IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 93-5615
(Summary Calendar)

JOHN L. BROWN,

Plaintiff-Appellant,

versus

DONNA SHALALA, SECRETARY,
HEALTH AND HUMAN SERVICES

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CV-112)

(October 3, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[1]

John L. Brown appeals the judgment of the district court affirming the denial of his claim for disability benefits. For the following reasons, we affirm.

BACKGROUND/PROCEDURAL HISTORY

John L. Brown was working for a construction company in June, 1987, when he suffered an on-the-job injury which damaged his right knee. In March, 1989, the knee collapsed and he fell, damaging his back. Since the accidents, he has undergone four operations which

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

attempted to repair his back and knee. He has not returned to work since the initial accident in 1987.

On June 15, 1990, Brown filed a claim for disability benefits with the Department of Health and Human Resources. He claimed that he was unable to continue working because of debilitating pain in his knee and back. An Administrative Law Judge ("ALJ") conducted a hearing on Brown's claim on October 24, 1990. The ALJ found that, although the medical evidence supported Brown's claim that he was experiencing pain in his back and knee, it did not support his contention that the pain was extensive enough to prevent him from doing sedentary work. Consequently, the ALJ denied Brown's request for disability benefits. Brown filed an appeal with the Appeals Council which vacated the ALJ's decision and remanded the case to the ALJ for the resolution of several issues.

Following a second hearing on January 4, 1992, the ALJ again denied disability benefits. The ALJ again found that Brown was capable of sedentary work and that sedentary jobs existed in the area where Brown lived. The Appeals Council denied Brown's request for a second review and upheld the ALJ's decision. Brown filed an appeal in district court. The district court affirmed the ALJ's ruling. Brown appeals the judgment of the district court.

LEGAL PRECEPTS

A claimant under the Social Security Act is disabled if the claimant is unable to perform "any substantial gainful activity by reason of any medically determinable mental or physical impairment"

for at least twelve months. 42 U.S.C. § 423(d)(1)(A). A five-step analysis is used to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. The burden is on the claimant at the first four steps to show that: (1) he is not engaged in substantial gainful activity, (2) his impairment is "severe," (3) he meets or equals an impairment listed in Appendix One of the regulations, thus being disabled, and (4) he cannot perform his past relevant work. At step five, the burden shifts to the Secretary of Health and Human Resources to show that the claimant, considering his severe impairment and other factors such as age, residual function capacity, education, and work experience, can perform work available in the national economy, and thus the claimant is not disabled. See Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991).

This Court's review of the Secretary's decision is limited to determining "whether the Secretary applied the correct legal standard[s] and whether the Secretary's decision is supported by substantial evidence on the record as a whole." Orphey v. Secretary of Health & Human Services, 962 F.2d 384, 386 (5th Cir. 1992). "Substantial evidence is more than a scintilla and less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991).

DISCUSSION

Brown contends that the ALJ erred in finding that he was capable of sedentary work, step five of the analysis.[2] At the time of the first hearing, Brown was forty-two years old. He testified at that hearing that the pain in his back and knee prevents him from sitting or standing for more than twenty minutes at a time. He also testified that he suffered from depression and had difficulty concentrating due in part to the pain medications. Brown has worked as a laborer all his life. He has no skills and his I.Q. has been assessed at seventy-seven.

At the October hearing, Brown testified that he had gone hunting the previous winter and that he had gone fishing the previous summer. He also testified that he performed maintenance on his truck and that three months prior to the October hearing, he had installed a new starter into his truck. He further testified that he cooked for his family. In a claims report he completed, Brown wrote that he reads magazine articles and the Bible for one to two hours every day. He also wrote that he went out with his family one or two times per week.

A functional capacity assessment performed in May 1990, which was just before Brown's second back surgery, found that Brown could sit for about six hours and was capable of carrying of lifting ten pounds. The doctor's report after Brown's surgery, written in June 1990, stated that his rehabilitation was going well. A psychiatric

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[2]Brown's insured status expired on June 30, 1992. Brown had to be determined to be disabled before this date. Oldham v. Schweiker, 660 F.2d 1078, 1080 n.1 (5th Cir. 1981).

review technique form, completed on May 6, 1990, revealed no evidence of depression. It also stated that Brown had no difficulty with maintaining social functioning. The form did state that Brown had difficulty concentrating.

The vocational expert testified that, even with his limitation, Brown was capable of performing sedentary work. She named three jobs he could perform: telephone order clerk, order caller, and ticket seller. She said that, in North Texas, there were approximately 1000 ticket seller jobs, 1000 to 1200 telephone order clerks jobs, and approximately 500 order caller jobs.

We find that substantial evidence exists in the record to support the ALJ's finding that Brown was capable of sedentary work. Brown's own testimony, the vocational expert's testimony, and the medical evidence, indicate that Brown is capable of performing sedentary work. The vocational expert's testimony indicated that such work was available. We find no error in the district court's decision to affirm the decision of the ALJ.

Brown contends that the trial court erred in concluding that there were jobs available for Brown. He argues, based on evidence never presented to the ALJ, that the vocational expert erred in finding sedentary jobs existed in the area where Brown lived. Evidence not presented at trial will not be reviewed on appeal. Topalian v. Ehrman, 954 F.2d 1125, 1131-32, n.10 (5th Cir. 1992), cert. denied, ___U.S.___, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). We therefore do not examine the merits of this argument.

Brown argues that a finding that he was disabled was mandated under 20 C.F.R. § 404, app. 1, ¶ 1.05(c). This argument was not presented to the ALJ, the Appeals Council, or to the trial court. Failure to present an argument to the Appeal Council is a failure to exhaust administrative remedies. Paul v. Shalala, 29 F.3d 208, 210 (5th Cir. 1994). We thus have no jurisdiction over this claim. See id.

CONCLUSION

Because there is substantial evidence in the record to support the judgment of the ALJ, the judgment of the district court is AFFIRMED.