IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20406
(Summary Calendar)

CONNIE SKINNER,

Plaintiff-Appellant,

versus

DONNA E. SHALALA, Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93-2988)

(January 25, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Connie Skinner sought review, in federal district court, of an administrative decision by the Secretary of Health and Human Services ("Secretary") which determined that she was disabled as of June 1, 1992, but not prior to that date, for the purpose of entitlement to social security disability insurance benefits. Skinner contended that she has been disabled since February 17, 1990. Both Skinner and the Secretary moved for summary judgment. The district court granted summary judgment in favor of the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Secretary, and denied Skinner's motion. Skinner appeals the district court judgment. We affirm.

FACTS

Connie Skinner filed an application for disability insurance benefits on August 2, 1990. In her disability report, Skinner alleged that she suffered from chronic carpal tunnel syndrome. Her application was denied. At Skinner's request, testimony and other evidence was presented before an Administrative Law Judge ("ALJ"). The ALJ ultimately determined that Skinner could perform other work which existed in significant numbers in the national economy and that she was thus not under a disability as defined in the Act.

The Appeals Council granted Skinner's request for review, stated that it was prepared to issue a decision adopting the ALJ's findings for the months prior to June 1, 1992, and proposed to find that Skinner became disabled on June 1, 1992, the month she attained fifty years of age.[1] The Appeals Council subsequently issued a decision which stated that Skinner was not disabled and thus not entitled to disability insurance benefits prior to June 1, 1992, but that she was under a disability and thus entitled to benefits as of June 1, 1992.

The decision of the Appeals Council became the final decision of the Secretary. Skinner next sought review in federal district court. The district court found that the decision of the Appeals

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[1] We note that, the Appeals Council notified Skinner that (1) it proposed to issue a decision which found her disabled as of June 1, 1992, the month she attained age 50, and (2) it would consider any comments or new and material evidence that Skinner submitted within 20 days of the notice. Skinner did not respond to this notice within the 20 day period.

Council was supported by substantial evidence in the record and granted summary judgment in favor of the Secretary.

DISCUSSION

Skinner argues that the decision of the Appeals Council is not supported by substantial evidence. She contends that there is no substantial evidence that she is capable of substantial gainful employment, that 20 C.F.R. pt. 404, subpt. P, App. 2, § 201.00(h), example 1, mandates a finding that she is disabled, and that the Appeals Council erred by applying the age guidelines in a mechanical fashion.

LEGAL PRINCIPLES

The claimant bears the burden of showing that she is disabled within the meaning of the Social Security Act. Cook v. Heckler, 750 F.2d 391, 393 (5th Cir. 1985). 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. §§ 416(i)(1), 423(d)(1)(A), 1382c(a)(3)(A).

Our review of the denial of disability insurance benefits is limited to two issues: (1) whether the Secretary applied the proper legal standards, and (2) whether the Secretary's decision is supported by substantial evidence on the record as a whole. Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992).

The Proper Legal Standard

The Secretary conducts a five-step sequential analysis in determining whether a claimant is disabled: 1) whether the claimant

is presently working; 2) whether the claimant has a severe impairment; 3) whether the impairment is listed, or equivalent to an impairment listed in Appendix 1 of the Regulations; 4) whether the impairment prevents the claimant from performing past relevant work; and 5) whether 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, 789 (5th Cir. 1991). "The burden of proof is on the claimant for the first four steps, but shifts to the Secretary at step five." Bowling v. Shalala, 36 F.3d 431, 435 (5th Cir. 1994) (quoting Anderson v. Sullivan, 887 F.2d 630, 632-633 (5th Cir. 1989)). "A finding that a claimant is disabled or is not disabled at any point in the five-step review is conclusive and terminates the analysis." Lovelace v. Bowen, 813 F.2d 55, 58 (5th Cir. 1987). The part of this analysis which Skinner challenges on appeal is the Council's finding at step five that, prior to June 1, 1992, she was not disabled because she was able to perform other gainful activity.

Substantial Evidence

If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. Anthony, 954 F.2d at 295. "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 scintilla, but it need not be a preponderance." Id. "This Court may not reweigh the evidence or try the issues de novo. . . . Rather, conflicts in the evidence are for the Secretary to resolve." Id.

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).

ABILITY TO PERFORM OTHER SUBSTANTIAL GAINFUL ACTIVITY

In steps one through four of the legal standard, the evidence shows that Skinner is not working and that she has an unlisted impairment which prevents her from performing her past work as a skilled flour miller. At step five of the legal standard, the burden shifted to the Secretary to show that there were other jobs in the national economy that Skinner could perform. See Anderson v. Sullivan, 887 F.2d at 632.

Vocational expert Ted Jolly testified that there was a significant number of jobs available to Skinner which she could functionally perform. In his hypothetical to Jolly, the ALJ incorporated the fact that Skinner was limited to sedentary work, that she would be slower than the average person performing the job, and that she would require frequent rests of five to ten minutes per hour. Jolly considered Skinner's impaired manual dexterity, her non-competitive pace, and her need for five to ten minute breaks each hour. We therefore turn to examine whether this testimony constitutes substantial evidence.

Dr. Frank Barnes had testified that Skinner suffered from bilateral median nerve neuritis diagnosed as carpal tunnel syndrome since February 1990. He testified that Skinner's lifting ability was limited to ten pounds; her grip strength was normal. He indicated that although she could use her hands, she could not use them rapidly and she would require a five to ten minute break each hour from activities with her hands. The objective medical evidence indicates that Skinner should not perform work that is repetitive and strenuous on her hands and wrists. A functional capacity evaluation of Skinner prepared in July 1991 indicated that she could perform most work tasks requiring bilateral manual dexterity, but at no greater than ten pounds and at a slower non-competitive rate. The objective medical evidence revealed that Skinner lacked speed, but not ability, in her performance of tasks which required bilateral manual dexterity.

Skinner testified at the hearing that her hands ached and that certain movements of her hands caused the pain to intensify. She stated that she had a lack of control of the fingers of her hands and that her hands would come open and she would drop things. She testified that bending her wrist and any movement that required her fingers to be closed together caused the pain to intensify. She also testified that she drove, talked on the telephone, went fishing, played bingo, and cooked dinner occasionally. She stated that she took Advil and aspirin every day for the pain.

As noted above, Jolly testified that there were a significant number of unskilled, sedentary jobs that a person with Skinner's limitations could perform, such as cashier, ticket seller, phone

work jobs, driving jobs, and security work. Skinner submitted evidence from another vocational expert that conflicted with Jolly's testimony and indicated that the jobs identified by Jolly exceeded the requirements of both unskilled and sedentary work. In response to this evidence, Jolly testified that performance of the jobs of gate security, charge account clerk, self-park parking lot attendant, and telephone quotation clerk fit within a hypothetical which approximated Skinner's disability. He testified that these jobs existed in the thousands in the Houston metropolitan and Galveston regional area and existed in the tens of thousands nationally. He later stated, however, that he "may be wrong" with regard to whether the job of gate security was unskilled and sedentary.

At step five, to carry her burden of establishing that other work exists for a claimant, the Secretary may rely upon the Medical-Vocational guidelines (the "Grid") or upon the testimony of a vocational expert. Bowling v. Shalala, 36 F.3d at 435. The ALJ's hypothetical, as well as Jolly's testimony, was such that it addressed the pace and ability of Skinner's bilateral manual dexterity, in accordance with the medical evidence and with some of the tasks which Skinner still performs.

Based upon her functional limitations, age, education, work experience, and the testimony of vocational expert Jolly, the Appeals Council concluded that before June 1992, jobs that Skinner could perform were available in the national economy.

Although the testimony of the two vocational experts was conflicting, "conflicts in the evidence, including medical

opinions, are to be resolved by the Secretary, not by the courts." Patton v. Schweiker, 697 F.2d 590, 592 (5th Cir. 1983). This Court does not "substitute its judgment for that of the Secretary" even if the evidence "preponderates toward a wholly different finding." Id. The conclusion of the Appeals Council, based upon the testimony of vocational expert Jolly, that jobs exist that Skinner can perform is supported by substantial evidence in the record.

A *MANDATORY* FINDING OF DISABILITY?

Skinner next argues that 20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00(h), mandates a finding that she is disabled, as follows:

> [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 and 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 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 bilateral manual dexterity. None of the rules in appendix 2 are applicable to this particular set of facts, because this individual cannot perform the 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.

20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00(h), example 1 (emphasis added).

We are not persuaded by this argument for several reasons. First, contrary to Skinner's assertions, this rule is couched in terms of discretionary rather than mandatory language. In other words, the phrase "is not precluded" does not translate into "is mandatory". Secondly, the medical evidence shows that Skinner *can*

perform tasks which require manual bilateral dexterity, but only at a slower pace; thus, the example is not tailored to Skinner's disability. As stated in the Decision of the Appeals Council,

> [Skinner] has severe impairment from bilateral carpal tunnel syndrome, . . . [and] has the residual functional capacity to perform sedentary level exertional activity compromised by *slower manual dexterity and the need for a non-competitive rate without a required pace*.

(Emphasis added.) This determination is supported by substantial evidence in the form of medical testimony and documentation. Thirdly, the language of § 2.01.00(h) indicates that the example is merely illustrative; thus, it does not automatically outweigh the testimony of a vocational expert. We conclude that the example is not mandatory and does not require a finding of disability.

THE AGE CLASSIFICATION

Using the "Grid", the Appeals Council found that Skinner was disabled as of June 1, 1992; using the "Grid" and the testimony of a vocational expert, the Appeals Council found that Skinner was not disabled before June 1, 1992. Skinner argues that the Appeals Council erred by applying the age guidelines in a mechanical fashion because it determined that she was disabled as of June 1, 1992, the month in which she attained the age of fifty.

Although age classifications may not be applied mechanically in borderline situations, the Secretary has discretion in determining when a situation is "borderline." Harrell v. Bowen, 862 F.2d 471, 479 (5th Cir. 1988). "The Secretary's interpretations of [her] regulations deserves considerable deference in the absence of an obvious inconsistency between the interpretation and the language of the regulation in question."

Id. Skinner presented no evidence that the age classifications were inaccurate or misleading as applied to her. See id. at 479 n.9. Because Skinner had not attained age fifty prior to June 1, 1992, the decision of the Appeals Council that the "Grid" did not direct that she was disabled at that time is supported by substantial evidence. See id. at 479 & n.9.

CONCLUSION

Although Skinner satisfied her burden by showing that she was no longer capable of her past work, the record contains substantial evidence that she could perform other work. A preponderance of evidence is not required. Thus, the conflict between the vocational experts is not dispositive of this question. The Secretary applied the proper legal analysis to facts which are supported by substantial evidence. Accordingly, the judgment of the district court is AFFIRMED.