UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALAN EUGENE BARBEE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.[1]

Case No.: 16-cv-1779-BEN-(DHB)

REPORT AND RECOMMENDATION REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

(ECF Nos. 14, 15)

On July 9, 2016, Plaintiff Alan Eugene Barbee ("Plaintiff") filed a complaint pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3) of the Social Security Act requesting judicial review of the final administrative decision of the Commissioner of Social Security ("Commissioner" or "Defendant") regarding denial of Plaintiff's claim for Supplemental Security Income benefits. (ECF No. 1.) On October 27, 2016, Defendant filed an Answer and the Administrative Record ("A.R."). (ECF Nos. 11, 12.)

[1] The Court hereby substitutes Nancy A. Berryhill, the Acting Commissioner of Social Security, for Carolyn W. Colvin, the former Acting Commissioner of Social Security, as Defendant in this suit. *See* Fed. R. Civ. P. 25(d); 42 U.S.C. § 405(g); ECF No. 15 at 1, n. 1.

On January 13, 2017, Plaintiff filed a motion for summary judgment seeking reversal of Defendant's final decision and remand for further administrative proceedings. (ECF No. 14.) Plaintiff contends the Administrative Law Judge ("ALJ") committed reversible error by failing to reconcile apparent conflicts between the testimony of the Vocational Expert ("VE") and the Dictionary of Occupational Titles ("DOT"). (*Id*.) On February 9, 2017, Defendant filed an opposition to Plaintiff's motion for summary judgment and a cross-motion for summary judgment. (ECF Nos. 15, 16.)[2] On February 23, 2017, Plaintiff filed an opposition to Defendant's cross-motion for summary judgment. (ECF No. 17.)

For the reasons set forth herein, and after careful consideration of the record and the applicable law, the Court **RECOMMENDS** that Plaintiff's motion for summary judgment be **GRANTED,** Defendant's cross-motion for summary judgment be **DENIED**, and the case **REMANDED** to the ALJ.

I. PROCEDURAL BACKGROUND

On April 30, 2012, Plaintiff filed an application for Supplemental Security Income benefits, in which he states his disability began on June 1, 2006.[3] (A.R. 42, 184-198, 280.) In his application, Plaintiff alleges his disability is due to seizures, mental illness, back problems, and a head injury. (A.R. 185, 300, 302.) Plaintiff's claim was initially denied on August 28, 2012, and upon reconsideration on May 15, 2013. (A.R. 42, 184-231.) Thereafter, on July 7, 2013, Plaintiff requested a hearing before an ALJ. (A.R. 42, 237-239.) On July 16, 2014, ALJ Paul Coulter held a hearing regarding Plaintiff's application for Supplemental Security Income benefits. (A.R. 60-79.) On August 28, 2014, the ALJ

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[2] Although filed separately on the docket, Defendant's cross-motion for summary judgment and Defendant's opposition to Plaintiff's motion for summary judgment are identical.

[3] Prior to Plaintiff's current application for Supplemental Security Income benefits, Plaintiff requested an ALJ hearing for a prior application for Supplemental Security Income benefits, and a hearing was held in 2007, as well as a supplemental hearing in 2008 regarding Plaintiff's application. (A.R. 81, 116, 177.) Plaintiff was granted disability benefits for that application on April 25, 2008. (A.R. 183.)

rendered an unfavorable decision and concluded that Plaintiff was not entitled to benefits. (A.R. 39-54.) The ALJ's decision became final on May 11, 2016, when the Appeals Council denied Plaintiff's request for review. (A.R. 1-5.) Thereafter, Plaintiff filed a complaint in the above-entitled matter. (ECF No. 1.)

II. LEGAL STANDARDS

A. Determination of Disability

To qualify for disability benefits under the Social Security Act, a claimant must demonstrate the following two things: (1) he suffers from a medically determinable physical or mental impairment that can be expected to last for a continuous period of twelve months or more, or would result in death; and (2) the impairment renders the applicant incapable of performing the work he previously performed or any other substantial gainful employment which exists in the national economy. 42 U.S.C. §§ 423(d)(1)(A), (d)(2)(A). A claimant must meet both requirements to be classified as disabled. *Id.* The Commissioner assesses a claim of disability through a five-step sequential evaluation process. The five steps are:

1. Is the claimant presently working in a substantially gainful activity? If so, then the claimant is not disabled within the meaning of the Social Security Act. If not, proceed to step two. *See* 20 C.F.R. §§ 404.1520(b), 416.920(b).
2. Is the claimant's impairment severe? If so, proceed to step three. If not, then the claimant is not disabled. *See* 20 C.F.R. §§ 404.1520(c), 416.920(c).
3. Does the impairment "meet or equal" one of the list of specific impairments described in 20 C.F.R. Part 220, Appendix 1? If so, the claimant is disabled. If not, proceed to step four. *See* 20 C.F.R. §§ 404.1520(d), 416.920(d).
4. Is the claimant able to do any work that he or she has done in the past? If so, the claimant is not disabled. If not, proceed to step five. *See* 20 C.F.R. §§ 404.1520(e), 416.920(e).
5. Is the claimant able to do any other work? If so, then the claimant is not disabled. If not, the claimant is disabled. *See* 20 C.F.R. §§ 404.1520(f), 416.920(f).

Bustamonte v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001) (citing *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999)). If the claimant is able to do other work, then the Commissioner must "show that the claimant can perform some other work that exists in 'significant numbers' in the national economy, taking into consideration the claimant's residual functional capacity ("RFC"),[4] age, education, and work experience." *Tackett*, 180 F.3d at 1099-00 (citing 20 C.F.R. § 404.1560(b)(3)). If an applicant is found to be disabled or not disabled at any step, there is no need to proceed further. *Ukolov v. Barnhart*, 420 F.3d 1002, 1003 (9th Cir. 2005) (citing *Schneider v. Comm'r of Soc. Sec. Admin.*, 223 F.3d 968, 974 (9th Cir. 2000)).

Although the ALJ must assist the claimant in developing the record, the claimant bears the burden of proof during the first four steps. *Tackett*, 180 F.3d at 1098, n.3 (citing 20 C.F.R. § 404.1512(d)). The Commissioner bears the burden of proof at the fifth step. *Id.* at 1100.

B. Scope of Review

The Social Security Act allows unsuccessful claimants to seek judicial review of the Commissioner's final agency decision. 42 U.S.C. §§ 405(g), 1383(c)(3). The scope of judicial review is limited. The Court must affirm the Commissioner's decision unless it "is not supported by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) (citing *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) ("We may reverse the ALJ's decision to deny benefits only if it is based upon legal error or it is not supported by substantial evidence.") (citing *Tidwell*, 161 F.3d at 601.)

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[4] The RFC is "the most [a claimant] can still do despite [his or her] limitations." 20 C.F.R. § 404.1545(a)(1). The RFC is "based on all the relevant evidence" in the case record. *Id*.

"Substantial evidence is more than a mere scintilla but less than a preponderance." *Tidwell*, 161 F.3d at 601 (citing *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997)). "Substantial evidence is relevant evidence which, considering the record as a whole, a reasonable person might accept as adequate to support a conclusion." *Flaten*, 44 F.3d at 1457 (citing *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993)). In considering the record as a whole, the Court must weigh both the evidence that supports and detracts from the ALJ's conclusions. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing *Vidal v. Harris*, 637 F.2d 710, 712 (9th Cir. 1981); *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975)).

The Court must uphold the denial of benefits if the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) ("Where evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.") (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039-40 (9th Cir. 1995)); *Flaten*, 44 F.3d at 1457 ("If the evidence can reasonably support either affirming or reversing of the Secretary's conclusion, the court may not substitute its judgment for that of the Secretary.") (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). The "substantial evidence test for upholding factual findings is 'extremely deferential to the factfinder.'" *Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1165 (9th Cir. 2010) (quoting *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 149 (1997)). The court's "'task is not to reweigh the evidence, but only to determine if substantial evidence supports the ALJ's findings.'" *Id*. (quoting *Metro. Stevedore Co.*, 521 U.S. at 149.) However, even if the Court finds that substantial evidence supports the ALJ's conclusions, the Court must set aside the decision "if the proper legal standards were not applied in weighing the evidence and making the decision." *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978) (quoting *Flake v. Gardner*, 399 F.2d 532, 540 (9th Cir. 1968)).

Section 405(g) permits the Court to enter a judgment affirming, modifying or reversing the Commissioner's decision. 42 U.S.C. § 405(g). The matter may also be remanded to the Social Security Administration for further proceedings. *Id*.

III. FACTUAL BACKGROUND

Plaintiff alleges he became disabled on June 1, 2006. (A.R. 42, 280.) In his application, Plaintiff alleges his disability is due to seizures, mental illness, back problems, and a head injury. (A.R. 185, 300, 302.) Prior to his disability, Plaintiff alleges he worked as a laborer and a street repairman. (A.R. 196-197, 303.)

A. Medical Evidence[5]

1. Treating Physicians

a. *California Department of Corrections*

The California Department of Corrections/Health Records Center provided Plaintiff's medical records from April 2011 to June 22, 2012. (A.R. 399-414.) Plaintiff was incarcerated from 2010 to 2012. (A.R. 645.) Plaintiff saw a doctor on at least two occasions in the Telemedicine Mental Health Clinic in 2011. (A.R. 399-414.) On July 6, 2011, the date of the last reported visit, Plaintiff reported that he was still doing "ok with the voices" and doing "ok with the anger." (A.R. 406.) The doctor stated that Plaintiff "reports continued mild depression; otherwise he appears fa[ir]ly stable." (A.R. 406.) Plaintiff was taking Zoloft, but declined antipsychotic medications. (A.R. 406.)

b. *East County Clinic*

The East County Clinic initially provided Individual Progress Notes for Plaintiff from June 1, 2012, June 28, 2012, July 30, 2012, September 28, 2012, December 21, 2012, and February 14, 2013. (A.R. 415-425, 469-479.) The Clinic subsequently provided

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[5] Plaintiff does not contest or address the ALJ's findings with regard to his physical impairments or physical functional ability. Therefore, only Plaintiff's mental health evidence is summarized here.

Individual Progress Notes for Plaintiff from April 22, 2013, July 8, 2013, August 5, 2013, September 9, 2013, October 7, 2013, November 4, 2013, January 13, 2014, March 10, 2014, and May 15, 2014. (A.R. 524-525, 597-628.)

On June 1, 2012, Plaintiff, accompanied by his girlfriend, was given an initial Mental Status Exam and seen by a doctor and a nurse. (A.R. 418-420.) The nurse noted that Plaintiff was prescribed Thorzine and Zoloft while in prison, from which he was released two weeks earlier, and was seeking continued medication management and to change his antipsychotic medication because of the side effects. (A.R. 420.) Plaintiff represented he still hears voices and has paranoia that people are watching him. (A.R. 420.) Plaintiff's subsequent Individual Progress Notes indicate that Plaintiff was responding well to medication. (A.R. 422, 469, 472.) On December 21, 2012, Plaintiff requested that his doctor complete a form so that his social security benefits could be continued. (A.R. 476.) Plaintiff produced a list of his medications being prescribed by the Family Health Centers of San Diego. (A.R. 476.)

In early 2013, Plaintiff reported that he was doing "okay" and that his medications were helping him. (A.R. 478, 524.) In February 2013, Plaintiff reported that his sister was helping him because of his seizures and because he could not cook. (A.R. 478.) He also asked about his social security form. (A.R. 478.) In April 2013, Plaintiff reported side effects for the first time to his medications. (A.R. 524.) He added that he was sleeping excessively. (A.R. 524.) In mid-2013, Plaintiff reported a lot of anxiety about his social security benefits, due to his financial and physical health. (A.R. 606-615.)

In early 2014, Plaintiff's doctor, Vijay Chennamchetty, M.D., started noting that it was unclear whether Plaintiff's behavior at his appointments was due to claimed psychotic symptoms or malingering, as a result of Plaintiff applying for social security benefits. (A.R. 597-604.) On May 14, 2014, Plaintiff's doctor stated: "Due to inconsistency of endorsed sx and their incongruence with objective presentation, author of this note is suspicious that pt might be exaggerating for his sx for secondary gain, possibly to support his application for federal security benefits." (A.R. 597.) The doctor noted that, in the

past, Plaintiff's symptoms and side effects appeared to get worse when he specifically asked about them. (A.R. 597.) The doctor also noted that Plaintiff had lived with his lady friend for over fifteen years and his sister is his current caregiver. (A.R. 597.) The doctor further noted that Plaintiff's psychosis reportedly started when he had five people he knew die in one month. (A.R. 597.) Plaintiff later noted that Plaintiff's behavior "has usually been inconsistent with and unrelated to stated symptoms," and that Plaintiff appears to be malingering. (A.R. 598.)

c. *Lemon Grove Family Health Centers of San Diego*

The Lemon Grove Family Health Centers of San Diego initially provided medical records from July 18, 2012 and August 2, 2012. (A.R. 426-434.) The records were later updated to include visits on September 4, 2012, November 5, 2012, December 20, 2012, January 28, 2013, and February 14, 2013. (A.R. 482-508.) The records were updated again to include visits on February 28, 2013, April 25, 2013, May 9, 2013, September 4, 2013, October 24, 2013, and February 20, 2014. (A.R. 538-544, 555-567.)

Plaintiff primarily saw the doctors at the Family Health Centers of San Diego to obtain medication refills. (A.R. 431, 428, 482, 494, 538.) Plaintiff also saw the doctors for his blood pressure, hypertension, vision, physical ailments, including his back and leg pain, and referrals. On July 18, 2012, Plaintiff saw Young Sik Lee, M.D., to follow up on lab results and renew prescriptions. (A.R. 431.) At the time, Dr. Lee noted Plaintiff was "alert, coherent, [and in] no acute distress." (A.R. 431.) On September 4, 2012, Plaintiff saw Yuhee Ki, M.D., and reported recurrent seizures, with the last seizure occurring a week prior to the visit. (A.R. 494.) Plaintiff reported that he had never been seen by neurology. (A.R. 494.) Plaintiff further reported taking medication for schizophrenia, but did not know the name or dose. (A.R. 494.) Dr. Kim ordered a neurology consult with Dr. Khamishon. (A.R. 496.) As of November 5, 2012, Plaintiff had not yet seen neurology. (A.R. 490.)

On May 9, 2013, Plaintiff requested a new referral to neurology for seizures. (A.R. 555.) Plaintiff reported a past history of seizures, which were being controlled by

medication prescribed by his psychiatrist. (A.R. 555.) His last reported seizure was the day before, and Plaintiff reported getting them twice per week. (A.R. 556.) Plaintiff was referred to neurology and an MRI was ordered. (A.R. 556.)

On July 29, 2013, Plaintiff had an MRI. (A.R. 567.) The MRI concluded that Plaintiff had deep and cortical atrophy, moderately prominent for Plaintiff's age, but otherwise it was an unremarkable brain MRI without and with contrast. (A.R. 567.)

On October 24, 2013, when Plaintiff appeared for a physical, he reported that he had been taking all medications as prescribed, that he sees a psychiatrist every six weeks, and is under the care of neurology for seizures. (A.R. 561.) Plaintiff also reported that he last had a seizure three weeks prior to the visit. (A.R. 561.) Plaintiff's reports in February 2014 were similar to his October 2013 visit. (A.R. 563.)

d. *Dr. Boris Khamishon, M.D.*

On December 10, 2012, Plaintiff saw Dr. Boris Khamishon, M.D., for a Neurologic Evaluation. (A.R. 462-465, 577-579.) Plaintiff informed Dr. Khamishon that he began experiencing seizures approximately eight years prior, after head trauma. (A.R. 462.) Plaintiff reported the seizures occurred every day, until medication reduced the frequency to once per week. (A.R. 462.) Plaintiff reported the seizures are usually nocturnal, but occur during the day as well. (A.R. 462.) Plaintiff further reported he has had grand mal seizures with convulsions, loss of consciousness, and rare urinary incontinency, along with complex partial seizures that are not accompanied by full loss of consciousness. (A.R. 462.) The seizures are characterized by staring episodes. (A.R. 462.) Plaintiff had no focal weakness, numbness, double vision, or difficulty swallowing. (A.R. 462.)

Dr. Khamishon reviewed Plaintiff's systems and stated that Plaintiff had no weight changes, fevers, chills, or sweats. (A.R. 462.) He further stated that Plaintiff had no recent changes to the eyes and no double vision, as well as no chest pain or palpitations, and no shortness of breath with exertion or cough. (A.R. 462.) Plaintiff also had no rash, itching, or burning, and no joint pain, cramping, abdominal pain, or issues with his appetite and digestion. (A.R. 462.) Dr. Khamishon noted a history of depression; but no history of

anxiety or schizophrenia. (A.R. 462.) Dr. Khamishon noted that Plaintiff appeared well nourished, well groomed, and had no history of mood disorder. (A.R. 463.) In regards to Plaintiff's mental status, Dr. Khamishon found that Plaintiff was alert and oriented, with intact language, concentration, and attention span. (A.R. 463.) Dr. Khamishon further found that Plaintiff was following commands and his speech was fluent, with a normal vocabulary and fund of knowledge. (A.R. 463.) Dr. Khamishon diagnosed Plaintiff with a seizure disorder that began eight years prior after head trauma and recommended a change in medication and a brain MRI. (A.R. 464.) Plaintiff's EEG taken the same day was normal. (A.R. 464.)

Dr. Khamishon continued to see Plaintiff from at least March 13, 2013 to March 20, 2014. (A.R. 568-579.) On June 18, 2014, Dr. Khamishon filled out a Seizure Disorder and Residual Functional Capacity Questionnaire. (A.R. 652-655.) Dr. Khamishon stated that Plaintiff was diagnosed with a seizure disorder and that he has grand mal and complex partial seizures. (A.R. 652.) Dr. Khamishon stated Plaintiff has seizures approximately twice per week and they last, on average, three minutes. (A.R. 652.) Dr. Khamishon found that Plaintiff's seizures would likely disrupt the work of co-workers and that he needs more supervision at work than an unimpaired worker. (A.R. 654.) Dr. Khamishon further found that Plaintiff cannot work at heights, cannot work with power machines that require an alert operator, and cannot operate a motor vehicle, but can take the bus alone. (A.R. 654.) Dr. Khamishon stated that Plaintiff would likely be absent from work more than four days per month. (A.R. 654.)

2. Examining Physicians

On July 12, 2013, Joann Scott, LCSW, from the County of San Diego Mental Health Services filled out a Behavioral Health Assessment. (A.R. 629-651.) Plaintiff reported hearing voices telling him he is worthless and seeing white shadows. (A.R. 629.) Plaintiff reported that the voices prevent him from thinking clearly or making decisions, and that his back pain interferes with his daily living. (A.R. 629.) Plaintiff reported that his

girlfriend and sister assist him in daily tasks, including bathing, dressing, transport, and cooking. (A.R. 629, 637.) Plaintiff reported that he lives with his girlfriend. (A.R. 632.)

Plaintiff was diagnosed with a psychotic disorder that began on July 16, 2008, and a mood and personality disorder that began on June 1, 2012. (A.R. 648.) The Assessment also noted Plaintiff's diabetes, seizures, and hypertension, which began on June 1, 2012. (A.R. 648.)

3. Non-Examining Physicians

Two State agency mental medical consultants, Harvey Bilik, Psy.D. and Phaedra Caruso-Radin, Psy.D., reviewed Plaintiff's medical records and provided a Mental Residual Capacity Assessment on August 14, 2012 and May 14, 2013, respectively, for Plaintiff's disability determinations. (A.R. 194-196, 212-214.) In their findings, both State agency mental medical consultants opined that Plaintiff's ability to understand and remember very short and simple instructions was not significantly limited, and Plaintiff's ability to understand and remember detailed instructions was only moderately limited. (A.R. 194, 213.) The consultants further opined that Plaintiff "can understand and remember simple and some detailed – but perhaps not complex – instructions," and "carry out simple and some detailed – but perhaps not complex – instructions over the course of a normal workweek." (A.R. 195, 212-213.) The consultants also opined that Plaintiff's ability to interact with the general public is moderately limited and that Plaintiff can act appropriately with others. (A.R. 195-196, 213.)

B. The Hearing

At the hearing on July 16, 2014, Plaintiff, who was represented by counsel, testified, along with the Gregory Jones, the VE. (A.R. 60-79.) Their testimony is summarized below.

1. Plaintiff's Testimony

On July 16, 2014, Plaintiff testified at a hearing before ALJ Coulter in San Diego, California. (A.R. 60-79.) Plaintiff stated he was 52 years old and has a high school education. (A.R. 63-64.) He stated that he lives with a friend in an apartment and has no

driver's license. (A.R. 64.) In regards to daily activities, Plaintiff stated that he does not help clean the apartment, or help with grocery shopping and cooking, and he does not do his own laundry. (A.R. 64.)

Plaintiff further stated that he can sit for about fifteen minutes and stand for about ten minutes at a time. (A.R. 64.) Plaintiff stated that he can walk about a block and uses a cane. (A.R. 65.) He added that he has had the cane for ten years and uses it for balance. (A.R. 65, 71.) He stated that the last time he had any kind of alcohol was about ten years prior to the hearing. (A.R. 65.)

Plaintiff testified that the last time he worked was twenty years ago. (A.R. 65.) He further testified that what keeps him from working are his seizures, and his psychiatric medications and back issues. (A.R. 66-67.) He stated that the last time he had a seizure was on the way to the ALJ hearing, and that he has tremors approximately two to three times each day, and grand mal seizures sometimes twice a week, as well as at night and occasionally during the day. (A.R. 66, 68-70.)

In regards to his medications, Plaintiff testified that he takes about ten psychiatric medicines for schizophrenia, which he was diagnosed with ten years prior. (A.R. 67.) Because of the schizophrenia, he sees things and hears voices that he cannot understand. (A.R. 67-68.) He also stated that he takes insulin every morning for his diabetes. (A.R. 68.) He further testified that the side effects of the medications cause him to cry a lot, and cause slowing in his legs and arms, and shaking in his head. (A.R. 71.) Plaintiff stated he sees a psychiatrist once a month. (A.R. 73-74.) He also stated that he believes the medications make it difficult for him to focus or concentrate. (A.R. 75.)

In regards to his back, Plaintiff testified that his sister soaks him in a bathtub for his back problem. (A.R. 68.) He stated the pain goes from his back down to the right side of his groin area. (A.R. 70-71.) For the pain, he takes Gabapentin. (A.R. 71.)

Plaintiff testified that his sister is his caregiver and comes to get him out of bed, feed him, bathe him, dress him, give him his medications, and take him outside or to other

places. (A.R. 72-73.) He also stated that he is scared to go outside of the house alone, has panic attacks, and has trouble being around people. (A.R. 74.)

2. Vocational Expert's Testimony

Gregory Jones, a VE, also testified before the ALJ on July 16, 2014. (A.R. 62, 75-79.) The ALJ asked Mr. Jones two hypotheticals. (A.R. 76-78.) First, the ALJ asked Mr. Jones to consider a hypothetical individual with the same age, education, and work experience as Plaintiff, who can: (i) lift, carry, push, or pull 20 pounds occasionally, 10 pounds frequently; (ii) stand and walk for about six hours out of eight; (iii) sit for about six hours out of eight; (iv) climb, balance, stoop, kneel, crouch, and crawl on a frequent basis; (v) understand, remember, and carry out simple job instructions; (vi) maintain attention and concentration; (vii) perform simple, routine, and repetitive tasks in a work environment free of fast paced production requirements; (viii) have occasional interaction with coworkers and supervisors; and (ix) work in an environment with occasional changes to the work setting and occasional work related decision making. (A.R. 76-77.)

This hypothetical individual cannot, however: (i) have concentrated exposure to irritants such as fumes, odors, dusts, and gases; (ii) be exposed, even moderately, to hazards such as machinery and heights; (iii) drive as a job; (iv) work near large open bodies of water; (v) perform work that would require directing others, abstract thought, or planning; (vi) have direct interaction with the public; or (vii) use ladders, ropes, or scaffolds. (A.R. 76-77.)

The ALJ then asked whether, using this hypothetical, there would be any jobs available in the national economy for such a hypothetical individual. (A.R. 77.) Mr. Jones responded there would be jobs available for such a hypothetical person. (A.R. 77.) Mr. Jones further stated that a hypothetical person could perform the occupation of three different jobs: a cafeteria attendant, a routing clerk, and a mail clerk. (A.R. 77-78.)

Second, the ALJ asked Mr. Jones to assume the same hypothetical as the first, except to add that the person is going to be absent more than four times per month due to various impairments. (A.R. 78.) The ALJ asked whether there would be jobs available in the

national economy for that hypothetical individual. (A.R. 78.) Mr. Jones testified that there would be no jobs available for such a person. (A.R. 78.)

The ALJ then asked Mr. Jones if his testimony had been according to the DOT. (A.R. 78.) Mr. Jones testified that his testimony had been according to the DOT concerning the first hypothetical, but the second hypothetical was predicated on his knowledge and experience. (A.R. 78.)

C. The ALJ's Findings

On August 28, 2014, the ALJ rendered an unfavorable decision regarding Plaintiff's application for disability benefits. (A.R. 39-59.) The ALJ followed the five-step, sequential evaluation process in rendering his decision. At step one, the ALJ concluded that Plaintiff "has not engaged in substantial gainful activity since April 30, 2012, the application date." (A.R. 44.)

At step two, the ALJ concluded that Plaintiff has the following severe impairments: lumbar spine degenerative disc disease; seizures disorder (post head trauma); diabetes mellitus; hypertension; sciatica; headache; obesity; gastroesophageal disease ("GERD"); asthma; schizophrenia; and depressive disorder. (A.R. 44.)

At step three, the ALJ concluded that Plaintiff did not have an impairment or combination of impairments that meets or equals the severity of one of the listed impairments in the Listing of Impairments, found at 20 C.F.R. §§ 416.920(d), 416,.925, 416.926. (A.R. 44.) The ALJ did note that obesity, although not listed as an impairment, could have potential effects causing or contributing to Plaintiff's impairment, and was considered. (A.R. 44.)

In regards to Plaintiff's mental impairments, the ALJ considered the severity of Plaintiff's mental impairments singly and in combination, and found that they do not meet

or medically equal the criteria of listings 12.04[6] and 12.06.[7] (A.R. 45.) In order to satisfy "paragraph B" criteria,[8] the ALJ noted that the mental impairments at issue "must result in at least two of the following: marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration." (A.R. 45.)

In regards to activities of daily living, the ALJ concluded Plaintiff had mild restriction and no limitation because he is "capable of performing numerous adaptive activities independently, appropriately, effectively, and on a sustained basis despite his alleged mental impairments." (A.R. 45.) Although Plaintiff testified that he needs a caregiver to help him bathe and shower, the ALJ found that the evidence from the record did not support this need. (A.R. 45.) The ALJ noted that in Plaintiff's function report from July 2, 2012, Plaintiff "reported activities such as getting up and brushing his own teeth, making his own meals, cleaning, and going shopping with another person, . . . which suggests greater activities than alleged." (A.R. 45.)[9]

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[6] Listing 12.04 relates to "[d]epressive, bipolar and related disorders." 20 C.F.R. Part 404, Subpt. P, App. 1 at § 12.04.

[7] Listing 12.06 relates to "[a]nxiety and obsessive-compulsive disorders." 20 C.F.R. § Pt. 404, Subpt. P, App. 1 at § 12.06.

[8] Listings 12.04 and 12.06 have three paragraphs, designated A, B, and C. A claimant's "mental disorder must satisfy the requirements of both paragraphs A and B, or the requirements of both paragraphs A and C." 20 C.F.R. § Pt. 404, Subpt. P, App. 1. Paragraph A requires medical documentation of certain conditions. *See* 20 C.F.R. § Pt. 404, Subpt. P, App. 1 at §§ 12.04(A), 12.06(A). Paragraph B requires extreme limitation of one, or marked limitation of two, of the following areas of mental functioning: (1) understand, remember, or apply information; (2) interact with others; (3) concentrate, persist, or maintain pace; (4) adapt or manage oneself. *See id*.

[9] On July 2, 2012, Plaintiff's sister filled out a Third Party Function Report, and a Function Report on behalf of Plaintiff. (A.R. 321-328, 350-357.) Plaintiff also filled out a Seizure Questionnaire. (A.R. 343-345.)

In regards to social functioning, the ALJ found that Plaintiff had moderate difficulties. (A.R. 45.) The ALJ noted Plaintiff's history of schizophrenia with reported difficulties with others. (A.R. 45.) However, the ALJ also noted that Plaintiff acknowledged going to the store, going to church, and spending time with family, friends, neighbors, and others, and getting along with them. (A.R. 45.)

The ALJ further found that Plaintiff had moderate difficulties with regard to concentration, persistence, or pace. (A.R. 45.) The ALJ noted Plaintiff's reported problems concentrating, paying attention, following instructions, hearing voices, and seeing things. (A.R. 45.) The ALJ also noted, however, that Plaintiff's treatment records show a generally normal thought process and average intellect. (A.R. 45.)

Lastly, the ALJ found that Plaintiff had experienced no episodes of decompensation that have been of extended duration. (A.R. 45.) Because he found Plaintiff's mental impairments "do not cause at least two 'marked' limitations or one 'marked' limitation and 'repeated' episodes of decompensation, each of extended duration," the ALJ held that the "paragraph B" criteria was not satisfied. (A.R. 45.)

The ALJ also considered whether the "paragraph C" criteria of Listing 12.04 and Listing 12.06 were satisfied, and found that the evidence failed to establish the presence of the criteria.[10] (A.R. 45-46.)

Next, the ALJ found that Plaintiff had the RFC to perform less than the full range of light work, as light work is defined in 20 C.F.R. § 416.967(b). (A.R. 46.) Specifically, the ALJ stated:

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[10] *See* 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 12.00(a)(2)(c), (G). A mental disorder in Paragraph C is considered "serious and persistent" if the claimant has a "medically documented disorder over a period of at least 2 years, and there is evidence of both: 1. Medical treatment, mental health therapy, psychosocial support(s), or a highly structured setting(s) that is ongoing and that diminishes the symptoms and signs of [the claimant's] mental disorder []; and 2. Marginal adjustment, that is, [the claimant] ha[s] minimal capacity to adapt to changes in [his] environment or to demands that are not already part of [his] daily life []." *Id*. at § 12.04(C); *see also* § 12.06(C).

> the claimant can lift, carry, push or pull twenty pounds occasionally and ten pounds frequently; the claimant can stand and/or walk six hours out of an eight-hour workday; the claimant can sit six hours out of an eight-hour workday; the claimant can climb, balance, stoop, kneel, crouch, and crawl on a frequent basis, but the claimant cannot climb ladders, ropes or scaffolds; the claimant must avoid concentrated exposure to irritants such as fumes, odors, dusts, and gases; the claimant must avoid even moderate exposure to hazards, such as machinery and heights; the claimant cannot drive as a job or work near large open bodies of water; the claimant can understand, remember, and carry out simple job instructions, but would be unable to perform work that would require directing others, abstract thought, or planning; the claimant can maintain attention and concentration to perform simple, routine and repetitive tasks in a work environment free of fast-paced production requirements; the claimant can have occasional interaction with coworkers and supervisors, but no direct interaction with the general public; and the claimant can work in an environment with occasional changes to the work setting and occasional work-related decision making.

(A.R. 46.)

In reaching this determination, the ALJ found that Plaintiff made inconsistent statements regarding matters relevant to the issue of disability. (A.R. 47.) Specifically, the ALJ noted that Plaintiff gave inconsistent testimony regarding the frequency of his seizures and how controlled they were. (A.R. 47-48.) The ALJ further stated that even though Plaintiff testified he had used a cane for the past ten years, Plaintiff was noted to have a normal gait with normal strength, and no weakness or deficit on September 4, 2012 and December 20, 2012. (A.R. 48.)

The ALJ further considered how Plaintiff's reports on the voices he hears and his visual hallucinations differed from his testimony, and concluded that he "may have been less than entirely candid." (A.R. 48.) The ALJ noted a prior report suggesting Plaintiff may have been exaggerating his symptoms for secondary gain due to the discrepancy between Plaintiff's subjective complaints and the objective medical evidence. (A.R. 48.) Additionally, the ALJ found that although Plaintiff testified he had difficulty concentrating, throughout the hearing, Plaintiff did not demonstrate or manifest difficulty in concentrating, as he paid attention and appeared to be able to answer questions without

difficulty, and responded appropriately, without delay. (A.R. 48.) The ALJ next reviewed Plaintiff's work history, which showed that Plaintiff worked only sporadically prior to his alleged disability onset date, which the ALJ stated raises the question as to whether Plaintiff's continuing unemployment is due to his medical impairments. (A.R. 48.) Lastly, the ALJ found the statements of Plaintiff's sister, which parrot Plaintiff's statements, to be not credible to the extent her statements are inconsistent with the ALJ's determination. (A.R. 48.) The ALJ found that the sister's repetition of Plaintiff's complaints, which he found highly suspect, did not make them any more credible. (A.R. 48.)

After consideration of the evidence, the ALJ found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." (A.R. 48.) The ALJ further reviewed, considered, and discussed Plaintiff's complete medical history, including evidence from the time prior to his eligibility for benefits. (A.R. 48-52.) The ALJ accorded weight to the various medical opinions. (A.R. 48-52.) The ALJ gave little weight to the opinion of Dr. Khamishon. (A.R. 50-51.) In determining Plaintiff's mental RFC, the ALJ gave great weight to the opinions of the State agency mental medical consultants. (A.R. 52.)

The ALJ then proceeded with step four of the sequential evaluation process. At this step, the ALJ concluded that Plaintiff had no past relevant work. (A.R. 52.) Finally, at step five, the ALJ determined that considering Plaintiff's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that Plaintiff can perform. (A.R. 53-54.) The ALJ determined that the VE's testimony that Plaintiff could perform the requirements of "representative occupations such as cafeteria attendant, routin[g] clerk, and mail clerk," was consistent with the information contained in the DOT. (A.R. 53.) Therefore, the ALJ concluded that

Plaintiff had not been disabled, as defined by the Social Security Act, since April 30, 2012, the date the application was filed.[11] (A.R. 54.)

IV. DISCUSSION

The sole issue in this case is whether the ALJ committed legal error at step five of the sequential evaluation process. (*See* ECF No. 14-1 at 6.) The parties do not dispute the ALJ's findings at steps one through four, and therefore, the Court does not address them.

At step five, Plaintiff argues the ALJ erred in adopting, without explanation, the testimony of the VE, which he alleges conflicted with the DOT. (*Id*.) In response, Defendant argues that by failing to cross-examine the VE on any potential conflict with the DOT at the ALJ hearing, Plaintiff waived the issue on appeal. (ECF No. 15-1 at 5-6.) Defendant further argues that the ALJ met his burden of resolving any apparent conflict between the VE's testimony and the DOT by simply asking the VE whether his testimony conforms to the DOT and receiving an unchallenged affirmative response. (*Id*. at 5.) Lastly, Defendant argues that an RFC limiting a claimant to "simple job instructions" is consistent with a Reasoning Level 2; thus, the ALJ's RFC finding and the jobs identified by the VE and adopted by the ALJ were appropriate. (*Id*. at 6-7.)

A. Waiver

1. Legal Standard

When social security claimants are represented by counsel, the Ninth Circuit has determined "they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). In so holding, the Ninth Circuit reasoned that "[t]he ALJ, rather than th[e] [c]ourt, [i]s in the optimal position to resolve the conflict between" the evidence provided. *Id*. The failure to comply with this rule may only be excused when necessary to avoid manifest injustice. *Id*.

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[11] The ALJ considered whether Plaintiff had been deprived of the ability to perform work subject to his RFC for any 12-month period after the application date. (A.R. 52.)

However, the Ninth Circuit has also held that if an argument raised for the first time on appeal is a pure question of law and the Commissioner would not be unfairly prejudiced by the plaintiff's failure to raise the issue below, it may nevertheless be considered by the court. *Silveira v. Apfel*, 204 F.3d 1257, 1260 n.8 (9th Cir. 2000) (citing *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996)).

2. Analysis

In reliance on *Meanel*, Defendant argues Plaintiff should have cross-examined the VE and raised the issue of conflict before the ALJ, in order to preserve the issue on appeal. (ECF No. 15-1 at 6.) In *Meanel*, the ALJ determined the plaintiff was not disabled because she could perform two occupations other than her past work. *Meanel*, 172 F.3d at 1113. After the district court upheld the ALJ's denial of benefits, the plaintiff appealed to the Ninth Circuit and argued there were insufficient numbers of those jobs in the local area. *Id.* at 1115. In support of her argument, the plaintiff relied on new statistics, which she failed to raise at the ALJ hearing and before the Appeals Council. *Id.* The Ninth Circuit held the argument was waived, stating that the ALJ was in "the optimal position to resolve the conflict between [the plaintiff]'s new evidence and the statistical evidence provided by the VE." *Id*. The court then found manifest injustice would not occur if it did not consider the new evidence. *Id.*

In response, Plaintiff relies on *Silveira* and *Sims v. Apfel*, 530 U.S. 103 (2000), to argue the issue has not been waived. (ECF No. 17 at 4.) In *Silveira,* the plaintiff was denied benefits and requested an Appeal's Council review, which was denied. *Silveira*, 204 F.3d at 1259. The district court upheld the Commissioner's denial of benefits and the plaintiff appealed to the Ninth Circuit, arguing there should have been a finding of disability because he had no transferable skills and thus his work history is equivalent to an unskilled work history. *Id.* at 1259-60. The Ninth Circuit acknowledged the issue was raised for the first time on appeal, but nevertheless considered the issue because it was a pure question of law and the Commissioner would not be unfairly prejudiced by the plaintiff's failure to raise the issue below. *Id.* at 1260, n.8. The Ninth Circuit distinguished

the case from *Meanel* because the plaintiff was not presenting new evidence for the first time on appeal, "thus depriving the Commissioner of an opportunity to weigh and evaluate the evidence." *Id.*

In *Sims*, the Supreme Court considered, in the context of Social Security benefits, "whether a claimant pursuing judicial review has waived any issues that he did not include in [his or her] request" for review to the Social Security Appeals Council. *Sims v. Apfel*, 530 U.S. 103, 104-05 (2000). The Supreme Court held that "[c]laimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." *Id.* at 112.

Here, the Court finds the issue raised by Plaintiff to be a pure question of law and no new evidence is before the Court. The Court further finds the Commissioner would not be unfairly prejudiced by Plaintiff's failure to raise the issue before the ALJ or the Appeals Council, as the Commissioner has had an opportunity to address the issue. *See Silviera*, 204 F.3d at 1260 n. 8. Thus, under *Silveira*, the Court finds the issue has not been waived and the Court may consider the claim.

Moreover, although the Supreme Court expressly stated in *Sims* that "[w]hether a claimant must exhaust issues before the ALJ is not before us," *Sims*, 530 U.S. at 107, district courts in the Ninth Circuit, and at least one other circuit court, have cited *Sims* as providing the basis for holding that plaintiffs need not preserve all issues in proceedings before the Commissioner. *See Hackett v. Barnhart*, 395 F.3d 1168, 1176 (10th Cir. 2005) (finding that even though there was nothing in the record to indicate the conflict was raised until the district court proceedings, pursuant to *Sims*, a plaintiff "need not preserve issues in the proceedings before the Commissioner or her delegates"); *Brewer v. Colvin*, No. ED CV 15-2219-E, 2016 WL 4491498, at *4 (C.D. Cal. Aug. 24, 2016) (finding, in reliance on *Sims*, that a plaintiff's counsel's failure to raise inconsistencies at the administrative hearing does not waive the issue); *see also Edlund v. Massanari*, 253 F.3d 1152, 1160 n. 9 (9th Cir. 2001) (finding that *Sims* forecloses the argument that a failure to raise an issue before the Appeals Council waives the issue).

Lastly, district courts in the Ninth Circuit frequently distinguish *Meanel*, finding that it does not apply in cases where the plaintiff's attorney failed to raise a conflict between the VE's testimony and the DOT at the ALJ hearing, because the ALJ bears the burden of proof at step five and is under an obligation to clarify any apparent conflict before making a finding. *See e.g., Brewer v. Colvin,* No. ED CV 15-2219-E, 2016 WL 4491498, at *4 (C.D. Cal. Aug. 24, 2016) (declining to apply *Meanel* because the administration has the burden of proof at step five, and the court did not need to review new evidence to determine the ALJ erred); *Murry v. Colvin*, No. 1:14-CV-01349-JLT, 2016 WL 393859, at *5 (E.D. Cal. Feb. 2, 2016) (declining to apply *Meanel*, in part, because it is the ALJ's obligation to clarify the record, especially with such an apparent inconsistency in the VE's testimony, and the ALJ bears the burden at step five); *Gonzales v. Astrue*, No. 1:10-cv-01330-SKO, 2012 WL 2064947, at *4 (E.D. Cal. June 7, 2012) (finding that the plaintiff's representative's failure to challenge inconsistencies between the VE's testimony and the DOT at the time of the hearing does not constitute a waiver of the argument).

Based on all of the foregoing, the Court finds that Plaintiff's claim has not been waived, and addresses the claim below.

B. The ALJ's Burden to Reconcile Conflicts Between the VE's Testimony and the DOT

1. Legal Standard

At step five of the sequential evaluation process, the Commissioner has the burden "to identify specific jobs existing in substantial numbers in the national economy that [a] claimant can perform despite [his] identified limitations." *Zavalin v. Colvin*, 778 F.3d 842, 845 (9th Cir. 2015) (quoting *Johnson v. Shalala,* 60 F.3d 1428, 1432 (9th Cir. 1995)); *see also* 20 C.F.R. § 416.920(g). In making a disability determination after this step, the ALJ relies primarily on the DOT for "information about the requirements of work in the national economy." *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir. 2007). "The DOT describes the requirements for each listed occupation, including the necessary General Education Development ('GED') levels; that is, 'aspects of education (formal and informal) . . .

required of the worker for satisfactory job performance.'" *Zavalin*, 778 F.3d at 846 (quoting DOT, App. C, 1991 WL 688702 (4th ed. 1991)). "The GED levels includes the reasoning ability required to perform the job, ranging from Level 1 (which requires the least reasoning ability) to Level 6 (which requires the most)." *Id*. (citing DOT, App. C, 1991 WL 688702).

In addition to the DOT, the ALJ "also uses testimony from vocational experts to obtain occupational evidence." *Massachi*, 486 F.3d at 1153; *see also Zavalin*, 778 F.3d at 846. Generally, the VE's testimony should be consistent with the DOT. SSR 00-4P at *2 (S.S.A. Dec. 4, 2000), *available at* 2000 WL 1898704;[12] *Massachi*, 486 F.3d at 1153. However, when conflicts occur, neither the DOT, nor the VE's evidence automatically trumps. *Massachi*, 486 F.3d at 1153-54 (citing SSR 00-4P at *2). "Thus, the ALJ must first determine whether a conflict exists." *Id.*

"When there is an apparent conflict between the vocational expert's testimony and the DOT—for example, expert testimony that a claimant can perform an occupation involving DOT requirements that appear more than the claimant can handle—the ALJ is required to reconcile the inconsistency." *Zavalin*, 778 F.3d at 846 (citing *Massachi*, 486 F.3d at 1153). The ALJ must ask the VE whether his or her testimony conflicts with the DOT. *Massachi*, 486 F.3d at 1153-54; SSR 00-4P at *4. If it does conflict, "the ALJ must then determine whether the vocational expert's explanation for the conflict is reasonable and whether a basis exists for relying on the expert rather than the [DOT]." *Id*. at 1153. A failure to ask the VE whether his or her testimony conflicts with the DOT may be harmless error if there is no conflict, or if the VE provides "sufficient support for [his or] her

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[12] "[Social Security Rulings] reflect the official interpretation of the [Social Security Administration] and are entitled to 'some deference' as long as they are consistent with the Social Security Act and regulations." *Avenetti v. Barnhart*, 456 F.3d 1122, 1124 (9th Cir. 2006) (quoting *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 n. 2 (9th Cir. 2005)).

conclusion so as to justify any potential conflicts." *Id.* at 1154, n. 19; *see also Hann v. Colvin*, No. 12-CV-06234, 2014 WL 1382063, at *14 (N.D. Cal. Mar. 28, 2014).

2. Analysis[13]

Plaintiff contends the VE's testimony is a deviation from the DOT because Plaintiff's RFC to "understand, remember, and carry out simple job instructions" conflicts with the VE's testimony that Plaintiff could perform the job of a mail clerk with a Reasoning Level 3, or a routing clerk or a cafeteria attendant with a Reasoning Level 2. (ECF No. 14-1 at 6-8.) Plaintiff further contends the VE's testimony that Plaintiff could perform the work of a cafeteria attendant conflicts with the RFC that Plaintiff cannot have "direct interaction with the general public." (*Id*. at 8-10.) Because the VE's testimony conflicts with the DOT, Plaintiff contends the ALJ should have given an explanation for that deviation, but failed to do so. (*Id*. at 6.)

In response, Defendant argues, in reliance on an unpublished Ninth Circuit decision, *Wentz v. Comm'r of Soc. Sec. Admin.*, 401 Fed. App'x. 189 (9th Cir. 2010), that when the ALJ asked whether the VE's testimony was consistent with the DOT, and the VE confirmed that it was consistent, and Plaintiff's attorney did not "challenge that representation," there was no apparent conflict. (ECF No. 16-1 at 5.) Thus, Defendant contends the ALJ met his obligations to resolve apparent conflicts under *Massachi* and SSR 00-4p. (*Id*.) For the following reasons, the Court disagrees.

In line with the decisions of several other district courts, the Court does not interpret *Wentz* to hold that an ALJ's duty to reconcile conflicts between the VE's testimony and the DOT is satisfied when an ALJ simply asks the VE whether there is a conflict and the VE says there is none. *See e.g.*, *Norris v. Colvin*, No. EDCV 12-1687 RNB, 2013 WL 5379507, at *2-3 (C.D. Cal. Sept. 25, 2013) (finding that the Commissioner's contention

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[13] Plaintiff does not argue that the hypotheticals posed by the ALJ to the VE were incomplete or otherwise erroneous. As this issue is not before the Court, the Court does not address it in its analysis.

that the ALJ may rely solely on the VE's unsupported conclusion that there is no conflict between her testimony and the DOT cannot be reconciled with the Ninth Circuit precedent requiring that the record clearly show how the ALJ resolved apparent conflicts); *Marquez v. Astrue*, No. CV 11-339-TUC-JGZ, 2012 WL 3011779, at *2-3 (D. Ariz. July 23, 2012) (holding that an ALJ cannot simply rely on the VE's testimony that no such conflicts exist); *Gonzales*, 2012 WL 2064947, at *2-4 (declining to apply *Wentz* because it does not interpret *Wentz* as holding that "whenever a VE states that there is no conflict between the VE's testimony and the DOT, that testimony must be accepted by the ALJ regardless of whether there is an unexplained apparent conflict").

The ALJ has a duty to reconcile conflicts between the VE's testimony and the DOT, and the ALJ cannot simply rely on the VE's unsupported testimony that no such conflict exists, when there is an apparent unresolved conflict. *See* SSR-004p at *2 ("When there is an apparent unresolved conflict between VE . . . evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE . . . evidence to support a determination or decision about whether the claimant is disabled."); *see also Zavalin*, 778 F.3d at 846 (citing *Massachi*, 486 F.3d at 1153); *Marquez*, 2012 WL 3011779, at *3; *Gonzales*, 2012 WL 2064947, at *4; *Norris*, 2013 WL 5379507, at *3.

The Court further finds *Wentz* to be distinguishable. In *Wentz*, the Ninth Circuit did not address a situation involving an apparent conflict. Instead, the Ninth Circuit affirmed the district court's finding of no apparent conflict because there was persuasive evidence the plaintiff's limitations still allowed her to perform the jobs the VE testified to at the hearing. *See Wentz*, 401 Fed. App'x at 191; *Wentz v. Astrue*, No. CIV. 08-661, 2009 WL 3734104, at *13-14 (D. Or. Nov. 4, 2009).[14] There is no indication in *Wentz* that the holding was intended to apply to situations in which there is an apparent conflict.

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[14] Other district courts have similarly factually distinguished *Wentz*. *See Gonzales*, 2012 WL 2064947, at *3; *Norris*, 2013 WL 5379507, at *3.

Moreover, in a subsequent unpublished opinion,[15] the Ninth Circuit, consistent with the Court's analysis above, stated as follows:

> The Commissioner's argument that the ALJ was entitled to rely on the VE's response that there was no conflict is unavailing. ALJs have an affirmative responsibility to resolve apparent conflicts, *see* SSR 00-4p, and a VE's answer that there is no conflict does not eliminate that duty where, as here, the record evinces a potential conflict.

Tester v. Colvin, 624 F. App'x 485, 487 n. 2 (9th Cir. 2015).

In this case, the ALJ asked the VE whether his testimony was according to the DOT, and the VE replied that it was as to the first hypothetical, without any further explanation, but it was based on his knowledge and experience as to the second hypothetical. (A.R. 78.) In the ALJ's findings, he stated that based on the VE's testimony, a finding of "not disabled" was appropriate, and made no further explanation for his reliance on the VE's testimony. (A.R. 53-54.) Because there is no other evidence that the ALJ considered any potential conflict between the VE and the DOT, the Court now considers whether the record evinces an apparent conflict between the VE's testimony and the DOT that the ALJ should have identified and reconciled before relying on the VE's testimony for a disability determination.

C. DOT Findings

1. Legal Standard

"Social Security Regulations separate a claimant's ability to understand, remember, and concentrate into just two categories: 'short and simple instructions' and 'detailed' or 'complex' instructions." *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 984 (C.D. Cal. 2005) (citing 20 C.F.R. § 416.969a(c)(1)(iii)). The DOT, however, employs a graduated measure starting at "simple one- or two-step instructions" at level one, up to the most complex, "applying principles of logical or scientific thinking," at level six. *Id.* A DOT reasoning

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[15] Although unpublished Ninth Circuit decisions are not binding precedent, they may be cited as persuasive authority. *See* Ninth Cir. Rule 36-3(a).

level applies to a person's ability by assessing whether that person can "apply increasingly difficult principles of rational thought and deal with increasingly complicated problems." *Zavalin*, 778 F.3d at 847 (citing DOT, App. C, 1991 WL 688702).

2. Analysis

Plaintiff contends that his RFC limitation to understanding, remembering, and carrying out "simple job instructions" is not compatible with Reasoning Level 2 or Level 3, but rather is only consistent with Reasoning Level 1. (ECF No. 14-1 at 6-7.) As such, Plaintiff argues that he does not retain the ability to perform the occupation of mail clerk, which requires Reasoning Level 3, or the occupations of cafeteria attendant or routing clerk, which require Reasoning Level 2. (*Id*. at 7-8.)

According to the DOT, Reasoning Levels 1 through 3 are defined as follows:

> Level 1: Apply commonsense understanding to **carry out simple one- or two-step instructions**. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job.
>
> Level 2: Apply commonsense understanding to **carry out detailed but uninvolved written or oral instructions**. Deal with problems involving a few concrete variables in or from standardized situations.
>
> Level 3: Apply commonsense understanding to **carry out instructions furnished in written, oral, or diagrammatic form**. Deal with problems involving several concrete variables in or from standardized situations.

DOT, App. C, 1991 WL 688702 (emphasis added); *see also Zavalin*, 778 F.3d at 847; ECF No. 14-3.

In response, Defendant does not contend that Plaintiff's limitations are compatible with Reasoning Level 3. (ECF No. 15-1 at 6.) Instead, Defendant argues that Plaintiff's RFC limiting him to understanding, remembering, and carrying out "simple job instructions" is compatible with Reasoning Level 2, which is the level required for the occupations of cafeteria attendant and routing clerk. (*Id*.)

Although Defendant does not address Plaintiff's argument that his limitations are incompatible with Reasoning Level 3, which is the level required for a mail clerk, the Court

finds there was an apparent conflict between the VE's testimony that Plaintiff could perform the occupation of mail clerk and the DOT, which the ALJ failed to address. In *Zavalin*, the Ninth Circuit held that "there is an apparent conflict between the residual functional capacity to perform simple, repetitive tasks, and the demands of Level 3 Reasoning." *Zavalin*, 778 F.3d at 847. In this case, the ALJ determined that Plaintiff is limited to "simple, routine and repetitive tasks" and "simple job instructions." (A.R. 46.) Based on the reasoning of *Zavalin*, the Court finds there was an apparent conflict between the VE's testimony that Plaintiff could perform the job of mail clerk and the DOT, which the ALJ failed to address. *See also Hackett*, 395 F.3d at 1176 (holding that the plaintiff's limitations to "simple and routine work tasks" seems inconsistent with the demands of Reasoning Level 3 and reversing and remanding to allow the ALJ to address the apparent conflict); *Simpson v. Colvin*, No. SACV 15-01122, 2016 WL 3091487, at *3-4 (C.D. Cal. May 31, 2016) ("The reasoning level three requirement conflicts with the ALJ's limitation that plaintiff could only perform simple, repetitive tasks"); *Bagshaw v. Astrue*, No. EDCV 09-1365, 2010 WL 256544, at *5 (C.D. Cal. Jan. 20, 2010) (holding that a mail clerk's requirement of Reasoning Level 3 is inconsistent with the plaintiff's RFC to simple, routine work).

However, the Court declines to extend this finding to Reasoning Level 2, as urged by Plaintiff. Plaintiff contends that his RFC limiting him to "simple job instructions" is similarly incompatible with a Reasoning Level 2. (ECF No. 14-1 at 7-8.) The Court disagrees. Courts have consistently held that RFC limitations to "simple, routine and repetitive tasks" and "simple job instructions" are compatible with Reasoning Level 2. *See e.g.*, *Zavalin*, 778 F.3d at 846-47 (stating that Reasoning Level 2 is "at least as consistent" with the plaintiff's RFC limitation to "simple, routine, and repetitive work" as Reasoning Level 3, "if not more so."); *Lara v. Astrue*, 305 Fed. App'x. 324, 326 (9th Cir. 2008) ("[S]omeone able to perform simple, repetitive tasks is capable of doing work requiring more rigor and sophistication [than Reasoning Level 1 jobs]—in other words, Reasoning Level 2 jobs."); *Abrew v. Astrue*, 303 Fed. App'x 567, 569 (9th Cir. 2008) (finding "there

was no conflict between the ALJ's step five determination that [the plaintiff] could complete only simple tasks and the vocational expert's testimony that [the plaintiff] could do jobs that the U.S. Department of Labor categorizes at 'Reasoning Level 2.'"); *Moore v. Astrue*, 623 F.3d 599, 604 (8th Cir. 2010) (finding there is no direct conflict between "carrying out simple job instructions" and occupations involving Reasoning Level Two); *Money v. Barnhart*, 91 Fed. App'x. 210, 215 (3d Cir. 2004) (finding that "[w]orking at reasoning level 2 would not contradict the mandate that [the plaintiff's] work be simple, routine and repetitive"); *Coleman v. Astrue*, No. CV 10-5641 JC, 2011 WL 781930, at *5 (C.D. Cal. Feb. 28, 2011) ("The Court recognizes . . . that the weight of prevailing authority precludes a finding of any inconsistency between a reasoning level of two and a mere limitation to simple, repetitive tasks or unskilled work." (collecting cases)); *Xiong v. Comm'r of Soc. Sec.*, 1:09-cv-00398-SMS, 2010 WL 2902508, at *6 (E.D. Cal. July 22, 2010) ("Courts within the Ninth Circuit have consistently held that a limitation requiring simple or routine instructions encompasses the reasoning levels of one and two.") (collecting cases)); *Watkins v. Comm'r Soc. Sec. Admin.*, 6:15-cv-01539-MA, 2016 WL 4445467, at *7, n. 2 (D. Or. Aug. 22, 2016) ("The District of Oregon repeatedly has held that the limitation to perform simple and routine tasks is not inconsistent with Reasoning Level 2 jobs."); *Gilbert v. Colvin*, 6:14-cv-00394-AA, 2015 WL 1478441, at *6-7 (D. Or. Mar. 31, 2015) (collecting cases).

Moreover, based on the ALJ's findings, there is substantial evidence in the record that demonstrates Plaintiff retains the capacity to do Reasoning Level 2 jobs.[16] *See Tidwell*, 161 F.3d at 601; *Flaten*, 44 F.3d at 1457. The requirements of Reasoning Level 2 are not in conflict with the limitations described by the opinions of the State agency medical

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[16] Although the ALJ does not explicitly state what he relied on in determining that Plaintiff had the capacity to do Reasoning Level 2 jobs, the Court reviewed the ALJ's opinion and the record to determine whether there was substantial evidence to support his findings.

consultants, whose opinions the ALJ gave great weight. (*See* A.R. 52.) The ALJ noted that "[t]he State agency mental medical consultants opined the claimant would have moderate limitations with detailed instructions, maintaining attention and concentration for extended periods, interacting appropriately with the general public, maintaining socially appropriate behavior to adhere to basic standards of neatness and cleanliness, and responding appropriately to changes in the work setting." (A.R. 52.) In their findings, both State agency mental medical consultants opined that Plaintiff's ability to understand and remember very short and simple instructions was not significantly limited, and Plaintiff's ability to understand and remember detailed instructions was only moderately limited. (A.R. 194, 213.) The consultants further opined that Plaintiff "can understand and remember simple and some detailed – but perhaps not complex – instructions," and "carry out simple and some detailed – but perhaps not complex – instructions over the course of a normal workweek." (A.R. 195, 212-213.)

Based on a comparison of the language, this testimony is consistent with the limitations of Reasoning Level 2. *See* DOT, App. C, 1991 WL 688702 (Reasoning Level 2 requires an ability to apply "commonsense understanding to carry out detailed but uninvolved written or oral instructions"). Given the foregoing, the Court does not find there was any apparent conflict between the VE's testimony that Plaintiff could perform Reasoning Level 2 work and the DOT that the ALJ failed to address.

The Court further finds that Plaintiff's reliance on *Rounds v. Comm'r of Soc. Sec. Admin*., 807 F.3d 996 (9th Cir. 2015), is misplaced. In *Rounds*, the Ninth Circuit, relying on *Zavalin*, held that an RFC limiting the plaintiff to "one- to two-step tasks" was in apparent conflict with the demands of Reasoning Level 2, which requires a person to "carry out detailed but uninvolved written or oral instructions." *Id.* at 1003 ("Only tasks with more than one or two steps would require 'detailed' instructions."); *see also Tester*, 624 Fed. App'x at 487-88 (finding that the plaintiff's RFC for "simple, 1-2 step work" is in apparent conflict with Reasoning Level 2). In making this determination, the Ninth Circuit relied on the close similarity in language between Reasoning Level 1, which includes the

limitation to carrying out "simple one- or two-step instructions," and the plaintiff's RFC limitation to "one to two step tasks." *Id*. at 1003. That same limitation is not present in this case.

Here, Plaintiff is not limited to "one- to two-step" tasks or instructions,[17] but rather "simple job instructions." In *Rounds*, the Ninth Circuit acknowledged these two are not one and the same. *Id*. at 1004 (distinguishing between the two by stating that "the ALJ did not merely restrict [the plaintiff] to 'simple' or 'repetitive' tasks[,] [i]nstead, he expressly limited her to 'one or two step tasks") & n. 6 (distinguishing *Rounds*, which involves an RFC limitation to "one to two step tasks," from cases involving an RFC limitation to simple or repetitive tasks); *see also Garcia v. Colvin*, CV 16-00652-JEM, 2016 WL 6304626, at *6 (C.D. Cal. Oct. 27, 2016) (recognizing the distinction courts have made between "simple, repetitive tasks" and "easy 1, 2 step directions"). Thus, the Court declines to apply *Rounds* to the facts of this case.

Plaintiff further contends the VE's testimony that Plaintiff could perform the job of a cafeteria attendant is inconsistent with Plaintiff's RFC, because Plaintiff's limitation to "no direct interaction with the general public" is not compatible with the cafeteria attendant occupation, which is described as carrying trays for cafeteria patrons and circulating among diners serving coffee. (ECF Nos. 14-1 at 8-9, 14-2 at 6; A.R. 46 ("the clamant can have occasional interaction with coworkers and supervisors, but no direct interaction with the general public").

The Ninth Circuit has not directly addressed the conflict between a cafeteria attendant and an RFC limitation to no public contact, but several district courts in this Circuit have held that an occupation involving service to patrons conflicts with an RFC

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[17] District courts in this Circuit frequently use the terms "tasks" and "instructions" interchangeably. *See Myers v. Colvin*, No. 1:12-CV-00378, 2013 WL 3481689, at *16 (E.D. Cal. July 10, 2013); *Whitaker v. Astrue*, 1:09–CV 0975, 2010 WL 1444659, at *4-6 (E.D. Cal. Apr. 12, 2010).

limitation to no interaction with the public. *See e.g., Norris*, 2013 WL 3676661, at *3 (finding the VE's testimony that the plaintiff could perform the occupation of a cleaner/housekeeper, which requires personal assistance to patrons, to be in conflict with the plaintiff's RFC limitation to no contact with the public); *Barton v. Astrue*, No. EDCV 12-1013, 2012 WL 5457462, at *3 (C.D. Cal. Nov. 8, 2012) (same); *Pardue v. Astrue*, No. EDCV 10-1830, 2011 WL 5520301, at *5 (C.D. Cal. Nov. 14, 2011) (same); *see also Bradshaw v. Colvin*, 642 Fed. App'x 677, 679 (9th Cir. 2016) (stating that the cafeteria attendant position requires "at least some interaction with other people"); *Hackett*, 395 F.3d at 1175-76 (using the DOT's description of a particular job to assist in determining whether there is a conflict with the VE's testimony). In line with these cases, the Court finds there was an apparent conflict between the RFC to "no direct interaction with the general public" and the occupation of cafeteria attendant, which the ALJ failed to explain.

D. Remand is Appropriate

Plaintiff asks the Court to reverse and remand for further proceedings. If the ALJ's decision "is not supported by the record, 'the proper course . . . is to remand to the agency for additional investigation or explanation.'" *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) (quoting *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)). "If additional proceedings can remedy defects in the original administrative proceedings, a social security case should be remanded. When however, a rehearing would simply delay receipt of benefits, reversal [and an award of benefits] is appropriate." *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981) (citations omitted).

Based on the foregoing, the Court finds the ALJ committed legal error by failing to resolve the apparent conflict between two of the three jobs the VE testified Plaintiff could perform and the DOT. Defendant argues that the ALJ's failure constitutes harmless error because Plaintiff could still perform the occupation of routing clerk. (A.R. 15-1 at 7.) However, although the Court does not find any apparent conflict between the VE's testimony that Plaintiff could perform the occupation of routing clerk and the DOT, it is reluctant to find harmless error, because the ALJ failed to explain at step five why he

disregarded the VE's testimony that no jobs exist in the national economy for a person who would be absent more than four times per month due to various impairments. (*See* A.R. 78.) Dr. Khamishon, Plaintiff's treating physician, opined that Plaintiff was likely to be absent more than four times per month. (A.R. 654.) The VE testified there would be no jobs available in the national economy for an individual with Plaintiff's limitations who would be absent more than four times per month. (A.R. 78.) Yet, the ALJ did not expressly address why he disregarded the VE's testimony in response to his second hypothetical.[18] Accordingly, the Court finds it appropriate to remand this case to the ALJ for further proceedings.

V. CONCLUSION

After a thorough review of the record in this matter and based on the foregoing analysis, this Court **RECOMMENDS** Plaintiff's motion for summary judgment be **GRANTED** and Defendant's cross-motion for summary judgment be **DENIED**, and the case be **REMANDED** for further proceedings.

This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to his case, pursuant to the provisions of 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(c).

IT IS HEREBY ORDERED that no later than **August 2, 2017**, any party may file and serve written objections with the Court and serve a copy on all parties. The documents should be captioned "Objections to Report and Recommendation."

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[18] Although the ALJ gave little weight to the opinion of Dr. Khamishon and great weight to the opinions of the State agency mental medical consultants, he did not expressly address Dr. Khamishon's opinion that Plaintiff would be absent more than four times per month, and the State agency mental medical consultants did not expressly opine on the issue. (*See* A.R. 50-52.)

IT IS FURTHER ORDERED that any reply to the objections shall be filed and served no later than **August 9, 2017**. The parties are advised that failure to file objections within the specific time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1156–57 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 18, 2017

LOUISA S PORTER
United States Magistrate Judge