

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 23, 2019

SEAN F. MCAVOY, CLERK

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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 CRISTELLA R. ,¹
8 Plaintiff,
9 vs.
10 ANDREW M. SAUL,
11 COMMISSIONER OF SOCIAL
12 SECURITY,²
13 Defendant.

No. 1:18-cv-03205-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 17, 18

13 Before the Court are the parties' cross-motions for summary judgment. ECF
14 Nos. 17, 18. The parties consented to proceed before a magistrate judge. ECF No.

15
16 ¹ To protect the privacy of plaintiffs in social security cases, the undersigned
17 identifies them by only their first names and the initial of their last names.

18 ² Andrew M. Saul is now the Commissioner of the Social Security Administration.
19 Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs
20 the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

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ORDER - 1

1 7. The Court, having reviewed the administrative record and the parties' briefing,
2 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
3 motion, ECF No. 17, and denies Defendant's motion, ECF No. 18.

4 **JURISDICTION**

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
6 1383(c)(3).

7 **STANDARD OF REVIEW**

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
13 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
14 (quotation and citation omitted). Stated differently, substantial evidence equates to
15 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
16 citation omitted). In determining whether the standard has been satisfied, a
17 reviewing court must consider the entire record as a whole rather than searching
18 for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
5 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
6 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
7 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
8 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
9 *Sanders*, 556 U.S. 396, 409-10 (2009).

10 **FIVE-STEP EVALUATION PROCESS**

11 A claimant must satisfy two conditions to be considered “disabled” within
12 the meaning of the Social Security Act. First, the claimant must be “unable to
13 engage in any substantial gainful activity by reason of any medically determinable
14 physical or mental impairment which can be expected to result in death or which
15 has lasted or can be expected to last for a continuous period of not less than twelve
16 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
17 impairment must be “of such severity that he is not only unable to do his previous
18 work[,] but cannot, considering his age, education, and work experience, engage in
19 any other kind of substantial gainful work which exists in the national economy.”
20 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
4 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
5 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis
9 proceeds to step two. At this step, the Commissioner considers the severity of the
10 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
11 claimant suffers from “any impairment or combination of impairments which
12 significantly limits [his or her] physical or mental ability to do basic work
13 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
14 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
15 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
16 §§ 404.1520(c), 416.920(c).

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §§
20 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more

1 severe than one of the enumerated impairments, the Commissioner must find the
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant’s impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
6 defined generally as the claimant’s ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant’s
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

13 If the claimant is capable of performing past relevant work, the Commissioner
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
15 If the claimant is incapable of performing such work, the analysis proceeds to step
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant’s
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
20 the Commissioner must also consider vocational factors such as the claimant’s age,

1 Appeals Council remanded Plaintiff's case for further administrative proceedings.
2 Tr. 380-85.

3 On August 24, 2016, Plaintiff appeared before a different ALJ for a second
4 hearing. Tr. 218-57. The ALJ deferred any decision on Plaintiff's claim until after
5 interrogatories were provided to a medical expert. Tr. 251-56. On March 22,
6 2017, Plaintiff appeared before the same ALJ for a third hearing. Tr. 258-98. On
7 September 21, 2017, the ALJ denied Plaintiff's claim. Tr. 12-45.

8 At step one of the sequential evaluation process, the ALJ found Plaintiff had
9 not engaged in substantial gainful activity since November 1, 2007. Tr. 18. At
10 step two, the ALJ found that Plaintiff had the following severe impairments:
11 neurocognitive disorder, affective/depressive disorder, opiate dependence, and pain
12 disorder. Tr. 18.

13 At step three, the ALJ found Plaintiff did not have an impairment or
14 combination of impairments that met or medically equaled the severity of a listed
15 impairment. Tr. 22. The ALJ then concluded that Plaintiff had the RFC to
16 perform light work with the following limitations:

17 [Plaintiff] cannot climb ladders, rope, or scaffolding. She can
18 occasionally stoop, kneel, crouch, crawl, and climb ramps and stairs.
19 She can frequently reach, handle, and finger bilaterally. She could
20 avoid unprotected heights or moving mechanical parts. She is limited
to performing unskilled work with a specific vocational preparation
(SVP) of two or less. She needs a work environment with few
workplace changes. She can have frequent interaction with
supervisors, coworkers, and the public. Due to her combination of

1 physical and psychological symptoms, she will be off-task up to ten
2 percent of her work shifts.

3 Tr. 25.

4 At step four, the ALJ found Plaintiff was unable to perform any past relevant
5 work. Tr. 34. At step five, the ALJ found that, considering Plaintiff's age,
6 education, work experience, RFC, and testimony from the vocational expert, there
7 were jobs that existed in significant numbers in the national economy that Plaintiff
8 could perform, such as small products assembler, electrical accessories assembler,
9 and office helper. Tr. 35-36. Therefore, the ALJ concluded Plaintiff was not
10 under a disability, as defined in the Social Security Act, from the alleged onset date
11 of November 1, 2007, though the date of the decision. Tr. 36.

12 On August 24, 2018, the Appeals Council denied review of the ALJ's
13 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
14 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

15 ISSUES

16 Plaintiff seeks judicial review of the Commissioner's final decision denying
17 her disability insurance benefits under Title II and supplemental security income
18 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
19 issues for review:

- 1 1. Whether the ALJ conducted a proper step-two analysis;
- 2 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 3 3. Whether the ALJ properly evaluated the medical opinion evidence; and
- 4 4. Whether the ALJ conducted a proper step-five analysis.

5 ECF No. 17 at 2.

6 DISCUSSION

7 A. Step Two

8 Plaintiff contends the ALJ erred by failing to identify her gastrointestinal
9 (GI) condition as a medically determinable impairment and by failing to identify
10 her spinal impairment as a severe impairment at step two. ECF No. 17 at 3-10.

11 At step two of the sequential process, the ALJ must determine whether the
12 claimant suffers from a "severe" impairment, i.e., one that significantly limits her
13 physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c),
14 416.920(c). To show a severe impairment, the claimant must first prove the
15 existence of a physical or mental impairment by providing medical evidence
16 consisting of signs, symptoms, and laboratory findings; the claimant's own
17 statement of symptoms alone will not suffice. 20 C.F.R. §§ 404.1521, 416.921.

18 An impairment is non-severe if "medical evidence establishes only a slight
19 abnormality or a combination of slight abnormalities which would have no more
20 than a minimal effect on an individual's ability to work...." Social Security Ruling

1 (SSR) 85-28 at *3. Therefore, an impairment is non-severe if it does not
2 significantly limit a claimant’s physical or mental ability to do basic work
3 activities, such as walking, standing, sitting, lifting, reaching, carrying, handling,
4 responding appropriately to supervision and usual work situations, and dealing
5 with changes in a routine work setting. 20 C.F.R. § 416.922 (2017); SSR 85-28 at
6 *3.

7 Step two is “a de minimus screening device [used] to dispose of groundless
8 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying
9 our normal standard of review to the requirements of step two, [the Court] must
10 determine whether the ALJ had substantial evidence to find that the medical
11 evidence clearly established that [Plaintiff] did not have a medically severe
12 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687
13 (9th Cir. 2005).

14 *1. Gastrointestinal Condition*

15 The ALJ found that Plaintiff did not have a GI condition that constituted a
16 medically determinable impairment, and that even if she did, the ALJ “account[ed]
17 for her pain symptoms by limiting her to light exertional labor with non-exertional
18 limitations.” Tr. 20. The ALJ erred. First, as argued by Plaintiff, the ALJ ignored
19 the evidence of record that detailed Plaintiff’s recurring abdominal adhesions.
20 ECF No. 17 at 4. On May 22, 2007, Plaintiff was admitted to Lourdes Medical

1 Center with complaints of abdominal pain, and five days later she had surgery to
2 resection her colon and to break up adhesions in her pelvic area and along her
3 small bowel. Tr. 778, 780. On November 8, 2007, Plaintiff had surgery for a
4 colostomy closure and more adhesions were found and lysed. Tr. 1564-65. On
5 January 2, 2008, a CT scan of Plaintiff's abdomen and pelvis showed a few loops
6 of distended small bowel in her pelvis, "suggesting adhesions." Tr. 1591. In April
7 2009, treating surgeon Robert Salisbury, M.D., noted that Plaintiff had pelvic pain
8 from "probable adhesions," and opined that this caused her to be severely limited
9 in her ability to stand, walk, lift, handle, and carry. Tr. 740. Dr. Salisbury
10 performed Plaintiff's hysterectomy on July 23, 2009, and multiple adhesions were
11 lysed during surgery. Tr. 1577. Her postoperative diagnosis was "[l]eft
12 hydrosalpinx with pelvic adhesive disease" and "probable uterine fibroids." Tr.
13 1577. On September 20, 2010, treating surgeon Ernesto Dizon, Jr., M.D. opined
14 that Plaintiff's abdominal pain was "likely from adhesions versus incisional
15 hernias." Tr. 1703. Dr. Dizon performed surgery on Plaintiff two weeks later, on
16 October 5, 2010, during which he laparoscopically lysed multiple adhesions. Tr.
17 1709. Dr. Dizon reported that he explored Plaintiff's abdominal cavity and noted
18 that it "took a while to lyse all the adhesions as these were significant adhesions."
19 Tr. 1709. On July 3, 2012, imaging of Plaintiff's upper GI and small bowel
20 revealed a "loop of mildly distended small bowel in the left upper quadrant and

1 mid abdomen which correlates with the palpable tenderness in [Plaintiff's]
2 abdomen" and "also correlates with the loop of abnormal bowel seen on recent
3 CT." Tr. 1715. Later that month, on July 20, 2012, Plaintiff underwent an
4 exploratory laparotomy and lysis of more adhesions by Dr. Dizon. Tr. 1681. Dr.
5 Dizon's postoperative diagnosis was chronic abdominal pain with intraabdominal
6 adhesions. Tr. 1681. Dr. Dizon again reported that this procedure revealed
7 "significant adhesions." Tr. 1681. He also noted, "in the lower abdomen near the
8 bladder, the omentum was quite adhered." Tr. 1681. Dr. Dizon performed an
9 inspection of Plaintiff's small bowel and reported a "[s]ignificant amount of
10 adhesions of the small bowel to the pelvis, as well [as] to other small bowel were
11 lysed using sharp dissection." Tr. 1681. Dr. Dizon observed "significant adhesion,
12 causing significant twisting and matting of small bowel loops." Tr. 1681. He
13 placed an antiadhesion barrier in Plaintiff's bladder area on top of the omentum.
14 Tr. 1681. However, just over five months later, on January 8, 2013, Plaintiff
15 underwent surgery with Dr. Dizon to remove her gallbladder, and more adhesions
16 were lysed. Tr. 1529. Dr. Dizon's postoperative diagnosis again included
17 "intraabdominal adhesions." Tr. 1529. Dr. Dizon reported, "of note, significant
18 adhesions of the omentum to the midline were noted and also the left lower
19 quadrant. [Plaintiff] has chronic right upper quadrant pain and left lower quadrant
20 pain." Tr. 1529. On August 5, 2013, treating ARNP Jason Roberts diagnosed

1 Plaintiff with peritoneal adhesions and noted “[p]eritoneal adhesions can cause
2 significant pain with many types of movement.” Tr. 980. On December 8, 2014,
3 ARNP Roberts noted that abdominal adhesions caused marked limitations in
4 Plaintiff’s ability to sit, stand, walk, lift, carry, handle, push, pull, reach, stoop, and
5 crouch. Tr. 1190. During the August 2013 hearing, Plaintiff testified that the main
6 reason she was unable to work was due to pain in the lower left part of her
7 abdomen. Tr. 189. She testified that Dr. Dizon told her the pain was caused by
8 “adhesive lesions.” Tr. 189. During the administrative hearings in August 2016
9 and March 2017, Plaintiff testified that she continued to have abdominal pain. Tr.
10 236, 272-74.

11 Second, the ALJ misrepresented the record related to Plaintiff’s GI
12 condition. The ALJ found that, contrary to her testimony, Plaintiff’s reviews of
13 symptoms had been negative for incontinence. Tr. 20 (citing Tr. 952, 1327).
14 While the records cited by the ALJ show that Plaintiff reported no urinary
15 incontinence, her symptom complaints involved bowel incontinence. *See* Tr. 952
16 (“negative for...urinary incontinence”); *see also* Tr. 1327 “negative...urinary
17 incontinence”). Moreover, despite the ALJ’s assertion that Plaintiff “has no
18 documented reports of incontinence to treatment providers,” on June 24, 2013, at a
19 consultation regarding her abdominal pain, Plaintiff reported to Amy Zeigler, PAC,
20 that she “occasionally leaks stool.” Tr. 988. On January 13, 2015, in a session

1 with Madora Althausser at Tri-Cities Community Health, Plaintiff reported that she
2 was partially or totally incontinent. Tr. 1734. Further, on May 21, 2015, Plaintiff
3 reported to Joelle Heikkila at Tri-Cities Community Health that she “continues to
4 experience frequent diarrhea which has been going on for approximately 7 years,
5 and said that there are times when she is unable to ‘feel it coming out’ affecting her
6 ability to plan or function in everyday events.” Tr. 1772. The ALJ also stated that
7 Plaintiff’s “work history otherwise indicates that she was able to continue working
8 despite the effects of any gastrointestinal (GI) impairment.” Tr. 19. However, at
9 the August 2013 hearing, Plaintiff testified that she understood the reason she was
10 let go from her job in November 2007 was because she was “missing too many
11 days of work because of the pain.” Tr. 191. At the March 2017 hearing, Plaintiff
12 testified that she was let go from her job in November 2007 because she was
13 missing a lot of work. Tr. 280. Based on this record, the ALJ’s conclusion that
14 Plaintiff’s GI condition was not a medically determinable impairment because she
15 had “generally normal clinical studies and examination findings” was not based on
16 substantial evidence. Tr. 20.

17 The ALJ erred when he failed to include a gastrointestinal condition as a
18 medically determinable impairment at step two. This error is not harmless. *See*
19 *Molina*, 674 F.3d at 1115 (an error is harmless only when it is “inconsequential to
20 the [ALJ’s] ultimate nondisability determination”). The ALJ stated that he

1 accounted for Plaintiff's pain symptoms from her GI condition by limiting her to
2 light work with non-exertional limitations. Tr. 20. "Light work involves lifting no
3 more than 20 pounds at a time with frequent lifting or carrying of objects weighing
4 up to 10 pounds...a job is in this category when it requires a good deal of walking
5 or standing, or when it involves sitting most of the time with some pushing and
6 pulling of arm or leg controls." 20 CFR §§ 404.1567(b), 416.967(b). The ALJ did
7 not place any limitations on Plaintiff's ability to walk or stand, nor did he include
8 any limitations to account for attendance issues. Tr. 25. As discussed *supra*, the
9 record reflects that Plaintiff's medical providers considered her abdominal
10 adhesions to be sufficiently serious as to require multiple procedures to lyse
11 significant adhesions. She was diagnosed by treating surgeon Dr. Dizon with
12 chronic abdominal pain with intraabdominal adhesions, Tr. 1681, and by treating
13 surgeon Dr. Salisbury with pelvic adhesive disease, Tr. 1577. Dr. Dizon opined
14 that Plaintiff's abdominal pain was "likely from adhesions versus incisional
15 hernias," Tr. 1703, and Dr. Salisbury opined that Plaintiff's pelvic pain was from
16 "probable adhesions," Tr. 740. Dr. Salisbury opined that Plaintiff's adhesions
17 caused her to be severely limited in her ability to stand, walk, lift, handle, and
18 carry, Tr. 740, and treating ARNP Roberts opined that her abdominal adhesions
19 caused marked limitations in Plaintiff's ability to sit, stand, walk, lift, carry,
20 handle, push, pull, reach, stoop, and crouch, Tr. 1190. Although the ALJ gave

1 only some weight to the opinion of Dr. Salisbury, the ALJ's discussion of Dr.
2 Salisbury's opinion was silent as to his diagnosis of and limitations assigned to
3 Plaintiff's adhesions. Tr. 28. The ALJ gave minimal weight to ARNP Roberts'
4 opinion that Plaintiff would miss four or more days of work per month due to pain
5 from her gastrointestinal adhesions, noting that ARNP Roberts "appears to have no
6 basis for his assessment besides [Plaintiff's] own reporting of longstanding pain
7 symptoms." Tr. 31-32. The ALJ's discussion of ARNP Roberts' opinion ignores
8 the diagnoses of intraabdominal adhesions and pelvic adhesive disease by
9 Plaintiff's treating surgeons. Tr. 1577, 1681.

10 The ALJ has committed harmful error in his finding at step two. Because
11 this error may impact multiple steps of the sequential evaluation process, on
12 remand, the ALJ must reassess the medical evidence at step two, reconsider
13 Plaintiff's symptom claims and the medical opinion evidence, reassess the RFC
14 and, if necessary, pose a new hypothetical to a vocational expert to ensure that it
15 properly includes all of Plaintiff's exertional and nonexertional limitations that are
16 supported by substantial evidence. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1165
17 (9th Cir. 2001) ("[a]n ALJ is free to accept or reject restrictions in a hypothetical
18 question that are not supported by substantial evidence.").

1 2. *Spinal Impairment*

2 The ALJ found that Plaintiff's spinal impairment was non-severe and that,
3 even if she did have a severe spinal impairment, "this impairment is
4 accommodated by limiting her to light exertional labor with non-exertional
5 limitations." Tr. 22. The ALJ erred. The ALJ concluded that the longitudinal
6 evidence, treatment records showing "generally adequate" management,
7 inconsistencies in the evidence, and Plaintiff's apparent malingering demonstrated
8 that Plaintiff did not have a severe spinal impairment. Tr. 22. However, an MRI
9 of Plaintiff's lumbar spine in December 2015 showed a broad-based degenerative
10 disc bulge flattening the ventral thecal sac and producing borderline mild canal
11 stenosis at L4-5. Tr. 1037. On July 11, 2016, Plaintiff had a facet joint steroid
12 injection in her lumbar spine. Tr. 1143. An MRI of her lumbar spine on August
13 17, 2016 showed disc bulges at L3-4 and L4-5. Tr. 1156. On September 26, 2016,
14 Plaintiff underwent spinal surgery. Tr. 1276. On December 30, 2016, after her
15 spinal surgery, an MRI of Plaintiff's lumbar spine showed moderate stenosis at L4-
16 5, and the L5 nerve roots were in close proximity to the disc with equivocal
17 impingement. Tr. 1278-79. The record reflects that Plaintiff's medical providers
18 considered Plaintiff's spinal impairment to be sufficiently serious as to require
19 spinal surgery and steroid injections, notwithstanding the pain medication that
20 Plaintiff was on for her lumbar condition. The record contains observations of

1 pain and limitations caused by Plaintiff's spinal impairment, Tr. 958-59, 1190, and
2 Plaintiff's reported limitations in sitting, standing, walking, bending, lifting,
3 pulling, and pushing, Tr. 276, 278, 283, 285-86, 1192. As with Plaintiff's GI
4 condition, the ALJ determined that, even if Plaintiff did have a severe spinal
5 impairment, this impairment was accommodated by limiting her to light exertional
6 labor with non-exertional limitations. Tr. 22. The ALJ failed to explain how the
7 RFC accommodated Plaintiff's spinal impairment and related symptoms.

8 Given that this matter is remanded for reconsideration of Plaintiff's GI
9 condition as discussed *supra*, on remand, the ALJ is directed to reconsider the
10 evidence related to Plaintiff's spinal impairment, reassess whether Plaintiff's spinal
11 impairment is a severe impairment, and determine whether it necessitates
12 additional exertional limitations in the RFC.

13 Typically, errors at step two are harmless if the step was resolved in a
14 claimant's favor because the sequential analysis continues. *See Stout v. Comm'r of*
15 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400
16 F.3d 676, 682 (9th Cir. 2005). Here, the error at step two was the result of the
17 ALJ's selective review of the medical evidence, as he disregarded and devalued
18 significant evidence related to abdominal adhesions and a spinal impairment that
19 necessitated steroid injections and surgery. The ALJ must consider all of the
20 relevant evidence in the record and may not point to only those portions of the

1 records that bolster his findings. *See, e.g., Holohan v. Massanari*, 246 F.3d 1195,
2 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely on some
3 entries in a claimant's records while ignoring others). Although the ALJ's analysis
4 continued beyond step two in this case, Plaintiff has shown through evidence in the
5 record that her GI condition and spinal impairment create limitations that have not
6 been accounted for in the RFC. *See Shinseki*, 556 U.S. at 409-10 (the party
7 challenging the ALJ's decision generally bears the burden of showing harm).
8 Therefore, the ALJ's error at step two in this case is not harmless. Further, the
9 ALJ's selective review of the record permeated the ALJ's entire decision and
10 impacted the analysis at the subsequent steps.

11 **B. Other Challenges**

12 Plaintiff raises several other challenges to the ALJ's evaluation of Plaintiff's
13 symptom claims and the medical opinion evidence, as well as the ALJ's step five
14 analysis. ECF No. 17 at 10, 20, 22. However, the ALJ's findings at other steps in
15 the sequential evaluation in this case inherently depend on the ALJ's findings
16 regarding the medically determinable and severe impairments at step two. Because
17 this case is remanded for the ALJ to reconsider Plaintiff's GI condition and spinal
18 impairment at step two, the Court declines to address Plaintiff's other challenges
19 here. However, the Court briefly addresses the following. First, if the ALJ is to
20 find that Plaintiff was malingering, the ALJ must reconsider his representation of

1 the record that Plaintiff’s allegations of disabling physical and psychological issues
2 were “severely undermined by *repeated* evidence of malingering in regards to
3 these complaints” when in fact there was only one medical source in the more than
4 1,800-page record to opine that Plaintiff was malingering. Tr. 27 (emphasis
5 added). Second, if the ALJ is to find that Plaintiff’s daily activities were
6 inconsistent with her alleged level of impairment, the ALJ must identify how
7 Plaintiff’s activities contradicted her testimony regarding her alleged symptoms.
8 *See Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014) (citing *Reddick v.*
9 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (“Recognizing that ‘disability claimants
10 should not be penalized for attempting to lead normal lives in the face of their
11 limitations,’ we have held that ‘[o]nly if [his] level of activity were inconsistent
12 with [a claimant’s] claimed limitations would these activities have any bearing on
13 [his] credibility.’”). The ALJ must consider Plaintiff’s testimony that her level of
14 activity was dependent upon whether she was having a good day or a bad day with
15 her pain level. *See, e.g.*, Tr. 194 (“I’ve got more bad days than good days”); Tr.
16 194 (“[T]oday was actually one of my good days and I was able to get up earlier
17 this morning and drive myself here. On the bad days, I can’t even get out of bed to
18 do anything”); Tr. 211 (Plaintiff testified that she wakes up around 6:30 a.m. on a
19 “good day”); Tr. 234 (“On my good days, I used to be able to at least go to the
20

1 store”); Tr. 279 (Plaintiff testified that on a “bad day,” she does not see anyone and
2 she does not know what is going on”).

3 The ALJ is instructed to conduct a new sequential analysis on remand,
4 including reassessing Plaintiff’s symptom claims and the medical opinion
5 evidence, and conducting a new analysis at step five in light of the new evaluation
6 of Plaintiff’s medically determinable and severe impairments at step two.

7 C. Remand

8 Plaintiff urges this Court to credit-as-true Plaintiff’s symptom claims and
9 several of the medical source opinions. ECF No. 17 at 13, 17-18, 22. “The
10 decision whether to remand a case for additional evidence, or simply to award
11 benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d 1226,
12 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985)).
13 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
14 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
15 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)
16 (“[T]he proper course, except in rare circumstances, is to remand to the agency for
17 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
18 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
19 cases, the Ninth Circuit has “stated or implied that it would be an abuse of
20 discretion for a district court not to remand for an award of benefits” when three

1 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
2 credit-as-true rule, where 1) the record has been fully developed and further
3 administrative proceedings would serve no useful purpose; 2) the ALJ has failed to
4 provide legally sufficient reasons for rejecting evidence, whether claimant
5 testimony or medical opinion; and 3) if the improperly discredited evidence were
6 credited as true, the ALJ would be required to find the claimant disabled on
7 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
8 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
9 the Court will not remand for immediate payment of benefits if “the record as a
10 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
11 F.3d at 1021.

12 Here, further proceedings are necessary. As discussed *supra*, substantial
13 evidence does not support the ALJ’s findings at step two. The ALJ’s findings at
14 step two permeated the entire decision, as Plaintiff’s symptom claims related to her
15 GI condition and spinal impairment were discredited, many of the medical source
16 opinions were discounted in part because the ALJ found they were based on
17 Plaintiff’s unreliable self-reports, and the ALJ’s findings at step five were based on
18 a hypothetical that was formulated under a flawed step two analysis. On remand,
19 the ALJ is to conduct a new sequential analysis, including reconsidering Plaintiff’s
20 symptom testimony and the medical opinion evidence, as well as considering the

1 testimony of a vocational expert if there is a new RFC in light of the new analysis
2 at step two relating to Plaintiff's GI condition and spinal impairment.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is not supported by substantial evidence and free of harmful legal
6 error. Accordingly, **IT IS HEREBY ORDERED:**

7 1. The District Court Executive is directed to substitute Andrew M. Saul as
8 the Defendant and update the docket sheet.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is **GRANTED**.

10 3. Defendant's Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

11 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
12 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
13 Security for further proceedings consistent with this recommendation pursuant to
14 sentence four of 42 U.S.C. § 405(g).

15 The District Court Executive is directed to file this Order, provide copies to
16 counsel, and **CLOSE THE FILE**.

17 DATED September 23, 2019.

18 *s/Mary K. Dimke*
19 MARY K. DIMKE
20 UNITED STATES MAGISTRATE JUDGE