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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ARLENE ELIZABETH MASTERSON,
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,
16 Defendant.

Case No.: 3:16-cv-01300-GPC-WVG

ORDER:

(1) **ADOPTING MAGISTRATE
JUDGE’S REPORT AND
RECOMMENDATION;**

(2) **GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT;**

(3) **DENYING DEFENDANT’S
CROSS-MOTION FOR SUMMARY
JUDGMENT; AND**

(4) **REMANDING THE MATTER
FOR FURTHER PROCEEDINGS**

[ECF Nos. 13, 15, 17.]

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26 On May 31, 2016, Plaintiff Arlene Elizabeth Masterson (“Plaintiff” or
27 “Masterson”) filed a Complaint seeking judicial review of a final decision by Carolyn W.
28 Colvin, the Acting Commissioner of the Social Security Administration (“Defendant” or

1 “Commissioner”),¹ denying Plaintiff’s applications for a period of disability, disability
2 insurance benefits (“DIB”), and supplemental security income (“SSI”) on the basis that
3 Plaintiff was not disabled. (Dkt. No. 1.)

4 The parties filed cross-motions for summary judgment. (Dkt. Nos. 13, 15.) On
5 July 11, 2017, Magistrate Judge William V. Gallo issued a report and recommendation
6 (“Report”) recommending that the undersigned judge grant Plaintiff’s motion for
7 summary judgment, deny Defendant’s cross-motion for summary judgment, and remand
8 the matter for further proceedings by the administrative law judge (“ALJ”). (Dkt. No.
9 17.) Defendant filed objections to the Report on July 25, 2017, (Dkt. No. 18), and
10 Plaintiff filed a response to Defendant’s objections, (Dkt. No. 19-1). Having reviewed
11 the parties’ arguments, the record, and the applicable law, the Court **ADOPTS** the
12 Magistrate Judge’s Report.

13 **LEGAL STANDARD**

14 **I. Standard of Review of Magistrate Judge’s Report and Recommendation**

15 The district court’s duties in connection with a Report from a magistrate judge are
16 set forth in Federal Rules of Civil Procedure 72(b) and 28 U.S.C. § 636(b). The district
17 court “may accept, reject or modify, in whole or in part, the findings and
18 recommendations made by the magistrate.” 28 U.S.C. § 636(b). The district court need
19 not review *de novo* those portions of a Report to which neither party objects. *See Wang*
20 *v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328
21 F.3d 1114, 1121–22 (9th Cir. 2003) (en banc). When no objections to a Report are made,
22 the Court may assume the correctness of the magistrate judge’s findings of fact and
23 decide the motion on the applicable law. *Campbell v. U.S. Dist. Ct. for the N. Dist. of*
24 *California*, 501 F.2d 196, 206 (9th Cir. 1974); *Johnson v. Nelson*, 142 F. Supp. 2d 1215,
25 1217 (S.D. Cal. 2001).

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28 ¹ Commissioner Nancy A. Berryhill is substituted for Commissioner Carolyn W. Colvin pursuant to
Federal Rule of Civil Procedure 25(d) and 42 U.S.C. § 405(g).

1 **II. Standard of Review of Commissioner’s Final Decision**

2 Section 205(g) of the Act permits unsuccessful claimants to seek judicial review of
3 the Commissioner’s final agency decision. 42 U.S.C. § 405(g). The reviewing court may
4 enter a judgment affirming, modifying, or reversing the Commissioner’s decision, and
5 may also remand the matter to the Social Security Administrator for further proceedings.
6 *Id.*

7 The scope of the reviewing court is limited; it may only “set aside the ALJ’s denial
8 of benefits . . . when the ALJ’s findings are based on legal error or are not supported by
9 substantial evidence in the record as a whole.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
10 Cir. 2007) (internal quotations omitted). “‘Substantial evidence’ means more than a mere
11 scintilla, but less than a preponderance, i.e., such relevant evidence as a reasonable mind
12 might accept as adequate to support a conclusion.” *Robbins v. SSA*, 466 F.3d 880, 882
13 (9th Cir. 2006). However, “[e]ven if the evidence is susceptible to more than one rational
14 interpretation, [the court] must uphold the ALJ’s findings if they are supported by
15 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111
16 (9th Cir. 2012).

17 **III. Determination of Disability**

18 For purposes of the Social Security Act, a claimant is disabled if she is unable “to
19 engage in any substantial gainful activity by reason of any medically determinable
20 physical or mental impairment which can be expected to result in death or which has
21 lasted or can be expected to last for a continuous period of not less than 12 months.” 42
22 U.S.C. § 423(d)(1)(A). In order to determine whether a claimant meets this definition,
23 the ALJ employs a five-step sequential evaluation. 20 C.F.R. § 416.920(a); *Molina*, 674
24 F.3d at 1110. If the ALJ determines that a claimant is either disabled or not disabled at a
25 step in the process, the ALJ does not continue on to the next step. *See* 20 C.F.R.
26 § 416.920(a)(4); *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1222 (9th Cir. 2009). In brief,
27 the ALJ considers whether the claimant is disabled by determining: (1) whether the
28 claimant is “doing substantial gainful activity”; (2) whether the claimant has a “severe,

1 medically determinable physical or mental impairment or combination of impairments
2 that has lasted for more than 12 months; (3) whether the impairment “meets or equals”
3 one of the listings in the regulations; (4) whether, given the claimant’s residual functional
4 capacity (“RFC”), the claimant can still do his or her “past relevant work”; and (5)
5 whether the claimant “can make an adjustment to other work.” 20 C.F.R. § 416.920(a).
6 Between steps three and four, the ALJ must, as an intermediate step, assess the claimant’s
7 RFC. *See* 20 C.F.R. § 416.920(e); *Bray*, 554 F.3d at 1222–23; *Garrison v. Colvin*, 759
8 F.3d 995, 1011 (9th Cir. 2014). The burden of proof is on the claimant at steps one
9 through four but shifts to the Commissioner at step five. *Bray*, 554 F.3d at 1222.

10 DISCUSSION

11 Defendant objects to the Magistrate Judge’s Report on three grounds.² (Dkt. No.
12 18.) Each is discussed in turn below.

13 I. Waiver of the Substantial Gainful Activity (“SGA”) Issue

14 Plaintiff argued to the Appeals Council that the ALJ erred in finding that her past
15 work was performed at the level of substantial gainful activity, as her past work did not
16 meet the minimum monthly earnings thresholds to qualify as such. (Dkt. No. 17 at 15–
17 16.) The Magistrate Judge concluded that although Plaintiff failed to raise the SGA issue
18 before the ALJ, Plaintiff ultimately did not waive the issue, because she presented it to
19 the Appeals Council when she sought review of the ALJ’s decision. (*Id.* at 17–18.)

20 Defendant relies upon *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999), to argue that
21 Plaintiff waived the SGA issue by failing to raise it in front of the ALJ in the first
22 instance. (Dkt. No. 18 at 2–4.) In *Meanel*, the claimant “relie[d] on new statistics that
23 she admittedly failed to raise at *both* her hearing before the ALJ and the Appeals
24 Council.” 172 F.3d at 1115 (emphasis added). The Ninth Circuit observed that “[t]he

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27 ² No objections were made to the remainder of the Magistrate Judge’s Report. Accordingly, the Court
28 limits its discussion to Defendant’s three objections. *See Reyna-Tapia*, 328 F.3d at 1121–22. The
Magistrate Judge’s description of the proceedings below are incorporated by reference. (*See* Dkt. No.
17 at 6–12.)

1 ALJ, rather than this Court, was in the optimal position to resolve the conflict between
2 Meanel’s new evidence and the statistical evidence provided by the VE.” *Id.*
3 Accordingly, the Ninth Circuit held that, “at least when claimants are represented by
4 counsel, they must raise all issues and evidence at their administrative hearings in order
5 to preserve them on appeal.” *Id.*

6 *Meanel* is distinguishable. First, the claimant in *Meanel* failed to raise the new
7 statistical evidence at her hearing before either the ALJ or the Appeals Council. *See* 172
8 F.3d at 1115. *Meanel*’s holding requires represented claimants to “raise all issues and
9 evidence at their administrative hearings in order to preserve them on appeal.” *Id.* The
10 holding does not, however, specify which level of the administrative process is the
11 terminus for purposes of waiver. *See id.* Second, recent Ninth Circuit authority disfavors
12 Defendant’s position. *See Lamear v. Berryhill*, No. 15-35088, 2017 WL 3254930, at *4
13 (9th Cir. Aug. 1, 2017) (publication forthcoming). In *Lamear*, the Ninth Circuit rejected
14 the Commissioner’s argument that claimant’s counsel waived an issue by failing to raise
15 it during the hearing in front of the ALJ. *See id.* The Ninth Circuit distinguished *Meanel*,
16 noting that “[u]nlike the claimant in *Meanel*, *Lamear* raised this issue to the Appeals
17 Council.” *Id.*

18 The Court **OVERRULES** Defendant’s first objection.

19 **II. Apparent Conflict Between the Vocational Expert’s (“VE’s”) Testimony**
20 **and Dictionary of Occupational Titles (“DOT”)**

21 “In determining whether an applicant is entitled to disability benefits, an ALJ may
22 consult a series of sources, including a [vocational expert (“VE”)] and the [Dictionary of
23 Occupational Titles (“DOT”).]” *Lamear*, 2017 WL 3254930, at *2. “If the expert’s
24 opinion that the applicant is able to work conflicts with, or seems to conflict with, the
25 requirements listed in the *Dictionary*, then the ALJ must ask the expert to reconcile the
26 conflict before relying on the expert to decide if the claimant is disabled.” *Gutierrez v.*
27 *Colvin*, 844 F.3d 804, 807 (9th Cir. 2016). The conflict must be “obvious or apparent.”
28 *Id.* at 808.

1 The Magistrate Judge concluded that the ALJ erred at step five by failing to ask the
2 VE to reconcile the apparent conflict between the VE’s testimony and the overhead
3 reaching requirements detailed in the DOT. (Dkt. No. 17 at 21–25.) Specifically,
4 Plaintiff’s RFC limited her to reaching overhead with her right arm on only an
5 occasional basis, or up to one-third of the day. (*See id.* at 23.) Despite this limitation, the
6 VE identified three jobs—mail clerk, small parts assembler, and garment folder—that
7 required frequent or constant reaching under the DOT. (*See id.* (DOT notes that mail
8 clerks and small parts assemblers perform frequent reaching between one-third to two-
9 thirds of the time, and that garment folders perform constant reaching two-thirds of the
10 time or more).) Problematically, the definition of reaching entails extending the hands
11 and arms in *any* direction, which Plaintiff cannot do with her right arm. (*See id.*) The
12 VE’s testimony exceeded Plaintiff’s RFC and created an apparent conflict with the
13 requirements listed in the DOT.

14 Relying on *Gutierrez v. Colvin*, 844 F.3d 804 (9th Cir. 2016), Defendant argues
15 that there was no apparent conflict between the VE’s testimony and the DOT. (Dkt. No.
16 18 at 4–7.) At issue in *Gutierrez* was “whether *overhead* reaching is such a common and
17 obvious part of cashiering that the ALJ should have recognized a conflict and questioned
18 the expert more closely before concluding that Ms. Gutierrez could work as a cashier.”
19 *Gutierrez*, 844 F.3d at 807. Specifically,

20 the applicant could not reach above shoulder level with her right arm. The VE
21 opined that she could work as a cashier, and the ALJ did not specifically question
22 the VE about how the applicant could do this in light of her inability to reach
23 overhead with her right arm. The applicant in *Gutierrez* . . . argued that the ALJ
24 should have recognized a conflict between the DOT and the VE’s testimony, and
25 questioned the VE more closely.

26 *Lamear*, 2017 WL 3254930, at *3 (citing *Gutierrez*, 844 F.3d at 807). Notwithstanding
27 the above, the Ninth Circuit “held there was no error because, based on common
28 experience, it is ‘unlikely and unforeseeable’ that a cashier would need to reach

1 overhead, and even more rare for one to need to reach overhead with both arms.” *Id.*
2 (citing *Gutierrez*, 844 F.3d at 808–09 & 809 n.2).

3 *Lamear* is again instructive. In *Lamear*, the Ninth Circuit emphasized that “[t]he
4 requirement for an ALJ to ask follow up questions is fact-dependent,’ and the more
5 obscure the job, the less likely common experience will dictate the result.” *Id.* at *3
6 (quoting *Gutierrez*, 844 F.3d at 808). Further, “[t]o avoid unnecessary appeals, an ALJ
7 should ordinarily ask the VE to explain in some detail why there is no conflict between
8 the DOT and the applicant’s RFC.” *Id.* In *Lamear*,

9 The VE opined that an individual with *Lamear*’s limitations, which included being
10 able only “occasionally” to handle, finger, and reach overhead with his left, non-
11 dominant hand and arm, but with no limitations on his right side, . . . could still
12 work as an office helper, mail clerk, or parking lot cashier, even though the DOT
states that these jobs require “frequent” handling, fingering, and reaching.

13 *Id.*

14 The Ninth Circuit distinguished *Gutierrez*:

15 Contrary to the facts in *Gutierrez*, we cannot say that, based on common
16 experience, it is likely and foreseeable that an office helper, mail clerk, or parking
17 lot cashier with limitations on his ability to “handle, finger and feel with the left
18 hand” could perform his duties. The DOT’s lengthy descriptions for these jobs
19 strongly suggest that it is likely and foreseeable that using both hands would be
20 necessary to perform “essential, integral, or expected” tasks in an acceptable and
21 efficient manner. . . . Moreover, all three jobs require workers to “frequently”
22 engage in handling, fingering, and reaching, which means that these types of
activities could be necessary for as much as two-thirds of the workday. Absent
23 anything in the record to explain this apparent discrepancy, we must reverse and
24 remand so the ALJ can ask the VE to reconcile these jobs with *Lamear*’s left hand
25 limitations.

26 *Id.*

27 Here, the positions of mail clerk, small parts assembler, and garment folder, while
28 not obscure, are not so commonplace that “common experience” can easily resolve the
conflict. As in *Lamear*, common experience does not dictate that it is likely and
foreseeable that a mail clerk, small parts assembler, or garment folder with limitations on

1 her ability to reach overhead with her right arm could perform her duties. This is
2 particularly true where all three jobs require workers to frequently or constantly engage
3 in reaching—indeed, reaching may be necessary for up to two-thirds of the workday for
4 mail clerks and small parts assemblers, and for up to the entire workday for garment
5 folders.

6 Moreover, Defendant’s argument that Plaintiff’s left arm was not similarly limited
7 as her right arm does not answer the question of whether the DOT’s reaching
8 requirements are unilateral or bilateral, “an issue that has divided many courts.” *Lamear*,
9 2017 WL 3254930, at *3. Here, as in *Lamear*, the Court “cannot determine from this
10 record, the DOT, or . . . common experience whether the jobs in question require both
11 [arms], so we cannot say the ALJ’s failure to inquire was harmless.” *Id.*; *see also*
12 *Pearson v. Colvin*, 810 F.3d 204, 211 (4th Cir. 2015) (“Although we could guess what
13 these occupations require in reality, it is the purview of the ALJ to elicit an explanation
14 from the expert as to whether these occupations do, in fact, require frequent bilateral
15 overhead reaching.”).

16 The Court **OVERRULES** Defendant’s second objection.

17 **III. Dr. Kotha’s Report and Basis for Remand**

18 Defendant objects that the Magistrate Judge erroneously recommended remanding
19 the matter based on Dr. Kotha’s assessment. (Dkt. No. 18 at 7–9.) It is plain, however,
20 that the Magistrate Judge did not base his recommendation on Dr. Kotha’s report.³ (*See*
21 Dkt. No. 17 at 25–30.) Rather, remand was recommended on account of the ALJ’s
22 failure to develop the record in two areas—the SGA factors and the apparent conflict
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26 ³ It is undisputed that “the administrative record includes evidence submitted to and considered by the
27 Appeals Council,” as “[t]he Commissioner’s regulations permit claimants to submit new and material
28 evidence to the Appeals Council and require the Council to consider that evidence in determining
whether to review the ALJ’s decision, so long as the evidence relates to the period on or before the
ALJ’s decision.” *Brewes v. Comm’r of SSA*, 682 F.3d 1157, 1162 (9th Cir. 2012) (citing 20 C.F.R. §
404.970(b)).

1 between the VE's testimony and the DOT. (*See id.*) The Report explicitly recommends
2 that the ALJ should *also* consider Dr. Kotha's assessment on remand. (*See id.* at 27.)

3 Further, the Report does not conclude that Dr. Kotha's assessment disturbs the
4 substantial evidence supporting the ALJ's decision. (*See id.* at 29.) Rather, the Report
5 notes that while questions of reliability or credibility may affect Dr. Kotha's report, the
6 ALJ, not the Court, is ultimately in the best position to resolve these evidentiary concerns
7 and determine the full significance—if any—of Dr. Kotha's report on the ALJ's own
8 RFC findings. (*See id.*)

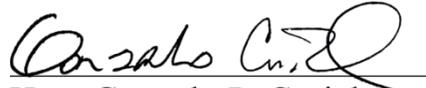
9 The Court **OVERRULES** Defendant's third objection.

10 **CONCLUSION**

11 For the foregoing reasons, the Court **OVERRULES** Defendant's objections and
12 **ADOPTS** the Magistrate Judge's Report and Recommendation. (Dkt. No. 17.) The
13 Court **GRANTS** Plaintiff's motion for summary judgment, (Dkt. No. 13), **DENIES**
14 Defendant's cross-motion for summary judgment, (Dkt. No. 15), and **REMANDS** the
15 matter for further proceedings by the ALJ.

16 **IT IS SO ORDERED.**

17 Dated: August 18, 2017

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19 Hon. Gonzalo P. Curiel
20 United States District Judge
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