

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5578

Summary Calendar

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BERTIE FIELDS,

Plaintiff-Appellant,

versus

LOUIS W. SULLIVAN, Secretary  
of Health and Human Services,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-91-CA-608)

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( February 3, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Bertie Fields brought this suit in the U.S. District Court for the Western District of Texas, seeking review of the Secretary's denial of Title II disability benefits. The Administrative Law Judge determined, after a hearing, that Fields was not disabled within the meaning of the Social Security Act and thus was ineligible to receive benefits. The district court affirmed. On

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal, Fields renews her contention that the ALJ's findings are not supported by substantial evidence. In particular, she maintains that the ALJ did not accord proper weight to her testimony and her physician's reports and that the Appeals Council erred in refusing to consider additional evidence she submitted after the ALJ had issued his decision. We find these claims meritless and affirm.

I.

Bertie Fields injured her back while lifting a box of computer paper in May 1987. She began treatment with Dr. Lester Lang soon after. In June 1987, a CT scan of Fields' lumbar spine disclosed a central bulging of the L4-5 disk. An August 1987 myelogram revealed scoliosis of the lumbar spine and the central bulging at L4-5. The report stated that such findings were consistent with degenerative disk disease, but also noted the absence of any evidence of disk herniation or nerve root compression. In December 1987, Dr. Lang referred Fields to Dr. Warren Neely, a neurological surgeon. Dr. Neely found that Fields' sensory and motor functions were virtually normal, but that her range of motion was reduced by 50% in all directions. He suspected that Fields had left L5 nerve root irritation and recommended steroid injections. The injections led to marked improvements in Fields' range of motion and straight leg raising. On February 25, 1988, Dr. Neely reported that she "is doing fairly well at this time from her back, hip and legs standpoint."

This period of improvement, however, was brief. Fields began to complain of left shoulder pain and underwent various tests over the next few months. The results were largely negative: April 1988 MRI tests of her cervical and lumbar spine disclosed no gross abnormality; a May 1988 NCS and EMG test revealed no evidence of peripheral neuropathy or lumbosacral radiculopathy; and a July 1988 left shoulder arthrogram was normal. Fields' complaints of increasing pain in her left shoulder, back, and leg, however, led Dr. Donald Bacon to administer additional injection therapy. In June, Dr. Neely noted that Fields "remains very symptomatic" and, in light of the lack of improvement, recommended removal of the L4-5 disk. When Fields and her husband elected to continue with conservative care in September 1988, Dr. Neely reported that he agreed with this decision and that he had instructed her concerning an active walking program, one that he had previously prescribed but one in which Fields had not yet participated. Additional examinations in November 1988 and January 1989 prompted Dr. Neely to reiterate his belief that surgery was necessary. "Her complaints have not changed. Her exam had not changed." After one year of conservative treatment, Fields' condition "has not improved."

Fields filed for disability benefits on January 20, 1989. She continued to see Dr. Lang and Dr. Neely at this time. Dr. Neely reported in May 1989 that Fields was experiencing pain in her neck, shoulders, wrists, back, hips, and left leg and a tingling sensation in her right index finger. An exam disclosed decreased

range of motion of the neck and waist and mildly positive straight leg raising at 80 degrees. Fields' motor function, however, was difficult to test because of poor cooperation and the results of the sensory examination "did not conform to any particular dermatonal distribution or peripheral nerve distribution." Dr. Lang stated for the first time in June 1989 that Fields "has been totally disabled" since her injury in May 1987 and that surgery might be necessary to improve her condition. He repeated this opinion in reports dated July 19 and September 8.

A hearing took place on September 14, 1989. Treating physicians' reports were submitted as exhibits and the ALJ heard the testimony of Fields and Dr. Don Marth, a vocational expert. Fields testified that the pain in her shoulders, back, and leg interfered with her sleep and severely limited her activities. She stated that she was able to attend to her personal needs, perform some of the cooking and cleaning, drive, watch television, and read, but could not walk more than a block before the pain became too great. Fields could not "sit for a long period of time without having to move around" and could not stand for more than fifteen minutes without become weak. In addition, she had difficulty holding things in her hand.

Dr. Marth testified that there were several jobs in the national economy for which Fields would be qualified if she were found capable of sedentary work, including many which have a sit/stand option. He also stated, however, that Fields would not

be able to perform any of these jobs if her complaints of pain were fully credible.

The ALJ issued his decision on March 31, 1990. He determined that Fields was capable of performing those sedentary jobs with a sit/stand option cited by Dr. Marth and thus was not disabled. While not discounting entirely Field's testimony and Dr. Lang's reports, the ALJ found that her complaints of pain were "credible only to the extent that she would be unable to perform light, medium or heavy work" and that Dr. Lang's opinion that she was "totally disabled" was "not well supported by objective evidence." Fields sought review of this decision and submitted additional documents, including another report of disability from Dr. Lang dated July 2, 1990. When the Appeals Council denied her request for review, Fields brought this suit in U.S. District Court for the Western District of Texas, contending that the ALJ did not properly weigh her testimony and the reports of Dr. Land and that the Appeals Council erred in refusing to consider Dr. Lang's subsequent report of disability. The district court adopted the magistrate's recommendation and affirmed the ALJ's determination. This appeal followed.

## II.

A claimant is "disabled" within the meaning of the Social Security Act if she is unable to perform substantial gainful activity for at least twelve consecutive months because of a medically determinable impairment. 42 U.S.C. § 423(d)(1)(A); Shipley v. Secretary of Health and Human Services, 812 F.2d 934,

935 (5th Cir. 1987). Disability is determined according to a five-step sequential evaluation. 20 C.F.R. § 404.1520; Villa v. Sullivan, 895 F.2d 1019, 1022 (5th Cir. 1990). The ALJ's decision in this case rests on step five, in which the Secretary must show that a claimant who cannot return to her past relevant work is capable of performing other work in the national economy. Mays v. Bowen, 837 F.2d 1362, 1364 (5th Cir. 1988). If the Secretary carries this burden, claimants must demonstrate that they cannot perform such work. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5th Cir. 1989).

The ALJ found that Fields "has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for prolonged standing, walking, lifting over 10 pounds, or performing work not offering a sit/stand option." Relying on the vocational testimony offered by the Secretary, the ALJ concluded that "there are a significant number of jobs in the national economy which [Fields] could perform" and therefore held that she was not disabled. Vol. II, at 25-26.

Fields challenges this finding on appeal. Our review of Fields' claim is limited to determining whether the Secretary's decision is supported by substantial evidence and whether he applied the proper legal standards. Carrier v. Sullivan, 944 F.2d 243, 245 (5th Cir. 1991). Substantial evidence is evidence that a reasonable mind might accept as adequate to support the decision. Richardson v. Perales, 402 U.S. 389, 401 (1971). We will find that a decision is not supported by substantial evidence only where

there is a conspicuous absence of credibility choices or no contrary medical evidence. Abshire v. Bowen, 848 F.2d 638, 640 (5th Cir. 1988). On the other hand, in cases where there is conflicting evidence, the Secretary's determination will be conclusive. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990). Application of the substantial evidence standard presumes a careful review of the record, but does not extend to a reweighing of the evidence. Abshire, 848 F.2d at 640.

Fields' argument that the ALJ did not accord sufficient weight to the testimony of Dr. Land and herself appears to be no more than an invitation to reweigh the evidence. Fields couches her claims in legal terms, however, contending that the ALJ's decision not to credit this testimony is attributable to his failure to employ the proper standards. In particular, Fields maintains that the ALJ's finding of no disability rests on an impermissibly arbitrary refusal to consider Dr. Lang's "uncontroverted" medical opinion to the contrary, see, e.g., Goodley v. Harris, 608 F.2d 234 (5th Cir. 1979), and a credibility determination unaccompanied by an analysis of the appropriate factors. See Duncan v. Harris, 518 F. Supp. 751 (E.D. Ark. 1980). An evaluation of the record under the proper standards, Fields argues, precludes the conclusion that the ALJ's decision is supported by substantial evidence.

We disagree. First, Fields is correct to assert that the Secretary may not arbitrarily ignore a treating physician's opinion that the claimant is "disabled." This does not mean, of course, that the Secretary must adopt such statements. 20 C.F.R.

§ 404.1527(e)(1). Rather, the testimony of a treating physician will be given "controlling weight" only where this opinion "is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." § 404.1527(d)(2).

The ALJ applied the proper standard in rejecting Dr. Lang's opinion that Fields "was unable to work" on grounds that it was "not well supported by objective evidence." The record provides ample support for this finding. In response to an inquiry from Fields' counsel, Dr. Lang reported for the first time in June 1989 that she had been "totally disabled" since her injury in May 1987. As the Secretary points out, however, a June 1987 examination disclosed only a bulging lumbar disk, and MRI, EMG, and NCS testing in April-May 1988 showed no gross abnormalities. Finally, Dr. Neely, who also treated Fields, never stated that she was disabled. The ALJ was entitled to give more weight to the opinion of a specialist. 20 C.F.R. § 404.1527(d)(5); Babineaux v. Heckler, 743 F.2d 1065, 1068 (5th Cir. 1984).

Fields also contends that the ALJ did not adhere to the guidelines set out in Duncan v. Harris, 518 F. Supp. 751 (E.D. Ark. 1980), in finding her complaints of pain "credible only to the extent that she would be unable to perform light, medium or heavy work." Vol. II, at 26. The Duncan formulation she commends, however, has not been adopted by this circuit. We have held that

an ALJ's unfavorable credibility evaluation of a claimant's complaints of pain will not be upheld on judicial review where the uncontroverted medical evidence shows a basis for the claimant's complaints unless the



ALJ weighs the objective medical evidence and assigns articulated reasons for discrediting the claimant's subjective complaints of pain.

Abshire, 848 F.2d at 642. The ALJ's determination that Fields' pain "is limiting, but . . . not severe enough to preclude other types of work" properly rested on a comparison of her testimony "with the total evidence" and was accompanied by specific reasons.

The ALJ held that "it does not seem reasonable to conclude from the minimal findings in evidence that such could be the basis for the degree of pain alleged." Subjective complaints of pain must be measured against the medical reports, see, e.g., Hollis v. Bowen, 837 F.2d 1378, 1384-85 (5th Cir. 1988), as well as the claimant's level of activity. See Reyes v. Sullivan, 915 F.2d 151, 155 (5th Cir. 1990); Hollis, 837 F.2d at 1385. The ALJ discovered no "evidence of any serious muscular weakness, atrophy, medical joint motion, muscle spasm, sensory loss, or other progressive physical deterioration which might be expected when there is intense and continuous pain." In addition, because Fields was able to drive, perform "some work around the house," "care for most of her personal needs," and "watch television and read," the ALJ stated that any restrictions on her routine were a product of choice, not disability. These findings are well supported by the record.

In sum, the ALJ's decisions to attach lesser weight to Dr. Lang's opinion and find Fields' testimony not fully credible, like his ultimate determination of no disability, were reached through

an application of the correct standards and are supported by substantial evidence.

Finally, we do not believe that the Appeals Council erred in refusing to consider the additional evidence Fields submitted after the ALJ's decision. The Social Security Act provides that a court "may at any time order additional evidence to be taken before the Secretary, but only 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." 42 U.S.C. § 405(g); Bradley v. Bowen, 809 F.2d 1054, 1057-58 (5th Cir. 1987). Fields argues that Dr. Lang's July 2, 1990 report of disability satisfies these requirements. We disagree.

Even if we assume that the evidence is new and that there is good cause for Fields' failure to submit it earlier,<sup>1</sup> she has failed to demonstrate that Dr. Lang's report is material. Fields claims that this evidence is material "in that it related to particular functioning abilities in specific detail in regard to an eight-hour workday setting." It is true that an evaluation of residual functional capacity is especially helpful in assessing a claimant's ability to work. But this is not the standard for materiality; rather, the evidence "must be relevant, probative, and

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<sup>1</sup>It is debatable whether Fields established good cause. She maintains that "good cause was shown for failure to incorporate [Dr. Lang's report] into the evidence in a prior proceeding on the basis that the exam did not occur until subsequent to the hearing." Our precedents expressly hold, however, that such an explanation is insufficient: "The mere fact that a medical report is of recent origin is not enough to meet the good cause requirement." Pierre v. Sullivan, 884 F.2d 799, 804 (5th Cir. 1989) (citing Bradley, 809 F.2d at 1058).

likely to have changed the outcome of the Secretary's determination." Pierre, 884 F.2d at 803; Bradley, 809 F.2d at 1058.

"Relevant" evidence "relate[s] to the time period for which benefits were denied" and cannot "concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition." Haywood v. Sullivan, 888 F.2d 1463, 1471 (5th Cir. 1989) (quoting Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985) (internal quotation omitted)); see also 20 C.F.R. § 404.970(b). The Appeals Council declined to consider Dr. Lang's report on grounds that it related to the time period after the ALJ's decision. This seems reasonable, given that one would expect, absent indications to the contrary, a physician to rely on the present condition of the patient in rendering a medical opinion. While conceding that the document by itself does nothing to subvert this inference, Fields argues that the new evidence must be viewed together with Dr. Lang's prior reports of disability. She adds that the Appeals Council should have sought clarification if it had any questions about its relevance. This argument, however, misperceives the parties' responsibilities. It is not the Secretary's burden to establish that new evidence is not relevant, but a claimant's to prove that it is. Fields has not made the requisite showing, either before the Appeals Council or in this court.

Even if we assume that the report relates to the relevant time period, Fields has not demonstrated that Dr. Lang's report is

likely to have changed the outcome of the ALJ's determination. Fields describes the July 2 report as consistent with Dr. Lang's earlier opinions that she was disabled, opinions which the ALJ rejected as "not well supported objective evidence." There is, therefore, no reason to believe that the ALJ would have accepted the conclusion of the report and reached a different result. At any rate, Fields makes no attempt to demonstrate a likelihood that Dr. Lang's report would have changed the outcome. Rather than challenging the district court's application of this rule, she takes issue with the law itself, contending that new evidence must be considered "[i]f there is any question that it may have changed the outcome of the decision." We need not consider the merits of this proposed standard or whether it has been satisfied in this case (although it is difficult to imagine a case in which it would not be) in order to recognize that it is not the rule that Congress has chosen to adopt.

The district court's decision is AFFIRMED.