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

CARLENE MONIQUE BUTLER,)
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 Plaintiff,)
)
 v.)
)
 NANCY A. BERRYHILL,)
 Acting Commissioner of Social)
 Security,)
)
 Defendant.)
 _____)

Case No. EDCV 16-1901 AJW

MEMORANDUM OF DECISION

Plaintiff seeks reversal of the decision of defendant, the Acting Commissioner of Social Security (the “Commissioner”), denying plaintiff’s applications for supplemental security income (“SSI”) benefits. The parties have filed a Joint Stipulation (“JS”) setting forth their respective contentions.

Administrative Proceedings

On October 31, 2012, plaintiff protectively filed her SSI benefits application alleging that she had been disabled since November 4, 2010. [See JS 2; Administrative Record (“AR”) 107-125]. In a December 2, 2014 written hearing decision that constitutes the Commissioner’s final decision, the Administrative Law Judge (“ALJ”) denied plaintiff’s application for SSI benefits. [AR 15-23]. The ALJ noted that plaintiff had filed prior applications for disability insurance benefits and SSI benefits alleging that she became disabled on October 8, 2010. Those applications were denied in a final written hearing decision finding plaintiff

1 “not disabled” from October 8, 2010 through February 23, 2012, the date of that decision. [See AR 15, 97-
2 103, 250-251]. The ALJ further determined that plaintiff had not rebutted the presumption of continuing
3 non-disability arising from the prior, final decision that she was not disabled. [AR 15]. The ALJ found that
4 plaintiff retained the residual functional capacity (“RFC”) to perform a range of light work that did not
5 preclude performance of her past relevant work as a telephone operator and as an office assistant as either
6 actually or generally performed. [AR 22-23]. Accordingly, the ALJ found plaintiff not disabled at any time
7 from October 31, 2012, the date her application was filed, through the date of the ALJ’s decision.¹ [AR
8 23].

9 **Standard of Review**

10 The Commissioner’s denial of benefits should be disturbed only if it is not supported by substantial
11 evidence or is based on legal error. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015); Thomas
12 v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). “Substantial evidence” means “more than a mere scintilla,
13 but less than a preponderance.” Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). It is “such
14 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Burch v.
15 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). The court is required to review the record as a whole and to
16 consider evidence detracting from the decision as well as evidence supporting the decision. Robbins v. Soc.
17 Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006); Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999).
18 “Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ’s
19 decision, the ALJ’s conclusion must be upheld.” Thomas, 278 F.3d at 954 (citing Morgan v. Comm’r of Soc.
20 Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999)).

21 **Discussion**

22 **Presumption of continuing non-disability**

23 Although applied less rigidly to administrative than to judicial proceedings, the principles of res
24 judicata apply to administrative decisions. See Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995); Chavez
25 v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988). A prior, final determination that a claimant is not disabled

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27 ¹ SSI benefits are not payable prior to the month following the month which the claimant’s
28 application is filed, regardless of the date of onset. See 20 C.F.R. §§ 416.330, 416.335. Therefore,
the relevant period was the date plaintiff’s application was filed through the date of the ALJ’s
decision.

1 creates a rebuttable presumption that the claimant retains the ability to work after the date of the prior
2 administrative decision. See Schneider v. Comm’r of Social Sec. Admin., 223 F.3d 968, 973 (9th Cir.
3 2000); Lyle v. Sec’y of Health & Human Servs., 700 F.2d 566, 567 (9th Cir. 1983). “Normally, an ALJ’s
4 findings that a claimant is not disabled ‘creates a presumption that the claimant continued to be able to work
5 after that date. However, the presumption does not apply ‘where the claimant raises a new issue, such as
6 the existence of an impairment not considered in the previous application.’” Vasquez v. Astrue, 572 F.3d
7 586, 597 (9th Cir. 2009) (quoting Lester, 81 F.3d at 827).

8 The Ninth Circuit has held that “all an applicant has to do to” to rebut the presumption of continuing
9 non-disability is to “raise a new issue in the later proceeding.” Vasquez, 572 F.3d at 598 (holding that the
10 ALJ erred in applying the presumption of continuing non-disability where the claimant alleged a mental
11 impairment not alleged in his earlier application, and that for purposes of rebutting the presumption it was
12 irrelevant that the ALJ found that impairment not severe). Under Ninth Circuit law, plaintiff rebutted the
13 presumption of continuing non-disability by raising a new impairment during the September 2014 hearing.
14 Plaintiff’s counsel asked her to describe the impairments that prevented her from working after the date of
15 the hearing on her prior applications. Plaintiff testified that she had right ear pain associated with
16 fluctuating hearing loss and tinnitus, and that her ear problems started around the beginning of 2014. She
17 said that her children and grandchildren had noticed her hearing loss and brought it to her attention, and
18 that she was aware that it was an issue. Plaintiff said that her doctor had discussed a hearing aid with her
19 but wanted to wait before prescribing one, and that one of her doctors said she had nerve damage but
20 another doctor disagreed. [See AR 35, 38-40]. Asked by her counsel about a reference to tinnitus in her
21 medical records, plaintiff said that since the start of 2014 she had “a lot of ringing in my ear.” [AR 40].

22 Defendant argues that plaintiff “not only failed to prove greater disability than in 2012, she has
23 completely ignored her burden” to “prove changed circumstances” and rebut the presumption of continuing
24 non-disability. [JS 8]. However, plaintiff was not required to prove changed circumstances to rebut the
25 presumption; she had only to allege the existence of a new impairment. See Lester, 81 F.3d at 827 (“[T]he
26 Commissioner may not apply res judicata where the claimant raises a new issue, such as the existence of
27 an impairment not considered in the previous application.”). Plaintiff’s hearing testimony about her right
28 ear pain, hearing loss, and tinnitus was sufficient to rebut the presumption.

1 Since the ALJ erred in finding that plaintiff had not rebutted the presumption of continuing non-
2 disability, his decision can stand only if it is otherwise supported by substantial evidence in the record and
3 free of harmful legal error.

4 **Severity finding**

5 Plaintiff contends that the ALJ erred in failing to discuss or make any findings regarding the
6 existence or severity of her ear and hearing problems. [JS 4-6].

7 At step two of the five-step sequential evaluation procedure, the Commissioner must determine
8 whether the claimant has a severe, medically determinable impairment or combination of impairments. See
9 Smolen v. Chater, 80 F.3d 1273, 1289-1290 (9th Cir. 1996) (citing Bowen v. Yuckert, 482 U.S. 137, 140-
10 141 (1987)). An medically determinable medical impairment is one that results “from anatomical,
11 physiological, or psychological abnormalities which can be shown by medically acceptable clinical and
12 laboratory diagnostic techniques,” and it “must be established by medical evidence consisting of signs,
13 symptoms, and laboratory findings, not only by [the claimant’s] statement of symptoms.” 20 C.F.R. §§
14 404.1508, 416.908, 404.1528, 416.928²; see Social Security Ruling (“SSR”) 96-4p, 1996 WL 374187, at
15 *1-*2.

16 The ALJ must determine whether a claimant’s medically determinable impairment or combination
17 of impairments significantly limits his or her physical or mental ability to do “basic work activities,” which
18 are “the abilities and aptitudes necessary to do most jobs,” such as (1) physical functions like walking,
19 standing, sitting, lifting, pushing, pulling, reaching, carrying, and handling; (2) the capacity for seeing,
20 hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) the use
21 of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6)
22 dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1521, 416.921.

23 As noted above, plaintiff raised the issue of ear and hearing problems before the ALJ by testifying
24

25 ² Many of the relevant regulations were revised, recodified, or deleted after the date of the
26 ALJ’s decision. See. e.g., Revisions to Rules Regarding the Evaluation of Medical Evidence, 82
27 Fed. Reg. 5844 (Jan. 18, 2017) (final rules effective Mar. 27, 2017); Revised Medical Criteria for
28 Evaluating Mental Disorders, 81 Fed. Reg. 66138 (Sep. 26, 2016) (final rules effective Jan. 17,
2017). Unless otherwise noted, all regulations cited herein are to the historical version of the
regulation that was in effect on the date of the ALJ’s decision.

1 that she experienced right ear pain, hearing loss, and tinnitus since the beginning of 2014, about nine months
2 before the hearing on her current SSI application. Her treatment records from San Bernardino County
3 clinics indicate that she sought treatment for ear and hearing problems before that date. In July 2013,
4 plaintiff presented with complaints of ringing and pressure in her ears and decreased hearing that at that
5 point already had been going on “for months.” Her diagnoses included chronic bilateral ear tinnitus,
6 chronic, with decreased hearing, and she was referred to audiology. [AR 996-997].

7 During an August 2013 follow-up visit, plaintiff again complained of hearing problems. She
8 underwent an audiogram, which showed abnormalities in both the right and left ear at higher frequencies.
9 She was referred to audiology and to an ear, nose, and throat specialist. [AR 992-993]. On January 16,
10 2014, plaintiff again sought treatment for ear problems. [AR 967-970]. She reported having seen an ear
11 doctor, who told her she had fluctuating hearing loss due to fluid in her ear. [AR 967]. She “fail[ed] an
12 audiogram here in clinic” but there was no “record of a formal audiology evaluation.” [AR 968]. Her
13 diagnoses included decreased hearing and serious otitis media by history. [AR 968, 970]. Plaintiff was
14 advised to follow up with her primary care doctor. [AR 968].

15 In March 2014 and April 2014, plaintiff was seen for complaints of hearing problems, among other
16 things. She was assessed with “intermittent” and “fluctuating” hearing loss and referred to audiology for
17 a repeat audiogram. [AR 986-988]. In August 2014, plaintiff sought treatment for chronic, daily ringing
18 in her ears associated with a history of ear pain, recently increasing in severity, and hearing loss. [AR 965].
19 A July 2014 audiogram showed hearing within normal limits, but the audiologist’s impression was that
20 plaintiff had a Eustachian tube defect. [AR 964]. Examination of her ears bilaterally revealed a right
21 tympanic membrane that was “cloudy compar[ed] to the left side with some tenderness with otoscope
22 manipulation.” [AR 965]. Plaintiff’s assessment was possible recent otitis media (ear infection) with
23 Eustachian tube defect. She was prescribed an antibiotic, Claritin, and Sudafed, and was referred to an ear,
24 nose, and throat specialist. [AR 965-966]. Abnormalities were noted on an August 2014 right ear
25 audiogram. [AR 964].

26 The ALJ did not mention or make any findings regarding ear or hearing problems in his December
27 2014 hearing decision. Plaintiff’s subjective testimony and her medical records for a period of over one
28 year reflecting her treatment for ear pain, tinnitus, and fluctuating or intermittent hearing loss document

1 signs, symptoms, and laboratory findings establishing the existence of a medically determinable hearing
2 impairment (and do not, as defendant contends, merely establish that she had an ear infection). Since
3 plaintiff produced evidence of a medically determinable impairment, the ALJ was required to assess the
4 severity of that impairment and to make appropriate findings at subsequent steps of the sequential evaluation
5 procedure. See 20 C.F.R. §§ 404.1520, 416.920.

6 The ALJ's error cannot be considered harmless because hearing is a "basic work activity" that
7 affects the ability to perform most jobs, 20 C.F.R. §§ 404.1521(b), 404.921(b), and because plaintiff's ear
8 and hearing problems are relevant to her ability to perform her past relevant work as a telephone operator
9 and an office assistant. The Dictionary of Occupational Titles ("DOT") states that the occupation of
10 telephone operator, DOT job number 235.662-022, requires "constant" hearing (defined as 2/3 or more of
11 the time), and that the occupation of office assistant, DOT job number 219.362-010 (designated as an
12 "administrative clerk" or "general office clerk" in the DOT) requires "frequent" hearing (defined as from
13 1/3 to 2/3 of the time). Nothing in the record suggests that those jobs as actually performed by plaintiff
14 required less hearing ability. [See AR 240-249 (plaintiff's work history report)].

15 Defendant's attempt to "fill in the blanks" in the ALJ's decision fails because the court is
16 "constrained to review the reasons the ALJ asserts" for the denial of benefits and "cannot affirm the decision
17 of an agency on a ground that the agency did not invoke in making its decision." Stout v. Comm'r, Social
18 Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006) (quoting Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
19 2003); Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001)). Accordingly, the ALJ committed reversible
20 legal error.

21 **Remedy**

22 A district court may "revers[e] the decision of the Commissioner of Social Security, with or without
23 remanding the cause for a rehearing[.]" Treichler v. Comm'r of Soc., Sec. Admin., 775 F.3d 1090, 1099 (9th
24 Cir. 2014) (quoting 42 U.S.C. § 405(g)). A remand for further administrative proceedings is the proper
25 remedy in this case because the ALJ's erroneous reliance on the presumption of continuing non-disability
26 and his failure to evaluate plaintiff's subjective testimony and the medical evidence regarding her ear and
27 hearing problems means that "all essential factual issues" have been not been resolved. Treichler, 775 F.3d
28 at 1101.

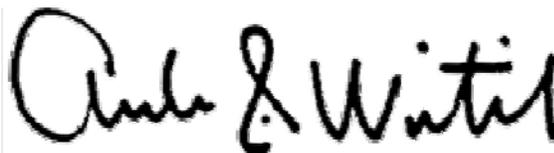
1 On remand, the Commissioner shall direct the ALJ to offer plaintiff the opportunity for a new
2 hearing, take appropriate steps to develop the record, properly evaluate the medical evidence of record and
3 plaintiff's subjective testimony, and issue a new hearing decision containing properly supported findings.³

4 Conclusion

5 For the reasons stated above, the Commissioner's decision is **reversed**, and this case is **remanded**
6 **to the Commissioner for further administrative proceedings.**

7 **IT IS SO ORDERED.**

8
9 July 20, 2017



10
11 ANDREW J. WISTRICH
United States Magistrate Judge

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³ This disposition makes it unnecessary to separately consider plaintiff's contention that the ALJ erred in evaluating plaintiff's subjective symptom testimony. [See JS 14-24].