UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8435
Summary Calendar

KENNETH MCCALL,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA, Secretary
of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CA-810)

(May 23, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Kenneth W. McCall appeals the district court's judgment in favor of the Secretary of Health and Human Services that resulted in the denial of disability benefits under 42 U.S.C. § 423. We affirm.

BACKGROUND

McCall, born on July 20, 1960, worked for Montgomery Ward in the product service department. His work required the lifting of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

heavy objects. On January 26, 1989, McCall injured his neck and back from an on-the-job injury. McCall underwent two surgeries in June and October of 1989.

In September, McCall filed his Title II application for social security disability benefits alleging that two disc herniations and high blood pressure prevented him from working beyond February 8, 1989. The Secretary of Health and Human Services (the Secretary) denied McCall's application initially and on reconsideration. At McCall's request, a hearing before an administrative law judge (ALJ) was held on August 28, 1990. The ALJ determined that although McCall was not able to perform his past relevant work as a salesman, he was not disabled because his residual functional capacity allowed him to perform a full day of sedentary work.[2]

In July 1991, the Social Security Appeals Council upheld the ALJ's decision, making it the final decision of the Secretary. In the district court, the magistrate judge recommended granting the Secretary's motion for summary judgment and over McCall's objections, the district judge adopted the magistrate's recommendation. McCall appeals.

DISCUSSION

On review, we determine whether the record as a whole contains substantial evidence supporting the ALJ's findings, and whether the ALJ applied the proper legal standards. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990). If supported by substantial

[2] The ALJ found that McCall would not be able to lift and carry objects weighing 25 pounds.

evidence, the Secretary's findings are conclusive and must be affirmed. Id. Substantial evidence is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. Id. We do not reweigh the evidence, try the issues de novo, or substitute our judgment for that of the Secretary. Harrell v. Bowen, 862 F.2d 471, 475 (5th Cir. 1988).

To obtain disability benefits, McCall has the burden of proving disability.[3] Cook v. Heckler, 750 F.2d 391, 393 (5th Cir. 1985). If the claimant establishes that he is disabled, the burden then shifts to the Secretary to show that the claimant is capable of other work. Harrell, 862 F.2d at 475. If the Secretary meets that burden, the claimant must prove that he cannot perform the other work. Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991). In evaluating a disability claim, the Secretary must determine sequentially whether: (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 of the regulations; (4) impairment prevents claimant from doing past relevant work; and (5) claimant cannot presently perform relevant work. 20 C.F.R. § 404.1520(b)-(f); Selders, 914 F.2d at 618. If disability is determined at any of the steps, the inquiry need not go further because such a finding is conclusive. See Harrell, 862 F.2d at

[3] The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medical determinable, physical, or mental impairment 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).

475.

Following this five-step process, the ALJ found that the claimant had not engaged in substantial gainful activity since his onset date and that claimant had "severe" impairment as defined in the Social Security Act, but that his impairment did not meet the impairments listed in the regulations. The ALJ found, however, that because McCall's impairment was not one that lasted for a continuous period of twelve months, he was not disabled. Although the ALJ could have concluded his analysis, he continued with the evaluation assuming his assessment about the period of impairment was erroneous. The ALJ concluded that McCall's impairment would prevent him from doing past relevant work, but that he could presently perform relevant work.

I.

McCall complains that the ALJ's decision is not supported by substantial evidence. Specifically, McCall argues that the ALJ erred by rejecting the opinions of McCall's treating physician. In a September 1990 letter, Dr. Stephen Earle, McCall's treating physician, stated that McCall was 100% disabled from performing his job as a workman and would not be able to engage in prolonged sitting, standing or walking.

Although the diagnosis of a treating physician should be afforded considerable weight in determining disability, the ALJ "'is entitled to determine the credibility of medical experts as well as lay witnesses and to weigh the opinions and testimony accordingly.'" Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir.

1990) (quoting Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985)). The ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion. Bradley v. Bowen, 809 F.2d 1054, 1057 (5th Cir. 1987).

The ALJ's decision to reject Dr. Earle's testimony and finding of no disability is supported by substantial evidence. In the same letter in which Dr. Earle stated that McCall was disabled, he stated that McCall could perform sedentary work with a restriction from lifting or pushing more than 35 pounds. Also, in August 1991 Dr. Earle stated that McCall was feeling fine with little or no pain. Dr. Earle did not note any significant limitation of motion except on one occasion in July 1990. He also did not notice any significant motor loss with muscle weakness or sensory reflex loss. X-rays and an MRI scan of McCall's cervical and lumbar spine showed stable alignment and no instability. Dr. Earle's statement that McCall's 1990 MRI scan showed a herniated disc is contradicted by the physician who performed the scan.

Another treating physician, Dr. Karl Swann, reported that McCall was healing well and had no pain, numbness, or weakness in the upper extremity. The doctor also noted that McCall had no difficulty with his neck except for occasional muscle spasms. In January 1990, Dr. Swann stated that McCall was making excellent progress from his two surgeries.

Notes from the physical therapist demonstrate that McCall's neck surgery was successful and that he had no complaints referable to his neck and only mild to moderate pain in August 1989 in the

lower back with activity. McCall had a normal range of motion and normal strength, reflexes, and sensory responses in his legs. The therapist stated that McCall was a good candidate for rehabilitation.

II.

Next, McCall complains that the ALJ ignored his subjective testimony regarding his pain. The determination of the disabling nature of the claimant's pain is within the ALJ's discretion and is entitled to considerable deference. Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991). In order to be disabling, the pain "must be constant, unremitting, and wholly unresponsive to therapeutic treatment." Id.

McCall testified that he experienced pain in his lower back that radiated to his leg and hip but did not take any medication for that pain. McCall missed several of his physical therapy sessions. Although he explained that the missed therapy sessions were due to his pain, the therapeutic associates' record classified McCall as a good rehabilitative candidate and that he responded well to the exercises. Further, those records indicated that McCall reported little or no pain when he was keeping appointments. McCall also testified that he exercised at home, and that he could sit and watch television for 15 minutes before needing to twist and turn. McCall described his daily activities as walking around the track, going to the mall, driving a car, and building train sets. His statements regarding his ability to stand were contradictory: at one point, he indicated that he could stand for 15 to possibly

30 minutes without trouble and then later he stated that he could stand only for 10 or 15 minutes before feeling pain. Finally, McCall testified that he was able to take a trip by car from San Antonio to Colorado with periodic stopping.

III.

McCall claims that the ALJ erred in relying on the Medical-Vocational Guidelines of Appendix 2 of the regulations rather than a vocational expert to determine what, if any, jobs were available that McCall could perform. At issue here is the final step of the five-part process: whether claimant can presently perform relevant work. The Secretary has the burden to show that the claimant's residual functional capacity, together with age, education, and work experience allow him to perform work in the national economy. See 20 C.F.R. § 404.1520(f). "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.

McCall claims that his pain and the inability to engage in prolonged sitting and standing should be considered as nonexertional limitations. McCall is correct in stating that pain may constitute a nonexertional impairment. Id. However, as discussed above, there was substantial evidence from which the ALJ could conclude that McCall's pain did not limit his ability to perform sedentary work.

The only medical testimony regarding McCall's inability to engage in prolonged sitting and standing is from Dr. Earle. Although "postural limitations" may be considered nonexertional limitations, see Hernandez v. Heckler, 704 F.2d 857, 861 (5th Cir. 1983), substantial evidence in the record supports the ALJ's conclusion that no nonexertional limitations exist. Dr. Earle contradicted his assessment by stating that McCall could perform sedentary work. Moreover, McCall's activities support the ALJ's discounting of Dr. Earle's statement. See Griego v. Sullivan, 940 F.2d 942, 945 (5th Cir. 1991) (inconsistencies between a claimant's daily activities and alleged limitations are relevant in evaluating credibility). Because the ALJ's finding of no nonexertional limitations is supported by substantial evidence in the record, he did not err in relying on the Guidelines to determine whether McCall could presently perform relevant work.

IV.

On appeal, McCall has submitted additional evidence consisting of his physician's current records. We may remand a case based on new evidence upon a showing that the evidence is material and that there is good cause for failing to incorporate such evidence into the record in a prior proceeding. Haywood v Sullivan, 888 F.2d 1463, 1471 (5th Cir. 1989). The evidence presented by McCall is not material because it does not concern his condition at the time of his disability application or at the time of his hearing. See id. Moreover, the mere fact that a report is of recent origin is insufficient to meet the good cause requirement. Pierre v.

Sullivan, 884 F.2d 799, 803 (5th Cir. 1989).

V.

Finally, McCall argues that he should be entitled to a closed period of disability from February 8, 1989 to December 31, 1990 or, alternatively, a trial work period. McCall raises these issues for the first time on appeal; therefore, we do not have jurisdiction to review these issues. Muse, 925 F.2d at 785.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment for the Secretary is AFFIRMED.