

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEITH BRADLEY SOULLIERE,

No. 2:14-cv-0352-CMK

Plaintiff,

vs.

MEMORANDUM OPINION AND ORDER

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

_____ /

Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are plaintiff’s motion for summary judgment (Doc. 16) and defendant’s cross-motion for summary judgment (Doc. 17). For the reasons discussed below, the court will grant plaintiff’s motion for summary judgment or remand and deny the Commissioner’s cross-motion for summary judgment.

///
///

1 **I. PROCEDURAL HISTORY¹**

2 Plaintiff applied for social security benefits with a protective filing date of
3 February 18, 2011, alleging an onset of disability on September 15, 2010, due to degenerate disk
4 dysplasia, lumbar radiculopathy, high blood pressure, depression, arthritis, shingles, and erectile
5 dysfunction (Certified administrative record (“CAR”) 56-58, 126-28, 146). Plaintiff’s claim was
6 denied initially and upon reconsideration. Plaintiff requested an administrative hearing, which
7 was held on October 9, 2012, before Administrative Law Judge (“ALJ”) Amita B. Tracy. In a
8 November 2, 2012, decision, the ALJ concluded that plaintiff is not disabled² based on the

9 _____
10 ¹ Because the parties are familiar with the factual background of this case, including
11 plaintiff’s medical history, the undersigned does not exhaustively relate those facts here. The
12 facts related to plaintiff’s impairments and medical history will be addressed insofar as they are
13 relevant to the issues presented by the parties’ respective motions.

14 ² Disability Insurance Benefits are paid to disabled persons who have contributed to
15 the Social Security program, 42 U.S.C. § 401 *et seq.* Supplemental Security Income (“SSI”) is
16 paid to disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Under both provisions,
17 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to
18 “a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &
19 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R.
20 §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The
21 following summarizes the sequential evaluation:

22 Step one: Is the claimant engaging in substantial gainful
23 activity? If so, the claimant is found not disabled. If not, proceed
24 to step two.

25 Step two: Does the claimant have a “severe” impairment?
26 If so, proceed to step three. If not, then a finding of not disabled is
appropriate.

Step three: Does the claimant’s impairment or combination
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
404, Subpt. P, App.1? If so, the claimant is automatically
determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past
work? If so, the claimant is not disabled. If not, proceed to step
five.

Step five: Does the claimant have the residual functional
capacity to perform any other work? If so, the claimant is not
disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

1 following findings:

- 2 1. The claimant meets the insured status requirements of the Social
3 Security Act through December 20, 2015.
- 4 2. The claimant has not engaged in substantial gainful activity since
5 September 15, 2010, the alleged onset date (20 CFR 404.1571 *et*
6 *seq.*)
- 7 3. The claimant has the following severe impairments: degenerative
8 disc disease, high blood pressure, arthritis, obesity, and depression
9 (20 CFR 404.1520(c)).
- 10 4. The claimant does not have an impairment or combination of
11 impairments that meets or medically equals one of the listed
12 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR
13 404.1520(d), 404.1525 and 404.1526).
- 14 5. After careful consideration of the entire record, the undersigned
15 finds that the claimant has the residual functional capacity to
16 perform light work as defined in 20 CFR 404.1567(b) except
17 occasional climbing of ramps and stairs; never climbing ladders,
18 ropes or scaffolds; frequent balancing; occasional stooping;
19 occasional kneeling, occasional crouching; never crawling; limited
20 to simple, routine, repetitive tasks; would need a sit/stand option
21 which is defined as sitting for 15 minutes and standing for 10 to 15
22 minutes.
- 23 6. The claimant is unable to perform any past relevant work (20 CFR
24 404.1565).
- 25 7. The claimant was born on June 1, 1962 and was 48 years old,
26 which is defined as a younger individual age 18-49, on the alleged
disability onset date. The claimant subsequently changed age
category to closely approaching advanced age (20 CFR 404.1563).
8. The claimant has at least a high school education and is able to
communicate in English (20 CFR 404.1564).
9. Transferability of job skills is not material to the determination of
disability because using the Medical-Vocational Rules as a
framework supports a finding that the claimant is “not disabled,”
whether or not the claimant has transferable job skills (See SSR
82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

///

25 The claimant bears the burden of proof in the first four steps of the sequential evaluation
26 process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential
evaluation process proceeds to step five. Id.

1 **III. DISCUSSION**

2 Plaintiff argues the ALJ erred at step five of the sequential disability analysis in
3 identifying alternative work activity the ALJ determined plaintiff could perform in light of the
4 assessed residual functional capacity. Specifically, plaintiff contends that the ALJ relied on the
5 vocational expert’s testimony that plaintiff could perform certain identified jobs which was
6 inconsistent with plaintiff’s residual functional capacity (RFC). While the ALJ set forth all of
7 the limitations identified in the RFC, the vocational expert identified three occupations that are
8 beyond plaintiff’s abilities and failed to resolve the discrepancy between plaintiff’s limitations
9 and the Dictionary of Occupational Titles (DOT). The ALJ determined plaintiff was limited to
10 simple and routine tasks, but the positions the vocational expert identified had a Reasoning Level
11 3 or 4, which is inconsistent. The ALJ failed to ask the vocational expert to resolve the
12 inconsistency.

13 Defendant counters that the reasoning levels identified in the DOT falls under the
14 category of General Educational Development (GED), which includes reasoning, mathematics,
15 and language, not just reasoning. Thus, the reasoning levels, and GED in general, within the
16 DOT describe more general educational background rather than particular mental demands of the
17 job. Defendant relies on out of circuit cases as support, noting at the time of briefing that there
18 were no Ninth Circuit cases on point.

19 Here, the ALJ determined plaintiff has the RFC to perform light work, with the
20 following additional limitations:

21 occasional climbing of ramps and stairs; never climbing ladders,
22 ropes or scaffolds; frequent balancing; occasional stooping;
23 occasional kneeling, occasional crouching; never crawling; limited
24 to simple, routine, repetitive tasks; would need a sit/stand option
25 which is defined as sitting for 15 minutes and standing for 10 to 15
26 minutes.

(CAR 14).

25 Based on this RFC, the ALJ utilized the services of a vocational expert at the
26 administrative hearing. The hypothetical presented to the vocational expert included the above

1 limitations. Based on the limitations set forth above minus the sit/stand limitation, the vocational
2 expert testified that such an individual could perform a wide range of jobs at the light, unskilled
3 level, including cashier II (DOT 211.462-010), storage facility clerk (DOT 295.367-026), and
4 parking lot attendant (DOT 915.473-010), which the vocational expert testified were consistent
5 with the DOT. (CAR 49-50). However, when the sit/stand limitation was included, the
6 vocational expert testified that such a limitation would eliminate the parking lot job, and the
7 cashiering position would be eroded by 90 percent, but the storage facility clerk job would still
8 be an option. (CAR 50-51). The vocational expert also identified work as a fundraiser (DOT
9 293.357-010) as a position available with the sit/stand limitation. In addition, the vocational
10 expert acknowledged that the DOT is silent on a sit/stand option limitation, but that based on her
11 experience and reviewing the job descriptions in the DOT as to how the job is going to be
12 performed, the positions were reconciled with the DOT. (CAR 52).

13 At step five of the sequential evaluation process, once a claimant establishes he
14 can no longer perform his past relevant work, the burden shifts to the Commissioner to establish
15 the existence of alternative jobs available to the claimant, given the claimant's age, education,
16 and work experience. See Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988) (citing
17 Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986)). This burden can be satisfied by
18 either applying the Medical-Vocational Guidelines ("Grids"), if appropriate, or relying on the
19 testimony of a VE. See id. The testimony of a VE should generally be consistent with the DOT,
20 although neither "trumps" the other if there is a conflict. See Massachi v. Astrue, 486 F.3d 1149,
21 1153 (9th Cir. 2007). If there is an inconsistency between the vocational expert's testimony and
22 the job descriptions in the DOT, the ALJ must resolve the conflict. See id. (citing SSR 00-4p).

23 The Ninth Circuit recently addressed the very issue raised in this case, whether a
24 limitation to simple and repetitive tasks is consistent with the demands of level-three reasoning.
25 See Zavalin v. Colvin, 778 F.3d 842 (9th Cir. 2015). The Ninth Circuit determined "that there is
26 an apparent conflict between the residual functional capacity to perform simple, repetitive tasks,

1 and the demands of Level 3 Reasoning.” Id. at 847. In Zavalin, the Ninth Circuit found that
2 “because the ALJ failed to recognize an inconsistency, she did not ask the expert to explain why
3 a person with Zavalin’s limitation could nevertheless meet the demands of Level 3 Reasoning.
4 We conclude that the ALJ erred in failing to reconcile this apparent conflict.” Id. Thus, the
5 Court remanded the case for further proceedings.

6 The facts of this case are quite similar. Plaintiff argues, and defendant does not
7 contend otherwise, the jobs identified by the vocational expert have a Reasoning Level 3 or 4.
8 As stated above, the RFC limits plaintiff to simple and routine tasks. As in Zavalin, the ALJ
9 failed to recognize this inconsistency, and did not ask the vocational expert to clarify. As such, a
10 remand is necessary to resolve this apparent inconsistency.

11 IV. CONCLUSION

12 Based on the foregoing, the undersigned finds that remand is necessary to resolve
13 the apparent inconsistency between the plaintiff’s RFC and the vocational expert’s testimony as
14 to the jobs available that plaintiff is able to perform. Accordingly, IT IS HEREBY ORDERED
15 that:

- 16 1. Plaintiff’s motion for summary judgment (Doc. 16) be granted;
- 17 2. Defendant’s cross-motion for summary judgment (Doc. 17) be denied;
- 18 3. This matter be remanded for further proceedings consistent with this order;

19 and

- 20 4. The Clerk of the Court be directed to enter judgment and close this file.

21
22 DATED: September 28, 2015

23 
24 **CRAIG M. KELLISON**
25 UNITED STATES MAGISTRATE JUDGE
26