UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50052
Summary Calendar

KENNETH LACKEY,

Plaintiff-Appellant,

versus

DONNA SHALALA, M.D.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CV-334)

(November 1, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Kenneth Lackey challenges the termination of his Social Security disability benefits. We **AFFIRM**.

I.

In December 1984, an administrative law judge (ALJ) found that Lackey was disabled as the result of two back surgeries, migraine headaches, and labile hypertension, and that he was entitled to benefits from January 31, 1980. In 1989, following a re-evaluation of his condition, Lackey was informed that he was no longer

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

disabled and that his benefits would be terminated. Lackey requested an administrative hearing, which was conducted on August 1, 1990; Lackey and a vocational expert testified. The ALJ found that Lackey's medical impairment had improved and that he was no longer disabled as of May 25, 1989. The Appeals Council denied Lackey's request for review.

Lackey sought judicial review of the Secretary's final decision. The district court adopted the magistrate judge's recommendation, and held that substantial evidence supported the decision to terminate Lackey's benefits.

II.

Lackey contends that there is no substantial evidence of medical improvement; and that the ALJ relied improperly on vocational rather than medical expert testimony, and rejected improperly a treating physician's opinion.

As is well-known, our task is to determine "whether the record contains substantial evidence in support of the ALJ's conclusions and whether the ALJ applied the proper legal standards in evaluating the evidence". ***Griego v. Sullivan***, 940 F.2d 942, 943 (5th Cir. 1991).

> [T]he Secretary may terminate disability benefits if substantial evidence demonstrates that:
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> > (A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and
> >
> > (B) the individual is now able to engage in substantial gainful activity.

Id. at 943-44 (quoting 42 U.S.C. § 423(f)(1)). Medical improvement is defined as "`any decrease in the medical severity of [the] impairment(s) which was present at the time of the most recent favorable medical decision that [the claimant] w[as] disabled or continued to be disabled'". ***Id***. at 944 (quoting 20 C.F.R. § 404.1594(b)(1). "A determination of medical improvement must be based on changes (improvement) in the symptoms, signs, and/or laboratory findings associated with [the] impairment(s)". ***Id***. (internal quotation marks and citation omitted). "In evaluating ability to engage in substantial gainful activity, the Secretary considers, first, whether the claimant can perform past relevant work and, if not, whether the claimant can perform other work". ***Id***. (citing 20 C.F.R. §§ 404.1594(f)(7) and (f)(8)). "[T]he ultimate burden of proof lies with the Secretary in termination proceedings". ***Id***.

If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. ***Richardson v. Perales***, 402 U.S. 389, 390 (1971) (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". ***Id***. at 401 (internal quotation marks and citation omitted). "`[N]o substantial evidence' will be found only where there is a `conspicuous absence of credible choices' or `no contrary medical evidence.'" ***Hames v. Heckler***, 707 F.2d 162, 164 (5th Cir. 1983) (quoting ***Hemphill v. Weinberger***, 483 F.2d 1137 (5th Cir. 1973); ***Payne v. Weinberger***, 480 F.2d 1006 (5th Cir. 1973)).

Generally, the opinion of a treating physician "should be accorded considerable weight in determining disability". ***Scott v. Heckler***, 770 F.2d 482, 485 (5th Cir. 1985). But, as a matter of law, that opinion is not entitled to greater weight than that of a consulting physician. ***Adams v. Bowen***, 833 F.2d 509, 512 (5th Cir. 1987). "[T]he ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion". ***Bradley v. Bowen***, 809 F.2d 1054, 1057 (5th Cir. 1987).

The ALJ found work-related medical improvement based on a comparison of the medical evidence supporting the disability finding in 1984 with the medical evidence from Lackey's re-evaluation in 1989. As hereinafter discussed, substantial evidence supports the ALJ's finding.

The disability finding in 1984 was based on "severe migraine headaches, and lumbar scarring, status post herniated disc with two back operations, and labile hypertension" and "disabling pain". On July 20, 1989, Dr. Long, a physician employed by the Texas Rehabilitation Commission, examined Lackey for the purpose of re-evaluating the earlier disability determination. Dr. Long reported that Lackey complained of (1) chronic low back pain radiating down his legs; (2) migraine headaches (the description of which was more characteristic of tension headaches) about six to eight times a year; and (3) sharp, left, parasternal pain radiating to the left shoulder for several years. Lackey also reported to Dr. Long that he had a cardiac catheterization in 1984, which revealed a spasm of one coronary blood vessel, but that his chest pain is not related

to exertion, may come on at rest, and occurs only every several months.

Dr. Long's examination revealed that Lackey complained of pain in his hamstring, but not his back or legs, on a straight-leg raise to 60 degrees; that a bent-leg flexion to 130 degrees did not cause any pain; and that he was able to "flex forward from a standing upright position with his knees locked in full extention [sic] to within 6 inches of the floor with his fingertips", complaining only of "tension-like pain in his hamstrings but no back pain". Dr. Long reported that (1) Lackey's gait was normal, (2) he was able to heel-and-toe walk without difficulty, and squat and rise from a squatting position without difficulty, (3) he did not use any assistive devices for walking, and (4) he showed no abnormalities and had a full range of motion of all joints including his back. In Dr. Long's opinion, Lackey had

> very little evidence of physical limitation on examination ... [and] [h]is headaches and chest pain appear to be minor and infrequent problems. The patient appears to have become dependent upon his oral Demerol in high doses which he takes frequently for his back pain.

The ALJ also considered the report of Dr. Neely, who examined Lackey on July 19, 1990, for an assessment of his back pain.[2] Dr. Neely's records reveal that Lackey informed him that "he continues to have a persistent intermittent pain in his low back and pain into his legs at a bilateral sciatic distribution." In Dr. Neely's

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[2] When Lackey had last seen Dr. Neely in 1982, Dr. Neely opined that Lackey was "totally disabled" and would not be able to work in the future because of "recurrent and rather severe radicular syndrome".

opinion, Lackey

> has been suffering from a failed laminectomy syndrome over the last ten years. I doubt that this is going to improve and I seriously doubt that he will ever be able to hold any job on a regular basis. I would therefore suggest that his disability continue at this point.

The ALJ found that Dr. Neely's opinion was "not well supported by objective evidence", because Dr. Neely's physical findings were "contradicted by the thorough report of Dr. Long". Lackey's assertion that the ALJ was required to reconcile Dr. Neely's opinion with Dr. Long's conclusions is unavailing, because an ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion. ***See Bradley v. Bowen***, 809 F.2d at 1057. We also reject Lackey's contention that a medical expert, rather than a vocational expert, should have testified at the hearing; the ALJ was free to rely on Dr. Long's report for medical expertise. *See* ***Richardson v. Perales***, 402 U.S. at 402.

The ALJ discredited Lackey's complaints of disabling pain, noting that the medical evidence and Lackey's testimony at the hearing regarding his daily activities (building clocks as a hobby, fishing, raising rabbits and chickens) were not consistent with a finding of total disability. The ALJ also noted that Lackey was hospitalized twice in 1988 -- once for injuries sustained when he was working with a hydraulic jack, and again when he fell against something while working in his shop.

III.

For the foregoing reasons, the judgment is

AFFIRMED.