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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PEGGY WOODS,)	Case No. CV 09-1547-OP
)	
Plaintiff,)	MEMORANDUM OPINION; ORDER
v.)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

The Court¹ now rules as follows with respect to the disputed issues listed in the Joint Stipulation (“JS”).²

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¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the United States Magistrate Judge in the current action. (See Dkt. Nos. 8, 9.)

² As stated in the Court’s Case Management Order, the decision in this case is being made on the basis of the pleadings, the Administrative Record, and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

1 I.

2 **DISPUTED ISSUE**

3 As reflected in the Joint Stipulation, the sole disputed issue which Plaintiff
4 raises as the ground for reversal and/or remand is whether the Administrative Law
5 Judge (“ALJ”) properly determined that Plaintiff’s alleged impairments did not
6 meet Listing 2.09. (JS at 4.)

7 II.

8 **STANDARD OF REVIEW**

9 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision
10 to determine whether the Commissioner’s findings are supported by substantial
11 evidence and whether the proper legal standards were applied. DeLorme v.
12 Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more
13 than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402
14 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec’y of
15 Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial
16 evidence is “such relevant evidence as a reasonable mind might accept as adequate
17 to support a conclusion.” Richardson, 402 U.S. at 401 (citation omitted). The
18 Court must review the record as a whole and consider adverse as well as
19 supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986).
20 Where evidence is susceptible of more than one rational interpretation, the
21 Commissioner’s decision must be upheld. Gallant v. Heckler, 753 F.2d 1450,
22 1452 (9th Cir. 1984).

23 III.

24 **DISCUSSION**

25 **A. The ALJ Committed Legal Error in Finding that Plaintiff’s Condition**
26 **Did Not Meet or Equal Any Listing.**

27 Plaintiff claims that the ALJ erred by failing to determine that her
28 impairments equaled a listing. (JS at 12.) The Court agrees with Plaintiff’s

1 contention.

2 **1. Applicable Law.**

3 At the third step of the sequential analysis, the ALJ must determine whether
4 a claimant’s impairment meets or equals an impairment listed in the “Listing of
5 Impairments” (“Listings”). See 20 C.F.R. Part 404, Subpt. P, App. 1; see also
6 Stout v. Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006) (citing
7 20 C.F.R. §§ 404.1520, 416.920); Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th
8 Cir. 1999). The Listings set forth certain impairments which are presumed to be
9 of sufficient severity to prevent the performance of work. See C.F.R. §§
10 404.1525(a), 416.925(a). If a claimant has an impairment which meets or equals a
11 listed impairment, disability is presumed and benefits are awarded. See 20 C.F.R.
12 §§ 404.1520(d), 416.920(d); Barker v. Sec’y of Health & Human Servs., 882 F.2d
13 1474, 1477 (9th Cir. 1989). An impairment “meets” a listed impairment if it is in
14 the Listings. See 20 C.F.R. §§ 404.1520(d), 416.920(d)

15 The claimant has the burden of proving disability, including disability based
16 on the Listing. Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995); Vick v.
17 Comm’r of Soc. Sec. Admin., 57 F. Supp. 2d 1077, 1087 (D. Or. 1999). The mere
18 diagnosis of a listed condition does not establish that a claimant “meets” the
19 Listings. Young v. Sullivan, 911 F.2d 180, 183-84 (9th Cir. 1990). “For a
20 claimant to show that his impairment matches a listing, it must meet all of the
21 specified medical criteria. An impairment that manifests only some of those
22 criteria, no matter how severely, does not qualify.” Sullivan v. Zebley, 493 U.S.
23 521, 530, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990); see also 20 C.F.R. §
24 404.1525(d). Thus, the ALJ must find that the claimant has an impairment which
25 corresponds to a listed impairment in diagnosis, severity, and duration.

26 **2. Listing 2.09.**

27 Listing 2.09 provides that a person meets the criteria for this section if the
28 medical evidence shows a: “Loss of speech due to any cause, with inability to

1 produce by any means speech that can be heard, understood, or sustained.” 20
2 C.F.R. Subpt. P, App.1, § 2.09. Social Security Ruling (“SSR”) 82-57³ provides
3 an explanation regarding how loss of speech should be evaluated by the ALJ. SSR
4 82-57 states:

5 Ordinarily, when an individual’s impairment prevents effective
6 speech, the loss of function is sufficiently severe so that an allowance
7 under **Listing 2.09** is justified on the basis of medical considerations
8 alone, unless such a finding is rebutted by work activity. To speak
9 effectively, an individual must be able to produce speech that can be
10 heard, understood, and sustained well enough to permit useful
11 communication in social and vocational settings. These criteria are
12 applicable to the production of speech whether by natural function of the
13 voice mechanism or by the use of a prosthetic device.

14 Three attributes of speech pertinent to the evaluation of speech
15 proficiency are: (1) audibility -- the ability to speak at a level sufficient
16 to be heard; (2) intelligibility -- the ability to articulate and to link the
17 phonetic units of speech with sufficient accuracy to be understood; and
18 (3) functional efficiency -- the ability to produce and sustain a
19 serviceably fast rate of speech output over a useful period of time.
20 When at least *one* of those attributes is missing, overall speech function
21 is not considered effective.

22 When a refined assessment of speech proficiency is necessary, it
23 should be made by a licensed otolaryngologist or a speech therapist
24 whose evaluation should be based *both* on personally listening to the
25 claimant’s speech and on a history of the claimant’s performance of the
26 individual’s speech capacity.

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28 ³ Social Security Rulings are binding on ALJs. See Terry v. Sullivan, 903
F.2d 1273, 1275 n.1 (9th Cir. 1990).

1 SSR 82-57 (emphasis in original).

2 **3. Analysis.**

3 Here, Plaintiff contends that her medically determinable impairment met
4 Listing 2.09. (JS at 3-9, 14-19.) In support of her contention, Plaintiff relies upon
5 the opinions of a consultative otolaryngologist and a speech pathologist, coupled
6 with several instances in the record demonstrating her severe voice disorder. (Id.)
7 First, on December 18, 2006, consultative physician, Dr. James Montagano
8 evaluated Plaintiff with respect to her voice. (Administrative Record “AR”) at
9 211-12.) Dr. Montagano observed her voice as “halting and difficult to
10 understand; it was strikingly reminiscent of the voice seen in spastic dysphonia.”⁴
11 (Id. at 212.) Dr. Montagano opined:

12 Peggy Woods has dysphonia that she claims arose immediately as a
13 result of having been choked 24 years ago. There is no history or
14 physical evidence of laryngeal fracture or arytenoids displacement. Her
15 voice and exam strongly suggest adductor type spastic dysphonia. I
16 could find no reference on a search of textbooks for an association
17 between trauma and spastic dysphonia, as the condition is idiopathic⁵
18 and thought to be of central origin. There is no surgical treatment for
19 the condition, [and] some success has been found with Botox injections.
20 I believe that the patient should have a trial of speech therapy.

21 (Id.)

23 ⁴ Dysphonia is defined as: “any impairment of voice; a difficulty in
24 speaking.” Dorland’s Illustrated Medical Dictionary (“DIMD”), 576 (30th ed.
25 2003). Spastic dysphonia is defined as: “difficulty in speaking due to excessively
26 vigorous adduction, or rarely abduction, of the vocal cords against each other, so
27 that the voice is hoarse, soft, and strained.” Id. at 577.

28 ⁵ Idiopathic is defined as: “of unknown cause or spontaneous origin.”
DIDM at 905.

1 Additionally, on December 21, 2006, Barbara Vasser, M.S., a licensed
2 speech pathologist, completed a speech and language evaluation of Plaintiff. (Id.
3 at 208-10.) Ms. Vasser observed Plaintiff’s voice as “soft, almost inaudible,” and
4 she spoke with “pitch breaks and raspy sound production.” (Id. at 209.) Ms.
5 Vasser also indicated that Plaintiff’s “[i]ntelligibility is compromised by limited
6 sound production.” (Id. at 210.) Ms. Vasser concluded that Plaintiff “presents
7 with a severe voice disorder,” and should seek a more thorough evaluation from an
8 otolaryngologist. (Id.)

9 Finally, Plaintiff points to several instances during the hearing where her
10 voice was so low or inaudible that the ALJ had to ask for clarification from
11 Plaintiff’s attorney, or ask Plaintiff to repeat her statements. (Id. at 221, 224-29,
12 231-32, 237, 239, 240-41.) Notably, Plaintiff’s testimony was inaudible several
13 times during the hearing, despite speaking directly into the microphone.⁶ (Id.)

14 In his decision, the ALJ found Plaintiff to have, *inter alia*, the severe
15 impairment of “a voice disorder of uncertain etiology.” (Id. at 23.) The ALJ then
16 found that Plaintiff’s voice impairment did not meet or medically equal a listed
17 impairment, including impairments related to speech. (Id. at 23-24.) The ALJ
18 assessed Plaintiff’s residual functional capacity (“RFC”) related to speech as
19 follows: “The claimant’s speech can be understood only when the person spoken
20 to faces the claimant and listens carefully.” (Id. at 24.) Thereafter, the ALJ

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23 ⁶ Defendant argues that the microphone was only used for recording
24 purposes at the hearing. (JS at 12.) The record is inconclusive as to whether the
25 microphone solely records a claimant’s testimony, or whether it both records a
26 claimant’s testimony and amplifies it. (AR at 223.) While moving closer to the
27 microphone would not make Plaintiff’s voice louder, it is unclear whether
28 speaking into the microphone at the original distance served solely for recording
purposes or for both recording and amplification purposes. Regardless, the record
clearly indicates portions of Plaintiff’s testimony as “inaudible.” (Id. at 221, 224-
29, 231-32, 237, 239, 240-41.)

1 expanded upon Plaintiff's voice disorder as follows:

2 [T]he record indicates that the claimant suffers from an impairment of
3 the voice that limits her to soft speech. Speech pathology evaluation has
4 revealed the claimant has a raspy voice, but has normal articulation.
5 Board-certified otolaryngologist James Montagano, M.D., examined the
6 claimant in December 2006. Dr. Montagano could not ascertain the
7 etiology of the claimant's voice disorder, but indicated that there was no
8 evidence of a laryngeal fracture. He indicated that the claimant's
9 presentation was consistent with adductor type spastic dysphonia, which
10 [is] a condition of "central origin." He indicated that there was no
11 surgical treatment available for such a condition, but indicated that some
12 patients had achieved improvements with laryngeal Botox injections.
13 In any event, although it is clear that the claimant has impairment of her
14 voice, her voice is intelligible upon careful listening as described in the
15 residual functional capacity.

16 (Id. at 26 (citations omitted).)

17 The Court finds that the ALJ committed legal error by improperly
18 determining that Plaintiff failed to meet Listing 2.09. In the decision, the ALJ
19 failed to properly analyze Plaintiff's voice impairment as to audibility,
20 intelligibility, and functional efficiency. The ALJ then inserted boilerplate
21 language that Plaintiff's voice impairment did not meet a listing. (Id. at 23-24);
22 see also id. at 82-57. Moreover, the ALJ appears to have rejected the opinions of
23 the Dr. Montagano and Ms. Wasser based upon the testimony of the vocational
24 expert ("VE"), who is neither an otolaryngologist nor a speech pathologist.⁷ (AR
25 at 26, 239); see also id. at 82-57. While Plaintiff does not raise this issue, the

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27 ⁷ At the hearing, the VE testified that Plaintiff could be understood by
28 another person, if that person listened carefully and faced toward Plaintiff. (AR at
239.)

1 Court is unconvinced that the ALJ properly rejected or discounted the opinions of
2 Dr. Montagano and Ms. Wasser. The ALJ also failed to reconcile Plaintiff’s RFC
3 related to her voice impairments with the evidence of Plaintiff’s voice disorder and
4 speech difficulty, as indicated by the several instances at the hearing where the
5 ALJ sought clarification of Plaintiff’s inaudible testimony, or the opinions in the
6 record demonstrating Plaintiff’s severe voice disorder. Finally, to the extent that
7 the ALJ determined that Listing 2.09 was not met as it required an absolute
8 inability to produce speech, this is also error. Listing 2.09 may be met by
9 individuals who “have difficulties with speech communication, including an
10 inability to sustain effective speech.” See Hajar v. Astrue, 2009 WL 3170097, at
11 *5 (C.D. Cal. Sept. 30, 2009); see also Meraz v. Barnhart, 300 F.Supp.2d 935, 941
12 (C.D. Cal. 2004); SSR 82-57.

13 Based on the foregoing, remand is warranted on the issue of whether
14 Plaintiff meets Listing 2.09. On remand, the ALJ will have the opportunity to
15 address this issue again and consider these issues in determining the merits of
16 Plaintiff’s case.⁸

17 **This Case Should Be Remanded for Further Administrative**
18 **Proceedings.**

19 The law is well established that remand for further proceedings is
20 appropriate where additional proceedings could remedy defects in the
21 Commissioner’s decision. Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).
22 Remand for payment of benefits is appropriate where no useful purpose would be
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24 ⁸ Defendant relies on Beauvoir v. Chater, 104 F.3d 1432, 1434 (2nd Cir.
25 1997) for the proposition that the ALJ may consider hearing testimony to
26 determine whether Listing 2.09 is met. (JS at 10.) While the ALJ may certainly
27 consider the hearing testimony, the Court is unconvinced by the many “inaudible”
28 instances in the hearing transcript that Plaintiff’s voice was “intelligible upon
careful listening.” (AR at 26.) On remand, the ALJ should address this issue
again, and, if required, develop the record further as to Plaintiff’s voice disorder.

1 served by further administrative proceedings, Kornock v. Harris, 648 F.2d 525,
2 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v.
3 Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would
4 unnecessarily delay the receipt of benefits. Bilby v. Schweiker, 762 F.2d 716, 719
5 (9th Cir. 1985). Here, the Court concludes that further administrative proceedings
6 would serve a useful purpose and remedy the administrative defects discussed
7 herein.

8 **IV.**

9 **ORDER**

10 Pursuant to sentence four of 42 U.S.C. § 405(g), IT IS HEREBY
11 ORDERED THAT Judgment be entered reversing the decision of the
12 Commissioner of Social Security and remanding this matter for further
13 administrative proceedings consistent with this Memorandum Opinion.

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15 Dated: January 5, 2010



16 HONORABLE OSWALD PARADA
17 United States Magistrate Judge
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