissioner's decision and remanded the case to an ALJ for another hearing and "any further action needed to complete the administrative record" prior to issuing a new decision. *Id.* at 383. On September 3, 2013, plaintiff, represented by counsel, appeared before ALJ Joseph D. Schloss. *Id.* at 337. The ALJ heard testimony from plaintiff and from Dr. Stephen Kaplan, a medical expert. *Id.* at 338-49. The ALJ continued the hearing to permit plaintiff time to submit additional medical evidence and fully develop the record prior to making a ruling. *Id.* at 349.

On March 10, 2014, plaintiff, represented by the same counsel, appeared at a supplemental hearing and again testified before the ALJ. *Id.* at 326, 331-34. The ALJ also heard testimony from Luis Mas, a vocational expert. *Id.* at 327-31. On March 24, 2014, the ALJ denied plaintiff's claims for benefits. *Id.* at 306-17.

Applying the well-known five-step sequential evaluation process, the ALJ found, at step one, that plaintiff had not engaged in substantial gainful activity since October 1, 2008, the alleged onset date. *Id*. at 309.

At step two, the ALJ found that plaintiff suffered from the following severe impairments: history of myocardial infarction; cardiomegaly; and fracture of the right ankle, status post open reduction and internal fixation (ORIF) surgery. *Id.* The ALJ found plaintiff's high blood pressure, history of being overweight, and anxiety disorder to be non-severe. *Id.*

At step three, the ALJ found that plaintiff's impairments, whether individually or in combination, did not meet or medically equal one of the listed impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the "Listings"). *Id.* at 310. The ALJ specifically analyzed plaintiff's impairments in light of 1.02, 1.06, 4.00, and the paragraph B and C criteria of listings under 12.00. *Id.*

The ALJ then assessed plaintiff's RFC,[1] and determined that she had the RFC to perform a range of light work with the limitations that plaintiff could: lift or carry 20 pounds occasionally and 10 pounds frequently; stand or walk for four hours out of an eight-hour workday; and sit for six hours out of an eight-hour workday. *Id.* at 310-11.

The ALJ found, at step four, that plaintiff could not perform her past relevant work. *Id.* at 315.

At step five, the ALJ found there were additional jobs that existed in significant numbers in the national economy that plaintiff could perform, including small parts assembler, swatch clerk, and checker. *Id.* at 315-16.

Consequently, the ALJ concluded that plaintiff did not suffer from a disability as defined by the Social Security Act ("SSA"). *Id*. at 317.

Plaintiff filed a request for review of the ALJ's decision, which was denied by the Appeals Council.[2] The ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by

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[1] Residual functional capacity is what a claimant can do despite existing exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-56 nn.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007).

[2] Although this does not appear in the Administrative Record, plaintiff asserts the Appeals Council denied review (P. Mem. at 2) and defendant does not dispute this.

substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

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

IV.

DISCUSSION

Plaintiff argues the ALJ erred because he improperly relied on the testimony of the VE, who identified jobs that exceeded plaintiff's RFC. P. Mem. at 2-7. Specifically, plaintiff alleges that the ALJ erred by failing to identify and explain inconsistency between the VE's testimony and the DOT. *Id.*

At step five, the burden shifts to the Commissioner to show that the claimant retains the ability to perform other gainful activity. *Lounsburry v.*

Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a claimant is not disabled at step five, the Commissioner must provide evidence demonstrating that other work exists in significant numbers in the national economy that the claimant can perform, given his or her age, education, work experience, and RFC. 20 C.F.R. §§ 404.1512(f), 416.912(f).

ALJs routinely rely on the DOT "in evaluating whether the claimant is able to perform other work in the national economy." *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990) (citations omitted); *see also* 20 C.F.R. § 416.966(d)(1) (DOT is source of reliable job information). The DOT is the rebuttable presumptive authority on job classifications. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ may not rely on a VE's testimony regarding the requirements of a particular job without first inquiring whether the testimony conflicts with the DOT, and if so, the reasons therefore. *Massachi*, 486 F.3d at 1152-53 (citing Social Security Ruling ("SSR") 00-4p).[3] But failure to so inquire can be deemed harmless error where there is no apparent conflict or the VE provides sufficient support to justify deviation from the DOT. *Id.* at 1154 n.19.

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

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[3] "The Commissioner issues Social Security Rulings to clarify the Act's implementing regulations and the agency's policies. SSRs are binding on all components of the SSA. SSRs do not have the force of law. However, because they represent the Commissioner's interpretation of the agency's regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations." *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th Cir. 2001) (internal citations omitted).

Here, the ALJ, as required, asked the VE to ensure his testimony was consistent with the DOT and to inform the ALJ should there be any deviation. AR at 328. Although the ALJ fulfilled his initial obligation to inquire whether the VE's testimony conflicted with the DOT, that was not the end of the ALJ's obligations. Where a VE wrongly testifies that there is no conflict, if "evidence from a VE 'appears to conflict with the DOT,' SSR 00-4p requires further inquiry: an ALJ must obtain 'a reasonable explanation for the apparent conflict.'" *Overman v. Astrue*, 546 F.3d 456, 463 (7th Cir. 2008) (quoting SSR 00-4p). Where the ALJ fails to obtain an explanation for and resolve an apparent conflict – even where the VE did not identify the conflict – the ALJ errs. *See Hernandez v. Astrue*, 2011 WL 223595, at *2-5 (C.D. Cal. Jan. 21, 2011) (where VE incorrectly testified there was no conflict between her testimony and DOT, ALJ erred in relying on VE's testimony and failing to acknowledge or reconcile the conflict); *Mkhitaryan v. Astrue*, 2010 WL 1752162, at *3 (C.D. Cal. Apr. 27, 2010) ("Because the ALJ incorrectly adopted the VE's conclusion that there was no apparent conflict, . . . the ALJ provided no explanation for the deviation" and "therefore committed legal error warranting remand.").

A. Plaintiff's RFC Compared to the Definition of Light Work

The ALJ found plaintiff's RFC limited to the range of light work that requires lifting or carry 20 pounds occasionally, and 10 pounds frequently, and involves no more than four hours standing and walking, or six hours sitting, during any eight-hour workday. AR at 310; P. Mem. at 3-4. The ALJ relied on the definition of light work in 20 C.F.R. §§ 404.1567(b) and 416.967(b) and SSR 83-10. *Id.* at 311. Plaintiff argues that under the definition in these regulations, the jobs described by the VE are incompatible with plaintiff's ability to stand or walk a maximum of four hours per workday. P. Mem. at 4-7.

The federal regulations and Social Security policy define light work as involving "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. §§ 404.1567(b), 416.967(b); SSR 83-10. The SSR notes the requirement of "a good deal of walking or standing" is the characteristic that most often distinguishes light work from sedentary work. SSR 83-10. According to the SSR, very few jobs involving light work can be accomplished while in a seated position, and those that can be generally require a greater exertion of force than sedentary work. *Id.* "[T]he full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday," with the possibility of sitting intermittently during the remaining two hours of the day. *Id.* Because plaintiff is limited to standing or walking no more than four hours in an eight-hour workday, she argues the ALJ erred in not restricting her to jobs with only a sedentary exertional level. P. Mem. at 5; *see* 20 C.F.R. §§ 404.1567(a), 416.967(a). The court disagrees.

The VE testified, and it is undisputed, that the three jobs identified by the VE are "light work." AR at 329-30; see DOT 706.684-022 (small parts assembler); DOT 222.587-050 (swatch clerk); DOT 222.687-010 (checker I). According to the ALJ's RFC determination, plaintiff is capable of performing only "a range of light work," not the "full range." AR at 310. Nonetheless, the DOT definition of light work under each of the vocations discussed by the VE does not require performance of the "full range" of light work and does not conflict with plaintiff's RFC. The DOT defines "light work" for these positions as involving the exertion of "up to 20 pounds of force occasionally"; or "up to 10 pounds frequently"; or "a negligible amount of force constantly." DOT 706.684-022, 222.587-050, 222.687-010. The definition for these jobs goes on to state that where the weight lifted is only negligible, the job is still light work when, in

addition, the employee is required to: (1) "walk[] or stand[] to a significant degree"; (2) sit for the majority of the time while "pushing and/or pulling of arm or leg controls"; or (3) "work at a production rate pace entailing the constant pushing and/or pulling of materials." *Id.* Thus, nothing in the DOT's description of these positions requires standing or walking six hours in an eight-hour workday. On the contrary, it allows for jobs that involve mostly sitting. Plaintiff's RFC, which limits her to standing and walking for no more than four hours, fits within this definition.

B. The ALJ Did Not Err at Step Five Because There Is No Actual or Apparent Conflict Between the VE Testimony and the DOT

After acknowledging that "a 50 year old individual with a twelfth grade education . . . [who] is limited to a range of light work in that she can lift and carry 20 pounds occasionally, 10 pounds frequently, with no other postural limitations except stand and walk would be limited to four hours out of an eight hour day, and could sit for six hours out of an eight hour day," could not do plaintiff's past relevant work as a child care attendant, the ALJ asked the VE whether there would be other jobs for that individual. AR at 329. The VE indicated such an individual could perform other "unskilled, light jobs in the economy," including small parts assembly, swatch clerk, and checker I. *Id.* at 329-30.

The hypothetical presented to the VE specifically and appropriately included plaintiff's standing and walking limitation. *Id.* Once presented with an accurate hypothetical based on an uncontested RFC, the VE is charged with "translat[ing] factual scenarios into realistic job market probabilities." *Sample v. Schweiker*, 694 F.2d 639, 643-44 (9th Cir. 1982). "The DOT lists maximum requirements of occupations as generally performed, not the range of requirements of a particular job as it is performed in specific settings." SSR 00-4p. An ALJ may rely on the testimony of a VE "to provide more specific information about

jobs or occupations than the DOT." *Id*; *Massachi*, 486 F.3d at 1152-53; *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) ("A VE's recognized expertise provides the necessary foundation for his or her testimony. Thus, no additional foundation is required."); SSR 00-4p. There is nothing in the DOT descriptions of the jobs identified by the VE that conflicts with plaintiff's RFC.

The ALJ limited plaintiff to a range of light work, presented the VE with a hypothetical that reflected plaintiff's age, educational level, relevant past work, and RFC. There is no actual or apparent conflict between the DOT and plaintiff's RFC. Therefore, at step five, the ALJ did not err in relying on the VE's testimony.

V.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered AFFIRMING the decision of the Commissioner denying benefits, and dismissing this action with prejudice.

DATED: September 29, 2015

SHERI PYM
United States Magistrate Judge