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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HEATHER NICOLE HENRY,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 1:19-cv-01690-SAB

ORDER DENYING PLAINTIFF’S SOCIAL
SECURITY APPEAL

(ECF Nos. 22, 28, 29)

I.

INTRODUCTION

Heather Nicole Henry (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for disability benefits pursuant to the Social Security Act. Plaintiff filed her opening brief in this matter on October 12, 2020. (ECF No. 22.) Defendant filed an opposition on December 14, 2020. (ECF No. 28.) Plaintiff filed a notice of submission on the record in lieu of a reply. (ECF No. 29.) The matter is submitted on the parties’ briefs, without oral argument, to Magistrate Judge Stanley A. Boone.¹

For the reasons set forth below, Plaintiff’s Social Security appeal shall be denied.

¹ The parties have consented to the jurisdiction of the United States Magistrate Judge and the matter has been assigned to the undersigned for all purposes. (See ECF Nos. 7, 8, 30.)

1 **II.**

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff protectively filed an application for a period of disability and disability insurance
4 benefits and a Title XVI application for supplemental security income on April 2, 2016. (AR
5 101, 102.) Plaintiff's applications were initially denied on October 10, 2016, and denied upon
6 reconsideration on December 21, 2016. (AR 133-137, 145-149.) Plaintiff requested and
7 received a hearing before Administrative Law Judge Janice E. Shave ("the ALJ"). Plaintiff
8 appeared for a hearing on October 30, 2018. (AR 36-74.) On November 21, 2018, the ALJ
9 found that Plaintiff was not disabled. (AR 12-30.) The Appeals Council denied Plaintiff's
10 request for review on October 1, 2019. (AR 1-3.)

11 **A. Relevant Hearing Testimony**

12 A vocational expert ("VE"), Bonnie Drumwright, testified at the hearing. (AR 41-43, 68-
13 73.) The VE classified Plaintiff's past work history as a childcare worker, Dictionary of
14 Occupational Titles ("DOT") 359.677-018, SVP 4, light but performed as medium; supervisor of
15 cashiers, DOT 211.137-010, SVP 7, light but performed as heavy; and cashier clerk, DOT
16 211.462-014, SVP 3, light but generally performed as medium. (AR 42.)

17 The ALJ presented a hypothetical of an individual of the same age, educational and
18 vocation background as Plaintiff. (AR 69.) This individual is capable of light exertion with a
19 sit/stand option at approximately 30 to 45 minute intervals to switch or shift positions; could
20 never climb ladders, ropes or scaffolds; never kneel, crouch or crawl. (AR 69.) She could
21 occasionally bend at the waist; frequently climb ladders, ropes, stairs and ramps; and could
22 frequently balance with no hand held assistive device needed. (AR 69.) The individual must
23 avoid concentrated exposures to extreme cold or extreme heat; and all expose to unprotected
24 heights, hazardous or moving machinery, and direct sunlight. (AR 69.)

25 The VE opined that this individual could not perform Plaintiff's past work as she
26 performed them. (AR 69.) However the jobs of supervisor of cashiers and childcare workers as
27 usually performed were congruent with the hypothetical. (AR 69-70.) The individual could also
28 perform work as a cashier 2, DOT 211.462-010, SVP 2, light. (AR 70.) Due to the need to

1 alternate between sitting and standing the numbers would be eroded by 90 percent to arrive at the
2 number of jobs that would allow for the stand/sit option. (AR 70.) This would result in
3 approximately 82,000 jobs in the national economy. (AR 70.) The VE clarified that the DOT
4 does not describe or explain erosion, but that the information was based on his personal
5 experience. (AR 70.) The individual would also be able to work as a storage facility rental
6 clerk, DOT 295.367-026, SVP 2, light, with about 76,000 jobs in the national economy; and a
7 ticket seller, DOT 211.467-030, SVP 2, light with about 20,000 jobs in the national economy.
8 (AR 70.)

9 The ALJ proffered a second hypothetical of the same individual with the additional
10 limitation that she would need to elevate both legs approximately 12 to 16 inches consistent with
11 the height of an overturned personal office trash can or recycle bin under the desk or table at will
12 when seated. (AR 71.) The VE opined that this would not make any difference and the same
13 jobs would remain available. (AR 71.)

14 The ALJ proffered a third hypothetical of an individual with the same limitations as
15 hypothetical two, but who would also require a ten minute break three times per day to recline
16 and elevate the legs to heart level which could take place during regularly scheduled breaks.
17 (AR 71.) The VE opined that this would not have any effect on the jobs available. (AR 72.)
18 The VE clarified that the DOT does not describe job erosion or the impact of needing to elevate
19 one's feet or the sit/stand option and all the opinions were based upon her professional
20 experience of over 39 years as a Vocational Rehabilitation Consultant. (AR 72.)

21 Plaintiff's attorney proffered the third hypothetical except that there would be
22 unscheduled breaks outside of the two regular breaks and lunch period. (AR 72.) The VE
23 opined that an employer would not tolerate a person leaving the work station to go lay down or
24 elevate to that degree or that many times a day and there would not be gainful employment. (AR
25 72.)

26 Plaintiff's attorney added the limitation that the individual would be absent more than
27 four days per month. (AR 73.) The VE opined that an employer would not tolerate that many
28 absences per month. (AR 73.)

1 **B. ALJ Findings**

2 The ALJ made the following findings of fact and conclusions of law.

- 3 • Plaintiff meets the insured status requirements of the Social Security Act through June
- 4 30, 2017.
- 5 • Plaintiff has not engaged in substantial gainful activity since May 1, 2016, the amended
- 6 alleged onset date.
- 7 • Plaintiff has the following severe impairments: lupus, positive(+) ANA test with
- 8 polyarthralgia including right knee pain and low back pain; peripheral neuropathy;
- 9 degenerative disc disease; status-post fatty mass or hemangioma removal from spine;
- 10 mild spondylotic changes of the cervical and thoracic spine; chronic fatigue; and obesity.
- 11 • Plaintiff is unable to perform any past relevant work.
- 12 • Plaintiff was born on August 23, 1984. She was 31 years old, which is defined as a
- 13 younger individual age 18-49, on the alleged disability onset date.
- 14 • Plaintiff has at least a high school education and is able to communicate in English.
- 15 • Transferability of job skills is not material to the determination of disability because
- 16 using the Medical-Vocational Rules as a framework supports finding Plaintiff is not
- 17 disabled, whether or not Plaintiff has transferable job skills.
- 18 • Considering Plaintiff's age, education, work experience, and residual functional capacity,
- 19 there are jobs existing in significant numbers in the national economy that she can
- 20 perform.
- 21 • Plaintiff has not been under a disability, as defined in the Social Security Act, from
- 22 October 31, 2015, through the date of this decision.

23 (AR 17-29.)

24 **III.**

25 **LEGAL STANDARD**

26 To qualify for disability insurance benefits under the Social Security Act, the claimant

27 must show that she is unable “to engage in any substantial gainful activity by reason of any

28 medically determinable physical or mental impairment which can be expected to result in death

1 or which has lasted or can be expected to last for a continuous period of not less than 12
2 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five step
3 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §
4 404.1520;² Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th
5 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is
6 disabled are:

7 Step one: Is the claimant presently engaged in substantial gainful activity? If so,
8 the claimant is not disabled. If not, proceed to step two.

9 Step two: Is the claimant’s alleged impairment sufficiently severe to limit his or
10 her ability to work? If so, proceed to step three. If not, the claimant is not
11 disabled.

12 Step three: Does the claimant’s impairment, or combination of impairments, meet
13 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the
14 claimant is disabled. If not, proceed to step four.

15 Step four: Does the claimant possess the residual functional capacity (“RFC”) to
16 perform his or her past relevant work? If so, the claimant is not disabled. If not,
17 proceed to step five.

18 Step five: Does the claimant’s RFC, when considered with the claimant’s age,
19 education, and work experience, allow him or her to adjust to other work that
20 exists in significant numbers in the national economy? If so, the claimant is not
21 disabled. If not, the claimant is disabled.

22 Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

23 Congress has provided that an individual may obtain judicial review of any final decision
24 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).
25 In reviewing findings of fact in respect to the denial of benefits, this court “reviews the
26 Commissioner’s final decision for substantial evidence, and the Commissioner’s decision will be
27 disturbed only if it is not supported by substantial evidence or is based on legal error.” Hill v.
28 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means more than a
scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
(internal quotations and citations omitted). “Substantial evidence is relevant evidence which,

² The cases generally cited herein reference the regulations which apply to disability insurance benefits, 20 C.F.R. §404.1501 et seq., however Plaintiff is also seeking supplemental security income, 20 C.F.R. § 416.901 et seq. The regulations are generally the same for both types of benefits. Therefore, further references are to the disability insurance benefits regulations, 20 C.F.R. §404.1501 et seq.

1 considering the record as a whole, a reasonable person might accept as adequate to support a
2 conclusion.” Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec’y of
3 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

4 “[A] reviewing court must consider the entire record as a whole and may not affirm
5 simply by isolating a specific quantum of supporting evidence.” Hill, 698 F.3d at 1159 (quoting
6 Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not
7 this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment
8 for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is
9 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be
10 upheld.”).

11 IV.

12 DISCUSSION AND ANALYSIS

13 Plaintiff contends that the ALJ erred at step five because she did not consider
14 accommodation as a factor under the American’s with Disabilities Act (“ADA”). Plaintiff
15 argues that, since she needs to elevate both her legs, two trash cans would be required to elevate
16 her legs and that crosses the line and it would be dangerous and a misuse of trash cans to provide
17 accommodation. Further, Plaintiff argues that the residual functional capacity is not specific as
18 to the relevant height of the chair that would be used for the sit and stand option and it is not
19 clear if a stool that is 36 inches high or a work chair that is 24 inches high would be required.
20 Plaintiff asserts that it would be dangerous for her use a trash and to find otherwise requires a
21 reasonable accommodation and it is unclear from this record whether a reasonable
22 accommodation is needed for Plaintiff to work in the cited occupations.

23 Defendant counters that Plaintiff’s challenge primarily concerns her characterization of
24 the need to elevate her legs as a reasonable accommodation relying on Cleveland v. Policy
25 Management Sys. Corp., 526 U.S. 795 (1999). Defendant contends that Plaintiff’s argument
26 fails as the need to elevate her legs does not meet the definition of a reasonable accommodation
27 as considered by the Court in Cleveland. Further, Defendant argues that the Ninth Circuit has
28 specifically found that a sit/stand option does not constitute an accommodation. Defendant

1 asserts that the ALJ specifically testified that the limitations would not preclude work the based
2 on his professional experience of 39 years as a vocation expert, and the ALJ reasonably relied on
3 this testimony.

4 Plaintiff replies that the matter is submitted on the record.

5 Plaintiff relies on Cleveland, which addressed whether “the law erects a special
6 presumption that would significantly inhibit an SSDI recipient from simultaneously pursuing an
7 action for disability discrimination under the Americans with Disabilities Act of 1990 (ADA),
8 claiming that ‘with ... reasonable accommodation’ she could ‘perform the essential functions’ of
9 her job.” 526 U.S. at 797. The Supreme Court held,

10 these two seemingly divergent statutory contentions are often consistent, each
11 with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically
12 estop the recipient from pursuing an ADA claim. Nor does the law erect a strong
13 presumption against the recipient’s success under the ADA.

14 Id. at 797-98.

15 The Social Security Administration (“SSA”) does not take “reasonable accommodation”
16 into account when determining whether a claimant is disabled for the purposes of SSDI. Id. at
17 803. “The omission reflects the facts that the SSA receives more than 2.5 million claims for
18 disability benefits each year; its administrative resources are limited; the matter of ‘reasonable
19 accommodation’ may turn on highly disputed workplace-specific matters; and an SSA
20 misjudgment about that detailed, and often fact-specific matter would deprive a seriously
21 disabled person of the critical financial support the statute seeks to provide.” Id. “[I]n order to
22 process the large number of SSDI claims, the SSA administers SSDI with the help of a five-step
23 procedure that embodies a set of presumptions about disabilities, job availability, and their
24 interrelation.” Id. This sequential process inevitably simplifies the process, “eliminating
25 consideration of many differences potentially relevant to an individual’s ability to perform a
26 particular job.” Id. at 804. Finally, if an individual has merely applied for and is not awarded
27 SSDI benefits, “any inconsistency in the theory of the claims is of the sort normally tolerated by
28 our legal system.” Id.

The Social Security regulations do not require that the ALJ incorporate ADA

1 accommodations into the residual functional capacity assessment. 20 C.F.R. § 404.1545; Glasp
2 v. Berryhill, 771 F.App’x 747 (9th Cir. 2019)³. Further, the regulations do not require that the
3 ALJ consider reasonable accommodation in determining whether work exists in the national
4 economy at step five of the sequential evaluation. 20 C.F.R. § 404.1566; Glasp, 771 F.App’x
5 747. An ALJ properly applied the law because an ADA accommodation was not relevant to
6 determine whether she could perform other work at step five of the sequential evaluation.
7 Glasp, 771 F.App’x 747; see also Johnson v. State, Oregon Dep’t of Human Res., Rehab. Div.,
8 141 F.3d 1361, 1366 (9th Cir. 1998) (“The ADA and the disability provision of the Social
9 Security Act have different purposes, and have no direct application to one another.”); SSR 11-
10 2P § D (1)(e), 2011 WL 4055665 (Sept. 12, 2011); Titles II & Xvi: Documenting & Evaluating
11 Disability in Young Adults, SSR 11-2P (S.S.A. Sept. 12, 2011) (“When we determine whether a
12 person can perform his or her past relevant work, we do not consider potential accommodations
13 unless his or her employer actually made the accommodation.”).

14 At Step Four, the ALJ assesses the claimant’s “residual functional capacity,” which is
15 defined as the most that a claimant can do despite the “physical and mental limitations” caused
16 by his impairments and related symptoms. 20 C.F.R. § 416.945(a)(1). At Step Five, the burden
17 shifts to the Commissioner “to identify specific jobs existing in substantial numbers in the
18 national economy that [a] claimant can perform despite [his] identified limitations.” Johnson v.
19 Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995); see also 20 C.F.R. § 416.920(g). At this step, the
20 ALJ considers potential occupations that the claimant may be able to perform. Zavalin v.
21 Colvin, 778 F.3d 842, 845 (9th Cir. 2015); see 20 C.F.R. § 416.966.

22 The ALJ relies on the DOT, which is the Social Security Administrations “primary
23 source of reliable job information” regarding jobs that exist in the national economy, in making
24 this determination. Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990). “The DOT describes
25 the requirements for each listed occupation, including the necessary General Educational
26 Development (‘GED’) levels; that is, ‘aspects of education (formal and informal) ... required of
27

28 ³ Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

1 the worker for satisfactory job performance.’ ” Zavalin, 778 F.3d at 845 (quoting DOT, App. C,
2 1991 WL 688702 (4th ed. 1991)).

3 Along with the DOT, the ALJ will rely on the testimony of a vocational expert who
4 testifies about specific occupations that a claimant is able to perform based on his residual
5 functional capacity. Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 689 (9th Cir. 2009);
6 20 C.F.R. § 416.966(e). In concluding the Step Five analysis the ALJ determines “whether,
7 given the claimant’s [residual functional capacity], age, education, and work experience, he
8 actually can find some work in the national economy.” Valentine, 574 F.3d at 689; see also 20
9 C.F.R. § 416.920(g). An ALJ cannot rely on the VE’s testimony without inquiring whether it
10 conflicts with the DOT and obtaining a reasonable explanation for any apparent conflict.
11 Massachi v. Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007).

12 Here, the ALJ relied on the testimony of the VE that work exists in the national economy
13 for a person with Plaintiff’s residual functional capacity. The VE opined that a person with
14 Plaintiff’s limitations would be able to work as a cashier 2, DOT 211.462-010, SVP 2, light.; a
15 storage facility rental clerk, DOT 295.367-026, SVP 2, light; and a ticket seller, DOT 211.467-
16 030, SVP 2, light. (AR 70.) The ALJ further considered how the job base would be eroded due
17 to the requirement that Plaintiff required a sit/stand option and still found that a significant
18 number of jobs, around 180,000, remained that the individual would be able to perform. (AR
19 70.) “A VE’s recognized expertise provides the necessary foundation for his or her testimony”
20 and the ALJ may properly rely on the testimony provided by the VE. Bayliss v. Barnhart, 427
21 F.3d 1211, 1218 (9th Cir. 2005). Here, Plaintiff argues that it is unclear whether she would
22 require a reasonable accommodation, however, the ALJ clarified that no particular equipment
23 would be needed for the individual to elevate her legs (AR 71) and the VE testified that, while
24 the DOT does not describe the impact of needing to elevate one’s feet or the sit and stand option,
25 her opinion was based on her 39 years as a Vocational Rehabilitation Consultant. (AR 72.) The
26 ALJ’s testimony is substantial evidence to support the ALJ’s finding that Plaintiff was not
27 disabled.

28 Accordingly, Plaintiff’s appeal of the final decision of the Commissioner is denied.

1 V.

2 **CONCLUSION AND ORDER**

3 Based on the foregoing, the Court finds that the ALJ did not err in determining that a
4 significant number of jobs exist in the national economy that a person with Plaintiff's residual
5 functional capacity would be able to perform.

6 Accordingly, IT IS HEREBY ORDERED that Plaintiff's appeal from the decision of the
7 Commissioner of Social Security is DENIED. It is FURTHER ORDERED that judgment be
8 entered in favor of Defendant Commissioner of Social Security and against Plaintiff Heather
9 Nicole Henry. The Clerk of the Court is directed to CLOSE this action.

10 IT IS SO ORDERED.

11 Dated: February 16, 2021

12 
13 _____
14 UNITED STATES MAGISTRATE JUDGE