

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

92-1066

(Summary Calendar)

BETTY BROOKS,

Plaintiff-Appellant,

VERSUS

LOUIS W. SULLIVAN, M.D.,
Secretary of Health & Human Services,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(CA 3-89-1560-T)

(March 4, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Betty Brooks appeals the district court's judgment upholding the decision of the Secretary of Health and Human Services ("Secretary") to terminate her disability benefits. Because substantial evidence supports the Secretary's decision, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Brooks originally injured her back in March 1983, while lifting buckets of icing for her job as a cake decorator with Safeway Bakery. This injury may have aggravated an existing condition in her chest wall which was the result of previous costochondritis and esophageal problems. She complained of lower back pain, numbness in the legs, and problems with lifting, twisting, bending, coughing, and sneezing. Between 1984 and 1986, Brooks was examined by eight doctors.

In February 1985, Brooks first filed for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. (1988), alleging disability due to hiatal hernia, back injury, hypertension, and arthritis. After her application was denied initially, and again on reconsideration, Brooks requested a hearing. A preliminary hearing was held before an Administrative Law Judge ("ALJ"), followed by a supplemental hearing. The ALJ issued a decision, finding that while Brooks had been disabled from March 4, 1984 to August 9, 1985,¹ her disability had ceased on August 9, 1985. The Appeals Council granted Brooks's request for review and remanded the case to the ALJ for testimony from a vocational expert and application of the medical improvement standard. The ALJ held another hearing, at which a vocational expert testified that Brooks's past work was unskilled and required only light exertion. The vocational expert opined that Brooks

¹ The ALJ found that Brooks was entitled to a period of disability and to disability insurance benefits commencing on March 4, 1985 and ending on the last day of October 1985, the second month after her disability ceased.

could still perform her past work. Subsequently, the ALJ issued a decision finding that Brooks was not disabled subsequent to August 9, 1985, because she could perform a range of light work limited only by a need to avoid highly stressful conditions. The Appeals Council refused to review the decision.

Brooks, represented by counsel, filed an action in district court seeking review of the Secretary's decision pursuant to 42 U.S.C. § 405(g) (1988). The case was referred to a magistrate judge who recommended affirming the Secretary's decision. Over Brooks's objections, the district court adopted the magistrate judge's report and recommendation. Brooks appeals.

II

Brooks argues that the ALJ's conclusion that her disability ended on August 9, 1985, is unsupported by substantial evidence. On review, this Court determines whether substantial evidence exists in the record as a whole to support the ALJ's factual findings and whether the proper legal standards were applied. *Griego v. Sullivan*, 940 F.2d 942, 945 (5th Cir. 1991); *Villa v. Sullivan*, 895 F.2d 1019, 1021 (5th Cir. 1990). If substantial evidence supports the Secretary's findings, they are conclusive and must be affirmed. 42 U.S.C. § 405(g) (1988); *Richardson v. Perales*, 402 U.S. 389, 390, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. *Richardson*, 402 U.S. at 401, 91 S. Ct. at 1427; *Selders*, 914 F.2d

at 617. It is more than a mere scintilla, but it need not be a preponderance. *Moore v. Sullivan*, 919 F.2d 901, 904 (5th Cir. 1990). "This court may not reweigh the evidence or try the issues de novo. Conflicts in the evidence are for the Secretary and not the courts to resolve." *Selders*, 914 F.2d at 617 (citation omitted).

The Secretary may terminate disability benefits on a finding that the claimant (1) has undergone medical improvement, and (2) thereby became able to engage in substantial gainful activity. 42 U.S.C. § 423(f)(1)(A) & (B) (1988); *Griego*, 940 F.2d at 943-44. A medical improvement is any decrease in the medical severity of any impairment which was present at the time of the most recent favorable decision that a claimant was disabled or continued to be disabled. 20 C.F.R. §§ 404.1594(b)(1) & 416.994(b)(1)(i) (1992); *Griego*, 940 F.2d at 944.

The ALJ found that, as of August 9, 1985, Brooks had experienced medical improvement in her condition. See Record on Appeal, vol. 2, at 24. In making this determination, the ALJ examined the extensive medical reports. In June 1985, Dr. Tom L. Hampton determined that Brooks was 100% disabled. See *id.* at 222. In August 1985, Dr. Bradley T. Britt concluded that Brooks had shown improvement, and expressed his desire that she find some sort of daily job or task.² See *id.* at 194. Furthermore, Dr. John R.

² Dr. Britt had examined Brooks three months earlier, and opined that Brooks was not suffering from any specific identifiable malady, and that her everyday activity needed to be built up. See Record on Appeal, vol. 2, at 193-94. Dr. Britt examined Brooks again in May and June, and felt that she had made a great deal of

Vorhies's report, upon which the ALJ primarily relied, revealed that Brooks suffered only from mild pain. *See id.* at 176. There was no evidence of cardiac chest pain, and her electrocardiogram was within normal limits. *Id.* at 177. The report stated that Brooks's arm and leg strength was normal, as was her bending, squatting, and lifting. *See id.* at 176. There was no evidence of bone or tissue destruction, or muscle atrophy. *Id.* In addition, the range of motion, strength, and coordination of her hands and fingers was normal. *Id.* at 177. Dr. Vorhies concluded that Brooks "has generalized pain without any evidence of a serious disorder." *Id.* at 176.

The ALJ has the discretion to determine the credibility of the medical reports in the record. *Griego*, 940 F.2d at 945. Furthermore, the ALJ "is entitled to determine the credibility of medical experts as well as lay witnesses and to weigh their opinions and testimony accordingly." *Moore*, 919 F.2d at 905 (quoting *Scott v. Heckler*, 770 F.2d 482, 485 (5th Cir. 1985)). Therefore, while Brooks did become disabled in March 1984 as a result of lifting icing, there is substantial evidence in the record to support the ALJ's conclusion that Brooks's medical condition had improved by August 9, 1985. *See Perales*, 402 U.S. at 401.

progress and could return someday to a fairly normal lifestyle, and that her problem had degenerated to a chronic illness behavior problem, rather than a specific physical pathology. *See id.* at 194.

The record also supports the ALJ's finding that the claimant can engage in substantial gainful activity which exists in the national economy. 20 C.F.R. § 404.1594(b)(3) (1992); *Griego*, 940 F.2d at 944. In making that decision, the Secretary engages in an analysis similar to the five-step sequential procedure used in initially determining whether a claimant is entitled to disability benefits. *Griego*, 940 F.2d at 944; see also 20 C.F.R. § 404.1520(b)-(f) (1992). In deciding whether a claimant can engage in substantial gainful activity, "the Secretary considers, first, whether the claimant can perform past relevant work and, if not, whether the claimant can perform other work." *Griego*, 940 F.2d at 944. In making this determination, the Secretary must take into account the claimant's residual capacity, together with age, education, and work experience. *Moore*, 919 F.2d at 904. The ultimate burden of proof remains with the Secretary in termination proceedings. See *id.* at n.1.

The ALJ found that Brooks was not currently engaged in substantial gainful activity, and that she did not suffer from an impairment or combination of impairments, see 20 C.F.R. § 404 subpt. P, app. 1 (1992), that materially affected her ability to perform her past relevant work. Based on Dr. Vorhies's "negative nerve conduction studies [,which] showed normal musculature power in all of [Brooks's] extremities," Record on Appeal, vol. 2, 176-77; see also *id.* at 216, the ALJ found that Brooks could perform

light work.³ See *id.* at 24. The ALJ found that Brooks's ability to perform light work was limited only by her nonexertional inability to perform in highly stressful jobs. See *id.* at 26. Despite Brooks's inability to tolerate high work stress, the ALJ pointed to a substantial number of sedentary and light work jobs that Brooks could perform, including her prior work as a cake decorator.⁴ See *id.* at 25-27. As other examples, the Secretary cited jobs working in a school cafeteria, making pastries, and taking tickets. See *id.* at 26.

Brooks argues that the Secretary did not give adequate consideration to her complaints of pain. The ALJ must consider a claimant's subjective complaints of pain. *Carrier v. Sullivan*, 944 F.2d 243, 246 (5th Cir. 1991). Pain constitutes a disabling condition under the Social Security Act only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment."

³ In *Moore*, we stated:

Light work involves lifting more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing or pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

Id., 919 F.2d at 904 n.1 (citing 20 C.F.R. § 404.1567(b)).

⁴ This conclusion was based on the testimony of a vocational expert, who testified that Brooks's past work as a cake decorator constituted light work activity, and that her past job involved little stress. See Record on Appeal, vol. 2, at 45-53. The vocational expert also named other light work activities that are not very stressful. See *id.*

Harrell v. Bowen, 862 F.2d 471, 480 (5th Cir. 1988). "How much pain is disabling is a question for the ALJ since the ALJ has primary responsibility for resolving conflicts in the evidence." *Carrier*, 944 F.2d at 247 (quoting *Scharlow v. Schweiker*, 655 F.2d 645, 648 (5th Cir. Unit A Sept. 1981)); see also *Hollis v. Bowen*, 837 F.2d 1378, 1384 (5th Cir. 1988).

The ALJ made a finding as to Brooks's subjective complaints, but did not give Brooks's testimony the weight that Brooks desired: "[Brooks's] testimony has been carefully compared to the medical evidence and her injuries are found credible, but it appears that claimant grossly overstates the severity of her pain during the entire period here involved and to that extent her testimony is not credible and is unworthy of belief." Record on Appeal, vol. 2, at 25; see also *id.* at 91 (In his examination of Brooks, Dr. Mayer stated that Brooks will need "psychological help . . . as she is completely addicted to giving in to her pain and symptom magnification."). The ALJ based his decision on Dr. James Muirhead's and Dr. Enrique Vassallo's psychological examinations. Both Dr. Muirhead and Dr. Vassallo found that Brooks's complaints were psychosomatic,⁵ and gave Brooks nearly all "good" and "very good" marks on the residual functional capacity examinations.⁶ See

⁵ Dr. Muirhead opined that Brooks "has tendencies to magnify and become preoccupied with physical complaints in a hypochondriacal way. She may attempt to use complaints in a fashion to avoid social or work responsibilities." Record on Appeal, vol. 2, at 200.

⁶ The residual capacity examination measured Brooks's mental ability to do work-related activities on a daily basis in a regular work setting. Record on Appeal, vol. 2, at 201.

id. at 199-202, 205-07. A later examination and residual capacity assessment by Dr. Henry Gardner, however, yielded a less optimistic assessment of Brooks's condition and prognosis for gainful activity. See *id.* at 226-29. The ALJ has the discretion to resolve conflicts in the evidence. See *Bradley v. Bowen*, 809 F.2d 1054, 1057 (5th Cir. 1987) (the ALJ may reject the opinion of any medical professional when evidence supports a contrary conclusion). We conclude that there is substantial evidence in the record which supports the ALJ's conclusion that Brooks's nonexertional impairments would not preclude her from engaging in gainful employment. See *Carrier*, 944 F.2d at 247 (upholding ALJ's decision to deny disability benefits where ALJ made findings as to plaintiff's subjective complaints of pain, but did not credit them to the extent that the plaintiff wanted).

III

For the foregoing reasons, we **AFFIRM**.