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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

|   |   |                                     |
|---|---|-------------------------------------|
| <b>WILBERT AYALA,</b>                         | ) | <b>NO. CV 17-209-KS</b>             |
| <b>Plaintiff,</b>                             | ) |                                     |
| <b>v.</b>                                     | ) | <b>MEMORANDUM OPINION AND ORDER</b> |
| <b>NANCY A. BERRYHILL,<sup>1</sup> Acting</b> | ) |                                     |
| <b>Commissioner of Social Security,</b>       | ) |                                     |
| <b>Defendant.</b>                             | ) |                                     |

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**INTRODUCTION**

Plaintiff filed a Complaint on January 10, 2017, seeking review of the Commissioner’s decision granting Plaintiff’s application for supplemental security income (“SSI”) and denying Plaintiff’s application for a period of disability and disability insurance benefits (“DIB”). (*See* Dkt. No. 1.) On February 27, 2017, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 10, 11, 12.) On November 14, 2017, the parties filed a Joint Stipulation (“Joint Stip.”)

<sup>1</sup> The Court notes that Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Accordingly, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court orders that the caption be amended to substitute Nancy A. Berryhill for Carolyn Colvin as the defendant in this action.

1 (Dkt. No. 22) in which plaintiff seeks an order reversing the Commissioner’s decision and  
2 either ordering the payment of benefits or remanding the matter for further administrative  
3 proceedings (Joint Stip. at 16). The Commissioner requests that the ALJ’s decision be  
4 affirmed or remanded for further proceedings. (*See id.* at 17-18.) The Court has taken the  
5 matter under submission without oral argument.  
6

## 7 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

8

9 In November 2012, Plaintiff, who was born on September 2, 1969, filed applications  
10 for SSI, a period of disability, and DIB alleging disability commencing December 22, 2001,  
11 due to: “herniated disk 13 14 back fussion back stimulator implant.”<sup>2</sup> (*See* Joint Stip. at 2;  
12 Administrative Record (“AR”) 25, 125, 127, 152) (errors in original). These were Plaintiff’s  
13 second applications for SSI, a period of disability, and DIB alleging disability commencing  
14 December 22, 2001. In 2010, Plaintiff had filed his first round of applications for SSI and  
15 DIB, which the Commissioner denied initially on December 2, 2010. (AR 25; *see also* AR  
16 56.) Plaintiff had not sought reconsideration of the initial denial of his 2010 applications  
17 (AR 25, 56), although he testified at the April 27, 2015 hearing that he “filled out the  
18 paperwork” to do so (AR 46-47).  
19

20 The Commissioner denied Plaintiff’s 2012 applications initially. (AR 55.) On June  
21 28, 2013, Plaintiff requested a hearing. (AR 78.) On April 27, 2015, Administrative Law  
22 Judge Edward P. Schneeberger (“ALJ”) held a hearing. (AR 38.) Plaintiff, who was  
23 represented by counsel, and Heidi Paul, the vocational expert (“VE”), testified at the hearing.  
24 (AR 38-53.) On May 14, 2015, the ALJ issued a partially favorable decision, denying  
25 Plaintiff’s application for DIB and granting Plaintiff’s application for SSI. (AR 25-33.) On  
26 November 10, 2016, the Appeals Council denied Plaintiff’s request for review. (AR 1-7.)  
27

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28 <sup>2</sup> Plaintiff was 32 years old on the alleged onset date and thus met the agency’s definition of a “younger person.”  
*See* 20 C.F.R. §§ 404.1563(c), 416.963(c).

1 **SUMMARY OF ADMINISTRATIVE DECISION**

2  
3 The ALJ found that Plaintiff met the insured status requirements of the Social Security  
4 Act through March 31, 2006 and, therefore, did not meet the insured status requirements on  
5 December 3, 2010, “the day after his administratively final and binding initial  
6 determination” on Plaintiff’s 2010 Title II application for DIB. (AR 28.) On that basis, the  
7 ALJ denied Plaintiff’s 2012 Title II application for a period of disability and DIB. (*Id.*)

8  
9 The ALJ found that Plaintiff had not engaged in substantial gainful activity after  
10 November 30, 2012, the date of his application for SSI. (AR 28.) The ALJ further found  
11 that Plaintiff had the following severe impairments: degenerative changes of the lumbar  
12 spine and status post lumbar spine surgery. (AR 28.) The ALJ concluded that Plaintiff did  
13 not have an impairment or combination of impairments that met or medically equaled the  
14 severity of any impairments listed in 20 C.F.R. part 404, subpart P, appendix 1 (20 C.F.R. §§  
15 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926). (*Id.* 29.) The ALJ  
16 determined that, as of November 30, 2012, Plaintiff had the residual functional capacity  
17 (“RFC”) to do the following: “1) stand for no more than fifteen to thirty minutes; 2) sit for  
18 no more than one hour; and 3) lift no more than ten pounds.” (AR 30.) The ALJ determined  
19 that Plaintiff was unable to perform his past relevant work as a tow truck operator (DOT  
20 919.663-026). (AR 31.) The ALJ further concluded that, given Plaintiff’s age, education,  
21 work experience, and RFC, there were no jobs that exist in significant numbers in the  
22 national economy that Plaintiff could perform. (AR 32.) Accordingly, the ALJ determined  
23 that Plaintiff had been under a disability, as defined in the Social Security Act, from  
24 November 30, 2012, the date of his 2012 application for SSI, through the date of the ALJ’s  
25 decision. (*Id.* 32.)

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1 'the agency's path may reasonably be discerned.'" *Brown-Hunter v. Colvin*, 806 F.3d 487,  
2 492 (9th Cir. 2015) (internal citations omitted).

### 3 4 **DISCUSSION**

5  
6 Plaintiff alleges that there is good cause for reopening his 2010 Title II application for  
7 DIB and that the Court has jurisdiction to review the ALJ's decision not to reopen Plaintiff's  
8 2010 Title II application because Plaintiff states a colorable constitutional claim. (Joint Stip.  
9 at 4.) The Commissioner responds that the Court lacks jurisdiction to review the ALJ's  
10 decision not to reopen Plaintiff's 2010 Title II application because Plaintiff did not complete  
11 the administrative review process with respect to that application and, therefore, did not  
12 obtain a judicially reviewable final decision. (*Id.* at 13.) The Commissioner also argues that  
13 Plaintiff fails to put forward any facts suggesting that his due process rights were violated  
14 and, consequently, fails to state a colorable constitutional claim as required to vest the Court  
15 with jurisdiction under these circumstances. (*See id.* at 14.) According to Commissioner,  
16 instead of stating a colorable constitutional claim, Plaintiff's argument is that the ALJ should  
17 have reopened the 2010 Title II Application because Plaintiff's impairments satisfied Listing  
18 1.04A.<sup>3</sup> (Joint Stip. at 14.)

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19  
20 <sup>3</sup> Listing 1.04A reads as follows:

21 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis,  
22 osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a  
23 nerve root (including the cauda equina) or the spinal cord. With:

24 A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation  
25 of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness)  
26 accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-  
27 leg raising test (sitting and supine);

28 OR

B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by  
appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia,  
resulting in the need for changes in position or posture more than once every 2 hours;

Or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate  
medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in  
inability to ambulate effectively, as defined in 1.00B2b.

1 **I. Applicable Law**

2  
3 Cases arising under the Social Security Act generally are not subject to review unless  
4 they challenge a “final decision . . . made after a hearing.” 42 U.S.C. § 405(g); *Califano v.*  
5 *Sanders*, 430 U.S. 99, 108 (1977). Because the Commissioner’s decision whether, for good  
6 cause shown, to reopen an earlier application is strictly discretionary, *see Udd v. Massanari*,  
7 245 F.3d 1096, 1100 (9th Cir. 2001); *Evans v. Chater*, 110 F.3d 1480, 1482 (9th Cir. 1997),  
8 it is not final and thus not generally reviewable by a district court. In *Sanders*, however, the  
9 Supreme Court recognized an exception “where the Secretary’s denial of a petition to reopen  
10 is challenged on constitutional grounds.” *Sanders*, 430 U.S. at 109. Thus, the Court may  
11 review the Commissioner’s decision not to reopen an earlier application if the plaintiff  
12 presents a “colorable constitutional claim of due process violation that implicates . . . either a  
13 meaningful opportunity to be heard or to seek reconsideration of an adverse benefits  
14 determination.” *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008) (internal quotation  
15 marks and citation omitted); *Evans*, 110 F.3d at 1483 (same). Notably, however, a due  
16 process challenge that is “completely unsupported by facts” or “wholly insubstantial,  
17 immaterial, or frivolous” does not raise a colorable constitutional claim. *Klemm*, 543 F.3d at  
18 1144, 1145; *Udd*, 245 F.3d at 1100 (quoting *Boettcher v. Sec’y of Health & Human Serv.*,  
19 759 F.2d 719, 722 (9th Cir. 1985)); *see also Subia v. Comm’r of Soc. Sec.*, 264 F.3d 899, 902  
20 (9th Cir. 2001) (“we will not waive a claimant’s failure to exhaust her administrative  
21 remedies merely because she has asserted *any* constitutional claim; rather, her constitutional  
22 claim must be ‘colorable’ . . . [as opposed to] immaterial and made solely for the purpose of  
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20 C.F.R. Part 404, Subpart P, Appendix 1 § 1.04A.

26 In his 2015 partially favorable decision, the ALJ wrote that he had found “no persuasive evidence” that Plaintiff  
27 satisfied all of the criteria for Listing 1.04A because “there is no evidence” in the record that Plaintiff has nerve root  
28 compression, spinal arachnoiditis, or lumbar spinal stenosis. (AR 29.) However, Plaintiff suggests that the ALJ’s finding  
is not supported by substantial evidence because EMG nerve conduction studies conducted on June 14, 2001 revealed  
nerve root compression syndrome at L5-S1. (*See* Joint Stip. at 8) (citing AR 217).

1 obtaining jurisdiction”) (emphasis in original) (internal quotation marks and citation  
2 omitted).

3  
4 **II. Plaintiff Fails To State A Colorable Constitutional Claim.**

5  
6 Plaintiff suggests two possible bases for finding a colorable due process claim.  
7 Plaintiff’s first and primary argument is that the Commissioner violated Plaintiff’s due  
8 process rights by omitting from the Administrative Record a copy of the initial determination  
9 notice denying Plaintiff’s 2010 Title II application. (*See* Joint Stip. at 9.) Significantly,  
10 Plaintiff does not allege that he was deprived of an adequate explanation of the basis for the  
11 adverse benefits determination in 2010, only that the Commissioner deprived him of due  
12 process in connection with his 2012 applications by omitting from the Administrative  
13 Record any reference to the 2010 filing except “the little table that is titled prior electronic  
14 filings.” (*Id.*) (citing AR 56). “[N]o other information is provided as to what evidence was  
15 considered nor if whether Listing 1.04A was even considered. . . . There is no way of  
16 knowing whether the evidence in 2012 application was considered in the 2010 initial denial.  
17 This violates [Plaintiff’s] due process rights. How can [Plaintiff] contend something – if  
18 [Plaintiff] does not know what evidence was in the file to do so.” (Joint Stip. at 9.) Plaintiff  
19 cites no authority for his position that due process requires the Commissioner to include a  
20 copy of the 2010 initial determination notice in the Administrative Record (*see generally*  
21 Joint Stip. at 9-10), and the Court is aware of none. Nevertheless, even if the Court assumes  
22 *arguendo* that Plaintiff is correct and the Commissioner’s omissions deprived Plaintiff of  
23 due process in connection with the denial of his 2012 Title II application, this is insufficient  
24 to state a colorable claim of a due process violation in connection with his 2010 Title II  
25 application as required to vest this Court with jurisdiction.

26  
27 Plaintiff also suggests a second basis for finding a colorable due process claim.  
28 Specifically, Plaintiff refers the Court to his testimony at the hearing that “he went and filled

1 out the paperwork to appeal the 2010 determination, but never heard back from Social  
2 Security.” (Joint Stip. at 12, 15 (citing AR 46, 47 (“I went back and filled out the paperwork  
3 and everything and I didn’t hear nothing back.”)).) Liberally construed, Plaintiff’s  
4 references to this portion of his hearing testimony suggest, but do not expressly contend, that  
5 Plaintiff was denied an opportunity to seek reconsideration of the adverse benefits  
6 determination. However, counsel did not raise this issue at the hearing when the ALJ asked  
7 why he should reopen Plaintiff’s prior application (*see generally* AR 48-50), and Plaintiff  
8 similarly does not now directly attack whether he had a meaningful opportunity to seek  
9 reconsideration of the adverse determination. *Cf. Garth v. Astrue*, No. 11-CV-05592-YGR,  
10 2013 WL 257090, at \*6 (N.D. Cal. Jan. 23, 2013) (finding no colorable constitutional claim  
11 where the plaintiff does not directly attack whether she had a meaningful opportunity to be  
12 heard or seek reconsideration of the adverse determination).

13  
14 Further, although the Court may review additional evidence to determine whether it  
15 has jurisdiction, *see Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), Plaintiff  
16 provides no supplemental materials to support the position that he was denied an opportunity  
17 to seek reconsideration of the initial adverse benefits determination. (*See generally*  
18 Complaint; Joint Stip.); *cf. also White v. Astrue*, No. C 10-02124 CRB, 2011 WL 900289, at  
19 \*3 (N.D. Cal. Mar. 15, 2011) (“Although Plaintiff’s Complaint contains only a mere  
20 allegation of a due process violation, his supporting material provides some facts showing a  
21 colorable constitutional violation.”). In light of the foregoing, Plaintiff’s references to a one-  
22 sentence portion of Plaintiff’s hearing testimony that is wholly unsupported by any other  
23 facts or evidence before the Court does not constitute a colorable due process claim *Cf.*  
24 *Klemm*, 543 F.3d at 1145 (because the plaintiff presented no facts in support of his  
25 allegation, his constitutional claim is “wholly insubstantial” and, therefore, not colorable);  
26 *Uvalles v. Astrue*, No. C11-00478 HRL, 2012 WL 967999, at \*2 (N.D. Cal. Mar. 21, 2012)  
27 (“A constitutional claim must go beyond bare assertions.”) (internal quotation marks and  
28 citation omitted).

1 For these reasons, Plaintiff fails to state a colorable constitutional claim as required to  
2 vest this Court with the jurisdiction to review the ALJ's decision not to reopen Plaintiff's  
3 2010 Title II application. Accordingly, the Complaint must be dismissed without prejudice  
4 for lack of subject matter jurisdiction.

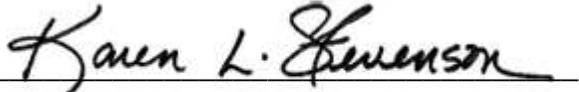
5  
6 **CONCLUSION**

7  
8 IT IS ORDERED that the Complaint is DISMISSED without prejudice for lack of  
9 subject matter jurisdiction.

10  
11 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this  
12 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for  
13 defendant.

14  
15 LET JUDGMENT BE ENTERED ACCORDINGLY

16  
17 DATED: November 17, 2017

18   
19 KAREN L. STEVENSON  
20 UNITED STATES MAGISTRATE JUDGE  
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