

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1559
Summary Calendar

KAREN KHAWAJA,

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
(4:92-CV-369-A)

(April 8, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Karen Khawaja appeals a summary judgment upholding the denial of her claim for social security benefits under 42 U.S.C. § 423. Finding no reversible 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Khawaja applied for social security benefits,¹ alleging a permanent disability resulting from an injury to her right wrist in February 1987 while working in an ice cream store. At the hearing conducted by the administrative law judge ("ALJ"), Khawaja testified that she was a twenty-six-year-old high school graduate with some college hours. She agreed that her past jobs included work in sales, cashiering, stocking, and custodial work.

Although she had been working at a fabric store as an assistant manager for three weeks preceding the ALJ hearing, she was experiencing a great deal of pain in her right wrist, elbow, and shoulder. Khawaja's counsel stated that this was not a closed-period-of-disability case but that Khawaja's contention was that she would be unable to maintain her present employment because of her right arm pain. The ALJ determined that Khawaja was not disabled, as her arm impairments did not preclude her past relevant work during the relevant period ending December 31, 1989.²

The Appeals Council declined review after noting that it considered additional medical evidence submitted by Khawaja concerning medical examinations and procedures conducted from June 1991 to September 1991. The ALJ's determination became the Secretary's final decision.

¹ Khawaja's application indicated that she sought disability benefits and supplemental security income. Her brief gives no indication that she is appealing the denial of supplemental security income.

² On appeal, Khawaja does not contest the dates of the relevant period of alleged disability.

II.

Khawaja filed suit in district court. Both parties moved for summary judgment. The magistrate judge recommended summary judgment in favor of the Secretary.

In his report, the magistrate judge found that there was substantial evidence to support the ALJ's findings except for finding # 5, Khawaja having the residual functional capacity to perform work-related activities except lifting over twenty pounds and doing repetitive push-pull motions with her right arm. The magistrate judge found that the medical reports supported a lifting restriction over ten pounds but not one over twenty pounds. As such, the magistrate judge impliedly modified the ALJ's fourth and fifth findings of fact, which referred to Khawaja's ability to perform "light work." Because of the ten-pound difference, the magistrate judge found that Khawaja's past work was sedentary in nature, not light work, and that she could perform her past work. See 20 C.F.R. § 404.1567(a) & (b) (defining light and sedentary work).

Khawaja filed objections to the magistrate judge's report. The district court, stating that it had conducted a de novo review, concluded that there was substantial evidence to support the Secretary's decision of no disability and that the Secretary had applied the correct legal standards.

III.

A.

This court "review[s] the district court's grant of a summary judgment motion de novo. Summary judgment is appropriate if the record discloses `that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.'" Spellman v. Shalala, 1 F.3d 357, 360 (5th Cir. 1993) (citations omitted).

Our review is limited to determining "whether the Secretary applied the correct legal standard[s] and whether the Secretary's decision is supported by substantial evidence on the record as a whole." Orphey v. Secretary of Health & Human Servs., 962 F.2d 384, 386 (5th Cir. 1992). A claimant under the Social Security Act is entitled to disability benefits if he is unable to perform any substantial gainful activity by reason of a medically determinable impairment for at least twelve months and is therefore "disabled." 42 U.S.C. § 423. In the present case, the disability requirements had to be met as of December 31, 1989, the date that Khawaja last met the insured-status requirement.

A five-step analysis is used to evaluate whether a claimant is disabled. 20 C.F.R. § 404.1520. At step 1, a claimant must not be working or engaging in substantial gainful activity. At step 2, a claimant is not disabled if he does not have a "severe impairment." At step 3, a claimant is considered disabled if his severe impairment meets or equals an impairment listed in Appendix One of the regulations. At step 4, a claimant will be considered not

disabled if he can perform past relevant work. At step 5, if the claimant cannot perform past relevant work, other factors are considered to determine whether he can perform other work, found in the national economy, in which case he is considered not disabled. See Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991). The burden to prove disability is on the claimant through step 4, and a determination of no disability at any step ends the analysis. The ALJ applied the five-step analysis and found that Khawaja could perform her past relevant work, thus ending the analysis at step 4.

B.

1.

Khawaja argues that the Secretary's determination that she can perform her past relevant work is not supported by substantial evidence. "Substantial evidence is more than a scintilla and less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991). "To make a finding of 'no substantial evidence,' [this Court] must conclude that there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'" Dellolio v. Heckler, 705 F.2d 123, 125 (5th Cir. 1983) (citation omitted).

On February 19, 1987, while working at an ice cream shop, Khawaja slipped while carrying a tub of ice cream and injured her right wrist when a cooler-cabinet lid slammed down on her arm. Later that year, doctors administered a series of stellate ganglion

blocks in order to relieve Khawaja's wrist pain. The procedures alleviated some of the pain, and Khawaja worked light duty for the ice cream store until June 1987, when her doctors took her off work.

Dr. Kenneth Glass began to treat Khawaja in January 1988. Khawaja continued to experience pain in her right wrist, with a clicking noise emanating from the wrist when she placed it in a position as if to scoop ice cream. In April 1988, Glass performed an arthrotomy on the wrist, identifying a cartilage problem in her wrist and removing ridges from a certain wrist bone. Khawaja remained in a cast while recovering from the surgery. Glass instructed that Khawaja was to remain off work and noted that she could not return to her pre-accident job; i.e., she must look for lighter work.

Subsequent medical examinations³ revealed normal movement in all joints except the right wrist, slow improvement with lessened wrist pain depending upon Khawaja's activities, and the probable onset of post-traumatic arthritis of the right wrist joint, with wrist surgery predicted. On March 16, 1989, Glass described Khawaja's work status as

permanently unable to return to her preaccident job or any other job involving lifting more than 10 pounds or repetitive use of her right hand. Patient now able to return to light duties with restrictions of no climbing, no lifting more than 10 pounds, and no repetitive use of her right hand and wrist but while wearing splint to immobilize right wrist as neces-

³ The medical records indicate that Khawaja received treatment for depression, and Glass's records noted Khawaja's fluctuating emotional health in dealing with her wrist pain. The ALJ found that Khawaja did not have a mental impairment, and Khawaja does not contest this finding.

sary.

The ice cream store did not have a non-scooping job available; thus, Khawaja remained off work.

Khawaja gave birth to her second child in November 1989. Before that month, she had reported experiencing pain in her right elbow while moving her right upper arm. Although Khawaja remained off work in December 1989, the doctor noted that she was taking care of her newborn.

In April 1990, after the relevant period for disability ended, Khawaja underwent wrist surgery that partially fused the joint by the insertion of pins. In August 1990, Glass noted that the wrist was improving and that the wrist pain was gone but that Khawaja complained of shoulder pain. Subsequent medical notations made by Glass in 1990 and 1991 reveal that the pain was lessened by the fusion surgery, that the doctor had released Khawaja to light duty in order to participate in state-sponsored work-retraining, that Khawaja reported the return of wrist pain with her job in a fabric store, and that arthritis was beginning to appear in her right arm.

Despite Khawaja's argument to the contrary, Glass did not state that she could not perform her past relevant work. His assessment of her ability to work stated that she could not return to her pre-accident job, scooping ice cream. See Muse, 925 F.2d at 790 (viewing "past relevant work" as encompassing more than the job the claimant held immediately before the injury). Khawaja listed four job titles to describe the eight jobs she held in the past, including her job scooping ice cream. By her own admission, only

her ice cream job required her to lift more than ten pounds. Dr. Glass restricted lifting to no more than ten pounds. Cf. Spellman, 1 F.3d at 364-65 (noting the propriety of rejecting treating physician's opinion when it is inconsistent with the other substantial evidence found in the record).

Two residual functional capacity assessments (RFC's) were conducted in August and December 1990. Khawaja was assessed as able to lift a maximum of twenty and fifty pounds and as able to lift ten and twenty pounds frequently. Limitations were assessed in Khawaja's ability to use her right arm to push and pull, to reach, and to handle. These assessments, combined with Khawaja's descriptions of her past jobs, support the ALJ's finding that Khawaja had the ability to perform her past work, with the exception of lifting over twenty pounds. See Villa v. Sullivan, 895 F.2d 1019, 1022 (5th Cir. 1990) (noting that ALJ's determination concerning ability to perform past relevant work may rest on description of past work as actually performed).

With the exception of her one job at the ice cream store, Khawaja's previous jobs did not require her to lift more than ten pounds. These previous jobs included work as a cashier, a cashier/order clerk, and a cashier/stocker. Although these jobs may entail doing repetitive work with one's hand, such as ringing sales into a register, the record does not indicate, nor does Khawaja argue, that Khawaja was precluded from doing repetitive work with her left arm and hand.

The ALJ found that Khawaja's subjective complaints were not

credible to the extent that her pain precluded her from light work, excluding her inability to do push-pull motions with her right arm. An ALJ's determination concerning a claimant's subjective complaints receives considerable deference on review. Wren, 925 F.2d at 128. To the extent that Khawaja testified that her impairments limited her ability to walk and to sit, and to the extent that she argues that her impairments prevented her from performing the walking and standing that her past work requires, the ALJ's credibility determination must be upheld. See Carrier v. Sullivan, 944 F.2d 243, 247 (5th Cir. 1991) (upholding the ALJ's determination of the extent of claimant's pain, a determination that was less than claimant wished). For the above-stated reasons, there is substantial evidence to support the Secretary's determination that Khawaja can perform her past relevant work. See Muse, 925 F.2d at 790; Villa, 895 F.2d at 1022-25.

2.

Khawaja argues that the district court erred in its consideration of the magistrate judge's report by failing to utilize de novo review. Khawaja filed objections to the magistrate judge's report, thus requiring the district court to conduct a de novo review. 28 U.S.C. § 636(b)(1); see Koetting v. Thompson, 995 F.2d 37, 40 (5th Cir. 1993). In its order, the district court stated that it had conducted a de novo review. We "assume that the district court did its statutorily commanded duty in the absence of evidence to the contrary." Longmire v. Guste, 921 F.2d 620, 623

(5th Cir. 1991). The record before us does not indicate the contrary.

Khawaja argues that the district court failed to indicate whether it adopted, modified, or rejected, in whole or in part, the magistrate judge's report. A district "court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." 28 U.S.C. § 636(b)(1).

The magistrate judge concluded that the Secretary's findings were supported by substantial evidence, except for portions of two findings dealing with the weight that Khawaja could lift and the category of work to which her past relevant work belongs. The district court's order is silent on whether it agreed with the magistrate judge. In light of Khawaja's own description of her past job duties, and in light of the two RFC's, any omission on the district court's part is harmless, as substantial evidence supports the Secretary's decision that Khawaja can perform her past relevant work; thus, she has no disability.

AFFIRMED.