

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4624
Summary Calendar

BEATRICE J. BROWN,

Plaintiff-Appellant,

VERSUS

U. S. SECRETARY OF HHS,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

(91-CV-817)

January 22, 1993

Before HIGGINBOTHAM, SMITH, and DeMoss, Circuit Judges:

PER CURIAM:*

BACKGROUND

Beatrice J. Brown applied for supplemental social security benefits because of disability in April 1989. She described her disability as high blood pressure, a back problem, breathing difficulties and recent surgery for a vaginal problem. According

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to Brown, she became disabled in 1977 and had not worked since that time.

Brown's claim was denied initially in June 1989 and on reconsideration. She requested and received a hearing before an administrative law judge (ALJ).

In March 1990 the ALJ determined that Brown had not engaged in substantial gainful employment since 1977. Although she was unable to perform her past relevant work as a cafeteria worker because of a severe condition, the ALJ found that Brown had the residual functional capacity to perform the full range of sedentary work. He found that Brown was not under a disability as defined in the Social Security Act at any time through the date of the decision. The decision of the ALJ became the final decision of the Secretary when the Appeals Council denied Brown's request for review.

Brown filed suit in the district court seeking review of the Secretary's decision. Both parties filed cross-motions for summary judgment. The district court adopted the report and recommendation of the magistrate judge and affirmed the Secretary's decision.

Brown was born in 1944 and completed the tenth grade. She described herself as a housewife between 1966 and the time of her application for benefits. Brown worked several weeks at an unspecified job at some type of tomato business and several months as a dishwasher in a school cafeteria. She claims that she stopped working at the cafeteria because she could not carry heavy objects. Although carrying heavy objects was also a problem at the tomato

business, she allegedly left that job because the company was destroyed in a fire.

In her initial disability reports filed in April 1989, Brown stated that she could do light house cleaning but that when she bent over low her back ached. She also reported that she walked for exercise, sometimes visited with friends and relatives, and drove her car occasionally. Although Brown did her own shopping, she brought her daughter along because her vision would become blurry sometimes and it would be difficult to see small objects. Additionally, Brown stated that she did most of her own cooking and put her clothes in the washing machine. Finally, Brown complained that she sometimes became tired when she walked, had back aches "off and on," experienced head aches "sort of often," and at times was short of breath.

Brown has had numerous surgical procedures and medical problems dating from at least 1986.

In May 1986, Dr. Foster Stickley performed an exploratory laparotomy, total abdominal hysterectomy and bilateral salpingo-oophorectomy. The diagnosis was uterine fibroid, endometriosis of the fallopian tubes and ovaries, pelvic inflammatory disease, and anemia, secondary to blood loss. The surgery was described as very traumatic but Brown tolerated the procedure well and was sent to recovery in excellent condition.

In April 1987 Dr. Lonnie Gardiner performed a combined flexible esophagogastroduodenoscopic procedure to evaluate Brown's chronic epigastric pains. This procedure revealed mild diffuse

gastritis and mild distal esophagitis. As a result, Brown was placed on intensive medical therapy for four to eight weeks.

In August 1988 Dr. Gardiner performed a partial colonoscopy to evaluate rectal bleeding. The examination revealed moderate internal hemorrhoids, but no polyps, vascular lesions, or mass lesions.

In January 1989 Dr. Gardiner performed a flexible sigmoidoscopy on Brown to determine the cause of hemocult positive stools and rectal bleeding. The examination revealed moderate internal hemorrhoids, but no polyps or vascular or mass lesions.

In preparation for vaginal surgery in April 1989, Dr. Stickley took X-rays of Brown which revealed scoliosis of the lower thoracic spine with convexity to the right. The X-rays showed no evidence of active cardiopulmonary disease.

During the April 1989 surgical procedure Stickley took multiple vaginal biopsies from Brown. A pathologist's evaluation of the biopsies revealed a small benign epithelial inclusion cyst, a small focus of calcification, and foci of nonspecific chronic inflammation. The report indicated no evidence of endometriosis or neoplasm (tumors). Dr. Stickley observed that "nothing we found in her vagina . . . would make her have any problems medically for disability."

Dr. Kenneth Ritter examined Brown in June of 1989 for the Disability Determinations Services. Ritter found that Brown's problems were:

- (1) Hypertension under good control at the present time, and it, with increased

- heart size, and the chart from her family physician, is [sic] apparent that this has only been under recent control, and not under very good control in the past.
- (2) Some abdominal pain of an unknown type although certainly with the number of medication [sic] she takes this is possibly responsible for this.
 - (3) Thoracic Scol[i]osis as a possible cause of her back pain.

Ritter concluded that "[f]unctionally Mrs. Brown could certainly do most of the things someone her age would be expected to do. I found her to walk well, to be reasonably strong, and to not have significant difficulties in bending or moving around."

Dr. Gardiner, corresponding with Brown's attorney in October 1989, described her chronic medical problems as including "hypertension, marked scoliosis of the lumbar spine, osteoarthritis of the lumbar spine, and degenerative disc disease of the lumbar spine." According to Gardiner, "[t]hese conditions of the lumbar spine cause significant back pain and disability for . . . Brown." Gardiner remarked that "[g]iven Mrs. Brown's conditions, I feel that the most she could do would be sedentary work; however, she may be unable to tolerate even sedentary work."

OPINION

This Court reviews the Secretary's decision to deny disability benefits based on whether there is substantial evidence in the record to support it and whether the proper legal standards were used in evaluating the evidence. 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." Id. at 1021-22 (citation omitted).

In applying this standard, the Court does not reweigh the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. Id. at 1022.

An individual is disabled under the Social Security Act if he is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months" 42 U.S.C. § 1382(a)(3)(A).

The Secretary follows a five-step process in evaluating a disability claim. 20 C.F.R. § 416.920. 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).

In order to be evaluated as disabled, the claimant: (1) cannot be performing work that is substantial gainful employment; (2) must have a severe impairment that limits his physical or mental ability to do basic work activities; (3) must have an impairment that meets the duration requirement and is listed or equal to one listed in the appendix to the regulations; (4) cannot have the residual functional capacity, measured by physical and mental demands, to do

work performed in the past; and (5) cannot be able to perform other work. 20 C.F.R. § 416.920(b)-(f); Anthony, 954 F.2d at 293.

The claimant has the initial burden of establishing that he can no longer perform his previous work. The burden then shifts to the Secretary to show that there is other substantial work which the claimant can perform. If the Secretary meets this burden, the claimant must then prove that he is not able to perform the alternate work. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5th Cir. 1989); see Carter v. Heckler, 712 F.2d 137, 142 (5th Cir. 1983). While Brown could no longer perform work she did in the past, for the reasons stated below, the ALJ correctly reached the fifth step and ruled that Brown could engage in substantial gainful activity because of her age, education, past relevant work, and residual functional capacity.

Brown contends that there was no substantial evidence supporting the ALJ's decision. Specifically she claims that the ALJ did not give adequate consideration to her subjective complaints of pain, i.e., the stomach pain and breathing impairment, and did not consider the combined effects of her hypertension, back impairment, and other problems in the context of her ability to engage in the full range of sedentary work on a sustained basis.

Where a claimant is said to be capable of performing sedentary work, the ALJ must consider the likelihood that the claimant can meet the minimum physical requirements on a daily basis in the "sometimes competitive and stressful conditions" of the real

world. Wingo v. Bowen, 852 F.2d 827, 831 (5th Cir. 1988) (quoting Allred v. Heckler, 729 F.2d 529, 533 (8th Cir. 1984)).

Subjective Pain:

The effect of the claimant's subjective pain forms part of the determination of whether he can function in the "competitive and stressful conditions" of the real world. "How much pain is disabling is a question for the ALJ since the ALJ has primary responsibility for resolving conflicts in the evidence." Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. 1981). Subjective evidence need not be given precedence over objective evidence. Villa v. Sullivan, 895 F.2d at 1024.

In considering Brown's subjective complaints of pain, the ALJ made the following observations:

[the] claimant's subjective symptoms, including pain, are of only a mild to moderate degree and tolerable to claimant for the level of work, residual functional capacity and work limitations as found herein; and claimant's subjective complaints are found not be [sic] fully credible but somewhat exaggerated and inconsistant [sic] with objective evidence of record."

Under case law in this Circuit, "[a]t a minimum, objective medical evidence must demonstrate the existence of a condition that could reasonably be expected to produce the level of pain or other symptoms alleged." Anthony, 954 F.2d at 296. The ALJ made clear that he did not fully credit Brown's allegations of subjective pain. Considering the discretion accorded the ALJ on this issue and in light of his findings on the objective evidence discussed

below, the ALJ had sufficiently explicit and adequate reasons for dismissing Brown's subjective complaints of pain.

Objective Medical Evidence:

The ALJ also scrutinized the combined effect of Brown's impairments analyzing the basis and outcome of each of Brown's surgical procedures and nonsurgical consultations to find that she was not disabled.

The ALJ dismissed Brown's back condition by noting the following factors: (1) she took only pain medication to treat it; (2) she drove when necessary; (3) she stated that she had just learned to live with the pain; and (4) her treating physician observed only that she might possibly not be able to endure sedentary work. He also noted that Brown had "full range of motion of all [the] joints in her legs." As a result, the ALJ found that Brown had the residual functional capacity to "perform the physical exertion requirements of work except for the inability to engage in the lifting and carrying requirements of light, medium and heavy work due to scoliosis of the lumbar spine."

The ALJ weighed the objective medical evidence and explained his reasons for discrediting the claimant's subjective complaints of pain. See Anderson, 887 F.2d at 633. According to the ALJ, "[t]he credible objective medical evidence of record is not supportive of claimant's exaggerated allegations of totally debilitating pain." Brown did not present medical evidence to contradict his finding concerning her medical condition.

There is substantial evidence to support the ALJ's determination that Brown's medical condition and pain do not amount to a disability for purposes of social security.

Brown also contends that the ALJ erred by giving greater weight to the opinions of the consulting physician rather than those of the treating physician.

As an initial matter, Brown mischaracterizes the record by alleging that the ALJ gave "little or no consideration to Dr. Gardiner's opinion regarding [her] inability to do the full range of even sedentary work."

Dr. Gardiner observed that Brown "may be unable to tolerate even sedentary work," not that she could not perform the full range of sedentary work. The ALJ incorporated Gardiner's evaluation in his decision but chose not to give its equivocal nature controlling weight in favor of disability. The ALJ gave greater weight to Dr. Ritter's determination that Brown was "reasonably strong" and could "walk well" and move around without inordinate difficulty.

As a general matter, to the extent the evidence was inconsistent, "the ALJ is . . . charged with the responsibility and discretion to determine just what weight to give to conflicting evidence presented at the hearing." Wingo, 852 F.2d at 830. More specifically, the ALJ is entitled to determine the credibility of medical experts and to weigh their opinions accordingly. Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985). Gardiner's determination of Brown's residual functional capacity was at best equivocal. Ritter's evaluation by contrast was more definite.

There is no case law, statutory, or administrative support for Brown's proposition that a consulting physician's opinion is per se less weighty than that of a treating physician. "The ALJ may give less weight to a treating physician's opinion when `there is good cause shown to the contrary.'" Id. (citations omitted).

Brown's final argument rests on the premise that she has a significant non-exertional impairment that prevents her from engaging in the full range of sedentary work and that the ALJ was obligated to establish the existence of available jobs based on expert vocational testimony.

Where "the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(a). Here the ALJ made findings of fact as to Brown's age, education, transferability of skills, work experience, and residual functional capacity. In particular, he found that she had a ninth grade education, was a "younger individual," had engaged in unskilled work in the past, and retained the residual functional capacity to work in a job that did not require light, medium, or heavy lifting or carrying. These findings coincided with the criteria in the Medical Vocational Guidelines and it was proper to rely on them. Anderson, 887 F.2d at 634.

Sedentary work is defined as work that:

involves lifting no more than 10 pounds at a time and occasionally lifting or carrying

articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties.

20 C.F.R. § 404.1567(a). These requirements are not dissimilar to the types of activities Brown reported that she could perform.

An ALJ must solicit vocational testimony only if a claimant cannot perform substantially all of the activities in a given category of exertional requirements. Carter, 712 F.2d at 142. In other words, the claimant must meet his prima facie burden of showing disability before the ALJ must consult a vocational expert. Green v. Schweiker, 694 F.2d 108, 112 (5th Cir. 1982), cert. denied, 460 U.S. 1091 (1983). Brown made no such showing. The ALJ can take administrative notice that a significant number of sedentary jobs exist in the region where the claimant lives. 20 C.F.R. § 416.966(d). The ALJ, here, found that Appendix 2 of 20 C.F.R. § 416.969 described numerous jobs in the national economy that Brown could perform.

In this case, there is substantial evidence in the record to support the ALJ's findings and application of the vocational guidelines. For these reasons, the secretary's decision to deny Brown's application for supplemental social security was supported by substantial evidence.

AFFIRMED.