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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

AMY DAVIS, o/b/o N.L.D, a minor  
child,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security  
Administration,

Defendant.

NO: 12-CV-0592-TOR

ORDER GRANTING PLAINTIFF’S  
MOTION FOR SUMMARY  
JUDGMENT AND REMANDING FOR  
FURTHER PROCEEDINGS

BEFORE THE COURT are the parties’ cross motions for summary judgment (ECF Nos. 14 and 15). Plaintiff is represented by Maureen J. Rosette. Defendant is represented by Leisa A. Wolf. The Court has reviewed the administrative record and the parties’ completed briefing and is fully informed. For the reasons discussed below, the Court will grant Plaintiff’s motion in part and deny Defendant’s motion.

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1 Plaintiff, on behalf of N.L.D., a minor child, seeks judicial review of the  
2 Commissioner’s final decision denying N.L.D. Supplemental Security Income  
3 Child Benefits under Title XVI.

#### 4 JURISDICTION

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
6 1383(c)(3).

#### 7 STANDARD OF REVIEW

8 A district court’s review of a final decision of the Commissioner of Social  
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is  
10 limited: the Commissioner’s decision will be disturbed “only if it is not supported  
11 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
12 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means  
13 relevant evidence that “a reasonable mind might accept as adequate to support a  
14 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,  
15 substantial evidence equates to “more than a mere scintilla[,] but less than a  
16 preponderance.” *Id.* (quotation and citation omitted). In determining whether this  
17 standard has been satisfied, a reviewing court must consider the entire record as a  
18 whole rather than searching for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its  
20 judgment for that of the Commissioner. If the evidence in the record “is

1 susceptible to more than one rational interpretation, [the court] must uphold the  
2 ALJ's findings if they are supported by inferences reasonably drawn from the  
3 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
4 court "may not reverse an ALJ's decision on account of an error that is harmless."  
5 *Id.* at 1111. An error is harmless "where it is inconsequential to the [ALJ's]  
6 ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted).  
7 The party appealing the ALJ's decision generally bears the burden of establishing  
8 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

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

10 To qualify for Title XVI (SSI) benefits, a child under the age of eighteen  
11 must have "a medically determinable physical or mental impairment, which results  
12 in marked and severe functional limitations, and which can be expected to result in  
13 death or which has lasted or can be expected to last for a continuous period of not  
14 less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i). The Commissioner has  
15 established a three-step sequential analysis to determine whether a claimant  
16 satisfies the above criteria. 20 C.F.R. § 416.924(a). First, the Commissioner  
17 considers whether the child is engaged in "substantial gainful activity." *Id.* at  
18 § 416.924(b). Second, the ALJ considers whether the child has a "medically  
19 determinable impairment that is severe," which is defined as an impairment that  
20 causes "more than minimal functional limitations." *Id.* at § 416.924(c). Finally, if

1 the ALJ finds a severe impairment, he or she must then consider whether the  
2 impairment “medically equals” or “functionally equals” a disability listed in the  
3 “Listing of Impairments.” *Id.* at § 416.924(c)-(d); *Id.* at § 404, Subpt. P, App. 1.

4 If the ALJ finds that the child’s impairment or combination of impairments  
5 does not meet or *medically* equal a listing, he or she must determine whether the  
6 impairment or combination of impairments *functionally* equals a listing. 20 C.F.R.  
7 § 416.926a(a). The ALJ’s functional equivalence assessment requires him or her  
8 to evaluate the child’s functioning in “six domains.” These six domains, which are  
9 designed “to capture all of what a child can or cannot do,” are as follows:

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

14 20 C.F.R. § 416.926a(b)(1)(i)-(vi).

15 A child’s impairment will be deemed to functionally equal a listed  
16 impairment if the child’s condition results in a “marked” limitation in two  
17 domains, or an “extreme” limitation in one domain. 20 C.F.R. § 416.926a(a). An  
18 impairment is a “marked limitation” if it “interferes seriously with [a person’s]  
19 ability to independently initiate, sustain, or complete activities.” 20 C.F.R.  
20 § 416.926a(e)(2)(i). By contrast, an “extreme limitation” is defined as a limitation

1 that “interferes *very* seriously with [a person’s] ability to independently initiate,  
2 sustain, or complete activities.” 20 C.F.R. § 416.926a(e)(3)(i) (emphasis added).

### 3 **ALJ’S FINDINGS**

4 N.L.D.’s application for Title XVI Supplemental Security Income payments  
5 was filed on September 29, 2009, with an alleged disability onset date of October  
6 6, 2006. Tr. 127-33. The alleged onset date was subsequently amended to  
7 September 29, 2009. Tr. 47. N.L.D.’s application was denied initially and upon  
8 reconsideration, and N.L.D. requested a hearing before an ALJ. Tr. 70-81. A  
9 hearing was held on March 1, 2011. Tr. 45-67. The ALJ issued a decision on  
10 March 30, 2011, finding that N.L.D. was not disabled under the Social Security  
11 Act. Tr. 13-37.

12 At step one, the ALJ found that N.L.D. had not engaged in substantial  
13 gainful activity since September 29, 2009, the application date. Tr. 19. At step  
14 two, the ALJ found that N.L.D. had severe impairments consisting of asthma, leg  
15 shortening, scoliosis, hearing issues complicated by ear infections, frequent urinary  
16 tract infections, anxiety disorder, post-traumatic stress disorder, and developmental  
17 delay. Tr. 19. At step three, the ALJ found that N.L.D. did not have an  
18 impairment or combination of impairments that medically equaled or functionally  
19 equaled a listed impairment. Tr. 19. With respect to functional equivalence, the

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1 ALJ found that N.L.D. had the following limitations on the six domains:

- 2 (1) No limitation in acquiring and using information  
3 (Tr. 23-24);
- 4 (2) Less than marked limitation in attending and  
5 completing tasks (Tr. 24-25);
- 6 (3) Less than marked limitation in interacting and  
7 relating with others (Tr. 26);
- 8 (4) No limitation in moving about and manipulating  
9 objects (Tr. 27-28);
- 10 (5) Less than marked limitation in the ability to care for  
11 herself (Tr. 28-29); and
- 12 (6) Less than marked limitation in health and physical  
13 well-being (Tr. 29-31).

14 Thus, the ALJ concluded that N.L.D. had not been disabled under the Social  
15 Security Act since the application date of September 29, 2009. Tr. 31.

16 N.L.D. subsequently requested review by the Appeals Council.

17 Tr.189. The Appeals Council denied review on September 12, 2012, making  
18 the ALJ's decision the Commissioner's final decision subject to judicial  
19 review. Tr. 1-7; 42 U.S.C. §§ 405(g), 1383(c)(3); 20 C.F.R. §§ 416.1481,  
20 422.210.

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1 **ISSUE**

2 N.L.D. raises a single issue for review: whether the ALJ erred in failing to  
3 find that N.L.D. had an “extreme” limitation in health and well-being for purposes  
4 of evaluating medical equivalence at step three. ECF No. 14 at 9-10.

5 **DISCUSSION**

6 N.L.D. contends that the ALJ erred in finding that she suffered from a “less  
7 than marked” limitation in health and well-being at step three. According to  
8 N.L.D., the medical evidence of recurring exacerbations of her asthma, sinusitis  
9 and otitis media<sup>1</sup> support a finding of an “extreme” limitation in this domain.

10 Specifically, N.L.D. argues:

11 N.L.D.’s documented signs and symptoms were substantially in  
12 excess of the requirements for showing a “marked” limitation. In fact,  
13 combined, N.L.D. experienced 18 episodes of illness or exacerbations  
14 in 2009[,] and in 2010 she experienced 14 episodes of illness or  
15 exacerbations. These numbers are far in excess of the requirements  
for showing a marked limitation, therefore, she should have [been  
found to have] an “extreme” [limitation] in the domain of health and  
physical well-being.

16 ECF No. 16 at 3; *see also* ECF No. 14 at 10.

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<sup>1</sup> Otitis media is the medical term for a middle ear infection.

1 The definition of a “marked” limitation is set forth at 20 C.F.R. §

2 416.926a(e)(2). The regulation provides, in pertinent part:

3 For the sixth domain of functioning, “Health and physical well-  
4 being,” we may also consider you to have a “marked” limitation if  
5 you are frequently ill because of your impairment(s) or have frequent  
6 exacerbations of your impairment(s) that result in significant,  
7 documented symptoms or signs. For purposes of this domain,  
8 “frequent” means that you have episodes of illness or exacerbations  
9 that occur on an average of 3 times a year, or once every 4 months,  
10 each lasting 2 weeks or more. We may also find that you have a  
11 “marked” limitation if you have episodes that occur more often than 3  
12 times in a year or once every 4 months but do not last for 2 weeks, or  
13 occur less often than an average of 3 times a year or once every 4  
14 months but last longer than 2 weeks, if the overall effect (based on the  
15 length of the episode(s) or its frequency) is equivalent in severity.

16 20 C.F.R. § 416.926a(e)(2)(iv) (emphasis added).

17 The definition of an “extreme” limitation is set forth at § 416.926a(e)(3).

18 The regulation states, in relevant part:

19 For the sixth domain of functioning, “Health and physical well-  
20 being,” we may also consider you to have an “extreme” limitation if  
you are frequently ill because of your impairment(s) or have frequent  
exacerbations of your impairment(s) that result in significant,  
documented symptoms or signs substantially in excess of the  
requirements for showing a “marked” limitation in paragraph  
(e)(2)(iv) of this section. However, if you have episodes of illness or  
exacerbations of your impairment(s) that we would rate as “extreme”  
under this definition, your impairment(s) should meet or medically  
equal the requirements of a listing in most cases.

20 C.F.R. § 416.926a(e)(3) (emphasis added) (citation omitted).

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1           Having reviewed the record, the Court finds that the ALJ’s conclusion with  
2 regard to N.L.D.’s health and physical well-being is not supported by substantial  
3 evidence. As N.L.D. correctly notes, the medical records document that N.L.D.  
4 was treated for asthma, sinusitis and otitis media on multiple occasions during  
5 2009 and 2010. Although N.L.D. does not appear to have experienced episodes of  
6 illness or exacerbations as frequently as she claims (*i.e.*, 18 episodes in 2009 and  
7 14 episodes in 2010), the medical records cited in her briefing (ECF No. 14 at 9-  
8 10) reveal at least five (5) episodes or exacerbations related to sinusitis in 2009 and  
9 at least seven (7) episodes or exacerbations related to sinusitis in 2010. Tr. 289,  
10 291, 298, 444, 499, 519, 542, 543, 655. With regard to otitis media, the medical  
11 records document at least five (5) episodes or exacerbations in 2009 and at least  
12 three (3) episodes or exacerbations in 2010. Tr. 298, 402, 404, 411, 412, 501, 519,  
13 542. The records are less clear about the frequency of episodes or exacerbations  
14 related to asthma, but several diagnoses note an increase in asthma symptoms in  
15 conjunction with sinusitis symptoms.

16           The ALJ did not specifically address any of the above evidence. Instead, the  
17 ALJ grouped all of N.L.D.’s numerous “health conditions” together and concluded  
18 that they fell short of a “marked” limitation in health and well-being:

19           Considering the treatment records, prior evaluations, [medical expert]  
20           Dr. Thoman’s opinion and the opinion from the claimant’s mother, the  
          undersigned concludes that the claimant had less than marked

1 limitations in her health and physical well-being. In general, and in a  
2 light most favorable to the claimant, her mother's statements on the  
3 frequency and severity of [N.L.D.'s] health conditions is not  
4 supported by the record evidence. There are multiple medical issues,  
5 but each one has either improved or stabilized with appropriate  
6 treatment or medical care, were ruled out as a diagnosis, and/or did  
7 not appear to pose significant limitations in the claimant's overall  
8 functioning. (See Ex. 3F, 26F, 27F, 37F, 30F, 8F, 9F, 19F, 24F, 7F,  
9 2F, 31F, 17F, 11F, 14F, 32F, 35F, 1F, 4F, 33F, 25F, 22F, 10F, 21F,  
10 and 29F). Furthermore, after a thorough review, the undersigned  
11 concludes there was no evidence of an impairment, or combination of  
12 impairments, that interfered seriously with the claimant's ability to  
13 initiate, sustain, or complete activities.

8 Tr. 30-31.

9 There are two problems with this analysis. First, the ALJ did not address  
10 whether N.L.D. met the criteria for a "marked" limitation as set forth in 20 C.F.R.  
11 § 416.926a(e)(2)(iv), or whether her documented symptoms were "substantially in  
12 excess" of those criteria within the meaning of 20 C.F.R. § 416.926a(e)(3)(iv).  
13 This was non-harmless error, as the objective medical evidence appears to at least  
14 satisfy the frequency threshold for a "marked" limitation as to N.L.D.'s sinusitis  
15 and otitis media. More importantly, however, the medical records cited by the ALJ  
16 do not support his blanket conclusion that all of N.L.D.'s conditions were "either  
17 improved or stabilized with appropriate treatment or medical care." Tr. 30. At  
18 least with respect to N.L.D.'s sinusitis and otitis media, these records reflect  
19 recurrent, ongoing problems. Tr. 289, 291, 298, 402, 404, 411, 412, 444, 499, 501,  
20 519, 542, 543, 655.

1           Despite these deficiencies in the ALJ’s analysis, it is not clear from the  
2 existing record that the ALJ would be required to find N.L.D. disabled. To be  
3 entitled to benefits, N.L.D. must demonstrate an “extreme” limitation in health and  
4 physical well-being. A finding of a “marked” limitation on this domain would be  
5 insufficient to support a finding of disability given that N.L.D. was found to have  
6 “less than marked” or no limitations on the other five domains. *See* 20 C.F.R. §  
7 416.926a(a) (functional equivalence to a listed impairment requires “marked”  
8 limitations in at least two domains or an “extreme” limitation in one domain).  
9 Thus, the Court finds that a remand for an immediate award of benefits is not  
10 appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

11           On remand, the ALJ should conduct a new hearing, solicit testimony from a  
12 medical expert about N.L.D.’s ability to potentially satisfy the frequency criteria  
13 set forth in 20 C.F.R. §§ 416.926a(e)(2)(iv) and (e)(3)(iv), and issue a new  
14 decision. N.L.D. may present new arguments and evidence and the ALJ may  
15 conduct further proceedings as necessary.

16 **IT IS HEREBY ORDERED:**

- 17           1. Plaintiff’s Motion for Summary Judgment (ECF No. 14) is **GRANTED**  
18           **in part.**  
19           2. Defendant’s Motion for Summary Judgment (ECF No. 15) is **DENIED.**

1 3. Pursuant to sentence four of 42 U.S.C. § 405(g), this action is  
2 **REVERSED** and **REMANDED** to the Commissioner for further  
3 proceedings consistent with this Order. This Court retains jurisdiction.

4 The District Court Executive is hereby directed to file this Order, enter  
5 Judgment for Plaintiff, provide copies to counsel, and **CLOSE** this file subject to  
6 reopening when the Commissioner shall file with the Court any such additional or  
7 modified findings of fact and decision.

8 **DATED** October 7, 2013.



11 *Thomas O. Rice*

12 THOMAS O. RICE  
13 United States District Judge  
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