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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,)	AMENDED
)	DECISION AND ORDER ¹
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

¹ The Decision and Order is amended to clarify a sentence on page 6, line 24.

1 born on February 28, 2000. [AR 13.] Plaintiff alleges disability on
2 the basis of asthma, obstructive sleep apnea syndrome, hearing
3 problems, allergies and concentration problems. [AR 104.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on October 29, 2008, and filed
6 on November 7, 2008. On April 7, 2009, Defendant filed an answer and
7 Plaintiff's Administrative Record ("AR"). On August 10, 2009, the
8 parties filed their Joint Stipulation ("JS") identifying matters not
9 in dispute, issues in dispute, the positions of the parties, and the
10 relief sought by each party. On August 18, 2009, the Joint
11 Stipulation was withdrawn, and a second Joint Stipulation was filed
12 that was identical to the initial Joint Stipulation except with
13 redactions of Plaintiff's name. This matter has been taken under
14 submission without oral argument.

15 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

16 Plaintiff applied for supplemental security income ("SSI") under
17 Title XVI of the Social Security Act on October 7, 2005, alleging
18 disability since February 18, 2003. [AR 10, 82.] After the
19 application was denied initially and on reconsideration, Plaintiff
20 requested an administrative hearing, which was held on November 15,
21 2007, before Administrative Law Judge ("ALJ") Lowell Fortune. [AR
22 31.] The hearing was continued to obtain additional medical records.
23 [AR 49.] A supplemental hearing was held on January 11, 2008, before
24 ALJ Fortune. [AR 51.] Plaintiff appeared with counsel, and testimony
25 was taken from Plaintiff's mother and medical expert Colin Hubbard.
26 [AR 52.] The ALJ denied benefits in a decision dated May 23, 2008.
27 [AR 10-20.] When the Appeals Council denied review on August 29,
28 2008, the ALJ's decision became the Commissioner's final decision. [AR

1 2.]

2 **IV. STANDARD OF REVIEW**

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

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

26 **V. DISCUSSION**

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

28 A claimant under the age of eighteen years shall be considered

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

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

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

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

20 Step three: The child's impairment must meet, medically equal or
21 functionally equal the severity of an impairment in 20 C.F.R. Pt.
22 404, Subpt. P, Appendix 1. If the child's impairment meets,
23 medically equals, or functionally equals the severity of a listed
24 impairment, and the impairment meets the twelve month durational
25 requirement, then the child is found to be "disabled".
26 Otherwise, the child will be found "not disabled".

27 20 C.F.R. § 416.924.

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

1 assessing the claimant's ability to function in terms of the following
2 six domains, which are "broad areas of functioning intended to capture
3 all of what a child can or cannot do": (i) acquiring and using
4 information; (ii) attending and completing tasks; (iii) interacting
5 and relating with others; (iv) moving about and manipulating objects;
6 (v) caring for oneself; and (vi) health and physical well-being. 20
7 C.F.R. § 416.926a(b)(1). An impairment or combination of impairments
8 functionally equals a Listing if it results in "marked" limitations in
9 two domains of functioning or an "extreme" limitation in one domain.
10 20 C.F.R. § 416.926a(a).

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

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

1 Social Security Act. [AR 20.]

2 **C. ISSUES IN DISPUTE**

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

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

10 [JS 2.]

11 As discussed below, Issue One is dispositive.

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

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

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

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

4 The testimony of lay witnesses, including family members, about
5 their own observations regarding the claimant's impairments
6 constitutes competent evidence that must be taken into account and
7 evaluated by the Commissioner in the disability evaluation. Robbins
8 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006); Stout v.
9 Commissioner, Social Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006).
10 Such testimony cannot be discounted unless the ALJ gives reasons that
11 are germane to that witness.² Carmickle v. Commissioner, Social Sec.
12 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008); Stout v. Commissioner,
13 454 F.3d at 1053 (citing Dodrill v. Shalala, 12 F.3d 915, 919 (9th
14 Cir. 1993)); Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001).

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

22 In this case, the ALJ's implicit rejection of the testimony of
23

24 ² 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 Plaintiff's mother without reasons germane to this witness did not
2 satisfy this standard. Proper consideration of this evidence was
3 particularly important because Plaintiff is young, unable to
4 articulate his own symptoms, and entirely reliant on his mother to
5 present his claim. See Kha Xiong ex rel. Pha Yang v. Astrue, 2008 WL
6 4196823 at *11 (E.D. Cal. 2008)(reversing ALJ's decision where
7 evaluation of child claimant's abilities in functional domains did not
8 account for relevant testimony of claimant's mother). Under these
9 circumstances, remand for further proceedings is appropriate. Merrill
10 ex rel. Merrill v. Apfel, 224 F.3d at 1086 (remanding for evaluation
11 of child claimant's claim under Listing of Impairments where, among
12 other things, ALJ failed to provide specific explanation for rejecting
13 testimony of claimant's mother); Smith ex rel. Enge v. Massanari, 139
14 F. Supp. 2d at 1135 (same).

15 **E. REMAND FOR FURTHER PROCEEDINGS**

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

1 disability can be made.³ 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 _____
28 ³ None of the remaining issues presented in the parties' Joint Stipulation, assuming they were meritorious, would clearly direct a finding of disability on the basis of the existing record.