FILED
United States Court of Appeals
Tenth Circuit

August 31, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TODD R. SEWELL,

Plaintiff - Appellant,

v.

COMMISSIONER, SSA,

Defendant - Appellee.

No. 20-1409
(D.C. No. 1:19-CV-00398-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

This is a Social Security benefits appeal brought under 42 U.S.C. § 405(g) and 28 U.S.C. § 1291. Todd R. Sewell challenges the final decision of the Commissioner of Social Security (Commissioner), denying his application for disability insurance benefits. We affirm.

I. BACKGROUND & PROCEDURAL HISTORY

Sewell worked as a United States Air Force intelligence officer from 1986 to

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

2015. He stopped working in April 2015 but remained on active duty until the Air Force recommended permanent retirement in May 2016.

Sewell filed for disability insurance benefits in June 2016, asserting he had become disabled (mostly due to the effects of a pulmonary embolism) in April 2015. A Social Security examiner denied his application at the initial level, after which he requested and received a hearing in front of an ALJ. Following the hearing, the ALJ issued a written decision under the Commissioner's five-step sequential evaluation process.[1]

The ALJ's conclusions at steps one through three favored Sewell and are no longer at issue. Before proceeding to step four, the ALJ assessed Sewell's residual functional capacity (RFC). The ALJ concluded that Sewell has the RFC "to perform a range of light work as defined in 20 CFR 404.1567(b)," but with certain additional limitations that are not relevant here. Aplt. App. vol. II at 99.[2] Then, at step four, the ALJ accepted the testimony of a vocational expert that Sewell's RFC precluded his return to work as an intelligence officer.

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[1] The five-step process requires the ALJ to consider whether a claimant: (1) engaged in substantial gainful activity during the alleged period of disability; (2) has a severe impairment; (3) has a condition which meets or equals the severity of a listed impairment; (4) can return to his or her past relevant work; and, if not, (5) could perform other work in the national economy. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The claimant has the burden of proof at steps one through four; the Commissioner has the burden of proof at step five. *See Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007).

[2] Portions of Sewell's appendix have multiple page numbers on the same page. We cite to the six-digit, non-boldface numbers in the bottom-right corner, omitting any leading zeros.

Finally, at step five, the ALJ accepted the vocational expert's testimony that, according to the Dictionary of Occupational Titles, other jobs within Sewell's RFC exist in the national and regional economy, namely, "housekeeper cleaner" and "cafeteria attendant." *Id.* at 109.[3] The ALJ therefore found that Sewell was not entitled to disability benefits.

Sewell appealed to the Social Security Appeals Council and submitted additional evidence purporting to show the jobs identified by the vocational expert are more strenuous than the vocational expert believed them to be. The Appeals Council acknowledged receipt of the evidence but otherwise denied review without substantive comment. Sewell then appealed to the United States District Court for the District of Colorado, which upheld the ALJ's decision.

We provide additional background as it becomes relevant to the issues discussed below.

II. STANDARD OF REVIEW

We review whether substantial evidence supports the ALJ's factual findings and whether the ALJ applied the correct legal standards. *Barnett v. Apfel*, 231 F.3d

[3] The vocational expert gave a third example that the ALJ accepted, "power screwdriver operator." *Id.* On appeal to the district court, Sewell challenged this job classification as inconsistent with his RFC. The Commissioner chose not to defend the ALJ's reasoning on this point, instead arguing that housekeeper cleaner and cafeteria attendant jobs were sufficient to sustain the agency's burden at step five to show the claimant could perform work in the national economy. *See* Aplee. Supp. App. at 45 n.6. Accordingly, we deem the Commissioner to have abandoned the ALJ's finding regarding power screwdriver operators.

687, 689 (10th Cir. 2000). Regarding substantial evidence, "the threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). We do not "reweigh the evidence" or "substitute our judgment for that of the agency." *Barnett*, 231 F.3d at 689 (internal quotation marks omitted).

III. ANALYSIS

A. "Light Work" and the Ability to Stand and Walk

Sewell attacks the ALJ's RFC determination because it says nothing explicit about how long he can stand or walk during an eight-hour workday. According to Sewell, this means the ALJ impliedly found he has no standing or walking limitations, which leads to two problems. First, in explaining the RFC, the ALJ said he gave "great weight" to a state agency reviewing physician's opinion about Sewell's "exertional limitations," Aplt. App. vol. II at 104, yet those exertional limitations included the ability to "stand and/or walk for a total of 6 hours in an 8-hour workday," *id.* at 103. Sewell argues that the ALJ cannot give great weight to the state agency opinion and, at the same time, reject that opinion's standing and walking limitation without explanation. Second, the RFC announced in the ALJ's opinion matches the hypothetical the ALJ proposed to the vocational expert, which in turn elicited the expert's opinion about the availability of housekeeper and cafeteria jobs. Sewell argues that, absent an explicit statement in the ALJ's hypothetical about standing and walking limitations, we cannot be sure the vocational expert tailored his

job-availability opinions to Sewell's true circumstances.

The district court rejected these arguments. It noted that the ALJ's hypothetical to the vocational expert and the ALJ's eventual RFC finding both describe Sewell as capable of performing "a range of light work as defined in 20 CFR [§] 404.1567(b)." *See* Aplt. App. vol. II at 99 (announcing the RFC); *id.* at 129 (asking the vocational expert to "assume a full range of light [work]"). The court further noted that Social Security Ruling 83-10 describes "the full range of light work" as "requir[ing] standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday." SSR 83-10, 1983 WL 31251, at *6. The district court therefore reasoned that if the RFC contained any implicit finding regarding Sewell's ability to stand and walk, it was an implicit *agreement* with (not rejection of) the state agency reviewing physician's opinion on that subject. The district court also found that, by virtue of SSR 83-10, this understanding of "light work" has become so established and pervasive that the vocational expert can be presumed to have understood it when the ALJ propounded his hypothetical.

Sewell argues that using "light work" as shorthand for the ability to stand or walk for six hours per workday misreads SSR 83-10, and that SSR 83-10's interpretation of "light work" (a term that comes from a Social Security regulation, 20 C.F.R. § 404.1567(b)) otherwise does not deserve deference. But these arguments do not address the issue before us. The question is not what "light work" *should* mean, but what the ALJ and vocational expert *understood it* to mean. Sewell does not contest the district court's conclusions in this regard.

In his reply brief, Sewell asserts that allowing the ALJ to use "coded language," Aplt. Reply Br. at 9, is inconsistent with *Evans v. Chater*, 55 F.3d 530 (10th Cir. 1995), but *Evans* does not so hold. The claimant in *Evans* asserted disability primarily due to carpal tunnel syndrome in both wrists. *Id.* at 531. However, the ALJ "fail[ed] to include in his hypothetical inquiry to the vocational expert *any* limitation in this regard," apparently deeming the condition relevant only to "the effect the associated chronic pain might have on her ability to remain attentive and responsive to work assignments." *Id.* at 532 & n.2. We held that failure to address carpal tunnel syndrome directly in the hypothetical "violated the established rule that such inquiries must include all (and only) those impairments borne out by the evidentiary record." *Id.* at 532.

Sewell interprets this to mean that the ALJ may not speak in shorthand to the vocational expert, but *Evans* merely says that relevant limitations must be included in the hypothetical. That does not answer the question here, namely, *whether* the relevant limitation was included (by means of shorthand). Again, Sewell offers no argument that this was not the ALJ's intent or the vocational expert's understanding. He has therefore waived the issue. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

Sewell argues that this particular use of shorthand was nonetheless contrary to Social Security Ruling 96-8p, which says that "the RFC must not be expressed initially in terms of the exertional categories of 'sedentary,' 'light,' 'medium,'

'heavy,' and 'very heavy' work" because it may obscure the step-four inquiry (whether the claimant can return to his past relevant work), SSR 96-8p, 1996 WL 374184, at *3. But the ALJ found in Sewell's favor on the past relevant work question, so any failure to follow SSR 96-8p was immaterial. *See Hendron v. Colvin*, 767 F.3d 951, 956 (10th Cir. 2014) (rejecting the claimant's argument that the ALJ erred by finding the claimant capable of "a full range of sedentary work," rather than "separately discuss[ing] and mak[ing] findings regarding her abilities to sit, stand, walk, lift, carry, push, or pull," because the ALJ ruled the claimant could not return to her past relevant work (emphasis removed)).

SSR 96-8p does not forbid expressing the RFC in terms of exertional categories in the step-five inquiry. To the contrary, it says, "At step 5 of the sequential evaluation process, RFC must be expressed in terms of, or related to, the exertional categories when the adjudicator determines whether there is other work the individual can do." SSR 96-8p, 1996 WL 374184, at *3. But it also declares it "necessary to assess the individual's capacity to perform each of [the exertional and nonexertional] functions [within a given exertional level] in order to decide which exertional level is appropriate and whether the individual is capable of doing the full range of work contemplated by the exertional level." *Id.* That brings us full circle to the original question: was the ALJ's reference to "light work" shorthand for a finding that Sewell can stand or walk for six hours in an eight-hour workday? As we have already noted, Sewell presents no argument that this was not the ALJ's intent, and has therefore waived the issue.

For these reasons, we reject Sewell's arguments that the ALJ impliedly found he had unlimited capacity to stand or walk, and that the hypothetical proposed to the vocational expert failed to include any standing/walking limitation.

B. New Evidence Submitted to the Appeals Council

As noted, a vocational expert testified—and the ALJ accepted—that a person with Sewell's RFC could perform two jobs as defined in the Dictionary of Occupational Titles (DOT): housekeeper cleaner and cafeteria attendant. Before the Appeals Council, Sewell submitted printouts from an Internet database called "Occu Collect." *See* Aplt. App. vol. III at 487–647.[4] Sewell says these printouts provide Department of Labor information that is more detailed and up-to-date than the DOT and that they establish housekeeper cleaners and cafeteria attendants normally must be able to perform duties that exceed Sewell's RFC. He therefore argues the Occu Collect data fundamentally undermine the vocational expert's opinion and deprive the ALJ of substantial evidence to support his conclusion about the jobs Sewell can perform.

Sewell frames this as a generic error, not attributable to any single actor. But it can't be the ALJ's error because the Occu Collect evidence was first presented to the Appeals Council. If the agency erred when it did not account for Occu Collect, it

[4] In briefing, Sewell repeatedly describes these printouts as deriving from the O*NET OnLine database maintained by the Department of Labor. He never clarifies the relationship between Occu Collect and O*NET. Regardless, on their face, the documents he submitted to the Appeals Council state they were produced by Occu Collect, so we refer to them as such.

must have been the Appeals Council's error.

The Appeals Council denied review through its standard letter that explains the rules it applied but does not provide any analysis specific to the claimant's case. As relevant here, that letter states,

> Under our rules, we will review your case [if] . . . [w]e receive additional evidence that you show is new, material, and relates to the period on or before the date of the hearing decision. You must also show there is a reasonable probability that the additional evidence would change the outcome of the decision. You must show good cause for why you missed informing us about or submitting it earlier.

Aplt. App. vol. II at 79–80. This explanation is a somewhat simplified restatement of the applicable Social Security regulation:

> (a) The Appeals Council will review a case at a party's request or on its own motion if—
>
> . . .
>
> (5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.
>
> (b) The Appeals Council will only consider additional evidence under paragraph (a)(5) of this section if you show good cause for not informing us about or submitting the evidence [at the ALJ level] . . . .

20 C.F.R. § 404.970.

The Commissioner points out that Sewell never argued to the Appeals Council that he had good cause for failing to present this material to the ALJ. In his reply

brief, Sewell does not address this argument. But in both his opening and reply briefs, he cites *O'Dell v. Shalala*, 44 F.3d 855 (10th Cir. 1994), for the proposition that "[e]vidence submitted to the Appeals Council forms part of the substantial evidence review of the Commissioner's final decision." Aplt. Opening Br. at 35; Aplt. Reply Br. at 14.

We indeed held in *O'Dell* that "new evidence [submitted to the Appeals Council] becomes part of the administrative record to be considered when evaluating . . . substantial evidence." 44 F.3d at 859. But we reached that holding based on the text of 20 C.F.R. § 404.970 as it then stood. We were particularly persuaded by the fact that the regulation "expressly authorize[d] submission of new evidence to the Appeals Council, without a 'good cause' requirement," *id.*, and that it "direct[ed] the Appeals Council to 'evaluate the entire record including the new and material evidence submitted,' and require[d] review if the ALJ's decision is contrary to the weight of the evidence 'currently of record,'" *id.* (quoting 20 C.F.R. § 404.970(b) (1994)).

The Commissioner amended § 404.970 in 2016. *See* Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 90,987, 90,994 (Dec. 16, 2016). Unlike the version of the regulation we considered in *O'Dell*, the amended regulation now contains an explicit good cause requirement, *see* 20 C.F.R. § 404.970(b), and no longer contains any of the other language on which *O'Dell* relied. Thus, new evidence submitted to the Appeals Council is no longer automatically included in the substantial evidence

analysis.

Here, the Appeals Council did not explicitly state that it was denying review because Sewell failed to meet the regulatory standard for new evidence. However, that conclusion is necessarily implied by the structure of the regulation. Again, it says "[t]he Appeals Council *will* review a case" if it "receives additional evidence that is [1] new, [2] material, and [3] relates to the period on or before the date of the hearing decision, and [4] there is a reasonable probability that the additional evidence would change the outcome of the decision," and, finally, "[5] [the claimant] show[s] good cause for not [introducing the evidence earlier]." 20 C.F.R. § 404.970(a), (a)(5), (b) (emphasis added). Because Sewell failed to argue good cause for not introducing the evidence earlier, the Appeals Council did not err in failing to review the evidence.

Nevertheless, Sewell argues that "a fair hearing right would always include the right to present rebuttal evidence." Aplt. Opening Br. at 51. It is not clear if Sewell means to invoke due process.[5] But Sewell participated in the ALJ hearing with the assistance of counsel, his counsel examined the vocational expert, and—subject to good cause and other requirements—the Appeals Council permits submission of new evidence at the administrative appeal stage. He does not explain how this process

[5] Sewell cites *Heckler v. Campbell*, 461 U.S. 458, 469 (1983), without explanation. That page of *Heckler* mentions "a principle of administrative law—that when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond," and explicitly distinguishes that from notice required by the due process clause.

was insufficient to present rebuttal evidence. We therefore reject the argument.

IV. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Nancy L. Moritz
Circuit Judge