UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1997
Summary Calendar

KENNETH W. RISHER,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary of Health and Human Services of the United States,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi
CA J89 0170 (B)

(August 11, 1993)

Before GARWOOD, DAVIS and EMILIO M. GARZA Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant, Kenneth Risher (Risher), appeals the district court's affirmance of the denial by appellee, the Secretary of Health and Human Services (the Secretary), of Richer's application for disability insurance benefits under 42 U.S.C. § 423 (1988). Risher contends that the district court should have

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

concluded that the administrative record established he was disabled and qualified for benefits because (1) Dr. Sidney Berry (Berry) did not make a definitive finding that Risher was capable of sedentary work; (2) another doctor opined that Risher was disabled; and (3) the Secretary failed to prove that jobs were available for him in the national economy. We affirm.

Facts and Proceedings Below

Risher was born on July 6, 1955. He earned a high school education and has worked as an auto and truck mechanic, a shop foreman, a lens grinder, and an automotive service writer.

Risher began to experience back problems in 1980. Dr. Berry diagnosed him with spondylolisthesis and operated on him, performing a decompression and lateral process fusion at L5 to 51. Risher was fired from his current job because of his injury but found new work after the injury began healing. Again in September 1982, Risher was treated for back injuries by Dr. Douglas Stringer, who performed another operation on his back. Risher healed somewhat, but the pain worsened and Risher was treated by Dr. McCraney, who started a program of physical therapy, heat massage, ultrasound, and whirlpool. Risher responded to this treatment and the pain diminished by May 16, 1983.

On April 17, 1985, Risher was admitted to the hospital by Dr. Michael Vise and treated for his recurrent back pain with nerve blocks. Risher was diagnosed with failed lumbar disc syndrome and recurrent lumbosacral strain.

On January 2, 1986, Risher was admitted to a mental hospital and treated for depression, caused in part by his continuing back

pain.

On September 24, 1986, Risher was admitted to the hospital complaining that he had exacerbated his back injuries at work when a car backed up and wedged him between it and another vehicle. Dr. Vise was consulted during this hospital visit, but did not treat Risher. Later, on October 20, 1986, Risher consulted Dr. Berry about this injury. Dr. Berry diagnosed Risher with degenerative lumbar disc disease and spondylosis with post-traumatic aggravation and right sciatica. Dr. Berry operated on Risher for these ailments. Risher, however, continued to complain of severe back pain.

After a continued course of treatment through March 1987, Dr. Berry observed that Risher's condition appeared to be improving. Dr. Berry wrote in his March 3, 1987, medical report that he felt that Risher "may be able to gradually return to some light to sedentary type activity." On March 4, 1987, Dr. Berry completed a certificate stating that Risher could return to work as long as he avoided heavy lifting.

Dr. Berry continued treating Risher through the end of 1987, observing that Risher's condition improved slightly and that Risher had reached maximum medical benefit. Dr. Berry noted that Risher's walking had improved.

Risher continued to be in pain, however. On February 26, 1988, Dr. Vise wrote a letter stating that it was his opinion that Risher was totally and permanently disabled by his back injuries and intractable pain as evidenced by his multiple surgeries and loss of reflexes in his right leg. There is no indication in the

record that Vise conducted an examination of Risher or treated Risher in 1988 prior to drafting this letter, or that Dr. Vise had relied on any recent medical tests of Risher's condition, except that at the Apirl 1988 Administrative Law Judge (ALJ) hearing, Risher testified that Vise had, by the time of the hearing, become his treating physician again. When he became so is not otherwise stated. The only evidence of previous examinations by Dr. Vise are the records of Dr. Vise's treatment of Risher in 1985. On April 6, 1988, Risher's internist, Dr. Strong, reported that Risher had chronic pain resulting in depression.

While these treatments were occurring, Risher on September 21, 1987, applied for disability insurance benefits, alleging disability since October 5, 1986, due to back injury. His application was denied initially and on reconsideration. In April 1988, Risher received a hearing before an ALJ, where he was represented by counsel. The ALJ decided, on July 13, 1988, that Risher was physically impaired and unable to return to his past type of work in the auto repair industry, but was not "disabled" since he was capable of sedentary work. The ALJ found that medical evidence showed that Risher was able to stand and walk on a minimal basis during the workday and that he could lift and carry ten pounds on an occasional basis.

Risher still complained of back pain so he consulted a neurosurgeon, Dr. John Jackson, in October 1988. Dr. Jackson apparently operated on Risher on November 30, 1988, evidently to re-fuse two vertebra. There is no report of the surgery in the record, but Dr. Jackson reported on March 2, 1989 that Risher was

totally disabled and would continue to be disabled for at least one year after the surgery.

The Appeals Council on January 27, 1989, affirmed the ALJ decision. On February 15, 1989, and again on March 6, 1989 (through counsel), Risher submitted to the Appeals Council a request to reopen, which included some of Dr. Jackson's records. This request was denied by letter dated May 25, 1989. In the meantime, on March 30, 1989, Risher had filed this suit in the federal district court seeking review of the ALJ's decision. A magistrate judge reviewed the evidence and concluded that it did not mandate the conclusion that Risher was disabled. Affirming the ALJ, the district court adopted the magistrate judge's recommendation. Risher appeals.

Discussion

Under the Social Security Act, a claimant is only entitled to disability benefits if the claimant is unable to perform any substantial gainful activity by reason of a medically determinable impairment for at least twelve months and is therefore "disabled." 42 U.S.C. § 423 (1988) (three other eligibility requirements must also be met). Risher raises three challenges to the sufficiency of the evidence supporting the ALJ's findings under part five of the five-step analysis used to evaluate whether a claimant is disabled, set forth in the Social Security regulations and adopted by the courts. 20 C.F.R. §§ 404.1520(b)-(f) and 416.920(b)-(f) (1992); *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991).[1] Step five

[1] The first four steps are: (1) if the claimant is working or engaged in a substantial gainful activity, the claimant will be

states that if the claimant cannot perform past work, "other factors including age, education, past work experience, and residual functional capacity must be considered to determine if work can be performed, in which case the claimant is considered not disabled." *Wren*, 925 F.2d at 125. The claimant bears the burden of showing that he is not capable of performing past work because of a mental or physical impairment. *Selders v. Sullivan*, 914 F.2d 614, 618 (5th Cir. 1990). The Secretary, then, bears the burden of proving that jobs are available in the national economy that the claimant can perform under the fifth step. *Wren*, 925 F.2d at 125. If the Secretary meets this burden, the claimant must then show an inability to perform the types of work suggested by the Secretary. *Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991).

We are limited on appeal to determining whether the Secretary applied the correct legal standard and whether, upon a review of the record as a whole, the Secretary's decision is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Orphey v. Secretary of HHS*, 962 F.2d 384, 386 (5th Cir. 1992). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Muse*, 925 F.2d at 789.

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found not disabled regardless of medical condition; (2) a claimant whose impairment is not severe will not be considered disabled; (3) a claimant whose impairment meets or equals an impairment listed in Appendix One of the regulations will be considered disabled without further consideration of age, education, or work experience; and (4) if the claimant is able to perform work the claimant has done in the past, the claimant will be found not disabled. *Id.*

I. Dr. Berry's Letter

Risher claims that Dr. Berry's report did not constitute "substantial evidence" of his ability to perform light work because it was qualified. Specifically, Risher claims that the ALJ relied only on Dr. Berry's guarded statement that the "[p]atient [Risher] may be able to gradually return to some light to sedentary type activity," made on March 3, 1987. However, Dr. Berry expressly found that Risher was capable of work and issued a certificate on March 4, 1987, which explicitly stated that Risher could return to work. The ALJ referred to this certificate in his decision. This certificate and the medical reports supporting it constitute substantial evidence that Risher was capable of sedentary work. Risher's contention lacks merit.

II. Opinion of Dr. Vise

Risher contends that the ALJ and the district court failed to give any weight to Dr. Vise's letter opining that Risher was permanently disabled.[2] The Secretary, through the ALJ, is entitled

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[2] Risher also contends that we should consider Dr. Jackson's report that Risher was completely disabled in November 1988. However, this report was not made until after the ALJ's decision was released and it relates to Dr. Jackson's examinations and treatment commencing October 10, 1988, nearly three months after the ALJ decision. It was therefore impossible for the ALJ to review it. In his request to the Appeals Council for reconsideration based on new evidence, Risher offered Dr. Jackson's report. The Appeals Council refused to review Risher's claim noting that the evidence revealed that in 1987 Risher was capable of work. The Appeals Council does not review an ALJ decision based on evidence of the claimant's condition after the ALJ decision was made. 20 C.F.R. § 404.970 (1992). Review, by the Appeals Council or federal courts, is only available based on new evidence of a claimant's condition prior to the time the ALJ rules on the request. *Id.*; *Johnson v. Heckler*, 767 F.2d 180, 183 (5th Cir. 1985) (like the ALJ, the courts could consider new evidence about the claimant's condition prior to the date of the

to determine the credibility of medical experts, to weigh their opinions accordingly, *Scott v. Heckler*, 770 F.2d 482, 485 (5th Cir. 1985), and to resolve material conflicts in the evidence. *Chaparro v. Bowen*, 815 F.2d 1008, 1011 (5th Cir. 1987). Objective medical evidence should support the expert opinion the ALJ chooses to accept. *Scott*, 770 F.2d at 485; *Milam v. Bowen*, 782 F.2d 1284, 1287 (5th Cir. 1986); 20 C.F.R. § 404.1527-28 (1992).

While the ALJ's opinion did not expressly accept or reject Dr. Vise's opinion, it implicitly rejected it by accepting Dr. Berry's report. The decision to accept Dr. Berry's opinion over Dr. Vise's is supported by substantial evidence. Specifically, Dr. Berry had a greater knowledge of Risher's condition during the relevant time period. Dr. Berry treated Risher in 1986 and 1987 immediately prior to issuing his opinion on Risher's condition. Vise opined in February 1988, in a letter without reference to objective clinical or laboratory findings, that Risher was disabled. There is no

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ALJ decision). The May 25, 1989, letter to Risher from the Appeals Council, written after Risher filed suit, reiterated that Risher's claim for review was denied and stated that the medical test results shown in Dr. Jackson's report did not establish that Risher was disabled. The follow-up letter did not result in the admission of Dr. Jackson's report into evidence since it was not issued until after the Appeals Council was divested of its jurisdiction over the matter by the filing of this action in federal district court. Dr. Jackson's report cannot be used to counter Dr. Berry's findings in this case. Since Dr. Jackson's report was issued after the ALJ's decision was made, it could be used as evidence in a new claim for benefits brought by Risher. Risher can reapply for benefits, as opposed to seeking to reopen this proceeding, assuming he meets section 423's eligibility requirements at the time of filing, for the time period beginning after the ALJ's denial of the claim adjudicated in this case. *See id.* (subsequent deterioration of condition may form basis for new claim); *Fair v. Bowen*, 885 F.2d 597, 600 (9th Cir. 1989) (applicant failed on three separate occasions to obtain disability benefits).

showing that Vise was Risher's treating physician in February 1988 or that he had then examined Risher (other than examination in or before 1986). *See Scott*, 770 F.2d at 485 (ALJ gives less weight to unsupported medical opinions). The ALJ did not err in accepting Dr. Berry's opinion over Dr. Vise's.

III. Available Alternative Work

Risher finally contends that the ALJ failed to make sufficient findings that jobs existed in the national economy that Risher was capable of performing. Under the regulations, the ALJ may rely on the "grids" contained in the regulations, which presume that jobs are available in the national economy for claimants meeting certain criteria. 20 C.F.R. §§ 404.1568-404.1599, 404.1569 Subpt. P, App. 2 (1992); *Selders v. Sullivan*, 914 F.2d 614, 618 (5th Cir. 1990); *Fraga v. Bowen*, 810 F.2d 1296, 1304 (5th Cir. 1987). More specifically, "[w]hen the claimant suffers only from exertional impairments, or if his nonexertional impairments [e.g. mental disabilities] do not significantly affect his residual functional capacity, the ALJ may rely exclusively on the grids to determine whether there is other work available that the claimant can perform." *Barnett v. Sullivan*, No. 90-3570 (5th Cir. 1991) (unpublished). *See Fraga*, 810 F.2d at 1304.

Here, contrary to Risher's allegation, the ALJ did make a finding that there were jobs available in the national economy that Risher could perform. The ALJ stated that: "Considering the exertional and nonexertional limitations within the framework of the medical-vocational rules, specifically [20 C.F.R. § 404.1569] Rule 201.28, Table No.1, Appendix 2, Subpart P, Regulations No.4,

this rule, when used as a frame of reference for decisionmaking, results in a conclusion that the claimant is not disabled." This statement and an additional similar conclusion sufficiently show that the ALJ found that jobs were available for Risher in the national economy under the cases cited above. These findings were supported by a vocational report and a vocational expert who testified at the ALJ hearing that jobs were available that Risher was capable of performing, such as security guard type jobs. Since, as discussed above, Dr. Berry's certificate constitutes substantial evidence of Risher's capability to do sedentary work, the ALJ did not reversibly err in finding that jobs were available that Risher was capable of performing. Since Risher offered no evidence that he was incapable of performing the types of work that the Secretary alleged and produced evidence were available and that he was capable of performing, Risher failed to meet his burden of proof under part five of the test. Hence he did not establish that the ALJ erred in finding that he was not entitled to disability benefits for the period in question.

Conclusion

Risher has failed to show grounds for setting aside the denial of benefits for the period at issue, October 5, 1986, through July 13, 1988. Accordingly, the judgment of the district court is

AFFIRMED.