

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-7754  
Summary Calendar

---

ROBERT L. HOLDINESS,

Plaintiff-Appellant,

versus

DONNA E. SHALALA,  
Secretary of Health & Human Services,

Defendant-Appellee.

---

Appeal from the United States District Court for the  
Northern District of Mississippi  
(EC 89 CV 273)

---

( August 3, 1993 )

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

PER CURIAM:\*

I

On May 25, 1988, Robert L. Holdiness applied for disability insurance benefits, alleging disability since March 15, 1988. After denial of his application at the first two levels of administrative review, Holdiness requested and received a hearing before an administrative law judge (ALJ). The ALJ issued a

---

\*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

decision on March 29, 1989, in which he ruled that Holdiness was not disabled within the meaning of the Social Security Act. The Appeals Council denied Holdiness' request for review of the ALJ's decision.

Holdiness subsequently sought judicial review in federal court. He moved to remand the case for further administrative proceedings on the ground that he had new medical evidence. The magistrate judge denied this motion and then issued findings and a recommendation that the Secretary's decision be affirmed. Holdiness filed two additional motions to remand. The district court denied these motions, adopted the magistrate judge's report and recommendation, affirmed the ALJ's decision, and dismissed the cause with prejudice. Holdiness appeals.

## II

Holdiness argues that the ALJ erred in: (1) finding, without the benefit of testimony by a vocational expert, that Holdiness had no non-exertional limitations; (2) not giving credibility to Holdiness' alleged pain; and (3) using the Dictionary of Occupational Titles.

This court's review of the Secretary's decision to terminate benefits is limited to two issues: "1) whether the Secretary applied the proper legal standards, and 2) whether the Secretary's decision is supported by substantial evidence on the record as a whole." Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992).

"If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed."

"Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. . . ." "[I]t must be more than a scintilla, but it need not be a preponderance." In addition, "[t]his Court may not reweigh the evidence or try the issues de novo." "[C]onflicts in the evidence are for the Secretary to resolve."

### III

Holdiness injured his right thigh after being struck by a pine tree on April 10, 1987. An examination on April 15, 1988, showed that Holdiness had marked atrophy of the calf muscles on the right side and weakness in his right leg. Additionally, a medical report dated April 16, 1988, reflects that Holdiness had had back trouble "off and on" for twelve to thirteen years.

In September 1988, Holdiness had a decompressive lumbar laminectomy. On January 17, 1989, the neurosurgeon, W. Lynn Stringer, M.D., noted that "[f]ollowing surgery [Holdiness'] back pain has improved a great deal but he continues to have a lot of weakness in his leg." Dr. Stringer further provided that "[i]t is not too late to expect continued improvement in neurologic function."

At the hearing before the ALJ, Holdiness testified that he had difficulty driving because of his leg. He also testified that his leg would not hold him up; the pain in his back radiated to his

right leg all the way to his knee; half of his right foot was numb; and he could stand for only five to ten minutes at a time. According to Holdiness, "pretty often" he had pain while sleeping.

Dr. Stringer concluded that Holdiness' major disability would be weakness in the right leg and foot. Dr. Stringer, however, did not mention any degree of disability as a result of back pain. He stated only that "following surgery [Holdiness'] back pain has improved a great deal."

The opinions, diagnoses, and medical evidence of a treating physician should be accorded considerable weight. Abshire v. Bowen, 848 F.2d 638, 641 (5th Cir. 1988). The ALJ, after considering the evidence from Dr. Stringer, concluded that "the current findings do not show any abnormalities so severe that they would reasonably be expected to produce pain of sufficient severity or persistence as to prevent [Holdiness] from performing sedentary work."

With regard to the residual weakness in Holdiness' right leg, Dr. Stringer noted that Holdiness had atrophy of the right calf, muscle weakness, no ankle reflex, and diminished sensation to pinprick "over the L5 and S1 dermatomes." Despite these findings, Dr. Stringer provided that it was not too late to expect continued improvement in neurologic function. The ALJ determined that Holdiness had the residual functional capacity to perform the physical exertional requirements of work except for standing or walking for prolonged periods and lifting or carrying objects

weighing more than ten pounds. By definition, sedentary work involves primarily sitting with only occasionally walking or standing, at most, and does not require lifting more than ten pounds on an occasional basis. See 20 C.F.R. §§ 404.1567(a), 416.967(a) (1991).

Holdiness argues that the ALJ erred in not having a vocational expert testify. An ALJ, however, need not rely on a vocational expert's testimony if the claimant suffers from only "exertional impairments or his non-exertional impairments do not affect his residual functional capacity." Fraga v. Bowen, 810 F.2d 1296, 1304 (5th Cir. 1987). The ALJ specifically found that Holdiness had no exertional impairments that affected his residual functional capacity and no non-exertional limitations. Substantial evidence supports this finding.

Holdiness further argues that the ALJ erred in not finding his subjective complaints of pain credible. It is improper for an ALJ not to consider a claimant's subjective complaints of pain. Carrier v. Sullivan, 944 F.2d 243, 247 (5th Cir. 1991). "It is also improper for an ALJ to make no finding as to a claimant's subjective complaints of pain if, if the claimant were believed, said claimant would be entitled to benefits." In this case, the ALJ made findings regarding credibility. How much pain is disabling is a question for the ALJ. Carrier, 944 F.2d at 247. This court may not reweigh the evidence.

Holdiness also argues that the ALJ erred in relying on the Dictionary of Occupational Titles (DOT) to determine that he retained the residual functional capacity to work. As support, Holdiness cites to Wingo v. Bowen, 852 F.2d 827 (5th Cir. 1988). In Wingo, however, this Court made no ruling on the use of DOT. In addition, contrary to Holdiness' contention, the ALJ in this case did not use DOT to establish that there were jobs that Holdiness could perform. The ALJ only relied on DOT to find that Holdiness could no longer perform jobs he previously had held.

Proper legal standards were applied by the Secretary, and substantial evidence supports the Secretary's decision. We, therefore, must affirm the Secretary. See Anthony, 954 F.2d at 292.

#### IV

Secondly, Holdiness argues that new medical reports by Dr. Suttle and Dr. Stringer require that his claim be remanded for further administrative proceedings. Although he referred to other "new evidence" in his first motion to remand, on appeal he does not. A remand is appropriate when new evidence is material and there was good cause for not having included it previously. 42 U.S.C. § 405(g). The materiality prong requires the claimant to show a reasonable possibility that the new evidence would have changed the Secretary's determination. Bradley v. Bowen, 809 F.2d 1054, 1058 (5th Cir. 1987). Implicit is the requirement that the new evidence relate directly to the period of disability that was

considered by the Secretary. The new evidence may not relate to a disability that was acquired after the Secretary's determination nor may it relate to a deterioration in a condition that was not disabling when the Secretary's determination was made. The ALJ issued his decision on March 29, 1989.

Because Dr. Stringer's letter of January 17, 1989, was part of the administrative record and was considered by the ALJ, it does not amount to "new evidence."

Dr. Suttle's letter of August 10, 1990, states that since the surgery, Holdiness "has had no improvement in his neurologic function, continuing to have a foot drop on the right side and no improvement in his muscle strength." Dr. Suttle concluded that Holdiness

is 100% permanently and totally disabled from engaging in any gainful activity existing in the national economy and that his disability is not confined to his right foot and leg but is a result of his back disability and this weakness in the leg and back limits his ability to stoop, crawl, bend, stand or walk.

In the April 23, 1991 letter, Dr. Suttle reiterated that Holdiness "continues to have disability in his back which limits his ability to stoop, crawl, bend, stand or walk for a significant period of time." In addition, Dr. Stringer's letter of July 30, 1991, reflects Dr. Stringer's conclusions after examining Holdiness on that date. According to Dr. Stringer, Holdiness "continues to have a significant physical impairment as a result of his advanced

degenerative lumbar disc disease with spinal stenosis and spinal cord compression, status post decompressive laminectomy."

The deterioration noted in these letters stems from the same underlying condition that caused Holdiness's non-disabling symptoms previously. That, however, does not mean that the subsequent deterioration is material to the earlier disability determination. See Bradley, 809 F.2d at 1058. Additionally, Holdiness has failed to show good cause for not bringing this evidence forth earlier.

Our failure to remand does not preclude Holdiness from having the new evidence considered, however; his subsequent deterioration might form the basis of a new claim. See Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985).

V

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.