

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4183
Summary Calendar

KERMIT J. PITRE, XXX-XX-XXXX,

Plaintiff-Appellant,

versus

DONNA SHALALA, U.S. SECRETARY OF
HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
(91-CV-1781)

(March 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Appellant Kermit J. Pitre was born in April 1934 and has a high school education. He has worked as a seismograph operator, geophysical party manager, backhoe operator, and crawfish farmer.

In February 1988, Pitre applied for Social Security disability benefits, claiming disability since January 1988 due to heart

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

problems, back problems, and arthritis. The ALJ held a hearing in March 1989. In May 1989, the ALJ found Pitre not disabled. In November 1989, the Appeals Council vacated the ALJ's decision and remanded the case to the ALJ for further findings regarding Pitre's alcoholism. The same ALJ held a supplemental hearing in March 1990. In August 1990, the ALJ once again found Pitre not disabled. The Appeals Council denied review, making the ALJ's determination the final decision of the Secretary.

Pitre sought judicial review. On cross motions for summary judgment, the magistrate judge recommended that the denial of benefits be affirmed. Over Pitre's objections, the district court adopted the magistrate judge's report, granted summary judgment for the Secretary, and dismissed the case.

I

Pitre argues generally that the ALJ's decision is not supported by substantial evidence and is contrary to law. He argues four specific grounds, to wit: 1) the ALJ did not give proper weight to Pitre's subjective complaints in determining his residual functional capacity (RFC), 2) the ALJ did not consider all of Pitre's impairments in combination, 3) the ALJ used the incorrect legal standard in evaluating Pitre's alcoholism, and 4) the ALJ erred in finding that Pitre was capable of performing jobs available in the national economy.

II

In the instant case, the ALJ made the following findings on remand from the Appeals Council. Pitre meets the insured status requirements for the relevant period. Pitre has not engaged in substantial gainful activity since January 1988. Medical evidence shows that Pitre has severe arthritis of the back and shoulders and chronic alcohol abuse but does not have an impairment or combination of impairments listed in, or equal to one listed in, the relevant appendix. Pitre has the RFC to perform the physical exertional and nonexertional requirements of work except for lifting more than 50 pounds. He cannot perform his past relevant work as a geophysical party observer, geophysical party manager, or backhoe operator. Pitre's RFC "for the full range of medium work is reduced by limited ability to climb, stoop, crawl, reach and strain and his inability to work around vibration or temperature extremes."

The ALJ also found the following. Pitre does not have work skills that are transferable to skilled or semi-skilled other jobs. Based on Pitre's exertional capacity for medium work, his age, education, and work experience, he is not disabled. Pitre's exertional limitations prevent him from performing the full range of medium work, but he can perform a significant number of jobs that exist in significant numbers in the national economy, such as order clerk, dispatcher, shipping and receiving clerk, and security

guard. Thus, the ALJ issued his decision that Pitre is not disabled.

III

Although the record is replete with medical evidence that will support the Secretary's decision, we will simply recount here the testimony of vocational expert Dr. John Grimes, who testified at the March 1990 hearing. The ALJ asked Dr. Grimes whether Pitre could perform any jobs in the national economy if one were to assume that Pitre has all of the limitations, restrictions, and pains that he alleged in his testimony and that he is an alcoholic. Dr. Grimes said, "No." The ALJ then asked:

Assume now that Mr. Pitre has a somewhat degenerative disc disease at L3-L4. He has full range of motion in the left shoulder and he can lift occasionally 50 pounds. He can lift a maximum frequently of 25 pounds. He can stand and walk without -- he's not affected. Standing and walking are not affected by the impairment. His sitting is not affected by the impairment. He can occasionally climb, occasionally stoop, frequently kneel, frequently balance, frequently crouch and occasionally crawl. His reaching and pushing and pulling are affected by the impairment because they may bother the left shoulder. His handling, feeling, seeing, hearing and speaking are not bothered by the impairment. He is restricted from temperature extremes, high humidity or vibration. He's not restricted from heights, moving machinery, chemicals, dust, noise or fumes. Considering only those physical limitations, would there be jobs that he can perform in the national economy?

Dr. Grimes said, "Yes." Dr. Grimes explained that such jobs include cashier, hotel clerk, information clerk, order clerk, dispatcher, shipping and receiving clerk, and security guard.

The ALJ posed a third hypothetical, asking about jobs for a person of the same limitations but assuming "a non exertional impairment of an alcoholic consumption problem and [the person] has a significant history of many years of alcohol abuse, but that he apparently has responded to a chemical dependency program and prior to, or has remained sober from August of 1989 until March 1990" and has good personal interaction skills and ability to carry out instructions. Dr. Grimes stated that it might eliminate some stressful cashiering jobs.

The ALJ followed up by asking Dr. Grimes to assume everything in the previous question and add that the person suffers from "tremendous hangovers." Dr. Grimes answered that if the consumption of alcohol were frequent enough to cause the person to miss work, the job base would be significantly eroded.

IV

A

Pitre first argues that the ALJ improperly held that his subjective complaints were not credible because they were not supported by objective medical evidence. The ALJ found, "To the extent the claimant is limited to the performance of a restricted range of medium work, his complaints are credible."

An ALJ may not ignore a claimant's subjective complaints of pain. Nor, however, may an ALJ make no findings regarding such complaints if, given credence, they would result in benefits. Carrier v. Sullivan, 944 F.2d 243 (5th Cir. 1991). Where an ALJ

credits such complaints but not to the extent that the plaintiff wishes, the ALJ makes a credibility determination that this Court does not reweigh. Id.

Pitre argues that he has significant health problems, which are disabling. Except for the July 1988 VA report, the objective evidence shows that although he has significant health problems, they are not disabling. The ALJ found Pitre's subjective account credible up to the point at which his testimony departed from the objective accounts. We cannot reweigh that objective evidence and invade the province of the trier of fact.

B

Pitre argues that the ALJ failed to consider the impact of all of Pitre's impairments in combination. He argues:

Obviously, the ALJ did not consider the appellant's subjective testimony, the substantiating testimony of his wife, the reports and medical records from the VA, or the limitations caused [sic] the appellant's heart condition, alcoholism and limited mental functioning. The only evidence the ALJ considered in making his RFC assessment was the consultative report of Dr. Webre.

Appellant's brief at 19-20.

The Secretary argues that this issue should not be considered because Pitre did not raise specific aspects of his argument-- consideration of Pitre's heart condition and intellectual functioning--in the district court or before the Appeals Council. While Pitre did not specifically cite those two topics, he did complain in the district court that the ALJ "failed to give proper consideration to all of the medical evidence supporting the

plaintiff's mental and physical impairments" and before the Appeals Council that the ALJ's decision was contrary to the law and the evidence. Thus, Pitre seems to have preserved this issue for review; we will therefore address the merits of this argument.

The ALJ's first decision considered Pitre's heart problems, Pitre's own testimony, Mrs. Pitre's testimony, and the VA medical reports. The Appeals Council remanded for the ALJ to consider Pitre's alcoholism. The ALJ stated at the beginning of his decision on remand that no new evidence of Pitre's physical condition had been submitted in the year since the first decision. The second decision focused on Pitre's alcoholism and considered Pitre's testimony. It did not consider the testimony of Mrs. Pitre or Pitre's alleged lower level of intelligence.

Upon remand of a case from the Appeals Council, the ALJ may make any determination that is not inconsistent with the remand order. Houston v. Sullivan, 895 F.2d 1012, 1015 (5th Cir. 1989). Merely because the ALJ has the discretion to make such a determination, however, does not mean that he must do so. By announcing that no new evidence of Pitre's physical condition had been submitted, the ALJ apparently chose not to redetermine facts previously found.

Mrs. Pitre's testimony at the second hearing only confirmed her husband's account of his activities and differed little from her testimony at the first hearing. As to the asserted "limited

mental functioning," Pitre argues about an alleged fact that is not in the record.

Dr. Fruge found Pitre's verbal IQ score to be 77, his performance IQ score to be 74, and his full scale IQ score to be 75. Dr. Fruge stated that the test scores reflected a borderline intelligence and were valid. Dr. Fruge also reported that Pitre had the mental abilities to perform unskilled to semi-skilled jobs.

Dr. Grimes considered Dr. Fruge's scoring "curious" because Pitre's previous jobs and his ability to communicate verbally indicated that he has a higher intelligence level than reflected in the scores. Dr. Grimes did not question Dr. Fruge's opinion that Pitre had the mental ability to do unskilled or semi-skilled work.

The record reflects that Pitre has an intelligence level in the 70's. The record also reflects that he has the mental capacity to do certain kinds of work. Given that the record shows Pitre to have adequate mental ability for unskilled and semi-skilled jobs, no fact was established to show that Pitre has "limited mental functioning," as Pitre now argues. In short, Pitre has identified no fact in the record that the ALJ was required to, but did not, consider.

C

Pitre argues that the ALJ used an incorrect standard in evaluating Pitre's alcoholism. The ALJ, he argues, ignored Pitre's assertion that he began drinking more heavily after he became unable to work.

"Before a finding of disability due to alcoholism can be made, it must be shown that the claimant is addicted to alcohol and cannot control his drinking voluntarily." Neal v. Bowen, 829 F.2d 528, 531 (5th Cir. 1987). For example, a claimant's testimony that he cannot control his drinking, that he drinks a dozen beers a day, and that he was fired for drinking on the job would support a finding of disability. Id. By contrast, hospitalization for alcohol addiction, use of alcohol after working hours, use of medication to help control drinking, abstention from drinking for five weeks, voluntary reduction in alcohol consumption for health reasons, and no evidence indicating that alcohol ever interfered with the claimant's job performance, taken together, support a finding of no disability. Id. at 531-32. Given Pitre's history of successful treatment, use of alcohol only after working hours, voluntary reduction in consumption followed by abstinence for about seven months, and loss of only one job due to alcohol in an otherwise satisfactory work history, his case is much closer to the latter illustration in Neal than the former.

Additionally, the ALJ found, "There is no evidence his condition changed substantially after December, 1987 except that the claimant sought treatment for his problem." The evidence supports that finding and would also support the finding that Pitre's alcoholism actually improved.

D

Finally, Pitre argues that the ALJ's finding that Pitre was able to perform other jobs available in significant numbers in the national economy was contrary to the evidence. He asserts that the ALJ's hypothetical questions to the vocational expert did not present all of Pitre's limitations. He argues, "The ALJ's decision indicates he relied exclusively on a hypothetical question which related the limitations as found in the report of Dr. Webre."

Hypothetical questions that are based on the testimony or evidence in the record may be asked. Chaney v. Califano, 588 F.2d 958, 960 n.5 (5th Cir. 1979). The limitations cited in the hypotheticals--arthritis, back and shoulder problems, alcohol abuse, limitations on climbing, stooping, crawling, reaching, straining, and exposure to vibrations and temperature extremes--were the limitations that the ALJ found Pitre to have. The ALJ's findings are supported by substantial evidence. Pitre has identified no authority that requires the ALJ's hypotheticals to incorporate "facts" that he does not find.

V

For the reasons set forth herein, the judgment of the district court is

A F F I R M E D.