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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

STELLA RUIZ ORTEGA,

Plaintiff,

v.

NANCY A. BERRYHILL, Acing
Commissioner of Social Security,

Defendant.

CASE NO. 16cv3098 JM(BLM)

ORDER ADOPTING REPORT AND
RECOMMENDATION; DENYING
OBJECTION

Plaintiff Stella Ruiz Ortega objects to the Report and Recommendation for Order Granting Defendant’s Motion for Summary Judgment and Denying Plaintiff’s Motion for Summary Judgment (“R & R”). Defendant did not file a response to the objection.¹ For the reasons set forth below, the court adopts the R & R in its entirety, denies Plaintiff’s objection, and instructs the Clerk of Court to close the file.

Legal Standards

Review of Social Security Determinations

An unsuccessful applicant for social security disability benefits may seek judicial review of a final agency decision. 42 U.S.C. § 405(g). A reviewing court must affirm the agency's decision if it is supported by substantial evidence and applies the correct legal standards. Id.; Orn v. Astrue, 495 F.3d 625, 630 (9th Cir.2007). “Substantial evidence is more than a mere scintilla but less than a preponderance.” Tidwell v.

¹ The court incorporates the R & R as if fully set forth herein.

1 Apfel, 161 F.3d 599, 601 (9th Cir.1998). “Substantial evidence is relevant evidence
2 which, considering the record as a whole, a reasonable person might accept as adequate
3 to support a conclusion.” Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,
4 1457 (9th Cir.1995). “Where the evidence is susceptible to more than one rational
5 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be
6 upheld.” Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir.2002).

7 Review of the Magistrate Judge's R & R

8 A district judge must “make a de novo determination of those portions of the [R
9 & R] to which objection is made.” 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b)(3); see
10 United States v. Remsing, 874 F.2d 614, 617 (9th Cir.1989). The district judge “may
11 accept, reject, or modify, in whole or in part, the finding or recommendations made by
12 the magistrate judge.” 28 U.S.C. § 636(b) (1).

13 **The Objection**

14 Plaintiff raises a single objection to the R & R: “Whether or not a hypothetical
15 individual may be able to compensate with a non-dominant fully-functional upper
16 extremity to meet an exertional requirement of a given occupation should be a question
17 left to vocational expert testimony.” Here, the hypothetical propounded by the
18 Administrative Law Judge (“ALJ”) to the Vocational Expert (“VE”) limited Plaintiff
19 in her lifting ability to ten pounds.² However, Plaintiff claims that her dominant right
20

21 ² The hypothetical presented called for unskilled sedentary work where Plaintiff
22 could not (1) lift more than ten pounds at a time, (2) lift or carry articles weighing more
23 than ten pounds, (3) stand or walk more than twenty minutes at one time, and no more
24 than two total hours in an eight-hour workday, (4) sit more than twenty minutes at one
25 time, and no more than six total hours in an eight-hour workday, (5) do more than
26 frequent reaching, handling, fingering, or any duties requiring feeling, (6) work in other
27 than a low stress environment meaning a low production level, no working with the
28 general public and no working with crowds of co-workers, only “occasional” contact
with supervisors and co-workers, but still have the ability to respond appropriately to
supervision, co-workers and usual, routine work situations, and the ability to deal with
only “occasional” changes in a routine work setting, (7) work at more than a low
memory level meaning the ability to understand remember and carry out only “simple”
work instructions, that ability to remember and deal with only “rare” changes in work
instructions from week to week, and the ability to remember and use good judgment
in making only “simple” work related decisions, and (8) do any more than “frequent”
near acuity visual work duties. AR at 311.

1 arm, according to Dr. Smith, is limited to lifting two pounds, even though she is able
2 to compensate for that weakness and lift ten pounds with her left arm. Plaintiff
3 contends that this limitation (i.e. the ability of an individual to compensate when the
4 dominant arm is able to lift two pounds and the other ten pounds) must be resolved by
5 a VE, by means of a hypothetical, and not by means of an ALJ's determination.

6 When an ALJ relies on the testimony of a vocational expert, the judge must
7 propound a hypothetical that incorporates all of the medical and vocational limitations
8 of the claimant as set forth in the record. Tackett v. Apfel, 180 F.3d 1094, 1101 (9th
9 Cir. 1999), 180 F.3d at 1101. If a hypothetical fails to reasonably reflect each of the
10 claimant's limitations supported by "substantial evidence," the expert's answer has no
11 evidentiary value. Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984); See also
12 Embrey v. Bowen, 849 F.2d 418, 423 (9th Cir.1988).

13 The hypotheticals propounded by the ALJ sought to define or categorize
14 Plaintiff's Residual Functional Capacity ("RFC").³ A determination of RFC is based,
15 among other things, upon a claimant's ability to perform sedentary work defined as:

16 Sedentary work involves lifting no more than 10 pounds at a time and
17 occasionally lifting or carrying articles like docket files, ledgers, and
18 small tools. Although a sedentary job is defined as one which involves
19 sitting, a certain amount of walking and standing is often necessary in
20 carrying out job duties. Jobs are sedentary if walking and standing are
21 required occasionally and other sedentary criteria are met.

22 20 C.F.R. §404.1567.

23 Here, the ALJ afforded Dr. Smith's testimony "significant probative weight."
24 (AR 31). Dr. Smith evaluated Plaintiff and opined that Plaintiff had "limited use of the
25 right arm" and noted a lifting restriction of two pounds with the right arm. (AR 656).
26 Despite the right arm limitation, Plaintiff retained the ability "to perform fine and gross

27 ³ The Commissioner has established a five-step inquiry for determining
28 eligibility for disabilities. At the fifth step, if an ALJ determines that a claimant suffers
from a nonexertional impairment that prevents him or her from performing past work
and the full range of other available work, the Commissioner must produce expert
vocational testimony or other similar evidence to establish that jobs exist in the
national economy that the applicant can perform. 20 C.F.R. § 404.1520; see also
Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999). Here, the commissioner met
this burden of proof at Step 5.

1 movements effectively.” AR 29. Notably, Plaintiff does not explain how the ALJ’s
2 RFC determination that Plaintiff could lift no more than ten pounds is not supported
3 by substantial evidence. The record does not indicate that Plaintiff had any limitations
4 on her left arm. Furthermore, Dr. Smith opined that Plaintiff could return to work as
5 of October 2011, with limited use of the right hand and limitations in lifting, pulling,
6 and pushing. (AR 656). Plaintiff also testified that she “mostly” used her left hand to
7 lift and carry things, and used her right hand to “steady[]” her left hand (AR 66).
8 Plaintiff has the initial burden to show that the limitation in her right arm rises to a
9 level that reasonably may disqualify her from performing sedentary work, consisting
10 of occasionally lifting up to ten pounds. See Meanel v. Apfel, 172 F.3d 1111, 1115
11 (9th Cir. 1999) (claimant carries burden to present objective medical evidence of
12 limitation). Plaintiff’s testimony and the medical record indicate that the ALJ
13 accounted for Plaintiff’s impairments by considering Dr. Smith’s medical evidence,
14 among other medical evidence, and concluding that Plaintiff could occasionally lift ten
15 pounds, thereby satisfying the lifting prerequisite to qualify for sedentary work.
16 Plaintiff does not dispute the finding that Plaintiff could occasionally lift ten pounds
17 (or that she satisfied the criteria for sedentary work). See 20 C.F.R. §404.1567.

18 In reliance upon Wasilauskis v. Astrue, No. 08-284BW, 2009 WL 861492 (D.
19 Me. Mar. 30, 2009), Plaintiff contends that the ALJ was required to ask the VE whether
20 Plaintiff’s ability to compensate for the weakness in her right arm impairs her ability
21 to perform sedentary work. Wasilauskis alleged a disability arising from a left-hand
22 degloving injury, T-11 disc wedging, anxiety disorder, and depressive disorder. Id at
23 *1. Plaintiff also had lost the ability to use his dominant left hand “for frequent fine
24 or gross manipulation.” The VE was not asked if an individual with manipulation
25 disabilities would qualify for the positions identified by the VE (courier/messenger,
26 ticket taker, parking lot attendant, and dowel inspector). At the time of oral argument,
27 the Commissioner conceded that plaintiff’s RFC did not permit him to perform three
28 of the four jobs. However, the Commissioner asserted that an individual with

1 plaintiff's limitations qualified for the position of dowel inspector, as defined in the
2 Dictionary of Occupational Titles ("DOT"). 20 C.F.R. §669.687-14. As the position
3 of dowel inspector required frequent handling, or gross manipulation, the court
4 concluded that this limitation required the ALJ to ask the VE to explain how plaintiff
5 is qualified for a position requiring gross manipulation when plaintiff's dominant hand
6 prevented him from using fine or gross motor skills. The matter was remanded for
7 further proceedings.

8 Here, Plaintiff makes no showing, or suggestion, that her limitations prevented
9 her from performing any of the 300,000 available sedentary unskilled positions
10 identified by the VE (Food and Beverage Clerk, DOT §209.567-014; Telephone
11 Quotation Clerk, DOT §237.367-046; and Sealer, DOT §559.687-014). (AR 34). In
12 Wasilauskis, the plaintiff made a specific showing that his manipulation limitations
13 could prevent him from performing the job of dowel inspector because that position
14 required him to frequently manipulate objects. Because the manipulation impairment
15 impacted plaintiff's ability to perform a job requiring frequent manipulation, the ALJ
16 erred by not presenting the VE with a hypothetical reflecting this impairment.

17 In Diehl v. Barnhart, 357 F.Supp.2d 804 (E.D. Pa. 2005), the claimant suffered
18 from numerous impairments, including one arising from a fall through a plate glass
19 window which resulted in the limited use of his impaired right arm. The VE cited
20 numerous types of jobs available to the claimant, including those jobs appropriate for
21 "individuals who have limited upper extremity use to one arm." Id. at 821. The issue
22 in Diehl concerned whether the DOT definition conflicted with the VE testimony. As
23 in Wasilauskis, the claimant's handling impairment had a direct bearing on the DOT
24 definitions and, therefore, was an issue properly presented to the VE.


25 Here, in contrast, Plaintiff does not identify how her limitation may prevent her
26 from performing any position identified by the VE, nor does her claim undermine the
27 ALJ's determination that she could perform the full range of sedentary unskilled work,
28 with the requisite and stated limitations. Without some showing in the record that the

1 purported limitation has a direct bearing on the claimant's ability to perform any of the
2 sedentary unskilled positions identified by the VE, Plaintiff cannot prevail on her claim
3 for Title II benefits. Consequently, the evidentiary record supports entry of judgment
4 in favor of Defendant and against Plaintiff.

5 In sum, the court denies Plaintiff's Objection, adopts the R & R in its entirety,
6 and instructs the Clerk of Court to close the file.

7 **IT IS SO ORDERED.**

8 DATED: April 5, 2018



Hon. Jeffrey T. Miller
United States District Judge

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