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DISTRICT OF NEVADA
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UNITED STATES DISTRICT COURT
AUG - 6 2009
DISTRICT OF NEVADA

1 KIM SCHREIER

2 Plaintiff,

3 vs.

4 MICHAEL J. ASTRUE,
5 Commissioner,
6 Social Security Administration,

7 Defendants.

8) 3:08-cv-00223-LRH (VPC)
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**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

August 4, 2009

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

Before the court is plaintiff's motion for reversal of the Commissioner's decision (#11). Defendant opposed and filed a cross-motion for summary judgment (#12). Plaintiff did not file a reply. For the reasons set forth below, the court recommends that plaintiff's motion for reversal (#11) be denied and defendant's cross-motion for summary judgment (#12) be granted.

I. ADMINISTRATIVE PROCEEDINGS

On January 21, 2004, plaintiff Kim Marie Schreier ("plaintiff") filed an application for Supplemental Social Security disability insurance benefits (AR 59, 71). Plaintiff alleged disability based on Schizo-affective disorder depressed type and a history of lumbothoracic strain (AR 59-60). Plaintiff's claim was denied initially (AR 62-66) and on reconsideration (AR 67-69). On May 18, 2006, a hearing was held before Administrative Law Judge ("ALJ") Mark C. Ramsey, where plaintiff was represented by attorney Dennis A. Cameron (AR 17-35 (opinion); AR 473-513 (transcript)). The ALJ filed a written opinion on October 24, 2006, in which he

1 upheld the denial of plaintiff's claim (AR 17-35). Plaintiff requested administrative review on
2 December 6, 2006 (AR 15), and the Appeals Council denied review on February 28, 2008,
3 making the ALJ's decision final (AR 6-8). Having exhausted all administrative remedies,
4 plaintiff filed a complaint for judicial review on April 28, 2008 (#1).

5

II. BACKGROUND

6 Plaintiff was born on December 12, 1967, and was thirty-eight years old at the time of her
7 hearing (AR 476). Plaintiff completed eighth grade (AR 476-77). Plaintiff's last employment that
8 lasted longer than six months was as a cashier and cook in a fast food restaurant (AR 477).
9 Plaintiff's other past employment includes a change person in a casino, a telemarketer, a cashier
10 in a convenience store, and as a lock assembler. *Id.* However, of these, only plaintiff's position
11 as a change person lasted longer than six months. *Id.* Plaintiff alleges that she became disabled
12 on May 13, 2003, due to post-traumatic stress disorder, panic disorder, diabetes mellitus,
13 hypothyroidism, hepatitis C, gastroesophageal reflux disorder, degenerative disc disease of the
14 cervical spine, and degenerative disc disease of the lumbar spine with an L1 compression
15 deformity (AR 71, #9, p. 2). Plaintiff previously filed an application for Social Security Insurance
16 benefits on November 19, 2001, alleging disability beginning on July 21, 2001. This claim was
17 denied initially in April 2002 and upon reconsideration in July 2002 (AR 20). A hearing was held
18 before an ALJ on April 17, 2003, and the ALJ denied plaintiff's claim for benefits on May 13,
19 2003. *Id.* In the 2006 decision, the ALJ found that because plaintiff did not request further review
21 of the May 2003 unfavorable decision, that decision became final and binding (AR 21).

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25 Following the 2006 hearing, the ALJ found plaintiff not disabled because she was capable
26 of performing work that exists in significant numbers in the national economy (AR 33).
27 Specifically, the ALJ made the following findings:

28 1. The claimant has not engaged in substantial gainful

- 1 activity since the alleged onset of disability.
- 2 2. The claimant's posttraumatic stress disorder,
3 schizoaffective disorder, panic disorder, diabetes mellitus,
4 hypothyroidism, hepatitis C, gastroesophageal reflux
5 disorder, degenerative disc disease of the cervical spine,
6 and degenerative disc disease of the lumbar spine with an
7 L1 compression deformity are considered "severe" based
8 on the requirements in the Regulations 20 CFR §
9 416.920(c).
- 10 3. These medically determinable impairments do not meet or
11 medically equal one of the listed impairments in
12 Appendix 1, Subpart P, Regulation No. 4.
- 13 4. The undersigned finds the claimant's allegations
14 regarding her limitations are not totally credible for the
15 reasons set forth in the body of the decision.
- 16 5. The claimant retains the residual functional capacity for
17 a full range of light exertional work, except that she
18 requires a sit/stand option. The claimant should have a
19 task-oriented job, rather than one that involves group
20 effort. The claimant should have no more than occasional
21 contact with the public at large. The claimant can
22 understand, remember and carry out simple job
23 instructions or tasks, but not complex job instructions or
24 tasks.
- 25 6. The claimant is unable to perform any of her past relevant
26 work (20 CFR § 416.965).
- 27 7. The claimant is a "younger individual between the ages of
28 18 and 44" (20 CFR § 416.963).
8. The claimant has a "limited education" (20 CFR §
416.964).
9. The claimant has no transferable skills from any past
relevant work and/or transferability of skills is not an
issue in this case (20 CFR §416.968).
10. The claimant has a residual functional capacity to perform
a significant range of light work (20 CFR § 416.967).
11. Although the claimant's exertional limitations do not
allow her to perform the full range of light work, based on

1 the testimony of the vocational expert, Social Security
2 Rulings 85-10 and 85-15 and the claimant's age,
3 education, work experience and residual functional
4 capacity as described above, the claimant is able to make
5 a successful adjustment to work that exists in significant
6 number in the national economy; a finding of "not
7 disabled" is therefore found within the framework of Rule
8 202.17 of the Medical Vocational Guidelines of Appendix
9 2, Subpart P, Regulations No. 4. Examples of such... work
10 includes 1800 sedentary and unskilled almond blancher
11 jobs, 2500 sedentary and unskilled dowel inspector jobs,
12 and 16,000 light and unskilled toll collector jobs.

- 13
- 14 12. The claimant was not under a "disability," as defined in
15 the Social Security Act, at any times through the date of
16 this decision (20 CFR § 416.920(g)).

17 (AR 34-35).

18 **III. STANDARD OF REVIEW**

19 The court must uphold the decision of an administrative law judge if the ALJ properly
20 applied the correct legal standards and his findings of fact are supported by substantial evidence
21 in the record. *See Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); 42 U.S.C. § 405(g).
22 "Substantial evidence" has been defined as "relevant evidence which a reasonable person might
23 accept as adequate to support a conclusion." *Matthews v. Shalala*, 10 F.3d 678, 679 (9th Cir.
24 1993); *see also Richardson v. Perales*, 402 U.S. 389, 401 (1971). Substantial evidence is more
25 than a mere scintilla but less than a preponderance. *See Jamerson v. Chater*, 112 F.3d 1064, 1066
26 (9th Cir. 1997), *citing Smolen*, 80 F.3d at 1279. "To determine whether substantial evidence
27 exists [the court must] look at the record as a whole, considering both evidence that supports and
28 undermines the ALJ's findings. However, if the evidence is susceptible of more than one rational
interpretation, the decision of the ALJ must be upheld." *Orteza v. Shalala*, 50 F.3d 748, 749 (9th
Cir. 1995) (citations omitted). The ALJ alone is responsible for determining credibility, and for
resolving ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

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2 IV. DISCUSSION

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5 A. Legal Framework

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7 Pursuant to the SSA, the Secretary has adopted regulations which establish a formalized,
8 five-step sequential evaluation process to determine whether a claimant is disabled. *See* 20 C.F.R.
9 § 404.1520. The Administrative Law Judge considers: (1) whether the person is engaging in
10 substantial gainful activity; (2) severity of the alleged impairment; (3) whether the impairment
11 meets or equals a listed impairment and meets the duration requirement; (4) whether the
12 individual is capable of doing work he or she has done in the past; and (5) whether the impairment
13 prevents the person from doing any other work. *Id.* If at any point in the five-step inquiry it is
14 determined that a claimant is or is not disabled, further review is unnecessary.

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16 B. Administrative Res Judicata

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18 Plaintiff argues that the defendant failed to provide a full and accurate transcript of the
19 entire record of the proceedings related to this case because he did not include the transcript of
20 the administrative hearing from plaintiff's 2003 disability case (#11, p. 4-5). Defendant's position
21 is that, under the doctrine of res judicata, plaintiff is precluded from "challenging or otherwise
22 reviewing the sufficiency of the evidence supporting the findings and determination of the 2003
23 ALJ decision - which is what she is attempting to do by complaining that the evidence from the
24 2003 ALJ decision is missing from the present case record" (#12, p. 5, citing *Chavez v. Bowen*,
25 844 F.2d 691, 692 (9th Cir. 1988)).

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27 1. *Chavez v. Bowen* and Acquiescence Ruling 97-4(9)

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29 "The principles of res judicata apply to administrative decisions, although the doctrine is
30 applied less rigidly to administrative proceedings than to judicial proceedings." *Chavez*, 844 F.2d
31 at 693. To overcome a presumption of non-disability which arises from a previous ALJ's finding

1 of non-disability, a Social Security disability claimant must prove “changed circumstances” which
2 indicate a greater disability.” *Id.*, citing *Taylor v. Heckler*, 765 F.2d 872, 875 (9th Cir. 1985).
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4 Although the court found that the plaintiff’s change in age (attainment of “advanced age” status)
5 created a “changed circumstance,” it nonetheless held that the first ALJ’s findings “concerning
6 the claimant’s residual functional capacity, education, and work are entitled to some res judicata
7 consideration in subsequent proceedings.” *Chavez*, 844 F.2d at 694.
8

9 Following the Ninth Circuit’s ruling in *Chavez*, the Social Security Administration
10 (“SSA”) adopted Acquiescence Ruling 97-4(9) to explain how the SSA will apply *Chavez* within
11 the Ninth Circuit. Aq. Ruling 97-4(9), 1997 WL 742758. The ruling applies “only to cases
12 involving a subsequent disability claim with an unadjudicated period arising under the same title
13 of the Act as a prior claim on which there has been a final decision by an ALJ or the Appeals
14 Council that the claimant is not disabled. *Id.* *3. The ruling directed adjudicators to follow a two-
15 step inquiry. *Id.* First, adjudicators must apply a presumption of continuing non-disability. A
16 “claimant may rebut this presumption by showing a “changed circumstance” affecting the issue
17 of disability with respect to the unadjudicated period.”¹ *Id.* Second, if the claimant rebuts the
18 presumption, adjudicators must give effect to certain findings “contained in the final decision by
19 an ALJ or the Appeals Council on the prior claim, when adjudicating the subsequent claim,”
20 including the findings of a claimant’s residual functional capacity, education, or work experience.
21 *Id.* “Adjudicators must adopt such a finding from the final decision on the prior claim in
22 determining whether the claimant is disabled with respect to the unadjudicated period unless there
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26 ¹The Acquiescence Ruling states: “e.g., a change in the claimant’s age category under 20
27 CFR 404.1563 or 416.963, an increase in the severity of the claimant’s impairment(s), the alleged
28 existence of an impairment(s) not previously considered, or a change in the criteria for determining
disability.” *Id.*

1 is new and material evidence relating to such a finding or there has been a change in the law,
2 regulations or rulings affecting the finding or the method for arriving at the finding.” *Id.*
3

4 **2. Analysis**

5 In his 2006 decision, the ALJ acknowledged that plaintiff had filed an earlier claim for
6 Social Security disability benefits in 2001, which was finally denied by an ALJ in 2003 (AR 20).
7 The ALJ specifically stated that because plaintiff did not appeal the unfavorable 2003 ALJ
8 decision, that decision became final and binding; therefore, the doctrine of res judicata applied
9 to the issue of whether plaintiff was disabled prior to the May 13, 2003 hearing (AR 21). The ALJ
10 addressed the applicability of Acquiescence Ruling 97-4(9), and determined that plaintiff had
11 rebutted the presumption of continuing non-disability by submitting additional medical records,
12 which established the existence of new severe impairments, and which constituted “changed
13 circumstances.” *Id.* Therefore, the ALJ continued his analysis to determine whether plaintiff
14 presented new and material evidence related to the ALJ’s 2003 findings regarding her RFC,
15 education, or work experience since the 2003 ALJ decision. *Id.*
16

17 The ALJ discussed plaintiff’s medical history and daily activities in significant detail
18 before making a determination on plaintiff’s RFC (AR 23-28). The ALJ stated: “After carefully
19 considering the entire record, including the medical evidence and subjective complaints, the
20 undersigned has determined that the claimant *continues to retain the residual functional capacity*
21 *as described by the previous Administrative Law Decision dated May 13, 2003*” (AR 28)
22 (emphasis added). The ALJ specifically found that plaintiff’s RFC limited her to jobs in which
23 she would be allowed an at will sit/stand option. *Id.* Further, plaintiff’s age category, education,
24 and work experience remained unchanged from the 2003 ALJ decision (AR 32). Therefore,
25 because plaintiff’s RFC, age category, education, and work experience were the same, the ALJ
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1 adopted “the findings previously made with respect to the questions of whether the claimant could
2 perform the requirements of her past relevant work and whether other jobs exist in significant
3 numbers in the national economy that she can perform.” *Id.* As such, the ALJ found that plaintiff
4 could not perform the requirements of her past relevant work. *Id.* However, based on the
5 testimony of the vocational expert (“VE”) at the 2003 hearing, the ALJ found that there exists a
6 significant number of jobs in the national economy that plaintiff is capable of performing. *Id.*
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9 In the 2003 ALJ decision, the ALJ found that plaintiff had the RFC to “perform a fully
10 range of light exertional work, which involves lifting and carrying 20 pounds occasionally and 10
11 pounds frequently, *except that she requires and at will sit/stand option....*” (AR 52) (emphasis
12 added). To determine if plaintiff could perform her past relevant work or other work that exists
13 in significant numbers in the national economy, the ALJ asked the VE “to assume a hypothetical
14 person with the same age and education as the claimant and to further assume that the person
15 retains the residual functional capacity to perform a full range of light exertional work, *except that*
16 *she requires an at will sit/stand option....*” (AR 55). The VE found that plaintiff could not perform
17 her past relevant work but that she could perform three jobs existing in significant numbers in the
18 national economy, namely almond blancher, dowel inspector, and toll collector, as each job
19 accommodates “the particular limitations of the hypothetical” (AR 56). Therefore, the VE and the
20 ALJ in the 2003 decision took plaintiff’s at will sit/stand limitation into account to determine that
21 plaintiff could perform jobs that existed in significant numbers in the national economy.
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24 Plaintiff claims that the court must determine if the evidence the VE gave during plaintiff’s
25 2003 hearing “was sufficient to support his testimony that the positions of almond blancher dowel
26 inspector, and toll collector could be performed by an individual who would need to alternate
27 sitting and standing at will” (#11, p. 6). Plaintiff contends that the court cannot make such a
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1 determination because defendant did not provide the transcript from plaintiff's 2003 hearing, and
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3 "[f]ailure to provide the transcript has made it impossible for this court to provide a full and fair
4 review of the relevant evidence." *Id.* p. 5. Plaintiff maintains that she cannot perform these jobs
5 and that the ALJ has not provided sufficient evidence that these jobs can accommodate an at will
6 sit/stand options. *Id.* p. 6. Plaintiff makes no mention of res judicata and does not discuss how it
7 may affect this case.
8

9 Defendant's position is that "the question of whether the VE's testimony in the 2003
10 hearing is sufficient to support the 2006 ALJ decision is foreclosed by the application of
11 administrative res judicata" (#12, p. 8). The court agrees. It is uncontested that defendant did not
12 include the transcript from plaintiff's 2003 hearing in the administrative record. However,
13 defendant did include the 2003 ALJ decision (AR 45-58). This decision demonstrates that plaintiff
14 was previously found to be not disabled in 2003. As such, in his 2006 decision, the ALJ correctly
15 applied the standards set forth in *Chavez* and in Acquiescence Ruling 97-4(9). The ALJ found that
16 plaintiff had rebutted the presumption of non-disability because she had demonstrated "changed
17 circumstances;" therefore, he continued to step two of the Acquiescence Ruling, and discussed
18 and analyzed all of plaintiff's medical records from 2003 through 2006, which he found to be
19 "new and material evidence." After reviewing these records, the ALJ concluded that plaintiff
20 retained the exact same RFC as was found in the 2003 ALJ decision. Plaintiff also remained in
21 the same age category and had the same education and work experience as in the 2003 ALJ
22 decision. Therefore, because all relevant findings related to plaintiff's disability remained the
23 same, the ALJ was able to adopt the findings from the 2003 ALJ decision "with respect to the
24 questions of whether the claimant could perform the requirements of her past relevant work and
25 whether other jobs exist in significant numbers in the national economy that she could perform"
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1 (AR 32). As such, the ALJ correctly applied the VE testimony from the 2003 ALJ decision.
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3 If plaintiff wished to challenge the 2003 ALJ decision, she had the opportunity to request
4 a review from the Appeals Council and to seek judicial review immediately following that
5 decision. Plaintiff cannot now challenge the sufficiency of evidence before the ALJ in the 2003
6 decision. Such a challenge is barred by administrative res judicata. Plaintiff failed to even mention
7 res judicata or give reasons why it may not apply in this case. As the 2006 ALJ decision found that
8 plaintiff had the same RFC, age, education, and work experience as in 2003, it was appropriate
9 for the 2006 ALJ to adopt the findings of the 2003 ALJ.
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11 Moreover, it is apparent that the VE and the ALJ in the 2003 decision did take plaintiff's
12 sit/stand limitations into account to determine that plaintiff could perform at least three jobs that
13 exist in significant numbers in the national economy. The ALJ's hypothetical to the VE at the
14 2003 hearing expressly stated that plaintiff could only perform jobs that allowed her to sit and
15 stand at will (AR 55). Further, the ALJ in the 2006 decision also expressly noted plaintiff's
16 sit/stand limitations. It is unclear why plaintiff believes that the VE's testimony was insufficient
17 given that the ALJ's hypothetical included an at will sit/stand limitation. Plaintiff states that
18 "unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand
19 at will" (#11, p. 6). However, plaintiff presents no evidence that the particular jobs identified by
20 the VE do not include an at will sit/stand option, particularly given that the VE and ALJ found
21 such jobs would accommodate plaintiff's particular sit/stand limitations. The ALJ properly
22 applied the correct legal standards and his findings of fact are supported by substantial evidence
23 in the record. Therefore, the court affirms the ALJ's decision.
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V. CONCLUSION

Based on the foregoing, the court recommends that the plaintiff's motion for reversal of the Commissioner's decision (#11) be **DENIED** and defendant's cross-motion for summary judgment (#12) be **GRANTED**.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within ten days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and Recommendation” and should be accompanied by points and authorities for consideration by the District Court.

2. This report and recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the plaintiff's motion for reversal of the Commissioner's decision (#11) be **DENIED** and defendant's cross-motion for summary judgment (#12) be **GRANTED**.

DATED: August 4, 2009


Valerie P. Cooke