

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8241
Summary Calendar

DONALD R. LEGGETT,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary of
Health and Human Services,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A-92-CV-193)

(July 29, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Donald R. Leggett (Leggett) sought judicial review of the denial of his application for disability benefits by the Secretary of Health and Human Services (Secretary) pursuant to Title II of the Social Security Act, 42 U.S.C. § 405(g)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(1988). Leggett now appeals the district court's affirmance of the Secretary's decision. We affirm.

Facts and Proceedings Below

On March 31, 1990, Leggett filed an application for disability insurance benefits and supplemental security income under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 416(i), 423, and 1381a, alleging he has been unable to work due to emphysema. A medical examination performed for the Social Security Administration (SSA) revealed that Leggett suffers from chronic obstructive pulmonary disease, probably emphysema, and has a history of tuberculosis, although it has been inactive for many years. Leggett uses a nonprescription inhaler for his respiratory problems but continues to smoke about one-half a pack of cigarettes per day. During a telephone interview with Leggett, an SSA employee prepared a disability report which Leggett later signed. The disability report identified his past work experience as a supply clerk and described the amount of physical activity as lifting up to twenty pounds occasionally, no more than ten pounds frequently; walking for one hour and standing for two hours per eight-hour day; and bending and reaching periodically. Shortly thereafter, Leggett prepared a vocational report describing his past work as a carpenter and as a change collector for a jukebox company. According to the vocational report, these jobs required him to carry a maximum of fifty pounds; lift twenty-five to fifty pounds frequently; stand for two hours per day; and bend frequently. On February 27, 1991, while represented by counsel, Leggett testified at a hearing before an administrative law judge

(ALJ) that he could lift up to thirty pounds but that he was more comfortable lifting ten to fifteen pounds. He also indicated that he must rest after walking about one-half block or standing for forty-five minutes due to shortness of breath, but that sitting usually did not bother him.

On May 8, 1991, the ALJ found that Leggett's respiratory impairment had not prevented him from performing his prior work as a supply clerk, and thus he was denied disability benefits. On February 7, 1992, the Appeals Council denied Leggett's request for review, and the decision became final. Leggett filed the present action in the district court on April 10, 1992, seeking to set aside the Secretary's decision. Over Leggett's objections, the district court adopted the magistrate judge's recommendations and entered judgment for the Secretary on March 17, 1993. Leggett now appeals this judgment. Because we find substantial evidence in support of the Secretary's decision, we affirm.

Discussion

Appellate review of the Secretary's denial of disability benefits is limited to determining whether the decision is supported by substantial evidence in the record and whether the proper legal standards were applied in evaluating the evidence. *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993); *Villa v. Sullivan*, 895 F.2d 1019, 1021 (5th Cir. 1990). If substantial evidence in the record supports the Secretary's findings, they must be affirmed. *Spellman*, 1 F.3d at 360; see 42 U.S.C. § 405(g) ("The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."). Substantial evidence

is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Villa*, 895 F.2d at 1022; *Richardson v. Perales*, 91 S.Ct. 1420, 1427 (1971). To determine if such evidence is present, we must review the entire record, but "we may neither reweigh the evidence in the record nor substitute our judgment for the Secretary's." *Villa*, 895 F.2d at 1022 (quoting *Hollis v. Bowen*, 837 F.2d 1378, 1383 (5th Cir. 1988)). Even if we find the preponderance of the evidence is against the Secretary's decision, we will not disturb the decision unless "there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'" *Harrell v. Bowen*, 862 F.2d 471, 475 (5th Cir. 1988) (per curiam) (citations omitted).

To be entitled to disability insurance benefits, an applicant must show that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than twelve months." *Villa*, 895 F.2d at 1022 (quoting 42 U.S.C. § 423(d)(1)(A)). The Secretary uses a five-step sequential evaluation to assess whether an applicant meets this criteria: (1) Is the claimant currently working? (2) Can the impairment be classified as severe? (3) Does the impairment meet or equal a listed impairment in Appendix One of the Secretary's regulations? (In which case, disability is automatic.) (4) Can the claimant perform his past relevant work? and (5) Is there other work available in the national economy that the claimant can perform? 20 C.F.R. §§ 404.1520 (b)-(f), 416.920 (b)-(f) (1992). In the present case, the ALJ determined that Leggett had not

engaged in substantial gainful activity since December 30, 1983, and that his respiratory impairment was severe but did not constitute a listed impairment. The ALJ concluded, however, that Leggett failed to satisfy step four because his impairment did not prevent him from performing his prior relevant work, and thus, he was not eligible for disability benefits.¹ The ALJ based this finding on the description in the disability report of Leggett's past work as a supply clerk.² The ALJ found that Leggett had the residual function capacity to perform work-related activities except for work involving lifting in excess of twenty pounds or ten pounds frequently.³ The ALJ concluded that the physical demands of Leggett's prior work as a supply clerk did not require the performance of work-related activities beyond his capabilities.

Leggett argues that the ALJ should have made a more detailed examination of the physical requirements of his past work because the vocational report and his testimony at the hearing were

¹ The ALJ found that Leggett's "[s]ubjective complaints of occupational impediments of such severity as to preclude the performance of sustained work activity [were] unsupported by the medical and non-medical evidence of record and [were] not considered credible." Finding 4.

² When considering whether an applicant can perform past relevant work, the ALJ may rest his assessment "on descriptions of past work as actually performed or as generally performed in the national economy." *Villa*, 895 F.2d at 1022.

³ Leggett's first residual function capacity assessment indicated that he could lift a maximum of fifty pounds; lift twenty-five pounds frequently; and stand, sit, walk, or sit a total of six hours per eight-hour day. The second assessment indicated the he could only lift a maximum of twenty pounds, and only ten pounds frequently. The ALJ based his decision on the results of the second assessment. The assessment more favorable to Leggett. See Finding 5.

inconsistent with the description in the disability report. However, Leggett did not challenge the accuracy of the disability report at his hearing. While we agree that the ALJ has a duty to make a sufficient inquiry into the applicant's claim, this duty does not relieve the applicant of his essential burden to prove his disability. *Villa*, 895 F.2d at 1023. This Court faced similar inconsistencies of job descriptions in *Villa*. There we held that:

"While these inconsistencies suggest that a further inquiry may have been warranted, *Villa* has failed to provide evidence that the reports contain inaccurate or misleading information about the requirements of his past jobs or that he was ever required to lift more than 50 pounds. Moreover, although *Villa* was represented by an administrative advocate at the hearing, there was no attempt to show that he did not understand what had been written in the reports, nor were the documents challenged at the administrative level." *Id.*

Thus, we conclude that, where there is conflicting evidence, the ALJ may properly make his determination of the applicant's past relevant work on the basis of documents signed by the applicant and left unchallenged by his counsel. *Id.* "Conflicts in evidence are for the Secretary and not for the courts to resolve." *Spellman*, 1 F.3d at 360 (citation omitted). Although Leggett's vocational report and his testimony at the hearing may be inconsistent with the information contained in the disability report, we find that a reasonable mind could accept the disability report as adequate to support the Secretary's determination.

Conclusion

We find substantial evidence in the report to support the decision of the Secretary, and accordingly we AFFIRM.

AFFIRMED