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

JOB ROBLES,)	Case No.: 1:17-cv-00566-BAM
)	
Plaintiff,)	ORDER REVERSING AGENCY’S DENIAL OF
)	BENEFITS AND ORDERING REMAND
v.)	
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

INTRODUCTION

Plaintiff Job Robles (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his applications for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) under Titles II and XVI of the Social Security Act.¹ The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Barbara A. McAuliffe.

Having considered the parties’ briefs, along with the entire record in this case, the Court finds that the decision of the Administrative Law Judge (“ALJ”) is not supported by substantial evidence in

¹ The parties consented to the jurisdiction of the United States Magistrate Judge. (Docs. 7, 8.)

1 the record as a whole and based upon proper legal standards. Accordingly, the ALJ's decision is
2 REVERSED and the case REMANDED for further proceedings consistent with this order.

3 **FACTS AND PRIOR PROCEEDINGS**

4 In July 2011, Plaintiff filed applications for disability insurance benefits and supplemental
5 security income. AR 437-38, 439-47.² Plaintiff alleged that he became disabled in June 2009, due to
6 bone necrosis of the ankle, cognitive difficulties since grade school, and that he was on methadone for
7 pain. AR 497. Plaintiff's application was denied initially and on reconsideration, and Plaintiff requested
8 a hearing before an Administrative Law Judge ("ALJ"). AR 228-31, 236-41. ALJ Evangelina P.
9 Hernandez held a hearing on May 16, 2013, and the ALJ issued an order denying benefits on May 31,
10 2013. AR 14. Plaintiff appealed, and on October 9, 2014, the Appeals Council vacated the May 2013
11 decision and remanded the case to an administrative law judge. AR 14. Following remand, ALJ
12 Hernandez held two hearings, and issued a second order denying benefits on September 27, 2016. AR
13 11-33, 74-84, 85-121. Plaintiff sought review of the ALJ's decision, which the Appeals Council denied,
14 making the ALJ's decision the Commissioner's final decision. AR 3-5, 10. This appeal followed.

15 **Relevant Hearing Testimony**

16 November 24, 2015

17 The ALJ held a hearing on November 24, 2015, in Stockton, California. AR 74-84. Plaintiff
18 appeared by videoconference and was represented by his attorney, Amanda Foss. Impartial Vocational
19 Expert Stephen Schmidt also appeared. AR 76. Following brief questioning, the ALJ elected to send
20 Plaintiff for consultative orthopedic and psychological evaluations. AR 83.

21 August 15, 2016

22 The ALJ held a second hearing on August 15, 2016, in Oakland, California. AR 85-121.
23 Plaintiff appeared with his attorney, Adrien Haddad. Impartial Vocational Expert Gerald Belchick also
24 appeared. AR 87.

25 In response to questions from his attorney, Plaintiff testified that the primary reason he cannot
26 work is due to pain in his right foot. Plaintiff injured his ankle in 2003, and he has received medical
27

28 ² References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

1 treatment and surgery following the injury. The surgery did not help his pain, and on a typical day the
2 pain is a 5 out of 10, even with medications. Certain things exacerbate the pain, such as sitting without
3 elevating his feet, walking and standing. AR 88-90.

4 When asked about his medications, Plaintiff testified that he takes Vitamin D, methadone, high
5 blood pressure medication and “nerve pills.” AR 94. The medications cause dizziness and extreme
6 drowsiness, and he takes three to four hour naps every day. AR 95-96. Plaintiff believed it was the
7 methadone that made him drowsy. He had allergic reactions to other pain medicine, so he had to return
8 to taking methadone. AR 102.

9 When asked about his personal care by the ALJ, Plaintiff testified that he has problems because
10 he has trouble standing. He also no longer makes meals, helps his mother, takes out the garbage or takes
11 public transportation. Additionally, he now has trouble getting along with people because of his
12 condition. He has trouble thinking and an inability to concentrate. AR 96-99.

13 When asked about his abilities, Plaintiff testified that he can probably walk about twenty minutes
14 before his foot starts to swell and he feels more pain. He has to stay off of his foot for at least two days
15 before the swelling subsides. Plaintiff further testified that he has now developed a cyst in his left ankle
16 because of the problem with his right foot. The cyst causes pain. He uses a cane for walking. AR 100-
17 03.

18 Plaintiff also testified that he usually goes to the doctor once a month for pain medication refills.
19 His new doctor also found that Plaintiff suffered from depression. Plaintiff testified that he suffers more
20 depression than anxiety. Plaintiff’s doctor stated that if Plaintiff were at work, he could still deal with
21 and interact with supervisors, coworkers and the public, but would not be able to do a lot of detailed
22 work, just simple one or two. Plaintiff believed this was fair, but also believed that it would be very
23 difficult for him to take a bus and try to sustain a job because he cannot think straight and is always
24 sleeping and dizzy. AR 104-06.

25 Another doctor said that Plaintiff should use his cane for long and uneven terrain. Plaintiff did
26 not think that was fair because he needs his cane all the time. Plaintiff also did not agree that he could
27 stand and walk for up to two hours in an eight-hour workday or that he could pick up 20 pounds. Plaintiff
28 reported that even when walking with his cane, he will feel pain in his right foot and lose his balance.

1 He has fallen about five or six times in the last twelve months when walking without a cane. AR 106-
2 07.

3 When asked about his ability to do a one or two step job sitting down, Plaintiff testified that he
4 would need his leg to be elevated. If not elevated, then he would not be able to concentrate because of
5 pain. He also would be sleepy and dizzy from the methadone. AR 108-09. Plaintiff further testified
6 that he has trouble sleeping due to pain, which would affect his ability to think and concentrate. AR
7 109-10.

8 Plaintiff also testified that he had been seeing a psychologist, but she retired. Plaintiff was
9 contacted about continuing his appointments with a psychologist, but he thought the weather was too
10 hot for him to be out waiting for the bus. Plaintiff stated that extreme heat and extreme cold bring out
11 pain in his ankle. AR 112.

12 Following Plaintiff's testimony, the ALJ elicited testimony from the Vocational Expert ("VE")
13 Gerald Belchick. The VE testified that Plaintiff's past work was characterized as deli worker and
14 restaurant worker. AR 113-14. The ALJ also asked the VE a series of hypothetical questions. For the
15 first hypothetical, the ALJ asked the VE to assume that someone like Plaintiff could do medium work.
16 He could stand or walk four hours in an eight-hour workday before needing a ten-minute break, he could
17 never climb ladders, ropes or scaffolds, but occasionally climb ramps or stairs and all other postural
18 were occasional. He had to avoid concentrated exposure to extreme heat and concentrated exposure to
19 extreme cold. His work would be limited to simple as defined in the DOT as SVP levels 1 and 2, routine
20 and repetitive tasks. He would need to work in a low stress job defined as having only occasional
21 decision-making and occasional changes in the work setting. The VE testified that this person could
22 perform Plaintiff's past relevant work. He also could perform other medium jobs and light jobs.
23 Examples at the light level include rental counter clerk, information clerk, and mail clerk. AR 114-16.

24 For the second hypothetical, the ALJ asked the VE about a person who could do medium work,
25 could never climb ladders, ropes or scaffolds, occasionally could climb ramps or stairs, occasionally
26 could balance, frequently could stoop, crouch, kneel and crawl. This person also had to work in jobs
27 limited to simple as defined in the DOT as SVP levels 1 and 2, routine and repetitive, needed to work
28 in a low stress job as defined as having only occasional decision making, only occasional changes in the

1 work setting, and had to avoid concentrated exposure to extreme heat. This person also could walk and
2 stand for four hours. The VE testified that this was a sit-stand option, meaning that he could do his work
3 while standing and while seated. The VE testified that there were jobs in the economy that this person
4 could perform such as cashier II, but this person would not be able to perform Plaintiff's past work. AR
5 116-17.

6 For the third hypothetical, the ALJ asked the VE to assume a person of Plaintiff's age, education
7 and work experience who could perform light work. He could stand or walk for four hours and sit for
8 six hours, and would need a sit or stand option. He could never climb ladders, ropes, or scaffolds,
9 occasionally could climb ramps or stairs, occasionally balance, and frequently could stop, crouch, kneel
10 and crawl. He would need to avoid concentrated exposure to extreme cold and concentrated exposure
11 to extreme heat. He would be limited to simple work as defined in the DOT as SVP levels 1 and 2,
12 routine and repetitive and would need to work in a low stress job defined as having only occasional
13 decision making, only occasional change in the work setting. The VE testified that this person could
14 not perform Plaintiff's past work, but he could perform jobs called cashier II. AR 118-19.

15 Following the ALJ's questioning, Plaintiff's counsel inquired of the VE regarding the cashier II
16 jobs. In response, the VE testified that there would not be an option for the hypothetical person to
17 elevate one of their feet while sitting. If that person could not elevate the foot and would be off task for
18 15% of the time, the VE testified that the person would not be employable. If this person also needed
19 any sort of unscheduled breaks, it would be an aberration and not used for an example. AR 119-20.

20 **Medical Record**

21 The relevant medical record was reviewed by the Court, and will be referenced below as
22 necessary to this Court's decision.

23 **The ALJ's Decision**

24 Using the Social Security Administration's five-step sequential evaluation process, the ALJ
25 determined that Plaintiff was not disabled under the Social Security Act. AR 14-33. Specifically, the
26 ALJ found that Plaintiff had not engaged in any substantial gainful activity since June 24, 2009, his
27 alleged onset date. Further, the ALJ identified personality disorder, history of osteochondritis desiccans
28 of the right ankle status post-surgery, degenerative joint disease of the right ankle, obesity, a somatoform

1 disorder, mild degenerative disc disease of the lumbar spine and affective disorder as severe
2 impairments. AR 17-18. Nonetheless, the ALJ determined that the severity of Plaintiff's impairments
3 did not meet or equal any of the listed impairments. AR 18-21. Based on her review of the entire record,
4 the ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform light
5 work, except he could stand for four hours and walk for two hours. He could stand or sit for thirty
6 minutes at a time, and sit for three hours. He required the option to sit or stand alternatively at will, but
7 would not experience being off task for more than five percent of the work period. He could never
8 operate foot controls with the right foot and should never climb ladders, ropes or scaffolding. He could
9 occasionally climb ramps and stairs, and occasionally balance. He could frequently stoop, crouch, kneel
10 and crawl. He should avoid concentrated exposure to temperature extremes. He also retained the mental
11 abilities and attitudes to engage in simple (SVP 1 and 2), routine and repetitive tasks. He also required
12 a low stress occupation with at most occasional decision making or changes in the work setting. AR
13 21-31. With this RFC, the ALJ found that Plaintiff could not perform any past relevant work, but there
14 were other jobs existing in significant numbers in the national economy that he could perform, such as
15 cashier. AR 32-33. The ALJ therefore concluded that Plaintiff was not disabled under the Social
16 Security Act. AR 37.

17 SCOPE OF REVIEW

18 Congress has provided a limited scope of judicial review of the Commissioner's decision to deny
19 benefits under the Act. In reviewing findings of fact with respect to such determinations, this Court
20 must determine whether the decision of the Commissioner is supported by substantial evidence. 42
21 U.S.C. § 405(g). Substantial evidence means "more than a mere scintilla," *Richardson v. Perales*, 402
22 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119, n.
23 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as adequate to
24 support a conclusion." *Richardson*, 402 U.S. at 401. The record as a whole must be considered,
25 weighing both the evidence that supports and the evidence that detracts from the Commissioner's
26 conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the evidence and making
27 findings, the Commissioner must apply the proper legal standards. *E.g., Burkhardt v. Bowen*, 856 F.2d
28 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner's determination that the claimant

1 is not disabled if the Commissioner applied the proper legal standards, and if the Commissioner's
2 findings are supported by substantial evidence. *See Sanchez v. Sec'y of Health and Human Servs.*, 812
3 F.2d 509, 510 (9th Cir. 1987).

4 REVIEW

5 In order to qualify for benefits, a claimant must establish that he or she is unable to engage in
6 substantial gainful activity due to a medically determinable physical or mental impairment which has
7 lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §
8 1382c(a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such
9 severity that he or she is not only unable to do his or her previous work, but cannot, considering his or
10 her age, education, and work experience, engage in any other kind of substantial gainful work which
11 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The
12 burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990).

13 Plaintiff identifies two alleged errors: (1) the VE testified in apparent conflict with the Dictionary
14 of Occupational Titles ("DOT") with respect to the representative position of cashier; and (2) the ALJ
15 failed to articulate specific and legitimate reasons for rejecting Plaintiff's credibility

16 DISCUSSION³

17 **A. VE Testimony**

18 At step five of the sequential evaluation, the ALJ assessed whether there were other jobs in the
19 national economy that Plaintiff could perform based on his age, education, work experience and
20 functional abilities. In response to a hypothetical question based on Plaintiff's age, education, work
21 experience and RFC, the VE testified that such an individual would be able to perform the requirements
22 of a representative unskilled, exertionally light occupation such as cashier (DICOT 211.462-010). AR
23 33, 118-19.

24 Plaintiff now asserts that the ALJ erred by failing to reconcile an apparent conflict between his
25 RFC to perform simple, routine and repetitive tasks and the Level 3 Reasoning requirements of the
26

27 ³ The parties are advised that this Court has carefully reviewed and considered all of the briefs, including arguments,
28 points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific argument or brief is not to
be construed that the Court did not consider the argument or brief.

1 cashier job. Plaintiff is correct that there is an apparent conflict between his RFC limitation to simple,
2 routine and repetitive work and the demands of Level 3 Reasoning required by the cashier position.
3 *Zavalin v. Colvin*, 778 F.3d 842, 846-47 (9th Cir. 2015) (holding “there is an apparent conflict between
4 the residual functional capacity to perform simple, repetitive tasks, and the demands of Level 3
5 Reasoning”). “When there is an apparent conflict between the vocational expert’s testimony and the
6 DOT—for example, expert testimony that a claimant can perform an occupation involving DOT
7 requirements that appear more than the claimant can handle—the ALJ is required to reconcile the
8 inconsistency.” *Id.* at 846 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1153–54 (9th Cir. 2007)). The
9 ALJ must ask the expert to explain the conflict and “then determine whether the vocational expert’s
10 explanation for the conflict is reasonable” before relying on the expert’s testimony to reach a disability
11 determination. *Id.* Here, the ALJ did not ask the expert to explain why a person with Plaintiff’s
12 limitation to simple, routine and repetitive tasks could nevertheless meet the demands of Level 3
13 Reasoning. The ALJ’s failure to inquire about the conflict is error.

14 Defendant contends that this error is harmless, noting that “[a]lthough Plaintiff did not finish
15 high school, Plaintiff’s treating psychiatrist Dr. Savage concluded that Plaintiff had the intellectual
16 ability to achieve at the vocational college level and provided him with information about attending
17 college and getting an educational grant,” Plaintiff “had past experience performing reasoning level 2
18 work,” and the medical record did not demonstrate that “Plaintiff has reduced reasoning capabilities that
19 would prevent him from working as a cashier.” (Doc. No. 18 at pp. 16-17.)

20 Defendant’s argument is unavailing. Reasoning Level 3 in the context of cashier jobs means the
21 ability to “[a]pply commonsense understanding to carry out instructions furnished in written, oral, or
22 diagrammatic form. Deal with problems involving several concrete variables in or from standardized
23 situations.” *See* CASHIER II, DICOT 211.462-010, 1991 WL 671840. According to the record,
24 however, the ALJ gave great weight to the opinion of Dr. Les P. Kalman, the consultative psychiatric
25 examiner, who determined in December 2015 that Plaintiff could understand, remember and carry out
26 simple one and two-step job instructions, but had moderate limitations in the abilities to understand and
27 remember complex instructions, carry out complex instructions, and to make judgments on complex
28 work-related decision. AR 31, 941. Dr. Kalman also noted that Plaintiff’s medical records included an

1 IQ of 90 (AR 937), Plaintiff's education was limited to 11th grade in special education (AR 938), and
2 his mental limitations were based on a learning disorder, along with memory and focus issues (AR 941).
3 Thus, Dr. Kalman apparently set simple, routine and repetitive tasks as the highest level of Plaintiff's
4 ability. On this record, the Court cannot conclude that substantial evidence supports the ALJ's step-five
5 finding that Plaintiff could perform the work of cashier, which requires Reasoning Level 3. *Massachi*,
6 486 F.3d at 1154. As a result, this case will be remanded so that the ALJ can address the conflict with
7 the VE's testimony.

8 **B. The Court Declines to Address Plaintiff's Remaining Arguments**

9 Having found that remand is warranted, the Court declines to address Plaintiff's remaining
10 arguments. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because we remand the case to
11 the ALJ for the reasons stated, we decline to reach [plaintiff's] alternative ground for remand."); *see*
12 *also Augustine ex rel. Ramirez v. Astrue*, 536 F. Supp. 2d 1147, 1153 n.7 (C.D. Cal. 2008) ("[The] Court
13 need not address the other claims plaintiff raises, none of which would provide plaintiff with any further
14 relief than granted, and all of which can be addressed on remand.").

15 **C. Remand is Required**

16 The decision whether to remand for further proceedings or order an immediate award of benefits
17 is within the Court's discretion. *See Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When
18 no useful purpose would be served by further administrative proceedings, or where the record has been
19 fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *Id.*
20 at 1179 ("the decision of whether to remand for further proceedings turns upon the likely utility of such
21 proceedings"). However, where there are outstanding issues that must be resolved before a
22 determination of disability can be made, and it is not clear from the record the ALJ would be required
23 to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate. *Id.*

24 Here, there are outstanding issues that must be resolved before a final determination can be made.
25 Specifically, the ALJ's failure to inquire as to the conflict between the VE's testimony and the DOT
26 was error. On remand, the ALJ must take the testimony of a VE to determine whether there are jobs in
27 the national economy that Plaintiff is able to perform despite his mental limitations. Although the Court
28 understands the importance of expediting disability claims; remanding this case for further

1 administrative proceedings will serve a useful purpose in the resolution of this case. *Varney v. Sec'y of*
2 *Health & Human Serv.*, 859 F.2d 1396, 1401 (9th Cir. 1988). The Court therefore concludes that remand
3 for further administrative proceedings is appropriate.

4 **CONCLUSION**

5 Based on the foregoing, the Court finds that the ALJ's disability determination warrants
6 remand. Accordingly, the decision is REVERSED and the case REMANDED to the ALJ for further
7 proceedings consistent with this decision. The Clerk of the Court is DIRECTED to enter judgment in
8 favor of Plaintiff.

9
10 IT IS SO ORDERED.

11 Dated: September 20, 2018

12 /s/ Barbara A. McAuliffe
13 UNITED STATES MAGISTRATE JUDGE
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