334 F.2d 412
United States Court of Appeals Sixth Circuit.

James THOMPSON, Plaintiff-Appellant,
v.
Anthony J. CELEBREZZE, Secretary of Health, Education and Welfare, Defendant-Appellee.

No. 15568. | July 22, 1964.

Proceeding upon application for social security disability benefits. The hearing examiner found that claimant had not established impairments which would preclude him from engaging in any substantial gainful activity. The Appeals Council denied review. The United States District Court for the Eastern District of Kentucky, MacSwinford, Chief Judge, held that the claimant had failed to establish disability. He appealed. The Court of Appeals, McAllister, Senior Circuit Judge, held that evidence which did not show that claimant could obtain a position as timekeeper and weighmaster without seniority or special privilege, and which showed that claimant could not read and guessed at inventory in a store which he had kept, failed to discharge the Secretary's burden of proving that claimant, who was shown to be unable longer to work in mines or keep store, could perform substantial gainful work.

Reversed and remanded with instructions to allow benefits.

West Headnotes (3)

[1] Social Security and Public Welfare
Ability to Engage in Substantial Gainful Activity in General, Sufficiency

Finding of hearing examiner that applicant for social security disability benefits had not established impairments which would preclude him from engaging in any substantial gainful activities was contrary to uncontradicted evidence of medical experts and of applicant. Social Security Act, §§ 216(i), 213, 42 U.S.C.A. §§ 416(i), 423.

3 Cases that cite this headnote

[2] Social Security and Public Welfare
Ability to Engage in Substantial Gainful Activity and Employment Opportunities, Presumptions and Burden

Burden was on Secretary of Health, Education and Welfare to prove that social security disability benefits claimant, who was shown to be unable to work in mines or to keep store, could perform substantial gainful work, as, for example, work of timekeeper and weighmaster or of record keeper. Social Security Act, §§ 216(i), 213, 42 U.S.C.A. §§ 416(i), 423.

16 Cases that cite this headnote

[3] Social Security and Public Welfare
Capabilities and Employment Opportunities, Sufficiency

Evidence which did not show that social security disability benefits claimant could obtain position of timekeeper and weighmaster without seniority or special privilege, and which showed that claimant could not read and guessed at inventory in store which he had kept, failed to discharge Secretary's burden of proving that claimant, who was shown to be unable to work in mines or keep store, could perform substantial gainful work. Social Security Act, §§ 216(i), 213, 42 U.S.C.A. §§ 416(i), 423.

16 Cases that cite this headnote

Attorneys and Law Firms

***413** W. L. Steele, Ashland, Ky. (W. L. Steele, Ashland, Ky., and William C. Kibbey Grayson, Ky., on the brief), for appellant.

Sherman L. Cohn, Department of Justice, Washington, D.C. (John W. Douglas, Asst. Atty. Gen., Patrick C. McKeever, Atty. Dept. of Justice, Washington, D.C., Bernard T. Moynahan, U.S. Atty., Lexington, Ky., on the brief), for appellee.

Before CECIL and O'SULLIVAN, Circuit Judges, and McALLISTER, Senior Circuit Judge.

Opinion

McALLISTER, Senior Circuit Judge.

Appellant was a man 54 years old at the time of his application, in 1961, for disability benefits under the Social Security Act, Title 42 U.S.C.A., §§ 416(i) and 423.

When he was 16 years of age, he started working at the clay mines in Kentucky. He had a third-grade education, but could not read. The mines, in which appellant worked, are entered through a shaft on a hillside. From them clay is extracted, which is used to make firebrick. Appellant served in the Army in 1944 from February to November, and was given a discharge with 20% Disability, resulting from arthritis of the spine, which was aggravated by his service. During his service he had been on sick call several times and was later sent to the hospital for three weeks, when they found out what caused his disability. When he returned to civil life, he again worked in the mines. He was laid off in 1953 when the mine in which he was employed went out of business. He then bought a small store, but after two years there, quit work when he sold it in 1960 at the time he claims he became unable to take care of it, or to engage in any substantial gainful activity, because of his completely disabled condition, resulting from rheumatoid arthritis of the thoracic lumbar and cervical parts of the spine.

The Hearing Examiner of the Social Security Administration found that appellant had not established that he had impairments, either singularly or in combination, of such severity as to preclude him from engaging in any substantial gainful activity. The Appeals Council denied his request for review, thereby adopting the decision of the Hearing Examiner as the Secretary's final decision, and the District Court held that the burden of proving disability had been upon the plaintiff, and he had failed to discharge it. The court, accordingly, granted a motion for summary judgment in favor of the Government.

While appellant operated the store he had ‘a fairly good income. * * * I was doing fine.’ He and his family ‘ate out of the store and lived out of it.’ He testified: ‘We done well a long time out of it. But I just stood it as long as I thought I could. Pushed myself and my wife too.’ He has a little girl 13 years old, who is in school. He raises a small garden, but can't plow it. He can stay out in the garden, and chop it a little, if he ‘doesn't hump over.’ He can do this a little at a time, but when he bends over, the pain in his shoulders, and hips, and knees returns. He can't ‘sit too long’ and can't ‘stand too long.’ If he sits for an hour he ‘has to stir.’ ‘It starts hurting, but keep up and down, and stirring around ordinarily, it don't hurt too much.’ The only reason he disposed of the store was that he was physically incapable of operating it. ‘I ten times rather run it if I'd been able. * * * I sure didn't quit because I was afraid of work. I enjoyed my work. I like it thirty years at that one job, and I enjoyed it every day. Of course, I really enjoyed work. * * * I'd rather ***414** be cured and go to work than to draw, and I believe most any man would that's use to working all his life. I've been working all my life since I was eight years old.’ He stated that he could not even do the light work in the store. He had been helped by his wife and two young sons. At the time of the hearing, his wife had been under a doctor's care, since appellant gave up the store. She is not able to work. His sons have since grown up and left the place.

Four physicians examined appellant and three of them gave opinions that he was totally disabled from performing any type of work requiring the use of his back. This evidence was uncontradicted. One of the physicians, Dr. Brown, said: ‘He is unable to do this type of work (in a mine) or any other type of work which uses the back appreciably and this is the only type of work for which he is prepared.’ Another physician, Dr. Murray, stated: ‘This man is totally disabled from gaining a livelihood by manual labor.’ Another physician, Dr. Shufflebarger, stated: ‘Patient is totally disabled from work due to pain, and unable to have any movement of back.’ The fourth physician, Dr. Shiflett, stated: ‘Pelvis: There is bilateral narrowing and sub-chondral atrophy and sub-articular fragmentation of each sacroiliac joint, changes appearing to be due to a rheumatoid type arthritis, more advanced in left sacroiliac joint.’

Except for the report of the last physician, who stated that there was fragmentation of each sacroiliac joint, and gave no opinion as to disability, the other three physicians set forth the symptoms of pain and medical grounds upon which they based their conclusion that appellant was totally disabled.

Appellant proved his total disability, not only by his own persuasive and credible statements, but by the uncontradicted testimony of medical experts.

In Kerner v. Flemming, 283 F.2d 916 (C.A.2), it was held that the court is not bound to sustain a denial of benefits where the evidence affords no sufficient basis for the Secretary's negative answer. It is to be emphasized that it was competent for the physicians in this case to give their opinions as to appellant's ability to perform work. In Hall v. Celebrezze, 314 F.2d 686 (C.A.6) this court observed that if the medical

evidence presented by the claimant is disregarded, then claimant has no way of establishing the case, and that 'While the Secretary may have expertise in respect of some matters, we do not believe he supplants the medical expert.' In Jarvis v. Ribicoff, 312 F.2d 707 (C.A.6), the court held that the test of claimant's disability or inability to engage in any substantial gainful activity is a subjective one, and claimant need not establish complete absence of any opportunity for substantial gainful employment; he need only establish that he has become disabled from employment in any work in which he could profitably seek employment, in the light of his physical and mental capacities and his education, training and experience; and he need not be totally helpless or bedridden.

The language contained in the decision of the Hearing Examiner in this case indicates that he feels that appellant has impairments, but that he does not feel that such impairments are severe enough to preclude him from engaging in substantial gainful activity. It seems, therefore, that the Examiner has accepted the reports and opinions of the examining physicians, as he stated that 'the evidence clearly demonstrates that claimant is qualified by training and work experience for work of sedentary type, involving the maintaining of records of numerous types and work of a supervisory nature.' There is no escaping the implication that the Hearing Examiner concluded from the evidence that appellant was disabled insofar as heavy work was concerned. In Ellerman v. Flemming, D.C., 188 F.Supp. 521, 527, the court held:

'Under the Social Security Act, unlike some other statutes, it is not the burden of the claimant to introduce evidence which negatives every imaginable job open to men with his ***415** impairment, and of his age, experience and education. It is quite enough if he offers evidence of what he has done, of his inability to do that kind of work any longer, and, of his lack of particular experience for any other type of job. If there are other kinds of work which are available and for which the claimant is suited, it is the defendant's burden to adduce some evidence from which a finding can be made that he can do some type of work; actually, not apparently. Parfenuk v. Flemming, D.C.Mass.1960, 182 F.Supp. 532. Here, the Referee has made no such finding, whatsoever, based on evidence.'

The finding of the Hearing Examiner that appellant has not established that he has impairments, either singularly or in combination, of such severity as to preclude him from engaging in any substantial gainful activity is contrary to the uncontradicted evidence of three physicians and of appellant himself. This finding of the Hearing Examiner must be based upon the idea that because appellant, on account of his last two years of thirty years of labor, and, through his seniority, was able to secure a position of timekeeper and weigh master, that proved that he can engage in substantial gainful activity; and this idea must have as a premise that the position of timekeeper and weigh master is only a sinecure- and that anyone who is not able to bend his back or to sit or stand for more than a short time can engage in this work, which the Hearing Examiner characterizes as substantial gainful activity. If seniority at one company enables a workman to secure such a position after nearly thirty years of hard labor, it is doubtful or incredible to believe that he could secure such a position at another company without any seniority whatever. Moreover, the work of timekeeper and weigh master calls for more than a man, as disabled as appellant, can do, unless it is a job that can be performed by a man who can't sit down for more than a short time, can't stand up for more than a short time, and cannot be confined to any position for more than a short time; and there is no evidence that such a job is available anywhere, or, if it were available anywhere, that appellant could secure it without seniority in a company, or through some special privilege. The probability or possibility of a man, disabled as appellant is, securing a job of this kind, can exist only in the imagination; and to hold appellant to this requirement is to exact from him the obligation to secure a job that has its being only in fantasy.

The Hearing Examiner further said that the evidence clearly demonstrated that claimant was qualified by training and work experience for work of a sedentary type, involving the maintenance of records of numerous types and work of a supervisory nature. There is no such evidence in the case. The claimant testified: 'I can't read any.' There is no evidence that he kept records in the mine. In answering a leading question, as to his store, he testified:

'Q. In keeping books, how'd you keep books? By inventory and replacement?

'A. Well, yes. And a long time they would kind of guess at my inventory.'

This is not the kind of evidence that can be availed of to exclude a manual laborer like appellant from disability benefits under the Social Security Act, on the ground that the proofs clearly demonstrated that the claimant was qualified by training and work experience for work involving the maintaining of records of numerous types.

[1] **[2]** **[3]** The finding of the Hearing Examiner, sustained by the Secretary of Health, Education and Welfare, and by the order appealed from, is contrary to the uncontradicted evidence, and is not sustained by the proofs in the case.

Moreover, in this case the burden was upon the Secretary to adduce evidence that claimant could perform substantial gainful work- actually, not apparently, Ellerman v. Flemming, supra; and there ***416** was a complete absence of evidence in this regard.

In accordance with the foregoing, the judgment of the District Court is reversed, and the case is remanded with instructions to allow disability benefits to the appellant.

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