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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY GREGG,	)	Case No. CV 12-3223-JPR
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
vs.	)	REVERSING COMMISSIONER AND
	)	REMANDING FOR FURTHER
CAROLYN W. COLVIN, Acting	)	PROCEEDINGS
Commissioner of Social	)	
Security, <sup>1</sup>	)	
	)	
Defendant.	)	
	)	

**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security Supplemental Security Income benefits ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed January 3, 2013, which the Court has taken under submission without oral argument. For the

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<sup>1</sup> On February 14, 2013, Colvin became the Acting Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d), the Court therefore substitutes Colvin for Michael J. Astrue as the proper Respondent.

1 reasons stated below, the Commissioner's decision is reversed and  
2 this matter is remanded for further proceedings.

3 **II. BACKGROUND**

4 Plaintiff was born on June 10, 1956, and has an 11th-grade  
5 education. (Administrative Record ("AR") 49, 143.) He  
6 previously worked as a salesperson and a spray painter. (AR 17,  
7 85.)

8 Plaintiff filed an application for SSI on September 15,  
9 2006.<sup>2</sup> (AR 78, 86.) In a written decision issued on April 25,  
10 2008, an Administrative Law Judge ("ALJ") determined that  
11 Plaintiff was not disabled through the date of the decision. (AR  
12 78-86.) Plaintiff did not request review of the ALJ's April 25,  
13 2008 decision. (AR 9.)

14 On July 23, 2009, Plaintiff filed another application for  
15 SSI. (AR 9, 143-64.) Plaintiff alleged that he had been unable  
16 to work since July 12, 2009, because of respiratory and renal  
17 failure, chronic obstructive pulmonary disease (COPD),  
18 hyperlipidemia, neuropathy in both lower extremities, diabetes,  
19 pancreatitis, depression, dialysis, heart problems, headaches,  
20 colitis, and high blood pressure. (AR 87, 96.) His application  
21 was denied initially, on November 17, 2009 (AR 72, 87-91), and  
22 upon reconsideration, on February 25, 2010 (AR 73, 96-101).

23 On March 12, 2010, Plaintiff requested a hearing before an  
24 ALJ. (AR 103-04.) A hearing was held on February 2, 2011, at  
25 which Plaintiff, who was represented by counsel, appeared and  
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27 <sup>2</sup> Plaintiff had also filed SSI applications on December 13,  
28 2004, and June 30, 2005, which were both denied at the initial and  
reconsideration levels. (See AR 78.)

1 testified. (AR 40, 48-71.) In a written decision issued on  
2 February 18, 2011, the ALJ determined that Plaintiff was not  
3 disabled. (AR 9-18.) On March 3, 2011, Plaintiff requested  
4 review of the ALJ's decision. (AR 37.) On February 8, 2012, the  
5 Appeals Council denied Plaintiff's request for review. (AR 1-5.)  
6 This action followed.

### 7 **III. STANDARD OF REVIEW**

8 Pursuant to 42 U.S.C. § 405(g), a district court may review  
9 the Commissioner's decision to deny benefits. The ALJ's findings  
10 and decision should be upheld if they are free of legal error and  
11 supported by substantial evidence based on the record as a whole.  
12 § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct.  
13 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d  
14 742, 746 (9th Cir. 2007). Substantial evidence means such  
15 evidence as a reasonable person might accept as adequate to  
16 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter  
17 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than  
18 a scintilla but less than a preponderance. Lingenfelter, 504  
19 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,  
20 882 (9th Cir. 2006)). To determine whether substantial evidence  
21 supports a finding, the reviewing court "must review the  
22 administrative record as a whole, weighing both the evidence that  
23 supports and the evidence that detracts from the Commissioner's  
24 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
25 1996). "If the evidence can reasonably support either affirming  
26 or reversing," the reviewing court "may not substitute its  
27 judgment" for that of the Commissioner. Id. at 720-21.

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1 **IV. THE EVALUATION OF DISABILITY**

2 People are "disabled" for purposes of receiving Social  
3 Security benefits if they are unable to engage in any substantial  
4 gainful activity owing to a physical or mental impairment that is  
5 expected to result in death or which has lasted, or is expected  
6 to last, for a continuous period of at least 12 months. 42  
7 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257  
8 (9th Cir. 1992).

9 A. The Five-Step Evaluation Process

10 The ALJ follows a five-step sequential evaluation process in  
11 assessing whether a claimant is disabled. 20 C.F.R.  
12 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.  
13 1995) (as amended Apr. 9, 1996). In the first step, the  
14 Commissioner must determine whether the claimant is currently  
15 engaged in substantial gainful activity; if so, the claimant is  
16 not disabled and the claim must be denied. § 416.920(a)(4)(i).  
17 If the claimant is not engaged in substantial gainful activity,  
18 the second step requires the Commissioner to determine whether  
19 the claimant has a "severe" impairment or combination of  
20 impairments significantly limiting her ability to do basic work  
21 activities; if not, the claimant is not disabled and the claim  
22 must be denied. § 416.920(a)(4)(ii). If the claimant has a  
23 "severe" impairment or combination of impairments, the third step  
24 requires the Commissioner to determine whether the impairment or  
25 combination of impairments meets or equals an impairment in the  
26 Listing of Impairments ("Listing") set forth at 20 C.F.R., Part  
27 404, Subpart P, Appendix 1; if so, disability is conclusively  
28 presumed and benefits are awarded. § 416.920(a)(4)(iii). If the

1 claimant's impairment or combination of impairments does not meet  
2 or equal an impairment in the Listing, the fourth step requires  
3 the Commissioner to determine whether the claimant has sufficient  
4 residual functional capacity ("RFC")<sup>3</sup> to perform her past work;  
5 if so, the claimant is not disabled and the claim must be denied.  
6 § 416.920(a)(4)(iv). The claimant has the burden of proving that  
7 she is unable to perform past relevant work. Drouin, 966 F.2d at  
8 1257. If the claimant meets that burden, a prima facie case of  
9 disability is established. Id. If that happens or if the  
10 claimant has no past relevant work, the Commissioner then bears  
11 the burden of establishing that the claimant is not disabled  
12 because she can perform other substantial gainful work available  
13 in the national economy. § 416.920(a)(4)(v). That determination  
14 comprises the fifth and final step in the sequential analysis.  
15 § 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

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

17 At step one, the ALJ found that Plaintiff had not engaged in  
18 any substantial gainful activity since July 23, 2009, his most  
19 recent application date. (AR 12.) At step two, the ALJ  
20 concluded that Plaintiff had "the following conditions of ill-  
21 being: diabetes mellitus with retinopathy and peripheral  
22 neuropathy; hypertension, status post cerebrovascular accident;  
23 hyperlipidemia; and chronic obstructive pulmonary disease." (Id.  
24 (citation omitted.)) The ALJ further found that the combination  
25 of these impairments

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26  
27 <sup>3</sup> RFC is what a claimant can still do despite existing  
28 exertional and nonexertional limitations. 20 C.F.R. § 416.945; see  
Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 causes significant limitation in the claimant's ability  
2 to perform basic work activities. Therefore, the  
3 claimant has a severe impairment.

4 (Id.) At step three, the ALJ determined that Plaintiff's  
5 impairments did not meet or equal any of the impairments in the  
6 Listings. (AR 13.) At step four, the ALJ found that Plaintiff  
7 retained the RFC to perform light work<sup>4</sup> except "he can  
8 occasionally climb ramps and stairs, but he must never climb  
9 ladders, ropes, or scaffolds; and he can occasionally balance,  
10 stoop, kneel, crouch, and crawl." (AR 14.) Based on the  
11 vocational expert's testimony taken by the prior ALJ before his  
12 April 25, 2008 decision, the ALJ concluded that Plaintiff could  
13 perform his past relevant work as a salesperson as generally  
14 performed in the national economy. (AR 17.) Accordingly, the  
15 ALJ determined that Plaintiff was not disabled without reaching  
16 step five of the evaluation process. (AR 18.)

17 **V. RELEVANT FACTS**

18 On September 23, 2009, Plaintiff was examined by consulting  
19 internist Dr. John Sedgh. (AR 784-88.) After reviewing  
20 Plaintiff's medical records and performing a physical  
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22 <sup>4</sup> "Light work" is defined as involving "lifting no more  
23 than 20 pounds at a time with frequent lifting or carrying of  
24 objects weighing up to 10 pounds." 20 C.F.R. § 416.967(b). The  
25 regulations further specify that "[e]ven though the weight lifted  
26 may be very little, a job is in this category when it requires a  
27 good deal of walking or standing, or when it involves sitting most  
28 of the time with some pushing and pulling of arm or leg controls."  
Id. A person capable of light work is also capable of "sedentary  
work," which involves lifting "no more than 10 pounds at a time and  
occasionally lifting or carrying [small articles]" and may involve  
occasional walking or standing. § 416.967(a)-(b).

1 examination, Dr. Sedgh opined that Plaintiff retained the RFC for  
2 light work except that he could only occasionally kneel, crouch,  
3 or stoop. (Id.)

4 In November 2009, state-agency nonexamining physician Dr. P.  
5 N. Ligot completed a physical RFC assessment and indicated that  
6 Plaintiff's diagnoses included hypertension, status post cerebral  
7 vascular accident, and respiratory failure/chronic obstructive  
8 pulmonary disease. (AR 905-10.) Dr. Ligot opined that Plaintiff  
9 retained the RFC for light work except that he could only  
10 occasionally climb, stoop, kneel, crouch or crawl and should  
11 never balance. (AR 906-07.) Moreover, because of Plaintiff's  
12 COPD/respiratory failure and status post-cerebral vascular  
13 accident, he should avoid concentrated exposure to hazards and  
14 even moderate exposure to fumes, odors, dusts, gases, and poor  
15 ventilation. (AR 908.) These findings were confirmed by state-  
16 agency nonexamining physician Dr. R. E. Brooks on February 25,  
17 2010. (AR 936-38.)

18 Before engaging in the five-step analysis, the ALJ noted  
19 that Plaintiff failed to seek review of the ALJ's April 25, 2008  
20 decision denying his application "and therefore, that decision is  
21 administratively final." (AR 9.) As a result, the ALJ found  
22 that "there is a presumption of non-disability arising from" that  
23 decision and that in order to overcome the presumption, Plaintiff  
24 "must prove 'changed circumstances' indicating a greater  
25 disability established by new and material evidence." (AR 9-10.)  
26 The ALJ concluded that Plaintiff "failed to rebut the presumption  
27 of continuing non-disability" and therefore "I must adopt" the  
28 findings contained in the prior ALJ's April 25, 2008 decision.

1 (AR 10.)

2 At step two, the ALJ stated that his findings were based on  
3 the prior ALJ's analysis of the medical records, "introduced as  
4 collateral estoppel" and "corroborated by the current medical  
5 evidence[.]" (AR 12.) In assessing Plaintiff's physical  
6 impairments, the ALJ noted that he gave "particular emphasis" to  
7 the opinions of Dr. Sedgh and the state-agency nonexamining  
8 physicians, which he found to be "persuasive." (Id.)

9 Thereafter, in determining Plaintiff's RFC, the ALJ again noted  
10 that he based his assessment "primarily" on the opinions of the  
11 nonexamining physicians and Dr. Sedgh, "who found the claimant  
12 capable of light work." (AR 14.) The ALJ explained that "it is  
13 evident that the State Agency doctors essentially adopted the  
14 prior Administrative Law Judge decision and found no material  
15 change of circumstance, as do I." (Id. (citation omitted).)

## 16 **VI. DISCUSSION**

17 Plaintiff alleges that the ALJ erred in determining that  
18 Plaintiff had not overcome the continuing presumption of  
19 nondisability arising from the ALJ's April 25, 2008 decision  
20 denying Plaintiff's prior SSI application. (J. Stip. at 3-7, 10-  
21 12.) Specifically, Plaintiff contends that his COPD is a "new  
22 impairment" that was not raised in his prior application or  
23 considered by the prior ALJ in his April 25, 2008 decision. (J.  
24 Stip. at 5.) According to Plaintiff, "[t]he presence of this new  
25 impairment that previously was not considered constitutes a  
26 change[] in circumstances that precluded the application of *res*  
27 *judicata*." (Id.) Finally, Plaintiff notes that the nonexamining  
28 state-agency physician opined that Plaintiff suffered limitations



1 related to his COPD that did not exist during the prior period,  
2 which "further demonstrates that there has been a change in  
3 circumstances" precluding the application of res judicata. (J.  
4 Stip. at 5.)

5 A. Applicable Law

6 "The principles of res judicata apply to administrative  
7 decisions, although the doctrine is applied less rigidly to  
8 administrative proceedings than to judicial proceedings." Chavez  
9 v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988). "Normally, an ALJ's  
10 findings that a claimant is not disabled 'creates a presumption  
11 that the claimant continued to be able to work after that date.'" Vasquez v. Astrue, 572 F.3d 586, 597 (9th Cir. 2009) (quoting  
12 Lester, 81 F.3d at 827). "The presumption does not apply,  
13 however, if there are 'changed circumstances.'" Lester, 81 F.3d  
14 at 827 (quoting Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir.  
15 1985)); accord Acquiescence Ruling 97-4(9), 1997 WL 742758, at \*3  
16 ("When adjudicating the subsequent claim involving an  
17 unadjudicated period, adjudicators will apply a presumption of  
18 continuing nondisability and determine that the claimant is not  
19 disabled with respect to that period, unless the claimant rebuts  
20 the presumption . . . by showing a 'changed circumstance'  
21 affecting the issue of disability with respect to the  
22 unadjudicated period[.]"). Examples of changed circumstances  
23 precluding the application of res judicata to a subsequent  
24 unadjudicated period of alleged disability include "[a]n increase  
25 in the severity of the claimant's impairment," "a change in the  
26 claimant's age category, as defined in the Medical-Vocational  
27 Guidelines," "where the claimant raises a new issue, such as the  
28

1 existence of an impairment not considered in the previous  
2 application," and "where the claimant was unrepresented by  
3 counsel at the time of the prior claim." Lester, 81 F.3d at 827-  
4 28 (citations omitted); see also Acquiescence Ruling 97-4(9),  
5 1997 WL 724758, at \*3 (explaining that examples of changed  
6 circumstances include "a change in the claimant's age category  
7 under 20 CFR 404.1563 or 416.963, an increase in the severity of  
8 the claimant's impairment(s), the alleged existence of an  
9 impairment(s) not previously considered, or a change in the  
10 criteria for determining disability").

11 B. Analysis

12 The ALJ's determination that Plaintiff failed to rebut the  
13 presumption of continuing nondisability arising from the ALJ's  
14 April 25, 2008 decision is not supported by substantial evidence.  
15 Specifically, Plaintiff alleged a new impairment, COPD, in his  
16 most recent application, and the ALJ determined, at step two,  
17 that in combination with his other conditions it amounted to a  
18 severe impairment. (AR 12, 87, 96-97.) Therefore, Plaintiff's  
19 COPD was a new impairment that was not considered by the prior  
20 ALJ in his April 25, 2008 decision. (Compare AR 9-18 with AR 78-  
21 86.) Because Plaintiff alleged, and the ALJ determined, that  
22 Plaintiff has a new impairment that was not considered by the  
23 prior ALJ, it was improper for the ALJ to apply the presumption  
24 of continuing nondisability when deciding the instant SSI  
25 application. See, e.g., Lester, 81 F.3d at 828 (holding that  
26 plaintiff's allegation of new impairment that was not raised in  
27 prior application or addressed in prior decision and change in  
28 plaintiff's age category each independent reason precluding

1 application of res judicata); Light v. Soc. Sec. Admin., 119 F.3d  
2 789, 792 (9th Cir. 1997) (finding presumption of nondisability  
3 rebutted by evidence of diagnosis of new impairment and evidence  
4 that previous impairment had become increasingly severe, either  
5 of which could have been basis for finding of disability either  
6 independently or when aggregated with all of plaintiff's  
7 preexisting infirmities); Vasquez, 572 F.3d at 597-98 (holding  
8 that "because Vasquez raised a new issue not before ALJ Stacy and  
9 entered the 'closely approaching advanced age' category, it was  
10 improper for ALJ Rogers to apply a presumption of continuing non-  
11 disability when deciding Vasquez's second application").  
12 Defendant argues that because the ALJ did not find that  
13 Plaintiff's COPD was a "severe" impairment, the ALJ properly gave  
14 res judicata effect to the prior ALJ's decision. (J. Stip. at  
15 9.) The Ninth Circuit, however, rejected this argument in  
16 Vasquez and found it "irrelevant, because . . . a claimant  
17 defeats the presumption of continuing nondisability by raising a  
18 new issue in a later application." Vasquez, 572 F.3d at 598 n.9.  
19 The Ninth Circuit explained that "all an applicant has to do to  
20 preclude the application of res judicata is raise a new issue in  
21 the later proceeding." Id. (citation omitted). Acquiescence  
22 Ruling 97-4(9) requires only a "'changed circumstance' affecting  
23 the issue of disability," not necessarily a severe impairment.  
24 1997 WL 742758, at \*3.

25 Moreover, although the evidence does seem to support the  
26 ALJ's finding that Plaintiff is not disabled, the Court cannot  
27 conclude that the ALJ's error in giving res judicata effect to  
28 the prior ALJ's April 25, 2008 decision was harmless. The ALJ

1 clearly adopted the opinions of Drs. Sedgh, Ligot, and Brooks in  
2 assessing Plaintiff's RFC (AR 12, 14-15), but he failed to  
3 include or even discuss the environmental limitations opined by  
4 Dr. Ligot as a result of Plaintiff's respiratory failure/COPD and  
5 status post-cerebral vascular accident. (Compare AR 12 with AR  
6 908.) In addition, the VE testimony relied upon by the ALJ in  
7 determining that Plaintiff could perform his past relevant work  
8 as a salesman was offered at the hearing before the prior ALJ  
9 and, thus, did not include the environmental limitations opined  
10 by Dr. Ligot. (AR 17.) As a result, there is no VE testimony to  
11 support a finding that Plaintiff could perform his past relevant  
12 work - or any other work - if the environmental limitations  
13 opined by Dr. Ligot were incorporated into Plaintiff's RFC.  
14 Therefore, the Court cannot conclude that the ALJ's disability  
15 determination would have been the same had he found that  
16 Plaintiff had rebutted the presumption of continuing  
17 nondisability and not given res judicata effect to the prior  
18 ALJ's decision.

19 In sum, the ALJ's determination that Plaintiff failed to  
20 rebut the continuing presumption of nondisability arising from  
21 the prior ALJ's decision was not supported by substantial  
22 evidence, and Plaintiff is entitled to reversal on that basis.  
23 On remand, the ALJ shall reassess whether Plaintiff is disabled  
24 without giving res judicata effect to the ALJ's April 25, 2008  
25 decision.

## 26 VII. CONCLUSION

27 When error exists in an administrative determination, "the  
28 proper course, except in rare circumstances, is to remand to the

1 agency for additional investigation or explanation." INS v.  
2 Ventura, 537 U.S. 12, 16, 123 S. Ct. 353, 355, 154 L. Ed. 2d 272  
3 (2002) (citations and quotation marks omitted); Moisa v.  
4 Barnhart, 367 F.3d 882, 886 (9th Cir. 2004). Accordingly,  
5 remand, not an award of benefits, is the proper course in this  
6 case. See Strauss v. Comm'r of Soc. Sec. Admin., 635 F.3d 1135,  
7 1136 (9th Cir. 2011) (remand for automatic payment of benefits  
8 inappropriate unless evidence unequivocally establishes  
9 disability). As noted above, on remand, the ALJ shall reevaluate  
10 Plaintiff's claim of disability without giving res judicata  
11 effect to the prior ALJ's April 25, 2008 decision.

12 **ORDER**

13 Accordingly, **IT IS HEREBY ORDERED** that (1) the decision of  
14 the Commissioner is REVERSED; (2) Plaintiff's request for remand  
15 is GRANTED; and (3) this action is REMANDED for further  
16 proceedings consistent with this Memorandum Opinion.

17 **IT IS FURTHER ORDERED** that the Clerk of the Court serve  
18 copies of this Order and the Judgment herein on all parties or  
19 their counsel.

20  
21 DATED: June 4, 2013

  
JEAN ROSENBLUTH  
U.S. Magistrate Judge