UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7463

(Summary Calendar)

JUANITA BUTLER,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA, M.D.[*]

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(CA E91 0049 (L))

(September 10, 1993)

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

PER CURIAM:[**]

Juanita Butler appeals the district court's dismissal with prejudice of her action for judicial review of the Secretary's decision denying her application for a period of disability, and for disability insurance benefits, pursuant to 42 U.S.C. § 423

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[*] Donna E. Shalala is substituted for her predecessor Louis W. Sullivan, M.D., Secretary of Health and Human Services, pursuant to Fed. R. App. P. 43(c)(1).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(1988). Finding no error, we affirm.

I

Butler first experienced back problems in 1980, as a result of standing for several hours a day while working as a cashier. In 1980, Butler received back surgery from Dr. R.T. Abangan. After the surgery, Dr. Abangan reported that an examination of Butler's back showed a full range of motion, and that Butler "had complete relief from her pain" and that "her postoperative course was uneventful." Record on Appeal, vol. 2, at 142-44. Butler continued, however, to complain of back pain. Since 1980, Butler has been examined by several doctors.

Butler applied for a period of disability and disability benefits in April 1989, with a protective filing date of March 22, 1989, pursuant to Title II of the Social Security Act, 42 U.S.C. § 401 et seq. (1988). She alleged disability to due memory loss, back pain, and headaches. After her application was denied initially, and on reconsideration, Butler requested a hearing. After holding a hearing, the Administrative Law Judge ("ALJ") issued a decision finding that she was not disabled based on her alleged exertional limitations. Among his findings, the ALJ wrote:

> 1. The claimant met the special earnings requirements of the Act as of May 10, 1985, [the] alleged disability onset date, and continued to meet them through June 30, 1986, but not thereafter.
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> * * * *
>
> 3. The medical evidence establishes that at pertinent and adjudicative times, the claimant had [the] medically determinable impairment of post-status disc surgery and intermittent aching and pain on extensive standing, but that she did not have an

> impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulation No. 4.
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> * * * *
>
> 4. [The] [a]llegation of inability to work during the period May 10, 1985-June 30, 1986, due to pain or other subjective symptomatology is not credible in light of the evidentiary record and the adjudicative criteria set forth in Social Security Ruling 88-13.
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> * * * *
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> 7. The claimant's impairment did not prevent the claimant from preforming work as a dental assistant [sic] [or] cashier during the period May 10, 1985-June 30, 1986.

Id. The Secretary adopted the ALJ's findings and denied Butler's application.[1]

Butler, represented by counsel, filed an action in district court seeking review of the Secretary's decision pursuant to 42 U.S.C. § 405(g) (1988). The case was referred to a magistrate judge who recommended affirming the Secretary's decision. Over Butler's objections, the district court adopted the magistrate judge's report and recommendation. Butler appeals.

II

A

Butler first argues that the ALJ's find that she was not disabled is unsupported by substantial evidence. On review, this Court determines whether substantial evidence exists in the record

[1] The Appeals Council of the Department of Health & Human Services adopted the ALJ's findings and denied Butler's application, *see* Record on Appeal, vol. 2, at 12, which constitutes the final decision of the Secretary. *See id.*

as a whole to support the ALJ's factual findings and whether the proper legal standards were applied. *Griego v. Sullivan,* 940 F.2d 942, 945 (5th Cir. 1991); *Villa v. Sullivan,* 895 F.2d 1019, 1021 (5th Cir. 1990). If substantial evidence supports the Secretary's findings, they are conclusive and must be affirmed. 42 U.S.C. +s 405(g) (1988); *Richardson v. Perales,* 402 U.S. 389, 390, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); *Selders v. Sullivan,* 914 F.2d 614, 617 (5th Cir. 1990). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. *Richardson,* 402 U.S. at 401, 91 S. Ct. at 1427; *Selders,* 914 F.2d at 617. It is more than a mere scintilla, and less than a preponderance. Moore v. Sullivan, 919 F.2d 901, 904 (5th Cir. 1990). "This Court may not reweigh the evidence or try the issues de novo. Conflicts in evidence are for the Secretary and not the courts to resolve." *Selders,* 914 F.2d at 617 (citation omitted).

The Social Security Act defines disability 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 twelve months." 42 U.S.C. § 423(d)(1)(A). A claimant bears the initial burden of proving by a preponderance of the evidence that she has a medically determinable impairment or combination of impairments which prevents her from performing her past relevant work. *Anderson v. Sullivan,* 887 F.2d 630, 632 (5th Cir. 1989). The burden then

shifts to the Secretary to show that there is other substantial work which the claimant can perform. In order to receive disability insurance benefits, a claimant must also show that her condition became disabling before the expiration of her insured status. 42 U.S.C. §§ 423(a), (c); 20 C.F.R. §§ 404.101, .130, .131 (1992); *Ivy v. Sullivan,* 898 F.2d 1045, 1048 (5th Cir. 1990). The Secretary follows a five-step process in evaluating a disability claim. A finding that a claimant is not disabled at any point terminates the sequential evaluation. *Crouchet v. Sullivan,* 885 F.2d 202, 206 (5th Cir. 1989). The five steps are:

> 1) Claimant is not presently working;
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> 2) Claimant's ability to work is significantly limited by a physical or mental impairment;
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> 3) Claimant's impairment meets or equals an impairment listed in the appendix to the regulations. (If so, disability is automatic.)
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> 4) Impairment prevents claimant from doing past relevant work;
>
> 5) Claimant cannot perform relevant work.

See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520.

The ALJ determined that the relevant period of disability was from May 10, 1985, the alleged onset date of disability, through June 30, 1986, because Butler did not meet the special earnings requirements of the Social Security Act after June 30, 1986.[2] *See*

[2] Butler urges us to consider records of medical examinations conducted after June 30, 1986, the last day that she met the special earnings requirement. Those records allegedly indicate that Butler suffered from memory loss, a nonexertional limitation. We decline to consider the records because an impairment with an onset date or which resulted in disability after the

Record on Appeal, vol. 2, at 18. Therefore, the relevant period of disability was May 10, 1985 through June 30, 1986.

The ALJ found that Butler failed to pass step four in the five-step analysis, and was therefore not disabled, because Butler retained her functional capacity to perform her past relevant work as a dental assistant and cashier. The medical evidence shows that after her surgery, Butler had complete relief from pain. Butler first complained of back pain to her treating physician, Dr. Harry Causey, on May 9, 1985, one day before her alleged onset of disability. *See id.* at 172. Dr. Causey examined Butler, and found that she had mild tenderness over the mid lumbar spine, mild pain over the mid lumbar back, and mild pain over the mid lumbar spine with hypertension. *See id.* Butler told Dr. Causey that her back pain was more pronounced when she sat or stood for prolonged periods of time and when she first got out of bed. *See id.* Dr. Causey recommended that Butler stay off her feet more. *See id.* Dr. Causey's treatment notes reveal that Butler's pain improved significantly over the relevant period. *See id.* at 169-71. Ten days before Butler's insured status expired, she informed Dr. Causey that her pain was "much improved," except for some persistent right thigh discomfort which occurred only when sitting or lying. See i*d.* at 169. After the May 9, 1985 visit, Dr. Causey never again suggested that Butler stay off her feet. The evidence

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date that a claimant last met the special earnings requirement cannot serve as the vasis for a finding of disability. *See Owens v. Heckler,* 770 F.2d 1276, 1280 (5th Cir. 1985); *Ivy v. Sullivan,* 898 F.2d 1045, 1048 (5th Cir. 1990); *see, e.g., Demandre v. Califano,* 591 F.2d 1088, 1090 (5th Cir.), *cert. denied,* 444 U.S. 952, ___ S. Ct. _____, ___ L. Ed. 2d ___ (1979).

also shows that Butler prepared meals, cleaned the house, went grocery shopping, did laundry with her husband's help, went to church sometimes, and took trips. *See id.* at 53-55. In addition, the record indicates that Butler quit working primarily to care for her ill spouse))not because of disabling pain. *See* Record on Appeal, vol. 2, at 46, 89, 172.

Butler argues that the ALJ did not give adequate consideration to her complaints of pain. The evaluation of Butler's subjective symptoms is fully within the province of the ALJ who had the opportunity to observe whether she was disabled. *Harrell v. Bowen,* 862 F.2d 471, 480 (5th Cir. 1988). The ALJ must consider a claimant's subjective complaints of pain. *Carrier v. Sullivan,* 944 F.2d 243, 246 (5th Cir. 1991). Pain constitutes a disabling condition under the Social Security Act only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." *Harrell,* 862 F.2d at 480. "How much pain is disabling is a question for the ALJ since the ALJ has the primary responsibility for resolving conflicts in the evidence." *Carrier,* 944 F.2d at 247 (quoting *Scharlow v. Schweiker,* 655 F.2d 645, 648 (5th Cir. Unit A Sept. 1981); *see also Hollis v. Bowen,* 837 F.2d 1378, 1384 (5th Cir. 1988). The ALJ "may properly challenge the credibility of a claimant who asserts [s]he is disabled by pain." *Allen v. Schweiker,* 642 F.2d 799, 801 (5th Cir. 1981). Subjective complaints of pain must be consistent with the objective record to be established as credible. *Abshire v. Bowen,* 848 F.2d 633, ___ (5th Cir. 1988).

The ALJ made a finding as to Butler's subjective complaints, but did not give Butler's testimony the weight that she desired:

> While there was [evidence] of some moderate aches and pains, application of the adjudicative criteria as set forth in Social Security Ruling 88-13, and the objective medical findings and claimant's activities, shows that [Butler's] allegation of pain and disabling severity is not credible. . . . While she would be precluded from heavy or very heavy work due to her back condition, she could perform her work as a dental assistant or cashier operator. . . . The inability to work without some pain and discomfort is not necessarily determin[ative] of disability. . . . While claimant was certainly entitled to cease work, for whatever reasons were satisfactory to her, the evidence does not show pain of disabling severity at any time on or prior to the date claimant last met the special earnings requirement of the [Social Security Act].

Record on Appeal, vol. 2, at 22. The ALJ's finding is supported by the objective medical evidence, which shows that Butler's pain improved significantly over the relevant period, and was therefore not "constant, unremitting, and wholly unresponsive to therapeutic treatment."

In determining whether a claimant could perform her past relevant work, the ALJ must assess the physical demands of those jobs. *Villa,* 895 F.2d at 1022. This determination may be based on descriptions of past work as actually performed or as generally performed in the national economy. *Id.; see also Jones v. Bowen,* 829 F.2d 524, 527 n.2 (5th Cir. 1987). As a dental assistant, Butler stood for six hours a day, walked one hour, sat one hour, and lifted and carried no more than ten pounds. *See* Record on Appeal, vol. 2, at 85, 88. As a cashier, Butler stood for seven hours, sat for one hour, and lifted nothing heavier than boots, shoes, and luggage. *See id.* at 87. The ALJ's finding that Butler

could perform past relevant work is supported by Dr. Causey's treatment notes, evidence that Butler left work to care for husband and not because of her alleged disability, and evidence that Butler performed activities at home that were compatible with light work. The burden of proving that there was other work available to Butler never shifted to the Secretary, and Butler failed to prove that she was unable to perform her past work. We therefore conclude that the ALJ's finding that Butler was not disabled is supported by substantial evidence.

B

Butler contends the ALJ erred by not requiring the testimony of a vocational expert. Blue brief, 15. She is incorrect. The ALJ determined that Butler retained the capacity to perform her work as a dental assistant. R. 2, 23. The Secretary is not required to obtain expert vocational testimony where the claimant retains the residual functional capacity to perform her past relevant work. *See* 20 C.F.R. § 404.1566(e) (1993) ("If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert."); *see also Harper,* 887 F.2d 92, 97 (5th Cir. ___) (where claimant can perform past relevant work, "lack of expert testimony . . . becomes irrelevant").

C

Butler also argues that the ALJ failed to fully develop the record because he did not order consultative examinations. The ALJ "has the discretion to order a consultative examination." *Anderson v. Sullivan,* 887 F.2d 630, 634 (5th Cir. 1989). An examination is not required "unless the record establishes that such an examination is necessary to enable the administrative law judge to make the disability decision." *Id.* (quoting *Turner v. Califano,* 563 F.2d 669, 671 (5th Cir. 1977). There was sufficient evidence for the ALJ "to have decided that [Butler was] not disabled . . . , and therefore, no additional examination was warranted." *Id.*

III

For the foregoing reasons, we **AFFIRM** the district court's judgment.