

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50139
Summary Calendar

EUGENIO C. LOPEZ,

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
(SA-92-CV-709)

(December 22, 1994)

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

PER CURIAM:*

Eugenio Lopez appeals the denial of disability insurance benefits and supplemental security income benefits under 42 U.S.C. § 405(g). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

Lopez applied to the Social Security Administration (SSA) for disability and supplemental security income benefits. The SSA denied the application initially and on reconsideration. Lopez and his paralegal representative, Ismael Chagolla, sought review at a hearing before an administrative law judge (ALJ). The ALJ found that Lopez was not disabled, and the SSA Appeals Council denied Lopez's request for review, making the ALJ's decision the final decision of the Secretary of Health and Human Services.

Lopez sought review in the district court. The magistrate judge recommended that the district court affirm the Secretary's denial of benefits. Lopez objected to the recommendation and sought to introduce new evidence. After reviewing the entire record de novo, the district court rejected the proffered evidence on the ground that (1) it was not material and (2) Lopez had not shown good cause for failing to include it in the administrative record. The court adopted the magistrate judge's memorandum and recommendation and affirmed the denial of benefits.

II.

Appellate review of the Secretary's denial of disability benefits is limited to determining whether (1) the decision is supported by substantial evidence and (2) proper legal standards were used to evaluate the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). If the Secretary's findings are supported by substantial evidence, they are conclusive, and the

Secretary's decision must be affirmed. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Villa, 895 F.2d at 1021-22 (internal quotations and citations omitted).

In evaluating a disability claim, the Secretary must follow a five-step sequential process to determine whether (1) the claimant is presently working; (2) the claimant's ability to work is significantly limited by a physical or mental impairment; (3) the claimant's impairment meets or equals an impairment listed in the appendix to the regulations; (4) the impairment prevents the claimant from doing past relevant work; and (5) the claimant cannot presently perform relevant work. See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. The claimant has the burden of establishing that he is disabled. Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990).

The ALJ determined that Lopez could perform his past relevant work. Lopez has not identified any medical evidence that contradicts this determination, but he argues that the ALJ's review of his claim was inherently unfair.

III.

Lopez urges that the ALJ violated SSA guidelines and principles of due process by failing to provide an independent Spanish-speaking interpreter, by considering as evidence an interviewer's

report in English and not signed by Lopez, and by failing to fulfill his duty to develop the record. The Secretary argues that this court lacks jurisdiction to review these claims, as Lopez did not challenge the ALJ's conduct of the hearing before the Appeals Council.

Lopez's request for review by the Appeals Council stated: "I am disabled and unable to work. I also ask that you please consider my age (63), limited education (3rd grade in Mexico), inability to communicate in english & work history."¹

We have held that we have jurisdiction to review only those issues which have been exhausted through the administrative process. Paul v. Shalala, 29 F.3d 208, 210 (5th Cir. 1994); Muse, 925 F.2d at 790-91. An issue has not been exhausted unless it has been specifically presented to the Appeals Council. See Paul, 29 F.3d at 210. Representation by a paralegal rather than an attorney is not cause for failure to exhaust the administrative process. Cf. Harper by Harper v. Bowen, 813 F.2d 737, 738, 742-43 (5th Cir.) (judicial review barred where appellant relied upon paralegal's advice not to appeal ALJ's decision), cert. denied, 484 U.S. 969 (1987).

Lopez's request that the Appeals Council "consider" his "inability to communicate in English" is too indefinite to confer jurisdiction for us to address his current arguments concerning the ALJ's conduct of the hearing. Paul, 29 F.3d at 210. For the reasons discussed below, Lopez will not be prejudiced by the

¹ Chagolla continued to represent Lopez before the Appeals Council.

court's failure to address these issues. The record shows that Lopez and Chagolla agreed that Chagolla would interpret for Lopez, and Lopez has failed to identify any specific prejudice from the fact that his representative acted in dual capacities.

Lopez's challenge to the English-language questionnaire is based upon an SSA procedure that had not been issued when Lopez was interviewed. The ALJ cited this issue only in connection with his description of Lopez's daily activities. The ALJ's determination that Lopez could perform his past relevant work was based upon the cumulative administrative record, which included Lopez's medical records and his description of his past work. See Villa, 895 F.2d at 1022 (determination that a claimant can perform past relevant work may be based upon description of past work as actually performed).

When a claimant is unrepresented 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 quotation and citation omitted). An ALJ's decision will be reversed for a failure to develop an adequate record, however, only if a claimant can show that he was prejudiced because the ALJ denied him an opportunity to present evidence that might have changed the result.

Although Lopez argues that the ALJ failed to question him concerning his past relevant work or fully to develop the record concerning his complaints of pain, his arguments are speculative, and he has identified no specific facts or evidence that he would

have presented had the ALJ's inquiry been more thorough. Thus, Lopez has not demonstrated that he was prejudiced by the conduct of the hearing. Kane, 731 F.2d at 1220.

Further, the ALJ's conduct of the hearing in this case is consistent with standards we have found adequate in the past. The hearing lasted twenty-seven minutes, and the ALJ elicited information from Lopez about his condition, ability to perform various tasks, daily activities, and the nature of his pain. At the conclusion of the hearing, the ALJ asked whether Lopez wanted to present anymore testimony and suggested that he "take a moment . . . [to] be certain everything's been covered to your satisfaction." See James v. Bowen, 793 F.2d 702, 705 (5th Cir. 1986) (holding ten minute hearing sufficient where the ALJ "did develop the relevant facts" and "at least minimally fulfilled his duties . . . so that he could fully and fairly evaluate the case").

IV.

Lopez suggests that the ALJ formed an improper medical opinion by using a "sit and squirm" index to evaluate Lopez's medical condition. His argument is based upon the ALJ's comment that Lopez was "alert and responsive . . . [and] sat throughout the hearing and appeared in no acute distress."

An ALJ should not deny a disability claim solely upon lay deductions and demeanor evidence, but the ALJ may consider the claimant's demeanor as a factor in the disability determination. Taylor v. Heckler, 742 F.2d 253, 257 (5th Cir. 1984); Harrell v.

Bowen, 862 F.2d 471, 480 (5th Cir. 1988). "[T]he 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 (quotation and citation omitted).

The ALJ recognized that Lopez likely experienced "some degree of pain and discomfort," but he concluded that the degree of pain that Lopez suffered was not "incompatible with the performance of sustained work activity." In support of his determination that Lopez's pain was not disabling, the ALJ stated:

Neither the objective medical evidence nor the testimony of the claimant establishes that the ability to function has been so severely impaired as to preclude all types of work activity. Subjective complaints of intractable pain and profound functional limitations are not supported by the evidence of record and cannot be considered credible in view of full range of motion of all joints, negative straight leg raising, no motor or sensory deficits, ability to heel and toe walk, acknowledged improvement with medication and back support, inconsistencies between testimony and the written record regarding daily activities, no strong pain medication, no restrictions by a treating physician other than for a very short period, no evidence of muscle spasms, and observations at the hearing.

As Lopez's demeanor at the hearing was only one of several factors supporting the ALJ's determination of no disability, and as the other factors (which Lopez has not challenged) provide substantial evidence to support the ALJ's decision, no error is presented. See Villa, 895 F.2d at 1021-22, 1024.

AFFIRMED.