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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
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10 ERICA HARVEY-MITCHELL,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting  
14 Commissioner of the Social Security  
Administration,  
15

16 Defendant.

CASE NO. 2:16-cv-01939 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

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18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and  
19 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.  
20 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States  
21 Magistrate Judge, Dkt. 6). This matter has been fully briefed. *See* Dkt. 13, 14.

22 Plaintiff had a baby in January 2013 and later developed postpartum  
23 cardiomyopathy ("PPCM"). *See, e.g.*, AR. 283. PPCM presents with symptoms of heart  
24

1 failure secondary to left ventricular systolic dysfunction, such as shortness of breath and  
2 cardiomegaly (enlarged heart) and symptoms of acute renal failure. *See* Dkt. 14, pp. 3-5  
3 (citing, *e.g.*, *Peripartum Cardiomyopathy*, Michael P. Carson, M.D.,  
4 [Http://emedicine.medscape.com/article/153153-overview](http://emedicine.medscape.com/article/153153-overview) (last visited August 21, 2017)).  
5 Plaintiff contends that the ALJ erred by failing to conclude that some of these symptoms  
6 were severe impairments and by failing to conclude that plaintiff's impairments met or  
7 medically equaled a Listed Impairment.

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9 After considering and reviewing the record, the Court concludes that the ALJ did  
10 not commit any harmful error during the evaluation of plaintiff's Social Security  
11 application. Although plaintiff argues that the ALJ failed to conclude that some of her  
12 impairments were severe, plaintiff failed to carry her burden to demonstrate that any of  
13 these impairments were independent medically determinable impairments lasting for at  
14 least a year. For example, although plaintiff contends that the ALJ improperly failed to  
15 conclude that her shortness of breath was a severe impairment, the record shows that  
16 plaintiff's shortness of breath resolved within six months of her alleged onset date of  
17 disability. Similarly, regarding plaintiff's allegation regarding Listing 4.02, heart failure,  
18 plaintiff did not provide evidence demonstrating, as alleged, that her ejection fraction was  
19 30 percent or less for more than six months from the date of alleged disability onset.

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21 Therefore, this matter is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

## 22 BACKGROUND

23 Plaintiff, ERICA LA TRESHIA HARVEY-MITCHELL, was born in 1977 and  
24 was 36 years old on the alleged date of disability onset of July 20, 2013. *See* AR. 22, 183-

1 86, 187-92. Plaintiff has at least a high school education and is able to communicate in  
2 English. *See* AR. 29. Plaintiff has experience working in child care centers. AR. 43-45.

3 According to the ALJ, plaintiff has at least the severe impairments of “history of  
4 postpartum cardiomyopathy and morbid obesity (20 CFR 404.1520(c) and 416.920(c)).”

5 AR. 24.

6 At the time of the hearing, plaintiff was living with her three children. AR. 48.

7 PROCEDURAL HISTORY

8 Plaintiff’s applications for disability insurance benefits (“DIB”) pursuant to 42  
9 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42  
10 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and  
11 following reconsideration. *See* AR. 65, 66, 83, 84. Plaintiff’s requested hearing was held  
12 before Administrative Law Judge Timothy Mangrum (“the ALJ”) on December 23, 2014.  
13 *See* AR. 35-64. On June 5, 2015, the ALJ issued a written decision in which he concluded  
14 that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 19-34.

15 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Did the  
16 Commissioner err in determining plaintiff’s severe impairments; (2) Did the  
17 Commissioner err in determining that plaintiff did not meet or equal a medical listing; (3)  
18 Did the Commissioner err in evaluating plaintiff’s residual functional capacity; and (4)  
19 Did the Commissioner err because the decision is not supported by substantial evidence.  
20

21 *See* Dkt. 13, p. 2.



1 The ALJ found that plaintiff had severe impairments, including history of  
2 postpartum cardiomyopathy and morbid obesity. AR. 24. Therefore, the ALJ resolved  
3 step two of the sequential disability evaluation process in plaintiff's favor and continued  
4 on to the next step in the process. *See id.*

5 An impairment is "not severe" if it does not "significantly limit" the ability to  
6 conduct basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). If a claimant's  
7 impairments are "not severe enough to limit significantly the claimant's ability to  
8 perform most jobs, by definition the impairment does not prevent the claimant from  
9 engaging in any substantial gainful activity." *Yuckert, supra*, 482 U.S. at 146. Regarding  
10 the establishment of a disability, it is the claimant's burden to "furnish[] such medical  
11 and other evidence of the existence thereof as the Secretary may require." *Yuckert,*  
12 *supra*, 482 U.S. at 146 (quoting 42 U.S.C. § 423(d)(5)(A)) (citing *Mathews v. Eldridge*,  
13 424 U.S. 319, 336 (1976)) (footnote omitted).

14 The Court also notes that plaintiff bears the burden to establish by a  
15 preponderance of the evidence the existence of a severe impairment that prevented  
16 performance of substantial gainful activity and that this impairment lasted for at least  
17 twelve continuous months. 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c), 416.905(a),  
18 416.912(a) and (c); *Yuckert, supra*, 482 U.S. at 146; *see also Tidwell v. Apfel*, 161 F.3d  
19 599, 601 (9th Cir. 1998) (citing *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995)).  
20 Any impairment that does not last continuously for twelve months does not satisfy the  
21 requirement. 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c), 416.905(a), 416.912(a) and  
22 (c); *Roberts, supra*, 66 F.3d at 182.  
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1 In *Roberts*, the Ninth Circuit found that the decision by the Social Security  
2 Administration that plaintiff Roberts “was not disabled due to obesity was supported by  
3 substantial evidence because Roberts failed to carry the burden of showing that she met  
4 the duration requirement.” *Roberts, supra*, 66 F.3d at 182. As noted by the court, the  
5 “burden requires the claimant to make out a case both that she has an impairment listed in  
6 the regulations, and that she has met the duration requirement.” *Id.* (citing 20 C.F.R. §  
7 416.920(d)).

8  
9 Here, plaintiff contends that the ALJ failed to analyze the severity of plaintiff’s  
10 alleged “congestive heart failure, shortness of breath, acute renal failure, chest pain at  
11 rest, chronic systolic heart failure, left ventricular mural thrombus and hypertension.”  
12 Dkt. 13, p. 6 (citing AR. 254, 255, 282, 349, 401). Defendant argues that when the ALJ  
13 discussed plaintiff’s severe impairments, the ALJ noted as follows:

14 A diagnosis of postpartum cardiomyopathy exists in the record, with  
15 symptoms of ongoing shortness of breath, dyspnea on exertion,  
16 nocturnal dyspnea, and orthopnea post-partisan, as of July 2013. She  
17 experienced mildly intermittent chest pain. Chest x-ray showed  
18 cardiomegaly without overt edema. An echocardiogram revealed mildly  
dilated left ventricular function and severely reduced systolic function  
with an ejection fraction estimated at 10 percent to 15 percent with two  
left ventricular thrombi.

19 Dkt. 14, p. 3 (citing AR. 24-25 (citing AR. 252-336, 351-96, 420)). Regarding plaintiff’s  
20 alleged severe impairments not noted by the ALJ explicitly as symptoms of plaintiff’s  
21 postpartum cardiomyopathy (“PPCM”), defendant notes that in July 2013, plaintiff’s  
22 “repeat chest x-ray showed stable cardiomegaly again without congestive heart failure  
23 [and] . . . . [her] constellation of symptoms was thought to be consistent with acute  
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1 uncompensated systolic heart failure, most concerning for possible postpartum  
2 cardiomyopathy.” *Id.* at 4 (citing AR. 256, 276, 282); *see also* AR. 25 (the ALJ also  
3 noted this x-ray showing “stable cardiomegaly without congestive heart failure,” further  
4 noting that plaintiff’s “cardiomegaly without congestive heart failure was considered  
5 stable”) (citing AR. 262). Similarly, defendant notes that plaintiff’s symptom of acute  
6 renal failure was expected to normalize with treatment, and “does not appear in the  
7 record subsequent to [plaintiff] July 2013 hospitalization.” *Id.* at 5 (citing AR. 1-522, 263  
8 (“continue diuresis, anticipate Cr [serum creatinine] will normalize with improved LVSF  
9 [left ventricular systolic] function”), 271, 282). Finally, regarding plaintiff’s alleged  
10 severe impairment of hypertension, defendant notes that in December 10, 2013,  
11 approximately 5 months after plaintiff’s alleged onset date of disability, plaintiff’s  
12 physician indicated that her hypertension was “well-controlled.” *Id.* at 6 (citing AR. 349,  
13 401 (also assessed as well-controlled in December 2014)). Based on the above references  
14 to the record, defendant argues that “review of the record does not support [plaintiff’s]  
15 assertion [regarding severe impairments overlooked by the ALJ], as the alleged additional  
16 impairments were either symptoms of July 2013 PPCM, short-term issues/conditions  
17 arising from it, or conditions that were well-controlled with treatment.” *Id.* at 4 (*citing*  
18 *Warre ex rel. E.T. IV v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006)  
19 (“impairments that can be controlled effectively with medication are not disabling”).  
20 Plaintiff did not reply to any of defendant’s citations to the record or arguments, as she  
21 declined to file a reply. For the reasons discussed both here and in the subsequent section,  
22 *see infra*, section 2, the Court concludes that defendant’s arguments are persuasive.  
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1 Plaintiff's argument regarding the impairments that she alleges that the ALJ  
2 overlooked as severe impairments entails a list of the alleged severe impairments, along  
3 with citations to the record documenting that they are noted, and a sentence regarding  
4 plaintiff's testimony "about the symptoms she experienced because of her impairments,  
5 including being so short of breath that she did not feel like she was getting enough air."  
6 Dkt. 13, pp. 6-7 (citing AR. 45). In addition to a relatively detailed review of the medical  
7 record, some of which the Court has noted above, defendant responds to plaintiff's  
8 argument by noting that although plaintiff "states that her own testimony supported her  
9 claims, [she] does not dispute the ALJ's finding that her subjective allegations were not  
10 reasonably consistent with the medical evidence; thus she has waived the issue." Dkt. 14,  
11 p. 6 (internal citation to Dkt. 13, p. 7 (citing AR. 45)) (other citation omitted); *see also*  
12 defendant's general discussion, *id.* at pp. 3-8.

14 For the reasons stated, including defendant's citations to the record noted above,  
15 and the record as a whole, including the Court's discussion below, *see infra*, section 2,  
16 the Court concludes that defendant's argument that plaintiff's alleged overlooked severe  
17 impairments "were either symptoms of July 2013 PPCM, short-term issues/conditions  
18 arising from it, or conditions that were well-controlled with treatment" is persuasive and  
19 substantiated by the record. For example, although plaintiff's alleged date of disability  
20 onset is July 20, 2013, within six months of this date, on December 10, 2013 she reported  
21 no shortness of breath (dyspnea). *See* AR. 347. Similarly, as noted previously, her  
22 hypertension was well controlled by December 2013, and her symptom of acute renal  
23 failure was expected to normalize with treatment, and "does not appear in the record  
24

1 subsequent to [plaintiff] July 2013 hospitalization.” Dkt. 14, p. 5, 6 (citing AR. 263, 401).  
2 At her December 10, 2013 appointment, plaintiff described “NYHA Class 1 symptoms,”  
3 (AR. 347), which involve “no limitation of physical activity. Ordinary physical activity  
4 does not cause undue fatigue, palpitation, dyspnea (shortness of breath).” *Classes of*  
5 *Heart Failure*, American Heart Association website,  
6 [http://www.heart.org/HEARTORG/Conditions/HeartFailure/AboutHeartFailure/Classes-](http://www.heart.org/HEARTORG/Conditions/HeartFailure/AboutHeartFailure/Classes-of-Heart-Failure_UCM_306328_Article.jsp#.WZSur02FNLN)  
7 [of-Heart-Failure\\_UCM\\_306328\\_Article.jsp#.WZSur02FNLN](http://www.heart.org/HEARTORG/Conditions/HeartFailure/AboutHeartFailure/Classes-of-Heart-Failure_UCM_306328_Article.jsp#.WZSur02FNLN) (citing the New York  
8 Heart Association (NYHA) Functional Classification) (last visited August 21, 2017).  
9 Finally, as noted by defendant, heart failure does not mean that the heart has stopped  
10 working, but refers to a situation in which “the heart’s pumping power is weaker than  
11 normal,” and plaintiff’s ejection fraction is discussed further below, *see infra*, section 2.  
12 *See* Dkt. 14, p. 3 (citing <http://www.webmd.com/heart-disease/guide-heart-failure#1-2>).

14 Plaintiff did not meet her burden to demonstrate that the alleged severe  
15 impairments are independent severe impairments as defined by the Social Security Act.  
16 *See Roberts, supra*, 66 F.3d at 182 (citing 20 C.F.R. § 416.920(d)) (the “burden requires  
17 the claimant to make out a case both that she has an impairment listed in the regulations,  
18 and that she has met the duration requirement”). Therefore, the Court concludes that there  
19 is no harmful legal error at step two, and the ALJ’s findings are based on substantial  
20 evidence in the record as a whole.

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1           (2)   **Did the Commissioner err in determining that plaintiff did not meet or**  
2                   **equal a medical listing?**

3           Plaintiff contends that the ALJ erred in determining that plaintiff did not meet or  
4 equal a medical listing, specifically Listing 4.02. Dkt. 13, pp. 7-8. Defendant contends  
5 that there is no error. Dkt. 14, pp. 8-12.

6           At step-three of the administrative process, if the administration finds that the  
7 claimant has an impairment(s) that has lasted or can be expected to last for not less than  
8 twelve months and is included in Appendix 1 of the Listings of Impairments, or is equal  
9 to a listed impairment, the claimant will be considered disabled without considering age,  
10 education and work experience. 20 C.F.R. § 404.1520(d). The claimant bears the  
11 burden of proof regarding whether or not she “has an impairment that meets or equals the  
12 criteria of an impairment listed” in 20 C.F.R. pt. 404, subpt. P, app. 1 (“the Listings”).  
13 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005), *as modified to render a published*  
14 *opinion* by 2005 U.S. App. LEXIS 3756 (9th Cir. 2005).

15           A claimant must demonstrate that she medically equals each of the individual  
16 criteria for the particular Listing by presenting “medical findings equal in severity to *all*  
17 the criteria for the one most similar listed impairment.” *Kennedy v. Colvin*, 738 F.3d  
18 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990); 20  
19 C.F.R. § 416.926(a)). A claimant cannot rely on overall functional impact, but must  
20 demonstrate that the impairment equals each criterion in the Listing. *Id.*

21           Plaintiff alleges error regarding Listing 4.02, which includes the following  
22 requirements:  
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1 4.02 Chronic heart failure while on a regimen of prescribed treatment,  
2 with symptoms and signs described in 4.00D2. The required level of  
3 severity for this impairment is met when the requirements in **both A and**  
4 **B are satisfied.**

5 A. Medically documented presence of one of the following:

- 6 1. **Systolic failure** (*see 4.00D1a(i)*), with **left ventricular end**  
7 **diastolic dimensions greater than 6.0 cm or ejection fraction**  
8 **of 30 percent or less during a period of stability (not during**  
9 **an episode of acute heart failure); or**  
10 2. Diastolic failure . . . .

11 AND

12 B. Resulting in one of the following:

- 13 1. Persistent symptoms of heart failure which very seriously  
14 limit the ability to independently initiate, sustain, or complete  
15 activities of daily living in an individual for whom an MC,  
16 preferably one experienced in the care of patients with  
17 cardiovascular disease, has concluded that the performance of an  
18 exercise test would present a significant risk to the individual; or  
19 2. Three or more separate episodes of acute congestive heart  
20 failure within a consecutive 12-month period (*see 4.00A3e*),  
21 with evidence of fluid retention (*see 4.00D2b(ii)*) from clinical  
22 and imaging assessments at the time of the episodes, requiring  
23 acute extended physician intervention such as hospitalization or  
24 emergency room treatment for 12 hours or more, separated by  
periods of stabilization (*see 4.00D4c*); or  
3. **Inability to perform on an exercise tolerance test at a**  
**workload equivalent to 5 METs or less due to:**  
a. **Dyspnea, fatigue, palpitations, or chest discomfort;** or  
b. Three or more consecutive premature ventricular  
contractions (ventricular tachycardia), or increasing  
frequency of ventricular ectopy with at least 6 premature  
ventricular contractions per minute; or  
c. Decrease of 10 mm Hg or more in systolic pressure below  
the baseline systolic blood pressure or the preceding systolic  
pressure measured during exercise (*see 4.00D4d*) due to left  
ventricular dysfunction, despite an increase in workload; or  
d. Signs attributable to inadequate cerebral perfusion, such  
as ataxic gait or mental confusion.

20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 4.02 (emphases added).

1 Plaintiff contends that she meets this Listing because she meets the requirements  
2 of paragraph A regarding systolic failure and paragraph B, section 3(a), regarding  
3 inability to perform on an exercise tolerance test at a workload equivalent to 5 METs or  
4 less due to dyspnea, fatigue, and chest discomfort. This Listing requires meeting both  
5 paragraph A and paragraph B requirements. *See id.*

6 Regarding the paragraph A requirements, plaintiff contends that she demonstrated  
7 that she suffers from systolic failure, with “ejection fraction of 30 percent or less during a  
8 period of stability.” Dkt. 13, pp. 7-8. As noted by plaintiff, the ALJ determined that  
9 plaintiff did not meet Listing 4.02 in part because plaintiff’s “ejection fraction improved  
10 to a range of 35 to 40 percent within six months, above the requirement for the listing.”  
11 Dkt. 13, p. 7 (citing AR. 25). Although plaintiff contends that this finding by the ALJ is  
12 incorrect because in July 2014 plaintiff demonstrated ejection fraction of 10 to 15  
13 percent, this finding of ejection fraction of 10 to 15 percent on the page cited by plaintiff  
14 actually is from August 2, 2013. *See id.* (citing AR. 286); *see also* AR. 286. Plaintiff’s  
15 date of alleged disability onset of July 20, 2013. *See* AR. 22. Therefore, this finding in  
16 the record noted by plaintiff does not demonstrate that she met Listing 4.02 and was  
17 therefore disabled, as a finding of disability requires impairment for at least 12 months in  
18 duration. *See* 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c), 416.905(a), 416.912(a) and  
19 (c); *Roberts, supra*, 66 F.3d at 182.

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22 Next, plaintiff notes that her ejection fraction was estimated at 35 to 40 percent in  
23 December 2013, but plaintiff argues that this ejection fraction should not preclude her  
24 from meeting the Listing because “this is only an estimate as noted by her doctor [and]

1 given the closeness of the numbers to the requirement of the listing, it is likely that  
2 [plaintiff] meets the paragraph A listing requirements." Dkt. 13, pp. 7-8 (citing AR. 338).

3 Defendants notes that at her administrative hearing, plaintiff's attorney noted that  
4 plaintiff "probably doesn't meet that listing but she comes close." *See* AR. 42. Defendant  
5 also notes that by December 2013, as noted by the ALJ, an updated echocardiogram  
6 indicated that the left ventricle was mildly to moderately dilated; and that the left  
7 ventricular ejection fraction was improved, estimated at 35 to 40 percent. Dkt. 14, p. 10  
8 (citing AR. 25, 338, 400). Defendant argues that plaintiff therefore did not demonstrate  
9 the required readings continuing during the period of stability for the required 12  
10 continuous months. *See id.* at 11. Regarding plaintiff's argument that the ejection fraction  
11 results are only an estimate, defendant contends that "the ejection fraction results noted  
12 throughout the record were for the most part presented as estimates that her treating  
13 cardiologists accepted as valid. *Id.* (citing AR. 269, 272, 283, 286, 292, 296, 348).  
14 Defendant also contends that plaintiff "provides no authority in support of her implication  
15 that the estimates were not reliable indicators of her condition." *Id.* (citing plaintiff's  
16 brief, Dkt. 13, pp. 7-8).

17  
18 Regarding plaintiff's contention that given the closeness of the estimated numbers  
19 to the requirement of the Listing that it is likely that she meets the paragraph A Listing  
20 requirements, defendant argues that plaintiff's "condition simply did not meet the listing  
21 level requirements." *Id.* In support, defendant cites Ninth Circuit case law:  
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23 Listed impairments are purposefully set at a high level of severity  
24 because "the listings were designed to operate as a presumption of  
disability that makes further inquiry unnecessary . . . . Listed



1 518 (last echo was 12/2014 which showed her EF had returned to normal”). In addition,  
2 defendant’s arguments that plaintiff also did not establish that she met the requirements  
3 of paragraph B, which requires an inability to perform an exercise tolerance test at a  
4 workload equivalent to five METs or less due to shortness of breath, fatigue, palpitations,  
5 or chest discomfort, also are persuasive. As noted by the ALJ plaintiff denied complaints  
6 of chest pain, palpitations, or shortness of breath during follow-up visits between  
7 September and December 2013. *See* AR. 27; *see also* AR. 347 (“she is not having issues  
8 with edema or shortness of breath”), 348 (“negative for chest pain and exertional chest  
9 pressure/discomfort”).  
10

11 Furthermore, by December 2013, cardiologist Dr. Joshua L. Busch M. D. assessed  
12 that plaintiff’s condition was stable with NYHA class I symptoms. *See* AR. 349. NYHA  
13 class I symptoms means that there is “No limitation of physical activity. Ordinary  
14 physical activity does not cause undue fatigue, palpitation, dyspnea (shortness of  
15 breath).” *See Classes of Heart Failure*, American Heart Association website,  
16 [http://www.heart.org/HEARTORG/Conditions/HeartFailure/AboutHeartFailure/Classes-](http://www.heart.org/HEARTORG/Conditions/HeartFailure/AboutHeartFailure/Classes-of-Heart-Failure_UCM_306328_Article.jsp#.WZSur02FNLN)  
17 [of-Heart-Failure\\_UCM\\_306328\\_Article.jsp#.WZSur02FNLN](http://www.heart.org/HEARTORG/Conditions/HeartFailure/AboutHeartFailure/Classes-of-Heart-Failure_UCM_306328_Article.jsp#.WZSur02FNLN) (citing the New York  
18 Heart Association (NYHA) Functional Classification) (last visited August 21, 2017).  
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20 For the reasons stated and based on the record as a whole, the Court concludes that  
21 plaintiff did not establish that her impairments met or medically equaled Listing 4.02.  
22 The Court also concludes that plaintiff has not demonstrated that the ALJ committed any  
23 harmful legal error when evaluating whether plaintiff’s impairments met or medically  
24 equaled a Listing at step three of the sequential disability evaluation procedure.



