

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-40398  
Summary Calendar

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TINA THOMPSON O/B/O WARNER THOMPSON,

Plaintiff-Appellant,

VERSUS

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

Defendant-Appellee.

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Appeal from the United States District Court  
For the Western District of Louisiana

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(No. 93-CV-1014)

(February 24, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Tina Thompson ("Thompson"), on behalf of her child Warner Thompson ("Warner"), appeals the decision of the Secretary of the Department of Health and Human Services which denied Warner's claim for supplemental security income (SSI) benefits. Warner first

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

sought review in the district court, which adopted the magistrate judge's report and entered judgement for the Secretary.

#### Argument and Applicable Law

Warner, pro se, challenges the Secretary's denial of his application for supplemental security income benefits, arguing that there is not substantial evidence in the record to support the Secretary's decision and that improper legal standards were used.<sup>1</sup> In reviewing the Secretary's decision to deny disability insurance benefits, our inquiry is limited to whether there is substantial evidence in the record to support it and whether the proper legal standards were used in evaluating the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990) (adult disability case). If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990) (adult disability case).

Substantial evidence is more than a scintilla, but less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Villa, 895 F.2d at 1021-22. In applying this standard, this Court may not reweigh the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. Id. at 1022. This Court has set out

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<sup>1</sup>Warner also argues for the first time on appeal that he is disabled pursuant to the Americans with Disabilities Act of 1990 ("ADA"). The issue is not preserved for appeal and will not be reviewed. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Nor do we review appellant's first stated issue as set forth in his brief. Such purported issue is not briefed or argued anywhere in both of the briefs. Devoid of any argument or authorities, the issue has been waived and abandoned. Price v. Digital Equip. Corp., 846 F.2d 222, 224-5 (5th Cir. 1993).

four elements of proof that must be weighed when determining whether substantial evidence of disability exists: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) the claimant's subjective evidence of pain and disability; and (4) his age, education, and work history. Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991) (adult disability case).

The SSA based its denial of Warner's initial application on temporary regulations for deciding child disability cases instituted after the Supreme Court, in Sullivan v. Zebley, 493 U.S. 521, 535-41, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990), ruled that the SSA's "regulations and rulings implementing the child-disability statute simply do not carry out the statutory requirement that SSI benefits shall be provided to children with 'any . . . impairment of comparable severity' to an impairment that would make an adult 'unable to engage in any substantial gainful activity.'" The regulations governing child disability determinations were amended in 1991 in compliance with Zebley. See §§ 416.924, 416.926a.

The process for determining whether a child claimant is disabled differs from the five-step process used in evaluating an adult's disability claim.<sup>2</sup> The process or standard for determining

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<sup>2</sup> The five steps for determining whether an adult is disabled are:

- 1) Claimant is not presently working;
- 2) Claimant's ability to work is significantly limited by a physical or mental impairment or combination of impairments;
- 3) Claimant's impairment meets or equals an impairment listed in the appendix to the regulations (if so, disability is automatic);
- 4) Impairment prevents claimant from doing past

whether a child is disabled requires a determination about whether the child: 1) was engaged in substantial gainful activity, 2) had a severe impairment, 3) had an impairment that met or equaled an impairment listed in appendix 1 of 20 C.F.R. Pt. 404, and 4) had an impairment of comparable severity to an impairment that would disable an adult. § 416.924(b). In the fourth step, an Individualized Functional Assessment (IFA) is performed to determine whether the child's impairment limits his ability to physically or mentally function in an age-appropriate manner. § 416.924a.

#### Use of the Appropriate Standard

Unquestionably, the ALJ applied the appropriate legal standards in determining that Warner was not disabled under the Social Security Act. It is undisputed that Warner was not engaged in substantial gainful activity and that he had a severe impairment, an impairment which affected his ability to perform certain basic age-appropriate activities.

The ALJ determined that Warner did not have an impairment which met or equaled, medically or functionally, the severity outlined in the appendix to the regulations. See §§ 416.924(b), (e), and 416.924a(a). The ALJ noted that Warner did not contend that he had such an impairment; nor does Warner argue on appeal that he has such an impairment. Thus, the ALJ properly concluded that Warner was not disabled within the meaning of step three of

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- relevant work;  
5) Claimant cannot perform any other work.

See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520.

the test. See § 416.924a. The ALJ reasoned that because Warner's impairment failed to meet or equal the requisite degree of severity to qualify as a disability under step three of the test, the issue was whether Warner had an impairment or combination of impairments of comparable severity to one that would prevent an adult from engaging in substantial gainful activity. See § 416.924a(a).

Step four of the test requires a determination whether the child suffers from an impairment of comparable severity to that which would make an adult disabled. § § 416.924(b), (f), and 416.924a. As the ALJ noted, comparable severity means that a child's physical or mental impairment so limits his ability to function independently, appropriately, and effectively in an age-appropriate manner that the impairment and limitation resulting from it are comparable to those which would disable an adult.

§ 416.924(a). Specifically, the impairment must substantially reduce the child's ability to:

[g]row, develop, or mature physically, mentally or emotionally and, thus, to attain developmental milestones . . . at an age-appropriate rate; or

[g]row, develop, or mature physically, mentally, or emotionally and, thus, to engage in age-appropriate activities of daily living . . . in self-care, play and recreation, school and academics, vocational settings, peer relationships, or family life; or

[a]cquire the skills needed to assume roles reasonably expected of adults.

§ 416.924(a)(1)-(3). Pursuant to the criteria outlined in § 416.924c(2), the ALJ considered the following domains of development or functioning in making his disability determination: cognition, communication, motor abilities, social abilities,

personal/behavioral patterns, and concentration, persistence, and pace. § 416.924c(2).

#### Findings and the Evidence

The ALJ found that as Warner was four years old, almost three years old when the application was filed, the criteria prescribed for pre-school children applied (ages three through six). § 416.924c(d); see 416.924b(b). The ALJ noted the following factors in making his determination that Warner was not disabled. Warner never required inpatient hospitalization and took a minimal amount of medication: Ventolin, one teaspoon two times daily and Theophylline, one tablespoon every six hours. No treating source recorded complaints of medication side effects. Warner's growth and development were normal. The ALJ found "no deficits in the areas of cognition, communication, social functioning, personal/behavioral patterns, and concentration, persistence, and pace," normal motor strength and functioning, and the ability to play at a low level of exertion but restricted from overexertion such as running and jumping.

The ALJ concluded that:

[s]ince [Warner had] no more than a moderate limitation to motor abilities and environmental restrictions regarding protracted exposure to dust and fumes, a finding of disabled is impossible. His impairments do not substantially reduce his ability to function independently, appropriately, and effectively in an age-appropriate manner. His impairments do not substantially reduce his ability to grow, develop, or mature physically, mentally, or emotionally, and, thus attain developmental milestones at an age-appropriate rate, engage in age-appropriate activities of daily living, or acquire skills needed to assume roles reasonably expected of adults. The claimant does not have an impairment or combination of impairments of comparable severity to that which would preclude an adult from engaging insubstantial [sic] gainful activity.

A review of the record reveals that there is substantial evidence to support the Secretary's decision. Warner appears to have been diagnosed with asthma on April 5, 1990, although the ALJ determined that Warner was diagnosed with asthma on December 17, 1989. Urban Medical Clinic treated Warner for respiratory infections, sore throat, and asthma from May 1988 through December 1991. A pediatric clinic treated Warner from October 1989 through January 1992 for respiratory infections and rhinitis.

Warner's mother took him to the emergency room on January 15, 1989, for treatment of vomiting, fever, diarrhea, and coughing; his chest proved to be clear upon examination. Warner was taken to the emergency room on March 14, 1989, after falling out of a chair. He had a hematoma on his head, but cranial nerves, motor function, and sensory function were normal and skull x-rays were negative. Dr. Dennis Sullivan reported that Warner had normal breath sounds. Warner's chest was reported to be clear at an emergency room visit on May 24, 1989. He again received emergency room treatment on July 9, 1989, for a fall. Pediatric clinic notes reflect that Warner had a clear throat and good air exchange on October 20, 1989.

On April 5, 1990, Warner's mother took him to the emergency room for treatment of coughing and shortness of breath. His chest x-ray was normal, and he was treated with medication. His asthma had improved on April 6, 1990. He was seen again for chest congestion on February 12, 1991. Warner was treated with medication for asthma on March 24, 1991, and discharged in fair condition.

Warner was taken to the emergency room on June 17, 1991, for wheezing and was treated with medication and released. Warner received medication for asthma in the emergency room on July 11, 1991. He was treated for a respiratory infection on December 24, 1991. A chest x-ray on that date was normal.

Tina Thompson testified to the following facts at the hearing before the ALJ. Warner received medical treatment, including breathing treatments and shots, every month or every other month. She took Warner to the hospital for asthma attacks about once a month but cared for him at home during some of his attacks. Warner had attacks when cold or overheated and could not tolerate smoke or pets. He could ride a bicycle but after 10 or 15 minutes he exhibited "heavy breathing." He could not play for as long as could his cousin of the same age. Warner's grandmother testified that at times Warner panted like he was smothering, and he would be rushed to the hospital for breathing treatment and shots. She testified that within an hour or two after the hospital visits, he needed to be rushed to the hospital again.<sup>3</sup>

Especially supportive of the Secretary's decision is medical evidence from several doctors. In a report of January 30, 1992, Dr. Francis Capalongan stated that he had treated Warner for upper respiratory infections since 1988 and last saw Warner in July 1991. Warner then was in good health except for a cold; his lungs were clear with no rales. Dr. Capalongan reported that Warner was

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<sup>3</sup>The ALJ, in Finding No. 5, determined that the "[s]ubjective complaints are basically compatible with the claimant's individualized functional assessment and, to that extent, are considered credible."



taking Ventilin for asthma. He noted that Warner was disabled only during the time he was in his care.

On February 27, 1992, Dr. Billy McKellar, a pediatrician, performed an IFA of Warner. Dr. McKellar found no evidence of limitation of cognitive development or function, communicative development or function, social development or function, behavioral development or function, or concentration, persistence, and pace. He stated that Warner had a moderate limitation of motor development or function due to wheezing upon exertion caused by asthma but noted that Warner had not had any recent attacks. Dr. McKellar noted that Warner's December 1991 x-ray was clear and his asthma appeared well-controlled on medication. Dr. McKellar stated that Warner's asthma was a chronic impairment, but was not of comparable severity to an impairment that would disable an adult and, therefore, that Warner was not disabled.

Dr. Hollis Rogers also completed an IFA in which he agreed that Warner had no limitation in any category, except for moderate limitation of motor development and function. He noted that Warner had shown good improvement with medication. Dr. Rogers stated that Warner's asthma might restrict participation in sports, but was not of comparable severity to an impairment that would disable an adult and, therefore, that Warner was not disabled.

The evidence in the record to support the Secretary's finding is significantly more than a scintilla and constitutes substantial evidence in support of the denial of SSI benefits under the Social Security Act. Since the Secretary did not apply improper legal standards (See Selders, 914 F.2d at 617), we AFFIRM the decision of the District Court.

