IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FLORENCE RICHARDSON, on behalf of MAXWELL D. RICHARDSON, III a minor,	)	
Plaintiff,	)	Civil Action No. 02-373-KAJ
v.	)	
JO ANNE B. BARNHART, Commissioner of Social Security	)	
Defendant.	)	

MEMORANDUM OPINION

Daniel G. Atkins, Esquire, Community Legal Aid Society, Inc., 100 West 10th Street, Wilmington, Delaware 19801; Counsel for Plaintiff.

Colm F. Connolly, United States Attorney, District of Delaware; Patricia C. Hannigan, Assistant United States Attorney, 1007 S. Orange Street, Wilmington, Delaware 19801; Counsel for Defendant.

Of Counsel: James A. Winn, Regional Chief Counsel; Sandra Romagnole Gavin, Asst. Regional Counsel, Office of the General Counsel, Social Security Administration, Philadelphia, Pennsylvania.

July 6, 2004

JORDAN, District Judge

I. INTRODUCTION

Florence Richardson ("Plaintiff") brings this action on behalf of her son, Maxwell D. Richardson ("Maxwell"), for review of the Commissioner of Social Security's ("Commissioner") decision to deny supplemental security income ("SSI") to Maxwell under Title XVI of the Social Security Act.[1] Presently before the Court is Plaintiff's Motion for Summary Judgment (Docket Item ["D.I."] 14) and the Commissioner's Cross-Motion for Summary Judgment. (D.I. 16.) The Court has jurisdiction to review the Commissioner's decision under 42 U.S.C. § 405(g). For the reasons that follow, Plaintiff's Motion for Summary Judgment (D.I. 14) will be denied and the Commissioner's Cross-Motion for Summary Judgment (D.I. 16) will be granted.

II. BACKGROUND

A. MEDICAL HISTORY AND SCHOOL REPORTS

Maxwell was born on March 9, 1989 and Plaintiff claims Maxwell was disabled from birth. (D.I. 12 at 6.) The record reveals that on November 15, 1990, Susan Stine, M.D., a developmental pediatrician, reported that Maxwell's development was about five months behind and referred Maxwell to an educational/ therapeutic program to address weaknesses in his language and gross motor skills. (*Id*. at 208.) On December 20, 1991, Linda Pax, a physical therapist, noted that "Maxwell continues to make gross motor improvements, however he continues to be significantly delayed." (*Id*. at 207.) Ms. Pax recommended a structured developmental pre-school program to

[1] 42 U.S.C. §§ 401-433, 1381-1383f.

address Maxwell's gross motor skill development and attention span concerns, and recommended that Maxwell continue weekly physical therapy treatments. (*Id*.) On September 20, 1991, Brenda Zenorini, a speech/language pathologist, evaluated Maxwell and diagnosed him with "receptive-expressive speech/language delay." (*Id*. at 205.) Ms. Zenorini recommended a comprehensive educational program that would address all of Maxwell's therapeutic needs, as well as individual speech and language therapy. (*Id*.)

On February 25, 1992, Dr. Stine conducted a reevaluation and reported that Maxwell "continue[d] to show no evidence of any focal or progressive neurological disease or disorder," and while Maxwell was still somewhat hypotonic,[2] his muscle tone had improved considerably. (*Id*. at 198.) Dr. Stine noted that Maxwell had an orthopaedic consultation that included an EMG and nerve conduction study, both of which were normal. (*Id.*) Dr. Stine also noted that Maxwell's speech therapist and physical therapist were pleased with his progress. (*Id*.) Furthermore, Dr. Stine reported that Maxwell's IQ was at a higher level than when previously tested, and while still low, it was a significant improvement over previous testing. Finally, Dr. Stine stated that although Maxwell's expressive language was still unintelligible, Maxwell was "still trying very hard to communicate and was seen as an excellent imitator with fine socialization skills." (*Id*.)

On April 12, 1996, Dr. William Houston, a pediatrician at AI du Pont Institute, and Maxwell's primary care physician, diagnosed him with asthma and ADHD. (*Id*. at 336.)

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[2]In other words, he had diminished muscle tone.

Dr. Houston initially prescribed 2.5 miligrams ("mgs.") of Ritalin to help manage his behavioral difficulties. (*Id*. at 336,192.) Because there was "no distinct improvement," Dr. Houston increased the dosage to 5 mgs. less than four months later. (*Id*. at 336,188.) On November 13, 1996, Dr. Houston noted that Maxwell's ADHD was "not controlled" and the dosage of Ritalin was increased again to 7.5 mgs. (*Id*. at 184.) Dr. Houston reported that Maxwell responded well to the new dosage (*Id*. at 336),[3] and contemporaneous reports from the school corroborate this observation.[4] (*Id*. at 273.)

However, Maxwell's behavioral problems returned a year later, and, in October or November 1997, Dr. Houston increased Maxwell's dosage of Ritalin to 10 mgs. (*Id*. at 176-178, 336.) School reports from the same time frame, the first marking period of the 1997/1998 school year, note that "so many mornings he comes in as if he's not medicated, but settles and attends in the afternoon when medicated at school." (*Id*. at 249.)

In January 1998, J. Douglas Di Raddo, a school psychologist, conducted a psychoeducational evaluation to assess Maxwell's level of functioning.[5] (*Id*. at 289.) In summarizing his findings, Dr. Di Raddo stated that Maxwell had "a history of some physical and academic difficulty which is impacting [his] ability to learn within the class

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[3]In Maxwell's March 1997 progress notes, Dr. Houston states that there were "no bad reports from school" and that Maxwell was "doing well." (D.I. 12 at 182.)

[4]Maxwell's teachers said that during the last marking period of the 1996/1997 school year his "projects have been very good," he is "delightful to teach," and "gets along well with classmates." (D.I. 12 at 273.)

[5]In his evaluation, Dr. Di Raddo stated that Maxwell had been diagnosed with cerebral palsy (D.I. 12 at 285), but at the hearing before the ALJ, Plaintiff's attorney said that there was no official diagnosis (*Id.* at 35.)

setting. Current testing indicates a young boy whose cognitive skills are in the low average to borderline range of intelligence." (*Id*.) Dr. Di Raddo recommended that Maxwell should be considered for services that would bring up his achievement abilities, continue to receive occupational therapy and speech and language services, and that the medication Maxwell was receiving to address his attention issues should be monitored closely.[6] (*Id.* at 290.)

On January 15, 1998, Dr. Houston's file reports that Mawell was having problems at school and at home (*Id*. at 175), but the March 12, 1998 the file says that Maxwell was "doing well at home and school" and that he was "fairly cooperative and non-disruptive." (*Id*. at 173.)

On March 19, 1998, Ingrid Berlien, a physical therapist who had been seeing Maxwell once a week for individual or small group physical therapy sessions since November 1995, evaluated Maxwell and reported that his "gross motor development is slightly delayed, but he is very functional in his school environment." (*Id*. at 276.) As a result, Maxwell was discharged from physical therapy services. (*Id*.) Also in March 1998, the school district determined that Maxwell's special education service as a student with a "physical impairment" was no longer appropriate, and Maxwell's identification was therefore changed to a student with a learning disability. (*Id*. at 264.)

Dr. Houston's May 26, 1998 file indicates that Maxwell's school reported that he was screaming out in class, had difficulties concentrating, and was jumping on tables, but also stated that Maxwell "had a few weeks off of Ritalin due to difficulty in getting

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[6]Dr. Di Raddo reported that one of Maxwell's teachers reported that he had "poor attention," "excessive resistance," and "poor impulse control." (D.I. 12 at 288.)

[the] medicine." (*Id*. at 172.) Because Maxwell was having difficulty falling asleep, Dr. Houston changed his prescription to 15 mgs. in the two morning doses, and had Maxwell skip the evening dose. (*Id.*) By the end of 1998, the treatment notes reveal that Maxwell was "doing ok." (*Id.* at 169.) A November, 1998 school report states that Maxwell achieved the goals that were set in March of that year for him call out in class every fifteen minutes instead of every three minutes, and for him to decrease his hurtful comments to his peers to the point he is only saying two hurtful comments a day instead of fifteen. (*Id*. at 227.)

There are no treatment notes for 1999 in the record. School records note that in March 1999, Maxwell "calls out every 5 minutes" and needs an average of 3 verbal prompts to stay on task." (*Id*. at 215.) That report also stated that Maxwell's behavior varied from day to day. (*Id*.) His year end report card for the 1998/1999 school year demonstrated that he was getting A's, B's and C's in his classes, but was performing below grade level. (*Id*. at 252.)[7] Brenda Williams, Maxwell's 5th grade teacher, commented after the first marking period of the 1999/2000 school year that "Maxwell is easily distracted by auditory and visual stimuli in the classroom and is unsuccessful in activities requiring listening and no talking." (*Id*. at 266.)

The record contains three medical treatment notes for 2000 stating that Maxwell was doing well on Adderall and experiencing no problems. (*Id*. at 165-167).

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[7]It appears that Dr. Houston changed Maxwell's medication from Ritalin to Adderall in August 1999. (*See* D.I. 12 at 330, 309, 336). Dr. Houston explained that he changed the medication because "Max continued to have behavioral difficulties while taking Ritalin." (*Id*. at 336.)

On February 24, 2000, Ms. Williams completed a teacher questionnaire at the request of the Disability Determination Service of the Delaware Department of Labor ("DDS"). (*Id*. at 147.) Ms. Williams said that she had known Maxwell since the beginning of the school year and had not observed any worsening or sudden changes in his functioning or behavior. (*Id*. at 150.) She stated that Maxwell was performing at a 2nd grade level in reading, language, and math, and at a 3rd grade level in spelling. (*Id*. at 148.) She reported that Max's cognitive and communication skills were below grade level and not adequate for his age. (*Id.*) She also reported that Maxwell's behavior was within normal limits for his peer group and that he related appropriately with the other children and had reciprocal friendships. (*Id.*) Ms. Williams noted that there were no obvious side effects from the medication he was taking. (*Id*. at 149.) According to Ms. Williams, Maxwell's concentration was at 50%, his attention at 75% and his ability to complete tasks at 100%. (*Id*.)

Maxwell's final report card for the 1999/2000 school year show that he earned A's, B's and C's in his classes on a below grade instructional level. (*Id*. at 212.)

On August 9, 2000, at the request of DDS, I.L. Lifrak, M.D., completed a thorough physical examination and reported that Maxwell's clinical results were normal in all aspects. (*Id*. at 302-303.)

On August 23, 2000 Heidi Grieb-Ginn, M.S., conducted a speech and language evaluation and reported that, at 11½ years old, Maxwell's oral motor structure and skills were within functional limits. (*Id*. at 306.) His language skills were evaluated and assessed to be at the average level for the 8 to 11 year-old range. (*Id.* at 307.) Ms. Grieb-Ginn concluded that Maxwell had moderate vocabulary delays and moderate-

severe language delays, but that his vocal quality, fluency, and hearing were within functional limits. (*Id*.)

On August 27, 2000, Dr. Patricia Lifrak conducted a mental status examination determine Maxwell's residual functional capacity. (*Id*. at 308.) Dr. Lifrak noted that there were no problems with Maxwell's behavior at home. (*Id.*) She also noted that Maxwell got along well with his teachers and peers and that his grades were good for the last marking period. (*Id*.) Upon examination, Maxwell displayed a "mild" speech articulation problem, but his syntaxis and vocabulary were within normal limits. (*Id*. at 309.) There was no evidence or restlessness or hyperactivity, his attention span was within normal limits, and he was able to focus and remain on task. (*Id*.) Dr. Lifrak described Maxwell as cooperative, friendly, logical, and goal directed. (*Id*. at 310.) Dr. Lifrak noted some impairment in short-term memory and a below average fund of knowledge, but assessed his Global Assessment of Functioning ("GAF") at 60, which suggests moderate symptoms of circumstantial speech and occasional panic attacks or moderate difficulty in social or occupational functioning as evidenced by new friends or conflicts with peers or co-workers. (D.I. 17 at 9.) Dr. Lifrak also completed a supplemental questionnaire as to Maxwell's residual functional capacity, which indicated impairments of mild to moderate severity. (D.I. 12 at 311-312.)

On September 7, 2000, a DDS psychologist reviewed the evidence in the file and assessed Maxwell with ADHD and borderline intellectual functioning. (*Id*. at 317.) He opined that these impairments were severe, but did not meet, medically equal, or functionally equal the severity of a listing because Maxwell had less than marked

limitation in cognition and communication, social functioning, personal functioning and concentration, persistence, or pace, with no limitation in motor skills. (*Id*. at 317-320.)

A different DDS psychologist assessed Maxwell on November 21, 2000 and also concluded that Maxwell's impairments did not meet a listing. (*Id*. at 321-324.) Moreover, the psychologist found that Maxwell was working about two years below grade level, but could work independently when focused. (*Id*.) The psychologist opined that Maxwell was social, his behavior was within normal limits, his self-help skills were adequate, and he was responding well to Adderrall. (*Id.* at 324.)

The record contains three medical treatment notes from 2001. A note dated March 7, 2001 indicated that the school psychologist was concerned that Maxwell needed more medication to focus because he was "calling out in class," "forgetful to comb hair, etc." and "constantly moving." (*Id*. at 343.) Dr. Houston then increased Maxwell's dosage of Adderall to 15 mgs. per day. (*Id*.) On April 9, 2001 Dr. Houston wrote that Maxwell was "doing well" and "able to do homework." (*Id*. at 344; *see also id.* at 336.) On May 10, 2001 Dr. Houston noted that Maxwell was "doing well" on Adderall. (*Id*. at 345.)

In the first marking period of the 2001/2002 school year, Maxwell's 7th grade year, Maxwell earned 3 C's, I D, and 3 F's. (*Id*. at 341.)

On December 12, 2001, Alan Hendel, Maxwell's 6th grade teacher wrote a letter to the ALJ, at the request of Maxwell's legal representative, stating that the medication Maxwell received helped, but did not control all of his inattention, hyperactivity, and impulsivity. (*Id*. at 337.) Mr. Hendel stated that without his medication, Maxwell could barely function. (*Id*.)

At the administrative hearing on December 21, 2001, Plaintiff testified that she believes Maxwell is disabled because he can't climb a tree or ride a bike. (*Id*. at 32-33.) She said that Maxwell could not do things for a long period of time, that he had to be reminded to brush his teeth, comb his hair, and take a bath. (*Id*. at 33.) She also said that Maxwell leaves things all over, doesn't do the chores that she asks him to do, doesn't wipe himself well enough after using the toilet, and one time slept in his clothing and wanted to go to school in the same clothes. (*Id*. at 40-42.) She recounted that he once used a knife to pull a bagel out of the toaster while it was still plugged in. (*Id.*)

B. PROCEDURAL HISTORY

On February 8, 2000, Plaintiff filed for SSI on Maxwell's behalf alleging Maxwell was disabled due to attention deficit hyperactivity disorder ("ADHD") and a developmental coordination disorder. (D.I. 12 at 108.) The application was denied initially on September 20, 2000 (*Id*. at 71-74), and again upon reconsideration on December 14, 2000 (*Id*. at 78-81). Plaintiff appealed that determination and an administrative law judge ("ALJ") held a hearing on December 21, 2001. (*Id*. at 19.) The ALJ issued a decision on February 22, 2002 finding that Maxwell does not have an impairment, or combination of impairments, which meets, medically equals, or functionally equals the severity an impairment listed in the Listing of Impairments, 20 C.F.R. pt. 404, subpt. P, app. 1 (2001). (*Id*. at 16.) In so concluding, the ALJ determined that Maxwell was not "disabled" for purposes of eligibility for SSI. (*Id.*) On April 19, 2002, the Plaintiff appealed the ALJ's decision to this court.[8] (D.I. 2.)

[8]Plaintiff was permitted to seek federal court review of the ALJ's decision without first seeking Appeals Council review. (D.I. 12 at 3.) The Commissioner explains that

III. STANDARD OF REVIEW

This Court reviews a decision of the Commissioner to determine whether the decision is supported by substantial evidence in the record. 42 U.S.C. § 405(g); 5 U.S.C. § 706(2)(E); *see also Richardson v. Perales*, 402 U.S. 389, 390 (1971); *Monsour Med. Ctr. v. Heckler*, 806 F.2d 1185, 1190 (3d Cir. 1986). The Court is limited in its review to determining whether the Commissioner's decision is supported in the record by substantial evidence and whether the correct legal principles have been applied. 42 U.S.C. §§ 405(g), 1383(c); *Monsour Medical Ctr. v. Heckler*, 806 F.2d 1185, 1190 (3d Cir. 1990). The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Perales*, 402 U.S. at 427. It is less than a preponderance of evidence and more than a mere scintilla. *Id.*

The standard of review in this Court when deciding an appeal from the Commissioner is not *de novo*. *See Limerick Ecology Action v. United States Nuclear Regulatory Commission*, 869 F.2d 719, 753 (3d Cir. 1989). The Court is obliged, therefore, to affirm the decision of the Commissioner if the weight of the evidence substantially supports the decision, regardless of whether the Court may have decided the case differently if it were before it on first impression. *Richardson*, 402 U.S. at 401; *Monsour*, 806 F.2d at 1191.

IV. DISCUSSION

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this case was a disability redesign prototype case that was randomly selected by the Commissioner "to test modifications to the disability determination process and to test elimination of the request for the Appeals Council review." (D.I. 17 at 1 fn. 1.) Accordingly, there was no request for Appeals Council Review.

Under the Social Security Act (the "Act"), a child under the age of eighteen is considered to be "disabled" for purposes of eligibility for SSI if he has a medically determinable 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 at least twelve months or results in death. 42 U.S.C. § 1382c(a)(3)(C)(i).

To determine whether a child is eligible for SSI on the basis of disability, a three-step sequential evaluation process is followed. 20 C.F.R. § 416.924 (2001). Under this standard, the Commissioner considers, in sequence, whether the child is (1) engaging in substantial gainful activity, (2) has a medically determinable impairment or combination of impairments that is severe, and, if so, (3) whether the child's impairment(s) meets, medically equals, or functionally equals in severity any of the listed impairments at 20 C.F.R. Part 404, subpt. P, app. 1. 20 C.F.R. § 416.924(b)-(d). If a child has an impairment that meets or medically equals the requirements of a listing or that functionally equals the listings that meets the duration requirement, the Commissioner will find that the child is disabled.

In following the three-step process, the ALJ found that Maxwell had not engaged in substantial gainful activity during any part of the period under adjudication. (D.I. 12 at 16.) The ALJ also found that Maxwell had a "severe" impairments under the Act, including ADHD, learning disorders, and developmental delays. (*Id.*) However, the ALJ found that those impairments did not "medically meet, medically equal, or functionally equal the severity criteria of any ... listed impairment[]." Accordingly, the ALJ held that Maxwell was not disabled under the Act. (*Id.*)

A. THE ALJ'S DETERMINATION THAT MAXWELL DID NOT MEDICALLY MEET OR EQUAL A LISTED IMPAIRMENT

Plaintiff initially argues that the ALJ's finding that Maxwell's impairment did not meet or medically equals the listing set forth in 20 C.F.R. Part 404, subpt. P, app. 1, § 112.11 (ADHD)[9] is not supported by substantial evidence. (D.I. 15 at 7.) Specifically,

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[9]Section 112.11 provides:

> Attention Deficit Hyperactivity Disorder: Manifested by developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity.
> The required level of severity for these disorders is met when the requirements in both A and B are satisfied.
> A. Medically documented findings of all three of the following:
> 1. Marked inattention; and
> 2. Marked impulsiveness; and
> 3. Marked hyperactivity;
> And
> B. ... for children (age 3 to attainment of age 18), resulting in at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

Paragraph B2 of § 112.02 provides:

> For children (age 3 to attainment of age 18), resulting in at least two of the following:
> a. Marked impairment in age-appropriate cognitive/ communicative function, documented by medical findings (including consideration of historical and other information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized psychological tests, or for children under age 6, by appropriate tests of language and communication; or
> b. Marked impairment in age-appropriate social functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized tests; or
> c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings

Plaintiff argues that Dr. Houston, who has seen Max 36 times since 1996, concluded that Max met the listing for ADHD and the opinion of the treating physician must be "accorded great weight, especially when their opinion reflects expert judgment based upon continuing observation of the patient's condition over a prolonged period of time." (D.I. 15 at 9) (quoting *Allen v. Bowen*, 881 F.2d 37, 41 (3d Cir. 1989)).

The ALJ is not bound by a treating physician's opinion on the issue of the nature and severity of a claimant's impairment and may reject the opinion if 1) there is a lack of supporting medically acceptable clinical and laboratory diagnostic techniques, or 2) the opinion is inconsistent with other substantial evidence. *See* 20 C.F.R. 416.927(f)(2)(i). After thoroughly reviewing the medical evidence and Maxwell's school reports, the ALJ ALJ said, "I am not convinced by Dr. Houston's rather obvious attempt to help [Maxwell] obtain SSI, as his recent comments are not at all consistent with treatment notes over the years." (D.I. 12 at 11.)

The treatment notes and school reports reveal that from November 1996 to November 1997 Maxwell was doing well on Ritalin as the dosages were adjusted. (*Id*. at 182, 336, 273.) Maxwell experienced some problems during the latter part of the 1997 school year, but that may have been because he wasn't taking his medication

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> (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, appropriate standardized tests; or
> d. Marked difficulties in maintaining concentration, persistence, or pace.

A marked limitation is found when an impairment interferes seriously with a child's ability to independently initiate, sustain, or complete activities. 20 C.F.R. § 416.926a(e)(2).

before arriving at school. (*Id*. at 249.) Maxwell experienced further difficulties in the first part of 1998, but once again, this was due to a failure to take his medication. (*Id*. at 273.) When Maxwell was receiving the proper medication at the beginning of the 1998/1999 school year, his behavior was under control. (*Id*. at 227.)

There are no treatment notes for 1999 from Dr. Houston, or any other physician, in the record. Maxwell had some problems in school that year, but once Maxwell's prescription was changed from Ritalin to Adderall, the medical notes on file indicate that Maxwell was doing well. (*Id.* at 165-167.) One note in 2001 indicates that Maxwell was having difficulties while on Adderall, but when the dosage was increased, Maxwell was doing well again. (*Id.* at 343-345.) Thus, the ALJ concluded that "the evidence is reasonably clear that the ADHD is under fairly good control when [Maxwell] takes his medications." (D.I. 12 at 11.) There is more than a scintilla of evidence to support this conclusion, so I am bound to uphold it.

The evidence supporting the ACJ's conclusion includes the opinions of other medical experts. Dr. Patricia Lifrak reported no evidence of hyperactivity, inattention, or impulsivity. (*Id*. at 309.) In fact, she reported that Maxwell's attention span was within normal limits and that he was able to focus and remain on task. (*Id*.) She also reported that his residual functional capacity was of mild and moderate severity. (*Id*. at 311-312.) The opinions of the two psychological experts who assessed Maxwell and determined that his impairments did not meet or medically equal a listing are consistent with Dr. Lifrak's findings. (*Id*. at 317-324.) Finally, Ms. Grieb-Ginn, the language pathologist did not find that Maxwell had marked limitations with regard to cognitive and communicative functioning. (*Id*. at 306-307.) Rather, her evaluation noted developmental delays in

vocabulary and expression but further observed that Maxwell "demonstrated skills at an average level for an 8-11 year old .... (*Id*. at 307.)

Plaintiff also claims that Maxwell's school reports, specifically Mr. Hendel's letter to the ALJ, demonstrate that Maxwell met the 112.11 listing for ADHD. (D.I. 15 at 12-15). However, the ALJ was not persuaded by Mr. Hendel's report, which he felt was prepared "for the benefit of helping [Maxwell] obtain his SSI benefits" and "was not fully consistent with ... contemporaneously written notes and reports." (D.I. 12 at 11.) The ALJ pointed to Ms. Williams' assessment that Maxwell's behavior was within normal limits for his peer group, that he related with the other children, had reciprocal friendships, and that his concentration was at 50%, his attention at 75%, and his ability to complete tasks at 100%. (*Id*. at 148.)

Moreover, the ALJ found that Mr. Hendel's report was not even consistent with his own prior reports. (*Id*. at 11.) In a DDS teacher questionnaire dated November 15, 2000, Dr. Hendel wrote that Maxwell was slightly below his peer group in maturity and ability to function independently, and stated that he was not a discipline problem, was very social, worked hard to complete tasks, was capable of performing self-help skills, and was having success due to the special education program. (*Id*. at 154-157.)

Furthermore, the ALJ conducted a thorough hearing, questioning both Plaintiff and Maxwell about Maxwell's behavior, activities, friends, and functioning. (*Id*. at 21-48.) He found that the Maxwell was able to sit and concentrate with good attention on his Game Boy games. (*Id*. at 11.) The ALJ also found that, in regard to Maxwell's social functioning, Maxwell did not play much with children his age, but did play some. "Most of the time he is playing alone or with some younger children, but this appears more

because of his physical limitations and his inability to keep up, and not completely because of social immaturity." (*Id*. at 12.)

The ALJ's opinion indicates that he considered and weighed the pertinent evidence. Based on this evidence, the ALJ determined that Maxwell's impairments did not meet a listing pursuant to 20 C.F.R. pt. 404, subpt. P, app. 1. While there is evidence from which one could reach a contrary conclusion, there is substantial evidence to support the ALJ's finding that Maxwell's impairment did not meet the listing for ADHD.

B. THE ALJ'S DETERMINATION THAT MAXWELL DID NOT FUNCTIONALLY EQUAL A LISTED IMPAIRMENT

Plaintiff further challenges the ALJ's finding that Maxwell's condition is not functionally equivalent in severity to the listed impairment. 20 CFR § 416.924(d). Functional equivalence is an impairment of listing-level severity, i.e. it must result in "marked" limitations in two domains of functioning or in an "extreme" limitation in one domain. 20 C.F.R. § 416.926a(a). There are six domains of function used in determining functional equivalence: 1) acquiring and using information; 2) attending to and completing tasks; 3) interacting and relating with others; 4) moving about and manipulating objects; 5) ability to care for oneself; and 6) health and physical well-bing. 20 C.F.R. § 416.926a(b)(1). Plaintiff challenges the ALJ's findings in 1, 2, 3, and 5. (D.I. 15 at 8.)

In the domain of acquiring and using information, which measures how well a child acquires and learns information, *see* 20 C.F.R. § 416.92a(g), the evidence shows that Maxwell had a learning disability. (D.I. 12 at 289, 264, 148, 317-320, 321-324.) Dr.

Di Raddo reported that Maxwell was in the low average to borderline range of intelligence. (*Id*. at 289.) Dr. Patricia Lifrak assessed Maxwell's intelligence and knowledge limitations as mild to moderate. (*Id*. at 311.) Mr. Hendel noted that, if focused, Maxwell could learn and apply knowledge. (*Id*. at 154.) Except for the first marking period of his 7th grade year, Maxwell was performing at a level which, though not always at grade level, showed progress in his ability to acquire and use information. (See *id*. at 212, 252, 341.) Thus, even if Maxwell suffered a marked limitation in this area, as Plaintiff argues, the evidence does not support a finding that Maxwell has an extreme limitation with acquiring and using information.

The domain of attending and completing tasks measures how well a child focuses and maintains attention, carries out, and finishes activities, the pace at which activities are preformed, and the ease with which they are changed. *See* 20 C.F.R. § 416.92a(h). As previously discussed, Maxwell's medical treatment reports and school reports suggest that he could pay attention and focus on the task at hand. (*Id.* at 155, 309, 317-320, 321-324.) In fact, as previously discussed, Ms. Williams expressed that Maxwell's ability to complete tasks was 100%. (*Id*. at 159.) Moreover, the evidence demonstrates that Maxwell's medication enhanced his ability to concentrate.

The interacting and relating to others domain, as described in 20 C.F.R. § 416.92a(I), measures how well a child initiates and sustains emotional connections with others, develops and uses the language of the community, cooperates with others, complies with rules, responds to criticism, and respects and take care of the possessions of others. As discussed, Maxwell had friends, got along with his teachers,

and was very social in school. (*Id*. at 12, 148, 155, 273.) In short, there is substantial evidence that his social functioning is within normal limits.

Finally, in the domain of caring for oneself, which measures how well the child maintains a healthy emotional and physical state, including how well the child gets physical and emotional wants and needs met in appropriate ways, how the child copes with stress and changes in the environment, and whether the child takes care of his health, possessions, and living area, *see* 20 C.F.R. § 416.92a(k), the ALJ found that Maxwell was reasonably normal in not remembering to bathe, take out the trash, and clean the house, and that it was reasonably normal for a 12 year-old to make his bed poorly. (*Id*. at 14.) Maxwell's school reports and Dr. Patricia Lifrak's evaluation demonstrate that he is able to care for most of his day to day needs. (D.I. 12 at 150, 156, 311.)

Therefore, I hold that there is substantial evidence in support of the ALJ's finding that Maxwell does not have either a marked limitation in two of these domains or an extreme limitation in one of these domains. *See* 20 C.F.R. § 416a(a) (functional equivalence means an impairment that results "in 'marked' limitations in two domains of functioning or an 'extreme' limitation in one domain[s]").

V. CONCLUSION

Accordingly, for the reasons set forth herein, the Commissioners Motion (D.I. 16) will be granted and Plaintiff's Motion will be denied (D.I. 14). An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FLORENCE RICHARDSON, on behalf of MAXWELL D. RICHARDSON, III a minor,	)	
Plaintiff,	)	Civil Action No. 02-373-KAJ
v.	)	
JO ANNE B. BARNHART, Commissioner of Social Security	)	
Defendant.	)	

ORDER

For the reasons set forth in the Memorandum Opinion issued on this date,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment (D.I. 14) is DENIED, and the Commissioner's Cross-Motion for Summary Judgment (D.I. 16) is GRANTED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

July 6, 2003
Wilmington, Delaware