

IP 08-1416-C H/K RJ v Astrue
Judge David F. Hamilton

Signed on 07/24/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R.J.,)	
)	
Plaintiff,)	
vs.)	NO. 1:08-cv-01416-DFH-TAB
)	
MICHAEL J. ASTRUE,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R.J., a minor by, RITA TAYLOR,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:08-cv-1416-DFH-TAB
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

ENTRY ON JUDICIAL REVIEW

Plaintiff “RJ” is a child who seeks judicial review of a decision by the Commissioner of the Social Security Administration denying her application for children’s supplemental security income under the Social Security Act. Evidence indicates that RJ has borderline intellectual functioning, attention deficit hyperactivity disorder, and a conduct disorder. Acting for the Commissioner, an Administrative Law Judge (ALJ) determined that RJ did not have disabilities that met, medically equaled, or functionally equaled a listed impairment as required to show that a child is eligible for supplemental security income.

Supplemental security income for children is a program reserved for the most serious cases of disability. See *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th

Cir. 1997) (explaining 1996 legislative actions to raise standard). The evidence of the combination of RJ's limited intelligence and behavioral problems might support a finding that she is eligible, but the evidence also could support the opposite finding. In this case, the ALJ erred when he found that RJ's impairments of attention deficit hyperactivity disorder and conduct disorder were not "severe" impairments under the law. The difficult issue is whether that error was harmless. A close review of the ALJ's decision and the evidence leaves the court unable to treat the ALJ's error as harmless. The erroneous treatment of the two additional severe impairments continued to ripple through the later steps of the analysis. In finding that RJ did not functionally equal a listed impairment, the ALJ relied on reports that did not give sufficient attention to the behavioral impairments. In short, the case needs another careful look at all of RJ's impairments, including their combined effects.

Factual Background

RJ was born in 1995. Her mother filed an application for supplemental security income on her behalf on February 3, 2005. Her mother claimed that RJ suffered from conduct disorder and attention deficit hyperactivity disorder (ADHD). RJ's application was denied initially on May 9, 2005 and on reconsideration on June 15, 2005. On July 17, 2008, after a hearing, the ALJ denied RJ's claim. On September 25, 2008, the Appeals Council denied RJ's appeal.

I. *Medical Evaluations*

A. *Dr. Vandivier*

At the request of the Disability Determination Bureau, Dr. Phillip L. Vandivier, Ed. D., conducted a psychological evaluation of RJ in April 2005 when she was ten years old. R. 157-60. During the exam, RJ claimed that she had trouble only with math, but her mother said she was “not on the same level as other kids.” RJ attended the special education resource program at her school but had reportedly never been held back a grade level. At the time of the evaluation, RJ’s mother reported that RJ had three B’s, two C’s, and two D’s, all reported on an “adjusted scale.”

RJ’s test scores and evaluations suggested that she has borderline intellectual functioning: an IQ between 71 and 84 indicates borderline intellectual functioning, and any score of 70 or below is defined as mental retardation. R. 160; Diagnostic & Statistical Manual of Mental Disorders 740 (4th ed. 2000). Dr. Vandivier said that her “verbal comprehension at times seemed to be limited; for example, she said she would ‘stop, drop, and roll’ if she were home alone and saw thick smoke coming from her neighbor’s house.” R. 159. RJ did not appear to have difficulty with attention, concentration, activity level, or persistence.

Dr. Vandivier found that RJ related in a friendly and positive manner. RJ reported that she had no difficulty relating to other children her age. R. 159.

However, RJ's mother said that RJ was sensitive to other children teasing her, and when she disagreed with a teacher, she had an attitude problem. Dr. Vandivier found RJ to be independent in her dressing and grooming.

B. *Dr. Gange and Dr. Pressner*

J. Gange, Ph. D., and J. Pressner, Ph. D., both completed childhood disability forms for the SSA and found RJ was not disabled, though without examining her. R. 161-72. The only impairment that either indicated they investigated was borderline intellectual functioning. R. 161, 167. Both found that RJ's impairment was "severe" but did not medically meet the listing needed to establish eligibility for children's supplemental security income. R. 161-72. They found that RJ had less than "marked" functional limitations in the domains of acquiring and using information, attending and completing tasks, and interacting and relating with others. R. 163, 169. Both found RJ had no functional limitations in the domains of moving about and manipulating objects, caring for herself, and health and physical well-being. R. 164, 170.

C. *Dr. Cho*

RJ's pediatrician M. Cho, M.D., examined her on numerous occasions and diagnosed her with ADHD and behavior disorder. R. 188, 307. In June 2005, Dr. Cho found that RJ had not been doing well in school for two years and she had been in special education for one year. During this examination, Dr. Cho prescribed Concerta for ADHD. In March 2008, Dr. Cho felt that RJ's behavior disorder needed to be medically evaluated. R. 307.¹

D. *Gallahue Mental Health Services*

RJ's school referred her to Gallahue Mental Health Services because of poor school behavior and low academic performance. R. 306. RJ met with Gallahue staff on a semiweekly basis between December 2007 and May 2008. R. 235-306. During RJ's initial meeting, D. Altemeyer, MS NCC, found that RJ showed numerous signs of ADHD. R. 235. In January 2008, Ms. Altemeyer observed RJ's defiant behavior that was causing problems at school. R. 240. Also in January 2008, Ms. Altemeyer found RJ to be below grade level and found that she qualified for a general education curriculum, with modifications. R. 242. Ms. Altemeyer assigned RJ to anger management at that time. R. 244. In February 2008, Ms. Altemeyer thought that RJ would benefit from meeting with a doctor about

¹One page of Dr. Cho's records apparently was omitted from the record as originally filed with the court, but it had been marked as Exhibit C, page 1 of 3, in the administrative record. See Dkt. Nos. 20 and 21. The court has treated that page as part of the administrative record for judicial review.

medication. R. 256. Also in February, Ms. Altemeyer was informed that RJ was accused of bullying other children and that she lacked impulse control. R. 265. Ms. Altemeyer found that by May 2008, RJ was showing improvement with impulse control, her alternative school was helping, but she was still easily agitated. R. 306.

II. *School Records*

A. *Multidisciplinary Evaluation Team Reports*

In December 2004, Dr. Ronald Branca and the multidisciplinary evaluation team (MET) conducted the first of two evaluations of RJ for the Indianapolis Public Schools. R. 133-45. RJ's mother reported that RJ received D's and F's in math. R. 134. The MET administered the WISC-IV test to assess her intellectual abilities. R. 137. The MET estimated RJ's performance to be in the borderline range. *Id.* MET examiners observed RJ using hash marks and her fingers to count. R. 139. The MET also found that it was highly probable RJ had a conduct disorder and that its severity was mild to moderate. R. 140.² The report concluded that RJ was "at risk for developing a diagnosis of Conduct Disorder." R. 141. The MET found that RJ had failed both portions of the ISTEP test and that she displayed difficulty in peer relationships and at times had difficulty with adult authority. *Id.*

²"Children with a diagnosis of conduct disorder repeatedly violate the personal and property rights of others and the basic rules of society." R. 140.

In November 2007, while RJ was in seventh grade, a second MET report was produced. R. 189. Information provided by one of RJ's teachers suggested that RJ had "a *SIGNIFICANT* maturational delay for adaptive behavior in the classroom." R. 192. RJ scored three on a scale of ten for learning problems on the Behavior Evaluation Scale. A score less than eight indicates that the student "exhibits negative or inappropriate behaviors frequently enough to cause concern." R. 193. The MET found that RJ scored 89 for hyperactivity on the Conners teacher rating scale. A score above 70 means a person is clinically elevated in that area and more than two standard deviations from the mean. R. 193-94. RJ also scored 78 for ADHD on the same test. R. 194.

B. *Additional School Reports*

Between 2005 and 2007 the Indianapolis Public Schools produced numerous reports detailing RJ's classroom behavior and scholastic achievement. R. 173-86, 199-234. In November 2005, RJ's special education teacher prepared a conference report for RJ's mother. R. 173. The teacher found that RJ had good decoding skills but her comprehension was weak. R. 174. RJ's math skills were below grade level but improving. She was difficult to understand, immature, and sometimes pouted and refused to work.

In December 2006, RJ's teacher found that RJ was improving in math and written expression. R. 220. She continued to have difficulty speaking, and she

mumbled and slurred her words. RJ was immature compared with her peers, but she was beginning to listen to her teachers.

Indianapolis Public Schools records reflect that RJ had numerous tardies, unexcused absences, and suspensions. R. 213-15. She was suspended for an altercation with another student and for disobeying a teacher. R. 233-34. These behavior problems resulted in RJ being referred to counseling with Gallahue Mental Health Services. R. 306.

III. *Testimony*

RJ testified before the ALJ in July 2008. R. 311. She testified that she was in eighth grade and had previously attended an alternative school because she had gotten into trouble too many times. R. 312-13. During her testimony, RJ would not readily admit that she had problems. R. 314. RJ stated that other kids would laugh at her and say she was dumb “because I don’t know how to do math that good.” R. 316. RJ was taking medicine for her anger, but she frequently fought with her brothers. R. 317-18.

RJ testified that she was suspended for cursing a teacher. R. 324. She was also suspended for using the telephone during a Spanish class and refusing to hang up when told to do so. R. 326-29. RJ testified that she had friends and got along fine with them. R. 334-35. She played basketball and attended a regular school at the time of her testimony. R. 335, 338.

Statutory Framework for Determining Disability

To be eligible for supplemental security income under Title XVI of the Social Security Act, a child must establish that she suffers from a “physical or mental impairment, which results in marked and severe functional limitations, and . . . which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i). The implementing regulations for the Act provide the three-step sequential evaluation of a disability claim. See 20 C.F.R. § 416.924. The steps are:

- (1) Is the child engaged in substantial gainful activity? If so, she is not disabled.
- (2) If not, does the child have a medically severe impairment or combination of impairments? If not, then she is not disabled.
- (3) If so, does the child’s impairment meet, medically equal, or functionally equal an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1? If so, the child is disabled.

When applying this test, the burden of proof rests on the claimant at each step. See *Oliver v. Barnhart*, 2006 WL 3207864, at *7 (S.D. Ind. Sept. 15, 2006).

To determine whether an impairment is functionally equivalent to a listing, the ALJ must analyze its severity in six functional areas or “domains”: (a) acquiring and using information, (b) attending and completing tasks, (c) interacting and relating with others, (d) moving about and manipulating objects, (e) caring for oneself, and (f) health and physical well-being. 20 C.F.R. § 416.926a(b)(1). To equal a listing, the claimant must show that she has an

“extreme” limitation in one domain or “marked” limitations in two domains. 20 C.F.R. § 416.926a(a). A limitation is “extreme” if it interferes very seriously with the claimant’s ability to initiate, sustain, or complete activities independently. 20 C.F.R. § 416.926a(e)(3)(i). A limitation is “marked” if it interferes seriously with the claimant’s ability to initiate, sustain, or complete activities independently, or is a limitation that is “more than moderate” but “less than extreme.” 20 C.F.R. § 416.926a(e)(2)(i).

The ALJ applied the three step process to RJ. She satisfied step one because she had never been gainfully employed. R. 12. At step two, the ALJ found that RJ had the severe impairment of borderline intellectual functioning but was not severely impaired by either ADHD or behavior disorder. *Id.*

At step three, the ALJ evaluated RJ for borderline intellectual functioning under listing 112.05. R. 12-13. The ALJ determined that RJ did not meet or medically equal the listing. Under the functional equivalence evaluation, the ALJ found that RJ had less than a marked impairment in two of the six domains (acquiring and using information, and attending and completing tasks) and no impairment in the other four domains. The ALJ determined that RJ’s impairments did not functionally equal a listed impairment.

Because RJ did not meet, medically equal or functionally equal a listed impairment, the ALJ found she was not disabled for purposes of the Social

Security Act. The Appeals Council denied RJ's request for review, leaving the ALJ's decision as the final decision of the Commissioner of Social Security. R. 3; see *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000). RJ seeks judicial review in this court, which has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3).

Standard of Review

If the Commissioner's decision is supported by substantial evidence, it must be upheld by a reviewing court. 42 U.S.C. § 405(g); *Maggard v. Apfel*, 167 F.3d 376, 379 (7th Cir. 1999). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Maggard*, 167 F.3d at 379, quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To determine whether substantial evidence exists, the court reviews the record as a whole but does not attempt to substitute its judgment for the ALJ's judgment by reweighing the evidence, resolving material conflicts, or reconsidering facts or the credibility of witnesses. *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000). "Where conflicting evidence allows reasonable minds to differ as to whether a claimant is entitled to benefits," the court must defer to the Commissioner's resolution of that factual conflict. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

A reversal and remand may be required, however, if the ALJ committed an error of law, *Binion*, 108 F.3d at 782, or if the ALJ based the decision on serious factual mistakes or omissions. *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996). The ALJ has a basic obligation to develop a full and fair record, *Nelson v.*

Apfel, 131 F.3d 1228, 1235 (7th Cir. 1997), and must build an accurate and logical bridge between the evidence and the result to permit meaningful judicial review of the administrative findings. *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003); *Sarchet*, 78 F.3d at 307. If the evidence on which the ALJ relied does not support the conclusion, the decision cannot be upheld. *Blakes*, 331 F.3d at 569. The Commissioner's decision needs to be supported by substantial evidence, 42 U.S.C § 405(g), and if the "decision lacks evidentiary support or is so poorly articulated as to prevent meaningful review, the case must be remanded." *Steele v. Barnhart*, 290 F.3d 936, 940 (7th Cir. 2002). The ALJ must build a logical bridge between the evidence and the ALJ's conclusion. *Blakes*, 331 F.3d at 569.

Discussion

I. *The ALJ's Step Two Analysis*

Step two requires the ALJ to determine if a child's impairment is "severe." 20 C.F.R. § 416.924(c). This is not a demanding standard for the claimant. An impairment is not severe when it is only "a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations." *Id.* RJ argues the ALJ erred in concluding that her ADHD and behavior disorder were not severe.

The ALJ's entire step two analysis of these impairments consisted of the following: "Although the claimant's pediatrician assessed the claimant with Behavior disorder and ADHD on November 30, 2007 (Ex. 7F), the undersigned finds no evidence the foregoing impairments cause more than minimal functional limitations, therefore they are not considered severe for the purpose of this decision." R. 12. The Commissioner has conceded that substantial evidence does not support this conclusion. Def. Br. 5. The concession is appropriate because the "severe" standard is so low at step two. The ALJ stated only a conclusion and failed to make a logical connection between the evidence and that conclusion. There is ample evidence in the record showing that RJ's conduct disorder and ADHD cause "more than minimal" functional limitations.

II. *Harmless Error and Functional Equivalence to a Listing*

The Commissioner argues that the ALJ's error at step two was harmless because the ALJ considered RJ's ADHD and behavior disorder in his functional equivalence evaluation at step three. Def. Br. 5, citing *Sanchez v. Barnhart*, 467 F.3d 1081, 1082-83 (7th Cir. 2006) (harmless errors do not require or even permit remand by court). When an ALJ decides at step two whether an impairment is severe, the ALJ must ask if the impairment is more than "a slight abnormality" and if it causes "more than minimal functional limitations." 20 C.F.R. § 416.924(c). The functional equivalence standard at step three is much more demanding. It requires the ALJ to determine if a child has marked limitations in two domains of functioning or an extreme limitation in one domain. 20 C.F.R. § 416.926a(a). If an ALJ who properly found that RJ's ADHD and behavior disorder were severe impairments still could not reasonably have found that she satisfied the stringent disability standard, then the error at step two would have been harmless. The problem here is that the errors at step two continued to affect the ALJ's analysis at step three. In finding that RJ did not medically or functionally equal a listed impairment, the ALJ relied on evidence of evaluations that failed to consider adequately the effects of her ADHD and behavior disorder.

The Commissioner argues that the failure to discuss the listings was a harmless error because RJ failed to produce evidence sufficient to satisfy or medically equal the elements of the listings. It would be an unusual case where a claimant actually met a listing and the ALJ found that the impairment did not

even meet the low threshold for a “severe” impairment at step two. But the problem in this case is the combined effect of RJ’s impairments and whether they functionally equaled a listed impairment.

The burden of production rests on the claimant at each step. See *Oliver*, 2006 WL 3207864, at *7. Listing 112.11 for ADHD requires the claimant to show marked inattention, marked impulsiveness, and marked hyperactivity. 20 C.F.R. Pt. 404, Subpt. P, App. 1. Listing 112.08 for personality disorders requires the claimant to display deeply ingrained, maladaptive patterns of behavior associated with pathological dependence, passivity, or aggressiveness; or, intense and unstable interpersonal relationships and impulsive and exploitative behavior. *Id.* Both listings require the claimant to show marked impairment in two of the following areas: age-appropriate cognitive communicative function; age-appropriate social functioning; age-appropriate personal functioning; or maintaining concentration, persistence, or pace. *Id.*

RJ has produced enough evidence relevant to listings 112.08 and 112.11 to show that the ALJ’s abbreviated analysis at step two cannot be deemed harmless. Relevant to listing 112.11, ADHD, RJ’s evidence includes her score of 78 for ADHD on the Conners scale, her score of 89 for hyperactivity on the Conners scale, Dr. Cho’s finding that RJ could not sit still, and Gallahue Mental Services’ finding that RJ lacked impulse control. R. 194, 265; Ex. C-1. Relevant to listing 112.08, personality disorders, RJ has produced the following evidence

to show maladaptive patterns of behavior in aggressiveness: Gallahue Mental Health Services assigned RJ to anger management, reports of RJ bullying other students, RJ's suspension for an altercation, and RJ's suspension for cursing a teacher. R. 233, 264-65, 324. There was additional corroboration of this evidence from testimony.

Both listings require a showing of a marked impairment in two areas. Relevant to cognitive communicative function, Dr. Vandivier found RJ to have borderline intellectual functioning and found her verbal skills to be limited. R. 159-60. In the area of age-appropriate social functioning, RJ produced evidence that showed she had a significant maturational delay and she was immature compared to her peers. R. 192, 220.

For present purposes, the court assumes that this evidence falls short of meeting either listing 112.08 or 112.11, but these questions should remain open on remand. The reason the court cannot treat the step two errors as harmless is that they continued to affect the ALJ's analysis of whether RJ's combined impairments functionally equaled a listed impairment. That is a more difficult question for the ALJ, and the failure to consider the evidence of the combined effects means that the ALJ's step two errors were not harmless.

To functionally equal a listing, RJ must either have an "extreme" limitation in at least one domain or a "marked" limitation in at least two domains. 20 C.F.R.

§ 416.926a. The ALJ found that RJ did not have any limitations that were either marked or extreme. R. 12-21. The ALJ's determination that RJ did not have marked limitations in at least two domains was affected by his earlier error at step two.

Acquiring and Using Information: RJ argues that the ALJ ignored substantial evidence proving she had a marked limitation in acquiring and using information. RJ cites the following evidence that the ALJ failed to cite: RJ's failure of both sections of the ISTEP, the many learning accommodations she received, her low grades on an adjusted scale, her limited verbal comprehension, and Dr. Cho's statement that she had problems in school for two years and had been in special education for one year. R. 141, 155-59; Exhibit C-1. The ALJ also did not cite the special education re-evaluation, though it showed that RJ continued to have problems in reading and math and was difficult to understand. R. 174. The ALJ also failed to mention that RJ's teacher thought she had learning problems and unhappiness/depression. R. 193.

The ALJ mentioned the following: RJ was in special education classes; RJ had not been retained in a grade; RJ's own testimony that she was doing fine in school except for math; RJ's mother's report of problems in other areas; and RJ's GAF score of 70 that placed her in the borderline intellectual functioning range. R. 15. The ALJ also cited the state agency childhood disability evaluation, conducted by Dr. Gange in June 2005 that assessed RJ as having less than a

marked limitation in acquiring and using information. *Id.* This report was supposed to be based on the entire record, but its entire analysis for the domain of acquiring and using information consisted of “BIF,” presumably short for borderline intellectual functioning. R. 163. Dr. Gange did not evaluate RJ for ADHD or behavior disorder. He evaluated only the borderline intellectual functioning. R. 161.

The ALJ’s treatment of this domain was not sufficient to show that the step two error was harmless. His analysis did not give sufficient consideration to ADHD or the behavior disorder and whether they contributed to a combined effect, with the borderline intellectual functioning, that added up to marked impairment in this domain.

Interacting and Relating to Others: RJ argues that the ALJ ignored significant evidence of her problems in the domain of interacting and relating to others and erroneously concluded she did not have a conduct disorder. The ALJ failed to mention the following: RJ shoved and threatened another child, she was suspended for disobeying a teacher’s commands, and RJ’s teacher had a moderate concern for RJ’s anxiousness and poor self esteem. R. 194, 233-34. Gallahue Mental Health Services found RJ had numerous signs of ADHD and defiant behavior. R. 235, 240. RJ was suspended from school numerous times and forced to attend an alternative school because of behavior problems. R. 213-15, 313.

While the ALJ did not specifically cite her suspensions, he acknowledged her frequent struggles with compliance with classroom rules but concluded that RJ did not have a conduct disorder. R. 18. This conclusion appears to have been drawn from the MET report saying that RJ was “at risk for developing a diagnosis” of conduct disorder. R. 141. Risk of *developing* a diagnosis for conduct disorder implies that she had not yet been diagnosed. RJ points out that the preceding page of the same report stated that she was exhibiting behaviors “consistent with a high probability of having a moderate intensity Conduct Disorder of mild to moderate intensity.” R. 140. But “moderate” is still short of “marked.”

The ALJ again cited Dr. Gange’s childhood disability evaluation from June 2005 to support the conclusion that RJ did not have a conduct disorder. R. 18. However, this report did not evaluate RJ’s behavior disorder. R. 161. The only impairment that was mentioned was borderline intellectual functioning. *Id.* The ALJ did not cite RJ’s pediatrician’s diagnosis that she had a behavior disorder. R. 188. 20 C.F.R. § 416.927d(2) states: “we will always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.” The ALJ gave no reason for not weighing Dr. Cho’s opinion in his determination. R. 18. That omission was an error. See *Sarchet*, 78 F.3d at 309 (holding the ALJ erred and that the case must be remanded because of serious factual mistakes and omissions).

Attending and Completing Tasks: The ALJ found that RJ was impaired in the domain of attending and completing tasks but that the impairment was less than marked. Yet the December 2004 MET found RJ was significantly deficient in functional academics and self-direction. R. 141. RJ's pediatrician, Dr. Cho, found that RJ was not able to sit still and had behavior problems. Ex. C-1. The November 2007 MET found that RJ scored 89 for hyperactivity, on the Connors teacher rating scale: a score above 70 means a person is clinically elevated in that area and more than two standard deviations from the mean. R. 193-94. RJ scored 78 for ADHD on the same test. R. 194.

The ALJ based his decision on an MET report, a psychological evaluation, and the state agency childhood disability evaluation report. R. 16-17. These all provided evidence that RJ did not have a marked impairment in this area. The ALJ cited the November 2007 MET, where RJ was found to have a significant maturational delay. R. 17. The report concluded that the maturational delay was not likely to cause long term problems with RJ's learning progress. The ALJ concluded that she did not have a marked limitation in this domain.

The ALJ did not cite Dr. Cho's evaluation that showed RJ had ADHD and had problems in the domain of attending and completing tasks. The ALJ cited the November 2007 MET report, but he did not cite the portion that showed RJ had significant problems with both hyperactivity and ADHD. An ALJ is not required to cite every piece of evidence but he "must articulate some legitimate reason for

his decision.” *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000) (holding the ALJ erred in giving little or no weight to the treating physician’s opinion and claimant’s testimony). The state agency childhood disability evaluation found that RJ did not have a marked limitation in attending and completing tasks. R. 17. The evaluation did not evaluate RJ’s ADHD or behavior disorder. R. 161. Since the ALJ based his decision on an evaluation that did not evaluate two of RJ’s impairments that the ALJ erroneously determined were not severe, the court cannot conclude that the step two error was harmless. The ALJ’s decision on this issue needs further review.³

III. *Due Process*

RJ argues that the ALJ violated her right to due process through an “institutional-agency wide policy and procedure of only selectively considering the

³Step three of the analysis also required the ALJ to ask if RJ’s impairments met or medically equaled an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. Whether the ALJ must specifically mention the relevant listing is an unsettled question. Compare *Mogg v. Astrue*, No. 07-2508, 2008 WL 227330, at *2 (7th Cir. Jan. 28, 2008) (affirming denial of attorney fees under Equal Access to Justice Act because Seventh Circuit had not “announced a bright line rule” requiring the court to mention a specific listing), with *Barnett v. Barnhart*, 381 F.3d 664, 668 (7th Cir. 2004) (“In considering whether a claimant’s condition meets or equals a listed impairment, an ALJ must discuss the listing by name and offer more than a perfunctory analysis of the listing.”). The Seventh Circuit has found that failure to mention a listing, when combined with perfunctory analysis, may require remand. *Ribaudo v. Barnhart*, 458 F.3d 580, 583 (7th Cir. 2006) (remanding where ALJ erred by neither mentioning a listing nor providing sufficient analysis of the evidence). In RJ’s case, the ALJ did not mention the ADHD or behavior disorder listings and did not analyze the elements of those listings. On remand the ALJ must address the ADHD and behavior disorder listings and analyze RJ’s impairments against the elements of the listings.

evidence in the record so as to exclude from the ALJ's decision any of the evidence which proves a claimant's disability." Pl. Br. 21. The court is remanding the case based on the errors discussed above, but errors are not equivalent to a denial of due process in violation of the Constitution.

IV. *ALJ's Failure to Call a Medical Examiner*

RJ also argues that the ALJ made a reversible error by refusing to call a medical examiner to testify. RJ claims that the ALJ's opinion was based solely on his lay opinion. The ALJ did not base his decision solely on his lay opinion. The ALJ's opinion relied on Dr. Gange's and Dr. Vandivier's medical opinions. R. 15-18. An ALJ is allowed to apply the findings of different medical sources to make a determination. See *Imhausen v. Astrue*, No. 1:07-cv-0833, 2008 WL 623139, at *9-10 (S.D. Ind. March 4, 2008) (holding the ALJ committed no error in failing to summon a medical examiner). The ALJ has the discretion to order an additional medical evaluation. He did not err by determining that there did not need to be an additional examination. See 20 C.F.R. § 416.917; but see *Green v. Apfel*, 204 F.3d 780, 782 (7th Cir. 2000) (holding that the ALJ erred by rejecting a claim without having a physician examine the claimant). Because the case will be remanded, however, this ruling would not prevent an ALJ from deciding to use a medical examiner on remand, particularly since Dr. Gange and Dr. Vandivier apparently considered only the borderline intellectual functioning and not ADHD and conduct disorder.

V. *Exhibit C*

The Commissioner argues that the court should not consider Exhibit C-1. because it was not before the ALJ. The Commissioner correctly notes that RJ did not object to the record as being incomplete. The Commissioner also correctly notes that RJ has not argued Exhibit C-1. is a basis for remand under sentence six of 42 U.S.C. § 405(g). This section does not apply because RJ is not trying to have new evidence admitted. The table of contents of the ALJ record shows that there were three pages in Exhibit C. The record filed with the court has only two pages of Exhibit C. R. 187-88. The discrepancy between the table of contents and the record suggests that a page was inadvertently omitted from the record.

The ALJ did not examine this page during his determination. Exhibit C-1. could have been pertinent to the ALJ's decision. Exhibit C-1. is a medical record where Dr. Cho stated that RJ was: "not doing well at school x 2y. Attending 4th grade. On special ed. x 1 year. Testing done – IQ 78. ↑behavior issues. Not able to seat [sic] still." Dr. Cho then prescribed Concerta for RJ to control her ADHD. Dkt. No. 21. This page of the exhibit could affect the ALJ's step two and three analysis. Because the case must be remanded on other grounds, the court does not address whether it could properly rely on this document alone to remand the case. Upon remand the ALJ should take this exhibit into account in making a determination.

Conclusion

RJ might or might not meet the stringent requirements for supplemental security income for children. The problem here is that the ALJ erred at step two of the analysis of her condition, and the court cannot say that the error was harmless. The court remands the decision of the Commissioner denying RJ's application for supplemental security income. On remand, the Commissioner must give further consideration to the severity of RJ's ADHD and behavior disorder, evaluate her impairments against listings 112.08 and 112.11, and reconsider her combination of impairments in terms of listing requirements and functional equivalence to the relevant listings. In doing so, the Commissioner shall also consider all of Exhibit C and may want to ensure that an appropriate medical expert can testify regarding the combined effects of RJ's impairments.

So ordered.

Date: July 24, 2009

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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