UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3101

ROSE ROSS,

Plaintiff-Appellant,

versus

DEPARTMENT OF HEALTH & HUMAN SERVICES, Donna Shalala, Secretary,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(91-CV-2932-"M" (5))

(September 30, 1994)

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Rose Ross appeals the district court's dismissal of her action seeking judicial review of a decision by the Secretary of Health and Human Services ("the Secretary") to terminate her disability insurance benefits. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

In 1982, the Secretary granted Ross disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401 et seq., based upon its finding that she suffered from paranoid schizophrenia.[1] In June 1989, the Secretary reevaluated Ross' condition and concluded that Ross, a forty-eight year old woman with a college education, was no longer disabled because her mental impairment, as treated with medication, was in remission. Ross sought administrative review. After a hearing, an administrative law judge ("ALJ"), based upon Ross' testimony, progress notes prepared by Ross' treating psychiatrists, and a second report made by Dr. Cohen,[2] upheld the Secretary's decision. The Appeals Council declined to review the ALJ's decision, thus making it the final decision of the Secretary, and Ross sought judicial review of the decision in federal district court. Both Ross and the Secretary then filed motions for summary judgment. The district court, adopting the report and recommendations of a magistrate judge, granted the Secretary's motion and dismissed Ross' action. Ross now appeals, arguing that the ALJ's decision is not supported by the evidence.

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[1] Three psychiatrists who had examined Ross))two treating psychiatrists and one consulting psychiatrist))found her to be disabled. A fourth psychiatrist, Dr. Alvin Cohen, opined that Ross was not disabled.

[2] Specifically, Dr. Cohen opined that Ross suffered from atypical psychosis, "in remission with medication."

II

In reviewing Ross' claims of error, "we consider whether the record contains substantial evidence in support of the ALJ's conclusions and whether the ALJ applied the proper legal standards in evaluating the evidence."[3] *Griego v. Sullivan*, 940 F.2d 942, 943 (5th Cir. 1991) (per curiam). The Secretary, who bears the ultimate burden of proof, may terminate disability benefits if substantial evidence demonstrates that:

> (A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and
> (B) the individual is now able to engage in substantial gainful activity; . . . .

42 U.S.C. § 423(f); *see also Griego*, 940 F.2d at 943-44.

With regard to the first prong of the termination analysis, the Secretary's implementing regulations define "medical improvement" as "any decrease in the medical severity of [the individual's] impairment(s) which was present at the time of the most recent medical decision that [the individual was] disabled or continued to be disabled." 20 C.F.R. § 404.1594(b)(1) (1993). "A determination that there has been a decrease in medical

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[3] 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, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971). It is more than a mere scintilla and less than a preponderance. *Id.* In reviewing the Secretary's decision, we "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 v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990) (citation omitted).

severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated without impairment(s)." *Id.* Additionally, a medical improvement is related to an individual's ability to work only "if there has been a decrease in the severity . . . of the impairment(s) at the time of the most recent favorable medical decision *and* an increase in [the individual's] functional capacity to do basic work activities." *Id.* at § 404.1594(b)(3). Here, the ALJ concluded that there had been a medical improvement in Ross' impairment that was related to her ability to work.

The second prong of the § 423 analysis "relates to the ability to engage in substantial gainful activity. Here the implementing regulations incorporate many of the standards set forth in the regulations governing initial disability determinations." *Griego*, 940 F.2d at 944. In evaluating a claimant's ability to engage in substantial gainful employment, the Secretary follows an eight-step sequential process. *See* 20 C.F.R. § 404.1594(f); *see also Griego*, 940 F.2d at 944 n.1. In this case, the ALJ ended its inquiry at step 6, finding that Ross was not engaged in substantial gainful activity (step 1), Ross' condition was not equivalent to any impairment specifically listed by the Secretary as disabling (step 2), medical improvement had occurred (step 3), the medical improvement was related to Ross' ability to work because her functional capacity

to do basic work activities had increased (step 4),[4] and Ross' impairment was not severe because it "would not be expected to interfere with her ability to work, irrespective of her age, education and work history" (step 6).[5]

III

Ross first challenges the ALJ's finding that medical improvement had occurred, arguing that the evidence is insufficient to support that finding. Specifically, Ross complains that there is no evidence of medical improvement because the evaluation made by the consulting psychiatrist, Dr. Alvin Cohen, should be disregarded, and also because the ALJ did not obtain certain information from her treating psychiatrists. Ross further contends that the ALJ, when determining whether medical improvement had occurred, did not adequately take into account the side effects of her medication.

A

In 1982, the Secretary determined that Ross was disabled due to her mental impairment. Ross points out that in making that

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[4] Step 5, which deals with issues presented when no medical improvement has occurred, is not relevant here.

[5] The regulations specifically allowed the ALJ to end its inquiry based upon the latter finding. *See* 20 C.F.R. § 404.1594(f)(6); *see also Stone v. Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985) ("An impairment can be considered as not severe only if it is a slight abnormality having such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience.") (internal quotations omitted). Thus, contrary to Ross' suggestion on appeal, the ALJ was not required to obtain testimony from a vocational expert.

determination, the Secretary rejected a report made by Dr. Cohen concluding that she was not disabled. Ross argues that because Dr. Cohen's 1989 report was almost identical to the report he submitted in 1982, the 1989 report should be disregarded. In *Buckley v. Heckler*, 739 F.2d 1047, 1049-50 (5th Cir. 1984), we held that an "almost identical" psychiatric report made subsequent to the original determination of disability did not rebut the presumption of continued disability because it added no new information to the record on the claimant's mental status. In this case, although Dr. Cohen did make some similar findings in the 1989 report, he also pointed out significant differences in Ross' mental status. In 1982, Dr. Cohen found Ross to look older than her stated age, to be responsive in a rather general, vague manner, to have an intellectual capacity that was not in keeping with her education, and periodically to have been "grossly psychotic." In 1989, however, Dr. Cohen found that Ross looked her stated age, was pleasant and responsive, had no evidence of delusions or grossly abnormal thoughts, had an adequate intellectual capacity in keeping with her education, and had control of her symptoms with medication. Consequently, the 1989 report added sufficient new information of Ross' mental condition to the record and need not have been disregarded under *Buckley*.

Ross nonetheless argues that because the effects of a mental impairment fluctuate over time, *see Singletary v. Bowen*, 798 F.2d

818, 821 (5th Cir. 1986), Dr. Cohen's evaluation))based upon a single examination of Ross))cannot constitute substantial evidence. Although the proposition Ross advances generally *may* be true,[6] we need not decide that question here as Dr. Cohen's evaluation was supported by other evidence in the record. For example, after the 1982 finding of disability,[7] Ross was hospitalized only one time for a psychotic episode (in April 1987), and the record indicates that her psychiatrists attributed that incident to Ross' failure to take her medication. From May 1987 onward, Ross complained to her treating psychiatrists only of "bad dreams" or "nightmares," although she also reported that she was sleeping well.[8] The progress notes further indicate that Ross' psychiatrists considered her to be "stable" and "doing well." Moreover, the progress notes indicate that Ross was able to obtain employment as a substitute teacher for a short time in

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[6] *See* 20 C.F.R. § 12.00 E ("The results of a single examination may not adequately describe [the] sustained ability to function" of an individual with a long history of repeated hospitalizations or prolonged outpatient care with supportive therapy and medication.).

[7] One of the physicians treating Ross in 1982 opined that her disability was only temporary in nature.

[8] The ALJ stated that it considered the progress notes supplied by Ross' treating psychiatrist, which, as we note, supported Dr. Cohen's evaluation. Thus, we reject Ross' contention that the ALJ both ignored medical evidence and violated the "treating physician" rule. *See* 20 C.F.R. § 404.1527(e)(1); *see also Spellman v. Shalala*, 1 F.3d 357, 364 (5th Cir. 1993) (noting that a treating physician's opinion that a claimant is disabled does not require that the Secretary find the claimant to be disabled).

1987.[9] Finally, Ross testified before the ALJ both that she had been "thinking about wanting, . . . been wanting, thinking about [doing some kind of work]" and that she thought she could resume going to the State Rehabilitation Service. This evidence, when combined with Dr. Cohen's report, constitutes substantial evidence supporting the ALJ's finding that medical improvement had occurred.

B

Ross next contends that the ALJ's finding of medical improvement is not supported by the evidence because the ALJ failed to obtain certain information from her treating psychiatrist. Specifically, Ross complains that the ALJ failed to obtain from her psychiatrist a medical report containing, *inter alia*, a diagnosis, treatment plan, prognosis and medical assessment.[10]

"It is the duty of the ALJ to fully and fairly develop the facts relative to a claim for benefits. When he fails in that duty, he does not have before him sufficient facts on which to make an informed decision. Consequently, his decision is not supported by substantial evidence." *Pierre v. Sullivan*, 884 F.2d

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[9] According to the notes, Ross gave up this position "because she had to walk several blocks from the bus stop."

[10] The regulations in effect at the time the ALJ issued its decision required that any medical assessment submitted to the Secretary describe the claimant's "ability to reason or make occupational, personal, or social adjustments." 20 C.F.R. § 404.1513(c)(2) (1990).

799, 802 (5th Cir. 1989). "The failure of the ALJ to develop an adequate record is not, however, ground for reversal per se." *Kane v. Heckler*, 731 F.2d 1216, 1220 (5th Cir. 1984). Instead, to obtain reversal, the Ross must show that she was prejudiced as a result of the ALJ's failure. *Id.* To demonstrate prejudice, Ross must demonstrate that, "had the ALJ done his duty, she could and would have adduced evidence that might have altered the result." *Id.*; *see also Jiles v. Shalala*, No. 93-1030, slip op. at 4 (5th Cir. Nov. 18, 1993) (termination-of-benefits case).

We conclude that the ALJ fulfilled its duty to develop the record here. The ALJ requested from Ross' psychiatrists "any medical or educational report" relevant to Ross' claim.[11] In reaching its conclusion that Ross was no longer disabled, the ALJ relied on the progress notes supplied as a result of that query, and Ross does not contend that these notes are inaccurate.[12] Additionally, the ALJ extensively questioned Ross about her

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[11] A letter sent by the Secretary to Ross' psychiatrists requested "a copy of any medical or educational report which would assist this agency in making a determination of disability. The applicant alleges disability since 1982 due to Mental Illness. We would especially like to have reports of treatment records from 1982 to present." Shortly before the hearing, the ALJ sent a second letter stating, "I would appreciate you sending a copy of [Ross'] records covering the period from June 1989 to the present."

[12] *See* 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.00 D (When determining the severity of a mental impairment, "it is vital to obtain . . . *treatment notes* . . . if these are available.") (emphasis added); *id.* § 12.00 E ("It is mandatory to attempt to obtain adequate *descriptive information* from all sources which have treated the individual either currently or in the time period relevant to the decision.") (emphasis added).

problems and activity level during a twenty-minute hearing.[13] *See Carrier v. Sullivan*, 944 F.2d 243, 245 (5th Cir. 1991) (record developed fully where ALJ questioned unrepresented claimant with fifth grade education for twenty-six minutes); *James v. Bowen*, 793 F.2d 702, 704-05 (5th Cir. 1986) (record developed fully where ALJ questioned unrepresented claimant for ten minutes). Furthermore, the ALJ, before closing the hearing, inquired of Ross and her representative whether there was anything they wished to add to the record, and they declined the opportunity. *See Jiles*, slip op. at 4.

In any event, Ross has failed to demonstrate that the ALJ's alleged omission prejudiced her in any way. Dr. Cohen, the consulting psychiatrist, based his diagnosis and conclusions on his examination of Ross. Before issuing its decision, the ALJ reviewed both Dr. Cohen's report and the progress notes provided by Ross' treating psychiatrists. As noted earlier, this evidence is relevant and sufficient for a reasonable mind to accept as adequate to support the conclusion that medical improvement had occurred. Moreover, Ross has not identified what medical evidence of disability could have been submitted to the ALJ at the time of the hearing but was not, nor did she proffer such evidence in the district court or on appeal.[14] *Compare id.* at 5

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[13] Ross was represented at the hearing, apparently by a paralegal from the New Orleans Legal Assistance Corporation.

[14] Although Ross has alleged that additional evidence could have been obtained from her treating psychiatrists, she has

(no prejudice demonstrated in termination case where claimant failed to proffer evidence of continuing disability) *with Kane*, 731 F.2d at 1220 (remand when proffer of material evidence not obtained by an ALJ was made during oral argument). Consequently, Ross has not met her burden of establishing that she could and would have adduced evidence that would have altered the result of her hearing. *Jiles*, slip op. at 5. Accordingly, we must reject her claim of error.

C

Ross next contends that the ALJ did not consider the side effects of her medication when determining whether medical improvement had occurred. At the time of the hearing, Ross was taking Navane, a neuroleptic prescribed by her psychiatrists. According to the Secretary's regulations, "[n]euroleptics . . . may cause drowsiness, blunted affect, or other side effects involving other body systems. Such side effects must be considered in evaluating overall impairment severity." 20 C.F.R. pt. 404, subpt. P, app.1 § 12.00 G.

Ross asserts that her medication causes (1) drowsiness, (2) her head to turn to the right, (3) lack of control over her hands, and (4) contortions of her face. However, the medical evidence in the record does not support Ross' claim of drowsiness. *See Selders*, 914 F.2d at 617 ("Conflicts in the

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not alleged that such evidence would demonstrate that she was disabled.

evidence are for the Secretary and not the courts to resolve."); *Villa*, 895 F.2d at 1024 (noting that "a factfinder's evaluation of the credibility of subjective complaints is entitled to judicial deference if supported by substantial record evidence"). Moreover, the ALJ found that even though Ross' head "did appear to have a tendency to turn to the right at the hearing," she was able to move her head adequately and had "no significant limitations which would limit her ability to do substantial gainful activity."[15] Finally, the medical evidence does not document any reports of the latter two side effects. Therefore, the ALJ did not err in finding that the alleged side effects did not affect the severity of Ross' mental impairment.

IV

Ross next challenges the ALJ's finding that her mental disorder was not "severe" because she could perform basic work activities without significant limitation. "For mental disorders, severity is assessed in terms of the functional limitations imposed by the impairment." 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.00 C. In assessing functional limitations, the Secretary considers four areas: activities of daily living; social functioning; concentration, persistence, and pace; and

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[15] Dr. Cohen reported that both that Ross' motor activity and gait were normal and that he saw no involuntary movements. In contrast, Dr. Cohen's 1982 report stated that Ross' "motor activity and gait reveal that she has to hold her hand to her face a lot in order to keep her head from turning."

deterioration or decompensation in work or work-like setting. *Id.*

After reviewing the record, we conclude that there is substantial evidence supporting the ALJ's determination that Ross did not suffer from limitations in these areas. *See* 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.00. With regard to activities of daily living, Ross testified that her daily routine included such activities as watching television, reading the newspaper, cooking, cleaning, going to the grocery store, taking public transportation, attending church, and talking with friends on the telephone. Additionally, Ross told Dr. Cohen that she played bingo, did "some" sewing, and took responsibility for paying her bills and making her own appointments. Finally, both Cohen and the ALJ noted that Ross' behavior and appearance always was appropriate. *See* 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.00 C(1).

Substantial evidence also indicates that Ross was able to interact appropriately and communicate effectively with other people without limitation.[16] Ross testified before the ALJ that she was able to use the telephone to call and talk with friends and relatives. Ross further told Dr. Cohen that she was able to go on and complete routine errands, shop for groceries, attend parties given by relatives, and visit friends and relatives. She

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[16] While hospitalized in 1987, Ross had to be segregated because of "violence toward [the hospital] staff."

also described herself as "an easy-going person" who "doesn't get excessively angry." *See id.* § 12.00 C(2).

The record further supports the ALJ's conclusion that Ross possessed the ability to sustain focused attention sufficiently long so that she could timely complete tasks commonly found in work settings. Although Ross claims that she "doesn't concentrate as well as she should," Dr. Cohen found that Ross' "memory for recent and past events [was] adequate" and "[h]er fund of general information and intellectual capacity [was] adequate and in keeping with her education." Thus, Dr. Cohen concluded that Ross suffered from "no significant limitations which would cause any deficiency in concentration . . . from a clinical standpoint." *See id.* § 12.00 C(3).

Finally, substantial evidence supports the ALJ's finding that Ross would not suffer from deterioration or decompensation in a work setting. Ross informed Dr. Cohen that she had confidence in herself, could "function alright [sic]," and "enjoy[ed] people." Moreover, the progress notes indicate that Ross had not suffered from delusions, hallucinations, or suicidal ideations for a lengthy period. Based upon his examination of Ross, Dr. Cohen concluded that "there are no problems which would cause [Ross to] withdraw from the situation or decompensat[e] in a work setting." *See id.* § 12.00 C(4).

Therefore, although some evidence to the contrary is contained in the record,[17] the ALJ's conclusion that Ross' impairment was not severe because she could perform basic work-related activities is supported by substantial evidence. Accordingly, we must accept the ALJ's findings.

V

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[17] For example, a Social Security Administration physician who conducted a "psychiatric review" of the record indicated that Ross "often" experienced deficiencies in concentration, persistence, or pace, and suffered a "slight" restriction of activities of daily living, "slight" difficulties in maintaining social functioning, and "repeated" episodes of deterioration or decompensation in work or work-like settings. *But see* 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.03 B (noting that such findings are insufficient to support the conclusion that a mental disorder is "severe"). A mental residual functional capacity assessment indicated that Ross possessed "moderately limited" abilities "to work in coordination with or proximity to others without being distracted," "to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods," "to accept instructions and respond appropriately to criticism from supervisors," and "to respond appropriately to changes in the work setting." Additionally, the assessment reported that Ross "has reduced ability to adjust to work changes and is vulnerable to development of paranoid feelings to others at work, with some possibility of decompensating to psychosis under stress." Finally, Dr. Cohen indicated that Ross' prognosis was "guarded" and recommended that Ross continue receiving therapy.