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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 CYNTHIA L. HOPKINS,

9 Plaintiff,

10 v.
11

12 CAROLYN W. COLVIN,
13 Commissioner of Social Security,

14 Defendant.
15

No. 2:15-CV-00079-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

16 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
17 No. 14, 15. Attorney Dana C. Madsen represents Cynthia L. Hopkins (Plaintiff);
18 Special Assistant United States Attorney Leisa A. Wolf represents the
19 Commissioner of Social Security (Defendant). The parties have consented to
20 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
21 record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for
22 Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

23 **PROCEDURAL HISTORY**

24 The following is a timeline of the procedural history of Plaintiff's
25 applications for benefits:

26 **February 8, 2012.** Plaintiff filed an application for disability insurance
27 benefits (DIB) alleging an onset date of October 1, 2009. Tr. 24-26, 68-69.
28 Plaintiff's application is part of the record. Tr. 68-69.

1 **April 9, 2012.** Based on the evidence of record, a medical analysis was
2 completed on Plaintiff’s application for DIB from the date of onset through the
3 date last insured (October 1, 2009, through December 31, 2009). Matthew Comrie,
4 PSYD opined that Plaintiff did not have a medically determinable impairment
5 during the relevant time period. Tr. 26-27. The evidence of record is limited to a
6 work history report from Plaintiff dated April 9, 2012; no medical records were
7 considered by the reviewer. Tr. 26.

8 **April 12, 2012.** Plaintiff’s application was denied in a Notice of
9 Disapproved Claim. Tr. 29.

10 **May 20, 2013.** A letter from the Social Security Administration titled
11 “Important Information” states the following:

12 On **April 12, 2013** we sent you a letter about our decision on your claim
13 for Social Security disability benefits. We told you that if you did not
14 agree with the decision, you could request an appeal within 60 days
15 from the date you received that letter. Our records show that you did
16 not request an appeal until **May 16, 2013. This is 4 days after the
17 appeal end date.**”

17 Tr. 110.

18 **July 9, 2013.** Plaintiff reapplied for DIB alleging an onset date of October
19 1, 2009. Tr. 75. Plaintiff’s application is associated with the record. Tr. 75-76.

20 **July 19, 2013.** Plaintiff’s new application for DIB was denied because the
21 “information [Plaintiff] gave us does not show that there was any change in your
22 health before December 2009. This was when you last met the earnings
23 requirement for receiving benefits.” Tr. 32-34.

24 **August 12, 2013.** Plaintiff appointed Dana C. Madsen as her representative.
25 Tr. 35. Plaintiff also filed a request for reconsideration. Tr. 38.

26 **August 25, 2013.** A Notice of Disapproved Claim states that Plaintiff
27 “asked us to take another look at your claim for benefits. . . . You do not qualify
28 for benefits because this application concerns the same issues which were decided

1 when an earlier claim was denied.” Tr. 39-41.

2 **September 20, 2013.** A Notice of Reconsideration references a
3 “Reconsideration Filed: March 18, 20,”¹ and states the following:

4 [Plaintiff] stated that we did not consider your back as part of your
5 disability. However our records indicate that when you filed for
6 benefits in 03/09/2012 you were found not disabled at any time from
7 12/31/2005 to 12/31/2009, when you were last insured for disability
8 benefits. Because there has already been a medical decision denial and
9 there was not new evidence to reopen the previous decision we denied
10 your case res judicata meaning that since a decision was already made
11 for the same onset date we will not be processing your appeal.

11 Tr. 42-44.

12 **September 27, 2013.** Plaintiff requested a hearing before an Administrative
13 Law Judge (ALJ). Tr. 45.

14 **January 24, 2014.** ALJ Marie Palachuk sent a letter to Plaintiff’s counsel
15 stating:

16 The claimant previously filed an application for disability on 2/8/2012,
17 which was denied at the initial level on 4/12/2012. The claimant’s date
18 last insured is 12/31/2009. Because a medical determination has been
19 made subsequent to the expiration of the date last insured, you must
20 submit a brief explaining why this case should not be dismissed by on
21 the doctrine of res Judicata. You should also submit any new and
material evidence to support the claim. *Sic*.

22 Tr. 46.

23 **January 30, 2014.** Plaintiff filed a motion to reopen her February 8, 2012,
24 application and requested that the February 8, 2012, application be obtained and
25 joined with her current application. Tr. 47-48.

27 ¹The exact year is unreadable as the last two digits are cut off on the copy
28 provided to the Court.

1 **March 31, 2014.** The ALJ issued a Notice of Hearing stating the time and
2 location of the hearing. Tr. 49. Additionally, the ALJ limited the “issues I will
3 Consider” to the July 8, 2013, application for DIB. Tr. 51.

4 **June 24, 2014.** The ALJ held a hearing where Plaintiff, represented by
5 counsel, testified. Tr. 175-191.

6 **August 1, 2014.** The ALJ issued an unfavorable decision finding the
7 following: “The doctrine of res judicata applies in this case, as there is no good
8 cause with which to reopen the prior decision. Thus, further review of the
9 claimant’s current claim is precluded. The prior March 2013 medical decision is
10 final and binding.” Tr. 15. In the alternative to applying the doctrine of res
11 judicata, the ALJ continued with the five-step sequential evaluation analysis.² At
12 step one, the ALJ found that Plaintiff had not engaged in substantial gainful
13 activity during the period of October 1, 2009, through her date last insured,
14 December 31, 2009. Tr. 18. Therefore, the ALJ proceeded to step two, finding
15 that “there were no medical signs or laboratory findings to substantiate the
16 existence of a medically determinable impairment” through the date last insured.
17 *Id.* Based on her step two determination, the ALJ found that Plaintiff “was not
18 under a disability, as defined in the Social Security Act, at any time from October
19 1, 2009, the alleged onset date, through December 31, 2009, the date last insured.”
20 Tr. 19.

21 **August 6, 2014.** Plaintiff filed a Request for Review of Hearing
22 Decision/Order. Tr. 10.

23 **January 28, 2015.** The Appeals Council denied Plaintiff’s request for
24 review. Tr. 6-8.

25
26 ²The Commissioner has established a five-step sequential evaluation process
27 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*
28 *v. Yuckert*, 482 U.S. 137, 140-142 (1987).

1 **ALJ’S PROCEDURAL ANALYSIS**

2 In her August 1, 2014, decision, the ALJ made the following determinations
3 regarding the procedural history:

4 Plaintiff filed a DIB claim on February 8, 2012, alleging a disability onset of
5 October 1, 2009. The claim was denied on April 12, 2012, and the Plaintiff did not
6 appeal the denial. Tr. 14.

7 Plaintiff filed a second DIB claim on March 5, 2013. This application was
8 denied in a medical decision on March 14, 2013. Plaintiff did not appeal the
9 denial. Tr. 14.

10 Plaintiff filed a third DIB claim on July 8, 2013, alleging the same onset
11 date. The claim was denied initially on July 12, 2013, and upon reconsideration on
12 September 20, 2013. The ALJ refused to reopen Plaintiff’s March 5, 2013,
13 application for benefits applying the doctrine of res judicata and finding no good
14 cause reason to reopen the prior decision. Tr. 14-15.

15 **JURISDICTION**

16 On March 27, 2015, Plaintiff filed a complaint seeking judicial review of a
17 decision of the Commissioner of Social Security denying DIB. ECF No. 1, 4. She
18 alleges jurisdiction under 42 U.S.C. § 405(g) and asks the Court to overturn the
19 Commissioner’s decision to not re-open her prior application for benefits. ECF
20 No. 14.

21 Section 405(g) of Title 42 U.S.C. gives district courts jurisdiction to review
22 final decisions of the Commissioner. The decision of whether to reopen a
23 previously adjudicated claim has been held to be a purely discretionary decision of
24 the Commissioner, and is, therefore, not considered a “final” decision within the
25 meaning of § 405(g). *Califano v. Sanders*, 430 U.S. 99 (1977); *Krumpelman v.*
26 *Heckler*, 767 F.2d 586, 588 (9th Cir. 1985) (citing *Davis v. Schweiker*, 665 F.2d
27 934, 935 (9th Cir. 1982)). As such, district courts generally have no jurisdiction to
28 review a refusal to reopen a claim for disability benefits or a determination that

1 such a claim is barred by res judicata. *Davis*, 665 F.2d at 935. However, a district
2 court does have jurisdiction to determine whether res judicata was properly
3 applied. *Krumpelman*, 767 F.2d at 588, citing *McGowen v. Harris*, 666 F.2d 60
4 (4th Cir. 1981). Therefore, the Court has jurisdiction to review the application of
5 res judicata in this case and decide if the application was proper.

6 **STANDARD OF REVIEW**

7 The Court reviews the ALJ's determinations of law *de novo*, deferring to a
8 reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087
9 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not
10 supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*,
11 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being
12 more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another
13 way, substantial evidence is such relevant evidence as a reasonable mind might
14 accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,
15 401 (1971). If the evidence is susceptible to more than one rational interpretation,
16 the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
17 1097. Nevertheless, a decision supported by substantial evidence will be set aside
18 if the proper legal standards were not applied in weighing the evidence and making
19 the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,
20 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or
21 if conflicting evidence supports a finding of either disability or non-disability, the
22 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
23 (9th Cir. 1987).

24 **RES JUDICATA**

25 The question presented is whether the ALJ properly applied the doctrine of
26 res judicata.

27 A final judgement on the merits of an action precludes the parties from
28 relitigating issues that were or could have been raised in that action. *Federated*

1 *Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). This is known as the doctrine of
2 res judicata.

3 The principles of res judicata apply to administrative decisions, although the
4 doctrine is applied less rigidly to administrative proceedings than to judicial
5 proceedings. *Chavez v. Brown*, 844 F.2d 691, 693 (9th Cir. 1988). Under this
6 doctrine, a prior, final determination of nondisability has two results (1) it bars
7 reconsideration of a period already adjudicated under a final administration
8 decision, and (2) it creates a presumption of continued disability for the period
9 subsequent to a final administrative decision. *Lester v. Chater*, 81 F.3d 821, 827
10 (9th Cir. 1995). An initial determination is binding unless reconsideration is
11 requested within the stated period of time. 20 C.F.R. § 404.905. Here, the ALJ
12 determined that a reconsideration of the period of October 1, 2009, to December
13 31, 2009, was barred by a prior March 2013 medical decision that was “final and
14 binding.” Tr. 15.

15 In her decision, the ALJ found Plaintiff filed a second DIB claim on March
16 5, 2013, the application was denied in a medical decision on March 14, 2013, and
17 Plaintiff did not appeal the denial. Tr. 14. To support this conclusion, the ALJ
18 cited Exhibit 5E at 1 and Exhibit 7B. Exhibit 5E at 1 is the May 20, 2013, letter
19 stating that Plaintiff’s application was denied on April 12, 2013, and she filed an
20 appeal on May 16, 2013.³ Tr. 110. This does not support the ALJ’s conclusion
21 that Plaintiff filed an application on March 5, 2013, there was a medical
22 determination on March 14, 2013, and Plaintiff failed to appeal a denial. Instead, it
23 suggests that any denial may have been timely appealed.

24
25 ³The May 20, 2013, letter states that the May 16, 2013, appeal is 4 days
26 outside the 60-day time period allowed for an appeal. Yet, May 16, 2013, is only
27 34 days from April 12, 2013. Therefore, Plaintiff’s appeal was not made outside
28 the 60-day time period.

1 Exhibit 7B is the September 20, 2013, Notice of Reconsideration referencing
2 a “Reconsideration Filed: March 18, 20.” Tr. 42. This Notice of Reconsideration
3 states that Plaintiff applied and was denied benefits on March 9, 2012. *Id.* The
4 September 20, 2013, Notice of Reconsideration does not support the ALJ’s
5 determination that Plaintiff applied for benefits on March 5, 2013, a medical
6 determination was made on March 14, 2013, and Plaintiff failed to appeal a denial.

7 Reviewing the record as a whole, there is no reference to a March 5, 2013,
8 application for benefits or a March 14, 2013, medical determination concluding
9 that Plaintiff was not disabled from October 1, 2009, to December 31, 2009. The
10 ALJ applied res judicata based on these phantom applications and medical
11 determinations. Tr. 14-15. The record does not support the conclusion that this
12 application was filed, and it does not support the conclusion that a resulting
13 medical determination was a “final and binding” administrative decision.
14 Therefore, the ALJ improperly applied the doctrine of res judicata.

15 The ALJ’s reliance on an absent application and medical determination in
16 her application of res judicata results raises a due process concern. In *Sanders*, the
17 Supreme Court held that a review of the determination of res judicata was not a
18 final decision of the Commissioner and, therefore, district courts lack jurisdiction
19 to review the determination. 430 U.S. at 107-109. However, it recognized an
20 exception “where the Secretary’s denial of a petition to reopen is challenged on
21 constitutional grounds.” *Id.* at 109. Plaintiff raised the potential of a due process
22 violation in his briefing. ECF No. 14 at 9-10. As such, the Court potentially has
23 jurisdiction to review the res judicata determination on its merits.

24 In any event, any error resulting from the ALJ’s res judicata determination is
25 harmless in this case because the ALJ made an alternative finding addressing
26 Plaintiff’s eligibility from October 1, 2009, to December 31, 2009. *See infra.*

27 **STEP II DETERMINATION**

28 In the alternative to denying review based on res judicata, the ALJ also

1 concluded that Plaintiff was not disabled at step two of the sequential evaluation
2 process. Tr. 18-19.

3 Plaintiff does not challenge the alternative step two determination in her
4 briefing. ECF No. 14. The Court ordinarily will not consider matters on appeal
5 that are not specifically and distinctly argued in an appellant's opening brief. *See*
6 *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).
7 The Ninth Circuit explained the necessity for providing specific argument:

8 The art of advocacy is not one of mystery. Our adversarial system relies
9 on the advocates to inform the discussion and raise the issues to the
10 court. Particularly on appeal, we have held firm against considering
11 arguments that are not briefed. But the term "brief" in the appellate
12 context does not mean opaque nor is it an exercise in issue spotting.
13 However much we may importune lawyers to be brief and to get to the
14 point, we have never suggested that they skip the substance of their
15 argument in order to do so. It is no accident that the Federal Rules of
16 Appellate Procedure require the opening brief to contain the
17 "appellant's contentions and the reasons for them, with citations to the
18 authorities and parts of the record on which the appellant relies." Fed.
19 R. App. P. 28(a)(9)(A). We require contentions to be accompanied by
20 reasons.

18 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).

19 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
20 "manufacture arguments for an appellant" and therefore will not consider claims
21 that were not actually argued in an appellant's opening brief. *Greenwood v. Fed.*
22 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to
23 provide any briefing on the issue, any step two argument is waived.

24 Here, the ALJ made an alternative decision including the relevant time
25 period for all applications in the record, October 1, 2009, to December 31, 2009.
26 She found Plaintiff not disabled at step two. Therefore, any error surrounding the
27 ALJ's res judicata finding is harmless. *See Tommasetti v. Astrue*, 533 F.3d 1035,
28 1038 (9th Cir. 2008) (an error is harmless when "it is clear from the record that the

1 . . . error was inconsequential to the ultimate nondisability determination”).

2 Furthermore, even if Plaintiff had addressed the issue of the step two
3 determination in her brief, the ALJ’s determination is supported by substantial
4 evidence. An “impairment must be established by medical evidence consisting of
5 signs, symptoms, and laboratory findings, not only by [a claimant’s] statement of
6 symptoms.” 20 C.F.R. § 404.1508. The record does not contain a single piece of
7 objective medical evidence from the relevant time period. There, the ALJ’s
8 determination that Plaintiff did not have a medically determinable impairment
9 during the relevant time period is supported by the record.

10 **CONCLUSION**

11 Accordingly, **IT IS ORDERED:**

12 1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is
13 **GRANTED.**

14 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

15 The District Court Executive is directed to file this Order and provide a copy
16 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
17 **and the file shall be CLOSED.**

18 DATED January 20, 2016.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE