UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4713
Summary Calendar

HAMEY TOUSSANT, SSN XXX-XX-XXXX,

Plaintiff-Appellant,

versus

U. S. SECRETARY OF HEALTH
AND HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
(90-cv-0180)

(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellee the Secretary of Health and Human Services (Secretary) denied social security disability insurance benefits to plaintiff-appellant Hamey Toussant (Toussant or claimant) in a decision made final in January 1991 when the Appeals Council

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

declined to review the December 1989 denial of benefits by an administrative law judge (ALJ). On review pursuant to 42 U.S.C. § 405(g), the United States District Court for the Western District of Louisiana granted summary judgment for the Secretary upon recommendation of the United States Magistrate. Because we conclude that the ALJ improperly applied controlling legal standards concerning severe impairments, we remand to the Secretary for reconsideration of this issue.

Facts and Proceedings Below

At the time of the hearing before the ALJ on the current application for disability insurance benefits, Toussant was sixty-two years old. He had worked most of his life doing heavy manual labor in the construction business; he had not worked since 1982. He has a second- or third-grade education and is functionally illiterate, able only to sign his name in cursive writing.

In August 1985, Toussant was admitted to the W. O. Moss Regional Hospital in Lake Charles, Louisiana, complaining that he had awakened, unable to move his left leg, during the night prior to admission. He also complained of weakness in his left arm and numbness on his left side. He reported having hit his head eight or ten days before his admission to the hospital. According to hospital records, he felt his strength returning the day after his admission. He was able to walk but frequently dragged his left leg. Sensory response was slightly decreased on his left side. He was monitored and treated for hypertension. The diagnosis was that Toussant had suffered a mild stroke that affected the left side of his body. He was discharged after four days, at which time he

could walk slowly without falling. He was prescribed medication for his hypertension, which was under control.

Toussant returned to the hospital on September 12, 1985, complaining that he had almost passed out twice the day before. He was discharged the same day; the impression was of lightheadedness secondary to poor cardiovascular response caused by a reaction to his medication. An intravenous pyelogram done in January 1986 showed normal results. Some degenerative disk changes and arthritic changes in his spine were noted at that time.

Evidence of Toussant's medical condition during 1986 and 1987 consists solely of testimony of the claimant and his wife at the evidentiary hearing before the ALJ. The ALJ in his December 1989 decision, noting that the hospital had represented that it had delivered its entire file, which did not include records from 1986 or 1987, concluded that Toussant's evidence was not credible:

> "As a result of inconsistencies in testimony regarding sleep habits, marked limitation of physical functions versus the ability to drive and participate in recreational activities, the testimony regarding ongoing treatments and entries into the written record indicating no treatment during the period in question, the testimony of worsened condition and history of recovery given to the consulting examiner, the Administrative Law Judge finds that claimant's testimony and allegations are totally lacking in credibility regarding his physical condition in 1986 and 1987."

Medical records show that Toussant was admitted to the emergency room on September 7, 1988, seeking treatment after being hit on the head with a chair. He was continuing to have problems with hypertension, but hospital records reveal that he had not been taking his medication for financial reasons. In October 1988, his hypertension was under control; problems recurred the next month

and on and off throughout 1989 because of non-compliance with his medication. He experienced problems with his left eye in December 1988 and was instructed to see an optometrist.

Dr. Steven J. Snatic, a neurologist, performed a consultative exam on December 12, 1988. In his report (the Snatic report), he described Toussant as a "well developed, well nourished, generally healthy looking man with no obvious physical peculiarities," and found his mental status to be normal. Dr. Snatic noted that Toussant seemed to have "adequate muscle strength in all four limbs, though he perceives himself that his left leg is weaker than the right." Sensory response was decreased in the upper left extremity. Dr. Snatic's impression was that the stroke had left Toussant with "residual coolness, some sensory loss and perhaps mild weakness of the left leg. He has a problem with balance which prevents him from being able to walk on a narrow base." He concluded that Toussant probably would not be able to engage in activities requiring heavy manual labor or work with potentially dangerous machinery, and that, although physically able to perform lighter work, Toussant would not qualify for such work because of his lack of experience, training, and his inability to read and write.

Toussant first applied for social security benefits in September 1985; this application and a request for reconsideration were both denied. Following an evidentiary hearing, an ALJ issued a decision on June 17, 1986, finding that Toussant was not disabled within the meaning of the Social Security Act (Act), and denying benefits on the basis of that finding. Toussant did not appeal

this decision.

On September 26, 1988, Toussant filed the current application for disability insurance benefits.[1] He alleged that he had been disabled since September 3, 1985, because of the stroke, weakness in his left leg, pain in both legs, and high blood pressure. This application was denied by the Social Security Administration and the state agency in April 1989; a request for reconsideration was denied in September 1989.

Toussant had an evidentiary hearing before an ALJ on November 13, 1989. Both Toussant and his wife testified before the ALJ. Noting that Toussant had previously filed an application for disability insurance benefits, the ALJ limited his consideration of the disability issue to the unadjudicated period between June 17, 1986, the date of the prior ALJ decision, and December 31, 1987, the date Toussant's insured status expired. At the hearing, counsel for Toussant requested that the ALJ grant a psychological examination for his client. In a decision issued December 12, 1989, the ALJ denied benefits to Toussant on the grounds that, because his impairment was "slight," he was not disabled; the ALJ denied the request for a psychological examination.

Following the decision of the ALJ, Toussant's counsel arranged for psychological testing for his client. The psychologist, Dr. Downing, administered the WAIS-R test, on which Toussant received a verbal I.Q. of 69, a performance I.Q. of 71, and a full scale

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[1] Toussant filed a concurrent application for supplemental security income. Although found to be disabled, under identical criteria as for the current application, and thus eligible for benefits, his excess income precludes payment of benefits.

I.Q. of 69. Dr. Downing also administered the Wechsler Memory Scale test, which provided a result of 62. He "saw no evidence of malingering -- to the contrary [Toussant] persevered even when tasks were well beyond him." In his report (the Downing report), his impression was of mild mental retardation.

Toussant requested review of the ALJ's decision by the Appeals Council (Council) and forwarded the Downing report to the Council. Although it considered the Downing report, the Council concluded that the findings of Dr. Downing revealed Toussant's mental state as of the date of the examination but did not relate back to the period in question and that the record through December 27, 1988 disclosed no evidence of mental impairment. The Council denied review of the ALJ's decision, thus making the ALJ's denial of disability insurance benefits the final decision of the Secretary.

Toussant sought review of the Secretary's decision in the district court. The court, upon recommendation of the magistrate, granted summary judgment for the Secretary. Toussant brings this appeal.

Discussion

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 12 months." 42 U.S.C. § 423(d)(1)(A). A "physical or mental impairment" is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable

clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). In order for a claimant to be eligible to receive disability insurance benefits, his disability must exist on or before the expiration of his insured status.[2]

Federal regulations set forth a five-step sequential analysis for the determination of a disability: (1) Is the claimant presently working at a substantial gainful activity; (2) does the claimant have a severe impairment; (3) is the impairment listed in Appendix I to the regulations;[3] (4) is the claimant capable of performing past relevant work; and (5) is the claimant capable of performing any other work? 20 C.F.R. § 404.1520. If the claimant is found disabled or not disabled at any step in this sequence, no further analysis need be made. *Id*. The burden of proving disability is on the claimant for the first four steps of the determination process; only when the fifth step is reached does the burden shift to the Secretary to prove that the claimant is capable of performing some type of work. *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991). The claimant's age, education, and past work experience are considered at the fifth step. 20 C.F.R. § 404.1520(f).

We are limited in our review of the denial of disability benefits to a consideration of two issues: (1) whether the decision of the Secretary is supported by substantial evidence, and

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[2] Toussant's insured disability status expired on December 31, 1987.

[3] If a claimant's impairment is listed, a finding of disability is automatic.

(2) whether the Secretary applied the proper legal standards. 42 U.S.C. § 405(g); *Anthony v. Sullivan*, 954 F.2d 289, 292 (5th Cir. 1992). Toussant raises claims under both issues.

Substantial evidence is that which a reasonable mind might find adequate to support a conclusion. *Richardson v. Perales*, 91 S. Ct. 1420, 1427 (1971). It is more than a mere scintilla, but it may be less than a preponderance. *Anthony v. Sullivan*, 954 F.2d at 295. A finding of no substantial evidence is appropriate only if no credible evidentiary choices or medical findings exist to support the decision. *Johnson v. Bowen*, 864 F.2d 340, 343-344 (5th Cir. 1988).

Toussant claims that the Secretary's decision is not supported by substantial evidence because the ALJ did not meet his obligation to develop a full and fair administrative record. Specifically, he contends that the ALJ failed to develop a sufficient record when he refused to order a consultative psychological examination with I.Q. testing. We assume, *arguendo*, that in appropriate circumstances the ALJ's responsibility may remain even when a claimant is represented by counsel at the hearing, as was the case here. *Brown v. Bowen*, 827 F.2d 311, 312 (8th Cir. 1987). Failure to develop an adequate record does not always require reversal; the claimant must show that he has been prejudiced by that failure. *Kane v. Heckler*, 731 F.2d 1216, 1220 (5th Cir. 1984).

Consultative examinations are within the discretion of the ALJ and are not required unless the record establishes that they are necessary in order for the ALJ to make a decision on the claim. *Pearson v. Bowen*, 866 F.2d 809, 812 (5th Cir. 1989). *See Jones v.*

Bowen, 829 F.2d 524, 526 (5th Cir. 1987) (claimant must "raise a suspicion concerning such an impairment necessary to require the ALJ to order a consultative examination to discharge his duty of `full inquiry'").

Toussant asserts that there was sufficient evidence before the ALJ to support the request for the psychological examination, citing the Snatic report in which the doctor noted Toussant's limited education and literacy, his claim that his medication made him sleepy and weak and unable to drive, and testimony of his wife that "[t]he stroke even messed up his head, his brains" and that "it don't seem like he's well enough to learn." Both Toussant and his wife testified that he had been forgetful ever since he had the stroke.

The ALJ found otherwise, noting that Toussant had never applied for disability insurance benefits on the basis of mental impairment, but only on the basis of his stroke, and that Toussant never expanded his claim to include a mental impairment prior to the hearing. "When there is no contention that a claimant is mentally retarded, a few instances in the record noting diminished intelligence do not require that the ALJ order an I.Q. test in order to discharge his duty to fully and fairly develop the record." *Pierre v. Sullivan*, 884 F.2d 799, 803 (5th Cir. 1989). Further, the ALJ concluded that no evidence suggested a nervous or emotional pathology, that the record did not raise any suspicion as to a potentially disabling mental impairment, and that Toussant's mental ability had not prevented his past work.

Although there is some evidence in the record of Toussant's

limited education, it is not such that would reveal the necessity of a psychological examination. In fact, Toussant stated that he left school to work with his father; he never attributed his lack of education to any limited intellectual ability. His counsel's request for the psychological examination was based on a reference to Toussant's lack of education. The isolated statements of Toussant's wife, and the testimony regarding his forgetfulness are not enough to require the ALJ to order the requested examination. *Id.* at 802-803.

We conclude that the ALJ did not abuse his discretion in refusing to order the psychological examination with I.Q. testing and that therefore he fulfilled his duty to develop the administrative record.

Toussant also claims that the Council erred in finding that the mental retardation revealed by the Downing report, which the Council considered, did not relate back to the period before his insured status expired.

The Secretary concedes that the mere fact that an I.Q. test was not performed previously does not preclude a finding of earlier retardation. *Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985). However, the Secretary points out that the Council supported its dismissal of the Downing report by observing that "[t]he evidence of record through December 22, 1988 shows no memory deficits or other mental impairment." Indeed, the evidence in the record suggested several reasons for the low I.Q. scores other than a mental impairment, including Toussant's lack of a formal education, his head injury sustained in September 1988, and, as Dr.

Downing noted in his report, Toussant's poor eyesight.[4]

Further, Toussant has not shown any prejudice resulting from the Council's disregard of the Downing report. An I.Q. of 69, without the co-existence of another severe impairment during the relevant time period, does not meet a listed impairment and cannot be the sole grounds for a finding of disability. 20 C.F.R. Part 404, Subpart P, Appendix I, §§ 12.05(B) (I.Q. of 59 or less required for finding of disability based solely on mental retardation), 12.05(C) (requiring I.Q. of 60-70 and the presence of at least one other severe impairment). Even had the Council accepted Dr. Downing's findings as relevant to the time period in question, the ALJ's finding that Toussant had no other severe impairment would preclude a finding of disability solely on grounds of mental retardation.

We hold that substantial evidence in the record supports the Council's conclusion that the Downing report revealing mental retardation did not relate back to the period in question. Further, we observe that, even if the Council should have considered the substance of the Downing report, no prejudice resulted to Toussant because his I.Q. of 69 will not alone support

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[4] Toussant contends that the district court exceeded the limits of judicial review when it concluded that Toussant's head injury of September 7, 1988, could have accounted for the current I.Q. scores and mental retardation. The Council did not mention this reason in its refusal to review the ALJ's decision. Because we conclude that Toussant has not shown any prejudice resulting from the Council's failure to expound upon its reasons for determining that the I.Q. testing did not relate back to the crucial time period, any error on the part of the district court in articulating such a reason is harmless. *Babineaux v. Heckler*, 743 F.2d 1065, 1067 n. 2 (5th Cir. 1984) (where Secretary applied correct standard, district court error was harmless).

a finding of disability.

The ALJ determined that Toussant's impairment was not severe, ending his evaluation at the second step of the analysis. The controlling standard in this Circuit for determining the severity of an impairment is found in *Stone v. Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985): "'[A]n impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual that *it would not be expected to interfere* with the individual's ability to work, irrespective of age, education or work experience'" (emphasis added) (quoting *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984)).[5]

Toussant claims that the ALJ did not properly apply the *Stone* standard in determining that his impairment was not severe. Although in his findings, the ALJ cited *Stone* and stated that Toussant did not have an impairment "which significantly limit[s] his ability to perform basic work-related activities," his conclusion is worded in more restrictive language:

> "The Administrative Law Judge concludes that the record in this case does not substantiate the presence of an impairment which *precluded* claimant from performing any activity during the period in question and, therefore,

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[5] The regulations define a non-severe impairment as one which "does not significantly limit [a claimant's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1521(a); *see also* 20 C.F.R. § 404.1520(c). In *Stone v. Heckler*, we determined that this regulation was inconsistent with the language and legislative history of the Act because it unduly limited the impairments for which benefits would be available. 752 F.2d at 1104-1105. Although the Supreme Court upheld the severity regulation in *Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287 (1987), we have held that *Yuckert* did not supersede our standard set forth in *Stone*. *Anthony v. Sullivan*, 954 F.2d 289, 294-295 (5th Cir. 1992). Thus we will consider the propriety of the ALJ's severity determination under the *Stone* standard.

> the claimant did not have a severe impairment." (Emphasis added.)

In *Stone*, we stated that, unless the ALJ or the Council referred to the *Stone* standard, we would assume an incorrect standard had been applied to the severity requirement. *Stone*, 752 F.2d at 1106. Here, the ALJ followed our lead and cited *Stone* as the standard that he was applying. The restrictive language in the ALJ's conclusion that Toussant had no impairment which "precluded" him from working, however, is in violation of *Stone*.

Further, our review of the evidence suggests that the ALJ's step 2 conclusion is likely not supported by the evidence. The ALJ considered, *and did not discredit*, the Snatic report. In his report, Dr. Snatic described the limiting effect that Toussant's impairments would have on his ability to work and concluded that:

> "Mr. Toussant is probably not able to engage in activities that require heavy manual labor. His problem with balance, possible weakness of th[e] left leg and some sensory loss in the left hand would probably render him unable to sustain heavy physical effort. . . . He seems physically able to sustain relatively lighter work, provided it did not require balancing. Of course, these sorts of jobs may be completely unavailable to him because of his lack of experience, training, and inability to read and write."

We read this portion of the Snatic report as raising a question under *Stone* as to whether Toussant's impairments had a "minimal effect" such that would "not be expected to interfere" with his ability to work.

Although we acknowledge that this is a close question, we remand this to the Secretary for reconsideration of the Snatic report in light of *Stone*. *Cf. Anthony v. Sullivan*, 954 F.2d at 295-296 (affirming finding of no severe impairment where close

question, but no evidence corresponding to that of the Snatic report here).

In reexamining Dr. Snatic's December 1988 report, the Secretary should consider whether the head injury sustained by Toussant in September 1988 (or any other intervening factor) altered his condition in such a way that the report is not reflective of his condition as of December 31, 1987.

Conclusion

Although we hold that the ALJ did not abuse its discretion in refusing to order a psychological examination with I.Q. testing, and that the Council's dismissal of the independent testing results was not improper, we remand to the Secretary for a determination of the severity of Toussant's impairment(s) in accord with our standard set forth in *Stone v. Heckler*. We express no opinion as to whether the Secretary should find that Toussant is or is not disabled within the meaning of the Act. The judgment of the district court is REVERSED and the cause is REMANDED to the district court with directions that it be remanded to the Secretary for further proceedings consistent herewith.

REVERSED AND REMANDED