

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10419
(Summary Calendar)

ARTHUR GONZALES,
SSN: 376-44-7096,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary of
Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-2490-P)

(February 17, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff, Arthur Gonzales, appeals the judgment of the district court which affirmed the Secretary's denial of his claim for social security disability insurance benefits under 42 U.S.C. § 423. We affirm.

FACTS

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Arthur Gonzales, a forty-nine year old¹ construction carpenter who worked primarily with sheetrock in high-rise projects, suffered an abdominal hernia while on the job in 1982. On October 7, 1987, Gonzales again suffered a hernia while on the job. Prior to this incident, Gonzales underwent at least two surgical procedures for his hernia problems, and one of these involved the implant of a synthetic mesh for his abdominal wall. In December 1987, his physicians operated on him to removed most of the old, wadded mesh material and replace it with new Goretex material. Gonzales' recovery from this surgery was hindered by slow healing,² the presence of necrotic fat in the wound area, and recurrent buildup of fluid in the wound area which eventually became infected. He was hospitalized several times to control recurrent infections.

Gonzales underwent additional surgeries in October 1988, June 1989, and on October 17, 1991. During the last operation, surgeons removed the old implanted meshes, implanted the new Goretex mesh, and overlaid the mesh with a portion of muscle from Gonzales' upper leg.

In December 1989, Gonzales applied for disability and supplemental income benefits, alleging October 10, 1987 as the onset date of disability from recurring abdominal hernias. After his application was denied, an ALJ conducted a hearing approximately two months after Gonzales' last surgery.

¹ Gonzales was forty-nine at the time of the December 1991 ALJ hearing.

² Gonzales' poor healing was attributed to his diabetic condition.

At the hearing, Gonzales testified as follows: He was a high school graduate and, in 1989 he completed an eleven month long trade school course in printing.³ However, he had not used this training because he had not obtained a work release from his physicians. His past work included extensive movement and lifting objects weighing up to 150 pounds. He summarized his work experience and his medical history for the past ten years. As to his current physical abilities, Gonzales stated that he had to alter his position continuously because he had difficulty sitting, standing, or walking for any length of time greater than twenty to fifty minutes. He experienced discomfort and pain. He wears an abdominal binder except when bathing. Gonzales described his activities as reading, helping his wife with the dishes, fixing sandwiches, going to church, and some driving. Gonzales acknowledged that he was able to do more activities before his last surgery.⁴

The ALJ found that, although Gonzales could not perform his past work, Gonzales had the residual functional capacity (RFC) to perform the full range of sedentary-work activity and, therefore, was not disabled. Among the ALJ's specific findings is the following: Gonzales "has the residual functional capacity to perform the physical exertion requirements of work except for

³ Gonzales testified that the training course in printing required him to lift no more than a ream of paper but that, as of the time of the ALJ hearing, he had not used his new trade.

⁴ Gonzales also testified that his on-the-job injuries resulted in a workman's compensation settlement of \$74,000 and medical coverage through Gonzales' 65th birthday.

lifting more than 10 pounds and standing or walking for prolonged periods of time. There are no non-exertional limitations." The ALJ decision became the final agency decision.

Gonzales filed suit in federal district court against the Secretary of Health and Human Services (the Secretary) and the matter was referred to a magistrate judge. Both parties moved for summary judgment. The magistrate judge recommended summary judgment in favor of the Secretary. After Gonzales filed objections, the district court independently reviewed the record and adopted the magistrate judge's report, thus affirming the Secretary's denial of benefits. Gonzales appeals, asserting that there was not substantial evidence to support the Secretary's factual findings and resultant decision, therefore the district court erred in adopting the magistrate judge's recommendation. We disagree.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of a summary judgment de novo. Summary judgment is appropriate if the record discloses `that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.'" Spellman v. Shalala, 1 F.3d 357, 360 (5th Cir. 1993) (citation omitted). This Court's review of the Secretary's decision is limited to determining "whether the Secretary applied the correct legal standard and whether the Secretary's decision is supported by substantial evidence on the record as a whole." Orpheus v.

Secretary of Health & Human Services., 962 F.2d 384, 386 (5th Cir. 1992).

DISCUSSION

A claimant under the Social Security Act is disabled if the claimant is unable to perform "any substantial gainful activity by reason of a[] medically determinable . . . 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).

A five-step analysis is used to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920 (1994). The burden is on the claimant at the first four steps to show that he is not engaged in substantial gainful activity, that his impairment is "severe," and that he meets or equals an impairment listed in Appendix One of the regulations, thus being disabled, or if not, that he cannot perform his past relevant work. At Step 5, the burden shifts to the Secretary to show that the claimant, considering his severe impairment and other factors such as age, RFC, education, and work experience, can perform work available in the national economy, and thus the claimant is not disabled. See Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991).

The ALJ determined that Gonzales was not disabled at Step 5. After summarizing Gonzales' work and medical histories, the ALJ found that Gonzales' condition was "severe," but that his exertional level allowed him to lift up to ten pounds. The ALJ concluded that,

Although claimant has undergone multiple surgeries, there is no evidence of

complications such as to preclude claimant from engaging in the full range of sedentary work, nor is there evidence that claimant's condition was expected to or did last for 12 continuous months. The medical evidence shows that in between surgeries, claimant was able to engage in substantial gainful activity at the sedentary level. There are no medical records from claimant's latest surgery to show that he is unable to return to work.

The ALJ considered Gonzales' complaints of pain and of disabling limitations and found that the complaints were not credible to the extent that he alleged his pain and limitations prevented the full range of sedentary activity. The ALJ relied upon the Medical-Vocational Guidelines (the Grid) to find that Gonzales was not disabled. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 1, Rule 201.21 (1994).

Gonzales argues that the Secretary's decision is not supported by substantial evidence as to Gonzales' complaints of pain, lack of non-exertional impairments, and RFC for the full range of sedentary work.

"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 v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991). "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools." 20 C.F.R. § 404.1567(a) (1994). Sitting is the primary position for sedentary work although a certain amount of walking

and standing is often necessary and amounts to no more than two hours of such activity per eight-hour day. See id.; SSR 83-10.

Complaints of Pain

The ALJ found that Gonzales' subjective complaints of discomfort and pain were not credible so as to preclude sedentary activity. Gonzales challenges this finding as unsupported by substantial evidence.⁵

An ALJ's determination concerning a claimant's subjective complaints receives considerable deference on review. Wren, 925 F.2d at 128. Gonzales testified that he experienced constant dull pain with instances of sharp pain throughout the day and that he had to repeatedly change physical positions. However, Gonzales acknowledged that he did not list a pain-relief prescription on his list of medications, and that he had not taken the prescribed analgesic for over three weeks. See Carrier v. Sullivan, 944 F.2d 243, 246-47 (5th Cir. 1991) (noting that the plaintiff did not take medication for pain). He also stated that he took Tylenol only two or three times per week. The ALJ's findings concerning the extent of Gonzales' pain and subjective complaints are supported by this

⁵ Gonzales argues that the ALJ should not have relied on medical reports and assessments made in 1988 and 1990 because they are not "substantial evidence". However, the record reflects that the ALJ (1) considered Gonzales' post-October 1991 complaints of pain, discomfort from sitting, and fluid build-up; and (2) noted that his complaints since the October 1991 surgery have not been shown to last more than 12 continuous months.

evidence. See Selders v. Sullivan, 914 F.2d 614, 619 (5th Cir. 1990).

Reliance on the Grid:

Non-exertional Limitations & RFC for Sedentary Work

Several months after Gonzales' December 1987 surgery, the occupational therapist noted that Gonzales had no signs of discomfort in sitting, standing, or walking. One month after the 1987 surgery, the physician noted that Gonzales experienced no discomfort and that the synthetic-mesh implant to the abdominal wall was holding and the wound was well healed.

Two RFC assessments conducted in January and June of 1990 revealed that Gonzales could lift up to twenty pounds and frequently lift up to ten pounds. No limitations were noted in his ability to stand or walk which would affect the requirements of sedentary activity. However, in January 1990, Gonzales' physician noted that Gonzales could stand for periods of thirty minutes and could lift or carry no more than five pounds. In July 1990, Gonzales was released for work with a no-more-than-ten-pounds lift restriction. The time frame for these assessments and the physician's work release was between major surgical procedures.

Gonzales' last major surgery had occurred approximately two months before the hearing before the ALJ. Gonzales testified at the hearing that he stood for fifty minutes preaching at church the previous evening but that he had excruciating pain during the last fifteen minutes. Although Gonzales testified that the doctors

informed him that this past surgery was his last chance for relief, the record contains neither follow-up notes from the physicians nor subsequent RFC assessments. Thus, there is no indication that Gonzales' capacity for work, after he recovers from the October 1991 surgery, would be different than in the previous RFC assessments.⁶

Gonzales argues that the ALJ improperly relied upon Rule 201.21 from the Grid because he does not meet the RFC for sedentary work and because he has non-exertional impairments. He also argues that the ALJ erred by failing to utilize testimony from a vocational expert.

If the evidence of the severe impairment and the claimant's characteristics match the criteria of the rule from the Grid, then the ALJ may rely upon the Grid to determine whether the claimant is disabled at Step 5 of the analysis. See Scott v. Shalala, 30 F.3d 33, 34 (5th Cir. 1994); Fraga v. Bowen, 810 F.2d 1296, 1304 (5th Cir. 1987). When the ALJ properly relies on the Grid, testimony from a vocational expert is unnecessary. See Fraga, 810 F.2d at 1304-05.

Gonzales argues that his pain and weakness are non-exertional impairments. As discussed above, the ALJ's findings regarding Gonzales' complaints of pain and his limitations are supported by substantial evidence. See Carrier, 944 F.2d at 247. Gonzales' complaints of pain and weakness relate only to his ability to

⁶ There is no mention of additional evidence in the denial of appeal.

perform exertional tasks, thus the ALJ's determination that Gonzales had no non-exertional limitations is supported by substantial evidence. See 20 C.F.R. § 416.969a(b) (limitations which affect only the ability to sit, stand, walk, and lift are deemed exertional limitations).

The ALJ applied 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 1, Rule 201.21. The characteristics associated with this rule are that the claimant (1) is able to perform the full range of sedentary work, (2) has at least a high school education, and (3) has previous work experience that is skilled or semi-skilled but is not transferable. Sedentary work requires the ability to lift up to 10 pounds, to sit for at least six hours, and to stand for up to two hours, out of an eight-hour work day. Social Security Ruling 83-10; 20 C.F.R. § 416.967(a).

The ALJ found that Gonzales had an RFC for sedentary work, except for the ability to stand or walk for prolonged periods of time. Neither the ALJ nor the magistrate judge defined what was meant by "prolonged periods of time", but both noted that Gonzales was released to work on July 9, 1990 with a 10 pound lifting restriction. Gonzales' pre-1991 RFC assessments place him within the full range of sedentary work. Given the work release, the previous post-surgery RFC assessments, and the absence of medical evidence regarding Gonzales' post-October 1991 RFC, we find no medical evidence that Gonzales' RFC has changed from that required by 20 C.F.R. § 404, Subpt. P, App. 2, Table 1, Rule 201.21.

Accordingly, the ALJ did not err by using the Grid. See Fraga, 810 F.2d at 1304-05.

CONCLUSION

For the above stated reasons, the finding that Gonzalez is not disabled is supported by substantial evidence. Accordingly, the district court judgment is AFFIRMED.