

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ANGELA CRAWFORD,)
)
 Plaintiff,)
)
 vs.)
)
 PENNWELL PUBLISHING COMPANY, an)
 Oklahoma Corporation; TULSA)
 TYPOGRAPHICAL UNION #403, a)
 subordinate union of the PRINTING,)
 PUBLISHING, and MEDIA WORKERS)
 SECTOR, COMMUNICATIONS WORKERS OF)
 AMERICA; COMMUNICATIONS WORKERS OF)
 AMERICA; BILLY AUSTIN,)
 individually and as representative)
 of UNION; and MIKE PALMER, an)
 individual, and as representative)
 of PENNWELL;)
)
 Defendants.)

Case No. 94-C-856-K

FILED
 OCT 06 1994
 FIDELITY & SECURITY
 NATIONAL BANK

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now Plaintiff, Angela Crawford, and Defendants, PennWell Publishing Company and Mike Palmer, and request that Plaintiff's cause of action against PennWell Publishing Company and Mike Palmer be dismissed with prejudice for the reason that this matter has been settled as between these parties.

WHEREFORE, the above parties request that this matter be dismissed with prejudice as against Defendants PennWell Publishing Company and Mike Palmer.

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 Tom Lane
 600 South Main Street
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Angela Crawford
 Angela Crawford
 Plaintiff

Attorney for Plaintiff



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Attorneys for Defendants
PennWell Publishing Company
and Mike Palmer

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY D. STUART, RENE P.)
 HENRY, JR., UNKNOWN SHERIFF)
 AND DEPUTIES OF THE OSAGE)
 COUNTY SHERIFF'S DEPARTMENT,)
 THREE UNKNOWN COUNTY)
 COMMISSIONERS, UNKNOWN OWNERS)
 OF THE COLLINSVILLE SALES)
 BARN, AN UNKNOWN VETERINARIAN,)
 AND THE COUNTY OF OSAGE)
 COUNTY, OKLAHOMA,)
)
 Defendants.)

No. 92-C-269-K

FILED
OCT 6 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, SHERIFF OF)
 TULSA COUNTY, and BILL O'DELL,)
 DEPUTY SHERIFF OF TULSA)
 COUNTY,)
)
 Defendants.)

No. 92-C-905-K

JUDGMENT

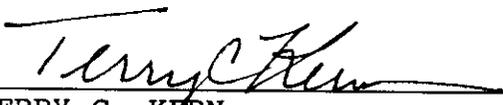
This matter came before the Court for consideration of the motion of defendants Larry D. Stuart and Rene P. Henry for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is

132

hereby entered for the defendants Larry D. Stuart and Rene P. Henry
and against the plaintiff.

ORDERED this 5th day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)

vs.)

LARRY D. STUART, RENE P.)
 HENRY, JR., UNKNOWN SHERIFF)
 AND DEPUTIES OF THE OSAGE)
 COUNTY SHERIFF'S DEPARTMENT,)
 THREE UNKNOWN COUNTY)
 COMMISSIONERS, UNKNOWN OWNERS)
 OF THE COLLINSVILLE SALES)
 BARN, AN UNKNOWN VETERINARIAN,)
 AND THE COUNTY OF OSAGE)
 COUNTY, OKLAHOMA,)

Defendants.)

No. 92-C-269-K ✓

FILED

OCT 6 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)

vs.)

STANLEY GLANZ, SHERIFF OF)
 TULSA COUNTY, and BILL O'DELL,)
 DEPUTY SHERIFF OF TULSA)
 COUNTY,)

Defendants.)

No. 92-C-905-K

ORDER

Before the Court are the motion for summary judgment of defendants Sheriffs, Deputies, County Commissioners of Osage County and the County of Osage, Oklahoma, filed February 18, 1994, the motion of the plaintiff to strike those defendants' answer, filed January 28, 1994, and the motion of the plaintiff to address that the defendants are not entitled to the defense of qualified immunity, filed February 9, 1994. Plaintiff brings this action

pursuant to 42 U.S.C. §1983.

The Honorable Thomas R. Brett previously granted summary judgment in favor of all defendants, which decision was reversed by the United States Court of Appeals for the Tenth Circuit. DiCesare v. Stuart, 12 F.3d 973 (10th Cir.1993). The appellate opinion sets out the undisputed factual background of this action. Id. at 975-76. The Court of Appeals found apparently legitimate claims in the warrantless seizure of plaintiff's horses and the failure of the state statutory scheme for sale of unclaimed animals to provide a hearing. Id. at 977-78. However, the decision remanded the case to this Court to "determine which, if any, of defendants are entitled to qualified immunity. . . and whether all defendants are sufficiently connected to the constitutional violations to hold them liable." Id. at 978. By Order of June 13, 1994, the case was transferred to the undersigned.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). The assertion of qualified

immunity presents a question of law. Elder v. Holloway, 114 S.Ct. 1019, 1023 (1994).

When the defense of qualified immunity has been raised by the defendant, the plaintiff then has the burden to show with particularity facts and law establishing the inference that the defendants violated a constitutional right. Once the plaintiff has sufficiently alleged the conduct violated clearly established law, then the defendant bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity. Walter v. Morton, _____ F.3d _____, 1994 WL 467053 (10th Cir.1994). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action. Applewhite v. United States Air Force, 995 F.2d 997, 1000 (10th Cir.1993) (citing Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)). The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. Applewhite, 955 F.2d at 1000 (quoting Hunter v. Bryant, 112 S.Ct. 534, 537 (1991)). Moreover, plaintiff must show an individual defendant had an "affirmative link" to the constitutional violations. Winters v. Board of County Commissioners, 4 F.3d 848, 855 (10th Cir.1993).

As stated, the United States Court of Appeals for the Tenth Circuit has isolated two apparent constitutional violations under these facts: (1) the warrantless seizure of the horses and (2)

failure to provide plaintiff the opportunity to challenge the sale. The Court will examine each violation in turn as it relates to these defendants' actions. Movants' first proposition is "it was not clearly established that the officers' entry onto the Plaintiff's property constituted a violation of federal law." (Movants' Brief at 9). They characterize the violation as a mere trespass, not a breach of federal law. A reading of the Tenth Circuit opinion remanding this case demonstrates it was not the entry per se but the warrantless seizure of the horses which did violate federal law, namely the Fourth Amendment. 12 F.3d at 977-78.

Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir.1992). The appellate decision in this case cites various Supreme Court decisions detailing the right of protection from warrantless seizures. 12 F.3d at 978. This Court concludes that the movants violated clearly established law by the warrantless seizure. Nevertheless, "[i]t simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that [this] search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly

conclude that probable cause is present, and we have indicated that in such cases these officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable." Anderson v. Creighton, 483 U.S. 635, 641 (1987).

In attempting to demonstrate such a good faith mistaken belief, movants argue "[t]he attachments to this brief show that all officers involved acted on the reasonable belief that the horses and property searched had been abandoned." (Brief at 11). In fact, none of the three affidavits attached to movants' brief contains such a statement. Movants have cited no authority which accepts belief in abandonment as establishing qualified immunity for a warrantless seizure. Also, movants have articulated no factors which this Court might examine to determine whether such a belief would be reasonable. For example, the fact that numerous vehicles, the condition of which has not been described, were still present on the property could as easily controvert an inference of abandonment. Under the present record, qualified immunity is not available to the movants as to the seizure of the horses.¹

Regarding the sale of the horses pursuant to the Oklahoma statutory scheme, the Court concludes that movants are entitled to qualified immunity, for the reasons given in the companion Order in this case which found defendants Stuart and Henry entitled to same.

¹As a subsidiary argument, movants contend they are shielded because they complied with the Oklahoma statutes which direct law officers to take care of maltreated or abused animals. See 21 O.S. §§ 1685 and 1686. These statutes' general language does not authorize violations of the Fourth Amendment to effectuate the statutes' purpose, however.

The movants complied with a facially valid state procedure and were objectively reasonable in doing so. It also appears the defendant Deputies had no role in the sale of the horses. There is no "affirmative link" between themselves and the constitutional violation. The parties have not specifically addressed the liability vel non of county commissioners of Osage County and the County itself. Insofar as the individual actors have been found not liable, necessarily the higher governmental authorities cannot be. The Court will not address other contours of this liability in the absence of briefing by the parties.

Also before the Court is the motion of the plaintiff to strike defendants' answer. The motion essentially argues that defendants' waived their affirmative defenses, including qualified immunity, by not filing an answer before filing their motion for summary judgment before Judge Brett. Defendants correctly point out that "Defendant is not required. . . to file an answer before moving for summary judgment." 10 Wright, Miller & Kane, Federal Practice and Procedure, §2718 at 668 (footnote omitted). The motion is denied.

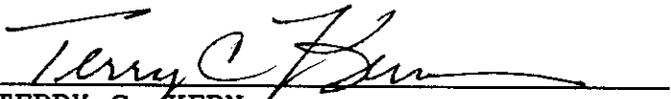
Finally, plaintiff has filed a motion to address that the defendants are not entitled to qualified immunity. To the extent plaintiff is arguing defendants are not immunized from liability under 42 U.S.C. §1983 by the Oklahoma Governmental Tort Claims Act, he is correct. See Tiemann v. Tul-Center, Inc., 18 F.3d 851 (10th Cir.1994). However, for the reasons detailed in this Order, the Court cannot conclude defendants have no entitlement to qualified immunity, and to that extent the motion is denied.

It is the Order of the Court that the motion of defendants Sheriff, Deputies, County Commissioners of Osage County and the County of Osage, Oklahoma for summary judgment is hereby DENIED as to the warrantless seizure of the horses and is hereby GRANTED as to the sale of the horses.

It is the further Order of the Court that the motion of the plaintiff to strike defendants' answer is hereby DENIED.

It is the further Order of the Court that the motion of the plaintiff to address that the defendants are not entitled to the defense of qualified immunity is hereby DENIED.

ORDERED this 5th day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

DATE OCT 07 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,
Plaintiff,

vs.

LARRY D. STUART, RENE P.
HENRY, JR., UNKNOWN SHERIFF
AND DEPUTIES OF THE OSAGE
COUNTY SHERIFF'S DEPARTMENT,
THREE UNKNOWN COUNTY
COMMISSIONERS, UNKNOWN OWNERS
OF THE COLLINSVILLE SALES
BARN, AN UNKNOWN VETERINARIAN,
AND THE COUNTY OF OSAGE
COUNTY, OKLAHOMA,

Defendants.

No. 92-C-269-K

FILED

OCT 6 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,
Plaintiff,

vs.

STANLEY GLANZ, SHERIFF OF
TULSA COUNTY, and BILL O'DELL,
DEPUTY SHERIFF OF TULSA
COUNTY,

Defendants.

No. 92-C-905-K

ORDER

Before the Court is the motion for summary judgment of defendants Stuart and Henry, filed February 18, 1994. Stuart and Henry are district attorneys for Osage County, Oklahoma. Plaintiff brings this action pursuant to 42 U.S.C. §1983.

The Honorable Thomas R. Brett previously granted summary judgment in favor of all defendants, which decision was reversed by the United States Court of Appeals for the Tenth Circuit. DiCesare

13/10

v. Stuart, 12 F.3d 973 (10th Cir.1993). The appellate opinion sets out the undisputed factual background of this action. Id. at 975-76. The Court of Appeals found apparently legitimate claims regarding the warrantless seizure of plaintiff's horses and the failure of the state statutory scheme for sale of unclaimed animals to provide a hearing. Id. at 977-78. However, the decision remanded the case to this Court to "determine which, if any, of defendants are entitled to qualified immunity. . . and whether all defendants are sufficiently connected to the constitutional violations to hold them liable." Id. at 978. By Order of June 13, 1994, the case was transferred to the undersigned.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). The assertion of qualified immunity presents a question of law. Elder v. Holloway, 114 S.Ct. 1019, 1023 (1994).

When the defense of qualified immunity has been raised by the defendant, the plaintiff then has the burden to show with

particularity facts and law establishing the inference that the defendants violated a constitutional right. Once the plaintiff has sufficiently alleged the conduct violated clearly established law, then the defendant bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity. Walter v. Morton, _____ F.3d _____, 1994 WL 467053 (10th Cir.1994). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action. Applewhite v. United States Air Force, 995 F.2d 997, 1000 (10th Cir.1993) (citing Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)). The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. Applewhite, 995 F.2d at 1000 (quoting Hunter v. Bryant, 112 S.Ct. 534, 537 (1991)). Moreover, plaintiff must show an individual defendant had an "affirmative link" to the constitutional violations. Winters v. Board of County Commissioners, 4 F.3d 848, 855 (10th Cir.1993).

As stated, the United States Court of Appeals for the Tenth Circuit has isolated two apparent constitutional violations under these facts: (1) the warrantless seizure of the horses and (2) failure to provide plaintiff the opportunity to challenge the sale. The Court will examine each violation in turn as it relates to these defendants' actions. In their statement of undisputed facts, movants list in paragraph no. 6 the following: "Osage County

District Attorney Rene Henry's involvement in this case began subsequent to the removal of the abandoned horses from the property on which they were found."¹ They state in paragraph no. 9, "Osage County District Attorney Larry Stuart did not in any way personally participate in the incidents which led to this lawsuit."

In response, plaintiff points to the brief in support of motion for summary judgment of the other Osage County defendants, filed on February 18, 1994. At page 21, that brief states "the Defendants acted pursuant to legal advice given to them by Assistant District Attorney Rene Henry." Plaintiff perceives this as a contradiction; however, the affidavit of Henry Bloomfield, attached as Exhibit C to the brief of the other Osage County defendants, states at paragraph 16: "Once the horses were taken to the Barn, the Osage County Sheriff's Office was in constant contact with the Osage County District Attorney's Office. The actions taken by the Osage County Sheriff's Office were pursuant to Oklahoma Statutory law and the advice of the Osage County District Attorney" (emphasis added). The emphasized portion makes plain the District Attorney's Office was consulted only after the horses were seized. No evidence is present in the record to indicate Stuart or Henry had any involvement in the warrantless seizure of the horses. Summary judgment is granted in their favor on that claim.

¹In its opinion, the United States Court of Appeals for the Tenth Circuit stated: "Assistant District Attorney Henry performed two functions in this case: he obtained a court order for the feeding and care of the horses and he issued a notice that the horses would be sold to satisfy the sheriff's department's lien on the animals" 12 F.3d at 977.

As to the sale of the horses, the appellate decision found "[c]ompliance with the statute . . . did not provide DiCesare with due process" 12 F.3d at 978. Nevertheless, compliance with the law as it existed at the time may be objectively reasonable and provide qualified immunity. See Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691, 701 (10th Cir.1991); Coen v. Runner, 854 F.2d 374, 377-78 (10th Cir.1988). Henry made application to the Osage County District Court for an order directing qualified individuals to provide care for the horses. On January 4, 1991, in accordance with 4 O.S. §85.6 and 42 O.S. §91, which are facially valid statutes, Henry filed notice of the intended sale of the surviving horses. The notice was mailed via certified mail to the parties determined to have a possible interest in the horses, including plaintiff who was incarcerated.² The notice was also posted at the auction barn and in other public places. Such is the extent of Henry's involvement.

No evidence is present in the record of any personal participation in these events on Stuart's part. The cited Oklahoma statutes, which applied to this situation, were clear in their mandate.³ No reported court decision had questioned their validity and defendant Henry followed the statutory scheme as written. An Assistant District Attorney is sworn to uphold state law. He

²Plaintiff's conviction for cruelty to animals was affirmed on August 30, 1994 by the Oklahoma Court of Criminal Appeals in case no. F-92-515.

³The Court rejects plaintiff's argument that the statutes are not applicable. The contrary conclusion is implicit in the Tenth Circuit opinion and explicit in the statutory language.

cannot be expected to depart from a facially valid expression of that law. The Court finds that Henry's compliance with state law was objectively reasonable and he is entitled to qualified immunity.⁴ Defendant Stuart, so far as the record reflects, had no participation in the events. Plaintiff has failed to establish an "affirmative link" between Stuart and the constitutional violation. Stuart is also entitled to summary judgment.

It is the Order of the Court that the motion of defendants Stuart and Henry for summary judgment is hereby granted.

ORDERED this 5th day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

⁴Of course, in light of the decision in DiCesare v. Stuart, 12 F.3d 973 (10th Cir.1993), compliance with the statutes as presently written may no longer be objectively reasonable.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 7 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

DOROTHY COLLEEN SPRINGER,
Plaintiff,
vs.
DONNA E. SHALALA,
Secretary of HHS,
Defendant.

No. 93-C-614-B
EASTERN DISTRICT
DATE: OCT 07 1994

ORDER

Before the Court for consideration is Plaintiff Dorothy Colleen Springer's appeal (Docket #1), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ") denial of Social Security benefits. The Plaintiff made application for disability insurance benefits on July 16, 1991, a hearing was held before the ALJ on October 2, 1992, and the ALJ rendered his decision denying benefits on December 16, 1992. The Appeals Council, following request for review of the ALJ's decision, affirmed the ALJ's decision on May 20, 1993. The complaint was filed herein on July 6, 1993.

The claim of entitlement to disability benefits was centered in Plaintiff's asserted back pain, high blood pressure, and obesity. The claimant has a high school education and is attending college. She has a work history of being a waitress and a mental health nurse's aide.

In March 1990, Plaintiff re-injured her low back while serving as a psychiatric nursing aide and struggling with a combative mental patient. The first months following March 1990, the

12

Plaintiff's neurosurgeon, Dr. Anthony Billings, concluded that Plaintiff apparently had a low back soft tissue injury that could be treated conservatively and she was temporarily totally disabled during this period. Dr. Billings caused a CT scan of the low back area of Plaintiff to be performed on November 1, 1990. (R. 193-194). After reviewing the CT scan, on November 12, 1990, Dr. Billings diagnosed Plaintiff as having a herniated nucleus pulposus at the level of L4-L5; subarticular facet stenosis L5-S1; and foraminal stenosis, L5-S1. (R. 193, 148). The diagnosis was further confirmed by myelogram on December 17, 1990. (R. 146). This diagnosed pathology was the source of Plaintiff's pain and disability brought on by nerve compression in the low back. As a result of the above, Dr. Billings, on December 18, 1990, performed a lumbar laminectomy, L4-L5, with excision of herniated nucleus pulposus, and a lumbar laminectomy at L5-S1. (R. 193, 142). Following the lumbar surgery Dr. Billings provided follow-up care and ultimately released the Plaintiff as having "achieved maximum benefit from supervised neurosurgical care" on January 15, 1992. Dr. Billings acknowledged that Plaintiff was continuing to have some low back pain and recommended weight loss. (R. 186).

The ALJ entered the following findings on December 16, 1992:

1. The claimant met the disability insured status requirements of the Act on March 27, 1990, the date the claimant stated she became unable to work, and continues to meet them December 31, 1994.
2. The claimant has not engaged in substantial gainful activity since March 27, 1990.

3. The medical evidence establishes that the claimant has severe vocational impairments, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.
4. The Administrative Law Judge finds claimant's testimony to be credible, only to the extent that it is reconciled with her ability to perform light exertional activity.
5. The claimant has the residual functional capacity to perform the physical exertion requirements of work except for those aspects of work over and above those set forth in light exertional activity.
6. The claimant is unable to perform her past relevant work as a waitress and a mental health nurses' aide.
7. The claimant has the residual functional capacity to perform the full range of light work (20 CFR 404.1567).
8. The claimant is 41 years old, which is defined as a younger individual (20 CFR 404.1563).
9. The claimant has a high school education and at least 90 college credit hours (20 CFR 404.1564).
10. In view of the claimant's age and residual functional capacity, the issue of transferability of work skills is not material.
11. Section 404.1569 of Regulations No. 4 and Rules 202.20, Table No. 2 of Appendix 2, Subpart P, Regulations No. 4, direct a conclusion that, considering the claimant's residual functional capacity, age, education, and work experience, she is not disabled.
12. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f)).

The Plaintiff's alleged errors are as follows:

1. Plaintiff objects to the ALJ's resolution of the conflicts in the physician opinions, and asserts that the ALJ should have found her disabled based on the opinions of Drs. Billings and Jennings.
2. Plaintiff objects to the ALJ's evaluation of her subjective complaints of disabling pain.
3. Plaintiff asserts that the effect of Plaintiff's obesity upon her back problems was not considered by the ALJ.

A person is entitled to social security disability benefits if she is unable to perform substantial gainful employment for at least twelve months of the applicable period. 20 C.F.R. § 404.1505(a).

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of

disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. See, Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

In this case, the ALJ entered a decision at the fifth level stating "the claimant has a residual functional capacity to perform

the physical exertion requirements of work except for those aspects of work over and above those set forth in light exertional activity."

A treating physician's opinion is entitled to extra weight unless it is contradicted by substantial evidence. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence.

"Subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Additionally, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755.

Herein, the opinion of treating physician, Dr. Anthony Billings, is entitled to extra weight because it is confirmed by objective evidence in November 1990, that Plaintiff had objective lumbar pathology which supported the necessity for the lumbar neurosurgery on December 18, 1990, to relieve the nerve compression. Such evidence supports the conclusion that from March 27, 1990, until January 15, 1992, Plaintiff was disabled and not

capable of carrying on any gainful employment. The objective evidence and the treating physician's opinion in this regard is overwhelming when examined in light of the other evidence.

With the exception of the period from March 27, 1990, until January 15, 1992 (approximately twenty-two months), the Court finds substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her, following January 15, 1992, from performing light exertional employment activity.

The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). There is qualified medical evidence within the record that although Plaintiff does experience some pain and Plaintiff is obese, that she still has the residual functional capacity to perform the full range of light work following January 15, 1992. (R. 224).

The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of the Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health and Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

For the reasons stated above, the Secretary's decision is reversed in part insofar as it determines Plaintiff is not entitled social security benefits from the period of March 27, 1990, to January 15, 1992, and in all other respects the Secretary's decision is affirmed insofar as it concludes that Claimant was not under a "disability" as defined in the Social Security Act, after

the date of January 15, 1992.

IT IS SO ORDERED this 7th day of October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MELVIN C. LONG, JR.;
ALLENE K. LONG aka Eileen Long;
BRIARWOOD OPTICAL;
GALE HUDDLESTON, Successor
Trustee of the Thomas Emmett
Murray Revocable Trust;
GALE HUDDLESTON, Individually;
COUNTY TREASURER, Osage County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Osage County, Oklahoma,

Defendants.

ENTERED

DATE

CIVIL ACTION NO. 94-C-512-E

FILED

OCT 7 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

OCT 07 1994

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day
of Oct, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Osage County,
Oklahoma, and Board of County Commissioners, Osage County,
Oklahoma, appear by John S. Boggs, Jr., Assistant District
Attorney, Osage County, Oklahoma; and the Defendants, Melvin C.
Long, Jr.; Allene K. Long aka Eileen Long; Briarwood Optical;
Gale Huddleston, Successor Trustee of the Thomas Emmett Murray
Revocable Trust; and Gale Huddleston, Individually, appear not,
but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Melvin C. Long, Jr.**, executed a Waiver of Service of Summons on June 14, 1994 which was filed on June 20, 1994; that the Defendant, **Allene K. Long aka Eileen Long**, executed a Waiver of Service of Summons on June 14, 1994 which was filed on June 20, 1994; that the Defendant, **Briarwood Optical**, executed a Waiver of Service of Summons on May 23, 1994 which was filed on May 25, 1994; that the Defendant, **Gale Huddleston, Successor Trustee of the Thomas Emmett Murray Revocable Trust**, executed a Waiver of Service of Summons on May 19, 1994 which was filed on May 23, 1994; that the Defendant, **Gale Huddleston, Individually**, executed a Waiver of Service of Summons on May 19, 1994 which was filed on May 23, 1994; that Defendant, **County Treasurer, Osage County, Oklahoma**, was served by certified mail, return receipt requested, delivery restricted to the addressee on May 19, 1994; and that Defendant, **Board of County Commissioners, Osage County, Oklahoma**, was served by certified mail, return receipt requested, delivery restricted to the addressee on May 23, 1994.

It appears that the Defendants, **County Treasurer, Osage County, Oklahoma**, and **Board of County Commissioners, Osage County, Oklahoma**, filed their Answer on or about May 25, 1994; that the Defendants, **Melvin C. Long, Jr.**; **Allene K. Long aka Eileen Long**; **Briarwood Optical**; **Gale Huddleston, Successor Trustee of the Thomas Emmett Murray Revocable Trust**; and **Gale**

Huddleston, Individually, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North 208 feet of the South 397.10 feet of the East 419 feet of the West Half of the Northeast quarter of the southwest quarter of Section 16 Township 22 North Range 12 East of the IB&M Osage County, State of Oklahoma according to the recorded plat thereof, provided the East 25 feet of this tract has a road easement reserved, containing 2.0 acres, plus and in addition The North 208 feet of the South 397.10 feet of the West 209 feet of the east 628 feet of the West Half of the Northeast quarter of the southwest quarter of Section 16, Township 22-N, R 12 E of the I.B.&M., Osage County, State of Oklahoma.

The Court further finds that this is a suit brought for the further purpose for foreclosure of a security agreement on personal property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma.

The Court further finds that on July 10, 1984, Melvin C. Long, Jr. and Allene K. Long executed and delivered to the United States of America, acting through the Small Business Administration, their note in the amount of \$36,500.00, payable in monthly installments, with interest thereon at the rate of 4 percent per annum.

The Court further finds that as security for the payment of the above-described note, Melvin C. Long, Jr. and Allene K. Long executed and delivered to the United States of America, acting through the Small Business Administration, a real estate mortgage dated July 10, 1984, covering the above-described property. This mortgage was recorded on July 10, 1984, in Book 0658, Page 976, in the records of Osage County, Oklahoma.

The Court further finds that as collateral security for payment of the above-described note, Melvin C. Long, Jr. and Allene K. Long executed and delivered to the United States of America, acting through the Small Business Administration, a Security Agreement dated July 10, 1984, which secured an interest in personal property and a Fleetwood Mobile Home, Serial Number MIFL1AE312511957.

The Court further finds that on July 10, 1984, a Financing Statement was filed in the records of Osage County, Oklahoma, securing certain personal property.

The Court further finds that on December 3, 1984, a Motor Vehicle Lien was filed with the State of Oklahoma further securing Small Business Administration's interest in a Fleetwood Mobile Home, Serial Number MIFL1AE312511957.

The Court further finds that the Defendants, Melvin C. Long, Jr. and Allene K. Long aka Eileen Long, made default under the terms of the aforesaid note, mortgage, and security agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Melvin C. Long, Jr. and Allene K. Long aka Eileen

Long, are indebted to the Plaintiff in the principal sum of \$33,230.94, plus accrued interest in the amount of \$992.09 as of March 11, 1994, plus interest accruing thereafter at the rate of 4 percent per annum or \$3.64 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Osage County, Oklahoma**, have liens on the real property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$237.43, plus penalties and interest, for the years 1992 (\$133.72) and 1993 (\$103.71). Said liens are superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Osage County, Oklahoma**, have liens on the real property which is the subject matter of this action by virtue of personal property taxes in the amount of \$9.62, plus penalties and interest, which became liens on the real property as of 1992 (\$7.36) and 1993 (\$2.26). Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Briarwood Optical; Gale Huddleston, Successor Trustee of the Thomas Emmett Murray Revocable Trust; and Gale Huddleston, Individually**, are in default and have no right, title or interest in the subject real and personal property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Small Business Administration, have and recover judgment against the Defendants, **Melvin C. Long, Jr. and Allene K. Long aka Eileen Long**, in the principal sum of \$33,230.94, plus accrued interest in the amount of \$992.09 as of March 11, 1994, plus interest accruing thereafter at the rate of 4 percent per annum or \$3.64 per day until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject real and personal property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Osage County, Oklahoma**, have and recover judgment in the amount of \$237.43, plus penalties and interest, for the years 1992 (\$133.72) and 1993 (\$103.71), plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Osage County, Oklahoma**, have and recover judgment in the amount of \$9.62, plus penalties and interest, which became liens on the real property as of 1992 (\$7.36) and 1993 (\$2.26) for personal property taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Briarwood Optical; Gale Huddleston, Successor Trustee**

of the Thomas Emmett Murray Revocable Trust; and Gale Huddleston, Individually, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Melvin C. Long, Jr. and Allene K. Long aka Eileen Long, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real and personal property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the amount of \$237.43, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the amount of \$9.62, plus penalties and interest, for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

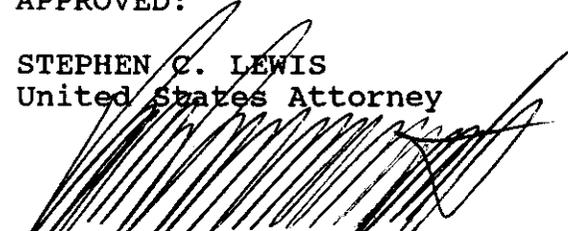
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real and personal property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real and personal property or any part thereof.

S/ JAMES O. ELLISON

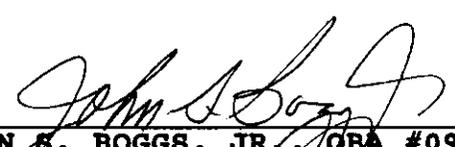
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-512-E

PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROLLIE A. PETERSON, an individual,)
and SUSAN P. PETERSON,)
an individual,)

Plaintiffs,)

v.)

Case No. 93-C-399-K ✓

NANCY VALENTINY; HUGH V. RINEER;)
C. MICHAEL ZACHARIAS; SHARON L.)
CORBITT; N. SCOTT JOHNSON;)
RINEER ZACHARIAS & CORBITT;)
a partnership; JEAN A. HOWARD;)
MARIAN B. HOWARD; SHARON DOTY;)
ROBERT W. BLOCK, M.D.; and the)
UNIVERSITY OF OKLAHOMA,)

Defendants.)

FILED

OCT 6 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the motion to dismiss and for summary judgment of defendants Hugh V. Rineer, C. Michael Zacharias, Sharon L. Corbitt, N. Scott Johnson, and defendant law firm Rineer, Zacharias & Corbitt. The present action was filed by the Plaintiffs, Rollie A. and Susan P. Peterson, against various Defendants who are alleged to have caused damage to them arising out of accusations that Mr. Peterson had sexually abused at least one of his children. The Defendants named in the Second Amended Complaint filed on July 12, 1993 are Jean A. Howard, Mr. Peterson's ex-wife; Jean's mother, Marian B. Howard; Attorneys Rineer, Zacharias & Corbitt, individually and in their law partnership relationship, and their employee, N. Scott Johnson, for their collective roles in the representation of Jean Howard in child custody litigation in Tulsa County Court; and Attorney Sharon Doty, employed by the law firm of Howard & Widdows in which Defendant Jean Howard's father, Gene Howard, is a principal partner; Nancy

Walentiny, a licensed psychotherapist hired by Defendant J. Howard; and Robert W. Block, M.D.¹, a pediatrician who specializes in child sexual abuse and teaches pediatric medicine at the University of Oklahoma².

I. Background

Rollie Peterson and Jean Howard were married October 30, 1971, in Tulsa, Oklahoma. In 1983, the couple moved to Sacramento, California. Two children were born of the marriage, Brett Peterson in 1984 and Kristen Peterson in 1987. During the fall of 1988, Peterson and Howard were divorced in the Superior Court of California. Joint legal custody and visitation of the two minor children was modified on July 19, 1990, by Stipulation and Order when Howard relocated to Tulsa, Oklahoma.

In August, 1990, Howard took Kristen to Ann Harrington Ward, a Tulsa pediatrician for a school physical. In October, 1991, Jean Howard requested of Harriet Fisher, the Howard family therapist since mid-1960's, a referral for the children for a sexual abuse evaluation. Jean Howard had begun to suspect that Kristen, age 4, may have been sexually abused, based upon various sex-related and suggestive remarks made by Kristen. On various occasions between late 1991 and April, 1992, Kristen was seen and examined by defendant Nancy Walentiny, a clinical social worker, by Defendant Block, by Ward and by Fisher. Most of the time when Kristen

¹Defendant Block was dismissed with prejudice as a result of the Court's finding (Docket #73) that Plaintiffs' Second Amended Complaint (Docket #4) failed to allege sufficient facts under Oklahoma law to state a cause of action against him.

²The University of Oklahoma was subsequently dismissed without prejudice on July 12, 1993 (Docket #3).

mentioned sexual abuse she referred to "Uncle Duke" (a male friend of her mother's) and only infrequently mentioned her father, the plaintiff, in such counseling sessions. Plaintiffs contend that defendant Walentiny led Kristen to accuse her father by Walentiny's questioning techniques.

In April, 1992, Tulsa Police Department Detective Randy Lawmaster and Walentiny conducted a videotaped interview of Kristen on the subject of sexual abuse. No conclusive evidence was obtained indicating Peterson had committed an instance or instances of sexual abuse with or upon Kristen, nor that Peterson ought to be or was considered as a suspect.

On April 24, 1992, Jean Howard, by and through her attorneys, the firm of Rineer, Zacharias & Corbitt, brought an action to modify the California divorce decree in the District Court of Tulsa County, alleging Peterson had sexually abused Kristen. Howard and her attorneys obtained a temporary injunction suspending Peterson's visitation with both minor children. However, the trial court sustained Peterson's motion for summary judgment and motion to vacate, opposed by Howard through her counsel, by Order entered February 19, 1993 in Case No. FD 92-02561, vacating the emergency temporary order and reinstating Peterson's unsupervised visitation rights.

Subsequently on April 30, 1993, Peterson filed this law suit, which was amended on June 22, 1993, and again on July 12, 1993, alleging (1) malicious prosecution against Jean Howard, Johnson, Corbitt, Zacharias and Rineer, individually, and as the

partnership, Rineer Zacharias & Corbitt, (2) slander per se against Jean Howard, Marian Howard, Walentiny and Doty, (3) libel against Jean Howard, Doty and Block, (4) intentional, reckless or negligent infliction of emotional distress against Marian Howard, Jean Howard, Walentiny, Doty, Johnson, Corbitt, Zacharias, Rineer and the partnership, Rineer Zacharias & Corbitt, (5) professional negligence against Walentiny, and (6) abuse of process against Howard, Johnson, Corbitt, Zacharias, Rineer, and the partnership, Rineer, Zacharias & Corbitt.³

In view of subsequent dismissals, the present motion now only involves plaintiffs' first and fourth causes of action as alleged against defendant Corbitt and defendant law firm Rineer, Zacharias & Corbitt.

First, the movants contend all claims against them should be dismissed based upon the abstention doctrine espoused in Burford v. Sun Oil Co., 319 U.S. 315 (1943). Generally, the Burford doctrine permits a federal court presented with basic problems of state policy pertaining to regulation of important state matters to abstain from exercising its jurisdiction when it would disrupt an important and complex state regulatory system. Movants suggest that plaintiffs' tort claims amount to little more than requests to discipline attorneys and this Court should defer to Oklahoma's

³By Order (Docket #85) entered June 6, 1994, pursuant to Plaintiffs' motion, Defendants, Hugh V. Rineer, C. Michael Zacharias, N. Scott Johnson, and Marian B. Howard, individually, have been dismissed from the lawsuit without prejudice. The Court further dismissed without prejudice Plaintiff Peterson's seventh cause of action based on abuse of process against Defendants J. Howard, Rineer, Zacharias, Corbitt, Johnson and the law partnership, Rineer Zacharias & Corbitt. Defendant Doty, pursuant to Plaintiffs' motion, was likewise dismissed without prejudice by Order of March 14, 1994, (Docket #74), thus rendering her motion for summary judgment (docket #63) moot.

regulation of its bar. Also, movants state Burford abstention may be appropriate because of domestic relations issues intertwined with the tort claims. The Court declines movants' invitation to abstain. Nothing compels an aggrieved party to proceed against an attorney only through state bar disciplinary proceedings or by requesting the imposition of sanctions. As to the implication of domestic relations issues, the Supreme Court did recently state "in certain circumstances, the abstention principles developed in Burford . . . might be relevant in a case involving elements of the domestic relationship." Ankenbrandt v. Richards, 112 S.Ct. 2206, 2216 (1992). The Supreme Court went on to state it had in mind a federal suit which "depended on a determination of the status of the parties," and further stated Burford abstention was inappropriate where the status of the domestic relationship has been determined as a matter of state law and had no bearing on the underlying torts alleged. Id. This Court finds the case at bar falls within the latter type. Abstention is rejected.

Movants seek summary judgment on plaintiff Rollie Peterson's first cause of action, malicious prosecution. Malicious prosecution actions are not favored under Oklahoma law and the elements of the action are narrowly construed. Glasgow v. Fox, 757 P.2d 836, 838-39 (Okla.1988). Such an action only accrues when five elements exist: the bringing of an action, successful termination in favor of the plaintiff, lack of probable cause, malice and damages. Meyers v. Ideal Basic Industries, 940 F.2d 1379, 1383 (10th Cir.1991). The pending motion focuses upon three elements:

successful termination, probable cause, and to a lesser extent, malice.

It is clear that an action was brought against Rollie Peterson by the filing on April 24, 1992 of a Petition to Modify Foreign Divorce Decree in the District Court for Tulsa County, State of Oklahoma, Case No. FD-92-2561. Within the body of that document, which is signed by defendant Corbitt, is the following paragraph:

Based upon Plaintiff's best information and belief and upon information obtained through counseling of the minor child, this child has been the victim of sexual abuse. The information relayed by the minor child indicates the Defendant and natural father is the individual perpetrating the abuse upon the child.

Based upon that allegation, Jean Howard requested the state court to enter an ex parte order suspending Rollie Peterson's visitation with the minor children, and that after a trial Rollie Peterson be awarded supervised visitation with the minor children. The Petition also requested an award of attorney fees and costs to Jean Howard.

In January, 1993, Rollie Peterson filed a motion to vacate the emergency temporary order and motion for summary judgment. Apparently accompanying the motion was an affidavit of Nancy Walentiny, Jean Howard's own expert witness, stating that in her opinion it was unlikely that Rollie Peterson had sexually abused either of his minor children. Jean Howard filed her response in February, 1993, in which she conceded the emergency order should be vacated, but stated material facts remained as to Rollie Peterson's counterclaim for custody, child support and attorney fees. By

order of February 19, 1993, the state court granted Rollie Peterson's motion. The order observes "all of the experts are in accord in the opinion that it is unlikely that Mr. Peterson was the perpetrator of sexual abuse as to either of his children, if, in fact, any sexual abuse occurred." Further, "[w]hile plaintiff is correct that the counterclaim of the defendant for custody, child support, attorney fees and suit monies remains at issue, the defendant's motion for summary judgment is not directed to the disposition of the issues raised by his counterclaim." Also, "there is no triable issue as to any material fact, and defendant is entitled, as a matter of law, to summary adjudication as to plaintiff's petition." Finally, "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's Petition to Modify Foreign Divorce Decree, filed April 24, 1992 is hereby denied." The trial court retained jurisdiction to resolve ancillary issues such as attorney fees.

Despite the above-quoted language, movants argue Rollie Peterson was not the prevailing party on the petition to modify. They point out the summary judgment entered was an interlocutory order, leaving issues remaining between the parties which were ultimately resolved by a settlement agreement. This ignores the fact that the only remaining issues were those raised by Peterson's counterclaim. The issue raised by the petition to modify decree, which commenced the action in question, was "successfully terminated" in Peterson's favor. The grant of summary judgment reached the "substantive rights" of the cause of action and thereby

"vindicated" Peterson as to the underlying action. See Glasgow, 757 P.2d at 839. Plaintiff has satisfied this element of a malicious prosecution action for summary judgment purposes.

Movants also argue plaintiff cannot demonstrate lack of probable cause in filing the state court petition. The issue of what constitutes probable cause in a malicious prosecution action is a mixed question of law and fact; where the evidence is conflicting, the court should submit the issue to the jury. Powell v. LeForce, 848 P.2d 17, 19 (Okla.1992). Movants rely on Ms. Corbitt's affidavit and deposition testimony, which states that she relied on Jean Howard's statements to her, specifically Ms. Walentiny's reported belief that Mr. Peterson had sexually abused Kristen. Ms. Corbitt further states that before filing the petition, Ms. Corbitt spoke to Walentiny, who related that Walentiny believed Kristen had been abused and there was reason to believe Mr. Peterson was the perpetrator. (Corbitt deposition, Exhibit C to Law Firm Defendants' Supplemental Summary Judgment Brief, at p.118, ll.10-12). Ms. Corbitt also cites her own reliance upon meeting with her law partners and her knowledge of the police videotape interview of Kristen.

Plaintiff responds by pointing to Walentiny's deposition, in which she denies speaking to Corbitt prior to the filing of the state court petition. (Walentiny deposition, Exhibit C to plaintiffs' opposition brief filed Sept. 13, 1993, at page 407, lines 1-3). Plaintiff further notes Corbitt admits she did not speak to Police Detective Lawmaster, who conducted the videotape

interview, or any of the therapists and counselors who had talked with Kristen (aside from Corbitt's assertion she spoke to Walentiny). Plaintiffs' basic argument is reliance on one's client alone is insufficient to establish probable cause.

The Supreme Court of Oklahoma has said "counsel is as good or better judge than [the client] is, of the duty and possibly the manner of making further inquiry, provided counsel is completely informed as to the basic or inciting facts which would lead to discovery of the further information." Williams v. Frey, 78 P.2d 1052, 1057 (Okla. 1938) (emphasis added). In dicta, the Oklahoma Supreme Court has stated "[a] lawyer cannot always be exonerated merely by showing that he followed his client's instructions." Reeves v. Agee, 769 P.2d 745, 755 n.35 (Okla. 1989). The United States Court of Appeals for the Tenth Circuit, in reviewing Oklahoma law, quoted the Restatement (Second) of the Law of Torts §674, comment d, to the effect that if an attorney prosecutes a civil proceeding for an improper purpose and without probable cause for belief in the possibility that the claim will succeed, the attorney is subject to liability for malicious prosecution. Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1372 (10th Cir.1991).

The Court concludes that Oklahoma law regarding malicious prosecution contemplates, depending on the allegations and factual context, a duty on an attorney's part to go beyond his client's representations and conduct some type of further inquiry before filing an action. However, the language quoted from the Frey decision gives the attorney considerable discretion in this regard.

In this case, involving the serious and potentially damaging allegation of sexual abuse, this "further inquiry" might involve at least obtaining the opinion of one qualified in the field prior to filing the action. If, as in this case, the client herself credibly relates that the client has consulted an expert and that the expert supports the client's position, the attorney does not necessarily violate the duty of further inquiry by relying solely upon the client's statement in reaching a conclusion that probable cause exists. Particularly is this so when it is undisputed that there was in fact supportive expert opinion at the time the action was filed. In this case, Corbitt contends she had a conversation with Walentiny (Corbitt affidavit at ¶8); Walentiny denies it took place (Walentiny deposition, Exhibit C to Plaintiffs' Opposition Brief filed September 13, 1993, at page 407, 11.1-3). A factual dispute exists, but the central question is whether it constitutes a genuine issue of material fact under Rule 56(c) F.R.Civ.P..⁴

Plaintiffs emphasize Walentiny's statement in her January, 1993 affidavit: "I had never reached a conclusion regarding whether or not the children were the subject of sexual abuse by Rollie Peterson, but advised Jean Howard as to what Kristen Peterson had told me." (Exhibit B to Affidavit of Sharon Corbitt at ¶3). During oral argument on the present motion, plaintiffs' counsel contended this statement was consistent with Walentiny's

⁴A factual dispute concerns a "material fact" if the dispute might affect the outcome of the case under governing law. Utah Power & Light Co. v. Federal Ins. Co., 983 F.2d 1549, 1553 (10th Cir.1993).

prior statements. In response, movants point to Walentiny's deposition taken September 9, 1992, (Exhibit B to Law Firm Defendants' Supplemental Summary Judgment Brief), and the following testimony:

Well, Kristin has named her dad as the person. After she named Duke and was told that grandma had said she hadn't spent any time alone, her--she was pretty quick to name her dad and was pretty consistent with that, although recanting that at times. There were symptoms following visitation with dad, and so I think that that is certainly a cause for concern. (Id. at 321, 11.3-9) (emphasis added).

Q. All right, Now I want to go back to your notes, please, beginning in March of 1992. Do I understand--or actually it's been suggested here to ask and I need to ask: Are you telling me that you have an expert opinion about whether she was molested, but not who did it?

A. I believe that this child was molested based on the information. My opinion is that this child was molested based on the information that I have from the child and from the mother. The child has relayed to me that it was her dad. And I have no reason to believe that the child isn't telling the truth.

Q. She has relayed to you that it has been at least three different people, hasn't she?

A. Duke, a fake Uncle Duke, and dad. (Id. at 331, 11. 4-18) (emphasis added).

While Kristen apparently named at different times three different people as molesting her, Walentiny clearly was persuaded it was in fact Kristen's father. In the January, 1993 affidavit, Walentiny states at paragraph 6: "After extensive consultation and discussions with Kee McFarland involving these recent evaluations and team assessments, I now concur with the opinion that it is

unlikely that Rollie Peterson was the perpetrator of sexual abuse of Brett Peterson or Kristen Peterson" (emphasis added).

At page 4 n.3 of their supplemental summary judgment brief, filed May 4, 1994, movants state the dispute as to whether Corbitt and Walentiny actually spoke prior to the filing of the state court action is not material because it is undisputed Walentiny testified in the September 9, 1992 deposition she believed Kristen had been sexually abused and had no reason not to believe Kristen's statements accusing her father. The Court agrees. The existence of probable cause is determined in light of the facts existing at the time the underlying action is filed, Meyers, 940 F.2d at 1383. However, since Walentiny stated in September, 1992, she did not disbelieve Kristen's statements, even assuming arguendo Walentiny did not speak to Corbitt prior to the filing of the petition, there has been no showing Walentiny would not have stated to Corbitt in April, 1992, there was "reason to believe" Rollie Peterson had committed sexual abuse.

The fact that Walentiny avoids describing her September, 1992 statement as an "expert opinion" is not dispositive in the Court's view. She was an expert in this field and had interviewed Kristen numerous times. Walentiny's testimony she saw no reason not to believe the child's statements represents Walentiny's imprimatur on the allegations made in state court. It is undisputed client Jean Howard told attorney Corbitt, prior to the filing of the state court action, that Walentiny suspected Mr. Peterson based on Walentiny's interviews of Kristen (Corbitt Affidavit at ¶7). The

two possible conclusions as to the disputed Corbitt-Walenty conversation are: (1) if it did occur, it merely served as confirmation of what client Howard had said Walenty believed; (2) if it did not occur, this does not negate probable cause because Walenty did in fact suspect Rollie Peterson in April, 1992, as Howard related to Corbitt. The statements of client to attorney standing alone, and certainly when coupled with Walenty's evaluation of Kristen's interview statements, constitute sufficient probable cause to file the Petition to Modify. Plaintiffs' burden is to demonstrate from the record not merely a factual dispute as to whether Corbitt interviewed Walenty prior to filing suit, but also that if Corbitt had interviewed Walenty, Walenty would have failed to provide factual support for the allegations in the Petition to modify. The latter showing has not been made. From the record presented, it appears Walenty did not change her position until January, 1993, when her affidavit was filed in the state court action. Thus, the Court concludes there does not exist a genuine issue of material fact that Corbitt did not have probable cause for belief in the possibility the claim would succeed.⁵ Summary judgment is granted as to the malicious prosecution claim.⁶

⁵In keeping with the teaching of Glasgow v. Fox, 757 P.2d 836 (Okla.1988), the Court must construe the elements of a malicious prosecution action narrowly.

⁶Movants have also argued absence of malice. Malice is a question of fact for the jury, and the jury has a right to infer malice from a want of probable cause. Daniel v. Pappas, 16 F.2d 880, 882 (10th Cir.1927). Plaintiffs have made no direct showing of malice in the filing of the state court action, and the Court has concluded probable cause existed.

Next, movants seek summary judgment as to plaintiffs' Fourth Cause of Action, denominated in the Second Amended Complaint as "Intentional, Reckless or Negligent Infliction of Emotional Distress." Both named plaintiffs seek recovery under this claim. Movants first refer to the litigation privilege codified in 12 O.S. §1443.1, which has been held to preclude not merely a defamation claim but also one for intentional infliction of emotional distress. Kirschstein v. Haynes, 788 P.2d 941,954 (Okla.1990). Plaintiffs respond by arguing since "[t]he same rule does not apply to claims for malicious prosecution," Robinson, 940 F.2d at 1372, a claim for intentional infliction of emotional distress which arises out of the same facts as a malicious prosecution claim is not barred by the privilege. The Court rejects the attempt to avoid the clear teaching of Oklahoma law.

In the alternative, plaintiffs contend California rather than Oklahoma law applies to the claim. The Oklahoma choice of law rule requires application of the law of the state with the most significant relationship to the parties. Brickner v. Gooden, 525 P.2d 632, 637 (Okla.1974). The Restatement (Second) of Conflict of Laws §155 provides in a malicious prosecution action, the law of the state where the proceeding complained occurred shall apply, unless some other state has a more significant relationship to the occurrence and the parties. The only relationship which California had to the occurrence is plaintiffs' residence there at the time. By contrast, Oklahoma has the significant interest in regulation of allegedly improper use of its judicial proceedings. Under the

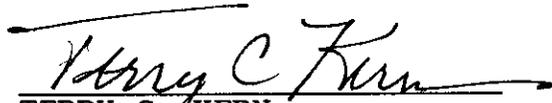
principles detailed above, the Court finds Oklahoma law applies and the claim for intentional infliction of emotional distress is barred.

Movants also seek judgment as to plaintiffs' claim for negligent infliction of emotional distress, arguing that Oklahoma law does not permit recovery absent physical injury. The proposition is dubious in light of the statement in Ellington v. Coca-Cola Bottling Co., 717 P.2d 109, 111 (Okla.1986), that a plaintiff may recover for mental anguish where it is caused by physical suffering and may also recover for mental anguish which inflicts physical suffering. A separate rationale for decision has not been raised by the parties, but the Court deems it proper to address. Although the Supreme Court of Oklahoma has not so stated, this Court sees no logical basis to deny extension of the "judicial proceeding" privilege to a claim of negligent infliction of emotional distress. In Kirschstein, 788 P.2d at 954 n.33, the Supreme Court of Oklahoma cited, and obviously found persuasive, California precedent for the proposition that a claim of intentional infliction of emotional distress is barred. There is also California precedent which holds a claim of negligent infliction of emotional distress is barred by the privilege. Howard v. Drapkin, 222 Cal.App.3d 843, 271 Cal.Rptr. 893 (2d Dist.1990). This Court is persuaded the Supreme Court of Oklahoma, if faced with the issue, would extend Kirschstein to a claim of negligent infliction of emotional distress. The present motion is granted with regard to plaintiff's fourth cause of action. In view

of the Court's ruling, it need not address movants' subsidiary argument that plaintiff Susan Peterson has no right of recovery because she was a third party, not directly the subject of the court documents in question.

It is the Order of the Court that the motion to dismiss and for summary judgment of defendant Corbitt and defendant Rineer, Zacharias & Corbitt is hereby granted.

IT IS SO ORDERED this 5th day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LOLA J. HARRING,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

93-C-0747-B

FILED
OCT 06 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DATE OCT 06 1994

ORDER

Now before the Court is Lola Harring's appeal of a decision by the Secretary of Health and Human Services to deny him Social Security disability benefits.¹ The chief issue is whether substantial evidence supports the Secretary's decision. In addition, Ms. Harring asserts two other issues: (1) The Administrative Law Judge ("ALJ") improperly analyzed her "sleepiness"; and (2) The ALJ misapplied the medical-vocational guidelines.² For the reasons discussed below, the court finds Ms. Harring's arguments to be without merit, and affirms the decision of the Secretary.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

² The issues as framed by Ms. Harring are: (1) Substantial evidence does not support the ALJ's finding that plaintiff's claim of disabling pain was not credible nor supported by medical evidence; (2) Substantial evidence does not support the ALJ's finding that claim of excessive sleepiness was not credible or supported by medical evidence; (3) Since Plaintiff suffers from non-exertional impairments, the Medical/Vocational guidelines should not have been applied; and (4) The testimony of the vocational expert supports a finding of disabled.

3

supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).³ A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

Keeping those two standards of review in mind, a claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in Appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

³ One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).

In the case at bar, Ms. Harring applied for disability benefits on January 15, 1992, claiming she was disabled since June 30, 1989. She claimed that pain in her back, neck and right arm prevented her from working. The Secretary denied Ms. Harring's application initially and on reconsideration.

After a hearing, the ALJ found that Ms. Harring was not disabled under the Social Security Act. At step 4, the ALJ concluded that Ms. Harring could not return to her past relevant work. He, however, found that she could do "sedentary" work. Ms. Harring challenges that finding, arguing that she is disabled under the Social Security Act.

II. Legal Analysis

The primary issue is whether substantial evidence supports the ALJ's decision of no disability.

At the time of the hearing, Ms. Harring was 33 years old, had an 11th grade education and had previously worked as a housekeeper, baby-sitter and janitor. She testified that she could no longer work because of "sharp pain" in her neck and back.

The only substantive medical evidence stems from examinations done by Dr. Gary Davis. Ms. Harring was discharged from Doctors' Hospital on September 19, 1991 after she had injured her neck and lower back moving heavy furniture. Dr. Davis discharged her with a C-Spine strain and spasm. *Record at 135*. Dr. Davis examined her several other times in 1991 and 1992, including April 29, 1992 where the doctor wrote:

This patient is a 32-year-old female with chronic low back syndrome, most likely secondary to muscle strain and spasm and degenerative joint disease. It is obvious that this patient would be a poor risk, a poor candidate for working in a job that consisted of heavy lifting...She is motivated to change her vocation to something in a field consistent of secretarial where she does not have to do prolonged bending, standing, stooping or any heavy lifting.

In my opinion, this patient is not employable relative to heavy manual labor.
Id. at 141.

The medical evidence indicates that Ms. Harring can work, albeit not in a job that requires heavy lifting. The testimony by the Vocational Expert also indicates that Ms. Harring can work. The Vocational Expert testified that Ms. Harring could work as a salad maker, dispatcher and production inspector. *Record at 51.* The expert acknowledged, however, if all of Ms. Harring's testimony was taken as true, Ms. Harring could not work. Notably, the ALJ discounted her testimony. In fact, he questioned her credibility. *Record at 21.*

Ms. Harring testified that "sharp pain" prevents her from working. She testified that she takes medication prescribed by her doctor, uses a heating pad off-and-on during the day and lays down three hours daily. She also testified that she can sit for 15 minutes at a time and stand 20 minutes at a time. She can walk up to three blocks and she has trouble cleaning house and vacuuming because of her "pain."

Taking the record as a whole, the court finds that Dr. Davis' reports and the testimony of the Vocational Expert to be substantial evidence supporting the ALJ's finding of no disability. Furthermore, the ALJ properly evaluated Ms. Harring's subjective complaints of pain.

The standard for evaluating complaints of pain is examined in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). An ALJ must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether,

considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id.* at 163-164.

In the instant case, the ALJ found that Plaintiff established a pain-producing impairment by the objective medical evidence submitted by Dr. Davis (spine strain and spasm). The ALJ also found a loose nexus between the impairment and Plaintiff's subjective allegations of pain. However, the ALJ - after considering all the subjective and objective evidence - decided that Plaintiff's pain was not disabling. That analysis was proper and is supported by substantial evidence.⁴

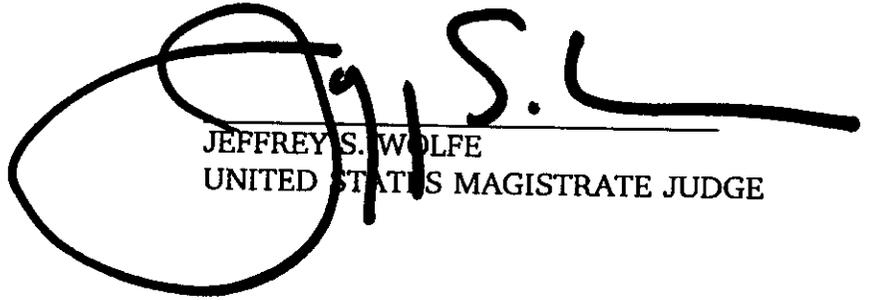
The final question is whether the ALJ erred by applying the Medical-Vocational Guidelines (the so-called, "Grids"). The ALJ, using the Grids as framework for his decision, found that Plaintiff had the residual functional capacity ("RFC") to perform the full range of sedentary work. *Record at 21*. He then concluded that the Grids directed a finding of no disability. *Id.*

Plaintiff disputes that finding, arguing that the Grids are not applicable because she suffered from pain and limitation of movement (i.e. nonexertional impairments). That argument, under the facts of this case, is not supported in the record. The "mere presence" of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant. *Gossett v. Bowen*, 862 F.2d 802, 807-808 (10th Cir. 1988). Therefore, since substantial evidence supports the ALJ's

⁴ In *Luna*, the Tenth Circuit set forth the factors to determine a claimant's credibility regarding subjective complaints of pain as (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. The ALJ examined several of these factors in his decision, including the "side effects of medication." *Record at 16-17*. He was within his province to make a determination that her "sleepiness" was not supported elsewhere in the record. While Ms. Harring disagrees with his conclusions, the Court finds the ALJ did not err in such analysis. Simply put, the record, taken as a whole, does not support Ms. Harring's assertion that she suffers from disabling pain.

finding that Plaintiff had the RFC to perform the full range of sedentary work, reliance on the grids was proper. The Secretary's decision is AFFIRMED.

SO ORDERED THIS 6th day of Oct., 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 6 1994

David M. Lawrence, Clerk
U.S. DISTRICT COURT

KATHERINE CARR and)
DEBBI WALLACE,)
)
Plaintiff,)
)
v.)
)
HOMELIFE ASSOCIATION,)
an Oklahoma non-profit)
corporation,)
)
Defendant.)

Case No. 94-C-166-B

ENTERED ON DOCKET
OCT 6 1994

ORDER OF DISMISSAL

In appearing to the court that the above entitled action has been fully settled,
adjusted and compromised and based on stipulation; therefore,

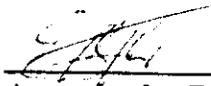
IT IS ORDERED AND ADJUDGED that the above entitled action be and it is
hereby dismissed without cost to either party and with prejudice to the Plaintiff.

DATED this 6 day of Oct., 1994.

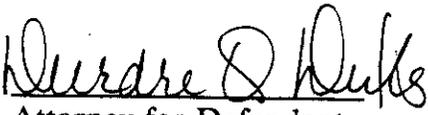
S/ THOMAS R. BRETT

United States District Judge

Approved as to form and content:



Attorney for Plaintiff



Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARSHA L. MARTIN; LANCE A.)
 MARTIN; STATE OF OKLAHOMA)
 ex rel. OKLAHOMA TAX COMMISSION;)
 HILLCREST MEDICAL CENTER;)
 FLEET MORTGAGE CORPORATION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

OCT 6 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 06 1994

CIVIL ACTION NO. 94-C 307B

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 6th day of Oct., 1994.

S/ THOMAS W. GIBSON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROBERT D. HALLEMEIER;)
 HELEN L. HALLEMEIER;)
 CITY OF BROKEN ARROW, OKLAHOMA;)
 COUNTY TREASURER, TULSA COUNTY,)
 OKLAHOMA;)
 BOARD OF COUNTY COMMISSIONERS,)
 TULSA COUNTY, OKLAHOMA)
)
 Defendants,)

FILED

OCT 6 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
OCT 06 1994
DATE

CIVIL ACTION NO. 94-C-594-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of Oct., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; The Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, ROBERT D. HALLEMEIER, was served with process a copy of Summons and Complaint on August 11, 1994; that the Defendant, HELEN L. HALLEMEIER, was served with process a copy of Summons and Complaint on August 11, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 26, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 28, 1994; and that the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**LOT FIVE (5), BLOCK ONE (1), WEST PARK ADDITION
TO BROKEN ARROW, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on August 21, 1989, the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, executed and delivered to Oak Tree Mortgage Corporation, their mortgage note in the amount of \$39,703.00, payable in monthly installments, with interest thereon at the rate of 8.435% percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, husband and wife, executed and delivered to Oak Tree Mortgage Corporation, a mortgage dated August 21, 1989, covering the above-described property. Said mortgage was recorded on August 24, 1989, in Book 5203, Page 147, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 5, 1990, Oak Tree Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 11, 1990, in Book 5246, Page 1511, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1990, the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 1, 1991.

The Court further finds that the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, are indebted to the Plaintiff in the principal sum of \$56,574.92, plus interest at the rate of 8.435% percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$22.20 fees for service of Summons and Complaint.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$17.00 which became a lien on the property as of July 7, 1988; a lien in the amount of \$21.00 which became a lien as of

June 26, 1992; a lien in the amount of \$16.00 which became a lien as of June 25, 1993; and a lien in the amount of \$16.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER, in the principal sum of \$56,574.92, plus interest at the rate of 8.435% percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action in the amount of \$22.20 fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action

by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$70.00, plus accruing costs and interest for personal property taxes for the years 1987, 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, ROBERT D. HALLEMEIER and HELEN L. HALLEMEIER have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, ROBERT D. HALLEMEIER and HELEN D. HALLEMEIER, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$70.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. SPETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Assistant United States Attorney
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County Treasurer and
Board of County Commissioners,
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MICHAEL R. VANDERBURG, OBA #9180

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P. O. Box 610
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(918) 251-5311
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-594-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 William J. Parke; Shelly L. Parke)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION; Sears,)
 Roebuck & Co. COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED
OCT 6 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
DATE OCT 6 1994
CIVIL ACTION NO. 94-C 188B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of Oct., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **William J. Parke and Shelly L. Parke**, appear by their attorney, Allen J. Autrey; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission** appears by Kim Ashley, Assistant General Counsel; the Defendant, **Sears, Roebuck & Co.** appears by its attorney J. Michael Morgan; and the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma.

The Court being fully advised and having examined the court file finds that the Defendants, **William J. Parke and Shelly L. Parke**, were served with Summons and Complaint on April 12, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on

March 2, 1994; that the Defendant, **Sears, Roebuck & Co.**, was served with Summons and Complaint on April 11, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 3, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 3, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 21, 1994; that the Defendants, **William J. Parke and Shelly L. Parke**, filed their Answer on May 17, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission** filed its Answer on March 22, 1994; and that the Defendant, **Sears, Roebuck & Co.** filed its Answer on May 9, 1994.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Eight (8), Block Five (5), FOX POINT, a Subdivision in the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on May 23, 1986, the Defendants, **William J. Parke and Shelly L. Parke**, husband and wife, executed and delivered to First Security Mortgage Company their mortgage note in the amount of \$69,497.00, payable in

monthly installments, with interest thereon at the rate of none and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, William J. Parke and Shelly L. Parke, husband and wife, executed and delivered to First Security Mortgage Company a mortgage dated May 23, 1986, covering the above-described property. Said mortgage was recorded on June 4, 1986, in Book 4946, Page 2580, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 28, 1986, First Security Mortgage Company assigned the above-described mortgage note and mortgage to Associates National Mortgage Corporation. This Assignment of Mortgage was recorded on June 24, 1986, in Book 4950, Page 2465, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 26, 1988, Associates Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 7, 1988, in Book 5105, Page 239, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1988, the Defendants, William J. Parke and Shelly L. Parke, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on November 1, 1989.

The Court further finds that the Defendants, William J. Parke and Shelly L. Parke, husband and wife, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **William J. Parke and Shelly L. Parke**, are indebted to the Plaintiff in the principal sum of \$111,492.38, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$56.00 which became a lien on the property as of June 26, 1992; a lien against the property in the amount of \$48.00, which became a lien as of June 25, 1993; and a claim against the subject property in the amount of \$47.00 for 1993 taxes. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of a tax warrant, dated July 11, 1990, and recorded on July 13, 1990, in Book 5264, Page 1345 in the records of Tulsa County, Oklahoma, in the amount of \$90.21 plus accrued and accruing

interest. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Sears, Roebuck & Co.**, has a lien on the property which is the subject matter of this action by virtue of a judgment, Case Number CS 91-133, in Tulsa District Court, dated February 20, 1991, and recorded on March 5, 1991 in Book 5307, Page 546 in the records of Tulsa County. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **William J. Parke and Shelly L. Parke**, in the principal sum of \$111,492.38, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for

taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$151.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, State of Oklahoma ex rel Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$90.21 for a tax warrant for the year 1986, plus accrued and accruing interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Sears, Roebuck & Co., have and recover judgment in the amount of \$3,778.14 plus court costs and an attorney's fee, with interest on the principal amount at the rate of 21% per annum, for a judgment entered by the District Court of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, William J. Parke, Shelly L. Parke, and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, William J. Parke and Shelly L. Parke, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without

appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount \$91.00, plus accrued and accruing interest for taxes which are currently due and owing.

Fourth:

In payment of the Defendant, Sears, Roebuck & Co. in the amount of \$3,778.14, plus court costs and an attorney's fee, with interest on the principal amount at the rate of 21% per annum.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County, in the amount of \$151.00 for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

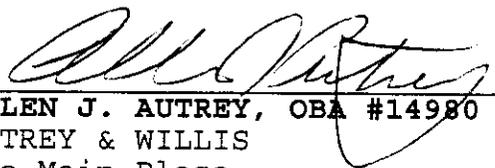
UNITED STATES DISTRICT JUDGE

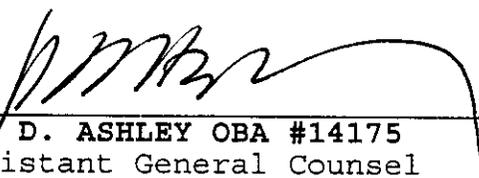
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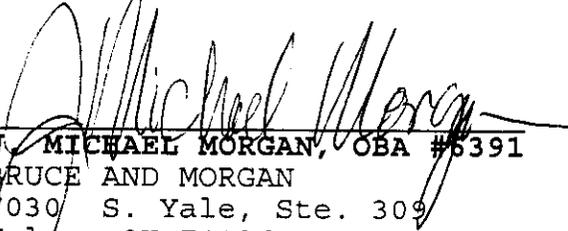
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for 
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Assistant United States Attorney
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Shelly L. Parke


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State of Oklahoma ex rel
Oklahoma Tax Commission


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BRUCE AND MORGAN
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(918) 492-4172
Attorney for Defendant
Sears, Roebuck & Co.

Judgment of Foreclosure
Civil Action No. 94-C 188B

NBK:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROLLIE A. PETERSON, an)
individual, and SUSAN P.)
PETERSON, an individual,)
)
Plaintiffs,)

vs.)

NANCY VALENTINY; HUGH V.)
RINEER; C. MICHAEL ZACHARIAS;)
SHARON L. CORBITT; N. SCOTT)
JOHNSON; RINEER, ZACHARIAS)
& CORBITT, a partnership;)
JEAN A. HOWARD; MARIAN B.)
HOWARD; SHARON DOTY; ROBERT)
W. BLOCK, M.D.; and the)
UNIVERSITY OF OKLAHOMA,)
)
Defendants.)

No. 93-C-399-K ✓

FILED

OCT 6 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the defendants' motion to dismiss and for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant Sharon L. Corbitt and defendant Rineer, Zacharias & Corbitt, a partnership, and against the plaintiff.

ORDERED this 5th day of October, 1994.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

102

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 06 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDY MURPHY,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES,)
)
Defendant.)

93-C-0744-E ✓

ORDER

Now before the Court is Judy Murphy's appeal of a decision by the Secretary of Health and Human Services to deny him Social Security disability benefits.¹ The overriding issue is whether substantial evidence supports the Secretary's decision. In addition, Ms. Murphy asserts that (1) the Administrative Law Judge ("ALJ") failed to evaluate her depression; (2) The ALJ failed to properly evaluate her pain; and (3) The ALJ failed to adequately consider her "potentially disabling arthritis." For the reasons discussed below, the Court affirms the Secretary's decision.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

ENTERED ON DOCKET
DATE 10-6-94

15

a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).² A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

Keeping these standards of review in mind, a claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In the case at bar, Ms. Murphy applied for disability benefits on March 28, 1991, claiming disability since February of 1990.³ Ms. Murphy contends that she can no longer

² One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).

³ The February, 1990, onset date is the "date" Ms. Murphy met the special earnings requirement of the Social Security Act. Record at 32.

work because of (1) problems with her back, neck, shoulder and jaw; (2) arthritis in neck and "bad" right knee; and (3) "mental problems." *Record at 77.*

The Secretary denied the application initially and on reconsideration. The ALJ, after holding a April 30, 1992 hearing, likewise found that Ms. Murphy was not disabled under the Social Security Act. The ALJ found that, while Ms. Murphy could not return to her past jobs, she could work as a cashier, receptionist and office clerk. *Id. at 73-74.* Ms. Murphy now challenges the ALJ's decision.

II. Legal Analysis

Ms. Murphy was born in 1947. She completed high school and attended college for two years. She has previously worked as a waitress, sewing machine operator and retail store manager. She testified that she could no longer work because of the aforementioned impairments.

On appeal, Ms. Murphy raises two issues. First, did the ALJ properly evaluate her depression. Second, did the ALJ failed to properly evaluate her pain? Finally, does substantial evidence support the decision of no disability?

A. Evaluation of Alleged Mental Impairment

The ALJ, relying on an examination by a consulting psychiatrist, found that Ms. Murphy did not have a mental impairment that was significant to keep her from working. *Record at 30.* The ALJ based this conclusion on evidence submitted by Dr. Ronald Passmore, who examined Ms. Murphy on July 12, 1991. Dr. Passmore found that Ms. Murphy had a "few symptoms of depression" but "not enough to warrant a diagnosis at this time." *Id. at 237.* Dr. Passmore did diagnose Ms. Murphy with a "mixed personality

disorder" and noted that "stressors in her life appear to be moderate." *Id. at 237.*

Ms. Murphy, however, disputes the ALJ's reasoning. She contends the ALJ should have should have (1) developed the record more fully concerning her "mental impairment" and (2) had a mental healthcare professional fill out the Psychiatric Review Technique Form. The Court, however, disagrees.

Little question exists that the ALJ has a basic duty of inquiry, especially when it concerns a claimant's mental impairments. Here, the ALJ adequately fulfilled that duty. While he did not delve into the "mental health" subject at his hearing, he did examine evidence from Dr. Passmore's examination. Given those circumstances, the Court finds the ALJ did not err on this issue.

The second question is whether the ALJ should have had a mental health expert complete the Psychiatric Review Technique Form. When a record "contains evidence of a mental impairment which allegedly prevents a claimant from working, the Secretary [is] required to follow 42 U.S.C. § 421(h):

Section 421(h) provides that an initial determination...than an individual is not under a disability in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment. *Andrade, 985 F.2d at 1049.*

In *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045 (10th Cir. 1993), the Tenth Circuit held that Section 421(h) did not impose an "absolute duty" on the ALJ to have a psychologist or psychiatrist complete the medical portion of the case review and the residual functional capacity assessment on every claimant alleging a mental impairment. *Id. at 1050.* Instead, the question of whether an ALJ should enlist expert help

is to be examined on a case-by-case basis. Some factors to be considered are:

1. Does the record support the ALJ's conclusion regarding the severity of claimant's mental impairment? Does the record support the ALJ's RFC assessment? *Id.*
2. Was claimant prejudiced by the ALJ's actions? In other words, was the ALJ's decision amply supported in the record? *Id.*

The common thread of these factors is whether the record supports the ALJ's conclusions regarding the severity of claimant's mental impairment. In this case, the ALJ's conclusions (and his RFC assessment) are supported in the record. In fact, the only evidence of any substance that addresses Ms. Murphy's mental impairment is the examination of Dr. Passmore. Although Dr. Passmore found that claimant had a "mixed personality disorder" and "a few symptoms of depression", his examination otherwise was unremarkable. No other evidence refutes Dr. Passmore's conclusions, especially as it relates to the time frame in question -- February 1990 through July 28, 1992.⁴ Consequently, given the circumstances of this case, the ALJ did not abuse his discretion by completing the psychiatric form himself.⁵

B. Evaluation of Pain

The rule on evaluating complaints of pain is examined in *Luna v. Bowen*.⁶ The court must first determine whether a claimant has established a pain-producing impairment by

⁴ The "evidence" advanced Ms. Murphy is that she was married six times, she had been given antidepressants by her treating physician and that she saw a psychiatrist while she was in prison. These facts, Ms. Murphy argues, suggests that she has a "severe mental impairment" that has not been properly evaluated.

⁵ Under a very liberal reading of Section 421(h), the ALJ would have to seek assistance from a mental health expert every time a claimant submitted a scintilla of evidence concerning a mental impairment. The undersigned does not give *Andrade* such a liberal reading. As with most evaluations of evidence, the ALJ should be free to exercise reasonable discretion on this matter.

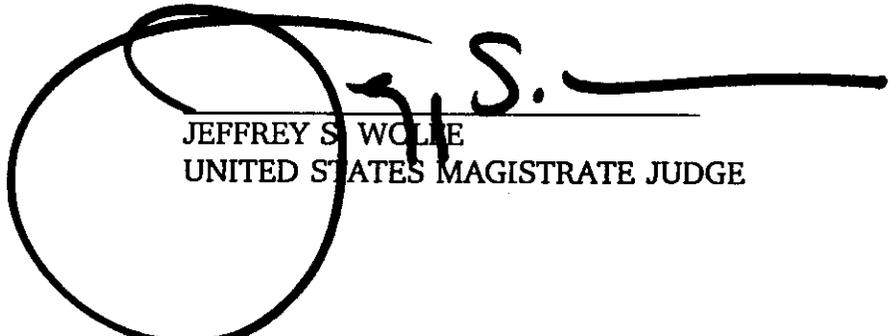
⁶ 834 F.2d 161 (10th Cir. 1987).

objective medical evidence. Second, the court must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id.* at 163-164.⁷

In the instant case, the ALJ did not err on this issue. He evaluated the objective evidence and Ms. Murphy's subjective complaints. While he found that Ms. Murphy had "mild to moderate pain", the ALJ concluded that the pain was not disabling. Therefore, the evaluation of pain was properly done.

In sum, none of the issues raised by Ms. Murphy in this appeal have merit. The ALJ properly examined and evaluated the evidence before reaching a decision. And the decision that Ms. Murphy is not disabled under the Social Security Act is supported by substantial evidence. The Secretary's decision is AFFIRMED.

SO ORDERED THIS 6th day of Oct., 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁷ In *Luna*, the Tenth Circuit set forth the factors to determine a claimant's credibility regarding subjective complaints of pain as (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. These factors, however, are not an exhaustive list.

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OCT 5 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

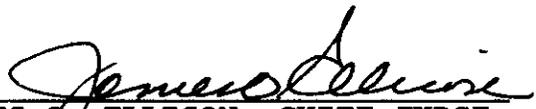
ANGINETTA MONTGOMERY,)
)
 Plaintiff,)
)
 vs.)
)
 AMSCO)
)
 Defendant.)

Case No. 93-C-139-E

O R D E R

This matter is dismissed pursuant to Fed.R.Civ.P. 4(m) for failure to effect service within 120 days of filing the complaint. The Court notes that the Complaint in this matter was filed on February 19, 1993, and that notice was given to Plaintiff on September 23, 1993 that the case would be dismissed if either service was not made or an extension of time not requested by September 30, 1993. The file reflects that the Defendant has not been served and that the Plaintiff has not requested any extension of time within which to effect service.

IT IS SO ORDERED THIS 5th DAY OF OCTOBER, 1994.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10-5-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 5 1994

BAILEY PETROLEUM CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 SCIENTIFIC DRILLING)
 INTERNATIONAL, INC.,)
)
 Defendant.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-439-E
(Consolidated with Case
No. 91-C-367-E)

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 5th day of October, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 10-5-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 4 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DYNEER CORPORATION,)
)
Plaintiff)
)
vs.)
)
MERCURY EDGEMONT CLUTCH CO.)
and VALUE COMPONENTS CORP.)
)
Defendants)

Case No. 93-C-8537 Bu ✓

ENTERED ON DOCKET
DATE OCT 05 1994

CONSENT DECREE AND PERMANENT INJUNCTION

This matter, coming to be heard upon the Joint Motion and Agreement of the Parties, this Court hereby finds, based upon the representations of counsel and the consents of the parties, that:

1. This Court has jurisdiction of the parties and of the subject matter hereof.

2. Plaintiff, Dyneer Corporation, has filed a Complaint for injunctive relief for breach of contract and for trademark infringement and unfair competition, and Defendants have been properly served with process in this matter.

3. Plaintiff is the owner of U.S. Trademark Registration No. 1,531,639 for the mark MERCURY for use in connection with "clutches for machinery other than land vehicles and marine craft", which registration is valid, subsisting and in full force and effect.

4. By reason of the long extensive and prior use of the above registered trademark, as outlined in the Complaint for

20

injunctive relief, Plaintiff's MERCURY mark has acquired a broad and extensive reputation and goodwill and serves to identify Plaintiff's goods and to distinguish them from the goods of others.

5. The parties have agreed that use by Defendants of the term "MERCURY" and/or the alternate terms "MERCUR", "MERC" or "MER", alone or in combination with other words, either as a trademark, service mark, tradename, business or corporate name or portion thereof, is or would be likely to cause confusion, mistake and/or deception with Plaintiff's registered MERCURY trademark, and that use by either Defendant would continue to infringe upon Plaintiff's statutory and common law rights in the MERCURY mark and registration listed above. The parties hereto agree that Defendants' use of the aforementioned terms and registered trademark is or would be likely to cause the public in general, and potential members and customers of Plaintiff to incorrectly believe or assume that Defendants' goods somehow emanate from, are affiliated, with, or are sponsored or approved by Plaintiff.

BASED UPON THE FOREGOING, and in order to resolve all issues between the parties, the parties have agreed and consented, and consequently the Court, HEREBY ORDERS, ADJUDGES AND DECREES pursuant to this consent as follows:

A. The Defendants, Mercury Edgemont Clutch Co., and Value Components Corp., and all those acting in concert or cooperation with either Defendant, are permanently enjoined from:

- (1) Using the terms "MERCURY", "MERCUR", "MERC" or "MER", or any variation or misspelling thereof, either alone or in combination with other words, either as a trademark, service mark, tradename, business or corporate name or a portion of any of the above.
- (2) Opening or operating any business using the above term, mark or facsimiles thereof or any other terms confusingly similar to Plaintiff's trademark listed above, in connection with the marketing, sale, distribution, promotion, advertising, identification or the Defendants' goods similar to those provided by the Plaintiff.

B. Upon the execution of this Consent and the entry of this Decree and Permanent Injunction, the Defendants shall within three (3) months cease and desist from the use of all advertising and promotional activities of any kind in print, radio, television, audio-visual or other media and shall destroy all literature, advertisements, labels, building signs, vehicle signs, tags, coupons and all printed materials of any kind in its possession or under its control which bear the Plaintiff's trademark as herein described as well as any marks commencing with the letters "MER" in any form or manner that would tend to identify or associate the Defendant or its business and services with those of the Plaintiff.

C. Defendants agree upon the execution of this Consent and the entry of this Decree and Permanent Injunction, never to adopt or use any trademark , service mark, tradename or corporate name which is likely to create confusion, mistake or deception with the trademark of the Plaintiff, as hereinbefore set forth; moreover, Defendants also agree and it is accordingly adjudged, that they will not directly or indirectly commit any act or do anything which would tend to divest or attempt to divest the Plaintiff or the goodwill which it has formed over the years in its registered mark or to do any act which encroaches upon the goodwill that the Plaintiff has acquired in its MERCURY mark.

D. Defendants agree and it is ordered and adjudged that it shall within three (3) months destroy all literature, signs, labels, prints, packages, documents, writings, advertising materials, stationery and other items in its possession or control which contain the infringing designations MERCURY, alone or in combination with other words, logos or symbols; and, that the Defendants shall also destroy all plates, molds, masters and other means of making any of such infringing items; and, that it will immediately notify all advertising or directory services, including all telephone directories and such similar services, that it is not authorized to display the infringing designation MERCURY and that it cancels such advertising and directs such directory publishers not to publish or include in any of its advertisements the infringing designation MERCURY; and, that the Defendants, within six three (3) months of this Order, shall

furnish Plaintiff's counsel with copies of its directive to such publishers and in addition thereto, furnish Plaintiff's counsel with an Affidavit that it has conformed with all of the provisions of this Order and permanent injunction.

E. The Court retains jurisdiction of this matter for the purpose of continued enforcement of the terms of this Consent Decree and Permanent Injunction and resolution of any disputes which might arise between the parties thereto; however, with respect to issues as pleaded, this Order is the final resolution thereof.

Agreed and consented to this 26 day of September, 1994.

DYNEER CORPORATION
By: Ralph S. Miller
Title: President, Tractech Div.

MERCURY EDMONT CLUTCH CO.
By: Harry Oschan
Title: President

Lawrence E. Laubscher Sr.
Lawrence E. Laubscher, Sr. ^{By}
Attorney for Plaintiff _{RPF}

VALUE COMPONENTS CORP.
By: Harry Oschan
Title: Director

[Signature]
Robert P. Fitz-Patrick
Attorney for Plaintiff

[Signature]
Kenneth C. Ellison
Attorney for Defendants

THE ABOVE JUDGMENT AND PERMANENT INJUNCTION IS HEREBY ENTERED this 4 day of Oct 1994.

[Signature]
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DENNIS B. PAGANO;
JOAN M. PAGANO;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

OCT 4 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 13 1994

CIVIL ACTION NO. 93-C-1091-B

AGREED DEFICIENCY JUDGMENT

This matter comes on for consideration this 4th day of October, 1994, upon the Agreement between the Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development, and the Defendants, Dennis B. Pagano and Joan M. Pagano, for a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United State Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendants, Dennis B. Pagano and Joan M. Pagano, appear by their attorney, Jim D. Shofner.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Housing and Urban Development have and recover from Defendants, Dennis B. Pagano and Joan M. Pagano, a deficiency judgment in the amount of \$48,458.71, plus interest at the legal rate of 5.69 percent per annum on said deficiency judgment from the date of judgment until paid.

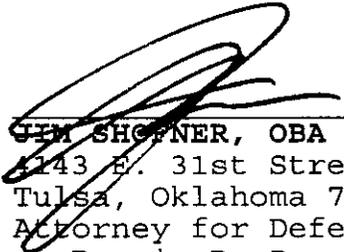
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA# 7169
Assistant United States Attorney
333 West 4th Street, Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463



GEM SHOPNER, OBA #8200
1143 E. 31st Street
Tulsa, Oklahoma 74135
Attorney for Defendants,
Dennis B. Pagano and
Joan M. Pagano

PP/lg

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

OCT 4 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

Plaintiff,

vs.

Case No. 91 C-815 E

ELMER L. HENDRYX, HELEN L.
HENDRYX, and E.H.R. TRUST,

Defendants.

STIPULATION FOR DISMISSAL

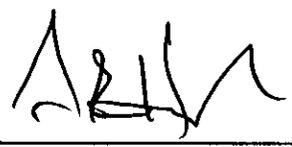
It is hereby stipulated and agreed that this action shall be dismissed without prejudice, the parties to bear their own costs, including attorneys' fees.

STEPHEN C. LEWIS
United States Attorney



JAMES J. LONG
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Tel. (202) 514-6563

Counsel for the United States



F. EUGENE HOUGH, OBA #25821306T
Hough & Watland
6968 South Utica Avenue
Tulsa, Oklahoma 74136
Tel. (918) 488-0929

Counsel for Defendants

ENTERED ON DOCKET

DATE 10-5-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 FRED P. LEIDING, JR. aka)
 FREDERICK PAUL LEIDING JR.; CITY)
 OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

OCT 4 1994

**Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

CIVIL ACTION NO. 94-C 520E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4 day
of Oct, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma**, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **City of Broken
Arrow, Oklahoma**, appears by Michael R. Vanderburg, City Attorney;
and the Defendant, **Fred P. Leiding, Jr. aka Frederick Paul
Leiding, Jr.**, appears not, but makes default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Fred P. Leiding, Jr. aka
Frederick Paul Leiding, Jr.** will hereinafter be referred to as
("**Fred P. Leiding, Jr.**"); and that the Defendant, **Fred P.
Leiding, Jr.**, is a single person.

ENTERED ON DOCKET

DATE 10-5-94

The Court being fully advised and having examined the court file finds that the Defendant, **City of Broken Arrow, Oklahoma**, acknowledged receipt of Summons and Complaint via certified mail on May 20, 1994.

The Court further finds that the Defendant, **Fred P. Leiding, Jr.**, was served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 12, 1994, and continuing through August 16, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Fred P. Leiding, Jr.**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Fred P. Leiding, Jr.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis,

United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on June 9, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on June 3, 1994; and that the Defendant, **Fred P. Leiding, Jr.**, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Two (2), LEISURE PARK II, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 25, 1980, David Bruce McKinney and Dana Christine McKinney, executed and delivered to NOWLIN MORTGAGE COMPANY their mortgage note in the

amount of \$52,950.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, David Bruce McKinney and Dana Christine McKinney, husband and wife, executed and delivered to NOWLIN MORTGAGE COMPANY a mortgage dated November 25, 1980, covering the above-described property. Said mortgage was recorded on December 2, 1980, in Book 1513, Page 2287, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 15, 1981, NOWLIN MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on May 11, 1982, in Book 4543, Page 2088, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 4, 1989, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C.. This Assignment of Mortgage was recorded on December 12, 1989, in Book 5225, Page 80, in the records of Tulsa County, Oklahoma. A corrected assignment, dated April 25, 1990, was filed on April 27, 1990, in Book 5249, Page 1509, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Fred P. Leiding, Jr., currently holds the record title to the property by virtue of a General Warranty Deed dated June 11, 1987, and

recorded on June 17, 1987, in Book 5031, Page 1962, in the record of Tulsa County, Oklahoma, from Dan L. Frank ; and Anne Frank, husband and wife, then the owners of the subject real property via mesne conveyances; and the Defendant, **Fred P. Leiding, Jr.**, is the current assumpor of the subject indebtedness.

The Court further finds that on June 2, 1988, the Defendant, Fred P. Leiding, Jr., filed his petition for Chapter 7 Bankruptcy, Case Number 88-1539-C, in United States Bankruptcy Court for the Northern District of Oklahoma; this case was discharged on October 7, 1988, and was closed on December 27, 1988.

The Court further finds that on November 1, 1989, the Defendant, Fred P. Leiding, Jr., entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1991 and May 1, 1992.

The Court further finds that the Defendant, Fred P. Leiding, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Fred P. Leiding, Jr.**, is indebted to the Plaintiff in the principal sum of \$91,057.24, plus interest at the rate of 12.5 percent per annum from May 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$46.00 which became a lien on the property as of June 23, 1992; a lien in the amount of \$42.00 which became a lien as of June 25, 1993; and a lien in the amount of \$45.00 which became a lien as of June 26, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendant, **Fred P. Leiding**, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover

judgment in rem against the Defendant, **Fred P. Leiding**, in the principal sum of \$91,057.24, plus interest at the rate of 12.5 percent per annum from May 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$133.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Fred P. Leiding, Jr. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Fred P. Leiding, Jr.**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$133.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



MICHAEL R. VANDERBURG, OBA #9180
City Attorney,
CITY OF BROKEN ARROW
P. O. Box 610
Broken Arrow, OK 74012
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 520E
NBK:lg

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1994 *RL*

CLIFFORD VERNON HARRIS AND)
REBA KATHRYN HARRIS,)
)
Plaintiffs,)
v.)
)
OKLAHOMA HORSE RACING)
COMMISSION, et al.)
)
Defendants.)

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Case No. 93-C-81-BU

**JUDGMENT STIPULATION FOR DISMISSAL OF
ACTION BY REASON OF SETTLEMENT**

Pursuant to Rule 41(1) Fed.R.Civ.P., Plaintiffs, Clifford Vernon Harris and Reba Kathryn Harris, and the Defendants, Benny Lovett, Claude Shobert, Royce Hodges, Charlie Cox and David Southard, through their respective attorneys of record, state that this action has been settled, without an admission of liability on the part of the Defendants, and stipulate that this action should be dismissed with prejudice, pursuant to the terms agreed upon by the parties.

SUSAN B. LOVING
ATTORNEY GENERAL OF OKLAHOMA

Dan M. Peters

DAN M. PETERS
ASSISTANT ATTORNEY GENERAL
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105
Attorney for the Defendants
State of Oklahoma, Benny Lovett,
Claude Shobert, Royce Hodges,
Charlie Cox and David Southard

Donna J. Priore

DONNA J. PRIORE
RANDAL D. MORLEY
1141 East 37th Street
Tulsa, OK 74105-3162
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEN E. GIDDENS
aka Kenneth Giddens
aka Kenneth E. Giddens;
FAY GIDDENS aka Fay A. Giddens;
GLOVER PROPERTIES, INC.
aka Glover Properties;
NEW HAMPSHIRE INSURANCE COMPANY;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA EMPLOYMENT SECURITY
COMMISSION;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
TULSA ADJUSTMENT BUREAU, INC.
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

OCT 4 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ENTERED
OCT 4 1994

CIVIL ACTION NO. 94-C-605-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4th day
of Oct., 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, NEW HAMPSHIRE
INSURANCE COMPANY, appears by its attorney, Cathy C. Taylor; the
Defendant, STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,
appears by Kim D. Ashley, Assistant General Counsel; the
Defendant, TULSA ADJUSTMENT BUREAU, INC., appears not having

previously filed a Disclaimer; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, appears not having previously filed a Disclaimer; the Defendant, GLOVER PROPERTIES, INC., appears not having filed a Disclaimer; and the Defendants, KEN E. GIDDENS and FAY GIDDENS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, KEN E. GIDDENS and FAY GIDDENS, were served with process a copy of Summons and Complaint on July 29, 1994; that the Defendant, GLOVER PROPERTIES, INC., signed a Waiver of Summons on June 22, 1994, filed on June 27, 1994; the Defendant, TULSA ADJUSTMENT BUREAU, INC., signed a Waiver of Summons on June 17, 1994, filed on June 21, 1994; that the Defendant, NEW HAMPSHIRE INSURANCE COMPANY, was served a copy of Summons and Complaint on June 15, 1994, by Certified Mail; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, was served a copy of Summons and Complaint on June 15, 1994, by Certified Mail; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on June 15, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 26, 1994; that the Defendant, NEW HAMPSHIRE INSURANCE COMPANY, filed its Answer on August 16, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its answer on July 8, 1994; that the Defendant, GLOVER PROPERTIES, INC., filed its Disclaimer on

July 6, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, filed its Disclaimer on June 24, 1994; that the Defendant, TULSA ADJUSTMENT BUREAU, INC., file its Disclaimer on July 1, 1994; and that the Defendants, KEN E. GIDDENS and FAY GIDDENS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Thirty-three (33), Block Five (5),
WOODLAND GLEN FOURTH, an Addition to the City
of Tulsa, Tulsa County, State of Oklahoma,
according to the recorded Plat thereof.**

The Court further finds that on January 4, 1985, Larry S. Caroon and Lynne S. Caroon, executed and delivered to The Richard Gill Company, their mortgage note in the amount of \$65,757.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Larry S. Caroon and Lynne S. Caroon, husband and wife, executed and delivered to The Richard Gill Company, a mortgage dated January 4, 1985, covering the above-described property. Said mortgage was recorded on January 7, 1985, in Book 4838, Page 292, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 4, 1986, The Richard Bell Company, assigned the above-described mortgage note and mortgage to Bancplus Mortgage Corp. This Assignment of Mortgage was recorded on November 12, 1986, in Book 4982, Page 253, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 19, 1989, Bancplus Mortgage Corp., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 10, 1989, in Book 5212, Page 2156, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, KEN E. GIDDENS and FAY GIDDENS, husband and wife, currently hold the fee simple title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on September 1, 1989, the Defendants, KEN E. GIDDENS and FAY GIDDENS, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on October 1, 1990.

The Court further finds that the Defendants, KEN E. GIDDENS and FAY GIDDENS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has

continued, and that by reason thereof the Defendants, KEN E. GIDDENS and FAY GIDDENS, are indebted to the Plaintiff in the principal sum of \$112,006.39, plus interest at the rate of Twelve and One-Half percent per annum from May 19, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$50.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$52.00 which became as of June 25, 1993; and a claim in the amount of \$51.00 for 1993 taxes. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of \$885.17 which became a lien on the property as of June 22, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, NEW HAMPSHIRE INSURANCE COMPANY, has a lien on the property which is the subject matter of this action by virtue of a judgment, filed in District Court, Tulsa County, Oklahoma on May 1, 1987, in the amount of \$5,962.50 which became a lien on the property as of May 7, 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KEN E. GIDDENS and FAY GIDDENS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, GLOVER PROPERTIES, INC., STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, and TULSA ADJUSTMENT BUREAU, INC., disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, KEN E. GIDDENS and FAY GIDDENS, in the principal sum of \$112,006.39, plus interest at the rate of Twelve and One-Half percent per annum from May 19, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$153.00, plus accruing interest, for personal property taxes for the years 1991, 1992, and 1993, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$885.17, plus accrued and accruing interest, for state taxes for the year 1991, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, NEW HAMPSHIRE INSURANCE COMPANY, have and recover judgment in the amount of \$5,962.50 for a judgment lien filed on May 7, 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; GLOVER PROPERTIES, INC.; STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION; TULSA ADJUSTMENT BUREAU, INC.; KEN E. GIDDENS and FAY GIDDENS, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, KEN E. GIDDENS and FAY GIDDENS, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment

the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, NEW HAMPSHIRE INSURANCE COMPANY, in the amount of \$5,962.50, plus the costs of this action.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$50.00, plus accruing interest, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$885.17, plus accrued and accruing interest, state taxes which are currently due and owing.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$103.00, plus accruing interest, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

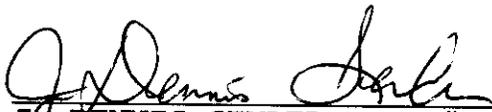
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



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Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



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Judgment of Foreclosure
Civil Action No. 94-C-605-B
NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DIANNA and KIRBY COUNCE,)
)
Plaintiffs,)
)
v.)
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)
)
Defendant.)

Case No. 94-C-211-B

ENTERED ON DOCKET

DATE OCT 04 1994

FILED
OCT 4 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 4th day of Oct., 1994, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refileing of a future action.

S. THOMAS W. LITTLE

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE SUM OF SEVEN THOUSAND
ONE HUNDRED TWENTY-THREE
AND 50/100 DOLLARS
(\$7,123.50) IN UNITED
STATES CURRENCY,

and

THE SUM OF ONE THOUSAND
SIXTY-NINE AND 20/100
DOLLARS (\$1,069.20)
IN UNITED STATES CURRENCY,

Defendants.

CIVIL ACTION NO. 94-C-298-B

ENTERED

DATE OCT 3 4 1994

FILED

OCT 3 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the
plaintiff's Motion for Judgment of Forfeiture as to the
following-described defendant currency:

THE SUM OF SEVEN THOUSAND
ONE HUNDRED TWENTY-THREE
AND 50/100 DOLLARS
(\$7,123.50) IN UNITED
STATES CURRENCY,

and

THE SUM OF ONE THOUSAND
SIXTY-NINE AND 20/100
DOLLARS (\$1,069.20)
IN UNITED STATES CURRENCY,

which totals \$8,192.70, all entities and/or persons interested in
the \$8,192.70 total defendant currency, the Court finds as
follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 29th day of March 1994, alleging that the defendant currency was subject to forfeiture pursuant to 18 U.S.C. §§ 981 because it was involved in a transaction, or attempted transaction(s), in violation of 18 U.S.C. § 1956, and pursuant to 18 U.S.C. § 1955 because it is property which was used in violation of the provisions of 18 U.S.C. § 1955, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 4th day of April 1994, by the Clerk of this Court to the United States Marshal for the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and for publication in the Northern District of Oklahoma.

On the 10th day of August 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency.

Robert Eugene Stingley, a/k/a Bob Eugene Stingley, and Billie Stingley were determined to be the only potential claimants in this action with possible standing to file claims to the defendant currency.

USMS 285s reflecting the service upon the defendant currency and all known potential claimants are on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, a newspaper of general circulation in the Northern District of Oklahoma, the district in which the defendant currency was seized, on August 18 and 25 and September 1, 1994. Proof of Publication was filed September 26, 1994.

No claims in respect to the \$8,192.70 total defendant currency have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the total \$8,192.70 defendant currency, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that
the following-described defendant currency:

THE SUM OF SEVEN THOUSAND
ONE HUNDRED TWENTY-THREE
AND 50/100 DOLLARS
(\$7,123.50) IN UNITED
STATES CURRENCY,

and

THE SUM OF ONE THOUSAND
SIXTY-NINE AND 20/100
DOLLARS (\$1,069.20)
IN UNITED STATES CURRENCY,

which totals \$8,192.70, be, and it hereby is, forfeited to the
United States of America for disposition according to law.

Entered this 3rd day of Oct. 1994.

S/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

APPROVED:



CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\STINGLEY\04204

to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under §§216(i) and 223 of the Social Security Act. Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir.1978).

Plaintiff sets forth two grounds for reversing the ALJ's denial of benefits:

A) Abuse of Discretion by the Administrative Law Judge.

1. Specifically, the Administrative Law Judge failed to consider all relevant factors in the analysis of subjective evidence of claimant's pain.

2. Specifically, the Administrative Law Judge applied the incorrect standard in determining the claimant's disability based on pain.

B) The Administrative Law Judge's action, findings, or conclusions are not support by substantial evidence.

1. Specifically, the Administrative Law Judge drew conclusions contrary to the evidence presented.

2. Conclusions drawn by the government's medical expert, and relied upon by the Administrative Law Judge, were discriminatory

in nature and contrary to the evidence presented.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. §423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See, Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987); *Talbot v. Heckler*, 814 F.2d 1456 (10th Cir.1987); *Tillery v. Schweiker*, 713 F.2d 601 (10th Cir.1983); and *Reyes v. Bowen*, 845 F.2d 242, 243 (10th Cir. 1988). The five steps, as set forth in the authorities above cited, proceed as follows:

- (1) Is the claimant currently working?
A person who is working is not disabled.
20 C.F.R. § 416.920(b).
- (2) If claimant is not working, does the claimant have a severe impairment? A person who does not have an impairment or combination of

impairments severe enough to limit his or her ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

- (3) If the claimant has a severe impairment, does it meet or equal an impairment listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1. A person whose impairment meets or equals one of the impairments listed therein is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) Does the impairment prevent the claimant from doing past relevant work? A person who is able to perform work he or she has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) Does claimant's impairment prevent him or her from doing any other relevant work available in the national economy? A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, at 243; Talbot v. Heckler, at 1460; 20 C.F.R. § 416.920.

The ALJ followed the five-step approach set forth above and concluded:

- 1) The claimant has not engaged in substantial gainful activity since the alleged onset date (March 15, 1988)¹.
- 2) The medical evidence establishes that the claimant has a history of connective tissue disease, lupoid,

¹ Plaintiff filed previous applications in 1987 and 1988 under Title II and Title XVI of the Social Security Act which were denied. Those denials were not appealed. Plaintiff alleged in her current application an onset date of March 15, 1988, but in a subsequent disability report she alleged her first condition made her stop working on March 15, 1988 and her second condition made her stop working on March 7, 1991.

hepatitis, steroid dependence with secondary obesity, chronic anemia, status post endometriosis, and successful exploratory laparotomy, and severe progressive muscle weakness.

3) That she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. The claimant has the residual functional capacity to perform work-related activities except for work involving lifting more than 10 pounds, standing and walking more than 2 hours at a time, and sitting more than 6 hours of an 8-hour day (20 CFR 404.1545 and 416.945).

4) The claimant's past relevant work as clerical worker did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1545 and 416.945).

The ALJ concluded therefore that claimant "was not under a disability as defined in the Social Security Act, at anytime through the date of this decision (20 CFR 404.1520(e) and 416.920(e))."

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, at 1521; Brown, at 362.

The Plaintiff has the burden to show that she is unable to return to the prior work she performed. Bernal, at 299. Further, the Plaintiff has the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577 (10th Cir.1984).

The Plaintiff's argument for reversal is essentially based upon the ALJ's evaluation of the evidence. Plaintiff contends that there was not substantial evidence to support the ALJ's findings, that the ALJ improperly weighed the medical evidence and that the ALJ improperly evaluated the pain credibility of the Plaintiff. Specifically, Plaintiff contends that the ALJ erroneously concluded that the Plaintiff could perform her past relevant work.

The ALJ considered the medical and other relevant evidence and concluded that Plaintiff could perform past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff's argues that the ALJ did not properly evaluate her claim that the pain she was suffering was disabling. The ALJ found that Plaintiff's testimony as to pain was not credible to the extent related and that her pain was not disabling.

The Tenth Circuit has held that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The ALJ considered all the evidence and the factors for

evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded Plaintiff's pain was not disabling to the extent testified to by claimant. The ALJ stated that the objective medical evidence showed no underlying medical condition so severe as to produce severe, disabling pain (Tr. at 21-24).

The ALJ set forth the dictates of Luna, at 22:

"The court, in Luna v. Bowen, 834 F.2d 161 (10th Cir.1987), recognized the difficulty of proving or disproving the severity of an individual's pain through medical test results, and instructed the decisionmaker to consider all the evidence presented which could possibly produce the pain alleged and utilize factors, in addition to the test results, e.g., 1) the claimant's persistent attempts to obtain pain relief, 2) willingness to try any treatment prescribed, 3) regular use of crutches or a cane or other ambulation assistive device, 4) regular contact with a doctor or pattern of treatment, 5) the possibility that psychological disorders are combined with her physical problems, 6) daily activities, and 7) dosage, effectiveness, and side effects of medication. Additionally, the court instructs that although the claimant's allegations of pain may not be disregarded based on lack of objective corroboration, the absence of an objective medical basis for the degree of severity of pain alleged may impact the weight to be given to the claimant's subjective allegations."

The ALJ observed that the nature of claimant's pain, as stated by claimant, was musculoskeletal, located all over her body, with a frequency depending on her exertional level; that she describes some aching type pain in her feet on some mornings associated with swelling to the extent she cannot put her shoes on; that both weather and exertional activities aggravate her pain but that the pain medication is helpful and does not have any significant side effects. The ALJ further observed that claimant does not use crutches, a cane or any other type of ambulation assistive device;

has never been referred for mental health treatment and fails to allege any depression, anxiety or other psychological impairment arising out of the alleged pain.

In addition, the ALJ noted that claimant's daily activities included grocery shopping twice a week (she can shop as long as necessary until the shopping was completed) plus other normal errands and shopping, cooking about an hour a day, housework about 30 minutes per day (but not every day), visiting friends about 3 hours a week, watching television about 5 hours per day, is active in various church activities, including teaching Sunday school, being active in two church choirs, has hobbies including crafts such as making bracelets and other arts and crafts work and can perform these activities as long as is necessary to complete the project (typically no more than 2 to 3 hours).

Claimant's treating physician, Janis Finer, M.D., reported in a November, 1991 statement that since claimant's discharge from the hospital in March 1991² she has gradually improved her strength and range of motion, had a good response to exercise and physical therapy and is expected to improve to the point that she is fully functional with no further pain or weakness. Dr. Finer further opined that, while being maintained on the steroid therapy, claimant's liver functions have become normal. Dr. Finer's

² Claimant underwent exploratory laparotomy, right salpingo-oophorectomy with excision of right rudimentary uterine horn, and excision of left ovarian endometriosis and fulguration of endometriosis in August, 1990, and in March, 1991 was admitted for further evaluation of abnormal liver tests and progressive muscle weakness.

additional opinion was that claimant could perform work-related activities in a sitting position, or in a standing position for short periods (moving about for short periods) but no heavy lifting and carrying for long periods.

Dr. Redding, the medical expert sponsored by the Secretary, testified that claimant's impairments did not satisfy the Listing of Impairments describing lupus and that while claimant has a history of lupoid hepatitis, she has not had frequent exacerbations demonstrating involvement of renal or cardiac or pulmonary or gastrointestinal or central nervous systems; that the March, 1991 hospital notes reflect that claimant has a negative hepatitis profile; that the muscle biopsy report found a pattern suggestive of lymphocytic vasculitis which is associated with connective tissue disease, particularly lupus, but also found that the myositis in this case is more focal than is usually seen in polymyositis. Dr. Redding testified that the claimant's condition was mild and that she was on very low doses of steroids for which there would be only minimal side effects. With regard to the muscle biopsy, Dr. Redding noted that even though it is consistent with polymyositis, it had very unusual findings in that it showed only a few of the muscle fibers were involved, with the involvement of the muscle and skin being only minimal.

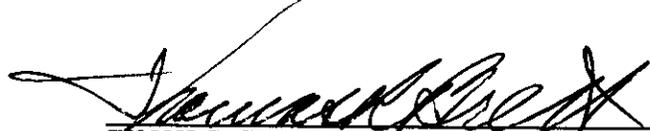
In Dr. Redding's opinion, claimant's pain complaints were not support by her impairments; that polymyositis causes weakness of the muscles but generally not pain; that hepatitis does not usually cause any symptoms other than weakness; that while claimant could

have some minimal pain secondary to joint swelling it would be therapeutically useful for her to work which could also help her to lose weight.

Substantial evidence supports the ALJ's conclusion that Plaintiff's allegations of pain were not credible to the extent that they precluded returning to her past work.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairments do not prevent her from performing her past relevant work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 3rd DAY OF October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 4 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DYNEER CORPORATION,

Plaintiff,

vs.

MERCURY EDMONT CLUTCH CO.
and VALUE COMPONENTS CORP.,

Defendants.

Case No. 93-C-853 Bu

ORDER

Plaintiff's Motion to Reopen for Entry of Consent Decree and Permanent Injunction comes on today for hearing. Being fully advised in the premises, this Court finds that for good cause shown, Plaintiff's Motion should be granted, and this case should thus be reopened so that the Court may enter a Consent Decree and Permanent Injunction, which was agreed upon by the parties hereto and which effectively terminates this litigation.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this case be reopened for the purpose of entering the Consent Decree and Permanent Injunction agreed upon by the parties hereto.



HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT COURT JUDGE

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 3 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CONNIE L. IVEY,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS,

Defendant.

No. 93-C-628-B

ENTERED IN DOCKET

DATE OCT 04 1994

ORDER

This matter comes on for consideration of Plaintiff's complaint seeking judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying Plaintiff's application for disability insurance benefits for the period from and after February 1, 1990, when she was age 37 years, under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq.*

Connie L. Ivey (Plaintiff or Claimant) filed an application for social security disability benefits (hereafter "Benefits") with the Defendant on March 27, 1992, asserting entitlement due to disability from chronic asthma, hypertension, hypothyroidism, obesity, and swelling in the legs. Following an administrative hearing on April 5, 1993, the Administrative Law Judge ("ALJ") entered a decision denying Plaintiff's application. The essence of the ALJ's decision is as follows: "The undersigned concludes that the claimant has (a) severe impairment(s) as defined in section 404.1521 of the Regulations, that is, impairments which significantly affect the performance of basic work activities. However, the record does not show that the claimant has an

impairment or combination of impairments which meets or equals the severity of any impairment listed in Appendix 1 to Subpart P of Regulations No. 4. Disability cannot, therefore, be established under section 404.1520(d) of the Regulations." The Claimant's impairment was centered primarily in her chronic asthmatic condition and not hypertension, hypothyroidism, obesity, and swelling in the legs. The ALJ concluded that Plaintiff ceased work as a cashier, telephone operator, income tax clerk and inventory clerk in February 1990, because she was pregnant and not due to any serious medical condition.

The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on February 1, 1990, the date the claimant stated she became unable to work, and continues to meet them through March 31, 1995.
2. The claimant has not engaged in substantial gainful activity since February 1, 1990.
3. The medical evidence establishes that the claimant has severe asthma; minimal obstructive lung disease, obesity, and nonsevere hypertension and hypothyroidism, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.
4. The degree of functional limitation the claimant alleges due to pain and other subjective complaint is not credible based on the reasons set forth herein.
5. The claimant has the residual functional capacity to perform work related activities except for work involving lifting/carrying 50 pounds occasionally or 25 pounds frequently, avoid excessive dust, fumes (20 CFR 404.1545).
6. The claimant's past relevant work as cashier, assistant manager/cashier, inventory clerk, income tax clerk, telephone operator did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1565).

7. The claimant's impairments do not prevent the claimant from performing her past relevant work.
8. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 404.1520(e)).

Plaintiff sets forth four grounds for reversing the ALJ's denial of benefits: (1) the ALJ's decision was not supported by substantial evidence; (2) vocational assumptions made by the ALJ were not in compliance with pronouncements made by the Social Security Administration (the "SSA"); (3) the medical evidence and vocational testimony support a conclusion that Plaintiff does not retain the residual functional capacity to engage in substantial gainful activity; and (4) Plaintiff meets a listing.

The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

The record reflects Claimant has eight to ten bad asthma attacks annually, requiring 24-36 hours during the acute stage, until controlled with Prednisone. She wheezes between attacks. Six to seven times a day Claimant uses a hand-held nebulizer

containing bronchodilators and a small Proventil inhaler in between times. She takes the prescribed medication Theodur supplemented with steroids frequently. (R. 161, 166). The record mentions Claimant takes "Intal inhalation" treatments three times daily requiring from 20 to 30 minutes per treatment. (R. 26, 46, 63, 69, 161, 166).

A review of the record leaves the court with two nagging questions: (1) is the petitioner's chronic asthmatic condition severe enough, essentially due to numerous acute episodes annually, to prevent her engaging in her past employment or some recognized substantial gainful activity, and (2) are the numerous daily pulmonary treatments that petitioner states require 20 to 30 minutes each (R. 69), such that no employment with the claimant's impairment would be available?

The Court remands the matter to the Secretary to further supplement the record regarding both the extent of claimant's disability and, if applicable, the availability of employment. The Social Security Administration or petitioner may consider it wise to employ a pulmonary consult to supplement the treating DOs' medical opinion.

IT IS SO ORDERED this 3rd day of October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

2. The ALJ failed to assess the Plaintiff's complaints of pain; and

3. The testimony of the Vocational Expert showed that the Plaintiff is disabled.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423(d)(1)(A). An individual

shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541,

544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

is not merely a quantitative exercise. Evidence is not substantial if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled.
20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to

limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920. In this case, the ALJ entered a decision at the fifth level of the inquiry, finding that Plaintiff is able to perform light-duty work. After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings.

Plaintiff's first argument for reversal is that the ALJ misapplied the medical vocational guidelines and filled out an OHA Psychiatric Review Technique Form without having a mental health care provider aid him. Plaintiff points to Andrade v. Secretary, 985 F.2d 1045 (10th Cir. 1993), for the proposition that this failure is reversible error. However, in Andrade, the ALJ had little to no medical evidence in the record regarding the extent of

the claimant's mental impairment. Here, the record amply supports the ALJ's finding regarding Plaintiff's mental impairment. See Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988).

The record shows that, on December 28, 1989, Plaintiff voluntarily admitted himself to Eastern State Hospital in Vinita, Oklahoma, for psychological examination and treatment. The mental status examination indicated that Plaintiff "was very logical, demonstrated no looseness of associations and no flight of ideas" (Tr. 266). He was alert and fully oriented, and he had a normal level of functioning (Tr. 267). He also was appropriately dressed and had adequate hygiene (Tr. 266). In a discharge summary, the doctor reported that Plaintiff's dependent personality could be "a very major portion of his psychiatric illness and most appropriately would be dealt with on the outpatient basis" (Tr. 265). Plaintiff was found to have a very dependent personality mixed with some passive/aggressive tendencies. Id. He was discharged from Eastern State at his own request, and he planned to continue outpatient treatment with CREOKS Mental Health Services.

In May 1990, CREOKS doctors stated that Plaintiff had not followed his prescribed treatment program (Tr. 315). "He did not ... truly engage in therapy, and soon felt he no longer needed outpatient treatment either." Id. Mental status examinations indicated that Plaintiff was alert, his thought content appropriate, coherent and relevant, he was fully oriented and spontaneous and he had adequate memory, retention and recall (Tr. 318-19). He was deemed stable with medication. He was offered

further treatment, but he said he "would do fine without treatment" (Tr. 315).

Plaintiff underwent a psychiatric examination by Dr. Passmore on February 3, 1992. The doctor found that Plaintiff was alert, and did not have any hallucinations or delusions. Plaintiff's memory was considered adequate (Tr. 403). He showed some evidence of ongoing depression and showed signs of sleep disturbance. His adjustment was found to be fair to poor (Tr. 404).

Upon reviewing the medical evidence of Plaintiff's mental state, the ALJ determined that Plaintiff's mental disorders are "not the source of marked distress" (Tr. 25). He found that, while Plaintiff is suspicious, he is not pathologically inappropriately suspicious or hostile. Plaintiff shows no oddities of thought, perception, speech or behavior; he shows only some passive/aggressive dependence on his mother. Id. Although Plaintiff states he has an inability to concentrate, the medical evidence indicates otherwise. The ALJ found that Plaintiff's depression does not meet the listed criteria that indicates disability per se. The Court agrees that Plaintiff's mental impairment is not sufficiently extreme as to be disabling, even in conjunction with Plaintiff's physical problems.

Plaintiff's second argument for reversal is that the ALJ misapplied the standards set down in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), for evaluating subjective allegations of pain. "If an impairment is reasonably expected to produce *some* pain, allegations of *disabling* pain emanating from that impairment are

sufficiently consistent to require consideration of all relevant evidence." Id. at 164 (emphasis in original). However, "[s]ubjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). Even considering Plaintiff's allegations of disabling pain, the ALJ relied on additional other evidence to determine that Plaintiff could perform light duty work.

The ALJ noted a number of "troubling inconsistencies and clear exaggerations" in Plaintiff's testimony (Tr. 30). For example, Plaintiff alleged at the administrative hearing that he had deformity in "every bone" of his body, and that he had prostate cancer (Tr. 17). There was no medical support provided that indicated deformity in every bone of Plaintiff's body¹ (Tr. 21). In addition, Plaintiff stated at the hearing that his prostate cancer was resolved by medical treatment and that no subsequent treatment was deemed necessary (Tr. 30).

Plaintiff, who is 5'2", alleged that he suffered a 25-pound

¹Plaintiff suffered from rickets as a child, which restricted his growth and accounted for a kyphosis, moderate lumbar scoliosis, marked thoracic scoliosis and for "ricket deformities" of the hands (Tr. 392). Plaintiff also suffers from a "keel" chest. Id.

weight loss. The medical records indicate, however, that Plaintiff weighed 95 pounds in December 1989 (Tr. 251); he weighed 102 pounds in January 1991 (Tr. 384); and he weighed 96 and a half pounds in February 1992 and at the time Plaintiff stated his weight was stable (Tr. 392). The ALJ noted that at no time did Plaintiff's reported weight exceed 106 pounds, and at no time did it drop lower than 94 pounds (Tr. 22). Therefore, the ALJ did not find Plaintiff's allegations of severe weight loss to be credible.

The objective medical evidence does not support Plaintiff's continuing allegations of pain. Plaintiff underwent several procedures between November 1990 and January 1991, including a transurethral resection of the prostate, a sphincterotomy and a hemorrhoid banding procedure. After this, his doctors could not find a basis for his complaints of pain (Tr. 322, 389). In October 1991, Dr. Cooper, one of Plaintiff's treating physicians, reported that Plaintiff continued to complain of rectal pain, which was treated with Darvocet N-100. He had no change of bowel, no dysuria or hematuria, no nausea or vomiting (Tr. 389). Rectal examination revealed good sphincter tone and no obstruction. Id. Plaintiff's anxiety was controlled with 10 mgs of Buspar a day. Plaintiff was found to be functioning "fairly well". Id.

Dr. Sutton conducted a consultative medical examination on February 3, 1992. Plaintiff complained of severe rectal pain, which he said worsened when he was sitting or laying down. Plaintiff's bowel habits were normal, and, according to Plaintiff, his prior cancer was gone (Tr. 391). Dr. Sutton noted that

Plaintiff had no difficulty in sitting or moving around the examination room, and that he did not evidence discomfort during the examination (Tr. 393). Plaintiff had good bilateral grip strength and good range of motion. He walked normally, did not exhibit tenderness and had no muscle spasms (Tr. 392). Dr. Sutton noted that Plaintiff's allegation of disability is solely based on rectal pain, for which he could find no physical cause. Id.

Plaintiff alleges that Dr. Sutton's entire report is suspect because he found that Plaintiff, who weighs 96 pounds, could lift 100 pounds, according to a form attached to Dr. Sutton's report. The ALJ noted this discrepancy, and found that Dr. Sutton's report as a whole was credible because the report itself states that Plaintiff can lift and carry any weight "commensurate with his size" (Tr. 31, 393). Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams, 844 F.2d at 755. Also, the ALJ did not rely solely upon the report of Dr. Sutton in determining that Plaintiff could perform light-duty work (Tr. 31).

Plaintiff's third argument for reversal is that the testimony of the Vocational Expert showed that the Plaintiff is disabled. Plaintiff states that the ALJ first found that Plaintiff could not perform a full range of light, medium or sedentary work, but upon remand found that Plaintiff could perform a full range of light work. The ALJ is not bound by any earlier residual functional capacity assessment. Campbell, 822 F.2d at 1522. The Court notes that the ALJ considered additional evidence before making his

second ruling, and there is substantial evidence in the record supporting it, as noted above. Because of this, the Court refuses to find Plaintiff to be disabled.

The ALJ considered the record and concluded that Plaintiff was capable of performing light-duty work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

The Court finds there is substantial evidence in the record to support the ALJ's determination. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 3rd DAY OF OCTOBER, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

OCT - 4 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

United States District Court

NORTHERN

DISTRICT OF

OKLAHOMA

ENTERED ON DOCKET

OCT 4 1994

DATE

Stephen Fortman

JUDGMENT IN A CIVIL CASE

v.

Donna E. Shalala, Secretary of Health
and Human Services

CASE NUMBER: 93-C-944-B

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that upon motion of the defendant, this case be remanded to the Secretary for further administrative action, per Ordered entered by Judge Thomas R. Brett on September 13, 1994.

October 4, 1994

Date

Richard M. Lawrence, Clerk

Clerk

(By) Deputy Clerk

21

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
BILLY JOHNSON;)
SETTIE A. JOHNSON;)
STATE OF OKLAHOMA, ex rel.)
OKLAHOMA TAX COMMISSION)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

OCT 3 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-566-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of September, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, BILLY JOHNSON, was served with process a copy of Summons and Complaint on July 12, 1994; that the Defendant, SETTIE A. JOHNSON, was served with process a copy of Summons and Complaint on July 12, 1994; that the

ENTERED ON DOCKET

DATE 10-4-94

Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on June 6, 1994, by Certified Mail.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on June 16, 1994; and the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 27, 1994; and the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on October 12, 1979, Billy Johnson filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 79-B-1251. On December 18, 1979, the United States Bankruptcy Court for the Northern District of Oklahoma entered its Discharge of Debtor, and on April 25, 1980, the case was subsequently closed.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Seventeen (17), Block Fifty-one (51),
VALLEY VIEW ACRES THIRD ADDITION to the City
of Tulsa, Tulsa County, State of Oklahoma,
according to the Recorded Plat thereof.**

The Court further finds that on April 1, 1976, the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, executed and

delivered to Harry Mortgage Co., their mortgage note in the amount of \$12,500.00, payable in monthly installments, with interest thereon at the rate of Eight and Three-Fourths percent (8.75%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, executed and delivered to Harry Mortgage Co., a mortgage dated April 1, 1976, covering the above-described property. Said mortgage was recorded on April 1, 1976, in Book 4208, Page 2570, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 8, 1976, Harry Mortgage Co., assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on April 9, 1976, in Book 4210, Page 858, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 16, 1989, Federal National Mortgage Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 6, 1989, in Book 5193, Page 500, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1989, the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements

were reached between these same parties on May 1, 1990 and February 1, 1991.

The Court further finds that the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, are indebted to the Plaintiff in the principal sum of \$17,642.24, plus interest at the rate of Eight and Three-Fourths percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$18.00 which became a lien on the property as of June 26, 1992; and a claim in the amount of \$1.00 for 1993 personal property taxes, plus accrued and accruing interest. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of \$672.87 which became a lien on the property as of ~~August 24,~~ ^{September 6,} 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, in the principal sum of \$17,642.24, plus interest at the rate of Eight and Three-Fourths percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 569 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$19.00, plus accrued and

accruing interest, for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$672.87, plus accrued and accruing interest, for ^{the} state taxes ^{lien} for the year 1985, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BILLY JOHNSON, SETTIE A. JOHNSON, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, BILLY JOHNSON and SETTIE A. JOHNSON, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$672.87, plus accrued and accruing interest, for state taxes currently due and owing.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$19.00, plus accrued and accruing interest, for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

c/ JAMES O. ELLISON

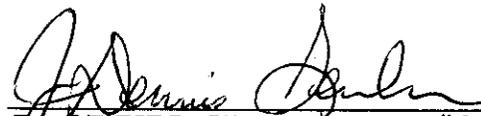
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
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Board of County Commissioners,
Tulsa County, Oklahoma



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(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-566-E

NBK:flv

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 04 1994

GARY LEE MCCOLLUM,)
)
 Plaintiff,)
)
 vs.)
)
 TOWN OF MOUNDS, OKLAHOMA,)
 MARIO LICCIARDELLO, individually)
 and in his official capacity as)
 Police Commissioner of the Town)
 of Mounds, Oklahoma; and BILL)
 MCCLENDON, individually and in)
 his official capacity as Chief)
 of Police of Mounds, Oklahoma,)
)
 Defendants.)

Case No. 93-C-1018-K

FILED

OCT 03 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

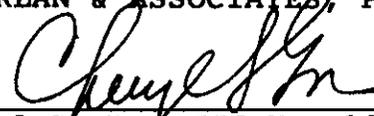
STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Town of Mounds, Mario Licciardello, and Bill McClendon, are hereby dismissed with prejudice.



Gary Lee McCollum

JOHN HARLAN & ASSOCIATES, P.C.

By: 

Cheryl S. Gar, OBA No. 14719
404 E. Dewey, Suite 106
P.O. Box 1325
Sapulpa, OK 74067

ATTORNEYS FOR PLAINTIFF

28

ELLER AND DETRICH
A Professional Corporation

By: 

JOHN H. LIEBER, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEY FOR DEFENDANTS

ENTERED ON DOCKET

DATE OCT 03 1994

FILED

SEP 30 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDY MARTIN and PATTY MARTIN,)	
)	
Plaintiffs,)	
)	
v.)	93-C-977-W
)	
SHELTER GENERAL INSURANCE CO.,)	
)	
Defendant.)	

ORDER

This order refers to Plaintiffs' Motion to Amend Judgment (Docket #59)¹, Plaintiffs' Motion for Attorneys Fees, Interest, and Costs (Docket #60), Defendant's Response to Plaintiffs' Motion to Amend Judgment (Docket #62), Defendant's Response to Plaintiffs' Motion for Attorneys Fees, Costs, and Interest (Docket #63), and Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion to Amend Judgment (Docket #66).

Plaintiffs ask the court to amend the judgment filed June 20, 1994 to include prejudgment interest of 15% from February 23, 1992 until the date of the verdict pursuant to Okla. Stat. tit. 36, § 3629(B).² They contend that the insurance policy in question

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

²Title 36 of the Oklahoma Statutes, §3629, states:

A. An insurer shall furnish, upon written request of any insured claiming to have a loss under an insurance contract issued by such insurer, forms of proof of loss for completion by such person, but such insurer shall not, by reason of the requirement so to furnish forms, have any responsibility for or with reference to the completion of such proof or the manner of any such completion or attempted completion.

B. It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of fifteen percent (15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict. This provision shall not apply to uninsured motorist coverage.

68

required Defendant to pay a loss within thirty days after the receipt of the proof of loss, which was signed by Plaintiffs on January 20, 1992 and received by Defendant on January 23, 1992. Plaintiffs also seek an order of the court awarding them attorney's fees and costs incurred in this action. They ask for \$184,882.25 in attorney's fees for 1390.54 hours plus enhancement by double for an amount of \$369,764.50. They also request an award of \$17,335.08 in costs, for a total request of \$387,099.58.

Defendant points out that this action for breach of an insurance contract and bad faith was tried to a jury, which found in favor of plaintiffs in the amount of \$132,372.45 in contract damages and \$10,000.00 in bad faith damages. The court adjusted the award of contract damages by crediting the amount of \$8,000.00 paid by Defendant for additional living expenses and \$92,671.91 unconditionally paid by Defendant during the litigation and entered judgment in favor of Plaintiffs in the amount of \$41,700.54. Defendant argues that Plaintiffs are not prevailing parties because it offered to confess judgment in the amount of \$120,863.65 on December 31, 1992.

Defendant also contends that Plaintiffs should not be allowed to recover prejudgment interest on amounts of \$92,671.92 and \$27,941.73³ which were unconditionally tendered to them on February 12, 1993 by Defendant. Defendant points out that the insurance contract bound it to pay a proof of loss within thirty days once "the

³These figures total \$120,863.65, which amount corresponds with the amount of the December 31, 1992 offer of judgment. The \$27,941.73 figure represents the amount advanced as attorneys fees, and will be credited against any award of attorneys fees which may be made pursuant to Okla. Stat. tit. 36, §3629. Defendant has no obligation to pay fees unless and until it is adjudicated that Plaintiffs are entitled to fees, and the reasonable amount of those fees is fixed by the court. This has not yet occurred, and Defendant is therefore entitled to a credit against prejudgment interest for the time that Plaintiffs had the actual or constructive use of the entire \$120,863.65 before judgment, even though the amount attributable to fees was not actually credited against the verdict.

When tendered, Plaintiffs rejected the proffered payments and made clear that they would not accept these monies absent court assurance that there would be no detrimental consequences for doing so. Plaintiffs had these funds available for use beginning on June 1, 1994, when the court determined that the tender was, indeed, unconditional; that acceptance of the checks would not constitute admissions in the separately pending civil declaratory judgment action, would not constitute satisfaction of plaintiffs' claims in this case, and that they were therefore free to cash them prior to trial. Defendants retained the earning power of the money before the court ruled that the checks could be cashed without detriment to Plaintiffs' lawsuits, and should consequently remain responsible for prejudgment interest to June 1, 1994.

amount of loss is finally determined . . ." and Okla. Stat. tit. 36, § 3629 requires an insurer to submit a written offer of settlement or reject a claim within ninety days of receipt of a proof of loss. Defendant also argues that Plaintiffs are not entitled to prejudgment interest on the \$10,000.00 awarded for bad faith, because Okla. Stat. tit. 36, § 3629 only applies to actions on an insurance contract. Defendant notes that Okla. Stat. tit. 12, § 727 provides for prejudgment interest on a damage award based on personal injury, including "detriment due to an action or omission of another" at the rate set forth in Oklahoma law, which is 6.99% in 1994.

Defendant also argues that Plaintiffs' Motion for Attorneys Fees, Interest, and Costs does not comply with Local Rules 54.1 and 54.2 concerning recovery of costs and attorney fees and seeks excessive fees. Defendant points out that the billing statement submitted by Plaintiffs' counsel contains unintelligible entries, such as the last two on page 8, and work done on other actions, such as the case dismissed on July 30, 1993, the declaratory judgment action which duplicated the fees in this case, and the case against Joe Paulk and Jack Yates, which Plaintiffs lost. Defendant notes that Plaintiffs' counsel seeks twenty-two hours of fees for work on a partial summary judgment motion on an issue conceded by Defendant, four hours for work on a "moot issue," 3.5 hours to review an uncontested motion in limine, and over forty hours on three nearly-identical motions in limine, only one of which was successfully argued to the court. Defendant also contends that Plaintiffs' counsel billed duplicative hours for several attorneys attending hearings, depositions, or the trial or preparing for the same. Defendant points out that Plaintiffs' counsel seeks fees for non-legal tasks, such as document filing and faxing, seeks an hourly rate of \$125.00

for inexperienced counsel, has failed to justify a fee enhancement, and has sought costs which are not recoverable by law. An initial review of the Plaintiffs' motion reveals that at least some of Defendant's concerns may be well founded, and that it is appropriate to schedule a hearing to address those issues. Counsel are directed to discuss the reasonableness of the fees claimed in advance of that hearing and to narrow the issues to be contested as much as possible by agreement and stipulation. Counsel are expressly cautioned and advised that they should engage in this exercise in the utmost good faith, and that the court will consider taking appropriate measures consistent with 28 U.S.C. § 1927 in the event the issues to be heard are deemed to have been unreasonably and vexatiously multiplied.

State law applies to questions involving prejudgment interest in diversity cases. McNickle v. Bankers Life and Casualty Co., 888 F.2d 678, 680 (10th Cir. 1989); Home Life Ins. Co., N.Y. v. Equitable Equipment Co., Inc., 694 F.2d 402, 404 (5th Cir. 1982); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941). The Home Life Insurance Company court went on to note that "state law dictates not only the entitlement to interest, but also the rate of interest" 694 F.2d at 404. Prejudgment interest is given in response to considerations of fairness and denied when its exaction would be inequitable. Brock v. Richardson, 812 F.2d 121, 126 (3d Cir. 1987); Blau v. Lehman, 368 U.S. 403, 414 (1962).

Plaintiffs' Motion to Amend Judgment (Docket #59) is granted. Plaintiffs are the prevailing party in this case under Okla. Stat. tit. 36, § 3629, because the jury's verdict

exceeded the written offer of settlement.⁴ Plaintiffs are entitled to prejudgment interest at the rate of 15% per year from April 23, 1992, which was ninety days after January 23, 1992 when Defendant received Plaintiffs' proof of loss, until June 1, 1994 on the amount of \$120,863.65, which was tendered by Defendant to Plaintiffs on February 12, 1993, but which tender was not determined by the court to be unconditional until June 1, 1994. This interest amounts to \$38,792.26⁵. Plaintiffs are entitled to prejudgment interest at the rate of 15% per year from April 23, 1992 until the date of judgment on the remaining amount of the verdict on the contract claim, \$11,508.80. This interest amounts to \$3,788.44.⁶ Plaintiffs are entitled to prejudgment interest on the \$10,000.00 verdict on the bad faith claim in the amount of \$789.00.⁷ These prejudgment interest calculations total \$43,369.70, and this amount will be added to the Amended Judgment which will be filed in this case in order to properly reflect the award of prejudgment interest.

A hearing is set on Friday, October 14, 1994 at 1:30 p.m. in Courtroom No. 2, located on the third floor, to consider plaintiffs' claim for attorneys fees pursuant to their

⁴Judgment would have been rendered on the verdict amount, if that amount had not already been partially satisfied by Plaintiffs' acceptance of Defendant's "unconditional" tender. The proper focus is on what Plaintiffs were entitled to receive as a result of the verdict. Here Plaintiffs were entitled to receive a total of \$142,372.45 (plus fees and costs) on their claims, which obviously exceeds the \$120,863.65 formally offered to settle all claims. The total of \$100,671.91 (\$92,671.92 "unconditional" payment plus \$8,000 in "unconditionally" paid additional living expenses) credited to the verdict amount in the judgment does not affect plaintiffs' total entitlement because it was not paid in settlement, but unconditionally, so as not to affect or limit plaintiff's claim. To say that the acceptance of the unconditional payments now renders the Plaintiffs the non-prevailing party is contrary to the law of this case, which the Plaintiffs relied upon in accepting the tender. See Order of June 1, 1994 (Docket No. 52).

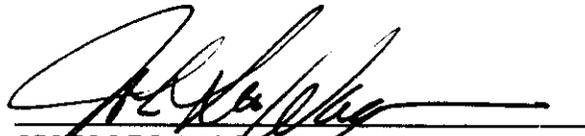
⁵The methodology for computing this amount is as follows: $\$120,863.65 \times .15$ (annual interest rate) divided by 365 days per year $\times 781$ days = \$38,792.26. In essence, this allows a credit for the 20 days plaintiffs had use of this money prior to the verdict.

⁶The methodology used to compute this figure is as follows: $\$11,508.80 \times .15$ (annual interest rate) divided by 365 days per year $\times 801$ days = \$3788.44

⁷While no Oklahoma cases have been found which specifically say that the award of prejudgment interest on a bad faith claim, is authorized, I accept Defendant's contention that Okla. Stat. tit. 12, § 727 applies. The amount was computed using the following methodology: $\$10,000 \times .0699$ (annual interest rate) divided by 365 days per year $\times 412$ days (from date of commencement of action on May 4, 1993 to date of judgment of June 20, 1994) = \$789.00.

Motion for Attorneys Fees, Interest, and Costs (Docket #60). The court will charitably deem the deadline for filing a bill of costs pursuant to Local Rule 54.1(A)⁸ met by the filing of the motion, but plaintiffs are to comply with that Rule and complete and file the Bill of Costs form available from the court clerk by October 14, 1994. Defendants may file a response brief by October 31, 1994, and the court clerk will then initially determine the costs to which plaintiffs are entitled in this action.⁹ The court will only address issues concerning the reasonableness of the claimed attorneys fees at the October 14th hearing.

Dated this 30th day of September, 1994.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Martin.4
ctck

⁸ Local Rule 54.1(A) states:

Bill of Costs: Within fourteen (14) days after the entry of judgment, the party recovering costs shall file a bill of costs on the form available from the clerk of court, a brief in support, and a verification of the bill of costs, pursuant to 28 U.S.C. § 1924. The brief shall (1) clearly and concisely itemize and describe the costs, (2) set forth the statutory basis for seeking those costs under 28 U.S.C. § 1920, and (3) reference and include copies of applicable invoices, receipts and disbursement instruments. Proof of service upon counsel of record of all adverse parties shall be indicated.

⁹See, Guidelines Employed by the Clerk When Taxing Costs, attached, which can be found as Attachment 8 to the Attorneys Information Manual prepared by Richard M. Lawrence, Clerk (Northern District of Oklahoma, January 14, 1994).

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT

RICHARD M. LAWRENCE
CLERK

NORTHERN DISTRICT OF OKLAHOMA
411 UNITED STATES COURTHOUSE
333 W Fourth Street
TULSA, OKLAHOMA 74103-3819

(918) 581-7796

(FAX) 581-7756

GUIDELINES EMPLOYED BY THE
CLERK WHEN TAXING COSTS

Following are the standards typically employed by the Clerk in awarding costs. I want to emphasize *typically*. Each cost bill must stand on its own and there are circumstances that would warrant the awarding of costs outside the stated parameters. Since the Clerk has discretion in awarding costs it is important to have a basis from which to proceed.

- A. **TRANSCRIPTS:** The costs of the originals of a trial transcript, a daily transcript, and of a transcript of matters prior to, or subsequent to trial, is taxable when authorized in advance or requested by the Court.
- B. **DEPOSITIONS:** Under 28 USC §1920 and 42 USC §1988, the reporter charge for the original of a deposition is taxable when the deposition is reasonably necessary to the litigation. The cost of a copy of a deposition is also taxable when each copy is reasonably necessary to the litigation.

A deposition is reasonably necessary to the litigation when:

- 1) A substantial part of the deposition is admitted into evidence, or
- 2) Portions of the transcript are presented for the purpose of impeachment, or
- 3) It is demonstrated that the deposition was used by the Court in ruling on a motion for summary judgment.

The expenses for depositions taken for merely investigational purposes or purely for discovery or simply in the course of thorough preparation will not ordinarily be taxed as costs. Fees, mileage and subsistence for the witness at the taking of a deposition are taxable at the same rate as for attendance at trial, if the deposition is reasonably necessary to the litigation under this standard.

C. **WITNESS FEES, MILEAGE, and SUBSISTENCE:**

- 1) **Witnesses in General:** The rate for witness fees, mileage, and subsistence is fixed by statute (20 USC §1821). Such fees are taxable if the witness takes the stand. Subsistence to the witness under 28 USC §1821 is taxable if the distance from the Court to the residence of the witness is such that mileage fees would be greater than subsistence fees if the witness were to return to his/her residence from day to day. No party shall receive witness fees or allowances. Witness costs shall be claimed by itemizing separately the fees, mileage and subsistence allowances.

2) **Expert Witness Fees:**

- a) Unless the expert witness is appointed by the Court, expert witness fees are not taxable under 28 USC §1920. Where the expert witness is not appointed by the Court, regular witness fees are taxable for expert witnesses if the expert witness takes the stand. Expert witness fees for expert witnesses appointed by the Court are taxable in amounts approved by the court.
 - b) Reasonable expert witness fees are taxable under 42 USC §1988, if the fees are not normally absorbed as part of law firm overhead, and if the Court concludes the testimony given in Court, was necessary. Expert witness fees are also taxable when otherwise explicitly authorized by federal law or the contract of the parties. If applicable, claims for expert witness fees shall be included with other appropriate costs in connection with the claims for attorney fees.
- D. **Interpreter and Translator Fees:** The reasonable fee of an interpreter is taxable if the fee of the witness involved is taxable. The reasonable fee of a translator is taxable if the document translated is admitted into evidence. Under 42 USC §1988, the reasonable fee of an interpreter or translator are taxable if such fees are not normally absorbed as part of the law firm overhead, and if the services rendered were reasonably necessary to the litigation.
- E. **Exemplification and Copies of Papers:** The cost of copies of an exhibit is taxable when requested by the Court, or when admitted into evidence in lieu of an original which is not available for introduction into evidence. The cost of copies submitted in lieu of originals, because of convenience of offering counsel, are not taxable. The fee of an official for certification or proof of non-existence of a document is taxable.
- F. **Maps, Charts, Models, Photographs, Summaries, Computations, and Statistical Summaries:** The cost of photographs, 8"x10" in size or less, is taxable if admitted into evidence. Enlargements greater than 8"x10" are not taxable except by order of the Court. Costs of models are not taxable except by order of the Court. The cost of compiling summaries, computations, and statistical comparisons is not taxable. Under 42 USC §1988, costs under this subsection are taxable if not normally absorbed as part of law firm overhead, and if these items were reasonably necessary to the litigation.

Costs in Comparative Negligence Cases: In comparative negligence cases, each party shall be taxed a percentage of each other party's taxable costs equal to the percentage of fault found against the taxed party.

RICHARD M. LAWRENCE, CLERK

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CHRISTOPHER LEE BUTLER)
aka Chris Lee Butler)
aka Christopher L. Butler;)
Shawna Louise Butler)
aka Shawna L. Butler;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma)
)
Defendants.)

CIVIL ACTION NO. 94-C-474-E

FILED

OCT 3 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31 day of Sept, 1994.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, CHRISTOPHER LEE BUTLER and SHAWNA LOUISE BUTLER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CHRISTOPHER LEE BUTLER, signed a Waiver of Summons on June 13, 1994.

The Court further finds that the Defendant, SHAWNA LOUISE BUTLER, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 12, 1994, and continuing through August 16, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by

ENTERED ON DOCKET

DATE 10-3-94

publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, SHAWNA LOUISE BUTLER, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, SHAWNA LOUISE BUTLER. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 23, 1994; and that the Defendants, CHRISTOPHER LEE BUTLER and SHAWNA LOUISE BUTLER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, CHRISTOPHER LEE BUTLER is one and the same and sometimes referred to as Chris Lee Butler and Christopher L. Butler. The Defendant, SHAWNA LOUISE BUTLER is one and the same and sometimes referred to as Shawna L. Butler.

The Court further finds that since their divorce, the Defendants, CHRISTOPHER LEE BUTLER and SHAWNA LOUISE BUTLER have remained unmarried persons.

The Court further finds that on January 17, 1991, Chris Lee Butler and Shawna Louise Butler, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-85-W. On May 15, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and on March 19, 1992, the case was subsequently closed.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fifteen (15), Block Two (2), OAK GROVE ADDITION, an Addition to the Town of Carbondale, now an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on October 27, 1987, the Defendant, CHRISTOPHER LEE BUTLER, executed and delivered to Mortgage Clearing Corporation, his mortgage note in the amount of \$35,240.00, payable in monthly installments, with interest thereon at the rate of Eight and Five-Eighths percent (8 5/8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CHRISTOPHER LEE BUTLER, a single person, executed and delivered to Mortgage Clearing Corporation, a mortgage dated October 27, 1987, covering the above-described property. Said mortgage was recorded on October 29, 1987, in Book 5060, Page 2287, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 4, 1989, Mortgage Clearing Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban

Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 8, 1989, in Book 5182, Page 645, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1989, the Defendant, CHRISTOPHER LEE BUTLER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1989 and March 1, 1990.

The Court further finds that the Defendant, CHRISTOPHER LEE BUTLER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CHRISTOPHER LEE BUTLER, are indebted to the Plaintiff in the principal sum of \$52,369.43, plus interest at the rate of Eight and Five-Eighths percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, CHRISTOPHER LEE BUTLER and SHAWNA LOUISE BUTLER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development,

have and recover judgment In Rem against the Defendant, CHRISTOPHER LEE BUTLER, in the principal sum of \$52,369.43, plus interest at the rate of Eight and Five-Eighths percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CHRISTOPHER LEE BUTLER and SHAWNA LOUISE BUTLER, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CHRISTOPHER LEE BUTLER, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to

possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S. JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
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(918) 581-7463


DICK A. BLAKELEY, OBA #852
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(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-474

NBK:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 3 1994
Shera M. Lawrence, Clerk
U.S. DISTRICT COURT

BUSTER HOPKINS,)
)
Plaintiff(s),)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna E. Shalala, Secretary)
)
Defendant(s).)

93-C-0588-Wolfe

ORDER

Now before the court is Buster Hopkins's appeal of a decision by the Secretary of Health and Human Services to deny him Social Security disability benefits.¹ The chief issue is whether substantial evidence supports the Secretary's decision. In addition, Hopkins asserts two other issues: (1) The Administrative Law Judge ("ALJ") did not properly weigh the objective medical evidence, including that of his "treating physician"; and (2) The ALJ did not properly analyze Hopkins's subjective complaints of pain. For the reasons discussed below, the Court **reverses** the Secretary's decision.

I. Standard of Review

The court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).² A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

Keeping those two standards of review in mind, a claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In the case at bar, Hopkins applied for disability benefits on August 28, 1990, alleging that he had been unable to work since June 25, 1989 because of **diabetes, chronic**

² *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).*

pain, gastric pain that causes vomiting and high blood pressure.³ The Secretary denied the application initially and on reconsideration. Hopkins then requested a hearing before an ALJ.

The ALJ -- after a June 15, 1992 hearing -- found that Mr. Hopkins was not disabled under the Social Security Act. At step 4, the ALJ concluded that Hopkins could not return to his past relevant work as a dishwasher/janitor. At step 5, however, the ALJ found that Hopkins could do "sedentary" work such as a "kitchen preparation" worker and as a grinder/buffer. Hopkins challenges that finding, arguing that he is disabled under the Social Security Act.

II. Legal Analysis

Mr. Hopkins, who has a GED and was born in 1943, raises two issues on appeal: (1) The ALJ improperly weighed the objective medical evidence; and (2) The ALJ improperly analyzed his complaints of pain.

A. ALJ's Handling of Objective Medical Evidence

The issue here, related to whether "substantial evidence" supports the Secretary's decision, focuses on reports from four doctors. Of the four doctors, three indicated that Mr. Hopkins either could not work or would have a difficult time doing so. The ALJ, in effect, rejected those opinions and relied on the opinion of a fourth doctor to conclude Mr. Hopkins could work.

³ Hopkins testified that he worked as a dishwasher at Northeastern Oklahoma A&M in Miami, Oklahoma from 1982 until 1989. He was forced to leave his job because had to go to prison on a lewd molestation conviction. He was released from prison in 1990. Record at 289. Hopkins also acknowledges a history of sexually molesting children. Id. Dr. Thomas Goodman, who examined Hopkins on January 21, 1991, wrote that "the only psychiatric problem I can find at the present are paraphilia, pedophilia chronic." Id. at 290. Hopkins testifies that he no longer has that problem.

Mr. Hopkins' treating physician at Morton Health Services noted on at least two times (May 14, 1991 and June 18, 1991) that Mr. Hopkins could not work. *Record at 364, 426.* A second doctor, Dr. Thomas Ashcraft, examined Mr. Hopkins on January 3, 1991. Dr. Ashcraft, a consulting physician, explained his findings as follows:

My impression is that this patient had diabetes, probably not under good control. He is post gunshot wound to the right foot with decreased function due to pain. The patient has intermittent claudication. He has a diabetic ulcer of the left foot. He probably has either 1. stomach ulcers, gastric ulcers or cancer of the stomach...He has nocturia, loss of memory and hypertension. With this patient's low mental status, he is unable to answer questions with ease...I feel that as a result of the above mentioned diagnoses, this patient could not obtain any type of functional job and would be unable to carry on any type of constructive job activity. He cannot be retrained. It...would be impossible to train this patient to undertake any type of job activity. *Record at 286.*

A third doctor, Dr. Robert Harris -- another consulting physician -- also found that Mr. Hopkins would have difficulties in working. Dr. Harris examined Mr. Hopkins on February 18, 1991, finding "the patient's limited ability to stand for long periods of time, his inability to walk without leg and hip pain, and his dyspnea on exertion, he is limited in his ability to work and retain a job, even which would include prolonged sitting and standing." *Id. at 296. (Emphasis added.)*

Dr. Dan Calhoun, a consulting physician who examined Mr. Hopkins on May 14, 1991, made no comments as to Mr. Hopkins' ability to work. However, he diagnosed Plaintiff with the following: (1) Diabetes mellitus; (2) significant foot and leg pain; (3) hypertension; (4) Gross exogenous obesity; (5) Chronic low back pain; and (6) Recent history of peptic ulcer disease. *Id. at 333.*

After discussing the medical evidence in the record, including the opinions of the four doctors, the ALJ rejected the opinion of Hopkins' treating physician and discounted the opinions of Drs. Ashcraft and Harris to the extent they supported a finding of disability. Instead, the ALJ relied, in part, on the findings of Dr. Calhoun. Wrote the ALJ:

The consultative physical examinations discussed above show no severe neurological deficits that would preclude sedentary work. The examination of the claimant's back and joints were essentially unremarkable. Notably, the most recent examination by Dr. Calhoun showed the claimant's radial, femoral, carotid, popliteal and pedal pulses were palpable bilaterally. This finding was consistent with the normal doppler flow study performed in February. No consultative physician reported any laboratory findings that demonstrated any medical condition that would prevent the claimant from performing sedentary work. Thus, the medical opinions of the consultative physicians to the extent they indicate the claimant cannot work, are rejected in the face of contrary evidence, including the documented laboratory findings, the inconsistent physical findings, and the claimant's reported daily activities and functional limitations. *Record at 31.*

The ALJ's explanation does not pass muster for two reasons. First, the ALJ may not interpose his own "medical expertise" over the real medical experts in the case (i.e. the doctors who examined Mr. Hopkins). The ALJ rejected not only the treating physician opinion⁴, but also the conclusions of two consulting examiners and, in effect, suggested that he [the ALJ] was in a better position than three doctors to interpret claimant's laboratory findings. This was improper. *See, Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987) ("While the ALJ is authorized to make a final decision concerning disability, he can not interpose his own "medical expertise" over that of a physician").

⁴ *The treating physician rule requires the ALJ to give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In this case, the ALJ did not err in discounting the opinion of Hopkins' treating physician. His "finding" was not explained whatsoever. See Edwards v. Sullivan, 937 F.2d 580, 583 (11th Cir. 1991) ("The treating physician's report may be discounted when it is not accompanied by objective medical evidence or is wholly conclusory.") But that, in itself, does not explain away the ALJ's decision to also reject the conclusions of two consulting physicians.*

Second, substantial evidence does not support a the ALJ's finding of no disability. The ALJ primarily relied on the following evidence: the Vocational Expert's testimony, selective parts of Dr. Calhoun's examination and portions of Mr. Hopkins' testimony concerning his daily activities. That evidence, as compared with the findings of the treating physicians, is not substantial. This is especially true since the Vocational Expert acknowledged at one point that Mr. Hopkins could not work. *Record at 82.*⁵ Consequently, the Secretary's decision is **REVERSED** and **REMANDED** for an award of disability benefits beginning on January 3, 1991.⁶

SO ORDERED THIS 28th day of Sept, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁵ *The evidence supporting Mr. Hopkins' disability claim is substantial. First, Dr. Ashcraft found that he could not work. Second, Dr. Harris found that Mr. Hopkins was "limited" in his ability to work. Third, the treating physician noted that Mr. Hopkins could not work. This opinion was properly discounted by the ALJ, but still carries some weight, however slight. Fourth, the diagnosis of Dr. Calhoun supports, in part, the findings of Drs. Harris and Ashcraft. Fifth, much of Mr. Hopkins' own testimony supports his disability. Sixth, the evidence submitted by David Ganzor (discounted by the ALJ) supports some of Hopkins' testimony. Evidence suggesting Hopkins' limited mental capacities also is included in the record.*

⁶ *Mr. Hopkins claims an onset date of June 25, 1989. However, the pertinent medical evidence indicates that Mr. Hopkins was disabled under the Act no earlier than January 3, 1991 -- the date of Dr. Ashcraft's examination. The medical evidence prior to that does not support a disability finding. Therefore, Mr. Hopkins should be awarded benefits as January 3, 1991.*

ENTERED ON DOCKET

DATE OCT 03 1994

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA

KEITH E. BRANDINGER,)
)
Plaintiff,)
)
v.)
)
DONNA SHALALA, SECRETARY)
OF HEALTH AND HUMAN SERVICES,)
)
Defendant.)

OCT 03 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

92-C-480-W

ORDER

This order pertains to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #14).¹ On March 10, 1994, this court issued an order remanding the case to the Secretary for reconsideration after testimony of a vocational expert is obtained. The Plaintiff now seeks attorney fees in the amount of \$2,357.55 pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1).²

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

² Title 28 of the United States Code, §2412(d)(1), states:

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny

In Melkonyan v. Sullivan, 501 U. S. 89, 111 S.Ct. 2157, 2159, 115 L.Ed.2d 78 (1991), the Supreme Court addressed "whether an administrative decision rendered following a remand from the District Court is a 'final judgment' within the meaning of EAJA." The Court concluded that "a 'final judgment' for purposes of 28 U.S.C. § 2412(d)(1)(B) means a judgment rendered by a court that terminates the civil action for which EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." Id. at 2162.

The Court discussed whether the district court had entered a final judgment in the case and, if not, whether either party was entitled to return to the district court for entry of a final judgment. Id. at 2162-63. It concluded that "[t]he answer depends on what kind of remand the District Court contemplated." Id. at 2163. In Sullivan v. Finkelstein, 496 U.S. 617 (1990), the Court had held that only two types of remands are available under the Social Security Act. The first type, under the fourth sentence of 42 U.S.C. § 405(g), provides: "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." The second type, under the sixth sentence, provides:

The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence

an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

The Court in Melkonyan concluded that dividing remand orders into two categories "harmonizes the remand provisions of § 405(g) with the EAJA requirement that a 'final judgment' be entered in the civil action in order to trigger the EAJA filing period." 111 S.Ct. at 2165. In sentence four cases, the EAJA filing period begins after the final judgment affirming, modifying, or reversing the Secretary's decision, but in sentence six cases, the filing period begins after the post-remand proceedings when the Secretary enters a final judgment. The Melkonyan Court vacated the decision of the appellate court and remanded the case for the district court to clarify its remand order to show if it was entered according to sentence four or six of § 405(g) to determine when the EAJA filing period began.

However, in cases where a remand occurs for the purpose of hearing additional evidence or making additional findings of fact when the district court has found that the Secretary's position is not supported by substantial evidence or the Secretary applied the wrong legal standard, neither sentence four nor six applies. "The sixth sentence of § 405(g) plainly describes an entirely different kind of remand, appropriate where the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that might have changed the outcome of the proceeding."

Finkelstein, 496 U.S. at 626. The court ordering such a remand intends to retain jurisdiction over the action pending the remand and to enter final judgment after the administrative proceedings are completed.

The Supreme Court addressed such a situation in Sullivan v. Hudson, 490 U.S. 877 (1989). In Hudson, the court of appeals directed the district court to remand the action for reconsideration after concluding that the Secretary failed to follow the applicable regulations. Id. at 880-81. After further proceedings, claimant was awarded benefits. The Court concluded that fees could be awarded under the EAJA for representation on remand if the Secretary's position was not substantially justified and the representation was necessary to carry out the court's mandate and to vindicate the claimant's rights. Id. at 890. The Court noted that when a remand occurs because the Secretary has made a factual or legal error in evaluating the claimant's claim, the remand order will often include instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed. Id. at 885.

The Court in Hudson noted that when a remand does not dictate the receipt of benefits, the claimant usually cannot attain "prevailing party" status under the EAJA until the administrative proceedings are concluded and the Secretary has modified his earlier decision to award benefits. Id. at 886. Also, an application for fees under the EAJA must be filed "within thirty days of final judgment in the action," yet there may be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete. Id. at 887.

Thus, for purposes of the EAJA, the Social Security claimant's status as a prevailing party and the final judgment

in her "civil action ... for review of agency action" are often completely dependent on the successful completion of the remand proceedings before the Secretary. Moreover, the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary.

Id. at 887-88.

The Tenth Circuit in Gutierrez v. Sullivan, 953 F.2d 579, 584 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 3064, 125 L.Ed.2d 746 (1993), construed the Supreme Court's opinions in Hudson and Melkonyan as recognizing a subcategory of cases in which the district court makes a fourth sentence remand, but intends to retain jurisdiction over the action pending further administrative proceedings and enter a final judgment after those proceedings are completed.

Subsequent to its decisions in Sullivan v. Hudson, 490 U.S. 877 (1989) and Melkonyan v. Sullivan, 501 U.S. 89 (1991), the Supreme Court determined that a sentence four remand pursuant to 42 U.S.C. § 405(g) was indeed a final judgment in Shalala v. Schaefer, ___ U.S. ___, 113 S.Ct. 2625, 125 L.Ed.2d 239 (1993). The Court ruled that a district court remanding a case pursuant to sentence four of § 405 must enter judgment in the case and may not retain jurisdiction over the administrative proceedings on remand, finding the sentence's plain language authorizes a court to enter a judgment "with or without" a remand order, not a remand order "with or without" a judgment. Id. at 2629.

The Court decided its ruling in Sullivan v. Hudson that fees incurred during administrative proceedings held pursuant to a district court's remand order may be recovered under the EAJA does not apply where the remand is ordered pursuant to

sentence four of § 405(g). Id. at 2630-31. The Court also stated that, contrary to dicta in Sullivan v. Hudson, a Social Security claimant who obtains a sentence-four judgment reversing the Secretary's denial of benefits meets the description of a "prevailing party" set out in Texas Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 791-792 (1989). 113 S.Ct. at 2632.

Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #14) is granted. The court's March 10, 1994 order was a final judgment and Plaintiff is a prevailing party entitled to fees under the EAJA.

Plaintiff's counsel asks to be compensated at an hourly rate of \$120.90. Under the EAJA, the statutory maximum for attorney fees is \$75.00 per hour. Counsel claims an entitlement to the higher rate based on the increased cost of living since the enactment of the EAJA in 1981 as evidenced by the Consumer Price Index published by the United States Department of Labor. Counsel claims as additional grounds for the \$120.90 per hour rate his experience in Social Security litigation and his continuing legal education in the area.

Section 2412(d)(2)(A) provides that: ". . . attorney's fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." Complete discretion is afforded district courts in awarding attorney fees under EAJA. Pierce v. Underwood, 487 U.S. 552, 571 (1988); Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989). According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994),

the Consumer Price Index for All Urban Consumers ("CPI-U") was 93.4 in 1981 and 147.2 in March of 1994. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 53.8, and that number is divided by the old CPI-U, which is .576, and multiplied by 100, which results in a 57.6% change. The base rate for attorney's fees is \$75.00 and 57.6% of that rate is \$43.20. The total fee is the base rate plus the increase in fee resulting from a higher CPI-U, or a total fee of \$118.20. Counsel is entitled to attorney's fees in the amount of \$2,304.90 for 19.5 hours at the enhanced rate of \$118.20 per hour.

Dated this 30th day of September, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Brand.ord
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