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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 PEGGY LOUISE WILLIAMS,
11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,
15 Defendant.

CASE NO. 15-cv-05352 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

16
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. 12, 13, 14).

21 After considering and reviewing the record, the Court concludes the ALJ failed to
22 develop the record on plaintiff's fibromyalgia diagnosis and resulting limitations. The
23 medical records from plaintiff's treating physician are largely illegible, raising ambiguity
24

1 as whether those documents contain the diagnostic criteria necessary for a diagnosis of
2 fibromyalgia. In the absence of legible records, the ALJ had a duty to develop the record,
3 which she failed to do. The error is not harmless because the illegible records may
4 contain symptoms and limitations stemming from fibromyalgia not considered by the
5 ALJ. The case is reversed and remanded for further proceedings.

6 BACKGROUND

7
8 Plaintiff, PEGGY LOUISE WILLIAMS, was born in 1951 and was 59 years old
9 on the alleged date of disability onset of July 24, 2011 (*see* AR. 160-61). Plaintiff
10 obtained her GED (AR. 44). Plaintiff has work experience as office manager in a law
11 office (AR. 46). This job ended when she was no longer able to perform the work due to
12 cancer treatment (AR. 47).

13 According to the ALJ, plaintiff has at least the severe impairments of “status post
14 treatment for cancer with hand and foot pain and numbness (20 CFR 404.1520(c))” (AR.
15 26).

16 At the time of the hearing, plaintiff was living with her husband and dog (AR. 43).

17 PROCEDURAL HISTORY

18 Plaintiff’s application for disability insurance (“DIB”) benefits pursuant to 42
19 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
20 reconsideration (*see* AR. 89-96, 97-105). Plaintiff’s requested hearing was held before
21 Administrative Law Judge Rebekah Ross (“the ALJ”) on July 17, 2013 (*see* AR. 38-87).
22 On August 9, 2013, the ALJ issued a written decision in which the ALJ concluded that
23 plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 21-37).
24

1 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or
2 not the ALJ failed to develop the record regarding plaintiff's alleged fibromyalgia at step
3 2; (2) Whether or not the ALJ erred by failing to incorporate into the RFC any significant
4 functional limitations caused by severe hand and foot pain and numbness found by the
5 ALJ at step 2; (3) Whether or not the ALJ erred by finding plaintiff not credible; (4)
6 whether or not the ALJ rejected lay witness testimony for improper reasons; and (5)
7 Whether or not the ALJ's step 4 determination was supported by substantial evidence or
8 was contrary to the law and facts (*see* Dkt. 12, p. 1). Because resolving the first issue is
9 dispositive, the Court will assume that upon remand, the ALJ will reevaluate the entire
10 record for the purpose of reaching a decision.
11

12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
14 denial of social security benefits if the ALJ's findings are based on legal error or not
15 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
16 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
17 1999)).
18

19 DISCUSSION

20 (1) Whether or not the ALJ failed to develop the record regarding plaintiff's
21 alleged fibromyalgia at step 2

22 At step two of the disability evaluation analysis, the ALJ omitted fibromyalgia as a
23 severe impairment after finding "there is no evidence in the record to support
24 [fibromyalgia] being a medically determinable impairment." (AR. 27). Step-two of the

1 administration's evaluation process requires the ALJ to determine if the claimant "has a
2 medically severe impairment or combination of impairments." *Smolen v. Chater*, 80 F.3d
3 1273, 1289-90 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§ 404.1520(a)(4)(ii),
4 416.920(a)(4)(ii) (1996). An impairment is "not severe" if it does not "significantly limit"
5 the ability to conduct basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). "An
6 impairment or combination of impairments can be found 'not severe' only if the evidence
7 establishes a slight abnormality that has 'no more than a minimal effect on an
8 individual[']s ability to work.'" *Smolen, supra*, 80 F.3d at 1290 (quoting Social Security
9 Ruling "SSR" 85-28) (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)).

11 The step-two analysis is "a *de minimis* screening device to dispose of groundless
12 claims," when the disability evaluation process ends at step two. *Smolen, supra*, 80 F.3d
13 at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)). To meet this low
14 threshold, the claimant must provide evidence from "acceptable medical sources" to
15 establish a "medically determinable impairment." 20 C.F.R. § 404.1513(a). "An
16 'impairment' must result from anatomical, physiological, or psychological abnormalities
17 that can be shown by medically acceptable clinical and laboratory diagnostic techniques."
18 Social Security Ruling ("SSR") 96-4p; *see also Ukolov v. Barnhart*, 420 F.3d 1002, 1005
19 (9th Cir. 2005). To prove a severe impairment, the record must include results of these
20 "medically acceptable clinical diagnostic techniques." *Ukolov, supra*, 420 F.3d at 1005.
21 Symptomology, alone, cannot establish a severe impairment. SSR 96-4p; *Ukolov, supra*,
22 420 F.3d at 1005. Here, the ALJ found a lack of objective medical evidence to support
23 the fibromyalgia diagnosis (AR. 27).
24

1 Plaintiff argues that the ALJ failed in the duty to properly develop the record on
2 her fibromyalgia diagnosis. The ALJ “has an independent ‘duty to fully and fairly
3 develop the record and to assure that the claimant’s interests are considered.’”
4 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting *Smolen v. Chater*, 80
5 F.3d 1273, 1288 (9th Cir. 1996) (quoting *Brown v. Heckler*, 713 F.2d 411, 443 (9th Cir.
6 1983) (per curiam))). The “duty exists even when the claimant is represented by
7 counsel.” *Brown, supra*, 713 F.2d at 443 (citing *Driggins v. Harris*, 657 F.2d 187, 188
8 (8th Cir. 1981)). However, the ALJ's duty to supplement the record is triggered only if
9 there is ambiguous evidence or if the record is inadequate to allow for proper evaluation
10 of the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan*
11 *v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (citing *Smolen, supra*, 80 F.3d at 1288
12 (other citation omitted)). Here, the Commissioner contends the duty was not triggered
13 because the record was more than adequate to determine plaintiff’s fibromyalgia was not
14 a medically determinable impairment (Dkt. 13, p. 3). The Court disagrees.

16 Under SSR 12-2p, fibromyalgia is considered a medically determinable
17 impairment with a physician diagnosis and evidence meeting either the 1990 American
18 College of Rheumatology Criteria for Classification of Fibromyalgia or the 2010
19 American College of Rheumatology Preliminary Diagnostic Criteria. SSR 12-2p. These
20 diagnostic regimes establish two different sets of specific medical findings necessary for
21 a fibromyalgia diagnosis. SSR 12-2p. A recent Ninth Circuit case requires the ALJ
22 consider both sets of diagnostic criteria when evaluating the medical evidence. *See*,
23 *Rounds v. Comm’r of Soc. Sec. Admin.*, 795 F.3d 1177, 1185 (9th Cir. 2015).
24

1 At the hearing, the ALJ inquired as to whether plaintiff had a diagnosis of
2 fibromyalgia by the American College of Rheumatology criteria (AR. 42). Plaintiff's
3 counsel stated the records contained a diagnosis of fibromyalgia but they were unclear as
4 to tender point testing¹ (AR. 42). Counsel further noted the medical records from
5 plaintiff's treating physician at Orchard Medical were largely illegible and difficult to
6 decipher due to the doctor's handwriting (AR. 42). Examination of the medical records
7 confirms reference to fibromyalgia as a chronic problem as of October 2011 (AR. 267).
8 The diagnosis is discernible in subsequent records, but any details of symptoms, physical
9 examinations, or diagnostics are indecipherable. (AR. 462-76). The Court is unable to
10 determine whether plaintiff's physician conducted any of the required testing or gave an
11 opinion on plaintiff's diagnosis or limitations. Given the illegibility of the medical
12 records, it is difficult for the Court to determine whether or not there is substantial
13 evidence supporting the ALJ's opinion that fibromyalgia was not a medically
14 determinable impairment.
15

16 With respect to fibromyalgia, The Administration "cannot rely upon the
17 physician's diagnosis alone. The evidence must document that the physician reviewed the
18 person's medical history and conducted a physical exam." Social Security Ruling, SSR
19 12-2p, available at 2012 SSR LEXIS 1, at *3, 2012 WL 3017612. Here, the physician's
20 documentation is illegible and, therefore, inadequate to allow for proper evaluation of the
21 medical evidence. This ambiguity triggers the ALJ's duty to develop the record. *See*
22

23 ¹ A tender point testing result of 11 positive tender points on physical examination is one
24 of the requirements of the 1990 ACR Criteria for classification of fibromyalgia.

1 | *Tonapetyan, supra*, 242 F.3d at 1150; *Mayes, supra*, 276 F.3d at 459-60. Furthermore,
2 | where the evidence is insufficient to establish a medically determinable diagnosis of
3 | fibromyalgia, SSR 12-2p suggests resolution of the insufficiency by recontacting the
4 | medical source or requesting additional records. SSR 12-2p * 4. In this case, the ALJ
5 | made no effort to resolve the insufficiency in the record. The ALJ’s failure to develop the
6 | record was error.

7 |
8 | The Commissioner argues any error is harmless because the ALJ considered the
9 | impact of both severe and non-severe conditions in evaluating plaintiff’s RFC (Dkt. 13, p.
10 | 3-4). However, when an ALJ fails to find an impairment severe, the error is not
11 | necessarily harmless just because the ALJ proceeds to subsequent steps in the sequential
12 | disability evaluation process. *See Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012).
13 | Exclusion of a severe impairment may result in a residual functional capacity that is
14 | incomplete, flawed, and not supported by substantial evidence in the record.” *See id.*
15 | When the RFC is incomplete, the hypothetical question presented to the vocational expert
16 | is also incomplete. *See id.* at 1162. As a result, the ALJ’s reliance on the vocational
17 | expert’s testimony is improper and the denial of benefits is not supported by the record.
18 | *See id.*

19 | The Ninth Circuit has “recognized that harmless error principles apply in the
20 | Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
21 | (*citing Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
22 | Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
23 | *Stout* that “ALJ errors in social security are harmless if they are ‘inconsequential to the
24 |

1 ultimate nondisability determination,' *Marsh v. Colvin*, 792 F.3d 1170, 2015 U.S. App.
2 LEXIS 11920 at *7-*8 (9th Cir. July 10, 2015) (citing *Stout*, 454 F.3d at 1055-56).

3 Here, the ALJ's error was not harmless because the illegibility of the medical
4 records raises doubt as to the accuracy of the RFC. The indecipherable records from
5 plaintiff's treating physician may contain symptoms, limitations, and medical opinions
6 not included in the ALJ's analysis and RFC determination. Until the ALJ resolves the
7 insufficiency in the record, the ALJ was in no position to properly evaluate the evidence.
8

9 Therefore, the case must be reversed and remanded for proceedings to further
10 develop the record.

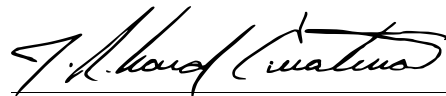
11 As for the other issues raised by plaintiff, the ALJ is directed to reevaluate the
12 record anew on remand, in light of the comments set forth above.

13 CONCLUSION

14 Based on these reasons and the relevant record, the Court **ORDERS** that this
15 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
16 405(g) to the Acting Commissioner for further consideration consistent with this order.

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

18 Dated this 10th day of November, 2015.

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21 J. Richard Creatura
22 United States Magistrate Judge
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