

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1536  
Summary Calendar

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MARJORIE JANICE FOSTER,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA,  
Secretary of Health and Human Services,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
(6:92-CV-071-C)

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(April 21, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Marjorie Foster appeals the denial of social security benefits under 42 U.S.C. § 405(g). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

Foster applied for disabled widow's insurance benefits under the Social Security Act on April 23, 1990, on the account of her husband, a deceased wage-earner. Foster's treating physician, Dr. Eisenrich, reported on September 18, 1990, that Foster had been treated for obesity and degenerative arthritis in her knees and left hip. A notation dated September 19, 1990, indicated that she suffered from severe degenerative arthritis of the left knee. In response to a follow-up phone call, Eisenrich reported on November 16, 1990, that Foster had degenerative disease of the knees and hips and did not have a decreased range of motion, but rather had hyperextension of her knees. In response to pre-hearing interrogatories, Foster reported that her condition became so severe that she could not work as of May 1, 1986. She claimed obesity and related arthritis under section 10.10(A) of the appendix 1 listings as her sole impairment.

After a hearing before the administrative law judge (ALJ) on May 13, 1991, the ALJ found that (1) Foster met the age requirement for disabled widow's benefits as of March 2, 1988, (2) Foster had not engaged in any substantial gainful activity since her alleged onset date of May 1, 1986, and (3) prior to September 19, 1990, Foster did not have an impairment that met or equaled those described in the listing of impairments.

Because the ALJ found that medical evidence alone did not demonstrate that Foster was disabled prior to September 19, 1990, the ALJ analyzed her residual functional capacity to perform work

and found that )) although Foster frequently visited doctors during the 1988-90 period in question )) the medical records during those years showed treatment for minor infections and hormone control; there was no evidence of treatment for osteoarthritis or the pain associated with it. The ALJ found that the medical records showed treatment with medications related to incidental infections, hormone imbalance, hypertension, and swelling caused by joint degeneration. Tylenol was the only medication used for pain. The ALJ found, in the light of the medical records, that Eisenrich's statement that "this patient is completely disabled from any type of work for which she is trained" lacked credibility. The ALJ wrote, "Since [Foster] is trained for no work at all, this has the ring of a talismanic phrase intended to help his long-time patient obtain Social Security benefits rather than an impartial and objective medical assessment."

The ALJ further found that Foster takes care of her adult disabled son without assistance and does her own shopping, cooking, and laundry for herself and her son. He found that Foster's ability to engage in these activities belied her complaints of disabling pain. The ALJ determined that Foster's allegations of total disability were not fully credible and that, because she indicated that her restrictions in daily living and pain had increased gradually over the years, she was less impaired during the 1988-90 period than at the time of the hearing. Thus, the ALJ concluded that Foster retained the residual functional capacity to engage in sedentary work at all times prior to September 19, 1990,

with the option alternately to sit or stand.

At step five in the sequential analysis of Foster's disability claim, the ALJ found that Foster had an eighth grade education and no job skills, which mandated a finding that she was disabled, subject to an additional step required by Social Security ruling 91-3p. Concerning the additional step, the ALJ stated:

Considering only the claimant's residual functional capacity, the decisive issue is whether the occupational base available to the claimant is comparable to the full range of sedentary work. The erosion of the occupational base is ascertained from the claimant's functional limitations caused by her impairments, without regard to age, education, or work experience. However, since the claimant was capable of sedentary work, there was no erosion of the claimant's occupational base to less than a full range of sedentary work, and she must be found not disabled prior to September 19, 1990, for the purposes of disabled widow's benefits.

The ALJ found that Foster was entitled to disabled widow's benefits beginning September 19, 1990, but not prior thereto.

Foster requested review of the ALJ's decision, submitting additional records indicating that she had a knee problem as early as 1983. The Appeals Council denied Foster's request for review.

Foster then filed suit in district court, arguing that the Secretary's denial of pre-September 19, 1990, benefits was not based upon substantial evidence because Foster met the obesity impairment requirements of section 10.10(A), and the Appeals Council's refusal to reopen Foster's prior denial on the basis of lack of jurisdiction was contrary to the applicable law. The district court found that there no was new, material evidence that required re-opening of Foster's case and that there was substantial evidence to support the ALJ's decision, as there was no medical

evidence that Foster had arthritis prior to September 19, 1990.

## II.

Foster argues that there was not substantial evidence to support the Secretary's finding that her impairment began on September 19, 1990. On review, this court determines whether substantial evidence exists in the record as a whole to support the ALJ's factual findings and whether the ALJ applied the proper legal standards. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990); Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990).

Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a mere scintilla and less than a preponderance. Id. "This [C]ourt may not reweigh the evidence or try the issues de novo. Conflicts in the evidence are for the Secretary and not the courts to resolve." Selders, 914 F.2d at 617 (citation omitted).

In evaluating a disability claim,<sup>1</sup> the Secretary conducts a five-step sequential analysis:

- (1) the claimant is not presently working;
- (2) the claimant has a severe impairment;
- (3) the impairment is . . . listed in, or equivalent to, an impairment listed in Appendix 1 of the Regulations;
- (4) the impairment prevents the claimant from doing past relevant work;
- and (5) the impairment prevents the claimant from doing

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<sup>1</sup> The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A).

any other substantially gainful activity. In determining whether the claimant can do any other work, the Secretary considers the claimant's residual functional capacity, together with age, education, and work experience, according to the Medical-Vocational Guidelines set forth by the Secretary.

Id. at 618 (citations omitted); see also Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. Foster, as claimant, bears the burden of proving that she is disabled.

In addition, for Foster to be eligible for disabled widow's benefits, she had to meet a three-pronged test:

To qualify for disabled widow's benefits, a claimant must establish that she is not married, is between 50 and 60 years old, and has a physical or mental impairment or impairments that, under the regulations promulgated by the Secretary, are deemed to be so severe as to preclude her from engaging in any gainful activity.

Deters v. Secretary of Health, Educ. & Welfare, 789 F.2d 1181, 1185 (5th Cir. 1986) (citing 42 U.S.C. §§ 402(e), 423 (d)(2)(B)). Congress, however, later changed the third prong of the legal standard so that a disabled-widow claimant need show only that her impairment precludes her from engaging in "substantial gainful activity." See Stokes v. Shalala, No. 92-7706 at 13 (5th Cir. Oct. 8, 1993) (unpublished) (citing 42 U.S.C. § 423(d)(1)(A) (1991)). Thus, for claims filed on or after January 1, 1991, or applications pending as of that date, the standard for determining disability in a disabled-widow case is the same standard applied to other title II disability claims. The ALJ properly applied the "substantial gainful activity" test to Foster's claims.

The listed impairment regarding obesity requires that the applicant meet a height-weight requirement and demonstrate one of

the following conditions: (1) a "[h]istory of pain and limitation of motion in any weight bearing joint or spine (on physical examination) associated with X-ray evidence of arthritis in a weight bearing joint or spine"; (2) a required level of hypertension; (3) a history of congestive heart failure; (4) chronic venous insufficiency; or (5) respiratory disease. 20 C.F.R. Pt. 404, subpt. P, app. 1, § 10.10(A)-(E). It is not disputed that Foster met the height-weight requirements. Although she made complaints of pain (which had been treated with Tylenol), there was no x-ray evidence or other evidence to support a finding of disability prior to September 19, 1990. Foster's lack of treatment for the alleged disability may be relied upon as an indication of nondisability. Villa, 895 F.2d at 1022. A medical record submitted to the Appeals Council indicates that Foster suffered from knee pain in 1982 but that it was related to her tripping and damaging her knee.

Foster's complaints of pain do not rise to the level of an impairment that would entitle her to benefits for an impairment prior to September 19, 1990. This court has held that pain constitutes a disabling condition under the Social Security Act only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." Harrell v. Bowen, 862 F.2d 471, 480 (5th Cir. 1988) (citation omitted). "Pain may constitute a non-exertional impairment that can limit the jobs a claimant would otherwise be able to perform." Selders, 914 F.2d at 618 (citation omitted). "[A] factfinder's evaluation of the credibility of subjective complaints is entitled to judicial deference if

supported by substantial record evidence." Villa, 895 F.2d at 1024 (citations omitted).

"How much pain is disabling is a question for the ALJ since the ALJ has primary responsibility for resolving conflicts in the evidence." Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. 1981). The ALJ may consider a claimant's reported daily activities in conjunction with other evidence to determine whether she is disabled under the Act. Reyes v. Sullivan, 915 F.2d 151, 155 (5th Cir. 1990). "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) (citation omitted). Foster's pain did not inhibit her daily functioning and was treated with Tylenol. There was substantial evidence to support the decision of the ALJ.

### III.

Foster argues that the district court failed to consider whether the Secretary was required to reopen an earlier application for benefits. Title 20 C.F.R. § 404.903(1) states that the Secretary's decision to deny the reopening of a case is not subject to judicial review unless the decision is challenged on constitutional grounds. See Califano v. Sanders, 430 U.S. 99, 107-08 (1977); Thibodeaux v. Bowen, 819 F.2d 76, 79-80 (5th Cir. 1987). Foster has not raised a constitutionally-based contention.



#### IV.

Foster argues that the district court failed to make a de novo review of the record. The district court expressly stated that it conducted such a de novo review. This court has held that, absent evidence to the contrary, it will assume that a district court has reviewed the entirety of the record de novo when adopting a magistrate judge's report. Koetting v. Thompson, 995 F.2d 37, 40 (5th Cir. 1993).

Foster argues that this presumption has been rebutted because the district court (1) stated that there was no dispute that Foster met the requirements of the obesity listing; (2) failed to discuss evidence support the ALJ's residual functional capacity finding; and (3) gave little consideration to her arguments concerning the onset date of her disability. Foster has misconstrued the district court's statement regarding whether she met the requirements of the obesity listing. Because the district court noted that the obesity listing requires a showing of a history of pain and joint stress, it is evident from the record that the court meant that there was no question that Foster met the first part of the test )) the height-weight requirement under part 404, subpt. P, app. 1, § 10.10(A). It was unnecessary for the district court to restate the magistrate judge's finding regarding Foster's residual functional capacity. 28 U.S.C. § 636.

Finally, substantial evidence supports the ALJ's finding regarding the onset date of Foster's disability; there was no evidence to support a finding of disability prior to the

September 19, 1990, onset date; therefore, it was unnecessary for the district court to consider additional evidence of impairment.

AFFIRMED.