UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8217
Summary Calendar

THOMAS W. KYLE,

Plaintiff-Appellant,

VERSUS

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

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W-90-CA-071)

(January 19, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Thomas W. Kyle (Kyle) applied for disability benefits under the Social Security Act (Act), which were denied, subsequent to two hearings before an administrative law judge (ALJ). Both the magistrate judge and the district court reviewed the final decision of the Social Security Administration of the Department of Health and Human Services (Secretary) and concluded that it was supported

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[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 Pursuant to that rule, the court has determined that this opinion should not be published.

by substantial evidence. Based upon our review of the record, we **AFFIRM**.

I.

Kyle claimed an onset of disability on April 29, 1986. Dr. C. P. Killingsworth saw Kyle on May 7, 1986, for complaints of gout in the great toes, knees, upper back, and shoulders. The Doctor found decreased range of motion in the shoulders, gout in the great toes, and elevated uric acid and triglyceride levels, but there was no obvious swelling or tenderness to the knees, back or hips. His diagnostic impression was that Kyle suffered from hypertension, migraine headaches, gout, and degenerative osteoarthritis. Killingsworth recommended excusing Kyle from work for 90 days and re-evaluating him then.

Approximately a month later, on May 27, Kyle was observed by Dr. J. W. Jundt, a rheumatologist, who, upon examination of Kyle, concluded that he did not appear to be in "apparent distress". He doubted Killingsworth's diagnosis of gout and also noted that Kyle's range of motion in all of his joints, aside from his right knee, was normal, and there was only a trace of effusion in the right knee with no evidence of deformity or gross degenerative changes. Further, there was only evidence of obvious arthritis in the right knee, which could represent degenerative osteoarthritis. Tests indicated that Kyle's uric acid and triglyceride levels had dropped significantly.

Dr. Jundt saw Kyle again on July 1, 1986. Kyle complained predominantly about right knee pain. Dr. Jundt found no effusion or ligament instability upon physical examination. He also noted

that Kyle's hypertension and hypertriglyceridemia were under control. However, in view of his conclusion that "[t]he patient's course and partial response to steroid injection and Indocin suggests an osteoarthritic condition which he is continually aggravating by his work situation", he strongly advised that Kyle discontinue his work at an oil platform.

Kyle also took an audiological examination that July. The examination revealed evidence of tonal decay; hearing aids were recommended. Medical records from September 1986 indicated that Kyle demonstrated "significant benefit" from the hearing aids.

Dr. Killingsworth saw Kyle again in July 1986 and suggested that he had rheumatoid arthritis, instead of or in addition to Dr. Jundt's earlier suggestion of degenerative osteoarthritis. He further indicated that Kyle was unable to work at that time. Dr. Jundt saw Kyle in September and disagreed with the rheumatoid arthritis diagnosis, stating that "[t]he company doctor told him he had rheumatoid arthritis. I don't believe this is the case". He reasserted that Kyle had degenerative osteoarthritis. Dr. Jundt found soreness, but good range of motion in the shoulders and knees. The left elbow had some thickening, but no warmth or erythema. There was some irregularity in the joint as if from some previous repetitive traumatic episodes. With respect to Kyle's complaints of pain, Dr. Jundt stated that Kyle "[c]ontinues to take the Indocin SR and gives him moderate relief of most symptoms aside from the left shoulder. He hasn't really had much problems with

the knees since discontinuing the previous line of work requiring climbing".

The following day, Dr. Killingsworth recorded, after examining Kyle, that he had a "pretty good range of motion", except in the shoulder. Although Kyle complained of a lot of pain in his shoulder, the doctor reported that "there is no swelling". With respect to pain medication, the doctor noted that Kyle "is relieved by Indocin but makes him dopey." On October 24, 1986, Dr. Killingsworth recorded that Kyle "state[d] that primarily the main thing is that he is extremely stiff, especially in his shoulders. He is unable to lift anything. He does not have particular severe pain ... this is usually relieved by Indocin".

In late October 1986, Dr. Jundt reported that Kyle "really has no other handicap aside from excessive climbing, excessive walking, or lifting". He reiterated that Kyle should not climb oil rigs, as this would aggravate his underlying arthritic condition, but that he was "definitely retrainable".

Dr. Douglas Harper, an orthopedic surgeon, examined Kyle on December 3, 1986. The doctor's impressions were of generalized arthritis and probable early arthritis in both knees. He advised Kyle that occupations involving much lifting, bending, twisting, stooping, walking, or climbing stairs would increase his pain. He also noted that Kyle "seems to be very intelligent and articulate".

Kyle apparently continued to see Dr. Killingsworth for pain in his joints. On December 30, 1986, the doctor noted that Kyle complained of severe pain in his left shoulder for two weeks, but

"said he is now starting to get some relief with the Indocin". The doctor also noted that Kyle "occasionally has to use Zydone pain pills". On January 31, 1987, Dr. Killingsworth reported that Kyle had "pretty good range of motion", but that he could not "do any particular overhead work or any kind of motion which involves pulling towards his chest or body".

On April 27, 1987, Dr. Killingsworth reported that Kyle's primary problem was degenerative traumatic osteoarthritis in his left shoulder and both knees, which is "only going to get worse". This diagnosis corresponds to the diagnosis given by Dr. Jundt, described above. Dr. Killingsworth still stated that Kyle had rheumatoid arthritis, but probably at a low grade which intermittently flared up. He also stated that Kyle had gout, hypertension, and migraine headaches. He noted that "[a]t the present time he seems to be pretty well maintained on Tagamet, which helps his arthritis medicine, Indocin, from tearing his stomach up. He also takes Inderal twice a day and Hydrochlorothiazide. Intermittently he has to take a strong narcotic pain medication like Vicodan". Dr. Killingsworth did not think Kyle was able to work, noting that Kyle was not able to lift more than ten pounds and could not work in jobs requiring him to bend over, stoop, kneel, crawl, or climb ladders. Further, he could not work around machinery or dangerous tools due to the mind altering effects of Indocin, which Kyle took for his arthritis. And, Dr. Killingsworth noted that "[t]here are times also when his hands are so swollen with his arthritis that he is unable to grip

properly or to use his hands in any meaningful function". This conclusion appears to be based on Kyle's subjective complaints; it is not supported in the medical record by recorded observations.

Kyle applied for disability insurance due to rheumatoid and osteoarthritis, hearing loss, hypertension, and a gunshot wound in his right leg and foot. Benefits were denied both initially and upon reconsideration, and a timely request for hearing was filed. Kyle was granted a hearing at which he appeared, represented by Bert A. Moore, a friend. At the hearing, Kyle testified that he drives four times a week; that he attends class six hours a day/two days a week; that he works with his cattle, sometimes with hired help; that he runs his cattle business as best he can; that he received general safety training at a safety academy in Houston; that he "can't lift anything or walk"; that when on Indocin for pain, he is unable to drive; and that he can pick up a 50-pound sack. After the hearing, the ALJ ruled that Kyle was not disabled and therefore not entitled to disability benefits under the Act.

Kyle requested a review of the hearing decision. The appeals council agreed with the ALJ that Kyle was limited to sedentary work and that his past work was skilled; however, it concluded that it could not agree with the ALJ's conclusions regarding the transferability of Kyle's skills to sedentary work without testimony from a vocational expert indicating that Kyle had transferable skills which would qualify him for "significant numbers" of jobs in the national economy.

In September 1988, for the second hearing, Dr. Killingsworth submitted a follow-up evaluation, reasserting that he did not think that Kyle was able to work; that he was unable to lift more than ten pounds at a time; that he had "much stiffness and decreased range of motion"; that he was not "capable of safely operating a motor vehicle for any prolonged period of time"; that he had significant hearing loss and was unable to wear hearing aids because they amplify background noise; and that his medications "affect his mental alertness". That month, at the second hearing, during which Kyle again appeared and was represented by Mr. Moore, a vocational expert (Jack W. Sudderth) testified that Kyle's work as a mail carrier was unskilled and involved no transferable skills; however, his work as a safety training representative required skills that were transferable; most significantly, he had technical knowledge of safety procedures. Accordingly, the expert concluded that Kyle had transferable skills for sedentary jobs in the health and safety field, which would involve being an inspector for, among others, insurance companies, government agencies, and the red cross. He testified that there were 500 such jobs in the immediate area, over 10,000 such jobs within the state of Texas, and over 80,000 such jobs in the continental United States.

The second ALJ confirmed the findings of the first ALJ and held that, considering Kyle's residual functional capacity, age, education, and work experience, section 404.1569 of Regulations No. 4 and Rules 201.15/201.22, Table No. 1 of Appendix 2, Subpart P, Regulations No. 4 ("regulations"), direct a conclusion that he is

not disabled.[2] The appeals council denied a request for review, and the decision thus became the final decision of the Secretary.

Kyle then filed an action in federal district court for review of the final decision. A magistrate judge recommended that the Secretary's decision be affirmed, on the bases that the decision was supported by substantial evidence and the proper standards were applied in evaluating the case. Upon reviewing Kyle's objections to the magistrate judge's report, the district court agreed and entered judgment affirming the Secretary's decision.

II.

A.

Kyle contends that he did not knowingly and willingly waive legal representation at his hearings, and that prejudice resulted from this absence of counsel.[3] Pursuant to 42 U.S.C. § 406, a claimant has a statutory right to counsel. And, it is the

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[2] The ALJ concluded that Kyle had not engaged in substantial gainful activity since April 29, 1986; that he has a severe medical impairment by virtue of osteoarthritis of the shoulders, knees and right foot and rheumatoid arthritis, but the impairments did not equal one listed in Appendix 1; that Kyle could perform the full range of sedentary work; that he has no non-exertional impairments; and that he was unable to perform his past relevant work as a safety inspector in offshore drilling or as a rural mail carrier; but that, given his age (52 years old), education (remote high school), residual functional capacity (sedentary), and work experience (skilled with transferable skills), he was able to perform other substantial gainful activity.

[3] Kyle asserts that the district court made no findings on the counsel claim; however, the court's silence may be explained by Kyle's failure to object to the magistrate judge's disposition of that legal issue. Despite Kyle's failure to object, we review this issue because it was properly raised before the magistrate judge, and it is legal, rather than factual. *See* ***Tijerina v. Estelle***, 692 F.2d 3, 5 n.1 (5th Cir. 1982).

Secretary's duty to notify the claimant of this right. ***Clark v. Schweiker***, 652 F.2d 399, 403 (5th Cir. Unit B 1981). This circuit, as well as others, have held that an intelligent waiver requires an explanation of the possibility of free counsel or a contingency arrangement, and the limitation on attorney's fees to 25% of past due benefits awarded. ***Thompson v. Sullivan***, 933 F.2d 581, 584 (7th Cir. 1991); ***Smith v. Schweiker***, 677 F.2d 826, 829 (11th Cir. 1982); ***Clark***, 652 F.2d at 403.

Although Kyle received written notice of his right to be represented by an attorney and of the possibility of free representation, it appears that he did not receive adequate written notice of the 25% limitation.[4] On January 12, 1988, Kyle appointed

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[4] With respect to the 25% cap, the notice stated,

> If you are found entitled to past-due benefits under Title II of the Social Security Act and your representative is an attorney who intends to charge a fee, 25 percent of such past-due benefits will be withheld by the Social Security Administration pending receipt of a petition from the attorney and approval of a fee by the Office of Hearings and Appeals. If the approved fee is less than 25 percent withheld, the amount of the fee will be paid to your attorney from the amount withheld and the difference will be sent to you. If the approved fee is more than 25 percent of your past-due benefits, the 25 percent of your past-due benefits withheld will be paid to your attorney and the difference is a matter to be settled between you and your attorney.
>
> None of your benefits will be withheld by the Social Security Administration if your representative is not an attorney or if there is no past-due benefits. If your representative petitions for a fee in these situations and a fee is approved by the Office of Hearings and Appeals, payment of such approved fee is a matter to be settled between you and your representative.

his friend, a non-lawyer, to be his representative. Before both hearings, the presiding ALJ informed Kyle that he had a right to be represented by an attorney, and confirmed that Kyle wanted his friend, Bert Moore, to represent him instead. However, both ALJs failed to inform Kyle of the various fee arrangements, including the 25% limitation. Accordingly, because Kyle did not receive adequate written or oral notice of the 25% cap, he may not have properly waived his right to representation.[5] In any event, we need not remand this case, because we conclude that Kyle was not prejudiced by Moore's representation.

In order to obtain a remand on the basis of an ineffectual waiver of the right to counsel, the record must show evidentiary gaps which result in unfairness or clear prejudice. ***Kane v. Heckler***, 731 F.2d 1216, 1220 (5th Cir. 1984). Kyle contends that

> [t]here were no inquiries as to rest requirements; no inquiry as to the cause of stress or the level of stress which produces problems for [Kyle]; there is no inquiry as to the number of days [Kyle] experiences such poor health or such severe pain as to prohibit him from performing any job. There is also no evidence of Mr. Kyle's residual functional capacity or conversely, his limitations.[6]

In ***Benson v. Schweiker***, 652 F.2d 406, 408 (5th Cir. Unit B 1981); ***Clark***, 652 F.2d at 403; and ***Peppers v. Schweiker***, 654 F.2d 369, 370-71 (5th Cir. Unit B 1981), we held that the use of the above quoted language, or language substantially similar to it, does not adequately inform a claimant of the 25% cap.

[5] We recognize that Kyle appointed his non-lawyer friend; however, if he did not have adequate information to make an informed decision, we cannot say that he exercised his right to representation, or properly waived that right.

[6] Kyle also asserts that the ALJ failed to develop the vocational expert's testimony regarding factors of age and psychological problems. We conclude, *infra*, that these factors were adequately addressed.

We do not find Kyle's contentions persuasive, because he fails to inform this court (and similarly failed to inform the district court) whether responses to such questions and accompanying evidence would have altered the outcome of the ALJ's determination.

In addition, we conclude that both ALJs elicited adequate information from Kyle to prevent unfairness or prejudice. The first ALJ questioned Kyle as to his medication, activity level, work experience, and functional limitations. Both ALJs gave Kyle's lay counsel considerable latitude in presenting his observations. In addition, the second ALJ allowed lay counsel to cross-examine the vocational expert and add evidence to the record at a later date. Accordingly, the ALJs adequately developed the record and no prejudice to Kyle resulted. *See* ***Carrier v. Sullivan***, 944 F.2d 243, 245 (5th Cir. 1991) (stating that 26 minute hearing (yielding 16 pages of testimony) in which ALJ questioned plaintiff about his condition, treatment, medication, daily routines, and how illness had affected him was sufficient).[7]

B.

Kyle contends that the Secretary erred in determining that he was not disabled. 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 ... has

[7] Kyle also contends that he was denied the opportunity to review and supplement testimony of the vocational expert. This contention is without merit, as the appeals council forwarded a tape of the hearing to Kyle's appointed counsel and advised Kyle, in accordance with 20 C.F.R. § 404.974, that a transcript would be available at cost. Moreover, Kyle has failed to show that he was prejudiced by the failure to grant his request in its entirety.

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). In evaluating a claim of disability, the Secretary conducts the well-known five-step sequential analysis: (1) whether the claimant is presently working, (2) whether the claimant has a severe impairment, (3) whether the impairment is listed, or is equivalent to an impairment listed, in Appendix 1 of the regulations, (4) whether the impairment prevents the claimant from doing past relevant work, and (5) whether the impairment prevents the claimant from doing any other substantial gainful activity. 20 C.F.R. § 404.1520; ***Muse v. Sullivan***, 925 F.2d 785, 789 (5th Cir. 1991). In the first four steps, the burden is on the claimant. At the fifth, the burden is initially on the Secretary to show that the claimant can perform other substantial gainful activity; and it then shifts to the claimant to show that, in fact, he cannot do the work suggested. ***Id.*** A finding that a claimant is disabled, or not disabled, terminates the sequential evaluation. ***Crouchet v. Sullivan***, 885 F.2d 202, 206 (5th Cir. 1989).

On appeal, our task is not to reweigh the evidence or try the issues *de novo*, ***Selders v. Sullivan***, 914 F.2d 614, 617 (5th Cir. 1990); but rather, we are limited to determining whether, based on our review of the record as a whole, there is substantial evidence to support the Secretary's decision. *See* 42 U.S.C. § 405(g); ***Fraga v. Bowen***, 810 F.2d 1296, 1302 (5th Cir. 1987). Substantial evidence is that which is both relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion; it

must be more than a mere scintilla, but it need not be a preponderance. ***Fraga***, 810 F.2d at 1302. We now address Kyle's assertions of evidentiary error.

1.

Citing ***Stone v. Heckler***, 752 F.2d 1099 (5th Cir. 1985), Kyle contends that the ALJ committed error in finding under step two that, although his impairment is severe, he could still be employed. Because the Secretary found Kyle not disabled at the fifth step, Kyle's contention is foreclosed by ***Harrell v. Bowen***, 862 F.2d 471, 481 (5th Cir. 1988) (stating that holding in ***Stone*** does not require remand when Secretary has gone beyond the second step because not all impairments deemed to be "severe" are disabling).

2.

Kyle asserts next that there is no evidence supporting the ALJ's determination of his residual functional capacity. The ALJ concluded that Kyle had the capacity to engage in sedentary work, which means that he can perform the physical exertion requirements of work except for lifting and carrying in excess of ten pounds, standing and walking more than occasionally, and climbing. 20 C.F.R. § 404.1567. This finding is substantially supported by both the medical evidence in the record and Kyle's testimony, which includes statements indicating that he walks occasionally and has the capacity to lift a 50 pound sack of feed.

We do not agree with Kyle's contention that the district court and the ALJ disregarded numerous medical reports. Kyle relies

primarily on the medical reports of Dr. Killingsworth, who stated that Kyle was unable to work, even at a sedentary level. Although, ordinarily, the opinions and diagnoses of a treating physician familiar with the claimant's injuries are accorded considerable weight, the ALJ is entitled, of course, to determine the credibility of medical experts and to weigh their opinions accordingly. *See* ***Moore v. Sullivan***, 919 F.2d 901, 905 (5th Cir. 1990); ***Scott v. Heckler***, 770 F.2d 482, 485 (5th Cir. 1985). Where the evidence presents conflicting testimony and reports that must be evaluated by their credibility, it is the Secretary's duty, not the courts', to resolve material conflicts in the evidence and decide the case. ***Chaparro v. Bowen***, 815 F.2d 1008, 1011 (5th Cir. 1987).

Here, Dr. Killingsworth's opinion was contradicted by Dr. Jundt's, who stated that plaintiff was "definitely retrainable", and that he "really has no handicap aside from excessive climbing, excessive walking or lifting". In addition, Dr. Harper, another examining physician, also made findings inconsistent with Dr. Killingsworth's; he concluded that Kyle was precluded only from work requiring a great deal of lifting, bending, twisting, stooping, walking, and climbing stairs. The ALJ duly noted the medical testimony presented and concluded that Kyle was able to perform sedentary work. Given the conflicting nature of this evidence, we will not substitute our judgment for that of the Secretary. *See* ***Moore***, 919 F.2d at 905.

3.

Kyle contends, in view of his non-exertional impairments, that the Secretary improperly relied on the medical-vocational guidelines of the social security regulations.[8] "When the claimant 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." ***Selders***, 914 F.2d at 618 (citing 20 C.F.R. § 404.1569 & Subpt. P. App. 2). The Secretary concluded that Kyle did not suffer any non-exertional impairments. Because we find that this conclusion is supported by substantial evidence, we conclude that the Secretary properly applied the guidelines.

First, we reject Kyle's contention that the Secretary ignored subjective evidence of pain, including the effects of pain medication. Subjective complaints of pain must be corroborated, at least in part, by "objective medical evidence", which "demonstrate[] the existence of a condition that could reasonably be expected to produce the level of pain or other symptoms alleged". ***Anthony v. Sullivan***, 954 F.2d 289, 296 (5th Cir. 1992). Obviously, we accord great deference to the ALJ's credibility findings as to the debilitating effects of pain. ***Hollis v. Bowen***, 837 F.2d 1378, 1385 (5th Cir. 1988). Here, both ALJs concluded

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[8] Kyle also contends that the use of the guidelines was improper, as his age was not sufficiently taken into account. We disagree. Kyle was properly classified as a person approaching advanced age. *See* 20 C.F.R. § 404.1563(c). Aside from the expert's speculation about his "adjustment factor", which is contradicted by Kyle's activities, *see infra*, he provides no reason for a departure from the Secretary's age classifications.

that Kyle's complaints of debilitating pain were not credible. There is substantial evidence in the record to support this determination.

The medical evidence does not demonstrate the existence of a condition that could reasonably produce chronic, debilitating pain; at best, the evidence is conflicting and thus warrants deference, *see supra*. Moreover, the record, for the most part, does not contain objective factors indicating the existence of severe pain, such as persistent limitations in the range of motion, muscular atrophy, weight loss, or impairment of general nutrition. ***Id.*** at 1384. Rather, repeated medical reports, including those of Dr. Killingsworth, indicate that Kyle did not appear to be in acute distress. In addition, the record indicates that Kyle took prescription pain medication only on an occasional basis, and that his conditions were responsive to medication. And, finally, Kyle testified that he engaged in a number of activities such as attending class and looking after his cattle.[9] Given these factors, we refuse to upset the credibility determination of the ALJs.

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[9] Kyle asserts that, contrary to findings of the ALJ and the district court, he quit college, had to hire someone else to help with his cattle, and could not drive due to his medication. These assertions do not accurately reflect his testimony. He testified that, although he had to drop a course prior to the first summer, he "went through the first summer" and is "trying to go to school, right now, 2 days a week". Concerning his work with his cattle, he stated that he worked alone "maybe 2 or 3 days a week" when he felt able. And, although he stated that "when I take that medication, I can't drive", he also stated that he drives, on the average, four times a week.

We also find substantial evidence supporting the Secretary's assessment of the severity of Kyle's hearing loss. The medical evidence duly notes that Kyle has a hearing problem attributable to gunfire in Vietnam. The ALJs recognized this problem, but concluded that "[t]he claimant was able to hear with assistive devices, absolutely adequately". Our review of the record supports this conclusion, as does the fact that he was able to attend classes and complete 32 hours of college work.[10] Accordingly, we do not find that his hearing loss, or level of pain, constitute non-exertional impairments that significantly affect his residual functional capacity, thus mandating a departure from the guidelines.

4.

Kyle raises a number of points of error with respect to the vocational testimony obtained in the second hearing, namely that (1) the ALJ refused to allow the vocational expert to testify about his non-exertional impairments; (2) the ALJ disregarded testimony about his ability to adjust; (3) the ALJ disregarded testimony from his representative regarding his lack of transferable skills; and (4) the ALJ failed to note the "obvious attempt" by the vocational

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[10] Dr. Killingsworth statements of September 1988, indicating that Kyle's hearing was getting worse, and that his hearing aids could not properly filter background noise, are not supported by objective testing; accordingly, we do not find that his evaluation is a basis for overturning a credibility determination that is amply supported by other evidence in the record. "Speculation about a possible non-exertional impairment cannot overturn the otherwise proper use of the administrative tables." ***Johnson v. Bowen***, 851 F.2d 748, 752 (5th Cir. 1988). Moreover, these statements are inconsistent with an earlier report that indicated that the hearing aids "significantly benefit[ed]" Kyle.

expert to signify the need to consider psychological factors. We agree with the district court that these contentions are without merit.

Based on our review of the record, we do not find that the ALJ refused to allow the vocational expert to testify about his non-exertional impairments. The ALJ did not include non-exertional impairments in his hypothetical because the appeals council had conclusively determined after the first hearing that Kyle did not have any non-exertional impairments. Nor do we find that the ALJ disregarded the expert's statement that someone with claimant's background "is going to have a tough time adjusting to sedentary work". Given Kyle's ability to attend class, the ALJ could conclude that Kyle was capable of so adjusting. In addition, the ALJ did not err in choosing not to rely on testimony from Kyle's representative regarding his lack of transferable skills, in light of reliable testimony from a more experienced vocational expert.

Moreover, we agree with the district court that the ALJ did not state that more psychological testing was needed, but, rather, indicated that in order to fully respond to the ALJ's request that she speculate on the possible limitations to Kyle's ability to do sedentary work, she would need more information.[11] We also hold

[11] The ALJ asked this hypothetical question because Moore had told him that he was going to send additional medical reports indicating that Kyle's condition had deteriorated from the time the appeals council determined that he could do a wide range of sedentary work. The ALJ therefore unsuccessfully tried to gauge the potential impact of this additional evidence on the expert's assessment. The additional evidence submitted consisted of Dr. Killingsworth's letter of September 23, 1988, discussed *supra*. The appeals council concluded that his observations and diagnosis were

that the ALJ's failure to order tests did not deprive Kyle of a "full and fair hearing". The decision to require an examination is discretionary and is not required "unless the record establishes that such an examination is *necessary* to enable the administrative law judge to make the disability decision". ***Jones v. Bowen***, 829 F.2d 524, 526 (5th Cir. 1987) (quoting ***Turner v. Califano***, 563 F.2d 669, 671 (5th Cir. 1977)). Kyle did not list a mental non-exertional impairment in his original request for benefits, nor is there any indication in the record that he ever requested a consultive examination. We do not find error.

5.

Finally, Kyle requests that this case be remanded in order to investigate his exposure to Agent Orange. We agree with the district court's conclusion that Kyle has failed to show good cause for the failure to place this evidence in the record in his initial administrative hearing, pursuant to 42 U.S.C. § 405(g).

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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repetitive and therefore adequately considered in making their initial determination that Kyle was capable of performing sedentary work and did not suffer from non-exertional impairments.