UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7755

(Summary Calendar)

FRANK J. KOENIG,

Plaintiff-Appellant,

versus

DONNA E. SHALALA, SECRETARY OF HEALTH & HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
CA G 91 152

September 9, 1993

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Frank Koenig appeals the district court's grant of summary judgment for the Secretary of Health and Human Services ("Secretary"), affirming the denial of his application for disability insurance benefits under Title II of the Social Security Act ("Act"). *See* 42 U.S.C. § 405(g) (1988). Finding substantial evidence to support the Secretary's decision, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Koenig was born on December 15, 1948. He attended school through the ninth grade but since he participated in a special education program, he estimates his education level at only fifth to seventh grade. His past relevant work history includes work as a sandblaster/painter and as an oil field worker. Koenig alleges that he injured himself in August 1984, when he accidentally shot himself in the shoulder with a shotgun. The wound was complicated by infection and drainage problems, and Koenig also had part of his right thumb and left index finger amputated as a result of gangrene.

A detailed follow-up examination in March 1985 noted that Koenig had "extensive soft tissue" resulting in a significantly decreased range of movement in his should and elbow. He had only thirty-degree flexation and abduction, and a limitation of movement in his elbow of forty-five to 135-degrees. The report also notes that despite the loss of part of his thumb and index finger, Koenig retained "a good functional hand with the remaining digits and the stump of a thumb." *See* Record on Appeal vol. 2, at 172.

After examining Koenig in October 1985, Dr. Bruce Browner concluded that there was no further drainage in Koenig's shoulder wound, that the humerus was stable, that there was no "gross pain," and that Koenig could begin a series of exercises to regain some motion. The report also advised Koenig to be "very protective of that arm and not engage in any atheletic [sic] activities, heavy

lifting, or manual labor with that arm as the union at this time is tenuous." *See id.* at 147.

Koenig was examined again in March 1986, after which Dr. Browner stated that Koenig had a good grip with his right hand and full flexation of the elbow, but that he now had fifty degrees of abduction in his shoulder, forty-five degrees of flexation, and forty-five degrees of extension.

Koenig was not examined again until July 27, 1989, at which time he complained of numbness and loss of feeling in the fingers of his right hand, and a tingling sensation in his fingers and in the stump of his thumb. The examination revealed that Koenig's movement in his shoulder and elbow had improved. His shoulder had eighty-degree abduction, ninety degrees of flexation, and was capable of a thirty-degree extension. His elbow's flexation was full and its extension was twenty-degrees of flexation. He had full movement of his wrist, his grip was strong, but he was unable to manipulate with the metacarpal, resulting in an inability to perform such tasks as buttoning buttons or writing. He was able to lift approximately twenty pounds if he could hook it over his hand, but was unable to lift an item such as a clipboard because of the lack of dexterity in his metacarpal. The doctor also noted that Koenig was able to walk, hop, and squat normally.

Koenig applied for disability benefits, alleging a disability in his right shoulder and arm. His application was denied initially and again on reconsideration. Koenig requested and received a hearing before an Administrative Law Judge ("ALJ"), who

determined that Koenig was incapable of performing his past work but had the residual functional capacity to perform unskilled light and unskilled sedentary work. Thus, the ALJ held that Koenig was not disabled within the meaning of the Act. The decision of the ALJ became the decision of the Secretary when the Appeals Council denied Koenig's request for review.

Koenig filed suit in the district court seeking review of the Secretary's decision. The district court adopted the report and recommendation of the magistrate judge and granted the Secretary's motion for summary judgment.

II

In reviewing the Secretary's decision to deny disability benefits, we must determine "whether the decision is supported by substantial evidence in the record and whether the proper legal standards were used in evaluating the evidence." *Villa v. Sullivan,* 895 F.2d 1019, 1021 (5th Cir. 1990). "Substantial evidence is more than scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Crouchet v. Sullivan,* 885 F.2d 202, 204 (5th Cir. 1989) (citing *Richardson v. Perales,* 402 U.S. 389, 390, 91 S. Ct. 1420, 1422, 28 L. Ed. 2d 842 (1971)). In applying this standard, we may not reweigh the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. *See Villa,* 895 F.2d at 1022.

The 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) (1988). The Secretary follows a five-step process in evaluating a disability claim:

> (1) Is the claimant currently working? (2) Can the impairment be classified as severe? (3) Does the impairment meet or equal a listed impairment in Appendix 1 of the Secretary's regulations? (If so, disability is automatic.) (4) Can the claimant perform past relevant work? and (5) Can the claimant perform other work?

Crouchet, 885 F.2d at 204; 20 C.F.R. § 404.1520(b)-(f) (1993). A finding that a claimant is not disabled at any point terminates the sequential evaluation. *See Villa,* 895 F.2d at 1022.

The ALJ performed the five-step analysis, concluding that: (1) Koenig had not engaged in substantial gainful activity since 1984; (2) Koenig's injury to his right shoulder, arm, and hand constituted a severe physical impairment; (3) Koenig's impairment did not meet or equal a listed impairment; (4) Koenig could not perform his past relevant work as a sandblaster/painter or oil-field worker; but (5) Koenig could, as evidenced by the vocational expert's testimony, perform substantial gainful activity in the areas of light and sedentary work.

On appeal to this Court, Koenig contends that: (A) the ALJ did not comply with Social Security Ruling ("SSR") 88-13, in evaluating Koenig's subjective complaints of pain; (B) the ALJ did not properly develop the record, given the fact that Koenig was

unrepresented by counsel; and (C) the record does not contain substantial evidence to support the finding that he is capable of performing other gainful employment.

A

Koenig first contends that the ALJ's failure to comply with SSR 88-13 invalidated his disability proceeding. *See* Brief for Koenig at 9-13. Although rulings such as SSR 88-13 are not binding on this Court, *see Anderson v. Sullivan,* 887 F.2d 630, 633 n.3 (5th Cir. 1989), they are nevertheless binding on the Secretary. *Hall v. Schweiker,* 660 F.2d 116, 119 (5th Cir. 1981) (per curiam); 20 C.F.R. § 422.406(b)(1) (1993). A failure by the Secretary to follow such a rule may justify a remand if the claimant can show prejudice. *Hall,* 660 F.2d at 119.

SSR 88-13 provides ALJs a framework for deciding whether to credit a claimant's subjective allegations of disabling pain. By its express terms, SSR 88-13 applies "when the claimant indicates that pain is a significant factor of his/her alleged inability to work, and the allegation is not supported by objective medical evidence in the file." SSR 88-13, at 2-3. When confronted with this situation, ALJs cannot ignore a claimant's subjective complaints of disabling pain; rather, they must consider "all of the available evidence, medical and other, that reflects on the impairment and any attendant limitations of functions." *Id.* at 2-3. In developing the evidence of pain, ALJs should investigate into such matters as: (1) the nature, location, onset, duration, frequency, radiation, and intensity of any pain; (2) precipitating

and aggravating factors (e.g., movement, activity, environmental conditions); (3) type, dosage, effectiveness, and adverse side-effects of any pain medication; (4) treatment, other than medication, for relief of pain; (5) functional restrictions; and (6) the claimant's daily activities. *Id.* at 3; *see also Bunnell v. Sullivan,* 947 F.2d 341, 346 (9th Cir. 1991).

Koenig argues that the ALJ's failure to inquire into all of the above factors constituted non-compliance with SSR 88-13. Assuming that SSR 88-13 even applies,[1] we disagree. SSR 88-13 does not require that an ALJ inquire into every factor in developing evidence of pain. *See* SSR 88-13, at 3 ("In developing evidence of pain . . . it is essential to investigate all avenues presented that relate to subjective complaints, including information . . . by treating and examining physicians and third parties, *regarding such matters* as: 1. The nature, location . . . ." (emphasis added)). The record shows that the ALJ inquired into Koenig's medication for pain, functional restrictions, and daily activities, as well as the nature and location of Koenig's pain. *See* Record on Appeal vol. 2, at 24-30. Although the ALJ's inquiries may not have been as extensive as those set forth in SSR 88-13, Koenig's

[1] The record shows that Koenig never alleged at the hearing that he suffered from disabling pain. When the ALJ pointedly asked Koenig if he felt pain, he merely responded that his neck felt stiff and that he took non-prescription Tylenol. *See* Record on Appeal vol. 2, at 24. Koenig never alleged that such pain was disabling. *See id.* SSR 88-13 provides a framework for ALJs to resolve "any inconsistencies" between the objective medical evidence and the claimant's subjective complaints of disabling pain. *See* SSR 88-13, at 3. Because Koenig's allegations of mild, rather than disabling, pain were not inconsistent with the objective medical evidence, SSR 88-13 may not govern this action.

subjective complaints of pain were investigated, considered, and made part of the ALJ's final determination,[2] which is all that SSR 88-13 requires. *See* SSR 88-13, at 3 ("In evaluating a claimant's subjective complaints of pain, the adjudicator must give full consideration to all of the available evidence, medical and other, that reflects on the impairment and any attendant limitations of function."). Moreover, because Koenig has failed to demonstrate any prejudice resulting from the ALJ's failure to inquire into all of SSR 88-13's enumerated factors. *See Hall,* 660 F.2d at 119. Consequently, we reject Koenig's first point of error.

B

Koenig next argues that the ALJ failed to fulfill his "special duty" to develop the record, given the fact that Koenig was unrepresented by counsel at the benefits hearing. *See* Brief for Koenig at 13-17. In cases where a claimant is unrepresented by counsel, the ALJ has a duty to "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Kane v. Heckler,* 731 F.2d 1216, 1219-20 (5th Cir. 1984) (attribution omitted). After reviewing the record))noting in particular that (1) the ALJ thoroughly questioned Koenig as to his daily activities, ability to perform various tasks, and medication and (2) such questioning yielded eighteen pages of testimony))we hold that the ALJ "at least minimally fulfilled his duties as set

[2] *See* Record on Appeal vol. 2, at 9 ("Based upon the testimony and documentary evidence of record, the Administrative Law Judge finds that the claimant suffers from mild pain which would not affect his concentration or other work-related abilities at the sedentary and light levels of activity.").

forth in *Kane* to develop the relevant facts so that he could fully and fairly evaluate the case." *James v. Bowen,* 793 F.2d 702, 705 (5th Cir. 1986); *see Kane,* 731 F.2d at 1218 (describing the ALJ's attempt to develop the facts as minimal where the hearing lasted only five minutes, and produced only four pages of testimony).

C

Koenig also contends that the record does not contain substantial evidence to support the ALJ's finding that he is capable of performing other gainful activity. *See* Brief for Koenig at 17-23. The medical evidence, as well as the testimony of the vocational expert and Koenig himself, constitutes substantial evidence to support the ALJ's finding. The medical evidence, as summarized above, revealed that the movement in Koenig's shoulder, arm, and hand had improved to the point where he could pick up twenty pounds. The evidence also showed that Koenig had nearly full range of movement in his shoulder and elbow, and could grip things with his hand, despite his inability to perform delicate functions with his right hand. *See* Record on Appeal vol. 2, at 174-75.

The vocational expert testified that a forty-one year old male with minimal mathematical and reading skills and very little use of his dominant hand, could perform up to thirty percent of unskilled light work, and ten percent of unskilled sedentary work. *See id.* at 30-31. The expert also testified as to the specific jobs that such a person could do, and the existence of such jobs in Koenig's geographic area. *See id.* at 31-35.

Lastly, Koenig testified that he could pick-up twenty to thirty pounds with his left arm, and that he had no trouble walking, standing, or sitting. *See id.* at 28-29. He also testified that he occasionally helps his mother around the house, and that he went fishing two months before the hearing. *See id.* at 25-27. Based upon all this evidence, we hold that substantial evidence exists in the record to support the ALJ's finding, and consequently, the Secretary's decision to deny benefits.

III

For the foregoing reasons, we AFFIRM.