

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PETER A. GORDON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-68-P-C
)	
SHIRLEY S. CHATER,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner’s determination that the plaintiff was engaged in substantial gainful activity, making him ineligible for benefits. I recommend that the court affirm the Commissioner’s decision.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff met the disability insured status

¹ This action is properly brought under 42 U.S.C. § 405(g). The Commissioner 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 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

requirements of the Social Security Act on the date of alleged onset of his disability, and that he continued to meet those requirements through the date of the decision, Finding 1, Record p. 21; that he had engaged in substantial gainful activity continuously since the date of alleged onset of his disability as a self employed individual, Finding 2, Record p. 21; and that, therefore, the plaintiff was not under a disability at any time prior to the Administrative Law Judge's decision on January 25, 1995, Finding 3, Record p. 21. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner. 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). 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).

Substantial Gainful Activity

The plaintiff argues that there is not substantial evidence in the record to support the finding that he has engaged in substantial gainful activity in the tire recycling business that he owns. At this stage, the first step of the sequential evaluation process, 20 C.F.R. § 404.1520, the burden is on the plaintiff to show that he is not engaged in substantial gainful activity. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The plaintiff was employed as a logger, Record p. 82, and was also self-employed in a tire recycling business since 1986, *id.* at 19. It is this self-employment that is at issue here.

The Step 1 evaluation for self-employed individuals is governed by 20 C.F.R. § 404.1575. The Administrative Law Judge found that the plaintiff's work activity in this business was not comparable to the activities of unimpaired individuals and that he did not receive substantial income from the business. Record p. 20. *See* 20 C.F.R. §§ 404.1575(a)(1), (a)(3) and (c). However, the Administrative Law Judge did find that the plaintiff's work activity was worth more than \$500 monthly to the business or when compared to what an owner would pay to an employee doing the work that the plaintiff was doing. Record p. 20. *See* 20 C.F.R. §§ 404.1575(a)(2), 404.1574(b)(2). Therefore, he found that the plaintiff was engaged in substantial gainful activity and, as a result, not disabled.

The plaintiff testified that he worked fourteen to sixteen hours a day in the business before the date of onset of his alleged disability and was able to work less than two hours per day at the time of the hearing. Record p. 48. Typically, he reports to his place of business in order to meet his workers when they arrive at 7:30 a.m. and tells them what to do that day. *Id.* at 41. In describing his work activity on the day before the hearing, the plaintiff explained that he met with his workers, then drove to his mother's home five miles away where he resides, where he made or received a total of about four business telephone calls regarding tire pricing and to set up a run to procure more tires. *Id.* at 35, 41-43. The net income of the business increased over the three years preceding the hearing to \$10,635. *Id.* at 19. The plaintiff's wife and mother submitted affidavits describing their participation in the management of the business and stating that the value of the plaintiff's services to the business is less than \$500 per month. *Id.* at 340, 342.

The plaintiff points out that this affidavit testimony is uncontradicted in the record. However, there is no requirement that the Administrative Law Judge accept the uncontradicted

testimony of lay witnesses, particularly when those witnesses have a potential bias due to their relationship with the claimant. The plaintiff also argues that the finding that he is engaged in substantial gainful activity conflicts with the findings of the psychiatrist to whom he was referred by the state agency for a consultative evaluation, Israel Zelterman, M.D., and of Peter E. Goldfine, M.D., the psychiatrist who served as the medical advisor at the hearing. Dr. Zelterman found that the plaintiff's "[e]motional status would preclude his making adjustment to a work situation at the present time." *Id.* at 222. Dr. Goldfine testified that the plaintiff met Listing 12.04 in 20 C.F.R. § 404, Subpart P, Appendix 1, which describes affective disorders. *Id.* at 53.

The plaintiff by his own testimony is engaged in managing the business, at least to a limited extent. In *Dolbashian v. Secretary of Health & Human Servs.*, 688 F.2d 4 (1st Cir. 1982), the court upheld a finding that the claimant was engaged in substantial gainful activity when he worked one hour per day at home in ordering and "book work" for his business, with insignificant profit. *Id.* at 5-6. Specifically, the court noted:

He was fortunate to have a pre-existing business and to be in the unusual position, due to the presence of other people who could help, of being able to keep the business going with a minimum of physical effort. Were he not in business for himself and able to accommodate his business to his physical condition, he might be deemed incapable of performing substantial gainful activity.

Id. at 6. Thus, the fact that Dr. Goldfine found the plaintiff in this case to meet a listing constituting disability at Step 3 of the sequential evaluation process and that Dr. Zelterman found him to be unable to make occupational adjustments does not necessarily mean that he must be found incapable at Step 1 of substantial gainful activity in his own business.

There is no direct evidence in the record of the value of the plaintiff's services to the business

other than the affidavits. There is little or no evidence to support the finding that an employer would pay an employee more than \$500 per month to perform the services provided by the plaintiff, particularly when the entire net income of the business is only about \$4,000 more than the annual total of such wages. *See Petersen v. Chater*, 72 F.3d 675, 678 n.4 (8th Cir. 1995) (appropriate to compare imputed wage amount to actual income of business to determine whether an owner would pay that amount to an employee doing what claimant was doing). However, the basis for the Administrative Law Judge's alternate conclusion -- namely, that the plaintiff's work activity was worth more than \$500 a month to the business -- does have substantial support in the evidence.

The plaintiff's testimony demonstrates that he undertakes some management and supervisory responsibilities for the business, including evaluating potential jobs, directing the daily work of employees and quoting prices to potential buyers or sellers. Record pp. 41-43. There is no evidence that the plaintiff's mental activities are not still "pivotal to the business." *Dolbashian*, 688 F.2d at 6. *See also Barber v. Sullivan*, 765 F. Supp. 58, 60, 65 (W.D.N.Y. 1991) (one hour per week managing insurance agency sufficient to support finding of substantial gainful activity when claimant was active decision maker for business). Although the Administrative Law Judge could have made the effort to obtain testimony from a witness who was qualified to establish a specific value for the plaintiff's services to his business, the evidence in the record is sufficient to support the conclusion that the plaintiff's activities are worth at least \$25 per work day (or \$500 per month) to his tire recycling business.

Accordingly, I recommend that the Commissioner'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 11th day of December, 1996.

*David M. Cohen
United States Magistrate Judge*