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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

|                               |   |                     |
|-------------------------------|---|---------------------|
| NOEL BUCKLEY O/B/O K.J.B.,    | ) | No. EDCV 08-1523 CW |
|                               | ) |                     |
| Plaintiff,                    | ) | DECISION AND ORDER  |
| v.                            | ) |                     |
|                               | ) |                     |
| MICHAEL J. ASTRUE,            | ) |                     |
| Commissioner, Social Security | ) |                     |
| Administration,               | ) |                     |
|                               | ) |                     |
| Defendant.                    | ) |                     |
|                               | ) |                     |

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and this matter remanded for further proceedings.

**I. BACKGROUND**

This action was brought on behalf of Plaintiff K.J.B., who was born on February 28, 2000. [AR 13.] Plaintiff alleges disability on the basis of asthma, obstructive sleep apnea syndrome, hearing problems, allergies and concentration problems. [AR 104.]



1 **IV. STANDARD OF REVIEW**

2 Under 42 U.S.C. § 405(g), a district court may review the  
3 Commissioner's decision to deny benefits. The Commissioner's (or  
4 ALJ's) findings and decision should be upheld if they are free of  
5 legal error and supported by substantial evidence. However, if the  
6 court determines that a finding is based on legal error or is not  
7 supported by substantial evidence in the record, the court may reject  
8 the finding and set aside the decision to deny benefits. See Aukland  
9 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.  
10 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240  
11 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,  
12 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
13 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada  
14 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

15 "Substantial evidence is more than a scintilla, but less than a  
16 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
17 which a reasonable person might accept as adequate to support a  
18 conclusion." Id. To determine whether substantial evidence supports  
19 a finding, a court must review the administrative record as a whole,  
20 "weighing both the evidence that supports and the evidence that  
21 detracts from the Commissioner's conclusion." Id. "If the evidence  
22 can reasonably support either affirming or reversing," the reviewing  
23 court "may not substitute its judgment" for that of the Commissioner.  
24 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

25 **V. DISCUSSION**

26 **A. THE THREE-STEP EVALUATION FOR CHILDREN'S DISABILITY**

27 A claimant under the age of eighteen years shall be considered  
28 disabled if he or she has a medically determinable impairment which

1 results in marked and severe functional limitations, and which can be  
2 expected to result in death or which has lasted or can be expected to  
3 last for a continuous period of at least twelve months. Merril ex  
4 rel. Merrill v. Apfel, 224 F.3d 1083, 1085 (9th Cir. 2000)(citing 42  
5 U.S.C. § 1382c(a)(3)(C)(i)).

6 Children's disability claims are evaluated using a three-step  
7 test:

8 Step one: If the child is engaging in substantial gainful  
9 activity, the child will be found "not disabled" regardless of  
his medical condition, age, education or work experience.

10 Step two: If the child is not engaging in substantial gainful  
11 activity, the next inquiry is to determine whether the child has  
12 a "severe" impairment. If the impairment is a slight abnormality  
13 or combination of slight abnormalities which "causes no more than  
14 minimal functional limitations", the child will be determined not  
to have a "severe" impairment and, therefore, "not disabled".  
If the child has a "severe" impairment, the inquiry proceeds to  
step three.

15 Step three: The child's impairment must meet, medically equal or  
16 functionally equal the severity of an impairment in 20 C.F.R. Pt.  
404, Subpt. P, Appendix 1. If the child's impairment meets,  
17 medically equals, or functionally equals the severity of a listed  
impairment, and the impairment meets the twelve month durational  
requirement, then the child is found to be "disabled".  
Otherwise, the child will be found "not disabled".

18 20 C.F.R. § 416.924.

19 Even if an impairment does not meet the requirements of, or is  
20 not medically equal to, a listed impairment, the claimant may be  
21 disabled if his or her impairment or combination of impairments is  
22 functionally equivalent to a listed impairment. 20 C.F.R. § 416.926a;  
23 see also Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th  
24 Cir. 2003); Augustine ex rel. Ramirez v. Astrue, 536 F. Supp. 2d 1147,  
25 1151 (C.D. Cal. 2008); Smith ex rel. Enge v. Massanari, 139 F. Supp.  
26 2d 1128, 1135 (C.D. Cal. 2001). Functional equivalence is measured by  
27 assessing the claimant's ability to function in terms of the following  
28

1 six domains, which are "broad areas of functioning intended to capture  
2 all of what a child can or cannot do": (i) acquiring and using  
3 information; (ii) attending and completing tasks; (iii) interacting  
4 and relating with others; (iv) moving about and manipulating objects;  
5 (v) caring for oneself; and (vi) health and physical well-being. 20  
6 C.F.R. § 416.926a(b)(1). An impairment or combination of impairments  
7 functionally equals a Listing if it results in "marked" limitations in  
8 two domains of functioning or an "extreme" limitation in one domain.  
9 20 C.F.R. § 416.926a(a).

10 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

11 Here, the ALJ found that Plaintiff had no history of substantial  
12 gainful activity (step one); and that Plaintiff had "severe"  
13 impairments, namely obstructive sleep apnea, conductive hearing loss,  
14 rhinitis and asthma (step two). [AR 13.] At step three, the ALJ found  
15 that Plaintiff did not have an impairment or combination of  
16 impairments that meets, medically equals, or functionally equals a  
17 listed impairment (step three). [Id.] As to the six specific domains  
18 of functioning for childhood disability claims, the ALJ found that  
19 Plaintiff's limitations included the following: (1) significant but  
20 less than marked limitation in acquiring and using information; (2)  
21 significant but less than marked limitation in attending and  
22 completing tasks; (3) no significant limitation in interacting and  
23 relating with others; (4) no significant limitation in moving about  
24 and manipulating objects; (5) no significant limitation in the ability  
25 to care for himself; and (6) significant but less than marked  
26 limitation in health and physical well-being. [AR 15-20.]  
27 Accordingly, Plaintiff was found not "disabled" as defined by the  
28 Social Security Act. [AR 20.]

1           **C. ISSUES IN DISPUTE**

2           The parties' Joint Stipulation identifies the following disputed  
3 issues:

- 4           1. Whether the ALJ properly considered the testimony of  
5           Plaintiff's mother;  
6           2. Whether the ALJ properly considered the opinion of  
7           Plaintiff's teacher; and  
8           3. Whether the ALJ properly developed the record.

9           [JS 2.]

10          As discussed below, Issue One is dispositive.

11           **D. TESTIMONY OF PLAINTIFF'S MOTHER**

12          At the administrative hearing, Plaintiff's mother testified that  
13 Plaintiff was unable to sleep at night and that he stops breathing.  
14 [AR 38.] Plaintiff's mother testified that the condition began when  
15 Plaintiff was three years old and that several remedies had been  
16 explored, including three sleep studies. [Id.] Plaintiff's mother  
17 also completed questionnaires stating, among other things, that with  
18 respect to the six domains of functioning referenced above, Plaintiff  
19 has shortness of breath, is often sleepy, has hearing problems, speaks  
20 too loudly, has trouble understanding, is inattentive, has trouble  
21 with concentration, is hyperactive in class, cannot care for himself  
22 without help, and fails to listen. [AR 128, 141-47.]

23          The administrative decision did not directly reference the  
24 testimony of Plaintiff's mother but concluded that, "statements  
25 concerning the intensity, persistence and limiting effects of the  
26 claimant's symptoms are not credible to the extent they are  
27 inconsistent with the finding that the claimant has not had an  
28 impairment or combination of impairments that functionally equals the

1 listings." [AR 14.] Plaintiff asserts that the ALJ's decision did not  
2 properly account for the testimony of Plaintiff's mother. [JS 3-4.]

3 The testimony of lay witnesses, including family members, about  
4 their own observations regarding the claimant's impairments  
5 constitutes competent evidence that must be taken into account and  
6 evaluated by the Commissioner in the disability evaluation. Robbins  
7 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006); Stout v.  
8 Commissioner, Social Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006).  
9 Such testimony cannot be discounted unless the ALJ gives reasons that  
10 are germane to that witness.<sup>1</sup> Carmickle v. Commissioner, Social Sec.  
11 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008); Stout v. Commissioner,  
12 454 F.3d at 1053 (citing Dodrill v. Shalala, 12 F.3d 915, 919 (9th  
13 Cir. 1993)); Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001).

14 Where the claimant is a child who is unable to adequately describe his  
15 symptoms, the Commissioner accepts the testimony of a person most  
16 familiar with the child's condition, such as a parent. 20 C.F.R. §  
17 416.928(a); Smith ex rel. Enge v. Massanari, 139 F. Supp. 2d at 1134.  
18 In such circumstances, the testimony of parents is a particularly  
19 valuable source of information in the evaluation because they usually  
20 see the child every day. 20 C.F.R. § 416.924a(a)(2)(i).

21 In this case, the ALJ's implicit rejection of the testimony of  
22 Plaintiff's mother without reasons germane to this witness did not

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24 <sup>1</sup> Although Plaintiff asserts that the correct legal standard for  
25 evaluation of the testimony of Plaintiff's mother is the "clear and  
26 convincing" credibility standard of Bunnell v. Sullivan, 947 F.2d 341,  
27 345 (9th Cir. 1991)(en banc), the Ninth Circuit has clearly held that  
28 testimony by third parties, including parents of child claimants, is  
evaluated under the standard applicable to lay witnesses. See Merrill  
ex rel. Merrill v. Apfel, 224 F.3d at 1086 (citing Dodrill v. Shalala,  
12 F.3d at 919); Smith ex rel. Enge v. Massanari, 139 F. Supp. 2d at  
1134.

1 satisfy this standard. Proper consideration of this evidence was  
2 particularly important because Plaintiff is young, unable to  
3 articulate his own symptoms, and entirely reliant on his mother to  
4 present his claim. See Kha Xiong ex rel. Pha Yang v. Astrue, 2008 WL  
5 4196823 at \*11 (E.D. Cal. 2008)(reversing ALJ's decision where  
6 evaluation of child claimant's abilities in functional domains did not  
7 account for relevant testimony of claimant's mother). Under these  
8 circumstances, remand for further proceedings is appropriate. Merrill  
9 ex rel. Merrill v. Apfel, 224 F.3d at 1086 (remanding for evaluation  
10 of child claimant's claim under Listing of Impairments where, among  
11 other things, ALJ failed to provide specific explanation for rejecting  
12 testimony of claimant's mother); Smith ex rel. Enge v. Massanari, 139  
13 F. Supp. 2d at 1135 (same).

14 **E. REMAND FOR FURTHER PROCEEDINGS**

15 The decision whether to remand for further proceedings is within  
16 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,  
17 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by  
18 further proceedings, or where the record has been fully developed, it  
19 is appropriate to exercise this discretion to direct an immediate  
20 award of benefits. Harman, 211 F.3d at 1179 (decision whether to  
21 remand for further proceedings turns upon their likely utility).  
22 However, where there are outstanding issues that must be resolved  
23 before a determination can be made, and it is not clear from the  
24 record that the ALJ would be required to find the claimant disabled if  
25 all the evidence were properly evaluated, remand is appropriate. Id.  
26 Here, as set out above, outstanding issues remain before a finding of  
27  
28



1 disability can be made.<sup>2</sup> Accordingly, remand is appropriate.

2 **VI. ORDERS**

3 Accordingly, **IT IS ORDERED** that:

4 1. The decision of the Commissioner is **REVERSED**.

5 2. This action is **REMANDED** to defendant, pursuant to Sentence  
6 Four of 42 U.S.C. § 405(g), for further proceedings as discussed  
7 above.

8 3. The Clerk of the Court shall serve this Decision and Order  
9 and the Judgment herein on all parties or counsel.

10  
11 DATED: November 3, 2009

12 \_\_\_\_\_/S/\_\_\_\_\_  
13 CARLA M. WOEHRLE  
14 United States Magistrate Judge  
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27 <sup>2</sup> None of the remaining issues presented in the parties' Joint  
28 Stipulation, assuming they were meritorious, would clearly direct a  
finding of disability on the basis of the existing record.