

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

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

Oct 29, 2020

SEAN F. McAVOY, CLERK

3 TALIA D., on behalf of R.V.E., a  
4 minor child,

No. 1:19-CV-3245-JTR

5 Plaintiff,

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

6  
7 v.

8 ANDREW M. SAUL,  
9 COMMISSIONER OF SOCIAL  
10 SECURITY,

11 Defendant.  
12

13 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
14 No. 14, 15. Attorney D. James Tree represents Talia D., who appears on behalf of  
15 her minor son, R.V.E. (Plaintiff); Special Assistant United States Attorney Alexis  
16 Toma represents the Commissioner of Social Security (Defendant). The parties  
17 have consented to proceed before a magistrate judge. ECF No. 6. After reviewing  
18 the administrative record and briefs filed by the parties, the Court **GRANTS**  
19 Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for  
20 Summary Judgment.

21 **JURISDICTION**

22 On August 17, 2016, Talia D. filed an application for Supplemental Security  
23 Income (SSI) benefits, on behalf of Plaintiff, alleging Plaintiff had been disabled  
24 since June 7, 2011, due to anomalous origin of the right coronary artery with  
25 interarterial course. Tr. 154, 156, 184. Plaintiff's application was denied initially  
26 and upon reconsideration.

27 On June 20, 2018, an administrative hearing was held before Administrative  
28 Law Judge (ALJ) Marie Palachuk, at which time testimony was taken from

1 Plaintiff, Plaintiff's mother (Talia D.) and medical expert Jerry Seligman, M.D.  
2 Tr. 38-56. On September 24, 2018, the ALJ issued a decision finding Plaintiff was  
3 not disabled. Tr. 15-29. The Appeals Council denied review on August 15, 2019.  
4 Tr. 1-5. The ALJ's September 2018 decision thus became the final decision of the  
5 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
6 405(g). Plaintiff filed this action for judicial review on October 14, 2019. ECF  
7 No. 1.

### 8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the  
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
11 here.

12 Plaintiff was born on November 17, 2001, and was 14 years old on the date  
13 of the disability application, August 17, 2016. Tr. 154, 156. At the administrative  
14 hearing, Plaintiff's mother, Talia D., testified Plaintiff had surgery in July 2016 to  
15 repair the right coronary artery of his heart. Tr. 47. She stated that prior to surgery  
16 Plaintiff had shortness of breath, fainting spells, dizziness, chest pain, coughing,  
17 spotty vision and headaches and Plaintiff continued to have headaches and fatigue  
18 following surgery. Tr. 48. She reported Plaintiff did not perform very well in  
19 school during the year following the surgery, Plaintiff's ninth-grade year. Tr. 48.

20 Plaintiff testified at the administrative hearing that he first experienced chest  
21 pain when he was eight years old and was subsequently diagnosed with a heart  
22 murmur. Tr. 50. He fainted for the first time in 2015 and twice in early 2016. Tr.  
23 50. He began to experience chest pain while participating in track in May 2016  
24 which resulted in the discovery of the need for heart surgery. Tr. 50-51. Prior to  
25 the July 2016 surgery, he also had shortness of breath, fatigue and headaches. Tr.  
26 51. He indicated that following surgery his headaches became worse and he was  
27 extremely tired. Tr. 51-52. Plaintiff stated he would fall asleep in his classes and  
28 his tiredness, combined with stress and headaches, caused low grades in his ninth-

1 grade year (a 1.3 grade point average). Tr. 52-53. During his ninth-grade year,  
2 Plaintiff had a doctor-imposed restriction to not participate in physical education  
3 classes and a physical accommodation to have the school bus drop him off at the  
4 top of a hill instead of the usual spot at the bottom of a hill. Tr. 53-54. At the time  
5 of the June 2018 administrative hearing, Plaintiff had just completed his tenth-  
6 grade year and reported a 2.5 grade point average. Tr. 54. He testified he  
7 continued to have headaches and was tired all the time. Tr. 54.

### 8 **STANDARD OF REVIEW**

9 The ALJ is responsible for determining credibility, resolving conflicts in  
10 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
11 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with  
12 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
13 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
14 only if it is not supported by substantial evidence or if it is based on legal error.  
15 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
16 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
17 1098. Put another way, substantial evidence is such relevant evidence as a  
18 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
19 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
20 rational interpretation, the Court may not substitute its judgment for that of the  
21 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
22 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
23 administrative findings, or if conflicting evidence supports a finding of either  
24 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
25 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
26 supported by substantial evidence will be set aside if the proper legal standards  
27 were not applied in weighing the evidence and making the decision. *Brawner v.*  
28 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

1 **SEQUENTIAL EVALUATION PROCESS**

2 The Social Security Act provides that a child under 18 is “disabled” for  
3 purposes of SSI eligibility if he “has a medically determinable physical or mental  
4 impairment, which results in marked and severe functional limitations, and which  
5 can be expected to result in death or which has lasted or can be expected to last for  
6 a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i).

7 The Commissioner follows a three-step sequential process in determining  
8 childhood disability: (1) whether the child is engaged in substantial gainful  
9 activity; (2) if not, whether the child has a medically determinable severe  
10 impairment; (3) and, if so, whether the child’s severe impairment meets, medically  
11 equals, or functionally equals the severity of a set of criteria for an impairment  
12 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. § 416.924.

13 If the Commissioner determines at step three that the claimant has an  
14 impairment or combination of impairments that meets or medically equals the  
15 severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P,  
16 Appendix 1, the analysis ends there. If not, the Commissioner decides whether the  
17 child’s impairment results in limitations that functionally equal a listing. 20 C.F.R.  
18 § 416.926a(a). In determining whether an impairment or combination of  
19 impairments functionally equal a listing, the Commissioner assesses the claimant’s  
20 functioning in terms of six domains: (1) acquiring and using information; (2)  
21 attending and completing tasks; (3) interacting and relating with others; (4) moving  
22 about and manipulating objects; (5) caring for yourself; and (6) health and physical  
23 well-being. 20 C.F.R. § 416.926a(b)(1).

24 When evaluating the ability to function in each domain, the ALJ considers  
25 information that will help answer the following questions “about whether your  
26 impairment(s) affect your functioning and whether your activities are typical of  
27 other children your age who do not have impairments”:

- 28 (i) What activities are you able to perform?

1 (ii) What activities are you not able to perform?  
2

3 (iii) Which of your activities are limited or restricted compared to other  
4 children your age who do not have impairments?

5 (iv) Where do you have difficulty with your activities – at home, in  
6 childcare, at school, or in the community?

7 (v) Do you have difficulty independently initiating, sustaining, or  
8 completing activities?

9 (vi) What kind of help do you need to do your activities, how much help do  
10 you need, and how often do you need it?

11 20 C.F.R. § 416.926a(b)(2)(i)-(vi).

12 The evaluation of functional equivalence begins “by considering the child’s  
13 functioning without considering the domains or individual impairments.” Title  
14 XVI: Determining Childhood Disability Under the Functional Equivalence Rule –  
15 The “Whole Child” Approach, SSR 08-1p, 2009 WL 396031 \* 1 (Feb. 17, 2009).  
16 The rules provide that “[w]hen we evaluate your functioning and decide which  
17 domains may be affected by your impairment(s), we will look first at your  
18 activities and limitations and restrictions.” Id. citing 20 C.F.R. § 416.926a(c). The  
19 rules instruct the Commissioner to:

20 Look at information we have in your case record about how your  
21 functioning is affected during all your activities when we decide whether  
22 your impairment or combination of impairments functionally equals the  
23 listings. Your activities are everything you do at home, at school, and in  
your community.

24 Id. citing 20 C.F.R. § 416.926a(b). The severity of limitation in each affected  
25 functional domain is then considered. This technique is called the “Whole Child”  
26 approach.

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1 **ADMINISTRATIVE DECISION**

2 On September 24, 2018, the ALJ issued a decision finding Plaintiff was not  
3 disabled as defined in the Social Security Act.

4 The ALJ found at step one that Plaintiff had not engaged in substantial  
5 gainful activity since the application date, August 17, 2016. Tr. 18.

6 At step two, the ALJ determined Plaintiff suffered from the following severe  
7 impairment: status/post congenital heart defect repair. Tr. 18.

8 The ALJ found at step three that the evidence of record demonstrated  
9 Plaintiff's impairment, although severe, did not meet, medically equal, or  
10 functionally equal the criteria of any of the Listings impairments. Tr. 18. With  
11 regard to functional equivalence, the ALJ concluded Plaintiff had no limitation in  
12 acquiring and using information, no limitation in attending and completing tasks,  
13 no limitation in interacting and relating with others, less than a marked limitation  
14 in moving about and manipulating objects, no limitation in caring for himself, and  
15 less than a marked limitation in health and physical well-being. Tr. 23-28. The  
16 ALJ thus determined Plaintiff's impairment did not result in marked or extreme  
17 limitations in any of the six domains. Tr. 28.

18 Accordingly, the ALJ concluded Plaintiff was not under a disability within  
19 the meaning of the Social Security Act at any time from the August 17, 2016  
20 disability application date, through the date of the ALJ's decision, September 24,  
21 2018. Tr. 28-29.

22 **ISSUES**

23 The question presented is whether substantial evidence supports the ALJ's  
24 decision denying benefits and, if so, whether that decision is based on proper legal  
25 standards.

26 Plaintiff contends the ALJ erred in this case by (1) failing to properly assess  
27 the Listings; (2) not properly assessing the opinion evidence; (3) not properly

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1 assessing Plaintiff's testimony; and (4) failing to properly assess the domains.  
2 ECF No. 14 at 1.

3 **DISCUSSION**

4 **A. Amend Dates of Disability**

5 Plaintiff's opening brief requests to amend the dates of his disability to a  
6 closed period: from December 1, 2015, to August 2, 2017. ECF No. 14 at 1; see  
7 also ECF No. 16 at 1. It is apparent Plaintiff seeks to amend the disability dates to  
8 limit the significance of evidence pertaining to Plaintiff's improved health after  
9 August 2017. See ECF No. 14 at 11 (release to exercise without restriction  
10 occurred in January 2018, after the newly requested closed period of disability);  
11 ECF No. 14 at 15, 16 (admitting Plaintiff had recovered and improved by August  
12 2017); ECF No. 14 at 17 (Plaintiff's tennis activity took place after the newly  
13 requested closed period of disability); ECF No. 14 at 20 (positive results of stress  
14 test occurred in June 2017, just before he now alleges disability ended in August  
15 2017).

16 Plaintiff fails to cite authority, and the Court is aware of none, which permits  
17 a claimant to amend an application for disability benefits before a court reviewing  
18 an agency's final decision. Instead, this Court reviews the decision of an ALJ to  
19 determine whether a claimant was entitled to benefits during a specific period of  
20 time, which period extends from the alleged onset date to the date of the ALJ's  
21 decision. Otherwise, this Court would be ruling on a situation the ALJ did not  
22 have an opportunity to consider. The Court's role is not to make its own decision  
23 on the merits of a claimant's claims but to review the decision of an ALJ and  
24 determine whether the ALJ's decision was supported by substantial evidence. This  
25 Court will not restrict its review of the evidence that was considered by the ALJ in  
26 her assessment of this case. Accordingly, Plaintiff's request to amend the dates of  
27 disability to a closed period is denied.

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1 **B. Plaintiff’s Subjective Complaints**

2 Plaintiff argues the ALJ reversibly erred by not properly assessing R.V.E.’s  
3 testimony. ECF No. 14 at 15-18; ECF No. 16 at 8-9.

4 It is the province of the ALJ to make credibility determinations. Andrews,  
5 53 F.3d at 1039. However, the ALJ’s findings must be supported by specific  
6 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
7 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
8 testimony must be “specific, clear and convincing.” *Lester v. Chater*, 81 F.3d 821,  
9 834 (9th Cir. 1996). “General findings are insufficient: rather the ALJ must  
10 identify what testimony is not credible and what evidence undermines the  
11 claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,  
12 918 (9th Cir. 1993).

13 The ALJ concluded Plaintiff’s medically determinable impairment could  
14 reasonably be expected to produce the alleged symptoms; however, Plaintiff’s  
15 statements concerning the intensity, persistence and limiting effects of those  
16 symptoms were not entirely consistent with the medical and other evidence of  
17 record. Tr. 20.

18 The ALJ found Plaintiff’s allegations of continued shortness of breath,  
19 fatigue and debilitating headaches were not consistent with the objective medical  
20 evidence of record. Tr. 19-22.

21 An ALJ may discount a claimant’s allegations if they conflict with the  
22 medical evidence of record. *Carmickle v. Comm’r Soc. Sec. Admin.*, 553 F.3d  
23 1155, 1161 (9th Cir. 2008) (“Contradiction with the medical record is a sufficient  
24 basis for rejecting the claimant’s subjective testimony.”); *Lingenfelter v. Astrue*,  
25 504 F.3d 1028, 1040 (9th Cir. 2007) (an ALJ may consider whether alleged  
26 symptoms are consistent with the medical evidence).

27 The ALJ mentions that August and September 2015 medical appointments  
28 did not reveal cardiac symptoms. Tr. 20, 244, 249-250. The Court believes the



1 ALJ detailed these reports as background information to show Plaintiff's cardiac  
2 issues did not present until late-April 2016, Tr. 251, and successful heart surgery  
3 was performed shortly after the discovery.

4 The ALJ determined the record reflected Plaintiff recovered well from his  
5 heart surgery as he reported in September 2016 that he was doing well with no  
6 complaints of chest pain or dizziness. Tr. 20, 305-306. Plaintiff likewise reported  
7 no complaints of shortness of breath, dizziness or headaches in a September 28,  
8 2016 care encounter. Tr. 20, 330-331. A follow up echocardiogram in October  
9 2016 revealed normal ventricular function and size, excellent left ventricular  
10 function, no pericardial effusion, and normal right coronary artery. Tr. 20-21, 420.  
11 Plaintiff again denied experiencing chest pain and did not complain of dizziness or  
12 headaches in a December 2016 care encounter. Tr. 21, 413-414. A February 2017  
13 electrocardiogram resulted in "stable" findings. Tr. 21, 421. In May 2017,  
14 Plaintiff denied chest pain, presyncope or syncopal events, and the results of an  
15 electrocardiogram were normal. Tr. 21, 424. A June 2017 exercise stress test was  
16 normal and placed Plaintiff in greater than the 90th percentile for males his age.  
17 Tr. 21, 453. A November 2017 echocardiogram was again normal. Tr. 21, 427. In  
18 January 2018, Plaintiff was advised "his heart is fine," and he was released to  
19 restart exercise and participate in P.E. Tr. 21, 442. The medical evidence  
20 consistently attributed Plaintiff's periodic complaints of shortness of breath during  
21 the relevant time period to his deconditioning rather than an underlying medical  
22 condition, Tr. 44, 421, 427, 533, which eventually resolved as Plaintiff reported in  
23 April 2018 that he was an active tennis player and could practice up to 2-3 hours at  
24 a time with no significant exercise intolerance, Tr. 21, 594.

25 Based on the foregoing, the ALJ's finding that the medical evidence of  
26 record conflicted with Plaintiff's testimony of disabling symptoms is supported by  
27 substantial evidence.

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1 The ALJ additionally determined Plaintiff's reports of difficulties in school  
2 due to his symptoms were inconsistent with his educational records. Tr. 22.  
3 Inconsistencies in a disability claimant's testimony support a decision by the ALJ  
4 that a claimant lacks credibility with respect to his claim of disabling symptoms.  
5 *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1986). The ALJ indicated  
6 educational records did not describe Plaintiff's absences as due to fatigue, nor was  
7 Plaintiff noted to be falling asleep during class. Tr. 237-241. Instead, Plaintiff's  
8 educational records show he had been disciplined for infractions such as passing  
9 notes, refusing to move, walking off school grounds, entering the women's  
10 restroom, and refusing to hand over his phone during class. Tr. 237-240. As found  
11 by the ALJ, these disciplinary records suggest Plaintiff's academic difficulties  
12 were not caused solely by symptoms from cardiac abnormalities. Tr. 22.

13 Plaintiff also asserts the ALJ discounted his subjective complaints based on  
14 his tennis activity. ECF No. 14 at 17; see *Fair v. Bowen*, 885 F.2d 597, 603 (9th  
15 Cir. 1989) (it is well-established that the nature of daily activities may be  
16 considered when evaluating credibility). Plaintiff argues that because he alleges  
17 his disability ended in August 2017, his tennis activity in 2018 is of little import.  
18 ECF No. 14 at 17. The undersigned disagrees. At the time of the ALJ's decision,  
19 Plaintiff alleged disability through mid-2018 and had testified at the June 2018  
20 administrative hearing that he was "tired all the time" and continued to have  
21 disabling headaches. Tr. 54. Plaintiff's April 2018 report that he was an active  
22 tennis player, could practice for up to 2-3 hours at a time with no significant  
23 exercise intolerance, and could keep up with his friends contradicts his testimony  
24 of continuing debilitating symptoms.

25 The ALJ is responsible for reviewing the evidence and resolving conflicts or  
26 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
27 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in  
28 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in

1 determining whether the ALJ's decision is supported by substantial evidence and  
2 may not substitute its own judgment for that of the ALJ even if it might justifiably  
3 have reached a different result upon de novo review. 42 U.S.C. § 405(g). After  
4 reviewing the record, the Court finds the ALJ provided clear and convincing  
5 reasons, supported by substantial evidence, for finding Plaintiff's symptom  
6 allegations were not entirely credible in this case.

7 **C. Lay Testimony of Plaintiff's Mother, Talia D.**

8 Plaintiff contends the ALJ erred by rejecting the testimony of Plaintiff's  
9 mother, Talia D. ECF No. 14 at 11-15; ECF No. 16 at 7-8.

10 In childhood disability cases, where the child is unable to adequately  
11 describe his symptoms, the Commissioner accepts the testimony of the person  
12 most familiar with the child's condition, such as a parent. *Smith ex rel. Enge v.*  
13 *Massanari*, 139 F.Supp.2d 1128, 1134 (9th Cir. 2001). In the Ninth Circuit, the  
14 testimony of third parties, including parents of child claimants, is evaluated under  
15 the standard applicable to lay witnesses. See *Merrill ex rel. Merrill v. Apfel*, 224  
16 F.3d 1083, 1086 (9th Cir. 2000) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th  
17 Cir. 1993); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to  
18 a claimant's symptoms is competent evidence that an ALJ must take into account,  
19 unless he or she expressly determines to disregard such testimony and gives  
20 reasons germane to each witness for doing so."). When an ALJ discounts a  
21 parent's testimony, she must give reasons that are "germane" to that witness.  
22 *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

23 The ALJ assigned "little weight" to the statements of Talia D. that Plaintiff  
24 continued to suffer migraines, he was tired all the time, he still experienced chest  
25 pain, and his grades suffered due to his fatigue. Tr. 23.

26 The ALJ determined Talia D's opinions were not consistent with the  
27 evidence of record which, as indicated above, revealed that Plaintiff typically  
28 exhibited no cardiac abnormalities upon stress testing and echocardiogram analysis

1 following his surgery. Tr. 23. Objective medical evidence provides a valid basis  
2 for discounting lay witness testimony. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.  
3 2001) (“One reason for which an ALJ may discount lay testimony is that it  
4 conflicts with medical evidence.”); see also *Bayliss v. Barnhart*, 427 F.3d 1211,  
5 1218 (9th Cir. 2005) (inconsistency with medical evidence is a germane reason for  
6 discrediting a lay witness). As discussed in Section B, above, the medical record  
7 reflects Plaintiff recovered well from his heart surgery with subsequent normal and  
8 stable findings on exam.<sup>1</sup> *Supra*.

9 Furthermore, the ALJ found Talia D’s opinion that Plaintiff’s academic  
10 difficulties were the result of the symptoms of his impairments was undermined by  
11 Plaintiff’s educational disciplinary records which suggested his poor academic  
12 performance was unrelated to cardiovascular issues. Tr. 23. As discussed in  
13 Section B, above, Plaintiff’s educational records document issues other than  
14 cardiac abnormalities for Plaintiff’s academic struggles during his ninth-grade  
15 year. *Supra*.

16 Based on the foregoing, the Court finds the ALJ provided germane reasons,  
17 supported by substantial evidence, for according “little weight” to Talia D’s  
18 opinions in this case.

19 **D. Paul A. Tompkins, M.D. - - New Evidence**

20 Plaintiff argues the ALJ also erred by providing no reason for failing to  
21 consider the July 2018 opinions of treating physician Paul A. Tompkins, M.D.  
22 ECF No. 14 at 8-9; ECF No. 16 at 3-5.

23 The administrative hearing in this case was held on June 20, 2018, and the  
24 ALJ issued her decision on September 24, 2018. The report of Dr. Tompkins was  
25 generated on July 11, 2018, Tr. 35-37, and submitted to the ALJ on July 28, 2018,  
26

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27 <sup>1</sup>Of significance, Plaintiff’s June 2017 exercise stress test was normal and  
28 placed him in greater than the 90th percentile for males his age. Tr. 21, 453.

1 ECF No. 14-1. Consequently, it was rendered and submitted after the hearing date  
2 but prior to the ALJ's decision.

3 Pursuant to 20 C.F.R. § 416.1435, counsel must submit all written material  
4 no later than five business days before the date of the scheduled hearing. See Tr.  
5 15. If counsel fails to timely submit evidence, and no exception to the regulation  
6 applies, see 20 C.F.R. § 416.1435(b), the ALJ may decline to consider any newly  
7 submitted evidence. 20 C.F.R. § 416.1435(a). Because counsel failed to timely  
8 submit Dr. Tompkins' July 11, 2018 report and no explanation for the untimely  
9 submission has been provided, the ALJ was not required to consider the report.

10 Nevertheless, this "new evidence" was considered by the Appeals Council  
11 and made a part of the administrative record at Tr. 35-37. See *Ramirez v. Shalala*,  
12 8 F.3d 1449, 1451-1452 (9th Cir. 1993) (noting that where the Appeals Council  
13 declined to review the decision of the ALJ after examining the entire record,  
14 including new material, the Ninth Circuit considered both the ALJ's decision and  
15 the additional materials submitted to the Appeals Council). The evidence is part of  
16 the administrative record, Tr. 35-37, and shall be considered by this Court in  
17 determining whether the ALJ's decision is supported by substantial evidence.

18 On a "Domain Statement for Child" form provided by Plaintiff's counsel,  
19 Dr. Tompkins checked boxes indicating Plaintiff had "marked" limitations in  
20 "Moving About and Manipulating Objects" and "Health and Physical Well-  
21 Being." Tr. 36-37.

22 In this case, the ALJ supported her decision regarding the assessment of the  
23 domains by according "great weight" to the opinions of medical expert Jerry W.  
24 Seligman, M.D., and the state agency medical consultants, Charles Wolfe, M.D.,  
25 and Nevine Makari, M.D. Tr. 22-23. Each of these doctors opined that Plaintiff  
26 experienced a less than marked limitation in health and physical well-being and in  
27 moving about and manipulating objects. Tr. 43, 62, 72. These doctors' opinions  
28 were supported with reference to the medical evidence and, as determined by the

1 ALJ, were “consistent with the objective medical evidence, revealing a claimant  
2 who, despite allegedly persistent headaches, shortness of breath, and fatigue,  
3 typically exhibited no cardiac abnormalities upon stress testing and  
4 echocardiogram analysis.” Tr. 22-23. As detailed in Section B, above, the medical  
5 record reflects Plaintiff recovered well from his July 2016 heart surgery with  
6 normal and stable findings upon exam. *Supra*.

7 Dr. Tompkins’ check-box report, Tr. 35-37, does not describe Plaintiff’s  
8 functional capabilities and fails to cite treatment notes or other objective evidence  
9 to support his opinions, other than a comment that Plaintiff “gets out of breath with  
10 activity.” See *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (an ALJ  
11 may discredit a treating physician’s opinion that is conclusory, brief, and  
12 unsupported by the record as a whole); *Crane v. Shalala*, 76 F.3d 251, 253 (9th  
13 Cir.1996) (holding that an ALJ may reject check-off forms that do not contain an  
14 explanation of the bases for their conclusions). As previously discussed, and stated  
15 by the ALJ, the medical evidence consistently attributed Plaintiff’s periodic  
16 complaints of shortness of breath to deconditioning rather than a medical  
17 condition, Tr. 44, 421, 427, 533. Furthermore, without more, the remark that  
18 Plaintiff “gets out of breath with activity” does not appear to describe a serious  
19 interference with Plaintiff’s ability to independently initiate, sustain or complete  
20 activities. See Tr. 35 (definition of marked impairment); 20 C.F.R. §  
21 416.926a(e)(2).

22 The Court finds Dr. Tompkins’ July 2018 check-box report does not deprive  
23 the ALJ’s decision of substantial evidence support.

24 **E. Veronica Rut Elin Schmer, M.D.**

25 Plaintiff next asserts the ALJ erred by assigning “great weight” to the  
26 opinions of Dr. Schmer, Tr. 23, but failing to recognize the restrictions Dr. Schmer  
27 assessed in her medical reports. ECF No. 14 at 10-11; ECF No. 16 at 5-6.

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1 The ALJ accorded “great weight” to the opinions expressed by Dr. Schmer,  
2 finding her opinions were consistent with the limitations assessed by other medical  
3 professionals of record. Tr. 23.

4 Dr. Schmer wrote a letter in September 2016 which stated Plaintiff “may  
5 require extra time walking from bus stop to school (up to 15 minutes), school to  
6 bus stop (up to 15 extra minutes), or between classes (up to 10 extra minutes),” Tr.  
7 412, and restricted Plaintiff from participating in P.E. during his ninth-grade year,  
8 Tr. 329. Dr. Schmer explained she was keeping Plaintiff out of P.E. “because his  
9 academic load is significant, and he would have to drop classes if he goes back into  
10 P.E.” Tr. 306. Dr. Schmer released Plaintiff to performing light weightlifting at  
11 home (limit of eight to 10 pounds) so he could get back into the toning of his  
12 muscles. Tr. 306.

13 Based on the medical evidence of record, including Dr. Schmer’s reports,  
14 the ALJ concluded Plaintiff’s severe impairment (status/post congenital heart  
15 defect repair) caused limitations; however, the ALJ found the impairment did not  
16 seriously interfere with Plaintiff’s ability to independently initiate, sustain or  
17 complete activities. 20 C.F.R. § 416.926a(e)(2). The ALJ thus determined  
18 Plaintiff had “less than marked limitations” in moving about and manipulating  
19 objects and in health and physical well-being. Tr. 26-28. The medical records of  
20 Dr. Schmer do not specifically assess the level of Plaintiff’s functioning, nor do  
21 they otherwise indicate Plaintiff had marked limitations.

22 While the Court “must do more than merely rubberstamp the ALJ’s  
23 decision[,]” *Winans v. Bowen*, 853 F.2d 643, 645 (9th Cir. 1988), where the  
24 evidence is susceptible to more than one rational interpretation, the ALJ’s decision  
25 must be upheld, *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (citations  
26 omitted). If there is sufficient evidence to support the ALJ’s outcome, the Court  
27 cannot substitute its own determination. See *Young v. Sullivan*, 911 F.2d 180, 184  
28 (9th Cir. 1990). Although Plaintiff contends the ALJ should have interpreted Dr.



1 Schmer's opinions differently, the Court finds the ALJ rationally interpreted Dr.  
2 Schmer's opinions and made functional equivalence findings consistent with her  
3 opinions. The ALJ's assessment and findings do not explicitly conflict with the  
4 records of Dr. Schmer. See *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007)  
5 (“[I]f evidence is susceptible of more than one rational interpretation, the decision  
6 of the ALJ must be upheld.”).

7 **F. Listing 104.06A(3)**

8 Plaintiff contends the ALJ erred by failing to find his cardiovascular  
9 impairment satisfied the requirements of Listing 104.06A(3). ECF No. 14 at 4-7;  
10 ECF No. 16 at 1-3.

11 The Listings describe, for each of the major body systems, impairments that  
12 are severe enough to prevent an individual from doing any gainful activity,  
13 regardless of age, education, or work experience. 20 C.F.R. § 416.925(a). Each  
14 Listing specifies the objective medical and other findings needed to satisfy the  
15 criteria of that Listing. A diagnosis alone is insufficient; a medically-determinable  
16 impairment must also satisfy all of the criteria of the Listing, 20 C.F.R. §  
17 416.925(d), and Plaintiff bears the burden of establishing that an impairment  
18 satisfies the requirements of a Listings impairment, *Tackett*, 180 F.3d at 1098-  
19 1099; 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d).

20 Listing 104.06A designates when a claimant with congenital heart disease  
21 has a condition that is per se disabling. 20 C.F.R. Part 404, Subpt. P, App. 1, §  
22 104.06A. Listing 104.06A(3) is satisfied when cyanotic heart disease with  
23 persistent, chronic hypoxemia is manifested by “[h]ypercyanotic spells, syncope,  
24 characteristic squatting, or other incapacitating symptoms directly related to  
25 documented cyanotic heart disease.” 20 C.F.R. Part 404, Subpt. P, App. 1, §  
26 104.06A(3).

27 It is undisputed Plaintiff had three syncopal events between December 2015  
28 and May 2016, a serious heart issue was discovered, and Plaintiff underwent

1 corrective heart surgery in July 2016. However, as discussed above, Plaintiff  
2 recovered well from his heart surgery with later examinations revealing normal and  
3 stable findings. *Supra*. The record reflects no subsequent findings of  
4 “incapacitating” symptoms and, at the administrative hearing, Dr. Seligman  
5 testified Plaintiff’s symptoms did not meet or equal a Listing, specifically  
6 identifying Listing 104.06. Tr. 18, 43, 44-45. Notably, as indicated by Defendant,  
7 Plaintiff attended school in the year prior to his heart surgery, underwent heart  
8 surgery in the summer, and returned to school the following fall. ECF No. 15 at 5  
9 citing Tr. 52. The Court finds substantial evidence supports the ALJ’s  
10 determination that Plaintiff’s severe cardiovascular impairment did not meet or  
11 equal a Listings impairment.

#### 12 **G. Functional Equivalence**

13 Plaintiff additionally argues the ALJ erred by failing to properly assess the  
14 functional domains in this case. ECF No. 14 at 18-20; ECF No. 16 at 9-10.  
15 Plaintiff contends he had marked limitations in two domains: “moving about and  
16 manipulating objects” and “health and physical well-being;” therefore, his severe  
17 impairment functionally equaled the Listings. *Id.*

18 To functionally equal the Listings, the claimant’s impairment or  
19 combination of impairments must result in “marked” limitations in two domains of  
20 functioning or an “extreme” limitation in one domain. 20 C.F.R. § 416.926a(d). A  
21 “marked limitation” in a domain results when the child’s impairment “interferes  
22 seriously” with the ability to independently initiate, sustain or complete activities.  
23 20 C.F.R. § 416.926a(e)(2). An “extreme limitation” in a domain results when the  
24 child’s impairment interferes “very seriously” with his ability to independently  
25 initiate, sustain or complete activities. 20 C.F.R. § 416.926a(e)(3).

26 The ALJ weighed the medical record, Plaintiff’s educational records, and the  
27 opinion evidence and found Plaintiff had less than marked limitations in the  
28 functional domains of moving about and manipulating objects and health and

1 physical well-being. Tr. 26-28. As discussed above, the ALJ credited the opinions  
2 of medical expert Seligman and reviewing doctors Wolfe and Makari that Plaintiff  
3 had a less than marked limitation in health and physical well-being and in moving  
4 about and manipulating objects. Tr. 43, 62, 72. Moreover, the evidence of record  
5 shows Plaintiff recovered well from his July 2016 heart surgery and had normal  
6 and stable findings on subsequent exams. Supra. The ALJ’s findings pertaining to  
7 the domains are supported by substantial evidence.

8 Since Plaintiff did not have marked limitations in at least two domains or an  
9 extreme limitation in one domain, the ALJ did not err by finding Plaintiff did not  
10 functionally equal the Listings. See 20 C.F.R. § 416.926a(d).

11 **CONCLUSION**

12 Having reviewed the record and the ALJ’s findings, the Court concludes the  
13 ALJ’s decision is supported by substantial evidence and free of legal error.

14 Accordingly, **IT IS ORDERED:**

15 1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is  
16 **GRANTED.**

17 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

18 The District Court Executive is directed to file this Order and provide a copy  
19 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant  
20 and the file shall be **CLOSED.**

21 DATED October 29, 2020.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

22  
23 \_\_\_\_\_  
24 JOHN T. RODGERS  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28