

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3493
(Summary Calendar)

BETTY SUGGS,

Plaintiff-Appellant,

versus

DEPARTMENT OF HEALTH & HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(92-CV-1768-D)

(July 19, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Betty Suggs appeals the judgment of the district court upholding the Secretary's final decision which denied disability insurance benefits or a disability period to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Suggs, pursuant to 42 U.S.C. § 405(g). Suggs complains that the Secretary's decision was not supported by substantial evidence, andSOat least at one time during the proceedingsSOcomplained that she was denied due process of law at her hearing. Finding that substantial evidence was adduced to support the Secretary's decision and that Suggs has abandoned her due process claim, we affirm.

I

FACTS AND PROCEEDINGS

Suggs' application for disability insurance benefits or a disability period beginning on April 19, 1985, were denied, both initially and upon reconsideration, and a timely request for a hearing was filed. She was granted a hearing at which she appeared represented by counsel, and after which the administrative law judge (ALJ) concluded that Suggs was not disabled and therefore not entitled to disability benefits under the Social Security Act (SSA). The Appeals Council reviewed the hearing decision and agreed with the ALJ's decision.

Suggs sought further review in federal district court where the Secretary and Suggs each filed motions for summary judgment. In her motion for summary judgment Suggs claimed that: 1) the ALJ erred in finding her complaints of pain not credible; 2) the ALJ improperly used the vocational expert and her testimony; 3) the ALJ improperly applied the medical-vocational guidelines (grids) in his determination; and 4) the Appeals Council improperly refused to consider new evidence. The magistrate judge determined that:

1) the Secretary's decision was supported by substantial evidence; 2) the ALJ did not err in his credibility determinations; 3) the ALJ did not err in his determination of Suggs' residual functional capacity; and 4) the new evidence Suggs presented to the Appeals Council was not material. The magistrate judge recommended 1) denying Suggs' motion for summary judgment, 2) granting the Secretary's motion for summary judgment, and 3) dismissing Suggs' action with prejudice. Over Suggs' objections, the district court adopted the magistrate judge's report and recommendation and affirmed the Secretary's decision that Suggs was not disabled as defined under the SSA.

II

ANALYSIS

A. Substantial Evidence

In essence Suggs contends that the Secretary's decision that she was not disabled is not supported by substantial evidence. Specifically, Suggs raises the following issues: First, that the ALJ made improper credibility findings regarding her testimony; second, that the use of the "grids" (medical-vocational guidelines) was improper; and third, that the ALJ improperly questioned the vocational expert.

Our review is limited to determining whether the record as a whole shows that the district court correctly concluded that substantial evidence supports the findings of the Secretary, and whether any errors of law were made. Fraga v. Bowen, 810 F.2d

1296, 1302 (5th Cir. 1987).¹ We may not reweigh the evidence or try the issues de novo, as conflicts in the evidence are for the Secretary and not for the courts to resolve. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990).

Suggs has the burden of proving that she is disabled within the meaning of the SSA. Fraga, 810 F.2d at 1301. The SSA defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment 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). In evaluating a claim of disability, the Secretary conducts a five-step sequential analysis asking whether 1) the claimant is presently engaging in substantial gainful activity, 2) the claimant has a severe impairment, 3) the impairment is listed, or is equivalent to an impairment listed, in Appendix 1 of the Regulations, 4) the impairment prevents the claimant from doing past relevant work, and 5) the impairment prevents the claimant from doing any other substantial gainful activity. 20 C.F.R. § 404.1520; Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991).

In the first four steps, the burden of proof is on the claimant; at the fifth step the burden is initially on the Secretary to show that the claimant can perform relevant work. If

¹ "The elements of proof to be weighed in determining whether substantial evidence exists include: 1) objective medical facts; 2) diagnoses and opinions of treating and examining physicians; 3) claimant's subjective evidence of pain; 4) claimant's educational background, age and work history." Owens v. Heckler, 770 F.2d 1276, 1279 (5th Cir. 1985).

the Secretary makes such a demonstration, the burden shifts back to the claimant to show that he cannot do the work suggested. Muse, 925 F.2d at 789. A finding that a claimant is disabled or not disabled at any step terminates the sequential evaluation. Crouchet v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989).

EVIDENCE PRESENTED TO ALJ

Suggs sought treatment for lupus² from Dr. John E. Hull on July 27, 1988. She related an episode of pericarditis that occurred five years previously and a history of lupus with Sjorgren's syndrome.³ She also had a history of pericarditis, Raynaud's phenomenon⁴ in winter, and fibromyalgia. She complained of small oral ulcers lasting two weeks at a time and reported developing a rash on her arms, neck, and face when exposed to the sun. She also complained of chest pain three times a year, adding that the pain was relieved if she sat up and leaned forward.

Dr. Hull's physical examination revealed multiple, small, white scars on Suggs' arms, back and face, with no edema. There was no tenderness of the joints or lesions, and Suggs had normal mucous membranes. Dr. Hull observed a good range of motion in Suggs' neck despite some muscle knotting and tenderness. An

² Lupus is a term originally used to depict erosion of the skin. Stedman's Medical Dictionary at 813 (24th ed. 1982).

³ Sjorgren's syndrome is a dryness of mucous membranes, telangiectasis, or purpuric spots on the face, and bilateral parotid enlargement, seen in menopausal women, and often associated with rheumatoid arthritis, Raynaud's phenomenon, and dental caries. Id. at 1394.

⁴ Raynaud's phenomenon is a spasm of the digital arteries with blanching and numbness of the fingers. Id. at 1070.

examination of Suggs' back was negative, as were her "straight leg raising" and "knee flexion onto chest" tests. She also had a normal range of motion in the hips. Dr. Hull concluded that Suggs had fibromyalgia and a past history of systemic lupus erythematosus (SLE).⁵

On August 4, 1988, Suggs was given a shot of Celestone by Dr. Hull for a complaint of left lower back pain. On August 9, 1988, a physical examination revealed negative results on "straight leg raising" and "knee flexion onto chest" tests, and a neurological examination was normal. Several days later, Dr. Hull's review of a CT scan of Suggs' lumbar spine was negative, although a small spina bifida⁶ occulta⁷ in one area of Suggs' spine was revealed.

On August 31, 1988, Dr. Hull noted that there was no response to his prescribed drug therapy and that Suggs still complained of pain on her left hip and side, with a round burning spot in her

⁵ Systemic lupus erythematosus is an inflammatory connective tissue disease with variable features, frequently including fever, weakness, joint pains, or arthritis resembling rheumatoid arthritis, diffuse erythematous skin lesions on the face, neck, or upper extremities, with liquefaction degeneration of the basal layer and epidermal atrophy, lymphadenopathy, pleurisy, and other evidence of an autoimmune phenomenon. Stedman's Medical Dictionary at 813.

⁶ Spina bifida is a limited defect in the spinal column, consisting of the absence of the vertebral arches, through which the spinal membranes, with or without spinal cord tissue, may protrude. Stedman's Medical Dictionary at 1315.

⁷ Spina bifida occulta is a form of spina bifida in which there is a spinal defect, but no protrusion of the cord or its membrane, although there is often some abnormality in their development. Id.

trapezius and rhomboid area that radiated around to her ribs. Suggs lower back was also stiff but her neurological examination was normal, despite some muscle knotting in the trapezius and rhomboid area. Dr. Hull also made note of oral complaints of pain but no accompanying withdrawal or wincing. Dr. Hull concluded that Suggs had fibromyalgia-like problems and tenderness along the rib margins in conjunction with a rhomboid complaint.

After Suggs complained about left knee and hip pain, Dr. Reggie Sanders referred her to Dr. Larry Ferachi, an orthopedic surgeon. On examination, Dr. Ferachi noted that Suggs had a mildly positive apprehension sign of subluxation of the left patella, as well as a painful, palpable plica that would pop on flexion to extension. X-rays of Suggs' left knee were negative for fracture, dislocation, or loose bodies. Dr. Ferachi concluded that Suggs had a pathologic plica of the left knee, for which he prescribed Naprosyn, hamstring stretching, and quad setting exercises.

On October 25, 1989, Dr. Ferachi reported that Suggs still felt left knee pain. She reported to him that she had been doing her exercises but, he noted, "probably not as much as we would like." He put her in a neoprene sleeve with patellar stabilizer and had her return in a month. As she still complained of pain on her return in November 1989, Dr. Ferachi scheduled arthroscopy. On December 19, 1989, an arthroscopy and arthroscopic partial synovectomy were performed at the Seventh Ward General Hospital. The post-operative diagnosis was pathologic suprapatellar plica of the left knee.

On December 29, 1989, Dr. Ferachi noted that Suggs knee looked good, with no signs of infection. On January 12, 1990, Dr. Ferachi discharged Suggs from his care after noting that she was doing extremely well and that she had full range of motion in her knees.

On May 1, 1990, Dr. Sanders gave Suggs a rheumatology evaluation for continuing pain in her left hip and back. His impression was that Suggs' unexplained low back pain appeared to be due to trochanteric bursitis, and that her Sjorgren's syndrome did not appear to be related to her hip pain.

On May 28, 1990, Dr. K. Lance Caulfield examined Suggs. She complained of pain in the left side of her hip and back and in her hands, wrists, shoulders, and knees. Dr. Caulfield found that Suggs had a normal range of motion in all of her joints, and that she had no red, warm, or swollen joints. He diagnosed a history of systemic lupus, long-standing arthralgia, a resolved case of pericarditis, and mild anemia. He stated that she appeared to be appropriately treated for the lupus, and stated that because of the anemia and arthralgia Suggs would not be able to do heavy manual tasks involving lifting, climbing, walking, or standing for prolonged periods of time. She could, however, perform routine tasks such as taking care of herself and her household, driving an automobile, sitting, and speaking.

Next Suggs underwent treatment from Dr. Dale A. Rollette, a chiropractor, between July 9 and 20, 1990, for lower back pain and numbness in her left leg. Dr. Rollette noted that he was seeing her on a three-visits-per-week basis and that she was showing

positive results. He commented that she was temporarily disabled, and he restricted her from bending, lifting, twisting, climbing, carrying, or excessive sitting.

On September 28, 1990, Suggs was examined by a neurosurgeon, Dr. Thomas P. Perone, at the request of Dr. Rollette. Suggs complained of persistent tingling along the posterior lateral aspect of her left leg and stated that she had experienced back pains off and on since 1973. Dr. Perone reported that her back x-rays appeared normal and that she appeared to be in good general health and moving without any difficulty, showing no evidence of spasm in the muscle groups of her back. She was able to flex her lumbar spine to about 75 degrees, and her "straight leg raising" and "hip rotation" tests showed no limitation on either side. The muscles of her buttocks, thighs, legs, and feet showed no evidence of loss of substance or atrophy. Neither was there loss of functional strength in her hips, knees, or ankles. Suggs' deep tendon knee and ankle reflexes were equal and symmetrical, and no sensory abnormalities were detected. An MRI was performed on October 10, 1990, and showed no significant abnormality. Dr. Perone concluded that "the bulk of" Suggs' complaints were musculoskeletal in nature and recommended continued follow-up with Drs. Rollette and Sanders.

At her hearing on November 20, 1990, Suggs testified that she was 47 years old, married, and had one child. She testified that she had a driver's license and would drive herself to the doctor, but that her sister-in-law had brought her to the hearing. Suggs

testified further that she finished the eleventh grade and had her GED, and that she last worked as a supervisor for Ridgeway Incorporated, a blueprinting shop, managing the front office and sales. She worked there from 1974 to 1985, prior to which she worked from 1968 to 1972 as a process checker on a conveyor belt for Western Electric.

Suggs also testified that she could no longer work due to side effects from the Naprosyn, Flexeril, Valium, and Darvocet she was taking. She stated that the condition of her knees prevented her from stooping and that her left side would go numb when she sat on it. She explained that her Raynaud's problem caused her fingers and toes to flare up and that she had to keep her feet and fingers warm. She also complained of chest pains from her "fibrosis" and tense and knotted muscles in her back that had to be massaged or rubbed out. She also had dryness of the eyes and mouth and did not sleep well because of the pain in her legs and chest. And she stated that her doctor gave her a 95 percent chance that she would live normally for ten more years, but that this statement was made before he had diagnosed her Raynaud's syndrome, Sjorgren's syndrome, or fibromyalgia.

On questioning by her attorney, Suggs stated that she had experienced left hip and leg pain for two years and that her knee would give way on occasion; that she had fallen several times because of it; and that, although she was able to drive 28 miles to her doctor, her blurred sight which resulted from her medication limited her driving. She also stated that her husband and sister-

in-law helped her with household chores and grocery shopping, noting that she was only able to do light dusting, fix her own breakfast, and dress herself. Her husband, though, had to lift her in and out of the bathtub. Suggs stated that she watched television and read magazines during the day.

NEW EVIDENCE PRESENTED TO THE APPEALS COUNCIL

Suggs produced new information for the Appeals Council. She stated that on November 22, 1991, she went to the emergency room because she was unable to close her left eye and had numbness of her mouth and cheek, and that she was diagnosed as having Bell's palsy.

CREDIBILITY AS TO COMPLAINTS OF PAIN

Suggs contends that the ALJ erred in determining that her complaints of pain were not credible. Pain is a disabling condition under the Act only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." Selders, 914 F.2d at 618-19 (citations and internal quotations omitted). Subjective complaints of pain must be corroborated by "objective medical evidence" which "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).

Here, the ALJ concluded that Suggs' complaints of debilitating pain were not credible. Although she complained of pain to her doctors, the objective medical evidence does not mandate a conclusion that Suggs' pain rises to the level of disabling pain

within the meaning of Anthony. Consequently, there is substantial evidence in the record to support the ALJ's determination that Suggs' complaints of disabling pain were not credible.

EFFECT OF MEDICATION

Suggs also argues that the district court and the ALJ failed to follow the relevant law in determining whether the effects of her medication affected her ability to perform gainful employment. When questioned by the ALJ, Suggs first stated that she was currently taking Valium, Flexeril, and Darvocet. She then stated that currently she was taking only Valium and Flexeril and that there was a possibility of taking only Valium after six weeks. Suggs testified that the effects of taking the medication were blurred vision, dizziness, and sleepiness. She opined that it was primarily the Valium that made her sleepy. The ALJ gave adequate consideration to the effects of Suggs' medication on her ability to perform sedentary work. The record demonstrates that the ALJ investigated the types of medication and their effect on Suggs' performance. See Babineaux v. Heckler, 743 F.2d 1065, 1068-69 (5th Cir. 1984).

MEDICAL-VOCATIONAL GUIDELINES AND VOCATIONAL EXPERT

Suggs also asserts that the ALJ's use of the medical-vocational guidelines ("grids") (20 C.F.R. § 404.1569, Rule 201.21, Table No. 1, App. 2, Subpt. P, Regulation 4) was incorrect. Suggs argues that the ALJ did not rely on any evidence outside the grids, specifically any from the vocational expert, in determining that she was not disabled. She also contends that the ALJ improperly

questioned the vocational expert. She concludes that the ALJ did not follow the proper analysis and did not meet his burden of proof that there was available gainful employment that she could be capable of performing.

The ALJ asked the vocational expert if, after hearing Suggs' testimony and reviewing her file, the expert believed that there were any jobs Suggs could perform in the local or national economy. The vocational expert answered "no," and the ALJ did not ask the vocational expert any further questions.

As the ALJ determined that Suggs could not perform her past work as assistant manager, process checker, or supervisor in a retail store, he was required to determine whether she could perform any other work available in the national economy, considering her age, education, work experience, and residual functional capacity. See Fraga, 810 F.2d at 1304. When the claimant's characteristics correspond to criteria in the grids 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 [grids]" in determining whether there is other work available that the claimant can perform.

After considering that Suggs was 47 years old, and had a high school equivalency diploma, the ALJ determined that she had the residual functional capacity to perform the full range of sedentary work. The ALJ determined that Suggs could not stand or walk for prolonged periods but found no nonexertional limitations.

Suggs argues that she has nonexertional limitations which hinder her ability to do sedentary work. She specifically identifies her inability to be in the sun because of her lupus and her inability to be in cold weather or air conditioning without protecting her hands and feet against cold as nonexertional impairments that hinder her ability to perform sedentary work. Yet Suggs does not offer any evidence of how these conditions frustrate her ability to do sedentary work. Additionally, there is no objective medical evidence supporting a finding that these conditions are medically significant nonexertional impairments that would prevent Suggs from engaging in gainful employment. See Selders, 914 F.2d at 619. Thus, there was substantial evidence to support the ALJ's determination that Suggs did not have any nonexertional impairments.

In assessing a person's residual functional capacity for work activity on a regular and continuing basis, the ALJ considers the person's ability to do day-to-day physical activities such as walking, standing, lifting, carrying, and the like. 20 C.F.R. § 404.1545(b). A limited ability to perform these activities may reduce a person's ability to do work. Id. Sedentary work involves:

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). "To be capable of performing sedentary

work under the guidelines, an individual must have some reasonable chance in the real world of being hired and, once hired, of keeping the job." Wingo v. Bowen, 852 F.2d 827, 831 (5th Cir. 1988).

A person between the ages of 18 and 49 is classified as a "younger individual." 20 C.F.R. Part 404, Subpt. P, App. 2, § 201.00(h). A younger individual between 45 and 49 years old who has a high school diploma or the equivalent and whose previous work skills are not transferable is classified as "not disabled" under the grids. Id. at Table No. 1 and § 201.00(h).

The medical evidence demonstrates that Suggs has SLE, Sjorgren's syndrome, and Raynaud's syndrome. Dr. Caulfield suggested that Suggs not do heavy manual tasks involving lifting, climbing, walking, or standing for prolonged periods of time. Suggs is not limited, however, in her ability to take care of herself and her household, drive an automobile, sit, or speak. Examinations demonstrate no evidence of limited mobility in her legs and hip joints and no evidence of atrophy in the muscles of her buttocks, thighs, legs, or feet. Additionally, Suggs testified that she drives herself to her doctor appointments, does light dusting, prepares her own breakfast and dresses herself.

Viewing the evidence presented to the ALJ and the applicable grids, it is apparent that the ALJ was able to rely on the grids for his determination. Therefore, there was substantial evidence to support the ALJ's determination that Suggs could do sedentary work, and thus was not disabled because of her placement on the grid, even considering the vocational expert's testimony. There

was also substantial evidence demonstrating that there was a "reasonable chance" of being hired and keeping a sedentary job. See Wingo, 852 F.2d at 831.

B. Due Process

Suggs contends that she was denied due process of law at her hearing. "Fed. R. App. P. 28(a)(4) requires that the appellant's argument contain the reasons he deserves the requested relief with citation to the authorities, statutes and parts of the record relied on." Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993) (internal quotations and citations omitted). As Suggs, who is represented by counsel, fails to explain why she was denied due process of law at her hearing, she has abandoned her argument.

III

CONCLUSION

Finding the presence of substantial evidence supporting the Secretary's decision and given Suggs' abandonment of her Due Process complaint the judgment of the district court is AFFIRMED.