

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41234
Summary Calendar

JOHN T. MARCANTEL,
SS# XXX-XX-XXXX

Plaintiff-Appellant,

VERSUS

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(93-CV-2065)

(June 8, 1995)

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

PER CURIAM:*

John Marcantel appeals the denial of his claim for disability insurance benefits under 42 U.S.C. § 405(g). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Marcantel filed an application for disability insurance benefits on March 18, 1992, asserting that he became disabled on May 23, 1990. The claim for disability was denied. Marcantel requested reconsideration, but the claim again was denied. He obtained a hearing before an administrative law judge ("ALJ") on March 29, 1993.

The ALJ found that Marcantel was not disabled as defined by the Social Security Administration because he could perform jobs that exist in significant numbers in the national economy. Marcantel requested review of the ALJ's decision. The Appeals Council considered the request for review but concluded that there was no basis for granting the request. This decision became the final decision of the Commissioner.

Marcantel brought his claim to federal district court on December 2, 1993. At the direction of the magistrate judge, both parties submitted motions for summary judgment. The magistrate judge issued his report and recommendation that the decision of the Commissioner be affirmed because there was substantial evidence to support the ALJ's determination. Marcantel objected to this recommendation, but the district court adopted it.

II.

Marcantel, represented by counsel on appeal, argues that the ALJ's decision was not supported by substantial evidence. The standard of review in cases under § 405(g) is whether there is

substantial evidence in the record to support the decision of the Commissioner. Cook v. Heckler, 750 F.2d 391, 392 (5th Cir. 1985). Substantial evidence is more than "a suspicion of the existence of the fact to be established, but 'no substantial evidence' will be found only where there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'" Hames v. Heckler, 707 F.2d 162, 164 (5th Cir. 1983) (citations omitted). If supported by substantial evidence, the ALJ's findings are conclusive and must be affirmed. Richardson v. Perales, 402 U.S. 389, 390 (1971). This does not allow the court to engage in a de novo assessment of the record. Deters v. Secretary of Health, Educ. & Welfare, 789 F.2d 1181, 1185 (5th Cir. 1986).

III.

Under the Social Security Act, "disability" is defined as the inability to engage in any substantial gainful activity because of any medically determinable physical or mental impairment which could be expected to last for a period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A); Shipley v. Secretary of Health & Human Servs., 812 F.2d 934, 935 (5th Cir. 1987). The regulations promulgated pursuant to the Act provide a five-step sequential evaluation process to determine disability. See 20 C.F.R. § 404.1520 (1992); Villa v. Sullivan, 895 F.2d 1019, 1022 (5th Cir. 1990). If at any point in the process a claimant is conclusively determined to be either disabled or not disabled, the inquiry ends. Marcantel's case came down to the final step of whether a claimant

"can do any other substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A)." Herron v. Bowen, 788 F.2d 1127, 1131 (5th Cir. 1986).

IV.

Marcantel argues that the ALJ erred in finding that he had the residual functioning to perform any job in the national economy. He contends that the ALJ had no basis for finding that his claims of debilitating pain were not credible. Pain, in and of itself, can be a disabling condition if it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." Harrell v. Bowen, 862 F.2d 471, 480 (5th Cir. 1988) (citations omitted). It is improper for an ALJ not to consider a claimant's subjective complaints of pain. Carrier v. Sullivan, 944 F.2d 243, 247 (5th Cir. 1991). "It is also improper for an ALJ to make no finding as to a claimant's subjective complaints of pain if, if the claimant were believed, said claimant would be entitled to benefits." Id. In addition, if uncontroverted medical evidence shows a basis for the claimant's complaints, the ALJ must weigh the objective medical evidence and assign articulated reasons for discrediting the subjective complaints of pain. Abshire v. Bowen, 848 F.2d 638, 642 (5th Cir. 1988).

In discrediting Marcantel's complaints of debilitating pain, the ALJ considered the medical reports of Dr. Anders and Dr. Tassin, the testimony of the claimant and his brother, and the claimant's appearance at the hearing. Anders, an orthopedic

surgeon, performed a percutaneous discectomy on Marcantel on January 30, 1992. On July 29, 1992, Anders reported that Marcantel had reached maximum medical improvement and released him to work within the limitation specified by the functional capacity evaluation performed by Sandra Mullens, a physical therapist. The ALJ accurately described the limitations contained in this report in his decision:

Specifically, the claimant cannot lift any weight in excess of 28 pounds, carry in excess of 23 pounds, push in excess of 20 pounds, or pull in excess of 27 pounds. He could walk on level surfaces at slow speed for distances up to one-half mile. He could climb up to five flights of stairs. He had no difficulty with repetitive squatting, repetitive foot motions for 10 minutes, stationary sitting for 30 minutes, or finger and hand dexterity. He could only occasionally repetitive trunk bend, kneel for no more than three minutes, or stationary stand for more than 15 minutes, or balance at any time.

On May 18, 1992, Tassin, a general practitioner, noted that Marcantel was depressed because of almost continuous pain in his back. Tassin was of the opinion that Marcantel was "completely and totally disabled and unable to work." The ALJ gave more weight to Anders's opinion because "only Dr. Anders had the benefit of the claimant's functional capacities evaluation in rendering his assessment of the claimant's ability to perform work activities." The ALJ also noted that Anders was a specialist and that Tassin "offered no specific objective findings to support his conclusion."

The ALJ noted Marcantel's complaints of pain but found that they were "not consistent with the conclusion that the claimant has pain so severe as to be disabling." To support this conclusion, the ALJ stated that Marcantel did not exhibit any of the symptoms

of a person in "constant, unremitting pain which is totally unresponsive to therapeutic measures." The ALJ observed that Marcantel did not have any observable signs such as "drawn features, expressions of suffering, significant weight loss[,] or overall health." The ALJ also noted that the drugs Marcantel was taking were not for severe and disabling pain but were for mild to moderate pain.

It is within the discretion of the ALJ to discount a petitioner's complaints of pain "based on the medical reports combined with her daily activities and her decision to forego certain medications." Griego v. Sullivan, 940 F.2d 942, 945 (5th Cir. 1991). The "evaluation of a claimant's objective symptoms is a task particularly within the province of the ALJ who has had an opportunity to observe whether the person seems to be disabled." Harrell, 862 F.2d at 480 (citations omitted).

The ALJ specifically found that Marcantel's testimony of his daily activities was not inconsistent with "many of the basic activities of work." There is sufficient evidence to support the ALJ's finding that Marcantel was not suffering disabling pain; the record is also sufficient to support the ALJ's finding that there were jobs in the national economy that he could perform. This finding was based upon the testimony of a vocational expert, using the functional capacity evaluation of Anders and Sandra Mullens.

AFFIRMED.