

first establish that the claimant's skills are sufficiently specialized and coveted by employers as to make the claimant's age irrelevant in the hiring process and enable the claimant to obtain employment with little difficulty.

Statute/Regulation/Ruling Citation:

Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Social Security Act (42 U.S.C. 423(d)(2)(A) and 1382c(a)(3)(B)); 20 CFR 404.1520(f)(1), 404.1563(d), 404.1566(c), 416.920(f)(1), 416.963(d), 416.966(c); 20 CFR Part 404, Subpart P, Appendix 2, sections 201.00(f) and 202.00(f); Social Security Ruling 82-41.

Circuit: Sixth (Kentucky, Michigan, Ohio, Tennessee)

Preslar v. Secretary of Health and Human Services, 14 F.3d 1107 (6th Cir. 1994).

Applicability of Ruling: This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, Administrative Law Judge (ALJ) hearing or Appeals Council).

Description of Case: In April 1989, the plaintiff, Walter Preslar, who was 61 years of age and had an eleventh grade education, applied for Social Security disability insurance benefits and Supplemental Security Income benefits based on disability. Mr. Preslar alleged that he was disabled due to pain resulting from hip and back injuries, osteoarthritis and the late effects of musculoskeletal and connective tissue injuries. Following denial of his claims at both the initial and reconsideration levels of the administrative review process, the plaintiff requested and received a hearing before an ALJ. The evidence provided at the hearing included the testimony of a vocational expert who testified that Mr. Preslar could not perform any of his past relevant work, which included food truck driving, custodial work, and bartending. The vocational expert also testified, however, that Mr. Preslar possessed truck driving skills and that there were a significant number of skilled light trucking jobs in the regional economy that he could perform with no significant vocational adjustment.

The ALJ found that Mr. Preslar could not perform his past relevant work, but that he retained the capacity to do a full range of light work with only minor limitations. The ALJ also found, based upon testimony by the vocational expert, that Mr. Preslar had "highly marketable work skills," including truck driving, the ability to use hand and power tools, and the ability to use a cash register. Based on these findings, the ALJ concluded that Mr. Preslar was not disabled. The Appeals Council denied Mr. Preslar's request for review,

and the ALJ's decision became the final decision of the Secretary. This decision was reviewed by a district court which upheld the Secretary's denial of disability benefits, and the plaintiff appealed to the Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit reversed the decision of the district court. The court of appeals noted that at the fourth and fifth steps of the five-step sequential evaluation process for determining disability prescribed in the Secretary's regulations, once a claimant establishes that he or she can no longer perform his or her past relevant work because of a severe impairment (step four), the burden shifts to the Secretary to show whether the claimant can perform other work which exists in the national economy, considering the claimant's residual functional capacity, age, education and work experience (step five). The court observed that for purposes of step five, a claimant's age is to be evaluated under the four-tiered structure of section 404.1563 of the Secretary's regulations.¹ Among other things, section 404.1563(d) provides that if a claimant is of advanced age (55 or over), has a severe impairment, and cannot do medium work, such claimant may not be able to work unless he or she has skills that can be transferred to less demanding jobs which exist in significant numbers in the national economy. The court noted that, in addition, section 404.1563(d) states that, "[i]f you are close to retirement age (60-64) and have a severe impairment, we will not consider you able to adjust to sedentary or light work unless you have skills which are highly marketable."

The Sixth Circuit observed that the term "highly marketable" skills was not expressly defined in the statutes, regulations or case law. The court stated, however, that it was evident from the regulations that "highly marketable" skills denoted something more than "transferable" skills. Specifically, the court noted that, under section 404.1563(d) of the regulations, claimants age 55 or over, including those close to retirement age, must possess skills easily transferable to other occupations; the "highly marketable" requirement, on the other hand, only

applies to those age 60-64. In addition, the court indicated that section 404.1563(a) of the regulations also sheds light on how the Secretary is required to evaluate a claimant's age, noting that the section states, in part:

Age refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others.

Although the Sixth Circuit noted that, under section 223(d)(2)(A) of the Act (42 U.S.C. 423(d)(2)(A)), vocational factors usually are to be viewed in terms of their effect on the ability to perform jobs rather than obtain them, the court nevertheless found that section 404.1563 of the regulations "recognizes a direct relationship between age and the likelihood of employment" and that, as age increases, the four-tiered structure of the regulation places an increasingly heavy burden on the Secretary to demonstrate that a claimant is "easily employable." The court concluded that the regulations and other judicial interpretations of "highly marketable" skills imply that such skills are those "which are sufficiently coveted by employers and sufficiently specialized or unique so as to offset the disadvantage of advancing age" and enable a claimant to obtain employment with little difficulty. The court indicated that the possession of such skills may be shown by establishing that a claimant's skills were acquired through specialized or extensive education, training or experience and that they give the claimant a significant advantage or edge over other, younger, potential employees competing for jobs requiring the skills, giving consideration to the number of such jobs available and the number of individuals competing for such jobs.

The court applied its interpretation of "highly marketable" skills to Mr. Preslar's case and concluded that the Secretary had not assessed whether Mr. Preslar's skills were in some way specialized or coveted by employers; had not determined the amount of training, education or experience required of the plaintiff to attain his skills; and had not assessed whether the plaintiff enjoyed a competitive edge over younger, potential employees with whom he would compete for truck driving jobs. Accordingly, the court remanded the case to the Secretary for reevaluation of whether the plaintiff possessed "highly marketable" skills in accordance with the court's interpretation of that term in section 404.1563(d) of the regulations.

¹ Although the court of appeals only cited the title II regulation concerning the evaluation of age, section 404.1563, the corresponding title XVI regulation, section 416.963, also was relevant in Mr. Preslar's case. These sections, entitled "Your age as a vocational factor," are virtually identical. Sections 404.1563(b)-(d) and 416.963 (b)-(d) specify three age categories: "Younger person" (under age 50); "Person approaching advanced age" (age 50-54); and "Person of advanced age" (age 55 or over). The latter includes a subcategory—a person close to retirement age (age 60-64).