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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROSALIE CARLOS ROBLES,	)	No. EDCV 16-2089-AS
	)	
Plaintiff,	)	<b>MEMORANDUM OPINION AND</b>
v.	)	<b>ORDER OF REMAND</b>
	)	
NANCY A. BERRYHILL, <sup>1</sup>	)	
Acting Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

**I. PROCEEDINGS**

On October 3, 2016, Plaintiff Rosalie Carlos Robles ("Plaintiff") filed a Complaint seeking review of the denial of her application for Supplemental Security Income Benefits (SSI). (Docket

<sup>1</sup> Nancy A. Berryhill is substituted for former Acting Commissioner Carolyn W. Colvin. See Fed. R. Civ. P. 25(d).

1 Entry No 1). On February 15, 2017, Defendant filed an Answer along  
2 with the Administrative Record ("AR"). (Docket Entry Nos. 15, 16).  
3 The parties have consented to proceed before a United States  
4 Magistrate Judge. (Docket Entry Nos. 12, 13). On August 3, 2017,  
5 the parties filed a Joint Stipulation ("Joint Stip.") setting forth  
6 their respective positions regarding Plaintiff's claim. (Docket  
7 Entry No. 21).

8  
9 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

10  
11 Plaintiff, formerly employed as a cashier and a teacher's aide,  
12 (AR 177), filed her SSI application on May 21, 2013, alleging a  
13 disabling condition beginning March 15, 2013, (AR 149), as a result  
14 of stage three breast cancer (AR 176). On February 12, 2015,  
15 Administrative Law Judge Sharilyn Hopson ("ALJ") examined the record  
16 and heard testimony from medical expert Dr. Robert Sklaroff,  
17 vocational expert Allen Ey ("VE"), and Plaintiff, who was represented  
18 by counsel. (AR 27-50). The ALJ then denied Plaintiff's application  
19 in a written decision on March 31, 2015. (AR 10-21).

20  
21 The ALJ applied the requisite five-step process to evaluate  
22 Plaintiff's case. At step one, the ALJ found that Plaintiff has not  
23 engaged in substantial gainful activity since the application date of  
24 May 21, 2013. (AR 12). At step two, the ALJ found that Plaintiff  
25 had the following severe impairments: breast cancer, status post  
26 bilateral mastectomy and removal of local lymph nodes; anemia;  
27 lymphedema; and depression. (Id.). At step three, the ALJ  
28 determined that Plaintiff's impairments did not meet or equal a

1 Listing found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 13).  
2 Next, the ALJ found that Plaintiff has the residual functional  
3 capacity ("RFC")<sup>2</sup> to perform light work with the following  
4 limitations: "lift and/or carry 10 pounds frequently, 20 pounds  
5 occasionally; stand, walk, or sit 6 hours out of an 8-hour day;  
6 occasionally climb stairs, no ladders, ropes, or scaffolds;  
7 occasionally balance, stoop, kneel, crouch, and crawl; and limited to  
8 simple routine tasks." (AR 15).

9  
10 The ALJ then proceeded to steps four and five. At step four,  
11 the ALJ determined that Plaintiff was not able to perform her past  
12 relevant work as a child care attendant and sales clerk. (AR 19).  
13 Relying on the VE's testimony at step five, the ALJ found Plaintiff,  
14 with her age, education, work experience, and RFC, can perform the  
15 following representative jobs existing in significant numbers in the  
16 national economy: cashier II (Dictionary of Occupational Titles  
17 ("DOT") 211.462-010) and storage-facility rental clerk (DOT 295.367-  
18 026). (AR 20). Accordingly, the ALJ concluded that Plaintiff has  
19 not been disabled since she filed her application on May 21, 2013.  
20 (Id.).

21  
22 On April 29, 2015, Plaintiff requested that the Appeals Council  
23 review the ALJ's Decision, and the Appeals Council denied her request  
24 on August 4, 2016. (AR 1-10). The ALJ's Decision thus became the  
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26  
27 <sup>2</sup> A Residual Functional Capacity is what a claimant can still  
28 do despite existing exertional and nonexertional limitations. See 20  
C.F.R. § 404.1545(a)(1).

1 Commissioner's final decision, allowing this Court to review it. See  
2 42 U.S.C. §§ 405(g), 1383(c).

### 3 4 **III. STANDARD OF REVIEW**

5  
6 This Court reviews the Administration's decision to determine if  
7 it is free of legal error and supported by substantial evidence. See  
8 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial  
9 evidence" is more than a mere scintilla, but less than a  
10 preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.  
11 2014). To determine whether substantial evidence supports a finding,  
12 "a court must consider the record as a whole, weighing both evidence  
13 that supports and evidence that detracts from the [Commissioner's]  
14 conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.  
15 2001) (internal quotation omitted). As a result, "[i]f the evidence  
16 can support either affirming or reversing the ALJ's conclusion, [a  
17 court] may not substitute [its] judgment for that of the ALJ."  
18 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

### 19 20 **IV. PLAINTIFF'S CONTENTIONS**

21  
22 Plaintiff raises two grounds for relief. First, she argues that  
23 the ALJ erred in rejecting the opinion of her treating physician.  
24 (Joint Stip. at 2-6). Second, she contends that the ALJ improperly  
25 found that she could perform the jobs of cashier II and facility  
26 rental clerk, despite the ALJ's failure to reconcile a conflict  
27 between the VE's testimony and the DOT's description of these jobs.  
28 (Id. at 10-15).

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**V. DISCUSSION**

After reviewing the record, the Court finds that Plaintiff's second claim warrants remand for further consideration. The Court declines to address Plaintiff's other claim.

**A. The ALJ Materially Erred In Concluding That Plaintiff Could Perform The Jobs Of Cashier II And Rental Facility Clerk**

Plaintiff contends that the ALJ erred in finding that she could perform the occupations of cashier II (DOT 211.462-010) and storage-facility rental clerk (DOT 295.367-026) because these jobs require a level of reasoning that conflicts with Plaintiff's RFC limitation to "simple routine tasks," and the ALJ failed to reconcile that conflict. (Joint Stip. at 10-15).

In considering potential occupations that a claimant could perform, the ALJ relies on the DOT and VE testimony. 20 C.F.R. § 416.966(e); Zavalin v. Colvin, 778 F.3d 842, 845-46 (9th Cir. 2015). "When there is an apparent conflict between the [VE's] testimony and the DOT – for example, expert testimony that a claimant can perform an occupation involving DOT requirements that appear to be more than the claimant can handle – the ALJ is required to reconcile the inconsistency." Zavalin, 778 F.3d at 846 (citing Massachi v. Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007)). An ALJ's failure to inquire into an apparent conflict is harmless where there is no actual conflict between the RFC and the DOT. Ranstrom v. Colvin, 622 F.

1 App'x 687, 689 (9th Cir. 2015) (citing Massachi, 486 F.3d at 1154 n.  
2 19).

3  
4 Here, the VE testified that Plaintiff could perform the  
5 occupations of cashier II (DOT 211.462-010) and storage-facility  
6 rental clerk (DOT 295.367-026), (AR 47-48), and the ALJ adopted that  
7 testimony, finding it "consistent with the information contained in  
8 the [DOT]," (AR 20). According to the DOT, both of these jobs  
9 require Level 3 reasoning, which is defined as the ability to  
10 "[a]pply commonsense understanding to carry out instructions  
11 furnished in written, oral, or diagrammatic form," as well as the  
12 ability to "[d]eal with problems involving several concrete variables  
13 in or from standardized situations." See Cashier II, DOT 211.462-  
14 010; Storage-Facility Rental Clerk, DOT 295.367-026. As noted, the  
15 ALJ limited Plaintiff to "simple routine tasks." (AR 15, 47).

16  
17 An apparent conflict exists as a matter of law between the ALJ's  
18 finding that Plaintiff is limited to "simple routine tasks" and the  
19 VE's testimony that a person with Plaintiff's limitations could  
20 perform DOT jobs requiring Level 3 reasoning. See Zavalin, 778 F.3d  
21 at 846-47 (finding an apparent conflict between the ALJ's finding  
22 that the claimant retained the RFC to perform simple, routine, or  
23 repetitive work, and the Level 3 reasoning requirements of the  
24 cashier and surveillance system monitor jobs that the ALJ found the  
25 claimant capable of performing). The ALJ's failure to resolve that  
26 apparent conflict was legal error. See id. at 847.

1 Defendant contends that any error here was harmless, noting that  
2 the Ninth Circuit in Zavalin "engaged in a thorough harmless error  
3 analysis before determining that the ALJ's failure to address the DOT  
4 conflict between a[n] RFC for simple and repetitive work and a Level  
5 Three Reasoning job was reversible error." (Joint Stip. at 17). In  
6 Zavalin, the court assessed whether the error was harmless by  
7 considering the DOT's descriptions of the jobs at issue - cashier and  
8 surveillance system monitor - in relation to the evidence that the  
9 ALJ relied on to assess the claimant's abilities. See Zavalin, 778  
10 F.3d at 848. The Commissioner in Zavalin argued the error was  
11 harmless because the claimant's success in math classes and his use  
12 of computer and video games demonstrated that he was capable of  
13 performing the jobs. Id. The Ninth Circuit disagreed. Id. First,  
14 the court noted that the claimant's math classes were part of a  
15 special education program. Id. Indeed, the claimant had graduated  
16 high school only with "a modified diploma" conferred on students who  
17 were unable to satisfy the standard educational requirements. Id. at  
18 847. Second, the Court determined that it could not rely on evidence  
19 of video game and computer use because the ALJ had not relied on it.  
20 Id. at 848 (citing Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050,  
21 1054 (9th Cir. 2006)).

22  
23 Defendant attempts to distinguish this case from Zavalin by  
24 pointing out that Plaintiff completed high school. (Joint Stip. at  
25 17). But while this fact may be relevant to the inquiry, it is  
26 clearly insufficient to show whether she can perform jobs that  
27 require Level 3 reasoning. The Court in Zavalin stated that "there  
28 is no rigid correlation between reasoning levels and the amount of

1 education that a claimant has completed." Zavalin, 778 F.3d at 847.  
2 This is because the reasoning levels do not correspond only to a  
3 claimant's education level; rather, they "correspond to the  
4 claimant's ability because they assess whether a person can 'apply'  
5 increasingly difficult principles of rational thought and 'deal' with  
6 increasingly complicated problems." Id.

7  
8 Defendant contends that the medical evidence, too, demonstrates  
9 Plaintiff's ability to perform jobs with Level 3 reasoning. (Joint  
10 Stip. at 17-18). For support, Defendant asserts that the limitation  
11 to "simple routine tasks" was based solely on Plaintiff's subjective  
12 complaints, while the two state agency psychological consultants<sup>3</sup>  
13 opined that Plaintiff did not have a severe mental impairment. (Id.  
14 at 18).

15  
16 Notwithstanding Defendant's view of the record, however, the ALJ  
17 specifically found the psychological consultants' opinions "not  
18 consistent with the full medical evidence of record," and thus gave  
19 them "less weight." (AR 17). And while the ALJ acknowledged there  
20 was "little" objective medical evidence to show "deficits in  
21 attention, concentration and memory," the ALJ determined that "the  
22 common side effects of the chemotherapy when combined with the  
23 effects of her depression limit the complexity of the activities  
24 [Plaintiff] would be able to sustain on a regular and continuous  
25 basis." (AR 16). For that reason, the ALJ limited Plaintiff to  
26 "simple routine tasks." (Id.).

27  
28 <sup>3</sup> Defendant refers to the sources as "physicians" but presumably means the two psychological consultants Heather Barrons, Psy.D. and Peggy Elam, Ph.D.



1           Based on the DOT, both jobs at issue involve some tasks that do  
2 not seem simple or routine. A cashier, for instance, must make  
3 change, compute bills, and verify cash on hand against totals on the  
4 register tape, among other things. Cashier II, DOT 211.462-010.  
5 They may also need to "give cash refunds or issue credit  
6 memorandums." Id.; see Zavalin, 778 F.3d at 848 ("As a cashier,  
7 reconciling the cash on hand against the cash register's tape and  
8 issuing credit memorandums to customers could contain situational  
9 variables that may not be simple or repetitive."). A storage-  
10 facility rental clerk must, among other things, compute rental fees;  
11 help customers select appropriate storage units; keep track of rental  
12 statuses, expirations, and waiting lists; and monitor security and  
13 surveillance cameras to ensure that they are working correctly.  
14 Storage-Facility Rental Clerk, DOT 295.367-026.

15  
16           Since the ALJ's decision gives no indication that Plaintiff is  
17 capable of performing work that requires Level 3 reasoning despite  
18 the limitation to "simple routine tasks," there is no basis for the  
19 Court to conclude that the ALJ's failure to reconcile the conflict  
20 amounts to harmless error.

21  
22 **B. Remand Is Warranted**

23  
24           The decision whether to remand for further proceedings or order  
25 an immediate award of benefits is within the district court's  
26 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000).  
27 The Ninth Circuit has stated that a remand for benefits is warranted  
28 "only in 'rare circumstances.'" Treichler v. Comm'r of Soc. Sec.

1 Admin., 775 F.3d 1090, 1100 (9th Cir. 2014) (quoting Moisa v.  
2 Barnhart, 367 F.3d 882, 886 (9th Cir. 2004)). Such circumstances are  
3 present only where the following elements are satisfied: (1) "the ALJ  
4 has failed to provide legally sufficient reasons for rejecting  
5 evidence, whether claimant testimony or medical opinion"; (2) "the  
6 record has been fully developed, [and] there are [no] outstanding  
7 issues that must be resolved before a determination of disability can  
8 be made"; and (3) the record as a whole, with the relevant testimony  
9 or evidence credited as a matter of law, "leaves not the slightest  
10 uncertainty as to the outcome of [the] proceeding." Id. at 1100-01  
11 (9th Cir. 2014) (internal quotations and citations omitted).

12  
13 Here, the ALJ materially erred by failing to reconcile the  
14 apparent conflict between the VE's testimony and the DOT, so it  
15 remains unclear whether Plaintiff is able to perform the jobs opined  
16 by the VE and, if not, whether other work exists for her. Thus, the  
17 Court remands for further proceedings to resolve this issue, as well  
18 as to address and resolve any other issues, as necessary.<sup>4</sup>

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27 <sup>4</sup> The Court has not reached any issues other than those  
28 addressed here, except as needed to conclude that further  
administrative proceedings are warranted.

1 **VI. CONCLUSION**

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3 For the foregoing reasons, the decision of the Administrative  
4 Law Judge is VACATED, and the matter is REMANDED, without benefits,  
5 for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).  
6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8

9 Dated: September 27, 2017.

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11 \_\_\_\_\_/s/\_\_\_\_\_  
12 ALKA SAGAR  
13 UNITED STATES MAGISTRATE JUDGE  
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