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

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11 JEROME BURNETT,

)

NO. EDCV 10-00105 SS

12 Plaintiff,

)

13 v.

)

**MEMORANDUM DECISION AND ORDER**14 MICHAEL J. ASTRUE,  
Commissioner of the Social  
15 Security Administration,

)

)

)

)

16 Defendant.

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**I.**

19

**INTRODUCTION**

20

21 Plaintiff Jerome Burnett ("Plaintiff") brings this action seeking  
22 to reverse the decision of the Commissioner of the Social Security  
23 Administration (the "Commissioner" or the "Agency") denying his  
24 application for Supplemental Security Income ("SSI"). The parties  
25 consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the  
26 undersigned United States Magistrate Judge. For the reasons stated  
27 below, the decision of the Agency is REVERSED and REMANDED for further  
28 proceedings.



1 benefits. (AR 392-407). Plaintiff filed the instant Complaint on  
2 February 4, 2010.

3  
4 **III.**

5 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

6  
7 To qualify for disability benefits, a claimant must demonstrate a  
8 medically determinable physical or mental impairment that prevents him  
9 from engaging in substantial gainful activity<sup>1</sup> and that is expected to  
10 result in death or to last for a continuous period of at least twelve  
11 months. See Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998)  
12 (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the  
13 claimant incapable of performing the work he previously performed and  
14 incapable of performing any other substantial gainful employment that  
15 exists in the national economy. See Tackett v. Apfel, 180 F.3d 1094,  
16 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

17  
18 To decide if a claimant is entitled to benefits, an ALJ conducts  
19 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

- 20  
21 (1) Is the claimant presently engaged in substantial gainful  
22 activity? If so, the claimant is found not disabled.  
23 If not, proceed to step two.  
24 (2) Is the claimant's impairment severe? If not, the  
25 claimant is found not disabled. If so, proceed to step  
26 three.

27  
28 <sup>1</sup> Substantial gainful activity means work that involves doing  
significant and productive physical or mental duties and is done for pay  
or profit. 20 C.F.R. § 416.910.

1 (3) Does the claimant's impairment meet or equal the  
2 requirements of any impairment listed at 20 C.F.R. Part  
3 404, Subpart P, Appendix 1? If so, the claimant is  
4 found disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing his past work? If  
6 so, the claimant is found not disabled. If not, proceed  
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the  
9 claimant is found disabled. If so, the claimant is  
10 found not disabled.

11  
12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d  
13 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. § 416.920(b)-  
14 (g)(1).

15  
16 The claimant has the burden of proof at steps one through four, and  
17 the Commissioner has the burden of proof at step five. See Bustamante,  
18 262 F.3d at 953-54. If, at step four, the claimant meets his burden of  
19 establishing an inability to perform the past work, the Commissioner  
20 must show that the claimant can perform some other work that exists in  
21 "significant numbers" in the national economy, taking into account the  
22 claimant's residual functional capacity ("RFC"),<sup>2</sup> age, education and  
23 work experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1).  
24 The Commissioner may do so by the testimony of a vocational expert or  
25 by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R.  
26 Part 404, Subpart P, Appendix 2 (commonly known as "the Grids"). See

27 \_\_\_\_\_  
28 <sup>2</sup> Residual functional capacity is "the most [one] can still do  
despite [his] limitations" and represents an assessment "based on all  
the relevant evidence." 20 C.F.R. § 416.945(a).

1 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a  
2 claimant has both exertional (strength-related) and nonexertional  
3 limitations, the Grids are inapplicable and the ALJ must take the  
4 testimony of a vocational expert. See Moore v. Apfel, 216 F.3d 864, 869  
5 (9th Cir. 2000).

6  
7 **IV.**

8 **THE ALJ'S DECISION**

9  
10 The ALJ employed the five-step sequential evaluation process. At  
11 step one, the ALJ found that Plaintiff had not engaged in substantial  
12 gainful employment since his alleged onset date.<sup>3</sup> (AR 397). At step  
13 two, the ALJ found that Plaintiff had the severe impairments of  
14 "polysubstance dependence with secondary mood disorder." (AR 398).

15  
16 At step three, the ALJ found that Plaintiff's impairments, either  
17 singly or in combination, do not meet or equal the requirements of any  
18 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR  
19 398). At step four, the ALJ determined that Plaintiff retained a  
20 physical RFC for "a full range of work at all exertional levels but with  
21 the following nonexertional limitations: routine, repetitive, entry  
22 level, minimally stressful work with no contact with the general public  
23 and superficial intermittent contact with co-workers and supervisors."  
24 (AR 399). Based on this RFC determination, the ALJ concluded that  
25 Plaintiff was unable to perform any of his past relevant work. (AR  
26 405).

27 \_\_\_\_\_  
28 <sup>3</sup> The ALJ's opinion identifies Plaintiff's alleged onset date as  
January 1, 1985. (AR 397). However, Plaintiff's application identifies  
his alleged onset date as July 15, 2000. (AR 75).

1 At step five, the ALJ found that based on Plaintiff's age,  
2 educational background, work experience, RFC and the vocational expert's  
3 testimony, Plaintiff "is capable of making a successful adjustment to  
4 other work that exists in significant numbers in the national economy."  
5 (AR 406). Accordingly, the ALJ found that Plaintiff was not disabled.  
6 (Id.).

7  
8 **V.**

9 **STANDARD OF REVIEW**

10  
11 Under 42 U.S.C. § 405(g), a district court may review the  
12 Commissioner's decision to deny benefits. The court may set aside the  
13 Commissioner's decision when the ALJ's findings are based on legal error  
14 or are not supported by substantial evidence in the record as a whole.  
15 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.  
16 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

17  
18 "Substantial evidence is more than a scintilla, but less than a  
19 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
20 which a reasonable person might accept as adequate to support a  
21 conclusion." Id. To determine whether substantial evidence supports  
22 a finding, the court must "'consider the record as a whole, weighing  
23 both evidence that supports and evidence that detracts from the  
24 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny  
25 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can  
26 reasonably support either affirming or reversing that conclusion, the  
27 court may not substitute its judgment for that of the Commissioner.  
28 Reddick, 157 F.3d at 720-21.

1 VI.

2 DISCUSSION

3  
4 **A. The Record Below Was Insufficient For The ALJ To Determine**  
5 **Whether Plaintiff Had Past Relevant Work And Therefore Whether**  
6 **20 C.F.R. § 404.1562(b) Applied**

7  
8 Plaintiff contends that the ALJ failed to properly consider whether  
9 he has past relevant work pursuant to 20 C.F.R. § 404.1562(b). (See  
10 Memorandum in Support of Plaintiff's Complaint ("Complaint Memo.") at  
11 8). The Court agrees.

12  
13 20 C.F.R. § 404.1562 sets forth "[m]edical-vocational profiles  
14 showing an inability to make an adjustment to other work." Subsection  
15 (b) states as follows:

16  
17 (b) If you are at least 55 years old, have no more than a  
18 limited education, and have no past relevant work experience.  
19 If you have a severe, medically determinable impairment(s)  
20 (see §§ 404.1520(c), 404.1521, and 404.1523), are of advanced  
21 age (age 55 or older, see § 404.1563), have a limited  
22 education or less (see § 404.1564), and have no past relevant  
23 work experience (see § 404.1565), we will find you disabled.

24  
25 20 C.F.R. § 404.1562(b); accord 20 C.F.R. § 416.962(b).

26  
27 The Commissioner does not appear to dispute that Plaintiff is at  
28 least fifty-five years old, has a severe, medically determinable

1 impairment, and that he has no more than a limited education. (See  
2 Memorandum in Support of Defendant's Answer ("Answer Memo.") at 9-10).  
3 Indeed, Plaintiff's California ID Card is in the record and states that  
4 Plaintiff was born on August 27, 1951. (AR 248). Accordingly,  
5 Plaintiff turned 55 years of age on August 27, 2006. Additionally, the  
6 ALJ expressly found that Plaintiff had the severe, medically  
7 determinable impairments of "polysubstance dependence with secondary  
8 mood disorder." (AR 398). Finally, the ALJ further found that  
9 Plaintiff "has a limited education." (AR 405). Thus, the Court  
10 concludes that Plaintiff is at least fifty-five years old, has a severe,  
11 medically determinable impairment, and that he has no more than a  
12 limited education pursuant to 20 C.F.R. § 404.1562(b).

13  
14 Defendant concedes that 20 C.F.R. § 404.1562(b) and 416.962(b)  
15 apply when a claimant has no past relevant work. (Answer Memo. at 9).  
16 However, Defendant argues these provisions do not apply to the present  
17 case because "[t]he ALJ reasonably found that Plaintiff did have past  
18 relevant work." (Id.) (citing AR 405). Indeed, the ALJ noted  
19 Plaintiff's testimony that he "has worked off the books" for the past  
20 twenty years "doing odd jobs" and that "he last worked a week before the  
21 hearing passing out flyers for \$20.00 dollars a day." (AR 405).  
22 Contrary to the ALJ's finding, however, it was impossible to determine  
23 from the current record whether Plaintiff's prior work doing odd jobs  
24 and passing out flyers qualified as "past relevant work."

25  
26 A plaintiff's prior work qualifies as "past relevant work" for  
27 purposes of a disability benefits application "when it was done within  
28 the last 15 years, lasted long enough for [the plaintiff] to learn to



1 do it, and was substantial gainful activity.” 20 C.F.R. § 416.965.  
2 Thus, there are three elements to the existence of past relevant work:  
3 (1) recency; (2) duration; and (3) substantial gainful activity. See  
4 Social Security Ruling 82-62, available at  
5 [http://www.ssa.gov/OP\\_Home/rulings/di/02/SSR82-62-di-02.html](http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-62-di-02.html). Here,  
6 Plaintiff’s prior work does not qualify as “past relevant work” because  
7 it does not constitute substantial gainful activity.

8  
9 Prior work performed between January of 1990 and June of 1999  
10 constitutes substantial gainful activity if the claimant earned more  
11 than \$500 per month on average. See 20 C.F.R. § 416.974(b)(2)(i) (Table  
12 1). Prior work performed between July of 1999 and December of 2000  
13 constitutes substantial gainful activity if the claimant earned more  
14 than \$700 per month on average. See id. Prior work performed after  
15 January 1, 2001 constitutes substantial gainful activity if the claimant  
16 earned on average per month more than \$740 in 2001, \$780 in 2002, \$800  
17 in 2003, \$810 in 2004, \$830 in 2005, \$860 in 2006, \$900 in 2007, \$940  
18 in 2008, \$980 in 2009, and \$1,000 in 2010. See Monthly Substantial  
19 Gainful Activity Amounts Chart, available at  
20 <http://www.ssa.gov/OACT/COLA/sga.html>.

21  
22 Plaintiff testified that he has survived for the past twenty years  
23 by working odd jobs and either staying with friends or living in a tent.  
24 (AR 740-41). Plaintiff never stated how much he earned from this  
25 occasional work, but he did state that he earned “[m]aybe \$20 a day”  
26 passing out flyers the week before the hearing. (AR 749). However,  
27 even assuming that Plaintiff worked thirty days a month and thus earned  
28 \$600.00 per month on average, this amount is still insufficient to

1 constitute substantial gainful activity for 2008, the year of the  
2 hearing. See Monthly Substantial Gainful Activity Amounts Chart,  
3 available at <http://www.ssa.gov/OACT/COLA/sga.html>.

4  
5 The Commissioner points out that Plaintiff's earnings are a  
6 presumptive, but not conclusive indicator of whether his prior work  
7 constitutes substantial gainful activity. (See Answer Memo. at 10); see  
8 also Lewis v. Apfel, 236 F.3d 503, 515 (9th Cir. 2001) ("Earnings can  
9 be a presumptive, but not conclusive, sign of whether a job is  
10 substantial gainful activity."). Indeed, the fact that Plaintiff earned  
11 less than the required threshold to constitute substantial gainful  
12 activity shifts the burden of proof to the Commissioner. See Lewis, 236  
13 F.3d at 515 ("The presumption that arises from low earnings shifts the  
14 step-four burden of proof from the claimant to the Commissioner.").  
15 "With the presumption, the claimant has carried his or her burden unless  
16 the ALJ points to substantial evidence, aside from earnings, that the  
17 claimant has engaged in substantial gainful activity." Id.

18  
19 Here, the ALJ noted that Plaintiff "was able to support himself" by  
20 working "odd jobs." (AR 405). However, Plaintiff explained that he was  
21 "basically homeless" and mainly lived in a tent. (AR 741). Regardless,  
22 the fact that Plaintiff occasionally worked odd jobs does not  
23 necessarily demonstrate that he engaged in substantial gainful activity.  
24 See Lewis, 236 F.3d at 516 (holding that the Commissioner failed to  
25 rebut the presumption against substantial gainful activity based on the  
26 claimant's occasional work of twenty hours per week where the claimant  
27 earned less than the required threshold). Moreover, the ALJ conceded  
28

1 that "[t]he vocational expert stated that based on [Plaintiff's] lack  
2 of recorded earning he has no past relevant work." (AR 405).

3  
4 **B. Remand For Further Proceedings Is Required**

5  
6 The Court concludes that remand is appropriate because additional  
7 proceedings could remedy defects in the Commissioner's decision. See  
8 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000); Kail v. Heckler,  
9 722 F.2d 1496, 1497 (9th Cir. 1984). On remand, the ALJ must apply the  
10 presumption against substantial gainful activity based on Plaintiff's  
11 low earnings. The ALJ should consider the following five factors to  
12 determine whether Plaintiff's prior work constitutes substantial gainful  
13 activity: (1) "the nature of the claimant's work"; (2) "how well the  
14 claimant does the work"; (3) if the work is done under special  
15 conditions"; (4) "if the claimant is selfemployed"; and (5) "the amount  
16 of time the claimant spends at work." Lewis, 236 F.3d at 515-16.  
17 "Generally, an ALJ should not consider activities like taking care of  
18 oneself, household tasks, hobbies, school attendance, club activities,  
19 or social programs to be substantial gainful activities." Id. at 516.  
20 Because the record is not sufficiently developed on this issue, the ALJ  
21 should take additional testimony from Plaintiff and/or a VE in order to  
22 resolve the ambiguities in the record.

23  
24 Although the Court has declined to address Plaintiff's remaining  
25 arguments for a remand, the Court notes that the ALJ failed to directly  
26 address the third party report of John Williams. This issue should be  
27 corrected on remand as well.

1 Finally, the ALJ declined to dismiss Plaintiff's claim on the basis  
2 of abandonment, citing 20 C.F.R. 404.957, although Plaintiff failed to  
3 appear at the scheduled hearing. (AR 13). Should Plaintiff fail to  
4 cooperate in any part of the continuing administrative process, the ALJ  
5 should reconsider whether Plaintiff has, in fact, abandoned these  
6 proceedings.

7  
8 **VII.**  
9 **CONCLUSION**

10  
11 Consistent with the foregoing, IT IS ORDERED that judgment be  
12 entered REVERSING the decision of the Commissioner and REMANDING this  
13 matter for further proceedings consistent with this decision. IT IS  
14 FURTHER ORDERED that the Clerk of the Court serve copies of this Order  
15 and the Judgment on counsel for both parties.

16  
17 DATED: September 29, 2010

18  
19 /s/  
20 -----  
SUZANNE H. SEGAL  
21 UNITED STATES MAGISTRATE JUDGE  
22  
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