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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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|-------------------------|---|------------------------|
| LOREN C. MARQUEZ, o/b/o |) | No. ED CV 11-01966-VBK |
| A.N.M., |) | |
| |) | MEMORANDUM OPINION |
| Plaintiff, |) | AND ORDER |
| |) | |
| v. |) | (Social Security Case) |
| |) | |
| MICHAEL J. ASTRUE, |) | |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified Administrative Record ("AR").

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") conducted a

1 full and fair hearing;

2 2. Whether Plaintiff's disability ceased on March 1, 2004;

3 3. Whether any of Plaintiff's impairments or the combination of
4 here impairments meet or medically or functionally equal the
5 Listing;

6 4. Whether the ALJ properly relied on Dr. Meyer's, Dr.
7 Townsend's and Dr. Taylor's reports and on Plaintiff's
8 teacher's questionnaire;

9 5. Whether the ALJ improperly rejected Dr. Shuhaibars's and Dr.
10 Heindelman's reports; and

11 6. Whether the ALJ properly assessed Plaintiff's mother's
12 credibility.

13 (JS at p. 13.)

14
15 This Memorandum Opinion will constitute the Court's findings of
16 fact and conclusions of law. After reviewing the matter, the Court
17 concludes that the decision of the Commissioner must be affirmed.

18
19 **INTRODUCTION AND PROCEDURAL HISTORY**

20 This case comes back to the Court following a Judgment remanding
21 the case for new hearing consistent with a Memorandum Opinion issued
22 by the Court on April 20, 2009. (See AR at 214, 215-226.)

23 Following the Judgment, a different ALJ conducted a new hearing
24 on February 24, 2010 (AR 424-444), at which Plaintiff appeared,
25 represented by counsel (the same counsel who represents her in this
26 action), and testimony was taken from Dr. Kania, appearing as a
27 Medical Expert ("ME"). The matter was adjourned and the hearing
28 resumed on June 25, 2010, at which time Plaintiff appeared with the

1 minor claimant A.N.M. (hereinafter "Claimant"), represented by the
2 same counsel, and Dr. Kania again appeared and testified as an ME. (AR
3 445-491.)

4 The ALJ issued an unfavorable decision on November 18, 2010. (AR
5 184-201.) This action followed.

6 The Claimant was born on September 4, 2001. On October 5, 2001,
7 the Claimant, by and through her mother, filed an application for
8 benefits under Title XVI of the Social Security Act ("Act"). (AR 88-
9 91.) That claim was granted on October 30, 2001, retroactive to the
10 date of birth, based on Claimant's extremely low birth weight, which
11 functionally equaled the severity of the impairment listed at 20
12 C.F.R. § 404, Subpart P, Appendix 1, Section 100.02. In March 2004,
13 benefits were terminated on the ground that Claimant's medical
14 condition had improved. (AR 42, 44.) Claimant's mother appealed that
15 decision, which was administratively denied, but, as noted above,
16 after Claimant's mother filed an action in this Court. Judgment was
17 entered on April 20, 2009 for Claimant, remanding the matter to the
18 Commissioner for further proceedings.

19
20 **ALJ Decision.**

21 In the ALJ's lengthy Decision, he ultimately concluded that the
22 Claimant was no longer disabled as of June 1, 2004. (AR at 184.) The
23 ALJ concluded that since June 1, 2004, Claimant has had severe
24 impairments of attention deficit hyperactivity disorder ("ADHD"), and
25 a learning disorder, pursuant to 20 C.F.R. § 416.924(c). (AR 194.) He
26 also concluded that since the same date, Claimant has not had an
27 impairment or combination of impairments that meets or medically
28 equals one of the listed impairments in 20 C.F.R. Part 404, subpart B,

1 Appendix 1, nor have any of her impairments functionally equaled any
2 of the listings. (AR 195.)

3
4 **Applicable Law re Childhood Disability: Cessation or Existence of**
5 **Disability.**

6 With regard to the procedures which must be followed to examine
7 whether a child's disability has ceased, a three-step evaluation
8 process is incorporated in 20 C.F.R. § 416.994a(b); see SSR 05-03p.

9 At the first step, the question is whether there has been medical
10 improvement in the impairment(s) which formed the basis of the most
11 recent favorable determination or decision. (See 20 C.F.R. §
12 416.994a(b)(1).) If there has been no medical improvement in that
13 impairment(s), a finding must be made that the child's disability
14 continues. If there has been medical improvement, the inquiry shifts
15 to Step Two, which focuses on whether the impairment(s) still meets or
16 medically or functionally equals the severity of the listed
17 impairment. If the impairment(s) does not meet or medically equal the
18 severity of the Listing, the inquiry proceeds to the third step, which
19 requires a determination of whether the child's current impairment(s)
20 are disabling under the rules set out in 20 C.F.R. § 416.024. The
21 step to determine current disability are described in 20 C.F.R. §
22 994a(b)(3)(i)-(iii). These steps require determination of whether a
23 child has a severe impairment or combination of impairments, whether
24 this impairment(s) meets or medically equals the severity of any of
25 the Listings, and if not, whether the impairment(s) functionally
26 equals the Listings. (See, infra, for further discussion of applicable
27 law.)

28 //

THE ALJ CONDUCTED A FULL AND FAIR HEARING

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3 In her first issue, Plaintiff contends that the ALJ failed to
4 conduct a full and fair hearing, for several reasons. First, that the
5 ALJ inappropriately or arbitrarily thwarted examination by Plaintiff's
6 counsel, and second, that the ALJ failed to resume the hearing, as he
7 had allegedly promised he would do at the conclusion of the second
8 session. For the following reasons, these contentions have no merit.

9 First, having reviewed the record, the Court does not perceive
10 that the ALJ inappropriately curtailed examination by Plaintiff's
11 counsel. Counsel posed numerous questions of the ME and responses
12 were provided to these questions. (AR 468-476.) The ALJ interrupted
13 only to indicate that some of counsel's questions were poorly formed
14 and would not elicit a reasonable response. (AR 471-473.) Counsel
15 attempted to read verbatim from the record, which resulted in the ALJ
16 reminding counsel that there were time limits of which he should be
17 aware. (Id.) All in all, the Court does not perceive that counsel was
18 inappropriately limited in his examination.

19 Plaintiff's second point is that the ALJ failed to resume the
20 hearing, which resulted in prejudice to Plaintiff meriting a remand
21 for further hearing. The record, though, actually indicates that the
22 ALJ indicated he considered resuming the hearing, but that this would
23 be dependent and contingent upon Plaintiff providing some
24 clarification of medical records as to medical treatment which
25 occurred for Claimant before 2006. (AR 490-491.) Indeed, the ALJ
26 stated that a supplemental hearing would not occur unless Plaintiff
27 provided these medical records for the period of 2004 and 2005. (AR
28 249, 490-491.) The ALJ thus continued that hearing giving sufficient

1 time to allow Plaintiff to obtain these medical records, which
2 Plaintiff failed to do. (AR 437, 250.) Consequently, the Court cannot
3 and does not conclude that the ALJ's decision not to hold a third
4 session of the hearing caused such prejudice to Plaintiff that her due
5 process rights were violated. See Mathews v. Eldridge, 424 U.S. 319,
6 333 (1976); Solis v. Schweiker, 719 F.2d 301, 302 (9th Cir. 1983).
7 Fundamentally, the Court concludes that the ALJ acted within his
8 discretion in making this determination.

9
10 **II**

11 **ISSUES 2, 3 AND 4 DO NOT PROVIDE GROUNDS FOR REVERSAL**

12 The Court will address the second through fourth issues raised by
13 Plaintiff together. This concerns whether Claimant's disability
14 ceased on June 1, 2004 (Issue No. 2);¹ whether any of Claimant's
15 impairments or combination of impairments meet or medically or
16 functionally equal a Listing (Issue No. 3); and whether the ALJ
17 properly relied upon evidence in the record from Drs. Meyer, Townsend,
18 and Taylor, and on the Claimant's teacher's Questionnaire (Issue No.
19 4).

20 Plaintiff contends that the ALJ found that Claimant's disability
21 ceased solely on the basis that her conditions of low birth weight and
22 prematurity had improved. This does not properly encapsulate the
23 ALJ's current Decision. The ALJ evaluated Claimant's impairments as
24 of the date of the "Comparison Point Decision" (AR 188), and also
25 impairments that occurred after that date. (AR 194.) The ALJ

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¹ As framed by Plaintiff, the issue is whether Claimant's
28 disability ceased on March 1, 2004; however, the ALJ's Decision
concluded that the disability ceased on June 1, 2004.

1 evaluated whether any of these found impairments were disabling
2 according to the requirements of the Listings. (AR 188-201.) As noted,
3 the ALJ found that Claimant had other severe impairments but
4 determined that they did not meet or equal Listing level severity. (AR
5 194-200.) Finding that disability ceased as of June 1, 2004, the ALJ
6 relied upon a June 2004 medical report which indicated that the
7 original disabling condition of low birth weight and prematurity had
8 improved. (AR 137-188.)

9 Further, Plaintiff's argument that the ALJ was precluded from
10 reevaluating whether the Claimant's disabilities ceased because of the
11 "law of the case" doctrine is a misplaced argument. Indeed, the very
12 purpose of the Court's previous Judgment ordering remand and a further
13 hearing was to allow further evidence to be obtained and examined so
14 that these issues could be properly evaluated and decided.

15 Having found that the ALJ properly determined that the disabling
16 condition had ceased, the Court's next task is to address whether the
17 ALJ correctly decided that Claimant is not disabled by virtue of
18 current impairments that were found in the Decision.

19 As to the third issue, Plaintiff's contention is that Claimant's
20 impairments medically equal Listing 2.09, which concerns speech
21 disorder, and also Listing 112.05, for mild mental retardation (see JS
22 at 22). Plaintiff argues that under the regulations concerning
23 functional equivalence for children, Claimant satisfies three of the
24 applicable domains set out in 20 C.F.R. § 416.926a(b)(i)-(iii).

25 As set out in the discussion of applicable law, supra, it was the
26 ALJ's task to determine whether Claimant has an impairment(s) which
27 functionally equals the Listings. In order to satisfy that standard,
28 her impairment(s) must cause "marked" functional limitations in two

1 domains of functioning, or extreme limitations in one domain. The
2 domains set out in the regulations are the following:

- 3 “(i) Acquiring and using information;
- 4 (ii) Attending and completing tasks;
- 5 (iii) Interacting and relating with others;
- 6 (iv) Moving about and manipulating objects;
- 7 (v) Caring for yourself; and
- 8 (vi) Health and physical well-being.”

9
10 The term “marked” is defined as a limitation which exists when
11 “your impairment(s) interferes seriously with your ability to
12 independently initiate, sustain or complete activities.” (See 20
13 C.F.R. § 416.926a(e)(ii).)

14 The ALJ examined evidence (see, infra) to make his determination
15 that Claimant did not meet or equal any of the Listings under the
16 applicable regulations. It must be noted that the Court’s task is
17 only to determine whether the ALJ’s Decision is supported by
18 substantial evidence which reasonably supported his conclusion. See
19 Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002).

20 The ALJ obtained testimony at the hearing from ME Dr. Kania, who
21 had reviewed the entire medical record. (AR 454-476.) It was Dr.
22 Kania’s conclusion that Claimant did not meet or equal a Listing in
23 that her impairments did not cause marked limitations in any of the
24 functional domains. (AR 467.) In making this determination, Dr. Kania
25 took into account Claimant’s performance over a period of time, noting
26 that children have different developmental rates which must be
27 factored into the evaluation. (AR 474-475.)

28 The ALJ also relied upon a psychological consultative examination

1 ("CE") by Dr. Townsend, who tested and examined Plaintiff in 2009,
2 when she was eight years old. (AR 387-402.) Dr. Townsend determined
3 that Claimant's intellectual functioning was in the average to low
4 average range. (AR 401.)

5 Previously, another psychological CE was performed by Dr. Taylor,
6 who reviewed medical records, and tested and examined Claimant when
7 she was three years old. (AR 147-151.) Dr. Taylor concluded that
8 Claimant has mild impairment in her cognitive development, social
9 development, and concentration, persistence and pace, in addition to
10 mild to moderate impairment in her communication development and
11 response to stimuli. (AR 147-151.)

12 The ALJ's Decision also contains an extensive examination of
13 Claimant's school records. The Court cannot find that the ALJ's
14 conclusion - that Claimant performed academically at or near her grade
15 level while exhibiting different behavioral problems - is not
16 supported by substantial evidence. (See AR at 264-267, 281-286, 296,
17 372, 387.) While Plaintiff takes great pains to point out, and the
18 record does support that Claimant had some behavioral problems at
19 school (Id.), the ALJ's conclusion was that, nevertheless, Claimant's
20 impairments do not satisfy the Listings, or equal them in severity.
21 The record does support the existence of some behavioral problems of
22 different types and at varying times in Claimant's school performance
23 (see summary by Plaintiff at JS 25-27). The Court disagrees, however,
24 that these behavioral problems undermine the ALJ's conclusion that
25 Claimant did not show marked limitations in the three stated domains.
26 Indeed, what the Court does observe is that many of the behavioral
27 problems which are described in the record and which Plaintiff asserts
28 actually exist are, rather, based on the reporting of Claimant's

1 mother, which is often inconsistent with the actual observations of
2 school personnel, or the conclusions of various mental health
3 professionals who rendered opinions that were relied upon by the ALJ.

4 In Plaintiff's fourth issue (see JS at 33-48) she essentially
5 argues that the ALJ improperly relied upon opinions rendered by Drs.
6 Meyer, Taylor, Townsend, teacher Ms. Cutler, and the ME. At the
7 outset, the Court must again note that it is not its function to
8 reweigh or reevaluate evidence, but rather, only to determine whether
9 substantial evidence supports the Decision. Under this level of
10 review, Plaintiff's argument fails. But, the Court will briefly
11 examine Plaintiff's arguments to indicate why it reaches that
12 conclusion.

13 First, Plaintiff erroneously concludes that this Court, in its
14 previous Memorandum Opinion, determined that Dr. Taylor's opinion did
15 not deserve any deference (see JS at 33, citing Memorandum Opinion,
16 contained at AR 222-223). That was not the Court's conclusion or the
17 basis for the remand. In any event, the fact is that the ALJ relied
18 upon a whole panoply of evidence not available to the previous ALJ in
19 rendering his current Decision.

20 As to both Drs. Taylor and Townsend, the record indicates that
21 they did perform objective testing and observed Claimant, they
22 reviewed medical evidence, and their reports are detailed and
23 narrative. While Plaintiff contends that Dr. Taylor's opinion
24 "reflects advocacy posturing" (JS at 33), the Court does not perceive
25 that, nor does Plaintiff's argument in this regard seem at all
26 persuasive. Plaintiff also complains that Dr. Taylor failed to
27 provide a diagnosis, but this does not render Dr. Taylor's report
28 unreliable. The ALJ must make a disability determination based on

1 functional limitations which are the result of any impairments that
2 are found. It is not essential that there be a diagnosis in order to
3 accomplish this task. Further, Plaintiff's arguments about
4 deficiencies in the IQ testing are based upon an asserted failure of
5 the ALJ to convert Claimant's IQ scores to a "standard deviation"
6 measurement. This argument is without merit, since under Listing
7 112.05, the IQ standard deviation is already accounted for. Further,
8 the Court cannot find any substantiation for Plaintiff's apparent
9 argument that IQ scores must be expressed in terms of standard
10 deviations.

11 With regard to the ALJ's reliance, in part, on the opinions of
12 the examining physicians, and the ME, the Court finds these arguments
13 insufficient to overturn the Decision. As to the ME, while Plaintiff
14 argues that his opinion was "totally worthless," the extensive
15 testimony he provided at the hearing was tied to his citations to
16 evidence in the record. (AR 454-476.) Further, Plaintiff asserts that
17 Claimant suffered from autism, but none of the independent examining
18 physicians made that diagnosis, and the ME concluded that the record
19 as a whole fails to support a diagnosis of autism. In any event, as
20 noted, whether or not Claimant suffered from autism is not the point;
21 rather, functional limitations resulting from impairments are the
22 issue.

23 As to Plaintiff's argument that Ms. Cutler was unqualified to
24 opine as to Claimant's behavior, because she only observed her for
25 seven months, the Court finds no merit in that argument, in that the
26 amount of time seems more than sufficient.

27 Plaintiff's extensive citation to the record with regard to the
28 fourth issue certainly highlights some behavioral issues and problems

1 which Claimant manifested, but again, the question is whether Claimant
2 has disabling symptoms, not whether there are behavioral problems.
3 Here, as the Court has previously noted, the conclusion is that
4 substantial evidence supports the ALJ's determination that disabling
5 conditions do not exist.

6
7 **III**

8 **THE ALJ DID NOT IMPROPERLY REJECT OPINIONS**

9 **FROM DRs. SHUAHAIBAR, HEINDSELMAN, AND A TEAM OF EXPERTS**

10 In Plaintiff's fifth issue, she contends the ALJ improperly
11 rejected opinions of these named individuals. The ALJ's evaluation of
12 their reports is contained at AR 196-197. The ALJ determined not to
13 accord significant weight to these opinions.

14 The extent of contact between these individuals and Claimant is
15 not extensive. Dr. Shuahaibar apparently saw Claimant two times: in
16 June 2006 and April 2010. (AR 153-156, 412.) Dr. Heindselman provided
17 a one-page report in January 2007 (AR 157), which is noted to be based
18 upon the psychiatric evaluation of Dr. Shuahaibar, reports from
19 Claimant's mother, or observations of the Claimant by either Dr.
20 Shuahaibar or Dr. Heindselman. Neither of these two individuals
21 apparently provided Plaintiff with any treatment, and there are no
22 treatment notes. Dr. Shuahaibar did not provide an opinion as to any
23 of Claimant's functional limitations. The ALJ gave less weight to
24 their opinions because he noted they were not consistent with the
25 overall record. (AR 196.) Indeed, the Court concurs with the ALJ that
26 the reports of Drs. Heindelsman and Shuahaibar incorporate and appear
27 to be somewhat based upon the subjective reporting of Claimant's
28 mother, which the ALJ found to be less than credible. (AR 196-199.)

1 Much of the apparent behavior reported, for example, by Dr.
2 Heindelsman, such as that Plaintiff has been observed to rock and bang
3 her head and bite herself is not corroborated by numerous other
4 longitudinal records, such as school records. In addition, while Dr.
5 Heindelsman indicated that Claimant had problems speaking, school
6 reports contradict this, and indeed indicate that she was "able to
7 communicate very effectively." (AR 297, 309, 328, 378, 387.)

8 With regard to the expert "team" cited by Plaintiff, the ALJ
9 reviewed the report, which is from the Mojave Vista Elementary (AR
10 194, 197-198). This report indicates that Claimant had problems in
11 some behavioral areas but was working close to her grade level in
12 academics (AR 295-309).

13 All in all, the Court concludes that the ALJ gave appropriate
14 weight to all of these opinions.

15 16 IV

17 THE ALJ'S DETERMINATION AS TO PLAINTIFF'S CREDIBILITY 18 IS SUPPORTED BY SUBSTANTIAL EVIDENCE

19 In her final issue, Plaintiff argues that the ALJ improperly
20 depreciated her credibility. She contends that the ALJ incorrectly
21 found that she provided inconsistent statements. (JS 61, citing AR at
22 197.) For example, the ALJ noted that the claims made by Plaintiff as
23 to Claimant's behavior were not supported by the Teacher
24 Questionnaire, and Plaintiff reasserts her argument that the Teacher
25 Questionnaire is not entitled to be viewed as a credible document, for
26 reasons articulated in the fifth issue.

27 It is the ALJ's duty to provide specific reasons germane to a
28 particular witness's testimony in order to discount the credibility of

1 that lay testimony. See Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir.
2 2009). The reasons cited by the ALJ in the Decision include the fact
3 that Claimant's mother refused to assist with the CE conducted by Dr.
4 Townsend. (AR 194, 401.) She refused to answer some of Dr. Townsend's
5 questions. (Id.) She refused to set aside her magazine in order to
6 answer questions. Although Plaintiff disagrees, the Court concludes
7 that this is a valid reason, among others, to discount Plaintiff's
8 credibility.

9 With regard to the ALJ's notation that Claimant's mother provided
10 inconsistent statements to different physicians, such as her report
11 that Claimant cuts herself with a razor, bangs her head, and injures
12 herself, the ALJ properly noted that while Plaintiff made such
13 complaints to Dr. Shuahaibar (AR 196, 153), she did not make such
14 reports to either Drs. Taylor or Townsend. (AR 148-149, 196, 397-398.)
15 Such inconsistencies may properly be considered by an ALJ in
16 determining credibility. See Molina v. Astrue, 674 F.3d 1104, 1112
17 (9th Cir. 2012).

18 Finally, the medical and school records substantially contradict
19 the testimony of Claimant's mother, as the ALJ noted. (AR 197-199.)
20 All of the examining and reviewing physicians agree that Claimant was
21 not as functionally limited as Plaintiff's mother alleged. This is
22 also evident in the school records, which indicate behavior problems,
23 but also demonstrate that Claimant academically functioned at or near
24 her grade level.

25 All in all, the Court finds that the credibility determination is
26 supported by substantial evidence. It should be noted that while
27 Plaintiff claims that her failure to cooperate with Dr. Townsend's
28 examination is not relevant to her credibility, because she is not the

1 Claimant, the Court finds that applicable case law is supportive of
2 the principle that a failure to cooperate with an examining physician
3 is an indicator of lack of credibility. The fact that the Claimant
4 here was a very young child is also relevant, in that the mother's
5 cooperation would be very material to the success of the examination.
6 The Court sees no basis to distinguish case law which provides that
7 failure to cooperate by a claimant is a ground for diminishing
8 credibility. In the context of this case, the same principles are
9 applicable.

10 The decision of the ALJ will be affirmed. The Complaint will be
11 dismissed with prejudice.

12 **IT IS SO ORDERED.**

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14 DATED: November 8, 2012

15 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

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