IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8826
Summary Calendar

VIRGINIA ASEBEDO,

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
(SA-92-CV-1069)

(August 3, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Virginia Asebedo appeals a judgment affirming the administrative denial of Social Security benefits. Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Asebedo filed for Social Security Income (SSI) and disability benefits in April 1990, alleging disability because of rheumatoid arthritis. The Secretary denied Asebedo's initial application and application for reconsideration. A hearing was then held before the Administrative Law Judge (ALJ). Asebedo testified at the hearing that she was thirty-four years old, had a tenth-grade education, and could read and write. She stated that she worked on an assembly line for Levi Strauss and for Data Point Corporation from 1979 to 1984, when she stopped working altogether because of the birth of her son.

Asebedo alleged an onset date of December 15, 1989, stating that in 1989 she suffered from swelling and that a doctor had diagnosed her as having rheumatoid arthritis, which caused her bones to inflate. Asebedo testified that she could walk for 30 minutes, after which she had difficulty sitting down, but then could walk for another 30 minutes after resting for two hours. She testified that standing and sitting for over 45 minutes caused her discomfort. She explained that she had to cut her hair because she could not close her hands around a hairbrush, and when her husband brushed her hair it hurt.

Asebedo testified that she was being treated with physical therapy and that she could perform light chores around the house such as laundry))so long as she did not lift heavy objects. She stated that she was treated by four doctors from May 1989 to March 1990, that two of the doctors did not know what was wrong with her, and that she stopped seeing doctors in March 1990 because she did

not have the money to pay for visits. She stated that she was treated with the anti-inflammatory medications Naprosyn and Indocin but that they did not relieve her pain. She explained that from May 1989 to March 1990 she was unable to lift a small bag of potatoes or carry her two-year-old son. She estimated that she could lift about ten pounds.

Asebedo objected to the calling of the vocational expert in her case, arguing that 20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00, sub-para. H, mandated a finding of disability. The ALJ overruled the objection.

Asebedo testified before the ALJ and the vocational expert that (1) she feels constant pain in her right hand; (2) she is right-handed; (3) she has difficulty grasping and holding things in her right hand; and (4) she can write with her right hand but feels pain after a period of writing.

The vocational expert opined that Asebedo had performed sedentary, semi-skilled work as a sewing machine operator and secretary; he testified that she had performed sedentary, unskilled work assembling photo albums and circuit boards. The expert testified that Asebedo's secretarial skills were transferable to other areas of work.

The ALJ then presented the expert with the following hypothetical:

> [A]ssume an individual of 34 years of age, with a tenth grade education, who is literate[.] [A]ssume that I find this individual suffers from rheumatoid arthritis to a degree that requires her to perform or renders her incapable of performing only sedentary work, at best, but requiring a sit/stand option. Assume as well that the

> rheumatoid arthritis leaves her with a limited use of her right hand for the performance of fine finger movements. Or . . . you may assume that there is an inability to perform jobs requiring bilateral manual dexterity. What job or jobs might exist in significant numbers for such an individual? Let me make clear that the inability to perform gross manual work is still present.

The expert opined that jobs were available as a receptionist for a beauty parlor, clerk in a laundromat, or a companion for the elderly and that well over 100,000 such positions were available in the national economy. Because of a lack of medical evidence, the ALJ ordered that Asebedo be examined by a rheumatologist.

Dr. Joel Rubenstein examined Asebedo on July 24, 1991, and determined that Asebedo did not have a destructive process affecting her hands or her wrists, that there was not an elevation of the sedimentation rate, and that her arthritis was well-regulated by gold therapy.

The ALJ found that, although Asebedo's rheumatoid arthritis was a severe impairment, the impairment was not "attended by clinical or laboratory findings which meet or equal in severity the medical criteria under section 1.02 of Appendix 1 of the Regulations." The ALJ found that Asebedo's testimony regarding her pain was credible "in so far as she cannot do more than sedentary work which permits alternate sitting and standing and does have fine bilateral manual dexterity." Finally, the ALJ determined that, although Asebedo was unable to perform her past relevant work, she could perform work as a receptionist, laundry clerk, or a companion for the elderly.

Asebedo unsuccessfully appealed the ALJ's decision to the

Appeals Council. She then filed suit with the district court, alleging that the Secretary's decision was not supported by substantial evidence because the ALJ relied upon the opinion of only one vocational expert over the criteria of disability described in 20 C.F.R. pt. 404, subpt. P, app. 2, sec. 201.00, sub-para H, example 1 ("example 1"). Asebedo contended that "the testimony of a single vocational expert does not constitute substantial evidence when weighed against the evidence codified in Appendix 2." The district court affirmed the decision of the Secretary.

II.

Asebedo argues on appeal that the testimony of the vocational expert does not constitute substantial evidence when weighed against the force of example 1. On review, this court determines whether substantial evidence exists in the record as a whole to support the ALJ's factual findings and whether the ALJ applied the proper legal standards. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990); Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a mere scintilla and less than a preponderance. Id. "This [C]ourt may not reweigh the evidence or try the issues de novo. Conflicts in the evidence are for the Secretary and not the courts to resolve." Selders, 914 F.2d at 617 (citation omitted).

In evaluating a disability claim,[1] the Secretary conducts a five-step sequential analysis:

> (1) the claimant is not presently working; (2) the claimant has a severe impairment; (3) the impairment is . . . listed in, or equivalent to, an impairment listed in Appendix 1 of the Regulations; (4) the impairment prevents the claimant from doing past relevant work; and (5) the impairment prevents the claimant from doing any other substantial gainful activity. In determining whether the claimant can do any other work, the Secretary considers the claimant's residual functional capacity, together with age, education, and work experience, according to the Medical-Vocational Guidelines set forth by the Secretary.

Id. at 618 (citations omitted); see also Muse v. Sullivan 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. Asebedo, as claimant, bears the burden of proving that she is disabled.

Asebedo argues that the force of example 1 mandates a finding that she is disabled. Example 1 states in pertinent part:

> [A] finding of disabled is not precluded for those individuals under the age 45 who do not meet all of the criteria of a specific rule who do not have the ability to perform a full range of sedentary work. The following examples are illustrative: Example 1: An individual under age 45 with a high school education who can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in appendix 1). A permanent injury of the right hand limits the individual to sedentary jobs which do not require manual bilateral dexterity. None of the rules in appendix 2 are applicable to this particular set of facts, because this individual cannot perform a full range of work defined as sedentary. Since the inability to perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate.

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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 can be expected to result in death or 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).

(Emphasis added.) In her complaint, Asebedo referred to the above example as "codified evidence." In her brief, she acknowledges that the above example does not compel a finding of disability. Nevertheless, she argues that the example demonstrates that the ALJ erred by relying upon the testimony of a single vocational expert in light of the example. Id.

The ALJ interpreted example 1 to require a permanent injury, such as the loss of a hand, the loss of fingers, or a major impingement on the nerves of the right arm of a right-handed claimant. This court is obligated to give great deference to the agency's interpretation of its own guidelines. Cieutat v. Bowen, 824 F.2d 348, 352 (5th Cir. 1987) (citations omitted). This deference places a heavy burden on a party challenging the agency's interpretation. Id. We are not free to set aside the Secretary's interpretation simply because we would have interpreted the regulations differently, and we must accept the Secretary's interpretation unless it is plainly inconsistent with the language of the guidelines. Id.

Asebedo cites to no authority and presents no justification to support her argument that example 1 should outweigh the testimony of a single vocational expert. The language of § 2.01.00(h) makes it plain that the example is merely illustrative. The clear language of the example and the deference accorded to the findings of the ALJ require affirmance.

In addition, the courts that have touched upon the argument raised by Asebedo do not show favor to her argument. They note

that example 1 is not mandatory, see Nelson v. Bowen, 855 F.2d 503, 507 (7th Cir. 1988), or that example 1 carries force only when bilateral manual dexterity is permanently compromised[2] or is far in excess of the example. See Fife v. Heckler, 767 F.2d 1427, 1430 (9th Cir. 1985) (permanent damage); Smith v. Schweiker, 735 F.2d 267, 272 (7th Cir. 1984) (neuromuscular limitations far in excess of example 1). The ALJ noted that Asebedo's dexterity was limited intermittently, and medical evidence indicated that her arthritis was "fairly well controlled on gold therapy." The district court did not err in finding that there was substantial evidence to support a finding that Asebedo was not disabled.

AFFIRMED.

[2] But cf. Hurt v. Secretary of Health & Human Servs., 816 F.2d 1141, 1143 (6th Cir. 1987) (finding disability where claimant had fractured his left arm and healing had taken over twelve months; no indication whether claimant was left-handed.)