Valdez v. Social Security Administration

2022 | Cited 0 times | D. New Mexico | January 31, 2022

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO CHASTITY VALDEZ, Plaintiff, v. Civ. No. 20-1263 RB/GJF KILOLO KIJAKAZI, Acting Commissioner of the Social Security Administration,

Defendant.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION THIS MATTER is before the Court upon Plaintif

in support), 32 (response), 33 (reply). Having meticulously reviewed the entire record and the , and for the following reasons, the Court hereby recommends that the AFFIRMED DENIED, and that the instant case be DISMISSED WITH PREJUDICE. I. BACKGROUND Plaintiff is 32 years old and lives with her parents and her two dogs. Administrative Record 41. Plaintiff completed school through the ninth grade and does not have any past relevant work experience. Id. at 28, 39 40. In May 2018, Plaintiff filed an application for Supplemental Security Income, alleging that she became disabled on March 14, 2007. Id. Her application was denied initially and on reconsideration. Id. Plaintiff alleged that she is disabled, as defined by the Social Security Act, because she suffers from bipolar disorder and attention- deficit/hyperactivity disorder). Id. at 15, 103 104. 1

The Social Security Administration

1 While Plaintiff initially alleged that she was disabled due to a combination of both physical and mental impairments,

Id. At the hearing, Plaintiff amended her alleged onset date to May 4, 2018. Id. Based on the

a e. Id. at 29. Plaintiff appealed

s Council, which denied her request for review. Id. at 1. In December 2020, Plaintiff filed the instant action . ECF 1. II. Plaintiff argues that the ALJ erred at steps four and five of the sequential evaluation process. Plaintiff contends that the ALJ erred at step four by finding that she had the residual functional capacity 2

to maintain concentration, persistence, and pace for two hours at a time during the workday with

normally scheduled breaks. ECF 28 at 8 9. Plaintiff insists that this finding was not supported by medical opinion evidence. Id. Plaintiff asserts that the ALJ also erred at step five by failing to resolve an apparent conflict between the RFC and the Dictionary of Occupational descriptions of the representative occupations the vocational expert testified that Plaintiff could perform. Id. 3

. ECF 28 at 2. discussion of alleged mental impairments. 2 The RFC is an assessment of the most a claimant can do despite her limitations. 20 C.F.R. § 416.945(a)(1). 3 opening See ECF 28 at 10 -4p, 2000 WL 1898704 (requiring ALJs to inquire further Haddock v. Apfel, 196 F.3d 1084 (10th Cir. 1999) (requiring an ALJ to e with the Dictionary of Occupational titles).

III. STANDARD OF REVIEW

A. Substantial Evidence cision is both legal and factual. See Maes v. Astrue, 522 the correct legal standards were applied and whether the decision is supported by substantial

evidenc , 961 F.2d 1495, 1497 98 (10th Cir. 1992))). In determining whether the correct legal standards were applied, the Court reviews in weighing particular Lax v. Astrue, 489 F.3d 1080, 1084 (10th Cir. 2007) (quoting Hackett v. Barnhart, 395 F.3d 1168, 1172 (10th Cir. 2005)). The Court may reverse and remand if s Hamlin v. Barnhart, 365 F.3d 1208, 1214 (10th Cir. 2004) (citing Winfrey v. Chater, 92 F.3d 1017, 1019 (10th Cir. 1996)). all be -evidence standard, a Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019)

(brackets in original) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Id. (internal quotation marks and citation

and means only such relevant evidence as a reasonable mind might accept Id. Case 1:20-cv-01263-RB-GJF Document 35 Filed 01/31/22 Page 3 of 16 substantial evidence will be found only whether there is a conspicuous absence of credible choices Trimiar v. Sullivan, 966 F.2d 1326, 1329 (10th Cir. 1992) (quoting Hames v. Heckler, 707 F.2d 162, 164 (5th Cir. 1983)) (internal quotation marks omitted). Under this standard, a court should still meticulously review the entire record, but it may Newbold v. Colvin, 718 F.3d 1257, 1262 (10th Cir. 2013) (quoting Branum v. Barnhart, 385 F.3d 1268, 1270 (10th Cir. 2004)); Hamlin, 365 F.3d at Oldham v. Astrue, 509 F.3d 1254, 1257 (10th Cir. 2007) (emphasis in

e Lax, 489 F.3d at 1084 (quoting Zoltanski v. F.A.A., 372 F.3d 1195, 1200 (10th Cir.

een two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been Id. (quoting Zoltanski, 372 F.3d at 1200) (brackets omitted). Ultimately, if the correct legal standards were applied and substantial evidence supports the Langley v. Barnhart, 373 F.3d 1116, 1118 (10th Cir. 2004); Hamlin, 365 F.3d at 1214.

B. Sequential Evaluation Process 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

The SSA has devised a five-step sequential evaluation process to determine disability. See

Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (citing 20 C.F.R. § 416.920). The claimant bears the burden of proof at steps one through four. See Bowen v. Yuckert, 482 U.S. 137, 146 & n.5 (1987); Grogan v. Barnhart, 399 F.3d 1257, 1261 (10th Cir. 2005); Williams v. Bowen, 844 F.2d 748, 750- 51, [she] is not [she] has a medically severe impairment mpairment is equivalent to a listed [her] from performing [her] Williams, 844 F.2d at 750-51; Grogan, 399 F.3d at 1261.

If the claimant has advanced through step four, the burden of proof then shifts to the Yuckert, 482 U.S. at 142, 146 n.5.

IV.

A. Steps One Through Three At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since her alleged onset date, May 4, 2018. AR at 17. At step two, the ALJ found that Plaintiff was severely disorder, and somatic symptom disorder. Id. At step three, the ALJ concluded that Plaintiff did not

have an impairment or a combination of impairments that met or medically equaled the severity of a Id. at 19. 4

4 the SSA finds that any the SSA Id.

B. Step Four 5 mental RFC to: - th supervisors and co- concentration, persistence, and pace for two hours at a time during the workday with normally

Id. account of the limiting effect of her symptoms, the objective medical evidence, and the medical opinion evidence. Plaintiff reported that she had a bad temper, difficulty concentrating, and trouble reading. Id. Plaintiff further claimed that she suffered from severe migraines three to four times per week. Id. at 23 (citing id. at 284 91). Additionally, Plaintiff alleged that she had difficulty remembering and understanding, following instructions, completing tasks, reading, concentrating, handling stress and change, and managing her mood. Id. (citing id. at 284 91). included paying bills, shopping, spending time with friends and family, watching television and

videos on her phone, playing games, and caring for her pets. Id. at 25. account of her symptoms. The ALJ noted that Plaintiff was diagnosed with mental impairments

before her alleged onset date. Id. at 23 (citing id. at 381). Plaintiff was repeatedly observed as having Id. at 23 24 (citing id. at 429). 5

The Tenth Circuit has described step four of the sequential evaluation process as occurring in three distinct phases. Winfrey Id. In phase two, the ALJ assesses the Id. Last, the could meet the physical and/or mental demands of her past relevant work. Id.

intellectual Id. (citing id. at 429). associated with her bipolar disorder and ADHD were described medication. Id. at 24 (citing id. at 503, 511, 525, 644, 648). Considering this information, the ALJ

alleged] mental limitations [were] not entirely consistent with Id. at 25. The ALJ then considered the relevant medical opinion evidence. State agency psychological consultant, Scott Walker, MD, Id. at 113. Dr. Walker opined that Plaintiff had Id. at 113 15.

Dr. Walker concluded that -like tasks where interpersonal contact [was] incidental to tasks performed and where the complexity of tasks [was] learned and performed by rote, involving few variables, little judgment, supervision that [was] simple, direct Id. at 115. y consistent with the

Id. at 26 (citing id. at 418 26, 511, 525, 648). The ALJ, however, fou s ability to understand, remember, and carry out tasks to be more restrictive than the record supported. Id. (citing id. at 503, 525, 646, 648). On reconsideration, state agency psychological consultant Ryan Jones, PhD, opined that Plaintiff had marked limitations in understanding, remembering, and carrying out detailed instructions. Id. at 130 31. Additionally, Dr. Jones concluded that Plaintiff had several moderate limitations in concentration and persistence, social interaction, and adaption. Id. at 131 32. In the narrative portion of his opinion, Dr. Jones opined that Plaintiff had the mental RFC to understand, recall, concentrate, perform simple repetitive tasks, interact appropriately with coworkers and

supervisors to learn tasks, accept criticism, and attend meetings. Id. at 132. He found, however, that Plaintiff would be unable to interact appropriately or tolerate contact with the public and would be Id. Dr. Jones therefore concluded that Plaintiff should be restricted to performing basic work-like tasks where interpersonal contact was incidental Id. at 132. As with his assessment

n, supported by citations to the evidence and was generally consistent with the record. Id. at 26 (citing

418 26, 502 29, 649). Similar to his assessment of however, the ALJ found that Dr. limiting than what the evidence in the record supported. Id. at 26.

Last, the ALJ addressed the opinion of John Koewler, PhD, who examined Plaintiff at the Id. at 327. Dr. Koe but Id. at 328.

Additionally, Dr. Koewler Id. [was] below average, possibility i Id. at 329. Dr. Koewler concluded that

Plaintiff was markedly limited in understanding and remembering detailed or complex instructions as well as working without supervision. Id. Dr. Koewler also found that Plaintiff was moderately to markedly limited in attending and concentrating. Id. And last, Dr. Koewler opined that Plaintiff was moderately limited in carrying out instructions, interacting with the public, coworkers, and supervisors, adapting to changes in the workplace, and using public transportation. Id. The ALJ found the entirety of y consistent,

did not include citations to the record, and was generally inconsistent with the record. Id. at 27. Because Plaintiff did not have any past relevant work, the ALJ moved to step five of the sequential evaluation process RFC could perform work reasonably available in the national economy. Id.

C. Step Five Plaintiff was 28 years old at the time of her alleged onset date. Id. at 28; see generally 20 consider that your testimony, the ALJ found that Plaintiff could perform the representative occupations of dishwasher

(146,000 jobs nationally), 6

automobile detailer (40,000 jobs nationally), 7

cleaner (220,000 jobs

6 kitchen work areas and restaurant equipment and utensils in clean and orderly condition: Sweeps and mops floors. Washes worktables, walls, refrigerators, and meat blocks. Segregates and removes trash and garbage and places it in designated containers. Steam-cleans or hoses-out garbage cans. Sorts bottles, and breaks disposable ones in bottle- crushing machine. Washes pots, pans, and trays by hand. Scrapes food from dirty dishes and washes them by hand or places them in racks or on conveyor to dishwashing machine. Polishes silver, using burnishing-machine tumbler, chemical dip, buffing wheel, and hand cloth. Holds inverted glasses over revolving brushes to clean inside surfaces. Transfers supplies and equipment between storage and work areas by hand or by use of handtruck. Sets up banquet tables. Washes and peels vegetables, using knife or peeling machine. Loads or unloads trucks picking up or delivering -010, 1991 WL 672755. 7 performing any combination of following duties: Washes vehicle exterior to clean cars, using cleaning solution, water, cloths, and brushes. Applies wax to auto body, and wipes or buffs surfaces to protect surfaces and preserve shine, using cloth or buffing machine. Vacuums interiors of vehicles to remove loose dirt and debris, using vacuum cleaner. Cleans upholstery, rugs, and other surfaces, using cleaning agents, applicators, and cleaning devices. Applies revitalizers and preservatives to vinyl or leather surfaces, and treats fabrics with spot and stain resistant chemicals to preserve and protect interior components. Cleans engine and engine compartment with steam cleaning equipment and various cleaning agents to remove grease and grime. Applies special purpose cleaners to remove foreign materials which do not respond to normal cleaning procedures, utilizing experience and following recommendations of product manufacturer. Paints engine components and related parts, using spray gun or aerosol can

and masking material. Applies paint to chipped body surfaces of vehicle, using container of touchup paint. Applies dyes and reconditioning -034, 1991 WL 687878.

nationally), 8

and merchandise marker (120,000 jobs nationally). 9

Id. at 28 29. The ALJ found that the OT, but made the following observation:

[t]he DOT does not specifically address the breakdown between interaction with supervisors, coworkers, and the public. At the hearing, the vocational expert considered the interaction provision in determining the number of jobs available in the national economy. The vocational expert testified this opinion was based on her regarding the interaction provision. Therefore, the undersigned accepts the

experience in the field when addressing this variance with the DOT.

Id. at 29. 10

Because the ALJ concluded that Plaintiff could work in occupations that exist in significant numbers in the national economy, the ALJ found that she had not been under a disability, as defined by the Social Security Act, since the date of her alleged disability onset date. Id. V. ANALYSIS The Court holds that the ALJ did not commit reversible error either (1) in finding that Plaintiff had the capacity to maintain concentration, persistence, and pace for two hours a time during the workday with scheduled breaks or (2) in considering

8 blishments, such as hotels, restaurants, clubs, beauty parlors, and dormitories, performing any combination of following duties: Sorts, counts, folds, marks, or carries linens. Makes beds. Replenishes supplies, such as drinking glasses and writing supplies. Checks wraps and renders personal assistance to patrons. Moves furniture, hangs drapes, and rolls carpets. Performs other duties as described under CLEANER (any industry) I Master Title. May be designated according to type of establishment cleaned as Beauty Parlor Cleaner (personal ser.); Motel Cleaner (hotel & rest.); or according to area -014, 1991 WL 672783. 9 price tickets to articles of merchandise to record price and identifying information: Marks selling price by hand on boxes containing merchandise, or on price tickets. Ties, glues, sews, or staples price ticket to each article. Presses lever or plunger of mechanism that pins, pastes, ties, or staples ticket to article. May record number and types of articles marked and pack them in boxes. May compare printed price tickets with entries on purchase order to verify accuracy and notify supervisor of discrepancies. May print information on tickets, using ticket- -034, 1991 WL 671802. 10 Plaintiff challenges this excerpted testimony that did not appear in the transcript of the hearing. ECF 28 at 10.

A. The ALJ Was Not Required to Find that Plaintiff Was More Limited in Her Ability to Maintain Concentration, Persistence, and Pace Plaintiff argues that because Drs. Walker and Jones opined that she was at least moderately limited in her ability to maintain concentration, persistence, and pace, the ALJ erred by not accounting for such a limitation in the RFC. ECF 28 at 8 9; see generally AR at 114 (Dr. Walker opining that Plaintiff had moderate limitations and one marked limitation in concentration and persistence), 132 (Dr. Jones opining that Plaintiff had moderate limitations and one marked limitation in concentration and persistence). Generally, an ALJ is not entitled to pick and choose through an uncontradicted medical opinion, taking only the parts that are favorable to a finding of nondisability. Haga v. Astrue, 482, F.3d 1205 (10th Cir. 2007). At the same time, however, an ALJ is entitled to resolve conflicts in the record. Id. Indeed, it is the ALJ, not a physician or psychologist, who is charged with formulating the RFC. Chapo v. Astrue, 682 F.3d 1285 (10th Cir. 2012) (quoting Howard v. Barnhart, 379 F.3d 945, 949 (10th Cir. 2004)). On this point, the Tenth Circuit has affirmatively rejected the notion that the components of an RFC lack substantial evidence unless they line up perfectly with an expert medical opinion. Chapo, 682 F.3d at 1289. In fact, the Tenth Circuit has rejected the argument that ic, affirmative, medical evidence on the record as to each requirement of an Howard, 379 F.3d at 949. nions on

As is typical for state agency consultants, Drs. Walker and Jones gave their opinions using a form document. See AR at 113, 130 ed the document preparer with help work activities. Id. (emphasis added). These questions asked Drs. Walker and Jones to assess

ability to engage in certain work-related tasks by identifying the degree to which she would be limited in each area. See id. In this case, Drs. Walker and Jones noted that Plaintiff would be at least moderately limited in sustaining concentration and persistence. Id. Notably, however, the answers to these types of questions were not actual opinions, as their opinions were recorded in the narrative section. Id. at 113, 130.

Indeed, the Tenth Circuit, this Court, and other courts in this District have repeatedly emphasized that it is the narrative portion of a form document that makes up a state agency opinion, not that doctor s notations of moderate limitations. See Rush v. Saul, 389 F. Supp.3d 957, 969 (D.N.M. 2019) (explaining Ten RFC in his narrative opinion, that controls over any moderate worksheet limitations because the

see also Smith v. Colvin, 821 F.3d 1264, 1269 n.2 (10th Cir. 2016); Munoz v. Kijakazi, Civ. No 20-245 GJF, 2021 WL 4290176, at *8 (D.N.M. Sept. 21, 2021) (same). potential limitations in concentration and task persistence in the narrative portion of his opinion. See AR at 115. Instead, his assessment focused on task complexity by restricting Plaintiff to performing only - For his part, Dr. Jones opined that Plaintiff could

Id. at 132. The Court thus required her at most to -related

decisions in a work Id. at 22, 132. By the same virtue, the carrying out simple instructions and making simple work-related decisions. Id. at 22, 115.

B. The ALJ Did Not Err at Step Five Plaintiff argues that the ALJ made two errors at step five. First, she contends that the ALJ [1] instructions and respond appropriately to criticism from supervisors [and] [2] the ability to sustain

an ordinary routine without special supervision internal quotation marks omitted) (emphasis in original). Second, Plaintiff asserts that the ALJ erred by describing (and relying on) certain testimony from the vocational expert that is entirely absent from the hearing transcript. At step five, in deciding whether a claimant can adjust to other work, the SSA must supply evidence of work that exists in significant numbers in the national economy that the claimant can do, considering her RFC. 20 C.F.R. § 416.966(b). The ALJ need not account, however, for whether work exists in the geographical area in which the claimant resides, whether a specific job vacancy exists, or even whether the claimant would be hired if she applied to one of the identified occupations. 20 C.F.R. § 416.966 (c)(1)-(8). But the SSA will not deny disability status if the qualifying jobs in very limited numbers in relatively few locations outside the region 416.966(b). For this determination, the SSA may rely on publications such as the DOT, see 20 C.F.R. § 416.966(d)(1)-(5), as well as vocational or other expert testimony. 20 C.F.R. § 404.1566(e). Biestek v. Berryhill, 139 S. Ct. 1148, 1162 (2019) (Gorsuch, J., dissenting). Indeed, the

Tenth Circuit has held that evidence to support a determination of nondisability, the ALJ must ask the expert how his or her testimony as to the exertional requirement of identified jobs corresponds with the [DOT] and elicit

Haddock v. Apfel, 196 F.3d 1084, 1086 87 (10th Cir. 1999). The Tenth Circuit later clarified that Haddock nonexertional limitations. See Hackett v. Barnhart, 395 F.3d 1168, 1175 (10th Cir. 2005). Put simply, an ALJ is required to elicit a reasonable explanation from the vocational expert that the DOT. Id. at 1174 76; see also SSR 00-

unresolved conflict between the [vocational expert] evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the [vocational expert] evidence

In this case, however, the precise conflict that Plaintiff perceives between the DOT and the that she challenges is unclear. See ECF 28 at 10. Plaintiff argues that there is a logical conflict between her instructions and respond appropriately to criticism from supervisors while at the same time requiring

special supervision to sustain task persistence. ECF 28 at 10. includes no citation to the record (or otherwise) supporting even the existence of either of these

limitations, leaving the Court perplexed about their origins. See id. Indeed, neither the RFC nor the

hypothetical individual submitted to the vocational expert included either of those limitations. AR at 22, 51 52. In fact, the only supervisory limitation the ALJ found Plaintiff to have was being none of the DOT descriptions for any of the

representative occupations identified by the vocational expert included any special supervisory demands. See DOT 318.687-010, 1991 WL 672755 (Dishwasher of instructions); DOT 915.687-034, 1991 WL 687878 (Automobile Detailer requiring

tions); DOT 323.687-014, 1991 WL 672783 ; DOT 209.587-034, 1991 WL 671802 (Merchandise Marker . was an apparent conflict between , and because she has failed to establish such a conflict, the Court . C.f. Shinseki v. Sanders, 556 U.S. 396, 409 (2009) (holding that the party seeking to have an agency decision set aside because of an erroneous ruling carries the burden of showing that prejudice resulted); Keyes-Zachary v. Astrue, 695 F.3d 1156, 1161 (10th Cir. 2012) (contentions Chambers v. Barnhart, 389 F.3d 1139, 1142 (10th Cir. 2004))).

[T] the Dictionary of Occupational Titles. However, the DOT does not specifically address the breakdown between interaction with supervisors, coworkers, and the public. At the hearing, the vocational expert considered the interaction provision in determining the number of jobs available in the national economy. The vocational expert testified this opinion was based on her years of professional experience. ECF 28 at 10 11 (quoting AR at 22). It is true, as Plaintiff says, that the transcript of the hearing did not include the vocational expert specifically stating that she considered Pla in interacting with different groups of individuals (i.e., coworkers, supervisors, and the public). See AR at 54 56. But aside from pointing out this error, Plaintiff has inclusion of that statement was harmful. See ECF 28 at 10 11. 11

Although Plaintiff argues that the ALJ violated Haddock by failing to elicit additional testimony from the ALJ, she has not identified

11 This Court believes the inclusion in his written decision of a description of testimony the vocational expert did not give was inadvertent and ultimately inconsequential. In the modern era, such cut-and-paste errors in a high-

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1)(c). Any request for an extension must be filed in writing no later than seven days from the date of this filing. A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed. about the interaction between such groups of individuals and the DOT (which, according to the ALJ, does not address such interactions) such that ony would have been triggered. See Haddock 196 F.3d at 1087. In sum, because Plaintiff has failed to identify any

conflict between testimony and the DOT, the Court holds that the ALJ did not holding in

Haddock. VI. CONCLUSION

The ALJ applied the correct legal standards and his findings and decision were supported by substantial evidence. IT IS THEREFORE RECOMMENDED AFFIRMED DENIED, and that the instant cause be DISMISSED

WITH PREJUDICE.

SO RECOMMENDED.

_____ THE HONORABLE GREGORY J. FOURATT

UNITED STATES MAGISTRATE JUDGE