IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4337
Summary Calendar

J.E. LEBLANC,

Plaintiff-Appellant,

VERSUS

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

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(87-CV-1200)

(January 18, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

J.E. LeBlanc appeals the summary judgment upholding the administrative denial of disability benefits under 42 U.S.C. § 405(g). 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

A.

LeBlanc filed his current applications for disability insurance benefits and supplemental security income ("SSI") on October 9, 1985, alleging disability since October 15, 1975, because of a nervous condition, a stomach impairment, and low blood sugar. The state agency and the Social Security Administration denied his applications. An administrative law judge ("ALJ") held a hearing on July 14, 1986, and decided on November 18 that LeBlanc was not disabled within the meaning of the Social Security Act. The Appeals Council denied LeBlanc's request for review on April 2, 1987.

B.

LeBlanc filed a complaint in federal district court seeking review of the Secretary's final decision pursuant to § 405(g). On the Secretary's motion, the magistrate judge remanded for further administrative proceedings. Supplemental hearings were held on March 4, 1988, April 30, 1989, and July 11, 1990.

On July 23, 1990, the ALJ issued a decision that LeBlanc was not disabled. The Appeals Council again denied LeBlanc's request for review, making the ALJ's decision the final decision of the Secretary. The district court then granted summary judgment in favor of the Secretary in accordance with the magistrate judge's recommendation and dismissed LeBlanc's complaint.

II.

LeBlanc was born on October 30, 1946, making him forty-three years of age at the time of the July 1990 administrative hearing. He has a high school education and past relevant work experience as a roughneck in the oil field industry.

LeBlanc has a history of epigastric and sternal pain associated with a gastrectomy in 1974 and of generalized complaints of nervousness. He previously was awarded disability benefits for a period beginning on October 15, 1975. When his case came up for periodic review, his benefits were terminated on December 22, 1982. LeBlanc did not appeal that determination.

LeBlanc was reevaluated by numerous doctors in connection with his 1985 application for disability benefits and SSI. In January 1986, Dr. Scott B. Gremillion, doctor of internal medicine, reported that LeBlanc continued to have complaints of abdominal and chest pain associated with his gastrectomy, and problems with nervousness.

In December 1986, Dr. G.R. Morin diagnosed mild anxiety reaction in a passive-aggressive personality. There was no deterioration in his personal habits and no impairment in his ability to relate to others. Morin reported some restriction in daily activities. Morin noted that LeBlanc did not appear to be motivated to return to employment.

Dr. Harper F. Willis performed a psychiatric evaluation in July 1986, which revealed a history of treatment for anxiety reaction by a Dr. Colby. An MMPI (Minnesota Personality Inventory)

revealed a profile frequently found in those suffering chronic anxiety and psychoneurosis. Harper diagnosed a generalized anxiety disorder, complicated by post gastrectomy "dumping" and cardiospasm. At the request of the ALJ, Dr. B.R. Burgoyne, a medical advisor, evaluated the medical reports and concluded that LeBlanc's mental disorder was mild to moderate and nonsevere and did not meet or equal the Listing 12.00 "B" criteria.

LeBlanc underwent psychiatric evaluation by Dr. Sam H. Benbow in February 1988. Benbow reported that LeBlanc felt he was unemployable. The clinical interview indicated a mild to moderate generalized anxiety disorder. There was no history of treatment since 1983. Social functioning, interests, and activity levels appeared constricted. There was no deterioration in pace, concentration, or personal habits.

Benbow diagnosed adjustment disorder with anxiety and depression, chronic and mild to moderate. LeBlanc's ability to perform work-related mental activities was assessed as good to fair in all areas except the ability to understand, remember, and carry out complex job instructions.

At the July 11 hearing, LeBlanc testified that he was not taking any medications or undergoing any treatment. The ALJ noted earnings for 1983-85, and LeBlanc stated that he had attempted work as a roughneck in 1983. He denied working in 1984 or 1985. He testified that his condition had worsened continually and that he had continuing difficulty with anxiety and depression.

Jeffrey Peterson, a vocational expert, testified, in response

to hypotheticals posed by the ALJ, that based upon the medical record, and considering LeBlanc's mental and physical limitations, he could perform simple, small assembly jobs, such as assembly line fabrication of small appliances. He testified that there were no significant numbers of this type of sedentary-level job existing in the local regional economy, identified as Louisiana, Texas, and the Southwest region. He said that such jobs are available in significant numbers in the national economy on the east and west coast regions and in the upper midwest, where there is more manufacturing of small parts.[1]

The ALJ then posed a second hypothetical incorporating LeBlanc's testimony regarding the severity of his mental condition. Peterson testified that if LeBlanc's testimony about his poor ability to relate to co-workers, deal with the public, interest with supervisors, handle work stress, and function independently were considered, there would be no job he could perform.

The ALJ determined that LeBlanc had severe residuals from a gastrectomy and an adjustment disorder with anxiety and depression, but that he did not have an impairment or combination of impairments listed in or medically equal to one listed in Appendix 1, Subpart P. He further determined that LeBlanc's subjective complaints were credible only to the extent they served to limit his residual functional capacity to sedentary work, exertionally. He found that LeBlanc's mental, nonexertional

[1] The jobs do not have to exist in the claimant's region if they exist in several other regions of the country. See 42 U.S.C. § 423(d)(2)(A).

limitations did not significantly erode his occupational base. He found that LeBlanc had the residual functional capacity to perform the full range of sedentary work, reduced by the nonexertional limitations of inability to understand, remember, and carry out complex job instructions.

Using the Medical-Vocational Guidelines as a framework, in conjunction with vocational expert testimony, the ALJ found that there were a significant number of jobs in the national economy that LeBlanc could perform, such as assembly-type jobs. The ALJ concluded that LeBlanc was not disabled, as defined by the Social Security Act.

III.

A.

LeBlanc argues that the ALJ's finding that significant numbers of jobs existed in the national economy that he could perform was not supported by substantial evidence. He contends that the Secretary's proof of this fact was lacking, because the vocational expert did not state the exact number of small assembly-type jobs that existed, and because the vocational expert did not testify, and the ALJ made no finding, regarding the nature of the duties and qualifications of such jobs and whether he could meet the mental and physical demands thereof. He argues that the Secretary was required to be more specific in her proof of these facts and that the deficiencies in proof deprived him of adequate opportunity to challenge the suitability and availability of the assembly-type

jobs. He also argues that the hypothetical question posed to the vocational expert by the ALJ did not accurately describe his condition because it did not describe with precision the mental impairments described by Benbow and ignored all other medical and testimonial evidence regarding his mental impairment.

Our review of the Secretary's decision is limited to two issues: (1) Did the Secretary apply the proper legal standards; and (2) is the Secretary's decision supported by substantial evidence on the record as a whole. Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992). If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It must be more than a scintilla, but it need not be a preponderance. Perales, id. at 401. "This Court may not reweigh the evidence or try the issues de novo. Rather, conflicts in the evidence are for the Secretary to resolve." Anthony, 954 F.2d at 295 (citations omitted).

As the claimant, LeBlanc has the burden of proving that he is disabled within the meaning of the Social Security Act. Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991). In evaluating a claim of disability, the Secretary conducts a five-step sequential analysis: (1) whether the claimant is presently working; (2) whether the claimant has a severe impairment; (3) whether the impairment is listed, or is equivalent to an impairment listed, in

Appendix 1 of the regulations; (4) whether the impairment prevents the claimant from doing past relevant work; and (5) whether the impairment prevents the claimant from doing any other substantial gainful activity. 20 C.F.R. § 404.1520; Muse, 925 F.2d at 789.

In the first four steps, the burden of proof is on the claimant. At the fifth step, the burden shifts to the Secretary to show that the claimant can perform relevant work. If the Secretary meets this burden, it shifts back to the claimant to show that he cannot perform the work suggested. Muse, 925 F.2d at 789.

LeBlanc sustained his burden of proof through the fourth step. The ALJ found that he was unable to perform his past relevant work. The ALJ determined that he was not disabled at the fifth step, finding that the Secretary had sustained her burden of proving that LeBlanc could engage in other substantial gainful work which existed in the national economy based upon the vocational expert's testimony. It is this finding that LeBlanc argues is not supported by substantial evidence.

Peterson, the vocational expert, testified that a person with LeBlanc's physical and mental limitations, as summarized by the ALJ in the hypothetical question, could perform small assembly-type work, which existed in substantial numbers in three regions of the national economy. LeBlanc argues that this evidence was not sufficient to sustain the Secretary's burden of proof because the expert did not testify to specific numbers of jobs and did not compare the duties and qualifications of that type of job with his capabilities.

LeBlanc does not point to any authority that requires a vocational expert to state specific numbers of jobs. The expert testified that the jobs existed in significant numbers. This is substantial evidence upon which the ALJ could make his finding. LeBlanc was represented by an attorney at the administrative hearing, and the ALJ gave the attorney an opportunity to question the expert, but he did not do so. If LeBlanc wished to know the exact numbers upon which the expert's statement was based in order to challenge the conclusion that it was a substantial number, he could have cross-examined. See Morris v. Bowen, 864 F.2d 333, 335-36 (5th Cir. 1988).

Likewise, Peterson gave his opinion that someone with LeBlanc's limitations could perform small assembly-type jobs. It then became LeBlanc's burden to show that he could not perform such work. LeBlanc did not cross-examine Peterson to determine how he had reached this opinion.

LeBlanc does not point to any authority requiring the expert specifically to compare the claimant's capabilities and the job requirements in testimony at the hearing. This is part of what an expert does in arriving at his opinion, to which Peterson testified. It is substantial evidence upon which the ALJ could make his determination. If LeBlanc wished to challenge this opinion, he had the burden and the opportunity to do so at the hearing through cross-examination.

LeBlanc's assertion that the ALJ's hypothetical did not adequately incorporate the mental limitations noted by Benbow is

incorrect. The ALJ specifically referred Peterson to Benbow's report. The ALJ was not required to state the contents of the report on the record. Peterson indicated that he was familiar with Benbow's assessment.

The hypothetical did not ignore all other testimonial evidence regarding LeBlanc's mental impairment. The ALJ propounded a second hypothetical to Peterson summarizing LeBlanc's testimony about how his mental impairment would affect his ability to work. Peterson testified that with those impairments, there was no work he could do. The ALJ found, however, that LeBlanc's testimony was not credible, and his findings regarding LeBlanc's mental impairment were confined to those limitations identified by Benbow. The ALJ was entitled to reject LeBlanc's testimony as not credible and to reject the expert's opinion based upon that hypothetical. See Owens v. Heckler, 770 F.2d 1276, 1282 (5th Cir. 1985).

LeBlanc is correct that the ALJ did not summarize the other medical reports regarding his mental status in the hypothetical, but limited the hypothetical to those limitations noted by Benbow. The ALJ noted, however, that Benbow was the last person who examined him, and the record shows that Benbow was the only doctor to assess specifically the effect of LeBlanc's mental impairment upon his ability to do work-related activities. Further, LeBlanc did not attempt, on cross-examination, to correct any deficiencies in the hypothetical.

The findings of the ALJ at step five were supported by substantial evidence based upon the testimony of the vocational

expert at the July 11, 1990, hearing. LeBlanc's argument that the ALJ ignored the opinions of two previous vocational experts is irrelevant, as the ALJ makes a de novo determination of disability. See Richardson v. Bowen, 807 F.2d 444, 447-48 (5th Cir. 1987).

B.

LeBlanc argues that he was deprived of due process because he did not receive adequate notice of the termination of his disability benefits in 1982 and was unable to appeal. LeBlanc did not raise this issue in the district court, and so it was waived. Chapparro v. Bowen, 815 F.2d 1008, 1011 (5th Cir. 1987). Because he failed to appeal the termination of benefits, that decision is subject to the principle of administrative res judicata. Muse, 925 F.2d at 787 n.1; Anderson v. Sullivan, 887 F.2d 630, 632 n.1 (5th Cir. 1989).

AFFIRMED.