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

10 JENNIFER B.,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Deputy
14 Commissioner of Social Security for
Operations,

15 Defendant.

CASE NO. 3:18-cv-05046 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

16 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local
17 Magistrate Judge Rule MJR 13. *See also* Consent Filed by Plaintiff To Proceed Before a
18 Magistrate Judge, Dkt 5. This matter has been fully briefed. *See* Dkt. 11, 12, 13.

19 After considering and reviewing the record, the Court concludes that the ALJ erred at
20 step 3 when she made a boilerplate finding that plaintiff's degenerative disc disease did not meet
21 the requirements of listing 1.04, regarding spinal disorders. The ALJ's analysis was insufficient
22 to rule out listing 1.04(B), and her error was harmful because had she found that plaintiff's
23 degenerative disc disease met the listing, her ultimate nondisability determination would have
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1 differed. Thus, this Court reverses and remands for a new hearing. In doing so, however, this
2 Court rejects plaintiff’s argument that the ALJ must consider new evidence related to plaintiff’s
3 2017 surgery, on the basis that plaintiff fails to show good cause for consideration of this
4 evidence.

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6 BACKGROUND

7 Plaintiff Jennifer B. was born in May 1978 and was 35 years old on the alleged date of
8 disability onset of July 1, 2013. AR. 233. Plaintiff’s highest level of education was three years
9 of college. AR. 389. Plaintiff worked as a health unit coordinator, receptionist, medical
10 assistant, teacher’s aide, and warehouse filler. AR. 390. She left her most recent job, as a
11 warehouse filler, because of her conditions. *See* AR. 389–90.

12 According to the ALJ, plaintiff has at least the severe impairments of status post bilateral
13 carpal tunnel release; cervical, lumbar, and thoracic degenerative changes and disc protrusion;
14 sleep apnea; polysubstance abuse disorder in remission on agonist therapy; and “anxiety
15 disorder, depression.” AR. 85.

16 At the time of the hearing, plaintiff lived with her family. AR. 182.

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18 PROCEDURAL HISTORY

19 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42 U.S.C. §
20 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42 U.S.C. §
21 1382(a) (Title XVI) of the Social Security Act were denied initially and following
22 reconsideration. *See* AR. 244, 257, 301, 307. Plaintiff’s requested hearing was held before
23 Administrative Law Judge Stephanie Martz (the “ALJ”) on January 21, 2016. AR. 176. On June
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1 24, 2016, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not
2 disabled pursuant to the Social Security Act. AR. 96.

3 In September 2017, plaintiff obtained an extension of time to submit additional evidence.
4 AR. 16. On November 22, 2017, after plaintiff submitted the additional evidence, the Appeals
5 Council denied plaintiff's request for review, making the written decision by the ALJ the final
6 agency decision subject to judicial review. See AR. 1-2; 20 C.F.R. § 404.981. In January 2018,
7 plaintiff filed a complaint in this Court seeking judicial review of the ALJ's written decision.
8 See Dkt. 3. Defendant filed the sealed administrative record regarding this matter on March 27,
9 2018. See Dkt. 7.

10 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) whether the ALJ
11 erred because she failed to properly examine whether plaintiff met listing 1.04; (2) whether the
12 ALJ should re-examine whether plaintiff met listing 1.04 in light of new evidence regarding
13 plaintiff's May 2017 surgery; (3) whether the ALJ erred in evaluating plaintiff's mental health
14 impairments; and (4) whether the ALJ erred when she evaluated the opinion evidence. Dkt. 11,
15 at 2.

16 17 STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
19 social security benefits if the ALJ's findings are based on legal error or not supported by
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
21 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).
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1 A. Evidence of nerve root compression characterized by neuro-anatomic
2 distribution of pain, limitation of motion of the spine, motor loss (atrophy with
3 associated muscle weakness or muscle weakness) accompanied by sensory or reflex
4 loss and, if there is involvement of the lower back, positive straight-leg raising test
5 (sitting and supine);

6 or

7 B. Spinal arachnoiditis, confirmed by an operative note or pathology report of
8 tissue biopsy, or by appropriate medically acceptable imaging, manifested by
9 severe burning or painful dysesthesia, resulting in the need for changes in position
10 or posture more than once every 2 hours;

11 or

12 C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings
13 on appropriate medically acceptable imaging, manifested by chronic nonradicular
14 pain and weakness, and resulting in inability to ambulate effectively, as defined in
15 1.00B2b.

16 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04.

17 The ALJ stated that the record did not contain evidence of a compromised nerve root or
18 spinal cord, a requirement for degenerative disc disease to meet listing 1.04. AR. 86. But the
19 ALJ simply restated listing 1.04 without discussing the medical records or evaluating the
20 evidence. *See* AR. 86.

21 In rendering a decision, an ALJ must provide the reasoning underlying her decision “in a
22 way that allows for meaningful review.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
23 2015). Standing alone, a boilerplate statement that the record does not contain evidence of a
24 compromised nerve root or spinal cord is insufficient for this Court to meaningfully review the
ALJ’s decision. Affirming the ALJ’s decision would require this Court to independently review
the record to determine whether there is any evidence of nerve root/spinal cord compromise,
weigh that evidence, and make its own finding under listing 1.04. But that is not the function of
this Court. *See Brown-Hunter*, 806 F.3d at 492 (quoting *Marsh v. Colvin*, 792 F.3d 1170, 1173
(9th Cir. 2015)) (a district court may not “substitute [its] own discretion for that of the agency”

1 because “the decision on disability rests with the ALJ and the Commissioner . . . in the first
2 instance, not with a district court.”).

3 This Court notes that under *Lewis*, the ALJ’s finding would be sufficient if elsewhere in
4 her decision, the ALJ discussed and evaluated evidence of nerve root/spinal cord compromise.
5 *See* 236 F.3d at 513. The extent of the ALJ’s discussion and evaluation of such evidence,
6 however, was her conclusion that plaintiff’s degenerative disc disease was a “severe” impairment
7 at step 2. AR. 85. Simply stating that “[t]he objective medical evidence . . . establishes the
8 above physical and mental health impairments [including degenerative disc disease] and supports
9 finding that each more than minimally affects the claimant’s ability to perform basic work
10 activities” certainly does not constitute discussing and evaluating evidence. *See* AR. 85.
11 Moreover, the evidence cited by the ALJ at step 2 includes evidence of spinal cord compromise:
12 2014 x-ray results showed a congenital vertebral deformity that could potentially result in spinal
13 scoliosis. AR. 623.

14 Defendant points to the ALJ’s finding in a different portion of her decision that there
15 were “minimal and mild examination findings” that were “inconsistent with the claimant’s
16 allegations of severely limiting pain.” AR. 90; *see* Dkt. 12, at 3 & n.3. Defendant argues that
17 this finding was essentially the same as finding no evidence of spinal cord or nerve root
18 compromise. *See* Dkt. 12, at 3. This Court disagrees: again, the ALJ did not make any specific
19 finding ruling out nerve root or spinal compromise. *See* AR. 90. Rather, the ALJ simply
20 discussed whether or not the record supported plaintiff’s allegations of severely limiting pain.

21 This Court notes that the ALJ did make findings in other portions of her decision that
22 effectively ruled out listing 1.04(A) and 1.04(C). The ALJ found no evidence of limited spinal
23 motion or motor loss accompanied by sensory or reflex loss, as required to meet listing 1.04(A).

1 See AR. 90 (finding good range of motion in all major joints and normal motor function based on
2 physical examination results); 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04(A). And the ALJ
3 found no evidence of an inability to ambulate effectively, as required to meet listing 1.04(C).
4 See AR. 90 (finding that treating providers documented that plaintiff had a normal gait); 20
5 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04(C).

6 However, as to listing 1.04(B), the ALJ made no findings regarding whether plaintiff
7 suffered from confirmed spinal arachnoiditis, had severe burning or painful dysesthesia, or
8 required postural changes more than once every two hours because of arachnoiditis. See AR.
9 82–96; 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 1.04(B). Thus, the ALJ erred at step 3 because the
10 ALJ’s boilerplate finding was insufficient to determine whether plaintiff met listing 1.04(B).
11 Specifically, the ALJ failed to evaluate and discuss evidence of whether plaintiff had nerve
12 root/spinal cord compromise and the requirements of listing 1.04(B) in her decision.

13 **2. New evidence**

14 Plaintiff argues that if this Court remands for further proceedings, the ALJ should
15 consider new evidence that plaintiff submitted to this Court—evidence of a 2017 spinal surgery.
16 See Dkt. 11, at 6.

17 Where, as here, a plaintiff seeks to have this Court consider evidence that is not part of
18 the record and that plaintiff submitted to neither the ALJ nor the Appeals Council, sentence 6 of
19 42 U.S.C. § 405(g) applies. Sentence 6 requires that plaintiff show that the new evidence is
20 material and that there is good cause for failure to incorporate the evidence into the record. 42
21 U.S.C. § 405(g); see also *Mayes v. Massanari*, 276 F.3d 453, 463 (9th Cir. 2001) (plaintiff must
22 demonstrate good cause for failure to provide the evidence earlier).

1 Here, the medical records that plaintiff seeks to have admitted are from May 2017. *See*
2 Dkt. 13-1, 13-2. Previously, plaintiff obtained an extension to submit additional information to
3 the Appeals Council and submitted those additional records in October 2017. *See* AR. 8.
4 However, the additional records submitted were records from 2014 to 2016; plaintiff did not
5 submit records from May 2017. *See* AR. 2 (summarizing the additional evidence submitted to
6 the Appeals Council).

7 Plaintiff provides no explanation for her failure to submit the May 2017 records earlier.
8 *See* Dkt. 11, at 6; Dkt. 13, at 2. Notably, in October 2017, plaintiff apparently submitted other
9 medical records but not the May 2017 records that she now seeks to have considered. *See* AR. 2,
10 8. Without any attempt to meet her burden to show good cause, this Court will not grant
11 plaintiff's request to direct the ALJ to consider plaintiff's new evidence. *See Mayes*, 276 F.3d at
12 463. This order is without prejudice, if plaintiff chooses to re-apply to the ALJ for submission of
13 additional evidence upon a showing of good cause.

14 **3. Not harmless error and remand for further proceedings**

15 In the Social Security context, error may be harmless if it “was inconsequential to the
16 ultimate nondisability determination.” *Stout v. Cmm’r*, 454 F.3d 1050, 1055 (9th Cir. 2006).
17 Here, had the ALJ properly considered plaintiff's degenerative disc disorder at step 3, the ALJ
18 may have determined that plaintiff satisfied listing 1.04(B), a determination that would have
19 changed the ultimate nondisability determination. Accordingly, the error was not harmless.

20 Plaintiff argues that a remand for an award of benefits, rather than further proceedings, is
21 appropriate. Dkt. 11, at 2. A remand for an award of benefits is appropriate in only rare
22 circumstances, including where further administrative proceedings would not be useful. *See*
23 *Treichler v. Cmm’r*, 775 F.3d 1090, 1103 (9th Cir. 2014). Here, because the ALJ made no
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1 finding regarding listing 1.04(B) and because the ALJ is in a better position than this court to
2 evaluate the evidence, remand is appropriate. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th
3 Cir. 1990).

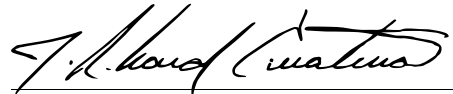
4 On remand, should the ALJ find that plaintiff's medical evidence is insufficient to satisfy
5 the requirements of a listing at step 3, the ALJ should continue the disability evaluation to steps 4
6 and 5. *See id.* at 176–77. Thus, the ALJ must reconsider the medical opinion evidence and
7 plaintiff's credibility, and this Court does not address plaintiff's remaining arguments.

8
9 CONCLUSION

10 Based on these reasons and the relevant record, the Court **ORDERS** that this
11 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
12 405(g).

13 **JUDGMENT** should be for the plaintiff, and the case should be closed.

14 Dated this 27th day of November, 2018.

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16 J. Richard Creatura
17 United States Magistrate Judge
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