



1 I. BACKGROUND

2 In 2002, plaintiff's son (the "claimant") filed an application for SSI benefits, which was  
3 granted. Administrative Record ("AR") 15. In July 2006, the Social Security Administration  
4 informed plaintiff, who is the claimant's representative payee, that there was an overpayment of  
5 \$2,605 for the period of March 1, 2005 through December 1, 2005, due to unreported income  
6 received by plaintiff during that period. AR 20. Plaintiff subsequently received a second notice  
7 of overpayment, this one indicating that the claimant was overpaid \$2,787 from November 2006  
8 to April 2007, also due to unreported income. *Id.* at 30-33.

9 Plaintiff filed requests for waiver of overpayment recovery (*id.* at 112-121), which were  
10 denied initially and on reconsideration (*id.* at 25-29, 36-41). On October 29, 2009, a hearing was  
11 held before administrative law judge Stanley R. Hogg ("ALJ Hogg"). *Id.* at 59. On December  
12 14, 2009, ALJ Hogg issued a decision denying plaintiff's request for waivers. *Id.* at 59-62. The  
13 Appeals Council subsequently denied plaintiff's request for review, leaving ALJ Hogg's decision  
14 as the final decision of the Commissioner. *Id.* at 69-71.

15 Plaintiff then filed the instant action challenging the Commissioner's denial of her  
16 application for a waiver. ECF No. 1. In July 2012, the court granted the Commissioner's  
17 unopposed motion to remand the matter pursuant to sentence six of 42 U.S.C. § 405(g), finding  
18 that meaningful review of ALJ Hogg's decision could not be completed because a recording of  
19 the October 29, 2009 hearing was unavailable. ECF Nos. 11, 15.

20 On April 26, 2013, a new hearing was held before ALJ Peter F. Belli (the "ALJ"). AR  
21 126-155. On June 10, 2013, the ALJ issued a decision denying plaintiff's applications for  
22 waivers. *Id.* at 15-19. Specifically, the ALJ found that plaintiff was not "without fault" in  
23 causing or accepting the overpayments because she accepted payments she knew, or should have  
24 known, were incorrect. *Id.* at 18.

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1 Plaintiff subsequently filed a written exception to the ALJ's decision, but the Appeals  
2 Council declined to assume jurisdiction.<sup>1</sup> *Id.* at 3-4. Accordingly, the ALJ's June 10, 2013  
3 decision is the final decision of the Commissioner. 20 C.F.R. § 416.1484(d).

#### 4 II. LEGAL STANDARDS

5 The Commissioner's decision to not waive recovery of overpayment will be upheld if the  
6 findings of fact are supported by substantial evidence in the record and the proper legal standards  
7 were applied. *Anderson v. Sullivan*, 914 F.2d 1121, 1122 (9th Cir. 1990).

8 The findings of the Commissioner as to any fact, if supported by substantial evidence, are  
9 conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is  
10 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521 (9th  
11 Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to support a  
12 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v.*  
13 *N.L.R.B.*, 305 U.S. 197, 229 (1938)).

14 "The ALJ is responsible for determining credibility, resolving conflicts in medical  
15 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
16 2001) (citations omitted). "Where the evidence is susceptible to more than one rational  
17 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."  
18 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

#### 19 III. ANALYSIS

20 Plaintiff does not dispute that an overpayment occurred. Nor does she challenge the  
21 amount of the assessed overpayment. Rather, plaintiff only challenges the ALJ's finding that she  
22 was not entitled to a waiver of recovery of the overpaid amounts. ECF No. 24. To qualify for a  
23 waiver, she must have been without fault in causing or receiving the overpayment. She argues

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25 <sup>1</sup> Once an ALJ issues a decision after remand from the district court, the plaintiff has 30  
26 days to file exceptions with the Appeals Council, requesting the Appeals Council review the  
27 ALJ's decision. 20 C.F.R. § 416.1484(b). If the Appeals Council finds no basis for changing the  
28 ALJ's decision, it is required to issue a notice addressing the claimant's exceptions and  
*Id.* explaining why no change is warranted. 20 C.F.R. § 416.1484(b)(2). "In this instance, the  
decision of the administrative law judge is the final decision of the Commissioner after remand."

1 that the ALJ erred in (1) finding that she was not “without fault” in receiving the overpayment  
2 because she knew, or should have known, that the payments were incorrect, and (2) failing to  
3 fully develop the record by obtaining testimony pertinent to the overpayment inquiry. *Id.* at 4-7.  
4 As explained below, the record before the court is insufficient to sustain the ALJ’s findings,  
5 necessitating remand for further administrative proceedings.

6       Upon determining that an overpayment has been made, the Social Security  
7 Administration’s (“SSA”) practice is “to notify the recipient of that determination, and then to  
8 shift to the recipient the burden of either (i) seeking reconsideration to contest the accuracy of that  
9 determination, or (ii) asking the [Commissioner] to forgive the debt and waive recovery . . . .”  
10 *Califano v. Yamasaki*, 442 U.S. 682, 686 (1979). Where, as here, a representative payee has been  
11 found liable for repayment of the overpaid benefits, she has a right to challenge her responsibility  
12 for repayment by requesting a waiver. POMS: IS 02220.001.<sup>2</sup>

13       The Commissioner may waive recovery of overpaid benefits under certain circumstances  
14 provided the “overpaid individual was without fault in connection with an overpayment.” 20  
15 C.F.R. § 416.550; *see also* 42 U.S.C. § 404(b)(1) (“there shall be no adjustment of payments to,  
16 or recovery by the United States from, any person who is without fault if such adjustment or  
17 recovery would defeat the purpose of this subchapter or would be against equity and good  
18 conscience.”). However, the party seeking a waiver bears the burden of proving she was without  
19 fault. *McCarthy v. Apfel*, 221 F.3d 1119, 1129 (9th Cir. 2000).

20       “Whether an individual is without fault depends on all the pertinent circumstances  
21 surrounding the overpayment in the particular case.” 20 C.F.R. § 416.552. In assessing fault, the  
22 agency “considers the individual’s understanding of the reporting requirements, the agreement to  
23 report events affecting payments, knowledge of the occurrence of events that should have been  
24 reported, efforts to comply with the reporting requirements, opportunities to comply with the

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26       <sup>2</sup> The SSA’s Program Operations Manual System (“POMS”) provides that a claimant and  
27 his or her representative payee are both liable for an overpayment where benefits are expended on  
28 the claimant’s support and the representative payee was at fault. POMS: IS 02201.020(A)(5); *see also Evelyn v. Schweiker*, 685 F.2d 351 (9th Cir. 1982) (holding that the Commissioner may recover overpayments from a representative payee).

1 reporting requirements, understanding of the obligation to return checks which were not due, and  
2 ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical  
3 and mental condition).” *Id.* However, an individual will be found to be at fault where she failed  
4 to “return a payment which [she] knew or could have been expected to know was incorrect.” *Id.*

5 On remand, the ALJ concluded that plaintiff was not without fault because she failed to  
6 return payments she knew, or should have known, were incorrect. AR 18. After purporting to  
7 summarize plaintiff’s testimony, the ALJ provided the following discussion to support his  
8 conclusion that plaintiff was not without fault in receiving the overpayment:

9 If we credit Ms. Lintz’s testimony that she always submitted wage  
10 stubs timely, then it is reasonable to conclude that Ms. Lintz should  
11 have questioned the amount of the claimant’s payments from month  
12 to month. If she submitted wage stubs, but then saw no  
13 accompanying changes in the claimant’s payments, she should have  
14 realized that the necessary changes had not been made to the  
15 claimant’s record and should have checked with the office  
16 regarding the payments, rather than just using the money.

17 *Id.*

18 Thus, the ALJ concluded that plaintiff’s own testimony did not support her contention that  
19 she was without fault in receiving the overpayments. Consequently, he found that plaintiff was  
20 liable for the overpayments. AR 16 n.1. The problem is that the basis for the ALJ’s holding—  
21 plaintiff’s testimony—is conspicuously absent from the record. The transcript of the April 26,  
22 2016 hearing reflects that the ALJ prohibited plaintiff from testifying. *Id.* at 126-155.

23 Although less than clear, the hearing transcript suggests that the ALJ would not permit  
24 plaintiff to testify due to the ALJ’s failure to understand that plaintiff appeared at the hearing to  
25 challenge her own (as opposed to Blackmon, the disabled beneficiary’s) liability for the  
26 overpayments.<sup>3</sup> *See generally* AR 128-155. Despite plaintiff’s attempt to explain that she was  
27 the claimant’s representative payee, and therefore potentially liable for any overpayment, the ALJ  
28 erroneously assumed that plaintiff’s appearance at the hearing was solely to represent the  
claimant’s interest as a non-attorney representative, not to contest her own liability. *See, e.g., id.*

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<sup>3</sup> Only plaintiff, the representative payee, appeared at the hearing. Blackmon did not.

1 at 129-130 (ALJ stating, “But you cannot - -as his representative, you cannot - - you’re not here  
2 to give evidence.”), 144 (ALJ stating that “we have no oral testimony today because you’re the  
3 representative.”), 147 (plaintiff stating, “I thought I was representing this case [as] the  
4 representative payee for the error that I was being accounted for. . . . I’m not trying to come in  
5 and represent [the claimant] . . . .”), 148 (ALJ stating that “you’re his representative. You are not  
6 his – you are not the witness.”).

7 The ALJ apparently became aware of his mistake after the hearing, as his decision  
8 specifically concluded that plaintiff, as opposed to the claimant, was not without fault in receiving  
9 the overpayment. *See id.* 16 n.1. The ALJ’s decision, however, fails to acknowledge the error  
10 made at the hearing and, as noted above, even purports to provide a summary of plaintiff’s  
11 testimony.

12 This of course begs the question of how was the ALJ able to provide a summary of  
13 plaintiff’s testimony in the written decision when plaintiff was prohibited from testifying at the  
14 hearing. It appears that the ALJ adopted verbatim extensive portions of the prior decision issued  
15 by ALJ Hogg, including the summary of plaintiff’s testimony from the first administrative  
16 hearing and ALJ Hogg’s analysis and reasoning for finding that plaintiff was not without fault.  
17 *See id.* at 59-62.

18 As noted above, this case was remanded to the Commissioner because there was no record  
19 of the administrative hearing held before ALJ Hogg. The Commissioner previously  
20 acknowledged in his motion to remand that the hearing transcript of plaintiff Lintz’s testimony  
21 was necessary to permit meaningful review of the ALJ’s decision. Further administrative  
22 proceedings were conducted, but Lintz’s testimony was inappropriately cutoff at the second  
23 hearing. The result is that the court is in the same place it was prior to remand. The new decision  
24 issued by the second ALJ is almost identical to that issued by ALJ Hogg in the earlier decision  
25 that was remanded for rehearing. The few differences in the two are immaterial to the finding  
26 that plaintiff was not without fault in receiving the overpayment.<sup>4</sup> Further, there continues to be

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28 <sup>4</sup> The new decision provides additional information regarding the case’s procedural history and addresses a few issues raised by plaintiff at the April 26, 2013 hearing. However, the

1 no transcript of the testimony upon which the decision rests. Accordingly, the court still lacks a  
2 record upon which it can conduct a meaningful review of the Commissioner’s decision denying  
3 plaintiff’s application for a waiver of overpayment.

4 Furthermore, the ALJ’s failure to issue his own decision based on testimony he personally  
5 observed is particularly problematic given that this case involves overpayment of benefits.  
6 “Unlike a disability determination, a decision of whether a person is at fault [for an overpayment]  
7 requires that the decision maker see the person, size up the testimony, and have an opportunity to  
8 question the individual about the circumstances involved in his claimed failure to recognize that  
9 an overpayment was made.” *Elliott v. Weinberger*, 564 F.2d 1219, 1233 (9th Cir. 1997). The  
10 ALJ may have physically seen plaintiff, but fell far short of satisfying his obligation to inquire  
11 about the circumstances surrounding the overpayment. Accordingly, the decision before the court  
12 is not supported by substantial evidence.

13 IV. CONCLUSION

14 Accordingly, it is hereby RECOMMENDED that:

- 15 1. Plaintiff’s motion for summary judgment be granted;
- 16 2. The Commissioner’s cross-motion for summary judgment be denied;
- 17 3. The matter be remanded for further consideration; and
- 18 4. The Clerk be directed to enter judgment in plaintiff’s favor.

19 These findings and recommendations are submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
21 after being served with these findings and recommendations, any party may file written  
22 objections with the court and serve a copy on all parties. Such a document should be captioned  
23 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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28 analysis pertaining to whether plaintiff was without fault in accepting the overpayment appears to  
be taken verbatim from ALJ Hogg’s decision. *Compare* AR 16-18 *with* AR 60-61.

1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 1, 2017.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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