[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10086
Non-Argument Calendar

D.C. Docket No. 2:19-cv-00566-JES-NPM

RODNEY T. PETERSON,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

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

(July 27, 2021)

Before LUCK, LAGOA and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Rodney Peterson appeals the district court's order affirming the Social Security Commissioner's ("Commissioner") denial of his claim for supplemental security income ("SSI"). On appeal, Peterson argues that the administrative law judge ("ALJ") failed to resolve inconsistencies between the vocational expert's ("VE") testimony and the Dictionary of Occupational Titles ("DOT") description of the jobs of marker and advertising material distributor. He also argues that the ALJ's residual functional capacity ("RFC") determination was not supported by substantial evidence because it did not include a spelling limitation. Finally, he argues that there was insufficient evidence to support the ALJ's finding that he had a limited education and could not read at the fourth-grade level. After reading the parties' briefs and reviewing the record, we affirm the district court's order denying SSI benefits.

I.

Peterson applied for SSI on October 29, 2015, alleging he had become disabled on December 28, 2013. After a hearing, an ALJ issued a decision denying Peterson's application, and the Appeals Council denied Peterson's request for review. Peterson then filed an action in federal district court, and a magistrate judge issued a report and recommendation ("R&R") recommending that the district court affirm the Commissioner's decision. The district court issued an order and

judgment adopting the magistrate judge's R&R and affirmed the Commissioner's decision. Peterson then perfected the instant appeal.

II.

When an ALJ denies benefits and the appeals council denies review, "we review the ALJ's decision as the Commissioner's final decision." *Doughty v. Apfel*, 245 F.3d 1274, 1278 (11th Cir. 2001). We review *de novo* the legal principles upon which an ALJ based its decision but review the resulting decision to determine whether it is supported by substantial evidence. *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005). "[T]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, ___ U.S. ___, 139 S. Ct. 1148, 1154 (2019). "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Winschel v. Comm'r of Soc. Sec. Admin.*, 631 F.3d 1176, 1178 (11th Cir. 2011) (quotation marks omitted). "We may not decide the facts anew, reweigh the evidence, or substitute our judgment for that of the Commissioner." *Id.* (quotation marks and brackets omitted). Rather, if the ALJ's decision is supported by substantial evidence, we defer to that decision even if the evidence may preponderate against it. *Crawford v. Comm'r of Soc. Sec.*, 363 F.3d 1155, 1158-59 (11th Cir. 2004).

III.

A disability is defined as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The mere diagnosis of a medical impairment is insufficient, as it does not reveal the extent to which the impairment limits the claimant's ability to work. *Moore*, 405 F.3d at 1213 n.6.

An individual claiming Social Security disability benefits must prove that he is disabled. *Id.* at 1211. The Social Security regulations establish a five-step, "sequential" process for determining whether a claimant is disabled. 20 C.F.R. § 416.920(a)(1). Throughout the process, the burden is on the claimant to introduce evidence in support of his application for benefits. *Ellison v. Barnhart*, 355 F.3d 1272, 1276 (11th Cir. 2003). If an ALJ finds a claimant disabled or not disabled at any given step, the ALJ does not go on to the next step. 20 C.F.R. § 416.920(a)(4).

At the first step, the ALJ must determine whether the claimant is currently engaged in substantial gainful activity. *Id.* § 416.920(a)(4)(i), (b). At the second step, the ALJ must determine whether the impairment or combination of impairments for which the claimant allegedly suffers is "severe." *Id.* § 416.920(a)(4)(ii), (c). At the third step, the ALJ must decide whether the

claimant's severe impairments meet or medically equal a listed impairment. *Id.* § 416.920(a)(4)(iii), (d). Where, as here, the ALJ finds that the claimant's severe impairments do not meet or equal a listed impairment, the ALJ must then determine, at step four, whether he has the RFC to perform his past relevant work. *Id.* § 416.920(a)(4)(iv), (e)-(f). "[RFC] is an assessment . . . of a claimant's remaining ability to do work despite his impairments." *Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir. 1997).

If the claimant cannot perform his past relevant work, the ALJ must then determine, at step five, whether the claimant's RFC permits him to perform other work that exists in the national economy. 20 C.F.R. § 416.920(a)(4)(v), (g). The ALJ may satisfy that burden and provide that evidence through a VE's testimony. *Phillips v. Barnhart*, 357 F.3d 1232, 1240 (11th Cir. 2004); *see also* 20 C.F.R. § 404.1566(e). A VE "is an expert on the kinds of jobs an individual can perform based on his or her capacity and impairments." *Phillips*, 357 F.3d at 1240. Finally, the burden shifts back to the claimant to prove he is unable to perform the jobs suggested by the Commissioner. *Hale v. Bowen*, 831 F.2d 1007, 1011 (11th Cir. 1987). An ALJ is not required to include in either the RFC or the hypothetical posed to the vocational expert any limitations that are not supported by the record. *Crawford*, 363 F.3d at 1161.

According to SSR 00-4p, the ALJ has an affirmative duty to identify and resolve apparent conflicts between a VE's testimony and information in the DOT. SSR 00-4p, 65 Fed. Reg. 75759-01, 75760 (Dec. 4, 2000). If the VE's evidence appears to conflict with the DOT, the ALJ will obtain a reasonable explanation of the apparent conflict. *Id.* Where the VE's evidence is inconsistent with the information in the DOT, the ALJ must resolve the conflict before relying on the VE's evidence to support a determination or decision that a claimant is or is not disabled. *Id.*

Although SSR 00-4p is not binding on us, the Social Security Administration is nevertheless bound to follow it, even where the internal procedures espoused in that interpretation are more rigorous than otherwise would be required. *Washington v. Comm'r of Soc. Sec.*, 906 F.3d 1353, 1361 (11th Cir. 2018). In *Washington*, we rejected the Commissioner's argument that SSR 00-4p only required the ALJ to ask the VE whether his testimony was consistent with the DOT. *Id.* at 1361-62. Instead, we held that SSR 00-4p imposed upon the ALJ an affirmative obligation to identify any apparent conflicts and to resolve them and that an ALJ's failure to discharge that duty means that the ALJ's decision is not supported by substantial evidence. *Id.* at 1362. We noted that "apparent" means "apparent to an ALJ who has ready access to and a close familiarity with the

DOT." *Id.* at 1366. In other words, the ALJ is required to identify conflicts that are "reasonably ascertainable or evident." *Id.*

IV.

Here, the ALJ found that Peterson could perform the jobs of marker and advertising material distributor. An individual working as a marker marks and attaches price tickets to articles of merchandise to record price and identifying information, marks selling price by hand on boxes containing merchandise, or on price tickets; ties, glues, sews, or staples price ticket to each article; presses lever or plunger of mechanism that pins, pastes, ties, or staples ticket to article; may record number and types of articles marked and pack them in boxes; may compare printed price tickets with entries on purchase order to verify accuracy and notify supervisor of discrepancies; and may print information on tickets, using a ticket-printing machine. DOT 209.587-034. The job requires a reasoning level of two, which requires the individual to "apply commonsense understanding to carry out detailed but uninvolved written or oral instructions" and "[d]eal with problems involving a few concrete variables in or from standardized situations." *Id.* It requires a math level of one and a language level of one, including printing simple sentences containing subject, verb, and object, and series of numbers, names, and addresses. *Id.*

An individual working as an advertising material distributor distributes advertising material "from house to house, to business establishments, or to persons on street, following oral instructions, street maps, or address lists." DOT 230.687-010. The job requires a reasoning level of one, a math level of one, and a language level of one, including printing simple sentences containing subject, verb, and object, and series of numbers, names, and addresses. *Id.* It requires constant exposure to weather but does not require exposure to any extreme cold, extreme heat, or wetness. *Id.*

Based on our review of the record, we are persuaded that the ALJ properly relied on VE testimony to determine that Peterson could perform the jobs of marker and advertising material distributor. We conclude that there was no apparent conflict between an RFC limitation to simple, routine, repetitive tasks and the DOT's description of jobs requiring level two reasoning. *See Valdez v. Comm'r of Soc. Sec.*, 808 F. App'x 1005, 1009 (11th Cir. 2020) (indicating that an RFC limitation to simple, routine, repetitive tasks does not conflict with a level three reasoning requirement). Additionally, we conclude that there is no apparent conflict between Peterson's RFC limitations and the level two reasoning requirements. The record indicates that a psychological consultant found that Peterson was only moderately limited in his ability to carry out detailed instructions, would need repetition of only some of the more detailed instructions,

and was able to meet the mental demands of a simple vocation on a sustained basis despite the limitations resulting from any impairment. This provides sufficient evidence to support the ALJ's decision not to include a limitation to only simple instructions in Peterson's RFC.

Moreover, the record demonstrates that the ALJ did not err by failing to raise any alleged conflict between an RFC limitation to avoid concentrated exposure to cold or wetness and the indication that an advertising distributor will be subject to constant exposure to weather. Under the DOT classifications, extreme cold, wet and/or humid, and exposure to weather are listed as separate characteristics for occupations. DOT 230.687-010. Further, the DOT description of advertising distributor specifically states that extreme cold and wetness are not conditions that exist for jobs in this occupation. *See id.* Peterson claims that a conflict exists because one RFC commentary was that he should avoid very wet floors because of his balance issues. However, the ALJ did not include this limitation in Peterson's RFC, so no conflict exists between the RFC and the DOT description of advertising distributor. Further, Peterson does not explain how the advertising distributor job would expose him to very wet floors, given that the job requires walking or driving from house to house or business to business. In sum, the record shows that the ALJ properly relied on VE testimony to determine that

there were a significant number of jobs in the national economy Peterson could perform with his RFC.

V.

Peterson contends that the ALJ's RFC assessment failed to include limitations on his spelling skills and that the jobs the ALJ found he could perform required language skills that exceeded his abilities. However, the record demonstrates that the ALJ's decision not to include a spelling limitation in Peterson's RFC was supported by substantial evidence. The record shows that Peterson can read at a fourth-grade level, that he had a full-scale intelligence quotient ("IQ") score of 93 in fifth grade, that he attended school through at least the tenth grade, and that he successfully filled out disability forms by hand. Because a spelling limitation to less than kindergarten levels is contradicted by the record, the ALJ did not err in failing to include it in Peterson's RFC. Furthermore, Peterson has failed to demonstrate that he is unable to perform the jobs suggested by the VE based on any spelling limitations and, thus, has not met his burden of showing that he is unable to perform the jobs of marker and advertising distributor

VI.

Peterson argues that the evidence that he completed the tenth grade in high school does not indicate that he has limited education, but rather, the evidence indicates that he might be functionally illiterate. Peterson asserts that he acquired a

neurocognitive disorder after he was aged 21 and his newer IQ score of 63 is more relevant than the IQ score from fifth grade. Thus, Peterson argues that the ALJ's finding that he had limited education was not supported by substantial evidence.

The regulations generally consider the seventh through eleventh grade level of formal education to be a "limited education." 20 C.F.R. § 416.964(b)(3). However, the numerical grade alone may not be sufficient to determine an individual's educational abilities depending on the evidence presented. *See id.* § 416.964(b). The record demonstrates that Peterson did complete the tenth grade, which indicates a limited education level. *See id.* § 416.964(b)(3). The record also does not contain objective evidence confirming the existence of a traumatic brain injury, as alleged by Peterson. Moreover, Peterson fails to demonstrate that the ALJ should have found him to be illiterate because Peterson indicated that he could read and understand English and write more than his name. Peterson also completed his function report without assistance from anyone, indicating that he is not illiterate. Based on our review of the record, we conclude that the ALJ properly concluded that Peterson had a limited education level and was not functionally illiterate, but rather could read at the fourth-grade level.

Accordingly, for the aforementioned reasons, we affirm the district court's order affirming the Commissioner's denial of SSI benefits to Peterson.

AFFIRMED.