UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3599
Summary Calendar

FRED L. ROBINSON, JR.,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA, Secretary
of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-91-665-A-M1)

June 7, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Fred L. Robinson appeals the district court's grant of summary judgment in favor of the Secretary of Health and Human Services (Secretary), contending that the court erred in affirming the final decision of the Secretary denying his application for disability benefits under the Social Security Act (Act), 42 U.S.C. § 401, *et. seq*. We **AFFIRM**.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

Robinson applied for disability benefits in December 1989[2], asserting damage to his neck and spine; he was 41 years old. Robinson, at least nominally, completed the ninth grade.[3] He subsequently worked as a truck driver and a construction worker over a 15 year period.

Robinson was injured in December 1986. A CT scan of the cervical spine showed mild disc bulging of the C3-4 and C4-5 discs. Robinson's treating chiropractor reported that even minimal lifting, carrying, and handling of objects exacerbated his symptoms. On the other hand, Dr. Humphries examined Robinson in January 1990 for the Disability Determinations Services and concluded that Robinson could perform heavy work that required bending and lifting; but, his neck condition precluded him from extremely heavy work.

Margaret Pereboom, Ph.D., provided a psychological evaluation of Robinson in April 1990. She administered a Wechsler Adult Intelligence Scale, Revised (WAIS-R) test showing that Robinson had a full scale IQ of 72, plus or minus two, placing him at the boundary between the borderline and mentally deficient ranges. According to Pereboom, this test revealed that Robinson was limited in his ability to learn new tasks or be retrained for different work.

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[2] Robinson also applied for benefits in July 1989, which were denied at the initial level and not pursued.

[3] His school records indicate that he received only one passing grade during the eighth and ninth grades, and repeated the first and fourth grades.

In addition, Robinson's score on the Wide Range Achievement Test (WRAT) placed him in the functionally illiterate category. Moreover, based on other tests, Pereboom suggested that Robinson "would seem" to suffer from anxious and obsessive thinking and confused, schizoid, or bizarre thinking. Due to the foregoing problems, Pereboom opined that Robinson was not capable of performing satisfactorily in a daily work situation, and reiterated several times that his condition was probably no different in 1986, the start of his disability period.

In October 1990, the Administrative Law Judge (ALJ) concluded that Robinson was not disabled. This decision became the final decision of the Secretary, and Robinson filed suit in district court, seeking review of it. After the parties filed cross-motions for summary judgment, the district court adopted the magistrate judge's report and recommendation and granted summary judgment for the Secretary.

II.

The Secretary applies the well-known five-step process to determine whether an individual is disabled under the Act. If the response to any step in the process is inconclusive, the Secretary proceeds to the next step. A finding that a claimant is disabled or not disabled at any point terminates the sequential evaluation. 20 C.F.R. § 416.920(a); ***Anthony v. Sullivan***, 954 F.2d 289, 293 (5th Cir. 1992). First, the claimant must show that he cannot engage in substantial gainful employment; second, that he has a severe impairment; third, that he has an impairment or combination of

impairments listed in, or equal to one listed in App. 1, Subpt. P; and, fourth, that, given his residual functional capacity, he is unable to perform his past relevant work. At the fifth step, the burden shifts to the Secretary to show that there is work in the national economy or other substantial work that the claimant can perform. 20 C.F.R. § 416.920; ***Wren v. Sullivan***, 925 F.2d 123, 125 (5th Cir. 1991). If the Secretary meets this burden, the claimant must then prove that he is not able to perform alternate work. ***Id.***

At the first step, the ALJ concluded that Robinson has not engaged in substantial gainful activity since December 1986. At the second and third steps, he ruled that Robinson has severe cervical disorders; but, he does not have an impairment or combination of impairments listed in, or medically equivalent to, one listed in the regulations. At the fourth step, the ALJ found that Robinson is unable to perform his past relevant work (truck driver, construction worker); however, at the fifth step, he concluded that Robinson is capable of performing other jobs in the national economy, considering his residual function capacity (light work; no nonexertional limitations), age (41), education (ninth grade marginal), and work experience (unskilled or none).[4]

We will affirm the Secretary's decision if there is substantial evidence in the record supporting her findings and if

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[4] In the absence of nonexertional limitations, the ALJ could rely exclusively on the medical-vocational guidelines for his finding. Under the guidelines, a "functionally illiterate", younger person, with a work history of unskilled or none, and the capacity to do light work, is deemed "not disabled". 20 C.F.R. 404, Subpt. P, App. 2, Table No. 2, Rule 202.16.

proper legal standards were used in evaluating that evidence. *See* 42 U.S.C. § 405(g); ***Villa v. Sullivan***, 895 F.2d 1019, 1021 (5th Cir. 1990). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". ***Villa***, 895 F.2d at 1021-22 (citation omitted).

Robinson does not challenge the ALJ's finding regarding his residual functional capacity to do light work; rather, he maintains that (1) the ALJ's determination that he had no medically determinable mental impairment was not supported by substantial evidence; (2) that the Social Security Administration's definition of "medical equivalency" at step three is so vague that it denies due process of law; and (3) that new and additional evidence merits a remand. We reject all three contentions.

A.

Robinson contends that the court failed to accord sufficient weight to the opinions and recommendations in the psychologist's report and thus reversibly erred in finding no medically determinable impairment. We conclude that the record contains substantial evidence to support the ALJ's "great reservations and hesitancy" to credit Pereboom's evaluation of Robinson's mental status and employability. First, the record reflects that Robinson had been successfully employed for 18 years with no indication of either personality problems or a sudden onset of such difficulties. Moreover, as the ALJ noted, Robinson "did not allege a mental impairment, has had no psychogenic complaints ... never sought or

received mental treatment" and is not taking psychogenic medication. ***Id.*** Furthermore, we agree with the district court that the record supports the ALJ's conclusion that many of Pereboom's findings were "too vague to be relied upon". Accordingly, we conclude that the ALJ was justified in discounting Pereboom's recommendation.[5]

In addition, although mental retardation qualifies as a non-exertional impairment, ***Johnson v. Sullivan***, 894 F.2d 683, 686 (5th Cir. 1990), Robinson was not mentally retarded under the regulations in effect at the time he applied for benefits because his WAIS-R valid verbal, performance, and full scale IQ tests were all above 69. *See* 20 C.F.R., Pt. 404, Subpt. P, App. 1, Listing 12.05C (1990). Below-average intelligence, alone, does not constitute an impairment. ***Johnson***, 894 F.2d at 686. Accordingly, we conclude that the ALJ's finding as to the absence of a medically determinable mental impairment is supported by substantial evidence.

B.

Relying on ***Sullivan v. Zebley***, 493 U.S. 521, 110 S. Ct. 885 (1991), Robinson contends that the definition of "medical equivalency" at the third step is so vague that it amounts to a

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[5] The ALJ also stated that it was his experience, that "regardless of the diagnosis or severity of the claimant's mental status, Ms. Pereboom invariably concludes that the claimant is unemployable". Even if this latter observation was inappropriate, it was not "administrative noticing" that Pereboom was *per se* unreliable, and there were sufficient alternative grounds upon which the ALJ discounted Pereboom's evaluation. *See* ***Mays v. Bowen***, 837 F.2d 1362, 1364 (5th Cir. 1988) (applying the harmless error rule in upholding the decision of the Secretary).

denial of due process. It is Robinson's burden, of course, to establish that the Secretary has acted arbitrarily or irrationally. ***Springdale Convalescent Center v. Mathews***, 545 F.2d 943, 955 (5th Cir. 1977).

In ***Zebley***, the Court held that the Secretary's child-disability regulations were incompatible with their authorizing statute, 493 U.S. at ___, 110 S. Ct. at 890, noting that the Secretary had "explicitly ... set the medical criteria defining the listed impairments at a higher level of severity than the statutory standard". ***Id.*** at 892. According to Robinson, the Secretary, in response to ***Zebley***, has proposed to amend the definition of functional equivalency to include functional limitations.

Robinson requests a remand under 42 U.S.C. § 405(g) for an application of this "functional equivalence" standard to his claim. We refuse to do so, because the ALJ considered Robinson's functional limitations when evaluating the fourth and fifth steps of the sequential evaluation. Robinson has failed to show that consideration under the third step might direct a different outcome.[6]

C.

Robinson requests remand based on "new and material" evidence consisting of a report from Pereboom, stating that a repeat of the

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[6] In ***Zelby***, 493 U.S. at ___, 110 S. Ct. at 893-94, the Court noted in dicta that, unlike children, adults had the opportunity in the fourth and fifth step to establish inability to perform past relevant work, or other work in the national economy; thus, for adults, the shortcomings of the listings were remedied at the fourth and fifth steps.

WAIS-R indicated lower scores. A disability benefits case will be remanded because of new evidence only if there is "a reasonable probability that the new evidence would have changed the outcome of the Secretary's determination had it been before him". ***Dorsey v. Heckler***, 702 F.2d 597, 604-05 (5th Cir. 1983) (citation omitted). Here, evidence of new, slightly lower scores, if accurate, reflect his *current* mental status and are thus irrelevant to his condition at the time he applied for benefits. *See* ***Johnson v. Heckler***, 767 F.2d 180, 183 (5th Cir. 1985). Because the "new" information is immaterial and would not have altered the Secretary's determination, a remand is not appropriate.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.