

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1368
Summary Calendar

SANDRA KAY STARR,

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
(2:91-CV-201)

(February 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Sandra Kay Starr qualified for disability insurance benefits beginning in 1984. However, on February 7, 1990, the Social Security Administration determined that Starr's condition had medically improved and that she was not eligible for benefits. The Administrative Law Judge (ALJ) concurred. The Appeals Council denied Starr's request for review.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Starr filed the instant complaint seeking review of the Secretary's final decision pursuant to 42 U.S.C. § 405(g). Starr and the Secretary filed cross-motions for summary judgment. The magistrate judge recommended that the Secretary's decision be affirmed. The district court adopted the magistrate judge's report and affirmed the Secretary's decision.

I

A

Starr is a 43-year-old female with a high school education, two and one-half years of college, and training and work experience as a licensed vocational nurse. Unfortunately, she was in an automobile accident on December 7, 1984, and sustained a comminuted fracture of her right elbow and a fractured clavicle. A pin was placed in her elbow, but the skin around the fracture site began to die, requiring that the wound be debrided several times. A skin graft was performed on December, 30, 1984. The pin was removed from the elbow on January 8, 1985, at which time Starr was discharged from the hospital.

Starr's elbow failed to heal. She returned to the hospital on February 25, 1985, was operated on on February 26, and discharged on March 1, 1985. X-rays taken on July 17, 1985, however, revealed that Starr's elbow still had not healed.

On August 19, 1985, Starr's treating physician, Dr. Sheffield, stated that Starr was unable to use her right arm because of a non-union of her elbow and because she was required to wear a long-arm

cast. Dr. Sheffield stated on October 7, 1985, that Starr's injury rendered her unable to work. Other of Starr's treating physicians continued to report through March 24, 1987, that Starr was unable to work because her elbow had not healed.

On November 13, 1987, Dr. Bob Stafford, an orthopedic surgeon, concluded that Starr's elbow had healed and removed the pin and traction wire from her elbow. On March 22, 1988, Starr complained of pain, which Dr. Sheffield concluded was caused by inadequate tissue padding under her skin graft. Dr. Sheffield inserted a tissue expander in her right elbow on June 20, 1988, which was removed on August 10, 1988. Starr complained of depression on January 17, 1989, and received treatment for the same until March 14, 1989.

B

The Social Security Administration, in July 1989, requested that Dr. Charles Davis examine Starr. The examination took place on July 11. Dr. Davis reported that Starr had limited ability to extend her right elbow. He determined that Starr could sit, stand, and walk during an eight-hour work day, occasionally lift up to ten pounds and frequently bend.

Pursuant to the request of the Social Security Administration, Starr was next examined by Dr. James Johnson, a psychiatrist, on October 9, 1989. Starr told Dr. Johnson that her alcohol consumption was under control, that she had been living alone and managing fairly well, and that her activities included housework,

cooking, watching television, driving, shopping, and visiting with family. Dr. Johnson diagnosed that Starr's depression was in remission and that Starr's personality was histrionic.

Thus, the Social Security Administration notified Starr on November 8, 1989, that her benefits were to stop because it determined that she was no longer disabled as of October 1989.

On January 4, 1990, Dr. Stafford reported that Starr's elbow had healed, though it had greatly restricted range of motion. He stated, "I feel that [Mrs. Starr] could do no heavy work with the involved elbow and she continues to have a great deal of disability."

Starr testified before a Disability Hearing Officer on January 11, 1990, that she was able to do laundry and prepare meals. She also stated that she did not have trouble concentrating or following instructions, but that she had always had some mental problems.

In a letter dated May 23, 1990, Dr. Stafford stated that Starr had not had any change in her elbow and was not significantly better than she had been three years previously.

C

(1)

Starr testified to the following at a hearing before an ALJ on June 19, 1990:

She has had twelve different surgeries on her right arm since her accident, including skin and bone grafts, and her right arm is

still not entirely healed. Her mental and emotional problems, which include depression or paranoid schizophrenia, pre-date, but were aggravated by, her 1984 accident.

Although Starr testified that she does "not have much use of [her] arm," she can dress herself with some difficulty. She has felt no change in her arm since it was injured and was unaware when the "union" occurred. She feels that because she is unable to use her right arm, she is unemployable as a nurse. Although she is in constant pain, she has learned to tolerate it. She is unable to do some housework, such as changing bed linens, but can wash her dishes using a dishwasher and can vacuum and dust using her left hand.

Starr's mental problems require that she take medication which makes her drowsy and she questions whether it would interfere with nursing duties. She is currently suffering weakness from three blood transfusions, but is unsure of the cause of her blood loss. Helen Bulin, Starr's mother, corroborated Starr's testimony.

(2)

Gerry Clink, a vocational expert, also present at the hearing, asked Starr whether she wrote with her right hand. She responded that she writes with her left hand. Starr's attorney, in response to the ALJ's question, stated that both of Starr's hands are dominant.

Clink testified to the following. Starr has been employed as a licensed vocational nurse since 1975. Transferrable skills

include compiling, computing, and writing, as well as "manipulating," or using tools. Sedentary jobs using one or more of those skills present in significant numbers in the economy include ward clerk at a hospital, records clerk at a hospital, telephone answering service, and telephone operator.

In response to the ALJ's questions, Clink stated the following. If Starr's alertness were reduced by 20 percent because of her medication, she would be unable to perform these jobs. Inability to interact with other employees because of depression, however, would not affect her ability to perform these jobs. Missing three days of work a month because of pain would not permit her to maintain these jobs.

After the hearing, Starr was involved in another automobile accident on July 14, 1990, in which she injured her right wrist. Her elbow, however, was not affected by the accident.

II

Our review of the Secretary's decision to terminate benefits is limited to two issues: 1) whether the Secretary apply the proper legal standards, and 2) whether the Secretary's decision supported by substantial evidence on the record as a whole. Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992). 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 that which is relevant and sufficient for

a reasonable mind to accept as adequate to support a conclusion. It must be "more than a scintilla, but it need not be a preponderance." Anthony, 954 F.2d at 295 (citations omitted). "This Court may not reweigh the evidence or try the issues *de novo*. Rather, conflicts in the evidence are for the Secretary to resolve." Id.

Starr argues that the evidence was insufficient to support the Secretary's decision that she had achieved a significant medical improvement and had, therefore, ceased to be disabled. Starr argues in rather colorful language that "[a]fter trashing four fallacious theories in support of the termination the magistrate . . . now hangs his entire decision upon the gossamer thread of his supposition that Mrs. Starr's initial disability was premised upon a hazard to healing rather than loss of function."

In termination proceedings, the ultimate burden of proof lies with the Secretary. Griego v. Sullivan, 940 F.2d 942, 944 (5th Cir. 1991). The Secretary may terminate disability benefits if substantial evidence demonstrates that: (1) the claimant has undergone medical improvement, and (2) the claimant is now able to engage in substantial gainful activity. Id. at 943-44 (citing 42 U.S.C. § 423(f)(1)(A) and (B)).

Medical improvement is any decrease in the medical severity of a claimant's impairment(s) which was present at the time of the most recent favorable medical decision that the claimant was disabled. A determination that there has been a decrease in

medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with the claimant's impairment(s). 20 C.F.R. § 404.1594(b)(1).

The ALJ determined that Starr had undergone medical improvement since June 16, 1987--the date of her most favorable medical decision--because her medical record showed that her depression was in remission and that the fracture of her distal humerus had healed. As discussed above, Dr. Johnson, a psychiatrist, diagnosed on October 9, 1989, that Starr's depression was in remission and on January 4, 1990, Dr. Stafford reported that her elbow had healed. The ALJ has discretion to determine the credibility of various medical reports in the record. Griego, 940 F.2d at 945. Therefore, the record substantiates the ALJ's finding that Starr had "medical improvement."

A determination of medical improvement is related to an individual's ability to work if, in addition to medical improvement, there has been "an increase in . . . functional capacity to do basic work activities." Griego, 940 F.2d at 944 (quoting 20 C.F.R. § 404.1594(b)(3)). In evaluating ability to engage in substantial gainful activity, the Secretary considers, first, whether the claimant can perform past relevant work and, if not, whether the claimant can perform other work. Id. (citing 20 C.F.R. § 404.1594(f)(7) and (f)(8)).

The ALJ determined that after November 1, 1989, Starr could perform light and sedentary work that did not require a normal

range of motion of her right arm, use of her right hand for firm grasping or lifting, or working in high stress. To support this finding, the ALJ relied on Dr. Stafford's statement that Starr had "satisfactory union of her fractures" and that she "could do no heavy work with the involved elbow." He also looked to the statement of a physician who treated Starr on July 14, 1990, after she was in a second automobile accident, that Starr's right elbow "remains a little dysfunctional." The ALJ stated that Starr continued to have some dysfunction of the right elbow and an affective disorder which significantly limits her ability to perform basic work activities. The ALJ then found that, based on the vocational expert's testimony, Starr could perform a significant number of jobs in the national economy.

Starr argues that the Secretary engaged in "a singularly vapid line of reasoning" when it relied on Dr. Stafford's statement that she could do no heavy work to find that she could do less than heavy work. The vocational expert's testimony, however, establishes that Starr has transferrable skills which could be used in sedentary work. Therefore, the record supports the ALJ's finding that Starr's medical improvement was related to her ability to perform basic work activities.

IV

For the reasons we have set out herein, the judgment of the district court is

A F F I R M E D.