

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Lashaw O. v. Commissioner of Social Security

Lashaw O. · No. 24-cv-1461-W-SBC · Decided May 23, 2025

SUMMARY

This Report and Recommendation concerns judicial review under 42 U.S.C. § 405(g) of the denial of supplemental security income benefits. The court recommends reversing the Commissioner’s final decision and remanding for further proceedings, concluding that the ALJ inadequately evaluated medical opinions and the claimant’s subjective symptom testimony. The document identifies the action as Case No. 24-cv-1461-W-SBC in the Southern District of California.

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 LASHAW O., Case No.: 24-cv-1461-W-SBC 12 Plaintiff, REPORT AND 13
v. RECOMMENDATION REGARDING REVERSING FINAL DECISION OF 14
COMMISSIONER OF SOCIAL SECURITY, THE COMMISSIONER OF SOCIAL 15
SECURITY Defendant. 16 17 On August 16, 2024, Plaintiff Lashaw O.¹ commenced this action
against Defendant 18 Commissioner of Social Security for judicial review under 42 U.S.C. §
405(g) of the denial 19 of her application for supplemental security income benefits.

(ECF No. 1.) The 20 Commissioner filed the Administrative Record on October 15, 2024. (ECF
No. 8.) Plaintiff 21 filed a Motion to Remand on December 18, 2024. (ECF No. 11.) The
Commissioner filed 22 23 24 25 26 1 The Court refers to Plaintiff using only her first name and
last initial pursuant to the Court’s Civil Local Rules. See S.D. Cal. Civ. R. 7.1(e)(6)(b).

27 1 a Responsive Brief on January 17, 2025. (ECF No. 13.) Plaintiff filed a Reply Brief on 2
January 26, 2025. (ECF No. 14.) 3 This Report and Recommendation is submitted to the
Honorable Thomas J. Whelan, 4 United States District Judge, pursuant to 28 U.S.C. § 636(b) and
Civil Local Rule 72.1(d). 5 For the following reasons, the Court recommends that the final
decision of the 6 Commissioner be REVERSED, and the case REMANDED for further
proceedings.

7 I. BACKGROUND 8 A. Factual and Procedural History 9 Plaintiff was born in 1971 and last
worked in 2005 as a sign flipper. (AR 231, 310.)² 10 She has a history of two significant car
accidents in 2005 and 2009. (AR 316.)

On or about 11 June 23, 2020, Plaintiff filed an application for supplemental security income (“SSI”) under 12 the Social Security Act. (AR 17, 621.) Plaintiff alleged that she had been disabled since 13 January 5, 2009, due to issues with her lower back, upper spine, memory and brain damage, 14 right leg being shorter than her left leg, and hip replacement.

(AR 67, 231, 235.) Plaintiff’s 15 applications were denied on initial review and again on reconsideration. (AR 111-15, 124- 16 29.) An administrative hearing was conducted on September 28, 2023, by Administrative 17 Law Judge (“ALJ”) Yvette Diamond. (AR 33.) During the administrative hearing, Plaintiff 18 amended her alleged onset date to August 6, 2021. (AR 35-36.)

On November 1, 2023, the 19 ALJ issued a decision and concluded that Plaintiff was not disabled from June 23, 2020, 20 the filing date of the application, through the date of the decision. (AR 17-28.) Plaintiff 21 requested a review of the ALJ’s decision; the Appeals Council denied the request on June 22 18, 2024. (AR 1-6.) Plaintiff then commenced this action pursuant to 42 U.S.C. § 405(g).

23 24 2 “AR” refers to the Administrative Record filed on October 15, 2024. (ECF No. 8.) 25 The Court’s citations to the AR use the page references on the original document rather 26 than the page numbers designated by the Court’s Case Management/Electronic Case Filing system (“CM/ECF”).

For all other documents, the Court’s citations are to the page numbers 27 1 B. ALJ’s Decision 2 In SSI cases, the Commissioner employs a five-step analysis outlined in 20 C.F.R. 3 § 416.920 in rendering a decision on a claimant’s claim. See 20 C.F.R. § 416.920; see also 4 Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999) (describing five steps).

In this 5 case, the ALJ determined at step one that Plaintiff had not engaged in substantial gainful 6 activity since June 23, 2020, the filing date of her application. (AR 19.) At step two, the 7 ALJ found that Plaintiff’s severe impairments consisted of degenerative disc disease, 8 osteoarthritis, status post right ankle fracture, status post brain injury, and anxiety disorder.

9 (Id.) The ALJ determined at step three that Plaintiff did not have an impairment or 10 combination of impairments that met or medically equaled a listed impairment. (AR 20.) 11 The ALJ found that Plaintiff had the residual functional capacity (“RFC”) to perform: 12 [L]ight work as defined in [20 C.F.R. § 416.967(b)], except the claimant can lift and carry twenty pounds occasionally and ten pounds frequently; stand 13 and/or walk for six of eight hours; and sit for six of eight hours.

The claimant 14 can occasionally climb stairs, balance, stoop, kneel, crouch, and crawl but cannot climb ladders. She can frequently reach, handle, finger, and feel but 15 only occasionally reach overhead and below the knees.

The claimant requires 16 the option to stand for thirty minutes and then sit for five minutes as needed throughout the day while remaining on task. She cannot have concentrated 17 exposure to temperature extremes, vibration, or hazards.

The claimant can 18 perform simple, routine tasks that are not fast-paced and that have no strict production demands. She can have occasional contact with supervisors, 19 coworkers, and the public. The claimant can perform low stress work, which 20 is defined as occasional decisionmaking and occasional changes in work setting. 21 22 (AR 23.) 23 At step four, the ALJ found that Plaintiff had no past relevant work.

(AR 27.) The 24 ALJ determined at step five that Plaintiff could perform the requirements of the 25 representative occupations of mail clerk, housekeeper, and office helper. (AR 28.) 26 Therefore, the ALJ concluded that Plaintiff had not been under a disability from June 23, 27 2020, through the date of the decision. (Id.) 1 C. Disputed Issues 2 Plaintiff asserts three grounds for remand: (1) the ALJ erred in assessing the medical 3 opinion of Julianne Tran, M.D., a consultative examiner, and the prior administrative 4 medical finding by D. Subin, M.D., a state agency physician; (2) the ALJ's evaluation of 5 her testimony was not supported by clear and convincing reasons; and (3) the ALJ's step 6 five finding was not supported by substantial evidence.

(ECF No. 11 at 17-29.) 7 II. LEGAL STANDARDS 8 Section 405(g) of the Social Security Act allows unsuccessful applicants to seek 9 judicial review of a final agency decision of the Commissioner. 42 U.S.C. § 405(g). The 10 scope of judicial review is limited, however, and a decision denying benefits will be set 11 aside “only if it is not supported by substantial evidence or is based on legal error.” 12 *Ferguson v. O'Malley*, 95 F.4th 1194, 1199 (9th Cir.

2024) (citations omitted). Substantial 13 evidence means “‘more than a mere scintilla but less than a preponderance; it is such 14 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” 15 *Sandgate v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (quoting *Andrews v. Shalala*, 53 16 F.3d 1035, 1039 (9th Cir. 1995)); see also *Biestek v. Berryhill*, 587 U.S. 97, 103, 139 S. 17 Ct.

1148, 1154, 203 L. Ed. 2d 504 (2019) (“[W]hatever the meaning of ‘substantial’ in 18 other contexts, the threshold for... evidentiary sufficiency [under the substantial evidence 19 standard] is not high.”). The court must consider the entire record, including the evidence 20 that supports and detracts from the Commissioner's conclusions. *Desrosiers v. Sec'y of 21 Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.

1988). If the evidence supports more 22 than one rational interpretation, the court must uphold the ALJ's decision. *Burch v. 23 Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Ford v. Saul*, 950 F.3d 1141, 1154 (9th Cir. 24 2020).

The district court may affirm, modify, or reverse the Commissioner's decision. 42 U.S.C. § 405(g). The matter may also be remanded to the Social Security Administration 26 ("SSA") for further proceedings. Id. 27 /// 1 III. DISCUSSION 2 A. ALJ's Evaluation of Dr. Tran's and Dr. Subin's Medical Opinions 3 Plaintiff's first argument is that the ALJ erred by finding the opinion of Dr. Tran and 4 the prior administrative medical finding ("PAMF") by Dr. Subin to be "not persuasive." 5 (ECF No. 11 at 17-22.)

She contends that the ALJ failed to consider Dr. Tran's explanations 6 supporting her conclusions while selectively addressing normal objective findings. (Id. at 7 18.) Plaintiff further argues that the ALJ erred when assessing the consistency of Drs. 8 Tran's and Subin's assessments with the record as a whole. (Id. at 21.)

The Commissioner 9 counters that substantial evidence supports the ALJ's evaluation of these opinions. (ECF 10 No. 13 at 2-4.) The Court concurs with Plaintiff. 11 1. Applicable standards 12 The SSA's revised 2017 regulations apply to Plaintiff because she filed her claim 13 after March 27, 2017. See Revisions to Rules Regarding the Evaluation of Medical 14 Evidence, 82 Fed.

Reg. 5844, 5844 (Jan. 18, 2017) (codified at 20 C.F.R. pts. 404 & 416); 15 20 C.F.R. § 416.920c. Under the new regulations, an ALJ is required to evaluate medical 16 opinions and PAMFs (i.e., opinions by state agency medical consultants) by assessing their 17 "persuasiveness." See 20 C.F.R. § 416.920c(a).

In determining how "persuasive" a medical 18 source's opinions are, the "most important factors" are supportability and consistency. Id.; 19 see also id. § 416.920c(b)(2). "Supportability" is the extent to which a medical source 20 supports their opinion with relevant objective medical evidence and supporting 21 explanations. Id. § 416.920c(c)(1). "Consistency" is the extent to which a medical opinion 22 is consistent with evidence from other medical and nonmedical sources.

Id. § 23 416.920c(c)(2). The ALJ's decision must contain an explanation of how the ALJ 24 considered the supportability and consistency factors. Id. § 416.920c(c)(2). The ALJ is also 25 required to consider the treatment or examining relationship, specialization, and other 26 factors, but his or her decision need not contain an explanation of how these factors were 27 considered.

Id. § 416.920c(b)(2), (c)(1)-(5); Woods v. Kijakazi, 32 F.4th 785, 792 (9th Cir. 1 2022). The ALJ's explanation of the persuasiveness of a medical opinion must be 2 supported by substantial evidence. Woods, 32 F.4th at 792. 3 2. Dr. Tran's opinion 4 Dr. Tran conducted a comprehensive orthopedic evaluation of Plaintiff on December 5 22, 2020. (AR 316-22.) Plaintiff recounted her history of two serious motor vehicle 6 accidents during the evaluation.

She stated that in 2005, she was hit by a car while working, 7 sustained a brain injury, and was in a coma for over two weeks. (AR 316.) She received 8 traumatic brain injury rehabilitation for

approximately two years following the accident. 9 (Id.) Plaintiff also stated that in 2009, she was involved in a car accident as a passenger and 10 was ejected from the vehicle.

(Id.) She was hospitalized for two months, sustained another 11 brain injury, and underwent multiple surgeries, including open reduction internal fixation 12 surgery of her right tibia and fibula, total hip replacement, and abdominal surgery. (Id.) 13 Plaintiff was also supposed to undergo cervical spine surgery due to a spinal fracture at 14 C1-C7, necessitating the wearing of a halo device, but the surgery was deferred.³ 15 Dr. Tran's impressions consisted of: (1) status post brain injury times two; (2) history 16 of cervical spine fracture; (3) possible cognitive deficits; and (4) status post right ankle 17 fracture and right ankle posttraumatic degenerative joint disease status post right tibia 18 surgery.

(AR 321.) With respect to Plaintiff's two previous brain injuries, Dr. Tran noted 19 that Plaintiff had findings of reduced coordination of the bilateral upper extremities, on the 20 left more than right, "with residual mildly reduced balance and residual weakness of 21 bilateral upper extremities." (Id.)

The doctor explained that it was difficult to determine 22 whether Plaintiff's bilateral upper extremity weakness was due to cervical spondylosis- 23 cervical myelopathy or traumatic brain injury. (Id.) She opined that the weakness was likely 24 due to multiple factors. (Id.) Dr. Tran further noted that while she did not perform a formal 25 26 3 Dr. Tran noted that it was difficult to determine the reason for the deferral of 27 1 mental status examination, Plaintiff appeared to have some cognitive deficits.

(Id.) As to 2 Plaintiff's right ankle and right tibia, Dr. Tran indicated that Plaintiff had minimally 3 reduced range of motion in her right ankle, a mild deformity at the right distal tibia, and a 4 mildly abnormal gait. (Id.) 5 Dr. Tran's functional assessment, in relevant part, was that Plaintiff could lift and/or 6 carry ten pounds occasionally and less than ten pounds frequently "due to the weakness of 7 bilateral hands and reduced balance," could stand and/or walk for at least two hours in an 8 eight-hour workday, did not have a sitting limitation, and did not require an assistive 9 device.

(AR 322.) She opined that Plaintiff should not drive due to her bilateral hand 10 weakness, reduced balance, and cognitive deficit. (Id.) 11 3. Dr. Subin's prior administrative medical finding 12 Dr. Subin, the state agency physician who reviewed Plaintiff's initial claim, 13 proffered an opinion regarding Plaintiff's RFC that closely followed Dr. Tran's functional 14 assessment.

(AR 78-79.) Dr. Subin opined, in relevant part, that Plaintiff could lift and/or 15 carry ten pounds occasionally and ten pounds frequently, stand and/or walk for slightly less 16 than two hours, and sit for six hours in an eight-hour workday. (Id.) 17 4. ALJ's finding 18 The ALJ found the opinions of Drs. Tran and Subin to be "not persuasive." She 19 reasoned: 20 These examiners opined that

the claimant can lift and/or carry ten pounds, stand and/or walk for two of eight hours, and sit for six of eight hours with 21 other postural and environmental limitations.

These are not persuasive. They 22 are not supported by the state examiners' own review of the record, noting that the claimant was able to heel and toe walk during the consultative 23 examination with negative straight leg raise testing. They are also not 24 supported by the claimant exhibiting normal lumbar range of motion during the consultative examination with negative Faber testing.

They are also not 25 consistent with the recent records in 2023 where the claimant exhibited full 26 shoulder range of motion with good movement in all her extremities. Finally, 27 1 they are no[t] consistent with the claimant reporting in 2023 that she was not using an assistive device. 2 3 (AR 26 (citing Exhibits 1A/8 (AR 73), 3A/7-8 (AR 96-97), 4F/6 (AR 319), 6F/10 (AR 4 338), 6F/7 (AR 335)).)4 5 5.

Analysis 6 a. Supportability 7 As set forth above, "supportability" is the extent to which a medical source supports 8 their opinion with relevant objective medical evidence and supporting explanations. 20 9 C.F.R. § 416.920c(c)(1).

Here, the ALJ relied solely on various normal objective findings 10 in determining that Dr. Tran's and Dr. Subin's opinions were not supported. Specifically, 11 the ALJ noted that Plaintiff was able to heel and toe walk, had a negative straight leg test, 12 had normal range of motion in her lumbar spine, and had a negative FABER test. (AR 26.) 13 Based on the Court's review of the record, however, this constitutes an impermissible 14 cherry-picking of the evidence.

See *Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014) 15 (finding that the ALJ improperly cherry-picked an examining doctor's observations instead 16 17 18 4 In this same paragraph, the ALJ also stated that she found the opinion of M. Adamo, 19 M.D., the state agency physician who reviewed Plaintiff's claim on reconsideration, not 20 persuasive, but she erroneously indicated that Dr. Amado found that Plaintiff could lift and/or carry ten pounds, stand and/or walk for two of eight hours, and six for six of eight 21 hours.

(AR 26.) Dr. Amado actually found that Plaintiff could lift and/or carry twenty 22 pounds occasionally and ten pounds frequently, stand and/or walk for six hours in an eight- hour workday, and sit for six hours in an eight-hour workday. (AR 101.)

The ALJ adopted 23 Dr. Amado's functional assessment in her decision and thus her determination that this 24 doctor's opinion was not persuasive was error. (See AR 23 (setting forth ALJ's formulation of Plaintiff's RFC).)

However, because the error was inconsequential to the ALJ's ultimate 25 decision, it was harmless. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) 26 ("harmless error...

exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination") (internal quotation marks and 27 1 of considering them in the context of the doctor's diagnoses and observations of 2 impairment).

For example, the straight leg test is used to assess lumbosacral nerve root 3 irritation⁵, the FABER (Flexion ABduction External Rotation) test is used to detect hip, 4 lumbar spine, or sacroiliac joint pathology⁶, and normal lumbar range of motion relates to 5 a person's movement in the lower back.

The Court is unable to discern how these findings 6 render Dr. Tran's opinion unsupported. And while the record does reflect that Plaintiff 7 could heel and toe walk, it also reflects the abnormal finding of reduced balance with 8 tandem walking. (AR 317.) 9 Dr. Tran was aware of the normal objective findings cited by the ALJ, as they arose 10 during her physical examination of Plaintiff, (see AR 317, 319-20), and rendered her 11 opinion despite those findings as her examination also yielded abnormal findings, which 12 was not addressed by the ALJ.

(See AR 317-18, 320-21 (reflecting tandem walking at a 13 slow pace with mildly reduced balance, decreased cervical range of motion, reduced 14 coordination in Plaintiff's bilateral upper extremities, and weakness in the bilateral upper 15 extremities). "ALJs must review the whole record; they cannot cherry-pick evidence to 16 support their findings." *Bostwick v. Colvin*, Case No. 13cv1936-LAB (MDD), 2015 WL 17 12532350, at *2 (S.D.

Cal. Mar. 30, 2015) (citing *Holohan v. Massanari*, 246 F.3d 1195, 18 1207 (9th Cir. 2001)); see also 20 C.F.R. § 416.929(a) (providing that the ALJ is required 19 to consider all available evidence, including medical history, medical signs, laboratory 20 findings, and claimant's statements about the effect of her symptoms).

The ALJ's cherry- 21 picking of the evidence undercuts her supportability determination. 22 23 24 25 5 See Nat'l Library of Medicine, <https://www.ncbi.nlm.nih.gov/books/NBK539717/> 26 [<https://perma.cc/MQA6-99QL>] (last visited May 16, 2025). 6 See Nat'l Library of Medicine, <https://pmc.ncbi.nlm.nih.gov/articles/PMC5159634/> 27 1 Furthermore, and more importantly, "supportability" refers not only to the extent to 2 which a medical opinion is supported by relevant objective evidence, but also the extent to 3 which a medical source provides relevant supporting explanations to support their opinion.

4 See 20 C.F.R. § 416.1520(c)(1). Dr. Tran, who is board certified in physical medicine and 5 rehabilitation, provided a detailed explanation for her impressions and functional 6 assessment after completing a thorough physical examination. (AR 317-22.) She explained 7 that her basis for finding that Plaintiff could lift and/or carry ten pounds occasionally and 8 less than ten pounds frequently was "due to the weakness of [Plaintiff's] bilateral hands 9 and reduced balance." (AR 322.)

The doctor elaborated that it was difficult to determine 10 whether Plaintiff's bilateral upper extremity weakness was caused by her cervical spine 11 impairments or traumatic brain injury and was likely due to a combination of reasons. (Id.) 12 She opined that Plaintiff should never drive due to her bilateral hand weakness, reduced 13 balance, and cognitive deficit.

(Id.) 14 The ALJ neglected to discuss Dr. Tran's supporting explanation in her decision, (see 15 AR 26), and did not explain how the evidence she cited in finding Dr. Tran's opinion 16 unsupported (i.e., Plaintiff's negative straight leg test, normal lumbar range of motion, 17 negative FABER testing), is germane to Plaintiff's upper extremity weakness and mildly 18 reduced balance, which served as the primary bases for Dr. Tran's functional assessment.

19 The Court additionally notes that under the SSA's regulations, the medical opinion of a 20 medical source who has received advanced education and training to become a specialist 21 may be more persuasive about medical issues related to her area of specialty than the 22 medical opinion of a medical source who is not a specialist in the relevant area of specialty.

23 See 20 C.F.R. § 416.920(c)(4). While the ALJ was not required to articulate how she 24 evaluated Dr. Tran's status as a board-certified specialist in physical medicine and 25 rehabilitation, she was required to consider it (see 20 C.F.R. § 416.920(a)), and the Court 26 is unable to discern from the ALJ's decision that she did so. 27 1 In sum, the ALJ failed to adequately consider the supportability factor of the 2 opinions of both Dr. Tran and Dr. Subin, whose opinion regarding Plaintiff's lifting and 3 carrying, standing and walking, and sitting abilities closely followed Dr. Tran's functional 4 assessment.

(AR 78-79.) 5 b. Consistency 6 "Consistency" is the extent to which a medical opinion is consistent with evidence 7 from other medical and nonmedical sources. 20 C.F.R. § 416.920(c) (2). The ALJ found 8 that Dr. Tran's and Dr. Subin's opinions were inconsistent with other evidence in the 9 record. (AR 26.) Specifically, the ALJ noted that recent records from 2023 reflected that 10 Plaintiff exhibited full shoulder range of motion with good movement in all her extremities 11 and that she was not using an assistive device.

(AR 26 (citing AR 335, 338).) Substantial 12 evidence does not support the ALJ's finding of inconsistency. Although one of the medical 13 records cited by the ALJ, a treatment note dated August 3, 2023, indicates that Plaintiff 14 had full range of motion in her shoulders, (see AR 338), it is not clear to the Court that this 15 finding, observed by Plaintiff's pain management specialist who was treating Plaintiff for 16 low back, bilateral shoulder, and right wrist pain, had any bearing on or was inconsistent 17 with Dr. Tran's findings, which were made in the context of Plaintiff's previous brain 18 injuries.

(Compare AR 338 with AR 321-22.) Additionally, the ALJ's determination that 19 Dr. Tran's and Dr. Subin's opinions were inconsistent with Plaintiff's 2023 records 20 reflecting that she did not

use an assistive device, (see AR 335), does not comport with the 21 record because Plaintiff was also not using an assistive device during her examination with 22 Dr. Tran (see AR 317.)

23 Based on the foregoing, the Court finds that the ALJ's determination that Dr. Tran's 24 and Dr. Subin's opinions were not persuasive is not supported by substantial evidence. See 25 Woods, 32 F.4th at 792 (providing that an ALJ cannot discredit a medical source's opinion 26 as unsupported or inconsistent without providing an explanation supported by substantial 27 evidence).

1 B. ALJ's Evaluation of Subjective Symptom Testimony 2 Plaintiff's second contention is that the ALJ failed to articulate clear and convincing 3 reasons to reject her subjective limitations. (ECF No. 13 at 22-26.) The Court agrees. 4 1. Applicable standards 5 It is up to the ALJ "to determine credibility, resolve conflicts in the testimony, and 6 resolve ambiguities in the record." Lambert v. Saul, 980 F.3d 1266, 1277 (9th Cir.

2020) 7 (quoting Treichler v. Comm'r Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014)). An 8 ALJ engages in a two-step analysis to determine the extent to which a claimant's report of 9 symptoms must be credited.

First, the ALJ must decide whether the claimant has presented 10 objective medical evidence of an underlying impairment which could reasonably be 11 expected to produce the pain or other symptoms alleged. Garrison v. Colvin, 759 F.3d 995, 12 1014 (9th Cir. 2014); see also SSR 16-3p, 2017 WL 5180304, at *3 (Oct. 25, 2017); 20 13 C.F.R. § 416.929(b).

Second, the ALJ evaluates the intensity and persistence of the 14 claimant's symptoms to determine the extent to which they limit the ability to perform 15 work-related activities. SSR 16-3p, 2017 WL 5180304, at *3; 20 C.F.R. § 416.929(c). 16 When the ALJ finds that a claimant is not malingering, "the ALJ can reject the claimant's 17 testimony about the severity of her symptoms only by offering specific, clear and 18 convincing reasons for doing so." Garrison, 759 F.3d at 1014-15; see also Lambert, 980 19 F.3d at 1277; Smartt v. Kijakazi, 53 F.4th 489, 499 (9th Cir.

2022) ("The standard isn't 20 whether our court is convinced, but instead whether the ALJ's rationale is clear enough 21 that it has the power to convince."). This requires the ALJ to "specifically identify the 22 testimony [from a claimant] she or he finds not to be credible and... explain what evidence 23 undermines that testimony." Lambert, 980 F.3d at 1277 (citing Treichler, 775 F.3d at 24 1102).

25 2. Plaintiff's subjective symptom testimony 26 At the administrative hearing, Plaintiff testified that she had not worked since before 27 2005 and had not applied for any jobs because she had not been "able to either stand or sit 1 or I've been in a lot of pain." (AR 40-41.)⁷ She saw her primary care provider about every 2 six weeks and was receiving trigger point injections from an orthopedist.

(AR 42-43.) The 3 only medication she was taking was hepatitis C medication. (AR 44.) She was waiting to 4 see another orthopedic doctor for her ankle and lower back. (Id.) Plaintiff testified that she 5 could perform household chores only “[a] little at a time” and could not vacuum or sweep 6 as doing so hurt her lower back. (AR 46-47.) She was able to prepare simple foods and 7 could go to the grocery store.

(AR 47.) For exercise, she walked about a block at a time 8 and then rested. (AR 48.) Socially, she spent time watching television with friends or going 9 to their houses. (AR 49.) She was able to read on her phone up to four hours a day and 10 went to the library about three times a month, where she read books and socialized. (AR 11 50-51.) She stated that she could lift about ten pounds.

(AR 51.) When grocery shopping, 12 she was able to lean on the cart and shop for half an hour before needing to stop and rest 13 for five minutes. (AR 52-53.) She estimated that she could stand or walk for fifteen minutes 14 before needing to sit down and could sit for fifteen minutes before needing to get up. (Id.) 15 3. ALJ’s findings 16 The ALJ determined that Plaintiff satisfied step one of the two-step analysis.

(AR 17 24.) At the second step, the ALJ stated, “As for [Plaintiff’s] statements about the intensity, 18 persistence, and limiting effects of her symptoms, they are not entirely consistent with the 19 objective medical evidence, the claimant’s longitudinal medical history, and some of the 20 claimant’s own endorsements.” (Id.) She explained: 21 22 23 7 Plaintiff also testified that she had recently been incarcerated.

(AR 41-42; see also 24 AR 71 (recounting a telephone call with the SSA on July 28, 2020, during which “[Claimant] stated that she was incarcerated for the past year at [Geo] Jail, a Federal Jail 25 in San Diego.”); AR 310 (reflecting Plaintiff’s report to Dr. Jessica Durr, the psychological 26 evaluator, that she had a history of six to seven arrests for trafficking and drug possession, had been incarcerated for three years total, and most recently had been arrested for drug 27 1 Specifically, while the claimant testified that she can only lift ten pounds, she wrote in her function report that she was able to lift twenty pounds.

She 2 reported in 2023 that she was able to walk without an assistive device with 3 full range of motion despite pain. Additionally, she ambulated independently and demonstrated full strength in her bilateral upper and lower extremities in 4 2023. Further, despite her history of brain injury, she demonstrated low 5 average cognitive functioning during the consultative examination.

6 (AR 24 (citations omitted); see also AR 26-27 (repeating the above) (citations omitted).) 7 She continued: 8 Turning to the claimant’s medical treatment and activities of daily living, the 9 claimant testified that she was taking pain medication during the relevant 10 period. Regarding her activities of daily living, the claimant testified that she is able to perform light household

chores, do some laundry, make simple meals, go to the grocery store and push a cart for thirty minutes, and go to the library.

She also testified that she will sometimes go on walks. As will be discussed below, the ALJ failed to set forth specific, clear and convincing reasons supported by substantial evidence in the record to discount Plaintiff's testimony. 4. Analysis a. Inconsistency between hearing testimony and function report In her Adult Function Report completed on August 4, 2020, Plaintiff wrote that she could lift twenty pounds.

(AR 246, 248.) During her hearing testimony on September 28, 2023, Plaintiff stated, in response to the ALJ's question, "How many pounds have you been able to lift for the last two years?" that she could lift ten pounds. (AR 51.)

The ALJ, noting that Plaintiff had indicated that she could lift twenty pounds in her function report, asked about the discrepancy. (AR 51-52.) Plaintiff explained, "Maybe that's when I was younger... [s]ince I've been getting older, I've noticed... I've gotten weaker and I would say it's changed in the past two years, three years." (AR 52.)

She continued, "It's pretty hard to determine how much something weighs when you're lifting it." (Id.) In her decision, the ALJ did not discuss Plaintiff's explanation in finding that this apparent inconsistency between the function report and hearing testimony negatively affected Plaintiff's credibility, and also disregarded that her own question during the hearing called for the amount Plaintiff could lift for the past two years whereas the function report had been completed over three years prior to the hearing.

(AR 51, 248.) The inconsistency between Plaintiff's statements, given three years apart, regarding the amount she could lift does not have the "power to convince" the Court that this was a reasonable basis for finding Plaintiff's symptom testimony not believable. See *Smartt*, 53 F.4th at 499 ("The standard isn't whether our court is convinced, but instead whether the ALJ's rationale is clear enough that it has the power to convince.").

Thus, this did not constitute a clear and convincing reason to discount Plaintiff's testimony. b. Ability to walk without an assistive device The ALJ's next reason for discounting Plaintiff's subjective symptom testimony was that Plaintiff "reported in 2023 that she was able to walk without an assistive device with full range of motion despite pain." (AR 24 (citing AR 335); see also AR 26 (citing AR 335).)

Plaintiff argues that the ALJ did not explain how this report was inconsistent with her testimony that she was limited in her ability to stand and walk. (ECF No. 11 at 24.) The Commissioner contends that Plaintiff's testimony that she needed to lean on a shopping cart and rest after shopping was undermined by her medical records in which Plaintiff did not report or demonstrate the need for an assistive device.

(ECF No. 13 at 5.) 23 Plaintiff's reported ability to walk without an assistive device does not constitute a 24 specific, clear, and convincing reason to discount her testimony. First, other than stating 25 that she needs to lean on a shopping cart while grocery shopping, the record does not reflect 26 that Plaintiff ever claimed to require an assistive device.

Second, the ALJ's statement on 27 this topic is convoluted and mischaracterizes the evidence. The medical record cited by the 1 ALJ does not indicate that Plaintiff was "able to walk without an assistive device with full 2 range of motion despite pain," as the ALJ claims. (See AR 24.) Rather, the treatment note 3 cited by the ALJ is of a telemedicine visit on September 5, 2023, in which Plaintiff reported 4 simply that "she does not use [an] assistive device for ambulation." (AR 335.)

The 5 reference to "range of motion" does not refer to Plaintiff's ability to walk but rather to 6 Plaintiff's ability to complete range of motion of her extremities without difficulty. (Id.) 7 Third, the Commissioner's interpretation of the ALJ's statement—that Plaintiff reporting 8 the lack of the need of an assistive device to her medical provider conflicted with her 9 hearing testimony that she leans on a grocery cart—is not explicitly set forth in the ALJ's 10 decision and appears to be an impermissible post hoc rationale.

See *Burrell v. Colvin*, 775 11 F.3d 1133, 1138 (9th Cir. 2014) ("We are constrained to review the reasons the ALJ 12 asserts.") (citation omitted). 13 The Court finds that Plaintiff's ability to walk without an assistive device is neither 14 a clear nor convincing reason to discount Plaintiff's subjective symptom testimony. 15 c. Full strength in bilateral upper and lower extremities 16 Next, the ALJ discounted Plaintiff's subjective symptom testimony because she 17 found it was inconsistent with the objective medical evidence, including that Plaintiff 18 "demonstrated full strength in her bilateral upper and lower extremities in 2023." (AR 24, 19 citing AR 338.)

This statement refers to a treatment note dated August 3, 2023, indicating 20 that on physical examination, Plaintiff showed 5/5 strength in her bilateral upper and lower 21 extremities in all muscle groups. (AR 338.) 22 Although an ALJ may not disregard a claimant's testimony "solely because it is not 23 substantiated affirmatively by objective medical evidence," (see *Robbins v. Soc.*

Sec. 24 Admin., 466 F.3d 880, 883 (9th Cir. 2006)), the ALJ may consider whether the alleged 25 symptoms are consistent with the medical evidence as one factor in her evaluation. See 26 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040 (9th Cir. 2007).

Here, the ALJ accurately 27 referred to medical evidence in the record to support her finding that Plaintiff demonstrated 1 full strength in her bilateral upper and lower extremities in 2023. Despite this, the Court 2 does not find that this constituted a clear and convincing reason to discount Plaintiff's pain 3 and other subjective symptom allegations because Plaintiff also exhibited abnormal 4 objective findings.

For example, Plaintiff's cervical x-rays taken on December 22, 2020, 5 showed straightening of the normal cervical curvature and moderate degenerative disease 6 at C5-6. (AR 315.) Notably, Dr. Tran, the consultative examiner, opined that Plaintiff's 7 history of cervical spine fracture might account for the weakness in Plaintiff's bilateral 8 upper extremities.

(AR 321.) During Dr. Tran's physical examination, Plaintiff exhibited 9 reduced coordination in her bilateral upper extremities, mildly reduced balance, and 10 weakness in the bilateral upper extremities. (AR 320-21.) Repeat cervical x-rays taken on 11 March 23, 2023, showed that Plaintiff's moderate multilevel spondylosis had progressed 12 since cervical x-rays taken on April 25, 2019.

(AR 342.) Objective evidence also confirmed 13 Plaintiff's reports of prior brain injury, neck fracture, and tibia and fibula fractures 14 following her car accidents. (See AR 321 ("There is evidence of a well healed surgical 15 incision at the top of the head in the upper frontal region likely [from] surgery for the 16 previous traumatic brain injury."); AR 342 (cervical x-rays showing "chronic appearing 17 osseous deformity at the dens possibly related to old trauma"); AR 315 (right ankle x-rays 18 revealing "previous fractures in the distal third of the tibia and fibula with internal 19 fixation").

Thus, this is not a case in which the medical evidence contained only normal 20 findings. Rather, the objective medical evidence showed both normal and abnormal 21 findings. The Court finds that the objective medical evidence in the record both supports 22 and detracts from Plaintiff's subjective symptom allegations and thus does not constitute a 23 clear and convincing reason to reject her testimony regarding the severity of her symptoms.

24 See Lambert, 980 F.3d at 1277. 25 d. Low average cognitive functioning 26 The ALJ also discounted Plaintiff's subjective symptom testimony on the basis that 27 "she demonstrated low average cognitive functioning during the consultative 1 examination." (AR 24.)

Here, the ALJ is referring to the psychological evaluation 2 performed by Jessica Durr, Ph.D. on October 26, 2020. (AR 308-13.) Dr. Durr conducted 3 a mental status examination and administered the Wechsler Adult Intelligence Scale IV 4 and Wechsler Memory Scale tests. (AR 310-12.)

The psychologist indicated that Plaintiff's 5 "overall cognitive ability on testing was in the low average range." (AR 312.) Dr. Durr's 6 opinion related only to Plaintiff's alleged mental impairments and not her physical 7 impairments. (AR 312-13.) 8 Plaintiff's low average cognitive functioning could constitute a clear and convincing 9 reason for the ALJ to discount her allegations regarding her mental impairments.

However, 10 low average cognitive functioning does not, absent further explanation by the ALJ, 11 constitute a reasonable basis for finding Plaintiff's physical symptoms not believable. See 12

Smartt, 53 F.4th at 499 (providing that the ALJ's rationale must have the "power to convince" the court); see also Ferguson, 95 F.4th at 1200 ("But an exam showing 'no neurological defects' and a 'normal mood,' at best, provides a reason to discount Ferguson's testimony about his neurological deficits and mood."); see also *Bogner v. 16 Comm'r Soc.*

Sec. Admin., No. CV-22-01908-PHX-DMF, 2023 WL 4734120, at *7 (D. 17 Ariz. July 25, 2023) ("Because Plaintiff's symptoms arise... not from a cognitive impairment, Plaintiff's intact cognitive functioning is not a clear and convincing reason to discount Plaintiff's symptom testimony."). 20 e. Daily activities 21 Finally, the ALJ found that Plaintiff's activities of daily living undermined her 22 allegations of work-precluding disability.

(AR 24.) The parties disagree on whether the 23 ALJ properly relied on Plaintiff's daily activities to discount her pain allegations. (See ECF 24 No. 11 at 24; ECF No. 13 at 6; ECF No. 14 at 9.) 25 Daily activities may form the basis of an adverse credibility determination when 26 evidence concerning the claimant's daily activities contradicts her testimony, or when the 27 activities meet the threshold for full-time work.

Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 1 2007); see also *Smith v. Kijakazi*, 14 F.4th 1108, 1114 (9th Cir. 2021). "One does not need 2 to be 'utterly incapacitated' in order to be disabled." *Vertigan v. Halter*, 260 F.3d 1044, 3 1050 (9th Cir. 2001). Nevertheless, "[e]ven where [a claimant's] activities suggest some 4 difficulty functioning, they may be grounds for discrediting the claimant's testimony to the 5 extent that they contradict claims of a totally debilitating impairment." *Molina v. Astrue*, 6 674 F.3d 1104, 1113 (9th Cir.

2012) (citations omitted) (superseded on other grounds by 7 20 C.F.R. § 404.1502(a)); see also *Lingenfelter*, 504 F.3d at 1040 (stating that an ALJ may 8 properly consider "whether the claimant engages in daily activities inconsistent with the 9 alleged symptoms" when assessing credibility). 10 Here, the ALJ made a reasonable determination based on specific, clear, and 11 convincing evidence that Plaintiff's daily activities were inconsistent with the alleged 12 severity of her limitations.

Plaintiff's daily activities, including light household chores, 13 laundry, preparing simple meals, going to the grocery store and pushing a cart for thirty 14 minutes, going to the library, and going on walks are inconsistent with her testimony that 15 she could not work due to pain and an inability "to either stand or sit." (AR 40-41.)

For 16 example, regarding her library visits, Plaintiff testified that she goes for two hours at a time 17 and likes to "[r]ead books, look at books, [and] make copies" and socializes by "speak[ing] 18 with people at the library." (AR 51, 55-56.) She also testified that she enjoyed going to the 19 beach for three hours with friends to feed wild birds. (See AR 49-50 ("[I]f somebody else 20 calls me and says yeah, let's go to the beach, then I will go.").)

She was able to take walks 21 for exercise, though she indicated that she had to stop and rest after going about a block. 22 (AR 48.) 23 Plaintiff's daily activities constituted a clear and convincing reason to discredit her 24 testimony regarding the functional limitations caused by her symptoms. 25 /// 26 /// 27 /// 1 f. Summary 2 Although Plaintiff's daily activities constituted a clear and convincing reason to 3 discount her symptom testimony, the remainder of the reasons articulated by the ALJ are 4 not clear and convincing.

The ALJ also did not sufficiently identify specific testimony from 5 Plaintiff she found not to be credible and the evidence undermining that testimony. See 6 Lambert, 980 F.3d at 1277. In sum, the Court finds that the ALJ failed to provide sufficient 7 clear and convincing reasons to discount Plaintiff's symptom allegations as required. See, 8 e.g., Garrison, 759 F.3d at 1014-15.

9 C. ALJ's Step Five Determination 10 Plaintiff next raises multiple issues concerning the ALJ's determination at step five, 11 in which the ALJ relied on vocational expert ("VE") testimony that Plaintiff could perform 12 the representative occupations of housekeeper, mail clerk, and office helper. Plaintiff 13 argues that (1) the VE failed to establish that a person with the need to sit for five minutes 14 every thirty minutes could remain on task and perform 80% of housekeeper jobs, (2) she 15 cannot perform the job of mail clerk, which requires reasoning level three, due to her 16 limitation to "simple, routine tasks," and (3) the office helper job has only 6,800 jobs in 17 the national economy which does not represent a sufficient number of jobs.

(ECF No. 11 18 at 26-29.) The Commissioner contends that Plaintiff has waived any challenge to the 19 housekeeper job, and that even if she had preserved her argument for appeal, the ALJ was 20 entitled to rely on the VE's testimony. (ECF No. 13 at 7-9.)

The Commissioner concedes 21 that Plaintiff's limitation to simple work precludes her from performing the mail clerk job 22 but argues that the number of national jobs in the economy for the remaining two positions 23 constitutes a significant number of jobs in the national economy. (Id. at 9-10.)

Thus, the 24 Commissioner asks the Court to affirm the ALJ's findings at step five. (Id. at 10.) 25 The Court finds that Plaintiff did not forfeit her challenge to the housekeeper job, 26 and that the ALJ erred by failing to ask the VE to reconcile an apparent or obvious conflict 27 between her testimony and the requirements for the housekeeper job in the Dictionary of 1 Occupational Titles ("DOT").

In light of this determination, the ALJ failed to meet her 2 burden to show that Plaintiff can perform work that exists in significant numbers in the 3 national economy. 4 1. Applicable standards 5 At step five in the sequential evaluation, the Commissioner has the burden "to show 6 that the claimant can perform some other work that exists in 'significant numbers' in the 7 national economy, taking into consideration the claimant's residual functional capacity, 8 age,

education, and work experience.” Tackett, 180 F.3d at 1100; see also 20 C.F.R. § 9 416.920(g)(1). “In making this determination, the ALJ relies on the DOT, which is the 10 SSA’s ‘primary source of reliable job information’ regarding jobs that exist in the national 11 economy.” Zavalin v. Colvin, 778 F.3d 842, 845-46 (9th Cir.

2015) (citations omitted); see 12 also SSR 00-4p, 2000 WL 1898704, at *2 (Dec. 4, 2000). In addition to the DOT, the ALJ 13 may obtain VE testimony about specific occupations that a claimant can perform 14 considering the limitations set forth in her RFC. Zavalin, 778 F.3d at 846. 15 Occupational evidence provided by a VE should generally be consistent with the 16 occupational information contained in the DOT.

See SSR 00-4p, 2000 WL 1898704, at *2. 17 If the VE’s opinion that the claimant “is able to work conflicts with, or seems to conflict 18 with, the requirements listed in the [DOT], then the ALJ must ask the expert to reconcile 19 the conflict before relying on the expert to decide if the claimant is disabled.” Gutierrez v. 20 Colvin, 844 F.3d 804, 807 (9th Cir.

2016) (citing SSR 00-4p, 2000 WL 1898704, at *2). 21 “[T]he conflict must be ‘obvious or apparent’ to trigger the ALJ’s obligation to inquire 22 further.” Lamear v. Berryhill, 865 F.3d 1201, 1205 (9th Cir. 2017) (citing Gutierrez, 844 23 F.3d at 808).

The focus of the conflict inquiry is the “essential, integral, or expected” job 24 requirements set forth in the DOT. Gutierrez, 844 F.3d at 808. 25 /// 26 /// 27 /// 1 2. VE’s testimony 2 The ALJ in this case asked the VE to consider the following hypothetical: 3 For our first hypothetical, please assume an individual who has the physical ability to do the following, with the claimant’s age, education, and work 4 experience, and these limitations.

Someone who can lift and carry 20 pounds 5 occasionally, 10 pounds frequently, stand or walk for six out of eight hours, sit for six out of eight hours.... And someone who is limited to simple, 6 routine tasks that are not fast paced and that have no strict production 7 demands[.] 8 9 (AR 59.)

The VE responded that such a person could perform the jobs of housekeeper 10 (DOT 323.687-014) (177,000 jobs in the national economy), marker (DOT 209.587-034) 11 (136,000 jobs in the national economy), and mail clerk (DOT 209.687-026) (11,000 jobs 12 in the national economy). (AR 60.)

The ALJ continued: 13 For a second hypothetical, please assume the following limitation in addition to those in hypothetical #1. Someone who requires the option to change 14 positions between sitting and standing as follows: stand for a half hour and 15 then sit for five minutes as needed throughout the workday while remaining on task. 16 17 (Id.)

The VE testified that the individual could still perform the mail clerk job, with no 18 erosion to the job numbers; the marker position would be replaced with an office helper 19 (DOT 239.567-

010) (6,800 jobs in the national economy); and there would be a reduction 20 of 20% in the number of housekeeper jobs, with approximately 140,000 jobs available after 21 the reduction.

(AR 60-61.) 22 The VE further testified, in response to questioning by Plaintiff's hearing counsel, 23 that these jobs would be eliminated if the individual needed to sit and stand for five minutes 24 every thirty minutes at will. (AR 63-64.) 25 3. Housekeeper job 26 Plaintiff argues that the VE failed to establish that a person with the need to sit for 27 five minutes every thirty minutes, as set forth in the RFC formulated by the ALJ, could 1 remain on task and perform 80% of housekeeper jobs.

She contends that unskilled work 2 like housekeeping does not ordinarily have the flexibility of a sit/stand option and that the 3 VE's testimony conflicted with the DOT. (ECF No. 11 at 26-28.) 4 a. Plaintiff's argument not forfeited 5 The Commissioner first responds that "'when claimants are represented by counsel, 6 they must raise all issues and evidence at their administrative hearings in order to preserve 7 them on appeal' or those issues are forfeited." (ECF No. 13 at 8 (citing *Meanel v. Apfel*, 8 172 F.3d 1111, 1115 (9th Cir.

1999)).) In *Meanel*, the Ninth Circuit reasoned that an ALJ, 9 rather than the court, is in the best position to resolve conflicts between a claimant's 10 evidence and statistical evidence provided by a VE. *Meanel*, 172 F.3d at 1115; see also 11 *Shaibi v. Berryhill*, 883 F.3d 1102, 1103 (9th Cir. 2017) (holding that a Social Security 12 claimant who wishes to challenge the factual basis of a VE's estimate of the number of 13 available jobs in the economy "must, at a minimum, raise the issue of the accuracy of the 14 expert's estimates at some point during administrative proceedings to preserve the 15 challenge on appeal in federal district court").

16 Here, the Commissioner argues that Plaintiff forfeited her right to challenge the VE's 17 testimony regarding the housekeeper job because she did not challenge the VE's testimony 18 before either the ALJ or the Appeals Council. (ECF No. 13 at 7-8 (citing AR 63-64 19 (plaintiff's counsel's questioning of VE administrative hearing); AR 299-300 (plaintiff's 20 counsel's letter requesting review of the ALJ's decision by the Appeals Council)).)

If 21 Plaintiff's argument regarding the availability of housekeeping positions relied solely on 22 "job numbers" evidence, the Court agrees that she would have forfeited this argument on 23 appeal by failing to raise it at the administrative level. See *Shaibi*, 883 F.3d at 1109 (relying 24 on the principle set forth in *Meanel* that "an agency, its experts, and its [ALJs] are better 25 positioned to weigh conflicting evidence than a reviewing court").

But the thrust of 26 Plaintiff's argument here regarding the VE's testimony about the availability of 27 housekeeping jobs relates not to a "job numbers" issue but rather to a conflict between the 1 VE's testimony and the DOT (see ECF No. 11 at 26-28), which does not require the Court 2 to weigh conflicting evidence. "[A]n ALJ is required to investigate and resolve any 3 apparent

conflict between the VE's testimony and the DOT, regardless of whether a 4 claimant raises the conflict before the agency." Shaibi, 883 F.3d at 1109.

Thus, Plaintiff's 5 argument is not forfeited. 6 b. Obvious or apparent conflict 7 In her decision, the ALJ adopted the VE's testimony that Plaintiff could perform the 8 job of housekeeper, of which she stated there were 177,000 jobs existed in the national 9 economy. (AR 27.)⁸ The DOT describes the duties of a "Cleaner, Housekeeping" as 10 follows: 11 Cleans rooms and halls in commercial establishments, such as hotels, restaurants, clubs, beauty parlors, and dormitories, performing any 12 combination of following duties: Sorts, counts, folds, marks, or carries linens.

13 Makes beds. Replenishes supplies, such as drinking glasses and writing supplies. Checks wraps and renders personal assistance to patrons. Moves 14 furniture, hangs drapes, and rolls carpets. 15 See DOT 323.687-014, 1991 WL 672783. A housekeeper also performs the duties 16 described under "Cleaner (any industry) I Master Title." Id. A "master title" describes 17 18 19 20 8 The ALJ's reference to 177,000 housekeeping jobs in the national economy represented the full number of such jobs available.

(AR 28, 59-60.) But because the ALJ 21 included a requirement in Plaintiff's RFC that she be permitted to stand for thirty minutes 22 and then sit for five minutes as needed throughout the day while remaining on task (see AR 23), the ALJ should have reduced the number of available housekeeping jobs that 23 Plaintiff could perform to 140,000. (AR 60-61 (reflecting VE's testimony that the total 24 number of housekeeping jobs available, 177,000, would be reduced by 20%, to approximately 140,000, for a person who needed to sit for five minutes every thirty 25 minutes).)

Because 140,000 jobs constitute a significant number of jobs in the national 26 economy, however, this error, on its own, is harmless. See *Gutierrez v. Comm'r Soc. Sec.*, 740 F.3d 519, 528-29 (9th Cir. 2014) (upholding ALJ's finding that 25,000 jobs constituted 27 1 "work duties that are common or potentially common to a number of jobs." See DOT, 2 Master Titles and Definitions, Cleaner I, 1991 WL 645969.

The master definition for a 3 "Cleaner I" is: 4 Maintains premises of commercial, institutional, or industrial establishments, office buildings, hotels and motels, apartment houses, retirement homes, 5 nursing homes, hospitals, schools, or similar establishments in clean and 6 orderly condition, performing the following duties: Cleans rooms, hallways, lobbies, lounges, rest rooms, corridors, elevators, stairways, and locker rooms 7 and other work areas.

Sweeps, scrubs, waxes, and polishes floors, using 8 brooms and mops and powered scrubbing and waxing machines. Cleans rugs, carpets, upholstered furniture, and draperies, using vacuum cleaner. Dusts 9 furniture and equipment. Polishes metalwork, such as fixtures and fittings. 10

Washes walls, ceiling, and woodwork. Washes windows, door panels, and sills. Empties wastebaskets, and empties and cleans ashtrays.

Transports trash 11 and waste to disposal area. Replenishes bathroom supplies. Replaces light 12 bulbs. 13 14 (Id.) 15 Plaintiff maintains that the ALJ should have asked the VE to give a clear explanation 16 for reducing the number of housekeeping jobs with a sit/stand option by only 20% as a 17 conflict existed between the VE's testimony and the description of the housekeeping job 18 in the DOT.

(ECF No. 11 at 27-28.) The Court agrees. When the VE's "opinion that the 19 applicant is able to work conflicts with, or seems to conflict with, the requirements listed 20 in the [DOT], then the ALJ must ask the expert to reconcile the conflict before relying on 21 the expert to decide if the claimant is disabled." Gutierrez, 844 F.3d at 807 (citing SSR 00- 22 4p, 2000 WL 1898704, at *2).

In this case, after the VE testified that Plaintiff could perform 23 the jobs of housekeeper, office helper, and mail clerk, the ALJ asked the expert whether 24 her testimony was consistent with the DOT and Selected Characteristics of Occupations. 25 (AR 62.) She replied, "Yes, Your Honor, to the extent that it can be." (Id.) She explained 26 that the DOT does not discuss sit/stand options, and that that portion of her testimony was 27 based on her professional experience, education, and training.

(Id.) 1 An ALJ is not absolved of the duty to reconcile conflicts merely because a VE 2 responds yes when asked if her testimony is consistent with the DOT. Lamear, 865 F.3d at 3 1205 n.3 (citing Moore v. Colvin, 769 F.3d 987, 990 (8th Cir. 2014)). If a conflict is 4 "obvious or apparent," this triggers the ALJ's obligation to inquire further. Id. at 1205. 5 Again, the focus of the conflict inquiry is the "essential, integral, or expected" job 6 requirements set forth in the DOT.

Gutierrez, 844 F.3d at 808. Here, the "essential, integral, 7 or expected" tasks in the DOT definition of the housekeeper job, which encompasses the 8 duties of a cleaner I, include maintaining the premises of commercial, institutional, or 9 industrial establishments, such as office buildings, hotels, motels, and the like; cleaning 10 multiple rooms and work areas, including hallways, lobbies, lounges, and restrooms; 11 sorting and carrying linens; making beds; sweeping and mopping floors; vacuuming floors 12 and furniture; dusting; and polishing.

See DOT, Master Titles and Definitions, Cleaner I, 13 1991 WL 645969; DOT 323.687-014, 1991 WL 672783. These tasks present an "obvious 14 or apparent" conflict with Plaintiff's requirement that she sit for five minutes every thirty 15 minutes. Based on common sense and real-world experience, it is likely and foreseeable 16 that a housekeeper would have to stand and/or walk to complete the majority of these tasks 17 and would be unable to sit for five minutes every thirty minutes.

See Gutierrez, 844 F.3d 18 at 808 (applying common experience to evaluation of DOT job description); Lamear, 865 19 F.3d at 1205-06 (same).⁹ Given the VE's testimony that the housekeeper job would be 20 21 22 9 The Ninth Circuit has not addressed in a published decision the question of whether an apparent conflict with the DOT arises when the DOT is silent as to a particular mental 23 or physical requirement.

Unpublished decisions go both ways. Compare *Dewey v. Colvin*, 24 650 F. App'x 512, 514 (9th Cir. 2016) (finding no conflict between sit/stand option and DOT because "the DOT is silent on whether the jobs in question allow for a sit/stand 25 option") with *Coleman v. Astrue*, 423 F. App'x 754, 756 (9th Cir. 2011) (finding an 26 apparent conflict between VE testimony and the DOT where the claimant needed to alternate sitting, standing, and walking on an hourly basis, and the VE testified that the 27 1 eliminated if an individual needed to sit and stand for five minutes every thirty minutes at 2 will, (see AR 63-64), it was particularly important for the ALJ to resolve this conflict.

3 Because there was an obvious or apparent conflict between the VE's testimony and 4 the DOT description of the housekeeper position, the ALJ was required to question the VE 5 about how Plaintiff could perform this job in light of the requirement in her RFC that she 6 sit for five minutes every thirty minutes. See SSR 00-4p, 2000 WL 1898704, at *4.

The 7 ALJ must then explain in her decision how she resolved the conflict. *Id.* "The procedural 8 requirements of SSR 00-4p ensure that the record is clear as to why an ALJ relied on a 9 vocational expert's testimony, particularly in cases where the expert's testimony conflicts 10 with the [DOT]." *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir. 2007); see also 11 *Zavalin*, 778 F.3d at 846 ("The ALJ's failure to resolve an apparent inconsistency may 12 leave us with a gap in the record that precludes us from determining whether the ALJ's 13 decision is supported by substantial evidence.").

14 In this case, the ALJ erred by failing to ask the VE about the conflict between her 15 testimony that Plaintiff could perform 80% of housekeeping jobs and the DOT's 16 description of the job duties for this position. Without this inquiry, the Court cannot 17 determine from the record whether the ALJ's decision is supported by substantial evidence. 18 Thus, the error is not harmless.

See *Tommasetti*, 533 F.3d at 1038. 19 /// 20 21 22 DOT, involve sitting most of the time or walking or standing to a significant degree), and *Buckner-Larkin v. Astrue*, 450 F. App'x 626, 628-29 (9th Cir. 2011) (finding "conflict" 23 between at-will sit/stand option and DOT was adequately addressed by VE based on VE's 24 own research and experience). District courts in the Ninth Circuit are divided on this issue.

See *Wester v. Colvin*, Case No. SACV 14-1212-JPR, 2015 WL 4608139, *5 (C.D. Cal. 25 July 31, 2015) (collecting cases). This Court believes a case-by-case approach is appropriate. See *id.* (“[W]hen a VE relies on a functional limitation about which the DOT is silent or unclear, a conflict may exist depending upon the circumstances of the case.”). 27 1 4. Mail clerk job 2 The Commissioner concedes that because Plaintiff’s RFC limited her to “simple, 3 routine tasks,” she could not perform the job of mail clerk, which requires Level 3 4 reasoning.

(See ECF No. 13 at 9-10 (citing *Zavalin*, 778 F.3d at 847 and *Rounds v. Comm’r*, 5 807 F.3d 996, 1003 (9th Cir. 2015)).) The ALJ’s reliance on this job at step five was error. 6 5. Office helper job 7 Plaintiff concedes that the office helper job supports the ALJ’s step five 8 determination. (ECF No. 11 at 29.) She argues, however, that with only 6,800 jobs 9 nationally, it is insufficient on its own to constitute a significant number of jobs in the 10 national economy.

(*Id.*) Plaintiff is correct. 11 The Ninth Circuit has not created a “bright-line rule” for what constitutes a 12 “significant number” of jobs. *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). 13 However, “a comparison to other cases is instructive.” *Id.* Plaintiff cites to *Gutierrez v. 14 Comm’r Soc. Sec.*, 740 F.3d 519 (9th Cir. 2014), to support her argument.

In *Gutierrez*, the 15 Ninth Circuit upheld the ALJ’s finding that 25,000 jobs constituted a sufficient number but 16 stated that it was a “close call.” *Id.* at 529. The Ninth Circuit provided further guidance in 17 *Randazzo v. Berryhill*, 725 F. App’x 446 (9th Cir. 2017). There, the circuit court 18 determined that “the remaining 10,000 electrical accessories assembler jobs found by the 19 expert may not amount to a significant number of jobs in the national economy.” *Id.* at 448; 20 see also *De Rivera v. Berryhill*, 710 F. App’x 768, 769 (9th Cir.

2018) (“it is not clear that 21 [5,000 national jobs] are sufficient.”). 22 In the case at hand, after discounting the housekeeper and mail clerk occupations, 23 the remaining 6,800 office helper jobs available in the national economy is not a sufficient 24 number to support the ALJ’s Step 5 determination. 25 D. Remedy 26 Plaintiff requests that the Court reverse the Commissioner’s decision and find her 27 disabled.

(ECF No. 11 at 29.) She requests in the alternative that the Court remand for 1 additional proceedings. (*Id.*) The decision whether to remand for further proceedings or for 2 immediate payment of benefits is within the discretion of the court. 42 U.S.C. § 405(g); 3 *Treichler*, 775 F.3d at 1099. A remand for an immediate award of benefits is appropriate 4 only in rare circumstances.

See *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015). 5 “If additional proceedings can remedy defects in the original administrative proceedings, 6 a social security case should be remanded.” *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th 7 Cir. 1981); see also *Garrison*, 759 F.3d at 1019. 8 The evidence in this case does not conclusively establish that Plaintiff is disabled 9 under the Social Security disability regulations.

Rather, the evidence must still be evaluated properly. Additional proceedings can remedy the defects in the ALJ's decision. Accordingly, remand for additional proceedings is appropriate.

IV. CONCLUSION

For the reasons stated above, the Court recommends that the final decision of the Commissioner be REVERSED, and the case REMANDED for further proceedings consistent with this opinion.

This Report and Recommendation will be submitted to the Honorable Thomas J. Whelan, United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties on or before June 6, 2025.

The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before June 13, 2025. The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. See *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir.

1998).
Dated: May 23, 2025
By: FG. Hon. Steve B. Chu
United States Magistrate Judge