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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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10 DUSTIN MICHAEL GURWELL,

11 Plaintiff,

12 v.

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

15 Defendant.

CASE NO. 2:16-cv-01799 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

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17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States
20 Magistrate Judge, Dkt. 6). This matter has been fully briefed. *See* Dkt. 10, 11, 12.

21 Plaintiff is young: he was 21 years old when he protectively filed a Social Security
22 application. *See* AR. 10, 204. Although plaintiff alleged disability since age 16, because
23 supplemental security income is not payable prior to the month following the month in
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1 | which the application was filed the ALJ concluded that the applicable period for
2 | evaluation purposes began August 28, 2013 – the month he filed his application *See, e.g.*,
3 | AR. 12, 21.

4 | On June 14, 2011, prior to filing the application, plaintiff’s treating physician
5 | noted that the evaluation “for chronic pain [was] negative.” AR. 275. At that time, the
6 | treating physician opined that plaintiff did not have a physical impairment. *See* AR. 277.
7 | However, approximately 3 ½ years later, and after plaintiff filed his application, this
8 | same treating physician diagnosed plaintiff with fibromyalgia. AR. 512.

9 | The ALJ found that plaintiff only had one severe impairment -- affective disorder.
10 | AR. 12. In doing so, the ALJ rejected plaintiff’s complaints of fibromyalgia, finding that
11 | the alleged fibromyalgia is not a medically determinable impairment. AR. 12-13.
12 | Although the ALJ found that there was “no firm diagnosis” of fibromyalgia in the record,
13 | this finding is not based on substantial evidence in the record as a whole, as there are
14 | numerous diagnoses of fibromyalgia by at least three different physicians in the record,
15 | two of them with relevant specialties. *See* AR. 13, 297, 441, 446, 455, 512. Similarly, the
16 | ALJ’s rejection of fibromyalgia on the basis that there are “no objective findings to
17 | support it,” also is not based on substantial evidence in the record as a whole. Plaintiff’s
18 | treating physician, Dr. Alan E. Carter M.D., observed that plaintiff “is tender at 12/18
19 | trigger points for fibromyalgia” on October 15, 2014, squarely within the relevant period
20 | of time.
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1 properly credit the opinions of plaintiff's treating and examining physicians; (3) Whether
2 the Commissioner's determination of plaintiff's residual functional capacity is support by
3 substantial evidence; (4) Whether the ALJ made improper adverse credibility findings
4 regarding plaintiff's testimony; and (5) Whether this case should be remanded for a
5 calculation of benefits. *See* Dkt. 10, p. 1.

6 STANDARD OF REVIEW

7 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
8 denial of social security benefits if the ALJ's findings are based on legal error or not
9 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
10 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
11 1999)).

12 DISCUSSION

13 **(1) Whether the ALJ committed legal error by failing to find plaintiff's** 14 **fibromyalgia and headache disorder to be medically determinable** 15 **impairments.**

16 First, plaintiff contends that the ALJ erred when evaluating his fibromyalgia at
17 step two of the sequential disability evaluation procedure. Dkt. 10, pp. 4-8; *see also* Dkt.
18 12, pp. 1-5. Defendant contends that substantial evidence supports the ALJ's findings that
19 plaintiff's alleged fibromyalgia is not medically determinable and that any error is
20 harmless. Dkt. 11, pp. 3-8.

21 Step-two of the administration's evaluation process requires the ALJ to determine
22 if the claimant "has a medically severe impairment or combination of impairments."
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1 | *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§
2 | 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). An impairment is "not severe" if it does not
3 | "significantly limit" the ability to conduct basic work activities. 20 C.F.R. §§
4 | 404.1521(a), 416.921(a). Basic work activities are "abilities and aptitudes necessary to
5 | do most jobs," including, for example, "walking, standing, sitting, lifting, pushing,
6 | pulling, reaching, carrying or handling; capacities for seeing, hearing and speaking;
7 | understanding, carrying out, and remembering simple instructions; use of judgment;
8 | responding appropriately to supervision, co-workers and usual work situations; and
9 | dealing with changes in a routine work setting." 20 C.F.R. § 404.1521(b). "An
10 | impairment or combination of impairments can be found 'not severe' only if the evidence
11 | establishes a slight abnormality that has 'no more than a minimal effect on an
12 | individual[']s ability to work.'" *Smolen, supra*, 80 F.3d at 1290 (quoting Social Security
13 | Ruling "SSR" 85-28) (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)).

15 | According to Social Security Ruling 96-3b, "[a] determination that an individual's
16 | impairment(s) is not severe requires a careful evaluation of the medical findings that
17 | describe the impairment(s) (*i.e.*, the objective medical evidence and any impairment-
18 | related symptoms), and an informed judgment about the limitations and restrictions the
19 | impairments(s) and related symptom(s) impose on the individual's physical and mental
20 | ability to do basic work activities." SSR 96-3p, 1996 SSR LEXIS 10 at *4-*5 (citation
21 | omitted). In *Benecke*, the Ninth Circuit concluded that the ALJ had erred in discounting
22 | medical opinions based in part on a fibromyalgia diagnosis, and found that the ALJ
23 | instead had been "relying on his disbelief of [the claimant's] symptom testimony as well
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1 as his misunderstanding of fibromyalgia.” *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th
2 Cir. 2004) (footnote omitted); *see also Green-Younger v. Barnhart*, 335 F.3d 99, 108 (2d
3 Cir. 2003). As noted by the Ninth Circuit, “[s]heer disbelief is no substitute for
4 substantial evidence.” *Id.*

5 Here, at step two, the ALJ found that plaintiff’s alleged fibromyalgia is not “a
6 medically determinable impairment because from [his] review, the references to
7 fibromyalgia are all by history And it is readily apparent no diagnosis of
8 fibromyalgia was ever made” AR. 13-14. However, this finding by the ALJ is
9 directly contradicted by the record. On December 4, 2013, plaintiff was referred “for
10 rheumatologic consultation at the request of Dr. Blackwell, Jeffrey, M.D. for second
11 opinion evaluation of the diagnosis of fibromyalgia.” AR. 442. A second opinion
12 regarding a diagnosis implies that a first opinion of a diagnosis was made. For this second
13 opinion, Dr. Thuc Nguyen, MD, examined plaintiff and reviewed records from six other
14 doctors. *See id.* Dr. Nguyen noted that plaintiff had been diagnosed with fibromyalgia in
15 2010, and after transfer of his care to a different doctor, plaintiff was referred to
16 neurology and rheumatology for second opinions regarding his widespread pain and
17 multiple complaints. *See id.* Dr. Nguyen examined plaintiff, for example noting that
18 plaintiff reported pain with range of motion in his elbows and shoulders, and that plaintiff
19 “has diffuse pain on palpation throughout his entire paraspinal spine region from neck
20 from tailbone.” AR. 445. Dr. Nguyen indicated that plaintiff “does not appear to have any
21 obvious joint deformity or synovitis or rash or any systemic symptoms to suggest an
22 inflammatory condition [but instead, plaintiff’s] history, clinical symptoms and exam
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1 findings are most consistent with fibromyalgia." AR. 446. He indicated that he discussed
2 with plaintiff "the diagnosis and treatment of fibromyalgia," and gave plaintiff a handout.
3 *Id.* When listing his "visit diagnoses," Dr. Nguyen listed as the primary diagnosis
4 "fibromyalgia syndrome." AR. 441. Buttressing these multiple clear indications that Dr.
5 Nguyen actually diagnosed fibromyalgia, when requested specifically to assess whether
6 or not plaintiff suffered from fibromyalgia, there is another note in the treatment record
7 by Dr. Jeffrey Blackwell M.D., who noted that plaintiff was seen "by Dr. Nguyen in
8 rheumatology today for consult, he agrees with fibromyalgia diagnosis" AR. 455.
9 Clearly Dr. Blackwell thought that Dr. Nguyen had diagnosed fibromyalgia. *See id.*
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11 Similarly, neurologist Dr. Dinah Thyerlei, M.D., examined plaintiff in July, 2013,
12 and indicated her opinion that "diagnosis is likely severe fibromyalgia with major
13 depressive disorder, could be reactive, also migraine headaches with rebound
14 (transformed) headaches from medication overuse headaches, which likely is leading to
15 your severe pain." AR. 309. The neurologist indicated that plaintiff's symptoms were
16 consistent with, among other things, "fibromyalgia with deconditioning for years." AR.
17 308. In another portion of her treatment record, when listing work activities affected by
18 plaintiff's impairments, the neurologist listed two diagnoses: depression and
19 fibromyalgia. AR. 297. Similarly, on October 15, 2014, plaintiff's treating physician, Dr.
20 Alan Carter, M.D., listed in the assessment portion of his report that the primary
21 encounter diagnosis was fibromyalgia syndrome. AR. 512.
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23 For the reasons stated and based on the record as a whole, the Court concludes that
24 the ALJ's rejection of plaintiff's alleged fibromyalgia as a medically determinable

1 impairment based on a finding that “it is readily apparent no diagnosis of fibromyalgia
2 was ever made” is not based on substantial evidence in the record as a whole. AR.
3 14. In contrast, a rheumatologist, a neurologist, and plaintiff’s treating physician all
4 diagnosed plaintiff with fibromyalgia following examination.

5 The ALJ also found that fibromyalgia was repeated in the record as part of
6 plaintiff’s history, “but with no objective finding to support it.” AR. 13. This finding, too,
7 is not based on substantial evidence in the record as a whole. Plaintiff’s treating
8 physician, Dr. Carter, examined plaintiff and noted that plaintiff “is tender at 12/18
9 trigger points for fibromyalgia.” AR. 512. As noted by the ALJ, “SSR 12-2p, Evaluation
10 of Fibromyalgia Requires ‘at least 11 tender points on physical examination.’”
11 AR. 13 (internal citation omitted). As plaintiff’s treating physician observed 12 tender
12 points at the “trigger points for fibromyalgia,” this requirement appears to be met. *See*
13 AR. 512. Although defendant contends that the other elements are not met for this set of
14 criteria for fibromyalgia, in addition to the trigger points, the record contains evidence of
15 widespread pain, and evidence that the doctor considered other disorders which could
16 cause the symptoms but excluded them. *See* AR. 442 (plaintiff was referred to neurology
17 and rheumatology for second opinions regarding his widespread pain and multiple
18 complaints), 445 (Dr. Nguyen examined plaintiff, noting that plaintiff “has diffuse pain
19 on palpation throughout his entire paraspinal spine region from neck from tailbone”), AR.
20 446 (Dr. Nguyen indicated that plaintiff “does not appear to have any obvious joint
21 deformity or synovitis or rash or any systemic symptoms to suggest an inflammatory
22 condition [but instead, plaintiff’s] history, clinical symptoms and exam findings are most
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1 consistent with fibromyalgia”); *see also* Dkt. 11, p. 4. As already noted, the examining
2 rheumatologist examined plaintiff specifically with an eye towards providing a second
3 opinion regarding the diagnosis of fibromyalgia, and then diagnosed plaintiff with
4 fibromyalgia. AR. 441, 446, 455.

5 It is true, however, as noted by the ALJ, that “Dr. Nguyen performed a physical
6 exam, but did not note any trigger point.” AR. 13 (citation omitted). It is also true that
7 plaintiff’s treating physician observed 12 tender points, but did not specify the location of
8 these tender points, thereby creating an ambiguity as to whether these tender points
9 qualify to establish the diagnosis of fibromyalgia for purposes of the Social Security Act.
10 *See* AR. 512. As acknowledged by plaintiff, the “positive tender points must be found
11 bilaterally (on the left and right sides of the body) and both above and below the waist,”
12 when attempting to demonstrate fibromyalgia with the 1990 ACR Criteria for the
13 Classification of Fibromyalgia. *See* Dkt. 10, p. 5 (quoting SSR 12-2p) (other citations
14 omitted). While Dr. Carter noted that the tender points were bilateral, he did not indicate
15 whether they were found both above and below the waist. *See* AR. 512.

17 Although plaintiff has presented both subjective and objective evidence of
18 fibromyalgia, along with multiple diagnoses, it appears that the record is ambiguous
19 regarding plaintiff’s alleged fibromyalgia.

20 The ALJ “has an independent ‘duty to fully and fairly develop the record and to
21 assure that the claimant’s interests are considered.’” *Tonapetyan v. Halter*, 242 F.3d
22 1144, 1150 (9th Cir. 2001) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir.
23 1996) (quoting *Brown v. Heckler*, 713 F.2d 411, 443 (9th Cir. 1983) (per curiam))). The
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1 ALJ's "duty exists even when the claimant is represented by counsel." *Brown, supra*, 713
2 F.2d at 443 (citing *Driggins v. Harris*, 657 F.2d 187, 188 (8th Cir. 1981)). However, the
3 ALJ's duty to supplement the record is triggered only if there is ambiguous evidence or if
4 the record is inadequate to allow for proper evaluation of the evidence. *Mayer v.*
5 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144,
6 1150 (9th Cir. 2001) (citing *Smolen, supra*, 80 F.3d at 1288 (other citation omitted)).
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8 Although it may be the case that aspects of the record that have not been
9 referenced to the Court would allow for a full review of plaintiff's fibromyalgia, it
10 appears that the record may need to be developed further on this issue.

11 The ALJ found that fibromyalgia is not a medically determinable impairment,
12 relying on the findings that there was no firm diagnosis of fibromyalgia and that there
13 was no objective finding to support any diagnosis of fibromyalgia. However, as just
14 discussed, both of these findings are not based on substantial evidence in the record as a
15 whole. Therefore, the Court concludes that the ALJ erred when evaluating plaintiff's
16 alleged fibromyalgia. The Court also concludes that the error is not harmless.

17 The Ninth Circuit has "recognized that harmless error principles apply in the
18 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
19 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
20 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
21 *Stout* that "ALJ errors in social security are harmless if they are 'inconsequential to the
22 ultimate nondisability determination' and that 'a reviewing court cannot consider [an]
23 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
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1 crediting the testimony, could have reached a different disability determination.”” *Marsh*
2 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In
3 *Marsh*, even though “the district court gave persuasive reasons to determine
4 harmless,” the Ninth Circuit reversed and remanded for further administrative
5 proceedings, noting that “the decision on disability rests with the ALJ and the
6 Commissioner of the Social Security Administration in the first instance, not with a
7 district court.” *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

8
9 In addition to finding that plaintiff’s alleged fibromyalgia is not a medically
10 determinable impairment, the ALJ found that plaintiff did not have any severe physical
11 impairments, finding that plaintiff’s only severe impairment is affective disorder. AR. 12;
12 *see also* AR. 16 (giving significant weight to a 2011 opinion from Dr. Carter that there
13 was no physical impairment, but failing to note Dr. Carter’s 2014 opinion that plaintiff
14 suffered from fibromyalgia, with 12 out of 18 tender points, even though the period of
15 time being reviewed by the ALJ is from August 28, 2013 through August 18, 2015). It is
16 likely that the finding that plaintiff suffered from the impairment of fibromyalgia, as
17 opposed to not having any severe impairment other than an affective disorder, would
18 affect the findings regarding what limitations plaintiff has and what work related tasks he
19 is capable of performing. Therefore, the Court cannot conclude with confidence “that no
20 reasonable ALJ, when fully crediting [the impairment of fibromyalgia], could have
21 reached a different disability determination.”” *Marsh*, 792 F.3d at 1173 (citing *Stout*, 454
22 F.3d at 1055-56). It also does not appear that the ALJ considered whether plaintiff’s
23 alleged fibromyalgia equaled a Listed Impairment at step three, *see* AR. 14, and it does
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1 not appear that any limitations were included in plaintiff's residual functional capacity to
2 accommodate any physical impairment. *See* AR. 15.

3 Therefore, the error is not harmless, and this matter needs to be reversed and
4 remanded for further administrative proceedings. However, the Court does not find
5 persuasive plaintiff's request that this matter be reversed with a direction to award
6 benefits. This record contains conflicts in the medical evidence, and plaintiff has not
7 directed the Court to evidence in the record establishing the diagnosis for fibromyalgia,
8 as it is construed for purposes of the Social Security Act.

9
10 Here, outstanding issues must be resolved, including whether or not plaintiff's
11 alleged fibromyalgia meets the definition of fibromyalgia relevant for Social Security.
12 The Court should not reverse with a direction to award benefits when outstanding issues
13 must be resolved. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1100 (9th
14 Cir. 2014) (quoting *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) ("we generally
15 remand for an award of benefits only in the 'rare circumstances,' *Moisa*, 367, F.3d at 886,
16 'where no useful purpose would be served by further administrative proceedings and the
17 record has been thoroughly developed"). The ALJ is responsible for resolving
18 ambiguities and conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722
19 (9th Cir. 1998) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

20
21 Regarding plaintiff's headaches, the Court notes that the ALJ relied on plaintiff's
22 MRI and the opinion of the neurologist to support the rejection of plaintiff's chronic
23 headaches as severe. *Id.* However, when reviewing the MRI, the neurologist noted that
24 the MRI revealed small "foci of increased T2 signal present within the ventricular white

1 matter most prominent right parietal.” AR. 302. Furthermore, he opined that the pattern
2 “is nonspecific, most suggestive of white matter changes associated with migraine, less
3 likely multiple sclerosis or vasculitis.” *Id.* Therefore, the record demonstrates that the
4 neurologist interpreted the MRI as demonstrating “changes associated with migraine,” as
5 opposed to the finding by the ALJ that the MRI is inconsistent with a finding of
6 headaches as a severe impairment. The Court concludes that the ALJ’s finding that the
7 MRI results support his finding that headaches are not severe is not a finding based on
8 substantial evidence in the record as a whole. Therefore, this aspect of the medical
9 record, too, should be evaluated following remand of this matter.
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11 Similarly, the Court already has concluded that the ALJ erred in reviewing the
12 medical evidence and that this matter should be reversed and remanded for further
13 consideration, *see supra*, section 1. The Court concludes that the medical opinion
14 evidence provided by plaintiff’s treating and examining physicians also should be
15 assessed anew following remand of this matter.

16 In addition, because the Court already has concluded that the ALJ erred in
17 reviewing the medical evidence and that this matter should be reversed and remanded for
18 further consideration, *see supra*, section 1, the RFC necessarily must be evaluated anew
19 following remand of this matter.
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21 **(2) Whether the ALJ made improper adverse credibility findings
22 regarding plaintiff’s testimony.**

23 The Court already has concluded that the ALJ erred in reviewing the medical
24 evidence and that this matter should be reversed and remanded for further consideration,

1 *see supra*, section 1. In addition, the evaluation of a claimant's statements regarding
2 limitations relies in part on the assessment of the medical evidence. *See* 20 C.F.R. §
3 404.1529(c); SSR 16-3p, 2016 SSR LEXIS 4. Therefore, plaintiff's testimony and
4 statements should be assessed anew following remand of this matter.

5 CONCLUSION

6 The Court concludes that the ALJ erred when evaluating the medical evidence.
7 The ALJ erroneously relied on two findings not based on substantial evidence when
8 evaluating plaintiff's alleged fibromyalgia; the lack of a diagnosis and lack of objective
9 support for this impairment. Both exist and this error is not harmless.
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11 Based on these reasons and the relevant record, the Court **ORDERS** that this
12 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
13 405(g) to the Acting Commissioner for further consideration consistent with this order.

14 **JUDGMENT** should be for plaintiff and the case should be closed.

15 Dated this 23rd day of June, 2017.

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18 J. Richard Creatura
19 United States Magistrate Judge
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