

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

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4
5 CELIA B. TOLENTO,

6 Plaintiff,

7 vs.

8 NANCY A. BERRYHILL, Acting Commissioner
9 of Social Security,

10 Defendant.

2:17-cv-01516-VCF

ORDER

MOTION FOR REVERSAL AND/OR REMAND [ECF
NO. 19], CROSS MOTION FOR SUMMARY
11 JUDGMENT TO AFFIRM [ECF No. 20].

12 The Court inadvertently entered the Report and Recommendation (ECF No. 22) in this case.
13 Accordingly, IT IS HEREBY ORDERED that the report and recommendation on the Motion for Reversal
14 and/or Remand (ECF No. 19) and Cross Motion for Summary Judgment to Affirm (ECF No. 20) is
15 stricken.

16 This matter involves Plaintiff Celia B. Tolento's appeal from the Commissioner's final decision
17 denying her social security benefits. Before the Court is Tolento's Motion for Reversal or Remand (ECF
18 No. 19) and the Commissioner of Social Security's motion for summary judgment to affirm (ECF No.
19 20). For the reasons stated below the Court denies Tolento's motion to reverse or remand and grants the
20 Commissioner's motion for summary judgment to affirm.

21 **STANDARD OF REVIEW**

22 The Fifth Amendment prohibits the government from depriving persons of property without due
23 process of law. U.S. CONST. amend. V. Social security claimants have a constitutionally protected
24 property interest in social security benefits. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). 42 U.S.C. §
25

1 Tolento claims that the ALJ made a legal error when he concluded that she had the residual
2 function capacity to continue working as a receptionist. Specifically, Tolento argues that the DOT
3 definition of “receptionist” requires frequent reaching without defining if that reaching includes
4 overhead reaching. (ECF No. 19 at 7). Tolento argues that given the vagueness of this definition, the
5 ALJ’s finding that Tolento had the residual capacity to engage in work as a receptionist is in conflict
6 with his finding that she had the residual capacity to engage in only occasional overhead reaching. (ECF
7 No. 19 at 7).

8 **II. Analysis of Potential Conflict**

9 A Commissioner’s decision will be upheld if it has any support in the record. *Bowling*, 36 F.3d at
10 434. While an ALJ may rely on the testimony of a vocation expert in reaching a decision, an ALJ must
11 first inquire if the testimony conflicts with the DOT. *Silvera v. Astrue*, No. CV 09-1935 JC, 2010 WL
12 3001619, at *3 (C.D Cal July 29, 2010). The failure to do so, however, may be harmless error if no
13 actual conflict exists. *Id.* For there to be a conflict between an expert’s testimony and the DOT, the
14 discrepancy must be “obvious or apparent.” *Gutierrez v. Colvin*, 844 F.3d 804, 808 (9th Cir. 2016). For
15 a discrepancy to be obvious or apparent, the testimony “must be at odds with the Dictionary’s listing of
16 job requirements that are essential, integral, or expected.” *Id.*

17 The ALJ’s decision that Tolento had the residual functional capacity to work as a receptionist did
18 not contradict his finding that she had the residual capacity to engage in only occasional overhead
19 reaching, because his decision has sufficient support within the record. While Tolento argues that the
20 DOT definition is too vague to support the ALJ’s finding, the ALJ did not rely solely on the DOT
21 definition in reaching his decision. He also consulted a vocation expert who testified that given
22 Tolento’s physical impairments, she could perform the work of a receptionist. (AR 40-43). Further, the
23 ALJ met his affirmative responsibility to question the vocation expert about any potential conflict
24 between his testimony and the DOT definition. After informing the vocation expert of Tolento’s
25 restriction on bilateral overhead reaching, the ALJ specifically asked the vocation expert if his testimony

1 was consistent with the definition found within the DOT. (AR 41-43). The expert answered in the
2 affirmative. (AR 43).


3 There is no conflict between the vocation expert's testimony and the definition provided in DOT
4 237.367-038. Any discrepancy between the vocation expert's testimony and the DOT definition is not
5 apparent or obvious. Therefore, no conflict between the two exists. Tolento is correct that the language
6 in DOT 237.367-038 does not specify the direction of reaching required of a receptionist. However, this
7 very omission demonstrates that frequent over-head bilateral reaching is not an essential, integral, or
8 expected requirement of being a receptionist. See *Briser v. Colvin*, No. 3:12-CV-00726-JE, 2013 WL
9 2318842, at *11 (D. Ord. May 27, 2013) (where the Court held that a DOT definition that required
10 frequent reaching did not indicate that the position required frequent overhead reaching). The DOT is
11 silent as to whether receptionists must engage in more than occasional overhead reaching. The vocation
12 expert testified that (1) someone with Tolento's specific physical impairments may work as a
13 receptionist, and (2) that his testimony did not conflict with DOT 237.367-038. There is substantial
14 evidence in the record to support the Commissioner's decision. (AR 17-21, 28-45).

15 ACCORDINGLY,

16 IT IS HEREBY ORDERED that Tolento's Motion for Reversal and/or Remand (ECF No. 19) is
17 DENIED.

18 IT IS FURTHER ORDERED that the Commissioner's Cross-Motion to Affirm (ECF No. 20) is
19 GRANTED.

20 DATED this 7th day of February, 2018.

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23 CAM FERENBACH
24 UNITED STATES MAGISTRATE JUDGE
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