IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8712
Summary Calendar

MATTIE SUE RODRIGUEZ,

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-872)

(August 25, 1994)

Before SMITH, WIENER, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Mattie Sue Rodriguez appeals from her denial of Supplemental Security Income ("SSI") benefits by the Secretary of Health and Human Services. Concluding that the district court correctly affirmed the findings of the administrative law judge ("ALJ") on

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

all points except for the determination of the side-effects of Rodriguez's medication, we affirm in part and vacate and remand in part for further consideration.

I.

Rodriguez applied for SSI on August 1, 1989, alleging disability on account of back problems and pinched nerves. After her application was denied by both the state agency and the Social Security Administration ("SSA"), Rodriguez had a de novo hearing before the ALJ. Finding that Rodriguez was not eligible for SSI, the ALJ also rejected her claim, and the decision was appealed to the Appeals Council, which remanded to the ALJ for rehearing and further consideration of Rodriguez's June 1990 hospitalization and for a consultative medical examination.

After considering the new evidence presented by Dr. Barry Portnoy, Rodriguez's examining physician, Dr. Arthur Briggs, a medical advisor called by the ALJ, and a vocational expert ("VE"), the ALJ concluded that Rodriguez was not disabled and was capable of performing jobs identified by the VE. The Appeals Council denied Rodriguez's request for a rehearing, thus rendering the ALJ's decision the final opinion of the Secretary.

Pursuant to 42 U.S.C. § 405(g), Rodriguez appealed to the district court. A magistrate judge issued a report and recommendation in favor of the ALJ's decision, and the district court subsequently affirmed. This appeal follows.

II.

Rodriguez raises several issues on appeal. She first contends that the ALJ erred as a matter of law in weighing more heavily the testimony of Briggs, a non-examining physician, over that of Portnoy, the examining physician. Rodriguez's second issue on appeal is that the ALJ failed to consider adequately the side-effects of Rodriguez's medication and the resulting impact on her ability to work. Rodriguez next asserts that the ALJ concluded erroneously that she was capable of performing jobs described by the VE and that such jobs were available in the local economy. Finally, Rodriguez contends that the ALJ's reliance upon evidence not made available to her attorneys denied her due process.

A.

Our review of the Secretary's final decision is limited to two inquiries: (1) whether substantial evidence of record supports the Secretary's decision and (2) whether the decision comports with relevant legal standards. Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). "Substantial evidence is more than a scintilla and less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Muse, 925 F.2d at 789. In applying this standard, we must review the entire record to determine whether such evidence is present. Singletary v. Bowen, 798 F.2d 818, 822-23 (5th Cir. 1986). Yet, "we may neither reweigh the evidence in the record nor substitute our

judgment for the Secretary's." Hollis v. Bowen, 837 F.2d 1378, 1382 (5th Cir. 1988). If supported by substantial evidence, the decision of the Secretary is conclusive and must be affirmed. Richardson v. Perales, 402 U.S. 389, 390 (1971).

In order to qualify for SSI benefits, the claimant must prove that she is disabled within the meaning of the Social Security Act. Cook v. Heckler, 750 F.2d 391, 393 (5th Cir. 1985). The Secretary has promulgated a five-step sequential process by which the determination of a claimant's disability is to be conducted: (1) whether she is currently working in gainful activities; (2) whether she has a severe impairment; (3) whether the impairment is sufficient under the regulations to support a finding of disability; (4) whether the claimant is capable of performing work undertaken in the past; and (5) whether her residual functional capacity is sufficient to allow her to perform certain employment. See 20 C.F.R. § 404.1520(b)-(f) (1989).

The claimant has the burden of proof on the first four steps, and, upon the satisfaction of this requirement, the burden shifts to the Secretary to prove that the claimant is capable of performing work in the national economy and that such work is available. Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991) (per curiam) (citing Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987)). A finding that the claimant has not carried her burden at any of the first four stages of the review is "conclusive and terminates the analysis." Lovelace v. Bowen, 813 F.2d 55, 58 (5th Cir. 1987).

B.

Rodriguez first alleges that the ALJ erred in failing to give the proper weight to the testimony of Portnoy, the examining physician. Rodriguez contends that, as a matter of law, the report of the non-examining physician (Briggs) does not provide substantial evidence to affirm the ALJ's decision. "`[O]rdinarily the opinions, diagnoses, and medical evidence of a treating physician who is familiar with the claimant's injuries, treatment, and responses should be accorded considerable weight in determining disability.'" 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, however, has the sole responsibility to determine the claimant's medical status; he "`is entitled to determine the credibility of medical experts as well as lay witnesses and to weigh their opinions and testimony accordingly.'" Moore, 919 F.2d at 905 (quoting Scott, 770 F.2d at 485).

We agree with the district court that the Moore standard of deference to the examining physician is contingent upon the physician's ordinarily greater familiarity with the claimant's injuries. As in this case, however, where the examining physician is not the claimant's treating physician and where the physician examined the claimant only once, the level of deference afforded his opinion may fall correspondingly. Under these circumstances, the ALJ's decision to weigh Briggs's testimony more heavily does not amount to reversible error.

Our decisions in Johnson v. Harris, 612 F.2d 993 (5th Cir.

1980), and Strickland v. Harris, 615 F.2d 1103 (5th Cir. 1980), do not conflict with our holding today. In Johnson, we remanded to the ALJ in part because the only physicians who testified as to the claimant's medical condition were SSA-appointed, non-examining physicians. 612 F.2d at 998. In contrast, the ALJ in this case heard testimony from both examining and non-examining physicians.

Similarly, our decision to reverse in Strickland was predicated upon a finding that the non-examining physician "venture[d] a conclusion based on a report by an examining psychiatric expert that the latter declined to make and that is not supported by the latter's observations or findings." 615 F.2d at 1110. Briggs did not venture in this case to make conclusions that Portnoy felt he could not make on direct examination; rather, Briggs offered an independent medical opinion based upon his examination of the report submitted by Portnoy.

We also find that substantial evidence exists to support the ALJ's decision to accept Briggs's assessment of Rodriguez's residual functional capacity.[1] Briggs did not contradict Portnoy's findings as to the clinical nature of Rodriguez's disabilities))her January 28, 1992, examination revealed, per Portnoy's conclusions,

[1] The record reflects that as to the other medical conditions (e.g., congestive heart failure), Briggs's testimony and Portnoy's findings are not sufficiently at odds to merit scrutiny. Rather, the major sticking point, and the determinative one as far as Rodriguez's ability to work is concerned, appears to be the evaluation of functional capacity.

We also dispose of Rodriguez's claim that the ALJ's decision was irretrievably tainted by his inaccurate factual assumption that she was capable of carrying a nine-year-old child. This factual error notwithstanding, the ALJ had substantial evidence upon which to base his determination regarding Rodriguez's residual functional capacity.

that she could tandem walk, walk on her heels and toes without great difficulty, and bend and lift an office chair without difficulty.

The two physicians diverged, however, in their individual conclusions from this evidence. Portnoy noted that, despite her apparent ability to lift in excess of 20 pounds, Rodriguez complained that her left shoulder and dorsal spine pain limited her carrying capacity. As such, Portnoy indicated a lifting limitation of 5-10 pounds. In contrast, Briggs acceded to Portnoy's findings regarding the limitations posed by Rodriguez's left arm but concluded that Portnoy's objective findings did not support a 10-pound limitation. The ALJ noted correctly that Portnoy's decision to recommend a 10-pound limitation was based upon Rodriguez's own statements, independently of the objective lifting evidence to the contrary.[2]

Hence, Briggs's determination that Rodriguez could perform light work was based upon Portnoy's objective examination findings. Briggs did not challenge Portnoy's objective data; he merely offered an independent medical interpretation of Rodriguez's test results. Although we might agree with Rodriguez that, all other things being equal, the ALJ could have deferred to the examining physician's intuition that Rodriguez's personal complaints were sufficient to trump the objective medical findings, we are persuaded that substantial evidence exists to support the ALJ's

[2] The "per pt" notation in Portnoy's report indicates that the lifting limitation was a result of Rodriguez's complaining of residual pain.

decision to credit Briggs's testimony more heavily. Because the ALJ is entitled to determine the credibility of medical experts, Scott, 770 F.2d at 485, and because we may not substitute our judgment for the Secretary's, Moore, 919 F.2d at 905, we affirm the ALJ's weighing of the Briggs testimony.

C.

Rodriguez next alleges that the ALJ erred in failing to consider the side-effects of her prescribed medication as they relate to her ability to work. Rodriguez testified at the hearing that her medication induced drowsiness and compromised her ability to work for any period of time. Assuming the validity of this testimony, the VE agreed that Rodriguez would be incapable of performing a home companion job. The ALJ, however, rejected Rodriguez's side-effects testimony because she had not complained previously of these side-effects and because no evidence had been presented that she could not take a different medication with fewer disabling side-effects.

Because we refuse to hazard a guess as to whether Rodriguez's failure to complain previously of these side-effects was sufficient, in and of itself, to move the ALJ to discount the testimony, we remand for further review by the ALJ. Where the ALJ's decision could have been predicated upon Rodriguez's failure to prove that medication was available that was less prone to produce side-effects, we agree with Rodriguez that the ALJ's failure to solicit medical testimony regarding the possibility of substituting

different medications constitutes error. See, e.g. Cowart v. Schweiker, 662 F.2d 731, 737 (11th Cir. 1981) ("It would have been appropriate for the administrative law judge to have sought further medical evidence, or to have made some further inquiry, since appellant raised the question.").

We do, however, draw a much narrower rule for the remand than Rodriguez suggests. Although the ALJ must consider subjective evidence of pain, Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. 1981), it is within his discretion to determine the weight he ascribes to such subjective, non-medical judgments, Jones v. Heckler, 702 F.2d 616, 621-22 (5th Cir. 1983). "[A] factfinder's evaluation of the credibility of the subjective complaints is entitled to judicial deference if supported by substantial record evidence." Villa, 895 F.2d at 1024.

Hence, if on remand the ALJ is not presented with any objective evidence that the medication as prescribed engenders the purported side-effects, he is entitled to make a decision as to the potential inhibitory effect of the medication on Rodriguez's employment solely on the basis of the credibility of her testimony. Because Rodriguez has the burden to prove her inability to work, Wren, 925 F.2d at 125, we do not impose upon the ALJ an affirmative duty to solicit medical testimony confirming Rodriguez's alleged side-effects. Only where Rodriguez satisfies her burden of production of such evidence must the ALJ then solicit expert medical testimony regarding the availability of other medications and their potential impact on Rodriguez's ability to find employ-

ment.

D.

Rodriguez also alleges that the Secretary failed to meet her burden to prove that Rodriguez could perform other jobs and that such jobs existed.[3] Neither party disputes that at the fifth prong of the disability evaluation process, the burden shifts to the Secretary to prove that, in light of the claimant's age, work experience, education, and residual functional capacity, gainful employment is available. Wren, 925 F.2d 125. When faced with a hypothetical purporting to reflect Rodriguez's medical condition, the VE identified the jobs of hand lacer and subsequently of home companion as within her abilities. The VE conceded on cross examination that the hand lacer job could not be performed by someone with Rodriguez's difficulty in grasping her left hand, but he asserted that the home companion job was still applicable.

Rodriguez contends, however, that the VE's statements on cross-examination that Rodriguez's difficulty grasping with the left hand "might limit her ability to perform [the home companion] job" amount to a concession that the home companion job was also unavailable to her. We disagree. First, it is uncontested that

[3] We are unsure, after reading Rodriguez's briefs, whether she is contesting the hypothetical posed by the ALJ to the VE. The district court records appear to reflect that Rodriguez raised this issue, but her briefs submitted with this appeal are more ambiguous. Assuming that she has raised the issue in this court, we find no error with the hypothetical. Where the hypothetical reasonably incorporated the disabilities recognized by the ALJ and where Rodriguez had the opportunity at the hearing to correct any defects, we uphold the ALJ's use of the hypothetical. See Morris v. Bowen, 864 F.2d 333, 336 (5th Cir. 1988).

the VE testified that several thousand home companion jobs exist in the local and national economies.

> The Secretary can meet its burden to show the existence of employment for the applicant by pointing to `testimony at the hearing that there are a number of jobs suited to the Appellant's capabilities which were available to him in his geographic locale.'

Morris, 864 F.2d at 335-36 (quoting Fortenberry v. Harris, 612 F.2d 947, 950 (5th Cir. 1980)). The VE's statements are sufficient to discharge the Secretary's duty.

Second, the ALJ had substantial evidence from which to conclude that the VE's statements regarding Rodriguez's limitations with her left hand did not disqualify her from the home companion market, but only might limit her ability to perform this job effectively. The ALJ was reasonable in not construing the VE's comments as a complete disqualification of Rodriguez from the job market. As such, the VE was not required to provide a second estimate as to the number of home companion jobs available for left-hand-limited persons; the Fortenberry duty had been discharged previously.

We also disagree with Rodriguez that the failure to incorporate the Dictionary of Occupational Titles ("DOT") job descriptions into the ALJ's decision is error. We have never held that use of the DOT is required; to the contrary, we have reversed decisions where the ALJ has relied upon the DOT to the exclusion of a VE. See Fields v. Bowen, 805 F.2d 1168, 1170 (5th Cir. 1986). The DOT is not "similar evidence" to that of the VE and cannot satisfy the Secretary's burden. Id. (citations omitted) ("[T]he Secretary must

produce `expert vocational testimony or other similar evidence' to establish that jobs exist in the national economy that the applicant can perform."). We continue to assert that the vocational expert "is able to compare all the unique requirements of a specified job with the particular ailments a claimant suffers in order to reach a reasoned conclusion whether the claimant can perform the specific job." Id. We therefore find no reversible error in the ALJ's use of the VE testimony to satisfy the Secretary's burden.

E.

Rodriguez finally asserts that the ALJ's reference in the second hearing to the transcript of the first hearing, without first providing her with a copy of this transcript, violates both the express requirements of the SSA and her constitutional right to due process. We agree with Rodriguez that, according to the SSA's procedure manual ("HALLEX"),[4] the record of a prior hearing, where that record is "relevant to the current claim," should be included in the proposed exhibits list. See HALLEX, I-2-115 (issued Mar. 31, 1992). HALLEX also provides, however, that the listing of a proposed exhibit does not require the SSA to disseminate the exhibit; the claimant must request it. Id. at I-2-135 ("If a claimant or representative asks to examine the record . . .") (emphasis added). We do not construe these two sections, taken

[4] As neither party has briefed the court on the legal enforceability of the policy manual, we need not reach the question and assume, for the purposes of this analysis only, that the guidelines create cognizable legal rights.

together, to create an affirmative duty on the part of the SSA to provide claimants with copies of either listed or unlisted exhibits. The plain language of HALLEX suggests that the manual is intended to create guidelines for the use of the hearing office staff, not to bind the SSA to certain procedural requirements.

Even assuming that HALLEX required the SSA to provide Rodriguez with copies of the first transcript, we would not find its failure to do so reversible error. Rodriguez has not alleged any foul play on the part of the SSA stemming from its failure to include the first hearing transcript on the exhibits list. Hence, we are confronted with Rodriguez's own failure to review the first transcript, not with the SSA's attempt to deprive her of the opportunity to do so. Where, as in this case, Rodriguez was represented by legal counsel at the second hearing (and by a legal assistant in the first hearing), and where seven months passed between the two hearings, we would expect Rodriguez's counsel, in the due diligence of preparing for the second hearing, to have examined all prior records. Whether the transcript was listed as a proposed exhibit is immaterial; Rodriguez's counsel had every opportunity to inspect the record. We refuse to attribute fault to the SSA for counsel's oversight.

We also reject Rodriguez's claims that the failure to list the first hearing transcript as a proposed exhibit amounts to a due process violation. Goldberg v. Kelly, 397 U.S. 254 (1970), and Mathews v. Eldridge, 424 U.S. 319 (1976), upon which Rodrgiuez relies, are inapposite. Both cases involved the deprivation of a

property right))the Secretary was attempting to terminate the Social Security benefits of appellants. The Court's decisions to require specific due process requirements under those circumstances were predicated on the prior maturation of a vested property right. See Mathews, 424 U.S. at 333; Goldberg, 397 U.S. at 264. Because Rodriguez has not been receiving benefits and thus has no vested property right, we refuse to apply the Mathews and Goldberg tests.

II.

We AFFIRM in regard to all of the findings of the ALJ, with the exception of his determination of the side-effects of Rodriguez's medication on her ability to find gainful employment. As to that issue, we VACATE and REMAND for further proceedings in accordance with this opinion.