

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50134
(Summary Calendar)

GARY JAMES,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary of
Health and Human Services,
ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-93-CV-02)

(October 17, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Gary W. James appeals the district court's
affirmance of the denial of disability insurance benefits by
Defendant-Appellee Donna Shalala, Secretary of Health and Human

*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should not be published.

Services (the Secretary) pursuant to 42 U.S.C. § 405(g). Specifically, James contends that the district court erred in finding substantial evidence to support the Secretary's decision. Agreeing with the district court, however, we affirm.

I

FACTS AND PROCEEDINGS

James applied for disability benefits on January 7, 1991, alleging that he had become disabled on August 8, 1989, as the result of a back injury. Following an administrative hearing, the Administrative Law Judge (ALJ) denied his applications, determining that, as James could perform light work including his past jobs of bartender and security guard, he was not disabled. The ALJ found that James met the appropriate disability insured status requirements of the Social Security Act (SSA) and that he had not engaged in substantial gainful activity since August 8, 1989. Her Findings Nos. 3 through 5 were that

The medical evidence establishes that the claimant has residual low back pain, status post L4-5 diskectomy, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

The claimant's allegations of impairments, including pain, are found credible to the extent the claimant would be incapable of lifting more than 20 pounds at a time or repetitively bending or stooping.

The claimant has the residual functional capacity to lift up to 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds but may not repetitively stoop or bend (20 C.F.R. 404.1545 and 416.945).

Although the ALJ found James to be impaired, her Findings Nos. 6 through 8 were that James was not under a disability as defined by the SSA because James could perform his past relevant work of bartender or security guard. The Appeals Council (AC) denied James's request for review.

James sought judicial review of the Secretary's denial of benefits. In the district court, James filed a motion for summary judgment, and the Secretary filed a memorandum in support of her decision. The magistrate judge recommended that the Secretary's decision denying benefits be affirmed. Over James's objections, the district court adopted the magistrate judge's recommendation and entered judgment for the Secretary.

The record reveals the following medical evidence. Dr. Dryer examined James on August 29, 1989, for evaluation of a back injury. Dr. Dryer was of the opinion that James had a soft tissue strain and instructed him to return to light duty not requiring lifting over 25 pounds for two weeks.

Dr. Cain began treating James in September 1989. An MRI revealed a degenerative disc at L5-S1 and a central disc bulge at that level with narrowing of the left L4-L5 neural foramen. Dr. Cain started James on a one month work hardening program and then instructed him to begin light duty. On March 5, 1990, Dr. Cain reported that James could not perform his past work as a warehouseman but indicated that James could work as a guard or watchman after he completed security guard training. Dr. Cain reported on March 16, 1990, that James's condition appeared static,

that he did not presently require surgery, and that he should avoid heavy lifting and repetitive stooping and bending.

James was next treated by Dr. Tipton, beginning in May 1990. Dr. Tipton considered James temporarily totally disabled. After a myelogram and CT scan testing revealed disc abnormalities at the L4-5 and L5-S1 levels, Dr. Tipton recommended a 10-day trial on Motrin and a possible steroid injection.

In June 1990 Dr. Haro administered steroid injections at Dr. Tipton's request. Although the injections did not help, James considered himself capable of light duty, and Dr. Tipton released him in August 1990 for work not requiring lifting over 30 pounds occasionally or 15-20 pounds frequently, coupled with a rest period after sitting or standing for one hour. On January 9, 1991, however, Dr. Tipton reported that James had not returned to work and needed vocational rehabilitation.

The next physician to examine James was Dr. Simonsen, who at Dr. Tipton's request saw James in February 1991. James reported that he was out of work, and his employer had no light duty available. James was described as very strong and muscular appearing. Dr. Simonsen diagnosed lumbosacral pain and disc disease by history, and he referred James for an exercise program.

In November 1991 Dr. Tipton performed surgery described as left-sided partial diskectomy of L4-5 for disc protrusion affecting the overlying L5 nerve root, with laminotomy on the right side at L5-S1 but leaving a soft and bulging disc in place due to the complexity of trying to excise it. James had recovered

satisfactorily from surgery by December 16, 1991. Dr. Tipton indicated in January 1992 that James could lift up to 30 pounds and sit, stand, or walk frequently but could do only very little bending, stooping, squatting, twisting, crawling or climbing.

James testified to the following facts at the hearing on October 21, 1991, before the administrative law judge (ALJ). He was 37 years old, had a twelfth grade education, and completed security guard training in August 1989. In August 1989 he injured himself while working and had low back pain, radiating left leg pain aggravated by changes in the weather, numbness in his left foot, muscle spasms in his left leg, and difficulty sleeping at night. He usually wore a back brace when he had to drive but was not wearing the brace at the hearing. The pain caused him difficulty walking, standing, and sitting for long periods of time. His pain medication made him drowsy and his activities were reduced because of his pain.

A vocational expert testified that James's prior jobs of security guard and bartender were light work. The expert testified that a person with James's age, education, and work experience, who could lift up to 20 pounds and could not repetitively bend or stoop, could perform the jobs of security guard and bartender. The expert acknowledged, however, that if James's medication made him drowsy he would have difficulty performing any job.

II

ANALYSIS

James challenges the Secretary's denial of his application for

disability insurance benefits, arguing that there is not substantial evidence in the record to support the Secretary's decision and that improper legal standards were used. In reviewing the Secretary's decision to deny disability insurance benefits, our inquiry is limited to those two questions: whether there is substantial evidence in the record to support it and whether the proper legal standards were used in evaluating the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990).

To obtain disability benefits, James had the burden of proving that he was disabled as defined by the SSA. Cook v. Heckler, 750 F.2d 391, 393 (5th Cir. 1985). Not all severe impediments are disabling. See Harrell v. Bowen, 862 F.2d 471, 481 (5th Cir. 1988). The SSA defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A). The Secretary follows a five-step process in evaluating a disability claim. A finding that a claimant is not disabled at any point terminates the sequential evaluation. Crouchet v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989). The five steps are:

- 1) Claimant is not presently working;
- 2) Claimant's ability to work is significantly limited by a physical or mental impairment or combination of impairments;
- 3) Claimant's impairment meets or

equals an impairment listed in the appendix to the regulations (if so, disability is automatic);

- 4) Impairment prevents claimant from doing past relevant work;
- 5) Claimant cannot perform any other work.

See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. The ALJ, at step four of the evaluation process, found that James was not disabled because he could perform his past jobs of bartender and security guard.

If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990). Substantial evidence is more than a scintilla, but less than a preponderance. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Villa, 895 F.2d at 1021-22. In applying this standard, we may not reweigh the evidence or try the issues de novo, but must review the entire record to determine whether substantial evidence exists to support the Secretary's findings. Id. at 1022. We have identified four elements of proof that must be weighed when determining whether substantial evidence of disability exists: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) the claimant's subjective evidence of pain and disability; and (4) the claimant's age, education, and work history. Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991).

James argues that the ALJ erred in finding that his testimony

concerning symptoms and limitations was not credible, and that the ALJ used improper guidelines in her determination, which he insists was not based on substantial evidence. James argues that the ALJ erred in finding that James had the residual functional capacity for light work activity except for repetitive stooping or bending, as such capacity is not supported by substantial evidence. He contends that the ALJ's Findings Nos. 6 and 7, that James could perform his past relevant work as bartender or security guard, are not supported by substantial evidence.

A review of the record reveals, however, that there is substantial evidence to support the Secretary's finding. See Selders, 914 F.2d at 617. Several of James's physicians instructed him to return to work. In August 1989 Dr. Dryer instructed James to return to light duty not requiring lifting over 25 pounds for two weeks. Dr. Cain, who began treating James in September 1989, started James on a one month work hardening program and then instructed him to begin light duty. On March 5, 1990, Dr. Cain reported that James could work as a guard or watchman. In August 1990 Dr. Tipton released James for work not requiring lifting over 30 pounds occasionally or 15-20 pounds frequently, and with a rest period after sitting or standing for one hour. After James's operation, in January 1992, Dr. Tipton indicated that James could lift up to 30 pounds and sit, stand, or walk frequently but could do only very little bending, stooping, squatting, twisting, crawling or climbing.

In her evaluation, the ALJ noted that several of James's own

descriptions of his condition support the finding that he was not disabled. She noted that in August 1989 James described the pain to Dr. Dryer as tolerable. By August 20, 1990, James told a physician that he felt capable of performing some type of gainful employment. Thereafter, James told his physician that "he has no job to return to and has no light duty job available," indicating to the ALJ that James was capable of performing light work. After the operation, James noted that he was "definitely better" and that his left leg pain was "a lot better."

Moreover, the vocational expert's testimony, in response to the hypothetical posed by the ALJ, that a person with James's age, education, and work experience, who could lift up to 20 pounds, and could not repetitively bend or stoop, could perform the jobs of security guard and bartender, supports the finding that James was not disabled.

James argues that the ALJ did not explain why James's testimony that he had difficulty standing, walking, and sitting; that he becomes drowsy from his medication; that he needs to recline for pain relief; that his daily activities are limited due to pain and other symptoms; and that he experiences bilateral numbness in his hands was not credible. He argues that the ALJ erred by applying improper legal standards in Finding No. 5 by not considering all of the physical restrictions placed on him by his treating physician, including the limitations to perform very little bending, stooping, squatting, twisting, crawling or climbing. James argues that the ALJ erred in failing to consider

all of the restrictions imposed by his impairments, specifically, the effects of his bilateral hand numbness, when determining that he could return to his past relevant work.

But the ALJ did note James's hearing testimony in her report and provided a competent evaluation of James's subjective complaints in light of the medical evidence. Further, as to the side effects of James's medication, the ALJ noted that James related no side effects from taking Endocin or Vicodin, or from using a TENS unit. The ALJ's determinations of the weight and credibility of the evidence "are entitled [to] considerable deference." Jones v. Bowen, 829 F.2d 524, 527 (5th Cir. 1987). We have held that "[t]he [SSA], regulations and case law mandate that the Secretary require that subjective complaints be corroborated, at least in part, by objective medical findings." Harrell, 862 F.2d at 481.

James also argues that the ALJ's hypothetical question to the vocational expert was defective because she did not precisely describe all of his impairments. In her report, however, the ALJ specifically noted James's complaints and made a specific finding that James's "allegations of impairments, including pain, are found credible to the extent the claimant would be incapable of lifting more than 20 pounds at a time or repetitively bending or stooping." As such, she was only required to incorporate the disabilities she recognized in her hypothetical to the vocational expert. See Morris v. Bowen, 864 F.2d 333, 336 (5th Cir. 1988) (hypothetical need only incorporate disabilities recognized by ALJ).

A challenge to an ALJ's credibility assessments presents "a very narrow window of appellate scrutiny" and is insulated from review absent "uncontrovertible documentary evidence or physical fact which contradicts it." Miranda v. National Transp. Safety Bd., 866 F.2d 805, 807 (5th Cir. 1989) (review of National Transportation Safety Board's decision; internal quotations and citation omitted). As neither circumstance exists in the instant case, we shall not disturb the Secretary's credibility findings. Likewise, as there is here substantial evidence in the record to support the Secretary's finding, and as the Secretary did not apply improper legal standards, her determination is AFFIRMED.¹

¹See Selders, 914 F.2d at 617.