IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-8460
Summary Calendar

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SARA HARVARD,

Plaintiff-Appellant,

versus

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

Defendant-Appellee.

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Appeal from the United States District Court for the
Western District of Texas
(A 91 CV 502)

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(December 17, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The relevant background facts of this appeal are as follows: Sara Harvard filed an application for social security disability benefits based on a "degenerative disease of the spine." The state agency and Social Security Administration denied those benefits.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

At a de novo hearing, held before an administrative law judge (ALJ), Harvard appeared with her attorney and a vocational expert. The ALJ found that Harvard was effectively insured under the Act from March 31, 1984, until December 31, 1988, and that she had "not engaged in substantial gainful activity since March 31, 1984." Based on the evidence, the ALJ found that although Harvard suffered degenerative disease of the lumbar spine, Harvard's testimony that the pain she experienced was severely disabling was "neither persuasive or credible and therefore cannot be found as fact." Harvard testified that she had formerly worked as a draftsman but had to quit because of her extreme pain. Finding that Harvard had been maintaining a "normal level of daily activities," the ALJ concluded that her impairments had not prevented "substantial gainful activity for any continuous twelve month period" and therefore Harvard was not disabled as defined by the Social Security Act. Harvard's appeal of that determination to the appeals council was denied.

Harvard filed a complaint in the district court, seeking judicial review of the final decision rendered by the appeals council. The district court affirmed the decision of the Secretary and found that the ALJ's finding that Harvard's pain was not so great as to render her "disabled" under the Social Security Act was "supported by substantial evidence." Harvard appealed.

I

Summary judgment is proper where the movant alleges "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); U.S. v. McCallum, 970 F.2d 66, 68 (5th Cir. 1992). This Court applies the same standard as the district court when it makes its ruling on the summary judgment motion. See Sims v. Monumental General Ins. Co., 960 F.2d 478, 479 (5th Cir. 1992).

To obtain disability benefits, Harvard must have proved that she was disabled as defined by the Social Security Act. Cook v. Heckler, 750 F.2d 391, 393 (5th Cir. 1985). Congress defines disability under the Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable, physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 416(i)(1) and
§ 423(d)(1)(A).

Judicial review of the Secretary's denial of disability benefits is limited to a determination of whether (1) the decision is supported by substantial evidence in the record and (2) whether the denial comported with relevant legal standards. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).

"Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Villa, 895 F.2d at 1021-22.

The Secretary must evaluate a disability claim by determining sequentially whether (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; (4) impairment prevents claimant from doing past relevant work; and (5) claimant cannot presently perform relevant work. See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. The claimant has the initial burden to establish that she cannot perform her past relevant work. If claimant has so proved, the burden will then shift to the Secretary to show that the claimant is capable of other work. To make this determination, the Secretary then considers the claimant's residual functional capacity, age, education, and work experience, according to the guidelines set forth by the Secretary. See 20 C.F.R. § 404.1561; Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990). If the Secretary meets that burden, the claimant must prove that he cannot perform the other work. Fields v. Bowen, 805 F.2d 1168, 1169-70 (5th Cir. 1986).

Where disability is determined at any of the steps, the inquiry need not go further because such a finding is conclusive.

See Harrell v. Bowen, 862 F.2d 471, 475 (5th Cir. 1988). A determination that the claimant is not disabled will similarly terminate further inquiry. Crouchet v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989). The ALJ stopped at the second stage of the sequential analysis and concluded that Harvard had no severe impairments through the date of his decision on June 27, 1990.

In Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991), this Court set forth four elements of proof that must be weighed when determining whether substantial evidence of disability exists: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) the claimant's subjective evidence of pain and disability; and (4) his age, education, and work history. This Court may not reweigh the evidence or try the issues de novo. Cook, 750 F.2d at 392. The Secretary, rather than the courts, must resolve conflicts in the evidence. See Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983).

As set forth in Wren, determining whether there is substantial evidence of disability involves a consideration of both objective and subjective elements. Wren, 925 F.2d at 126.

II

Since factors (1) and (2) under Wren are related, these factors may be considered together. When Harvard was hospitalized for pneumonia in 1987, a radiology report demonstrated that Harvard's "vertebral body heights are within normal limits" and that there was "no evidence of spondylysis [sic] or

spondylolisthesis" even though Harvard had "degenerative disk disease" at L4-5.

Harvard's treating physician, Dr. Bailey, reported that "[f]ollowing her illness in 1987, Mrs. Harvard's disability increased as dyspnea, weakness and fatigue and severe back and leg pain increased." Dr. Bailey noted that because of the symptoms reported by Harvard, "she was unable to engage in any gainful occupation." Dr. Bailey further observed that "[i]t was most difficult for her to get up and down and move about because of very severe, recurrent muscle spasm in her low back and sciatic neuritis bilaterally. Side bending and rotation also caused extreme pain." Dr. Bailey reported that at the time he last saw her on December 12, 1988, "it was impossible for her to carry on any of her normal activities" and that consequently she had developed "a mild Depressive Neurosis."

In the spring of 1989, the Secretary hired an examining physician, Dr. Obermiller, who took x-rays and reported "degenerative disks at the L4-5 and L3-4 level with a spondylolisthesis of 10mm of L3 and L4" and indicated that "[t]here are considerable arthritic changes about these two vertebral areas." Dr. Obermiller indicated that "[t]he L5-S1 disc level is intact with no spondylolysis or spondylolisthesis, as is the L2-3 level." Dr. Obermiller reported that X-rays did not reveal any "nerve root compression." Harvard's left hip x-ray was also reportedly normal. Dr. Obermiller observed that although Harvard

was "somewhat obese," she could "sit and stand without much difficulty and move about" and "has no difficulties lifting or carrying light objects." Harvard did exhibit a slight degree of pain when walking. Dr. Obermiller made further observations:

> The patient has no limitation of flexion or extension and extension rotation of the spine. There is no motor strength loss. She is able to heel-walk and toe-walk without difficulty ... There is no atrophy of the bilateral lower extremities proximally or distally. The patient cannot squat to beyond 20 degrees of flexion in the legs ... There is no particular spasm in the low back area ...
>
> I think that most of her back pain is mechanical in nature, and that she could possibly need a fusion to help with the mechanical back pain.

Although the opinion and diagnosis of Dr. Bailey, a treating physician, should be afforded considerable weight in determining disability, the ALJ "is entitled to determine the credibility of the medical experts as well as lay witnesses and to weigh their opinions and testimony accordingly." Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990) (citation omitted). "[T]he ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion." Bradley v. Bowen, 809 F.2d 1054, 1057 (5th Cir. 1987) (citation omitted). The ALJ found that Dr. Bailey's opinion was "not well supported by objective evidence, but has nonetheless been considered in light of all the evidence of record." The ALJ supported his conclusion further by noting that Social Security regulations do not require the ALJ to adopt

automatically an opinion rendered by a physician. (Citing § 404.1527 and § 416.927.)

The ALJ concluded that "[t]his physician's [Bailey's] opinion appears to be based on the claimant's subjective complaints as there is no objective evidence to support his opinion." That finding was based on substantial evidence in the record. Dr. Bailey's statement that it was *impossible* for Harvard to carry out her normal daily activities does not comport with Harvard's subsequent testimony before the ALJ in which she admitted participating in a wide array of activities pursuant to her hobbies and routine daily living.

After the hearing before the ALJ, Harvard was examined by another physician, Dr. Anderson, who reported that Harvard had "severe degenerative disc disease and osteoarthritic changes in her back" and that "there is no question that she has a cause for severe back pain." Dr. Anderson acknowledged Harvard's "spondylolysis and spondylothesis" and concluded that, although Harvard's pain is subjective, "there is very real evidence that it is objectively based." The examination by Dr. Anderson provided no new evidence. The ALJ considered Harvard's testimony estimating the severity of her pain and, without denying the existence of some pain, found only that the *degree* of pain was not "severe" as defined by the Act.

III

A

The ALJ could consider Harvard's reported daily activities in conjunction with other evidence to determine whether she was disabled under the Act. Reyes v. Sullivan, 915 F.2d 151, 155 (5th Cir. 1990). Harvard testified that she could take walks of five to ten minutes duration before experiencing spasms in her back and painful sensations running down her legs. She later indicated that she took regular walks with her animals. Harvard explained that she could sit for as much as an hour but that she needed to move about to relieve discomfort. She later conceded that she had worked for three hours on greeting cards even though she had to get up and down to prevent discomfort. Attending a movie was difficult because of its duration. Harvard testified that she lived alone in a log cabin and cooked her own meals, did her own shopping, cleaning and cared for her personal needs. Harvard managed a small garden containing only tomato plants. She tended three cats and a dog, feeding them from a five-gallon bucket. She fed the deer around her property. She also painted, considering herself an artist. Harvard visited friends occasionally and could drive her Volkswagen into town.

B

This Court has held that pain constitutes a disabling condition under the Social Security Act only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment."

Harrell, 862 F.2d at 480. "Pain may constitute a non-exertional impairment that can limit the jobs a claimant would otherwise be able to perform." Selders, 914 F.2d at 618 (citation omitted). "[A] factfinder's evaluation of the credibility of subjective complaints is entitled to judicial deference if supported by substantial record evidence." Villa, 895 F.2d at 1024 (5th Cir. 1990) (citations omitted). "How much pain is disabling is a question for the ALJ since the ALJ has primary responsibility for resolving conflicts in the evidence." Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. 1981). "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 other symptoms alleged." Anthony v. Sullivan, 954 F.2d 289, 296 (5th Cir. 1992) (citation omitted).

Harvard testified that throughout her activities her back hurt all the time. She rated the pain at five on a scale of one to ten, the latter being the worst pain. Harvard indicated that she would wake up every two or three hours on account of her back pain. Harvard testified that she took aspirin for the pain about 15 to 20 times each day. On appeal, Harvard contends, in part, that she took aspirin because of her "limited financial resources." The ALJ may still consider whether a claimant has opted to take aspirin rather than prescription medication when evaluating the claimant's credibility on the issue of pain. See Griego v. Sullivan, 940 F.2d 942, 944-45 (5th Cir. 1991). The ALJ rejected Harvard's claims as

to the degree of her pain, referring to her "over-the-counter [use of] aspirin for her pain" coupled with "her daily activities."

The ALJ indicated that "[i]n the instant case, the issue is not the existence of pain, but rather the degree of incapacity incurred because of it." Although the ALJ recognized that Harvard suffered from some pain and discomfort, he concluded that such pain would not preclude Harvard from "basic work activity." The vocational expert classified Harvard's past employment ("draftsman") as a "skilled level occupation with a sedentary and light exertional requirement ... it's basically a sedentary position."

C

The ALJ found that Harvard did not meet her initial burden to establish that she could not perform her past relevant work. For that reason, the burden did not shift to the Secretary to require a consideration of Harvard's residual functional capacity, age, education, and work experience. See Stone v. Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985). The ALJ found that Harvard's back problems would not interfere significantly with her ability to work "irrespective of age, education or work experience," because such problems did not constitute a "severe" impairment.

IV

Reviewing all factors, the ALJ found that Harvard's claim for disability collapsed since it was based on an estimate of pain that was "clearly exaggerated and not supported by objective findings,

in light of her daily activities and lack of prescribed medication and medical attention." The finding by the ALJ is amply supported by Harvard's own testimony regarding her daily activities, the medical records and reports. Such activities fairly reflect Harvard's ability to perform sedentary work. The ALJ did not have to accept the vocational expert's testimony as to Harvard's disability, since this expert merely concluded that, if facts as alleged by Harvard were true, then Harvard would be disabled. Such conclusions became irrelevant when Harvard's claims were unsupported by medical evidence. See Owens v. Heckler, 770 F.2d 1276, 1282 (5th Cir. 1985).

The district court thus did not err when it affirmed the Secretary's denial of disability benefits, because the ALJ's decision was supported by substantial evidence in the record and comported with relevant legal standards. Using the same standard as that applied by the district court, we AFFIRM the district court's finding that Harvard was not eligible for disability benefits under the Social Security Act.

A F F I R M E D.