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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 MARIA GONZALES
8 *OBO J.C.G.*,

9 Plaintiff,

10 v.

11
12 CAROLYN W. COLVIN,
13 Commissioner of Social Security,

14 Defendant.
15

No. 1:15-CV-03100-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

16 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
17 No. 16, 21. Attorney D. James Tree represents Marie Gonzales (Plaintiff), and
18 Special Assistant United States Attorney Leisa A. Wolf represents the
19 Commissioner of Social Security (Defendant). The parties have consented to
20 proceed before a magistrate judge. ECF No. 5. After reviewing the administrative
21 record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion
22 for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

23 **JURISDICTION**

24 On August 18, 2011, Plaintiff filed an application for Supplemental Security
25 Income (SSI) benefits on behalf of a child under age 18, with an alleged disability
26 onset date of December 3, 2000. Tr. 291-296. Plaintiff listed the child's disabling
27 conditions as hip problems and left leg and shoulder pain. Tr. 332.

28 Plaintiff's claim was denied initially and on reconsideration, and she requested a

1 hearing before an administrative law judge (ALJ). Tr. 137-139, 143-145, 146.

2 On June 21, 2013, ALJ Ilene Sloan held a hearing, at which medical expert,
3 Arthur Brovender, M.D., and Plaintiff, represented by counsel, and the minor child
4 testified. Tr. 41-66. A second hearing was held on November 20, 2013, at which
5 medical expert, John Rasmussen, M.D., Plaintiff, and the minor child testified. Tr.
6 67-99. On January 9, 2014, the ALJ issued a decision finding Plaintiff not
7 disabled. Tr. 19-34. The Appeals Council declined review on April 13, 2015. Tr.
8 1-8. The ALJ's January 9, 2014, decision became the final decision of the
9 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
10 405(g). Plaintiff filed this action for judicial review on June 11, 2015. ECF No. 1,
11 7.

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing transcript, the
14 ALJ's decision, and the briefs of the parties and thus, they are only briefly
15 summarized here. At the time of application for benefits, the child was ten years
16 old. Tr. 291. The minor child was diagnosed with left developmental hip
17 dislocation as an infant. Tr. 497-498, 506. She had a left hip open reduction and
18 Pemberton osteotomy in December of 2003. Tr. 479. In September of 2009, she
19 underwent a triple innominate osteotomy and femoral varus derotational
20 osteotomy. Tr. 606. She had hardware removed by an operation in December
21 2009. Tr. 514. Following the third operation, it was noted that she had a 2 cm leg
22 length discrepancy on the left. Tr. 517.

23 At the first hearing, the child testified that "when I'm doing [physical
24 education], I'll get pain again and I'll try to keep on walking but then the pain
25 really comes." Tr. 47. "I cannot kick the ball because, like, I can't play like other
26 kids, like, I don't know how to explain it," and the child continued:

27 If they hurt me, like, the doctor said that I'll start bleeding and all that
28 so, like, I can't play rough sports, like, basketball, soccer or any games,

1 have “a medically determinable physical or mental impairment, which results in
2 marked and severe functional limitations, and which can be expected to result in
3 death or which has lasted or can be expected to last for a continuous period of not
4 less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i). The Social Security
5 Administration has enacted a three step sequential analysis to determine whether a
6 child is eligible for SSI benefits on the basis of a disability. 20 C.F.R. §
7 416.924(a). First, the ALJ considers whether the child is engaged in “substantial
8 gainful activity.” 20 C.F.R. § 416.924(b). Second, the ALJ considers whether the
9 child has a “medically determinable impairment that is severe,” which is defined as
10 a slight abnormality or a combination of slight abnormalities that causes more than
11 minimal functional limitations. 20 C.F.R. § 416.924(c). Finally, if the ALJ finds a
12 severe impairment, she must then consider whether the impairment “medically
13 equals” or “functionally equals” a disability listed in the regulatory “Listing of
14 Impairments.” 20 C.F.R. § 416.924(d). An impairment is functionally equivalent
15 to a listed impairment if it results in marked limitations in two areas of functioning
16 or in extreme limitations in one area of functioning. 20 C.F.R. § 416.926a(a). An
17 impairment is a “marked limitation” if it “seriously interferes with [a person’s]
18 ability to independently initiate, sustain, or complete activities.” 20 C.F.R. §
19 416.926a(e)(2)(i). An “extreme limitation” is defined as a limitation that
20 “interferes very seriously with [a person’s] ability to independently initiate,
21 sustain, or complete activities.” 20 C.F.R. § 416.926a(e)(3)(i).

22 In determining whether an impairment is functionally equals a listing, the
23 ALJ assesses the child’s functioning in six domains in terms of her ability to: (1)
24 acquire and use information; (2) attend and complete tasks; (3) interact and relate
25 with others; (4) move about and manipulate objects; (5) care for oneself, and (6)
26 her general health and physical well-being. 20 C.F.R. § 416.926a(b)(1).

27 **ALJ’S FINDINGS**

28 At step one of the sequential evaluation process, the ALJ found that the child

1 had never engaged in substantial gainful activity. Tr. 22. At step two, the ALJ
2 found that the child suffered from the severe impairment of left congenital hip
3 dysplasia. *Id.* At step three, the ALJ found that the child’s impairments, alone and
4 in combination, did not meet or functionally equal one of the listed impairments.
5 Tr. 24. The ALJ concluded that the child did not have an “extreme” limitation in
6 any domain of functioning or a “marked” limitation in two domains of functioning.
7 Tr. 28-33. Accordingly, the ALJ concluded that the child was not disabled within
8 the meaning of the Social Security Act since the date of the application, August 18,
9 2011. Tr. 33.

10 ISSUES

11 The question presented is whether substantial evidence supports the ALJ’s
12 decision denying benefits and, if so, whether that decision is based on proper legal
13 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider the
14 minor child’s credibility, (2) failing to properly consider Plaintiff’s credibility, (3)
15 failing to properly consider and weigh the opinion of the school nurse, (4) giving
16 great weight to teacher questionnaires, and (5) failing to properly weigh medical
17 source opinions.

18 DISCUSSION

19 A. Credibility of Minor Child

20 Plaintiff argues that the ALJ erred in finding the minor child less than fully
21 credible because the evidence cited to support the credibility determination
22 predated the date of onset, as amended in the motion for summary judgment. ECF
23 No. 16 at 6-7.

24 Plaintiff attempts to amend the date of onset in her Motion for Summary
25 Judgment. ECF No. 16 at 1. This Court is limited to a review of the final decision
26 of the Commissioner. 42 U.S.C. § 405(g). Here, the ALJ’s decision is the final
27 decision of the Commissioner, and the ALJ’s decision is for the time period of
28 August 18, 2011, to January 9, 2014. Tr. 33. Therefore, the Court will review the

1 ALJ's decision for the same time period. Plaintiff cannot limit the relevant
2 evidence by minimizing the relevant time period the ALJ is to consider after the
3 fact. Therefore, Plaintiff's argument is without merit and the Court will not disturb
4 the ALJ's determination.

5 **B. Credibility of Plaintiff**

6 Plaintiff challenges the ALJ's finding that she was less than fully credible.
7 ECF No. 16 at 8.

8 Plaintiff is the parent of the claimant child. The child testified at the June
9 21, 2013, hearing regarding her pain. Tr. 47-56. Since the child was able to testify
10 and describe her symptoms, Plaintiff's testimony qualifies as the testimony of a lay
11 witness and not the testimony of a claimant. *See* S.S.R. 95-5p,

12 [I]n the case of an individual under age 18 who is unable to
13 adequately describe his or her symptoms, the description of the
14 symptom(s) given by the person who is most familiar with the
15 individual, such as a parent, other relative, or guardian, will be
16 accepted as a statement of the individual's symptoms.

17 The testimony of lay witnesses, including family members, about their
18 observations of the claimant's impairments must be considered by the ALJ.
19 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006); *Smolen v. Chater*,
20 80 F.3d 1273, 1288 (9th Cir. 1996); *Sprague*, 812 F.2d at 1232. Family members
21 who see the claimant on a daily basis are competent to testify as to their
22 observations. *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1298
23 (9th Cir. 1999); *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). If the ALJ
24 chooses to reject or discount the testimony of lay witnesses, she must give reasons
25 that are germane to each witness. *Regennitter*, 166 F.3d at 1298; *Dodrill*, 12 F.3d
26 at 919.

27 The ALJ concluded Plaintiff's testimony was (1) inconsistent with the
28 longitudinal record, which showed an improvement in symptoms, and (2)

1 inconsistent with Ms. Gonzalez’s lack of follow-up treatment indicating she
2 believed the child was functioning fine and her symptoms were not as disabling as
3 alleged. Tr. 26.

4 The ALJ’s first reason for finding Plaintiff less than fully credible, that it
5 was inconsistent with the longitudinal record, is not a legally sufficient reason.
6 The Ninth Circuit has held that an ALJ may discount lay testimony if it conflicts
7 with the medical evidence in the record. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th
8 Cir. 2001); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005);
9 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). But, the ALJ failed to
10 provide any specifics on how Plaintiff’s testimony was inconsistent with the
11 longitudinal record, suggesting that the ALJ was asserting that Plaintiff’s
12 statements were not corroborated by the longitudinal record. It is improper for the
13 ALJ to discredit testimony of a lay witness because it was not supported by
14 medical evidence in the record. *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.
15 2009). Either way, the ALJ’s reason is insufficient. If the testimony is
16 inconsistent with the record, the ALJ’s lack of specificity in how it was
17 inconsistent is an assertion that cannot be supported by substantial evidence, and if
18 the testimony was not corroborated by the longitudinal record, that rationale is not
19 legally sufficient under *Bruce*. However, any error resulting from this reason for
20 finding Plaintiff less than fully credible is harmless because the ALJ’s second
21 reason is legally sufficient. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th
22 Cir. 2008) (an error is harmless when “it is clear from the record that the . . . error
23 was inconsequential to the ultimate nondisability determination”).

24 The ALJ’s second reason for finding Plaintiff less than fully credible, that
25 her testimony was inconsistent with her lack of follow-up treatment indicating she
26 believed the child was functioning fine and her symptoms were not as disabling as
27 alleged, is a legally sufficient reason. The ALJ cited Exhibit 4F, Page 8 (Tr. 499),
28 which is a report from Kyle Heisey, M.D., dated January 17, 2003. Tr. 26. In the

1 report, the child's father indicated that he and her mother decided against surgery
2 because the child was walking fine. Tr. 499. Plaintiff objects to reliance on this
3 report to support the ALJ's conclusion because the report was created ten years
4 prior to the amended date of onset. ECF No. 16 at 8. As discussed above, the
5 relevant time period of the ALJ's decision was the date of application, August 18,
6 2011, through the date of the decision, January 9, 2014. Tr. 33-34. The Court will
7 not accept an after-the-fact narrowed relevant period of time in an attempt to limit
8 the relevant evidence upon judicial review. The Court acknowledges that the 2003
9 medical reports predate the application date by eight years, but Plaintiff alleged
10 disability from December 3, 2000. Therefore, the 2003 report can be used to
11 assess Plaintiff's credibility even if it predates the relevant time period. *See*
12 *Smolen*, 80 F.3d at 1284 (in determining credibility, the ALJ may consider
13 "ordinary techniques of credibility evaluation," such as a reputation for lying, prior
14 inconsistent statements, and other testimony by that appears less than candid). As
15 such, the ALJ's determination that Plaintiff is less than fully credible is without
16 harmful error.

17 **C. School Nurse**

18 Plaintiff challenges the weight the ALJ gave to the opinion of the child's
19 school nurse, Ashley Couch, RN. ECF No. 16 at 8-12.

20 When it comes to opinion evidence, there is a distinction between acceptable
21 medical sources and other sources. See S.S.R. 06-03p. "Accepted medical
22 sources" include licensed physicians, licensed psychologists, licensed optometrists,
23 licensed podiatrists, and qualified speech-language pathologists. 20 C.F.R. §
24 416.913(a). "Other sources" include nurse practitioners, physicians' assistants,
25 therapists, teachers, social workers, spouses and other non-medical sources. 20
26 C.F.R. § 416.913(d). Ms. Couch is a nurse and therefore an "other source." The
27 ALJ is required to consider observations by "other sources" regarding how an
28 impairment affects a claimant's ability to work. To reject her testimony the ALJ

1 was only required to provide reasons germane to her as a witness. *Nguyen v.*
2 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).

3 On December 4, 2013, Ms. Couch wrote a letter discussing the child's pain
4 and how the school accommodated her. Tr. 647. Ms. Couch noted that the child
5 was precluded from participating in physical education classes, was allowed to
6 move freely in class, was allowed to use the hallways at different times than other
7 students to avoid injury, was transported door-to-door between school and home,
8 and was allowed to remain seated while the rest of her class stood for long periods.
9 *Id.* Ms. Couch also stated that the child had an individualized health care plan that
10 allowed her to receive Ibuprofen as needed for pain, but there were times when the
11 medication was not enough and the child missed class in order to lie down to ease
12 the pain. *Id.* Furthermore, Ms. Couch noted that the child's limp resulted in
13 teasing and bullying from other students. *Id.*

14 The ALJ gave "little weight" to Ms. Couch's letter because (1) it was
15 inconsistent with the child's testimony, and (2) it was inconsistent overall medical
16 evidence of record. Tr. 26-27.

17 In support of her first reason, the ALJ noted that the child testified that she
18 was getting a "B" in her physical education class, "which suggests that she is able
19 to participate in some activities," that she plays with other children at her school,
20 and that she made no mention of being bullied or harassed. Tr. 27. The child
21 testified that "when I'm doing PE, I'll get pain again and I'll try to keep on
22 walking but then the pain really comes." Tr. 47. When asked how the pain affects
23 her "as far as playing with other kids," the child responded "I cannot kick the ball
24 because, like, I can't play like other kids, like, I don't know how to explain it," and
25 she continued:

26 If they hurt me, like, the doctor said that I'll start bleeding and all that
27 so, like, I can't play rough sports, like, basketball, soccer or any games,
28 like, that so PE, like, I really want to play baseball but I have no sports.

1 I can't play nothing. So I just walk around.

2 Tr. 48. The child testified that she cannot run in PE so she is always walking, she
3 can sometimes jump, and she can climb. Tr. 48-49. She stated that she had a "B"
4 in PE "because, like, I can't do any sports so he just gives me a B." Tr. 54.

5 Ms. Couch's letter stating that the child was precluded from participating in
6 PE is not inconsistent with the child's testimony that she is limited to walking
7 during PE. Furthermore, just because the child did not mention being bullied at the
8 hearing, when she was not questioned about being bullied, does not mean that the
9 child's testimony was inconsistent with the nurse's statement. Therefore, the
10 ALJ's first reason for rejecting Ms. Couch's evidence is not legally sufficient.
11 However, any error from the ALJ's first reason is harmless because the ALJ
12 provided a second legally sufficient reason for rejecting Ms. Couch's letter. *See*
13 *Tommasetti*, 533 F.3d at 1038.

14 In support of her second reason, the ALJ noted that the record did not
15 indicate any significant problems with attendance. Tr. 27. The evidence from
16 Wapato Middle School showed that from September 29, 2009, to June 11, 2010,
17 there were seventeen attendance log entries, most correlating with Plaintiff
18 bringing in a note to excuse the child. Tr. 436. In the 2010/2011 school year, there
19 were six attendance log entries. Tr. 437. In the 2011/2012 school year, there were
20 seven attendance log entries. *Id.* In the 2012/2013 school year, there were two
21 attendance log entries. *Id.* An attendance calendar showed that from September
22 2012 through May 2013, the child missed a total of six full days with additional
23 notations indicating that she missed some class periods on days she attended
24 school. Tr. 438-440. The ALJ concluded that these records do not indicate any
25 significant problems with attendance. Tr. 27. If the evidence is susceptible to
26 more than one rational interpretation, the court may not substitute its judgment for
27 that of the ALJ. *Tackett*, 180 F.3d at 1097. Here, the ALJ found that this evidence
28 did not support the school nurse's assertion. Therefore, the Court will not disturb

1 the ALJ's finding.

2 The ALJ did not commit harmful error in her treatment of evidence
3 presented by the school nurse.

4 **D. Teacher Questionnaires**

5 Plaintiff challenges the great weight the ALJ gave to the teacher
6 questionnaires at Exhibits 2E, 5E, and 10E. ECF No. 16 at 12.

7 Opinions that predate the alleged onset of disability are of limited relevance.
8 See *Fair v. Bowen*, 885 F.2d 597, 600 (9th Cir. 1989); *Carmickle v. Comm'r, Soc.*
9 *Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008).

10 The questionnaire at Exhibit 2E was completed on February 6, 2008. Tr.
11 313-320. The questionnaire at Exhibit 5E was completed on February 19, 2010.
12 Tr. 338-345. The questionnaire at Exhibit 10E was completed on December 9,
13 2010. Tr. 373-380. The Court recognizes that upon application, the Plaintiff had
14 an alleged onset date of December 3, 2000. Tr. 291. However, Plaintiff had
15 multiple prior applications for benefits, the last of which was denied on April 22,
16 2011. Tr. 122-136. The record does not contain any request to reopen any of these
17 prior applications. Therefore, the earliest onset date that could have been
18 considered was April 23, 2011.¹ All of the questionnaires pre-date the earliest
19 possible onset date in this case. Therefore, they are of limited relevance, and the
20 ALJ erred in giving them great weight.

21 Additionally, Plaintiff asserts that all questionnaires were completed prior to
22 Dr. Mosca's opinion, which is the onset date as amended in Plaintiff's Motion for
23 Summary Judgment. ECF No. 16 at 12. The Court will not allow Plaintiff to

24
25 ¹Under the doctrine of res judicata, Plaintiff cannot relitigate the findings
26 and decisions on the merits which become final as a result of a claimant's failure to
27 seek administrative review after noticed of an adverse decision. *Taylor v. Hackler*,
28 765 F.2d 872, 876 (9th Cir. 1985).

1 reduce the pool of relevant evidence by reducing the relevant time period the ALJ
2 was to consider after the fact. *See supra*. The relevant time period in this case was
3 from August 18, 2011, the date of application, through January 9, 2014, the date of
4 the ALJ decision. Again, all three of the opinions predate the earliest possible
5 onset date and the relevant time period considered in the ALJ's decision.

6 Therefore, the ALJ's determination giving great weight to these opinions is error.
7 However, this error is harmless considering the ALJ also relied heavily upon the
8 opinion of Dr. Rasmussen, who testified that the child had less than marked
9 limitations in all domains of functioning. Tr. 27, 76-77. This reliance has been
10 found to be free of error, as discussed below. *See Tommasetti*, 533 F.3d at 1038.

11 **E. Medical Source Opinions**

12 Plaintiff challenges the weight the ALJ provided to the October 18, 2013,
13 opinion of Vincent Mosca, M.D., and C. Mervyn Rasmussen, M.D. ECF No. 16 at
14 12-14.

15 In weighing medical source opinions, the ALJ should distinguish between
16 three different types of physicians: (1) treating physicians, who actually treat the
17 claimant; (2) examining physicians, who examine but do not treat the claimant;
18 and, (3) nonexamining physicians who neither treat nor examine the claimant.
19 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
20 weight to the opinion of a treating physician than to the opinion of an examining
21 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
22 more weight to the opinion of an examining physician than to the opinion of a
23 nonexamining physician. *Id.*

24 When a treating physician's opinion is not contradicted by another
25 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
26 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
27 physician's opinion is contradicted by another physician, the ALJ is only required
28 to provide "specific and legitimate reasons" for rejecting the opinion of the first

1 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

2 The specific and legitimate standard can be met by the ALJ setting out a
3 detailed and thorough summary of the facts and conflicting clinical evidence,
4 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
5 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
6 conclusions, he “must set forth his interpretations and explain why they, rather
7 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
8 1988).

9 **1. Vincent Mosca, M.D.**

10 On October 18, 2013, Dr. Mosca completed a questionnaire in which he
11 opined that the child functionally equaled a listing. Tr. 638-640. He stated that
12 domains one, two and four were not applicable to the child. *Id.* But he opined that
13 domain three was marked because “other students make fun of her and mock her
14 about her limp.” Tr. 639. He opined that domain five was marked because, “pain
15 interferes with her emotional and physical state.” *Id.* Then he opined domain six
16 was extreme, stating “she has frequent bouts of pain which limits her activities.
17 She should sit rather than stand. She should not participate in any activities that
18 would cause more irritations to her hip – that is most activities.
19 Irritation/Inflammation to her hip will damage it requiring a sooner surgery.” Tr.
20 640. When asked about the child’s prognosis, he stated, “[p]ain will increase along
21 with her mobility will decrease. She will most likely require a hip replacement in
22 her 20’s if not sooner. Artificial hips last about 15 years so she will require
23 multiple hip replacements.” Tr. 638.

24 The ALJ gave “little weight” to Dr. Mosca’s opinion because (1) it was
25 inconsistent with Dr. Mosca’s treatment notes and (2) the opinion contained an
26 anomaly on page two under domain five. Tr. 27-28.

27 To support her first reason, the ALJ noted that in August 2011, Dr. Mosca
28 stated that the child was able to walk back and forth without any evidence of an

1 obvious limp, she hopped three times on each leg, and she had some pain but was
2 able to do and participate in many activities. Tr. 27-28. An ALJ may rely on
3 internal inconsistencies in evaluating a physician's report. *Bayliss*, 427 F.3d at
4 1216. Plaintiff challenges the ALJ's reliance on the 2011 treatment notes as not
5 being inconsistent with the 2013 opinion because it was penned over two years
6 prior to the 2013 opinion. ECF No. 16 at 13-14. In addition to the August 17,
7 2011, evaluation by Dr. Mosca, the record contains an evaluation performed
8 November 26, 2012, at which the child stated that there was one time about two
9 months prior that she had a lot of pain in her left hip and had to be taken home
10 from school, but at the time of the evaluation, she was completely pain-free and
11 active. Tr. 635. Dr. Mosca noted she walked with a nonantalgic gait and no limp.
12 Tr. 636. He stated that the child was "continuing to do well." *Id.*

13 Having reviewed the record as a whole, the opinion of Dr. Mosca is not
14 supported by his treatment notes contained in the record. The Court acknowledges
15 that these treatment notes are years prior to the October 18, 2013, opinion, but the
16 record lacks a recent evaluation from Dr. Mosca that corroborates the October 18,
17 2013, opinion. As such, the Court will not disturb the ALJ's determination.

18 The ALJ's second reason, an anomaly on the page two, under domain five,
19 is not a legally sufficient reason to give Dr. Mosca's opinion little weight. On the
20 form completed by Dr. Mosca, under domain five there is a pen mark that appears
21 in the shape of an "r" or an unfinished "n." Tr. 639. The ALJ hypothesized that it
22 "appears as if something else was written under the paragraph but either not
23 completed, erased, etc." Tr. 28. If the ALJ determined that this notation rendered
24 Dr. Mosca's opinion ambiguous he was required to reach out to Dr. Mosca and
25 request a clarification. *See Mayes v. Massanari*, 276 F.3d 453, 459-460 (9th Cir.
26 2001) (the ALJ has a duty to develop the record with the evidence is ambiguous).
27 However, any error resulting from the ALJ's reliance on the anomaly is harmless
28 because the ALJ provided another legally sufficient reason to support his rejection

1 of Dr. Mosca’s opinion. *See Tommasetti*, 533 F.3d at 1038.

2 **2. C. Mervyn Rasmussen, M.D.**

3 Plaintiff challenges the “great weight” given to Dr. Rasmussen’s testimony
4 at the hearing. ECF No. 16 at 12-13.

5 Dr. Rasmussen was a nonexamining physician who testified at the second
6 hearing. Tr. 74-98. Dr. Rasmussen testified that the child did not meet listing
7 101.02, Major Dysfunction of the Joints. Tr. 75. As for the domains, Dr.
8 Rasmussen testified that the child had no limitations in acquiring and using
9 information, attending and completing tasks, and interacting and relating to others,
10 and caring for yourself and less than marked in moving about and manipulating
11 objects and health and physical well-being. Tr. 75-76.

12 The ALJ gave “significant weight” to the opinion of Dr. Rasmussen because
13 he had an opportunity to review the record and his opinion was consistent with
14 objective and physical exam findings. Tr. 27. When a treating or examining
15 physician’s opinion is contradicted by another doctor, the “[Commissioner] must
16 determine credibility and resolve the conflict.” *Thomas v. Barnhart*, 278 F.3d 947,
17 956–57 (9th Cir. 2002). “The opinions of a nonexamining physician may also
18 serve as substantial evidence when the opinions are consistent with independent
19 clinical findings or other evidence in the record.” *Id.* The ALJ need not accept the
20 opinion of any physician, including a treating physician, if that opinion is brief,
21 conclusory, and inadequately supported by clinical findings. *Batson*, 359 F.3d at
22 1195.

23 The ALJ determined that the opinion of treating physician Dr. Mosca was of
24 little evidentiary value because the opinion was not supported by his own treatment
25 notes. Tr. 27-28. The ALJ turned to the opinion of nonexamining physician, Dr.
26 Rasmussen, and concluded that it was consistent with objective medical evidence,
27 specifically that the claimant was fairly active and independent in activities of
28 daily living despite the imaging that showed the femoral head under acetabulum

1 warranting future surgery. Tr. 27. Since Dr. Rasmussen's opinion is consistent
2 with the medical evidence, his opinion can be considered substantial evidence even
3 though he is a nonexamining physician. Therefore, the ALJ's determination
4 assigning his opinion significant weight is without error.

5 **CONCLUSION**

6 Having reviewed the record and the ALJ's findings, the Court finds the
7 ALJ's decision is supported by substantial evidence and free of harmful legal error.
8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is
10 **GRANTED.**

11 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED.**

12 The District Court Executive is directed to file this Order and provide a copy
13 to counsel for plaintiff and defendant. Judgment shall be entered for Defendant and
14 the file shall be CLOSED.

15 DATED May 11, 2016.

A handwritten signature in black ink, appearing to read "JR", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE