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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 THOMAS D. CULVER,

12 Plaintiff,

13 v.
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15 CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

16 Defendant.
17

)
) Case No. EDCV 15-00920-JEM
)

) MEMORANDUM OPINION AND ORDER
) AFFIRMING DECISION OF THE
) COMMISSIONER
)

18 PROCEEDINGS

19 On May 11, 2015, Thomas D. Culver ("Plaintiff" or "Claimant") filed a complaint seeking
20 review of the decision of the Commissioner denying Plaintiff's application for Social Security
21 Disability Insurance benefits. The Commissioner filed an Answer on August 13, 2015. On
22 November 13, 2015, the parties filed a Joint Stipulation ("JS"). The matter is now ready for
23 decision.

24 Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this
25 Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record ("AR"),
26 the Court concludes that the Commissioner's decision must be affirmed and this case
27 dismissed with prejudice.
28

BACKGROUND

Plaintiff is a 55-year-old male who applied for Social Security Disability Insurance benefits on October 23, 2012 (AR 133-136), alleging disability beginning October 5, 2011. (AR 133, 152.) The ALJ determined that Plaintiff had not engaged in substantial gainful activity since October 5, 2011, the alleged onset date. (AR 16.)

Plaintiff's claim was denied initially on April 26, 2013 (AR 31-40), and on reconsideration on October 2, 2013. (AR 42-53.) Plaintiff filed a timely request for hearing, which was held before Administrative Law Judge ("ALJ") Joseph D. Schloss on October 1, 2014, in Moreno Valley, California. (AR 14.) Plaintiff appeared and testified at the hearing and was represented by counsel. (AR 14.) Vocational expert ("VE") Luis O. Mas also appeared and testified at the hearing. (AR 14.)

The ALJ issued a favorable decision on October 8, 2014. (AR 14-19.) On April 1, 2015, the Appeals Council vacated the ALJ's October 8, 2014, decision and issued an unfavorable decision. (AR 4-7.) The Appeals Council's decision is the final decision of the Commissioner.

DISPUTED ISSUES

As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as grounds for reversal and remand:

1. Whether the Defendant's Appeals Council has properly considered and developed the effect of Plaintiff's mental impairments on his ability to perform past relevant work at step number four of the sequential evaluation process.
2. Whether the Defendant's Appeals Council has properly developed the record pertaining to Plaintiff's past relevant work and the dictionary of occupational titles job description of Plaintiff's past relevant work at step number four of the sequential evaluation process.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273 , 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846

1 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
2 based on the proper legal standards).

3 Substantial evidence means “‘more than a mere scintilla,’ but less than a
4 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.
5 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
6 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at
7 401 (internal quotation marks and citation omitted).

8 This Court must review the record as a whole and consider adverse as well as
9 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where
10 evidence is susceptible to more than one rational interpretation, the ALJ's decision must be
11 upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
12 “However, a reviewing court must consider the entire record as a whole and may not affirm
13 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882
14 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
15 F.3d 625, 630 (9th Cir. 2007).

16 THE SEQUENTIAL EVALUATION

17 The Social Security Act defines disability as the “inability to engage in any substantial
18 gainful activity by reason of any medically determinable physical or mental impairment which
19 can be expected to result in death or . . . can be expected to last for a continuous period of not
20 less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has
21 established a five-step sequential process to determine whether a claimant is disabled. 20
22 C.F.R. §§ 404.1520, 416.920.

23 The first step is to determine whether the claimant is presently engaging in substantial
24 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
25 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,
26 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or
27 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not
28 significantly limit the claimant's ability to work. Smolen, 80 F.3d at 1290. Third, the ALJ must

1 determine whether the impairment is listed, or equivalent to an impairment listed, in 20 C.F.R.
2 Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d at 746. If the impairment
3 meets or equals one of the listed impairments, the claimant is presumptively disabled. Bowen,
4 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the
5 claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir.
6 2001). Before making the step four determination, the ALJ first must determine the claimant's
7 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is "the most [one] can
8 still do despite [his or her] limitations" and represents an assessment "based on all the relevant
9 evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC must consider all of the
10 claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),
11 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

12 If the claimant cannot perform his or her past relevant work or has no past relevant work,
13 the ALJ proceeds to the fifth step and must determine whether the impairment prevents the
14 claimant from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864,
15 869 (9th Cir. 2000). The claimant bears the burden of proving steps one through four,
16 consistent with the general rule that at all times the burden is on the claimant to establish his or
17 her entitlement to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established
18 by the claimant, the burden shifts to the Commissioner to show that the claimant may perform
19 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support
20 a finding that a claimant is not disabled at step five, the Commissioner must provide evidence
21 demonstrating that other work exists in significant numbers in the national economy that the
22 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
23 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
24 entitled to benefits. Id.

25 THE ALJ DECISION

26 In this case, the Appeals Council determined at step one of the sequential process that
27 Plaintiff has not engaged in substantial gainful activity since October 5, 2011, the alleged onset
28 date. (AR 6-7.)

1 At step two, the Appeals Council determined that Plaintiff has the following medically
2 determinable severe impairments: osteoarthritis of the right knee, obesity, and lumbar
3 sprain/strain. (AR 7.)

4 At step three, the Appeals Council determined that Plaintiff does not have an impairment
5 or combination of impairments that meets or medically equals the severity of one of the listed
6 impairments. (AR 7.)

7 The Appeals Council then found that Plaintiff has the RFC to perform work-related
8 activity at the light exertional level with the following limitations:

9 Claimant is limited to lifting and carrying up to ten pounds occasionally and
10 less than ten pounds frequently, standing and walking for up to two hours in
11 an eight-hour workday, sitting for up to six hours in an eight-hour workday,
12 occasionally pushing and pulling with the right lower extremity, and
13 occasionally climbing ladders, ropes, or scaffolds.

14 (AR 7.)

15 At step four, the Appeals Council found that Plaintiff is able to perform his past relevant
16 work as a systems surveillance monitor. (AR 7.)

17 Consequently, the Appeals Council found that Claimant was not disabled within the
18 meaning of the Social Security Act, from October 5, 2011 through October 8, 2014. (AR 29.)

19 DISCUSSION

20 The Appeals Council's nondisability determination is supported by substantial evidence
21 and free of legal error. As the Commissioner's final decision, it must be affirmed.

22 On October 18, 2014, the ALJ assessed Plaintiff with a light work RFC. (AR 16.) The
23 ALJ concluded at step four of the sequential process that Plaintiff could not perform his past
24 relevant work as a surveillance monitor because of his physical impairments. (AR 18.) That
25 job, as he performed it, required Plaintiff to lift and carry at the medium exertional level. (AR
26 18.) The ALJ also concluded at step five of the sequential process that there are no jobs in the
27 national economy that Plaintiff could perform. (AR 18.) The ALJ thereupon issued a favorable
28 decision finding Plaintiff disabled. (AR 19.)

1 On April 1, 2015, however, the Appeals Council issued a corrective decision that Plaintiff
2 is capable of performing his past relevant work as a surveillance systems monitor at a casino
3 as the job is generally performed in the national economy. (AR 4-5.) Plaintiff challenges the
4 Appeals Council's nondisability determination because (1) it failed to properly consider
5 Plaintiff's mental impairments, and (2) his past relevant work was not as a systems surveillance
6 monitor but as a gambling monitor, a job the Appeals Council determined he would be unable
7 to perform. (AR 18.) These contentions lack merit.

8 **I. PLAINTIFF FAILED TO PRESENT EVIDENCE OF**
9 **MENTAL FUNCTIONAL LIMITATIONS.**

10 The ALJ did not address Plaintiff's mental impairments. The ALJ found that Plaintiff had
11 the severe physical impairments of osteoarthritis of the right knee, obesity, and lumbar
12 sprain/strain. (AR 16.) The ALJ also stated, "The undersigned is not determining whether the
13 Claimant has a severe mental impairment because there is sufficient evidence in the record to
14 find the Claimant disabled based on his severe physical impairments." (AR 16 (emphasis
15 added).) The Appeals Council ruling also did not address Plaintiff's mental impairments, even
16 though Plaintiff in his written argument to the Appeals Council asserted mental impairments of
17 depression and anxiety. (AR 18.) There is medical evidence of record of Plaintiff's depression
18 and anxiety and medication to treat those impairments. (AR 196, 437-440.) Plaintiff contends
19 that the Appeals Council failed to properly consider his mental impairments in determining at
20 step four of the sequential process that he could do his past relevant work as generally
21 performed.

22 Plaintiff, however, expressly abjured reliance on mental impairments or limitations as a
23 basis of disability through the date of the ALJ's decision. In his Disability Report, he alleged
24 only "right knee/back problem/hbp," not depression or anxiety. (AR 152-156.) He specifically
25 advised the Administration that he did not want to pursue mental impairments as a basis for
26 disability. (AR 47, 48, 53, 62.) He also reported that he is no longer taking antidepressants or
27 anxiety medication, which renders irrelevant his belated assertion of medication side effects in
28 challenging the Appeals Council's decision. (AR 47, 48, 358, 362.) There can be no

1 medication side effects if Plaintiff is not taking medication. Based on these circumstances,
2 Agency reviewing physicians and the Administration determined there was insufficient evidence
3 to adequately assess the severity of Plaintiff's mental condition. (AR 48, 53, 62.) Plaintiff does
4 not respond to this evidence of his election not to pursue disability on the basis of mental
5 impairments or his cessation of medication for his depression and anxiety. These factors
6 preclude any reliance on subjective symptoms by Plaintiff.

7 Additionally, there is no medical evidence of any mental functional limitations.
8 Complaints of depression and even evidence of a mental impairment do not establish disability
9 or a severe impairment unless there is evidence of a related functional loss that impacts the
10 ability to work. Barker v. Sec'y of HHS, 882 F.2d 1474, 1477 (9th Cir. 1989). An impairment is
11 not severe if it does not significantly limit physical or mental ability to perform basic work
12 activities. 20 C.F.R. § 404.1521. Plaintiff here has failed to present any evidence of a severe
13 mental impairment or of mental functional limitations that affect his ability to work. He has not
14 met his burden to show he cannot perform his past relevant work. Matthews v. Shalala, 10
15 F.3d 678, 691 (9th Cir. 1993.)

16 The Appeals Council "need not discuss all evidence" but must explain why significant
17 probative evidence has been rejected. Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir.
18 1984). Here, there was no probative evidence to discuss or reject. The Appeals Council was
19 not required to discuss Plaintiff's mental impairments because there was no evidence of a
20 severe mental impairment or of any mental functional limitations, and Plaintiff previously
21 abjured reliance on mental limitations as a basis for disability and had ceased taking
22 medications for his depression and anxiety.

23 **II. THE APPEALS COUNCIL AND VE REASONABLY DETERMINED THAT** 24 **PLAINTIFF COULD PERFORM HIS PAST RELEVANT WORK**

25 The Appeals Council determined that Plaintiff can perform his past relevant work as a
26 surveillance systems monitor at a casino as generally performed in the national economy. (AR
27 5.) Typically, the best sources of how a job is performed in the national economy is the
28 Dictionary of Occupational Titles ("DOT"). Pinto, 249 F.3d at 844-45. The DOT raises a

1 presumption as to job classification requirements. Johnson v. Shalala, 60 F.3d 1428, 1435 (9th
2 Cir. 1995). Here, DOT code 379.367-010 indicates that a surveillance system monitor is an
3 unskilled sedentary occupation with exertion up to 10 pounds occasionally and requiring less
4 than 30 days to learn (SVP 2). Id. The VE testified Plaintiff could perform this job as generally
5 performed as per the DOT but not as actually performed. (AR 5-7, 26-28.)

6 Plaintiff argues that the job of gambling monitor more closely approximates his past
7 relevant work at the casino. DOT code 343.367-014 indicates that a gambling monitor is light
8 work with exertion up to 20 pounds occasionally and is skilled (SVP 7), requiring over 2 years
9 and up to 4 years to learn. Id. The Appeals Council found this job would exceed the demands
10 of the Claimant's RFC. (AR 5.)

11 The Appeals Council, however, noted that a gambling monitor spends a majority of the
12 workday walking and standing on the casino floor, but Claimant indicated his job was mostly
13 sitting behind a screen, monitoring and watching over the casino, cashier, parking lot, etc. (AR
14 6, 24-25, 160.) Plaintiff himself characterized the job as surveillance or surveillance monitor.
15 (AR 24-25, 153, 158.) The gambling monitor is skilled and light; the surveillance monitor is
16 unskilled and sedentary. The Appeals Council noted that the VE testified that the surveillance
17 monitor is the DOT code most closely related to the Claimant's past relevant work. (AR 6.)
18 The Appeals Council concluded that the VE's testimony is supported by a preponderance of
19 the evidence. (AR 6.) A VE's testimony is substantial evidence. A VE's recognized expertise
20 provides the necessary foundation for his or her testimony. Bayliss, 427 F.3d at 1218. No
21 additional foundation is required. Id. Plaintiff disagrees with the Appeals Council's
22 determination that Claimant can perform his past relevant work as a surveillance monitor as
23 generally performed per the DOT, but that determination is supported by substantial evidence.

24 * * *

25 The Appeals Council's nondisability determination is supported by substantial evidence
26 and free of legal error. As the Commissioner's final decision, it must be affirmed.

ORDER

IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the Commissioner and dismissing this case with prejudice.

DATED: December 30, 2015

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE