

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4119
Summary Calendar

BARBARA LYNCH,

Plaintiff-Appellant,

versus

DONNA SHALALA,
SECRETARY, HEALTH AND
HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(6:75-CV-339)

(March 9, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant contests the district court's summary judgment affirming the Secretary's decision to deny Social Security disability payments to Mrs. Lynch. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

The district court vacated the denial of disability benefits to Barbara Lynch by the Secretary of Health and Human Services (Secretary) and remanded the case four times to the Secretary for additional evidence. Lynch injured her back while lifting materials at work on December 22, 1972. Her past relevant work included housekeeping jobs and simple factory employment, jobs which involved lifting up to 35 pounds. In 1974, Lynch applied for disability benefits.¹ To receive the disability benefits, Lynch had to meet the disability requirements for a twelve-month period ending no later than March 31, 1974. In the last remand, the district court adopted the magistrate judge's report which instructed the Secretary, among other directives, to determine the credibility of Lynch's assertions of pain and the severity of any psychological impairment.

An administrative law judge (ALJ) conducted the final hearing on January 6, 1987, by acknowledging the past evidence received in this case, and by receiving additional evidence: testimony by Lynch and by Dr. Matthew Jaremko and exhibits including the results of a psychological examination conducted by Dr. Robert McClure.

The ALJ made twelve findings of fact and concluded that Lynch could not perform her past relevant work, but based on Lynch's residual functional capacity and other factors, she had the

¹ Lynch stated that she is receiving supplemental security income beginning from the year 1984.

ability, as of March 1974, to do sedentary work not involving lifting more than ten pounds.

In explaining his assessment, the ALJ first analyzed the medical evidence concerning her back. He found that Lynch's "exertional impairments . . . limited her to a full range of sedentary work." The ALJ then analyzed the psychological evidence, concluding that Lynch had a severe mental impairment at present, but that there was no medical evidence indicating that she was so impaired as of March 1974. The ALJ also found that the mental impairment, in conjunction with her physical impairment, did not render her disabled as of March 1974.

The Secretary adopted the ALJ's findings and conclusions, noting that Lynch "has presented no credible medical evidence or other documentation . . . which provides a reasonable basis to infer more than mild work-related mental limitations on or before March 31, 1974." The district court granted the motion filed by Lynch, proceeding pro se, to reopen the case. Lynch moved for the admission of exhibits: correspondence and reports originating after the relevant period of disability. Both the Secretary and Lynch moved for summary judgment. The district court adopted the magistrate judge's report that recommended summary judgment in favor of the Secretary. The district court also denied any outstanding motions. Lynch is represented by pro bono counsel on appeal.

DISCUSSION

This Court "review[s] the district court's grant of a summary judgment motion de novo. Summary judgment is appropriate if the record discloses `that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.'" Spellman v. Shalala, 1 F.3d 357, 360 (5th Cir. 1993) (citations omitted).

This Court's review of the Secretary's decision is limited to determining "whether the Secretary applied the correct legal standard and whether the Secretary's decision is supported by substantial evidence on the record as a whole." Orphey v. Secretary of Health & Human Servs., 962 F.2d 384, 386 (5th Cir. 1992). A claimant under the Social Security Act is 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. In the present case, the disability requirements had to be met as of March 1974, the date that Lynch last met the insured-status requirement. A five-step analysis is generally used to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 404.1520a.

The five-step analysis, although not explicitly stated in the regulations in effect during the relevant period, 1974, appears to be implied in the applicable regulation. See 20 C.F.R. § 404.1502 (1973); see also Vega v. Harris, 636 F.2d 900, 903 (2d Cir. 1981) (applying retroactively the new regulations for

determining disability at Steps 4 and 5 because the expressed purpose of the new regulations was to consolidate and to elaborate upon longstanding agency policies). The ALJ applied the five-step analysis and found that Lynch could not engage in her past relevant work, but was not limited in engaging in sedentary work. In the analysis, the ALJ first discussed Lynch's back impairment, taking his explanation through the five steps, and then he discussed Lynch's mental impairment, finding that Lynch did not have a severe mental impairment during the relevant period.

Lynch first argues that the ALJ failed to comply with the requirements of Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985). In Stone, this Court reviewed the Secretary's denial of disability, a determination that ended at Step Two in the five-step analysis: if a claimant's impairment is not severe, the claimant is not disabled under the Act. See Stone, 752 F.2d at 1101. This Court set out the correct legal standard to use for determining "nonseverity,"² and held that it will be assumed that the wrong standard was applied "unless the correct standard is set forth by reference to this opinion or another of the same effect, or by an express statement that the construction [this Court] give[s] . . . is used." Id. at 1106; see also Anthony v. Sullivan, 954 F.2d 289, 293-94 (5th Cir. 1992) (explaining Stone).

² "[A]n impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience." Stone, 752 F.2d at 1101 (citation and internal quotation omitted).

Subsequent to Stone, this Court has also held that, when the ALJ's analysis goes beyond Step Two, i.e., the impairment is severe, specific reference to Stone and its requirements is not necessary. See Harrell v. Bowen, 862 F.2d 471, 481 (5th Cir. 1988); Shipley v. Secretary of Health & Human Servs., 812 F.2d 934, 935 (5th Cir. 1987). As to Lynch's back impairment, the ALJ determined Lynch was not disabled at Step Five. As to Lynch's mental impairment, the ALJ stopped his analysis at an earlier step.

This Court does not require the use of "magic words" for compliance with Stone. Hampton v. Bowen, 785 F.2d 1308, 1311 (5th Cir. 1986). This Court "remand[s] only where there is no indication the ALJ applied the correct standard." Id. In the ALJ's opinion, he explained the testimony of three doctors and their opinions of Lynch's mental condition from a 1977 examination. He then described the 1987 psychological examination of Lynch which diagnosed a disabling mental impairment. After noting the relevant period for disability under the Act in Lynch's case, a period ending March 1974, the ALJ relied on the 1977 examination and the examining doctor's "statement that there was no limitation in [Lynch's] ability to perform work requiring frequent contact with others or to perform simple, complex, repetitive or variable tasks" to conclude that Lynch had a non-severe impairment as of 1977, thus finding, by implication, no severe impairment during the relevant period. Id. Although direct reference to Stone would have been preferable, the ALJ's opinion followed the correct standard. See Hampton, 785 F.2d at 1311.

Lynch argues that the ALJ's findings conflict with each other. She argues that the ALJ found that she did not have a severe impairment, a finding which conflicts with analysis which goes beyond Step Two. A review of the twelve findings of fact indicates no internal inconsistency. Within his analysis, the ALJ found that Lynch "did not have a `severe' mental impairment on or before March 31, 1974." This finding is supported by medical evidence in the record. This is not inconsistent with the twelve findings of fact, findings which account for Lynch's severe impairment, during the relevant period, from her back problems and which end the analysis at Step 5 as to Lynch's back problems.

Lynch also argues that the ALJ misapplied the legal standards by failing to analyze and find that she had the listed impairment, somatoform disorder, as found in 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.07. Somatoform disorder was not a listed impairment in March 1974. See 20 C.F.R. Part 404, Subpt. P, App. 1, §§ 12.01- 12.05 (1973); see also Brown v. Bowen, 864 F.2d 336, 337 n.1 (5th Cir. 1988) (noting that the listing on somatization disorders did not exist before 1985). Lynch fails to identify legal authority for the proposition that an ALJ must apply the listings in place more than ten years past the relevant period of alleged disability. See LeMaster v. Secretary of Health & Human Servs., 802 F.2d 839, 841-42 (6th Cir. 1986) (appearing to assume that a new listing applies retroactively). But see Sierra Medical Center v. Sullivan, 902 F.2d 388, 392 (5th Cir. 1990) (explaining general principles supporting disfavor of giving regulations

retroactive effect). Moreover, in light of the ALJ's analysis leading to the finding of no severe mental impairment during the relevant period, thus ending the analysis at Step 2, the ALJ was not required to reach any issue at Step 3 as to Lynch's mental impairment. See Wren, 925 F.2d at 125-26.

Lynch next argues that the Secretary's decision is not supported by substantial evidence. "Substantial evidence is more than a scintilla and less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991). "To make a finding of 'no substantial evidence,' [this Court] must conclude that there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'" Dellolio v. Heckler, 705 F.2d 123, 125 (5th Cir. 1983) (citation omitted).

Lynch's argument focuses exclusively on the Secretary's decision as to any mental impairment. At the last ALJ hearing, Dr. Jaremko testified that, in his opinion, the record was lacking in psychological information. In 1973, the hospital discharge report noted that diagnosis included "anxiety state," but the report does not elaborate on her mental state, focusing instead on her back and muscle strain. In 1977, Dr. Wick examined Lynch for psychological impairments. Dr. Wick ascertained Lynch's condition as "hypochondriacal neurosis," commenting that "[t]his lady shows evidence of mild deterioration of her interests, and her activities are moderately constricted. She does appear to relate adequately to other people. She perhaps has some immature personality traits,

and dealing with responsibility has perhaps been more difficult than she can express." The residual functional capacity form completed by Dr. Wick indicated impairments existing from none to mild.³

At the 1978 hearing, Dr. Asa DeLoach, another psychiatrist testifying based upon the record, agreed with Dr. Wick's diagnosis. Dr. DeLoach defined "hypochondriacal neurosis" as "tension or anxiety of a psychic type, oftentimes the person's incapacity or unwillingness to deal with emotional, mental or other types of distress, are not dealt with directly but instead referred to areas of the body as pysical [sic] symptoms." Although Dr. DeLoach categorized this neurosis as "severe," he opined that Lynch would not be foreclosed from sedentary work.

Two other witnesses, Dr. Helmet Tauber (psychiatrist) and Dr. Charles McAleer (psychologist), testifying from the record as it stood in 1980, concurred with Dr. Wick's assessment. In 1987, Dr. Jaremko discounted Dr. Wick's assessment by focusing on Dr. Wick's use of the word "impression" instead of "diagnosis" in his report, and by noting the changes in the field of psychology which made Dr. Wick's assessment obsolete. Dr. Jaremko opined that a current psychological evaluation of Lynch may provide insight into the relevant period of alleged disability under consideration.

The subsequent evaluation and report, made by Dr. Robert

³ In answer to one of the questions on the form, Dr. Wick categorized Lynch's estimated degree of restriction of daily activity as moderate, "moderate" being defined as "an impairment which affects but does not preclude ability to function." R. 5, 164-65.

McClure, revealed that Lynch was presently suffering from severe psychogenic pain disorder and compulsive personality disorder. McClure summarized that "[t]his woman hurt her back 14 years ago and has been almost completely dysfunctional [sic] ever since." Dr. Jaremko, however, reviewed and discounted Dr. McClure's summary based upon the lack of evidence as to the onset of the disorder and its severity and upon Dr. McClure's own assessment of Lynch's unreliability in stating her history.

Based upon this evidence, the ALJ's determination that no severe mental impairment existed during the relevant period ending in 1974 is supported by substantial evidence. Lynch argues that the ALJ erred by requiring her to prove the onset of severity within the relevant period. She argues that the ALJ should have relied upon the credible inference that the severe mental impairment did exist during the relevant period. This Court has held

that in cases involving slowly progressive impairments, when the medical evidence regarding the onset date of disability is ambiguous and the Secretary must infer the onset date, [Social Security Ruling] 83-20 requires the inference be based on an informed judgment. The Secretary cannot make such an inference without the assistance of a medical advisor.

Spellman, 1 F.3d at 362 (footnote omitted). The ALJ had the assistance of Dr. Jaremko. In light of Dr. Wick's evaluation in 1977, ten years earlier than Dr. McClure's evaluation, the necessary inference which the ALJ utilized is that Lynch's mental impairment, whatever correct terminology should apply, was not

severe in 1974. See Ivy v. Sullivan, 898 F.2d 1045, 1049 (5th Cir. 1990).

Lynch contests the ALJ's handling of her complaints of pain. The ALJ found that Lynch's "subjective complaints are credible only to the extent of precluding work at a higher than sedentary exertional level." "The ALJ must consider subjective evidence of pain, but it is within his discretion to determine the pain's disabling nature. Such determinations are entitled to considerable deference." Wren, 925 F.2d at 128. In light of the relevant period under consideration, a period ending in March 1974, and in light of the ALJ's finding, a finding which did not credit Lynch's subjective complaints of pain to the extent that Lynch wished, the ALJ did not err. See Carrier v. Sullivan, 944 F.2d 243, 247 (5th Cir. 1991).

Lynch argues that the Secretary failed to carry her burden in providing evidence that Lynch could engage in sedentary work which was available in the national economy. Lynch argues that a vocational expert should have testified at the 1987 hearing. "Whether a vocational expert will be called in the particular case is clearly within the discretion of the Secretary." Jones v. Heckler, 702 F.2d 616, 622 (5th Cir. 1983). The ALJ expressly referred to a table within the medical-vocational guidelines. "When the claimant suffers only from exertional impairments or his non-exertional impairments do not significantly affect his residual functional capacity, the ALJ may rely exclusively on the Guidelines in determining whether there is other work available that the

claimant can perform." Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990). Lynch does not contest the findings concerning her exertional impairment from her back strain.

Lynch argues that the magistrate judge erred in failing to review her additional evidence of current medical records which Lynch moved to have admitted. The district court denied all outstanding motions when he granted summary judgment for the Secretary.

Under 42 U.S.C. § 405(g), which controls the scope of [] review, [a reviewing court] may remand to the Secretary "upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding"

Haywood v. Sullivan, 888 F.2d 1463, 1471 (5th Cir. 1989).

Materiality requires relevance to the period under consideration. Id. Here, the current medical records are almost twenty years past the relevant period. Moreover, there is the uncontested fact that Lynch is presently incapable of engaging in gainful employment. It is questionable that any new evidence found in current medical records could distinguish the relevant period from the after-acquired disability. See Haywood, 888 F.2d at 1471. Further, a review of the "Current Records" indicate that this new evidence is not relevant to her mental impairment. For these reasons, the district court did not err in denying Lynch's motions.

For the foregoing reasons the judgment of the district court is AFFIRMED.