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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN LINDEMANN,)	Case No. CV 16-7597-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	AFFIRMING COMMISSIONER
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
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I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying his applications for Social Security disability insurance benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed May 30, 2017, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is affirmed.

1 **II. BACKGROUND**

2 Plaintiff was born in 1966. (Administrative Record ("AR")
3 56.) He completed 10th grade (AR 45, 352), received his GED in
4 jail (id.), and worked as a care provider and pipe cutter (AR 66-
5 67, 290-92).

6 On April 1, 2015, Plaintiff filed an application for DIB (AR
7 69), and on April 18 he filed one for SSI (AR 83). In both
8 applications, Plaintiff alleged that he had been unable to work
9 since March 25, 2015, because of skin cancer, bipolar disorder,
10 anxiety, and a torn rotator cuff in his right shoulder.¹ (AR 60,
11 74.) After his applications were denied initially (AR 56-83) and
12 on reconsideration (AR 84-113), he requested a hearing before an
13 Administrative Law Judge (AR 128). A hearing was held on June
14 13, 2016, at which Plaintiff, who was represented by counsel,
15 testified, as did a vocational expert. (AR 42-55.) In a written
16 decision issued June 27, 2016, the ALJ found Plaintiff not
17 disabled. (AR 7-20.) Plaintiff requested review from the
18 Appeals Council, and on August 17, 2016, it denied review. (AR
19 1-3.) This action followed.

20 **III. STANDARD OF REVIEW**

21 Under 42 U.S.C. § 405(g), a district court may review the
22 Commissioner's decision to deny benefits. The ALJ's findings and
23 decision should be upheld if they are free of legal error and
24 supported by substantial evidence based on the record as a whole.
25 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra

26
27 ¹ Although they were not listed in his initial applications,
28 Plaintiff also complained of neck pain and depression. (AR 44-
46, 63, 85.) Those complaints were considered on initial review
and reconsideration. (AR 63, 85, 92, 107.)

1 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
2 evidence means such evidence as a reasonable person might accept
3 as adequate to support a conclusion. Richardson, 402 U.S. at
4 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
5 It is more than a scintilla but less than a preponderance.
6 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
7 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
8 substantial evidence supports a finding, the reviewing court
9 "must review the administrative record as a whole, weighing both
10 the evidence that supports and the evidence that detracts from
11 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
12 720 (9th Cir. 1996). "If the evidence can reasonably support
13 either affirming or reversing," the reviewing court "may not
14 substitute its judgment" for the Commissioner's. Id. at 720-21.

15 **IV. THE EVALUATION OF DISABILITY**

16 People are "disabled" for purposes of receiving Social
17 Security benefits if they are unable to engage in any substantial
18 gainful activity owing to a physical or mental impairment that is
19 expected to result in death or has lasted, or is expected to
20 last, for a continuous period of at least 12 months. 42 U.S.C.
21 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
22 1992).

23 A. The Five-Step Evaluation Process

24 The ALJ follows a five-step sequential evaluation process to
25 assess whether a claimant is disabled. 20 C.F.R.
26 §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821,
27 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first
28 step, the Commissioner must determine whether the claimant is

1 currently engaged in substantial gainful activity; if so, the
2 claimant is not disabled and the claim must be denied.

3 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

4 If the claimant is not engaged in substantial gainful
5 activity, the second step requires the Commissioner to determine
6 whether the claimant has a "severe" impairment or combination of
7 impairments significantly limiting his ability to do basic work
8 activities; if not, the claimant is not disabled and his claim
9 must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

10 If the claimant has a "severe" impairment or combination of
11 impairments, the third step requires the Commissioner to
12 determine whether the impairment or combination of impairments
13 meets or equals an impairment in the Listing of Impairments set
14 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
15 disability is conclusively presumed. §§ 404.1520(a)(4)(iii),
16 416.920(a)(4)(iii).

17 If the claimant's impairment or combination of impairments
18 does not meet or equal an impairment in the Listing, the fourth
19 step requires the Commissioner to determine whether the claimant
20 has sufficient residual functional capacity ("RFC")² to perform
21 his past work; if so, he is not disabled and the claim must be
22 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
23 has the burden of proving he is unable to perform past relevant
24 work. Drouin, 966 F.2d at 1257. If the claimant meets that
25 burden, a prima facie case of disability is established. Id.

27
28 ² RFC is what a claimant can do despite existing exertional
and nonexertional limitations. §§ 404.1545, 416.945; see Cooper
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 If that happens or if the claimant has no past relevant
2 work, the Commissioner then bears the burden of establishing that
3 the claimant is not disabled because he can perform other
4 substantial gainful work available in the national economy.
5 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); Drouin, 966 F.2d at 1257.
6 That determination comprises the fifth and final step in the
7 sequential analysis. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
8 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

9 B. The ALJ's Application of the Five-Step Process

10 At step one, the ALJ found that Plaintiff had not engaged in
11 substantial gainful activity since March 25, 2015, the alleged
12 onset date. (AR 12.) At step two, he concluded that Plaintiff
13 had severe impairments of "tendinosis of bilateral shoulders" and
14 "degenerative disc disease of the cervical spine." (Id.) At
15 step three, he determined that Plaintiff's impairments did not
16 meet or equal a listing. (AR 15.)

17 At step four, the ALJ found that Plaintiff had the RFC to
18 perform light work³ with the following limitations:

19 [H]e can occasionally crawl; he can frequently climb
20 ramps and stairs, balance, stoop, kneel, and crouch; he
21 can occasionally reach and handle with the bilateral
22 upper extremities; he can frequently feel and finger; he

23
24 ³ "Light work involves lifting no more than 20 pounds at a
25 time with frequent lifting or carrying of objects weighing up to
26 10 pounds." §§ 404.1567(b), 416.967(b). "Even though the weight
27 lifted may be very little, a job is in this category when it
28 requires a good deal of walking or standing, or when it involves
sitting most of the time with some pushing and pulling of arm or
leg controls." Id. If someone can do light work, then "she can
also do sedentary work, unless there are additional limiting
factors such as loss of fine dexterity or inability to sit for
long periods of time." Id.

1 must not work at top rungs of ladders; he must not keep
2 his head and neck in a fixed position for extended
3 periods, such as working with a computer; and he must not
4 look up and down or side to side repetitively, such as
5 judging a tennis match.

6 (Id.)

7 The ALJ concluded that Plaintiff had no past relevant work.
8 (AR 19.) At step five, he relied on the VE's testimony to find
9 that given Plaintiff's age, education, work experience, and RFC,
10 he could "perform the requirements of representative occupations
11 such as surveillance monitor, DOT 379.367-010,⁴ a sedentary,
12 unskilled (SVP 2) occupation with 826,000 such positions in the
13 national economy." (AR 19-20.) Accordingly, he found Plaintiff
14 not disabled. (AR 20.)

15 **V. PLAINTIFF HAS WAIVED THE SOLE ISSUE HE RAISES ON APPEAL,⁵**
16 **AND NO MANIFEST INJUSTICE WILL RESULT IF THE COURT DOES NOT**
17 **CONSIDER IT**

18 Plaintiff contends that the ALJ erred in failing to resolve
19 an apparent conflict between the VE's testimony and the
20 Dictionary of Occupational Titles ("DOT"). (J. Stip. at 3-5.)
21 He argues that the VE's testimony that a person with his RFC
22 could perform the job of surveillance-system monitor is

23
24 ⁴ The actual job title listed as DOT 379.367-010 is
"surveillance-system monitor." 1991 WL 673244.

25 ⁵ Plaintiff has actually "forfeited" the issue rather than
26 "waived" it. See United States v. Scott, 705 F.3d 410, 415 (9th
27 Cir. 2012) ("Waiver is 'the intentional relinquishment or
28 abandonment of a known right,' whereas forfeiture is 'the failure
to make the timely assertion of [that] right.'" (citation
omitted)). But because most of the analogous cases refer to a
"waiver rule," the Court will too.

1 inconsistent with the DOT because the "chief work duty" of a
2 surveillance-system monitor, as defined by DOT 379.367-010, 1991
3 WL 673244, involves "prolonged looking at screens," and his RFC
4 states that "he must not keep his head and neck in a fixed
5 position for extended periods [of time], such as working with a
6 computer." (J. Stip. at 4-5 (citation omitted).) The DOT
7 describes the duties of the surveillance-system-monitor position
8 as follows:

9 Monitors premises of public transportation terminals to
10 detect crimes or disturbances, using closed circuit
11 television monitors, and notifies authorities by
12 telephone of need for corrective action: Observes
13 television screens that transmit in sequence views of
14 transportation facility sites. Pushes hold button to
15 maintain surveillance of location where incident is
16 developing, and telephones police or other designated
17 agency to notify authorities of location of disruptive
18 activity. Adjusts monitor controls when required to
19 improve reception, and notifies repair service of
20 equipment malfunctions.

21 DOT 379.367-010, 1991 WL 673244.

22 Plaintiff did not raise this issue at the hearing or even
23 hint at it. (See generally AR 42-54.) After the VE testified,
24 the ALJ gave Plaintiff's counsel the opportunity to question her,
25 and he declined. (AR 54.) Nor did counsel specifically raise
26 this issue on appeal. (See AR 5 (cited reason in request for
27 review of ALJ's decision only that he "disagree[d] with the
28 decision").) He also has not even addressed Defendant's waiver

1 argument (see J. Stip. at 6) in his reply (see id. at 8).
2 Accordingly, Plaintiff has waived the right to raise this issue
3 in federal court unless manifest injustice would result. See
4 Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (as amended)
5 (reviewing court need not address issues not raised before ALJ or
6 Appeals Council unless manifest injustice would result); see also
7 Phillips v. Colvin, 593 F. App'x 683, 684 (9th Cir. 2015) ("This
8 issue was waived by [claimant]'s failure to raise it at the
9 administrative level when he was represented by counsel, and
10 [claimant] has not demonstrated manifest injustice excusing the
11 failure."); Solorzano v. Astrue, No. ED CV 11-369-PJW, 2012 WL
12 84527, at *6 (C.D. Cal. Jan. 10, 2012) ("Counsel are not supposed
13 to be potted plants at administrative hearings. They have an
14 obligation to take an active role and to raise issues that may
15 impact the ALJ's decision while the hearing is proceeding so that
16 they can be addressed.").⁶

17 No manifest injustice would result here because Plaintiff's
18 RFC is not directly or obviously inconsistent with the
19 surveillance-system-monitor job description in the DOT. See
20 Sanchez v. Berryhill, No. 1:15-cv-00510-EPG, 2017 WL 1709326, at
21 *3 (E.D. Cal. May 3, 2017) ("A 'manifest injustice' is defined as
22

23 ⁶ Meanel was decided in 1999. In 2000, the Supreme Court
24 held that a plaintiff does not forfeit a claim simply by failing
25 to raise it before the Appeals Council. Sims v. Apfel, 530 U.S.
26 103, 108 (2000) (holding that claims need not be raised before
27 Appeals Council to be exhausted). But Sims expressly declined to
28 decide whether a claim would be forfeited if the claimant also
neglected to raise it before the ALJ. See id. at 107 ("Whether a
claimant must exhaust issues before the ALJ is not before us.").
Thus, Sims did not overrule Meanel, which this Court remains
bound by.

1 'an error in the trial court that is direct, obvious, and
2 observable[.]'" (citation omitted)); see, e.g., Simpson v.
3 Colvin, No. SACV 15-01122-DTB, 2016 WL 3091487, at *1-2 (C.D.
4 Cal. May 31, 2016) (finding no manifest injustice in waiver when
5 represented plaintiff failed to raise issue of conflict between
6 RFC and DOT at ALJ hearing and in request for review from Appeals
7 Council), appeal docketed, No. 16-55964 (9th Cir. July 6, 2016);
8 Goodman v. Colvin, No. CV-15-00807-PHX-JAT, 2016 WL 4190738, at
9 *17-18 (D. Ariz. Aug. 9, 2016) (no manifest injustice in waiver
10 when plaintiff failed to question VE about possible conflicts
11 between RFC limitations and DOT); cf. Jones v. Colvin, No.: 2:15-
12 cv-09489 KS, 2016 WL 4059624, at *3 & n.2 (C.D. Cal. July 27,
13 2016) (finding manifest injustice when ALJ failed to reconcile
14 RFC with DOT job description because Ninth Circuit had directly
15 held that "'there is an apparent conflict between the [RFC] to
16 perform simple, repetitive tasks and the demands of Level Three
17 Reasoning'" (citation omitted)).

18 Because it is not obvious that "using closed circuit
19 television monitors" and "observ[ing] television screens" would
20 require an individual to "keep his head and neck in a fixed
21 position for extended periods," no manifest injustice will result
22 from finding waiver. Indeed, the DOT description includes
23 several duties unrelated to observing and using screens, such as
24 "monitor[ing] premises of public transportation terminals to
25 detect crimes or disturbances" and "notif[ying] authorities by
26 telephone of need for corrective action." See DOT 379.367-010,
27 1991 WL 673244. Moreover, as the Commissioner points out,
28 surveillance-system monitors typically look at "multiple"

1 screens; they do not necessarily hold their head or neck in a
2 fixed position for an extended period of time.⁷ (See J. Stip. at
3 7.) Finally, Plaintiff himself testified that he was able to
4 watch television for up to two hours at a time (AR 52),
5 indicating that he can perform the duties of the surveillance-
6 system-monitor job. As such, unlike in Jones, failure to address
7 this otherwise waived issue would not amount to manifest
8 injustice because no direct, obvious, or observable conflict
9 between Plaintiff's RFC and the DOT exists, and the Ninth Circuit
10 has certainly not indicated otherwise. See Jones, 2016 WL
11 4059624, at *3 n.2.

12 Accordingly, Plaintiff has waived the only issue he raises
13 on appeal.

14 **VI. CONCLUSION**

15 Consistent with the foregoing and under sentence four of 42
16 U.S.C. § 405(g),⁸ IT IS ORDERED that judgment be entered
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21 ⁷ Similarly, no obvious or apparent conflict exists between
22 the DOT's description of looking at multiple screens and
23 Plaintiff's restriction on "repetitive looking up or down, or
24 right to left." (AR 54.) Moving the head out of a fixed
25 position at one screen to look at others does not equate to the
constant side-to-side and up-and-down movement that would be
required of someone "judging a tennis match," as the ALJ
described Plaintiff's limitation. (AR 15.) Indeed, Plaintiff
does not even argue the point. (See generally J. Stip. at 3-5.)

26 ⁸ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."

1 AFFIRMING the decision of the Commissioner, DENYING Plaintiff's
2 request for remand, and DISMISSING this action with prejudice.

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DATED: July 12, 2017



JEAN ROSENBLUTH,
U.S. Magistrate Judge