UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8518
Summary Calendar

IRMA FUENTES,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA,
Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(MO-91-CA-055)

April 7, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Irma Fuentes appeals the district court's summary judgment in favor of the Secretary of Health and Human Services in her action for review, pursuant to 42 U.S.C. § 405(g), of the Secretary's final decision denying her application for disability benefits under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 416(i), 423, & 1382c(a)(3)(A). Because the Secretary's determination is not supported by substantial evidence and was

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 Pursuant to that rule, the court has determined that this opinion should not be published.

reached by improper legal standards, we **REVERSE** and **REMAND** for further proceedings consistent with this opinion.

I.

Fuentes first applied for disability-related benefits in August 1988, with a protective Title XVI filing on July 14, 1988, alleging an inability to work since July 14, 1988, due to heart problems, shortness of breath, and arthritis. She was 49 years old, had an eighth grade education, and had past relevant work as a shirt presser and checker in a laundry. The Secretary denied her application in January 1989, on initial determination, and in April 1989, on reconsideration. Fuentes then requested a *de novo* hearing before an Administrative Law Judge (ALJ) of the Social Security Administration (SSA), which was held in October 1989.

At the hearing, Fuentes testified that she experienced constant arthritic pain in her hands and knees, and that her treating physician, Dr. Mansour, instructed her to stay off her feet and keep them elevated. She stated that, at any one time, she could walk only approximately one-half block, sit for only 10 minutes, and stand for only 15 minutes; that she could barely lift a five-pound sack of flour; that she could not bathe or fully dress herself; she could not sleep through the night without getting up several times because of pain in her back, knees, and hands; and that she had to rest frequently during the day because of her inability to sleep at night. She also complained of swelling in her knees and hands, and additional pain in her legs due to varicose veins.

The record before the ALJ also contained various past medical records and medical reports prepared for the proceedings. Dr. Vogel, who examined Fuentes at the request of the SSA, reported the following: significant degenerative changes of the right knee and a "functional disability related to this", a slight antalgic gait favoring her left leg, morbid obesity contributing to her degenerative joint complaints,[2] varicosities in her lower legs, cardiomegaly, mild pulmonary vascular congestion, and left ventricle enlargement.

Dr. Mansour's clinic records, which spanned from March 1987 to September 1989, contained various descriptions of arthritic pain, swelling, and tenderness in multiple joints; and diagnoses of obesity, osteoarthritis, arthralgia, polymyositis, varicosity of the legs, and fibrositis. The day after the hearing, Dr. Mansour submitted a medical opinion, using Fuentes' representative's questionnaire form, which was included in the record, indicating that, as a result of her impairments, Fuentes was unable to stand, walk, or sit for more than 30 minutes at one time, stand or walk for more than one hour during an eight-hour work day, or lift more than five pounds on a regular basis. Additionally, an X-ray submitted with that opinion showed moderate degenerative changes in the left knee. Two other doctors, who did not examine Fuentes, prepared residual functional capacity assessments. Both assessments indicated that Fuentes retained the capacity to lift

[2] Fuentes, who is approximately 5'5" tall, weighs approximately 250 pounds.

and/or carry a maximum of 50 pounds, to frequently lift and/or carry 25 pounds, to stand, sit, and/or walk a total of approximately six hours per eight-hour day, and, at least occasionally, to climb, balance, stoop, kneel, crouch, and crawl. Those reports, however, apparently were not considered by the ALJ; and the Secretary does not rely on them in his argument.

That December, the ALJ denied the requested benefits, finding that, although Fuentes was unable to perform her past relevant work, she was still capable of performing the full range of sedentary work, as defined in 20 C.F.R. §§ 404.1567 & 416.967, thus rendering her not disabled. In February 1991, the Appeals Council denied Fuentes's request for review of the ALJ's decision, making that decision the final decision of the Secretary. Having exhausted administrative remedies, Fuentes brought this action in April 1991, seeking review of the Secretary's denial. On cross motions for summary judgment, the district court, in a most thorough opinion, ruled in favor of the Secretary, and dismissed Fuentes's claim.

II.

The sole issue presented is whether the Secretary erred in determining that Fuentes was not disabled. Our review is limited to determining (1) whether the Secretary applied the proper legal standards, and (2) whether the Secretary's decision is supported by substantial evidence on the record as a whole. ***Anthony v. Sullivan***, 954 F.2d 289, 292 (5th Cir. 1992). "We may not reweigh the evidence or substitute our judgment for that of the Secretary,

but we must scrutinize the record in its entirety to ascertain whether substantial evidence does indeed support the Secretary's findings". ***Fraga v. Bowen***, 810 F.2d 1296, 1302 (5th Cir. 1987). To be substantial, evidence must be relevant and sufficient for a reasonable mind to accept it as adequate to support a conclusion. ***Id.*** It is more than a scintilla, but less than a preponderance. ***Id.***

In evaluating a disability claim, the Secretary follows the well known sequential five-step process: (1) If the claimant is presently working, a finding of "not disabled" must be made; (2) if the claimant does not have a "severe impairment" or combination of impairments, he will not be found disabled; (3) if the claimant has an impairment that meets or equals an impairment listed in Appendix 1 of the Regulations, disability is presumed and benefits are awarded; (4) if the claimant is capable of performing past relevant work, a finding or "not disabled" must be made; and (5) if a claimant's impairment prevents him from doing any other substantial gainful activity, taking into consideration his age, education, past work experience, and residual functional capacity, he will be found disabled. ***Anthony***, 954 F.2d at 293 (5th Cir. 1992); 20 C.F.R. §§ 404.1520 & 416.920. A finding at any point in the five-step review that a claimant is disabled or not disabled terminates the analysis. ***Id.***; 20 C.F.R. § 416.920(a). Through step four, the claimant bears the burden of proof, but once he has established the inability to perform past relevant work, the burden shifts to the Secretary to show that there is work in the national economy or

other substantial work that the claimant can perform. ***Wren v. Sullivan***, 925 F.2d 123, 125 (5th Cir. 1991). If the Secretary meets this burden, then the claimant must prove that he is not able to perform the alternate work. ***Anderson v. Sullivan***, 887 F.2d 630, 632-33 (5th Cir. 1989).

The ALJ reached all five steps, concluding in step four that Fuentes was incapable of performing her past relevant work, but, in step five, that Fuentes was still capable of performing the full range of sedentary work. In finding Fuentes capable of sedentary work, the ALJ rejected Dr. Mansour's physical capacity assessment as "obviously unsupported" and Fuentes's testimony regarding the extent of her pain as "grossly out of proportion to the evidence of record". Citing no other evidence, the ALJ stated that he "[saw] nothing *to contraindicate* the ability to sustain work activity at a sedentary exertional level". (Emphasis added.) He then referred to the Medical-Vocation Guidelines in the regulations, 20 C.F.R. § 404.1567, Subpart P, Appendix 2, which take administrative notice of unskilled jobs available in the national economy, and concluded that "considering her age, ... past work experience, and limitations", jobs existed in the national economy which Fuentes could reasonably be expected to perform.

This conclusion is not supported by substantial evidence, and was reached by improper legal standards. First, the ALJ appears to have improperly placed on Fuentes the burden of proving that she was *incapable* of performing sedentary work, rather than requiring the Secretary to produce evidence that she was capable of it.

Assuming, without deciding, that the ALJ was otherwise entitled to rely exclusively on the Medical-Vocational Guidelines to determine the existence of other work that Fuentes could perform,[3] there was insufficient medical evidence for the ALJ to determine that Fuentes had the residual functional capacity to perform sedentary work.

Second, although the ALJ is entitled to determine the credibility of medical experts and to weigh their opinions accordingly, ***Scott v. Heckler***, 770 F.2d 482, 485 (5th Cir. 1985), his rejection of Dr. Mansour's opinion left the record devoid of any medical evidence of the *effect* of Fuentes's impairments. Dr. Vogel's report was too vague to support the ALJ's finding regarding Fuentes's residual capacity, and, in any event, tended to support Dr. Mansour's opinion. Furthermore, even if the ALJ had relied on the non-examining doctors' reports, the reports of non-examining physicians, taken alone, do not constitute substantial evidence. ***Strickland v. Harris***, 615 F.2d 1103, 1109 (5th Cir. 1980).

In ***Taylor v. Heckler***, 742 F.2d 253, 256-57 (5th Cir. 1984), this court held that the ALJ's "lay deductions" that the claimant

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[3] When the characteristics of the claimant correspond exactly to criteria in the Medical-Vocational Guidelines, and a 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. 20 C.F.R. § 404.1569; ***Fraga***, 810 F.2d at 1304. Otherwise, he must rely upon expert vocational testimony or other similar evidence to establish that such jobs exist. ***Fraga***, 810 F.2d at 1304. The ALJ did not state whether he considered Fuentes's impairments exertional, non-exertional, or both. *See also* ***Perez v. Schweiker***, 653 F.2d 997 (5th Cir. 1981) (holding reliance on the Guidelines improper where the medical evidence was insufficient to establish that the criteria regarding residual capacity were satisfied).

was not disabled, based upon the "lack of finding of ... objective symptoms", in the face of the claimant's treating physicians' opinions and the claimant's testimony to the contrary, were unsupported by substantial evidence -- "at least where these doctors' conclusions [were] not contradicted by the only other medical report in the record". Similarly, in ***Freeman v. Schweiker***, 681 F.2d 727, 731 (11th Cir. 1982) (cited favorably in ***Smith***, 742 F.2d at 257), the Eleventh Circuit held that the ALJ's finding of a non-painful residual capacity, based solely upon the lack of observable symptoms, was not supported by substantial evidence where the medical evidence showed a basis for the claimant's complaints of pain. Additionally, in ***Perez v. Schweiker***, 653 F.2d 997, 1001 (5th Cir. 1981), this court reversed where the ALJ discarded the unequivocal testimony of the treating physician, the claimant, and the claimant's wife, and apparently based his finding that the claimant retained the capacity to perform light work on his own half-hour observation of the claimant during the hearing. In ***Perez***, we stated: "Even if [the claimant's] impairment [was] not disabling based upon the medical evidence alone, the Secretary clear[ly] overstepped his bounds in making medical and vocational decisions without any support in the record". 653 F.2d at 1001.

III.

For the foregoing reasons, the summary judgment is **REVERSED,** and the case is **REMANDED** for further proceedings consistent with this opinion.

REVERSED and REMANDED.