UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8758
Summary Calendar

SUZANNE MCEVOY,

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-1238)

(September 13, 1994)

Before THORNBERRY, SMITH, and WIENER, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

On November 28, 1990, Suzanne McEvoy applied to the Social Security Administration for Supplemental Security Income benefits, alleging disability since October 15, 1989, due to lung disease.[1]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Specifically, the medical records indicate that McEvoy suffers from chronic asthma. McEvoy also alleged in her

A hearing was conducted by an administrative law judge (ALJ), and McEvoy, her attorney, and a vocational expert attended.[2] The ALJ found McEvoy not disabled because she was capable of performing other jobs available in the economy. McEvoy requested review of this decision, but the Appeals Council denied that request, making the ALJ's decision the final decision of the Secretary of Health and Human Services (the Secretary).

McEvoy then filed suit in district court seeking review of the Secretary's decision. The district court affirmed the denial of disability benefits, and McEvoy timely appealed to this Court. We remand for the following reason.

Discussion

McEvoy makes numerous complaints about the hearing conducted by the ALJ. Essentially, however, McEvoy complains that there is not substantial evidence to support the Secretary's determination that she is not disabled. On review, this Court's function is to determine whether substantial evidence exists in the record as a whole to support the Secretary's factual findings. **Anthony v. Sullivan**, 954 F.2d 289, 292 (5th Cir. 1992). If the Secretary's findings are supported by substantial evidence, they are conclusive

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application for benefits, however, that she suffers from throat cancer. The record indicates, however, that McEvoy had benign polyps removed from her throat.

[2] A hearing was first scheduled for September 5, 1991, but then postponed to October 23, 1991. The October 23 hearing was commenced, but soon after the hearing was adjourned in order to provide McEvoy the opportunity to obtain a neurological consultative examination. The next hearing was held on March 24, 1992. It is this hearing that forms the basis of McEvoy's complaint.

and must be affirmed. 42 U.S.C. § 405(g); **See Richardson v. Persales**, 91 S.Ct. 1420, 1427 (1971). Substantial evidence is evidence which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion; it must be more than a scintilla, but it need not be a preponderance. **Richardson**, 91 S.Ct. at 1427. This Court may not reweigh the evidence or try the issues ***de novo***. **Cook v. Heckler**, 750 F.2d 391, 392 (5th Cir. 1985). Despite our limited review, however, it is essential that we examine the entire record "to determine the reasonableness of the decision reached by the Secretary and whether substantial evidence exists to support it." **Randall v. Sullivan**, 956 F.2d 105, 109 (5th Cir. 1992).

As claimant, McEvoy has the burden of proving that she is disabled within the meaning of the Social Security Act. **Fraga v. Bowen**, 810 F.2d at 1301. 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 twelve months." 42 U.S.C. § 423(d)(1)(A). In making a disability determination, the Secretary engages in a sequential evaluation process.[3] Once the claimant establishes

[3] In evaluating a claim of disability, the Secretary conducts a five-step sequential analysis by determining whether (1) the claimant is not presently working, (2) the claimant's ability to work is significantly limited by a severe physical or mental impairment, (3) the impairment meets or equals an impairment listed in the appendix to the regulations, (4) the impairment prevents the claimant from doing past relevant work, and (5) the impairment prevents the claimant from performing any other substantial gainful activity. 20 C.F.R. § 404.1520; **Muse v. Sullivan**, 925 F.2d 785,

disability, the burden shifts to the Secretary to show that there is other substantial gainful employment available which the claimant is able to perform. **Harrell v. Bowen**, 862 F.2d 471, 475 (5th Cir. 1988). If the Secretary fulfills his burden of demonstrating alternative employment exists, the burden then shifts back to the claimant to prove that he is unable to perform the alternate work. **Fraga**, 810 F.2d at 1302.

The ALJ found at step five that McEvoy was able to perform other work that existed in the national economy. Accordingly, the ALJ found that McEvoy was not disabled. The issue on appeal then becomes whether there is substantial evidence to support this finding.

During the hearing, the vocational expert testified that, taking environmental concerns and physical activity into account, McEvoy could be a ticket taker at a movie theater or a hostess in a restaurant as long as she did not clear tables or do lifting. The vocational expert also testified that McEvoy could be a hotel clerk in an environmentally controlled setting. When questioned by McEvoy's attorney, however, the vocational expert was unable to affirmatively state that given McEvoy's lung condition, she could actually perform these types of work if there were cigarette smoke or other environmental irritants in the air.[4] Specifically, the

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789 (5th Cir. 1991).

[4] McEvoy testified that she had to quit all of the other jobs that she had in the past because she could not breathe adequately under the given environmental conditions. McEvoy stated that she simply could not breathe in most environments due to her asthma and allergies.

vocational expert stated that whether an individual could be a theater ticket taker or a restaurant hostess would depend on the individual's pulmonary problem and ability to tolerate the surrounding air. The vocational expert hesitated to offer an opinion concerning whether McEvoy herself could perform the duties of a ticket taker if there were environmental irritants in the air. The vocational expert concluded by stating, "Someone with some degree of asthma might not be able to tolerate any of that. Somebody with another type of disorder with medication may be able to tolerate it." The vocational expert attempted to clarify his position, but he was cut off by the ALJ who determined that no further explanation was necessary.

McEvoy argues that the failure of the vocational expert's testimony to prove that she could affirmatively work in the jobs described, coupled with a letter submitted to the ALJ the day after the hearing, detracts from the vocational expert's opinion, thereby rendering his finding unsupported by substantial evidence. Specifically, McEvoy's treating physician wrote a letter to the ALJ advising the ALJ to pay very careful attention to any proposal regarding a work environment. The physician indicated that McEvoy could not be exposed to cigarette smoke or dusty environments and that work in a restaurant or hotel setting would expose her to undesirable quantities of cigarette smoke and air conditioning-related mold spores. Furthermore, the physician explained that McEvoy's sensitivity to these types of environmental exposures clearly exacerbated her illness.

Upon the record before us, we are unable to determine whether there is substantial evidence to support the Secretary's findings, because we cannot see that the ALJ relied on an opinion of the vocational expert which was based upon the physical conditions of McEvoy. The medical reports contained in the record clearly establish that McEvoy suffers from various types of pulmonary disorders which call into question some assumptions made by the vocational expert.

We note also that McEvoy raises an issue concerning the ALJ's failure to consider her mental impairment. McEvoy did not raise this issue in her application for benefits. It is, however, within the ALJ's discretion to order a consultative psychiatric examination if the situation so warrants. **Jones v. Bowen**, 829 F.2d 524, 526 (5th Cir. 1987). Based on our disposition of the case, it is unnecessary for us to reach this issue, but the Secretary may wish to consider the issue on remand.

Conclusion

Based on the foregoing, we remand this case to the district court for remand to the Secretary for further consideration consistent with this opinion.

REVERSED AND REMANDED.