

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3753
Summary Calendar

IRMA HONOR,

Plaintiff-Appellant,

VERSUS

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DONNA E. SHALALA, SECRETARY OF,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA 92-3258 E)

(June 30, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Irma Honor, who was born in December 1948, filed an application for Social Security disability benefits dated March 10, 1990, alleging that she became disabled on October 1, 1987. In her

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

application, she described her disabling conditions as: diabetes, bad headaches, and arthritis in her legs, back, arms, and neck. She listed prior jobs as a machine operator, a food server, and a cane cutter. According to the application, she last worked in April 1985. After her application was denied at the first two levels of administrative review, Honor filed a request for a hearing.

Honor was represented by counsel at the hearing. Following the hearing and the receipt of Honor's medical records, the ALJ issued a decision denying benefits. The ALJ determined that during the period at issue, October 1, 1987, to December 31, 1988, Honor suffered from severe impairments of cervical and lumbar sprain, obesity, and diabetes mellitus, which is controllable with medication and dietary regimen. The ALJ found Honor retained the residual functional capacity for at least medium exertional activity and that she could return to her prior relevant work. The Appeals Council denied Honor's request for review, making the ALJ's decision the final decision of the Secretary of the Department of Health and Human Services, Donna Shalala. Honor then filed her complaint seeking judicial review of the denial.

The case was referred to a magistrate judge, and the parties filed cross-motions for summary judgment. The magistrate judge recommended granting the Secretary's motion. The district court adopted the magistrate judge's recommendation over Honor's objections, and this timely appeal followed.

OPINION

Appellate review of the Secretary's denial of disability benefits is limited to determining whether: (1) the decision is supported by substantial evidence; and (2) proper legal standards were used to evaluate the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). If the Secretary's findings are supported by substantial evidence, then the findings are conclusive and the Secretary's decision must be affirmed. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Villa, 895 F.2d at 1021-22 (internal quotations and citations omitted).

In evaluating a disability claim, the Secretary must follow a five-step sequential process to determine whether: (1) the claimant is presently working; (2) the claimant's ability to work is significantly limited by a physical or mental impairment; (3) the claimant's impairment meets or equals an impairment listed in the appendix to the regulations; (4) the impairment prevents the claimant from doing past relevant work; and (5) the claimant cannot presently perform relevant work. See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. The claimant has the burden of establishing that she cannot perform her past relevant work. Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990).

This Court has set out four elements of proof that must be weighed when determining whether substantial evidence of disability exists: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) the claimant's subjective evidence of pain and disability; and (4) her age, education, and work history. Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991). This Court may not reweigh the evidence or try the issues de novo. Cook v. Heckler, 750 F.2d 391, 392 (5th Cir. 1985). The Secretary, rather than the courts, must resolve conflicts in the evidence. See Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983).

Honor argues that the ALJ erred by accepting the diagnosis of the consulting physician, Dr. Faust, over the diagnosis of her treating physician Dr. Watermeier, because: (1) Faust did not have access to diagnostic tests supportive of Watermeier's diagnosis; and (2) Faust's examination took place two years after the date of last insurance.

Dr. Watermeier treated Honor from October 21, 1986, to May 27, 1987, for headaches and pain in her neck and lower back, resulting from an October 14, 1986, auto accident. He initially diagnosed a musculoligamentous sprain to the cervical and lumbar zones with radiating pain in her arm and leg on the left side. He recommended additional testing, and advised Honor to restrict her activities for several weeks. On December 11, 1986, a CT scan of Honor's lumbar spine revealed mild bulging at L3-4, L4-5, but with no evidence of foraminal encroachment. That same day, a CT scan of Honor's cervical spine indicated minor marginal spurs. Also on

December 11, Watermeier performed a thermogram of Honor's cervical spine and discovered evidence of left-sided nerve fiber impingement. A thermogram of Honor's lumbar spine revealed evidence of bilateral abnormality on the left at the L5 dermatome distribution and on the right at the S1 dermatome distribution. Id. at 181. A magnetic resonance imaging (MRI) test of Honor's cervical spine, on January 21, 1987, demonstrated findings compatible with posterior protrusion/herniation of the C6-7 disc, without associated spur formation. An MRI of Honor's lumbosacral spine showed minimal loss of water content at the L3-4, L4-5 discs, with mild bulging but no foraminal encroachment. Watermeier admitted Honor to St. Charles General Hospital for additional diagnostic tests, including x-rays of the lumbar spine and a lumbar discogram, which revealed minor degenerative changes in the L3-4 and L4-5 levels. Thereafter, Watermeier's diagnosis was cervical and lumbar disc disease. Watermeier last treated Honor on May 27, 1987, and concluded that she was totally disabled from October 21, 1986, through June 29, 1987. Throughout this period, Watermeier treated Honor for neck, arm, back, and leg pain with injections and prescriptions for pain medication.

Honor was subsequently treated at the River Parishes Hospital emergency room a number of times. On August 30, 1988, she complained of pain in her breasts and legs. She sought treatment for chest pain and arm pain on October 10, 1988. She received treatment for pain in her shoulders and arms on November 11, 1988. Records reveal, however, that she had a full range of motion in her

shoulders. On May 5, 1989, she was treated for swelling in her left leg and right arm. She reported that she had this type of pain intermittently, once or twice a month, for the past two years. The report indicates that Honor had good flexion and extension of the right shoulder and a full range of motion with her left leg. In March 1989, Honor was treated by Dr. Matthews for pain in the right shoulder and numbness in both hands. Matthews reported that the range of motion in Honor's right shoulder was painfully restricted.

Honor went to the emergency room at Charity Hospital of New Orleans on August 11, 1989, complaining of pain in her mid-chest, right breast, and arm. The treating physician diagnosed "possible radiculopathy,"¹ prescribed pain medication, and referred Honor to neurology. Honor returned to Charity on January 8, 1990, for a muscle spasm in her neck, occasional pain in her shoulder, and swelling of the joints in the arms and hands.

On March 4, 1990, Honor sought treatment for a swollen right arm at River Parishes Hospital emergency room. The report indicates that Honor complained of pain in her right shoulder and elbow and a limited range of motion. A physical examination revealed full range of motion with some tenderness. Dr. Matthews provided further treatment for Honor's shoulder pain from March to May 1990. An electromyogram (EMG)² was normal.

¹Radiculopathy is a disease of the spinal nerve roots. Stedman's Medical Dictionary 1187.

²This is a graphic representation of the electric currents associated with muscular action. Stedman's Medical Dictionary 451.

On May 25, 1990, Honor went to the Oschner Hospital emergency room complaining of pain in her upper arm, lower neck, and upper back, radiating to her lower leg and the rest of her body. A physical examination revealed no acute joint pain or limited range of motion. She informed the emergency room physician that she had been diagnosed with possible arthritis and wanted a second opinion. On June 4, 1990, Honor returned to Oschner for further evaluation. A neurological exam was normal, and the physician saw no reason for neurological intervention. The Oschner physicians diagnosed Honor's condition as chronic neck and back pain and fibrositis.³ A bone scan performed at Oschner yielded normal results. An exam of Honor's lumbar spine showed mild anterior wedging of the T12 vertebral segment, mild degenerative changes, but no spondylolysis (defects in the vertebrae) or spondylolisthesis (forward movement of one of the lower lumbar vertebrae). An exam of Honor's cervical spine revealed some "minimal hypertrophic spurring" with no "neural foraminal encroachment," and no prevertebral soft tissue swelling. A study of Honor's pelvis showed "mild degenerative changes . . . in the lower lumbar spine." An EMG was normal for nerves and muscles on the right side of the body.

Dr. Faust, the consulting examiner, evaluated Honor on December 5, 1990. His report indicates that he reviewed a

³Fibrositis is "inflammation of the fibrous tissue," or "muscular rheumatism." Stedman's 529-30. The term "is used to denote aching soreness or stiffness in the absence of objective abnormalities." Id. at 530.

discogram performed in February 1987, x-rays of the cervical and lumbar spine taken June 4, 1990, an EMG also from June 4, 1990, and a bone scan performed on June 7, 1990. None of these studies revealed serious abnormalities. Faust did not review the results of the thermograms or the MRI studies in formulating his opinion. He performed a physical examination of Honor. His report states that Honor exhibited tenderness in the area of her cervical and lumbar spine. No evidence of muscle spasms was present. Honor had a full range of motion of the cervical spine. Faust reported a "positive Tinel and wrist flexion test on the left side."⁴ Straight leg raises were positive at 90 degrees, and there was pain on resisted abduction of both shoulders. Faust concluded that "this patient has no evidence of any structural or anatomic deformities inconsistent with a person 41 years of age." His diagnosis was fibrositis, which, he explained, causes "no disability, does not progress, [and] causes no arthritis."

Honor contends that the ALJ erred by relying on Faust's diagnosis because it was made without the benefit of the thermogram and MRI results that Watermeier used to make his diagnosis. Honor further argues that by failing to provide Faust with these test results, the ALJ breached his duty to develop the record adequately. Honor concedes that she did not provide the records to the ALJ until after Faust performed his examination, but

⁴The "positive Tinel" indicates "a sensation of tingling or 'pins and needles,' felt in the distal extremity of a limb when percussion is made over the site of an injured nerve." Stedman's 1290.

nevertheless maintains that it was the ALJ's duty to obtain and provide them to Faust. She requests that the case be remanded to allow Faust to reconsider his opinion in light of this evidence. The Secretary argues that this Court lacks jurisdiction to review whether the ALJ breached his duty to develop the record properly by failing to provide these reports to Faust because Honor did not raise this claim in her request for review of the ALJ's decision to the Appeals Council.

This Court has held that it lacks jurisdiction to review issues that have not been exhausted through the administrative process. See, e.g., Muse, 925 F.2d at 791; Dominick v. Bowen, 861 F.2d 1330, 1331 (5th Cir. 1988). The record supports the Secretary's assertion that Honor's attorney did not argue in his brief to the Appeals Council that the ALJ breached his duty to develop the record adequately by failing to submit Watermeier's records to Faust. Instead, Honor argued that the ALJ erred by: (1) attributing only cervical and lumbar sprains to her, (2) failing properly to address her complaints of pain, (3) failing to ascribe sufficient weight to Watermeier's opinion, and (4) posing an improper hypothetical question to the vocational expert. Accordingly, because Honor did not exhaust her administrative remedies as to this issue, the Court lacks jurisdiction to review it.

Moreover, the record suggests that Honor did not advance this argument because she failed to submit the records to the ALJ prior to the consultative examination. Her initial application, dated

March 16, 1990, lists Dr. Watermeier as a treating physician and states that she (Honor) has the records from this treatment. A claimant has the duty to provide medical evidence to the Secretary to support a disability determination. 20 C.F.R. § 404.1512(b). If the claimant fails to provide the medical evidence necessary to make a determination, the ALJ must make a decision based on the evidence available. § 404.1516; see Wren, 925 F.2d at 126.

Honor did preserve her claim that the ALJ erred by rejecting the diagnosis of her treating physician, Dr. Watermeier, by presenting it to the Appeals Council. Although the opinion and diagnosis of a treating physician should be afforded considerable weight in determining disability, "the ALJ has sole responsibility for determining a claimant's disability status." Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990). "[T]he ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion." Bradley v. Bowen, 809 F.2d 1054, 1057 (5th Cir. 1987) (citation omitted).

The ALJ discounted Watermeier's opinion because of "various contrary diagnostic studies." The ALJ correctly noted that the December 11, 1986, CT scan revealed only a minimal diffuse annular bulge at L4-5 and a mild diffuse annular bulge at L3-4, with an otherwise normal scan. The ALJ further observed that the February 25, 1987, lumbar discogram revealed minimal degenerative changes at the L3-4 and L4-5 levels with an essentially normal L5-S1 level. The ALJ did not discuss the findings of the MRIs or the thermograms, but simply stated that the remainder of the medical

evidence submitted concerning Honor's treatment with Watermeier "fails to indicate disability subsequent to claimant's alleged onset date of October 1, 1987."

While we view the issue as a close one, there is sufficient medical evidence in the record to support the ALJ's decision to disregard Watermeier's opinion. Faust found no evidence of any structural or anatomical deformities based on his physical exam and his review of the available medical records. The x-rays Faust took of Honor's cervical and lumbar spine showed a spur at L3-4, disc space narrowing, and no facet changes. Moreover, Faust indicated that Honor's impairment did not restrict her ability to lift and carry, stand and walk, sit, climb, stoop, kneel, balance, crouch, and crawl. Faust's diagnosis is consistent with the diagnosis Honor obtained from the Oschner Clinic after extensive diagnostic testing. Finally, the other medical evidence Honor submitted to support her claim does not reveal any objective findings of serious abnormalities in the cervical disc or lumbar spine areas.

Given the limited scope of our review, we AFFIRM the decision of the Secretary.