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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.: 3:16-cv-01779-BEN-DHB

ORDER:

- (1) ADOPTING REPORT AND RECOMMENDATION;**
- (2) GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT;**
- (3) DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT; and**
- (4) REMANDING FOR FURTHER PROCEEDINGS**

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¹ The Court 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.

1 Plaintiff Alan Eugene Barbee filed this action seeking judicial review of the
2 Commissioner of Social Security's denial of his application for Supplemental Security
3 Income benefits. Plaintiff and Defendant each filed motions for summary judgment.
4 (ECF Nos. 14, 15). The Honorable Louisa S. Porter issued a thoughtful and thorough
5 Report and Recommendation recommending that this Court grant Plaintiff's motion for
6 summary judgment, deny Defendant's motion for summary judgment, and remand the
7 case to the Administrative Law Judge ("ALJ") for further proceedings. (ECF No. 18).
8 Defendant filed timely objections to the Report and Recommendation (ECF No. 19), to
9 which Plaintiff replied (ECF No. 20).

10 Where a party files a timely objection to a report and recommendation, the Court
11 reviews de novo those portions of the report or specific proposed findings or
12 recommendations to which an objection is filed. 28 U.S.C. § 636(b)(1). Upon review of
13 the Report and Recommendation, Plaintiff's Objections, the relevant portions of the
14 record, and the law, the Court adopts the Report and Recommendation in full.

15 **BACKGROUND**

16 The procedural history of this matter and a summary of the administrative record
17 ("AR") has been laid out in the thorough Report and Recommendation issued by the
18 Magistrate Judge. As this history is well-known to the parties, this Court adopts the
19 Magistrate Judge's description of the administrative record and procedural history. A
20 short summary of relevant events is laid out below.

21 Plaintiff applied for Supplemental Security Income benefits on April 30, 2012,
22 claiming the onset of disability on June 1, 2006. Plaintiff alleges his disability is due to
23 seizures, mental illness, back problems, and a head injury. On August 28, 2014, after
24 holding a hearing, the ALJ concluded that Plaintiff was not entitled to benefits and denied
25 his application. The Appeals Council denied review of the ALJ's decision, rendering the
26 ALJ's decision final.

27 Plaintiff sought judicial review of that decision. (Compl., ECF No. 1). Plaintiff
28 challenges the ALJ's decision at step five of the disability determination, in which the

1 ALJ must consider whether the claimant is capable of doing any work available in the
2 national economy. At the administrative hearing, a vocational expert (“VE”) testified
3 that Plaintiff could perform three jobs, and the ALJ adopted those findings. Plaintiff
4 believes the requirements of those jobs, as outlined in the Dictionary of Occupational
5 Titles (“DOT”), are not consistent with the limitations in his residual functional capacity
6 (“RFC”) assessment. Plaintiff contends the ALJ committed reversible error by failing to
7 reconcile apparent conflicts between the VE’s testimony and how those jobs are
8 described in the DOT.

9 In response, Defendant argues that by failing to cross-examine the VE on any
10 potential conflict with the DOT at the hearing, Plaintiff waived the issue on appeal.
11 Defendant further argues that the ALJ met his burden of resolving any apparent conflict
12 between the VE’s testimony and the DOT by simply asking the VE whether his testimony
13 conforms to the DOT and receiving an unchallenged affirmative response. Finally,
14 Defendant contends that a residual functional capacity limiting a claimant to “simple job
15 instructions” is consistent with a “Reasoning Level 2”² and thus the ALJ’s RFC finding
16 and the jobs identified by the VE and adopted by the ALJ were appropriate.

17 The Report and Recommendation first concluded that Plaintiff has not waived the
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20 ² The DOT defines different levels of reasoning skills. See DOT, App. C, 1991 WL
21 688702; *Zavalin v. Colvin*, 778 F.3d 842, 847 (9th Cir. 2015). DOT job descriptions
22 include the reasoning level required for the position. See ECF No. 14-3. At issue here
23 are Reasoning Levels 2 and 3. Reasoning Level 1 is the lowest reasoning level. It
24 requires the employee to “[a]pply commonsense understanding to carry out simple one-
25 or two-step instructions [and] [d]eal with standardized situations with occasional or no
26 variables in or from these situations encountered on the job.” See DOT, App. C, 1991
27 WL 688702. Reasoning Level 2 requires the employee to “[a]pply commonsense
28 understanding to carry out detailed but uninvolved written or oral instructions [and]
[d]eal with problems involving few concrete variables in or from standardized
situations.” *Id.* Reasoning Level 3 requires the employee to “[a]pply commonsense
understanding to carry out instructions furnished in written, oral, or diagrammatic form
[and] [d]eal with problems involving several concrete variables in or from standardized
situations.” *Id.*

1 argument regarding the potential inconsistency between the VE and DOT because he
2 raises a pure question of law, not new evidence. Judge Porter found that the
3 Commissioner would not be unfairly prejudiced by Plaintiff's failure to raise the issue
4 earlier as she has had an opportunity to address the issue. Judge Porter rejected
5 Defendant's argument that the ALJ satisfied his duty to resolve apparent conflicts
6 between the VE's testimony and the DOT by simply asking the VE whether there is a
7 conflict and relying on the VE's response that there is none.

8 In considering Plaintiff's argument on the merits, Judge Porter agreed with
9 Defendant that there is no apparent conflict that the ALJ failed to address regarding the
10 VE's testimony that Plaintiff can perform Reasoning Level 2 work and the DOT.
11 However, she identified two conflicts between the VE's testimony and the DOT that the
12 ALJ should have identified and reconciled before relying on the VE's testimony in the
13 disability determination. See *Lamear v. Berryhill*, ___ F.3d ___, 2017 WL 3254930, at *2
14 (9th Cir. Aug. 1, 2017) (“[I]f the [vocational] expert’s opinion that an applicant is able to
15 work conflicts with, or seems to conflict with, the requirements listed in the [DOT], then
16 the ALJ must ask the expert to reconcile the conflict before relying on the expert to
17 decide if the claimant is disabled. . . . To avoid unnecessary appeals, an ALJ should
18 ordinarily ask the VE to explain in some detail why there is no conflict between the DOT
19 and the applicant’s RFC.”).

20 First, Judge Porter found that the ALJ failed to address an apparent conflict
21 between the VE's testimony that Plaintiff can perform the job of a mail clerk and the
22 DOT's reasoning level requirements for a mail clerk. A mail clerk requires a claimant to
23 have a Reasoning Level 3 capacity, but Judge Porter found that a Reasoning Level 3
24 requirement is inconsistent with the ALJ's RFC assessment that Plaintiff is limited to
25 “carry[ing] out simple job instructions.” (AR 46). Second, Judge Porter found an
26 unresolved, apparent conflict between the RFC assessment that Plaintiff can have “no
27 direct interaction with the general public,” and the VE's testimony that Plaintiff can
28 perform the work of a cafeteria attendant, which the DOT describes as involving

1 interaction with the public.

2 Judge Porter thus concluded that the ALJ committed legal error by failing to
3 resolve apparent conflicts between the DOT and two of the three jobs that the VE
4 testified Plaintiff can perform. If the legal error is harmless, however, the district court
5 must affirm the ALJ's decision. *Zavalin*, 778 F.3d at 845. Here, Judge Porter explained
6 that she was "reluctant to find harmless error because the ALJ failed to explain at step
7 five why he disregarded the VE's testimony that no jobs exist in the national economy for
8 a person who would be absent more than four times per month," which was a limitation
9 placed on Plaintiff's ability to work by his treating physician. (R&R at 32-33).
10 Accordingly, Judge Porter recommended remand to the ALJ for further proceedings.

11 STANDARD OF REVIEW

12 An applicant may seek judicial review of a final agency decision pursuant to 42
13 U.S.C. §§ 405(g), 1383(c)(3). An ALJ's decision will be reversed by the reviewing court
14 only if "it is based upon legal error or is not supported by substantial evidence." *Bayliss*
15 *v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citation omitted). "Substantial
16 evidence means more than a mere scintilla but less than a preponderance; it is such
17 relevant evidence as a reasonable mind might accept as adequate to support a
18 conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court must
19 consider the record as a whole, weighing both the evidence that supports and detracts
20 from the ALJ's conclusion. See *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001);
21 *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "The
22 ALJ is responsible for determining credibility, resolving conflicts in medical testimony,
23 and for resolving ambiguities." *Andrews*, 53 F.3d at 1039. Where the evidence is
24 susceptible to more than one rational interpretation, the ALJ's decision must be upheld.
25 *Id.* at 1039-40. The Court may not reverse an ALJ's decision on account of an error that
26 is harmless. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

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DISCUSSION

The Commissioner makes two objections. First, she argues that Plaintiff waived his argument about a conflict between the VE's testimony and the DOT because he failed to bring the conflict to the ALJ's attention. Second, she argues that Magistrate Judge Porter erred by failing to find harmless error. The Court addresses each argument in turn.

I. Waiver

The Commissioner argues that "Plaintiff's entire argument concerning errors at step five [was] waived by failing to bring the alleged apparent conflict to the ALJ's attention." (Obj. at 4). The Ninth Circuit has recently rejected such an argument:

[O]ur law is clear that a counsel's failure [to raise a potential inconsistency between a VE's testimony and the DOT] does not relieve the ALJ of his express duty to reconcile apparent conflicts through questioning: "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. That inquiry did not happen here, and so we must remand the case to permit the ALJ to follow up with the VE.

Lamear, ___ F.3d ___, 2017 WL 3254930, at *4 (citing Prochaska v. Barnhart, 454 F.3d 731, 735 (7th Cir. 2006) for support, which held that the claimant was "not required to raise t[he conflict] at the hearing, because [Social Security Ruling 00-4p] places the burden of making the necessary inquiry on the ALJ"). A claimant's failure to raise a conflict between the VE's evidence and the DOT at the administrative hearing does not preclude the claimant from raising the issue in district court. See *id.* The Ninth Circuit's holding thus forecloses the Commissioner's argument here. The Court overrules this objection.

II. Harmless Error

The Commissioner argues that Magistrate Judge Porter should have found that the ALJ's legal errors constituted harmless error because Plaintiff can still perform the occupation of a routing clerk, which was the one job that the VE testified Plaintiff can

1 perform where Judge Porter did not find error. The Commissioner contends that Judge
2 Porter erred by sua sponte raising concerns about the ALJ's decision to disregard the
3 VE's testimony regarding the availability of jobs if Plaintiff had to miss work four times
4 a month.

5 **A. Factual Background**

6 One of Plaintiff's treating physicians was Boris Khamishon, M.D. On June 18,
7 2014, Dr. Khamishon completed a Seizure Disorder Residual Functional Capacity
8 Questionnaire provided by Plaintiff. (AR 652-655). Dr. Khamishon stated that Plaintiff
9 suffered from seizures twice a week, each of which average approximately three minutes.
10 (AR 652). He indicated that Plaintiff loses consciousness during the seizures. (Id.) Dr.
11 Khamishon further reported that Plaintiff's seizures would likely disrupt the work of co-
12 workers and that he needs more supervision than an unimpaired worker. (AR 654). He
13 stated that Plaintiff would sometimes need to take unscheduled breaks during an eight-
14 hour work day and that his impairments would likely cause him to be absent from work
15 more than four days per month. (Id.)

16 At the administrative hearing, the ALJ posed two hypotheticals to the VE. The
17 first hypothetical asked if there would be any jobs available in the national economy for
18 an individual having certain impairments. The VE responded that such a hypothetical
19 person could perform three different jobs: a cafeteria attendant, a routing clerk, and a
20 mail clerk. As explained above, Magistrate Judge Porter found conflicts between the
21 VE's testimony and the DOT for the jobs of a cafeteria attendant and a mail clerk. The
22 second hypothetical asked the VE to assume the same hypothetical as the first, except
23 that the individual would be absent four times a month because of his or her impairments.
24 The VE replied that no jobs would be available in the national economy for such a
25 hypothetical person.

26 In the ALJ's findings and written decision, the ALJ addressed Dr. Khamishon's
27 Seizure Disorder Residual Functional Capacity Questionnaire and gave it little weight
28 "because it is not supported by objective evidence and it is inconsistent with the record as

1 a whole.” (AR 50). Although not discussed in direct relation to Dr. Khamishon’s
2 opinion, elsewhere in the decision, the ALJ found that Plaintiff was inconsistent in stating
3 how frequently the seizures occurred (AR 47); that Plaintiff’s seizures were controlled
4 through medication (AR 47-48); and that Plaintiff’s diagnostic studies “have been
5 essentially normal” (AR 49). The ALJ further discredited Dr. Khamishon’s “checklist-
6 style form” because it “appears to have been completed as an accommodation to the
7 claimant and includes only conclusions regarding functional limitations without any
8 rationale for those conclusions.” (AR 51). The ALJ suggested that Dr. Khamishon may
9 have completed the Questionnaire to placate a demanding patient and “avoid unnecessary
10 doctor/patient tension.” (Id.). The ALJ did not address the second hypothetical in his
11 written findings.

12 **B. Analysis**

13 An ALJ’s error is harmless where it is “inconsequential to the ultimate
14 nondisability determination.” *Molina*, 674 F.3d at 1115 (internal citations removed).
15 The Ninth Circuit has explained that a court must “look at the record as a whole to
16 determine whether the error alters the outcome of the case.” *Id.* An ALJ’s error in
17 finding that a claimant can perform certain jobs is harmless if the “remaining jobs
18 identified by the vocational expert exist in significant numbers.” *Allison v. Astrue*, 425 F.
19 App’x 636, 640 (9th Cir. 2011) (citing *Carmickle v. Comm’r*, 533 F.3d 1155, 1162-63
20 (9th Cir. 2008)).

21 In this case, the Commissioner contends that the legal errors are harmless because
22 thousands of routing clerk jobs exist in the national economy that Plaintiff can still
23 perform. Generally, the Commissioner would be correct. See *Yelovich v. Colvin*, 532 F.
24 App’x 700, 702 (9th Cir. 2013) (holding that VE’s incorrect testimony as to two of the
25 three jobs that claimant could perform was harmless error because 900 regional and
26 42,000 national jobs existed for the third job). However, the issue is different here
27 because Judge Porter has raised concerns about legal error in the ALJ’s decision that
28 might infect the entire determination of Plaintiff’s non-disability.

1 Judge Porter did not find harmless error because she was troubled by the ALJ's
2 apparent decision to disregard the VE's answer to the second hypothetical that no jobs
3 would exist for a person who is absent from work more than four times per month. As an
4 initial matter, contrary to the Commissioner's assertion, Judge Porter was not precluded
5 from raising this issue sua sponte. See *Farley v. Colvin*, 231 F. Supp. 3d 335, 339-41
6 (N.D. Cal. 2017) (collecting cases and explaining that the court has the power to consider
7 issues sua sponte in social security appeals). The Court has a duty to make an
8 "independent determination as to whether the [ALJ's] findings are supported by
9 substantial evidence." *Id.*

10 Where the record is unclear, the court should not find that an ALJ's legal error is
11 harmless. See *Lamear*, ___ F.3d ___, 2017 WL 3254930, at *3 ("[W]e cannot determine
12 from his record, the DOT, or our common experience whether the jobs in question
13 require both hands, so we cannot say the ALJ's failure to inquire was harmless.");
14 *Zavalin*, 778 F.3d at 848 ("On this mixed record, 'we cannot determine whether
15 substantial evidence supports the ALJ's step-five finding that [Zavalin] could perform
16 [the] work.'"). Such is the case here. The ALJ gave little weight to Dr. Khamishon's
17 opinion, but failed to address his limitation that Plaintiff would be absent from work
18 more than four days per month and failed to address the second hypothetical, which
19 relied on Dr. Khamishon's opinion. Upon review of the ALJ's decision, the Court has
20 doubts whether the ALJ properly rejected Dr. Khamishon's opinion. Accordingly,
21 remand for further proceedings is appropriate. See *Lewis v. Apfel*, 236 F.3d 503, 517 (9th
22 Cir. 2001) (holding that ALJ erred in not considering hypothetical with treating
23 physician's comments about plaintiff's limitations, to which the VE testified that no jobs
24 would be available to plaintiff, because the ALJ did not provide clear and convincing
25 reasons for rejecting the physician's opinion). The Commissioner's objection is
26 overruled.

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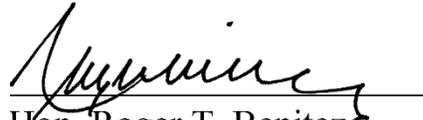
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1 **CONCLUSION**

2 The Court **ADOPTS** the Report and Recommendation (ECF No. 18) and
3 **OVERRULES** the Commissioner’s objections (ECF No. 19). Plaintiff’s motion for
4 summary judgment is **GRANTED** (ECF No. 14) and Defendant’s motion for summary
5 judgment is **DENIED** (ECF No. 15). This case is **REMANDED** for further proceedings.

6 **IT IS SO ORDERED.**

7 Dated: August 29, 2017

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9 Hon. Roger T. Benitez
10 United States District Judge
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