

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8330
Summary Calendar

ROBERT LEE JACOBS,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA, ETC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(DR-90-CV-12)

(June 28, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

I.

BACKGROUND

Plaintiff-Appellant Robert Lee Jacobs (Jacobs) appeals the district court's summary judgment in favor of defendant-appellee, Secretary of Health and Human Services (Secretary). The order

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissed Jacobs' motion to remand and affirmed the Secretary's denial of Jacobs' claim for Social Security Disability insurance benefits and supplemental income benefits, under 42 U.S.C. § 405 (g).

On July 26, 1988, Jacobs filed an application for social security benefits. Jacobs alleged total disability due to diabetes, uncontrollably high blood pressure and ulcers. Jacobs' medical records indicate a history of pancreatitis dating back to an abdominal injury in 1961, a fractured cervical spine dating back to 1954, and treatment for hypertension and coronary artery disease.

On February 2, 1987, Jacobs entered a hospital. Doctors diagnosed him with acute pneumonia. Conventional treatment had no effect on Jacobs. Subsequently, surgeons drained Jacobs' lungs and performed two surgeries to repair a perforated ulcer. On April 19, 1987, the hospital discharged Jacobs. Over the next two years, Dr. Winn periodically treated Jacobs for diabetes and hypertension. The only significant event during this time was Jacobs' hospitalization from February 20-March 3, 1988, for injuries sustained in a car collision.

On March 30, 1989, Dr. Winn issued a "[T]o whom it may concern letter" summarizing his treatment of Jacobs since 1969. The letter emphasized that Jacobs' 1987 surgeries had left him with a ventral hernia which significantly limited Jacobs' ability to lift. Further, the letter stated that Dr. Winn was treating Jacobs with medication for depression related to his medical problems. In

particular, the letter specified that Dr. Winn considered Jacobs "completely and totally disabled."

On April 6, 1989, the administrative law judge (ALJ) held a hearing. The ALJ advised Jacobs of his right to counsel when Jacobs elected to appear *pro se*. After Jacobs answered that he could not afford an attorney, the ALJ informed Jacobs of the availability of Legal Services counsel. Additionally, the ALJ stated that he "would be glad to give [Jacobs] a delay so that [he could] find help." Nevertheless, Jacobs said that he was "very informed" of his rights in this area, and insisted on proceeding with the hearing.

During the hearing, which determined the extent of Jacobs' disability, Jacobs stated that he had not worked since 1986. However, Jacobs said that prior to the time of the hearing, he had done some odd jobs about six hours a day, one day a week. When asked by the ALJ why he could not perform a light job, Jacobs first said it would be difficult for him to find such a job, and then stated that his diabetes would pose a problem. Furthermore, Jacobs said that it would be hard for him to take up a job because of his susceptibility to insulin reactions and blackout spells. Responding to the ALJ'S question asking how far he could walk, Jacobs estimated that he could walk one mile. Now, Jacobs contends that, in response to the ALJ's question, he stated he imagined he could walk a mile and did not know for sure that he could. Jacobs also said he could lift 60-70 pounds, occasionally even 100 pounds

"if I have to." Further, Jacobs testified that he continued to drive and do household chores.

Jacobs admitted his failure to follow Dr. Winn's request to monitor his blood sugar while at home. However, Jacobs explained that he had a defective monitoring device. Jacobs also complained of severe abdominal pain once every 3-4 weeks. Further, Jacobs stated that he had not had any side-effects from his medication.

Dr. Don Marth, a psychologist and vocational rehabilitation counselor, testified at the hearing as a vocational expert. Dr. Marth classified Jacob's past work as light to very heavy, and skilled in nature. The ALJ asked Dr. Marth to assume that Jacobs could perform light and sedentary work. Assuming such a functional capacity and taking into account Jacobs' age, education, and work experience, Dr. Marth testified that Jacobs' farming skills would transfer to the jobs of sales clerk, telephone sales clerk, order taker, and sales representative in a pesticide, fertilizer, insecticide, or spray company. On the other hand, if Jacobs had hypoglycemic attacks or dizzy spells on a frequent basis, Dr. Marth testified that he would experience difficulty in performing those jobs. In response, Jacobs stated that such jobs did not exist in his area.

Jacobs contends that the ALJ did not inform Jacobs of his right to cross-examine the vocational expert. However, the record reflects that at the conclusion of Dr. Marth's testimony, and upon further reexamination of Jacobs, the ALJ asked Jacobs whether he

had "anything else . . . to say this morning," to which Jacobs replied that he did not.

On July 31, 1989, the ALJ issued a decision finding Jacobs capable of performing the light and sedentary jobs identified by Dr. Marth. Thus, the ALJ found Jacobs not disabled within the meaning of the Social Security Act.¹ The ALJ also appended to the decision two copies of the Psychiatric Review Technique form, finding Jacobs without any medically determinable mental impairment. The Appeals Council denied Jacobs' request for review, and the ALJ's decision became the final decision of the Secretary.

On March 8, 1990, Jacobs filed a complaint in District Court. On May 28, 1991, the Magistrate Judge recommended that the Secretary's decision be affirmed. On June 10, 1992, the District Court adopted the recommendation and affirmed the Secretary's decision. Jacobs filed a timely Notice of Appeal on June 19, 1992.

On appeal to this Court, Jacobs contends that the District Court erred in upholding the ALJ's decision because: (1) the ALJ failed to develop the record fully and fairly; (2) no substantial evidence existed to support the decision; and (3) the ALJ denied Jacobs the right to cross-examine the vocational expert. Because we find Jacobs' arguments to be meritless, we AFFIRM.

¹ Sections 423(d)(1)(A) and 1382c(a)(3)(A) of the Social Security Act define "disability" as:

The inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

II.

ANALYSIS

A. DID THE ALJ FAIL TO DEVELOP THE RECORD FULLY AND FAIRLY

This Court set forth a standard of review in Kane v. Heckler, 731 F.2d 1216, 1219 (5th Cir. 1984), (stating that the ALJ has a duty to fully and fairly develop the facts relative to a claim for benefits). When, as in this case, the claimant is not represented by counsel, the ALJ's obligation "rises to a special duty" which requires the ALJ to "scrupulously and conscientiously probe into, inquire, of, and explore for all relevant facts." Id. at 1219-20. If the ALJ fails in this duty he does not have before him sufficient facts on which to make an informed decision and consequently the decision is not supported by substantial evidence. Furthermore, the Court in Kane held that the claimant (Kane) must show that had the ALJ done his duty, Kane could have and would have adduced evidence that might have altered the result. Id. at 1220.

Jacobs contends that the ALJ failed to perform his duty and develop the record fully. See Kane v. Heckler, 731 F.2d 1216, 1219 (5th Cir. 1984). In Kane, this Court remanded a denial of benefits by the ALJ because: "[t]he record disclosed[d] no question by the ALJ concerning whether or not Kane desired counsel. The hearing lasted five minutes and its transcript consisted{ed} of four pages. . . . The aLJ asked only one perfunctory question about Kane's subjective complaints." Kane v. Heckler, 731 F.2d at 1218.

In contrast, this Court held in James v. Bowen, 793 F.2d 702, 704-705 (5th Cir. 1986), that the hearing before the ALJ was

adequate and distinguishable from that in Kane because it lasted for ten minutes and the ALJ questioned the applicant extensively about his condition.² In comparison, the hearing in Jacobs' case lasted thirty-two minutes. Further, Jacobs' hearing yielded fifteen pages of testimony. Cf. Carrier v. Sullivan, 944 F.2d 243, 245 (5th Cir. 1991) (where the hearing lasted for 26 minutes and yielded 16 pages of testimony). The ALJ advised Jacobs of his right to counsel, including the right to have counsel free of charge. Additionally, the ALJ offered to postpone the hearing so that Jacobs could obtain counsel. Moreover, the ALJ extensively questioned Jacobs about the following aspects of his claim: (1) the day he last worked; (2) his attempts to find other work; (3) his ability to push, pull, reach, and grasp; (4) his lifting capacity; (5) his walking ability; (6) his need for assistive devices; (7) his ability to bend and stoop; (8) his smoking and drinking habits; (9) his activities; (10) his degree of pain; (11) why he felt he could not work; and (12) whether he had any side-effects from medication. Finally, the ALJ asked Jacobs to comment on the vocational expert's testimony.

Dr. Winn stated that Jacobs was being treated for depression resulting from his physical ailments. This Court has held that depression relating from frustrations concerning functional

² In James, this court unequivocally states that it did not set a time rule in Kane for determining if the ALJ conducted a full and fair investigation, but rather an objective test. Further, the court asserted that the substantial questioning of the ALJ about James' ability to walk, lift etc. did develop the relevant facts and the amount it took is not determinative.

limitations does not constitute a medically determinable mental impairment. Jones v. Bowen, 829 F.2d 524, 526 (5th Cir. 1987). Jacobs did not specifically raise the issue of depression in his claim for disability benefits or at the hearing before the ALJ. Therefore, the ALJ was not required to further develop the record on this issue; however, the ALJ did attach a Psychiatric Review Technique form in which he found that Jacobs did not have a medically determinable impairment. The ALJ fulfilled his duty to develop a full and fair record. See Carrier v. Sullivan, 944 F.2d at 245.

Jacobs further argues that the ALJ failed in his duty to take into account subjective complaints like pain. Jacobs contends that the ALJ may not discount a claimant's pain without contrary medical evidence. Johnson v. Bowen, 699 F. Supp. 475, 482 (E.D. Pa. 1988).³ However, this Court has previously held that not all pain or discomfort is disabling, and the fact that a claimant cannot work without such symptoms will not render his disabled. Cf. Hollis v. Bowen, 837 F.2d 1378, 1384 (5th cir. 1988). In this case, the ALJ did find plaintiff's complaints credible to the

³ Johnson states that the standard for evaluating a plaintiff's subjective complaints requires:

. . . (1) that subjective complaints of pain be seriously considered even where not fully confirmed by objective medical evidence; (2) that subjective pain may support a claim for disability benefits and be disabling; (3) that where such complaints are supported by medical evidence, they should be given great weight; and (4) that where a claimant's testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant's pain without contrary medical evidence.

Johnson v. Bowen, 699 F. Supp. 475, 482 (E.D. Pa. 1988).

extent that he was limited to light and sedentary work activity. the ALJ's determination that plaintiff's complaints are credible only to this extent is entitled to considerable deference if supported by substantial evidence. See Carrier v. Sullivan, 944 F.2d at 247; Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991).

Moreover, the ALJ properly noted that the record does not contain evidence of muscular spasm, atrophy, sensory loss, or similar observable manifestations which would indicate severe and constant pain. Cf. Hollis v. Bowen, 837 F.2d at 1384. Also, factors like Jacobs' ability to engage in driving and household work were found by the ALJ to be found inconsistent with his complaints. The ALJ noted that Jacobs' testimony suggested that he was not working because he could not find a job, not because he was disabled. Cf. 20 C.F.R. §§ 404.1566(c), 416.966(c).⁴ Accordingly the ALJ identified sufficient reasons for finding Jacobs' subjective complaints not credible to the extent that they would preclude the performance of light and sedentary jobs.

B. DID SUBSTANTIAL EVIDENCE EXIST TO SUPPORT THE ALJ'S DECISION

The Court must determine whether there is substantial evidence in the record to support the ALJ's decision and whether the proper legal standards were used in evaluating the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). Substantial

⁴ 20 C.F.R. § 404.1566(c) states "We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy but you remain unemployed because-

1. Your inability to get work;
2. Lack of work in your local area;"

evidence is more than a scintilla, but less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Villa, 895 F.2d at 1021-22. In applying this standard, this Court may not reweight the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the ALJ's findings. Id. at 1022.

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). 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. Crouch v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989). The five steps are:

- 1) Claimant is not presently working;
- 2) Claimant's ability to work is significantly limited by a physical or mental impairment;
- 3) Claimant's impairment meets or equals an impairment listed in the appendix to the regulations. (If so, disability is automatic);
- 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 Jacobs' claim failed to pass

step three in the five step analysis. The ALJ stated that Jacobs "does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No.4."

The ALJ also found that--although Jacobs cannot perform his past relevant work as a farmer--Jacobs retains the residual functional capacity to perform other relevant work in telephone sales or as an order taker. Thus, Jacobs is also disqualified at step five in the five-step analysis.

Jacobs contends that there could not have been substantial evidence for the ALJ's decision because the ALJ did not follow the recommendation of Dr. Winn, Jacobs' treating physician.⁵ Jacobs argues that the ALJ is bound by Dr. Winn's determination unless contradicted by substantial evidence. Havas v. Bowen, 804 F.2d 783, 785 (2nd Cir. 1986). Jacobs further asserts that an ALJ may disregard the treating physician's opinion but only by setting forth "specific, legitimate reasons for doing so, and this decision must itself be based on substantial evidence. As authority for the above Jacobs cites Rodriguez v. Bowen, 876 F.2d 759 (9th Cir. 9189). Jacobs is incorrect.

In the Fifth Circuit, the ALJ has broad discretion in determining the credibility of medical experts as well as lay witnesses and to weight their opinions and testimony accordingly. Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990). In addition, the ALJ is free to reject the treating doctor's determinations if

⁵ Dr. Winn considered Jacobs completely and totally disabled.

there is contradictory evidence. Bradley v. Bowen, 809 F.2d 1054, 1057 (5th Cir. 1985).

The strongest evidence contradicting the treating physicians' determination of disability came from Jacobs himself. Jacobs testified at the hearing that he could lift, walk, sit, use his arms and legs. Jacobs stated that he had done some odd jobs about one day a week prior to the hearing. When asked why he could not perform a light job, Jacobs stated that he could perform light work, but that it would be difficult for him to find such a job. There is ample evidence for the ALJ to conclude--in spite of the treating physician's findings--that Jacobs was not disabled for the purpose of the Social Security Act.

C. PROCEDURAL DUE PROCESS OBJECTIONS

Jacobs makes two procedural due process claims. First, Jacobs argues the ALJ denied his right to procedural due process by not informing him of his right to cross-examine the vocational expert. Jacobs states that the ALJ has a special responsibility to inform a claimant that he has a right to cross-examination particularly when he represents himself. Coffin v. Sullivan, 895 F.2d 1206 (8th Cir. 1990).

This Court has held that "[p]rocedural perfection in administrative proceedings is not required, so that judgments will be vacated only when a party's substantial rights have been affected. Morris v. Bowen, 837 F.2d 1362, 1364 (5th Cir. 1988). The ALJ does not have an absolute duty to advise an unrepresented claimant of the right to cross-examine witnesses, and failure to do

so is seldom, by itself, reason for remand. Figueroa v. Secretary of Health, Education & Welfare, 585 F.2d 551, 554 (1st Cir. 1978). Further, this Court has also held that it was not error for an ALJ not to advise a pro-se claimant of the right to cross-examine a non-testifying witness, when the claimant did not object to the admissibility of the witness's testimony or request cross-examination. Cross v. Finch, 427 F.2d 405, 408 (5th Cir. 1970).

Jacobs was informed of his right to have an attorney represent him at the hearing. The form advising him of his right to counsel stated: "[A] representative can question witnesses . . . in support of your claim." Jacobs was, in fact, informed by the Secretary that he could question witnesses.

After the testimony of the vocational rehabilitation expert, the ALJ asked Jacobs if there was anything else he would like to say.

The ALJ did not inform Jacobs of his right to cross-examine; however, the ALJ did engage in a fair, searching, and even-handed questioning of both Jacobs and the vocational expert. See Figueroa, 585 F.2d at 554.

Jacobs has not indicated any additional evidence he would have produced if he had been informed of his right to cross examine.⁶ His substantial rights were not affected by the failure of the ALJ to inform him of his right to cross-examine. Mays, 837 F.2d at

⁶ While Jacobs asserts that he did not realize that he could present evidence in support of his claim, the Notice of Hearing sent to him in this case reveals that Jacobs was indeed advised that he could present evidence, including supporting witness testimony and arguments.

1364. Accordingly, Jacobs has not established a due process violation resulting from the ALJ's failure to advise him of the right to cross-examine Dr. Marth.

Second, Jacobs makes the assertion that the Psychiatric Review Technique form attached in duplicate to the ALJ's decision constitutes a post-hearing medical report, which gives right to cross-examination of the author by Jacobs. However, a Psychiatric Review Technique is not a medical report; it is a form in which the ALJ addresses allegations of a mental impairment, in accordance with the regulations. Cf. 20 C.F.R. § 404.1520(a). Further, the ALJ wrote the report.

III.

CONCLUSION

For the foregoing reasons we hold that substantial evidence existed to support the ALJ's decision, the ALJ fully developed the record and satisfied procedural due process.

We AFFIRM.