

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3308
Summary Calendar

LARRY J. FERNANDEZ,

Plaintiff-Appellant,

VERSUS

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

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Louisiana

(CA-92-301-B-M1)

(April 27, 1994)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

Larry J. Fernandez applied for disability insurance benefits in October 1987, March 1988, and June 1989. Fernandez described his disabling condition as permanent ligament and muscle damage in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his lower back, grain asthma, and a heart murmur. Fernandez' applications of October 1987 and March 1988 were denied without further appeal. Fernandez' June 1989 application was also denied, but this time he requested and received a hearing before an administrative law judge (ALJ). At a hearing on January 8, 1991,¹ Fernandez testified that he hurt his back in 1982 and again in 1985 and 1986. As a result, he receives a disability pension from the Union of approximately \$629.00 a month. Fernandez further testified that he has not had surgery on his back, he has some pain, he is unable to sit or stand for long periods of time, he is able to play darts about two hours each week, he has grain asthma sometimes, and he can lift between fifteen and twenty pounds. The ALJ noted that Fernandez' medical records indicated no remarkable medical abnormalities. As a result, in May 1991, the ALJ found Fernandez was not disabled. Testimony from a vocational expert established that Fernandez had the residual functional capacity to perform the full range of light to medium work as long as he avoided exposure to dust and grain, did not have to climb, and was allowed to alternate between standing and sitting. In particular, the ALJ noted that Fernandez could work as a truck driver, sales person, cashier, order clerk, and office machine operator.

Fernandez requested review of this decision by the Appeals Council and submitted additional medical evidence. The additional

¹ A prior hearing in December 1989 resulted in a decision that Fernandez was not disabled. However, the Appeals Council remanded the case for further proceedings after the tape of the hearing could not be located. The hearing held on January 8, 1991 was the hearing subsequent to the remand by the Council.

evidence likewise proved no medical abnormalities, and the council denied Fernandez' request for additional review in January 1992. The ALJ's decision, therefore, became the final decision of the Secretary.

Fernandez then filed suit in district court in April 1992 seeking review of the Secretary's decision. The district court referred the case to a magistrate judge. The magistrate judge ordered Fernandez to file a motion for summary judgment within 60 days, gave the Secretary 120 days to file a motion for summary judgment, and granted Fernandez 15 days from service of the Secretary's motion to file a reply memorandum. The Secretary answered Fernandez' complaint and filed a motion for summary judgment and a brief in support of the motion. About seven weeks later, without Fernandez having filed a motion for summary judgment, or a motion for extension of time, the magistrate judge recommended granting the Secretary's motion for summary judgment on the grounds that the Secretary's decision applied the correct legal standards and was supported by substantial evidence.

Fernandez filed untimely objections to the magistrate judge's report and recommendation even though Fernandez' counsel received a notice from the magistrate judge that his report and recommendation had been filed and that Fernandez had ten days from the date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law. The notice also warned that a failure to object to the findings would constitute a waiver of the right to attack the factual findings on

appeal. The magistrate also warned that absolutely no extension of time would be granted to file written objections to the report. The magistrates' order was docketed on January 6, 1993, and Fernandez' objections were filed on January 20, 1993. The objections were denied on January 26, 1993. Fernandez then filed a motion for reconsideration of the magistrate's report and denial of the motion for extension of time on February 23, 1993. The magistrate denied these motions on March 25, 1993 and judgment was entered against Fernandez. Fernandez timely appeals to this Court.

Discussion

Fernandez, who is represented by counsel, argues that the magistrate judge and the district court violated his due process rights and exceeded statutory authority by ordering Fernandez to proceed by filing a motion for summary judgment.² He then argues, without citation to the administrative record, that granting the Secretary's motion for summary judgment was error.

² Fernandez' counsel contends that the magistrate judge's order to proceed by filing a motion for summary judgment was ambiguous. After reviewing the order, we find the order to be a clear directive to the parties to proceed by filing motions for summary judgment. Even if Fernandez' counsel believed that the magistrate judge's order was ambiguous, the fact of the matter is that he never filed a motion for summary judgment, he never opposed the Secretary's motion for summary judgment, and he waited until after the magistrate judge issued his report before filing any type of response. He was warned of the consequences of just such inaction. In addition, Fernandez' brief to this Court contains no citation to any authority to support his contention that the magistrate judge exceeded his authority. At best, his brief consists of a statement of facts containing speculation and irrelevant observations. Arguments must be briefed to be preserved. **Yohey v. Collins**, 985 F.2d 222, 225 (5th Cir. 1993). Therefore, we do not address Fernandez' contention that the magistrate judge exceeded his authority.

This Court reviews a grant of summary judgment de novo. **Hansen v. Continental Ins. Co.**, 940 F.2d 971, 975 (5th Cir. 1991). Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. **Campbell v. Sonat Offshore Drilling, Inc.**, 979 F.2d 1115, 1119 (5th Cir. 1992); Fed. R. Civ. P. 56(c). The party opposing a motion for summary judgment may not rely on mere allegations or denials set out in its pleadings, but must provide specific facts demonstrating that there is a genuine issue for trial. **Id.**; Fed. R. Civ. P. 56(e). On appeal from summary judgment, this Court examines the evidence in the light most favorable to the non-moving party. **Salas v. Carpenter**, 980 F.2d 299, 304 (5th Cir. 1992).

The district court's grant of summary judgment was not in error. Fernandez did not file a motion for summary judgment, did not respond to the Secretary's motion for summary judgment, nor did he respond timely with objections to the magistrate judge's recommendation, despite notice of the consequences of such inaction. The Secretary's memorandum in support of summary judgment includes a thorough disposition of the undisputed facts of the case, a synopsis of Fernandez' medical reports and opinions, and the relevant law as applied to the facts of the case. The memorandum clearly supports the Secretary's decision that Fernandez was not disabled.

This Court reviews the Secretary's decision to deny disability benefits by reviewing the record for substantial evidence that

would support the decision and whether the proper legal standards were used in evaluating that evidence. **Villa v. Sullivan**, 895 F.2d 1019, 1021 (5th Cir. 1990). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." **Id.** at 1021-22 (citation omitted). In applying this standard, we do not reweigh the evidence; rather, we review the entire record to determine whether substantial evidence exists to support the Secretary's finding. **Id.** at 1022.

The Secretary's finding is based on a five-step process used to evaluate disability claims.³ 20 C.F.R. § 416.920. A finding that a claimant is disabled or not disabled at any point terminates the sequential evaluation. 20 C.F.R. § 416.920(a); **Anthony v. Sullivan**, 954 F.2d 289, 293 (5th Cir. 1992). The Claimant always has the initial burden of establishing that he can no longer perform his previous work. If the Claimant proceeds through all five steps, then the burden shifts to the Secretary to show that there is work in the national economy or other substantial work that the claimant can perform. **Wren v. Sullivan**, 925 F.2d 123, 125 (5th Cir. 1991). If the Secretary meets this burden, the claimant

³ In order to be evaluated as disabled, the claimant: (1) cannot be performing work that is substantial gainful employment; (2) must have a severe impairment that limits his physical or mental ability to do basic work activities; (3) must have an impairment that meets the duration requirement and is listed or equal to one listed in the appendix to the regulations; (4) cannot have the residual functional capacity, measured by physical and mental demand, to do work performed in the past; and (5) cannot be able to perform other work. 20 C.F.R. § 416.920(b)-(f); **Anthony**, 954 F.2d at 293.

must then prove that he is not able to perform the alternate work. **Anderson**, 887 F.2d at 632-33.

The Secretary's finding of no disability is supported by substantial evidence presented during the hearing before the ALJ. Fernandez did not suffer from debilitating pain. The medical records, and Fernandez' own testimony supports a finding that Fernandez suffered from "discomfort", intermittent pain if he over-exerted himself, and some symptoms of pain with increased activities.⁴ Fernandez did not take prescription pain medication. He did not undergo surgery or treatment which would be commensurate with severe pain. There simply is no objective basis for Fernandez' complaints of pain, and no objective findings to indicate that he suffers from severe pain.⁵

Finally, the testimony of a vocational expert established that a substantial number of jobs in the economy existed that Fernandez could perform given his physical condition. Even with his grain asthma, and need to alternate sitting and standing, and with an inability to climb, the expert testified that there were a sizeable number of jobs in the economy for truck drivers, salesperson, cashiers and order parts clerks--all of which Fernandez had the capacity to fulfill.

⁴ We give judicial deference to the factfinder's evaluation of the credibility of subjective complaints when supported by substantial record evidence. **Villa**, 895 F.2d at 1024.

⁵ It is likewise evident from the record that Fernandez' heart murmur does not impose functional limitations.

Neither the medical evidence in the record nor Fernandez' own testimony support a conclusion that the pain associated with his back injury, combined with his grain asthma and heart murmur, is disabling. In addition, expert testimony supports a finding that Fernandez is capable of performing a number of jobs in the present economy. Therefore, substantial evidence exists to support the Secretary's decision that Fernandez is not disabled.

Conclusion

Based on the foregoing, the decision of the district court is AFFIRMED.