FILED
United States Court of Appeals
Tenth Circuit

October 12, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MELONIE STAHELI,

Plaintiff - Appellant,

v.

COMMISSIONER, SSA,

Defendant - Appellee.

No. 22-4001

Appeal from the United States District Court
for the District of Utah
(D.C. No. 1:20-CV-00159-JCB)

Natalie Bolli-Jones (Jay K. Barnes, with her on the briefs), Law Office of Jay Barnes, St. George, Utah, for Appellant.

Jennifer Randall, Special Assistant U.S. Attorney Office of the General Counsel, Social Security Administration (Trina A. Higgins, United States Attorney, and Mona Ahmed, Regional Chief Counsel, Social Security Administration, Office of the General Counsel, with her on the briefs), Denver, Colorado, for Appellee.

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

Melonie Staheli appeals from the district court's judgment affirming the Commissioner's decision denying her application for Social Security disability

benefits. We have jurisdiction, *see* 42 U.S.C. § 405(g) and 28 U.S.C. § 1291, and affirm the denial of benefits.

Ms. Staheli applied for benefits on April 5, 2018, alleging disability beginning March 28, 2018. The agency denied her application initially and on reconsideration. She then requested a hearing before an administrative law judge (ALJ), at which she testified telephonically.

A January 2005 automobile accident caused Ms. Staheli to suffer facial damage and other injuries. After recovering from the accident, she worked full-time as a medical records clerk. In March 2015 she suffered a stroke. After the stroke she reported frequent headaches, memory loss, and vision problems. Medical professionals also diagnosed her with mental health issues, including anxiety, depression, bipolar disorder, and attention deficit hyperactivity disorder. And psychologists determined that her IQ scores fell within the lowest ten percent of the population.

Ms. Staheli was eventually terminated from her medical records job because she was unable to perform her work duties. She later obtained part-time work and by the time of the benefits hearing, she was working twenty hours a week. She testified that she continued to experience work performance and concentration issues.

The ALJ issued a written decision denying relief. Applying the five-step sequential evaluation process that the Commissioner uses for determining disability,

see Wall v. Astrue, 561 F.3d 1048, 1052 (10th Cir. 2009),[1] he determined Ms. Staheli was not disabled within the meaning of the Social Security Act.

At step one of the process, the ALJ determined that Ms. Staheli had not engaged in substantial gainful activity since her alleged onset date. At step two, he determined that her severe impairments included depression, anxiety, posttraumatic stress disorder, and an unspecified neurocognitive disorder. But at step three, he concluded that she lacked an impairment or combination of impairments that met or medically equaled a listed impairment. The ALJ then considered the entire record to assess Ms. Staheli's residual functional capacity (RFC). He found that she had the RFC

> to perform a full range of work at all exertional levels but with the following nonexertional limitations: Due to a visual impairment, she can never climb ladders, ropes, or scaffolds; she can never be exposed to hazards such as power tools or dangerous moving machinery. She has the

[1] We have summarized the five-step process as follows:

> Step one requires the agency to determine whether a claimant is presently engaged in substantial gainful activity. If not, the agency proceeds to consider, at step two, whether a claimant has a medically severe impairment or impairments. An impairment is severe under the applicable regulations if it significantly limits a claimant's physical or mental ability to perform basic work activities. At step three, the ALJ considers whether a claimant's medically severe impairments are equivalent to a condition listed in the appendix of the relevant disability regulation. If a claimant's impairments are not equivalent to a listed impairment, the ALJ must consider, at step four, whether a claimant's impairments prevent her from performing her past relevant work. Even if a claimant is so impaired, the agency considers, at step five, whether she possesses the sufficient residual functional capability to perform other work in the national economy.

Wall, 561 F.3d at 1052 (citations and internal quotation marks omitted).

> ability to understand, remember, and carry out simple, routine, and repetitive tasks; she can perform goal-oriented but not assembly line paced work; she can occasionally interact with co-workers, supervisors, and the general public; and she can adapt to routine changes in the work place.

Aplt. App., vol. I at 49 (bolding omitted).

Based on this assessment, the ALJ found at step four of the analysis that Ms. Staheli could not perform her past relevant work as a medical records clerk. But at step five, considering her age, education, work experience, RFC, and testimony from a vocational expert (VE), the ALJ found there were jobs in significant numbers in the national economy that she could perform, including housekeeping cleaner, laundry folder, and garment sorter. The ALJ therefore determined that Ms. Staheli was not disabled. The Appeals Council denied review, making the ALJ's decision the Commissioner's final decision.

"We review the Commissioner's decision to determine whether the factual findings are supported by substantial evidence in the record and whether the correct legal standards were applied." *Wilson v. Astrue*, 602 F.3d 1136, 1140 (10th Cir. 2010). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). An agency decision that either applies an incorrect legal standard or is unsupported by substantial evidence is subject to reversal. *See Noreja v. Comm'r, SSA*, 952 F.3d 1172, 1178 (10th Cir. 2020).

Ms. Staheli raises two issues for our review, both involving the ALJ's evaluation of the medical evidence. She argues the ALJ failed to evaluate the

opinion of a psychologist, Dr. James M. Ottesen, concerning her work-related limitations. She also argues the ALJ failed to discuss test results obtained by both Dr. Ottesen and a consultative psychologist, Dr. Chris Anderson, that showed she scored under the tenth percentile in the areas of full-scale IQ, working memory, and processing speed.

1. Evaluation of Dr. Ottesen's "Medical Opinion"

Ms. Staheli filed her claim after March 27, 2017. It is therefore subject to the revised procedures for evaluating medical opinions described in 20 C.F.R. § 404.1520c. A "medical opinion" is defined as

> a statement from a medical source about what [the claimant] can still do despite [her] impairment(s) and whether [she has] one or more impairment-related limitations or restrictions in [specified] abilities . . . [including her] ability to perform mental demands of work activities, such as understanding; remembering; maintaining concentration, persistence, or pace; carrying out instructions; or responding appropriately to supervision, co-workers, or work pressures in a work setting.

Id. § 404.1513(a)(2)(ii) (eff. March 27, 2017).

Under the revised procedures, the ALJ does "not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from [the claimant's] medical sources." *Id.* § 404.1520c(a). Instead, the ALJ evaluates opinions using five factors identified in the regulation: supportability; consistency; relationship with the claimant; specialization; and other factors, such as "a medical source's familiarity with the other evidence in a claim." *Id.* § 404.1520c(c).

The regulations further provide that the ALJ "will articulate in [his] determination or decision how persuasive [he] find[s] all of the medical opinions and all of the prior administrative medical findings in [the claimant's] case record." *Id.* § 404.1520c(b). Under the regulations applicable here, statements by a medical source reflecting judgments about the nature and severity of a claimant's impairments and her prognoses are not considered "medical opinions." *See id.* § 404.1513(a)(3). Statements on issues reserved to the Commissioner, including on the ultimate issue of whether the claimant is or is not disabled or able to work, are evidence that is "neither valuable nor persuasive," and the ALJ is not required to "provide any analysis about how [he] considered such evidence in [his] determination or decision." *Id.* § 404.1520b(c)(3).

Dr. Ottesen saw Ms. Staheli after she "contacted Vocational Rehabilitation Services seeking both vocational training and vocational placement." Aplt. App., vol. III at 655. Dr. Ottesen is a Ph.D. licensed psychologist. The purpose of his examination was to make a "[p]sychological assessment of [Ms. Staheli's] academic and vocational potential, needs for psychological services, basis for vocational planning and service delivery." *Id.* He interviewed her and performed several psychological tests. In a section entitled "Prognosis," he stated that her "prognosis for completing on-the-job training and maintaining full-time, gainful employment is fair to good as long as the job tasks are within her ability level, she receives adequate supervision/training/accommodations, and she is provided sufficient time to perform her tasks." *Id.* at 660. In a section entitled "Recommendations," he stated, "It is

recommended Ms. Staheli receive extensive supervision and support while at work. This support can include tutoring, extended time to complete tasks, and any other support/accommodations available at the work site." *Id.*

The ALJ mentioned Dr. Ottesen's evaluation in his decision. After noting that Dr. Ottesen's IQ testing revealed "an IQ of 75, suggestive of borderline to low average intellectual functioning," *id.*, vol. I at 50, he stated:

> [Ms. Staheli] drove herself to the appointment [with Dr. Ottesen], was well-groomed, had a depressed, broad affect, had some stuttering of speech, was friendly and cooperative, became frustrated when she had difficulty completing tasks, and had attention and concentration that were "not always good." Her prognosis for completing job training and maintaining employment were fair to good, as long as she is given sufficient time to complete tasks.

Id. at 51.

Ms. Staheli argues the ALJ erred in failing to evaluate Dr. Ottesen's statements as a medical opinion using the criteria in § 404.1520c, while the Commissioner argues that Dr. Ottesen's statements did not constitute a "medical opinion." The issue centers on whether Dr. Ottesen provided a "statement from a medical source about what [Ms. Staheli could] still do despite [her] impairment(s)." § 404.1513(a)(2).[2] We conclude he did not, and the ALJ was therefore not required to evaluate his statements as a medical opinion.

[2] As the district court noted, the current definition of a medical opinion requires "a statement from a medical source" about *both* "what [the claimant] can still do despite [her] impairment(s)" *and* "whether [she has] one or more impairment-related limitations or restrictions in [specified] abilities." § 404.1513(a)(2). Dr. Ottesen's report detailed her impairment-related limitations, but it did not identify what she could still do despite her impairments.

Dr. Ottesen's statements about Ms. Staheli's prognosis for completing job training and maintaining employment do not qualify as a medical opinion for two reasons. First, to the extent they addressed the ultimate issue of disability (i.e., Ms. Staheli's ability to maintain employment), they were "neither valuable nor persuasive" and the ALJ was not required to analyze them in his decision. *See* § 404.1520b(c)(3)(i) (listing statement that claimant is "able to perform regular or continuing work" as an example of a statement on an issue reserved to the Commissioner).

Second, Dr. Ottesen's general statements about Ms. Staheli's prognosis were not a "medical opinion" because they did not provide evidence concerning her ability to perform the specific demands of work activities. *See* § 404.1513(a)(2). Instead, they described in broadly applicable terms what she would likely need to hold down a job. *Most* workers—not just Ms. Staheli—can only be expected to perform "job tasks . . . within [their] ability level," need "adequate" training and supervision, along with any required accommodations, and require "sufficient time to perform [their] tasks." Aplt. App., vol. III at 660. These broad statements did not meet the regulatory criteria for a medical opinion.

The additional statements in Dr. Ottesen's "recommendation" section were also too general to meet the definition of a "medical opinion." He recommended that Ms. Staheli receive extensive supervision and support if she returned to work, and he offered examples of support that might be provided. But those general recommendations did not supply an opinion about what she could still do despite her

impairments. The ALJ therefore did not err by failing to evaluate Dr. Ottesen's recommendations as a medical opinion.

We are not persuaded otherwise by Ms. Staheli's argument that the ALJ's failure to treat Dr. Ottesen's report as a medical opinion was inconsistent with the ALJ's evaluation of Dr. Anderson's report, which addressed the same topic. She asserts the ALJ was required to explain "why the report of Dr. Anderson was evaluated as a medical opinion, while the report of Dr. Ottesen was not." Aplt. Opening Br. at 18. But Ms. Staheli fails to show the regulations prohibited the ALJ from choosing to evaluate Dr. Anderson's report or required him to explain why he did so. And Ms. Staheli fails to show that this choice prejudiced her. *Cf. Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1161-65 (10th Cir. 2012) (applying harmless error doctrine to ALJ's failure to specify comparative weight given to medical opinions).

Of course, an ALJ's decision to selectively accord "medical opinion" status to some reports while denying that status to other reports that address the same topic could represent impermissible "cherry picking" of portions of the evidence supporting his decision. *See Hardman v. Barnhart*, 362 F.3d 676, 681 (10th Cir. 2004) (stating ALJ may not "pick and choose among medical reports, using portions of evidence favorable to his position while ignoring other evidence"). But Ms. Staheli fails to show that is what happened here. Rather than "cherry picking" the "medical opinion" Dr. Anderson offered, the ALJ *rejected* it. *See* Aplt. App., vol. I at 51 (finding Dr. Anderson's opinion that Ms. Staheli's impairments are likely to

"interfere with her ability to function" "not persuasive" (internal quotation marks omitted)).

Ms. Staheli also argues that the ALJ improperly "used both Dr. Ottesen's opinion and Dr. Anderson's opinion in his evaluation of all other opinion evidence despite failing to evaluate Dr. Ottesen's opinion and finding Dr. Anderson's opinion not persuasive." Aplt. Opening Br. at 18. We disagree. The ALJ relied on Dr. Anderson's observations and other objective findings, not on his conclusions. Thus, the record does not suggest the ALJ treated Dr. Anderson's findings as a "medical opinion" solely to bolster their use in discrediting other opinions. Nor does the record suggest that the ALJ improperly relied on Dr. Anderson's opinion (rather than Dr. Anderson's findings) after rejecting that opinion as unpersuasive, *see id.* at 19.[3] We find no error in the ALJ's reliance on Dr. Anderson's findings to evaluate the medical opinions in the record.[4]

---

[3] The same analysis applies to Ms. Staheli's argument that the ALJ improperly used Dr. Ottesen's opinion to evaluate Dr. Anderson's opinion, despite failing to evaluate Dr. Ottesen's statements as a medical opinion. *See* Aplt. Opening Br. at 18. The ALJ relied on Dr. Ottesen's *findings*, not his *opinion*.

[4] Ms. Staheli asserts the Commissioner adopted a "narrow" definition of "medical opinion" in briefing this issue as an impermissible "post-hoc attempt to excuse" the ALJ's failure to properly consider Dr. Ottesen's opinion. *See* Reply Br. at 2-4. This argument is waived because Ms. Staheli raises it for the first time in her reply brief. *See Mays v. Colvin*, 739 F.3d 569, 576 n.3 (10th Cir. 2014) (declining to address argument raised for the first time in a reply brief). In any event, the argument lacks merit. We will not "adopt post-hoc rationalizations to support the ALJ's decision *that are not apparent from the ALJ's decision itself*." *Haga v. Astrue*, 482 F.3d 1205, 1207-08 (10th Cir. 2007) (emphasis added). That is not the case here. The ALJ stated he had "*fully considered the medical opinions* and prior administrative medical findings," Aplt. App., vol. I at 51 (emphasis added), and he

2. Evaluation of IQ Evidence

Ms. Staheli also argues that even if the ALJ was not required to evaluate Dr. Ottesen's statements as a medical opinion, he was still required to provide an evaluation of the objective medical evidence Dr. Ottesen supplied. *See* 20 C.F.R. §§ 404.1513(a)(1) (defining "objective medical evidence"), 404.1513(a)(3) (defining "other medical evidence").[5] Specifically, she argues the ALJ did not adequately consider the objective cognitive test scores from Dr. Ottesen and Dr. Anderson.

The ALJ did discuss Ms. Staheli's IQ scores as part of his RFC determination. He expressly recognized that IQ testing from Drs. Ottesen and Anderson "revealed an IQ of 75, suggestive of borderline to low average intellectual functioning." Aplt. App., vol. I at 50. But Ms. Staheli argues he should have gone further and specifically evaluated and discussed the doctors' statements that the objective test scores showed she was "below the tenth percentile for working memory, processing speed, and full-scale IQ" and adjusted his RFC accordingly. Aplt. Opening Br. at 20.

In general, an ALJ's RFC assessment is concerned with "what kind of substantial gainful work the claimant can *do*, not just with her numerical [IQ]

---

evaluated each of the medical opinions. He had already discussed Dr. Ottesen's vocational evaluation in an earlier part of his RFC analysis, along with the other medical evidence. It is thus apparent from the ALJ's decision that the reason he did not evaluate Dr. Ottesen's statements as a medical opinion was that he concluded that the statements were not a medical opinion.

[5] In her heading for this argument, Ms. Staheli cites 20 C.F.R. § 404.1513(a)(3), which defines "other medical evidence." She then repeatedly mentions "objective medical evidence," which is a different concept that is defined in § 404.1513(a)(1). Our analysis applies whether the IQ test results and interpretation are considered "other medical evidence" or "objective medical evidence."

scores." *Keyes-Zachary*, 695 F.3d at 1173. Here, the ALJ weighed all the evidence concerning Ms. Staheli's mental capacity, including her IQ scores, and adopted mental limitations in his RFC assessment based on that evidence. But Ms. Staheli argues the tenth percentile figure associated with her IQ scores is of particular importance here because, according to the Dictionary of Occupational Titles (DOT), the jobs the ALJ identified at step five "cannot be performed by the bottom 10% of the population in general learning aptitude." Aplt. Opening Br. at 20 n.1.[6] She argues this restriction on the jobs the VE identified and the ALJ adopted creates a conflict between the VE's testimony and the DOT that the ALJ should have resolved. Again, we must disagree.

An ALJ must resolve conflicts between the VE's testimony and the DOT. *See Poppa v. Astrue*, 569 F.3d 1167, 1173 (10th Cir. 2009); SSR 00-4p, 2000 WL 1898704, at *2 (Dec. 4, 2000). Ms. Staheli asserts such a conflict exists here, because the VE identified jobs that the DOT says she cannot do. The reason she says she cannot do them is that the DOT states these jobs cannot be performed by the bottom ten percent of the population, as measured by *general learning aptitude*. She claims she falls within this category because the IQ testing in her case shows that she falls within the bottom ten percent of the population for IQ scores.

[6] The Commissioner argues this contention is waived because Ms. Staheli did not present it to the district court until her reply brief, and the district court did not discuss it. Because we discern no error, we need not determine whether this argument was waived.

Her argument assumes, without evidence or discussion, that the percentile figures associated with "general learning aptitudes" directly correlate with IQ percentage figures. It also assumes that the limitation on general learning aptitude is part of the DOT. But she fails to show that either assumption is valid.

The Third Circuit has rejected a similar argument. In *Burns v. Barnhart*, 312 F.3d 113 (3d Cir. 2002), the claimant argued that the ALJ was required to inquire into a conflict that allegedly arose between the VE's testimony and the DOT, where the claimant's IQ score of 75 placed him in the lowest ten percent of the population. He asserted that for the jobs the ALJ identified, the DOT required an aptitude level above the lowest ten percent of the population. In rejecting this argument, the Third Circuit noted that "aptitude levels are not in the DOT or any other source of which the Social Security Administration has taken administrative notice." *Id.* at 128.

To the extent Ms. Staheli argues the ALJ should have further discussed Drs. Ottesen and Anderson's conclusions or statements *about* the low IQ scores, we also discern no reversible error. The ALJ described the doctors' conclusion that the 75 IQ score was "suggestive of borderline to low average intellectual functioning." Aplt. App., vol. I at 50. Although he did not go on to expressly discuss their more detailed statements concerning the implications of the low scores, his RFC assessment showed he adequately considered and addressed this issue. The ALJ stated she could "understand, remember, and carry out simple, routine, and repetitive tasks" and could "perform goal-oriented but not assembly line paced work." *Id.* at 49 (bolding omitted). This suggests he adequately considered the limiting implications

of her low IQ scores, and we cannot reweigh the evidence on this point. *See Hendron v. Colvin*, 767 F.3d 951, 956 (10th Cir. 2014).

3. Conclusion

We affirm the district court's judgment affirming the agency's denial of social security disability benefits.