

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1429
Summary Calendar

DORIS J. ALBERT,

Plaintiff-Appellant,

versus

DONNA SHALALA, M.D., Secretary
of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
CA 3 89 1091 G

(September 2, 1993)

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

GARWOOD, Circuit Judge:

Plaintiff-appellant, Doris J. Albert (Albert), appeals the district court's affirmance of the denial by appellee, the Secretary of Health and Human Services (the Secretary), of Albert's application for disability insurance benefits under 42 U.S.C. § 423 (1988). Albert contends that the Secretary should have concluded that she was disabled and qualified for benefits because her

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

injuries were equivalent to a "listed impairment" and because she was incapable of returning to her past work. We affirm.

Facts and Proceedings Below

Albert was born on October 31, 1954. She earned a high school degree and spent two years in college. Since then, she has worked as a library clerk, teacher's aide, a store clerk at Walmart and Shop-N-Bag, a typist for a state agency, and most recently in a hospital as a supply clerk for one month in 1986. None of these jobs required her to lift more than twenty-five pounds.

On August 14, 1986, Albert was involved in a car accident in which she was sideswiped by an eighteen wheeler. She was admitted to a hospital complaining of back pain, neck pain, and soft tissue swelling in her ankle. Doctors could find no medical reason for her back and neck pain, and X-rays were within normal limits. Albert remained hospitalized for ten days while her ankle healed. Albert was then treated with physical therapy which improved her condition. However, she skipped two appointments and discontinued the treatments.

On September 18, 1986, Albert consulted Doctor Steve Rowlan, an orthopedic surgeon. Dr. Rowlan determined that Albert was obese (she is sixty-two inches tall and weighs two-hundred and sixty pounds) and experiencing tenderness and pain in her lower back. However, he determined that she could bend forward, flex her toes, and heel-toe walk without difficulty. Her reflexes were normal and straight leg raising was negative to seventy degrees. He advised Albert to walk more.

Dr. Rowlan examined Albert one month later. He determined

that although she continued to complain of pain, it was safe for her to return to work. Dr. Rowlan examined her again on December 1, 1986. Then, Albert said that she experienced no more leg pain, but she still complained of back and neck pain. Dr. Rowlan could find no medical reason for her pain. He ordered a bone scan which was normal. Albert visited Dr. Rowlan one more time. Straight leg raising tests were negative and reflexes were normal. Albert told him that she intended to apply for disability benefits, but he responded that he was unable to determine a reason for her inability to work or her pain.

Albert sought other explanations for her pain. She was examined by Dr. William Christensen, an internal medicine specialist. He opined that she was suffering only from chronic pain syndrome as opposed to any residual back injury. He advised her to stop taking prescription pain medicine and that he thought it was unlikely that she would qualify for disability benefits.

On October 5, 1987, Dr. Rodney Sloane, a state internal medicine specialist examined her. She complained of constant pain in her neck, back, right hip, and right leg. However, she had full range of motion in her neck, albeit with pain, and no back pain on motion or straight leg raising. Finding no bone or neurologic impairments, he diagnosed her as being obese.

Albert then consulted Dr. Claire Tibiletti. Dr. Tibiletti diagnosed Albert as suffering from mechanical and neurogenic pain and opined that she would be unable to work for six to eight weeks. Dr. Tibiletti then ordered a CAT scan which revealed no significant impairment except stenosis of the lumbar canal. Albert was given

injection therapy which she stated did not decrease her pain.

Albert applied for disability benefits and a hearing was held before an Administrative Law Judge (ALJ). Albert was represented by counsel. Albert testified that she could not sit for more than twenty to thirty minutes, that she could not drive more than twenty or thirty miles, that she could not stand for long periods, that she spent most of her day on the couch, and that her medication made her drowsy.

The ALJ found that although she was subjectively experiencing pain and that she was obese, Albert's complaints were not supported by any medical diagnosis that she was impaired. The ALJ found that there was no evidence of arthritis or traumatic osteophytes even two years after her car accident. The ALJ determined that Albert was capable of performing sedentary work and specifically that she could carry and lift weights of up to twenty pounds. The ALJ concluded that Albert was not disabled because she was capable of performing her past relevant work and that she was not entitled to benefits.

Albert appealed this decision to the Secretary's Appeals Council which denied her claim. Albert filed this suit in the court below seeking review of the Secretary's decision. A magistrate judge reviewed the evidence and concluded that Albert was properly found not disabled. Affirming the ALJ, the district court adopted the magistrate judge's recommendation and granted the Secretary's motion for summary judgment. Albert appeals. We affirm.

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). The courts have followed a five-step test set forth in the Social Security regulations to evaluate whether a claimant is disabled. 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). The steps are generally described as follows: (1) if the claimant is working or engaged in a substantial gainful activity, the claimant will be 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; and (5) 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 proof on steps one through four. *Id.*

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.

Albert contends that she meets the requirements of step three of the test and qualifies as disabled because her impairments are equivalent to those listed in the Social Security regulations. Albert has the burden of proof on this issue. See *Selders v. Sullivan*, 914 F.2d 614, 619-20 (5th Cir. 1990). 20 C.F.R. § 404.1525, Appendix 1, Part 404, Subpart P, Rule 10.10 (1992), provides that obesity¹ combined with other ailments may constitute a person permanently disabled. The only listed ailment which might be similar to Albert's is obesity combined with a "[h]istory of pain and limitation of motion in any weight bearing joint or spine (on physical examination) associated with X-ray evidence of arthritis in a weight bearing joint or spine." *Id.* For an impairment to be considered "equal" to a listed impairment, it must be "at least equal in severity and duration to the listed findings." 20 C.F.R. § 404.1526 (1992).

Albert argues that her impairments are equally severe because she has a long history of severe pain, she suffers from headaches, her medications cause drowsiness, and the ALJ erred in not applying step three or at least in failing to provide sufficient reasons why

¹ It is beyond cavil that Albert meets the definition of obese, as stated in the above cited regulation.

she did not qualify under step three. However, as the ALJ properly found, the record shows that no medical evidence supports Albert's claim about the severity of her impairments. There is no medical evidence of any serious limitation of motion or impairment in any weight bearing joint or her spine. The CAT scan revealed no significant impairment except stenosis of the lumbar canal, the bone scan tests were normal, and none of the four doctors opined that she would be permanently disabled.² The ALJ specifically stated that "The claimant does not have arthritis, not even traumatic osteophytes on the injured areas" In light of the fact that the medical evidence adequately supports the finding that Albert does not suffer an impairment equivalent in severity or duration to obesity combined with pain and arthritis with limitation of motion in weight bearing joints or her spine, Albert has failed to meet her burden of proof, and the ALJ's conclusion that Albert was not presumptively disabled under step three of the test is supported by substantial evidence.

Second, Albert claims that she is incapable of returning to her past work and therefore that she meets step four of the test. The ALJ found that Albert could return to her past relevant work as a teacher's aide since it involved sedentary work, she could lift and carry up to twenty pounds while working, and the job's work

² Contrary to Albert's contention, no reversible error is presented by the ALJ's failure at step three to address Albert's alleged nervousness or the side effects from her medication. Albert does not specify just how any of such matters were relevant to the step three determination; and, in any event, there is no medical evidence either that Albert suffers adverse side effects from her medication or that she required treatment for any psychological problems. See *Selders*, 914 F.2d at 619.

demands did not exceed her residual functional capacity. Although the ALJ technically erred, as the Secretary concedes, in classifying a teacher's aide position as sedentary work when it is generally viewed as light duty work, the ALJ's conclusion that Albert is able to perform that job as it is actually performed or generally performed in the national economy is supported by substantial evidence and is hence controlling. See *Villa v. Sullivan*, 895 F.2d 1019, 1022 (5th Cir. 1990) (ALJ must compare physical ability of claimant to the physical attributes of an applicant's past work as actually performed or as generally performed in the national economy; we found that although the DOT handbook classified laborer as heavy work, Villa's actual past work was only medium duty). The record shows that Albert is capable of walking, standing, and sitting for short periods of time and that she is capable of lifting and carrying up to twenty pounds, consistent with the physical duties of a teacher's aide.³ The record adequately supports the finding that her complaints of pain are not supported by objective medical evidence. Finally, Albert's original orthopedic surgeon found that there was no reason why she could not return to her past work.

Conclusion

The district court did not err in finding that the decision of the ALJ and the Secretary was supported by substantial evidence.

³ Albert testified at the ALJ hearing that as a teacher's aide, she lifted up to twenty pounds and in her application for disability benefits she stated that her job as a teacher's aide involved about four hours of sitting, two hours of standing, two hours of walking and occasional bending daily.

Accordingly, the judgment appealed from is

AFFIRMED.