

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5029

September Term, 2018

FILED ON: APRIL 2, 2019

PEARL LEE GLOVER,

APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY

APPELLEE

Appeal from the United States District Court
for the District of Columbia
Magistrate Judge G. Michael Harvey
(No. 1:16-cv-02229)

Before: GARLAND, *Chief Judge*, and PILLARD and WILKINS, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the Magistrate Judge and on the briefs of the parties and oral arguments of counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the Magistrate Judge be **AFFIRMED IN PART** and **REVERSED** and **REMANDED IN PART**.

In 2012, Appellant Pearl Lee Glover applied for disability insurance benefits and supplemental security income. She alleged disability beginning in 2011. On September 15, 2015, after a hearing, an Administrative Law Judge issued a written decision denying Appellant's applications. Appellant filed for review of the ALJ's decision in the District Court, and the parties consented to proceeding before a Magistrate Judge. On December 8, 2017, the Magistrate Judge issued a Report and Recommendation, which he would subsequently deem a Memorandum Opinion and Order, denying Appellant's motion for reversal and granting Appellee's motion for affirmance.

Appellant appeals from the Magistrate Judge's judgment of affirmance. We affirm as to

Appellant's application for disability insurance benefits. But we reverse as to Appellant's application for supplemental security income and remand to the Magistrate Judge with instructions to remand to Appellee for further proceedings consistent with this judgment.

This Court reviews the Magistrate Judge's judgment "de novo, as if the agency's decision had been appealed to this court directly." *Jones v. Astrue*, 647 F.3d 350, 355 (D.C. Cir. 2011) (internal quotation marks omitted). "In so doing, we consider whether the [ALJ's decision] is based on substantial evidence in the record . . ." *Page v. Berryhill*, 688 F. App'x 7, 9 (D.C. Cir. 2017) (internal quotation marks omitted). "This standard of review calls for careful scrutiny of the entire record to determine whether . . . the ALJ [] has analyzed all evidence and has sufficiently explained the weight he [or she] has given to obviously probative exhibits." *Simms v. Sullivan*, 877 F.2d 1047, 1050 (D.C. Cir. 1989) (internal citation and quotation marks omitted).

In evaluating a claim of disability, an ALJ must conduct a five-step inquiry. At step one, the individual must show that she is not engaged in "substantial gainful activity." 20 C.F.R. § 404.1520(a)(4)(i). At step two, the ALJ must determine whether the individual has a "severe impairment." *Id.* §§ 404.1520(a)(4)(ii), 404.1520(c), 404.1509. At step three, the ALJ must determine whether the individual's impairment "meets or equals" an impairment listed in the regulations. *Id.* §§ 404.1520(a)(4)(iii), 404.1520(d). "[I]f the claimant suffers from an impairment that . . . meets or equals an impairment listed in Appendix 1 to [Appellee's] regulations, she is deemed disabled and the inquiry is at an end." *Butler*, 353 F.3d at 997 (citing §§ 404.1520(d), 416.920(d)). Otherwise, at step four, the individual must demonstrate that she is incapable of performing her previous work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f). At step five, the ALJ must determine whether the individual "can make an adjustment to other work," considering, among other things, her residual functional capacity ("RFC"). *Id.* §§ 404.1520(a)(4)(v), 404.1520(g).

Appellant challenges the following aspects of the ALJ's determinations against her at steps three and five. At step three, the ALJ concluded that Appellant did not satisfy the listing criteria of Disorders of the Spine, 20 C.F.R., Pt. 404, Subpt. P, App'x 1-A § 1.04(C) because "the record is devoid of evidence of . . . lumbar spinal stenosis with accompanying ineffective ambulation." A. 48. At step five, in determining that Appellant had the RFC to perform light work, the ALJ accorded great weight to two assessments of non-examining sources, conducted on behalf of Appellee in 2012 and 2013, which concluded that Appellant could sit, stand, or walk for four to six hours in an eight-hour day. *See id.* at 58; *see also id.* at 54-55. By contrast, the ALJ refused to fully credit a 2015 assessment of Appellant's primary care provider, physician assistant Alexandra Scheer, which indicated that Appellant could sit, stand, or walk for thirty minutes in an eight-hour day. *Id.* at 58. The ALJ refused to fully credit Scheer's assessment because, as the ALJ twice stated, the ALJ believed her assessment concluded that Appellant could walk one mile "without" a cane, *see id.* at 56, 58, a fact that the ALJ found does "not readily align" with the capacity to sit or stand for only thirty minutes in an eight-hour day, *id.* at 58. In addition, the ALJ declined to fully credit Appellant's reports of her limitations (which, with respect to sitting and standing, were consistent with PA Scheer's findings, *compare id.* at 50, *with id.* at 56) because, according to the ALJ, Appellant admitted to abilities in 2012 that undermine the reliability of her statements

indicating that she has been disabled since 2011. *Id.* at 52. Moreover, the ALJ assigned only limited weight to a 2015 independent medical examination of Philip J. Marion, M.D. (which the ALJ inaccurately stated was from 2013, *compare id.* at 55, *with id.* at 356) that concluded that occupational activity was precluded for Appellant due to spine disease and poor position tolerance. *Id.* at 58.

The ALJ's determination that Appellant is not eligible for disability insurance benefits is supported by substantial evidence. To be eligible for disability insurance benefits, an applicant must be insured at the time of disability, *see* 42 U.S.C. § 423(c), and it is uncontested that Appellant was last insured on September 30, 2011. The ALJ determined that she was not disabled as of that date based on the assessments from non-examining sources conducted on Appellee's behalf in 2012 and 2013 and on admissions Appellant made in 2012 regarding her functional abilities. Moreover, Appellant points to no objective medical evidence to rebut the ALJ's determination that she was not disabled as of September 30, 2011. Indeed, in arguing that the ALJ erred in determining that she was not disabled, Appellant relies on the assessments of Scheer and Marion and her testimony before the ALJ, all of which occurred in 2015. Accordingly, we affirm the Magistrate Judge's judgment of affirmance as to the ALJ's denial of Appellant's application for disability insurance benefits.

The ALJ's determination that Appellant is not eligible for supplemental security income, however, is not supported by substantial evidence. In assessing whether Appellant was eligible for supplemental security income, the ALJ was required to consider all the record evidence and adequately explain his determinations. *See Simms*, 877 F.2d at 1050. The ALJ erred in three ways. First, at step three, the ALJ failed to adequately explain why Appellant's impairments did not satisfy § 1.04(C). Indeed, the ALJ disposed of this issue in a single sentence that erroneously described the criteria for an inability to ambulate effectively as requiring "the use of a hand-held assistive device that limits the functioning of both upper extremities," A. 48, when the rule makes clear that needing two-hand assistive devices is not a prerequisite to that condition, *see* 20 C.F.R. pt. 404, subpt. P, App'x 1-A § 1.00B(2)(b)(2). The ALJ thus incorrectly assessed evidence that Appellant was unable to ambulate effectively. Appellant's Br. 29 (citing record evidence that Appellant could not use public transportation, sustain a reasonable walking pace, engage in routine ambulatory activities, or climb more than a few stairs, and that she fell frequently). He also failed to address the record evidence of lumbar spinal stenosis. *See* A. 419 (MRI showed "moderate narrowing of the neural foramina"), 461 (finding "moderate bilateral foraminal stenosis"). Second, at step five, the ALJ discounted Scheer's report based on a plain misreading of that report. Scheer's report stated that Appellant could walk one mile "with" a cane. *Id.* at 352. But the ALJ twice misread it as stating that Appellant could walk one mile "without" a cane, *see id.* at 56, 58, and predicated his decision to not fully credit Scheer's assessment on this misreading, *see id.* at 58. Third, also at step five, the ALJ did not adequately explain his reasons for discounting evidence—including Appellant's statements to her doctors and testimony at the hearing, as well as the reports of Scheer and Marion—that Appellant's symptoms had worsened between 2012 and 2015. The non-examining assessments conducted on Appellee's behalf in 2012 and 2013, to which the ALJ accorded great weight, *see id.* at 58, did not directly speak to Appellant's status in 2015. Appellee contends that evidence elsewhere in the record supports the ALJ's decision, but we consider only

the reasons given by the ALJ. *See Jones*, 647 F.3d at 356 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Accordingly, we reverse the Magistrate Judge's judgment of affirmance as to the ALJ's denial of Appellant's application for supplemental security income and remand to the Magistrate Judge with instructions to remand to Appellee. On remand, Appellee is to correct its reading of Scheer's assessment and adequately explain whether, as of the date of its decision, Appellant's degenerative condition has rendered her disabled at step three under § 1.04(C) and, if not, at step five.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk