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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON

5 LORENA ESTRADA O/B/O J.E.,

6 Plaintiff,

7 vs.

8 CAROLYN W. COLVIN, Acting  
9 Commissioner of Social Security,

10 Defendant.

No. CV-13-3121-FVS

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

11 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 16, 21.)  
12 Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney Franco  
13 Becia represents defendant. After reviewing the administrative record and briefs filed by the  
14 parties, the court GRANTS defendant's Motion for Summary Judgment and DENIES plaintiff's  
15 Motion for Summary Judgment.

16 **JURISDICTION**

17 Plaintiff Lorena Estrada protectively filed for supplemental security income (SSI) on  
18 behalf of J.E., a minor (plaintiff), on December 17, 2007. (Tr. 189.) Plaintiff alleged an onset  
19 date of November 27, 2007. (Tr. 129.) Benefits were denied initially and on reconsideration. (Tr.  
20 62, 68, 76.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was  
21 held before ALJ R.S. Chester on October 23, 2009. (Tr. 37-58.) ALJ Chester denied benefits (Tr.  
22 21-36) and the Appeals Council denied review. (Tr. 1.) Plaintiff filed a claim in U.S. District  
23 Court and the matter was remanded for further review. (Tr. 304-21.) A second hearing was held  
24 before ALJ Ruperta M. Alexis on May 7, 2013. (Tr. 348-78.) Plaintiff was represented by  
25 counsel and testified at the hearing. (Tr. 370-74.) Plaintiff's mother also testified. (Tr. 350-68.)  
26 ALJ Alexis denied benefits (Tr. 278-94) and the matter is again before the court pursuant to 42  
27 U.S.C. § 405(g).

1  
2 **STATEMENT OF FACTS**

3 The facts of the case are set forth in the administrative hearing transcripts, the ALJ's  
4 decision, and the briefs of plaintiff and the Commissioner, and will therefore only be  
5 summarized here.

6 Plaintiff was 13 years old and in in seventh grade at the time of the second hearing. (Tr.  
7 350, 370.) According to his mother, he has missed a lot of school due to colds and in-house  
8 suspensions. (Tr. 352.) He has been suspended because of his behavior. (Tr. 352.) He has also  
9 received lunch detention and Friday school. (Tr. 352.) Plaintiff's mother said he gets detention  
10 because he will not pay attention and refuses to do what is asked. (Tr. 353.) He is constantly  
11 reminded to get on task. (Tr. 353.) He gets in trouble at school because he talks back to the  
12 teacher and is defiant. (Tr. 353.) His mother testified plaintiff has trouble focusing and  
13 everything distracts him. (Tr. 354.) It has been recommended that plaintiff get therapy but  
14 insurance does not cover therapy. (Tr. 357.) His sleep has improved since he has been taking  
15 medication. (Tr. 359-60.) According to his mother, plaintiff is "in his own world" a lot of the  
16 time. (Tr. 361.)

17 **STANDARD OF REVIEW**

18 Congress has provided a limited scope of judicial review of a Commissioner's decision.  
19 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ,  
20 when the determination is not based on legal error and is supported by substantial evidence. *See*  
21 *Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th  
22 Cir. 1999). "The [Commissioner's] determination that a claimant is not disabled will be upheld if  
23 the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570,  
24 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere  
25 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a  
26 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v.*  
27 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial  
evidence "means such relevant evidence as a reasonable mind might accept as adequate to  
support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).  
"[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the  
evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On

1 review, the Court considers the record as a whole, not just the evidence supporting the decision  
2 of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*  
3 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.  
5 Richardson, 402 U.S. at 400. If evidence supports more than one rational interpretation, the  
6 Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
7 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by  
8 substantial evidence will still be set aside if the proper legal standards were not applied in  
9 weighing the evidence and making the decision. *Brawner v. Sec’y of Health and Human Serv.*,  
10 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the  
11 administrative findings, or if there is conflicting evidence that will support a finding of either  
12 disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812  
13 F.2d 1226, 1229-30 (9th Cir. 1987).

### 14 SEQUENTIAL PROCESS

15 On August 22, 1996, Congress passed the Personal Responsibility and Work Opportunity  
16 Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 105 which amended 42 U.S.C. §  
17 1382c(a)(3). Under this law, a child under the age of eighteen is considered disabled for the  
18 purposes of SSI benefits if “that individual has a medically determinable physical or mental  
19 impairment, which results in marked and severe functional limitations, and which can be  
20 expected to result in death or which has lasted or can be expected to last for a continuous period  
21 of not less than 12 months.” 42 U.S.C. § 1382(c)(a)(3)(C)(i)(2003).

22 The regulations provide a three-step process to determine whether a child is disabled.  
23 First, the ALJ must determine whether the child is engaged in substantial gainful activity. 20  
24 C.F.R. § 416.924(b). If the child is not engaged in substantial gainful activity, the analysis  
25 proceeds to step two. Step two requires the ALJ to determine whether the child’s impairment or  
26 combination of impairments is severe. 20 C.F.R. § 416.924(c). The child will not be found to  
27 have a severe impairment if it constitutes a “slight abnormality or combination of slight  
abnormalities that cause no more than minimal functional limitations.” *Id.* If, however, there is a  
finding of severe impairment, the analysis proceeds to the final step, which requires the ALJ to  
determine whether the impairment or combination of impairments “meet, medically equal or

1 functionally equal” the severity of a set of criteria for an impairment in the listings. 20 C.F.R. §  
2 416.924(d).

3 The regulations provide that an impairment will be found to be functionally equivalent to  
4 a listed impairment if it results in extreme limitations in one area of functioning or marked  
5 limitations in two areas of functioning. 20 C.F.R. § 416.926a(a). To determine functional  
6 equivalence, the following six broad areas of functioning, or domains, are considered: acquiring  
7 and using information, attending and completing tasks, interacting and relating with others,  
8 moving about and manipulating objects, caring for self, and health and physical well-being. 20  
9 C.F.R. § 416.926a.

### 10 **ALJ’S FINDINGS**

11 At step one of the sequential evaluation process, the ALJ found plaintiff did not engage in  
12 substantial gainful activity since December 17, 2007, the application date. (Tr. 281.) At step two,  
13 the ALJ found plaintiff had the following severe impairments: attention deficit hyperactivity  
14 disorder (ADHD) and behavioral problems. (Tr. 281.) At step three, the ALJ found plaintiff does  
15 not have an impairment or combination of impairments that meets or medically equals the  
16 severity of one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 281.) The  
17 ALJ then determined plaintiff does not have an impairment or combination of impairments that  
18 functionally equals a listing. (Tr. 282.) Thus, the ALJ concluded plaintiff has not been disabled  
19 as defined in the Social Security Act since December 17, 2007, the date the application was filed.  
20 (Tr. 294.)

### 21 **ISSUES**

22 The question is whether the ALJ’s decision is supported by substantial evidence and free  
23 of legal error. Specifically, plaintiff asserts the ALJ erred by: (1) improperly considering the  
24 medical opinion evidence; (2) failing to discuss the findings of Dr. Liebe; and (3) making a  
25 negative credibility finding. (ECF No. 16 at 9-16.) Defendant argues the ALJ: (1) properly  
26 discredited the symptoms and limitations alleged; (2) properly considered Dr. Liebe’s findings;  
27 and (3) reasonably evaluated the medical evidence. (ECF No. 21 at 7-21.)

### **DISCUSSION**

#### **1. Credibility**

Plaintiff argues the ALJ committed reversible error by making negative credibility  
findings. (ECF No. 16 at 11-13.) In social security proceedings, the claimant must prove the

1 existence of a physical or mental impairment by providing medical evidence consisting of signs,  
2 symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not  
3 suffice. 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on the basis of a  
4 medically determinable impairment which can be shown to be the cause of the symptoms. 20  
5 C.F.R. § 416.929. Symptoms are the claimant's description of the physical or mental  
6 impairment, or in the case of a claimant under the age of 18 who is not able to describe his  
7 symptoms, the description of a parent or other person who is most familiar with the child. 20  
8 C.F.R. § 416.928(a)

9       Once medical evidence of an underlying impairment has been shown, medical findings  
10 are not required to support the alleged severity of the symptoms. *Bunnell v. Sullivan*, 947 F.2d  
11 341, 345 (9<sup>th</sup> Cir. 1991). If there is evidence of a medically determinable impairment likely to  
12 cause an alleged symptom and there is no evidence of malingering, the ALJ must provide  
13 specific and cogent reasons for rejecting a claimant's subjective complaints. *Id.* at 346. The ALJ  
14 may not discredit pain testimony merely because a claimant's reported degree of pain is  
15 unsupported by objective medical findings. *Fair v. Bowen*, 885 F.2d 597, 601 (9<sup>th</sup> Cir. 1989).  
16 The following factors may also be considered: (1) the claimant's reputation for truthfulness; (2)  
17 inconsistencies in the claimant's testimony or between his testimony and his conduct; (3)  
18 claimant's daily living activities; (4) claimant's work record; and (5) testimony from physicians  
19 or third parties concerning the nature, severity, and effect of claimant's condition. *Thomas v.*  
20 *Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir. 2002).

21       If the ALJ finds that the claimant's testimony as to the severity of her pain and  
22 impairments is unreliable, the ALJ must make a credibility determination with findings  
23 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
24 claimant's testimony. *Morgan v. Apfel*, 169 F.3d 595, 601-02 (9<sup>th</sup> Cir. 1999). In the absence of  
25 affirmative evidence of malingering, the ALJ's reasons must be "clear and convincing."  
26 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007); *Vertigan v. Halter*, 260 F.3d  
27 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169 F.3d at 599. The ALJ "must specifically identify the  
testimony she or he finds not to be credible and must explain what evidence undermines the  
testimony." *Holohan v. Massanari*, 246 F.3d 195, 1208 (9<sup>th</sup> Cir. 2001)(citation omitted).

      The ALJ found plaintiff's impairments could reasonably be expected to produce some of  
the alleged symptoms. (Tr. 284.) However, the ALJ found the statements from plaintiff's mother

1 regarding the intensity, persistence and limiting effects of the alleged symptoms are not entirely  
2 credible. (Tr. 284.) The ALJ gave several reason to support the credibility finding.

3 First, the ALJ found the medical evidence does not support plaintiff's allegations. (Tr.  
4 285.) While subjective pain testimony may not be rejected solely because it is not corroborated  
5 by objective medical findings, the medical evidence is a relevant factor in determining the  
6 severity of a claimant's pain and its disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857  
7 (9th Cir. 2001); 20 C.F.R. 416.929(c)(2). The ALJ pointed out plaintiff's test scores show  
8 average cognitive ability and no discrepancy evidencing a specific learning disability. (Tr. 136-  
9 39, 227, 285.) Dr. McKnight testified at the first hearing that plaintiff's test results indicate  
10 academic achievement within the average range. (Tr. 134, 495.) Dr. McKnight testified plaintiff  
11 may have borderline behavioral problems with breaking rules, aggression and withdrawal based  
12 on the mother's report of behaviors. (Tr. 285, 496.) Plaintiff was tested for special education but  
13 was not found eligible in any category. (Tr. 140, 496.) Although plaintiff demonstrated some  
14 difficulty with language skills, Dr. McKnight testified his overall intelligence is within the  
15 average range. (Tr. 499.) All of these factors are reasonably interpreted by the ALJ as objective  
16 evidence inconsistent with the claimed disabling limitations. As a result, this is a clear and  
17 convincing reason supporting the negative credibility finding.

18 Second, the ALJ observed several inconsistencies in the record which diminish plaintiff's  
19 credibility. (Tr. 285.) A strong indicator of credibility is the consistency of the individual's own  
20 statements made in connection with the claim for disability benefits and statements made to  
21 medical professionals. S.S.R. 96-7p. In making a credibility evaluation, the ALJ may rely on  
22 ordinary techniques of credibility evaluation. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.  
23 1996). The ALJ pointed out plaintiff's mother alleged that her son's grades are low, that he has  
24 difficulty getting along with others, and difficulty maintaining his attention, concentration and  
25 persistence. (Tr. 285.) However, plaintiff was observed by a school counselor to remain 100% on  
26 task at school for 25 minutes and does well with one-on-one help. (Tr. 137, 197, 285, 497.) In  
27 2011, plaintiff's mother reported to Dr. Liebe she has no concerns with delinquency and that  
plaintiff is much better when he takes his medication. (Tr. 540, 542.) Additionally, despite  
reports of social difficulties, in 2011, Dr. Liebe reported plaintiff associates with two relatives  
who are near his age and the three went fishing together. (Tr. 541.) He has a friend at school with  
whom he eats lunch and walk around the track. (Tr. 372.) Plaintiff also enjoys playing with

1 Legos, plays video games and shares a computer with his sisters. (Tr. 373-74, 541.) These  
2 activities could reasonably be considered to require concentration, attention, and social  
3 interaction inconsistent with the claimed limitations. As a result, the ALJ cited substantial  
4 evidence which reasonably supports a clear and convincing reason for the negative credibility  
5 finding. Thus, the ALJ did not err.

## 6 **2. Dr. Liebe**

7 Plaintiff argues the ALJ erred by failing to consider the opinion of Dr. Liebe. (ECF No.  
8 16 at 9-11.) In disability proceedings, a treating physician's opinion carries more weight than an  
9 examining physician's opinion, and an examining physician's opinion is given more weight than  
10 that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004);  
11 *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If the treating or examining physician's  
12 opinions are not contradicted, they can be rejected only with clear and convincing reasons.  
13 *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and  
14 "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*,  
15 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995). Historically, the courts have recognized conflicting medical  
16 evidence, the absence of regular medical treatment during the alleged period of disability, and  
17 the lack of medical support for doctors' reports based substantially on a claimant's subjective  
18 complaints of pain as specific, legitimate reasons for disregarding a treating or examining  
19 physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64  
20 (9<sup>th</sup> Cir. 1995); *Fair*, 885 F.2d at 604.

21 If a treating or examining physician's opinions are not contradicted, they can be rejected  
22 only with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996).  
23 However, if contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons  
24 that are supported by substantial evidence. *See Flaten v. Secretary of Health and Human Serv.*,  
25 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir.  
26 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9<sup>th</sup> Cir. 1989)).

27 Dr. Liebe examined plaintiff in March and August 2006 and in August 2011. (Tr. 227-31,  
540-42.) In March 2006, Dr. Liebe diagnosed attention deficit/hyperactivity disorder and  
identified two other "probable" comorbidities of specific learning disability and oppositional  
defiant disorder. (Tr. 231.) She noted that plaintiff's oppositional behaviors are present at home  
and school and opined they "and are causing a functional impairment." (Tr. 231.) Dr. Liebe

1 recommended behavioral therapy. With respect to a possible learning disability, Dr. Liebe noted  
2 that the school would be testing plaintiff. (Tr. 231.) With respect to ADHD, Dr. Liebe  
3 recommended behavioral therapy and a trial of medication, although plaintiff's mother did not  
4 want to consider medication. (Tr. 231.) In August 2006, Dr. Liebe reviewed the results of school  
5 testing which showed average cognitive ability and no specific learning disability. (Tr. 227.) Dr.  
6 Liebe noted plaintiff's behaviors had not changed, but the mother had not yet accessed  
7 behavioral therapy. (Tr. 228.) Dr. Liebe recommended behavioral therapy and additional  
8 neurodevelopmental testing. (Tr. 228.)

9 In August 2011, Dr. Liebe saw plaintiff again after a five-year absence. (Tr. 540.)  
10 Plaintiff's mother reported that plaintiff began taking Strattera about two years prior and both she  
11 and his teachers felt that his behaviors were in relatively good control. (Tr. 540.) When plaintiff  
12 was off medication, his teacher was concerned about daydreaming, but once the medication was  
13 restarted, plaintiff's attention, focus, and completion of work improved. (Tr. 540.) When plaintiff  
14 is taking medication, his mother reports he responds to requests more quickly with less  
15 oppositionality. (Tr. 540.) His mother reported she had no concerns with delinquency and his  
16 occasional anger is much better on medication. (Tr. 540-41.) He has made friends. (Tr. 541.) Dr.  
17 Liebe diagnosed attention deficit/hyperactivity disorder. (Tr. 542.) When taking medication  
18 consistently, plaintiff "appears to have sustained academic progress at school, and by mother's  
19 report is not having significant behavioral disturbance." (Tr. 542.) Dr. Liebe recommended  
20 continuing medication, monitoring academic progress, and no further testing or follow up. (Tr.  
21 542.)

22 Plaintiff argues the ALJ erred by failing to address Dr. Liebe's findings. (ECF No. 16 at  
23 9-11.) Although the ALJ did not specifically discuss Dr. Liebe's notes, the ALJ cited Dr. Liebe's  
24 reports favorably throughout the decision. (Tr. 285-87.) The ALJ need not discuss all evidence  
25 presented, but must explain why significant probative evidence has been rejected. *Vincent v.*  
26 *Heckler*, 739 F.2d 1393, 1394-95 (9<sup>th</sup> Cir. 1984). The ALJ did not reject Dr. Liebe's findings.<sup>1</sup>

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27 <sup>1</sup> Even if the ALJ should have assigned weight to Dr. Liebe's findings, any error is harmless  
because Dr. Liebe's opinions do not contain evidence of additional limitations beyond the ALJ's  
findings. Harmless error occurs when an error is inconsequential to the ultimate nondisability  
determination. *See Carmickle v. Comm'r, Soc. Sec. Admin*, 533 F.3d 1155, 1162 (9th Cir. 2008);



1 Plaintiff does not mention the 2011 findings, but emphasizes Dr. Liebe's March 2006 finding  
2 that plaintiff's oppositional behaviors are causing a functional impairment. (ECF No. 16 at 10-  
3 11.) However, Dr. Liebe did not identify any specific functional limitations applicable to the six  
4 domains. Furthermore, Dr. Liebe's 2011 findings show that plaintiff oppositional behavior  
5 improved significantly on medication. Notwithstanding, plaintiff asserts, "Dr. Liebe made it  
6 clear that his psychological symptoms would not be controlled with medications." (ECF No. 16  
7 at 11.) Dr. Liebe's 2011 findings indicate that plaintiff's symptoms were, in fact, controlled with  
8 medication. (Tr. 541-42.) An impairment effectively controlled with medication is not disabling.  
9 *Warre v. Comm'r Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006). As a result, there is  
10 nothing in Dr. Liebe's findings which could reasonably be construed as evidence of limitations  
11 greater than the ALJ's findings regarding the six domains.

### 12 **3. Other Opinion Evidence**

13 Plaintiff argues the ALJ should not have rejected the opinions of ARNP Beauchamp and  
14 plaintiff's first grade teachers, Ms. Gonzalez and Ms. Ramirez. (ECF No. 16 at 13-16.) The  
15 opinion of an acceptable medical source such as a physician or psychologist is given more  
16 weight than that of an "other source." 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d  
17 967, 970-71 (9<sup>th</sup> Cir. 1996). "Other sources" include nurse practitioners, physicians' assistants,  
18 therapists, teachers, social workers, spouses and other non-medical sources. 20 C.F.R. §§  
19 404.1513(d), 416.913(d). However, the ALJ is required to "consider observations by non-  
20 medical sources as to how an impairment affects a claimant's ability to work." *Sprague v.*  
21 *Bowen*, 812 F.2d 1226, 1232 (9<sup>th</sup> Cir. 1987). Non-medical testimony can never establish a  
22 diagnosis or disability absent corroborating competent medical evidence. *Nguyen v. Chater*, 100  
23 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). Pursuant to *Dodrill v. Shalala*, 12 F.3d 915 (9<sup>th</sup> Cir. 1993), an  
24 ALJ is obligated to give reasons germane to "other source" testimony before discounting it.

#### 25 **a. Teacher Opinions**

26 The ALJ considered the opinions of plaintiff's first grade teachers, Ms. Gonzalez and Ms.  
27 Ramirez. (Tr. 284, 286-87.) Ms. Gonzalez completed a Social Security Administration Teacher

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*Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9<sup>th</sup> Cir. 2006); *Batson v. Comm'r Soc.*  
*Sec. Admin*, 359 F.3d 1190, 1195-97 (9<sup>th</sup> Cir. 2004).

1 Questionnaire form in April 2007. (Tr. 165-72.) Ms. Gonzalez opined plaintiff has obvious  
2 problems in five areas of the domain of acquiring and using information and noted plaintiff can  
3 be very defiant and refuse to do anything. (Tr. 166.) In the domain of attending and completing  
4 tasks, she opined plaintiff only has a slight problem in some areas and noted he is very persistent  
5 about finishing a task before moving on. (Tr. 167.) Ms. Gonzalez identified four areas on the  
6 domain of interacting and relating with others which she rated as an obvious problem. She did  
7 not rate the domain of moving about and manipulating objects. (Tr. 168-69.) In the domain of  
8 caring for himself, Ms. Gonzalez assessed a serious problem in handling frustration and being  
9 patient and an obvious problem in the ability to use coping skills to meet the demands of the  
10 school environment. (Tr. 170.) No concerns were noted in the domain of health and physical  
11 well-being. (Tr. 171.)

12 The ALJ assigned little weight to Ms. Gonzalez opinion because the objective evidence  
13 and plaintiff's activities of daily living do not show that his impairments meet or equal the  
14 childhood disability listings, as discussed *supra*. (Tr. 286.) Inconsistency with medical evidence  
15 is a germane reason for rejecting lay witness evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218  
16 (9th Cir. 2005); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Vincent v. Heckler*, 739 F.2d  
17 1393, 1395 (9th Cir. 1984). The ALJ pointed out that plaintiff's cognitive scores and overall  
18 intelligence are average. (Tr. 136-39, 227, 286, 499.) The ALJ also observed that the opinion had  
19 been generated seven years before the decision and does not address plaintiff's behavioral  
20 improvement with medication. (Tr. 286.) These reasons are all germane to the witness and are  
21 supported by the evidence.

22 Ms. Ramirez also completed an SSA Teacher Questionnaire form in January 2008. (Tr.  
23 196-203.) Ms. Ramirez assessed a serious problem and an obvious problem in most areas of the  
24 domain of acquiring and using information. (Tr. 197.) She stated plaintiff has a hard time staying  
25 on task, but he does ok when he has one on one help. (Tr. 197.) Ms. Ramirez also identified a  
26 very serious problem, serious problem, or an obvious problem in most areas of the domain of  
27 attending and completing tasks. (Tr. 198.) She noted plaintiff has to be told several times what  
the tasks are. (Tr. 198.) In the domain of interacting and relating with others, Ms. Ramirez noted  
one serious problem area and four obvious problem areas. (Tr. 199.) She identified no problems  
in the domain of moving about and manipulating objects; two obvious problems in the domain of

1 caring for himself; and no significant concerns in the domain of physical well-being. (Tr. 200-  
2 02.)

3 The ALJ assigned little weight to Ms. Ramirez opinion for the same reasons noted for  
4 Ms. Gonzalez' opinion. (Tr. 287.) If the ALJ gives germane reasons for rejecting testimony by  
5 one witness, the ALJ need only point to those reasons when rejecting similar testimony by a  
6 different witness. *Molina v. Astrue*, 674 F.3d 1104, 1114 (9<sup>th</sup> Cir. 2012). The regulations require  
7 consideration of other source opinions, *see* 20 C.F.R. §§ 404.1529(c)(3), 404.1545(a)(3), but do  
8 not require the ALJ to provide express reasons for rejecting testimony from each lay witness, *see*  
9 *id.*; *see also* SSR 06-03p (recognizing "there is a distinction between what an adjudicator must  
10 consider and what the adjudicator must explain in the disability determination or decision").  
11 *Molina at id.* The ALJ observed Ms. Gonzalez' opinion contradicts Ms. Ramirez' opinion on the  
12 issue of the ability to stay on task since Ms. Gonzalez specifically noted plaintiff is very  
13 persistent about completing tasks. (Tr. 167, 197, 286.) Further, Ms. Ramirez' note that plaintiff is  
14 capable of doing work with one-on-one assistance suggests plaintiff is less limited than assessed.  
15 (Tr. 287.) The ALJ observed that despite the reports of Ms. Ramirez and Ms. Gonzalez, plaintiff  
16 was not placed in special education. (Tr. 287.) This was reasonably interpreted by the ALJ to  
17 suggest that although plaintiff had some difficulties at school, he was not as limited as alleged.  
18 Again, these reasons are germane to the witness and supported by the evidence.

19 **b. ARNP Beauchamp**

20 Plaintiff argues the ALJ erred in rejecting the opinion of ARNP Beauchamp. (ECF No.  
21 16 at 14-15.) Ms. Beauchamp completed a "Medical Report for Child" form in August 2009.<sup>2</sup>  
22 (Tr. 265-67.) Ms. Beauchamp opined plaintiff has a marked impairment in the domain of

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23 <sup>2</sup> This is the only evidence from Ms. Beauchamp in the record. Plaintiff describes Ms.  
24 Beauchamp as a treating provider (ECF No. 16 at 14), although the record does not reflect a  
25 history of a treating relationship. Ms. Beauchamp's statement indicates plaintiff began care at  
26 that office in April 2009, although it is not clear that Ms. Beauchamp had previously seen  
27 plaintiff. (Tr. 267.) At the first hearing, the ALJ gave plaintiff's counsel additional time to obtain  
treatment records from Ms. Beauchamp. (Tr. 55-56.) However, the report is the only evidence in  
the record from Ms. Beauchamp. Notwithstanding, even if Ms. Beauchamp is a treating provider,  
the ALJ gave germane reasons supported by substantial evidence for rejecting the opinion.

1 acquiring and using information and noted plaintiff “reportedly” has a difficulty with learning  
2 and information processing. (Tr. 265.) For the domain of attending and completing tasks, Ms.  
3 Beauchamp assessed a marked limitation and noted plaintiff has difficulty initiating and  
4 completing tasks that are complex or involve organization. (Tr. 265.) She assessed a less than  
5 marked limitation in the domains of interacting and relating to others, moving about and  
6 manipulating objects, and caring for self; and no limitation in the domain of health and physical  
well-being. (Tr. 266-67.)

7 The ALJ assigned little weight to the marked limitations in Ms. Beauchamp’s opinion for  
8 reasons previously discussed by the ALJ. *See Molina at id.* The ALJ rejected Ms. Beauchamp’s  
9 findings regarding marked mental health limitations because as discussed *supra*, neither the  
10 objective evidence nor activities of daily living support such limitations. (Tr. 287.) Further, the  
11 ALJ observed that Ms. Beauchamp did not cite any specific objective medical evidence that  
12 plaintiff has marked limitations with learning and information processing. (Tr. 284.) Ms.  
13 Beauchamp did not cite any exam findings or personal observations in the report regarding  
14 attending and completing tasks or otherwise identify the basis for her conclusion. (Tr. 265.) In  
15 fact, Ms. Beauchamp’s explanation for each assessment of the six domains is a one-sentence  
16 statement with no supporting detail. (Tr. 265-66.) The amount of relevant evidence supporting  
17 the opinion and the quality of the explanation provided are relevant factors in evaluating a  
18 medical opinion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9<sup>th</sup> Cir. 2007); *Orn v. Astrue*, 495  
19 F.3d 625, 631 (9<sup>th</sup> Cir. 2007). The ALJ also concluded Ms. Beauchamp’s findings are less  
20 reliable because she noted that plaintiff’s mother reported his symptoms are controlled when he  
21 takes his medication. (Tr. 267.) As noted *supra*, an impairment effectively controlled with  
22 medication is not disabling. *Warre*, 439 F.3d at 1006. The reasons cited by the ALJ are germane  
23 to the witness and are supported by substantial evidence. As a result, the ALJ did not err.

24 In reply briefing, plaintiff cites language in the August 2012 U.S. District Court remand  
25 order: “Ms. Beauchamp’s assessment is consistent with Plaintiff’s test results and teacher  
26 evaluations that Plaintiff had marked limitations in acquiring and using information and  
27 attending and completing tasks.” (Tr. 416, ECF No. 22 at 3.) Arguments not made in an opening  
brief are waived. *Bray v. Comm’r*, 554 F.3d 1219, 1226 n. 7 (9<sup>th</sup> Cir. 2009).  
Notwithstanding, without citing any authority, plaintiff suggests this language is a factual  
finding which binds the ALJ to find that Ms. Beauchamp’s assessment and the teacher

1 evaluations are consistent. (ECF No. 22 at 3-5.) The ALJ, not this court, is responsible for  
2 reviewing the evidence and resolving conflicts or ambiguities. *Magallanes v. Bowen*, 881 F.2d  
3 747, 751 (9th Cir.1989); see also *Richardson v. Perales*, 402 U.S. 389, 400 (1971)

4 The ALJ detailed test results which support the conclusion that there is a lack of objective  
5 supporting evidence for Ms. Beauchamp's finding of a marked limitation in the domain of  
6 acquiring and using information. (Tr. 287.) In particular, all results of the CTONI were average  
7 (Tr. 136) and results of the Woodcock Johnson were in the average range. (Tr. 137.) While the  
8 results of the WISC III IQ testing were determined to be invalid, it was noted that deficits were  
9 attributed to cultural and language factors and not any deficit in plaintiff. (Tr. 135.) In addition,  
10 Dr. McKnight concluded the test results no marked limitations. (Tr. 495-96.) The court must  
11 uphold the ALJ's decision when it is not based on legal error and is supported by substantial  
12 evidence. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). Plaintiff does not address any of  
the facts cited by the ALJ as supporting evidence but relies on explanatory language in a prior  
court decision that is not binding precedent.

13 Furthermore, even if the test result evidence is ambiguous, the court must uphold the  
14 ALJ's decision where the evidence is susceptible to more than one rational interpretation.  
15 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). As a result, the court concludes the  
16 ALJ's finding regarding test results and a lack objective evidence is rational and must be upheld.  
17 Lastly, the court's order directed the ALJ to reconsider the weight afforded to the opinion of Ms.  
18 Beauchamp and other lay witnesses and to support the findings with germane reasons supported  
19 by substantial evidence. (Tr. 422.) Even if the ALJ erred on this issue, the ALJ cited three other  
20 germane reasons supported by substantial evidence for rejecting the marked limitations assessed  
21 by Ms. Beauchamp. Therefore, any error would be harmless error. See *Carmickle v. Comm'r,*  
*Soc. Sec. Admin*, 533 F.3d 1155, 1162 (9th Cir. 2008).

22 Plaintiff also argues for the first time on reply that the ALJ erred in considering evidence  
23 of plaintiff's cognitive abilities because ADHD and ODD are not characterized by intelligence.  
24 (ECF No. 22 at 6-7.) Notwithstanding, this argument fails because plaintiff's cognitive abilities  
25 are relevant in evaluating the domain of acquiring and using information. 20 C.F.R. §  
416.926a(g).

#### 26 **4. Substantial Evidence**

1 Plaintiff argues the ALJ erred by relying solely on the opinions of nonexamining medical  
2 advisors and rejecting the opinions of all other providers. (ECF No. 16 at 13-16.) The opinion of  
3 a nonexamining physician may serve as substantial evidence if it is supported by other evidence  
4 in the record and are consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995).  
5 Some cases have upheld the rejection of an examining or treating physician based in part on the  
6 testimony of a non-examining medical advisor when other reasons to reject the opinions of  
7 examining and treating physicians exist independent of the non-examining doctor's opinion.  
8 *Lester*, 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9<sup>th</sup> Cir. 1989)  
9 (reliance on laboratory test results, contrary reports from examining physicians and testimony  
10 from claimant that conflicted with treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179  
11 (9<sup>th</sup> Cir. 1995) (rejection of examining psychologist's functional assessment which conflicted  
12 with his own written report and test results). Thus, case law requires not only an opinion from  
13 the consulting physician but also substantial evidence (more than a mere scintilla but less than a  
preponderance), independent of that opinion which supports the rejection of contrary conclusions  
by examining or treating physicians. *Andrews*, 53 F.3d at 1039.

14 The ALJ indicated that in addition to the opinions Dr. McKnight and the state agency  
15 examiners that plaintiff is not disabled,<sup>3</sup> the ALJ also relied on evidence of plaintiff's ability to  
16 do well when he takes his prescribed medication. (Tr. 287.) This evidence comes from Dr.  
17 Liebe's report and from ARNP Beauchamp's report. Both Dr. Liebe and Ms. Beauchamp noted  
18 that plaintiff's mother reported plaintiff's symptoms were controlled with medication. (Tr. 267,  
19 541-42.) As a result, the ALJ did not rely solely upon the opinion of Dr. McKnight and the state  
20 agency examiners, but on evidence independent of the non-examining, non-treating medical  
21 opinions. *See Jamerson v. Chater*, 112 F.3d 1064 (9<sup>th</sup> Cir. 1997) (affirming ALJ decision  
22 regarding disability of a minor based in part on opinions of non-treating, non-examining  
23 acceptable medical sources contrary to a teacher opinion). Therefore, substantial evidence  
24 supports the ALJ's findings and the ALJ did not err.

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25 <sup>3</sup> As discussed *supra*, Dr. McKnight opined plaintiff has less than marked or no limitations in the  
26 six domains. (Tr. 498-500.) Dr. Gilbert, a reviewing psychologist, opined in May 2007 and July  
27 2008 that plaintiff has less than marked limitation in five domains and no limitation in one  
domain. (Tr. 233-38.)

1  
2 **CONCLUSION**

3 Having reviewed the record and the ALJ's findings, this court concludes the ALJ's  
4 decision is supported by substantial evidence and is not based on error.

5 **IT IS ORDERED:**

- 6 1. Defendant's Motion for Summary Judgment (**ECF No. 21**) is **GRANTED**.  
7 2. Plaintiff's Motion for Summary Judgment (**ECF No. 16**) is **DENIED**.

8 The District Court Executive is directed to file this Order and provide a copy to counsel  
9 for plaintiff and defendant. Judgment shall be entered for defendant and the file shall be  
10 **CLOSED**.

DATED January 20, 2015

11 *s/Fred Van Sickle*  
12 Fred Van Sickle  
13 Senior United States District Judge  
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