

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

**Nov 27, 2018**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SHERRY L.,<sup>1</sup>

Plaintiff,

v.

NANCY A. BERRYHILL, Commissioner  
of Social Security,

Defendant.

No. 4:18-CV-05019-EFS

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

Before the Court, without oral argument, are cross summary-judgment motions.<sup>2</sup> Plaintiff Sherry L. appeals the Administrative Law Judge's (ALJ) denial of benefits.<sup>3</sup> Plaintiff contends the ALJ: (1) erred at step one by finding that Plaintiff engaged in substantial gainful activity since the alleged onset date; (2) improperly rejected the opinion of a lay witness, Plaintiff's daughter; (3) improperly rejected the opinions of Plaintiff's medical providers; (4) improperly rejected Plaintiff's severe impairments; (5) erred in failing to find that Plaintiff's impairments met or equaled

<sup>1</sup> To protect the privacy of social-security plaintiffs, the Court refers to them by first name and last initial. *See* LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Plaintiff" for any other identifier that was used.

<sup>2</sup> ECF Nos. 16 & 17.

<sup>3</sup> ECF No. 16.

1 a listed impairment; (6) erred in rejecting Plaintiff's subjective complaints; and (7)  
2 erred in failing to conduct adequate analyses at steps four and five.<sup>4</sup> The Court has  
3 reviewed the administrative record and the parties' briefing. For the reasons set  
4 forth below, the Court affirms the ALJ's decision, denies Plaintiff's Motion, and  
5 grants the Commissioner's Motion.

### 6 I. Standard of Review

7 On review, the Court must uphold the ALJ's determination that the claimant  
8 is not disabled if the ALJ applied the proper legal standards and there is substantial  
9 evidence in the record as a whole to support the decision.<sup>5</sup> Substantial evidence  
10 means more than a mere scintilla, but less than a preponderance.<sup>6</sup> It means such  
11 relevant evidence as a reasonable mind might accept as adequate to support a  
12 conclusion.<sup>7</sup> The Court will also uphold "such inferences and conclusions as the [ALJ]  
13 may reasonably draw from the evidence."<sup>8</sup>  
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15 In reviewing a denial of benefits, the Court considers the record as a whole,  
16 not just the evidence supporting the ALJ's decision.<sup>9</sup> That said, the Court may not  
17 substitute its judgment for that of the Commissioner. If the evidence supports more  
18 than one rational interpretation, a reviewing court must uphold the ALJ's decision.<sup>10</sup>  
19 Further, the Court "may not reverse an ALJ's decision on account of an error that is  
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22 <sup>4</sup> See generally ECF No. 16.

23 <sup>5</sup> *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012) citing (*Stone v. Heckler*, 761 F.2d 530, 531 (9th Cir.1985)).

24 <sup>6</sup> *Id.* at 1110–11.

25 <sup>7</sup> *Id.* (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir.2009)).

<sup>8</sup> *Id.* (citing *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.2008)).

<sup>9</sup> *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

<sup>10</sup> *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 harmless.”<sup>11</sup> An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
2 nondisability determination.”<sup>12</sup> The burden of showing that an error is harmful  
3 normally falls upon the party attacking the agency’s determination.<sup>13</sup>

## 4 **II. Five-Step Disability Determination**

5 The ALJ uses a five-step sequential evaluation process to determine whether  
6 an adult claimant is disabled.<sup>14</sup> The claimant has the initial burden of establishing  
7 entitlement to disability benefits under steps one through four.<sup>15</sup> At step five,  
8 however, the burden shifts to the Commissioner to show that the claimant is not  
9 entitled to benefits.<sup>16</sup>

10  
11 Step one assesses whether the claimant is currently engaged in a substantial  
12 gainful activity.<sup>17</sup> If the claimant is, benefits will be denied.<sup>18</sup> If not, the ALJ  
13 proceeds to the second step.

14 Step two assesses whether the claimant has a medically severe impairment,  
15 or combination of impairments, which significantly limit the claimant’s physical or  
16 mental ability to do basic work activities.<sup>19</sup> If the claimant does not, the disability  
17 claim is denied.<sup>20</sup> If the claimant does, the evaluation proceeds to the third step.

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21 <sup>11</sup> *Molina*, 674 F.3d at 1111 (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th  
Cir.2006)).

22 <sup>12</sup> *Id.* at 1115 (citations omitted).

23 <sup>13</sup> *Id.* at 1111 citing (*Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

24 <sup>14</sup> See 20 C.F.R. §§ 404.1520, 416.920.

25 <sup>15</sup> See *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971).

<sup>16</sup> See *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984).

<sup>17</sup> 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

<sup>18</sup> 20 C.F.R. §§ 404.1520(b), 416.920(b).

<sup>19</sup> 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

<sup>20</sup> 20 C.F.R. §§ 404.1520(c), 416.920(c).

1 Step three compares the claimant’s impairment to several recognized by the  
2 Commissioner to be so severe as to preclude substantial gainful activity.<sup>21</sup> If the  
3 impairment meets or equals one of the listed impairments, the claimant is  
4 conclusively presumed to be disabled.<sup>22</sup> If the impairment does not, the evaluation  
5 proceeds to the fourth step.<sup>23</sup>

6 Step four assesses whether the impairment prevents the claimant from  
7 performing work he or she has performed in the past by determining the claimant’s  
8 residual functional capacity (RFC).<sup>24</sup> If the claimant is able to perform his or her  
9 previous work, the claimant is not disabled.<sup>25</sup> If the claimant cannot perform this  
10 work, the evaluation proceeds to the fifth step.

11 Step five, the final step, assesses whether the claimant can perform other  
12 work in the national economy in light of his or her age, education, and work  
13 experience.<sup>26</sup> The Commissioner has the burden to show (1) that the claimant can  
14 perform other substantial gainful activity, and (2) that a “significant number of jobs  
15 exist in the national economy” which the claimant can perform.<sup>27</sup> If both of these  
16 conditions are met, the disability claim is denied; if not, the claim is granted.<sup>28</sup>

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21 <sup>21</sup> 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d). *See* 404 Subpt. P App.

22 1.

22 <sup>22</sup> 20 C.F.R. §§ 404.1520(d), 416.920(d).

23 <sup>23</sup> 20 C.F.R. §§ 404.1520(e), 416.920(e).

23 <sup>24</sup> 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

24 <sup>25</sup> *Id.*

24 <sup>26</sup> 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

24 <sup>27</sup> *Kail*, 722 F.2d at 1497–98; 20 C.F.R. §§ 404.1520(g), 416.920(g).

25 <sup>28</sup> 20 C.F.R. §§ 404.1520(g), 416.920(g).

1                   **III.   Facts, Procedural History, and the ALJ’s Findings**

2                   Plaintiff was born on March 25, 1962, and is 54 years old.<sup>29</sup> Plaintiff has her  
3 two year college degree.<sup>30</sup> From October 2014 to March 2015, Plaintiff worked at an  
4 onion plant in Pasco, Washington, picking debris out of onions on a conveyor belt.<sup>31</sup>  
5 Plaintiff testified that her job ended after Plaintiff was informed she was being taken  
6 off the schedule at work.<sup>32</sup>

7                   On December 23, 2013, Plaintiff filed a Title II application for a period of  
8 disability and disability insurance benefits,<sup>33</sup> and a Title XVI application for  
9 supplemental security income.<sup>34</sup> In both applications, Plaintiff alleged disability  
10 beginning on September 30, 2013.<sup>35</sup> Plaintiff’s claims were initially denied and also  
11 denied upon reconsideration.<sup>36</sup> Plaintiff requested a hearing before an ALJ, which  
12 was held on February 3, 2016.<sup>37</sup> On February 26, 2016 the ALJ, M.J. Adams,  
13 rendered a decision denying Plaintiff’s claim.<sup>38</sup>

14                   At step one, the ALJ found Plaintiff had engaged in substantial gainful  
15 activity from October 2014 through March 2015.<sup>39</sup>  
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20 <sup>29</sup> See Administrative Record (AR) 654.

21 <sup>30</sup> *Id.*

22 <sup>31</sup> AR 655–58.

23 <sup>32</sup> AR 659.

24 <sup>33</sup> AR 24.

25 <sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> AR 24–37.

<sup>39</sup> AR 26.

1 At step two, the ALJ found the Plaintiff had one severe medical impairment:  
2 degenerative changes of the lumbar spine.<sup>40</sup> The ALJ also found that Plaintiff's HIV,  
3 rash/dermatitis, trigger finger, hand arthritis, knee pain, hip pain, foot problems,  
4 shoulder pain, rheumatoid arthritis, Attention Deficit Hyperactivity Disorder,  
5 memory loss, substance use disorder, and adjustment disorder were not severe.<sup>41</sup>

6 At step three, the ALJ found that Plaintiff did not have an impairment that  
7 met the severity of a listed impairment.<sup>42</sup>

8 At step four, the ALJ found that Plaintiff has the RFC to lift and/or carry 50  
9 pounds occasionally and 25 pounds frequently, stand and/or walk six hours in an  
10 eight-hour workday with usual breaks, and sit six hours in an eight-hour workday  
11 with usual breaks.<sup>43</sup> The ALJ also found that Plaintiff can push and pull, including  
12 operation of hand and foot controls without limitations, except those noted for lifting  
13 and carrying.<sup>44</sup> The ALJ stated that Plaintiff can frequently climb ramps, stairs,  
14 ladders, ropes, and scaffolds, as well as balance without limitation, and can  
15 frequently kneel, crouch, and crawl.<sup>45</sup> The ALJ did not find that the Plaintiff had  
16 manipulative, visual, communicative, or environmental limitations.<sup>46</sup> In reaching  
17 these conclusions, the ALJ found that Plaintiff's degenerative changes of lumbar  
18 spine could be reasonably expected to cause the alleged symptoms, but that her  
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22 <sup>40</sup> AR 27.

23 <sup>41</sup> AR 27–34.

24 <sup>42</sup> AR 31.

25 <sup>43</sup> AR 31–32.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

1 statements concerning the intensity, persistence, and limiting effects of the  
2 symptoms were not entirely consistent with evidence presented in the record.<sup>47</sup>

3 When determining Plaintiff's RFC, the ALJ gave little weight to the lay  
4 witness testimony of Monica Mata, Plaintiff's daughter.<sup>48</sup> The ALJ gave some weight  
5 to the July 2014 opinion of Dr. Steven Vanderwaal.<sup>49</sup> The ALJ gave greater weight  
6 to the 2014 state agency opinion of Dr. Susan Moner.<sup>50</sup> The ALJ gave little weight  
7 to the December 2015 opinion of PA-C Ryan Law.<sup>51</sup> The ALJ gave some weight to the  
8 July 2014 opinion of Dr. Heather Bee, but limited weight to Dr. Bee's opinion that  
9 Plaintiff struggles to relate to others.<sup>52</sup>

10  
11 At step five, the ALJ found that Plaintiff was able to perform past relevant  
12 work as a waitress, bartender, cashier, supervisor, and agricultural produce sorter.<sup>53</sup>  
13 The ALJ found that these jobs do not require the performance of work-related  
14 activities precluded by Plaintiff's RFC.<sup>54</sup> Alternatively, the ALJ found that there are  
15 other jobs that exist in significant numbers in the national economy that Plaintiff  
16 can perform, considering her age, education, work experience, and RFC.<sup>55</sup>

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21 <sup>47</sup> AR 32.

22 <sup>48</sup> AR 34.

23 <sup>49</sup> *Id.*

24 <sup>50</sup> AR 34.

25 <sup>51</sup> *Id.*

<sup>52</sup> AR 35.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> AR 36.

1 The Appeals Council denied Plaintiff's request for review,<sup>56</sup> making the ALJ's  
2 decision the final decision for purposes of judicial review.<sup>57</sup> Plaintiff filed this lawsuit  
3 on February 2, 2018.<sup>58</sup>

#### 4 IV. Applicable Law & Analysis

##### 5 A. **The ALJ did not err in finding that Plaintiff engaged in substantial** 6 **gainful activity.**

7 Plaintiff's work at the onion plant from October 2014 to March of 2015 is  
8 presumptively substantial gainful activity (SGA) because Plaintiff's average  
9 monthly earnings exceeded the substantial gainful employment amounts. SGA is  
10 work done for pay or profit that involves significant mental or physical activities.<sup>59</sup>  
11 Earnings may be a presumptive, but not conclusive, sign of whether a job is  
12 substantial gainful activity.<sup>60</sup> Monthly earnings averaging more than \$1,070 in 2014,  
13 and \$1,090 in 2015 generally show that a claimant has engaged in substantial  
14 gainful activity.<sup>61</sup> Plaintiff earned \$223.00 during the third quarter of 2014,  
15 \$6,065.00 during the fourth quarter of 2014, and \$4,951.00 during the first quarter  
16 of 2015 while working at the onion plant.<sup>62</sup> The ALJ therefore correctly concluded  
17 that Plaintiff's average monthly earnings of \$1,293.50 in 2014 and \$1,650.33 in 2015  
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21 <sup>56</sup> AR 7.

22 <sup>57</sup> 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

23 <sup>58</sup> ECF No. 1.

24 <sup>59</sup> *Lewis v. Apfel*, 236 F.3d 503, 515 (9th Cir. 2001); 20 C.F.R. §§ 404.1571–404.1572, 416.971–  
416.975.

25 <sup>60</sup> 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2). *See Substantial Gainful Activity*, Social Security,  
<https://www.ssa.gov/oact/cola/sga.html> (last visited Nov. 19, 2018).

<sup>61</sup> *Id.*

<sup>62</sup> AR 26, 139 & 149.



1 exceeded the SGA amounts per month for the calendar years of 2014 and 2015,  
2 making her work presumptively SGA.

3 Further, substantial evidence supports the ALJ's finding that Plaintiff's work  
4 was not an "unsuccessful work attempt," and that Plaintiff therefore failed to rebut  
5 the presumption that she engaged in SGA.<sup>63</sup> When a claimant works for less than  
6 six months, that work will be considered an unsuccessful work attempt and not SGA  
7 if the claimant stopped working because of his or her impairment, or because of the  
8 removal of special conditions that took into account the claimant's impairment and  
9 permitted the claimant to work.<sup>64</sup> Plaintiff argues that she was unable to keep up  
10 with the demands of her employment and sustained multiple injuries, which  
11 resulted in the termination of her employment.<sup>65</sup> However, the ALJ noted that  
12 Plaintiff admitted she was unsure why her job ended.<sup>66</sup> Further, the ALJ found that  
13 the record did not support Plaintiff's allegations that she often missed work, was  
14 injured on the job three times, and was constantly reprimanded for sitting down at  
15 work.<sup>67</sup> Therefore, the ALJ properly concluded that Plaintiff's work at the onion  
16 plant was not an unsuccessful work attempt.  
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20 <sup>63</sup> AR 27.

21 <sup>64</sup> 20 CFR §§ 404.1574(c)(3), 416.974(c)(3).

22 <sup>65</sup> ECF No. 16 at 9.

23 <sup>66</sup> Compare *Lingenfelter v. Astrue*, 504 F.3d 1028, 1033 (9th Cir. 2007) (holding that where the  
24 claimant was fired after nine weeks "because he was too slow to do the work adequately" and  
25 because he "just couldn't do it anymore because of the pain," this constituted an unsuccessful  
work attempt) and *Taylor v. Colvin*, No. 3:13-CV-05448-RBL, 2014 WL 2216094, at \*5 (W.D.  
Wash. May 23, 2014) (finding that claimant's work was SGA because "the record in *Lingenfelter*  
showed the claimant stopped working due to his impairments, whereas the record here, as  
plaintiff himself admits, fails to demonstrate that. Indeed, plaintiff admits he does not know why  
those jobs ended.") (citation omitted).

<sup>67</sup> See AR 26–27 & 658–59.

1 Plaintiff points to three medical reports to support her argument,<sup>68</sup> none of  
2 which contradict the substantial evidence that supports the ALJ's conclusion.<sup>69</sup>  
3 First, Plaintiff points to a March 2, 2015 report where Plaintiff presented with leg  
4 numbness resulting from a work accident.<sup>70</sup> Plaintiff also states that an April 16,  
5 2015 report proves that her leg numbness was not improving and shows new  
6 injuries, including a back injury.<sup>71</sup> However, the April report does not state whether  
7 Plaintiff's leg numbness was improving or worsening—it only indicates that she was  
8 still being treated for leg numbness.<sup>72</sup> Further, the back injury indicated in the April  
9 report states that the back injury began on April 12, 2015, after Plaintiff's  
10 employment ended.<sup>73</sup> Finally, Plaintiff cites to an MRI from July 28, 2015—four  
11 months after Plaintiff stopped working.<sup>74</sup> Ultimately, the ALJ rationally concluded  
12 that the record does not show Plaintiff stopped working because of her impairment.<sup>75</sup>

14 The ALJ was not required to continue to steps two through five because  
15 Plaintiff failed at step one, therefore any subsequent errors are harmless.<sup>76</sup>

16 **B. The ALJ did not improperly reject the opinion of Plaintiff's lay**  
17 **witness.**

18 The ALJ provided sufficient reasons for giving little weight to the lay witness  
19 testimony of Monica Mata, Plaintiff's daughter. An ALJ need only give germane  
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21 <sup>68</sup> ECF No. 16 at 10.

22 <sup>69</sup> The Court also notes that the ALJ need not discuss every piece of medical evidence. *Smith v. Berryhill*, 708 F. App'x 402, 403 (9th Cir. 2017).

23 <sup>70</sup> ECF No. 16 at 10. *See* AR 474–75.

24 <sup>71</sup> *Id.*

25 <sup>72</sup> AR 476.

<sup>73</sup> AR 477 (“This is a new problem. Episode onset: [S]unday”).

<sup>74</sup> ECF No. 16 at 10. *See* AR 449, 508.

<sup>75</sup> *See Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

<sup>76</sup> *Molina*, 674 F.3d at 1115.

1 reasons for discrediting the testimony of lay witnesses.<sup>77</sup> Ms. Manta stated that  
2 Plaintiff's back injury limits Plaintiff's ability to bend, lift, stand for long periods,  
3 and lift heavy objects.<sup>78</sup> The ALJ provided three particularized reasons for  
4 discounting Ms. Manta's testimony: the ALJ stated that Ms. Manta's descriptions  
5 were inconsistent with (1) Plaintiff's physical examinations, (2) Plaintiff's own  
6 testimony, and (3) Plaintiff's work at the onion plant.<sup>79</sup> Therefore, the ALJ did not  
7 improperly reject the opinion of Ms. Manta.  
8

9 **C. The ALJ did not improperly reject the opinions of Plaintiff's medical  
10 providers.**

11 The ALJ properly assigned little weight to Mr. Law's December 2015  
12 opinion,<sup>80</sup> some weight to Dr. Bee's July 2014 opinion, and limited weight to Dr. Bee's  
13 opinion that Plaintiff struggles to relate to others.<sup>81</sup>

14 1. Ryan Law

15 The ALJ properly gave the opinion of Mr. Law less weight than the opinion of  
16 Dr. Moner. Mr. Law, a physician's assistant, is considered an "other source,"<sup>82</sup>  
17 therefore, his opinion is entitled to less weight than opinions from acceptable medical  
18 sources.<sup>83</sup> The ALJ concluded that the opinion of Dr. Moner, an acceptable medical  
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21 <sup>77</sup> *Lewis*, 236 F.3d at 511.

22 <sup>78</sup> AR 213–220.

23 <sup>79</sup> See AR 34 & 712–13.

24 <sup>80</sup> AR 35.

25 <sup>81</sup> *Id.*

<sup>82</sup> Medical opinions are separated into evidence from acceptable and nonacceptable medical sources and "other sources." Physician's assistants are considered "other sources" and "nonacceptable medical sources." 20 CFR § 404.1513(d)(1).

<sup>83</sup> *Noe v. Apfel*, 6 F. App'x 587, 588 (9th Cir. 2001) (citing *Gomez v. Chater*, 74 F.3d 967, 970–71 (9th Cir. 1996)).

1 source, more accurately reflected the medical records and properly gave Mr. Law's  
2 opinion less weight.<sup>84</sup>

3 Further, The ALJ may discount the opinion of an "other source" by providing  
4 reasons that are germane to that witness.<sup>85</sup> Mr. Law diagnosed Plaintiff with  
5 degenerative disc disease and polyarthritis, concluding that Plaintiff was limited to  
6 light exertional work.<sup>86</sup> The ALJ provided several reasons supported by the record  
7 for discounting Mr. Law's opinion: Mr. Law's opinion was inconsistent with (1)  
8 Plaintiff's medical record; (2) Plaintiff's work at the onion plant, which required her  
9 to lift 20 pounds and stand for her entire shift; (3) Plaintiff's own report in July 2014  
10 that she could lift up to 20 pounds, stand two hours, and walk one mile; (4) overall  
11 objective findings that Plaintiff retained intact motor and sensory function  
12 throughout her extremities.<sup>87</sup> Therefore, the ALJ properly discounted Mr. Law's  
13 opinion.  
14

15 2. Dr. Bee's opinions

16 The opinion of Dr. Bee, a non-treating source, <sup>88</sup> was properly accorded less  
17 weight because her opinion was contradicted by the record.<sup>89</sup> "A report of a non-  
18 examining, non-treating physician should be discounted and is not substantial  
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21 <sup>84</sup> See AR 34 & 60-73.

22 <sup>85</sup> *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.1993).

23 <sup>86</sup> AR 448.

24 <sup>87</sup> See AR 35 & 412-13.

25 <sup>88</sup> AR 62.

<sup>89</sup> Plaintiff argues that the ALJ did not explain how Dr. Bee's conclusions were based on Plaintiff's subjective complaints rather than objective testing.<sup>89</sup> However, the ALJ's inference is rational because Dr. Bee's conclusion seems to be based on Plaintiff's report that she has had altercations with co-workers. See *Molina*, 674 F.3d at 1110 (concluding that Courts should uphold reasonable inferences by the ALJ); AR 415, 417 & 422.

1 evidence when contradicted by all other evidence in the record.”<sup>90</sup> The ALJ gave some  
2 weight to Dr. Bee’s July 2014 opinion that the claimant possessed adequate cognitive  
3 capacities to function in a number of employment roles and limited weight to  
4 Dr. Bee’s opinion that the claimant struggles to relate to others.<sup>91</sup> The ALJ reasoned  
5 that Dr. Bee did not have the opportunity to review the longitudinal record, which  
6 supported no more than mild limitations in social functioning.<sup>92</sup> Additionally, the  
7 ALJ noted that the longitudinal record shows minimal mental complaints,  
8 essentially no mental health treatment, and that providers frequently described  
9 Plaintiff as having a normal mood and affect.<sup>93</sup> Therefore, the evidence on the record  
10 contradicted Dr. Bee’s opinion and the ALJ properly disregarded it.  
11

12 **D. The ALJ did not improperly reject Plaintiff’s severe impairments at**  
13 **step two.**

14 Substantial evidence supported the ALJ’s conclusion that Plaintiff had only  
15 one severe impairment: degenerative changes of the lumbar spine.<sup>94</sup> At step two, the  
16 claimant has the burden to show that he or she has a medically severe impairment  
17 or combination of impairments.<sup>95</sup> The ALJ will only find an impairment to be severe  
18 if it “significantly limits [the claimant’s] physical or mental ability to do basic work  
19 activities.”<sup>96</sup> The “ability to do basic work activities” means possessing “the abilities  
20 and aptitudes necessary to do most jobs.”<sup>97</sup> For Plaintiff, the most relevant activities  
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22 <sup>90</sup> *Gallant v. Heckler*, 753 F.2d 1450, 1454 (9th Cir. 1984) (citation omitted).

23 <sup>91</sup> AR 30.

24 <sup>92</sup> AR 30, 33.

25 <sup>93</sup> AR 30.

<sup>94</sup> AR 31.

<sup>95</sup> *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

<sup>96</sup> 20 C.F.R. §§ 404.1521(a), 416.920(a).

<sup>97</sup> 20 C.F.R. §§ 404.1521(b), 416.920(b).

1 include the ability to perform physical functions such as walking, sitting, lifting,  
2 pushing, pulling, reaching, carrying, or handling.<sup>98</sup> “An impairment is considered  
3 ‘not severe’ if it is a slight abnormality that causes no more than minimal limitations  
4 in the individual’s ability to function independently, appropriately, and effectively  
5 in an age-appropriate manner.”<sup>99</sup> Thus, the ALJ must have had substantial evidence  
6 to find that the medical evidence clearly established that Plaintiff did not have a  
7 medically severe impairment or combination of impairments.<sup>100</sup>

8  
9 Substantial evidence indicates that the medical evidence does not establish  
10 that Plaintiff’s HIV was a severe impairment because it was well controlled since  
11 beginning treatment in December 2014; thus, it did not significantly limit her ability  
12 to do basic work activities.<sup>101</sup> Plaintiff’s testimony that she experienced fatigue from  
13 her HIV medication was not corroborated by any of the treatment notes from her  
14 former HIV provider, who noted that she was tolerating therapy well.<sup>102</sup>

15 Substantial evidence indicates that the medical evidence does not establish  
16 that Plaintiff’s rash/dermatitis was a severe impairment because it was resolved  
17 within 6 months; thus, it did not significantly impair her ability to work.<sup>103</sup>

18 Substantial evidence indicates that the medical evidence does not establish  
19 that trigger finger and arthritis were severe impairments because Plaintiff’s medical  
20 examinations and records, as well as her job as a produce sorter, contradicted  
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23 <sup>98</sup> 20 C.F.R. §§ 404.1522, 416.922.

<sup>99</sup> *Webb*, 433 F.3d at 686–87 (citations omitted).

<sup>100</sup> *Id.* at 687.

<sup>101</sup> AR 27.

<sup>102</sup> *See* AR 27 & 534–67.

<sup>103</sup> AR 27 & 417.

1 Plaintiff's testimony.<sup>104</sup> Thus, evidence did not indicate that it significantly impaired  
2 Plaintiff's ability to work.

3 Substantial evidence indicates that the medical evidence does not establish  
4 that shoulder, knee, and foot pain were severe impairments because Plaintiff's  
5 alleged symptoms were not consistent with Plaintiff's physical examination, medical  
6 records, and examinations.<sup>105</sup> Further, no provider ever ordered any imaging studies  
7 of her hips or workups of her shoulders.<sup>106</sup> Thus, evidence did not establish that it  
8 significantly impaired Plaintiff's ability to work.

9 Substantial evidence indicates that the medical evidence does not establish  
10 that ADHD was a severe impairment because Mr. Law, who diagnosed Plaintiff with  
11 ADHD, is not qualified to establish whether an individual has a medically  
12 determinable impairment.<sup>107</sup> Further, Dr. Bee did not diagnose Plaintiff with  
13 ADHD.<sup>108</sup> The ALJ also found that a diagnosis of ADHD was inconsistent with  
14 Plaintiff's education and work history.<sup>109</sup>

15 Substantial evidence indicates that the medical evidence does not establish  
16 that memory loss was a severe impairment because Dr. Bee did not find evidence of  
17 a cognitive disorder.<sup>110</sup>  
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22 <sup>104</sup> AR 27.

23 <sup>105</sup> AR 29.

24 <sup>106</sup> *Id.*

25 <sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> AR 30.

1           Substantial evidence indicates that the medical evidence does not establish  
2 that substance abuse was a severe impairment because Plaintiff was largely clean  
3 and sober since the alleged onset date of September 2013.<sup>111</sup>

4           Substantial evidence indicates that the medical evidence does not establish  
5 that adjustment disorder was a severe impairment because Plaintiff's providers  
6 consistently stated she had a normal mood and affect.<sup>112</sup> Further, although Dr. Bee  
7 diagnosed Plaintiff with adjustment disorder, Dr. Bee was a one-time examiner who  
8 did not have the opportunity to review the entire longitudinal record, which shows  
9 minimal mental health complaints and no mental health treatment.<sup>113</sup> Alternatively,  
10 the ALJ based this conclusion on Plaintiff's "Part B" ratings, which showed Plaintiff  
11 had: (1) no more than mild limits in daily living; (2) no more than mild limitations  
12 in social functioning; (3) no more than mild limits in concentration, persistence, and  
13 pace; and (4) no episodes of decompensation.<sup>114</sup>

14  
15 **E.     The ALJ did not improperly discount Plaintiff's subjective account.**

16           The ALJ found that Plaintiff's medical impairment could reasonably be  
17 expected to produce the Plaintiff's alleged symptoms. The ALJ engages in a two-step  
18 analysis to determine whether a claimant's testimony regarding subjective pain or  
19 symptoms is credible. First, the ALJ determines whether there is objective medical  
20 evidence of an impairment that could reasonably be expected to produce the alleged  
21

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22  
23  
24 <sup>111</sup> *Id.*

<sup>112</sup> AR 30–31.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*



1 symptoms.<sup>115</sup> In the present case, because the ALJ determined the Plaintiff’s medical  
2 impairment could “reasonably be expected to cause the alleged symptoms,” she  
3 passed the first step of the analysis.<sup>116</sup>

4         However, the ALJ properly rejected Plaintiff’s subjective account of her  
5 symptoms. If a claimant meets the first test and there is no evidence of malingering,  
6 the ALJ can only reject the claimant’s testimony about the severity of the symptoms  
7 if the ALJ gives “specific, clear and convincing reasons” for doing so.<sup>117</sup> In making an  
8 adverse credibility determination, an ALJ may consider: (1) the claimant’s  
9 reputation for truthfulness; (2) inconsistencies in the claimant’s testimony or  
10 between her testimony and her conduct; (3) the claimant’s daily living activities; (4)  
11 the claimant’s work record; and (5) the nature, severity, and effect of the claimant’s  
12 condition.<sup>118</sup> The ALJ found that Plaintiff’s allegations were out of proportion with  
13 the overall objective evidence because her symptoms were contradicted by medical  
14 evidence, including an MRI in July of 2015 and physical examination findings.<sup>119</sup>  
15 The ALJ also found the allegations were also inconsistent with Plaintiff’s conduct,  
16 reports, work at the onion plant, and subsequent filing for and receipt of  
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22 <sup>115</sup> *Molina*, 674 F.3d at 1112 (internal quotations and citations omitted).

23 <sup>116</sup> AR 25.

24 <sup>117</sup> *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d  
25 1028, 1036 (9th Cir. 2007)). See *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation  
omitted) (noting the ALJ must make sufficiently specific findings “to permit the court to conclude  
that the ALJ did not arbitrarily discredit [the] claimant’s testimony.”).

<sup>118</sup> *Thomas v. Barnhart*, 278 F.3d 947, 958–59 (9th Cir. 2002).

<sup>119</sup> See AR 32–34, 449 & 508.

1 unemployment benefits.<sup>120</sup> Therefore, substantial evidence existed for the ALJ to  
2 discount Plaintiff's subjective complaints.

3 **F. The ALJ did not err in failing to find that Plaintiff's impairments met**  
4 **or equaled a Listing.**

5 The ALJ reasonably concluded that Plaintiff failed to meet Listing 1.04A.<sup>121</sup>  
6 At step three, the ALJ determines if a claimant's impairment meets or equals an  
7 impairment listed in Appendix 1 to Subpart P of Regulations Number 4.<sup>122</sup> As the  
8 Social Security Ruling explains, each case should be evaluated based on the  
9 record.<sup>123</sup> Listing 1.04A, disorders of the spine, requires Plaintiff to exhibit:

10 Evidence of nerve root compression characterized by neuro-anatomic  
11 distribution of pain, limitation of motion of the spine, motor loss  
12 (atrophy with associated muscle weakness or muscle weakness)  
13 accompanied by sensory or reflex loss and, if there is involvement of the  
14 lower back, positive straight-leg raising test (sitting and supine).<sup>124</sup>

15 The ALJ properly concluded that Plaintiff demonstrated intact motor, sensory, and  
16 neurologic function on physical examinations, as well as negative straight leg  
17 raising.<sup>125</sup> Accordingly, the ALJ's finding that Plaintiff did not meet listing 1.04A  
18 was supported by substantial evidence.

19 **G. The ALJ did not fail to meet her step four or five burden.**

20 At step four, the ALJ properly concluded that Plaintiff was able to perform  
21 past relevant work as a waitress, bartender, cashier, supervisor, and agricultural

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22 <sup>120</sup> AR 33 (noting that Plaintiff held herself out as "ready, able, and willing to work."). *See Carmickle*  
*v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161–62 (9th Cir. 2008) ("[R]eceipt of unemployment  
23 benefits can undermine a claimant's alleged inability to work fulltime.").

<sup>121</sup> AR 23–24.

<sup>122</sup> 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1, 416.920(d).

<sup>123</sup> *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005) (citing SSR 02–01p (2002)).

<sup>124</sup> 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1, 416.920(d).

<sup>125</sup> *See* AR 31, 523–30 & 412–13.

1 sorter.<sup>126</sup> At step four, the ALJ asks whether Plaintiff can perform any past  
2 performed work.<sup>127</sup> The ALJ concluded that Plaintiff's past jobs do not require the  
3 performance of work-related activities precluded by Plaintiff's RFC because the  
4 Plaintiff performed them in the last 15 years at SGA levels.<sup>128</sup> The ALJ also adopted  
5 the testimony of the vocational expert (VE), who opined that Plaintiff can perform  
6 all of her past relevant work.<sup>129</sup> Therefore, substantial evidence supported the ALJ's  
7 conclusion at step four.

8  
9 While the ALJ did not need to proceed to step five, the ALJ alternatively found  
10 that there would still be a significant number of jobs in the national economy that  
11 Plaintiff could perform, even if Plaintiff's RFC was limited to medium or light  
12 work.<sup>130</sup> At step five, the Commissioner has the burden to "identify specific jobs  
13 existing in substantial numbers in the national economy that [the] claimant can  
14 perform despite her identified limitations."<sup>131</sup> An ALJ may solicit VE testimony as  
15 to the availability of jobs in the national economy.<sup>132</sup> A VE's testimony may  
16 constitute substantial evidence.<sup>133</sup> The ALJ adopted the VE's testimony that  
17 substantial jobs existed that Plaintiff could perform,<sup>134</sup> therefore the ALJ's  
18 conclusion was supported by substantial evidence.

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21 <sup>126</sup> *Bayliss v. Barnhart*, 427 F.3d 1211, 1217–18 (9th Cir. 2005) (concluding that VE testimony can  
constitute substantial evidence).

22 <sup>127</sup> 20 C.F.R. §§ 404.1520(e), 416.920(e).

23 <sup>128</sup> AR 35.

24 <sup>129</sup> See AR 35–36 & 676–81.

25 <sup>130</sup> AR 36.

<sup>131</sup> *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995).

<sup>132</sup> *Tackett v. Apfel*, 180 F.3d 1094, 1100–01 (9th Cir. 1999).

<sup>133</sup> *Bayliss*, 427 F.3d at 1217–18. See *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). See also  
*Farias v. Colvin*, 519 F. App'x 439, 440 (9th Cir. 2013).

<sup>134</sup> See AR 36–37 & 676–81.

1 Plaintiff argues that because the ALJ improperly rejected medical findings,  
2 severe impairments, and supported functional limitations, the VE's testimony was  
3 incomplete and of no evidentiary value.<sup>135</sup> This argument merely restates Plaintiff's  
4 earlier allegations.<sup>136</sup> The ALJ's hypothetical properly accounted for the limitations  
5 supported by the record.<sup>137</sup>

6 **V. Conclusion**

7  
8 In summary, the Court finds the record contains substantial evidence from  
9 which the ALJ properly concluded that Plaintiff does not qualify for benefits.

10 Accordingly, **IT IS HEREBY ORDERED:**

- 11 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.  
12 2. The Commissioner's Motion for Summary Judgment, **ECF No. 17**, is  
13 **GRANTED**.  
14 3. **JUDGMENT** is to be entered in the Commissioner's favor.  
15 4. The case shall be **CLOSED**.

16 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
17 provide copies to all counsel.

18 **DATED** this 27<sup>th</sup> day of November 2018.

19  
20 s/Edward F. Shea  
21 EDWARD F. SHEA  
22 Senior United States District Judge

23  
24 <sup>135</sup> ECF No. 16 at 19–20.

<sup>136</sup> *Id.*

25 <sup>137</sup> *See Magallanes v. Bowen*, 881 F.2d 747, 756–57 (9th Cir. 1989) (holding it is proper for the ALJ to limit a hypothetical to those restrictions supported by substantial evidence in the record).