

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5113  
Summary Calendar

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STEPHANIE A. THOMAS,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA, Secretary of Health and Human Services,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Louisiana  
(91-CV-1750)

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June 18, 1993

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:<sup>1</sup>

Stephanie A. Thomas 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 Secretary's termination of disability benefits under the Social Security Act (ACT), 42 U.S.C. § 401, *et. seq.*. We **AFFIRM**.

I.

In January 1987, the Secretary deemed Thomas disabled effective July 25, 1986, due to malignant lymphoma. Thomas was so

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<sup>1</sup> 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 Pursuant to that rule, the court has determined that this opinion should not be published.

diagnosed in the fall of 1986, and was referred to Dr. Gore, an oncologist. Throughout the remainder of 1986 and 1987, Thomas underwent aggressive chemotherapy that required intermittent hospitalization. In October 1987, an exploratory laparotomy was performed, which indicated an absence of lymphoma lesions. Dr. Gore reported that the lymphoma was in complete remission.

In April 1988, Dr. Gore confirmed that Thomas' cancer was in complete remission, but noted that "her chances of recurrence in the future are quite high". Also in April, Dr. McCalla, Thomas' surgeon, reported that the most recent laparotomy showed an absence of residual malignant lymphoma. The doctor opined that there was no physical basis for continued disability; but, "[f]urther questions of her disability concerning her long treatment as [sic] chemotherapy and the prognosis of the malignant lymphoma should be addressed to Dr. Stanley Gore".

In May 1988, the Secretary terminated Thomas' benefits due to medical improvement; Thomas requested reconsideration. In May 1989, an administrative law judge (ALJ) found that Thomas was not disabled as of May 1988, based, in part, on the following reports.

In June 1988, Dr. Gore reported to Disability Determinations that Thomas had received no chemotherapy since August 1987; that she was ambulatory; that she had no "abnormalities" with respect to sitting, standing, handling objects, speaking, or hearing; and that he was not aware of any mental impairment; but, that it would not be reasonable to expect her to lift or carry heavy objects. He noted that he could find no explanation for her continuing

complaints of abdominal pain. In July 1988, however, Dr. Gore assessed that Thomas had undergone extensive chemotherapy with possible long-term effects, and that "[s]he is probably not employable at this time".

In August 1988, Dr. Morin diagnosed Thomas with a mild to moderate depressive reaction, noting that she was well-developed and obese; fully alert and oriented with an intact memory for both recent and remote events; and able to relate to others with no restriction in interests, deterioration in personal habits, or restrictions in daily activities.

In November 1988, Dr. Gore assessed that Thomas was able to lift 15 pounds occasionally and frequently able to lift and carry eight to ten pounds. He stated that Thomas could occasionally balance, stoop, crouch, kneel, and crawl, but could never climb. He further stated that, due to decreased stamina and exercise capability, Thomas should not stand or walk for more than one hour in an eight-hour day, but that Thomas' ability to sit was not restricted. Dr. Gore opined that, because of peripheral neuropathy from chemotherapy, Thomas would have problems fingering, feeling, pushing, or pulling.

In an undated response to questions, Dr. Gore reported that he last saw Thomas in December 1988, at which time, Thomas complained of chronic abdominal swelling and pain in her hands. He concluded that Thomas experienced "intermittent abdominal swelling"; that "chemotherapy may be causing peripheral neuropathy"; and that due

to decreased stamina and exercise capability, Thomas was unable to stand and walk for six to eight hours of an eight hour day.

Through 1989, Thomas continued her visits to the oncology clinic. She was hospitalized in November 1989 for pneumonia, and in December 1989 for a myelography and bone scan; all tests showed normalcy, although the bone scan revealed some arthritis in the joints. Dr. Gore could not establish the basis for her complaints of severe back pain; he asserted that, to some degree, Thomas' complaints of pain had "a psychological component".<sup>2</sup>

As noted, and based on an administrative hearing in December 1988, the ALJ issued a decision in May 1989, finding plaintiff not disabled. In May 1990, the Appeals Council remanded the case to the ALJ, stating that the ALJ's decision, *inter alia*, did not adequately address Thomas' subjective complaints, including pain, nausea, numbness, dizziness, and shortness of breath.

Dr. Gore submitted two additional reports prior to Thomas' second administrative hearing. In January 1990, Dr. Gore assessed that Thomas was not restricted from lifting or carrying any weight; that due to Dyspnea and abdominal pain, she could only walk for one-half of an hour and sit for one to two hours in an eight-hour day; that, because of abdominal pain, she could never climb, crouch, kneel, or crawl; that, due to numbness in her fingers from chemotherapy, Thomas could not finger, feel, push, or pull; and that, because of fatigue and anxiety, Thomas should be restricted

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<sup>2</sup> In June 1990, Dr. Gore reached a similar conclusion: "I feel that many of [Thomas'] complaints are related to psychogenic origin. She is given Prozac and advised to take this daily".

from all environmentally-restrictive surroundings. Based on the foregoing, Dr. Gore concluded that Thomas "should be considered totally disabled". In July 1990, Dr. Gore reported that Thomas continued to be in remission from malignant lymphoma, although she still suffered from chronic intermittent pain syndrome, shortness of breath on exertion, and chronic abdominal swelling.

A second administrative hearing was held in July 1990. Thomas testified that she had medically improved since 1986, and that her ability to walk had improved from the hearing in December 1988.<sup>3</sup> She stated that lifting heavy objects was the only restriction Dr. Gore had imposed, and that she was able to drive. Nonetheless, Thomas insisted that she was unable to work.

A vocational expert testified. The ALJ presented two hypotheticals. The first included limitations contained in Dr. Gore's January 1990 report, including severe impairments in her capacity to stand, walk, and sit, *see infra* note 9. The expert responded that, given such limitations (i.e. total time standing one-half of an hour; total time sitting one to two hours), there were no available jobs in the national or regional economies. The ALJ re-examined Thomas, who testified that in the course of an eight hour day, she could stand a total of "about three hours", and sit for a total of one hour.

The ALJ then addressed a second hypothetical to the vocational expert, asking whether there were a significant number of jobs in

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<sup>3</sup> She testified that she was now able to walk four blocks without pause.

the national economy that (1) require no more than occasional climbing, crouching, kneeling, or crawling; (2) require alternate sitting and standing during the work day; (3) require no protracted exposure to environmental pollutants or temperature extremes; and (4) are available to individuals with a high school education and residual functional capacity for light work who are not able to understand, remember, or carry out complex or detailed job instructions. The vocational expert testified that an individual with the above description would be qualified for jobs such as routing clerk, credit card clerk, cashier, food checker, cashier checker, and repair order clerk, which exist in very high numbers in the local and national economies.

Finally, the ALJ modified the second hypothetical and asked the expert to consider "the additional restriction that there be a need for two to three hours of recumbent rest during the course of the day". The vocational expert responded that "you're going to run into problems with some of the clerking positions. The employers generally will not allow the -- that rest during an eight hour work day."

In view of the expert's differing responses to the hypotheticals, the ALJ concluded, "what I need to do at this point is go back and look at what the doctors have found and look at their conclusions, and take into account what [Thomas has] told me [regarding restrictions on sitting and standing], and decide whether that testimony is supported or not".

In his report, the ALJ found that "[b]ased on the evidence of record, including the testimony of the claimant, . . . the claimant retains the residual functional capacity for a wide range of light work activity . . . reduced in this case by [the limitations set forth in the unmodified second hypothetical]". Accordingly, the ALJ concluded that considering Thomas' age (40), education (high-school), clerical skills from past relevant work as a cashier, and the opinion of the vocational expert, Thomas could perform other work that existed in significant numbers in the national economy, such as clerical jobs, cashier, and credit clerk<sup>4</sup>; she therefore was no longer disabled.

The appeals council denied Thomas' request for a rehearing; thus, the ALJ's determination became the final decision of the Secretary. Thomas filed a complaint in district court seeking review of the Secretary's decision; and it granted the Secretary's motion for summary judgment.

## II.

On review, this court determines 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); see also 42

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<sup>4</sup> We agree with the district court that this finding is consistent with the ALJ's finding that Thomas could not return to her past relevant work as a cashier-checker. As the district court noted, Thomas testified that her former job included stocking the store, cleaning, and delivery. The cashier-checker jobs described by the vocational expert required "no more than occasional climbing, crouching, kneeling, and crawling" and thus, unlike her former job, were suited to her functional limitations.

U.S.C. § 405(g). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It must be more than a mere scintilla, but it need not be a preponderance. **Richardson v. Perales**, 402 U.S. 389, 401 (1971).

In termination proceedings, the Secretary bears the ultimate burden of proof, **Griego v. Sullivan**, 940 F.2d 942, 944 (5th Cir. 1991), and may terminate benefits if substantial evidence demonstrates that (1) the claimant has undergone medical improvement related to her ability to do work; and (2) the claimant is able to engage in substantial gainful activity.<sup>5</sup> **Id.**

Thomas' disability was based on the presence of non-Hodgkin's lymphoma. See 20 C.F.R. § 404, Subpt. P, App. 1, §§13.06(A). We

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<sup>5</sup> The implementing regulations set forth an eight-step sequential process for evaluating possible terminations:

(1) is the claimant engaged in substantial gainful activity; (2) if not, does the claimant have an impairment or combination of impairments which meets or equals the severity of an impairment listed in appendix 1; (3) if not, has there been medical improvement; (4) if there has been medical improvement, is it related to the claimant's ability to do work; (5) if there has been no medical improvement, or if the medical improvement is not related to the claimant's ability to do work, is one of the exceptions to medical improvement applicable; (6) if there has been medical improvement related to the claimant's ability to do work, or if one of the first group of exceptions is applicable, is the combination of impairment's severe; (7) if so, is the claimant able to engage in past relevant work; (8) if not, is the claimant able to perform other work in the national economy.

20 C.F.R. § 404.1594 (f)(1-9).



agree with the district court that the remission of Thomas' lymphoma, and the termination of aggressive chemotherapy with resulting hospitalization, constitute an improvement in Thomas' medical condition related to her ability to do work.<sup>6</sup>

Thomas appears to agree that her condition has improved, but maintains that the Secretary's decision fails to properly account for her severe pain, onset of arthritis, symptoms of peripheral neuropathy, decreased stamina, and depression. Similarly, she asserts that the absence of these impairments from the ALJ's hypothetical to the vocational expert rendered the expert's opinion inaccurate. We disagree.

A.

Subjective complaints of pain must be corroborated, at least in part, by "objective medical evidence", which "demonstrate[] the existence of a condition that could reasonably be expected to produce the level of pain or other symptoms alleged". **Anthony v. Sullivan**, 954 F.2d 289, 296 (5th Cir. 1992). We accord great deference to the ALJ's credibility findings as to the debilitating effects of pain. **Hollis v. Bowen**, 837 F.2d 1378, 1384 (5th Cir. 1988). Here, the ALJ recognized that Thomas "experiences some degree of pain and discomfort"; however, he concluded that "[n]either the objective medical evidence nor the testimony of the

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<sup>6</sup> We similarly agree with the district court that the ALJ properly concluded that Thomas has not engaged in substantial gainful activity since July 1986; that Thomas' impairments do not meet or equal the severity of an impairment listed in Appendix 1; that Thomas' impairments are severe; and that Thomas is unable to perform her past relevant work as a teacher's aide or cashier-checker.

claimant establishes that the claimant's ability to function has been so severely impaired as to prevent a wide range of light work activity". The ALJ's findings are amply supported in the record.

Although the record is replete with complaints by Thomas of severe pain in her abdomen, back, and chest, it is devoid of objective medical evidence in support of the alleged severity of her pain. Dr. Gore noted on more than one occasion that he could find no explanation for her continuing complaints of abdominal pain<sup>7</sup>; and he similarly failed to establish medical explanations for her back pain and her chest pain. Instead, Dr. Gore surmised in December 1989 that Thomas' complaints of pain had a "psychological component"; and again, in June 1990, that many of her complaints are related to "psychogenic origin".<sup>8</sup>

Moreover, Thomas' medical record fails to demonstrate the existence of objective factors indicating the existence of severe pain -- such as limitations in the range of motion, muscular atrophy, weight loss, or impairment of general nutrition. See

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<sup>7</sup> Although he reported "intermittent abdominal swelling", he failed to link such swelling with severe abdominal pain.

<sup>8</sup> The ALJ was not required to consider the psychological component of Thomas' pain because, according to a psychiatric assessment report, Thomas had no functional limitations. See **Harrel v. Bowen**, 862 F.2d 471, 482 (5th Cir. 1988) (stating that "in the absence of a *medically determinable* mental impairment, the Secretary is not required to consider the effects of [psychosomatic pain] on the claimant's work capacity"). Although the "OHA Psychiatric Review Technique Form" found that Thomas had "affective disorders" due to "psychological component to pain", the disorder only "slightly" restricted her activities of daily living, and her maintenance of social functioning, and "seldom" resulted in, *inter alia*, "deficiencies of concentration". Dr. Morin's psychiatric report is consistent with this assessment.

**Hollis**, 837 F.2d at 1384 (stating that the absence of such factors can justify the ALJ's conclusion).

In addition, Thomas' daily activities are inconsistent with the alleged severity of her condition. Thomas reported that she cares for her daily needs, attends church, drives a car, performs light housekeeping, watches television, and reads both the newspaper and the Bible. Thomas' complaints were also contradicted by her demeanor at the hearing; the ALJ noted that Thomas "exhibited no signs of experiencing discomfort while remaining seated throughout the hearing and was able to respond appropriately to questioning throughout the proceedings".

Finally, Dr. Gore's January 1990 assessment, stating that abdominal pain precluded Thomas from sitting more than two hours in an eight hour day, was properly disregarded. "Generally, unless good cause can be shown to the contrary, a treating physician's opinion is entitled to considerable weight". **Floyd v. Bowen**, 833 F.2d 529, 531 (5th Cir. 1987). Here, however, as stated *supra*, there is no medical basis for Dr. Gore's assessment of the severity of Thomas' pain. More important, the January 1990 opinion is contradicted by his June 1988 report, in which he stated that Thomas had no abnormalities with respect to sitting, and his November 1988 report, in which he repeated that Thomas' ability to sit was not restricted. There is no explanation for his change in opinion; Gore was aware of Thomas' complaints of abdominal pain well before June 1988, and her medical condition in no way

deteriorated. Given this internal inconsistency, it was within the ALJ's discretion to disregard Dr. Gore's January 1990 assessment.

Accordingly, we conclude that the requisite substantial evidence supports the ALJ's findings regarding the nature of Thomas' pain. The ALJ did not err by omitting references to pain, including restrictions related to sitting, in his hypothetical to the vocational expert.

B.

Thomas maintains that the ALJ ignored her testimony, corroborated by Dr. Gore's reports, regarding her decreased stamina. The record contains numerous references of Thomas' complaints of decreased stamina and shortness of breath<sup>9</sup>; and, in November 1988, December 1988, and January 1990, Dr. Gore opined that Thomas' ability to stand and walk was severely limited due to same.<sup>10</sup>

In his first hypothetical to the vocational expert, the ALJ asked the expert to consider the restrictions set forth in Dr. Gore's January 1990 report. The disability determination, however, was based on a second hypothetical, in which the ALJ asked the expert to consider a claimant capable of "alternating sitting and standing" throughout an eight hour day. In so doing, the ALJ did not disregard the limitations on standing, as expressed by Thomas

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<sup>9</sup> As noted, Thomas testified that, in the course of an eight hour day, she could stand a total of about three hours.

<sup>10</sup> Dr. Gore reported that Thomas had the capacity to walk for one-half of an hour and sit for one to two hours in a eight hour day.

and Dr. Gore, but simply did not find credible their assessment of the severity of Thomas' condition.<sup>11</sup> The ALJ's credibility assessment is amply supported by the record.

First, Dr. Gore's failure to provide a meaningful medical explanation for the cause of Thomas' condition and its severity minimizes the weight of his opinion.<sup>12</sup> In addition, the above reports are inconsistent with his June 1988 report, in which he stated that Thomas had no abnormalities with respect to standing, and are inconsistent with Thomas' description of her daily activities. Furthermore, his opinion is contradicted by the opinion of Dr. McCalla, Thomas' surgeon, who reported in April 1988 that "I find no physical examination that the patient is disabled".<sup>13</sup> Where evidence presents conflicting testimony and reports that must be evaluated by their credibility, it is the Secretary's duty, not the duty of the courts, to resolve material

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<sup>11</sup> The ALJ expressed particular concern regarding the exertional requirements of the jobs described by the vocational expert (e.g., cashier, clerk, or combination). He asked the expert whether the clerical positions described "require a person to be on their feet six out of eight hour work day?"; the expert responded that "a lot" of the jobs described may be performed in "a seated position"; that a combination of sitting and standing vary with the particular job.

<sup>12</sup> In June 1988, Dr. Gore stated in general terms that "her performance status is reduced as compared to someone who has never had chemotherapy"; however, in the same report, Dr. Gore stated that Thomas was ambulatory, and had no abnormalities with respect to standing.

<sup>13</sup> We recognize that the strength of Dr. McCalla's opinion as compared to Dr. Gore in terms of the effects of chemotherapy is minimized by Dr. McCalla's statement that "[f]urther questions of [Thomas'] disability concerning her long treatment as chemotherapy ... should be addressed to Dr. Stanley Gore".

conflicts in the evidence and decide the case. *Chapparo v. Bowen*, 815 F.2d 1008, 1011 (5th Cir. 1987). Accordingly, the ALJ did not err in failing to wholly accept the restrictions as set forth by Thomas and Dr. Gore.

C.

Thomas contends that the ALJ did not properly account for her symptoms of peripheral neuropathy. In November 1988, and January 1990, Dr. Gore reported that Thomas' chemotherapy treatment resulted in peripheral neuropathy, which impairs her ability to finger, feel, push, and pull, although she retains the ability to reach and handle. Other reports cast doubt on these findings. In May 1988, Dr. Gore reported that Thomas complained of "numbness" in her hands, but he failed to discover significant abnormality. And, in June 1988, he reported that Thomas had received no chemotherapy since August 1987, and had no abnormalities with respect to handling objects. It was certainly within the discretion of the ALJ to rely on the earlier reports, especially because, according to Dr. Gore, adverse reactions to chemotherapy "resolve" over time. In addition, Thomas testified that she takes medication every day to relieve cramping in her fingers, and that during the day the cramping usually subsides.<sup>14</sup> Accordingly, we conclude that the record contains substantial evidence in support of the ALJ's implicit conclusion that Thomas' peripheral neuropathy was either

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<sup>14</sup> She testified, "it's really bad on me when I wake up in the morning. It's mostly bad in the morning time. But, during the day it usually leave, and it will come back".

not as severe as claimed or would otherwise not interfere with her ability to work.<sup>15</sup>

III.

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

**AFFIRMED.**

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<sup>15</sup> In addition, the ALJ did not err in failing to properly account for Thomas' depression and arthritis. As stated *supra*, a psychological assessment concluded that Thomas had no functional impairments. As for her arthritis, there is no indication in the record that her arthritis would impair her ability to work.