

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 9 2022

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

DANIEL MITCHELL,

Plaintiff-Appellant,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant-Appellee.

No. 21-35647

D.C. No. 3:20-cv-05853-SKV

MEMORANDUM*

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

Submitted November 10, 2022**
Seattle, Washington

Before: IKUTA and COLLINS, Circuit Judges, and FITZWATER,** District Judge.

* 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 Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Daniel Mitchell (“Mitchell”) appeals the district court’s judgment affirming the Commissioner of Social Security’s denial of his application for supplemental security income under Title XVI of the Social Security Act. The district court had jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3). We have jurisdiction under 28 U.S.C. § 1291. Reviewing the district court’s judgment de novo and the ALJ’s findings for substantial evidence, *Attmore v. Colvin*, 827 F.3d 872, 875 (9th Cir. 2016), we affirm.

1. Substantial evidence supports the administrative law judge’s (“ALJ’s”) finding that inconsistencies in Mitchell’s testimony undermine the weight his testimony should be afforded. The ALJ discussed in detail several inconsistencies between Mitchell’s testimony and the record before the Commissioner, including the medical evidence presented to the Commissioner and Mitchell’s reported activities. 20 C.F.R. § 416.929(a), (c) (2017); *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

2. Substantial evidence supports the ALJ’s decisions regarding the persuasiveness of various medical opinions provided to the Commissioner. The ALJ considered the extent to which the opinions were based on the unreliable subjective reports of Mitchell and evaluated the opinions’ consistency and supportability against other evidence in the record, including objective clinical findings and observations and Mitchell’s contrasting reported activities. 20 C.F.R. § 416.920c (2017); *Garrison*

v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) (“An ALJ can satisfy the ‘substantial evidence’ requirement by ‘setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.’”) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)); *see also Ford v. Saul*, 950 F.3d 1141, 1155 (9th Cir. 2020) (explaining that conflicts between a physician’s opinion and the claimant’s activity level is a reason for rejecting the medical opinion).

3. Mitchell failed to preserve his separation of powers challenge. He raises this argument for the first time on appeal, and this Court generally does “not ‘consider an issue not passed upon below.’” *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (quoting *Golden Gate Hotel Ass’n v. City & Cnty. of S.F.*, 18 F.3d 1482, 1487 (9th Cir. 1994)). Even if Mitchell had preserved this contention, his counsel recognized in a Fed. R. App. P. 28(j) letter (citing *Kaufmann v. Kijakazi*, 32 F.4th 843 (9th Cir. 2022)) that his constitutional arguments concerning the tenure of the Commissioner of Social Security are foreclosed.

AFFIRMED.