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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
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12 STACY OLLEY,) Case No. CV 10-6786-MLG
13 Plaintiff,) MEMORANDUM OPINION AND ORDER
14 v.)
15 MICHAEL J. ASTRUE,)
16 Commissioner of the)
17 Social Security)
18 Administration,)
Defendant.)

19 Plaintiff Stacy Olley ("Plaintiff") seeks review of the
20 Commissioner's final decision denying her application for supplemental
21 security income ("SSI") pursuant to Title XVI of the Social Security
22 Act. For the reasons stated below, the Commissioner's decision is
23 reversed, and this action is remanded for further proceedings.
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25 **I. Factual and Procedural Background**

26 Plaintiff was born on January 15, 1965. (Administrative Record
27 ("AR") at 25). She has a high school education, but no past relevant
28 work experience. (AR at 25).

1 Plaintiff originally filed an application for SSI on June 18, 2004,
2 (AR at 31). Plaintiff was found not disabled after a hearing before an
3 administrative law judge. (AR at 31-38). The ALJ's decision was
4 subsequently affirmed by the Appeals Council and this Court. (AR at 19);
5 see *Olley v. Astrue*, EDCV 08-00018-MLG.

6 On January 4, 2008, Plaintiff filed a second application for SSI,
7 alleging that she has been disabled since December 9, 2007, due to
8 numbness in her hands, chronic diarrhea, depression, and diabetes. (AR
9 at 19, 65). The Social Security Administration denied Plaintiff's
10 application initially and on reconsideration. (AR at 42-46, 50-54).

11 An administrative hearing was held before Administrative Law Judge
12 F. Keith Varni ("the ALJ") on January 8, 2010. (AR at 220-34).
13 Plaintiff, who was represented by counsel, testified at the hearing. (AR
14 at 222-34). The ALJ issued a decision on February 10, 2010, finding that
15 Plaintiff had not met her burden of establishing changed circumstances
16 to rebut the presumption of continuing non-disability. (AR at 19); see
17 *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988) (applying the rule of
18 res judicata to administrative decisions). The ALJ also found that
19 Plaintiff: (1) has not engaged in substantial gainful activity since her
20 alleged onset date (step 1); (2) suffers from severe impairments,
21 including diabetes, gastroesophageal reflux disease with diarrhea, and
22 status post hysterectomy (step 2); (3) does not have any impairments
23 that meet or equal the criteria of a listed impairment (step 3); (4) has
24 a residual functional capacity ("RFC") to perform a range of light work;¹

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26 ¹ Specifically, the ALJ found that Plaintiff is able to lift and
27 carry 10 pounds frequently and 20 pounds occasionally, sit with normal
28 breaks for six hours in an eight-hour workday, stand and/or walk with
normal breaks for six hours in an eight-hour workday, push and pull
without limitation, and perform gross and fine manipulation, including

1 and (5) a finding of "not disabled" is directed by section 202.20 of the
2 grids, 20 C.F.R. Pt. 404, Subpt. P, App. 2 (step 5). (AR at 25-26).

3 Plaintiff requested that the Appeals Council review the ALJ's
4 decision. (AR at 11). While Plaintiff's request was pending, Plaintiff
5 submitted additional evidence to the Appeals Council. (AR at 11, 196-
6 201). On July 3, 2010, the Appeals Council denied review, leaving the
7 ALJ's decision as the "final decision of the Commissioner." (AR at 5-7).
8 The Appeals Council found that the newly submitted evidence did not
9 provide a basis for changing the ALJ's decision. (AR at 6).

10 Plaintiff commenced this action for judicial review on September
11 17, 2010. The parties filed a Joint Stipulation outlining the disputed
12 facts and legal issues on April 20, 2011. Plaintiff contends that the
13 ALJ erred by applying the presumption of continuing non-disability
14 because she presented evidence demonstrating a deterioration in her
15 condition. (Joint Stipulation at 4). Further, Plaintiff asserts the
16 residual functional capacity assessment was not supported by substantial
17 evidence and the ALJ erred in discounting Plaintiff's subjective symptom
18 testimony. (Joint Stipulation at 3-5, 10-13, 16-17). Plaintiff seeks
19 remand for payment of benefits or, in the alternative, remand for
20 further administrative proceedings. (Joint Stipulation at 18). The
21 Commissioner requests that the ALJ's decision be affirmed. (Joint
22 Stipulation at 18). The Joint Stipulation has been taken under
23 submission without oral argument.

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28 grasping, holding, turning, picking, and pinching. (AR at 22).

1 **II. Standard of Review**

2 Under 42 U.S.C. § 405(g), a district court may review the
3 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
4 findings and decision should be upheld if they are free from legal error
5 and are supported by substantial evidence based on the record as a
6 whole. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401
7 (1971); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
8 evidence means such evidence as a reasonable person might accept as
9 adequate to support a conclusion. *Richardson*, 402 U.S. at 401;
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more
11 than a scintilla, but less than a preponderance. *Lingenfelter*, 504 F.3d
12 at 1035 (citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir.
13 2006)). To determine whether substantial evidence supports a finding,
14 the reviewing court "must review the administrative record as a whole,
15 weighing both the evidence that supports and the evidence that detracts
16 from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715,
17 720 (9th Cir. 1996). "If the evidence can reasonably support either
18 affirming or reversing," the reviewing court "may not substitute its
19 judgment" for that of the Commissioner. *Id.* at 720-721.

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21 **III. DISCUSSION**

22 Plaintiff argues that the medical evidence in the record
23 demonstrates that her condition deteriorated since the prior decision
24 denying benefits in 2006, and that the ALJ's current assessment of her
25 residual functional capacity assessment is not supported by
26 substantial evidence. See *Chavez v. Bowen*, 844 F.3d 691, 693 (9th Cir.
27 1988) (explaining that a presumption of continuing nondisability may
28 be rebutted by proving "changed circumstances" indicating a greater

1 disability); Acquiescence Ruling 97-4(9). In particular, Plaintiff
2 argues that the ALJ failed to properly consider the opinion of her
3 treating physician, David Vargas, M.D. (Joint Stipulation at 4).

4 Dr. Vargas began treating Plaintiff in June 2007. (AR at 120,
5 201). His records show that Plaintiff suffered from major depression,
6 irritable bowel syndrome, gastroesophageal reflux disease, and poorly
7 controlled diabetes. (AR at 115-20, 181-82, 185, 190, 192, 194). Dr.
8 Vargas prescribed a variety of medications for these conditions.
9 Nevertheless, he noted on one occasion that medication had not helped
10 Plaintiff's neuropathy pain. (AR at 115). He also reported that
11 Plaintiff had been experiencing suicidal thoughts. (AR at 182).

12 The ALJ gave little consideration to Dr. Vargas's records. In
13 determining that Plaintiff had failed to establish a deterioration in
14 her condition since the 2006 unfavorable decision, the ALJ stated that
15 Plaintiff's physical examinations were essentially normal. (AR at 24).
16 The ALJ found that Plaintiff suffered from the same impairments that
17 were considered severe in 2006 (*i.e.*, diabetes, gastroesophageal
18 reflux disease with diarrhea, and status post hysterectomy).

19 This finding was inconsistent with Dr. Vargas's opinion. (AR at
20 21-22). In addition to treating Plaintiff for gastroesophageal reflux
21 disease, poorly controlled diabetes, and major depression, Dr. Vargas
22 also diagnosed Plaintiff with irritable bowel syndrome. (AR at 115-20,
23 181-82, 185, 190, 192, 194). Because Dr. Vargas was Plaintiff's
24 treating physician, his opinion was entitled to special weight. See 20
25 C.F.R. § 416.1527 ; *Reddick*, 157 F.3d at 725; *Lester v. Chater*, 81
26 F.3d 821, 830 (9th Cir. 1995).

27 The ALJ cited the report of the non-examining state agency
28 physician to support his assessment of Plaintiff's physical

1 impairments. (AR at 24). However, the opinion of a non-examining
2 doctor cannot alone constitute substantial evidence to warrant the
3 rejection of the opinion of a treating physician. See *Lester v.*
4 *Chater*, 81 F.3d 821, 831 (9th Cir. 1996). Thus, the ALJ's conclusion
5 that Plaintiff failed to meet her burden of showing changed
6 circumstances is not supported by substantial evidence. Acquiescence
7 Ruling 97-4(9) (explaining that changed circumstances include an
8 increase in the severity of the claimant's impairments, the existence
9 of a new impairment, a change in the criteria for determining
10 disability, and a change in age status).

11 Even if a claimant is able to demonstrate changed circumstances
12 to overcome the presumption of continuing non-disability, a prior
13 ALJ's assessment of her residual functional capacity assessment is
14 still entitled to some res judicata consideration. *Chavez*, 844 F.2d at
15 694; Acquiescence Ruling 97-4(9) ("Adjudicators must adopt such a
16 finding from the final decision on the prior claim in determining
17 whether the claimant is disabled with respect to the unadjudicated
18 period unless there is new and material evidence relating to such a
19 finding or there has been a change in the law, regulations or rulings
20 affecting the finding or the method for arriving at the finding.").
21 Here, rather than adopt the prior ALJ's residual functional capacity
22 finding, the ALJ in the current case determined that Plaintiff's
23 ability to perform light work actually improved since the 2006
24 decision.² Once the ALJ determined that Plaintiff demonstrated changed

25 ² In 2006, the ALJ found that Plaintiff was limited to occasional
26 use of her right hand for handling and fingering, restricted from using
27 a forceful grip or bilateral grasp and needed to alternate use of her
28 hands every 15 minutes while driving. (AR at 34). In the current
decision, the ALJ found that Plaintiff can push and pull without
limitation and can perform frequent gross and fine manipulation. (AR ta

1 circumstances with respect to her residual functional capacity, the
2 ALJ was obligated to reassess Plaintiff's current residual functional
3 capacity in its entirety. See *Chavez*, 844 F.2d at 693-94; Acquiescence
4 Ruling 97-4(9).

5 In March 2010, Dr. Vargas completed a physical residual
6 functional capacity questionnaire on Plaintiff's behalf. (AR at 197-
7 2010). Dr. Vargas's opinion stands in stark contrast to the ALJ's
8 residual functional capacity assessment. (AR at 197-201). Dr. Vargas
9 opined that Plaintiff suffers from diffuse abdominal pain "up to
10 10/10" with cramping and diarrhea "8-10 times daily." (AR at 197). He
11 described Plaintiff's pain as constant, and concluded that Plaintiff
12 is severely limited in her ability to effectively deal with work
13 stress. (AR at 198). Dr. Vargas reported that Plaintiff has been
14 experiencing these symptoms and limitations since June 2007. (AR at
15 201).

16 Plaintiff asserts that Dr. Vargas's questionnaire shows that the
17 ALJ's assessment of her residual functional capacity is not supported
18 by substantial evidence. (Joint Stipulation at 4-5, 10-11). However,
19 the ALJ never actually had an opportunity to review the questionnaire,
20 as it was prepared after the ALJ issued the decision. (AR at 19-26,
21 197-201). The Appeals Council considered the new evidence, but
22 concluded that it did not justify review. (AR at 6).

23 Where a claimant is seeking review based on evidence not
24 presented to the ALJ, the Appeals Council must only provide such
25 review when the submitted evidence: (1) is new, (2) is material, and
26 (3) relates to the period on or before the date of the ALJ hearing

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28 22).

1 decision. See *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993);
2 see also 20 C.F.R. § 416.1470(b). Dr. Vargas's physical residual
3 functional capacity questionnaire satisfies these criteria. It is new
4 and Dr. Vargas stated that his findings relate to the period at issue.
5 (AR at 197-201). The questionnaire is also material. See *Booz v. Sec'y*
6 *of Health & Human Servs.*, 734 F.2d 1378, 1380-81 (9th Cir. 1984)
7 (explaining that evidence is material where it creates a reasonable
8 possibility that the outcome of the case would change). While the
9 questionnaire may be less persuasive than the contemporaneous medical
10 evidence of record because it was prepared after the ALJ's decision,
11 it bears directly on the issue of Plaintiff's ability to perform work-
12 related functions. (AR at 197-201). As Dr. Vargas is Plaintiff's
13 treating physician, there is a reasonable possibility that the new
14 evidence that Plaintiff submitted would have changed the ALJ's
15 decision in this case. *Booz*, 734 F.2d at 1380-81. Accordingly, remand
16 for consideration of Dr. Vargas's new residual functional capacity
17 questionnaire, in conjunction with the existing medical records, is
18 appropriate. See *Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000)
19 ("While we properly may consider the additional evidence presented to
20 the Appeals Council in determining whether the Commissioner's denial
21 of benefits is supported by substantial evidence, it is another matter
22 to hold on the basis of evidence that the ALJ has had no opportunity
23 to evaluate that Appellant is entitled to benefits as a matter of law.
24 The appropriate remedy in this situation is to remand this case to the
25 ALJ; the ALJ may then consider, the Commissioner then may seek to
26 rebut and the VE then may answer questions with respect to the
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1 additional evidence.").³

2 Accordingly, IT IS ORDERED that this action be remanded for
3 further proceedings consistent with this Memorandum Opinion.

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6 DATED: May 10, 2011

7 MARC L. GOLDMAN

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MARC L. GOLDMAN
9 United States Magistrate Judge
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24 ³ In light of this remand, the Court will not reach Plaintiff's
25 remaining argument. See *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th
26 Cir. 2003) (where there are outstanding issues that must be resolved
27 before a determination of disability can be made, and it is not clear
28 from the record that the ALJ would be required to find the claimant
disabled if all the evidence were properly evaluated, remand is
appropriate). The Court recommends, however, that the ALJ consider all
of Plaintiff's arguments when determining the merits of her case on
remand.