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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUDOLPH M. PETRITZ, Plaintiff-Appellant, v. KILOLO KIJAKAZI, Acting Commissioner of Social Security, Defendant-Appellee.	No. 22-35155 D.C. No. 2:21-cv-00003-JTJ MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
John T. Johnston, Magistrate Judge, Presiding

Submitted December 8, 2022**
Seattle, Washington

Before: O'SCANNLAIN, McKEOWN, and MILLER, Circuit Judges.

Rudolph Petritz appeals from the district court's order affirming the Commissioner of Social Security's denial of his application for disability insurance benefits under the Social Security Act. We have jurisdiction under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291, and we affirm.

1. Petritz argues that the testimony of the vocational expert about the physical requirements of various potential jobs conflicts with the work requirements set out in the Dictionary of Occupational Titles. If there is an "obvious or apparent" conflict between a vocational expert's opinion that a claimant can do a job and the work requirements in the Dictionary, the administrative law judge (ALJ) "must ask the expert to reconcile the conflict before relying" on the testimony. *Gutierrez v. Colvin*, 844 F.3d 804, 807–08 (9th Cir. 2016); *see also* SSR 00-4p, 65 Fed. Reg. 75,760 (2000).

Petritz perceives a conflict with respect to the requirements for climbing. But as the ALJ explained, even if there is a conflict, it has no bearing on the particular occupations the expert identified. Petritz is restricted from frequent climbing. Of the five occupations the ALJ considered, only one requires climbing at all, and that one, cleaner, requires it only occasionally. U.S. Dep't of Labor, Dictionary of Occupational Titles at 381.687-018 (4th ed. rev. 1991). All of the occupations were within his abilities under either the expert's testimony or the Dictionary.

Petritz also perceives a conflict over the requirements relating to air quality. Contrary to Petritz's contention, Petritz's residual functional capacity as identified by the ALJ did not limit him to a work environment with clean air. Instead, the

ALJ found that Petritz must avoid "concentrated exposure" to fumes, odors, dusts, and poor ventilation. Petritz does not assert a conflict based on the concentrated-exposure limitation, but if he had, any error would be harmless. Only one of the occupations that the expert identified, packager, involves exposure to the restricted elements. *See* Dictionary of Occupational Titles, *supra*, at 920.587-018. Excluding that occupation, the other four occupations amount to more than 160,000 estimated jobs in the national economy. Thus, sufficient work remained available to justify the denial of benefits. *See Shaibi v. Berryhill*, 883 F.3d 1102, 1110 n.7 (9th Cir. 2017).

2. Petritz argues that his residual functional capacity should have incorporated a limitation to light work. While Dr. Goldstein and treating physician Dr. McGree favored a light-work restriction, treating physician Dr. Popovich saw no need for work restrictions of any kind. And Drs. Fernandez and Schofield maintained that Petritz could lift fifty pounds. The ALJ considered the varied opinions of those doctors to formulate the medium-work and corresponding fifty-pound limitation. *See* 20 C.F.R. § 404.1567(c).

If another doctor contradicts a treating physician's opinion, "the ALJ may discount the treating physician's opinion by giving 'specific and legitimate reasons' that are supported by substantial evidence in the record." *Ford v. Saul*, 950 F.3d 1141, 1154 (9th Cir. 2020) (quoting *Lester v. Chater*, 81 F.3d 821, 830

(9th Cir. 1995)); *cf. Woods v. Kijakazi*, 32 F.4th 785, 789 (9th Cir. 2022) (describing the standard under the new regulations, which do not apply to this case because Petritz filed his application for benefits before 2017). Dr. Popovich, Dr. Fernandez, and Dr. Schofield contradicted the opinion of treating physician Dr. McGree, and the ALJ gave specific and legitimate reasons for his decision. The ALJ explained that a medium-work restriction reflected the opinions of Dr. Fernandez and Dr. Schofield and the generally positive results of physical examinations with Dr. Popovich. *See Morgan v. Commissioner of Soc. Sec. Admin.*, 169 F.3d 595, 602–03 (9th Cir. 1999) (rejecting a treating physician's opinion based in part on specific medical evidence and the opinion of a nonexamining doctor). In addition, the ALJ took account of Petritz's "robust activities of daily living." Petritz testified that he helped build a house for his daughter and rewired the electrical configuration in his son's home. "A conflict between a treating physician's opinion and a claimant's activity level is a specific and legitimate reason for rejecting the opinion." *Ford*, 950 F.3d at 1155. Given the reasons the ALJ cited, substantial evidence supports the decision to choose a limitation approximating medium work.

3. Finally, Petritz argues that the ALJ erred in weighing evidence differently in the 2020 decision as compared to the vacated 2018 decision. Because Petritz raises this objection for the first time on appeal, he has forfeited the argument. *See*

Greger v. Barnhart, 464 F.3d 968, 973 (9th Cir. 2006). In any event, the argument lacks merit. Because the prior decision was vacated, the ALJ was permitted to reexamine the evidence and reach different conclusions.

AFFIRMED.