

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAR 16 1989

EARL L. WEATHERFORD,

Plaintiff-Appellant,

v.

OTIS BOWEN, M.D., Secretary, Health and
Human Services,

Defendant-Appellee.

ROBERT L. HOECKER
Clerk

No. 87-2430
(D.C. No. 86-C-731-C)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before MCKAY and BARRETT, Circuit Judges, and JENKINS, Chief
Judge.**

**Honorable Bruce S. Jenkins, Chief Judge, United States District
Court for the District of Utah, sitting by designation.

Earl Weatherford appeals from the district court's order affirming the Secretary of Health and Human Services' denial of disability benefits. Mr. Weatherford claimed disability due to heart disease, but the Secretary found he was not disabled pursuant to the criteria set forth in the social security regulations and thereby denied him benefits. On appeal, the magistrate recommended the Secretary's decision be affirmed, and

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

the district court agreed. Mr. Weatherford now asks that we reverse the lower court's holding. We affirm.

Mr. Weatherford originally applied for disability benefits in 1975, alleging he suffered from coronary artery disease. He received benefits for arteriosclerotic cardiovascular disease with angina pectoris from 1975 until 1982 when he was terminated after a disability review. Mr. Weatherford appealed his termination to the Appeals Council, which denied his appeal on April 27, 1983, but did not file for further review in the district court. Instead, he filed a new application for disability benefits in January of 1984, claiming a disability beginning May 1, 1983, through the present.

A hearing on Mr. Weatherford's new application was conducted before an Administrative Law Judge (A.L.J.), during which appellant requested his application be amended to claim disability beginning in 1975. In support of his application, Mr. Weatherford presented medical reports from several physicians and the results of various treadmill and other medical tests used to measure the presence and degree of heart disease. Based on appellant's stated symptoms, coupled with varying test results, each physician diagnosed appellant as having coronary artery disease and therefore concluded he was totally or substantially disabled.

After an initial appeal and remand, the A.L.J. ultimately concluded that the April 27, 1983, decision to terminate Mr. Weatherford's benefits was res judicata as to appellant's application for benefits for his condition prior to that date. The A.L.J. thereby declined to reopen appellant's earlier case.

As to appellant's application for benefits due to his heart condition after May 1, 1983, the A.L.J. determined that the objective medical evidence did not support a finding that appellant was disabled under the standards provided in the social security regulations. Rather, the A.L.J. concluded Mr. Weatherford's condition amounted to "arteriosclerotic heart disease with angina pectoris, functional classification II or III, stable for many years, essential hypertension without evidence of end organ damage, exogenous obesity, and general poor physical conditioning." Tr. Vol. II at 13. The A.L.J. noted that, because the objective evidence did not support a finding of disability under the Listing of Impairments under which a claimant could be found disabled per se, 20 C.F.R. pt. 404, subpt. P, app. 1 (1982) (Listing of Impairments), the consideration of disability rested solely on Mr. Weatherford's allegations of severe chest pain. The A.L.J. found this testimony to be self-serving and incredible. In reaching this conclusion, the A.L.J. considered as important the fact that Mr. Weatherford had not seen a physician for several years, had not been hospitalized for his condition since 1977 except for a short stay in a California hospital, gave inconsistent testimony concerning his educational background and job skills, and claimed to have had several "heart attacks," which allegation was unsupported by the medical evidence in the record. The A.L.J. concluded that the evidence showed Mr. Weatherford had the residual functional capacity to engage in a full range of at least light work, and was therefore not disabled. The Secretary affirmed this decision.

Mr. Weatherford raises three issues on appeal. First, he contends the A.L.J. erred in refusing to reopen his previous disability case. Second, he alleges there was not substantial evidence in the record to support the A.L.J.'s decision. That appellant was not disabled per se according to the Listing of Impairments. Third, he argues the Secretary erred in permitting the testimony of a medical advisor who had previously treated the appellant, which testimony Mr. Weatherford claims tainted the entire case.

Appellant first contends that the Secretary erred in refusing to reopen and to review the previous denial of benefits. In Califano v. Sanders, 430 U.S. 99 (1977), the United States Supreme Court held that federal courts do not have jurisdiction to review denials by the Secretary of petitions to reopen a case unless the denial is contested on constitutional grounds. This conclusion was based on the Court's view that Congress intended to limit judicial review of such discretionary decisions as "a policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims." Id. at 109. Because there is no constitutional challenge here, we do not have jurisdiction to review the A.L.J.'s decision not to reopen the previous case.

As an alternative argument, Mr. Weatherford contends that the A.L.J. reopened the case de facto when he accepted and considered new evidence. Appellant cites several cases to support this proposition, but a review of these cases clearly shows that courts are only willing to find a de facto reopening where the A.L.J.

issues a full opinion on the merits of the claim and does not apply or mention res judicata or specifically refer to reopening principles. Krumpelman v. Heckler, 767 F.2d 586, 588 (9th Cir. 1985), cert. denied, 475 U.S. 1025 (1986); McGowen v. Harris, 666 F.2d 60, 67-68 (4th Cir. 1981); see also Purter v. Heckler, 771 F.2d 682, 695-96 (3d Cir. 1985)(the A.L.J. neither discussed whether it should reopen Purter's claims nor mentioned res judicata); Taylor ex rel. Peck v. Heckler, 738 F.2d 1112, 1114-15 (10th Cir. 1984)(case was in fact reopened where A.L.J. did not refer to res judicata and did not specifically decline to reopen the decision but determined the case on the merits). In the present case, the A.L.J. specifically stated that the new evidence did not warrant the reopening of the case and held that the decision terminating appellant's benefits prior to the new application date was res judicata. Tr. Vol. II at 15. The exception to the Califano v. Sanders rule, as applied in Krumpelman and McGowen above, does not apply to this case.¹

Second, Mr. Weatherford challenges the Secretary's determination that he was not disabled. The scope of our review of the Secretary's evaluation of disability status is limited to determining whether the finding as to disability is supported by substantial evidence. 42 U.S.C. § 405(g) (1982); Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983).²

¹ In his conclusion, appellant makes an additional argument that his case should have been reopened to be evaluated under the new Act which provides for the medical improvement standard. We reject this argument for the reasons stated by the Fifth Circuit in Richardson v. Bowen, 807 F.2d 444, 445-47 (5th Cir. 1987).

² Substantial evidence is "defined as 'such relevant evidence

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. § 416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. § 416.920(a). The five steps are as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b). (2) A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. § 416.920(c). (3) A person whose impairment meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d). (4) A person who is able to perform work she has done in the past is not disabled. 20 C.F.R. § 416.920(e). (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 2290-96 (1987); cf. Tillery v. Schweiker, 713 F.2d 601, 602 (10th Cir. 1983).

Mr. Weatherford only challenges the Secretary's determination under step three above, that appellant's impairment does not meet the criteria set out in the Listing of Impairments. Appellant argues to the contrary, that he has an impairment which equals the condition contained in § 4.00 (Cardiovascular System) of the Listing of Impairments. A finding of disability under the Listing

as a reasonable mind might accept as adequate to support a conclusion." . . . [T]he determination is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence -- particularly certain types of evidence (e.g., that offered by treating physicians) or if it really constitutes not evidence but mere conclusion."

Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)(citations omitted).

would render him disabled per se. Knipe v. Heckler, 755 F.2d at 145-46 ("The Regulations provide that if the severity of a claimant's impairment meets or exceeds that found in the Listing of Impairments, he will be found 'disabled without considering [his] age, education, and work experience.'"). This step of the evaluation process is completely objective, in that it is based solely on meeting the specific clinical and laboratory requirements set out in the Listing of Impairments.³

Mr. Weatherford claims he has coronary artery disease, a narrowing of the arteries. He alleges that the Listing of Impairments addresses his particular condition in § 4.00B, which states:

B. Congestive heart failure . . . [or] [o]ther congestive, ischemic, or restrictive (obstructive) heart disease such as caused by cardiomyopathy . . . may result in significant impairment dues [sic] to congestive heart failure, rhythm disturbances, or ventricular outflow obstruction in the absence of left ventricular enlargement as described in 4.02B1. However, the ECG criteria as defined in 4.02B2 should be fulfilled. Clinical findings such as symptions [sic] of dyspnea, fatigue, rhythm disturbances, etc., should be documented and the diagnosis confirmed by echocardiography or a cardiac catheterization.

³ The medical findings consist of symptoms, signs and laboratory findings.

We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical . . . consultants designated by the Secretary in deciding medical equivalence.

20 C.F.R. pt. 404, subpt p, App. 1, §4.00B. Section 4.02B2, referred to in the above, requires an " . . . ECG showing QRS duration less than 0.12 second with Sv1 plus Rv5 (or Rv6) of 35 mm. or greater and ST segment depressed more than 0.5 mm. and low, diphasic or inverted T waves in leads with tall R waves". Id.

The medical evidence in the record is obviously lacking in many of the requirements listed above. In his brief, appellant attempts to demonstrate the existence of restrictive heart disease by simply citing to over one hundred pages of record and fails, in the most part, to make any specific references to any medical or physician reports which support his contention.⁴ From our review of the record, Mr. Weatherford failed to demonstrate all the criteria required in this section of the Listing of Impairments.

Appellant also argues that his condition meets the requirements of § 4.04(B)(7)(a) of the Listing of Impairments. This argument fails for two reasons. First, this subsection is applicable only if acceptable treadmill exercise tests are not available. Id. §4.04(B) Several such tests are contained in the record. Second, from a practical standpoint, Mr. Weatherford does not meet the criteria set forth in the subsection. The specific arteries found to be impaired in Mr. Weatherford's medical reports⁵ are not included in the list of arteries covered by the

⁴ This court is not required to sift through the entire record in order to support a party's position. Friedel v. City of Madison, 832 F.2d 965, 969 (7th Cir. 1987); Mitchel v. General Elec. Co., 689 F.2d 877, 878-79 (9th Cir. 1982).

⁵ A coronary arteriogram completed in 1977 showed a ninety percent narrowing of the left anterior descending artery in its midportion and a sixty percent obstruction of the obtuse margin of the circumflex at its origin.

subsection, namely the left main coronary artery or a proximal coronary artery. Accordingly, appellant has not shown that he meets the Listing criteria on the evidence presented. We conclude that substantial evidence exists in the record to support the Secretary's decision that Mr. Weatherford was not disabled per se.

Appellant's final contention concerns the testimony of Dr. Nelson, whom the A.L.J. used as a medical advisor. Mr. Weatherford consented to Dr. Nelson's testimony prior to and during the hearing. After the hearing, Mr. Weatherford remembered he had been treated by Dr. Nelson in 1974 and had a personality conflict with him. He therefore filed a written objection to the testimony. Appellant contends the testimony tainted the entire case and requests the case be remanded for a new hearing. The A.L.J. stated in his decision that, because Dr. Nelson had treated Mr. Weatherford in the past, "this would obviously disqualify the testimony given by Dr. Nelson as a medical advisor." Tr. Vol. II at 19. Appellant has given no reason and we see nothing to suspect that the A.L.J. could not appropriately ignore the testimony of Dr. Nelson in rendering his opinion. The record contains substantial evidence to support the conclusion reached by the A.L.J. without Dr. Nelson's testimony.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM