IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41236
Summary Calendar

CHARLES MONROE,

Plaintiff-Appellant,

VERSUS

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

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Lousiana
(93-CV-1532)

(May 5, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Charles Monroe appeals a judgment upholding the final decision of the Secretary of Health and Human Services denying disability insurance benefits. Finding no error, we affirm.

I.

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Monroe applied for disability insurance benefits beginning on August 20, 1991. Benefits were denied both initially and upon reconsideration, and a timely request for a hearing was filed. Monroe was granted a hearing at which he appeared with appointed counsel. He again was denied disability insurance benefits. The Appeals Counsel denied his request for review and affirmed the administrative law judge's (ALJ's) decision as the final decision of the Secretary.

Monroe then filed a complaint in federal district court for review of the final decision of his claim. Monroe and the Secretary filed motions for summary judgment.

Monroe complained that (1) the Secretary's denial was not supported by substantial evidence; (2) the basis for the ALJ's decision on the issue of Monroe's credibility regarding Monroe's complaints for pain and physical limitations was not supported by the record; and (3) the testimony of the vocational expert was legally flawed because the vocational expert was asked by the ALJ to assess Monroe's credibility in answering the hypothesis posed by the ALJ. The magistrate judge reported that (1) the ALJ's credibility findings regarding Monroe's subjective complaints of totally disabling pain and physical limitations were supported by the record; (2) Monroe had the residual functional capacity to perform the full range of light work; (3) there was no reversible error in the ALJ's request to the vocational expert to assess Monroe's credibility in answering the hypothesis posed by the ALJ; and (4) the denial of Monroe's claim was supported by substantial

evidence.

The magistrate judge recommended affirming the Secretary's decision that Monroe was not entitled to disability insurance benefits and granting the Secretary's motion for summary judgment. Over Monroe's objections, the district court affirmed the Secretary's decision.

II.

A.

Monroe complains there is no substantial evidence to support the Secretary's decision that he was not disabled. Specifically, Monroe contends that the ALJ made improper credibility findings regarding his testimony concerning his pain and physical limitations, especially his need to elevate both of his legs, as nonexertional factors limiting the range of jobs Monroe could perform.[1]

Our review is limited to determining whether the record as a whole shows that the district court was correct in concluding that substantial evidence supports the findings of the Secretary and whether any errors of law were made. Fraga v. Bowen, 810 F.2d 1296, 1302 (5th Cir. 1987). Substantial evidence is that

[1] It is unclear whether Monroe is contesting the ALJ's finding that he had a tenth-grade level education. Monroe testified at the hearing that he believed he was at the tenth-grade level after having attended night school to try to get a GED, despite never having had a formal estimation of his education level. Additionally, the vocational expert considered in his hypothetical that the speculative individual had an eighth grade education, which was how far Monroe went in school. Because the vocational expert did not consider Monroe to have a tenth grade education, even if Monroe is contesting the education level finding of the ALJ, there does not appear to have been any error.

which is relevant and which is sufficient for a reasonable mind to accept as adequate to support a conclusion. It must be more than a mere scintilla, but it need not be a preponderance. Id.[2] This court may not reweigh the evidence or try the issues de novo, as conflicts in the evidence are for the Secretary, not the courts, to resolve. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990).

Monroe has the burden of proving that he is disabled within the meaning of the Social Security Act. Fraga, 810 F.2d at 1301. The 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). In evaluating a claim of disability, the Secretary conducts a five-step sequential analysis: (1) whether the claimant is presently engaging in substantial gainful activity; (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 doing past relevant work; and (5) whether the impairment prevents the claimant from doing any other substantial gainful activity. 20 C.F.R. § 404.1520; Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991).

In the first four steps, the burden is on the claimant. At

[2] "The elements of proof to be weighed in determining whether substantial evidence exists include: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) claimant's subjective evidence of pain; (4) claimant's educational background, age and work history." Owens v. Heckler, 770 F.2d 1276, 1279 (5th Cir. 1985).

the fifth step, the burden is initially on the Secretary to show that the claimant can perform relevant work. If the Secretary makes such a demonstration, the burden shifts to the claimant to show that he cannot do the work suggested. Muse, 925 F.2d at 789. A finding that a claimant is disabled or not disabled at any point terminates the sequential evaluation. Crouchet v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989). Here, the ALJ determined that Monroe was not disabled at the fifth step.

On October 25, 1990, Monroe was admitted to LaSalle General Hospital with complaints of increasing pain in the right calk and edema. A venous study showed the veins in his leg were obstructed and deep vein thrombosis[3] of the right leg was diagnosed. Monroe was prescribed Coumadin therapy of 5 milligrams a day and discharged several days later, still on the 5 milligrams of Coumadin a day. Id. at 123.

On March 11, 1991, Monroe was admitted to the emergency room and diagnosed with superficial thrombophlebitis[4] in his left leg and was admitted to the hospital. It was noted that he already had thrombophlebitis in his right leg and was on Coumadin. Monroe was given Heparin intravenously. A venous study showed no new, active clots, but chronic venous insufficiency and phlebitis[5] were noted in both legs. Monroe was discharged on March 24, 1991, with

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[3] Thrombosis is the presence of a thrombus, which is a plug or clot in a blood vessel. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1718 (27th ed. 1988).

[4] Thrombophlebitis is a condition in which inflammation of the vein wall has preceded the formation of a plug or clot (thrombus) in the blood vessel. Id.

[5] Phlebitis is inflammation of a vein. Id. at 1279.

instructions to continue the Coumadin therapy, which had been increased to 7.5 milligrams a day, and to wear his Jobst stockings.

On August 15, 1991, Monroe again was admitted to the emergency room. Although the pertinent portion of the record is illegible, both the district court and Monroe relate that Monroe went to the hospital complaining of right leg pain. On August 21, 1991, Monroe was admitted to the hospital with acute deep vein thrombosis in his left leg and was given Heparin intravenously. Jobst stockings were also ordered for him.

Several days earlier, Monroe's Coumadin had been discontinued because the medication caused him to hemorrhage in his lower extremities. Monroe was then placed on Ecotrin. At the time of this hospitalization, he was working at the Dresser Corporation. Before he was discharged on August 26, 1991, his physician, Dr. Sanit Sirikul, advised him to change jobs to a position that did not require prolonged standing. Sirikul observed that he could predict a vascular specialist in Monroe's near future.

In September 1991, Sirikul referred Monroe to vascular surgeon Dr. James P. David, who found a history of several episodes of phlebitis and venous stasis[6] and determined that Monroe had not been able to take Coumadin for the past few months because of the sores developing on his lower extremities. David noted that Monroe must stand in place at his work for about eight to ten hours a day. David concurred with Sirikul's recommendation of disability.

[6] Venous stasis is the stopping of the blood flow in a vein. Id. at 1577.

Venous studies conducted on September 13, 1991, by David, and reported ten days later, showed no evidence of acute deep venous thrombosis. There was, however, reflux[7] in the valve structures at multiple walls on the left, valvular incompetence, and valvular damage. David also concurred with Sirikul that there were some abnormal clotting factors and recommended a hematology consultation with Dr. Richard Mansour, a specialist in oncology and hematology.

On October 29, 1991, Mansour examined Monroe and concluded that he was a candidate for long-term anticoagulation. However, Mansour cautioned Monroe about starting any new medication while on Coumadin. Id.

On October 16, 1991, Monroe again went to the emergency room with swelling, tenderness, warmth, and erythema in his left leg. This is the last recorded recurrence of such a problem. On November 5, 1991, David characterized Monroe's major problems as venous insufficiency and venous stasis associated with recurrent episodes of deep venous thrombosis and possibly related to hypercoagulation. David recommended placing Monroe on a long-term anticoagulate and also fitted Monroe with support stockings for additional management of the symptoms of venous stasis. David also recommended that Monroe avoid prolonged periods of standing and working and recommended a total permanent disability for the type of work Monroe was doing at that time.

In January 1992, David again reported that he believed Monroe had a significant disability for the work he was doing. In August

[7] Reflux is a backward or return flow. Id. at 1441.

1991, David noted that Monroe's expectations for improvement were small. David again observed that he did not think Monroe could function at his previous work of standing at machinery in a valve plant and again recommended that Monroe qualify for a complete disability.

At his hearing, Monroe testified that he was forty-nine years old. He estimated that he had a tenth grade education, despite the fact that he completed school only to the eighth grade and had no formal evaluation placing him at the tenth-grade level. He went to night school several different times to get a GED, but did not obtain his GED. However, he admitted that he could read a newspaper, read and write a letter, add and subtract, and make change. He also testified that he attended a welding course but did not complete the course or become a certified welder.

Monroe testified that before he went to work for Dresser Industries, he did routine carpenter work. He testified that for the past twenty years he was a machinist at Dresser. He stated that at Dresser he used to load valves of different sizes and run the machines. He testified that, depending on the size of the valves he was loading, he had to lift between forty-five and sixty pounds at his job. He stated that he had to stand eight to ten hours a day operating his machine and bend over pallets to pick up the valves.

Monroe testified that he stopped working in August 1991, on the advise of David and Sirikul, after they informed him that he had blood clots in his legs. He testified that the two doctors

informed him that he could not sit or stand for long periods of time. Monroe stated that he also saw Mansour for a possible blood disorder, but that Mansour ruled it out after checking Monroe.

Monroe testified that he wears heavy elastic stockings every day. He also testified that his legs hurt all the time and swell if he stands or sits for over an hour. He stated that he had to elevate them three or four times a day for about an hour to relieve the swelling. Monroe testified that he did not believe he could again stand six to eight hours a day, forty hours a week, without having to return to the hospital. Monroe testified that he believed he would have to elevate his legs four or five times a day if he had to stand on his feet all the time. He stated that he believed he could pick up twenty pounds or more on occasion and that, if he sat too long, the blood circulation in his legs was cut and he must move around or elevate them.

Monroe testified that he used to take Coumadin, a blood thinner, but that he now took Ecotrin, a type of non-prescription, coated aspirin. He said that he was taken off of Coumadin after blood and clear blisters started coming through on the top of his feet. He stated that the Ecotrin worked fairly well, easing his pain and acting as a blood thinner.

Monroe testified that he did not climb because of fear of falling, now that his legs go numb and develop cramps when the blood stops flowing. He said that when the pain was bad, he could not pay attention to anything else. He testified that the pain was from his ankles to his hips and that the worst pain was below his

knees on the inside of his legs. Monroe described the pain as a squeezing, deep pain. He testified that his legs hurt "pretty much all the time" and that for two or three hours they were even more painful. During those times, Monroe testified that he had to take aspirins and lie down or soak in hot water. Monroe also testified that he has arthritis in his left shoulder and in both of his hands. He stated that his hands started hurting a couple of years ago but that he was able to work despite the pain.

Monroe testified that he had difficulty driving a car because his legs go to sleep. He also testified that he had no longer hunted deer and squirrels. He testified that he did it when he first stopped working and tried it one time during the year of the hearing but that his legs now hurt too badly to go. Monroe also testified that he used to play basketball, softball, ride horses, and ride three-wheelers, but that he could no longer do any of these activities.

Monroe testified that he visits with relatives and friends who live close to him, goes to get his wife, gets the paper on occasion, and walks up the hill to get out of the house. Monroe also testified that he goes to church, although he does not sit through the entire service because his legs go numb. Monroe testified that he also goes grocery shopping with his wife. Monroe testified that he could only sit for thirty-five minutes to an hour. Monroe also testified that his sleeping is usually disturbed because his legs go numb and he must walk around before going back to bed.

Monroe testified that he receives, $1,300 a month from a long-term disability insurance policy that he obtained through Dresser. He also said that his wife delivers mail on a part-time basis. The ALJ accepted the stipulation of Monroe's attorney that if Monroe's wife testified, her testimony would corroborate and confirm Monroe's testimony.

The ALJ asked vocational expert Lionel Bordelon to consider a hypothetical individual who was, like Monroe, forty-nine years old, with a tenth-grade limited education, had performed past relevant work as a machinist, and who has been diagnosed with leg problems consisting of episodes of venous thrombosis and signs of venous stasis. The ALJ also asked Bordelon to consider the facts that this hypothetical individual wears stockings, uses Ecotrin therapy, is able to walk about 100 feet, can stand for an hour, cannot climb or bend, and can lift twenty pounds or more.

The ALJ further asked Bordelon to consider Monroe's testimony, to the extent Bordelon deemed it credible. The ALJ then asked Bordelon whether this hypothetical person could return to work as a machinist. Bordelon answered in the negative. The ALJ overruled Monroe's counsel's objection regarding the portion of the hypothetical that requested Bordelon to assess the credibility of Monroe's testimony.

The ALJ further asked Bordelon whether this hypothetical individual could do any other kind of work, considering his limitations and restrictions. Bordelon replied that the person could work as a weigher, measurer, checker, or a weigh scale

operator. Bordelon defined the last job as a basically sedentary occupation in which the person operating the scale would have the ability to walk, stand, and/or sit at liberty. Bordelon stated that there were 4,018 such jobs in the U.S. economy and 997 such jobs in the Louisiana economy. Bordelon also mentioned the possibility of the hypothetical individual's being an alarm monitor, which had 112,099 such occupations in the U.S. economy and 2,262 in the Louisiana economy.

On examination by Monroe's attorney, Bordelon testified that he had not examined Monroe or tested his particular job skills. Bordelon testified that he was assuming that Monroe had an average intelligence, based upon the fact that Monroe had completed the eighth grade. Bordelon also testified that, if Monroe's complaints were valid, he could still perform the position. Bordelon testified that he had previously done an on-site job analysis of the DOT D weigh scale operator, which was a civil service job. Bordelon further testified that that particular job required the taking of a civil service test.

Monroe contends that the ALJ erred in determining that his complaints of pain and physical limitations, especially his need to elevate both of his legs several times a day, as nonexertional limitations, were not credible. Monroe concedes that his testimony fell short of proving that the pain and swelling he experiences in both of his legs is such that it is considered disabling. See Selders, 914 F.2d at 618-19 (holding that pain is a disabling condition under the Act only when it is constant, unremitting, and

wholly unresponsive to therapeutic treatment). He believes, however, that his pain and physical limitations should have been considered nonexertional limitations that limited the range of jobs he could perform.

Nonexertional limitations describe nonstrength-related restrictions, including limits on a claimant's mental processes, sensory abilities, or tolerance of certain environmental conditions. 20 C.F.R. § 404.1569a (b)-(c). The effect of the claimant's subjective pain forms part of the determination of whether he can function in the "competitive and stressful conditions" of the real world. Wingo v. Bowen, 852 F.2d 827, 831 (5th Cir. 1988) (internal citations and quotations omitted). "[T]he ALJ has primary responsibility for resolving conflicts in the evidence." Scharlow v. Schweiker, 655 F.2d 645, 648 (5th Cir. Unit A Sept. 1981) (per curiam). Subjective evidence need not be given precedence over objective evidence. Villa v. Sullivan, 895 F.2d 1019, 1024 (5th Cir. 1990).

Here, the ALJ concluded that Monroe's testimony regarding his pain and physical limitations was not fully credible because it was not supported by the medical evidence. The ALJ found that Monroe's medical treatment was sporadic and that if his complaints were as severe as he alleged, he would have sought more regular medical treatment. The ALJ also found no indication that Monroe was taking any pain medication and that if Monroe was in constant pain, it was reasonable to believe that he would be taking some pain medication for relief. The ALJ found that Monroe's complaints of pain would

be no more than a slight limitation on his ability to work. The ALJ also found that Monroe's daily activities were in keeping with the requirements for light level work.

Monroe lists the number of times he was seen by the medical health care providers to refute the ALJ's statement that his medical treatment was sporadic. Monroe also states that, despite the ALJ's statement that there was no indication that Monroe was taking pain medication, the record demonstrated that Monroe was taking Ecotrin, which was an enteric coated aspirin that also relieved pain as well as inflammation and working as an anti-platelet.

A review of the cited treatments and services provided demonstrates that only a few are for complaints of pain or swelling. The majority of the reports are for checkups, tests and evaluations, lab work, and letters written by the doctors. Monroe also testified that Ecotrin relieved his pain and admitted that it was a non-prescription pain medication. There was evidence in the record supporting the ALJ's finding that Monroe's pain was neither disabling nor a nonexertional limitation that prevented him from working.

Monroe also states that the hypothetical question posed to Bordelon did not mention any pain or swelling that Monroe suffered. Hypotheticals posed by an ALJ to a vocational expert need only incorporate the disabilities that the ALJ recognizes. Bowling v. Shalala, 36 F.3d 431, 435-36 (5th Cir. 1994). If the claimant is afforded the opportunity to correct deficiencies in the ALJ's

question by mentioning or suggesting to the vocational expert any purported defects in the hypothetical questions, there is no reversible error. Monroe's attorney was given the opportunity to cross-examine Bordelon but failed to mention the pain, although counsel mentioned Monroe's needed to elevate his legs. Because counsel was afforded this opportunity, even though he did not fully utilize it, there is no reversible error. See Bowling, 36 F.3d at 436.

Finally, Monroe contends that the ALJ did not consider his testimony about his need to elevate both of his legs several times a day as a nonexertional factor limiting the range of jobs Monroe could perform. Upon examination by Monroe's attorney, Bordelon testified that Monroe could perform the jobs of alarm monitor and weigh scale operator, even though he would have to elevate his legs several times a day. Monroe states that Bordelon eliminated the job of alarm monitor after considering Monroe's need to elevate his legs. Monroe misstates the record, however: Bordelon never eliminated the position of alarm monitor because of Monroe's need to elevate his legs. The ALJ considered the testimony of the vocational expert in making his findings regarding the credibility of Monroe's need to raise his legs as a nonexertional limitation. There was substantial evidence to support the Secretary's decision to consider Monroe not disabled and to deny him disability insurance benefits.

B.

Monroe argues that the ALJ's hypothetical to the vocational expert's testimony was flawed because the ALJ asked the vocational expert to assess Monroe's credibility. Monroe contends that it is not a vocational expert's role to assess credibility. He does not identify any portion of his testimony that he considers the vocational expert to have found incredible. Considering the discussion above, however, it would appear that Monroe was referring to his testimony of pain and physical limitations that the ALJ deemed incredible.

At the hearing, the ALJ stated in pertinent part to Bordelon:

> Let me ask you to consider a hypothetical individual who has the following restrictions and limitations I'm about to pose to you. Let me ask you to consider the testimony of the claimant to the extent that you assess the credibility of such testimony to the degree you deem credible.

Subsequently, Monroe's counsel objected, stating that he did not consider it a proper hypothetical when Bordelon must assess Monroe's credibility. Counsel considered any credibility assessments to be solely within the ALJ's purview. The ALJ overruled the objection, stating that counsel would have the opportunity to present his own hypotheticals with any additions or limitations that he deemed proper.

As stated earlier, the hypothetical questions that an ALJ poses to a vocational expert need only incorporate the disabilities that the ALJ recognizes, if the claimant is afforded the opportunity to correct deficiencies in the ALJ's question by mentioning or suggesting to the vocational expert any purported defects in the hypothetical questions. Bowling, 36 F.3d at 435. This opportunity

includes mentioning any additional disabilities not recognized by the ALJ's findings or disabilities recognized but omitted from the hypotheticals. Id. at 436.

The ALJ determined that Monroe's pain produced only a "slight" limitation on his ability to work. Even assuming that the ALJ erred in telling Bordelon to consider Monroe's testimony of pain and physical limitation, for purposes of answering the hypothetical, to the extent that Bordelon deemed it to be credible, Monroe's counsel had the opportunity to correct this deficiency by mentioning or suggesting Monroe's pain and physical limitations as additional factors to be considered in answering the hypothetical. As a result, any error would not be reversible.

C.

Monroe argues for the first time on appeal that the ALJ's finding of the existence of a significant number of jobs that Monroe could perform is legally insufficient. Counsel did not raise this issue in the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

Monroe contends that the number of jobs for the position of weigh scale operator is not "significant." He also contends that Bordelon later eliminated the position of alarm monitor as a possible position for Monroe. As earlier stated, though, that

statement is inconsistent with the record. Bordelon did not eliminate the position of alarm monitor as a possible job for Monroe. Both Monroe and the Secretary agree this court has no case authority on the legal definition of what is a significant number of jobs.

In Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992), the court held that various factors demonstrated that 650-900 jobs within the entire state constituted a significant number of jobs. See also Hall v. Bowen, 837 F.2d 272, 276 (6th Cir. 1988) (reversing district court's determination that 1350 jobs in the local economy was not a significant number after looking at several factors); cf. Denais v. Secretary of Health & Human Servs., 820 F. Supp. 278, 282-83 (W.D. La. 1993) (using same analysis of Trimiar and Hall to find that 1,004 was a significant number of jobs, but that claimant effectively rebutted evidence that there were a significant number of jobs she could perform). A finding that 997 weigh scale operator positions and 2,262 alarm monitor positions in the Louisiana economy constituted a significant number of jobs would not result in manifest injustice.

AFFIRMED.