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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARINE WATERS O/B/O E.W.,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

NO. EDCV 07-1281 AGR

MEMORANDUM OPINION AND
ORDER

Carine Waters filed this action on October 12, 2007, on behalf of her son E.W.¹ At the same time, the Court granted Waters' application to be appointed guardian ad litem for E.W. (Dkt. No. 8.) Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before Magistrate Judge Rosenberg on November 1 and December 13, 2007. On June 19, 2008, the parties filed a Joint Stipulation ("JS") that addressed the disputed issues. The Court has taken the matter under submission without oral argument.

¹ The Court will refer to Carine Waters as Waters and to her son as E.W.

1 III.

2 **DISCUSSION**

3 **A. Child Definition of Disability**

4 “An individual under the age of 18 shall be considered disabled . . . if that
5 individual has a medically determinable physical or mental impairment, which
6 results in marked and severe functional limitations, and which can be expected to
7 result in death or which has lasted or can be expected to last for a continuous
8 period of not less than 12 months.” 42 U.S.C. § 1382c(C)(i).² An impairment is
9 “marked and severe” if it meets, medically equals, or functionally equals an
10 impairment listed in 20 C.F.R. § 404, Subpart P, Appendix I. 20 C.F.R. §
11 416.924(d)(1). A claimant “meets” a listed impairment if the claimant’s
12 impairment matches the listed impairment. *Id.* A claimant “medically equals” the
13 listed impairment by demonstrating medical findings that are of equal medical
14 significance to the listed impairment. 20 C.F.R. § 416.926(b).

15 A claimant “functionally equals” a listed impairment by showing either a
16 marked limitation in two functional domains (out of six) or an extreme limitation in
17 one domain. 20 C.F.R. § 416.926a(a); *See Warre v. Comm’r of the SSA*, 439
18 F.3d 1001, 1004 (9th Cir. 2006). The six domains are acquiring and using
19 information, attending and completing tasks, interacting and relating with others,
20 moving about and manipulating objects, caring for yourself, and health and
21 physical well-being. 20 C.F.R. § 416.926a(b)(1)(i-vi). A marked limitation is more
22 than moderate and less than extreme, and occurs when an impairment(s)
23 “interferes seriously with your ability to independently initiate, sustain, or complete
24 activities.” 20 C.F.R. § 416.926a(e)(2)(i). An extreme limitation occurs when an
25 impairment(s) “interferes very seriously with your ability to independently initiate,
26 sustain, or complete activities.” 20 C.F.R. § 416.926a(e)(3)(i).

27 _____
28 ² “[N]o individual under the age of 18 who engages in substantial gainful
activity . . . may be considered to be disabled.” 42 U.S.C. § 1382c(C)(ii).

1 **B. The ALJ's Findings**

2 E.W. was born on July 21, 2004. A.R. 14. He had severe impairments of
3 mild cerebral palsy and developmental delay. *Id.* E.W. did not meet, equal, or
4 functionally equal a listing. *Id.* With respect to the six domains, E.W. had less
5 than marked limitations in acquiring and using information, no limitation in
6 attending and completing tasks, no limitation in interacting and relating with
7 others, less than marked limitations in moving about and manipulating objects,
8 less than marked limitations in caring for himself, and less than marked limitations
9 in his health and physical well-being. A.R. 15-20.

10 **C. Plaintiff's Testimony and Questionnaire**

11 Waters argues that the ALJ did not consider lay testimony and
12 questionnaires. JS 4.

13 “If the ALJ wishes to discount the testimony of lay witnesses, he must give
14 reasons that are germane to each witness.” *Stout v. Comm’r*, 454 F.3d 1050,
15 1053 (9th Cir. 2006). “[W]here the ALJ’s error lies in a failure to properly discuss
16 competent lay testimony favorable to the claimant, a reviewing court cannot
17 consider the error harmless unless it can confidently conclude that no reasonable
18 ALJ, when fully crediting the testimony, could have reached a different disability
19 determination.” *Id.* at 1056.

20 Waters does not explain in what way the lay testimony/statements
21 contradict any of the ALJ’s findings. She does not connect the lay observations
22 to any of the six functional domains at issue. Waters has not demonstrated that
23 the ALJ discounted the oral or written lay statements.

24 On November 12, 2004, when E.W. was three months old, Waters
25 completed a Function Report. A.R. 64-68. On March 17, 2005, when E.W. was
26 almost eight months old, Waters completed a Function Report. A.R. 85-89. She
27 stated that E.W. had been given morphine while in her womb at about three
28

1 months.³ As a result, he has “withdrawals,” that include screaming, pulling out his
2 hair, and pulling out the hair of others. His parents have to give him medication
3 so he can sleep, and the medication doesn’t always work. The doctor has
4 decreased the amount of opium E.W. takes,⁴ and the withdrawal symptoms have
5 therefore gotten worse. According to Waters, it requires two people to take care
6 of Elijah. When they give him opium, “he daze in and out,” but when the
7 medication wears off, “its (sic) pure trouble.” A.R. 88-89.⁵

8 On November 8, 2006, at the hearing, when E.W. was a little over 2 years
9 and 3 months old, Waters testified that E.W. was having “muscle spasms in his
10 feet and the toes curling on top of one another, and he turns his feet in.” A.R.
11 288. She testified that “when he’s walking he will – if it starts happening, he will
12 drop right then and there, and complain of the pain in his foot, and I have to stop
13 and massage it.” A.R. 288-289. She testified that E.W. “tightens up his fists
14 really tight, and he’s squeezing like he’s trying to take control. . . . [H]e does that
15 a lot. And then he attack. He’ll scream and then he’ll go for your face.” A.R.
16 288.

17
18 ³ E.W. was born with neonatal abstinence syndrome because of “opiate
19 exposure in utero (mother had chronic pancreatitis and was taking large amounts
20 of MS contin [morphine].” A.R. 109. Thus, E.W. “became addicted” to the pain
21 medication before he was born and had to be slowly weaned from the effects of
22 his morphine addiction. A.R. 140.

23 ⁴ On February 25, 2005, when E.W. was seven months old, Dr. Luke, a
24 treating physician, advised Waters that E.W. “does not need any more tincture of
25 opium.” A.R. 154. Dr. Luke acknowledged that Waters “still hesitates to do so.”
26 *Id.* The records indicate that, by 2006, E.W. was no longer on that medication.
27 A.R. 230 (1/27/06, “has stopped tincture of opium”); see also A.R. 222 (5/24/06).

28 ⁵ Waters mentions statements made by her common-law husband, but
does not cite to any document in the administrative record and does not describe
the substance of any of his statements. There is a disability report that states
E.W. “has been going thru withdrawals - shaking and screaming.” A.R. 90. Even
assuming this report is from Waters’ common-law husband, it is cumulative and
does not alter the analysis. See *Zerba v. Comm’r of Social Security*
Administration, 279 Fed. Appx. 438, 440 (9th Cir. 2008) (failure to address
husband’s cumulative lay testimony is harmless error); *Rohrer v. Astrue*, 279 Fed.
Appx. 437, 437 (9th Cir. 2008) (cumulative questionnaire).

1 In her reply, Waters argues that her descriptions of foot cramps, making
2 fists, screaming and going for a parent's face "may have an etiology completely
3 separate and distinct from cerebral palsy." JS 8-9. Waters' argument is not
4 supported by any citation to the administrative record and is speculative. E.W.
5 was diagnosed with mild cerebral palsy, with greater involvement of the lower
6 extremities than the upper extremities. A.R. 224; see also A.R. 255. In the
7 medical records dated near Waters' March 2005 function report, it was noted that
8 E.W. keeps his hands in fists. A.R. 141. On May 24, 2006, Waters reported that
9 E.W. "cries and screams in the middle of the night sometimes and requires some
10 comforting." A.R. 223. Moreover, Waters concedes that cerebral palsy "affects
11 muscle movement" and may cause "stiff or tight muscles and exaggerated
12 reflexes (spasticity)." JS 8 n.3.

13 Accordingly, the ALJ did not err. Any error was harmless, as no
14 reasonable ALJ, even when fully crediting the lay testimony/statements, could
15 have reached a different disability determination under the applicable legal
16 standards. See *Stout*, 454 F.3d at 1056.

17 **D. E.W.'s Medications**

18 Waters argues that the ALJ failed to consider the side effects of E.W.'s
19 medications and the impact the side effects could have on E.W.'s ability to obtain
20 and sustain full-time competitive employment. JS 10. For a toddler, the issue of
21 ability to sustain full-time competitive employment is irrelevant. Waters does not
22 connect her argument about side effects to any of the six functional domains at
23 issue.

24 Waters relies on a Disability Report Appeal form completed on May 16,
25 2005. A.R. 90-96. In Section 2 of the form, it identifies the following change in
26 E.W.'s condition: "has been going thru withdrawals – shaking and screaming
27 (sic)." A.R. 90. The date of the change in condition was December 15, 2004,
28 when E.W. would have been almost four months old. *Id.* According to the form,

1 E.W. was prescribed Phenobarbital and opium, the side effects of which included
2 constipation, sensitivity to light, headaches, dehydration, and sleepiness. A.R.
3 93.

4 According to the medical records, as of December 22, 2004, when E.W.
5 was five months old, he was no longer prescribed Phenobarbital. *Compare* A.R.
6 178 (10/15/04 exam showing prescription of Phenobarbital *with* 168 (12/22/04
7 exam showing no prescription of Phenobarbital); *see also* A.R. 153 (2/25/05
8 exam (“Lately he was off the phenobarbital and currently he is only on minute
9 amount of tincture of opium”). E.W. was also weaned off of the opium. A.R. 153
10 (showing only tincture of opium being given as of 2/25/05); A.R. 230 (1/27/06,
11 “has stopped tincture of opium”).

12 In analyzing the six domains, the ALJ relied upon evaluations of E.W.
13 during the period he was taking medications and would have been experiencing
14 alleged side effects. The ALJ relied upon Dr. Taylor’s evaluation dated February
15 2, 2005, which noted that, according to Waters, E.W. was on Phenobarbital and
16 opium. A.R. 15, 17, 18, 141. The ALJ also relied on an evaluation dated
17 December 9, 2005 (A.R. 17, A.R. 280-283) and E.W.’s treatment records during
18 the entire time period. A.R. 15-16.

19 In addition, the ALJ relies upon evaluations performed after E.W. stopped
20 taking Phenobarbital and opium, which would show after effects.⁶ The ALJ relied
21 upon an evaluation dated May 4, 2006 (A.R. 15-20, A.R. 216-219), and an
22 evaluation dated December 28, 2005. A.R. 17, 270-278; A.R. 273 (noting no
23 current medications).

24 Thus, to the extent that any error occurred, it was harmless. As stated
25 above, Waters does not show how any side effects would change the ALJ’s
26 findings in the six domains based on E.W.’s performance in evaluations

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28 ⁶ As of May 2006, the ALJ noted that E.W. had regular bowel movements.
A.R. 19-20.

1 conducted both while E.W. was on Phenobarbitol and/or opium, and after those
2 medications ceased. Substantial evidence supports the ALJ's decision, and any
3 error does not negate the validity of the ALJ's findings in the six domains.

4 *Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1162-63 (9th Cir. 2008) (harmless
5 error analysis). Stated differently, no reasonable ALJ, even when fully crediting
6 the side effects, could have reached a different disability determination under the
7 applicable legal standards. See *Stout*, 454 F.3d at 1056.

8 **IV.**

9 **ORDER**

10 IT IS HEREBY ORDERED that Commissioner's decision is affirmed.

11 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
12 Order and the Judgment herein on all parties or their counsel.

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15 DATED: October 30, 2008

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ALICIA G. ROSENBERG
United States Magistrate Judge