NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued January 25, 2023
Decided February 14, 2023

Before

DIANE S. SYKES, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2258

BRADFORD KENNEDY, JR.,
Plaintiff-Appellant,

v.

KILOLO KIJAKAZI, Acting Commissioner of Social Security,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 20 cv 1417

Sheila Finnegan,
Magistrate Judge.

O R D E R

Bradford Kennedy suffered a bad fall in 2016; it resulted in a broken cervical vertebra that required surgical correction. He contends that he was never the same again, and so he applied for Social Security disability benefits. His efforts were unsuccessful both before an administrative law judge (ALJ) and the Social Security Appeals Council. This was so even though Kennedy submitted to the Appeals Council the results from an electromyogram (EMG) test that had been ordered before the ALJ handed down her decision, even though the test was conducted a month afterwards.

The Appeals Council refused to consider the new evidence, and the district court (acting through a magistrate judge with the consent of the parties, see 28 U.S.C. § 636(c)) upheld its decision.

The Appeals Council reasoned that because the test results came in a month after the ALJ's decision, they did "not relate to the period at issue." It erred in doing so. The results of the test reflect a medical condition that existed during the period at issue, and the fact that the procedure was not performed until after the date of the ALJ's decision does not justify ignoring it. The Acting Commissioner now seeks to defend the Appeals Council's decision on an alternate ground not mentioned by the Council. But the agency may not substitute other reasons on appeal for its decision. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Because the decision cannot stand on the grounds the agency asserted, we vacate the district court's judgment and remand the case to the Social Security Administration for further proceedings.

I

Kennedy worked in construction until he fell in 2016, hitting his head on a table and breaking a vertebra in his neck. The fall caused extreme pain, diminished his grip strength in his right hand, and generated tingling and numbness in one leg from spinal cord compression. Kennedy underwent surgery, but the decreased grip strength remained, leading him to drop items often, and the pain and tingling still radiated from his lumbar spine down one leg. Burdened by an assortment of other orthopedic and pulmonary ailments, he never held gainful employment after his fall. He applied for disability benefits in 2017. After his application was denied, he pursued a hearing before an ALJ.

At the hearing, a vocational expert testified about the availability of jobs for a person with the same characteristics and limitations as Kennedy. The answer depended on whether, based on Kennedy's grip strength, he was limited to fingering and handling items only "occasionally" (no jobs available), or if he could do so "frequently" (jobs available). Kennedy insisted that he could finger and handle objects only occasionally. Possible support for this limitation came from his doctor, who reported in January 2019 that Kennedy might have carpal tunnel syndrome and might require a wrist brace.

The ALJ, however, thought that the evidence that Kennedy could "frequently" finger and handle objects was more persuasive, and so she denied his request for benefits in an order dated February 12, 2019. Applying the familiar five-step analysis,

the ALJ found at Step 2 that Kennedy had several severe impairments and many non-severe impairments. At Step 3, the ALJ ruled that these impairments did not meet or equal the severity of a listed impairment. Her next job was to ascertain Kennedy's "residual functional capacity"—that is, the most that he can do given his deficits. She concluded that the objective evidence did not correspond with Kennedy's testimony about pain and that Kennedy could still perform light work, including "frequently" handling and fingering objects with his right hand, with some limitations. These limitations meant that, under Step 4, Kennedy could no longer work in his past construction job, but that at Step 5, based on the vocational expert's testimony, other jobs were available to him.

Kennedy appealed the ALJ's decision to the Appeals Council. With his appeal, he submitted new evidence, as permitted. Kennedy's doctor (who earlier had suspected carpal tunnel syndrome) had ordered an EMG on January 23, 2019, a month before the ALJ's decision. The EMG—the first such scan in the record—was completed on March 21, 2019, around five weeks after that decision. It showed physical evidence of carpal tunnel syndrome, a possible compression of Kennedy's ulnar nerve in his right wrist, and abnormalities in his spine suggesting radiculopathy (damage to nerve roots near the spine). The results also confirmed that a wrist brace at night might alleviate pain.

The Appeals Council denied Kennedy's request to review the ALJ's decision. It gave only one reason for that action: "You submitted records … dated March 21, 2019 (7 pages). The Administrative Law Judge decided your case through February 12, 2019. This additional evidence does not relate to the period at issue. Therefore, it does not affect the decision about whether you were disabled beginning on or before February 12, 2019."

Kennedy next turned to the district court. As relevant here, he argued that the scan did, in fact, relate to the period before February 12 because it was ordered in January, and it corroborated the same ailments (sensory and strength deficits in right arm and left leg) that he consistently had reported since his injury in June 2016. The government repeated the Appeals Council's reason for refusing to consider the evidence. In the alternative, it argued that any error by the Appeals Council was harmless because, even if it considered the new evidence, nothing undermined the ALJ's findings.

The district court denied relief. The judge allowed that the EMG arguably related to the period at issue. But she thought that she did not need to reach that issue because, as the government had argued in the alternative, the EMG's results did not create a

"reasonable probability" that the ALJ's decision would change. In so concluding, the judge opined that the EMG results provided no new information: Kennedy's doctor already suspected that Kennedy had carpal tunnel syndrome and already had recommended a wrist brace. Moreover, Kennedy's leg functioning appeared no different from the way it had looked in previous tests. Kennedy appeals, focusing on the refusal of the Appeals Council to consider his EMG results.

II

The Appeals Council will review additional evidence if it "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." 20 C.F.R. § 404.970(a)(5). This court considers *de novo* whether the Appeals Council erred in implementing its regulations. *Stepp v. Colvin*, 795 F.3d 711, 722, 725 (7th Cir. 2015). Courts are limited to reviewing only the reasons provided by the agency at the time of the decision. *Chenery*, 318 U.S. at 95.

We consider first whether the Appeals Council erred in applying the regulations when it ruled that his EMG results did "not relate to the period at issue." It is true that the relevant period for present purposes ended "at the date of the hearing decision." 20 C.F.R. § 404.970(a)(5). Nonetheless, in *Bjornson v. Astrue*, 671 F.3d 640, 642 (7th Cir. 2012), we recognized that an ALJ could assess evidence created *after* the end of the relevant period if nothing suggests that symptoms worsened since that date. Kennedy's EMG scan meets this standard. It provides objective evidence confirming both the pain from nerve damage to which Kennedy testified, and the existence of a condition that his doctor suspected (carpal tunnel syndrome) before the decision's date. Nothing in the record suggests that the scan revealed new injuries. It is telling, also, that the government has made no effort to defend the Appeals Council's actual rationale.

That brings us to the argument the government *has* urged: that the Appeals Council's decision should be upheld on harmless-error grounds, because the evidence has no reasonable possibility of changing the outcome of the case. The Appeals Council, however, never said any such thing, and so ordinarily this argument would have no purchase. On review, this court strictly limits itself to the reasons provided by the agency. *Chenery*, 318 U.S. at 95; see also *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (*Chenery* doctrine requires agency to "defend its actions based on the reasons it gave when it acted" in the interest of promoting agency accountability, instilling confidence in agency decisions, and maintaining an orderly process of review). But in narrow circumstances harmless error may provide an exception to the

Chenery doctrine. *Sahara Coal Co. v. Off. of Workers' Comp. Programs*, 946 F.2d 554, 558 (7th Cir. 1991); *Keys v. Barnhart*, 347 F.3d 990, 994 (7th Cir. 2003) (applying the harmless-error exception to *Chenery* in Social Security cases). The exception is available only if the reviewing court can predict with great confidence, based on overwhelming support in the record, that the agency will reinstate its decision. *Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010); see also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (reviewing court must not have even "the slightest uncertainty as to the outcome of the proceeding").

The government argues that any error is harmless because the Appeals Council (and the ALJ) would find the new evidence to be duplicative and thus lacking a reasonable possibility of affecting the ALJ's decision. It points out that Kennedy had testified about his pain and strength and sensory difficulties in his wrist, hand, and leg; and a doctor had suspected that Kennedy had carpal tunnel syndrome and suggested a wrist brace. But for two reasons, this argument falls short of clearing the high bar for bypassing *Chenery*.

First, the government's argument that the Appeals Council and ALJ would treat the EMG as duplicating other evidence ignores the requirement that administrative law judges must "submit to medical scrutiny" diagnostic scans of "new and potentially decisive medical evidence." *Goins v. Colvin*, 764 F.3d 677, 680 (7th Cir. 2014). Although the record contains the EMG's raw results, as described above, no doctor has yet scrutinized them, and this is not the stuff of lay knowledge. Thus, this court cannot say whether the EMG results duplicate previous evidence (none of which is an EMG) in the record.

Second, even if the EMG results duplicated other evidence, the corroboration they provided may have led to a different decision. The ALJ thought that no objective medical evidence supported Kennedy's asserted pain or his claim that he could not handle or finger items more than occasionally. And, at the time, his doctor had only suspected carpal tunnel syndrome (a fact that the ALJ did not mention in her opinion). The EMG's objective evidence showing why Kennedy felt pain in his right hand and wrist, and confirming his doctor's suspicion that he has carpal tunnel syndrome, could have changed the ALJ's decision. See *Poole v. Kijakazi*, 28 F.4th 792, 796 (7th Cir. 2022) (quoting *Haynes v. Barnhart*, 416 F.3d 621, 626 (7th Cir. 2005)) ("[W]e are not to reweigh the evidence or substitute our own judgment for that of the ALJ."). Put simply, if we change the pool of evidence that was before the ALJ—especially by adding an objective test—it is at least possible that the judge's weighing of that evidence would also change.

Under the circumstances, we do not have the necessary "great confidence" that the new evidence creates no reasonable probability of a different outcome. See *Spiva*, 628 F.3d at 353 (that the ALJ *might* have reached the same result is insufficient for harmless error).

Because we cannot say with great confidence that the Appeals Council would on remand reject review based on the EMG results, the error is not harmless. We thus VACATE the judgment of the district court and REMAND the case to the Social Security Administration.