

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40940  
Summary Calendar

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PATRICK B. O'LEARY,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary of Health and Human Services,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(1:91-CV-698)

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(June 6, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Appellant Patrick O'Leary challenges the district court's judgment rejecting his appeal of the denial of social security disability benefits. We find no error and affirm.

O'Leary, now over 40 years old, last worked in November 1983, when he suffered a back injury on the job. He has objective symptoms of arthritis or disc problems in his back. Complaining

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that he is unable to maintain any gainful employment, he filed a pro se application for disability insurance benefits and supplemental security income in 1989. The ALJ held nearly an hour-long hearing, questioning both O'Leary and a vocational expert, and the ALJ received O'Leary's medical records. The ALJ also expressly permitted O'Leary to supplement his records with the findings of a myelogram that O'Leary said was scheduled after the hearing. O'Leary did not take advantage of this opportunity. The ALJ found that he is not disabled within the meaning of the Act, and the appeals council and district court concurred in this decision.

O'Leary has been represented by counsel in the district court and in this court and raises three arguments. First, he asserts that the ALJ did not facilitate his pro se presentation and therefore did not fully develop the record. We agree that the ALJ has a special duty to develop a full and fair record when a claimant is unrepresented at the hearing. Kane v. Heckler, 731 F.2d 1216, 1219-20 (5th Cir. 1984). But even if the ALJ fails in this regard, in order to warrant a remand, the claimant must still show prejudice in the form of evidence that could and would have been introduced that might have altered the outcome. Id. at 1220. Neither of the Kane criterion is met here. The ALJ conducted a thorough hearing and gave O'Leary ample opportunity to describe his limitations and to cross-examine the vocational expert who testified. O'Leary also had the opportunity to offer the myelogram results, but he did not avail himself of that opportunity either

during or after the administrative proceedings. O'Leary has not shown how he was prejudiced by the ALJ's handling of his hearing.

O'Leary next contends that the ALJ should have considered his testimony that the use of his right hand is limited and, under certain regulations, the inability to perform jobs requiring bilateral manual dexterity significantly compromises his ability to do sedentary work. The regulations, he contends, required the ALJ to determine the extent that jobs are precluded because of O'Leary's inability to use his hands. Interpreting O'Leary's presentation in the administrative process very liberally, we shall assume that this issue was presented to the ALJ and then to the district court. Nevertheless, there is no merit in this contention. First, even though the ALJ did not pose hypothetical questions to the vocational expert that incorporated O'Leary's limited use of his hand, O'Leary had the opportunity to correct that error in his own questioning of the expert. O'Leary declined to do so. Under these circumstances, the omission was not reversible error even if the impairment was a recognized limitation. Bowling v. Shalala, 36 F.3d 431, 435-36 (5th Cir. 1994). Moreover, the vocational expert also listed jobs that O'Leary could perform that did not require fine motor manipulation skills such as temporary labor coordinator, repair order clerk and dispatcher. The omission of the hypothetical was therefore harmless.

O'Leary also challenges the ALJ's failure to conclude that he is disabled by pain. This question is committed to the

sound interpretation of the fact finder, who must rely on the credibility of the claimant as well as whether his objective symptoms could create the kind of pain to which he testifies. Here, the ALJ determined that, although O'Leary's impairments cause him some degree of pain, his condition does not prevent him from performing a limited range of sedentary work. O'Leary's testimony reflected that his pain is relieved with non-prescription drugs and that he has attempted to find work within a bicycle ride of his home. Some of the medical evidence suggests that O'Leary's complaints are not fully credible and that he is capable of performing at least a limited range of sedentary work. Thus, the ALJ's finding of no disability because of pain was supported by substantial evidence.

For these reasons, the judgment of the district court is **AFFIRMED.**