NO. 81-5042
76-673

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD RAY WILLIAMSON,

Plaintiff-Appellant,

v.

PATRICIA ROBERTS HARRIS,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant-Appellee.

_____/

ORDER

BEFORE: MERRITT and JONES, Circuit Judges, and DIGGS-TAYLOR, District Judge*

Plaintiff Donald Ray Williamson (hereinafter claimant) appeals from the judgment of the district court affirming the denial of Social Security disability benefits by the defendant Secretary of Health and Human Services (hereinafter Secretary). We affirm the judgment of the district court.

On April 15, 1974, claimant filed an application for disability insurance benefits alleging that he became unable to work on July 30, 1973, due to a back injury. This injury was the result of an accident which occurred when the claimant was attempting to load a motor onto a truck and was subsequently aggravated when a rock from the roof of an underground mine

* The Honorable Anna Diggs-Taylor, United States District Court for the Eastern District of Michigan, sitting by designation.

dislodged and struck claimant. The Social Security Administration denied the application initially and upon reconsideration. Thereafter, claimant requested, and was granted, a hearing.

At this hearing before Administrative Law Judge (ALJ) Velmer Knapp, claimant, then forty years old, testified that he had gained most of his work experience as a roof bolt operator in the mining industry, although he had been employed as a laborer with a construction firm. He also commented about the amount of pain he felt as a result of his injury and noted that this pain prohibited him from standing or sitting for more than very short intervals of time.

The ALJ considered medical evidence submitted by five physicians which was contradictory in part. Two of these doctors diagnosed that the claimant had suffered an acute back sprain and nerve root compression or irritation. However, the other three physicians found no indicia of neurological damage.

In addition, a vocational specialist, Dr. Phyllis Shapero, testified as to the vocational aspects of the issues involved. Her conclusions were clearly expressed in responses to two hypothetical questions posed by the ALJ. In his first question, after being advised to keep in mind the claimant's age, education and work experience, the witness was asked to assume that: (1) the claimant suffered from a chronic thrombosacral or back sprain which partially limited his motion,

particularly in bending; and (2) the claimant also has spondylosis of the spine which, on occasion, would cause some discomforting pain with heavy exertion. On the basis of these assumptions, Dr. Shapero was asked if there were any jobs that the claimant was qualified to do. In response, the vocational specialist testified that there were jobs classified as light or sedentary which claimant could perform. After the witness gave several examples of such work, the ALJ posited his second question. In that question, he asked the witness not only to assume those conditions he had detailed in his first hypothetical but also to assume that the claimant, because of nerve root irritation or compression, suffered from constant pain which would become aggravated with substantial exertion of any kind. Ms. Shapero remarked:

> Well, your honor, of course pain is relative. It would depend on the man, but I think if the man is in constant pain, it's very hard to perform any work on a substantial basis.
>
> And most of the jobs I have mentioned would require a certain amount of exertion. Therefore, on the basis of your hypothetical, I don't know of any work that he could perform on a sustained basis.

Based on the above evidence and testimony, the ALJ concluded that claimant was not disabled as defined by §423(d)(1)(A) of the Social Security Act, 42 U.S.C. §423(d)(1)(A), and denied the award of benefits. In reaching this decision, the ALJ noted that there

light and sedentary jobs which could be performed by the claimant and remarked:

> The weight of the medical evidence indicates there is no neurological involvement connected with the claimant's problem, and that he suffered no fracture as a result of any mine injury. The Administrative Law Judge noted that the claimant sat comfortably, and without any apparent distress throughout the hearing. It is also worth observing that most of the claimant's physical examinations were for evaluation of his impairment, and not for treatment purposes.

The Secretary adopted the findings and conclusions of the ALJ. Subsequently, claimant filed this suit in the district court to obtain a review of this denial. The district court affirmed the Secretary's decision.

In order to be eligible for disability benefits within the meaning of the Social Security Act, a claimant must demonstrate that his "physical impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot considering his age, educational and work experience, engage in any other kind of substantial, gainful work which exists in the national economy ..." 42 U.S.C. §423(d)(2)(A). The burden is on the claimant to furnish medical or other evidence of the existence of a disability. 423 U.S.C. §405(g). However, once a prima facie demonstration has been made, the burden shifts to the Secretary to show that there is work in the national economy which the claimant can perform. Hephner v. Mathews, 574 F.2d

359, 361 (6th Cir. 1978); Ganett v. Finch, 436 F.2d 15, 18 (6th Cir. 1970). The findings of the Secretary are conclusive if supported by the evidence and it is within her province to resolve any conflicts in the evidence and to decide questions of credibility. Wokojance v. Weinberger, 513 F.2d 210, 212 (6th Cir. 1975). In determining whether substantial evidence exists, the reports of treating physicians are to be accorded more weight than the reports of other doctors. Whitson v. Finch, 437 F.2d 728, 732 (6th Cir. 1971); see also, Gliddings v. Richardson, 480 F.2d 652 (6th Cir. 1975). Moreover, substantiality of the evidence must be based upon the record taken as a whole. Futernick v. Richardson, 484 F.2d 647, 648 (6th Cir. 1973).

On this appeal, claimant asserts that the ALJ erred in finding that he could engage in gainful activity by disregarding the vocational expert's response to his second hypothetical question concerning the existence of pain. Claimant contends that the evidence is clear and uncontroverted that he was in pain, and that this pain would prevent him from doing any work at all. Our review of the record indicates, however, that the Secretary's decision was supported by substantial evidence.

A claimant's capacity to perform work of any type must be evaluated in light of his age, his education, his work experience and his impairment including pain. Hephner v. Mathews, supra at 362-63. The essential inquiry in the instant case is whether

the ALJ considered the factor of pain in his decision. Determining an individual case whether a claimant's pain is so severe as to render that individual disabled "is necessarily a personal inquiry, and depends heavily on the credibility of the claimant." Beavers v. Secretary of Health, Education and Welfare, 577 F.2d 383, 386 (6th Cir. 1978).

Our reading of the ALJ's decision indicates that he did consider the factor of pain. His statement, "The Administrative Law Judge noted that the claimant sat comfortably, and without any apparent distress throughout the hearing," in the context of the plaintiff's own testimony concerning his pain, can only be viewed as determination that the claimant's testimony was not credible. This determination is supported by the ALJ's crediting of the medical evidence which indicated that the claimant did not suffer any neurological damage or any fracture as a result of the mine injury. Accordingly, the ALJ was not required to give controlling consideration to the vocational expert's testimony. In sum, substantial evidence on the record exists to support the Secretary's decision.

Therefore, the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Barbara J. Burns
Deputy Clerk

ISSUED AS MANDATE: March 18, 1982
COST: NONE

2.

NO. 80-5399
77-456

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHILDERS & VENTERS, INC.,
a Kentucky corporation,

Plaintiff-Appellant,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellee.

/

ORDER

Before: BROWN and KENNEDY, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Appellant Childers & Venters, Inc., an automobile dealership, brought this suit in the Eastern District of Kentucky to recover flood damage under an "all risks" insurance policy. The District Court ruled that the policy did not insure against flood damage.

On December 30, 1976, appellee Continental Casualty Co., after agreeing to insure appellant against property damage, issued a "binder" pending issuance of the actual policy. The binder designated the insurance as "all risk" coverage. The binder further stated that coverage was "under the provisions of the type of policy in use by the company at the inception of this binder." Appellee asserts that all of its policies in force on December 30, 1976, including its all risks policy for property damage, contained an exception for flood loss. Appellant does not dispute this point.

Appellant paid the designated premium. Before appellant received the actual policy its premises were flooded. Appellant's

policy arrived thereafter and contained an exclusion for flood losses.

Appellant then brought suit to collect on the binder. The parties and the District Court all agreed that interpretation of the contract was a matter of law for the court, not a jury, to decide. Appellant argued that when the binder said "all risks" it meant literally that. The District Court held that the above quoted language, stating that coverage was under provisions of the type of policy in use by the company at the inception of the binder, qualified the phrase "all risks." Specifically, because appellee's "all risks" property loss policy contained an exception for flood loss, the court ruled that the binder excluded flood damage as well. The court granted summary judgment for appellee.

The only issue on appeal is whether the District Court's interpretation of the binder is erroneous. Appellant argues that the binder was ambiguous, so it should be construed against the insurance company. Appellant argues that it reasonably understood "all risks" to mean all risks, including flood loss. It should be noted that appellant had had an "all risk" policy with another company effective the three years prior to the contract with appellee, which likewise excluded flood damage. We hold that the District Court was correct -- under the express terms of the binder appellant was not insured against flood loss.

The cases cited by appellant do not aid it. In Republic Insurance Co. v. French, 180 F.2d 796 (10th Cir. 1950), a binder insured against "all risks" of loss of property while the insured

was on vacation. The insured suffered losses when clothing was stolen from her automobile. The insurance company refused to pay the loss on the ground that the policy actually issued did not cover this loss unless the automobile was locked and the theft resulted from a forcible entry. The court ruled that under the all risks binder, the insurance company was liable. It is not clear from the court's opinion whether the binder did not contain appropriate qualifying language of the type present here, or one insurance contract was negotiated for and bound but a different type of policy was issued. In either event, Republic Insurance is inapposite. The binder appellee issued here was qualified, and the policy issued was the one negotiated for. The other cases cited by appellant as applying the rule of Republic have nothing to do with the extent of coverage provided by "all risks" language in an insurance binder. See Great American Insurance Co. v. Fireman's Fund Insurance Co., 481 F.2d 948 (2d Cir. 1973); Gordon Mailloux Enterprises, Inc. v. Firemen's Insurance Co. of Newark, 366 F.2d 740 (9th Cir. 1966).

The judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Barbara J. Burns
Deputy Clerk

ISSUED AS MANDATE: March 18, 1982
COST: NONE