IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-30327
(Summary Calendar)

SIDNEY E. WHEAT,

Plaintiff-Appellant,

versus

DONNA E. SHALALA,

Defendant-Appellee.

Appeal from United States District Court
for the Eastern District of Louisiana
(CA 93-1128 M)

(April 3, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Sidney E. Wheat is a 39-year-old man who applied for social security disability benefits in January 1991. From November 1986 to November 1988, Wheat worked as labor foreman of an asbestos-removal operation. Wheat previously had worked as a bricklayer, truck driver, roustabout, millwright worker, and equipment operator.

Wheat's problems began on November 16, 1988, when he fell

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

through some stairs at work and injured his back.[1] He was admitted to the hospital, where he was diagnosed with lumbosacral strain, with possible nerve contusion in the right buttock, and a contusion of the right patella.

On December 2, 1988, Wheat was discharged from the hospital. According to his doctor, Wheat was slowly improving with traditional treatment but was then unable to work.[2] Wheat began to see Dr. Claude Williams with complaints of knee pain (but no back pain). This prompted an arthroscopic evaluation of Wheat's right knee, which revealed "[n]o unusual findings of injury."

Wheat later began to complain of lower back pain radiating into his right leg, but suffered "no definite radicular pain[.]" Williams noted that Wheat was unable to work and believed that surgery would be necessary. A laminectomy, discectomy, and fusion at the L5-S1 region was performed. Upon discharge from the hospital, Wheat was able to walk with a brace, but was instructed to avoid stooping, bending, or lifting.

Over the next six to seven months, Wheat returned to Dr. Williams's office on numerous occasions for follow-up visits. Initially Wheat showed progress in healing from the surgery. He was wearing the brace, was exercising, and had worked up to walking more than one mile per day. But beginning with his visit to Williams on October 25, Wheat began to complain of lower back and

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[1]Wheat had undergone a laminectomy in 1974, but had been able to work without back pain after the surgery. Wheat also had undergone arthroscopic surgery on his right knee in 1988.

[2]*See* 4 J.E. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER T-141 (1994).

leg pain, although tests appeared normal. Williams directed Wheat to increase his activities and prescribed Soma, a muscle relaxant and analgesic. Wheat began to improve. He felt comfortable without his brace, could move and sit up better, and was able to walk one-half mile per day without discomfort. Williams prescribed physical therapy.

Wheat again began to complain to Williams of pain throughout February and March 1990. He had problems with physical therapy because some of the functional capacity tests were too strenuous. Williams recommended rest, daily walking, and exercise, and prescribed an anti-inflammatory drug, hoping that Wheat would be able to return to physical therapy. The physical therapist had opined that Wheat "would be able to do light to moderate functional activities, especially if he is using mostly his arms and legs to give support to the resistance." Wheat's MRI revealed a solid fusion at L5-S1, but revealed "degenerative changes at L3-L4 consistent with loss of intradiscal water." Williams believed that Wheat had achieved his maximum medical improvement. He stated that Wheat was "a candidate for vocational rehabilitation for light to moderate type of work in the future." Williams estimated that Wheat had a 15 percent partial permanent impairment of his body functions, which he later changed to 25 percent. Despite Wheat's continued subjective complaints of pain, Williams did not think further surgery was necessary. Wheat was also seen by Dr. Bert Bratton in May 1990, who concluded "[t]here was no evidence to explain the clinical symptomology."

At the behest of his attorney, Wheat visited Bob Roberts for a vocational evaluation on April 23, 1990. Roberts noted that Wheat could sit for only ten minutes at a time. Wheat needed several rest breaks, and still was "unable to return to functional levels of performance." After considering Wheat's medical records and Roberts's own evaluation, Roberts concluded that Wheat could not return to his past work.

Roberts conducted an ERGOS evaluation of Wheat on October 15, 1990. Roberts noted that Wheat suffered from discomfort and pain during the evaluation, which finally necessitated discontinuing the evaluation. Roberts concluded that Wheat met the weight requirements for sedentary work but did not meet the sitting requirements. Roberts opined that Wheat required further medical supervision and physical rehabilitation before he could benefit from vocational rehabilitation.

Dr. Cornelius Gorman evaluated Wheat's vocational potential on November 6, 1990. He concluded that Wheat could obtain minimum-wage, sedentary employment following vocational rehabilitation. Gorman was concerned, however, that some adjustment might be necessary because Wheat needed to lie down during the day.

A physician assessed Wheat's residual functional capacity on February 25, 1991, for evaluation of his social security claim. The physician determined that Wheat could lift 50 pounds occasionally and 25 pounds frequently. The physician determined that Wheat could stand or walk for about six hours per eight-hour

work day and sit for about six hours per work day. The physician determined that Wheat's ability to push or pull was unlimited, except for the limitations on Wheat's lifting abilities. According to the physician, Wheat could climb, balance, kneel, crouch, and crawl frequently. Wheat could stoop occasionally. The physician believed that Wheat's ERGOS evaluation was flawed because Wheat did not complete the evaluation. Another medical consultant assessed Wheat's residual functional capacity on May 20, 1991.

Vocational Expert Robert Strader testified that Wheat's previous jobs ranged from unskilled to semi-skilled positions with medium to very heavy exertional requirements. The ALJ asked Strader three hypothetical questions. All three hypotheticals assumed a 36-year-old with a sixth-grade education, who could write short, simple letters, and who had Wheat's employment history. The second hypothetical was as follows:

> [I]f I assume that occasionally the claimant could only lift 20 pounds and 10 pounds frequently. He can stand at least 4 to 5 hours in an 8-hour day, but he cannot stand for more than an hour at any one time without resting. Sitting approximately would be 6 hours in an 8-hour day. His pushing and pulling abilities are limited and he should avoid climbing ladders, working at unprotected heights, and (INAUDIBLE) vibration. He should not climb ropes or scaffolds. . . . Now, under this hypothetical, would he be able to perform any of, of his past relevant jobs?

Strader testified that, based upon the physical limitations in this hypothetical, Wheat would be unable to return

to his past relevant work. However, when asked what, if any, other jobs in the national economy under this particular hypothetical that Wheat would be able to perform, Strader responded that Wheat could obtain employment as a security guard, driver, assembly worker, gate tender, bridge operator, or booth cashier. However, Strader testified that Wheat probably would not be able to obtain one of these positions if he needed to lie down or rest on the job.

The ALJ found that Wheat suffered from lower back pain syndrome, but that his condition did not meet or equal the criteria set forth in the applicable regulations for an automatic finding of disability. The ALJ found that Wheat's assertions of pain and restrictions on his daily activities were exaggerated and not supported by the evidence. He found that Wheat retained the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently. The ALJ found that Wheat could stand four to five hours per eight-hour day and sit six hours per work day. He found that Wheat possessed a limited ability to push or pull and could not climb ladders or work at unprotected heights or near vibrations. The ALJ found that Wheat could not return to his past relevant work, but could work in the positions listed by the vocational expert. The ALJ found Wheat not disabled.

The Appeals Council denied Wheat's request for review of the ALJ's determination and his request to reopen his appeal following a January 1993 examination by a physician who opined that Wheat was disabled.

Wheat filed a complaint seeking judicial review of the denial of benefits. Both parties moved for summary judgment. The district court granted summary judgment for the Secretary.

DISCUSSION

The hypothetical questions

Wheat contends that the ALJ mistakenly relied on Strader's answer to his second hypothetical to find that he could perform several jobs. Wheat argues that the ALJ's third hypothetical to Strader reflected his true physical condition. The third hypothetical assumed the same premises as the second hypothetical (see *supra*), but with the claimant suffering from recurrent lower back pain requiring periods of lying down and resting. Wheat contends that Strader and the ALJ should have considered the results of Roberts' tests. Additionally, Wheat contends that he is unable to perform the jobs that Strader listed in his answer to the ALJ's hypothetical, as those jobs are listed in the DICTIONARY OF OCCUPATIONAL TITLES.

A hypothetical question is adequate if it "reasonably incorporated the disabilities recognized by the ALJ[.]" *Morris v. Bowen*, 864 F.2d 333, 336 (5th Cir. 1988). The second hypothetical the ALJ posed to Strader incorporated the disabilities from which the ALJ found that Wheat suffered. The third hypothetical contained limitations exceeding those from which Wheat was found to suffer. The ALJ properly relied upon the second hypothetical.

"The Secretary, not the courts, has the duty to weigh the evidence, resolve material conflicts in the evidence, and decide

the case." *Chaparro v. Bowen*, 815 F.2d 1008, 1011 (5th Cir. 1987). To the extent that the ALJ found the results of Roberts' vocational testing not credible, this Court should not disturb that credibility determination.

The social security regulations provide that the Secretary will take notice of the DICTIONARY OF OCCUPATIONAL TITLES ("DOT") when considering whether sufficient numbers of jobs exist in the national economy. 20 CFR § 404.1566(d)(1). The regulations also provide, however, that the Secretary may rely on the testimony of a vocational expert to determine whether a claimant may perform particular jobs. 20 CFR § 404.1566(d)(5). Reliance on the DOT alone to determine that a claimant may perform jobs is error. The DOT is not "similar evidence" to the testimony of a vocational expert. *Fields v. Bowen*, 805 F.2d 1168, 1170-71 (5th Cir. 1986). Wheat therefore has not shown that any variance between the DOT and Strader's testimony constitutes reversible error.

The Secretary's Finding on the Issue of Disability

Wheat contends that the Secretary erred by finding that he was not disabled. Wheat first argues that he was disabled as a matter of law because he suffered from an impairment listed in the Secretary's regulations. He then argues that the Secretary's decision is not supported by the evidence.

A federal district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law." *GATX Aircraft Corp. v. M/V COURTNEY LEIGH*, 768 F.2d 711, 714 (5th Cir. 1985); FED. R. CIV. P. 56(c).

A reviewing court must determine whether substantial evidence exists in the record as a whole to support the Secretary's factual findings. *Fraga v. Bowen*, 810 F.2d 1296, 1302 (5th Cir. 1987); 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla and less than a preponderance. It is evidence which is relevant and sufficient to allow a reasonable person to accept it as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

The burden of proving disability in a social security case rests on the claimant. *Jones v. Bowen*, 829 F.2d 524, 526 (5th Cir. 1987). The relevant statute 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 12 months." 42 U.S.C. § 423(d)(1)(A).

The Secretary follows a five-step sequential process when evaluating disability claims. First, the claimant must not be working presently. 20 C.F.R. §§ 404.1520(b). Second, the claimant must establish an "impairment or combination of impairments which significantly limits [his] physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1520(c). Third, for a finding of disability without consideration of age, education, and work experience, the claimant must establish that his impairment meets

or equals an impairment enumerated in the listing of impairments in an appendix to the social security regulations. 20 C.F.R. §§ 404.1520(d). Fourth, the claimant must establish that his impairment prevents him from doing his past relevant work. 20 C.F.R. §§ 404.1520(e). Finally, the burden shifts to the Secretary to establish that there is other work that the claimant can perform. If the Secretary meets this burden, the claimant must then prove that he is unable to perform the work suggested. 20 C.F.R. §§ 404.1520(f). *See also Fraga*, 810 F.2d at 1302. The Secretary disposed of Wheat's claim at step five.

As mentioned above, the Secretary may weigh the evidence and make credibility determinations. *Chaparro*, 815 F.2d at 1011. The evaluation of a claimant's subjective symptoms is within the province of the ALJ who had an opportunity to observe the claimant. *Harrell v. Bowen*, 862 F.2d 471, 480 (5th Cir. 1988). The ALJ "may properly challenge the credibility of a claimant who asserts he is disabled by pain." *Allen v. Schweiker*, 642 F.2d 799, 801 (5th Cir. 1981). "Although a claimant's assertion of pain or other symptoms must be considered by the ALJ, . . . a claimant [must] produce objective medical evidence of a condition that reasonably could be expected to produce the level of pain alleged." *Harper v. Sullivan*, 887 F.2d 92, 96 (5th Cir. 1989).

The Secretary's denial of benefits to Wheat is supported by substantial evidence in the record. First, Wheat asserts that he suffers from a spinal disorder listed in the Secretary's regulations. The regulations indicate that the Secretary considers

an individual disabled if he suffers from:

> Other vertebrogenic disorders (e.g., herniated nucleus puplosus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:
>
> 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
>
> 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 CFR Part 404, Subpart P, App. 1 § 1.05(C).

The medical reports do not reflect radicular distribution of motor loss. Williams's reports indicate that Wheat's ability to bend was limited but that he could walk between one-quarter and three-quarters of a mile per day before feeling pain. Wheat was able to walk on his toes and heels when Williams examined him. Williams noticed no atrophy. Wheat's reflexes were good. Wheat's straight-leg raising tests were negative. Bratton's report indicates that Wheat could flex forward to 30 degrees and could move his legs significantly. Bratton noted that Wheat's reflexes were equal bilaterally. Because the medical evidence does not reflect radicular distribution of motor loss, Wheat's infirmity did not equal the impairment listed in the regulations.

The record also supports the Secretary's determination that Wheat could meet the exertional standards of some light work.

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of

> objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.

20 CFR § 404.1567. The consultant who examined Wheat on May 20, 1991, concluded that Wheat could lift 20 pounds occasionally and 10 pounds frequently, could stand or walk for about four to five hours per work day, and could sit for about six hours, if he were allowed to alternate sitting and standing. The consultant also determined that Wheat could not climb ropes, ladders, or scaffolds, and should avoid vibrations. The ALJ incorporated the consultant's findings into the hypothetical posed to Strader. The evidence also supports the ALJ's conclusion that Wheat could satisfy the intellectual standards for the jobs listed by Strader. Wheat testified that he possessed a sixth-grade education and could compose a simple letter. Additionally, Wheat testified that he had supervised the work of 12 to 15 other people on his asbestos-removal job. Strader testified that an average sixth-grader could perform the jobs he had listed.

The evidence does not indicate a condition that would cause the kind of pain about which Wheat complains. Williams's reports indicate that the July 1989 fusion had healed. The medical records indicate that Wheat's reflexes were normal, that he could walk some distance without pain, and could move his legs significantly. Wheat testified at the hearing that he took pain medication only occasionally. He neglected to bring his back brace

to the hearing and was able to drive to the hearing. Because substantial evidence supports the Secretary's decision, we affirm the grant of summary judgment on Wheat's claim that he is disabled.

The period from November 1988 through April 1990

Finally, Wheat contends that he at least is entitled to benefits for the period from November 1988 through April 1990. Wheat did not raise this contention before the Appeals Council. Wheat therefore has failed to exhaust his administrative remedies regarding that claim. This Court lacks jurisdiction to consider Wheat's contention. *See Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994).

Conclusion

For the foregoing reasons, we AFFIRM.