

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WILLARD DOWNEY,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

1:09-cv-0812 SKO

**ORDER REGARDING PLAINTIFF'S
SOCIAL SECURITY COMPLAINT**

(Doc. 1)

BACKGROUND

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (the "Commissioner" or "Defendant") denying his application for disability insurance benefits ("DIB") pursuant to Title II of the Social Security Act. 42 U.S.C. § 405(g). The matter is currently before the Court on the parties' briefs, which were submitted, without oral argument, to the Honorable Sheila K. Oberto, United States Magistrate Judge.¹

¹ The parties consented to the jurisdiction of the United States Magistrate Judge. (Docs. 9, 12.) On April 7, 2010, the action was reassigned to the Honorable Sheila K. Oberto for all purposes. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; *see also* L.R. 301, 305.

1 **FACTUAL BACKGROUND**

2 Plaintiff was born in 1956, has a ninth-grade education, and previously worked as a roofer.
3 (Administrative Record ("AR") 23, 25, 26.) Plaintiff stopped working because of an "aortic
4 mechanic valve replacement." (AR 26.)

5 On October 11, 2005, William Holmes, M.D., an orthopedic surgeon, reported that Plaintiff
6 complained of right shoulder pain exacerbated by overhead lifting and repetitive reaching and
7 grasping. Plaintiff took occasional Vicodin for discomfort. (AR 183.) On January 19, 2006,
8 Plaintiff reported to Dr. Holmes that his shoulders bothered him with overhead lifting, reaching, and
9 pulling. (AR 177.)

10 On March 13, 2006, Plaintiff filed an application for DIB, alleging disability beginning
11 March 10, 2006, due to heart valve replacement and shoulder pain. (AR 9, 11, 97.)

12 On June 1, 2006, D.D. Sharbaugh, a state agency medical consultant, assessed Plaintiff's
13 physical residual functional capacity ("RFC"). (AR 149-56.) The consultant opined that Plaintiff
14 could (1) occasionally lift and/or carry up to 50 pounds and frequently up to 25 pounds; (2) stand
15 and/or walk for a total of about six hours in an eight-hour workday; (3) sit for about six hours in an
16 eight-hour workday; and (4) perform limited pushing and/or pulling with the upper extremities. (AR
17 150.) Plaintiff was "limited to bilateral frequent overhead work." (AR 152.) Plaintiff had no
18 postural, visual, communicative, or environmental limitations. (AR 151-53.)

19 On July 2, 2006, Dr. Holmes completed a questionnaire indicating that Plaintiff had an
20 unlimited ability to sit, stand, and walk. (AR 198.) Plaintiff could lift "20 to 30 pounds frequently"
21 and "15 pounds occasionally" during the workday. (AR 199.) Plaintiff could occasionally reach,
22 handle, feel, push, pull, and grasp. (AR 199.)

23 On July 11, 2006, Robert Master, M.D., a cardiologist, completed a questionnaire indicating
24 that Plaintiff should not work on a roof. (AR 163.) Dr. Master opined that Plaintiff could sit, stand,
25 and walk for eight hours in an eight-hour workday, and he did not need to lie down or elevate his
26 legs (AR 163), and could reach, handle, feel, push, pull, and grasp for eight hours a day (AR 164).

1 The Commissioner denied Plaintiff's application initially and again on reconsideration;
2 consequently, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR 47-
3 52, 61-65.) On January 15, 2008, ALJ Sandra Rogers held a hearing where Plaintiff testified that
4 he could only sit for 20 minutes, stand for 10 minutes, and lift up to ten pounds. (AR 32.)

5 The Social Security Administration has taken administrative notice of the Dictionary of
6 Occupational Titles (the "DOT"), which is published by the Department of Labor and gives detailed
7 physical requirements for a variety of jobs. *Massachi v. Astrue*, 486 F.3d 1149, 1152 n.8 (9th Cir.
8 2007); *see also* 20 C.F.R. § 404.1566(d)(1). A vocational expert ("VE") testified that, according to
9 the DOT, Plaintiff's past work as a roofer was medium² with no transferable skills to light or
10 sedentary jobs. (AR 38.) A hypothetical person of the same age, education, and work experience
11 as Plaintiff could not perform Plaintiff's past relevant work if that person could at most lift 20 to 30
12 pounds occasionally and 15 pounds frequently, and could occasionally reach, handle, feel, push, pull,
13 and grasp. (AR 39.) Such a person, however, could perform the light, unskilled jobs of parking lot
14 attendant and sales attendant. (AR 40-41.)

15 The VE further testified that 15,200 unskilled parking lot and sales attendant jobs
16 accommodated the occasional use of the upper extremities. The VE further explained that he had
17 eroded the total available jobs by 50% to account for Plaintiff's non-exertional limitations that
18 prevented Plaintiff from using his hands more than occasionally. The VE testified that the reduced
19 number of parking lot and sales attendant jobs accommodated "limited arm usage" in that the jobs
20 "fit the hypothetical of light work with only occasional hand and arm usage." (AR 40, 41.) The ALJ
21 did not, however, ask the VE the basis for his testimony or whether his testimony was consistent
22 with the DOT.

23 On June 11, 2008, the ALJ issued a decision, finding Plaintiff not disabled since March 10,
24 2006. (AR 6-19.) Specifically, the ALJ found that Plaintiff (1) had not engaged in substantial
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26 ² "Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects
27 weighing up to 25 pounds. If someone can do medium work, [the Commissioner determines] that he or she can also do
sedentary and light work." 20 C.F.R. § 404.1567(c).

1 gainful activity since the alleged onset date of March 10, 2006; (2) has an impairment or a
2 combination of impairments that is considered "severe" based on the requirements in the
3 Regulations; (3) does not have an impairment or combination of impairments that meets or equals
4 one of the impairments set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1; (4) could not perform
5 his past relevant work; and (5) could perform other work in the national economy. (AR 11-18.)
6 Plaintiff sought review of this decision before the Appeals Council. On March 6, 2009, the Appeals
7 Council denied review. (AR 1-3.) Therefore, the ALJ's decision became the final decision of the
8 Commissioner. 20 C.F.R. § 404.981.

9 On May 5, 2009, Plaintiff filed a complaint before this Court seeking review of the ALJ's
10 decision. Plaintiff argues that the ALJ erred in relying on the VE's testimony that conflicted with
11 the DOT and in failing to comply with Social Security Rulings ("SSRs") 83-12 and 83-14.³

12 **SCOPE OF REVIEW**

13 The ALJ's decision denying benefits "will be disturbed only if that decision is not supported
14 by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
15 1999). In reviewing the Commissioner's decision, the Court may not substitute its judgment for that
16 of the Commissioner. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996). Instead, the Court must
17 determine whether the Commissioner applied the proper legal standards and whether substantial
18 evidence exists in the record to support the Commissioner's findings. *See Lewis v. Astrue*, 498 F.3d
19 909, 911 (9th Cir. 2007).

20 "Substantial evidence is more than a mere scintilla but less than a preponderance." *Ryan v.*
21 *Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). "Substantial evidence" means "such
22 relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
23 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (*quoting Consol. Edison Co. of N.Y. v. NLRB*, 305

25 ³ SSRs are "final opinions and orders and statements of policy and interpretations" that the Social Security
26 Administration has adopted. 20 C.F.R. § 402.35(b)(1). Once published, these rulings are binding precedent upon ALJs.
27 *Heckler v. Edwards*, 465 U.S. 870, 873 n.3 (1984); *Gatliff v. Comm'r of Soc. Sec. Admin.*, 172 F.3d 690, 692 n.2 (9th
28 Cir. 1999).

1 U.S. 197, 229 (1938)). The Court "must consider the entire record as a whole, weighing both the
2 evidence that supports and the evidence that detracts from the Commissioner's conclusion, and may
3 not affirm simply by isolating a specific quantum of supporting evidence." *Lingenfelter v. Astrue*,
4 504 F.3d 1028, 1035 (9th Cir. 2007) (citation and internal quotation marks omitted).

5 APPLICABLE LAW

6 An individual is considered disabled for purposes of disability benefits if he is unable to
7 engage in any substantial, gainful activity by reason of any medically determinable physical or
8 mental impairment that can be expected to result in death or that has lasted, or can be expected to
9 last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A),
10 1382c(a)(3)(A); *see also Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The impairment or
11 impairments must result from anatomical, physiological, or psychological abnormalities that are
12 demonstrable by medically accepted clinical and laboratory diagnostic techniques and must be of
13 such severity that the claimant is not only unable to do his previous work, but cannot, considering
14 his age, education, and work experience, engage in any other kind of substantial, gainful work that
15 exists in the national economy. 42 U.S.C. §§ 423(d)(2)-(3), 1382c(a)(3)(B), (D).

16 The regulations provide that the ALJ must undertake a specific five-step sequential analysis
17 in the process of evaluating a disability. In the First Step, the ALJ must determine whether the
18 claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).
19 If not, in the Second Step, the ALJ must determine whether the claimant has a severe impairment
20 or a combination of impairments significantly limiting her from performing basic work activities.
21 *Id.* §§ 404.1520(c), 416.920(c). If so, in the Third Step, the ALJ must determine whether the
22 claimant has a severe impairment or combination of impairments that meets or equals the
23 requirements of the Listing of Impairments ("Listing"), 20 C.F.R. 404, Subpart P, App. 1. *Id.*
24 §§ 404.1520(d), 416.920(d). If not, in the Fourth Step, the ALJ must determine whether the claimant
25 has sufficient RFC despite the impairment or various limitations to perform her past work. *Id.*

1 §§ 404.1520(f), 416.920(f).⁴ If not, in Step Five, the burden shifts to the Commissioner to show that
2 the claimant can perform other work that exists in significant numbers in the national economy. *Id.*
3 §§ 404.1520(g), 416.920(g). If a claimant is found to be disabled or not disabled at any step in the
4 sequence, there is no need to consider subsequent steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99
5 (9th Cir. 1999); 20 C.F.R. §§ 404.1520, 416.920.

6 DISCUSSION

7 **A. The ALJ Improperly Relied on the Testimony of the Vocational Expert**

8 Plaintiff contends that the ALJ erred in failing to inquire whether the VE's testimony
9 conflicted with the DOT. Plaintiff further asserts that the VE's testimony did, in fact, conflict with
10 the DOT and that the conflict was not sufficiently addressed by the ALJ or the VE. Defendant
11 maintains, on the other hand, that the VE explained the conflict and that the ALJ's error in failing
12 to ask the VE about any conflict between the VE's testimony and the DOT was harmless.

13 As noted above, a VE testified that Plaintiff's past relevant work as a roofer was medium with
14 no transferable skills to light or sedentary jobs. (AR 38.) The ALJ found Plaintiff to have the RFC
15 to perform light work except that Plaintiff could only occasionally reach, handle, feel, push, pull, and
16 grasp. (AR 12.) Plaintiff could not work on a roof. (AR 12.) The VE testified that a hypothetical
17 person of the same age, education, and work experience as Plaintiff could not perform Plaintiff's past
18 relevant work if that person could at most lift 20 to 30 pounds occasionally and 15 pounds
19 frequently, and could occasionally reach, handle, feel, push, pull, and grasp. (AR 39.) Such a
20 person, however, could perform the light, unskilled jobs of parking lot attendant and sales attendant.
21 (AR 40-41.)

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24 ⁴ RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in
25 a work setting on a regular and continuing basis of 8 hours a day, for 5 days a week, or an equivalent work schedule.
26 SSR 96-8p. The RFC assessment considers only functional limitations and restrictions that result from an individual's
27 medically determinable impairment or combination of impairments. *Id.* "In determining a claimant's RFC, an ALJ must
consider all relevant evidence in the record including, *inter alia*, medical records, lay evidence, and 'the effects of
symptoms, including pain, that are reasonably attributed to a medically determinable impairment.'" *Robbins v. Soc. Sec.*
Admin., 466 F.3d 880, 883 (9th Cir. 2006).

1 The VE further testified that, in light of Plaintiff's limitation of occasional hand usage, the
2 availability of these parking lot and sales attendant jobs would be eroded, or reduced, by 50% to a
3 total of 4,200 parking lot attendant jobs and 11,000 sales attendant jobs. (AR 40-41.) As noted
4 above, the ALJ did not ask the VE whether his testimony was consistent with the DOT.

5 The Social Security Administration relies "primarily on the DOT Occupational
6 evidence provided by a VE . . . generally should be consistent with the occupational information
7 supplied by the DOT." SSR 00-4p, 2000 WL 1898704, at *2. "Neither the DOT nor the
8 VE . . . evidence automatically 'trumps' when there is a conflict." *Id.* "When a VE . . . provides
9 evidence about the requirements of a job or occupation, the adjudicator has an affirmative
10 responsibility to ask about any possible conflict between that VE . . . evidence and information
11 provided in the DOT." *Id.* at *4. In such situations, the adjudicator "will [a]sk the VE . . . if the
12 evidence he or she has provided conflicts with information provided in the DOT." *Id.* "If the
13 VE's . . . evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable
14 explanation for the apparent conflict." *Id.* In view of the requirements of SSR 00-4p, an ALJ may
15 not rely on a VE's testimony about the requirements of a particular job without first inquiring
16 whether the testimony conflicts with the DOT and whether there is a reasonable explanation for any
17 deviation. *Massachi*, 486 F.3d at 1152-53. The failure to do so may be harmless where there is no
18 conflict or where the VE provides sufficient support justifying any deviations. *See id.* at 1154 n.19.

19 According to the DOT, the jobs of parking lot attendant and sales attendant require frequent
20 reaching and handling. *See* 1991 WL 687865; 1991 WL 672643. Because the ALJ found that
21 Plaintiff could reach and handle only occasionally, Plaintiff could not perform these jobs as
22 identified in the DOT. In this case, the VE testified that, in view of Plaintiff's limitation of
23 occasional hand usage, the number of parking lot and sales attendant jobs would be eroded by about
24 half, i.e., that there were 4,200 parking lot attendant jobs and 11,000 sales attendant jobs that
25 Plaintiff could perform. (AR 39-41.) The ALJ, however, did not ask the VE the basis for this
26 testimony or whether the testimony conflicted with the DOT. Nonetheless, the ALJ ultimately
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1 adopted the VE's testimony in her decision which stated: "Pursuant to SSR 00-4p, the vocational
2 expert's testimony is consistent with the information contained in the Dictionary of Occupational
3 Titles." (AR 18.)

4 In response, Defendant concedes that the ALJ erroneously found that the VE's testimony was
5 consistent with the DOT. (Def.'s Resp. Br. at 4 n.3.) Defendant maintains, however, that the error
6 did not impact the ALJ's analysis. Moreover, Defendant contends that the ALJ's failure to inquire
7 pursuant to SSR 00-4p whether the VE's testimony was consistent with the DOT was harmless.
8 According to Defendant, the VE fully explained the deviation from the DOT by (1) identifying the
9 specific DOT code numbers and job titles contained in the DOT, (2) eroding the total available jobs
10 by 50% to account for Plaintiff's limited, occasional use of his hands, and (3) explaining that the
11 reduced number of jobs "fit the hypothetical of light work with only occasional hand and arm usage."
12 (AR 41.) Therefore, the ALJ's error was harmless because it "was inconsequential to the ultimately
13 nondisability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir.
14 2006).

15 Without adequate supporting evidence, however, Defendant's claim that the omission was
16 inconsequential is insufficient to merit a harmless error determination. *See Robbins*, 466 F.3d at
17 885; *cf. Stout*, 454 F.3d at 1055 ("We have . . . found harmless errors that occurred during a
18 procedure or step the ALJ was not required to perform."). Rather, when the ALJ fails to ask the VE
19 whether his testimony conflicts with the DOT, such a procedural error is harmless if either there is
20 no conflict or the VE had provided sufficient support for his conclusion so as to justify any potential
21 conflicts. *Massachi*, 486 F.3d at 1154 n.19.

22 In this case, the VE did not provide a reasonable explanation for deviating from the DOT.
23 Reasonable explanations include that the DOT does not provide information about all occupations,
24 information about a particular job not listed in the DOT may be available elsewhere, and the general
25 descriptions in the DOT may not apply to specific situations. *Id.* at 1153 n.17 (*citing* SSR 00-4p).
26 The VE's testimony in this case that Plaintiff's occasional use of his hands would reduce the available
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1 number of parking lot and sales attendant jobs by half provides no basis for his deviation from the
2 DOT, such as the VE's experience in placing people with limitations similar to those of Plaintiff.
3 Therefore, the ALJ's error in failing to inquire whether the VE's testimony conflicted with the DOT
4 was not harmless.

5 The ALJ further erred by not explaining in her written decision how the apparent conflict
6 between the VE's testimony and the DOT was resolved. Instead, the ALJ noted the VE's testimony
7 that an individual with Plaintiff's age, education, work experience, and RFC would be able to
8 perform the jobs of parking lot attendant and sales attendant that were available in the economy
9 "after 50% erosion for non-exertional limitations." (AR 18.) The ALJ found that, based on the VE's
10 testimony, Plaintiff "has been capable of making a successful adjustment to other work that exists
11 in significant numbers in the national economy." (AR 18.)

12 SSR 00-4p provides:

13 When vocational evidence provided by a VE . . . is not consistent with information
14 in the DOT, the adjudicator must resolve this conflict before relying on the
15 VE . . . evidence to support a determination or decision that the individual is or is not
16 disabled. The adjudicator will explain in the determination or decision how he or she
resolved the conflict. The adjudicator must explain the resolution of the conflict
irrespective of how the conflict was identified.

17 SSR 00-4p, 2000 WL 1898704, at *4. While *Massachi* does not expressly address SSR 00-4p's
18 requirement that the ALJ explain any conflicts in her written decision, the Ninth Circuit stated that
19 "[t]he procedural requirements of SSR 00-4p ensure that the record is clear as to why an ALJ relied
20 on a vocational expert's testimony, particularly in cases where the expert's testimony conflicts with
21 the [DOT]." *Massachi*, 486 F.3d at 1153. Where the ALJ does not follow the procedural
22 requirements of SSR 00-4p, this Court cannot determine whether substantial evidence supports the
23 ALJ's step-five findings. *See id.* at 1153-54.

24 In sum, the Court finds that substantial evidence does not support the ALJ's determination
25 that, although Plaintiff could not perform his past relevant work, he could perform other work in the
26 national economy. The Court, therefore, remands this case for further proceedings. Accordingly,
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1 the Court need not address Plaintiff's remaining argument that the ALJ failed to comply with SSRs
2 83-12 and 83-14. *See Angel v. Barnhart*, 329 F.3d 1208, 1210 n.4 (10th Cir. 2003) ("Given the
3 nature of our remand [for further proceedings before the ALJ], we do not address [the claimant's]
4 claim that she does not have the residual functional capacity to perform her past relevant
5 work"); *Byington v. Chater*, 76 F.3d 246, 250-51 (9th Cir. 1996) ("Because we find that the
6 district court committed error and the decision of the ALJ is supported by substantial evidence, we
7 do not consider the Secretary's other arguments on appeal.").

8 **B. Remand is Required**

9 "The court shall have power to enter, upon the pleadings and transcript of the record, a
10 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,
11 with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). In Social Security cases,
12 the decision to remand to the Commissioner for further proceedings or simply to award benefits is
13 within the discretion of the court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). "If
14 additional proceedings can remedy defects in the original administrative proceedings, a social
15 security case should be remanded. Where, however, a rehearing would simply delay receipt of
16 benefits, reversal [and an award of benefits] is appropriate." *Id.* (alteration in original) (internal
17 quotation marks omitted); *see also Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1399
18 (9th Cir. 1988) ("Generally, we direct the award of benefits in cases where no useful purpose would
19 be served by further administrative proceedings, or where the record has been thoroughly
20 developed." (citation omitted)).

21 The Court has determined that the ALJ erred in finding that Plaintiff could perform work in
22 the national economy. The Court finds that this error can be corrected with further proceedings and
23 remands this action for further analysis at step five. On remand, the ALJ shall specifically inquire
24 as to whether the VE's testimony, as to the positions available given the hypothetical limitations,
25 deviates from the DOT and if so, whether there is any reasonable explanation for such deviation.

1 **CONCLUSION**

2 Based on the foregoing, the Court finds that the ALJ's decision is not supported by substantial
3 evidence and is, therefore, REVERSED and the case REMANDED to the ALJ for further
4 proceedings consistent with this order. The Clerk of this Court is DIRECTED to enter judgment in
5 favor of Plaintiff Willard Downey and against Defendant Michael J. Astrue, Commissioner of Social
6 Security.

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9 IT IS SO ORDERED.

10 **Dated: August 30, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE