[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

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No. 22-13913

Non-Argument Calendar

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LEE LOWERY,

Plaintiff-Appellant,

versus

ACTING COMMISIONER, SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee.

____

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:21-cv-02420-JEM

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Before WILSON, JORDAN, and LUCK, Circuit Judges.

PER CURIAM:

Lee Lowery appeals the district court's order affirming the Social Security Administration's denial of his claim for disability insurance benefits ("DIB") pursuant to 42 U.S.C. § 1383(c)(3). First, Mr. Lowery argues that the administrative law judge ("ALJ") improperly omitted his emotional support dog from her residual functional capacity ("RFC") finding. Second, he contends that the ALJ failed to adequately account for a limitation in his treating psychologist's opinion in the RFC because she omitted the psychologist's opinion that he struggles with multi-step directions. Third, he asserts that the ALJ erred in finding that he could perform light-exertion work despite his limitations.

For the reasons which follow, we agree with Mr. Lowery on the first two points, and reverse and remand for further proceedings before the ALJ.

I

Mr. Lowery filed an application for DIB in January of 2017, alleging a disability onset of October of 2013, later amended to December of 2016. In his initial disability report, he claimed to be suffering from PTSD, as well as knee and ear conditions, which limited his ability to work since October of 2012. When disability examiners denied his application initially and on reconsideration, Mr. Lowery requested a hearing before an ALJ.

The ALJ held a hearing in February of 2019. At the hearing, the ALJ acknowledged that Mr. Lowery was accompanied by his emotional support dog, Beano. Before the ALJ, Mr. Lowery argued that the bilateral degenerative joint disease in his knees and his PTSD, stemming from his service in the Gulf War, affected his ability to concentrate, get along with others, and hold a full-time job.

The ALJ presented two hypothetical scenarios to the vocational expert ("VE") to assess what jobs Mr. Lowery could perform. The VE testified that an individual with Mr. Lowery's physical, psychological, and interpersonal limitations could work as an office cleaner, photocopy operator, and garment sorter, for which there were 177,000, 45,400 and 28,700 jobs, respectively, in the national economy. Next, the ALJ presented the same scenario with the additional limitation of requiring a cane to ambulate. The VE stated that this individual could work as a photocopy operator and as a garment sorter, but not as an office cleaner.

The ALJ then asked how the need for an emotional support dog in close proximity to the individual would affect his ability to hold a job. The VE said that if an employee needed an emotional support dog nearby throughout the workday, the employer might have to provide an accommodation if it met the requisite ADA standards and if the dog were required for psychiatric reasons. But the ALJ did not pose a hypothetical scenario to the VE which includes the use of an emotional support dog.

In May of 2019, the ALJ issued a decision denying Mr. Lowery's application, concluding that he was not disabled and thus did not qualify for DIB. Although the ALJ found that Mr. Lowery had three severe impairments (PTSD, major joint dysfunction, and obesity), she concluded that he retained the RFC to perform light work as set out in 20 C.F.R. § 404.1567(b).

To reach these conclusions, the ALJ relied on and summarized Mr. Lowery's medical treatment records from 2016 to 2018. The ALJ highlighted the opinion of Dr. John Whitley, PhD, a psychologist who evaluated Mr. Lowery in December of 2017, and opined that he had moderate difficulties interacting with others and would do better with "solitary, simple work with simple changes." The ALJ acknowledged Dr. Whitley's observation that Mr. Lowery would struggle with multi-step and complex directions.

The ALJ determined that although Mr. Lowery could not perform his past relevant work as a tubing inspector, there were a significant number of jobs in the national economy that he could perform. In particular, the ALJ concluded that, based on his RFC and the VE's answers to the hypothetical questions, Mr. Lowery could work as an office cleaner, a photocopy operator, or a garment sorter. Because Mr. Lowery qualified for those occupations, which collectively accounted for 251,100 jobs in the national economy, he was not disabled for DIB purposes.

The Appeals Council declined to review the ALJ's decision. Mr. Lowery subsequently sought judicial review of the agency's

decision in federal court. The district court affirmed, concluding that the ALJ's findings were supported by substantial evidence. Mr. Lowery timely appealed.

II

We review *de novo* the ALJ's application of legal principles, and we review the ALJ's resulting decision "to determine whether it is supported by substantial evidence." *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005). "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Crawford v. Comm'r of Soc. Sec.* 363 F.3d 1155, 1158 (11th Cir. 2004). We will affirm the ALJ's decision if it is supported by substantial evidence, even if the preponderance of evidence weighs against it. *See id.* at 1158-59. But we will not "affirm simply because some rationale might have supported the ALJ's conclusion." *Owens v. Heckler*, 748 F.2d 1511, 1516 (11th Cir. 1984).

III

Before addressing in detail Mr. Lowery's assignment of error, we set out some background information about the administrative process used to evaluate a DIB claim.

Eligibility for DIB requires that a claimant be disabled. *See* 42 U.S.C. § 423(a)(1)(E). A claimant is disabled if he cannot engage in substantial gainful activity due to a medically determinable impairment expected to last for a continuous period of at least 12 months. *See* § 423(d)(1)(A).

The SSA sets out a five-step, sequential evaluation process for determining whether a claimant is disabled for DIB purposes. *See* 20 C.F.R. § 404.1520(a)(2), (4). An ALJ must evaluate whether (1) the claimant is presently engaged in substantial gainful activity, (2) the claimant has a medically severe impairment, (3) the impairment is equivalent to one of those listed in the appendix of the relevant disability regulation, (4) the impairment prevents the claimant from performing his or her past work, and (5) the claimant possesses the RFC to perform other work in the national economy, considering their age, education, and work experience. *See* § 404.1520(a)(4)(i)–(v).

Importantly, the claimant bears the burden of proof for the first four steps. At step five, the burden temporarily shifts to the Commissioner to prove that the claimant will be able to perform other jobs in the national economy despite the claimant's limitations. *See Buckwalter v. Acting Comm'r of Soc. Sec.*, 5 F.4th 1315 (11th Cir. 2021).

A

Mr. Lowery first contends that the ALJ erred at step five by (1) omitting his need for his emotional support dog, Beano, in his RFC, and (2) failing to include his need for Beano in the hypothetical questions presented to the VE.

In order to help analyze the step-five requirement—whether there are enough jobs in the national economy that the claimant can perform—the SSA has created Medical–Vocational Guidelines ("the grids"). *See* 20 C.F.R. § 404.1567. Five degrees of RFC are

outlined in the grids by general exertional level: sedentary, light, medium, heavy, and very heavy exertion. *See* 20 C.F.R. § 404.1569(a). These RFC levels reflect the maximum degree to which "an individual is still able to do despite the limitations caused by his or her impairments." *Phillips v. Barnhart*, 357 F.3d 1232, 1238 (11th Cir. 2004). If the ALJ finds that a claimant's exertional capacity, education, age, and skills fit precisely within a particular grid level, the ALJ may conclude that the claimant is not disabled. *See Haddock v. Apfel*, 196 F.3d 1084, 1088 (10th Cir. 1999).

Exclusive reliance on the grids is not appropriate when a claimant "is unable to perform a full range of work at a given functional level or when a claimant has non-exertional impairments that significantly limit basic work sills." *Walker v. Bowen*, 826 F.2d 996, 1002–03 (11th Cir. 1987). "When the grids are not controlling, the preferred method of demonstrating job availability is through expert vocational testimony." *Id.* at 1003.

We have held that where a hypothetical question posed to a VE does not comprehensively account for impairments found by the ALJ, the VE's answer does not qualify as substantial evidence to support the ALJ's decision. *See Pendley v. Heckler*, 767 F.2d 1561, 1563 (11th Cir. 1985). Here, the ALJ found Mr. Lowery capable of light work, but this finding was qualified by many additional physical restrictions, including limits on climbing ramps and stairs; on understanding and carrying out simple instructions; on maintaining concentration, persistence, and pace for more than

two-hour periods; on interacting with the public; and on performing team-based work.

After acknowledging that this restrictive RFC precluded Mr. Lowery's return to his past work as a tubing inspector, the ALJ determined that based on his RFC and the VE's answers to the two hypothetical questions, Mr. Lowery could work as an office cleaner, photocopy operator, or garment sorter.

In reaching this conclusion, the ALJ failed to account for an additional mental restriction that *she found* qualified Mr. Lowery's RFC: his need for Beano, the emotional support dog that he received as part of a clinical study for veterans suffering from PTSD. One of the reasons provided by the ALJ for the RFC assigned to Mr. Lowery was that Beano was performing his intended function: Mr. Lowery "was getting beneficial support from his emotional support dog" and it helped mitigate his PTSD symptoms.

As a result, the ALJ's hypotheticals posed to the VE were not complete. By failing to include Mr. Lowery's need for Beano by his side during the workday, the factual assumptions underlying the hypothetical scenario posed to the VE did not fully account for Mr. Lowery's limitations. Accordingly, we conclude that the ALJ's decision is not supported by substantial evidence.

The district court concluded that the ALJ's decision was supported by substantial evidence because it viewed Mr. Lowery's dog as not being medically necessary. This rationale, however, was not carried into the ALJ's findings. The ALJ never excluded Beano

from her RFC finding because it was not medically necessary, or for any other reason. Instead, the ALJ failed to acknowledge the VE's testimony that the dog "would be considered an accommodation," which only "some employers might consider" accommodating. The district court's rationale was thus a *post hoc* rationalization of the ALJ's decision, which we cannot affirm. *See generally S.E.C. v Chenery Corp.*, 332 U.S. 194, 196 (1947).

In any event, the reconstructed version of the ALJ's decision ultimately flounders. In evaluating a record for DIB purposes, an ALJ may consider, in addition to objective medical evidence, any "treatment other than medication" and "any measures that the claimant used to relieve his pain or symptoms." 20 C.F.R. § 404.1529(c)(3). This is exactly what the ALJ did: she factored Beano into Mr. Lowery's RFC as a measure for him to alleviate his PTSD. By failing to account for Mr. Lowery's need for his dog during the workday in the RFC and hypotheticals, the ALJ issued a decision which lacked substantial evidence. The Commissioner thus failed to meet its burden of showing that Mr. Lowery could perform other gainful employment in the national economy.

Next we consider whether the ALJ's error can be deemed harmless. As a general proposition, reviewing courts apply the harmless error doctrine in reviewing a decision of the Commissioner denying a DIB claim. *See Diorio v. Heckler*, 721 F.2d 726, 728 (11th Cir. 1983). But reviewing courts will not affirm on harmless error grounds "[w]here an insufficient record precludes a determination that substantial evidence support[s] the ALJ's denial

of benefits." *Patterson v. Comm'r of Soc. Sec. Admin.*, 846 F.3d 656, 658 (4th Cir. 2017).

Assuming that the harmless error doctrine applies in these circumstances, we conclude that a remand is required. First, the Commissioner waived any harmless error argument by failing to present it in her submission to this Court. *See United States v. Hall*, 858 F.3d 254, 280 n.8 (4th Cir. 2017) (explaining that the government may waive a harmless error argument). Second, notwithstanding the Commissioner's waiver, we are unable to conclude that the ALJ's errors are harmless in this case. The administrative record does not clearly demonstrate that, needing a dog by his side, Mr. Lowery can actually perform the three occupations identified by the VE and relied on by the ALJ at step five. And we cannot assume that the VE would have answered in a similar manner had the ALJ instructed her to consider the added limitation of needing an emotional support dog nearby at work. Accordingly, a remand is appropriate for the ALJ to properly make this factual determination.

B

With respect to his second argument, Mr. Lowery claims that the ALJ erred by assigning great weight to Dr. Whitley's opinion—stating that Mr. Lowery struggled with complex and multi-step directions—and not including the latter limitation in his RFC.

For claims filed before March 27, 2017—like Mr. Lowery's—the ALJ must give a treating physician's opinion "substantial or considerable weight unless there is good cause to discount [it]." *Simon v. Comm'r of Soc. Sec.*, 7 F.4th 1094, 1104 (11th Cir. 2021) (quotation marks omitted). A "treating source" is a physician or other medical source who has provided the claimant with medical treatment and has, or previously had, an ongoing treatment relationship with the claimant. *See* 20 C.F.R. § 404.1527(a)(2).[1]

The weight to be given to a physician's opinion depends on several factors, including (1) the length of treatment and frequency of evaluation; (2) the nature and extent of the treatment relationship; (3) the medical evidence supporting the opinions; (4) its consistency with the record as a whole; (5) whether there is specialization in the medical area at issue: and (6) any other factors tending to support or contradict the opinion. *See* § 404.1527(c); *see also Schink v. Comm'r of Soc. Sec.*, 935 F.3d 1245, 1260 (11th Cir. 2019).

When a VE provides evidence about a job's requirements, the ALJ has an affirmative duty to inquire about any "apparent conflicts" between that evidence and information provided in the Dictionary of Occupational Titles ("DOT"). *See Buckwalter*, F.4th at 1321. A conflict is apparent if it is "apparent to an ALJ who has

[1] For claims filed on or after March 27, 2017, the SSA does not give "any specific evidentiary weight" to any medical opinion. *See* 20 C.F.R. § 404.1520c. For claims filed before March 27, 2017, however, the rule regarding treating physicians' opinions still applies. *See* § 404.1527.

ready access to and a close familiarity with the DOT." *Washington v. Comm'r of Soc. Sec.*, 906 F.3d 1353, 1366 (11th Cir. 2018). If the "conflict is reasonably ascertainable or evident," the ALJ must identify it. *See id.* Apparent means "seeming real or true, but not necessarily so." *Id.* (quotation marks omitted). 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 that a claimant is or is not disabled. *See Buckwalter*, 5 F.4th at 1321. According to SSR 00-4P, neither the VE's testimony nor the DOT automatically trumps when the two conflict. *See id.* Although SSR 00-4P is not binding on us, the SSA is nevertheless bound to follow it. *See id.*

In *Buckwalter*, we explained that the difference between jobs with level one and level two reasoning is the length of the instructions, not their complexity. *See id.* at 1323. Although level one is limited to instructions with only one or two steps, the instructions in level two are not limited in length. *See id.* Simple instructions under level one and uninvolved instructions under level two are not in conflict because "simple" and "uninvolved" are similarly defined. *Id.*

As noted, if there is an apparent conflict between the RFC and requirements for the jobs identified by the ALJ, the ALJ must address the conflict. *See Viverette v. Comm'r of Soc. Sec.*, 13 F.4th 1309, 1317 (11th Cir. 2021). If she fails to address the conflict, then the remaining question is whether the failure is harmless. *See id.* In *Viverette*, we ruled that the ALJ's failure to address the conflict

between the RFC and one of the identified jobs was not harmless. *See id.* at 1318. We noted that the ALJ identified three possible occupations that the claimant could perform and cumulatively determined that those occupations existed in significant numbers in the national economy. *See id.* Because around eighty percent of the named jobs conflicted with the RFC, we could not conclude that the error was harmless. *See id.* at 1318.

As an initial matter, the ALJ properly assigned great weight to Dr. Whitley's opinion. Because Mr. Lowery filed his DIB claim in January of 2017, Dr. Whitley's opinion was still subject to the treating physician rule. *See Simon*, 7 F.4th at 1104. But the ALJ is not required to refer to every piece of evidence provided by a claimant in a decision, so long as the decision does not broadly reject the claimant's position or disregard the claimant's whole medical condition. *See Dyer v. Barnhart*, 395 F.3d 1206, 1211 (11th Cir. 2005).

Turning to Mr. Lowery's claim, the ALJ failed to address an apparent conflict between Lowery's RFC and the requirements of the garment sorter and photocopy operator jobs. Dr. Whitley opined that Mr. Lowery would struggle with multi-step directions. Yet, an individual working as a photocopy operator or garment sorter must be able to carry out detailed but uninvolved instructions and level two reasoning. *See* DOT §§ 207.685-014, 222.687-014. As we held in *Buckwalter*, 5 F.4th at 1321, jobs requiring level two reasoning do not possess a limit in the length of instructions. This conflicts with Dr. Whitley's opinion—to

which the ALJ assigned great weight—that Mr. Lowery would struggle with multi-step directions. As a result, the ALJ based her finding of fact on the VE's testimony about a total number of 251,100 jobs, without considering an apparent conflict that affected 74,100 of those jobs.

Although the number of jobs generally available to Mr. Lowery is greater than that available to the claimant in *Viverette*, we remain hesitant to make any factual determinations ourselves. "[W]here additional (or more specific) agency fact-finding is needed, remand is the appropriate disposition." *Viverette*, 13 F.4th at 1318. Because the ALJ did not find that the remaining office cleaner jobs *alone* exist in significant numbers and, again, because the Commissioner has waived any harmless error argument, we decline to determine this question ourselves.

C

We turn to Mr. Lowery's third and final argument, which is that the ALJ's RFC finding does not reasonably account for Lowery's cane, knee brace, shoe lift, or obesity. Five degrees of RFC are outlined in the grids by general exertional level: sedentary, light, medium, heavy, and very heavy exertion. *See* 20 C.F.R. § 404.1569(a).

"The ALJ has a basic obligation to develop a full and fair record." *Welch v. Brown*, 854 F.2d 436, 440 (11th Cir. 1988). This obligation ensures that the ALJ fulfills her duty and allows us to determine whether the ALJ's findings are supported by substantial evidence. *See id.*

Here, there is substantial evidence in the record to support the ALJ's finding that Mr. Lowery could perform light work because his medical records stated that his knee pain was managed through medication and physical therapy, his pain diminished after he warmed up, his knee brace and shoe lift helped him walk better, and he primarily used his cane in the mornings. Accordingly, the ALJ adequately considered Mr. Lowery's knee condition and his various ambulatory devices and determined that he could perform light work.

IV

The judgment of the district court is reversed and the matter is remanded with instructions to remand to the Commissioner for further proceedings before the ALJ.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.