IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8047
(Summary Calendar)

CHARLES L. HENLEY,

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 Texas
(SA-92-CA-0258)

(October 5, 1993)

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

PER CURIAM:[*]

Plaintiff-Appellant Charles L. Henley appeals the district court's affirmance of the Secretary's denial of Supplemental Security Income (SSI) benefits pursuant to 42 U.S.C. § 405(g). Concluding that there was substantial evidence to support the Secretary's decision, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

PROCEEDINGS

On April 10, 1990, Henley applied for SSI benefits, alleging a disability resulting from an injury that he had incurred about a year earlier. His application was denied initially and again on reconsideration. Henley requested and received a hearing before an administrative law judge (ALJ) who determined that Henley was not disabled within the meaning of the Social Security Act (the Act). Based on the Medical-Vocational Guidelines, see 20 C.F.R. Part 404, Subpt. P, App. 2, the ALJ concluded that even though Henley was incapable of performing his past work he had the residual functional capacity to perform unskilled light work. The decision of the ALJ became the decision of the Secretary when the Appeals Council denied Henley's request for review.

Henley filed suit in the district court seeking review of the Secretary's decision. The district court adopted the report and recommendation of the magistrate judge and affirmed the Secretary's decision. Henley timely appealed.

II

FACTS

Henley, born on July 9, 1941, has an eighth grade education. On March 28, 1989, he injured his lower back while installing carpet. Until that date Henley had been a self-employed carpenter. After conservative treatment, Henley briefly attempted to return to work but lower back pain prevented his doing so. A lumbar MRI scan revealed lumbar radiculopathy produced by a herniated nucleus

pulposus at the L4-5 level. On March 15, 1990, Henley underwent a bilateral L4-5 laminectomy, foraminotomy, and partial diskectomy. His neurosurgeon reported that Henley responded well to the surgery and received relief from leg pain. Although Henley had normal post-operative intermittent lower back discomfort, he was able to walk toe-and-heel without difficulty.

In August 1990, Henley was evaluated for neck pain that radiated into his left upper arm. He reported that this injury dated from October 28, 1988, when he had received an electrical shock. A neurological evaluation and a cervical MRI scan were ordered, which showed a disc herniation with spinal cord compression at C5-6.

A consulting physician, Dr. Peter Holmes, recommended that, because of the cervical condition, Henley should not carry more than 25 pounds at work on an occasional basis or more than 20 pounds on a frequent basis. Dr. Holmes placed no restrictions on standing, walking or sitting. He predicted that the amount Henley could lift, maximally and repetitively, would be doubled after the surgery. In May 1991, after the administrative hearing, Henley underwent an anterior cervical diskectomy and fusion with iliac crest graft at C5-6. The record does not reflect whether Henley's cervical condition improved after surgery.

At the administrative hearing, Henley testified that he was unable to perform household chores; that he used a walking stick when he left the house; that he was able to walk up one flight of stairs; and that he could drive a car on errands. Although his

wife usually drove the car, Henley had driven from San Antonio to Kerrville to visit relatives, a trip of approximately 100 miles. Henley was able to sit for 20 to 25 minutes and walked every day. He could walk for two blocks before stopping to rest. Henley was taking medication for pain and used a "TNS" machine, which gave him some relief.

III

ANALYSIS

In reviewing the Secretary's decision to deny disability benefits, we must determine whether there is substantial evidence in the record to support it and whether the proper legal standards were used in evaluating the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). Substantial evidence is more than a scintilla but less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. at 1021-22. In applying this standard, we may not reweigh the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. Id. at 1022.

The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A). The Secretary follows a five-step process in evaluating a disability claim. A finding that a claimant is not

disabled at any point terminates the sequential evaluation. Crouchet v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989). The five steps are:

1) Claimant is not presently working;

2) Claimant's ability to work is significantly limited by a physical or mental impairment;

3) Claimant's impairment meets or equals an impairment listed in the appendix to the regulations (if so, disability is automatic).

4) Impairment prevents claimant from doing past relevant work;

5) Claimant cannot perform relevant work.

See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. The ALJ determined at step five of the sequential analysis that Henley was not disabled.

Initially, the burden is on the claimant to establish that he is unable to do his previous work. The burden then shifts to the Secretary to show that there is other substantial work which the claimant can perform. If the Secretary meets this burden, the claimant must then prove that he is not able to perform the alternate work. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5th Cir. 1989). "In determining whether the claimant can do any other work, the Secretary considers the claimant's residual functional capacity, together with age, education, and work experience, according to the Medical-Vocational Guidelines set forth by the Secretary." Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990).

The ALJ determined that Henley could do light work.

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.

20 C.F.R. § 404.1567(b). The ALJ based his finding that Henley is capable of light work on the consultative examination and Henley's own testimony. The consulting physician limited Henley to lifting no more than 25 pounds at a time and frequent lifting and carrying of objects weighing no more than 20 pounds. He placed no restrictions on walking, standing or sitting. Henley testified that he could drive a car and walk up one flight of stairs. Henley was able to sit for 20 to 25 minutes and walked every day. This constitutes substantial evidence in support of the ALJ's determination that Henley was capable of light work under the Guidelines.

Henley argues that the ALJ failed to evaluate properly Henley's subjective pain, failed to articulate reasons for his credibility findings on that issue, and improperly relied on the Medical-Vocational Guidelines in determining that Henley was capable of light work. "When the claimant 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 Guidelines in determining whether there is other work available that the claimant can perform." Selders, 914 F.2d at 618; accord Anderson v. Sullivan, 887 F.2d 630, 634

(5th Cir. 1989); cf. Fields v. Bowen, 805 F.2d 1168, 1170-71 (5th Cir. 1986) (claimant suffered from mental disability, a non-exertional impairment). While pain may constitute a non-exertional impairment, pain constitutes a disabling condition only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." Id. at 618-19.

Henley argues that the ALJ failed to consider expressly the intensity and persistence of his pain. As pain alone can be disabling, the ALJ must give consideration to the claimant's subjective complaints of pain; and the ALJ has a duty to make affirmative findings regarding the credibility of the claimant's assertions regarding pain. See Scharlow v. Schweiker, 655 F.2d 645, 648-49 (5th Cir. 1981) (reversing decision of Secretary because ALJ failed to rule on credibility of claimant's subjective complaints of pain). Within the Secretary's discretion is the right to determine the pain's disabling nature. Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991).

The ALJ stated generally:

> Consideration has been given to all of the available evidence, medical and other, that reflects on the claimant's impairments and any attendant limitations of function in evaluating the extent to which pain affects his functional ability to do basic work activities. This evaluation has included a consideration of the claimant's prior work record and the nature, location, onset, duration, frequency, radiation and intensity of any pain.

Based upon this evaluation, the ALJ found:

> In spite of the claimant's allegations of disabling pain the evidence of record, including the claimant's testimony, establishes that he continues to drive, he has maintained a good appetite, despite medical advice he continues to smoke, he is able to take care of his

> personal needs such as bathing and dressing. He is a ham [radio] operator, is able to walk one flight of stairs, is able to open and close doors, and he walks for exercise. The extent of his activities belies his subjective complaints of a disabling condition.

From the foregoing statements, it is clear that the ALJ did not disbelieve that Henley was in pain. Instead, based on the consulting physician's report and Henley's own testimony, the ALJ found that Henley's pain was not so constant, unremitting, intense and persistent as to be disabling. See Selders, 914 F.2d at 619. This conclusion did not constitute an abuse of discretion under the substantial evidence standard. See Carrier v. Sullivan, 944 F.2d 243, 247 (5th Cir. 1991) (distinguishing Scharlow where ALJ credited claimant's subjective complaints of pain but found no disabling condition); see also Griego v. Sullivan, 940 F.2d 942, 945 (5th Cir. 1991) ("While exclusive reliance on daily activities or a decision to forego a particular medication might concern us, we find no error in the consideration of these factors in conjunction with the medical reports"). As there was substantial evidence that Henley's pain was not severe enough to constitute a disabling condition, the ALJ was entitled to rely solely on the Medical-Vocational Guidelines and was not required to call a vocational expert. Selders, 914 F.2d at 618.

Henley also argues that, as he lacks manual dexterity in one hand as a result of the cervical condition and suffers from carpal-tunnel syndrome, a vocational expert should have been consulted. Again, the ALJ was entitled to rely exclusively on the Medical-Vocational Guidelines unless Henley was found to suffer from a non-exertional impairment. The regulations provide:

> Basic work activities means the abilities and aptitudes

> necessary to do most jobs. Included are exertional abilities such as walking, standing, pushing, pulling, reaching and carrying, and nonexertional abilities and aptitudes such as seeing, hearing, speaking, remembering, using judgment, dealing with changes in a work setting and dealing with both supervisors and fellow workers.

20 C.F.R. § 220.177(d) (emphasis added). Henley's inability to grasp, hold, turn, raise and lower objects with one hand is not a non-exertional impairment.

Henley argues that there is substantial evidence in the record that he was disabled. In so asserting Henley demonstrates a misunderstanding of the substantial evidence standard. It matters not that there is substantial evidence or even a preponderance of the evidence that the claimant is disabled; what matters is whether there is substantial evidence supporting the Secretary's determination that the claimant is not disabled. As previously noted, on appeal we may not reweigh the evidence or try the issues de novo; rather, we must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. Villa, 895 F.2d at 1022. Neither is the question whether we would have reached the same conclusion if presented with the same evidence, but whether there is more than a scintilla of evidence to support the Secretary's findings. Concluding in this case that there clearly is more than such a scintilla of evidence that Henley was not disabled, the Secretary's decision is supported by substantial evidence and therefore is

AFFIRMED.