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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

D.L.A. III,)	Case No. CV 14-03772-AS
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On May 21, 2014, Plaintiff D.L.A., a minor child, proceeding through his mother and appointed guardian ad litem, Calundra C. Thomas, filed a Complaint seeking review of the denial of his application for Supplemental Security Income. (Docket Entry Nos. 3-4). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 10, 12). On September 26, 2014,

1 Defendant filed an Answer along with the Administrative Record ("AR").
2 (Docket Entry Nos. 14-15). The parties filed a Joint Position Statement
3 ("Joint Stip.") on June 14, 2015, setting forth their respective
4 positions regarding Plaintiff's claims. (Docket Entry No. 31).

5 The Court has taken this matter under submission without oral
6 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
7 Security Case," filed May 27, 2014 (Docket Entry No. 8).

8
9 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

10
11 Plaintiff was born on December 2, 2000. (See AR 189, 203). On
12 April 1, 2011, Plaintiff filed an application for Supplemental Security
13 Income, alleging a disability since December 1, 2009. (See AR 189-93).
14 On October 1, 2012, the Administrative Law Judge ("ALJ"), Gail Reich,
15 heard testimony from Plaintiff, Plaintiff's mother, and medical expert
16 ("ME") David B. Peterson.¹ (See AR 57-98). At the time of the hearing,
17 Plaintiff was eleven years old and in the sixth grade. (See AR 61, 79).
18 On October 15, 2012, the ALJ issued a decision denying Plaintiff's
19 application. (See AR 12-24).

20 Applying the three-step sequential evaluation process,² the ALJ

21 ¹ Two prior hearings were postponed so that Plaintiff could have
22 additional time to secure an attorney. (See AR 99-112).

23 ² "An individual under the age of 18 shall be considered disabled
24 . . . if that individual has a medically determinable physical or mental
25 impairment, which results in marked and severe functional limitations,
26 and which can be expected to result in death or which has lasted or can
27 be expected to last for a continuous period of not less than 12 months."
28 42 U.S.C. § 1382c(a)(3)(C)(I).

29 In determining eligibility for Supplemental Security Income based
30 on a childhood disability, the Commissioner applies a three-step
31 evaluation process. See 20 C.F.R. § 416.924(a).

32 At step one, the Commissioner considers whether the child has
33 engaged in substantial gainful activity. See 20 C.F.R. § 416.924(b). If
34 (continued...)

1 found, at step one that Plaintiff did not engage in substantial gainful
2 activity since April 1, 2011, the application date. (See AR 15). At
3 step two, the ALJ found Plaintiff's learning disorder "severe." (Id.).
4 At step three, the ALJ found that Plaintiff did not have an impairment
5 or combination of impairments that met, medically equaled, or
6 functionally equaled, one of the Listings. (Id.).

7 The ALJ's finding that Plaintiff's impairment did not functionally
8 equal a listing was based on her determination that Plaintiff did not
9 have a marked limitation in at least two out of six functional domains
10 or an extreme limitation in one domain. Specifically, the ALJ found
11 that Plaintiff had (1) less than a marked limitation in acquiring and
12 using information (Domain No. 1); (2) less than marked limitation in
13 attending and completing tasks (Domain No. 2); (3) a marked limitation
14 in interacting and relating with others (Domain No. 3); (4) no
15 limitation in moving about and manipulating objects (Domain No. 4); (5)
16 no limitation in the ability to care for himself (Domain No. 5); and (6)
17 no limitation in health and physical well-being (Domain No. 6). (See AR
18 18-23). Accordingly, the ALJ concluded that Plaintiff had not been
19 disabled, as defined in the Social Security Act, since April 1, 2011,
20 the date the application was filed. (See AR 23).

21 ² (...continued)
22 not, then at step two, the Commissioner considers whether the impairment
23 or combination of impairments is severe. 20 C.F.R. § 416.924(c). If
24 severe, step three requires the Commissioner to determine whether the
25 impairment meets, medically equals, or functionally equals in severity
26 any impairment that is listed in 20 C.F.R. Part 404, Subpart P. Appendix
27 1 (the "Listings"). See 20 C.F.R. § 416.924(d).

28 An impairment functionally equals a Listing if the child has marked
limitations in two out of six functional domains or an extreme
limitation in one domain. See 20 C.F.R. § 416.926a(a). The six
functional domains are: (1) acquiring and using information; (2)
attending and completing tasks; (3) interacting and relating with
others; (4) moving about and manipulating objects; (5) caring for
himself; and (6) health and well-being. See 20 C.F.R. § 416.926a(b)(1)
(i)-(vi).

1 Plaintiff requested that the Appeals Council review the ALJ's
2 decision. (AR 7). The request was denied on March 21, 2014. (AR 1-3).
3 The ALJ's decision then became the final decision of the Commissioner,
4 allowing this Court to review the decision. See 42 U.S.C. §§ 405(g),
5 1383(c).

6 **PLAINTIFF'S CONTENTIONS**

7
8 Plaintiff alleges that the ALJ failed to properly: (1) determine
9 whether Plaintiff's impairments functionally equaled a listing at step
10 three of the sequential evaluation of childhood disability; and (2)
11 consider the lay witness opinion of Plaintiff's mother. (See Joint
12 Stip. at 2).

13 **DISCUSSION**

14
15 After consideration of the record as a whole, the Court finds that
16 Plaintiff's first claim of error warrants a remand for further
17 consideration. Since the Court is remanding the matter based on
18 Plaintiff's first claim of error, the Court will not address Plaintiff's
19 second claim of error.

20 **A. The ALJ Failed To Properly Consider The Record In Determining** 21 **Whether Plaintiff's Impairment Functionally Equaled A Listing**

22
23 Plaintiff contends that the ALJ's finding, at step-three of the
24 three-step evaluation process, that Plaintiff's impairments do not
25 functionally equal a Listing, is not supported by substantial evidence.
26 (See Joint Stip. at 4-11, 16-20). In particular, Plaintiff challenges
27 the ALJ's finding of "less than marked limitation" in the (second)
28 domain of attending and completing tasks. (Id.).

1 The Social Security Regulations list the information and factors
2 that will be considered in determining whether a child's impairment
3 functionally equals a Listing. See 20 C.F.R. §§ 416.926a, 416.924a,
4 416.926a. The ALJ is responsible for determining functional equivalence
5 after consideration of all evidence submitted. See 20 C.F.R. §
6 416.926a(n). In making this determination, the Commissioner considers
7 test scores together with reports and observations of school personnel
8 and others. See 20 C.F.R. §§ 416.924a, 416.926a(e)(4)(ii). The ALJ
9 also considers what activities the child is, or is not, able to perform;
10 how much extra help the child needs in doing these activities; how
11 independent the child is; how the child functions in school; and the
12 effects of treatment, if any. See 20 C.F.R. § 416.926a(b). This
13 information comes from examining and non-examining medical sources as
14 well as "other sources" such as parents, teachers, early intervention
15 team members, case managers, therapists, and other non-medical sources
16 who have regular contact with the child. See 20 C.F.R. §
17 416.913(c)(3)(d).

18 In the domain of "attending and completing tasks," the ALJ assesses
19 how well the child can focus and maintain attention, and how well the
20 child can begin, carry through, and finish activities, including the
21 mental pace at which the child performs activities and the ease of
22 changing activities, as well as the child's ability to avoid impulsive
23 thinking and prioritize completing tasks and manage his time. See 20
24 C.F.R. § 416.926a(h). A school-age child (age 6 to attainment age of
25 12) without an impairment is expected to have the ability to: (a) focus
26 attention in a variety of situations in order to follow directions,
27 remember and organize school materials, and complete classroom and
28 homework assignments; (b) concentrate on details and not make careless
mistakes (beyond what would be expected of other children in the same
age who do not have impairments) in his work; (c) change activities or
routines without distracting [himself] or others and stay on task and in
place when appropriate; (d) sustain attention well enough to participate

1 in a group sport, read by himself, and complete family chores; and (e)
2 complete a transition task without extra reminders and accommodation.
3 See 20 C.F.R. § 416.926a(h)(2)(iv).

4 A "marked" limitation in a domain is found when a child's
5 impairment "interferes seriously with [the child's] ability to
6 independently initiate, sustain, or complete activities." See 20
7 C.F.R. § 416.926a(e)(2). A child's functioning may be seriously limited
8 when the impairment limits only one activity or when the interactive and
9 cumulative effects of the impairment limit several activities. Id. In
10 addition, a "marked limitation" may also be found when there is a valid
11 score that is two standard deviations or more (but less than three)
12 below the mean on a comprehensive standardized test designed to measure
13 ability or functioning in that domain, and day-to-day functioning in
14 domain-related activities that are consistent with that score.

15 Here, the ALJ found that Plaintiff had "less than marked limitation
16 in the domain of attending and completing tasks, as testified to by the
17 medical expert and supported by the entire record." (See AR 19-20).
18 Plaintiff contends that the ALJ erred in making this determination
19 because evidence in the record, including several school reports and
20 standardized test results, demonstrate that Plaintiff has a "marked
21 limitation" in this domain. (See Joint Stip at 2-11, 16-20). Although
22 Plaintiff claims that the ALJ failed to consider an April 27, 2011
23 teacher questionnaire and a June 28, 2011 consultative psychological
24 evaluation in determining whether Plaintiff's impairment functionally
25 equaled a listing, it appears that the ALJ did discuss those records in
26 her decision. (See Joint Stip. at 5-7; see also AR 17). As set forth
27 below, the Court finds that the ALJ failed to consider the March 13,
28 2012 teacher's report (AR 343-44) and discuss its findings in
determining that Plaintiff's ability to meet the requirements in the

1 domain of attending and completing tasks was less than marked.³
2 Therefore the ALJ's step 3 determination is not supported by
3 substantial evidence, let alone the "entire record," as the ALJ
4 contends.

5 1. School Reports
6

7 A January 14, 2011 Individualized Education Program ("IEP")⁴ report
8 from Coliseum Elementary School discussed Plaintiff's strengths, needs,
9 impact of disability, as well as annual goals and objectives, in areas
10 of reading, writing, and math. (See AR 219-31). The information was
11 gathered from teacher reports and informal assessments. (See AR 221-
12 22). Among other things, the IEP report noted under "Impact of
13 Disability" that "[Plaintiff's] specific learning disability negatively
14 affects his ability to meet grade level standards. This is manifested
15 in his difficulty with retaining, recalling and reusing information
16 presented to him. This impacts his involvement in the general education
17 curriculum." (Id.).

18 A February 1, 2012 IEP report from Coliseum Elementary school
19 discussed the same topics above. (See AR 352-65). The information was
20 gathered from teacher reports, informal assessments, and results from
21 the California Standards Test ("CST"). (See AR 354-55). Significantly,

22 ³ Although the ALJ referred to the records contained within Exhibit
23 8F during the hearing, the ALJ did not mention the March 13, 2012
24 teacher's report and the Court has no basis to find that the ALJ
25 considered the report in reaching her step 3 determination. (AR 92-94).

26 ⁴ An IEP is "a written statement for each child with a disability,"
27 which includes, among other things, "a statement of the child's present
28 levels of academic achievement and functional performance," "a statement
of measurable annual goals, including academic and functional goals," "a
description of how the child's progress toward meeting the annual goals
... will be measured and when periodic reports on the progress the child
is making toward meeting the annual goals," and "a statement of the
special education and related services . . . to be provided to the
child." See 20 U.S.C. § 1414(d).

1 the IEP report noted under "Impact of Disability" that Plaintiff's
2 "short attention span makes it difficult for him to retain, recall and
3 reuse information that has been presented to him visually and orally."
4 (Id.).

5 On March 13, 2012, Plaintiff's fifth grade teacher completed a
6 "Vanderbilt Assessment Scale-TEACHER Informant" form. (See AR 343-44).
7 Ms. Moran opined that Plaintiff "very often": (1) fails to give
8 attention to details or makes careless mistakes in schoolwork; (2) has
9 difficulty sustaining attention to tasks or activities; (3) does not
10 seem to listen when spoken to directly; (4) does not follow through on
11 instructions and fails to finish schoolwork; (5) has difficulty
12 organizing tasks and activities; (6) avoids, dislikes, or is reluctant
13 to engage in tasks that require sustained mental effort; (7) is easily
14 distracted by extraneous stimuli; and (8) is forgetful in daily
15 activities. (See AR 343).

16 A September 27, 2012 IEP amended the February 1, 2012 IEP to
17 include an additional "250 minutes/week of pullout time FROM general
18 education to be spent in the Resource Learning Center for 50
19 minutes/day" per "parent request." (See AR 261-77).

20 While an ALJ need not discuss every piece of evidence, an ALJ must
21 explain why significant and probative evidence is rejected. See Vincent
22 v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (an ALJ must provide
23 an explanation when he rejects "significant and probative evidence")
24 (citation omitted). In the evaluation of child disability cases, the
25 opinions of a child's teachers are highly probative. See 20 C.F.R. §§
26 416.924a, 416.926a(e)(4)(ii) (In determining whether a child's
27 impairment functionally equals a listing, the Commissioner considers
28 "test scores together with . . . reports of classroom performance and
the observations of school personnel and others."); see also SSR 09-
2p(IV)(B) (an IEP is an "important source[] of specific information

1 about a child's abilities and impairment-related limitations, and
2 provides valuable information about the various kinds of levels of
3 support a child receives" and is "relevant in determining if the "child
4 has marked and severe functional limitations."). As is the case with
5 all "other source" or lay testimony, the teachers' opinions must be
6 considered and the weight given to them explained. Stout v.
7 Commissioner, Social Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006).
8 If their opinions are rejected, the ALJ must give specific "germane"
9 reasons for doing so. Id.

10 Here, the ALJ's failure to discuss the March 13, 2012 teacher's
11 assessment of Plaintiff's abilities in the various requirements listed
12 in the domain of attending and completing tasks in determining that
13 Plaintiff was "less than marked" in that domain, was error.⁵ See Gallant
14 v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) ("Although it is within
15 the power of the [Commissioner] to make findings . . . and to weigh
16 conflicting evidence, he cannot reach a conclusion first, and then
17 attempt to justify it by ignoring competent evidence in the record that
18 suggests an opposite result.") (internal citation omitted.).

18 2. Standardized Test Scores

19
20 Plaintiff contends that the ALJ's failure to discuss his testing
21 scores, specifically the California Standards Test ("CST") administered
22 in Spring 2012, constitutes error. (Joint Stip. 9-10). The test
23 results show that Plaintiff was performing "far below basic level" in
24 "Math," "below basic level" in "Science," and at "basic level" in
25 "English-Language." See AR 281-82. See 20 C.F.R. § 416.926a(e)(ii)

26 ⁵ The Court does not find the ALJ's error to be harmless. The
27 opinion was given by a teacher who worked closely with Plaintiff and the
28 teacher's assessment of Plaintiff's abilities in the categories listed
in the domain of attending and completing tasks was probative and
relevant to the ALJ's determination of whether Plaintiff was marked or
less than marked in that domain.

1 ("The medical evidence may include formal testing . . . When you have
2 such scores, we will consider them together with the information we have
3 about your functioning to determine whether you have a 'marked' or
4 'extreme' limitation in a domain."); see also 20 C.F.R. §
5 416.926a(e)(4)(iii)(B) ("When we do not rely on test scores, we will
6 explain our reasons for doing so in your case record or in our
7 decision.").

8 However, as the Commissioner points out, the ALJ discussed these
9 test scores with the medical expert during the hearing and the medical
10 expert testified that he could not use the CST test results to determine
11 disability for Social Security which requires a specific test score to
12 determine whether the student level of achievement is at half grade
13 level. ("Well the state test is going to show how he's performing
14 relative to his cohort [phonetic] and . . . based on the Social Security
15 standard, he would need to be scoring at 50 percent or half of his
16 chronological age and achievement. . . If your're a fifth grader, your
17 performing like a second grader. That would be 50 percent.") (AR 92-
18 93). The medical expert testified that there was nothing in the record
19 that showed that Plaintiff was performing at the third grade level. (AR
20 94). Accordingly, the ALJ did not err in failing to properly consider
21 Plaintiff's CST test scores in determining that Plaintiff was "less than
22 marked" in the domain of attending and completing tasks.

21 **B. Remand Is Warranted**

23 The decision whether to remand for further proceedings or order an
24 immediate award of benefits is within the district court's discretion.
25 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
26 useful purpose would be served by further administrative proceedings, or
27 where the record has been fully developed, it is appropriate to exercise
28 this discretion to direct an immediate award of benefits. Id. at 1179
("[T]he decision of whether to remand for further proceedings turns upon

1 the likely utility of such proceedings."). However, where, as here, the
2 circumstances of the case suggest that further administrative review
3 could remedy the Commissioner's errors, remand is appropriate. McLeod
4 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,
5 211 F.3d at 1179-81.

6 Since the ALJ failed to properly assess if Plaintiff's impairment
7 was functionally equivalent to a Listing by failing to consider the
8 March 13, 2012 teacher evaluation, remand is appropriate. Because
9 outstanding issues must be resolved before a determination of disability
10 can be made, and "when the record as a whole creates serious doubt as to
11 whether the [Plaintiff] is, in fact, disabled within the meaning of the
12 Social Security Act," further administrative proceedings would serve a
13 useful purpose and remedy defects. Burrell v. Colvin, 775 F.3d 1133,
14 1141 (9th Cir. 2014)(citations omitted).⁶

15 **ORDER**

16 For the foregoing reasons, the decision of the Commissioner is
17 reversed, and the matter is remanded for further proceedings pursuant to
18 Sentence 4 of 42 U.S.C. § 405(g).

19 LET JUDGMENT BE ENTERED ACCORDINGLY.

20 DATED: November 25, 2015.

21
22
23 _____ /s/
24 ALKA SAGAR
25 UNITED STATES MAGISTRATE JUDGE

26 _____
27 ⁶ As this case is being remanded for the ALJ to consider the March
28 13, 2012 teacher evaluation, the Court does not reach Plaintiff's second
claim, but directs that the lay witness testimony of Plaintiff's mother
also be re-assessed on remand.