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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ESTHER A. CONTE,)	Civil No. 04-2329-LAB(LSP)
)	
Plaintiff,)	
)	REPORT AND RECOMMENDATION
v.)	DENYING PLAINTIFF'S MOTION FOR
)	SUMMARY JUDGMENT (12-1),
JO ANNE B. BARNHART,)	DENYING DEFENDANT'S MOTION FOR
Commissioner of Social)	SUMMARY JUDGMENT (15-1) AND
Security,)	REMANDING TO THE
)	ADMINISTRATIVE LAW JUDGE
Defendant.)	

I

STATEMENT OF THE CASE

The principal issues in this case involve the analysis of (1) the recognition of income and resources under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1382f (hereinafter "the Act"), and (2) the time at which money should be determined as income under the Act. The results of the forgoing analysis determine if benefits should be adversely affected.

Esther A. Conte (hereinafter referred to as "Plaintiff"), currently an 86 year-old woman, received supplemental security income (SSI) payments under the Act from 1979 until May 1, 2003.

19

1 Transcript (hereinafter "Tr.") at 142. The Social Security Adminis-
2 tration (hereinafter "SSA") terminated Plaintiff's benefits when she
3 gave her son, Gary Conte (hereinafter "Gary"), a \$90,000 check
4 (hereinafter the "Sulzer" check), which represented a portion of
5 proceeds from a class action settlement by the manufacturer of her
6 defective hip prostheses. Tr. at 158, 13-22. Plaintiff appealed the
7 termination of benefits. The SSA denied her appeal. Tr. at 158.

8 On July 2, 2003, Plaintiff requested a hearing before an
9 Administrative Law Judge (hereinafter "ALJ"). Tr. at 25-28. On May
10 21, 2004 the ALJ upheld SSA's decision to terminate Plaintiff's SSI
11 benefits. Tr. at 13-22. The ALJ found that the settlement check
12 was a resource transferred for less than fair market value under §
13 1382b(C)(1)(A) of the Act. Tr. at 275.

14 Following the unfavorable ALJ decision, Plaintiff timely
15 requested review by the SSA Appeals Council on July 16, 2004. Tr.
16 at 9. On September 17, 2004, the Appeals Council declined to review
17 the case. On November 22, 2004, Plaintiff responded by filing an
18 action for judicial review pursuant to 42 U.S.C. §§ 405(g) and
19 1383(c)(3). Tr. at 4.

20 On April 18, 2005, Plaintiff filed a Motion for Summary
21 Judgment (hereinafter "Motion") pursuant to Rule 56 of the Federal
22 Rules of Civil Procedure. On May 20, 2005, JoAnne B. Barnhart,
23 Commissioner of the Social Security Administration (hereinafter
24 "Defendant"), through the United States Attorney, filed a Cross-
25 Motion for Summary Judgment.

26 Plaintiff's position is that the ALJ erred when he ruled that
27 the Sulzer check was a resource within the definition of the Act.
28 Plaintiff further argues that even if the Sulzer check was classi-

1 fied as income (before it became a resource) when it was transferred
2 to Gary, it is exempt from the provisions of the Act which would
3 penalize her for the transfer because only resources are penalized
4 under the Act. Plaintiff's Motion at 12.

5 Defendant's position is that the Sulzer check was a resource
6 when Plaintiff gave it away in February 2003 so Plaintiff is
7 ineligible for SSI benefits for a maximum of 36 months under 42
8 U.S.C. § 1382b(C)(1)(A). Defendant's Cross-Motion for Summary
9 Judgment (hereinafter Defendant's Motion) at 5.

10 II

11 ALJ'S FINDINGS

12 In this case, the ALJ specifically found the following:

- 13 1. On December 19, 2002, a check was issued to the claimant
14 for \$90,000 drawn on the account of Sulzer Settlement
Trust in National City Bank at Ashland, Ohio.
- 15 2. The \$90,000 was the second of two settlement awards
16 resulting from litigation over defective hip prostheses,
the first in the amount of \$40,000 having been paid to
17 the claimant, and spent by her, in November 2002.¹
- 18 3. The \$90,000 check was delivered to the claimant's mail-
19 box at her residence, probably at some time before
February 1, 2003, although neither the claimant or her
20 son, Gary Conte, recalls having seen the check prior to
February 2003.
- 21 4. The claimant had a valuable property right in her claim
22 against Sulzer which had been reduced to judgment prior
to December 19, 2002, as to which the claimant had the
23 right, authority or power to liquidate within the mean-
ing of the regulations defining what is a "resource" (20
24 C.F.R. §416.1201(a)(1)).
- 25 5. At some time between December 19, 2002, and February 1,
2003, the \$90,000 check was delivered to the claimant's
26 mailbox at her residence.
- 27 6. At the time the \$90,000 check was delivered to the
28 claimant's mailbox at her residence, the claimant was

¹ The total settlement was in the amount of \$130,000. The prior \$40,000 partial payment is not at issue because Plaintiff spent it on a new car, kitchen goods, hearing aids, and paid off credit cards within the same month it was received. Tr. at 14, 37, 38, 273. Because Plaintiff spent the \$40,000 before the first day of the month following its receipt, the SSA treated the check as unearned income rather than a resource. Consequently, Plaintiff remained SSI eligible because she had not exceeded the maximum amount of resources, \$2,000, statutorily permitted for SSI recipients. Tr. at 82, 86.

1 recuperating from injuries sustained in a motor vehicle
2 accident resulting in continuous hospitalization or
inpatient rehabilitation from late November 2002 through
late February 2003.

- 3 7. The claimant did not actually see the \$90,000 check
4 until some time in February 2003, her son, Gary Conte,
brought it to her in the rehabilitation facility.
- 5 8. In February 2003, or on or about the 20th day of that
6 month, the claimant negotiated the \$90,000 check to her
7 son, Gary Conte, in what she describes as a gift.
- 8 9. In February 2003, on or about the 20th day of that
9 month, the \$90,000 check was deposited in an account
10 with Bank of America in the name of Gary Conte only, and
11 the \$90,000 remained untouched in that account at least
through February 6, 2004.
- 12 10. At some time between December 19, 2002 and February 1,
2003, the \$90,000 check was "received" by the claimant,
within the meaning of the regulations regarding when
income is "counted" for purposes of determining indigence
for entitlement to SSI (20 C.F.R. §§416.1111, 416.1123).

Tr. at 20-21.

12 The ALJ, in rejecting Plaintiff's allegations that the
13 Sulzer check was income at the time she gave it to her son and
14 that the transfer of income for less than fair market value is not
15 penalized under 42 U.S.C. §1382b(C)(1)(A), provided the following
16 rationales in support of his conclusion:

- 17 1. On December 19, 2002, the \$90,000 check was "set
18 aside" for the claimant's use within the meaning of
19 the regulations regarding when income is "counted"
for purposes of determining indigence for entitlement
to SSI (20 C.F.R. §§416.1111, 416.1123).
- 20 2. The \$90,000 was technically "income" within the meaning
21 of the regulations prior to February 1, 2003, and was
22 technically a "resource" within the meaning of the regu-
lations on and after February 1, 2003 (20 C.F.R.
§§416.1103, 416.1201(a)).
- 23 3. Although the statute regarding transfers of property for
less than fair market value (Social Security Act
24 §1613(c)(a)(A), 42 U.S.C. §1382b(C)(1)(A)) uses the word
"resources," which happens to have a technical meaning,
25 Congress did not intend to restrict the application of
that law to property that is technically considered
26 "resources" rather than "income" under the Agency's
"counting" procedures.
- 27 4. The \$90,000 settlement paid to the claimant from the
28 "Sulzer Settlement Trust," by check dated December 19,
2002, and transferred by the claimant to her son, Gary
Conte, in February 2003, is not exempt from the provi-
sions of the Social Security Act §1613(c)(a)(A), 42

1 U.S.C. §1382b(C)(1)(A), regarding transfers of "re-
2 sources" for less than fair market value, on the grounds
3 that it was "income" rather than "resources" she trans-
ferred it to her son in February 2003.
Tr. at 21-22.

4 III

5 **SUMMARY OF APPLICABLE LAW**

6 SSI is a federally administered welfare program for aged,
7 blind, or disabled individuals. Recipients must meet the indi-
8 gence requirements of the Act. The indigence requirements are
9 statutorily described in terms of "income" and resources." 42
10 U.S.C. § 1382(a)(1). A claimant for SSI benefits may become
11 ineligible for benefits if income or resources are received in
12 excess of specific statutory maximums. 42 U.S.C. § 1382(a)
13 (2005). If a claimant's income in a month exceeds the \$552
14 maximum for 2003 or if the claimant's total resources exceed the
15 \$2,000 maximum allowable in any given month, the claimant is
16 ineligible for benefits in that month. § 1382(a)(3).

17 **A. SCOPE OF REVIEW**

18 The Commissioner's decision denying disability benefits will
19 be disturbed only if it is not supported by substantial evidence
20 or is based on material legal error. Magallanes v. Bowen, 881
21 F.2d 747, 750 (9th Cir. 1989). Although deference is given to an
22 agency's reasonable construction of statutes, an ALJ's findings of
23 law are reviewed de novo. McNatt v. Apfel, 201 F.3d 1084, 1087
24 (9th Cir. 2000). However, where an error of law has been made,
25 an ALJ's decision must be overturned. Bunnell v. Sullivan, 947
26 F.2d 341, 346 (9th Cir. 1991).

1 IV

2 ANALYSIS

3 The determination of whether the transaction at issue in this
4 case should be penalized hinges on the resolution of three issues.
5 The court will first address the question of whether transfers of
6 both *income* and *resources* are penalized under the Act. The second
7 issue is whether a check from a class action settlement is un-
8 earned income, an issue which necessitates a two-pronged analysis
9 of (a) whether money received from a settlement should be treated
10 as unearned income and (b) whether the treatment of a *check* is
11 different than the treatment of money under the Act. Because
12 unearned income becomes a resource on the first moment of the
13 month following its receipt and the Sulzer check was issued two
14 months prior to the Plaintiff's actual receipt of it, the third
15 issue before the court is when a check is received within the
16 meaning of the Act.

17 **A. THE ACT ONLY PENALIZES TRANSFERS OF RESOURCES**

18
19 The ALJ's conclusion that transfers of both income and
20 resources are penalized under the Act was erroneous. The Act
21 expressly penalizes only claimants who "dispose of *resources* for
22 less than fair market value" by terminating the claimant's SSI
23 eligibility not just for the month, as when the claimants re-
24 sources exceed the \$2,000 statutorily prescribed maximum, but by
25 making the claimant ineligible for SSI benefits for a maximum of
26 thirty-six months. 42 U.S.C. § 1382b(c)(1)(A)(I). The term
27 "income" does not appear in § 1382b(c), but does appear 27 times
28 in various provisions of § 1382. See, e.g. § 1382(a)(1)(A),

1 §1382(a)(2)(A) (dictating the income levels permitted for SSI
2 recipients). Therefore, by interpreting the Act as penalizing both
3 income and resources, the ALJ ignored a fundamental canon of
4 statutory construction. That canon, dictated by the Supreme
5 Court, prescribes that when a legislative body "includes particu-
6 lar language in one section of a statute but omits it in another
7 section of the same Act, it is generally presumed that [the
8 legislative body] acts intentionally and purposely in the dispa-
9 rate inclusion or exclusion." Russello v. United States, 464 U.S.
10 16, 23 (1983).

11 The ALJ should not have used drafts of § 1382b(c) by the
12 House Ways and Means Committee to infer that statute penalizes
13 both income and resources because there is no evidence to rebut
14 the presumption that the legislature "said what they meant and
15 meant what they said." Connecticut Nat'l Bank, 503 U.S. at 253-
16 54. § 1382b(c) only expressly uses the term "resource," so it
17 penalizes only a claimant who disposes of resources for less than
18 fair market value, rather than a claimant who disposes of income
19 for less than fair market value. 42 U.S.C. § 1382b(c).

20 **B. A CHECK RECEIVED AS A RESULT OF JUDGMENT BY A COURT IS INCOME**
21 **AND NOT A RESOURCE AT RECEIPT**

22 The classification as income of a check received from a class
23 action settlement for the purposes of the Act requires a two-
24 pronged inquiry. First, status of a money judgment or settlement
25 for personal injuries must be determined. Second, it must be
26 established that a check is money rather than another kind of
27 asset under the Act and applicable regulations.
28

1 **1. A PERSONAL INJURY AWARD IS INCOME**

2 The court first turns to the question of whether money
3 received from a personal injury settlement is income or a re-
4 source. Income is defined in the Act as both earned and unearned
5 income. Unearned income includes "prizes and awards." 42 U.S.C.
6 § 1382(a)(2)(C); 20 C.F.R. § 416.1121(f). An award includes money
7 "received as the result of a decision by a court." 20 C.F.R.
8 416.1121(f).

9 The typical "settlement" entered into by parties to a suit is
10 similar enough to a "decision by a court" that resulting money is
11 likely unearned income under SSA regulations. A settlement is an
12 "agreement to terminate or forestall all or part of a lawsuit."
13 Gorman v. Holte, 164 Cal. App. 3d 984 (1985). However, a class
14 action settlement would more definitively fit the definition of
15 "decision by the court" because class action settlements must be
16 approved by the court after a hearing and finding that the settle-
17 ment is "fair, reasonable, and adequate." Fed. R. Civ. Proc.
18 23(e)(1)(A), (C). Moreover, the court may refuse to approve a
19 settlement even after notification of settlement is sent to
20 individual parties to the class action. See Fed. R. Civ. Proc.
21 23(e)(3).

22 Therefore, money received by SSI beneficiaries pursuant to
23 personal injury settlements is an "award" within the meaning of 42
24 U.S.C. § 1392(a)(2)(C). LaBeaux v. Sullivan, 760 F. Supp. 761
25 (N.D. Iowa 1991). As a result, the money from the personal injury
26 settlement in this case is unearned income.
27
28

1 **2. A CHECK IS INCOME AT ISSUANCE**

2 "Cash," a term used interchangeably with the term "money"
3 within the Act and regulations, is listed under the definitions of
4 both resources and income. So, although money received from a
5 settlement of a personal injury suit is income, the court must
6 determine whether a check is the equivalent of cash. Cash is
7 listed as both a resource and income under SSA regulations, but
8 SSA policies dictate that an asset cannot possibly be both *income*
9 and a *resource* simultaneously. Program Operations Manual System
10 (hereinafter POMS) SI 01120.0055.

11 Resources under the Act are defined as "cash or other liquid
12 assets or real or personal property that an individual owns and
13 could convert to cash to be used for his support and maintenance."
14 20 C.F.R. § 416.1201. Assets are items owned that have value.
15 BLACK'S LAW DICTIONARY 2004. Liquid assets are cash or other
16 property which can be converted to cash within 20 days. 20 C.F.R.
17 § 416.1201(b). Checking accounts, bonds, mutual fund shares, but
18 not *checks*, are enumerated under the list of assets that are
19 countable as "liquid resources."² 20 C.F.R. § 416.1201(b) (empha-
20 sis added). Countable resources are those resources remaining
21 after eliminating from consideration assets that are not resources
22 and property essential to self-support. Id. SSA calculates SSI
23 recipients' resources monthly, determining whether resources
24 exceed the maximum allowable at the first moment of each calendar
25 month. POMS SI 01110.600.

26
27
28 ²Defendant incorrectly stated the law in its Motion for Summary Judgment, stating
"checks are among the 'liquid resources' SSA considers in determining the amount of a claimant's
'resources.' 20 C.F.R. § 416.1201(b) (2004)."

1 17. This analogy is flawed: although the Sulzer check was issued
2 from a trust, Plaintiff had no control, much less unrestricted
3 control, over the account funds. Also, Plaintiff was institution-
4 alized and physically unable to pick up the check. Therefore,
5 without cashing or depositing the check, Plaintiff had no legal
6 right to the funds and consequently could not have liquidated the
7 property for her support and maintenance. Tr. at 21. Unlike the
8 claimants in Chalmers and Gordon who made complex legal arrange-
9 ments to shelter their assets, Plaintiff had only an unendorsed,
10 uncashed, and unclaimed check. Chalmers, 23 F.3d at 752; Gordon,
11 803 F.2d at 1073. Therefore, unlike the trust and partnership in
12 prior cases, the Sulzer check is money, or cash, and consequently
13 was income at receipt rather than a liquid resource.

14 **C. THE MEANING OF "RECEIPT" MUST BE SUPPLEMENTED BY JUDICIAL**
15 **INTERPRETATION**

16 For the purposes of the Act, with few exceptions, income
17 becomes a resource if it is retained past the first moment of the
18 month following its receipt. POMS SI 01120.005, 20 C.F.R. §
19 416.1207(d). Therefore, the date of receipt becomes the central
20 issue in determining if or when the Sulzer check was a countable
21 resource.

22 To determine the date of receipt, the word "receipt" must be
23 defined with respect to the Act. Though the Act uses the words
24 "receive," "receipt," or "receiving" several times, Congress did
25 not define the term within the Act. See 42 U.S.C. § 1382e(F),
26 (I) (i) (II) (dictating eligibility of persons in institutions
27 "receiving" payments under a State payment plan). A court review-
28

1 ing SSA interpretations of the Social Security Act must "give
2 effect to the unambiguously expressed intent of Congress." Since
3 the statute is silent, the court must look to SSA regulations for
4 a definition of "receipt." Chevron, USA, Inc. v. Natural Resources
5 Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See Sullivan
6 v. Everhart, 494 U.S. 83, 89 (1990). See also Christensen v.
7 Harris County, 529 U.S. 576 (2000) (holding that interpretations of
8 statutes or Federal Regulations contained in agency manuals lack
9 the force of law and are not entitled to Chevron deference by a
10 reviewing court).

11 The SSA regulations are also silent as to the definition of
12 "receipt." See 20 C.F.R. § 416.1207(d); See also POMS SI
13 0112.005 (lacking reference to or a definition of, "receive,"
14 "receipt," or "receiving"). According to the rules of statutory
15 construction, before judicial construction may be employed to
16 define a term, the term must first be characterized as ambiguous.
17 See Reno v. National Transp. Safety Bd., 45 F.3d 1375, 1379 (9th
18 Cir. 1999); Household Credit Services, Inc. v. Pfennig, 541 U.S.
19 232, 243 (2004) (holding that an agency's regulations are "binding
20 in the courts" unless ambiguous or manifestly contrary to the
21 statute). To determine whether a regulation is ambiguous, and
22 thus not binding on the courts, courts first look to plain meaning
23 of the regulation. United States v. Hagberg, 207 F.3d 569, 547
24 (9th Cir. 2000).

25 Courts may look to Black's Law Dictionary to find the plain
26 meaning of a term. See U.S. v. Bucher, 375 F.3d 929, 932 (9th
27 Cir. 2004). Receipt is defined as "the act of receiving some-
28 thing." BLACK'S LAW DICTIONARY (8th Ed. 2004. Black's Law

1 Dictionary contains 334 definitions of the term "receive." Id.
2 With so many definitions, it is difficult to accept that there is
3 "plain meaning" within the dictionary definition. This leads to
4 the conclusion that the Court cannot rely on plain meaning to
5 define the term.

6 Because there is no "plain meaning" of the term "receipt,"
7 and because the Act, SSA regulations, and decisional law specific
8 to the Act are silent as to the meaning of receipt, the regulation
9 must be characterized as ambiguous. Therefore, according to the
10 rules of statutory construction, judicial construction may be
11 employed to determine the meaning of the word "receipt" according
12 to the Act. See Pauley v. BethEnergy Mines, Inc., 501 U.S. 680,
13 702 (1991); Irvington Moore, Div. of U.S. Natural Res., Inc. v.
14 Occupational Safety and Health Review Comm'n, 556 F.2d 431, 435
15 (9th Cir. 1977); Kearfott Guidance and Navigation Corp. v.
16 Rumsfeld, 320 F.3d 1369, 1377 (D.C. Cir. 2003) (applying the rules
17 of statutory construction to interpreting a silent regulation
18 derived by an agency interpreting a silent statute). See also
19 Tierdael Const. Co. v. Occupational Safety and Health Review
20 Com'n, 340 F.3d 1110 (10th Cir. 2003) (holding that consulting
21 secondary sources was unnecessary in determining whether removal
22 of asbestos-containing pipe during excavation was Class II activ-
23 ity under OSHA regulation, where plain meaning of regulation
24 encompassed such activity); Consumer Prod. Safety Comm'n, 447 U.S.
25 at 108.

26 Judicial construction includes looking to decision law. See
27 U.S. v. Wells, 519 U.S. 482 (1997) (holding that Congress presumes
28 statutes to be read in conformity with Supreme Court's prece-

1 dents). The term "receive" has been construed by the Ninth
2 Circuit in an Internal Revenue Service (IRS) Regulation with
3 language congruent to the language in 20 C.F.R. § 416.1123(a), the
4 SSA regulation at issue. See Treas. Reg. §1.451-2(a), 26 U.S.C. §
5 451. The applicable IRS Regulation states that income is construc-
6 tively received by a taxpayer "in the taxable year during which it
7 is credited to his account, set apart for him, or otherwise made
8 available so that he may draw upon it at any time, or so that he
9 could have drawn upon it during the taxable year if notice of
10 intention to withdraw has been given." Treas. Reg. § 1.451-2(a).
11 Similarly, the SSA regulation provides that unearned income is
12 countable when it is received, credited to the claimant's account
13 or set aside for the claimant's use. 20 C.F.R. § 416.1123(a).

14 The doctrine of constructive receipt supplements the meaning
15 of "receive" in the IRS regulation similarly to the SSA regulation
16 at issue. The doctrine is well-recognized and even codified. It
17 treats money, or an interest in property, as received by an
18 individual or company when the individual or company has the right
19 to receive funds during a taxable year but does not actually
20 receive them. 26 U.S.C. § 451; See also North American Oil Consol-
21 idated v. Burnet, 286 U.S. 417, 423 (1932) (holding that net
22 profits were not received by a company under the doctrine of
23 constructive receipt because the company did not have a right to
24 demand that the receiver pay over money throughout the taxable
25 year). The purpose of the rule is to prevent individuals from
26 benefitting from intentionally deferring the recognition of income
27 under the tax code by delaying picking up a check or by asking a
28 payor to mail it.

1 The doctrine of constructive receipt does not apply in cases
2 in which there is substantial limitation or restriction on the
3 taxpayer's right to beneficial enjoyment of the income. See
4 Baxter v. Commissioner, 816 F.2d 493, 495 (9th Cir. 1987), citing
5 Avery v. Commissioner, 292 U.S. 210, 215 (1934) (holding that
6 dividend checks prepared by a corporation on December 31, but not
7 regularly available until the first business day of January were
8 not income until the taxable year beginning in January because the
9 checks did not constitute payments "prior to their actual re-
10 ceipt"). Where substantial limitations affect the taxpayer's
11 control of a check, the taxpayer is not considered in constructive
12 receipt of its face amount. For example, although the check in
13 Baxter was dated December 30, 1978, it was not constructively
14 received by the taxpayer until taxable year 1979 because of the
15 time and distance (40 miles) involved in cashing the check and
16 receiving credit for it at the taxpayer's own bank. Baxter, 816
17 F.2d at 495.

18 The public policy behind the doctrine of constructive receipt
19 is as well-suited to SSA regulations as it is to IRS regulations.
20 Claimants who intentionally or carelessly do not pick up a check
21 to avoid countable resources would be deemed to have construc-
22 tively received it, because the claimant could have converted it
23 to "cash to be used for his or her support and maintenance." 20
24 C.F.R. § 416.1201(a). For those claimants, the doctrine provides
25 harsh consequences by imputing income to the claimant. However,
26 for claimants who are physically incapacitated, or like the
27 plaintiff in Baxter, unable because of distance and time to
28 convert a check, actual receipt will trigger counting under SSA

1 regulations and legal fiction will not be used to impute the
2 receipt of the check. Baxter, 816 F.2d at 495.

3 Like the plaintiff in Baxter, Plaintiff here was substan-
4 tially hindered from physical possession of her check. In fact,
5 Plaintiff's barriers to physical possession of the check were
6 greater than those which satisfied the court in Baxter. The court
7 in Baxter found traveling a distance of 40 miles on a non-business
8 day was a substantial enough burden that a check could not be
9 constructively received. Id. In this case, Plaintiff was severely
10 injured, institutionalized, and lived alone, Thus, she was
11 incapable of picking up the check at her home.

12 According to the above analysis, Plaintiff would not have
13 received the Sulzer check until February 2003 so it would have
14 been income at transfer to her son, Gary. Because the transfer of
15 income is not penalized under 42 U.S.C. § 1382b(c), Plaintiff
16 would not have been subject to a penalty for the transfer of the
17 check to Gary. Based on the foregoing analysis, this Court would
18 be obligated to find that the ALJ's findings were based upon an
19 error of law and the ALJ's decision would have to be overturned.
20 Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991).

21 However, that does not end the court's analysis because
22 unlike the check in Baxter, the Sulzer check was mailed to Plain-
23 tiff. It is generally recognized that a presumption of the due
24 receipt of a letter or of a communication through the mail arises
25 when the letter or communication was (1) properly addressed to the
26 addressee, (2) properly stamped with sufficient postage, and (3)
27 deposited in the post office or other place where mail may prop-
28 erly and legally be deposited for collection and transmission.

1 Hagner v. United States, 285 U.S. 427 (1932). This presumption
2 controls even when the contents of the letter would, if the letter
3 were received, tend to subject the party receiving it to a penalty
4 of forfeiture. Rosenthal v. Walker, 111 U.S. 185, 194 (1884).
5 This presumption has been applied by courts to documents mailed by
6 several administrative agencies, including the Immigration and
7 Naturalization Service (hereinafter "INS"), the IRS, and Federal
8 Courts. See Busquets-Ivars v. Ashcroft, 333 F.3d 1008 (9th Cir.
9 2003) (INS); Anderson v. United States, 966 F.2d 487 (9th Cir.
10 1992); Nunley v. City of Los Angeles, 52 F.3d 729 (9th Cir. 1995)
11 (United States District Court).

12 The Ninth Circuit Court of Appeals has determined that a
13 "bursting bubble" approach should be taken to this presumption, in
14 that the presumption disappears where rebuttable evidence is
15 presented. Nunley, 42 F.3d at 796. However, the challenging
16 party still bears the burden of proving non-receipt even after the
17 "bubble" of presumption has burst. When the challenging party
18 denies receipt, the fact finder must weigh the evidence and make a
19 considered factual determination concerning receipt. Even after
20 the "bubble" has been "burst," the factual question of receipt
21 remains and may be decided in favor of receipt by a fact finder
22 who may choose to draw inferences of receipt from the evidence of
23 mailing, despite contrary evidence. Id. The nature of the factual
24 findings vary, but courts have considered evidence of an incorrect
25 zip code enough to deprive a party of the benefit of the presump-
26 tion of receipt. For example, where the INS used an incorrect zip
27 code on correspondence directed to the plaintiff, the court held
28 that mailed notice which failed to include a proper zip code is

1 not properly addressed. Busquets-Ivars, 333 F.3d at 1010.

2 In this case, the Sulzer check appears to satisfy the three
3 elements of the presumption of due receipt. Plaintiff's son
4 admitted to the ALJ that the Sulzer check was amidst the mail
5 accumulated in Plaintiff's mailbox at her residence. Tr. at 14,
6 40. To be in the mailbox, the check must have been (1) properly
7 addressed, (2) stamped properly, and (3) deposited in a post
8 office box or similarly official postal repository. Therefore,
9 the Sulzer check would have been "received" by Plaintiff, at the
10 "regular time," meaning in the ordinary course of business of the
11 post office. Rosenthal, 111 U.S. at 193. Any burden of rebuttal
12 appears to be on Plaintiff to show she should not be charged with
13 "constructive receipt" and the "normal course" of delivery of the
14 check. Busquets-Ivars, 333 F.3d at 1010.

15 The presumption of receipt is not one of law, but "a mere
16 inference of fact, founded on the probability that the officers of
17 the government will do their duty and the usual course of busi-
18 ness." Rosenthal, 111 U.S. at 193. However, neither party
19 addressed the issue of presumption of due receipt of correspon-
20 dence through the mail. As a result, this court recommends that
21 this matter be remanded to the ALJ for a more fully developed
22 factual determination and to provide the parties an opportunity to
23 address the issues herein raised.

24 V

25 CONCLUSION

26 After reviewing the administrative record as a whole, weigh-
27 ing both the evidence that supports and detracts from the ALJ's
28 conclusion, the Court finds that the ALJ based his findings upon

1 an errors of law. Therefore, this Court **RECOMMENDS** that Plain-
2 tiff's Motion for Summary Judgment be **DENIED**, and this case be
3 **REMANDED** for further factual development.


4 This report and recommendation of the undersigned Magistrate
5 Judge is submitted to the United States District Judge assigned to
6 this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

7 **IT IS ORDERED** that no later than September 5, 2005, any party
8 to this action may file written objections with the Court and
9 serve a copy on all parties. The document should be captioned
10 "Objections to Report and Recommendation."

11 **IT IS FURTHER ORDERED** that any reply to the objections shall
12 be filed with the Court and served on all parties no later than
13 September 22, 2005. The parties are advised that failure to file
14 objections within the specified time may waive the right to raise
15 those objections on appeal of the Court's order. Martinez v.
16 Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: August 4, 2005

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LEO S. PAPAS
United States Magistrate Judge

cc: All Parties
Judge Larry A. Burns