

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3062
Summary Calendar

VELMA PHILLIPS,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA,
Secretary, Department of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA 91 475 A M2)

(December 13, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

On January 4, 1989, Velma Phillips applied for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB), alleging disability since November 30, 1986, due to Crohn's disease, arthritis, a stomach ulcer, blindness, and "bad nerves." These applications were denied initially and on reconsideration.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Phillips requested and received a hearing before an Administrative Law Judge (ALJ). The ALJ determined that Phillips's impairments did not preclude her from performing her past relevant work as a cook. Thus, the ALJ held that Phillips was not disabled within the meaning of the Social Security Act. The decision of the ALJ became the final decision of the Secretary when the Appeals Council denied Phillips's request for review.

Phillips filed suit in the district court seeking review of the Secretary's decision. The parties later filed cross motions for summary judgment. The district court approved the report and recommendation of the magistrate judge over Phillips's objections and granted the Secretary's summary judgment motion.

I. FACTS AND PROCEDURAL HISTORY

The following facts were presented for the Secretary's determination. Phillips was born on May 25, 1943. She graduated from high school and has worked as a sales person and a cook. On April 12, 1986, Phillips visited Dr. Bruce L. Baer at the Baton Rouge Medical Center (Baton Rouge Medical), with complaints of increased belching, flatus, borborygmia, abdominal bloating, diarrhea, and constipation. Dr. Baer diagnosed Crohn's disease involving the distal terminal ileum. Crohn's disease, a chronic, inflammatory disease of the gastrointestinal tract, is characterized by symptoms such as cramping, nausea, severe abdominal pain, fatigue, diarrhea, and insomnia. See Dix v. Sullivan, 900 F.2d 135, 136 (8th Cir. 1990). "Crohn's disease also causes fistulas--abnormal passages between two internal organs or

an internal organ and the surface of the body." Id. The severity of the symptoms depends on whether the patient is having a flare-up and the length of the flare-up. See id.

On November 10, 1986, Phillips was readmitted to Baton Rouge Medical, complaining of severe cramping pains in the upper abdomen, nausea, and vomiting. She was diagnosed with intermittent small bowel obstruction and underwent an operation involving resection of the terminal ileum and proximal cecum with an ileoascending colostomy. Phillips recovered fairly well after surgery but suffered from diarrhea that lasted for approximately two weeks in January 1987.

Phillips returned to Baton Rouge Medical on April 5, 1987, with complaints of intermittent sharp pain in the right lower quadrant, diarrhea, nausea, and vomiting. Dr. Baer opined that Phillips had experienced a slight exacerbation of Crohn's disease. Dr. Baer last examined Phillips on June 6, 1987, and advised that she return in one month's time for a follow-up, but Phillips did not do so.

On January 15, 1988, Phillips was admitted to Our Lady of the Lake Regional Medical Center complaining of acute abdominal pains, recurrent vomiting, diarrhea, and some dehydration. Dr. Shaban Faruqui diagnosed Grade I esophagitis and erosive duodenitis. Phillips did well during her hospital stay and it was decided that she should switch to an out-patient basis. She was discharged on January 21, 1988.

On February 23, 1989, Dr. Douglas W. Davidson conducted a consultative examination of Phillips and diagnosed her as having Crohn's disease. Nevertheless, his functional assessment indicated that she could sit, stand, and walk for eight hours a day. Phillips was also found able to lift up to 25 pounds on a continuous basis and from 25-50 pounds on a frequent basis. No postural or environmental limitations were assessed by Dr. Davidson.

On June 29, 1989, Phillips saw Dr. David Dragon for a consultative eye examination. He diagnosed myopic astigmatism, recommended glasses, and placed no work limitations on Phillips.

At the hearing before the ALJ, Phillips testified that she had been unable to work since developing Crohn's disease. She stated that she has at least eight bowel movements a day and as many as fifteen movements a day. She also stated that she was taking 40 milligrams of Prednisone for her Crohn's disease, as well as medication for her arthritis and insulin for her diabetes. Phillips's friend essentially corroborated her testimony.

The ALJ's decision was entered on March 30, 1990. On February 24, 1991, Phillips requested that the Appeals Council review the ALJ's decision in light of additional medical records from Earl K. Long Memorial Hospital (EKLH). Dr. David Harper had evaluated Phillips in August 1989 for continuing abdominal complaints, nausea, and vomiting. The additional evidence reflects that on August 29, 1989, he opined that Phillips would be totally disabled from working for a year or more as a result of her Crohn's disease.

However, on August 30, 1990, another treating physician at EKLH indicated that he could not determine whether Phillips was totally disabled until he saw her response to outpatient treatment. The Appeals Council denied Phillips's request after concluding that "[t]he evidence shows that the claimant continued to have problems due to Crohn's disease but not to the extent that she would be precluded from performing her past relevant work."

II. DISCUSSION

In reviewing the Secretary's decision to deny disability benefits, this Court must determine whether there is substantial evidence in the record to support it and whether the proper legal standards were used in evaluating the evidence. Villa v. Sullivan, 895 F. 2d 1019, 1021 (5th Cir. 1990). Substantial evidence is more than a scintilla but less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Villa, 895 F.2d at 1021-22. In applying this standard, this Court may not reweigh the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. Id. at 1022.

The Social Security 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 12 months." 42 U.S.C. § 423(d)(1)(A). The same law and regulations govern whether

a claimant is "disabled" for SSI or DIB purposes. Haywood v. Sullivan, 888 F.2d 1463, 1467 (5th Cir. 1989). The Secretary follows a five-step process in evaluating a disability claim. A finding that a claimant is not disabled at any point terminates the sequential evaluation. Crouchet v. Sullivan, 885 F.2d 202, 204, 206 (5th Cir. 1989). The five steps are:

- 1) Claimant is not presently working;
- 2) Claimant's ability to work is significantly limited by a physical or mental impairment;
- 3) Claimant's impairment meets or equals an impairment listed in the appendix to the regulations (if so, disability is automatic);
- 4) Impairment prevents claimant from doing past relevant work; and
- 5) Claimant cannot perform relevant work.

See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520.

On the first four steps of the analysis, the initial burden is on the claimant to prove that she is disabled. On the fifth step, the burden shifts to the Secretary to show that there is other substantial work in the national economy which the claimant can perform. Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991).

The ALJ followed this five-step process. The ALJ found that Phillips had not worked since November 30, 1986. The ALJ further found that Phillips has "severe Crohn's disease, diabetes mellitus and anxiety" but that her impairment or combination of impairments does not meet or equal an impairment listed in the appendix to the regulations. The ALJ then moved to step four, determining that

Phillips was not disabled because she could work as a cook, as she had in the past. This determination ended the ALJ's analysis.

Phillips contends that there was not substantial evidence to support the Secretary's determination that she was not disabled. She correctly points out that a determination that a claimant can engage in substantial gainful activity must take into account the claimant's actual ability to "hold whatever job he finds for a significant period of time." Id. at 12; Singletary v. Bowen, 798 F.2d 818, 822 (5th Cir. 1986). She argues that "[t]he very nature and symptoms of Crohn's disease render [her] incapable of performing her past relevant work as a cook." Id.

Phillips relies primarily on Dix for supporting authority. In Dix, the Eighth Circuit held that an applicant suffering frequent flare-ups of Crohn's disease was entitled to SSI benefits even though she sometimes received reprieves from her symptoms and pain. 900 F.2d at 138. Even if this Court were to agree with the holding in Dix, Phillips's reliance on that case is misplaced. In Dix, the applicant had undergone surgery five or more times since first being diagnosed with Crohn's disease and had been found to be disabled based on the regularity and severity of her symptoms. Id. at 136-38. Phillips, however, required only two brief hospitalizations in the fourteen months after her November 12, 1986, operation. She received conservative treatment intermittently before being hospitalized again in August 1989. Thus, based on the totality of the medical evidence, the Appeals Board concluded that Phillips suffered from the symptoms of Crohn's

disease "on an intermittent basis but not to a disabling extent."

Phillips contends that she cannot return to her past relevant work as a cook because of the frequency of her bowel movements and gas. "A determination that a claimant is unable to continue working for significant periods of time must, however, be supported by more than a claimant's personal history; it must also be supported by medical evidence." Singletary, 798 F.2d at 822. As indicated above, the medical evidence does not reflect that the nature of Phillips's disease prevented her from maintaining regular employment. Moreover, after examining Phillips, Dr. Davidson diagnosed Crohn's disease but concluded that Phillips was capable of sitting, standing, and walking for eight hours a day, and capable of lifting up to 25 pounds on a continuous basis and from 25-50 pounds on a frequent basis. Although a treating physician, Dr. Harper, opined that Phillips was disabled, this assessment was contradicted by that of another treating physician who could not state whether Phillips was disabled, as the matter depended on her response to outpatient therapy. When "the evidence presents conflicting testimony and reports that must be evaluated by their credibility," it is "[t]he Secretary, not the courts, [who] has the duty to weigh the evidence, resolve material conflicts in the evidence, and decide the case." Chaparro v. Bowen, 815 F.2d 1008,

1011 (5th Cir. 1987). The ALJ's decision was supported by substantial evidence.

AFFIRMED.