TRANSFERABLE SKILLS, DICTIONARY OF OCCUPATIONAL TITLES

IN THE UNITED STATES DISTRICT COURT
FOR THE XXXXX DISTRICT OF XXXXX

FIRSTNAME LASTNAME,	)	
	)	
Plaintiff,	)	No. XXXXX
	)	
v.	)	
	)	PLAINTIFF'S BRIEF
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

I. Standard of Review

Under 42 U.S.C. § 405(g), a court reviews whether substantial evidence supports the Commissioner's final decision—and its essential subsidiary factual findings—and whether the Commissioner applied the proper legal criteria in reaching her decision. 42 U.S.C. § 405(g); Reddick v. Chater, 157 F.3d at 715, 720 (9th Cir. 1998).

"Substantial evidence" (1) may be less than a preponderance of the evidence; (2) must be more than a scintilla of evidence; and (3) is such relevant evidence as a reasonable mind might accept to support a conclusion. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Richardson v. Perales, 402 U.S. 389, 401 (1971); Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 618-19 (1966); Reddick, 157 F.3d at 720.

To determine whether substantial evidence supports the Commissioner's decision, a court reviews the whole record, Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992), including evidence that detracts from the Commissioner's findings and decision, Universal Camera Corp. v. NLRB, 340 U.S. 456, 487-88 (1951). A court must affirm the Commissioner's factual findings even if the court

believes that substantial evidence would support alternative findings. Arkansas, 503 U.S. at 113. But a court should adopt a finding suggested by the claimant if the record requires those findings. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996); see also 42 U.S.C. § 405(g) (sentence four) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.").

When it reviews an ALJ's decision, a court evaluates the reasons the ALJ gave for his or her decision, not post hoc rationalizations for the decision. See Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

II. *Background*: The ALJ Rendered a Step-Five Decision.

A. Disability is Evaluated With the Five-Step Sequential Evaluation.

A claimant is disabled if he or she has a medical impairment(s) that prevented him or her from performing substantial gainful activity for at least twelve consecutive months or that can be expected to prevent him or her from performing substantial gainful activity for at least twelve consecutive months or result in death. 42 U.S.C. § 423(d). A five-step sequential evaluation is used to adjudicate claims of disability:

> [Step one] (b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
>
> [Step two] (c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.
>
> [Step three] (d) When your impairment(s) meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.
>
> [Step four] (e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or

> on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
>
> [Step five] (f) Your impairment(s) must prevent you from doing any other work.
>
> (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

20 C.F.R. § 404.1520(b)-(f)(1) (2003) (internal brackets added).

In order to be entitled to DIB, a claimant must be disabled as of the date his or her insured status expires. Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). Lastname's insured status did not expire before the ALJ rendered his decision. (Tr. at 38.) Therefore, his insured status is not at issue.

B. There Are Three Types of Step-Five Decisions.

Because the ALJ rendered a step-five decision (Tr. at 30), Lastname sets forth the law of step five. At step five, the Commissioner has the burden "to show that the claimant can perform some other work that exists in 'significant numbers' in the national economy, taking into consideration the claimant's residual functional capacity, age, education, and work experience." Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999); 20 C.F.R. § 404.1520(f) (2003) (step five). There are three ways the Commissioner may carry this burden and each involves, to some degree, the use of the Medical-Vocational Guidelines (Grid). 20 C.F.R. Pt. 404, Subpt. P, App. 2 (2003) (Grid). First, if a claimant's residual functional capacity and vocational characteristics correspond precisely to a Grid rule, the Grid rule is used to "direct" a finding of "disabled" or "not disabled." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00 (2003). The second and third ways both use the Grid as a "framework" for decisionmaking. 20 C.F.R. Pt. 404, Subpart P, App. 2, § 200.00(e)(2) (2003). The second way uses the Grid as a "framework" without vocational-expert testimony, and the third way uses the Grid as a "framework" with vocational-expert testimony. When a claimant's ability to perform a full range of work at a specific exertional level is "significantly" diminished, the fact-finder must use the Grid as a framework with vocational-expert testimony to make a correct decision. Tackett, 180 F.3d at 1101-04; Reddick, 157 F.3d at 729.

C. The ALJ Rendered a Step-Five Decision.

At step one, the ALJ found that Lastname had not engaged in substantial gainful activity since his alleged onset date of March 19, 1998. (Tr. at 38.) 20 C.F.R. § 404.1520(b) (2003) (step one). Lastname's work activity after his alleged onset date were unsuccessful work attempts. (Tr. at 33-34.) At step two, the ALJ determined that Lastname had a "severe" impairment. (Tr. at 34, 38.) 20 C.F.R. § 404.1520(c) (2003) (step two). At step three, the ALJ concluded that Lastname did not have an impairment or combination of impairments that met or equaled a listed impairment. (Tr. at 38.) 20 C.F.R. § 404.1520(d) (2003) (step three). At step four, the ALJ made a residual functional capacity finding, i.e., an assessment of the most a claimant can do despite the total limiting effects of all his or her impairments. (Tr. at 39.) 20 C.F.R. § 404.1520(e) (2003) (step four); 20 C.F.R. § 404.1545 (2003) (defining "residual functional capacity"). Lastname could "perform sedentary-level activity on a sustained basis, with an option to periodically change from one position to the other (sit/stand). He has monocular vision which does not preclude his ability to operate a motor vehicle." (Tr. at 39.) Based on this residual functional capacity, Lastname could not do his past relevant work as a repair miner. (Tr. at 34, 39.) At step five, the ALJ relied on vocational-expert testimony to decide that Lastname was not disabled. (Tr. at 39.) 20 C.F.R. § 404.1520(f) (2003) (step five). Lastname could work as a information clerk, telephone solicitor, and dispatcher. (Tr. at 39.).

III. Argument

A. *Transferable Skills*: The Vocational Expert's Testimony Did Not Carry the Commissioner's Step-Five Burden.

At step five, an ALJ must take into account a claimant's work experience. 20 C.F.R. §§ 404.1520(f), 404.1560(c), 404.1561 (2003). There are three levels of work experience: unskilled, semi-skilled, and skilled. See 20 C.F.R. § 404.1568 (2003) (defining skill levels of work). As matters of law and logic, if an ALJ finds that a claimant has no transferable skill—and is thus necessarily limited to unskilled work—the ALJ cannot find the claimant not disabled based on the claimant's ability to do semi-skilled or skilled work. Substantial evidence does not support the

ALJ's step-five decision because the ALJ found Lastname not disabled based on his ability to do semi-skilled work and skilled work even though the ALJ recognized that Lastname had no transferable skills. (Tr. at 39.) To show this, Lastname first describes Specific Vocational Preparation (SVP) and discusses the importance of the Dictionary of Occupational Titles (DOT).[1]

1. SVP 1 and 2 Jobs are Unskilled.

"Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." DOT, App. C.[2] Social Security Ruling (SSR) 00-4p explains that "unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9 in the DOT." SSR 00-4p;[3] see also Terry v. Sullivan, 903 F.2d 1273, 1276-77 (9th Cir. 1990) (explaining SVP).

2. The *DOT* is Important But Not Binding.

The DOT is an important, but not binding, vocational resource. 20 C.F.R. § 404.1566(d)(1) (2003); SSR 00-4p. When an ALJ relies on vocational-expert testimony at step five, the vocational expert's testimony may depart from the DOT if there is "persuasive evidence" to justify the departure, see Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995), and when there is a "reasonable explanation" for any departure, see SSR 00-4p.

3. The 3 *DOT* Jobs the Vocational Expert Identified are Semi-Skilled or Skilled.

The three DOT jobs the vocational expert identified are either semi-skilled (telephone solicitor and information clerk) or skilled (dispatcher):

Job	*DOT*	SVP
information clerk	237.367-022	4 (semi-skilled)
dispatcher	249.167-014	5 (skilled)
telephone solicitor	299.357-014	3 (semi-skilled)

[1] Employment and Training Admin., U.S. Dep't of Labor, Dictionary of Occupational Titles (4th ed. rev. 1991), available at http://www.oalj.dol.gov/libdot.htm.
[2] Available at http://www.oalj.dol.gov/public/dot/refrnc/dotappc.htm.
[3] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html.

(Tr. at 80, 83-84.) DOT, Nos. 237.367-022, 249.167-014, 299.357-014 (copy attached).

4. The ALJ Reasonably *Rejected* the Vocational Expert's Testimony That Lastname Had Transferable Skills.

In his formal findings, the ALJ concluded that Lastname did not have "any acquired work skills, which are transferable to . . . skilled or semiskilled work . . . ." (Tr. at 39.) The ALJ thus reasonably rejected the vocational expert's testimony that Lastname had transferable skills. (Tr. at 82.) Lastname had only one past relevant job: working underground as a repair miner. (Tr. at 119.) He lifted heavy rocks, timbers, and steel beams; operated heavy equipment; and crawled in very low areas. (Tr. at 114.) Because no reasonable ALJ would find that Lastname acquired transferable skills as a repair miner to do a semi-skilled or skilled sedentary work such as a desk job, the ALJ correctly found that Lastname did not have transferable skills.[4]

5. Because Lastname Had No Skills Transferable to Sedentary Work, He Could Not Do the 3 Jobs Identified.

Because the ALJ found that Lastname did not have transferable skills to semi-skilled or skilled sedentary work (Tr. at 39), the ALJ should not have found Lastname not disabled based on his ability to do semi-skilled work as an information clerk and telephone solicitor and skilled work as a dispatcher (Tr. at 39). In other words, the vocational expert's testimony did not carry the Commissioner's step-five burden. While the vocational expert testified, e.g., that Lastname had skills transferable to work as a telephone solicitor (Tr. at 82), the ALJ found no such transferable skills (Tr. at 39).

The ALJ's error can be seen from other perspectives.

a. Incomplete Hypothetical Question

The erroneously ALJ stated that the vocational expert "was asked to assume an individual of the claimant's . . . work history." (Tr. at 38.) Before asking his hypothetical question, the ALJ

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[4] The vocational expert seemed to base her testimony that Lastname had transferable skills on Lastname's work after his March 1998 alleged onset date. (Compare Tr. at 82 (vocational expert's testimony), with id. at 66 (Lastname's testimony).) The ALJ found that Lastname did not perform substantial gainful activity after March 1998. (Tr. at 33-34, 38.) Therefore, Lastname did not acquire skills at work after March 1998.

did not instruct the vocational expert that Lastname had no transferable skills. (Tr. at 77.) In his hypothetical question, the ALJ did not ask the vocational expert to take into account the fact that Lastname did not have transferable skills. (Tr. at 77.) And, after he asked his hypothetical question, the ALJ did not tell the vocational expert that Lastname did not have transferable skills. (Tr. at 77-86.) Thus, contrary to the ALJ's contention, the ALJ did not in his hypothetical question or elsewhere inform the vocational expert that Lastname was restricted to unskilled work or, equivalently, that Lastname did not have transferable skills to sedentary work. (Tr. at 76-86.) Therefore, the ALJ's hypothetical question was incomplete, omitting the essential fact that Lastname did not have any transferable skills to sedentary work. (Tr. at 77.)

b. Inconsistency With the *DOT*

Because the ALJ did not ask the vocational expert to assume that Lastname was restricted to unskilled work (Tr. at 77) and because the vocational expert believed that Lastname had transferable skills (Tr. at 82), the Court should not assume that the vocational expert believed that she could identify only unskilled jobs. However, even assuming arguendo that the vocational expert believed that she was supposed to identify only unskilled jobs, the vocational expert did not provide "persuasive evidence," see Johnson, 60 F.3d at 1435, or a "reasonable explanation" for the departure of her testimony from the DOT with respect to the skill level of work. The DOT jobs the vocational expert identified were either semi-skilled (telephone solicitor and information clerk) or skilled (dispatcher). (Tr. at 80, 83-84.) DOT, Nos. 237.367-022, 249.167-014, 299.357-014. The vocational expert did not explain expressly why the DOT erroneously categorized work as a information clerk and telephone solicitor as semi-skilled and work as a dispatcher as skilled. (Tr. at 76-86.) According to the vocational expert herself, work as a telephone solicitor utilized "transferable skills" (Tr. at 82), and half of the dispatcher jobs identified required "computer skills" (Tr. at 84).

6. The ALJ Did Not Satisfy His "Affirmative Responsibility" Under SSR 00-4p to Ask About the *DOT*.

The ALJ made a related but distinct error with the respect to the vocational expert's testimony and the DOT. Under SSR 00-4p, the ALJ had an "affirmative responsibility" to ask the vocational expert about the consistency of her testimony with the DOT. SSR 00-4p.[5] The ALJ did not ask any questions about the DOT. Only Lastname's attorney inquired about the DOT. (Tr. at 76-86.)

B. *Part-Time Work*: The Vocational Expert's Testimony Did Not Carry the Commissioner's Step-Five Burden.

The vocational expert's testimony did not carry the Commissioner's step-five burden because the vocational expert identified part-time and full-time jobs when part-time jobs are irrelevant at step five as a matter of law.

1. At Step Five, Only Full-Time Work is Relevant.

The Commissioner has broad authority to govern through regulation the adjudication of claims for Disability Insurance Benefits. See 42 U.S.C. § 405(a); Bowen v. Yuckert, 482 U.S. 137, 145 (1987). By regulation, a claimant's "residual functional capacity" concerns his ability to work on a "regular and continuing basis." 20 C.F.R. § 404.1545(b)-(c) (2003). "Courts grant an agency's interpretation of its own regulations considerable legal leeway." Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 1269 (2002). The Commissioner uses Social Security Rulings to interpret the meaning of regulations and requires by regulation its adjudicators to follow such rulings. 20 C.F.R.

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[5] The ruling mandates:

> When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the DOT. In these situations, the adjudicator will:
>
> Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and
>
> If the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

SSR 00-4p.

§ 402.35(b) (2002); see also Holohan v. Massanari, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001) (discussing SSRs). Through SSR 96-8p and SSR 96-9p, the Commissioner defines residual functional capacity on a "regular and continuing basis" as work "8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p[6] (footnote omitted); see also SSR 96-9p (same).[7] Lastname will refer to working eight hours per day, five days per week as "full-time" work. Cf. also Rollins v. Massanari, 261 F.3d 853, 859 (9th Cir. 2001) (acknowledging SSR 96-8p's full-time work rule).[8] (The Ninth Circuit has applied provisions of SSR 96-8p other than its full-time work rule. See Reed v. Massanari, 270 F.3d 838, 843 (9th Cir. 2001) (applying SSR 96-8p rule concerning step four); Pinto, 249 F.3d at 845 (same).)

2. The Vocational Expert Did Not Distinguish Between Full-Time and Part-Time Jobs.

The ALJ relied on the vocational expert's testimony to decide that Lastname was not disabled at step five where only full-time work is relevant. (Tr. at 7-8.) SSR 96-8p; SSR 96-9p. Yet, the vocational expert did not distinguish between part-time and full-time jobs, admitting that she identified both part-time and full-time jobs. (Tr. at 79, 83.) Substantial evidence does not support the ALJ's uncritical reliance on the vocational expert's testimony. (Tr. at 38-39.) Because Lastname's ability to work part-time at step five is irrelevant, see SSR 96-8p; SSR 96-9p, the vocational expert's testimony is tainted by the inclusion of an unknown number of part-time jobs. When the vocational expert admitted that she did not distinguish between part-time and full-time

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[6] Available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-08-di-01.html.

[7] Available at htmlhttp://www.ssa.gov/OP_Home/rulings/di/01/SSR96-09-di-01.html. There is a narrow exception to the rule that residual functional capacity concerns full-time work. If at step four a claimant had part-time past relevant work, the claimant may be found not disabled based on his ability to do his part-time past relevant work. SSR 96-8p n.2. This exception does not apply here because Lastname proved he could not do his past relevant work and thus reached step five. (Tr. at 39.)

[8] See also Myers v. Apfel, 238 F.3d 617, 620 & n.2 (5th Cir. 2001) (applying SSR 96-8p's full-time work rule); Bladow v. Apfel, 205 F.3d 356, 360 (8th Cir. 2000) (same); Ross v. Apfel, 218 F.3d 844, 849 (8th Cir. 2000) (same); Kelley v. Apfel, 185 F.3d 1211, 1214 (11th Cir. 1999) (same).

jobs, the ALJ should have concluded that the vocational expert's testimony did not carry the Commissioner's step-five burden or, at a minimum, have asked the vocational expert if she could provide job-incidence data for full-time jobs only. SSR 96-8p; SSR 96-9p.

C. *Limited Range of Sedentary Work*: The Vocational Expert's Testimony Did Not Carry the Commissioner's Step-Five Burden.

In order for a vocational expert's testimony to carry the Commissioner's step-five burden to produce evidence of the existence of jobs that a claimant can do given his or her vocational profile (age, education, and work experience) and residual functional capacity, the vocational expert must answer an accurate hypothetical question. See Gamer v. Secretary of Health and Human Servs., 815 F.2d 1275, 1279 (9th Cir. 1987) (a hypothetical question must be complete and accurate).[9] In this case, the vocational expert's testimony did not carry the Commissioner's step-five burden because the ALJ found that Lastname could do a limited range of sedentary work while the vocational expert identified jobs that required a full range of sedentary work. (Compare Tr. at 37-39 (ALJ's finding of a limited range of sedentary work) with id. at 80 (vocational expert's assumption of a full range of sedentary work).) To show this, Lastname must first describe the requirements of a full range of sedentary work.

[9] Accord Rose v. Shalala, 34 F.3d 13, 19 (1st Cir. 1994) (requiring an accurate hypothetical question); Totz v. Sullivan, 961 F.2d 727, 730 (8th Cir. 1992) (same); Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir.1991) (same); Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987) (same); Varley v. Secretary of Health & Human Servs., 820 F.2d 777, 779 (6th Cir. 1987) (same); De Leon v. Secretary of Health and Human Servs., 734 F.2d 930, 935-36 (2d Cir. 1984) (same).

1. A Full Range of Sedentary Work Requires Prolonged Sitting.

"Sedentary" work is defined by regulation.[10] 20 C.F.R. § 404.1567(a) (2003). 20 C.F.R. § 404.1567(a) (2003). According to SSR 83-11, a "full range" of work refers to an ability to do "all or substantially all" of the exertional demands of work at a specific exertional level.[11] SSR 96-9p (emphasis omitted); SSR 83-11.[12] A full range of "sedentary" work—and less than a full range of sedentary work—is described in several SSRs: SSR 96-9p, SSR 85-15,[13] SSR 83-14,[14] SSR 83-12,[15] and SSR 83-10.[16]

Sitting, Standing, and Walking: A full range of sedentary work requires the ability to do prolonged sitting of two hours at one time. SSR 96-9p; see also SSR 83-12; SSR 83-10. A full

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[10] Section 404.1567(a) states that sedentary

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

20 C.F.R. § 404.1567(a) (2003).

[11] Among other rulings, SSR 96-9p explains the difference between exertional and nonexertional limitations:

> Exertional capacity addresses an individual's limitations and restrictions of physical strength and defines the individual's remaining ability to perform each of seven strength demands: Sitting, standing, walking, lifting, carrying, pushing, and pulling. An exertional limitation is an impairment-caused limitation of any one of these activities.
>
> Nonexertional capacity considers any work-related limitations and restrictions that are not exertional. Therefore, a nonexertional limitation is an impairment-caused limitation affecting such capacities as . . . balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, and feeling. . . .

SSR 96-9p.

[12] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR83-11-di-02.html.
[13] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR85-15-di-02.html.
[14] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR83-14-di-02.html.
[15] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR83-12-di-02.html.
[16] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR83-10-di-02.html.

range of sedentary work also requires standing and/or walking for a total of about six hours in an eight-hour workday and intermittent standing for about two hours in an eight-hour workday. SSR 83-10. Social Security Ruling 96-9p addresses when a claimant cannot do the prolonged sitting that a full range of sedentary work requires, i.e., sitting hours before a normal mid-morning break, lunch, and mid-afternoon break:

> Alternate sitting and standing: An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded. The extent of the erosion will depend on the facts in the case record, such as the frequency of the need to alternate sitting and standing and the length of time needed to stand. The [residual functional capacity] assessment must be specific as to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a vocational resource in order to determine whether the individual is able to make an adjustment to other work.

SSR 96-9p.

2. The ALJ Found That Lastname Could Not Do the Prolonged Sitting That a Full Range of Sedentary Work Requires.

The ALJ found that Lastname could do "sedentary" work with an additional limitation concerning sitting and standing: the "option to periodically change from one position to the other (sit/stand)." (Tr. at 39; see also id. at 37-38 (same).) The ALJ thus concluded that Lastname could not do the prolonged sitting that a full range of sedentary work requires. If the ALJ believed that Lastname could do the prolonged sitting that a full range of sedentary work requires, the ALJ would not have stated repeatedly that Lastname had an additional limitation for a sit/stand option beyond the normal requirements of a full range of sedentary work. (Tr. at 37-39.)

3. The Vocational Expert Identified Jobs Requiring a Full Range of Sedentary Work.

In his hypothetical question, the ALJ asked the vocational expert to assume that a person could "stand and sit for a period of time but require[d] the option to periodically change from one position to the other." (Tr. at 77.) Importantly, the vocational expert did not understand the ALJ's hypothetical question as assuming that a person could not do the sitting that a full range of

sedentary work requires. Instead, the vocational expert stated that jobs she identified required the ability to do a "full range of sedentary work." (Tr. at 80 ("Q All right. And in order to do any of these jobs that you've outlined for us, he would have to be able to do the full range of sedentary work, in order to do those jobs, is that correct? A Yes.").) Because the vocational expert identified jobs that required the ability to do a "full range" of sedentary work (Tr. at 80), the vocational expert did not provide evidence of jobs accepting the ALJ's residual functional capacity finding that Lastname could do less than a full range of sedentary work (Tr. at 37-39).

The vocational expert also testified that she assumed that a person needed to change positions frequently. (Tr. at 80.) If the vocational expert believed that a full range of sedentary permitted changes in position from sitting to standing at intervals of less than two hours, the vocational expert was mistaken. See SSR 96-9p (a full range of sedentary work requires prolonged sitting of two-hours at one time).

4. *Alternatively*, the ALJ's Residual Functional Capacity Finding and Hypothetical Question Are Unreviewable.

There is another way of understanding the ALJ's error. When an ALJ finds that a claimant cannot do the prolonged sitting that a full range of sedentary work requires, it is vital to specify the "frequency of the individual's need to alternate sitting and standing." SSR 96-9p. The ALJ's residual functional capacity finding that Lastname needed the "option to periodically change from one position to the other (sit/stand)" should have specified how long Lastname needed to sit at one time, e.g., at will (as frequently as Lastname wished), ten minutes, fifteen minutes, or thirty minutes.

If the Commissioner argues that the ALJ found that Lastname could sit or stand at will, i.e., that Lastname could change positions from sitting to standing whenever he wanted, Lastname will agree that indeed he needed to be able to change positions whenever he wanted. (Tr. at 59 ("I have to be able to get up and down when I want").) Yet even if the ALJ found that Lastname needed to be able to sit or stand whenever he wanted, the Commissioner will highlight the defect in the vocational expert's testimony. The vocational expert did not herself assume that the jobs she

identified accommodated a need to change positions from sitting to standing at will, but instead required the ability to perform a full range of sedentary work (Tr. at 80), which requires prolonged sitting of two hours at one time, see SSR 96-9p.

D. *Failure to Cite Precise Publication*: The Vocational Expert's Testimony Did Not Carry the Commissioner's Step-Five Burden.

This is an unusual case in that the vocational expert gave exact job-incidence data, e.g., that there were 175,000 dispatcher jobs in the United States and 2,400 dispatcher jobs in Arizona, but the vocational expert was unable to cite the precise source for this data. (Tr. at 78, 84-85.) This raises the obvious question: from where did the vocational expert obtain her exact job-incidence data? When a vocational expert specifies exact job-incidence data but is unable to identify the precise publication from which he or she obtained the data, the vocational expert's testimony does not carry the Commissioner's step-five burden. In such case, the vocational expert's job-incidence data is founded on the vocational expert's memory, but the vocational expert's memory is so deficient that the vocational expert is unable to remember the precise data source for his or her testimony. If a vocational expert cannot remember or provide the precise source for his or her data—the name of the publication, the date of the publication, and the relevant page number—then the vocational expert's recollection of data from that unknown source is not substantial evidence.

E. *Listing 1.13*: The ALJ Did Not Evaluate Expressly Listing 1.13.

A claimant is disabled at step three if his or her condition meets or equals the requirements of a Listed impairment. 20 C.F.R. § 404.1520(d) (2003) (step three). The ALJ rendered his decision on April 11, 2001. (Tr. at 40.) At that time, Listing 1.13 provided:

> 1.13 Soft tissue injuries of an upper or lower extremity requiring a series of staged surgical proceedings within 12 months after onset for salvage and/or restoration of major function of the extremity, and such major function was not restored or expected to be restored within 12 months after onset.

20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, § 1.13 (2001). Listing 1.08, a clarifying regulation effective October 21, 2002, is substantially similar:

> 1.08 Soft tissue injury (e.g., burns) of an upper or lower extremity, trunk, or face and head, under continuing surgical management, as defined in 1.00M, directed toward the salvage or restoration of major function, and such major function was not restored or expected to be restored within 12 months of onset. Major function of the face and head is described in 1.00O.

20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, § 1.08 (2003). The ALJ erroneously failed to evaluate expressly whether Lastname's three surgeries on his left knee—in March 1998, (Tr. at 181), in October 1998 (Tr. at 241), and in April 1999 (Tr. at 213)—met or equaled the requirements of Listing 1.13 for at least one year. (Tr. at 33-40.) This was legal error. See Marcia v. Sullivan, 900 F.2d 172, 175-76 (9th Cir. 1990).

F. *Treating Physician Dr. DoctorOne*: The ALJ Did Not Give Legally Sufficient Reasons for Rejecting Treating Physician Dr. DoctorOne's Opinions.

Substantial evidence does not support the ALJ's rejection of treating surgeon Dr. DoctorOne's opinions. (Tr. at 35-36.)

1. A Treating Physician's Opinion is Important.

A treating physician's opinion is important. Under Ninth Circuit law, an ALJ must present "clear and convincing" reasons for rejecting the uncontroverted opinion of a claimant's treating physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (internal quotation marks and citation omitted). When the treating physician's opinion is controverted, an ALJ must give "specific and legitimate" reasons for rejecting the opinion. Id. (internal quotation marks and citation omitted). Similarly, by regulation, an ALJ must "always give good reasons" for the weight accorded to a treating physician's opinion. 20 C.F.R. § 404.1527(d)(2) (2003).

2. The ALJ's Stated Reasons Are Insufficient.

In December 2000, Dr. DoctorOne reported that Lastname could not work full-time (Tr. at 374-75), which is tantamount to an opinion that Lastname was disabled at step five, see SSR 96-8p. The ALJ rejected Dr. DoctorOne's opinion on the ground that it was "inconsistent" with Dr. DoctorOne's "clinical records and assessment." (Tr. at 36.) Because the ALJ left unexplained how Dr. DoctorOne's records undercut his opinion (Tr. at 36), the ALJ's rejection of Dr. DoctorOne's

December 2000 opinions is conclusory and thus not legally sufficient. Further, Dr. DoctorOne's opinions in November 1999 (Tr. at 232-33) and December 1999 (Tr. at 230-31) were inconsistent with the ALJ's residual functional capacity finding. In November and December 1999, Dr. DoctorOne reported that Lastname could not lift ten pounds (Tr. at 230, 232), while the ALJ found that Lastname could lift ten pounds (Tr. at 39 (referring to "sedentary" work[17]).) Further, in November 1999, Dr. DoctorOne reported that Lastname could not stoop (Tr. at 233), a reasonable limitation the ALJ did not recognize (Tr. at 39).

In sum, the ALJ should have respected treating surgeon Dr. DoctorOne's December 2000 opinions. Lester, 81 F.3d at 830; 20 C.F.R. § 404.1527(d)(2) (2003).

IV. Conclusion

The Court should enter judgment reversing the Commissioner's final decision under sentence four of 42 U.S.C. § 405(g), without a remand for a rehearing, i.e., for a finding of disability and award of benefits or, alternatively, with a remand for a rehearing, i.e., for further administrative proceedings.

RESPECTFULLY SUBMITTED:

[17] Sedentary work requires lifting ten pounds. 20 C.F.R. § 404.1567(a) (2003).