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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LACLAIRE DUFF,	)	Case No. SACV 12-157-JEM
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	REVERSING DECISION OF
	)	COMMISSIONER AND REMANDING
MICHAEL J. ASTRUE,	)	FOR FURTHER PROCEEDINGS
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

**PROCEEDINGS**

On February 2, 2012, Laclaire Duff (“Plaintiff or Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Supplemental Security Income (“SSI”) disability benefits. The Commissioner filed an Answer on May 22, 2012. On August 14, 2012, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision must be reversed and the case remanded for further proceedings in accordance with this Memorandum and Order and with law.

1 **BACKGROUND**

2 Plaintiff is a 49 year old female who applied for Supplemental Security Income benefits  
3 on June 30, 2008, alleging disability beginning November 14, 2006. (AR 9.) Plaintiff has not  
4 engaged in substantial gainful activity since June 30, 2008, the date of the application. (AR 11.)

5 Plaintiff's claim was denied initially on September 22, 2008. (AR 9.) Plaintiff filed a  
6 timely request for hearing, which was held before Administrative Law Judge ("ALJ") Wendy  
7 Weber on March 10, 2010, in Orange, California. (AR 9, 251-72.) Claimant appeared and  
8 testified at the hearing, and was represented by counsel. (AR 9.) Medical expert Arnold  
9 Ostrow, M.D., and vocational expert ("VE") Joseph H. Torres, also appeared and testified at the  
10 hearing. (AR 9.) The ALJ issued an unfavorable decision on April 9, 2010. (AR 9-19.) The  
11 Appeals Council denied review on December 8, 2011. (AR 2-4.)

12 **DISPUTED ISSUES**

13 As reflected in the Joint Stipulation, Plaintiff raises only the following disputed issue as  
14 the basis for reversal and remand:

- 15 1. Whether the ALJ properly determined that Plaintiff could perform alternative work  
16 activity.

17 **STANDARD OF REVIEW**

18 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
19 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
20 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846  
21 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
22 based on the proper legal standards).

23 Substantial evidence means "more than a mere scintilla,' but less than a  
24 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.  
25 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is "such relevant evidence as a  
26 reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at  
27 401 (internal quotation marks and citation omitted).

1 This Court must review the record as a whole and consider adverse as well as  
2 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where  
3 evidence is susceptible to more than one rational interpretation, the ALJ's decision must be  
4 upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).  
5 "However, a reviewing court must consider the entire record as a whole and may not affirm  
6 simply by isolating a 'specific quantum of supporting evidence.'" Robbins, 466 F.3d at 882  
7 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495  
8 F.3d 625, 630 (9th Cir. 2007).

### 9 THE SEQUENTIAL EVALUATION

10 The Social Security Act defines disability as the "inability to engage in any substantial  
11 gainful activity by reason of any medically determinable physical or mental impairment which  
12 can be expected to result in death or . . . can be expected to last for a continuous period of not  
13 less than 12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has  
14 established a five-step sequential process to determine whether a claimant is disabled. 20  
15 C.F.R. §§ 404.1520, 416.920.

16 The first step is to determine whether the claimant is presently engaging in substantial  
17 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging  
18 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,  
19 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or  
20 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not  
21 significantly limit the claimant's ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.  
22 1996). Third, the ALJ must determine whether the impairment is listed, or equivalent to an  
23 impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d  
24 at 746. If the impediment meets or equals one of the listed impairments, the claimant is  
25 presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141. Fourth, the ALJ must determine  
26 whether the impairment prevents the claimant from doing past relevant work. Pinto v.  
27 Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four determination,  
28

1 the ALJ first must determine the claimant's residual functional capacity ("RFC").<sup>1</sup> 20 C.F.R. §  
2 416.920(e). The RFC must consider all of the claimant's impairments, including those that are  
3 not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If  
4 the claimant cannot perform his or her past relevant work or has no past relevant work, the ALJ  
5 proceeds to the fifth step and must determine whether the impairment prevents the claimant  
6 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th  
7 Cir. 2000).

8 The claimant bears the burden of proving steps one through four, consistent with the  
9 general rule that at all times the burden is on the claimant to establish his or her entitlement to  
10 benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the claimant, the  
11 burden shifts to the Commissioner to show that the claimant may perform other gainful activity.  
12 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a  
13 claimant is not disabled at step five, the Commissioner must provide evidence demonstrating  
14 that other work exists in significant numbers in the national economy that the claimant can do,  
15 given his or her RFC, age, education, and work experience. 20 C.F.R. § 416.912(g). If the  
16 Commissioner cannot meet this burden, then the claimant is disabled and entitled to benefits.

17 Id.

## 18 THE ALJ DECISION

19 In this case, the ALJ determined at step one of the sequential process that Plaintiff has  
20 not engaged in substantial gainful activity since June 30, 2008, the application date. (AR 11.)

21 At step two, the ALJ determined that Plaintiff has the following combination of medically  
22 determinable severe impairments: myofascial neck and back pain with underlying spondylosis;  
23 obesity; L4-5 bilateral stenosis; L5-S1 stenosis; non-insulin dependent diabetes mellitus;  
24 asthma; cervical degenerative disc disease; status post-poly substance abuse, in remission;  
25 bipolar disorder; and depressive disorder. (AR 11. )

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27 <sup>1</sup> Residual functional capacity ("RFC") is what one "can still do despite [his or her] limitations"  
28 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1),  
416.945(a)(1).

1 At step three, the ALJ determined that Plaintiff does not have an impairment or  
2 combination of impairments that meets or medically equals one of the listed impairments. (AR  
3 12-14.)

4 The ALJ then found that the Plaintiff had the RFC to perform light work, except for the  
5 following limitations:

6 Plaintiff can lift and carry 20 pounds occasionally, 10 pounds frequently;  
7 stand and walk for 6 hours; sit for 6 hours; occasionally bend, stoop, crouch,  
8 and climb stairs; no use of upper extremities for above the shoulder work; no  
9 foot pedals; occasional use of lower extremities as guides; no ladders, ropes  
10 or scaffolds; no unprotected heights; avoid heavy air pollution; avoid extreme  
11 heat and cold; simple repetitive tasks; and no rapid assembly or quota work.

12 (AR 15-17.)

13 At step four, the ALJ found that Plaintiff is unable to perform any past relevant work as a  
14 driver. (AR 17.) The ALJ, however, found that considering Plaintiff's age, education, work  
15 experience, and RFC, there are jobs that exist in significant numbers in the national economy  
16 that Plaintiff can perform, including packer, bench assembler, and assembler of small products.

17 (AR 18-19.)

18 Consequently, the ALJ concluded that Claimant is not disabled within the meaning of the  
19 Social Security Act. (AR 19.)

## 20 DISCUSSION

21 Based on the VE's testimony, the ALJ determined at step five of the sequential process  
22 that there are jobs that exist in significant numbers in the national economy that Plaintiff can  
23 perform. (AR 18-19.) The VE testified that a person with Plaintiff's RFC could perform three  
24 light exertional level unskilled jobs in the national economy: packer, bench assembler, and  
25 small products assembler. (AR 18-19.) The VE testified (AR 267) that her testimony was  
26 consistent with the Dictionary of Occupational Titles ("DOT"), and the ALJ so found. (AR 19.)

1 Plaintiff challenges the ALJ's step five determination, asserting that the VE's testimony  
2 conflicts with the DOT and the ALJ's RFC and that the VE failed to provide an explanation for  
3 those conflicts. The Court agrees.

#### 4 **A. Relevant Law**

5 The Commissioner bears the burden at step five of the sequential process to prove that  
6 Plaintiff can perform other work in the national economy, given his RFC, age, education and  
7 work experience. 20 C.F.R. § 416-912(g); Silveira v. Apfel, 204 F.3d 1257, 1261 n.14 (9th Cir.  
8 2000). ALJ's routinely rely on DICOT "in evaluating whether the claimant is able to perform  
9 other work in the national economy." Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990)  
10 (citations omitted); 20 C.F.R. §§ 404.1566(d)(1), 416.966(d)(1). DICOT raises a presumption  
11 as to job classification requirements. Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1998).  
12 An ALJ may not rely on a vocational expert's testimony regarding the requirements of a  
13 particular job without first inquiring whether the testimony conflicts with DICOT. Massachi v.  
14 Astrue, 486 F.3d 1149, 1152-53 (9th Cir. 2007) (citing SSR 00-4p ("the adjudicator has an  
15 affirmative responsibility to ask about any possible conflict between that [vocational expert]  
16 evidence and information provided in the [Dictionary of Occupational Titles]")). In order to  
17 accept vocational expert testimony that contradicts DICOT, "the record must contain  
18 'persuasive evidence to support the deviation.'" Pinto, 249 F.3d at 846 (quoting Johnson, 60  
19 F.3d at 1435). The ALJ must obtain a reasonable explanation for the variance and then must  
20 decide whether to rely on the VE or DICOT. See Pinto, 249 F.3d at 847. Failure to do so,  
21 however, can be harmless error where there is no actual conflict or the VE provides sufficient  
22 support to justify any conflicts with or variation from DICOT. Massachi, 486 F.3d at 1154 n.19.

#### 23 **B. Analysis**

24 The DOT descriptions of the jobs identified by the vocational expert do not indicate an  
25 explicit requirement to reach over the shoulder. The packer occupation (DOT 290.687-166)  
26 requires constant "reaching," which means 2/3 or more of the time. The bench assembler (DOT  
27 706.694-042) and small products assembler (DOT 706.684-022) jobs require frequent  
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1 “reaching,” which means 1/3 to 2/3 of the time. “Reaching” is not defined in the DOT job  
2 descriptions.

3 Plaintiff observes that the Department of Labor describes reaching as “extending hand(s)  
4 and arm(s) in any direction.” See The Revised Handbook for Analyzing Jobs (“HAJ”), 1991, pp.  
5 12:6. The Commissioner notes that a companion publication of the DOT also defines reaching  
6 as “extending hand(s) and arm(s) in any direction.” See Selected Characteristics of  
7 Occupations Defined in the Revised Dictionary of Occupational Titles (“SCO”), App. C (1993).  
8 The Commissioner, moreover, has defined reaching as “extending the hands and arms in any  
9 direction.” SSR 85-15, 1985 WL 56857, at \*7.

10 The Commissioner argues that extending hands and arms in any direction does not  
11 mean that the reaching required for the three jobs identified by the VE involve reaching at or  
12 about the shoulder level. (JS 15.) The Commissioner cites in support of his argument Fuller v.  
13 Astrue, 2009 WL 4980273, at \*2-\*4 (C.D. Cal. Dec. 15, 2009), which held that because DOT  
14 does not define reaching as reaching above the shoulder, there was no apparent conflict  
15 between the VE’s finding and the DOT. See also Johnson v. Astrue, 2011 WL 6132255, at \*4  
16 (C.D. Cal. Dec. 9, 2011).

17 As the Commissioner acknowledges, however, authority in this district is in conflict. In  
18 Mkhitaryan v. Astrue, 2010 WL 1752162, at \*3 (C. D. Cal. April 27, 2010), the Court there held  
19 that the SCO’s definition of reaching as extending the hands and arms “in any direction” plainly  
20 encompasses above the shoulder reaching. “Any direction” would include upward reaching  
21 above the shoulder. Thus, there was an apparent conflict between the VE’s testimony and the  
22 DOT for which no explanation was offered. Id.; see also Richardson v. Astrue, 2012 WL  
23 1425130, at \*3-\*5 (C.D. Cal. April 25, 2012) (relying on Mkhitaryan, the Court noted that SSR  
24 00-4p explicitly requires the ALJ to determine whether a conflict exists between the VE’s  
25 testimony and DOT); Bermudez v. Astrue, 2011 WL 997290, at \*3 (C.D. Cal. March 21, 2011)  
26 (also relying on Mkhitaryan).

27 Richardson and Bermudez rely heavily on the Seventh Circuit decision in Prochaska v.  
28 Barnhart, 454 F.3d 731, 736 (7th Cir. 2006), which stated:

1 It is not clear to us whether the DOT's requirements include reaching  
2 above shoulder level, and this is exactly the sort of inconsistency the ALJ  
3 should have resolved with the expert's help. We cannot determine, based  
4 on the record, whether the expert's testimony regarding stooping and  
5 reaching was actually inconsistent with the DOT. That determination should  
6 have been made by the ALJ in the first instance . . . here there is an  
7 apparent unresolved inconsistency in the evidence that should have been  
8 resolved.

9 This language of Prochaska was cited by the Ninth Circuit in Massachi, 486 F.3d at 1153 n.13.

10 The Court finds the reasoning of Mkhitaryan and Prochaska persuasive.

11 Here, the ALJ inquired of the VE whether his testimony was consistent "with the DOT  
12 and its companion publication." (AR 270.) The VE's testimony in the affirmative was incorrect.  
13 There was an apparent conflict that the ALJ should have identified and inquired further of the  
14 VE for an explanation of the apparent unresolved inconsistency. The failure to do so was error,  
15 requiring reversal and remand for further proceedings.

16 **ORDER**

17 IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is  
18 REVERSED and REMANDED for further proceedings.

19 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

20  
21 DATED: August 28, 2012

22 /s/ John E. McDermott  
23 JOHN E. MCDERMOTT  
24 UNITED STATES MAGISTRATE JUDGE  
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