

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4958
Summary Calendar

AUDREY DUPLÉCHIN,

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
(92 CV 460)

(March 22, 1994)

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

PER CURIAM:*

Audrey Duplechín applied for disability insurance benefits and supplemental security income on June 22, 1990. She alleged that she was disabled because she suffered from diabetes and high blood pressure. Duplechín's applications were denied initially and on reconsideration.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Represented by counsel, Duplechin appeared for a hearing before an Administrative Law Judge (ALJ). The ALJ determined that Duplechin was not entitled to a period of disability or disability insurance benefits and was not eligible for supplemental security income, and Duplechin requested a review of the decision by the Appeals Council. The Appeals Council allowed Duplechin's attorney to submit additional evidence for the record. After reviewing the additional evidence, the Appeals Council denied Duplechin's request for review, and the ALJ's decision became the final decision of the Secretary.

Duplechin filed a complaint in the district court seeking review of the Secretary's decision. Duplechin and the Secretary moved for summary judgment. The magistrate judge recommended that the district court enter summary judgment in favor of the Secretary and dismiss the action. After considering Duplechin's objections, the district court adopted the report and recommendation of the magistrate judge and dismissed the suit.

I

Duplechin's appeal raises the basic issue whether the Secretary's finding that she was not disabled is supported by substantial evidence. She urges that the district court erred by finding that the Secretary properly rejected the hearing testimony of Duplechin's daughter and Dr. Michael Berard's report, which was filed as supplemental evidence with the Appeals Council. She suggests that the district court should have rejected the Appeals

Council's determination that Dr. Berard's report did not have an evidentiary basis, and that the court should have remanded the matter to the Secretary for consideration of other new evidence.

This court limits its review to two issues: "(1) whether the Secretary applied the proper legal standards, and (2) whether the Secretary's decision is supported by substantial evidence on the record as a whole." Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992).

II

First, the ALJ found that Duplechin had not engaged in substantial gainful activity since her alleged onset date of January 14, 1989. Based on reports from Duplechin's treating physicians and four consultative evaluations, the ALJ further found that Duplechin suffered from a severe impairment due to a combination of hypertension, insulin-dependent diabetes mellitus, obesity, and an adjustment disorder with mixed emotional features. Next, the ALJ found that Duplechin, represented by counsel, had failed to prove that she was disabled per se under Social Security regulations because she had presented no argument or evidence that would support such a finding. The ALJ then determined that Duplechin was not disabled within the meaning of the Social Security Act because she was capable of performing her past relevant work as a seamstress.

III

A

"If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed." Anthony, 954 F.2d at 295. "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." Id.

B

Duplechin suffers from diabetes, obesity, hypertension, degenerative arthritis. She has impaired vision, which can be corrected with glasses, and she suffers from an adjustment disorder with mixed emotional features.

Duplechin's internist, Dr. Nix, and his partner, Dr. Bordelon, treated Duplechin for diabetes from January 1989 through March 1991. Dr. Nix hospitalized Duplechin for insulin therapy and a cardiac evaluation in January 1989. Medical tests showed evidence of mild left ventricular hypertrophy and borderline cardiomegaly with no evidence of failure. In March 1990, Dr. Bordelon reported that Duplechin's daughter had called him because Duplechin allegedly tried to kill herself by driving into the path of a truck. He referred Duplechin to University Medical Center for an evaluation, but she denied having suicidal thoughts.

Duplechin received four consultative examinations in connection with her application for disability benefits.

Dr. Donald Gremillion, an internist, examined Duplechin on July 12, 1989. Duplechin complained of diabetes, high blood pressure, arthritis, and chest pain. Dr. Gremillion determined that Duplechin suffered from impaired vision, which could be corrected with glasses, degenerative arthritis, and that she had a history of diabetes mellitus. Dr. Gremillion noted that Duplechin's physical problems should not limit her activities.

Dr. Samuel Stagg, an internist, examined Duplechin on August 14, 1990. Duplechin told Dr. Stagg that she suffered from dizziness and headaches caused by her diabetes and high blood pressure. She complained that she was nervous and that she experienced chest pains when she became angry at her grandchildren. Dr. Stagg diagnosed Duplechin as suffering from obesity, a diabetic history, and controlled hypertension. Dr. Stagg stated that, based on her history and his physical examination, he did not see why Duplechin could not do "most anything she wishes."

Dr. Larry Baker, an ophthalmologist, examined Duplechin on October 9, 1990. Dr. Baker determined that Duplechin's vision could be corrected to 20/20 with glasses, and that she had no work restrictions related to her visual impairment.

Dr. Sam Benbow, a psychiatrist, examined Duplechin on March 29, 1991. Duplechin told Dr. Benbow that her daughter's statements to Dr. Bordelon about Duplechin's alleged suicidal tendencies were untrue. Dr. Benbow found that Duplechin was alert, cooperative, and in good contact with her surroundings. He

diagnosed her as suffering from "mild chronic anxiety and depression that in and of itself would not totally preclude some type of gainful employment."

After the hearing before the ALJ, Duplechin's attorney arranged for her to be examined by clinical psychologist Michael Berard. Dr. Berard's report, which concluded that Duplechin was not capable of gainful employment, was submitted to the Appeals Council as supplemental evidence.

Duplechin also filed in the district court a report of a chest x-ray taken March 18, 1992, which indicated "some enlargement of" her heart.

C

Duplechin testified at the hearing that she had stopped working as a babysitter because she had dizzy spells and her feet were swollen. She stated that now her legs, feet, and hands hurt constantly. She is unable to walk more than a block without getting tired. Her memory is bad, and she has frequent dizzy spells. She is too nervous to be around her grandchildren or to go shopping. She once threatened to drive into a truck because her grandchildren were making noise in the car, and the noise was giving her a headache.

Duplechin's daughter confirmed her mother's complaints of nervousness and physical limitations.

Duplechin was 48 years old when she appeared before the ALJ. She informed the ALJ that she had completed the eighth grade, and

that she could read, write, and do basic arithmetic. She had worked as cashier and assistant manager of a convenience store for eight and one-half years until the business was sold in 1983. After that, she cared for children in her home. Before Duplechin took the job in the convenience store, she had worked for approximately one year as a sewing machine operator.

IV

Duplechin argues on appeal that the district court erred by finding that substantial evidence supported the Secretary's decision because the Secretary "ignored" Dr. Berard's report and the testimony of Duplechin's daughter.

The ALJ evaluated the testimony of Duplechin and her daughter in the light of the lack of objective evidence and the absence of a medical diagnosis of disability. The ALJ noted that Duplechin had repeatedly failed to follow her doctors' advice concerning proper management of her diabetes and that Duplechin's credibility was undermined by the fact that her medical records did not reflect symptoms of the severity that she described at the hearing.

The Appeals Council rejected Dr. Berard's conclusion that Duplechin was unemployable because Berard had provided "no evidentiary basis for reaching this conclusion," and because "it [was] readily apparent" that Berard's report was based on Duplechin's subjective reports of her symptoms. This determination was within the discretion of Appeals Council because Dr. Berard's opinion was not consistent with other substantial evidence in the

record. Spellman v. Shalala, 1 F.3d 357, 365 (5th Cir. 1993).

When the evidence is conflicting and it involves credibility determinations, it is "[t]he Secretary, not the courts, [who] has the duty to weigh the evidence, resolve material conflicts in the evidence, and decide the case." Chaparro v. Bowen, 815 F.2d 1008, 1011 (5th Cir. 1987). The Secretary's determination that Duplechin is not disabled because she can perform past relevant work as seamstress involves a credibility determination.

V

Duplechin also argues that the district court should have remanded the case to the Secretary for consideration of additional x-ray evidence.

A remand is appropriate when new evidence is material and there was good cause for not having included it previously. The materiality prong requires the claimant to show a reasonable possibility that the new evidence would have changed the Secretary's determination. Implicit in that criterion is the requirement that the new evidence relate directly to the period of disability that was considered by the Secretary. The new evidence may not relate to a disability that was acquired after the Secretary's determination or to a deterioration in a condition that was not disabling when the Secretary's determination was made. 42 U.S.C. § 405(g); Bradley v. Bowen, 809 F.2d 1054, 1058 (5th Cir. 1987).

The new x-ray evidence is not material because there is no evidence that it is related to Duplechin's claim of disability due to diabetes and high blood pressure. Accordingly, a remand is unnecessary. The lack of a remand will not preclude Duplechin from having the new evidence considered because this evidence may form the basis of a new Social Security claim. Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985).

VI

Because substantial evidence supports the Secretary's determination that Duplechin was not disabled, the judgment of the district court is

A F F I R M E D.¹

¹The motion to file additional record excerpts is denied because the material sought to be included is irrelevant to the disposition of this appeal.