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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARIA G.,  
Plaintiff,  
v.  
ANDREW M. SAUL, Commissioner  
of Social Security,<sup>1</sup>  
Defendant.

Case No. 5:19-cv-00291-KES

MEMORANDUM OPINION AND  
ORDER

**I.**

**PROCEDURAL BACKGROUND**

In November 2014, Plaintiff Maria G. (“Plaintiff”) applied for Title II disability insurance benefits (“DIB”) alleging a disability onset date of September 20, 1999. Administrative Record (“AR”) 153-56.<sup>2</sup>

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<sup>1</sup> Andrew Saul is now the Commissioner of Social Security and is automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

<sup>2</sup> Plaintiff submitted an earlier application and was found “not disabled” in an ALJ decision dated December 9, 2005. AR 16. The Social Security Administration (“SSA”) was unable to locate a copy of the 2005 decision, so the ALJ considered Plaintiff’s application de novo. Id.

1 On October 2, 2017, an Administrative Law Judge (“ALJ”) conducted a  
2 hearing at which Plaintiff, who was represented by an attorney, appeared and  
3 testified, as did a vocational expert (“VE”). AR 29-71. On March 23, 2018, the  
4 ALJ issued an unfavorable decision. AR 12-28. The ALJ found that Plaintiff met  
5 the earnings requirements to qualify for DIB through March 31, 2007, the last date  
6 insured (“LDI”). AR 16. Through her LDI, Plaintiff suffered from severe neck  
7 and back impairments described as “degenerative disc disease of the cervical spine,  
8 status post-fusion surgery and mild degenerative changes of lumbar spine.” AR  
9 18. The ALJ found that before her LDI, Plaintiff had “no significant problems  
10 with her vision.” AR 18-19.

11 Despite her impairments, the ALJ found that through her LDI, Plaintiff had  
12 the residual functional capacity (“RFC”) to do light work as defined in 20 C.F.R.  
13 § 404.1567(b) with some additional limitations, as follows:

14 [S]he can lift, carry, push, and pull up to 20 pounds occasionally, 10  
15 pounds frequently; sit up to six hours in an eight-hour workday; stand  
16 and/or walk up to three hours in an eight-hour workday; occasionally  
17 climb ramps and stairs; never climb ladders, ropes, or scaffolds; and  
18 occasionally balance, stoop, kneel[,] crouch, and crawl.

19 AR 19-20.

20 Based on this RFC and the VE’s testimony, the ALJ found that Plaintiff  
21 could perform the jobs of sewing machine operator (Dictionary of Occupational  
22 Titles [“DOT”] 787.685-046) or “Cashier II” (DOT 211.462-010). AR 23. The  
23 ALJ concluded that Plaintiff was not disabled from September 20, 1999, through  
24 her LDI of March 31, 2007. Id.

## 25 II.

### 26 ISSUES PRESENTED

27 Issue One: Whether the ALJ’s finding that Plaintiff can work as a sewing  
28 machine operator and Cashier II is supported by substantial evidence.



1 at a time with frequent lifting or carrying of objects weighing up to  
2 10 pounds. Even though the weight lifted in a particular light job  
3 may be very little, a job is in this category when it requires a good  
4 deal of walking or standing – the primary difference between  
5 sedentary and most light jobs. A job is also in this category when it  
6 involves sitting most of the time but with some pushing and pulling  
7 of arm-hand or leg-foot controls, which require greater exertion than  
8 in sedentary work; e.g., mattress sewing machine operator, motor-  
9 grader operator, and road-roller operator (skilled and semiskilled jobs  
10 in these particular instances). Relatively few unskilled light jobs are  
11 performed in a seated position. “Frequent” means occurring from  
12 one-third to two-thirds of the time. Since frequent lifting or carrying  
13 requires being on one’s feet up to two-thirds of a workday, the full  
14 range of light work requires standing or walking, off and on, for a  
15 total of approximately 6 hours of an 8-hour workday. Sitting may  
16 occur intermittently during the remaining time. The lifting  
17 requirement for the majority of light jobs can be accomplished with  
18 occasional, rather than frequent, stooping. Many unskilled light jobs  
19 are performed primarily in one location, with the ability to stand  
20 being more critical than the ability to walk. They require use of arms  
21 and hands to grasp and to hold and turn objects, and they generally do  
22 not require use of the fingers for fine activities to the extent required  
23 in much sedentary work.

24 SSR 83-10.

25 At the hearing, the ALJ asked the VE what jobs a hypothetical worker with  
26 Plaintiff’s RFC could do, as follows:

27 **ALJ:** [T]he next hypothetical individual, could work at the light  
28 range, 20 pounds occasionally, 10 pounds frequently. The sitting

1 would still be six hours out of an eight-hour work day, but the  
2 standing and walking would be three hours out of an eight-hour work  
3 day; could occasionally climb ramps and stairs, no climbing ladders,  
4 ropes, and scaffolds; occasionally balance, stoop, kneel, crouch, and  
5 crawl. Is there work for this individual?

6 **VE:** Yes. There would be some light, unskilled work. All that I  
7 mention will be light, SVP 2. Sewing machine operator, 787.685-  
8 046, 34,000 positions in the nation. Or cashier, Roman numeral II,  
9 211.462-010, with approximately 150,000 positions in the nation.  
10 But I'm going to erode it for 90 percent, allowing for that need for  
11 flexibility in sitting and standing. And after the erosion, there are  
12 approximately 15,000 positions in the nation. Types of positions I'd  
13 be considering would be ticket seller or cashier or cashier in a  
14 cafeteria. I don't believe there would be any other positions other  
15 than that. The other types of positions that afford flexibility in sitting  
16 and standing, I take the position that one needs to be able to stand and  
17 walk four out of eight [hours].

18 AR 67-68.

19 Neither the ALJ nor counsel for Plaintiff asked the VE about any perceived  
20 conflicts between her testimony and the DOT. AR 69-70.

## 21 **2. The VE Adequately Explained Any Conflict with the DOT.**

### 22 a. Sewing Machine Operator.

23 Per the above-cited definitions, not all light work requires the ability to stand  
24 or walk for six hours per day. Rather, the DOT also rates jobs as "light" when they  
25 involve "sitting most of the time but with some pushing and pulling of arm-hand or  
26 leg-foot controls, which require greater exertion than in sedentary work." SSR 83-  
27 10. The specific example given is that of a mattress sewing machine operator. Id.  
28 Plaintiff points to nothing in the DOT's description of the duties of a sewing

1 machine operator that suggests that its “light” rating is due to the need to walk or  
2 stand more than three hours per day versus the use of foot pedals. Thus, as to the  
3 sewing machine operator job, Plaintiff has not demonstrated a conflict between the  
4 VE’s testimony and the DOT.

5 In her reply, Plaintiff concedes that there is no conflict as to the sewing  
6 machine operator job, but she argues that the ability to do one occupation is not  
7 enough to find her not disabled, citing Lounsbury v. Barnhart, 468 F.3d 1111,  
8 1117 (9th Cir. 2006). (JS at 13.) Lounsbury involved the application of Grid  
9 Rule 202.07 to a claimant of advanced age with transferrable skills. Lounsbury,  
10 468 F.3d at 1116-17. Plaintiff has failed to develop any Lounsbury-based  
11 argument by failing to discuss that case’s facts and holding, identify which Grid  
12 Rule she contends applies to her, and explain why she is (or is not) similarly  
13 situated to claimant Lounsbury. See DeBerry v. Comm’r of SSA, 352 Fed. App’x  
14 173, 176 (9th Cir. 2009) (declining to consider claim that ALJ failed properly to  
15 apply Social Security law where claimant did not argue the issue “with any  
16 specificity” in her opening brief and failed to cite “any evidence or legal authority”  
17 in support of her position); see generally Indep. Towers of Washington v.  
18 Washington, 350 F.3d 925, 929 (9th Cir. 2003) (party’s “bare assertion of an issue”  
19 in briefing “does not preserve a claim” on appeal). Indeed, district courts regularly  
20 affirm where ALJs found not disabled claimants who could do a single job with  
21 fewer than 35,000 positions in the nation, rendering any error on other jobs  
22 harmless. See, e.g., Purser v. Colvin, No. 3:15-CV-05845-KLS, 2016 WL  
23 3356193, at \*4 (W.D. Wash. June 17, 2016) (“[T]he remaining 28,970 jobs in the  
24 national economy . . . for the bench hand occupation is sufficient to satisfy the  
25 ALJ’s findings at step five.”); Davis v. Colvin, No. EDCV 13-464-OP, 2014 WL  
26 358407, at \*10 (C.D. Cal. Jan. 30, 2014) (“Thus, in this case, the Court finds no  
27 error in the ALJ’s finding that 25,200 jobs [of appointment clerk] in the national  
28 economy constitutes a significant number of jobs.”).

1                   b. Cashier II.

2                   As noted above, even if the ALJ erred with respect to the Cashier II job, that  
3 error would be harmless. But Plaintiff has not identified any such error. The VE  
4 specifically eroded the number of available Cashier II jobs to account for a  
5 restriction to walking and standing only three hours per day. AR 67-68. Thus, the  
6 VE accounted for the discrepancy between her opinion and the DOT's rating of  
7 this job as light work.

8                   To the extent that Plaintiff argues the VE "addressed the sit stand option but  
9 not the limitation to three hours [of standing and walking]," Plaintiff takes the  
10 VE's words out of context. (JS at 8.) The ALJ's hypothetical did not include a  
11 sit/stand option, but rather a limitation to standing and walking for only three hours  
12 per day. AR 67. In reading the VE's testimony as a whole, it is evident that the  
13 VE's reference to "flexibility in sitting and standing" addressed standing and  
14 walking limitations, because she then said, "I take the position that one needs to be  
15 able to stand and walk four out of eight [hours]" to explain why other positions  
16 were unavailable. AR 68.

17                   Plaintiff also argues that the VE eroded the number of available Cashier II  
18 jobs by 90% "based upon standing only four hours of the day, not three." (JS at  
19 13.) This again misunderstands the VE's testimony. The VE testified that to  
20 perform "other" unskilled, light work (i.e., jobs *other* than that of cashier), one  
21 would need to be able to stand or walk at least four hours per day.

22                   **B. ISSUE TWO: Retroactive "Freeze" Due to Blindness.**

23                   The SSA publishes the Program Operations Manual System ("POMS"), a set  
24 of internal guidelines intended for adjudicators at the initial or reconsideration  
25 levels. Lockwood v. Comm'r Soc. Sec. Admin., 616 F.3d 1068, 1073 (9th Cir.  
26 2010). The POMS "may be entitled to respect ... to the extent it provides a  
27 persuasive interpretation of an ambiguous regulation," but the POMS "does not  
28 impose judicially enforceable duties on either this court or the ALJ." Kennedy v.

1 Colvin, 738 F.3d 1172, 1177-78 (9th Cir. 2013).

2 Plaintiff cites the POMS DI 25501.380 to argue that if she became blind  
3 after her LDI but before the ALJ’s decision, then she is entitled to “freeze” her  
4 earnings record (and preserve her insured status) through the date of the ALJ’s  
5 decision. (JS at 14-15.) She argues that her vision impairment, which worsened  
6 from needing glasses in 2007 to being legally blind in 2017, tolled her LDI, such  
7 that the ALJ was required to assess its severity after March 31, 2007. (JS at 16.)

8 **1. Summary of Relevant Evidence.**

9 Plaintiff testified that she had cataracts due to diabetes. AR 51. In 2007, she  
10 could read using glasses. Id. In 2014, a medical source indicated “no decrease in  
11 vision.” AR 439. In 2015, Plaintiff could still drive. AR 182.

12 The ALJ determined that Plaintiff had “no significant problems with her  
13 vision” before March 2007 (AR 19), and Plaintiff agrees that the ALJ’s  
14 “assessment of [her] vision before 2007 is fair.” (JS at 15.)

15 In the JS, Plaintiff discusses evidence of treatment for vision impairments in  
16 2015, 2016, and 2017. (Id.) Plaintiff cites records from two medical sources in  
17 June 2017 who stated that Plaintiff is legally blind. Id., citing AR 1172-73.

18 **2. Plaintiff Cannot Rely on the POMS to Show Legal Error.**

19 Per the above-cited authorities, the POMS does not confer any legal rights  
20 on DIB claimants. Plaintiff has failed to cite any applicable regulation that is  
21 allegedly ambiguous but was interpreted more clearly by POMS DI 25501.380.  
22 Because Plaintiff has failed to cite any supporting authority, she fails to  
23 demonstrate legal error.

24 Even if the Court were to consider her POMS-based argument, Plaintiff  
25 failed to cite POMS DI 25501.380 in its entirety<sup>3</sup> or other relevant POMS

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26  
27 <sup>3</sup> For example, POMS DI 25501.380 states explicitly that to establish the  
28 established onset date of statutory blindness, “a claimant must meet insured status requirements at the time the medical evidence supports a finding of statutory



1 provisions and explain their application to the facts of her case. For example,  
2 POMS DI 26005.001 talks about DIB claimants needing to be “statutorily blind  
3 before he or she stopped working.” The premise of Plaintiff’s argument (i.e., that  
4 post-LDI blindness retroactively creates indefinite LDI tolling) seems inconsistent  
5 with the concept of a freeze (which would merely preserve the status quo) and the  
6 orderly administration of the DIB program.<sup>4</sup>

### 7 **C. ISSUE THREE: New Evidence.**

#### 8 **1. Factual Background.**

9 At the hearing, Plaintiff’s counsel represented that he was waiting to receive  
10 additional records from Pacific Eye Institute. AR 33. The ALJ noted that a one-  
11 page prescription from Pacific Eye Institute had been provided at the hearing and it  
12 would be part of the record. *Id.*, referring to AR 1172. The ALJ agreed to leave  
13 the record open for two weeks to receive additional records. AR 34.

14 The ALJ’s decision notes that Plaintiff “submitted or informed [the ALJ]  
15 about additional written evidence from Pacific Eye Institute less than five business  
16 days before the scheduled hearing date.” AR 15. The ALJ found no good cause  
17 for Plaintiff’s failure to submit this evidence earlier. *Id.* The ALJ further noted  
18  
19 blindness.”

20 <sup>4</sup> Plaintiff incorrectly assumes that a “freeze is not needed when one meets  
21 the listing level of severity before the DLI” (and therefore the “freeze” language  
22 must apply to claimants who meet the statutory blindness listing *after* the DLI).  
23 (JS at 20.) According to the POM, the purpose of a freeze is: (1) “To eliminate the  
24 years of low earnings (due to a worker’s disability) from the computation of  
25 benefits and to preserve the worker’s insured status.”; (2) “Insured status is frozen  
26 to protect future rights and benefits.”; (3) “When an onset is established several  
27 years in the past, it is the DIB freeze that preserves insured status and allows  
28 payment to start based on a recent claim.”; and (4) “Any year wholly or partially in  
a period of DIB is excluded from the computation (not counted among elapsed  
years). This preserves a benefit based on earnings at the time disability began.”  
POM DI 10105.005A.

1 that the Pacific Eye Institute records pertained to treatment in 2017 or later, while  
2 Plaintiff's LDI was March 31, 2007. AR 16. As a result, those records had "little  
3 probative value," and the ALJ did not make them part of the AR. Id. Plaintiff's  
4 request for review by the Appeals Council mentioned neither new evidence nor the  
5 ALJ's decision not to exhibit the Pacific Eye Institute records. AR 152.

6 Now, Plaintiff submits approximately 40 pages of records from the Pacific  
7 Eye Institute. (Dkt. 20-1.) Insofar as they are legible, they date from 2016 or later.  
8 (Id.; see also JS at 24 [discussing records].) Plaintiff contends that she thought  
9 they were part of the AR, and she was unaware that they were not until so  
10 informed by her new counsel. (JS at 23-24.) She contends that the records are  
11 relevant to show that she developed blindness before the ALJ's decision, thereby  
12 extending her LDI, per Issue Two. (JS at 24.)

## 13 **2. Remand Is Not Required.**

14 The Court has the authority to remand this matter for further proceedings  
15 upon the presentation of new and material evidence for which good cause exists for  
16 the lack of earlier presentation. 40 U.S.C. § 405(g).

17 Plaintiff fails to demonstrate good cause for failing to submit post-2016  
18 documents before her appeal to the district court. The ALJ and her attorney  
19 specifically discussed records from the Pacific Eye Institute at the hearing on  
20 October 2, 2017. AR 33. Counsel knew that the administrative record would only  
21 be held open for two weeks. AR 34. Plaintiff has not explained why counsel was  
22 unable to obtain and submit then-existing records within those two weeks or  
23 request a further extension.

24 Even if Plaintiff's or counsel's error constituted good cause, she has failed to  
25 demonstrate materiality. As discussed in Issue Two, the assertion that Plaintiff  
26 became legally blind years after her LDI did not extend her 2007 LDI to the ALJ's  
27 2018 decision. Thus, medical records describing Plaintiff's vision impairments in  
28 2016, 2017, and 2018 are immaterial to the determination of Plaintiff's DIB

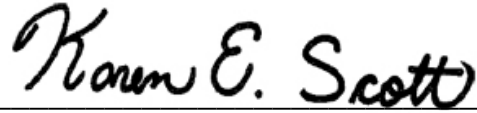
1 application.

2 **IV.**

3 **CONCLUSION**

4 For the reasons stated above, IT IS ORDERED that judgment shall be  
5 entered AFFIRMING the decision of the Commissioner.

6 DATED: January 28, 2020

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KAREN E. SCOTT

9 United States Magistrate Judge

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