

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7706

(Summary Calendar)

ELMA W. STOKES,

Plaintiff-Appellant,

versus

DONNA E. SHALALA, M.D.,*
Secretary of Health & Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA E91 0091 (L))

(October 8, 1993)

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:**

Elma Stokes appeals the district court's dismissal with prejudice of her action for judicial review of the Secretary's decision denying her application for a period of disability, and

* Donna E. Shalala, M.D., is substituted for her predecessor Louis W. Sullivan, M.D., Secretary of Health and Human Services, pursuant to Fed. R. App. P. 43(c)(1).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

for disability insurance benefits, pursuant to 42 U.S.C. § 423 (1988). Finding no error, we affirm.

I

Stokes, a fifty-nine year old woman with an eighth grade education, filed applications in August 1988 for both disabled widows' benefits under § 402(e) and Supplemental Security Income ("SSI") benefits under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. (1988).¹ The record indicates that Stokes had no prior relevant work history. Her protective filing date was August 16, 1988.

In her 1988 application for SSI benefits, Stokes alleged that she was disabled due to arthritis in both her shoulders and knees and diabetes. In an August 1988 disability report, Stokes stated that she did a small amount of cooking and cleaning, occasionally visited the park, and, on a typical day, spent three hours walking, two hours standing, and four hours sitting. At the March 1990 hearing on her application, Stokes, in addition to reaffirming the statements made in her application, testified that she could not stand for more than two hours a day due to the varicose veins in her leg. She also stated that her doctor told her she had Parkinson's disease, which caused her hands to shake uncontrollably. However, Stokes recounted that she had not

¹ Stokes filed similar applications in July 1982 and May 1986, which the Secretary denied at the initial level of review. Because Stokes did not appeal those determinations, they are binding on all parties and are not reviewable. See *Califano v. Sanders*, 430 U.S. 99, 107-08, 97 S. Ct. 980, 985-86, 51 L. Ed. 2d 192 (1977); 20 C.F.R. § 404.955 (1993). Thus, the period of disability relevant on this appeal runs from May 1986.

sought or received medical treatment for the varicose veins in her legs and that the shaking of her hands was under "better control" than previously, although her hands became swollen two or three times every week. She further testified that she generally took care of her personal needs, washed dishes, folded clothes, and usually spent her days reading, writing letters, and watching television.

The record indicates that Stokes first received treatment for arthritis in 1987. After X-rays indicated arthritis in her right shoulder, Dr. Bill Davis, at that time her treating physician, treated Stokes with steroid and anesthetic injections in December 1987 and August 1988. Stokes reported in September 1988 that her shoulder felt "much better." The record contains no indication that she requested any further treatment for her arthritis.

Dr. John Mutziger, a consultive examiner, examined Stokes in October 1988. Dr. Mutziger reported that Stokes "ambulated without any aid" or pain, had "fine manipulative ability," and had a "full range of motion of all joints" except the right shoulder, which had "a slight decrease in forward elevation and abduction." Additionally, he found that Stokes's diabetes had caused no end-organ damage and was effectively controlled by medication.

In October 1989, Dr. Michael B. Shrock, based on Stokes's "masked" facial expression and hand tremors, concluded that she had Parkinson's disease. Dr. Shrock treated Stokes with

medication for this until December 1989 and reported in February 1990, less than five months after his original diagnosis, that Stokes was asymptomatic for Parkinson's. In March 1990, however, Dr. Shrock concluded that the ongoing and progressive nature of Stokes's conditions))non-insulin dependent diabetes, peptic ulcers, arthritis, and Parkinson's disease))rendered her unable to hold "any substantial gainful employment."

Dr. Perrin L. Berry, a medical advisor to the ALJ, concluded in April 1990 that Stokes probably did not have Parkinson's disease, that her diabetes were under "good control," and that Stokes could perform many physical tasks without limitation. Dr. Berry found that Stokes could lift, carry, stand, walk, and sit without limitation. He also concluded that her medical problems might affect Stokes's ability to balance, crawl, kneel, handle objects, work at heights, and work with moving machinery.

After considering the evidence, an administrative law judge ("ALJ") found that Stokes suffered from diabetes, hand tremors, arthritis in various joints, and obesity, and that these constituted severe physical impairments. Based on the record as a whole, however, the ALJ denied disabled widows' benefits to Stokes because she did not carry her burden of demonstrating that her impairments met or equalled the impairments considered by the Secretary to be per se grounds for disability. The ALJ further determined that Stokes was ineligible for SSI benefits because she retained the residual functional capacity to perform work available in the national economy, thus rendering her not

disabled. The Secretary adopted the ALJ's findings and denied Stokes's application.²

II

Stokes challenges several aspects of the Secretary's decision to deny her disability benefits. On review, this Court determines whether substantial evidence exists in the record as a whole to support the ALJ's factual findings and whether the ALJ applied the proper legal standards. *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990); *Villa v. Sullivan*, 895 F.2d 1019, 1021 (5th Cir. 1990). Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971). It is more than a mere scintilla and less than a preponderance. *Id.* "This Court may not reweigh the evidence or try the issues de novo. Conflicts in the evidence are for the Secretary and not the courts to resolve." *Selders*, 914 F.2d at 617 (citation omitted).

A

Stokes first argues that the evidence does not support the ALJ's determination that she is not disabled. In evaluating a

² The Appeals Council of the Department of Health & Human Services adopted the ALJ's findings and denied Stokes's application. This constitutes the final decision of the Secretary.

disability claim,³ the Secretary conducts a five-step sequential analysis:

(1) the claimant is not presently working; (2) the claimant has a severe impairment; (3) the impairment is not listed in, or equivalent to, an impairment listed in Appendix 1 of the Regulations; (4) the impairment prevents the claimant from doing past relevant work; and (5) the impairment prevents the claimant from doing any other substantially gainful activity. In 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.

Id. at 618 (citations omitted); see also *Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991); 20 C.F.R. § 404.1520. Stokes, as claimant, bears the burden of proving that she is disabled. *Id.* The ALJ found that Stokes was not working at the time of the hearing (step one), that she had severe impairments (step two), that her impairments did not meet or equal any of the impairments described in the Secretary's listing of impairments (step three),⁴ and that Stokes had no relevant work history (step four). Lastly, the ALJ found that Stokes retained the residual functional capacity to perform substantially gainful activity and, therefore, was not disabled.

Substantial evidence supports the Secretary's determination that Stokes was not disabled. Both Dr. Mutziger and the non-

³ The 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).

⁴ 20 C.F.R. Pt. 404, Subpt. P, App. 1.

examining government physician, Dr. Berry, concluded that her impairments, while severe, had no significant effects on Stokes's residual functional capacity. See *Harrell v. Bowen*, 862 F.2d 471, 481 (5th Cir. 1988) (recognizing that not all severe impairments are disabling). Dr. Mutziger reported that Stokes ambulated without aid or pain, was of average intelligence, had no difficulty understanding simple directions given to her, and seemed to have a good understanding of her financial affairs; Dr. Berry reported that Stokes could lift, carry, stand, walk, sit, climb, stoop, crouch, reach push, pull, see, hear, and speak without limitation.⁵ Moreover, Dr. Berry rejected the conclusion that Stokes was disabled. The medical opinions of these physicians certainly constitute "more than a mere scintilla" of evidence and are the kind of evidence that "a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 390, 91 S. Ct. at 1427. While Stokes correctly points out that the Secretary's findings are contradicted by evidence in the record))primarily her testimony)) "[c]onflicts in the evidence are for the Secretary and not the courts to resolve." *Selders*, 914 F.2d at 617. Because

⁵ The Secretary's regulations define "basic work activities" to include:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situation; and
- (6) Dealing with changes in a routine work setting.

20 C.F.R. § 404.1521(b).

substantial evidence supports the Secretary's determination that Stokes was capable of heavy work,⁶ we will not disturb that finding on appeal.⁷

B

Stokes next contends that the Secretary was required to give controlling weight to her treating physician's opinion that she was physically incapable of engaging in substantially gainful activity. The ALJ found that Stokes suffered from diabetes, hand tremors, arthritis in various joints, and obesity. Stokes also had a history of mild attacks of vertigo. The ALJ found that while these constituted a severe physical impairment, Stokes could still perform "heavy work." On the other hand, Dr. Michael B. Shrock, Stokes's treating physician, concluded that Stokes could not "hold any substantial gainful employment, now or in the foreseeable future."

"If . . . a treating source's opinion on the issue(s) of the nature and severity of [the claimant's] impairment(s) is well-

⁶ See *infra* note 11 and accompanying text.

⁷ Stokes contends that the ALJ denied her due process of law by relying upon Dr. Berry's post-hearing report without giving her the opportunity to cross-examine him. The record does not support this claim. The ALJ twice gave Stokes the opportunity to submit questions to Dr. Berry, and Stokes did not avail herself either of these opportunities or of her right to subpoena Dr. Berry. See *Richardson v. Perales*, 402 U.S. 389, 408, 91 S. Ct. 1420, 1431 (1971) (noting that the use of medical advisors is not unconstitutional or improper if the opportunity for cross-examination is available); *Lidy v. Sullivan*, 911 F.2d 1075, 1077 (5th Cir. 1990) (holding that a claimant has an absolute right to subpoena a reporting physician), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2274, 114 L. Ed. 2d 725 (1991). Thus, the ALJ did not deprive Stokes of due process of law.

supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record, . . . it [will be given] controlling weight." 20 C.F.R. § 404.1527(d)(2). It is the Secretary, however, who ultimately determines whether a claimant is disabled:

[The Secretary is] responsible for making the determination or decision about whether [a claimant] meet[s] the statutory definition of disability. In so doing, [the Secretary] review[s] all of the medical findings and other evidence that support a medical source's statement that [a claimant] is disabled. A statement by a medical source that [a claimant is] "disabled" or "unable to work" does not mean that [the Secretary] will determine that [a claimant] is disabled.

20 C.F.R. § 404.1527(e)(1); see also *Spellman v. Shalala*, ___ F.2d ___, slip op. at 6403 (5th Cir. 1993).

Dr. Shrock indicated that Stokes was totally disabled due to her diabetes, peptic ulcers, Parkinson's disease, and arthritis. The record, however, indicates that those physical impairments did not affect Stokes's ability to perform heavy work. Medication effectively controlled Stokes's diabetes, and the diabetes caused no end-organ damage. Moreover, Stokes's hand tremors responded well to treatment, and Dr. Shrock noted that she was asymptomatic for Parkinson's disease just one month before the hearing. Stokes also testified that her medications caused her to suffer no side effects. Additionally, there is evidence that Stokes generally took care of her own personal needs, performed some household tasks, read, wrote letters, watched television, went to church, and went grocery shopping with her daughter. Because Dr. Shrock's

opinion was inconsistent with the other substantial evidence in the record, the Appeals Council acted within its discretion in disregarding Dr. Shrock's opinion. *Spellman*, slip op. at 6403.⁸

C

Stokes argues that substantial evidence does not support the Secretary's finding that she can perform jobs available in the national economy.⁹ The Secretary determined that Stokes could perform available jobs based on the Guidelines alone, without the benefit of expert testimony. See 20 C.F.R. Pt. 404, Subpt. P, App. 2. Stokes argues that the Secretary's finding is not supported by substantial evidence because the Secretary failed to consider the testimony of a vocational expert.

⁸ Stokes argues that the ALJ did not adequately consider her complaints of pain. The evaluation of Stokes's subjective symptoms is fully within the province of the ALJ, who had the opportunity to observe whether she was disabled. *Harrell v. Bowen*, 862 F.2d 471, 480 (5th Cir. 1988). Although the ALJ must consider a claimant's subjective complaints of pain, *Carrier v. Sullivan*, 944 F.2d 243, 247 (5th Cir. 1991), pain constitutes a disabling condition under the Act only when it is "constant, unremitting, and wholly unresponsive to therapeutic treatment." *Harrell*, 862 F.2d at 480. "How much pain is disabling is a question for the ALJ [because] the ALJ has the primary responsibility for resolving conflicts in the evidence." *Carrier*, 944 F.2d at 247 (citation omitted). The ALJ's finding is supported by the objective medical evidence, which shows that Stokes's ailments improved significantly with treatment over the relevant time period and her pain was not "constant, unremitting, and wholly unresponsive to therapeutic treatment."

⁹ Where the fifth step of the five-step sequential analysis is reached, the Secretary determines whether the claimant, based upon her residual functional capacity, is capable of performing jobs that exist in the national economy. See 20 C.F.R. §§ 404.1520(f) and 404.1561. The Secretary bears the burden of proving that the claimant can perform available jobs. *Fraga v. Bowen*, 810 F.2d 1296, 1301-02 (5th Cir. 1987). If the Secretary fails to meet this burden, the claimant will be found to be disabled. See 20 C.F.R. 404.1520(f).

We will not disturb the Secretary's determination so long as it is supported by substantial evidence. *Fraga v. Bowen*, 810 F.2d 1296, 1302 (5th Cir. 1987). The Guidelines alone amount to substantial evidence, thus eliminating the need for testimony from a vocational expert, where the claimant suffers from non-exertional limitations that do not significantly affect her capacity for work. *Id.* at 1304; *Selders*, 914 F.2d at 618 ("When [the claimant's] 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."); *cf. Dellolio v. Heckler*, 705 F.2d 123, 127 (5th Cir. 1983) ("The regulations expressly pretermitt reliance upon the guidelines if nonexertional . . . impairments *significantly circumscribe* the claimant's ability to execute tasks.") (emphasis added).¹⁰ Because Stokes's non-exertional limitations did not significantly affect her residual functional capacity, the ALJ, using the Guidelines as a framework, concluded that Stokes could perform heavy work. A finding that impairments

¹⁰ Although we have on other occasions simply prohibited the Secretary from using the Guidelines where the claimant suffers solely from non-exertional impairments, see, e.g., *Broussard v. Bowen*, 828 F.2d 310, 313 (5th Cir. 1987) ("Recent case law has emphasized that, when the claimant has a solely nonexertional impairment, use of the medical-vocational guidelines in reaching a decision is improper."); *Pate v. Heckler*, 777 F.2d 1022, 1026 (5th Cir. 1985) ("the Secretary may not apply the Guidelines in a case involving solely non-exertional impairments"), this panel must follow *Dellolio* and its progeny as *Dellolio* was the first panel decision squarely addressing this issue. See *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 95 n.3 (5th Cir. 1992) (noting that we must follow the first panel decision on an issue), *cert. dismissed*, ___ U.S. ___, 113 S. Ct. 51, 123 L. Ed. 2d 463 (1993).

do not preclude heavy work "generally is sufficient for a finding of not disabled, even though age, education, and skill level of prior work experience may be considered adverse." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 204.00.¹¹ Because Stokes fit the profile contained in § 204.00, vocational expert testimony was not necessary to support the Secretary's determination that Stokes could perform available work.

Stokes nonetheless argues that vocational expert testimony was required in her case because she has severe impairments that restrict the range of jobs available to her. Stokes relies on *Ferguson v. Schweiker*, 641 F.2d 243, 248 (5th Cir. 1981), where we held that the Secretary, to meet her burden of proof, must rely on the testimony of a vocational expert if an applicant is unable to perform the full range of work specified by the applicable Guideline rule. Stokes's reliance on *Ferguson* is misplaced. Unlike Ferguson, Stokes does not suffer from exertional impairments that limit her ability to do the kind of work specified in the applicable Guideline rule. The ALJ found that Stokes's characteristics corresponded to criteria set out in the Guidelines and that she was capable of performing heavy work; these findings are supported by substantial evidence. See *supra* part II.A. In *Ferguson*, by contrast, unrefuted medical testimony showed Ferguson was unable to accomplish several tasks that were required for much

¹¹ Section 204.00 also provides that "[t]he residual functional capacity to perform heavy work . . . includes the functional capacity for work at the lesser functional levels as well, and represents substantial work capability for jobs in the national economy at all skill and physical demand levels."

of the light work the Secretary found Ferguson capable of performing. See *Ferguson*, 641 F.2d at 247. Because of those exertional limitations, Ferguson's characteristics did not fit the profile set out in the applicable Guideline rule. Therefore, *Ferguson* is distinguishable and provides no support for Stokes's position.

III

Stokes finally contends that the ALJ applied an improper standard in judging the merits of her disabled widows' claim. Under the standard in effect at the time of the ALJ's decision in August 1990, Stokes, to be eligible for disabled widows' benefits, had to meet a three-pronged test:

To qualify for disabled widow's benefits, a claimant must establish that she is not married, is between 50 and 60 years old, and has a physical or mental impairment or impairments that, under regulations promulgated by the Secretary, are deemed to be so severe as to preclude her from engaging in *any gainful activity*.

Deters v. Secretary of Health, Educ. & Welfare, 789 F.2d 1181, 1185 (5th Cir. 1986) (emphasis added, citing 42 U.S.C. §§ 402(e) and 423(d)(2)B)). Congress, however, later changed the third prong of the legal standard so that a disabled widows' claimant need only show that her impairment precludes her from engaging in "substantial gainful activity." See 42 U.S.C.A. § 423(d)(1)(A) (1991). Thus, for claims filed after January 1, 1991, or applications pending as of that date, the standard for determining disability in disabled widows' cases is the same standard applied to other Title II disability claims. See discussion *supra* part II.A.

Stokes contends that the ALJ erred by applying the "any gainful activity" test to her widows' disability claim, rather than the "substantial gainful activity" test. The Secretary counters by arguing that because the ALJ determined Stokes could engage in substantial gainful activity with regard to her SSI benefits, the failure to make such a determination with regard to her disabled widows' claim is harmless error.¹² We agree with the Secretary. See *Anderson v. Sullivan*, 887 F.2d 630, 634 (5th Cir. 1989) (employing a harmless error analysis in a disability case); *Mays v. Bowen*, 837 F.2d 1362, 1364 (5th Cir. 1988) (same). As noted, the Secretary's denial of Stokes's application for SSI benefits was based on the ALJ's application of the Secretary's five-step sequential analysis. At step five, the ALJ concluded that Stokes retained the residual functional capacity to perform jobs available in the national economy and thus was not disabled. We previously concluded that this finding is supported by substantial evidence. Therefore, it necessarily follows that Stokes's application for widows' disability benefits also would have been denied had the ALJ followed the five-step analysis. Accordingly, we uphold the Secretary's determination that Stokes is not eligible to receive disabled widows' benefits.

IV

For the foregoing reasons, we AFFIRM.

¹² Because the Secretary has not argued that the new standard is not applicable to Stokes's application, we need not address that issue.