UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7477
Summary Calendar

MONCH JERNIGAN,

Plaintiff-Appellant,

versus

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

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Mississippi
CA EC 91 23 D D

(June 29, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Monch A. Jernigan (Jernigan) appeals the district court's judgment affirming the denial of his claim for social security disability insurance and supplemental security income benefits by defendant-appellee the Secretary of Health and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Human Services (the Secretary). Concluding that substantial evidence supports the Secretary's decision, we affirm.

Background and Medical History

Jernigan was born on December 5, 1945, and was forty-three years old at the time of the hearing before the administrative law judge (ALJ). At that time, he was five feet eleven inches tall and weighed one hundred sixty pounds. Jernigan has a tenth-grade education and worked in a plywood plant as a dryer and machine operator from 1966 until the onset of his alleged disability on June 24, 1988. He has not worked since.

On August 22, 1988, and on a follow-up visit on August 28, 1988, Jernigan went to Dr. A. P. Soriano (Dr. Soriano) complaining of problems from a work-related injury to his right wrist that occurred in 1968.[1] Dr. Soriano determined that there existed no diminished range of motion in claimant's wrist. Jernigan complained to Dr. Soriano about blackout spells, but Dr. Soriano was given no history for this complaint. Dr. Soriano described Jernigan's prognosis as satisfactory.

On October 18, 1988, Dr. Dewitt G. Crawford (Dr. Crawford) performed a consultative examination on Jernigan, who complained of weakness in his ankles, knees, shoulder, and right arm; tremors in his right arm; and an occasional swelling in the knees. He apparently made no mention of blackout spells. After an

[1] Jernigan visited Dr. Soriano on June 18, 1987, for hair loss secondary to exposure to wood chemicals, which Dr. Soriano treated successfully. An unknown physician had treated Jernigan between 1970 and 1985 for acne and abscesses. There was no evidence that this physician treated Jernigan for any significant medical conditions.

examination, Dr. Crawford could not determine the cause of Jernigan's joint pain and weakness because it was difficult for Dr. Crawford to determine "what is real and what is not real," and recommended that a neurological and/or orthopedic evaluation be performed.

On October 26, 1988, Dr. Thomas E. Ingram (Dr. Ingram) performed a consultative neurological examination on Jernigan, who at that time complained of difficulty with his left leg "drawing up," stiffness and pain in his right shoulder, fatigue, a "pinched nerve" in his back, general weakness, "nerve problems," and a mild swallowing difficulty (although he also reported gaining thirty to forty pounds within the last year).[2] Jernigan did not mention blackout spells during this visit. Dr. Ingram concluded that "[e]valuation of formal strength testing was limited by the questionable effort by the patient," and that "his strength was judged to be a minimum of 4/5 in all major muscle groups." Dr. Ingram did note that there were possible signs of early tongue atrophy, and recommended to Jernigan a thorough medical examination to determine if the atrophy was treatable.

Dr. Ingram also performed a medical assessment (physical) on Jernigan. Dr. Ingram indicated that based on this assessment, Jernigan could lift and/or carry twenty-five to forty pounds occasionally and ten to twenty pounds frequently. Dr. Ingram noted possible findings of generalized weakness, but inconsistent

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[2] This consultative neurological examination was ordered by the ALJ upon the request of Jernigan's attorney during the hearing before the ALJ to review the Secretary's determination of Jernigan's status.

strength testing. He noted that there existed no limitation on Jernigan's ability to sit, and although there might be some limitation on his ability to stand or walk, such limitation could not be determined because Dr. Ingram observed no objective gait disturbance even though Jernigan made subjective complaints about leg weakness. Dr. Ingram also determined that Jernigan could occasionally climb, balance, stoop, crouch, kneel, and crawl, and that there existed no environmental restrictions or limitations on physical functions.

Proceedings Below

On August 22, 1988, Jernigan applied for supplemental security income under Title XVI and for disability insurance benefits under Title II. He alleged in his applications that he had been disabled since June 25, 1988, due to blackout spells, arthritis, and numbness on the entire right side of his body. Jernigan's applications were denied, initially and upon reconsideration. Jernigan requested a hearing before an ALJ. At the *de novo* hearing held on August 9, 1989, at which Jernigan was represented by counsel, Jernigan testified that he quit his job in 1988 because he could not lift the required amount (75 to 100 pounds) due to back pain, and that he had dizzy spells due to the heat from the kilns (400 to 500 degrees). He also testified as to blackout spells, a weakness in his left leg, numbness on his right side, and loss of grip in his right hand, but he emphasized that his main problems were his back and his nerves. After the hearing, the ALJ found that Jernigan had the residual functional capacity to perform a full range of light work, and that he had no objectively confirmed

nonexertional impairments. Therefore, he was not under a disability as defined in the Social Security Act and thus was not entitled to disability insurance benefits or supplemental security income. On January 2, 1991, the Appeals Council denied a request for review, thus the ALJ's determination became the final decision of the Secretary.

Jernigan filed this action for judicial review of the Secretary's decision in the United States District Court for the Northern District of Mississippi. The United States Magistrate filed a report recommending that the district court affirm the decision of the Secretary on the grounds that substantial evidence supported the decision. The district court entered an order adopting the magistrate's report and affirming the Secretary's decision. This appeal followed.

Discussion

We are limited on appeal to determining whether the Secretary applied the correct legal standard and whether, upon a review of the record as a whole, the Secretary's decision is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Orphey v. Secretary of HHS*, 962 F.2d 384, 386 (5th Cir. 1992); *Bradley v. Bowen*, 809 F.2d 1054, 1057 (5th Cir. 1987). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991).

Jernigan bears the burden of proving that he is disabled within the meaning of the Act. *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991). Social Security regulations set forth a five-step

analysis to be used in evaluating a claimant's disability status. "'If the claimant is found to be either disabled or not disabled at any point in the process no further review is necessary." *Bradley*, 809 F.2d at 1056 (quoting *Herron v. Bowen*, 788 F.2d 1127, 1131 (5th Cir. 1986)).

The five steps of the analysis are as follows: (1) if the claimant is working, engaged in a substantial gainful activity, he will be found not disabled regardless of medical condition; (2) a claimant whose impairment is not "severe" will not be considered disabled; (3) a claimant whose impairment meets or equals an impairment listed in Appendix One of the regulations will be considered disabled without further consideration of age, education, or work experience; (4) if the claimant is able to perform work he has done in the past, he will not be found to be disabled; and (5) if the claimant cannot perform past work, other factors including residual functional capacity, age, education, and past work experience are considered to determine if other work can be performed, in which case the claimant is not disabled. 20 C.F.R. §§ 404.1520(b)-(f) and 416.920(b)-(f); *Wren*, 925 F.2d at 125. The claimant has the initial burden of proving disability on all but the fifth step. *Bowen v. Yuckert*, 107 S.Ct. 2287, 2294 n. 5 (1987); *Wren*, 925 F.2d at 125. Here, the burden of proof shifts to the Secretary to show that the claimant could perform alternative work. *Muse*, 925 F.2d at 789.

Applying the above analysis, the ALJ found that Jernigan had not engaged in substantial gainful activity since June 25, 1988. Furthermore, the ALJ found that none of Jernigan's impairments met

or equalled those listed in Appendix One of the regulations. The ALJ then found that Jernigan had the residual functional capacity to perform work-related activities other than those involving heavy or medium lifting, but that he did not have any nonexertional impairments that would restrict his ability to work.[3] The ALJ noted that Jernigan was a "younger individual," with a limited education, and semi-skilled work experience. The ALJ then determined that as a result of his musculoskeletal impairments, Jernigan could not do his past relevant work but could perform light work. Based on the medical-vocational guidelines, the ALJ found that Jernigan was able to perform a significant number of light jobs in the national economy.[4] As a result of these findings, Jernigan's medical-vocational profile coincided with the criteria in Table 2, Rule 202.18, which directs a finding of not disabled.

Jernigan alleges four points of error in the Secretary's decision, and we address each in turn.

I. Need For a Vocational Expert

Jernigan argues that where nonexertional limitations exist, the ALJ cannot rely solely on the vocational guidelines, and must consider other evidence provided by a vocational expert. Jernigan

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[3] These conclusions were based on the ALJ's assessment that Jernigan's claims as to the severity of his conditions and discomforts and the existence of his alleged nonexertional impairments were not supported by objective evidence.

[4] Light work is defined in 20 C.F.R. §§ 404.1567(b), 416.967(b) as involving lifting no more than twenty pounds at a time, with frequent lifting and carrying of objects weighing up to ten pounds.

does not dispute that there existed substantial evidence to support the ALJ's decision that he had the exertional capacity to perform light work.[5] Instead, he argues that even if a claimant does have such exertional capacity, the vocational guidelines cannot be relied on *in toto* if the claimant has any nonexertional limitation. This Court has held that "when nonexertional limitations are shown, a disability decision cannot be made solely on the basis of the vocational guidelines." *Martin v. Heckler*, 748 F.2d 1027, 1034-35 (5th Cir. 1984). However, this is only true when the nonexertional limitations are significant. "When the characteristics of the claimant correspond to criteria in the Medical-Vocational Guidelines of the regulations . . . and the claimant either suffers only from exertional impairments or his non-exertional impairments do not *significantly affect* his residual functional capacity, the ALJ may rely exclusively on the Guidelines in determining whether there is other work available that the claimant can perform." *Fraga*, 810 F.2d at 1304 (emphasis added).

Jernigan argues that he has nonexertional limitations as the result of blackout spells and nerve problems. However, Jernigan has failed to present any objective evidence that these are significant nonexertional limitations. He consulted three different doctors, and according to their medical reports he

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[5] We note that this determination is supported by evidence from Dr. Ingram's medical assessment, which is clearly consistent with a residual functional capacity for light work. Such medical evidence satisfies the substantial evidence standard because "unless there is good cause shown to the contrary the testimony of the treating physician must be accorded substantial weight". *Fraga v. Bowen*, 810 F.2d 1296, 1303 n. 8 (5th Cir. 1987) (citations omitted).

mentioned blackout spells only to Dr. Soriano, the first doctor he visited, and he did not repeat this allegation to the physicians who subsequently examined him. Dr. Soriano apparently took no action regarding these blackout spells because Jernigan did not give him any background history concerning this condition. Jernigan mentioned nerve problems to the third physician, Dr. Ingram, who could not make any conclusive findings because of his suspicion that Jernigan was fabricating his conditions.[6] Although the second physician, Dr. Crawford, was not informed of either nerve problems or blackout spells, he also could not make conclusive findings as to Jernigan's other alleged conditions because he was unable to determine which of them had been fabricated. Jernigan did not mention blackout spells or nerve problems on either his application for disability insurance benefits or on his application for supplemental security income benefits. Given these circumstances, Jernigan has failed to show that the ALJ was required to find that he had significant nonexertional limitations. Therefore, the ALJ properly relied on the vocational guidelines alone without the testimony of a vocational expert.

II. Subjective Pain Complaints

Jernigan contends that the ALJ did not properly consider his subjective complaints of pain. We would first note that "[i]t is within the discretion of the administrative law judge to determine

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[6] Dr. Ingram did find that Jernigan was "alert, oriented, and cooperative," that he had no problems with recent or remote memory, and that there were no indications of "a major thought disorder."

the disabling nature of pain." *Jones v. Heckler*, 702 F.2d 616, 621-22 (5th Cir. 1983). Here, the ALJ found that "claimant's allegations as to the severity of his conditions and discomforts are not supported by the evidence of record and are not credible." We will uphold the ALJ's assessment that the pain was not disabling where the medical records do not establish that an impairment could have reasonably produced the disabling degree of pain alleged by the claimant. *Id.* at 622. "At a minimum, objective medical evidence must demonstrate the existence of a condition that could reasonably be expected to produce the level of pain or symptoms alleged." *Anthony v. Sullivan*, 954 F.2d 289, 296 (5th Cir. 1992). No such objective medical evidence exists in this case.

In *Jones*, the ALJ's determination was upheld where the medical evidence did not show objective clinical findings indicating a musculoskeletal or neurological impairment of such severity as to support the claimant's contention of debilitating pain, the claimant was not receiving regular medical care, was not taking a large amount of prescribed pain medications, and the claimant's demeanor at the hearing was not consistent with that of a person suffering from constant pain. 702 F.2d at 622. Here, the objective medical evidence does not establish that Jernigan was suffering from any condition that would result in disabling pain. None of the examining physicians recorded any complaints by Jernigan of excessive pain, and none of them were able to accurately diagnose his physical conditions because of his questionable efforts during testing. The physicians also did not report any signs of atrophy besides the possible atrophy of

Jernigan's tongue, and they also did not report any deformity in his extremities, muscle spasm, or the like.[7] Absent objective medical evidence supporting claimant's subjective complaints of pain, the ALJ did not err in determining that claimant's pain was not disabling. *See Harper v. Sullivan*, 887 F.2d 92, 96-97 (5th Cir. 1989).

III. Further Consultative Examinations

In Jernigan's last two points of error, he argues that the ALJ erred in not ordering a further examination. He notes that Dr. Ingram recommended further evaluation, but that further consultative examinations were not ordered. Jernigan also submits that he did not have the financial resources to afford such an examination.

Jernigan's first argument is that this failure by the ALJ violates the rule laid down in *Lovelace v. Bowen*, 813 F.2d 55 (5th Cir. 1987). He contends that *Lovelace* requires further examinationsSQpresumably paid for by the governmentSQwhere a claimant cannot afford the examinations himself and his consulting physicians recommend such examinations. *Lovelace* does not stand for such a proposition. In *Lovelace*, we held that generally a medical condition that can be remedied is not disabling unless "the claimant cannot afford the prescribed treatment or medicine, and can find no way to obtain it, [then] 'the condition that is

[7] We would also note that, as in *Jones*, Jernigan was not under the regular care of a physician, nor was he prescribed a large amount of medicine. Also, it seems apparent from the ALJ's findings that his demeanor at the hearing did not comport with that of one suffering from extreme pain.

disabling in fact continues to be disabling in law.'" *Id.* at 59 (quoting *Taylor v. Bowen*, 782 F.2d 1294, 1298 (5th Cir. 1986)). Here, Jernigan's condition is not disabling so it is irrelevant if he can afford further consultative examinations.[8] The ALJ did not require Jernigan to suffer under a disabling condition that he could not afford to have cured, but rather the ALJ did not order further examinations of conditions which, based on substantial objective medical evidence, were not disabling. *See Harper*, 887 F.2d at 97 (finding that the *Lovelace* rule is inapplicable where "no physician on record has pronounced [the claimant] disabled and his subjective symptomatology has been found incredible").

Jernigan next argues that the ALJ abused its discretion because it is error for an ALJ to fail to order further consultative examinations after such are recommended by a physician. Although the ALJ did grant a second examination after a request from Jernigan's counsel, counsel did not request any further consultative examinations. Under the circumstances, the ALJ was not required to do so *sua sponte*.

The ALJ "has the discretion to order a consultative examination." *Anderson v. Sullivan*, 887 F.2d 630, 634 (5th Cir. 1989). "An examination at government expense is not required 'unless the record establishes that such an examination is

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[8] We would also note that the suggestion of Jernigan's indigent status is first raised as a bald assertion in his brief in this Court. Jernigan did not produce any evidence at trial that he was unable to afford further consultative examination. He testified that although he had no income, his wife worked, and he saw a doctor and took prescribed medication. All of this testimony indicates the existence of at least some financial resources.

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)). Under this rule, the ALJ is required to make such a *sua sponte* order only if the record establishes that such further examinations were necessary. Such a *sua sponte* order would not be required simply because a consulting physician determined that a further examination might be desirable. Here, the record does not establish that additional examinations were necessary for decision; quite to the contrary, "[t]here is sufficient evidence in the instant case for the ALJ to have decided that the claimant is not disabled . . . and, therefore, no additional examination was warranted." *Id.*

Conclusion

The judgment of the district court is

AFFIRMED.