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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *PPH* DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ESTHER A. CONTE,

Plaintiff,

vs.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CASE NO. 04CV2329-LAB (LSP)

ORDER

- 1) ADOPTING REPORT AND RECOMMENDATION;
- 2) DENYING EACH PARTY'S MOTION FOR SUMMARY JUDGMENT; AND
- 3) REMANDING CASE

Plaintiff Esther A. Conte appeals the Commissioner's decision to terminate the supplemental security income payments ("SSI") Plaintiff had been receiving from 1979 to May 1, 2003 pursuant to the Social Security Act, 42 U.S.C. § 1381-1382f (the "Act"). For the reasons which follow, the parties' respective motions for summary judgment are **DENIED**, and the case is **REMANDED** to the Commissioner for further development consistent with this order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is over 86 year old, and had been receiving SSI benefits. SSI is a federally administered welfare program for the aged, blind, or disabled individuals. Recipients must meet

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1 certain indigence requirements, which are defined in terms of "income" and "resources." 42
2 U.S.C. § 1382(a).

3 The Commissioner terminated Plaintiff's SSI benefits when Plaintiff gave her son a
4 \$90,000 check, which represented a portion of her proceeds from a class action settlement with the
5 manufacturer of her defective hip prosthesis. The check was issued on December 19, 2002. It is
6 unknown when exactly it was delivered to Plaintiff's mailbox. When the check arrived, Plaintiff
7 had been hospitalized following a car accident in November 2002, and remained hospitalized and
8 subsequently institutionalized for rehabilitation through late February 2003. She first saw the
9 check some time in February, when her son brought her accumulated mail to her. On or about
10 February 20, 2003, she negotiated the check to her son. Her benefits were terminated in May 2003.

11 Plaintiff appealed the termination of benefits, but her appeal was denied. After requesting a
12 hearing before an Administrative Law Judge ("ALJ"), the decision to terminate was upheld. The
13 ALJ found that although the \$90,000 was initially Plaintiff's unearned income, it "technically"
14 became a "resource" pursuant to 20 C.F.R. § 416.1201(a) and was a resource at the time of the
15 transfer. He further found the check was not exempt from 42 U.S.C. § 1382b(c)(1)(A) which
16 penalizes claimants for transfers of resources for less than fair market value, thus rendering
17 Plaintiff ineligible for SSI benefits for up to 36 months. Plaintiff requested review of the ALJ's
18 decision, which request was denied.

19 Plaintiff timely filed an action for judicial review in this Court, and subsequently filed a
20 motion for summary judgment. The Commissioner filed a cross-motion. The case was referred to
21 United States Magistrate Judge Leo S. Papas for a report and recommendation in accordance with
22 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(c)(1)(c). Plaintiff argued the ALJ erred when
23 he found the settlement check was a "resource" at the time of the transfer. She claimed the check
24 was "income," and transfer of income is not penalized under section 1382b(c)(1)(A). The
25 Commissioner argued the ALJ's finding that the check was a resource was correct.

26 Judge Papas issued a report and recommendation recommending to deny both summary
27 judgment motions and remand the case to the ALJ for additional fact finding. Specifically, Judge
28 Papas found section 1382b(c)(1)(A) penalizes only claimants who dispose of resources for less

1 than fair market value, rather than those who dispose of income. He further found the settlement
2 check was initially Plaintiff's unearned income. Unearned income is counted when it is received,
3 credited to the claimant's account or set aside for claimant's use, whichever is earlier. 20 C.F.R.
4 § 416.1123(a). He rejected the ALJ's conclusion the \$90,000 was set aside for Plaintiff on
5 December 19, 2002, and concluded additional fact finding was necessary to determine when
6 Plaintiff received the settlement check. The Commissioner objected to the report and
7 recommendation, and Plaintiff responded.

8
9 **DISCUSSION**

10 **I. Standard of Review**

11 The district court has jurisdiction to review the magistrate judge's report and
12 recommendation concerning a dispositive motion, and makes a *de novo* determination of those
13 portions of the magistrate judge's disposition to which specific written objection have been timely
14 and appropriately made. Fed. R. Civ. P. 72(b); *see also United States v. Reyna-Tapia*, 238 F.3d
15 1114, 1121 (9th Cir. 2003) (*en banc*). The Commissioner objects to three findings in the report
16 and recommendation: (1) that the settlement proceeds were not set aside for Plaintiff on December
17 19, 2002; (2) that only transfer of resources, as opposed to income, for less than fair market value
18 is penalized under section 1382b(c)(1)(A); and (3) that the date Plaintiff received the check is
19 material to this case. Accordingly, these are the only aspects of the report and recommendation
20 reviewed by the Court. "A judge of the court may accept, reject, or modify, in whole or in part, the
21 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

22 **II. Judicial Review of Commissioner's Decision to Terminate SSI Benefits**

23 Judicial review of administrative rulings regarding SSI benefits is the same as judicial
24 review of final agency decisions denying a claim for disability benefits pursuant to 42 U.S.C.
25 § 405(g). 42 U.S.C. § 1383(c)(3). A reviewing court must affirm the denial of benefits if the
26 agency's decision is supported by substantial evidence and applies the correct legal standards.
27 *Batson v. Comm'r of the Soc. Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial
28 evidence means "such relevant evidence as a reasonable mind might accept as adequate to support

1 a conclusion.” *Ostenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). Although deference is
2 given to an agency’s reasonable construction of statutes, an ALJ’s findings of law are reviewed *de*
3 *novo*. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). An ALJ’s decision must be
4 overturned if it is based on an error of law. *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991).

5 **III. Commissioner’s Objections**

6 Whether the settlement check was “income” or “resource” when Plaintiff gave it to her son
7 is material because the Act expressly penalizes transfer of resources for less than fair market
8 value.¹ See 42 U.S.C. § 1382b(c)(1)(A). The Act does not contain a similar provision for income.
9 See *id.* § 1382a. An item initially counted as income may subsequently be counted as a resource:

10 Items received in cash or in kind during a month are evaluated first under the
11 income counting rules and, if retained until the first moment of the following
month, are subject to the rules for counting resources at that time.

12 20 C.F.R. § 416.1207(d); see also Program Operations Manual System (“POMS”) SI 01120.005
13 (income becomes a resource if it is retained past the first moment of the month following its
14 receipt). No asset is counted as income and resource during the same month. POMS SI
15 01110.600.

16 When the settlement check can be counted as Plaintiff’s income is material because, if
17 retained, it is counted as a resource the following month. If the check is counted as Plaintiff’s
18 income before February 1, 2003, it can be counted as a resource in February, when she transferred
19 it to her son, and the penalty of section 1382b(c)(1)(A) applies. If it is counted as income in
20 February 2003, it can not be counted as a resource in the same month, and the penalty provision
21 does not apply. The date when the check is counted as Plaintiff’s income is therefore
22 determinative of the case. Income is counted at the earliest of when it is received by the claimant,
23 when it is credited to the claimant’s account, or when it is set aside for the claimant’s use. 20
24 C.F.R. § 416.1123(a).

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28 ¹ The Commissioner questions this premise. Her objection in this regard is addressed
below.

1 **A. Whether the Act Penalizes Transfers of Income**

2 The Commissioner argues it does not matter whether the settlement check was income or
3 resource when Plaintiff gave it to her son, because in either case, this is the type of transaction the
4 Act intended to penalize. The Commissioner maintains that “[a]ny other interpretation of the
5 statute would create a loophole that would eviscerate the statutory provision.” Although this is not
6 an unreasonable position, it is not one that finds support in the plain reading of the statute or the
7 regulations.

8 In support of her argument, the Commissioner cites to *Gordon v. Sec. of Health and Human*
9 *Svc's*, 803 F.2d 1071 (9th Cir. 1986). The case, however, did not address the issue at hand. It held
10 a claimant with resources in excess of the statutory limit ceased to be eligible for SSI benefits. *Id.*
11 at 1073. The court reasoned that “[t]o allow [the claimant] to shelter funds accessible to him for
12 his support merely by designating himself as trustee would subvert the Congress’ interest in
13 providing SSI benefits only to persons with limited resources.” *Id.* The holding and reasoning in
14 this case addressed only resources and not income. It neither addressed income generally as
15 distinct from resources, nor specifically whether a claimant’s transfer of income for less than fair
16 market value triggered termination of benefits pursuant to section 1382b(c)(1)(A). *Gordon*
17 therefore does not support the Commissioner’s objection that it does not matter whether the check
18 was income or resource.

19 The Commissioner next maintains her interpretation of the statutes she administers is
20 controlling. This is an overstatement of the law. Although “[c]ourts grant an agency’s
21 interpretation of its own regulations considerable leeway,” they still examine the agency’s
22 interpretation for lawfulness. *Barnhart v. Walton*, 535 U.S. 212, 217 (2002).

23 The Commissioner’s objection relies on the ALJ’s reasoning. (Objections at 2-3.) The
24 ALJ acknowledged the statute expressly refers only to “resources,” and that the distinction between
25 “income” and “resources” is pervasive in the Act, as well as in the regulations and procedures.
26 (Transcript (“Tr.”) at 18-19.) The ALJ then rejected all this, and based his decision on legislative
27 history. (*Id.* at 19.)

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1 This was error, since the statutory scheme unambiguously distinguishes between resources
2 and income. The Court adopts the Magistrate Judge's detailed statutory interpretation analysis.
3 (See Report and Recommendation ("R&R") at 6-7.) The Court also notes the Act contains two
4 consecutive provisions, section 1382a, which addresses income, and section 1382b, which
5 addresses resources. Only section 1382b contains a provision penalizing a claimant for
6 transferring resources for less than fair market value. As discussed in the report and
7 recommendation, the presumption is that the distinction between the treatment of income and
8 resources was deliberate. (*Id.* at 7.) This distinction is consistent with the statutory scheme which
9 converts any income remaining at the beginning of the following month into resources. See 20
10 C.F.R. § 416.1207(d). There are no regulations or procedures interpreting section 1382b(c)(1)(A)
11 in the manner advanced by the Commissioner in this case.

12 Since the statute unambiguously precludes the interpretation advanced by the
13 Commissioner, that interpretation is contrary to law. See *Walton*, 535 U.S. at 217-18. The ALJ's
14 decision, based on this erroneous interpretation of the statute, must therefore be reversed. See
15 *Bunnell*, 947 F.2d at 346. For the same reasons, the Commissioner's objection is overruled.

16 **B. Whether the Check Was a Resource at the Outset**

17 The Commissioner also argues the check could be counted as Plaintiff's resource from the
18 moment Plaintiff received it, since "resources means cash or other property which can be
19 converted to cash." (Objections at 3 (citing 20 C.F.R. § 416.1201(a).) Therefore, she contends, it
20 is immaterial to determine when the check is counted as Plaintiff's "income."

21 The ALJ's decision correctly acknowledged an asset may meet the definition of both,
22 "income" and "resource." However, it is initially counted as "income." If retained, it is counted as
23 a "resource" at the beginning of the following month. (Tr. at 16.)

24 To adopt the Commissioner's interpretation would be contrary to her own regulations,
25 which provide that items which fit into both categories are first counted as income. See 20 C.F.R.
26 § 416.1207(d). It would also be contrary to her procedures manual, which provides an item cannot
27 be income and resource at the same time. See POMS SI 01110.600. Accordingly, the
28 Commissioner's objection is overruled.

1 **C. Whether the Check Was Set Aside for Plaintiff's Use in December 2002**

2 As noted above, the check is counted as income on the earliest of when Plaintiff received it,
3 when it was credited to her account, or when it was set aside for her use. *See* 20 C.F.R.
4 § 416.1123(a). Since neither party contends the check was credited to Plaintiff's account, the only
5 relevant issues to consider are when she received it and when it was set aside for her use.

6 The Commissioner contends the Magistrate Judge erred when he found the check was not
7 set aside for Plaintiff's use on December 19, 2002, the date on the check. The Commissioner does
8 not attempt to distinguish the pertinent case law discussed in the report and recommendation, and
9 cites to no contrary authority. (*Cf.* R&R at 10-11 *and* Objections at 1-2.)

10 Since neither the Act nor its regulations define the term "set aside," the Magistrate Judge
11 and the ALJ each relied on other authorities. The Magistrate Judge turned to cases interpreting
12 when an asset is attributable to the claimant for purposes of SSI benefit eligibility. If the claimant
13 has unrestricted control over funds or if he has the power to partition a partnership holding his
14 inheritance, the assets are attributable to him. *See Gordon*, 803 F.2d 1071 (unrestricted control
15 over funds of an unincorporated association); *Chalmers v. Sec. of Health and Human Svc's*, 23
16 F.3d 752 (3d Cir. 1994) (power to partition partnership with siblings holding inherited property).²
17 The Commissioner does not argue these authorities do not apply, but relies entirely on the ALJ's
18 decision, which did not address these authorities. (*See* Tr. at 16.) The Court adopts the report and
19 recommendation which distinguishes the Uniform Commercial Code ("UCC"), the authority relied
20 upon by the ALJ. (*Cf.* R&R at 10-11 *and* Tr. at 17.) The Commissioner does not present any
21 authority or argument to show UCC is the persuasive authority on the issue presented here.

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25 ² Both cases addressed the claimant's access to or control over "resources." The timing
26 issue present in this case, which highlights the distinction between "income" and "resources," was not
27 present in either case. In *Gordon*, the facts show the claimant had unlimited access to the funds from
28 at least February to October 1983, well in excess of one month, the maximum amount of time during
which the funds could be counted as income. In *Chalmers*, the claimant received the property in 1980,
but her benefits were terminated in 1989. Accordingly, the claimant held the property longer than one
month. The assets in *Gordon* and *Chalmers* were undisputably "resources" rather than "income."
Nevertheless, these cases are instructive on the issue when certain assets can be attributed to the
claimant for purposes of SSI benefits eligibility.

1 Accordingly, the Commissioner's objection is overruled. Since the ALJ's decision that the
2 \$90,000 was set aside for Plaintiff in December 2002 is contrary to pertinent legal authority, it
3 must be reversed. See *Bunnell*, 947 F.2d at 346.

4 **D. Whether Plaintiff Received the Check Before February 2003**

5 Last, the Commissioner objects to the recommendation to remand, because, she argues,
6 remand would require resolution of an immaterial issue – when Plaintiff received the check for
7 purposes of 20 C.F.R. § 416.1123(a). As discussed above, the time of receipt is not immaterial but
8 dispositive of this case.

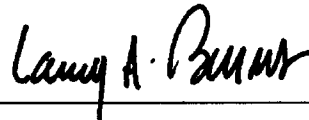
9 In the absence of any objections, the Court adopts the report and recommendation with
10 respect to the interpretation of the term "receive" and "receipt." See *Reyna-Tapia*, 238 F.3d at
11 1121. Remand is necessary to allow the parties to present evidence and address the doctrine of
12 constructive receipt and presumption of receipt in due course. The Court finds ALJ's summary
13 treatment of receipt in his decision does not adequately address these issues. (See Tr. at 17.)

14
15 **CONCLUSION**

16 For the foregoing reasons, the Commissioner's objections are overruled, the report and
17 recommendation is **ADOPTED**, and each party's motion for summary judgment is **DENIED**. The
18 case is **REMANDED** to the Commissioner for further factual development and consideration
19 consistent with this order. The Clerk is hereby instructed to enter judgment terminating this case.

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21 **IT IS SO ORDERED.**

22 DATED: 2-17-06



HONORABLE LARRY ALAN BURNS
United States District Judge

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25 cc: Magistrate Judge Leo S. Papas
All Counsel of Record

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