

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 22-11825

Non-Argument Calendar

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DONNA GILBERT,

Plaintiff-Appellant,

*versus*

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia  
D.C. Docket No. 3:20-cv-00107-RGV

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Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Donna Gilbert appeals the district court's affirmance of the Social Security Administration's (SSA) denial of her claim for disability insurance benefits (DIB), under 42 U.S.C. § 405(g), and supplemental security income (SSI), under 42 U.S.C. § 1383(c)(3). Gilbert argues that the administrative law judge (ALJ) failed to find that she has a respiratory impairment that met Listing 3.02C(2) despite her providing results of an arterial blood gas (ABG) test satisfying the criteria for disability under that Listing. Additionally, she argues that, when determining her residual functional capacity (RFC), the ALJ erred by: (1) failing to evaluate all of her impairments, specifically her meniscus degeneration and tear, scoliosis, neuropathy, and right ankle tendinopathy and tumor; (2) improperly weighing the medical and opinion evidence; and (3) finding that her subjective complaints and her sister's and daughter's third-party function reports were not consistent with her medical evidence.

In a social security disability case in which the Appeal Council has denied review, we review the ALJ's decision as the Commissioner's final decision. *Viverette v. Comm'r of Soc. Sec.*, 13 F.4th 1309, 1313 (11th Cir. 2021). We therefore review the ALJ decision the same as we would of the district court, meaning "we neither defer to nor consider any errors in the district court's opinion." *Henry v.*

22-11825

Opinion of the Court

3

*Comm’r of Soc. Sec.*, 802 F.3d 1264, 1267 (11th Cir. 2015) (per curiam).

We review the ALJ’s decision to determine whether it is “supported by substantial evidence and based on proper legal standards.” *Winschel v. Comm’r of Soc. Sec.*, 631 F.3d 1176, 1178 (11th Cir. 2011). We review *de novo* whether the ALJ applied the correct legal standard. *Viverette*, 13 F.4th at 1313–14.

“Because a hearing before an ALJ is not an adversary proceeding, the ALJ has a basic obligation to develop a full and fair record.” *Graham v. Apfel*, 129 F.3d 1420, 1422 (11th Cir. 1997) (per curiam). The ALJ has the duty to “scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.” *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981). An ALJ fails to satisfy this duty not only when he fails to elicit facts relevant to the applicant’s claim at the hearing, but also when his decision omits key information. *Id.* Such procedural defects require a remand for further agency proceedings. *See id.* at 735–37.

To determine whether a claimant is disabled for purposes of DIB and SSI, the Social Security regulations mandate a five-step sequential evaluation process. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *Viverette*, 13 F.4th at 1312. Under the first step, the claimant has the burden to show that she is not currently engaged in substantial gainful activity. *See* 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). At the second step, the claimant must show that she has a severe impairment. *See* 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). The regulations define a severe impairment as an

“impairment or combination of impairments which significantly limit[] [the claimant’s] physical or mental ability to do basic work activities.” 20 C.F.R. §§ 404.1520(c), 416.920(c).

If the ALJ determines that the claimant “does not have a severe impairment or combination of impairments, the disability claim is denied.” *Bowen v. Yuckert*, 482 U.S. 137, 140–41 (1987). If the claimant has a severe impairment, the evaluation proceeds to the third step. *Id.* at 141.

Step three considers whether the claimant has shown that she has an impairment that “meets or equals a disability described in the Listing of Impairments, which describes impairments that are considered severe enough to prevent a person from doing any gainful activity.” *Davis v. Shalala*, 985 F.2d 528, 532 (11th Cir. 1993); 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). “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 v. Barnhart*, 284 F.3d 1219, 1224 (11th Cir. 2002) (per curiam). “If a claimant’s condition meets or equals the listed impairments, [s]he is conclusively presumed to be disabled and entitled to benefits.” *Bowen v. City of New York*, 476 U.S. 467, 471 (1986). Only if a claimant does not meet a listing does the analysis proceed to step four and a consideration of the claimant’s RFC. *Id.*

The listings on respiratory disorders evaluate “disorders that result in obstruction (difficulty moving air out of the lungs) or restriction (difficulty moving air into the lungs), or that interfere with

22-11825

Opinion of the Court

5

diffusion (gas exchange) across cell membranes in the lungs.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A1, § 3.00A(1).

To assess the severity of a claimant’s respiratory disorder, the SSA requires medical evidence, including the claimant’s medical history, physical examination findings, imaging results, pulmonary function tests, relevant laboratory tests, and descriptions of treatments prescribed with the claimant’s response to the treatment, depending on the claimant’s respiratory disorder and associated effects. *Id.* § 3.00D(1). Spirometry, which measures “how well [the claimant] move[s] air into and out of [her] lungs,” *id.* § 3.00E(1), and ABG tests, which measure “the partial pressure of oxygen,  $P_aO_2$ , and carbon dioxide,  $P_aCO_2$ , in the arterial blood” are two types of pulmonary function tests, *id.* § 3.00D(4).

“An ABG test measures  $P_aO_2$ ,  $P_aCO_2$ , and the concentration of hydrogen ions in [the claimant’s] arterial blood.” *Id.* § 3.00G(1). The SSA uses “a resting or an exercise ABG measurement to evaluate [the claimant’s] respiratory disorder under 3.02C2.” *Id.* To use a resting ABG test to meet a listing, the claimant “must be medically stable at the time of the test.” *Id.* § 3.00G(2)(i). Additionally, the claimant’s ABG test had to be administered while they were breathing room air without oxygen supplementation. *Id.* § 3.00G(2)(a)(ii). Furthermore, the resting ABG test must include: (1) the claimant’s “name, the date of the test, and either the altitude or both the city and State of the test site;” and (2) “[t]he  $P_aO_2$  and  $P_aCO_2$  values.” *Id.* § 3.00G(2)(b).

Section 3.02 sets forth listing criteria for chronic respiratory disorders from causes other than cystic fibrosis. *Id.* § 3.02. Those listings can be satisfied through different sorts of testing, set forth in subparts A through D; if any of the four subparts are met, the claimant has established an impairment meeting the listing. *Id.* The subparts are: (1) in subpart A, a forced expiratory volume below a certain threshold for an individual's height, age, and sex; (2) in subpart B, a forced vital capacity volume below a certain threshold for an individual's height, age, and sex; (3) in subpart C, a chronic impairment of gas exchange demonstrated in one of three ways; and (4) in subpart D, complications requiring three hospitalizations of at least 48 hours within a 12-month period that are at least 30 days apart. *Id.* Listing § 3.02 does not provide a specific durational requirement that the claimant has to meet. *See id.*

The three sets of criteria for the § 3.02C listing for chronically impaired gas exchange are: (1) in subpart 3.02C(1), an average of two unadjusted, single-breath measurements of diffusing capacity of the lungs for carbon monoxide below a certain threshold for an individual's height and sex; (2) in subpart 3.02C(2), an arterial  $P_{aO_2}$  below a certain threshold based on the individual's  $P_{aCO_2}$ , and adjusted for the test site's elevation above sea level; or (3) in subpart 3.02C(3), a percentage of oxygen saturation of blood hemoglobin, measured by pulse oximetry, that is less than or equal to 87% for test sites below 3,000 feet above sea level (with lower thresholds for higher elevations). *Id.* § 3.02C. As to 3.02C(2) specifically, this listing is satisfied by ABG testing results showing a  $P_{aCO_2}$  of 40 or above and an arterial  $P_{aO_2}$  of less than 55 for test site

22-11825

Opinion of the Court

7

elevations of 3,000 feet above sea level or less. *Id.* § 3.02C(2). In Atlanta, the elevation is approximately 1,000 feet above sea level. See Spot Elevation, Atlanta, Ga., National Map, USGS, <http://apps.nationalmap.gov/viewer> (last visited Mar. 22, 2023).

When considering whether a claimant meets the impairments listed in Appendix 1, the ALJ must consider Appendix 1 but need not “mechanically recite the evidence leading to her determination,” as “[t]here may be an implied finding that a claimant does not meet a listing.” *Hutchison v. Bowen*, 787 F.2d 1461, 1463 (11th Cir. 1986). In *Hutchinson*, we explained that it was clear that the ALJ implicitly found that the claimant did not meet any of the impairments in Appendix 1 because he “was obviously familiar with the sequential evaluation process,” his decision included a statement of law recognizing that a finding of a listed impairment would require a determination of disability at step three, and yet he reached the fourth and fifth steps of the disability analysis. *Id.* Substantial evidence to support the finding and inference must be in the record. *Id.*; see *Edwards v. Heckler*, 736 F.2d 625, 629–31 (11th Cir. 1984) (concluding that the ALJ impliedly found that the claimant failed to meet a particular listing he argued was applicable, as the listing requirement was substantially identical to the severe impairment requirements at step two of the analysis, which the ALJ discussed, but going on to reverse this implicit determination as one not supported by substantial evidence).

In this case, using the SSA’s five-step evaluation, the ALJ found that Gilbert (1) met the insured status requirements through

March 31, 2016, and had not engaged in substantial gainful activity since October, 30, 2011; (2) had severe impairments of diabetes mellitus, osteoarthritis of the ankle and knees, asthma, connective tissue disease/fibromyalgia, and obesity; and (3) did not have an “impairment or combination of impairments that [met] or medically equal[ed] the severity of one of the listed impairments in 20 CFR Part 404.” Yet, Gilbert had submitted medical evidence that her ABG test form May 2016 in Atlanta, GA, demonstrated a  $P_aCO_2$  of 51.2 and a  $P_aO_2$  of 51. Considering that a patient meets the Listing 3.02C(2) with a  $P_aCO_2$  of 40 or above and  $P_aO_2$  of 55 or below, this test indicates that she likely meets the requirements of the 3.02C(2) listing. Accordingly, because the ALJ disregarded this relevant medical evidence at step three, the ALJ did not meet his burden of developing a full and fair record and inquiring into all of the relevant facts in Gilbert’s case. We VACATE and REMAND the district court’s affirmance of the ALJ’s decision. On remand, the district court should remand the case to the ALJ to further develop the record to determine whether Gilbert met all the criteria in Listing 3.02C(2). In light of the ALJ’s step three error, we will not address Gilbert’s RFC arguments.

**VACATED AND REMANDED.**