UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7137

(Summary Calendar)

J. C. MOORE,

Plaintiff-Appellant,

VERSUS

LOUIS W. SULLIVAN, M.D.,
Secretary of Health & Human Services
of the United States

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
CA W87 0100 (B))

(December 28, 1992)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Plaintiff J. C. Moore's application for a period of disability, and for disability insurance benefits, pursuant to 42 U.S.C. § 423, was denied because the Secretary of Health & Human Services ("the Secretary") found that Moore was not disabled. The district court affirmed the Secretary's decision, and Moore appeals, arguing that: (a) the Secretary's finding of non-

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

disability was not supported by the evidence; (b) the Secretary erred in his application of the Medical-Vocational Guidelines used to determine disability; and (c) because the Secretary did not rely on testimony from a vocational expert, he failed to prove that there are jobs available in the national economy which Moore can perform. We affirm.

I

J. C. Moore was a construction worker until he injured his back on the job, and he has not worked since then. Moore, who attended school through the second grade, can neither read nor write, and has no skills relating to any job other than construction work. Since the date of his injury, Moore has been examined by a number of physicians, who have expressed different opinions as to the nature of Moore's injury and his remaining capacity for work.

Dr. John Evans reported that Moore experienced lower back pain, *see* Record on Appeal, vol. 2, at 234, 251, as a result of which Moore was unable to do any form of work. *See id*. at 224, 234, 251. Dr. James Bosscher also examined Moore and stated that Moore suffered from chronic back pain, and that he would "likely be disabled [for the] rest of [his] life." *See id*. at 229.

Moore received more favorable diagnoses from several physicians, including Dr. Louis Farber, who reported that Moore satisfactorily performed heel and toe walking and deep knee bends. *See id. at 138-39.* Dr. Farber also expressed the opinion that

Moore was not totally disabled. *See id*. A non-examining government physician completed a Residual Functional Capacity Assessment, based on the reports of Drs. Evans and Farber, *see id*. at 126-30, and concluded that Moore was able to stand, sit, or walk about six hours per day, and lift or carry items weighing up to fifty pounds. *See id.* at 128. No other physical limitations were indicated in the Residual Functional Capacity Assessment. *See id.* Finally, Dr. Frank Tilton concluded (after examining Moore) that Moore could occasionally carry objects weighing up to ten pounds for as much as one-third of an eight hour work day, *see id.* at 240; that Moore could stand or walk for two to four hours, at one hour intervals, during an eight hour work day, *see id.*; and that Moore could sit for three to six hours, at one hour intervals, during an eight hour work day. *See id*. at 241. According to Dr. Tilton, Moore could never climb, balance, stoop, kneel, or crawl; but Moore's injury did not affect his ability to push, pull, reach, handle, feel, see, hear, or speak. *See id.*

On September 29, 1986, Moore applied for a period of disability and disability insurance benefits. Moore's application was reviewed by an administrative law judge (ALJ), who first determined that Moore was no longer able to do construction work, but was capable of performing sedentary work,[1] based on Moore's

[1] Sedentary work "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).

medical history. *See* Record on Appeal, vol. 2, at 16. The ALJ then referred to the Medical-Vocational Guidelines ("the Guidelines"), *see id.* at 18, which provided that an individual of Moore's age,[2] education, and experience, who is limited to sedentary work, was not disabled.[3] Based on this information, the ALJ recommended that Moore's application be denied because Moore was not disabled. *See id.* at 18-19. The Secretary adopted the ALJ's findings and denied Moore's application.[4] Moore sought judicial review of the Secretary's decision in federal district court, as authorized by 42 U.S.C. § 405(g)(1988), and the district court affirmed the Secretary's decision. *See* Record on Appeal, vol. 2, at 27, 33.

II

A

Moore contends that the Secretary erred in finding that he was capable of sedentary work. We will uphold the Secretary's finding

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[2] Moore was 38 years old at the time of his injury, and 43 years old when his eligibility for disability insurance benefits expired. *See* Record on Appeal, vol. 2, at 13. Consequently, for purposes of the Guidelines, Moore fit into the category of persons 18-44 years of age.

[3] The Guidelines provide that a person such as Moore, whose "maximum sustained work capability [is] limited to sedentary work," who is 18-44 years of age, and who is illiterate and unskilled, is not disabled. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, tbl. no.1, rule 201.23.

[4] The Appeals Council of the Department of Health & Human Services adopted the ALJ's findings and denied Moore's application, *see* Record on Appeal, vol. 2, at 5-6, which constitutes the final decision of the Secretary. *See id.*, vol. 1, at 9.

of fact if it is supported by "substantial evidence." *See Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990) ("On review, this court's function is to determine whether substantial evidence exists in the record as a whole to support the Secretary's factual findings." (citation omitted)). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 390, 91 S. Ct. 1420, 1427, 28 L.Ed.2d 842 (1971). "This court may not reweigh the evidence or try the issues de novo. Conflicts in the evidence are for the Secretary and not the courts to resolve." *Selders*, 914 F.2d at 617 (citations omitted).

Substantial evidence supports the Secretary's determination that Moore was capable of performing sedentary work. Both Dr. Tilton and the non-examining government physician concluded that Moore was capable of lifting objects weighing at least ten pounds.[5] Dr. Tilton also reported that Moore was capable of sitting up to six hours per day, interspersed with periods of walking or standing, which Moore can do periodically for as long as four hours per day.[6] Furthermore, Dr. Farber and the non-examining government physician both rejected the conclusion that Moore was totally disabled. The medical opinions of these physicians certainly constitute "more than a mere scintilla" of evidence, and are the kind of evidence that "a reasonable mind might accept as adequate

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[5] *See supra* note 1 (definition of "sedentary work").

[6] *See id.*

to support a conclusion." *See Richardson* at 390, 91 S. Ct. at 1427. Moore correctly points out that the Secretary's finding is contradicted by evidence in the record; but "[c]onflicts in the evidence are for the Secretary and not the courts to resolve." *Selders*, 914 F.2d at 617 (citations omitted). Because substantial evidence supports the Secretary's finding that Moore was capable of sedentary work, we will not disturb that finding on appeal.

B

Moore also contends that the Secretary erroneously applied the Guidelines. Moore argues that he should have been found disabled,[7] based on § 201.00(c), which provides that

> [i]nability to engage in substantial gainful activity would be indicated where an individual who is restricted to sedentary work because of a severe medically determinable impairment lacks special skills or experience relevant to sedentary work, lacks educational qualifications relevant to most sedentary work (e.g., has a limited education or less) and the individual's age, though not necessarily advanced, is a factor which significantly limits vocational adaptability.

20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00(c). Moore contends that § 201.00(c) mandates a finding that he is disabled because he is restricted to sedentary work, has no skills, and has only a limited (second grade) education.

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[7] Disability is defined as the "*inability 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 12 months . . . ." 42 U.S.C. § 423(d)(1)(A) (1988) (emphasis added).

We review the Secretary's application of the Guidelines to determine "that no errors of law were made." *See Neal v. Bowen*, 829 F.2d 528, 530 (5th Cir. 1987). We find no errors of law here. Section 201.00(c) explicitly provides that "inability to engage in substantial gainful activity would be indicated where . . . the individual's age . . . is a factor which significantly limits vocational adaptability." The record does not indicate, and Moore does not argue, that his age (38 to 43 years during the period at issue) significantly limits his vocational adaptability. Consequently, § 201.00(c) was inapplicable to Moore's case, and the Secretary was correct in not finding Moore to be disabled based upon § 201.00(c).[8]

Moore also argues that the Secretary erred by not finding him to be disabled under § 201.00(h). Moore relies on an illustrative example contained in § 201.00(h), which indicates that a finding of disabled would be appropriate for a 41-year old individual who is unskilled, illiterate, restricted to sedentary work, *and mildly mentally retarded*. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00(h), example 2. The example illustrates that mentally disabled persons have a reduced capacity for sedentary work, and should be treated accordingly. *See id.* Because Moore is not

[8] Moore's reliance on *Albritton v. Sullivan*, 889 F.2d 640 (5th Cir. 1989), is misplaced for the same reason that § 201.00(c) is inapplicable. *Albritton* involved the application of § 202.00(d), which deals with applicants whose age "is a factor . . . which significantly limits vocational adaptability." *See Albritton*, 889 F.2d at 643; 20 C.F.R. pt. 404, subpt. P, app. 2, § 202.00(d). Because Moore's age did not significantly limit his vocational adaptability, neither *Albritton* nor § 202.00(d) is apposite.

mentally retarded, the example has little, if any, bearing on his application, and the Secretary committed no "error of law," *see Neal*, 829 F.2d at 530, in declining to rely upon it.

C

Lastly Moore contends that substantial evidence does not support the Secretary's finding that he can perform jobs available in the national economy.[9] The Secretary determined that Moore could perform available jobs))and therefore was not disabled))on the basis of the Guidelines,[10] without the benefit of expert testimony.

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[9] In determining whether an applicant is disabled, the Secretary follows a five-step procedure. *See* 20 C.F.R. § 404.1520. If the applicant is found not to be disabled at any step, no further steps are undertaken. *See id.* § 404.1520(a). Where the fifth step is reached, the Secretary determines whether the applicant is capable of performing jobs which exist in the national economy. *See id*. §§ 404.1520(f) and 404.1561. The Secretary bears the burden of proving that the applicant can perform available jobs. *Fraga v. Bowen*, 810 F.2d 1296, 1301-02 (5th Cir. 1987). If the Secretary does not prove that the applicant is able to perform available jobs, the applicant will be found disabled. *See* 20 C.F.R. §§ 404.1520(f).

[10] The Secretary uses the Guidelines to determine whether there are jobs in the national economy which an applicant can perform. If an applicant fits the profile contained in a particular Guideline rule, that rule directs a finding of "disabled" or "not disabled," depending on the availability of jobs for applicants fitting the rule's profile. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00 (The rules in the Guidelines "reflect the analysis of the various vocational factors (i.e., age, education, and work experience) in combination with the individual's residual functional capacity (used to determine his or her maximum sustained work capability for sedentary, light, medium, heavy, or very heavy work) in evaluating the individual's ability to engage in substantial gainful activity in other than his or her vocationally relevant past work . . . . The existence of jobs in the national economy is reflected in the . . . rules . . . .").

The Secretary applied Rule 201.23, and determined that Moore was capable of performing jobs available in the national economy. *See supra* note 3.

Moore contends that the Secretary's finding is not supported by substantial evidence, because the Secretary failed to consider the testimony of a vocational expert.

We will not disturb the Secretary's determination so long as it is supported by substantial evidence. *See Fraga v. Bowen*, 810 F.2d 1296, 1304 (5th Cir. 1987) (finding of "not disabled"))based on the Guidelines alone, without expert testimony))reviewed for substantial evidence). The Guidelines alone amount to substantial evidence, and vocational expert testimony is not necessary, where 1) the applicant's characteristics precisely fit the criteria specified in the Guidelines, and 2) the applicant suffers only from exertional limitations[11] or his non-exertional limitations[12] do not significantly affect his capacity for work. *Fraga*, 810 F.2d at 1304. *See also Hernandez*, 704 F.2d at 863 ("When . . . the factors used in the guidelines coincide with the [applicant's] actual situation, the guidelines substitute for vocational expert testimony . . . ."). Because Moore precisely fit the profile contained in Rule 201.23,[13] and was afflicted only by exertional impairments,[14] vocational expert testimony was not necessary to

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[11] "Limitations are classified as exertional if they affect [the applicant's] ability to meet the strength demands of jobs." 20 C.F.R. §404.1569a. The strength demands of jobs are "sitting, standing, walking, lifting, carrying, pushing [and] pulling." *Id.*

[12] Non-exertional limitations are those which affect the applicant's ability to meet demands other than strength demands. *Id.*

[13] *See supra* note 3.

[14] Moore does not allege that his back injury amounts to a non-exertional impairment, and nothing in the record suggests that

support the Secretary's determination that Moore could perform available work.

Nonetheless, Moore contends that vocational expert testimony was required in his case, because he was able to perform only a limited range of sedentary work. Moore relies on *Ferguson v. Schweiker*, 641 F.2d 243 (5th Cir. 1981). There we held that, where an applicant is unable to perform the full range of work specified by the applicable Guideline rule, the Secretary cannot meet his burden of proof unless he relies on the testimony of a vocational expert. *Ferguson*, 641 F.2d at 248 ("It is only when the claimant can clearly do unlimited types of light work . . . that it is unnecessary to call a vocational expert . . . ." (citations omitted)).

Moore's reliance on *Ferguson* is misplaced. Unlike Ferguson, Moore does not suffer from exertional impairments which limit his ability to do the kind of work specified in the applicable Guideline rule. The Secretary found that, in spite of his back pain, Moore was capable of performing sedentary work,[15] which finding is supported by substantial evidence.[16] In *Ferguson*, by contrast, unrefuted medical testimony showed that Ferguson was unable to push, pull, climb, balance, or reach overhead, all of which were required for much of the light work (such as custodial

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his injury affects demands other than strength demands. *See supra* notes 11, 12.

[15] *See supra* note 1 (definition of "sedentary work").

[16] *See supra* II.A.

jobs) which the Secretary found Ferguson capable of performing. *See Ferguson*, 641 F.2d at 247. Because of these exertional limitations, Ferguson's characteristics did not fit those set out in the applicable Guideline rule. Therefore, *Ferguson* is distinguishable, and provides no support for Moore's position.

Moore argues that his illiteracy limited the range of sedentary jobs that he could perform, and therefore *Ferguson* required the Secretary to consider expert testimony. We disagree. Because illiteracy is one of the features of the applicant profile in Rule 201.23,[17] Moore precisely fit that profile. Furthermore, unlike Ferguson's physical limitations, which necessitated expert testimony, Moore's illiteracy is not the type of limitation which is considered in determining an applicant's work capacity (e.g. sedentary, light, medium, etc.).[18] Consequently, for the purposes of the Secretary's disability determination, Moore's illiteracy did not diminish his capacity for sedentary work. Even though he was illiterate, Moore precisely fit the profile in Rule 201.23, and expert testimony was not required. *See Fraga*, 810 F.2d at 1304; *Hernandez*, 704 F.2d at 863.

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[17] *See supra* note 3.

[18] An applicant's ability to perform various levels of work is determined on the basis of the applicant's impairments. *See* 20 C.F.R. § 404.1545 ("Your impairments and any related symptoms . . . may cause physical and mental limitations that affect what you can do in a work setting."). Illiteracy is not an "impairment." *See* 20 C.F.R. § 404.1508 ("Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques.").

III

For the foregoing reasons, we AFFIRM.