UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50119

(Summary Calendar)

OBRA WILLIAMS,

Plaintiff-Appellant,

versus

DONNA SHALALA,
Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(A 92 CV 363)

(November 25, 1994)

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

PER CURIAM:[*]

Obra Williams appeals the district court's order affirming the decision of the Secretary of Health and Human Services ("Secretary") denying his claim for supplemental security income ("SSI") benefits based on disability. Williams contends that the decision of the Secretary is not supported by substantial evidence and is contrary to law. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

The Secretary and the Secretary's Appeals Council denied Obra Williams' first application for supplemental security income benefits based on disability in 1988. Williams did not seek judicial review of this decision. Instead, he filed a new application for SSI benefits in 1990. Williams alleged that he was disabled because he suffered from the residual effects of a gunshot wound, hernias, diabetes, and high blood pressure.

After Williams' second application was denied, he requested a hearing before an administrative law judge ("ALJ"). Following a hearing, the ALJ determined that Williams was not disabled and thus not eligible for SSI benefits. The Appeals Council denied his request for review, and the decision of the ALJ became the final decision of the Secretary. Williams then filed a civil action in district court. A magistrate judge reviewed the Secretary's decision and recommended that the district court affirm it. After considering Williams' objections, the district court adopted the magistrate's report and recommendation and dismissed the case.

Williams appeals the district court's affirmance of the Secretary's decision on the grounds that: 1) substantial evidence did not support the Secretary's finding that Williams was not disabled; 2) the Secretary improperly applied the medical-vocational guidelines in determining that Williams was not disabled; and 3) the Secretary improperly gave res judicata effect to an SSI decision on Williams' earlier application.

II

A

Williams contends that substantial evidence does not support the Secretary's finding that he was not disabled. Judicial review of a disability claim under 42 U.S.C. § 405(g) (1988) focuses on whether the whole record contains substantial evidence that supports the Secretary's decision. *Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938)); *see also Anthony v. Sullivan*, 954 F.2d 289, 295 (5th Cir. 1992) (applying *Richardson*). Substantial evidence "must be more than a scintilla, but it need not be a preponderance." *Anthony*, 954 F.2d at 295; *see also Muse*, 925 F.2d at 789 (same). A court will find that there is no substantial evidence to support the Secretary's findings only when there is a "conspicuous absence of credible choices" or "no contrary medical evidence." *Hames v. Heckler*, 707 F.2d 162, 164 (5th Cir. 1983) (citations omitted). The reviewing court, however, "may not reweigh the evidence or try the issues *de novo*." *Anthony*, 954 F.2d at 295.

We examine the following factors from the record to determine whether substantial evidence of a disability exists: "1) objective medical facts; 2) diagnoses and opinions of treating and examining physicians; 3) claimant's subjective evidence of pain and

disability; and 4) claimant's age, education, and work history." *Wren v. Sullivan*, 925 F.2d 123, 126 (5th Cir. 1991).[1] A court can approve a finding that a claimant is disabled when a consideration of these factors permit it to conclude that the claimant is not able "to engage in any substantial gainful activity . . . for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1988). A physical limitation or impairment alone does not establish disability. *Milam v. Bowen*, 782 F.2d 1284, 1286 (5th Cir. 1986). Rather, a claimant's impairment must be so severe that it interferes with basic work activities; otherwise, the Secretary may deny the claim. *Anthony*, 954 F.2d at 293.

Williams argues specifically that the Secretary erred when she found that, because he could perform light work, he was not disabled.[2] He asserts that objective medical facts and his

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[1] Williams does not dispute the Secretary's findings on his age and education level; therefore, our analysis will be limited to considering objective medical facts, diagnoses and opinions of treating and examining physicians, and Williams' subjective evidence of pain and disability. The Secretary noted that Williams was forty-seven-years old at the time of the decision and has an eighth-grade education. The applicable Social Security regulations define anyone under 50 as a "younger person." 20 C.F.R. § 416.963(b) (1994). The regulations categorize Williams' eighth-grade education as "limited" but not "marginal." *Id.* § 416.964(b)(2),(3) (1994).

The current set of regulations to which we cite was originally promulgated in 1980; therefore, these regulations were in effect at the time of the Secretary's decision.

[2] The regulations define "light work" as follows:

> 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. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 416.967(b) (1994).

physician's diagnoses and opinions regarding his impairments support a finding of disability. He also disputes the Secretary's resolution and treatment of his claims of subjective pain.

The record establishes several objective medical facts. At a medical examination, Williams was able to arise easily from the examination table, extend his leg fully while in a sitting position, perform heel and toe walking, bend thirty degrees laterally each way, and rotate his hips thirty degrees each way. The examination further revealed that Williams had good muscle tone in all four extremities. Williams also underwent audiological testing that revealed a severe hearing loss in his left ear. Williams testified that he could walk at a normal pace for three or four blocks without getting tired, sit for up to two hours, stand in one place for thirty minutes, drive a car, and do light housework.

The record discloses additionally that Williams' physician, Dr. Jeffree A. James, conducted a medical assessment and diagnosis in 1990. Dr. James diagnosed Williams as having diabetes with no end-organ (e.g., brain, eye, heart, kidney) damage, mild hypertension, a ventral hernia, and a residual gunshot wound with no evidence of neurological compromise. Based on his diagnosis, Dr. James concluded that Williams should be restricted to sedentary work.[3]

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[3] The regulations define "sedentary work" as follows:
Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is

The Secretary found that the medical evidence established Williams' claimed impairments.[4] The Secretary also found that Williams had physical limitations from his diabetes and pain from the residual gunshot wound that would prevent him from working in his former occupations.[5] However, the Secretary compared Williams' impairments to the criteria listed in the Social Security regulations and determined that Williams' impairments did not permit her to find that his condition was severe enough to prevent him from engaging in *any* substantial gainful activity. *See* 20 C.F.R. § 404.1525 (1994).[6]

Nothing in the record indicates that the Secretary's analysis of Williams' impairments departed from the criteria established by the Social Security regulations. The objective medical facts support the Secretary's findings that Williams' impairment was not

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> often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

Id. § 416.967(a) (1994).

[4] In evaluating a claimant's impairments, Social Security regulations require the Secretary to conduct a five-step sequential analysis: 1) whether the claimant is presently working; 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. *Id.* § 416.920 (1994).

[5] The record indicates that Williams' former occupations include porter and furniture mover.

[6] Impairments considered severe enough to prevent a person from doing any substantial gainful activity are listed in the appendix of the Social Security regulations. *See* 20 C.F.R. Part 404, Subpt. P., app. 1 (1994). The Secretary evaluates the claimant's medical evidence to determine if the claimant has such an impairment or a condition equivalent to those listed in the appendix. *See id.* § 404.1526 (1994). If the Secretary determines that a claimant does not have a severe impairment that would warrant a finding of disability, the Secretary may consider the impact of other related symptoms, such as pain. *See id.* § 404.1529 (1994).

severe and that he was not prevented from engaging in substantial gainful activity. Moreover, the Secretary's findings are not inconsistent with the diagnoses and opinions of Williams' own physician.[7]

Williams also argues that the Secretary erred in not adequately considering his subjective claims of pain. Pain alone has been recognized as a disabling condition under the Social Security Act, but only where it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." *Hames*, 707 F.2d at 166. A claimant is not disabled, therefore, merely because she cannot work without experiencing some pain or discomfort. *Id*. To establish that pain exists at the level the claimant alleges, objective medical evidence must show an underlying condition that reasonably would produce that pain. *Anthony*, 954 F.2d at 296. Moreover, subjective claims of pain need not be credited over objective medical evidence. *Id*. at 295.

Williams testified at his hearing before the Secretary that his left leg gave way easily, and that he has constant pain shooting down the left side of his body as a result of the residual gunshot wound. Although an examination of Williams revealed that a bullet fragment remained in his back, Dr. James found no

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[7] Dr. James concluded that Williams was capable of "sedentary work," which qualifies as substantial gainful work. *See* 20 C.F.R. § 416.967(a) (1994). The Secretary's conclusion that Williams could perform "light work" is not inconsistent with Dr. James' conclusion in that both agree Williams is capable of *some* work, and that he is not disabled. Although the Secretary concluded that Williams was capable of light work, Social Security regulations require the Secretary only to consider Dr. James' diagnoses and opinions, which she did. *See Spellman v. Shalala*, 1 F.3d 357, 364 (5th Cir. 1993)(determining disability is duty that ultimately lies with the Secretary).

neurological compromise. Williams rated his pain as a "five" on a scale of one to ten and has been prescribed a painkiller. The Secretary found that Williams suffers "some pain" as a result of the residual gunshot wound and diabetes, but noted as inconsistent with Williams' claim of disabling pain his testimony that he could walk at a normal pace for three or four blocks without getting tired, sit for up to two hours, stand in one place for thirty minutes, drive a car, and do light housework. Consequently, the Secretary chose to credit objective evidence and need not have considered conclusive Williams' subjective testimony.

Additionally, Williams argues that the Secretary erred in stating no basis for disbelieving Williams' claims of pain. Williams contends that *Scharlow v. Schweiker*[8] requires the Secretary to state the credibility choices she makes when evaluating a subjective complaint of pain and the basis for those choices. In *Scharlow*, we held that:

> [I]f the claimant could have prevailed if all of the claimant's evidence had been believed, the trier of the fact has a duty to pass on the issue of the truth and reliability of complaints of subjective pain or the medical significance of such complaints once found credible. Failure to indicate the credibility choices made and the basis for those choices in resolving the crucial subsidiary fact of the truthfulness of subjective symptoms and complaints requires reversal and remand.

655 F.2d at 648-49 (citations omitted). *Scharlow*, however, requires only that the Secretary evaluate conflicts between subjective evidence and medical evidence as to the claimant's complaint of pain. *Hollis v. Bowen*, 837 F.2d 1378, 1385 (5th Cir.

[8] 655 F.2d 645, 648-49 (5th Cir. 1981).

1988). The Secretary stated specifically that full consideration had been given to the available evidence, medical and otherwise, that reflected on Williams' allegation of pain. The Secretary explained further that she gave consideration to the claimant's work record, and the nature, location, onset, duration, frequency, radiation, and intensity of Williams' pain.[9] As discussed *supra*, the Secretary noted that objective evidence did not support Williams' subjective complaint of disabling pain. Thus, the Secretary complied with *Scharlow* by "indicating the credibility choices made and the basis for those choices." 655 F.2d at 648-49.

Based on our examination of the record, we conclude the following: 1) objective medical evidence supports the Secretary's finding that Williams did not have a severe disability and was not prevented from doing substantial gainful work; 2) the Secretary's findings on the objective medical evidence were consistent with the medical diagnosis of Williams' physician; and, 3) the Secretary adequately and properly evaluated Williams' subjective claims of pain. Consequently, substantial evidence supports the Secretary's finding that Williams was not disabled because he could perform light work.

B

Williams contends next that, because he has nonexertional impairments, the Secretary improperly relied on medical-vocational

[9] Social Security regulations require the Secretary to consider all factors relevant to a claimant's symptoms, such as pain and its nature. *See* 20 C.F.R. § 404.1529 (1994).

guidelines in determining that he was not disabled.[10] When a claimant suffers *only* from nonexertional impairments, and such impairments affect his ability to meet the demands of employment other than strength demands, the medical-vocational guidelines do not apply. *See* 20 C.F.R. § 416.969a(c)(2) (1994).[11] However, "[w]hen the claimant suffers only from exertional impairments or his nonexertional impairments do not significantly affect his residual functional capacity, the ALJ [and, consequently, the Secretary] may rely exclusively on the Guidelines . . . ." *Selders v. Sullivan*, 914 F.2d 614, 618 (5th Cir. 1990).

The record establishes that Williams has profound hearing loss in his left ear and that he has had this impairment since childhood. However, Williams has normal hearing in his right ear. Further, Williams had no difficulty in understanding and responding to the questions asked of him in the hearing on his application. The record also reveals that Williams demonstrated that he could move and flex his body normally during a medical examination.[12]

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[10] The medical-vocational guidelines assist the Secretary in making a determination on a claim of disability by providing tables that compare various vocational factors (i.e., age, education, and work experience) against an individual's capability for work (i.e., sedentary, light, medium, heavy, or very heavy work) to determine if a claimant is able to engage in substantial gainful work other than that work in which the claimant has previously engaged. The guidelines direct a finding of "disabled" or "not disabled." *See* 20 C.F.R., Pt. 404, Subpt. P, app. 2 (1994).

[11] "Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional." *Id.* § 416.969a(a) (1994). Nonexertional limitations include, in relevant part, "difficulty in seeing or hearing" and "difficulty performing the manipulative or postural functions of some work such as reaching, crawling, or crouching." *Id.* §§ 416.969a(c)(1)(iv),(vi) (1994).

[12] The results of Williams' 1990 medical examination are discussed in Part II.A, *supra*.

Consequently, substantial evidence supports the Secretary's conclusion that Williams' impairments, other than his hearing loss, were exertional and that his hearing loss, as a nonexertional impairment, did not affect his residual functional capacity. Therefore, the Secretary did not err when she applied the medical-vocational guidelines in determining that Williams was not disabled.

C

Lastly, Williams contends that the Secretary erred in giving res judicata effect to the decision of the Secretary on Williams' prior application for social security benefits. The findings of the Secretary on a disability claim are conclusive, subject to judicial review. 42 U.S.C. § 405(g) (1988). The Social Security Act provides for judicial review of the Secretary's final decision on disability benefits made after a hearing in which the appellant was a party. *Id*. Failing to commence a civil action within the time allotted by the Social Security Act for appeal forecloses judicial review of the Secretary's decision denying benefits, absent a colorable constitutional claim. *Califano v. Sanders*, 430 U.S. 99, 109, 97 S. Ct. 980, 986, 51 L. Ed. 2d 192 (1977). When the Secretary's decision on the same facts and issues becomes final through either administrative of judicial action, the doctrine of res judicata applies. 20 C.F.R. § 404.957(c)(1) (1994). A medical condition is presumed not to have changed from the time of the Secretary's earlier final determination unless the claimant proves the contrary. *Buckley v. Heckler*, 739 F.2d 1047, 1048-49 (5th Cir.

1984) (requiring new evidence to change Secretary's prior determination).

The Secretary rejected Williams' earlier claim of disability, which was based on the same facts and issues presented in his later claim, finding that Williams' impairments were not severe enough to keep him from working. The record reveals no significant deterioration of Williams' physical condition since the filing of his earlier application. Because Williams did not seek judicial review of his prior application, the Secretary did not err in giving res judicata effect to her earlier decision. Further, substantial evidence supports the Secretary's finding that Williams did not overcome his burden to prove that his condition had changed.

III

For the foregoing reasons, we AFFIRM the decision of the Secretary.