IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1500

Summary Calendar

Frank Collins, Jr.,

Plaintiff-Appellant,

versus

Louis W. Sullivan, M.D., Secretary of Health and Human Services

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(2:90-CV-09)

(January 28, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Frank Collins brought suit under Section 205(g) of the Social Security Act, to challenge the termination of his disability insurance benefits. Accepting the report and recommendation of the magistrate judge, the district court denied relief. We affirm.

We have reviewed all of the evidence, but need only briefly recite the most relevant facts. Frank Collins first received

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

disability benefits in 1976. During a periodic review of his status in 1987, the Secretary determined that Collins's health had improved so that he could return to work. Collins challenged this finding and received hearings before an administrative law judge.

The ALJ recommended that Collins undergo a consultative psychological examination. The ALJ also referred to a consultative physician to review Collins's medical records. Finally, the ALJ heard Collins's testimony and that of a vocational expert, Mr. Glass. At the time of the final hearing in 1989, Collins was 51 years old.

The testimony showed that Collins had a history of semi-skilled work before 1976. Despite a tenth grade education, Collins's academic skills tested at the elementary school level, all below the 5th percentile among adults. Using the WAIS test, a psychologist found that Collins's full-scale I.Q. was 73.

Collins suffers from a variety of ailments. He claims to have suffered a stroke, although medical examinations and records have not confirmed this claim. He suffered a head injury while employed which Dr. Harvey, the consulting physician, suggested may have resulted in neurological deficit. The evidence shows that Collins has diabetes mellitus with hypoglycemic attacks, chronic obstructive pulmonary disease, glaucoma, hypertension, and arthritis in his left shoulder. Collins underwent surgery for chronic dislocation of his right shoulder in 1983 and for a torn rotator cuff in his left shoulder in 1988. Dr. Harvey opined that shoulder arthritis posed the most significant problem. The ALJ

found that Collins has a severe impairment or combination of impairments.

The vocational expert, Glass, testified that Collins could engage in unskilled light work, such as dining room attendant or outside delivery man. His testimony established that there are a significant number of jobs in the economy that Collins could perform. Finding that Collins's medical condition had improved and that he had an exertional capacity for light work, the ALJ ruled that Collins's disability had ceased.

On review, we must determine whether substantial evidence exists in the record as a whole to support the Secretary's factual findings and whether the proper legal standards were applied. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. Richardson v. Perales, 402 U.S. 389, 390, 91 S. Ct. 1420 (1971)(citing 42 U.S.C. § 405(g)). Only a conspicuous absence of credible choices or no contrary medical evidence will produce a finding of no substantial evidence. Hames v. Heckler, 707 F.2d 162, 164 (5th Cir. 1983).

Regulations set forth by the Secretary prescribe that disability reviews should be conducted according to a sequential eight-step process. 20 C.F.R. § 404.1594(f) (1992). Step eight of that process is at issue in this case. Collins does not dispute the ALJ's preliminary finding of medical improvement related to work ability. Under step eight, where the claimant is unable to perform work done in the past because of severe impairments, the

Secretary will consider the claimant's functional capacity, age, education, and past work experience to determine if he can do other work. § 404.1594(f)(8).

After reviewing the medical evidence and Collins's testimony, the ALJ concluded that, although Collins suffered a severe impairment or combination of impairments, he was capable of performing light work. Pursuant to the Social Security Administration's regulations, the ALJ then applied the Medical-Vocational Guidelines. Under rule 202.11 of the guidelines, a claimant with Collins's profile (aged fifty-one years at the time of the hearing, tenth-grade education, and semiskilled but with nontransferable skills), who is capable of performing light work is to be adjudged not disabled. See 20 C.F.R. Part 404, Subpart P, App. 2, Table No. 2, Rule 202.11.

We find substantial evidence in the record for the finding that Collins can perform light work. Light work is defined as work that involves lifting of no more than twenty pounds at a time with frequent lifting or carrying of up to ten pounds. § 404.1567(b). Medical evidence as well as testimony of Collins's activities provide a sufficient basis for this finding. Substantial evidence means that evidence which is sufficient for a reasonable mind to accept as adequate to support a conclusion. Jones v. Heckler, 702 F.2d 616, 620 (5th Cir. 1983). This court may not reweigh the evidence. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990).

Collins complains that the ALJ erred by applying the guidelines to conclude that he was not disabled. He contends that

the ALJ was precluded from relying upon the guidelines because his low intelligence scores demonstrate a non-exertional impairment. Where non-exertional impairments significantly affect a claimant's residual functional capacity, the Secretary may not rely exclusively on the guidelines, but must rely on other evidence. See Carter v. Heckler, 712 F.2d 137, 142 (5th Cir. 1983).

We reject Collins's contention, because we have held that below-average intelligence does not constitute a non-exertional impairment. Selders v. Sullivan, 914 F.2d 614, 619 (5th Cir. 1990); Johnson v. Sullivan, 894 F.2d 683, 686 (5th Cir. 1990). Although mental retardation does qualify as a non-exertional impairment, Collins's lowest I.Q. score of 73 does not satisfy the regulation's definition of retardation. See 20 C.F.R. Part 404, Subpart P, App 1 § 12.05 (requiring I.Q. score of 70 or less). Borderline I.Q. scores will not be considered a non-exertional impairment. See e.g. Selders, 914 F.2d at 619 (I.Q. score of 72 does not support finding of non-exertional impairment); but see Webber v. Secretary, H.H.S., 784 F.2d 293, 298 (8th Cir. 1986) (ALJ may not rely on guidelines when reduced intellectual functioning coexists with severe exertional impairment). We therefore hold that the guidelines were sufficient to meet the Secretary's burden of proof, and the ALJ was not required to rely upon the evidence of a vocational expert.

Of course, the ALJ in this case did hear the testimony of such an expert. Glass testified that Collins could perform several light works jobs. The ALJ credited this testimony in his written

analysis, but did not include it in his concluding list of "Findings." Collins complains that Glass's testimony failed to take Collins's limited mental abilities into account. Because we hold that no vocational expert testimony was necessary, we need not determine whether or not the ALJ relied upon that testimony, nor whether it was based upon all necessary information.

Collins also contends that the ALJ failed to consider the length of time he had been disabled and out of work. We disagree. The ALJ's findings note that Collins has not engaged in substantial gainful activity since 1976. Moreover, the ALJ referred Collins to a psychologist who evaluated his skills in a variety of areas. 20 C.F.R. § 404.1594(b)(4)(iii) provides that the Secretary will consider the length of disability for claimants fifty years of age or older, to take disadvantages from aging and inactivity into account. Although there is no express reference to this regulation in the ALJ's decision, we find that the relevant and necessary facts have been considered.

AFFIRMED.