

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60433
Summary Calendar

OBEDIAH BESTER, JR.,

Plaintiff-Appellant,

versus

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

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(4:93-CV-55)

(December 27, 1994)

Before JOLLY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:*

I

On November 26, 1991, Obediah Bester, Jr., applied for supplementary security income benefits, alleging a disability beginning on February 19, 1991, because of knee problems and headaches. His application was denied initially and again on reconsideration. Bester requested and received a hearing before an

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

administrative law judge ("ALJ") who determined that Bester was not disabled within the meaning of the Social Security Act. Based upon the Medical-Vocational Guidelines, see 20 C.F.R. Pt. 404, Subpt. P, App. 2, the ALJ concluded that Bester was incapable of performing his past work as a painter/sandblaster but that he had the residual functional capacity to perform the full range of sedentary work. The decision of the ALJ became the decision of the Secretary when the Appeals Council denied Bester's request for review.

Bester then filed suit in the district court seeking review of the Secretary's decision. The district court adopted the report and recommendation of the magistrate judge and affirmed the Secretary's decision. Bester now appeals to this court.

II

In reviewing the Secretary's decision to deny disability benefits, we must determine whether there is substantial evidence in the record to support the decision and whether the proper legal standards were used in evaluating the evidence. Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). Substantial evidence is more than a scintilla, but less than a preponderance. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. at 1021-22. In applying this standard, this court 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.

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 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;
- 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 relevant work.

See Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520.

Initially, the burden is on the claimant to establish that he is unable to do his previous work. The burden then shifts to the Secretary to show that there is other substantial work that the claimant can perform. If the Secretary meets this burden, the claimant must then prove that he is not able to perform the

alternate work. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5th Cir. 1989). In general, "[i]n determining whether the claimant can do any other work, the Secretary considers the claimant's residual functional capacity, together with age, education, and work experience, according to the Medical-Vocational Guidelines set forth by the Secretary." Selders v. Sullivan, 914 F.2d 614, 618 (5th Cir. 1990). The Secretary concluded that Bester was not disabled at step 5 of the sequential evaluation.

III

A

On appeal, Bester contends that the Secretary should not have relied exclusively on the Medical-Vocational guidelines and should have consulted with a vocational expert.

When the characteristics of the claimant correspond to criteria in the Medical-Vocational Guidelines of the regulations, . . . and the claimant either suffers only from exertional impairments or his non-exertional impairments do not significantly affect his residual functional capacity, the ALJ may rely exclusively on the Guidelines in determining whether there is other work available that the claimant can perform.

Fraga v. Bowen, 810 F.2d 1296, 1304 (5th Cir. 1987). Otherwise, the ALJ must use vocational testimony or other like evidence to show that such jobs exist.

"[P]ain may constitute a non-exertional impairment that limits the range of jobs a claimant otherwise would be able to perform." Id. Since pain alone can be disabling, the ALJ must give consideration to the claimant's subjective complaints of pain, and

the ALJ has a duty to make affirmative findings regarding the credibility of the claimant's assertions regarding pain. See Scharlow v. Schweiker, 655 F.2d 645, 648-49 (5th Cir. 1981) (reversing decision of secretary because ALJ failed to rule on credibility of claimant's subjective complaints of pain). It is within the Secretary's discretion to determine the pain's disabling nature. Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991). Pain constitutes a disabling condition only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." Selders, 914 F.2d at 618-19. "There must be clinical or laboratory diagnostic techniques which show the existence of a medical impairment which could reasonably be expected to produce the pain alleged." Id. at 618.

The ALJ found that Bester's ability to perform the full range of sedentary work was not significantly compromised by non-exertional limitations, including pain. The ALJ's finding is supported by substantial evidence because the record contains no clinical findings that demonstrate the existence of a medical impairment that can reasonably be expected to produce the level of pain alleged by Bester. Therefore, the ALJ did not err by relying exclusively on the Medical-Vocational guidelines.

B

Bester also argues that the ALJ erred by failing to consider the combined effect of all of his impairments. As in Fraga, the ALJ found that Bester did not suffer from a combination of

impairments. The ALJ discredited Bester's testimony regarding his alleged arm and shoulder discomfort, his chronic headaches, and side-effects of his medication. Substantial evidence supports the ALJ's determination that these conditions were not disabling. See Fraga, 810 F.2d at 1305.

C

Finally, citing Richardson v. Perales, 402 U.S. 389, 390, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), Bester argues that he was only required to "prove his case above a scintilla and not by a preponderance of the evidence." In Harper v. Sullivan, 887 F.2d 92, 96 (5th Cir. 1989), the Court held that statements to this effect in the jurisprudence refer to the "quantity of evidence required to support administrative findings of the ALJ, not to a claimant's burden of proof."

IV

We thus find no reversible error in the proceedings or holdings of the Secretary and therefore hold that the judgment of the district court is

A F F I R M E D.