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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD DOYLE MUSSER,

Case No. 1:14-cv-00684-SKO

Plaintiff,

ORDER ON PLAINTIFF’S COMPLAINT

(Doc. 17)

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

I. INTRODUCTION

Plaintiff, Richard Doyle Musser (“Plaintiff”), seeks judicial review of a final decision of the Commissioner of Social Security (the “Commissioner”) denying his application for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) benefits pursuant to Titles II and XVI of the Social Security Act. 42 U.S.C. §§ 405(g), 1383(c)(3). 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 a U.S. Magistrate Judge. (Docs. 7, 8.)

1 **II. FACTUAL BACKGROUND**

2 Plaintiff was born on May 2, 1971, and alleges disability beginning on August 21, 2007.
3 (AR 32; 249; 253; 292.) Plaintiff claims he is disabled due to back injury, lower extremity nerve
4 damage, major depressive like episode, depression, mood disorder, and “multiple conditions.”
5 (See AR 253.)

6 **A. Relevant Medical Evidence**

7 On May 8, 2009, Plaintiff attended his first psychotherapeutic visit since a work-site injury
8 in 2007; psychiatric Agreed Medical Examiner Myron L. Nathan evaluated Plaintiff. (AR 679-
9 725.) Plaintiff reported symptoms of anxiety and depression, difficulty with short-term memory,
10 irritability, and anger, but denied any suicidal ideation. (AR 684-85; 699; 700.) Plaintiff reported
11 socializing with friends each week or every two weeks, driving occasionally, and walking daily
12 and sometimes working out on a Nordic Track. (AR 686.)

13 Plaintiff was not anxious or depressed, and did not exhibit any signs of a thought disorder,
14 hallucinations, or delusions. (AR 687; 697.) Plaintiff was oriented, displayed average
15 intelligence, and had satisfactory judgment. (AR 687-88.) Dr. Nathan diagnosed Plaintiff with
16 depressive disorder, not otherwise specified (AR 696) and recommended Plaintiff see a
17 psychiatrist to receive a prescription for psychotropic medication (AR 700).

18 Dr. Nathan opined Plaintiff was experiencing a psychiatric disorder as a result of his
19 physical symptomatology but determined that Plaintiff had never been even temporarily totally
20 disabled from a psychiatric standpoint. (AR 700.) Dr. Nathan further opined that from a
21 psychiatric standpoint, there was no reason why Plaintiff could not resume his former work
22 activities without any restrictions or limitations. (AR 701.) Dr. Nathan further cautioned that
23 Plaintiff’s “response style [on psychological testing] may indicate a tendency to magnify illness,
24 an inclination to complain, or feelings of extreme vulnerability associated with a current episode
25 of acute turmoil,” and that his “scale scores may be somewhat exaggerated, and the interpretations
26 should be read with this in mind.” (AR 691.)

27 On December 9, 2010, psychologist Banafshe P. Ardebili, Ph.D., examined Plaintiff for
28 consultative examination. (AR 526-32.) Plaintiff reported experiencing depression since injuring

1 his back in 2007, but denied experiencing any suicidal ideation. (AR 527.) Plaintiff
2 acknowledged a history of substance abuse, including methamphetamines and marijuana, and an
3 arrest and conviction history for possession of crystal methamphetamines. (AR 527-28.)

4 Plaintiff reported that he could take care of his self-dressing, self-bathing, and personal
5 hygiene; could drive, pay bills and handle cash appropriately, and use a computer on a daily basis.
6 (AR 528.) Dr. Ardebili observed that Plaintiff had intellectual functioning in the low average
7 range, depressed mood, and dysphoric affect, but was also oriented, had an above average fund of
8 knowledge, had linear and goal-directed thought processes, had intact insight and judgment, had
9 no impairment in his memory, successfully completed digits forward and backwards, had intact
10 attention and concentration, was able to follow the conversation with the interviewer well, and was
11 able to give a detailed account of his history, current functioning, and activities. (AR 528-29.)

12 Dr. Ardebili diagnosed Plaintiff as suffering from a mood disorder, not otherwise
13 specified, active cannabis dependence, and methamphetamine dependency and abuse in sustained
14 full remission, and assessed Plaintiff as having a global assessment of functioning (GAF)² score of
15 67, indicating mild symptoms. (AR 531.) Dr. Ardebili opined Plaintiff could understand,
16 remember, and carry out short, simple instructions, could accept instructions from supervisors,
17 interact fairly appropriately with supervisors, coworkers, and peers, and had only mild inability to
18 understand, remember, and carry out detailed instructions. (AR 531.) Dr. Ardebili recommended
19 mental health treatment services for Plaintiff's mood and affective disturbances. (AR 532.)

20 Dr. Nathan examined Plaintiff again on January 4, 2011. (AR 635-78.) Dr. Nathan noted
21 Plaintiff had received mental health treatment from a Kaiser Permanente physician, Dr. Rowell,
22 since Dr. Nathan's 2009 examination, but had stopped seeing Dr. Rowell in December 2010. (AR
23 637.) Plaintiff did not exhibit any physical discomfort, was not anxious or depressed, denied
24 suicidal ideation, but exhibited a sad affect. (AR 644; 656.) Plaintiff was able to laugh and smile

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26 ² The GAF scale is a tool for "reporting the clinician's judgment of the individual's overall level of functioning."
27 Am. Psychiatric Ass'n, *Diagnosis & Statistical Manual of Mental Disorders* 32 (4th ed. 2000). The clinician uses a
28 scale of zero to 100 to consider "psychological, social, and occupational functioning on a hypothetical continuum of
mental health- illness," not including impairments in functioning due to physical or environmental limitations. *Id.* at
34. A GAF score between 61 and 70 indicates mild symptoms or some difficulty in social, occupational, or
school functioning. *Id.*

1 and had no signs of anhedonia. (AR 642.) Plaintiff stated he had improved emotionally since the
2 2009 examination and got depressed only periodically. (AR 655.) Plaintiff reported having poor
3 concentration and a deterioration in his memory, but did not show any signs of cognitive deficits.
4 (AR 653, 655-56.) When asked about his daily activities, Plaintiff stated he takes his child out to
5 eat, to the park, or to the arcade, gardens around his home, and walks. (AR 643-644).

6 Dr. Nathan diagnosed relational problems; a depressive disorder, not otherwise specified,
7 history of amphetamine abuse, in full remission; and a GAF score of 60, indicating moderate
8 symptoms. (AR 650; 657.) Dr. Nathan again noted Plaintiff had a tendency to exaggerate his
9 symptomatology, opining that Plaintiff had “exaggerated his symptoms in responding to both the
10 [psychological personality and psychopathology tests], as they were grossly exaggerated and
11 invalid” and “[a]s a result, the totally subjective tests without checks or balances would have to be
12 looked upon with some skepticism.” (AR 653.) Dr. Nathan opined Plaintiff had no work
13 restrictions or limitations and there was no reason he could not resume his former work activities.
14 (AR 639; 657.)

15 In 2011 and 2012, Satnam Atwal, M.D., provided mental health treatment to Plaintiff.
16 (AR 886-907). In April 2011, Dr. Atwal diagnosed Plaintiff with major depressive disorder
17 without psychotic features in partial remission, post-traumatic stress disorder, and assessed
18 Plaintiff as having a GAF score of 50, indicating serious symptoms. (AR 901.) However, with
19 medication, Dr. Atwal reported Plaintiff’s symptoms improved. (AR 886-99.) In June 2011,
20 Plaintiff reported he stayed physically active during the daytime and was active socially, he did
21 not feel sad anymore and did not have feelings of hopelessness, and he had a “euthymic,”
22 reasonably positive mood. (AR 897.)

23 In October and November 2011, Dr. Atwal reported Plaintiff was emotionally stable, had a
24 euthymic mood, and exhibited good insight and judgment. (AR 892-93.) Plaintiff reported
25 feeling much better and “happy most of the time,” no feelings of hopelessness or worthlessness, an
26 improved relationship with his girlfriend, and an increase in his social and physical activity. (AR
27 892-93.) Plaintiff denied having sleeping problems, mood swings, racing thoughts, or medication
28 side effects. (AR 892-93.) During subsequent appointments in 2012, Plaintiff reported

1 experiencing difficulty concentrating, but repeatedly affirmed that his medications relieved his
2 depression and stated he felt good, his anger was better controlled, and his energy level was
3 improved. (AR 887-90.)

4 **C. Hearing Testimony**

5 **1. Plaintiff's Testimony**

6 Plaintiff testified at the hearing that he has an 11-year old child who does not live with
7 him, and he lives in a trailer on his girlfriend's property. (AR 33.) Plaintiff has a GED certificate,
8 and completed courses toward an Associate of Arts degree at a junior college. (AR 35.) Plaintiff
9 attends Jehovah's Witnesses meetings once a week. (AR 38.)

10 Plaintiff worked in roofing, framing, and construction prior to an injury to his back; he
11 continues to be involved in a workers' compensation case appeal over the injury. (AR 34; 39-41.)
12 Plaintiff could previously lift up to 200 pounds. (AR 41.) As a result of the back injury, Plaintiff
13 has muscle spasms and "constant" back pain and fatigue. (AR 41; 54-55; 57.) He experiences
14 some relief from medication and pressing a golf ball against his back, and has successfully
15 experienced relief from injections, chiropractic care, and physical therapy. (AR 41-57.) Plaintiff
16 has treated with a counselor. (AR 50.)

17 Plaintiff is able to handle his own self-care, do household chores like dusting and folding
18 laundry, and mows the lawn. (AR 36-38; 53-54.) On a typical day, Plaintiff spends time lying
19 down, taking naps, and usually takes a shower in the middle of the day. (AR 38-39.) Plaintiff
20 testified he gets depressed from watching television, his girlfriend helps him manage his finances,
21 and he has difficulty getting along with others but that he was better at being self-controlled on
22 medication. (AR 51-52.)

23 Plaintiff testified he could not concentrate on reading the newspaper for more than four
24 minutes, that he got depressed in front of large groups of people, that he had suicidal thoughts and
25 cried every day, and that he took medications and tried "to get over it." (AR 60-62.) Plaintiff has
26 difficulty sleeping soundly, and wakes up in the middle of the night intermittently. (AR 62.)

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1 **2. Vocational Expert’s Testimony**

2 A vocational expert (“VE”) testified at the hearing that an individual of Plaintiff’s age,
3 education, and work experience, with the RFC to perform light work and sit, stand, and walk for 6
4 hours, with a sit/stand option, and a restriction to performing simple routine tasks, would not be
5 able to perform Plaintiff’s past relevant work as a Carpenter, Dictionary of Occupational Titles
6 (“DOT”), 1991 WL 645964, at 860.381-022, and Carpenter Supervisor, DOT 860.131-018.
7 (AR 63-64.) Work as a Carpenter requires a heavy exertional level and an SVP level of 7³, while
8 work as a Carpenter Supervisor requires a medium exertional level and an SVP level of 8⁴.
9 (AR 63-64; DOT 860.381-022; 860.131-018.)

10 The VE testified that such an individual would be able to perform other work, including
11 the jobs of Cashier II, DOT 211.462-010, with 108,000 jobs in the national economy and 1,200
12 jobs in the state, Storage Facility Rental clerk, DOT 295.367-026, with 31,000 jobs in the national
13 economy and 5,400 jobs in the state, and Ticket Seller, DOT 211.467-030, with 13,000 jobs in the
14 national economy and 1,400 in the state, all of which require a light exertion level and SVP of 2⁵.
15 (AR 64-65.) When the ALJ asked the VE whether her testimony was consistent with the DOT, the
16 VE responded that her testimony was consistent. (AR 70.)

17 **C. The ALJ’s Decision and Plaintiff’s Request for Review**

18 The issue before the Court is very narrow. Plaintiff and the Commissioner agree that the
19 ALJ correctly proceeded through the first four steps of the five-step sequential analysis. (Docs.
20 13; 14.) First, the ALJ found that Plaintiff has not engaged in substantial gainful activity since
21 August 21, 2007, the date on which he alleges he became disabled. (AR 12.) Second, the ALJ
22 found that Plaintiff suffered from lumbar degenerative joint disease and facet arthropathy,
23 polyneuropathy, chronic pain syndrome, and depression, which were all severe impairments.

24 _____
25 ³ Specific Vocational Preparation (“SVP”), as defined in DOT, App. C, is the amount of lapsed time required by a
26 typical worker to learn the techniques, acquire the information, and develop the facility needed for average
27 performance in a specific job-worker situation. An SVP level of 7 would require learning time of over 2 years up to
28 and including 4 years.

⁴ An SVP level of 8 would require learning time of over 4 year up to and including 10 years.

⁵ An SVP level of 2 would require learning time of “[a]nything beyond short demonstration up to and including 1
month.”

1 (AR 12.) Third, the impairments were not severe enough to meet or equal one of the impairments
2 listed in Appendix1, Subpart P of 20 C.F.R. Part 404. (AR 12-13.) Fourth, the ALJ found that
3 Plaintiff did not retain the RFC to perform his past relevant work as a Carpenter and Carpenter
4 Supervisor, which required a medium/skilled exertional level. (AR 20.)

5 Arriving at the last step of the sequential analysis, the ALJ determined that other jobs
6 existed in significant numbers in the national economy that a person of Plaintiff's RFC could
7 perform. (AR 20.) Based on the testimony of the VE, the ALJ found that "considering the
8 [Plaintiff]'s age, educational background, work experience, and [RFC,]" Plaintiff could perform
9 work as a Cashier II, DOT 211.462-010, Storage Facility Rental clerk, DOT 295.367-026, and
10 Ticket Seller, DOT 211.467-030, which require a light/unskilled exertional level and SVP of 2.
11 (AR 20-21.) Accordingly, the ALJ held that Plaintiff was not disabled. (AR 21.)

12 Plaintiff requested review by the administrative Appeals Council; when that was denied, he
13 sought judicial review under 42 U.S.C. § 405(g). (Docs. 1, 13, p. 4.) Plaintiff contends the ALJ
14 improperly relied on VE testimony which deviated from the DOT at Step 5. (Doc. 13.)

15 III. SCOPE OF REVIEW

16 The Commissioner's decision that a claimant is not disabled will be upheld by a district
17 court if the findings of fact are supported by substantial evidence in the record and the proper legal
18 standards were applied. 42 U.S.C. § 405(g); *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007);
19 *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000); *Morgan v.*
20 *Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Davis v. Heckler*, 868 F.2d
21 323, 325 (9th Cir. 1989); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999); *Tidwell v. Apfel*,
22 161 F.3d 599, 601 (9th Cir. 1999); *Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985) (the
23 findings of the Commissioner as to *any* fact, if supported by substantial evidence, are conclusive.)
24 Substantial evidence is more than a mere scintilla, but less than a preponderance. *Ryan v. Comm'r*
25 *of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008); *Saelee v. Chater*, 94 F.3d 520, 521 (9th Cir.
26 1996). "It means such evidence as a reasonable mind might accept as adequate to support a
27 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v.*
28 *N.L.R.B.*, 305 U.S. 197, 229 (1938)). "While inferences from the record can constitute substantial

1 last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A),
2 1382c(a)(3) (A); *see also Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The impairment or
3 impairments must result from anatomical, physiological, or psychological abnormalities that are
4 demonstrable by medically accepted clinical and laboratory diagnostic techniques and must be of
5 such severity that the claimant is not only unable to do his previous work, but cannot, considering
6 his age, education, and work experience, engage in any other kind of substantial, gainful work that
7 exists in the national economy. 42 U.S.C. §§ 423(d)(2)-(3), 1382c(a)(3)(B), (D).

8 The regulations provide that the ALJ must undertake a specific five-step sequential
9 analysis in the process of evaluating a disability. In Step 1, the ALJ must determine whether the
10 claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b),
11 416.920(b). If not, the ALJ must determine at Step 2 whether the claimant has a severe
12 impairment or a combination of impairments significantly limiting her from performing basic
13 work activities. *Id.* §§ 404.1520(c), 416.920(c). If so, the ALJ moves to Step 3 and determines
14 whether the claimant has a severe impairment or combination of impairments that meet or equal
15 the requirements of the Listing of Impairments (“Listing”), 20 § 404, Subpart P, App. 1, and is
16 therefore presumptively disabled. *Id.* §§ 404.1520(d), 416.920(d). If not, at Step 4 the ALJ must
17 determine whether the claimant has sufficient RFC despite the impairment or various limitations
18 to perform her past work. *Id.* §§ 404.1520(f), 416.920(f). If not, at Step 5, the burden shifts to the
19 Commissioner to show that the claimant can perform other work that exists in significant numbers
20 in the national economy. *Id.* §§ 404.1520(g), 416.920(g). If a claimant is found to be disabled or
21 not disabled at any step in the sequence, there is no need to consider subsequent steps. *Tackett v.*
22 *Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. §§ 404.1520, 416.920.

23 V. DISCUSSION

24 A. Substantial Evidence Supports the ALJ’s Finding that Plaintiff is not Disabled

25 The ALJ relied on the VE’s testimony at the hearing to determine Plaintiff could work as a
26 Cashier II, Storage Facility Rental clerk, or Ticket Seller. (AR 21.) The three jobs require a
27 Reasoning Level of 3. DICOT 211.462-010; 295.367-026; 211.467-030. Plaintiff argues that the
28 VE’s testimony impermissibly deviated from the DOT without explanation, because Plaintiff’s

1 limitation to simple, routine tasks is inherently inconsistent with the requirements of Level 3
2 Reasoning. (Docs. 13; 15.) The Commissioner concedes that the VE’s testimony conflicted with
3 the DOT, but contends that any deviation from the DOT was harmless, because Plaintiff’s
4 educational background and cognitive abilities support the ALJ’s reasonable finding that Plaintiff
5 could perform these unskilled jobs.

6 **1. Legal Standard**

7 At Step 5, the Commissioner has the burden “to identify specific jobs existing in
8 substantial numbers in the national economy that [a] claimant can perform despite [his] identified
9 limitations.” *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995); *see also* 20 C.F.R.
10 § 416.920(g). The ALJ considers potential occupations that the claimant may be able to perform,
11 given the claimant’s assessed RFC, defined as the most that a claimant can do despite “physical
12 and mental limitations” caused by his impairments and related symptoms. 20 C.F.R.
13 § 416.945(a)(1); 20 C.F.R. § 416.966.

14 In making this determination, the ALJ relies on the DOT, which describes the requirements
15 for each listed occupation, including the necessary General Educational Development (“GED”)
16 levels; that is, “aspects of education (formal and informal) . . . required of the worker for
17 satisfactory job performance.” DOT, App. C, 1991 WL 688702 (4th ed. 1991). The GED levels
18 include the reasoning ability required to perform the job, ranging from Level 1 (which requires the
19 least reasoning ability) to Level 6 (which requires the most). *See* 20 C.F.R. §§ 416.969,
20 416.966(d)(1).

21 In addition to the DOT, the ALJ relies on the testimony of vocational experts who testify
22 about specific occupations that a claimant can perform in light of his residual functional capacity.
23 20 C.F.R. § 416.966(e); *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).
24 Finally, to conclude the Step 5 analysis, the ALJ determines “whether, given the claimant’s RFC,
25 age, education, and work experience, he actually can find some work in the national economy.”
26 *Valentine*, 574 F.3d at 689; *see also* 20 C.F.R. § 416.920(g).

27 When there is an apparent conflict between the vocational expert’s testimony and the DOT,
28 the ALJ is required to reconcile the inconsistency. *Massachi v. Astrue*, 486 F.3d 1149, 1153-54

1 (9th Cir. 2007). In the Ninth Circuit, “there is an apparent conflict between the [RFC] to perform
2 simple, repetitive tasks, and the demands of Level 3 Reasoning.” *Zavalin v. Colvin*, 778 F.3d 842,
3 846 (9th Cir. 2015). The ALJ must therefore ask the expert to explain the conflict and “then
4 determine whether the [VE]’s explanation for the conflict is reasonable” before relying on the
5 VE’s testimony to reach a disability determination. *Id.*; *see also* SSR 00-4P.

6 An ALJ may rely on VE testimony that contradicts the DOT only insofar as the record
7 contains persuasive evidence to support the deviation. *See Johnson*, 60 F.3d at 1435; *see also*
8 *Pinto v. Massanari*, 249 F.3d 840, 846 (9th Cir. 2001); *Massachi*, 486 F.3d at 1152-53;
9 *Tommasetti*, 533 F.3d at 1042; *Light v. Social Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1977).
10 Even if the ALJ errs in failing to reconcile an apparent conflict between the VE’s testimony and
11 the DOT, the Court must consider whether the plaintiff’s abilities, such as his educational
12 background, demonstrate that he is indeed capable of working, rendering the ALJ’s error harmless.
13 *See Zavalin*, 778 F.3d at 847-48.

14 **2. Analysis**

15 SSR 00-4p explicitly requires that the ALJ determine whether the expert’s testimony
16 deviates from the DOT, and whether there is a reasonable explanation for any deviation. At the
17 hearing, the VE testified that her testimony was consistent with the DOT. (AR 21; 70.) Though
18 the VE was incorrect and her testimony was actually inconsistent with the DOT, “an ALJ may rely
19 on expert testimony which contradicts the DOT” when “the record contains persuasive evidence to
20 support the deviation.” *See Johnson*, 60 F.3d at 1435; *Light*, 119 F.3d at 793. The record here
21 contains sufficiently persuasive evidence to support the ALJ’s deviation from the DOT in finding
22 that Plaintiff could perform jobs requiring Level 3 Reasoning despite an assessed limitation to
23 “simple, routine tasks.” Further, the ALJ’s error in failing to reconcile the VE’s testimony with
24 the DOT is harmless, because Plaintiff’s abilities, including his educational and vocational
25 background and medical record, demonstrate that he is indeed capable of working.

26 Plaintiff relies on *Zavalin* for the position that Plaintiff’s limitation to simple and routine
27 tasks is inconsistent with the demands of Level 3 Reasoning and the ALJ’s reliance on the VE’s
28 testimony was therefore reversible error. (Doc. 15 (citing *Zavalin*, 778 F.3d 842).) In *Zavalin*, the

1 Ninth Circuit compared the definitions of Level 2 and Level 3 Reasoning⁶ to determine that
2 “limitation to simple, routine tasks is at odds with Level 3’s requirements because it may be
3 difficult for a person limited to simple, repetitive tasks to follow instructions in ‘diagrammatic
4 form’ as such instructions can be abstract.” 778 F.2d at 847 (internal citation omitted). The Court
5 held that “there is no rigid correlation between reasoning levels and the amount of education that a
6 claimant has completed[,]” so that while a claimant’s “educational background is relevant, the
7 DOT’s reasoning levels clearly correspond to the claimant’s *ability* because they assess whether a
8 person can ‘apply’ increasingly difficult principles of rational thought and ‘deal’ with increasingly
9 complicated problems.” *Id.* (citing DOT, App. C, 1991 WL 688702 (italics in original)); *see also*
10 *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005) (a job’s reasoning level “gauges the
11 minimal ability a worker needs to complete the job’s tasks themselves”).

12 The *Zavalin* Court emphasized that the Commissioner’s reliance on the plaintiff’s
13 completion of high school as evidence of his level of reasoning ability was belied by his
14 enrollment in special education classes, special accommodations in his regular classes, and his
15 graduating with a “modified diploma.” 778 F.3d at 847 (the plaintiff had medical diagnoses of
16 cerebral palsy, a learning disorder, and a speech impairment causing him to speak in a halting
17 manner, and had never held a job). While *Zavalin* is instructive, the facts are distinguishable from
18 the case currently before the Court.

19 Here, Plaintiff received a GED certificate and attended some college courses toward an
20 Associate of Arts degree at Phillips Junior College from 1991 to 1992. (AR 35; 254; 527.) That
21 level of education, while not dispositive of Plaintiff’s reasoning ability, indicates that he has
22 “abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th
23 grade level or above.” 20 C.F.R. § 404.1564(b)(4). Unlike the plaintiff in *Zavalin*, Plaintiff
24 neither presented any evidence, nor contended, that he was enrolled in special education classes or
25

26 ⁶ Level 2 Reasoning requires the ability to “[a]pply commonsense understanding to carry out detailed but
27 uninvolved written or oral instructions” and to “[d]eal with problems involving a few concrete variables in or from
28 standardized situations.” Level 3 Reasoning requires the ability to “[a]pply commonsense understanding to carry out
instructions furnished in written, oral, or diagrammatic form” and “[d]eal with problems involving several concrete
variables in or from standardized situations.” DOT, App. C, 1991 WL 688702.

1 required special accommodations to complete his GED or the college courses he took. (*See*
2 AR 35; 527 (Plaintiff denied any special education courses in his academic history).)

3 Further, Plaintiff has performed skilled work in the past. (AR 63-64.) Plaintiff's past
4 relevant work as a Carpenter and Carpentry Supervisor both require Level 4 Reasoning, which
5 requires a worker to "[a]pply principles of rational systems to solve practical problems and deal
6 with a variety of concrete variables in situations where only limited standardization exists" and
7 "[i]nterpret a variety of instructions furnished in written, oral, diagrammatic, or schedule form."
8 *See* DICOT 860.381-022; 860.131-018; DOT, App. C, 1991 WL 688702. Unlike the plaintiff in
9 *Zavalin*, Plaintiff has past relevant work which was performed at a higher Reasoning Level than
10 the jobs identified by the ALJ in its decision.

11 Finally, there is no medical evidence in the record supporting a conclusion that Plaintiff
12 has diminished cognitive or reasoning ability that would preclude him from performing work at
13 the same reasoning level as his prior relevant work. (*See* AR 15-17; 528-29; 653; 655-56.) In
14 December of 2010, Consultative Examiner Dr. Ardebili noted that Plaintiff's "memory is
15 unimpaired for remote and immediate memory," his "attention and concentration are intact," his
16 "thought processes were linear and goal-directed[.]" his "insight and judgment appear to be
17 intact," and his speech was fluent and coherent. (AR 529-30.) Opining Plaintiff's "cognitive
18 ability falls within the low average range" and he has a "mild inability to understand, remember
19 and carry out detailed instructions[.]" Dr. Ardebili concluded that Plaintiff has "the ability to
20 understand, remember and carry out short, simple instructions." (AR 531.) Further, state agency
21 physician M. Dilger opined that Plaintiff "would only have mild limitations in carrying out
22 detailed tasks." (AR 542.) While the ALJ assessed Plaintiff's RFC as being limited to carrying
23 out "simple, routine tasks," unlike in *Zavalin*, the medical evidence does not establish that Plaintiff
24 is *unable* to work in occupations requiring Level 3 Reasoning.

25 Plaintiff does not argue, and nowhere in the record is there any medical evidence
26 indicating that Plaintiff's severe mental impairment of depression would prevent him from being
27 able to carry out the duties in the job descriptions of the three occupations identified by the ALJ.
28 A Level 3 Reasoning score requires that the claimant be able to "apply commonsense

1 understanding to carry out instructions furnished in written, oral, or diagrammatic form” and “deal
2 with problems involving several concrete variables in or from standardized situations.” DOT App.
3 C, 1991 WL 688702. Plaintiff does not argue that he cannot perform these skills, and his
4 educational background, employment experience at a higher reasoning level, and cognitive
5 abilities appear to match the requirements of Level 3 Reasoning. *See Hillier v. Social Sec. Admin.*,
6 486 F.3d 359, 367 (8th Cir. 2007) (evaluating plaintiff’s past work experience and holding that
7 “[i]n the abstract, tension exists between only being able to understand, remember, and follow
8 simple, concrete instructions and working as a cashier. We, however, do not decide cases in the
9 abstract.”).

10 Substantial evidence exists within the record to support the ALJ’s reliance on the VE’s
11 testimony that Plaintiff is able to work as a Cashier II, Storage Facility Rental clerk, and Ticket
12 Seller – occupations requiring Level 3 Reasoning – despite his assessed RFC limiting him to
13 “simple, routine tasks.” *See Johnson*, 60 F.3d at 1435; *see also Zavalin*, 778 F.3d at 847-48. Any
14 error in the ALJ’s failure to reconcile the apparent conflict between the VE’s testimony and the
15 DOT is therefore harmless, and the ALJ’s decision must be affirmed.

16 VI. CONCLUSION

17 Based on the foregoing, the Court finds that the ALJ’s decision is supported by substantial
18 evidence in the record as a whole and is based on proper legal standards. Accordingly, the Court
19 DENIES Plaintiff’s appeal from the administrative decision of the Commissioner of Social
20 Security. The Clerk of this Court is DIRECTED to enter judgment in favor of Defendant Carolyn
21 W. Colvin, Acting Commissioner of Social Security and against Plaintiff Roberto Muniz Vasquez.

22
23 IT IS SO ORDERED.

24 Dated: July 21, 2015

/s/ Sheila K. Oberto
25 UNITED STATES MAGISTRATE JUDGE