

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 93-1940  
Summary Calendar

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MELVIN PERKINS, Plaintiff-Appellant,  
versus  
DONNA E. 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  
(5:92-CV-121-C)

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September 12, 1994

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM<sup>1</sup>:

Plaintiff-appellant Melvin Perkins ("Perkins") appeals the district court's denial of his appeal of the decision of Defendant-appellee Donna E. Shalala's, Secretary of Health and Human Services ("Secretary"), denial of his claim for supplemental security income benefits. We VACATE and REMAND.

FACTS AND PROCEDURAL HISTORY

Perkins filed an application for supplemental security income on August 4, 1989 alleging that he had been disabled since August

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

15, 1978 as a result of diabetes, heart problems, high blood pressure and arthritis. Perkins' application was denied administratively, initially and on reconsideration. Upon Perkins' request, an administrative law judge ("ALJ") conducted a hearing on November 27, 1990. Following the hearing, the ALJ issued a decision on March 19, 1991 in which he determined that Perkins was not disabled because he had the residual functional capacity to perform a full range of sedentary work. Perkins' request for review was denied by the Appeals Council on April 7, 1992.

Perkins filed a complaint seeking judicial review of the Secretary's decision denying him supplemental security benefits. The parties filed cross-motions for summary judgement. Perkins attached to his motion a notice from the Social Security Administration ("SSA"), dated January 30, 1992, indicating that Perkins had been found eligible to receive supplemental security income based on a second application that he had filed in June 1991.

The magistrate judge determined that there was substantial evidence in the record to support the Secretary's findings and recommended a denial of Perkins' complaint. Perkins filed objections to the magistrate judge's Findings Conclusions and Recommendation, attaching documents obtained from the SSA regarding the 1992 award of benefits and an additional medical report. After reviewing Perkins' objections, the magistrate judge directed the Secretary to address the issues raised by the subsequent decision of the Secretary and the additional medical report.

Perkins filed a supplemental complaint alleging that he had obtained new medical evidence which had not been presented to the ALJ. Perkins also filed a supplemental motion for summary judgment, arguing that the decision of the Secretary was not supported by substantial evidence, and, alternatively, seeking the district court's consideration of the new and material evidence. The magistrate judge issued additional findings in which he determined that the additional evidence offered was either not "new" evidence or would not have changed the outcome of the Secretary's decision. The magistrate judge recommended that the decision of the Secretary be affirmed. The district court adopted the Findings, Conclusions and Recommendation of the magistrate judge.

The administrative record reflects that Perkins was hospitalized in 1978 with complaints of severe chest pain and pharyngitis. Perkins electrocardiogram ("EKG") displayed changes suggestive of a myocardial infarction. Perkins was examined by Dr. Monzer Attar, an internist, in February 1988. Dr. Attar noted that Perkins had again been hospitalized for chest pain in 1980, and that Perkins reported that he continued to suffer from retrosternal chest pain. Perkins stated that the chest pain occurred with exertion. However, Perkins reported to the doctor that he cooked, cleaned house, worked in the yard and drove. Perkins also had complaints of arthritis in his extremities and back.

Based on the examination and objective testing, Dr. Attar's diagnosed Perkins with questionable angina pectoris based on non-

specific T wave abnormalities by the EKG. He also noted that Perkins had hypertension which was under good control, poorly controlled insulin-dependent diabetes mellitus, arthralgia with no limitation of motion of any joint and history of gout in both feet.

Perkins was examined in November 1978 by Dr. Robert J. Faust, a specialist in internal medicine and cardiology. Perkins complained of daily precordial chest pain which was relieved by the use of nitroglycerin. Perkins' EKG showed evidence of antero lateral ischemia. Perkins underwent tests at the Veterans Administration Medical Center in November 1989, which revealed a borderline heart condition.

Dr. Faust again examined Perkins in December 1989. Perkins reported that he was taking approximately fifteen nitroglycerin tablets per week to relieve his chest pain. Based on his examination and X-rays, Dr. Faust concluded that Perkins suffered from arteriosclerotic heart disease with angina pectoris, insulin-dependent diabetes, hypertensive cardiovascular disease and degenerative joint disease of the back, hips, knees and ankles.

Perkins was forty-nine years old at the time of the hearing, a high school graduate and had been previously employed as a laborer. Perkins testified that he continuously experienced chest pain when engaging in any strenuous activity. He also complained of constant knee and back pain. Perkins testified that his daily activities included fixing his breakfast and watching television. He denied doing any yard or housework.

Dr. James Lowell, the medical advisor who was present during

the hearing, reviewed Perkins' medical records. Dr. Lowell testified that Perkins' EKG showed only "evidence" of ischemia, and that such findings were not diagnostic of ischemia. Dr. Lowell also stated that an X-ray cannot establish the occurrence of a muscle spasm.

The ALJ determined that Perkins' claims of pain and loss of functional capacity were not credible. The ALJ also determined that Perkins was not disabled because he had the capacity to do sedentary work.

#### NEW AND MATERIAL EVIDENCE

Perkins contends that the district court erred in determining that evidence of tests or examinations not concluded on the date of the administrative hearing cannot be considered as "new and material evidence." He further argues that the court erred in finding that Dr. Faust's additional report was not "material evidence," and in failing to address the impact of the Secretary's January 1992 finding that he was disabled based on his heart condition. In addition, Perkins contends that the magistrate judge erred in failing to address the subsequent decision of the Secretary awarding Perkins benefits based on his application filed in June 1991. He argues that the Secretary's determination that Perkins' heart condition met the criteria for a listed impairment is evidence that Perkins was suffering from that condition at the time that the ALJ rendered his decision in the first case.

The Secretary did not file a brief and conceded in a letter to the Clerk that the case should be remanded to the Secretary in

light of the subsequent award of benefits to Perkins on his 1991 application for disability benefits. Although the Secretary has conceded that the award of benefits is "new" and "material" evidence justifying a remand, it is not clear from the Secretary's letter whether she has also conceded that the additional medical reports submitted by Perkins constitute "new" and "material" evidence and that Perkins has shown "good cause" for failing to submit the evidence during the administrative proceeding.

This [C]ourt may order additional evidence to be taken before the Secretary "only upon a showing that there is new evidence which is material and there is good cause for the failure to incorporate such evidence into the record in a prior proceeding."

*Pierre v. Sullivan*, 884 F.2d 799, 803 (5th Cir. 1989) (citing 42 U.S.C. § 405(g)).

The magistrate judge refused to consider the evidence of testing conducted after the administrative hearing was concluded because it did not constitute "new evidence." The magistrate judge also refused to consider the results of a treadmill test and a consultative examination performed by Dr. Humphrey at the request of the state agency in November 1991. The results of the treadmill test revealed that Perkins experienced chest pain and fatigue after one minute, and that he did not meet his target heart rate. There was a severe reduction in his functional aerobic capacity and occasional PVCs during the recovery period. Dr. Humphrey examined Perkins and concluded that he is able to lift twenty pounds occasionally, less than ten pounds frequently, and that he was able to stand or walk less than two hours per day. Dr. Humphrey also

determined that Perkins was able to sit for two-to-four hours only in a work day, and that breaks and lunch period would not provide him with a sufficient period to alternate sitting and standing.

Evidence is "new" if it is not merely cumulative of what is already contained in the record. *Pierre*, 884 F.2d at 803. Although there were several EKG test results in the record which were suggestive of ischemic disease, there were no other records of treadmill testing which showed the effect of the disease on Perkins' physical functional capacity during the relevant period. Dr. Humphrey's evaluation of Perkins' residual functional capacity was not cumulative evidence. Therefore, the district court erred in failing to categorize the evidence as "new."

Perkins also demonstrated "good cause" for his failure to present the additional records and the additional report of Dr. Faust during the pendency of the administrative proceedings. Perkins was unaware of the existence of the reports until his counsel obtained the records from the Secretary in January 1993 in connection with the granting of his second application for benefits. The new records contained the results of examinations and tests obtained at the request of the state agency. Therefore, the records were not within the possession and control of Perkins. See *Pierre*, 884 F.2d at 803 (to demonstrate "good cause," a claimant must offer a proper explanation why the evidence was not submitted earlier in the proceeding).

The remaining issue is whether Perkins has demonstrated that the new records are "material" evidence. Although the magistrate

judge did not make a finding that the treadmill and Humphrey reports were not material evidence, by citing *Johnson v. Heckler*, 767 F.2d 180, 183 (5th Cir. 1985), the magistrate judge did raise a "materiality" issue. Perkins argues that *Johnson* is not controlling insofar as it is contrary to *Ferguson v. Schweiker*, 641 F.2d 243 (5th Cir. 1981), which preceded *Johnson* and has not been overruled.

In *Ferguson*, the Court remanded the case to the Secretary to determine whether there were jobs in the economy that the claimant was capable of performing, and whether he was capable of controlling his alcoholism. *Ferguson*, 641 F.2d at 247-50. The Court stated in a footnote that, in addition to considering a claimant's other impairments on remand, the Secretary should also consider burns which he had suffered after the initial administrative hearing. *Id.* at 250 n.9. The Court further stated that it was not offering an opinion as to whether the burn evidence "would in itself constitute new evidence requiring a remand to the Secretary." *Id.* The Court stated that in the interest of fairness, the Secretary should consider all the claimant's impairments, "including evidence of events occurring after the initial administrative hearing." *Id.*

*Johnson* disagreed with *Ferguson* insofar as it held that new evidence of a disability commencing after the issuance of the Secretary's decision should be grounds for a remand. *Johnson*, 767 F.2d at 183. *Johnson* held that the materiality component requires that the new evidence "relate to the time period for which benefits



were denied, and . . . it [may] not concern evidence of later-acquired disability or of the subsequent deterioration of the previously non-disabling condition." *Id.* (internal quotations and citations omitted).

It is not clear whether *Johnson* and *Ferguson* can be reconciled; however, the issue need not be resolved at this point in the proceeding. Perkins has made a strong showing that the "new" evidence presented confirms that he suffered from a disabling heart impairment at the time that the ALJ denied the benefits.

There was substantial medical evidence in the administrative record that Perkins suffered from ischemic heart disease with associated angina pectoris. Perkins complained of chest pain upon exertion. The results of the treadmill test establish the effect of the heart disease on Perkins' functional capacity. Although it is not apparent whether Dr. Humphrey considered Perkins' heart impairment in listing the restrictions on his physical capacity, his diagnosis of Perkins' impairments corresponded with the diagnoses of the other doctors, and he did not list any new impairments which could have caused the limitations placed on Perkins. This evidence does not clearly reflect that Perkins' impairments resulted from a later-acquired disability or a subsequent deterioration of a previously non-disabling condition. Thus, the evidence is "material" to a determination of his condition during the relevant time period.

The magistrate judge determined that the May 1990 report of Dr. Faust was "new" evidence because it was prepared prior to the

date of the administrative hearing. However, the magistrate judge also determined that the Faust report, which stated that Perkins was permanently disabled, was not "material" evidence because it was conclusional in nature and was not supported by any particular medical findings.

The "materiality" component requires that there be a reasonable possibility that the evidence would have changed the outcome of the Secretary's decision. *Bradley v. Bowen*, 809 F.2d 1054, 1058 (5th Cir. 1987). The Faust "report" was actually a form questionnaire sent to the doctor by a state agency. The form contained limited space to state a diagnosis and boxes to be checked indicating the claimant's capacity to work. Dr. Faust checked the box reflecting that Perkins was unable to work because of his physical condition and indicated that Perkins was permanently disabled.

The diagnosis made by Dr. Faust on the form was the same diagnosis that he made following his examination of Perkins in December 1989. The December report contained detailed clinical findings, along with the results of a number of tests performed on Perkins. Further, Dr. Faust's findings in the report were in accord with the diagnosis of Dr. Attar in 1988, and his conclusion on the form was the same as the conclusion reached by the physician who had treated Perkins at the Veterans Administration Hospital. Dr. Faust had also examined Perkins in 1978 and made similar findings. The findings in Dr. Faust's previous reports were sufficient to support the conclusion reached in the questionnaire.

See *Scott v. Heckler*, 770 F.2d 482, 485 (5th Cir. 1985) (ALJ could not reject opinion as conclusional where it was based on examination and treatment of claimant over several months and was uncontradicted by other testimony). Therefore, we find that Dr. Faust's report is "material" evidence because there is a reasonable possibility that it would change the outcome of the Secretary's decision.

#### EVIDENCE OF DAILY ACTIVITIES

Perkins contends that the ALJ erred in relying on the evidence that he performed household activities because he failed to consider that his activities were often accompanied by, or restricted by pain. The ALJ noted that there were contradictions in the record regarding the extent of Perkins' daily activities. Perkins testified that his activities were limited to cooking breakfast and watching television. However, Perkins stated in several disability reports that he did various chores around the house and yard. Perkins also advised Dr. Attar that he cooked, cleaned, and did yard work.

The ALJ was entitled to consider evidence of Perkins' daily activities in conjunction with the other evidence presented in evaluating his physical capacity. *Reyes v. Sullivan*, 915 F.2d 151, 154 (5th Cir. 1990). Further, the inconsistencies in his testimony and the written reports were relevant in evaluating his credibility. *Id.*

Perkins also argues that the district court did not address the ALJ's failure to use the correct standards in evaluating his

complaints of pain. Perkins argues that the ALJ did not consider the evidence that he was suffering from a muscle spasm, and indicated that he did not believe that Perkins was taking fifteen nitroglycerin tablets a week.

Pain constitutes a disabling condition when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." *Harrell v. Bowen*, 862 F.2d 471, 480 (5th Cir. 1988) (citations omitted). "[A] factfinders evaluation of the credibility of subjective complaints is entitled to judicial deference if supported by substantial record evidence." *Villa v. Sullivan*, 895 F.2d 1019, 1024 (5th Cir. 1990) (citation omitted). "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 determined that Perkins' claims of pain and loss of functional capacity required further consideration because they were not supported by the objective medical evidence in the record. In making the evaluation, the ALJ considered that a radiologist had noted that X-rays of Perkins lumbar spine suggested evidence of a muscle spasm, but the ALJ rejected the finding based on Dr. Attar's negative finding of spasm during a clinical examination.

The ALJ also relied on the fact that Perkins was not taking any pain medication at the time of the hearing. The ALJ questioned Perkins' assertion that he consumed large quantities of nitroglycerin on a continual basis because there was no evidence

that he had been re-prescribed the drug by a physician. Perkins argues that he listed nitroglycerin on his medication list as a drug which had been prescribed for him on an "as needed" basis since 1974, and that it was also listed as a prescribed medication in a 1988 report.

The ALJ properly considered Perkins' complaints of pain and rejected them based on objective evidence in the record. However, the Secretary must re-evaluate Perkins' claims of pain in light of the new evidence and should seek evidence confirming whether he has been prescribed nitroglycerin on a continual basis. The Secretary must also re-evaluate Perkins' ability to engage in work-related activities in light of the additional evidence presented.

#### CONCLUSION

Based on the reasons articulated above, we VACATE the judgment of the district court and REMAND with instructions that the case be remanded to the Secretary for consideration of the additional evidence.