

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41218
Summary Calendar

MATILDA THOMAS,
XXX-XX-XXXX,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA, Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CV-1291)

(May 23, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Matilda Thomas appeals from the denial of her application for Social Security disability benefits. We **AFFIRM**.

I.

Thomas applied for benefits in 1989, claiming disability since December 28, 1987, due to, among other things, problems with her back, high blood pressure, diabetes, fatigue, weakness, and nervousness. The application was denied originally and on

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

reconsideration. Following an administrative hearing, the administrative law judge (ALJ) determined that Thomas was not disabled. The Appeals Counsel, however, granted Thomas' request for review and remanded the case to the ALJ. The ALJ again found no disability; the Appeals Counsel again remanded. Following the third determination by an ALJ that Thomas was not disabled, the Appeals Counsel denied review; and the determination of the ALJ became the final decision of the Secretary.

Thomas challenged the decision in district court; and in November 1994, it granted the Secretary's motion for summary judgment.

II.

The ALJ found that despite Thomas' ailments (hypertension, obesity, diabetes, status-post modified radical mastectomy, dysthymia, psychological factors affecting physical condition, and borderline intellectual function), she retained the residual functional capacity to perform her past relevant work as a booting machine operator. We review only for whether this decision is "supported by substantial evidence in the record and whether the proper legal standards were used in evaluating the evidence". ***Villa v. Sullivan***, 895 F.2d 1019, 1021 (5th Cir. 1990).

In determining disability, *vel non*, the Secretary applies the familiar five-step process:

1. An individual who is working and engaging in substantial gainful activity will not be found disabled regardless of the medical findings.

2. An individual who does not have a "severe impairment" will not be found to be disabled.

3. An individual who meets or equals a listed impairment in Appendix 1 of the regulations will be considered disabled without consideration of vocational factors.

4. If an individual is capable of performing the work he has done in the past, a finding of "not disabled" must be made.

5. If an individual's impairment precludes him from performing his past work, other factors including age, education, past work experience, and residual functional capacity must be considered to determine if other work can be performed.

Id. at 1022. The claimant has the burden of proof for the first four steps, but the burden shifts to the Secretary for the fifth. **Anderson v. Sullivan**, 887 F.2d 630, 632-33 (5th Cir. 1989). A disability determination at any point in the five-step process is conclusive and terminates any further analysis. *E.g.*, **Harrell v. Bowen**, 862 F.2d 471, 475 (5th Cir. 1988).

A.

The Secretary concluded that Thomas was not disabled because she was capable of performing her past relevant work -- step four of the sequential analysis. Thomas asserts that it was improper for the ALJ to consider vocational factors and the testimony of a vocational expert at this step. In support, she cites 20 C.F.R. § 404.1560(b):

Past relevant work. We will first compare your residual functional capacity with the physical and mental demands of the kind of work you have done in the past. If you still have the residual functional capacity to do your past relevant work, we will find that you can still do your past relevant work, and we will determine that you are

not disabled, without considering your vocational factors of age, education, and work experience.

Thomas contends that the foregoing requires the ALJ to consider only medical evidence in determining ability to perform past relevant work.

We disagree. The section in issue does not state that a determination on past relevant work must be made without consideration of vocational factors. The Secretary may consider a claimant's vocational background and residual functional capacity. See 20 C.F.R. § 404.1560(a) ("[If] we cannot decide whether you are disabled on medical evidence alone, we will consider your residual functional capacity together with your vocational background."). Concomitantly, we think it is within the Secretary's discretion to rely on the opinions of a vocational expert. See **Greenspan v. Shalala**, 38 F.3d 232, 239 (5th Cir. 1994) (affirming determination, based in part on testimony of vocational expert, that claimant was able to perform past relevant work).²

² **Greenspan** is contrary to **Smith v. Bowen**, 837 F.2d 635, 637 (4th Cir. 1987), which relied on the language of 20 C.F.R. § 404.1566(e) to conclude that the testimony of a vocational expert is improper until "after a claimant is found unable to do her past relevant work". **Id.** (emphasis in original). That section states only that a vocational expert may be used in determining whether a claimant can perform other relevant work. Along that line, the Secretary's motion to file a supplemental brief in response to Thomas' reply brief is **GRANTED**.

Thomas urges that because the Secretary inappropriately relied on the testimony of a vocational expert at step four, there was an "implicit finding" that she could not perform her past relevant work; therefore, the analysis necessarily proceeds to step five. Thomas contends that the Secretary failed to sustain its burden at step five. Because we have concluded that the analysis ended properly at step four, we do not reach this issue.

B.

Thomas seeks a remand to introduce new evidence of her disability. "This court may remand to the Secretary and order consideration of additional evidence upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." *Latham v. Shalala*, 36 F.3d 482, 483 (5th Cir. 1994). Because Thomas has made no attempt to show cause for her failure earlier to present this evidence to the ALJ, there is no basis for relief.

III.

For the foregoing reasons the judgment is

AFFIRMED.