UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8324
Summary Calendar

ANN E. GRANT,

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
(A-91-CA-900-SS)

(August 15, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Ann E. Grant (Grant) appeals the district court's judgment affirming the denial of her application for social security disability insurance benefits by the Secretary of Health and Human Services (Secretary). 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Prior Proceedings

Grant applied for social security disability insurance benefits on January 9, 1990, claiming that she had been disabled since February 19, 1988, due to a back injury. Her application was denied initially and again on reconsideration. Grant requested, and was granted, a hearing before an ALJ. Grant testified at the hearing, which was held October 4, 1990; she was represented by the Legal Aid Society of Central Texas.

The ALJ determined that Grant was "not disabled" within the context of the Social Security Act. Grant appealed to the Appeals Council, which declined to review the ALJ's decision; the Secretary's denial of benefits thus became final. On review pursuant to 42 U.S.C. § 405(g), the district court accepted the report and recommendation of the magistrate judge and affirmed the Secretary's decision. The present appeal followed.

Medical History

Grant was born on March 26, 1936; she was fifty-four years old at the time of her hearing before the ALJ. She has a seventh-grade education, and her reading and writing skills are limited; she has had no further training. Grant's past work experience has been in housekeeping and janitorial positions. She has worked part-time as a school crossing guard. Grant's application for disability insurance benefits stems from an injury to her back on February 19, 1988, while she was working for the Texas State Highway Department as a custodian.

Grant first saw Dr. Jane Derebery in January 1988 for persistent low back pain. Grant informed Dr. Derebery that she had

injured her back at work in 1987;[1] she had continued working after that injury but periodically suffered exacerbations of her condition which forced her to be off work. Her employer would not accommodate any restrictions on her work performance, however, and Grant eventually stopped working.

At the time of the first examination, Dr. Derebery concluded that Grant's problem appeared to be musculoskeletal and was probably not caused by a medical condition. X-rays revealed degenerative disc disease in the L5-S1 area of her back.[2] On March 29, 1988, Grant had a positive bone scan taken which indicated an "area of increased activity in the right upper sacrum and region of articulation with L5." Dr. Derebery prescribed a nonsteroidal anti-inflammatory medication which gave Grant "good pain relief" from her chronic discogenic disease.[3]

Grant was evaluated by Dr. Randall F. Dryer of the Austin Back Clinic in May 1988. His assessment was that Grant had "[p]robable degenerative arthritis in the L5-S1 area with multiple degenerative disc disease." Dr. Dryer continued to treat Grant through the summer of 1988. He ordered a CT scan which revealed multiple level

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[1] Presumably, this refers to an earlier back injury during Grant's tenure as a custodian for the Highway Department. Grant injured her back again on February 19, 1988, shortly after seeing Dr. Derebery for the first time. It is this latter injury which forms the basis for her application for disability insurance benefits.

[2] "L5-S1" denotes the area between the fifth lumbar vertebra and the sacrum. STEDMAN'S MEDICAL DICTIONARY, Plate 2 (5th ed. 1982).

[3] "Discogenic" refers to "a disorder originating in or from the intervertebral disc." *Id*. at 402.

degenerative disc disease in the L4-5 and L5-S1 areas of her back; he assessed her as having mild right-sided foraminal and spinal stenosis.[4] Dr. Dryer found no frank herniation or free fragment of disc, however, and there was no evidence of spondylolysis or spondylolisthesis.[5] Neurologically, Grant was "normal." Grant's condition remained unchanged after an epidural steroid injection.

Dr. Dryer concluded that Grant was not improving under his conservative treatment. He did not believe that she was a good candidate for surgery, however, and transferred her care back to Dr. Derebery for re-evaluation. Although he thought that Grant was impaired and unable to work, he deferred to Dr. Derebery for a complete functional evaluation.

During the summer of 1989, Dr. Derebery performed isometric strength tests on Grant which showed that she had a persistent strength impairment of thirty-nine percent.

Dr. Ira Bell examined Grant in August 1989 for the Texas Rehabilitation Commission. He diagnosed her as suffering from hypertension and back pain. He concluded that she could sit, stand, walk, and lift ten pounds frequently; she was able to lift twenty-five or fifty pounds, bend, stoop, kneel, squat, crouch, crawl, climb, and balance occasionally. Dr. Bell placed no restrictions on her working environment.

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[4] This diagnosis refers to a narrowing of the apertures in Grant's spine. *Id*. at 548, 1336.

[5] "Spondylolysis" is a defect in an area between the surfaces of the vertebra. *Id*. at 716, 1322. "Spondylolisthesis" refers to a "forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or upon the sacrum." *Id*. at 1322.

Dr. Derebery last saw Grant in February 1990. Grant had experienced a slight increase in her back pain because she was out of her anti-inflammatory medication. Dr. Derebery's examination revealed the ability to flex to forty-five percent; Grant's mobility in all ranges of motion tested had decreased. She had palpable pain, but was neurologically normal with negative straight leg raising and equal reflexes. Dr. Derebery concluded her assessment of Grant's condition:

> "Currently, the patient has permanent work restriction of no lifting over 20 lbs. She is encouraged to stay active and to continue her back exercises. She takes Disalcid, 1500 mg. twice a day, to control her back pain. She is disabled from performing her current job but would be a good candidate for consideration of a less strenuous job that would not necessitate lifting over 20 lbs. infrequently and no repetitive lifting over 11 lbs."

Finally, in connection with her request for a hearing before the ALJ, Grant was examined by Dr. George L. John in May 1990. He concurred with earlier diagnoses of degenerative disc disease and hypertension. He also noted that her diabetes had not resulted in any end organ deficit and that she had no neurological deficits. In his assessment of Grant's physical capacities, he determined that she retained the maximum capacities to lift fifty pounds, frequently lift twenty-five pounds, and stand, walk, or sit about six hours per day. Her abilities to push, pull, and perform other physical tasks were unlimited. Dr. John also found that Grant was not restricted by any environmental factors. He concluded that she was not disabled through the date of his examination.

Discussion

I. Standard of Review

In reviewing the denial of disability benefits, we are limited to a consideration of two issues: (1) whether, upon the record as a whole, substantial evidence supports the decision of the Secretary, and (2) whether the Secretary applied the proper legal standards. 42 U.S.C. § 405(g); *Anthony v. Sullivan*, 954 F.2d 289, 292 (5th Cir. 1992). Grant raises claims under both issues.

Evidence is substantial if it is both relevant and sufficient for a reasonable mind to find adequate to support a conclusion. *Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991). It is more than a scintilla, but it need not be a preponderance. *Fraga v. Bowen*, 810 F.2d 1296, 1302 (5th Cir. 1987). A finding of no substantial evidence is appropriate only if, considering the record as a whole, no credible evidentiary choices or medical findings exist to support the decision. *Johnson v. Bowen*, 864 F.2d 340, 343-344 (5th Cir. 1988). In our review of the evidence, we consider objective medical facts, clinical findings, the diagnoses of examining physicians, subjective evidence of pain and disability as provided by the claimant's testimony, and the claimant's age, education, and work history. *Fraga*, 810 F.2d at 1302 n.4.

II. Determination of Disability

A disability, for purposes of qualifying for disability insurance benefits, is "the inability to do 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 12 months." 20 C.F.R. § 404.1505(a). A substantial gainful activity is one which "involves doing significant and productive physical or mental duties . . . for pay or profit." *Id*. § 404.1510(a), (b). A claimant must establish a physical or mental impairment by medical evidence. *Id*. § 404.1508.

In evaluating a claimant's disability status, the Secretary utilizes a five-step analysis as set forth in 20 C.F.R. § 404.1520(b)-(f). If the claimant is found to be disabled or not disabled at any point in the process, the analysis is ended, and no further review is necessary. *Bradley v. Bowen*, 809 F.2d 1054, 1056 (5th Cir. 1987). *See also Wren v. Sullivan*, 925 F.2d 123, 125-126 (5th Cir. 1991). Grant bears the initial burden of proving that she is disabled within the meaning of the Act on all but the fifth step. *Bowen v. Yuckert*, 107 S.Ct. 2287, 2294 n.5 (1987); *Wren*, 925 F.2d at 125.

The first inquiry is whether the claimant is engaged in a substantial gainful activity; if so, she will be found not disabled regardless of her medical condition, age, education, or work experience. Second, a claimant must have a severe impairment or combination of impairments, *i.e.*, one which significantly limits her physical or mental ability to do basic work activities. Third, if a claimant has an impairment which meets or equals an impairment listed in Appendix 1 of the regulations, she will be considered disabled without further consideration of age, education, or work experience. Fourth, the claimant is not disabled if her residual functional capacity permits her to perform past relevant work. Finally, if the claimant cannot perform past relevant work, factors

including residual functional capacity, age, education, and past work experience are considered to determine if other work available in the national economy can be performed, in which case the claimant is not disabled. 20 C.F.R. § 404.1520(b)-(f). *See Wren*, 925 F.2d at 125.

Here, the ALJ concluded that Grant was not disabled at step four, finding that she was capable of performing her past relevant work as a school crossing guard. Grant claims on appeal that there was insufficient evidence to support the finding that she was capable of performing past relevant work, arguing that she was unable to perform her past work as a custodian or housekeeper and that her past work as a school crossing guard was not a substantial gainful activity. She contends that the ALJ misapplied the regulations concerning the criteria for past relevant work in considering her job as a school crossing guard.

III. Analysis

In order for a claimant to be found not disabled at the fourth step, she must be able to perform past relevant work, and that work must constitute a substantial gainful activity.[6] 20 C.F.R. § 404.1571. The record contains sufficient evidence that Grant was physically capable of performing her work as a school crossing guard, which involved directing elementary school children across a street during the mornings and afternoons of school days. She estimated that this job required that she walk for six hours and

[6] Thus, past relevant work must be both substantial, *i.e.*, a work activity that involves doing significant physical or mental activities, and gainful, *i.e.*, an activity done for pay or profit. 20 C.F.R. § 404.1572(a)-(b).

stand for eight hours.[7] She did not have to sit, bend, or lift or carry any weight. According to Dr. Bell's assessment, Grant had no restrictions on her abilities to walk or stand. Dr. Derebery concluded that, while Grant probably could not continue working as a custodian, she was a good candidate for lighter work.

We question, however, whether her work as a crossing guard could be found to be a substantial gainful activity. Contrary to Grant's contention, this work may qualify even though it was only a part-time job. *Id*. § 404.1572(a). The ALJ made no findings, however, on the issue of whether Grant's work as a school crossing guard could qualify under section 404.1574(b)(3), which requires certain levels of earnings for work to be considered a substantial gainful activity. Neither the Secretary nor the district court addressed this issue. According to the regulations, average earnings of less than $190 a month in calendar years after 1979 and before 1990 generally will not show that a claimant has engaged in a substantial gainful activity.[8] *Id*. § 404.1574(b)(3)(vi).

The only evidence in the record of Grant's salary as a school crossing guard was a Vocational Report completed by Grant as part of her application for disability benefits. In the report, Grant stated that she had worked as a school crossing guard from August 1978 until November 1980; she was paid $3.00 per hour.[9] In her

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[7] These estimates seem somewhat unrealistic; apparently, Grant worked only two to four hours each day as a crossing guard.

[8] For calendar years 1978 and 1979, a claimant earning less than $170 or $180 a month, respectively, would not be considered gainfully employed. 20 C.F.R. § 404.1574(b)(3)(iv)-(v).

[9] Grant testified before the ALJ that she left her job as a

brief on appeal, Grant asserts that she worked between two and four hours a day as a crossing guard. Assuming that she worked four hours a day, five days a week, her monthly salary would be approximately $160, less than the earning level required by the regulations.[10]

Because there is insufficient evidence that Grant's job as a school crossing guard qualifies as a substantial gainful activity, and because what evidence exists tends to indicate that it does not, we may not affirm the denial of benefits on this ground. We note, however, that the ALJ did not limit his rulings to the first four levels of the disability analysis, but went on to determine that Grant would be found not disabled in step five upon application of the Medical-Vocational Guidelines (the grids) provided in Subpart P, Appendix 2, of the Social Security regulations.

In his decision, the ALJ determined that, even if Grant were not capable of performing any past relevant work, she would be found not disabled at step five according to the grids. The grids "reflect the major functional and vocational patterns which are encountered in cases which cannot be evaluated on medical considerations alone." 20 C.F.R. Subpart P, App. 2, § 200.00(a). The grids, which are based on an analysis of unskilled jobs throughout the national economy at various functional levels,

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school crossing guard because dust and car exhaust aggravated her allergies.

[10] This is a generous estimate. Grant's schedule followed the school calendar: she did not work during the summer, nor during school holidays during the rest of the year.

permit the Secretary to evaluate the disability status of claimants of different residual functional capacities according to tables comparing the claimants' ages, education, and previous work experience. A finding of disabled or not disabled depends upon the availability of jobs for persons meeting the listed functional and vocational criteria.

If the findings of fact concerning a claimant's factors match the criteria of the rule, the Secretary uses that rule to decide whether the person is disabled. *Id*. § 404.1569; App. 2, § 200.00(a).[11] The grids do not take non-exertional impairments into consideration; if such impairments are a factor, the Secretary may not rely exclusively on the grids to make a disability determination.

> "When the characteristics of the claimant correspond to criteria in the Medical-Vocational Guidelines of the regulations . . . and the claimant either 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." *Fraga v. Bowen*, 810 F.2d 1296, 1304 (5th Cir. 1987) (citing 20 C.F.R. Subpart P, App. 2, § 200.00).

Grant contends that she suffers from non-exertional impairments which preclude the application of the grids. She claims that she suffers from high blood pressure, diabetes, and allergies. Dr. N. Mayorga of the Rosewood Medical Clinic treated Grant for these conditions. The evidence in the record supports

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[11] If any one of the findings of fact does not coincide with a corresponding criterion of the rule, however, the rule does not govern the conclusion of disabled or not disabled. In that instance, full consideration must be given to all relevant facts and regulations applying to that case. App. 2, § 200.00(a).

the ALJ's conclusion that medications prescribed by Dr. Mayorga were able to control these problems.

The ALJ found, upon plainly adequate evidence in the record, that Grant "could engage in a full range of light work activity." Table 2 of Appendix 2 governs the disability analysis for claimants limited to light work. The criteria of Rule 202.10 of Table 2 correspond to Grant's vocational factors: at fifty-four years of age, her age at the time of the hearing before the ALJ, Grant falls into the category of "closely approaching advanced age"; she has a limited (or less) education, and her previous work experience has been in unskilled labor. Rule 202.10 directs a finding of "not disabled."[12]

We observe that Grant was on the verge of qualifying as "advanced age," describing persons fifty-five and older, at the time of the ALJ's hearing. Were the same analysis to be made at the time of our consideration, Grant would be found disabled. Rule 202.01 of Table 2 requires a finding of disabled for persons of advanced age with limited education and previous work experience in unskilled positions. Our review is limited, however, to whether Grant was disabled at the time of the hearing before the ALJ and from the date claimed as the onset of her disability, February 19, 1988; we do not consider whether she might be found disabled today. *See Godsey v. Bowen*, 832 F.2d 443, 445 (7th Cir. 1987) (evidence of

[12] The findings of fact for each factor of the grids are subject to rebuttal, and a claimant may submit evidence to refute the findings. App. 2, § 200.00(a). The factors in Grant's case are not subject to challenge, however. By her own testimony, she was fifty-four years old at the time of the hearing, has a limited education, and has worked only in unskilled jobs.

deterioration of claimant's condition by 1986 immaterial to application because it did not show that her condition was other than as found at the administrative hearing in 1983); *Sanchez v. Secretary of Health and Human Services*, 812 F.2d 509, 512 (9th Cir. 1987) ("The new evidence indicates, at most, mental deterioration after the hearing, which would be material to a new application, but not probative of [claimant's] condition at the hearing.").

The ALJ correctly applied the grids and determined that Grant was not disabled.

Conclusion

Because the evidence at the time of the hearing before the ALJ fully supports the ALJ's determination that Grant was not disabled according to the grids, the judgment of the district court affirming the denial of Grant's application for disability insurance benefits is

AFFIRMED.