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

ESPERANZA MARCHBANKS,)	No. SA CV 13-1778-AS
)	
Plaintiff,)	
v.)	MEMORANDUM AND OPINION
)	
CAROLYN W. COLVIN,)	
Acting Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	
)	

PROCEEDINGS

Plaintiff Esperanza Marchbanks ("Plaintiff"), asserts disability since March 7, 2007, based on alleged physical impairments. (A.R. 186-192, 224). The Administrative Law Judge ("ALJ") examined the Certified Administrative Record ("A.R.") and heard testimony from Plaintiff and a vocational expert ("VE") on July 20, 2011, and April 4, 2012. (A.R. 73-131). On May 1, 2012, the ALJ denied Plaintiff

1 benefits in a written decision. (A.R. 20-42). On July 15, 2013, the
2 Appeals Council denied review. (A.R. 5-10).

3 On November 19, 2013, Plaintiff filed a Complaint, pursuant to
4 42 U.S.C. § 405(g), alleging that the Social Security Administration
5 erred in denying her disability benefits (Docket Entry No. 3). On
6 April 15, 2014, Defendant filed an Answer to the Complaint (Docket
7 Entry No. 13), and the Certified Administrative Record (Docket Entry
8 No. 14). The parties have consented to proceed before a United
9 States Magistrate Judge (Docket Entry Nos. 9, 10). On October 23,
10 2014, the parties filed a Joint Stipulation ("Joint Stip.") setting
11 forth their respective positions on Plaintiff's claim (Docket Entry
12 No. 22).

13
14 **RELEVANT ADMINISTRATIVE FINDINGS**

15
16 Based on a review of the record and testimony from a VE, the ALJ
17 found, at step five, that Plaintiff did not have the residual
18 functional capacity ("RFC") to return to her past relevant work as a
19 home health aide, a certified nursing assistant, or a
20 cashier/checker. (A.R. 36). The ALJ did find, however, that
21 Plaintiff could work as a "bakery worker conveyer line" or a "counter
22 clerk photo finishing." (A.R. 37). The VE, relying on the
23 Dictionary of Occupational Titles ("DOT"), testified that these jobs
24 existed in significant numbers in both the local and national
25 economies. (A.R. 37, 101).

1 waived the issues related to new statistical evidence that was
2 introduced for the first time on appeal). This is true in the case
3 of new statistical evidence, as "[t]he ALJ, rather than this Court,
4 [is] in the optimal position to resolve the conflict between [a
5 claimant's] new evidence and the statistical evidence provided by the
6 VE." Id. Here, the Court's consideration of the new evidence would
7 "deprive[] the Commissioner of an opportunity to weigh and evaluate
8 that evidence."¹ Silveira v. Apfel, 204 F.3d 1257, 1260 fn. 8 (9th
9 Cir. 2000). The Court finds that because Plaintiff was represented
10 by counsel at her hearing before the ALJ and failed to raise this
11 issue at the hearing, seek reconsideration of the ALJ's decision, or
12 raise this issue before the Appeals Council, she has waived the issue
13 on appeal. As a result, this Court's determination of whether the
14 ALJ erred is limited to a review of the record at the time of the
15 administrative hearing, and the additional evidence submitted to the
16 Appeals Council.²

21 ¹
22 If an issue is "a pure question of law and the Commissioner will not
23 be unfairly prejudiced by [Plaintiff's] failure to raise the issue
24 below," it may be raised for the first time on appeal. Silveira v.
25 Apfel, 204 F.3d at 1260 fn. 8 (citing United States v. Thornburg, 82
26 F.3d 886, 890 (9th Cir. 1996)). This principal does not apply here
27 because the new statistical *evidence* that Plaintiff raises on appeal is
28 a question of fact.

26 ²
27 The additional evidence submitted to the Appeals Council consisted of
28 a single brief that does not mention the issue that Plaintiff now raises
before this Court. (A.R. 296-300).

1 **CONCLUSION**

2
3 The only issue that Plaintiff has raised is one which has been
4 waived because it was not raised below. (Joint Stip. 4). Both
5 parties have stipulated to the accuracy of the ALJ's medical and non-
6 medical evidentiary findings. (Id.) As a result, the decision of
7 the ALJ need not be examined, as there is no contention that the ALJ
8 erred in any of her other findings.

9
10 **ORDER**

11
12 For all of the forgoing reasons, the decision of the
13 Administrative Law Judge is affirmed.

14
15 LET JUDGMENT BE ENTERED ACCORDINGLY.

16
17 Dated: November 4, 2014

18 /s/ _____
19 ALKA SAGAR
20 UNITED STATES MAGISTRATE JUDGE
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