

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60453
Summary Calendar

JAMES RUTHERFORD,

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-54)

(December 22, 1994)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

James Rutherford applied for social security disability benefits and supplemental security income on August 13, 1991, alleging disability since July 15, 1989. In his applications for

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

benefits, Rutherford alleged that he suffered from arthritis, nerve problems, kidney problems, and fluid retention. Rutherford asserted that he earned wages of \$125 per week as a pest exterminator with Scratch Termite.

The Social Security Administration denied Rutherford's applications, as well as his request for reconsideration. Rutherford then sought a hearing before an administrative law judge (ALJ). Following the hearing, the ALJ determined that Rutherford had been working at a paying job that required significant physical activities, therefore Rutherford's work constituted substantial gainful activity. Accordingly, the ALJ concluded that Rutherford was not disabled within the meaning of the Social Security Act.

Rutherford requested review of the ALJ's decision by the Appeals Council, but the Appeals Council denied his request, noting that the evidence supported the ALJ's finding of no disability. Rutherford then filed a complaint in district court for judicial review of the decision. The case was referred to a magistrate judge, who recommended that the district court affirm the Secretary's decision to deny benefits. The district court adopted the magistrate judge's recommendation over Rutherford's objections. Rutherford timely appeals to this Court. We affirm.

Discussion

Appellate review of the Secretary's denial of 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, then the findings are conclusive and the Secretary's decision must be affirmed. 42 U.S.C. § 405(g); **Richardson v. Perales**, 91 S.Ct. 1420 (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). This Court, however, may not reweigh the evidence presented to the Secretary because conflicts in the evidence are for the Secretary to determine and not for the courts to resolve. **Spellman v. Shalala**, 1 F.3d 357, 360 (5th Cir. 1993).

In evaluating a disability claim, the Secretary must follow a five-step sequential process. **See Muse v. Sullivan**, 925 F.2d 785, 789 (5th Cir. 1991). The first step provides that an individual "who is working and engaging in substantial gainful activity will not be found disabled regardless of the medical findings." **Wren v. Sullivan**, 925 F.2d 123, 125 (5th Cir. 1991). "A finding that a claimant is disabled or is not disabled at any point in the five-step review is conclusive and terminates the analysis." **Id.** at 125-26.

The ALJ terminated the evaluation process at the first step, finding that Rutherford had been engaging in substantial gainful activity throughout the period of the alleged disability. Rutherford contends that the ALJ erred by terminating the

evaluating process at the first step and by underestimating the severity of his impairments.

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). Substantial gainful activity has been described as "work activity that involves doing significant physical or mental activities." 42 U.S.C. § 404.1572(a), 416.972(a). "[W]ork may be substantial even if it is done on a part-time basis." **Id.** The regulations, however, create a presumption that the claimant has been engaging in substantial gainful activity based on the claimant's average earnings for the period at issue. 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2); **see Davis v. Schweiker**, 641 F.2d 283, 286 (5th Cir. Unit B 1981). If unrebutted, this presumption negates any finding of disability. **Id.** Thus, the amount of a claimant's earnings can constitute substantial evidence of nondisability. **Id.**

The Secretary found that the evidence indicated that Rutherford's work constituted substantial work activity within the meaning of the regulations because his job duties involved significant physical and mental activities and his earned income from the work for the period at issue fell within guideline standards. **See** 20 C.F.R. §§ 404.1572(a), 416.972(a). Rutherford's

testimony at the hearing supports these assertions. Rutherford testified that he was paid to drill foundation holes under houses with an electric drill, dig shallow ditches around houses with a pick, crawl under houses to inspect for termites, and drag a hose from his truck under houses to spray chemicals in the holes or ditches. Moreover, Rutherford's earnings during this period create a presumption under the regulations that Rutherford engaged in substantial gainful activity throughout the period in which he alleged he was disabled. Although the record contains some conflicting evidence as to Rutherford's earnings for the years 1990-92, it sufficiently supports the ALJ's findings that Rutherford earned in excess of \$300 per month for 1989 and more than \$500 per month for the years 1990-92.¹ "This Court may not

¹ The record establishes that in 1989 Rutherford earned an average of \$367.13 per month, which exceeds the \$300 amount set forth in the regulations and establishes a presumption that Rutherford engaged in substantial gainful activity. **See** 20 C.F.R. §§ 404.1574(b)(2)(vi), 416.974(b)(2)(vi). Information provided by Scratch Termite to the Social Security Administration indicates that Rutherford's average monthly earnings for the years 1990, 1991 and the first eight months of 1992 was \$502.11. This exceeds the \$500 amount set forth in the regulations and creates a presumption that Rutherford engaged in substantial gainful activity. **See** 20 C.F.R. §§ 404.1574(b)(2)(vii), 416.974(b)(2)(vii).

We note in passing that Rutherford's testimony concerning his earnings conflicts with the information provided by Scratch Termite as well as his application for supplemental security income. Rutherford testified that he made about \$82 per week, but his application for benefits stated that he made about \$125 per week. Still further, records at the Social Security Administration differ from both of these amounts. The ALJ noted the discrepancies in the record regarding Rutherford's earnings, and concluded that neither Rutherford nor his employer had been candid with the Social Security Administration. The ALJ resolved the conflicts in the evidence against Rutherford. The ALJ acted well within his discretion in resolving the conflicting evidence against Rutherford.

reweigh the evidence or try the issues *de novo*. Conflicts in evidence are for the Secretary and not the courts to resolve." **Spellman v. Shalala**, 1 F.3d 357, 360 (5th Cir. 1993)(internal quotations omitted).

Finally, Rutherford's argument that the ALJ erred by stopping at step one of the five-step sequential evaluation process is without merit. The ALJ need not address each of the five steps in the sequential evaluation process after determining that the claimant is not disabled. **See Wren**, 925 F.2d at 125-26. Likewise, Rutherford's contention that the ALJ should have considered the severity of his impairments is without merit because the determination of whether an impairment is severe occurs at step two of the evaluation process. **Id.** at 125. The ALJ need not have reached step two, having concluded at step one that Rutherford was not disabled because he was engaging in substantial gainful activity.

Conclusion

Based on the foregoing, the decision of the district court is AFFIRMED.