

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

FILE

OCT 19 1994

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

RICHARD MCKINNEY,)
)
Petitioner,)
)
vs.)
)
MICHAEL W. CARR, et al.,)
)
Respondents.)

Case No. 92-C-971-C

ORDER

On August 29, 1994, the Court gave Petitioner yet another opportunity to file a reply to Respondents' supplemental response and to advise the Court whether he wishes to pursue his pending petition for a writ of habeas corpus although he has already served his sentence and has been released from custody. The Petitioner has failed to respond to the Court order. **ACCORDINGLY, IT IS HEREBY ORDERED** that Petitioner's application for a writ of habeas corpus (doc. #1) be **dismissed** at this time for lack of prosecution.

IT IS SO ORDERED this 19 day of oct., 1994.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-20-94

Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, RICHARD F. GRAY and BETTY J. GRAY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RICHARD F. GRAY, was served with process a copy of Summons and Complaint on August 10, 1994; that the Defendant, BETTY J. GRAY, was served a copy of Summons and Complaint on August 10, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on June 29, 1994 by Certified Mail; and that Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on June 29, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on July 22, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its answer on July 8, 1994; and that the Defendants, RICHARD F. GRAY and BETTY J. GRAY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, RICHARD F. GRAY, is also known as and sometimes referred to as Richard Finley Gray, Dick Gray, Richard J. Gray and Richard Gray, will hereinafter be referred to as "RICHARD F. GRAY." The Defendant, BETTY J. GRAY, is also known as and sometimes referred to as Betty Jean Gray, will hereinafter be referred to as "BETTY J. GRAY."

The Court further finds that on November 12, 1992, Richard Finley Gray aka Dick Gray and Betty Jean Gray, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-B-3950. On March 17, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and on July 9, 1993 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 TWENTY-THREE (23), BLOCK ONE (1),
WOODSTOCK, 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 December 9, 1982, Julie N. Morris, executed and delivered to First Continental Mortgage Co., her mortgage note in the amount of \$53,900.00, 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, Julie N. Morris, a single person, executed and delivered to First Continental Mortgage Co., a mortgage dated December 9, 1982, covering the above-described property. Said mortgage was recorded on December 13, 1982, in Book 4655, Page 2277, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 25, 1987, Commonwealth Savings Association successor by merger to First Continental Mortgage Co., assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America, L.P. This Assignment of Mortgage was recorded on June 18, 1987, in Book 5032, Page 454, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 11, 1988, Commonwealth Mortgage Company of America, L.P., 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 August 23, 1988, in Book 5123, Page 1526, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, RICHARD F. GRAY and BETTY J. GRAY, 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 July 1, 1988, the Defendants, RICHARD F. GRAY and BETTY J. GRAY, 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 July 1, 1989 and July 1, 1990.

The Court further finds that the Defendants, RICHARD F. GRAY and BETTY J. GRAY, 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, RICHARD F. GRAY and BETTY J. GRAY, are indebted to the Plaintiff in

the principal sum of \$101,512.04, 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 \$41.00 which became a lien on the property as of June 26, 1992; and a lien in the amount of \$27.00 which became a lien as of June 25, 1993. Said liens 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 \$256.61 which became a lien on the property as of May 27, 1993; and a lien in the amount of \$403.74 which became a lien as of January 21, 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, RICHARD F. GRAY and BETTY J. GRAY, are in default, and have 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, RICHARD F. GRAY and BETTY J. GRAY, in the principal sum of \$101,512.04, 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 6.06 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 \$68.00, plus accruing interest, for personal property taxes for the years 1991 and 1992, 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 \$660.35, plus accrued and accruing interest, for state taxes for the years 1991 and 1992, 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, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, RICHARD F. GRAY and BETTY J. GRAY, 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, RICHARD F. GRAY and BETTY J. GRAY, 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 appraisal 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 \$41.00, plus accruing interest, personal property taxes which are currently

due and owing.

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$256.61,
plus accrued and accruing interest, state taxes
which are currently due and owing.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa
County, Oklahoma, in the amount of \$27.00, plus accruing
interest, personal property taxes which are currently due and
owing.

Sixth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$403.74,
plus accrued and accruing interest, state 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.

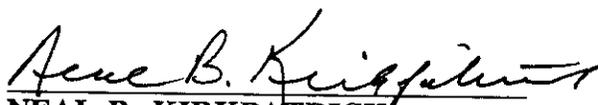
right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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:

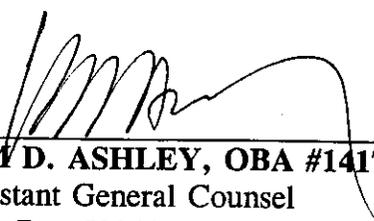
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Judgment of Foreclosure
Civil Action No. 94-C-645-E

NBK:flv

ENTERED ON DOCKET
DATE OCT 19 1994
FILED

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

OCT 18 1994

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

PAULA A. BOYES, et al,)
)
Plaintiff(s),)
)
v.)
)
WORLD PUBLISHING COMPANY,)
)
Defendant(s).)

94-C-0258-K ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

1. Introduction

This report and recommendation addresses Defendant World Publishing Company's Motion to Disqualify Counsel (docket #24), filed August 18, 1994. Also addressed are Plaintiff's Motion to Strike (docket #37) and Plaintiff's Motion for Sanctions (docket #37).

The essence of the Motion is summarized in Defendant's Motion:

...E. John Eagleton, an attorney with that firm [Eagleton, Eagleton & Harrison], previously represented NPC and WPC in labor and employment matters. Defendant's Motion to Disqualify at p.1.

Defendant asserts that Plaintiff's counsel formerly represented Defendant, and should, by reason of such representation, be disqualified from acting contrary to Defendant's interests in this case. Plaintiffs, and more specifically, Plaintiffs' counsel, ask the court to deny the Motion, asserting that the representation was not contrary to the governing Rule; and 2) that the acts complained of Defendant are more than twenty (20) years past.

The governing rule is found at 5 O.S.A. Ch. 1 App. 3A, Rule 1.9 (*Conflict of Interest: Former Client*):

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(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter...

2. The Facts and Issues

Plaintiffs' current lawyers are:

- a) Mr. Don Herrold;
- b) Mr. James R. Eagleton; and
- c) Mr. Charles D. Harrison.

Defendant's Motion is predicated on the activity of Mr. James R. Eagleton in the case. Specifically, Mr. James R. Eagleton is in a current partnership with E. John Eagleton. Defendant complains of Mr. James R. Eagleton's presence asserting that his partner, E. John Eagleton acted as counsel for Newspaper Printing Corporation ("NPC" - a related corporate entity) in the early to mid- 1970's. In so acting, Defendant argues that E. John Eagleton, as a partner in the firm Kothe and Eagleton "served as attorneys for NPC with respect to labor and employment matters." Opening Memorandum in Support of Motion to Disqualify (docket #25), at p. 3. Defendant further points out that "[t]hese legal matters included advice and counselling on Fair Labor Standards Act and "Wage and Hour" Compliance." Id.

It is undisputed that neither Mr. Don Herrold, Mr. Charles Harrison or Mr. James R. Eagleton ever represented Defendant World Publishing Company or NPC.

The only question before the court is whether the firm of Eagleton, Eagleton & Harrison, Inc. should be disqualified from the case based Mr. E. John Eagleton's activities in the early to mid- 1970's as a partner in the firm of Kothe and Eagleton.

The Comment to Rule 1.9 of the "*Rules of Professional Conduct*" is helpful in establishing the parameters of question. It states, in-part:

The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree...[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

...[I]t has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might be properly applied to some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented for only limited purposes...It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification...Thus if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met. (Emphasis added.)

a. E. John Eagleton's Testimony

Mr. E. John Eagleton testified that the "only representation he remembered ["in representing NPC...] was the printers over in Oklahoma City." Deposition of E. John Eagleton, at p. 13, ln. 9. When asked about an "organizational drive of District Managers", Mr. E. John Eagleton testified that he didn't "remember anything" and that it didn't "ring a bell with me at all." Id. at p. 14, lns. 8-12.

He further testified: "All I remember that we were involved in was a strike problem of the printers union or the line typers or whatever it was, and that involved Oklahoma City and Gaylord. That's the only recollection. Since that time, other than Ken and I being neighbors, I don't think there's been any other representation." Id. at p. 17, ln. 7.

When asked about the general nature of representation, Mr. E. John Eagleton testified: "I could not generally agree that we had general representation in labor matters. Could easily have. My recollection was limited to the printers strike. That's my only real recollection of that representation. It could easily have been much greater than that, but I don't believe I was involved on a regular basis on that basis. And the reason is, the only thing I remember is -" Id. at p. 21, ln. 11.

On cross examination, Mr. E. John Eagleton testified that he had no knowledge of wage and hour policies at the World Publishing Company; never advised NPC or the World Publishing Company about such policies; and had no recollection about representation, other than the printer's strike. Id. at p. 22 et seq.

b. Charles Kothe's Affidavit

Charles Kothe, partner in the firm of Kothe and Eagleton averred:

In 1965 I and E. John Eagleton formed the law firm of Kothe & Eagleton, Inc. In this firm I was principally responsible for labor litigation and related labor problems for clients. E. John Eagleton was our tax lawyer.

E. John Eagleton never in my presence or to my knowledge rendered any advice to Defendants in wage and hour and/or related labor matters.

c. Testimony of Kenneth S. Fleming

Mr. Kenneth S. Fleming is the current President of World Publishing Company. Mr. Fleming has held various positions of significant responsibility with NPC and World Publishing Company for a number of years and testified regarding his relationship with Kothe and Eagleton. He testified that he "met Charles Kothe...at their office" in 1970 or 1971. *Deposition of Kenneth S. Fleming, at p. 5, ln. 21.* Mr. E. John Eagleton was also present. The purpose of meeting with the firm was to "aid and assist me in the area of labor management." *Id. at p. 6, ln. 14.* When asked about what Mr. Fleming thought were Mr. E. John Eagleton's qualifications, Mr. Fleming testified:

As best I recall, in the general conversation, Mr. Kothe stated that Mr. Eagleton was his partner and at that moment they were sharing facilities, and we had a general discussion about some of my needs. And I don't specifically recall that Mr. Kothe or Mr. Eagleton spelled out anybody's qualifications. When I said what I needed, Mr. Kothe felt that he was more than capable of handling it, and I think I knew that before I went over there. Mr. Eagleton, being a very reputable, credible attorney as far as I knew, was demonstrated to me by Mr. Kothe that he was his partner and he would aid and assist as we progressed along. *Id. at p.7, ln. 9.*

Mr. Fleming further testified:

Well, you know, what -- I'm trying to follow the line of questioning here. There is no question in my mind, no question whatsoever, that Mr. Eagleton had numerous conversations with me dealing in the area of labor, wage and

hour, employment, et cetera, et cetera, et cetera, over a three- to four-year period. There's no question in my mind whatsoever if that's what we're driving at, and I want the record to so state that. *Id.* at p. 20, ln. 14.

3. Analysis

The situation presented by Defendant's Motion is not as straightforward as contemplated by the framers of Rule 1.9. Neither, however, is it so convoluted as to defy analysis and resolution.

Here, the question is not whether an individual lawyer is taking a position adverse to his client, but whether he is now precluded from taking a position adverse to his law partner's former client of twenty-plus years past. Analysis must necessarily begin with facts of the situation. (*The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction.*) Comment, Rule 1.9, *Rules of Professional Conduct*.

Setting aside the question of imputation of knowledge between law partners, the first issue is one of scope. The undersigned has reviewed the *in camera* submissions by Defendant. They contain various memoranda which in fact indicate that Mr. E. John Eagleton did consult with both Mr. Fleming and his law partner regarding labor matters relating to NPC. And therein lies a critical fact. None of the *in camera* submissions directly reference or relate to World Publishing Company. All related to NPC ("Newspaper Printing Corporation"). This fact supports Mr. E. John Eagleton's testimony regarding his activities.

More to the point, the specifics of this situation involve incidents more than twenty years past. Mr. E. John Eagleton gave a deposition, taken at the courthouse, in which he swore under oath that he had little recollection of any of those occurrences, recalling only the "printers' strike".

Local Rule 1.4 provides:

All attorneys admitted to practice before this court are officers of the court and shall assist the court in securing the just, speedy, and inexpensive determination of every action.

The *Oath of Attorney* administered to every member of the Bar of the U.S. District Court for the Northern District of Oklahoma provides in-part:

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law.
Local Rule 83.4.

Mr. E. John Eagleton testified that he has virtually no recollection of the events which Defendant now complains prejudice his law partner. Mr. Eagleton is a member of the Bar of this court. His duty to speak truthfully should be accepted when he gives his sworn deposition. Beyond that, his duty as an officer of the court carries him beyond the realm of question. The documents submitted for the court's consideration do not speak to *World Publishing Company*, but to *Newspaper Printing Corporation*. NPC is not a party to this action.

Mr. E. John Eagleton is not an attorney of record in this case.

Given that he has no actual recollection; and that the majority of his work twenty years ago was with a non-party (albeit a *related* entity), there is little substantive knowledge which could theoretically be imputed to his new law partner. Given the paucity of actual information and the distance in time between the current representation and that of Mr. E John Eagleton the undersigned finds that Mr. E. John Eagleton's representation of NPC may constructively found to be for "limited purposes", as that term is referenced in the Comment to Rule 1.9:

...[I]t has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might be properly applied to some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented for only limited purposes... (*Emphasis added.*)

Thus, the court should not, under the facts of this case, presume that all confidences known by Mr. E. John Eagleton are known by his new law partner, Mr. James R. Eagleton. More to the point, the *Comment* draws a distinction between an individual lawyer and newly affiliated law partners:

This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification...Thus if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met. (*Emphasis added.*)

Such is the case here. Defendant argues that Mr. E. John Eagleton's knowledge and confidences should be imputed to Mr. James R. Eagleton, the attorney actually of record for Plaintiffs. However, Mr. E. John Eagleton's testimony belies any academic *or* actual assertion of knowledge: he says he has little or no actual recollection of events twenty years past. Thus, his joining the new firm of *Eagleton, Eagleton & Harrison* is akin to the situation described in the *Comment*. The new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

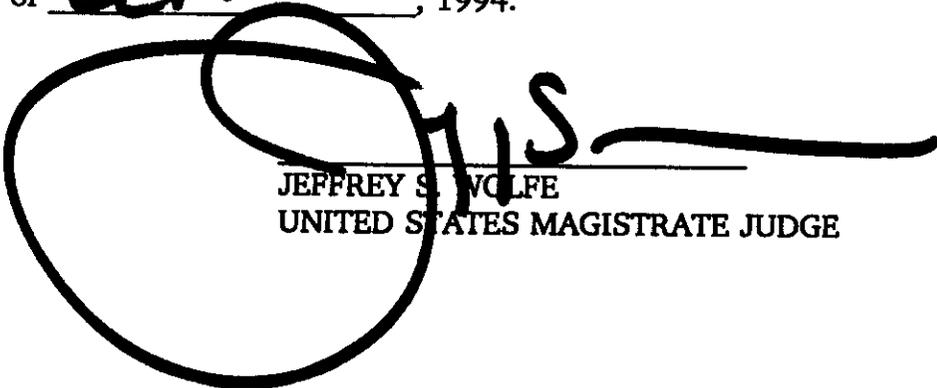
4. Recommendation

The United States Magistrate Judge recommends that Defendant's Motion to Disqualify be denied, provided that Mr. E. John Eagleton certify of record herein that he has complied with the requisites of Rule 1.9 (b) and (c) insofar as the facts of this case and his previous representation are concerned. His knowledge is limited, distant in time, and thus cannot be said to be "substantially related" to the case at bar. More particularly, he is not an attorney of record herein and his knowledge, being limited, cannot be the basis for imputed disqualification of his new law partner.

Finally, the United States Magistrate Judge recommends that 1) Plaintiff's Motion to Strike (docket #37) be denied as moot; and 2) Plaintiffs' Motion to Sanction (docket #37) be denied, the matters now fully before the court and by this report, disposed of, pending any appeal.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.¹

Dated this 18th day of Oct, 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

¹ See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

DATE OCT 19 1994

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

FRANK TAUCHER and MARKET)
MOVEMENTS, INC.,)
)
Plaintiff,)
)
vs.)
)
ALEXANDER ELDER and FINANCIAL)
TRADING SEMINARS, INC.,)
)
Defendants.)

No. 94-C-457-K

FILED
OCT 18 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 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 defendants and against the plaintiffs.

ORDERED this 18 day of October, 1994.

Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET

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

DATE OCT 19 1994

FRANK TAUCHER and MARKET)
MOVEMENTS, INC.,)
)
Plaintiff,)
)
vs.)
)
ALEXANDER ELDER and FINANCIAL)
TRADING SEMINARS, INC.,)
)
Defendants.)

No. 94-C-457-K

FILED
 OCT 18 1994
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the motion of the defendants for summary judgment. The parties do not dispute the facts, either of the litigated events or the litigation history. On January 3, 1992, plaintiff Taucher filed a "Petition for damages for libel" in state court against the two present defendants and Oster Communications, Inc.. The allegations concerned a negative book review written by defendant Elder regarding a book published by Taucher. Defendants removed the case to federal court, where it was assigned case no. 92-C-98-B. On February 21, 1992, plaintiffs filed what amounted to an amended complaint in federal court, again alleging libel and adding claims for intentional infliction of emotional distress and intentional interference with business relations, all arising from publication of the book review.

By Order entered August 14, 1992, Judge Thomas R. Brett granted the defendants' motions to dismiss pursuant to Rule 12(b)(6) in case no. 92-C-98-B. On August 21, 1992, plaintiffs filed a motion for leave to file an amended complaint. The motion

itself states "[c]ounsel feels the plaintiff is in possession of information which would allow counsel to state a valid cause of action for one or more of the causes of action which were contained in the petition." There is no indication a copy of the proposed amended complaint accompanied the motion. (Plaintiff and his counsel, through affidavits submitted in the present action, assert the amended complaint would have alleged a claim for breach of contract, the claim asserted herein.) Defendant Oster Communications, Inc., filed an objection to the motion, contending that any amendment would be futile. By Order of September 15, 1992, Judge Brett denied the motion for leave to file an amended complaint. The Order states any amendment would be futile and "the Plaintiffs can not state a claim upon which relief can be granted based on the book review." Plaintiffs filed no appeal in 92-C-98-B.

On April 11, 1994, plaintiff filed a state court petition against defendants Elder and Financial Trading Seminars, Inc., alleging breach of contract through publication of the book review (i.e., alleging the existence of a contract between the parties in which defendants would use their best efforts to market plaintiffs' book). Defendants removed the case to this Court on May 4, 1994, and now move for summary judgment based upon res judicata.

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).

Initially, the Court finds federal law controlling here. "As a general rule [federal courts] apply federal law to the res judicata issue in successive diversity actions. . ." Lowell Staats Min. Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271, 1274 (10th Cir.1989). The general principle is:

Res judicata generally applies where there is an identity of parties and of claims and a final judgment on the merits. It is designed to ensure the finality of judicial decisions. Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Stated alternatively, under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.

Clark v. Haas Group, Inc., 953 F.2d 1235, 1237-38 (10th Cir.1992) (citations omitted) (emphasis added).

Defendants argue that the dismissal in the prior action represents a final judgment on the merits, and plaintiffs attempt to state a new cause of action arising out of the same facts is barred. In response, plaintiffs contend they did not have a full and fair

opportunity to litigate their breach of contract claim in the prior litigation because Judge Brett denied them leave to file an amended complaint. Plaintiffs also protest that the denial was made without a hearing or any inquiry into the nature of the proposed amendment.

Upon review, the Court finds summary judgment is appropriate. Denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading. King v. Hoover Group, Inc., 958 F.2d 219, 222-23 (8th Cir.1992). If the plaintiffs thought Judge Brett's denial of their motion was erroneous, the proper course of action was to appeal the ruling, not commence a new lawsuit arising out of the same facts. The decision now stands as a final judgment on the merits, barring the present breach of contract claim.

Defendants' Motion for Sanctions

The defendants have filed a separate motion for sanctions pursuant to Rule 11 F.R.Cv.P.. They refer specifically to Rule 11(b)(2), which mandates an attorney's signature on a pleading as certification that "the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law". It is undisputed that movants complied with the 21 day "safe harbor" provision of Rule 11(c)(1)(A). The 1993 amendments to Rule 11 make imposition of sanctions for a Rule 11 violation discretionary rather than mandatory. Knipe v. Skinner, 19 F.3d 72, 78 (2nd Cir.1994). Rule

11 sanctions should be imposed with caution. Id. Plaintiffs plainly conducted considerable legal research in response to the present motions. In the filed responses, plaintiffs correctly cite the principle that a party must have a "full and fair opportunity" to litigate the claim or issue sought to be barred. The position taken in the responses is that Judge Brett's denial of the motion to amend prevented such a full and fair opportunity. The Court has rejected this argument in the discussion above relating to the motion for summary judgment, but Rule 11 is not a fee-shifting mechanism. Although the question is close, the Court now concludes the plaintiffs were not unreasonable in asserting their position as warranted by existing law, and sanctions will not be imposed.¹

It is the Order of the Court that the motion of the defendants for summary judgment is hereby GRANTED. The motion of the defendants for sanctions is hereby DENIED.

ORDERED this 18 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

¹ Griffen v. City of Oklahoma City, 3 F.3d 336 (10th Cir.1993) directs that Rule 11 is not applicable to a state court petition filed prior to removal, but that a federal court may nevertheless examine the state court filing pursuant to 12 O.S. §2011. The Court has done so, and denies sanctions for the reasons stated.

DATE OCT 19 1994

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

FRANK TAUCHER and MARKET)
 MOVEMENTS, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 ALEXANDER ELDER and FINANCIAL)
 TRADING SEMINARS, INC.,)
)
 Defendants.)

No. 94-C-457-K

FILED
 OCT 18 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 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 defendants and against the plaintiffs.

ORDERED this 18 day of October, 1994.

Terry C. Kern
 TERRY C. KERN
 UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET

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

DATE OCT 19 1994

FRANK TAUCHER and MARKET)
MOVEMENTS, INC.,)
)
Plaintiff,)
)
vs.)
)
ALEXANDER ELDER and FINANCIAL)
TRADING SEMINARS, INC.,)
)
Defendants.)

No. 94-C-457-K

FILED
 OCT 18 1994
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the motion of the defendants for summary judgment. The parties do not dispute the facts, either of the litigated events or the litigation history. On January 3, 1992, plaintiff Taucher filed a "Petition for damages for libel" in state court against the two present defendants and Oster Communications, Inc.. The allegations concerned a negative book review written by defendant Elder regarding a book published by Taucher. Defendants removed the case to federal court, where it was assigned case no. 92-C-98-B. On February 21, 1992, plaintiffs filed what amounted to an amended complaint in federal court, again alleging libel and adding claims for intentional infliction of emotional distress and intentional interference with business relations, all arising from publication of the book review.

By Order entered August 14, 1992, Judge Thomas R. Brett granted the defendants' motions to dismiss pursuant to Rule 12(b)(6) in case no. 92-C-98-B. On August 21, 1992, plaintiffs filed a motion for leave to file an amended complaint. The motion

itself states "[c]ounsel feels the plaintiff is in possession of information which would allow counsel to state a valid cause of action for one or more of the causes of action which were contained in the petition." There is no indication a copy of the proposed amended complaint accompanied the motion. (Plaintiff and his counsel, through affidavits submitted in the present action, assert the amended complaint would have alleged a claim for breach of contract, the claim asserted herein.) Defendant Oster Communications, Inc., filed an objection to the motion, contending that any amendment would be futile. By Order of September 15, 1992, Judge Brett denied the motion for leave to file an amended complaint. The Order states any amendment would be futile and "the Plaintiffs can not state a claim upon which relief can be granted based on the book review." Plaintiffs filed no appeal in 92-C-98-B.

On April 11, 1994, plaintiff filed a state court petition against defendants Elder and Financial Trading Seminars, Inc., alleging breach of contract through publication of the book review (i.e., alleging the existence of a contract between the parties in which defendants would use their best efforts to market plaintiffs' book). Defendants removed the case to this Court on May 4, 1994, and now move for summary judgment based upon res judicata.

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).

Initially, the Court finds federal law controlling here. "As a general rule [federal courts] apply federal law to the res judicata issue in successive diversity actions. . ." Lowell Staats Min. Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271, 1274 (10th Cir.1989). The general principle is:

Res judicata generally applies where there is an identity of parties and of claims and a final judgment on the merits. It is designed to ensure the finality of judicial decisions. Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Stated alternatively, under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.

Clark v. Haas Group, Inc., 953 F.2d 1235, 1237-38 (10th Cir.1992) (citations omitted) (emphasis added).

Defendants argue that the dismissal in the prior action represents a final judgment on the merits, and plaintiffs attempt to state a new cause of action arising out of the same facts is barred. In response, plaintiffs contend they did not have a full and fair

opportunity to litigate their breach of contract claim in the prior litigation because Judge Brett denied them leave to file an amended complaint. Plaintiffs also protest that the denial was made without a hearing or any inquiry into the nature of the proposed amendment.

Upon review, the Court finds summary judgment is appropriate. Denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading. King v. Hoover Group, Inc., 958 F.2d 219, 222-23 (8th Cir.1992). If the plaintiffs thought Judge Brett's denial of their motion was erroneous, the proper course of action was to appeal the ruling, not commence a new lawsuit arising out of the same facts. The decision now stands as a final judgment on the merits, barring the present breach of contract claim.

Defendants' Motion for Sanctions

The defendants have filed a separate motion for sanctions pursuant to Rule 11 F.R.Cv.P.. They refer specifically to Rule 11(b)(2), which mandates an attorney's signature on a pleading as certification that "the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law". It is undisputed that movants complied with the 21 day "safe harbor" provision of Rule 11(c)(1)(A). The 1993 amendments to Rule 11 make imposition of sanctions for a Rule 11 violation discretionary rather than mandatory. Knipe v. Skinner, 19 F.3d 72, 78 (2nd Cir.1994). Rule

11 sanctions should be imposed with caution. Id. Plaintiffs plainly conducted considerable legal research in response to the present motions. In the filed responses, plaintiffs correctly cite the principle that a party must have a "full and fair opportunity" to litigate the claim or issue sought to be barred. The position taken in the responses is that Judge Brett's denial of the motion to amend prevented such a full and fair opportunity. The Court has rejected this argument in the discussion above relating to the motion for summary judgment, but Rule 11 is not a fee-shifting mechanism. Although the question is close, the Court now concludes the plaintiffs were not unreasonable in asserting their position as warranted by existing law, and sanctions will not be imposed.¹

It is the Order of the Court that the motion of the defendants for summary judgment is hereby GRANTED. The motion of the defendants for sanctions is hereby DENIED.

ORDERED this 18 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

¹ Griffen v. City of Oklahoma City, 3 F.3d 336 (10th Cir.1993) directs that Rule 11 is not applicable to a state court petition filed prior to removal, but that a federal court may nevertheless examine the state court filing pursuant to 12 O.S. §2011. The Court has done so, and denies sanctions for the reasons stated.

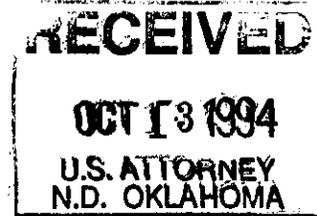
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)

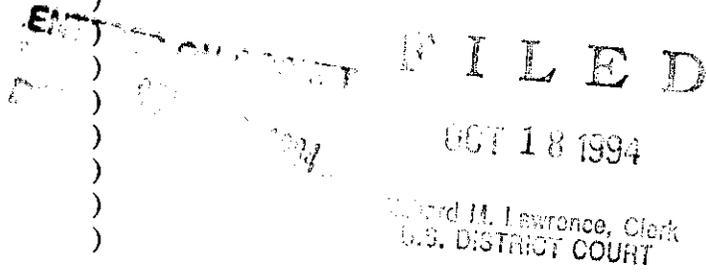
vs.)

DANNY J. HOLLAND)
aka Danny Joe Holland;)
TAMARA J. HOLLAND)
aka Tamara Jane Holland;)
STATE OF OKLAHOMA, ex rel.)
OKLAHOMA TAX COMMISSION;)
HOUSEHOLD FINANCE CORPORATION)
III;)
CITY OF BROKEN ARROW, Oklahoma)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County, Oklahoma,)

Defendants,)



Civil Case No. 94-C-693-B



JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DANNY J. HOLLAND, signed a Waiver of Summons on July 20, 1994, filed on July 22, 1994; that the Defendant, TAMARA J. HOLLAND, signed a Waiver of Summons on July 15, 1994,

filed on July 19, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on July 18, 1994, by Certified Mail; that Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on July 18, 1994, by Certified Mail; and that Defendant, HOUSEHOLD FINANCE CORPORATION III, was served a copy of Summons and Complaint on July 18, 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 August 3, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on August 9, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on August 3, 1994; and that the Defendants, DANNY J. HOLLAND, TAMARA J. HOLLAND and HOUSEHOLD FINANCE CORPORATION III, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND were husband and wife at the time they became record holders of the subject property; and were divorced in Tulsa County District Court, case number FD-9100472, on February 21, 1991, and since such time both Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, have remained single persons.

The Court further finds that on December 13, 1990, Danny J. Holland and Tamara J. Holland, filed their voluntary petition in bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-3919-C. On April 8, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on February 27, 1992.

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 One (1), WINDSOR ESTATES, 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 June 13, 1986, the Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION, their mortgage note in the amount of \$64,407.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION, a mortgage dated June 13, 1986, covering the above-described property. Said mortgage was recorded on June 17, 1986, in Book 4949, Page 294, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 10, 1987, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA (formerly known as COMMONWEALTH MORTGAGE CORPORATION) assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P. This Assignment of Mortgage was recorded on August 17, 1987, in Book 5045, Page 2194, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 26, 1988, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to THE LOMAS & NETTLETON

COMPANY. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1401, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 5, 1990, LOMAS MORTGAGE USA, INC., formerly The Lomas & Nettleton Company, 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 January 16, 1990, in Book 5230, Page 2405, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 1, 1989, the Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, 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 August 1, 1990.

The Court further finds that the Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, 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, DANNY J. HOLLAND and TAMARA J. HOLLAND, are indebted to the Plaintiff in the principal sum of \$100,045.65, plus interest at the rate of Ten and One-Half 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 \$17.00 which became a lien on the property as of June 26, 1992. Said lien is 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 \$228.52, plus accrued and accruing interest, which became a lien on the property as of November 20, 1990; a lien in the amount of \$201.59, plus accrued and accruing interest, which became a lien on the property as of November 20, 1990; and a lien in the amount of \$560.21, plus accrued and accruing interest, which became a lien on the property as of March 23, 1993. 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 of.

The Court further finds that the Defendants, DANNY J. HOLLAND, TAMARA J. HOLLAND, and HOUSEHOLD FINANCE CORPORATION III, 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, DANNY J. HOLLAND and TAMARA J. HOLLAND, in the principal sum of \$100,045.65, plus interest at the rate of Ten and One-Half percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 0.04 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 \$17.00 for personal property taxes for the year 1990, 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 \$990.32, plus accrued and accruing interest, 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, DANNY J. HOLLAND, TAMARA J. HOLLAND, HOUSEHOLD FINANCE CORPORATION III, 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 Defendants, DANNY J. HOLLAND and TAMARA J. HOLLAND, 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 appraisal 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 \$430.11, plus accrued and accruing interest, for State Taxes which are currently due and owing.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$17.00, plus accruing costs and 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 560.21, plus accrued and accruing interest, for State 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

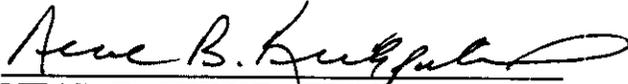
since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. DRETT

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



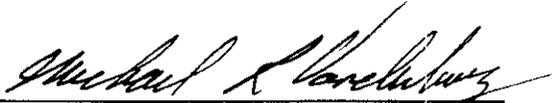
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(918) 596-4841
Attorney for Defendants,
County Treasurer and
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Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



MICHAEL R. VANDERBURG, OBA #9180

City Attorney,

CITY OF BROKEN ARROW

P. O. Box 610

Broken Arrow, OK 74012

(918) 252-5311

Attorney for Defendant,

City of Broken Arrow, Oklahoma

Judgment of Foreclosure

Civil Action No. 94-C-693-B

NBK:flv

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

BAUCOM CONCRETE CONSTRUCTION
COMPANY, INC.,

Plaintiff,

vs.

CRANE CONSTRUCTION COMPANY and
UNITED STATES FIDELITY AND
GUARANTY ASSURANCE GROUP, INC.

Defendants.

Case No. 94-C-816-B

ENTERED
DATE OCT 19 1994

FILED
OCT 18 1994

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

O R D E R

Before the Court is Plaintiff's Motion to Remand (Case #3), based on the contention that the amount in controversy is not sufficient to support diversity jurisdiction pursuant to 28 U.S.C. § 1332.

Plaintiff Baucom Concrete and Construction Company, Inc. ("Baucom") filed suit in Tulsa County District Court, alleging that Defendant Crane Construction Company ("Crane") has not paid Baucom \$46,850 for construction work done on a Tulsa Wal-Mart store. United States Fidelity and Guaranty Assurance Group ("Fidelity") is named as the bonding company that guaranteed payment. The Defendants removed the case to this Court, alleging federal diversity jurisdiction, pursuant to 28 U.S.C. § 1441.

The parties agree that diversity of citizenship exists.¹ The

¹Baucom is incorporated in Oklahoma, with its principal place of business in Oklahoma. Crane is incorporated in Arkansas, with its principal place of business in Arkansas. Fidelity is incorporated in Maryland. Defendants do not name the location of Fidelity's principal place of business, but state that it is not Oklahoma.

issue here is whether this case meets the amount-in-controversy requirement of more than \$50,000. On the face of Baucom's complaint, it does not. Defendants, however, ask the Court to consider their counterclaim for \$100,000 in determining whether the amount in controversy is sufficient. The counterclaim was filed as part of the Removal Petition.

The parties agree that the Tenth Circuit has not spoken on this issue directly. Defendants allege, however, that Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604 (10th Cir. 1940), applies to this case. The Court disagrees. The Ronzio court stated that, in determining the amount in controversy, a court may look to the pecuniary result of the case to either party. However, Ronzio, like most of the cases cited by the parties, deals with the problem of putting a monetary value on a plaintiff's claim. Such cases involve quiet title actions,² declaratory judgments,³ separate claims by co-plaintiffs,⁴ injunctions⁵ and future benefits under a contract.⁶ In short, these cases involve a dispute as to the true value of the plaintiff's claim, when that claim is difficult

²Ronzio, 116 F.2d 604.

³Government Employees Insurance Co. v. Lally, 327 F.2d 568 (4th Cir. 1964).

⁴Lonquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970); Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969).

⁵McCarty v. Amoco Pipeline Co., 595 F.2d 389 (7th Cir. 1979); Family Motor Inn v. L-K Enterprises, 369 F.2d 766 (E.D.Ky. 1973).

⁶Bowman v. Iowa State Travelers Mutual Assurance Co., 449 F.Supp. 60 (E.D.Okla. 1978).

to value. Here, there is no dispute that Baucom is seeking \$46,850. Unlike in the bulk of the cases cited by the parties, the question here is whether to consider the value of the Defendants' counterclaim; the question is not how to value Baucom's claim.

There appears to be a split of authority on whether to consider the amount of a counterclaim when determining the amount in controversy, but the majority follows the rule that the amount in controversy is determined solely by the plaintiff's complaint. The most persuasive reason for not considering a counterclaim is that, by the very terms of the removal statute, only cases brought in state court "of which the [federal] courts ... have original jurisdiction, may be removed by the defendant." 28 U.S.C. § 1441(a). Baucom's claim could not have been brought in federal court because the amount in controversy is not met. Since removed cases are subject to the same jurisdictional requirements as original actions, no part of the required jurisdictional amount may be met by considering a defendant's counterclaim. Oliver v. Haas, 777 F.Supp. 1040 (D.P.R. 1991); Cabe v. Pennewalt, 372 F.Supp. 780 (W.D.N.C. 1974). See also Williams v. Beyer, 455 F.Supp. 482 (D.N.H. 1978) ("No part of the required jurisdictional amount can be met by considering a defendant's counterclaim."), and Umbenhower v. Mutual of Omaha Insurance Company, 298 F.Supp. 927, 929 (W.D.Mo. 1969) ("[I]t is the claim of the plaintiff which determines the amount in controversy.").

Another persuasive reason to not consider the counterclaim is by analogy to federal question jurisdiction and the "well-pleaded

complaint" rule. Federal-question jurisdiction must be apparent from the plaintiff's complaint; a federal defense to a state law claim does not allow the case to be removed. Louisville and Nashville R.R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); Oklahoma Tax Commission v. Graham, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). Whether a federal court should remand such a case depends solely on the complaint, "unaided by the answer or petition for removal." Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). See Cowan v. Windeyer, 795 F.Supp. 535, 538 (N.D.N.Y. 1992) ("Because the amount in controversy is a jurisdictional prerequisite to diversity cases, this too should be measured based upon rights asserted by the plaintiff.") and Ronca v. Monarch Water Systems, 1990 WL 140154 (E.D.Pa. 1990), which refuses to consider a counterclaim by analogizing to the principle that a federal defense does not allow removal. See also Video Connection of America v. Priority Concepts, 625 F.Supp. 1549 (S.D.N.Y. 1986).

On the other hand, cases that do consider counterclaims in determining the amount in controversy are concerned that not doing so would deprive a defendant of his federal forum if the plaintiff wins the race to the courthouse. This concern is especially prevalent when the counterclaim is compulsory, not permissive. Swallow & Assoc. v. Henry Molded Products, Inc., 794 F.Supp. 660 (E.D. Mich. 1992). The Swallow court based its reasoning solely on treatises, apparently because the parties did not address the issues discussed previously in this Order. One treatise, in

addressing the "race to the courthouse" argument, stated that the state-court defendant retains the right to file his claim in federal court, thereby causing both claims to be litigated concurrently. However, this may result in the federal court staying or dismissing its case. Even if both cases proceed, instead of a race to the courthouse, there is a race to judgment because the first case may collaterally estop issues in the second case.⁷ 1A J. Moore, B. Ringle & J. Wicker, Moore's Federal Practice, para. 0.167[8] (2d ed. 1991).

Another issue considered by Swallow is the function of the amount-in-controversy requirement. As stated in Moore's:

if the jurisdictional amount requirement serves any salutary function it is to measure the substantiality of the claim. We believe that the substantiality of the claim can best be gauged by reference to what is actually at stake in the litigation rather than by strict reference to plaintiff's claim for relief.

Id. See also Congaree Broadcasters, Inc., v. TM Programming, 436 F.Supp. 258, 262 (D.S.C. 1977) ("[T]he purpose of a jurisdictional amount, to keep trivial cases away from the court, is satisfied where the case is worth a large sum to either party" [citations omitted]).⁸

While the Court believes that cases such as Swallow do have a

⁷The Court notes that, regardless of whether this case proceeds in the Northern District of Oklahoma or Tulsa County District Court, there likely will be a race to judgment in any event, because of the pending litigation in Memphis, Tennessee, that is closely related to the claims involved here.

⁸The Congaree court applied the Ronzio line of cases to the counterclaim context, which this Court declines to do.

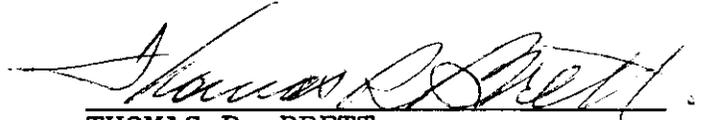
valid point, the question ultimately is answered by the general principle that all doubts regarding federal jurisdiction of a claim should be resolved in favor of remand. This practice spares the parties from relitigating the matter should an appellate court later rule that original jurisdiction was lacking. Also, remand avoids the possibility of extending federal jurisdiction at the expense of state sovereignty. Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941).

The Court notes an additional factor that weighs in favor of remand: the Defendants' counterclaim had not been filed at the time this case was removed. One court in the Tenth Circuit categorically refused to consider the counterclaim in establishing the amount in controversy because the counterclaim was filed concurrently with the removal petition, as is the case here. Martin Pet Products (U.S.) v. Lawrence, 814 F.Supp. 56 (D.Kan. 1993). "The counterclaim had not been filed at the time of removal and cannot serve as a basis for later establishing this court's jurisdiction." Id. at 58. The right of removal is determined by the pleadings at the time of removal. Alabama Great S. Ry. Co. v. Thompson, 200 U.S. 206, 216 (1906); Lonnequist, 421 F.2d at 599; Bowman, 449 F.Supp. at 62. Under this rationale, the Court is precluded from consideration of the counterclaim in this instance, because it had not been filed when the case was removed.

Plaintiff's Motion to Remand this case to Tulsa County District Court is hereby GRANTED. This Order renders moot both the Defendants' motion for admittance of nonresident attorney (Docket

#9) and Defendant Crane's motion to add Wal-Mart as a third-party defendant (Docket #12).

IT IS SO ORDERED THIS 18th 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.)
)
 MICHAEL A. SCOTT; PATRICIA J.)
 SCOTT; FIDELITY FINANCIAL)
 SERVICES aka FIDELITY FINANCIAL)
 SERVICE, INC.; TRIAD BANK, N.A.;)
 CITY OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

OCT 18 1994

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

ENTERED IN DOCKET
DATE OCT 18 1994

CIVIL ACTION NO. 94-C 650B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th 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, **Fidelity**
Financial Services aka Fidelity Financial Services, Inc., appears
by its attorney, Roger A. Long; the Defendant, **City of Broken**
Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney;
and the Defendants, **Michael A. Scott, Patricia J. Scott, and**
Triad Bank, N.A., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Michael A. Scott and Patricia J. Scott**, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, **Michael A. Scott**, waived service of Summons, which was filed on July 25, 1994; that the Defendant, **Patricia J. Scott**, waived service of Summons on July 20, 1994, which was filed on July 25, 1994; that the Defendant, **Fidelity Financial Services aka Fidelity Financial Services, Inc.**, waived service of Summons on July 6, 1994, which was filed on July 8, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, acknowledged service of Summons and Complaint via certified mail on June 30, 1994; and that the Defendant, **Triad Bank, N.A.**, waived service of Summons on August 2, 1994, which was filed on August 4, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on July 26, 1994; that the Defendant, **Fidelity Financial Services aka Fidelity Financial Services, Inc.**, filed its answer on July 11, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on July 8, 1994; and that the Defendants, **Michael A. Scott, Patricia J. Scott, and Triad Bank, N.A.**, 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 Eight (8), Block Six (6), WOLF CREEK ESTATES, 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 February 28, 1986, M. Lyndon Teehee and I. Suzanne Teehee, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of \$85,635.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, M. Lyndon Teehee and I. Suzanne Teehee, husband and wife, executed and delivered to First Security Mortgage Company a mortgage dated February 28, 1986, covering the above-described property. Said mortgage was recorded on March 13, 1986, in Book 4929, Page 2387, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 25, 1986, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to Mortgage Clearing Corporation. This Assignment of Mortgage was recorded on December 19, 1986, in Book 4990, Page 558, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 21, 1989, Mortgage Clearing Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on March

22, 1989, in Book 5173, Page 701, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Michael A. Scott and Patricia J. Scott, currently hold the record title to the property by virtue of a General Warranty Deed dated June 27, 1988, and recorded on June 27, 1988, in Book 5110, Page 852, in the records of Tulsa County, Oklahoma; and that the Defendants, Michael A. Scott and Patricia J. Scott, are the current assumptors of the subject indebtedness.

The Court further finds that on April 1, 1989, the Defendants, Michael A. Scott and Patricia J. Scott, 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 May 1, 1990, February 1, 1991 and September 1, 1991.

The Court further finds that on August 12, 1991, the Defendants, Michael A. Scott and Patricia J. Scott, filed their petition for Chapter 13 relief in the United States Bankruptcy Court for the Northern District of Oklahoma; this petition was converted to a Chapter 7, which was discharged on April 6, 1994, and closed on May 10, 1994.

The Court further finds that the Defendants, Michael A. Scott and Patricia J. Scott, 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, **Michael A. Scott and Patricia J. Scott**, are indebted to the Plaintiff in the principal sum of \$125,642.66, plus interest at the rate of 10.5 percent per annum from June 14, 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 \$42.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Fidelity Financial Services aka Fidelity Financial Services, Inc.**, has a lien on the property which is the subject matter of this action by virtue of a second mortgage in the original sum of \$3,342.12, which became a lien on the property as of April 23, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

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 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 Defendants, **Michael A. Scott, Patricia J. Scott, and Triad Bank, N.A.**, are in default, and have 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, **Michael A. Scott and Patricia J. Scott**, in the principal sum of \$125,642.66, plus interest at the rate of 10.5 percent per annum from June 14, 1994 until judgment, plus interest thereafter at the current legal rate of 6.06 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 \$42.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Fidelity Financial Services aka Fidelity Financial**

Services, Inc., have and recover judgment in the amount of \$3,342.12, plus penalties and interest, for a second mortgage.

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, **Michael A. Scott, Patricia J. Scott, Triad Bank, N.A. 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 Defendants, **Michael A. Scott and Patricia J. Scott**, 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, Fidelity Financial Services aka Fidelity Financial Services, Inc., in the original amount of \$3,342.12, plus penalties and interest, for a second mortgage.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$42.00, 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.

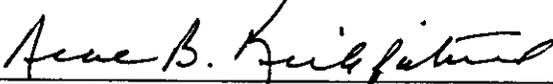
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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 J. HETT

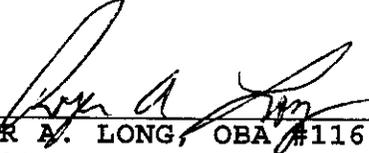
UNITED STATES DISTRICT JUDGE

APPROVED:
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Attorney for Defendant,
Fidelity Financial Services aka
Fidelity Financial Services, Inc.

Judgment of Foreclosure
Civil Action No. 94-C 650B
NBK:lg

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

FILED

OCT 18 1994

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

JERRY R. RUSHING)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.)
)
 Respondents.)

No. 88-C-1288-E ✓

O R D E R

The above styled Petition for Writ of Habeas Corpus was remanded by the Tenth Circuit for a determination of whether the 1980 taped statement of Jerry Chuck Rushing (Jerry Chuck) would have been material in the 1980 murder trial of Petitioner Jerry R. Rushing (Rushing) wherein he was accused of killing his estranged wife, i.e. whether there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." In accordance with the Order of the Tenth Circuit, a hearing was held on October 7, 1994. After considering the record, the pleadings, the testimony and exhibits¹ submitted, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court finds as follows:

Jerry Chuck Rushing is one of Petitioner's three children. At the time of the murder of his mother, Jerry Chuck was eight years old. Approximately one month after the murder he gave a taped

¹ There was no testimony presented at the hearing. Moreover, the only exhibit presented was a map of the victim's living room on January 11, 1980. Despite having been invited to do so prior to the hearing, neither side offered any additional briefing on the issue presented by the Tenth Circuit, nor any materials with which to supplement the record.

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statement to the police wherein he stated that he was awake at the time of the murder, and that there were six people in the house at that time: his mother, his father, Quanita Renee Washington (Washington), his brother and sister, and himself. The Tenth Circuit held that this statement was impeachment evidence subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963), because it contradicted the testimony of the state's key witness, Jerry Pollard (Pollard), that she was in the house during the murder, and thus, an eyewitness.

However, under Brady, only evidence that is both favorable to the accused and "material either to guilt or to punishment" must be disclosed. Brady, 373 U.S. at 87. "[A] constitutional error occurs . . . only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." United States v. Bagley, 473 U.S. 667, 678 (1985). This determination of materiality should be made "in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post trial proceeding the course that the defense and the trial would have taken" had the statement been disclosed. Bagley, 473 U.S. at 683. Pursuant to these standards, the Tenth Circuit remanded for a determination of whether the statement of Jerry chuck was material.

In considering the "totality of the circumstances" in order to make a determination of the materiality of Jerry Chuck's 1980 statement the Court considers the evidence presented at trial and the impact that Jerry Chuck's statement would have had on that

evidence. Pollard gave the following testimony:

On January 10, 1980, [she and Washington] telephoned [Rushing] and summoned him to Enid. The trio met at the motel where Washington and Pollard were staying. They drove past Ms. Rushing's home twice during the evening hours of January 10.

At approximately 1:00 a.m. on January 11, they returned to Ms. Rushing's house. Pollard was instructed by [Rushing] to go to Ms. Rushing's door and ascertain whether Ms. Rushing would speak to him and let him see the children. Pollard complied, knocked on the door and was invited inside by Ms. Rushing. Subsequently, [Rushing] burst into the house and began firing a gun at Ms. Rushing. Ms. Rushing returned fire, striking [Rushing] once. Pollard hid behind a chair when the shooting began, and after it stopped she and [Rushing] ran out of the house to the awaiting pickup.

Rushing v. State, 676 P.2d 842 (Okla. Cr. 1984).

In contrast, Rushing attempted to establish, through his own testimony and that of Washington, that Pollard killed Ms. Rushing. Washington testified as to the events on the morning of January 11:

At approximately 1:30 a.m. on January 11, she, Pollard and [Rushing] drove to Ms. Rushing's house in a pickup. [Rushing] and Pollard got out of the pickup. Pollard was carrying her gun and a plastic cup. After letting them out, Washington drove the pickup around the block and parked in the street near Ms. Rushing's home. Washington could see [Rushing] standing near the porch, but could not see Pollard. She then heard gunshots, and started to run toward the house. [Rushing], who was holding his leg, motioned her back, yelling that "it" or "she" had "gone crazy."

Washington returned to the pickup. She heard at least one more shot before [Rushing] and Pollard returned to the pickup. Pollard was screaming, crying and apologizing for shooting Ms. Rushing. [Rushing] told her not to worry, because he would be blamed.

Rushing, 676 P.2d at 847.

Rushing testified that the murder occurred as follows:

When he, Pollard and Washington arrived at Ms. Rushing's house at approximately 1:00 a.m. on January 11,

Washington remained in the pickup while he and Pollard went to the house. He did not have a gun, and was not aware that Pollard had one. Pollard was instructed to go to the door and ask Ms. Rushing whether she would allow the appellant to see the children. Ms. Rushing invited Pollard in.

Soon Pollard appeared at the door and motioned for the appellant to come in. As he entered, Ms. Rushing screamed, "Now you'll pay for it," and shot him in the right hip. He stumbled outside, waved at Washington, and shouted, "Its gone crazy." He then heard gunshots and re-entered the house. He saw Pollard shoot Ms. Rushing once, and saw her put the gun to Ms. Rushing's head and shoot again. [He] took the gun from Pollard. They ran to the pickup and drove away. He later threw the gun into a ditch along the highway as he and Washington left Enid. The gun was never found.

Rushing, 676 P.2d at 847-848.

Considering this evidence, the Court does not find that the statement of Jerry Chuck was either favorable to Rushing or material to his guilt. Thus there is not a reasonable probability that, has the statement been disclosed, the result of the trial would have been different. The statement places Rushing inside the house as opposed to merely entering the door, and it contradicts the testimony of both Rushing and Washington in several respects. Additionally, it is highly unlikely that Rushing would have used the statement to contradict Pollard's testimony that she was inside the house at the time of the murder, or that the statement would have changed the outcome of the trial, since to place her outside the house would have undermined Rushing's attempt to establish that Pollard committed the murder.

Rushing's Petition for Writ of Habeas Corpus is Denied.

ORDERED this 18th day of October, 1994.

James O. Ellison

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

I. The ALJ's Denial Decision

Ms. Diaz applied for Supplemental Social Security Income on April 1, 1991. Ms. Diaz, 41 years old at the time of the hearing before the ALJ, alleges she can no longer work because of heart problems, pulmonary disease, asthma, hernia, an enlarged liver and tendinitis. Ms. Diaz, who has a 10th grade education, has previously worked as a bartender, cashier and waitress.

After examining the evidence, the ALJ found that Ms. Diaz could not return to her past work. However, he found that she had the Residual Functional Capacity ("RFC") to perform light and sedentary work, but was restricted by her inability to stand or walk more than 2 hours in an 8-hour work day. The ALJ then concluded that Ms. Diaz could work as either a cashier or an assembly worker. *Record at 25.*

II. Legal Analysis

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, the ALJ found, at step 5, that Ms. Diaz could return to work as a cashier or an assembly worker. Ms. Diaz challenges that finding, contending that substantial evidence does not support the ALJ's decision. Ms. Diaz also argues that the ALJ

did not properly apply Social Security Ruling 83-12. A review of the record, however, indicates that Ms. Diaz's arguments are without merit.

The pertinent medical evidence consists of reports by three doctors.² Dr. Gilbert Emde treated Ms. Diaz for right lower lobe pneumonia in 1990. Dr. Alan Cohn examined Ms. Diaz on August 27, 1991. He diagnosed her with congenital heart disease, recurrent pneumonia, dyspepsia and "unspecified numbness" in the left arm and leg. Dr. Cohn also found that Ms. Diaz could lift up to 40 pounds occasionally and 25 pounds frequently. He found she could stand and/or walk up to two hours in an eight-hour work day and sit for up to six hours. Dr. Cohn noted that she had a "good range of motion" with no significant musculoskeletal weakness. *Id. at 174.*

Dr. Krug examined Ms. Diaz on July 8, 1992. The results were similar to those of Dr. Cohn's examination, although Dr. Krug noted shoulder problems. He opined that Ms. Diaz had "real significant" bursitis with "maybe calcium deposits and arthritis of right shoulder." Dr. Krug said he believed the condition was "very painful." *Id. at 182.*

The other evidence consists of testimony by Ms. Diaz and the Vocational Expert. Ms. Diaz testified that she could not work because of "congenital heart disease and my liver." She also testified that she has asthma, bronchitis, shortness of breath and has had strokes. *Id. at 46.* However, she testified that she had not seen a doctor since moving back from New Mexico -- with the exception of the consulting physician's examination. The Vocational Expert testified that Ms. Diaz could work in sedentary assembly work and sedentary cashier work. *Id. at 66.*

² The ALJ found that medical evidence prior to 1990 was not relevant to his decision as Ms. Diaz' onset date is April of 1991. The court agrees and, as a result, the medical evidence reviewed is from 1990 and forward.

Contrary to Ms. Diaz' argument, substantial evidence supports the ALJ's decision that she could return to work. The reports of Drs. Cohn and Krug, coupled with the testimony of the Vocational Expert, support the ALJ's determination.

The second issue raised by Ms. Diaz is whether the ALJ properly followed SSR 83-12. If a claimant cannot perform his past relevant work, the Secretary bears the burden of showing that the claimant has the RFC to perform other work in the national economy, considering her age, education and former experience. The burden may be met either through the testimony of the Vocational Expert or through use of the Medical-Vocational Guidelines ("Grids").

In this case, the ALJ did not rely on the Grids. Instead, he followed the procedure required by 83-12 by asking the Vocational Expert hypothetical questions that reflected Ms. Diaz' limitations. See, Talbot v. Heckler, 814 F.2d 1456, 1463, fn. 5 (10th Cir. 1987). The Vocational Expert testified that -- despite the limitations on the ability to sit and stand -- that Ms. Diaz could work as a cashier and assembly worker. As a result, the undersigned finds no error was made. The Secretary's decision is **AFFIRMED**.

SO ORDERED THIS 18th day of October, 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE OCT 19 1994

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

FILED

OCT 18 1994

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

LOLA J. GRIMES,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, SECRETARY OF)
 HEALTH AND HUMAN SERVICES,)
)
 Defendant.)

No. 92-C-936-K ✓

O R D E R

Before the Court is the civil action of the plaintiff, pursuant to 42 U.S.C. §405(g), seeking review of the Secretary's denial of disability benefits. Plaintiff sought benefits under Title XVI of the Social Security Act, also called the Supplemental Security Income program. 42 U.S.C. §§ 1381 et seq.

To prove a disability, a claimant must establish a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 1382c(a)(3)(A) & 423(d)(1)(A). Further, 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. . . . " 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The Secretary must

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follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §§ 404.1520 and 416.920. If a determination can be made at any of the steps that a claimant is or is not disabled, the review ends. §416.920(a). The five steps are 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 the ability to do basic work 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 regulations 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. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable

mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

During the sequential evaluation process, plaintiff testified that she can walk "one mile to cross the river", can lift a 20 pound bag of potatoes, can sit for an hour at church, fishes from the bank and stays part of the night, reads the Bible and novels, watches TV, mops, cooks, can drive, and enjoys crocheting. She testified she believes in witchcraft and evil just as she believes in God and good. However, she denied hallucinations or delusions. Plaintiff has been arrested for prostitution, vagrancy, drunkenness, charged with assault with a deadly weapon and intent to commit murder, robbery and shoplifting. She has been incarcerated in California and Oklahoma, and admitted she had a problem following rules, laws and regulations.

Plaintiff urges the Court to find that she is entitled to disability benefits because of her mental impairment, which impairment precludes performance of past work or other work.¹ At the time of the Administrative Law Judge's ("ALJ") decision, plaintiff was 52 years of age, had a 9th grade education but had obtained a GED at age 35. Plaintiff, who has not engaged in any substantial gainful activity since March 10, 1990, complained of headaches, dizziness, loss of memory and neck/back pain. The claimant alleged these problems have been going on for several years, but because of her incarceration, she had been unable to receive adequate medical care.

However, none of the doctors who examined her stated that she was disabled from working. Dr. Richard Cooper examined her on June 12, 1990, and concluded that the claimant's mental status was good with no positive indication of memory problems. He did feel the claimant had considerable difficulty with headaches based largely on her complaints. Also, despite numerous visits made by the plaintiff to Morton Comprehensive Services, a facility allegedly involved in treating her for arthritis, no significant reference in the claimant's medical records is made pertaining either to complaints or findings relating to arthritis. Then on October 4,

¹Plaintiff also presented testimony of her pain, dizziness and lack of concentration and memory. She testified to physical restrictions limiting the time periods in which she could stand or sit. The Court finds the ALJ properly evaluated these claims under Luna v. Bowen, 834 F.2d 161 (10th Cir.1987) and found them not credible. The record contains substantial evidence in support of this conclusion. See Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir.1990).

1990, a CT scan and sinus x-rays were administered on plaintiff by Dr. S. Husain, a neurologist of the same treating facility, who concluded the CT scan was normal as were the sinus x-rays. In fact, Dr. Husain indicated that plaintiff's complaints of headaches were muscular tension origin. Further, Thomas Goodman, M.D., a psychiatrist, examined plaintiff on June 24, 1991, finding the plaintiff was oriented to time, place and person, and otherwise, an intelligent woman, with good memory, and without any defect of recent recall. Diagnostically, this psychiatrist found the plaintiff "between a severe schizotypal personality with antisocial features or an atypical psychotic process, possibly a bipolar disorder." Yet the claimant was capable of thinking abstractly and using judgment. This physician completed a mental assessment of the ability of plaintiff and found she had fair to good ability in all categories relating to making occupational adjustments as well as making personal-social adjustments.

After review of the medical documentation and completion of the Psychiatric Review Technique Form (PRTF), the ALJ ruled that the extent to which plaintiff is impaired was not of a degree to warrant a determination that the plaintiff meets or equals any of the listings of impairment. "Whether a claimant meets or equals a listed impairment is strictly a medical determination." Ellison v. Sullivan, 929 F.2d 534, 536 (10th Cir. 1990); 20 C.F.R. §§ 404.1526(b), 416.926(b). The Court has reviewed the record and concludes that the ALJ's findings that plaintiff did not have a listed impairment and was not otherwise disabled are supported by

substantial evidence.

Finally, plaintiff contends that the ALJ failed to consider the vocational expert's answer regarding plaintiff's ability to do other work. However, the ALJ found that the recommendations made by the vocational expert as to the existence of work for a person having the residual functional capacity and vocational characteristics of the plaintiff credible. The Court concurs. Plaintiff contends that the ALJ failed to consider the expert's answer to a question posed by her lawyer, in which the expert stated that plaintiff would not be able to stay or last on a job for very long because "there are rules and regulations to follow." That question, however, alone is not supported by plaintiff's own admissions.

Q: So do you have a problem following laws, regulations or rules?

A: Not really, I just have to do what I have to do.

(Tr. 121) The ALJ then asked the vocational expert whether, considering those restrictions, jobs existed that plaintiff could perform. See Hargis v. Sullivan, 945 F.2d 1482, 1491-92 (10th Cir. 1991). The vocational expert identified bench assembly jobs, grinding machine operators, and supply clerks at the sedentary or light exertional level. Jobs in bench assembly at the sedentary level exist nationally in the number of 183,000 and regionally in the number of 23,000; these jobs at the light exertional level exist nationally and regionally in the number of 889,000 and regionally in the number 111,000; jobs as grinding machine operator

at the sedentary level exists nationally in the number of 26,000 and regionally in the number of 3,000; and jobs as supply clerk exists at the light exertional level 236,000 nationally, 30,000 regionally. The ALJ determined that the recommendations made by the vocational expert as to the existence of work for a person having the residual functional capacity and vocational characteristics of the claimant credible. The Court concurs.

Upon thorough review of the medical evidence, plaintiff's testimony and transcript of the record, the Court concludes the record fully supports the ALJ's determination. Plaintiff's complaint for benefits is hereby DENIED.

IT IS SO ORDERED this 18 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE OCT 19 1994

FILED

OCT 19 1994

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

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

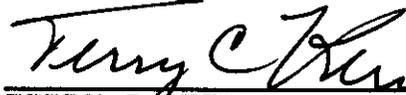
APPLIED ENERGY SYSTEMS, INC.,)
)
Plaintiff,)
)
vs.)
)
WILLIAM R. RILEY,)
)
Defendant.)

Case No. 93-C-627-K

J U D G M E N T

In accord with the Order filed this date finding in favor of Plaintiff, Applied Energy Systems, Inc. after a non-jury trial, the Court hereby enters judgment in favor of the Plaintiff, Applied Energy Systems, Inc., and against the Defendant, William R. Riley, in the amount of \$270,018.44, plus interest in the amount of \$102,403.32, together with post judgment interest at the legal rate (6.06%) until such judgment is paid. Costs and attorney fees may be awarded upon proper application.

DATED this 18 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

11

ENTERED ON DOCKET
OCT 19 1994

DATE
FILED

OCT 18 1994

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

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

APPLIED ENERGY SYSTEMS, INC.,)
)
Plaintiff,)
)
vs.)
)
WILLIAM R. RILEY,)
)
Defendant.)

Case No. 93-C-627-BK ✓

O R D E R

The above styled action for recovery of amounts due on contract came on for nonjury trial. Evidence was presented on September 12, 1994. Closing argument was held on September 14, 1994. After considering the pleadings, the testimony and exhibits admitted at trial¹, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law in accordance with Rule 52, Fed.R.Civ.P.

FINDINGS OF FACT

A. Jurisdiction and Venue

1. Applied Energy Systems (Applied) is a corporation incorporated under the laws of the state of Michigan, having its principal place of business in the state of Oklahoma.

2. William R. Riley is a citizen of the state of Texas.

¹ Although Plaintiff listed 8 exhibits, and the Defendant listed 17 exhibits, only Plaintiffs exhibits 1, 2, 3A, 3B, 3C, 3D, 3E, 3F, 4, 5, 6A, 6B, 6C, 7A, 7B, 7C, 7D, 7E, 7F, 7G, and 7H were offered and admitted into evidence, and thus considered by the Court.

3. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$50,000.

B. Circumstances Surrounding the Substitution Agreements

4. On December 8, 1989, Mid-Continent Power Company, Inc. (MCPC) and Barclays Bank PLC entered into a Construction and Term Credit Agreement to finance the expansion, refurbishment and operation of a cogeneration plant owned and operated by MCPC near Pryor, Oklahoma, which converts natural gas into steam and electricity. The total amount advanced to MCPC pursuant to the 1989 Credit Agreement was \$30,160,000.00.

5. The notes under which MCPC received the proceeds of the 1989 Credit Agreement were:

- (a) \$26,694,000.00 - Construction Loan Note;
- (b) \$2,966,000.00 - Series A Term Loan Note;
- (c) \$500,000.00 - Working Capital Loan Note.

6. The 1989 Credit Agreement stated that the construction financing would be converted to a term loan note at the earlier of final completion of the project or January 15, 1991, under certain conditions.

7. All of the funds, except those advanced under the Working Capital Loan Note, were to bear interest at 10.30%. The funds advanced under the Working Capital Loan Note were to bear interest at the prime rate or the fed funds rate, whichever was greater.

8. The funds advanced under the Working Capital Loan Note were due and payable of December 8, 1990. The funds advanced under the Construction Loan Note were due and payable on January 15,

1991. The funds advanced pursuant to the Series A Term Loan were due and payable ten years from the first quarterly payment date.

9. On July 6, 1990, MCPC and Barclays entered into Credit Agreement Amendment Number One, which modified the 1989 Credit Agreement by increasing the amount being financed by \$2.5 million. These additional proceeds were evidenced by a Series A Increase Note for \$250,000 and Construction Loan Increase Note for \$2,250,000. These notes were to bear interest at 10.9%.

10. In late 1990, Barclays wanted MCPC to be released from its obligation to other creditors, and therefore, Riley began to negotiate "substitution agreements" whereby Riley would be substituted as the obligor on the debts of MCPC.

11. Applied was the project engineer and project developer for the cogeneration plant. On December 12, 1990, Riley and Applied entered into two Substitution Agreements whereby Riley would be substituted as the obligor for the \$270,018.44 owed to Applied by MCPC, and would also be responsible for the payment of interest at the rate of 10% per annum until the amounts were paid. The Substitution Agreements, which do not contain a date certain for payment, provide:

The AES obligation² shall be due and payable at the earliest of (a) the date of any merger or consolidation of MCPC or the sale or transfer of a substantial portion of the assets of MCPC, (b) the date of any refinancing, recapitalization, or the leasing of a substantial portion of the assets of MCPC, (c) the date of the sale by Riley

² The quoted language is from one of the two Substitution Agreements. The second Substitution Agreement begins with the language "The principal sum and accrued interest." The remaining quoted language is identical.

of a controlling interest in the capital stock of MCPC, or (d) the date of any cash dividend or similar distribution with respect to the capital stock of MCPC.

12. The Substitution Agreements between Applied and MCPC were drafted by Raymond Kelly (Kelly), an attorney for Riley. At the time the Substitution Agreements were negotiated, Michael Haws was both vice-president of MCPC and owner of Applied.

13. Mr. Riley testified that he discussed with Mr. Haws at the time of negotiating the Substitution Agreements that in order for Applied to be paid, MCPC would have to make a profit or get additional cash from its lenders. He testified that was his intent when entering into the agreement. However, the Court does not find this testimony credible as Mr. Riley did not remember any such conversation in his deposition.

14. Kelly, a corporate attorney, testified that he believed the parties intended that refinancing would trigger an obligation to repay only if Riley received value from the refinancing. He also testified that he could have included such language in the substitution agreement but did not because he did not know if the parties would have agreed to such language. Thus any ambiguity was created by Kelly as Riley's agent.

C. Effect of the 1993 Credit Agreement

15. Effective January 29, 1993, MCPC and the Banks entered into an Amended and Restated Credit Agreement, which required the execution of a new series of notes:

- (a) \$18,434,084.20 - Term Loan Note;
- (b) \$8,135,076.87 - Term Loan Note;

(c) \$2,500,000.00 - Swap Loan Note;

(d) \$500,000.00 - Working Capital Loan Note.

16. The aggregate principal amount of the Term Loan Notes was \$26,569,161.07 which represented the outstanding balance of the Construction Loans and the Series A term Loan under the 1989 Credit Agreement and Amendment One.

17. The proceeds from the Swap Loan Note were to be used only for the termination of various interest rate swap Agreements.

18. The 1993 Credit Agreement also provided for New Money Loans for certain pre-approved expenses totalling \$805,000.00. These New Money Loans were never funded.

19. The interest rates, maturity date of the notes, and the Guaranty Agreement were changed under the 1993 Credit Agreement. Moreover, the 1993 Credit Agreement contains the following language:

WHEREAS, the Company has requested that the Banks amend the Original Credit Agreement to incorporate the revised terms and conditions upon which the Banks would be willing to (i) make a term loan to the company to refinance the Construction Loans and Series A Term Loan currently outstanding and to pay certain costs associated with the refinancing, (ii) continue to make Working Capital Loans to the Company, and (iii) make available New Money Loans to the Company for specified working capital needs;

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332 (a). The parties are citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds \$50,000. The Court has personal jurisdiction over both parties.

2. Under Oklahoma law, a contract must be construed to "to

give effect to the mutual intention of the parties." Okla.Stat.tit. 15, §152. The contract must be considered as a whole, without narrowly construing, or taking language out of context. Mercury Investment Company v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985). Parol evidence cannot be used to vary, modify, or contradict the terms of an instrument, but may be used to explain the meaning of words. Id. Here, the meaning of the word refinancing is uncertain when read in the context of the phrase "the date of any refinancing, recapitalization, or the leasing of a substantial portion of the assets of MCPC," and the entire Substitution Agreement.

3. However, the Substitution Agreements were drafted by Riley's agent, and any ambiguities or uncertainties will be construed against Riley. Okla. Stat. tit. 15, §170.

4. In the Amended and Restated Credit Agreement, the parties refer to the transaction as a refinancing. Moreover, the Amended and Restated Credit Agreement provides for new loan terms, the execution of new notes, a different interest rate, and, under certain conditions, the loaning of additional money. Thus, the Court concludes that the Amended and Restated Credit Agreement entered into between Barclays, Nippon and MCPC on January 29, 1993 was a "refinancing". Therefore, Riley's obligation became due and payable on January 29, 1993.

5. Applied is entitled to a judgment in its favor and against Riley in the amount of \$270,018.44, plus interest in the amount of \$102,403.32, together with post judgment interest at the legal rate

until such judgment is paid.

IT IS SO ORDERED THIS 18 DAY OF OCTOBER, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL J. AGUILAR;)
 DEBORAH ANN AGUILAR;)
 JULIE A. AGUILAR;)
 INTERSTATE ELECTRIC)
 CORPORATION;)
 HAROLD HENSLEY;)
 JOSEPHINE HENSLEY)
 CITY OF SAND SPRINGS, Oklahoma)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED
OCT 17 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
OCT 18 1994
DATE _____

Civil Case No. 93-C-350-BU ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 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 not having previously claimed no interest; the Defendants, MICHAEL J. AGUILAR, DEBORAH A. AGUILAR, INTERSTATE ELECTRICAL CORPORATION, HAROLD HENSLEY, and JOSEPHINE HENSLEY, appear by their attorney, Joe Francis, Esq.; the Defendant, CITY OF SAND SPRINGS, Oklahoma, appears not having previously filed a Disclaimer; and the Defendant, JULIE A. AGUILAR, appears not having previously filed a Disclaimer.

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The Court being fully advised and having examined the court file finds that the Defendant, JULIE A. AGUILAR, acknowledged receipt of Summons and Complaint on May 11, 1993; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint on May 10, 1993; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 26, 1993; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 21, 1993.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 11, 1993; that the Defendants, MICHAEL J. AGUILAR, DEBORAH ANN AGUILAR, INTERSTATE ELECTRIC CORPORATION, HAROLD HENSLEY AND JOSEPHINE HENSLEY, filed their Answer on April 27, 1993; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, filed its Disclaimer on May 20, 1993; and the Defendant, JULIE A. AGUILAR, filed her Disclaimer on May 25, 1993.

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 "M" of the Resubdivision and Replat of Lots 4 thru 13 inclusive, Block 5, ROCK HILL ADDITION to the City of Sand Springs, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 21, 1983, the Defendants, MICHAEL J. AGUILAR and JULIE A. AGUILAR, then husband and wife, executed and delivered to First Security Mortgage Company, a mortgage note in the amount of

\$49,500.00, payable in monthly installments, with interest thereon at the rate of Twelve and Three-Fourths percent (12.75%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, MICHAEL J. AGUILAR and JULIE A. AGUILAR, then husband and wife, executed and delivered to First Security Mortgage Company, a mortgage dated November 21, 1983, covering the above-described property. Said mortgage was recorded on November 30, 1983, in Book 4747, Page 1982, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 25, 1984, First Security Mortgage Company assigned the above-described mortgage note and mortgage to Victor Federal Savings and Loan Association. This Assignment of Mortgage was recorded on August 6, 1984, in Book 4808, Page 1541, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1985, Victor Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to Duval Federal Savings and Loan Association. This Assignment of Mortgage was recorded on September 12, 1985, in Book 4891, Page 1261, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 27, 1989, Duval Federal Savings and Loan 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 December 7, 1989, in Book 5224, Page 487, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1989, the Defendants, MICHAEL AGUILAR and DEBORAH ANN AGUILAR, 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 April 1, 1990.

The Court further finds that the Defendants, MICHAEL J. AGUILAR and JULIE A. AGUILAR, 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, MICHAEL J. AGUILAR and JULIE A. AGUILAR, are indebted to the Plaintiff in the principal sum of \$84,047.00, plus interest at the rate of Twelve and Three-Fourths percent per annum from April 15, 1993 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, 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 the Defendants, JULIE A. AGUILAR and CITY OF SAND SPRINGS, Oklahoma, Disclaim 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, MICHAEL J. AGUILAR and JULIE A. AGUILAR, in the principal sum of \$84,047.00, plus interest at the rate of Twelve and Three-Fourths percent per annum from April 15, 1993 until

judgment, plus interest thereafter at the current legal rate of 6.06 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 Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JULIE A. AGUILAR, and CITY OF SAND SPRINGS, Oklahoma, MICHAEL J. AGUILAR; DEBORAH ANN AGUILAR JULIE A. AGUILAR; INTERSTATE ELECTRIC CORPORATION; HAROLD HENSLEY and JOSEPHINE HENSLEY, 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, MICHAEL J. AGUILAR and JULIE A. AGUILAR, 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;

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

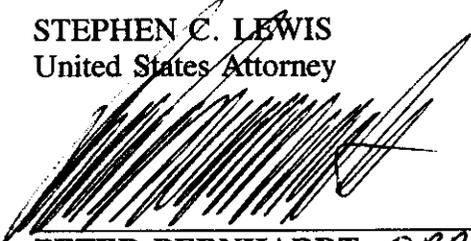
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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.

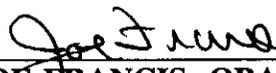

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Michael J. Aguilar
Deborah A. Aguilar
Interstate Electric Corporation
Harold Hensley
Josephine Hensley

Judgment of Foreclosure
Civil Action No. 93-C-350-BU

NBK:flv

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

FILED

OCT 17 1994

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

MIKE WARNER,)
)
Plaintiff,)
)
vs.)
)
TULSA COUNTY, et al.,)
)
Defendants.)

Case No. 92-C-532-BU

ENTERED ON DOCKET

OCT 18 1994

DATE _____

JUDGMENT

This action came before the Court upon the motions for summary judgments of the defendants, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of the defendants, Stanley Glanz, Board of County Commissioners of Tulsa County, Phil Evans and the City of Tulsa, and against the plaintiff, Mike Warner, and that the defendants, Stanley Glanz, Board of County Commissioners of Tulsa County, Phil Evans and the City of Tulsa, recover of the plaintiff, Mike Warner, their costs of action.

Dated at Tulsa, Oklahoma, this 17 day of October, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 17 1994

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

MIKE WARNER,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA COUNTY, et al.,)
)
 Defendants.)

Case No. ⁹² 94-C-532-BU ✓

ENTERED ON DOCKET

DATE OCT 18 1994

ORDER

This matter comes before the Court upon the Motion to Dismiss or in the Alternative Summary Judgment filed by the defendants, Stanley Glanz, John Doe and the Board of County Commissioners of Tulsa County and the Motion for Summary Judgment filed by the defendants, Phil Evans and the City of Tulsa. The plaintiff, Mike Warner, has responded to the motions and upon due consideration of the parties' submissions, the Court makes its determination.

The plaintiff brings this action under 42 U.S.C. § 1983 alleging that the defendants violated his constitutional rights. The plaintiff specifically alleges that his Fourth Amendment rights were violated when the defendant, Phil Evans, a police officer, arrested the plaintiff for a misdemeanor offense not committed in Officer Evan's presence. The plaintiff also alleges that his Fourth and Fourteenth Amendment rights were violated when John Doe, a deputy jailer, allegedly assaulted the plaintiff while being detained at the Tulsa County Jail and when the other deputy jailers failed to provide medical attention to the plaintiff. According to the plaintiff, Stanley Glanz and the Board of County Commissioners

W0

of Tulsa County failed to properly train the deputy jailers and failed to implement proper policies to protect the plaintiff. All the defendants deny that they violated any constitutional rights of the plaintiff.

At the outset, the Court concludes that dismissal of the named defendants, Tulsa County, Dave Been, Acting Chief of Police, and the Police Department of the City of Tulsa, Oklahoma, is appropriate. In order to sue Tulsa County, the plaintiff must name as defendant the Board of County Commissioners of Tulsa County. Okla. Stat. tit. 19, § 4 (1991). Tulsa County cannot be named defendant. As to Dave Been, Acting Chief of Police, the plaintiff has sued him in his official capacity. By doing so, the plaintiff has essentially sued the City of Tulsa. Kentucky v. Graham, 473 U.S. 159, 165 (1985) (official capacity suits represent another way of pleading an action against the entity of which the officer is an agent). Because the City of Tulsa is a named defendant, it is redundant to have Dave Been, Acting Chief of Police, named as a defendant. Likewise, it is redundant to name the Police Department of the City of Tulsa as defendant since any judgment against the Police Department would have to be paid by the City of Tulsa.

In addition, the Court also finds that dismissal of the defendant, John Doe, is appropriate. The instant action has been pending for over two years since the filing of the complaint. The plaintiff has never attempted to determine the identity of the defendant, John Doe, during discovery. Moreover, the plaintiff has shown no indication that he intends to determine John Doe's

identity prior to trial. Since the defendant, John Doe has never been identified and he has not been properly served, the Court concludes that the defendant must be dismissed.

As to the defendants, Stanley Glanz and the Board of County Commissioners of Tulsa County, the Court concludes that summary judgment is warranted. The plaintiff has alleged that the defendants violated his constitutional rights because they failed to adequately train and supervise the deputy jailer who allegedly injured the plaintiff. The only evidence presented by the plaintiff in support of his claim is a statement made to the plaintiff by an unidentified deputy sergeant that "they don't give these damn rookies any training or discipline before they send them up here to do this job." The plaintiff contends that this statement is admissible at trial under Rule 802(d)(2)(D), Fed. R. Evid., and is sufficient to overcome summary judgment. The Court disagrees.

Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. The Court finds that the plaintiff has failed to sufficiently demonstrate that the alleged statement falls within Rule 801(d)(2)(D) because he has failed to show that the statement concerned a matter within the scope of the unidentified deputy sergeant's employment with the sheriff's department. The plaintiff has provided no evidence to establish that the unidentified deputy

sergeant had any responsibility over the training of deputy jailers or had any involvement whatsoever in their training. Because the plaintiff has failed to show that the statement concerned a matter within the scope of the deputy sergeant's employment, the Court finds that the statement would be not admissible under Rule 801(d)(2)(D). See, e.g., Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1564-1566 (11th Cir. 1991)(statement of cabin steward that the cruise line had prior knowledge of problems with sliding glass door inadmissible because no evidence that the statement concerned a matter within employment); Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 572 (8th Cir. 1989)(derogatory remarks of airline employees inadmissible because remarks were not within scope of employment).

Since the statement of the unidentified deputy sergeant is hearsay under Rule 801, Fed. R. Evid., and thus inadmissible at trial, the Court cannot consider the evidence in ruling on the defendants' summary judgment motion. World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir.), cert. denied, 474 U.S. 823 (1985). In light of the fact that the plaintiff has provided no other evidence to support his § 1983 claim against the defendants based upon a failure to train or supervise the deputy jailer, the Court finds that the defendants are entitled to summary judgment.

The plaintiff has alleged in his complaint that the defendants, Stanley Glanz and the Board of County Commissioners of Tulsa County, are also liable under § 1983 because they failed to

implement policies and failed to train or supervise their employees in regard to providing medical attention to detainees such as the plaintiff in the county jail. Having reviewed the record, the Court finds that the plaintiff has failed to provide any evidence whatsoever to support his claim. Given the lack of evidence, the Court finds that the defendants are entitled to summary judgment on the plaintiff's § 1983 claim in regard to the lack of medical attention.

The Court notes that the plaintiff has argued in his response brief that if the Court finds that he does not have a cause of action under § 1983 against the defendants, then he should be allowed to pursue a state law tort claim against the defendants based upon the theory of respondeat superior. Even if the plaintiff had evidence to support his state law tort claim, the Court concludes that the plaintiff could not maintain a tort action against the defendants. In order to bring a tort claim against the defendant, Board of County Commissioners, the plaintiff must file first notice of his claim as required by the Governmental Tort Claims Act, Okla. Stat. tit. 51, § 156 (1991) or his claim is barred. The plaintiff has made no allegation and has presented no evidence that such claim has been filed. The defendant, Stanley Glanz, is immune from tort liability as there is no allegation or evidence to show that he was not acting within the scope of his employment. See, Okla. Stat. tit. 51, § 152.1(A) (1991). Consequently, the Court finds that the plaintiff cannot recover against the defendants, Stanley Glanz and the Board of County

Commissioners of Tulsa County, based upon a state law tort claim.

In regard to the defendants, Phil Evans and the City of Tulsa, the Court concludes that summary judgment is required. The plaintiff's claim against the defendants is based upon the fact that he was arrested for an alleged misdemeanor committed outside of Officer Evan's presence which violates state law. The courts addressing this issue have held that a federal civil rights action will not lie for a warrantless misdemeanor arrest unless the arresting officer lacked probable cause. Fields v. City of South Houston, 922 F.2d 1183 (5th Cir. 1991); Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974). In this case, the undisputed evidence indicates that Officer Evans had probable cause to arrest the plaintiff for the misdemeanor. Because probable cause existed to arrest the plaintiff, the Court finds that no constitutional violation occurred.

Based upon the foregoing, the Court DISMISSES the defendants, Tulsa County, Dave Been, Acting Chief of Police and the Police Department of City of Tulsa. The Court GRANTS the Motion to Dismiss (Docket No. 31) as to the defendant, John Doe, and GRANTS the alternative Motion for Summary Judgment (Docket No. 31) as to the defendants, the Board of County Commissioners of Tulsa County and Stanley Glanz. The Court also GRANTS the Motion for Summary Judgment (Docket No. 36) of the defendants, Phil Evans, and the City of Tulsa.

ENTERED this 17th day of October, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 5, 1994.

The Court further finds that the Defendant, PATRICK W. BROOKS, 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 August 3, 1994, and continuing through September 7, 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, PATRICK W. BROOKS, 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 abstractor filed herein with respect to the last known address of the Defendant, PATRICK W. BROOKS. 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 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 Answers on April 25, 1994; and that the Defendants, KIM R. JACOBS and PATRICK W. BROOKS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, KIM R. JACOBS and PATRICK W. BROOKS are single, unmarried people.

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 Fourteen (14) and the South Thirty (30),
feet of Lot Fifteen (15), Block Eighteen (18),
FEDERAL HEIGHTS SECOND ADDITION to Tulsa,
Tulsa County, State of Oklahoma, according to
the recorded Plat No. 526.**

The Court further finds that on January 30, 1987, the Defendants, KIM R. JACOBS and PATRICK W. BROOKS, executed and delivered to Sears Mortgage Corporation, a mortgage note in the

amount of \$49,500.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, KIM R. JACOBS and PATRICK W. BROOKS, each single persons, executed and delivered to Sears Mortgage Corporation, a mortgage dated January 30, 1987, covering the above-described property. Said mortgage was recorded on February 2, 1987, in Book 4999, Page 111, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, Sears Mortgage Corporation, assigned the above-described mortgage note and mortgage to Independence One Mortgage Corporation. This Assignment of Mortgage was recorded on February 5, 1988, in Book 5078, Page 2471, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 7, 1990, Independence One 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 May 10, 1990, in Book 5252, Page 766, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1990, the Defendant, KIM R. JACOBS, 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.

The Court further finds that the Defendant, KIM R. JACOBS and PATRICK W. BROOKS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, KIM R. JACOBS and PATRICK W. BROOKS, are indebted to the Plaintiff in the principal sum of \$70,127.24, plus interest at the rate of Nine percent per annum from February 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 \$17.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$17.00 which became a lien on the property 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 Defendants, KIM R. JACOBS and PATRICK W. BROOKS, 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 the Defendant, ERMA L. JACOBS, should be dismissed as a defendant to this action.

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, KIM R. JACOBS and PATRICK W. BROOKS, in the principal sum of \$70,127.24, plus interest at the rate of Nine percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.06 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 \$34.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, KIM R. JACOBS and PATRICK W. BROOKS, 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, KIM R. JACOBS and PATRICK W.

BROOKS, 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 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, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$34.00, 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.

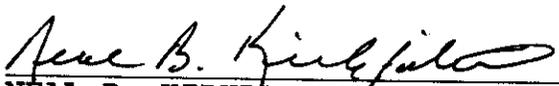
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS J. ...

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) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-324-B

NBK:flv

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

FILED

OCT 17 1994

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

JACK W. SILKEY, Individually,
and as representative for all
similarly situated present and
past employees,

Plaintiff,

vs.

SNOW'S FURNITURE FUNCTION INC.,
an Oklahoma corporation,

Defendant.

Case No. 94-C-22-B

ENTERED ON DOCKET

DATE OCT 18 1994

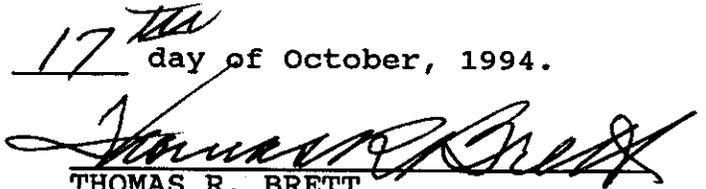
O R D E R

On June 15, 1994, Defendant herein filed its Motion for Summary Judgment with brief. On July 1, 1994, Plaintiff filed his Dismissal With Prejudice.

Rule 41 (a)(1)(i) provides that "an action may be dismissed without Order of the Court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment . . .". All other dismissals, other than joint dismissals, must be by Order of the Court.

Defendant has failed to object to the putative dismissal, which the Court will treat as a Motion to Dismiss With Prejudice, unopposed. Therefore, the Court concludes Plaintiff's Motion should be and the same is hereby GRANTED. This matter is herewith dismissed with prejudice.

IT IS SO ORDERED this 17th 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 17 1994

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

RANDY AND JANET MUNINGER,

Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE
COMPANY, in its corporate
capacity, and as Liquidating
Agent for UNION BANK AND
TRUST,

Defendant.

Case No. 92-C-252-B

ENTERED ON DOCKET

DATE OCT 18 1994

O R D E R

On April 9, 1992, Defendant herein filed its Answer and Counterclaim. On May 19, 1992, Plaintiffs Randy and Janet Muninger filed their Answer to Counterclaim.

Thereafter, and on June 9, 1994, Defendant filed its Dismissal Of Counter-Claim Without Prejudice.

Rule 41 (a)(1)(i) provides that "an action may be dismissed without Order of the Court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer . . .". All other dismissals, other than joint dismissals, must be by Order of the Court.

Paragraph (c) makes this rule applicable to counterclaims.

Plaintiffs have failed to object to the putative dismissal, which the Court will treat as a Motion to Dismiss, unopposed. Therefore, the Court concludes Defendant's Motion should be and the

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same is hereby GRANTED. Defendant's counterclaim is herewith dismissed without prejudice.

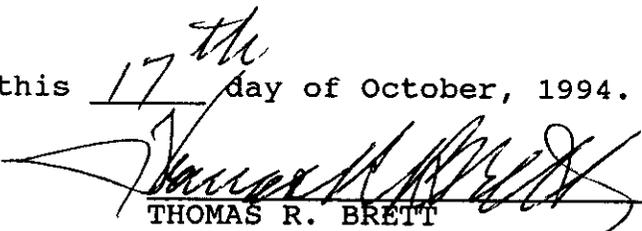
IT IS SO ORDERED this 17th day of October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

The Court concludes Plaintiff's Counterclaim to St. Paul's Counterclaim is indeed not permitted under the Rules. Fed.R.Civ.P. 7(a). Further, it appears that the allegations of Plaintiff's Counterclaim to St. Paul's Counterclaim is essentially a rehash of Plaintiff's original Complaint (Petition). Lastly, the Court is of the view that the proper procedure would be or would have been for Plaintiff to seek and obtain Court permission to file an amended Complaint if such need existed to enhance his original pleadings. Rule 15, Fed.R.Civ.P..

The Court concludes St. Paul's Motion To Dismiss Plaintiff's Counterclaim should be and the same is hereby GRANTED. Plaintiff's Counterclaim to St. Paul's Counterclaim is herewith dismissed.

IT IS SO ORDERED this 17th day of October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE OCT 17 1994

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

F I L E D

OCT 17 1994

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

JAMES E. McDONELL, FRANCES P.)
MCDONELL, GEORGE J. McDONELL,)
SYLVIA S. MCDONELL, LONI)
FRANCIS,)
Plaintiffs,)

vs.)

Case No. 93-C-972-BU ✓

NOEL W. SMITH, a/k/a Noel)
Smith, Noel E. Smith, and)
Noel A. Smith, EXPRESS)
RESERVATIONS GROUP, INC., an)
Oklahoma Corporation, and)
RN GROUP, LTD., an Oklahoma)
corporation,)
Defendants.)

ORDER

Upon agreement of the parties, the Court hereby orders the Clerk to administratively terminate this action in his records pending resolution of the criminal investigation and/or criminal case involving Defendant, Noel W. Smith, a/k/a Noel Smith, Noel E. Smith, and Noel A. Smith.

The parties are DIRECTED to notify the Court of the termination of the criminal investigation and/or criminal case so that the Court may reopen this matter, if necessary, to obtain a final determination of the litigation. The parties are advised that the administrative termination of this action shall in no way affect any applicable statute of limitations, provided that this action was originally filed within the proper time limit.

Entered this 17 day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JAMES E. McDONELL; FRANCES P.)
McDONELL; GEORGE J. McDONELL;)
SYLVIA S. McDONELL; LONI)
FRANCIS;)

Plaintiffs,)

vs.)

NOEL W. SMITH, a/k/a Noel)
Smith, Noel E. Smith, and)
Noel A. Smith; EXPRESS)
RESERVATIONS GROUP, INC., an)
Oklahoma corporation; and)
RN GROUP, LTD., an Oklahoma)
corporation,)

Defendants.)

Case No. 93-C-972-BU ✓

FILED

OCT 17 1994

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

ORDER

In light of the administrative closure of this case pending the criminal investigation and/or criminal case involving Defendant, Noel W. Smith, a/k/a Noel Smith, Noel E. Smith, and Noel A. Smith, the Court declares as MOOT Plaintiffs' Second Motion to Extend Deadlines and for Setting Scheduling Conference (Docket No. 26) and Plaintiffs' Amended Second Motion to Extend Deadlines and for Setting Scheduling Conference (Docket No. 28).

ENTERED this 17 day of October, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE OCT 17 1994

AVTECH, INC., an Oklahoma
corporation, and
DONALD A. MCCANCE,

Plaintiffs,

-vs-

APL INTERNATIONAL, INC.,
formerly APL Sales, Inc.,
DONALD L. BOSHEARS, an
individual, RICK BOSHEARS, an
individual, FAMBO, INC.,
an Oklahoma corporation,
LOVE BOX COMPANY, INC., a
corporation, BEN ROBINSON,
an individual, HOMESTEAD TOOL
& DIE, INC., a corporation,
and HOMESTEAD TOOL AND
MACHINE, INC., a corporation,

Defendants.

Civil Action No. 94-C-506-BU

F I L E D

OCT 17 1994

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

ORDER

Upon Stipulation filed by Plaintiffs and Defendant Love Box Company, Inc., stipulating that Defendant Love Box Company, Inc. may be dismissed with prejudice from this action, it is,

ORDERED that Defendant Love Box Company, Inc. is hereby dismissed with prejudice from the above-entitled action with Defendant Love Box Company, Inc. bearing its own costs and attorneys' fees.

ENTERED this 17th day of October, 1994.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

DATE OCT 17 1994

TEXACO INC. and TEXACO
EXPLORATION AND PRODUCTION
INC.,

Plaintiffs,

vs.

BETHLEHEM SUPPLY CORPORATION,

Defendant.

OCT - 7 1994

NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-788-BU

F I

OCT 17 1994

ORDER

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

This matter comes before the Court upon the Motion for Summary Judgment of Plaintiffs, Texaco Inc. and Texaco Exploration and Production Inc., filed on August 15, 1994. From reviewing the Court file, it appears that Defendant has not responded to Plaintiffs' Motion for Summary Judgment within the time prescribed by the Local Rules and has not filed a request for an extension of time to respond to the motion. It also appears from reviewing Plaintiffs' motion and the attachments thereto that Defendant is barred, pursuant to Okla. Stat. tit. 68, § 1212(c), from defending Plaintiffs' action. Therefore, in accordance with Local Rule 7.1(C), the Court deems Plaintiffs' motion confessed.

Having independently reviewed the motion, the Court finds that no genuine issues of material fact exist and that Plaintiffs are entitled to judgment as a matter of law.

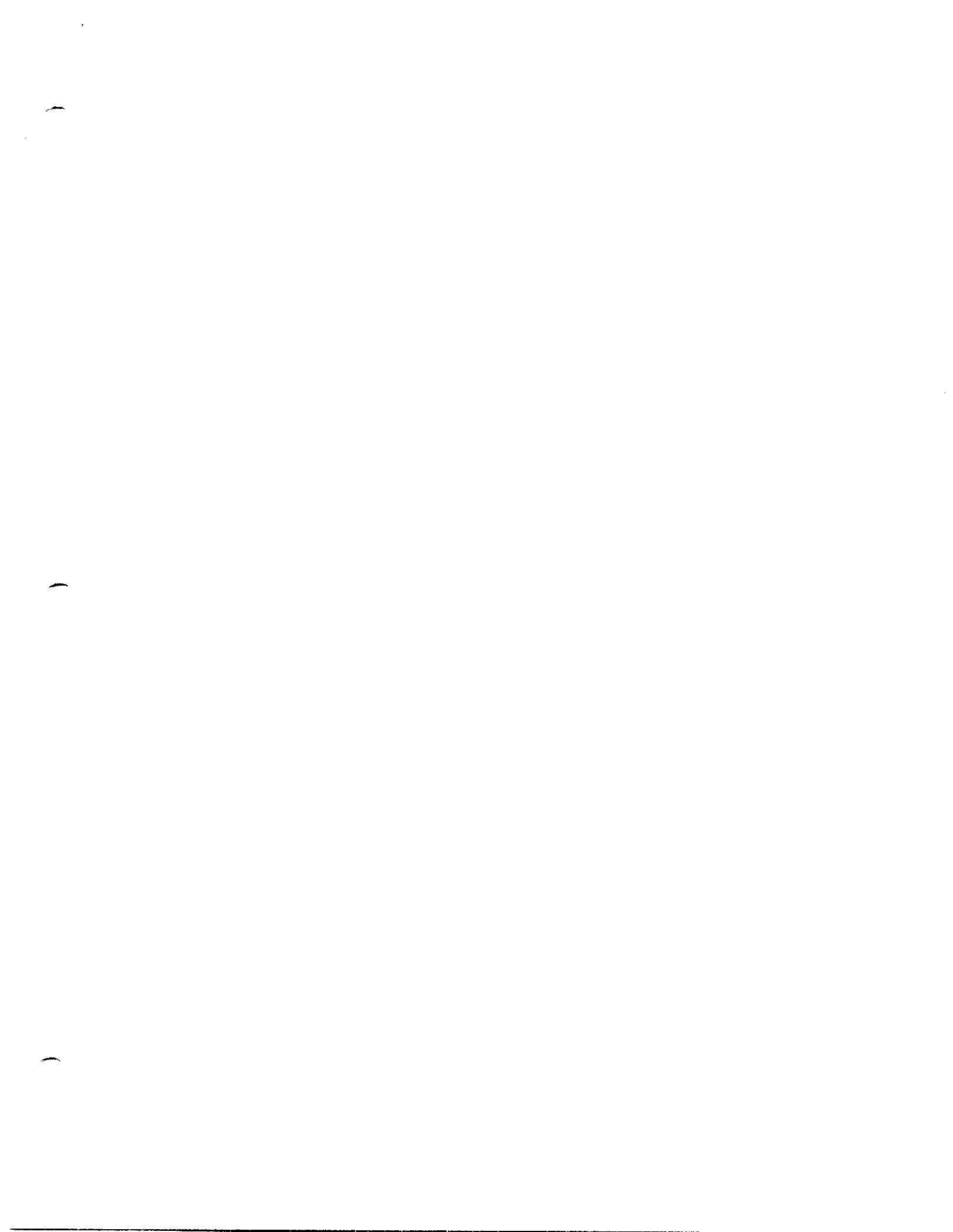
Accordingly, Plaintiffs' Motion for Summary Judgment (Docket No. 4) is GRANTED. Plaintiffs are DIRECTED to submit a proposed judgment for the Court's approval on or before Monday, October 24, 1994. Plaintiffs shall submit with the proposed judgment any

supporting affidavits and documentation for attorneys' fees and costs.

ENTERED this 17 day of October, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE



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

FILED

OCT 14 1994

U.S. District Court

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JAIME OGAZ-NEVAREZ,)
 ALBERTO CARREONES,)
)
 Defendants.)

No. 94-CR-127-B

ENTERED ON DOCKET

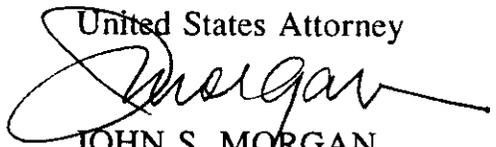
DATE 10/17/94

DISMISSAL ON SUPERSEDING INDICTMENT

Comes now the government and hereby moves to dismiss the Indictment without prejudice due to the returning of a Superseding Indictment on the 7th day of October, 1994.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



JOHN S. MORGAN
Assistant United States Attorney
3900 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918) 581-7463

IT IS SO ORDERED:

S/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

Date: 10-14-94

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 14 1994
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NATURAL RESOURCES DEFENSE COUNCIL, INC.,)
Plaintiff,)
v.)
MCDONNELL DOUGLAS CORPORATION,)
Defendant.)

Civil Action
No. 92 C 122B

OCT 17 1994

ORDER OF DISMISSAL

Upon joint application of the parties, and for good cause shown, it is hereby ORDERED, ADJUDGED AND DECREED that this action be and hereby is dismissed without prejudice.

DATED: 10-14, 1994

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

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

CLIFFORD DEWAIN McCALL)
and GLADYS McCALL)

Plaintiffs,)

vs.)

ALAN LESTER RUSSUM and)
THE DANIEL COMPANY OF)
SPRINGFIELD,)

Defendants.)

FILED

SEP 14 1984

U.S. DISTRICT COURT

NO. 93-C1129-B

ENTERED AND INDEXED

DATE 10/17/94 -

ORDER

For good cause shown, and upon joint application of the parties, the above captioned case is hereby dismissed with prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

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

OCT 14 1994

ALBERT VAIL,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

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

92-C-0965-C ✓

ENTERED ON DOCKET
DATE 10-17-94

ORDER

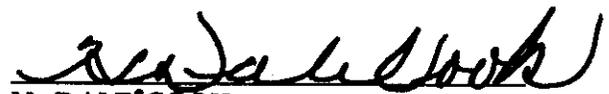
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed September 22, 1994 in which the Magistrate Judge recommended that Secretary's decision be **affirmed**.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 14th day of October, 1994.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
OCT 17 1994
DATE _____

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

ALFRED W. LUMPKIN,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No. 92-C-707-10

FILED

OCT 17 1994

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

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.¹

In the case at bar, the ALJ made his decision at the fifth step of the sequential

¹ 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 decisions. 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).

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evaluation process.² He found the claimant unable to perform his past relevant work as a drill press operator or drill press setup operator. He concluded that claimant retained the residual functional capacity to perform work-related activities except for work involving occasional lifting of more than 20 pounds at a time, frequent lifting, or carrying of objects weighing more than 10 pounds; standing or walking off and on for more than 6 hours in an 8 hour workday and frequent bending and stooping. The ALJ determined that claimant's pain and shortness of breath do not effect his concentration or prevent performance of medium work activity. He stated that claimant's residual functional capacity for the full range of light work was reduced by the limitations listed above.

The ALJ concluded that, prior to May 28, 1990, the claimant was 54 years old which can be defined as closely approaching advanced age, but as of May 28, 1990, he attained age 55, which is defined as advanced age. He has a high school education, and he does not have any acquired work skills which are transferable to the skilled or semiskilled work activities of other work. Based on his exertional capacity for light work, age, education, and work experience, the ALJ determined that, prior to May 28, 1990, the claimant's capacity for the full range of light work was not significantly compromised by his additional nonexertional limitations. Thus, he was not disabled prior to May 28, 1990.

² The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

However, after that date, the regulations at § 404.1569 and § 416.969 direct that the claimant, considering his residual functional capacity, age, education, and work experience, be found "disabled."

Claimant appeals this decision, alleging his disability commenced in April of 1986. He argues that the ALJ improperly relied on the grids and his exertional limitations in determining his disability date, ignoring his back pain, diabetes, heart condition and high blood pressure, all nonexertional impairments, and imposed a disability onset date of May 28, 1990 pursuant to the grid regulations for advanced age individuals. Claimant contends the ALJ's ruling violates the rule precluding application of the grids where nonexertional impairments are involved. Claimant urges that the ALJ's reliance on the grids should be reversed and the case should be remanded for testimony by a vocational expert.

Claimant alleges that he has suffered disability since April 15, 1986, due to diabetes, heart condition, high blood pressure, arthritis and a back injury (TR 64, 71, 107). At a hearing on July 10, 1991, he testified that he had last worked as a drill press operator and drill press set-up operator (TR 45). He complained that he has constant low back pain with radiation into his legs (TR 47). He stated that he could not sit for more than 30 minutes, stand for more than one hour, walk more than one block at a time, or lift over 30 pounds (TR 48). He testified that he was sleeping 9 to 10 hours per night (TR 49). He stated that he occasionally works as a dishwasher at a restaurant two or three times a week (TR 49, 134).

Medical evidence of record demonstrates that claimant underwent back surgery in 1967 and hospitalization for back pain in 1975 (TR 185-189, 232-240). X-rays in 1975

showed some narrowing of the lumbar spine at L4-5, reportedly consistent with degenerative disc disease (TR 235-238). Claimant returned to work following these incidents (TR 45).

The medical record also indicates that claimant was diagnosed with diabetes mellitus in 1974 and 1975 (TR 226-234, 237). In June 1990, he told a doctor that he never used insulin after he was advised to use it, and never received any subsequent medical treatment for this condition (TR 288). He claimed that he had sold his blood on numerous occasions and had received no reports from the blood center that his blood sugar level was high (TR 288).

Plaintiff was seen and treated for chest pains in November 1985 and the diagnosis was costochondritis (TR 277-278). A treadmill test was negative (TR 280). His condition improved with medication treatment, and he was discharged in satisfactory condition after four days in the hospital with a note that he could resume his usual activities (TR 274-275). He was again hospitalized in January 1986 for complaints of chest pain (TR 283). The physical examination was within normal limits except for "mild anterior chest wall tenderness" (TR 285). A chest x-ray was negative for acute pathology, and an EKG was within normal limits (TR 286-287). He was again treated with medication, and his "anxiety and chest pain stabilized satisfactorily" (TR 283-287).

On June 26, 1990, Dr. Richard G. Cooper performed a consultative examination for complaints of a heart problem, low back pain, and shortness of breath (TR 288-294). It was noted that plaintiff was a long-term smoker, but that he had no history of chronic lung disease (TR 290). Pulmonary examination revealed some moderate medium crackles in the

left base (TR 290). All costochondral junctions were tender (TR 290). The range of motion of the cervical spine was full (TR 290). Some limitation of motion of the thoracolumbar spine was noted on side bending at 20 degrees, flexion at 80 degrees, and extension at 10 degrees (TR 290). Range of motion of the fingers, wrists, elbows, shoulders, knees and ankles was full (TR 290). Costoclavicular maneuver was negative, but abduction and rotation of the right shoulder aggravated plaintiff's complaints of paresthesia in the right hand (TR 290). His range of motion in the hips was full except for extension, and straight leg raising tests were negative (TR 290). There was no evidence of atrophy of the extremities or of peripheral vascular disease (TR 290). The doctor reported that plaintiff's chest pain was musculoskeletal in origin, and stated that claimant "would be impaired in any activity that required heavy aerobic activity" (TR 288-291).

Dr. Donald R. Inbody performed a consultative psychiatric evaluation on August 20, 1990 (TR 305-307). Claimant told the doctor that he had not seen any doctor for the past two or three years and was presently on no prescription medication (TR 305). On examination, plaintiff was found to be oriented in all spheres and of average intelligence, with no signs of anxiety, depression, psychomotor retardation, or suicidal ideation (TR 306).

When the ALJ found at step four that claimant could not return to his past relevant work, the burden shifted from claimant to the ALJ to establish that claimant could do other jobs existing in significant numbers in the national economy, considering his residual functional capacity (RFC), age, education, and past work experience. Ragland v. Shalala,

992 F.2d 1056, 1057 (10th Cir. 1993). The ALJ found that claimant had the RFC for a full range of light work, not significantly compromised by nonexertional limitations, prior to May 28, 1990 and relied on the medical-vocational guidelines to find that a significant number of jobs existed that he could perform, thereby compelling a finding that he was not disabled prior to that date.

If supported by substantial evidence, the ALJ must be affirmed. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991). Substantial evidence, however, requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

At step five, the ALJ can meet his burden of showing the claimant retains the capacity to perform other work that exists in the national economy by relying on the grids. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). However, he cannot rely on the grids conclusively unless the claimant can perform the full range of work at an RFC level on a daily basis and possesses the physical ability to perform most of the jobs in that range. Id. at 579-80. Reliance on the grids is inappropriate if nonexertional impairments further limit the range of jobs available to the claimant. Id. at 582 n.6. Absent evidence that he could perform the full range of light work and qualified for most of the jobs in that RFC category prior to May 28, 1990, the ALJ was required to produce expert vocational testimony or other similar evidence to establish the existence of significant work that claimant could perform. Hargis, 945 F.2d at 1490, 1491.

The ALJ rejected claimant's claim that he is disabled by pain. The medical evidence

supports an inference that plaintiff did not suffer from completely disabling pain prior to May 28, 1990. However, the ALJ was required to demonstrate that claimant retained the exertional and nonexertional capacity to perform the full range of light work despite any pain he suffered. 992 F.2d at 1060. "Pain, even if not disabling, is still a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant." Thompson v. Sullivan, 987 F.2d 1482, 1490-91 (10th Cir. 1993).

Pain can be an exertional or a nonexertional impairment. It is nonexertional if it is present whether or not the claimant is exerting himself in activities relating to an RFC range's strength requirements. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Within this framework, pain experienced while walking, standing, and lifting is exertional, and pain experienced while sitting and lying down is nonexertional. Id. Plaintiff claimed he was in constant pain and that pain limited his ability to lift, sit, and stand prior to May 28, 1990. The ALJ recognized that pain limited claimant's ability to frequently lift, carry more than ten pounds, and occasionally lift more than twenty pounds after May 28, 1990. He therefore did not find claimant's pain insignificant. All of the physicians who examined claimant noted that he had some pain.

The ALJ could not meet his burden of proving that claimant could perform work at a particular RFC level by relying on the absence of contraindication in the medical records. 987 F.2d at 1491. The ALJ's impression that claimant's pain did not prevent his performance of light work prior to May 28, 1990 is not substantial evidence, by itself, to support the finding that claimant could perform such work. 814 F.2d at 1464. The ALJ

presented no evidence that claimant had the capacity to perform the full range of light work prior to May 28, 1990. While claimant was given a consultative examination, the consulting physician expressed no opinion as to claimant's RFC. The ALJ should have heard testimony by a vocational expert regarding the impact of claimant's pain on his ability to work prior to May 28, 1990.

This case is remanded for a supplemental hearing at which testimony by a vocational expert is to be presented on the impact of claimant's pain on his ability to work within the RFC prior to May 28, 1990.

Dated this 17 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

s:Lumpkin

**HALL, ESTILL, HARDWICK, GABLE, GOLDEN &
NELSON, P.C.**
Attorneys for Defendant

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4100 Bank of Oklahoma Tower

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Tulsa, OK 74172

DATE OCT 14 1994

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

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 BILLY K. GRISHAM, JR.,)
 MARILYN G. GRISHAM, and)
 OKLAHOMA FARM BUREAU MUTUAL)
 INSURANCE COMPANY,)
)
 Defendants,)

OCT 14 1994 *pw*
 Richard M. Lawrence, Clerk
 U.S. DISTRICT COURT

Civil Action No. 94-C-823-K ✓

NOTICE OF DISMISSAL

The United States of America, ex rel., Small Business Administration (SBA),
 by and through Stephen C. Lewis, United States Attorney, Northern District of
 Oklahoma, and Phil Pinnell, Assistant United States Attorney, hereby file its Notice of
 Dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i). The United States would further
 show the Court that this action has been settled by the parties prior to an answer or
 other responsive pleading being filed by the Defendants.

Respectfully submitted,

UNITED STATES OF AMERICA

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
Northern District of Oklahoma
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on this the 14th day of October, 1994, I mailed a true and correct copy of the above and foregoing with postage thereon prepaid to Howard D. Perkins, Jr., Post Office Box 690355, Tulsa, OK 74169-0355, Frank Caramante, Agent and Broker, Professional Liability Claims Analyst, A.I. Management and Professional Liability Claims Adjusters, 70 Pine Street, 2nd Floor, New York, NY 10270, Jack O'Toole, Small Business Administration, 200 N.W. 5th Street, Suite 670, Oklahoma City, OK 73102.



PHIL PINNELL
ASSISTANT UNITED STATES ATTORNEY

PEP:cg

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

FILED

OCT 14 1994

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

DANNY R. WILLIAMS,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA E. SHALALA,)
 Secretary of Health and)
 Human Services,)
)
 Defendant.)

Case No. 93-C-693-B

ENTERED ON BOOKET

OCT 14 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 under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq.*

Danny R. Williams, (Plaintiff or claimant) filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on May 13, 1991, with a protective filing date of April 22, 1991. Plaintiff's application was denied initially, and again upon reconsideration. After an administrative hearing held on June 25, 1992, the Administrative Law Judge (ALJ) issued a denial Decision on December 15, 1992. The Appeals Council denied the Plaintiff's request for review on June 8, 1993.

The Plaintiff filed this action on August 3, 1993, pursuant 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. Plaintiff alleges "a complicated medical history with

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a variety of classical symptoms of a somatoform disorder: nausea, vomiting, chronic diarrhea, lower abdominal pain, chronic insomnia, urinary frequency, severe headaches, weakness & easy fatigability, inability to control emotions, mixed insomnia, swelling in glands of groin, chronic cough, muscle weakness & chronic neck pain, constant hurting in fingers, elbows, and shoulders, frequent shakes because of pain, blurred vision, cramping, and depression."

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 five grounds for reversing the ALJ's denial of benefits:

- 1) The ALJ erroneously rejected the opinions of medical experts.
- 2) The ALJ did not correctly consider the Plaintiff's non-exertional impairments.
- 3) The ALJ did not call a Vocational Expert witness.
- 4) The ALJ incorrectly determined Plaintiff's residual functional capacity.
- 5) The ALJ incorrectly applied the "grids" in the presence

of severe non-exertional impairments.

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 (Tr. 13-37):

- 1) That claimant has not engaged in any substantial gainful activity since 1981.
- 2) That claimant is determined to have a vocationally severe impairment by Social Security definition.
- 3) That 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.
- 4) That claimant cannot perform his past relevant work as auto body shop owner/repairman, welder foreman, grocery store manager and fast food franchise manager but retains the residual functional capacity to perform the

light work of auto body repairman, janitor, car wash attendant, assembler and meter reader.

5) That there are jobs which claimant can perform consistent with his medically determinable impairments, functional limitations, and the foregoing vocational factors; that therefore claimant is not disabled within the meaning and intent of the Social Security Act.

Specifically the ALJ found that the degree of functional limitation the claimant alleges due to pain and other subjective complaints is not credible based on the reasons set forth herein.

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.

The Plaintiff has the burden to show that he is unable to return to the prior work he performed, Bernal, at 299, a burden the Plaintiff carried. Further, the Plaintiff has the burden of proving his disability prevents him from engaging in any gainful work activity, Channel v. Heckler, 747 F.2d 577 (10th Cir.1984), a burden Plaintiff did not sustain.

This is essentially a "pain" case. Plaintiff's primary argument is that the ALJ did not properly evaluate his claim that the pain he was suffering was disabling. The ALJ found that Plaintiff's testimony as to pain was not credible and that his pain was not disabling sufficient to satisfy the Regulations.

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 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. The ALJ stated that the objective medical evidence showed no underlying impairment so severe as to preclude light and sedentary work (TR at 34-35).

The Court concludes the reports of several examining doctors amply support the ALJ's determination that from an objective standpoint Plaintiff's pain symptomatology is simply not credible to an extent to establish disability under the Social Security Act.

Claimant gave a history of back pain for a 5 or 6 year period beginning in approximately 1981. Claimant in 1981, the then owner/operator of a automobile body repair shop, testified he was suddenly hit with so much pain he "couldn't get out of bed one morning" and simply shut down his shop rather than selling or leasing. (Tr. at 58). Claimant suffered a head injury in a car wreck in approximately 1960 or 1961 while a teenager. He had a severe anxiety attack in 1988 following another such accident. Dr. Thomas A. Goodman, who saw claimant in August, 1992, for a psychiatric consultative evaluation, thought claimant might have

some element of a somatoform disorder. Dr. Goodman opined that claimant had a somewhat unusual history of a multitude of symptoms which did not appear to have been specifically diagnosed medically. Dr. Goodman thought claimant showed evidence of an underlying personality disorder of the schizotypal variety.¹ Claimant alleged to Dr. Goodman that he had seen the face of Jesus in 1990 during a "saving" experience and that he, claimant, was superstitious, believing in magic and in demon possession. Claimant acknowledged to Dr. Goodman that he had a history of run-ins with the police, primarily juvenile offenses and drunkenness offenses as an adult.

Dr. Edwards, in June, 1991, seeing claimant for a general physical examination under a complaint of painful muscles and joints, found claimant to be unmotivated towards employment, delusional, having a hypochondriacal disorder but otherwise a healthy male. Dr. Edwards found claimant to have an unlimited ability to do work such as sit, stand, move about, lift/carry, handle objects, and to hear and speak.

Dr. Spray, seeing claimant in June, 1991 for a psychological consultative evaluation, noted that claimant slept 6 to 8 hours; that claimant had not had any crying spells since he had been on the drug Amitriptyline but acknowledged that he was not then taking the drug; that claimant had done odd-and-end jobs for 5 to 6 weeks in 1990 for a temporary employment service; that claimant was

¹ Claimant, a daily user of marijuana for a three year period leading up to 1988, lives alone, has few friends and has or had a delusion of himself as being a prophet of God Who spoke to claimant through his radio.

nervous but that he (claimant) had difficulty seeing his nervousness as necessarily problematic; that claimant alleged he had some suicidal ideation after his wife left him but was not then currently suicidal. Claimant exhibited no pain related behaviors to Dr. Spray during the examination. Claimant acknowledged to Dr. Spray that he was a heavy alcohol user between the ages of 15 and 24.

The ALJ concludes that the medical evidence was convincing that claimant does not have marked limitation of motion nor abnormal motion of affected joints despite complaints of joint pain and stiffness. The ALJ further concluded that claimant's mental or psychological impairments were not of the required level of severity to meet the requirements of "disabled" as set forth in the Regulations.

The ALJ considered all of the evidence and concluded that Plaintiff could perform sedentary or light 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 concludes there is substantial evidence to support the ALJ's finding that Plaintiff is able to perform sedentary or light work.

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748,

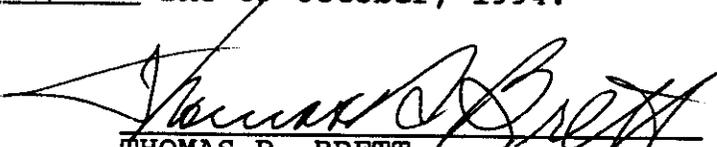
755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence.

The ALJ concluded that Plaintiff's non-exertional mental impairment did not satisfy all of the medical criteria of the Appendix 1 listings and thereby does not significantly reduce the range of jobs Plaintiff was otherwise capable of performing such as unskilled sedentary or light work. Therefore the ALJ could properly rely exclusively upon the Medical-Vocational Guidelines ("grids") to demonstrate that Plaintiff was not precluded from performing a significant number of jobs. Gossett v. Bowen, 862 F.2d 802 (10th Cir.1988),

Plaintiff's arguments are without merit since the determination of residual functional capacity is predicated upon the ALJ's conclusion that Plaintiff's complaints of disabling pain were not supported by the objective medical evidence.

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's decision that the Plaintiff is able to perform sedentary or light work and that therefore Plaintiff is not disabled as defined by the Social Security Act and the Regulations thereunder. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 14 DAY OF October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

IN RE:)
ASBESTOS LITIGATION,)

DIANE M. CAREL, PHILIP D. LOWRY,)
and DARRELL F. LOWRY, individually)
and as Surviving Children and Next)
of Kin of MARY ANN LOWRY, Deceased,)
and DIANE M. CAREL, as Personal)
Representative of the Estate of)
MARY ANN LOWRY, Deceased.)

M-1417
ASB(I) - 6595

ENTERED ON DOCKET
DATE OCT 14 1994

FILED

OCT 13 1994

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

No. 91-C-0062-C

FINAL JUDGMENT

The Court having earlier granted summary judgment against Plaintiffs' failure to warn and marketing defect claims, and in light of Plaintiffs' withdrawal of their other remaining claims, IT IS ORDERED that FINAL JUDGMENT be entered in favor of all Defendants.

SO ORDERED this 13th day of October, 1994.

Richard M. Lawrence
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**
NORTHERN DISTRICT OF OKLAHOMA

OCT 13 1994

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

ZELDA ANDERSON,
Plaintiff,
vs.
TRI COUNTY AREA VOCATIONAL
TECHNICAL SCHOOL DISTRICT,
Defendant.

Case No. 93-C-1100-BU

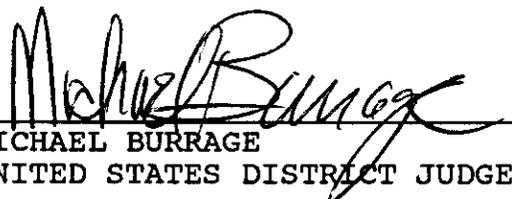
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DATE

J U D G M E N T

This matter came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant, Tri County Area Vocational Technical School District, and against Plaintiff, Zelda Anderson, and that Defendant, Tri County Area Vocational Technical School District, recover from Plaintiff, Zelda Anderson, its costs of action.

Dated at Tulsa, Oklahoma this 12 day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

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FILED

OCT 13 1994 *pw*

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

ZELDA ANDERSON,)
)
 Plaintiff,)
)
 vs.)
)
 TRI COUNTY AREA VOCATIONAL)
 TECHNICAL SCHOOL DISTRICT,)
)
 Defendant.)

Case No. 93-C-1100-BU ✓

ENTERED ON DOCKET

DATE OCT 14 1994

ORDER

This matter comes before the Court upon the motion of Defendant, Tri County Area Vocational Technical School District, for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Plaintiff, Zelda Anderson, has responded to the motion and Defendant has replied thereto. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. At all times relevant to this action, Plaintiff was employed by Defendant as a manager of the Business Assistance Center. Her position was that of a support employee.

2. The Business Assistance Center is an incubator for new business in Nowata, Osage and Washington counties and specifically in Bartlesville, Oklahoma where the Business Assistance Center is located. New businesses could locate in the Business Assistance Center, pay rent to Defendant, and have the benefit of assistance provided by the Business Assistance Center in getting the businesses off the ground.

3. In addition to the manager, four coordinators and two

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secretaries worked in the Business Assistance Center. Two of the coordinators and both of the secretaries were female.

4. Each coordinator was responsible for teaching a specific program at the Business Assistance Center. The manager and coordinators were co-equal positions. The coordinators were all state-funded positions, whereas the manager's position was funded by local funds received from ad valorem taxes and tuition paid to Defendant.

5. Clovis Weatherford became superintendent for Defendant in March of 1990. Shortly thereafter, Mr. Weatherford asked Plaintiff to submit her resignation based upon complaints he had received from the coordinators in the Business Assistance Center. Plaintiff refused to resign. Mr. Weatherford decided not to press the issue further.

6. In July of 1990, assistant superintendent Bill Price was assigned the responsibility of overseeing the Business Assistance Center.

7. Mr. Price evaluated Plaintiff's performance for the 1991-1992 school year in May of 1992 and gave her a good evaluation.

8. In the spring of 1992, Mr. Price advised Mr. Weatherford that he was considering recommending the elimination of Plaintiff's position as manager of Business Assistance Center. Mr. Weatherford told Mr. Price to present a written recommendation on the matter.

9. On May 18, 1992, Mr. Price made a written recommendation to Mr. Weatherford that Plaintiff's position be eliminated. Mr. Price indicated that Plaintiff's responsibilities could be divided among the other employees in the Business Assistance Center and the

money used for her salary could be used for other purposes. Mr. Price also recommended to Mr. Weatherford that one of the secretarial positions be reduced to part time.

10. Defendant had a Policy for Suspension, Demotion, Termination, or Non-Reemployment of Support Employees. The policy provided that a support employee such as Plaintiff could be suspended, demoted, terminated or non-reemployed for several reasons, including if it was in the best interest of the school district.

11. On or about May 26, 1992, Plaintiff was notified that she had been recommended for non-reemployment. The cause cited for the non-reemployment was a reduction in force. The notice advised Plaintiff of her right to a hearing before the Tri County Vo Tech Board of Education. It also advised Plaintiff of her right to be represented by counsel at the hearing, her right to present evidence and witnesses on her behalf and her right to confront and cross-examine the witnesses on behalf of the school administration.

12. Plaintiff requested a hearing before the Board of Education and was notified by letter dated June 9, 1992 that the hearing would be held on July 8, 1992.

13. At the hearing, Mr. Weatherford testified that he concurred with Mr. Price's recommendation to reduce the staff at the Business Assistance Center. He also testified that Mr. Price and the four coordinators at the Business Assistance Center could perform all of the responsibilities of Plaintiff's position in addition to their regular responsibilities. He further testified

that eliminating Plaintiff's position would save Defendant \$28,370.00, which money could be used to benefit other programs. Finally, he testified that there were no open positions for which Plaintiff was qualified.

14. Plaintiff represented herself at the hearing and was allowed to cross-examine Mr. Weatherford.

15. Plaintiff also testified in her own behalf and called seven witnesses who testified as to her abilities and strengths as manager of the Business Assistance Center.

16. All witnesses were sworn to tell the truth and the Board of Education members were permitted to ask questions of any witness.

17. No evidence was presented by the school administration suggesting Plaintiff should be not be reemployed because she had failed to perform the duties of her job.

18. After the school administration's attorney and Plaintiff made closing arguments, the Board of Education retired to executive session and deliberated in private. Neither Mr. Weatherford nor the school administration's attorney went into executive session with the Board members.

19. Upon returning to open session, the Board of Education voted to adopt the following findings of fact:

1. During the 1991-92 fiscal year, Zelda Anderson served as the Business Assistance Center Manager.

2. Ms. Anderson's employment contract with the Tri County Vo Tech provided that she was to be paid an annual salary of \$26,500.00 and teacher retirement benefits in the amount of \$1,870.79 for a total compensation package of \$28,370.79.

3. The Superintendent of Schools, Clovis Weatherford, and the Assistant Superintendent, Bill Price, have carefully reviewed the functions of the Business Assistance Center and have determined that the position of Business Assistance Center Manager should be eliminated.

4. The elimination of the Business Assistance Center Manager position will save the School District \$28,370.79 per fiscal year. The savings will occur because the Business Assistance Center Manager duties can be delegated to persons occupying current positions with the Tri County Vo Tech. These persons can and will perform all the duties of Business Assistance Center Manager and their current job duties without adversely affecting the operations of the Business Assistance Center.

5. There is no other position available in the Tri County Vo Tech for which Zelda Anderson is qualified and can be employed.

6. For the reasons stated, it is in the best interest of the Tri County Vo Tech that the position of Business Assistance Center be eliminated and that the employment contract of Zelda Anderson not be renewed for the 1992-93 fiscal year.

20. Following Plaintiff's non-renewal, her job duties were divided among Mr. Price and the four coordinators in the Business Assistance Center. Plaintiff's position has never been reinstated.

Plaintiff brings this action against Defendant alleging claims under 42 U.S.C. § 1983 for violating her due process rights under the Fourteenth Amendment and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., for discriminating against her based upon her sex. Plaintiff also alleges a claim against Defendant for breach of contract under state law. Defendant denies that it violated Plaintiff's due process rights, that it discriminated against Plaintiff in any manner and that it breached any contract with Plaintiff.

In its motion, Defendant contends that it is entitled to

summary judgment on all of Plaintiff's claims. In regard to Plaintiff's claim that she was deprived of her property right without due process of law, Defendant argues that Plaintiff's claim is without merit since Plaintiff received all the due process required by the Fourteenth Amendment prior to her non-renewal. Defendant contends that Plaintiff was given notice of the non-renewal as well as the specific reasons for the non-renewal. Defendant contends that Plaintiff was permitted at the hearing before the Board of Education to cross-examine Mr. Weatherford about the reasons for non-renewal. She was also permitted to present evidence in opposition to Mr. Weatherford's recommendation for non-renewal. Defendant further argues that the Board of Education was an impartial tribunal and that its findings of facts were based upon the evidence presented at the hearing.

In response, Plaintiff contends that Defendant is not entitled to summary judgment because the non-renewal hearing was nothing but a "sham". Plaintiff contends that there was no evidence to support the Board of Education's ultimate finding of fact that it was in the best interest of the school district to not renew Plaintiff's contract. Plaintiff contends that no evidence was presented as to a lack of funding for her job or that funds were needed for other areas in the school district. According to Plaintiff, there was also no evidence presented to the Board of Education by the school administration which demonstrated a shortage of work so as to require the elimination of Plaintiff's position. Furthermore, Plaintiff argues that the Board of Education was a biased tribunal.

Plaintiff maintains that she observed several board members talking to the school administration's attorney prior to the hearing and that she has observed in the past that the board members rubber-stamp the superintendent's recommendations.

Having reviewed the undisputed evidence, the Court finds that summary judgment on Plaintiff's procedural due process claim is warranted. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 96 S.Ct. 893, 902 (1976) (quoting Armstrong v. Manzo, 85 U.S. 1187, 1191 (1965)). The opportunity to be heard at a meaningful time and in a meaningful manner includes three elements: (1) an impartial tribunal; (2) notice of charges within a reasonable time before the hearing; and (3) absent emergency circumstances, a pre-termination hearing. Walker v. United States, 744 F.2d 67, 70 (10th Cir. 1984). In the instant case, the undisputed facts show that all three elements were satisfied. Even though Plaintiff claims that the Board of Education was biased, Plaintiff has failed to present any evidence to support such allegation. Plaintiff testified in her deposition that she observed the school administration's attorney talking with several of the Board members prior to the hearing. Upon further questioning, however, Plaintiff admitted that she had no knowledge as to the subject matter of the conversation between the attorney and the Board members. Plaintiff also testified that she had observed in the past that the Board was a rubber-stamp for the superintendent's recommendations. She again admitted that she had

no evidence to support such claim. Because honesty and integrity are presumed on the part of a tribunal, Withrow v. Larkin, 95 S.Ct. 1456, 1464 & 1468 (1975), and Plaintiff has failed to overcome such presumption with admissible evidence, the Court concludes that the Board of Education was an impartial tribunal.

As to the latter two elements, the undisputed facts establish that Plaintiff was given notice of the recommended non-renewal of her contract and a hearing prior to the non-renewal of her contract. The hearing included an opportunity for Plaintiff to confront Mr. Weatherford as to the reasons for non-renewal and an opportunity to present evidence on her own behalf to rebut Mr. Weatherford's testimony. The Court concludes that the hearing and the notice complied with the requirements of the Fourteenth Amendment.

Plaintiff additionally argues that she was deprived of due process because the Board of Education did not hear evidence supporting all of its findings of fact. Specifically, Plaintiff contends that there was no evidence to support the finding that it was in the best interest of the school district to not renew her contract. Plaintiff contends that the school administration only made vague references to saving money and to the ability of other employees to perform her duties. Plaintiff contends that there was no evidence presented to the Board of Education in regard to a lack of funding or a shortage of work.

The Court concludes that the Board of Education's ultimate finding that it was in the best interest of the school district to

eliminate Plaintiff's position was supported by the evidence. The Board of Education's ultimate finding was based upon the culmination of its other findings for which the Board of Education heard evidence. The Court concludes that it was not necessary for the school administration to show a shortage of funds or a shortage of work to justify the decision to eliminate Plaintiff's position. Although lack of funds and lack of work are reasons for non-reemployment under the Policy for Suspension, Demotion, Termination, or Non-Reemployment of Support Employees, "the best interest of the school district" is also a reason for non-reemployment. The Board of Education found that Plaintiff's duties could be delegated to other persons occupying current positions with the school district and that the school district could save \$28,370.79 per year with the elimination of Plaintiff's position. The Court concludes that these findings, which were supported by evidence, were sufficient to support the Board's ultimate finding that it was in the best interest of the school district to eliminate Plaintiff's position.

The Court's function is not to second guess the Board of Education's decision; rather, it is only to ensure that Plaintiff was provided with due process when the decision was made. Pitts v. Board of Education of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 557 (10th Cir. 1989). Based upon the evidence in the record, the Court finds that Plaintiff was provided with adequate due process and that summary judgment is appropriate on Plaintiff's claim that she was deprived of her property interest without due process of law.

Plaintiff has also alleged a claim against Defendant that she was deprived of her liberty interest without due process of law. Defendant contends that summary judgment is required on this claim because Plaintiff was not stigmatized by any statement made or action taken by Defendant. Defendant contends that no suggestion was made by Defendant at the July 8, 1994 hearing that Plaintiff had been anything but a good employee. According to Defendant, the recommendation to non-renew Plaintiff was solely a business decision. Defendant further contends that Plaintiff was given a full opportunity to refute the reasons for non-renewal.

Plaintiff counters Defendant's contentions arguing that she was stigmatized by statements made by Mr. Weatherford to the local newspaper. Plaintiff contends that Mr. Weatherford's statements that Plaintiff's job was "just a little bit more than what a good secretary can handle" and that the "position actually would be 'upgraded' by giving Assistant Superintendent Bill Price most of Anderson's duties" damaged her professional reputation. Based upon such statements, Plaintiff argues that Defendant is not entitled to summary judgment.

Having reviewed the evidence, the Court finds that Plaintiff's claim is without merit. In order to establish a claim against Defendant for deprivation of a liberty interest without due process of law, Plaintiff must show: (1) that a stigmatizing statement was made during the course of employment termination; (2) that the statement was disclosed publicly, and (3) that the stigmatizing statement was false. Melton v. City of Oklahoma City, 928 F.2d

920, 927 (10th Cir. 1991). The Court finds that Plaintiff cannot establish the first element. The Court concludes that the alleged statements of Mr. Weatherford were not stigmatizing. As noted by the Tenth Circuit in Asbill v. Housing Authority of Choctaw Nation, 726 F.2d 1499, 1503 (10th Cir. 1984), the Supreme Court in Board of Regents v. Roth, 92 S.Ct. 2701, 2707 (1971), indicated that for statements to be stigmatizing they must rise to such a serious level as to place the employee's good name, reputation, honor, or integrity at stake. As an example, the Supreme Court noted that a charge of dishonesty or immorality would be stigmatizing. Id. In the instant case, the Court finds that the alleged statements of Mr. Weatherford do not give place Plaintiff's good name, reputation, honor or integrity at stake. Indeed, the alleged statements are directed to the position held by Plaintiff not to Plaintiff herself. However, even if the statements could be construed to be directed at Plaintiff, they do not rise to the serious level of damaging Plaintiff's standing or association in the community. Because the Court finds that the statements are not stigmatizing, the Court concludes that Plaintiff's claim for deprivation of liberty interest without due process of law fails as a matter of law.

Additionally, the Court finds that Plaintiff's substantive due process claim is insufficient. Without deciding that Plaintiff's property interest in her employment was entitled to substantive due process protection, the Court finds that Plaintiff's employment was not arbitrarily removed by Defendant. The undisputed facts show

that Plaintiff's position was eliminated because Plaintiff's duties could be performed by other employees and the school district could save over \$28,000.00 in salary and benefits. Plaintiff's position was funded by local funds and the elimination of her position freed up funds for other uses. The undisputed facts also show that Plaintiff's position was never reinstated by Defendant. Thus, as the evidence shows no abuse of state power in connection with Plaintiff's non-renewal, the Court finds that Defendant is entitled to summary judgment on Plaintiff's substantive due process claim.

Next, Defendant argues that it is entitled to summary judgment on Plaintiff's Title VII claim. Title VII makes it an unlawful employment practice to discharge or otherwise discriminate against any individual on the basis of sex with respect to compensation, terms, or conditions or privileges of employment. 42 U.S.C. 2000e-2(a)(1). Plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of sex discrimination. Texas Dept. of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981). If Plaintiff establishes a prima facie case, a presumption of discrimination exists. Id. at 1094. The burden then shifts to Defendant to articulate legitimate, non-discriminatory reasons for its employment action. Id. at 1093. If Defendant sustains its burden of production, the presumption of discrimination is rebutted. Plaintiff must then demonstrate that the proffered reasons were not the true reasons for the employment action but were a pretext for discrimination. Id. The ultimate burden of persuasion remains on Plaintiff to prove that she has

been a victim of intentional sexual discrimination. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747-49 (1993).

In its motion, Defendant contends that Plaintiff cannot establish a prima facie case of sex discrimination. However, even if Plaintiff can establish a prima facie case, Defendant contends that Plaintiff cannot satisfy her ultimate burden of persuasion that Defendant intentionally discriminated against her. Defendant contends that the undisputed evidence establishes that Plaintiff was non-renewed because her duties could be absorbed by other employees and the elimination of Plaintiff's position could save Defendant over \$28,000.00.

Plaintiff, in response, contends that summary judgment is not appropriate because the evidence is sufficient to establish a prima facie case of sex discrimination. According to Plaintiff, the facts show that she was female, that she was performing her job satisfactorily but she was non-renewed and that Defendant intended to discriminate against her because of her sex. Plaintiff contends that the evidence shows that she was treated less favorably than males from the time Mr. Weatherford sought her resignation until her contract was renewed.

Having reviewed the evidence, the Court concludes that summary judgment is appropriate. Plaintiff has failed to show a prima facie case of sex discrimination. Plaintiff has not presented any evidence from which a factfinder might reasonably conclude that Defendant intended to discriminate against Plaintiff. Plaintiff has alleged that she was not treated as favorably as male employees

because she was excluded from meetings and training sessions. However, Plaintiff admitted in her deposition that male employees were also excluded at times from meetings. She also admitted that other female employees were not excluded from the meetings. In support of her claim, Plaintiff has also argued that Mr. Weatherford asked for her resignation when he became superintendent for Defendant. Mr. Price rather than Mr. Weatherford made the initial recommendation to eliminate Plaintiff's position.

Even assuming Plaintiff could establish a prima facie case of sex discrimination, the Court concludes, from reviewing the record, that Plaintiff has failed to present sufficient evidence to raise a genuine issue of fact for trial as to whether Defendant's proffered reasons were not the true reasons for its employment decision and as to whether Defendant's employment decision was motivated by Plaintiff's sex. The Court concludes that reasonable jurors could not differ from the evidence in the record that Plaintiff was non-renewed due to the fact that it was in the best interest of the school district to not renew her contract.

Finally, Defendant argues that Plaintiff's breach of contract claim under state law is without merit. Defendant contends that it was authorized under its policy governing support employees to not renew Plaintiff's contract because it was in their best interest not to renew the contract. Defendant also contends that under state law, it was authorized to determine the number of personnel needed for its staff and to reduce the number of personnel if necessary. Defendant contends that the undisputed facts

demonstrate that Plaintiff's position was not necessary. Thus, Defendant's decision to not renew Plaintiff's contract does not constitute a breach of contract.

Contrary to Defendant's arguments, Plaintiff contends Defendant breached its contract. Plaintiff contends that in the absence of just cause, her contract was to be renewed by Defendant. Plaintiff contends that no just cause was presented to the Board of Education for not renewing her contract. Because no just cause existed for non-renewal, Plaintiff contends that she is entitled to recover damages against Defendant for breach of contract.

The Court concludes that the undisputed evidence establishes that Defendant did not breach its contract with Plaintiff in failing to renew her contract. The policy provides that Defendant may not reemploy Plaintiff if it is in the best interest of the school district. The undisputed evidence establishes that elimination of Plaintiff's position was in the best interest of the school district because her position could be performed by other employees and the school district could use money saved from the elimination in other areas. Since the Board of Education eliminated Plaintiff's position on the basis that it was in the best interest of the school district, the Court finds that Plaintiff's breach of contract claim is without merit.

Based upon the foregoing, Defendant's Motion for Summary Judgment (Docket No. 13) is GRANTED. Judgment shall issue forthwith.

ENTERED this 12 day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIM W. PRICE; DIANA L. PRICE;
BILL R. PRICE; BETTY ANN PRICE;
FEDERAL LAND BANK, Wichita,
Kansas; CITIZENS STATE BANK OF
MORRISON, an Oklahoma Banking
Corporation; JOHN DEERE COMPANY;
M. SCOTT ROACH; MARVA J. ROACH;
COUNTY TREASURER, Pawnee County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Pawnee County,
Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE OCT 14 1994

F I L E D

OCT 13 1994

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

~~BY MICHAEL BURRAGE~~

CIVIL ACTION NO. 93-C-0140-BU ✓

AGREED JUDGMENT

This matter comes on for consideration this 12 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, **Jim W. Price and Diana L. Price**, appear by their attorney Vicky J. Maine.

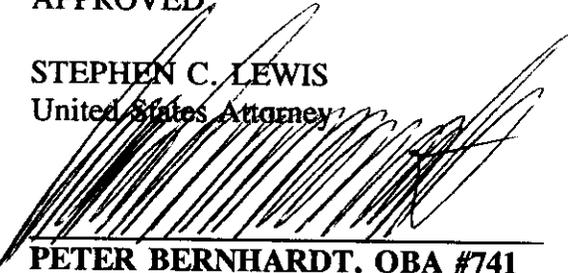
The Court being fully advised and having examined the court file finds that the
Defendants, **Jim W. Price and Diana L. Price**, acknowledged receipt of Summons and
Complaint on May 18, 1993. On September 29, 1994, the Plaintiff received certified funds
in the amount of \$37,500.00 from the Defendants, **Jim W. Price and Diana L. Price**, as
settlement for the real estate and machinery. The Defendants, **Jim W. Price and Diana L.
Price**, agree that they are still indebted to the Plaintiff for the amount remaining on their

loans with the Farmers Home Administration and that judgment may be entered against them in the amount of \$102,026.02 as of September 29, 1994, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid.

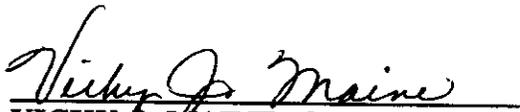
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendants, **Jim W. Price and Diana L. Price**, in the principal sum of \$102,026.02, as of September 29, 1994, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid.


UNITED STATES DISTRICT JUDGE

APPROVED:


STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



VICKY J. MAINE, OBA #14355
P.O. Box 447
409 6th Street
Perry, Oklahoma 73077
(405) 336-5803
Attorney for Defendants,
Jim W. Price and Diana L. Price

Judgment of Foreclosure
Civil Action No. 93-C-0140-BU

PB:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 14 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIM W. PRICE; DIANA L. PRICE;
BILL R. PRICE; BETTY ANN PRICE;
FEDERAL LAND BANK, Wichita,
Kansas; CITIZENS STATE BANK OF
MORRISON, an Oklahoma Banking
Corporation; JOHN DEERE COMPANY;
M. SCOTT ROACH; MARVA J. ROACH;
COUNTY TREASURER, Pawnee County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Pawnee County,
Oklahoma,

Defendants.

F I L E D

OCT 13 1994

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

CIVIL ACTION NO. 93-C-0140-BU

ORDER

This matter comes on for consideration upon the submission of an agreed judgment by the Plaintiff, United States of America, acting through the Farmers Home Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendants, Jim W. Price and Diana L. Price, through their attorney Vicky J. Maine. The Court finds that Plaintiff and the Defendants, Jim W. Price and Diana L. Price, have settled their differences and that this renders the foreclosure action moot. The agreed judgment between the parties is filed this same date as this order dismissing the remaining part of this foreclosure action.

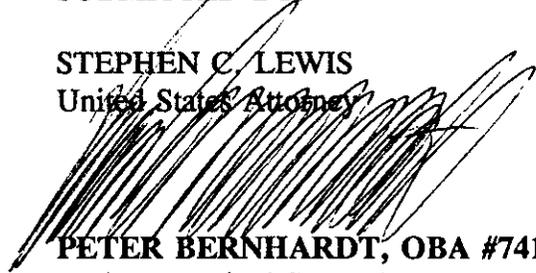
IT IS THEREFORE ORDERED that on this 12 day of oct, 1994,

this foreclosure action shall be dismissed without prejudice.


UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB:css

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

FILED

OCT 13 1994

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

DATE OCT 13 1994

Case No. 92-C-258-BU

DON AUSTIN, an individual,)
BARBARA WILLIS, an individual,)
DOROTHY COOKS, an individual,)
KAREN SNAP, an individual, and)
other JOHN DOE or JANE DOE)
Plaintiffs as they become known,)
Plaintiffs,)
vs.)
SUN REFINING AND MARKETING)
COMPANY,)
Defendant.)

ORDER

This matter comes before the Court on the Application to Dismiss without prejudice Plaintiff, Donna Moose. The Court having reviewed the application and affidavits, being fully advised in the premises, finds that the application should be sustained.

IT IS THEREFORE ORDERED BY THE COURT that the Plaintiff, Donna Moose, shall be dismissed without prejudice.

Entered this 12th day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 13 1994

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

MITCHELL TROTTER, III,)
)
 Plaintiff and)
 Cross-Defendant,)
)
 vs.)
)
 COMMUNITY BANK & TRUST CO.,)
)
 Defendant, Cross-Plaintiff)
 and Third-Party Plaintiff,)
)
 UNITED STATES OF AMERICA,)
 ex rel., COMMISSIONER OF)
 INTERNAL REVENUE SERVICE;)
 STATE OF OKLAHOMA, ex rel.,)
 OKLAHOMA TAX COMMISSION and)
 EUNA TROTTER PERKINS,)
)
 Third-Party Defendants.)

Case No. 93-C-482-BU

ENTERED ON DOCKET
DATE OCT 13 1994

ORDER

This matter comes before the Court upon the Joint Motion to Dismiss of Plaintiff, Mitchell Trotter, III, Defendant, Counterclaimant and Cross-Claimant, Community Bank & Trust Company, and Third-Party Defendant, Euna Trotter Perkins, filed on October 7, 1994, wherein the parties request the Court to dismiss the claims and parties to Case Number 93-C-482-BU, with prejudice.

Finding that by agreement between Plaintiff, Mitchell Trotter, III and Defendant, Counterclaimant, and Cross-claimant Community Bank & Trust Company (CNB) that CNB is to retain the proceeds of the CDs which were the subject of this lawsuit, and that the interest of the United States of America (IRS) and State of Oklahoma (OTC) in the proceeds of the CDs have previously been determined to be junior to that of CNB, and finding that CNB and

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Third-Party Defendant Euna Trotter Perkins have executed a settlement of all claims,

IT IS THEREFORE ORDERED that Case Number 93-C-482-BU be and hereby is DISMISSED with PREJUDICE as to the claims contained therein.

Entered this 12 day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1994

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

MID-SOUTH IRON WORKERS WELFARE)
PLAN; WILLIAM H. NOBLE, TRUSTEE,)
)
Plaintiff,)
)
v.)
)
H.K.B., INC., an Oklahoma)
corporation,)
)
Defendant.)

Case No. 94-C-797-BU ✓

OCT 13 1994

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW, on this 12 day of oct, 1994, the above-entitled cause comes on before me, the undersigned Judge of the above-entitled Court. Plaintiff, Mid-South Iron Workers Welfare Plan; William H. Noble, Trustee, represented and having entered its appearance by its counsel, Kelly F. Monaghan of Wilkinson & Monaghan, and the Defendant, H.K.B., Inc., having been lawfully served with Summons in this case and failing to enter its appearance or file an Answer within the statutorily prescribed period. Whereupon, the Court, having examined the court files herein and after due deliberations thereon, finds as follows:

The Court finds that on August 18, 1994, Plaintiff filed its Complaint in the above-entitled and numbered cause with the Court Clerk, requesting judgment against Defendant for specific sums set forth therein, plus penalties, interest, attorney's fees and court costs.

The Court further finds that on August 20, 1994, Defendant was served with Summons and the Complaint by personally serving Robert K. Bridgeman, an Officer of Defendant, as evidenced by the

Return of Summons filed in this cause of action with the Court Clerk indicating that proper service had been made on the Defendant.

The Court further finds that the Clerk of this Court has entered default in this matter.

The Court further finds that the allegations contained in the Plaintiff's Complaint are taken as true and correct, and that it is hereby granted judgment against Defendant as hereinafter set forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, H.K.B., Inc., was lawfully served with Summons in this cause and has not made an appearance and, therefore, is in default.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff be granted judgment against Defendant, H.K.B., Inc. in the principal sum \$26,059.63, penalties of \$2,605.96, accrued interest totalling \$3,530.15, as of September 30, 1994, costs in the amount of \$160.50, and attorneys' fees of \$2,600.00. The total amount of the judgment ordered is \$34,956.24, with interest thereon at the rate of twelve percent (12%) per annum.

ALL FOR WHICH LET EXECUTION ISSUE.


JUDGE OF THE DISTRICT COURT

Kelly F. Monaghan OBA #11681
WILKINSON & MONAGHAN
7625 East 51st Street, Suite 4000
Tulsa, Oklahoma 74145
(918) 663-2252

ATTORNEYS FOR PLAINTIFF

midshkb.jdg

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

F I L E D

PITNEY BOWES, INC.,)
)
 Plaintiff,)
)
 v.)
)
 COMMERCIAL MAILING SYSTEMS, INC.)
 and JEFFREY R. LYNCH,)
)
 Defendants.)

OCT 13 1994

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

No. 94-C-464-BU
District Judge Michael Burrage
Magistrate Judge Wagner

OCT 13 1994

AGREED INJUNCTION

This matter comes before the Court for entry of an Agreed Injunction pursuant to Fed. R. Civ. P. 58 and 65. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1).

It is hereby ordered and adjudged:

1. Defendants Commercial Mailing Systems, Inc., and its employees and affiliates, including, but not limited to Jeffrey R. Lynch, are hereby enjoined from making any contact -- by telephone, in person, by mail, or by any other means -- with any entity (except as noted below) currently a lessee of Pitney Bowes equipment from Pitney Bowes (hereafter "Pitney Bowes Lease Customer") in the following counties in Kansas: Barton, Butler, Cowley, Ellis, Finney, Ford, Harvey, Kingman, Lyon, McPherson, Montgomery, Neosho, Pratt, Reno, Saline, Sedgwick, Seward and Sumner (hereafter "Greater Wichita Area"), from 5:00 p.m. Central Daylight Savings Time, September 8, 1994 through January 31, 1995. During this period, the Defendants shall use their best effort to ascertain whether each entity that they contact in the Greater Wichita Area is a Pitney Bowes Lease Customer at the time of any

such contact. If any potential customer is a current Pitney Bowes Lease Customer, the Defendants shall immediately cease all further contact with that Pitney Bowes Lease Customer until after January 31, 1995, or until such time as the Pitney Bowes Lease Customer ceases to qualify as a Pitney Bowes Lease Customer. This prohibition applies regardless of the type of equipment subject to the lease. This prohibition on contacting Pitney Bowes Lease Customers shall not preclude the Defendants from contacting any entity to which Defendant CMS or its predecessor, Adtronics, had sold or leased any mailing or shipping equipment (to wit: postage meter; mailing machine or system; shipping machine or system; folder/insertor; mailing or shipping workstation; or addressing equipment) prior to February 1, 1994.

2. The Defendants and their employees and affiliates are further enjoined from making any contact -- by telephone, in person, by mail, or by any other means -- with any Pitney Bowes Lease Customer in the Greater Wichita Area from February 1, 1995, through December 31, 1995, unless the Defendants immediately notify Pitney Bowes of the following information:

- a. The name of the Pitney Bowes Lease Customer;
- b. The name of the person contacted; and
- c. The date of contact.

For purposes of this paragraph, the term "immediately" means that the Defendants shall within 24 hours of the contact (1) call Thomas Anderson, District Director at the Pitney Bowes District Director's office at 800/872-9110 to advise him that they will be transmitting a facsimile, and (2) transmit the information described above via facsimile to the Pitney

Bowes District office at 913/894-5138. The Defendants shall maintain a log of the facsimiles thus transmitted, and on the last business day of each month from February through December, 1995, shall transmit that log by facsimile to Pitney Bowes at 913/894-5138 so that the parties may mutually assure themselves that all the information required to be transmitted has been transmitted and received. During the period encompassed by this paragraph, the Defendants shall try to ascertain whether each entity that they contact in the Greater Wichita Area is a Pitney Bowes Lease Customer at the time of such contact. The prohibitions and requirements of this paragraph apply to every Pitney Bowes Lease Customer, regardless of the type of equipment subject to the lease.

3. The parties, in agreeing to this Agreed Injunction, acknowledge the jurisdiction of this Court to properly enter and enforce this Agreed Injunction. The Agreed Injunction shall be enforceable against any and all Defendants in this lawsuit.

4. This Court retains jurisdiction to enforce this Agreed Injunction. The attorneys for the Defendants shall cause copies of this Agreed Injunction to be delivered to the Defendants no later than the day after the entry hereof.

5. The Defendants agree that any violation of this Agreed Injunction by either Defendant shall be deemed a violation by all Defendants, except for a violation by Lynch while no longer employed by CMS or an affiliate which will be considered only a violation by Lynch. In the event the Court determines a violation of the terms of the Agreed Injunction has occurred, and that violation took place when Lynch was employed by CMS or an affiliate, the Defendants will be jointly and severally liable for that obligation. If any Defendant violates any part of this Agreed Injunction, the Plaintiff may by motion with

notice to the attorneys for the Defendants apply for sanctions or such other relief as may be appropriate.

Dated:

Enter:

MICHAEL BURRAGE

Michael R. Burrage
United States District Judge

Agreed as to form:

PITNEY BOWES, INC.
INC.

COMMERCIAL MAILING SYSTEMS,

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One of its Attorneys

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

L E D

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

OCT 12 1994 *[Signature]*
 Lawrence, Court Clerk
 DISTRICT COURT

93-C-0915-*[Signature]*

ORDER

Now before the Court is Bettie Berry's appeal of a decision by the Secretary of Health and Human Services to deny her Social Security disability benefits.¹ Although Ms. Berry raises three issues, only one needs to be examined: Should Ms. Berry's previous application be re-opened?

The pertinent facts are as follows: On July 3, 1991 Ms. Berry applied for Social Security disability benefits. On December 20, 1991, the application was denied by the Secretary. Ms. Berry failed to take further action on that application. However, she did apply for benefits a second time on March 5, 1992. The second application was denied initially and again on reconsideration. The Administrative Law Judge ("ALJ") then held a hearing and subsequently issued a denial decision, prompting the instant appeal. The ALJ also decided not to re-open Ms. Berry's first application, on the grounds of *res judicata*.

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."

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The issue is whether the ALJ erred by not re-opening Ms. Berry's prior application(s). As a general rule, this court is without jurisdiction to review such a decision unless a claimant can show a colorable constitutional claim. *Califano v. Sanders*, 430 U.S. 99, 102-103, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).²

In the case at bar, Ms. Berry contends that she was mentally retarded when she filed her previous application(s). In addition, she claims she was not represented by counsel at that time. Mental illness can constitute a colorable constitutional claim. *See generally, Elchediak v. Heckler*, 750 F.2d 892 (11th Cir. 1985).

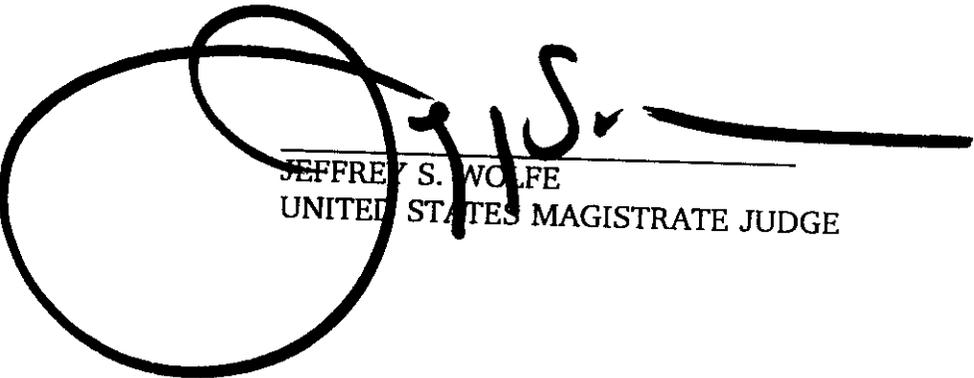
In *Elchediak*, a claimant asserted that paranoid schizophrenia prevented him from proceeding in a timely fashion on a previous disability application. The medical evidence confirmed that he suffered from such a mental illness, although it was unclear as to whether the illness prevented him from seeking administrative review of the Secretary's denial of his application. The Eleventh Circuit remanded the case so the Secretary could make such a factual determination.

In *Young v. Bowen*, 858 F.2d 951 (4th Cir. 1988), facts similar to *Elchediak* existed. The court there held that once the claimant presented "prima facie proof" that her mental illness prevented her from understanding the administrative procedure, the Secretary must hold an evidentiary hearing to rebut the prima facie case." *Id.* at 955, quoting *Shrader v. Harris*, 631 F.2d 297 (4th Cir. 1980). *Also, see Tucker v. Sullivan*, 779 F.Supp. 1290 (D. Kan. 1991).

² See, also, *Nelson v. Secretary of Health & Human Services*, 927 F.2d 1109, 1111 (10th Cir. 1991) ("Absent a colorable constitutional claim, a district court does not have jurisdiction in the Secretary's discretionary decision not to reopen an earlier adjudication.")

In the case at bar, the circumstances are much the same as *Elchediak* and *Young*. Some evidence supports Ms. Berry's claim that mental illness prevented her from understanding and pursuing administrative relief on her prior application.³ While that evidence, in itself, does not make her assertion a "fact", it does indicate the need for further review. Therefore, the Secretary must hold such a hearing to determine whether Ms. Berry did, in fact, lack competence at the time of her earlier application. *Shrader*, 631 F.2d at 302. The case is REMANDED.⁴

SO ORDERED THIS 12th day of October, 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

³ Not every claimant alleging such a mental impairment will have raised a "colorable constitutional claim." *Nelson v. Secretary of Health and Human Services*, 927 F.2d 1109, 1111 (10th Cir. 1990). Instead, the mental impairment allegation must have some merit. *Tucker*, 779 F.Supp. at 1296. In this case, there is evidence which supports Ms. Berry's assertion. A September 10, 1991 examination by Dr. Herndon Snider concluded that Ms. Berry is in the "mildly mentally retarded range." *Record* at 264. Dr. Snider noted that she can read on the fourth-grade level, do math on a third-grade level and spell on a fifth-grade level. Dr. Snider also noted that tests showed she had a full-scale IQ of 69. He further observed that previous tests done on Ms. Berry had been "comparable". Dr. Snider's examination, however, is not conclusive. Dr. David Dear, a consulting psychiatrist who examined Ms. Berry on June 10, 1992, found no "psychiatric abnormality" that would prevent her from working. *Id.* at 276. Nevertheless, the record does support Claimant's assertion, and further review is thus required.

⁴ On remand, the ALJ -- after considering the evidence presented by the parties at the evidentiary hearing -- shall determine whether Ms. Berry's mental retardation precluded her from understanding and pursuing her administrative remedies following the denial of her first application for benefits. Obviously, if the ALJ re-opens the case, he must re-examine the evidence to make a determination on disability. However, if the ALJ decides not to re-open the case, he must still have a mental health professional assist him in filling out Ms. Berry's RFC. See, *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045 (10th Cir. 1993) (Discussion of when an ALJ should enlist the help of a mental health care professional).

DATE OCT 13 1994

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

FILED

Richard M. Lewis, Clerk
U. S. District Court
Northern District of Oklahoma

VELMA L. WILLIAMS and ALLEN WILLIAMS, wife and husband,)

Plaintiffs,)

vs.)

Case No. 93-C-988-K

JOE HAMRA d/b/a Leisure Village Health Care Center,)

Defendant.)

JUDGMENT

Judgment is hereby entered in favor of the Defendant Joe Hamra d/b/a Leisure Village Health Care Center and against Plaintiffs Velma L. Williams and Allen Williams.

Entered this 11 day of October, 1994.

s/ TERRY C. KERN

TERRY C. KERN
United States District Judge

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT FOR THE DATE OCT 13 1994
NORTHERN DISTRICT OF OKLAHOMA

CHERYL J. MARTIN,)
)
 Plaintiff,)
)
 vs.)
)
 FARRIS EXPRESS FUELS, INC. a)
 corporation; and)
 DAVID FARRIS,)
)
 Defendants.)

Case No. 93-G-711 K

FILED
 OCT 13 1994
 Clerk

JUDGMENT

Judgment is hereby entered in favor of the Defendants Farris Express Fuels, Inc. and David Farris and against Plaintiff Cheryl J. Martin.

Entered this 11 day of October, 1994.

s/ TERRY C. KERN
 TERRY C. KERN
 United States District Judge

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

ENTERED ON DOCKET
OCT 13 1994
DATE _____

VALERIE FRONKO,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

FILED

OCT 13 1994

93-C-0603 - W Richard M. Lawrence, Clerk:
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff Valerie Fronko applied for Social Security disability benefits, alleging he could no longer work because of severe pain on the right side of her body. The Secretary of Health and Human Services denied that application. Ms. Fronko now appeals that decision to this Court.¹

Ms. Fronko raises two issues: (1) Did the Administrative Law Judge ("ALJ") err when finding that Ms. Fronko did not have a "severe" impairment; and (2) Does substantial evidence support the ALJ's decision? For the reasons discussed below, the case is remanded.

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.

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."

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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).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).

II. Legal Analysis

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).

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).

In this case, the ALJ found, at step 2, that Ms. Fronko did not have a severe impairment and, as a result, was not disabled under the Act. Ms. Fronko challenges that finding, asserting that she met her burden at step 2 because of the "severe pain" on her right side.³

To meet her burden at step 2, Ms. Fronko must show she suffers from an impairment that significantly limits her "physical or mental ability to do basic work activities." 20 C.F.R. 404.1521(a). At this stage, her age, education and work experience are not considered. See 20 C.F.R. 416.920(c). If Ms. Fronko cannot show she has a medically severe impairment, she is not eligible for disability benefits.⁴

The time period in question is whether Ms. Fronko had a "severe impairment" between the alleged onset date of January 1, 1985 and July 25, 1991. The medical evidence shows that on February 13, 1991, Ms. Fronko was diagnosed with chronic pelvic pain. *Record at 91*. On June 18, 1991, Ms. Fronko underwent surgery and adhesions in her pelvis were removed. *Id. at 102-103*. Dr. Steve Vouis, an M.D. who performed the surgery, noted that Ms. Fronko had "pelvic pain" at the time. *Id.*

³ Ms. Fronko writes that "the ALJ's finding that the plaintiff has severe right side pain but not a severe impairment is puzzling. Furthermore, the ALJ's finding that the plaintiff had only complained about pain on one occasion is simply not true. The plaintiff had at least two surgeries in California because of severe pain. She was rushed to the Emergency Room at Tulsa Regional Hospital because of severe pelvic pain. Finally, she was treated by physicians at the University of Oklahoma College of Medicine for severe right side pain. The ALJ erred in his finding that the plaintiff does not have a severe impairment." Plaintiff's Brief at page 3 (docket # 15).

⁴ The claimant's burden is further explained in *Williams v. Bowen*, 844 F.2d 748, 750-751 (10th Cir. 1988): "Pursuant to the severity regulations, the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities, i.e., the abilities and aptitudes to do most jobs...Presumptively, if the medical severity of a claimant's impairments is so slight that the impairments could not interfere with or have a serious impact on the claimant's ability to do basic work activities, irrespective of vocational factors, the impairments do not prevent the claimant from engaging in substantial gainful activity...If the claimant is unable to show that his impairments would have more than minimal effect on his ability to do basic work activities, he is not eligible for disability benefits. If, on the other hand, the claimant presents medical evidence and makes the *de minimis* showing of medical severity, the decision maker proceeds to step three."

Some eight months later, Ms. Fronko was taken to an emergency room because of chronic pain in her pelvis. *Id. at 116*. However, Ms. Fronko was not hospitalized and she was sent home. On March 24, 1992, records show that doctors diagnosed Ms. Fronko with "chronic" pain on her right side. *Id. at 124*. Ms. Fronko also was taking medication for her pain. *Id. at 132*.

Based on the foregoing, the ALJ found that Ms. Fronko failed to show any impairments that would "cause any severe effect on or reduction of the claimant's physical capacity to perform work-related activities." *Id. at 13*. The court agrees with the ALJ's conclusion.

However, an additional item of evidence was submitted after the ALJ made his decision. Dr. Vouis wrote in a July 22, 1991 Medical Statement that Ms. Fronko had "pain generated to approximate[ly] 50 percent of her body." *Id. at 136*. He also noted that she was unable to work full-time. *Id.* The Appeals Council examined this statement, but found that it was not supported either by the record or by supporting medical signs and laboratory findings. *Id. at 4*.

In *Riley v. Shalala*, 18 F.3d 619 (8th Cir. 1994), the court outlined what should be done under these circumstances. Once it is clear that the Appeals Council has considered newly submitted evidence, this court must look at the record, including the new evidence, to determine if the ALJ's decision is supported by substantial evidence. The court in *Riley* also notes:

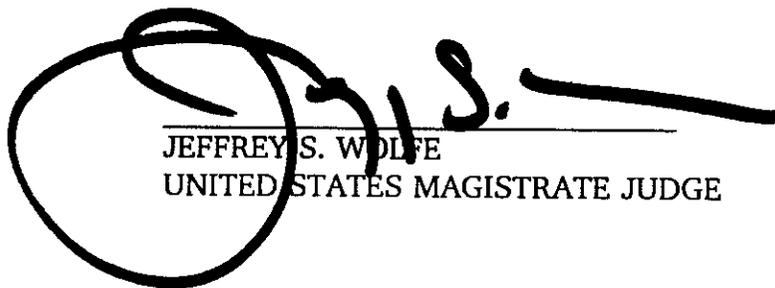
Of necessity, that means that we must speculate to some extent on how the administrative law judge would have weighed the newly submitted reports if they have been available for the original hearing. We consider this to be a peculiar task for a reviewing court. *Id. at 622*.

Here, the court has no way of knowing how the ALJ would weigh Dr. Vouis's July 22, 1991 Medical Statement. On one hand, Dr. Vouis is Ms. Fronko's treating physician and, as a result, his opinion should be given substantial weight. *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir. 1987). As a result, the ALJ may have, at a minimum, decided that Ms. Fronko did have a "severe impairment" at step 2 and proceeded in the analysis. On the other hand, as the Appeals Council noted, Dr. Vouis's opinion was not accompanied by objective medical evidence. *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.") Consequently, the ALJ may have given Dr. Vouis's opinion little, if any, weight.

Given the circumstances, the Court believes that Dr. Vouis' July 22, 1991 statement, although not accompanied by objective medical evidence, would have changed the outcome of the ALJ's decision. Other evidence in the record indicates on several occasions that doctors examining Ms. Fronko noted that she had "chronic" pain. That evidence, coupled with Dr. Vouis' opinion that she cannot work full-time, makes a *de minimis* showing of a medical severe impairment.⁵ Therefore, the Court finds that Ms. Fronko has met her burden at step 2. The case is REMANDED. The ALJ is ordered to proceed to step 3 of the sequential analysis.

⁵ *The Court is tempted to affirm this decision for two reasons. First, the record suggests that claimant could have submitted the July 22, 1991 Statement to the ALJ prior to his decision. Second, the Statement is not accompanied by objective medical evidence. But since Dr. Vouis examined Ms. Franko on several occasions (including an operation), his opinion should be given extra weight. However, it should be noted that the Court is making no decision concerning disability. On remand, the ALJ shall make that determination after examining Dr. Vouis' Statement*

SO ORDERED THIS 13th day of October, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

FILED

OCT 12 1994

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

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

LAURIE K. LAWSON,
)
)
 Plaintiff,
)
 vs.)
)
 DONNA E. SHALALA,
)
)
 Secretary of Health and
)
 Human Services,
)
 Defendant.)

Case No. 93-C-852-B ✓

~~EXHIBIT~~
DATE 10/13/94

O R D E R

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 under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq.*

Laurie K. Lawson, (Plaintiff or claimant) filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on December 9, 1991, alleging an inability to work, complaining of disabling carpal tunnel syndrome in both hands, tardy ulnar nerve palsy in both arms, a history of surgery in the right and left hands for carpal tunnel release and residual pain and numbness in both hands and in the inner arms. Plaintiff also complained of allergies and occasional headaches.

Plaintiff's application was denied initially, and again upon reconsideration. After an administrative hearing held on December 7, 1992, the Administrative Law Judge (ALJ) issued a denial Decision on May 18, 1993. The Appeals Council denied the

Plaintiff's request for review on September 7, 1993.

The Plaintiff filed this action on September 22, 1993, pursuant to 42 U.S.C. §405(g) and 42 U.S.C. §1383(c)(3), seeking judicial review of the administrative decision to deny her Social Security Disability Claim and Supplemental Security Income Claim.¹ 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 as her principal ground for reversing the ALJ's denial of benefits, that the ALJ failed to sufficiently advise Plaintiff, who was appearing pro se, of her burden of proof herein. Specifically, Plaintiff complains that the ALJ failed to advise Plaintiff that, in addition to her burden of showing she could not perform her past relevant work (surgical nurse) she had the additional burden of proving she could not perform any significant work available in the national economy.

¹ While Plaintiff appeals in this action the Secretary's denial of Plaintiff's Supplemental Security Income claim neither Plaintiff nor Defendant address this issue in their briefs.

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 (January 16, 1991).
- 2) That claimant is determined to have a vocationally severe impairment by Social Security definition.
- 3) That claimant's impairment(s) do not meet or equal the criteria established for any impairment shown in the Listing of Impairments in Appendix 1, Subpart P, Regulations No. 4.
- 4) That claimant's residual functional capacity is for sedentary activity which is not compatible to her past relevant work as an operating technician or as a surgical assistant.
- 5) That claimant's capacity to do other work (found by the ALJ to exist in the national economy under the Secretary's regulations), in view of her age (40), her education, her relevant work experience and her established residual functional capacity, directs a

conclusion of not disabled.

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.

The Plaintiff has the burden to show that she is unable to return to the prior work she performed, Bernal, at 299, a burden which she sustained. 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), a burden which Plaintiff failed to sustain.

Plaintiff cites Lopez v. Secretary of Dept. of HHS, 728 F.2d 148 (2nd Cir.1984) and Eames v. Heckler, 586 F.Supp. 1579 (D.C.W.D. NY 1984), for the proposition an ALJ must carefully develop the record and must assure that the pro se claimant has a fair hearing. The Secretary counters that an ALJ has no enhanced duty to inform a pro se claimant of his or her rights, citing James v. Bowen, 793 F.2d 702 (5th Cir.1986) and Kane v. Heckler, 731 F.2d 1216 (5th

Cir.1984). Further, the Secretary argues that the ALJ advised Plaintiff that she had a right to counsel and offered to postpone the hearing to allow her to obtain such representation but that she voluntarily elected to proceed with the hearing as a pro se claimant. Lastly, the Secretary points out that the Notice of Hearing (Tr. 46-48) fully informs Plaintiff of her obligations regarding the scheduled hearing.

The Court concludes the Notice of Hearing advises Plaintiff that she should be prepared to prove that she can no longer do any substantial gainful employment.² The Notice also advises Plaintiff of her right of representation. Although the Notice of Hearing had already informed Plaintiff of her right to legal or other representation, the ALJ advised Plaintiff of her right to an attorney and his willingness to postpone the hearing if Plaintiff so desired such representation. Even though the ALJ offered no such advice as to Plaintiff's burden of proving that she was unable to engage in any substantial gainful activity,³ the Court concludes

² The Notice of Hearing advises Plaintiff that the specific issues at the hearing will be ". . . (4) your ability to engage in substantial gainful activity since your impairment began;" and that the "law defines disability as the inability to do any substantial gainful activity". Further, the Notice advises Plaintiff that the ALJ will "consider the following questions in the order listed: . . . (4) Can you do the kind of work that you have done in the past? . . . (5) Can you do any other work considering your age, education, and previous work experience?"

³ Also attached to the Notice of Hearing (Tr. 48) is a menu of advice or attached forms "pertinent in your case". One such marked form was HA Form 677, "Important Additional information about: Notice of Hearing if Claimant is Unrepresented, is attached." Form 677, important or otherwise, does not appear to be a part of the present record.

he was under no lawful obligation to do so.

In reviewing the transcript the Court is struck with Plaintiff's almost single-minded theme that she "simply cannot go back to my type of employment⁴ at all. I have lost the feeling and manual dexterity that is vital in the operating room. The chronic discomfort makes daily household routines extremely time consuming, awkward(sic) & frustrating." Such references to past relevant work to the almost virtual exclusion of any gainful activity reference perhaps could have prompted the ALJ to insure that Plaintiff's perception of her burden of proof was not unadvisedly narrow. However, the Court concludes the ALJ had no special obligation under the law to advise the pro se Plaintiff of her burden of proof regarding an inability to engage in any employment.

"[A] claimant for disability benefits is entitled to a full hearing under the Secretary's regulations and in accordance with the beneficent purposes of the Act, Lopez, supra, citing Gold v. Secretary of H.E.W., 463 F.2d 38 at 43 (2nd Cir.1972. While an ALJ has a special duty to protect the rights of a pro se claimant, Echevarria v. Secretary of Health and Human Services, 685 F.2d 751 (2nd Cir.1982) that duty is to insure that a claimant has a fair hearing. A fully developed record is proof that the ALJ complied with the special duty. Lopez at 149, citing cases.

Herein, the ALJ assiduously assesses the reports of doctors

⁴ Plaintiff has worked for the sixteen years preceding the date of onset first as an operating room scrub nurse, then eventually becoming a CST (certified surgical technologist).

Crout⁵, Jennings, Clendenin, Hasting and Miller, giving particular comparison to the objective findings of the doctors in contrast with the subjective complaints of Plaintiff.

Dr. Crout, in January, 1992, felt the claimant should be considered for vocational rehabilitation, giving the upper right extremity had a 5 percent partial disability under workman's compensation guidelines with no surgical correction of the upper left extremity. Dr. Jennings' report, prior to left extremity surgery, assessed claimant as suffering from bilateral carpal tunnel syndrome and ulnar palsy by history. Dr. Hasting performed an electromyogram study on June 23, 1992, with findings of very minimal relatively slowing of the right ulnar nerve across the elbow, noting that on the left, the relative across the elbow of the ulnar nerve discrepancy was "mild" and that the "EMG findings are quite mild, maximal left." Dr. Clendenin noted that the electromyogram result was only "mildly positive" and that although claimant's symptoms were "quite strong". Dr. Clendenin, in November, 1992 felt claimant could return to work when ever she felt she was up to it and temporarily disabled claimant for another six weeks and noted she then could return to work without restrictions. Dr. Miller noted in June, 1992, that claimant was doing very well in response to a gel sheeting treatment to soften up her surgery scars (carpal tunnel release and breast

⁵ Dr. Crout's report contains a significant lapse in it, noted by the ALJ, from January 13, 1988 to April 6, 1992, which sheds no light on the period of time in which claimant claims that she became disabled.

augmentation); that the two inflammatory scars which were keloid on the right and left breast limited claimant's motion to a minor degree.

The ALJ, after consideration of the medical evidence, claimant's testimony and her credibility, determined claimant's residual functional capacity (RFC) to ascertain the particular type of work claimant may be able to do despite her impairments, concluding that claimant could perform sedentary work activities. The ALJ explained sedentary work as involving lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools; that a sedentary job is defined as one which involves sitting, a certain amount of walking and standing also being necessary.

The ALJ also evaluated Plaintiff's subjective complaints of pain. The ALJ found that Plaintiff's testimony as to pain was credible only to the extent that it is reconciled with claimant's abilities to perform sedentary work activities 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. The

ALJ noted that claimant's testimony shows signs of exaggeration and embellishment of symptoms, conflicting with the mild nature of her etiology.

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

Lastly, the ALJ found that under the regulations various unskilled and semiskilled jobs at the several levels of exertion exist in the national economy based on a residual functional capacity for the full range of sedentary work and the claimant's age, education, and work experience, requiring a final conclusion of "not disabled".

The Court concludes the Secretary's decision is supported by substantial evidence and Plaintiff's appeal is accordingly DENIED. The Court also DENIES Plaintiff's appeal as to the Supplemental Security Income issue on the ground that the Secretary's decision is supported by substantial evidence.⁶

IT IS SO ORDERED THIS 12th DAY OF October, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁶ Plaintiff's Supplemental Security Income claim was denied by the Secretary on the ground that "You (or you and your spouse) have monthly income of about \$2411.00 (spouse wages). This is too high for SSI payments in your State." Tr. 76)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 BRADLEY L. RICHARDSON aka)
 BRADLEY LAMONT RICHARDSON;)
 CHARLOTTE M. SMITH aka CHARLOTTE)
 MARIE SMITH aka CHARLOTTE MARIE)
 RICHARDSON; THOMAS E. GLOVER;)
 LINDA J. GLOVER; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED
OCT 14 1994
U.S. District Court
Northern District of Oklahoma

DATE 10/13/94 -

CIVIL ACTION NO. 94-C 450B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 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; and the Defendants, **Bradley L.**
Richardson aka Bradley Lamont Richardson, Charlotte M. Smith aka
Charlotte Marie Smith aka Charlotte Marie Richardson, Thomas E.
Glover, and Linda J. Glover, appear not, but make default.

The Court being fully advised and having examined the
court filed finds that the Defendant, **Bradley L. Richardson aka**
Bradley Lamont Richardson, will hereinafter be referred to as
("**Bradley L. Richardson**"); and the Defendant, **Charlotte M. Smith**

aka **Charlotte Marie Smith** aka **Charlotte Marie Richardson**, will hereinafter be referred to as ("**Charlotte M. Smith**").

The Court being fully advised and having examined the court file finds that the Defendant, **Bradley L. Richardson**, was served with process on June 27, 1994; that the Defendant, **Thomas E. Glover**, waived service of Summons, which was filed on May 18, 1994; and that the Defendant, **Linda J. Glover**, waived service of Summons on May 13, 1994, which was filed on May 18, 1994.

The Court further finds that the Defendant, **Charlotte M. Smith**, 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 25, 1994, and continuing through August 29, 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, **Charlotte M. Smith**, 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, **Charlotte M. Smith**. 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 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 Answer on May 19, 1994; and that the Defendants, **Bradley L. Richardson, Charlotte M. Smith, Thomas E. Glover, and Linda J Glover**, 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 Twenty-five (25), Block Ten (10), SHANNON PARK SIXTH, An Addition in Tulsa County, City of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on July 22, 1983, Thomas W. Dement and Laurie J. Dement, executed and delivered to SHEARSON/AMERICAN EXPRESS MORTGAGE CORPORATION their mortgage note in the amount of \$53,950.00, payable in monthly installments, with interest thereon at the rate of twelve and three-quarters percent (12.75%) per annum.

The Court further finds that as security for the payment of the above-described note, Thomas W. Dement and Laurie J. Dement, husband and wife, executed and delivered to SHEARSON/AMERICAN EXPRESS MORTGAGE CORPORATION a mortgage dated July 22, 1983, covering the above-described property. Said mortgage was recorded on July 26, 1983, in Book 4710, Page 696, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 16, 1989, SHEARSON LEHMAN MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development it's successors and or assigns. This Assignment of Mortgage was recorded on January 26, 1989, in Book 5164, Page 1521, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Bradley L. Richardson and Charlotte M. Smith, currently hold record title to the property by virtue of a General Warranty Deed dated March 23, 1988, and recorded on March 24, 1988, in Book 5088, Page 2561, in the records of Tulsa county, Oklahoma; and that the Defendants, Bradley L. Richardson and Charlotte M. Smith, are the current assumptors of the subject indebtedness.

The Court further finds that on February 1, 1989, the Defendants, Bradley L. Richardson and Charlotte Smith, 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 February 1, 1990 and July 1, 1991.

The Court further finds that the Defendants, Bradley L. Richardson and Charlotte M. Smith, 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, **Bradley L. Richardson and Charlotte M. Smith**, are indebted to the Plaintiff in the principal sum of \$104,727.79, plus interest at the rate of 12.75 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 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 \$30.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$32.00 which became a lien as of June 25, 1993; and a lien in the amount of \$36.00 which became a lien on June 26, 1992. 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 Defendants, **Bradley L. Richardson, Charlotte M. Smith, Thomas E. Glover, and Linda J. Glover**, are in default, and have 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, **Bradley L. Richardson and Charlotte M. Smith**, in the principal sum of \$104,727.79, plus interest at the rate of 12.75 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 Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and

recover judgment in the amount of \$98.00 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, Bradley L. Richardson, Charlotte M. Smith, Thomas E. Glover, Linda J. Glover 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 Defendants, Bradley L. Richardson and Charlotte M. Smith, 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

\$98.00, 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.

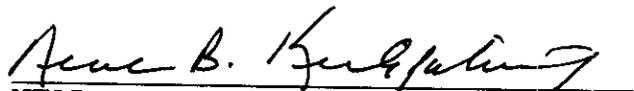
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BERRY

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

Judgment of Foreclosure
Civil Action No. 94-C 450B

NBK:lg

ENTERED ON DOCKET
OCT 12 1994

DATE **FILED**

OCT 13 1994

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

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

MICHELLE GERKE,)
)
 Plaintiff,)
)
 v.)
)
 ROGER GAUTIER,)
)
 Defendant.)

Case No. 92-C-309-W

ORDER

This case was consolidated with Michelle Gerke v. Roger Gautier, Case No. 92-C-235-E, on August 31, 1993. Case No. 92-C-235-E was dismissed by District Judge James O. Ellison on March 9, 1994. This case is therefore dismissed.

Dated this 11th day of October, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

8

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

ALBERT BROWN,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

FILED

OCT 12 1994

93-C-1111-E Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

The Secretary of Health and Human Services denied Social Security disability benefits to Plaintiff Albert Brown. The Secretary found that Mr. Brown was unable to perform his past work as a maintenance man, truck driver or roofer. However, the Secretary concluded that Mr. Brown could do light-level work and, as a result, was not disabled under the Social Security Act.

Mr. Brown now appeals that decision, raising two issues: (1) Whether substantial evidence supports the Secretary's decision and (2) Whether the case should be remanded to consider "new" evidence.¹ For the reasons set forth below, the Secretary's decision is affirmed.

I. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the

¹ The procedural aspect of this case merits some discussion. Mr. Brown is proceeding pro se and is unable to write his brief. Consequently, on January 4, 1994, a hearing was held where Mr. Brown explained the basis for appeal to the undersigned. As a result, he does not have to submit a brief as discussed in an October 7, 1994 Minute Order. Instead, the Court will review the record in light of Mr. Brown's oral assertions of error.

ENTERED ON DOCKET
DATE 10-12-94

7

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, the Secretary, found at step 5, that Mr. Brown could perform "light" work.

The primary issue is whether substantial evidence supports the Secretary's decision. 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).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).

Mr. Brown applied for disability benefits on June 8, 1992, claiming he had been unable to work since June 5, 1991. Mr. Brown contends that he can no longer work because of a "heart impairment" and "shortness of breath." *See, February 2, 1993 Order (docket #3)*.

The Administrative Law Judge ("ALJ") issued his denial decision on July 12, 1993. Therefore, the question is whether substantial evidence supports the Secretary's decision

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).

that Brown was not disabled between June 5, 1991 and July 12, 1993.

A review of the evidence shows that substantial evidence supports the Secretary's decision. As noted by the ALJ, an examination by Dr. Altaf Husain, an M.D., on July 7, 1992 indicated that Mr. Brown was in the "above fitness" category. *Record at 109-110*. Dr. Husain specifically found Mr. Brown's heart to be normal and the examination was unremarkable.

The only other medical evidence is a series of "progress notes" by the Veterans Administration Outpatient Clinic. *Id. at 141-163, 165-176*. The notes, which are thoroughly discussed in the ALJ's decision, indicate that Mr. Brown complained of chest pain and hypertension. It also was noted he smoked one pack of cigarettes daily and he was suspected of using alcohol. However, none of the progress notes suggest that Mr. Brown had a "severe heart impairment" and do not support his claim that he can no longer work.

Mr. Brown testified that he has not worked since February of 1991. He testified that he can no longer work because of "very bad chest pains" in his heart, dizziness and shortness of breath. He also testified that he drinks a "fifth" a week (presumably alcohol) and smokes a pack every couple of days. *Id. at 43*. He testified that his daily activities are limited.

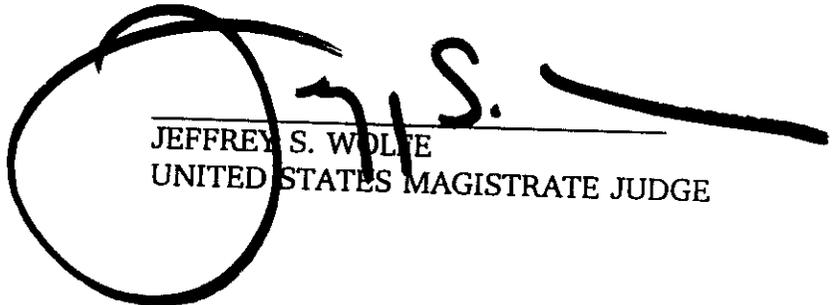
After examining the evidence, the ALJ acknowledged that Mr. Brown had chest pains, shortness of breath, blurred vision and dizziness; however, the ALJ concluded that the stated impairments did not prevent him from performing light work. The ALJ also wrote:

The ALJ finds it reasonable to conclude that claimant retains the residual functional capacity to perform a full range of light work. He finds nothing

in the medical documents contradicts this determination and that the claimant is subject to no further limitations of an exertional or nonexertional nature further restricting the claimant's ability to perform work-like activity. *Id. at 17.*

The ALJ's examination of the evidence was not in error. No objective medical evidence documents Mr. Brown's complaints. Put simply, while Mr. Brown has voiced his complaints, there are no medical records which agree with him. Therefore, the undersigned concludes substantial evidence supports the finding that Mr. Brown is not disabled. Therefore, the Secretary's decision is **AFFIRMED**.

SO ORDERED THIS 12th day of October, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

FILED
OCT 12 1994

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

JOHNATHAN R. FREEMAN,

Plaintiff,

v.

OFFICER WARD; TULSA POLICE
DEPT., RONALD PALMER, CHIEF
OF POLICE,

Defendants.

CASE NO. 94 C 547-B

ENTERED IN CLERK'S OFFICE

DATE OCT 12 1994

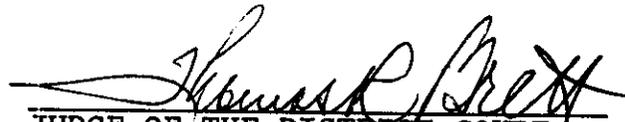
ORDER

This matter comes on for hearing on Plaintiff Johnathan R. Freeman's Motion to Dismiss Party this 12th day of Oct, 1994.

The Court finds that the Motion is GRANTED.

THEREFORE, PREMISES CONSIDERED, this Court grants Plaintiff's Motion to Dismiss Party from the above-styled and captioned matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Ronald Palmer, Chief of Police, be dismissed from the above-styled and captioned matter without prejudice.


JUDGE OF THE DISTRICT COURT

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clm

CERTIFICATE OF SERVICE

This is to certify that on this _____ day of _____,
1994, a true and correct copy of the above and foregoing Motion
was hand delivered to:

CITY OF TULSA
David Pauling
City Attorney
and
Mark H. Newbold
Sr. City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 NICHOLAS R. REYES; OLGA S. REYES;)
 R. VANVALKENBURG aka RALPH)
 VANVALKENBURG; G. VANVALKENBURG)
 aka GLORIA VANVALKENBURG; CITY)
 OF GLENPOOL, Oklahoma; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

OCT 12 1994

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

CIVIL ACTION NO. 94-C 263E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 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; and the Defendants, **Nicholas R.**
Reyes, Olga S. Reyes, R. VanValkenburg aka Ralph VanValkenburg,
G. VanValkenburg aka Gloria VanValkenburg, and **City of Glenpool,**
Oklahoma, appear not, but make default.

The Court being fully advised and having examined the
court filed finds that the Defendants, **Nicholas R. Reyes and Olga**
S. Reyes, are husband and wife.

ENTERED ON DOCKET
DATE 10-12-94

The Court being fully advised and having examined the court file finds that the Defendant, **City of Glenpool, Oklahoma**, acknowledged receipt of Summons and Complaint, which was not dated due to scrivener's error, but was filed on March 24, 1994; that the Defendants, **Nicholas R. Reyes and Olga S. Reyes**, were served with process on June 3, 1994, as evidenced by the U.S. Marshal's service; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 21, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 21, 1994.

The Court further finds that the Defendants, **R. VanValkenburg aka Ralph VanValkenburg and G. VanValkenburg aka Gloria VanValkenburg**, were 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 29, 1994, and continuing through September 2, 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 Defendants, **R. VanValkenburg aka Ralph VanValkenburg and G. VanValkenburg aka Gloria VanValkenburg**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants 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 addresses of the Defendants, **R. VanValkenburg aka Ralph VanValkenburg and G. VanValkenburg aka Gloria VanValkenburg**. 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 parties served by publication with respect to their 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 Defendants 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 April 12, 1994; and that the Defendants, **Nicholas R. Reyes, Olga S. Reyes, R. VanValkenburg aka Ralph VanValkenburg, G. VanValkenburg aka Gloria VanValkenburg, and City of Glenpool, Oklahoma**, 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 Seventeen (17), Block Eight (8),
KENDALWOOD III, an Addition in the City of
Glenpool, Tulsa County, State of Oklahoma,
according to the Recorded Amended Plat
thereof.

13975 Oak Pl.,
Glenpool, Ok 74033

The Court further finds that on May 15, 1986, Lawrence M. Smaling and Sandra D. Smaling, executed and delivered to MIDFIRST MORTGAGE CO. their mortgage note in the amount of \$59,892.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Lawrence M. Smaling and Sandra D. Smaling, husband and wife, executed and delivered to MIDFIRST MORTGAGE CO. a mortgage dated May 15, 1986, covering the above-described property. Said mortgage was recorded on May 29, 1986, in Book 4945, Page 1632, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 9, 1986, MIDFIRST MORTGAGE CO. assigned the above-described mortgage note and mortgage to MIDLAND MORTGAGE CO. This Assignment of Mortgage was

recorded on November 14, 1986, in Book 4982, Page 2017, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 20, 1990, MIDLAND MORTGAGE CO. 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 January 4, 1991, in Book 5297, Page 927, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Nicholas R. Reyes and Olga S. Reyes, currently hold the record title to the property by virtue of a Joint Tenancy Warranty Deed dated March 13, 1989, and recorded on March 14, 1989 in book 5171, Page 1871, in the records of Tulsa county, Oklahoma; and that the Defendants, Nicholas R. Reyes and Olga S. Reyes, are the current assumptors of the subject indebtedness.

The Court further finds that on December 1, 1990, the Defendants, Nicholas R. Reyes and Olga S. Reyes, 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.

The Court further finds that the Defendants, Nicholas R. Reyes and Olga S. Reyes, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Nicholas R. Reyes and Olga S. Reyes**, are indebted to the Plaintiff in the

principal sum of \$87,835.05, plus interest at the rate of 10 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 in the amount of \$13.20, 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 \$69.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$71.00 which became a lien as of June 25, 1993; a lien in the amount of \$43.00 which became a lien as of June 25, 1993; a lien in the amount of \$73.00 which became a lien on June 26, 1992; and a lien in the amount of \$13.00 which became a lien as of July 5, 1989. 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 Defendants, **Nicholas R. Reyes, Olga S. Reyes, R. VanValkenburg aka Ralph VanValkenburg, G. VanValkenburg aka Gloria VanValkenburg, and City of Glenpool, Oklahoma**, are in default, and have 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, **Nicholas R. Reyes and Olga S. Reyes**, in the principal sum of \$87,835.05, plus interest at the rate of 10 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 in the amount of \$13.20, 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 \$269.00 for personal property taxes for the years 1998, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Nicholas R. Reyes, Olga S. Reyes, R. VanValkenburg aka Ralph VanValkenburg, G. VanValkenburg aka Gloria VanValkenburg, City of Glenpool, 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 Defendants, **Nicholas R. Reyes and Olga S. Reyes**, 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, County Treasurer, Tulsa County, Oklahoma, in the amount of \$269.00, 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.

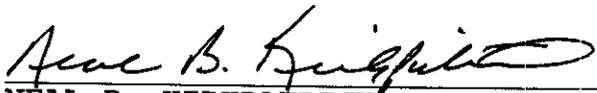
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

Judgment of Foreclosure
Civil Action No. 94-C 263
NBK:lg

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

FILED

OCT 11 1994

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

ANGELA CRAWFORD,

Plaintiff,

vs.

No. 94-C-856-K

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;
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 a representative of PENNWELL;

Defendants.

ENTERED ON DOCKET
DATE OCT 12 1994

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Angela Crawford, and requests that this Court dismiss 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, without prejudice in the above-captioned cause of action. Plaintiff requests that this dismissal be subject to any savings clauses that may apply. 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, have not responded nor filed an answer in this action.

Respectfully submitted,
W. C. "BILL" SELLERS, INC.,

By: 

Tom C. Lane, OBA No. 12746
600 South Main Street
Post Office Box 1404
Sapulpa, Oklahoma 74067-1404
(918) 224-5357

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 14 day of October, 1994, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to attorney for Defendant PennWell Publishing Company:

Lynn Paul Mattson, Esq.
Kristen L. Brightmire, Esq.
DOERNER, STUART, SAUNDERS, DANIEL
ANDERSON & BIOLCHINI
320 S. Boston Avenue, Suite 500
Tulsa, Oklahoma 74103



Tom C. Lane, Sr.

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

JANET LAVONNE MITCHELL,

Plaintiff,

vs.

W.R. BERKLEY CORPORATION, a
Delaware corporation, and EMPLOYEE
BENEFIT ADMINISTRATION OF
OKLAHOMA, Inc., d/b/a BERKLEY
RISK MANAGEMENT OF OKLAHOMA,
an Oklahoma Corporation,

Defendants.

Case No. 94-C-812-B

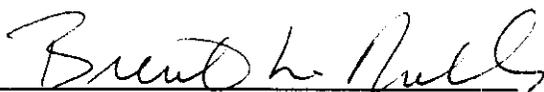
FILED

OCT 11 1994

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

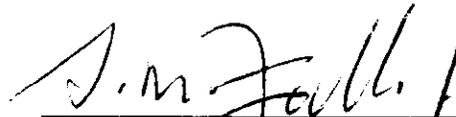
STIPULATION OF DISMISSAL WITHOUT PREJUDICE

The Plaintiff, Janet Lavonne Mitchell, and the defendants, W.R. Berkley Corporation and Employee Benefit Administration of Oklahoma d/b/a Berkley Risk Management of Oklahoma, pursuant to FED. R. CIV. P. 41, hereby stipulate to the dismissal without prejudice of the present case by Plaintiff against defendants.



Brent L. Mills, O.B.A. #13464
TILLY & WARD
P.O. Box 3645
Tulsa, OK 74101-3645
(918) 583-8868

ATTORNEYS FOR JANET LAVONNE
MITCHELL


Mr. S.M. Fallis, Jr. O.B.A. #2813
Nichols, Wolfe, et al
400 Old City Hall Building
124 East Fourth Street
Tulsa, OK 74103-5010
(918) 584-5182

ATTORNEYS FOR W.R. BERKLEY
CORPORATION AND EMPLOYEE
BENEFIT ADMINISTRATION OF
OKLAHOMA D/B/A BERKLEY
RISK MANAGEMENT OF
OKLAHOMA, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 11 1994

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

KIMBERLY D. TARRANT,)
)
 Plaintiff,)
)
 vs.)
)
 DEVELOPMENTAL SERVICES)
 OF TULSA, INC.,)
 an Oklahoma corporation)
)
 Defendant.)

No. 94-C-393BU

RECEIVED
OCT 11 1994
CLERK'S OFFICE

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 11th day of October, 1994, the above styled and numbered matter comes on before this Court pursuant to Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refiling of same.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

/s/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE OCT 11 1994

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

Lavenia Morris,
Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS

Defendant.

No. 93-C-500-K ✓

FILED

OCT 7 1994

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

O R D E R

Plaintiff Lavenia Morris ("Morris") seeks review of the Secretary's decision to deny claimant's application for social security disability benefits ("benefits") under 42 U.S.C. § 405(g).

Morris filed her request for benefits in March of 1991, alleging disabilities arising in November of 1989 due to heart disease, chest pains, numbness in hands and arms, and swelling of feet and legs. After denial by initial and reconsidered determinations, Plaintiff requested a hearing before an administrative law judge (ALJ). The ALJ found that Morris' impairment does not prevent her from performing past relevant work and thus she was not disabled. On March 30, 1993, the Appeals Council denied Plaintiff's request for review. Plaintiff has now sought review in the district court and raises the following issues to be considered:

17

- 1) Plaintiff asserts she is unable to perform any type of work, including past work, on a sustained, reasonably regular basis as a result of absenteeism caused by fatigue and illness. Therefore, Plaintiff argues that the case be remanded for full evaluation of her non-exertional impairments.
- 2) The ALJ did not consider sufficiently Plaintiff's alleged depression by failing to obtain the assistance of a mental health care professional and to assess her mental residual capacity.
- 3) The ALJ demonstrated prejudice against Plaintiff since the Secretary did not rebut observations about Plaintiff's fatigue and depression.

Plaintiff is a 49-year-old female who has completed 12th grade and vocational training in keypunch operating which she used in her work. On June 29, 1985, Plaintiff was hospitalized for evaluation of chest pain suggesting angina and infarction. Electrocardiogram and serial enzymes confirmed the clinical impression of acute infarction. Prior to her heart attack, she had worked for one year in the cash disbursement section of Oxy USA, Inc., where she consistently ranked as one of the most productive clerks in the office.

After the heart attack, however, Plaintiff's productivity fell drastically, and her absenteeism rate rose rapidly. Due to her extensive fatigue, the department borrowed a cot for plaintiff to rest during the lunch break. Frequently, she slept from 11:30 A.M until 1:30 or 2:00 P.M. and also during her allotted fifteen-minute breaks. Along with her exhaustion, Plaintiff also complained of chest pain and swelling in the feet and legs which prevented her from working. Because she took so many sick days, she also used her vacation time to recover from illnesses.

Despite this decline, Plaintiff continued to work as a full-time cash distribution clerk at Oxy USA for four more years. She was laid off in November of 1989 only after the company engaged in a restructuring. After the lay-off, she looked for work, scheduled at least two interviews, but was allegedly unable to muster the energy to make the interviews.

Currently, Plaintiff remains at home every day, mainly reading but without any other hobbies. She suffers chest pains daily for which she takes Cardizem and often lies down to relieve the pain. Plaintiff also stated that she takes Inderal, Premarin, and one aspirin daily. Plaintiff stays in bed much of the day. Due to numbness in the hands and arms, she states she has difficulty lifting or holding items and is prone to dropping objects. While she often begins household chores such as cooking and laundry, her sister, with whom she lives, usually must complete them since Plaintiff is unable to finish due to fatigue.

Discussion

Before the Court is the appeal of the Plaintiff to the Secretary's denial of disability benefits. The Social Security Act entitles every individual who "is under a disability" to a disability benefit. 42 U.S.C.A. §423(a)(1)(D). 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. § 423(d)(2)(A).

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are 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 the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations 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. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

In this case, ALJ concluded at step four after determining

that Plaintiff could return to past relevant work that did not require management or supervising and was therefore not disabled.

In reaching this decision, the ALJ found:

1. Morris has not engaged in substantial gainful activity since November 1, 1989.
2. Morris suffered a myocardial infarction, but she does not have a listed impairment.
3. Morris' complaints are not supported by nor consistent with the medical records.
4. Morris has residual functional capacity to perform work related activities except for work involving lifting greater than 10 pounds at a time, occasionally.
5. Morris' past relevant work as a computer operator, CRT operator or clerk does not require the performance of work-related activities precluded by the above limitations.

The Secretary's decisions and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency

decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

There is substantial evidence in the record to support the conclusions by the ALJ that Plaintiff's impairment does not prevent her from performing her past relevant work. Although the record includes some evidence supporting Morris' claim, there is substantial evidence to show that she did not meet her burden necessary to show a disability. Andrade, 985 F.2d at 1050.

Plaintiff returned to work as a cash distribution clerk for four years subsequent to the 1985 heart attack. In fact, her earnings continued to increase during that time. (Tr. 81). The ALJ found this record of continued employment strongly suggestive of continued ability to work. In response, Morris points to the statement by her employer, Cindy Haney, who implies that Plaintiff continued work largely as a result of the extraordinary measures taken by her colleagues to accommodate Plaintiff's medical needs. In addition, Morris stated on her Disability Report in March of 1992 that "If my last employer had not let me rest, I could not have worked since the last heart attack. But with her help and compassion, I worked until I was layed off. At this time, I cannot pass a physical exam for employment." (Tr. 88). While continued employment at Oxy USA should not be considered dispositive, it does reflect significant ability on the part of the Plaintiff to do substantial work.

The vocational expert provided testimony implying that Morris

possessed the ability to work as a computer operator, bookkeeper or accounting clerk, and scheduling and distribution clerk. This testimony came in response to a hypothetical posed by the ALJ setting forth qualifications as well as maladies similar to those of the Plaintiff's. During cross-examination, Plaintiff's counsel asked the expert whether a high level of fatigue and absenteeism could preclude Plaintiff from holding the jobs the expert previously noted. The expert answered that a plaintiff facing such a situation could not keep the jobs previously listed. Therefore, it is important to assess whether the medical evidence shows medical reasons for such long breaks and absences.

In evaluating the extent of Plaintiff's fatigue impairment and chronic illnesses, this Court must not only assess the testimony by the Plaintiff and her sisters but also look closely at the medical records. With regard to such subjective symptoms such as fatigue, the relevancy of the medical evidence is all the more important. The statute states:

An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which shows the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged. . . . 42 U.S.C. § 423(d)(5)(A).

Similarly, the Tenth Circuit has said 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).

In the progress records of Dr. Poplin, one of Plaintiff's treating physicians, it is noted that she had not returned to the office since April of 1991. (Tr. 134) There are no suggestions by Dr. Poplin that Plaintiff could not work or return to work. Moreover, the medical records do not support the assertion that Plaintiff would frequently miss one to two weeks due to colds or other, normally minor, illnesses. Although Plaintiff need not report every cold or flu to the doctor to substantiate her claim, one would expect some references to such frequent, extended, and debilitating illnesses. The ALJ charted numerous visits to the office of Dr. Poplin, beginning in August of 1985. Despite periodic complaints of chest pain, Dr. Poplin's examinations repeatedly reached negative results, and he never suggested cardiovascular studies other than occasional electrocardiograms.

The ALJ also rightfully relied on evidence presented by Dr. Kash Biddle who performed a consultative examination on October 21, 1991 at the request of the Social Security Administration. The diagnosis included no mention of chronic fatigue or illness. Although the Plaintiff complained of chest pain at the time of the examination, Dr. Biddle noted no indicia of distress. Dr. Biddle stated that there was no evidence of coronary artery disease or arteriography and doubted that Plaintiff's chest pain was cardiac in nature. (Tr. 163) Instead, Dr. Biddle believed that the chest pains might be a product of coronary spasm. As treatment for

Morris' palpitations, he suggested that Plaintiff discontinue caffeine consumption. Dr. Biddle also noted that Plaintiff continued to smoke despite urging by Dr. Poplin for Plaintiff to stop smoking.

In sum, the medical evidence does not offer any diagnostic or laboratory findings of a cardiac or other impairment of a degree of severity that would preclude Plaintiff from working or returning to work. Based on the medical evidence in the record, the ALJ had substantial evidence to conclude that Plaintiff failed to meet her burden in demonstrating that she was unable to perform past work.

The second issue that Plaintiff raises on appeal is that the ALJ did not sufficiently consider Plaintiff's alleged depression and should have obtained an opinion from a mental health care professional. When the record contains evidence that a claimant seeking disability is mentally impaired, the Secretary may not determine that claimant is not under a disability without first making sure that a qualified mental health expert has reviewed the case and assessed any applicable residual functional capacity. Andrade, 985 F.2d at 1048.

In this case, however, the record does not demonstrate sufficient evidence to trigger such a duty, and therefore the ALJ's decision regarding the alleged mental impairment is amply supported by the record. Bernal, 851 F.2d at 302 (10th Cir. 1988). The Plaintiff did not even mention an alleged depression impairment during her own testimony before the ALJ. While the record shows that plaintiff was given Librium for nervousness during brief

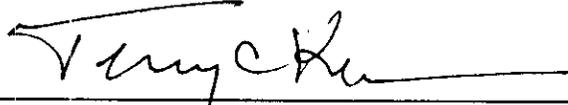
periods, the medication was not prescribed for depression. Moreover, none of these periods took place during the time period adjudicated (1989-1992) in this dispute. Although Plaintiff complained of stress anxiety related to pain and received Buspar for treatment, Plaintiff never sought regular treatment for depression and never was treated for depression during the adjudicated time. Although the consultative physician, Dr. Biddle, did note some depression, the doctor described it as minimal and intermittent.

Finally, Plaintiff alleges that the ALJ failed to fully consider the record and demonstrated definite prejudice against the Plaintiff. Specifically, the Plaintiff argues that the ALJ failed to consider adequately her severe fatigue as evidenced in her testimony, the medical records, and the statement from her former employer at Oxy USA. This allegation is groundless. In fact, the ALJ specifically included a lengthy discussion of all the major points made by Plaintiff's employer, Ms. Haney, with regard to Plaintiff's fatigue as well as the medical record. Nevertheless, the ALJ decided found this testimony ultimately unpersuasive in light of the medical evidence. 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 and Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

Based on the foregoing, this Court determines that there is sufficient relevant evidence to support the ALJ's ruling that

Plaintiff is able to perform her prior work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 7th DAY OF October, 1994



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED
OCT 11 1994

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

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

JOANN STATTEL,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Case No. 93-C-1152-B

Wagner ✓

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on before the court for trial on its merits this 4th day of October, 1994, and trial having been completed, the court makes Findings of Fact and draws Conclusions of Law as follows.

FINDINGS OF FACT

Any Conclusion of Law that might be properly characterized as a Finding of Fact is incorporated herein.

The court finds:

1. The court has jurisdiction of the parties and subject matter herein, as it is a proper case under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq.
2. Plaintiff made timely claim pursuant to the Federal Tort Claims Act and this action was timely commenced.
3. Defendant acted with regard to matters in this case through the United States Postal Service at Owasso, Oklahoma.
4. It is undisputed by the parties that no building codes or safety regulations were violated and that the parking lot was properly designed and paved.

ENTERED ON DOCKET
DATE 10-11-94

5. On the afternoon of November 19, 1992, around 4:00 p.m., plaintiff went to the United States Post Office located in Owasso, Oklahoma ("the Post Office"). She parked in a slot in front of the building and went inside to purchase stamps. When she left the building, she stepped off of the curb, took two or three steps, and fell. While she was in the Post Office, no car pulled in or out on the left side of her car, so she took the same path to and from the car.

6. When plaintiff approached her car, she walked along the white parking space line within a couple of feet from her car.

7. On November 19, 1992, it had been raining most of the day. Plaintiff stated that it was raining at 7:30 a.m. when she took her son to school and pouring at 2:30 p.m. Witnesses disagree as to whether it was misting at the time of plaintiff's fall, but plaintiff testified it was. She testified that the pavement looked dark black.

8. Plaintiff admits that she was not paying attention to the ground where she was walking when she fell, but was looking at a red porsche which was pulling out across the lot.

9. Plaintiff was wearing low heeled loafers with slick plastic soles at the time she fell. The shoes were produced at trial.

10. Plaintiff does not know why she fell, but she speculated at the time that she slipped in mud.

11. Plaintiff's husband, John Stattel, saw no oil on the spot where plaintiff fell, but testified that the spot looked black. He found no oil stains or mud on the seat of his automobile where plaintiff sat on the way to the hospital, but the seat was damp.

12. Plaintiff's husband noticed a 6-8" spot on the back of the legs and buttocks portion of the damp pants plaintiff was wearing when they got to the hospital. He concluded that the spot was caused by oil. Plaintiff's husband also testified that he was a "neatnik", and that he successfully used spot remover on the pants to remove the stain. The pants were not produced at trial because they had been one of two pairs of pants owned by plaintiff that fit comfortably during her convalescence, and consequently they had been washed many times.

13. Ruby West testified as to the circumstances surrounding her fall at the Post Office approximately one year before plaintiff's fall. The conditions were dry on the day she fell, and she testified that she told a Post Office employee she stepped in oil. She was not sure that she stepped in the substance which she later found on her clothes. The dry conditions in Ms. West's case do not duplicate those in the plaintiff's case, and the fall was remote in time from plaintiff's.

14. Bert Young testified as to the circumstances surrounding the fall of his deceased wife, Anna Young, at the Post Office one day before plaintiff's fall. Ms. Young fell one space over from the space where plaintiff fell. Bert Young talked to plaintiff's husband in the hospital and reported his wife's fall to a Post Office employee on the day it happened. He testified that his wife had oil on her left pant's leg. He saw oil all over the handicapped parking space at the Post Office at 9:30 a.m. on November 19, 1992. The testimony of Bert Young is somewhat suspect due to its emotional content. He testified that he attributed his wife's death from heart failure to the fact that she gave up her desire to live because she couldn't walk after her fall at the Post Office.

15. James Parris, a Mennonite minister, testified that he was at the Post Office on the day plaintiff fell. He saw her fall from behind a car and went to assist her. She fell on the driver's side of her car between the car and the white line. He knows what oil looks like when wet, but he saw no oil or other substance on the wet pavement. He did not specifically look to see what was on the ground where plaintiff fell.

16. Linda Whenry testified that she was at the Post Office on the day plaintiff fell and came to help after James Parris did. It was misting rain, and she does not remember a downpour. She just saw wet black pavement in the spot where plaintiff fell. On sunny days she had noticed oil in front of the Post Office, in the center of parking spaces and also off to the side of the spaces. She testified that cars occasionally parked over the slot lines instead of between them. She had slipped at the Post Office three or four times while wearing loafers or tennis shoes when it was raining, but she never reported the slips to a Post Office employee. She had only slipped in wet conditions and did not know if she slipped in oil. She attributed the slips to the wet incline.

17. Michael Agnew testified that he was a maintenance worker at the Post Office from 1989 to May of 1991 or 1992. He used oil absorbent on the parking lot there two or three times a month or more if needed. Oil spots were visible and dark, but not always slick-looking. He testified that no one ever fell in the parking lot while he was custodian at the Post Office.

18. Rhonda Agnew testified that she works as a window clerk at the Post Office and was working on the day plaintiff fell. It was a cloudy day and it was misting. Around 4:00 p.m. she was advised that plaintiff had fallen. She checked on plaintiff, who was

sitting on the white line by her car. She saw only mud on the ground from the wheel well and saw no oil. She testified that she was diligent in looking for oil, because she knew she would have to make a report of the incident. She testified that Ruby West did not have oil on her clothing when she reported her fall a year before plaintiff's fall and asked if the Post Office had insurance. She testified that Anna Young just stated she stepped off the curb and fell when she reported her fall. She did not notice any oil in the spot where Anna fell, but noticed oil in the parking lot a few feet away.

19. Nancy Casto is a second-year electrical engineering student at the University of Tulsa. She testified that she began work as a maintenance custodian at the Post Office at least several weeks, and perhaps a couple of months before plaintiff fell, although she did not recall the exact date. One of her duties is to maintain the grounds. In dry weather she uses one bag of absorbent on the parking lot each month, but in wet weather she uses one bag of absorbent on the parking lot each week because it washes away quickly. At 8:00 a.m. on November 19, 1992, the postmaster told her to put absorbent on all the parking spaces facing the building where she saw oil deposits. She followed his instructions and did not put absorbent on any of the white lines because she saw no oil there. On other occasions, she put absorbent on the lines when she saw oil on them. She saw no oil tracks on the rug inside the main door of the Post Office on the day after Plaintiff's fall. She was not at the Post Office when plaintiff fell.

20. Larry Campbell testified that he is the postmaster at the Post Office and comes in twice a day to inspect the building and parking lot. He supervises his employees by visual inspection. He was at the Post Office on November 18 and 19, 1994. He

testified that maintenance guidelines provide that the parking lot be policed and swept one to seven times a week. He was not at the Post Office when plaintiff fell, but Rhonda Agnew reported the fall to him. He checked the spot where the fall occurred the next day, but he could see no substance or spot where the fall occurred and no maintenance reason for the fall. He testified that he never has received a complaint from a customer who claimed they fell in oil, but four reports of persons who have fallen have been received. One thousand patrons a day visit the Post Office, which is open six days a week.

21. Glenn Harvey testified that he is supervisor of customer service at the Post Office, and he investigated Anna Young's accident. Mrs. Young reported to him that she slipped on the curb. He testified that, on the day Mrs. Young fell, it was cloudy, but dry.

22. Jerry Grigar testified that he was superintendent for postal operations at the Post Office on the day Ruby West fell. Mrs. West told him she slipped as she stepped off the curb, and he saw no loose, foreign, or wet places on the curb. A car could not leave oil on the curb. He testified that, if he ever saw a buildup of oil in spots on the parking lot, they were removed. He testified that he monitors the Post Office parking lot on a daily basis. It rained on the day plaintiff fell. There are thirty-three employees at the Post Office.

23. Dr. Jerry Purswell, defendant's expert witness, conducted tests at the Post Office and testified that the coefficient of friction (COF) with plaintiff's shoes was less than the coefficient of friction with rubber-soled shoes. He testified that rain will wash oil away. He concluded that the cause of plaintiff's fall was inadequate footwear and lack of attention by plaintiff. He found that the friction-measurement apparatus of plaintiff's

expert, Robert Smith, was faulty, because it was designed to determine the coefficient of friction in bathtubs. He testified that a parking lot can have a higher COF when wet, because the moisture attracts grit and dust from the air.

24. John Hargis, defendant's second expert witness, testified that Dr. Purswell's work was well done and he used great integrity. The court discounts this testimony, as it was outside Mr. Hargis' field of expertise and he did no friction testing himself. He testified that rain would lift oil and wash it away. Long after the time Plaintiff fell, he viewed the Post Office parking lot when it was wet and testified that wet oil spots could be seen.

25. Robert Smith, plaintiff's expert witness, testified that the friction-measurement apparatus used by Dr. Purswell was faulty, as his tests cannot be duplicated by a standard measuring device, as is required by the scientific method. He opined that the minimum COF necessary for slip resistance is 0.5, and that the COF of the parking lot would have been less than this when wet. He took issue with Dr. Purswell's contention that the parking lot would have had a higher COF when wet. Mr. Smith said that this overlooks the "lubrication principle" which says wet surfaces have a lower COF because water acts as a lubricant.

26. Defendant's Exhibit "J-3" shows that the parking lot at the Post Office was recoated on July 17, 1991 to make it more slip-resistant. John Hargis reported that the lot had not changed significantly from that time in any way that would make it more dangerous to pedestrians. He testified that the parking lot was unusually well maintained in a manner that exceeded ordinary standards. Most businesses do not place absorbent on

their parking lots with the frequency attested to by Ms. Casto.

27. Defendant's Exhibit B, a weather report, showed .67" of moisture fell on November 19, 1992.

CONCLUSIONS OF LAW

Any Finding of Fact which is more appropriately characterized as a Conclusion of Law is incorporated herein.

The court draws Conclusions of Law as follows:

1. This court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. § 1346(b).

2. Under the Federal Tort Claims Act, on which this lawsuit is based, Oklahoma law is applicable in determining whether the defendant, through its agents and employees, acted negligently. 28 U.S.C. § 2674.

3. Under Oklahoma law, plaintiff has the burden of proving each of the following propositions: (1) that she has sustained injury; (2) that the party from whom she seeks to recover breached a duty owed to her, and (3) that such breach of duty was a direct cause of the injury sustained. Nicholson v. Tacker, 512 P.2d 156, 158 (Okla. 1973); Brown v. Wal-Mart Stores, Inc., 11 F.3d 1559 (10th Cir. 1993).

4. Plaintiff was an invitee on defendant's premises who was on the premises at the invitation of the owner for some purpose in which the owner had an interest of business or commercial significance.

5. A businessman owes his invitee the duty to exercise ordinary care to keep his premises in a reasonably safe condition and to warn an invitee of hidden dangers on the

premises. Id. The Oklahoma court has recognized that the open and obvious doctrine is a bar to recovery under a theory of negligence. "Not only is there no duty to keep premises free from obvious dangers, but there is also no duty of defendant to warn plaintiff of such obvious dangers In the case of the open and obvious danger, the fact that the danger is readily apparent to the plaintiff makes it clear that the defendant has not breached any duty to the plaintiff." Nicholson, at 159. See also, Sutherland v. Saint Francis Hospital, Inc., 595 P.2d 780, 783 (Okla. 1979).

6. Under Oklahoma law, an invitee has a duty to exercise reasonable care for his or her own safety. The invitor "is not liable for an injury to an invitee resulting from a danger which was obvious or should have been observed by the invitee in the exercise of reasonable care, or from a condition which was as well known or as obvious to the invitee as to the inviter [sic], or which the inviter [sic] had no reason to believe would not be discovered by the invitee." Beatty v. Dixon, 408 P.2d 339, 343 (Okla. 1965) (citing 65 C.J.S. Negligence § 50).

7. Plaintiff has failed to prove by a preponderance of the evidence that a hidden danger existed in the Owasso Post Office parking lot which the United States knew about or should have known about in the exercise of reasonable care, and therefore there was no duty to warn plaintiff of such a danger. The earlier falls reported by Ruby West and Anna Young did not constitute notice of a dangerous condition. Ruby West's fall occurred under dry conditions where oil would have been obvious and was remote in time, and Anna Young's fall occurred in a different spot where no evidence of oil was found.

8. Plaintiff has failed to prove by a preponderance of the evidence that

Defendant breached a duty owed to her as its invitee. The Defendant took all reasonable steps to insure the safety of the premises. The lot was resurfaced on July 17, 1991, to make it more slip-resistant, and no significant change or wear had occurred in the sixteen months prior to plaintiff's fall. The postmaster customarily inspected the premises twice a day. The custodian put absorbent on all oil accumulations that she found. In fact, absorbent had been spread on the parking lot on the very morning of the day that plaintiff fell. Even if Ms. Young's accident the previous day had constituted notice that oil in the parking lot was creating a dangerous condition (and the court does not find that this is the case), this action was consistent with, and would have satisfied the Defendant's duty of ordinary care under the circumstances. The Plaintiff does not suggest any additional action that the Post Office could have taken to prevent plaintiff's injury on the day in question.

9. The pavement was wet on the day plaintiff fell. This was an open and obvious condition, which the Plaintiff testified that she was aware of. Her clothing was wet after the fall. The court does not doubt that plaintiff's clothing may have also been soiled as a result of her fall. That soil may even have contained some oily residue from an oil spot on the pavement, as her husband contends. However there is no direct proof before this court as to the nature of the residue on the clothing, and even if there was this would not necessarily suggest that Plaintiff slipped as a result of that substance, but would merely establish that she came in contact with it at some time while she was sitting or being moved from the pavement.

10. According to plaintiff, it rained heavily shortly before her fall. This is

supported by the meteorological evidence submitted into evidence. The experts agreed that oil is lighter than water and tends to float away if it rains. The parking lot has a four percent grade which slopes away from the front of the building. Stain patterns in the photographs submitted at trial show that water would tend to flow across the diagonal white parking slot lines and wash all the way out of the Plaintiff's path of travel. None of the witnesses who observed the scene of plaintiff's fall reported seeing oil or any foreign substance at that spot. There was no oil residue on the shoes plaintiff wore that day and no oil tracks on the rug inside the door of the Post Office where plaintiff entered after having traversed the same path that she followed immediately prior to her fall. Plaintiff admitted that she was wearing slick-soled shoes and not paying attention to where she walked. Plaintiff has failed to prove by a preponderance of the evidence that action or inaction by defendant caused her injury.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that plaintiff, Joann Stattel, take nothing by reason of her complaint and that defendant, United States of America, have judgment against plaintiff.

Dated this 11th day of October, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Stattel

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

FILED

OCT 07 1994

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

CHARLES SPOTWOOD,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

93-C-0905-E ✓

ORDER

Plaintiff Charles Spotwood applied for Social Security disability benefits, alleging he could no longer work because of severe pain and high blood pressure. The Secretary of Health and Human Services denied that application. Mr. Spotwood now appeals that decision to this court.¹

Mr. Spotwood raises four issues: (1) The Administrative Law Judge ("ALJ") ignored the "treating physician rule"; (2) The ALJ improperly relied on the Medical/Vocational guidelines; (3) The ALJ should have had a vocational expert testify; and (4) Substantial evidence does not support the Secretary's decision to deny benefits. For the reasons discussed below, the Secretary's decision is **affirmed**.

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.

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 10-11-94

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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).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).³

Keeping these 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).

II. Legal Analysis

Mr. Spotwood applied for Social Security Disability Benefits and Supplemental

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).

Security Income on January 31, 1992. He claimed he had been unable to work since June 22, 1991. The Secretary denied the application initially and on reconsideration.

The ALJ then held a hearing on December 17, 1992 where Mr. Spotwood testified. After listening to Mr. Spotwood's testimony and examining the other evidence in the record, the ALJ found that Mr. Spotwood was not disabled. At Step 4 of the above analysis, the ALJ concluded that the 47-year-old Mr. Spotwood could not return to his past work as an upholsterer. The ALJ found, however, at Step 5, that Mr. Spotwood could do "medium" level work. *Record at 50.*

An examination of the record indicates that the ALJ did not err in reaching such a conclusion. Medium work "involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." In addition, someone who can do medium work is also able to do light and sedentary work. *20 C.F.R. §404.1568(c)*. Substantial evidence supports the ALJ's finding that Mr. Spotwood can do medium work.

The pertinent medical evidence is as follows. Mr. Spotwood was examined by Dr. Joseph Sutton, a consulting physician, on January 19, 1993. Dr. Sutton acknowledged that Mr. Spotwood had a "legitimate case of low back syndrome" and "considerable lumbar pain." However, he noted that "no objective evidence of disability" could be found and that Mr. Spotwood had a normal range of motion. Dr. Sutton also completed a RFC that indicated that Mr. Spotwood could sit for 4 to 6 hours during a work day; could stand 4 to 6 hours during a work day and could walk 4 to 6 hours during a work day. Dr. Sutton also found that Mr. Spotwood could frequently lift 21 to 25 pounds and occasionally lift 26 to 50 pounds. Dr. Sutton also recommended that Mr. Spotwood's activity be restricted

to occasional bending, squatting and climbing. *Record at 217-224.*

Dr. Sutton's opinion was similar to every other doctor who examined Mr. Spotwood. Dr. J.M. Bazih examined Mr. Spotwood and found that he had degenerative disc disease L4-L5, L5-S1. Dr. Bazih recommended that Mr. Spotwood "avoid any strenuous activities such as repeated lifting, stooping, twisting, pushing and pulling." *Id. at 210.* Dr. Bazih made no finding as to whether Mr. Spotwood could work, but he did say that Mr. Spotwood should avoid heavy lifting or twisting.⁴

Similar findings were made by Dr. Ronald Williams, a chiropractor who examined Mr. Spotwood on June 1, 1992. Dr. Williams found that X-rays revealed a degeneration of the L5-S1 disc and lumbar pain. *Id. at 208.* An examination by Dr. Richard G. Cooper on April 24, 1992 noted pain in the lumbar region in addition to "tenderness" in the lower left ribs and high blood pressure (210/120). *Id. at 198.* Drs. John Forrest and Joshua Stolow submitted similar evidence and noted that Mr. Spotwood had urinary blockage.

The only non-medical evidence comes from Mr. Spotwood himself. He testified that he completed eighth grade. He testified that he has pain in his back and both legs, which prevents him from tying his shoes and causes difficulty walking up stairs. Mr. Spotwood also testified that he has high blood pressure, which sometimes results in dizziness. *Id. at 62-88.*

As noted earlier, substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. In this

⁴ *The ALJ found that Dr. Bazih was not a "treating physician." Since the record shows that Mr. Spotwood visited Dr. Bazih five times, the Court disagrees with the ALJ's conclusion. However, adding extra weight to the Dr. Bazih's opinion, does not alter the ALJ's decision of no disability. That is because Dr. Bazih's conclusions are similar to the other medical evidence in the case.*

case, substantial evidence supports the ALJ's determination that Mr. Spotwood can do medium-level work. In fact, little, if any, evidence -- with the exception of parts of his testimony -- supports a finding of no disability. The Secretary's decision is **AFFIRMED**.⁵

SO ORDERED THIS 7th day of Oct., 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁵ Ms. Spotwood's other issues are without merit. The ALJ did not call a vocational expert to satisfy the Secretary's burden on step 5 of the sequential analysis. Instead, he relied on the Medical/Vocational guidelines ("Grids"). If a claimant has significant nonexertional limitations preventing the full range of work, an ALJ may not solely rely on the guidelines. 20 C.F.R. §404.1569. However, in this case, the ALJ found, and the record supports, that Mr. Spotwood could the full range of medium work. Therefore, despite the presence of some nonexertional limitations, the ALJ properly relied on the Grids to make a finding of no disability. Furthermore, the ALJ did not have to call a vocational expert.

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

VINCE BREEDLOVE, individually,)
)
Plaintiff,)
vs.)
)
PIZZA HUT OF AMERICA, INC.,)
)
Defendant.)

Case No. ~~93-C-868-E~~

93-C-114-B

FILED
OCT 9 1994

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Vince Breedlove, Plaintiff, by and through his counsel of record, Richardson, Stoops & Keating, and Pizza Hut of America, Inc., Defendant, by and through its counsel of record, Secrest, Hill & Folluo, and, pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby agree and stipulate to Plaintiff's dismissal with prejudice of the above-styled and numbered cause, and of all claims asserted therein as against Pizza Hut of America, Inc., Defendant, with prejudice to the refileing thereof.

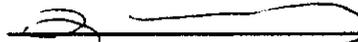
RESPECTFULLY SUBMITTED,
RICHARDSON, STOOPS & KEATING

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