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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DENNIS M.,¹)	NO. EDCV 17-1831-KS
Plaintiff,)	
v.)	MEMORANDUM OPINION AND ORDER
NANCY A. BERRYHILL, Acting)	
Commissioner Of Social Security,)	
Defendant.)	

INTRODUCTION

Plaintiff filed a Complaint on September 8, 2017, seeking review of the denial of his application for a period of disability, disability insurance benefits (“DIB”) under Title II of the Social Security Act, and supplemental security income (“SSI”). (Dkt. No. 1.) On November 3, 2017, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 11, 12, 13.) On July 25, 2018, the parties filed a Joint Stipulation (“Joint Stip.”). (Dkt. No. 23.) Plaintiff seeks an order reversing the Commissioner’s decision and ordering the payment of benefits or, in the

¹ Partially redacted in compliance with Federal Rule of Civil Procedure 5.2(c)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 alternative, remanding for further proceedings. (Joint Stip. at 18.) The Commissioner
2 maintains that the ALJ's decision is free of legal error and requests that the ALJ's decision
3 be affirmed or, in the alternative, remanded "to the agency for additional investigation or
4 explanation." (*Id.* at 19 (internal citation omitted).) The Court has taken the matter under
5 submission without oral argument.

6 7 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

8
9 On October 18, 2013, Plaintiff filed concurrent applications for DIB and SSI under the
10 Social Security Act Titles II and XVI, alleging disability commencing January 11, 2010.
11 (Administrative Record ("AR") at 196-212.) The Commissioner denied his claim initially
12 on January 24, 2014 (AR 122-126), and on reconsideration on April 22, 2014 (AR 130-135).
13 On April 29, 2014, Plaintiff filed a written request for a hearing. (AR 136.) On May 5,
14 2016, Administrative Law Judge Janice E. Shave held a hearing. (AR 36-73.) At the
15 hearing, Plaintiff, represented by counsel, testified, along with Vocational Expert ("VE")
16 Jackie Benson-Duhaine, and Medical Expert ("ME"), Patrick McCaffery. (AR 36-73.) On
17 May 24, 2016, the ALJ issued an unfavorable decision. (AR 18-35.) On June 17, 2016,
18 Plaintiff requested Appeals Council review of the ALJ's decision. (AR 196.) The Appeals
19 Council denied review on July 10, 2017. (AR 1-8.) This timely appeal followed.

20 21 **SUMMARY OF ADMINISTRATIVE DECISION**

22
23 Applying the five step evaluation process, the ALJ first found that Plaintiff met the
24 insured status requirements of the Social Security Act through September 30, 2014 and had
25 not engaged in substantial gainful activity since January 11, 2010, the alleged onset date.
26 (AR 23.) Next, the ALJ found that Plaintiff had the following severe impairments: vision
27 loss in the left eye, high myopia and astigmatism in the right eye, nystagmus in the left eye,
28 artificial right eye, and unexplained left-sided headaches. (*Id.*) The ALJ concluded that

1 Plaintiff did not have an impairment or combination of impairments that met or medically
2 equaled the severity of any impairments listed in 20 C.F.R. part 404, subpart P, appendix 1
3 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926), including
4 Listings 1.02 and 1.04. (AR 24.) The ALJ determined that Plaintiff had the residual
5 functional capacity (“RFC”) to:

6
7 perform medium work . . . except he can never climb ladders, ropes or scaffolds, but
8 he can frequently climb ramps and stairs. He can frequently balance at ground level,
9 stoop, kneel, crouch and crawl. He is unable to drive for work; he must avoid all
10 exposure to eye irritants, such as dusts and gases. He must avoid all exposure to
11 chemicals, unprotected heights, and hazardous machinery due to vision safety. He
12 must avoid even moderate exposure to flickering lights, such as fluorescent light as the
13 sole source of lighting. [Plaintiff] has monocular vision and is incapable of jobs
14 requiring bilateral depth perception, but he does have unilateral depth perception. He
15 is unable to engage in nighttime vision and must be permitted to wear safety glasses at
16 all times during the workday, and sunglasses when exposed to bright light. He is able
17 to assemble parts 1-inch or larger and viewing computer screens 9-point font or larger,
18 but he must be permitted to increase the font size to 12-point font as needed.

19
20 (AR 24.)

21
22 The ALJ determined that Plaintiff was not able to perform his past relevant work as a
23 security guard, recycler, line installer, and pump man. (AR 28.) However, relying on the
24 VE’s testimony, the ALJ concluded that considering Plaintiff’s age,² education, work
25 experience and RFC, there are jobs that exist in significant numbers in the national economy
26

27 ² Plaintiff, who was born on July 18, 1969, was 40 years old on the alleged disability onset date. (AR 28). He
28 was classified as a “younger individual age 18-49” under Agency guidelines. (*See id*; also 20 CFR 404.1563 and 416.963.)

1 that Plaintiff can perform, including the representative occupations of patient transporter
2 (DOT³ 355.677-014), a medium exertional level (SVP⁴ 2) occupation; dining room attendant
3 (DOT 311.677-018) a medium exertional level (SVP 2) occupation; and hospital cleaner
4 (DOT 323.687-010), also a medium exertional level (SVP 2) occupation. (AR 29.)
5 Accordingly, the ALJ determined that Plaintiff had not been under a disability, as defined in
6 the Social Security Act, from the alleged onset through the date of the ALJ’s decision. (AR
7 30.)

8
9 **DISPUTED ISSUE**

10
11 Plaintiff presents a single disputed issue relating to the ALJ’s determination at step
12 five: Whether the ALJ properly considered the visual impairment in assessing residual
13 function capacity. (Joint Stip. at 4.)

14
15 **STANDARD OF REVIEW**

16
17 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
18 determine whether it is free from legal error and supported by substantial evidence in the
19 record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). “Substantial evidence
20 is ‘more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
21 reasonable mind might accept as adequate to support a conclusion.’” *Gutierrez v. Comm’r of*
22 *Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal citations omitted). “Even when the
23 evidence is susceptible to more than one rational interpretation, we must uphold the ALJ’s
24 findings if they are supported by inferences reasonably drawn from the record.” *Molina v.*
25 *Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012).

26
27
28 ³ “DOT” refers to the *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991).
⁴ “SVP” refers to Specific Vocational Preparation, as defined in Appendix C of the DOT.

1 Plaintiff contends that the ALJ failed to “independently assess the presence of a conflict”
2 between the VE’s testimony and the DOT, as well as its companion publications, including
3 SCO. (Joint Stip. at 6.) Plaintiff maintains that he “does not possess the near acuity required
4 for the patient transporter” position because the DOT for this occupation requires
5 “occasional” near acuity and the SCO defines “near acuity” as “Clarity of vision at 20 inches
6 or less.” (*Id.* at 7 (citing SCO Appendix C-4 at 15).) In addition, Plaintiff points to the DOT
7 description of the patient transporter job as requiring, among other things, “following written
8 or oral instructions.” (Joint Stip. at 7.) With respect to the dining room attendant position,
9 Plaintiff argues he does not have the far acuity required for the position based on the SCO’s
10 definition of “far acuity.”

11
12 As to the third occupation the ALJ identified as suitable for Plaintiff based on his RFC
13 – hospital cleaner – Plaintiff argues that because he cannot be exposed to fluorescent
14 lighting, “this precludes his ability to perform that job.” Further, Plaintiff maintains that
15 “[c]leaning specifications in hospitals would certainly require some reading of directions
16 with small print and cleaning or spotting items to clean that are smaller than an inch in
17 diameter and exposure to chemicals.” (Joint Stip. at 9.) Plaintiff points out that while the
18 DOT description did not include “caustic chemicals” in the job description, it does indicate
19 “that he would be dealing with germicides and sterilizing equipment.” (*Id.*) In sum,
20 according to Plaintiff, the ALJ failed to “properly address the visual limitations” and relied
21 on VE testimony that “contains unexplained deviation from the DOT.” (Joint Stip. at 11.)
22 Plaintiff seeks reversal and remand “for proper consideration of [Plaintiff’s] visual
23 limitations which preclude his ability to perform all three positions.” (*Id.*)

24
25 Defendant responds that the ALJ’s decision is supported by substantial evidence and
26 free of legal error. Further, Defendant argues that Plaintiff fails to identify actual legal error
27 in the ALJ’s decision making process, but challenges the ALJ’s determination of available
28 alternative occupations “largely based on speculation about the jobs the [VE] identified.”

1 (Joint Stip. at 12.) For the reasons discussed below, the Court agrees with Defendant and
2 concludes the ALJ’s decision is free of material legal error and must, on that basis, be
3 affirmed.

4
5 **II. Applicable Law**
6

7 At step five of the evaluative process, the ALJ must “identify specific jobs existing in
8 substantial numbers in the national economy that a claimant can perform despite [his]
9 identified limitations.” *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995); *and see* 20
10 C.F.R. §§ 404.1520(g), 404.1566(a), 416.920(g), 416.966(a). In doing so, the ALJ is entitled
11 to rely on the DOT’s description of the requirements for each listed occupation and on VE
12 testimony about the specific occupations that the plaintiff can perform. *See Zavalin v.*
13 *Colvin*, 778 F.3d 842, 845-46 (9th Cir. 2015); *see also Osenbrock v. Apfel*, 240 F.3d 1157,
14 1163 (9th Cir. 2001) (testimony of a VE constitutes substantial evidence). These are
15 designated sources of “reliable job information.” *See* 20 C.F.R. §§ 404.1566(d)-(e),
16 416.966(d)-(e); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (ALJ may rely on
17 “any reliable job information,” including the testimony of a VE); *Johnson*, 60 F.3d at 1435.

18
19 When there is an apparent conflict between the VE’s testimony and the DOT, the ALJ
20 is required to resolve the inconsistency. *Massachi v. Astrue*, 486 F.3d 1149, 1153-54 (9th
21 Cir. 2007). The ALJ must first determine whether a conflict exists. *Id.* at 1453. If it does,
22 the ALJ must then ask the VE to explain the conflict and “determine whether the [VE’s]
23 explanation for the conflict is reasonable and whether a basis exists for relying on the expert
24 rather than the [DOT].” *Id.* An ALJ’s failure to resolve any apparent inconsistency can
25 prevent the Court from determining whether the ALJ’s decision is supported by substantial
26 evidence. *Id.* at 1154.

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1 **III. The ALJ Did Not Err At Step Five**

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3 **A. The Hearing Testimony**

4
5 At the hearing, the ME, Dr. McCaffery, testified that, based his review of the medical
6 records, Plaintiff had 20 over 60 visual acuity in his left eye but noted that it fluctuates
7 between 20/60 and 20/80. (AR 46, 53; *see also* AR 318, Ex. 1F, 4.) The ALJ also
8 questioned Plaintiff about how his visual limitations affect his daily activities. (AR 62.)
9 Plaintiff stated that he has to sit very close to a computer screen to see adequately and this
10 gives him a headache. (*Id.*) He also testified that although he has glasses that correct of
11 reading, he doesn't use the bifocal because "it just don't seem to get along with [his] eye."
12 (*Id.*) When asked if he had ever told his health care provider that he couldn't use the bifocal,
13 Plaintiff said "I never told him anything like that." (*Id.*) When questioned by his own
14 attorney, Plaintiff indicated that he can read "big print" and has trouble reading "almost
15 anything" including road signs, so he doesn't ready "nothing but the big print Bible." (AR
16 64.) When cooking, he can read instructions or a recipe if he hold[s] the box up close." (*Id.*
17 at 65.)

18
19 In posing hypotheticals to the VE, the ALJ accounted for numerous limitations related
20 to Plaintiff's vision. For example, one hypothetical posed by the ALJ stated:

21
22 The individual must avoid all exposure to eye irritants such as dust and
23 gases, and the individual must avoid all exposure to chemicals, unprotected
24 heights and hazardous machinery. This is secondary to vision safety.

25 The individual must avoid even moderate exposure to flickering lights
26 such as fluorescent is the sole source. The individual has monocular vision and
27 is not capable of jobs requiring two-eyed depth perception, but does have depth
28

1 perception, one-eyed depth perception which is significantly less – it’s not
2 three-D depth perception.

3 And the individual does not have the ability to engage for work in
4 nighttime vision. An individual must be allowed to wear safety glasses or
5 sunglasses at all times.

6
7 (AR 68.) The ALJ’s second hypothetical included these same restrictions and additional
8 limitations that “[t]his individual is capable of assembling parts one inch or larger” and
9 needed a 12 point font. (AR 71-72.) The VE replied that the additional limitations did not
10 change the jobs the VE had previously identified as suitable based on Plaintiff’s RFC. (*Id.* at
11 72.)

12
13 The VE concluded that all past work was excluded, but other occupations existed in
14 substantial numbers in the national economy that Plaintiff could perform, including dining
15 room attendant and hospital cleaner. (AR 70.) When the ALJ specifically asked if the
16 hospital cleaner was consistent with a limitation to no exposure to chemicals, the ALJ
17 responded that “in the DOT description, in terms of hazards, it does not indicate that there
18 are toxic or caustic chemical hazards present.” (*Id.*) When questioned by Plaintiff’s
19 attorney about the basis for his opinions, the VE replied, “My opinion is based upon my
20 professional experience, my education, training as well as utilizing the Dictionary of
21 Occupational Titles job descriptions and physical requirements.” (AR 72.) Plaintiff’s
22 counsel asked no other questions of the VE. (*Id.*)

23
24 **B. Plaintiff Has Identified No Conflict Between the VE’s Testimony and the DOT**

25
26 In order to trigger the ALJ’s responsibility to resolve a conflict, a conflict must
27 actually exist between the VE’s testimony and the DOT. *See e.g., Dewey v. Colvin*, 650 Fed.
28 Appx 512, 514 (9th Cir. 2016). “For a difference between an expert’s testimony and the

1 [DOT's] listing to be fairly characterized as a conflict, it must be obvious or apparent."
2 *Gutierrez v. Colvin*, 844 F.3d 804, 808 (9th Cir. 2016). Here, there is no obvious or apparent
3 conflict that warrants reversal of the Commissioner's decision.
4

5 Plaintiff maintains that there is a conflict with the patient transporter job because
6 Plaintiff does not have "near acuity." Plaintiff alleges that he will be unable to read patient
7 name tags and "cannot see across a dining room." (Joint Stip. at 10.) However, as
8 Defendant correctly points out, the ALJ's RFC did not have any limitation for "near acuity."
9 (See Joint Stip. at 13; AR 24.) Moreover, as even Plaintiff notes, the DOT description for
10 the patient transporter job indicates the worker must follow "**written or oral instructions**
11 . . . Delivers messages, mail, medical records, and other items." (Joint Stip. at 7 (citing
12 DOT 355.677-014) (emphasis in original).) Thus, the DOT clearly contemplates that the
13 worker may be given oral instructions that would not call upon on the worker's visual acuity
14 one way or the other. Plaintiff also argues that he does not have the visual acuity to perform
15 the dining room attendant job because he "would not be able to see across the dining room or
16 be able to spot the empty glass, dirty dish, or hand raised for assistance." (Joint Stip. at 8.)
17 However, Plaintiff points to no requirements in the DOT that these specific tasks are
18 essential requirements for a dining room attendant 311.677-018. In suggesting that Plaintiff
19 cannot perform particular tasks that a patient transporter of dining room attendant might
20 encounter, Plaintiff does not identify any specific DOT job requirements that the ALJ
21 overlooked or that created an inconsistency with the VE's testimony that the ALJ should
22 have resolved. Rather, Plaintiff speculates about tasks that could be required in these jobs.
23 Such speculation does not indicate any material legal error in the ALJ's step five analysis.
24

25 Plaintiff also alleges that the hospital cleaner job is inconsistent with the RFC. (Joint
26 Stip. at 9.) Plaintiff concedes that for this position the "DOT does not require near or far
27 acuity," but Plaintiff alleges that he *might* be exposed to fluorescent lighting, *might* be
28 required to do "some reading of directions with small print and cleaning or spotting items to

1 clean that are smaller than an inch in diameter,” and *might* be exposed to harsh chemicals.
2 (*Id.*) Here, too, Plaintiff points to no actual conflicting or contradictory requirements in the
3 DOT for this occupation that would suggest a material legal error by the ALJ. Indeed, the
4 ALJ specifically questioned the VE about whether the hospital cleaner job was consistent
5 with the RFC’s limitation for exposure to harsh chemicals, and, as noted, the VE replied that
6 the DOT “does not indicate that there are toxic or caustic chemical hazards present.” (AR
7 70.) Accordingly, there was no deviation from the DOT on this issue that warrants reversal.

8
9 After a thorough review of the record, the Court finds no inconsistency between the
10 VE’s testimony about alternative occupations available in the national economy that Plaintiff
11 can perform based on his RFC and the DOT requirements for those positions. Further, as
12 stated above, the ALJ was entitled to rely on the DOT’s description of the requirements for
13 each listed occupation and on VE testimony about particular occupations. *See* 20 C.F.R. §§
14 404.1566(d)-(e), 416.966(d)-(e); *Zavalin*, 778 F.3d at 845-46; *Osenbrock*, 240 F.3d at 1163.
15 Accordingly, the ALJ’s determination at step five is free of legal error and supported by
16 substantial record evidence and, for these reasons, must be affirmed.

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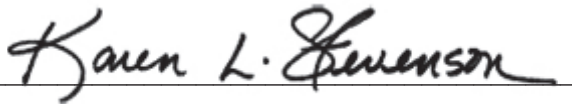
1 **CONCLUSION**

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3 For the reasons stated above, IT IS ORDERED that the decision of the Commissioner
4 is AFFIRMED.

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6 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
7 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and counsel for
8 defendant.

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10 LET JUDGMENT BE ENTERED ACCORDINGLY.

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12 DATED: October 30, 2018

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14 KAREN L. STEVENSON
15 UNITED STATES MAGISTRATE JUDGE
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