

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

10 VICKIE XIONG,) 1:09-cv-00553 GSA
11)
12 Plaintiff,) ORDER REGARDING PLAINTIFF'S
13) SOCIAL SECURITY COMPLAINT
14 v.)
15 MICHAEL J. ASTRUE, Commissioner)
16 of Social Security,)
17 Defendant.)

BACKGROUND

20 Plaintiff Vickie Xiong ("Plaintiff") seeks judicial review of a final decision of the
21 Commissioner of Social Security ("Commissioner" or "Defendant") denying her application for
22 supplemental security income pursuant to Title XVI of the Social Security Act. The matter is
23 currently before the Court on the parties' briefs, which were submitted, without oral argument, to
24 the Honorable Gary S. Austin, United States Magistrate Judge.¹

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28 ¹ The parties consented to the jurisdiction of the United States Magistrate Judge. *See* Docs. 10 & 11.

FACTS AND PRIOR PROCEEDINGS²

Plaintiff filed her application for supplemental security income on or about January 31, 2005. AR 26. The claim was denied initially on May 20, 2005, and upon reconsideration on March 15, 2007. AR 26-27. Plaintiff then requested a hearing before an Administrative Law Judge (“ALJ”) on or about April 17, 2007. AR 33. ALJ Bert C. Hoffman held a hearing on April 15, 2008. AR 527-554. On May 29, 2008, the ALJ issued an unfavorable decision denying benefits. AR 9-25. On December 2, 2008, the Appeals Council denied review. AR 3-5.

Hearing Testimony

ALJ Hoffman held a hearing on April 15, 2008 in Fresno, California. AR 527. Plaintiff was represented by Melissa Proudian. AR 527. Plaintiff and her mother, Hmai Yang (“Ms. Yang”), testified with the aid of an interpreter. AR 527.

A. Testimony of Vickie Xiong

During the hearing the ALJ asked Plaintiff to verify her Social Security Number, what language she spoke in, and who her teacher was. AR 529. When asked how old she was, Plaintiff responded that she was seven years old and has brothers and sisters at home. AR 530. She also responded that she was the youngest in her family. AR 530. The ALJ asked Plaintiff to speak up several times and Plaintiff responded with “Yes” to each command. AR 532. When asked if she had siblings Plaintiff responded “yes.” AR 532. At the end of hearing the ALJ thanked Plaintiff for coming, and Plaintiff responded by saying “Bye.” AR 553. No further testimony from Plaintiff was given. The majority of the testimony was given by Plaintiff’s mother.

B. Testimony of Ms. Yang

Plaintiff is currently in second grade at Olmos Elementary School.³ AR 109-114, 535. Plaintiff did not learn English until kindergarten. AR 553.

² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

³ It is unclear from the record where Olmos Elementary School is located.

1 During 2001, Plaintiff was exposed to lead when she was living in the family home in
2 Milwaukee. AR 537. She was one and a half years old at the time. AR 537. Symptoms
3 included paleness, bloated stomach and lethargy. AR 537.

4 Plaintiff was taken to a hospital and tests revealed her lead level was 215. AR 539.
5 Plaintiff received an IV and was injected with several needles into her legs over 83 hours to
6 reduce the amount of lead poisoning. AR 538. In addition, tubes were inserted into her nose and
7 pills were taken. AR 541. This process was repeated several times. AR 541. Plaintiff was
8 hospitalized for two weeks. AR 538. Plaintiff's mother was told the process would be lengthy
9 because the lead got into Plaintiff's bones. AR 542. There were no side effects to the injections,
10 but the pills might cause "black liver." AR 542. After the treatment, Plaintiff was told to return
11 to the hospital every other week to receive an injection. AR 539. Plaintiff also received
12 injections at home during the weeks she did not receive injections at the hospital. AR 539.

13 In October 2003, Plaintiff and her family moved to California and she received treatment
14 at Valley Children's Hospital in Madera, California. AR 538, 540. Plaintiff was not hospitalized
15 at Valley Children's, however, she was hospitalized at Kaweah Delta in Visalia, California in
16 early 2004 for two days and two nights. AR 540, 541. The lead removal process in Milwaukee
17 was not repeated at Kaweah Delta. AR 541. Plaintiff was never hospitalized again and her
18 subsequent treatment was limited to medication. AR 540. However, she only took medication
19 when her lead levels rose because one of the side effects of the medication was liver damage.
20 AR 542. It has been more than a year since Plaintiff last took the pills. AR 542. Aside from
21 black liver, side effects included loss of appetite, hyperactivity, loss of attention, and behavior
22 problems. AR 543. Plaintiff's appetite still has not fully returned and she takes vitamins to
23 ensure she receives the proper nutrients. AR 543.

24 Plaintiff received nursing visits while in Wisconsin and California. AR 543. The nurse
25 analyzed Plaintiff's urine and provided Plaintiff's mother with dietary information to instruct
26 Plaintiff on proper nutrition. AR 543. The urine tests were performed monthly for a duration of
27 one to two years while Plaintiff resided in Wisconsin and California. AR 544. Plaintiff's urine
28 is not currently tested. AR 544. The nurse also handled Plaintiff's injections and obtained

1 medication for Plaintiff when her temperature rose or she had headaches. AR 544. Plaintiff
2 suffers from headaches two to three times a week. AR 544. She takes Tylenol to alleviate the
3 pain, however, the headaches often recur within two or three days. AR 545. No medication
4 other than Tylenol is used to combat the headaches. AR 545.

5 Plaintiff also has difficulty walking due to pain in her leg bones. AR 545. Plaintiff is
6 carried around by her mother when this occurs. AR 545. To ease the pain, Plaintiff's mother
7 gives Plaintiff Tylenol and massages her legs for ten minutes while the pain dissipates. AR 547.

8 The lead poisoning also causes Plaintiff to have seizures, during which time she foams at
9 the mouth. AR 545. The seizures occur once every one to two weeks, lasting from two to three
10 minutes, after which time Plaintiff feels normal again. AR 547. The seizures have no side
11 effects other than leaving the Plaintiff "very tired" for two to three hours. AR 547-548. Plaintiff
12 received treatment at Valley Children's Hospital for the seizures, but was not prescribed
13 medication because the adverse side effects would outweigh the benefits. AR 548.

14 Plaintiff's mother stated Plaintiff was "not very smart like [her] other children" because
15 Plaintiff did not "learn well and she does not function as well" as her siblings. AR 549. Plaintiff
16 is unable to perform tasks when asked to do so. AR 549. For example, Plaintiff is unable to
17 "straighten places," brush her teeth, or eat properly. AR 549. Plaintiff's siblings are able to
18 perform these tasks with no problems. AR 549.

19 In kindergarten, Plaintiff's teacher noted Plaintiff had learning problems and difficulty
20 performing arithmetic, and recommended that Plaintiff repeat the grade. AR 549. Plaintiff's
21 mother did not agree to have Plaintiff retained. AR 549. However, as Plaintiff proceeded
22 through her schooling, Plaintiff's mother expressed concern that Plaintiff may not pass second
23 grade. AR 535. Lastly, Plaintiff's mother was told by physicians that Plaintiff will continue to
24 have problems in her adult years. AR 550.

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1 **Medical Record**

2 ***A. Public Health Nurse Lillarose Bangs***

3 On November 4, 2002, a PHN Lead Referral sheet from Public Health Nurse Lillarose
4 Bangs noted that Plaintiff's blood lead level ("BLL") decreased from 215 to 50. AR 340.
5 Plaintiff received chelation therapy several times. AR 340. On January 14, 2005, Nurse Bangs
6 reported that Plaintiff's BLL was at 44.5. AR 265. She visited Plaintiff's home where Plaintiff's
7 mother informed her that Plaintiff was still having small seizures, not eating correctly, and
8 complained of her bones hurting. AR 265.

9 In a letter dated November 9, 2006, Nurse Bangs stated the chelation procedure put a toll
10 on the Plaintiff's body. AR 128. In addition, Plaintiff continued to have seizures, learning
11 difficulties, problems sleeping and headaches. In a letter dated November 15, 2006, Nurse Bangs
12 reported Plaintiff had been chelated approximately thirteen times. AR 248. Bangs stated that
13 lead poisoning leads to severe permanent neurological damage in young children, impacting their
14 reading and learning abilities, speech and language capabilities, and can cause mental retardation.
15 AR 248. Plaintiff's symptoms include headaches, irritability, and abdominal pain which is
16 consistent with lead poisoning AR 248. She also noted Plaintiff suffers from lack of sleep and
17 suffers continuously from abrupt seizures. AR 248.

18 ***B. 2005 Function Report***

19 On January 31, 2005, a Function Report was completed by Plaintiff's mother. AR 82-89.
20 She noted that Plaintiff was not totally unable to speak; however, she had problems speaking
21 clearly. AR 84. Plaintiff's speech could hardly be understood even by people who knew her
22 well. AR 84. Plaintiff's mother noted Plaintiff's ability to communicate was limited. AR 85.
23 Plaintiff was able to use complete sentences of more than four words most of the time, able to
24 talk about what she was doing, and able to ask for what she wanted. AR 85. Plaintiff's mother
25 reported Plaintiff's ability to communicate was limited. AR 85. Specifically, Plaintiff cannot
26 ask many "what, why, and where" questions or take part in conversations with other children.
27 AR 85. In addition, Plaintiff is unable to talk about activities that happened in the past and
28 cannot tell familiar childhood stories, or answer questions about them. AR 85. Plaintiff cannot

1 deliver simple messages such as telephone messages; however, she could recite numbers up to
2 three, and knew her age. AR 86. Plaintiff could not count three objects (like blocks, cars or
3 dolls), could not recite numbers to ten, could not identify most colors, did not know her own
4 birthday, did not know her own phone number, could not define common words or read capital
5 letters of the alphabet, and could not understand jokes. AR 86.

6 Plaintiff's mother also reported Plaintiff's physical abilities were limited; however, she
7 was able to catch a large ball and could use scissors very well. AR 87. Plaintiff was affectionate
8 toward parents and enjoyed being with other same-aged children. AR 87. Plaintiff also shared
9 toys, took turns, and played "pretend" with other children. AR 87. Plaintiff was reported to
10 control her bowels and bladder during the day, and eat using a fork and spoon by herself. AR 88.
11 Plaintiff could not dress herself with or without help, could not wash or bathe herself without
12 help, and could not brush her teeth with or without help. AR 88. Plaintiff was able to pay
13 attention and stick with tasks. AR 88.

14 **C. *Dr. Ralph Diaz***

15 On April 13, 2005, Dr. Ralph Diaz, a consulting, board certified pediatrician at Valley
16 Health Resources in Fresno, California examined Plaintiff. AR 203-205. He noted Plaintiff's
17 past history included a diagnosis of lead poisoning in 2002, and hospitalization in Milwaukee for
18 five days every other week for eight weeks. AR 203. Plaintiff was hospitalized in 2004 for five
19 days secondary to lead poisoning. AR 203. Her BLL levels were normal. AR 203. Dr. Diaz
20 determined that Plaintiff had full range of motion and no neurological damage to her cranial
21 nerves and reflexes. AR 205. Also, there was no gross sensory or motor deficits. AR 205.
22 Plaintiff was able to dress without help. AR 205. Dr. Diaz concluded Plaintiff was severely lead
23 poisoned, noting a possibility of decreased cognitive ability. AR 205. Plaintiff was six to eight
24 months delayed in language and fine motor skills and had appropriate gross motor and social
25 skills. AR 205. Dr. Diaz stated it was difficult to ascertain what the patient's future cognitive
26 ability will be in terms of output. AR 205. There was no disorganization of motor function, no
27 neurological abnormalities, and gait was normal. AR 205. Response to stimuli was
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1 approximately six months delayed secondary to language delay. AR 205. There was a six month
2 delay in cognitive ability. AR 205.

3 ***D. Dr. Richard Engeln***

4 On April 15, 2005, Plaintiff underwent a psychological evaluation by Dr. Richard
5 Engeln, Ph.D., a clinical psychologist. AR 198-202. Dr. Engeln stated Plaintiff seemed to speak
6 well, but spoke in sentences or answered questions only when she wanted to. AR 200. Plaintiff
7 was “slow-to-warm” up and was reluctant to attempt tasks. AR 200. Plaintiff’s responses to
8 questions involved whispering the answer to her mother who then relayed the answers to the
9 doctor. AR 200. Plaintiff’s responses to figure drawing tasks were generally scribbling. AR
10 200. Plaintiff was cooperative when asked to point to objects or select an object out of a group
11 of four. AR 200. Plaintiff did not respond to auditory queries. AR 200. Plaintiff’s mother
12 stated she could respond to the tasks given, but Plaintiff was very controlling about her answers.
13 AR 200. Plaintiff’s Bender-Gestalt II score was 84, low average, but the test’s demands of
14 children at Plaintiff’s age level are very low. AR 200. On the TONI III, a visual matching and
15 reasoning task, Plaintiff scored 85, low average, when compared to a normative age of six years.
16 AR 200. All formal measurements of abilities, including Stanford-Binet, were in the moderate
17 range of mental retardation. AR 200-201. Plaintiff’s Vineland Adaptive Behavior Scale scores
18 showed mild range of mental retardation and borderline mental retardation. AR 201. Despite
19 Plaintiff’s mother’s claims, there was no evidence of any attention deficit, and no evidence of any
20 expansive behavior. AR 201. Dr. Engeln concluded that it is not clear Plaintiff has a language
21 disorder or any real developmental disorder. AR 202. He recommended placing Plaintiff in
22 regular kindergarten. AR 202.

23 ***E. Physical Therapy Developmental Evaluation***

24 Plaintiff was seen on April 12, 2005 at Children’s Hospital Central California where she
25 underwent a physical therapy developmental evaluation. AR 142-147. Range of motion was
26 normal with some slight joint laxity with hyperextension at her knees. AR 144. Plaintiff walked
27 intermittently on the dorsal aspects of her toes. AR 144. Plaintiff demonstrated normal strength
28 and motor control. AR 144. Reaction and reflexes were also normal. AR 144. Plaintiff failed

1 to perform several physical tasks. AR 144. However, it was difficult to determine whether
2 Plaintiff was capable of these activities because she was reluctant to try or did not understand.
3 AR 144. Gait was normal. AR 144. Play skills were somewhat limited and Plaintiff had poor
4 verbal skills, but no physical therapy was recommended. AR 146.

5 ***F. Drs. Sadda Reddy and Evangeline Murillo***

6 Plaintiff's records were reviewed by Dr. Sadda Reddy, a state agency, non-examining
7 physician, and Dr. Evangeline Murillo, a state agency non-examining psychiatrist on or around
8 May 9, 2005. AR 115-120. They noted Plaintiff suffered from severe impairments. AR 115.
9 With regard to the six domains of functioning, Plaintiff scored "no limitation" in the domains of
10 attending and completing tasks, interacting and relating to others, moving about and
11 manipulating objects, and caring for yourself. AR 117-118. Plaintiff scored "less than marked"
12 in acquiring and using information and health and physical well-being. AR 117-118. Drs. Reddy
13 and Murillo relied on information given by Plaintiff's mother in the Function Report for their
14 evaluations. AR 117-118. In a Disability Determination Rationale dated May 9, 2005, Dr.
15 Reddy opined Plaintiff does not meet, or functionally equal any listing. AR 196-197. In a
16 Disability Determination Rationale dated May 11, 2005, Dr. Murillo opined Plaintiff should be
17 placed in regular kindergarten. AR 194-195.

18 ***G. Drs. Patrice Solomon and Andre Chabot***

19 On June 6, 2005, Dr. Patrice Solomon, evaluated Drs. Reddy's and Murillo's evaluation
20 of Plaintiff, and agreed with their findings. AR 124-126. On the same date, Dr. Andre Chabot
21 reviewed Reddy's and Murillo's evaluation and agreed with their findings. AR 121-123.

22 ***H. Dr. Jane Donat***

23 On June 28, 2005, Plaintiff was seen in the Neurology Clinic at Children's Hospital
24 Central California where she was examined by Dr. Jane Donat. AR 148-149. Dr. Donat noted
25 Plaintiff's blood level was staying in the 40's and she had not taken a chelation agent in some
26 time. AR 148. Plaintiff's BLL was decreasing due to her lack of continuous exposure to lead.
27 AR 148. Plaintiff appeared to have a seizure disorder with generalized tonic-clonic seizures
28 occurring on a monthly basis. AR 148. However, the seizures are brief and self-limited. AR

1 148. Dr. Donat agreed with Plaintiff's mother that no chronic anti-convulsant medication would
2 be given because the potential side-effects would outweigh their benefit. AR 148-149.
3 Plaintiff's mother brought up Plaintiff's hyperactivity, short attention span and distractibility.
4 AR 148. There was some indistinctness in speech found, however, it was not anticipated that
5 Plaintiff would get special help in kindergarten. AR 148.

6 ***I. Other Records***

7 An Individual Student Learning Plan dated February 28, 2006 noted Plaintiff was at risk
8 of retention, but would be promoted. AR 524. Plaintiff would attend extended days one to two
9 days per week. AR 524. Plaintiff's Grade One Assessment noted Plaintiff needed to increase
10 reading speed and comprehension.⁴ AR 522. A Developmental Flow Sheet noted mild delays in
11 dressing herself without help, and giving her own address.⁵ AR 246. Plaintiff had a moderate
12 delay in giving her own phone number. AR 246. No other child developmental skills were
13 noted. AR 246. On April 4, 2008, Plaintiff's second grade teacher stated Plaintiff was "low in
14 academic areas" and is very quiet in class to the point where the teacher could barely hear her.
15 AR 109.

16 On December 19, 2006, Plaintiff's BLL had improved to 27.5. AR 378. On April 6,
17 2007, Plaintiff's BLL was considered "stable" at 31.6. AR 372. Plaintiff's BLL had also
18 improved to 27.3 on May 9, 2007. AR 371. BLL's fluctuated as time went on (AR 369, 368,
19 364, 360), but a recent blood test on February 29, 2008 showed Plaintiff's BLL had dropped to
20 23.7, and was considered stable. AR 514.

21 Subsequent follow-up examinations throughout 2005 to 2008 showed nothing remarkable
22 except treatment for other conditions. AR 180, 185, 214, 375-376, 379. No medications were
23 being taken as of February 1, 2005. AR 190, 193, 214. Possible seizure disorder was noted on
24 June 6, 2005 and April 5, 2005. AR 187, 191. Plaintiff had no complaints throughout the series
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27 ⁴ This form is not dated.
28 ⁵ This form is not dated.

1 of clinical visits. AR 188, 185, 370, 373. During the closed period of disability there was only
2 one complaint of a headache. AR 183.

3 **SCOPE OF REVIEW**

4 Congress has provided a limited scope of judicial review of the Commissioner's decision
5 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
6 the Court must determine whether the decision of the Commissioner is supported by substantial
7 evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla,"
8 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*
9 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a
10 reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at
11 401. The record as a whole must be considered, weighing both the evidence that supports and
12 the evidence that detracts from the Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993,
13 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must
14 apply the proper legal standards. *E.g., Burkhardt v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).
15 This Court must uphold the Commissioner's determination that the claimant is not disabled if the
16 Secretary applied the proper legal standards, and if the Commissioner's findings are supported by
17 substantial evidence. *See Sanchez v. Sec'y of Health and Human Serv.*, 812 F.2d 509, 510 (9th
18 Cir. 1987).

19 **REVIEW**

20 **Child Disability Standard**

21 The childhood disability standard was changed by the Personal Responsibility and Work
22 Opportunity Act of 1996. *Pub. L. No. 104-193, § 211, 110 Stat. 2105 (1996)*, amending 42
23 U.S.C. § 1382c(a)(3)(A). The amendment provides:

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

1 To apply the new statutory standard, the Commissioner now uses a three-step sequential
2 evaluation procedure for determining whether a child's impairments result in marked and severe
3 functional limitations and is therefore disabled. 20 C.F.R. § 416.924(b)-(d). The amendment
4 eliminated the fourth step in the disability analysis: determining whether the child had an
5 impairment or impairments of comparable severity to that which would disable an adult. This
6 new standard applies to new claims filed on or after August 22, 1996, and to new claims not yet
7 finally adjudicated on that date. 42 U.S.C. § 1382c. A claim is not finally adjudicated if an
8 administrative or judicial appeal was pending on or after that date regarding a claim that has been
9 denied in whole. *Id.*; *see Jamerson v. Chater*, 112 F.3d 1064, 1065 n.1 (9th Cir. 1997).

10 The relevant inquiry at step one is whether the child is engaged in substantial gainful
11 activity. 20 C.F.R. § 416.924(b). If not, step two requires the fact finder to determine whether
12 the child has a medically severe impairment or combination of impairments. 20 C.F.R. §
13 416.924(c). Plaintiff bears the burden of demonstrating a severe impairment. 20 C.F.R. §
14 416.924. If the impairment is a “slight abnormality or a combination of slight abnormalities that
15 cause no more than a minimal functional limitation,” the Commissioner will find that the child
16 does not have a severe impairment and therefore is not disabled. 20 C.F.R. § 416.924(c).

17 Step three requires determining whether the severe impairment meets or equals in severity
18 any impairment that is listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §
19 416.924(d). If such an impairment exists, the Commissioner must find the child disabled. *Id.* If
20 the child's impairment does not meet or medically equal any listing, then the Commissioner must
21 determine if the limitations caused by the impairment functionally equal a listing in the Listing of
22 Impairments. *Id.* To do so, the Commissioner will assess all of the functional limitations caused
23 by the child's impairments in six domains: (1) acquiring and using information; (2) attending and
24 completing tasks; (3) interacting and relating with others; (4) moving about and manipulating
25 objects; (5) caring for self; and (6) health and physical well being. *See* 20 C.F.R. § 416.926a(a)-
26 (b). To functionally equal a listing, the impairments must result in marked limitations in two
27 domains of functioning or an “extreme” limitation in one domain. 20 C.F.R. § 416.926a(a).

A. *The ALJ's Findings*

2 Applying the steps in this case, the ALJ found that: (1) Plaintiff did not engage in any
3 substantial gainful activity because she was five years old at the time of filing her claim, and has
4 never engaged in any substantial gainful activity during the period of disability from January 31,
5 2005 to April 9, 2007;⁶ (AR 15); (2) Plaintiff had a medically severe impairment because she had
6 a history of lead poisoning, mild developmental delay, and a history of seizure disorder (AR 15);
7 and (3) Plaintiff had “less than marked” evaluations for four of the six domains of functioning:
8 acquiring and using information, attending and completing tasks, moving about and manipulating
9 objects, and health and physical well-being. AR 20-24. Plaintiff had “no limitation” evaluations
10 for interacting and relating with others, and caring for herself. AR 21-23. Therefore, the ALJ
11 determined that Plaintiff was not disabled pursuant to the Social Security Act.

DISCUSSION

13 Plaintiff contends the ALJ erred in rejecting Plaintiff's testimony and the testimony of her
14 mother. Doc. 17 at 4.

A. Plaintiff's Testimony

16 Plaintiff argues that the ALJ improperly assessed her subjective symptom testimony.
17 Doc. 17 at 4. As the Defendant points out, the Plaintiff gave very little testimony during the
18 interview with the ALJ, and what she did say was limited to pleasantries between the ALJ and
19 herself. AR 529-532, 553. Defendant argues that Plaintiff's testimony was not rejected. Doc. 20
20 at 5.

21 In his findings, the ALJ noted that Plaintiff did testify at the hearing. AR 12. However,
22 only the statements of the Plaintiff's mother were mentioned in determining inconsistencies
23 between Plaintiff's symptoms and the impairments. AR 17.

24 It is true that “[s]o long as the [ALJ] makes specific findings that are supported by the
25 record, the adjudicator may discredit the claimant’s allegations based on inconsistencies in the
26 testimony or on relevant character evidence.” *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir.

⁶ At the outset of the hearing, Plaintiff's counsel requested a closed period of disability from January 31, 2005 to April 9, 2007. AR 531. The ALJ granted counsel's request. AR 531.

1 1991). However, where the ALJ fails to articulate reasons for believing or disbelieving a
2 claimant's testimony, it is deemed credible as a matter of law. *See Varney v. Secretary of Health*
3 and *Human Services*, 859 F.2d 1396, 1398 (9th Cir. 1988) (citing *Hale v. Bowen*, 831 F.2d 1007,
4 1012 (11th Cir. 1987); *Ceguerra v. Secretary of Health & Human Services*, 933 F.2d 735, 740-41
5 (9th Cir. 1991). *See also Ware on Behalf of Ware*, 902 F.Supp. 1262, 1273 (E.D. Wash. 1995)
6 (Mother's testimony on behalf of her son was credited as true because the ALJ made no
7 credibility finding as to the mother's testimony).

8 Here, there is no testimony by which an ALJ could extract ample descriptions of
9 Plaintiff's symptoms because Plaintiff's testimony was limited to mere pleasantries. AR 529-
10 532, 553. The vast majority of the hearing transcript revolves around Plaintiff's mother.
11 Whatever testimony Plaintiff gave is credited as true and is not dispositive on any issue in this
12 matter. In short, the ALJ cannot discount testimony that was never given and what testimony
13 remains is *de minimis*.

14 ***B. Lay Opinion Testimony***

15 Plaintiff argues that the ALJ does not offer any legally sufficient reasons to reject the
16 testimony of Plaintiff's mother. Specifically, Plaintiff argues the ALJ's decision is improper
17 because his rejection of Ms. Yang's testimony is based on the fact that the objective medical
18 evidence did not support the level of limitation she describes.

19 As a preliminary matter, Plaintiff has argued that the ALJ must offer clear and convincing
20 reasons for rejecting the testimony of Plaintiff's mother. Doc. 17 at 6-7. This is an incorrect
21 statement of the law. Judges may, "in addition to evidence from acceptable medical sources . . . ,
22 also use evidence from other sources to show the severity of [plaintiff's] impairment(s) and how
23 it affects [her] ability to work." 20 C.F.R. §§ 404.1513(d), 416.913(d). Such other sources
24 include spouses, parents and other caregivers, siblings, other relatives, friends, neighbors, and
25 clergy. See 20 C.F.R. §§ 404.1513(d)(4), 416.913(d)(4). Lay witness testimony by family
26 members and friends who have the opportunity to observe plaintiff on a daily basis "constitutes
27 qualified evidence" that the ALJ must consider. *Sprague v. Brown*, 812 F.2d 1226, 1231-32 (9th
28 Cir. 1987); see *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) ("An eyewitness can often tell

1 whether someone is suffering or merely malingering. While this is particularly true of witnesses
2 who view the claimant on a daily basis, the testimony of those who see the claimant less often
3 still carries some weight"). To reject lay testimony, an ALJ must give reasons "germane to each
4 witness" for doing so. *Dodrill v. Shalala*, 12 F.3d at 919. Thus, the ALJ must give germane
5 reasons for rejecting Ms. Yang's testimony.

6 With regard to Plaintiff's mother's credibility, the ALJ notes the following:

7 After considering the evidence of record, I find the claimant's medically
8 determinable impairments could reasonably be expected to produce the alleged
9 symptoms; however, the statements concerning the intensity, persistence and
10 limiting effects of the claimant's are not credible to the extent they are
11 inconsistent with finding that the claimant does not have an impairment or
12 combination of impairments that functionally equals the listings for the reasons
13 explained below . . .
14 AR 16-17.

15 To support this conclusion, the ALJ provides a very detailed analysis of all of the medical
16 records including doctor and hospital reports, lab results, psychological and physical therapy
17 evaluations, as well as teacher/learning assessments. AR 19-24. An ALJ cannot discredit a lay
18 person's testimony just because he finds that it is "not supported by medical evidence in the
19 record." *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009) (quoting *Smolen v. Chater*, 80 F.3d
20 1273, 1289 (9th Cir. 1996)). In this case, however, the ALJ also relied on parts of a function
21 report filled out by Plaintiff's mother, as well as Plaintiff's teachers' and physical therapists'
22 reports assessing Plaintiff's physical, educational, and social abilities. AR 16-19. This is
23 illustrated throughout the ALJ's findings.

24 1. *Acquiring and Using Information*

25 Plaintiff's mother testified that she was concerned about her daughter's mental
26 development. AR 549. However, the ALJ credited the Function Report and Plaintiff's second
27 grade teacher in determining the limitations were less than marked. AR 20. Specifically, the
28 ALJ relied on the Function Report in finding Plaintiff can communicate in complete sentences,
and recite numbers to three. AR 20, 85, 86. Plaintiff's second grade teacher reported Plaintiff
was "low" in academic areas, and had a "mild" problem learning new skills and keeping up with
peers. AR 20, 109, 113. Dr. Diaz noted a six month delay in cognitive and language abilities,

1 but was unsure about her future cognitive abilities. AR 20, 205. However, as the ALJ
2 concluded, “at the age of [four] years and [ten] months, [Plaintiff] was functioning above [two-
3 thirds] of chronological age. Accordingly, the limitations in this domain were less than marked.”
4 AR 20. The ALJ’s conclusions are consistent with the findings of the four state agency
5 physicians who opined Plaintiff had less than marked limitations in this area. AR 117-118, 121-
6 126.

7 2. *Attending and Completing Tasks*

8 According to Plaintiff’s mother, Plaintiff is unable to perform tasks when asked to do so.
9 AR 549. For example, Plaintiff is unable to “straighten places,” brush her teeth, or eat properly.
10 AR 549. However, the ALJ determined that Plaintiff’s ability to attend and complete tasks was
11 “less than marked.” AR 21. Per the Function Report, the ALJ concluded Plaintiff has the ability
12 to pay attention and stick with tasks. AR 21, 88. Plaintiff’s second grade teacher noted Plaintiff
13 is able to finish “things she starts, listening and remaining attentive, organizing and concentrating
14 on her schoolwork, and sticking to a play activity.” AR 21, 114. The teacher stated Plaintiff has
15 a mild problem in learning new skills and keeping up with her peers. AR 21, 113. The ALJ also
16 considered Dr. Diaz’s conclusion that Plaintiff had a six month delay in cognitive and language
17 abilities in addition to her six month delay in responses to stimuli. AR 21, 205.

18 The ALJ’s findings are supported by Dr. Engeln, who opined there was no evidence of
19 attention deficit or expansive behavior. AR 201. The ALJ’s findings also match the conclusions
20 of the four state agency physicians, who felt that Plaintiff had less than marked limitations in this
21 area. AR 117, 121-126.

22 3. *Interacting and Relating with Others*

23 The ALJ concluded the Plaintiff had no limitations in this area. AR 22. The ALJ
24 credited Plaintiff’s mother’s testimony in the Function Report when she stated Plaintiff enjoyed
25 being with the same-aged children, showed affection towards them and parents. AR 22, 87. The
26 ALJ also cites Plaintiff’s second grade teacher who felt Plaintiff was very quiet in class, and
27 could barely be heard when called on. AR 22, 109. However, “if heard, she can be understood.”
28 AR 22, 112.

1 The ALJ's conclusions are in accord with those of the four state agency physicians, and
2 Dr. Donat who opined Plaintiff's speech did not require any special help in kindergarten. AR 24,
3 117, 121-126, 148.

4 4. *Moving About and Manipulating Objects*

5 Per the Function Report, the ALJ credited Plaintiff's mother testimony wherein she stated
6 Plaintiff could catch a large ball, and use scissors "fairly well." AR 22, 87. The ALJ cited the
7 Physical Therapy Developmental Evaluation which observed Plaintiff's gait was normal. AR 22,
8 144. Dr. Diaz concluded that Plaintiff was six to eight months delayed in language and fine
9 motor skills. AR 22, 205. This conclusion deviates from those of the four state agency
10 physicians who opined that Plaintiff had no limitations in this area. AR 118, 121-126.

11 Nevertheless, the ALJ concluded Plaintiff had less than marked limitations in this area. AR 22.

12 5. *Caring for Yourself*

13 Plaintiff's mother feels that Plaintiff's ability to brush her teeth and get dressed are
14 diminished. AR 549. Specifically, in the Function Report, Plaintiff's mother stated Plaintiff
15 could not dress her herself with or without help. AR 88. However, the ALJ held that Plaintiff
16 had no limitations in this area because, "[p]er the Function Report, [Plaintiff] is able to eat using
17 [a] fork and spoon by [herself]." AR 23, 88. In addition, the ALJ cited Dr. Diaz, who opined
18 Plaintiff could dress herself. AR 23, 205. Based on the Function Report, the four state agency
19 physicians concluded Plaintiff had no limitations in this area. AR 118, 121-126. The ALJ's
20 conclusions are consistent with their findings. AR 23.

21 6. *Health and Physical Well-Being*

22 Plaintiff's mother testified that lead poisoning gave Plaintiff headaches which are treated
23 with Tylenol. AR 544-545. In addition, the lead poisoning is responsible for Plaintiff's seizures
24 which lasted two to three minutes and caused fatigue for two to three hours. AR 547-548.

25 The ALJ noted that Plaintiff has a history of lead toxicity; however, "she has not needed
26 to take a chelation agent (succimer) for some time, and her lead blood level had continued to
27 decline." AR 24. This is consistent with Dr. Donat's findings who opined Plaintiff's BLL's
28 were dropping because she was no longer exposed to lead. AR 148.

1 In addition, the ALJ noted Plaintiff's mother testimony concerning the seizures, but found
2 they were not particularly bothersome, that Plaintiff does not take any medication to treat them
3 and has not required any hospital or emergency care. AR 24. This is also consistent with Dr.
4 Donat's opinion that the seizures posed no danger because they were brief and self-limited. AR
5 148-149.

6 As for the headaches, the ALJ stated they "do not cause significant limitation of function
7 and there were no adverse side effects associated with the use of Tylenol." AR 24. To support
8 this conclusion, the ALJ cited Plaintiff's second grade teacher who noted no complaints of
9 headaches. AR 24, 109-114. Furthermore, the teacher noted no excessive absenteeism. AR 24,
10 113. The ALJ's conclusion is supported by the medical record where there was only one
11 complaint of a headache within the closed period of disability. AR 24, 183.

12 The ALJ also cited Drs. Reddy and Murillo who opined Plaintiff has a history of iron
13 deficiency but no anemia or growth impairments. AR 24, 120. All four state agency physicians
14 opined Plaintiff had less than marked limitations in this area, noting elevated lead levels;
15 however, Plaintiff's physical exam was normal. AR 118, 121-126.

16 Based on the above, the ALJ properly relied upon other factors in conjunction with the
17 objective medical evidence.. An ALJ is permitted to discount lay testimony to the extent it is
18 inconsistent with medical evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005)
19 ("Inconsistency with medical evidence is [a germane reason to discredit the testimony of lay
20 witnesses]"). Here, the ALJ properly rejected portions of the Plaintiff's mother's testimony
21 because it was inconsistent with the medical evidence and other information contained within the
22 record.

23 Finally, Plaintiff cites to boilerplate law and makes a conclusory statement that if Ms.
24 Yang's testimony was credited as true, Plaintiff would be disabled under the Act. However,
25 Plaintiff has not cited to one aspect of Ms. Yang's testimony or specifically identified how this
26 testimony would have altered the ALJ's finding in any of the six domains. Therefore, the Court
27 is not persuaded that the ALJ did not provide germane reasons for rejecting some portions of Ms.
28 Yang's testimony, or that his reliance on the evidence in the medical record and information from

1 other sources was improper. Plaintiff correctly points out that a person does not have to be
2 completely incapacitated to be entitled to social security benefits. *See Smolen v. Chater*, 80 F.3d
3 at 1284 n.7 (“The Social Security Act does not require that claimants be utterly incapacitated to
4 be eligible for benefits, and many home activities may not be easily transferable to a work
5 environment . . .”); *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987) (noting that a disability
6 claimant need not “vegetate in a dark room” in order to be deemed eligible for benefits).
7 However, in this case, the ALJ generally credited Ms. Yang’s testimony, but as explained above,
8 rejected it when objective medical evidence and assessments from Plaintiff’s teachers and
9 therapists contradicted Ms. Yang’s perceptions regarding the six domains. As a result, the ALJ
10 provided germane reasons for rejecting portions of Ms. Yang’s testimony and the decision is
11 supported by substantial evidence.

12 **CONCLUSION**

13 Based on the foregoing, the Court finds that the ALJ’s decision is supported by
14 substantial evidence in the record as a whole and is based on proper legal standards.
15 Accordingly, this Court DENIES Plaintiff’s appeal from the administrative decision of the
16 Commissioner of Social Security. The Clerk of this Court is DIRECTED to enter judgment in
17 favor of Defendant Michael J. Astrue, Commissioner of Social Security, and against Plaintiff
18 Vickie Xiong.

19 IT IS SO ORDERED.

20 **Dated: June 25, 2010**

21 /s/ Gary S. Austin
22 UNITED STATES MAGISTRATE JUDGE
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