

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 94-50778

Summary Calendar

TRINI CONSTANCIO,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA
Secretary, Department of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas

(No. A-93-CA-087)

(May 25, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Trinidad (Trini) Constancio appeals the decision of the district court which affirmed the decision¹ of the Secretary of

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ An Administrative Law Judge had found that Constancio could perform a wide range of sedentary work activities, including her prior work as a food tabulator and thus was not disabled.

Health and Human Services denying Appellant's request for disability insurance benefits. We AFFIRM the decision of the district court.

DISCUSSION

This Court's review of the Secretary's decision is limited to determining "whether the Secretary applied the correct legal standard[s] and whether the Secretary's decision is supported by substantial evidence on the record as a whole." Orphey v. Secretary of Health & Human Services, 962 F.2d 384, 386 (5th Cir. 1992). "Substantial evidence is more than a scintilla and less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991).

A claimant under the Social Security Act is disabled if the claimant is unable to perform "any substantial gainful activity by reason of a[] medically determinable...impairment" for at least twelve months. 42 U.S.C. § 423(d)(1)(A). The ALJ determined, and Constancio does not argue otherwise, that Constancio first met the special earnings requirements on October 28, 1989.

A five-step analysis is used to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. The burden is on the claimant at the first four steps to show that (1) she is not engaged in substantial gainful activity, that (2) her impairment is "severe," and (3) that she meets or equals an impairment listed in

When the Appeals Council denied Constancio's request for review, the ALJ's decision became the final decision of the Secretary. Constancio's action in the district court challenged the findings of the Secretary of Health and Human Services.

Appendix One of the regulations, thus being disabled, or if not, (4) that she cannot perform her past relevant work. At Step Five, the burden shifts to the Secretary to show that the claimant, considering her severe impairment and other factors such as age, residual functional capacity (RFC), education, and work experience, can perform work available in the national economy, and thus the claimant is not disabled. See Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991). The ALJ determined that Constancio could perform her past relevant work as a cashier and a food tabulator. Thus, the ALJ determined that Constancio was not disabled at Step Four.

FAILURE TO APPLY TEST FOR SEVERITY

Constancio argues that the ALJ failed to comply with the requirements of Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985). In Stone, this Court reviewed the Secretary's denial of disability, a determination that ended at Step Two in the five-step analysis: if a claimant's impairment is not severe, the claimant is not disabled under the Act. Stone, 752 F.2d at 1101. This Court set out the correct legal standard to use for determining "nonseverity,"² and held that it will be assumed that the wrong standard was applied "unless the correct standard is set forth by reference to this opinion or another of the same effect, or by an express statement that the construction [this Court] give[s]...is used." Id. at 1106; see also Anthony v. Sullivan, 954 F.2d 289,

² "[A]n impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience." Stone, 752 F.2d at 1101 (citation and internal quotation omitted).

293-94 (5th Cir. 1992) (explaining Stone).

Subsequent to Stone, this Court has also held that, when the ALJ's analysis goes beyond Step Two, i.e. the impairment is severe, specific reference to Stone and its requirements is not necessary. See Harrell v. Bowen, 862 F.2d 471, 481 (5th Cir. 1988); Shipley v. Secretary of Health & Human Services, 812 F.2d 934, 935 (5th Cir. 1987). The ALJ determined Constancio was not disabled at Step Four. Accordingly, reference to Stone and its requirements was unnecessary.

FAILURE TO STATE SPECIFIC NUMBER OF JOBS

Citing to non-binding authority, Constancio contends that the ALJ erred by failing to make a finding that a specific number of jobs existed for which Constancio was qualified. The expert testified that jobs which Constancio could perform existed in significant numbers: "hundreds regionally, thousands nationally." This is substantial evidence upon which the ALJ could make his finding. LeBlanc v. Shalala, No. 93-4337 slip op. at 9 (5th Cir. Jan. 18, 1994) (unpublished). Constancio was represented by counsel at the hearing before the ALJ, and the ALJ gave counsel an opportunity to question the expert, but counsel did not do so. If Constancio wished to know the exact numbers upon which the expert's statement was based in order to challenge the conclusion that it was a substantial number, she could have cross-examined. See Morris v. Bowen, 864 F.2d 333, 335-36 (5th Cir. 1988).

In addition, the issue of the number of jobs available is relevant at only the fifth step of the sequential evaluation

process. 20 C.F.R. § 404.1560 (1994). Constancio was determined not disabled at Step Four.

PAST RELEVANT WORK

Constancio also argues that there was no substantial evidence that she had ever worked as a food tabulator. Constancio listed her past relevant work as that of a cashier, salesperson, and a food server. She stated that she supervised six cashiers and operated cash registers and tagging machines in a cafeteria where she worked from 1974 to 1989. A "Food Tabulator": "Keeps record of all food items sold: Observes items on customer's tray. Presses key corresponding to food item listed on tabulating or multicounting machine which registers each item." *Dictionary of Occupational Titles*, 4th ed. at 168, § 211.582-010 (1977). Despite her contentions to the contrary, Constancio has performed past work as a food tabulator.

SUBJECTIVE COMPLAINTS OF PAIN

Constancio contends that her pain made her disabled until May 1992. Not all pain is disabling, and subjective evidence of pain need not be credited over conflicting medical evidence. Anthony, 954 F.2d at 295. At a minimum, objective medical evidence must demonstrate the existence of a condition that could reasonably be expected to produce the level of pain alleged. Id. at 296. Pain severe enough to create a disabling condition must be constant, unremitting, and wholly unresponsive to therapy or treatment. Johnson v. Bowen, 864 f.2d 340, 347 (5th Cir. 1988). It is within the ALJ's discretion to consider the debilitating nature of a

claimant's pain. Jones v. Bowen, 829 F.2d 524, 527 (5th Cir. 1987). In finding Constancio's pain not disabling, the ALJ credited Constancio's testimony that she had to alternate sitting and standing and that she had some difficulty concentrating. Nevertheless, the ALJ also noted that Constancio had not mentioned any severe concentration difficulties to any physician. Furthermore, Constancio's mild medication level is inconsistent with disabling pain. See Jones v. Heckler, 702 F.2d 616, 622 (5th Cir. 1983) (medication level is relevant). Although the medical evidence supported the existence of some level of pain, the ALJ did not abuse his discretion in finding that the extent of Constancio's pain did not preclude sedentary work.

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.