

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50602
(Summary Calendar)

PATRICIA CARRILLO,

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-93-CA-435)

(February 17, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Patricia Carrillo appeals the district court judgment which affirmed the Social Security Administration's denial of her claim for social security disability insurance benefits. We affirm.

FACTS

Patricia Carrillo applied for supplemental security benefits on October 10, 1990. Carrillo alleged that she became disabled in February 1986 as a result of an automobile/pedestrian accident. As a result of the accident, Carrillo received a large hematoma on her

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

left thigh which required numerous surgeries and resulted in a large soft-tissue defect. Carrillo listed the following impairments on her application: back pain, a leg injury, and bowel control problems.

After the Department of Health and Human Services, Social Security Administration (the Secretary) denied Carrillo's application, Carrillo requested a hearing before an administrative law judge (ALJ). Carrillo testified before the ALJ that she cannot sit or stand for any length of time; she has fecal incontinence, stomach problems, vision problems, asthma, and pain in her legs; she falls constantly; and she has trouble sleeping. Following the hearing and the receipt of additional documentary medical evidence, the ALJ denied Carrillo's application. On appeal, a magistrate judge recommended affirmance of the ALJ's decision. The district court adopted the report and recommendation of the magistrate judge. Carrillo appeals.

DISCUSSION

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

Was the Proper Legal Standard Applied?

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment 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) (disability insurance); see 42 U.S.C. § 1382c(a)(3)(A) (supplemental security income). "The suffering of some impairment does not establish disability; a claimant is disabled only if she is incapable of engaging in any substantial gainful activity." Anthony v. Sullivan, 954 F.2d 289, 293 (5th Cir. 1992) (citation and internal quotation marks 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. In the first four steps, the burden is on the claimant. Muse, 925 F.2d at 789. At the fifth step the burden is initially on the Secretary to show that the claimant can perform relevant work. Id. If the Secretary makes such a demonstration, the burden shifts to the claimant to show that he cannot do the work suggested. Id. A finding that a claimant is disabled or not disabled at any point terminates the sequential evaluation. Crouchet v. Sullivan, 885 F.2d 202, 206 (5th Cir. 1989).

At step one, the ALJ found that Carrillo had not engaged in substantial gainful activity since February 18, 1986. At steps two and three, the ALJ found that Carrillo suffered from a severe impairment, but that she did not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1 of the Regulations. At step four, the ALJ determined that Carrillo was able to perform her past relevant work as a waitress and bartender and thus was not disabled. Carrillo did not identify any medical evidence which contradicted this determination.

Carrillo argues that the ALJ's decision is inconsistent with relevant legal standards because he erroneously evaluated the severity of her impairments under Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985), and failed to enunciate the Stone standard in his opinion, necessitating remand.

In Stone, this Court reviewed a denial of disability which was based on a finding on nonseverity at Step Two in the five-step analysis. After setting out the correct legal standard for determining "nonseverity," Stone held that we will assume that the Secretary "applied an incorrect standard to the severity requirement unless the correct standard is set forth by reference to this opinion or another of the same effect" Id. at 1106; see also, Anthony, 954 F.2d at 293-94 (explaining Stone).

Stone applies only when the court's disposition is on the basis of nonseverity. See Stone, 752 F.2d at 1106. At Step Two, the ALJ determined that Carrillo's injury was severe and proceeded

to Step Four. Thus, Carrillo's argument under Stone has no legal or factual basis.

The ALJ followed the correct legal standard. See Muse, 925 F.2d at 789.

Was there Substantial Evidence?

If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed. Anthony, 954 F.2d at 295. Carrillo argues that the record does not contain substantial evidence supporting the Secretary's decision that she can perform her previous work because the ALJ improperly failed to consider the combined disabling effect of her non-exertional limitations, such as pain, frequent falls, fecal incontinence, vision problems, and chronic asthma.

"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). "The elements of proof to be weighed in determining whether substantial evidence exists include: 1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) claimant's subjective evidence of pain; (4) claimant's educational background, age and work history." Owens v. Heckler, 770 F.2d 1276, 1279 (5th Cir. 1985). This Court may not reweigh the evidence or try the issues de novo, as conflicts in the evidence are for the Secretary and not for the courts to resolve. Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990). However, this Court must review the

entire record to determine whether such evidence is present. Villa, 895 F.2d at 1022.

The ALJ's decision reflects that he considered the medical evidence of Carrillo's alleged ailments and found:

The claimant's main complaints are of back pain, left leg pain and numbness, the need to have a restroom close by, and vision problems. There is no evidence in the record of vision problems and the medical evidence does not establish fecal incontinence. However, that has been taken into account in establishing a residual functional capacity for the claimant. The claimant's main complaints are of pain. The effect of pain and other symptoms on an individual's ability to work is an important part of the disability evaluation process and is an integral element of this decision.

Thus, the ALJ properly considered all of Carrillo's alleged non-exertional limitations. Id.

The record reflects the following substantial evidence, supporting the ALJ's finding that Carrillo is capable of light work activity.

1. Objective Medical Evidence

The record contains objective medical facts which eliminate the possibility of disabling pain based on the normal results of musculoskeletal, neurological and electrodiagnostic studies. Carrillo was examined by several physicians, none of whom found that she was disabled or precluded from light work. Medical records report no neurological problems and normal range of motion in Carrillo's leg and back. Dr. Powell reported that, while complaining of bitter pain, Carrillo walked down the hall with normal gait and ambulation.

2. Diagnoses and Opinions of Examining Physicians

With regard to Carrillo's non-exertional limitations other than pain, the expert testimony and other medical evidence are consistent with the ALJ's findings. At the hearing, Dr. Holcomb expressed an uncontradicted opinion that Carrillo's asthma required only minor environmental limitations. Dr. Robison reported that Carrillo's vision was correctable to 20/30 in one eye and 20/40 in the other with her current prescription. With regard to Carrillo's alleged fecal incontinence, after examination over a period, Dr. Dooley opined that she may need to take several restroom breaks during the day. Dr. Holcomb opined that Carrillo could perform a wide range of light work activity based upon the objective medical evidence.

In March 1991, Dr. Ballinger performed a residual functional capacity assessment and reported: Carrillo's basic strength factor was limited; her climbing, balancing, and stooping activities should be limited to occasional; she could not lift over 50 pounds; she could frequently lift up to 25 pounds; she could stand approximately six hours; and her reaching, handling, and speaking abilities were unlimited.

3. Carrillo's Subjective Evidence of Pain

The ALJ must consider subjective evidence of pain, but it is within his discretion to determine the pain's disabling nature. Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991). Disabling pain must be constant, unremitting, and wholly unresponsive to therapeutic treatment. Id.

Carrillo testified at the hearing that her main problem is with pain in her legs and back. She testified that she cannot sit or stand for any length of time due to pain and that pain in her legs causes her to fall frequently. Carrillo's friend of 22 years corroborated her testimony.

Based on the lack of objective medical evidence to support her complaints, the ALJ rejected Carrillo's complaints of pain to the extent that it prevented her from performing light work activity. The ALJ's credibility finding is entitled to considerable deference. See Wren, id.

4. Carrillo's Educational Background, Age, and Work History

At the time of her hearing, Carrillo was 49 years old and had an 11th grade education. Carrillo's past relevant work experience includes jobs as a construction worker, landscaper, night-crawler picker, bar attendant, and waitress. Carrillo also has experience in cleaning and painting. The vocational expert at the hearing testified that given Carrillo's non-exertional limitations, she should be able to perform her previous work as a waitress and bar attendant.

This record contains such relevant evidence as a reasonable mind might accept as adequate to support the ALJ's conclusion that Carrillo is not disabled and may perform her previous work activity despite her non-exertional limitations. Thus, the judgment below is supported by substantial evidence.

CONCLUSION

The record shows that the ALJ considered the combined effect of Carrillo's non-exertional limitations and reveals substantial evidence supporting the decision. For this reason, we AFFIRM the district court judgment.