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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RODERICK STEWARD, by and through his guardian ad litem, SHANIKKIA HOLLEY,	}	1:09cv0886 DLB
	}	
Plaintiff,	}	ORDER REGARDING PLAINTIFF'S SOCIAL SECURITY COMPLAINT
v.	}	
MICHAEL J. ASTRUE, Commissioner of Social Security,	}	
	}	
Defendant.	}	

1:09cv0886 DLB
ORDER REGARDING PLAINTIFF'S
SOCIAL SECURITY COMPLAINT

BACKGROUND

Plaintiff Roderick Steward ("Plaintiff"), by and through his Guardian ad Litem Shanikkia Holley, seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying his application for supplemental security income pursuant to Title XVI of the Social Security Act. The matter is currently before the Court on the parties' briefs, which were submitted, without oral argument, to the Honorable Dennis L. Beck, United States Magistrate Judge.

1 **FACTS AND PRIOR PROCEEDINGS¹**

2 Plaintiff filed his application on May 13, 2005, alleging disability since June 2, 1999, due
3 to seizures and blackouts. AR 124, 128. Plaintiff was seven years old at the time of filing. AR
4 124. After Plaintiff's application was denied initially and on reconsideration, he requested a
5 hearing before an Administrative Law Judge ("ALJ"). AR 23-27, 30-34, 35-36. ALJ Edward
6 Steinman held a hearing on September 8, 2008, and denied benefits on September 30, 2008. AR
7 5-17, 276-304. The Appeals Council subsequently denied review. AR 4.

8 **Hearing Testimony**

9 ALJ Steinman held a hearing on September 8, 2008, in Bakersfield, California. Plaintiff
10 appeared with his attorney, Geoffrey Hayden. Plaintiff's mother appeared and testified, as well
11 as medical expert William Rack, M.D. AR 276.

12 Shanikkia Holley, Plaintiff's mother, testified that as her son gets older, he gets more
13 headaches and nosebleeds. Plaintiff gets nosebleeds two to three times per week, and both his
14 nosebleeds and headaches are caused by physical activity. AR 281-282. He also gets nosebleeds
15 at home if it is hot in the house, though it still depends on what he's doing. Plaintiff gets
16 headaches, which last about an hour, two to three times a week. AR 282. Plaintiff's doctor has
17 not prescribed any medication for the headaches and told him to take Tylenol. AR 284-285. His
18 headaches go away when he lays down and goes to sleep. AR 282-283.

19 Plaintiff has not blacked out in about six months and Ms. Holley explained that she keeps
20 him out of any situations where he could blackout. AR 287. When he blacked out six months
21 ago, his older brother head-butted him while they were playing. Ms. Holley brought Plaintiff
22 inside, "got him out of" it, gave him Tylenol and made him sit down for a while. AR 288. This
23 made him feel better. AR 289.

24 Ms. Holley testified that Plaintiff was in sixth grade, in regular classes. He received
25 speech and language assistance in the past, but was no longer receiving such assistance. Though
26 he was now doing better, Plaintiff continues to stutter "a little bit." AR 285.

27 _____
28 ¹ References to the Administrative Record will be designated as "AR," followed by the appropriate page
number.

1 Plaintiff is allowed to go to recess, but Ms. Holley does not allow him to play football or
2 other sports until they know what's going on with his head. AR 285. Plaintiff was doing well in
3 school and getting good grades. He gets along well with his two brothers and his sister and has
4 friends that he plays with after school. AR 286.

5 Ms. Holley explained that at home, Plaintiff doesn't give her too many problems and is a
6 good kid. He is assigned chores and is able to complete them. AR 286-287.

7 Plaintiff testified that he last had a headache the day before the hearing and it "hurt[]
8 bad." He usually takes one Tylenol and then goes to sleep. When he wakes up, his head stops
9 hurting. AR 290. Prior to that headache, his last headache was about a week ago. AR 291. He
10 thought his headaches occurred once or twice a week. AR 291. During recess, he plays
11 basketball and sometimes plays "tagger," and he does not feel ill when he plays outside. AR 291.
12 He has friends in school and gets along with them. He also gets along with his brothers and his
13 sister. AR 292.

14 When questioned by his by attorney, Plaintiff testified that he gets nosebleeds at school
15 but does not go to the nurse. When he has headaches, he sees "black things" and spots. AR 293.
16 He rated his headache pain at a five or six out of ten. His ears sometimes ring when he gets
17 headaches. AR 294.

18 Medical expert Dr. Rack testified that he did not think that Plaintiff had a seizure
19 disorder. Testing did not reveal evidence of a disorder and he is not being treated for a seizure
20 disorder. Plaintiff's headaches could be migraines or related to musculoskeletal issues or
21 tension. The headaches did not last long and did not appear to be related neurologically to a
22 physical examination abnormality. AR 299. Dr. Rack explained that the irregularity mentioned
23 in the MRI would not likely be related to the headaches, but he recommended a repeat scan.²

24 Dr. Rack did not believe that Plaintiff had an impairment that met or equaled a listed
25 impairment. AR 299. Dr. Rack also did not see any marked impairments in any of the domains
26 examined in determining whether Plaintiff had a functionally equivalent impairment. He also did
27

28 ² A request for a repeat MRI was denied as "cost prohibitive." AR 12, 204-205.

1 not believe that Plaintiff had any “less than marked” impairments. Dr. Rack believed that
2 Plaintiff’s impairment was non-severe. AR 300.

3 When questioned by Plaintiff’s attorney, Dr. Rack testified that Plaintiff’s nosebleeds
4 may be related to an irregularity in his nose and did not necessarily represent something wrong
5 neurologically. Although it was possible that it was neurological, such a connection would be
6 rare. AR 301. Dr. Rack did not see any evidence of nosebleeds in the medical records. AR 300.

7 As to Plaintiff’s blackouts, Dr. Rack testified that they could have been related to “breath
8 holding spells,” which wouldn’t be related to a neurological issue and would be benign in nature.
9 The irregularities on Plaintiff’s MRI are common changes that often do not represent a
10 significant abnormality. AR 301.

11 Medical Record

12 Plaintiff saw neurologist Asela P. Jumao-as, M.D., for evaluation of his headaches on
13 April 8, 2005. His mother reported an increase in headaches for the past two weeks. He was
14 taking Ibuprofen, which seemed to help. Ms. Holley also described episodes of unconsciousness
15 which began at age 3. Dr. Jumao-as described Plaintiff as an alert, bright 7 year old boy.
16 Plaintiff’s neurological examination was normal. Dr. Jumao-as diagnosed probable migraines
17 and episodes of loss of consciousness, rule out seizures versus breath holding spells. Dr. Jumao-
18 as recommended an MRI in light of the presence of café au lait spots and the recent observation
19 of stuttering. An EEG was also ordered and Plaintiff was started on suppression therapy with
20 Ciproheptadine at bedtime. Plaintiff could continue with Ibuprofen as needed. AR 216-217.

21 Plaintiff underwent an MRI scan of his brain on April 21, 2005. The test showed
22 punctuated areas of increased signal intensity mainly in the periventricular white matter in both
23 parietal regions. These were “non-specific” findings which could be secondary to ischemic,
24 demyelinating or dysmyelinating disease. AR 214.

25 On April 27, 2005, Dr. Jumao-as wrote a note to Plaintiff’s school indicating that Plaintiff
26 should avoid exposure to heat because of his migraines. Dr. Jumao-as also noted that Plaintiff
27 stuttered and recommended a speech evaluation. AR 212.

1 On September 27, 2005, Plaintiff was evaluated by Chuck K. Lee, M.D., for possible
2 seizures and headaches. Plaintiff's mother reported blackouts starting at age 3, which seemed to
3 worsen after "playing hard." She also reported that Plaintiff began having headaches about 2
4 years ago.

5 On examination, Plaintiff stuttered when reading a passage. He had two café au lait
6 spots. Sensory and motor functions were normal and deep tendon reflexes and muscle tone were
7 symmetrical. Dr. Lee noted that Plaintiff seemed to be responding to cyproheptadine, with no
8 further blackout episodes or seizure activity. MRI records were not available for review, though
9 Plaintiff's mother described them as normal. Dr. Lee found Plaintiff to be otherwise healthy and
10 able to carry out normal activities. Plaintiff still noted headaches after exertion, which Dr. Lee
11 found to be compatible with migraines. Other than the stuttering, Plaintiff's physical
12 examination was normal. Dr. Lee opined that Plaintiff would need to continue follow-up with
13 the neurologist for his migraines and blackout episodes. It was unclear whether Plaintiff had a
14 seizure disorder, as he had not been prescribed any antiseizure medications. He also
15 recommended that Plaintiff be evaluated by a speech therapist so that appropriate speech therapy
16 could be initiated. AR 221-222.

17 On October 3, 2005, Plaintiff underwent a speech and language assessment through his
18 school district. The speech therapist determined that Plaintiff was an excellent candidate for a
19 speech program with emphasis on decreasing dysfluent speech patterns. AR 223-224.

20 In October 2005, Plaintiff's teacher, Katharine Love, stated the only condition that she
21 was aware of was Plaintiff's stuttering. She noted that he had just qualified for speech services.
22 AR 146, 189-197.

23 On November 10, 2005, State Agency physician Lavanya Bobba, M.D., determined that
24 Plaintiff had a less than marked limitation in acquiring and using information, no limitation in
25 attending and completing tasks, a less than marked limitation in interacting and relating with
26 others, no limitation in moving about and manipulating objects, no limitation in caring for
27 himself and a less than marked limitation in his health and physical well-being. AR 225-232.

28 This was affirmed on January 30, 2006. AR 233-239.

1 In October 2006, after a year of speech therapy, Plaintiff's teacher noted that he
2 completes assignments, is responsible and stays on task, though he can get frustrated and have
3 difficulty dealing with disappointment. Plaintiff was described as a "nice boy" and his smile
4 "lights up the room." AR 191. Plaintiff spent 97 percent of his day in the general education
5 program. AR 193.

6 Plaintiff saw Juliane Tran, M.D., on August 29, 2008, for a neurological examination.
7 Plaintiff complained that he had "spells sometimes." Plaintiff's mother told Dr. Tran that
8 Plaintiff has had seizures since he was five years old and described "spells" during which
9 Plaintiff's eyes roll up, his upper extremities/arms get flaccid and he has decreased response
10 time. She explained that these spells last for five minutes and that if Plaintiff was not supported
11 during that time, he would fall down. Plaintiff also complained of headaches. He participated in
12 normal activities, though he did not play football. AR 251-252.

13 Plaintiff's neurological examination was normal. His mental status was fair to good for
14 his age. Dr. Tran noted subjective reports of periodic "spells," but found that it was unclear
15 whether these spells were partial seizures or not. There was no indication that Plaintiff had
16 previously been on seizure medications. He described the MRI findings as unspecific. Although
17 there were no functional limitations per se, Dr. Tran opined that because of Plaintiff's transient
18 spells, his limitation barring contact sports at school should continue as a precaution. Plaintiff
19 should never be exposed to unprotected heights, also as a precaution. AR 252-261.

20 ALJ's Findings

21 The ALJ determined that Plaintiff had the severe impairments of a seizure disorder,
22 nonspecific, and headaches. He did not have an impairment or combination of impairments that
23 met or equaled a listed impairment. The ALJ also determined that Plaintiff did not have an
24 impairment or combination of impairments that functionally equaled a listing. In so finding, the
25 ALJ determined that Plaintiff had no limitation in acquiring and using information, no limitation
26 in attending and completing tasks, no limitation in interacting and relating with others, a less than
27 marked limitation in moving about and manipulating objects, no limitation in caring for himself
28 and a less than marked limitation in his health and physical well-being. AR 11-17.

SCOPE OF REVIEW

1
2 Congress has provided a limited scope of judicial review of the Commissioner’s decision
3 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
4 the Court must determine whether the decision of the Commissioner is supported by substantial
5 evidence. [42 U.S.C. 405](#) (g). Substantial evidence means “more than a mere scintilla,”
6 [Richardson v. Perales, 402 U.S. 389, 402 \(1971\)](#), but less than a preponderance. [Sorenson v.](#)
7 [Weinberger, 514 F.2d 1112, 1119, n. 10 \(9th Cir. 1975\)](#). It is “such relevant evidence as a
8 reasonable mind might accept as adequate to support a conclusion.” [Richardson, 402 U.S. at](#)
9 [401](#). The record as a whole must be considered, weighing both the evidence that supports and
10 the evidence that detracts from the Commissioner’s conclusion. [Jones v. Heckler, 760 F.2d 993,](#)
11 [995 \(9th Cir. 1985\)](#). In weighing the evidence and making findings, the Commissioner must
12 apply the proper legal standards. *E.g.*, [Burkhart v. Bowen, 856 F.2d 1335, 1338 \(9th Cir. 1988\)](#).
13 This Court must uphold the Commissioner’s determination that the claimant is not disabled if the
14 Secretary applied the proper legal standards, and if the Commissioner’s findings are supported by
15 substantial evidence. *See* [Sanchez v. Sec’y of Health and Human Serv., 812 F.2d 509, 510 \(9th](#)
16 [Cir. 1987\)](#).

REVIEW

17
18 In determining disability in children, the Commissioner uses a three-step sequential
19 evaluation procedure. [20 C.F.R. § 416.924\(b\)-\(d\)](#). The relevant inquiry at step one is whether
20 the child is engaged in substantial gainful activity. [20 C.F.R. § 416.924\(b\)](#). If not, step two
21 requires the fact finder to determine whether the child has a medically severe impairment or
22 combination of impairments. [20 C.F.R. § 416.924\(c\)](#). Plaintiff bears the burden of
23 demonstrating a severe impairment. [20 C.F.R. § 416.924](#). If the impairment is a “slight
24 abnormality or a combination of slight abnormalities that cause no more than a minimal
25 functional limitation,” the Commissioner will find that the child does not have a severe
26 impairment and therefore is not disabled. [20 C.F.R. § 416.924\(c\)](#).

27 Step three requires determining whether the severe impairment meets or equals in severity
28 any impairment that is listed in [20 C.F.R. Part 404](#), Subpart P, Appendix 1. [20 C.F.R. §](#)

1 [416.924\(d\)](#). If such an impairment exists, the Commissioner must find the child disabled. *Id.* If
2 the child’s impairment does not meet or medically equal any listing, then the Commissioner must
3 determine if the limitations caused by the impairment functionally equal a listing in the Listing of
4 Impairments. *Id.* To do so, the Commissioner will assess all of the functional limitations caused
5 by the child’s impairments in six domains: (1) acquiring and using information; (2) attending and
6 completing tasks; (3) Interacting and relating with others; (4) moving about and manipulating
7 objects; (5) caring for self; and (6) health and physical well being. See [20 C.F.R. § 416.926a\(a\)-](#)
8 [\(b\)](#).

9 To functionally equal a listing, the impairments must result in marked limitations in two
10 domains of functioning or an “extreme” limitation in one domain. [20 C.F.R. § 416.926a\(a\)](#). A
11 “marked” limitation is one that “interferes seriously with [the child’s] ability to independently
12 initiate, sustain, or complete activities.” [20 C.F.R. 416.926a\(e\)\(2\)](#). It means “ ‘more than
13 moderate’ but ‘less than extreme.’” *Id.* On the other hand, an “extreme” limitation “interferes
14 very seriously with [the child’s] ability to independently initiate, sustain, or complete activities.”
15 [20 C.F.R. § 416.926a\(e\)\(3\)](#). It is the rating given to the “worst limitations.” *Id.*

16 **DISCUSSION**

17 As his sole argument, Plaintiff contends that the ALJ improperly assessed Plaintiff’s
18 testimony and that of his mother, Ms. Holley.

19 In [Orn v. Astrue, 495 F.3d 625, 635 \(9th Cir. 2007\)](#), the Ninth Circuit summarized the
20 pertinent standards for evaluating the sufficiency of an ALJ’s reasoning in rejecting a claimant’s
21 subjective complaints:

22 An ALJ is not “required to believe every allegation of disabling pain” or other
23 non-exertional impairment. See [Fair v. Bowen, 885 F.2d 597, 603 \(9th Cir.1989\)](#).
24 However, to discredit a claimant’s testimony when a medical impairment has been
25 established, the ALJ must provide “ ‘specific, cogent reasons for the disbelief.’” [Morgan,](#)
26 [169 F.3d at 599](#) (quoting [Lester, 81 F.3d at 834](#)). The ALJ must “cit[e] the reasons why
27 the [claimant’s] testimony is unpersuasive.” *Id.* Where, as here, the ALJ did not find
28 “affirmative evidence” that the claimant was a malingerer, those “reasons for rejecting the
claimant’s testimony must be clear and convincing.” *Id.*

Social Security Administration rulings specify the proper bases for rejection of a
claimant’s testimony. . . An ALJ’s decision to reject a claimant’s testimony cannot be
supported by reasons that do not comport with the agency’s rules. See 67 Fed.Reg. at
57860 (“Although Social Security Rulings do not have the same force and effect as the

1 statute or regulations, they are binding on all components of the Social Security
2 Administration, ... and are to be relied upon as precedents in adjudicating cases.”); *see*
3 [Daniels v. Apfel, 154 F.3d 1129, 1131 \(10th Cir.1998\)](#) (concluding that ALJ’s decision at
4 step three of the disability determination was contrary to agency regulations and rulings
5 and therefore warranted remand). Factors that an ALJ may consider in weighing a
6 claimant’s credibility include reputation for truthfulness, inconsistencies in testimony or
7 between testimony and conduct, daily activities, and “unexplained, or inadequately
8 explained, failure to seek treatment or follow a prescribed course of treatment.” [Fair,](#)
9 [885 F.2d at 603](#); *see also* [Thomas, 278 F.3d at 958-59](#).

10 Similarly, the ALJ is required to consider lay witness testimony in determining whether a
11 claimant is disabled. [Bruce v. Astrue, 557 F.3d 1113 \(9th Cir. 2009\)](#); [Dodrill v. Shalala, 12 F.3d](#)
12 [915, 919 \(9th Cir. 1993\)](#). Such testimony is competent evidence and “cannot be disregarded
13 without comment.” [Nguyen v. Chater, 100 F.3d 1462, 1467 \(9th Cir.1996\)](#). If an ALJ disregards
14 the testimony of a lay witness, the ALJ must provide reasons “that are germane to each witness.”
15 *Id.* Further, the reasons “germane to each witness” must be specific. [Stout v. Comm’r, 454 F.3d](#)
16 [1050, 1054 \(9th Cir.2006\)](#) (explaining that “the ALJ, not the district court, is required to provide
17 specific reasons for rejecting lay testimony”).

18 As a threshold matter, the Court notes that Plaintiff’s argument is mainly boilerplate and
19 lacks specificity. Although Plaintiff claims that the ALJ “does not offer a single legally
20 sufficient reason to reject” the testimony of Plaintiff and his mother, he does not identify any
21 allegedly rejected testimony. Nor does Plaintiff explain how the RFC finding was inconsistent
22 with Plaintiff’s testimony and that of his mother. His failure to point to specific testimony
23 renders Plaintiff’s argument conclusory and unhelpful to the Court’s analysis.

24 In any event, a comparison of the hearing testimony and the ALJ’s findings reveals that
25 the ALJ credited the testimony. For example, in finding that Plaintiff had no limitations in
26 acquiring and using information, the ALJ noted that Plaintiff does well in school, no longer
27 needs speech therapy, has not been in special education classes though he had additional help,
28 and is able to play at school. AR 13. These statements are entirely consistent with the testimony.
29 Ms. Holley testified that Plaintiff plays at recess, gets good grades in school, attends regular
30 classes, no longer receives speech therapy, is a “good kid” and mostly completes his assigned
31 chores. AR 285-287. Similarly, Plaintiff testified that he does well in school and participates in
32 recess. AR 291. There is nothing in either Ms. Holley’s testimony or Plaintiff’s testimony that

1 suggests he has any limitation in this domain. Although Ms. Holley testified that Plaintiff still
2 stutters “a little bit,” this does not necessarily suggest any limitations in this domain, and Plaintiff
3 does not argue otherwise.

4 In finding that Plaintiff had no limitations in attending and completing tasks, the ALJ
5 noted that “nothing in the record or the testimony” suggests a limitation in this area. AR 14.
6 Indeed, Ms. Holley’s testimony that Plaintiff does well in school and does his chores at home is
7 consistent with this finding. AR 285-287.

8 The ALJ next determined that Plaintiff had no limitation in interacting and relating with
9 others. AR 15. He explained that “the record and testimony show that the claimant has friends
10 at home” and “gets along with his family.” AR 15. Ms. Holley testified that Plaintiff has friends
11 at school and gets along well with his brother and sisters. AR 285-286. Plaintiff also testified
12 that he gets along with his friends at school, as well as his siblings. AR 292.

13 In determining that Plaintiff had a less than marked limitation in moving about and
14 manipulating objects, the ALJ found such a limitation based on Plaintiff’s need for seizure
15 precautions. The limitation did not reach the level of “marked,” however, because Plaintiff is
16 able to play with his friends, participates in physical education at school and plays basketball and
17 tag. AR 15. Again, this is wholly consistent with the testimony of Plaintiff and his mother. In
18 fact, given that the medical record provides no evidence of a seizure disorder and Dr. Rack
19 testified that Plaintiff did not appear to have a seizure disorder, it appears that the ALJ relied on
20 Ms. Holley’s testimony related to Plaintiff’s “blackouts” to find such an impairment. AR 12,
21 287.

22 Next, the ALJ determined that Plaintiff did not have any limitations in caring for himself.
23 AR 15. As Plaintiff’s mother testified, Plaintiff no longer needed speech therapy. AR 285.
24 There was simply no testimony from either Ms. Holley or Plaintiff that indicated he had any
25 issues in caring for himself.

26 Finally, the ALJ found that Plaintiff had a less than marked limitation in his health and
27 physical well-being. AR 17. The ALJ based the limitation on Plaintiff’s seizure disorder, though
28 he found it to be less than marked, in part because Plaintiff plays sports and participates in

1 physical education at school, his headaches are short-lived and controlled by Tylenol and his
2 blackouts appear controlled by medication. AR 17. Again, there is no contradictory testimony.
3 Ms. Holley testified that Plaintiff's headaches, for which he takes Tylenol, last about an hour and
4 are remedied by sleep. AR 282-283. Plaintiff testified to the same facts. AR 291. Ms. Holley
5 also testified that Plaintiff has not had a blackout for the past six months. AR 287. Finally, both
6 Plaintiff and his mother testified that Plaintiff participated in recess at school, with Plaintiff
7 adding that he plays basketball and tag. AR 285, 291.

8 Based on the above, the Court finds that the ALJ did not err in his treatment of the
9 hearing testimony. In fact, although the ALJ noted in his boilerplate section that "the statements
10 concerning the intensity, persistence and limiting effects of the claimant's symptoms are not
11 credible to the extent they are inconsistent" with the ALJ's findings, there is simply no testimony
12 that contradicts the ALJ's findings.

13 The ALJ's treatment of the hearing testimony is supported by substantial evidence and
14 free of legal error.

15 CONCLUSION

16 Based on the foregoing, the Court finds that the ALJ's decision is supported by
17 substantial evidence in the record as a whole and is based on proper legal standards.
18 Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the
19 Commissioner of Social Security. The clerk of this Court is DIRECTED to enter judgment in
20 favor of Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff,
21 Roderick Steward.

22
23 IT IS SO ORDERED.

24 **Dated: April 8, 2010**

/s/ Dennis L. Beck
25 UNITED STATES MAGISTRATE JUDGE
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28