

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-3458  
Summary Calendar

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WILLIAM A. MITCHELL,

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 Eastern District of Louisiana

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(CA 91-3347 "I" (5))

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(April 5, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

The instant application is William A. Mitchell's third for disability insurance benefits. He had initially received benefits from 1971 through 1982 for a back injury suffered while working as a pipe-fitter, but those benefits were terminated in 1982 after a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

visit to Dr. Gordon P. Nutik, who examined Mitchell on behalf of the Social Security Administration ("SSA"). Mitchell did not appeal this decision.

In 1984, Mitchell found work as an air-conditioning mechanic, but re-injured his back about one week after he began work. He filed his second application for benefits on October 10, 1984, which was denied initially and again on reconsideration. He did not appeal this decision, but instead filed a July 1985 application for benefits. That application was construed as a motion to reopen the denial of his October 1984 application, and then denied on res judicata grounds. Mitchell sought review of this decision, but the district court refused to disturb the Secretary's decision and this Court affirmed. Mitchell v. Sullivan, No. 89-3117 (5th Cir. Oct. 18, 1989) (unpublished).

Mitchell filed his third application for benefits on June 6, 1989, alleging that he had been unable to work prior to 1984 because of chronic anxiety, nervousness, hypertension, and severe back pain resulting from two lumbar disc operations and a "rheumatoid-like" illness. This application was denied initially and again on reconsideration. He requested and received a hearing before an Administrative Law Judge ("ALJ"), who determined that, at the time his disability insurance expired on June 30, 1984, Mitchell was not disabled.

The decision of the ALJ became the decision of the Secretary when the Appeals Council denied Mitchell's request for review. Mitchell filed suit in the district court seeking review of the

Secretary's decision. The district court adopted the report and recommendation of the magistrate judge and granted the Secretary's motion for summary judgment.

The following facts were presented for the Secretary's consideration. Mitchell was born in 1935, achieved a seventh-grade education, and had past work experience as a pipe fitter, a cab driver, and an air-conditioning mechanic. Dr. Nutik's 1982 report noted that Mitchell had degenerative disc disease in his back, a sacralization of the fifth lumbar vertebra to the sacrum "that appears to be arthritic," and arthritis in his left foot. He concluded that Mitchell was incapable of lifting, climbing, stooping or standing for "even short periods of time."

After re-injuring his back in 1984, Mitchell first saw Dr. John R. Montz, a back specialist at the Pontchartrain Bone and Joint Clinic. Following his first visit to Montz on June 4, 1984, the doctor stated that Mitchell had persistent backaches, occasional numbness in his right leg, limited forward flexation, paravertebral muscle spasms, equal reflexes, and negative straight leg raise. He concluded that Mitchell "remains disabled." He recommended a conservative course of treatment consisting of Tylenol #3, Soma 30, and bed rest for one week with gradual ambulation the second.

Mitchell's next visit to Montz, two weeks later, revealed persistent lower back pain and discomfort in the right leg, but only "mild" paravertebral muscle spasms in the lower lumbar segments. Mitchell experienced pain during extension or lateral

bending, but the straight leg raise was accomplished without symptoms. Montz also noted that Mitchell was able to heel-to-toe walk without significant weakness, and that sensation was intact. Montz later noted that, in light of Mitchell's continued discomfort following one month of conservative treatment, he recommended that Mitchell return to his neurosurgeon for further evaluation. He also concluded that, at the time, he had felt only that Mitchell was "unable to do his normal job."

Mitchell then saw Dr. Kenneth Vogel, a neurologist and surgeon who had performed Mitchell's back surgery in 1973, who reported that Mitchell was a 49-year-old male in "no acute distress," suffering from lumbosacral and left leg pain. Vogel found that Mitchell's degree of motion was moderately limited in all directions with flexation limited to 50 degrees. He concluded that Mitchell had an acute lumbosacral strain and a possible herniated lumbar disc. He directed Mitchell to have a CT-scan performed by Dr. Daniel Johnson, which confirmed the herniated disc. Mitchell was referred to physical therapy.

Vogel saw Mitchell again on December 20, 1984, noting that conservative care had yielded "temporary relief" to Mitchell's lumbosacral and left leg pain. A neurological examination revealed no change or improvement from Mitchell's herniated lumbar disc or facet arthropathy.

Mitchell's family physician, Dr. Curtis Bonin, tendered his examination notes from 1985 through 1987, wherein he confirmed the physical analysis by Dr. Vogel -- lower back pain and inflammatory

arthritis -- but added that "the main reasons that he [Mitchell] will never work again are his mental problems." Bonin diagnosed Mitchell's mental problems as depression and anxiety, and sedivism (involuntary chemical abuse, as used by Dr. Bonin), and concluded that Mitchell would never work again.

In a later report, Bonin stated that Mitchell had suffered since the 1960's from chronic anxiety disorder, which was treated with Valium. Bonin also noted (1) recurring gout in Mitchell's left foot and left knee since 1973-74, (2) "rheumatoid like illness" which had been treated by a rheumatologist since the early 1980's, and (3) hypertension, which had been diagnosed as severe in 1971. Mitchell's psychiatrist, Dr. David Mitchell, noted in an August 23, 1988, letter that he had been treating Mitchell for fifteen months since his referral from Dr. Bonin. He noted that Mitchell's problem was a chronic anxiety disorder pre-dating Mitchell's back injury of May 22, 1984, but related to that back injury. He wrote that "[p]rognosis for improvement is nil."<sup>1</sup>

#### OPINION

Mitchell was last insured for disability purposes on June 30, 1984. Thus, to prove that he is entitled to disability insurance benefits, Mitchell must prove that he became disabled prior to the expiration of his insured status on June 30, 1984. 42 U.S.C. § 423(a), (c); Anthony v. Sullivan, 954 F.2d 289, 295 (5th Cir.

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<sup>1</sup>Dr. Mitchell later referred Mitchell to Dr. Richard Roniger, a psychiatrist. Although Mitchell attempts to rely on Roniger's conclusions in his appellate argument, they are not part of the record on appeal, were not referenced by either the magistrate judge or district court, and are largely irrelevant.

1992); see also Owens v. Heckler, 770 F.2d 1276, 1280 (5th Cir. 1985) ("Any impairment which had its onset or became disabling after the special earnings test was last met cannot serve as the basis for a finding of disability" for purposes of disability insurance benefits).

In reviewing the Secretary's decision to deny disability insurance benefits, this Court's inquiry is limited to 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). If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. Selders v. Sullivan, 914 F.2d 614, 617 (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 re-weigh 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 twelve months."

42 U.S.C. § 423(d)(1)(A). The Secretary follows a five-step process in evaluating a disability claim. 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 or combination of impairments;
- 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 he 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). If the Secretary meets this burden, the claimant must then prove that he is not able to perform the alternate work. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5th Cir. 1989).

In determining whether a claimant can perform any other work, the ALJ considers the claimant's age, education, work experience, and residual functional capacity. Selders, 914 F.2d at 618; 20 C.F.R. § 404.1561.

When the characteristics of the claimant correspond to criteria in the Medical Vocational Guidelines of the regulations, . . . and the claimant either suffers only from exertional impairments or

his non-exertional impairments do not significantly affect his residual functional capacity, the ALJ may rely exclusively on the Guidelines in determining whether there is other work available that the claimant can perform.

Fraga v. Bowen, 810 F.2d 1296, 1304 (5th Cir. 1987).

The Secretary concluded that, although Mitchell could not perform his past relevant work, prior to the expiration of his benefits he had the residual functional capacity to perform the full range of sedentary work. The Secretary also concluded that Mitchell's capacity to perform sedentary work was not significantly compromised by his non-exertional impairments at the time his coverage expired. Therefore, based on Mitchell's age at the time of the expiration of his coverage (49 years old), and his residual functional capacity, the medical-vocational guidelines directed a finding of "not disabled."

Mitchell argues that this conclusion is not supported by substantial evidence in the record. Sedentary work

[I]nvolves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). As noted above, Mitchell's condition had improved in the months he had sought treatment following his injury in May of 1984 -- Dr. Montz noted that Mitchell's flexation had improved from 10 degrees to 25 degrees in a matter of two weeks,



and to 50 degrees by his August 13, 1984, CT-scan with Dr. Johnson. His positive neurological findings were limited to the lumbosacral region, the motor examination was "normal," and, after noting "mild" muscle spasm and "mild" scoliosis on the left, a positive 60-degree leg raise on the left, bilateral foot hypalgesia, +1 reflexes, and a tenderness of L5 bilaterally, the doctor concluded that the "remainder of the neurologic examination of the motor, sensory, and cerebellar systems is considered within normal limits." These neurologic signs were unchanged as of December 20, 1984.

Mitchell testified at the hearing before the ALJ that prior to his injury in 1984 he had been restricted by Dr. Vogel to lifting 35 pounds or less. He also testified that his condition was better in 1984 -- even after his injury -- than it was at the time of the hearing in 1990. He testified that in 1984 he was able to work, and that he could walk up to six blocks. During his examination by Dr. Montz on May 22, 1984, the date he re-injured his back, Mitchell told Dr. Montz that he had not had any problems with his back or legs since his operation in the 1970's. Finally, the Secretary noted that Mitchell had not sought treatment for any of his back problems between 1985 and 1987.

Based on Mitchell's physical limitations at the time his coverage expired in 1984, the requirements of a sedentary job, and the standard of review applied by this Court to the Secretary's findings, we will not disturb the Secretary's conclusion that Mitchell could perform sedentary work. Therefore, because Mitchell

had a residual functional capacity to perform sedentary work, was 45-49 years old with a limited education and non-transferable skills, the Secretary properly relied on Rule 201.19, 20 C.F.R. Subpart P, App. 2, Table No. 2, which directs a finding of "not disabled."

Mitchell also argues that the Secretary improperly discounted the evidence of Drs. Bonin and Mitchell, who concluded that he was unable to work during the time in question. However, "conflicts in the evidence, including medical opinions, are to be resolved by the Secretary, not by the courts." Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983); see also Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990) (medical evidence from treating physicians is "accorded considerable weight in determining disability."). This Court does not "substitute its judgment for that of the Secretary" even if the evidence "preponderates toward" a different finding. Patton, 697 F.2d at 592. Because there is substantial evidence to support the Secretary's decision, it must be affirmed, even in the face of such conflicting evidence. Selders, 914 F.2d at 617.

Mitchell also argues that the Secretary should not have relied exclusively on the medical-vocational guidelines because his non-exertional impairments did significantly affect his residual functional capacity. In particular, he cites the mental and emotional distress pointed out by Drs. Bonin and Mitchell.

The Secretary, however, did consider Mitchell's subjective complaints of emotional distress. She concluded, first, that Mitchell's subjective complaints were not credible, and that his

emotional problems had been successfully treated with medication. She also noted the lack of clinical evidence in support of this condition. Moreover, although both Drs. Bonin and David Mitchell pointed out that Mitchell's mental and emotional problems pre-dated his return to work in 1982, these problems did not impair his ability to work at that time. See, e.g., Fraga, 810 F.2d at 1305 & n.11 (ability to work despite pre-existing condition supports Secretary's finding of not disabled). In the 1987 letter, Dr. Bonin wrote that Mitchell's mental condition was deteriorating. In the 1988 letter, Dr. David Mitchell stated that the claimant's mental problems were "aggravated" by his back injury in May 1984. Neither doctor's assessment, however, provides strong evidence of Mitchell's mental condition when his insured status expired in June 1984.

Thus, because the Secretary's conclusion that Mitchell's non-exertional impairments did not significantly affect his residual functional capacity is supported by substantial evidence, the Secretary correctly relied on the medical-vocational guidelines, which directed a finding that Mitchell was not disabled. See Selders, 914 F.2d at 618-19.

AFFIRMED.