[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12197
Non-Argument Calendar

D.C. Docket No. 0:17-cv-60569-JJO

ADEM ALBRA,

Plaintiff-Appellant,

versus

ACTING COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 8, 2020)

Before MARTIN, BRANCH and EDMONDSON, Circuit Judges.

PER CURIAM:

Adem Albra appeals the district court's order affirming the Social Security Commissioner's denial of Albra's application for disability insurance benefits ("DIB"), 42 U.S.C. § 405(g). Reversible error has been shown; we vacate the district court's order and remand with instructions to vacate the Commissioner's decision and to remand to the Commissioner for further proceedings.

Our review of the Commissioner's decision is limited to whether substantial evidence supports the decision and whether the correct legal standards were applied. Winschel v. Comm'r of Soc. Sec., 631 F.3d 1176, 1178 (11th Cir. 2011). "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." Id. Under this limited standard of review, we may not make fact-findings, not re-weigh the evidence, and not substitute our judgment for that of the Administrative Law Judge ("ALJ"). Moore v. Barnhart, 405 F.3d 1208, 1211 (11th Cir. 2005). We review de novo the district court's determination about whether substantial evidence supports the ALJ's decision. See Wilson v. Barnhart, 284 F.3d 1219, 1221 (11th Cir. 2002).

A person who applies for Social Security DIB must first prove that he is disabled. See 20 C.F.R. § 404.1512(a). The Social Security Regulations outline a five-step sequential evaluation process for determining whether a claimant is

disabled. 20 C.F.R. § 404.1520(a)(4). The ALJ must evaluate (1) whether the claimant engaged in substantial gainful work; (2) whether the claimant has a severe impairment; (3) whether the severe impairment meets or equals an impairment in the Listing of Impairments (the "Listings"); (4) whether the claimant has the residual functional capacity ("RFC") to perform his past relevant work; and (5) whether, in the light of claimant's RFC, age, education, and work experience, other jobs exist in the national economy the claimant can perform. Id.

Applying the five-step evaluation process, the ALJ first determined that Albra had engaged in no substantial gainful activity since his application date. The ALJ then determined that Albra had the following severe impairments: AIDS and an affective and anxiety disorder. At step three, the ALJ concluded that Albra had no impairment or combination of impairments that met or medically equaled a listed impairment.

The ALJ next determined that Albra had the capacity to perform medium work with limitations. Among other limitations, the ALJ determined that Albra had "the capacity to understand, remember and carry out short, simple instructions." The ALJ concluded that Albra was unable to perform his past work but that jobs existed in significant numbers in the national economy that Albra could perform. As a result, the ALJ concluded that Albra was not disabled. The district court affirmed the decision.

I.

On appeal, Albra contends that the ALJ erred at step three by failing to consider whether Albra's HIV-related herpes simplex infection of his right eye met Listing 14.08(D)(2)(a).

A claimant is "conclusively presumed to be disabled" if he meets or equals the level of severity of a listed impairment. Crayton v. Callahan, 120 F.3d 1217, 1219 (11th Cir. 1997). The claimant has the burden of proving that an impairment meets or equals a listed impairment. See Barron v. Sullivan, 924 F.2d 227, 229 (11th Cir. 1991).

"To 'meet' a Listing, a claimant must have a diagnosis included in the Listings and must provide medical reports documenting that the conditions meet the specific criteria of the Listings and the duration requirement." Wilson, 284 F.3d at 1224 (citing 20 C.F.R. § 404.1525(a)-(d)). "To 'equal' a Listing, the medical findings must be 'at least equal in severity and duration to the listed findings.'" Id. (citing 20 C.F.R. § 404.1526(a)).

In determining whether a claimant meets or equals a Listing, "[t]he ALJ must consider the applicant's medical condition taken as a whole." Jamison v. Bowen, 814 F.2d 585, 588 (11th Cir. 1987). The ALJ, however, need not "cite to

particular regulations or cases" or "mechanically recite the evidence leading to [the] determination." Id. at 588-89; Hutchinson v. Bowen, 787 F.2d 1461, 1463 (11th Cir. 1986). In some cases, the ALJ's finding that a claimant fails to meet a listing may be implied from the record. See Hutchinson, 787 F.2d at 1463 (concluding that the ALJ "implicitly found" that a claimant met no listed impairment where -- although the ALJ made no express finding at step three that the claimant met no Listing -- the ALJ proceeded to address steps four and five of the sequential evaluation).

At the time of the ALJ's decision in this case, Listing 14.08(D)(2)(a) provided that a claimant meets the Listing for HIV infection if he has medical documentation establishing HIV and a "[h]erpes simplex virus causing [a] [m]ucocutaneous infection . . . lasting for 1 month or longer . . .." 20 C.F.R. pt. 404, subpt. P, app. 1, § 14.08(D)(2)(a) (2016).

The record in this case is insufficient for us to determine if the ALJ considered properly whether Albra's impairments met or equaled Listing 14.08(D)(2)(a). At step three, the ALJ found that "[t]he medical evidence does not establish the claimant's impairments meet the severity criteria required by the Listings of Impairments." The ALJ then discussed in detail only whether Albra's mental impairment met the criteria of Listing 12.04: the ALJ never mentioned Listing 14.08.

In addressing Albra's mental impairments, the ALJ noted that Albra had reported to a psychologist that he "had developed a herpes ulcer of the right eye which left him blind in that eye for six months." The ALJ then said these words: "[A] thorough review of the record reveals no medical documentation to validate this allegation. As will be later discussed, progress notes of his primary care physician for a nine-month period following the illness, indicate he had no complaints of the eye and examinations remained intact."

The ALJ later addressed Albra's eye condition again in assessing Albra's RFC. The ALJ described the medical records and opinions of Albra's primary care physician (Dr. Dwyer), who saw Albra regularly for routine management of Albra's HIV. The ALJ summarized Dr. Dwyer's progress notes as showing that Albra "consistently remained asymptomatic." The ALJ also considered an HIV medical source statement[1] completed by Dr. Dwyer: a document the ALJ said indicated that Albra "demonstrated no repeated manifestations [of his HIV], other than herpes virus." On that HIV form, Dr. Dwyer confirmed that Albra had tested positive for HIV. Dr. Dwyer also checked a box indicating that Albra had experienced "Herpes Simplex Virus causing mucocutaneous infection . . . lasting for 1 month or longer . . .."

[1] The "HIV medical source statement" refers to Social Security Administration form SSA-4814-FS titled "Medical Report on Adult with Allegation of Human Immunodeficiency Virus (HIV) Infection."

About Albra's eye condition, the ALJ said that Dr. Dwyer's progress notes showed that -- on 29 May 2015 -- Albra reported to Dr. Dwyer that he had a corneal ulcer but reported no symptoms of right eye blindness. Dr. Dwyer's 29 May 2015 progress notes show that Dr. Dwyer diagnosed Albra with "herpes simplex with other ophthalmic complications." In making that diagnosis, Dr. Dwyer commented that he could "think of few infections that would result in corneal scarring outside of HSV."

The ALJ then said that Dr. Dwyer's progress notes from 6 August 2015, 9 October 2015, and 22 March 2016 indicated that Albra denied having eye symptoms during those visits and reported no right eye blindness. Based on Dr. Dwyer's progress notes, the ALJ determined that the record failed to support Albra's allegation "that he had been blind in the right eye for six months following the cornea involvement in May 2015."

The ALJ says she then afforded "great weight" to Dr. Dwyer's opinion. Supposedly consistent with Dr. Dwyer's opinion, the ALJ determined that Albra's "HIV status has been asymptomatic with no opportunistic infections other than a herpes flare." (emphasis added).

Given the language of the ALJ's decision in this case, we cannot reasonably draw the inference that the ALJ considered evidence of Albra's herpes infection and made an implied finding that Albra failed to meet Listing 14.08(D)(2)(a). To

the contrary, the ALJ's decision seems to credit Dr. Dwyer's 29 May 2015 diagnosis of Albra with a herpes simplex viral infection in his right eye and to credit Dr. Dwyer's opinion on the HIV medical source statement that Albra experienced "Herpes Simplex Virus causing mucocutaneous infection . . . lasting for 1 month or longer . . .." To the extent the ALJ found that Albra's eye complaints were unsupported by the record, we read that finding as limited to Albra's allegation that he suffered blindness in his right eye for six months. The ALJ made no findings that directly contradicted Dr. Dwyer's herpes diagnosis and, instead, the ALJ says she gave "great weight" to Dr. Dwyer's opinion.[2]

Given the observed inconsistency between the ALJ's finding that Albra suffered from a herpes infection and the ALJ's determination that Albra met or equaled no Listing, we cannot ascertain whether the ALJ followed properly the proscribed sequential evaluation. When -- as in this case -- we cannot determine effectively whether the ALJ applied the pertinent statutory and regulatory requirements, we will vacate and remand for clarification. See Jamison, 814 F.2d at 588-89.

[2] On appeal, the Commissioner argues that other evidence in the record -- evidence not discussed by the ALJ -- is contrary to Dr. Dwyer's opinion and supports a finding that Albra did not meet Listing 14.08(D)(2)(a). We may not, however, make additional fact-findings, re-weigh the evidence, or substitute our judgment for that of the ALJ. See Moore, 405 F.3d at 1211. Here, the ALJ gave great weight to Dr. Dwyer's opinion and credited Dr. Dwyer's diagnosis of Albra's herpes infection. That other record evidence might support a different determination does alter our review of the ALJ's decision.

II.

Albra also contends that the ALJ failed to fulfill an affirmative duty to identify and to resolve conflicts between the testimony of the Vocational Expert ("VE") and the Dictionary of Occupational Titles ("DOT"). Albra says this failure constitutes a violation of Social Security Ruling 00-4p (SSR 00-4p) and our decision in Washington v. Comm'r of Soc. Sec., 906 F.3d 1353 (11th Cir. 2018).

The Commissioner bears the burden at step five "to show the existence of other jobs in the national economy which, given the claimant's impairments, the claimant can perform." Washington, 906 F.3d at 1359. The "critical inquiry" at this stage "is whether jobs exist in the national economy in significant numbers that the claimant could perform in spite of his impairments." Id. at 1360. In making this determination, the ALJ may consider information from the DOT and the testimony of the VE. Id.

An ALJ has an "affirmative duty" -- under SSR 00-4p -- to identify and to resolve apparent conflicts between a VE's testimony and information in the DOT. Washington, 906 F.3d at 1362-63. An "apparent conflict" is one "that is reasonably ascertainable or evident from a review of the DOT and the VE's testimony." Id. at 1365. "At a minimum, a conflict is apparent if a reasonable

comparison of the DOT with the VE's testimony suggests that there is a discrepancy, even if, after further investigation, that turns out not to be the case." Id. "The failure to properly discharge this duty means the ALJ's decision is not supported by substantial evidence." Id. at 1362.

Here, the VE testified that a person with Albra's capacity could perform work as a hand packager, a collator, a small parts assembler, or a box bender. The DOT assigns a General Education Development ("GED") reasoning level to each position. Under the DOT, the jobs of hand packager, collator, and small parts assembler are assigned a GED reasoning level of two, which requires the ability to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions." (DOT 653.687-010, 706.684-022, 920.587-018, App'x C(III)). The job of box bender is assigned a GED reasoning level of one, which requires the ability to "[a]pply commonsense understanding to carry out simple one- or two-step instructions." (DOT 641.687-010, App'x C(III)).

Albra's RFC provided that Albra had the "capacity to understand, remember and carry out short, simple instructions:" a limitation that seems to correspond to a GED reasoning level of one. Because three of the four jobs identified by the VE require a GED reasoning level that exceeds Albra's RFC, there exists an apparent conflict between the VE's testimony about the jobs Albra could perform and the DOT's descriptions of those jobs.

On appeal, the Commissioner says that, even if the ALJ erred in failing to identify and to resolve this conflict, that error is harmless because the ALJ also relied on the VE's testimony that Albra could perform work as a box bender: a job that requires a GED reasoning level of one. Because we have already determined that a remand is necessary for the ALJ to clarify the ALJ's decision-making at step three, we need not decide today whether the ALJ's error at step five is harmless. Instead-- to the extent the ALJ reaches step five on remand -- the ALJ shall reassess the findings at that step consistent with this opinion and with our decision in Washington.

We vacate the district court's order affirming the ALJ's decision. We remand the case to the district court with instructions to vacate the Commissioner's decision and to remand to the Commissioner for further proceedings.

VACATED AND REMANDED.