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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MARYANN CELEDON,

Plaintiff,

v.

CAROLYN W. COLVIN, ACTING  
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:13-CV-00449-SMS

ORDER GRANTING PLAINTIFF'S SOCIAL  
SECURITY APPEAL AND REMANDING  
ACTION FOR FURTHER  
ADMINISTRATIVE PROCEEDINGS

(Doc. 1)

Plaintiff Maryann Celedon, by her attorneys, Law Offices of Lawrence D. Rohlfing, seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for disability insurance benefits pursuant to Title II and for supplemental security income (“SSI”) pursuant to Title XVI of the Social Security Act (42 U.S.C. § 301 *et seq.*) (“the Act”). This action was initially referred to the undersigned pursuant to Local Rule 302(c)(15), and both parties filed their voluntary consent (Docs. 9 & 10) to proceed before a United States Magistrate Judge for all purposes pursuant to 28 U.S.C. § 636(c). The matter is before the Court on the parties’ cross-briefs, which were submitted without oral argument to the Honorable Sandra M. Snyder, U.S. Magistrate Judge. After a review of the complete record and applicable law, the Court will remand for further proceedings.

## BACKGROUND

### I. Procedural History

On December 29, 2009, Plaintiff applied for disability insurance benefits and supplemental security income. Plaintiff alleges onset of disability on November 13, 2005. The Commissioner initially denied the claims on April 30, 2010, and upon reconsideration again denied the claims on September 21, 2010. Plaintiff filed a timely request for a hearing on November 17, 2010.

On August 26, 2011, represented by counsel, Plaintiff appeared and testified at a video hearing presided over by Judson Scott, Administrative Law Judge (“ALJ”). *See* 20 C.F.R. 404.929 *et seq.* An impartial Vocational Expert (“VE”), Lawrence Hughes, as well as three impartial medical experts, Allan Levin, M.D., Shakil Mohammed, M.D., and John Morse, M.D., also appeared and testified. Time ran short at the first hearing.

On December 20, 2011, the ALJ presided over a supplemental video hearing. Plaintiff again appeared and testified at the supplemental video hearing, represented by counsel. The VE, Mr. Hughes, and the three impartial medical experts, Drs. Levin, Mohammed, and Morris, also again appeared and testified.

The ALJ denied the application on February 3, 2012. On January 4, 2013, the Appeals Council denied review. Plaintiff filed a complaint seeking this Court’s review on March 27, 2013.

### II. Administrative Record<sup>1</sup>

#### A. Plaintiff's Facts and Testimony (August 26, 2011 and December 20, 2011)

Plaintiff, born May 13, 1969, lived in a one-story apartment with her companion. Plaintiff completed high school, had one year of college, and is able to communicate in English. Plaintiff last worked in 2004 as a telephone operator, and had 20 years of clerical-type experience. At the time of the hearing, Plaintiff was not currently working and had not worked since 2004.

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<sup>1</sup> Plaintiff does not contest the ALJ’s findings regarding the medical evidence or the weighing of her credibility. Therefore, the Court summarizes only the disputed vocational evidence.

1 Plaintiff testified that she had diabetes, fibromyalgia, depression, asthma, irritable bowel  
2 syndrome, anxiety, arthritis, and pain in her neck, back, and right shoulder. Plaintiff stated that her  
3 asthma and diabetes were controlled with medication. As to her psychiatric condition, she testified  
4 that she took medications (Zoloft and Xanax), to control her depression and anxiety as prescribed by  
5 her physical medicine rehabilitation physician, Bradford Anderson, M.D. However, she was not  
6 currently receiving treatment from a psychiatrist.

### 7 **B. Vocational Expert Testimony**

8 Lawrence Hughes testified as vocational expert (“VE”). Hughes classified Plaintiff’s past  
9 relevant work as a telephone operator as Specific Vocational Preparation (“SVP”) level 3 – semi-  
10 skilled, sedentary exertional level. *See* DOT Code 235.662-022. Considering the demands of that  
11 work, the limitations of Plaintiff’s Residual Functional Capacity (“RFC”),<sup>2</sup> and the Plaintiff’s entire  
12 medical-vocational profile, Hughes testified that a similarly capable individual would be able to  
13 perform the demands of Plaintiff’s prior work as it is actually and generally performed.  
14

15 The ALJ posed the following hypothetical (“the First Hypothetical”) to the VE:  
16

17 I’d like you to assume a hypothetical individual . . . who has the same age, education, and  
18 experience as the claimant does, who has the capacity to engage in work at the light exertion  
19 level, which would permit the lifting and carrying of up to 10 pounds frequently and up to 20  
20 pounds occasionally with the use of . . . both arms and hands together. However, if the right  
21 major arm is used by itself, it would be limited to 10 pounds, up to 10 pounds frequently, and  
22 10 pounds occasionally. The hypothetical person has the capacity to sit, stand, and walk in  
23 each posture for up to six hours out of an eight-hour day, however, with a sit-stand option at  
24 will for comfort. Posturals are all occasional, except there would be a preclusion from  
25 climbing of ladders, ropes, and scaffolds, or crawling. There would be no overhead reaching  
26 or work with the right upper extremity. The hypothetical person is precluded from heavy  
27 grasping or gripping or torquing with either hands [sic]. There would be no work at  
28 unprotected heights or around hazardous, moving machinery. There would also be no  
concentrated exposure to dust, gases, or fumes. The hypothetical person requires reasonable  
access to a bathroom and would also be able to have up to one added unscheduled break per

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<sup>2</sup> A claimant’s “residual functional capacity” is what a claimant can still do despite her limitations. 20 C.F.R. § 404.1545(a). Where those limitations are physical, the Commissioner “considers [the claimant’s] ability to do various physical activities” walking, standing, lifting, carrying, pushing, pulling, reaching, handling and “evaluates other physical functions” to determine the claimant’s “residual functional capacity for work activity on a regular and continuing basis.” 20 C.F.R. § 404.1545(b).

1 day of up to 20 minutes in addition to the three regular breaks during the regular workday.  
2 Mental limitations would be the capacity to engage in simple, repetitive one- to three-step  
3 tasks; may have frequent contact with coworkers and supervisors; may have occasional  
4 public contact; may engage in normal-stress work. And finally, the hypothetical person may  
5 be . . . off task up to five to ten percent of the workday on a presumptive basis due to the  
6 combination of pain or prescription side effects. With that residual functional capacity . . . is  
7 the hypothetical person able to do any of the claimant’s past work?

8 Before responding, Hughes asked the ALJ to clarify whether this hypothetical individual  
9 would require a daily unscheduled 20-minute break. The ALJ confirmed that she would. On that  
10 basis, Hughes opined that the individual from the first hypothetical would be “unemployable in the  
11 mainstream.” The VE further testified that a similarly capable individual in a telephone operator  
12 position “could not . . . sit/stand at will. She could change position frequently. But if it has to be  
13 absolutely at will and she has to be able to perform her job standing, then she could not return to the  
14 switchboard job.”

15 After reviewing his notes, the ALJ posed a second hypothetical (“the Second Hypothetical”),  
16 removing the option for the individual to sit or stand at will, instead requiring the individual’s ability  
17 to change positions frequently for comfort. The VE testified that this hypothetical individual *would*  
18 be able to perform the telephone operator position if her unscheduled breaks were approximately  
19 five minutes. The VE stated that if the hypothetical RFC limitations required multiple 20-minute  
20 unscheduled breaks, then the individual would *not* be able to perform the telephone operator  
21 position. The VE opined that the bright line for employability was an unscheduled twice-daily break  
22 for a maximum of ten (10) minutes, a duration which, if exceeded, would render the hypothetical  
23 individual unemployable.

24 The ALJ posed a third hypothetical, modifying the relevant potential work to “unskilled.”<sup>3</sup>  
25 The VE responded that notwithstanding that change, his determination would still hinge on the

26 \_\_\_\_\_  
27 <sup>3</sup> “Unskilled work is work which needs little or no judgment to do simple duties that can be learned  
28 on the job in a short period of time. The job may or may not require considerable strength. For  
example, we consider jobs unskilled if the primary work duties are handling, feeding, and offbearing  
(that is, placing or removing materials from machines which are automatic or operated by others), or

1 duration of any required unscheduled breaks. The VE referenced the Plaintiff's application in which  
2 she admitted having transferable skills such as experience with clerical duties, filing, writing,  
3 operating switchboards, a year of college, and 20-years of clerical type experience. With her  
4 transferable skills, the VE opined that additional jobs existed in the national economy which a  
5 similarly capable individual could perform. The VE testified that an individual with Plaintiff's RFC  
6 could perform any sedentary, semi-skilled<sup>4</sup> job with an SVP of 3, such as "appointment clerk" (DOT  
7 code 237.367-010), with 45,000 jobs available nationally and 4- to 5,000 in California.  
8

9 The VE also testified that the hypothetical individual could perform any unskilled, sedentary  
10 level job with an SVP of 2, such as "document preparer" (DOT code 249.587-018), with 23,000  
11 positions nationally and 2,000 in California, as well as "addresser" (DOT code 209.587-010), with  
12 over 16,000 positions nationally and approximately 1,600 in California.

13 In a fourth hypothetical, Plaintiff's counsel asked the VE to add to the RFC in the First  
14 Hypothetical the following moderate impairments: ability to perform simple and repetitive tasks;  
15 ability to maintain a work pace appropriate to the given workload; ability to perform complex or  
16 varied tasks; ability to relate to other people beyond giving and receiving instructions; ability to  
17 influence people; ability to make generalizations, evaluations, or decisions without immediate  
18 supervision; ability to accept and carry out responsibility for direction, control, and planning. The  
19 VE testified that where an individual would be moderately unable to perform these functions "for up  
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21

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22 machine tending, and a person can usually learn to do the job in 30 days, and little specific  
23 vocational preparation and judgment are needed. A person does not gain work skills by doing  
24 unskilled work." SSR 83-10.

25 <sup>4</sup> "Semiskilled work is work which needs some skills but does not require doing the more complex  
26 work duties. Semiskilled jobs may require alertness and close attention to watching machine  
27 processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding  
28 equipment, property, material, or persons against loss, damage or injury; or other types of activities  
which are similarly less complex than skilled work, but more complex than unskilled work. A job  
may be classified as semiskilled where coordination and dexterity are necessary, as when hands or  
feet must be moved quickly to do repetitive tasks." See Social Security Ruling 83-10; Social  
Security Regulations §§ 404.1568, 416.968.

1 to 30% of each day,” such an RFC would preclude the hypothetical individual from working in the  
2 national economy.

3 Counsel then proposed a fifth hypothetical with the following modifications to the First  
4 Hypothetical: that the individual could only occasionally reach, grasp, grip, and torque with her right  
5 hand; was limited to lifting five pounds with her right upper extremity; and was moderately to  
6 severely impaired in her concentration, persistence, and pace. The VE testified that this hypothetical  
7 individual would not be able to perform Plaintiff’s prior work or any other job available in the  
8 national economy.  
9

10 Counsel proposed a sixth hypothetical with the following modifications to the first  
11 hypothetical: the individual would have to be able to go to the bathroom three to five times during an  
12 eight-hour workday, totaling a required 75 minutes of unscheduled breaks per day. The VE testified  
13 that such requirements would preclude work.

14 Counsel proposed a seventh hypothetical with the following modifications to the first  
15 hypothetical: the individual would require two unscheduled 30-minutes breaks to lie down, totaling a  
16 required 60 minutes of unscheduled breaks per day. The VE testified that such requirements would  
17 also render the hypothetical individual non-employable.  
18

19 Counsel proposed an eighth hypothetical with the following modifications to the first  
20 hypothetical: the individual would miss at least three workdays per month, possibly more, due to  
21 doctor’s appointments and/or emergency visits to the doctor. The VE testified that this hypothetical  
22 person would be precluded from working in the national economy.  
23

## 24 **LEGAL STANDARD**

25 Congress has provided a limited scope of judicial review of the Commissioner’s decision to  
26 deny benefits under the Act. The record as a whole must be considered, weighing both the evidence  
27 that supports and that which detracts from the Commissioner’s decision. *Lingenfelter v. Astrue*, 504  
28 F.3d 1028, 1035 (9th Cir. 2007) (citation and internal quotation marks omitted). In weighing the

1 evidence and making findings, the Commissioner must apply the proper legal standards. *See, e.g.,*  
2 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). If the ALJ applied the proper legal  
3 standards and the ALJ's findings are supported by substantial evidence, this Court must uphold the  
4 ALJ's determination that the claimant is not disabled. *See, e.g., Ukolov v. Barnhart*, 420 F.3d 1002,  
5 104 (9th Cir. 2005); *see also* 42 U.S.C. § 405(g). Substantial evidence means "more than a mere  
6 scintilla but less than a preponderance." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1998 (9th Cir.  
7 2008). It is "such relevant evidence as a reasonable mind might accept as adequate to support a  
8 conclusion." *Burch*, 400 F.3d at 679. Where the evidence as a whole can support either outcome,  
9 the Court may not substitute its judgment for the ALJ's, rather, the ALJ's conclusion must be  
10 upheld. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

## 12 DISCUSSION

13 An individual is considered disabled for purposes of disability benefits if she is unable to  
14 engage in any substantial, gainful activity by reason of any medically determinable physical or  
15 mental impairment that can be expected to result in death or that has lasted, or can be expected to  
16 last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)  
17 (3)(A); *see also Barnhart v. Thomas*, 540 U.S. 20, 23, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003). The  
18 impairment or impairments must result from anatomical, physiological, or psychological  
19 abnormalities that are demonstrable by medically accepted clinical and laboratory diagnostic  
20 techniques and must be of such severity that the claimant is not only unable to do his previous work  
21 but cannot, considering his age, education, and work experience, engage in any other kind of  
22 substantial, gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)-(3),  
23 1382c(a)(3)(B), (D).

24  
25  
26 To encourage uniformity in decision making, the Commissioner has promulgated regulations  
27 prescribing a five-step sequential process for evaluating an alleged disability. 20 C.F.R. §§  
28 404.1520 (a)-(f); 416.920 (a)-(f). In the first-step analysis, the ALJ must determine whether the

1 claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).  
2 If not, in the second step, the ALJ must determine whether the claimant has a severe impairment or a  
3 combination of impairments significantly limiting her from performing basic work activities. *Id.*  
4 §§ 404.1520(c), 416.920(c). If so, in the third step, the ALJ must determine whether the claimant  
5 has a severe impairment or combination of impairments that meets or equals the requirements of the  
6 Listing of Impairments, 20 C.F.R. 404, Subpart P, App. 1. *Id.* §§ 404.1520(d), 416.920(d). If not, in  
7 the fourth step, the ALJ must determine whether the claimant has sufficient RFC, despite the  
8 impairment or various limitations to perform his past work. *Id.* §§ 404.1520(f), 416.920(f). If not,  
9 in step five, the burden shifts to the Commissioner to show that the claimant can perform other work  
10 that exists in significant numbers in the national economy. *Id.* §§ 404.1520(g), 416.920(g). If a  
11 claimant is found to be disabled or not disabled at any step in the sequence, there is no need to  
12 consider subsequent steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999); 20 C.F.R. §§  
13 404.1520, 416.920.

14  
15 In the five-step sequential review process to determine whether a claimant qualifies as  
16 disabled, the burden of proof is on the claimant at steps one through four, but shifts to the  
17 Commissioner at step five. *See Tackett*, 180 F.3d at 1099. If the ALJ determines that a claimant is  
18 either disabled or not disabled at any step in the process, the ALJ does not continue on to the next  
19 step. *See* 20 C.F.R. § 416.920(a)(4).

20  
21 The first step is not at issue. Both Plaintiff and the Commissioner agree that Plaintiff is not  
22 currently performing substantial gainful work. *See* 20 C.F.R. § 416.920(a)(4)(i). At steps two and  
23 three, the ALJ found that Plaintiff’s reactive obstructive airway disease, tendonitis and full tear of  
24 the rotator cuff, degenerative disc disease of the cervical spine, disc bulge of L5-S1, chronic pain  
25 syndrome, gastritis, irritable bowel syndrome, gastroesophageal reflux disease, and depressive  
26 disorder not otherwise specified (20 CFR 404.1520(c) and 416.920(c)) were severe impairments, but  
27 that none of these impairments alone or in any combination met or medically equaled the severity of  
28



1 an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. *See* 20 C.F.R. §§ 404.1520(d),  
2 404.1525, 404.1526, 416.920(d), 416.925, 416.926. Plaintiff does not challenge the ALJ's  
3 construction of her RFC. Therefore, steps two and three are not at issue.

4 As an intermediate step between steps three and four, the ALJ must assess the claimant's  
5 RFC. *See* 20 C.F.R. § 416.920(e). The ALJ stated Plaintiff's RFC in this way:

6 I find that the claimant has the residual functional capacity to perform a range of light work  
7 as defined in 20CFR 404.1567(b) and 416967(b) and SSR 83-10 specifically as follows: the  
8 claimant can [lift] and/or carry 20 pounds occasionally and 10 pounds frequently with the use  
9 of both arms and hands together; she can [lift] and/or carry up to 10 pounds if she is just  
10 using her right arm and hand; she can sit, stand and/or walk for six hours out of an eight-hour  
11 workday with the ability to change positions at will for comfort; she is precluded from  
12 crawling or climbing ladders, ropes, and scaffolds; she can perform all other postural  
13 activities occasionally; she is restricted from performing overhead reaching or work with the  
14 right upper extremity; she is precluded from heavy grasping, gripping, or troqing [sic] with  
15 either hand; she is prohibited from working at unprotected heights or around hazardous  
16 moving machinery; she is restricted from concentrated exposure to dust, gases, or fumes; she  
17 requires reasonable access to a restroom; she is permitted to have one additional unscheduled  
18 break per day that is under 10 minutes in addition to the three regular breaks during a regular  
19 workday; she is limited to performing simple repetitive one to three step tasks; she can have  
20 frequent contact with co-workers and supervisors; she can have occasional contact with the  
21 general public; she can engage in normal stress work; and she may be off task up to five to  
22 10 percent of the workday on a presumptive basis due to the combination of pain or  
23 prescription side effects.

24 Plaintiff does not contest the ALJ's construction of her RFC.

25 At step four, the ALJ must determine whether, in light of the claimant's RFC, she can return  
26 to substantial gainful activity performed in the past. 20 C.F.R. § 404.1520(e). Here, the ALJ  
27 determined that Plaintiff was capable of returning to her past relevant work as a telephone operator,  
28 thus is not disabled. Plaintiff challenges the step-four findings and conclusion.

At step five, the Commissioner must establish that the claimant is capable of performing  
substantial gainful work. The ALJ presented the above RFC to the VE, who then considered  
whether an individual burdened with the stated limitations could obtain gainful work in the national  
economy. The VE testified that Plaintiff could not only return to gainful work in her former capacity  
as a telephone operator, but that she had transferable skills and could transition to work as an

1 appointment clerk, document preparer, or addressor. Accordingly, the ALJ determined that Plaintiff  
2 is not disabled. Plaintiff also challenges the step-five findings and conclusion.

3 Plaintiff first challenges the ALJ's decision alleging that the ALJ's step four finding was  
4 erroneous because it was based on vocational expert (VE) testimony that deviated from the  
5 Dictionary of Occupational Titles ("DOT") and the ALJ did not obtain a reasonable explanation  
6 from the VE for the deviation. Second, Plaintiff argues that the ALJ's step-five finding was  
7 erroneous because the VE testified that a hypothetical individual with Plaintiff's RFC – which  
8 Plaintiff seems to read as including a sit or stand at will requirement – would be precluded from  
9 work, including the three identified alternative occupations. Therefore, Plaintiff argues, the ALJ's  
10 nondisability determination is not supported by substantial evidence.

12 The Commissioner counters that the ALJ's step-four finding and conclusion is supported by  
13 substantial evidence because the VE testified that a hypothetical individual with Plaintiff's RFC  
14 could perform her prior work. The Commissioner also contends that the ALJ's RFC finding did not  
15 include a sit/stand at will requirement, but only that Plaintiff requires changing positions for comfort.  
16 On that basis, the Commissioner argues that the ALJ's step-four determination was supported by  
17 substantial support, was not erroneous, and a step-five analysis is unnecessary. Even so, in a step-  
18 five inquiry, the Commissioner contends that Plaintiff's age, education and previous work  
19 experience direct a finding of not disabled under the Medical-Vocational Guidelines (also known as  
20 "the grids") and, notwithstanding Plaintiff's limitations, the VE identified alternative jobs that  
21 Plaintiff could perform that exist in significant numbers in the national economy. Therefore, the  
22 Commissioner contends that even if the step-four findings and conclusion were in error, it was  
23 harmless error because the ALJ's step-five findings and conclusion were properly made.

26 For the reasons below, the Court finds that although the ALJ's construction of Plaintiff's  
27 RFC did not include a sit/stand at will requirement, substantial evidence does not support the ALJ's  
28 findings and conclusion at step four and five.

1                   **A. Step-Four Analysis (Past Relevant Work)**

2                   At step four of the sequential analysis, the ALJ relied on the VE’s testimony to conclude that  
3 Plaintiff was capable of performing her past relevant work as a telephone operator (also referred to  
4 as switchboard operator), as well as other sedentary work that was limited to simple, repetitive tasks.

5                   Plaintiff asserts that the ALJ’s step-four finding was erroneous because the DOT is silent  
6 about whether a person performing a telephone operator job has the ability to sit/stand at will,  
7 therefore when the VE testified as to Plaintiff’s ability to perform her prior position in consideration  
8 of that requirement, his testimony deviated from the DOT without justification. Plaintiff contends  
9 that because the ALJ did not obtain a reasonable explanation from the VE for the discrepancy from  
10 the DOT, the ALJ’s step-four finding lacks the support of substantial evidence. Plaintiff further  
11 contends that the ALJ’s nondisability determination was in conflict with the VE’s testimony that a  
12 sit/stand at will requirement would preclude an individual with Plaintiff’s RFC from working.  
13

14                   The Commissioner argues that the ALJ did not err at step four because the ALJ’s  
15 construction of the RFC did not include a sit/stand requirement. Thus, the Commissioner contends,  
16 because the VE’s testimony is not in conflict with the DOT it serves as sufficient support for the  
17 ALJ’s findings and nondisability determination.  
18

19                   The record reflects that at step four, the ALJ relied on the VE’s testimony that the telephone  
20 operator position has an SVP of 3 and that a similarly capable person with Plaintiff’s RFC could  
21 perform such a semi-skilled, sedentary position. *See* DOT 235.662-022; *see also* SSR 00-4p (an SVP  
22 of 3 corresponds to semi-skilled work). The VE testified that the telephone operator position was  
23 considered sedentary.<sup>5</sup> *See* DOT Code 235.662-022. The ALJ posed several hypotheticals to the  
24 VE. In the Second Hypothetical, the ALJ explicitly modified the First Hypothetical, *supra*, removed  
25

26  
27 \_\_\_\_\_  
28 <sup>5</sup> To determine the physical exertion requirements of work in the national economy, the  
Commissioner classifies jobs as *sedentary, light, medium, heavy, and very heavy*. *See* Code of  
Federal Regulations § 404.1567.

1 the sit/stand option, and substituted the requirement that the individual be able to change positions  
2 frequently for comfort.

3 When presented with the Second Hypothetical, the VE testified that an individual with the  
4 same age, education, experience, and physical capabilities as Plaintiff would be able to perform  
5 Plaintiff's past work as a telephone operator. Notwithstanding Plaintiff's mischaracterization of the  
6 ALJ's construction of Plaintiff's RFC – which in plain language does not include a sit/stand option<sup>6</sup>  
7 – the ALJ has “an affirmative responsibility” to ask about any possible conflict between the  
8 vocational expert's evidence and information provided in the Dictionary of Occupational Titles  
9 (“DOT”). *Masachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007); *see also* SSR 00-4p. The Ninth  
10 Circuit, citing Social Security Ruling 00-4p, has stated that the ALJ's affirmative responsibility to  
11 inquire about a possible deviation is triggered when a vocational expert provides evidence about the  
12 requirements of a job or occupation. *Masachi*, 486 F.3d at 1152. The DOT defines the telephone  
13 operator job is as follows:  
14

15 Operates cord or cordless switchboard to relay incoming, outgoing, and interoffice calls:  
16 Pushes switch keys on cordless switchboard to make connections and relay calls. Plugs cord  
17 of cord type equipment into switchboard jacks to make connections and relay calls. May  
18 supply information to callers and record messages. May keep record of calls placed and toll  
19 charges. May perform clerical duties, such as typing, proofreading, and sorting mail. May  
20 operate system of bells or buzzers to call individuals in establishment to phone. May receive  
21 visitors, obtain name and nature of business, and schedule appointments [RECEPTIONIST  
(clerical) 237.367-038].

21 *See* DOT Code 235.662-022.

22 Parsing the VE's testimony, the Court finds that the VE gave no testimony modifying the  
23 DOT's job requirements. Indeed, in response to the ALJ's hypothetical which listed a similar set of  
24 limitations to the ALJ's ultimate construction of Plaintiff's RFC, the VE referenced the specific  
25 DOT code for telephone operator and made no modifications. The DOT description of the job  
26 requirements demonstrates that these include tasks such as receiving visitors, sorting mail, using the  
27

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28 <sup>6</sup> The ALJ determined that the Plaintiff “can sit, stand and/or walk for six hours out of an eight-hour  
workday with the ability to change positions at will for comfort.”

1 typewriter, and other clerical duties. The DOT's description is implicitly consistent with the VE's  
2 proposition that the hypothetical individual has the minimal degree of choice that would allow an  
3 individual to make physical movements from task to task without guidance about how to do so  
4 "frequently" with comfort.

5         However, the distinction between "at will" and "frequently" is meaningful. The VE testified  
6 that a similarly capable individual with the same physical capabilities as described in hypothetical  
7 two would be able to perform Plaintiff's prior work as it is generally performed according to the  
8 DOT. But his testimony was based on a hypothetical that merely allowed Plaintiff to "frequently"  
9 change positions, not to do so "at will" as included in the ALJ's final construction of Plaintiff's  
10 RFC. The VE testified that a similarly capable individual could "frequently" change positions, but  
11 he emphasized that "if it has to be absolutely at will and she has to be able to perform her job  
12 standing, then she could not return to the switchboard job." The ALJ did not elicit any other  
13 information about an individual's degree of choice as to movement "at will" on the job. And the VE  
14 offered no testimony as to whether a similarly capable individual would have the necessary  
15 autonomy to change positions "at will" in a telephone operator position as it is generally performed.  
16 The DOT is likewise silent. Therefore, the Court cannot conclude that the ALJ's step-four findings  
17 and conclusion are based on substantial evidence if no such evidence exists, (*see, e.g., Bayliss v.*  
18 *Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005), and the ALJ did not ask the VE for a justification for  
19 this potential conflict (*see Massachi*, 486 F.3d at 1152).

22         The Court concludes that because the hypothetical posed to the VE did not contain all of the  
23 limitations that the ALJ ultimately found credible, the ALJ's reliance on the VE's testimony, in the  
24 absence of other evidence or justification for an apparent conflict, does not provide reasonably  
25 substantial support.

27         The Court's inquiry does not end there. The weight of authority in this circuit, including in  
28 this district, has concluded that a limitation to simple, repetitive tasks is inconsistent with the DOT's

1 description of jobs requiring GED reasoning Level 3. *Espinoza v. Astrue*, No. 5:12-cv-00544-OP,  
2 2013 WL 327889, at \*3 (C.D. Cal. Jan. 29, 2013) (recognizing that the Ninth Circuit has not  
3 addressed the issue directly, but "the weight of authority in this Circuit holds that a limitation to  
4 simple, repetitive or routine tasks is incompatible with a reasoning level of 3"); *Kim v. Colvin* CV  
5 13-01841-JEM, 2013 WL 6670335, at \*8 (C.D. Cal. Dec. 18, 2013) (same); *Gonzales v. Astrue*,  
6 1:10-CV-01330-SKO, 2012 WL 2064947 (E.D. Cal. June 7, 2012) (same); *Torrez v. Astrue*, No.  
7 1:09-cv-00626-JLT, 2010 WL 2555847, at \*8 (E.D. Cal. June 21, 2010) (finding DOT precludes  
8 claimant limited to simple repetitive tasks from performing jobs that requiring Level 3 reasoning  
9 based upon weight of authority in this circuit); *Grimes v. Astrue*, No. EDCV 09–2208–JEM, 2011  
10 WL 164537, at \*4 (C.D. Cal. Jan. 18, 2011) (limitation for simple, repetitive tasks not consistent with  
11 jobs requiring Level 3 reasoning); *Pak v. Astrue*, No. EDCV 08–714–OP, 2009 WL 2151361, at \*7  
12 (C.D. Cal. July 14, 2009) (reasoning level 3 conflicts with prescribed limitation that claimant can  
13 perform simple, routine tasks); *Squire v. Astrue*, No. EDCV 06–1324–RC, 2008 WL 2537129, at \* 5  
14 (C.D. Cal., Jun. 24, 2008) (Reasoning level 3 inconsistent with simple, repetitive work). *Tudino v.*  
15 *Barnhart*, 2008 WL 4161443, at \*11 (S.D. Cal. Sept. 5, 2008) ("Level-two reasoning appears to be  
16 the breaking point for those individuals limited to performing only simple repetitive tasks.").

17 Telephone operator is such a job. The position is considered Reasoning Level 3. The VE  
18 testified that Plaintiff, or a similarly capable individual, could perform the telephone operator job  
19 despite the ALJ's construction of Plaintiff's RFC in the hypothetical limiting her "to performing  
20 simple repetitive one to three step tasks." The ALJ should have requested a justification for this  
21 apparent conflict with the DOT in the VE's testimony. *See Masachi*, 486 F.3d at 1152.

### 22 **B. Step-Five Analysis (Other Potential Jobs Plaintiff Could Perform)**

23 An ALJ's error in accepting VE testimony without requesting justification for its deviation  
24 from the DOT is harmless if in a proper step-five analysis an ALJ concludes that there are a  
25 significant number of other jobs a Plaintiff would be able to perform. Accordingly, if after  
26

1 reviewing the record the Court finds that evidence demonstrates that there are a significant number  
2 of jobs that Plaintiff can perform either at the local or national level, it must affirm the ALJ's  
3 decision. *Beltran v. Astrue*, 700 F. 3d 386, 390 (9th Cir. 2012).

4 Here, the ALJ concluded that a significant number of unskilled jobs existed in the economy  
5 which an individual with Plaintiff's limitations could perform. Unskilled work is that which requires  
6 little or no judgment to do simple duties that can be learned on the job in a short period of time and  
7 needs little specific vocational preparation. *See* 20 C.F.R. § 416.968(a); *see also* SSR 83-10. The  
8 basic mental demands of unskilled work include the ability to understand, carry out, and remember  
9 simple instructions. SSR 85-15. The ALJ determined that Plaintiff could perform a range of  
10 sedentary work, with a limitation to simple, repetitive tasks. The Ninth Circuit has not directly  
11 addressed the issue, although many district courts including this one have found that the grids are  
12 applicable at step five because a person restricted to simple, repetitive tasks can perform unskilled  
13 work. *See e.g. Beaupre v. Astrue*, 2012 WL 1435032 (E.D. Cal. Apr. 25, 2012) at \*11-12  
14 (concluding that claimant's restriction to simple repetitive tasks and entry level work "was not  
15 sufficiently severe to warrant departure from the grids"); *Ramsey v. Astrue*, 2012 WL 5499900 (E.D.  
16 Cal. Nov. 13, 2012) at \*6 (affirming the ALJ's reliance on the grids because the claimant's RFC for  
17 simple repetitive tasks that do not involve more than occasional interaction with the public was  
18 "consistent with unskilled work"); *Sam v. Astrue*, 2010 WL 496718 (E.D. Cal. Dec. 1, 2010) at \*11  
19 (affirming the ALJ's reliance on the grids where Plaintiff was limited to simple, repetitive tasks  
20 because "[t]he ability to perform simple, repetitive tasks is consistent with unskilled work"); *Tapia v.*  
21 *Colvin*, 2014 WL 4655829 (C.D. Cal. Feb. 4, 2014) at \*4 (collecting cases).

22 Plaintiff does not challenge the ALJ's properly drawn conclusion that Plaintiff has the RFC  
23 to perform simple, repetitive tasks consistent with SVP Level 2 work. The ALJ relied on the VE's  
24 testimony to substantiate his conclusion that Plaintiff could perform the positions of "appointment  
25 clerk" (DOT 237.367-010) with a Reasoning Level 3 and SVP Level 3; "document preparer" (DOT  
26  
27  
28

1 249.587-018) with a Reasoning Level 3 and SVP Level 2; and “addresser” (DOT 209.587-010) with  
2 a Reasoning Level 2 and SVP Level 2. Like “telephone operator,” both “appointment clerk” and  
3 “document preparer” have a Reasoning Level of 2, which conflicts with the ALJ’s construction of  
4 Plaintiff’s RFC that she is limited to performing only simple repetitive tasks.

5 As a result, only one potential job remains which could serve to support the notion that a  
6 significant number of jobs existed in the nationally economy that Plaintiff could perform, and about  
7 which the VE also testified. The VE testified that the “addresser” job is an unskilled, sedentary  
8 position with 16,000 jobs nationally and 1,600 in California, and that a similar unskilled job “allows  
9 for shifting position or standing or walking now and again, that sort of thing.”  
10

11 However, the DOT is silent on an individual’s functional autonomy. The DOT description of  
12 “addresser” is as follows, “Addresses by hand or typewriter, envelopes, cards, advertising literature,  
13 packages, and similar items for mailing. May sort mail.” DOT 209.587-010. The DOT’s  
14 description of the “addresser” position is not implicitly consistent with the proposition that an  
15 individual has the degree of choice to move “at will” for comfort as the job is generally performed.  
16 Considering that issue, the Court finds Social Security Ruling 83-12 instructive:  
17

18 Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or  
19 stand at will. In cases of unusual limitation of ability to sit or stand, a [vocational expert]  
20 should be consulted to clarify the implications for the occupational base.

21 SSR 83-12.

22 Although the ALJ’s final construction of Plaintiff’s RFC does not include a sit/stand “at will”  
23 option, its plain language limits Plaintiff to those jobs where she can change positions “at will.” If  
24 unskilled jobs are so particularly structured, the question remains whether the “addresser” position as  
25 generally performed is so restrictive as to also disallow the frequent changes of position “at will”  
26 required by Plaintiff’s RFC. However, the ALJ failed to ask the VE to elaborate as to this distinction  
27 as it relates to the “addresser” position. The ALJ also failed to ask the VE to justify this possible  
28 conflict with the DOT. *See* SSR 00-4p. If the ALJ does not comply with SSR 00-4p, the ALJ may



1 not rely on a vocational expert's testimony regarding the requirements of a particular job. *Id.* (when  
2 a VE offers evidence about requirements of a particular job, the ALJ has an affirmative duty to ask  
3 whether the VE's testimony conflicts with the DOT); *see also Massachi*, 486 F.3d at 1152.

4 Therefore, the Court finds that despite the "addresser" position's appropriate Reasoning  
5 Level, the ALJ failed to fully develop the record to support his finding that a substantial number of  
6 jobs existed that could be performed by an individual with Plaintiff's limitations. *See Stout v.*  
7 *Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1054–55 (9th Cir. 2006). On this basis, the Court  
8 concludes that the ALJ erred in his step-five analysis.

### 10 C. Harmless Error

11 To determine whether this is harmless error, a court evaluates whether the error could "alter  
12 the outcome of the case." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) ("[A]n error is  
13 harmless so long as there remains substantial evidence supporting the ALJ's decision and the error  
14 'does not negate the validity of the ALJ's ultimate conclusion.'") (quoting *Batson v. Comm'r of Soc.*  
15 *Sec.*, 359 F.3d 1190, 1197 (9th Cir. 2004)). A reviewing court must consider "an estimation of the  
16 likelihood that the result would have been different." *Id.* at 1055 (finding that "[t]he ALJ's decision,  
17 and the record of [claimant's] contradictions, make it plain that the ALJ would have reached the  
18 same conclusion" as to disability if the ALJ had not erroneously considered *ex parte* evidence).

19 The failure to inquire about an inconsistency with the DOT may be considered harmless if  
20 there is no conflict or if the VE's testimony provides sufficient support to justify any potential  
21 conflict. *Massachi*, 486 F.3d at 1154 n. 19 (failure to follow SSR 00–4p would have been harmless if  
22 there had been no conflict between the opinion and DOT) (citing *Johnson v. Shalala*, 60 F.3d 1428,  
23 1435 (9th Cir. 1995)). "In order for an ALJ to accept [VE] testimony that contradicts the [DOT], the  
24 record must contain 'persuasive evidence to support the deviation.' " *Pinto v. Massanari*, 249 F.3d  
25 840, 846 (9th Cir. 2001) (quoting *Johnson*, 60 F.3d at 1435).

1 The Court finds that there is no clear evidence that conflict does not exist between the VE's  
2 testimony and the DOT. Moreover, the ALJ did not ask for, and the VE did not volunteer,  
3 persuasive evidence to support a deviation from the DOT, if any.

4 As the VE's testimony does not show that Plaintiff could perform work that existed in  
5 substantial numbers in the national economy and the ALJ's determination lacks other support, the  
6 Court finds that the ALJ erred in his step-five analysis because it was not supported by substantial  
7 evidence. The Court concludes that this error was not harmless because it was potentially  
8 consequential to the ultimate nondisability determination.  
9

### 10 CONCLUSION AND ORDER

11 Upon a careful review of the full record, the Court is unconvinced that Plaintiff is disabled.  
12 Yet, however reluctantly, the Court must remand because of the woefully inadequate record. The  
13 Court concludes that the record is not fully developed to provide substantial evidence to support the  
14 ALJ's nondisability determination. Accordingly,

#### 15 IT IS HEREBY ORDERED:

- 16 1. pursuant to sentence four of 42 U.S.C. § 405(g), that the matter is **REMANDED** for  
17 further proceedings consistent with this decision; and,
- 18 2. the Clerk of Court is **DIRECTED** to enter judgment in favor of Plaintiff Mary Ann  
19 Celedon and against Defendant, Carolyn Colvin, Acting Commissioner of Social  
20 Security.  
21

22  
23  
24 IT IS SO ORDERED.

25 Dated: September 11, 2014

/s/ Sandra M. Snyder  
26 UNITED STATES MAGISTRATE JUDGE