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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Armentha Hooker,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.

No. CV-13-02616-PHX-JAT

ORDER

14
15 Plaintiff Armentha Hooker, mother of minor claimant Z.H., appeals a denial of
16 benefits by the Acting Commissioner of Social Security (“Commissioner”). The Court
17 now rules on this appeal.

18 **I. BACKGROUND**

19 **A. Procedural History**

20 Plaintiff filed an application for disability insurance benefits on May 28, 2009 on
21 behalf of her minor daughter, Z.H., alleging Z.H.’s disability beginning May 26, 2009.
22 The claim was denied on September 15, 2009, and again upon reconsideration on January
23 13, 2010. Plaintiff requested a hearing, which was conducted by an Administrative Law
24 Judge (“ALJ”) on April 17, 2012 in Phoenix, Arizona.

25 **B. Factual Background**

26 Z.H. began seeing mental health professionals in 2007 at the age of five due to
27 behavioral problems at home and school. Specifically, Plaintiff reported to a
28 psychologist, Herb Brenden, Ed.D, L.P., that Z.H. had trouble focusing and following

1 directions and became violent with peers and teachers. Dr. Brenden referred Z.H. to a
2 psychiatrist, Dexter D. Whittemore, M.D., and Z.H. was diagnosed with attention deficit
3 hyperactivity disorder (“ADHD”) and oppositional defiant disorder (“ODD”).
4 Dr. Whittemore prescribed Daytrana 15 mg and noted improvements in focus,
5 organization, and impulsivity. At one point during Z.H.’s treatment with Dr. Whittemore,
6 Z.H.’s father reported that she was doing “generally well” with the treatment plan, but
7 Z.H.’s teachers, continued to report behavioral problems.

8 In 2009, when she was seven years old, Z.H. qualified for special education
9 services in her school district in Minnesota, which included intermittent attendance in
10 special education classes and a behavioral intervention plan. Between 2009 and 2010,
11 Z.H.’s parents and teachers reported periods of improvement and periods of increased
12 violent, disruptive, and impulsive behavior. Dr. Whittemore eventually added Ritalin to
13 Z.H.’s treatment plan.

14 Plaintiff and Z.H. moved to Arizona in 2010 and saw a psychiatrist, Edwin A.
15 Perez, M.D., in October 2010, seven months after Z.H.’s last appointment with Dr.
16 Whittemore. Z.H.’s new school district in Arizona placed Z.H. on an “individual
17 education plan,” under which Z.H.’s teacher reported steady improvements.

18 Dr. Perez completed an assessment of Z.H.’s limitations on June 30, 2011, in
19 which he concluded that Z.H. had marked limitations in motor functioning, social
20 functioning, and concentration, persistence, or pace. Z.H.’s fourth grade teacher in
21 Arizona, Ms. Linda Foster, filled out a similar assessment, concluding that Z.H. had
22 marked limitations in cognitive/communicative functioning and concentration,
23 persistence, or pace as well as an extreme limitation in social functioning. At the hearing,
24 a non-examining medical expert, Raymond E. Moore, Ph.D, testified that Z.H. did not
25 have any marked or extreme limitations. Plaintiff also testified at the hearing, stating that
26 Z.H. inflicts physical harm on others and herself, takes abnormally long to do her
27 homework, has trouble focusing, and is generally defiant toward adults.

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1 **II. DISABILITY**

2 **A. Three-Step Evaluation Process**

3 The ALJ follows a three-step process to evaluate whether a child is disabled. First,
4 the ALJ determines whether the child is engaged in substantial gainful activity. 20 C.F.R.
5 § 416.924(a), (b). If the child is engaged in substantial gainful activity, then she is not
6 disabled. 20 C.F.R. § 416.924(b). Second, the ALJ determines whether the child has a
7 “medically determinable impairment(s) that is severe.” 20 C.F.R. § 416.924(c). For
8 purposes of this step, “a slight abnormality or a combination of slight abnormalities that
9 causes no more than minimal functional limitations” does not constitute a severe
10 impairment. 20 C.F.R. § 416.924(c). If the child has no severe, medically determinable
11 impairment, the she is not disabled. 20 C.F.R. § 416.924(c). Finally, the ALJ must
12 determine whether the child’s impairment “meet[s], medically equal[s], or functionally
13 equal[s] the listings.” 20 C.F.R. § 416.924(d). The impairment medically equals a listed
14 impairment if “it is at least equal in severity and duration to the criteria of any listed
15 impairment.” 20 C.F.R. § 416.926(a); *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006,
16 1012 (9th Cir. 2003). The impairment is functionally equivalent to a listed impairment if
17 the child has a “marked” limitation in two areas or an “extreme” limitation in one area.
18 20 C.F.R. § 416.926a (a); *Howard*, 341 F.3d at 1012.

19 In making disability determinations, the ALJ must “develop the record and
20 interpret the medical evidence.” *Howard*, 341 F.3d at 1012 (citing *Crane v. Shalala*, 76
21 F.3d 251, 255 (9th Cir. 1996)). In doing do, however, “the ALJ does not need to ‘discuss
22 every piece of evidence.’” *Id.* (citing *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998)
23 and *Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir.1984)).

24 **B. The ALJ’s Decision**

25 At step one, the ALJ determined that Z.H. is not engaged in gainful employment.
26 At step two, the ALJ determined that Z.H. has two medically determinable, severe
27 impairments: ADHD and ODD. At step three, the ALJ found that Z.H. does not have an
28 impairment or combination of impairments that meets, medically equals, or functionally

1 equals the listings. Accordingly, the ALJ concluded that Z.H. is not disabled and
2 therefore Plaintiff is not entitled to benefits.

3 **C. Standard of Review**

4 A district court:

5 may set aside a denial of disability benefits only if it is not
6 supported by substantial evidence or if it is based on legal
7 error. Substantial evidence means more than a mere scintilla
8 but less than a preponderance. Substantial evidence is
9 relevant evidence, which considering the record as a whole, a
reasonable person might accept as adequate to support a
conclusion. Where the evidence is susceptible to more than
one rational interpretation, one of which supports the ALJ's
decision, the ALJ's decision must be upheld.

10 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation
11 marks omitted). This is because “[t]he trier of fact and not the reviewing court must
12 resolve conflicts in the evidence, and if the evidence can support either outcome, the
13 court may not substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d
14 1016, 1019 (9th Cir. 1992). Under this standard, the Court will uphold the ALJ's findings
15 if supported by inferences reasonably drawn from the record. *Batson v. Comm’r of the*
16 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the Court must consider
17 the entire record as a whole and cannot affirm simply by isolating a “specific quantum of
18 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (internal
19 quotation omitted).

20 **III. Discussion**

21 Plaintiff's main objections to the ALJ's decision center on the way the ALJ
22 assigned weight to the various sources of evidence. Specifically, Plaintiff argues that the
23 ALJ erred by assigning “little weight” to Dr. Perez's assessment, ignoring Ms. Foster's
24 assessment, and relying on Dr. Moore's opinion. As these sources differ in nature, the
25 Court will address them each separately.

26 **A. Dr. Perez**

27 Plaintiff's first and largest argument is that the ALJ erroneously assigned “little
28 weight” to Dr. Perez's assessment of Z.H. The ALJ explained that she diminished the

1 weight given to Dr. Perez’s assessment because Dr. Perez was “not seeing [Z.H.]
2 consistently or regularly” when he completed the assessment and because the assessment
3 was inconsistent with Z.H.’s medical¹ and school records.

4 ALJs are entitled to give less weight to physicians that do not regularly treat a
5 claimant or who are not procured for the purpose of treatment. The regulations provide
6 in-depth guidance in this regard:

7 Treating source means your own physician, psychologist, or other
8 acceptable medical source who provides you, or has provided you, with
9 medical treatment or evaluation and who has, or has had, an ongoing
10 treatment relationship with you. Generally, we will consider that you have
11 an ongoing treatment relationship with an acceptable medical source when
12 the medical evidence establishes that you see, or have seen, the source with
13 a frequency consistent with accepted medical practice for the type of
14 treatment and/or evaluation required for your medical condition(s). We may
15 consider an acceptable medical source who has treated or evaluated you
only a few times or only after long intervals (e.g., twice a year) to be your
treating source if the nature and frequency of the treatment or evaluation is
typical for your condition(s). We will not consider an acceptable medical
source to be your treating source if your relationship with the source is not
based on your medical need for treatment or evaluation, but solely on your
need to obtain a report in support of your claim for disability. In such a
case, we will consider the acceptable medical source to be a nontreating
source.

16 20 C.F.R. § 416.902.

17 The Ninth Circuit has elaborated upon this guidance, holding that “[t]he key issue
18 in determining whether [a physician] was claimant’s treating physician is whether his
19 examinations of her were prompted by her need for treatment.” *Benton ex rel. Benton v.*
20 *Barnhart*, 331 F.3d 1030, 1038 (9th Cir. 2003) (quoting *Bowman v. Commr, Soc. Sec.*
21 *Admin.*, 2001 WL 215790 (Feb. 23, 2001)). Additionally, the Ninth Circuit has explained
22 that “[i]t is not necessary, or even practical, to draw a bright line distinguishing a treating
23 physician from a non-treating physician. Rather, the relationship is better viewed as a
24 series of points on a continuum reflecting the duration of the treatment relationship and
25 the frequency and nature of the contact.” *Id.* (quoting *Ratto v. Sec’y, Dep’t of Health &*

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27 ¹ The Court acknowledges that the notes cited by the ALJ as “Dr. Perez’s own
28 treatment notes” were actually written by Dr. Whittemore and other mental health
professionals. This error, however, is insubstantial, as the contents of the notes, not the
author’s identity, is at issue.

1 *Human Servs.*, 839 F. Supp. 1415, 1425 (D. Or. 1993)).

2 Applying these standards, the Court concludes that the ALJ did not commit
3 reversible error by assigning “little weight” to Dr. Perez’s assessment. After a careful
4 review of the record, the Court could locate documentary evidence of only three visits
5 Z.H. had with Dr. Perez: one on October 25, 2010 (Tr. 871–77), another on October 12,
6 2011 (Tr. 831–33), and another on January 11, 2012 (Tr. 985–86). Only one of these
7 visits occurred before Dr. Perez completed his assessment in June of 2011. There are no
8 treatment notes on the record for the June 15, 2011 visit Dr. Perez claims he had with
9 Z.H. Even if Dr. Perez did, in fact, see Z.H. in June 2011, that would only be his second
10 recorded visit with Z.H. before completing the assessment and the first recorded visit in
11 eight months. The other records cited by Plaintiff consist of notes taken by other health
12 care professionals, informed consent forms, and Dr. Perez’s assessment itself. The only
13 other evidence that indicates Dr. Perez may have seen Z.H. more than twice before
14 making his assessment is Plaintiff’s testimony that Z.H. visits Dr. Perez “from once a
15 month to once every three months.” The fact remains, however, that there is no
16 documentary evidence of any such regular visits. Additionally, Plaintiff was testifying in
17 April of 2012 about Z.H.’s *current* schedule with Dr. Perez, so the testimony does not
18 necessitate the conclusion that Z.H. had a regular schedule with Dr. Perez *before* Dr.
19 Perez completed his assessment. In short, there is little record evidence that Dr. Perez had
20 an “ongoing treatment relationship” with Z.H. when he completed the assessment; to the
21 contrary, the record strongly indicates that Dr. Perez saw Z.H. a few times, at most,
22 before completing the assessment.

23 The ALJ’s assignment of “little weight” to the Dr. Perez’s assessment is further
24 buttressed by her reasonable findings that Dr. Perez’s assessment was inconsistent with
25 the medical record and Z.H.’s school records. In particular, the ALJ cited progress reports
26 within Z.H.’s school records that note Z.H.’s improvement in behavior, (Tr. at 776, 780),
27 and a “45-day screening report” that shows only a few areas of behavioral and functional
28 inadequacies, (Tr. 778). The ALJ also cites treatment notes that indicate Z.H. was a

1 mainstream student (as opposed to a special education student), (Tr. 663) and was “doing
2 generally well” with her focus and impulsivity, (Tr. 664). These school and medical
3 records showing Z.H.’s functionality, combined with the evidence showing the limited
4 nature of Dr. Perez’s treating relationship with Z.H., constitute substantial evidence
5 supporting the ALJ’s decision to assign Dr. Perez’s assessment diminished weight.
6 Therefore, the ALJ did not err by assigning “little weight” to Dr. Perez’s assessment.

7 **B. Ms. Foster**

8 Plaintiff argues that the ALJ erred by ignoring an assessment completed by Ms.
9 Foster, which corroborates Dr. Perez’s conclusions that Z.H. had disabling limitations.
10 The Commissioner argues that any error in ignoring Ms. Foster’s assessment was
11 harmless because Ms. Foster did not base her opinion on scientific or medical testing.
12 Finally, the Commissioner argues that because the ALJ properly rejected Dr. Perez’s
13 conclusion that Z.H. has marked limitations, the ALJ need not address every piece of lay
14 testimony which reaches the same conclusions.

15 Both parties cite *Molina v. Astrue*, 674 F.3d 1122 (9th Cir. 2012) in support of
16 their positions. In that case, the Ninth Circuit affirmed their well-established precedent
17 that “lay witness testimony cannot be disregarded without comment,” but held that the
18 ALJ’s failure to comment on lay testimony was harmless “[b]ecause the ALJ had validly
19 rejected all the limitations described by the lay witnesses.” *Molina*, 674 F.3d at 1114,
20 1122 (9th Cir. 2012) (quoting *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)
21 (internal quotations marks omitted)). Specifically, the court held that because the ALJ
22 had validly found that the claimant’s purported limitations were not supported by the
23 record, “the ALJ’s failure to give specific witness-by-witness reasons for rejecting the lay
24 testimony did not alter the ultimate nondisability determination.” *Id.* at 1122.

25 *Molina*’s holding is directly applicable here. First, the Court notes that it was
26 unable to locate any mention of Ms. Foster’s assessment in the ALJ’s decision; the
27 portions of the ALJ’s decisions the Commissioner claims cited Ms. Foster’s assessment
28 actually cite a treatment note by Dr. Whittemore. Thus, the ALJ erred by disregarding lay

1 testimony without comment. *Molina*, 674 F.3d at 1114. As noted above, however, the
2 ALJ in this case properly rejected the limitations described by Dr. Perez because they
3 were not supported by the record. Therefore, because Mr. Foster reached essentially the
4 same conclusions Dr. Perez reached regarding Z.H.'s limitations, the ALJ's error was
5 harmless.

6 **C. Dr. Moore**

7 Plaintiff argues that Dr. Moore's opinion does not constitute substantial evidence
8 to support the ALJ's finding of nondisability. Plaintiff notes that Dr. Moore did not take
9 into account the records of Z.H.'s treatment before the alleged onset date or the records
10 of her treatment after December 2011, all of which Plaintiff argues indicate major
11 limitations. Plaintiff further argues that Dr. Moore erroneously concluded that Z.H.'s
12 limitations were a result of non-compliance with medication. Finally, Plaintiff argues that
13 Dr. Moore placed too much emphasis on the school records indicating improvement in
14 Z.H.'s behavior, since those records did not identify how improvement was measured and
15 because those records "pertained to a discrete period of time" and thus "were not an
16 accurate representations of Z.H.'s functioning over time."

17 ALJs give weight to a nonexamining source based on factors laid out by the
18 regulations. The following factors are applicable here:

19 Supportability. The more a medical source presents relevant evidence to
20 support an opinion, particularly medical signs and laboratory findings, the
21 more weight we will give that opinion. The better an explanation a source
22 provides for an opinion, the more weight we will give that opinion.
23 Furthermore, because nonexamining sources have no examining or treating
24 relationship with you, the weight we will give their opinions will depend on
25 the degree to which they provide supporting explanations for their opinions.
26 We will evaluate the degree to which these opinions consider all of the
27 pertinent evidence in your claim, including opinions of treating and other
28 examining sources.

Consistency. Generally, the more consistent an opinion is with the record as
a whole, the more weight we will give to that opinion.

20 C.F.R. § 416.927(c)(3)–(4); *see also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
2002) ("The opinions of non-treating or non-examining physicians may also serve as
substantial evidence when the opinions are consistent with independent clinical findings

1 or other evidence in the record. “).

2 The Court is troubled that Dr. Moore formed his opinion without reviewing the
3 records that predate the alleged onset date or postdate December 2011. Nevertheless,
4 even without reviewing those records, Dr .Moore reviewed nearly two years’ worth of
5 treatment notes and school records, so it cannot be said that his opinion is without basis.
6 The Court also recognizes that, as Plaintiff points out, the record contains evidence of
7 behavior that is consistent with the limitations claimed by Plaintiff and Dr. Perez. But the
8 record also contains evidence of behavior that indicates Z.H. has no marked or severe
9 limitations. For example, as Dr. Moore explained in his testimony, Z.H. is a mainstream
10 student, receives normal grades, and has shown consistent improvement in her behavior
11 at school. The medical records also indicate multiple times when Plaintiff reported Z.H.’s
12 medications as being helpful. This evidence shows that Dr. Moore’s opinion is consistent
13 with substantial record evidence, even if other record evidence contradicts his opinion. It
14 is the ALJ’s duty to resolve these types of conflict in the evidence. *See Parra v. Astrue*,
15 481 F.3d 742, 750 (9th Cir. 2007) (“Generally, questions of credibility and resolution of
16 conflicts in the testimony are functions solely for the agency.”) (quoting *Sample v.*
17 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (internal quotations marks omitted)).
18 Accordingly, although this is a close case, the Court must defer to the ALJ’s decision to
19 give significant weight to Dr. Moore’s opinion.

20 **D. Plaintiff’s Testimony**

21 The ALJ cited three primary reasons for discrediting Plaintiff’s testimony²: gaps in
22 treatment, noncompliance with treatment, and inconsistency with the educational record
23 which shows that Z.H. was a mainstream student. (Tr. 21–22). Plaintiff argues that the
24 record contains evidence that Z.H. received “extensive psychiatric care from about
25 age 5.” Plaintiff also points out record evidence that Z.H. was, in fact, medication-

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27 ² Plaintiff’s brief seems to suggest that Z.H. herself testified or otherwise made
28 claims of disability, (Doc. 13 at 23–25, 23 n.5) but she was not present at the hearing,
(Tr. 16, 38, 96), and no other statements by Z.H. could be located by the Court. The
Court therefore considers the arguments made by Plaintiff to pertain to the testimony of
Plaintiff, Z.H.’s mother and the official claimant at the agency proceedings.

1 compliant. Additionally, Plaintiff argues that the ALJ should not have put much weight
2 on the fact that Z.H. was a mainstream student because there is great variability among
3 school districts on these matters and because Z.H. received some special education
4 services.

5 The Social Security Administration has promulgated a ruling outlining how an
6 ALJ should determine a claimant's credibility. S.S.R. 96-7p (Cum. Ed.1996), available at
7 61 Fed.Reg. 34,483-01 (July 2, 1996) (“[T]he individual's statements may be less
8 credible if the level or frequency of treatment is inconsistent with the level of complaints,
9 or if the medical reports or records show that the individual is not following the treatment
10 as prescribed and there are no good reasons for this failure.”). The Ninth Circuit has
11 upheld this ruling:

12 Social Security Administration rulings specify the proper bases for
13 rejection of a claimant's testimony. *See* S.S.R. 02-1p (Cum. Ed.2002),
14 *available at* Policy Interpretation Ruling Titles II and XVI: Evaluation of
15 Obesity, 67 Fed.Reg. 57,859-02 (Sept. 12, 2002); S.S.R. 96-7p (Cum.
16 Ed.1996), *available at* 61 Fed.Reg. 34,483-01 (July 2, 1996). An ALJ's
17 decision to reject a claimant's testimony cannot be supported by reasons
18 that do not comport with the agency's rules. *See* 67 Fed.Reg. at 57860
19 (“Although Social Security Rulings do not have the same force and effect
20 as the statute or regulations, they are binding on all components of the
21 Social Security Administration, ... and are to be relied upon as precedents in
22 adjudicating cases.”); *see Daniels v. Apfel*, 154 F.3d 1129, 1131 (10th
23 Cir.1998) (concluding that ALJ's decision at step three of the disability
24 determination was contrary to agency regulations and rulings and therefore
25 warranted remand). Factors that an ALJ may consider in weighing a
26 claimant's credibility include reputation for truthfulness, inconsistencies in
27 testimony or between testimony and conduct, daily activities, and
28 “unexplained, or inadequately explained, failure to seek treatment or follow
a prescribed course of treatment.” *Fair*, 885 F.2d at 603; *see also Thomas*,
278 F.3d at 958-59.

22 *Orn v. Astrue*, 495 F.3d 625, 635-36 (9th Cir. 2007).

23 The ALJ's decision here uses the precise criteria outlined by the Social Security
24 Administration and the Ninth Circuit, and is supported by substantial evidence. The ALJ
25 dedicates five paragraphs to describing instances in the record where Z.H. missed follow-
26 up visits, (Tr. 663, 708), responded well to medication, (Tr. 669, 680, 871), went seven
27 months without seeking treatment, (Tr. 708, 825, 845), and had had periods where she
28 was not taking medications, (Tr. 691). (Tr. 21-22). As the Social Security Administration

1 and the Ninth Circuit have recognized, these instances properly impeach the credibility of
2 Plaintiff's reports of Z.H.'s limitations. Indeed, Plaintiff does not argue that these
3 instances did not occur, but that the ALJ should have instead emphasized Z.H.'s instances
4 of compliance and history of getting psychiatric treatment for seven years. It is
5 quintessentially the province of the ALJ to resolve conflicts of evidence and to make
6 credibility determinations, and a reviewing court may only rarely overturn those findings.
7 *See Parra*, 481 F.3d at 750. Because the ALJ cited substantial record evidence to support
8 her findings regarding Plaintiff's credibility, the Court will uphold the ALJ's decision to
9 disregard Z.H.'s testimony as not credible.³

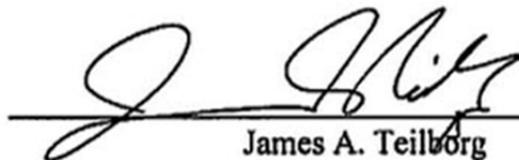
10 **IV. CONCLUSION**

11 For the foregoing reasons,

12 **IT IS ORDERED** that the decision of the Administrative Law Judge is affirmed.

13 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
14 accordingly. The judgment will serve as the mandate of this Court.

15 Dated this 3rd day of February, 2015.

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James A. Teilborg
Senior United States District Judge

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³ The Court notes that the ALJ did not discuss Z.H.'s status as a mainstream student in much detail. Specifically, while the ALJ noted that Z.H. is a "mainstream student who has continually been elevated from one grade to the next," she did not address that Z.H. had attended special education classes intermittently and had behavioral problems. *See* 20 C.F.R. § 416.924a(b)(7)(iv). The Court need not reach this issue, however, because it holds that the other reasons the ALJ gave for discrediting Z.H.'s testimony were independently sufficient to withstand scrutiny.