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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 James Cassidy,

10 Plaintiff,

11 v.

12 Carolyn W Colvin,

13 Defendant.
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No. CV-16-08286-PCT-ESW

ORDER

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16 Pending before the Court is Defendant's Motion to Dismiss (Doc. 8). Defendant
17 asserts that this action must be dismissed for lack of subject matter jurisdiction. For the
18 reasons set forth herein, the Motion (Doc. 8) will be denied.¹

19 **I. DISCUSSION**

20 **A. Procedural History**

21 Plaintiff has filed two successive applications for disability insurance benefits
22 under Title II of the Social Security Act.² Social Security denied Plaintiff's first
23 application on April 30, 2012. (Doc. 8-1 at 5-7). Plaintiff did not request review of the
24 denial that application.

25 On March 1, 2013, Plaintiff filed a second disability application, which alleged a
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27 ¹ The parties have consented to the exercise of Magistrate Judge jurisdiction.
(Doc. 11).

28 ² Plaintiff also filed an application for supplemental security income under Title
XVI of the Social Security Act, which was denied in December 2011. (Doc. 8-1 at 8-14).

1 disability onset date of November 1, 2008. (Doc. 1-2 at 4). On May 26, 2013, Social
2 Security denied the claim. (*Id.*). On August 12, 2013, upon Plaintiff’s request for
3 reconsideration, Social Security affirmed the denial of benefits. (*Id.*). Plaintiff requested
4 a hearing before an ALJ. (*Id.*). On December 4, 2013, the assigned ALJ stated that she
5 “compared the evidence considered in reaching the previous determination with that
6 relating to the claimant’s current claim” and “finds that no new and material evidence has
7 been submitted” (*Id.*). After concluding that Plaintiff’s second disability benefit
8 application involved the same facts and issues as Plaintiff’s first disability benefit
9 application, the ALJ did not find it appropriate to reopen Plaintiff’s first application.
10 (*Id.*). The ALJ dismissed Plaintiff’s request for a hearing regarding his second disability
11 benefit application under the doctrine of res judicata. On September 26, 2016, the
12 Appeals Council denied Plaintiff’s request for review. (Doc. 1-5 at 1-2).

13 **B. Legal Standards**

14 **1. Res Judicata**

15 In *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988), the Ninth Circuit
16 explained that “the principles of res judicata apply to administrative decisions,” and “in
17 order to overcome the presumption of continuing nondisability arising from the first
18 [ALJ’s] findings of nondisability,” the claimant must prove “‘changed circumstances’
19 indicating a greater disability.” Pursuant to 20 C.F.R. § 404.957(c)(1), an ALJ may
20 dismiss a claimant’s request for a hearing if “[t]he doctrine of res judicata applies
21” An ALJ “may not apply res judicata where the claimant raises a new issue, such as
22 the existence of an impairment not considered in the previous application.” *Lester v.*
23 *Chater*, 81 F.3d 821, 827 (9th Cir. 1995) (citation omitted). “Nor is res judicata to be
24 applied where the claimant was unrepresented by counsel at the time of the prior claim.”
25 *Id.* at 827-28.

26 **2. Subject Matter Jurisdiction**

27 Pursuant to Federal Rule of Civil Procedure 12(b)(1), dismissal is appropriate
28 when the Court lacks subject matter jurisdiction over a claim. Under the Social Security

1 Act, district courts have jurisdiction to review “any final decision . . . made after a
2 hearing.” 42 U.S.C. § 405(g). The Ninth Circuit has held that Social Security’s decision
3 not to reopen a previously adjudicated disability claim is a “purely discretionary decision
4 and is therefore not considered a ‘final’ decision within the meaning of § 405(g).”
5 *Krumpelman v. Heckler*, 767 F.2d 586, 588 (9th Cir. 1985) (citing *Davis v.*
6 *Schweiker*, 665 F.2d 934, 935 (9th Cir. 1982)). “District courts, therefore, have no
7 jurisdiction to review a refusal to re-open a claim for disability benefits or a
8 determination that such a claim is res judicata.” *Id.* However, a “district court has the
9 jurisdiction to determine, and should determine, whether the claim precluded is the same
10 as the claim previously determined.” *Id.* (citing *McGowen v. Harris*, 666 F.2d 60, 66
11 (4th Cir. 1981) (“[U]pon a challenge to its jurisdiction on the basis that administrative res
12 judicata has been applied in bar of a claim . . . , the district court has jurisdiction to
13 determine, as appropriate, whether res judicata has properly been applied . . .”).

14 In addition, the Ninth Circuit has recognized that judicial review is available as to
15 a non-final decision made by Social Security in “a case in which a claimant raises a
16 colorable constitutional challenge to the Secretary’s decision.” *Panages v. Bowen*, 871
17 F.2d 91, 93 (9th Cir. 1989). Such a constitutional challenge “must relate to the manner or
18 means by which the Secretary decided not to reopen the prior decision, rather than to the
19 merits of the prior decision or the means by which that decision was reached.” *Id.* A
20 “mere allegation of a due process violation” is not a colorable constitutional
21 claim.” *Anderson v. Babbitt*, 230 F.3d 1158, 1163 (9th Cir. 2000) (citing *Hoye v.*
22 *Sullivan*, 985 F.2d 990, 992 (9th Cir. 1993)). The claim must be supported by “facts
23 sufficient to state a violation of substantive or procedural due
24 process.” *Id.* (quoting *Hoye*, 985 F.2d at 992).

25 C. Analysis

26 Defendant asserts that the ALJ “appropriately dismissed Plaintiff’s request for
27 hearing due to *res judicata*.” (Doc. 8 at 4). To support this assertion, Defendant has
28 provided a Declaration of Nancy Chung, who is the Chief of Court Case Preparation and

1 Review Branch 1 of the Office of Appellate Operations at the Social Security
2 Administration. (Doc. 8-1 at 1-4). Ms. Chung states that she has custody of Plaintiff's
3 official file relating to his disability applications. (*Id.* at 3). Ms. Chung recounts the
4 general procedural history regarding Plaintiff's disability insurance benefit applications,
5 but does not detail whether the applications involved the same facts and
6 issues. *See Trulson v. Com'r, Soc. Sec. Admin.*, 319 F. App'x 635 (9th Cir. 2009)
7 "[A] new issue in a second benefits application will render res judicata inapplicable
8"). The Court finds that Defendant has failed to provide sufficient information from
9 which the Court may determine whether the ALJ properly decided the res judicata issue.
10 *See McGowen*, 666 F.2d at 66 ("In order to make this jurisdictional determination, the
11 district court must have before it a record sufficient to determine the scope of the
12 successive claims for res judicata purposes"). The Court will deny Defendant's
13 Motion to Dismiss (Doc. 8). Defendant will be required to file an answer and the
14 administrative record within thirty days of this Order.

15 In his Response (Doc. 12 at 3) to Defendant's Motion to Dismiss, Plaintiff states
16 that he "will move for dismissal of this action" if the Court orders Defendant to file the
17 administrative record. If Plaintiff does not move for dismissal of this action within thirty
18 days after Defendant files an answer and the administrative record, Defendant may file a
19 motion to dismiss pursuant to Federal Rule of Civil Procedure 12(h)(3). *See Augustine v.*
20 *United States*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983) (explaining that the issue of
21 subject matter jurisdiction "may be raised by the parties at any time pursuant to Fed. R.
22 Civ. P. 12(h)(3)," and concluding that the government's motion to dismiss for lack of
23 subject matter jurisdiction filed after the government's answer was "properly before the
24 court as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction"); *Berkshire*
25 *Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880, n.3 (3d Cir. 1992) ("The
26 distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the
27 former may be asserted at any time and need not be responsive to any pleading of the
28 other party.").

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II. CONCLUSION

IT IS ORDERED denying without prejudice Defendant’s Motion to Dismiss (Doc. 8).

IT IS FURTHER ORDERED that Defendant shall file an answer and the administrative record by **June 27, 2017**.

IT IS FURTHER ORDERED that if Plaintiff does not move for dismissal of this action within thirty days after Defendant files an answer and the administrative record, then Defendant may file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(h)(3) within thirty days thereafter. If neither party moves to dismiss this case, then the parties shall follow the briefing schedule set forth in the Court’s December 21, 2016 Order (Doc. 6).

Dated this 26th day of May, 2017.



Eileen S. Willett
United States Magistrate Judge