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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LATINA I. LINDSTROM, Plaintiff-Appellant, v. KILOLO KIJAKAZI, Acting Commissioner of Social Security, Defendant-Appellee.	No. 21-16533 D.C. No. 2:20-cv-01234-DGC MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted November 15, 2022
Phoenix, Arizona

Before: BYBEE and OWENS, Circuit Judges, and RAKOFF,[**] District Judge.

Claimant Latina Lindstrom ("Lindstrom") appeals the district court's ruling, which affirmed the Commissioner of Social Security's denial of her application for disability benefits. Lindstrom contends that the Administrative Law Judge

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

[**] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

("ALJ") erred in relying on the vocational expert's testimony and improperly weighed medical source opinion evidence, Lindstrom's self-reported symptom testimony, and third-party lay evidence.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We "review the district court's order affirming the ALJ's denial of social security benefits de novo and will disturb the denial of benefits only if the decision contains legal error or is not supported by substantial evidence." *Lambert v. Saul*, 980 F.3d 1266, 1270 (9th Cir. 2020) (quoting *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted). We affirm.

1. Lindstrom raises several objections to the vocational expert testimony. Some of these objections were not squarely before the ALJ, others were given only a cursory briefing during the district court proceedings, and some were omitted from the opening brief and only raised at oral argument before us. To the extent that these objections were not adequately presented, they are forfeited. *See United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005) ("[I]ssues not raised to the district court normally are deemed waived."); *Balser v. Dep't of Justice,* 327 F.3d 903, 911 (9th Cir. 2003) ("Issues not raised in the opening brief

usually are deemed waived."); *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) ("[A]ppellants must raise issues at their administrative hearings in order to preserve them on appeal before this Court.").

Lindstrom argues that the vocational expert's testimony was contradicted by other job data that her counsel presented to the ALJ via a post-hearing submission. An ALJ has an affirmative obligation only to resolve conflicts between vocational expert testimony and the Dictionary of Occupational Titles (DOT). *Massachi v. Astrue*, 486 F.3d 1149, 1150 (9th Cir. 2007) (citing SSR 00-4p). Lindstrom's alternate data is not based on the DOT, but rather on data from the Occupational Outlook Handbook and O-Net. An ALJ need only explain conflicts between vocational expert testimony and non-DOT data if that data constitutes "significant probative evidence." *Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1193 (9th Cir. 2022) (quotation omitted).

Lindstrom's alternate data is not significantly probative for two reasons. First, it does not indicate that the vocational expert's testimony was unreliable. Instead, the data merely shows that a different methodology could have been used to reach a different conclusion. Second, as Lindstrom's counsel conceded at oral argument, the alternate data may not be accurate. Lindstrom's job estimates rest on the erroneous assumption that each job characteristic is independent, ignoring the

possibility that—for example—jobs that require occasional contact with others may be more likely to be part-time. An ALJ need not accept data that does not rely on the DOT, is mathematically inaccurate, and that does not undermine vocational expert testimony. *See Kilpatrick*, 35 F.4th at 1193–95.

2. The ALJ provided "specific and legitimate reasons supported by substantial evidence in the record" for giving the opinions of Lindstrom's treating physician and two examining physicians little weight. *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995) (internal quotations and citation omitted). Lindstrom's treating physician's opinions were inconsistent with his treatment records, which evidenced largely unremarkable findings. While he opined that Lindstrom was moderately/moderately severely limited in her ability to work, his treatment records documented a normal gait, complete lumbar range of motion, and intact muscle tone in her arms and legs. The two examining physicians, whose opinions were given little weight, both examined Lindstrom after the insured period and failed to provide any retrospective diagnoses. *See Turner v. Comm'r Soc. Sec. Admin.*, 613 F.3d 1217, 1224 (9th Cir. 2010) (finding that the ALJ was entitled to disregard an examining-source opinion provided after the date last insured, particularly where it conflicted with medical evidence during the insured period).

Additionally, the ALJ appropriately gave partial weight to the opinion of an examining psychologist. Although the psychologist opined that Lindstrom had some problems with concentration and social interactions and was likely to be distracting and potentially irritating to others, she made other contradictory observations. For example, the psychologist found that Lindstrom had an appropriate affect and a satisfactory attention span, such as an almost perfect performance on a mini mental status exam. Given the conflicting observations, the ALJ appropriately gave the opinion partial weight.

3. The ALJ provided "specific findings stating clear and convincing reasons" for discounting Lindstrom's subjective testimony and that of Lindstrom's husband. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); *see* 20 C.F.R. § 404.1529(c)(2). Although partially crediting Lindstrom's own testimony, the ALJ specified that Lindstrom's testimony related to lower back pain, knee pain, and mental impairments was inconsistent with objective medical evidence demonstrating less severe limitations and issued appropriate limitations based on the record as a whole. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1165–66 (9th Cir. 2001) (the ALJ properly discounted the claimant's symptom testimony based on physical examination findings); *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (the ALJ is not required to include all possible limitations in their assessment, only

limitations the ALJ found credible and supported by substantial evidence in the record).

Similarly, the ALJ properly considered Lindstrom's daily activities—caring for her personal hygiene, some cleaning and shopping, and helping care for her father-in-law—in her credibility analysis. *See Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) ("In reaching a credibility determination, an ALJ may weigh inconsistencies between the claimant's testimony and his or her conduct, daily activities, and work record, among other factors.").

Finally, the ALJ properly discounted the third-party lay testimony given by Lindstrom's husband. His testimony was nearly identical to Lindstrom's own and was similarly inconsistent with objective medical evidence and opinions in the record. *See Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (finding that the ALJ gave germane reasons for rejecting the testimony of a spouse when it was similar to testimony given by the claimant that was properly rejected).

AFFIRMED.