

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

FILED

NOV 9 1994

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

FEDERAL DEPOSIT INSURANCE)
CORPORATION, in its Corporate)
Capacity for The Citizens Bank,)
Drumright, Oklahoma)
Plaintiff,)

v.)

Case No. 94 C 31 E

TERRY LEE VARNER AND LORETTA)
SUE VARNER; INTERNAL REVENUE)
SERVICE; BOARD OF COUNTY)
COMMISSIONERS OF CREEK)
COUNTY; COUNTY TREASURER)
OF CREEK COUNTY, FRANK YOUNG,)
AND LEO J. DAVIS,)
Defendants.)

JOURNAL ENTRY OF JUDGMENT

THIS CAUSE comes on without hearing this 8th day of November, 1994, before the undersigned Judge on the Plaintiff's Motion for Summary Judgment. Plaintiff appears by its attorneys, Martin & Shelton, P.C. The Defendants, Terry Lee Varner and Loretta Sue Varner, husband and wife, appear not. The Defendants, Board of Commissioners of Creek County and Creek County Treasurer appear through their attorney, Wesley R. Thompson. The Defendant Internal Revenue Service appears through its attorney, Phil Pinnell. Defendant Frank Young appears by his attorney, Michael Green, and Defendant Leo Davis appears by his attorney, Steven Singer.

ENTERED ON DOCKET

DATE 11-10-94

THE COURT, being fully advised in the premises, finds that this Court has jurisdiction over the parties and subject matter of this action and that all of the uncontroverted facts as set out in the Plaintiff's Motion for Summary Judgment are true.

THE COURT FURTHER FINDS AND ORDERS AS FOLLOWS:

1. Due and regular service of summons with a copy of the Plaintiff's Petition attached, has been made upon the following Defendants as required by law: Terry Lee Varner and Loretta Sue Varner, Internal Revenue Service, Board of County Commissioners of Creek County, County Treasurer of Creek County, Frank Young and Leo J. Davis. Further, that the summons is legal and regular in all respects, the answer days have expired, and the Defendants, Terry Lee Varner and Loretta Sue Varner have failed to appear, answer or otherwise plead, either in person or by an attorney.

2. Defaults have occurred under the terms and conditions of the Note and Mortgage as alleged in Plaintiff's Motion for Summary Judgment. Plaintiff is entitled to foreclosure of its Mortgage as against all Defendants. The Mortgage expressly waives appraisalment at the option of the owner and holder, such option to be exercised at the time judgment is rendered herein. Plaintiff elects to have said property sold with appraisalment.

3. There is due Plaintiff on the Note and Mortgage sued upon herein, the principal sum of \$206,252.27 with interest at 14% per annum from September 9, 1987, until paid, \$5,000.00 in attorneys' fees, late charges accrued and accruing, reimbursement for all expenses, including, but not limited to, advances made for payment of abstracting expenses, taxes, insurance premiums, costs of maintenance and preservation of the subject property, together with all other costs of foreclosure and this action, accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff have and recover judgment in rem against all Defendants, for the principal sum of \$206,252.27 with interest at 14% per annum from September 9, 1987, until paid, attorneys' fees, late charges, accrued and accruing, and reimbursement for all expenses, including, but not limited to advances made for payment of abstracting expenses, taxes, insurance premiums, costs of maintenance and preservation of the subject property, together with all other costs of foreclosure and this action, accrued and accruing; that the amounts are secured by the Mortgage and constitute a first, prior and superior lien, except as to Ad Valorem taxes, upon the following described real estate and premises:

THE NORTH HALF (N/2) OF THE NORTH HALF (N/2) OF
THE NORTHWEST QUARTER (NW/4) OF THE SOUTHWEST
QUARTER (SW/4) OF THE SOUTHWEST QUARTER (SW/4)
OF SECTION 33, TOWNSHIP 19 NORTH, RANGE 8 EAST, IN
CREEK COUNTY, STATE OF OKLAHOMA

and that any and all right, title or interest which the Defendants, or any of them, have, or claim to have, in or to said real estate and premises is subsequent, junior and inferior to the first mortgage and lien of the Plaintiff, except as to Ad Valorem taxes.

IT IS FURTHER ORDERED by the Court that the Mortgage and lien of the Plaintiff in the amounts hereinabove found and adjudged be foreclosed, and upon the failure of the Defendants, to satisfy said judgment, interest, attorneys' fee and costs, a Special Execution and Order of Sale shall issued out to the office of the District Court Clerk for the Northern District of Oklahoma in this cause, commanding the sheriff of Creek County to levy upon, advertise and sell, after due and legal appraisalment, the real estate and premises hereinabove described, advancements made by Plaintiff for preservation of the subject property, and to pay

the proceeds of said sale to the clerk of this Court, as provided by law, for application as follows:

1. To the payment of Plaintiff's costs, the costs of said sale and of this action, and Plaintiff's attorneys' fees;
2. To the payment of the 1991, 1992 and 1993 Ad Valorem Taxes to Dessa Hammtree, the County Treasurer of Creek County.
3. To the payment of the first mortgage and judgment lien of the Plaintiff in the amounts hereinabove set forth;
4. The balance, if any, shall be held by the Clerk of this Court to abide the further order of the Court.

IT IS FURTHER ORDERED by the Court that from and after a sale of said real estate as herein directed, and upon the confirmation of such sale by the Court, the parties to this action shall be forever barred and foreclosed of and from any lien upon or adverse to the right and title of the purchaser at such sale; EXCEPT THAT THE EQUITY OF REDEMPTION OF THE UNITED STATES OF AMERICA, AS PROVIDED BY 28 U.S.C. §2410(c), IS HEREBY RESERVED; and the Plaintiff and Defendants, and all persons claiming by, through or under them since the commencement of this action, are perpetually enjoined and restrained from ever setting up or asserting any lien upon or right, title, equity or interest in or to the real estate adverse to the right and title of the purchaser at such sale, if the sale is confirmed; and that upon

application by the purchaser, the Court Clerk shall issue a writ of assistance to the sheriff of Creek County, who shall place the purchaser in full and complete possession and enjoyment of the premises.

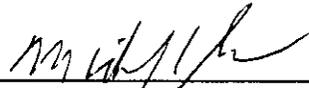
JUDGE OF THE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PREPARED AND APPROVED:

By 

Pamela Shelton, OBA #10784
Rebecca Brett OBA 14190
320 South Boston Avenue, Suite 905
Tulsa, Oklahoma 74103
(918) 584-1880
Attorneys for Plaintiff, Resolution Trust
Corporation, as Receiver for Homestead
Federal Savings Association

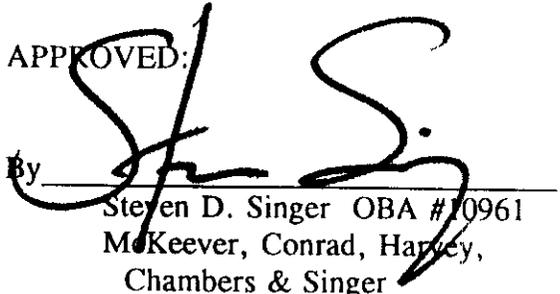
APPROVED:

By 

Michael L. Green OBA #3571
406 South Boulder, Suite 707
Tulsa, Oklahoma 74103
(918) 585-5595
Attorney for Defendant Frank Young

APPROVED:

By



Steven D. Singer OBA #10961
McKeever, Conrad, Harney,
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Enid, Oklahoma 73702
(405) 234-4133
Attorney for Defendant Leo Davis

APPROVED:

By *Phil Pinnell*

Phil Pinnell OBA #7169

Assistant U.S. Attorney

333 W. Fourth Street, Suite 3460

Tulsa, Oklahoma 74103

(918) 581-7463

Attorney for Defendant Internal Revenue Service

APPROVED:

By


Wesley R. Thompson OBA #8993

Assistant District Attorney

P.O. Box 1006

Sapulpa, Oklahoma 74067

(918) 224-3921

Attorney for Defendants Creek County Treasurer
and Board of Creek County Commissioners

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LAURA LEE FRANCIS)
 aka Laura Lee Wade;)
 J.D. WADE)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

NOV 10 1994

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

CIVIL ACTION NO. 94-C-473-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this _____ day
of _____, 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, LAURA LEE
FRANCIS aka Laura Lee Wade and J.D. WADE, appear not, but make
default.

The Court further finds that the Defendants, LAURA LEE
FRANCIS aka Laura Lee Wade and J.D. WADE, 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
August 17, 1994, and continuing through September 21, 1994, as
more fully appears from the verified proof of publication duly

ENTERED ON DOCKET

DATE 11-10-94

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, LAURA LEE FRANCES aka Laura Lee Wade and J.D. WADE, 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 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, LAURA LEE FRANCIS aka Laura Lee Wade and J.D. WADE. 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 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 Answers on May 23, 1994; and that the Defendants, LAURA LEE FRANCIS aka Laura Lee Wade and J.D. WADE, 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 Eighteen (18), Block Five (5), SUNWOOD HILLS THIRD, an Addition to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 1, 1990, the Defendant, LAURA LEE FRANCIS, executed and delivered to First Mortgage Corp, her mortgage note in the amount of \$52,700.00, 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, the Defendant, LAURA LEE FRANCIS, a single person, executed and delivered to First Mortgage Corp., a mortgage dated June 1, 1990, covering the above-described property. Said mortgage was recorded on June 6, 1990, in Book 5257, Page 1518, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 10, 1991, First Mortgage Corp., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 11, 1991, in Book 5327, Page 1773, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1991, the Defendant, LAURA LEE FRANCIS, 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, LAURA LEE FRANCIS, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, LAURA LEE FRANCIS aka Laura Lee Wade, is indebted to the Plaintiff in the principal sum of \$72,971.29, plus interest at the rate of Ten 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 \$44.00 which became a lien on the property as of September 14, 1993; a lien in the amount of \$38.00 which became a lien on the property as of June 25, 1993; and a

lien in the amount of \$45.00 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, LAURA LEE FRANCIS aka Laura Lee Wade and J.D. WADE, 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, 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 Defendant, LAURA LEE FRANCIS aka Laura Lee Wade, in the principal sum of \$72,971.29, plus interest at the rate of Ten percent per annum from April 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 \$127.00 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, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, LAURA LEE FRANCIS aka Laura Lee Wade and J.D. WADE, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of

\$127.00, 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
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DICK A. BLAKELEY, OBA #852
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-473

NBK:flv

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

FILED

NOV - 9 1994

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

BILLY G. MECOM,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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CASE NO. 94-C-759-B

ENTERED ON DOCKET

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DATE

**JOINT STIPULATION FOR
DISMISSAL WITHOUT PREJUDICE**

The Plaintiff, Billy G. Mecom, by agreement with the Defendant, United States of America, hereby dismisses this action without prejudice because no claim for refund has been filed with respect to the additional 1987 taxes that were paid on or about August 6, 1993. Each party to this proceeding is to bear his own costs and attorney fees.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



E. John Eagleton, OBA #2582
Charles D. Harrison, OBA 3921
**EAGLETON, EAGLETON &
HARRISON, INC.**
320 South Boston, Suite 709
Tulsa, Oklahoma 74103-3727
(918) 584-0462

Attorneys for Plaintiff
Billy G. Mecom



James J. Long
Trial Attorney, Tax Division
U.S. Department of Justice
Ben Franklin Station
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Washington, D.C. 20044
(202) 514-6563

Attorneys for Defendant
United States of America

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARION O. ROSS, JR.; PATRICIA A.)
 ROSS; JESSE JOYNER; WILLIE MAE)
 JOYNER; STATE OF OKLAHOMA ex rel.)
 OKLAHOMA TAX COMMISSION; SERVICE)
 COLLECTION ASSOCIATION, INC.;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

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DATE NOV 10 1994

CIVIL ACTION NO. 94-C 466B

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day
of Nov., 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **State of**
Oklahoma ex rel Oklahoma Tax Commission, appears by Kim D.
Ashley, Assistant General Counsel; the Defendant, **Service**
Collection Association, Inc., appears not, having previously
filed its disclaimer; and the Defendants, **Marion O. Ross, Jr.,**
Patricia A. Ross, Jesse Joyner and Willie Mae Joyner, appear not,
but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Jesse Joyner and Willie Mae Joyner**, waived service of Summons on May 16, 1994, which was filed on May 17, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via Certified Mail on May 12, 1994; and that the Defendant, **Service Collection Association, Inc.**, waived service of Summons, which was filed on May 17, 1994.

The Court further finds that the Defendants, **Marion O. Ross, Jr. and Patricia A. Ross**, were 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 June 28, 1994, and continuing through August 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, **Marion O. Ross, Jr. and Patricia A. Ross**, 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, **Marion O. Ross, Jr. and Patricia A. Ross**. 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 May 23, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on May 27, 1994; that the Defendant, **Service Collection Association, Inc.**, filed its Disclaimer on May 26, 1994; and that the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner, and Willie Mae Joyner**, 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 SIXTEEN (16), BLOCK ONE (1), SUMMERFIELD SOUTH, AN ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT, LESS AND EXCEPT A DRIVEWAY EASEMENT MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHWEST CORNER OF SAID LOT SIXTEEN (16), WHICH IS ALSO THE SOUTHWEST CORNER OF LOT SEVENTEEN (17), BLOCK ONE (1), SAID SUMMERFIELD SOUTH; THENCE SOUTHWESTERLY ALONG THE WESTERLY BOUNDARY OF SAID LOT SIXTEEN (16), SIX (6.00) FEET; THENCE EASTERLY TO A POINT IN THE NORTHERN BOUNDARY OF SAID LOT SIXTEEN (16); THENCE NORTHWESTERLY ALONG THE SAID NORTHERN BOUNDARY OF SAID LOT SIXTEEN (16), TEN (10.00) FEET TO THE POINT OF BEGINNING, THIRTY (30.00) SQUARE FEET, MORE OR LESS.

The Court further finds that on August 31, 1988, the Defendants, Marion O. Ross, Jr. and Patricia A. Ross, executed and delivered to OAK TREE MORTGAGE CORPORATION their mortgage note in the amount of \$69,805.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Marion O. Ross, Jr. and Patricia A. Ross, husband and wife, executed and delivered to OAK TREE MORTGAGE CORPORATION a mortgage dated August 31, 1988, covering the above-described property. Said mortgage was recorded on October 27, 1988, in Book 5136, Page 1978, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 7, 1989, Oak Tree Mortgage Corporation f/k/a United Bankers Mortgage Corporation assigned the above-described mortgage note and

mortgage to the United States Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 12, 1989, in Book 5206, Page 2246, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 30, 1989, the Defendants, Marion O. Ross, Jr. and Patricia A. Ross, 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, Marion O. Ross and Patricia A. Ross, 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, **Marion O. Ross and Patricia A. Ross**, are indebted to the Plaintiff in the principal sum of \$104,022.46, plus interest at the rate of 8.5 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 \$56.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$49.00 which became a lien on June 25, 1993; and a claim against the

subject property in the amount of \$56.00 for the tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of tax warrant number ITI9000160000, in the amount of \$466.92, plus interest, penalties, and costs, which was filed on March 21, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner, and Willie Mae Joyner**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Service Collection Association, Inc.**, disclaims any right, title or interest in the subject 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, **Marion O. Ross, Jr. and Patricia A. Ross**, in the principal sum of \$104,022.46, plus interest at the rate of 8.5 percent per annum from April 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, 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 \$161.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$466.92, plus penalties and interest, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner, Willie Mae Joyner, Service Collection Association, Inc. 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, **Marion O. Ross Jr. and Patricia A. Ross**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for

the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$466.92, plus accrued and accruing interest, for state taxes.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$161.00, 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.

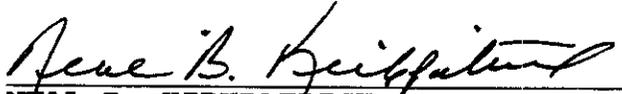
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

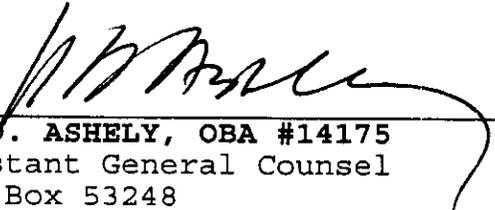
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C 466B

NBK:lg

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

FILED

NOV 8 1994

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

RESOLUTION TRUST CORPORATION, as)
Receiver for Cimarron Federal)
Savings Association,)
)
Plaintiff,)
)
vs.)
)
DERYL L. GOTCHER and NADINE)
N. GOTCHER,)
)
Defendants.)

Case No. 93-C-719-~~B~~ K

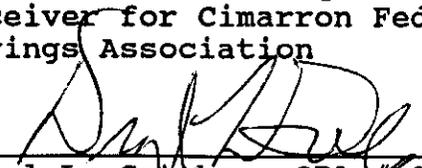
STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Resolution Trust Corporation, as Receiver for Cimarron Federal Savings Association, and Defendants Deryl L. Gotcher and Nadine N. Gotcher ("Defendants") hereby stipulate that this action should be dismissed with prejudice.



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Attorney for Defendants
Deryl L. Gotcher and Nadine
N. Gotcher

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

ENTERED ON DOCKET
DATE NOV 09 1994

STANLEY PEDERSEN
Plaintiff,

vs.

OKLAHOMA FIXTURE COMPANY,
an Oklahoma corporation,
Defendant.

No. 94-C-110-K ✓

FILED

NOV 08 1994

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

ORDER

Defendant Oklahoma Fixture Company ("OFC") is in the business of manufacturing retail store fixtures and has a separate glass plant which manufactures glass for the showcases, mirrors, and dividers used in the fixtures. In June 1990, Stanley Pedersen ("Pedersen") was hired by OFC Vice President, Mark Cavins ("Cavins") to be the plant manager for the glass plant. When hired, Pedersen was 50 years old (born May 24, 1940).

On September 13, 1993, Cavins terminated Pedersen's employment as plant manager due to perceived morale problems with employees at the glass plant and because of continued failure to meet production delivery schedules. In response, Plaintiff argues that any morale problems at the plant were related to the corporate office's failure to give a promised raise. Additionally, Plaintiff admits that there were difficulties in meeting production schedules but responds by saying that these problems were caused by OFC not by him. Pedersen was replaced as plant manager by forty-year old Gary Geilenfeld.

No one ever told Pedersen that he was being terminated because

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of his age. Pedersen could recall only one fact in his deposition that led him to believe that his age was a factor in the decision to terminate him. Evidently, the President of OFC, Ronnie Line, several times stated beginning in the summer of 1992 that OFC was "a young, aggressive, dynamic, company" or, alternatively, that OFC's management style was "young and dynamic".

Ronnie Line's date of birth is September 9, 1943, making him three years younger than the Plaintiff.

Legal Discussion

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den. 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson v. Liberty Lobby,

Inc., the Court stated:

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

In this case, Plaintiff alleges age discrimination under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. §621 et seq. (1995). ADEA plaintiffs may establish discrimination directly through the three-part framework established in McDonnell Douglas v. Green, 411 U.S. 792 (1973). Under McDonnell Douglas, a plaintiff first bears the burden of establishing a prima facie case of discrimination. Establishment of a prima facie case creates a presumption of unlawful discrimination that requires a defendant, in the second stage, to come forward with a nondiscriminatory reason for the action. At the third stage, the plaintiff must show that age was a determinative factor in the defendant's employment decision or show that the defendant's explanation of its action was merely pretextual. This three part framework serves as an effective vehicle to assess the motion for summary judgment.

In the context of an age discrimination claim, a plaintiff makes out a prima facie case by showing that 1) he was within the protected age group; 2) he was doing satisfactory work; 3) he was discharged; and 4) the position was filled by a younger person. Macdonald, 941 F.2d at 1119. See also 29 U.S.C. 631(a) (1995).

There is sufficient evidence in this instance to establish a prima facie case of age discrimination. Plaintiff was over 40, was discharged, and replaced by a younger person. While Defendant contests whether Plaintiff was doing satisfactory work, the case law shows this requirement can be met by Pedersen's own testimony that his work was satisfactory. MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1121 (10th Cir. 1991). Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508, 512 (10th Cir. 1986). In light of Plaintiff's testimony that he performed "satisfactory work", this Court finds that all the requirements of a prima facie case have been met. (Plaintiff's Response to Motion for Summary Judgment, Statement of Stanley Pedersen, para. 15).

If Plaintiff had failed to make a prima facie case, he could clearly not avoid summary judgment. Cone v. Longmont United Hospital Association, 14 F.3d 526, 528 (1994). Nevertheless, a plaintiff who succeeds in establishing a prima facie case does not automatically survive a motion for summary judgment. MacDonald, 941 F.2d at 1121. The court must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff. Id at 1121-22; Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989).

The Defendant has responded to the Plaintiff's prima facie case by submitting a legitimate nondiscriminatory reason for its action. Namely, Defendant cites morale problems at the plant and difficulty in meeting production schedules to justify termination

of Plaintiff's employment. Therefore, the case moves to the third stage which requires Plaintiff to show the role that age played in the decision or that the Defendant's asserted rational was a pretext.

In the third stage of the analysis, failure to come forward with evidence of discrimination or pretext will entitle the defendant to judgment. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Plaintiff must come forward with enough evidence to support an inference that the employer's reason was merely pretextual, by showing either "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Cone, 14 F.3d at 530, quoting Burdine, 450 U.S. at 256.

In trying to show pretext, Plaintiff makes two arguments. First, Pedersen points to comments made by the Company's president, Ronnie Line, that OFC was a "young, aggressive, and dynamic company." (Defendant's Motion for Summary Judgment, Exhibit A, p.60). Alternatively, Plaintiff characterizes these remarks as indicating that the "management style was young and dynamic." (Plaintiff's Response to Motion for Summary Judgment, Statement of Stanley Pedersen, para. 13) (emphasis added). In his deposition, Plaintiff states that these comments constitute the only reason for his belief that he was discriminated against on the basis of age. (Defendant's Motion, Exhibit A, p. 64). However, these comments do not appear to relate to Plaintiff but to the company itself. Moreover, the comments seem to be descriptive rather than designed

to reflect a desire for changes in the company or its management style. Thus, it could be interpreted not as an indication of age discrimination but instead as an assessment of the youthful character of the entire company, including the Plaintiff. This interpretation appears all the more likely given the fact that the person who allegedly made the comments was only three years younger than Plaintiff. The absence of age discrimination is also reflected in the fact that OFC hired Pedersen when he was already fifty years old.

At best, these remarks are only stray, ambiguous comments that relate only collaterally to the actual age of the Plaintiff. As such, the Tenth Circuit and other circuits have held analogous comments to be insufficient to create a jury issue. Palochko v. Manville Corp., 21 F.3d 981, 982 (10th Cir. 1994) (statement that employee was "old soldier" insufficient to overcome motion for summary judgment); Cone, 14 F.3d at 531 (10th Cir. 1994) (statement that company needed new young blood insufficient to create jury issue); Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1025 (6th Cir. 1993) (statement that plaintiff's fifty-fifth birthday was a cause for concern insufficient to find age discrimination) cert. denied, 114 S.Ct 175 (1993); Turner v. North American Rubber Inc., 979 F.2d 55, 59 (5th Cir. 1992) (statement by vice-president that he was sending in "three young tigers" held irrelevant). Similarly, it is impossible to draw a reasonable inference that Plaintiff was terminated as a result of age discrimination from comments characterizing the company, its style, or its management team as

young. The connection is simply too attenuated to escape a motion for summary judgment.

Second, Plaintiff tries to argue that the reasons given by OFC for his termination are false. Plaintiff disputes the termination not by denying the central reasons cited by OFC--problems with morale and meeting production schedules--but by saying he was not at fault for such problems. Indeed, Plaintiff readily admits that there were constant difficulties during a three year period in meeting delivery schedules, particularly during the busy summer months. Pederson simply disagrees with the OFC's evaluation of the job he did as plant manager. However, this disagreement does not rise to the level of showing that the Defendant's explanation is pretextual or unworthy of credence. In Fallis v. Kerr-McGee, 944 F.2d 743, 747 (1991), the court held that a plaintiff's general dispute concerning job performance in the absence of any other evidence of age discrimination could not provide a sufficient basis for a jury to infer that the employer terminated the plaintiff on the basis of age. In the view of the Tenth Circuit, a plaintiff cannot prevail simply by challenging in "general terms" the basis on which an employer made an employment decision without any additional evidence (over and above the prima facie case) of age discrimination. Id. Mere conjecture does not suffice to show pretext when there is a legitimate business reason for the challenged employment decision. Palochko, 21 F. 3d at 980.

Finally, Plaintiff alleges he may prove discrimination by a means other than the analytic framework provided by McDonnell

Douglas. As an alternative, Plaintiff refers to Notari v. Denver Water Dept., 971 F.2d 585 (10th Cir. 1992) to show that he may make a case under the ADEA by bringing direct, circumstantial evidence of discrimination. However, under this test, such evidence must have the cumulative probative force to support a reasonable inference of discrimination. As reflected in the discussion above, Pedersen is unable to make that showing.

Plaintiff has failed to create a genuine issue concerning the alleged pretextual nature of his termination and has failed to produce any evidence from which a reasonable juror could conclude that his discharge was a result of age discrimination. Therefore, Defendant's Motion for Summary Judgment is granted.

ORDERED this 8 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

DATE NOV 09 1994

NOISE REDUCTION, INC., and SOUND SOLUTION, L.P. a Delaware limited partnership,

Plaintiffs,

vs.

Case No. 94-C-431-K

NORDAM CORPORATION, a corporation, SIEGFRIED, INC., a corporation, NORDAM, a general partnership, UNITED TECHNOLOGIES CORPORATION, PRATT & WHITNEY GROUP; COMMERCIAL ENGINE BUSINESS, a corporation, and THE BOEING COMPANY, BOEING COMMERCIAL AIRPLANE CO., a corporation,

Defendants.

FILED

NOV 08 1994

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

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that all matters previously pending before this Court have been resolved. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that further litigation in this Court is necessary.

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ORDERED this 7 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Carlton Riggins

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS

Defendant.

No. 93-C-0041-K ✓

FILED

NOV 08 1994

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

O R D E R

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

Riggins filed his request for benefits in December 1990 alleging disabilities arising from a back injury, hypertension, and obesity. After denial by initial and reconsidered determinations, Plaintiff requested a hearing before an administrative law judge (ALJ). The ALJ found that Riggins' impairment does not prevent him from performing past relevant work as either a deliveryman or security guard and thus was not disabled.

On November 13, 1992, 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:

- 1) Plaintiff asserts he is disabled because his back condition satisfies all the criteria of §1.05C, and his

obesity condition satisfies all the medical criteria of §10.10 of the Appendix 1 Listing of Impairments.

- 2) Three physicians, Doctors Vosburgh, Truett, and Farrar state that Plaintiff cannot do past work.
- 3) Plaintiff cannot do his past work nor even sedentary work in light of previous surgeries and inability to stand or sit for any period of time.

Plaintiff is a 53-year-old male who has completed 9th grade and has suffered from numerous back-related injuries beginning with back surgery which first occurred in 1970. The injury from which this claim arises took place on April 21, 1990 when Riggins assisted a co-worker in trying to prevent a load of newspapers from falling over.

Discussion

Before the Court is the appeal of the Plaintiff to the Secretary's denial of disability benefits. 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 perform medium exertional activity. The ALJ found that Plaintiff has the residual functional capacity to perform work-related activities except for work involving requirements over and above medium exertional activity. (Tr. 21). Riggins' relevant past work as delivery man and security guard did not require the performance of work related activities precluded by the above limitations. (Tr. 24-25).

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 297, 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.

The first objection raised by Riggins is that his back condition and obesity are so severe as to meet the criteria established for an impairment listed in Appendix 1 Listing of Impairments. 20 C.F.R. pt. 404 Subpt. P, App. 1 (pt. A) (1992). These "Listings" are a group of medical conditions which have been determined to be so severe that they result in a finding of entitlement to benefits without consideration of age, educational, or vocational factors. The ALJ properly decided that neither condition satisfies the Listings set forth at 20 C.F.R. pt. 404, subpt P, App. 1 (pt.A) (1992).

Both parties agree that Riggins' back condition should be evaluated under §1.05C of the Listings. According to that section, titled "Other Vertebrogenic Disorders," the claimant must show 1) pain, muscle spasm, and significant limitation of motion in the spine; and 2) appropriate radicular distribution of significant

motor loss with muscle weakness and sensory and reflex loss. These symptoms must persist for three months and be expected to last twelve months. The ALJ properly noted that the medical evidence clearly demonstrates that Plaintiff did not suffer from persistent muscle spasms, significant limitation of spine motion, significant motor loss, and sensory and reflex loss. (Tr. 11-16). Thus, Plaintiff did not meet his burden in showing that his condition satisfies the requirements of 20 C.F.R. Part 404, subpt. P, App. 1, §1.05C.

The ALJ was also correct in determining that Riggins was not obese according to the Listings. Under §10.10, Riggins was required to show that his weight could be expected to remain at or above the weight specified in the Listings for twelve continuous months along with a history of arthritis, hypertension, congestive heart failure, venous insufficiency, or respiratory disease. See 20 C.F.R. supra at §10.10. For a man of Riggins' above-average height of 74-74.5 inches tall, the Listings demand a showing that his weight would remain equal to or greater than 356-360 pounds for twelve continuous months. Although Plaintiff weighed 360 pounds in January 1992 (Tr. 214), he weighed 326 pounds in March 1991 (Tr. 187), 333 pounds in April 1991 (Tr. 194), and 334 pounds in July 1991 (Tr. 207). Therefore, the ALJ correctly determined that Plaintiff could not show obesity as established by the Listings since Plaintiff could not show the impairment had lasted or could be expected to last for at least twelve months. Smith v. Sullivan, 769 F. Supp. 1386, 1395 (E.D. Va. 1991).

Second, Plaintiff cites the medical opinions of Doctors John Vosburgh, Michael D. Farrar, and Casey Truett who stated that Plaintiff could not return to former work activities. Plaintiff was examined by Doctor Vosburgh in January 1973. Since that time, Plaintiff performed work as a deliveryman and security guard. Thus, the ALJ was clearly justified in discounting the views of Dr. Vosburgh. The ALJ also discounted the medical reports provided by Doctors Truett and Farrar largely because they were consultative examinations based on the workers' compensation system. Both doctors concluded that Riggins was permanently and totally disabled. (Tr. 19, 21). Neither Farrar or Truett were treating physicians. Farrar was, in fact, hired by Plaintiff's workers' compensation attorney to assist him in obtaining workers' compensation benefits. Similarly, Dr. Truett's report was addressed and submitted to a Judge on the Workers' Compensation Court.

It is well-established that the opinion of the treating physician receives substantial weight. Reyes v. Bowen, 845 F.2d 242, 244-245 (10th Cir. 1988); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985) In contrast to the opinions of Doctors Vosburgh, Truett, and Farrar, Plaintiff's treating physician, Dr. Terrill Simmons, found that Riggins should be released to "return to light work activity." (Tr. 173). Moreover, Simmons consistently recommended to Plaintiff that he lose weight as part of his treatment. The last entry on August 15, 1990 states, "I feel he will have to tolerate his

discomfort until either weight reduction and exercise relieves it. . . ." (Tr. 171). On July 15, 1990, during the time of Simmons' recommendation, Plaintiff weighed 280 pounds. (Tr. 180). By the time Plaintiff received an examination from Dr. William Dandridge five months later, Plaintiff weighed 360 pounds.

The ALJ relied most heavily on the medical findings by Dr. William Dandridge who examined the Plaintiff in January 1992 pursuant to a request by the ALJ for a consultative orthopedic examination. (Exhibit 37). According to Dandridge, Plaintiff retained significant capacity to function in a work environment. Dr. Dandridge concluded that Plaintiff could sit for a total of four hours at one time without the need for rest or change of position and that he had the capacity to stand for one hour and walk for one hour without the need for rest or change of position. He assessed Plaintiff's ability to stand and walk at a total of four hours during an eight hour day and said he could lift up to 100 pounds infrequently. Dr. Dandridge also found that Plaintiff could use his feet without restriction for repetitive movement such as in pushing and pulling leg controls. Plaintiff's ability to use both his hands for repetitive movement was also unimpaired, and he was found able to occasionally bend and squat. Dr. Dandridge also concluded that Plaintiff could infrequently crawl, climb, and reach.

The Record in this case provides an abundance of medical records from a variety of doctors. The ALJ did not ignore the opinions of Doctors Vosburgh, Farrar, and Truett but simply relied

more heavily on other medical evidence, finding that evidence more credible. In determining whether a finding is supported by substantial evidence, this court must consider the record as a whole. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). The records of the treating physician, Dr. Simmons, along with the examination results of Dr. Dandridge substantiate the ALJ's conclusion and justify a reduced reliance on the medical opinions which are either decades old or prepared to satisfy the requirements of the workers' compensation system.

Third, Plaintiff says he cannot do his past work nor even sedentary work in light of previous surgeries and inability to stand or sit for any period of time. However, the ALJ appropriately decided that Plaintiff could satisfy the requirements of serving as a security guard and delivery man. Plaintiff reported that his past work as a security guard could be performed while sitting most of the day and reported no lifting or carrying. As a deliveryman, Plaintiff reported that he spent approximately one half the day walking, one quarter standing, and one quarter sitting. In his evaluation, Dr. Dandridge wrote that Plaintiff was capable of, in an eight hour day, sitting for eight hours, or standing for four hours, or walking for four hours. This medical assessment is consistent with the statements by Plaintiff concerning the requirements of his prior employment. (Tr. 80, 81)

There is substantial evidence in the record to support the conclusions by the ALJ that Plaintiff's impairment does not prevent him from performing past relevant work. Although the record

includes some evidence supporting Riggins' claim, most of this evidence concerns statements relating to his own pain. With regard to subjective symptoms such as pain, 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 this case, the objective medical evidence does not match the Plaintiff's claim that he is unable to return to past work.

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 prior work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 7 DAY OF November, 1994


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 9 1994

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

THRIFTY RENT-A-CAR SYSTEM, INC.,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

S2K INTERNATIONAL, INC., a foreign)
corporation; STANLEY M. KRAWETZ,)
an individual; and SANDRA KRAWETZ,)
an individual,)

Defendants.)

Civil Action No. 94-C-622-B

ENTERED ON DOCKET
DATE NOV 09 1994

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties hereto, by their counsel, and, pursuant to Fed. R. Civ. P. 41(a)(1), hereby stipulate and agree that the above-captioned cause be dismissed, with prejudice, pursuant to an agreed settlement entered into between the parties.

DATED this 9th day of ~~October~~ ^{November}, 1994.

Respectfully submitted,

LIPE, GREEN, PASCHAL,
TRUMP & BRAGG, P.C.

By:

Constance L. Young
Richard A. Paschal, OBA #6927
Constance L. Young, OBA #14537
3700 First National Tower
15 East 5th Street, Suite 3700
Tulsa, Oklahoma 74103-4344
(918) 599-9400

- and -

[Signature]
Stanley M. Krawetz

[Signature]
Sandra Krawetz

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

FILED

NOV 8 1994 *RL*

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

RICK HOWARD and PAM HOWARD,)
)
 Plaintiffs,)
)
 vs.)
)
 WESTINGHOUSE ELECTRIC CORP.,)
 TECUMSEH PRODUCTS CO., and)
 DELORES NEWMAN,)
)
 Defendants,)

Case No. 93-C-361-BU ✓

RECORDED AND INDEXED
DATE 11-9-94

ORDER OF DISMISSAL WITH PREJUDICE

UPON CONSIDERATION of the filing of the stipulation of Plaintiffs and Defendant, Westinghouse Electric Corporation, and for good cause shown, the Court here by enters its ORDER that Plaintiffs causes of action against the Defendant, Westinghouse Electric Corporation are HEREBY DISMISSED, with prejudice to the re-filing thereof.

Michael Bunnage
UNITED STATES DISTRICT JUDGE

Dated: 11-7-94

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

JOSEPH F. CLARK, as Guardian)
Ad Litem for JOHN KARL)
PETERS, JR., a minor child,)
Plaintiff,)

vs.)

PANDJIRIS WELDMENT CO., and)
PANDJIRIS, INC.,)
Defendants.)

No. 94-C-116-B

ENTERED ON DOCKET

DATE 11-9-94

FILED

NOV 8 1994

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

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiff, JOSEPH F. CLARK, as Guardian Ad Litem for JOHN KARL PETERS, JR., a minor child, and Defendant, PANDJIRIS WELDMENT CO., and PANDJIRIS, INC. for a dismissal with prejudice of the above captioned cause against PANDJIRIS WELDMENT CO., and PANDJIRIS, INC. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action as to PANDJIRIS WELDMENT CO., and PANDJIRIS, INC. pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby dismissed with prejudice to the filing of a future action against PANDJIRIS WELDMENT CO., and PANDJIRIS, INC., the parties to bear their own respective costs.

Dated this 28 day of Oct., 1994.

SI THOMAS R. BRETT

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

WDP:mb C:\WORD\9408\ORDERDIS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 8 1994

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAMES DONALD GRAGG;)
CHERYL D. GRAGG aka)
Cheryl Denise Gragg;)
ELIZABETH MORGAN)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE 11-9-94

CIVIL ACTION NO. 94-c-715-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7 day
of Nov, 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, JAMES
DONALD GRAGG, CHERYL D. GRAGG aka Cheryl Denise Gragg, and
ELIZABETH MORGAN, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, JAMES DONALD GRAGG, signed a
Waiver of Summons on August 19, 1994, filed on August 25, 1994;
that the Defendant, CHERYL D. GRAGG aka Cheryl Denise Gragg,
signed a Waiver of Summons on August 19, 1994, filed on

**NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.**

August 25, 1994; that the Defendant, ELIZABETH MORGAN, signed a Waiver of Summons on August 24, 1994, filed on August 25, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on August 16, 1994; and that the Defendants, JAMES DONALD GRAGG, CHERYL D. GRAGG, and ELIZABETH MORGAN, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, CHERLY D. GRAGG, is one and the same person and sometimes referred to as Cheryl Denise Gragg, and will hereinafter be referred to as "CHERYL D. GRAGG."

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 Three (3), Block Two (2), SUMMERFIELD, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on June 27, 1986, Charles William Burger and Calveta Hill Burger, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of \$65,861.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10½%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles William Burger and

Calveta Hill Burger, husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated June 27, 1986, covering the above-described property. Said mortgage was recorded on July 1, 1986, in Book 4952, Page 2170, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 16, 1990, Mercury Mortgage Co., Inc., 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 February 20, 1990, in Book 5236, Page 2549, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, Charles William Burger and Calveta Hills Burger, husband and wife, granted a general warranty deed to JAMES DONALD GRAGG and CHERYL D. GRAGG, husband and wife. This deed was recorded with the Tulsa County Clerk on March 2, 1989, in Book 5169, Page 1988 and JAMES DONALD GRAGG and CHERYL D. GRAGG, became record title holders, and assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on Mach 28, 1989, the Defendants, JAMES DONALD GRAGG and CHERYL D. GRAGG, husband and wife, granted a Quit-Claim Deed, to the Defendant, ELIZABETH MORGAN. This Quit-Claim Deed was recorded on March 28, 1989, in Book 5174, Page 1103, in the records of County Clerk, Tulsa County, Oklahoma. However, the Marriage Status of the Defendant, ELIZABETH MORGAN was not recited.

The Court further finds that on December 19, 1989, the Defendant, ELIZABETH MORGAN, granted a Quit-Claim Deed, to the Defendants, JAMES DONALD GRAGG and CHERYL D. GRAGG, husband and wife. The Quit-Claim Deed was recorded on December 19, 1989, in Book 5226, Page 597, in the records of County Clerk, Tulsa County, Oklahoma. However, the Marriage Status of the Defendant, ELIZABETH MORGAN was not recited.

The Court further finds that on March 1, 1990, the Defendants, JAMES DONALD GRAGG and CHERYL D. GRAGG, 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 March 1, 1991 and November 1, 1992.

The Court further finds that the Defendants, JAMES DONALD GRAGG and CHERYL D. GRAGG, 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, JAMES DONALD GRAGG and CHERYL D. GRAGG, are indebted to the Plaintiff in the principal sum of \$95,342.87, plus interest at the rate of 10½ percent per annum from May 13, 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 \$43.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$48.00 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, JAMES DONALD GRAGG, CHERYL D. GRAGG, and ELIZABETH MORGAN, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, JAMES DONALD GRAGG and CHERYL D. GRAGG, in the principal sum of \$95,342.87, plus interest at the rate of 10½ percent per annum from May 13, 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 \$91.00 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, JAMES DONALD GRAGG, CHERYL D. GRAGG, and ELIZABETH MORGAN 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, JAMES DONALD GRAGG and CHERYL D. GRAGG, 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
\$91.00, 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/ MICHAEL BURRAGE

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-715-BU

NBC:fla

FILED
NOV 8 - 1994

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

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

RICK HOWARD and PAM HOWARD,)
)
) PLAINTIFFS,)
)
) vs.)
)
) WESTINGHOUSE ELECTRIC CORP.,)
) TECUMSEH PRODUCTS CO., and)
) DELORES NEWMAN,)
)
) DEFENDANTS.)

CIV 93-C-361-BU

ENTERED ON DOCKET
DATE 11-9-94

ORDER OF DISMISSAL WITH PREJUDICE

UPON Stipulation of Dismissal of the parties herein and application for an Order of Dismissal With Prejudice of all claims against Tecumseh Products Company, and being fully advised by both parties that an agreed settlement has been reached between Plaintiffs Rick Howard and Pam Howard and Tecumseh Products Company:

IT IS HEREBY ORDERED that Plaintiffs' claims against the Defendant, Tecumseh Products Company, be dismissed with prejudice.

Michael Burrage

JUDGE MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 4 1994

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

NOISE REDUCTION, INC.,)
et al.,)
)
Plaintiffs,)
)
vs.)
)
NORDAM CORPORATION,)
)
)
Defendant.)

No. 93-C-451-E

ENTERED ON DOCKET
DATE NOV 08 1994

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been resolved, and there are no additional matters pending within this case. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that further litigation is necessary.

ORDERED this 4th day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STEPHEN E. GARMAN aka STEPHEN
EUGENE GARMAN; SHEILA A.
GARMAN aka SHEILA ANNETTE
GARMAN; CHRIS LEE RICKNER;
DIANNA LEE RICKNER; COUNTY
TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

NOV 4 1994

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

ENTERED ON DOCKET

~~DATE NOV 0 6 1994~~

CIVIL ACTION NO. 94-C-621-E

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed with prejudice.

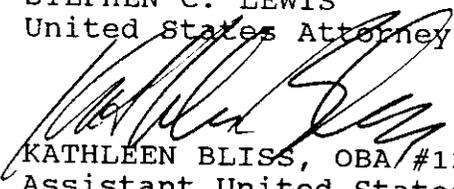
Dated this 3rd day of November, 1994.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



KATHLEEN BLISS, OBA #13625
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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

NOV 08 1994

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

MINNIE RUTH RICE,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

CIVIL ACTION NO. 94-C-272-K

ORDER

NOW on this 7 day of November, 1994, this matter comes on for hearing pursuant to the Joint Stipulation of Dismissal and Application for Dismissal With Prejudice of the parties hereto. The Court, being fully advised in these premises, finds that the Application should be granted.

IT IS THEREFORE ORDERED that this cause is dismissed with prejudice.

IT IS FURTHER ORDERED that each party shall be responsible for its own costs and attorney fees incurred as a result of the above captioned cause.


UNITED STATES DISTRICT JUDGE

5

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DENNIS L. COLE and BARBARA)
 S. COLE,)
)
 Defendants.)

No. 94-C-844-K

FILED

NOV 04 1994

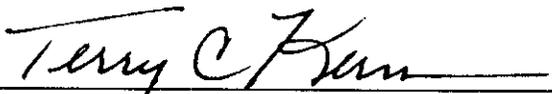
Richard M. Lawton, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

The defendants having filed a petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 3 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 08 1994

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

JESSE LEE HOWELL,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant and)
Third Party Plaintiff,)
)
vs.)
)
DELORES K. HOWELL, DANIEL L.)
NICHOLS, and SYDNEY NICHOLS,)
)
Third Party Defendants.)

FILED
NOV 4 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. CV-92-C-081-E

**DISMISSAL OF DELORES K. HOWELL,
WITH PREJUDICE, AS A PARTY IN THIS CASE**

Upon Joint Motion to Dismiss Counter-Claim Defendant, Delores K. Howell, with prejudice from this proceeding, as jointly filed by Herbert P. Haschke, Jr., counsel for Delores K. Howell, and Jay P. Golder, counsel for the United States of America, it is hereby **ORDERED** that Delores K. Howell is hereby dismissed, with prejudice from this case, and all future proceedings herein.

This Order given this 4th day of Nov., 1994.



Judge for the United States District Court
for the Northern District of Oklahoma

HH-DWP

ENTERED ON DOCKET
DATE NOV 08 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LEE J. FINCH, JR.;)
 DOLORES ANN FINCH;)
 TRANSAMERICA FINANCIAL)
 SERVICES, INC.;)
 CITY OF JENKS, Oklahoma)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

NOV 4 1994

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

CIVIL ACTION NO. 94-C-407-E

**AMENDED
JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 3 day
of Nov, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, LEE J.
FINCH, JR., DOLORES ANN FINCH, TRANSAMERICA FINANCIAL SERVICES,
INC., and CITY OF JENKS, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, LEE J. FINCH, JR., Signed a
Waiver of Summons on April 25, 1994, filed on May 9, 1994; that
the Defendant, DOLORES ANN FINCH, signed a Waiver of Summons on
April 25, 1994, filed on May 9, 1994; that the Defendant,

NOTE: THIS COURT IS TO BE SEALED
BY THE CLERK OF THE COURT AT
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

TRANSAMERICA FINANCIAL SERVICES, INC., was served a copy of Summons and Complaint on April 25, 1994 by Certified Mail; that the Defendant, CITY OF JENKS, Oklahoma was served a copy of Summons and Complaint on July 13, 1994 by Certified Mail.

The Court further finds that on February 15, 1991, DOLORES ANN FINCH filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-00418-W. On April 18, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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 Eight (8), GLENNWOOD
SOUTH, an addition to the County of Tulsa,
State of Oklahoma, according to the recorded
Plat thereof.**

The Court further finds that on February 26, 1987, Ted L. Hulett and Vanessa G. Hulett, executed and delivered to Mortgage Clearing Corporation, a mortgage note in the amount of \$62,539.00, 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, Ted L. Hulett and Vanessa G. Hulett, Husband and Wife, executed and delivered to Mortgage Clearing Corporation, a mortgage dated February 26, 1987, covering the above-described property. Said mortgage was recorded on March 4, 1987, in Book 5005, Page 2509, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, Mortgage Clearing Corporation, assigned the above-described mortgage note and mortgage to Triad Bank, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 27, 1989, Triad Bank, N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 30, 1989, in Book 5228, Page 1843, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 21, 1988, Ted L. Hulett and Vanessa G. Hulett, husband and wife granted a general warranty deed to the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH, husband and wife. This deed was recorded with the Tulsa County Clerk on December 16, 1988, in Book 5146 at Page 584 and the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on November 1, 1989, the Defendant, DOLORES ANN FINCH, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1990, November 1, 1991, and October 1, 1992.

The Court further finds that the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH, 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, LEE J. FINCH, JR. and DOLORES ANN FINCH, are indebted to the Plaintiff in the principal sum of \$85,829.89, plus interest at the rate of Nine percent per annum from March 1, 1994, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$55.00 which became a lien on the property as of June 25, 1993, and a claim in the amount of \$27.00 for 1993 taxes due. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, LEE J. FINCH, JR., DOLORES ANN FINCH, TRANSAMERICA FINANCIAL SERVICES,

INC., and CITY OF JENKS, Oklahoma, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that 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, LEE J. FINCH, JR. and DOLORES ANN FINCH, in the principal sum of \$85,829.89, plus interest at the rate of Nine percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.0% 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 \$82.00 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, LEE J. FINCH, JR., DOLORES ANN FINCH, TRANSAMERICA FINANCIAL SERVICES, INC., CITY OF JENKS, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LEE J. FINCH, JR., and DOLORES ANN FINCH, 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 \$82.00, 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-407-E

NBK:flv

FILED

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

NOV 4 1994

DAISY E. PAULEY,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA E. SHALALA, Secretary of)
 Health and Human Services,)
)
 Defendant.)

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

No. 93-C-243-E

ENTERED ON DOCKET

DATE NOV 08 1994

O R D E R

Before the Court is the appeal of the Plaintiff Daisy Pauley to the Secretary's denial of disability benefits.

Plaintiff brings this action to contest the denial of Supplemental Security Income Disability Benefits. Pauley requested benefits on April 2, 1991¹, and her application was denied. She was again denied on reconsideration, before the administrative law judge, and by the Appeals Council. Plaintiff, who suffers from blindness (being cross-eyed), deafness, arm and leg pain and obesity, claims that the Secretary erred in denying her application for supplemental benefits because 1) she considered the jobs of part-time kitchen helper and salvation arm bell-ringer as past relevant work; and 2) she failed to "combine" Plaintiff's impairments and consider Plaintiff's testimony regarding the disabling pain that she suffered. The Secretary argues that the ALJ's decisions that Plaintiff was not disabled, that her allegations of disabling pain were not credible, and that she could

¹ Plaintiff filed three previous applications for benefits in 1984, 1986, and 1988. Each of these applications was denied, and none were appealed to district court. The 1991 application is the only one before this Court.

perform work as a kitchen helper or light and sedentary unskilled jobs are supported by substantial evidence and should be upheld.

At the hearing before the administrative law judge, Plaintiff testified that she was 52 years old, had finished the eighth grade, was 5'3" tall, and weighed about two hundred pounds. Her last work was in December of 1991 as a salvation army bellringer. Prior to that, she worked for three years ending in 1986 bussing tables at the Coney Islander two hours a day, five days a week.

Plaintiff testified that her biggest problem that kept her from returning to work were her hearing difficulties, and that although she has hearing aids, and can hear "so-so" with them, she often needs to read lips. She also has a painful left foot and right arm from falling in hole a few years ago, and has problems with her arms and legs "giving out on her." She did, however, testify that she could drive, and do some cleaning around the house.

The vocational expert testified that Plaintiff's cleaning work was an unskilled occupation at the medium exertional level and that her work as a table cleaner was an unskilled occupation at the light exertional level. He testified that an individual who was hard of hearing, had poor vision in one eye, and took medication for chronic pain should be able to return to work as a kitchen worker or do other light jobs such as production helper, assembly worker, or cashier.

The Physician who examined Plaintiff on March 10, 1992, found that she was able to hear in normal conversational tone of voice, was able to get on and off the examining table and in and out of a

chair without difficulty, had good grip strength and no tenderness in her right arm or ankle. He stated that he "did not find any evidence of any disability in this patient with regard to muscle strength or level of pain . . ." He also stated that she had "no limitations with regards to her hands for repetitive movements," and "should be able to bend and reach frequently," and "squat, crawl and climb occasionally."

Based on this testimony, and the entire record, the Administrative Law judge then made the following findings:

The subjective allegations of disabling pain are not credible.

The claimant's past relevant work as kitchen worker did not require the performance of the work-related activities precluded by the above limitations.

The claimant's impairments do not prevent the claimant from performing her past relevant work.

The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 416.920(e)).

In the alternative, there are a significant number of jobs available which the claimant could perform, in accordance with the vocational testimony by the vocational expert. Such jobs were available in the numbers as testified by the vocational expert and the undersigned finds there are a significant number of such job available which the claimant could perform. Therefore, the claimant is not disabled either under the provisions of Rule 202.10, of the testimony of the vocational expert, or the fact that the claimant can perform her past relevant work.

Legal Analysis

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.

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).

Claimant argues that the ALJ erred in finding that Claimant's work as a kitchen helper was past relevant work to which Claimant could return since she only made \$160.00 per month at the two hour a day job. However, the regulations provide that "the fact that your earnings are not substantial will not necessarily show that you are not able to do substantial gainful activity." 20 CFR 404.1574(a)(1). The ALJ was correct in finding that the work as kitchen helper was work experience and that, since the work was within Plaintiff's residual functional capacity, Plaintiff could continue with that work and was not limited to doing it two hours per day.

Additionally the ALJ's finding that Plaintiff could perform other light unskilled jobs is supported by substantial evidence, The hypothetical question asked by the ALJ took into account all of the impairments supported by the record and therefore supports the ALJ's findings. See Gay v. Sullivan, 986 F.2d 1336, 1340-41 (10th Cir. 1993). The fact that the vocational expert admitted that the

jobs he listed would require manual dexterity does not change this result. Plaintiff was found to have good grip strength and no arm tenderness by Dr. Sutton.

Lastly, the finding that Plaintiff's testimony regarding disabling pain is not credible is supported by substantial evidence. Plaintiff relies on Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987), for the proposition that "only a loose nexus between the proven impairment and the pain alleged is necessary," and "if an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to required consideration of all the relevant evidence." Both of these propositions are correct. However, simply because there is an objective impairment does not mean that the ALJ does not need to evaluate the credibility of the witness. Luna, at 165. In fact Luna identified several factors that can be looked to in evaluating credibility: attempts to find relief for pain and willingness to try treatment prescribed, regular use of crutches or cane, regular contact with doctor, possibility that psychological disorders combine with physical problems, daily activities, and medication taken.

The Secretary's denial of supplemental disability benefits is supported by substantial evidence and is affirmed.

IT IS SO ORDERED THIS 2^d DAY OF NOVEMBER, 1994.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 4 1994

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

HOMeward BOUND, INC.)
et al.,)
)
Plaintiffs,)
)
v.)
)
THE HISSOM MEMORIAL CENTER,)
et. al.,)
)
Defendants.)

Case No. 85-C-437-E ✓

ENTERED ON DOCKET
DATE NOV 0 8 1994

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, have filed a Quarterly Fee Application on October 11, 1994 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and approves the Stipulation of the parties.

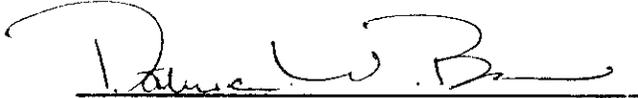
The Court hereby award the firm Bullock & Bullock uncontested attorney fees in the amount of \$ 74,033.75 and out-of-pocket expenses in the amount of \$ 7,308.30.

IT IS THEREFORE ORDERED that the Department of Human Services shall pay Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of \$ 74,033.75 plus expenses in the amount of \$ 7,308.30, and a judgment in the amount of \$ 81,342.05 is hereby entered on this day.

ORDERED this 8th day of October, 1994.


JAMES O. ELLISON
United States District Court

717



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Patricia W. Bullock
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ATTORNEYS FOR PLAINTIFFS



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(405) 521-4274

ATTORNEY FOR DEFENDANTS

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

JOSEPH F. CLARK, as Guardian)
Ad Litem for JOHN KARL)
PETERS, JR., a minor child,)
Plaintiff,)

vs.)

PANDJIRIS WELDMENT CO., and)
PANDJIRIS, INC.,)
Defendants.)

No. 94-C-116-B ✓

ENTERED ON DOCKET
DATE NOV 07 1994

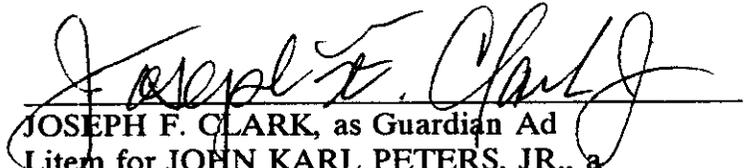
FILED

NOV 4 1994

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

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the attorneys for the Plaintiff, JOSEPH F. CLARK, as Guardian Ad Litem for JOHN KARL PETERS, JR., a minor child, and attorneys for the Defendants, PANDJIRIS WELDMENT CO., and PANDJIRIS, INC., and hereby stipulate and agree that the above captioned cause may, upon Order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein against PANDJIRIS WELDMENT CO., and PANDJIRIS, INC., and state that a compromise settlement covering all claims involved in the above captioned cause has been made between the Plaintiff and PANDJIRIS WELDMENT CO., and PANDJIRIS, INC. and the said parties hereby request the Court to dismiss said action against PANDJIRIS WELDMENT CO., and PANDJIRIS, INC. with prejudice pursuant to this Stipulation.


JOSEPH F. CLARK, as Guardian Ad Litem for JOHN KARL PETERS, JR., a minor child, Plaintiff



THOMAS LAYON
1412 S. Boston, Suite 210
Tulsa, OK 74119
Attorney for Plaintiff

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

By 

WILLIAM D. PERRINE (#11955)
15 West 6th Street, Suite 2800
Tulsa, OK 74119-5430
918/582-1173
Attorneys for Defendants,
PANDJIRIS WELDMENT CO., and PANDJIRIS, INC.

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

ALAN F. DANIELS,

Plaintiff,

vs.

SUTHERLAND LUMBER COMPANY,
a Missouri Limited Partnership,
d/b/a SUTHERLAND SPRINGS FARMS,
and RICHARD VANATTA,

Defendants.

ENTERED ON DOCKET

DATE NOV 7 1994

No. 93-C-1157-K

FILED

NOV 04 1994

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

ORDER OF DISMISSAL

THIS MATTER comes on for hearing on the Joint Stipulation of the Plaintiff, Alan F. Daniels, and the Defendants, Sutherland Lumber Company and Richard Vanatta, for a dismissal with prejudice of the above-captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise covering all claims involved in this action, which this Court hereby approves, and that the above-entitled cause should be dismissed with prejudice to the filing of a future action pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-entitled cause be and is hereby dismissed with prejudice to the filing of a future action, the parties to bear their own respective costs.

37

Dated this 3 day of ~~October~~ ^{November}, 1994.

Terry C. Furr
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

Robert C. Jenkins
ROBERT C. JENKINS
P. O. Box 326
Jay, OK 74346
918/253-4245

- and -

Bobby C. Ramsey
BOBBY C. RAMSEY
P. O. Box 487
Jay, OK 74346

ATTORNEYS FOR PLAINTIFF

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE (#36)

By H/C
HAROLD C. ZUCKERMAN (#11189)
MARY QUINN-COOPER (#11966)
WILSON T. WHITE (#13611)
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Tulsa, OK 74119-5430
918/582-1173

ATTORNEYS FOR DEFENDANTS

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

LARRY KATING AND JEANNE KATING,)
Individually and as Parents and)
Natural Guardians of ALEX KATING and)
DREW KATING, minor children,)

and)

LARRY KATING AND JEANNE KATING,)
Individually and as Parents and)
Natural Guardians of SARAH KATING)
and LEAH KATING, deceased minor)
children,)

Plaintiffs,)

vs.)

CITY OF PRYOR, *ex rel.*, THE)
MUNICIPAL UTILITY BOARD OF PRYOR, a)
political subdivision of the City of)
Pryor Creek,)

Defendants.)

FILED

NOV 4 1994

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

Case No. 94-C-600-E ✓

O R D E R

Now before the Court is the Motion to Dismiss (Docket #5) of the Defendant, City of Pryor, *ex rel.*, The Municipal Utility Board of Pryor (Pryor).

Plaintiffs Larry Kating and Jeanne Kating, Individually and as natural guardians of Alex Kating and Drew Kating (minor children) and Sarah Kating and Leah Kating (deceased minor children) (Katings) bring this action alleging that Pryor, through its negligence, caused an explosion and fire at the Katings' home in Pryor Creek on December 31, 1992. Two of the Kating children (Alex and Drew) were injured as a result of the explosion and fire, and two of the Kating children (Sarah and Leah) ultimately died as a

result of the explosion and fire. The Katings assert that Pryor was negligent in improperly installing the natural gas distribution system and meter, failing to safely distribute and deliver natural gas to their home and failing to properly odorize the natural gas delivered to their home.

Pryor has filed a motion to dismiss, asserting that this action is barred by the limitation provision of the Oklahoma Governmental Tort Claims Act, which provides:

No action for any cause arising under this act, §151 et seq. of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section. Neither the claimant nor the state of political subdivision may extend the time to commence an action by continuing to attempt settlement of the claim.

Okla.Stat.tit.51, §157B. Both sides agree that the Notice of claim was deemed denied on June 22, 1993, and that this action was not filed within 180 days thereafter.

The Katings, however, argue that dismissal of this action is not appropriate, because a related lawsuit filed in Mayes County, which is currently pending and was timely filed, tolled the statute of limitations in §157B. For this proposition, the Katings rely on Martinez v. Missouri Pacific Railroad Co, 296 S.W. 2d 90 (Mo. 1956), and Okla.Stat.tit. 12, §100. Neither Martinez nor §100 supports Plaintiffs' proposition.

In Martinez, the court found that "the timely institution of a suit in Louisiana interrupts the running of the applicable prescriptive statute." Id., at 92. However, the Martinez case dealt with Louisiana law, and that state had a statute which

specifically addressed the tolling of the statute of limitations with the filing of a suit in a court of competent jurisdiction. Id. Additionally, the Martinez case did not deal with suit against a political subdivision or a governmental tort claims act.

Similarly, Okla.Stat.tit. 12, §100, which allows a case to be filed within one year of a previous dismissal, does not help Plaintiffs. First, the Mayes County case is still pending, so §100, on its face, does not apply. Moreover, §100 is not applicable to cases brought under the Oklahoma Governmental Tort Claims Act. Ceasar v. City of Tulsa, 861 P.2d 349, 350-51 (Okla. App. 1993) (finding §100 inapplicable because the time limitations of the Governmental Tort Claims Act "are conditions imposed upon the very right to bring the action and are not directed solely to the remedy").

Defendants' Motion to Dismiss is granted.

IT IS SO ORDERED THIS 1st ^{November} DAY OF ~~OCTOBER~~, 1994.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

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

DATE NOV 04 1994

KAISER-FRANCIS OIL COMPANY,)
 a Delaware corporation,)
)
 Plaintiff,)
)
 v.)
)
 UNIVERSAL RESOURCES)
 CORPORATION, a Texas)
 corporation, and UNION)
 PACIFIC OIL AND GAS)
 CORPORATION,)
)
 Defendants.)

Case No. 94-C-637-E ✓

F I L E D

NOV 4 1994

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

ORDER AND JUDGMENT

Plaintiff Kaiser-Francis Oil Company's ("Kaiser-Francis") September 8, 1994 Motion for Summary Judgment against Defendants Universal Resources Corporation ("Universal") and Union Pacific Oil and Gas Corporation ("Union Pacific") (collectively "Defendants") comes before the Court, pursuant to 28 U.S.C. §§ 2201 and 2201, and Rules 56 and 57 of the Federal Rules of Civil Procedure. The Court has examined the pleadings, and the authorities cited and the arguments asserted in the briefs of the parties, as well as the exhibits attached thereto. The Court finds that there is no genuine issue as to any material fact and that Plaintiff Kaiser-Francis is entitled to judgment against Defendants as a matter of law.

IT IS THEREFORE ORDERED that Plaintiff Kaiser-Francis' Motion for Summary Judgment is granted against Defendants.

IT IS FURTHER ORDERED that, in accordance with this Court's ruling granting said Motion, declaratory judgment should be entered on behalf of the Plaintiff Kaiser-Francis, and against Defendants, and that the following findings and conclusions constitute the Court's decision and declaratory judgment in this case.

The Court finds that under the terms of the unambiguous Agreement,

Defendant Union Pacific resigned as operator of the Existing Wells effective March 31, 1994 upon its conveyance of all of its right, title, and interest in the Existing Wells to Defendant Universal.

The Court further finds that under the terms of the unambiguous Agreement, both Defendant Union Pacific and Defendant Universal have no right to operate the Existing Wells.

The Court further finds that under the terms of the unambiguous Agreement, Kaiser-Francis is the successor operator of the Existing Wells effective May 1, 1994 and is entitled to immediate possession and control of all records and equipment necessary for proper operation of the Existing Wells.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that declaratory judgment is hereby entered on behalf of the Plaintiff Kaiser-Francis, and against Defendants, and that the Plaintiff is entitled to the declaratory relief stated in the above findings and conclusions of the Court, which constitute the Court's decision and declaratory judgment in this case.

IT IS SO ORDERED AND DATED this 2nd day of Nov., 1994.



THE HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT COURT JUDGE

DATE NOV 04 1994

FILED

NOV .4 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

GEORGE WASHINGTON, JR.,)
)
Plaintiff,)
)
vs.)
)
LOUIS W. SULLIVAN, M.D.,)
)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

No. 91-C-452-E

ORDER AND JUDGMENT

The Court's Order dismissing this case has been reversed and remanded by the Tenth Circuit with instructions to remand to the Secretary.

IT IS THEREFORE ORDERED that the case is hereby remanded to the Secretary for further proceedings consistent with the opinion of the Tenth Circuit.

ORDERED this 3rd day of November, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

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

DATE NOV 04 1994

GIBCO INDUSTRIES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES E. GREEN and JANE)
 ANNETTE GREEN, d/b/a CONCRETE)
 ADDITIVES/CALIFORNIA,)
)
 Defendants.)

No. 91-C-542-E

FILED

NOV 4 1994

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

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been resolved. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Protective Order that was issued in this case on October 26, 1992 shall remain in effect. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

ORDERED this 3rd day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE NOV 04 1994

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

OXY USA, INC.,
Plaintiff,
vs.
UNITED STATES DEPARTMENT OF
THE INTERIOR; MANUAL LUJAN,
JR.; DAVID C. O'NEAL; S.
SCOTT SEWELL; and GARY
JOHNSON,
Defendants.

No. 92-C-634-E ✓

FILED

NOV 4 1994

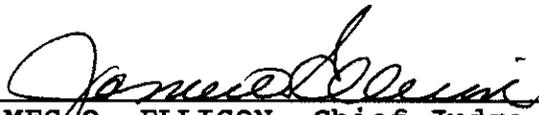
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 2^d day of November, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

13

ENTERED ON DOCKET

NOV 04 1994

DATE _____

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

FILED

NOV 4 1994

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

JAMES E. ORR, individually,)
and doing business as ED ORR)
& ASSOCIATES,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

No. 92-C-688-E

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 90 days that settlement has not been completed and further litigation is necessary.

ORDERED this 2^d day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

33

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY D. ROBISON aka GARY DUANE
ROBISON; PATRICIA L. ROBISON aka
PATRICIA LOIS ROBISON; TULSA
ADJUSTMENT BUREAU, INC.;
STATE OF OKLAHOMA ex rel
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

NOV 4 1994

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

ENTERED ON DOCKET

NOV 04 1994

DATE

CIVIL ACTION NO. 94-C 364B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4th day of Nov.,

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, **Tulsa Adjustment Bureau, Inc.,** appears not having previously filed its Disclaimer; and the Defendants, **Gary D. Robison aka Gary Duane Robison and Patricia L. Robison aka Patricia Lois Robison,** appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Gary D. Robison aka Gary Duane Robison** will hereinafter be referred to as

("Gary D. Robison") and the Defendant, **Patricia L. Robison aka Patricia Lois Robison** will hereinafter be referred to as ("**Patricia L. Robison**"); and that the Defendants, **Gary D. Robison and Patricia L. Robison** are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, **Gary D. Robison**, acknowledged receipt of Summons and Complaint on July 13, 1994, and subsequently waived service of Summons on September 10, 1994, which was filed on September 12, 1994; that the Defendant, **Patricia L. Robison**, acknowledged receipt of Summons and Complaint on July 13, 1994, and subsequently waived service of Summons on September 9, 1994, which was filed on September 13, 1994; that the Defendant, **Tulsa Adjustment Bureau, Inc.**, acknowledged receipt of Summons and Complaint on April 15, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via certified mail on August 2, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 15, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 14, 1994.

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

Lot Seven (7), Block Nine (9), SMITHDALE, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 14, 1979, Charles Manuel, executed and delivered to Mager Mortgage Company his mortgage note in the amount of \$27,700.00,

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, Charles Manuel, a single person, executed and delivered to Mager Mortgage Company a mortgage dated August 14, 1979, covering the above-described property. Said mortgage was recorded on August 20, 1979, in Book 1421, Page 1204, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 14, 1979, MAGER MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on September 20, 1979, in Book 4428, Page 1169, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 20, 1988, FEDERAL NATIONAL MORTGAGE ASSOCIATION assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C.. This Assignment of Mortgage was recorded on May 25, 1988, in Book 5101, Page 2208, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Gary D. Robison and Patricia L. Robison, currently hold the fee simple title to the property by virtue of a General Warranty deed dated September 1, 1987, and recorded on September 8, 1987 in Book 5050, Page 1, in the records of Tulsa County, Oklahoma; and the Defendants, Gary D. Robison and Patricia L. Robison, are the current assumptors of the subject indebtedness.

The Court further finds that on June 1, 1988, the Defendants, Gary D. Robison and Patricia L. Robison, 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, 1991.

The Court further finds that the Defendants, Gary D. Robison and Patricia L. Robison, 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, **Gary D. Robison and Patricia L. Robison**, are indebted to the Plaintiff in the principal sum of \$49,455.94, plus interest at the rate of 10 percent per annum from March 29, 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 \$10.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$10.00 which became a lien as of June 25, 1993; a lien in the amount of \$21.00 which became a lien as of June 26, 1992; and a lien in the amount of \$4.00 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, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the subject property by virtue of a tax warrant in

the amount of \$114.48 which was filed on February 16, 1994 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the 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, **Gary D. Robison and Patricia L. Robison**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Tulsa Adjustment Bureau, Inc.**, disclaims any right, title or interest in the subject 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, **Gary D. Robison and Patricia L. Robison**, in the principal sum of \$49,455.94, plus interest at the rate of 10 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the current legal rate of 6.00 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 \$48.00 for personal property taxes for the years 1988 and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$114.48, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Gary D. Robison, Patricia L. Robison, Tulsa Adjustment Bureau, Inc. 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, **Gary D. Robison and Patricia L. Robison**, 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 \$38.00, 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 \$114.48, plus accrued and accruing interest for state taxes which are currently due and owing.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$10.00, 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. BRETT

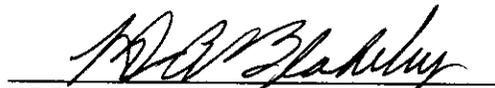
UNITED STATES DISTRICT JUDGE

APPROVED:

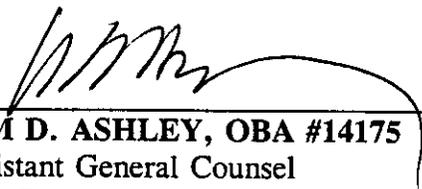
STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK

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



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Oklahoma City, OK 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel

Oklahoma Tax Commission

Judgment of Foreclosure

Civil Action No. 94-C 364B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLAUDE L. GORDON, JR.
aka Claude Lewis Gordon;
NANCY K. GORDON
aka Nancy Kay Gordon
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

NOV 4 1994

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

ENTERED ON DOCKET

NOV 04 1994
DATE

CIVIL ACTION NO. 94-C-653-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4th day
of Nov., 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, CLAUDE L.
GORDON, JR. aka Claude Lewis Gordon, and NANCY K. GORDON aka
Nancy Kay Gordon, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, CLAUDE L. GORDON, JR. aka
Claude Lewis Gordon, Jr., was served with process a copy of
Summons and Complaint on September 15, 1994; and that the
Defendant, NANCY K. GORDON aka Nancy Kay Gordon, was served with
process a copy of Summons and Complaint on September 15, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 26, 1994; and that the Defendants, CLAUDE L. GORDON, JR. aka Claude Lewis Gordon, and NANCY K. GORDON aka Nancy Kay Gordon, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that CLAUDE L. GORDON, JR., is one and the same and sometimes referred to as Claude Lewis Gordon, Jr., will hereinafter be referred to as "CLAUDE L. GORDON, JR." The Defendant, NANCY K. GORDON, is one and the same and sometimes referred to as Nancy Kay Gordon, will hereinafter be referred to as "NANCY K. GORDON."

The Court further finds that on September 19, 1991, CLAUDE LEWIS GORDON, JR., and NANCY KAY GORDON, filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-03284-C. On May 3, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor.

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 Three (3), Block One (1), WOODPARK, 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 10, 1984, Charles E. Neff, Jr., executed and delivered to Charles F. Curry Company, his mortgage note in the amount of \$85,635.00, 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, Charles E. Neff, Jr., executed and delivered to Charles F. Curry Company, a mortgage dated February 10, 1984, covering the above-described property. Said mortgage was recorded on February 14, 1984, in Book 4766, Page 2230, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 21, 1989, Charles F. Curry 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 April 13, 1989, in Book 5177, Page 1511, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, CLAUDE L. GORDON, JR., and NANCY K. GORDON, 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 the Defendants, CLAUDE L. GORDON, JR., and NANCY K. GORDON, made default under the terms of the aforesaid note and mortgage by reason of their failure to

make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, CLAUDE L. GORDON, JR., and NANCY K. GORDON, are indebted to the Plaintiff in the principal sum of \$140,639.90, 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 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 \$85.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$73.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$71.00 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, CLAUDE L. GORDON, JR., and NANCY K. GORDON, 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, CLAUDE L. GORDON, JR., and NANCY K. GORDON, in the principal sum of \$140,639.90, 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 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 \$229.00 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, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CLAUDE L. GORDON, JR., and NANCY K. GORDON 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, CLAUDE L. GORDON, JR., and NANCY K. GORDON, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States

Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$229.00, 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. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


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-653-B

NBK:flv

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

FILED

NOV 4 1994

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

JOSHUA ALAN AVEN,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 93-C-1013-B

ENTERED ON DOCKET
NOV 04 1994

DATE _____

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for a decision. Respondent has filed a Rule 5 response. For the reasons stated below the Court concludes that Petitioner's application for a writ of habeas corpus should be denied as procedurally barred.

I. BACKGROUND

On April 6, 1987, Petitioner pleaded no contest to two counts of Obtaining Merchandise by Bogus Check, After Former Conviction of a Felony, in Tulsa County District Court, case numbers CRF-86-3586 and CRF-86-4112, and was sentenced to fifteen years imprisonment on each count to run concurrently. Petitioner timely filed an application to withdraw his plea of no contest which the district court denied. On direct appeal, the Oklahoma Court of Criminal Appeals ordered the plea and sentence vacated on the ground that the district court had not verified whether Petitioner was mentally competent to enter his plea of no contest.

On remand, Petitioner moved to withdraw his request to withdraw his plea of no contest, contending that the Court of

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Criminal Appeals had declined to address his real claim--i.e. that his sentence was improperly enhanced on the basis of a prior deferred sentence from Arkansas--and therefore, that he would face a higher sentence if he went to trial. (Tr. of September 22, 1988 hearing.) The trial granted Petitioner's request to withdraw his request to withdraw his plea of no contest and held that "[t]he sentences heretofore imposed in both these matters . . . will remain in full force and effect." (Tr. at 9.) Although Petitioner did not file a timely direct appeal following this ruling, he moved for post-conviction relief on three different occasions.

In February 1991, Petitioner filed his first application for post-conviction relief in Tulsa County District Court, raising as grounds of errors unlawful enhancement because of prior deferred sentence and use of juvenile convictions. The district court denied the application on May 2, 1991, concluding that Petitioner had waived his claims when he failed to perfect a timely appeal. The district court further concluded that the prior felony convictions were valid for purpose of sentence enhancement because Petitioner had yet to file a motion requesting that his prior Arkansas conviction be set aside. (Doc. #15, ex. C.) The Oklahoma Court of Criminal Appeals affirmed relying on the procedural bar. (Doc. #15, ex. D.)

After obtaining an order expunging his Arkansas Conviction, Petitioner filed a second application for post conviction relief in Tulsa county District Court in October 1991. He alleged that the enhancement of his sentence was unlawful because his prior

convictions had now been expunged. The district court denied the application on March 18, 1992 on the ground that the issue was res judicata and/or waived. In the alternative, the Court concluded that, even if the Arkansas convictions had been set aside, Petitioner had another valid prior conviction, Case No. CRF-84-3164. (Doc. #15, ex. F.) On August 6, 1992, the Oklahoma Court of Criminal Appeals affirmed, finding that "all issues previously ruled upon by this Court are res judicata, and all issues not raised in Appellant's first application, which could have been raised, are waived." (Doc. #15, ex. H.)

In his third application for post-conviction relief, Petitioner again contended his sentences were improperly enhanced with invalid prior convictions and he was not advised of his appeal rights. The district court denied the application as procedurally barred, and the Oklahoma Court of Criminal Appeals affirmed. (Doc. #17.)

In the present application for a writ of habeas corpus, Petitioner alleges once again that his sentence was improperly enhanced on the basis of the deferred sentence from Arkansas.¹ The Respondent has objected to Petitioner's application on the ground that Petitioner procedurally defaulted his claim regarding the enhancement of his sentence; that the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and that Petitioner failed to show cause and

¹Petitioner has previously elected to dismiss his unexhausted claims and to proceed with his exhausted claim. (Docs. #18 and #21.)

prejudice, or a fundamental miscarriage of justice to excuse his procedural default. The Petitioner has not submitted a reply although this Court's July 1, 1994 order specifically granted Petitioner such an opportunity.

II. DISCUSSION

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 111 S. Ct.

1454, 1470 (1991).

Petitioner has not disputed that the decision of the Oklahoma Court of Criminal Appeals rested upon a state procedural bar. Nor has he offered any facts that would demonstrate cause and prejudice under the Coleman standard for his failure to move to withdraw his guilty plea and then appeal his conviction to the Oklahoma Court of Criminal Appeals. Lastly, this case does not present any of those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey, 111 S. Ct. at 1470. Therefore, the Court denies Petitioner's application for a writ of habeas corpus as procedurally barred.

ACCORDINGLY, IT IS HEREBY ORDERED that this petition for a writ of habeas corpus is **denied** as procedurally barred.

IT IS SO ORDERED this 4th day of Nov., 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

LARRY ALBERT HORNER,
Petitioner,
vs.
LARRY MEACHUM, et. al.,
Respondent.

ENTERED ON DOCKET
NOV 04 1994

DATE _____

Case No. 93-C-443-B ✓

FILED
NOV 4 1994

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

ORDER

In his amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Petitioner challenges his state conviction on Fourth Amendment grounds. Respondent argues that Petitioner may not be granted habeas corpus relief on the ground of fourth amendment claim because he had a full and fair opportunity to litigate his fourth amendment claim in state court. For the reasons stated below, the Court concludes that Petitioner's amended petition for a writ of habeas corpus should be denied.

I. BACKGROUND

In this proceeding, Petitioner attacks his conviction in Case No. CF-88-77, District Court of Osage County, where he was found guilty in a jury trial of knowingly possessing stolen vehicles. The conviction was appealed to the Oklahoma Court of Criminal Appeals which affirmed the conviction in Case No. F-90-52. Horner v. State, 836 P.2d 679 (Okla. Crim. App. 1992).

In the present petition, Petitioner alleges (1) that the warrantless administrative search of the auto salvage yard in

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Petitioner's case violates the Fourth Amendment; (2) that the evidence obtained as a result of the above illegal search should be excluded under the Fourth Amendment; and (3) that in the absence of consent or a warrant, "plain view" seizures can be justified only if they meet probable cause standard and if they are unaccompanied by unlawful trespass. (Doc. #15.) Respondent argues that Petitioner received a full and fair hearing on his fourth amendment claims in the State court and therefore, he is not entitled to review in this habeas corpus action. (Docs. #5 and #19.) Petitioner replies that habeas corpus review is proper in this case because the State court refused to apply the correct standard. (Doc. #18.)

II. DISCUSSION

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the

exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

The Court will not belabor its discussion of Petitioner's substantive claims because the State court granted Petitioner a full and fair opportunity to litigate his fourth amendment claims. In Stone v. Powell, 428 U.S. 465, 494 (1976), the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal-habeas-corpus court need not address a fourth amendment question as long as the state court has given petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 347 (1992).

Petitioner does not dispute that he received not one but two opportunities to fully, fairly, and adequately discuss the admissibility of the evidence in question in the State court. Petitioner first filed a motion to suppress and had an opportunity to present his arguments at a lengthy hearing which included the testimony of several witnesses. The appellate court also addressed the matter at great length and found the search in question not to

be unreasonable. Horner v. State, 836 P.2d 679 (Okla. Crim. App. 1992).

Petitioner argues, however, that the Tenth Circuit has recognized an exception to Stone v. Powell when the state court refuses to apply the correct standard under the Constitution, citing Gamble v. State of Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978). Petitioner argues that "[a]lthough the Oklahoma Court of Criminal Appeals in the present case cited See v. City of Seattle and New York v. Burger in its opinion, it failed to apply the controlling Constitutional law as outlined in the dissent." (Doc. #18 at 3.)

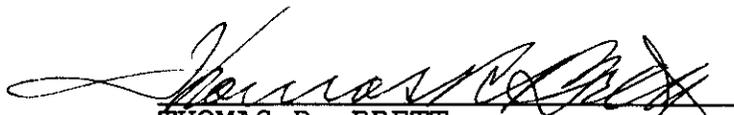
This Court disagrees. In Horner, 836 P.2d at 680-82, the Oklahoma Court of Criminal Appeals considered the factual basis of Petitioner's claim under the proper constitutional standards. The Court performed a detailed analysis of the Oklahoma statute in question under the criteria set out in New York v. Burger, 482 U.S. 691, 702-03 (1987), and concluded that the statute on its face adequately protects Fourth Amendment rights. Petitioner's reliance on the dissent for the proposition that the majority refused to apply the correct constitutional standards is improper. The dissent merely disagreed with the majority's analysis of the statute in question under the Burger factors and nowhere stated that the underlying constitutional standards were incorrect. Horner, 836 P.2d at 683.

Therefore, the Court concludes that Petitioner's application for a writ of habeas corpus must be denied on the ground that

Petitioner has had a full and fair opportunity to litigate his fourth amendment claim in the State court.

ACCORDINGLY, IT IS HEREBY ORDERED that the amended petition for a writ of habeas corpus (doc. #15) be **denied**.

IT IS SO ORDERED this 4 day of Nov., 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOV 03 1994
U.S. DISTRICT COURT
OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
THRESSA D. DEBRITO;)
MANUEL P. DEBRITO, JR.;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

NOV 4 1994

ENTERED ON DOCKET
NOV 0 8 1994
DATE

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

CIVIL ACTION NO. 94-C-395-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4th day
of Nov., 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; and the Defendants, THRESSA D.
DEBRITO and MANUEL P. DEBRITO, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, Thressa D. DeBrito, signed a
Waiver of Summons on May 16, 1994, filed on May 17, 1994; that
the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX
COMMISSION, was served of Summons and Complaint on June 6, 1994,
by Certified Mail.

The Court further finds that the Defendant, MANUEL P. DEBRITO, JR. aka MANUEL PETER DEBRITO, Jr., 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, MANUEL P. DEBRITO, JR. aka Manuel Peter DeBrito, Jr., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, MANUEL P. DEBRITO, JR. aka Manuel Peter DeBrito, Jr. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the 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.

The Court further finds that the Defendant, THRESSA D. DEBRITO, is one and the same and sometimes referred to as Thressa Denise DeBrito, will be referred to hereinafter as "THRESSA D. DEBRITO." The Defendant, MANUEL P. DEBRITO, JR. is one and the same and sometimes referred to as M.P. DeBrito, Jr., and Manuel Peter DeBrito, will be hereinafter referred to as "Manuel P. DeBrito."

The Court further finds that since her divorce from the defendant, Manuel P. DeBrito, Jr., on September 28, 1990 in Tulsa County District Court Case Number FD 90-1213, the Defendant, THRESSA D. DEBRITO, has been a single person.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 27, 1994; and that the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 16, 1992, Thressa D. DeBrito, filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-3981-W. On March 17, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed Discharge of Debtor, the case was subsequently closed on July 13, 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 Eighteen (18), Block One (1), HOLMES ADDITION, to Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 29, 1983, the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., executed and delivered to Shearson\American Express Mortgage Corporation, a mortgage note in the amount of \$35,000.00, payable in monthly installments, with interest thereon at the rate of Thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., executed and delivered to Shearson\American Express Mortgage Corporation, a mortgage dated September 29, 1983, covering the above-described property. Said

mortgage was recorded on September 30, 1983, in Book 4732, Page 287, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 15, 1985, Shearson\American Express Mortgage Corporation, assigned the above-described mortgage note and mortgage to The New York Guardian Mortgagee Corporation. This Assignment of Mortgage was recorded on February 21, 1985, in Book 4845, Page 2632, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 22, 1988, The New York Guardian Mortgagee Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 12, 1988, in Book 5092, Page 2785, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., are indebted to the Plaintiff in the principal sum of \$58,109.67, plus interest at the rate of Thirteen percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property

which is the subject matter of this action by virtue of personal property taxes in the amount of \$22.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$4.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$4.00 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 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 \$499.90 which became a lien on the property as of May 3, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., in the principal sum of \$58,109.67, plus interest at the rate of Thirteen percent per annum from March 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 \$30.00, plus accruing interest, for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$499.90, plus accrued and accruing interest, for personal property taxes for the year 1991, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, THRESSA D. DEBRITO and MANUEL P. DEBRITO, JR., to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$22.00, 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 \$499.90, 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 \$8.00, 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.

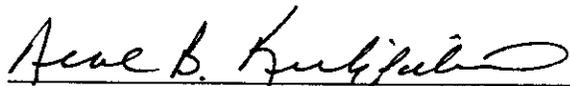
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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



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



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-395-B

NBK:flv

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

FILED

NOV - 4 1994

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

CME ASSOCIATES, INC.,
a Texas Corporation,

Plaintiff,

vs.

Case No. 93-C1068-E

CLOYED RAY PASLAY,
DONNA F. PASLAY,
HORACE D. PASLAY,
SHIRLEY M. PASLAY,
HENRY N. COOK, and
PATRICIA M. COOK, individuals,

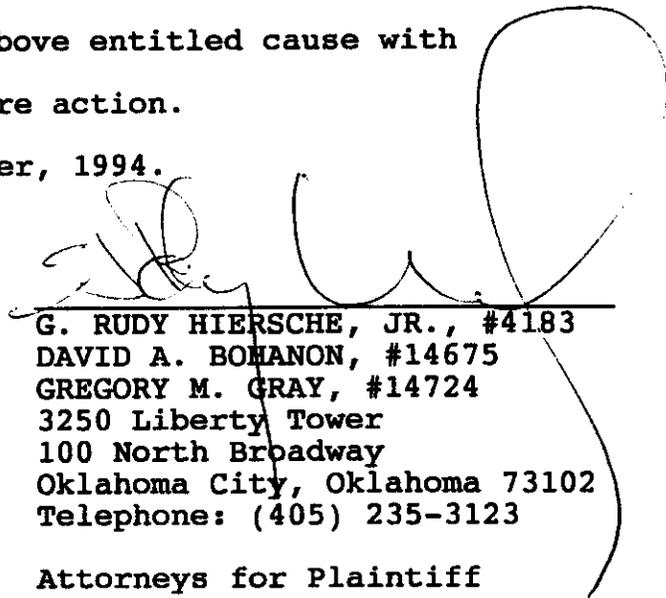
Defendants.

ENTERED ON DOCKET
DATE NOV 04 1994

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, CME Associates, Inc., a Texas Corporation, and based on a settlement agreement reached in a settlement conference conducted by Magistrate Wagner, and full compliance with all requirements set forth in the settlement agreement, hereby dismisses the above entitled cause with prejudice to the filing of a future action.

Dated this 25th day of October, 1994.



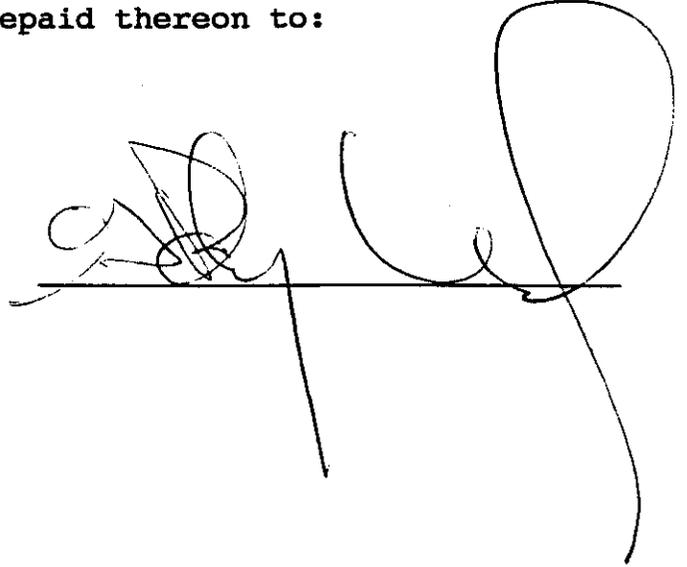
G. RUDY HIERSCHE, JR., #4183
DAVID A. BOHANON, #14675
GREGORY M. GRAY, #14724
3250 Liberty Tower
100 North Broadway
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-3123

Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of November, 1994,
a true and correct copy of the above and foregoing instrument was
mailed with sufficient postage prepaid thereon to:

R. THOMAS SEYMOUR
F. RANDOLPH LYNN
550 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103.

A handwritten signature in black ink, appearing to read "F. Randolph Lynn", is written over a horizontal line. The signature is highly stylized and cursive, with a large loop on the right side.

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

FILED

NOV 3 1994

WILLIAM MICHAEL FURMAN,)
)
 Plaintiff(s),)
)
 v.)
)
 WARLICK INVESTMENTS, LTD.,)
)
 Defendant(s).)

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

93-C-0854-B ✓

ENTERED ON DOCKET

DATE NOV 03 1994

ORDER

On March 10, 1994, the Court granted Appellant's Motion to Proceed In Forma Pauperis. Since that time, Appellant has taken no action and failed to submit a status report as ordered. Therefore the case is dismissed for failure to prosecute.

SO ORDERED THIS 3rd day of Nov, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

6

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
 vs.)
)
 KENNETH NEIL BURKE)
 aka Kenneth N. Burke;)
 MONA KAY BURKE)
 aka Mona K. Burke;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

NOV 3 1994

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

ENTERED ON DOCKET
NOV 03 1994
DATE _____

CIVIL ACTION NO. 94-C-281-B

**AMENDED
JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 3rd day of Nov., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer; and the Defendants, KENNETH N. BURKE and MONA KAY BURKE, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, KENNETH NEIL BURKE, was served a copy of Summons and Complaint on July 21, 1994, by Certified Mail; that the Defendant, MONA KAY BURKE, was served a

copy of Summons and Complaint on July 16, 1994, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on March 25, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 28, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 25, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on April 26, 1994; that the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 8, 1990, Kenneth Neil Burke and Mona Kay Burke, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-01576. The case was discharged on October 1, 1990, by the United States Bankruptcy Court for the Northern District of Oklahoma, and the case was subsequently closed on November 20, 1990.

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 One (1), Block Twenty-eight (28), WESTERN VILLAGE FOURTH ADDITION, an Addition to Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on October 25, 1982, Jeffrey D. Allen and Kristi L. Allen, husband and wife, executed and delivered to Oklahoma Mortgage Company, Inc., their mortgage note in the amount of \$41,600.00, 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, Jeffrey D. Allen and Kristi L. Allen, husband and wife, executed and delivered to Oklahoma Mortgage Company, Inc., a mortgage dated October 25, 1982, covering the above-described property. Said mortgage was recorded on October 28, 1982, in Book 4646, Page 1682, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 10, 1982, Oklahoma Mortgage Company, Inc., assigned the above-described mortgage note and mortgage to Utah Mortgage Loan Corporation. This Assignment of Mortgage was recorded on November 18, 1982, in Book 4652, Page 869, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1986, First Security Realty Services Corporation, fka Utah Mortgage Loan Corporation, assigned the above-described mortgage note and mortgage to The Lomas & Nettleton Company. This Assignment of

Mortgage was recorded on April 30, 1987, in Book 5019, Page 2393, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 6, 1989, 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 July 19, 1989, in Book 5195, Page 1792, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 29, 1986, Jeffrey D. Allen and Kristi L. Allen, husband and wife, granted a general warranty deed to the Defendants, Kenneth N. Burke and Mona Kay Burke, husband and wife. This deed was recorded with the Tulsa County Clerk on September 2, 1986, in Book 4966 at Page 2401 and the Defendants, Kenneth N. Burke and Mona KAY Burke, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that the Defendants, KENNETH N. BURKE and MONA KAY BURKE, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, are indebted to the Plaintiff in the principal sum of \$79,237.53, plus interest at the rate of Twelve and One-Half percent per annum from January 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 \$8.00 which became a lien on the property as of July 5, 1989; a lien in the amount of \$30.00 as of June 26, 1992, and a claim in the amount of \$26.00 for 1993 taxes, plus accruing costs and interest. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, claim no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, in the principal sum of \$79,237.53, plus interest at the rate of Twelve and One-half percent per annum from

January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 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 \$64.00 for personal property taxes for the years 1988, 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, KENNETH NEIL BURKE, MONA KAY BURKE, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

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

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$64.00, 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.

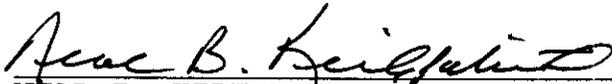
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
3460 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-281-B

NBK:flv

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

FILED

NOV 01 1994

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

J. A. FONSECA,)
)
 Plaintiff,)
)
 v.) Case No. 94-CV-392-BU
)
 DEVELOPMENTAL SERVICES)
 OF TULSA, INC.,)
 an Oklahoma corporation,)
)
 Defendant.)

ENTERED ON DOCKET
DATE NOV - 3 1994

ORDER OF DISMISSAL WITH PREJUDICE
AND
ORDER OF CONFIDENTIALITY

NOW ON this 1st day of Nov. ~~October~~, 1994, the above styled and numbered matter comes on before this Court pursuant to the Joint 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 refileing of same. Further, the Court, based upon such Joint Stipulation of Dismissal finds that effective October 24, 1994, at 3:00 p.m., an Order of Confidentiality should be entered whereby both parties to this proceeding are to keep the terms of resolution confidential, and when referring to the resolution of this proceeding shall state only "The matter has been mutually resolved".

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
The Honorable John Leo Wagner
United States District Judge

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

ENTERED ON DOCKET
DATE NOV - 3 1994

ST. JOHN MEDICAL CENTER, INC.,)
HILLCREST MEDICAL CENTER,)
OSTEOPATHIC HOSPITAL)
FOUNDERS' ASSOCIATION, INC.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

F I L E D

NOV 2 1994

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

Case No. 94-C-163-BU

ORDER

This matter comes before the Court on the United States' Motion for Partial Summary Judgment filed May 13, 1994 (Docket Entry #5) with Memorandum in Support thereof (Docket Entry #6); Response of Plaintiffs to Defendant's Motion filed May 31, 1994 (Docket Entry #7); and Reply Brief of United States filed June 8, 1994 (Docket Entry #8).

After review of the above-referenced pleadings, in consideration of the applicable law, this Court hereby finds that Plaintiffs are hospitals that provide medical care to their patients. Some of those patients receive medical transportation via Air Evac of Tulsa, Inc., ("Air Evac") a company that provides helicopter air transportation to the Plaintiffs, among others. Plaintiffs commenced this action seeking a refund from the Defendant of certain transportation excise taxes paid, pursuant to 26 U.S.C. § 4261(a), under protest. Plaintiffs assert that the air transportation provided by Air Evac is exempt from transportation excise taxes as provided under 26 U.S.C. § 4261(f) and, further, that even if the exemption does not apply to the Plaintiffs, they are not the party responsible for payment of the excise tax under 26 U.S.C. § 4261(d).

Defendant files the Motion for Partial Summary Judgment currently coming before the Court seeking a determination on the issues of: (1) whether the exemption to the 26 U.S.C. § 4261(a) transportation excise tax contained in 26 U.S.C. § 4261(f) pertaining to medical air transportation is applicable to fares for air transportation tax rendered prior to September 30, 1988; and (2) whether Plaintiffs are parties subject to the excise tax set forth at 26 U.S.C. § 4261(a) for the periods in question.

For summary judgment to be appropriate, this Court must find that there exists no genuine issues as to any material fact and that, in this case, Defendant is entitled to partial summary judgment as a matter of law. Fed. R. Civ. Pr. 56(c). The specific tax in question imposed by Section 4261(a) states that, "there is hereby imposed upon the amount paid for taxable transportation (as defined in Section 4262) of any person a tax equal to eight percent of the amount so paid. ..." This section further provides that, "the taxes imposed by this section shall be paid by the person making the payment subject to the tax." 26 U.S.C. Section 4261(d).

The exemption at issue in this case arises under Section 4261(f) which provides that, "no tax shall be imposed under this section ... on any air transportation by helicopter for the purpose of providing emergency medical services if such helicopter -

(1) does not take off from, or land at, a facility eligible for assistance under the Airport and Airway Development Act of 1970 during such transportation, and

¹ The tax imposed by this section was increased to ten percent by amendment effective November 30, 1990. The effect of this amendment on the case at hand has not been discussed by the parties and will not be determined herein.

(2) does not otherwise use services provided pursuant to the Airport and Airway Improvement Act of 1982 during such transportation."²

The effective date of the amendment creating this exemption stated that, "the amendment made by Subsection (a) shall apply to transportation beginning after September 30, 1988, but shall not apply to amounts paid on or before such date."³ Defendant asserts that only the taxes for air transportation paid after September 30, 1988 would qualify for the exemption and all those paid for services rendered before this date would not be subject to said exemption. Plaintiffs have responded in apparent agreement with this assertion by the Defendant. As a result, we find Defendants motion meritorious on the issue of the effective date of the medical transportation exemption. As a result, this Court finds that there exists no genuine issue as to any material facts on this point of law and further finds that the exemption only applies to air transportation services rendered after September 30, 1988.

The second issue raised in Defendant's motion is not as easily resolved. Although the interpretation of the statute that establishes the party responsible for payment of the air transportation excise tax is a question of law, certain facts which have not been presented to this Court are essential for an appropriate ruling as to the responsible party in this particular case. Specifically, this Court determines that the relationship between Air Evac and the various Plaintiffs, among other disputed and/or omitted facts must be

² For the purposes of this motion, the Defendant has admitted that the Plaintiffs qualify for the exemption under this section, but reserve the right to later challenge this fact.

³ Section 404(d)(1) of Public Law 100-223, entitled "Effective Dates."

presented to the Court before summary judgment would be appropriate. As a result, this Court shall deny Plaintiffs' motion on the second issue.

IT IS THEREFORE ORDERED THAT the United States' Motion for Partial Summary Judgment filed May 13, 1994 (Docket Entry #5) is hereby **GRANTED IN PART AND DENIED IN PART**. Specifically, the Motion is **GRANTED** in that the exemption established under Section 4261(f) for medical helicopter air transportation excise tax is only applicable for services rendered and fares incurred after September 30, 1988. However, the motion is **DENIED** in so far as the request that Plaintiffs be determined the responsible party for such taxes incurred on or before September 30, 1988.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MICHAEL BURRAGE

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

NOV - 3 1994
FILED
NOV 2 1994

JENNIFER WILLIAMS,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF THE COUNTY OF TULSA, et al.,)
)
 Defendants.)

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

Case No. 94-C-96-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 2 day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

35

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

ENTERED ON DOCKET
DATE NOV - 2 1994

FORREST TOWRY, an individual,)
)
Plaintiff,)
vs.)
)
CASINO CREDIT SERVICES, INC.,)
a Delaware corporation,)
d/b/a CRW FINANCIAL, INC.,)
)
Defendant.)

No. 94cv438-BU

FILED
NOV - 2 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL OF COUNTS
1, 2, 3, 4, 5, 6, AND 8 WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure and the terms of settlement in this case, Plaintiff Forrest Towry and Defendant Casino Credit Services, Inc., d/b/a CRW Financial, Inc. hereby stipulate that the First, Second, Third, Fourth, Fifth, Sixth and Eighth claims for relief in Plaintiff's First Amended Complaint, filed September 9, 1994, should be dismissed with prejudice to any future refiling, each party to bear its own costs.

The claims asserted in the Seventh and Ninth claims for relief of the First Amended Complaint, that is, the Defamation claim and the COBRA claim respectively, are specifically not dismissed at this time.

29

C2J

Respectfully submitted,

Patterson Bond

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ATTORNEYS FOR DEFENDANT
CASINO CREDIT, INC. d/b/a
CRW FINANCIAL, INC.

ENTERED ON DOCKET

DATE NOV - 3 1994

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 2 1994

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

MICHAELA PEARSON, as Personal)
Surviving Representative of)
R.J. Pearson, Jr.,)

Plaintiff,)

vs.)

Case No. 93-C-699E

AIR-X-CHANGERS, a subsidiary)
of Harsco, Inc.,)

Defendant.)

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

It is hereby stipulated and agreed between the parties, Plaintiff Michaela Pearson, individually and as surviving Representative of R. J. Pearson, Jr., deceased, Defendant Air-X-Changers, a subsidiary of Harsco, Inc., by and through their respective attorneys, Richardson, Stoops & Keating and John Woodard of Feldman, Hall, Franden, Woodard & Farris, that the above-titled action be, and the same hereby is, dismissed without prejudice, each party to pay its own costs.

Dated: November 27, 1994

Dated: November 1st, 1994



Attorney for Plaintiff



Attorney for Defendant

It is so ordered this ____ day of November, 1994.

S/ MICHAEL BURRAGE

PRESIDING JUDGE

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

FILED

NOV - 2 1994

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

GERALD W. BRIDGEWATER,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES,)
)
 Defendant.)

93-C-1059-B
ENTERED ON DOCKET
DATE NOV - 3 1994

ORDER

Plaintiff Gerald Bridgewater applied for Social Security disability benefits in 1992, claiming he was disabled between October 1, 1985 and December 31, 1986 because of ulcers and pain. The Secretary of Health and Human Services denied that application. Mr. Bridgewater now appeals that decision to this Court.¹

Mr. Bridgewater raises two issues. First, does substantial evidence support the Secretary's decision that he was able to perform "medium" or "light" work between October 1 and December 31, 1986? Second, did the Administrative Law Judge ("ALJ") err by applying the Medical-Vocational Guidelines ("Grids"). For the reasons below, the Court affirms the Secretary'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

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."

supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).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, Mr. Bridgewater last met the Title II disability earnings requirements on December 31, 1986. He alleges disability since October 1, 1985. Therefore, the pertinent question is whether substantial evidence supports the ALJ's finding of no disability between those two dates.³

The ALJ found that Mr. Bridgewater had a history of peptic ulcer disease and mild osteoarthritis. He concluded that, while Mr. Bridgewater could not return to his previous work as a carpenter and stone mason, he was able to do "medium" work during the applicable time frame.⁴ In reaching his decision, the ALJ applied the Grids and did not call a Vocational Expert.

Substantial evidence supports the ALJ's decision.⁵ As noted by the ALJ, the record indicates a history of peptic ulcer disease during the time in question, but none of the medical evidence shows that Mr. Bridgewater was unable to do "medium" work. Mr. Bridgewater underwent surgery for his ulcer on December 1, 1986, but was discharged with the only restrictions being on his lifting and driving. *Id. at 123.*⁶ Shedding further light on his condition was a October 28, 1987 examination by Dr. Glenn Cosby -- nine months after his eligibility status expired. Dr. Cosby diagnosed Mr. Bridgewater with "peptic disease, chronic, with dumping syndrome, postoperative vagotomy and pyloroplasty"

³ Mr. Bridgewater's earlier disability application was denied by the Secretary on November 17, 1987. Mr. Bridgewater, however, applied again on June 23, 1992. The ALJ re-opened the earlier application and considered all of the evidence in the record.

⁴ As noted by the ALJ, a claimant's impairment must last for a continuous period of twelve (12) months. 20 CFR §404.1509. In addition, the ability to perform medium work includes the ability to do light work. see 20 CFR §404.1567(c). Therefore, the ALJ's decision will be affirmed if the record shows claimant can perform light or medium work.

⁵ The undersigned has received the entire record.

⁶ The discharge report also notes that Mr. Bridgewater was diagnosed with arthritis and "alcohol abuse in the past" in addition to peptic ulcer disease.

and mild "osteoarthritis." *Id.* at 129. In addition, Dr. Cosby wrote:

This man has a long standing history of peptic disease, postoperative, with a dumping syndrome. I suspect he is not following his diet properly. He is gaining weight and he apparently does not like to take his medication...he states he is perfectly comfortable so long as he doesn't exert. *Id.*

The examination of Dr. Cosby, coupled with the aforementioned hospital discharge statement, constitutes substantial evidence.⁷ Mr. Bridgewater argues, in effect, that his testimony establishes a finding of disability; but the record, as a whole, does not support his claim. In addition, the ALJ discounted Mr. Bridgewater's testimony.

The second issue is whether the ALJ improperly applied the Grids. The ALJ used the Grids as a "framework" to determine that Mr. Bridgewater could perform "medium" work. Mr. Bridgewater disputes that finding, arguing that the Grids are not applicable because he suffered nonexertional impairments (i.e. pain, extreme fatigue and excessive diarrhea). That argument, under the facts of this case, is without merit. The "mere presence" of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant. *Gossett v. Bowen*, 862 F.2d 802, 807-808 (10th Cir. 1988). Therefore, since substantial evidence supports the ALJ's finding that Plaintiff had the RFC to perform the full range of medium work, reliance on the grids was proper. Therefore, the Secretary's decision is **AFFIRMED**.

⁷ Evidence in the record certainly suggests that Mr. Bridgewater's condition worsened by 1990 (See December 5, 1990 report by Dr. Michael Farrar, Record at 178). But the question on appeal is whether he was disabled between October of 1985 and December of 1986.

SO ORDERED THIS 2nd day of Nov., 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

FILED

NOV - 3 1994

WILLIAM J. WADE, TRUSTEE,)
)
Appellant,)
)
vs.)
)
RONNIE HANNON, et al.,)
)
Defendants.)

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

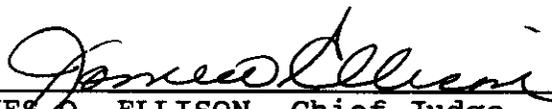
No. 91-C-477-E
91-C-572-E
91-C-632-E
(Consolidated)

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been resolved, and there are no remaining issues to be resolved by this Court. Therefore it is not necessary that the action remain upon the calendar of the Court.

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

ORDERED this 3RD day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 11-3-94

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

FILED

NOV - 3 1994

WILLIAM J. WADE, TRUSTEE,)
)
Appellant,)
)
vs.)
)
RONNIE HANNON, et al.,)
)
Defendants.)

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

No. 91-C-477-E
91-C-572-E
91-C-632-E ✓
(Consolidated)

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been resolved, and there are no remaining issues to be resolved by this Court. Therefore it is not necessary that the action remain upon the calendar of the Court.

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

ORDERED this 3rd day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 11-3-94

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

FILED

NOV - 3 1994

SHELTER INSURANCE COMPANY)
)
 Plaintiff,)
)
 vs.)
)
 BOBBY LEE and GLENDALINE)
 HELM,)
)
 Defendants.)

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

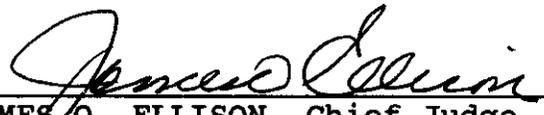
No. 94-C-654-E

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 3rd day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 11-3-94

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

FILED

NOV - 3 1994

JASON DAY and DORIS DAY,)
)
 Plaintiffs,)
)
 vs.)
)
 BROKEN ARROW PUBLIC SCHOOL)
 DISTRICT, (i001)(T),)
)
 Defendant.)

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

No. 94-C-648-E ✓

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 3rd day of November, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 11-3-94

ENTERED ON DOCKET

DATE NOV - 3 1994

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

NOV 03 1994

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

BOBBY R. ASHER,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA E. SHALALA, SECRETARY)
 OF HEALTH AND HUMAN SERVICES,)
)
 Defendant.)

No. 92-C-1174-K

ORDER

Before this Court, pursuant to 42 U.S.C. § 405(g), is the appeal of the plaintiff to the Secretary's denial of disability benefits under Title II of the Social Security Act (the "Act"). The Administrative Law Judge ("ALJ") found that the claimant could perform other work which was identified in significant numbers in the national economy, and was, therefore, not disabled and not entitled to further disability benefits after September 19, 1991. Plaintiff contends the ALJ's decision closing the period of disability as of September 19, 1991, is unsupported by substantial evidence and the Secretary failed to apply the correct legal standard or to provide the Court with sufficient evidence to determine that appropriate legal principles applicable to his case were followed.

Plaintiff seeks disability insurance benefits under Title II of the Social Security Act, which defines "disability" as:

the "inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted ... for a continuous period of not less than 12 months." 42 U.S.C. §416(i)(1), §423(d)(1)(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 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).

An individual is under a "disability" only if the impairment is of such severity that it not only prevents the successful performance of his past work but also, considering his age,

education, and work experience, prevents the successful performance of any other work that exists in significant numbers in the national economy. 42 U.S.C. §423(d)(2)(A), §1392c(a)(3)(B).

Plaintiff's original application for disability insurance was filed February 28, 1991, alleging disability since June 23, 1989. (Tr. 93-96). After a hearing before an ALJ, a decision was issued on March 16, 1992, granting plaintiff a closed period of disability from June 23, 1989 through September 19, 1991 but denying any benefits under the Act thereafter. When the Appeals Council denied review on October 29, 1992, and affirmed the denial of benefits, the present Complaint was filed on December 22, 1992, although incorrectly file-stamped December 22, 1993.

At the time of the hearing before the ALJ, plaintiff was 49 years old,¹ had a second grade education, and 20 years experience as a diesel mechanic. Medical history reveals a lifting injury to plaintiff's back in June 1989 resulting in two back surgeries, a left hemilaminectomy at L3-4 in January 1990 and a redo lumbar laminectomy and repeat diskectomy at L3-4, decompression of all neural structures and extensive irrigation of the lumbar spine in March 1990; hospitalization in August 1991 for esophagitis, hiatal hernia and gastritis; a 1973 motor vehicle accident resulting in surgery to his right knee; repair of a right inguinal hernia, and long-term diabetes mellitus. The ALJ found that Mr. Asher had not engaged in substantial gainful activity since June 23, 1989, the

¹Plaintiff was born July 5, 1942, being 52 years of age at the present time.

date the claimant stated he became unable to work and thereby met the disability insured status requirements of the Act.

At the hearing, the ALJ received testimony from Dr. Harold Goldman, a medical expert; Ms. Cheryl Mallon, the vocational expert; and plaintiff. Mr. Asher testified he has trouble sitting for any length of time (Tr. 39), burning and stinging radiating down his right leg (Tr. 45), numbness in his right leg (Tr. 52), continual back pain (Tr. 55), muscle spasms at night (Tr. 58), pain in the left hipbone (Tr. 59), long-term arthritis in left shoulder (Tr. 61), pain in right shoulder radiating to the elbow (Tr. 62) as well as the impairment of diabetes (Tr. 45). Although plaintiff had post-operative problems stabilizing his diabetes, he admits the diabetes never hindered him on the job. Exposure to the heat is also limited because plaintiff gets "real weak." (Tr.47-48). Plaintiff testified he cannot vacuum or mow the lawn, but he is able to drive the children to school, attend church activities regularly, occasionally visit a friend in the nursing home, and do light housework. (Tr.39). Mr. Asher went fishing two times during the summer of 1991, both times from a boat, one time for about 2 hours and the other time for about an hour. (Tr. 40) He gets up early most days, washes dishes, straightens the house, does the laundry and basically "just kind of rattle through the day." (Tr. 43). Once he refinished a couple of old guns, "cold bluing" them, but testifies he's really not able to work. (Tr. 43). Plaintiff is able to lift 10 pounds if he goes "down and comes up straight," to walk between 1/4 and 1/2 mile before his leg "feels like it's

going to sleep" and "sticky like pains" start, to sit approximately 2 hours before he has to take a 15 minute break, and to stand "not more than an hour." (Tr. 50-52). He has difficulty bending, stooping, squatting, or lifting and continues to use a TENS unit 3-4 times a week, mostly "all night." (Tr. 54). Plaintiff has difficulty using tools, "especially air wrenches," or lifting heavy objects. (Tr. 61). Although the record indicates a history of left clavicular fracture, treatment of claimant's left shoulder predates the alleged onset date. (Tr. 302-348). Plaintiff admits his left shoulder is an old arthritis problem but the problem now is in his right shoulder. "It hurts. It plain hurts ... it feels like you're just stretching everything in there... when it gets bad." He cannot raise his arm above his head and the pain radiates down into his elbow. (Tr. 61-62).

In conjunction with the above impairments, Plaintiff argues he is illiterate, finishing only 2nd or 3rd grade, and therefore has difficulty reading, spelling, making change, subtracting, dividing, or doing fractions. Plaintiff testified he had attended Tulsa Literacy Lab for almost a year and could "read a menu now and some things in a newspaper." (Tr. 34). However, he could not spell well enough to make an inventory list, but admitted he could copy a number or something like that. (Tr. 65). Mr. Asher has never worked in an office situation but confirmed he met the public pretty regularly during the course of his former employment with Tulsa County. (Tr. 66). On February 28, 1991, the disability interviewer, C. Riley, noted that Mr. Asher could not read the

application "due to lack of education." (Tr. 126).

None of the doctors² treating plaintiff indicated he had any loss of muscle, muscle atrophy, or motor weakness. No further surgical procedures were needed even though there was some discussion as to whether a spinal fusion would help his pain syndrome. Further CAT scans and MRIs disclosed no further ruptured disk, although there was slight bulging of the disk at L4-5 level. (Tr. 70, 158). Although there was no evidence of further nerve root impingement in the lower back, the low back range of motion was basically 0 degrees extension and 45 degrees flexion. (Tr. 160). Plaintiff does not wear a back brace nor does he use a cane or crutches, and he "walks without a limp." (Tr. 349) In his Reconsideration Disability Report, dated 6-5-91, Mr. Asher indicates, however, he has trouble walking and "cannot walk at all on unlevel ground." (Tr. 64, 129). Claimant underwent physical therapy and Cybex evaluation for impairment rating of his legs. He was given a combined rating of 16% based on his range of motion and the two back surgeries despite tests results of equal strength in both legs. (Tr. 170). However, the medical record indicates it has been approximately four years since plaintiff was tested for sensory or reflex loss in his lower extremities. (Tr. 80-81, 170). Glenda Brown, the disability reviewer completing his 6-5-91 Reconsideration Report, noted the claimant "walked stiffly and as

²Dr. John Vosburg is plaintiff's treating physician. The plaintiff obtained a second opinion from Dr. Randall Hendericks, who performed MRI and CAT and MRI studies. Previous surgeons were Dr. William Mays, Dr. Don Hawkins, Dr. Henry Modrak and Dr. Alan Fielding.

if in pain. He had difficulty sitting or getting up or down." Dr. Vosburg confirmed in his final report dated December 5, 1990, because of plaintiff's loss of intervertebral disk, residual pain and discomfort in the back and residual sciatic nerve irritation, he would rate Mr. Asher's permanent partial impairment at 36%. (Tr. 160). Progress notes, dated August 28, 1991, continue to indicate complaints of "intense, constant pain in the mid-lumbar area" when standing, walking, and "numbness and paresthesia in his right leg." (Tr. 277). Dr. Vosburg last evaluated plaintiff in January 1992 for "residual pain and discomfort of the right knee in the patellofemoral quadriceps mechanism, limiting kneeling, squatting, climbing and heavy loads." Upon examination by Dr. Vosburg, the patient had good alignment of his lower extremities, a well-healed surgical scar across the anterior aspect of the right patella, with full range of motion. (Tr. 349). As to the diabetes mellitus, plaintiff has no evidence of gait disturbance of motor function and normal nerve conduction velocity with no evidence of diabetic neuropathy. Medical records do not reveal any eye examinations, but plaintiff testified he can read fairly well with his glasses. (Tr. 58, 71). In February 1992, the claimant furnished a list of medications reflecting he had continued on Insulin, Tagamet and Tylenol #3 for pain.³ (Tr. 301). Additionally, the record reflects Mr. Asher is allergic to penicillin and aureomycin. (Tr. 271, 327).

³It is noted that in the past plaintiff had difficulty regulating his blood sugar which limited his usage of anti-inflammatory drugs. Plaintiff is unable to take any medication except ibuprofen, ulcer medication and insulin.

After an opportunity to hear testimony from the plaintiff and to review the medical information, the neurological expert, Harold Goldman, M.D., opined that Mr. Asher's impairments neither met nor equaled the Listings. However, he explained that plaintiff's residual functional capacity is limited by "his pain syndrome ... and not by any anatomical abnormality such as a ruptured disk or a fusion." (Tr. 71). When questioned by plaintiff's attorney, Dr. Goldman indicated the back limitation experienced by plaintiff "is either on the basis of pain or spasm." (Tr. 76). He went on to explain that people with diabetes have a very common entity called diabetic radiculitis. "They don't have to have a neuropathy in which they lose their peripheral nerve functions ... diabetics have a particular propensity for having nerve injuries." With the scarring that has occurred in plaintiff's spine, "he has a radiculopathy. In other words, ... [the] dorsal roots coming out of his spine are affected by the combination of the surgery and his diabetes." (Tr. 78). And because of this dorsal root irritation, Dr. Goldman agreed that a spinal fusion would be of little, if any, benefit to plaintiff. He further emphasized that plaintiff's "spasm and pain is real." Referring to the Cybex strength testing of plaintiff, Dr. Goldman explained, "Weakness is often a secondary effect of pain, and ... people with back pain and leg pain will often say their legs feel weak even though when you test them, the muscles are fine and the nerves are fine. They just can't do as much with their leg because of pain." (Tr. 79). However, this medical expert testified, from his review of the records, Mr. Asher

would have no difficulty with rapid alternating movements with his hands or legs, and could sit, stand and walk a total of 8 hours in an 8 hour work day. (Tr. 73). Dr. Goldman concluded that plaintiff's testimony was essentially consistent with the medical records.

Applying Social Security Ruling 88-13 and the Luna standard, the ALJ reviewed plaintiff's component of exertional pain associated with his impairments and the degree to which his symptoms negatively impact the potential occupational base. Ruling 88-13 provides the "usually reliable" objective indicators of the intensity and persistence of pain:

Medical history and objective medical evidence such as evidence of muscle atrophy, reduced joint motion, muscle spasm, sensory and motor disruption, are usually reliable indicators from which to draw reasonable conclusions about the intensity and persistence of pain and the effect such pain may have on the individual's work capacity.

In Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), the Court proffered various factors in addition to medical test results which should be considered: attempts to find relief for pain and the willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, daily activities, dosage, effectiveness and side effects of medication. The ALJ concluded that the claimant has a "severe impairment" within the meaning of the Act, but concluded that the claimant does not have an impairment that meets or equals the criteria of the Listings of Impairments, 1.05.C, relative to musculoskeletal impairments, and 9.08, relative to diabetic impairments. The ALJ

then moved to the fourth step of the evaluation process, determining that commencing September 19, 1991, the claimant has the residual functional capacity to perform sedentary level work activities, but could not reasonably be expected to return to his former work as a diesel mechanic. The Court agrees.

At the fifth step of the evaluation process, the ALJ determined the claimant could do other work considering the testimony of plaintiff, a vocational expert and application of the medical-vocational guidelines, or "the grids." The grids, which assist in the determination of social security disability claims, consider a claimant's residual functional capacity, that is, the functional level of work that the claimant is physically able to perform on a sustained basis in relation to his age, education and work experience. 20 C.F.R. § 404, subpart P, Appendix 2 (1983). Then corresponding rules identify whether there exist a significant number of jobs in the national economy that the claimant can perform. Where the claimant's characteristics coincide with the criteria of a specific rule in the grids, that rule directs a conclusion as to whether the claimant is disabled. Channels v. Heckler, 747 F.2d at 578. In appropriate circumstances, the Secretary can meet its burden on step five by relying on the grids. The grids cannot be conclusively applied, however, when a nonexertional impairment, such as pain, limits the claimant's ability to perform the full range of work in a particular residual functional capacity category. Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir.1985).

The record reflects that on December 5, 1990, and confirmed again on September 19, 1991, plaintiff was released by Dr. Vosburg to return to work. Plaintiff's treating physician noted, "He continues to have significant amount of pain in his back, pain in both legs, which markedly limits his ability to do work. Vocational rehabilitation is in order." (Tr. 71, 160). On a permanent basis, the plaintiff's work must be (1) sedentary in nature; (2) no frequent bending or stooping; (3) no lifting over 20 pounds, and (4) work that would permit plaintiff to sit at least 50% of the work day. (Tr. 160, 276). Within the framework set out by his treating physician and although the vocational expert confirmed plaintiff would be considered illiterate, (Tr. 85), she identified the following sedentary and light exertional jobs in the national economy that plaintiff could perform:

- 1) **Assembly**, sedentary exertional level, unskilled level, 23,000 in regional economy with 183,000 in the national economy;
- 2) **auto mechanic**, light exertional level, semi-skilled level, 33,000 in regional economy with 256,000 in the national economy; and
- 3) **delivery driver**, light exertional level, semi-skilled level, 17,000 in regional economy with 135,000 in the national economy.

(Tr. 83). She also testified that plaintiff's skills were highly marketable with marginal adjustment to the auto mechanic but with major adjustment to the other jobs in view of plaintiff's past relevant work.

Hence, the ALJ found and concluded that the plaintiff's profile coincides with Rule 201.18 of the grids, which directs that

the claimant is "not disabled." However, the ALJ correctly noted the grids may not be applied conclusively in a given case unless the plaintiff's characteristics precisely match the criteria of a particular rule. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir.1989). This is because the grids measure a claimant's exertional limitations, i.e., strength, and because an individual's capacity to work may also be limited by nonexertional limitations, such as pain.

Thus, the presence of a nonexertional limitation which prevents the applicant from performing the full range of work may preclude application of the grids and dictate their use only as a framework to determine disability. See Gossett v. Bowen, 862 F.2d 802, 806 (10th Cir.1988). Such was the approach taken here. After specific consideration of these additional impairments of the claimant and their impact, and although finding the occupational base may be reduced, the ALJ concluded the claimant's residual functional capacity did not limit his performance of a significant number of jobs existing in the national economy. Therefore, the claimant was "not disabled" and not entitled to the benefits sought.

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.

Plaintiff first contends the ALJ made an incorrect finding regarding literacy, when a correct finding would have led to a conclusion of disability. He points to 20 C.F.R. pt. 404, subpt. P, app. 2 §201.00(h), which provides for individuals aged forty-five to forty-nine,

(1) who are restricted to sedentary work, (2) who are unskilled or have no transferrable skills, (3) who have no relevant past work or who can no longer perform vocationally relevant past work, and (4) who are either illiterate or unable to communicate in the English language, a finding of disability is warranted.

The ALJ made the following finding at ¶9: "The claimant has a minimal 3rd grade education, is in literacy training, and can read and write at a grade school level (20 CFR 404.1564)." No specific citations to the record are made for this finding. The vocational expert testified plaintiff would be considered illiterate (Tr. 85). Plaintiff testified he could not spell well enough to make a list

of things in an inventory room (Tr. 65). 20 C.F.R. 404.1564(b)(1) provides one is considered illiterate if he cannot read or write a simple message such as instructions or inventory lists. The Court does not see substantial evidence supporting the ALJ's finding in paragraph 9.

The government does not directly respond to plaintiff's argument on this point or contest the other three elements listed in §201.00(h) were present. Rather, it appears to take the position that the ALJ was nevertheless justified in accepting the testimony of the vocational expert as to the existence of other jobs in the national economy which plaintiff could perform. It is established the regulations afford the Secretary no opportunity to rebut a grid conclusion of disability through the testimony of a vocational expert. Williams v. Shalala, 30 F.3d 142, 1994 WL 385165 (10th Cir.1994).

Also, the Court does not agree with the final conclusion reached by the ALJ regarding claimant's disabling pain and his ability to perform other work in the national economy after September 19, 1991. It has long been recognized that a pain-producing impairment, whether psychological or physiological in origin, must be proven by objective medical evidence before an agency decision maker can find a claimant disabled by pain. (Citations omitted.) Luna v. Bowen, 834 F.2d at 163. Applying the criteria of Luna, if an appropriate nexus does exist between impairment and pain alleged, the claimant is warranted in receiving benefits based upon disabling pain. Accordingly, if an impairment

is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence. Id. at 164. Quoting Cotton v. Bowen, 799 F.2d at 1407 (9th Cir. 1986), the Court of Appeals stated,

Congress clearly meant that so long as the pain is associated with a clinically demonstrated impairment, credible pain testimony should contribute to a determination of disability.

According to the Secretary's own account, the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations. Luna at 165.

Consequently, the ALJ's conclusion that plaintiff could perform the light and sedentary jobs identified by the vocational expert is not supported by substantial evidence, and therefore, is not affirmed by this Court. The Secretary must demonstrate that sufficient jobs exist in the national economy that the claimant may perform given the level of pain he suffers and within his limitations and abilities. Given plaintiff's profile, the vocational expert testified that plaintiff's past work experience gave rise to transferable skills including auto mechanic and diesel mechanic skills, and that plaintiff could perform such jobs as light auto mechanic, light delivery driver and sedentary assembly work. When questioned by the claimant's attorney, the vocational

expert testified that claimant's ability to perform these jobs would be adversely impacted by his age and illiteracy.

Q. So, that -- those factors, the fact that he's approaching advanced age, with -- and he's functionally illiterate, those would adversely impact his ability to do --

A. To do these, yes.

Q. -- these kind of jobs.

(Tr. 86). In addition to Mr. Asher's illiteracy and age, she agreed he was extremely limited on bending and lifting, "which would eliminate the auto mechanic jobs, the only job that would use any of those transferable skills." (Tr. 84). And because of his diabetic condition, plaintiff is prohibited from operating any vehicle transporting passengers or hazardous waste substances.

(Tr. 47). Sedentary work would involve using arms, shoulders and hands, and plaintiff described a loss of sensation in his right hand⁴ so that from time to time he "drops things," which "would eliminate the sedentary work that he could mostly do." The light jobs, "he would have to be able to stand more than one hour at a time. Since he has no skills to -- any type -- desk work, it would eliminate any unskilled assembly work that he might be able to do."

(Tr. 84). When questioned by the ALJ regarding his ability to overhaul an engine, the claimant testified he "could probably do everything but lifting the crank and the heads every time." He went on to explain he would be able to use a long repeater pipe to loosen a "frozen" bolt", could ring the pistons ... tighten up a

⁴Plaintiff is right handed. (Tr. 32).

rod ... could torque a head down ... but as far as lifting it ... I don't think I could." (Tr. 66-67).

It is true vocational adjustment to sedentary work may be expected where the individual has special skills or experience relevant to sedentary work or where age and basic educational competence provide sufficient occupational mobility to adapt. Rule 201.00(h). However for individuals within the group 45-49⁵, age is a less positive factor. Accordingly, for such individuals; (1) who are restricted to sedentary work, (2) who are unskilled or have no transferable skills, (3) who have no relevant past work or who can no longer perform vocational relevant past work, and (4) who are either illiterate or unable to communicate in the English language, a finding of disabled is warranted. Rule 201.00(h).

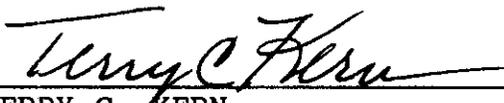
The Administrative Law Judge incorrectly found that Rule 201.18 of the grids most closely coincides with the claimant's residual functional capacity. Formal application of this rule is possible, however, only when the full range of activity for the rule is not limited by the combined effects of the claimant's nonexertional impairments. Channel v. Heckler, 747 F.2d 577, 580 (10th Cir. 1984). Absent a specific finding, supported by substantial evidence, that despite his nonexertional impairments, plaintiff could perform a full range of sedentary work on a sustained basis, it was improper for the ALJ conclusively to apply the grids in determining that plaintiff was not disabled. Channel

⁵Plaintiff was born July 5, 1942, being 52 years of age at the present time.

at 582 n.3. In view of this disposition, the Court need not address plaintiff's argument that the Secretary should have ordered a consultative examination pursuant to 20 C.F.R. §1417(a).

In summary, the ALJ made an erroneous finding of plaintiff's literacy, failed to give sufficient weight to plaintiff's disabling pain and inadequately evaluated the effect of the pain on plaintiff's ability to do other work. Because the ALJ failed to apply the correct legal standards and his opinion is not supported by substantial evidence in the record, the Court must REVERSE the decision of the ALJ, and REMAND the case to the Secretary of Health and Human Services with directions to grant benefits.

It is so ordered this 2 day of November, 1994.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

run concurrently. The Oklahoma Court of Criminal Appeals affirmed the revocation of the suspended sentence in 1983. (Doc. #6, ex. B.)

In the meanwhile, on June 30, 1982, Petitioner was convicted by a jury of the Burglary and Rape charges alleged in Case No. CRF-81-3714, and was sentenced to twenty years and thirty-five years imprisonment respectively. The sentences were to run consecutively. Petitioner's conviction and sentence were affirmed on direct appeal. (Doc. #6, ex. D.)

In December 1992, Petitioner filed a second application for post-conviction relief as to his 1979 and 1981 convictions.¹ He argued (1) that his 1979 convictions were unconstitutional in that he was tried as an adult when females of the same age were tried as juveniles, and (2) that his trial counsel failed to advise him of his Sixth and Fourteenth Amendment rights. As to his 1981 conviction, he alleged (1) that the state used improper impeachment evidence, (2) his sentence was improperly enhanced because the two prior convictions were void, and (3) counsel provided ineffective assistance when he did not discover that his 1979 prior convictions were infirm.

The district court denied Petitioner's application with regard to the 1979 convictions on the ground that Petitioner had waived all his claims when he failed to file a direct appeal, Mains v. State, 597 P.2d 774 (Okla. Crim. 1979). As to CRF-81-3714, the

¹Apparently, Petitioner had filed a first application for post-conviction relief in 1990.

Court found that Petitioner was barred from raising issues that could have been raised on direct appeal. The Court also denied on the merits Petitioner's claims of ineffective assistance of counsel. (Doc. #6, ex. F.)

In the present application, Petitioner contends that his 1979 trial counsel provided ineffective assistance when he failed to inform him of his right to appeal his 1979 convictions and that his 1981 trial counsel provided ineffective assistance when he failed to discover that his 1979 convictions were constitutionally defective. Respondent argues that Petitioner was not denied the effective assistance of counsel with respect to his 1979 convictions because he was advised of his right to appeal his 1979 guilty pleas. In the alternative, Respondent argues that trial counsel does not have a duty in every case to inform a defendant of his right to appeal following a plea of guilty. As to the 1981 conviction, Respondent argues that Petitioner is procedurally barred from raising ineffective assistance of trial counsel.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review

of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

Next the Court turns to Petitioner's substantive habeas claims. the Court will address first Petitioner's claim with regard to his 1979 guilty pleas and second his claims regarding his 1981 convictions.

A. 1979 Guilty Pleas

With regard to his 1979 guilty pleas, Petitioner has alleged ineffective assistance of trial counsel in failing to inform him of his right to appeal.

To prove ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner

established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, ___ F.3d ___, Nos. 93-1287 & 93-1626, 1994 WL 247898 at *2 (7th Cir. Jun. 10, 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992). Under Strickland, this Court must first determine whether counsel had a duty to advise Petitioner of his right to appeal. If there is no such duty, the failure to advise cannot be ineffective assistance.

Although a defendant has a right to appeal a judgment entered on a guilty plea, failure to appeal an appealable judgment does not amount to ineffective assistance of counsel per se. See Oliver v. United States, 961 F.2d 1339, 1342 (7th Cir.), cert. denied, 113 S. Ct. 469 (1992). "An attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Castellanos,

1994 WL 247898 at *2; Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188.

Laycock remains good law in spite of the more recent holding in Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991), that the Sixth Amendment right to counsel continues to apply after a sentence is imposed and while the Defendant contemplates whether to file an appeal as of right.² Although it is unclear whether the defendant in Baker was convicted following a trial as opposed to a guilty plea, the Tenth Circuit continues to adhere to the rule that a defendant who pleads guilty does not have a right to notice of his right to appeal in every case. See Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992). But see United States v. Youngblood, 14 F.3d 38, 39-40 (10th Cir. 1994) (analyzing counsel's conduct under the Baker analysis although the defendant had pleaded guilty, but noting that the defendant had never affirmatively indicated any desire to appeal to his counsel or the district

²In Baker, the Tenth Circuit stated that counsel must fully explain the advantages and disadvantages of an appeal, provide the defendant with advice about the merits of an appeal and its probability of success, and inquire whether a defendant wishes to appeal the conviction. Id. at 1499. When the defendant requests an appeal--even one counsel believes to be frivolous--counsel must perfect the defendant's appeal so that the defendant may proceed pro se. Id. at 1499 n.3. See also Jones v. Cowley, ___ F.3d ___, No. 93-6277, slip op. at 5-11 (10th Cir. Jun. 30, 1994) (not yet released in the permanent law).

court); see also Randall v. State, 861 P.2d 314 (Okla. Crim. App. 1993) (holding that hearing on application to withdraw guilty plea is "critical stage" which invokes defendant's constitutional right to counsel).

After carefully reviewing the record in this case, the Court concludes that Petitioner's counsel did not provide ineffective assistance even if he did not advise Petitioner of the limited right to appeal his guilty plea. See Marshall v. Cowley, 19 F.3d 1443, 1994 WL 56940 at *1 (10th Cir. 1994) (unpublished opinion) (counsel's failure personally to notify a defendant of his limited right to appeal a guilty plea does not constitute ineffective assistance of counsel). Petitioner has neither alleged a constitutional claim of error which could result in setting aside his guilty plea or that he asked his counsel to appeal his guilty plea. The Court also notes that in the order denying Petitioner's second application for post-conviction relief, the Tulsa County District Court noted that it had fully advised the Petitioner of his right to appeal, but that Petitioner failed to do so.

Because Petitioner's counsel rendered "reasonably effective assistance," Petitioner fails the first prong of the constitutional ineffectiveness inquiry. Accordingly, the Court must deny Petitioner's first ground for relief.

B. 1981 Conviction

In his second ground for relief, Petitioner argues that his

trial counsel provided ineffective assistance when he failed to discover that his prior convictions were constitutionally defective. Respondent argues that Petitioner is procedurally barred from raising this issue because he failed to raise it on direct appeal.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a

petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner does not dispute that he defaulted his ineffective-assistance-of-trial-counsel claim in state court pursuant to an independent and adequate state procedural rule. He argues, however, that ineffective assistance of appellate counsel in failing to raise that issue on direct appeal is sufficient cause to excuse his default.

Although ineffective assistance of appellate counsel may establish cause for procedural default, Murray v. Carrier, 477 U.S. 478, 486-487 (1986), in order to prove ineffective assistance, Petitioner must show that counsel's representation fell "outside the wide range of professionally competent assistance," Strickland v. Washington, 466 U.S. 668, 690 (1984), and that it resulted in an outcome that is unreliable or fundamentally unfair. See Lockhart v. Fretwell, 113 S.Ct. 838, 844 (1993). A successful ineffective assistance claim must therefore include a showing that if counsel had raised the claim in question on direct appeal, Petitioner would have had a reasonable probability of obtaining relief to which he is entitled under law. See id. at 842-43.

Petitioner falls far short of meeting this standard. He does not identify any external impediment which prevented his appellate counsel from raising this claim on appeal, and relies instead on the mere fact that counsel failed to raise that issue on appeal. Therefore, the Court concludes that Petitioner has not shown cause

to excuse his procedural default.

As Petitioner makes no claim of actual innocence, the Court need not address the alternative of the fundamental miscarriage of justice in lieu of cause and prejudice. See Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992).

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. **ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 2nd day of Nov, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV - 2 1994

WILLIAM R. JOHNSON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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CIVIL NO. 94-C-266-BU

FILED

NOV - 1 1994

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

STIPULATION OF DISMISSAL

The plaintiff, William R. Johnson, by his attorney of record, Mark S. Thetford, and the defendant, United States of America, acting on behalf of the United States Postal Service, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 1st day of November, 1994.

Phil Pinnell

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(918) 749-0749

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

FILED

NOV - 1 1994

ROBERT L. WIRTZ, JR., et al.,)
)
Plaintiff,)
)
vs.)
)
RON CHAMPION, et al.,)
)
Defendants.)

No. 93-C-970-E
(Base File)

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

94-C-444-E ✓

ORDER

On September 19, 1994, the Court granted Defendants' motion to dismiss the above consolidated action and gave Plaintiffs an additional twenty days to file a motion for leave to amend and a proposed amended complaint, curing the defects noted in the order. The Court further stated that failure to file a motion to amend would result in the dismissal of their respective action.

Plaintiffs Donnie Joe Frye and Charles A. Frazier have failed to comply with the September 19, 1994 order. **ACCORDINGLY, IT IS HEREBY ORDERED that** the claims of Donnie Joe Frye and Charles A. Frazier are **dismissed** from this consolidated action, and that the Clerk shall **close** case nos. 93-C-1052-E and 94-C-444-E.

SO ORDERED THIS 1st day of November, 1994.

James O. Ellison

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 11-2-94

F I L E D

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

NOV 2 1994

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

SHERI FORD-DOOLITTLE,)
)
Plaintiff,)
)
vs.)
)
SOUTHWEST SECURITIES, et al.,)
)
Defendants.)

Case No. 94-C-234-BU

ENTERED ON DOCKET

NOV 02 1994

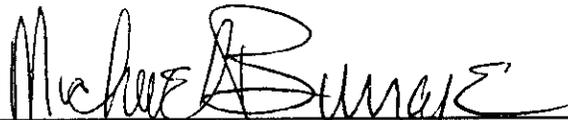
DATE

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 2nd day of November, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED
NOV 2 1994

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

WAYNE H. CREASY, et al.,)
)
 Plaintiffs,)
 vs.)
)
 ALBION NORMAN, et al.,)
)
 Defendants.)

Case No. 93-C-773-BU

ENTERED ON DOCKET
DATE NOV 02 1994

ORDER

This matter comes before the Court upon the Report and Recommendation issued by United States Magistrate Judge Jeffrey S. Wolfe on October 12, 1994. In the Report and Recommendation, Magistrate Judge Wolfe advised the parties of their right to object to the Report and Recommendation within ten (10) days. The court file reflects that none of the parties has filed an objection to Magistrate Judge Wolfe's Report and Recommendation. In accordance with 28 U.S.C. § 636(b), the Court has conducted a de novo review of this matter. Having done so, the Court agrees with the recommendation of Magistrate Judge Wolfe and adopts Magistrate Judge Wolfe's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation of Magistrate Judge Wolfe (Docket No. 31). The Court DIRECTS Plaintiffs to submit a judgment for the Court's approval on or before Wednesday, November 16, 1994. The Court declares MOOT Plaintiffs' Application for Civil Warrant of Arrest (Docket No. 30).

ENTERED this 2nd day of ^{November} ~~October~~, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 2 1994

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

HARRY T. HANIG, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 ALEXANDER & ALEXANDER BENEFITS)
 SERVICES, INC., a New Jersey)
 corporation,)
)
 Defendant.)

Case No. 94-C-137BU

ENTERED ON DOCKET

DATE NOV 02 1994

ORDER DISMISSING WITH PREJUDICE ALL OF PARTIES' CLAIMS

There comes before the Court the stipulation of Plaintiff, Harry T. Hanig, and Defendant, Alexander & Alexander Benefits Services, Inc., to dismiss with prejudice all of Plaintiff's claims against Defendant, and all of Defendant's counterclaims against Plaintiff. Also before the Court is the parties' stipulation that the terms of this dismissal with prejudice be kept strictly confidential.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's claims against Defendant are dismissed with prejudice;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's counterclaims against Plaintiff are dismissed with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the terms of this dismissal with prejudice shall be kept strictly confidential by Plaintiff and Defendant. The parties are ordered not to discuss or otherwise disclose the terms of this lawsuit's resolution, except to say that "the lawsuit was resolved", and except as required for filing federal and/or state tax returns or responding to an order of a court or administrative agency of competent jurisdiction,

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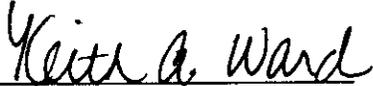
provided that prior to responding to said order the disclosing party shall give the other party notice of the order and allow that party 72 hours within which to seek to quash the disclosure order.

Dated: November 2, 1994

SO ORDERED.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO SUBSTANCE
AND FORM BY:


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Brent L. Mills, OBA #13464
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ATTORNEYS FOR DEFENDANT
ALEXANDER & ALEXANDER
BENEFITS SERVICES, INC.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 2 1994

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

WILLIAM R. JOHNSON,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

CIVIL NO. 94-C-266-BU

ENTERED ON DOCKET
DATE NOV 02 1994

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, William R. Johnson, against the United States of America are hereby dismissed with prejudice.

Dated this 2 day of Nov, 1994.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

Phil Pinnell

PHIL PINNELL, OBA # 7169
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

2
FILED

NOV - 1 1994

ROBERT L. WIRTZ, JR., et al.,)
)
Plaintiff,)
)
vs.)
)
RON CHAMPION, et al.,)
)
Defendants.)

No. 93-C-970-E
(Base File)

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

93-C-1052-E

ORDER

On September 19, 1994, the Court granted Defendants' motion to dismiss the above consolidated action and gave Plaintiffs an additional twenty days to file a motion for leave to amend and a proposed amended complaint, curing the defects noted in the order. The Court further stated that failure to file a motion to amend would result in the dismissal of their respective action.

Plaintiffs Donnie Joe Frye and Charles A. Frazier have failed to comply with the September 19, 1994 order. **ACCORDINGLY, IT IS HEREBY ORDERED that** the claims of Donnie Joe Frye and Charles A. Frazier are **dismissed** from this consolidated action, and that the Clerk shall **close** case nos. 93-C-1052-E and 94-C-444-E.

SO ORDERED THIS 12th day of November, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
ENTERED ON DOCKET
DATE 11-2-94

12

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

FILED

NOV 2 1994

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

THOMAS EAVES,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 93-C-264-B

ENTERED ON DOCKET
NOV 02 1994
DATE

ORDER

Petitioner's pro-se application for a writ of habeas corpus under 28 U.S.C. § 2254 is now at issue before the Court. The Respondent has filed a Rule 5 response. Petitioner has also filed a motion for evidentiary hearing and for immediate adjudication. As more fully set out below, the Court concludes that Petitioner's motion and application should be denied.

I. BACKGROUND

In the present petition for a writ of habeas corpus, Petitioner, an Osage Indian, challenges his conviction for Murder in the Second Degree in the District Court of Osage County, Case No. CRF-85-65. He argues, as he did at the state trial and on direct criminal appeal, that the State of Oklahoma lacked criminal jurisdiction to prosecute him for the murder of his father, an Indian, because the crime occurred in an Indian Housing project, a dependent Indian community under 18 U.S.C. § 1151.

At trial, the parties stipulated that the land in question was originally tribal land allotted to an Osage Indian. The parcel was

b1

subsequently sold to a non-Indian who in turn sold it to the Osage Indian Housing Authority (Housing Authority), a state agency created pursuant to Okla. Stat. Ann. tit. 63, § 1053 (West 1984).¹ The parties also stipulated as to the substance of a Cooperation Agreement between the Housing Authority and the City of Pawhuska as follows:

[I]nitial funding for the housing project came from the federal government, Department of Housing and Urban Development, (HUD); title to the land is held by the Housing Authority; the city of Pawhuska is to provide all public services including police and fire protection, water, sanitation, sewer, electricity and road maintenance; and an annual payment in lieu of taxes is to be paid by the Housing Authority to the city of Pawhuska.

The record also shows that ninety percent of the residents of the

¹Section 1057 reads as follows:

There is hereby created, with respected to each Indian tribe, band, or nation in the state, a public body corporate and politic, to function in the operating areas of such Indian tribe, band, or nation to be known as the "housing authority" of said Indian tribe, band, or nation, which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county authorities created pursuant to this act: Provided that said Indian housing authority shall not transact any business nor exercise its powers hereunder until or unless the governing council of said tribe, band, or nation, as the case may be, by proper resolution, declares that there is a need for an authority to function for said tribe, band, or nation.

Except as otherwise provided in this act, all the provisions of law applicable to housing authorities created for cities and counties and the commissioners of such authorities and the commissioners thereof, unless a different meaning clearly appears from the context. The Chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointing and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority.

housing project were Indian, the children attended Pawhuska schools with the assistance of federal funds, Indians had first priority for housing, and the Indian Health Service had installed the water and sewer lines.

The trial court overruled Petitioner's motion to dismiss his murder charges for lack of jurisdiction and concluded that the housing project at issue was not a "dependent Indian community" because it was owned by the Osage Tribal Housing Authority, a state agency subject to state jurisdiction. (Tr. of Dec. 20, 1985 hearing at 14-15.) A majority of the Oklahoma Court of Criminal Appeals affirmed, relying on the same key issue. The majority of the Court also noted that:

[T]he State of Oklahoma and the City of Pawhuska have considered the project to be under their jurisdiction since its origin. The state and city have provided all essential services. The federal government has merely subsidized selective programs. The Tribal Council has never formed a court or enacted a code or ordinance to provide for criminal prosecution. The federal prosecutor has never attempted to exercise jurisdiction, believing the housing authority to be under state jurisdiction.

The Court further concluded that while each of the mentioned factors alone "may not be sufficient to defeat a finding of a dependent Indian community," that the evidence as a whole supported a conclusion that the project in question was not a dependent Indian community under 18 U.S.C. § 1151. Eaves v. State, 795 P.2d 1060, 1063 (Okla. Crim. App. 1990).

In the published order denying rehearing, the majority of the Oklahoma Court of Criminal Appeals refused "to retreat from [its] reliance on 63 O.S. 1981, § 1057, which created the housing

authority as a state agency" because "[b]y acceding to the creation of a tribal housing authority as a state agency, the tribe has voluntarily relinquished its autonomy." Eaves v. State, 800 P.2d 251, 252 (Okla. Crim. App. 1990). The Court further noted that the fact "that title to the land is in a state agency should be fatal to any holding that the land in question is Indian Country." Id.

In the present petition, Petitioner argues that federal criminal jurisdiction over a dependent Indian community, such as the one at issue in this case, should not be defeated by the sole fact that the Housing Authority originated as a result of State law. Respondent contends that the state court properly exercised jurisdiction because the Housing Authority was state created and because the federal prosecutor declined to exercise jurisdiction, believing the project to be subject to state authority.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204

(8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

Next the Court turns to the sole issue in this case, whether the housing project owned by the Osage Tribal Housing Authority was a dependent Indian community under 28 U.S.C. § 1151(b) and therefore outside the jurisdiction of the State court.² In Blatchford v. Sullivan, 904 F.2d 542, 544-548 (10th Cir. 1990), the Tenth Circuit Court of Appeals summarized a series of federal cases addressing the standards guiding the determination of dependent Indian community. The Court concluded that the factors set out in United States v. Martine, 442 F.2d 1022 (10th Cir. 1971), and later expanded in United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), were adequate in determining whether a particular location is a dependent Indian community. In Martine, 442 F.2d at 1023, the Tenth Circuit analyzed "the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes, and to the federal government, and the established practice of government agencies toward the area." In South Dakota, 665 F.2d

²Section 1151 defines Indian country to include: (1) land within the limits of any Indian reservation, (2) dependent Indian communities, and (3) Indian allotments, the Indian titles to which have not been extinguished.

at 839, the Eighth Circuit Court applied the following more detailed analysis:

(1) [W]hether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting the territory"; (2) "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies to ward the area; (3) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

Id.³

Under either analysis, the phrase "dependent Indian community"

³In South Dakota, the case most analogous to the case at hand, the Eighth Circuit Court held that a housing project located in the City of Sisseton, South Dakota, was a dependent Indian community. The Eighth Circuit noted that the United States held the land in trust for the Sisseton-Wahpeton Sioux Tribe by warranty deed, and that the housing project originated under a Tribal Ordinance and was administered by the Tribe's Housing Authority who leased the land directly from the Tribe. The Tribe was involved in the operation of the housing project through the Tribal Council who was responsible for appointing the members of the Board of Commissioners of the Housing Authority, for removing them for cause, and for reviewing periodic reports from the Board. No new housing could be planned without prior consultation with the Tribal government. Moreover, the Tribe maintained several social services for the project. South Dakota, 665 F.2d 837.

The federal government also maintained close ties with the housing project by providing the initial financing for building the project, by administering some of the social services, providing water and sewage facilities, a garbage truck, and road work through the Bureau of Indian Affairs and Indian Health Service (IHS). Moreover the federal government had reached agreement with the state government to obtain basic governmental service to maintain the project. The City of Sisseton provided snow removal, street and sidewalk repair, stop signs for the project, and maintained the only road into the project and the sewer and water lines which are attached to the City's services. Lastly, the children in the project attend the Sisseton schools which had received federal funds under the Johnson-O'Malley Act, to assist the education of the large number of Indian students in the school system. Id.

is "intended to afford federal criminal jurisdiction over [offenses] committed by Indians in communities which are both 'Indian' in character and federally dependent." United States v. Cook, 922 F.2d 1026, 1031 (2nd Cir. 1991) (cited case omitted). "In general terms, the question to be answered is whether the land was 'validly set apart for the use of the Indians, as such, under the superintendence of the government.'" Housing Authority v. Harjo, 790 P.2d 1098, 1101 (Okla. 1990) (quoting United States v. Pelican, 232 U.S. 442, 449 (1914)). The test is a flexible one, not tied to any single factor. Harjo, 790 P.2d at 1101.

As noted in the background section of this order, the relevant facts surrounding the land status dispute in this case are essentially uncontested. The land at issue is owned by the Osage Indian Housing Authority, a state agency; the purpose of the community is to provide low cost housing primarily for Indians; the Federal Government provided the initial funding for purchasing the land, building the houses, and setting up the utilities; and the Federal Government has entered into agreements with the City of Pawhuska to annex the project into the city and provide sewer, sanitation, water, electricity, road maintenance, fire protection, and police protection to the residents. It is also undisputed that federal funds under the Johnson O'Malley Act are provided so Indian children can attend public schools in Pawhuska.

The dispositive issue in this case is that the title of the land is owned by a state created agency, the Osage Indian Housing Authority, which is subject to state civil and criminal

jurisdiction by its very creation. The Housing Authority at issue in this case, unlike the one in South Dakota, originated by virtue of State law and not under a Tribal Ordinance. As a result all powers and duties derive through State law and not from the Tribe. Any involvement of the Tribe in the Osage Housing Authority is provided by a contract between the Housing Authority and the Tribe; the Tribal Council has never formed a court or enacted a code or ordinance to provide for criminal prosecution in the project. It is also dispositive that the State of Oklahoma and the City of Pawhuska have always maintained that the project was under their jurisdiction and that neither the Osage Tribe nor the federal government has ever attempted to exercise jurisdiction over the project.

Accordingly, the Court concludes that the crime of which Petitioner has been convicted did not occur within a dependent Indian community and, thus, the Federal Major Crimes Act does not apply. Petitioner's application for a writ of habeas corpus must, therefore, be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for evidentiary hearing and immediate adjudication (doc. #29) is **denied**, and
- (2) The petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 2nd day of Nov., 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

its holding on Goodwin v. State of Oklahoma, 923 F.2d 156 (10th Cir. 1991), which states, "if the highest state court has recently addressed the issue raised in the petition and resolved it adversely to the petitioner," exhaustion is not required. Id. at 157. The issue in Goodwin was the constitutionality of Oklahoma's Cap law. Goodwin alleged that his equal protection rights were violated because the Cap law prohibits the awarding of time credits to violent offenders, those classified as higher than "medium security" and repeat offenders. Id. at 157. The Court felt that Gonzales's petition raised the same issues as did Goodwin's petition, so exhaustion was unnecessary.

Upon further consideration, however, the Court believes Gonzales is raising an issue that has not yet been addressed by the Oklahoma courts. Construing his petition liberally, he apparently alleges that he was treated differently than other repeat offenders due to prosecutorial discretion; some prosecutors will charge a repeat offender under Okla.Stat.tit. 21 § 51, while others choose not to do so. This discretion, Gonzales states, violates his right of equal protection under the law because all repeat offenders are not treated in the same manner. Unlike some repeat offenders, Gonzales states, he was charged under § 51. This prosecutorial discretion allows the state to subvert the legislative intent behind the Cap law to not allow repeat offenders to acquire time credits, Gonzales alleges.

The Court cannot find an instance in which the state has addressed this issue. Gonzales admits he has not attempted to seek

state court relief. Therefore, Gonzales's Petition for a Writ of Habeas Corpus is hereby DENIED because he has failed to exhaust his state remedies.

IT IS SO ORDERED THIS 2nd DAY OF NOVEMBER, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

NOV 2 1994

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

ZELA HALL,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

Case No. 93-C-617-B

ENTERED IN DOCKET

DATE NOV 02 1994

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.*

Zela Hall (Plaintiff or claimant), a 29 year old female, filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on November 18, 1991, with a protective filing date of October 2, 1991. Claimant alleges she is totally disabled because of lupus, rheumatoid arthritis and depression. Plaintiff's application was denied initially, and after an administrative hearing held on November 5, 1992, the Administrative Law Judge (ALJ) issued an unfavorable decision on February 6, 1993. The Plaintiff's request for review, filed on February 17, 1993, was denied by the Appeals Council on May 5, 1993.

The Plaintiff filed this action on July 6, 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. 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).

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

The 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 above approach set forth above and concluded:

- 1) That claimant has not engaged in any substantial gainful activity since October 16, 1991.
- 2) That the claimant is determined to have a vocationally severe impairment by Social Security definition because her impairments of lupus, rheumatoid arthritis and depression are expected to interfere more than minimally with her work-related activities.
- 3) That the claimant "does not have an impairment or combination of impairments which meets or equals any of the listed impairments in Appendix 1" to Subpart P of Regulations No.4.
- 4) That the claimant has the functional capacity to perform claimant's past relevant work as an accounting clerk and a data clerk and the Claimant is not therefore disabled under the Social Security Act.

The Secretary, through the ALJ and the Appeals Council, determined claimant is not disabled within the meaning of the

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

Plaintiff primarily complains of lupus which her treating physician, Dr. Robert C. Harris, D.O., diagnosed as systemic lupus erythematosus. This diagnosis is contrary to the bulk of medical evidence, specifically the opinions of Dr. Ellen T. Zanetakis, M.D. and Dr. Richard G. Cooper, D.O., who diagnosed claimant's disease as discoid lupus, a less onerous disease. A treating physician's opinion is entitled to great weight but can be disregarded if brief, conclusory, or against the weight of the evidence, all three being somewhat present herein. Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1986); Bernal v. Heckler, 851 F.2d 297 (10th Cir. 1989). The ALJ concluded that Dr. Harris' treatment notes did not contain sufficient objective findings. Further, the ALJ concluded that Dr. Harris' report consisted largely of claimant's subjective symptoms and that his opinion that claimant was totally disabled from all work is not consistent with the bulk of medical evidence.

Dr. Cooper noted that claimant complained of low back pain and skin lesions on the forearms, the face, the back and about the ankles and feet. Dr. Cooper stated these lesions were flat and "not

very angry looking" and noted that claimant reported taking Plaquenil, Dermatex, Pamelor, Prednisone, Prozac, Chlorzoxazone and Buspar as well as numerous over-the-counter pain relief remedies for her headaches. Dr. Cooper reported claimant's stated a history of significant alopecia which was successfully treated with steroid injections but saw no indication of significant alopecia at the time of the examination, February 12, 1992. Dr. Cooper's report contains no conclusion that claimant's medical afflictions render her disabled. Dr. Zanetakis' report also fails to conclude that claimant's medical problems cause her to be disabled from a gainful employment standpoint.

Claimant was seen consultatively by Dr. James R. Allen, M.D., who concluded that claimant could not be diagnosed as having any clinical psychiatric condition. Dr. Allen noted that claimant was somewhat socially isolated, had gained considerable weight, reported sleeping a lot and for long periods of time and tended to be withdrawn. Dr. Allen concluded that "[A]s far as mental problems are concerned, Ms. Hall is able to work."

Plaintiff alleges that she suffers from pain and limitation as the result of pain. The ALJ found that Plaintiff's pain was not disabling within the meaning of the Social Security Act. 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. Substantial evidence supports the ALJ's conclusion that Plaintiff's allegations of pain were not credible to the extent that they precluded returning to her past work. The ALJ concluded that claimant can perform sedentary exertional activity, and that her allegations of pain and other nonexertional impairments "are not found to have any further impact on (her) residual functional capacity." The ALJ concluded that claimant is able to perform the full range of sedentary exertional activity despite her complaints of pain and her other nonexertional impairments.

The Plaintiff has the burden to show that she is unable to return to the prior work she performed, a burden she did not carry. Bernal, at 299. Further, the Plaintiff has the burden of proving her disability that prevents her from engaging in any gainful work activity if she should establish that she could not return to her past relevant work. Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984). Here, however, the claimant has failed to show that she cannot engage in her prior work activity.

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that the Plaintiff is able to perform her prior work.

In her Complaint Plaintiff asks the Court to reverse the Secretary's decision and grant her disability benefits.

Alternatively, Plaintiff requests that the Court remand the matter back to the Secretary to consider new and additional medical evidence.

The Secretary argues, and the Court agrees, that much of the proffered new evidence is not new at all but merely a restatement of Plaintiff's medical deficiencies. For example, Dr. Harris' letter of August 4, 1993, is exactly the same letter, word for word, as his letter of August 4, 1992. Further, Dr. E. Macedo's report of December 22, 1992, appears to be essentially an ankle sprain report recommending that "[I]version stress view should be obtained to rule out the possibility of lateral collateral ligament tear." There appears to be no supporting evidence of lateral collateral ligament tear in Plaintiff's remand papers.

The Court concludes that Plaintiff's alternative Motion to Remand is not well supported.

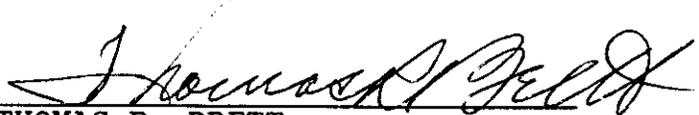
SUMMARY

The ALJ considered all the evidence and concluded that Plaintiff could perform her past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Harqis 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). 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 Court concludes there is substantial evidence to support the ALJ's finding that Plaintiff is able to perform her past relevant work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 2nd DAY OF November, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
NOV 01 1994
DATE _____

HYPERVISION, INC.,)
)
Plaintiff,)
)
vs.)
)
DAVID NOSS and MYRIAD)
TECHNOLOGIES, INC.)
)
Defendants.)
)
MYRIAD TECHNOLOGIES, INC.)
)
Third Party Plaintiff,)
)
vs.)
)
JERRY BULLARD and JIM)
NOEL,)
)
Third Party Defendant)

Case No. 94-C-737-K ✓

FILED
NOV 01 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Order

Now before this Court is the Objection to the Report and Recommendation written by the United States Magistrate Judge ("Magistrate") granting Defendant Myriad Technologies, Inc. ("Myriad") injunctive relief to prevent Plaintiff Hypervision, Inc. ("Hypervision") from infringing Myriad's patents and selling its trade secrets.¹ Hypervision, along with Third Party Defendants,

¹Originally, the Magistrate was handling two applications for preliminary injunctive relief. On July 29, 1994, Plaintiff filed an application requesting that the Defendants be enjoined from representing to others that Hypervision was illegally infringing its patent. On August 12, 1994, Defendant Myriad Technologies, Inc. filed its application for a preliminary injunction. As to Plaintiff's application, the parties reached an agreement, and further action has been held in abeyance. The Magistrate then proceeded to hear three days of argument concerning Defendant's application for a preliminary injunction. The Magistrate's ruling on Defendant's application is the central subject of this Order.

35

Jerry Bullard ("Bullard") and Jim Noel, ask this Court to reject the Report and Recommendation of the Magistrate Judge.

Subsequent to the Report and Recommendation of the Magistrate, Plaintiff filed two motions. First, Plaintiff filed a Motion to Reconsider Decision of the United States Judge pursuant to Rule 72.1(B) of the Local Civil Rules of the United States District Court for the Northern District of Oklahoma. In this instance, such a motion is improper. Rule 72.1(B) states that a motion to reconsider may be addressed to the Magistrate Judge "when new law or facts, not previously called to the attention of the Magistrate Judge, should be fairly considered in making a decision." Plaintiff presents no new law or facts, and therefore this Court denies any motion to reconsider as inappropriate. Nevertheless, Plaintiff also filed an objection pursuant to Rule 72(b) of the Federal Rules of Civil Procedure. According to that Rule, this Court is required to review de novo those portions of the Magistrate Judge's Report to which the Plaintiff has specifically objected. Sperryn & Company, Ltd v. Engineered Controls Int'l, Inc., 1991 WL 30113 (N.D. Ill 1991); Watson v. Hardiman, 1990 WL 201358 (N.D. Ill. 1990). Under Federal Rule 72(b), this Court now reviews the Magistrate's Report and Recommendation.

Factual Background

The basic facts in the underlying dispute are not in question. Instead, Hypervision disagrees with the Magistrate's interpretation of patent law as applied to the facts of the case. The 33-page

Report and Recommendation (Docket #17) provides an exhaustive factual chronology of this dispute and can be referred to in conjunction with the following discussion of the dispute's background.

At issue is Myriad's allegation that Jerry Bullard, Jim Noel and Hypervision have infringed the patent exclusively held by Myriad and misappropriated trade secrets. The controversy surrounds a system developed in 1991 by Carl G. van Schoyck ("van Schoyck") that allows transmission of eyeglass lens prescriptions from a doctor's office to an optical lab where the lens can be "ground" by an optical machine.

Van Schoyck applied for and was granted a United States Patent on October 26, 1993, Patent Number 5,257,198 (the '198 Patent). Claim (1.) ("Claim 1") of the Patent is an independent claim and constitutes the element of the patent which Defendant Myriad asserts has been and is being infringed by Plaintiff Hypervision.

Claim 1 recites:

1. A method by which an eye care professional can convey edger information to a remotely located optician in which the eye care professional has eyeglass frames selected by or for the user, the eyeglass frames having demonstration lenses therein; the optician having a numerically controlled edger capable of shaping and beveling lenses in response to digital information signals. . . .

Claim 1 continues by listing seven steps comprising the patented process. The first five steps are carried out at the doctor's (or eye care professional's) office. They include:

a) marking a horizontal axis on said demonstration lenses with an ophthalmoscopic (sic) while said demonstration lenses are in said eyeglass frames;

- b) removing each said demonstration lens having said horizontal axis marked thereon from said eyeglass frames;
- c) placing said demonstration lenses on a lens pattern scale having a horizontal axis line thereon and aligning [it] on each demonstration lens with the lens pattern scale horizontal line;
- d) tracing an outline of each said demonstration lens onto said lens pattern scale.
- e) placing said lens pattern scale having said demonstration lenses outline marked thereon into an optical scanning digital data transmitter wherein the patterns of the lenses are converted to digital information signals.

The next two steps involve transmission to an optician where the lenses are to be made. These steps include:

- f) transmitting said digital information signals by a data transmission carrier to a computer at the location of said optician, the data being received and stored in said computer; and
- g) processing [the signals] to provide operating instruction signals for use in said numerically controlled edger to cause said edger to shape and bevel eyeglasses to clone said demonstration lenses, the shaped and beveled lenses then being ready for delivery to said eye care professional for insertion into said eyeglass frames.

The benefit of this process chiefly is that it saves the eye care professional from having to ship the selected frames to the optical laboratory. Instead, the lens shape is traced onto a sheet, which is "faxed" to a computer at the optical laboratory. While the frames stay in the doctor's office, the faxed information is transformed by a software package that enables the edging machine to create lenses that match the originally traced and faxed lens shapes. The lenses are then mailed back to the doctor or eye care professional who installs them in the frames. Myriad markets this

process under the trade name Instavision.

In 1991, van Schoyck, the inventor and patent holder, hired Jerry Bullard as a "consultant" to assist in developing the data transmission system. Bullard signed a confidentiality agreement providing that he would maintain in confidence all information pertaining to the system van Schoyck was developing. Bullard also recruited Defendant David Noss, a Tulsa attorney, to invest in the system and to form Myriad as the exclusive licensee of it. On January 7, 1993, Bullard signed, as President of Myriad, a License and Distributorship Agreement ("the Agreement") whereby van Schoyck granted Defendant Myriad the exclusive licensing rights to the Instavision system.

On April 27, 1993, Noss terminated Bullard as President and director of the corporation in light of alleged misrepresentations made by Bullard to Noss about Bullard's employment status with American Airlines. In a letter agreement on April 29, 1993, Bullard agreed that rights in techniques develop by Bullard for Myriad remained the exclusive property of Myriad.

Notwithstanding these agreements, Bullard proceeded to develop a system he called Hypervision. Like Instavision, Hypervision is a system designed to transmit an image of lens shape from a doctor's office to an optical lab so that the lenses may be made without sending the eyeglass frames. On August 24, 1993, Bullard demonstrated Hypervision to American Airlines. In demonstration materials, he described the Hypervision process. Hypervision would:

- *Trace demo lens on trace sheet or trace inside of frame
- * Measure lens circumference
- *Add RX info to trace sheet
- *Fax trace sheet to Lab
- *Fax is received at Lab
- *Trace of lens is processed in PC
- *Lens image sent to edger
- *Lens is cut and finished
- *Lens is mailed to doctor
- *The frame is not involved!

Report and Recommendation at p.6; Defendant's "Exhibit M-12". After Bullard's efforts to market Hypervision to American Airlines proved unsuccessful, Bullard continued to market Hypervision to various optical laboratories. All of Hypervision's present customers had been customers of Myriad. (Report and Recommendation at p.7).

After a three-day hearing, the Magistrate issued a preliminary injunction restraining Bullard, Jim Noel, and Hypervision, their employees, assigns, agents, and representatives from any activity infringing the '198 patent. Specifically, the Report and Recommendation prohibited them from marketing Hypervision or the process under any other name. Moreover, the court consolidated the hearing of the application with trial of the action on the merits pursuant to Fed. Rule Civ. P. 65(a)(2) and determined that Plaintiff was liable for patent infringement and misappropriation of trade secrets.

Discussion of Law

Plaintiff Hypervision objects to the Magistrate's Report and Recommendation, saying that it misconstrues fundamental patent law. Plaintiff argues that the Magistrate improperly relied on its

interpretation of the "meaning" or "essence" of the patent and ignored the public's right to rely on limitations set forth therein.

In determining that Hypervision infringed, the Magistrate relied heavily on the doctrine of equivalents. The doctrine of equivalents is a well-established method for demonstrating patent infringement. The doctrine states:

An accused device may infringe a claim under the doctrine of equivalents if it performs substantially the same overall function or work, in substantially the same way, to produce substantially the same overall result as the claimed invention.

Dolly v. Spalding & Evenflo Companies, Inc., 16 F.3d 394, 397 (Fed. Cir. 1994); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 608 (1950); Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931, 934 (Fed. Cir. 1987) (in banc), *cert. denied* 485 U.S. 961 (1988). In other words, in order to find an infringement, the accused device must perform substantially the same overall function of the claimed invention; achieve substantially the same result as the claimed invention; and do so in substantially the same way as the claimed invention.

While Plaintiff is correct that the claim should not be examined solely to determine its "meaning" and "essence", the Magistrate was perfectly justified in evaluating the function of the patented device. This examination is simply designed to clarify the claim's objectives and methods for achieving them in order to make the equivalents assessment. Without such an examination, it would be impossible to determine whether the

accused device performs substantially the same overall function and achieves substantially the same result as the patented invention.

Plaintiff does not appear seriously to contest the Magistrate's conclusion that the overall function and result of the Hypervision process is the same as the Instavision process. Indeed, the two processes share identical functions. Both systems seek to transform the optical industry by reducing the turnaround time between receiving a prescription from a doctor and getting the requisite lenses from the lens laboratory. They result in a process by which lens prescription information is transmitted via software to an optical lab so that an edging machine can manufacture the lens without using frames. In this way, the doctrine of equivalents as explained in Dolly and Graver is satisfied with respect to two of the three key elements. The accused device performs substantially the same overall function or work as well as achieves the same overall result of the claimed invention.

Plaintiff argues, however, that the Magistrate improperly interpreted Claim 1 by "reworking" it, and thereby misapplied the equivalents analysis. By reworking Claim 1, Plaintiff alleges that the Magistrate overlooked limitations in the patent that warrant, under the equivalents doctrine, a finding of noninfringement. These limitations allegedly indicate important ways in which the two systems differ and therefore achieve their functions in varying manners. Under the doctrine of equivalents, it is not enough that the claimed and accused devices perform substantially the same function and achieve substantially the same result. Perkin-Elmer,

822 F.2d at 1531 n.6. Such a circumstance is commonplace for devices sold in competition. Id. The critical distinction to be examined at this point is whether the claimed invention and accused device achieve these similar results in a substantially similar manner.

Plaintiff only points to two alleged misinterpretations by the Magistrate. First, Plaintiff argues that a typographical error in Claim 1 was inappropriately interpreted to expand the scope of the patent's meaning. According to Claim 1, the first step of the process is comprised of "marking a horizontal line with an ophthalmoscopic while said demonstration lenses are in said eyeglass frames." (emphasis added). Both parties admit a typographical error was made in this description. Plaintiff Hypervision argues that "ophthalmoscopic" should read "ophthalmoscope" while Defendant Myriad argues it should read "ophthalmoscopic device".² In its Report and Recommendation, the Magistrate found it unnecessary to resolve this dispute. "[W]hatever device is actually used to mark the horizontal line on the lens," the Magistrate wrote, "the doctrine of equivalents would bring such device within the ambit of the '198 Patent. . . ." Report and Recommendation at p. 21.

²In the Court's view, the better interpretation would read "ophthalmoscopic device" since an ophthalmoscope is used to examine the eyes rather than serve as a writing instrument. An "ophthalmoscopic device" seems a more fitting phrase to indicate the instrument with which one might draw a line on a lens. However, the Magistrate did not decide ultimately which interpretation is preferred, finding such a determination to be unnecessary. This Court concurs in that conclusion.

Although the Magistrate's formulation may be expansive, the general legal proposition is correct. "To be an 'equivalent' the element substituted in the accused device for the element set forth in the claim must not be such as would substantially change the way in which the function of the claimed invention is performed." Perkin Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528, 1533 (Fed. Cir. 1987). Hypervision uses a "Tracing Block" to mark a horizontal line on the lens, the same method actually used by the Instavision process. Despite the fact that Instavision actually uses a tracing block, it is necessary to determine whether the tracing block is a method substantially similar to the method contemplated by the patent itself.

The recent case of Goodwall Construction Co. v. Beers Construction Co., 26 U.S.P.Q.2d 1420, 1425-26 (Fed. Cir. 1993) presents an analogous situation. The Goodwall patent covered a method for texturing a concrete surface. The patented process prescribed securing a blunt-tipped moil point rod to a pneumatically powered riveter. The hammer operator would then force the hammer rod assembly against a concrete surface which would roughen the surface to create an aesthetic appearance. The process employed by Beers, the alleged infringer, achieved the same result but used a chipping hammer rather than a riveter and a chisel blank rather than a rod to texture the concrete. The court held that although the two processes at issue used different parts, they both related to a method for texturing concrete. The court held that a chipping hammer was substantially equivalent to the

pneumatically-powered riveter called for in the patent. Similarly, the chisel blank was found to be substantially equivalent to the blunt tipped moil rod.

As in Goodwall, this Court recognizes that substantial equivalence can be realized even if the two processes diverge in particular ways. The basic use of either an ophthalmoscope or an ophthalmoscopic device to draw a straight line appears to be substantially the same as a straight line drawn by a tracing block. The essential task at issue here is the simple drawing of a centered horizontal line on the lens. The mechanism for this act is of secondary importance. No evidence has been presented to reflect that the Hypervision process of line drawing is any different than the method of line-drawing contemplated by either an "ophthalmoscope" or "ophthalmoscopic device." Substitution of an equivalent of the recited limitation satisfies the "substantially same way" prong of the test. Malta v. Schulmerich Carillons, Inc., 952 F.2d 1320, 1329 (Fed. Cir. 1991), cert. denied 112 S. Ct. 2942 (1992). Therefore, the Magistrate correctly rejected arguments made by Plaintiff that such a difference precluded a finding of infringement.

The second limitation that the Magistrate is alleged to have ignored in Patent '198 is the use of *two lenses* in the patented Instavision process. The Magistrate is alleged to have "reworked the claims limitation" by obscuring the distinction between the use of the plural form of lens, "lenses", and its singular form, "lens". Because the patent employs the plural form, Plaintiff

argues that a limitation in the patented process is the use of two lenses. Therefore, according to Plaintiff, a process that uses only one lens could not infringe under the doctrine of equivalents.

Review of the patent language reflects use of the words, "demonstration lenses"; "each said demonstration lens"; and "patterns of lenses". Plaintiff argues that these words reflect a limitation that two lenses must be used in the Instavision transmission process. The Magistrate found this difference inconsequential, pointing out a general equivalence between the singular and plural forms when discussing eyewear. Implicit in the language of eyeglasses or frames, he found, is the notion of two eyes and recourse to the plural form. He wrote, "To find that the '198 Patent requires the transmission of two lens shapes, and that the transmission of a single lens shape is not an equivalent is to deny fundamental human anatomy." Again, this language is somewhat overstated, since one can imagine a system where using only measurements in one eye is a substantial distinction over a process utilizing both eyes.

Nevertheless, the evidence in this case reflects that the language utilizing the plural form in Claim 1 is incidental. In fact, it would be reasonable to interpret the language of Claim 1 to reflect a process where the information from each lens is transmitted separately. The plural form could simply indicate that it is typical to activate the process twice for each application. While construing a patent requires careful adherence to the language of the claim, the Court should not be blinded by

insignificant distinctions. "Courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing." Graver Tank & Mfg., 339 U.S. at 607. In fact, the doctrine of equivalents was specifically designed as an equitable instrument in a situation such as this.

Infringement under the doctrine of equivalents has been 'judicially devised to do equity' in situations where there is no literal infringement, but liability is nevertheless appropriate to prevent what is in essence a pirating of the patentee's invention.

Texas Instruments v. U.S. International Trade Com'n, 988 F.2d 1165, 1173 (Fed. Cir. 1993); Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861 (Fed. Cir. 1985). According to the court in Miles Laboratories Inc. v. Shandon Inc., "The doctrine of equivalents thus prevents the risk of injustice that may result from a limited focus on words alone." 27 U.S.P.Q. 2d 1123, 1127 (Fed. Cir. 1987), *cert. denied* 114 S. Ct. (1994).

Given the factual context of this dispute, equity is particularly appropriate to alleviate the risk of "pirating"--as referred to in Texas Instruments--of the Instavision process. Bullard actively recruited investors in the Instavision process but shortly after termination began to market a practically identical system. The use of the plural form of lens in the patent compared to the use of a singular lens in the Hypervision method is too literal a distinction in light of the overall background and facts of this case. The Court stated in Graver:

One who seeks to pirate an invention. . . may be expected to introduce minor variations to conceal and shelter the

piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form.

339 U.S. at 607. The fact that the patent language utilizes the plural form of "lens" does not minimize the fact that Hypervision achieves the same result in substantially the same manner as the method set forth in the patented claim.

Finally, this Court must also review the decision by the Magistrate finding that Bullard misappropriated a trade secret under Oklahoma law. Misappropriation requires satisfaction of the following elements: existence of a trade secret; misappropriation of this secret by Defendant; and use of the secret by Bullard or Hypervision to the detriment of Myriad. Micro Consulting, Inc. v. Zubeldia, 813 F. Supp. 1514, 1534 (W.D.Okla. 1990). The Magistrate found all these elements to be satisfied and granted a preliminary injunction pertaining to the trade secret claim.

Plaintiff's objection to the Magistrate's Report and Recommendation contests the finding that Bullard misappropriated the trade secret. Plaintiff does not appear to debate that Instavision's software and methodology constitute a trade secret nor that actions were taken to ensure protection for the software at the heart of the system. Instead, Plaintiff refers to excerpted testimony by the inventor, Carol van Schoyck, allegedly implying that Hypervision was an independent creation of Jerry Bullard. However, the weight of the evidence as discussed above powerfully suggests the opposite conclusion. In fact, other testimony from van Schoyck demonstrates his clear belief that Hypervision

infringed on the Instavision process and on his patent. Reporter's Transcript of Cross Examination of Mr. van Schoyck at p. 53. Moreover, Bullard was intimately familiar with the Instavision technology, and he quickly developed an almost identical, infringing, system shortly after being terminated from Myriad. In doing so, Bullard used information he knew to be controversial. Therefore, the Magistrate's finding of a misappropriation was appropriate. Since Hypervision has unquestionably benefitted from sales of the infringing system, all the elements of a misappropriation action have been met.

For the reasons stated above, the Report and Recommendation of the Magistrate are hereby accepted by this Court. Having accepted the Magistrate's Report and Recommendation, this Court issues an injunction restraining Jerry Bullard, Jim Noel, and Hypervision, their employees, assigns, agents, and representatives from directly or indirectly engaging in any activity which infringes the '198 Patent and/or which makes use of in any way the software presently known as Instavision or Hypervision. Specifically, Bullard, Noel, and Hypervision should be prohibited from marketing Hypervision or the Hypervision process by any other name or appellation; or in any other form or format wherein the processes of the '198 Patent are infringed and/or the Instavision software employed. Moreover, this Court, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, hereby consolidates the three-day evidentiary hearing held before the Magistrate with trial on the merits with regard to the issue of liability. The record generated by three days of

hearings need not be repeated in a separate trial. Finally, the Application for Preliminary Injunction filed by Plaintiff Hypervision, previously held in abeyance until disposition of the Report and Recommendation, is now denied as moot.

IT IS SO ORDERED THIS 31 OF OCTOBER, 1994

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV 1 1994

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
STEPHEN E. GARMAN, et al.,)
)
Defendants.)

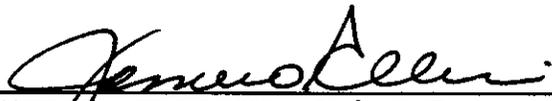
No. 94-C-621-E

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 9/27 day of October, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 11-1-94

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

MURIEL KAY DAVIS, a single woman,

Plaintiff,

and

HEINZ BAKERY,

Intevening Plaintiff,

v.

ADAMATIC, A CORPORATION, a New
Jersey corporation

Defendant.

Case No. 94-C-149K

FILED

NOV 01 1994

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

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Application of the Plaintiff and the Intervening Plaintiff, the Court hereby orders that all claims against Defendant Adamatic, A Corporation, be and the same are hereby dismissed with prejudice to refiling at a later date.

IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE

36

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV 01 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRETTA ANN MORROW;
LONGVIEW LAKE ASSOCIATION,
INC.; UNKNOWN OCCUPANT;
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

OCT 31 1994

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

Civil Case No. 94-C 740K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31 day of October,

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, **Unknown Occupant**, should be dismissed; and the Defendants, **Henretta Ann Morrow and Longview Lake Association, Inc.**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Henretta Ann Morrow aka Ann Morrow**, will hereinafter be referred to as ("**Henretta Ann Morrow**")"; and James Morrow aka James H. Morrow aka James Harold Morrow will hereinafter be referred to as ("**James Morrow**").

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The Court being fully advised and having examined the court file finds that the Defendant, **Henretta Ann Morrow**, waived service of Summons on August 2, 1994, which was filed on August 4, 1994; and that the Defendant, **Longview Lake Association, Inc.**, acknowledged receipt of Summons and Complaint via certified mail on September 9, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on August 23, 1994; and that the Defendants, **Henretta Ann Morrow and Longview Lake Association, Inc.**, 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 19, Block 22, LONGVIEW LAKE ESTATES, BLOCKS 17 THRU 22, INCLUSIVE, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof; LESS AND EXCEPT a strip of land being more particularly described as follows, to-wit: BEGINNING at the Northeast corner of Lot 19; thence South along the Easterly line of Lot 19 for 90.0 feet to the Southeast corner of said Lot 19; thence Northwesterly along the Southerly line of Lot 19 for 9.40 feet to a point; thence in a Northeasterly direction for 88.20 feet to a point on the North line of Lot 19; thence easterly along the North line of Lot 19 for 3.46 feet to the Point of Beginning;

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of James Morrow, and of judicial termination of a joint tenancy.

The Court further finds that the Defendant, Henretta Ann Morrow, and James Morrow, husband and wife, became the record owners of the real property involved in this action by virtue of that certain General Warranty Deed dated June 11, 1987, from Robert R. Ritter and Barbara Jean Ritter, husband and wife, to James J. and Henretta Ann Morrow (Husband and Wife) as joint tenants, and not as tenants in common, on the death of one the survivor, the heirs and assigns of the survivor, to take the entire fee simple title; which General Warranty Deed was filed on August 13, 1987, in Book 5045, Page 854, in the records of Tulsa County, Oklahoma.

The Court further finds that James Morrow died on March 30, 1988, while seized and possessed of the real property being foreclosed; and upon the death of James Morrow, the subject property vested in his surviving joint tenant, Henretta Ann Morrow; a copy of Certificate of Death No. 001861 was issued by San Mateo County, Redwood City, California certifying James Morrow's death.

The Court further finds that on March 21, 1980, Charles Edward Chessher and Monty Lee Jackson, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION their mortgage note in the amount of \$58,250.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles Edward Chessher and Monty Lee Jackson, each a single person, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION a mortgage

dated March 21, 1980, covering the above-described property. Said mortgage was recorded on March 27, 1980, in Book 4466, Page 1279, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 29, 1980, WESTERN PACIFIC FINANCIAL CORPORATION assigned the above-described mortgage note and mortgage to Security Pacific Mortgage Corporation. This Assignment of Mortgage was recorded on October 20, 1980, in Book 4505, Page 130, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 2, 1985, SECURITY PACIFIC MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to MANUFACTURERS HANOVER MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on December 18, 1985, in Book 4913, Page 1370, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 24, 1989, FIREMAN'S FUND MORTGAGE CORPORATION FKA MANUFACTURERS HANOVER MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 6, 1989, in Book 5187, Page 1419, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 8, 1982, Charles Edward Chessher, a single person, granted a Warranty Deed to Monty Lee Jackson, a single person; which Warranty Deed was recorded on June 10, 1982, Book 4618, Page 1934, in the records of Tulsa County, Oklahoma. However, the legal description within the Warranty Deed incorrectly recites the subject real property.

The Court further finds that on May 12, 1983, Charles Edward Chessher, a single person and Monty Lee Jackson, a single person, granted a General Warranty Deed to Barbara Ritter, husband and wife, which was recorded on May 16, 1983, Book 4691, Page 1281, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1989, the Defendant, Henretta Ann Morrow, 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 July 1, 1989 and July 1, 1990.

The Court further finds that the Defendant, Henretta Ann Morrow, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Henretta Ann Morrow**, is indebted to the Plaintiff in the principal sum of \$102,299.53, plus interest at the rate of 13 percent per annum from June 16, 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 Plaintiff is entitled to a judicial determination of the death of James Morrow, and to a judicial termination of the joint tenancy of James Morrow and the Defendant, Henretta Ann Morrow, in the real property involved herein.

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 23, 1994; a lien in the amount of \$33.00 which became a lien as of June 25, 1993; and a lien in the amount of \$41.00 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 Defendant, **Unknown Occupant**, should be dismissed because the Defendant, **Henretta Ann Morrow**, is actually the occupant of the subject property.

The Court further finds that the Defendants, **Henretta Ann Morrow and Longview Lake Association, Inc.**, 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 death of James Morrow be and the same is judicially determined to have occurred on March 30, 1988, in the city of Redwood City, San Mateo County, California.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of James Morrow, and the Defendant, Henretta Ann Morrow, in the above-described real property be and the same hereby is judicially terminated as of the date of the death of James Morrow on March 30, 1988.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Henretta Ann Morrow**, in the principal sum of \$102,299.53, plus interest at the rate of 13 percent per annum from June 16, 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 \$115.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Unknown Occupant**, is dismissed from this action because the Defendant, **Henretta Ann Morrow**, is the actual occupant of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Henretta Ann Morrow, Longview Lake Association, Inc. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Henretta Ann Morrow**, 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:

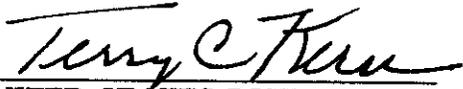
In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$115.00, personal property taxes which are currently due and owing.

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.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK

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(918) 581-7463


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

Judgment of Foreclosure
Civil Action No. 94-C 740K

NBK:lg

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

FILED

OCT 31 1994

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

SAUNDRA GILLEY,)
)
Plaintiff,)
)
v.)
)
ALLOY WELDING SUPPLY, INC.,)
and JOHNSON BROKERS &)
ADMINISTRATORS, INC.)
)
Defendants.)

Case No. 94-C-86-E

STIPULATION OF DISMISSAL

It is hereby stipulated by and between the parties through the undersigned counsel that Alloy Welding Supply, Inc., and Johnson Brokers & Administrators, Inc., Defendants, be dismissed from this action with prejudice pursuant to Fed. R. Civ. P. Rule 41(a)(1)(ii). Each party shall bear their own costs and attorney fees.

DATED October 31, 1994



Brad Heckenkemper, OBA #4041
Steven B. Butterfield, OBA #14196
Barrow, Gaddis, Griffith & Grimm
610 South Main Street, Suite 300
Tulsa, Oklahoma 74119-1248

COUNSEL FOR PLAINTIFF
SAUNDRA GILLEY

ENTERED ON DOCKET
DATE 11-1-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 31 1994

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

United States of America,)
)
 Plaintiff)
)
 v.)
)
 Arutunoff, Christopher S.)
)
 Defendant)

Case No.: 91-CR-033-002-B

ENTERED IN DOCKET
DATE NOV 01 1994

JUDGMENT AND COMMITMENT ORDER ON
REVOCAION OF SUPERVISED RELEASE

Now on this 28th day of October, 1994, this cause comes on for sentencing after a previous finding that the defendant violated conditions of supervised release as set out in the Petition on Supervised Release filed on September 30, 1994. The defendant is present in person and with his attorney, C.W. Hack. The Government is represented by Assistant United States Attorney Kenneth Snoke, and the United States Probation Office is represented by Kevin Robbins.

The defendant was heretofore convicted on his plea of guilty to count one, Conspiracy to Commit Security Fraud, of a seventeen-count Indictment. On September 12, 1991, he was sentenced to thirty months imprisonment to be followed by a three year term of supervised release. He was ordered to make restitution in the amount of \$877,617.73, and required to participate in a substance abuse program. On October 29, 1993, resentencing was held pursuant

to 10th Circuit remand. The resentencing did not affect the previously imposed imprisonment, term of supervised release, drug condition, or standard conditions of supervised release. It did, however, reduce the amount of restitution ordered to \$18,000, and included a special condition requiring adherence to the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128.

On October 7, 1994, a revocation hearing was held regarding allegations that the defendant possessed a controlled substance and drug paraphernalia, possessed a firearm, and committed new law violations. The defendant stipulated to possessing a controlled substance and drug paraphernalia. The other two allegations were withdrawn by agreement of the Government and the probation office. Sentencing was scheduled for April 28, 1994.

As a result of the sentencing hearing, the Court finds that the instant offense occurred after November 1, 1987, and that Chapter Seven of the U. S. Sentencing Commission Guidelines is applicable. In accordance with U.S.S.G. § 7B1.1(a)(2), the Court finds that the violations of supervised release constitute a Grade B violation. Further, in accordance with U.S.S.G. § 7B1.4(a), the defendant's original Criminal History Category of III is now applicable for determining the imprisonment range of eight to fourteen months. Pursuant to U.S. v. Lee, 957 F.2d 770 (10th Cir., 1992), the policy statements in Chapter Seven are not mandatory, but must be considered by the Court. Therefore, the following sentence is ordered.

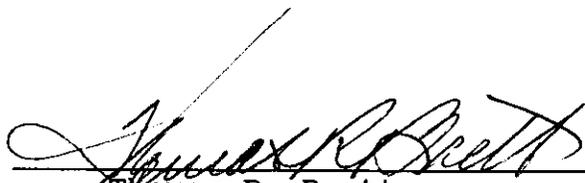
It is adjudged by the Court that the defendant is found to be in violation of supervised release condition #7, which alleges possession of a controlled substance and drug paraphernalia, and the conditions of supervised release shall be modified, to wit:

As a condition of supervised release, the defendant shall serve four months in a community corrections facility. Restitution in the amount of \$18,000 remains in effect, and is to be paid during the terms of placement and supervised release. The defendant is ordered to make all reasonable efforts to make payment as determined by the probation office. Further, the Court recommends that the Bureau of Prisons designate the defendant to the Freedom House Community Correctional Component in Tulsa, Oklahoma, where he may continue his present employment.

The following additional special condition of supervised release is also imposed:

The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.

The defendant is ordered to report to the designated institution for voluntary surrender on November 11, 1994, by 6:00 P.M.



Thomas R. Brett
United States District Judge

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

FILED

OCT 31 1994

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

MARY MCDANIEL; STEPHANIE
MCDANIEL, a minor,

Plaintiffs,

vs.

RON CHAMPION, Warden of Dick
Conner Correctional Facility,

Defendant.

No. 93-C-1031-K

ENTERED ON DOCKET

DATE NOV 01 1994

JUDGMENT

This matter came before the Court for consideration of the defendant's 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 defendant and against the plaintiffs.

ORDERED this 31 day of October, 1994.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

13

ENTERED ON DOCKET

DATE NOV 01 1994

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

FILED

OCT 31 1994

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

MARY MCDANIEL; STEPHANIE)
MCDANIEL, a minor,)
)
Plaintiffs,)
)
vs.)
)
RON CHAMPION, Warden of Dick)
Conner Correctional Facility,)
)
Defendant.)

No. 93-C-1031-K

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiffs bring this action pursuant to 42 U.S.C. §1983. Mary McDaniel and her eleven year old daughter Stephanie wished to visit Mary's husband, Marion McDaniel, in prison. A Lieutenant Wes Penland of the Osage County Sheriff's Department received a phone call from an informant (known to Penland but kept anonymous in this litigation) who stated Mary would attempt to smuggle drugs in to her husband. Penland then called Investigator Bill McKenzie of Dick Conner Correctional Center and relayed the information. McKenzie recommended to the shift supervisor that Mary McDaniel and anyone accompanying her be searched until further notice. (McKenzie affidavit, Exhibit E to Defendant's Brief at ¶3).

When the plaintiffs arrived at the prison, Mary was told she and Stephanie would have to submit to a strip search before they were allowed to visit. Stephanie at first did not understand what was involved in a strip search. When the procedure was explained,

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she refused to be strip searched. Mary then told Stephanie she must submit or they would not be allowed to visit. Stephanie then agreed to be searched. Defendant states both plaintiffs signed consent forms; Stephanie denies giving her consent. The search was conducted in a locked room and no one was allowed in or out during the search. The plaintiffs' bodies were not touched during the search. However, plaintiffs assert each of them was requested to bend over and expose her vagina and rectum, and each was made to squat and cough. No contraband was found. The next day, plaintiffs and another of Mary's daughters arrived for another visit. When informed of the request for another strip search, all three refused. Because of the refusal to be searched, the three were not permitted to visit Marion McDaniel.

Initially, defendant moves for summary judgment on the basis of qualified immunity. This defense provides:

[w]hen government officials are performing discretionary functions, they will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." In determining whether the law involved was clearly established, the court examines the law as it was at the time of the defendants' actions.

It is the plaintiff's burden to convince the court that the law was clearly established. In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." While the plaintiff need not show that the specific action at issue has previously been

held unlawful, the alleged unlawfulness must be "apparent" in light of preexisting law. The "'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" If the plaintiff is unable to demonstrate that the law allegedly violated was clearly established, the plaintiff is not allowed to proceed with the suit.

Hilliard v. City and County of Denver, 930 F.2d 1516, 1518 (10th Cir.), cert. denied, 112 S.Ct. 656 (1991) (citations omitted).

In determining whether a genuine issue of fact remains, the Court views all facts and inferences in the light most favorable to the non-moving party. Burnette v. Dow Chemical Co., 849 F.2d 12269, 1273 (10th Cir.1988).

Weighing the state's legitimate interest in prison security against the privacy rights of prison visitors, a visitor may only be subjected to a strip search if the search is supported by reasonable suspicion. Boren v. Deland, 958 F.2d 987, 988 (10th Cir.1992). Prison officials must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience; this standard also requires that the suspicion be individualized. Id. "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Adams v. Williams, [407 U.S.

143 (1972)]. . . demonstrates as much." Alabama v. White, 496 U.S. 325, 330 (1990).

In Adams, a policeman was personally approached by an informant known to him and who had provided the policeman with information in the past. The informant stated an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The policeman approached the vehicle and, after a seizure of the individual for Fourth Amendment purposes, an incidental frisk discovered the weapon. The Supreme Court upheld the search, concluding while the "informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, . . . the information carried enough indicia of reliability" to justify the stop. 407 U.S. at 147. "Before a tip may justify a search, 'the nature of the tip, the reliability of the informant, the degree of corroboration, other factors contributing to suspicion or the lack thereof, and the nature and extent of the search must all be assessed.'" Daugherty v. Campbell, 33 F.3d 554, 556-57 (6th Cir.1994)(quoting United States v. Afanador, 567 F.2d 1325, 1329 n.4 (5th Cir.1978)).

Penland's affidavit states in pertinent part: "The informant gave information that Mary McDaniel had made a drug purchase with the intent to deliver the drugs to her husband in prison. I considered this informant to be reliable." (Exhibit D to Defendant's Brief at ¶3). No statement is made as to why Penland considered the informant reliable. Nothing appears in the record detailing Penland's familiarity with the informant or the

informant's past reliability. One treatise states: "Whatever Adams means, it surely should not be read as approving mere conclusory assertions that a certain informant is reliable." 3 LaFave, Search and Seizure, §9.3(e) at 480. The fact prison officials considered Penland highly credible does not bear on this issue. "An officer's recitation of a tip does not automatically vest the information with credibility or reliability, nor does it transform the officer into a reliable informant." Daugherty, 33 F.3d at 556. While Daugherty involved an anonymous tip, this Court has been provided with no more evidentiary basis for a credibility determination than in that case.

In defendant's reply in support of the pending motion, defendant argues plaintiffs are seeking to reap a benefit from not conducting discovery and questioning Penland regarding the informant's credibility. Nevertheless, it remains defendant's motion which is before the Court. "If the plaintiff has identified the clearly established law and the conduct that violated the law", as have plaintiffs here, "the defendant as the movant in a motion for summary judgment bears the normal burden of showing that no material issues of fact remain that would defeat his or her claim of qualified immunity." Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 646 (10th Cir.1988). The bare assertion that an informant is reliable, absent other specific objective facts and rational inferences drawn therefrom, is insufficient.

Defendant attempts to offer additional justification through this statement in the affidavit of McKenzie: "Marion McDaniel is

currently serving time for drug related charges and I have personal knowledge that information has been present for many years that inmate Marion McDaniel has been suspected of obtaining and distributing drugs at Dick Conner Correctional Center. I know that DOC staff have never been able to prove that Inmate McDaniel was involved but it was common knowledge among staff that he was suspected of being involved in some kind of drug activity." (McKenzie affidavit, Exhibit E to Defendant's Brief at ¶6). In an affidavit attached to plaintiffs' response, Marion McDaniel denies any drug-related activity while in prison. The statements in the McKenzie affidavit that "information" exists that McDaniel is "suspected" of drug activity in prison simply means rumors are circulating. The Court concludes such rumors do not constitute specific objective facts or a rational inference drawn therefrom, as required in Boren, 958 F.2d at 988.

The fact Mary McDaniel signed a consent form upon threat of being turned away is also not dispositive. "The fact that a prison visitor has consented to the search upon prompting from officials does not eliminate the reasonable suspicion requirement." Spear v. Sowders, 33 F.3d 576, 580-81 (6th Cir.1994). A serious question exists as to the validity of such consent as well. See Cochrane v. Quattrocchi, 949 F.2d 11, 14-15 (1st Cir.1991).

As to Stephanie McDaniel, the Court reiterates that suspicion must be individualized. Boren, 958 F.2d at 988. Defendant addresses the issue as follows: "Since the informant indicated Mary McDaniel was going to smuggle drugs into the prison, it was

not unreasonable for the correctional officers to assume she might hide the narcotics on her person or with her daughter." (Defendant's Brief at 11). The tip, as related in the record, concerns itself only with Mary McDaniel. "[T]he fourth amendment does not permit any automatic or casual transference of 'suspicion.'" United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir.1978). In Thorne v. Jones, 765 F.2d 1270, 1277 (5th Cir.1985), cert. denied, 475 U.S. 1016 (1986), the court held an informant's tip that an inmate's mother was smuggling in drugs was insufficient to justify a strip search of the inmate's father who was accompanying her. Even assuming prison officials were reasonable in thinking Mary McDaniel might have hidden contraband on her daughter's person, no showing has been made that the suspicion made necessary a strip search of an eleven year old, as opposed to a pat-down search. In sum, the Court concludes plaintiffs have, in the summary judgment context, established a violation of a clearly established constitutional right of which a reasonable person would have known. Summary judgment based upon qualified immunity is therefore denied as to the claims of both plaintiffs.

Defendant raises another ground in the pending motion, noting that he as warden is the only named defendant. Defendant contends plaintiffs have failed to raise a genuine issue of material fact regarding defendant's personal liability for these searches under 42 U.S.C. §1983. It is undisputed defendant did not personally participate in the search. 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).

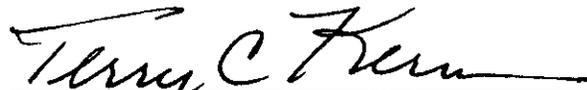
Defendant first asserts, and plaintiffs concede, §1983 "will not support a claim based on a respondeat superior theory of liability." Polk County v. Dodson, 454 U.S. 312, 325 (1981). Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "'the moving force of the constitutional violation.'" Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir.19987). Plaintiffs assert "It is defendant Champion's policy that is responsible for the strip search of plaintiffs." (Plaintiffs' Response Brief at 9). While this statement is literally true, plaintiffs do not explain how the policy is itself a repudiation of constitutional rights. The written policy says "Strip searches may only be conducted as follows: (1) There is reasonable belief that the person is carrying contraband."

(Exhibit B to Defendant's Brief at p.7) This standard comports with extant case law, as detailed in this Order. If plaintiffs are arguing this strip search represented an unconstitutional deviation from the written policy, this single incident does not establish a pattern or policy of deliberate indifference on the warden's part. Cf. Ouzts v. Cummins, 825 F.2d 1276, 1278 (8th Cir.1987).

At paragraph 8 of the Complaint, plaintiffs assert defendant failed to adequately train his personnel. A failure to train which amounts to deliberate indifference to the rights of persons with whom the personnel come in contact may give rise to §1983 liability. In this case, plaintiffs admittedly conducted no discovery and have placed before the Court no evidence regarding the quality of training received by defendant's personnel. The record does not raise a genuine issue of material fact regarding a "failure to train" claim. A warden's general responsibility for supervising the operation of a prison is insufficient to establish personal involvement. Ouzts, 825 F.2d at 1277.

It is the Order of the Court that the motion of the defendant for summary judgment is hereby granted.

ORDERED this 31 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

GLENN ANDREW PRATER,)
 PLAINTIFF,)
VS.)
))
ST. CECILIA CATHOLIC CHURCH,)
CATHOLIC DIOCESE OF TULSA,)
AND MORRIS DALE VANDERFORD,)
 DEFENDANTS.)

CASE NO. 94-C-381-B

OCT 31 1994

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

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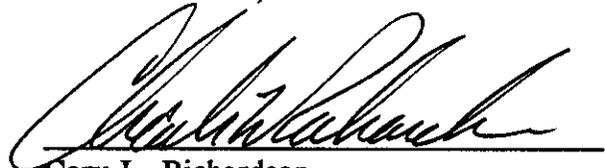
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STIPULATION OF DISMISSAL

Come now the parties in the above-styled and numbered cause and pursuant to the provisions of FRCVP 41(a)(1)(ii), stipulate to the dismissal of this action without prejudice to the refiling hereof. Each party agrees to bear their own fees and costs.

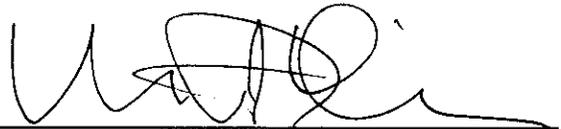
Respectfully submitted,

RICHARDSON, STOOPS & KEATING



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