

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**PAUL T. DELISLE,** )  
 )  
 **Plaintiff** )  
 )  
 **v.** )  
 )  
 **KENNETH S. APFEL,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )

**Docket No. 98-147-P-H**

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

This Social Security Disability (“SSD”) appeal raises issues concerning substantial gainful activity and eligibility for benefits. I recommend that the court affirm the commissioner’s finding that the plaintiff is not eligible for benefits.

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 requirements of the Social Security Act on December 31, 1971, the date upon which he stated that

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<sup>1</sup> 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 16.3(a)(2)(A), 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 18, 1998 pursuant to Local Rule 16.3(a)(2)(C) 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.

he became unable to work, and that he acquired sufficient quarters of coverage to remain insured only through December 31, 1975, Finding 1, Record p. 16; that after December 31, 1975 the plaintiff engaged in substantial gainful activity (specifically, from 1982 to 1985), Findings 2-4, Record p. 17; that he earned 16 quarters of coverage between 1982 and 1985, when he stopped engaging in substantial gainful activity, so that he did not acquire the necessary 20 quarters of coverage in the 40 calendar quarter period ending in the quarter in which he became unable to engage in substantial gainful activity, Finding 5, Record p. 17; that the plaintiff did not apply for a period of disability until March 1986, more than 12 months after any prior period of disability would have ceased, based on his ability to engage in substantial gainful activity from July 1982 to 1985, Finding 6, Record p. 17; and that the plaintiff was not eligible for disability benefits at any time through December 31, 1975, or at any time since that date, Finding [7], Record p. 17. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final decision 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 made 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).

The plaintiff does not dispute the finding that he did not obtain coverage under the Social Security Act through his employment from July 1982 through 1985. Rather, he contends that this work did not constitute substantial gainful activity and that his disability did not end during this

employment, so that he is still disabled as he was in 1971 and is entitled to benefits through December 31, 1975. Itemized Statement of Specific Errors (Docket No. 4) at 1-2. The burden of proof is on the plaintiff to demonstrate that he did not engage in substantial gainful activity during the 1982-1985 period in question. *Bell v. Commissioner of Social Sec.*, 105 F.3d 244, 246 (6th Cir. 1996); *see also Field v. Chater*, 920 F. Supp. 240, 241 (D. Me. 1995).

A disability ceases for purposes of the Social Security Act when the individual becomes able to engage in substantial gainful activity. 42 U.S.C. § 423(f)(1)(B). An application for benefits must be filed within 12 months after the disability ceases. 20 C.F.R. § 404.621(d).<sup>2</sup> The issue here is thus whether the plaintiff engaged in substantial gainful activity when he was employed by Bath Iron Works from July 7, 1982 to October 17, 1985,<sup>3</sup> Record p. 75, or by General Electric for an indeterminate period in 1985 for which he earned \$6,055.15, Record pp. 62, 67 & Supplemental Record. The plaintiff argues that both of these employments should be considered unsuccessful work attempts within the meaning of 20 C.F.R. § 404.1573(b). If that is the case, his disability has continued since 1975, his filing is timely, and he is entitled to benefits.

The record shows that the plaintiff worked continuously at Bath Iron Works from July 7,

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<sup>2</sup> The plaintiff contends that he is entitled to a 36-month period in which to file, citing the following language in 20 C.F.R. § 404.621(d): “If you were unable to apply within the 12-month period because of a physical or mental condition, you may apply not more than 36 months after your disability ended.” Itemized Statement at 2-3. The plaintiff has provided no evidence to support a conclusion that he was unable to apply within the 12-month period after he began working in July 1982, Record p. 75, and, even if he had, his application was filed on March 1, 1986, Record p. 14, more than 36 months thereafter.

<sup>3</sup> Earnings from Louis Chevrolet (\$348.40) and UPS (\$182.88) in 1983 and from Louis Chevrolet (\$616.40) and Industrial Welding & Machine, Inc. (\$504.00) in 1984, Supplemental Record, attached to Itemized Statement, do not meet the threshold for consideration as substantial gainful activity, 20 C.F.R. § 404.1574(b)(2), and will not be considered further.

1982 to May 13, 1983, again from March 26, 1984 to May 18, 1984, and from September 20, 1984 to October 17, 1985, although he was on leave of absence from September 24, 1984 until his employment was terminated. Record p. 75. He was not paid by Bath Iron Works in 1985. Supplemental Record. Under the applicable regulations, a claimant's earnings will "ordinarily" determine whether he or she has engaged in substantial gainful activity. 20 C.F.R. § 404.1574(a)(1) & (b). Earnings in excess of \$300 per month received between 1980 and 1989 show that the claimant has engaged in substantial gainful activity. 20 C.F.R. § 404.1574(b)(2)(vi). Both the Bath Iron Works employment (\$9,130.40 for six months in 1982) and the General Electric employment (\$6,055.15 for an unknown number of months in 1985) meet this test. *See Social Security Ruling 83-33, reprinted in West's Social Security Reporting Service, Rulings 1983-1991, at 95* ("In evaluating an employee's work activity for [substantial gainful activity] purposes, the primary consideration is 'earnings' derived from such services.")

The plaintiff contends that this work was nonetheless not substantial gainful activity, citing 20 C.F.R. § 404.1573(b). Itemized Statement at 3. That regulation provides:

We consider how well you do your work when we determine whether or not you are doing substantial gainful activity. If you do your work satisfactorily, this may show that you are working at the substantial gainful activity level. If you are unable, because of your impairments, to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given other people doing similar work, this may show that you are not working at the substantial gainful activity level. If you are doing work that involves minimal duties that make little or no demands on you and that are of little or no use to your employer . . . this does not show that you are working at the substantial gainful activity level.

As evidence to support his contention that this section of the regulation applies, the plaintiff offers his testimony that his work at Bath Iron Works was secured through his then father-in-law, that other

people used to cover for him and do some of his work for him, and that he sometimes hid and tried to be invisible, Record pp. 35-36, 44, and that he worked at General Electric for only “a few months,” *id.* p. 34. Itemized Statement at 4. This evidence is clearly insufficient to meet the plaintiff’s burden of proof concerning the employment at General Electric,<sup>4</sup> and, on balance, I conclude that the evidence does not meet the requirements of the regulation as to Bath Iron Works. The fact that Bath Iron Works twice called the plaintiff back to work after the initial 10-month period of employment is sufficient evidence to support the administrative law judge’s necessarily implied conclusion that the plaintiff’s performance was satisfactory.

The plaintiff’s argument that the work at Bath Iron Works and General Electric should be considered unsuccessful work attempts founders under Social Security Ruling 84-25, which provides that work will be considered an unsuccessful work attempt only if it lasts no more than 6 months and there were frequent absences due to the impairment, the claimant’s work was unsatisfactory due to the impairment, the work was done during a period of temporary remission of the impairment, or the work was done under special conditions. Social Security Ruling 84-25, *reprinted in West’s Social Security Reporting Service*, Rulings 1983-1991, at 268. It is not necessary to evaluate this section of the ruling further because it also provides that “[substantial gainful activity]-level work lasting more than 6 months cannot be a[n unsuccessful work attempt] regardless of why it ended or was reduced to the non-[substantial gainful activity] level.” *Id.* The plaintiff’s employment by Bath Iron Works clearly lasted more than 6 months and it is impossible to tell from the evidence submitted by the plaintiff whether the work at General Electric did so as well. Accordingly, neither of these

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<sup>4</sup> The plaintiff also reported in a Work Activity Report, presumably submitted to the Social Security Administration, that he “needed extra help” and “couldn’t remember what I was supposed to do” during the General Electric employment. Record p. 67. This does not change my conclusion.

jobs can be considered unsuccessful work attempts.

The plaintiff argues in the alternative that his work at Bath Iron Works and General Electric should be considered a trial work period, which would not affect his entitlement to benefits, invoking 20 C.F.R. § 404.1592. That regulation provides, in relevant part:

*(a) Definition of the trial work period.* The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform *services . . .* in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months.

\* \* \*

*(c) Limitations on the number of trial work periods.* You may have only one trial work period during a period of entitlement to cash benefits.

\* \* \*

*(e) When the trial work period begins and ends.* The trial work period begins with the month in which you become entitled to disability insurance cash benefits . . . . It cannot begin before the month in which you file your application for benefits . . . .

(Emphasis in original.) Here, the Bath Iron Works employment clearly exceeded nine months, and it is not possible to tell whether the General Electric employment did so as well from the evidence provided by the plaintiff. More important, the application for benefits at issue here was filed in March 1986,<sup>5</sup> after the employment at issue was completed. Therefore, the employment cannot be

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<sup>5</sup> The commissioner contended at oral argument that the only application before the court is the plaintiff's application for benefits that was filed in 1994 because the commissioner's ruling on the March 1986 application, denying benefits, had become final more than four years before the 1994 application was filed, making it impossible to reopen the earlier application under 20 C.F.R. § 404.988. However, counsel for the commissioner did not dispute that Social Security Ruling 91-5p would apply to make it possible to reopen the 1986 application if the plaintiff's mental impairment made him incapable of understanding at that time the procedures required to pursue an appeal of that decision. See Social Security Ruling 91-5p, *reprinted in West's Social Security Reporting Service, Rulings 1983-1991*, at 810-11. In any event, this issue is moot given my recommended decision on the merits of the plaintiff's claim.

considered a trial work period.

For the foregoing reasons, 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 this 22nd day of December, 1998.*

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*David M. Cohen  
United States Magistrate Judge*