

1 Administrative Law Judge's ("ALJ") decision with the
2 subsequent allowance of benefits the date after the ALJ's
3 decision.

4 2. Whether the ALJ gave proper consideration to the question of
5 residual functional capacity.

6 3. Whether the ALJ gave proper consideration to Plaintiff's
7 testimony.

8 (JS at 4.)

9
10 This Memorandum Opinion will constitute the Court's findings of
11 fact and conclusions of law. After reviewing the matter, the Court
12 concludes that for the reasons set forth, the decision of the
13 Commissioner must be reversed and the matter remanded.

14
15 I

16 **THE COURT REMANDS FOR RECONCILIATION OF THE ALJ'S DECISION**
17 **DENYING BENEFITS WITH THE CLOSE IN TIME SUBSEQUENT FINDING**
18 **OF DISABILITY AND ALLOWANCE OF BENEFITS BY THE COMMISSIONER**

19 The final decision of the Commissioner in this case is based upon
20 a Decision of the ALJ following an evidentiary hearing. (AR 26-34.)
21 The ALJ's decision was issued on November 12, 2009, and found that
22 Plaintiff was not disabled from his onset date, January 30, 2007,
23 through the date of the decision. (AR 33.)

24 Following this determination, the Social Security Administration
25 awarded Supplemental Security Income benefits ("SSI") to Plaintiff,
26 based upon a claim that he filed on February 17, 2010. This Notice of
27 Award (AR 178-193) states that as of February 2010, Plaintiff met all
28 the rules to be eligible for SSI based on being disabled. (AR 178.)

1 Citing the Ninth Circuit's case in Luna v. Astrue, 623 F.3d 1032,
2 1035 (9th Cir. 2010), Plaintiff argues that the Court should remand
3 this matter to the Commissioner for reconciliation of the two claims.
4 (JS at 6.)

5 Plaintiff argues that, "On June 26, 2011, the Social Security
6 Administration advised [Plaintiff] that he became entitled to
7 disability benefits beginning May 2010 based upon an onset date of
8 November 13, 2009. (Exhibit I.)" (JS at 5.) The Court concludes that
9 the holding of Luna v. Astrue, supra, is controlling here and mandates
10 remand for reconciliation by the Commissioner of the first
11 determination denying Plaintiff benefits based on a finding of non-
12 disability through November 12, 2009, and the second administrative
13 determination that found Plaintiff disabled as of November 13, 2009.

14 In Luna, the ALJ had denied Luna's claims on January 27, 2006.
15 While Luna's complaint was pending in District Court, he filed a
16 second application for disability insurance benefits and SSI which was
17 granted on August 20, 2007. In the Notice of Award, the Commissioner
18 found Luna disabled as of January 28, 2006, one day after the date
19 Luna was found to be not disabled based on his first application. (See
20 623 F.3d at 1034.)

21 The Court of Appeal determined that the District Court's remand
22 pursuant to 42 U.S.C. § 405(g), which authorizes a remand upon a
23 showing of new material evidence, was applicable, and substantiated
24 the lower court's remand order. In so concluding, the appellate court
25 noted the District Court's finding that the Commissioner's award of
26 disability benefits "was new and material evidence warranting remand
27 for further factual consideration because it commenced at or near the
28 time Luna was found not disabled based on the first application."

1 (Id.)

2 The Ninth Circuit panel in Luna distinguished a previous Circuit
3 decision rendered in Bruton v. Massanari, 268 F.3d 824 (9th Cir. 2001).
4 The Luna court noted that in Bruton, the record indicated that the
5 second application involved different medical evidence, a different
6 time period, and a different age classification. (Id.) In Luna's
7 case, the Court made the following conclusion:

8 "We cannot conclude based on the record before us
9 whether the decisions concerning Luna were reconcilable or
10 inconsistent. There was only one day between the denial of
11 Luna's first application and the disability onset date
12 specified in the award for her successful second
13 application, but she may have presented different medical
14 evidence to support the two applications, or there might be
15 some other reason to explain the change. Given this
16 uncertainty, remand for further factual proceedings was an
17 appropriate remedy."

18 (623 F.3d at 1035, citation omitted.)

19
20 This case is more like Luna than Bruton. The relevant time
21 period between the first finding of non-disability (November 12, 2009)
22 and the finding of disability on November 13, 2009 was one day. That
23 is close enough in time between the first and second decisions to
24 necessitate a remand for reconciliation, following the holding of
25 Luna.

26 The Court's determination that Plaintiff's first issue has merit
27 relieves it of the necessity to address the second issue, which is
28 whether the ALJ gave proper consideration to Plaintiff's residual

1 functional capacity ("RFC"). The issue as framed is whether the ALJ
2 correctly assessed Plaintiff's RFC based on differing medical
3 evaluations, principally one of a non-examining physician, Dr. Yee,
4 and the other by examining physician Dr. To. (See JS at 9, et seq.)
5 Presumably, the evaluations of both of these medical sources were
6 considered by the Commissioner in his determination that Plaintiff
7 qualified for disability as of November 13, 2009. Consequently, the
8 Court's Order that there must be a reconciliation of the first and
9 second decisions of necessity incorporates a requirement that there be
10 a reconciliation of these differing medical opinions.

11 The same is true as to Plaintiff's third issue, which questions
12 whether the ALJ gave proper consideration to his own testimony.
13 Again, it may very well be that Plaintiff's own subjective assessment
14 of his functional limitations was considered by the Commissioner in
15 rendering his second decision finding Plaintiff to be disabled.
16 Whether or not those subjective descriptions contained in Plaintiff's
17 second application were consistent with or differed from the content
18 of his testimony at the hearing before the ALJ concerning the first
19 application is, again, a matter which must be reconciled on remand.

20 For the foregoing reasons, this matter will be remanded for
21 further hearing to reconcile the Commissioner's denial of benefits and
22 a finding of non-disability as of November 12, 2009 with a later
23 finding on November 13, 2009 that Plaintiff is disabled and should be
24 awarded SSI benefits.

25 **IT IS SO ORDERED.**

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27 DATED: May 9, 2012

28 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

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