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

SOUSA YANG,  
Plaintiff,

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
Defendant.

**1:16-cv-1195 GSA**

**ORDER DIRECTING ENTRY OF  
JUDGMENT IN FAVOR OF PLAINTIFF  
SOUSA YANG AND AGAINST  
DEFENDANT NANCY A. BERRYHILL,  
ACTING COMMISSIONER OF SOCIAL  
SECURITY**

**I. INTRODUCTION**

Plaintiff Sousa Yang (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for Supplemental Security Income (“SSI”) pursuant to XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs which were submitted without oral argument to

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Nancy A. Berryhill shall be substituted in for Carolyn W. Colvin, as Nancy A. Berryhill in now the acting Commissioner of Social Security.

1 the Honorable Gary S. Austin, United States Magistrate Judge.<sup>2</sup> (*See*, Docs. 21, 23, and 24). Upon  
2 a review of the entire record, the Court finds that the ALJ did not apply the proper standards and  
3 the decision is not supported by substantial evidence. Accordingly, the Court GRANTS  
4 Plaintiff's appeal.

## 5 **II. FACTS AND PRIOR PROCEEDINGS**<sup>3</sup>

### 6 **A. Background**

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8 On January 22, 2013, Plaintiff filed an application for SSI claiming disability beginning  
9 February 28, 2008. AR 13; 43. The parties agree that the Plaintiff properly exhausted her  
10 administrative remedies and that the Appeals Council denied Plaintiff's appeal. (Doc. 21, pg. 2  
11 and Doc. 23, pgs. 2-3). Therefore, this appeal is a review of Administrative Law Judge Vincent  
12 Misenti's ("ALJ") decision issued on July 30, 2015, which is considered the Commissioner's  
13 final order. *See*, 42 U.S.C. §§ 405(g), 1383(c)(3). AR 10-21. Plaintiff is challenging the ALJ's  
14 failure to resolve a conflict between the vocational expert's testimony and the Dictionary of  
15 Occupational Titles ("DOT").  
16

### 17 **B. The Disability Standard**

18 To qualify for benefits under the Social Security Act, a plaintiff must establish that he or  
19 she is unable to engage in substantial gainful activity due to a medically determinable physical or  
20 mental impairment that has lasted or can be expected to last for a continuous period of not less  
21 than twelve months. 42 U.S.C. § 1382c(a)(3)(A). An individual shall be considered to have a  
22 disability only if:  
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24 . . . his physical or mental impairment or impairments are of such  
25 severity that he is not only unable to do his previous work, but

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27 <sup>2</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. (*See* Docs. 9 and 10).

28 <sup>3</sup> References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

1 cannot, considering his age, education, and work experience,  
2 engage in any other kind of substantial gainful work which exists in  
3 the national economy, regardless of whether such work exists in the  
4 immediate area in which he lives, or whether a specific job vacancy  
5 exists for him, or whether he would be hired if he applied for work.

6 42 U.S.C. § 1382c(a)(3)(B).

7 To achieve uniformity in the decision-making process, the Commissioner has established  
8 a sequential five-step process for evaluating a claimant's alleged disability. 20 C.F.R. §  
9 416.920(a)-(f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding  
10 that the claimant is or is not disabled. 20 C.F.R. § 416.920(a)(4). The ALJ must consider  
11 objective medical evidence and opinion testimony. 20 C.F.R. § 416.927, 416.929.

12 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in  
13 substantial gainful activity during the period of alleged disability, (2) whether the claimant had  
14 medically-determinable "severe" impairments, (3) whether these impairments meet or are  
15 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,  
16 Appendix 1, (4) whether the claimant retained the residual functional capacity ("RFC") to  
17 perform his past relevant work, and (5) whether the claimant had the ability to perform other jobs  
18 existing in significant numbers at the regional and national level. 20 C.F.R. § 416.920(a)-(f).

### 19 **C. Summary of the ALJ's Decision**

20 Using the Social Security Administration's five-step sequential evaluation process, the  
21 ALJ determined that Plaintiff did not meet the disability standard. AR 10-21. More particularly,  
22 the ALJ found that Plaintiff had not engaged in substantial gainful activity since January 22,  
23 2013, the application date. AR 15. Further, the ALJ identified an affective disorder as a severe  
24 impairment. AR 15. However, the ALJ found that Plaintiff did not have an impairment or  
25 combination of impairments that met or medically equaled one of the listing impairments in 20  
26 C.F.R. Part 404 P, Appendix 1. AR 16-17.  
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1 The ALJ also determined that Plaintiff had the residual functional capacity (“RFC”) to  
2 perform a full range of work at all exertional levels with the following non-exertional limitations:

3 She does not speak English. She is limited to simple, routine, and repetitive tasks. She is  
4 not able to perform at a production rate pace, but can perform goal-oriented work. She is  
5 limited to simple work-related decisions. She can occasionally interact with coworkers  
and the public.

6 AR 17.

7 When making the finding that Plaintiff was not able to communicate in English, the ALJ  
8 stated that the Plaintiff “... is considered in the same way as an individual who is illiterate in  
9 English.”<sup>4</sup> AR 20. At step four, the ALJ relied on the VE’s testimony and found that Plaintiff  
10 had no past relevant work. AR 20. However, at step five, he found that Plaintiff was capable of  
11 performing work as a cleaner II (DOT 919.687-014), and as an industrial cleaner (DOT 381.687-  
12 018). AR 20. Accordingly, the ALJ found that Plaintiff was not disabled. AR 21.

13  
14 **III. STANDARD OF REVIEW**

15 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine  
16 whether (1) it is supported by substantial evidence, and (2) it applies the correct legal standards.  
17 See *Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d  
18 1071, 1074 (9th Cir. 2007).

19 “Substantial evidence means more than a scintilla but less than a preponderance.”  
20 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which,  
21 considering the record as a whole, a reasonable person might accept as adequate to support a  
22 conclusion.” *Id.* Where the evidence is susceptible to more than one rational interpretation, one  
23 of which supports the ALJ's decision, the ALJ's conclusion must be upheld.” *Id.*

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<sup>4</sup> Plaintiff’s native language is Hmong and she had an interpreter at the administrative hearing before the ALJ. AR 13, 286.

1                   **IV.    THE ISSUE PRESENTED**

2                   Plaintiff argues that the ALJ committed legal error by failing to resolve a conflict between  
3 the ALJ’s findings that she had no English skills and the VE’s testimony that Plaintiff could  
4 perform the jobs listed above. Specifically, she contends that the “General Educational  
5 Development” category of the DOT indicates that the two jobs identified by the VE (a cleaner II  
6 and cleaner, industrial) require a language level of one and two respectively. Language level one  
7 requires the ability to recognize the meaning of 2,500 two or three-syllable words; read at a rate  
8 of 95-120 words per minute; write simple sentences containing a subject, verb, and object, as well  
9 as a series of numbers. She also asserts that language level two requires even more English  
10 proficiency. Given these language requirements, the ALJ did not properly address the conflict  
11 between the VE’s testimony and his language findings. Thus, he incorrectly concluded that  
12 Plaintiff could work as a cleaner II and an industrial cleaner, without obtaining additional  
13 clarification from the VE. (Doc. 21, pgs.12-15; Doc. pg. 5-7, Doc. 24, pgs. 2-8).

14                   Defendant argues that Plaintiff misunderstands how the DOT’s General Education  
15 Development corresponds to step five of the disability process. Specifically, the Commissioner  
16 contends that it would be improper to require that an ALJ rely on information in the DOT that  
17 contradicts the Commissioner’s regulatory framework. On one hand, the DOT’s General  
18 Educational Development describes education generally and not only includes formalized  
19 education, but also includes education received from experience and self-study. As part of this  
20 paradigm, the DOT presumes that every job mandates that a person has some ability to read and  
21 write. On the other hand, the five-step process considers *all* vocational factors. These factors  
22 include an individual’s RFC, educational levels, an ability to perform work despite any mental or  
23 physical impairment, as well as a person’s English language skills. Under the Commissioner’s  
24 regulations, illiteracy, or the inability to communicate in English, is not an automatic bar from  
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1 performing work at step five of the disability process. As such, the Defendant argues the ALJ  
2 properly concluded that Plaintiff could perform the identified jobs despite her English language  
3 deficiencies, especially since neither of the DOT job descriptions require that an individual must  
4 read, write, or text. Therefore, any conflict was not apparent at the time of the hearing and further  
5 questioning of the VE was not required. Moreover, the world of unskilled work (which the ALJ  
6 found that Plaintiff was capable of performing) does not require literacy, or even the ability to  
7 communicate in English. Finally, the Commissioner argues that Plaintiff waived this issue on  
8 appeal because she was represented by an attorney at the hearing who declined the opportunity to  
9 pose any questions to the VE on this topic, and consequently, invited the error. AR 307. Thus,  
10 there is substantial evidence to support the conclusion that Plaintiff can perform these jobs. (Doc.  
11 23, pgs. 6-12).  
12

#### 13 **IV. DISCUSSION**

##### 14 **A. Waiver of Argument**

15 Preliminarily, the Court will address whether Plaintiff waived this argument since this is a  
16 threshold issue in this case. Defendant contends that Plaintiff waived her argument because she  
17 was represented by counsel at the hearing, yet her attorney failed to direct any questions to the  
18 VE about this issue, or any other issue, even after the VE testified that there was no conflict  
19 between his testimony and the DOT. AR 306-307. Defendant cites to *Meanel v. Apfel*, 172 F.3d  
20 1111, 1115 (9th Cir. 1999) in which the Ninth Circuit held that, “at least when claimants are  
21 represented by counsel, they must raise all issues and evidence at the administrative hearings in  
22 order to preserve them on appeal.” (Doc. 18, pgs. 5-6). In opposition, the Plaintiff contends that  
23 the Commissioner’s regulations and the case law require that an ALJ must inquire about apparent  
24 conflicts between the VE’s testimony and the DOT regardless of whether the Plaintiff raises the  
25 issue. Moreover, it is the Commissioner’s burden at step five to establish that Plaintiff can  
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1 perform work that exists in substantial numbers in the national economy. Because the Defendant  
2 bears the burden at the final phase of the disability process, Plaintiff cannot waive the issue or  
3 invite error.

4 After the briefing was completed in this case, the Ninth Circuit published *Shaibi v.*  
5 *Berryhill*, 870 F. 3d 874, 882 (9th Cir. 2017).<sup>5</sup> In *Shaibi*, the Ninth Circuit addressed whether a  
6 Plaintiff waived the issue of challenging a VE’s testimony at an administrative hearing regarding  
7 the number of available jobs when the issue was not raised before the ALJ at the hearing. *Shaibi*,  
8 870 F. 3d at 881. The Court reaffirmed its holding in *Meanel* and held that a Plaintiff waives the  
9 issue of challenging the number of available jobs if an attorney does not raise it at the hearing  
10 before the ALJ. *Shaibi*, 870 F. 3d at 882. In the decision, however, the Court reiterated the long  
11 standing principle that an ALJ is required to resolve an apparent conflict between the VE’s  
12 testimony and the DOT regardless of whether a claimant raises the conflict before the agency; but  
13 that there was no such authority for the premise that the ALJ had to do so when examining the  
14 number of jobs available. *Shaibi*, 870 F. 3d at 882. Given the Court’s distinction, it appears a  
15 Plaintiff need not raise a conflict between the VE’s testimony and the DOT regarding functional  
16 requirements of job duties (as opposed to only challenging the number of jobs) before the ALJ to  
17 preserve the issue. As such, Plaintiff may present this issue for the first time in this Court.

## 21 **B. Step Five**

### 22 ***1. Legal Standard***

23 If a Plaintiff establishes that he or she is unable to perform his past work at step four, the  
24 burden shifts to the Commissioner at step five “to identify specific jobs existing in substantial  
25 numbers in the national economy that [a] claimant can perform despite [his or her] identified  
26 limitations.” *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995); *see also* 20 C.F.R. §

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28 <sup>5</sup> Neither party supplied supplemental briefing on *Shaibi*, or advised the Court that the Ninth Circuit had issued this decision.

1 416.920(g). At this stage, the ALJ first assesses a claimant’s “residual functional capacity,”  
2 which is defined as the most that a claimant can do despite “physical and mental limitations”  
3 caused by his or her impairments and related symptoms. 20 C.F.R. § 416.945(a)(1). The ALJ then  
4 considers potential occupations that the claimant may be able to perform. See 20 C.F.R. §  
5 416.966.

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7 At step five, the ALJ may rely on the DOT and testimony from a VE to assess a  
8 claimant’s ability to perform certain jobs in light of his or her residual functional capacity. 20  
9 C.F.R. §§ 416.966(e); 416.969; 416.966(d)(1); *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d  
10 685, 689 (9th Cir. 2009). As part of this process, occupational information provided by a VE  
11 should generally be consistent with the DOT. SSR 00-04, 2000 WL 1898704, at \*2 (Dec. 4,  
12 2000). Furthermore, the ALJ must resolve any apparent conflict between the VE’s testimony and  
13 the DOT before relying on the VE’s testimony in support of a disability determination. *Id*;  
14 *Zavalin v. Colvin*, 778 F. 3d 842, 846 (9th Cir. 2015); *Massachi v. Astrue*, 486 F. 3d 1149, 1153-  
15 1154 (9th Cir. 2007). When there is an apparent unresolved conflict between the VE and the  
16 DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the  
17 VE to support a determination or decision about whether the claimant is disabled. *Massachi*, 486  
18 F. 3d at 1153. Neither the DOT nor the VE testimony automatically “trumps” when there is a  
19 conflict. *Id*. The adjudicator must resolve the conflict by determining if the explanation given by  
20 the VE is reasonable and provides a basis for relying on the VE’s testimony rather than on the  
21 DOT information. *Id*.

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24 However, not all potential conflicts between a vocational expert’s job suitability  
25 recommendation and the DOT will be apparent or obvious. *Gutierrez v. Colvin*, 844 F. 3d 804,  
26 808 (9th Cir. 2016). In order for a difference between a VE’s testimony and the DOT’s listings to  
27 be fairly characterized as a conflict, it must be obvious or apparent. *Id*; *Lamear v. Berryhill*, 865  
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1 F. 3d 1201 (9th Cir. 2017). This means that the testimony must be at odds with the DOT's listing  
2 of job requirements that are essential, integral, or expected. *Id.* Where the job itself is a familiar  
3 one, less scrutiny by the ALJ is required. *Id.* Thus, an ALJ must ask follow up questions of a  
4 vocational expert only when the expert's testimony is either obviously or apparently contrary to  
5 the DOT. However, the obligation doesn't extend to unlikely situations or circumstances. *Id.*  
6 Thus, the requirement for an ALJ to ask follow up questions to determine if an actual conflict  
7 exists, is fact-dependent.

## 9 **2. The Jobs at Issue**

10 As noted above, to meet her burden at step five, the Commissioner considers information  
11 from the DOT. “The DOT describes the requirements for each listed occupation, including the  
12 necessary General Educational Development (“GED”) levels; that is, ‘aspects of  
13 education...required of the worker for satisfactory job performance.’” *Zavalin*, 778 F.3d at 846  
14 (quoting DOT, App. C, 1991 WL 688702(4th ed.1991)). The GED Scale is composed of three  
15 divisions: Reasoning Development, Mathematical Development, and Language Development.  
16 Relevant here are the language development levels which assesses the language abilities needed  
17 to perform a job successfully, and range from level one (which requires the least language ability)  
18 to level six (which requires the most). DOT App’x C – Components of the Definition Trailer,  
19 General Education Development 1991 WL 688702. The cleaner II job requires a level I language  
20 skill. Level I language requires the following:

23 *Reading:* Recognize meaning of 2,500 (two- or three-syllable) words. Read at rate of 95-  
24 120 words per minute. Compare similarities and differences between words and between  
series of numbers.

25 *Writing:* Print simple sentences containing subject, verb, and object, and series of  
26 numbers, names, and addresses.

27 *Speaking:* Speak simple sentences, using normal word order, and present and past  
28 tenses.

1991 WL 688702

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The job description of a cleaner II is as follows:

Cleans interiors and exteriors of transportation vehicles, such as airplanes, automobiles, buses, railroad cars and streetcars. Cleans interior of vehicle, using broom cloth vacuum cleaner, and whisk broom. Cleans windows with water, cleansing compounds, and cloths or chamois. Replenishes sanitary supplies in vehicle compartments. Removes dust, grease, and oil from exterior surfaces of vehicles, using steam-cleaning equipment, or by spraying or washing vehicles using spraying equipment, brush or sponge.  
DOT 919.687-014, 1991 WL 687897

The cleaner, industrial job requires a level II language ability. A language level II requires the following:

*Reading:* Passive vocabulary of 5,000-6,000 words. Read at rate of 190-215 words per minute. Read adventure stories and comic books, looking up unfamiliar words in dictionary for meaning, spelling, and pronunciation. Read instructions for assembling model cars and airplanes.

*Writing:* Write compound and complex sentences, using cursive style, proper end punctuation, and employing adjectives and adverbs.

*Speaking:* Speak clearly and distinctly with appropriate pauses and emphasis, correct punctuation, variations in word order, using present, perfect, and future tenses.  
1991 WL 688702

The job description for cleaner, industrial is as follows:

Keeps working areas in production departments of industrial establishment in clean and orderly condition, performing any combination of the following duties: Transports raw materials and semi-finished products or supplies between departments or buildings to supply machine tenders or operators with materials for processing, using hand truck. Arranges boxes, material, and hand trucks or other industrial equipment in neat and orderly manner. Cleans lint, dust, oil, and grease from machines, overhead pipes, and conveyors, using brushes, air hoses, or steam cleaner. Cleans screens and filters. Scrubs processing tanks and vats. Cleans floors, using water hose, and applies floor drier. Picks up reusable scrap for salvage and stores in containers.  
DOT 381.687-018, 1991 WL 673258

When reading the job descriptions and the language level requirements together for each of these jobs, there is an apparent conflict between the ALJ’s finding that Plaintiff “is not able to

1 communicate in English, and is considered in the same way as an individual who is illiterate in  
2 English” (AR 20), and the language capabilities required for the jobs. The DOT clearly notes that  
3 some language skills are necessary to be successful for these jobs. Moreover, as Plaintiff correctly  
4 notes, some language skills may be needed to read cleaning solution instructions, or even to  
5 obtain verbal directions on how to operate cleaning machinery.  
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7 The Commissioner’s argument that the DOT should not trump the Commissioner’s five  
8 step regulatory process is not persuasive. In fact, comparing the two systems side-by-side  
9 underscores that the paradigms indeed have contradictory approaches: the DOT requires language  
10 skills for all jobs, while the Commissioner’s five step process considers English skills, but the  
11 inability to speak or read English does not necessarily preclude an individual’s ability to work.  
12 Given the fundamental differences in the approaches, the conflict should have been apparent to  
13 the judge. The fact that the conflict exists, however, does not necessarily mean that Plaintiff  
14 cannot perform the identified jobs; only that the ALJ was required to explore the conflict so that  
15 he could independently determine if the explanation given by the VE was reasonable and  
16 provided a basis for relying on the VE’s testimony rather than on the DOT requirements.  
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18 The Court is similarly not persuaded by the Commissioner’s argument that the ALJ  
19 limited Plaintiff to simple work which does not require that she speak, read, or write English.  
20 Here, the ALJ made an additional finding that Plaintiff is not able to communicate in English,  
21 separate and apart from the simple work limitation. This finding is supported by Plaintiff’s own  
22 testimony that she does not know how to read or write, and the fact that she used a Hmong  
23 interpreter at the hearing. AR 13; 286-287; 293. Consequently, this factor warrants further  
24 consideration that the ALJ did not contemplate when determining what jobs Plaintiff could  
25 perform.  
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27 In light of the ALJ’s failure to resolve the conflict between the VE’s testimony and the  
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1 English language requirements outlined by the DOT, the ALJ did not apply the proper legal  
2 standards in this case and the decision is not supported by substantial evidence. This error is not  
3 harmless since no additional jobs were identified. Accordingly, the case must be remanded so  
4 that the record can be developed in this area. *Garrison v. Colvin*, 759 F. 3d 995, 1020 (9th Cir.  
5 2014). (A remand with for an award of benefits is only appropriate when the record has been fully  
6 developed and further administrative proceedings would serve no useful purpose). On remand,  
7 the ALJ shall address the above discussed conflict with the VE. After hearing additional  
8 testimony, the ALJ should determine whether the VE's explanation is reasonable and provides a  
9 basis for relying on the VE's testimony rather than on the DOT in accordance with SSR 00-04,  
10 2000 WL 1898704 and the other cases outlined in this order. If the VE's explanation is not  
11 reasonable, the ALJ may explore the availability of other jobs as appropriate.  
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13  
14 **V. CONCLUSION**

15 Based on the foregoing, this Court GRANTS Plaintiff's appeal from the administrative  
16 decision of the Commissioner of Social Security. The case is remanded to the Commissioner  
17 consistent with the instructions outlined in this order. The Clerk of this Court is DIRECTED to  
18 enter judgment in favor Plaintiff, Sousa Yang and against Nancy A. Berryhill, Commissioner of  
19 Social Security, and close this action.  
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22 IT IS SO ORDERED.

23 Dated: November 28, 2017

/s/ Gary S. Austin  
24 UNITED STATES MAGISTRATE JUDGE  
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