

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 82-1920

MARIA MELENDEZ,

Plaintiff, Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, U.S. District Judge.]

Before

Campbell, Chief Judge,

Bownes and Breyer, Circuit Judges.

Richard K. Latimer, and Kistin, Babitsky, Latimer, Oppenheim,
Kalnins & Beitman on brief for appellant.

William F. Weld, United States Attorney, Nancy Serventi,
Assistant United States Attorney, and Donna McCarthy, Assistant
Regional Attorney, Department of Health and Human Services, on
brief for appellee.

October 14, 1983

I.

PER CURIAM. Maria M. Melendez, a 36 year old¹ woman with a ninth grade education and a history of unskilled work as a packer and an assembler, appeals from the district court affirmance of the denial by the Secretary of Health and Human Services of her application for Social Security disability benefits. She alleges disability since June 23, 1979 due to a back injury. The Secretary determined that the evidence failed to establish the existence of a disabling impairment, for the statutory period of time,² that precluded her from engaging in sedentary work, as that term is defined in the regulations. See 20 C.F.R. § 404.1567(a)(1983). Based on that determination the Secretary applied Rule 201.24 of the Medical Vocational Guidelines, 20 C.F.R. Part 404 Appendix 2 (1983), which in those circumstances mandates a ruling of not disabled for a person of appellant's age, education and work experience.

We affirm the denial of benefits for the period prior to July 1980. As to the time after that date, we reverse.³

1. This was her age at the time the Administrative Law Judge (ALJ) issued his decision on July 21, 1981.

2. To be eligible for disability benefits under the Social Security Act the disability must be one "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 12 months." 42 U.S.C. § 423(d)(A).

3. As of June 23, 1973, the alleged date of onset of the disability, Mrs. Melendez met the special earning requirements of the Act (see p.20 ALJ decision); the special earnings requirement will continue to be satisfied until September 30, 1984. (See tr. 35).

II.

Utilization of the Medical Vocational Guidelines to determine disability within the meaning of the Social Security Act is available after the claimant's "residual functional capacity (i.e. the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs), age, education and work experience [is] determined" 20 C.F.R. Part 404, Appendix 2 § 200.00(c)(1983). In the instant case the controversy revolves, mainly, around whether the ALJ's finding of fact relative to the first of these elements, that is, Mrs. Melendez's capacity for the sustained performance of jobs categorized as "sedentary," finds support in the record. That she is no longer able to engage in jobs with "light" to "medium" exertional requirements, her previous work experience, is not disputed. Nonetheless, the Secretary determined that she is capable of performing sustained "sedentary" work and, on that basis, applied the Guidelines.⁴

Sedentary work, as defined by the regulations, "involves lifting no more than 10 pounds at a time" and "is defined as one which involves sitting" although "a certain amount of walking and standing is often necessary in carrying out job duties." "Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a)(1983).

4. The regulations classify jobs in the national economy as "sedentary," "light," "medium," "heavy" and "very heavy," according to their exertional requirements. See 20 C.F.R. § 404.1567 (1983).

Mrs. Melendez was first hospitalized because of her back injury from July 20, 1979 to July 28, 1979, complaining of right side lower back and right buttock pain that radiated to her right leg. The medical evaluation performed at that time indicated that she suffered from low back pain with sciatica, osteitis condensans illii, borderline diabetes, obesity and anemia (Tr. 98-103). After some improvement she was released and then hospitalized again from August 13, 1979 to August 21, 1979 complaining of the same symptoms. A lumbar myelogram revealed "a large right sided L5-S1 extradural filling defect consistent with acute herniated extruded lumbar disk," [sic] for which she underwent surgery that consisted of "a right L5 hemilaminectomy and L5-S1 disk [sic] excision" on August 15. (Tr. 104-109).

Thereafter hospital records and the reports of her treating physician Dr. Hillier, the orthopedic surgeon that performed the operation, reveal a continued pattern of improvement, although most of the time there are still complaints of some pain. The day after the surgery the pain in her leg "was totally relieved" and when she was discharged on August 21 she was "ambulating without difficulty," and "taking tylenol for discomfort." The final diagnosis was acute herniated lumbar disc on the right at L5-S1 and diabetes mellitus. (Tr. 109).

On August 30, Dr. Hillier reports that she was "quite comfortable" and felt "very little discomfort," (tr. 110). Although on September 24 she complained of "some ache down the right leg intermittently" and the electromyogram [EMG] revealed "mild findings of some denervation,

insertional activity in the right L-5, S-1," the doctor reported that things were "coming along relatively well" with "just some residual nerve root irritation." Up to that point she was on a modified activity program (tr. 111). Upon increased activities as of November, Dr. Hillier reported complaints of cramps and discomfort in the right calf in the mornings or at night with the EMG and nerve conduction tests revealing "significant improvement with less signs of denervation in the right L-5, S-1 supplied muscles." (Tr. 112) Also, during this November visit it was noted that she might be pregnant, which condition was later confirmed.

At the sixth month pregnancy stage, on March 24, 1980, Dr. Hillier reported that she "still complain[ed] of cramps in her right calf" although her latest EMG revealed "significant improvement with no sign of denervation" (tr. 113). An additional EMG performed one month before the delivery date, on May 12, 1980, continued to reveal "no signs of active denervation" and by March 15 Dr. Hillier reported that "only a little bit of pain in her back remained." (Tr. 114-116). After delivery, by July 7, the "back and leg pain had subsided" while she still suffered from "residual ache in her back and leg." (Tr. 117).

The ALJ relied on the foregoing facts, the only evidence of her condition up to July 1980 offered by claimant, to conclude that it was insufficient to establish that her condition precluded her from engaging in sedentary work for a period of at least 12 months.

Our review of the Secretary's findings are limited to determining whether they are supported by substantial evidence. 42 U.S.C. § 405(g) (1981); Miranda v. Secretary of Health, Education and Welfare, 514 F.2d

996 (1st Cir. 1975). While the reports evince the existence of a serious spinal impairment, which undoubtedly is relevant to Mrs. Melendez's work capabilities, they contain no specifics about the degree to which that condition precluded her from performing the tasks associated with sedentary work up to the Summer of 1980. This lack coupled with the medically confirmed progressive improvement of her condition, and, the fact that Mrs. Melendez was able to carry and deliver a child without a reported increase in pain or in the severity of her impairment, may well have indicated to the ALJ that she was capable of sedentary work. Thus, we conclude that there is substantial evidence to support that finding.⁵

III.

Post July 1980, however, there is no requisite support in the record for the Secretary's conclusion. The only medical evidence relied on consisted of Dr. Hillier's further reports with accompanying results of clinical tests, which support Mrs. Melendez's position of inability for sustained performance of sedentary work. These assessments of her condition were rejected by the ALJ as "based upon the subjective complaints of the claimant," to which no credibility was given by the ALJ.

5. Because the ALJ did not rely on the two residual functioning capacity reports (dated 8-14-80 and 10-14-80) from nonexamining Social Security Administration physicians, which are part of the record (Tr. 65, 72), and, we have found support for his finding on other parts of the record, we need not reach the issue raised by appellant, of whether these reports by themselves could constitute substantial evidence to support the Secretary. See Rodriguez v. Secretary of Health and Human Services, 647 F.2d 218 (1st Cir. 1981).

Although mindful that evaluation of the evidence falls within the province of the Secretary, Rodriguez v. Celbrezze, 349 F.2d 494, 495-96 (1st Cir. 1965), we are unable to uphold such evaluation when it is premised on an incorrect fact and contrary to the evidence.

Our review of the medical evidence reveals that rather than being based exclusively on "the subjective complaints of the claimant," these reports evince continuous reference to "medically acceptable clinical and laboratory diagnostic techniques," 42 U.S.C. § 423(d)(3), i.e. EMG studies, myelograms, the results of clinical evaluations etc. in support of findings of impairment consistent with inability for sustained sedentary work. That, in addition, they record Mrs. Melendez's complaints of pain does not detract from their value as competent evidence in support of her claim.

As of September 8, 1980, Mrs. Melendez reported "a lot of discomfort" in her low back, which Dr. Hiller characterized as being of a "stiff arthritic nature," further specifying that she was unable to bend forward or turn from side to side. EMG testing was unremarkable. Physical examination performed at that time revealed a negative neurological evaluation with "restricted range of motion of her back, some point tenderness around the L-4, 5 and L5, S-1 facets bilaterally. The diagnosis was, "[a]cute and chronic lumbar radicular syndrome. Status post disc excision with secondary facet inflammation." Three 50 m.g. Indocin tablets daily and modified activities were prescribed. (Tr. 120). Although there are reports of improvement with that treatment, she continued through 1980 and 1981 suffering from pain discomfort, which at some points was reported to be "unbearable," (tr. 121, 123, 126-127, 128-131). The appearance of some post surgical and inflammatory

arthritis in the lumbar facet joints was noted on September 24.
(Tr. 121).

EMG studies performed on January 26, 1981 and February 23, 1981 revealed insertional activity down the leg. (Tr. 123, 124-25).

In an evaluation of Mrs. Melendez's residual functioning capacity, dated March 9, 1981, Dr. Hillier described her as not being able to sit for one hour at a time; not being able to stand or walk more than one hour at a time; not being able to sit more than one hour during an entire eight hour day; not being able to stand or walk for more than two hours during an entire eight hour day; not being able to lift or carry more than 5 lbs, and that, only occasionally. Use of her feet for repetitive movements such as in pushing or pulling leg controls was limited to her left leg. She was also described as unable to squat, crawl, climb or reach and as being able to bend only occasionally. Activities involving driving or being around unprotected heights or moving machinery was restricted (tr. 132).

Although a myelogram performed on March 11, 1980 was normal (tr. 130-131) Dr. Hillier noted that "there [were] signs of discogenic disease with collapse of the L-5, S-1 disc space and possible some lateral root entrapment involving the L-5 nerve root" (tr. 129). On this date an intrathecal steroid injection was administered.

Mrs. Melendez continued on the Indocin and modified activities through April, June and September 1981. (Tr. 137-139; 143-145, 154-157). Some improvement was reported but EMG results continued showing insertional activity involving the right leg (tr. 137-139, 143-145). On June 4, Dr. Hillier reported "still ongoing of nerve root irritation down the leg"; "unable to sit for more than 15 minutes at a time, cannot stand for more than 1/2 hour at a time"; "[e]xamination reveale[d] restricted

range of motion of her back and signs of nerve root tension in her right lower extremity with some motor weakness involving the left L-5 nerve root." (Tr. 143)

A September 17, 1981, report considered by the Appeals Council, revealed very little improvement, with the latest EMG indicating "persistent insertional activity involving the right L-5, S-1 nerve root." (Tr. 154-157).

The order of the district court of November 17, 1982 is affirmed as to the period prior to July 1980 and is vacated as to the period post July 1980 and the cause is remanded to the district court with instructions to remand the case to the Secretary who may either enter a determination of disability for the later period or, in lieu thereof, conduct a further hearing at which additional evidence is to be taken, and findings made, on the subject of claimant's pain during the period post July 1980. If the Secretary elects to hold another hearing, she shall make a new determination of whether or not claimant was disabled for the period in question.