Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

John A. Scalice
Senior Vice President, Nuclear Operations

March 23, 1998

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Dear Mr. Lieberman:

In the Matter of	) Docket Nos.	50-327	50-390
Tennessee Valley Authority	)	50-328	50-391

TENNESSEE VALLEY AUTHORITY (TVA) - RANDOLPH FRADY: U.S. DEPARTMENT OF LABOR (DOL) (NO. 96-3831) - EA 95-252

The purpose of this letter is to inform you of the issuance of a final mandate by the U.S. Court of Appeals for the Sixth Circuit in the case of *Tennessee Valley Authority v. Randolph Frady, U.S. Department of Labor*. Issuance of the mandate constitutes the final action by the Sixth Circuit in this case, as neither Mr. Frady nor the DOL has requested a rehearing. Enclosure 1 to this letter contains a copy of the mandate dated March 10, 1998.

As we informed the NRC's Region II counsel, Ms. Carolyn Evans, the Sixth Circuit issued its decision in the case involving Mr. Frady's complaint on January 12, 1998. A copy of that decision was provided to Ms. Evans shortly after it was rendered. Enclosure 2 to this letter contains a copy of the decision for your information. In its decision, the Sixth Circuit upheld TVA's position in all respects and reversed and set aside the Secretary of Labor's decision. As we have discussed with you on previous occasions, prior to the Secretary's decision, both the Wage and Hour Division of the DOL and an Administrative Law Judge (ALJ) found no

IE14

merit in Mr. Frady's claims that he was denied selection for 14 different positions in retaliation for raising safety concerns. The Secretary of Labor upheld the ALJ's decision on 11 of the claims, but found that Mr. Frady should prevail on the other three claims. TVA steadfastly maintained that it had made legitimate business decisions in concluding that Mr. Frady was less qualified than others for those particular positions and that Mr. Frady's prior engagement in protected activities was not a factor considered by TVA. In reversing the Secretary of Labor's decision and vacating the order of the Secretary and the Administrative Review Board, the Sixth Circuit upheld TVA's position, finding that none of the Secretary's decisions regarding the three contested allegations was supported by substantial evidence. The Sixth Circuit left undisturbed the Secretary's decision regarding Mr. Frady's other 11 allegations which were decided in favor of TVA.

This recent decision by the Sixth Circuit has a substantial impact on the enforcement action undertaken by the NRC against TVA in connection with Mr. Frady's complaints. On December 8, 1995, soon after the Secretary of Labor's decision, the NRC sent a copy of the decision to TVA and referenced the Secretary's conclusion that TVA failed to hire Mr. Frady in three instances in retaliation against him for engaging in protected activities. The NRC identified these discriminatory acts as apparent violations of 10 CFR §50.7 and stated that, "[b]ased on the Secretary of Labor's decision in this case, the apparent violations are being considered for escalated enforcement action in accordance with the 'General Statement of Policy and Procedure for NRC Enforcement Actions,' (Enforcement Policy), NUREG-1600." The NRC then gave TVA an opportunity to respond to the apparent violations.

On January 12, 1996, in lieu of requesting a predecisional enforcement conference, TVA responded in writing to the NRC's notice of apparent violation. In its letter, TVA strongly disagreed with those portions of the Secretary of Labor's decision which held that TVA discriminated against Mr. Frady. TVA's letter provided a detailed examination of the Secretary's decision in four areas. First, TVA clearly set forth those instances in which the ALJ correctly held that Mr. Frady's nonselections were for valid business reasons. Second, TVA demonstrated where the evidence showed that Mr. Frady's nonselection was not related to any protected activity. Third, TVA showed where the Secretary

did not properly resolve conflicts in the testimony or give the requisite deference to the ALJ's credibility findings. Fourth, TVA showed where the Secretary's decision was contrary to the law in several respects. In addressing each of these points, TVA provided sound bases for its disagreement with the Secretary's decision.[1]

Notwithstanding TVA's arguments to the contrary, the NRC on February 20, 1996, notified TVA that based on the information developed by the DOL, "the NRC adopts the Secretary of Labor's Decision in this case and finds that the adverse actions taken against Mr. Frady were in retaliation for his engaging in protected activities." The NRC issued a Severity Level II violation and a Proposed Imposition of Civil Penalty in the amount of $80,000. The base civil penalty amount was deemed warranted because the violation was identified by a complaint filed with the DOL and was not identified by TVA.[2] The NRC also recognized TVA's plans to appeal the Secretary of Labor's decision to the Sixth Circuit and agreed that if the case was successfully appealed, the NRC would reconsider the enforcement. Shortly thereafter on March 15, 1996, TVA requested that the NRC defer the imposition of the civil penalty in Mr. Frady's case until the final decision by the Sixth Circuit was rendered. In its letter of April 4, 1996, the NRC agreed to defer issuance of an order imposing the civil penalty until 30 days after judicial review was completed and a decision was issued.

On the basis of the Sixth Circuit's recent decision and final mandate in the case of *Tennessee Valley Authority v. Randolph Frady, U.S. Department of Labor*, reversing the Secretary of Labor's decision and upholding TVA's position in all respects, TVA now respectfully asks the NRC to reconsider its finding of discrimination in violation of 10 CFR §50.7.

---

[1] TVA's letter also examined the circumstances surrounding Mr. Frady's complaint and the Secretary of Labor's decision and determined that after consideration of several indicators of employee morale and the condition of the work environment, no chilling effect resulted from the Secretary's decision.

[2] The NRC recognized that TVA's Office of Inspector General conducted two investigations of Mr. Frady's concerns which, as has proven to be the case, did not substantiate any instance of discrimination in TVA's job selection process.

Section XIII of the NRC's Enforcement Policy states that the NRC may reopen an enforcement action in cases where significant new information is received or obtained by the NRC which indicates that an enforcement sanction was incorrectly applied. In the case at hand, by its own statement, the NRC's finding of discrimination against TVA and the subject enforcement action were based upon the decision of the Secretary of Labor. That decision has now been reversed and vacated, and a final mandate finding in favor of TVA has been issued by the U.S. Court of Appeals for the Sixth Circuit. As a result, the sole basis given by the NRC for taking enforcement action against TVA no longer exists.

In addition, 10 CFR §2.205 allows the person charged with a violation to state any facts, explanations, and arguments denying the charges of the violation, or demonstrating any extenuating circumstances, error in the notice of violation, or other reason why a penalty should not be imposed. Upon consideration of such, the Executive Director for Operations may issue an order dismissing the proceeding or remitting the civil penalty. Since payment of the civil penalty was deferred pending the outcome of the case, and a final decision has now been rendered by the Sixth Circuit in TVA's favor, the regulations fully allow the NRC to take into account these new circumstances and dismiss the subject proceeding and refrain from issuing an order imposing the civil penalty.

For all of the above reasons, TVA respectfully requests the NRC to withdraw the Notice of Violation and Proposed Imposition of Civil Penalty in this case, and resolve this enforcement matter in TVA's favor.

Sincerely,

J. A. Scalice

Enclosures
cc (Enclosures):
U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

cc: Continued on page 5

cc (Enclosures):
Mr. Luis A. Reyes, Regional Administrator
U.S. Nuclear Regulatory Commission
Region II
Atlanta Federal Center
61 Forsyth Street, SW, Suite 23T85
Atlanta, Georgia 30303

NRC Resident Inspector
Sequoyah Nuclear Plant
2600 Igou Ferry Road
Soddy Daisy, Tennessee 37379

NRC Resident Inspector
Watts Bar Nuclear Plant
1260 Nuclear Plant Road
Spring City, Tennessee 37381

ENCLOSURE 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

VALERIE FIELDS
(513) 564-7026

Filed: March 10, 1998

William J. Stone
Lynne Bernabei
Thomas F. Fine

RE: 96-3831 980313D012
TVA vs. Frady
District Court No. 92-ERA-34
92-EPA-19

The mandate issued in the above-styled case. Please be advised that the administrative record will be sent under separate cover.

Leonard Green, Clerk

(Ms.) Valerie Fields
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 96-3831

Filed: March 10, 1998

TENNESSEE VALLEY AUTHORITY

Petitioner

v.

RANDOLPH FRADY;

Intervenor

UNITED STATES DEPARTMENT OF LABOR

Respondent

MANDATE

Pursuant to the court's disposition that was filed 1/12/98 the mandate for this case hereby issues today.

A True Copy.

COSTS: Pending

Attest:

Filing Fee .....$
Printing .....$

Total .....$

Deputy Clerk

ENCLOSURE 2

NOT FOR PUBLICATION

NO. 96-3831

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE VALLEY AUTHORITY,

Petitioner,

v.

RANDOLPH FRADY, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR REVIEW OF THE DECISIONS AND ORDERS OF THE UNITED STATES DEPARTMENT OF LABOR

BEFORE: RYAN, SUHRHEINRICH, and COLE, Circuit Judges.

PER CURIAM. This appeal arises from claims by Randolph Frady under the whistleblower protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988), which prohibits licensees of the Nuclear Regulatory Commission (NRC) from discriminating against employees who engage in protected activity, such as identifying nuclear safety concerns or making complaints under the ERA. Pursuant to the ERA, Plaintiff Frady filed complaints with the U.S. Department of Labor (DOL), alleging that his non-selection for fourteen different positions was the result of unlawful retaliation for his protected activities while working as a nuclear inspector for Defendant Tennessee Valley Authority (TVA). The case ultimately reached the Secretary of Labor (hereinafter Secretary), who found for Plaintiff with regard to three of the fourteen allegations.

Petitioner TVA appeals the Secretary's decision for Plaintiff on those three allegations. The issues raised by Petitioner on appeal ask whether "the Secretary was arbitrary and

capricious in disregarding the ALJ's credibility determinations," and whether his "decision was supported by substantial evidence." We find that the Secretary's decision with regard to the three contested allegations is *not* supported by substantial evidence. We, therefore, **REVERSE** that decision.

I. Facts

Plaintiff Frady was employed by TVA from 1978 until 1992. From 1983 on, he worked as a nuclear inspector at the Sequoyah and Watts Bar nuclear plants. While working as an inspector, he raised safety concerns with the NRC and TVA management on several occasions. In December 1990, Frady received notice that he would be terminated due to a reduction in force. In response, Frady filed a complaint under the ERA. The complaint resulted in a settlement agreement which extended Frady's employment with TVA until January 1992. As part of that agreement, Frady was placed in the Employee Transition Program from June 1991 until his termination. The program allowed him to seek a new position within TVA, which he did. However, Frady was not selected for any of the positions he applied for, and he filed ERA complaints challenging these non-selections.

After an investigation by the DOL's Wage and Hour Division found no merit to Frady's complaints, he filed a request for a hearing. An administrative law judge (hereinafter ALJ), charged with making recommendations to the Secretary, conducted the hearing and thereafter dismissed eight of the fourteen allegations upon TVA's motion for summary judgment. The ALJ issued a written opinion discussing the remaining six allegations and recommended that they all be decided in TVA's favor. The Secretary adopted the ALJ's recommendations concerning the eight dismissed allegations and three of the six allegations decided on the merits, but found for Frady on the remaining three allegations, which are the only ones contested here. While on remand to the ALJ for determination of Plaintiff's remedy, the parties reached agreement on the

appropriate remedy, contingent upon this appeal. The resulting "Joint Stipulation" was recommended for approval by the ALJ, and the Administrative Review Board of the DOL issued an order approving it.

Two of the three contested allegations concern Frady's application for machinist trainee positions at both the Watts Bar and Sequoyah nuclear plants, as well as for a steamfitter trainee position at Sequoyah. Applicants for each of these three positions were considered by a different three-person committee, consisting of a TVA representative, a member of the applicable union, and Kevin Green, a human resources manager for TVA. The TVA and union representatives were charged with ranking the applicants and making the hiring decisions, while Green was assigned to be a facilitator. Each of the committees ranked Frady below the applicants who were ultimately selected. The third contested allegation concerns Frady's application for a quality control inspector position at the Sequoyah facility. Shortly after the vacancy for this position was announced, a staffing study conducted by an outside consultant recommended that staffing levels at the facility be reduced. Roy Lumpkin, Frady's former supervisor and the supervisor for the open position, ultimately decided to cancel the vacancy without hiring anyone for it.

II. Applicable Law

We review the Secretary's decision to ensure that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Ohio v. Ruckelshaus, 776 F.2d 1333, 1339 (6th Cir. 1985) (quoting 5 U.S.C. § 706(2)(A)(Administrative Procedure Act)). As part of our review, "we must determine whether [the decision] is supported by substantial evidence, which is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). The substantial evidence standard requires

us to consider evidence in the record that is contrary to the Secretary's findings and conclusions. Tel Data Corp. v. National Labor Relations Bd., 90 F.3d 1195, 1198 (6th Cir. 1996).

Although the ALJ only recommends a decision, the evidentiary support for the Secretary's conclusions "may be diminished, however, when the administrative law judge has drawn different conclusions." National Labor Relations Bd. v. Brown-Graves Lumber Co., 949 F.2d 194, 196-97 (6th Cir. 1991). In particular, this court "will not normally disturb the credibility assessments of . . . an administrative law judge, who has observed the demeanor of the witnesses." Litton Microwave Cooking Prods. Div., Litton Sys., Inc., 868 F.2d 854, 857 (6th Cir. 1989) (reversing National Labor Relations Board, which declined to follow ALJ's recommendation to dismiss complaint) (internal quotes omitted); accord Curran v. Dept. of the Treasury, 714 F.2d 913, 915 (9th Cir. 1983) ("Special deference is to be given the ALJ's credibility judgments"). Given the conflicts in this case between the conclusions of the ALJ and the Secretary, we must examine the record with particular scrutiny. Tel Data, 90 F.3d at 1198.

The law governing Frady's proof of his claims was carefully laid out by the Secretary:

> a complainant . . . must first make a *prima facie* case of retaliatory action by the [defendant], by establishing that he engaged in protected activity, that he was subject to adverse action, and that the [defendant] was aware of the protected activity when it took the adverse action. Additionally, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. If a complainant succeeds in establishing the foregoing, the [defendant] must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. The complainant bears the ultimate burden of persuading that the [defendant's] proffered reasons . . . are a pretext for discrimination. At all times, the complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity.

Frady v. Tennessee Valley Authority, Nos. 92-ERA-19 & 92-ERA-34, slip op. at 5-6 (Secretary of Labor Oct. 23, 1995) (citations omitted) (hereinafter Secretary's Opinion); accord Moon, 836 F.2d at 229. The Secretary went on to state that, as part of the establishment of a prima facie case, "Frady must establish that he was qualified for such position; that, despite his qualifications, he was rejected; and that TVA continued to seek and/or select similarly qualified

applicants." Secretary's Opinion at 18 (adopted from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The Secretary concluded that, for each of the three contested allegations, Frady established all the elements of a prima facie case discussed above and met his ultimate burden of proving that TVA's proffered reasons for its personnel decisions were a pretext for retaliation.

III. Trainee Positions

Two of the three contested allegations involve the machinist and steamfitter trainee positions. The record contains little to support the Secretary's finding that Plaintiff established a prima facie case of retaliation with regard to these positions. As to the knowledge element of a prima facie case, we agree with the ALJ's finding that there is no evidence that members of the selection committees knew about Plaintiff's protected activity, including his earlier ERA complaint. (J.A. at 73). As to the inference element of a prima facie case, the Secretary found that Plaintiff "established an inference of retaliatory motive based on temporal proximity." Secretary's Opinion at 24. Where adverse employment action follows rapidly after protected activity, common sense and case law allows an inference of a causal connection. See Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987) (stating, in a case where the plaintiff was fired less than two weeks after making a complaint, that "the proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection"). However, because seven or eight months elapsed between Frady's most recent protected activity, namely the filing of the earlier ERA complaint, and the decisions by the selections committees, the Secretary's inference is a weak one.[1]

---

[1]The Secretary chose to determine temporal proximity based on Frady reaching a settlement agreement with TVA in June 1991, two or three months before his non-selection by the committees. We believe that the date of the complaint, January 1991, is the more appropriate date to use, because 1) unlike a settlement agreement, a complaint is clearly a protected activity under the ERA, and 2) common sense dictates that employees are much more likely to be retaliated against

Even if we were to overlook the scarcity of evidence supporting the knowledge and inference elements of Plaintiff's prima facie case, we would still be forced to conclude that the Secretary's decision regarding the trainee positions was not supported by substantial evidence. Assuming arguendo that Plaintiff established a prima facie case, Defendant must produce evidence of a legitimate, nondiscriminatory reason for the non-selection. The Secretary conceded that Defendant met this burden of production by presenting testimony that the people selected for the trainee positions had qualifications superior to those of Plaintiff. Secretary's Opinion at 24. However, the Secretary found that Plaintiff met his ultimate burden of proving that this legitimate reason was a pretext for discrimination. The Secretary discussed several evidentiary reasons why he reached this conclusion, id. at 26-31, but none of them amount to substantial evidence.

The most direct reason cited by the Secretary was that he did "not find the testimony indicating that the selectees . . . were found by each committee to be better qualified than Frady based on their 'hands on' experience to be persuasive." Id. at 26. In reaching this conclusion, the Secretary did not give any deference, as required, to the ALJ's implicit finding that this testimony was credible. Moreover, the Secretary substituted his judgment for that of the selection committees at an inappropriate level of detail, when he determined that Frady's experience using calibration tools and building a log home was equivalent to other applicants' experience with automobile engines and heating and air-conditioning equipment. Id. at 20-21.

The other reasons cited by the Secretary for his conclusion that Frady proved pretext are speculative at best. For example, the Secretary concludes that "other candidates could have been 'primed' in advance to assist them in answering the standard questions that were asked

---

for filing a complaint against their employer than for resolving the dispute with their employer by reaching a settlement agreement.

of each applicant." The Secretary bases this hypothesis solely on committee member Green's off-hand comment during his testimony that "I have no knowledge that [the candidate] was primed or anything." Id. at 27-28. The Secretary also cites, as evidence of pretext, that eleven of the eighteen applicants selected by the committees were from outside TVA, despite a TVA policy of filling vacancies from within the ranks of TVA employees. Id. at 29. However, the Secretary fails to explain how discrimination against Frady can explain more than one of the eleven selections from outside TVA.

As further evidence of pretext, the Secretary cites the fact that TVA "relied almost entirely on [committee member] Green's testimony concerning the relevant qualifications." Id. at 30. The Secretary concludes that this indicates that Green was less than honest when he indicated that he was a facilitator on the selection committees, rather than a decision maker. Even if we ignore the problems with citing a defendant's strategy as evidence of a witness's credibility, Defendant's reliance on Green's testimony about qualifications can be explained by the fact that Green was the personnel representative on the committees and was the only person to serve on all the relevant selection committees.

Finally, the Secretary cites evidence "that Frady was the subject of a considerable degree of animus from supervisory personnel . . . at TVA." Id. at 31. However, the Secretary cites no evidence that the animus was due to Frady's protected activity. In fact, there is evidence pointing in the opposite direction. For example, TVA employee Michael Miller, a witness vouched for by Frady, (J.A. at 492-93), attributed the animus from one supervisor to personality conflicts rather than Frady's whistleblowing. (J.A. at 652-4). Without evidence that the animus was based on protected activity, the animus does not suggest retaliation for such activity.

We also note that one of the two decision makers on each selection committee was a union representative, rather than a representative of TVA. Frady never alleged, and the

Secretary never found, that the there was any reason why the union representatives would discriminate against Frady. Thus, it is significant that the TVA and union representatives ranked Frady at about the same level, as he concedes. (J.A. at 487). This appears to us to be compelling evidence that the TVA representatives were not biased by Plaintiff's protected activity. Moreover, the fact that the union representatives gave Plaintiff a relatively low ranking indicates that they too believed there was a legitimate reason for not selecting him.

For all the reason discussed above, we conclude that the Secretary's decision regarding the machinist and steamfitter trainee positions is not supported by substantial evidence.

IV. Quality Control Inspector Position

One of the three contested allegations involves a quality control inspector position at the Sequoyah facility. Unlike the trainee positions, this position was canceled rather than being filled by other applicants. However, after Roy Lumpkin canceled the inspector vacancy, two inspectors "returned to their positions as nuclear inspectors at the Sequoyah plant pursuant to the terms of a settlement agreement." Secretary's Opinion at 36. The Secretary, therefore, "conclude[d] that TVA, in effect, filled the announced nuclear inspector vacancy with similarly qualified candidates," thus establishing one element of a prima facie case. Id.

We find, however, that this conclusion is not supported by substantial evidence for a number of reasons. First, the two inspectors returned to their positions almost a year after the vacancy was canceled. Id. at 36 n.26. Second, Roy Lumpkin, the manager who canceled the vacancy, moved to an unrelated position four months before the inspectors returned, (J.A. at 600), and was uninvolved in their return. Third, the two inspectors returned based on settlement agreements, whereas Plaintiff sought the position through regular application channels.[2] For

[2]Plaintiff's earlier settlement agreement guaranteed only that he would be placed in the Employee Transition Program.

all these reasons, Plaintiff cannot show that he was treated any differently than similarly qualified candidates. See White v. General Motors Corp., Inc., 908 F.2d 669, 671 (10th Cir. 1990) ("to maintain an action for wrongful discharge, [plaintiffs] must demonstrate that they were treated differently because of their whistleblowing activity").

The Secretary also concludes that Plaintiff met the prima facie requirement of raising an inference that his protected activity was the likely reason for the adverse action, namely the vacancy cancellation. The Secretary bases this conclusion on two factors. One factor is the temporal proximity between the cancellation and Frady's protected activity. Secretary's Opinion at 38. However, as discussed with regard to the trainee positions, the Secretary's inference based on temporal proximity is a weak one, because seven months elapsed between Frady's earlier ERA complaint and the cancellation of the vacancy. The second factor cited by the Secretary is his "conclu[sion] that Lumpkin strongly suspected, if he did not have certain knowledge, that Frady had applied for the position." Id. This is by no means a forgone conclusion, given that Lumpkin canceled the vacancy before he received the applications from Human Resources. Yet the Secretary explicitly bases his conclusion on the following summary of Lumpkin's testimony: "although [Lumpkin] was unsure whether he had been told . . . that Frady had applied for the job, he was 'reasonably certain if [Frady] wanted the inspector job at Sequoyah, he would have applied.'" Id. We fail to see how this testimony leads to the conclusion that Lumpkin strongly suspected or knew for sure that Frady had applied.

In summary, substantial evidence is lacking with regard to at least two elements of a prima facie case of retaliation involving the canceled inspector position. Plaintiff cannot show that the canceled vacancy was filled with similarly qualified candidates, and the Secretary's finding that Plaintiff successfully raised an inference of discrimination lacks adequate support. We conclude, therefore, that the Secretary's decision regarding the inspector position fails to

meet the substantial evidence standard. In addition, we note that the consultant's study, which recommended a reduction in staff, appears to be the legitimate reason for the cancellation, as Defendant contends. However, we need not reach this issue, because a defendant's obligation to proffer a legitimate reason for an adverse employment decision is not triggered until a prima facie case of discrimination is established, Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987), which Plaintiff failed to do here.

V. Conclusion

The Secretary's decision for Plaintiff with regard to each of the three contested allegations is unsupported by substantial evidence. We, therefore, **REVERSE** that decision and **VACATE** the orders of the Secretary and Administrative Review Board. The Secretary's decision for Defendant regarding Plaintiff's other eleven allegations is undisturbed.