UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8746
Summary Calendar

SHIRLEY A. BUNTON,

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
(A-92-CA-412JN)

(August 22, 1994)

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

GARWOOD, Circuit Judge:

Plaintiff-appellant Shirley Bunton (Bunton) seeks judicial review of the final decision of the Secretary of Health and Human Services (the Secretary) denying her application for disability benefits under the Social Security Act, 42 U.S.C. § 401 *et seq*.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(the Act). The district court granted summary judgment in favor of the Secretary, and we affirm.

Facts and Proceedings Below

Bunton was born in 1961, has a seventh grade education, and has past relevant work as a cook. Medical evidence in the record reflects that she injured her back in February 1987 and was examined by Dr. John Obermiller the following April for pain in her right leg, hip, and back. Dr. Obermiller concluded that Bunton suffered from a lumbar disc disease at the L5-S1 level and ordered an epidural steroid injection to reduce the bulging of the disc. The injection led to significant improvement in Bunton's condition, and she was released from Dr. Obermiller's care on May 13, 1987. By November, however, Bunton's pain had returned. Dr. Obermiller prescribed a second injection and physical therapy, but after her symptoms showed only slight improvement, he referred her to Dr. Frosty Moore, an orthopedic surgeon, for possible back surgery.

Dr. Moore examined Bunton on September 9, 1988, and determined that she had full range of motion in her lower back, her reflexes and sensation were intact, and no pain was present in either leg. However, a CT scan revealed bulging discs at the L4-5 and L5-S1 levels. Dr. Moore did not recommend surgery, but rather stated Bunton could perform work not requiring lifting over fifty pounds, constant sitting and frequent standing, pushing, pulling, or climbing. The following February, Dr. Obermiller reevaluated Bunton for the Texas Rehabilitation Commission (TRC) and found that, although she complained of mild back and leg pain which somewhat limited her activities, her physical condition had not

changed. Dr. Obermiller recommended that because Bunton weighed 230 pounds, she could improve her physical functioning with weight loss and conditioning exercises.

On October 1, 1990, Bunton filed an application for social security disability benefits because of her back injury and weight problem. Dr. Obermiller again examined her for the TRC in January 1991, at which time her weight had increased to 240 pounds. Dr. Obermiller found that while her range of motion had deteriorated, she showed no signs of muscle spasm, atrophy, or weakness. He concluded that Bunton had a mild degenerative lumbar disc and recommended that she institute a walking program to lose weight and a fitness program to strengthen her lower back and abdominal muscles.

The Social Security Administration (SSA) denied Bunton's application initially and on reconsideration. Because Bunton failed to appear for a medical examination as instructed, the SSA based its decision on medical reports provided by Drs. Obermiller and Moore. Bunton then requested review by an administrative law judge (ALJ) but elected not to attend the hearing. The ALJ ruled on September 24, 1991, that Bunton was not disabled as defined by the Act because she possessed the functional capacity to do a full range of light work.[1] After the Secretary declined to review the

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[1] The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Secretary evaluates disability claims through a five step process:

"(1) Is the claimant currently working? (2) Can the

ALJ's decision, Bunton filed the present complaint in the court below pursuant to section 405(g) of the Act. The magistrate judge recommended the Secretary's decision be affirmed, but modified to reflect that Bunton could only perform *sedentary* work rather than *light* work. Over Bunton's objections, the district court adopted the magistrate judge's report, modified the Secretary's decision, and entered summary judgment for the Secretary on October 7, 1993. Bunton brings this appeal.

Discussion

First, Bunton contends that she did not knowingly waive her right to counsel at her hearing before the ALJ. There is no constitutional right to government-furnished counsel in social security proceedings, *Brandyburg v. Sullivan*, 959 F.2d 555, 562 (5th Cir. 1992), but claimants have a statutory right to counsel (other than at government expense) under the Act. 42 U.S.C. § 406; 20 C.F.R. § 404.1700. The claimant must be properly informed of this right, but may waive it if given sufficient notice enabling her to decide whether to retain counsel. 42 U.S.C. § 406(b)(1)(c); *Clark v. Schweiker*, 652 F.2d 399 (5th Cir. Unit B July 1981); *see*

> 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 her previous relevant work? and (5) Is there other work available in the national economy that the claimant can perform?" *Kershaw v. Shalala*, 9 F.3d 11, 12-13 n.1 (5th Cir. 1993); 20 C.F.R. §§ 404.1520, 416.920 (1992).

The ALJ concluded that Bunton was unable to return to her past relevant work as a cook, but she could perform other jobs available in the national economy.

also Thompson v. Sullivan, 933 F.2d 581, 584 (7th Cir. 1991). This Court has identified certain factors to guide the courts in judging the sufficiency of the notice. The Secretary should normally advise the applicant that there may be organizations in the area offering free representation, if that is the case. *See Clark*, 652 F.2d at 403; *Benson v. Schweiker*, 652 F.2d 407, 408 (5th Cir. Unit B July 1981). The notice at issue in *Clark* made no reference to free legal representation. Thus, as the Court reasoned, "the natural assumption from this notice [wa]s that any representative whom the claimant may seek w[ould] have the right to demand a fee for these services." *Clark*, 652 F.2d at 403. In addition, the claimant should be informed that attorneys may represent the claimant on a contingent basis and that the fee cannot exceed twenty-five percent of the amount of benefits received. *Clark*, 652 F.2d at 403; *Benson*, 652 F.2d at 408.

The pre-hearing written notice Bunton received included a list of organizations capable of locating private attorneys who "may be willing to represent [her] and not charge a fee unless [her] claim is allowed." This phrasing may actually be more understandable to a layperson than the legal nomenclature "contingent fee" used in *Clark*. The notice Bunton received did not specify that the fee was limited to twenty-five percent of her potential benefits, but it did inform her that any fee charged must be approved by the SSA. The notice clearly informed Bunton that "if [she was] not able to pay for representation and [she] believe[d she] might qualify for *free legal representation*, the list contains names of organizations

which may be able to help [her]" (emphasis added).[2] There is nothing to suggest Bunton was misled. We conclude that this notification complies with the requirements set forth in *Clark* and *Benson*,[3] and accordingly, Bunton knowingly effectuated a waiver of her right to counsel at the hearing.

Our result would not change had we found Bunton's notices insufficient. By not raising this issue before the Appeals Council, at which time she *was* represented by counsel,[4] Bunton failed to exhaust administrative remedies. *Muse v. Sullivan*, 925 F.2d 785, 791 (5th Cir. 1991). As such, this claim is not properly

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[2] The notice specified that the list providing this information was enclosed. We may assume, therefore, that Bunton received the list, or, if for some reason the list was not attached, she was at least on notice that such a list existed and it was her responsibility to contact the office which had sent the notice. Bunton was advised in another notice that there were "groups [which] may be able to give you the name of a lawyer who will help you for free. Contact any Social Security office if you want the names of these groups."

[3] The Seventh and Eleventh Circuits have interpreted *Clark* as invalidating any notice of hearing that fails to specify that no more than twenty-five percent of the claimant's recovery can be paid in fees. *See Thompson v. Sullivan*, 933 F.2d 555, 562 (7th Cir. 1991); *Edwards v. Sullivan*, 937 F.2d 580, 585 (11th Cir. 1991). In both *Thompson* and *Edwards*, as in *Clark* and *Benson*, the claimant appeared at the hearing, and the ALJ failed to properly inform her of the limit on fees. Bunton, on the contrary, chose not to attend the hearing before the ALJ; thus the Secretary was never afforded the opportunity to explain any misunderstandings concerning the notice. Because Bunton did not even seek *free* legal representation, we cannot say the lack of information on fee limits prevented her from obtaining *paid* representation.

Clark observed "while we do not determine that the notice is intended to discourage a claimant from obtaining the aid of counsel, we do determine that the entire tone of the notice is more than likely to have that effect." *Id*. at 403. We cannot say that of the notices given Bunton here.

[4] Bunton's ability to find counsel to represent her before the Appeals Council suggests that she knew how to obtain legal representation but merely neglected to do so.

before us, and we are precluded from reviewing it. *Dominick v. Bowen*, 861 F.2d 1330, 1332 (5th Cir. 1988); 20 C.F.R. § 404.900 (indicating that a claimant's failure to follow administrative procedures will waive judicial review). Thus, Bunton has waived any claim she may have had concerning the sufficiency of the notice. In addition, this Circuit will not reverse the Secretary's decision for an improper waiver of counsel absent a showing of prejudice or unfairness. *Kane v. Heckler*, 731 F.2d 1216, 1220 (5th Cir. 1984). No such showing has been made here.

Bunton next challenges the district court's modification and affirmance of the Secretary's decision. Bunton argues that by determining the evidence did not support a finding that she could perform light work, the district court was required to remand the decision for a new hearing. However, when reviewing matters of law, the district court is empowered to affirm, modify, or reverse the decision of the Secretary, with or without remanding the cause for a rehearing. 42 U.S.C. § 405(g). Further, "[t]his court will not vacate a judgment unless the substantial rights of a party have been affected." *Mays v. Bowen*, 837 F.2d 1361, 1364 (5th Cir. 1988). The ALJ found Bunton capable of performing a full range of light work.[5] This finding necessarily included an implicit determination that she could also perform *less* strenuous sedentary

[5] Light work involves lifting no more than twenty pounds at a time with frequent lifting of no more than ten pounds, requires a significant amount of walking or standing, or involves sitting most of the time with some pushing and pulling. To be considered capable of performing a full range of light work, the claimant must have the capacity to do substantially all of these activities. *See* 20 C.F.R. § 416.967(b).

work.[6] In the present case, as in *Mays*, "[t]he fact that the United States magistrate agreed with only one of [several] determinations by the administrative law judge and consequently had to use a different disability table did not affect [the claimant's] substantial rights." *Id*. at 1364. A decision made under Rules 202.17 or 202.18, Table No. 2 Appendix 2, relating to sedentary work, rather than Rules 201.24 or 201.25 of Table No. 1, Appendix 2, relating to light work, will still result in a finding of "not disabled." Thus, since the Secretary's decision both before and after modification indicated Bunton was "not disabled," her substantial rights were not affected. *Id*.

Accordingly, we limit our review to whether the Secretary's decision, as modified, was supported by substantial evidence in the record. *See Anthony v. Sullivan*, 954 F.2d 289, 292 (5th Cir. 1992). We may not reweigh the evidence or substitute our own judgment for that of the Secretary, *Pierre*, 884 F.2d at 802, and all conflicts in the evidence are to be resolved by the Secretary, *Anthony*, 954 F.2d at 295. In this instance, the record clearly supports the determination that Bunton was capable of performing sedentary work. The medical evaluations performed by Drs. Obermiller and Moore satisfied the residual work capacity for sedentary work. For instance, Dr. Obermiller observed that:

> "[Bunton] would have no difficulties with any sedentary-type work which would require fine manipulations of the hand as she is able to hear, speak, understand and utilize her upper extremities without difficulty. [She]

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[6] Sedentary work involves lifting no more than ten pounds, frequent sitting, and occasional standing or walking. *See* 20 C.F.R. § 416.967 (a).

> may have some difficulty with heavy lifting or any prolonged stooping."

Neither physician advised Bunton to limit her activities, which currently include house cleaning, some gardening, and regular church attendance. Moreover, Bunton stated that she has not worked since 1980, but the injury which is alleged to have caused her disability did not occur until 1987. From this, the Secretary could reasonably conclude that Bunton's claimed disability was not the sole cause for her failure to work.

Bunton's remaining arguments are equally unavailing. Her weight does not entitle her to disability benefits. Obesity, if remediable, is not disabling, *Lovelace v. Bowen*, 813 F.2d 55, 59 (5th Cir. 1987), and Bunton has not lost weight or begun an exercise program as directed by physicians. Her subjective complaints of pain can constitute a disabling condition only when the pain is constant, unrelenting, and wholly unresponsive to therapeutic treatment. *Harrell v. Bowen*, 862 F.2d 471, 480 (5th Cir. 1988). But evaluating "a claimant's subjective symptoms is a task particularly within the province of the ALJ who has an opportunity to observe whether the person seems to be disabled." *Id*. (quotation omitted). In this instance, the ALJ did not abuse his discretion in discounting Bunton's complaints "based on the medical reports combined with her daily activities and her decision to forego [treatment]." *Griego v. Sullivan*, 940 F.2d 942, 945 (5th Cir. 1991).

Finally, in gauging Bunton's ability to work, the ALJ considered her age, education, and work history. Bunton contends,

however, that the ALJ erred by not including illiteracy as a limiting factor. This argument is without merit. The record reflects that Bunton has a seventh grade education and gives no indication of illiteracy. Indeed, the Secretary's regulations defining sedentary work apply to a person age 18-44 with a limited or less than limited education, even if the individual is illiterate. *See* 20 C.F.R. pt. 404 subpt. P, app. 2, § 201.00(i). Thus, a finding of illiteracy would not have altered the Secretary's decision.

Conclusion

Accordingly, the Secretary's decision denying benefits is AFFIRMED.