

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 94-50120  
Summary Calendar

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CLARITA G. STANSEL, Plaintiff-Appellant,  
versus  
DONNA E. SHALALA, Secretary of Health Defendant-Appellee.  
and Human Services,

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Appeal from the United States District Court for the  
Western District of Texas  
(92-CV-651)

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(November 18, 1994)

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

PER CURIAM<sup>1</sup>:

Plaintiff-Appellant Clarita G. Stansel ("Stansel") appeals the district court's denial of her appeal of the decision of Defendant-Appellee Donna E. Shalala's, Secretary of Health and Human Services ("Secretary"), denial of her claim for disability insurance benefits under Title II of the Social Security Act. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 6, 1989, Stansel filed an application for

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

disability insurance benefits based on hypertension, a heart condition, and a stroke. Her claim was denied. On reconsideration, the claim was again denied. Stansel requested a hearing before an Administrative Law Judge ("ALJ"). The hearing was held in Austin, Texas, on January 24, 1991. The ALJ issued his decision finding that Stansel was not disabled as defined by the Social Security Act.

Stansel requested a review of the ALJ's decision. The Appeals Council remanded the case to the ALJ with following instructions:

Consider the combined effects of all of the claimant's impairments on or before December 31, 1985, give further consideration to the claimant's residual functional capacity and provide appropriate rationale (Social Security Ruling 86-8).

Consider the opinions of treating and examining sources in accordance with the provisions of 20 CFR 404.1527 as revised on August 1, 1991, and provide appropriate rationale for the weight accorded such opinion evidence.

Give further consideration to the claimant's subjective complaints, including fatigue and pain, in accordance with the criteria described in Social Security Ruling, 88-13 and 20 CFR 404.1529 as revised on November 14, 1991.

Following remand, the ALJ concluded that Stansel was not entitled to disability benefits. Stansel again sought review of the ALJ's decision. This time, the Appeals Council found that there was no basis to grant her request for review. The denial became the final decision of the Secretary.

Stansel next brought her claim to federal district court. The case was assigned to a magistrate judge who ordered Stansel and the

Secretary to submit briefs in the case. Subsequently, the magistrate judge issued a Report and Recommendation, recommending that the final decision of the Secretary be upheld. Stansel filed objections. The district court considered the entire record in the case along with Stansel's objections, adopting the magistrate judge's Report and Recommendation. The court affirmed the decision of the Secretary and dismissed Stansel's case.

#### DISCUSSION

Stansel, who is represented by counsel on appeal, alleges that she did not knowingly waive her right to counsel at the ALJ hearing, and that the ALJ failed to carry out his duty to develop all the relevant facts. A claimant has a statutory right to counsel at a Social Security hearing. 42 U.S.C. § 406. However, the claimant may waive this right if given sufficient information to enable her to decide intelligently whether to retain counsel or proceed *pro se*. See *Clark v. Schweiker*, 652 F.2d 399, 403-04 (5th Cir. 1981). A claimant may not have sufficient information to make an intelligent waiver unless she receives an explanation of the possibility of free counsel or a contingency arrangement, and the limitation on attorney's fees to 25% of past due benefits awarded. *Id.* at 403-04. Pre-hearing written notification alone may be inadequate. *Benson v. Schweiker*, 652 F.2d 406, 408 (5th Cir. 1981).

At Stansel's hearing, the ALJ informed her that she had the right to be represented by an attorney or other qualified person, but failed to inform her that she could possibly obtain representation on a contingency basis and that the maximum fee for

that contingency representation would not exceed 25% of recovery. Stansel replied that the services of an attorney would be too costly.

A flaw in the waiver of counsel does not require a remand unless the record reveals evidentiary gaps which result in unfairness or clear prejudice. See *Goodman v. Richardson*, 448 F.2d 388, 389 (5th Cir. 1971). When a claimant is not represented by counsel, the ALJ has a duty to "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Kane v. Heckler*, 731 F.2d 1216, 1219-20 (5th Cir. 1984) (internal quotations omitted). To establish that the ALJ failed to fulfill this heightened duty, the claimant must show that, "had the ALJ done his duty, [the claimant] could and would have adduced evidence that might have altered the result." *Id.* at 1220.

Stansel argues that the ALJ did not adequately question her regarding her specific problems in caring for personal needs and doing household chores. In *James v. Bowen*<sup>2</sup>, this Court determined that a ten-minute hearing during which the ALJ questioned the claimant about his physical symptoms and current medication, his ability to perform various tasks, his daily activities and the frequency with which he saw a doctor, and gave him an opportunity to provide any other information, was adequate.

During her hearing, the ALJ asked Stansel if she was able to do any housework. The ALJ asked several questions that clarified Stansel's response that she could cook, wash dishes and do laundry

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<sup>2</sup> 793 F.2d 702, 705 (5th Cir. 1986).

in a washing machine. The ALJ also determined that Stansel could walk no more than two blocks without becoming extremely tired and having intense pain. The ALJ elicited that Stansel did not go visiting, but that she did attend church every Sunday. Stansel responded positively to the ALJ's question that she was able to dress, bathe and comb her hair. The ALJ also asked Stansel to describe her daily routine. Finally, the ALJ asked her if she wished to provide any other information.

Stansel asserts that an attorney would have asked more probing questions to bring out any additional difficulties she was having. She argues that claimants often answer that they can bathe and dress, but upon more indepth inquiry will describe other problems with activities such as hair care, buttoning buttons, putting on tight fitting clothes and dropping dishes. What claimants often do is irrelevant. Stansel has not asserted that these generalities apply in her case. She has not indicated what evidence she would have introduced at the hearing to change the result of the proceedings, and she cannot establish prejudice. *See Kane*, 731 F.2d at 1220. We find the ALJ's inquiries were sufficient to satisfy the requirements under *Kane*. *See James*, 793 F.2d at 705.

Stansel next contends that the ALJ's decision was not supported by the facts. The standard of review in cases under 42 U.S.C. § 405(g) is whether there is substantial evidence in the record to support the decision of the Secretary. *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). Substantial evidence is more than "a suspicion of the existence of the fact to be established,

but 'no 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) (citations omitted). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).

Under the Social Security Act, "disability" is defined as the inability to engage in any substantial gainful activity due to a medically determinable physical or mental impairment which could be expected to last for a period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A); *Shipley v. Secretary of Health and Human Services*, 812 F.2d 934, 935 (5th Cir. 1987). The regulations promulgated pursuant to the Social Security Act provide for a five-step sequential evaluation process to determine disability. See 20 C.F.R. §§ 404.1520, 416.920 (1990); *Villa v. Sullivan*, 895 F.2d 1019, 1022 (5th Cir. 1990). If at any point in the process a claimant is conclusively determined to be either disabled or not disabled, the inquiry ends. Stansel's case came down to the final step of whether a claimant "can do any other 'substantial gainful work which exists in the national economy.'" *Herron v. Bowen*, 788 F.2d 1127, 1131 (5th Cir. 1986) (quoting 42 U.S.C. § 423(d)(2)(A)).

Stansel argues that the Secretary erred in finding that she had the residual functioning capacity to perform the full range of light work. She contends that the ALJ misinterpreted the evidence regarding what she is capable of doing and that the ALJ did not

assert specific reasons for rejecting her testimony of pain resulting from headaches and left side weakness.

Pain, in and of itself, can be a disabling condition if it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." *Harrell v. Bowen*, 862 F.2d 471, 480 (5th Cir. 1988) (citations omitted). It is improper for an ALJ not to consider a claimant's subjective complaints of pain. *Carrier v. Sullivan*, 944 F.2d 243, 247 (5th Cir. 1991). "It is also improper for an ALJ to make no finding as to a claimant's subjective complaints of pain if, if the claimant were believed, said claimant would be entitled to benefits." *Id.* In addition, if uncontroverted medical evidence shows a basis for the claimant's complaints, the ALJ must weigh the objective medical evidence and assign articulated reasons for discrediting the claimant's subjective complaints of pain. *Abshire v. Bowen*, 848 F.2d 638, 642 (5th Cir. 1988).

In discrediting Stansel's testimony, the ALJ considered that although she asserted she suffers from severe headaches and experiences pain when she walks, she does not require prescribed pain medication. The ALJ also considered that she cooks, washes dishes and does the laundry. The ALJ further considered that although Stansel was medically precluded from engaging in strenuous work, she was not precluded from anything but strenuous activity. The ALJ interpreted this prohibition to allow the occasional lifting of up to 20 pounds, and regular lifting of up to 10 pounds.

It is within the discretion of the ALJ to discount a

petitioner's complaints of pain "based on the medical reports combined with her daily activities and her decision to forego certain medications." *Griego v. Sullivan*, 940 F.2d 942, 945 (5th Cir. 1991). The "evaluation of a claimant's subjective symptoms is a task particularly within the province of the ALJ who has had an opportunity to observe whether the person seems to be disabled." *Harrell*, 862 F.2d at 480 (citations omitted). The ALJ specifically found that Stansel's subjective complaints did not interrupt her normal daily activities and did not preclude her from performing light work. We find sufficient evidence in the record to support these findings. AFFIRMED.