

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>EDMUND TARDIFF, JR.,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 91-183 B</b>
	)	
<b>LOUIS W. SULLIVAN, M.D.,</b>	)	
<b>in his capacity as Secretary</b>	)	
<b>of Health and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's determination that plaintiff Edmund Tardiff, Jr. is able to perform his past relevant work despite a breathing problem. The plaintiff asserts that the Secretary incorrectly concluded that his former job as an edge trimmer is past relevant work and that he is able to return to his past relevant work although he has difficulty breathing due to environmental irritants.

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<sup>1</sup> This action is properly brought under 42 U.S.C. ' ' 405(g), 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 26, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' ' 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since June 20, 1987 and that he met the disability insured status requirements on that date and thereafter through December 31, 1987, Findings 1-2, Record pp. 20-21; that he has ``severe right venous insufficiency with recurrent cellulitis and edema, dyspnea associated with chronic obstructive pulmo[n]ary disease, obesity, low average intelligence, and alcohol dependence," but does not have any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Findings 3-4, Record p. 21; that his allegations are generally credible except ``to the extent that [he] alleges that his limitations prevent him from performing all work," Finding 5, Record p. 21; that he ``has the residual functional capacity to perform work-related activities except for work involving lifting and carrying objects weighing in excess of 50 pounds, or more than 25 pounds on a frequent basis, standing for prolonged periods of time, and performing any highly strenuous activities on a sustained basis," Finding 6, Record p. 21; that he is able to perform past relevant work as an edge trimmer, Findings 7-8, Record p. 21; that he was not disabled during his insured period or at any time through the date of decision, Finding 9, Record p. 21. The Appeals Council declined to review the decision,<sup>2</sup> Record pp. 3-4, making it the final determination of the

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<sup>2</sup> The Appeals Council rejected the plaintiff's contention that his chronic pulmonary disease prevents him from returning to his past relevant work as an edge trimmer, finding, as noted by the Administrative Law Judge, that no treating physician mentioned specific environmental restrictions resulting from his disease and that ``it has required minimal medical intervention." Record p. 3. The Council also found, contrary to the plaintiff's assertion, that the Administrative Law Judge considered the psychological report of David W. Booth, Ph.D. and it noted that the potential limitations mentioned by Dr. Booth were contingent upon the plaintiff's consumption of alcohol which, according to the record, he has not lost the ability to control. *Id.* p. 3-4.

Secretary. 20 C.F.R. ' ' 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' ' 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

### **A. Past Relevant Work**

The plaintiff contends that the Secretary erred in finding that his job as an edge trimmer in a shoe factory is past relevant work within the meaning of the Secretary's regulations. Specifically, Tardiff claims that he last worked as an edge trimmer either in 1965 or 1968, both of which predate by more than fifteen years his July 1987 disability onset date.

It is true that only work performed by the plaintiff within fifteen years prior to the date on which his disability insured status requirement was last met -- here, December 31, 1987 -- may be considered as past relevant work. 20 C.F.R. ' ' 404.1565(a), 416.965(a). However, the record contains at least four different versions of the plaintiff's work history as an edge trimmer of shoes -- all of them statements by the plaintiff. In Exhibit 19 the plaintiff is shown last performing that job in 1975. Exh. 19, Record p. 104. Exhibit 20 indicates that his last work in that capacity was done in 1976. Exh. 20, Record p. 98. However, Exhibit 17 states that the plaintiff last worked as a edge trimmer in 1968. Exh. 17, Record p. 86. Most recently, at the hearing before the Administrative Law Judge, in response to questioning by his representative the plaintiff stated that he last worked as an

edge trimmer in 1965. Record p. 38. Each of these records indicates that the plaintiff also worked as a shoe shop supervisor in between or following periods of work as an edge trimmer. Exhibit 19 is the most detailed of the four versions, suggesting that it was the most carefully prepared and therefore the most reliable account. It is the only statement listing names of stores, exact years at each store and yearly salaries for each stint of work. Exh. 19, Record p. 98.

The Administrative Law Judge, whose responsibility it is to resolve conflicts and contradictions in the evidence, *Ortiz v. Secretary of Health & Human Servs.*, No. 91-1471, slip op. at 13 (1st Cir. Dec. 9, 1991), apparently credited the information contained in Exhibits 19 and 20 in finding that the plaintiff's work as an edge trimmer constitutes his past relevant work.<sup>3</sup> Record p. 20. Fifteen years prior to December 31, 1987 would encompass both 1975 and 1976, the years listed in these exhibits for the plaintiff's last period of work as an edge trimmer. Accordingly, the Secretary's conclusion that the plaintiff's work as an edge trimmer is past relevant work as defined by the governing regulations is supported by substantial evidence.

### **B. Residual Functional Capacity**

The plaintiff asserts that the Secretary failed to make the necessary findings to support his conclusion that Tardiff is capable of returning to his past relevant work as an edge trimmer in a shoe shop. His specific contention is that the Secretary's implicit finding that Tardiff can avoid environmental irritants as an edge trimmer is not supported by substantial evidence.

At this stage of the evaluative process, Step Four, the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote*, 690 F.2d at 7. In determining this issue, the

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<sup>3</sup> The plaintiff contended at oral argument that the conflicting accounts of his work history warranted further inquiry by the Administrative Law Judge. However, the Secretary is often faced with irreconcilable evidence from which he must nevertheless make a finding of fact. Here, it was Tardiff's burden to provide a credible version of his resume, instead of the four largely inconsistent accounts he gave.

Secretary must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's residual functional capacity would permit performance of that work. *May v. Bowen*, 663 F. Supp. 388, 393-94 (D. Me. 1987); 20 C.F.R. ' ' 404.1520(e), 416.920(e); Social Security Ruling 82-62. However, to generate the issue in the first instance the claimant must satisfy his burden of production, that is the burden ' ' of bringing all relevant evidence before the agency, either in [his] application, supplemental information, or oral testimony." *May*, 663 F. Supp. at 393. Once done, the Secretary ' ' may not simply rely upon ' the failure of the claimant to *demonstrate* [that] the physical and mental demands of [his] past relevant work' can no longer be met, but, ' [having been] *alerted by the record to the presence of an issue*', must develop the record further." *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5-6 (1st Cir. 1991) (citing *May*, 663 F. Supp. at 394) (emphasis in original).

The plaintiff testified that he can lift up to sixty pounds three or four times without resting, that he can stand for only about ten minutes at a time and sit for ' ' [o]ver four hours, three or four hours." Record p. 36. Tardiff also stated that he can only walk about 50 yards before his right leg gets sore, his right ankle swells and he becomes short of breath. *Id.* pp. 32-33. He further testified that his breathing is complicated by humidity and paint fumes. *Id.* pp. 30, 40.

Tardiff explained that his work as an edge trimmer required that he stand up and sit down at times depending ' ' on the type of shoe I was working on." *Id.* p. 38. Although his statements in Exhibits 19 and 20 do not specifically identify whether the physical requirements therein listed are for his work as a supervisor or edge trimmer, his testimony at the hearing clarifies the evidence on this point. Based on his testimony that as a supervisor he was required to walk a great deal to make inspections, whereas the nature of the edge-trimmer work did not require as much walking, it appears that the physical exertion requirements for work listed in Exhibit 19 refer to his duties as an edge

trimmer and those in Exhibit 20 to his duties as a supervisor. Exhibit 19 is the only evidence of the specific requirements of his past relevant work as an edge trimmer. It notes that the plaintiff was required to walk one hour per day, stand two hours, sit six hours, occasionally bend and frequently lift or carry objects weighing only up to ten pounds. Exh. 19, Record p. 99. He stated that he quit working in a shoe factory in 1980 because he was unable to perform the extensive walking required for his job as a supervisor due to shortness of breath. Record p. 39. Nothing in the record indicates whether, while performing his shoe-factory jobs, the plaintiff was exposed to environmental irritants, such as humidity or paint fumes, which he testified seriously affect his ability to breathe. *Id.* pp. 30, 40.

The Administrative Law Judge concluded that Tardiff was capable of performing medium exertional work, *see* 20 C.F.R. §§ 404.1567, 416.967, as long as it did not require him to stand for prolonged and uninterrupted periods of time.<sup>4</sup> Record p. 19. While accepting the plaintiff's assertion that he "is limited by his breathing problem," the Administrative Law Judge noted that "[Tardiff's] own description of his work capacity and of his daily activities suggests that his breathing problem does not prevent him from performing all jobs. . . . In particular, he can perform those jobs which do not require that he remain on his feet for prolonged and uninterrupted periods of time." *Id.* p. 20.

The plaintiff has not made an initial showing that environmental irritants in the workplace of an edge trimmer would cause him shortness of breath. "The record supports the conclusion that the claimant failed to present evidence showing the 'practical consequences' of [his] conditions on the requirements of [his] prior work." *Santiago*, 944 F.2d at 6 (citing *Gray v. Heckler*, 760 F.2d 369, 375 (1st Cir. 1985); Social Security Ruling 82-62). Tardiff contended at oral argument that both his

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<sup>4</sup> The Administrative Law Judge did note that he considered the plaintiff's estimate that he could stand for only ten minutes at a time to be conservative. Record p. 19.

testimony that he left his job in a shoe factory because he had a breathing problem and the Secretary's finding that he has chronic obstructive pulmonary disease are consistent with the plaintiff's assertion that he is unable to return to his past relevant work because of environmental irritants. However, according to Tardiff it was the prolonged walking he did for the purpose of making inspections as a supervisor which caused him to stop working in a shoe factory; nothing was mentioned about environmental irritants as a factor. In short, after testifying that such irritants restrict his activity the plaintiff failed to present any evidence to show, how or to what degree, if any, [the presence of these irritants] were important elements of [his] former work." *Santiago*, 944 F.2d at 6. Based upon his own description of his job requirements, Tardiff's abilities support a conclusion that he is able to return to work as an edge trimmer. Therefore, I conclude that substantial evidence supports the Secretary's finding.

For the foregoing reasons, I recommend that the Secretary's decision be ***AFFIRMED***.

**NOTICE**

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 10th day of March, 1992.***

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***David M. Cohen***  
***United States Magistrate Judge***