

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 MARQUITA MARIE QUESADA,
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL,
15 Defendant.

Case No.: 16cv2716-CAB-KSC

**AMENDED ORDER REGARDING
CROSS MOTIONS FOR SUMMARY
JUDGMENT [Doc. Nos. 12, 13]**

16
17 Pending before the Court are cross motions for summary judgment. [Doc. Nos. 12
18 and 13.] For the reasons set forth below, Plaintiff’s motion for summary judgment [Doc.
19 No. 12] is **GRANTED**, Defendant’s motion for summary judgment is **DENIED** and the
20 matter is **REMANDED** for further proceedings.

21 **PROCEDURAL BACKGROUND**

22 This case arises under the Social Security Act, Title XVI. Plaintiff Marquita Marie
23 Quesada filed an application for supplemental security income on May 16, 2013, alleging
24 disability commencing April 2, 2012. AR 177-82. The Commissioner denied the claims
25 by initial determination on September 25, 2013. AR 114-19. Plaintiff requested
26 reconsideration of the initial determination on November 4, 2013. AR 120-22. The
27 Commissioner denied reconsideration on December 19, 2013. AR 123-28. Plaintiff
28 requested a de novo hearing before an Administrative Law Judge (“ALJ”) on February 2,

1 2014. AR 129-31. The Commissioner appointed ALJ Robin L. Henrie to preside over the
2 matter. AR 141-60. ALJ Henrie conducted the oral hearing on January 16, 2015. AR 45-
3 76. On March 21, 2015, ALJ Henrie issued a decision finding Plaintiff not disabled
4 under the Social Security Act. AR 25-44. Plaintiff requested that the Appeals Council
5 review the decision by ALJ Henrie on April 23, 2015. AR 21-23. The Appeals Council
6 denied the request for review on September 1, 2016. AR 1-6. On that date, the ALJ
7 decision became the final decision of the Commissioner. 42 U.S.C. § 405(h). This civil
8 action followed.

9 ALJ DECISION

10 The ALJ used the five-step sequential evaluation process to guide the decision. 20
11 C.F.R. § 416.920. The ALJ agreed that Plaintiff did not engage in substantial gainful
12 activity since April 2, 2012. AR 30, ¶ 1. The ALJ found that Plaintiff suffered from
13 medically determinable severe impairments consisting of mood disorder with psychotic
14 features; degenerative disc disease of the lumbar spine; and schizophrenia with paranoia.
15 AR 30, ¶ 2. The ALJ decided that the impairment did not meet or equal any “listed”
16 impairment. AR 31, ¶ 3 (citing 20 C.F.R., Part 404, Subpart P, Appendix 1). The ALJ
17 assessed Plaintiff as retaining the residual functional capacity to perform the demands of

18 lifting more than 10 pounds at a time, on more than an occasional basis;

19 lifting and carrying articles weighing more than 5 pounds, on more than an
20 occasional basis;

21 standing or walking more than 10-15 minutes at one time, and no more than
22 2 total hours in an 8-hour workday, with an option to use a cane for walking
23 or standing as needed;

24 sitting more than 30 minutes at one time, and no more than 6 total hours in
25 an 8-hour work day;

26 note: regarding standing/walking and sitting, to be as comfortable as
27 possible, claimant required the option to make the postural changes noted
28 above, thus there must have been an option to perform work duties while
standing/walking or sitting, due to the need for these postural changes;

1 more than occasional stooping, bending, twisting or squatting;
2
3 working on the floor (e.g. no kneeling, crawling or crouching);
4
5 ascending or descending full flights of stairs (but a few steps up or down not
6 precluded);
7
8 overhead lifting or overhead reaching;
9
10 any foot control work duties;
11
12 working in other than a clean, climate controlled environment, with only
13 minimal noise;

14 working in other than a low stress environment, which means:

- 15 • a low production level (where VE classified all SGA jobs as low,
16 average or high production),
- 17 • no working with the general public and no working with crowds of
18 co-workers,
- 19 • only "rare" contact with supervisors and co-workers, but still having
20 the ability to respond appropriately to supervision, co-workers and
21 usual, routine work situations,
- 22 • the ability to deal with only "occasional" changes in a routine work
23 setting;

24 work at more than a low concentration level, which means the ability to be
25 alert and attentive to (and to adequately perform) only unskilled work tasks;

26 work at more than a low memory level, which means:

- 27 • the ability to understand, remember and carry out only "simple"
28 work instructions,
- the ability to remember and deal with only "rare" changes in the
work instructions from week to week,
- the ability to remember and use good judgment in making only
"simple" work related decisions;

AR 33-34, ¶4 (citing 20 C.F.R. §416.967(a)).

The ALJ agreed that Plaintiff lacked past relevant work. AR 39, ¶ 5. The
ALJ classified Plaintiff as a younger individual on the alleged onset date. AR 39, ¶

1 6. The ALJ categorized Plaintiff as possessing a limited education and the ability
2 to communicate in English. AR 39, ¶ 7. The ALJ treated the question of
3 transferability of skills as immaterial. AR 39, ¶ 8. The ALJ adduced and accepted
4 testimony of a vocational expert that an individual of Plaintiff's age, education,
5 work experience, and residual functional capacity could perform the work of final
6 assembler (DOT¹ 713.687-018); lens inserter (DOT 713.687-026); and table
7 worker (DOT 739.687-182). AR 39, ¶ 9. The ALJ concluded that Plaintiff did not
8 suffer from a disability between April 2, 2012, and the date of the decision. AR 40,
9 ¶ 10.

10 TESTIMONY OF THE VOCATIONAL EXPERT

11 The ALJ propounded a hypothetical question to the vocational expert
12 ("VE") in written form. AR 272. The VE identified work as a lens inserter
13 (representing 30,000 jobs in the national economy), final assembler (representing
14 23,000 jobs in the national economy), and table worker (representing 14,000 jobs
15 in the national economy). AR 73. The VE stated that all jobs represented full-time
16 work and that none of the work required reduction for any aspect of the limitations
17 imposed. *Id.*

18 If permitted only rare contact with supervisors, the VE would reduce the
19 number of jobs by 15%. AR 73-74. Use of a cane would not impact the ability to
20 perform the work identified. AR 74. The Plaintiff's representative at the hearing
21 had no questions. AR 75.

22 STANDARD OF REVIEW

23 Under 42 U.S.C. section 405(g), courts review the ALJ's decision to determine
24 whether substantial evidence supports the ALJ's findings and if they are free of legal
25

26
27 ¹ *Dictionary of Occupational Titles*, published by the United States Department of Labor. The Social
28 Security Administration has taken administrative notice of the DOT, which is published by the
Department of Labor and gives detailed physical requirements for a variety of jobs. *See* 20 C.F.R.
§416.966(d)(1), *Massachi v. Astrue*, 486 F.3d 1149, 1152, n. 8 (9th Cir. 2007).

1 error. *See Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir.1996); *DeLorme v. Sullivan*,
2 924 F.2d 841, 846 (9th Cir.1991) (ALJ's disability determination must be supported by
3 substantial evidence and based on the proper legal standards). Substantial evidence means
4 “ ‘more than a mere scintilla,’ but less than a preponderance.” *Saelee v. Chater*, 94 F.3d
5 520, 521–22 (9th Cir.1996) (*quoting Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct.
6 1420, 28 L.Ed.2d 842 (1971)). Substantial evidence is “such relevant evidence as a
7 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S.
8 at 401, 91 S.Ct. 1420 (internal quotation marks and citation omitted).

9 When looking for substantial evidence, courts must review the record as a whole
10 and consider adverse as well as supporting evidence. *See Robbins v. Soc. Sec. Admin.*,
11 466 F.3d 880, 882 (9th Cir.2006). Where evidence is susceptible to more than one
12 rational interpretation, the ALJ's decision must be upheld. *See Morgan v. Comm'r of the*
13 *Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.1999). “However, a reviewing court must
14 consider the entire record as a whole and may not affirm simply by isolating a ‘specific
15 quantum of supporting evidence.’ ” *Robbins*, 466 F.3d at 882 (quoting *Hammock v.*
16 *Bowen*, 879 F.2d 498, 501 (9th Cir.1989)); *Orn v. Astrue*, 495 F.3d 625, 630 (9th
17 Cir.2007).

18 A claimant is “disabled” as defined by the Social Security Act if: (1) “he is unable
19 to engage in any substantial gainful activity by reason of any medically determinable
20 physical or mental impairment which can be expected to result in death or which has
21 lasted or can be expected to last for a continuous period of not less than twelve months,”
22 and (2) the impairment is “of such severity that he is not only unable to do his previous
23 work but cannot, considering his age, education, and work experience, engage in any
24 other kind of substantial gainful work which exists in the national economy.” 42 U.S.C.
25 §§ 1382c(a)(3)(A)-(B) (West 2004); *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir.2012).

26 To determine whether a claimant is disabled, an ALJ engages in a five-step
27 sequential analysis as required under 20 C.F.R. sections 404.1520(a)(4)(i)-(v).
28 Specifically under step five, which is at issue here, a claimant is disabled unless the

1 Commissioner meets her burden and shows that there exist a significant number of jobs
2 in the national economy that claimant can do. 20 C.F.R. §§ 416.920(a)(4)(v),(g);
3 416.960(c); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.1999) (the
4 Commissioner bears the burden of showing the existence of significant jobs). Significant
5 jobs in the “national economy” must exist either “in the region where such individual
6 lives or in several regions in the country.” 42 U.S.C. § 423(d)(2)(A). There is no bright-
7 line rule for determining how many jobs are “significant” under step five in the Ninth
8 Circuit, although “a comparison to other cases is instructive.” *Beltran v. Astrue*, 700 F.3d
9 386, 389 (9th Cir.2012). Moreover, there must be more than a few “scattered”, “isolated”
10 or “very rare” jobs available. *Walker v. Mathews*, 546 F.2d 814, 820 (9th Cir.1976); *see*
11 *also Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 529 (9th Cir.2014). Finally, even if
12 there are not sufficient jobs in the regional economy, courts must still look to the
13 availability of those jobs across several regions in the national economy. *Gutierrez*, 740
14 F.3d at 528.

15 DISCUSSION

16 The sole issue in this case is whether the ALJ committed legal error at step five of
17 the sequential evaluation process. The parties do not dispute the ALJ's findings at steps
18 one through four, and therefore, the Court does not address them.

19 At step five of the sequential evaluation process, the Commissioner has the burden
20 “to identify specific jobs existing in substantial numbers in the national economy that [a]
21 claimant can perform despite [his] identified limitations.” *Zavalin v. Colvin*, 778 F.3d
22 842, 845 (9th Cir. 2015) (*quoting Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir.
23 1995)); *see also* 20 C.F.R. § 416.920(g). In making a disability determination after this
24 step, the ALJ relies primarily on the DOT for “information about the requirements of
25 work in the national economy.” *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir. 2007).
26 “The DOT describes the requirements for each listed occupation, including the necessary
27 General Education Development (‘GED’) levels; that is, ‘aspects of education (formal
28

1 and informal) ... required of the worker for satisfactory job performance.’ ” *Zavalin*, 778
2 F.3d at 846 (*quoting* DOT, App. C, 1991 WL 688702 (4th ed. 1991)).

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

10 “When there is an apparent conflict between the vocational expert's testimony and
11 the DOT—for example, expert testimony that a claimant can perform an occupation
12 involving DOT requirements that appear more than the claimant can handle—the ALJ is
13 required to reconcile the inconsistency.” *Zavalin*, 778 F.3d at 846 (*citing Massachi*, 486
14 F.3d at 1153). The ALJ must ask the VE whether his or her testimony conflicts with the
15 DOT. *Massachi*, 486 F.3d at 1153-54; SSR 00-4P at *4. If it does conflict, “the ALJ must
16 then determine whether the vocational expert's explanation for the conflict is reasonable
17 and whether a basis exists for relying on the expert rather than the [DOT].” *Id.* at 1153. A
18 failure to ask the VE whether his or her testimony conflicts with the DOT may be
19 harmless error if there is no conflict, or if the VE provides “sufficient support for [his or]
20 her conclusion so as to justify any potential conflicts.” *Id.* at 1154, n. 19; *see also Barbee*
21 *v. Berryhill*, No. 16cv1779, 2017 WL 3034531, at *13 (S.D. July 18, 2017), *Hann v.*
22 *Colvin*, No. 12-CV-06234, 2014 WL 1382063, at *14 (N.D. Cal. Mar. 28, 2014).

23 This approach was affirmed by the Ninth Circuit in *Lamear v. Berryhill*, --- F.3d --
24 - (2017), 2017 WL 3254930, at *2-3 (9th Cir. August 1, 2017). In *Lamear*, the Ninth
25 Circuit remanded a case for further proceeding where the ALJ had not reconciled an
26 apparent conflict between the vocational expert’s testimony and the DOT. *Id.* at *4. In
27 doing so, the Ninth Circuit held as follows:
28

1 In determining whether an applicant is entitled to disability benefits, an ALJ
2 may consult a series of sources, including a VE and the DOT. Presumably,
3 the opinion of the VE would comport with the DOT's guidance. But “[i]f the
4 expert's opinion that the applicant is able to work conflicts with, or seems to
5 conflict with, the requirements listed in the Dictionary, then the ALJ must
6 ask the expert to reconcile the conflict before relying on the expert to decide
7 if the claimant is disabled.” *Gutierrez v. Colvin*, 844 F.3d 804, 807 (9th Cir.
8 2016). [footnote omitted.]

7 We have explained that the conflict must be “obvious or apparent” to trigger
8 the ALJ's obligation to inquire further. *Id.* at 808. For example, in *Gutierrez*,
9 the applicant could not reach above shoulder level with her right arm. *Id.* at
10 807. The VE opined that she could work as a cashier, and the ALJ did not
11 specifically question the VE about how the applicant could do this in light of
12 her inability to reach overhead with her right arm. *Id.* The applicant in
13 *Gutierrez*, like *Lamear*, argued that the ALJ should have recognized a
14 conflict between the DOT and the VE's testimony, and questioned the VE
15 more closely. *Id.* We held there was no error because, based on common
16 experience, it is “unlikely and unforeseeable” that a cashier would need to
17 reach overhead, and even more rare for one to need to reach overhead with
18 both arms. *Id.* at 808–09 & 809 n.2.

16 Of course, “[t]he requirement for an ALJ to ask follow up questions is fact-
17 dependent,” *id.* at 808, and the more obscure the job, the less likely common
18 experience will dictate the result. To avoid unnecessary appeals, an ALJ
19 should ordinarily ask the VE to explain in some detail why there is no
20 conflict between the DOT and the applicant's RFC. [footnote omitted.]
21 Doing so here likely would have eliminated the need for this appeal.

20 *Lamear*, 2017 WL 3254930 at *2-3.

21 1. Conflict between DOT and RFC.

22 Plaintiff argues that ALJ Henrie committed error because he did not ask if
23 any aspects of the VE testimony (other than the sit/stand option) were consistent
24 with the DOT or the SCO². [Doc. No. 12-1 at 6-7.] In particular, Plaintiff argues
25 that the DOT describes the noise level for the three identified jobs (lens inserter,
26

27 ² *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles*, a
28 companion publication to the DOT, also published by the United States Department of Labor. See
Social Security Ruling 00-4p.

1 final assembler and table worker) as requiring exposure to noise level 3. The SCO
2 defines noise level 3 as moderate. SCO App. D, ¶5. However, the ALJ found an
3 RFC for exposure to minimal noise [AR 33, ¶4] and asked the VE to assume
4 exposure to minimal noise [AR 272]. Yet the ALJ did not ask the VE to explain
5 the inconsistency between the DOT/SCO and the RFC.

6 Defendant argues that the VE was questioned about the other details in the
7 hypothetical and that he responded that the DOT did not provide any specificity as
8 to those details. Thus, the VE’s conclusion, which was based on his 40 years of
9 experience, was not in conflict with the DOT. [Doc. No. 13-1 at 5.] However, the
10 DOT does provide specificity for the noise level of the jobs and defines it as
11 moderate. This appears to conflict with Plaintiff’s RFC, which says that she can
12 only be exposed to minimal noise. Moreover, the jobs at issue are sufficiently
13 obscure that it cannot be decided on “common knowledge” as to whether Plaintiff
14 can tolerate a moderate exposure to noise. *Lamear*, 2017 WL 3254930, at *2-3.
15 Thus, there does appear to be a conflict which the ALJ was obligated to clarify.

16 Finally, Defendant argues that Plaintiff should not be allowed to raise any of
17 these arguments because Plaintiff’s counsel did not raise them at the administrative
18 hearing. [Doc. No. 31-1 at 3-4.] According to recent Ninth Circuit authority, “an
19 ALJ is required to investigate and resolve any apparent conflict between the VE’s
20 testimony and the DOT, regardless of whether a claimant raises the conflict before
21 the agency.” *Shaibi v. Berryhill*, 870 F.3d 874, 2017 WL 3598085 at *6 (9th Cir.
22 Aug. 22, 2017), citing *Lamear v. Berryhill*, 865 F.3d 1201, 1206-07 (9th Cir. Aug.
23 1, 2017). Therefore, failure by the ALJ to resolve the apparent conflict between
24 the VE testimony and the DOT is reversible error.

1 2. Conflict between CBP and VE testimony.

2 Plaintiff argues that the VE testimony is also in conflict with the CBP³.
3 [Doc. No. 12-1 at 7-9.] The VE testified that Plaintiff could work as a lens inserter
4 (representing 30,000 jobs in the national economy), final assembler (representing
5 23,000 jobs in the national economy), and table worker (representing 14,000 jobs
6 in the national economy). AR 73. Lens inserter and final assembler are both
7 considered to be jobs within the optical goods industry. See DICOT 713.687-026
8 and 713.687-018 (“Industry Designation: Optical Goods Industry”). However,
9 according to the CBP printout provided by Plaintiff, the entire ophthalmic goods
10 manufacturing industry had a total of 24,910 jobs in the country. [Doc. No. 12-2.]
11 Thus, argues Plaintiff, this conflicts with the VE testimony that there are over
12 30,000 jobs for a lens inserter alone, which is only one of the numerous positions
13 within the optical goods industry.

14 Defendant argues that the ALJ was not obligated to take administrative
15 notice of the CBP, and this Court should also decline to take judicial notice of the
16 CBP. [Doc. No. 13-1 at 8.] However, the Social Security Administration has
17 taken administrative notice of the CBP, which is published by the Bureau of the
18 Census, and therefore it is a resource that can be used by the ALJ to make a
19 determination as to the availability of jobs in an industry. See 20 C.F.R.
20 §416.966(d)(2). Defendant also argues that there is no indication as to what
21 information Plaintiff inputted into the website to get the results page, or whether
22 the single page submitted by Plaintiff is complete or accurate. [Doc. No. 13-1 at
23 8.] While Plaintiff’s search methodology is unclear, Defendant does not provide
24 her own submission from the CBP to show whether Plaintiff’s submission is
25 accurate, and does not provide any information to rebut Plaintiff’s contention that
26

27
28 ³ *County Business Patterns*, published by the Bureau of the Census. The Social Security Administration has also taken administrative notice of the CBP. See 20 C.F.R. §416.966(d)(2).

1 the VE's estimates of jobs available for lens inserter and final assembler conflict
2 with the CBP.

3 The Court notes that the CBP is a resource which the Social Security
4 Administration finds to be reliable and useful. It is, however, unclear as to how the
5 information provided by Plaintiff was generated from the CBP.⁴ This Court makes
6 no ruling as to whether there is an actual conflict between the CBP and the VE
7 testimony.

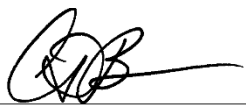
8 Finally, unlike an apparent conflict with the DOT, an ALJ is not required to
9 *sua sponte* take administrative notice of economic data in the CBP. *Shaibi*, 2017
10 WL 3598085 at *6. Therefore, by failing to raise it at the administrative level,
11 Plaintiff has waived this argument. *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir.
12 1999), *as amended* (June 22, 1999).

13 **CONCLUSION**

14 For the reasons set forth above, Plaintiff's motion for summary judgment is
15 **GRANTED**, Defendant's motion for summary judgment is **DENIED**, and the
16 matter is **REMANDED** to the Social Security Administration for further
17 proceedings consistent with this order. The Clerk of the Court shall **CLOSE** this
18 case.

19 **IT IS SO ORDERED.**

20 Dated: October 10, 2017

21 
22 _____
23 Hon. Cathy Ann Bencivengo
24 United States District Judge
25
26
27

28 ⁴ Given the lack of clarity as to how Plaintiff obtained the information from the CBP, the request for
judicial notice [Doc. No. 12-2] is denied.