NOT FOR PUBLICATION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

KENNETH W. PHILPOT, Plaintiff - Appellant, v. FRANK BISIGNANO, Commissioner of Social Security, Defendant - Appellee.	No. 24-6415 D.C. No. 3:23-cv-06130-SKV MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Sarah Kate Vaughan, Magistrate Judge, Presiding

Submitted August 22, 2025**
Portland, Oregon

Before: CALLAHAN, M. SMITH, and MENDOZA, Circuit Judges.

Kenneth Philpot appeals a district court judgment affirming a Social Security Administration decision denying disability insurance and supplemental security income benefits. We have jurisdiction under 28 U.S.C. § 1291.

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* 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).

Reviewing de novo, *see Woods v. Kijakazi*, 32 F.4th 785, 788 (9th Cir. 2022), reversal is appropriate only if the ALJ's decision was not supported by substantial evidence or was based on legal error. *Smartt v. Kijakazi*, 53 F.4th 489, 494 (9th Cir. 2022). "The Court 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v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. § 404.1502(a)).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. An administrative law judge ("ALJ") must "consider all of [a claimant's] known medically determinable impairments, including those that are not 'severe'" when assessing a claimant's residual functional capacity ("RFC"). *Woods*, 32 F.4th at 793 (original alterations omitted) (quoting 20 C.F.R. § 404.1545(a)(2)). The ALJ's decision that Philpot's RFC no longer included the limitation of missing days of work as of March 31, 2022, is supported by substantial evidence. Namely, the ALJ relied on evidence that Philpot's seizure medication was adjusted and his reports of no seizures or side effects throughout 2022. However, even assuming error in the ALJ's omission of an RFC limitation that Philpot will miss one day a month due to his impairments, the error would be harmless because the jobs that the ALJ found Philpot could perform included a tolerance of absenteeism of up to one and a half days a month. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) ("[T]o the extent the

ALJ's RFC finding erroneously omitted [claimant's] postural limitations . . . any error was harmless since sedentary jobs [which the ALJ found claimant could perform] require infrequent stooping, balancing, crouching, or climbing.").

2. The ALJ must assess the persuasiveness of medical opinions based upon their "supportability" and "consistency." *Cross v. O'Malley*, 89 F.4th 1211, 1214 (9th Cir. 2024) (quoting 20 C.F.R. § 416.920c(b)(2)). The ALJ did so here, finding the opinions of Nurse Wilmot and Dr. Wheeler "consistent with and supported by" the medical evidence, and incorporated them into the RFC determination. Philpot argues that the ALJ somehow rejected these opinions, but this misreads the ALJ's opinion. The ALJ included Nurse Wilmot's opinion in the RFC by finding that Philpot could perform "simple work," *see* 20 C.F.R. § 404.1568(a), and included Dr. Wheeler's opinion by finding jobs for Philpot that tolerate absenteeism up to one and a half days a month. Further, to the extent Philpot attempts to argue that other medical evidence supports the opinions of Nurse Wilmot and Dr. Wheeler, his briefing merely recounts the medical evidence and asserts without analysis that it is supportive. Such broad and unsupported assertions do not amount to genuine argument, and we find any challenge to the ALJ's handling of this evidence waived. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003); *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007).

3. "When objective medical evidence is inconsistent with a claimant's subjective testimony, an ALJ can reject the claimant's testimony about the severity of [his] symptoms only by offering specific, clear, and convincing reasons for doing so . . . ." *Kitchen v. Kijakazi*, 82 F.4th 732, 739 (9th Cir. 2023) (alteration in original) (quoting *Smartt*, 53 F.4th at 494). The ALJ's determination that Philpot's testimony was not entirely consistent with the record is supported by specific, clear, and convincing reasons, including reference to medical records. Philpot argues that the ALJ should not have believed him when he said his seizures had abated, but this is no more than a dispute over the evidence concerning his impairments. And "if the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld." *Farlow v. Kijakazi*, 53 F.4th 485, 488 (9th Cir. 2022) (internal quotations omitted).

4. Philpot argues that the ALJ erred by discrediting his mother's testimony and providing "no explanation at all for how he weighed this evidence." We need not address whether the ALJ was required to explain how he evaluated lay witness testimony because any error would be harmless. Philpot's mother's statement largely recounts the same facts that were elicited during his testimony and, as explained above, that evidence was properly accounted for and incorporated into the ALJ's RFC determination. Therefore, if there were any error in his consideration of it, it was "'inconsequential to the ultimate nondisability

determination' in the context of the record as a whole." *Molina*, 674 F.3d at 1121–22 (quoting *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2012)).

AFFIRMED.