NOT FOR PUBLICATION

FILED

OCT 11 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH HUBBELL, Plaintiff-Appellant, v. KILOLO KIJAKAZI, Defendant-Appellee.	No. 22-35672 D.C. No. 4:21-cv-05060-RMP MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Rosanna M. Peterson, District Judge, Presiding

Submitted October 6, 2023**
Seattle, Washington

Before: WARDLAW and M. SMITH, Circuit Judges, and MATSUMOTO,*** District Judge.

Kenneth Hubbell ("Hubbell") appeals the district court's order affirming the Administrative Law Judge's ("ALJ") denial of disability insurance benefits and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

supplemental security income. "We review a district court's judgment upholding the denial of social security benefits de novo," and "may set aside a denial of benefits only if it is not supported by substantial evidence or is based on legal error." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (internal quotation marks omitted). Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

1. The ALJ did not fail to meet his duty to develop the record. There is no indication that the record before the ALJ was ambiguous or insufficient. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) ("Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to 'conduct an appropriate inquiry.'").

2. Hubbell fails to raise a colorable due process claim. Hubbell had two hearings before the ALJ and had the opportunity to submit evidence, including his own testimony. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"). Hubbell does not articulate how, if at all, the ALJ's alleged failure to call a vocational expert at the 2021 hearing or the ALJ's reliance on the 2018 hearing testimony disadvantaged his claim. *See*

Klemm v. Astrue, 543 F.3d 1139, 1144 (9th Cir. 2008) (holding that an error must be material for a claimant to state a colorable constitutional claim).

3. The ALJ provided specific and legitimate reasons to discount the opinions of Dr. Roman, Dr. Marks, Dr. Eisenhauer, Dr. Khaleeq, Dr. Morgan, Dr. Petaja, and Eric Thoma, LMHC, as, *inter alia*, (1) lacking support, or contradicting, the objective medical record, (2) premised on inaccurate information provided by Hubbell, (3) premised on unreliable medical opinions, (4) internally inconsistent, (5) outside the individual's area of expertise, and/or (6) not meaningfully explained. *See Ford v. Saul*, 950 F.3d 1141, 1154–56 (9th Cir. 2020) (observing that an ALJ may reject opinions that are "brief, conclusory, and inadequately supported by clinical findings," "inconsistent with [the claimant's] activity level," "lack[ing] explanation," or "contradicted by the opinions of [other doctors]"). For substantially the same reasons given by the district court, we find no error as to the ALJ's evaluation of these opinions.

4. Substantial evidence supports the ALJ's finding that Hubbell's impairments were not per se disabling at step three of the sequential process. Listed impairments are set at a high level of severity because "the listings were designed to operate as a presumption of disability that makes further inquiry unnecessary." *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990), *superseded by statute on other grounds as stated in Kennedy v. Colvin,* 738 F.3d 1172, 1174 (9th Cir. 2013). The

ALJ offered more than mere "boilerplate" rejection at step three, *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001), citing improvement in Hubbell's plexopathy, physical exams that showed no motor or neurological deficits, and imaging that showed stable findings. Although the ALJ did not discuss Listing 12.15, his findings on the criteria of Listings 12.04 and 12.06 apply to Listing 12.15. *See Gonzales v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) ("It is unnecessary to require the [Commissioner], as a matter of law, to state why a claimant failed to satisfy every different section of the listing of impairments.").

5. The ALJ offered clear and convincing reasons to discount Hubbell's symptom testimony as inconsistent with the medical record and his daily activities, noting, for example, exam findings of "5/5 grip strength, intact sensation, good range of motion, etc." and that Hubbell had been dirt biking in 2020. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (finding that "[c]ontradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony").

6. Having found no error with the ALJ's determinations above, we find no step-five error. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (rejecting step-five argument where claimant "simply restate[d] her argument that the ALJ's RFC finding did not account for all her limitations").

7. Hubbell's remaining arguments are waived because he failed to raise them

before the district court. *See Smartt v. Kijakazi*, 53 F.4th 489, 500–01 (9th Cir. 2022) ("We need not address [the claimant's] remaining arguments because she waived them by not raising them before the district court.").

AFFIRMED.