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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUNYA L. MANNING,)	Case No. CV 14-0867-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	REVERSING COMMISSIONER
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying her application for Social Security disability insurance benefits (“DIB”) and supplemental security income (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). This matter is before the Court on the parties’ Joint Stipulation, filed November 3, 2014, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is reversed and this action is remanded for further proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born on May 4, 1972. (Administrative Record
3 ("AR") 55, 156.) She completed the 11th grade and worked as a
4 fast-food cashier, janitor, home-care provider, and hair braider.
5 (AR 55, 57, 79-80, 178-77.)

6 On November 19, 2004, Plaintiff filed applications for DIB
7 and SSI, alleging that she had been unable to work since April
8 26, 2004. (See AR 91.) Plaintiff appeared and testified at a
9 hearing, at which she was not represented by counsel. (Id.) In
10 a written decision dated October 23, 2006, an Administrative Law
11 Judge found that Plaintiff had a severe impairment of "history of
12 low back pain" and a nonsevere impairment of "dysthymic reaction"
13 but determined that she was not disabled. (AR 94, 96.)

14 On August 6, 2010, Plaintiff again filed applications for
15 DIB and SSI. (AR 102-03, 156-57.) She alleged that she had been
16 unable to work since December 30, 2004, because of "Pulm[o]nary
17 Lung Disease," "G[E]RD," "Back," "Nerve damage to left side of
18 body," "depression," "colon cancer - severe/unk," "Hem[orrh]oids
19 (damage and bleeding)," "Major Rectum problems," "legs," and
20 "Lupus." (AR 156, 172, 176.) After Plaintiff's application was
21 denied, she requested a hearing before an ALJ. (AR 117-18.) A
22 hearing was held on April 11, 2012, at which Plaintiff, who was
23 represented by counsel, testified, as did Plaintiff's boyfriend
24 and a vocational expert. (AR 49-87.) In a written decision
25 issued June 25, 2012, the ALJ determined that Plaintiff was not
26 disabled. (AR 30-38.) On August 20, 2013, the Appeals Council
27 denied Plaintiff's request for review. (AR 8-14.) On December
28 13, 2013, the council set aside its earlier action to consider

1 additional information and then again denied Plaintiff's request
2 for review. (AR 1-7.) This action followed.

3 **III. STANDARD OF REVIEW**

4 Under 42 U.S.C. § 405(g), a district court may review the
5 Commissioner's decision to deny benefits. The ALJ's findings and
6 decision should be upheld if they are free of legal error and
7 supported by substantial evidence based on the record as a whole.
8 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
9 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
10 evidence means such evidence as a reasonable person might accept
11 as adequate to support a conclusion. Richardson, 402 U.S. at
12 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
13 It is more than a scintilla but less than a preponderance.
14 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
15 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
16 substantial evidence supports a finding, the reviewing court
17 "must review the administrative record as a whole, weighing both
18 the evidence that supports and the evidence that detracts from
19 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
20 720 (9th Cir. 1998). "If the evidence can reasonably support
21 either affirming or reversing," the reviewing court "may not
22 substitute its judgment" for that of the Commissioner. Id. at
23 720-21.

24 **IV. THE EVALUATION OF DISABILITY**

25 People are "disabled" for purposes of receiving Social
26 Security benefits if they are unable to engage in any substantial
27 gainful activity owing to a physical or mental impairment that is
28 expected to result in death or which has lasted, or is expected

1 to last, for a continuous period of at least 12 months. 42
2 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
3 (9th Cir. 1992).

4 A. The Five-Step Evaluation Process

5 An ALJ follows a five-step sequential evaluation process to
6 assess whether someone is disabled. 20 C.F.R. §§ 404.1520(a)(4),
7 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
8 1995) (as amended Apr. 9, 1996). In the first step, the
9 Commissioner must determine whether the claimant is currently
10 engaged in substantial gainful activity; if so, the claimant is
11 not disabled and the claim must be denied. §§ 404.1520(a)(4)(i),
12 416.920(a)(4)(i). If the claimant is not engaged in substantial
13 gainful activity, the second step requires the Commissioner to
14 determine whether the claimant has a "severe" impairment or
15 combination of impairments significantly limiting her ability to
16 do basic work activities; if not, a finding of not disabled is
17 made and the claim must be denied. §§ 404.1520(a)(4)(ii),
18 416.920(a)(4)(ii). If the claimant has a "severe" impairment or
19 combination of impairments, the third step requires the
20 Commissioner to determine whether the impairment or combination
21 of impairments meets or equals an impairment in the Listing of
22 Impairments ("Listing") set forth at 20 C.F.R., Part 404, Subpart
23 P, Appendix 1; if so, disability is conclusively presumed.
24 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

25 If the claimant's impairment or combination of impairments
26 does not meet or equal one in the Listing, the fourth step
27 requires the Commissioner to determine whether the claimant has
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1 sufficient residual functional capacity ("RFC")¹ to perform her
2 past work; if so, she is not disabled and the claim must be
3 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
4 has the burden of proving she is unable to perform past relevant
5 work. Drouin, 966 F.2d at 1257. If the claimant meets that
6 burden, a prima facie case of disability is established. Id. If
7 that happens or if the claimant has no past relevant work, the
8 Commissioner bears the burden of establishing that the claimant
9 is not disabled because she can perform other substantial gainful
10 work available in the national economy. §§ 404.1520(a)(4)(v),
11 416.920(a)(4)(v), 404.1560(c), 416.960(c). That determination
12 comprises the fifth and final step in the sequential analysis.
13 §§ 404.1520(a)(4), 416.920(a)(4); Lester, 81 F.3d at 828 n.5;
14 Drouin, 966 F.2d at 1257.

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

16 At step one, the ALJ found that Plaintiff had not
17 continuously engaged in substantial gainful activity since
18 December 30, 2004, her alleged onset date. (AR 33.) At step
19 two, he found that Plaintiff had the severe impairments of "a
20 history of possible fibromyalgia and lupus; vascular disease; a
21 history of hemorrhoids; and a possible seizure disorder." (Id.)
22 At step three, he determined that Plaintiff's impairments did not
23 meet or equal any of the impairments in the Listing. (AR 34.)
24 At step four, the ALJ found that Plaintiff had the RFC to perform
25 medium work with additional limitations. (AR 35.) Specifically,

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27 ¹ RFC is what a claimant can do despite existing
28 exertional and nonexertional limitations. §§ 404.1545, 416.945;
see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 Plaintiff could occasionally climb ladders, ropes, scaffolds,
2 ramps, or stairs; frequently stoop, kneel, crouch, or crawl;
3 occasionally be exposed to hazardous machinery, unprotected
4 heights, or other high-risk, hazardous, or unsafe conditions; and
5 never drive. (Id.) Based on the VE's testimony, the ALJ found
6 that Plaintiff could perform her past relevant work as a janitor,
7 cashier, hair braider, and home-care provider. (AR 37.) He
8 therefore concluded that Plaintiff was not disabled. (Id.)

9 **V. DISCUSSION**

10 Plaintiff contends that the ALJ erred in (1) finding that
11 she had not overcome the continuing presumption of nondisability
12 arising from the October 2006 decision and (2) assessing her
13 credibility. (J. Stip. at 4.) Because the ALJ should not have
14 applied the presumption of nondisability in this case, and
15 because the error was not harmless, remand is warranted.

16 A. The ALJ Erred in Finding that Plaintiff Failed to Rebut 17 the Presumption of Continuing Nondisability

18 Plaintiff contends that the application of res judicata was
19 inappropriate because she was not represented by counsel in
20 connection with her previously filed applications and because she
21 submitted evidence of an increase in the severity of her mental
22 impairment and the diagnosis of new impairments not raised in her
23 prior application or considered by the earlier ALJ. (Id. at 5-
24 6.)

25 1. Applicable law

26 "The principles of res judicata apply to administrative
27 decisions, although the doctrine is applied less rigidly to
28 administrative proceedings than to judicial proceedings." Chavez

1 v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988). "Normally, an ALJ's
2 findings that a claimant is not disabled creates [sic] a
3 presumption that the claimant continued to be able to work after
4 that date." Vasquez v. Astrue, 572 F.3d 586, 597 (9th Cir.
5 2009).

6 "The presumption does not apply, however, if there are
7 'changed circumstances.'" Lester, 81 F.3d at 827 (quoting Taylor
8 v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985)); accord SSAR 97-
9 4(9), 1997 WL 742758, at *3 (Dec. 3, 1997) ("When adjudicating
10 the subsequent claim involving an unadjudicated period,
11 adjudicators will apply a presumption of continuing nondisability
12 and determine that the claimant is not disabled with respect to
13 that period, unless the claimant rebuts the presumption . . . by
14 showing a 'changed circumstance' affecting the issue of
15 disability with respect to the unadjudicated period . . .").
16 Examples of changed circumstances precluding the application of
17 res judicata include "[a]n increase in the severity of the
18 claimant's impairment," "a change in the claimant's age category,
19 as defined in the Medical-Vocational Guidelines," and a new issue
20 raised by the claimant, "such as the existence of an impairment
21 not considered in the previous application." Lester, 81 F.3d at
22 827-28 (citations omitted); see also SSAR 97-4(9), 1997 WL
23 724758, at *3.

24 The presumption also does not apply "where the claimant was
25 unrepresented by counsel at the time of the prior claim."
26 Lester, 81 F.3d at 827-28 (citing Gregory v. Bowen, 844 F.2d 664,
27 666 (9th Cir. 1988)).

1 2. Analysis

2 First, the ALJ's application of res judicata was
3 inappropriate because Plaintiff was not represented by counsel in
4 connection with her previously filed applications. (See AR 91);
5 Lester, 81 F.3d at 827-28; Gregory, 844 F.2d at 666.

6 Second, the ALJ's determination that Plaintiff failed to
7 rebut the presumption of continuing nondisability arising from
8 the October 2006 decision is not supported by substantial
9 evidence. Specifically, Plaintiff alleged new impairments -
10 pulmonary lung disease, GERD, nerve damage, colon cancer,
11 hemorrhoids, rectal problems, leg issues, and lupus - and
12 increased severity of her previously established mental
13 impairment of dysthymia to depression. (AR 176.) And the ALJ
14 found that the medical evidence established severe impairments of
15 a history of possible fibromyalgia and lupus, vascular disease, a
16 history of hemorrhoids, and a possible seizure disorder - none of
17 which were alleged or found to exist in the 2006 decision (see AR
18 91-96) - as well as nonsevere mental impairments. (AR 34.)
19 Plaintiff's allegations of new physical impairments and more
20 severe mental impairment thus constituted "changed
21 circumstances." (See AR 91-96); Lester, 81 F.3d at 827. On that
22 basis as well, the ALJ should not have applied the presumption of
23 continuing nondisability when deciding Plaintiff's most recent
24 applications. See, e.g., Lester, 81 F.3d at 828 (holding that
25 plaintiff's allegation of new impairment not raised in prior
26 application or addressed in prior decision and change in
27 plaintiff's age category were independent reasons precluding
28 application of res judicata); Light v. Soc. Sec. Admin., 119 F.3d

1 789, 792 (9th Cir. 1997) (as amended) (finding presumption of
2 nondisability rebutted by evidence of diagnosis of new impairment
3 and evidence that previous impairment had become increasingly
4 severe); Vasquez, 572 F.3d at 597-98 (holding that "because
5 Vasquez raised a new issue not before ALJ Stacy and entered the
6 'closely approaching advanced age' category, it was improper for
7 ALJ Rogers to apply a presumption of continuing non-disability
8 when deciding Vasquez's second application").

9 The Commissioner "acknowledges that Plaintiff's doctors
10 diagnosed her with history of possible fibromyalgia and lupus,
11 history of hemorrhoids, and possible seizure disorder since the
12 prior ALJ decision" but contends that "the ALJ permissibly found
13 that these were not worsening or new conditions." (J. Stip. at
14 9-10.) To support this contention, the Commissioner argues that
15 the evidence showed that Plaintiff's impairments were not
16 disabling. (Id. at 8.) But they need not have been disabling or
17 even severe to preclude application of res judicata. See
18 Vasquez, 572 F.3d at 598 n.9 (holding that whether new impairment
19 was deemed severe is "irrelevant, because . . . a claimant
20 defeats the presumption of continuing nondisability by raising a
21 new issue in a later application"; emphasizing that "all an
22 applicant has to do to preclude the application of res judicata
23 is raise a new issue in the later proceeding" (citation
24 omitted)); see also SSAR 97-4(9), 1997 WL 742758, at *3
25 (requiring only a "'changed circumstance' affecting the issue of
26 disability").

27 The Commissioner further argues that even if the ALJ did err
28 in applying the presumption, "any error was harmless, since the

1 ALJ would have had to proceed with a review of the medical
2 evidence, as he did here." (J. Stip. at 8.) Although the
3 evidence does seem to support the ALJ's finding that Plaintiff is
4 not disabled, the Court cannot conclude that the ALJ's error in
5 giving res judicata effect to the October 2006 decision was
6 harmless. The ALJ stated that if Plaintiff did not rebut the
7 presumption, he "must" find her not disabled. (AR 33.) Indeed,
8 although the ALJ found severe impairments of history of possible
9 fibromyalgia and lupus, vascular disease, history of hemorrhoids,
10 and possible seizure disorder (AR 33), his explanation of the
11 basis for Plaintiff's RFC includes little discussion of any
12 evidence of lupus, vascular disease, or hemorrhoids, only brief
13 mention of Plaintiff's seizures and fibromyalgia, and only a
14 handful of cites to specific evidence in the record (see AR 35-
15 37; see also AR 33). The Court therefore cannot determine
16 whether he assessed this evidence properly or at all. See
17 Vincent ex rel. Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th
18 Cir. 1984) (noting that ALJ must "explain why significant
19 probative evidence has been rejected" (internal quotation marks
20 omitted)).

21 Relatedly, the ALJ gave "significant weight" to the opinions
22 of Dr. Robert Moore, who performed a December 2012 neurological
23 examination of Plaintiff, and state-agency physician L. Limos
24 because their opinions "seem essentially well-supported by the
25 record," but he failed to discuss portions of the record that
26 might be seen as inconsistent with the doctors' findings. (AR
27 36; see, e.g., AR 365-69, 623-27.) The ALJ did not indicate the
28 weight he gave to the opinions of treating neurologist Salvatore

1 Danna (see, e.g., AR 352-56), examining neurologist Munther
2 Hijazin (see AR 598-601), or examining internist Rocely Ella-
3 Tamayo (see AR 571-75). See §§ 404.1527(e)(2)(ii),
4 416.927(e)(2)(ii) (noting that ALJ must consider all medical
5 evidence in record and "explain in [his] decision the weight
6 given to . . . [the] opinions from treating sources, nontreating
7 sources, and other nonexamining sources"). Therefore, the Court
8 cannot conclude that the ALJ's disability determination would
9 have been the same had he found that Plaintiff had rebutted the
10 presumption of continuing nondisability and not given res
11 judicata effect to the prior ALJ's decision.

12 In sum, the ALJ's application of the presumption of
13 continuing nondisability was inappropriate because Plaintiff was
14 unrepresented in connection with her prior applications and
15 presented "changed circumstances" in her most recent
16 applications. Plaintiff is entitled to reversal. On remand, the
17 ALJ shall reassess whether Plaintiff is disabled without giving
18 res judicata effect to the October 2006 decision. Because the
19 ALJ must reassess Plaintiff's credibility after reconsidering the
20 evidence of her impairments, the Court does not reach the issue
21 raised in the Joint Stipulation concerning Plaintiff's
22 credibility.

23 B. Remand for Further Proceedings Is Appropriate

24 When, as here, an ALJ errs in denying benefits, the Court
25 generally has discretion to remand for further proceedings. See
26 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When no
27 useful purpose would be served by further administrative
28 proceedings, however, or when the record has been fully

1 developed, it is appropriate under the "credit-as-true" rule to
2 direct an immediate award of benefits. See id. at 1179 (noting
3 that "the decision of whether to remand for further proceedings
4 turns upon the likely utility of such proceedings"); Garrison v.
5 Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

6 Under the credit-as-true framework, three circumstances must
7 be present before the Court may remand to the ALJ with
8 instructions to award benefits:

9 (1) the record has been fully developed and further
10 administrative proceedings would serve no useful purpose;

11 (2) the ALJ has failed to provide legally sufficient
12 reasons for rejecting evidence, whether claimant
13 testimony or medical opinion; and (3) if the improperly
14 discredited evidence were credited as true, the ALJ would
15 be required to find the claimant disabled on remand.

16 Garrison, 759 F.3d at 1020. When, however, the ALJ's findings
17 are so "insufficient" that the Court cannot determine whether the
18 rejected testimony should be credited as true, the Court has
19 "some flexibility" in applying the credit-as-true rule. Connett
20 v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003); see also
21 Garrison, 759 F.3d at 1020 (noting that Connett established that
22 credit-as-true rule may not be dispositive in all cases). This
23 flexibility should be exercised "when the record as a whole
24 creates serious doubt as to whether the claimant is, in fact,
25 disabled within the meaning of the Social Security Act."
26 Garrison, 759 F.3d at 1021.


27 Here, under Connett, remand for further proceedings is
28 appropriate because the ALJ improperly applied the presumption of

1 continuing nondisability and thus failed to properly consider
2 evidence of Plaintiff's impairments, yet for the reasons stated
3 by the ALJ (see AR 35-37), the Court has serious doubts as to
4 whether she is in fact disabled.²

5 **V. CONCLUSION**

6 Consistent with the foregoing, and pursuant to sentence four
7 of 42 U.S.C. § 405(g),³ IT IS ORDERED that judgment be entered
8 REVERSING the decision of the Commissioner, GRANTING Plaintiff's
9 request for remand, and REMANDING this action for further
10 proceedings consistent with this Memorandum Opinion. IT IS
11 FURTHER ORDERED that the Clerk serve copies of this Order and the
12 Judgment on counsel for both parties.

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16 DATED: March 30, 2015



JEAN ROSENBLUTH
U.S. Magistrate Judge

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22 _____
23 ²The Court noted that Plaintiff is in any event likely not
24 entitled to any benefits for the period from December 30, 2004,
25 her alleged onset date, to October 23, 2006, the date of the
first ALJ's decision. See Lester, 81 F.3d at 827.

26 ³This sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."