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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUSTIN IVORY,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of Social Security Administration,

Defendant.

Case No. CV 07-5929-MLG

MEMORANDUM OPINION AND ORDER

Plaintiff Justin Ivory seeks judicial review of the Social Security Commissioner's denial of his application for Supplemental Security Income ("SSI") benefits under the Social Security Act. For the reasons stated below, the Commissioner's decision is **AFFIRMED**.

I. Facts and Procedural History

Plaintiff was born on March 27, 2001. (AR 19.) Plaintiff's mother applied for SSI benefits on his behalf on October 14, 2004, alleging disability due to Plaintiff's impairment of speech and language delays. (*Id.*)

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The Commissioner denied Plaintiff's application on November 19, 2004. (AR 59.) Administrative Law Judge ("ALJ") Richard L. Leopold held a hearing on May 3, 2005, at which Plaintiff and his mother failed to appear. (AR 52.) The ALJ determined that Plaintiff and his mother were "non-essential witnesses," and, based solely on the record, he issued a decision concluding that Plaintiff was not entitled to SSI on August 2, 2005. (AR 52-56.) The Social Security Administration Appeals Council remanded the case to the ALJ for a new hearing on December 12, 2005, finding that the ALJ needed to consider the testimony of Plaintiff's mother in reaching the disability determination. (AR 73-74.)

The ALJ held a new hearing on September 8, 2006, at which Plaintiff and his mother testified without counsel. (AR 16.) The ALJ issued an unfavorable decision on October 19, 2006, in which he determined that Plaintiff had not engaged in substantial gainful activity, that his impairment of speech and language delays was "severe," and that his impairment did not meet, medically equal, or functionally equal the listings found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 19.) The ALJ found that Plaintiff had not been disabled from the alleged onset date to the decision date, and that he was not entitled to SSI benefits. (*Id.*)

Plaintiff requested review of the ALJ's decision and submitted two additional exhibits to support the claim. (AR 7, 10.) The Appeals Council denied Plaintiff's request for review on July 18, 2007. (AR 4.) Plaintiff timely filed this action on September 12, 2007, alleging that the ALJ erred because (1) the ALJ should have determined that Plaintiff functionally met the listings under 20 C.F.R. § 416.926; (2) the decision is not supported by substantial evidence; and (3) the ALJ improperly discounted the credibility of Plaintiff's mother in reaching

the disability determination. (Joint Stip. 3.) Plaintiff requests remand for a new administrative hearing or the award of benefits. (Joint Stip. 30.)

II. Standard of Review

The Court must uphold the Social Security Administration's disability determination unless it is not supported by substantial evidence or is based on legal error. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)(citing *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006)). Substantial evidence means more than a scintilla, but less than a preponderance; it is evidence that a reasonable person might accept as adequate to support a conclusion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support either affirming or reversing the ALJ's conclusion," the reviewing court "may not substitute [its] judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

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III. Discussion

A. The ALJ Properly Found that Plaintiff's Impairment Did Not Functionally Equal the Listings

Under the Social Security Act, a child under the age of eighteen is considered disabled "if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C.A. § 1382c(a)(3)(C)(i) (West 2008). A disability determination for individuals younger than eighteen requires three findings: (1) the claimant must not be performing substantial gainful work, 20 C.F.R. § 416.924(b); (2) the claimant's impairment, or combination of impairments, must be severe, 20 C.F.R. § 416.924(c); and (3) the claimant's impairment must meet, or be medically or functionally equal to, a listed impairment found in 20 C.F.R. Part 404, Subpart P, Appendix 1. When the claimant's impairment does not meet or equal an impairment in the listing, or does not meet the durational requirement, the claimant is determined not to be disabled. 20 C.F.R. § 416.924(d).

Whether an impairment "functionally equals" a listed impairment requires an inquiry into the impairment's effect on six specific areas known as domains of functioning. These domains include: (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for oneself; and (6) health and physical well-being. 20 C.F.R. § 416.926a(b)(1). To functionally equal a listed impairment, the impairment must result in "marked" limitations in two domains or an "extreme" limitation in one domain. 20 C.F.R. §

416.926a(a).

In concluding that Plaintiff's impairment did not functionally equal the listings, the ALJ relied on a state agency physician's opinion regarding Plaintiff's functional limitations. (AR 17.) Samuel N. Grossman, M.D., determined that Plaintiff had "less than marked" limitations in the three domains of acquiring and using information, attending and completing tasks, and interacting and relating with others, but he had no limitation in the three domains of moving about and manipulating objects, caring for himself, and health and physical well-being. (AR 140-42.) Based on these determinations, Dr. Grossman concluded that Plaintiff's impairment did not functionally equal the listings. (AR 17-19.)

The ALJ made several findings in concluding that Plaintiff's impairment did not functionally equal the listings. These include a finding that Plaintiff's "functional ability is not extremely limited in at least one or markedly limited in at least two of aforementioned six domains," as required by the regulations for a finding of functional equality. (AR 18-19.) Plaintiff takes issue only with this finding, arguing that the record demonstrated marked limitations in three of the six domains, which, if true, would render Plaintiff disabled. (Joint Stip. 24-25.) Plaintiff argues that the "majority" of the evidence supports his argument. (*Id.*)

Plaintiff relies on a teacher questionnaire completed by Faith P. Mischel-Golden, M.A., which outlined her observations of Plaintiff's impairments. (AR 154-60.) The questionnaire addresses each of the six domains by asking the respondent to rate the claimant's abilities in several specific areas within each domain on the following scale: (1) no problem; (2) a slight problem; (3) an obvious problem; (4) a serious

problem; and (5) a very serious problem. Ms. Golden's ratings of Plaintiff's abilities overall showed relatively mild limitations, indicating that Plaintiff had no more than an obvious problem in any area, and slight or no problems in most areas. (*Id.*)

Plaintiff does not dispute that Ms. Golden rated his impairments as "obvious" or "slight," rather than "serious" or "very serious." Instead, Plaintiff argues that the regulations do not define "obvious," and that Ms. Golden's minimal comments on the form demonstrate that Plaintiff does indeed have a marked impairment. (Joint Stip. 15-25.)

The Court is not convinced that an "obvious" problem translates into a marked limitation as defined in the regulations. A "marked" limitation occurs when an impairment "interferes *seriously* with your ability to independently initiate, sustain, or complete activities," and is more than moderate but less than extreme. *Id.* § 416.926a(e)(2) (emphasis added). An "extreme" limitation occurs when an impairment "interferes *very seriously* with your ability to independently initiate, sustain, or complete activities." *Id.* § 416.926a(e)(3) (emphasis added). Ms. Golden had the option of indicating that Plaintiff had either a "serious" or "very serious" problem, but she instead chose the lesser designations of "obvious," "slight," or "no problem" when characterizing Plaintiff's limitations. Ms. Golden's comments beneath her ratings simply provide additional insight into her perceptions of those limitations, without purporting to modify the ratings. Contrary to Plaintiff's contentions, Ms. Golden did not indicate that Plaintiff suffered from any "marked" or "severe" limitations. Plaintiff's attempt to recharacterize the form's content is without merit.

Plaintiff also relies on an evaluation completed by the Los Angeles Unified School District, Division of Special Education in

arguing that his limitations are "marked." This two-page assessment describes the nature of Plaintiff's limitations and concludes

> [Plaintiff] does present as a child with moderate delays in all areas of receptive, expressive and articulation development. He is a child who may benefit from special education services in a speech and language enriched program.

(AR 165.) Nothing in the description of Plaintiff's impairments or this conclusion suggests that Plaintiff's limitations are either "marked" or "severe."

Similarly, Plaintiff's reliance on a Preschool Team Assessment Report completed by Nikoline Loba is misplaced. (AR 161-63, 166.) Ms. Loba described both Plaintiff's abilities and his limitations, concluding,

> Using alternative measures of assessment [Plaintiff's] cognitive ability may be ... within the average range. Self help skills, and motor skills are his strengths at this time as reported by his mother and observation. [Plaintiff] appears to be delayed in pre[-]academics, social skills and communication skills, which may be affecting his ability to access a preschool curriculum. [Plaintiff] does qualify for special education services at this time as a child who [has] developmental delays of 25 percent in these areas. These delays appear to be adversely affecting his educational performance and cannot be corrected without special education services.

(AR 166.) Again, this assessment does not suggest that Plaintiff's limitations were "marked" or "severe."

Plaintiff essentially argues that the mere existence of the limitations translates into a "marked" impairment under the regulations. The reports Plaintiff cites reveal only that Plaintiff does have limitations, not that they are "marked." Plaintiff discusses at length the abilities a normal child of that age should have, arguing that Plaintiff's deficiencies in several areas clearly demonstrates the severity of his limitations. The parties do not dispute that Plaintiff has limitations; the ALJ found that his impairment was "severe" under the regulations. However, the record simply does not show that Plaintiff's impairments were "marked" or "severe," as required for a finding of functional equivalence.

The ALJ's conclusion that Plaintiff's impairment did not functionally equal the listings is supported by substantial evidence in the record. Plaintiff is not entitled to relief on this claim.

B. Substantial Evidence Supports the ALJ's Decision

Plaintiff contends that the ALJ's decision is not supported by substantial evidence because the ALJ did not adequately consider and clearly reject particular evidence in the record, and because the ALJ did not seek the opinion of a consulting pediatrician. (Joint Stip. 4.) As discussed below, Plaintiff's arguments are without merit.

1. The ALJ Adequately Considered the Record

In concluding that Plaintiff was not disabled, the ALJ relied on the opinion of a non-examining state agency physician, Dr. Grossman, who completed the Childhood Disability Evaluation Form on November 8, 2004. (AR 138-43.) Dr. Grossman opined that Plaintiff's severe impairments included speech and language delays, but that those impairments did not meet, medically equal, or functionally equal the listings. (AR 138.) The ALJ also discussed the opinion of a school

psychologist, Nikoline Loba, and referenced several other exhibits in the record in reaching his decision.

Plaintiff contends that the ALJ erred by failing to adequately discuss, and properly reject, several reports in the record. (Joint Stip. 4.) Specifically, Plaintiff claims the ALJ should have discussed the following documents in further detail: (1) the teacher questionnaire filled out by Ms. Golden, discussed above; (2) a Preschool Team Assessment Report completed by Nikoline Loba, also discussed above; (3) an Infant Toddler Preschool Programs speech and language report; and (4) a special education assessment plan, which included an individualized education program. (Joint Stip. 10.) Plaintiff acknowledges that the ALJ referenced Exhibit 3F, in which all of these documents are located, but Plaintiff asserts that "it is not clear in the decision which document in Exhibit 3F the ALJ was actually referring to...." (Joint Stip. 5.) Plaintiff argues that the ALJ should have given specific and legitimate reasons for rejecting each of these reports individually. (Joint Stip. 9-10.)

The Court first notes that ALJ is not required to discuss every piece of evidence in the record. *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984)(per curiam). Additionally, it is clear that the ALJ did consider the reports. The ALJ referenced Exhibit 3F not once, but twice in the decision. Each time, the ALJ discussed specific aspects of the reports in the exhibit, such as Ms. Loba's description of Plaintiff's impairments, Plaintiff's abilities in general, and his improvements over time. (AR 18-19.) The ALJ was not required to identify each report by name.

Moreover, the reports at issue are lay opinions regarding Plaintiff's limitations. Plaintiff acknowledges that these types of

reports do not receive the same weight and consideration as physicians' opinions. *See Jamerson v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997). (Joint Stip. 9.) Nevertheless, Plaintiff correctly notes that the ALJ must give some reason for rejecting even lay opinions in reaching a disability determination. *See Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). What Plaintiff fails to demonstrate is that the ALJ actually rejected these opinions. As discussed in detail above, the ALJ's findings are not inconsistent with any of these reports. The ALJ concluded that Plaintiff had a severe impairment of speech and language delay, but that the impairment did not meet, medically equal, or functionally equal the listings. (AR 17.) Nothing in the reports contradicts the ALJ's findings, and in fact those findings are supported by substantial evidence in the record. Accordingly, Plaintiff is not entitled to relief on this claim.

2. The ALJ Was Not Required to Obtain a Medical Opinion from a Different Physician

Plaintiff argues that the ALJ's reliance on Dr. Grossman's opinion was improper because Dr. Grossman is a surgeon rather than a pediatrician. (Joint Stip. 8.) The Social Security Act states, "In making any determination under this subchapter with respect to the disability of an individual who has not attained the age of 18 years ... the Commissioner of Social Security shall make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the disability of the individual ... evaluates the case of such individual." 42 U.S.C.A. § 1382c(a)(3)(I) (West 2008). Plaintiff contends that Dr. Grossman, as a surgeon, is not a qualified pediatrician, nor is there evidence that he "specializes in a field of medicine appropriate to the disability

of the individual." (Joint Stip. 8-9.)

In response, Defendant notes that a second consultant, Georgianne B. Huskey, S.L.E., also signed Dr. Grossman's evaluation of Plaintiff. (Joint Stip. 13; AR 139.) According to Defendant, the "S.L.E." after Ms. Huskey's name indicates that she is a Certified Speech and Language Specialist in the State of California. (*Id.*) The regulations state that a qualified speech and language pathologist is an acceptable medical source for determining whether a claimant suffers from a speech or language impairment. 20 C.F.R. § 416.913(a)(5). Furthermore, a speech and language specialist would certainly be an "individual who specializes in a field of medicine appropriate to the disability of the individual."

Plaintiff's single reference to Ms. Hurskey in the Joint Stipulation states that "there is no indication that this individual is a physician as they have not indicated any medical specialty." (Joint Stip. 9.) In the reply section of his argument on this issue, however, Plaintiff does not dispute Defendant's assertions regarding Ms. Huskey's qualifications as a speech and language specialist. Accordingly, the Court accepts Defendant's representation that the S.L.E. designation after Ms. Huskey's name indicates that she is in fact a certified speech and language specialist. The ALJ did not err by relying on this medical opinion.

The Court concludes that the ALJ's decision is supported by substantial evidence in the record. Plaintiff's arguments are without merit.

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C. The ALJ Gave Proper Weight to the Opinion of Plaintiff's Mother

On November 29, 2004, Plaintiff's mother, Cassandra Ivory, wrote a letter in support of Plaintiff's SSI claim. (AR 133-34.) In the letter, Ms. Ivory characterized Plaintiff as "slow," with a short attention span and impulsive behavior. She stated, "It is obvious that [Plaintiff] cannot function in a regular classroom setting because of his marked and severe functional limitations and disabilities that is hindering him." (AR 133.)

The ALJ rejected Ms. Ivory's statements in reaching the disability determination due to "inconsistencies between Ms. Ivory's opinion and the claimant's functional limitations" and because "her opinions and statements rest on non-medical factors." (AR 18.) The ALJ noted that Plaintiff's medical record did not show that he had marked and severe functional limitations, as claimed by Ms. Ivory. The ALJ concluded that Ms. Ivory's statements were not persuasive, and he disregarded them. (*Id.*)

Plaintiff argues that the ALJ's rejection of Ms. Ivory's lay opinion regarding his limitations was improper, because the ALJ did not provide specific examples of contradictions between her statements and the record. (Joint Stip. 27.) Plaintiff's mother, as a non-medical lay witness, can provide testimony about Plaintiff's symptoms and limitations, which the ALJ is required to consider. *See Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). "Lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *see also Dodrill v.*

Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993). An ALJ may appropriately reject a family member's opinion if it conflicts with the medical record. *Lewis*, 236 F.3d at 512; *Dodrill*, 12 F.3d at 918-19.

As discussed above, the ALJ rejected Ms. Ivory's opinion regarding the extent of Plaintiff's functional limitations because the record contradicted her statements. Specifically, the ALJ stated that the record showed Plaintiff did not suffer from "marked and severe functional limitations," as claimed by Ms. Ivory. (AR 19.) Plaintiff is correct that the ALJ did not explain in minute detail the particular pieces of evidence that specifically contradicted Ms. Ivory's claim. However, the decision does discuss the ALJ's reasons for concluding that Plaintiff's impairments did not lead to marked and severe functional limitations. The ALJ explained,

> The claimant's reports show that the claimant has demonstrated adequate functioning in his ability to complete most tasks with redirection and responded [*sic*]. The claimant's performance improved as he became more familiar with his environment and the therapist. (Exhibit 3F). Additional reports indicated that the claimant was able to brush his teeth, care for himself, feed himself, and perform activities of daily living. The claimant's fine motor skills were age level as well as his gross motor skills.

(AR 19.)

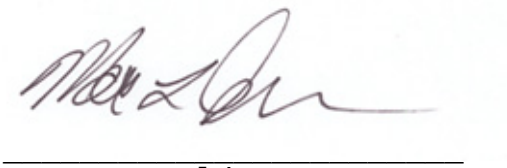
The ALJ did not specifically explain how Ms. Ivory's opinion that Plaintiff had "marked and severe functional limitations" was contradicted by the record. However, the ALJ was not required to provide an exhaustive, in-depth analysis of his rationale for rejecting

her opinion. The ALJ was only required to *expressly* reject the opinion and provide a "germane" reason for doing so. *Lewis*, 236 F.3d at 510-11. The ALJ complied with this obligation: he stated that Ms. Ivory's opinion was unpersuasive, and he explained that the record contradicted her opinion. The ALJ also discussed his reasons for concluding that Plaintiff's limitations were not marked. The ALJ was not required to do more, and his conclusions were supported by substantial evidence in the record. The ALJ did not err in his treatment of Ms. Ivory's lay opinion. Plaintiff is not entitled to relief on this claim.

IV. Conclusion

For the reasons stated above, the decision of the Social Security Commissioner is **AFFIRMED**.

Dated: October 21, 2008



Marc L. Goldman
United States Magistrate Judge