NONPRECEDENTIAL DISPOSITION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

Submitted January 24, 2023*
Decided August 26, 2024

Before

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-1716

KELLY KECK,
Plaintiff-Appellant,

v.

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

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 20-C-1063

William C. Griesbach,
Judge.

O R D E R

Kelly Keck, who has long-term symptoms from her reaction to breast-cancer treatment, appeals the denial of her application for disability insurance benefits. Among other challenges, she argues that the administrative law judge erred by finding that she

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* We granted the appellant's unopposed motion to waive oral argument. Thus, the appeal is submitted on the briefs and record. *See* FED. R. APP. P. 34(f).

† We automatically substituted the original appellee for his successor, the current Commissioner. *See* FED. R. APP. P. 43(c).

had limitations in the areas of concentration, persistence, or pace but omitting them from his assessment of her residual functional capacity. We agree and thus reverse and remand.

Keck complained in the second half of 2015 to her primary doctor—Kevin Andrasko—of abdominal pain, nausea, dizziness, and difficulty balancing, and in January 2016, she was diagnosed with breast cancer. Shortly afterward, she underwent a lumpectomy and began chemotherapy, but she soon experienced severe fatigue and shortness of breath from the treatment and discontinued it. Throughout the summer of 2016, her doctors wrote that she reported pain, depression, and anxiety. And in October, Dr. Scott Trippe—a psychologist who examined Keck at the request of a state disability agency—opined that she had mild-to-moderate limitations in her ability to complete a normal workday.

Keck then applied for federal disability insurance benefits for the 17-month period between July 2015 and December 2016 (the month Keck was last eligible for benefits.) She alleged that she could not work during that period because of her depression, chronic fatigue, poor memory, poor decision-making, lack of endurance, pain, and falling.

In connection with Keck's application, two state-agency psychologists completed forms assessing her mental capacity. They indicated that Keck would be off task for up to 10 percent of the workday and had moderate limitations in (1) maintaining concentration for extended periods, (2) completing a normal workday and workweek without interruptions from her psychological symptoms, and (3) performing at a consistent pace without unreasonable breaks. Both psychologists also opined that Keck could perform simple, routine work involving simple instructions, but only one said she could do so over a normal workday.

The Social Security Administration denied Keck's application initially and upon reconsideration, and she proceeded to a hearing before an ALJ. Keck testified to her mental and physical limitations. Because of the chemotherapy, she had difficulty focusing on tasks and took daily naps of one and a half to two hours. She added that she sometimes forgot where she left her car and often could not recall what she should be doing each day (e.g., eating, showering, and brushing her teeth).

The ALJ applied the familiar five-step analysis for assessing disability and concluded that Keck was not disabled during the relevant time period. *See* 20 C.F.R. § 404.1520(a)(4). The ALJ determined that Keck did not engage in substantial gainful

activity from the alleged onset of her disability through her date last insured (step 1); that she suffered during that period the severe impairments of depression, anxiety, and residuals of breast cancer (step 2); and that her impairments did not meet the criteria for any listed impairment, but she had moderate limitations in the areas of concentration, persistence, and pace (CPP) (step 3). Between steps 3 and 4, the ALJ assessed Keck's residual functional capacity (RFC) and concluded that she was limited to simple, routine work involving simple instructions, simple decision-making, no multitasking, and an average, nonvariable pace. The ALJ similarly described Keck's RFC in the hypothetical he posed to the vocational expert (VE) at the hearing regarding what jobs Keck could work. Next, the ALJ concluded that given Keck's RFC and the VE's testimony, Keck could not have worked her past jobs (step 4), but she could have performed jobs that existed in significant numbers in the national economy (step 5).

Keck sought judicial review, *see* 42 U.S.C. § 405(g), and the district court upheld the ALJ's decision. As relevant here, the court rejected Keck's argument that the RFC assessment did not account for her CPP limitations. In the court's view, the ALJ (1) accounted for Keck's CPP limitations by confining her to simple, routine tasks involving simple decision-making and no multitasking; and (2) did not need to include Keck's time-off-task limitation because the jobs she could perform would expect her to be on task between 90 and 95 percent of a workday and were thus compatible with her limitation.

On appeal, Keck contends that the ALJ erred because his RFC assessment and hypothetical to the VE did not account for her moderate CPP limitations. Specifically, Keck argues that the ALJ ignored the psychologists' opinions that she that she would be off task for up to 10 percent of a workday and had moderate limitations in concentrating for extended periods, completing a normal workday, and working at a consistent pace.

An ALJ's RFC assessment and hypothetical to a VE must incorporate all the claimant's limitations that the record supports, including CPP limitations. *Crump v. Saul*, 932 F.3d 567, 570 (7th Cir. 2019). An ALJ need not use any specific words but must in substance account for all supported limitations. *Id.* The best way to do so is to include the specific limitations in the RFC and hypothetical. *Id.*

The ALJ here concluded that Keck had moderate CPP limitations. Next, in assessing Keck's RFC, the ALJ addressed what tasks Keck could perform:

> The claimant is further limited to simple, routine tasks, work involving no more than simple decision-making, no more than occasional and minor changes in the work setting, and work requiring the exercise of only simple judgement. She ought not perform work which requires multitasking. She could perform work requiring an average production pace, but is incapable of significantly above average or highly variable production pace work. … She ought not perform work which requires significant self-direction.

In deciding whether this RFC accounted for Keck's CPP limitations, *Crump* is instructive. There, as in this case, psychologists concluded that the claimant was moderately limited in her ability to maintain attention and concentration for extended periods. 932 F.3d at 569. And there, as in this case, the ALJ concluded that the claimant had moderate CPP limitations and fashioned an RFC that limited her to "simple, routine, repetitive tasks with few workplace changes." *Id.* In *Crump*, we reversed and remanded because the RFC did not account for the durational aspect of the claimant's CPP limitations: "[O]bserving that a person can perform simple and repetitive tasks says nothing about whether the individual can do so on a sustained basis, including, for example, over the course of a standard eight-hour work shift." *Id.* at 570. (internal citation omitted). We thus concluded that "limiting Crump to simple, routine, and repetitive tasks with few workplace changes was not enough to address her limitations and ensure that she could maintain the concentration and effort necessary to function in a workplace and otherwise sustain employment." *Id.* at 571. And *Crump* is not an outlier. We have repeatedly stated that an RFC does not account for CPP limitations when it limits a claimant to certain kinds of work without addressing the claimant's ability to sustain that work. *See, e.g.*, *Lothridge v. Saul*, 984 F.3d 1227, 1233 (7th Cir. 2021); *Martin v. Saul*, 950 F.3d 369, 374–75 (7th Cir. 2020); *Decamp v. Berryhill*, 916 F.3d 671, 675–76 (7th Cir. 2019).

Here, the ALJ made the same error as the ALJ in *Crump*: His RFC did not speak to Keck's moderate limitations in sustaining for extended periods concentration and work performance. The state-agency psychologists said that Keck could do simple, routine work but would be off task for up to ten percent of each workday and had moderate limitations in (1) maintaining attention and concentration for extended periods, (2) completing a normal workday and workweek without interruptions from her psychological symptoms, and (3) performing at a consistent pace without unreasonable breaks. Similarly, Dr. Trippe said that Keck had mild-to-moderate difficulty completing a normal workday and workweek without unreasonable breaks.

And though the ALJ found that Keck had moderate CPP limitations, he, like the ALJ in *Crump*, limited her to certain kinds of work—simple tasks, no multitasking, and so on—without addressing whether she could do that work persistently, such as throughout a normal workday or workweek. Nor did the RFC address the time-off-task limitation.

The Commissioner raises several defenses of the ALJ's decision, but none is persuasive. First, the Commissioner argues that the ALJ could rely on the psychologists' opinions that Keck could do simple, routine work. But even if that reliance were warranted, the ALJ still needed to account for Keck's other limitations, including her moderate limitations in maintaining concentration for prolonged periods, completing a normal workday and workweek, and working at a consistent pace. *See DeCamp*, 916 F.3d at 676. Second, the Commissioner argues that the ALJ did not need to adopt the psychologists' opinions and that the responsibility for determining RFC rests with the ALJ alone. *See Thomas v. Colvin*, 745 F.3d 802, 808 (7th Cir. 2014). True, but an ALJ may not selectively ignore evidence that supports a finding of disability. *See Lothridge*, 984 F.3d at 1234. And here, the ALJ disregarded the moderate limitations in the psychologists' opinions by failing to account for them in the RFC. Finally, the Commissioner adopts the district court's reasoning that even if the ALJ had limited Keck to being off task for up to ten percent of the workday, she still would have been able to perform the jobs identified by the VE. But the ALJ did not rely on the VE's testimony to justify omitting the time-off-task limitation, and the Commissioner may not defend the decision on grounds not used by the agency. *Poole v. Kijakazi*, 28 F.4th 792, 797 (7th Cir. 2022) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

Because the ALJ did not properly account for Keck's limitations in concentration, persistence, and pace, we do not address Keck's other arguments. Accordingly, we VACATE the judgment and REMAND this case to the district court with directions to remand the case to the Social Security Administration for further proceedings consistent with this order.

KIRSCH, *Circuit Judge*, concurring. I agree with the majority's application of *Crump v. Saul*, 932 F.3d 567 (7th Cir. 2019), to this case. An ALJ's RFC analysis must account for all limitations that are supported by the record, including CPP limitations. See *id*. at 570. And we have repeatedly held that limiting a claimant to simple, routine, and repetitive tasks does not, by itself, encompass the durational aspects of the claimant's limitations, such as the claimant's ability to remain focused over a sustained period. *Id*. Therefore, I agree that the ALJ erred by not incorporating Keck's CPP limitations when assessing her RFC.

I write separately to explain why the ALJ's error was harmless. When applying harmless error in this context, "we will not remand a case to the ALJ for further specification where we are convinced that the ALJ will reach the same result. That would be a waste of time and resources for both the Commissioner and the claimant. Thus, we look at the evidence in the record to see if we can predict with great confidence what the result on remand will be." *McKinzey v. Astrue*, 641 F.3d 884, 892 (7th Cir. 2011) (citation omitted). Here, Keck's CPP limitations, which the ALJ erroneously ignored in the RFC analysis, indicated that she would be off task for up to 10 percent of the workday and would have difficulty completing a normal workday at a consistent pace without unreasonable breaks. However, the vocational expert, when proffering jobs that Keck could still perform despite her limitations, testified that those jobs would expect the employee to be focused on tasks between 90 and 95 percent of the workday and would provide the employee multiple breaks throughout the day. I therefore have no trouble concluding that, even if the ALJ had properly incorporated Keck's CPP limitations, the outcome would not change: the ALJ would conclude that, while Keck could not perform her past jobs, she could have performed jobs that existed in significant numbers in the national economy, and she is therefore not entitled to disability benefits.

Nonetheless, I join the majority because the Commissioner did not raise harmless error on appeal, resulting in waiver of the argument. Cf. *United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991) (rejecting the government's argument that harmless error is nonwaivable); see also *Arej v. Sessions*, 852 F.3d 665, 669 (7th Cir. 2017) ("The government has not raised harmless error here, so that argument is waived.") (Sykes, J., concurring in the judgment); *Rhodes v. Dittmann*, 903 F.3d 646, 664 (7th Cir. 2018) (noting that a state can waive or forfeit a harmless error argument in a habeas proceeding). We may, in our discretion, raise harmless error sua sponte, see *Giovannetti*, 928 F.2d at 226–27 (explaining why a party's failure to raise harmless error does not

bind the court), but that discretion should only be exercised in limited circumstances—namely, when there is a near certainty of harmlessness, see *United States v. Jewel*, 947 F.2d 224, 228 n.5 (7th Cir. 1991) ("A major factor that affects our exercise of that discretion is the certainty of the harmlessness in this case."). Because my colleagues view this case as a closer call, certainty of harmlessness is logically absent, and thus this is not the proper time to exercise our discretion. In sum, because the Commissioner did not raise harmless error on appeal, and because we should not raise that argument sua sponte here, I join the majority in vacating the judgment and remanding the case.