

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8468
Summary Calendar

DOUGLAS EARL DURDEN,

Plaintiff-Appellant,

versus

DEPARTMENT OF HEALTH & HUMAN
SERVICES, Secretary of Health
and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(A-90-CA-612)

(April 22, 1993)

Before POLITZ, Chief Judge, DUHÉ AND DeMOSS, Circuit Judges.

POLITZ, Chief Judge:*

Douglas Earl Durden seeks disability insurance benefits under 42 U.S.C. §§ 416(i) and 423, and supplemental social security income disability benefits under 42 U.S.C. § 1381a. The Secretary

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of Health and Human Services found Durden capable of engaging in substantial gainful activity and thus ineligible for benefits under the Act. The district court affirmed and Durden timely appealed. We reverse.

Background

Durden began as a golf course general laborer and worked up to superintendent of maintenance. He sustained a serious on-the-job injury to his back in 1982 and suffers from a degenerative condition involving at least three discs in his lower back. He collected workmen's compensation following this injury until returning to work on his own initiative in early 1984. At that time he supervised ten men in the upkeep of the golf course, traversing same in a golf cart. The work crew was aware of his back pain and faithfully followed his orders to ease his workload. The pain worsened and in 1988 Durden was forced to quit work. He has not worked since.

Twice married and twice divorced, Durden now lives alone in a trailer located on his father's property, receiving \$90 a month in food stamps. He can dress in the morning only with his sister's help, and spends the day reading, watching television, and taking naps. He cannot stand or sit still for more than a few minutes at a time and no longer is able to negotiate stairs. His sleep is erratic. Once an avid sportsman, he no longer hunts or fishes or attends sporting events. He cannot endure long drives or even go shopping. Because of his back pain he takes Vicodin, Hydroxyzine,

and Soma three times per day, Disalcid four times per day, two Amtriphine before bed, and Tylenol prn. The back pain requires the wearing of a back brace and use of a TENS unit which applies regular electric charges to his back as part of the pain management. With increasing frequency the pain overwhelms the foregoing regimen and he must resort to injections by his doctor. Durden attested that the medications make him drowsy, that stress exacerbates his pain, and that he has grown severely depressed.

His application for benefits was twice denied by the Social Security Administration before a hearing was conducted by an administrative law judge. The ALJ received numerous reports from doctors, including Dr. Denny Tharp, Durden's regular physician, all of whom agreed that there was narrowing of his L4-L5 disc space. The reports also stressed that Durden's subjective complaints of pain were genuine and that his condition continues to deteriorate as his back muscles weaken. This muscle atrophy appears to result from Durden's efforts to withdraw and avoid the pain associated with his degenerative disc condition; his lifestyle has become more sedentary and he wears the back brace more regularly.

The ALJ found Durden not disabled notwithstanding his damaged vertebrae, deteriorating muscle condition, and emotional condition. Durden sought relief from the Appeals Council without avail. The Secretary declined to review that decision, thus rendering it her final decision. Durden filed a complaint in federal district court. The magistrate judge recommended that the Secretary's decision be reversed and that Durden be awarded the benefits he

sought. The district court declined to follow this recommendation.

Analysis

Our review of the Secretary's determination is limited to considering whether it is supported by substantial evidence and whether the appropriate legal standard was applied.¹ We may not simply substitute our judgment for that of the Secretary; rather, when reviewing the evidence with an eye toward its sufficiency, we ask only whether it is of such weight and quality that reasonable minds would accept it as supporting the Secretary's conclusion. In short, in order to acquit his burden on appeal Durden must demonstrate that the evidence leaves a "conspicuous absence of credible choices" or that there is simply "no contrary medical evidence."² Our review of the record convinces us that Durden has satisfied that requirement.

An individual applying for benefits has the initial burden of establishing that he is disabled. The burden then shifts to the Secretary to prove that the applicant is capable of engaging in substantial gainful activity.³ Durden's ability to engage in substantial gainful activity must, however, be evaluated in light

¹ **Villa v. Sullivan** 895 F.2d 1019 (5th Cir. 1990).

² **Hames v. Heckler**, 707 F.2d 162 (5th Cir. 1983).

³ **Neal v. Bowen**, 829 F.2d 528 (5th Cir. 1987).

of the totality of his impairments.⁴

In order to determine whether an individual is disabled within the meaning of the Social Security Act, the Secretary has adopted a five-step sequential process set forth in 20 C.F.R. § 404.1520(b)-(f). One of the inquiries is whether the individual is capable of returning to his prior work. If he can, by definition the individual is not disabled.

The Secretary accepted the ALJ's determination that Durden was capable of returning to his prior work. We think the objective medical evidence compels a different conclusion.⁵ The overwhelming weight of the medical evidence, including the reports of treating physicians, establishes that Durden's impairments have grown more acute since he quit working in 1988 because of his back pain.⁶

Durden described his debilitating physical pain. Such evidence is probative if supported objectively.⁷ The Secretary in

⁴ 42 U.S.C. § 423(d)(2)(C).

⁵ Indeed, the government candidly acknowledges that pain and medication cause severe restrictions on Durden's activities and social contacts, as it disputes mental illness as a cause.

⁶ Dr. Tharp and other treating physicians stressed the severity of Durden's pain and noted his inability to return to work. The ALJ evidently chose to discount this aspect of Dr. Tharp's evaluation as he rejected Durden's subjective complaints. We have stressed that "unless there is good cause shown to the contrary, the testimony of the treating physician must be accorded substantial weight." **Fruge v. Harris**, 631 F.2d 1244, 1246 (5th Cir. 1980).

⁷ **Wren v. Sullivan**, 925 F.2d 123 (5th Cir. 1991).

fact concedes that "plaintiff's testimony as to his functional limitations, if accepted as true, would preclude virtually any occupation." The ALJ rejected Durden's subjective complaints despite overwhelming corroboration from the medical reports, including several doctors who had been treating Durden for years.

Durden now claims that after the ALJ hearing he was involved in an automobile accident in which he suffered a shoulder injury and further injured his lower back. We cannot consider this information on this appeal;⁸ nor do we need to. The record before us suffices.⁹ The medical evidence clearly establishes that Durden cannot presently return to his former employment. In addition, at his age and with his educational background and work experience he cannot engage in any other gainful activity. It is clear that he can do little more than try to avoid pain, with a moderate degree of success, through rest and medication, maintaining a positive attitude, and hoping that pain therapy will yield positive results.

We are compelled to the conclusion that Durden established his disability and that there is no persuasive evidence that he is capable of engaging in substantial gainful activities. Durden is presently disabled within the meaning of 42 U.S.C. § 423 and he is entitled to benefits provided by law therefor.¹⁰

⁸ **Bradley v. Bowen**, 809 F.2d 1054 (5th Cir. 1987).

⁹ 42 U.S.C. § 405(g); **Harris v. Secretary of Health & Human Serv.**, 821 F.2d 541 (10th Cir. 1987).

¹⁰ **Carroll v. Secretary of Health & Human Serv.**, 705 F.2d 638 (2d Cir. 1983) (noting that absent motion for remand to present

The judgment of the district court is REVERSED, judgment in favor of Durden is RENDERED, and the matter is REMANDED to the Secretary for the calculation of benefits which ought be done forthwith.

new material evidence and a showing of good cause for "failure to present such evidence" at the first hearing, remand for reconsideration would be inappropriate).