

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hunter v. Astrue

254 F. App'x 604 (9th Cir. 2007) · Decided November 14, 2007

SUMMARY

The Ninth Circuit affirmed the denial of Kenneth W. Hunter's Social Security disability benefits. The court held that the ALJ gave specific and legitimate reasons for discounting a treating physician's opinion and properly relied on vocational-expert testimony that Hunter could perform security-guard work. The court also held that Hunter's incarceration history was not relevant to whether he was medically disabled under the Social Security Act.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Per curiam; Bybee; Hall; Zapata
JURISDICTION	Federal
DECIDED	November 14, 2007
DISPOSITION	affirmed
PROCEDURAL POSTURE	Hunter appealed the district court's order upholding the Commissioner's final denial of Social Security disability benefits.
STANDARD OF REVIEW	The Ninth Circuit reviews a district court's order upholding the Commissioner's final denial of benefits de novo. The Commissioner's decision is affirmed if supported by substantial evidence and based on proper legal standards.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Kenneth W. Hunter v. Michael J. Astrue, Commissioner of Social Security

TOPICS

judicial review of agency action

agency adjudication

standard of review

administrative law

appellate procedure

PRACTICE AREAS

Social Security disability

administrative law

appellate procedure

QUESTIONS PRESENTED

1. Whether the ALJ gave legally sufficient reasons for rejecting the treating physician's opinion.
2. Whether substantial evidence supported the ALJ's finding that Hunter could perform work as a security guard despite a conflict with the Dictionary of Occupational Titles.
3. Whether the ALJ was required to consider Hunter's incarceration history and resulting difficulty obtaining employment in determining disability.

HOLDINGS

1. The ALJ did not commit reversible error in rejecting Dr. Oba's opinion because the ALJ provided specific and legitimate reasons supported by the record for finding another medical opinion more persuasive.
2. The ALJ properly relied on vocational-expert testimony that Hunter could perform security-guard work and that such work existed in significant numbers in the national economy.
3. The ALJ properly refused to consider whether Hunter would actually obtain security-guard employment because of his incarceration history; disability is determined by whether the claimant can perform substantial gainful work existing in the national economy, not by whether an employer would hire him.

KEY QUOTATIONS

“The Commissioner’s decision must be affirmed if it was supported by substantial evidence and based on proper legal standards.” (606)

“only if his physical or mental ... impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether ... he would be hired if he applied for work.” (606-07)

“The Social Security Act is not an unemployment compensation act, but an act to compensate those who cannot work because of their medical disability.” (607)

FACTUAL BACKGROUND

Hunter sought Social Security disability benefits based on medical impairments, including physical limitations. The ALJ found the opinion of treating physician Dr. Oba less persuasive because Dr. Oba had seen Hunter only once, lacked identified specialized pulmonary training, relied on limited or old records and subjective complaints, and offered opinions unsupported by objective clinical findings. Relying on vocational-expert testimony, the ALJ found that Hunter could perform security-guard work existing in significant numbers in the national economy, notwithstanding his incarceration history.

PROCEDURAL HISTORY

An Administrative Law Judge denied benefits after rejecting the treating physician's opinion and finding that Hunter could perform work as a security guard. The district court upheld the Commissioner's final denial, and Hunter appealed to the Ninth Circuit. The Ninth Circuit affirmed.

DISPOSITION

affirmed

CASES CITED

- Ukolov v. Barnhart, 420 F.3d 1002, 1004 (9th Cir. 2005)
- Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002)
- Osenbrock v. Apfel, 240 F.3d 1157, 1162-63 (9th Cir. 2001)
- Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995)
- Sorenson v. Weinberger, 514 F.2d 1112, 1117 (9th Cir. 1975) (per curiam)

OPINION

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PER CURIAM.

*606MEMORANDUM ***

The facts and procedural posture of the case are known to the parties, and we do not repeat them here. The Ninth Circuit reviews a district court's order upholding the Commissioner's final denial of benefits de novo. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9th Cir.2005). The Commissioner's decision must be affirmed if it was supported by substantial evidence and based on proper legal standards. *Id.* Kenneth W. Hunter, the Appellant, argues that the Administrative Law Judge ("ALJ") committed reversible error by rejecting the medical opinion of Hunter's treating physician, Dr. Oba. As is required when rejecting the opinion of a treating physician, the ALJ set forth specific and legitimate reasons for finding Dr. Abdelkarim's opinion more persuasive than that of Dr. Oba. See *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.2002). The ALJ explained that the record indicates that Hunter visited Dr. Oba on a single occasion, that the only objective evidence relied upon by Dr. Oba consisted of "old records, marked decreased breath sounds; sear and atrophy of right shoulder/arm with weakness," that Dr. Oba did not claim any special training in pulmonary disorders, that his opinions were unsupported by objective clinical findings, and that he appeared to base his assessment largely on Hunter's subjective complaints. Hunter also argues that the ALJ committed reversible error in finding that he could work as a security guard. As part of determining whether a claimant is disabled within the meaning of the Social Security Act, an ALJ considers the claimant's residual functional capacity, age, education and work experience to determine whether the claimant can make an adjustment to other work. 20 C.F.R. § 416.920(a)(4)(v). To meet her burden, the ALJ may rely on the testimony of a vocational expert ("VE") who must identify specific jobs in the national economy that the claimant is qualified to perform. *Osenbrock v. Apfel*, 240 F.3d 1157, 1162-63 (9th Cir.2001). Here, the ALJ correctly relied upon the VE's testimony that a security guard job would accommodate Hunter's physical limitations and that 80,-000 such jobs exist in California. Although the Dictionary of Occupational Titles

(“DOT”) classifies a security guard as a “semi-skilled” position, an ALJ may rely on expert testimony which is contrary to the DOT where there is persuasive evidence to support the deviation. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). The ALJ here properly relied on the VE’s testimony that in his experience, not all security guard jobs required extensive writing skills. Finally, the ALJ correctly refused to consider whether Hunter could actually obtain work as a security guard because of his incarceration history. Under the statutory framework, an individual will be deemed disabled “only if his physical or mental ... impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether ... he would be hired if he applied for work.” 42 U.S.C. § 423(d)(2)(A) (emphases added). There is no support for Hunter’s argument that *607his incarceration history demonstrates a lack of trustworthiness which is similar to a mental limitation. The Social Security Act is not an unemployment compensation act, but an act to compensate those who cannot work because of their medical disability. See *Sorenson v. Weinberger*, 514 F.2d 1112, 1117 (9th Cir.1975) (per curiam). Hunter’s legitimate medical impairments would not prevent him from working as a security guard. AFFIRMED. This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.