In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1901

AUGUST FETTING,

Plaintiff-Appellant,

v.

KILOLO KIJAKAZI,
Acting Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 20-cv-1268 — **William C. Griesbach**, *Judge*.

ARGUED FEBRUARY 8, 2023 — DECIDED MARCH 9, 2023

Before FLAUM, SCUDDER, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. This case concerns the denial of August Fetting's application for supplemental security income. An administrative law judge ("ALJ") found that although Fetting possessed particular physical and mental limitations, he was not disabled under the Social Security Act because he could perform work in certain jobs that existed in significant numbers in the national economy—for example, the work of

a cleaner/housekeeper, routing clerk, or marker. Fetting filed suit in the District Court for the Eastern District of Wisconsin to review the ALJ's decision, and the court affirmed the denial. On appeal, Fetting raises only one issue: whether substantial evidence supports the ALJ's finding that a significant number of these jobs exist in the national economy. We hold that it does and affirm.

I. Background

Fetting applied for supplemental security income in March 2018. At the time, he was fifty years old and suffered from back pain, headaches, depression, and anxiety. The Social Security Administration denied his application initially and again on rehearing, and Fetting filed a written request for an administrative hearing.

During the hearing, a vocational expert ("VE") testified to Fetting's physical and mental limitations and his ability to perform certain jobs. Fetting's attorney told the ALJ that he had "[n]o objections to [the VE's] qualifications" but that he "want[ed] to reserve [the] right to object to specific testimony if necessary." The ALJ then asked the VE whether Fetting could perform any job that existed in significant quantities in the national economy. The VE answered affirmatively, testifying that Fetting could perform the representative occupations of a cleaner/housekeeper, a routing clerk, and a marker. The VE estimated that, in the national economy, there were 200,000 cleaner/housekeeper jobs, 40,000 routing clerk jobs, and 200,000 marker jobs.

During cross examination, Fetting's counsel asked the VE for the source of his jobs data. The VE stated that he calculated his estimates from numbers published by the U.S. Bureau of

Labor Statistics. He explained that "[t]he Bureau [does] not provide job numbers on individual … occupations" and instead "combine[s] several occupations in a grouping." To estimate the prevalence of an individual occupation within a grouping, the VE explained, he "look[ed] at the composition of [the] group" and determined the relative frequency of each occupation within the group using his "knowledge of the labor market, [acquired] over 30+ years of job placement activities." Fetting's attorney asked the VE if he used a specific formula, to which the VE stated: "It's a simple formula based on the composition of that grouping. It's not a hard and fast scientific type formula." At the end of the hearing, Fetting's attorney asked the VE if he had "done any analysis to validate" his estimates. The VE stated that he had not conducted any "formal analysis" but had "in the past checked numbers in other reporting formats."

The ALJ issued a decision finding that Fetting did not have a disability under the Social Security Act ("the Act") and therefore was not eligible for benefits. He found that, despite possessing certain physical and mental limitations, Fetting could perform the requirements of the representative occupations of a cleaner/housekeeper, routing clerk, and marker, and that these jobs existed in significant quantities in the national economy. In making this finding, the ALJ relied on the VE's testimony, which the ALJ found to be "consistent with the information contained in the Dictionary of Occupational Titles" and "based on [the VE's] professional experience."

Fetting sought judicial review of the ALJ's decision in federal court, arguing, among other things, that the VE's methodology for calculating his job number estimates was unreliable. The district court affirmed the ALJ's final decision. The

court found that Fetting had forfeited his arguments criticizing the reliability of the VE's testimony by failing to object at the administrative hearing or in a post-hearing brief and that, as a result, "the ALJ was permitted to accept the VE's uncontradicted testimony."

II. Analysis

To be entitled to benefits under the Act, a claimant must be "aged, blind, or disabled." 42 U.S.C. § 1382(a)(1). The Act defines disability as the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." *Id.* § 1382c(a)(3)(A). The impairment must be of "such severity that [the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." *Id.* § 1382c(a)(3)(B).

The Social Security Administration utilizes a five-step inquiry when determining whether a claimant suffers from a disability under the Act. The ALJ must evaluate:

> (1) whether the claimant is currently [un]employed; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets or equals one of the impairments listed by the [Commissioner] … ; (4) whether the claimant can perform her past work; and (5) whether the claimant is capable of performing work in the national economy.

Clifford v. Apfel, 227 F.3d 863, 868 (7th Cir. 2000) (quoting *Knight v. Chater*, 55 F.3d 309, 313 (7th Cir. 1995)); *see also* 20

C.F.R. § 404.1520. The burden of proof is on the claimant for the first four steps. *Clifford*, 227 F.3d at 868. At step five, the burden shifts to the agency to show that "there are significant numbers of jobs in the national economy for someone with the claimant's abilities and limitations." *Ruenger v. Kijakazi*, 23 F.4th 760, 761 (7th Cir. 2022) (citing 20 C.F.R. § 416.960(c)(2)).

To meet this burden, the agency often relies upon VEs to assess a claimant's ability to engage in certain activities. VEs testify as to the kinds of work that a claimant can perform, as well as the prevalence of those jobs in the national economy based on statistics from "publicly available sources," "'information obtained directly from employers[,]' and data otherwise developed from their own 'experience in job placement or career counseling.'" *Biestek v. Berryhill*, 139 S. Ct. 1148, 1152 (2019) (citations omitted). A VE's job number testimony is only an estimate; VEs "are neither required nor expected to administer their own surveys of employers to obtain a precise count of the number of positions that exist at a moment in time for a specific job." *Chavez v. Berryhill*, 895 F.3d 962, 968 (7th Cir. 2018).

The Social Security Administration utilizes the job classification system in the U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT), but the DOT does not provide estimates of the prevalence of these jobs in the national economy. Accordingly, many VEs—including the one who testified at Fetting's hearing—base their estimates on the U.S. Bureau of Labor Statistics' *Occupational Employment Statistics* (OES), which contains annual employment estimates for 800 occupations. The job number estimates published in the OES do not exactly correspond to the DOT job classification system: the former utilizes the Standard Occupational Classification

(SOC) system, comprising broad occupational categories encompassing multiple DOT job titles. Thus, when calculating job number estimates, VEs must convert the information in the OES from the SOC system to the DOT system.

Fetting contends that the VE in this case used an unreliable methodology for calculating his job number estimates. Before addressing this argument, however, we first determine whether Fetting forfeited his objections to the VE's testimony by failing to make them at the administrative hearing.

A. Forfeiture

"When no one questions the [VE's] foundation or reasoning, an ALJ is entitled to accept the [VE's] conclusion …." *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). Accordingly, a claimant who does not object to a VE's testimony during the administrative hearing forfeits those objections. *See Brown v. Colvin*, 845 F.3d 247, 254 (7th Cir. 2016). Fetting contends that he objected to the VE's testimony in a letter and prehearing brief, as well as at the hearing, thereby preserving these arguments on appeal. We disagree.

Neither Fetting's letter nor his prehearing brief contained the objections he now raises. The letter stated that Fetting "d[id] not stipulate or consent to the vocational expert providing numbers" in advance of the hearing and that he "d[id] not believe a proper foundation for [the VE's] testimony w[ould] be established [or that] [the VE] has training or experience sufficient to provide accurate job numbers." The letter did not challenge the VE's methodology for estimating the prevalence of jobs in the national economy or make any specific objections to the VE's job number testimony. And although the letter reserved Fetting's "right to submit written post-hearing

objections and statements with respect to any vocational witness testimony," Fetting did not file any post-hearing objections or statements.

Similarly, Fetting's prehearing brief did not raise any specific concerns regarding the VE's testimony or the methodology he used. It stated: "The claimant does not object to the vocational expert's qualifications but reserves the right to object to the substance of the vocational expert's testimony. The claimant may file a post-hearing brief outlining errors and inconsistencies in the vocational testimony." Like his letter, Fetting merely reserved the right to make objections to the VE's testimony at or after the hearing—which he did not do.

Fetting's argument that his lawyer's questioning at the hearing sufficiently preserved his arguments is similarly unpersuasive. A claimant who fails to object at the hearing forfeits any challenge to the VE's testimony. *See Brown*, 845 F.3d at 254; *Liskowitz v. Astrue*, 559 F.3d 736, 743 (7th Cir. 2009). This objection must be specific; to avoid forfeiture, a claimant must do more than make a general objection or vaguely ask the VE about his methodology. *Compare Coyier v. Saul*, 860 F. App'x 426, 427–28 (7th Cir. 2021) (finding forfeiture where the claimant made only one general objection and asked no specific questions), *with Chavez*, 895 F.3d at 966 (addressing the claimant's arguments where she made "repeated" objections about the VE's use of the equal distribution method), *and Brace v. Saul*, 970 F.3d 818, 821 (7th Cir. 2020) (addressing the claimant's arguments where he objected that the VE's estimate "lacked sufficient foundation and methodological rationality").

During the hearing, Fetting's attorney asked the VE four questions regarding the VE's methodology but did not

otherwise object or indicate that he believed the methodology was unreliable. Moreover, Fetting's attorney stated during the hearing that he reserved the right to object in a post-hearing brief but never filed any such objection. *See Coyier*, 860 F. App'x at 427–28 (emphasizing that the claimant did not submit a post-hearing brief "despite assuring the court prior to and at the hearing that he would do so"). He therefore forfeited his arguments.

Fetting contends that the doctrines of forfeiture and waiver do not apply in disability proceedings, citing the Supreme Court's decision in *Carr v. Saul*, 141 S. Ct. 1352, 1359 (2021), for support. Putting aside the fact that Fetting has waived this argument because he did not assert it in his opening brief, *see Bernard v. Sessions*, 881 F.3d 1042, 1048 (7th Cir. 2018), Fetting's argument has no merit. In *Carr*, the Court addressed whether the claimants forfeited their arguments that they were "entitled to new hearings before different ALJs because the ALJs who originally heard their cases were not properly appointed under the Appointments Clause of the U.S. Constitution." 141 S. Ct. at 1356. The Court stated that its decision was made "[i]n the specific context of petitioners' Appointments Clause challenges" and that "[o]utside th[at] context … the scales might tip differently." *Id.* at 1360 & n.5. For this reason, *Carr* does not help Fetting.

B. Substantial Evidence

Independent of forfeiture, the ALJ's finding that there are a significant number of jobs for cleaners/housekeepers, routing clerks, and markers in the national economy is supported by substantial evidence. *Brace*, 970 F.3d at 821 (quoting 42 U.S.C. § 405(g)). The substantial evidence standard "is not high" and requires only enough "relevant evidence as a

reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Biestek*, 139 S. Ct. at 1154).

When the ALJ bases his decision on the testimony of a VE, substantial evidence requires that the ALJ "ensure that the approximation is the product of a reliable method." *Id.* A "precise count is not necessary," but the VE's testimony "must be supported with evidence sufficient to provide some modicum of confidence in its reliability." *Id.* at 822 (citation omitted). A reliable methodology is based on "well-accepted sources." *Ruenger*, 23 F.4th at 763 (citation omitted). Additionally, the VE must explain his methodology "cogently and thoroughly," and this explanation must be sufficient to instill some confidence that the estimate was not "conjured out of whole cloth." *Id.* (citation omitted).

During Fetting's administrative hearing, the VE testified that the numbers in the OES refer to groupings that encompass "several occupations" and "report numbers." He explained that, to convert the OES statistic into estimates for individual DOT occupations, he "look[ed] at the composition of a[n] [OES] group" and, using his "knowledge of the labor market, [acquired] over 30+ years of job placement activities," determined the relative prevalence of each job in that group. As an example, the VE testified that "the cleaner/housekeeping position is in a group with nine other DOT occupations," totaling 925,000 positions nationwide. Based on his experience, a "[c]leaner, housekeeping position is something that's found at many different industries and that would be one that would … make up a larger portion of the total group." He therefore concluded that there are about 200,000 jobs in the national economy for cleaners/housekeepers.

The VE's testimony was sufficiently cogent and thorough for the ALJ to rely on it. To be sure, the VE could have explained his methodology more clearly, but he gave enough detail for us to understand the sources of his data and the general process he adopted. The VE explained that he used the OES numbers and his thirty years of job placement experience to calculate his estimates. *See Chavez*, 895 F.3d at 968 (7th Cir. 2018); *Rennaker v. Saul*, 820 F. App'x 474, 479 (7th Cir. 2020) (holding that "a VE may draw from his expertise to provide a reasoned basis for his job-number estimates"). And contrary to Fetting's contention, a VE is not required to use a market study, computer program, or publication to make his calculations. *See Liskowitz*, 559 F.3d at 743 (noting that the VE does not testify "as a census taker or statistician"); *Chavez*, 895 F.3d at 968.

Fetting makes numerous other objections to the VE's methodology, contending:

> We have no idea if he accounted for the RFC [residual functional capacity] when looking at the vaguely selected jobs within an OES code, whether he considered only jobs that were full-time, whether he eliminated part-time positions, how he determined how many of the BLS [Bureau of Labor Statistics] numbers were light versus medium or heavy in exertion, or how he determined the numbers he provided during testimony.

Fetting forfeited these concerns by failing to ask any questions about them at the hearing. *See Liskowitz*, 559 F.3d at 744 (noting that if the claimant had made her objections at the hearing, the VE could have said more on those specific issues). More to the point, however, the VE was not required to provide

every detail of his calculations. *See Ruenger*, 23 F.4th at 763; *Bruno v. Saul*, 817 F. App'x 238, 243 (7th Cir. 2020).

Lastly, Fetting argues that remand is warranted because the ALJ in this case "fail[ed] in his duty of inquiry" and did not ask sufficient additional questions during the hearing to determine whether the VE's calculations were reliable. But the VE's testimony did not give the ALJ any reason to suspect that his methodology was unreliable. As we said in *Chavez*, 895 F.3d at 970, the VE is permitted to support his approximation by "drawing on knowledge of labor market conditions and occupational trends, gleaned from … placing workers in jobs." This is exactly the methodology that the VE in Fetting's case stated that he used to calculate his estimates. Because the VE's explanation was cogent and thorough, the ALJ was not required to seek further clarification.

III. Conclusion

Fetting did not object to the VE's testimony at his hearing and thus forfeited his challenges to the VE's methodology. Regardless, the VE properly based his estimates on reliable statistics and his professional experience and sufficiently explained his methodology at the hearing. For these reasons, the ALJ was permitted to rely on the VE's testimony, and substantial evidence supports the ALJ's finding that Fetting could perform work present in significant amounts in the national economy.

AFFIRMED