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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION

PATRICIA WOODS,)	ED CV 10-1306-CW
)	
Plaintiff,)	MEMORANDUM DECISION
)	AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying plaintiff's application for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act. Pursuant to 28 U.S.C. § 636(c).

The parties have consented that the case may be handled by the undersigned.

The action arises under 42 U.S.C. § 405(g), which authorizes the court to enter judgment upon the pleadings and transcript of record before the Commissioner. Plaintiff and defendant have filed a joint stipulation (Plaintiff's Brief with Points and Authorities Requesting

1 Remand or Reversal ["Plaintiff's Brief"]; Defendant's Brief with
2 Points and Authorities in Opposition to Plaintiff's Request for Remand
3 or Reversal ["Defendant's Brief"], and defendant has filed the
4 certified transcript of record. After reviewing the matter, the Court
5 concludes that the decision of the Commissioner should be reversed and
6 remanded for further proceedings.
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9 **I.**

10 **BACKGROUND**

11 On April 9, 2004, plaintiff filed a Title II application for a
12 period of disability and disability insurance benefits; plaintiff also
13 protectively filed a Title XVI application for supplemental security
14 income ("SSI") on March 16, 2004. (AR 21). Both applications, which
15 alleged disability beginning June 29, 2001, were initially denied on
16 August 2, 2004, and upon reconsideration on March 8, 2005. Thereafter,
17 plaintiff filed a timely written request for a hearing on April 7,
18 2005 and appeared and testified at the hearing held on October 11,
19 2006. On January 22, 2007, the ALJ issued an unfavorable decision,
20 finding plaintiff had severe physical impairments but could perform a
21 wide range of light work. (AR 21-31).
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24 On August 2, 2007, plaintiff protectively filed a second
25 application for supplemental security income ("SSI"), alleging
26 disability beginning June 30, 2001, due to pain in the right shoulder,
27 neck, and hands. (AR 74, 91). The claim was denied initially on March
28 18, 2008, and upon reconsideration on April 18, 2008. Thereafter,

1 plaintiff filed a written request for a hearing on May 7, 2008. (20
2 CFR 416.1429 *et seq.*) Plaintiff appeared and testified at the hearing
3 on September 29, 2009; the ALJ issued an unfavorable decision on
4 November 13, 2009. (AR 14). The ALJ determined that plaintiff had not
5 presented new material evidence showing changed circumstances
6 indicative of greater disability during the unadjudicated period,¹
7 that she had the same limitations as those found in 2007, and that she
8 could not perform her past relevant work, but remained able to
9 perform other jobs existing in significant numbers. (AR 11-20). After
10 considering plaintiff's age, education, work experience, and residual
11 functional capacity ("RFC"), the ALJ concluded that plaintiff was not
12 disabled within the meaning of the Social Security Act.
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15 16 II.

17 18 STANDARD OF REVIEW

19 Under 42 U.S.C. § 405(g), a district court may review the
20 Commissioner's decision to deny benefits. The Commissioner's (or
21 ALJ's) findings and decision should be upheld if they are free of
22 legal error and supported by substantial evidence. However, if the
23 court determines that a finding is based on legal error or is not
24 supported by substantial evidence in the record, the court may reject
25 the finding and set aside the decision to deny benefits. See Aukland
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¹ The unadjudicated period was from January 23, 2007 (first day after the first ALJ's decision denying benefits) to November 13, 2009 (date of the second ALJ's decision denying benefits).

1 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
2 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
3 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
4 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
5 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
6 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).
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8 "Substantial evidence is more than a scintilla, but less than a
9 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
10 which a reasonable person might accept as adequate to support a
11 conclusion." Id. To determine whether substantial evidence supports
12 a finding, a court must review the administrative record as a whole,
13 "weighing both the evidence that supports and the evidence that
14 detracts from the Commissioner's conclusion." Id. "If the evidence
15 can reasonably support either affirming or reversing," the reviewing
16 court "may not substitute its judgment" for that of the Commissioner.
17 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.
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20 **III. DISCUSSION**

21 **A. THE FIVE-STEP EVALUATION**

22 To be eligible for disability benefits a claimant must
23 demonstrate a medically determinable impairment which prevents the
24 claimant from engaging in substantial gainful activity and which is
25 expected to result in death or to last for a continuous period of at
26 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
27 721; 42 U.S.C. § 423(d)(1)(A).
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1 Disability claims are evaluated using a five-step test:

2 Step one: Is the claimant engaging in substantial
3 gainful activity? If so, the claimant is found not
4 disabled. If not, proceed to step two.

5 Step two: Does the claimant have a "severe" impairment?
6 If so, proceed to step three. If not, then a finding of not
7 disabled is appropriate.

8 Step three: Does the claimant's impairment or
9 combination of impairments meet or equal an impairment
10 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
11 so, the claimant is automatically determined disabled. If
12 not, proceed to step four.

13 Step four: Is the claimant capable of performing his
14 past work? If so, the claimant is not disabled. If not,
15 proceed to step five.

16 Step five: Does the claimant have the residual
17 functional capacity to perform any other work? If so, the
18 claimant is not disabled. If not, the claimant is disabled.

19 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
20 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
21 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
22 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
23 "not disabled" at any step, there is no need to complete further
24 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

25 Claimants have the burden of proof at steps one through four,
26 subject to the presumption that Social Security hearings are non-
27 adversarial, and to the Commissioner's affirmative duty to assist
28 claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a *prima facie* case of disability is
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")², age,
2 education, and work experience, a claimant can perform other work
3 which is available in significant numbers. Tackett, 180 F.3d at 1098,
4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

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6 **B. ISSUES**

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8 Plaintiff makes three challenges to the ALJ's decision denying
9 benefits. Plaintiff alleges that the ALJ erred in (1) determining
10 there were no changed circumstances indicative of greater disability
11 during the unjudicated period; (2) finding plaintiff had no mental
12 functional limitations; and (3) improperly considering the evidence
13 regarding plaintiff's credibility. ³ For the reasons discussed below,
14 the Court finds that plaintiff's first claim of error does have merit.
15 Because the matter is remanded based on plaintiff's first claim of
16 error, the Court will not address plaintiff's second and third
17 contentions.
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19 Plaintiff claims in Issue One that the ALJ erred in determining
20 there were no changed circumstances because the ALJ failed to properly
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23 ² Residual functional capacity measures what a claimant can still
24 do despite existing "exertional" (strength-related) and
25 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
26 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
27 work without directly limiting strength, and include mental, sensory,
28 postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

³ The Court's determination that the ALJ improperly applied the
doctrine of res judicata renders it unnecessary to address plaintiff's
other contentions.

1 consider plaintiff's change in age classifications and the increased
2 severity of the impairment in her right arm. Defendant asserts that
3 plaintiff's contention is meritless because the ALJ proceeded through
4 all five steps of the sequential evaluation and did not adopt a
5 continuing presumption of non-disability via res judicata.
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7 Although the doctrine of res judicata is applied more rigidly in
8 judicial proceedings, the Commissioner may apply administrative res
9 judicata to a subsequent disability claim if the same parties, facts,
10 and issues are involved in both the prior and subsequent claims.
11 Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988); see Lyle v.
12 Secretary of Health and Human Servs., 700 F.2d 566, 568 (9th Cir.
13 1983). However, if the plaintiff can prove "changed circumstances"
14 that constitute new material evidence indicative of greater
15 disability, she may overcome the presumption of continuing disability
16 arising from the first ALJ's findings. Chavez, 844 F.2d at 693; see
17 Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985).
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20 In Chavez, the court held that the attainment of "advanced age"
21 status constitutes a changed circumstance that precludes the
22 application of res judicata, because different age classifications are
23 often outcome-determinative under the distinctions drawn by the
24 Medical Vocational grids. Id. In response to Chavez, Acquiescence Ruling
25 97-4(9) established that changed circumstances can also be shown by an
26 increase in the severity of the claimant's impairment(s), the alleged
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1 existence of an impairment(s) not previously considered, or a change
2 in the criteria determining disability. Id.

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4 Here, the ALJ improperly determined that there were no changed
5 circumstances indicating plaintiff had greater disability during the
6 unadjudicated period. In making his finding that plaintiff was not
7 disabled within the meaning of the Social Security Act, the ALJ
8 concluded that "the principles of administrative res judicata are
9 applicable . . . [because] the current record [did] not comport with
10 different findings than those heretofore adjudicated." (AR 14). The
11 ALJ determined that "the current record reflects updated medical
12 records . . . continuing in the same vein as those previously reviewed
13 and reflecting no substantive changes in the claimant's overall
14 condition." (AR 17). Finally, the ALJ indicated that "the findings of
15 the prior decision as to significant gaps in credibility are
16 incorporated by reference." (AR 18). Contrary to defendant's
17 contention that the ALJ did not apply the doctrine of res judicata
18 because he conducted the sequential five step evaluation, the ALJ
19 ignored changed circumstances and relied on the previous decision to
20 preclude the adjudication of several issues.

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23 First, the ALJ failed to consider evidence of plaintiff's change
24 in age status---evidence that the Chavez court has deemed to be "often
25 outcome-determinative" towards an ALJ's determination of disability.
26 Chavez, 844 F.2d at 693. On July 5, 2007, plaintiff turned fifty years
27 old, moving her from the (younger individual) classification to the
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1 (closely approaching advanced age) classification. Id. Like the
2 plaintiff in Chavez, plaintiff's 50th birthday during the
3 unadjudicated period constituted new material evidence relevant to an
4 ultimate assessment of her disability. Thus, plaintiff's movement to a
5 higher age classification precludes the application of res judicata to
6 the first ALJ's finding against disability.
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8 Second, the evidence proffered between July 2004 and July 2009
9 showed a worsening of plaintiff's impairments. In the first decision,
10 the ALJ cited the consultative examiner, who reported plaintiff was
11 able to raise her right arm on occasion; moreover, the medical
12 evidence of record did not mention any credible complaints by
13 plaintiff regarding restrictive range of motion in her right arm. (AR
14 27). However, in June 2007, Dr. Wood reported that plaintiff's "right
15 arm was hypersensitive to light touch and that she does not move it."
16 (AR 119). Furthermore, in November 2007, Dr. Wood reported that the
17 "[p]atient holds right arm stiff and does not allow it to be touched."
18 (AR 117).
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21 Finally, Dr. Wood's objective findings that plaintiff could not
22 move her arm were corroborated by those of Dr. Sophon, who examined
23 plaintiff in February 2008. Dr. Sophon determined that plaintiff
24 demonstrated no active movement of the arm and had "no functional use
25 of her right upper extremity." (AR 125-131). Although the state
26 agency did not credit a complete loss of right arm use, the
27 consultative examining orthopedist also recognized plaintiff's lack of
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1 functional movement of the right upper extremity. (AR 17).
2 Consequently, the disparate assessments of plaintiff's ability to move
3 her right arm support a finding that her condition worsened and
4 therefore constituted changed circumstances that preclude the
5 application of res judicata.
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7 **C. REMAND FOR FURTHER PROCEEDINGS**
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9 The decision whether to remand for further proceedings is within
10 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
11 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
12 further proceedings, or where the record has been fully developed, it
13 is appropriate to exercise this discretion to direct an immediate
14 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
15 remand for further proceedings turns upon their likely utility).
16 However, where there are outstanding issues that must be resolved
17 before a determination can be made, and it is not clear from the
18 record that the ALJ would be required to find the claimant disabled if
19 all the evidence were properly evaluated, remand is appropriate. Id.
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22 Here, because outstanding issues remain, remand for further
23 administrative proceedings is appropriate. See e.g., Strauss v.
24 Comm'r of Soc. Sec. Admin., 635 F.3d 1135, 1136 (9th Cir. 2011)
25 (remand for automatic payment of benefits inappropriate unless
26 evidence unequivocally establishes disability).
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1 IV. ORDERS

2 Accordingly, **IT IS ORDERED** that:

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4 1. The decision of the Commissioner is **REVERSED**.

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6 2. This action is **REMANDED** to defendant, pursuant to Sentence
7 Four of 42 U.S.C. §405(g), for further administrative proceedings
8 consistent with instructions set forth in the body of the decision.

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10 3. The Clerk of the Court shall serve this Decision and Order
11 and the Judgment herein on all parties or counsel.

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14 DATED: June 29, 2011

15 _____/s/_____

16 CARLA M. WOHRLE

17 United States Magistrate Judge
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