

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1030
Summary Calendar

ELMO JILES,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA,
Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(7:91-CV-0025-K)

(November 18, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Elmo Jiles appeals a summary judgment denying his challenges to the termination of his disability benefits under 42 U.S.C. § 405(g). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

A.

In 1976, Jiles was granted disability benefits based upon a diagnosis of mental deficiency (IQ of 63) and organic brain syndrome with epilepsy. On review in 1978, Kiles's disability benefits were continued with an unchanged diagnosis. On re-evaluation in 1982, the Secretary of Health and Human Services (the "Secretary") determined that Jiles's disability had ceased in August 1982. Accordingly, his benefits were discontinued in October 1982.

Jiles sought administrative review and, after a hearing, the administrative law judge ("ALJ") upheld the Secretary's decision. The denial of benefits was again upheld at a second administrative hearing conducted in 1988.

The Appeals Council remanded to the ALJ for reconsideration of the credibility of Jiles's complaints of pain in light of Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. Unit A Sept. 1981) (per curiam). After a third administrative hearing in 1990, the ALJ again concluded that Jiles was no longer disabled within the meaning of the Social Security Act. The Appeals Council denied Jiles's request for further review.

B.

Jiles filed a complaint in district court to set aside the Secretary's decision. Jiles and the Secretary filed cross-motions for summary judgment. The magistrate judge recommended that the

Secretary's motion be granted. The district court overruled Jiles's objections, adopted the recommendation of the magistrate judge, denied Jiles's motion for summary judgment, and entered summary judgment in favor of the Secretary.

II.

Jiles was fifty-three years old at the time of the last administrative hearing. He has a fifth-grade education, and his past work experience involved unskilled heavy labor. He last worked in 1975.

Jiles testified that he had been unable to work for fifteen years because he had injured his back trying to lift 100 pounds, he "used to drink," and he had heart trouble. He was hospitalized for his back problem in the 1970's and has taken medication for his back since that time. He stated that he had stopped drinking in 1980. Since he stopped drinking, his stomach "is not as large as it was."

Wiles has suffered from bronchitis for the last five years, and he takes a prescription drug to help with his breathing. He also stated that he has a "nerve problem" that causes chest pains, breathlessness, and rapid heartbeats. He testified that Dr. Bluff had given him a prescription for this problem, which did not help. According to Jiles, when these episodes occur he has to sit very still for thirty minutes to an hour.

Jiles testified that he no longer has seizures and that he does not take medication for this problem. He stated that it was

his back problem that kept him from working.

Jiles told the ALJ that he could walk a block and lift ten pounds. He no longer drives, and he spends most of his time watching television or "something like that." His daughter cooks and shops for him and pays his bills.

Jiles has undergone two psychological evaluations since the initial diagnosis of mental deficiency. In 1982 tests, Dr. Morris ranked Jiles's full scale IQ at 72. Jiles informed Morris that he spent most of his time hunting, and Morris noted that Jiles had "a considerable amount of knowledge" about the subject. Morris stated that Jiles's level of adaptive functioning appeared to be significantly higher than his IQ indicated. Morris evaluated Jiles again in 1988 and rated his full scale IQ at 75. Morris noted that Jiles's "approach to testing was characterized by much intentional exaggeration of symptoms," suggesting that Jiles was malingering.

Jiles was hospitalized twice in 1983 and three times in 1985 with complaints of chest pains. The records from these hospitalizations indicate that he did not suffer a heart attack or a myocardial infarction. During a 1984 consultative examination, the physician noted that Jiles had "some chest pain which [was] . . . suggestive of angina but not classical for it." Jiles's EEG was normal at his last discharge in 1985.

The record contains reports of Dr. Brooks's continuing regular examinations of Jiles from 1985 through April 1987. Other than a continuing prescription for Nitrostat, there is no mention of any type of heart problem. In October 1985, Jiles reported that he

felt well, and Brooks noted no arrhythmia.

Jiles was hospitalized with an acute duodenal ulcer in November 1982. His condition was classified as improved on discharge, and he was instructed to take Tagamet and Mylanta for the next two months and to avoid greasy foods. Jiles did not return for further treatment.

An upper gastro-intestinal series in August 1984 revealed scar tissue at the base of the duodenal bulb but no active ulcer in that area. The test showed an antral posterior wall ulcer. Brooks examined Jiles in September 1984, however, and found that Jiles had maintained his diet and medication and that he had no symptoms suggesting an ulcer.

Jiles vomited blood after a drinking bout in January 1986, but no ulcer was detected by x-ray. Symptomatic care was prescribed. The report noted that Jiles's gastritis problems were secondary problems caused by alcohol abuse. The ALJ determined that most of Jiles's ulcer and gastritis problems had been resolved with appropriate medication and/or treatment.

Jiles was diagnosed with cirrhosis of the liver in 1983. During an October 1984 consultative examination, Dr. Caras noted Jiles's "obviously severe liver disease" and stated that "[e]ven if this patient is not drinking at this time, there will not be any real improvement, in fact it may worsen."

During a December 1984 examination, however, Brooks noted only "minimal cirrhosis demonstrated at this time, alcoholic." Brooks's summary of observations from June and July 1985 states that Jiles's

alcoholic cirrhosis has shown a "marked improvement over [the] last 18-24 mos." Brooks's continuing notes of regular examinations through October 1987 contain no further mention of any liver problems.

The ALJ found that Jiles was in the range of borderline intellectual functioning, not mentally retarded. He noted that Jiles had smelled of alcohol during the IQ test on which he scored 63, that he had scored higher on subsequent tests, and that the record contained strong indications of malingering.

Noting that "this case turns on the issue of credibility," the ALJ specifically found that Jiles's "allegations of pain and other limitations [lacked credibility] and [were] not supported by the medical evidence of record to the degree alleged." The ALJ determined that the medical evidence showed improvement in Jiles's nonexertional impairments that was related to his ability to work. The ALJ considered both Jiles's physical and mental impairments in his evaluation of Jiles's residual functional capacity.

Vocational rehabilitation counselor Kathy Bottroff testified that Jiles's past work had been heavy and unskilled. The ALJ asked Bottroff what jobs were available in the national economy for a man of Jiles's age and educational background who was limited to light work. Bottroff stated that there were approximately 3,900 grader and sorter jobs available, 181,000 folding machine operator jobs, 40,200 gluing machine operator jobs, 239,000 food service worker jobs, and 390,000 electronic assembly jobs.

The ALJ then asked Bottroff what jobs would be available

assuming that Jiles also were precluded from working around fumes or smoke that would exacerbate his bronchitis. Bottroff responded that this restriction would exclude 20 to 25% of the food service worker jobs, but that Jiles would be able to perform the other jobs. Bottroff characterized all of the foregoing jobs as unskilled work that could be learned on-the-job in less than thirty days.

III.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); United States v. McCallum, 970 F.2d 66, 68 (5th Cir. 1992). This court's review is de novo. Id.

A.

Jiles contends on appeal that he did not knowingly waive representation by counsel and that the ALJ erred by failing to develop the record with more recent medical evidence of his ulcers, livers disease, and nerves. Jiles suggests that, because of his limited intelligence, he was incapable of making an informed waiver of representation.

At each hearing, the ALJ informed Jiles that he had the right to bring an attorney to the hearing, and Jiles indicated that he

was aware of that right. At the first hearing, the ALJ told Jiles that if he wanted to be represented by an attorney, "now would be the time to tell me."

At the second hearing, Jiles was accompanied by a friend, and Jiles informed the ALJ that he did not need additional representation. At the third hearing, Jiles waived his right to representation and, when questioned by the ALJ, stated that he did not wish to submit additional medical evidence. Jiles testified succinctly and coherently at each hearing. The transcripts of the hearings do not suggest that his repeated waivers of representation were uninformed.

The decision to require a consultative examination is within the discretion of the ALJ. Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991). An examination is required only if the ALJ cannot otherwise make a disability determination. Anderson v. Sullivan, 887 F.2d 630, 634 (5th Cir. 1989). Where a claimant is unrepresented at the hearing, however, the ALJ has a special duty to develop a full and fair record and to inquire and explore in order to develop all the relevant facts. Kane v. Heckler, 731 F.2d 1216, 1219-20 (5th Cir. 1984). If the ALJ fails in this regard, the claimant still must show prejudice in the form of evidence that could, and would, have been adduced that might have altered the outcome in order to warrant a remand. Id. at 1220.

In Kane, we remanded a denial of benefits because "[t]he record disclose[d] no question by the ALJ concerning whether or not Kane desired counsel. The hearing lasted five minutes and its

transcript consist[ed] of four pages The ALJ asked only one perfunctory question about Kane's subjective complaints." Id. at 1218.

In contrast, we held in James v. Bowen, 793 F.2d 702, 704-05 (5th Cir. 1986), that the hearing before the ALJ with no attorney present was adequate. We distinguished Kane because James's hearing lasted for ten minutes, and the ALJ questioned him extensively about his condition. Id.

This case is more similar to James than to Kane. The ALJ inquired extensively into Jiles's medical problems and activity level. Before closing each hearing, the ALJ inquired of Jiles whether there was anything he wished to add. Jiles's first hearing lasted 17 minutes, his second 25 minutes, and his third 23 minutes. See Carrier v. Sullivan, 944 F.2d 243, 245 (5th Cir. 1991) (ALJ did not violate "special duty" to unrepresented claimant who, like Jiles, had only a fifth-grade education, by failing to develop the record properly at a 26-minute hearing).

Although Jiles's brief refers to additional evidence that an attorney could have acquired to support his claim, Jiles has not identified more current medical evidence of disability, nor did he proffer such evidence in the district court. See Kane, 731 F.2d at 1220. Jiles has not met his burden of establishing that he was prejudiced by his allegedly inadequate waiver of counsel or that he "could and would have adduced evidence that might have altered the result" of the hearing. Id.

B.

We review the Secretary's decision to determine whether there is substantial evidence in the record to support it and whether the Secretary applied the proper legal standards. Griego v. Sullivan, 940 F.2d 942, 943 (5th Cir. 1991). 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 (1971). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. Id. at 401. "This Court may not reweigh the evidence or try the issues de novo. Rather, conflicts in the evidence are for the Secretary to resolve." Anthony v. Sullivan, 954 F.2d 289, 295 (5th Cir. 1992) (citations omitted).

The Secretary may terminate disability benefits if substantial evidence shows that (1) there has been any medical improvement in the individual's impairment or combination of impairments and (2) the individual is now able to engage in substantial gainful activity. 42 U.S.C. § 423(f)(1)(A), (B); Griego, 940 F.2d at 943-44. A medical improvement is defined as any decrease in the medical severity of the impairment that was present at the time of the most recent favorable medical decision that the claimant was disabled or continued to be disabled. 20 C.F.R. § 404.1594(b)(1). A determination of medical improvement "must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with [the] impairments." Id.

Medical improvement must be related to ability to work. This

occurs if there has been a decrease in the severity of the impairment and an increase in functional capacity to do basic work activities. 20 C.F.R. § 404.1594(b)(3); Griego, 940 F.2d at 944-45. In this case, substantial evidence supported the ALJ's determination that Jiles's medical condition had improved. See Perales, 402 U.S. at 401.

A determination that Jiles has had medical improvement does not end the inquiry. The Secretary bears the burden of proving that he can engage in substantial gainful activity. Griego, 940 F.2d at 944. In making this determination, the Secretary must use an eight-step sequential process set forth at 20 C.F.R. § 404.1594(f). Id. at 944 n.1.

Jiles argues that the ALJ used an inappropriate legal standard by failing to consider his age and the length of his absence from the workforce in determining his residual functional capacity. To the contrary, the ALJ followed the required eight steps in determining whether Jiles could engage in substantial gainful activity. The ALJ found that Jiles did not have an impairment or combination of impairments that met or exceeded the severity of an impairment listed in Appendix 1, subpart P, Regulation No. 4; that there had been medical improvement; that the medical improvement was related to Jiles's ability to work; that he did have an impairment or combination of impairments that was severe; and that, since August 1982, these impairments left him with the residual functional capacity to perform the "exertional and nonexertional requirements of work" subject to the restrictions that he not lift

over twenty pounds, be required to understand or carry out "more than simple instructions," or work in a polluted environment.

Based upon Jiles's residual functional capacity and the testimony of a vocational expert, the ALJ determined that he could work as a grader or sorter, folding machine operator, or cementing and gluing machine operator and that he also could perform electronic assembly. The ALJ's decision notes Jiles's age, his fifth-grade education, and the fact that he had not worked since 1975.

The relevant regulations require that the ALJ order special work evaluations or other testing because of a claimant's age and length of disability, but only if the available evidence does not resolve what type of work the claimant can or cannot do on a sustained basis. 20 C.F.R. § 404.1594(b)(4)(ii)-(iii). In this case, the vocational expert testified that the jobs that she identified could be learned on the job in less than thirty days. Included in the expert's assessment of Jiles's abilities was the fact that he had not worked since 1975, that he was approximately fifty-three years old, and that he had limited education and physical abilities. The ALJ did not err by failing to order additional testing, as the record indicated that Jiles could perform the jobs identified by the vocational expert.

Jiles also urges that the ALJ erred by failing to consider whether he was disabled based upon a combination of his impairments. The ALJ specifically found, however, that Jiles was not disabled based upon a combination of his impairments. This

determination should be upheld as supported by substantial evidence. See Tamez v. Sullivan, 888 F.2d 334, 336 (5th Cir. 1989).

C.

Jiles also contends that the ALJ used an inappropriate legal standard to assess his alcoholism. He argues that the ALJ erred by relying upon his assertion that he no longer drank, as this testimony may have been the rationalization of a sick individual. See Ferguson v. Schweiker, 641 F.2d 243, 249 (5th Cir. Unit A Mar. 1981).

Alcoholism can be disabling if it prevents a claimant from engaging in substantial gainful activity. In making this determination, the ALJ should consider whether the claimant has lost the ability to control his drinking. Orphey v. Secretary of Health & Human Servs., 962 F.2d 384, 386 (5th Cir. 1992). Contrary to Jiles's contention, the ALJ used the correct standard to evaluate his drinking problem. At both his 1988 and 1990 hearings, Jiles informed the ALJ that he no longer drank alcohol. Although the ALJ found evidence of a substance addiction disorder, he determined that there was no evidence that the problem had resulted in "deterioration or decompensation in a work or work-like setting[]."

The record supports the finding that Jiles's alcoholism was under control. In July 1985, Brooks noted that Jiles's cirrhosis of the liver had "marked[ly] improved." Although Jiles was hospitalized in 1986 for alcohol-related gastritis, no additional

liver damage was noted, and Jiles's medical records since 1986 indicate no further bouts of drinking.

Jiles's counselor at the Quannah Outreach Center reported in 1987 that he had been a client of the center since 1975. The counselor reported that Jiles no longer used alcohol and that his problems were controlled by medication. This case is distinguishable from Orphey, as there is no substantial evidence in the record to indicate that Jiles has a current substance abuse problem. See id. at 385-87. The ALJ's finding that Jiles was not disabled because of his alcoholism was supported by objective evidence.

AFFIRMED.