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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 CHARLES E. SISTRUNK,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting  
10 Commissioner of Social Security,

11 Defendant.

Case No. 3:15-cv-05248-KLS

ORDER AFFIRMING DEFENDANT'S  
DECISION TO DENY BENEFITS

12  
13 Plaintiff has brought this matter for judicial review of defendant's denial of his  
14 applications for disability insurance and supplemental security income (SSI) benefits. The parties  
15 have consented to have this matter heard by the undersigned Magistrate Judge. *See* 28 U.S.C. §  
16 636(c), Federal Rule of Civil Procedure 73; Local Rule MJR 13. For the reasons set forth below,  
17 the Court affirms defendant's denial.  
18

19 FACTUAL AND PROCEDURAL HISTORY

20 On July 26, 2004, plaintiff filed an application for disability insurance benefits, alleging  
21 disability as of August 7, 2003. Dkt. 13, Administrative Record (AR), 27. That application was  
22 denied on initial administrative review on October 19, 2004, and on reconsideration on February  
23 4, 2005. *Id.* A hearing was held before an administrative law judge on January 3, 2007, at which  
24 plaintiff appeared and testified as did a vocational expert. *Id.* In a decision dated May 24, 2007,  
25 the ALJ determined plaintiff to be not disabled. AR 27-37.  
26

ORDER - 1

1 On May 27, 2009, plaintiff filed another application for disability insurance benefits, as  
2 well as another one for SSI benefits, alleging in both applications that he became disabled  
3 beginning May 24, 2007. AR 18, 40, 487, 491. Both applications were denied on initial  
4 administrative review on August 26, 2009. AR 40, 491. Plaintiff did not seek reconsideration of  
5 that denial.

6 On September 27, 2011, plaintiff filed a third application for disability insurance benefits  
7 and a third application for SSI benefits, alleging in both applications that he became disabled  
8 beginning May 24, 2007. AR 16. Both applications were denied on initial administrative review  
9 on October 9, 2011, and on reconsideration on April 8, 2013. *Id.* The disability insurance  
10 benefits application was denied because it concerned the same issues that were decided by the  
11 ALJ in the May 24, 2007 decision. *Id.* The application for SSI benefits was denied due to “excess  
12 resources.” *Id.*

13 Plaintiff requested a hearing, and one was held before an ALJ on January 31, 2014, at  
14 which plaintiff, represented by counsel, appeared and testified. AR 525-75. In a decision dated  
15 February 21, 2014, the ALJ found the prior ALJ’s May 24, 2007 decision and the denial of  
16 plaintiff’s May 27, 2009 applications were not appealed and therefore were “administratively final  
17 and binding.” AR 18-19. The ALJ further found that because plaintiff had failed to prove “changed  
18 circumstances” overcoming “the presumption of continuing nondisability” arising from the prior  
19 denials, he had failed to show a basis for re-opening them, and therefore his September 27, 2011  
20 application for disability insurance benefits was denied for that reason. AR 19. The ALJ also  
21 upheld the denial of the September 27, 2011 application for SSI benefits, because plaintiff did  
22 not meet the resource criteria for receiving such benefits. AR 20.

23 Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council on  
24  
25  
26

1 March 4, 2015, making the ALJ's decision the final decision of the Commissioner. AR 1; 20  
2 C.F.R. § 404.981, § 416.1481. On April 27, 2015, plaintiff filed a complaint in this Court  
3 seeking judicial review of that decision. Dkt. 3. The administrative record was filed with the  
4 Court on August 11, 2015. Dkt. 13. As the parties have completed their briefing, this matter is  
5 now ripe for the Court's review.

6  
7 Plaintiff argues defendant's decision to deny benefits should be reversed and remanded for  
8 an award of benefits, or in the alternative for further administrative proceedings, because the ALJ  
9 erred by failing to find good cause to re-open the prior denials. For the reasons set forth below,  
10 however, the Court agrees with defendant that it lacks the authority to review the ALJ's decision  
11 not to re-open, and therefore finds that decision should be affirmed.

#### 12 DISCUSSION

13  
14 The determination of the Commissioner that a claimant is not disabled must be upheld by  
15 the Court, if the "proper legal standards" have been applied, and the "substantial evidence in the  
16 record as a whole supports" that determination. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th  
17 Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*, 359 F.3d 1190, 1193 (9th  
18 Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991) ("A decision supported by  
19 substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied  
20 in weighing the evidence and making the decision.") (citing *Browner v. Secretary of Health and*  
21 *Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).

22  
23 Substantial evidence is "such relevant evidence as a reasonable mind might accept as  
24 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation  
25 omitted); *see also Batson*, 359 F.3d at 1193 ("[T]he Commissioner's findings are upheld if  
26 supported by inferences reasonably drawn from the record."). "The substantial evidence test

1 requires that the reviewing court determine whether the Commissioner's decision is "supported by  
2 more than a scintilla of evidence, although less than a preponderance of the evidence is required."  
3 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). "If the evidence admits of  
4 more than one rational interpretation," the Commissioner's decision must be upheld. *Allen v.*  
5 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) ("Where there is conflicting evidence sufficient to  
6 support either outcome, we must affirm the decision actually made.") (quoting *Rhinehart v. Finch*,  
7 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

8  
9 The Commissioner may apply administrative *res judicata* "to bar reconsideration of a  
10 period with respect to which she has already made a determination, by declining to reopen the  
11 prior application." *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996). As defendant points out,  
12 plaintiff does not challenge the ALJ's finding that administrative *res judicata* applies to the prior  
13 denials of her applications for benefits. A determination by the Commissioner that a claimant is  
14 not disabled, furthermore, "creates a presumption that the claimant continued to be able to work  
15 after" the date of that determination. *Vasquez v. Astrue*, 572 F.3d 586, 597 (9th Cir. 2009)  
16 (quoting *Lester*, 81 F.3d at 827)).

17  
18 On the other hand, a determination by the Commissioner "may be reopened . . . [w]ithin  
19 four years of the date of the notice of the initial determination if [the Commissioner finds] good  
20 cause . . . to reopen the case." 20 C.F.R. § 404.988. The "good cause" requirement is satisfied if  
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22  
23 <sup>1</sup> As the Ninth Circuit has further explained:

24 . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
25 which the [Commissioner] reached. If the [Commissioner]'s findings are supported by  
26 substantial evidence, the courts are required to accept them. It is the function of the  
[Commissioner], and not the court's to resolve conflicts in the evidence. While the court may  
not try the case de novo, neither may it abdicate its traditional function of review. It must  
scrutinize the record as a whole to determine whether the [Commissioner]'s conclusions are  
rational. If they are . . . they must be upheld.

*Sorenson*, 514 F.2d at 1119 n.10.

1 '[n]ew and material evidence is furnished.'" 20 C.F.R. § 404.989. In determining whether to re-  
2 open the prior denials the ALJ considered the evidence plaintiff submitted. AR 19. While the ALJ  
3 found that evidence to be "new", he determined that it was not "material" because it did "not provide  
4 any additional insight or evidence relevant to [plaintiffs] medical condition" during the relevant  
5 time period. *Id.*

6  
7 Plaintiff challenges the propriety of this finding, arguing the ALJ erred in failing to find  
8 the evidence he submitted was new and material and thus satisfied the good cause requirement.  
9 However, as defendant notes the Commissioner's refusal to reopen a prior decision concerning an  
10 earlier period is generally "not subject to judicial review." *Lester*, 81 F.3d at 827. This is because  
11 once an administrative decision becomes final, the decision to reopen a disability claim is "purely  
12 discretionary." *Taylor v. Heckler*, 765 F.2d 872, 877 (9th Cir. 1985). Since a discretionary  
13 decision is not a "final decision" within the meaning of 42 U.S.C. § 405(g),<sup>2</sup> a refusal to reopen a  
14 decision "is not a 'final decision subject to judicial review.'" *Id.* (citations omitted); *see also Udd v.*  
15 *Massanari*, 245 F.3d 1096, 109-998 (9th Cir. 2001) (decision "not to reopen a prior, final benefits  
16 decision is discretionary and ordinarily does not constitute a final decision") (citing *Califano v.*  
17 *Sanders*, 430 U.S. 99, 107-09)).

18  
19 The ALJ's decision declining to re-open plaintiff's prior applications thus is not subject to  
20 review by this Court. One exception to the rule that a purely discretionary decision of the  
21 Commissioner is not a final decision and therefore not subject to judicial review, is "where the  
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23 <sup>2</sup> Section 405(g) reads:

24 Any individual, after any final decision of the Commissioner of Social Security made after a  
25 hearing to which he was a party, irrespective of the amount in controversy, may obtain a  
26 review of such decision by a civil action commenced within sixty days after the mailing to  
him of notice of such decision or within such further time as the Secretary may allow.

42 U.S.C. § 405(g).

1 denial of a petition to reopen is challenged on constitutional grounds.” *Udd*, 245 F.3d at 1098-99.  
2 A constitutional challenge “that is not ‘wholly insubstantial, immaterial, or frivolous’ raises a  
3 colorable constitutional claim.” *Id.* at 1099 (citation omitted). Plaintiff, however, has not raised  
4 any constitutional claims, colorable or otherwise.

5 Another exception is “where the Commissioner considers ‘on the merits’ the issue of the  
6 claimant’s disability during the already-adjudicated period.” *Lester*, 81 F.3d at 827; *Lewis v. Apfel*,  
7 236 F.3d 503, 510 (9th Cir. 2001). If “such a *de facto* reopening occurs, the Commissioner’s  
8 decision as to the prior period is subject to judicial review.” *Lester*, 81 F.3d at 827. But “where the  
9 discussion of the merits is followed by a specific conclusion that the claim is denied on *res*  
10 *judicata* grounds, the decision should not be interpreted as re-opening the claim and is therefore  
11 not reviewable.” *Krumpelman v. Heckler*, 767 F.2d 586, 589 (9th Cir. 1985) (citation omitted).  
12 Here, the ALJ specifically applied the doctrine of administrative *res judicata*, and expressly  
13 declined to re-open that already adjudicated period.

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15  
16 Lastly, plaintiff states that he disputes the ALJ’s determination to uphold the denial of his  
17 application for SSI benefits on the basis that he does not meet the resource criteria therefor. But  
18 other than stating he is disputing that determination, plaintiff offers no evidence or argument that  
19 the ALJ committed any specific errors in regard thereto. Accordingly, plaintiff has failed to show  
20 the ALJ erred here. *See Valentine v. Comm’r Social Sec. Admin.*, 574 F.3d 685, 689 (9th Cir.  
21 2009) (“To establish eligibility for Social Security disability benefits, a claimant has the burden to  
22 prove he is disabled.”); *Carmickle v. Comm,r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th  
23 Cir. 2008) (issue not argued with specificity in briefing will not be addressed); *Kim v. Kang*, 154  
24 F.3d 996, 1000 (9th Cir.1998) (matters not specifically and distinctly argued in opening brief  
25 ordinarily will not be considered).  
26

1 CONCLUSION

2 Based on the foregoing discussion, the Court finds the ALJ properly concluded plaintiff  
3 was not disabled. Accordingly, defendant's decision to deny benefits is AFFIRMED.

4 DATED this 4th day of January, 2016.

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8 Karen L. Strombom  
9 United States Magistrate Judge