

Appeals Council upheld these findings, *id.* at 4-5, making this decision the final determination of the commissioner, 20 C.F.R. § 404.981.

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 conclusion 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 administrative law judge in this case reached only the first step of the commissioner's sequential evaluation process. 20 C.F.R. § 404.1520. The burden of proof is on the plaintiff at this step to demonstrate that he did not engage in substantial gainful activity during the 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). Under the applicable regulations, a claimant's earnings will ordinarily determine whether he has engaged in substantial gainful activity. 20 C.F.R. § 404.1574(a)(1) & (b); 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.") Average earnings in excess of \$240 per month received in 1977, \$260 per month received in 1978 and \$300 per month received between 1980 and 1989 show that the clamant has engaged in substantial gainful activity. 20 C.F.R. § 404.1574(b)(2)(i).

The administrative law judge found that the plaintiff's average monthly earnings for the relevant years were as follows: in 1977 \$241.21, in 1978 \$277.95, in 1982 \$457.67, in 1986 \$723.18, in 1987 \$625.05 and in 1988 \$394.17. Record at 104. The plaintiff relies on Social Security Ruling 84-25, which interprets 20 C.F.R. § 404.1575(d), as support for his contention that his work in each of these years was done "during a period of temporary remission" of his impairment of bipolar disorder or was "done under special conditions." Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 6) at 3-4. Based on his own testimony, he contends that he "gets a job[], works for a while, and then will have another relapse in which he goes off the medication, ceases to function and 'crashes' again," causing him to lose his job. *Id.* at 4.

The regulations at issue provide, in pertinent part:

(1) *General.* Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, your impairment forced you to stop working or to reduce the amount of work you do so that your earnings from such work fall below the substantial gainful activity earnings level . . . and you meet the conditions described in paragraphs (c)(2), (3), (4), and (5), of this section.

* * *

(2) *Event that must precede an unsuccessful work attempt.* There must be a significant break in the continuity of your work before we will consider that you began a work attempt that later proved unsuccessful. You must have stopped working . . . because of your impairment or because of the removal of special conditions that were essential to the further performance of your work. We explain what we mean by special conditions in § 404.1573(c). We will consider your prior work to be "discontinued" for a significant period if you were out of work at least 30 consecutive days. We will also consider your prior work to be "discontinued" if, because of your impairment, you were forced to change to another type of work or another employer.

(3) *If you worked 3 months or less.* We will consider work of 3 months or less to be an unsuccessful work attempt if you stopped working . . . because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work.

(4) *If you worked between 3 and 6 months.* We will consider work that lasted longer than 3 months to be an unsuccessful work attempt if it ended . . . within 6 months because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work and —

- (i) You were frequently absent from work because of your impairment;
- (ii) Your work was unsatisfactory because of your impairment;
- (iii) You worked during a period of temporary remission of your impairment; or
- (iv) You worked under special conditions that were essential to your performance and these conditions were removed.

(5) *If you worked more than 6 months.* We will not consider work you performed at the substantial gainful activity earnings level for more than 6 months to be an unsuccessful work attempt regardless of why it ended

20 C.F.R. § 404.1574(c)(1)-(5) (when claimant was employee). Identical language applying to self-employed claimants is set forth in 20 C.F.R. § 404.1475(d). “Special conditions” are defined as follows:

Examples of the special conditions that may relate to your impairment include, but are not limited to, situations in which —

- (1) You required and received special assistance from other employees in performing your work;
- (2) You were allowed to work irregular hours or take frequent rest periods;
- (3) You were provided with special equipment or were assigned work especially suited to your impairment;
- (4) You were able to work only because of specially arranged circumstances, for example, other persons helped you prepare for or get to and from your work;
- (5) You were permitted to work at a lower standard of productivity or efficiency than other employees; or
- (6) You were given the opportunity to work despite your impairment because of family relationship, past association with your employer or your employer’s concern for your welfare.

20 C.F.R. § 404.1573(c). The plaintiff does not contend that he was frequently absent from work due to his impairment or that his work was unsatisfactory due to his impairment. Statement of Errors at 4.

The plaintiff states that “the case law recognizes that the short term jobs of less than six months are unsuccessful work attempts.” *Id.* at 7. This misstates the holdings of the case law cited by the plaintiff in

support and is clearly incorrect given the unambiguous language of 20 C.F.R. § 404.1574(c)(4). Jobs lasting between three and six months are to be classified as unsuccessful work attempts only if one of the four additional factors was present. The plaintiff has understandably disavowed reliance on two of those four factors with respect to his employment in 1977, 1982, 1986, 1987 and 1988 that would otherwise be considered substantial gainful activity under 20 C.F.R. § 404.1574(b). The administrative law judge found that “the claimant’s allegation of jobs that lasted for 7 months clearly eliminates his contention that his prior work consisted of a number of unsuccessful work attempts.” Record at 105. The plaintiff contends, Statement of Errors at 8, that the administrative law judge “made an implicit, adverse credibility determination” with respect to this issue because he chose to credit the plaintiff’s testimony, in response to a question from his attorney, that “there might have been one or two jobs that I might have lasted seven months, but nothing more than that,” rather than his later testimony, in response to his attorney’s question, “[Y]ou’re pretty comfortable that all these jobs have been less than six months?”, “Yes, definitely.” Record at 122. My analysis will assume that there is no evidence that any of the plaintiff’s jobs during the years at issue lasted more than six months,² but I note that the administrative law judge is expected to resolve conflicts in the evidence. No credibility determination was necessary in order to choose one of the plaintiff’s contradictory statements over the other, particularly when the statement he now wishes the administrative law judge to be required to adopt was elicited by his counsel in an effort to overcome testimony that constituted a damaging admission. *See generally Robinson v. Shalala*, 1995 WL 94924 (N.D.Cal. Feb. 22, 1995), at *7.

² The plaintiff characterizes the finding that he held some jobs for seven months or more as “crucial,” Statement of Errors at 7, but the decision may be upheld without relying on that finding.

The plaintiff suggests that the earnings for several of the years at issue that are, by regulation, to be taken as evidence of substantial gainful activity actually represent employment for periods of fewer than three months, if certain rates of pay are assumed. Statement of Errors at 6. However, the plaintiff testified that one of his jobs, in 1986, “lasted almost six months,” Record at 113, and that in 1986 or 1987 he worked for four months for Jublanski Painting and Restoration, *id.* at 119. He also testified generally that “I’ve never really been able to remain employed for more than five or six months at a time.” *Id.* at 120. Since engaging in substantial gainful activity even once during the period between October 1971 and October 1998 would make the plaintiff ineligible for the benefits he claims, the fact that other jobs may have lasted less than three months appears to be irrelevant under the circumstances.

The plaintiff invokes the exception for work done under special conditions that is provided by 20 C.F.R. § 404.1574(c)(4) for any of his jobs that may have lasted more than six months, asserting that his testimony to the effect that “every now and then, I’d run into somebody that was compassionate as far as my mental health issues are concerned,” Record at 122, “strongly suggests that if there were any times when Mr. Benson managed to work more than six months it was only on those occasions when employers made special accommodations,” Statement of Errors at 4-5. As I have already noted, my analysis does not rely on the plaintiff’s testimony that “one or two” of his jobs might have lasted seven months, but, were I to rely on that testimony, this general statement could not bear the weight assigned to it by the plaintiff. Even in the light of his succeeding testimony, that his current employer “makes exceptions for me” and “compensates” for “days I’m feeling poorly,” Record at 122, the plaintiff has failed to provide evidence that any special conditions similar to those described in 20 C.F.R. § 404.1573(c) were provided for him at any past jobs.³

³ The administrative law judge established, through an appropriate question to the plaintiff, *see* 20 C.F.R. § 404.1573(c)(6), (*continued on next page*)

The plaintiff cites Social Security Ruling 84-25 (“SSR 84-25”) in support of his contention that any jobs during the relevant period that may have lasted between three and six months must be categorized as unsuccessful work attempts rather than substantial gainful activity because the work was done during a period of temporary remission of his bipolar disease. Statement of Errors at 4. He refers to medical records submitted after the administrative law judge issued his decision which show that he was hospitalized in 1986. *Id.* at 5-6. However, those records show hospital admissions between January 9 and 29 and between January 29 and February 3, 1986, Record at 24-28, well before the six-month job that began in April 1986, *id.* at 113. They do not show anything about the reason why that employment ended or about the possibility that the plaintiff was again hospitalized in September for treatment of his impairment. SSR 84-25 is particularly instructive at this point.

If work lasted more than 3 months, it must have ended . . . within 6 months due to the impairment

* * *

In considering why a work effort ended . . . , we do not rely solely on information from the worker. Therefore, if impartial supporting evidence is not already a part of the claims file, confirmation with the employer is required. If the information from the employer is inconclusive or if none is available, the reason for work discontinuance or reduction may be confirmed with the person’s physician or other medical source. After being apprised of the circumstances, the physician or other medical source could state whether, in his or her opinion or according to the records, the work discontinuance . . . was due to the impairment.

Social Security Ruling 84-25, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991*, at 268-69. Here, the plaintiff offers nothing but his own testimony. He admits that “many” records from the relevant time period “are no longer available.” Statement of Errors at 5. He was not able to produce medical records for the period after September 1986 and did not offer the name of any medical provider

that the plaintiff was not hired for any jobs because he had a friendship or other connection with the employers, Record (continued on next page)

who might be able to testify about a medical cause for the end of his employment at that time. The administrative record shows that information was requested from that employer, but was not provided. Record at 179, 193-94. The plaintiff observes, in conclusory fashion, that “there is the usual requirement that the ALJ develop the factual record on these issues,” apparently referring to the possible seven-month jobs. Statement of Errors at 7. When asked at oral argument what the administrative law judge could have done under the circumstances, counsel for the plaintiff responded that his staff might have been able to obtain more information from the employers “if the ALJ really had wanted to develop this record.” From all that appears in the record, the plaintiff had not made the administrative law judge aware of the existence of any person, employer or medical provider that he or the plaintiff’s attorney could have contacted for more information. The burden of proof remains with the plaintiff at Step 1 and, at a minimum, that burden requires him to make the possible location of additional relevant information known to the administrative law judge.

Because the record contains substantial evidence supporting the commissioner’s conclusion that the plaintiff engaged in substantial gainful activity in 1986, the decision should be affirmed.

Conclusion

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

at 118.

and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

MARK BENSON

represented by **FRANCIS JACKSON**
JACKSON & MACNICHOL
85 INDIA STREET
P.O. BOX 17713
PORTLAND, ME 04112-8713
207-772-9000
Email: mail@jackson-macnichol.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by

KAREN BURZYCKI
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL,
REGION 1
Room 625 J.F.K. FEDERAL
BUILDING
BOSTON, MA 02203

617/565-4277
Email: karen.burzycki@ssa.gov