

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8530
Summary Calendar

ROBERT GUERIN,

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-90-CA-348-SS)

(June 28, 1994)

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

PER CURIAM:*

The plaintiff appeals the district court's judgment denying him Social Security disability benefits. Because we hold that the plaintiff was not prejudiced by the lack of representation by counsel, that the administrative law judge used the relevant legal

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

standards, and that the administrative law judge based his decision on substantial evidence, we affirm the district court.

I

Before November 1986, Robert Guerin had worked as a blocker, re-blocker, and transporter of mobile homes. Guerin was in an automobile accident on November 5, 1986. On May 23, 1988, Guerin applied for disability benefits. He alleged that since December 31, 1986, he had been disabled because of constant neck pain, numbness, and dizzy spells as a result of his automobile accident.

II

The Secretary of Health and Human Services (the "Secretary") denied Guerin's initial application. Guerin requested a hearing before an administrative law judge (the "ALJ"). The ALJ heard Guerin's case on March 22, 1989. Guerin represented himself at the hearing. The ALJ denied Guerin's application, reasoning that, Guerin could still perform light work duties and, thus, was not disabled.

Guerin subsequently retained counsel, who filed a request for a review of the ALJ's decision. The Appeals Council denied Guerin's request for review. Guerin then sought judicial review in the district court. The district court initially affirmed the Secretary's decision, acting sua sponte, without affording Guerin an opportunity to file a brief or present his arguments. Guerin moved for rehearing, asserting a due process violation. His motion

was denied, and Guerin appealed to this court. This court vacated and remanded, finding that the district court's affirmance without providing Guerin an opportunity to file a brief was a due process violation and was not harmless error. On remand, the parties filed briefs after which the district court, presided over by a different district judge, again affirmed the Secretary's decision that Guerin was not entitled to disability insurance benefits. Guerin now appeals the district court's judgment.

III

On appeal, Guerin, in effect, raises three issues. First, Guerin argues that he was prejudiced by the lack of representation of qualified counsel because the ALJ failed to develop the record sufficiently in the absence of such counsel. Second, Guerin argues that the ALJ improperly applied the Medical-Vocational Guidelines in determining that Guerin was not disabled. Third, Guerin argues that the ALJ's conclusion is not supported by substantial evidence.

A

First, Guerin contends that he did not knowingly and voluntarily waive his right to counsel, and that he was prejudiced by the lack of adequate representation. Under 42 U.S.C. § 406, a person claiming disability benefits has a right to counsel. The Secretary has the duty to inform a claimant of this right. Clark v. Schweiker, 652 F.2d 399, 403 (5th Cir. Unit B July 1981). An intelligent waiver usually requires an explanation that the claimant that would pay no greater fee than twenty-five percent of

his recovery. See Thompson v. Sullivan, 933 F.2d 581, 584-85 (7th Cir. 1991); Smith v. Schweiker, 677 F.2d 826, 829 (11th Cir. 1982); Clark, 652 F.2d at 403-04.

In the instant case, the ALJ informed Guerin that he had the "right to be represented by an attorney or other qualified person." The ALJ failed, however, to inform Guerin of the possibility of obtaining representation on a contingency basis, or that the maximum fee for that contingency representation would not exceed twenty-five percent of recovery. Accordingly, we assume that Guerin did not make a knowing and voluntary waiver of counsel.

A flawed waiver of counsel will require remand, however, only when the record reveals evidentiary gaps that result in unfairness or clear prejudice. See Edwards v. Sullivan, 937 F.2d 580, 586 (11th Cir. 1991); Goodman v. Richardson, 448 F.2d 388, 389 (5th Cir. 1971). Accordingly, when an unrepresented claimant appears before the ALJ, the ALJ must "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." Kane v. Heckler, 731 F.2d 1216, 1219-20 (5th Cir. 1984) (internal quotations omitted). Failure to fulfill this heightened duty is cause to remand for the gathering of additional evidence if the claimant shows that, "had the ALJ done his duty, [the claimant] could and would have adduced evidence that might have altered the result." Id. at 1220 (emphasis added).

In the instant case, our review shows that the ALJ "scrupulously and conscientiously" developed the record. First,

the ALJ admitted into the record a letter and numerous medical reports from various doctors and a psychologist concerning Guerin's physical and mental condition. Second, the ALJ admitted the testimony of Guerin, his wife, and his friend into the record. Third, at Guerin's request, the ALJ asked pertinent questions to Guerin's wife. During these questions, the ALJ asked Guerin's wife to assure that the ALJ was not asking questions that Guerin was opposed to. Fourth, the ALJ asked Guerin if there was any further evidence that he would like to introduce. Finally, we note that Guerin does not argue that new evidence that the ALJ failed to incorporate into the record would change the result of the hearing. See 42 U.S.C. § 405(g) (1988) (allowing a court to remand "only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding"). Accordingly, the ALJ fully developed the record and, thus, Guerin was not prejudiced by his lack of counsel.

B

Second, Guerin contends that the ALJ improperly applied the Medical-Vocational Guidelines of the Social Security regulations because the relevant regulations do apply to a person of his age and education. In evaluating a claim for disability, the ALJ conducted a five-step analysis to determine if Guerin was "disabled." Under this analysis, the ALJ must determine that:

(1) the claimant is not presently working, 20 C.F.R. § 404.1520(b); (2) the claimant has a severe impairment, 20 C.F.R. § 404.1520(c); (3) the impairment is not listed in, or equivalent to, an impairment listed in Appendix 1 of the Regulations, 20 C.F.R. § 404.1520(d); (4) the impairment prevents the claimant from doing past relevant work, 20 C.F.R. § 404.1520(e); and (5) the impairment prevents the claimant from doing any other substantial gainful activity. 20 C.F.R. § 1520(f).

Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990). In the instant case, the ALJ found that Guerin was not disabled under step five because he was qualified for other, light-level work under the Medical-Vocational Guidelines. Guerin disputes this finding on the grounds that the Medical-Vocational Guidelines not apply to his case. See Lawler v. Heckler, 761 F.2d 195, 197 (5th Cir. 1985) (holding that the Medical-Vocational Guidelines may be used to determine the availability of alternate work only if their evidentiary underpinnings coincide with the claimant's case). Guerin argues that Rules 202.13 and 202.14 do not apply to his case because of his age. The complete lack of merit of this argument is shown by the fact that Guerin's age at the time of the hearing-- fifty-two years--falls near the center of the fifty to fifty-four year old range contemplated by Regulation 20 C.F.R. § 404.1563(c). Next, Guerin appears to argue that his level of education, a high school diploma and approximately two years of college, does not fit the Medical-Vocational Guidelines. Rules 202.13 and 202.14, however, refute Guerin's contention by applying to claimants with at least a high school education. Thus, given Guerin's age and educational level, the ALJ did not err in using the Medical-

Vocational Guidelines in determining that Guerin was qualified for light-level work and, thus, not disabled.¹

C

Finally, Guerin contends that the ALJ's decision that Guerin's physical and mental problems did not prevent him from engaging in light-level work was not supported by substantial evidence. Guerin argues that the record evidence shows that his physical and mental ailments are so severe that they prevent him from engaging in such activities. We review Guerin's claim to determine whether the record as a whole provides substantial evidence to support the ALJ's finding. 42 U.S.C. § 405(g) (1988); Selders, 914 F.2d at 617. A finding of no substantial evidence is warranted only if no credible evidentiary choices or medical findings exist to support that ALJ's decision. Johnson v. Bowen, 864 F.2d 340, 343-44 (5th Cir. 1988) (citations omitted). In our examination, we are conscious that we may not reweigh the evidence. Cook v. Heckler, 750 F.2d 391, 392 (5th Cir. 1985); Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983).

¹We note that Guerin argues that certain of his problems, e.g., mental problems, constituted nonexertional impairments under 20 C.F.R. 404, Subpt. P, App. 2 Rule 200.00(e), thus, making Rules 202.13 and 202.14 inapplicable for determining the availability of light-level work. As discussed in Part C of this opinion, infra, these problems of Guerin's are not so severe as to impair his ability to perform light-level work. Thus, Guerin's arguments that his nonexertional impairments prevented the ALJ from using Rules 202.13 and 202.14 fail.

A claimant has the initial burden of showing that he was disabled. Selders, 914 F.2d at 618. Once a claimant establishes his disability, the burden shifts to the Secretary to show that the claimant is able to perform other gainful employment. Id. If the Secretary points out other gainful employment, the burden shifts back to the claimant to show that his impairments prevent his performance of such other work. Id.

In the instant case, the ALJ found that Guerin had carried his initial burden of proving that his impairments prevented him from performing his former job. The ALJ also found that Guerin was able to perform light-level work. In effect, Guerin argues that either the Secretary failed to prove that he could do light-level work or that he rebutted that finding.

Guerin argues that the record does not provide substantial evidence that his physical impairments prevent him from performing light-level work. Specifically, Guerin asserted at the hearing that he experienced dizziness, arm and hand numbness, and neck and shoulder pain. Regulation 20 C.F.R. §§ 404.1567(b) and 416.967(b) indicate that light-level work involves lifting between ten and twenty pounds, as well as either a significant amount of sitting while handling arm or leg controls or a significant amount of walking. At the hearing, Guerin indicated that he could lift fifteen to twenty pounds. Further, Guerin indicated that he drove approximately 200 miles per week, including out-of-town trips, and that he occasionally drove a motorcycle. Both activities involve

sitting and operating leg and arm controls. Guerin also testified that he could walk up to half a mile. Further, pain is disabling only if it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." Selders, 914 F.2d at 618-19 (citations omitted). Here, a letter from one doctor indicated that Guerin's physical pain had responded positively to treatment. Guerin admitted at the hearing that he was not taking any prescription medication for his pain. Moreover, of the medical reports reviewed by the ALJ, none stated that Guerin's physical impairments prevented him from performing light-level work, and one doctor stated that Guerin could perform nonstrenuous work. Thus, the ALJ's finding with regard to the lack of severity of Guerin's physical problems is fully supported by substantial evidence on the record.

Guerin also argues that there was insufficient evidence to support a finding that his mental problems prevented him from engaging in light-level work. At the hearing, Guerin presented evidence, including the report of a psychologist, that he was slower than average; was suspicious and mistrustful in relationships; suffered from anxiety, a paranoid personality disorder and mild depression; and had a "unique" personality. Further, the record indicates that Guerin had taken two prescription drugs for his mental condition. Against this evidence, the ALJ weighed the statement of Guerin's wife that he was "congenial," Guerin's own statement that he visited friends,

and Guerin's admission that, at the time of the hearing, he was no longer taking any medication for his mental problems. Further, Guerin did not list any mental problems when he initially applied for disability benefits. See Pierre v. Sullivan, 884 F.2d 799, 802 (5th Cir. 1989) (viewing the claimant's post-hoc claim of mental impairment with suspicion when the claimant failed to list mental problems on his initial application for disability benefits). In effect, Guerin asks this court to reweigh the evidence before the ALJ. This we cannot do. Cook, 750 F.2d at 392. Accordingly, we hold that the ALJ's finding that Guerin's mental problems will not prevent him from engaging in light-level work is fully supported by substantial evidence on the record.

IV

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.