**NOT FOR PUBLICATION**

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| TAMMIE JO BERSIE,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CAROLYN W. COLVIN*, Acting Commissioner of Social Security,<br><br>Defendant-Appellee. | No. 23-4377<br><br>D.C. No. 2:23-cv-0806<br><br>MEMORANDUM** |

Appeal from the United States District Court
for the District of Arizona
Magistrate Judge Steven P. Logan, Presiding

Submitted January 14, 2025***
San Francisco, California

Before: H.A. THOMAS, MENDOZA, and JOHNSTONE, Circuit Judges.

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* Carolyn W. Colvin is substituted for her predecessor Martin O'Malley, Commissioner of the Social Security Administration, as Acting Commissioner of the Social Security Administration, pursuant to Federal Rule of Appellate Procedure 43(c).

** 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).

Tammie Bersie appeals the district court's judgment affirming the Commissioner of Social Security's denial of her application for disability insurance benefits under the Social Security Act. On appeal, Bersie argues the Administrative Law Judge (1) erred in determining her past work, (2) erred at step four because substantial evidence does not support finding that she can perform her past relevant work as a retail store manager or a manager trainee, (3) improperly discredited her testimony, and (4) failed to consider new evidence submitted to the Appeals Council. We have jurisdiction under 28 U.S.C. § 1291. "We review a district court's judgment de novo and set aside a denial of benefits only if it is not supported by substantial evidence or is based on legal error." *Smartt v. Kijakazi*, 53 F.4th 489, 494 (9th Cir. 2022) (internal quotation marks and citation omitted). Substantial evidence is "more than a mere scintilla. It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) (cleaned up). We "may not reverse an ALJ's decision on account of a harmless error." *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds* by 20 C.F.R. § 404.1502(a)). We affirm.

1. The ALJ did not err in determining Bersie's past relevant work. First, Bersie is correct that "[w]e do not usually consider that work you did 15 years or

more before the time we are deciding whether you are disabled." 28 C.F.R. § 404.1565.[1] However, the ALJ's inclusion of Bersie's fast-food manager position was harmless error because the ALJ identified two other positions within the applicable 15-year window that Bersie could perform. *See* 20 C.F.R. § 404.1520(f); *see also Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (noting that to qualify for disability benefits, the claimant must demonstrate they are unable to engage in *any* substantial gainful activity).

Second, Bersie asserts that her position at Walmart is appropriately characterized as a composite job, which cannot support past work as generally performed. *See Valencia v. Heckler*, 751 F.2d 1082, 1086 (9th Cir. 1985). But contrary to Bersie's belief, any occupation where a claimant has held more than one position does not automatically create a composite job. Rather, substantial evidence supports the vocational expert's determination that Bersie's Walmart positions are separate occupations under the DOT, namely a retail store manager

[1] While at the time of the ALJ's decision, past relevant work was defined as work that was performed within the past fifteen years, new regulations reducing the relevant work period to five years have since gone into effect. *See Intermediate Improvement to the Disability Adjudication Process, Including How We Consider Past Work*, 89 Fed. Reg. 27653 (Apr. 18, 2024). The revised regulations apply only to claims adjudicated on or after their effective date. *See id.* In this case the ALJ's decision was issued prior to the effective date of the new regulations, so the prior version of the regulation applies.

and a manager trainee.[2] Indeed, the evidence establishes that she held these roles at different times, and Bersie herself considered her various roles at Walmart as separate positions.

Moreover, Bersie, who was represented by counsel, forfeited this argument by not raising it before the ALJ or challenging the vocational expert's testimony at the administrative hearing. *See Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)).

2. Substantial evidence supports the ALJ's finding that Bersie could perform her past relevant work as a manager trainee and retail store manager. While the ALJ found Bersie suffered from two severe conditions, the ALJ found that the evidence did not support finding Bersie as limited to the extent alleged. This was largely due to findings provided by two State agency medical consultants, who both found Bersie was limited but still able to perform light exertional work. Additionally, one independent medical examiner found Bersie's "subjective complaints of numbness and tingling" related to her shoulder pain were not supported by any medical evidence. Indeed, the physician "did not find significant physical exam corroboration for [Bersie's] subjective complaints" and believed that Bersie was magnifying her symptoms. Bersie attempts to refute this finding

[2] While the ALJ's decision states "manager trainer," this is presumably a typo, as the ALJ provided the correct DOT code for a "manager trainee."

by pointing to one document in the record to support her argument that her RFC is more limited than was accounted for. However, that documentation does not outweigh the extensive evidence supporting the ALJ's residual function capacity assessment.

3. The ALJ provided clear and specific reasons for discounting Bersie's testimony. The ALJ considers "all of the available evidence" when "evaluating the intensity and persistence of [the alleged] symptoms," including whether the "pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence." 20 C.F.R. § 404.1529(a). Here, the ALJ discounted Bersie's testimony regarding the extent of her pain and symptoms because her pain was improving with medication and treatment, medical evidence and physician opinions did not support finding that she was as limited to the extent alleged, and evidence demonstrates that she magnified her symptoms.

4. Lastly, Bersie argues that the ALJ failed to consider the new evidence submitted to the Appeals Council. This argument fails too. Bersie does not point to what part of the new evidence demonstrates that the ALJ erred in finding her not disabled. But even considering the new evidence, substantial evidence supports the ALJ's finding, as the new evidence largely overlaps with the medical records already considered by the ALJ and thus would not change the ALJ's conclusion. *See Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012).

**AFFIRMED.**