

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

ANTHONY BALL,	)	
	)	
Plaintiff,	)	
	)	No. CV-09-764-HU
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	OPINION & ORDER
	)	
Defendant.	)	
_____	)	

Tim Wilborn  
WILBORN LAW OFFICE, P.C.  
P.O. Box 2768  
Oregon City, Oregon 97045

Attorney for Plaintiff

Dwight C. Holton  
ACTING UNITED STATES ATTORNEY  
District of Oregon  
Adrian Brown  
ASSISTANT UNITED STATES ATTORNEY  
1000 S.W. Third Avenue, Suite 600  
Portland, Oregon 97204-2092

/ / /  
/ / /  
/ / /

1 - OPINION & ORDER

1 Kathryn A. Miller  
SPECIAL ASSISTANT UNITED STATES ATTORNEY  
2 Office of the General Counsel  
Social Security Administration  
3 701 Fifth Avenue, Suite 2900 M/S 901  
Seattle, Washington 98104-7075

4 Attorneys for Defendant

5 HUBEL, Magistrate Judge:

6 Plaintiff Anthony Ball brings this action for judicial review  
7 of the Commissioner's final decision to deny disability insurance  
8 benefits (DIB). This Court has jurisdiction under 42 U.S.C. §  
9 405(g). All parties have consented to entry of final judgment by  
10 a Magistrate Judge in accordance with Federal Rule of Civil  
11 Procedure 73 and 28 U.S.C. § 636(c). I reverse the Commissioner's  
12 decision and remand the case for additional proceedings.

13 PROCEDURAL BACKGROUND

14 Plaintiff filed his DIB application on May 11, 2001, alleging  
15 an onset date of June 30, 2000, and based on a combination of  
16 impairments including post-traumatic stress disorder, degenerative  
17 disc disease, and left shoulder degenerative joint disease. Tr.  
18 67-70, 155. Following an initial denial which was affirmed on  
19 reconsideration, Tr. 31, 32, plaintiff appeared, with counsel,  
20 before Administrative Law Judge (ALJ) Schloss for a hearing on  
21 November 20, 2002, followed by a supplemental hearing on April 16,  
22 2003. Tr. 1266-1320. On October 23, 2003, the ALJ found plaintiff  
23 not disabled. Tr. 932-41.

24 In a June 16, 2004 Order, the Appeals Council granted  
25 plaintiff's request for review, vacated ALJ Schloss's October 23,  
26 2003 decision, and remanded the case back to the ALJ for further  
27 proceedings. Tr. 949-50.

1           Upon remand from the Appeals Council, ALJ Tielens held a  
2 hearing on February 22, 2006. Tr. 1321-1364. Plaintiff was again  
3 represented by counsel. Id. On May 10, 2006, ALJ Tielens found  
4 plaintiff not disabled. Tr. 15-30. The Appeals Council denied  
5 plaintiff's request for review of this decision, making ALJ  
6 Tielen's May 10, 2006 decision the Commissioner's final decision.  
7 Tr. 8-12. Plaintiff then filed an action in this Court seeking  
8 judicial review of ALJ Tielens's May 10, 2006 decision. Ball v.  
9 Astrue was given civil docket number CV-07-231-MA and assigned to  
10 Judge Marsh.

11           Following the filing of plaintiff's opening memorandum in  
12 support of plaintiff's request that the ALJ's decision be reversed  
13 and remanded for a determination of benefits, defendant moved to  
14 remand the case back to the agency for further proceedings. In  
15 this motion, defendant conceded certain errors by the ALJ, but  
16 argued that unresolved issues prevented a remand for benefits and  
17 instead, a remand for additional proceedings was appropriate.  
18 Plaintiff filed a memorandum in reply/opposing defendant's motion.

19           In a February 14, 2008 Opinion & Order, Judge Marsh granted  
20 defendant's motion to remand. Tr. 1438-45. The details of his  
21 Order are addressed more fully below.

22           Upon remand, ALJ Say held another hearing, on October 28,  
23 2008. Tr. 1523-54. Plaintiff was represented by counsel. Id. On  
24 February 13, 2009, ALJ Say found plaintiff not disabled. Tr. 1369-  
25 84. The Appeals Council denied plaintiff's request for review of  
26 the ALJ's February 13, 2009 decision. Tr. 1365-67.

27                           STANDARD OF REVIEW & SEQUENTIAL EVALUATION

28           A claimant is disabled if unable to "engage in any substantial

1 gainful activity by reason of any medically determinable physical  
2 or mental impairment which . . . has lasted or can be expected to  
3 last for a continuous period of not less than 12 months[.]" 42  
4 U.S.C. § 423(d) (1) (A). Disability claims are evaluated according  
5 to a five-step procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395  
6 (9th Cir. 1991). The claimant bears the burden of proving  
7 disability. Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir.  
8 1989). First, the Commissioner determines whether a claimant is  
9 engaged in "substantial gainful activity." If so, the claimant is  
10 not disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20  
11 C.F.R. §§ 404.1520(b), 416.920(b). In step two, the Commissioner  
12 determines whether the claimant has a "medically severe impairment  
13 or combination of impairments." Yuckert, 482 U.S. at 140-41; see  
14 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not  
15 disabled.

16 In step three, the Commissioner determines whether the  
17 impairment meets or equals "one of a number of listed impairments  
18 that the [Commissioner] acknowledges are so severe as to preclude  
19 substantial gainful activity." Yuckert, 482 U.S. at 141; see 20  
20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is  
21 conclusively presumed disabled; if not, the Commissioner proceeds  
22 to step four. Yuckert, 482 U.S. at 141.

23 In step four the Commissioner determines whether the claimant  
24 can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e),  
25 416.920(e). If the claimant can, he is not disabled. If he cannot  
26 perform past relevant work, the burden shifts to the Commissioner.  
27 In step five, the Commissioner must establish that the claimant can  
28 perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§

1 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets  
2 this burden and proves that the claimant is able to perform other  
3 work which exists in the national economy, he is not disabled. 20  
4 C.F.R. §§ 404.1566, 416.966.

5 The court may set aside the Commissioner's denial of benefits  
6 only when the Commissioner's findings are based on legal error or  
7 are not supported by substantial evidence in the record as a whole.  
8 Baxter, 923 F.2d at 1394. Substantial evidence means "more than a  
9 mere scintilla," but "less than a preponderance." Id. It means  
10 such relevant evidence as a reasonable mind might accept as  
11 adequate to support a conclusion. Id.

#### 12 DISCUSSION

13 Plaintiff alleges that ALJ Say made several errors in his  
14 February 13, 2009 decision. Defendant contends that plaintiff is  
15 precluded from raising most of these arguments as a result of Judge  
16 Marsh's 2008 decision which defendant contends is the "law of the  
17 case." Because a recitation of the medical and other evidence is  
18 unnecessary if defendant is correct, I address defendant's  
19 preclusion argument first.

20 In the litigation before Judge Marsh, plaintiff contended that  
21 ALJ Tielens made nine separate errors: (1) the ALJ failed to  
22 properly consider plaintiff's post-traumatic stress disorder  
23 (PTSD); (2) the ALJ failed to properly consider Veteran's  
24 Administration disability ratings; (3) the ALJ did not properly  
25 consider the lay witness and third party testimony; (4) the ALJ  
26 improperly rejected treating physician opinions; (5) the ALJ  
27 improperly rejected plaintiff's testimony; (6) the ALJ failed to  
28 include his residual functional capacity (RFC) finding in a

1 vocational hypothetical; (7) the ALJ relied on vocational expert  
2 testimony which did not consider the ALJ's RFC finding; (8) the  
3 ALJ's RFC finding was deficient in that it improperly excluded  
4 limitations established by improperly rejected evidence; and (9)  
5 the ALJ improperly classified plaintiff's past relevant work.  
6 Ball, No. CV-07-231-MA, Pltf's Open. Brief at pp. 7-8 (dkt #11).  
7 Plaintiff also generally argued that ALJ Tielens's decision was not  
8 supported by substantial evidence and was based on the application  
9 of incorrect legal standards. Id. at p. 8.

10 In defendant's memorandum in support of its motion to remand,  
11 defendant agreed with some of the arguments plaintiff made in his  
12 opening memorandum. Ball, No. CV-07-231-MA, Deft's Mem. in Sup. of  
13 Rem. at p. 6 (dkt #17). Defendant agreed that in his May 10, 2006  
14 decision, ALJ Tielens had failed to address the lay witness  
15 statement of plaintiff's sister Brenda Bailey, and had made errors  
16 in regard to assessing plaintiff's prior work and in his  
17 alternative step five finding. Id. Defendant denied all other  
18 assertions of error. Id.

19 Defendant argued that unresolved issues prevented a remand for  
20 a determination of benefits. Id. at pp. 7, 9-11. Defendant  
21 represented that upon remand, the ALJ would obtain supplemental  
22 vocational expert testimony to address plaintiff's ability to  
23 perform his past relevant work at step four, and if necessary, his  
24 ability to make a vocational adjustment to other work at step five  
25 that is within his assessed RFC. Id. In addition, the ALJ would  
26 clarify any potential inconsistencies between plaintiff's RFC and  
27 the requirements of past relevant work or other work identified at  
28 steps four and five. Id. Finally, the ALJ would evaluate the lay

1 witness statement of plaintiff's sister. Id.

2 In reply, and in opposition to the motion to remand, plaintiff  
3 argued that a remand for further administrative proceedings was  
4 unnecessary because the record was fully developed and supportive  
5 of a finding of disability. Ball, No. CV-07-231-MA, Pltf's  
6 Reply/Opposition at p. 1 (dkt #19). More specifically, plaintiff  
7 argued that when the improperly rejected opinion of Dr. Dobscha was  
8 credited as true, plaintiff's impairments met Listed Impairment  
9 12.06, establishing plaintiff's disability at step three of the  
10 sequential evaluation. Id. at p. 2. Additionally, plaintiff  
11 argued that crediting Dr. Dobscha's opinion regarding plaintiff's  
12 RFC limitations established plaintiff's disability at steps four  
13 and five, regardless of other errors. Id. at pp. 4-5. Plaintiff  
14 further argued that the ALJ improperly rejected the VA's disability  
15 ratings and giving great weight to those ratings established that  
16 plaintiff was disabled. Id.

17 Judge Marsh specifically addressed plaintiff's argument that  
18 ALJ Tielens had improperly discredited Dr. Dobscha's opinion and  
19 had improperly determined that plaintiff did not meet Listed  
20 Impairment 12.06 based on his PTSD. Ball, No. CV-07-231-MA, Op. at  
21 pp. 3-7. Judge Marsh stated that "[t]he ALJ thoroughly considered  
22 whether Ball's PTSD met or equaled Listed Impairment 12.06, which  
23 he noted to require a combination of the A and B criteria, or the  
24 A and C criteria, as set forth in that listing." Id. at p. 4.  
25 Judge Marsh explained that the "ALJ's step three findings are  
26 rooted in his categorical rejection of Ball's credibility." Id.  
27 Judge Marsh also discussed the reasons ALJ Tielens rejected Dr.  
28 Dobscha's opinion. Id. at p. 6. Following this discussion, Judge

1 Marsh concluded that "[s]ince I find the ALJ's assessment of this  
2 anomalous record to be reasonable and based on substantial  
3 evidence, I decline to credit as true Dr. Dobscha's assessment of  
4 Ball's work-related functional limitations." Id. at p. 7.

5 Judge Marsh then remarked on defendant's concessions and the  
6 relief defendant sought in the motion to remand. Id. He then  
7 concurred with defendant that "further proceedings are necessary to  
8 obtain supplemental vocational expert testimony, and to address all  
9 lay witness testimony." Id. He concluded with the following  
10 statements:

11 By no means is a finding of disability directed on the  
12 present record. As should be clear by now, I do not find  
13 any merit to Ball's arguments that the ALJ wrongly  
14 rejected his credibility, failed to properly consider the  
15 significance of his VA disability rating and receipt of  
16 benefits, or failed to provide legally sufficient reasons  
17 for rejecting Dr. Dobscha's opinion. Therefore, I affirm  
18 the ALJ's evaluation of these issues as based on  
19 substantial evidence and legally sufficient reasoning.

20 Id. at pp. 7-8.

21 In the instant case, defendant argues that the "law of the  
22 case" precludes reexamination of issues previously decided by Judge  
23 Marsh. Generally, the law of the case doctrine provides that the  
24 decision of a higher court on a legal issue must be followed in all  
25 subsequent proceedings in the same case. E.g., United States v.  
26 Park Place Assocs., Ltd., 563 F.3d 907, 925 (9th Cir. 2009). The  
27 doctrine is based on the public policy that litigation must come to  
28 an end. United States v. Smith, 389 F.3d 944, 948 (9th Cir. 2004).

The doctrine applies to district court determinations made in  
the context of judicial review of administrative agency decisions.  
E.g., Brachtel v. Apfel, 132 F.3d 417, 419-20 (8th Cir. 1997) (law  
of the case doctrine applies to administrative agencies on remand



1 and thus, if district court found that the plaintiff needed to lie  
2 down, ALJ is bound by that finding on remand); Wilder v. Apfel, 153  
3 F.3d 799, 803 (7th Cir. 1998) (law of the case doctrine "requires  
4 the administrative agency, on remand from a court, to conform its  
5 further proceedings in the case to the principles set forth in the  
6 judicial decision, unless there is a compelling reason to  
7 depart.").

8 In a 2005 decision, the Central District of California  
9 reviewed a social security action for the third time. Ischay v.  
10 Barnhart, 383 F. Supp. 2d 1199 (C.D. Cal. 2005). The first time,  
11 the court reversed and remanded the ALJ's determination at step  
12 four and ordered the ALJ to complete the five-step disability  
13 evaluation. Id. at 1203. The second time, the parties stipulated  
14 to a remand for the purpose of obtaining additional vocational  
15 expert testimony. Id. at 1208.

16 Upon appeal to the district court for the third time, the  
17 plaintiff argued that the court's second remand order established  
18 the law of the case and precluded the ALJ from revisiting steps one  
19 through four of the sequential process. Id. at 1213. The  
20 defendant argued that the doctrine was inapplicable because the  
21 pending case was a different case than the one remanded. Id.

22 The court rejected the defendant's argument. The court  
23 thoroughly discussed the related concepts of the "law of the case"  
24 and the "rule of mandate," which it noted was a "specific and more  
25 binding variant of the law of the case," and concluded that the  
26 "doctrine of the law of the case and the rule of mandate apply to  
27 matters remanded to the Agency for further proceedings." Id. at  
28 1214, 1216 (internal quotation omitted). In rejecting the

1 defendant's argument regarding the pending case not being the  
2 "same" case for purposes of the law of the case doctrine, the court  
3 was "unpersuaded" that the prior district court order operated as  
4 a final judgment divesting the district court of jurisdiction. Id.  
5 at 1217-18. The court explained that the United States Supreme  
6 Court and the Ninth Circuit had both recognized that "an action  
7 brought following a reversal and remand for further proceedings in  
8 the same litigation is the same case for purposes of application of  
9 the law of the case doctrine." Id. The court stated that "[a]ny  
10 argument that this Court's December 12, 2001 Order [remanding the  
11 case for the second time] could be anything but part of the 'same  
12 case'" had to be rejected. Id. at 1218; see also Brown v. Astrue,  
13 597 F. Supp. 2d 691, 696-98 (N.D. Tex. 2009) (fact that court  
14 remanded action to ALJ pursuant to sentence four did not preclude  
15 application of law of the case; relevant question was whether  
16 district court made substantive determinations about the ALJ's  
17 findings).

18 Some district courts have concluded that a subsequent appeal  
19 to the district court of an ALJ decision issued after a sentence  
20 four remand by the district court, is not the "same litigation" for  
21 purposes of the law of the case doctrine. Frost v. Astrue, 627 F.  
22 Supp. 2d 1216, 1223 (D. Kan. 2008) (because a sentence four remand  
23 in a social security case is a final judgment which terminates the  
24 case and makes judicial review of a decision after remand a  
25 separate piece of litigation, court would not apply law of the case  
26 doctrine); Hollins v. Apfel, 160 F. Supp. 2d 834, 840 (S.D. Ohio  
27 2001) (same), aff'd, No. 01-3535, 49 Fed. Appx. 533, 2002 WL  
28 31398968 (6th Cir. Oct. 17, 2002). In both of those cases,

1 however, the court alternatively considered the doctrine of issue  
2 preclusion regarding issues previously decided by the district  
3 court before remand to the ALJ. Frost, 627 F. Supp. at 1223;  
4 Hollins, 160 F. Supp. 2d at 840.

5 Because the Ninth Circuit offers no guidance, and the relevant  
6 district court decisions have reached differing results, compare  
7 Ishchay and Brown (suggesting sentence four judgment of remand does  
8 not terminate litigation and subsequent proceedings are "same case"  
9 for purposes of "law of the case" doctrine), with Frost and Hollins  
10 (expressly holding that a sentence four judgment of remand  
11 terminates the case at that point rendering subsequent proceedings  
12 new litigation), I consider whether relitigation of any issues  
13 decided by Judge Marsh in his February 14, 2008 Opinion, is  
14 precluded under the law of the case doctrine, or alternatively, the  
15 doctrine of issue preclusion. For the reasons explained below, I  
16 agree with defendant that some of the issues plaintiff raises in  
17 the instant matter have been previously decided and are not subject  
18 to further review.

19 For a prior ruling to become law of the case as to a  
20 particular issue, that issue "must have been decided explicitly or  
21 by necessary implication in the previous disposition." Herrington  
22 v. County of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993) (internal  
23 quotation marks and alteration omitted). Here, it is beyond doubt  
24 that Judge Marsh explicitly discussed and rejected plaintiff's  
25 arguments that the ALJ erred in his credibility finding, erred in  
26 his assessment of the VA disability findings, and erred in his  
27 rejection of Dr. Dobscha's opinion and assessment of plaintiff's  
28 work-related functions. Thus, in the instant case, I do not

1 consider plaintiff's arguments that the ALJ improperly rejected Dr.  
2 Dobscha's opinion and the VA disability ratings and improperly  
3 rejected plaintiff's testimony because the law of the case doctrine  
4 precludes reexamination of those issues.

5 Moreover, Judge Marsh also expressly held that the ALJ's  
6 assessment of the record at step three was "reasonable and based on  
7 substantial evidence." Ball, No. CV-07-231-MA, Op. at pp. 7-8  
8 (affirming ALJ's evaluation of issues related to step three  
9 determination as based on substantial evidence and legally  
10 sufficient reasoning). Thus, I do not consider plaintiff's  
11 argument that the step three finding is not supported by  
12 substantial evidence or based on the correct legal standards.

13 There are exceptions to the law of the case doctrine. "The  
14 law of the case doctrine is subject to three exceptions that may  
15 arise when (1) the decision is clearly erroneous and its  
16 enforcement would work a manifest injustice, (2) intervening  
17 controlling authority makes reconsideration appropriate, or (3)  
18 substantially different evidence was adduced at a subsequent  
19 trial." Minidoka Irrigation Dist. v. Dep't of Interior, 406 F.3d  
20 567, 573 (9th Cir. 2005) (internal quotation omitted); see also  
21 Mendenhall v. National Transp. Safety Bd., 213 F.3d 464, 469 (9th  
22 Cir. 2000) (court may depart from the law of the case when (1) the  
23 first decision was clearly erroneous; (2) an intervening change in  
24 the law has occurred; (3) the evidence on remand is substantially  
25 different; (4) other changed circumstances exist; or (5) a manifest  
26 injustice would otherwise result).

27 Plaintiff argues that here, the prior decision is clearly  
28 erroneous and a manifest injustice will result if it is enforced.

1 I reject this argument. I find no validity to plaintiff's argument  
2 that Judge Marsh's decision was clearly erroneous. As to the  
3 issues he reviewed, Judge Marsh's Opinion shows he considered them  
4 thoroughly. An exception to the law of the case doctrine is not  
5 warranted here. No manifest injustice will result by enforcing the  
6 determinations made by Judge Marsh.

7 If the law of the case doctrine is not appropriately applied  
8 here because, according to some courts, proceedings following a  
9 sentence four remand constitute a separate cause of action, then  
10 the alternative analysis is one of issue preclusion. The doctrine  
11 of issue preclusion provides that "once a court decides an issue of  
12 fact or law necessary to its judgment, that decision precludes  
13 relitigation of the same issue on a different cause of action  
14 between the same parties." Park Place Assocs., 563 F.3d at 925  
15 n.11 (internal quotation omitted). There is no question that the  
16 parties in the instant case are the same as in Judge Marsh's case  
17 and that, as discussed above, Judge Marsh decided several issues  
18 which were necessary to the remand judgment. Thus, the errors  
19 plaintiff raises in the instant case regarding the rejection of Dr.  
20 Dobscha's opinion and the VA disability ratings, regarding  
21 plaintiff's credibility, and regarding an unsupportable step three  
22 finding, are not subject to relitigation and I do not consider  
23 them.

24 Finally, although I conclude that these issues are precluded  
25 under the law of the case or issue preclusion doctrine, I reject  
26 defendant's contention that the law of the case, or issue  
27 preclusion, similarly precludes relitigation of certain issues  
28 regarding the lay witness testimony. Plaintiff contends that the

1 ALJ failed to comply with Judge Marsh's Order by failing to address  
2 "all" lay witness testimony. In his opening memorandum filed in  
3 Judge Marsh's case, plaintiff argued that ALJ Tielens had erred by  
4 failing to discuss lay testimony of plaintiff's sister and his  
5 supervisor, and had improperly rejected testimony of plaintiff's  
6 wife. In its motion to remand, defendant conceded that ALJ Tielens  
7 had erred by failing to address the lay testimony of plaintiff's  
8 sister. Defendant expressly stated that it did not concede any  
9 other errors by ALJ Tielens regarding lay witness testimony. In  
10 his Opinion and Order, Judge Marsh noted defendant's concessions  
11 that mistakes were made at step four and in the alternative step  
12 five finding, but Judge Marsh engaged in no substantive discussion  
13 of any of the lay witness testimony. Then, in concluding, Judge  
14 Marsh stated that further proceedings were necessary to address  
15 "all lay witness testimony." Id. at p. 7.

16 Based on this language, plaintiff contends that upon remand,  
17 the ALJ was required to re-address all lay witness testimony to  
18 fully comply with Judge Marsh's Order. I agree with plaintiff.  
19 Without any discussion of the merits of the ALJ's treatment of the  
20 lay witness testimony, neither the law of the case doctrine nor the  
21 doctrine of issue preclusion precludes relitigation of the lay  
22 witness issues. Although, when examined in the context of the  
23 concession made by defendant regarding lay testimony, it is perhaps  
24 possible to interpret Judge Marsh's reference to "all" as an  
25 acknowledgment that ALJ Tielens failed to discuss "all" of the lay  
26 witness testimony because he omitted any reference to plaintiff's  
27 sister's statements, the Order is unclear. It plainly says "all"  
28 lay witness testimony was to be addressed and it is undisputed that

1 upon remand, ALJ Say did not discuss all of the lay witness  
2 testimony. I address the alleged errors in regard to lay witness  
3 testimony below.

4 In addition to the lay witness testimony, plaintiff raises  
5 other arguments that require discussion. They are: (1) whether  
6 the ALJ erred in regard to Dr. Cowan's and Dr. Barrett's opinions;  
7 (2) whether the ALJ erred in regard to his findings regarding  
8 transferrable skills; and (3) whether the vocational expert  
9 testimony conflicts with the Dictionary of Occupational Titles.<sup>1</sup>

#### 10 I. Lay Testimony

11 Based on Judge Marsh's Order, ALJ Say considered the third  
12 party lay witness statements of plaintiff's sister Brenda Bailey.  
13 Bailey's first statement, dated November 7, 2002, reveals that  
14 Bailey lives in Georgia and that she had seen plaintiff once in the  
15 last year or two. Tr. 313. She also stated that she saw him once  
16 every two years when he visited the family. Id. Bailey rated  
17 plaintiff as markedly impaired in his functionality and activities  
18 of daily living. Id. She reported that plaintiff had told her of  
19 many limitations, including an inability to perform weeding,  
20 mowing, raking, cleaning bathtub/shower, cleaning floors, and  
21 vacuuming. Tr. 314. Plaintiff also reported to Bailey that he  
22 needed help while fishing for halibut because of back and shoulder  
23 pain. Id.

24 Bailey noted that plaintiff had told her that he had fought

---

26 <sup>1</sup> In his list of alleged errors noted in his Opening  
27 Memorandum, plaintiff contends that the ALJ failed to consider  
28 plaintiff's combined impairments. Pltf's Op. Mem. at p. 10.  
However, plaintiff fails to mention this contention again in his  
argument, and I do not consider it.

1 with people, including a shouting match with his supervisor in  
2 1999. Id. She indicated that he was markedly impaired in social  
3 functioning and that every other month when she calls, he seems  
4 severely depressed. Tr. 315-16. In a subsequent submission, dated  
5 June 3, 2006, Bailey reported that plaintiff was at a certain army  
6 checkpoint in Korea on the date of the "Axe-Murder Incident." Tr.  
7 1194.<sup>2</sup> She noted that since that time, something had "happened" to  
8 plaintiff. Id. She remarked that plaintiff had complained about  
9 burning and shooting pain in his back and legs since a 1997 car  
10 accident. Id. Bailey noted that after plaintiff flew to Alabama  
11 for a family funeral in 2004, plaintiff mostly laid down and  
12 complained of pain. Tr. 1195. When Bailey speaks to plaintiff, he  
13 is lying on the couch due to either depression, or severe pain from  
14 his stomach, shoulder or back. Id.

15 ALJ Say considered both of Bailey's statements and explained  
16 that

17 [t]here is no reason to change the [RFC] because of third  
18 party lay witness statements, inclusive of Ms. Bailey's  
19 statements. While the undersigned finds the lay witness  
20 testimony and statements are essentially credible, much  
21 of the information, particularly from Brenda Bailey, who  
lives in Georgia and only sees the claimant every two  
years or so, is not entirely credible in terms of her  
observations because she has not observed him for any  
prolonged period of time.

22 Tr. 1382. The ALJ also noted that at the most recent hearing,  
23 plaintiff testified that Bailey was a credible witness. Id. The  
24 ALJ explained that the statement was of questionable validity and  
25

---

26 <sup>2</sup> As Judge Marsh explained in his Opinion & Order, the  
27 "Axe-Murder Incident" occurred in August 1976 along the North-  
28 South Korean border when a workforce stationed there was ambushed  
and one member of the workforce was killed with a hatchet. Ball,  
No. CV-01-231-MA, Op. at p. 5.



1 value because plaintiff's credibility, not his sister's, was  
2 lacking. Id.

3 Plaintiff argues that the ALJ erred by, on the one hand,  
4 finding Bailey's statements "essentially credible," and on the  
5 other, rejecting her observations because Bailey had not observed  
6 plaintiff for any "prolonged period of time." Plaintiff also  
7 argues that the ALJ erred by not specifically mentioning Bailey's  
8 statements about plaintiff's presence at the Axe-Murder Incident or  
9 her assessment that plaintiff has certain marked limitations.

10 The ALJ may reject lay witness testimony for reasons that are  
11 germane to the witness. Carmichael v. Commissioner, 533 F.3d 1155,  
12 1163-64 (9th Cir. 2008). Here, the ALJ rejected Bailey's  
13 statements because they were not based on her personal observation  
14 over a period of time. This reason is germane to Bailey and is  
15 sufficient. See, e.g., Crane v. Shalala, 76 F.3d 251, 254 (9th  
16 Cir. 1995) (indicating that sufficient contact by the lay witness  
17 with the claimant is required to render lay witness competent to  
18 testify regarding claimant's limitations). Additionally, there was  
19 no need for ALJ Say to separately mention Bailey's "marked"  
20 checkbox limitation assessments since these were part of, and based  
21 on, Bailey's narrative descriptions which ALJ Say legitimately  
22 rejected. Finally, Judge Marsh had already affirmed ALJ Tielens's  
23 negative credibility determination regarding plaintiff and  
24 specifically discussed, and rejected, plaintiff's assertions  
25 regarding his participation in the Korea "Axe-Murder Incident."  
26 Ball, No. CV-07-231-MA, Op. at pp. 5-7. There was no error by the  
27 ALJ in failing to specifically address Bailey's statements in this  
28 regard.

1           The ALJ also discussed statements by plaintiff's wife,  
2 specifically citing to three written statements she submitted  
3 before Judge Marsh's Remand Order, and to one she submitted post-  
4 remand. Plaintiff's objections are limited to the pre-remand  
5 statements. See Pltf's Op. Mem. at pp. 13-15 (raising objections  
6 only to the ALJ's discussion of pre-remand statements submitted by  
7 plaintiff's wife).

8           The ALJ rejected the several statements submitted by  
9 plaintiff's wife because he found that plaintiff admitted to  
10 greater activities than reported by his wife, her statements were  
11 eroded by the plaintiff's own lack of credibility and propensity to  
12 exaggerate his symptoms and limitations, and her testimony and  
13 statements were not supported by the medical records as a whole.  
14 Tr. 1381. Additionally, the ALJ noted that while the written  
15 statements from plaintiff's wife were "generally credible" as a  
16 report of her observations of behavior demonstrated by plaintiff,  
17 she was not knowledgeable in the medical or vocational fields and  
18 was unable to render appropriate opinions on how claimant's  
19 physical impairments affected his overall abilities to perform  
20 basic work activities at various exertion levels. Id.

21           Plaintiff argues that the ALJ erred because plaintiff's own  
22 lack of credibility is independent of his wife's third party  
23 observations that do not rely on his credibility or reporting.  
24 Plaintiff also argues that the ALJ's statement about plaintiff's  
25 wife's lack of knowledge in the medical or vocational fields has no  
26 bearing on her credibility as a lay witness. Finally, plaintiff  
27 contends that the ALJ erred by finding that plaintiff's wife's  
28 statements were not supported by the medical records as a whole

1 because the medical records, according to plaintiff, overwhelmingly  
2 establish that plaintiff is disabled.

3 The ALJ's rejection of the plaintiff's wife's statements is  
4 supported by the record and is based on reasons germane to her  
5 testimony. First, given plaintiff's lack of credibility, a finding  
6 not subject to reexamination, it was not error for the ALJ to  
7 suggest that plaintiff's wife's reported observations of  
8 plaintiff's activities, while generally credible, are still  
9 inherently unreliable. To the extent her observations were based  
10 on plaintiff's statements to her or observing his activity level,  
11 given the determination of plaintiff's own negative credibility, it  
12 is possible his complaints and behaviors were not credible. Even  
13 if the ALJ erred in that regard, his statement regarding  
14 plaintiff's wife's lack of knowledge in the medical or vocational  
15 fields is a valid basis for rejecting her functional limitation  
16 assessments, such as "marked," e.g., Tr. 317-20, because such  
17 assessments are distinct from reports of observations of daily  
18 activities and they require some familiarity with medical/  
19 vocational guidelines and vernacular which plaintiff's wife does  
20 not have. Finally, while plaintiff contends that Dr. Dobscha's  
21 opinion, and others, actually supports plaintiff's wife's  
22 statements, ALJ Tielens's rejection of Dr. Dobscha's opinion was  
23 expressly affirmed by Judge Marsh, is not subject to relitigation,  
24 and thus cannot be a basis for arguing that the lay witness  
25 statement finds support in the record. The ALJ did not err in  
26 rejecting plaintiff's wife's statements.

27 As to the statement by fellow servicemember Mike Bilbo,  
28 although ALJ Say did not discuss it, there is no error. Bilbo's

1 statements, which appear to have been part of the record before  
2 Judge Marsh, address plaintiff's presence in Korea during the Axe-  
3 Murder Incident. Tr. 353, 367-68. Relitigation of this issue is  
4 precluded by Judge Marsh's express discussion of the issue and his  
5 finding that ALJ Tielens's rejection of plaintiff's credibility was  
6 not error. ALJ Say did not err in failing to discuss this lay  
7 witness testimony.

8 Finally, there is no mention by ALJ Say of a June 2000  
9 statement by plaintiff's former supervisor Robert Hathaway which  
10 noted, shortly before plaintiff's alleged onset date, plaintiff's  
11 difficulties in carrying heavy luggage or boxes, and standing or  
12 sitting in place for long periods of time. Tr. 266, 420. Because  
13 of the requirement by Judge Marsh that the ALJ on remand address  
14 all lay witness testimony, and because disregard of lay witness  
15 testimony is error, Stout v. Commissioner, 454 F.3d 1050, 1056 (9th  
16 Cir. 2006), the ALJ erred in this regard.

## 17 II. Opinions of Dr. Cowan and Dr. Barrett

18 Plaintiff contends that the ALJ improperly rejected the  
19 opinions of plaintiff's treating chiropractor, Dr. Lee Cowan, D.C.,  
20 and a treating psychiatrist, Dr. Thomas Barrett, M.D. I agree with  
21 plaintiff that the ALJ erred; however, the error is not an improper  
22 rejection, but a failure to address these practitioners' opinions  
23 at all.

24 Plaintiff correctly notes that Judge Marsh's Opinion contained  
25 no express discussion of ALJ Tielens's rejection of Dr. Cowan's  
26 opinions. However, as noted above, Judge Marsh did affirm ALJ  
27 Tielens's step three finding. Thus, to the extent Dr. Cowan's  
28 opinions have any relevance to a step three determination, Judge

1 Marsh's Order precludes reexamination of Dr. Cowan's opinions under  
2 the doctrines of law of the case or issue preclusion. Nonetheless,  
3 Dr. Cowan's opinions have relevance to the determinations at step  
4 four and step five, issues which were expressly remanded by Judge  
5 Marsh to the agency for further consideration. ALJ Say's failure  
6 to even discuss Dr. Cowan's opinions in regard to his step four and  
7 five determinations, and in particular, plaintiff's RFC, was error.

8 Similarly, his failure to discuss Dr. Barrett's May 2008  
9 report was also error. Although defendant argues that ALJ Say  
10 rejected Dr. Barrett's report because it related to a period of  
11 time after December 31, 2005, the date on which plaintiff's  
12 eligibility for DIB expired, defendant has misread ALJ Say's  
13 decision which makes no mention of Dr. Barrett's report and which  
14 cites the time period after December 31, 2005, as the basis for  
15 rejecting a sleep study report.

16 However, as with Dr. Cowan, given the preclusive effect of  
17 Judge Marsh's Opinion on the step three finding, the ALJ did not  
18 err in failing to discuss Dr. Barrett's report as part of a step  
19 three analysis. Still, as with Dr. Cowan, Dr. Barrett's report is  
20 relevant to any determinations made at steps four and five, and to  
21 the ALJ's RFC determination. The ALJ's failure to discuss Dr.  
22 Barrett's opinions in regard to the step four and five  
23 determinations was error.

24 Plaintiff argues that because Dr. Cowan's and Dr. Barrett's  
25 opinions conclusively establish disability, there is no reason to  
26 return this case to the agency for further proceedings, especially  
27 given the long period of time in which the case has been pending  
28 and the numerous errors made by various ALJs during the litigation.

1 Although I recognize that continued administrative hearings pose a  
2 burden, I do not believe remand for benefits is appropriate here.

3 First, as discussed in more detail below, errors at step five  
4 require a remand for further proceedings. Second, while the  
5 crediting as true rule may be applicable when an ALJ has improperly  
6 rejected testimony, I find its application inappropriate in this  
7 case when the ALJ has simply failed to discuss the medical opinion  
8 testimony. Because the ALJ, not this Court, is the factfinder, it  
9 should be the ALJ's province to address the evidence in the first  
10 instance. Additionally, as plaintiff notes, as to Dr. Cowan, after  
11 ALJ Tielens issued his decision in May 2006, defendant issued  
12 Social Security Ruling (SSR) 06-3p which addresses the method for  
13 evaluating opinions from "other sources," who are not "acceptable  
14 medical sources," including chiropractors like Dr. Cowan. The ALJ,  
15 as the factfinder, should perform the initial assessment of Dr.  
16 Cowan's opinions under this SSR.

### 17 III. Transferability of Skills

18 Vocational Expert (VE) Jenipher Gaffney testified at the  
19 October 28, 2008 hearing before ALJ Say. Tr. 1536-54. As part of  
20 her testimony, the VE testified that plaintiff's work as an equal  
21 opportunity officer was classified as a sedentary, skilled  
22 position, but that his prior position as a civil rights specialist  
23 had no equivalent match in the Dictionary of Occupational Titles  
24 (DOT). Tr. 1439-40. The VE explained that the civil rights  
25 specialist position most closely matched two recognized DOT  
26 positions: contract clerk and training specialist. Id. The DOT  
27 classifies the training specialist job as a light, semi-skilled  
28 occupation, and classified the contract clerk job as a sedentary,

1 skilled occupation. Id.

2 The ALJ presented a hypothetical to the VE which included a  
3 limitation of simple, routine, repetitive work with occasional  
4 complex tasks, and not requiring frequent or repetitive interaction  
5 with co-workers or the general public. Tr. 1543-44. The VE  
6 responded that such an individual would be unable to perform any of  
7 plaintiff's past work. Tr. 1544.

8 Next, the ALJ asked if such an individual would have  
9 transferable skills within the limitations the ALJ had described.

10 Id. The VE said yes. Tr. 1544-45. She explained that

11 occupations that would be feasible in light of  
12 transferrable skills would be an occupation known as a  
13 general office clerk. As the title would imply, that  
14 individual performs a variety of office and clerical  
15 tasks of a very general nature. That is classified in  
16 the DOT as a light semi-skilled job. I think it fits the  
17 restrictions for simple, routine and repetitive, even  
18 though the SVP is semi-skilled. It is a 3 on the SVP.

19 Tr. 1545. The VE also identified a similar administrative clerk  
20 position which was also a light, semi-skilled job. Id. As part of  
21 her testimony, the VE testified that plaintiff's transferable  
22 skills were "processing of information, the clerical processes  
23 procedures, the computer skills, filling [sic] skills, copying,  
24 using routine office equipment, telephones, computers, faxes,  
25 printers, etcetera." Tr. 1545.

26 In his decision, ALJ Say stated that the VE testified that  
27 plaintiff's past relevant work as a civil rights and equal  
28 employment opportunities claim specialist was skilled with a  
specific vocational preparation code of 6-7 and with the  
transferable skills of processing information and performing  
clerical duties such as filing and operating office equipment. Tr.

1 1383. Then, based on plaintiff's age, education, work experience,  
2 and RFC, ALJ Say found that plaintiff had work skills acquired from  
3 his past relevant work that were transferable to other occupations  
4 with jobs existing in significant numbers in the national economy.  
5 Id. He identified the jobs as general office clerk and  
6 administrative clerk. Id. Thus, he found that plaintiff was not  
7 disabled. Id.

8 Under the applicable regulation, defendant considers a  
9 claimant

10 to have skills that can be used in other jobs, when the  
11 skilled or semi-skilled work activities you did in past  
12 work can be used to meet the requirements of skilled or  
13 semi-skilled work activities of other jobs or kinds of  
work. This depends largely on the similarity of  
occupationally significant work activities among  
different jobs.

14 20 C.F.R. § 404.1568(d)(1). The regulation further provides that  
15 [t]ransferability is most probable and meaningful among  
16 jobs in which-

- 17 (i) The same or a lesser degree of skill is  
18 required;  
19 (ii) The same or similar tools and machines are  
used; and  
(iii) The same or similar raw materials, products,  
processes, or services are involved.

20 20 C.F.R. § 404.1568(d)(2). Moreover, the regulation recognizes  
21 that "[t]here are degrees of transferability of skills ranging from  
22 very close similarities to remote and incidental similarities among  
23 jobs. A complete similarity of all three factors is not necessary  
24 for transferability." 20 C.F.R. § 404.1568(d)(3).

25 Social Security Ruling 82-41 further provides that  
26 transferability is most probable and meaningful among jobs in which  
27 the same or lesser degree of skill is required because "people are  
28 not expected to do more complex jobs than they have actually



1 performed (i.e., from a skilled to a semiskilled or another skilled  
2 job, or from one semiskilled to another semiskilled job)[.]" SSR  
3 82-41, available at 1982 WL 31389, at \*5. Additionally, a skill is  
4 defined as

5 knowledge of a work activity which requires the exercise  
6 of significant judgment that goes beyond the carrying out  
7 of simple job duties and is acquired through performance  
8 of an occupation which is above the unskilled level[;]  
9 [ilt is practical and familiar knowledge of the  
10 principles and processes of an art, science or trade,  
11 combined with the ability to apply them in practice in a  
12 proper and approved manner.

13 Id. at \*2.

14 "Usually the higher the skill level, the more the potential  
15 for transferring skills increases." Id. at \*4. SSR 82-41  
16 acknowledges that a "particular job may or may not be identifiable  
17 in authoritative reference materials." Id. A vocational expert  
18 may be necessary to ascertain whether there are transferable skills  
19 from a claimant's past relevant work. Id. Additionally,  
20 occupational titles and "skeleton descriptions," while relevant,  
21 may be insufficient sources of information about a claimant's past  
22 relevant work with the claimant himself being in the best position  
23 to describe his duties. Id. As an example of transferable skills,  
24 SSR 82-41 expressly notes that

25 a semiskilled general office clerk (administrative  
26 clerk), doing light work, ordinarily is equally  
27 proficient in, and spends considerable time doing,  
28 typing, filing, tabulating and posting data in record  
books, preparing invoices and statements, operating  
adding and calculating machines, etc. These clerical  
skills may be readily transferable to such semiskilled  
sedentary occupations as typist, clerk-typist and  
insurance auditing control clerk.

29 Id. at \*3.

30 When transferability of skills is an issue, the "'ALJ is

1 required to make certain findings of fact and include them in the  
2 written decision.'" Bray v. Commissioner, 554 F.3d 1219, 1232 (9th  
3 Cir. 2009) (quoting SSR 82-41, 1982 WL 31389, at \*7). "'[T]he  
4 acquired work skills must be identified, and specific occupations  
5 to which the acquired work skills are transferable must be cited in  
6 the ALJ's decision.'" Id. (quoting SSR 82-41, 1982 WL 31389, at  
7 \*7) (ellipsis omitted).

8 Plaintiff argues that the VE's testimony regarding  
9 transferable skills, and the ALJ's findings regarding transferable  
10 skills, are not supported by substantial evidence. Plaintiff  
11 contends that there is no evidence that plaintiff performed such  
12 tasks in his past relevant work and that the two occupations  
13 identified by the VE require different tools, different work  
14 processes, different work settings, and different industries from  
15 those of plaintiff's past relevant work.

16 I find no error in the ALJ's finding that plaintiff possessed  
17 certain general office skills obtained in his past relevant work  
18 which were transferrable to the positions of general office clerk  
19 or administrative clerk. Both past relevant work positions and the  
20 two positions identified by the VE were all semi-skilled,  
21 satisfying the requirement that skills should be transferred from  
22 one skill level to an equal or lesser skill level.

23 The VE testified that she had studied the vocational materials  
24 in the record and she also requested clarification of the job tasks  
25 and duties in plaintiff's most recent position as a civil rights  
26 specialist. Tr. 1536-37. Based on his testimony, she concluded  
27 that the civil rights specialist was most properly matched to a  
28 training specialist and a contract clerk. Tr. 1539.

1           The VE then explained that plaintiff's past relevant work  
2 provided him with certain skills she specifically identified and  
3 which she testified would be transferable to the general office  
4 clerk and administrative clerk positions. Tr. 1545-46. The ALJ  
5 did not cite every skill identified by the VE, but did rely on the  
6 skills of processing information and performing clerical duties  
7 such as filing and operating office equipment as relevant  
8 transferable skills. Tr. 1383.

9           The VE's testimony provided the ALJ with substantial evidence  
10 of the skill level required in plaintiff's past relevant work and  
11 the particular skills acquired by his past relevant work  
12 activities. Although plaintiff complains that there is no evidence  
13 that he performed such tasks in his past relevant work, as SSR 82-  
14 41 itself acknowledges, semi-skilled office positions inherently  
15 carry with them proficiency in certain office-related skills such  
16 as typing, filing, working with data, and operating machinery. SSR  
17 82-41, 1982 WL 31389, at \*3. The rule also recognizes that some  
18 job skills have "universal applicability across industry lines"  
19 such that "transferability of skills to industries differing from  
20 past work experience can usually be accomplished with very little,  
21 if any, vocational adjustments[.]" SSR 82-41, 1982 WL 31389, at  
22 \*6.

23           The ALJ did not err in his determinations regarding  
24 plaintiff's transferability of skills.

#### 25 IV. Vocational Expert Testimony & DOT

26           In questioning the VE, the ALJ posed the following  
27 hypothetical: an individual, fifty-four years old, with a high  
28 school education and a bachelor's degree in sociology, with

1 plaintiff's work history who is limited to medium exertion  
2 activities such that he can lift and carry up to fifty pounds  
3 occasionally, twenty-five pounds frequently, sit up to six hours  
4 out of an eight-hour work day, stand and walk up to six hours out  
5 of an eight-hour work day, and occasionally use his left arm and  
6 left upper extremity to reach, handle, finger, and feel. Tr. 1543.  
7 The ALJ also included limitations because of mental impairments,  
8 including a limitation to "simple routine repetitive work including  
9 occasional complex tasks, not requiring frequent or repetitive  
10 interaction with co-workers or the general public." Tr. 1543-44.  
11 In response to a question by the VE to clarify the limitation  
12 regarding interaction with co-workers or the public, the ALJ  
13 indicated that superficial interaction would be all right for work-  
14 related purposes, such as giving and receiving information or  
15 instructions. Tr. 1544.

16 In response, the VE identified the previously mentioned  
17 positions of general office clerk and administrative clerk. Tr.  
18 1545. For the general office clerk, the VE testified that it was  
19 a light, semi-skilled job that fit the restrictions for simple,  
20 routine, and repetitive work, even though it was an SVP 3 position.  
21 Id. The DOT number is 209.562-010. Id. The VE described the  
22 administrative clerk position as being very similar in terms of job  
23 tasks and duties, but people performing the job would more likely  
24 be assigned to assist one individual or a small group of  
25 individuals rather than performing generally in an office. Id.  
26 The job was also classified as light and semi-skilled, with DOT  
27 number 219.362-010. Id. The VE stated that the SVP for the  
28 administrative clerk position is 4. Tr. 1546. She testified that

1 both jobs were consistent with the DOT. Id.

2 Plaintiff contends that the VE's testimony departs from the  
3 DOT and that the ALJ failed to obtain the VE's explanation for that  
4 departure. As a result, plaintiff contends that the VE's testimony  
5 does not provide substantial evidence at step five.

6 Plaintiff cites three errors in the VE's testimony. First, as  
7 plaintiff notes, the DOT classifies both the general office clerk  
8 and administrative clerk as requiring the ability to reach, handle,  
9 and finger "frequently." Dictionary of Occupational Titles (4th  
10 ed. 1991) (1991 WL 671792, 1991 WL 671953). Plaintiff contends  
11 that positions with this requirement conflict with the limitation  
12 by the ALJ to only an occasional use of the left upper extremity  
13 for reaching, handling, fingering, and feeling. Defendant responds  
14 that plaintiff overlooks the fact that the ALJ found no limitations  
15 in plaintiff's dominant right extremity and furthermore, that there  
16 is no evidence that the identified jobs require bilateral reaching,  
17 handling, or fingering. Thus, defendant contends, there is no  
18 conflict between the VE testimony and the DOT.

19 I agree with defendant because, as defendant notes, there are  
20 no limitations on plaintiff's use of his right arm and hand. And,  
21 defendant is correct that there is no evidence that the identified  
22 jobs require bilateral reaching, handling, or fingering.

23 Next, plaintiff notes that the DOT description of the  
24 administrative clerk position suggests that "dealing with people"  
25 is a requirement of the position, making the VE's testimony  
26 conflict with the DOT regarding this position. The administrative  
27 clerk job description in the DOT includes "[g]ives information to  
28 and interviews customers, claimants, employees, and sales

1 personnel" as well as "[m]ay greet and assist visitors." 1991 WL  
2 671953. It further indicates that the position requires "[d]ealing  
3 with people[.]" Id. The description of the administrative clerk  
4 position in the DOT appears to conflict with the ALJ's limitation  
5 of plaintiff to jobs not requiring frequent or repetitive  
6 interaction with co-workers or the general public.

7 The ALJ may rely on VE testimony that conflicts with or  
8 deviates from the DOT "but only insofar as the record contains  
9 persuasive evidence to support the deviation." Johnson v. Shalala,  
10 60 F.3d 1428, 1435 (9th Cir. 1995). Thus, in Johnson, the ALJ  
11 properly relied on VE testimony which conflicted with the DOT  
12 because the VE gave "persuasive testimony of available job  
13 categories in the local rather than the national market, and  
14 testimony matching the specific requirements of a designated  
15 occupation with the specific abilities and limitations of the  
16 claimant." Id.

17 SSR 00-4p, available at 2000 WL 1898704, makes clear that  
18 "[n]either the DOT nor the VE [] evidence automatically 'trumps'  
19 when there is a conflict." SSR 00-4p, 2000 WL 1898704, at \*2. In  
20 the face of a conflict, the "adjudicator must elicit a reasonable  
21 explanation for the conflict before relying on the VE [] evidence  
22 to support a determination or decision about whether the claimant  
23 is disabled." Id. "The adjudicator must resolve the conflict by  
24 determining if the explanation given by the VE [] is reasonable and  
25 provides a basis for relying on the VE or VS testimony rather than  
26 on the DOT information." Id.

27 Here, while ALJ Say asked the VE if her testimony was  
28 consistent with the DOT, the VE answered in the affirmative. As a

1 result, there is no explanation in the record for any conflict  
2 between her testimony and the DOT. Therefore, there is an  
3 unresolved issue at step five.

4 Finally, plaintiff's primary complaint about the VE's  
5 testimony conflicting with the DOT relates to plaintiff's  
6 limitation to no more than simple, routine, repetitive work  
7 including occasional complex tasks. Plaintiff notes that the  
8 general office clerk and administrative clerk positions identified  
9 by the VE carry reasoning levels of three and four, respectively.  
10 1991 WL 671792, 1991 WL 671953.

11 Reasoning level three is defined as the ability to "[a]pply  
12 commonsense understanding to carry out instructions furnished in  
13 written, oral, or diagrammatic form[, and to] [d]eal with problems  
14 involving several concrete variables in or from standardized  
15 situations." DOT, App. C, 1991 WL 688702. Reasoning level four is  
16 defined as the ability to "[a]pply principles of rational systems  
17 to solve practical problems and deal with a variety of concrete  
18 variables in situations where only limited standardization exists[,  
19 and to] [i]ntepret a variety of instructions furnished in written,  
20 oral, diagrammatic, or schedule form." Id.

21 Plaintiff contends that these reasoning requirements are  
22 incompatible with the limitations given by the ALJ to simple,  
23 routine, repetitive work with occasional complex tasks. The only  
24 appropriate positions, according to plaintiff, are those which  
25 carry a reasoning level of one, defined as the ability to "[a]pply  
26 commonsense understanding to carry out simple one- or two-step  
27 instructions[, and] [d]eal with standardized situations with  
28 occasional or no variables in or from these situations encountered

1 on the job." Id.

2 In response, defendant contends that the DOT's reasoning scale  
3 reflects an individual's formal or informal educational  
4 achievements in reasoning, math, and language, and is not a  
5 reflection of the duties or tasks an individual would be required  
6 to perform on a particular job. Defendant argues that plaintiff's  
7 educational achievement includes a college degree in sociology and  
8 transferable skills from his past relevant work.

9 While defendant makes a valid point about plaintiff's college  
10 degree and his transferable skills, the DOT's own explanation of  
11 the reasoning scale suggests that the reasoning level assigned to  
12 a job classification does in fact reflect the reasoning skills  
13 required for the worker to satisfactorily perform that particular  
14 job.

15 The DOT explains that the General Educational Development  
16 (GED) section of its job classifications has three divisions:  
17 reasoning development, mathematical development, and language  
18 development. Id. The GED section "embraces those aspects of  
19 education (formal and informal) which are required of the worker  
20 for satisfactory job performance." Id.

21 In Meissl v. Barnhart, 403 F. Supp. 2d 981 (C.D. Cal. 2005),  
22 the court explained that a "job's reasoning level . . . gauges the  
23 minimal ability a worker needs to complete the job's tasks  
24 themselves." Id. at 983 (distinguishing reasoning levels from the  
25 SVP level). "[T]he issue of a job's simplicity . . . appears to be  
26 . . . squarely addressed by the GED reasoning level ratings." Id.  
27 (internal quotation and brackets omitted). Thus, in Meissl, "[t]he  
28 one vocational consideration directly on point with the limitation



1 [to simple tasks performed at a routine pace] contained in the RFC  
2 is a job's reasoning level score." Id. Accordingly, while the  
3 reasoning scale may generally embrace an individual's educational  
4 achievements, the DOT indicates that a job classification's  
5 particular reasoning level corresponds directly to the reasoning  
6 skills required for the worker to satisfactorily perform that  
7 particular job.

8 Several courts have found level two reasoning to be consistent  
9 with the ability to do simple, routine and/or repetitive work  
10 tasks. See, e.g., Hackett v. Barnhart, 395 F.3d 1168, 1176 (10th  
11 Cir. 2005) (Level 2 reasoning more consistent with limitation to  
12 simple, routine work tasks); Meissl, 403 F. Supp. 2d at 983-85  
13 (limitation to simple, repetitive tasks closer to level 2  
14 reasoning); Flaherty v. Halter, 182 F. Supp. 2d 824, 850-51 (D.  
15 Minn. 2001). Defendant, however, cites to no cases finding a  
16 limitation to simple, routine, repetitive work consistent with a  
17 level three or four reasoning level. Furthermore, I agree with  
18 plaintiff that while the RFC in this case allows for the occasional  
19 complex task, the DOT classifications indicate that the requisite  
20 reasoning level applies to the particular job as it is regularly  
21 performed.

22 The problem here is the failure of the VE to explain how  
23 plaintiff, with the limitations given by the ALJ, can perform the  
24 jobs cited by the VE given the reasoning levels assigned to those  
25 jobs by the DOT. On the present record, there is a conflict with  
26 the VE testimony and the DOT. As explained above, in such cases  
27 the ALJ may credit the VE testimony, but only when the record shows  
28 that the ALJ has obtained a "reasonable explanation" for the

1 conflict and then explains a basis for relying on the VE rather  
2 than on the DOT. Although the VE may have been able to provide  
3 such an explanation, in this case the ALJ failed to obtain one.  
4 Thus, the ALJ's step five determination is, at this point, without  
5 support in the record.

6 In social security cases, the district court is not the  
7 factfinder and thus, I am not in a position to adjudicate the facts  
8 contained in this record. But, I echo Judge Marsh's previous  
9 statement that "[b]y no means is a finding of disability directed  
10 on the present record." Tr. 7. It is relatively apparent that for  
11 a decision to be final, at the administrative or district court  
12 level, it is essential that the ALJ on remand carefully review all  
13 regulations, dot every "i," cross every "t," and proofread his or  
14 her proposed disposition for internal consistency. The Court urges  
15 the ALJ to do this to avoid this case having to be returned by the  
16 Court to the ALJ for a third time.

17 CONCLUSION

18 The Commissioner's decision is reversed and the case remanded  
19 for further proceedings consistent with this Opinion.

20 IT IS SO ORDERED.

21 Dated this 27th day of August, 2010.

22  
23 /s/ Dennis J. Hubel

24 \_\_\_\_\_  
25 Dennis James Hubel  
26 United States Magistrate Judge  
27  
28