

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8759
Summary Calendar

LULA KIRKSEY,

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 390)

(April 28, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

In March 1990 Lula Mae Kirksey applied for Social Security disability benefits and supplemental security income, claiming disability since September 1989 due to fibrositis. Kirksey's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

applications were denied initially and on reconsideration. Represented by counsel, Kirksey appeared for a hearing before an Administrative Law Judge (ALJ) on February 5, 1990. In March 1991, the ALJ determined that Kirksey was not disabled. On February 20, 1992, the Appeals Council denied Kirksey's request for review, making the ALJ's determination the final decision of the Secretary.

On April 10, 1992, Kirksey sought judicial review. Kirksey moved for summary judgment, and the magistrate judge recommended the denial of benefits be affirmed. Over Kirksey's objections, the district court adopted the magistrate judge's report, sustained the Secretary's decision, and dismissed the case. Kirksey now appeals.

OPINION

Kirksey argues generally that the ALJ's decision is not supported by substantial evidence and is contrary to law. She urges specifically that (1) the ALJ used the wrong legal standard to evaluate whether substantial evidence supported the Secretary's decision that Kirksey was not disabled, (2) the ALJ did not give proper weight to the physician's reports in the determination that Kirksey could perform other work, (3) the ALJ did not adequately consider Kirksey's subjective complaints of pain, and (4) the ALJ erred in failing to appoint a vocational expert.

Legal Standards to Determine Disability

Relying on Lovelace v. Bowen, 813 F.2d 55, 60 (5th Cir. 1987) (although person's demeanor may reflect level of chronic pain, the relevant question is the level of pain during work and not the level of pain at rest), Kirksey argues that the ALJ improperly

evaluated her using a "sit and squirm" standard based on his spontaneous impression of her level of pain at the hearing. 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 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, 416.920; Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991).

At step one, the ALJ found that Kirksey met the insured-status requirements for the relevant period and had not engaged in substantial gainful activity since September 21, 1989. At step two, the ALJ determined from reports of Kirksey's treating physician that Kirksey suffers from severe fibrositis. At step three, the ALJ found that she does not have an impairment or combination of impairments listed in, or medically equal to, one listed in the relevant index. At step four, the ALJ found that Kirksey was not disabled within the meaning of the Social Security Act; although she cannot perform her past relevant work as a custodian in the school system, she has the residual functional capacity (RFC) to perform the physical exertional requirements of medium work except for lifting more than 50 pounds. Because the

ALJ applied the proper legal standard in evaluating Kirksey's claim, the Court now examines the question whether the factual findings are supported by substantial evidence.

On review, this Court determines whether substantial evidence in the record as a whole supports the Secretary's factual findings to which the proper legal standards were applied. Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992). If substantial evidence supports such findings, they are conclusive. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It must be more than a mere scintilla, but it need not be a preponderance. Perales, 402 U.S. at 401. This Court does not reweigh the evidence; conflicts are for the Secretary to resolve. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990).

The claimant has the burden of proving that she is disabled within the meaning of the Social Security Act. Fraga v. Bowen, 810 F.2d 1296, 1301 (5th Cir. 1987). Disability is 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).

To determine whether substantial evidence of disability exists, four elements of proof must be weighed: "1) objective medical facts; 2) diagnoses and opinions of treating and examining

physicians; 3) claimant's subjective evidence of pain and disability; and 4) claimant's age, education, and work history." Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991). The entire record is reviewed to determine if such evidence is present. Villa v. Sullivan, 895 F.2d 1019, 1022 (5th Cir. 1990).

Objective Medical Facts

Kirksey suffers from fibrositis syndrome, myositis, and arthritis. R. 2, 145. At the time of the hearing, she weighed approximately 250 pounds and had a fifteen-year habit of smoking a pack of cigarettes a day. X-rays and an MRI scan of both the lumbar and cervical spines revealed no abnormalities, and a physical examination revealed no obvious synovitis or swelling in peripheral joints.

Diagnoses and Opinions of Treating and Examining Physicians

Kirksey's treating physician, Dr. Rosenberg, a rheumatologist, began seeing Kirksey in November 1983, at which time he diagnosed her with diffuse fibrositis and non-articular rheumatism. In September 1984 he hospitalized Kirksey for "severe left knee pain and inability to ambulate related to a work injury that she had suffered," but noted that her fibrositis and myositis remained stable. He continued seeing her intermittently for the next three years, and on September 28, 1987, he reported that her "most recent testing and evaluation has shown her to be in very good, excellent health . . . free of disease." Then on October 7, 1989, Dr. Rosenberg writes that although "she had been off medications for a long while, [] two weeks ago she was given severe tasks to do at

work . . . [which] caused a severe flare of her musculoskeletal pains and weaknesses. She has been unable to work ever since." His plan was to allow her to work as tolerated on light duty only.

On January 8, 1990, an examining physician, Dr. Holmes, noted that Kirksey was "released to work and subsequently fired [T]his patient would do excellent as a clerk and myofibrilitis would be absolutely no contraindication to being a clerk. I also think she could do her work with therapy at this point." In February 1990, Dr. Rosenberg reiterated that her prognosis is poor for any major further recovery and that she will need to be retrained for "sedentary [sic] type work" as she will not be able to resume any strenuous activity or similar occupation that she previously held. On March 6th, Dr. Rosenberg wrote that Kirksey "continues to be totally disabled from not only her work activities, but even from her daily activities of living, such as grooming, bathing and dressing herself." He opined that she is now completely disabled and this is due to her work-related injury and activities. This opinion was repeated on May 24th and December 19th.

Subjective Evidence of Pain and Disability

Kirksey testified at the hearing that she was injured on the job while working as a custodian and that she has been unable to return to work since the injury. She stated that now she has constant pain in her shoulders, lower back, knees, feet and hands for which she takes various medications, which are not always successful at alleviating her symptoms. She also complained that her hands get "sore in the joints," puffy, and inflamed. Kirksey

also informed the ALJ that she could walk only about two steps, she can be on her feet for about twenty minutes before becoming weak, she can sit for about an hour, and she is unable to dress herself or do housework.

Age, Education, and Work History

Kirksey was 42 years old when she appeared before the ALJ. She informed the ALJ that she completed high school and one year of college. Her previous employment had been as a school custodian.

The ALJ found Kirksey's allegations of constant pain were not credible or corroborated by the objective evidence of record, that there was substantial evidence to believe that Kirksey's fibrositis did not cause disabling pain, or that Kirksey suffered from a disability as defined by the Social Security Act.

Proper Weight Due to Physician's Reports

Kirksey argues that the ALJ erred by not relying on Dr. Rosenberg's reports concluding that Kirksey is totally disabled. Notwithstanding Kirksey's contention that the ALJ substituted his own evaluation of her medical condition, Dr. Rosenberg's reports are ambiguous: They diagnose fibrositis, arthritis, and synovitis, but her x-rays and an MRI scan revealed no abnormalities and his physical examination did not disclose any swelling of the joints; furthermore, Dr. Rosenberg rendered inconsistent opinions that Kirksey is unable to return to her former job and is totally disabled, and needs to be retrained for sedentary work. Dr. Rosenberg's files reflect that in January 1990 an examining physician, Dr. Peter Holmes, opined that "muscle strain is a small

component of her disease" and "[t]his patient would do excellent as a clerk and myofribitis would be absolutely no contraindication to being a clerk. I also think she could do her work with therapy at this point." It is within the ALJ's discretion to resolve conflicts in the evidence. Jones, 702 F.2d at 621. Moreover, the weight to be attributed to a physician's report depends upon the extent to which it is supported by specific clinical findings. Id. Dr. Rosenberg's conflicting conclusions respecting Kirksey's prognosis for employment in a sedentary capacity created internal discrepancies within the province of the Secretary to resolve. Id. The ALJ's decision to discount Dr. Rosenberg's unsupported medical findings based only on Kirksey's subjective complaints given during office visits and to rely on Dr. Rosenberg's opinions which are supported by objective medical evidence in the record (which show no physical impairment to support a finding of disability) for the conclusion that Kirksey was not disabled was proper. See Chaparro v. Bowen, 815 F.2d 1008, 1011 (5th Cir. 1987) (conflicts in the evidence, including those arising in medical opinions, are to be resolved not by the courts, but by the Secretary).

Subjective Complaints of Pain

Kirksey next argues that the ALJ failed to evaluate properly her complaints of pain. Because pain alone may support a finding of disability, the ALJ is required to consider the claimant's testimony as subjective evidence of pain. Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. 1981). "However, not all pain is disabling; moreover, subjective evidence need not be credited over

conflicting medical evidence. . . . At a minimum, objective medical evidence must demonstrate the existence of a condition that could reasonably be expected to produce the level of pain or other symptoms alleged." Anthony, 954 F.2d at 295-96. In order to be disabling, the "pain must be constant, unremitting, and wholly unresponsive to therapeutic treatment." Wren, 925 F.2d at 128. The ALJ weighed Kirksey's subjective complaints and determined that they were "credible only to the extent they serve to limit residual functional capacity to a medium level of exertion when considering evidence of record as a whole, including daily activities, medications taken, and their efficacy." Specifically, the ALJ noted that (1) Kirksey testified that only once or twice a month would medication fail to help her pain, and (2) she testified inconsistently that she could walk only about two steps, but that she goes grocery shopping with her family (although she prefers to find a store with a motorized cart) and that she needed help fixing her hair, but she attempted to dye her own hair. In the ALJ's view, "these inconsistencies cast doubt not only on her credibility, but for the remainder of the testimony as well." Because the ALJ determined that Kirksey exaggerated her symptoms and the medical evidence did not provide any basis to support her contention of constant, debilitating pain, the ALJ's conclusion that the pain Kirksey suffered would not prevent her from engaging in sedentary work was amply supported by the evidence.

Failure to Appoint Vocational Expert

Kirksey finally argues that the ALJ erred in failing to

appoint a vocational expert to provide testimony respecting Kirksey's ability to perform other jobs that exist in the national economy because she had a nonexertional limitation precluding the ALJ to apply the Medical-Vocational Guidelines (GRIDS). Because the ALJ determined that Kirksey could not perform her past work as a school custodian, he was then required to determine if she could perform any other work available in the national economy considering her age, education, work experience, and residual functional capacity. Fraga, 810 F.2d at 1304. When the claimant's characteristics correspond to criteria in the GRIDS and the claimant either "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 [GRIDS]" in his determination whether there is other work available that the claimant can perform. Id. After considering that Kirksey was 42 years old and had completed high school and one year of college, the ALJ determined that Kirksey's capacity for the full range of light work was not significantly compromised by non-exertional limitations, including pain; accordingly, no vocational expert was required.

AFFIRMED.