

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 30, 2018**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

VERONICA M. O/B/O OAS, a minor  
child,

NO: 1:17-CV-3201-FVS

Plaintiff,

ORDER GRANTING DEFENDANT'S  
MOTION FOR REMAND AND  
GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT IN  
PART

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

BEFORE THE COURT IS Defendant's Motion for Remand, ECF No. 19, and Plaintiff's Motion for Summary Judgment, ECF No. 12. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney D. James Tree. Defendant is represented by Special Assistant United States Attorney Justin L. Martin. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below the Court GRANTS Defendant's Motion for Remand, ECF No. 19, and GRANTS in part Plaintiff's Motion for Summary Judgment, ECF No. 12.

ORDER GRANTING DEFENDANT'S MOTION FOR REMAND AND  
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN PART ~ 1

1 **JURISDICTION**

2 Plaintiff’s mother filed for supplemental security income (“SSI”) on behalf of  
3 her minor child, OAS<sup>1</sup> (“Plaintiff”), on November 4, 2013, alleging an onset date of  
4 June 20, 2004. Tr. 217-20. Benefits were denied initially, Tr. 127-29, and upon  
5 reconsideration, Tr. 135-37. Plaintiff’s mother appeared at a hearing before an  
6 administrative law judge (ALJ) on December 2, 2015, and at a second hearing before  
7 the same ALJ on July 20, 2016. Tr. 47-79, 83-101. On August 1, 2016, the ALJ  
8 denied Plaintiff’s claim, Tr. 20-37, and on October 4, 2017, the Appeals Council  
9 denied review. Tr. 1-5. The matter is now before this Court pursuant to 42 U.S.C. §  
10 1383(c)(3).

11 **BACKGROUND**

12 The facts of the case are set forth in the administrative hearing and transcripts,  
13 the ALJ’s decision, and the briefs of Plaintiff and the Commissioner, and are therefore  
14 only summarized here.

15 Plaintiff was born in 2004, Tr. 217, and was therefore 11 years old at the time  
16 of the first hearing. He alleges disability due to epilepsy and a learning disorder. Tr.  
17 244. In 2012, Plaintiff was determined to be eligible for special education services for  
18 a specific learning disability. Tr. 652-59. School records also indicate significant  
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20 <sup>1</sup> In the interest of protecting Plaintiff’s privacy, the Court will use the first name  
21 and last initial of Plaintiff’s mother throughout this decision.

1 behavioral problems, resulting in many suspensions and an expulsion from school.  
2 Tr. 678, 694-95, 711-718. In May 2013, Plaintiff was diagnosed with epilepsy after  
3 suffering a seizure. Tr. 454, 490-92. His seizures are generally well-controlled with  
4 medication. Tr. 726-28.

## 5 **STANDARD OF REVIEW**

6 A district court's review of a final decision of the Commissioner of Social  
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
8 limited; the Commissioner's decision will be disturbed "only if it is not supported by  
9 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158  
10 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable  
11 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and  
12 citation omitted). Stated differently, substantial evidence equates to "more than a  
13 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).  
14 In determining whether the standard has been satisfied, a reviewing court must  
15 consider the entire record as a whole rather than searching for supporting evidence in  
16 isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its judgment  
18 for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
19 2001). If the evidence in the record "is susceptible to more than one rational  
20 interpretation, [the court] must uphold the ALJ's findings if they are supported by  
21 inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111

1 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s decision on  
2 account of an error that is harmless.” *Id.* An error is harmless “where it is  
3 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115  
4 (quotation and citation omitted). The party appealing the ALJ’s decision generally  
5 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.  
6 396, 409-10 (2009).

### 7 **THREE-STEP PROCESS FOR CHILDHOOD DISABILITY**

8 To qualify for Title XVI supplement security income benefits, a child under the  
9 age of eighteen must have “a medically determinable physical or mental impairment,  
10 which results in marked and severe functional limitations, and which can be expected  
11 to result in death or which has lasted or can be expected to last for a continuous period  
12 of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i). The regulations provide a  
13 three-step process to determine whether a claimant satisfies the above criteria. 20  
14 C.F.R. § 416.924(a). First, the ALJ must determine whether the child is engaged in  
15 substantial gainful activity. 20 C.F.R. § 416.924(b). Second, the ALJ considers  
16 whether the child has a “medically determinable impairment that is severe,” which is  
17 defined as an impairment that causes “more than minimal functional limitations.” 20  
18 C.F.R. § 416.924(c). Finally, if the ALJ finds a severe impairment, she must then  
19 consider whether the impairment “medically equals” or “functionally equals” a  
20 disability listed in the “Listing of Impairments.” 20 C.F.R. § 416.924(c)-(d).

1 If the ALJ finds that the child’s impairment or combination of impairments  
2 does not meet or medically equal a listing, she must determine whether the  
3 impairment or combination of impairments functionally equals a listing. 20 C.F.R. §  
4 416.926a(a).<sup>2</sup> The ALJ’s functional equivalence assessment requires her to evaluate  
5 the child’s functioning in six “domains.” These six domains, which are designed “to  
6 capture all of what a child can or cannot do,” are as follows:

- 7 (1) Acquiring and using information;
- 8 (2) Attending and completing tasks;
- 9 (3) Interacting and relating with others;
- 10 (4) Moving about and manipulating objects;
- 11 (5) Caring for self; and
- 12 (6) Health and physical well-being.

13 20 C.F.R. § 416.926a(b)(1)(i)-(vi). A child’s impairment will be deemed to  
14 functionally equal a listed impairment if the child’s condition results in a “marked”  
15 limitation in two domains, or an “extreme” limitation in one domain. 20 C.F.R. §  
16 416.926a(a). An impairment is a “marked limitation” if it “interferes seriously with [a

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18 <sup>2</sup> All references to 20 C.F.R. § 416.926a refer to the version of the regulation  
19 effective June 12, 2015 to October 6, 2016, which was the version in effect at the  
20 time of the ALJ’s decision. Revisions to Rules Regarding the Evaluation of  
21 Medical Evidence, 81 Fed. Reg. 37153 (June 9, 2016).

1 person's] ability to independently initiate, sustain, or complete activities." 20 C.F.R.  
2 § 416.926a(e)(2)(i). By contrast, an "extreme limitation" is defined as a limitation  
3 that "interferes very seriously with [a person's] ability to independently initiate,  
4 sustain, or complete activities." 20 C.F.R. § 416.926a(e)(3)(i).

### 5 **ALJ'S FINDINGS**

6 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
7 activity since November 4, 2013, the application date. Tr. 24. At step two, the ALJ  
8 found Plaintiff has the following severe impairments: seizure disorder, conduct  
9 disorder, attention deficit-hyperactivity disorder, and specific learning disorder  
10 (impairment in reading). Tr. 24. At step three, the ALJ found that Plaintiff does not  
11 have an impairment or combination of impairments that meets or medically equals the  
12 severity of a listed impairment. Tr. 25. The ALJ then found Plaintiff does not have an  
13 impairment or combination of impairments that functionally equals the severity of the  
14 listings. Tr. 26. Thus, the ALJ concluded that Plaintiff has not been disabled, as  
15 defined in the Social Security Act, since November 4, 2013, the date the application  
16 was filed. Tr. 36.

### 17 **ISSUES**

18 Plaintiff seeks judicial review of the Commissioner's final decision denying  
19 supplemental security income benefits under Title XVI of the Social Security Act.  
20 ECF No. 12. Plaintiff raised the following issues for review:  
21



1 *Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand  
2 would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir.  
3 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (2014) (noting that a district  
4 court may abuse its discretion not to remand for benefits when all of these conditions  
5 are met). This policy is based on the “need to expedite disability claims.” *Varney*,  
6 859 F.2d at 1041. But where there are outstanding issues that must be resolved before  
7 a determination can be made, and it is not clear from the record that the ALJ would be  
8 required to find a claimant disabled if all the evidence were properly evaluated,  
9 remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir.  
10 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

11 Plaintiff requests remand for an immediate award of benefits from November 4,  
12 2013 to September 29, 2016, based on the favorable outcome of Plaintiff’s second  
13 application for SSI dated September 30, 2016. ECF No. 20 at 1. On January 12,  
14 2018, Plaintiff was awarded SSI benefits retroactive to September 30, 2016. ECF No.  
15 21-1 at 3. Plaintiff asserts there is “overwhelming evidence” of disability, including  
16 evidence of behavior problems so severe that he was expelled from school, and  
17 evidence of poor academic achievement, as well as the January 2018 disability  
18 finding. ECF No. 20 at 3. However, the Court concludes it is not clear that the record  
19 dictates a disability finding because of the deficiencies in the record conceded by  
20 Defendant. The record is not fully developed. Given the insufficiency of the ALJ’s  
21 findings and the medical expert’s testimony with regard to Listing 112.08 and the



1 severe impairment of conduct disorder, the Court does not find clear evidence of  
2 disability based on the record.

3 With regard to the later disability determination, the Court has no information  
4 about the basis for the January 2018 disability finding or whether additional evidence  
5 was received. The fact that a later favorable disability determination was made does  
6 not necessarily compel a disability finding on the record before the Court. Thus,  
7 remand for further proceedings is the appropriate remedy. *See Luna v. Astrue*, 623  
8 F.3d 1032 (9th Cir. 2010) (“There was only one day between the denial of Luna’s first  
9 application and the disability onset date specified in the award for her successful  
10 second application, but she may have presented different medical evidence to support  
11 the two applications, or there might be some other reason to explain the change.  
12 Given this uncertainty, remand for further factual proceedings was an appropriate  
13 remedy.”)

14 On remand, Plaintiff suggests the ALJ is required to obtain a psychiatric  
15 evaluation, ECF No. 12 at 18-19, while Defendant requests that a psychiatric  
16 evaluation be obtained “if possible.” ECF No. 19 at 12. “One of the means available  
17 to an ALJ to supplement an inadequate medical record is to order a consultative  
18 examination, *i.e.*, ‘a physical or mental examination or test purchased for [a claimant]  
19 at [the Social Security Administration's] request and expense.’ ” *Reed v. Massanari*,  
20 270 F.3d 838, 841 (9th Cir.2001) (quoting 20 C.F.R. § 416.919). At the first hearing,  
21 Dr. Grossman testified that the results of a psychiatric evaluation “would be relevant

1 information that I would be glad to look at and it may be helpful.” Tr. 67. At the end  
2 of the hearing, the ALJ said he would request a psychiatric evaluation at the agency’s  
3 expense. Tr. 77. In the decision, the ALJ reported:

4 Considerable effort was made to schedule a consultative psychiatric  
5 evaluation, but due to a cancellation by the psychiatrist, followed by a  
6 cancellation by the claimant due to a house fire, and finally, the  
7 previously scheduled consultative psychiatrist terminated his contract  
8 with the Agency. There was no other psychiatrist available in the area,  
9 so a consultative psychological evaluation was conducted. Exhibit  
10 (Ex.) 20F [Tr. 752-57]. The claimant’s representative has requested  
11 another consultative evaluation, but I do not find that warranted.  
12 Whether to send the claimant for a consultative evaluation is within the  
13 discretion of the Administrative Law Judge. [20 C.F.R. §] 416.917;  
14 HALLEX I-2-5-20. In the present case, I find that the record has been  
15 sufficiently developed that an additional consultative psychiatric  
16 evaluation is not necessary.

17 Tr. 21. Thus, the failure to supplement the record with a psychiatric evaluation was  
18 caused by factors outside of the ALJ’s control.<sup>3</sup> Notwithstanding, the same issues  
19 remain undeveloped in the record, despite the ALJ’s assertion to the contrary.

20 Therefore, on remand, the ALJ is directed to obtain a consultative psychiatric  
21 examination.

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<sup>3</sup>The responsibility for the consultative examination process rests not with the SSA  
but with cooperating State agencies. 20 C.F.R. §416.919s(a). The State agencies  
are responsible for recruiting qualified physicians to perform consultative  
examinations. 20 C.F.R. § 416.919s(f)(1).



1 examination; and (3) give further consideration to whether Plaintiff functionally  
2 equals a Listing by reevaluating the evidence in the record and articulating the weight  
3 given to the relevant medical opinions.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendant's Motion for Summary Judgment Requesting Remand, **ECF No.**  
6 **19**, is **GRANTED**.

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12** is **GRANTED in**  
8 **part**.

9 3. This case is **REVERSED** and **REMANDED** for further administrative  
10 proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. §  
11 405(g).

12 4. An application for attorney fees may be made by separate motion.

13 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order  
14 and provide copies to counsel. Judgment shall be entered for Plaintiff and the file  
15 shall be **CLOSED**.

16 **DATED** November 30, 2018.

17  
18 *s/ Rosanna Malouf Peterson*  
19 ROSANNA MALOUF PETERSON  
20 United States District Judge  
21