UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

GERALD J. ROSE,
Plaintiff,

v. CIVIL ACTION NO. 83-1618-Mc

SECRETARY OF HEALTH
AND HUMAN SERVICES,
Defendant.

J U D G M E N T

November 13, 1986

Mc NAUGHT, D. J.

The judgment of this Court having been vacated by the First Circuit Court of Appeals on September 22, 1986, in accordance with the direction of that Court,

Judgment is hereby entered vacating the determination of the Secretary of Health and Human Services. This matter is remanded to the said Secretary for further agency proceedings in accordance with the opinion of the First Circuit Court of Appeals.

A copy of the Opinion of the Court of Appeals shall be appended to this judgment.

JOHN J. Mc NAUGHT
UNITED STATES DISTRICT JUDGE

District Court
CA: 83-01618-MC
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[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 86-1010

GERALD J. ROSE,

Plaintiff, Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, U.S. District Judge]

Before

Campbell, Chief Judge,

Bownes and Breyer, Circuit Judges.

Ben D. Worcester and Conn, Worcester, Conn & Senior on brief for appellant.

Nancy B. Salafia, Assistant General Counsel, William F. Weld, United States Attorney, and Martha B. Sosman, Assistant United States Attorney, on brief for appellee.

September 22, 1986

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BREYER, Circuit Judge. Claimant, Gerald J. Rose, is a 39-year-old man with a history of mental illness dating to his teens. In 1982 Rose applied for surviving child's insurance benefits and for disability insurance benefits. The administrative law judge found after a hearing that Rose had been disabled as defined by the Social Security Act since 1966 and granted Rose's claims for benefits. The Secretary's Appeals Council reviewed the case on its own motion and reversed. The district court held that the Appeals Council's rejection of Rose's claims was supported by substantial evidence and summarily affirmed. On appeal, Rose raises a single claim meriting our attention: that the Secretary's determination that he was not disabled was not supported by substantial evidence. We agree, and for the reasons discussed below, we remand to the Secretary for further findings.

I.

In reviewing the evidence of disability, we must consider two different time periods, because Rose has made two separate claims for benefits. First Rose claims disability benefits as a surviving child of an insured individual; his father died insured in 1981. To be eligible for surviving child's benefits, Rose must prove that he became disabled before his twenty-second birthday on December 4, 1968, 42 U.S.C. § 402(d)(1)(B)(ii); 20 C.F.R. § 404.350(e), and that

he remained continuously disabled until six months before filing his application for benefits on March 5, 1982, 42 U.S.C. § 402(d)(1)(B)(ii); 20 C.F.R. § 404.621(a)(1)(ii); Suarez v. Secretary of Health and Human Services, 755 F.2d 1, 3-4 (1st Cir. 1985).

Second, Rose seeks disability benefits based on his own earnings record. To receive such benefits, he must establish that he was disabled between January 1, 1971, and September 30, 1971, when he met the insured status requirements of the Social Security Act, 42 U.S.C. § 423(a)(1)(A), (c)(1); 20 C.F.R. § 404.315(a); Deblois v. Secretary of Health and Human Services, 686 F.2d 76, 79 (1st Cir. 1982). During that nine-month period, his earnings from a dishwashing job qualified him for disability insurance benefits. In addition, Rose must demonstrate that he remained continuously disabled until twelve months before filing his application for disability insurance benefits on July 14, 1982, 20 C.F.R. §§ 404.315(c), 404.320(b)(3).

In short, to succeed in his claim for surviving child's insurance benefits, Rose must prove a disability that spanned some 13 years from December 1968 until September 1981. To prevail in his disability insurance claim, he must prove a disability spanning the 10 years between September 1971 and July 1981. Because the former period encompasses the latter,

we may consider the two claims together, focusing on the longer period.

II.

The Social Security Act defines "disability" as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment 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). To determine whether a claimant suffers from a disability, so defined, the Social Security Administration applies a five-step test established in its regulations. 20 C.F.R. § 404.1520; see Goodermote v. Secretary of Health and Human Services, 690 F.2d 5, 6-7 (1st Cir. 1982); see also 20 C.F.R. § 404.1503. In Rose's case, each of the five steps must be applied to assess Rose's condition during the 13 years in which he must have suffered from a continuous disability.

First, the claimant must show that he was not, at any time at which he must demonstrate disability, performing "substantial gainful activity;" if he did in fact hold a meaningful job, he was not disabled. The Appeals Council found that none of Rose's sporadic employment constituted substantial gainful activity. Second, the claimant must demonstrate that he suffered, at all pertinent times, from a "severe impairment." The Appeals Council conceded that Rose indeed suffered from a

severe psychiatric impairment; it did not limit its finding to any particular time period. Third, the claimant will succeed in establishing a disability if he shows that his impairment, at all times during which he must demonstrate disability, met or equalled an impairment listed in Appendix 1 of the Regulations. 20 C.F.R. 404, Subpart P, Appendix 1, § 12.03. The Appeals Council found that Rose's impairment, while severe, did not at all pertinent times meet the specified level of severity, and Rose has not challenged this finding.

If the claimant's disability did not meet or equal an Appendix 1 impairment, then the SSA proceeds to steps four and five. The Appeals Council rejected one of Rose's claims under step four and one under step five; the reasons for the distinction are not important here. Under step four, if the claimant has held "past relevant work," then he will be found not disabled unless he shows he can no longer perform that work. The Appeals Council found that Rose's sporadic work as a dishwasher, although not "substantial gainful activity," did "in fact reflect that he had the capacity to perform this job." (Tr. 15.) We reject that finding, for the statutory definition of disability is not the inability to perform any "job," but the inability to perform "substantial gainful activity." 42 U.S.C. § 423(d)(1); see supra p. 4. Past insubstantial activity cannot demonstrate an ability to perform substantial activity.

Vaughn v. Heckler, 727 F.2d 1040, 1042 (11th Cir. 1984). True, step four refers only to "relevant" work and does not borrow the phrase "substantial gainful activity" from step one. But we cannot attribute to the regulations the odd notion that present work proves an absence of disability only if it is "substantial" (step one), whereas a present ability to perform past work proves an absence of disability under step four even if that work was insubstantial. It would be grossly unfair for the regulations to require the claimant to prove an inability to do even insubstantial work when the statute requires him to prove only the inability to do substantial work.

We must therefore proceed to step five: even if the claimant has no relevant prior work experience or cannot perform his prior work, the claimant will be found not disabled if the SSA shows that he can perform other work. The Appeals Council found that Rose was indeed capable of other work -- that his "nonexertional impairment did not reduce [his occupational] base" and that, at least at some of the times in question, he could perform numerous "simple, repetitive tasks requiring no social interaction or close supervision." (Tr. 14.)

III.

Our review is limited to the question whether there is "substantial evidence" for the Secretary's conclusion that Rose was capable of substantial gainful activity. 42 U.S.C.

§ 405(g). We believe there is not. The record presents strong evidence that Rose suffered from a functionally disabling mental impairment. Rose first entered a psychiatric hospital in 1966, at age 19, and was then diagnosed with a "Schizophrenic Reaction, Chronic Undifferentiated Type." (Tr. 70.) According to hospital records, his mother reported that he talked to himself, would not bathe, and had threatened her with a knife. (Tr. 72-73.) Test results showed "vagueness, looseness of association, inappropriateness, bizarreness, confusion over his sexual identification [and] a lot of psychic factors showing non-human feeling, all adding up to a very active schizophrenic process." (Tr. 75.) Rose escaped from the hospital (which he had entered voluntarily) after three months, reentered the following year, and escaped again two months later. (Tr. 70, 78.) In June 1968, still before his twenty-second birthday, Rose was hospitalized a third time, "for a rest," for two weeks. (Tr. 106.)

Rose has not been hospitalized since 1968. He has, however, visited various doctors and since 1979 or before has regularly taken Sorentil, a drug used to treat schizophrenia. (Tr. 86.) He has been repeatedly diagnosed to be suffering from schizophrenia. (Tr. 91-92, 93.) In 1982 one physician noted "a moderately-severe personality disorder manifested by withdrawal, emotional and sexual immaturity, passivity,

dependency, difficulty in socializing and inadequa[cy] as an individual." (Tr. 111.) At the oral hearing before the ALJ, Rose's mother, aunt, and a longtime family lawyer all testified that he has loud and animated conversations with himself, has long lapses in concentration, and chain smokes. (Oral Hearing 30-32, 34-36, 42-43.) The lawyer testified that Rose is not capable even of simple tasks, such as washing floors or dishes. (Oral Hearing 31.) The ALJ concluded that the testimony of these witnesses "leaves no doubt of the existence of markedly severe functional impairment." (Tr. 23.) Rose has held several odd jobs over the years, mainly as a dishwasher, but he has never remained long at any one job and has rarely if ever worked more than nine hours in a week. The most he has earned in any one year is $1046 in 1970. He reported no earnings between 1978 and 1981. (Tr. 126.) The ALJ, Appeals Council and district court agreed that his work has never amounted to "substantial gainful activity." (Tr. 14, 23.) The ALJ found further that at least since 1966 Rose "has been unable to direct his physical or intellectual capabilities to productive activity on a regular basis." (Tr. 23.)

In the face of this evidence, the Appeals Council found that Rose was in fact at times capable of meaningful work. It cited in its support the following evidence: (1) that at the conclusion of Rose's second hospitalization in

1967, his condition, according to hospital records, was "probably good"; (2) that during his third hospitalization in 1968, Rose was reported to speak spontaneously and coherently, was not tense or nervous, was oriented to time, place and person, had a fair memory, and denied hallucinations and depression; (3) that Dr. Jose Delgado, who evaluated Rose in May 1982, found "no loosening of associations, tangentiality, irrelevance, incoherence, or illogicality," and concluded that Rose had a fair grasp of current events, a fair fund of knowledge, adequate memory, and intact judgment; and (4) that Rose responded appropriately to the ALJ's questions at the hearing on these claims. (Tr. 10-12.)

In affirming the Appeals Council's holding, the district court cited two further pieces of evidence: that between his first and second hospitalizations, Rose was able to travel "without difficulty" from his mother's home in Virginia to his father's home in California, then later to his grandmother's home in Massachusetts; and that Dr. Maxim Anastos, a psychiatrist, after reviewing Rose's treatment history but without having examined Rose, concluded in 1982 that Rose was, between 1964 and 1968, capable of "unskilled and unstressful work." Finally, there also appears in the record the opinion of Dr. Alan Fisch, who concluded -- apparently without examining Rose -- that as of May 1982,

his capacity to perform simple repetitive work was not significantly restricted. (Tr. 40.) The Secretary has not cited Dr. Fisch's report to this court.

We believe that the facts cited by the Appeals Council and the district court are not substantial evidence for the conclusion reached under step five that Rose is capable of substantial gainful activity. First, although hospital records show that his mental condition at the end of his second hospitalization in 1967 was "probably good," the same form recommends a discharge status of "unimproved." (Tr. 83.) Second, Rose's ability to travel after his first hospitalization is weak evidence of a capacity to work and is especially unpersuasive in light of the second hospitalization that soon followed. Third, despite favorable comment on Rose's condition made during his third hospitalization in June 1968 and after an evaluation by Dr. Delgado in May 1982, both the hospital evaluator and Dr. Delgado diagnosed Rose to be suffering from schizophrenia (Tr. 91-92, 105), and neither offered any vocational conclusions. Fourth, although Drs. Anastos and Fisch did draw such conclusions, their analysis consisted of four checkmarks on a standard form with an additional line or two of "comments" at the bottom. (Tr. 33, 40.) Dr. Anastos gave his opinion in 1982 of Rose's capacity to work between 1964 and 1968 -- a period largely irrelevant

to our inquiry here. Dr. Fisch's report was not even cited to this court by the Secretary. Moreover, neither doctor personally examined Rose; both rendered their opinions after merely reviewing Rose's file. And fifth, although a claimant's intelligent testimony before an ALJ could belie an incapacitating mental illness, here the ALJ, who personally observed Rose, found that Rose was functionally impaired; indeed, he had "no doubt" about it. (Tr. 23.)

Finally, no vocational expert testified before the ALJ. This court has recently held that the "Appeals Council cannot blithely dismiss the ALJ's evaluation, and the considerable body of evidence of mental impairment, to the point of inferring on the basis of no affirmative evidence whatever" that a claimant was able to perform substantial work. Burgos Lopez v. Secretary of Health and Human Services, 747 F.2d 37, 42 (1st Cir. 1984). In that case we suggested that the Secretary present "more specific expert evidence concerning [the claimant's] ability to function in the workplace, coupled with a vocational expert's testimony as to the availability of jobs in the national economy which someone possessing claimant's . . . limitations might fill." Id. The Secretary has failed entirely to present such affirmative evidence here. In these circumstances, we feel it is appropriate to remand so that further evidence may be taken.

IV.

We believe that the Secretary's rejection of Rose's claims for surviving child's insurance benefits and disability insurance benefits was not supported by substantial evidence. We therefore remand the case with the expectation that the Secretary will either grant Rose's claims for benefits or produce affirmative evidence showing Rose's ability to perform substantial work at pertinent times.

The judgment of the district court is vacated. The district court is directed to enter a judgment vacating the Secretary's determination and remanding for further agency proceedings in accordance with this opinion.