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

**JOSE GARIBAY-CANELA,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **MICHAEL J. ASTRUE,** )  
 **Commissioner of the Social** )  
 **Security Administration,** )  
 )  
 **Defendant.** )  
 \_\_\_\_\_ )

**Case No. CV 09-4332 AJW**  
  
**MEMORANDUM OF DECISION**

Plaintiff filed this action seeking reversal of the decision of defendant, the Commissioner of the Social Security Administration (the “Commissioner”), denying plaintiff’s applications for disability insurance benefits and supplemental security income (“SSI”) benefits. The parties have filed a Joint Stipulation (“JS”) setting forth their contentions with respect to each disputed issue.

**Administrative Proceedings**

On July 7, 2006, plaintiff filed applications for disability insurance benefits and SSI benefits. [AR 21, 303]. Plaintiff alleged that he had been disabled since March 10, 2003, due to severe back pain. [AR 214]. On May 29, 2008, an Administrative Law Judge (the “ALJ”) denied benefits in a written hearing decision. [Administrative Record (“AR”) 31-37]. The ALJ noted that plaintiff had filed prior applications for disability insurance benefits and SSI benefits that were finally denied on June 12, 2006. [AR 31].

1 Applying a presumption of continuing non-disability, the ALJ concluded that plaintiff had not shown  
2 “changed circumstances” from the date of the prior decision warranting any change in the prior ALJ’s  
3 findings.<sup>1</sup> The ALJ found that plaintiff was last insured for disability insurance purposes through December  
4 31, 2007. The ALJ determined that plaintiff had severe lumbar degenerative disc disease, but that he  
5 retained the residual functional capacity (“RFC”) to perform light work with occasional climbing, stooping,  
6 kneeling, and crouching. The ALJ found that plaintiff could not perform his past relevant work, but that  
7 alternative work within his RFC existed in significant numbers in the national economy. [AR 36-37].

8 The Appeals Council denied plaintiff’s request for review of the ALJ’s decision. [AR 10].  
9 Subsequently, however, the Appeals Council vacated its decision denying the request for review solely as  
10 it pertained to plaintiff’s application for SSI benefits. The Appeals Council found that plaintiff had  
11 submitted new and material medical evidence that showed changed circumstances reflecting a greater level  
12 of disability than the ALJ found. [AR 2]. Accordingly, the Appeals Council vacated the ALJ’s decision  
13 denying plaintiff’s application for SSI benefits and remanded the matter for further administrative  
14 proceedings. Because the new evidence was dated after December 31, 2007, plaintiff’s date last insured,  
15 the Appeals Council did not vacate the ALJ’s decision denying disability insurance benefits. [AR 5-7].

16 Plaintiff subsequently filed this action seeking judicial review of the Commissioner’s final decision  
17 denying his claim for disability insurance benefits.

### 18 **Standard of Review**

19 The Commissioner’s denial of benefits should be disturbed only if it is not supported by substantial  
20 evidence or is based on legal error. Stout v. Comm’r Social Sec. Admin., 454 F.3d 1050, 1054 (9th Cir.  
21 2006); Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). “Substantial evidence” means “more than  
22 a mere scintilla, but less than a preponderance.” Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir.

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24 <sup>1</sup> A prior, final determination that a claimant is not disabled creates a presumption that the  
25 claimant retains the ability to work after the date of the prior administrative decision. See Schneider  
26 v. Commissioner of Social Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000); Lyle v. Sec’y of Health  
27 & Human Servs., 700 F.2d 566, 567 (9th Cir. 1983). This presumption of “continuing non-  
28 disability” may be overcome by a showing of “changed circumstances,” by new facts establishing  
a previously unlitigated impairment or other apparent error in the prior determination, or where the  
claimant’s unrepresented status has resulted in an inadequate record. Lester v. Chater, 81 F.3d 821,  
827-828 (9th Cir. 1995); Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988).

1 2005). “It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”  
2 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (internal quotation marks omitted). The court is  
3 required to review the record as a whole and to consider evidence detracting from the decision as well as  
4 evidence supporting the decision. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006);  
5 Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). “Where the evidence is susceptible to more than  
6 one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld.”  
7 Thomas, 278 F.3d at 954 (citing Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
8 1999)).

## 9 Discussion

### 10 Durational requirement

11 Plaintiff contends that the ALJ erred in concluding that plaintiff failed to show a deterioration in his  
12 lumbar spine impairment prior to his date last insured that had lasted, or could be expected to last, for twelve  
13 consecutive months. [See JS 5-12].

14 To satisfy the criteria for disability under Social Security Act, a disabling physical or mental  
15 impairment must last, or be expected to last, no less than twelve consecutive months, or it must be expected  
16 to result in death. See 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1509, 416.909; see also  
17 Quang Van Han v. Bowen, 882 F.2d 1453, 1458 (9th Cir. 1989). Plaintiff bears the burden of proving that  
18 the durational requirement is satisfied. Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied,  
19 517 U.S. 1122 (1996); Young v. Sullivan, 911 F.2d 180, 181 (9th Cir. 1990); see 20 C.F.R. §§ 404.1509  
20 & 416.909. Plaintiff also bears the burden of proving that he was disabled prior to December 31, 2007, his  
21 date last insured. See 42 U.S.C. § 423(a)(1)(A); Flaten v. Sec’s of Health & Human Servs., 44 F.3d 1453,  
22 1459 (9th Cir. 1995); Morgan v. Sullivan, 945 F.2d 1079, 1080 (9th Cir. 1991). Thus, plaintiff must prove  
23 that prior to his date last insured, he had a disabling physical or mental impairment that had lasted, or was  
24 expected to last, at least twelve consecutive months, or was expected to result in death.

25 The ALJ summarized the relevant evidence relating to plaintiff’s lumbar degenerative disc disease  
26 as follows. In August 2007, plaintiff was seen for complaints of worsening low back pain radiating into his  
27 right lower extremity with associated numbness and tingling. [AR 34]. Plaintiff exhibited “some significant  
28 clinical findings.” [AR 34]. His treating physician, Dr. Catalino Dureza, opined that plaintiff was

1 temporarily totally disabled for workers' compensation purposes. Dr. Dureza also requested authorization  
2 for an MRI and a lumbar corset. [AR 34].

3 An MRI conducted on August 30, 2007 showed mild degenerative disc disease at multiple levels,  
4 a 3 millimeter central disc protrusion at L3-4 associated with a small tear involving the posterior annulus,  
5 slight narrowing of the neural foramina bilaterally, and mild transverse compression of the thecal sac. At  
6 L4-5, there was a possible small tear involving the posterior annulus.<sup>2</sup> AT L5-S1, there was slight  
7 narrowing of the neural foramina bilaterally with mild encroachment upon the L5 nerve roots. [AR 34-35,  
8 340-341]. The impression was "suggestion of small tears involving the posterior annulus at L3-L4 and L4-  
9 L5. While there is no evidence of nerve root compression and the neural foramina are widely patent, these  
10 small tears may account for both pain and radiculopathy." [AR 35, 341]. On September 17, 2007, after  
11 reviewing those records, Dr. Dureza recommended a pain management consultation for possible lumbar  
12 epidural steroid injections. Dr. Dureza saw plaintiff again on October 22, 2007 and November 20, 2007.  
13 He continued to opine that plaintiff was temporarily totally disabled. [AR 35].

14 A December 2007 lumbar spine MRI from another treating physician, Dr. Carlos Cordoba, showed  
15 L4-5 and L5-S1 disc desiccation, signal loss, and annular fissures with no spinal stenosis, protrusion, or  
16 extrusion. There was a focal annular tear at L4-5 and an annular fissure at L5-S1. Dr. Cordoba prescribed  
17 extra-strength Tylenol and released plaintiff to return to his regular work on January 5, 2008. [AR 35].

18 The ALJ noted that during the administrative hearing, plaintiff testified that he had an upcoming  
19 appointment with an orthopedist; however, plaintiff's counsel had not submitted any additional medical  
20 records. The ALJ concluded that "[u]nder the circumstances, the medical evidence does not establish that  
21 any worsening of the claimant's condition in August 2007 is ongoing and is reasonably expected to last for  
22 12 months." [AR 35].

23 Plaintiff submitted post-hearing medical evidence to the Appeals Council. That evidence included  
24 progress reports from Dr. Dureza dated May 1, 2008 and June 3, 2008, orthopedic treatment reports dated  
25 January 2009 and February 2009, and an electrodiagnostic study dated February 2009. [See AR 2, 6, 13,

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28 <sup>2</sup> The annulus (anulus) fibrosus of an intervertebral disc is "the ring of fibrocartilage and  
fibrous tissue forming the circumference of the intervertebral disc" and "surrounds the nucleus  
pulposus, which is prone to herniation when the annulus fibrosus is compromised." Stedman's  
Medical Dictionary anulus (27th ed. 2000).

1 45-73]. The Appeals Council concluded that this evidence was new and material, and that it showed  
2 “changed circumstances, indicating a greater disability” than the evidence before the ALJ, warranting a  
3 remand for further administrative proceedings. [AR 2-3].

4 A reviewing court “consider[s] on appeal both the ALJ's decision” and “additional material  
5 submitted to the Appeals Council.” Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993) (citing Bates v.  
6 Sullivan, 894 F.2d 1059, 1063-64 (9th Cir.1990) and 20 C.F.R. § 404.970(b)). Thus, the question is whether  
7 the record as a whole supports the ALJ’s finding that the deterioration in plaintiff’s severe lumbar spine  
8 impairment, which produced “significant clinical findings” between August 2007 to November 2007—prior  
9 to plaintiff’s date last insured—was not reasonably expected to last for twelve months. [AR 35].

10 The “significant clinical findings” from 2007 to which the ALJ referred in his decision are reflected  
11 in treatment reports from Dr. Dureza, a board certified neurosurgeon, from August 2007 through November  
12 2007. [AR 326-346]. Dr. Dureza’s examination findings include “3+” to “4+” tenderness to palpation with  
13 spasm and inflammation noted in the bilateral erector spinae muscles [AR 327, 332, 337]; “3+” to “4+”  
14 tenderness to palpation with inflammation noted in the bilateral iliac crest, median sacral crest, and PSIS  
15 (posterior superior iliac spine) muscles [AR 327, 332, 337]; restricted range of lumbar spine motion due to  
16 tenderness, spasm, and swelling [AR 331, 336, 343]; decreased sensation to light touch and pinprick in the  
17 right L5 and S1 dermatomal distribution [AR 327, 331, 336]; reflexes “diminished 1+ throughout the Patella  
18 and Achilles, bilaterally” [AR 327, 331]; patient either unable to squat or unable to do so without difficulty  
19 [AR 331, 336]; positive heel walk and toe walk bilaterally [AR 328, 331, 336]; positive straight leg raising  
20 test bilaterally in the supine position<sup>3</sup> [AR 328, 331, 336]; and motor weakness [AR 332, 337]. An August  
21 2007 MRI ordered by Dr. Dureza also yielded positive findings, as previously noted. [See AR 35-36, 340-  
22 341].

23 The Appeals Council concluded that very similar clinical findings made in January 2009 constituted  
24 “new and material evidence” warranting an order vacating the ALJ’s denial of plaintiff’s application for SSI  
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27 <sup>3</sup> A positive straight leg raising test or positive Lasegue's sign is indicative of pain produced  
28 in the sciatic nerve distribution of the opposite leg, as with lumbar disc rupture on the same side as  
the pain. Dan J. Tennenhouse, M.D., J.D., F.C.L.M., Attorneys’ Medical Deskbook 3d § 11:2  
(2004).

1 benefits. Specifically, the Appeals Council noted:

2 [T]reatment notes dated January 17, 2009 show upon physical examination there is  
3 tenderness, spasms, tightness, and reduced range of motion, positive sciatic stretch signs, and  
4 positive straight leg raises. The examination also indicates there is decreased L4-L5  
5 sensation, and the claimant is unable to perform heel and toe walks due to increased pain.  
6 It appears that this new evidence shows changed circumstances, indicating a greater  
7 disability. Therefore, further evaluation and consideration is needed.

8 [AR 2].

9 The January 17, 2009 treatment notes referenced in the Appeals Council's decision were from Daniel  
10 A. Capen, M.D., a treating orthopedist. Dr. Capen examined plaintiff again in February 2009 and concluded  
11 that his lumbar symptoms had worsened since the previous month. [See AR 70-73]. In a January 2009  
12 "Authorization to Release Medical Information," moreover, Dr. Capen stated that plaintiff's condition had  
13 an onset date of August 4, 2000 (the date plaintiff had an on-the-job injury) and was "chronic." [AR 69; see  
14 AR 39]. Dr. Capen had a longitudinal treatment relationship with plaintiff, in that he treated plaintiff for  
15 lumbar spine disease from November 2004 to January 2006. [AR 40, 108, 263-298]. Therefore, Dr. Capen  
16 was familiar with plaintiff's lumbar spine condition both before and after expiration of his insured status  
17 on December 31, 2007.

18 The Appeals Council concluded that Dr. Capen's January 2009 findings showed a greater level of  
19 impairment severity than the ALJ found based on the record before him. Dr. Capen's findings are very  
20 similar to what the ALJ described as the "significant clinical findings" made by Dr. Dureza between August  
21 2007 and November 2007, prior to plaintiff's date last insured. The ALJ did not have the benefit of that  
22 evidence when he concluded that there was no medical evidence showing that plaintiff's lumbar spine  
23 impairment lasted, or was expected to last, at least twelve consecutive months from August 2007.

24 Additional evidence that plaintiff's lumbar spine impairment lasted at least twelve consecutive  
25 months from August 2007 is found in post-hearing progress reports from Dr. Dureza dated May 1, 2008 and  
26 June 3, 2008. Those reports were submitted to the Appeals Council but were not mentioned by the Appeals  
27 Council in its decisions. [See AR 2-3, 46-52, 388-395]. Dr. Dureza's clinical findings in May 2008 and  
28 June 2008 were consistent with the findings he reported from August 2007 through November 2007. They

1 are also consistent with Dr. Capen’s examination findings in January 2009 and February 2009. [Compare  
2 AR 46-52 with AR 326-346 and AR 66-7].

3 Dr. Dureza’s post-hearing reports show the persistence of plaintiff’s lumbar spine signs and  
4 symptoms from August 2007 until after his date last insured, while Dr. Capen’s notes indicate that those  
5 findings continued until at least February 2009, a period of more than twelve consecutive months. When  
6 the ALJ found that “the medical evidence does not establish that any worsening of [plaintiff’s] condition  
7 in August 2007 is ongoing and is reasonably expected to last for 12 months” [AR 35], he did not have that  
8 evidence before him. Those reports, however, are part of the record in this action for judicial review.  
9 Accordingly, the ALJ’s finding that plaintiff’s lumbar spine impairment did not meet the durational  
10 requirement prior to his date last insured is not based on substantial evidence in the record as a whole.

11 In finding that plaintiff’s lumbar spine impairment did not meet the durational requirement, the ALJ  
12 also relied on the results of an August 2007 CT scan and a December 2007 MRI. [See AR 35-36]. The ALJ,  
13 however, did not explain how those imaging studies supported his conclusion that plaintiff did not have a  
14 lumbar spine impairment that was expected to last at least twelve consecutive months. As noted above, Dr.  
15 Dureza reviewed an August 2007 MRI report, which showed mild multi-level degenerative disc disease,  
16 a 3 millimeter central disc protrusion at L3-4 associated with a small annular tear, slight neural foraminal<sup>4</sup>  
17 narrowing bilaterally, mild transverse compression of the thecal sac, a possible small annular tear at L4-5,  
18 and slight narrowing of the neural foramina bilaterally at L5-S1 with mild encroachment upon the L5 nerve  
19 roots. [AR 34-35, 340-341]. The August 2007 lumbar CT scan showed “mild disc bulges or protrusions,  
20 worse at L3-4 and also at L4-5 worse on the left and also slightly at L5-S1 on the right, with mid ventral  
21 impressions on the thecal sac and slight neural foramen encroachment, worse at L3-L4 on the left and at L5-  
22 S1 on the right. No frank spinal stenosis noted. Mild old appearing wedging of L3.” [AR 35, 369]. Those  
23 CT scan findings do not appear to be inconsistent with the contemporaneous MRI findings.

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25 <sup>4</sup> An intervertebral or neural foramen is “any of the openings that give passage to the spinal  
26 nerves from the vertebral canal and are formed by the juxtaposition of superior and inferior notches  
27 in the pedicles of contiguous vertebrae.” The Merriam-Webster Medical Dictionary, intervertebral  
28 foramen, available at MedlinePlus, a website of the United States National Library of Medicine and  
the National Institutes of Health, <http://www.merriam-webster.com/medlineplus> (last visited  
November 8, 2010).

1 The December 2007 MRI showed L4-5, L5-S1 disc desiccation, signal loss, and annular fissures  
2 with no spinal stenosis, protrusion, or extrusion. A focal annular tear was seen at L4-5, and an annular  
3 fissure was present at L5-S1. [AR 377]. Those findings vary somewhat from the August 2007 MRI and CT  
4 scan findings. For example, the August 2007 MRI and CT scan reports showed evidence of a disc  
5 protrusion at L3-4, mild compression of the thecal sac, slight neural foraminal narrowing bilaterally at L3-4  
6 and L5-S1, and slight or mild nerve encroachment at L5-S1. [AR 340-341, 368-369]. The December 2007  
7 MRI report does not include such findings. On the other hand, the December 2007 report is consistent with  
8 the August 2007 MRI and CT scan reports in showing evidence of disc degeneration and annular tear or  
9 annular fissure. The radiologist who reviewed the August 2007 MRI report noted that “small annular tears  
10 may account for both pain and radiculopathy.” [AR 341]. Nothing in the record suggests that the differences  
11 between the August 2007 MRI and CT scan reports and the December 2007 MRI report are significant  
12 enough to establish that plaintiff’s lumbar spine impairment ceased as of December 2007.

13 The ALJ also pointed to a January 2008 state disability insurance form signed by Dr. Cordoba stating  
14 that plaintiff was released to return to his “regular/customary work” on January 5, 2008. [AR 371]. In the  
15 “diagnosis” section of that form, Dr. Cordoba said that plaintiff’s ICD-9 (International Classification of  
16 Diseases, Ninth Revision, Clinical Modification) diagnosis code was 724.2, which is low back syndrome  
17 or low back pain. See 1 ICD-9 CM Table of Diseases and Injuries § 724 (6th ed. 2010). Dr. Cordoba wrote  
18 that plaintiff had chronic and severe pain, lumbar disc desiccation by MRI, and a disc bulge at L3-4  
19 (notwithstanding the absence of a finding of disc bulge on the December 2007 MRI report). [AR 371].

20 Dr. Cordoba’s statement that plaintiff was released to return to his regular and customary work as  
21 of January 5, 2008 is not dispositive. No explanation is provided of how Dr. Cordoba reached that  
22 conclusion. The ALJ himself rejected that conclusion by finding that plaintiff’s RFC precluded him from  
23 performing his past relevant work as a forklift operator or tractor driver. The diagnosis, findings, and  
24 symptoms that Dr. Cordoba briefly noted on that form indicate plaintiff continued to exhibit signs and  
25 symptoms of lumbar disc disease in January 2008.

26 For all of these reasons, the ALJ’s finding that plaintiff did not meet his burden to show the existence  
27 of a severe physical or mental impairment that had lasted or was expected to last twelve consecutive months  
28 prior to his date last insured lacks substantial support in the record as a whole.



1 ///

2 **Remedy**

3 In general, the choice whether to reverse and remand for further administrative proceedings, or to  
4 reverse and simply award benefits, is within the discretion of the court. See Harman v. Apfel, 211 F.3d  
5 1172, 1178 (9th Cir.) (holding that the district court's decision whether to remand for further proceedings  
6 or for payment of benefits is discretionary and is subject to review for abuse of discretion), cert. denied, 531  
7 U.S. 1038 (2000). The Ninth Circuit has observed that “the proper course, except in rare circumstances,  
8 is to remand to the agency for additional investigation or explanation.” Moisa v. Barnhart, 367 F.3d 882,  
9 886 (9th Cir. 2004) (quoting INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam)).

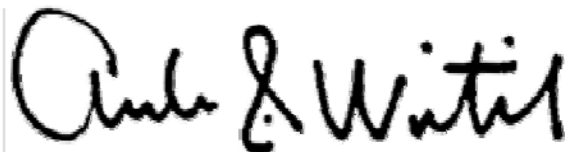
10 The record as a whole shows that plaintiff’s lumbar disc disease met the twelve-month durational  
11 requirement prior to his date last insured. A remand is required to permit the ALJ to conduct further  
12 administrative proceedings and to issue a new decision containing appropriate findings, including a new  
13 credibility finding based on the record as a whole.<sup>5</sup> See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir.  
14 2004) (noting that a remand for further administrative proceedings is appropriate “if enhancement of the  
15 record would be useful”).

16 **Conclusion**

17 The Commissioner’s decision is not supported by substantial evidence and does not reflect  
18 application of the proper legal standards. Accordingly, the Commissioner’s decision is **reversed**, and this  
19 case is **remanded** to the Commissioner for further administrative proceedings consistent with this  
20 memorandum of decision.

21  
22 **IT IS SO ORDERED.**

23  
24 November 8, 2010



25  
26 ANDREW J. WISTRICH  
United States Magistrate Judge

27  
28 <sup>5</sup> This disposition obviates the need to discuss plaintiff’s contention that the ALJ erred in assessing the credibility of his subjective symptoms.