

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-2410  
(Summary Calendar)

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CLARENCE BURSE,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary of Health  
and Human Services, Et Al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA-H-85-4360)

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(September 26, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant Clarence Burse is again before this court appealing rulings of the district court in its review of a denial by Secretary of Health and Human Services (the Secretary) of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

disability benefits under 42 U.S.C. 405(g). Contemporaneously, Burse seeks reconsideration of our earlier order denying his motion to supplement the record. For the reasons set forth below, we affirm the district court and deny the motion for reconsideration.

I

FACTS AND PROCEEDINGS

Burse filed an application for disability benefits in April 1984 alleging that he had become disabled in February 1983, as a result of a back injury and back surgery. The application was denied administratively, both initially and on reconsideration. Following an administrative hearing, the Administrative Law Judge (ALJ) determined that Burse was not disabled. The Appeals Council denied Burse's request for review.

Burse sought judicial review of the Secretary's denial of benefits. The Secretary filed a summary judgment motion which the district court denied, remanding the case to the Secretary for consideration of new evidence that Burse had undergone a second back surgery. Following remand, the Secretary again denied benefits to Burse.

Burse filed a motion to reinstate his case in the district court and objections to the Secretary's order denying him benefits. The district court denied both the motion to reinstate and Burse's request for a ruling on his pleading. Burse appealed and we reversed the district court's denial of the motion to reinstate, remanding the case for further proceedings. The district court, sua sponte, reviewed the pleadings and records on file and affirmed

the decision of the Secretary.

Burse was thirty-three years old at the initial hearing held in November 1984. He testified to the following facts. A high school graduate, Burse was previously employed as a grocery order puller, a butcher, and a utility worker. He injured his back in February 1983 and underwent back surgery in September of that year. He continued to experience pain in December, but was able to care for his three-year old child and to perform housework. Burse was unable to use his left hand at all or to write much with his right hand because of an old gunshot wound. A vocational expert testified that there were a number of sedentary jobs that Burse could perform despite his physical limitations.

A second hearing was held after the district court remanded the case to the Secretary to consider the new evidence that Burse had undergone a second back surgery in May 1985. Burse testified at the June 1989 hearing that he continued to have pain and stiffness in his lower back following his May 1985 fusion surgery. He was able to sit for thirty minutes and to stand for between fifteen and twenty minutes. He had not been assigned to work more than a few weeks since his incarceration in September 1985. A vocational expert testified that there were light and sedentary jobs that Burse could perform despite his physical limitations.

An electromyogram (EMG) conducted in August 1983 indicated that Burse had nerve root irritation in the lower lumbar region. He underwent a laminectomy, performed by Dr. Detenback in September 1983, and was without significant back or leg pain by October.

X-rays taken in November showed no abnormality and Burse's reflexes, and muscle strength appeared normal at that time.

In March 1984, Dr. Detenback directed Burse to resume activities that did not require any strenuous lifting, stooping, or bending. Burse reported significant back pain in June 1984, and a CAT scan of Burse's lumbar spine was found to be compatible with herniated nucleus pulposus.

Dr. James Jacob, an orthopedic surgeon, examined Burse in June 1984. The examination revealed some decreased range of motion and muscle spasm; however, (1) there was no muscle atrophy or wasting in the lower extremities, (2) Burse's deep tendon reflexes were equal and symmetric, and (3) there was no motor deficit present. Dr. Jacob was of the opinion that Burse could perform sedentary work which did not require excessive bending or stooping, or lifting over ten to fifteen pounds.

Burse was also examined in June 1984 by Dr. Kaestner, another orthopedic surgeon. Burse was able to stand well on his heels and toes, his foot pulses were equal, and no motor or sensory deficits were found. Dr. Kaestner reviewed Burse's June CAT scan and disagreed with the finding that it reflected an extensive lumbar abnormality. The physician observed only mild spurring and no recurrent disc herniation. Dr. Kaestner believed that Burse had a good surgical result and that he was capable of light to moderately heavy activity. The doctor observed no clinical changes during a November examination.

Dr. Steven Goldstein, a neurologist, examined Burse in

December 1984. Burse reported that he was caring for his three children at that time and that he performed housework and grocery shopping. His motor examination was normal in all extremities, his deep tendon reflexes were normal, and there was no muscle atrophy in his lower extremities. He was able to squat and bend without difficulty, toe walk, and hop. An EMG showed mild nerve root irritation. Dr. Goldstein was of the opinion that Burse could lift and carry up to ten pounds, could walk for two hours, and could sit for four hours in an eight-hour day.

Dr. Kaestner hospitalized Burse in May 1985 due to a recurrent disc herniation. Dr. Kaestner noted in a September 1985 report that Burse had been disabled from his past work since February 1983, and had been totally disabled since the May 1985 surgery. The doctor was of the opinion that Burse would be unable to return to work for approximately ten months.

Burse's prison medical records reflect that an October 1986 examination showed no apparent leg atrophy and no paravertebral muscle spasm. In November he reported problems with prolonged standing, and in December reported problems with prolonged sitting at his job in the dental shop. X-rays of his lumbar spine in January 1987 showed that the bony lumbar fusion was present, that the remaining vertebral bodies were intact, and that his disc spaces appeared well preserved.

Burse was placed on unassigned work status on February 26, 1987; however, by April 29 of that year an examination determined that he had normal range of motion and his reflexes were equal. In

June, Burse was restricted from lifting over 20 pounds and from standing for prolonged periods. He received a pass to work half-days in July because of his chronic back pain, and continued to have the half-day work passes renewed through the end of the year. Although an August examination revealed right leg shortening, it also showed that no muscle atrophy had occurred and that Burse's reflexes remained intact.

Burse was examined in the Neurology Clinic on January 6, 1988, and the examination revealed no evidence of nerve root impingement at that time. At his request, Burse received a half-day work pass on January 20, but was advised to attempt to work a full work day on February 3. Burse complained of pain in February and March, but the examining physician found "no objective justification" for issuing a half-day work assignment. An examination in March revealed no evidence of nerve root impingement. Burse worked full-work days in March (including one eleven-hour day) prior to developing muscle spasm. He was assigned to an eight-hour work day in May. Burse continued to complain of pain but was found to have a full range of motion in all extremities and was able to rise up and down without difficulty. Burse's requests for non-work status in May and June were denied. X-rays showed Burse's lumbar fusion was intact in August 1988.

At the Secretary's request, Burse was examined in August 1988 by Dr. Selassie, a neurologist. The exam revealed that Burse had adequate motor strength in his upper and lower extremities. There was no atrophy in the lower extremities, his gait was normal, and

he was able to squat and rise easily.

Dr. Selassie was of the opinion that Burse could frequently lift ten pounds and occasionally lift twenty pounds, could stand or walk for three hours a day at one-hour intervals, and was able to sit continuously for eight hours a day. Dr. Selassie stated that Burse could reach, handle, and finger objects.

## II

### ANALYSIS

Appellate review of the Secretary's denial of disability benefits is limited to determining whether: (1) the decision is supported by substantial evidence; and (2) proper legal standards were used to evaluate the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). If the Secretary's findings are supported by substantial evidence they are conclusive, and the Secretary's decision 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 more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Villa, 895 F.2d at 1021-22 (internal quotations and citations omitted).

In evaluating a disability claim, the Secretary must follow a five-step sequential process to determine whether: (1) the claimant is presently working; (2) the claimant's ability to work is significantly limited by a physical or mental impairment; (3) the claimant's impairment meets or equals an impairment listed in the

appendix to the regulations; (4) the impairment prevents the claimant from doing past relevant work; and (5) the claimant cannot presently perform relevant work. See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. The claimant has the initial burden of demonstrating that he cannot perform his previous work. Fields v. Bowen, 805 F.2d 1168, 1169-70 (5th Cir. 1986). If the claimant does so the burden then shifts to the Secretary, "who must show that the claimant can perform alternative employment." Id. at 1170. If the Secretary does so the burden shifts back again to the claimant, who must show that he cannot perform such alternative work. Id.

We have set out four elements of proof that must be weighed when determining whether substantial evidence of disability exists: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) the claimant's subjective evidence of pain and disability; and (4) his age, education, and work history. Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991). We may not, however, reweigh the evidence or try the issues de novo. Cook v. Heckler, 750 F.2d 391, 392 (5th Cir. 1985). The Secretary, rather than the courts, must resolve conflicts in the evidence. See Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983).

A. The supplemental Administration Record

Burse argues that the district court's decision affirming the Secretary's decision is not based on the record as a whole because the district court did not have before it the supplemental administrative record contained. Burse argues that the docket



sheet in the case reflects that the supplemental record was not filed and entered until after the district court issued its decision in April 1993.

Although the docket sheet reflects that the supplemental transcript was not entered on the docket until June 14, 1993, it also reflects that the transcript was filed with the court on March 8, 1990. Furthermore, the district court made reference to information contained in the supplemental record in its April 30, 1993, order. The record does not support Burse's assertion that the district court did not review the entire record.

B. Substantial Record Evidence

Burse insists that the district court erred in affirming the ALJ's determination without an independent review of the record because the ALJ erroneously stated the evidence in the case. Burse continues by arguing that the ALJ erroneously determined that Burse's prison records reflected that he worked an eleven-hour work day and that he had been assigned to work an eight-hour day. Burse argues further that his prison medical records reflect that he was relieved of all work duty between January and July 1987 and thereafter received half-day passes. And Burse argues that his medical status was changed and falsified by Dr. Stauber in June 1988 after Burse had filed a grievance against the doctor.

The prison medical records reflect that Burse was "medically unassigned" for certain periods between January and July and thereafter received half-day passes until the end of the year. It appears that Burse received limited work passes based on his

subjective complaints of pain because the objective findings in the prison records showed no evidence of nerve root impingement during this period. The ALJ did not err in failing to give any weight to Burse's "unassigned status" because the objective evidence did not reflect that Burse was disabled at that time. The record also supports the ALJ's determination that Burse worked an eleven-hour day on at least one occasion and was assigned to work eight-hour days in early 1988.

Burse argues that the ALJ incorrectly found that Burse could perform repetitive piecemeal work with his hands because he is right-handed and that hand is not impaired. Burse insists that he testified that he had suffered a gunshot wound to his right hand. Burse's testimony did support his assertion that his right hand sustained a gunshot wound, but Burse's testimony that he was able to perform butcher work after sustaining the wound and the opinions of the examining doctors support the ALJ's finding that Burse is able to use his hands to handle objects.

C. Listed-Impairment Criteria

Burse contends that his back condition meets the criteria of the listed impairment for disorders of the spine. Burse asserts that the record reflects that he suffered a herniated disc in April 1983.

To meet the listed-impairment criteria for a spinal disorder, the claimant must have a disorder, such as a herniated nucleus pulposus or spinal stenosis. The disorder must be accompanied by pain, muscle spasm, significant limitation of motion in the spine,

and significant motor loss with muscle weakness and sensory and reflex loss which persists for three months and is expected to last twelve months. 20 CFR Pt. 404, Subpart P, App. 1, § 1.05(C).

Although there was evidence that Burse suffered from herniated discs in September 1993, and in May 1995, the record reflects that the problem was alleviated following his surgeries. Further, the objective findings in the record reflect that Burse did not experience muscle weakness, or significant sensory or reflex loss. There is substantial evidence in the record to support the ALJ's finding that Burse's spinal disorder did not meet the criteria of a listed impairment.

D. Date of Onset

Burse contends that the ALJ did not properly consider the onset date of his disability. Burse argues that the onset day was February 23, 1983, the date that he initially sustained a back injury.

A claimant's "onset date" must be correctly established and supported by the evidence. See Spellman v. Shalala, 1 F.3d 357, 361 (5th Cir. 1993) (quoting Social Security Ruling (SSR) 83-20). In determining the onset date, consideration should be given to "the individual's allegation, the work history, and the medical evidence." Id. (citations omitted).

The ALJ recognized in his first decision that Burse suffered two herniated discs at the time that he fell in February 1983 and that he was unable to engage in gainful employment prior to December 1983. Thus, the ALJ agreed with Burse's original stated

onset date. The ALJ further determined, however, based on the objective evidence in the record, that as a result of his initial surgery in September, Burse was able to perform sedentary work as of December 1983. The ALJ further determined that Burse was able to engage in such work until he underwent fusion surgery in May 1985. This finding is supported by the evidence that Burse was capable of squatting and bending, toe walking, and hopping and that he was able to care for three children and a household in December 1984. Dr. Kaestner's post-surgery report stated that Burse had been totally disabled since his May 1985 surgery. Thus, there is substantial evidence in the record to support the ALJ's finding there was a second period during which Burse was unable to work and that such period began in May 1985. That onset date is not critical, however, because the record does not reflect that Burse was disabled for more than twelve months following the surgery.

E. Subjective Complaints of Pain

Burse contends that the ALJ erred in determining that Burse could perform light or sedentary labor because the ALJ failed to consider whether Burse could maintain a job in light of his inability to sit for long periods of time without experiencing pain. Burse insists that his complaints of pain are supported by objective evidence in the record. Burse also argues that the ALJ erred in relying on the opinion of the vocational expert to determine if a herniated disc caused disabling pain.

Pain can be severe enough to create a disabling condition, "but only when it is constant, unremitting, and wholly unresponsive

to therapy or treatment." Johnson v. Bowen, 864 F.2d 340, 347 (5th Cir. 1988) (internal quotations and citations 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) (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.

Relying on the medical evidence presented, the ALJ determined that Burse could perform sedentary work after December 1983, which primarily involving sitting, but allowed for alternate standing and sitting or changing of position. The ALJ also determined that after May 1986, Burse experienced only mild to moderate pain and that his complaints were exaggerated and not credible. There was substantial evidence in the record to support the finding that Burse's disc herniations were repaired by his surgeries and that he is able to sit for extended periods of time without suffering disabling pain. The ALJ did not rely on the vocational experts for a medical opinion. Rather, he sought their opinions regarding whether there were jobs existing that Burse could perform despite his limitations documented by the medical evidence in the record.

F. Inclusion of Prison Medical Records

Burse argues that the district court abused its discretion in failing to address his objection to including his prison medical records in the administrative record.

Burse's prison medical record was the only record of his medical condition and treatment between 1986 and 1988 and was thus relevant to the Secretary's disability determination. Although the district court did not directly address Burse's objection, the record makes clear that prison medical notes were properly made a part of the administrative record. See Bickford v. International Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. 1981) (reversal is inappropriate if ruling of district court can be affirmed on any grounds, regardless of whether those grounds were used by district court).

In his reply brief, Burse seeks reconsideration of our previous order denying his motion to supplement the record. Burse argues that these records would demonstrate that the district court did not have access to the supplemental administrative record. As discussed above, however, the district court's order establishes that it did have access to the supplemental record. There was no abuse of discretion; so we have denied Burse's motion for reconsideration contemporaneously herewith.

Finding no reversible error, we  
AFFIRM.