

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OCT - 3 1990

ROBERT L. HOECKER
Clerk

CHAMP JENKINS,

Plaintiff-Appellant,

v.

LOUIS W. SULLIVAN, M.D., Secretary of
Health and Human Services,

Defendant-Appellee.

No. 89-5147
(D.C. No. 88-C-677-C)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Judge, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals from an order of the district court affirming the final decision of the Secretary denying his application for Social Security disability benefits filed pursuant to 42 U.S.C. §§ 416(1) and 423.

* 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.

Plaintiff, who was born in 1938 and has a seventh grade education, applied for benefits alleging that he was disabled because of rheumatoid arthritis and ankylosing spondylitis as of October 1, 1985. His application was denied and he requested a hearing before an administrative law judge (ALJ). The ALJ found that while plaintiff was suffering from rheumatoid arthritis, his condition was not severe enough to meet or equal a listed impairment. See 20 C.F.R. § 404.1520(d); 20 C.F.R. pt. 404, subpt. P., app. 1 § 1.02. The ALJ then found that plaintiff could return to his previous work as a janitor. The Appeals Council affirmed and plaintiff appealed to the district court.

The case was referred to a magistrate, who recommended that benefits be awarded. The magistrate found that the Secretary's determination that plaintiff's impairment did not meet or equal the listed impairment for rheumatoid arthritis was not supported by substantial evidence. The district court did not follow the magistrate's recommendation, holding that criterion A of section 1.02 was not met because plaintiff had presented no evidence of a significant restriction of function.

On appeal, plaintiff argues that the district court erred in finding that he did not meet or equal the listed impairment, the Secretary and district court failed to assess his pain and the ineffectiveness of his medication, he does not have the residual functional capacity (RFC) to perform his past work, and he is unable to perform any substantial gainful activity.

"Our review of social security administration cases is usually quite limited. 'The Secretary's decision must be

sustained if supported by substantial evidence. The reviewing court does not weigh the evidence and may not substitute its discretion for that of the agency.'" Sorenson v. Bowen, 888 F.2d 706, 710-11 (10th Cir. 1989)(quoting Cagle v. Califano, 638 F.2d 219, 220 (10th Cir. 1981))(citations omitted). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401 (1971)(quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

"The Secretary has established a five-step sequential evaluation process for determining whether a person is disabled." Bowen v. Yuckert, 482 U.S. 137, 140 (1987). See 20 C.F.R. § 404.1520. The Secretary found that plaintiff was disabled at steps one and two in that he was not presently engaged in substantial gainful activity and he had a medically severe impairment. See 20 C.F.R. § 1520(b), (c).

In step three, the Secretary must determine whether plaintiff's impairment is equivalent to one of the listed impairments that the Secretary has previously determined are so severe as to preclude substantial gainful activity pursuant to 20 C.F.R. §§ 404.1520(d). Yuckert at 141. In order to be adjudged disabled at step three, plaintiff had to meet both requirements under the listing:

A. History of persistent joint pain, swelling, and tenderness involving multiple major joints (see 1.00D) and with signs of joint inflammation (swelling and tenderness) on current physical examination despite prescribed therapy for at least 3 months, resulting in significant restriction of function of the affected joints, and clinical activity expected to last at least 12 months; and

B. Corroboration of diagnosis at some point in time by either.

1. Positive serologic test for rheumatoid factor; or
2. Antinuclear antibodies; or
3. Elevated sedimentation rate; or
4. Characteristic histologic changes in biopsy of synovial membrane or subcutaneous nodule (obtained independent of Social Security disability evaluation).

20 C.F.R. pt. 404, subpt. P., app. 1, § 1.02. The Secretary agreed that plaintiff met criterion B because he had shown an elevated sedimentation rate. However, the Secretary found that plaintiff had not met criterion A. We agree. While plaintiff has demonstrated some swelling and tenderness of major joints and some decrease in range of motion, he has not shown that this resulted in a "significant restriction of function" of those joints.

Therefore, because plaintiff was not conclusively presumed disabled, the Secretary next had to determine under step four whether plaintiff could perform his prior work. The ALJ held that

[a]fter assessing the claimant's remaining capacity for work, and the physical and mental demands of the work he has done in the past, . . . claimant has the residual functional capacity to do his past relevant work of janitor.

. . . .

7. The claimant has the residual functional capacity to perform work-related activities except for work involving heavy exertion on a sustained basis (20 C.F.R. § 404.1545).

8. The claimant's past relevant work as a janitor did not require the performance of work-related activities precluded by the above limitations (20 C.F.R. § 404.1565).

9. The claimant's impairments do not prevent the claimant from performing his past relevant work of janitor.

ALJ's Decision of January 14, 1988, at 5-6.¹

In order to meet his burden of proof at step four, the plaintiff must show that he is unable to perform his past relevant work. "Past relevant work is defined as work that (1) occurred within the past fifteen years (the so-called recency requirement), (2) was of sufficient duration to enable the worker to learn to do the job (the so-called duration requirement), and (3) was substantial gainful employment. 20 C.F.R. § 416.965(a)(1986)." Jozefowicz v. Heckler, 811 F.2d 1352, 1355 (10th Cir. 1987).

All of plaintiff's prior jobs meet the recency requirement having been performed after 1970. He had worked as a dishwasher, truck driver, janitor, and at a transmission shop.

Plaintiff testified that he quit his job at the transmission shop in 1975 after about two years because he "couldn't stay on the concrete" and his feet and legs were bothering him. He lost his next job as a janitor after six months when the store lost its contract. He then became a truck driver, but quit that job in 1983 because he could no longer crawl up on the trailer to tie down the loads. His last two jobs were at a restaurant, in 1986 and 1987. Plaintiff worked as a dishwasher and "tried to clean the kitchen up." He was let go from each of those jobs after five

¹ Because the ALJ did not address plaintiff's other prior jobs at a transmission shop and as a truck driver, we may assume that he determined plaintiff could not return to those jobs.

or six weeks because he was unable to perform his job duties since he had to go home sick three or four hours early "a lot" and needed help to do the job.

Plaintiff's jobs as a dishwasher occurred during his alleged disability period. However, work done during that period "may show that you are able to do work at the substantial gainful activity level." 20 C.F.R. § 404.1571. However, prior nonsubstantial gainful activity cannot be the basis for a step four determination of nondisability. Lauer v. Bowen, 818 F.2d 636, 641 (7th Cir. 1987). Plaintiff's dishwasher jobs were not substantial gainful employment and cannot be considered here. Plaintiff's other jobs do meet all criteria for past relevant work.

Once a determination is made that plaintiff has performed past relevant work, the ALJ must evaluate whether plaintiff is able to perform this work in light of his RFC. RFC is a medical assessment of what plaintiff is able to do and encompasses an evaluation of plaintiff's physical, mental, and any other impairments. See 20 C.F.R. § 404.1545. The ALJ must also consider other evidence of limitations including plaintiff's own testimony. Martin v. Sullivan, 901 F.2d 650, 652 (8th Cir. 1990).

Plaintiff's treating physician stated that plaintiff was currently disabled for an indefinite period. However, he could be helped with proper long-term treatment and "[i]f he can be improved with medication and physical therapy, he could return to some gainful employment." Record at 105-06.

Plaintiff testified he could not stay on his feet, could only walk about half a block before stopping to rest, and had problems with his hands in that he did not have much grip a lot of times. He was in "pretty constant pain" as the arthritis in his spine was "real bad." His ability to do things depended a lot on the weather. He had bad headaches and got dizzy at least every week. Plaintiff later submitted a letter to the Appeals Council stating that his vocational rehabilitation counselor had determined that he could not be helped and was not able to work at anything.

The ALJ made no specific finding as to plaintiff's RFC. However, by finding that plaintiff could return to his prior work as a janitor, he impliedly found that plaintiff had the RFC to work and, thereby, rejected the treating physician's opinion that plaintiff was disabled. The ALJ gave no "specific, legitimate reasons" rejecting the treating physician's opinion. See Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). "Unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician." Id. The ALJ also found that plaintiff's subjective complaints were not credible to the extent alleged, but did not specify what aspects were not credible and which were credible. Giving substantial weight to the treating physician's opinion, plaintiff could only have had minimal, if any, RFC.

After a determination of RFC is made, the ALJ must then evaluate the demands of plaintiff's former work and compare those demands with his present abilities. See Marcia v. Sullivan, 900 F.2d 172, 177 n.6 (9th Cir. 1990). "The ALJ has a duty to fully

investigate and make explicit findings as to the physical and mental demands of a claimant's past relevant work and to compare that with what the claimant herself is capable of doing before he determines that she is able to perform her past relevant work." Nimick v. Secretary of Health & Human Servs., 887 F.2d 864, 866 (8th Cir. 1989)(emphasis in original)(footnote omitted); see also Orlando v. Heckler, 776 F.2d 209, 213 (7th Cir. 1985)("[T]o determine that a claimant is unable to return to his former work, the administrative law judge must compare the demands of that work with the claimant's existing physical abilities"), citing to Strittmatter v. Schweiker, 729 F.2d 507, 509 (7th Cir. 1984).

This determination encompasses not only whether plaintiff has the RFC to perform the actual functional demands and job duties of his particular past relevant job, but also whether he can perform the functional demands and job duties of the occupation as generally required by employers throughout the national economy. Arbogast v. Bowen, 860 F.2d 1400, 1403 (7th Cir. 1988).

While the ALJ determined that plaintiff could return to his past relevant work as a janitor, he made no findings as to the actual functional demands of that job. We hold that substantial evidence does not support the Secretary's determination that plaintiff could perform his past relevant work. The actual functional demands placed on a janitor would clearly exceed the minimal RFC plaintiff possessed.

We note that no determination of permanent disability could be made at the time of the hearing. The treating physician reported that if plaintiff could be helped, he could return to

gainful employment. Because the potential for improvement was present, we must remand this case for further development of the record at step four to determine whether plaintiff remains unable to return to his prior relevant work.

If plaintiff has not improved, the burden then shifts to the Secretary at step five, Williams v. Bowen, 844 F.2d 748, 751, (10th Cir. 1988), to show that there is work in the economy which plaintiff can perform based on his current physical condition, including consideration of plaintiff's complaints of pain and the effectiveness of his medication and therapy, id. at 753-57.

The judgment of the United States District Court for the Northern District of Oklahoma is REVERSED, and the case is REMANDED for further proceedings in accordance with this order and judgment.

ENTERED FOR THE COURT
PER CURIAM