

1 and testified before the ALJ. (Tr. 117-162). Also appearing and testifying were William
2 Temple, M.D., an impartial medical expert (AR 120-26); Sidney Bolter, M.D., a second
3 impartial medical expert (AR 126-29); Mark Remas, an impartial vocational expert (AR
4 130-31); and Connie Guillory, a second impartial vocational expert (AR 148-62).

5 On May 2, 2007, the ALJ denied Plaintiff's application for DIB and SSI in a written
6 decision. (AR 19-31).

7 On June 29, 2007, Plaintiff filed a request for review of the ALJ's decision. (AR
8 13-15). On September 12, 2008, the Appeals Council denied Plaintiff's request for review
9 rendering the decision of the ALJ final. (AR 4-6).

10 On November 14, 2008, Plaintiff commenced this action for judicial review pursuant
11 to 42 U.S.C. § 405(g). (Doc. # 1). On July 29, 2010, after the parties filed cross-motions
12 for summary judgment, the Magistrate Judge issued a Report and Recommendation
13 recommending that the Court grant Plaintiff's Motion for Summary Judgment and deny
14 Defendant's Motion for Summary Judgment. (Doc. # 17).

15 On August 19, 2010, Defendant filed objections to the Report and Recommendation.
16 (Doc. # 22). On September 7, 2010, Plaintiff filed a reply to Defendant's objections. (Doc.
17 # 19).

18 STANDARD OF REVIEW

19 The duties of the district court in connection with the Report and Recommendation
20 of a Magistrate Judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. §
21 636(b). The district judge must "make a de novo determination of those portions of the
22 report ... to which objection is made," and "may accept, reject, or modify, in whole or in
23 part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b). The
24 district court need not review de novo those portions of a Report and Recommendation to
25 which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir.
26 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

27 The ALJ's decision denying benefits "will be disturbed only if that decision is not
28 supported by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161

1 F.3d 599, 601 (9th Cir. 1999) (citation omitted). “Substantial evidence is more than a mere
2 scintilla but less than a preponderance.” *Id.* (citation omitted).

3 DISCUSSION

4 The R&R correctly concludes that it was error for the ALJ to find that Plaintiff
5 could return to her past relevant work. (Doc. # 17). Defendant does not object to this
6 recommendation but contends that the Commissioner’s final decision should be affirmed
7 and judgment should be entered for the Commissioner. (Doc. # 18 at 3). Defendant
8 asserts, “[a]lthough the ALJ incorrectly stated that Plaintiff could return to her past
9 relevant work, the vocational expert’s testimony alternatively showed that Plaintiff could
10 perform other work in significant numbers.” *Id.* Defendant contends that the ALJ’s error
11 was harmless “[b]ecause the ALJ *could* have made [an] alternative finding that Plaintiff
12 could perform a significant number of jobs” (Doc. # 18 at 1, 3 (emphasis added)).

13 Plaintiff asserts that the ALJ did not rely on the vocational expert’s testimony
14 regarding other work and did not find that Plaintiff could perform other work which existed
15 in significant numbers as part of the decision. (Doc. # 19 at 1.) Plaintiff contends that
16 Defendant’s post hoc justification for denying Plaintiff benefits does not show that error by
17 this ALJ was harmless because “[t]he Commissioner’s decisions must stand or fall with the
18 reasons set forth in the ALJ’s decisions, as adopted by the Appeals Council.” *Id.* at 1-2
19 (quoting *Barbato v. Comm’r Soc. Sec. Admin.*, 923 F. Supp 1273, 1278 n.2 (C.D. Cal.
20 1996)).

21 The Court cannot accept the ALJ’s denial of benefits for grounds which are not
22 determined in the ALJ’s decision. *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001)
23 (“Although we can affirm the judgment of a district court on any ground supported by the
24 record, we cannot affirm the decision of an agency on a ground that the agency did not
25 invoke in making its decision.” (citations omitted)); *see also Burlington Truck Lines, Inc. v.*
26 *United States*, 371 U.S. 156, 169 (1962) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196
27 (1947)). The record shows that the ALJ did not determine whether Plaintiff can engage in
28 other types of substantial gainful work which exists in the national economy. The ALJ did

1 not pose a hypothetical to the vocational expert containing Plaintiff's complete residual
2 functional capacity regarding the availability of other work and the ALJ did not find that
3 Plaintiff could perform other work which existed in a significant number in the decision.
4 The record is not adequate to allow the Court to find that Plaintiff is not disabled based on
5 this alternative theory on non-disability. The Court will adopt the Magistrate Judge's
6 recommendation of remand made in the R&R.

7 Defendant further objects to the Magistrate Judge's finding in a footnote that
8 Plaintiff was unable to perform other jobs identified by the vocational expert because the
9 Dictionary of Occupational Titles ("DOT") described the jobs as involving either frequent
10 or constant reaching and Plaintiff's residual functional capacity limited her to no overhead
11 reaching with her right arm. (Doc. # 18 at 1; Doc. # 17 at 13-14 n.3). Because the Court
12 has found that the ALJ did not rely on the vocational expert's testimony regarding other
13 jobs and did not determine that Plaintiff could perform other jobs as part of the decision,
14 the finding in footnote 3 is more properly determined on remand. The court will not adopt
15 footnote 3 in the R&R.

16 CONCLUSION

17 After reviewing de novo those portions of the Report and Recommendation to which
18 Defendant objected, and after generally reviewing the Report and Recommendation and the
19 ALJ's decision in light of the Administrative Record, the Court finds that the Magistrate
20 Judge correctly evaluated the facts and applied the controlling law in this case.

21 Accordingly, IT IS HEREBY ORDERED that: (1) the Court ADOPTS all portions
22 of the Report and Recommendation (Doc. # 17) except for pages 13-14, footnote 3; (2)
23 Plaintiff's Motion for Summary Judgment (Doc. # 12) is GRANTED; and (3) Defendant's
24 Cross-Motion for Summary Judgment (Doc. # 15) is DENIED. The Court REMANDS this

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1 case to the ALJ so that she can discharge her duties pursuant to SSR 00-4p.

2 IT IS SO ORDERED.

3 DATED: September 14, 2010

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5 **WILLIAM Q. HAYES**
6 United States District Judge

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