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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

KAREN LUCILLE RICE,  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL,<sup>1</sup>  
Acting Commissioner of  
Social Security,  
  
Defendant.

No. CV 17-00353 SS

**MEMORANDUM DECISION AND ORDER**

**I.**

**INTRODUCTION**

Plaintiff Karen Lucille Rice ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency")

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<sup>1</sup> Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for former Acting Commissioner Carolyn W. Colvin in this case. See Fed. R. Civ. P. 25(d).

1 denying her application for Disability Insurance Benefits ("DIB").  
2 The parties consented, pursuant to 28 U.S.C. § 636(c), to the  
3 jurisdiction of the undersigned United States Magistrate Judge.  
4 For the reasons stated below, the decision of the Commissioner is  
5 REVERSED and REMANDED for further proceedings.  
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## 7 8 II.

### 9 STANDARD OF REVIEW

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11 Under 42 U.S.C. § 405(g), a district court may review the  
12 Commissioner's decision to deny benefits. "The court may set aside  
13 the Commissioner's denial of benefits when the ALJ's findings are  
14 based on legal error or are not supported by substantial evidence  
15 in the record as a whole." Aukland v. Massanari, 257 F.3d 1033,  
16 1035 (9th Cir. 2001) (citing Tackett v. Apfel, 180 F.3d 1094, 1097  
17 (9th Cir. 1999)); accord Smolen v. Chater, 80 F.3d 1273, 1279 (9th  
18 Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir.  
19 1989)). However, the court must "affirm the denial of disability  
20 benefits if it is supported by substantial evidence and the  
21 Commissioner applied the correct legal standards." Marci v.  
22 Chater, 93 F.3d 540, 543 (9th Cir. 1996).  
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26 "Substantial evidence is more than a scintilla, but less than  
27 a preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
28 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.

1 1997)). It is "relevant evidence which a reasonable person might  
2 accept as adequate to support a conclusion." Id. To determine  
3 whether substantial evidence supports a finding, the court must  
4 "consider the record as a whole, weighing both evidence that  
5 supports and evidence that detracts from the [Commissioner's]  
6 conclusion." Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan,  
7 2 F.3d 953, 956 (9th Cir. 1993). If the evidence could reasonably  
8 support either affirming or reversing that conclusion, the court  
9 may not substitute its judgment for that of the Commissioner.  
10 Reddick, 157 F.3d at 720-21 (citing Flaten v. Sec'y of Health &  
11 Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

### 15 III.

#### 16 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

17  
18 To qualify for disability benefits, a claimant must demonstrate  
19 a medically determinable physical or mental impairment that  
20 prevents her from doing a substantial gainful activity, and that  
21 is expected to result in death or last for a continuous period of  
22 at least twelve months. Reddick, 157 F.3d at 721 (citing 42 U.S.C.  
23 § 423 (d) (1) (A)). The impairment must render the claimant  
24 incapable of performing any other substantial gainful employment  
25 that exists in the national economy. Tackett, 180 F.3d at 1098  
26 (citing 42 U.S.C. § 423 (d) (2) (A)).  
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1 To decide if a claimant is entitled to benefits, an ALJ conducts  
2 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.

3  
4 (1) Is the claimant presently engaged in a substantial gainful  
5 activity? If yes, the claimant is found not disabled. If  
6 no, proceed to step two.

7 (2) Is the claimant's impairment severe? If no, the claimant  
8 is found not disabled. If yes, proceed to step three.

9 (3) Does the claimant's impairment meet or equal one of the  
10 specific impairments described in 20 C.F.R. Part 404,  
11 Subpart P, Appendix 1? If yes, the claimant is found  
12 disabled. If not, proceed to step four.

13  
14 (4) Is the claimant capable of performing his past work? If  
15 yes, the claimant is found not disabled. If no, proceed to  
16 step five.

17 (5) Is the claimant able to do any other work? If not, the  
18 claimant is found disabled. If yes, the claimant is found  
19 not disabled.  
20

21 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,  
22 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R.  
23 §§ 404.1520 (a) - (g) (1) & 416.920 (a) - (g) (1).  
24

25  
26 The claimant has the burden of proof at steps one through four,  
27 and the Commissioner has the burden of proof at step five.  
28 Bustamante, 262 F.3d at 953-54. "Additionally, the ALJ has an

1 affirmative duty to assist the claimant in developing the record  
2 at every step of the inquiry." Id. at 954. If, at step four, the  
3 claimant meets his burden of establishing an inability to perform  
4 past work, the Commissioner must show that the claimant can perform  
5 some other work that exists in "significant numbers" in the  
6 national economy, taking into account the claimant's residual  
7 functional capacity ("RFC"), age, education, and work experience.  
8 Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20  
9 C.F.R. §§ 404.1520 (g) (1), 416.920 (g) (1). The Commissioner may  
10 do so by the testimony of a vocational expert ("VE") or by reference  
11 to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part  
12 404, Subpart P, Appendix 2 (commonly known as "the Grids").  
13 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a  
14 claimant has both exertional and non-exertional limitations, the  
15 Grids are inapplicable and thus the ALJ must take VE testimony.  
16 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart  
17 v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).  
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IV.

DISCUSSION

**A. The ALJ Failed To Properly Assess Plaintiff's Fibromyalgia As A Severe Impairment At Step-Two Of The Evaluation**

Plaintiff contends that the ALJ erred at step two by finding her fibromyalgia was a non-severe impairment. (Plaintiff's Memorandum In Support of the Complaint ("Pl. MSO") at 1, 14-17). The Court agrees.<sup>2</sup>

By its own terms, the evaluation at step two is a de minimis test – intended to weed out the most minor of impairments. See Bowen v. Yuckert, 482 U.S. 137, 153-54, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987) (O'Connor, J. concurring); Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001) ("We have defined the step-two inquiry as a de minimis screening device to dispose of groundless claims.") (citing Smolen, 80 F.3d at 1290). An impairment is not severe only if the evidence establishes a slight abnormality that has only a minimal effect on an individual's ability to work.

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<sup>2</sup> Plaintiff also contends that the ALJ erred in improperly assessing the opinions of treating physicians Drs. Wheeler and Levy. (Pl. MSO at 17-23). Plaintiff further argues that the ALJ erroneously engaged in picking and choosing through the evidence in order to support his desired RFC. (Pl. MSO at 23-25). However, it is unnecessary to reach Plaintiff's arguments on these grounds, as the matter is remanded for the alternative reasons discussed at length in this Order.

1 Smolen, 80 F.3d at 1290 (internal quotations and citations  
2 omitted).

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5 Here, the ALJ applied more than a de minimis test at step two  
6 when he concluded that Plaintiff's fibromyalgia was not severe. In  
7 reaching this conclusion, the ALJ acknowledged that Dr. Joshua  
8 Levy, M.D., diagnosed Plaintiff with fibromyalgia. (AR 24). The  
9 ALJ nonetheless found the impairment as non-severe because Dr.  
10 Levy's "treatment notes fail to provide longitudinal context in  
11 the form of medical signs and findings, which would show or  
12 otherwise support the functional limitations resulting from such  
13 diagnosis." (AR 24). However, though Dr. Levy's handwriting is  
14 difficult to read, the treatment notes clearly indicate that Dr.  
15 Levy diagnosed and treated Plaintiff for fibromyalgia from at least  
16 December 2014 to June 2015. (See AR 367, 371, 373, 376, 383, 513).  
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20 Moreover, Dr. Levy opined that Plaintiff has physical  
21 limitations resulting from her fibromyalgia. (See AR 509-13). In  
22 particular, Dr. Levy opined Plaintiff is able to sit for 20 minutes  
23 at a time for a total of 3 hours in an 8-hour workday; stand/walk  
24 for 10 minutes at a time for a total of 2 hours in an 8-hour  
25 workday; and lift and carry less than 10 pounds frequently, 10  
26 pounds occasionally, and never over 10 pounds. (AR 509-10).  
27 Further, Plaintiff will need to take 3-4 unscheduled breaks during  
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1 an 8-hour workday for 15 minutes at a time. (AR 509). Finally,  
2 Dr. Levy opined that due to her fibromyalgia, Plaintiff is limited  
3 in the use of her hands and is not capable for working an 8-hour  
4 day, 5 days a week. (AR 510).

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7 As the Ninth Circuit recently observed in Revels v. Berryhill,  
8 \_\_\_ F.3d \_\_\_, 2017 WL 4819137 (9th Cir. October 26, 2017): "In  
9 evaluating whether a claimant's residual functional capacity  
10 renders them disabled because of fibromyalgia, the medical evidence  
11 must be construed in light of fibromyalgia's unique symptoms and  
12 diagnostic methods . . . the failure to do so is error." Revels,  
13 2017 WL 4819137 at \*10. Here, the ALJ failed to consider the  
14 unique medical evidence of fibromyalgia properly at step-two of  
15 the evaluation.  
16

17  
18 Because a step-two evaluation is to dispose of "groundless  
19 claims," and the evidence here establishes that Plaintiff suffered  
20 from fibromyalgia resulting in limitations in her ability to work,  
21 the ALJ erred in the step-two analysis regarding Plaintiff's  
22 fibromyalgia. See Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir.  
23 2005) ("An impairment or combination of impairments may be found  
24 'non severe only if the evidence establishes a slight abnormality  
25 that has no more than a minimal effect on an individual's ability  
26 to work.'" (emphasis in original). Remand is required.  
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1 **B. Remand Is Required To Remedy Defects In The ALJ's Decision**

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3 Remand for further proceedings is appropriate where additional  
4 proceedings could remedy defects in the Commissioner's decision.  
5 See Leon v. Berryhill, \_\_\_ F.3d \_\_\_, 2017 WL 515294 at \* 5, (9th  
6 Cir. November 7, 2017); Harman v. Apfel, 211 F.3d 1172, 1179 (9th  
7 Cir. 2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).  
8 Because the ALJ improperly evaluated the severity of Plaintiff's  
9 fibromyalgia under step two of the evaluation, the case must be  
10 REMANDED to remedy this and other defects.  
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14 For the foregoing reasons, the matter is remanded for further  
15 proceedings. On remand, the ALJ must include fibromyalgia as one  
16 of Plaintiff's severe impairments and analyze its impact on  
17 Plaintiff's ability to work.

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V.

CONCLUSION

Consistent with the foregoing, and pursuant to sentence four of 42 U.S.C. § 405(g),<sup>1</sup> IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: November 13, 2017

/s/  
\_\_\_\_\_  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

**THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,  
LEXIS/NEXIS OR ANY OTHER LEGAL DATABASE.**

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<sup>1</sup> This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."