

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8600
Summary Calendar

JO BETH NEWMAN,

Plaintiff-Appellant,

versus

DEPARTMENT OF HEALTH & HUMAN
SERVICES, and LOUIS W. SULLIVAN,
M.D., SECRETARY,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
A 91 CV 538

(May 12, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Jo Beth Newman filed applications for disability insurance benefits under Title II of the Social Security Act ("the Act"), 42 U.S.C. §§ 416(i) and 423, and for supplemental security income benefits based on disability under Title XVI of the Act, 42 U.S.C. § 1381a. Newman alleged disability because of extreme fatigability

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

and muscle weakness as a result of post-polio syndrome. The Secretary of Health and Human Services ("the Secretary") denied her claims, and Newman requested and received a hearing before an administrative law judge (ALJ). The ALJ found that Newman was not disabled within the meaning of the Act. The Appeals Council denied Newman's request for review of the ALJ's decision, and the decision therefore became the final decision of the Secretary. Newman sought judicial review in district court pursuant to section 205(g) of the Act, 42 U.S.C. § 405(g). The district court affirmed the decision of the Secretary, and Newman appealed. We find that the decision of the ALJ is supported by substantial evidence and we therefore affirm the district court.

I

In 1953, Newman was diagnosed with acute spinal and bulbar poliomyelitis. Newman was unable to walk with any degree of strength for approximately one year; however, she made a remarkable recovery and was twice married and reared two children. Newman now claims she suffers from post-polio syndrome and that this condition causes extreme exhaustion and pain, leading to inability to perform daily living, social, and work activities, as well as stiffness and lack of strength in her feet, legs, shoulders, neck, and arms.

Newman's past relevant work experience is as a bookkeeper and a bank teller. She was born on October 27, 1934, and was 55 years old at the time of her hearing before the ALJ. Newman is divorced, has two grown children, and lives with her mother. She has a high

school education and is experienced in semi-skilled work with transferable skills.

Newman filed an application for social security disability insurance benefits on May 30, 1989, alleging that she had been unable to engage in substantial gainful activity since December 31, 1987 due to post-polio syndrome. Her claim was initially denied and she filed a timely request for a hearing before an ALJ. The ALJ issued a decision on May 24, 1990, that Newman was not disabled within the meaning of the Act. On May 8, 1991, the Appeals Council declined to grant Newman's request for review of this decision. After she timely exhausted her administrative remedies, Newman sought judicial review of the Secretary's final decision. On August 21, 1992, the magistrate judge recommended that the Secretary's decision be affirmed. By order dated September 30, 1992, the district court adopted the recommendation of the magistrate judge and affirmed the decision of the Secretary. Newman appeals.

II

Although Newman states eight issues on appeal, her argument in essence is that the ALJ's determination that she was not disabled because she could perform sedentary-level work in the national economy is not supported by substantial evidence. On the other hand, the Secretary argues that substantial evidence and relevant legal standards support the ALJ's decision that Newman was not

disabled because she could perform sedentary-level work in the national economy.

III

A

Our review of the ALJ'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) the denial comported with relevant legal standards. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). If the ALJ'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.

B

We begin our evaluation by noting that not all severe impediments are disabling. Harrell v. Bowen, 862 F.2d 471, 481 (5th Cir. 1988). To obtain disability benefits, Newman must prove that she is disabled as defined by the 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 12 months." 42 U.S.C. §§

416(i)(1), 423(d)(1)(A). The ALJ must evaluate a disability claim by determining sequentially whether (1) the claimant is not presently working; (2) the claimant's ability to work is significantly limited by a physical or mental impairment; (3) the claimant's impairment meets or equals an impairment listed in the appendix to the regulations; (4) the claimant's impairment prevents her from doing past relevant work; and (5) the claimant cannot presently perform relevant work. 20 C.F.R. § 404.1520; Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991). A finding that a claimant is not disabled at any point in the five-step review is conclusive and terminates the analysis. Wren v. Sullivan, 925 F.2d 123, 125-26 (5th Cir. 1991).

Newman has the initial burden of proving that she is disabled within the meaning of the Act. Cook, 925 F.2d at 125. If she proves this, the burden shifts to the Secretary to show that Newman is capable of performing other work by considering her residual functional capacity, age, education, and work experience. See 20 C.F.R. § 404.1561; Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990). If the Secretary succeeds, Newman must prove that she cannot perform the other work. Fields v. Bowen, 805 F.2d 1168, 1169-70 (5th Cir. 1986).

The ALJ found that Newman has post-polio syndrome that is indeed severe but not so severe as to be disabling. The ALJ found that, based upon the objective medical evidence, Newman can stand no more than thirty minutes at one time and no more than two hours

out of a given eight-hour period, and can sit for no more than two hours at a time and no more than six hours out of an eight-hour period. Because of these restrictions, the ALJ found that Newman can engage only in a narrow range of sedentary work. The ALJ discredited Newman's testimony regarding her symptoms, noting that objective medical findings indicate that her general motion and coordination were within normal limits and that there was no neurological injury.

The ALJ found that Newman could not, however, return to her former work as a bookkeeper, check processing clerk, or bank teller. He then took into consideration Newman's age of 55 years, her high school education, her work experience, her transferable skills, and her residual functional capacity for sedentary work and found that Newman can perform a narrow range of sedentary work, such as an accounting clerk and a receptionist. The ALJ also found that there are numerous jobs such as these available in the economy. Newman was therefore found not disabled under the Act.

C

We will now examine whether the ALJ's decision is supported by substantial evidence. Four elements of proof must be weighed when determining whether substantial evidence 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) her age, education, and work history. Wren, 925 F.2d at 126. The ALJ resolves conflicts in the evidence, see

Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983), and this court may not reweigh the evidence or try the issues de novo. Cook, 750 F.2d at 392.

The objective medical facts presented by Newman are rather extensive. First, Newman had acute spinal and bulbar poliomyelitis in 1953. Chest x-rays taken on February 23, 1983, revealed a normal heart, clear lungs with no evidence of infiltrate in either lung, and several tiny osteophytes in the mid dorsal vertebra. A cytology report on cervical cells showed no atypical cells. On April 1, 1986, Newman had a complete hysterectomy, removal of the ovaries and fallopian tubes, appendectomy, and vaginal cuff suspension. On this date, her admission physical revealed that her pupils were round and reacted to light; there was no thyroid enlargement and the trachea was in the mid-line; her lungs were clear to inspection, palpation, percussion, and auscultation; and her deep tendon reflexes were diminished but appeared to be fairly equal bilaterally.

On February 27, 1987, a physical examination revealed no thyroid enlargement, clear lung fields, and regular heart sounds without murmurs. On February 7, 1989, Newman had out-patient surgery to remove a benign fibrocystic mass in her right breast. Her physical examination prior to this surgery revealed no masses in her neck, a clear chest, and a regular heart rate and rhythm without any murmurs. On January 15, 1990, Newman was examined by a neurologist; the examination revealed that Newman's cranial

nerves were normal, her neck was strong, her speech was distinct, her extraocular muscle movements were full, her hearing was good, her carotid pulses were full, her cardiac rhythm was regular, her lung fields were clear, and that she was within the normal limits of station, general motor, and coordination tests.

On November 30, 1989, Newman had an EMG performed on her right arm and on June 28, 1990, had one performed on her left leg. The EMG on her arm revealed that the screening nerve conduction studies in the right median and ulnar nerves were within normal limits, but that there was a lower median sensory amplitude compared to the ulnar. The EMG revealed the presence of chronic denervation changes that were most pronounced in the proximal arm muscles. The EMG on her leg revealed no acute fracture or dislocation, normal appearance of the prevertebral soft tissues, and no narrowing of the spinal canal. The EMG further revealed sclerosis of the facet joints more severe in the lower lumbar spine.

We will now review the diagnoses and opinions of physicians who treated or examined Newman. After examining Newman on January 15, 1990, her neurologist noted that she showed some fatigability but did not have objective evidence of serious neurologic injury. He noted that she had suffered from polio and that it was possible that she was suffering from a slowly progressive post-polio syndrome. On February 7, 1990, this neurologist again examined Newman and told her that it would be difficult for her to obtain full social security benefits because

she looked so healthy and could perform so well on acute motor and sensory testing.

The doctor who performed the EMG's on Newman noted that there were no reliably documented electrophysiologic hallmarks of post-polio syndrome and that there was no objective evidence for changes that would be manifest clinically as weakness. This doctor opined that Newman was suffering from mild degenerative changes of the lumbar spine.

The final opinion came from a doctor at the Post-Polio Clinic in Houston, Texas, dated April 8, 1991. This doctor stated that clinical findings of muscle weakness and fatigability are consistent with a progressive neuromuscular disease. Furthermore, a previous electromyogram demonstrated residuals of previous polio, which was consistent with a diagnosis of post-polio syndrome. The doctor stated that in his opinion Newman should be considered disabled from employment with even light duties likely to cause further progression of weakness and loss of function.

We now turn to Newman's subjective evidence of pain and disability. Newman testified before the ALJ and stated that she could not work because she did not have the strength to punch anybody's time clock. She complained that when using her arms to comb her hair, play cards, read the newspaper, or drive a car, her arms got heavy, sometimes tingled, and placed stress on her neck and throat; in addition, these activities made her tired. Newman further testified that her toe joints and her finger joints hurt

when used and that she got a tingling feeling and a feeling of heaviness in her legs; furthermore, her legs bothered her after doing the dishes or taking a shower. Newman stated that she did not think she could drive any more because driving bothered her neck, arms, and shoulders; in addition, she often got severe muscle cramps from fastening the seat belt, and looking around to check traffic caused cramps in her neck.

Newman further testified that for the past two years she has had trouble swallowing when she was in a hurry and that it takes her two days to recover after her once-a-month grocery shopping. Newman also stated that she was fired from her last job because she forgot a customer was waiting, and that this happened because she was just too tired to think. Newman testified that she lies down every afternoon for a nap, and that after she has been on a trip or has done something to overexert herself, she just sits for the entire day and does nothing.

Regarding Newman's education, age, and work history, at the time of her hearing she was 55 years of age. She has a high school education, and her work history is as a bank teller, bank clerk, and as a bookkeeper.

D

Newman argues that there is not substantial evidence to support the Secretary's finding that she is not disabled. We disagree. The objective medical facts and the diagnoses and opinions of Newman's treating physicians strongly support the

decision of the ALJ. The only physician to indicate that Newman was indeed disabled was the doctor from the Post-Polio Clinic. This doctor examined her only once and it is unclear whether he was relying on Newman's subjective complaints or whether he actually observed her "weakness and fatigability" as the basis for his opinion that she was incapable of performing even light work. On the other hand, the decision of the ALJ is supported by the reports of other examining physicians. The ALJ as factfinder has the sole responsibility for weighing the evidence and may choose whichever physician's diagnosis is most supported by the record. Bradley v. Bowen, 809 F.2d 1054, 1057 (5th Cir. 1987). Furthermore, the ALJ is entitled to determine the credibility of the medical experts. Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990). Statements such as the one issued by the Post-Polio Clinic physician that are brief and conclusional are accordingly given less weight. Scott, 770 F.2d at 485.

Newman's subjective testimony of her fatigability, pain, and disability does not rebut the strong medical evidence. First of all, it is within the discretion of the ALJ to determine the disabling nature of subjective evidence of pain. Jones v. Heckler, 702 F.2d 616, 621-22 (5th Cir. 1983). Such determinations are entitled to considerable deference. James v. Bowen, 793 F.2d 702, 706 (5th Cir. 1986). Disabling pain must be constant, unremitting, and wholly unresponsive to therapeutic treatment. Haywood v. Sullivan, 888 F.2d 1463, 1470 (5th Cir. 1989). 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).

The ALJ found that Newman's testimony regarding her pain was clearly inconsistent with her residual functional capacity and the objective medical findings. While the ALJ did make erroneous observations in his decision,¹ the findings are nevertheless supported by substantial evidence. Newman gave no indication that her pain was constant and unremitting. To the contrary, she testified that she had to rest for a longer period of time after she overexerted herself or after she had been on a trip. Newman testified that she did grocery shopping once a month and that she did laundry at least twice a week. She also described her daily routine as rising at 7:00 A.M., drinking coffee for two hours, showering, dressing, making up her bed, and cleaning the kitchen. Sometimes she walks her dog, crochets, or visits with neighbors. In short, Newman's testimony of her subjective pain in no way negated or called into question the medical evidence.

V

Because we find that the ALJ's decision is supported by substantial evidence, we affirm the denial of Newman's applications

¹The ALJ reported that Newman did grocery shopping more than once a week. He also referred to Newman's ability to drive a car, engage in card playing, and engage in daily household chores.

for disability benefits. Accordingly, the decision of the district court is

A F F I R M E D.