NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued December 12, 2023
Decided December 22, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1428

CHAD A. SHERMAN,
Plaintiff-Appellant,

v.

MARTIN J. O'MALLEY,
Commissioner of Social Security,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. 1:21-cv-411-TLS-SLC

Theresa L. Springmann,
Judge.

O R D E R

Chad Sherman applied for Social Security disability benefits because of bladder cancer, anxiety, and injuries to his feet, hands, and knees. An administrative law judge (ALJ) determined he was not disabled after finding that he could perform jobs that exist in significant numbers in the economy. The district court upheld the denial of benefits. Sherman appeals, arguing primarily that the ALJ ignored the effects of his urinary frequency and fatigue on his ability to remain sufficiently on task during the day. We affirm.

Sherman is an army veteran who last worked as a line cook in 2012. That year, he was diagnosed with bladder cancer and had a tumor removed. To monitor those issues, he has undergone routine cystoscopies (a procedure in which doctors insert a small camera into the urethra to look inside the bladder). He has also suffered from an enlarged prostate and nocturia (frequent urination at night), for which he has been prescribed medication.

The record contains conflicting evidence over Sherman's need to urinate frequently during the day, but he continued periodically to voice the concern to doctors until at least December 2020. At a hearing before the ALJ in November 2020, Sherman testified that he uses the bathroom "four or five times a night" and "at least twice every hour" during the day. And at a supplemental hearing in April 2021, he again testified to waking up "five times a night" to use the bathroom and that, even if he restricts his fluid intake, he urinates hourly during the day.

The record also contains references to Sherman's fatigue—many reports of difficulty sleeping and a few of daytime fatigue or drowsiness. Sherman was taking an opioid (for pain), which can cause sleepiness, but he told the ALJ that he didn't "take anything that makes [him] drowsy." He also testified that he lies down and naps daily for at least an hour.

This case has a somewhat protracted procedural history, having already been remanded once. Sherman applied for disability insurance benefits and supplemental security income in 2015. After the agency denied his claims, he had a hearing before an ALJ, who determined that he was not disabled. Sherman sought judicial review of the ALJ's determination, and in February 2020 the district court remanded the case because the vocational expert's testimony about his methodology did not "assure[] [the district court] that his estimates are reliable for this particular plaintiff."

On remand, a different ALJ applied the five-step analysis for assessing disability, *see* 20 C.F.R. § 404.1520, and concluded in July 2021 that Sherman was not disabled. The ALJ determined that Sherman did not engage in substantial gainful activity since the alleged onset of his disability (step one); that his impairments were severe (step two); but that none equaled an impairment listed in 20 C.F.R. § 404.1520 (step three); that he could perform light work with some physical limitations and could engage in routine and repetitive tasks for two-hour increments provided he received normal breaks and lunch periods (step four); and that there were a significant number of jobs in the national economy that he could perform (step five).

Relevant to this appeal, when two vocational experts were asked how long an individual could be off task and nonetheless keep any of these jobs, they testified that the limit would be 10% (first expert) or 15% (second expert) of the workday. Anything more, they explained, would be work preclusive. The second expert elaborated that an individual would need to be on task "at least 50 minutes of every hour."

Sherman filed no written exceptions to the ALJ's decision, and the Appeals Council did not otherwise assume jurisdiction, so the ALJ's decision was the final decision of the Commissioner. *See* 20 C.F.R. § 404.984(a).

Sherman again sought judicial review, *see* 42 U.S.C. § 405(g), arguing that the ALJ erred in crafting the residual functional capacity (RFC) by failing to consider that his need to urinate once an hour and his need to nap each day would exceed the off-task tolerance of employers and render him unemployable. The district court upheld the ALJ's decision, finding that it was supported by substantial evidence.

On appeal, Sherman raises a handful of arguments, but we begin by addressing the only two that he raised in the district court (and which, therefore, are properly before us). We review an ALJ's decision deferentially, upholding it if it is supported by substantial evidence—that is, evidence that a "reasonable mind might accept as adequate to support a conclusion." *Sevec v. Kijakazi*, 59 F.4th 293, 297–98 (7th Cir. 2023) (quoting *Simila v. Astrue*, 573 F.3d 503, 513 (7th Cir. 2009)).

Sherman first argues that the ALJ ignored evidence of his need to urinate frequently and, as a result, failed to include limitations for this need in the RFC. Sherman notes the ALJ's acknowledgment of a report from 2018 in which he complained of urinary frequency but contends that she overlooked "the majority of the record" that supported his claims of a "constant need to urinate." He adds that his need to urinate once an hour—especially when combined with other impairments—would cause him to exceed the off-task limits identified by the vocational expert.

The ALJ did not err in her consideration of this condition. Although she did not discuss certain reports documenting Sherman's need to urinate frequently, she acknowledged other evidence of the condition. An ALJ "does not need to discuss every piece of evidence in the record" but must confront evidence that "does not support her conclusion." *Moore v. Colvin*, 743 F.3d 1118, 1123 (7th Cir. 2014); *see also Deborah M. v. Saul*, 994 F.3d 785, 788–89 (7th Cir. 2021) (finding no error where omitted evidence "did not reveal any substantially different information" than addressed evidence). Here, the

evidence that the ALJ did not address was of the same nature as the evidence she mentioned: reports and testimony of Sherman's need to urinate frequently. She therefore did not ignore an *entire* line of evidence. In any event, Sherman did not introduce anything to show that his hourly trips to the bathroom would render him unemployable (based on the off-task limits explained by the second vocational expert). The uncited evidence therefore did not undermine the ALJ's determination that Sherman was not disabled, and she did not need to confront it.

Sherman next argues that the ALJ ignored evidence regarding his fatigue and need to nap throughout the day, and that she failed to incorporate this need into a limitation in the RFC. Sherman does not consistently identify the source of his fatigue; he attributes it alternatively to his medication, urinary frequency at night, and pain in his legs and back. He claims that the ALJ overlooked a medical report in which he was said to be experiencing fatigue, as well as his testimony at hearings in which he described needing to nap daily for at least an hour. And, based on testimony from one of the vocational experts, he argues that the amount of time he would be off task for his daily naps would be work preclusive.

Sherman's argument is well taken. An ALJ may not ignore a claimant's testimony about pain and fatigue, *see Reinaas v. Saul*, 953 F.3d 461, 467 (7th Cir. 2020), and here the ALJ failed to acknowledge any evidence of Sherman's fatigue. Because Sherman's need to nap—if his testimony were credited—would cause him to exceed the off-task tolerance of an employer, the ALJ erred in omitting this issue entirely from her decision.

But this error is harmless. We do not remand a social security case if we are convinced that the ALJ would reach the same result. *See McKinzey v. Astrue*, 641 F.3d 884, 892 (7th Cir. 2011). And, on this record, we do not see how the result would be any different. For one, the evidence is conflicting about whether Sherman experiences fatigue at all. At various points, he complained about fatigue or drowsiness; at other times, he appeared to deny experiencing those issues. Similarly, in a report he filled out at the agency's request, he stated that "some meds I take make me tired" but later testified that none of his medications make him drowsy. These inconsistencies, and the absence of any medical report supporting Sherman's claim of needing to nap, lead us to conclude that "no purpose" would be served by a remand directing the ALJ to explain why she rejected this line of evidence. *Id.*

Sherman also argues—for the first time—that the ALJ disregarded his obesity and memory limitations, exaggerated his ability to handle and finger, and overstated his RFC as being able to perform "light work." But Sherman did not raise these issues in the district court, so he waived the right to argue them on appeal. *See Jeske v. Saul*, 955 F.3d 583, 597 (7th Cir. 2020). Sherman counters that his general challenge to the RFC in the district court preserved more specific challenges regarding any RFC limitations. He invokes *Arnett v. Astrue*, 676 F.3d 586, 593 (7th Cir. 2012), in which we found that a claimant's challenge to the ALJ's overall RFC determination preserved an argument that the ALJ failed to account for any sit-and-stand limitations in the RFC.

But we recently clarified the scope of *Arnett* and explained that "a litigant sufficiently preserves an issue for appeal when the similarity between trial and appellate arguments resembles that of the *Arnett* claimant's." *Tutwiler v. Kijakazi*, __ F.4th __, 2023 WL 8461648 at *2 (7th Cir. Dec. 7, 2023). Unlike the claimant in *Arnett*, who brought the relevant issue to the district court's attention and simply "shifted her argument slightly" on appeal, *id.*, Sherman did not apprise the district court of any potential limitations other than frequent urination and fatigue. His new arguments are therefore waived.

AFFIRMED