

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

SPECTRUM NATURAL GAS COMPANY)
LIQUIDATING TRUST,)
)
Plaintiff,)
)
vs.)
)
UNIT PETROLEUM COMPANY,)
)
Defendant, and Third)
Party Plaintiff,)
)
vs.)
)
ARKLA ENERGY MARKETING)
COMPANY, d/b/a ARKLA GENERAL)
SUPPLY,)
)
Third Party Defendant.)

CASE NO. 94-C-282-B

FILED

FEB 16 1995

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

ENTERED ON DOCKET
FEB 17 1995
DATE _____

O R D E R

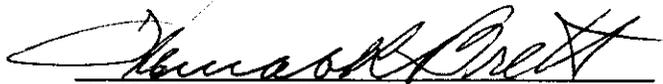
This matter comes on for consideration of Third Party Defendant's Motion to Withdraw the Reference and Combined Amended Demand For Jury Trial. Also for consideration is Plaintiff's Motion for Summary Judgment and Defendant Unit Petroleum Company's Cross Motion for Summary Judgment.

On November 21, 1994, the parties herein filed, in The United States Bankruptcy Court For The Northern District Of Oklahoma, a Joint Stipulation of Dismissal With Prejudice, jointly consenting to the dismissal of the Complaint, Amended Complaint and Third Party Complaint in this matter.

Accordingly, all motions herein are denied as moot and the Court herewith Orders this matter be and the same is dismissed with

prejudice. Parties are to bear their own costs and attorneys fees.

IT IS SO ORDERED this 16th day of February, 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 16 1995

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

ROBERT LEE WILLIAMS,)

Plaintiff,)

vs.)

No. 94-C-0015-B

TULSA POLICE DEPARTMENT,)
et al.,)

Defendants.)

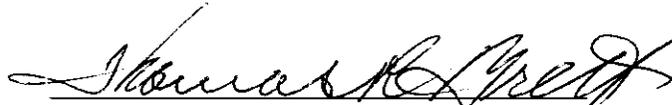
ENTERED ON DOCKET

DATE FEB 17 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Robert Lee Williams. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 16th day of Feb, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

18

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEB 10 1995

FILED

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

UNITED STATES OF AMERICA,

FEB 10 1995

Plaintiff,

v.

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

Civil Action No.

WYNONA OIL AND GAS,

Defendant.

95 C 137B

ENTERED ON DOCKET

DATE FEB 17 1995

JOINT STIPULATION AND ORDER OF DISMISSAL

The Parties in this cause of action, Plaintiff, the United States of America, and Defendant, Wynona Oil and Gas ("Wynona"), through their undersigned representatives stipulate and agree as follows:

1. Plaintiff, United States of America, on behalf of the Environmental Protection Agency ("EPA"), filed a Complaint against Wynona pursuant to Section 1423(c)(7), 42 U.S.C. § 300h-2(c)(7) of the Safe Drinking Water Act ("SDWA"). Pursuant to the Complaint, the United States seeks to collect a civil penalty previously assessed against Wynona Oil and Gas by an Administrative Order (Order), Docket No. VI-UIC-89-0017, issued pursuant to Section 1423(c)(2) of the SDWA, 42 USC § 300h-2(c)(2).

2. To settle the claims contained in the Complaint, Wynona has agreed to pay the sum of \$4,000.00 to the United States by electronic funds transfer.

3. Based upon information and belief, Wynona Oil and Gas, was at all times relevant hereto, the actual owner of the

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injection wells identified in the Order referenced in paragraph 1 above. For purposes of this stipulation, Wynona Oil and Gas and Wynona Oil and Gas Company is the same entity as named in the Order pursuant to which the Administrator seeks administrative penalties.

4. Payment of this sum shall constitute full settlement and satisfaction of the civil claims asserted by the United States in this action against Wynona, as set forth in the United States's Complaint and underlying Administrative Order. Such payment is not deductible for federal taxation purposes.

5. Within thirty (30) days of the filing of this stipulated dismissal, Defendant shall pay the sum of \$4,000.00 by Electronic Funds Transfer ("EFT") to the U.S Department of Justice Lockbox bank, referencing DOJ Case No. 90-5-1-1-5068 and the United States Attorney's Office file numbers to be provided by the United States. Payment shall be made in accordance with instructions provided by the Plaintiff to the Defendant upon the filing of the stipulated dismissal. Such directions will be provided by the Office of the United States Attorney, Northern District of Oklahoma. Notice of the transfer shall be sent to the Office of Regional Counsel, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, and to the Chief, Environmental Enforcement Section, Environment & Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044. Any EFT

received by the United States after 11:00 A.M. (Eastern Time) will be credited on the next business day.

6. In the event that the penalty payment is not timely made, Wynona shall pay an additional one hundred dollars (\$100) for each and every day that said payment is late as a stipulated penalty.

7. Wynona shall pay interest for any late payment of civil or stipulated penalties. The rate of interest shall be the rate established pursuant to 28 U.S.C. § 1961 on the date payment is due, and shall be assessed from the date payment is due until payment is made. If payment is not timely made, Plaintiff may elect to move to vacate this dismissal and reinstate this action.

8. The Court shall retain jurisdiction over the parties and this lawsuit until all required monies have been paid.

9. This stipulated dismissal is limited to the civil claims of the Environmental Protection Agency under the SDWA with respect to the matter described above, and does not apply to any other claim, civil or criminal, which Plaintiff may have against Defendants.

10. The undersigned representative of Wynona and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind each party to this document.

For Plaintiff, UNITED STATES OF AMERICA:

Date: 2-6-95

Joey M. Gross
JOEY M. GROSS
Acting Chief
Environmental Enforcement Section

Date: 1-12-95

Samuel D. Blesi
SAMUEL D. BLES
Trial Attorney
Environmental Enforcement
Section
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

STEPHEN C. LEWIS
United States Attorney

Date: 2-10-95

Phil Bernhardt
PETER BERNHARDT
Assistant U.S. Attorney
Tulsa, Oklahoma

For THE ENVIRONMENTAL PROTECTION AGENCY:

Date: 12-16-94

Pat Weatherly
PAT WEATHERLY
Office of Regional Counsel
U.S. Environmental Protection
Agency
Region VI
1445 Ross Avenue
Dallas, Texas 75202

Date: 1-5-95

Elyse M. DiBiagio-Wood
ELYSE M. DIBIAGIO-WOOD
Office of Enforcement
United States Environmental
Protection Agency - HQ
401 M Street, S.W.
Washington, D.C. 20460

For Defendant: WYNONA OIL AND GAS ("WYNONA")

Date: 11/30/94



Lynne A. Wilkins Dixon
Attorney at Law
Commercial Federal Building
400 East Central, Suite 401
P.O. Drawer 1669
Ponca City, OK 74602

Attorney for Wynona

Date: 12-1-94

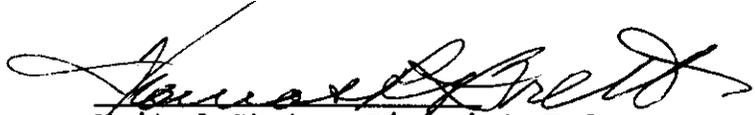


WYNONA OIL AND GAS

By: MAJIR KNORNBLIT, Operator

As stipulated and agreed to by the parties, IT IS SO ORDERED.

Date: February 16, 1995


United States District Judge
Northern District of Oklahoma

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

FILED
FEB 16 1995 *RU*

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

JAMES P. MARTIN,)
)
Plaintiff,)
)
vs.)
)
D. JACKSON, et al.,)
)
Defendants.)

No. 94-C-897-BU

ENTERED ON DOCKET
DATE FEB 17 1995

ORDER

Before the Court are Defendants' motions to dismiss and for summary judgment, filed on November 11 and December 7, 1994, and Defendant Jackson's motion to deem confessed his motion for summary judgment, filed on January 23, 1995. The Plaintiff, a pro se litigant, has not responded to any of the motions.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions, and a confession of the matters raised by the motions. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendant Jackson's motion to deem confessed his motion for summary judgment (doc. #12) is **granted**.
- (2) Defendant Jackson's motion for summary judgment (doc. #9) is **granted** and judgment is entered in favor of Defendant Dwight Jackson and against the Plaintiff, James P.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Martin.

- (3) The motion to dismiss (doc. #8) of the Tulsa County District Attorney's Office is **granted** and the above captioned case is **dismissed without prejudice** as to the Tulsa County District Attorney's Office.
- (4) The Court **may reinstate** this action if Plaintiff submits a response to Defendants' motions to dismiss and for summary judgment no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).
- (5) The Clerk shall **mail** a copy of this order to Plaintiff at P.O. Box 1500, El Reno, OK 73036.

SO ORDERED THIS 16 day of Feb, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 16 1995

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

ROBERT MITCHUM WATKINS,)
)
 Plaintiff,)
)
 vs.)
)
 JOEL SUTTON, et al.,)
)
 Defendants.)

No. 94-C-519-BU

ENTERED ON DOCKET
DATE FEB 17 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Robert Mitchum Watkins. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 16 day of Feb, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 16 1995

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ROBERT MITCHUM WATKINS,)
)
 Plaintiff,)
)
 vs.)
)
 JOEL SUTTON, et al.,)
)
 Defendants.)

No. 94-C-519-BU

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

ENTERED ON BOOKS

DATE FEB 17 1995

ORDER

In this prisoner's civil rights action, Plaintiff, pro se and in forma pauperis, alleges that his placement in the Restrictive Housing Unit, pending transfer to his assigned facility following a court hearing, violated his Eighth Amendment rights to be free from cruel and unusual punishment and his First Amendment right of access to the courts. The Defendants have moved to dismiss or for summary judgment on the basis of the court-ordered Martinez report. The Plaintiff has objected to Defendants' motion. For the reasons stated below, the Court concludes that Defendants' motion should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

On March 23, 1994, Plaintiff was transported from the Lexington Assessment and Reception Center (LARC) to Dick Conner Correctional Center (DCCC) because he was scheduled to appear in Osage County District Court the next day. Plaintiff attended his hearing as scheduled on March 24, 1994, and he was returned to DCCC and temporarily placed in the Restrictive Housing Unit (RHU) on

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"transit detention" pending his return to LARC. Department of Correction (DOC) officials transported Plaintiff to LARC on March 30, 1994.

On April 14, 1994, Plaintiff was again scheduled to appear in Osage County District Court. Therefore, DOC officials transported Plaintiff to DCCC on April 12, 1994. Plaintiff attended his hearing on April 14, 1994, and returned to DCCC that same day where he was classified as being on "transit detention" and was temporarily placed in RHU. Plaintiff remained in RHU until April 27, 1994, when DOC officials transported him back to LARC.

On May 19, 1994, Plaintiff filed the instant action against Captain Joel Sutton and Warden Ron Champion. He alleged that his confinement in RHU pending transfer to LARC violated his Eighth Amendment right to be free from cruel and unusual punishment and his First Amendment right of access to the courts. He alleged that, instead of transporting him back to his assigned facility, Defendants confined him in RHU as any other inmate who had committed a rule violation. He contended that, while in RHU, he was deprived the right to make phone calls, to exercise without handcuffs, to take a shower once a day, and to "contact visits." In support of his denial of access to the courts and the law library, he contended that "in March of 1994, [he had] received an order from 'the United States Court of Appeals for the Tenth Circuit,' that [he had] forty (40) days to prepare and file an 'opening brief.'" Plaintiff requested compensatory and punitive damages. (Doc. #1.)

II. ANALYSIS

A. Dismissal for Failure to State a Claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be

presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Plaintiff has sufficiently stated claims as to deprivations of his First and Eighth Amendment rights to avoid dismissal under Rule 12(b)(6). Plaintiff's complaint specifically alleges deprivations of his First Amendment right of access to the courts and the law library, and his Eighth Amendment right to be free from cruel and unusual punishment. Furthermore, Plaintiff has attributed these deprivations to Defendants acting under color of law through their capacity as employees of the Oklahoma Department of Corrections. Therefore, construing Plaintiff's complaint liberally, in accord with his pro se status, the Court concludes that Plaintiff has sufficiently stated a claim upon which relief can be granted for deprivation of his First and Eighth Amendment rights. Defendant's motion to dismiss must accordingly be denied.

B. Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be

necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. Eighth Amendment

To sustain an Eighth Amendment violation based on deliberate indifference, Plaintiff must allege and prove that the conditions of confinement evidence a wanton disregard for safety of prisoners and that prison officials had a "sufficiently culpable state of mind." Farmer v. Brennan, 114 S.Ct. 1970, 1977 (1994). Prison conditions "must not involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Neither can they be disproportionate to the severity of the crime warranting imprisonment. Id. The Eighth Amendment proscribes punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or those

which "involve the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976). Conditions resulting in the "unquestioned and serious deprivation of basic human needs" constitute cruel and unusual punishment." Rhodes, 452 U.S. at 347. In contrast:

[C]onditions that cannot be said to be cruel and unusual under contemporary standard are not unconstitutional. to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

Id.

Under these clear legal precedents, the Court concludes that Plaintiff has failed to show that his temporary stay on "transit detention" in RHU amounted to a constitutional deprivation under the Eighth Amendment. The mere fact that the conditions of confinement in RHU were harsher and interfered with Plaintiff's desire to live as comfortably as possible does not suffice to establish that Defendants intentionally deprived Plaintiff of a constitutional right. Plaintiff has not shown that the conditions in RHU fell below the "minimal civilized measure of life's necessities. See Hudson v. McMillan, 503 U.S. 1, 112 S.Ct. 995, 1000 (1992) ("Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation"). Similarly, the denial of a shower for a maximum period of three days does not amount to a constitutional violation.

Plaintiff's belated argument (raised for the first time in his response) that he was not afforded due process prior to his confinement in RHU lacks merit. Plaintiff's detention in RHU was not for punishment as in the case of an inmate who has committed a rule violation and is placed in Disciplinary Unit Segregation. Accordingly, Plaintiff was not entitled to a hearing prior to his placement on "transit detention" pending transfer to his assigned facility.

Therefore, Defendants are entitled to judgment as a matter of law on Plaintiff's Eighth Amendment claim.

3. Access to the Courts and the Law Library

Next, Plaintiff alleges that his placement on "transit detention" interfered with his constitutional rights of access to the courts and the law library. He alleges that although he had a deadline for filing an opening brief in the Tenth Circuit Court of Appeals, Defendant refused to permit him to go to the law library.

A convicted inmate has a constitutional right to adequate, effective, and meaningful access to the courts and the law library. Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

The right is one of the privileges and immunities accorded citizens under article four of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation

omitted).

In Bounds v. Smith, 430 U.S. 817, 827 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

After reviewing the Special Report and Plaintiff's response, the Court concludes that Plaintiff has not demonstrated a total deprivation of legal materials. The special report reveals that Plaintiff had access to the law library during his stays in RHU through visits from legal research assistants. In addition, Plaintiff signed for and received two envelopes of legal papers.

At the most Plaintiff has alleged a limited deprivation of access resulting from his temporary inability to use some of the legal materials which he had left at LARC. To establish a claim of limited deprivation of access, however, Plaintiff must show both cause and some prejudice that followed from the alleged deprivation of legal materials. See Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). Plaintiff has neither alleged nor shown that his appeal to the Tenth Circuit was dismissed because he was unable to use his material at LARC. Moreover, Plaintiff spent approximately twenty-one days on "transit detention" between March and April, thus leaving him at least an additional twenty days to file an opening brief in the Tenth Circuit Court of Appeals. Therefore, the Court cannot conclude that Plaintiff has demonstrated prejudice

to escape summary judgment in this case. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claims of denial of access to the courts and the law library.

4. Immunity

In addition to attacking Plaintiff's claims on the merits, Defendants argue that they are entitled to qualified immunity in their individual capacities and to eleventh amendment immunity in their official capacities. As to qualified immunity, they argue that reasonable prison officials in their position would not have believed their actions violated any clearly established right of the Plaintiff. See Anderson v. Creighton, 483 U.S. 635, 639-41 (1987); Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993). In analyzing this issue, this Court must look at "the contours" of the First and Eighth Amendment right, and whether a reasonable prison official would have understood that the actions about which Plaintiff complains violated that right. Anderson, 483 U.S. at 639-41 (1987).

The Court firmly believes that this question must be answered in the negative in this case. The undisputed facts of this case demonstrate that Plaintiff was not denied "the minimal civilized measure of life's necessities" or access to the courts or the law library. Therefore, Defendants are protected by qualified immunity in their individual capacities. Similarly, the Court concludes that, to the extent that Plaintiff has sued Defendants in their official capacities, they are not proper "person" within the

meaning of section 1983. Wallace v. Oklahoma, 721 F.2d 301, 303-04 (10th Cir. 1983).

III. CONCLUSION

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motions to dismiss for failure to state a claim (docs. #5 and #13) are **denied** and their motions for summary judgment (docs. #5 and #13) are **granted**;
- (2) Plaintiff's motion "to dismiss defendants' motion to dismiss or for summary judgment" (doc. #14) is **denied**.

SO ORDERED THIS 16 day of Feb, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 16 1995

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

XETA CORPORATION, an Oklahoma)
corporation,)

Plaintiff,)

vs.)

Case No. 94-C-1080-BU

CANTON INDUSTRIAL CORPORATION,)
a Nevada corporation; and)
RICHARD DAVID SURBER, an)
individual, and GERALD CURTIS,)
an individual,)

Defendants.)

ENTERED ON DOCKET
FEB 17 1995
DATE _____

ORDER

This matter comes before the Court upon the motion of Defendants, Canton Industrial Corporation ("Canton"), Richard David Surber ("Surber") and Gerald Curtis ("Curtis"), to dismiss this action pursuant to Rule 12(b)(2), Fed. R. Civ. P., for lack of personal jurisdiction. Plaintiff, Xeta Corporation ("Xeta"), has responded to the motion and Defendants have replied thereto. Upon due consideration of the parties' submissions, the Court makes the its determination.

Plaintiff brings this action seeking to recover damages from Defendants based upon certain alleged fraudulent conveyances made to Canton. Canton is a Nevada corporation with its principal place of business in Salt Lake City, Utah. In its complaint, Xeta alleges that on August 26, 1993, it obtained a judgment in the amount of \$149,859.14 in this judicial district against ATC, Inc. ("ATC"), a Delaware corporation. The judgment was affirmed by the Tenth Circuit Court of Appeals on October 20, 1994. Xeta also

alleges that in April 1994, ATC entered into a consulting agreement with Canton. According to Xeta, Canton assumed total control of ATC by virtue of the consulting agreement. Xeta alleges that ATC's principal place of business was moved from Texas to Salt Lake City, Utah and it was given the same business address, phone number and fax number as Canton. Xeta alleges that the officers of Canton became the officers of ATC. Xeta specifically alleges that Surber became the chief financial officer of ATC and that Curtis became the president of ATC.

In its complaint, Xeta additionally alleges that in May of 1994, ATC became involved in litigation with Nationwide Cellular in Nassau County, New York and King County, Washington. After being apprised of the litigation, Xeta applied to the Court for an order requiring ATC to apply any proceeds of any settlement or judgment in the litigation with Nationwide Cellular to the satisfaction of Xeta's judgment against ATC. Xeta alleges that while the application was pending with the Court, ATC entered into a settlement with Nationwide Cellular. After Nationwide Cellular paid the settlement proceeds to ATC, the settlement proceeds were transferred from ATC's bank account to Canton's bank account. Xeta alleges that Surber and Curtis made the decision to transfer the monies to Canton and gave the orders to complete all the transfers. Xeta alleges that the transfers to Canton constitute fraudulent conveyances.

In their motion to dismiss, Defendants contend that they lack sufficient contacts with the state of Oklahoma to permit the Court

to exercise personal jurisdiction over them. They state that Canton is a foreign corporation and that Surber and Curtis are non-residents of Oklahoma. Defendants also state that they have not transacted any business or conducted any activities in Oklahoma. They further state that the acts alleged in the complaint occurred, if at all, outside Oklahoma. Consequently, Defendants contend that the Court has no basis to exercise personal jurisdiction over them.

Plaintiff, in response, contends that Defendants are subject to personal jurisdiction of this Court due to their participation in a conspiracy to fraudulently convey to Canton the proceeds of the settlement between ATC and Nationwide Cellular. While Plaintiff admits that the complaint does not mention the term "conspiracy," it argues that a conspiracy may be inferred from the allegations. Plaintiff alleges that the conspiracy between Defendants and ATC was directed to Oklahoma and specifically effected Xeta in Oklahoma. It also contends that the acts of the co-conspirator ATC, which is subject to this Court's jurisdiction, constitute the acts of Defendants. In addition, Plaintiff argues that the funds allegedly diverted by Defendants were subject to being applied in Oklahoma to the satisfaction of an Oklahoma judgment. Based upon these facts, Plaintiff argues that sufficient minimum contacts exist in Oklahoma for the Court to properly exercise personal jurisdiction over Defendants.

In order to obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is proper under the laws of the forum state and that

the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment. Rambo v. American So. Ins. Co., 839 F.2d 1415, 1416 (10th Cir. 1988). In Oklahoma, jurisdiction may be exercised on any basis consistent with the Constitution of Oklahoma and the Constitution of the United States. Okla. Stat. tit. 12, § 2004(F).

The constitutional test for personal jurisdiction is well-established. A federal court sitting in diversity "may exercise personal jurisdiction over a nonresident defendant so long as there exist 'minimum contacts' between the defendant and the forum state." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). The defendant's contacts with the forum state must be such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316, 66 S.Ct. at 158. A defendant's contacts are sufficient if the defendant "purposefully avails itself of the privilege of conducting activities within the forum State." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1953).

The plaintiff bears the burden of establishing personal jurisdiction over a defendant. Rambo, 839 F.2d at 1417. When a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits or other written materials, the plaintiff need only make a prima facie showing. Id. All factual disputes are resolved

in favor of the plaintiff in determining whether the plaintiff has made a prima facie showing which establishes jurisdiction. Id.

Applying these principals, the Court finds that Xeta has failed to establish a prima facie case of personal jurisdiction over Defendants. It is undisputed that Defendants have not transacted any business or conducted any activities in Oklahoma so as to create general jurisdiction. See, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, n. 9, 104 S.Ct. 1868, 1872 n. 9, 80 L.Ed.2d 388 (1984). As to the existence of specific jurisdiction, see, Helicopteros, 466 U.S. at 414 n. 8, 104 S.Ct. 1872, n. 9, it is also undisputed that Defendants had no contact with Oklahoma in regard to the alleged fraudulent conveyances which are the subject of Xeta's action. Xeta alleges in its brief that personal jurisdiction exists because Defendants and ATC entered into a civil conspiracy to fraudulently convey the settlement proceeds to Canton and the conspiracy was directed at Oklahoma. The Court, however, finds such allegation lacks merit. The complaint, liberally construed, does not allege a conspiracy between Defendants and ATC. Nor can a conspiracy be inferred from the allegations. The complaint simply alleges that transfers of the settlement proceeds were made to Canton and that such transfers constitute fraudulent conveyances. The Court will not permit Xeta to create jurisdiction based upon allegations not within the complaint.

Relying upon Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) and Burt v. Board of Regents, 757 F.2d 242, 244-

45 (10th Cir. 1985), Xeta also alleges that personal jurisdiction exists over Defendants because the fraudulent conveyances caused harm or had an effect on Xeta within the State of Oklahoma. The Court, however, finds that the fraudulent conveyances were not "purposefully directed" at Oklahoma. Moreover, the focal point of the transfers was not Oklahoma. The Court therefore concludes that Calder and Burt are distinguishable from this case.

Because Xeta has failed to show that Defendants purposefully directed their activities to Oklahoma, the Court finds that Defendants lack sufficient minimum contacts with Oklahoma to exercise personal jurisdiction. The Court further finds that Defendants' remote contacts with Oklahoma are not such that Defendants would reasonably anticipate being haled into this Court.

Based upon the foregoing, the Court hereby GRANTS Defendants' Motion to Dismiss for Lack of Personal Jurisdiction (Docket No. 2). In light of the Court's ruling dismissing this action for lack of personal jurisdiction over Defendants, the Court declares MOOT Defendants' Motion to Dismiss for Improper Venue (Docket No. 2).

ENTERED this 16th day of February, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

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

FEB 16 1995

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

KAREN LINDUFF,)
)
Plaintiff,)
)
vs.)
)
CITY OF BIXBY, JIM BENNETT,)
)
JOE WILLIAMS, ED STONE, and)
)
CHERYL POWELL,)
)
Defendants.)

Case No. 94-C-101-BU ✓

ENTERED ON DOCKET
DATE FEB 17 1995

ORDER

This matter comes before the Court upon the Motion to Dismiss Without Prejudice filed by Plaintiff, Karen Linduff, on February 14, 1995. Upon due consideration of the unopposed motion, the Court hereby GRANTS the motion and DISMISSES WITHOUT PREJUDICE the above-captioned matter.

ENTERED this 16th day of February, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JALINDA K. BALL,)
)
 Plaintiff,)
)
 v.)
)
 KIMBERLY-CLARK CORPORATION,)
)
 Defendant.)

No. 94-C-369K

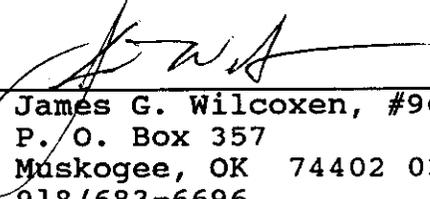
FEB 18 1995
Richard H. Lawrence, Clerk
U. S. DISTRICT COURT
MUSKOGEE, OKLAHOMA 74402

**AMENDED STIPULATION
OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated that the above-entitled action may be dismissed with prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

DATED this 15th day of February, 1995.

WILCOXEN, WILCOXEN & PRIMOMO

By 

James G. Wilcoxen, #9605
P. O. Box 357
Muskogee, OK 74402 0357
918/683-6696

Attorneys for Plaintiff

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

By 

John R. Woodard, III, #9853
525 South Main, Suite 1400
Tulsa, OK 74103 4409
918/583-7129
FAX 918/584-3814

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE FEB 17 1995

HARRY LEVAN,

Plaintiff,

vs.

CENTENNIAL LIFE INSURANCE
COMPANY, a foreign insurance
corporation, and DAVE JOHNSON,
CLU, ChFC, agent,

Defendants.

Case No. 93 C1069 K

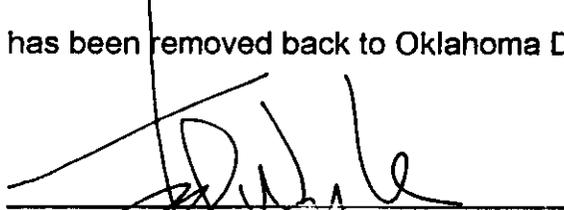
FILED

FEB 17 1995

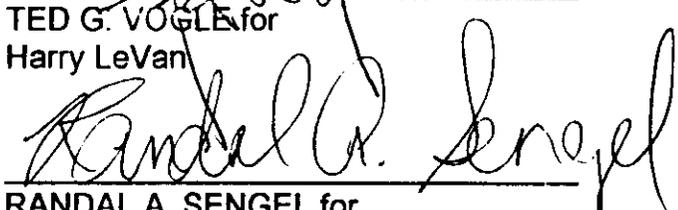
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff Harry LeVan and the Defendant Centennial Life Insurance Company, only, and stipulates that in the above captioned matter their differences have been resolved and jointly stipulate and agree to the dismissal with prejudice of the action between Harry LeVan and Centennial Life Insurance Company, only, leaving for adjudication Harry LeVan v. Dave Johnson, CLU, ChFC, agent, which has been removed back to Oklahoma District Court, Tulsa Division.



TED G. VOGLE for
Harry LeVan



RANDAL A. SENDEL for
Centennial Life Insurance Company

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 REAL PROPERTY KNOWN AS:)
 232 and 234 MELTON ROAD,)
 LIBERTY, PICKENS COUNTY,)
 SOUTH CAROLINA, AND ALL)
 BUILDINGS, APPURTENANCES,)
 AND IMPROVEMENTS THEREON;)
)
 and)
)
 REAL PROPERTY KNOWN AS:)
 909 NORRIS DRIVE,)
 LIBERTY, PICKENS COUNTY,)
 SOUTH CAROLINA, AND ALL)
 BUILDINGS, APPURTENANCES,)
 AND IMPROVEMENTS THEREON;)
)
 and)
)
 REAL PROPERTY KNOWN AS:)
 5861 McLEOD DRIVE,)
 LAS VEGAS, CLARK COUNTY,)
 NEVADA, AND ALL BUILDINGS,)
 APPURTENANCES, AND)
 IMPROVEMENTS THEREON;)
)
 and)
)
 THE SUM OF ONE HUNDRED)
 THIRTY THOUSAND THIRTY)
 DOLLARS (\$100,030.00))
 IN UNITED STATES CURRENCY;)
)
 and)
)
 ONE 1982 MERCEDES BENZ,)
 VIN WDBBA45A2CB015752,)
)
 Defendants.)

CIVIL ACTION NO. 94-C-85-B

FILED

FEB 16 1995

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

ENTERED ON DOCKET

DATE FEB 16 1995

**JUDGMENT OF FORFEITURE
BY DEFAULT AND BY STIPULATION**

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default and by Stipulation against the defendant real properties and vehicle and all entities and/or persons interested in the defendant real properties and vehicle, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 31st day of January 1994, alleging that the defendant real properties and vehicle, to-wit:

- a) All those pieces, parcels, or tracts of land in the State of South Carolina, County of Pickens, off S.C. Hwy. 93, on Melton Road. According to plat of survey by John C. Smith, surveyor, dated April 24, 1991, said tracts or parcels of land are known as Tracts A & D, containing 8.25 acres and 10.10 acres, respectively, and all buildings, appurtenances, and improvements thereon. Reference is made to said plat, which is recorded in Plat Book 47, at Page 116-B, Office of the Clerk of Court for Pickens County, for metes and bounds description of the within conveyed tract.

ALSO, a 20 foot easement or right of way for ingress and egress to the within tract from Melton Road; Tract A, containing 8.25 Acres and Tract D, containing 10.10 Acres, being T.M.S. #F16-01-0030.

This being the property conveyed to Betty M. McPeck by Deed of Hubert D. Patrick dated July 8, 1991, and recorded August 20, 1991, in Book 142 of Deeds at Page 37 in the records of Pickens County, South Carolina; by deed of Deborah D.

Patrick and Dennis Gene Patrick dated July 8, 1991, and recorded August 20, 1991, in Book 142 of Deeds at Page 33, in the records of Pickens County, South Carolina, and by deed of James J. Haley and Helen Haley dated July 8, 1991, and recorded in Book 142 of Deeds at Page 46 in the records of Pickens County, South Carolina, and known as 232 and 234 Melton Road, Liberty, Pickens County, South Carolina;

- b) All that certain piece, parcel, or lot of land lying and being situate in the State of South Carolina, County of Pickens, and containing 7.61 acres, and all buildings, appurtenances, and improvements thereon, and being shown on a Plat prepared by John C. Smith, RLS, dated February 7, 1972, and recorded in Plat Book 19 at Page 159, records of Pickens County, South Carolina, reference to which is invited for a more complete and accurate description.

This being the property conveyed to James Hobart Van Over by Deed of Wayne D. Stancil, dated June 25, 1992, and recorded in Book 182 at Page 77 in the land records of Pickens County, South Carolina, known as 909 Norris Drive, Liberty, Pickens County, South Carolina;

- c) Lot One (1) of that certain Parcel Map in File 15, Page 88, in the Office of the County Recorder of Clark County, Nevada, and recorded December 6, 1977, in Book 819 of Official Records as Document No. 778683, a/k/a 5861 McLeod Drive, Las Vegas, Clark County, Nevada, and all buildings, appurtenances, and improvements thereon; APM 160-170-070;
- d) One 1982 Mercedes Benz,
VIN WDBBA45A2CB015752;

were subject to forfeiture pursuant to 21 U.S.C. § 881, because they were furnished, or intended to be furnished, in exchange for a controlled substance, or were purchased with proceeds traceable to such an exchange, and/or because they were used to facilitate drug transactions, in violation of the drug laws of the United States.

Warrants of Arrest and Notices In Rem were issued by The Honorable Thomas R. Brett, Chief Judge of the United States District Court for the Northern District of Oklahoma, as follows:

- | | | |
|----|---|--|
| a) | United States Marshal
for the Northern
District of Oklahoma | Issued 2-6-94, for
seizure of defendant
vehicle and for
publication in the
Northern District of
Oklahoma. |
| b) | United States Marshal
for the District of
South Carolina | Issued 2-3-94, for
seizure of the
defendant real
property in the
District of South
Carolina and for
publication in the
District of South
Carolina. |
| c) | United States Marshal
for the District of Nevada | Issued 2-3-94 for
seizure of the
defendant real
property in the
District of Nevada
and for publication
in the District of
Nevada, |

for seizure and arrest of the defendant real properties and vehicle and publication according to law in the above-referenced districts.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the respective Warrants of Arrest and Notices In Rem on the defendant real properties and the defendant vehicle, by posting a copy thereof on the defendant properties, as follows:

232/234 Melton Road, August 18, 1994
Liberty, Pickens County,
South Carolina

909 Norris Drive August 18, 1994
Liberty, Pickens County,
South Carolina

5861 McLeod Drive July 12, 1994
Las Vegas, Clark County,
Nevada

1982 Mercedes July 21, 1994
at Tulsa, Oklahoma

The following individuals were determined to be the only potential claimants in this action with possible standing to file a claim, or claims, herein to all or part of the real properties and vehicle, and were personally served in this action as shown below:

JAMES HOBART VAN OVER, Served:
a/k/a JAMES H. VAN OVER, March 31, 1994
and GARY WATSON,

BETTY M. VAN OVER, Served:
a/k/a BETTY M. WATSON, May 20, 1994
and BETTY McPEEK,

COUNTY TREASURER OF PICKENS COUNTY Served:
Pickens County Courthouse August 18, 1994
Pickens, South Carolina

ANTHONY DINECCO, Served:
Trustee of the April 12, 1994
ANTHONY DINECCO 1989 TRUST
as to the real property at
5861 McLeod Drive,
Las Vegas, Clark County, Nevada

PRINCIPAL RESIDENTIAL Served:
MORTGAGE, INC., April 7, 1994
f/k/a **PRINCIPAL MUTUAL**
LIFE INS. CO.,
711 High Street
Des Moines, Iowa 50392-0770,
as to the real property at
5861 McLeod Drive
Las Vegas, Clark County, Nevada

COUNTY TREASURER OF Served:
CLARK COUNTY, NEVADA July 12, 1994
Clark County Courthouse
Las Vegas, Nevada,
as to the real property at
5861 McLeod Drive
Las Vegas, Clark County, Nevada

LAND TITLE OF NEVADA, INC. Served:
720 South Seventh Street July 12, 1994
Las Vegas, Nevada 89101
as to the real property at
5861 McLeod Drive
Las Vegas, Clark County, Nevada

COUNTY ASSESSOR OF Served:
CLARK COUNTY, NEVADA, September 1, 1994
309 South Third Street
Fourth Floor
Las Vegas, Nevada 89155
as to the real property at
5861 McLeod Drive
Las Vegas, Clark County, Nevada

CLARK COUNTY SANITATION DISTRICT Served:
5857 East Flamingo August 25, 1994
Las Vegas, Nevada 89122
as to the real property at
5861 McLeod Drive
Las Vegas, Clark County, Nevada

Board of County Commissioners/
Board of Trustees
of Clark County Sanitation District
225 East Bridger Avenue
Fifth Floor
Las Vegas, Nevada 89155

Served:
September 1, 1994

USMS 285s reflecting the service upon the defendant real properties, the defendant vehicle, and the potential claimants are all on file herein.

James Hobart Van Over, a/k/a James H. Van Over and Gary Watson, who was determined to be one of the potential claimants in this action with possible standing to file a claim to the defendant real properties and vehicle, executed a Stipulation for Forfeiture of the defendant real properties and vehicle; filed March 25, 1994. In addition, James H. Van Over also executed deeds conveying all right, title, or interest he may have in and to the defendant real properties to the United States of America.

Betty M. Van Over, a/k/a Betty M. Watson and Betty McPeek, who was determined to be one of the potential claimants in this action with possible standing to file a claim to the defendant real properties and vehicle, executed a Stipulation for Forfeiture of the defendant real properties and vehicle; filed May 19, 1994. In addition, Betty M. Van Over also executed deeds conveying all of her right, title, and interest in and to the defendant real properties to the United States of America.

All persons or entities interested in the defendant real properties and vehicle were required to file their claims herein

within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notices of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

The following mortgage and tax claims have been filed with regard to the defendant real property at 5861 McLeod Drive, Las Vegas, Nevada:

	<u>Date Claim Filed</u>	<u>Date Answer Filed</u>
Principal Residential Mortgage, Inc.	4-15-94	5-02-94
ANTHONY DINECCO, TRUSTEE OF THE ANTHONY DINECCO 1989 TRUST	6-06-94	6-06-94
ANTHONY DINECCO, Individually	6-06-94	NONE
District Attorney of CLARK COUNTY NEVADA on behalf of:	9-08-94	9-08-94
County Treasurer of Clark County, Nevada		
LAND TITLE OF NEVADA	10-31-94	NONE
ANTHONY DINECCO	06-01-94	NONE

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

Publication of Notice of Arrest and Seizure occurred as follows and Proof of Publication was filed December 28, 1994:

- | | | |
|----|-------------------------------|--|
| a) | Northern District of Oklahoma | Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, October 27, November 3, and November 10, 1994, |
| b) | District of South Carolina | The Pickens Sentinel, Pickens, South Carolina, September 24, 21, and 28, 1994, |
| c) | District of Nevada | Las Vegas Review-Journal, Las Vegas, Nevada, September 6, 13, 20, and 27, 1994. |

No other claims in respect to the defendant real properties and vehicle have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant real properties or vehicle, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real properties and vehicle, and all persons and/or entities interested therein, except James Hobart Van Over, a/k/a James H. Van Over and Gary Watson, who executed Stipulation for Forfeiture on February 17, 1994; filed March 25, 1994; Betty M. Van Over, a/k/a Betty M. Watson and Betty McPeek, who executed a Stipulation for Forfeiture on May 6, 1994; filed May 19, 1994; and Anthony Dinecco, Trustee of

the Anthony Dinecco 1989 Trust; Anthony Dinecco, Individually; Principal Residential Mortgage, Inc., f/k/a Principal Mutual Life Ins. Co.; County Treasurer of Clark County Nevada; and Land Title of Nevada, Inc., as to the real property located at 5861 McLeod Drive, Las Vegas, Nevada, and there is no known reason why judgment of forfeiture by default against all persons and/or entities having an interest in the defendant real properties and vehicle, except the above-named entities and individuals, should not be entered.

The United States of America has entered into a Stipulated Expedited Settlement Agreement, properly approved by the Court and filed herein, with the following Claimants, providing for the payments of their mortgage claims as set forth therein upon the entry of a Judgment of Forfeiture in this matter:

**Anthony Dinecco,
as Trustee of the
Anthony Dinecco
1989 Trust**

**Agreement Filed June 6, 1994
Order Approving Filed June 8, 1994**

**Principal Residential
Mortgage Incorporated**

**Agreement Filed Nov. 8, 1994
Order Approving Filed:
Nov. 10, 1994**

The United States further consents to the validity and payment of the claim filed by Anthony Dinecco, individually, on June 6, 1994, and Land Title of Nevada on October 31, 1994, as set forth in the Declaration of Assistant United States Attorney Catherine Depew Hart filed February 14, 1995.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant real properties and vehicle:

- a) All those pieces, parcels, or tracts of land in the State of South Carolina, County of Pickens, off S.C. Hwy. 93, on Melton Road. According to plat of survey by John C. Smith, surveyor, dated April 24, 1991, said tracts or parcels of land are known as Tracts A & D, containing 8.25 acres and 10.10 acres, respectively, and all buildings, appurtenances, and improvements thereon. Reference is made to said plat, which is recorded in Plat Book 47, at Page 116-B, Office of the Clerk of Court for Pickens County, for metes and bounds description of the within conveyed tract.

ALSO, a 20 foot easement or right of way for ingress and egress to the within tract from Melton Road; Tract A, containing 8.25 Acres and Tract D, containing 10.10 Acres, being T.M.S. #F16-01-0030.

This being the property conveyed to Betty M. McPeck by Deed of Hubert D. Patrick dated July 8, 1991, and recorded August 20, 1991, in Book 142 of Deeds at Page 37 in the records of Pickens County, South Carolina; by deed of Deborah D. Patrick and Dennis Gene Patrick dated July 8, 1991, and recorded August 20, 1991, in Book 142 of Deeds at Page 33, in the records of Pickens County, South Carolina, and by deed of James J. Haley and Helen Haley dated July 8, 1991, and recorded in Book 142 of Deeds at Page 46 in the records of Pickens County, South Carolina, and known as

232 and 234 Melton Road, Liberty,
Pickens County, South Carolina;

- b) All that certain piece, parcel, or lot of land lying and being situate in the State of South Carolina, County of Pickens, and containing 7.61 acres, and all buildings, appurtenances, and improvements thereon, and being shown on a Plat prepared by John C. Smith, RLS, dated February 7, 1972, and recorded in Plat Book 19 at Page 159, records of Pickens County, South Carolina, reference to which is invited for a more complete and accurate description.

This being the property conveyed to James Hobart Van Over by Deed of Wayne D. Stancil, dated June 25, 1992, and recorded in Book 182 at Page 77 in the land records of Pickens County, South Carolina, known as 909 Norris Drive, Liberty, Pickens County, South Carolina;

- c) Lot One (1) of that certain Parcel Map in File 15, Page 88, in the Office of the County Recorder of Clark County, Nevada, and recorded December 6, 1977, in Book 819 of Official Records as Document No. 778683, a/k/a 5861 McLeod Drive, Las Vegas, Clark County, Nevada, and all buildings, appurtenances, and improvements thereon; APM 160-170-070;

- d) One 1982 Mercedes Benz,
VIN WDBBA45A2CB015752;

and that such real properties and vehicle be, and they are, forfeited to the United States of America for disposition according to law, in the following priority:

**REAL PROPERTIES LOCATED IN
THE STATE OF SOUTH CAROLINA:**

- a) First, from the sale of the real properties, payment to the United States of America of all expenses of forfeiture of the defendant real properties, including, but not limited to, expenses of seizure, custody, advertising, and sale;
- b) The remaining proceeds of the sale of the defendant real properties in the State of South Carolina shall be disposed of by the United States Marshals Service, according to law.

**REAL PROPERTY LOCATED AT:
5861 McLEOD DRIVE,
LAS VEGAS, NEVADA**

- a) First, from the sale proceeds of the real property, payment to the United States of America of all expenses of forfeiture of the defendant real property located at 5861 McLeod Drive, Las Vegas, Nevada, including, but not limited to, expenses of seizure, maintenance and custody, advertising, and sale.
- b) Second, to Claimant Principal Residential Mortgage Inc., principal and non-default interest due and owing to it pursuant to the Stipulated Settlement Agreement.
- c) Third, to Anthony Dinecco, Trustee of the Anthony Dinecco 1989 Trust, the sum of \$168,917.16, for principal and interest due and owing.
- d) Fourth, to Claimant Anthony Dinecco, Individually, the sum of \$5,500.98, which was expended by him in making payments to Principal Residential Mortgage, Inc., after James H. Van Over, alias Gary Watson, and Betty M. Van Over, alias Betty M. Watson, defaulted on their Deed of Trust to Anthony Dinecco.

e) Fifth, any amounts due and owing, pursuant to claims filed by the County Treasurer of Clark County, Nevada, as allowed by the Court.

f) Sixth, to Land Title of Nevada, Inc., the sum of \$1,221.40.

g) Seventh, the remaining proceeds of the sale of the defendant real property located at 5861 McLeod Drive, Las Vegas, Nevada, the buildings, appurtenances, and improvements thereon, shall be retained by the United States Marshals Service, for disposition according to law.

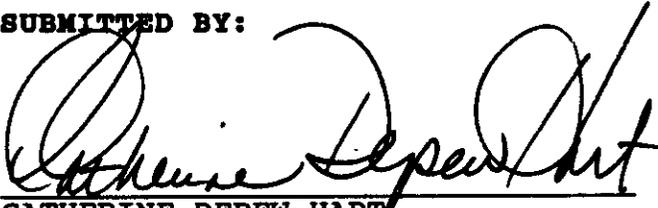
1982 MERCEDES BENZ:

The United States Marshals Service shall deliver the defendant vehicle to the United States Customs Service for official law enforcement use.

S/ THOMAS R. BRETT

THOMAS R. BRETT, Chief Judge of the
United States District Court

SUBMITTED BY:

A handwritten signature in black ink, appearing to read "Catherine Depeew Hart". The signature is written in a cursive style with large, sweeping loops.

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\VANOVER4\04443

N:\UDD\CHOOK\FC\VANOVER5\04443

N:\UDD\CHOOK\FC\VANOVER7\04443

N:\UDD\CHOOK\FC\VANOV14\04443

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

FILED

FEB 15 1995

LL

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

URALL O. EDWARDS,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, SECRETARY HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

Case No. 93-C-313-E ✓

ENTERED ON DOCKET

DATE FEB 16 1995

ORDER

Now before the Court is the appeal of the Plaintiff Urall O. Edwards to the Secretary's denial of disability benefits.

Plaintiff brings this claim asserting that he is severely and irremediably disabled and continues to be disabled because of neck problems, back problems, shoulder problems, limited range of motion; breathing problems, decreased vision, and severe constant pain. He claims that the Secretary erred in denying his applications for Social Security Disability benefits and Supplemental Security Income Disability Benefits. He contends that substantial evidence does not support the Administrative Law Judge's determination that he can perform light or sedentary work, that the hypothetical question asked of the expert was incomplete and misleading and that the Administrative law judge erred when he "cut off" the Plaintiff's attorney while cross-examining the expert.

The Plaintiff was 53 years old at the time of the administrative hearing in 1991. He is 5'3" tall, weighs 174 pounds and completed the 12th grade. He worked from 1970 until 1989 for

the city of Tulsa as a street department laborer. He testified he was injured on the job and hurt his neck and has not worked since 1989. He had two neck surgeries: one in 1988, and one in 1989. He currently has pain across his shoulders and neck. He is clumsy with his right hand and drops things. He states he is now able to lift only 10 to 15 pounds, stand for 30 minutes to an hour, walk no more than 8 blocks and not sit for extended periods of time. He takes no prescription pain medication because he has no money.

The medical records reveal that Plaintiff underwent surgery on March 16, 1988, for an anterior cervical discectomy and fusion at C6-7. He healed satisfactorily, had total resolution of his symptomology, no neurological deficit, and was released for work on July 25, 1988. He then had a C5-C6 partial hemilaminectomy and foraminotomy in 1989. Ten weeks postoperatively, he was found to be able to return to work, although it was stated he may be better off in the long run to perform a job with less lifting. In January, 1990, Edwards was noted to have mild spasm and local tenderness in the cervical muscles. He was examined in August, 1990, and found to have spasm and local tenderness, as well as decreased grip strength in the right hand, and to be capable only of work in an area of sedentary activity which would avoid manual labor and repetitive head and upper extremity movements and grasping. Dr. Gilliland, who examined Plaintiff for an evaluation of permanent impairment, found in 1991, that as a result of neck and back problems, he met the social security listings for "disorders of the spine," was 100% impaired, and capable of no

more than restricted sedentary activity.

The vocational expert testified that Plaintiff could not return to his job as a street laborer. However, he opined that Plaintiff could engage in other types of work such as cashier, toll booth or parking lot cashier, or bench assembly work. The Administrative Law Judge found that Edwards was capable of light work with a restriction of no prolonged walking, and a requirement of alternating positions. He concluded that Edwards would have only mild to moderate pain at light work. He found that while Edwards could not perform his previous work, there were numerous sedentary and light unskilled jobs that Edwards could perform.

The Administrative Law Judge found that the Plaintiff was not fully credible regarding his pain, and noted: "[t]he claimant seems to limit himself to no work, whereas the physical examinations indicate that he is not so limited." He also found that the Plaintiff's impairment did not meet a listed impairment, that Plaintiff was capable of work at a light level and his pain would not effect his ability to work at that level. Specifically, he found that Plaintiff's residual functional capacity for light work is reduced by pain which does not interrupt his concentration or performance, and, thus, Plaintiff is not disabled.

Legal Analysis

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).

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 of 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 Plaintiff argues that his ailments constitute a "listed impairment" and should have been found disabling, and that since he cannot stand, walk or sit for 6 hours out of an 8 hour work day, he is not able to perform either light or sedentary activity on a sustained basis. He also argues that the hypothetical to the vocational expert was misleading when it required him to assume that the plaintiff could perform sedentary or light work and failed to take into account all of the Plaintiff's documented nonexertional impairments.

The Defendant argues that the spinal impairment did not meet the requirements of the listings, and that even though Dr. Gilliland found in 1991 that he had a listed impairment, this is not supported by the medical records and the progress he appears to have made after surgery. The Defendant also asserts that a hypothetical question that directed the expert to assume that

Plaintiff could perform light and sedentary work, but that he could not walk over 8 blocks without feeling pain, has to change positions from time to time because of pain, and had to take nonprescription medication for relief of his pain is a consistent and fair hypothetical. The Defendant also points out that Plaintiff's counsel did not complain about the hypothetical or about being "cut off" during cross examination of the vocational expert to the appeals council.

The Court finds that substantial evidence supports the ALJ's finding that the Plaintiff did not have a listed impairment. The medical records support a finding that Plaintiff does not have a listed impairment, and the only testimony to the contrary is the report of Dr. Gilliland. Moreover, both treating physicians, Dr. Lins and Dr. Fielding concluded that Plaintiff was healing and could return to work, although Dr. Fielding recommended he seek less strenuous work. The testimony of these treating physicians should be given greater deference than that of Dr. Gilliland, who was an evaluating physician. Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987). Additionally, the hypothetical used by the ALJ was appropriate, since it addressed the limitations that the ALJ found Plaintiff to have. Plaintiff's appeal is denied.

IT IS SO ORDERED THIS 14th DAY OF FEBRUARY, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED

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

FEB 15 1995

le

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

ORA KATHLEEN HART,)
)
Plaintiff,)
)
vs.)
)
DONNA SHALALA, SECRETARY HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 93-C-159-E ✓

ENTERED ON DOCKET

DATE FEB 16 1995

O R D E R

Now before the Court is the appeal of the Plaintiff Ora Kathleen Hart (Hart) to the Secretary's denial of disability benefits.

Plaintiff appeals the Secretary's denial of her applications for Social Security and Supplemental Security Income Disability benefits. She claims that she has been disabled since November 17, 1988, because of fibromyalgia, myofascial pain, multiple somatic complaints, and affective and personality disorders. Her claim was denied by the Administrative Law Judge, then remanded by the Appeals Counsel for a supplemental hearing, and denied again by the ALJ. The Administrative law judge found that plaintiff was not entitled to benefits because she had the residual functional capacity to perform sedentary and/or light jobs.

Plaintiff was 44 years old at the time of the supplemental hearing. She has a GED and a floral design certificate from Platt College. She had worked at Safeway store as cashier, courtesy clerk, stock clerk, and in the floral department for 11 years prior to quitting in 1988. Plaintiff claims to suffer from facial

numbness and neck, back, and hip pain. She has suffered from depression since 1985. Her current activities include washing dishes, doing laundry, and playing bingo once a week. She takes prescription medications: Desyrel, Lopid, Lozol, Flexeril, Voltaren, Synthroid, and Darvocet. She testified that these medications help to ease her pain, but that she experiences no side effects from these medications.

Plaintiff's records reveal that she underwent an anterior cervical discectomy with fusion at C4-5 and C5-6 in February, 1989, and exploratory surgery because of continued pain and numbness in September, 1989. After the exploratory surgery, the patient was noted to have a solid fusion C4-5 and C5-6. She was placed on a TENS unit postoperatively, and received good relief from pain. In March, 1990, her treating physician, Dr. Marilyn Lins, noted that Plaintiff's pain "significantly impairs work capacity, even of sedentary nature, unless frequent rest intervals are available," and that she was "unable to return to work in her former occupation." In April, 1990, Dr. Lins noted that the Plaintiff's pain was decreased and that she had essentially normal neurological findings.

Minor Gordon, PhD, who examined Plaintiff on June 6, 1990, found that she had major depression, moderate and avoidant personality, but noted that she was "an individual who likely has overstated the extent of the pain." Dr. Ronald Passmore, who examined Plaintiff on 6-27, 1990, found that she had unlimited or very good mental ability to do work-related activities. He noted,

however, that the pain syndrome would probably increase her absences, but gave her a good ability to demonstrate reliability. On October 9, 1990, Dr. Hallford, found Plaintiff to be capable of returning to work without any specific restrictions other than the common sense avoidance of aggravating activities.

Dr. William Dandridge, who examined Plaintiff on January 28, 1992, found that Plaintiff could walk without difficulty, could sit, stand or walk for 3 hours each at a time and a total of 8 hours each, that she could lift up to 25 pounds frequently, and that she could use her hands and feet for repetitive movements and could bend , squat, crawl, and climb.

The vocational expert testified that Plaintiff could perform the sedentary jobs of entry level auditing/accounting clerk, inventory/stock clerk, receptionist, and order clerk. The expert also testified that she could perform the light jobs of ticket agent or hotel clerk in order to alternate between sitting and standing.

The ALJ found that while Plaintiff could not return to her previous job, she was capable of sedentary or light work, and thus was not disabled. He relied on the evaluation of Dr. Dandridge that Plaintiff retains the residual physical ability to perform light or sedentary work. While he recognized the opinion of Dr. Lins, he noted that it is not supported by any other treating or examining physician, is in conflict with the residual function analysis, and the opinion of the psychologist that she is overstating her pain.

Legal Analysis

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).

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.

In this Case, the ALJ found that the Plaintiff sustained her burden of proving a disability through the first four steps and decided the case at the fifth sequential step. Plaintiff complains that the ALJ did not properly evaluate her complaints of pain, and improperly rejected the opinion of her treating physician, Dr. Lins. The Secretary argues that the ALJ correctly evaluated the Plaintiff's complaints by looking at the objective medical evidence as well as other factors such as her activities, responsiveness to medication, etc. The Secretary also argues that the ALJ correctly noted the reasons for rejecting Dr. Lins' opinion and that the

ALJ's findings were therefore supported by substantial evidence.

The First issue, regarding the ALJ's evaluation of Plaintiff's pain complaints can be analyzed using the framework provided in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Thus, the decision maker must consider all of the evidence presented to determine whether the claimant's pain is disabling, including medical data, other objective indications of the degree of the pain, and subjective accounts of the severity of the pain. Id. at 163. Factors to be considered include the claimant's persistent attempts to find relief from pain and his willingness to try prescribed treatment, regular use of crutches or a cane, regular contact with a doctor, the possibility that psychological disorders combine with physical problems, the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Id. at 165-66.

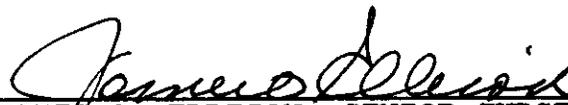
Here, the ALJ found that Plaintiff did appear to try prescribed treatment, took pain medication with no side effects, used a TENS unit, and had daily activities which included washing dishes, doing laundry, watching television, playing bingo, and visiting friends outside the home. Based on these findings, the ALJ concluded, that "claimant suffers from mild to moderate pain which would not effect her concentration or other work-related abilities at sedentary and light levels of work activity." The Court finds that the ALJ properly evaluated Plaintiff's complaints of pain according to the Luna criteria, and that his conclusions, with respect to disabling pain, are based on substantial evidence.

Plaintiff also complains that the ALJ improperly rejected the

opinion of her treating physician, Dr. Lins, and instead improperly based his decision on the opinion of two "one shot" consultative doctors' opinions. However, Dr. Lins merely opined that "patient is unable to return to work in her former occupation. Due to the necessity of frequent rest intervals, it is undetermined at this time whether the patient can be retrained in different vocation and return to work." Clearly the ALJ did rely on the opinion of Dr. Lins in finding that Plaintiff could not return to her former occupation. Moreover, the ALJ found that the "necessity for frequent rest intervals" was not supported by the objective evidence, nor was it in any manner quantified. In fact, in determining Plaintiff's residual functional capacity, no such limitation was placed on Plaintiff.

The ALJ properly considered the objective medical evidence, and the subjective evidence such as Plaintiff's activities, and his determination is supported by substantial evidence. Plaintiff's appeal is denied.

IT IS SO ORDERED THIS 14TH DAY OF FEBRUARY, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED

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

FEB 15 1995

ll

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

JAMES L. BELL,)
)
Plaintiff,)
)
vs.)
)
DONNA SHALALA, SECRETARY OF HEALTH)
AND HUMAN SERVICES,)
)
Defendant.)

Case No. 92-C-1087-E ✓

ENTERED ON DOCKET

DATE FEB 16 1995

ORDER

Now before the Court is the appeal of the plaintiff James L. Bell (Bell) to the Secretary's denial of disability benefits.

Bell Filed for Social Security Benefits in 1981¹ and 1988. These Applications were denied, and he filed the pending application in 1990. His 1990 application was denied by an Administrative Law Judge and the Appeals Council and he perfected a timely appeal to this court. He was last insured for benefits on September 30, 1984, and thus claims entitlement to benefits from October 31, 1979, his alleged onset date through September 30, 1984. He does not claim any physical disability, but claims that he has been mentally disabled due to Paranoid Schizophrenia and Post Traumatic Stress Disorder (PTSD) since 1979.

Bell, who was 32 to 37 years old during the relevant time period, has a GED plus some college classes, and is a Vietnam

¹ There is also some vague reference to an application filed in 1984. Plaintiff however, is not certain of this, and no record of a 1984 filing has been found by the Secretary. Further, in his brief, Plaintiff references only the reopening of the 1981 and 1988 applications, and the Court will confine its review to these applications.

Veteran. He has held jobs only sporadically, although he has attempted to work as a microfilm technician with an oil company in 1969, an optical scanner data processing operator from 1969-1970, a drummer sporadically through the 1970's and 1980's, a welder in the early 1970's, and a respiratory therapist for a short time in the mid-1970's. He has attempted to start a business manufacturing drums, with the help of the Veteran's Administration, since the late 1980's. He receives VA benefits, and has been assessed by the physicians at the VA to be incapable of working around others and in confined areas. He lives by himself and takes care of his own domestic needs.

Bell began to have psychological problems shortly after his return to the United States in 1968. He has a history of mental impairment from schizophrenia, and was regarded as 100 percent disabled by the Veteran's Administration due to paranoid schizophrenia from July 10, 1979 to May 5, 1985. Dr. Baldwin, the psychologist who treated him in 1979, noted that the Plaintiff essentially admitted that he did not want to go to work, and felt that he was faking or magnifying his problems. He stated on November 2, 1979, "although his paranoia is handicapping, he is also hindered by his strong hostility toward authority figures so that he is determined not to let others control his. It is his attitude or perception which keeps him from working (thus he could if he wanted to)."

Dr. Norfleet, a psychiatrist, noted after a psychiatric evaluation in July, 1980, "Mr. Bell appears to be extremely

explosive and it is my opinion that he suffers with a schizophrenic reaction, chronic paranoid type. He has a well-developed paranoid delusional system. This system is directed at almost anyone that he establishes any sort of relationship with. I fear that he is not going to be substantially rehabilitated." In June, 1982, The VA psychiatrist, Dr. Charles Cobb, noted that Plaintiff appeared fairly paranoid during the interview, that his diagnosis of schizophrenia, paranoid type should be continued, and that he appeared actively paranoid at this time. Throughout 1983 Plaintiff was noted several times to be anxious, and have "mixed personality disorders," and was placed on medication for anxiety and depression. At one time during this period, he was noted to have problems with substance abuse, an avoidant personality, anxiety attacks, and borderline sociopathic overtones.

In 1984, he was convicted and sent to prison until January, 1987. His records during this time do not reveal that Plaintiff was treated for mental problems, other than attending weekly veteran's administration counseling sessions, during imprisonment. Plaintiff was diagnosed with PTSD in 1987 and underwent inpatient treatment for this disorder at a veteran's center in Washington. He was noted at that time to suffer from severe PTSD and have "a marked impairment in social and occupational functioning."

In a residual functional capacity assessment made in 1990, by Dr. Harold Binder, it was determined that Plaintiff's mental abilities were not significantly limited and he was capable of performing work involving some detailed instructions with limited

interaction with co-workers and the general public. Dr. Robert Nelson testified at the March, 1991 administrative hearing that he had treated Plaintiff for approximately a year and a half, that his review of the record supports a finding that since early 1979, Plaintiff's condition satisfied the Social Security Listing of Impairments for schizophrenia and PTSD. He also was of the opinion that Plaintiff was not malingering or lazy. Dr. Mancuso who performed a psychiatric examination on Plaintiff, opined that Plaintiff probably was not malingering, but did not think exaggeration could be ruled out. Dr. Mancuso found that Plaintiff had no useful ability to function in the areas of relating to co-workers, dealing with the public, and dealing with work stresses.

The vocational expert testified that Plaintiff could perform sedentary jobs such as bench assembler and grinding machine operator; the light jobs of delivery driver and supply clerk; and the medium jobs of janitor and groundskeeper. She reached this conclusion based on plaintiff's limitations of not working in jobs requiring a lot of judgment, working with more than a few people, or working in confined areas.

Based on this evidence, the ALJ determined that between October 31, 1979 and September 30, 1984, plaintiff had the residual functional capacity to perform the type of work testified to by the vocational expert. He questioned the helpfulness of the testimony of Dr. Nelson regarding Plaintiff's condition for a time period during which Dr. Nelson was not seeing him, and found Plaintiff not entirely credible.

The issues on appeal are whether the ALJ properly rejected the testimony of Dr. Nelson, whether the vocational expert's response supports the ALJ's findings and whether the ALJ erred in not reopening the 1981 application.

Legal Analysis

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)
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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).

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.

This case was decided by the ALJ at the fifth sequential step, and thus the burden was on the Secretary to demonstrate that the Plaintiff was not disabled because he could perform other work in the national economy. Plaintiff objects to the ALJ's findings, arguing that the ALJ should have given great weight to the opinion of Dr. Nelson, that the vocational expert's responses do not show that plaintiff could perform work and that he erred in not

reopening the 1981 application (since he did reopen the 1988 application). The government argues that the ALJ properly gave great weight to the opinions of the physicians who were treating plaintiff during the relevant time period, that the hypothetical asked of the vocational expert was correct because it contained the restrictions Plaintiff was ultimately found to have, and that the 1981 application could not be reopened because the social security regulations at 20 C.F.R. §§404.988(b) and 404.989(a)(1) allow reopening only within four years of the initial determination on the prior application.

The ALJ noted that it was repeatedly reported that the claimant was exaggerating or magnifying his symptoms and reached the conclusion "that the claimant's subjective complaints of paranoia and other symptoms are not of such intensity, frequency, and duration as to affect his concentration or prevent the performance of work activity at the level already discussed. To the extent that the claimant's testimony tends to show otherwise, such testimony, in light of all other evidence, including the medical exhibits, is deemed not sufficiently credible to support a finding of disability under current criteria."

In so finding, the ALJ rejected the opinion of Dr. Nelson, Plaintiff's current treating physician that, since 1979, he had met the social security listings for PTSD and schizophrenia, on the basis that Dr. Nelson was not treating him during the time period in question. The court finds this distinction disingenuous, and finds that Dr. Baldwin's finding that Plaintiff "could work if he

wanted to" is not substantial evidence to support his conclusion. The ALJ did not properly give "great weight" to the opinions from the psychologists and psychiatrists during the adjudicated period, Talbot v. Heckler, 814 F.2d 1456, 1463 (10th Cir. 1987), but rather concentrated on the opinion of one psychologist while ignoring the opinion and diagnoses of other psychologists and psychiatrists during that time period. In doing so he also improperly ignored the VA disability rating, Baca v. Department of Health and Human Services, 5 F.3d 476, (10th Cir. 1993), and the opinion of Dr. Nelson.

Moreover, the finding that Plaintiff is not credible is not supported by substantial evidence and is inconsistent with the numerous notations that he is a paranoid schizophrenic, anxious, depressed, and has personality disorders. It is further inconsistent with the finding of his psychiatrist when he finally was correctly diagnosed with PTSD that he had a "marked impairment in social and occupational functioning." Based on the fact that the ALJ's conclusion is not supported by substantial evidence and the vocational expert testified that a person who was incapable of effectively working with people and paranoid and suspicious of supervisors could not perform any of the mentioned jobs, this case is reversed and remanded for benefits.

IT IS SO ORDERED THIS 14th DAY OF FEBRUARY, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET
DATE FEB 16 1995

JOYCE CRAWFORD,

Plaintiff,

v.

BRUCE HOLLEY, INC., d/b/a
B.H. INDUSTRIES,

Defendant.

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Case No. 93-C-987-K

F I L E D

FEB 16 1995

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

DISMISSAL WITH PREJUDICE

In accordance with the Settlement Agreement executed between the parties in the above-styled case, plaintiff dismisses with prejudice this action in its entirety.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO
SUBSTANCE AND FORM:



Shane M. Egan
Attorney for Plaintiff, JOYCE CRAWFORD



R. Mark Solano
Attorney for Defendant, B.H. HOLLEY, INC.,
d/b/a B.H. INDUSTRIES

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
FEB 16 1995
DATE _____

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 STEVE HEIDEBRECHT)
 aka Steve W. Heidebrecht;)
 ANNETTE S. HEIDEBRECHT;)
 COMMERCIAL FEDERAL MORTGAGE)
 CORPORATION, formerly known as)
 CFS Mortgage Corporation;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

FEB 15 1995

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

) CIVIL ACTION NO. 95-C-0076-K

ORDER TO DISMISS

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 Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 14 day of Feb, 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

PB:css

Order to Dismiss
Case No. 95-C-0076-K

ENTERED ON DOCKET
DATE FEB 16 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE UNKNOWN HEIRS, EXECUTORS,
ADMINISTRATORS, DEVISEES,
TRUSTEES, SUCCESSORS AND
ASSIGNS OF ARCHIE S. WARD,
Deceased; JO ANN WILLIAMS;
STATE OF OKLAHOMA ex rel.
OKLAHOMA TAX COMMISSION ;
COUNTY TREASURER, Tulsa
County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-598-K

F I L E D

FEB 16 1995

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day
of Feb., 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendants, County Treasurer, Tulsa County, Oklahoma, and
Board of County Commissioners, Tulsa County, Oklahoma, appear
not, having previously claimed no right, title or interest in the
subject property; the Defendant, State of Oklahoma ex rel.
Oklahoma Tax Commission, appears not, having previously filed a
Disclaimer; and the Defendants, The Unknown Heirs, Executors,
Administrators, Devisees, Trustees, Successors and Assigns of
Archie S. Ward, Deceased, and Jo Ann Williams, appear not, but
make default.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Jo Ann Williams, executed a

Waiver of Service of Summons on June 17, 1994, which was filed on June 20, 1994; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, was served with Summons and Complaint on June 14, 1994 by certified mail, the Return of Service filed on July 28, 1994.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Archie S. Ward, Deceased, 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 September 14, 1994, and continuing to October 19, 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, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Archie S. Ward, Deceased, 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, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Archie S. Ward,

Deceased. 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 on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, 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 places of residence and/or mailing addresses. 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 Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on July 26, 1994, claiming no right, title or interest in the subject property; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on July 26, 1994, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on July 15, 1994; and that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Archie S. Ward, Deceased, and Jo Ann Williams, 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 Twelve (12), Block Nine (9), FRIENDLY HOMES ADDITION to City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Archie S. Ward and of judicially determining the heirs of Archie S. Ward.

The Court further finds that Archie S. Ward became the record owner of the real property involved in this action by virtue of that certain Warranty Deed dated November 2, 1976, from Richard L. Roudebush, as Administrator of Veterans Affairs, to Archie S. Ward, a single person, which Warranty Deed was filed of record on November 4, 1976 in Book 4238, Page 1357, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that Archie S. Ward died on November 8, 1991, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 26200 was issued by the Oklahoma State Department of Health certifying Archie S. Ward's death.

The Court further finds that on November 3, 1976, Archie S. Ward, now deceased, executed and delivered to the United States of America, acting on behalf of the Administrator

of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$11,750.00, 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, Archie S. Ward, a single person, now deceased, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated November 3, 1976, covering the above-described property. Said mortgage was recorded on November 4, 1976, in Book 4238, Page 1376, in the records of Tulsa County, Oklahoma.

The Court further finds that Archie S. Ward, now deceased, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof, Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$7,822.46, plus interest at the rate of 9 percent per annum from November 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$355.87 for publication fees.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Archie S. Ward, and to a judicial determination of the heirs of Archie S. Ward.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Archie S. Ward, Deceased, and Jo Ann Williams, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem in the principal sum of \$7,822.46, plus interest at the rate of 9 percent per annum from November 1, 1991 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$355.87 for publication fees, 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 Death of Archie S. Ward be and the same is hereby judicially determined to have occurred on November 8, 1991, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that despite the exercise of due diligence by Plaintiff and its counsel, no known heirs of Archie S. Ward, Deceased, have been discovered and it is hereby judicially determined that Archie S. Ward, Deceased, has no known heirs, executors, administrators, devisees, trustees, successors and assigns, and the Court approves the Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Archie S. Ward, Deceased, Jo Ann Williams, and County Treasurer 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 the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real 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/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
USA v. The Unknown Heirs...of Archie S. Ward, et al.
Civil Action No. 94-C-598-K

PP/esf

FILED

FEB 15 1995

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

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

ROB ODOM,

Plaintiff,

v.

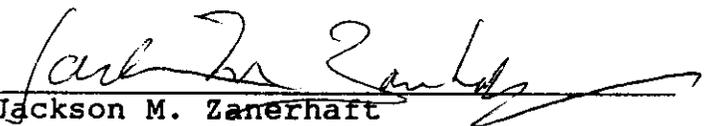
OKLAHOMA DEPARTMENT OF
CORRECTIONS and WINIFRED
OUSLEY,

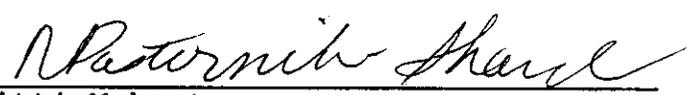
Defendants.

Case No. 94-C-254-K
ENTERED ON DOCKET
DATE FEB 16 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Rob Odom, and Defendants, State of Oklahoma, ex rel Department of Corrections, Tulsa Community Corrections Center and Winifred Ousley by and through their respective counsel of record and, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, make known their Stipulation of Dismissal With Prejudice of the above styled cause with respect to all Defendants.


Jackson M. Zanerhaft
Attorney for Plaintiff


Mitti Mohanty
Rebecca Pasternik-Ikard
Attorneys for Defendants State of Oklahoma, ex rel, Department of Corrections and Tulsa Community Corrections Center


Andrew B. Morsman
Attorney for Defendant Winifred Ousley

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

ENTERED ON DOCKET
FEB 16 1995
DATE

SHASHEEN CREEKMORE,
as mother and next friend of
LEALLEN RAY CREEKMORE, a minor;
and MARK CREEKMORE AND
SHASHEEN CREEKMORE, individually

Plaintiffs,

v.

WAL-MART, INC., a corporation;
Q. B. SCOTT COMPANY, INC., and
DOWELANCO,

Defendants.

Case No. 94-C-596-K

COURT
FEB 1995

ORDER GRANTING PLAINTIFFS' APPLICATION FOR
DISMISSAL WITH PREJUDICE

Upon Plaintiffs' Application for Dismissal with Prejudice, the Court being fully advised in the premises and for good cause shown, finds it should be granted.

IT IS ORDERED that the above-styled cause of action be and is hereby dismissed with prejudice, with each party to bear her/his/its owns costs and attorney fees.

ORDERED, this 15 day of February, 1995.


UNITED STATES DISTRICT JUDGE

giving up the right to present this dispute to a jury at a trial in which case the jury might award either a greater or lesser amount of damages than those received in the settlement.

The Court further finds that Shasheen Creekmore, as parent of the above-named minor child understands that the child may require future medical and/or psychological treatment and that by settling this case on behalf of the child, she is giving up the rights of the child to present his claims to a jury at a trial and that the jury might award more or less than the settlement amounts referred to herein. The Court finds that Shasheen Creekmore understands that her child will receive no further compensation beyond the amounts referred to herein, now or in the future, from any of the Defendants for any claims arising out the matters alleged in this lawsuit and, considering all of the above, the Court finds that Shasheen Creekmore believes this settlement on behalf of her minor child to be fair, reasonable and in the best interest of the child.

The Court further finds that the terms of the Settlement Agreement provide that the total settlement paid by the Defendants to the Plaintiffs is Four Thousand and NO/100 Dollars (\$4,000.00) and of that total sum, One Thousand Eighty-Three and 33/100 Dollars (\$1,083.33) shall be paid to Mark Creekmore and One Thousand Eighty-Three and 34/100 Dollars (\$1,083.34) to Shasheen Creekmore in their individual capacities, out of which they will be responsible for and will pay all medical, pharmaceutical and/or counselling bills and satisfy all liens or subrogation claims incurred to date for the care and treatment of the minor child or themselves in connection with the events which gave rise to this lawsuit. Additionally, out of the total settlement amount the Plaintiffs' attorney, Dale F. McDaniel, shall be paid One Thousand Three Hundred Thirty-Three and 33/100 Dollars (\$1,333.33)

for legal fees and expenses incurred in the handling of this matter, which fees and expenses the Court finds are reasonable. Finally, the Court further finds out of the total settlement amount that, the Defendants shall pay the sum of Five Hundred and NO/100 Dollars (\$500.00) to Shasheen Creekmore, in her capacity as natural mother and next friend to Leallen Ray Creekmore, minor child, and said amount shall be deposited in a custodial account to be maintained for the minor child's use.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the settlement in favor of the minor child described above, in light of all the circumstances, is fair, reasonable and is hereby approved by the Court pursuant to Okla. Stat. tit. 12, § 83.

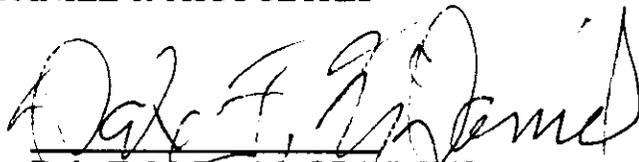
NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Settlement Agreement of the parties is approved as fair and reasonable and that the parties and their assignees are hereby ordered to fully perform said Settlement Agreement.


UNITED STATES DISTRICT JUDGE

Approved as to form:

MCDANIEL & ASSOCIATES

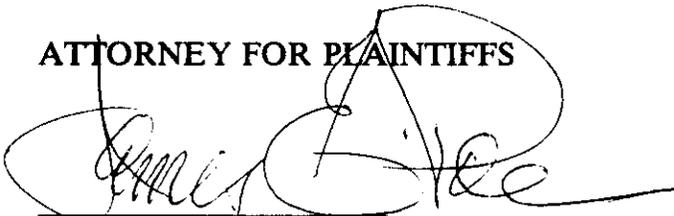
By:



Dale F. McDaniel, OBA# 5948
5563 South Lewis, Suite 100
Tulsa, OK 74105
(918) 747-7454

ATTORNEY FOR PLAINTIFFS

By:

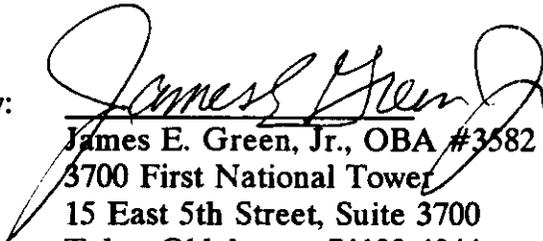


James E. Poe, OBA #7198
Manhattan Building
111 West 5th Street, Suite 740
Tulsa, OK 74103-4267
(918) 585-5537

ATTORNEY FOR DEFENDANTS,
WAL-MART, INC. and Q.B.
SCOTT COMPANY, INC.

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

By:



James E. Green, Jr., OBA #3582
3700 First National Tower
15 East 5th Street, Suite 3700
Tulsa, Oklahoma 74103-4344
(918) 599-9400

ATTORNEYS FOR DEFENDANT,
DOWELANCO

DSF/tsr

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

FILED

FEB 15 1995

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

CAROL STANBERY, INDIVIDUALLY, AND)
AS NEXT FRIEND OF HER MINOR)
DAUGHTER, MELISSA STANBERY,)

Plaintiff,)

vs.)

Case No. 94-C-1195B

JAMES S. OHLSON, PRE-FAB TRANSIT)
CO., AND PROTECTIVE INSURANCE)
COMPANY, a foreign corporation,)

Defendants.)

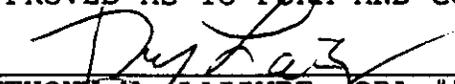
ORDER DISMISSING
PROPERTY DAMAGE CLAIMS ONLY

NOW on this 15 day of Feb, 1995, the Parties Application for Order Authorizing Partial Dismissal With Prejudice comes on for consideration before the undersigned Judge of the District Court. After appropriate review and consideration, and finding there is no issue remaining as to the property damage claims, the Court hereby enters it Order dismissing, with prejudice, all property damage claims that the Plaintiff have asserted, reserving all other issues for further determination.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:



ANTHONY M. LAIZURE, OBA #5170
Attorney for Plaintiff



DAN S. FOLLUO, OBA #11303
Attorney for Defendant,

ENTERED ON DOCKET

DATE FEB 16 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE FEB 16 1995

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARIWANA HUSSAINI-IBRAHIM)
 aka M. Hussaini-Ibrahim)
 aka Mariwana Hussaini;)
 MAGALENE I. HUSSAINI)
 aka Magalene Ferguson;)
 LANTANA AHMED;)
 TULSA ADJUSTMENT BUREAU, INC.;)
 CITY OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

FEB 15 1995

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

CIVIL ACTION NO. 94-C-578-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of Feb.,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW,
Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma;
the Defendant, Mariwana Hussaini-Ibrahim aka M. Hussaini-Ibrahim aka Mariwana
Hussaini, appears by his attorney, Marcus S. Wright, Esq.; the Defendant, TULSA
ADJUSTMENT BUREAU, INC., appears not, having previously filed its Disclaimer; and

the Defendants, MAGALENE I. HUSSAINI aka Magalene Ferguson and LANTANA AHMED, appear not but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, MARIWANA HUSSAINI-IBRAHIM aka M. Hussaini-Ibrahim aka Mariwana Hussaini, was served with process a copy of Summons and Complaint on July 15, 1994; that the Defendant, MAGALENE I. HUSSAINI aka Magalene Ferguson, was served with process a copy of Summons and Complaint on July 15, 1994; that the Defendant, TULSA ADJUSTMENT BUREAU, INC., signed a Waiver of Summons on June 8, 1994, filed on June 9, 1994; that Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy receipt of Summons and Complaint on June 7, 1994 by Certified Mail.

The Court further finds that the Defendant, LANTANA AHMED, 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 12, 1994, and continuing through September 16, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, LANTANA AHMED, 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, LANTANA AHMED. The Court conducted an inquiry into the sufficiency of the service by

publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 13, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 28, 1994; the Defendant, MARIWANA HUSSAINI-IBRAHIM aka M. Hussaini-Ibrahim aka Mariwana Hussaini, filed his Answer on August 12, 1994; the Defendant, TULSA ADJUSTMENT BUREAU, INC., filed its Disclaimer on June 8, 1994; and that the Defendants, LANTANA AHMED and MAGALENE I. HUSSAINI aka Magalene Ferguson, have failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, MARIWANA HUSSAINI-IBRAHIM, is also known as and sometimes referred to as M. Hussaini-Ibrahim and Mariwana Hussaini will hereinafter be referred to as "MARIWANA HUSSAINI-IBRAHIM."

The Defendant, MAGALENE I. HUSSAINI, is also known as and sometimes referred to as Magalene Ferguson will hereinafter be referred to as "MAGALENE I. HUSSAINI."

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), WINDSOR
ESTATES SECOND, 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 September 23, 1986, Keith H. Mackie and Evelyn S. Mackie, executed and delivered to Firstier Mortgage Co., their mortgage note in the amount of \$85,600.00, 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, Keith H. Mackie and Evelyn S. Mackie, husband and wife, executed and delivered to Firstier Mortgage Co., a mortgage dated September 23, 1986, covering the above-described property. Said mortgage was recorded on September 30, 1986, in Book 4973, Page 301, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, Firstier Mortgage Co., assigned the above-described mortgage note and mortgage to Leader Federal Savings and Loan Association. This Assignment of Mortgage was recorded on January 8, 1988, in Book 5073, Page 2794-2795, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 7, 1988, Leader Federal Savings & Loan Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 7, 1988, in Book 5126, Page 1344-1345, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 11, 1987, Keith H. Mackie and Evelyn S. Mackie, husband and wife, granted a general warranty deed to M. Hussaini-Ibrahim, a single person. This deed was Recorded with the Tulsa County Clerk on September 10, 1987, in Book 5050 at Page 1950 and the Defendant, M. Hussaini-Ibrahim assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on August 16, 1988, the Defendant, MARIWANA HUSSAINI-IBRAHIM, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1989, September 15, 1990 and April 1, 1991.

The Court further finds that the Defendant, MARIWANA HUSSAINI-IBRAHIM, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, MARIWANA HUSSAINI-IBRAHIM, is indebted to the Plaintiff in the principal sum of \$138,019.54, plus interest at the rate of Ten percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this

action in the amount of \$353.50 (\$11.04 fees for service of Summons and Complaint, \$342.46 publication fees).

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 \$29.00 which became a lien on the property as of July 2, 1990; a lien in the amount of \$13.00 which became a lien on the property as of June 20, 1991; a lien in the amount of \$85.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$75.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$68.00 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, CITY OF BROKEN, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, LANTANA AHMED and MAGALENE I. HUSSAINI aka Magalene Ferguson, are in default, and has no right, title or interest in the subject real property.

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

The Court further finds that the Defendant, TULSA ADJUSTMENT BUREAU, INC., disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, MARIWANA HUSSAINI-IBRAHIM, in the principal sum of \$138,019.54, plus interest at the rate of ten percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$353.50 (\$11.04 fees for service of Summons and Complaint, \$342.46 publication fees), 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 \$270.00 for personal property taxes for the years 1989-1993, plus the costs of this action.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, TULSA

ADJUSTMENT BUREAU, INC., MAGALENE I. HUSSAINI LANTANA AHMED, and MARIWANA HUSSAINI-IBRAHIM, 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, MARIWANA HUSSAINI-IBRAHIM, to satisfy the Judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$270.00, 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.

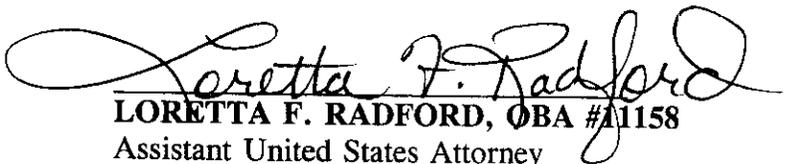
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

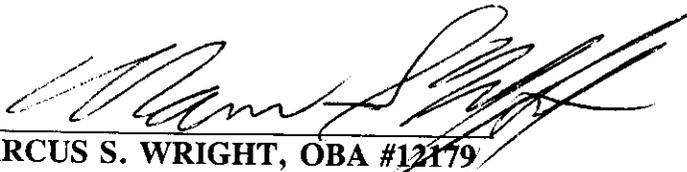
STEPHEN C. LEWIS
United States Attorney



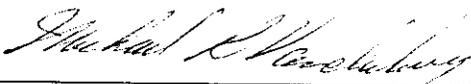
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Judgment of Foreclosure
Civil Action No. 94-C-578-B

LFR:flv

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

FEB 15 1995

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

JANET D. COLE,

Plaintiff,

v.

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

Defendant.

93-C-722-W ✓

ENTERED ON DOCKET

DATE FEB 16 1995

JUDGMENT

Judgment is entered in favor of Janet D. Cole in accordance with this court's Order filed February 14, 1995.

Dated this 15th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB 14 1995

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

JANET D. COLE,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
)
SECRETARY OF HEALTH AND)
)
HUMAN SERVICES,)
)
Defendant.)

Case No. 93-C-722-~~E~~ W ✓

ENTERED ON DOCKET
DATE FEB 16 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income benefits under § 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

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

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

15

evaluation process.² He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting 25 pounds occasionally and 10 pounds frequently, carrying 10 pounds occasionally and 5 pounds frequently, prolonged standing, walking over 2 hours in an 8-hour day, squatting or crawling, occasional bending, climbing, and reaching. He also found that claimant had a 40 percent decreased right grip. He then concluded that claimant was unable to perform her past relevant work as a nursing home medication aide, a press operator, and a waitress. He determined that her residual functional capacity for the full range of light work was reduced by limitations on carrying over 10 pounds occasionally or 5 pounds frequently and prolonged standing/walking and decreased right grip.

The ALJ found that claimant was 43 years old, which is defined as a "younger person," had a tenth grade, "limited," education, plus a certificate as a Certified Medical Assistant, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. Based on her exertional capacity for light to sedentary work and her age, education, and work experience, the ALJ found that the social security regulations led to a conclusion of "not disabled." He determined that, although her additional nonexertional limitations did not allow her to perform the full range of

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

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

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

sedentary to light work, there were a significant number of jobs in the national economy which she could perform, such as information clerk, telephone answering service, cashier, and parking lot attendant. Having determined that claimant's impairments did not prevent her from performing some sedentary to light work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ erred in failing to find that claimant had an arthritic condition which met the social security listings.
- (2) That the ALJ improperly assessed claimant's residual functional capacity.
- (3) That the ALJ did not ask the vocational expert a proper hypothetical question.

It is well settled that the claimant bears the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The ALJ concluded that the medical evidence established that the claimant had severe ankylosing spondylitis of multiple joints, but not an impairment which would meet the listings in Appendix 1, Subpart P, Regulation No. 4 of the Social Security regulations. He found that the degree of functional limitation she alleged due to pain and other subjective complaints was not credible.

Claimant alleges that she became disabled on March 27, 1990, due to ankylosing spondylitis of multiple joints with related swelling and pain. The medical records reflect that several doctors have diagnosed her with this ailment (TR 180, 181, 195, 205, 217, 229, 243, 262), and the ALJ found that she could not perform certain work because of it

(TR 22-23).

Claimant's physician, Dr. Ray Stowers, diagnosed her ankylosing spondylitis on April 4, 1990, and again on May 25, 1990 (TR 180-181). She was referred to Dr. B.B. Baker, a rheumatologist, who found on April 2, 1990 that she was able to place her fingers on the floor without bending her knees, but her Schober's maneuver was somewhat abnormal, showing an interference with the mobility of the low back (TR 195). She also had restriction of the cervical vertebrae and effusion of the third right PIP joint (TR 195). Dr. Baker injected the PIP joint and took x-rays of her lumbar and sacroiliac joints, which showed sclerosis of both sacroiliacs, the right one worse than the left (TR 195). He reviewed a positive HLA-B27 antigen testing report submitted by Dr. Stowers (TR 184), but otherwise laboratory work was essentially normal (TR 195). Dr. Baker diagnosed claimant's condition as ankylosing spondylitis and recommended Butazolidin, Tolectin, Naprosyn, or Indocin for treatment (TR 195).

Claimant was seen by Dr. Phillip Knight for a worker's compensation claim physical on May 2, 1990, and he concluded that her job involving repetitive tasks all day long with parts varying in size and weights had caused her current injury (TR 200). Dr. Knight found crepitance, pain, and limitation of range of motion and loss of strength in her wrists, hands, and hips (TR 201). There was pain on range of motion in the wrists, and bilateral crepitance with increased stiffness, lost range of motion, flexibility, and diminished strength in the grips of the hands bilaterally (TR 201). There was some pain in the hip area and limitation of range of motion, caused by repetitive squatting, bending, and weight bearing activities (TR 201). Dr. Knight concluded that claimant had sustained repeated trauma

injury to her shoulders, wrists, and hips bilaterally, was unable to do her customary occupation, and should be given temporary total disability until aggressive therapy would allow her to return to employment (TR 201).

Dr. David Heck examined claimant on September 24, 1990. He reported that there was "rather marked abnormality of flexion and extension" of her neck and increased dorsal kyphosis (TR 205).³ He found "significant heat and apparent chronic effusion of the right leg with decreased range of motion on the right knee and hip" (TR 205). Additionally, her right wrist showed chronic synovial thickening, although no overt amount of heat, with a significant decreased range of motion noted (TR 205). There was some suggestion of early ulnar drift of the 5th, 4th, and 3rd digits of the right hand and synovial thickening at the MP joints of the affected digits (TR 205). There were excellent radial pulses bilaterally, and no significant ankle edema (TR 205). There was a significant decreased range of motion of the shoulders bilaterally, with some crepitus of the right shoulder noted to palpation with flexion and extension (TR 205).

Dr. Heck noted that he observed claimant as she walked and she needed no assistive device and appeared stable (TR 205). There was "exaggerated dorsal kyphosis for a patient in this age group and there does appear to be some limited forward flexion - extension of the spine" (TR 205). The doctor concluded that claimant had inflammatory arthritity of some variety and physical symptoms not inconsistent with ankylosing spondylitis or rheumatoid arthritis (TR 205).

On November 29, 1990, a doctor reported arthritis pain and synovial thickening in

³Kyphosis is defined in Webster's Seventh New Collegiate Dictionary as the "abnormal backward curvature of the spine".

claimant's right wrist (TR 173). On February 26, 1991, claimant was examined by Dr. Thomas Chandy, who reported that she walked with a limp on the right side and had moderate swelling of the right knee with a moderate effusion and tenderness in the medial and lateral joint space (TR 217). Her flexion was only 70 to 75 degrees, as compared to 135 degrees in the opposite side (TR 217). Patella compression caused pain (TR 217). Examination of the right shoulder showed her movement restricted by 50%, and she was unable to abduct or flex beyond 90 degrees with pain (TR 217). External rotation caused significant pain and about 75% restriction of movement (TR 217).

X-rays taken by Dr. Chandy of the shoulder showed some amount of degenerative changes in the AC joint, but the Gleno Humeral Joint appeared satisfactory (TR 217). X-rays of the right knee showed narrowing of the medial and lateral joint space with a small osteophyte in the medial joint space of the right knee (TR 217). Dr. Chandy concluded claimant had subacromial bursitis in her right shoulder with generalized ankylosing spondylitis, with synovitis and degenerative arthritis in her right knee with a synovial effusion (TR 217). He injected the right shoulder and right knee with Depo Medrol and recommended a physical therapy program for her shoulder and knee (TR 217).

On April 2, 1991, claimant's pain and movement of the right shoulder had improved, but her right knee had not (TR 218). Her swelling had decreased, her flexion was 110 degrees, an improvement of 20 degrees, and her abduction was 110 degrees (TR 218). Her internal and external rotation were still restricted by 50% (TR 218). The swelling of her knee had lessened, and its range of movement improved from 70 degrees to 90 degrees and extension was -10 degrees (TR 218). Dr. Chandy noted the improvement with 14

physical therapy sessions and recommended its continuation (TR 218). He anticipated she would need 22 treatments over the next 8 weeks for maximum improvement (TR 218).

Dr. Knight saw claimant for another worker's compensation examination on April 1, 1991 and reported shoulder tenderness, crepitance, clicking, and reduced range of motion (TR 221). There were no sensory changes or muscle atrophy (TR 221). Flexion and extension in her knee were limited, and crepitance and a grinding sensation were noted on movement of the knee (TR 221). Crepitance, pain, tenderness, and reduced motion were also noted in her wrists (TR 221). The doctor changed his conclusion of temporary disability to total disability from her usual occupation, to continue "until her problems have resolved or her condition has stabilized." (TR 222).

On May 28, 1991, Dr. Chandy reported 40-50% improvement in claimant's shoulder as a result of physical therapy (TR 229). He found swelling, tenderness, and reduced motion in her knee and reduced motion in her shoulder joint (TR 229). He concluded that the total impairment rating for her knee was 14% and the total impairment for her upper right extremity was 21% (TR 229). He stated: "[i]t is unlikely that she will be able to work and I advised her to apply for Social Security Benefits for which she is totally disabled to do physical work for any type of employment [sic]. I advised her that ankylosing spondylitis is a permanent problem and may effect other joints in other areas. She is released from orthopedic care. She will continue on her arthritis medications." (TR 229).

Dr. Chandy reiterated on September 10, 1991: "Janet Cole is permanently totally disabled to do any physical work. Diagnosis is Ankylosing Spondylitis Generalised [sic],

which is a form of arthritis with subacromial bursitis of the right shoulder with degenerative arthritis of the right knee with synovitis." (TR 243).

On August 19, 1992, Dr. E. Joseph Sutton, II, examined claimant and found that her right knee was "warm and hot" (TR 262). She had a right knee effusion present, but her right hand grip was weaker than the left, only about 60% of the left (TR 262). Her reflexes were equal bilaterally and 2+ in the patellar, triceps, biceps, and Achilles regions (TR 262). She got on and off the examination table with some difficulty, moving slowly in some discomfort (TR 262). She seemed to have decreased range of motion in her right wrist and right knee (TR 262).

Dr. Sutton watched claimant as she walked through his office and out into the parking lot, and she walked with a slow pace and seemed to have a significant limp on the right side (TR 262). She used her car keys to open her car trunk and actually stood out in the parking lot for a period of time before she left (TR 262). The doctor diagnosed her with arthritis and ankylosing spondylitis by history (TR 262). He concluded she should be able to sit four hours at one time and perhaps stand and walk one hour at one time (TR 262). During an entire eight-hour day, she could probably sit for eight hours and stand and walk for perhaps two hours, as she seemed to be spending at least this much time sitting at the present time (TR 262).

Claimant argues that the ALJ erred in failing to find that this evidence showed that her condition meets or equals the social security listing for arthritis. This argument has merit. There is substantial evidence in the record that claimant has an impairment that meets Listing § 1.02 in 20 C.F.R. § 404, Appendix 1, Subpart P, Regulation No. 4 of the

Social Security regulations.

To establish a disability under Listing § 1.02, which pertains to active rheumatoid arthritis and other inflammatory arthritis, claimant must show the following:

- A. History of persistent joint pain, swelling, and tenderness involving multiple major joints [hip, knee, ankle, shoulder, elbow, or wrist and hand] and with signs of joint inflammation (swelling and tenderness) on current physical examination despite prescribed therapy for at least 3 months, resulting in significant restriction of function of the affected joints, and clinical activity expected to last at least 12 months; and
- B. Corroboration of diagnosis at some point in time by either
 1. Positive serologic test for rheumatoid factor; or
 2. Antinuclear antibodies; or
 3. Elevated sedimentation rate; or
 4. Characteristic histologic changes in biopsy of synovial membrane or subcutaneous nodule (obtained independent of Social Security disability evaluation).

Several doctors diagnosed claimant as having ankylosing spondylitis, a chronic inflammatory disease of the joints. The doctors reported a history of persistent joint pain, swelling, and tenderness in her hip, knee, shoulder, elbow, wrist, and hand since April 1990. Dr. Chandy reported joint swelling and tenderness on May 28, 1991 after claimant had received physical therapy since the end of February 1991. Dr. Stowers reported a positive finding of HLA-B27 and several doctors reported synovial thickening in her knee, wrist, and hands (TR 173, 205, 217). According to medical materials discussing ankylosing spondylitis appended to claimant's brief, "[u]se of laboratory studies is limited in that the only consistent abnormality is the presence of the HLA-B27 antigen. X-ray findings are quite helpful for diagnosis and show sacroilitis, squaring of vertebral bodies, presence of bony bridges from one lumbar body to another (syndesmophytes), and finally fusion of the

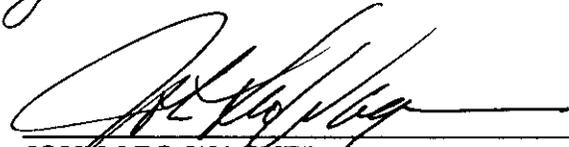
spine."

The medical materials go on to state:

The outcome for individual patients is difficult to define with some having quite mild disease but others having progressive disease with fusion of the spine, flexion contractures of the neck, and severe cardiac involvement. Some studies show that the younger the age onset of disease the worse the prognosis in terms of need for hip replacements or other corrective procedures. Aspects of the disease which may lead to disability include loss of spine motion in the lower back and neck, significant arthritis in both hips leading to loss of motion, constant pain and stiffness, and on occasion fusion of the hip joints, recurrent episodes of arthritis of the shoulders, elbows, knees, leading to decreased use of affected limbs

A claimant with a disability which is equivalent to one described in the listings should be deemed disabled. 20 C.F.R. § 404.1578. The record shows substantial, undisputed evidence that the severity of Ms. Cole's ankylosing spondylitis meets or equals Listing § 1.02, and the Secretary erred in not finding her disabled. The decision is reversed and the case is remanded for a determination of benefits pursuant to the Social Security Act.

Dated this 14th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Cole.or

ENTERED ON DOCKET

DATE FEB 15 1995

FILED

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

FEB 14 1995

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

H. R. NEAL, ANITA K. MCKNEELY,)
RANDALL G. WILDMAN, MARTIN R.)
HONAKER, DOBIE O. WELCHER,)
MAX H. CASE, VERNON R. BERGLAN,)
DENVER C. MALONE, WARREN S.)
BARGER and CHARLES R. FRANKS,)

Plaintiffs,)

v.)

Case No. CIV-93-C-365-B

THE STATE OF OKLAHOMA, ex rel.)
DEPARTMENT OF CORRECTIONS,)

Defendant.)

STIPULATION FOR DISMISSAL OF
ACTION BY REASON OF SETTLEMENT

Pursuant to Rule 41(1) Fed.R.Civ.P., Plaintiffs, through their attorney of record, state that this action has been settled, without an admission of liability on the part of the Defendant, and stipulate that this action should be dismissed with prejudice.



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ATTORNEY GENERAL OF OKLAHOMA



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ATTORNEY FOR THE DEFENDANT

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

FILED

FEB 15 1995 *DA*

FIGGIE ACCEPTACNE CORPORATION,)
)
 Appellant,)
)
 vs.)
)
 CITY ROOFING COMPANY,)
)
 Appellee.)

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

Case No. 92-C-539-B ✓
Bky No. 90-2657-C
Adv No. 91-333-C

ENTERED ON DOCKET
DATE FEB 15 1995

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, 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, by 3-15-95, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 15th day of February, 1995.

Thomas R. Brett

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL R. ROBISON aka MICHAEL)
 RAY ROBISON; LOLA F. ROBISON aka)
 LOLA FRANCIS ROBISON; KURTZ &)
 ASSOCIATES, INC.; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

FEB 14 1995

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

ENTERED ON DOCKET
DATE 2/15/95

CIVIL ACTION NO. 94-C 425B

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day
of Feb, 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Loretta F. Radford, 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, **Michael R.**
Robison aka Michael Ray Robison, Lola F. Robison aka Lola Francis
Robison, and Kurtz & Associates, Inc., appear not, but make
default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Michael R. Robison aka**
Michael Ray Robison, will hereinafter be referred to as ("**Michael**
R. Robison"); that the Defendant, **Lola F. Robison aka Lola**
Francis Robison, will hereinafter be referred to as ("**Lola F.**

Robison"); and that the Defendants, **Michael R. Robison and Lola F. Robison** are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, **Kurtz & Associates, Inc.**, waived service of Summons on April 29, 1994, which was filed on May 2, 1994.

The Court further finds that the Defendants, **Michael R. Robison and Lola F. Robison**, 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 October 13, 1994, and continuing through November 17, 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, **Michael R. Robison and Lola F. Robison**, 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 address of the Defendants, **Michael R. Robison and Lola F. Robison**. 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 Loretta F. Radford, 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 19, 1994; and that the Defendants, **Michael R. Robison, Lola F. Robison, and Kurtz & Associates, Inc.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 2, 1993, Lola F. Robison filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-1835-C. On April 21, 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 Three (3), Block Three (3), BRIARGLEN EXTENDED, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 20, 1983, Douglas R. Divelbiss and Dena J. Divelbiss, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC. their mortgage note in the amount of \$58,050.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Douglas R. Divelbiss and Dena J. Divelbiss, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC. a mortgage dated May 20, 1983, covering the above-described property. Said mortgage was recorded on May 24, 1983, in Book 4693, Page 1684, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 22, 1988, TURNER CORPORATION OF OKLAHOMA, INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development its successors and assigns. This Assignment of Mortgage was recorded on December 28, 1988, in Book 5148, Page 449, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Michael R. Robison and Lola F. Robison, currently hold the record title to the subject real property by virtue of a General Warranty Deed dated September 12, 1985, and recorded on September 24, 1985 in Book 4894, Page 712, in the records of Tulsa County, Oklahoma. The Defendants, Michael R. Robison and Lola F. Robison, are the current assumptors of the subject indebtedness.

The Court further finds that on January 1, 1989, the Defendants, Michael R. Robison and Lola F. 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.

The Court further finds that the Defendants, Michael R. Robison and Lola F. Robison, 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, **Michael R. Robison and Lola F. Robison**, are indebted to the Plaintiff in the principal sum of \$95,454.78, plus interest at the rate of 11.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$36.00 which became a lien on the

property as of June 23, 1994; a lien in the amount of \$45.00 which became a lien as of June 25, 1993; a lien in the amount of \$57.00 which became a lien as of June 25, 1993; and a lien in the amount of \$28.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Michael R. Robison, Lola F. Robison, and Kurtz & Associates, 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 Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Michael R. Robison and Lola F. Robison**, in the principal sum of \$95,454.78, plus interest at the rate of 11.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 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 \$166.00 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, **Michael R. Robison, Lola F. Robison, Kurtz & Associates, 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, **Michael R. Robison and Lola F. 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 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
\$166.00, 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.

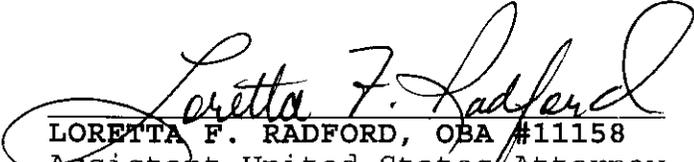
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

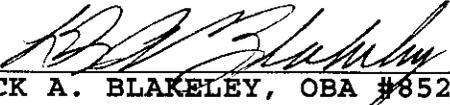
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
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(918) 581-7463


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

Judgment of Foreclosure
Civil Action No. 94-C 425B

LFR:lg

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

FILED

FEB 13 1995

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

ABDULLAH MUHAMMED,)
)
 Petitioner,)
)
 vs.)
)
 JACK COWLEY, et al.,)
)
 Respondents.)

No. 92-C-986-C

ENTERED ON DOCKET
DATE 2-14-95

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed in part and reversed in part with instructions to dismiss Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 13 day of February, 1995.

H. Dale Cook
H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 17 day of Feb, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

FEB 14 1995 *ll*

DONNA M. CONLY,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

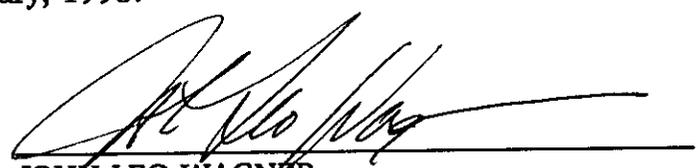
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

93-C-771-W ✓

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in
accordance with this court's Order filed February 13, 1995.

Dated this 13th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE FEB 14 1995

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

F I L E D

FEB 10 1995

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

JOHNNY R. TRAVIS,

Plaintiff,

v.

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

Defendant.

Case No. 92-C-934-W

ENTERED ON DOCKET

DATE FEB 14 1995

ORDER

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

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

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

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

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

evaluation process.² The ALJ concluded that the plaintiff has the residual capacity to perform the physical exertional requirements of work, except for lifting and carrying more than 50 pounds on occasion and frequently lifting and carrying more than 25 pounds, with no medically determinable nonexertional limitations. The ALJ found that plaintiff is unable to perform his past relevant work as a mechanic, but has the residual functional capacity to perform the full range of medium work. Having determined that plaintiff's impairments did not prevent him from performing medium work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Plaintiff now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ's decision that plaintiff is not disabled is not supported by substantial evidence.
- (2) That the ALJ erred in finding that plaintiff could perform medium work.
- (3) That the ALJ's finding that plaintiff's allegations of pain were grossly exaggerated was in error.
- (4) That the ALJ failed to consider all plaintiff's impairments in combination.
- (5) That the ALJ's mechanical application of the "grids" was in error.
- (6) That the ALJ's hypothetical questions to the vocational expert were incomplete.

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

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

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

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

At the hearing on February 20, 1992, the plaintiff testified that he had not worked since February 1991 and was receiving long-term disability benefits from Phillips Petroleum (TR 37-38). He stated that he stopped working when he developed arthritis, causing discomfort in sitting for over half an hour and standing for over an hour and an inability to walk, bend, or stoop without discomfort (TR 41-42). He claimed that he could not handle a job sitting for long periods (TR 46). His worst pain is in his left knee and elbow, and peptic ulcers limit his ability to take strong medications (TR 43, 45). He testified that he sees his doctor when he needs to, does two hours of housework a day, watches television, and drove himself to the hearing from Bartlesville, a one-hour trip (TR 43-44).

Plaintiff was first examined for elbow pain by Dr. Michael L. Bumpus on April 17, 1990 (TR 104). The left elbow was examined and x-rayed, with no abnormalities found except for a slight bone spur, and the impression was of an "essentially negative left elbow." (TR 110). The doctor prescribed Ibuprofen, Naprosyn and Voltaren (TR 104). By May 3, 1990, plaintiff reported he was doing "great" as long as he took the Voltaren (TR 104). He was not seen for arthritic pain again until December 4, 1990, when Dr. Bumpus suggested a job change and prescribed Feldene (TR 103). Dr. Bumpus completed a form for General American Life Insurance Company (not dated) which did not state whether or not he felt the plaintiff was totally disabled, could perform full-time or part-time work of another type, or what restrictions, if any, he would place upon patient's

return to work (TR 105-106).

Plaintiff was referred by Dr. Bumpus to a rheumatology specialist, Dr. Richard T. Hess, for examination on January 21, 1991 (TR 114). Dr. Hess found that the plaintiff had a moderate limitation of functional capacity and was capable of minimum or sedentary activity (TR 114-117). Dr. Hess stated that plaintiff was a candidate for vocational rehabilitation and disabled from his past work, but not other work (TR 117). Dr. Hess found that mineralization and alignment were normal, and joint spaces were well preserved (TR 114). The doctor's diagnosis of plaintiff was "bilateral-lateral humeral epicondylitis and patellofemoral osteoarthritis in both knees," with the prognosis for recovery poor (TR 114, 116).

The ALJ noted that plaintiff told Dr. Hess that, with even a short term use of anti-arthritic medications, he developed gastrointestinal symptoms, but treatment notes from Dr. Bumpus "totally refute that statement." (TR 15). Plaintiff also told Dr. Hess he had taken Zantac on a regular basis for many years (TR 114), whereas the same treatment notes show that he told his treating physician on April 15, 1991, that he was doing so well on Feldene without any gastrointestinal side effects that he had voluntarily discontinued Zantac, Cytotec, and Carafate on his own volition and he did not resume using Zantac until December 12, 1991 (TR 103-104, 127).

Dr. Hess found plaintiff had full normal range of motion of the cervical spine, both hips, and both knees, and mild stiffness of lumbosacral spine on forward flexion and extension (TR 114). Dr. Hess' neurological examination was normal, there was no evidence of edema in the extremities, and pulses were intact (TR 114). Dr. Hess stated

that injections of corticosteroid xylocaine mixtures into the elbows might be appropriate, along with physical therapy for both knees (TR 113). He also stated heat, massage and ultrasound might be helpful and, since there was no question that a lot of claimant's symptomatology was from the left elbow, it might improve dramatically with a local injection of kenalog mixed with lidocaine or similar combinations of medications (TR 113). Claimant has never returned to Dr. Hess, although he indicated on his list of medications that he was continuing to take carafate, which had been prescribed by Dr. Hess (TR 131).

Dr. Hess stated the claimant's maintenance work "seems to cause as well as aggravate his current symptoms, particularly in the knees and elbows," and suggested he would benefit from a change in his type of work (TR 113). He concluded that plaintiff was totally disabled for his past work, but could engage in full-time sedentary work (TR 117). The only actual restrictions he reported was that claimant had to avoid heavy lifting and "repetitive motion," but he did not state which joints should not be repetitively moved (TR 117).

Plaintiff claims he has peptic ulcer disease and gastric distress due to arthritic medication. The medical records from his treating physician cover almost three years, and in that period, he complained of stomach upset distress caused by arthritic medications four times, on December 4, 1990, January 4, 1991, December 12, 1991, and January 6, 1992 (TR 103-112, 126-128). He had no complaints of any abdominal pain or gastric distress for almost a full year from January 4, 1991, until December 12, 1991, when he stated Feldene was again causing some stomach upset and resumed using Zantac and Cytotec (TR 127).

The vocational expert testified that a person could do sedentary work if he could lift 10 pounds, sit 6-8 hours a day and concentrate despite pain (TR 47-48). She cited a number of sedentary jobs available in the region where the claimant resides and in the national economy within the plaintiff's vocational abilities (TR 48). She stated that if a person could drive a car for an hour, he could perform some bench assembly jobs (TR 48). She testified that light machinery maintenance jobs involved all those activities that plaintiff's previous job had involved, except the lifting (TR 49). She said that most light jobs would require plaintiff to be able to stand for more than one hour, stand and walk at least six hours out of an eight hour day, and sit more than 30 minutes out of an eight hour day (TR 50). If a person could not do these activities, he would not be able to engage in substantial gainful activity (TR 50).

There is substantial evidence supporting the conclusion that plaintiff was not disabled and could perform medium work with certain lifting restrictions. The record shows that the ALJ considered the medical evidence, along with the testimony of the plaintiff and vocational expert, before reaching his conclusion. He noted that, while there was "in actuality very little objective medical evidence to support a diagnosis of osteoarthritis, and the evidence in the record very strongly shows that diagnosis was made based far more upon claimant's subjective complaints than it was on objective findings," a treating general practitioner and an examining rheumatologist expressed the opinion plaintiff could no longer perform his past relevant work (TR 17). The ALJ considered not only plaintiff's physical capacities, but his age, education and work experience. Plaintiff's testimony was viewed in light of his subjective complaints of pain, daily activities and

history of treatment. No doctor concluded he could not work, but only recommended a change in his job.

The second issue is whether the ALJ properly considered all the plaintiff's impairments including pain in his decision. There is substantial evidence to support plaintiff's claim that he suffers disabling pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f 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." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had knee and elbow problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "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, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ recognized that plaintiff had a pain-producing impairment arthritic condition and apparently found a loose nexus between the arthritis and his subjective complaints of pain. Then, after considering all the objective and subjective evidence, he determined that the pain did not preclude plaintiff from work activity: "Because the medical evidence does not contain clinical findings and laboratory tests to support the

claimant's allegations of totally disabling pain, a determination of disability must rest solely on his subjective complaints." (TR 20).

Medical evidence to support the ALJ's conclusion includes Dr. Bumpus' finding no major abnormalities in x-rays on April 17, 1990 and the arthritis in control on April 15, 1991 (TR 110, 127). Further evidence supplied by Dr. Hess showed a normal sedimentation rate, with joint spaces well preserved, and a moderate limitation of functional capacity (TR 114). Finally, medical records show that plaintiff's peptic ulcers have been controlled by medications (TR 103-112, 126-128). In addition, the rheumatologist recommended that beside oral medication, the plaintiff could improve with local injections and physical therapy, but plaintiff received no other treatment in addition to oral medication and swimming three times a week. The ALJ noted that activities engaged in by the plaintiff included fishing, occasional driving, participation in local organizations, and a "small amount of housework." Certainly the ALJ took into account all the relevant Luna factors, including daily activities, willingness to try treatments, and attempts to find pain relief in his determination. Id. at 21-22.

Significantly, while the ALJ noted that a one time observation is not determinative of pain, he stated:

[s]uch observation is felt to be a valuable tool to be considered in connection with all of the evidence in the record in attempting to assess the validity of his complaints of severe pain which are, of course, subjective. Claimant was observed closely at the hearing. He was articulate, had no observable difficulty in comprehending questions, paid close attention to the procedures, and no problem with concentration or memory were appreciated. He used his hands often and without difficulty in expressing himself during the hearing. He did not complain of pain, did not appear to be experiencing pain or discomfort, and, in fact, appeared to be relaxed and comfortable. He testified that at some unspecified time he uses or has used a cane. He did

not exhibited [sic] any signs of difficulty or discomfort in walking, standing, sitting, or rising from a seated position. He stood erect, walked with a normal gait, and did not require an assistive device to ambulate. Further, he did not display an observable limp. At the conclusion of the hearing, which lasted for 30 minutes, the claimant arose from his chair without hesitation of [sic] assistance, and walked from the hearing room with a brisk gait." (TR 23).

There is evidence to support the ALJ's conclusion that there was a psychological overlay to plaintiff's pain:

"The claimant testified that he receives a long-term disability insurance payment in the amount of \$1,322.00 per month. While that is certainly not comparable to his past proven earnings . . . it has been well published in the local newspapers that his employer, Phillips Petroleum Company in Bartlesville, Oklahoma, anticipates laying off up to 1,200 people in the very near future. Claimant could not hope to secure another job in the small town in which he resides, which would approach his past earnings for Phillips or, probably, which would be as much as his long-term disability payment." (TR 24).

Thus, while the medical evidence does support a medically determinable impairment that could reasonably expect to cause pain, it does not appear to have a significant impact on Mr. Travis' ability to work. With the exception of plaintiff's subjective complaints, there is no evidence demonstrating that the arthritic condition was so severe as to limit his ability to stand, walk, sit or lift between 25-50 pounds. Therefore, the claimant's pain is not in fact disabling.

The ALJ did not fail to properly consider all of plaintiff's impairments in combination. He determined that plaintiff's complaints of disabling pain and limited mobility and stiffness were not credible after examining the medical records, and observing him at the hearing (TR 20-23).

The ALJ did not err in his use of "grid" regulations. In Huston v. Bowen, 838 F.2d

1125, 1131 (10th Cir. 1988), the court wrote:

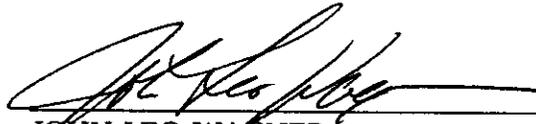
Automatic application of the grids is appropriate only where a claimant's residual functional capacity (RFC) and other characteristics precisely match a grid category. RFC is primarily a measure of exertional capacity, i.e. strength. Residual capacity, however, sometimes is curtailed by nonexertional limitations, such as postural or sensory limitations. Where such is the case, the grids may not be applied mechanically but may serve only as a framework in aid in the determination of whether sufficient jobs remain within a claimant's RFC range (sedentary, light, medium and heavy and very heavy).

Plaintiff contends that he does not fit a grid because of his complaints of severe pain and limited ability to walk, stand and sit, which the ALJ found not credible. (See Plaintiff's Brief, Docket #6, at page 8). 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). As stated before, while the claimant is unable to continue work at his previous job, one does not have to be pain free to engage in substantial gainful activity.

Finally, the ALJ's hypothetical questions to the vocational expert were not incomplete. Because he did not find evidence in the record to support plaintiff's claims of disabling pain and an inability to sit more than 30 minutes, stand more than 60 minutes, walk more than 50 yards, stoop, squat, or crawl, or lift more than 30 pounds, he was not required to include these claims in his questions to the vocational expert.

The decision of the ALJ is supported by substantial evidence. The decision is therefore affirmed.

Dated this 10th day of February, 1994.

A handwritten signature in cursive script, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Travis.rr

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

FILED

FEB 10 1995

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

DONALD POOR,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 92-C-470-W ✓

ENTERED ON DOCKET
DATE FEB 14 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, and for supplemental security income benefits under § 1614(a)(3)(A) of the Act.

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

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

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

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hepner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

10

evaluation process.² He found that claimant is unable to perform his past relevant work as service technician, auto mechanic, car salesman, and route salesman. He concluded that claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for the exertional limitations of no lifting/carrying over 25 pounds, and no prolonged sitting or standing, and the nonexertional limitations of no bending, stooping, or climbing, and the need for an atmosphere having no chemicals, smoke, or fumes. He found that, although the claimant's additional nonexertional limitations do not allow him to perform the full range of sedentary work, there are a significant number of jobs in the national economy which he could perform. Examples of such jobs are: assembly work at the sedentary level in the number of 183,000 nationally and 23,000 regionally; cashier sales jobs at the sedentary level in the number of 615,000 nationally and 80,000 regionally; and security systems monitor at the sedentary level in the number of 89,000 nationally and 11,000 regionally. Having determined that claimant could do a significant number of jobs in the national economy, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

The claimant now appeals this decision and raises the following issues:

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

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

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

1. That the ALJ improperly adopted the assessment of claimant's residual functional capacity by his treating physician rather than the consultative examiner's assessment.

2. That the ALJ improperly found claimant's complaints of pain not credible.

3. That the ALJ failed to find that claimant suffered nonexertional limitations which prevent him from doing the jobs suggested by the vocational expert.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant complains of back and neck impairments and asthma. He has done semiskilled and skilled work requiring medium to light exertion as a service technician, auto mechanic, welder, car salesman, and route salesman. After herniating a disk at C6-7, he underwent an anterior cervical diskectomy and fusion in May of 1985. (Tr. 159-163). Three weeks post-op, concerned about losing his job, he returned to work as a service technician for horizontal band saws. (Tr. 39, 127-128). On January 6, 1987, he fell on ice and injured his neck and lower back. (Tr. 128). On June 9, 1987, he underwent a lumbar laminectomy with decompression of L5-6 nerve roots and an anterior cervical diskectomy and fusion at C5-6. (Tr. 179-180). On July 21, 1987, a repeat anterior diskectomy and fusion was performed to replace the bone graft at C5-6, which had collapsed and extruded. (Tr. 181). From November 1988 to January 1989, he had an unsuccessful work attempt as a security guard, which he claims failed because of back pain and exposure to irritating chemicals. (Tr. 99-100). From 1989 to 1990, he reported

working as a self-employed engine rebuild, trouble shooter, and mechanic. (Tr. 105).

Claimant challenges the ALJ's adoption of the treating physician's testimony concerning his ability to work, arguing that the treating physician's medical reports are conclusory, brief, and lacking in specific physical findings to support their opinions. Claimant concludes that the consultative examiner's reports (Tr. 201-219) are more representative of his condition and should have been the basis of the ALJ's determination.

It is well established in this Circuit that the Secretary must give substantial weight to the testimony of the claimant's treating physician unless good cause is shown to the contrary. Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988) (citing Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987)). A treating physician's opinion might be rejected if it is brief, conclusory and unsupported by the medical evidence.

In this case the treating physicians, Dr. Billings and Dr. Hicks, recognized that claimant had exertional limitations and could no longer perform his previous work. Dr. Billings found on January 4, 1988 that claimant experienced discomfort especially in his low back and occasionally in the neck and shoulder, rendering him 20% disabled. (Tr. 164). He stated that claimant could return to work, outlining restrictions that he not lift over 25 pounds and avoid bending, stooping, prolonged sitting and standing. (Tr. 164). Dr. Hicks stated that claimant still had some mild pain on October 10, 1987, but opined that claimant had reached his maximum improvement and recommended that he be released, saying nothing about his inability to work. (Tr. 257). The medical reports of the doctors are not brief, conclusory, or unsupported by substantial evidence.

The consultative examiner's reports, if adopted as claimant contends, would not

support his case. The reports recognized the claimant's complaints, noting he has limited range of motion in his lumbar spine, hands, ankles and knees due to either surgical procedures or pain. (Tr. 202-204). However, the examiner made no determination as to claimant's inability to perform work.

Claimant's main contention is that the ALJ improperly found his testimony not credible and concluded he was not suffering disabling pain. Pain is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f 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." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had back and neck problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "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, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

Claimant claims his neck pain is so severe he cannot hold books to read, his hands get numb so he drops things, and he cannot walk three blocks. (Tr. 37, 44-45). However, his allegations of pain are inconsistent with the medical evidence. Claimant's family doctor, Dr. Collins, as recently as 1991, found claimant's reflexes all intact and no problems reflected in a neurological examination. (Tr. 270). There is no record that he sought relief

for pain from 1988 to 1991. Dr. Hinkle, a physician selected by claimant's attorney in 1988, found claimant had physical limitations due to his injuries, opined that the prognosis for him to return to his former employment was not good, and suggested consultation with a vocational rehabilitation specialist. (Tr. 263). Dr. Hicks, working in consultation with Dr. Billings, found that claimant had reached maximum improvement and could be released. (Tr. 257). Dr. Billings, the treating physician, confirmed claimant's pain, but concluded claimant has achieved maximum benefit from supervised care and opined that claimant was capable of returning to work which did not require lifting over 25 pounds, bending, stooping, or prolonged sitting or standing. (Tr. 164). These findings are not inconsistent with claimant's complaints of some pain, but are inconsistent with a claim of total disability. The ALJ did not err in finding that claimant lacked credibility to the extent he alleged disabling pain.

The claimant also argues that his asthmatic condition renders him disabled. The objective medical evidence affirms that he has a mild obstructive lung defect. (Tr. 193, 198, 202, 222). The evidence also shows a history of asthma and bronchitis problems. (Tr. 198). Claimant submitted to pulmonary tests to reveal the magnitude of his complications, but the tests revealed plaintiff to be within normal limits. (Tr. 206, 220, 227). Furthermore, claimant was told to quit smoking, but testified that he smoked a half pack of cigarettes a day. (Tr. 37, 193, 198). A claimant may not receive disability benefits if he does not follow prescribed treatment. Pacheco v. Sullivan, 931 F.2d 695, 697-98 (10th Cir. 1991).

Finally, claimant argues that the ALJ erred in failing to find nonexertional

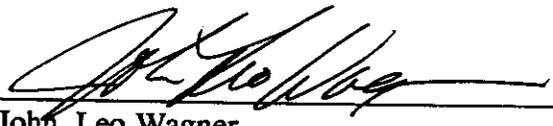
limitations which preclude him from performing sedentary work. He has claimed reduced cervical range of motion, pain, and asthma as limitations preventing him from working.

The evidence alluded to earlier rebuts these claims. Also, the vocational expert testified that claimant acquired skills using hand tools from his past relevant work experience, which were transferable to other sedentary work that involved working in a fume-free environment. The expert listed jobs claimant could do, such as sedentary assembly work, cashier sales jobs, and sedentary security systems monitor. (Tr. 58-59). The ALJ concluded claimant could perform these jobs, relying on the reports of Dr. Billings, Dr. Hinkle and Dr. Hicks, that he could not perform his previous work, but could perform other work with rehabilitation.

The medical evidence supports the conclusion that claimant could perform such jobs as long as he could adjust his position, as he claims he needs to do every thirty minutes. (Tr. 46-47). While his cervical motion is somewhat restricted, the range of motion found by Dr. Harris (Tr. 203) would not prohibit him from performing some neck movement required of a cashier, assembly line worker, or security system monitor. He has reported working as a security guard and self-employed engine rebuilder and mechanic in the years following his laminectomy and diskectomy (Tr. 99-100, 105).

There is substantial evidence to support the final decision of the Secretary that claimant is not disabled. The decision of the Secretary is affirmed.

Dated this 10th day of February, 1995.



John Leo Wagner
UNITED STATES MAGISTRATE JUDGE

T:poor.rr

FILED

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

FEB 10 1995

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

DONALD POOR,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

92-C-470-W

ENTERED ON DOCKET

DATE FEB 14 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed February 10, 1995.

Dated this 10th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

JOACHIM KERST,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

F I L E D

FEB 10 1995 *le*

93-C-88-W ✓

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

ENTERED ON DOCKET

DATE FEB 14 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under 42 U.S.C. §§ 416(i) and 423, and for supplemental security income benefits based on disability under 42 U.S.C. § 1381(a).

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

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

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

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

(13)

evaluation process.² He found that plaintiff had the residual functional capacity to perform work-related activities, except for work involving moderate to heavy lifting/carrying, repeated extension of his neck, and more than occasional exposure to climates featuring excessive dust, fumes or other pollutants. He found that plaintiff was unable to return to his past relevant work as a machinist, but was able to return to his past relevant work as an insurance salesman. Having determined that plaintiff's impairments did not prevent him from performing past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Plaintiff now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ improperly discounted plaintiff's alcoholism in light of the evidence and the appropriate legal standard.
- (2) That the ALJ improperly evaluated plaintiff's complaints of pain and other subjective complaints.

It is well settled that the plaintiff bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

In a October 7, 1991 hearing before the ALJ, plaintiff testified that he cannot speak for extended periods of time and has difficulty swallowing and becomes hoarse (TR 58).

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

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

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

He said he has difficulty standing after an hour because his back and neck hurt and that sitting causes the same problem (TR 67-71). However, he has no difficulty with walking (TR 67). He testified that the pain is constant, and Motrin and Flexeril help at times (TR 75-78). He claimed that the pain interferes with his concentration, and to relieve the pain he must lay down (TR 68-69). However, by moving around in his chair, he could sit for an hour (TR 69). He further testified he maintained his apartment and did his own cooking, washing, and cleaning, except for vacuuming (TR 72-73). He testified he has difficulty carrying grocery sacks over long distances and usually has someone help him (TR 70, 73). He stated that, except for his twice a week meetings of Alcoholics Anonymous, he spends most of his time either in his apartment, sitting outside, or walking around (TR 74-75).

After reviewing the evidence, the ALJ found plaintiff has chronic neck pain (status post fusion), chronic obstructive pulmonary disease, asthma, and alcohol dependence (TR 20). The ALJ also found that these impairments have been somewhat further complicated by the presence of hepatitis B, a slight hearing loss, and some difficulty with speaking and swallowing (TR 20). However, the ALJ determined that, while plaintiff does have an impairment or combination of impairments that impose significant limitations upon his ability to function, his impairments either singly or collectively do not meet or equal an impairment listed in Appendix 1 of the Social Securities Regulations (TR 20). In view of the plaintiff's limitations, the ALJ found that he was unable to perform his past work as a machinist, but was able to perform his past work as an insurance salesman (TR 20). In making his determination, the ALJ found claimant's subjective complaints of pain were not

credible, based on observation of the claimant at the hearing, the lack of medical evidence to support his complaints (TR 21), the fact that claimant returned to work as a diesel mechanic for the railroad in July of 1991 and stated no problems in performing his job (TR 316), and in pursuing his daily activities (TR 18-19).

Plaintiff contends that his chronic alcoholism is well-documented in the record. Alcoholism has been recognized, alone or combined with other causes, as constituting a disability if it prevents a claimant from engaging in substantial gainful activity. McShea v. Schweiker, 700 F.2d 117, 118 (3d Cir. 1983); Cannon v. Harris, 651 F.2d 513, 518-19 (7th Cir. 1981). The courts that have determined that alcoholism can constitute a disability are generally in agreement that the standard for disability due to alcoholism is a showing that the claimant has a clear addiction to alcohol while lacking the ability to control its use voluntarily. McShea, 700 F.2d at 119; Cannon 651 F.2d at 519. Medical evidence, not the plaintiff's testimony, must be relied upon to show whether the claimant has the ability to control the use of alcohol. Lofton v. Schweiker, 653 F.2d 215, 218 (5th Cir. 1981).

Alcoholism, like other impairments, can be present in varying degrees of severity. The severity test for social security disability purposes is designed to screen out minor mental or physical problems that are presumptively non-disabling. For an impairment to be considered a severe impairment, the condition must be one that significantly limits a person's physical or mental abilities to do basic work activities. 20 C.F.R. § 404.1521(a). In other words, an impairment is non-severe if it is a "slight abnormality which has such a minimal effect on the individual that it could not be expected to interfere with the

individual's ability to work, irrespective of age, education or work experience" Brady v. Heckler, 724 F.2d 914, 921 (11th Cir. 1984).

There is substantial evidence to support the finding of the ALJ that the claimant's alcohol problem was not disabling. Claimant appears to have an alcohol dependency, and has received inpatient treatment several times for his problem since 1989 (TR 196-97, 198-232, 240-41, 274-292). While in alcohol rehabilitation, plaintiff's alcoholism was described on March 25, 1991 by Dr. Lee Branham as "non-severe" (TR 128). Dr. Branham noted that he could "interact well with other people and concentrate and handle stress well when he puts his mind to it, although he tends to blame others" (TR 128). The doctor stated that no significant psychological limitations were observed, and while there was some depression, there were "no distortions of thought." (TR 128). Plaintiff was found to be extremely well oriented and cognitively unimpaired (TR 128).

Dr. J. Kalar reported on November 13, 1989 "[o]n the MacAndrew scale the patient did not score similar to those who are known to be chemically dependent," and show impulsivity, irresponsibility, and untrustworthiness (TR 199). Further, Dr. Edward Pease on March 30, 1989, indicated claimant's dependency had no adverse effect on his work, "patient denied any problems occupationally," and determined no period of convalescence was necessary after alcohol rehabilitation and that claimant could return to work the next day (TR 196-197).

Plaintiff testified before the ALJ that his dependence on alcohol was not a cause of his inability to be gainfully employed (TR 66). The record shows that claimant's alcoholism has not affected his work performance except for his termination for refusal to

stay in a rehabilitation clinic (TR 203). At the hearing on October 7, 1991, plaintiff testified he could stop drinking if he wanted to and had not had a drink since April (TR 59).

In addition, plaintiff has presented no significant evidence of physical disability due to alcohol abuse. Claimant has had hepatitis B since 1966 and has had numerous biopsies done upon his liver to assess any damage. No significant deterioration has occurred either from the hepatitis B or prolonged drinking, although there has been some moderate fatty change (TR 238).

Plaintiff's second contention is that the ALJ improperly discounted his subjective complaints of pain and other complaints and erroneously found he retained the ability to perform his past work as an insurance salesman.

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent

attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f 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." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a neck problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "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, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion

on this matter. Frey, 816 at 517.

There is substantial evidence to support the ALJ's decision that claimant's cervical pain and other complaints are not so severe as to be disabling and that he could return to his past work as an insurance salesman.

There is little medical evidence in the record that would support a finding that claimant's neck problems are disabling. The medical records do show that plaintiff underwent a fusion of his cervical spine at the C3-4 levels in the fall of 1989 and has decreased range of motion in that area with some pain (TR 199, 223, 234, 255). However, on September 20, 1990, Dr. Behrouz Rassekh advised plaintiff he could return to work on October 1, 1990, but should avoid repeated extensions of the neck, heavy lifting and climbing and could perform almost any other type of occupation (TR 239). Dr. Rassekh also stated claimant would have no difficulty with standing, walking around or sitting for an eight-hour work day (TR 239). Additionally, x-rays taken in May 1991 showed normal vertebrae alignment and only mild degenerative changes were seen in the facet joint of the C3-4 level (TR 309). The doctor noted that plaintiff failed to keep a number of scheduled appointments and was unpredictable with follow-up office visits (TR 239).

Plaintiff's testimony at the administrative hearing provides additional support for the ALJ's decision. Plaintiff testified that, when he takes his pain medication, he usually obtains relief (TR 77). During the hearing, the ALJ noted that plaintiff sat without apparent discomfort for one and a half hours (TR 19), although plaintiff did state he had neck pain during the hearing in spite of taking his medication shortly before it and could

relieve the pain by shifting around in his chair (TR 68-69).

The plaintiff's daily activities also do not support a claim of disability. Plaintiff testified he did all his own cooking, cleaning, laundry and shopping (TR 72-73) and most significantly, plaintiff returned to work on July 17, 1991 with the railroad as a diesel mechanic and had not reported difficulties in doing the work (TR 316). While plaintiff also claims he suffers disabling obstructive pulmonary disease and asthma, causing a perpetually hoarse voice, he admitted he smokes one to one-half packs of cigarettes a day (TR 234, 255). Dr. Louis Burgher concluded on February 25, 1991 that his pulmonary function tests showed no significant impairment (TR 257). Pulmonary function tests on June 19, 1991 showed only mild obstructive dysfunction, normal lung volumes, increased diffusion, and no significant change compared to tests done in 1988 (TR 288). His treating doctor stated he had only small airway disease and discontinued his use of Theophylline (TR 279). There was substantial evidence to support the ALJ's conclusion that the obstructive pulmonary disease and asthma were controlled by medications (TR 12).

The ALJ used the testimony of the vocational expert for the limited purpose of evaluating claimant's prior work activity and whether he was able to engage in that prior work activity. The findings of the medical experts precluded heavy work, but light work was permitted (TR 239). Thus there was nothing in the evidence that prevented claimant from returning to his past relevant work as an insurance salesman. This occupation would not require claimant to repeatedly extend himself, involve heavy lifting, or expose him to harmful atmospheric environments (TR 89-97).

There is substantial evidence to support the conclusion of the ALJ that plaintiff is

not disabled. The decision of the ALJ is affirmed.

Dated this 10th day of February, 1994.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Kerst.rr

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

FEB 10 1995 *RL*

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

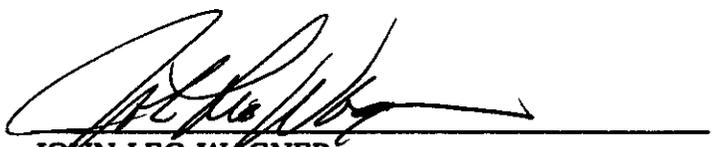
JOACHIM KERST,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

93-C-88-W ✓

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed February 10, 1995.

Dated this 10th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE FEB 14 1995

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

T I L E D

FEB 18 1995 *RL*

W. B. MARTIN,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA, et al.,)
)
Respondents.)

No. 94-C-1188-BU

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

ENTERED ON DOCKET

DATE FEB 14 1995

ORDER

Plaintiff has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254, but has not submitted the proper \$5.00 filing fee or a court-approved motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Although the Clerk notified Plaintiff of the above deficiencies and mailed him the court-approved motion for leave proceed in forma pauperis on January 9, 1995, the Plaintiff has not responded.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis (not on the Court approved form, doc. #2) is **denied** and that the petition for a writ of habeas corpus is **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

SO ORDERED THIS 10 day of Feb, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA FEB 13 1995 *R*

MEDSERV CORP. d/b/a MEDCO)
MEDICAL EQUIPMENT AND SUPPLY,)
)
Plaintiff,)
)
vs.)
)
L. GARY NEAL,)
)
Defendant.)

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

Case No. 94-C-786-BU

ENTERED ON DOCKET

DATE FEB 14 1995

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 60 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 10th day of February, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 19 1995

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

DONNA M. CONLY,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 93-C-771-E

FILED

FEB 13 1995

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

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

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

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

ENTERED ON DOCKET

DATE FEB 14 1995

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evaluation process.² He found that the plaintiff had the residual functional capacity to perform the physical exertion requirements of work except for those aspects of work over and above those set forth for light exertional activity provided she stands and walks no more than four hours a day on a noncontinuous basis and limits her sitting to six hours a day on a noncontinuous basis and performs no activities that require twisting and hyperflexion of the lumbosacral spine. He concluded that the plaintiff was unable to perform past relevant work as a cashier, bus driver, truck driver, and security guard.

The ALJ determined that the plaintiff is 42 years old, which is defined as a younger individual, has completed the eleventh grade, which is defined as limited, and has transferable skills to perform work activity of a light delivery driver. He found that, although the plaintiff's exertional limitations did not allow her to perform the full range of light work, there are a significant number of jobs in the national economy which she could perform, including delivery driver and general office clerk. The ALJ concluded that, considering the plaintiff's age, education, work experience and transferability of skills, she was not disabled under the Social Security Act at any time through the date of the decision.

Plaintiff now appeals this ruling and asserts alleged errors by the ALJ:

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

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

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

- (1) That the ALJ's denial of the claimant's request to reopen was an abuse of discretion.
- (2) That the ALJ's decision that the claimant is not disabled is not supported by substantial evidence.
- (3) That the ALJ failed to give proper weight to the treating physician's diagnosis.
- (4) That the ALJ's decision that the claimant does not meet or equal the listings in Appendix 1 is not supported by the medical evidence.
- (5) That the ALJ erred in applying the factors for disabling pain as set forth in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

It is well settled that the plaintiff bears the burden of proving her disability that prevents her from engaging in gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). The medical record shows that she has vertebrogenic disorders and trauma-induced arthritis of the spine. However, the ALJ concluded that there were jobs in the national economy that she could perform.

Plaintiff's first assertion is that the ALJ's denial of her request to reopen in light of new evidence was a failure on the part of the ALJ to give proper weight to the treating physician's diagnosis. The plaintiff asserts that such error in the ALJ's decision not to reopen constitutes an abuse of discretion.

This court is without jurisdiction to consider the Secretary's refusal to reopen the claim. Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990). Judicial review under 42 U.S.C. § 405(g) is limited to a final decision made after a hearing. Califano v. Sanders, 430 U.S. 99, 107-08 (1977). "The Secretary's decision not to reopen a previously adjudicated claim for benefits is discretionary and therefore, is not a final decision

reviewable by this court under 42 U.S.C. § 405(g)." Brown, 912 F.2d at 1196. Only when constitutional questions are raised will judicial review be authorized under 405(g) notwithstanding the Secretary's decision to deny benefits without a hearing. Califano, 430 U.S. at 109. This is not one of those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds. Plaintiff seeks only an additional opportunity to establish that she satisfies the Social Security Act's eligibility standards for disability benefits. Therefore, § 405(g) does not afford subject matter jurisdiction.

Nor is this a case where the ALJ has effectively reopened the case by reviewing the additional reports submitted by the plaintiff. "Only when the agency has clearly stated or otherwise demonstrated that it has in fact reopened the original case on the merits" will the case be considered reopened. Morris v. Sullivan, 897 F.2d 553, 558 (D.C. Cir. 1990). The Appeals Council and the ALJ both considered the additional reports submitted by Dr. John B. Vosburgh for the plaintiff (TR 3, 33). The Appeals Council let stand the ALJ's finding that "[t]he new evidence is merely cumulative. It does not provide any new material information. Accordingly, I must deny your request to reopen the decision of February 17, 1993" (TR 33). In reaching his conclusion, the ALJ noted that Dr. Vosburgh's residual functional capacity determination was consistent with his finding that the "claimant could perform the wide range of light exertional activity" (TR 33). Neither the Appeals Council nor the ALJ expressed any intent to reopen the plaintiff's case. Without any such expressed intent, this court is without jurisdiction to review the decision of the Secretary not to reopen plaintiff's claim. Id. at 558.

Judicial review of a social security case is based upon "a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based." 42 U.S.C. § 405(g). The court's limited review function precludes it from examining evidence not in the administrative record. As the additional reports submitted by Dr. Vosburgh were submitted after the ALJ's decision of February 17, 1993, they are not considered part of the record reviewable by this court. These reports will not be considered in evaluating the plaintiff's remaining alleged errors by the ALJ.

Plaintiff's next claim is that the ALJ's decision that she is not disabled is not supported by substantial evidence. She alleges that she is disabled due to severe chronic pain in her lower back which radiates into her legs (TR 74, 169). She contends that this condition became disabling in January of 1991, without a traumatic precipitating event, but as a result of a degenerative back disorder that has continued to cause her pain despite undergoing two surgical procedures to correct the problem (TR 72-73, 169).

The medical evidence presents a history of back problems dating from a back injury in 1974 resulting in a herniated disk, which was surgically repaired (TR 72). The plaintiff injured her back a second time in 1976 requiring a lumbar discectomy and fusion of her lower back at the L4-5 and L5-S1 level (TR 44, 169, 202).

Progress notes taken by Dr. John B. Vosburgh report that the plaintiff responded well to post operative treatment (TR 202). Throughout the winter of 1976-77 the notes portray the plaintiff as making "excellent progress" (TR 209). But by the summer of 1977 plaintiff was experiencing discomfort and pain while her progress remained satisfactory (TR 208). The medical record contains complaints of pain in all of the subsequent visits to Dr.

Vosburgh from 1977 through June of 1982, at which time the plaintiff discontinued treatment (TR 202-208).

The medical evidence established that the plaintiff, now living in California, again sought treatment for back pain in February of 1991 (TR 73). During this period plaintiff was treated by Dr. Belen B. Lacuna (TR 186). The treatment consisted of arthritis medication and bed rest (TR 73). Plaintiff was not hospitalized during this period (TR 73).

On November 16, 1991, a consultative examination was performed on the plaintiff by the Eastview Medical Group of Oakland, California (TR 169). Dr. David Martin found the plaintiff's range of motion in the neck and legs to be normal (TR 170). The report revealed the back range of motion to be slightly diminished (TR 171). The plaintiff was able to put her fingers within four (4) inches of the floor (TR 171). Flexion was measured at 75 degrees (normal range, 90 degrees) (TR 171). Extension was measured at 10 degrees (normal range, 15 degrees) (TR 171). Bilateral side bending was 15 degrees (normal range, 20 degrees) (TR 171). A straight leg test was also performed:

Straight-leg raising was positive on the left at 45 degrees, reproducing her back pain and radiation down the left lower extremity, and negative on the right to 90 degrees. Back examination demonstrated two mid-lumbar, mid-line incisions, which are well healed. There is tenderness about the upper end of the fusion incision to both palpation and percussion. (TR 171).

A sensory exam revealed intact senses to "light touch, pin prick, [and] vibration throughout." (TR 172).

The examination found the plaintiff's symptom's consistent with a "hypermobile segment above the level of her fusion which is characteristic [for the plaintiff's past medical history]" (TR 173). This impression led to a "functional capacity assessment . . . based on

. . . probable musculoskeletal instability with lumbar radiculopathy indicated by the patient's physical examination and history." (TR 173).

Dr. Martin's functional capacity assessment stated that:

Lifting, carrying, pushing and pulling should be limited to 25 pounds on an occasional basis, 10 pounds on a frequent basis. Standing and walking should be limited to four hours per day on a noncontinuous basis and sitting should be limited to approximately six hours per day on a noncontinuous basis. The only activities that are contraindicated are those requiring twisting and hyperflexion of the lumbosacral spine (TR 173).

In 1992, plaintiff, having returned to Oklahoma, saw Dr. Vosburgh in April, May, and July (TR 180). She underwent a myelogram assessment of her lower back revealing "advanced stenosis of the L4-5 level" (TR 180). Dr. Vosburgh's last entry for the period under consideration states: "Patient's status is about the same, has pain in the lower back, pain in both legs. She is markedly impaired in her ability to get around" (TR 180). Dr. Vosburgh further recommended that the plaintiff consider surgery sometime in the future (TR 180).

There is substantial evidence in the record to support the decision of the ALJ that the plaintiff, while precluded from performing past relevant work, is not disabled, as the impairment does not prevent her from doing some light work available in the national economy. The ALJ noted that during the examination at Eastview that the plaintiff stated that she had no fixed numbness, areas of specific weakness, or any bowel or bladder changes (TR 44, 170-173). The ALJ also noted that the physical examination revealed a woman in "no acute distress," who presented "no significant findings of muscle atrophy or wasting" (TR 44, 170, 172). The ALJ noted that during the hearing the plaintiff "sat comfortably" and "was very alert and responsive" (TR 47). The ALJ found significant that

the documentary evidence and testimony showed that the plaintiff does housework, prepares meals for her family, shops, enjoys reading, walks and tapes movies (TR 48, 140-141). The ALJ noted in particular that the plaintiff reads 3 to 4 books a week "a[n] activity [that] usually requires a great deal of sitting down." (TR 48, 141).

The ALJ, noting "troubling inconsistencies in claimant's testimony," found the plaintiff to be "credible only to an extent that it is reconciled with claimant's abilities to perform a wide range of work activities." (TR 47). The ALJ, relying in the residual functional assessment of Eastview Medical Group, found that the plaintiff was able to perform light work, reduced slightly by a restriction on the plaintiff's twisting and hyperflexion of the lumbar spine (TR 47).

Plaintiff asserts that the ALJ failed to give proper weight to the treating physician's opinion regarding plaintiff's severe pain. The treating physician rule requires the ALJ to give substantial weight to the opinions of the plaintiff's treating physician. Talbot, 814 F.2d at 1463. If the ALJ disregards the opinions of the treating physicians, specific legitimate reasons must be given for such a finding. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). "However, a treating physician's report may be rejected if it is brief, conclusory and unsupported by medical evidence." Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988).

In the instant case, the ALJ noted that Dr. Vosburgh had failed to supply the requested evidence to support his opinion, which the ALJ considered brief and conclusory (TR 48). The ALJ also found Dr. Vosburgh's treatment notes to be "internally inconsistent" and "at odds with the bulk of the medical evidence" (TR 48). The ALJ properly considered

the treating physician's opinions and chose to disregard them after stating specific reasons for doing so.

Plaintiff next asserts that the ALJ's decision that the claimant does not meet or equal the listings in Appendix 1 is not supported by the medical evidence. In making this assertion the plaintiff merely draws the court's attention to the listing of impairments found in 20 C.F.R. § 404, Subpt. P, App. 1, § 1.05C. Plaintiff fails to cite any objective evidence in support of the alleged error but seems to assert that the error is to be found in the application of § 1.05C.

20 C.F.R. § 404, Subpt. P, App. 1, § 1.05C states:

- C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected pain to last 12 months. With both 1 and 2:
 - 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.

The ALJ found that the plaintiff does have a history of vertebrogenic disorders and surgical repair, complaints of pain, and mild to moderate muscle spasm. But the ALJ failed to find a significant limitation of motion in the spine (TR 46). The ALJ stated: "The Eastview Medical Group noted claimant to have a full range of cervical motion Additionally, claimant does not present findings of appropriate radicular distribution of significant motor loss, muscle weakness, or sensory and reflex loss." (TR 46). The ALJ applied the listing to the plaintiff's testimony and medical evidence and found the plaintiff

unable to meet the requirements of 1.05C. (TR 46).

The plaintiff's last assertion is that the ALJ, in failing to note that the plaintiff is unable to afford the drugs prescribed to her, erred in applying the factors for disabling pain as set forth in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f 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." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "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, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

Plaintiff, in asserting that the ALJ failed to take into account that she cannot afford any prescription drugs, mischaracterizes the ALJ's finding by stating that, "The Administrative Law Judge noted that Ms. Conly takes no pain medication." (Plaintiff's Brief, page 8). This statement is taken out of context, as the ALJ went on to state that "she uses only Extra-Strength Tylenol or Regular Tylenol for pain relief. These are both mild pain relief remedies easily obtained over the counter. Claimant was not taking any

medications on November 1991" (TR 49). The use of pain medication is only one of many factors the ALJ may use in determining whether the plaintiff's pain is disabling.

In the instant case, the ALJ came to his conclusion after evaluating "claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions and the combined impact on the claimant's daily activities" (TR 50).

Lastly, it has been recognized that "some claimant's exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d at 517. The ALJ properly considered all of the plaintiff's objective complaints of pain, made specific findings, and found the plaintiff's allegation of pain would not further limit or reduce the plaintiff's residual functional capacity assessment. (TR 50).

The Secretary's decision that the plaintiff was not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. The decision is affirmed.

Dated this 13th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:only.or

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

FILED

FEB 13 1995

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

RICHARD EUGENE MICKEY,)
)
 Plaintiff,)
)
 vs.)
)
 RICK HUDLEY, et al.,)
)
 Defendants.)

No. 94-C-959-B ✓

ENTERED ON DOCKET

DATE FEB 14 1995

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on December 28, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

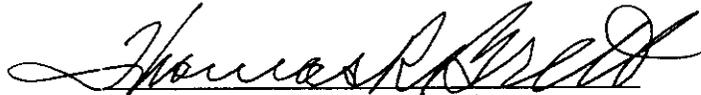
- (1) Defendants' motion to dismiss or for summary judgment (doc. #7) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 13 day of Feb., 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

FEB 13 1995

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

No. 94-C-935-B

RICHARD EUGENE MICKEY,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

ENTERED ON DOCKET

DATE FEB 14 1995

ORDER

Before the Court is Defendants' motion to dismiss filed on December 16, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss (doc. #4) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 13 day of Feb., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

FEB 13 1995 *le*

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

CORNELIUS MAPLE,)
)
Plaintiff,)
)
vs.)
)
OKLAHOMA DEPARTMENT OF)
CORRECTIONS,)
)
Defendant.)

No. 94-C-994-B ✓

ENTERED ON DOCKET
DATE FEB 14 1995

ORDER

Before the Court is Hugh Reed's motion to dismiss due to lack of subject matter jurisdiction and improper venue, filed on December 7, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event, the Court determines that Defendant Reed is not a proper party to this case and that venue for a claim against the Oklahoma Department of Corrections does not lie in this District.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss (doc. #4) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 13 day of Feb., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILED

FEB 14 1995 *le*

United States District Court

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

Northern DISTRICT OF Oklahoma

Wilma Hudson,
SSN: 440-40-3796,
Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

Donna E. Shalala,
Secretary of Health and
Humans Services,
Defendant.

CASE NUMBER: 93-C-0082-E ✓

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

IT IS ORDERED AND ADJUDGED that this case be remanded to the Secretary for further administrative action signed by Judge Jeffrey S. Wolfe on February 16, 1994 and entered on the docket on February 18, 1994.

ENTERED ON DOCKET
DATE FEB 14 1995

FEB 14 1995

Date

Richard M. Lawrence, Clerk

Clerk

Kinda M. Collins

(By) Deputy Clerk

FILED

FEB 14 1995 *pe*

United States District Court

Northern DISTRICT OF Oklahoma

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

Dorothy M. Jenkins,
SSN: 442-48-2204,
Plaintiff,

v.

Department of Health and
Human Services, Donna Shalala,
Secretary,
Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-C-0217-E ✓

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

IT IS ORDERED AND ADJUDGED that the Court REMANDS the case to the Secretary on two issues. First, the ALJ must clarify how he analyzed the March 18, 1991 letter from treating physician Huey. If the letter is to be given substantial weight, the ALJ must then re-examine the evidence in light of such finding. Second, the ALJ must have Ms. Jenkins undergo a consulting examination with a qualified psychologist or psychiatrist. Once the examination is complete, a supplemental hearing shall be held where the psychologist testifies regarding the issue of mental impairment. If the ALJ finds that a mental impairment exists, he shall re-evaluate the other evidence in the record in light of this finding, per Order signed by Judge Jeffrey S. Wolfe August 9, 1994 and entered on docket on August 10, 1994.

ENTERED ON DOCKET

DATE FEB 14 1995

FEB 14 1995

Date

Richard M. Lawrence, Clerk

Clerk

Linda M. Collins

(By) Deputy Clerk

17

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

FILED

FEB 13 1995

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

PUBLIC SERVICE COMPANY OF)
OKLAHOMA and OKLAHOMA GAS)
AND ELECTRIC COMPANY,)
)
Plaintiffs)
)
v.)
)
VERNON E. FAULCONER, INC.,)
)
Defendant.)

CASE NO. 92-C-1156-B

ENTERED ON DOCKET

DATE 2/14/95

O R D E R

This matter comes on for consideration of the Court's Order of July 13, 1994¹, wherein it directed the parties to submit proposed findings of fact and conclusions of law on the issue of the applicability of the Colorado River² Doctrine to the instant case, and further set the matter for evidentiary hearing. The parties agree no evidentiary hearing is now necessary. The Court is of the view that the format of findings of fact and conclusions of law is also unnecessary in light of the conclusions reached herein.

The facts underlying this matter appear as follows:

The parties herein, or their predecessors, entered into a gas

¹ This matter at such time was assigned to the Honorable James O. Ellison but was transferred to the undersigned by minute order dated November 10, 1994.

² This doctrine is urged herein in consideration of the issue of whether, in the interest of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, a district court should refuse the jurisdiction given to it. Specifically, in this case the doctrine has been urged relative to the instant declaratory judgment action and the (then) existence of another action pending in state court between the same parties on the same issues.

25

purchase contract in 1971 regarding natural gas produced from wells located in Pittsburgh County, Oklahoma. Plaintiffs Public Service Company (PSO) and Oklahoma Gas and Electric Company (OG & E) contend the contract expired by its own terms on or before May 27, 1992. Defendant Vernon E. Faulconer, Inc. (VFI) asserts that wells drilled pursuant to oil and gas leases covered by the contract remain capable of delivering commercial quantities of gas and that therefore the contract remains viable.

VFI alleges that despite repeated demand for Plaintiffs to honor the contract they ceased performance thereof effective May 27, 1992. On August 21, 1992, VFI filed suit in the District Court of Blaine County, Oklahoma, against PSO and OG & E. In October, 1992, PSO and OG & E filed separate motions to dismiss for lack of proper venue. The Blaine County District Court, after hearing, concluded that venue was not properly laid and dismissed VFI's petition, by minute order, on December 17, 1992, and a written memorial of dismissal was filed on January 7, 1993.

On December 18, 1992, one day after the state court minute order dismissal, PSO and OG & E filed suit herein. On January 7, 1993, VFI appealed the state court dismissal by filing a Petition in Error in the Supreme Court of the State of Oklahoma.

On January 11, 1993, VFI filed its motion to dismiss herein, seeking dismissal of the instant Complaint on the grounds that there was a pending state court action involving the same issues and same parties as were at issue in the present action. On March 30, 1993, this Court entered its Order dismissing this matter, citing the pending state court action as a significant basis for

its ruling. PSO and OG & E appealed the matter to the Tenth Circuit Court of Appeals.

By Memorandum Opinion filed March 29, 1994, the Oklahoma Court of Appeals affirmed the state court dismissal. Thereafter, VFI filed a Petition for Rehearing in the Court of Appeals which was denied on May 24, 1994.

On June 9, 1994, the Tenth Circuit Court of Appeals entered its Order and Judgment reversing the District Court's Order of Dismissal, noting that this Court reached its conclusion, "without elaboration, that the balance of the factors listed above weighed in favor of declining jurisdiction over appellants' declaratory judgment action." The "factors listed above" were that the state court suit was filed prior to the federal suit, and that there was a danger the cases could result in piecemeal litigation.

The Tenth Circuit opinion also noted the following:

"While this appeal was pending, the Oklahoma Court of Appeals issued a memorandum opinion affirming the dismissal of VFI's state suit, and VFI petitioned for rehearing. Appellants now represent to us that VFI's petition was denied by order filed May 24, 1994. We leave it to the district court on remand to confirm this fact and to accord it the appropriate consequences."

In fact, VFI's Petition for Rehearing has indeed been denied, no Petition for Certiorari to the Oklahoma Supreme Court to challenge the state Court of Appeals decision has been filed, and the mandate has issued from the Oklahoma Supreme Court rendering final the state court dismissal. (see Joint Report of parties, docket entry #24, exhibits B and C).

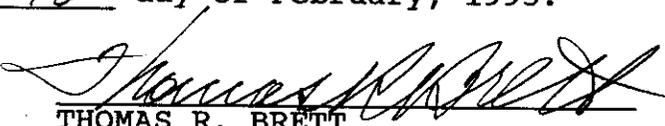
Plaintiffs herein argue that "any reconsideration by this Court at this time, regarding the propriety of its jurisdiction

over the pending declaratory judgment action, need not include any other pending action." VFI argues that at the time this Court dismissed this action there was a pending state court action which validates the Court's prior action. The Court concludes VFI's position is not presently relative.

Fundamental to the authorities cited in the parties' proposed Conclusions of Law³ is the existence of a pending state court action. In the present matter the overriding issue once was: is a state court action pending at a point in time after having been dismissed by the state court but being still within time allowed to appeal such dismissal? That is not the issue before this Court at the present time.

The Court concludes the dismissal of the state court action, now final, moots the applicability of the Colorado River doctrine. Accordingly, this Court's Order of Dismissal entered March 29, 1993, filed March 30, 1993, is hereby vacated and held for naught. Case management conference is scheduled herein for the 5th day of May, 1995, at 9:30 A.m..

IT IS SO ORDERED this 13th day of February, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

³ Specifically, Brillhart v. Excess Insurance Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), Colorado River Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), Moses H. Cone Memorial Hospital v. Mercury Construction, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), United States Fidelity & Guaranty Co. v. Murphy Oil USA, Corp., 21 F.3rd 259 (8th Cir.1994), and ARW Exploration Corp. v. Acquire, 947 F.2d 450 (10th Cir.1991).

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

ENTERED ON DOCKET
DATE FEB 14 1995

FILED

FEB 13 1995

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

JALINDA K. BALL,)
)
Plaintiff,)
)
v.)
)
KIMBERLY-CLARK CORPORATION,)
)
Defendant.)

No. 94-C-369K

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

It is hereby stipulated that the above-entitled action may be dismissed without prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

DATED this 9th day of February, 1995.

WILCOXEN, WILCOXEN & PRIMOMO

By


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P. O. Box 357
Muskogee, OK 74402 0357
918/683-6696

Attorneys for Plaintiff

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

By


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FAX 918/584-3814

Attorneys for Defendant

ENTERED ON DOCKET
DATE FEB 14 1995

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

SWEDE INDUSTRIES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 ZEBCO CORPORATION, a Delaware)
 Corporation, and the)
 BRUNSWICK CORPORATION, a)
 Delaware Corporation,)
)
 Defendants.)

No. 90-C-596-K

FILED

FEB 13 1995

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

JUDGMENT

This matter came before the Court for consideration upon conclusion of non-jury trial. The issues having been duly considered and a decision having been rendered in accordance with the Findings of Fact, Conclusions of Law and Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendants and against the plaintiff.

ORDERED this 13 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

SWEDE INDUSTRIES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 ZEBCO CORPORATION, a Delaware)
 Corporation, and the)
 BRUNSWICK CORPORATION, a)
 Delaware Corporation,)
)
 Defendants.)

No. 90-C-596-K ✓

FILED

FEB 15 1995

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

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



The above-styled case was tried to the Court without a jury, and evidence was presented from October 3, 1994 through October 13, 1994. The parties filed supplemental proposed Findings of Fact and Conclusions of Law on November 30, 1994. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Judgment, in accordance with Rule 52 F.R.Cv.P., as follows:

FINDINGS OF FACT

Introduction

1. This is a patent infringement action in which Swede Industries, Inc. ("Swede"), charges Brunswick Corporation ("Brunswick") and its Zebco Corporation division ("Zebco"), (collectively, "Defendants") with infringement of Plaintiff's

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design patent no. 307,621 ("'621 design patent") and Plaintiff's utility patent no. 4,961,547 ("'547 utility patent"). Both claims of infringement relate to the "BULLET" fishing reel that is made and sold by Zebco.

Parties

2. Swede is an Oklahoma corporation with its principal place of business in Claremore, Oklahoma. Swede was formed by Robert Peterson ("Peterson"), a former Zebco employee. Swede manufactures and sells fishing reels.

3. Brunswick is a Delaware corporation having its principal place of business in Lake Forest, Illinois. Its wholly owned subsidiary, Zebco, has its principal place of business in Tulsa, Oklahoma, and manufactures and sells fishing equipment, including spincast reels and tackle combinations consisting of a spincast reel and a matching balanced rod. Brunswick has committed none of the allegedly infringing acts and is involved in this litigation solely as the owner of common stock of its subsidiary, Zebco. (See Pre-Trial Order of September 30, 1994, at Section V -- Facts Not Admitted But Which Will Not Be Contested by Opposing Evidence at Trial at p.9.)

4. Swede manufactures and markets a spincast fishing reel under the trade designation of Swede 2000 and markets the same reel through a national distributor under the distributor's "Eagle Claw"

name. (See Peterson at pp.219-220.)¹

5. Peterson was formerly employed by Zebco from 1954 to 1964. Peterson left Zebco, opting to go into business for himself, and continued to manufacture parts for Zebco spincast reels and others through his Nupar Corporation over the course of 18 years.

The Nature of the Action

6. The complaint in this action was filed July 12, 1990. An Amended Complaint was filed December 27, 1990 and charged Defendants with infringement of both the '621 Design Patent and the '547 Utility Patent issued to Swede. The alleged infringement occurred through the manufacture, use and sale of certain of Defendants' spincast "BULLET" reels and rod and reel combinations. Zebco manufactures six models of the "BULLET" reel, four of which are accused of infringing the '621 Design Patent. These four models are: (1) Bullet .38 (2) Silver Bullet .357 (3) Bullet .22 (4) Silver Bullet .257. All six models of the "BULLET" reel are accused of infringing the '547 Utility Patent. These six are the four previously listed and, in addition, (5) the Triggerspin Bullet .22 and (6) the Triggerspin Silver Bullet .257. In response, defendants assert that the two patents are invalid and, even if valid, are not infringed by the "BULLET" reels.

7. U.S. Design Patent No.307,621 (PX 23) was issued on May 1,

¹All references to the Trial Transcript are referred to by the name of the witness followed by the page number of the Trial Transcript. All references to Defendants' Trial Exhibits are referred to herein as "DX"; all references to Plaintiff's Trial Exhibits are referred to herein as "PX".

1990 and U.S. Patent No. 4,961,547 (PX 33) was issued on October 9, 1990.

Development of the Swede Reel and the '621 Shape

8. Peterson and Tom Kirby ("Kirby") (an employee of Swede Industries during the relevant time who claims to be the sole inventor of the '547 utility patent),² first began looking at designing and manufacturing a closed-faced spincast reel in January of 1985. (See Peterson at pp.43-44; PX 1.)

9. Peterson and Kirby contacted a Tulsa draftsman, Nick Rylander, to prepare patent drawings for a potential spincast reel. (See Peterson at pp.43-44; PX 1.)

10. Peterson and Kirby directed that Rylander draw patent drawings to get as close to the shape of a spincast reel manufactured by Johnson Reel Company as the draftsman could get without infringing a design patent. (See Kirby at p.293.)

11. In 1986, Peterson had a conversation with Mr. Ed Hall of Arkansas. Mr. Hall brought the Shimano Aerocast reel to Mr. Peterson's attention. (See Peterson at pp.44-45, 119-120.) Peterson and Kirby recognized that the Shimano Aerocast was unique in the market in that it had a non-round front and a flip-top design. (See Peterson at pp.120-122; Kirby at pp.296-297.)

12. Peterson met with representatives of Baugh Design in

² Kirby testified that he told Robert Peterson and Mr. James Head, counsel for Swede Industries, that he did not believe that Robert Peterson should be listed as co-inventor of the '547 utility patent, as Peterson in fact is. (PX 33). Mr. Kirby eventually quit Swede Industries over this issue. (See Kirby at p.322.)

Wichita, Kansas, in April of 1987 to discuss the possibility of designing a spincast reel. (See Peterson at p.122, 128.)

13. At this meeting Ben Baugh ("Baugh") (the principal of Baugh Design), Mark Kimbrough ("Kimbrough") (an employee of Baugh Design), Peterson, and perhaps other employees of Baugh Design were in attendance. (See Peterson at pp.122-123; Kimbrough at p.747.)

14. Peterson brought current catalogues of spincast reels and a Shimano Aerocast reel to this meeting. Peterson testified and Baugh believed that Peterson brought other fishing reels to this meeting; however, Kimbrough disputes this fact and testified that Peterson brought only one reel -- the Shimano Aerocast. (See Peterson at pp.46-48, 123; Kimbrough at pp.747-749.)

15. According to Peterson, Baugh Design was instructed by Peterson to do something completely different than what was in the marketplace. (See Peterson at p.46.)

16. Kimbrough was given the definite impression from Peterson that his assignment was to utilize the Shimano Aerocast reel and produce concept drawings to scale to the Aerocast and with a flip-top opening. To this end, Kimbrough drew the internal components of the Shimano Aerocast reel to scale to utilize in preparing concept drawings. (See Kimbrough at pp.748-751; Peterson at p.126; PX 204.)

17. The only fishing reel that Kimbrough utilized in preparing the concept drawings for Swede's reel was the Shimano Aerocast. (See Kimbrough at p.750-751.)

18. A total of 19 concept drawings were presented to Peterson

by Baugh Design on April 27, 1987. All 19 concept drawings were flip-top designs and all were drawn to allow internal components of the same size and shape as utilized in the Shimano Aerocast reel to be used in any of the concept drawings. (See Peterson at pp.126-127; Kimbrough at pp.752-753.)

19. Kimbrough prepared the Concept 1 reel drawings, which represent the same reel in the '621 patent drawings. (See Kimbrough at pp.755-756; Peterson at pp.128-129.)

20. Swede caused the '621 design patent application to be filed on July 27, 1987, listing Robert Peterson as sole inventor (PX 23).

21. Swede filed four (4) additional U.S. design patent applications on reels from the original 19 concept drawings. All four subsequent design patent applications were granted. (See Peterson at pp.152-153; see also, PX 24, PX 25, PX 26, and PX 27.)

22. Models were made for Swede of the Concept 1 drawing, or the '621 patent shape. PX 16, a white over grey model, was made at Peterson's request by Don Phillips. PX 17, a green over grey wood model, was prepared at Baugh Design. PX 18 and PX 19 are black flip-top plastic prototypes which were prepared by Prototype Technologies of Elk Grove, Illinois. (See Peterson at pp.54-57, 135-137.)

23. PX 17, PX 18, and PX 19 are practically identical in shape and all to scale of the Shimano Aerocast and have the flip-top design reflected in the '621 drawings. (See Peterson at pp.131, 135-136, 139, 166-167.)

24. Kirby, in June of 1988, caused the Shimano Aerocast internal parts to be measured and put on the CAD machine of Ed Hall in Arkansas. (See Kirby at pp.293-294; Peterson at p.139.)

25. Internal working parts were made by Peterson to scale to the internal working parts of the Shimano Aerocast reel. These handmade internal operating mechanisms were placed inside PX 18 and PX 19, and these flip-top prototypes were then taken to the 1988 AFTMA show in Las Vegas. (See Peterson at pp.138-141; Kirby at pp.294-297.)

26. On January 25, 1989, James Head, counsel for Swede, advised Swede that a Shimano utility patent had issued and a decision was made by Peterson to change from a flip-top design to a conventional front-to-back design. (See Peterson at p.60; Kirby at pp.302-305.) Swede's patent application on the '621 patent had been pending since July 27, 1987 (PX 23).

27. The change from a flip-top to front-to-back design required Swede to again seek the assistance of Baugh Design and, on April 5, 1989, it began to redesign the reel. Among changes made in the design in addition to a change from flip-top to top-to-bottom to front-to-back opening was the lowering of the horizontal center line of the reel from 1.465" to 1.365" above the rod (Kirby at p.304)(PX 90 at p.378).

Swede Marketing and Advertising

28. Jim Villot ("Villot") was hired in October of 1989 as a part-time marketing consultant for Swede. He remained in that position until August 1992. (See Villot at p.358.)

29. Villot had prior marketing experience with fishing reels as he was national sales manager at Zebco from 1958 to 1965. (See Villot at pp.348-349.) He also was a sales representative for Pflueger reel. (See Villot at p.350.)

30. Villot worked less than 20 hours per week for Swede in 1990. He averaged about 12 hours per week in 1991 and only 8 hours per week in 1992. (See Villot at pp.442-443.)

31. Villot conceded that Swede: (a) had never purchased radio or television advertising for its reel; (b) spent less than \$10,000 for the advertising budget in 1992 and 1993; (c) spent a total for advertising in 1990 and again in 1991 of \$10,200 plus production costs; and (d) never prepared a written marketing plan, but only estimated projections. (See Villot at pp.441-442.)

32. Villot believed that, in part, it was the combination of Zebco's advertising as well as its nationally well known name and Swede's lack of advertising and nationally known name that made it difficult for Swede to sell its reel. (See Villot at pp.438-439.)

33. Villot traveled to Springfield, Missouri, from Tulsa, Oklahoma, in April of 1990. According to Mr. Villot, he traveled the three hour car ride to Springfield with Peterson and Ralph Lafferty ("Lafferty") (a Swede consultant and former president of Zebco) just to ride along as Lafferty and Peterson were going to attempt to make a sale of Swede reels to Bass Pro Shops ("Bass Pro"). Bass Pro is an extremely large purchaser of reels both for its stores and catalogues. (See Villot at pp.439-440.)

34. Villot was not as optimistic as Lafferty and Peterson

about Swede's ability to sell to Bass Pro. In fact, Villot did not believe Swede would be able to sell Bass Pro the Swede reel because he did not think Bass Pro or any other large customer would do pioneering sales work for unknown companies. (See Villot at pp.440-441.)

35. Even before seeing a BULLET reel, Villot believed that Swede would not make the sale to Bass Pro in April of 1990. (See Villot at p.441.)

36. By May of 1994, Swede was selling its reel by private labeling the product under the national name brand "Eagle Claw" to K-Mart Corporation. Further, the Swede reel designated as an Eagle Claw was receiving national advertising in *Sports Illustrated*. (See Peterson at pp.219-222; DX 520.)

37. Without the Eagle Claw name brand, Swede would have been unable to sell reels to K-Mart. (See Peterson at p.222.)

Swede Projection of Sales Not Met

38. PX 117 is a projection of Swede sales. PX 118-121 are Swede's three-year plans. These projections were for sales of a new reel for a new company. The projections were made at a time when Swede had no production reels to show potential field representatives. The projections were forecasts of Peterson, Lafferty, Marge Peterson and Villot. (See Villot at pp.368-371, 376-377.)

39. Mr. Villot believed that these projections were attainable, notwithstanding the company's lack of advertising and

marketing budget. He based these projections, in part, on his experience in selling Pflueger fishing reels at a store in El Paso, Texas in the mid 1970s. (See Villot at pp.369-370.)

40. Swede had a goal for the first year sales of 172,590 reels. (See Villot at p.449; PX 478.)

41. Villot conceded that the 172,590 number was reflective of the fact that the Swede reel was first shown at the AFTMA show on July 25, 1990 (i.e, 1-7-25-90). (See Villot at pp.449-450.)

42. DX 478 is a map of the United States with a goal for sales of Swede reels by state. Each state goal was determined by dividing the number of fishing licenses in each state by the total number of fishing licenses and multiplying this % by 172,590. (See Villot at pp.448-450.)

43. Villot testified neither the net profit nor the net sale projections were met in the 1991-1993 tackle years. (Villot at p.373).³

44. A large number of orders for the Swede 2000 reel were subsequently not filled for Swede customers. However, Swede's business records reflect the reasons for cancellation of orders dealt largely with the financial condition of small retailers who intended to sell Swede reels. (See Hurt at pp.476-481; PX 110.)

The Zebco BULLET Reels

45. Since 1954, the Zebco Model 33 spincast reel has been the flagship of the Zebco line, having maintained essentially its same

³For example, the 1991 tackle year is measured from August, 1990 through July, 1991. (Villot at p.369).

distinctive cone-shaped front cover and its "stubby" back cover. One form of spincast reel, also known as a "closed face" reel, sits atop a fishing rod and is actuated by depressing a thumb button.

46. In the early 1980s, Zebco engaged Richard Ten Eyck & Associates to design a new more aerodynamic spincast reel to be its "shape of the 80s." Jack Robbins ("Robbins") was the industrial designer who designed the Zebco 2000 series or PRO-STAFF series reels (DX 212(a), 212(b), and 212(c)) which are the Zebco "shape of the 80s" reels. The Zebco 2000 series reels sit lower on the rod and incorporate a more streamlined and elongated look than the Zebco Model 33. (See Robbins at pp.815-819).

47. Zebco management, in the early 1980s, utilized "creativity seminars" to enhance the innovation and development of Zebco's spincast products. (See Jackson at pp.486-487.)

48. At a Zebco creativity seminar on May 16, 1984, Zebco employees discussed the possibility of building a spincast reel with a "bullet-shaped profile, a long bullet-shaped front cover." (See Jackson at pp.488-489; DX 1.)

49. In May of 1984, Design Works, an independent industrial design firm engaged by Zebco, presented Zebco with spincast concepts that called for "an ergonomic study," and a "streamline appearance." (See DX 5, DX 487.)

50. In late July or early August of 1985, the American Fishing Tackle Manufacturers Association held its annual trade show (the "AFTMA Show") in St. Louis, Missouri. (See Robbins at p.819.) Shimano, a Japanese fishing tackle company, introduced the Shimano

Aerocast reel at the AFTMA Show (PX 3). (See Robbins at p.820).

51. The Shimano Aerocast is the only spincast reel to ever enter the marketplace with a clam shell (top-to-bottom) or "flip-top" design. It also had a non-round front. (See Robbins at p.820; Peterson at pp.122, 124-125; Jackson at pp.489-90; Kirby at p.297.)

52. In the Fall of 1985, shortly after the 1985 AFTMA show, Robbins Design was engaged by Zebco to do a design study on a flip-top reel. (See Jackson at pp.490-492; Robbins at pp.820-821.)

53. Zebco was interested in being able to react to market forces should the flip-top design and non-round look of the Shimano Aerocast become popular. (See Jackson at p.492.)

54. Robbins Design completed and presented to Zebco its preliminary design study for a "flip-top" spincast reel by December 17, 1985. (See Robbins at pp.821-823; DX 9 at p.1; DX 11.)

55. The Shimano Aerocast did not sell well in the marketplace and by the Spring of 1986 Zebco decided not to pursue the flip-top design. (See Jackson at pp.492-493.)

56. By 1987, Zebco had begun conducting innovation meetings. Innovation meetings brought outside vendors and designers in contact with Zebco engineers, designers and marketing personnel to discuss potential innovations and improvements of Zebco products. (See Jackson at p.492.)

57. A March 4, 1987 Zebco spincast innovation meeting discussed a "front cover which was not round;" a "non-cylindrical reel . . . for palming." (See Tipton at p.803; DX 6.)

58. Dr. Steven Tipton ("Tipton"), an assistant professor of engineering at the University of Tulsa, attended and moderated the March 4, 1987 innovation meeting. Tipton then developed an egg-shaped reel to present to Zebco at the next innovation meeting (See Tipton at pp.804-805; DX 6; DX 8).

59. On May 5, 1987, Tipton displayed and discussed at a spincast innovation meeting the "egg-shaped reel" (DX 7).

60. Zebco, in the Spring of 1987, decided that it wanted to develop a new look for a family of reels including spincast, spinning and baitcast reels. At least three design firms were given an opportunity to prepare concept drawings for the "look of the 90s". Robbins Design was selected. (See Jackson at p.493.)

61. On June 2, 1987, Robbins began his design studies for Zebco's spincast, spinning and baitcast reels. (See Robbins at pp.824-825; DX 16.)

62. On July 14, 1987, Robbins presented to Zebco his initial design studies for Zebco's "look of the 90s" products. Included in the spincast design concepts are renderings A1, A2, B and C. (See Robbins at pp.826-828; DX 9 at p.3; DX 18-21.)

63. In late Summer of 1987, Zebco management determined that they preferred the initial A2 concept drawing as the point of further focus by Robbins Design. (See Jackson at p.495; DX 82.)

64. Zebco specifically rejected proposed concept drawings B and C in part because they were flip-top drawings and Robbins was ultimately instructed to provide to Zebco only front-to-back design drawings in the future. (See Robbins at pp.828-829.)

65. On October 27, 1987, Gayle's Force, a marketing research firm located in Tulsa, Oklahoma, completed a mall intercept study which further confirmed Concept A2 as a viable shape for a new reel. (See Jackson at pp.496-497; DX 91-93.)

66. In November of 1988, Gayle's Force was engaged by Zebco to conduct a second mall intercept survey in which fishermen were shown a prototype of what became the BULLET reel. This survey confirmed the anticipated popularity of shape of the A2 concept. (See Jackson at pp.499-500; DX 107.)

67. The BULLET project was referred to within Zebco as the Magcast, Lasercast, Maxcast and eventually BULLET Project. (See Robbins at pp.833, 835; Jackson at p.501.)

Zebco Marketing of BULLET Reels

68. Denny Jackson ("Jackson"), Senior Vice President of Marketing for Zebco, testified concerning Zebco's commitment to the BULLET reels. Mr. Jackson has been an employee of Zebco for 23 years. Zebco made a commitment to market its new BULLET reel. Zebco's advertising was done by emphasizing the BULLET brand and not in comparing it to other competitors' products. (See Jackson at p.509.)

69. In the 1990 to 1991 tackle year, Zebco supported the BULLET reels with a national advertising campaign costing approximately \$250,000-\$300,000. This would include various media

and cooperative advertising discounts. (See Jackson at p.502.)

70. For the 1991-1992 tackle year, and the 1992-1993 tackle year, Zebco spent similar sums of money for advertising including in 1992-1993 some national television advertising. (See Jackson at pp.502-503.)

71. Jackson testified based on his experience that if Zebco allocated only \$10,000 per year for its first two years of advertising on the BULLET reels and no money for years three and four and no radio or television advertising at any time that it would have been very difficult if not almost impossible for Zebco to sell the BULLET reels. (See Jackson at p.507.)

72. According to Jackson, "the Marts" (K-Mart and Wal-Mart) along with the catalogues such as Cabella's and Bass Pro and the "category killers" (i.e., sporting goods specialty chains such as Sports Unlimited and Sports Authority) make up to 75-80% of all spincast reel sales. (See Jackson at p.504-505.) Further, Jackson testified that these large purchasers do not do pioneering work for new manufacturers. (See Jackson at p.506.)

73. In Jackson's experience, these large purchasers of reels expect the manufacturer to supply the cost of advertising and a national name brand. (See Jackson at pp.505-506.)

74. Jackson doubted that a reel made by Zebco without its Zebco name or advertising budget would be purchased by "the Marts," the catalogues or the category killers. (See Jackson at pp.507-508.)

75. The Court finds, based on the evidence in the record,

that the reason for Swede's disappointing sales was more likely its lack of name brand and advertising and marketing budget rather than the shape of any competitive reel.

Inventorship of the Reel Design in the '621 Design Patent Drawings

76. Based on the findings of fact of the Court with respect to the development of the Swede reel and the '621 shape, *infra*, at Findings of Fact No. 31 to Findings of Fact No. 50, the Court finds that Peterson was not the sole inventor of the '621 design patent. This finding stands unchallenged by an analysis of the testimony of every witness.

77. Jerry Dunlap ("Dunlap") is a patent lawyer in private practice in Oklahoma City, Oklahoma. Dunlap testified as an expert witness for Swede. Dunlap admitted on cross-examination that Peterson was not the sole inventor of the '621 patent (PX 23). Further, Mr. Dunlap testified that Peterson was not the sole inventor of the other four design patents granted to Swede. (See Dunlap at pp.612-613.)

78. Harris Zimmerman ("Zimmerman") is a patent lawyer in private practice in Oakland, California. Zimmerman testified as an expert for Defendants Zebco and Brunswick. In Zimmerman's opinion, Peterson is not an inventor at all on the '621 design (PX 23) or the other four design patents. Zimmerman believed that, at best, Peterson might be a co-inventor of the '621 patent. (See Zimmerman at pp.1007-1008.)

79. Peterson testified that he believed he was the sole inventor of the design in the '621 patent (PX 23) because his

initial agreement with Baugh Design contained a provision which required Baugh Design to assign all rights to the design work including patent rights to the client. (See Peterson at p.165; PX 12.)

80. Peterson also testified that no one, including Baugh, Kimbrough or Andrew Covault, had ever requested co-inventor status. (Peterson at p.241).

Inventorship of the '547 Patent

81. Kirby testified with respect to the '547 utility patent that he, Kirby, was the sole inventor and that he ultimately quit working for Swede in a dispute with Peterson over this issue. (See Kirby at p.322.)

82. Kirby testified that both Peterson and Swede's counsel, James Head, were aware at the time of the '547 application being filed that Kirby did not believe Peterson to be a co-inventor. (See Kirby at p.322.)

83. Kirby testified that while Peterson was not a co-inventor of the subject matter of the '547 patent, Kirby signed a declaration with the Patent & Trademark Office claiming to be only a co-inventor with Peterson because he feared that he would lose his job at Swede if he did not sign the declaration. (See Kirby at pp.334-335.)

DIFFERENCES BETWEEN THE SHAPE OF THE ORNAMENTAL DESIGN FOR A FISHING REEL AS SHOWN IN THE '621 DESIGN PATENT (PX 23) AND THE BULLET REELS

Swede Employees' Opinions

84. Peterson testified that the shape of the back and foot area of the BULLET reels significantly differs from the shape of the back and foot area in the '621 drawings (PX 23). (See Peterson at p.164.)

85. Peterson testified that the front cover of the Swede production reel is substantially similar to the front cover of the BULLET reels. (See Peterson at p.181-182.)

86. Villot testified that: (1) the shape of the reel in the '621 patent is better looking than the shape of the BULLET reels; (2) the shape of the reel in the '621 patent is much softer and more graceful than the shape of the BULLET reels; (3) the shape of the front cover of the reel in the '621 patent is much longer than the front cover of the BULLET reels; and (4) the shape of the reel in the '621 patent is streamlined as opposed to "bloated or puffed" or the "pregnant guppy" appearance of the BULLET reels. (See Villot at pp.435-437.)

87. Dorothy Hurt ("Hurt") was employed by Swede as an office worker. She testified that the shape of the Swede design (PX 23) looks a lot better than the BULLET reels' shape because it has a long and smooth look. (See Hurt at p.475.)

**Opinion of the Industrial Designers Who
Created the '621 Shape and the BULLET Reels' Shape**

88. Kimbrough, at the time of the trial, was employed as one of three principals and president of Design Edge, a 20-person industrial design firm in Austin, Texas. (See Kimbrough at pp.740-741.) Kimbrough's firm has received five (5) national and

international awards for industrial designs for its clients in the last three years. (See Kimbrough at pp.741-742.) Kimbrough has never had any business relationship with Zebco. (See Kimbrough at p.789.)

89. In April of 1987, Kimbrough was employed as an industrial designer at Baugh Design. Kimbrough created the ornamental design for a fishing reel shown at PX 23. (See Findings of Fact Nos. 36-43.)

90. Kimbrough at trial compared the shape of the BULLET reels to the shape of the ornamental design of a fishing reel as shown at PX 23. From each view (front, top, back, and side), Kimbrough found substantial differences in the shape of PX 23 as compared to the shape of the BULLET reels. These differences included substantial differences in shape from the back view. The BULLET reels from the back view reflect a thumb button which is recessed down to the top of the foot on the reel. The shape in PX 23 reflects a back thumb button not as recessed. On the BULLET reels the drag is located off-center and below the outer cover. The drag on PX 23 is shown as centered and partially protruding above the outer cover. Substantial differences in shape from the side view were found. On the BULLET reels there are no "pinchers" on the front cover to activate a clam-shell opening and no pivot or hinge ("rear pivot point") on the rearward side view of the BULLET reels as opposed to the shape depicted at PX 23. The shape of the BULLET reels from the side view is fatter and wider than the shape of the PX 23. The location of the foot of the BULLET reels as reflected

from the side view is located further toward the back of the reel as opposed to the shape depicted in PX 23. The sculptured look of the body into the foot is also missing in the BULLET reels but is present in PX 23 from the side view. Substantial differences in shape between the BULLET reels and PX 23 were observed from the top view. The shape of the front cover of the BULLET reels is shorter and fatter with a different shaped curvature from that depicted in PX 23. Difference in the location of the drag are also notable from the top view. The shape of the handle and the knobs on the handle also differ between PX 23 and the BULLET reels and these differences can be seen from the top view. From the front view, Kimbrough also found differences. The BULLET reel is not as sculptured or tapered in shape. The BULLET reels do not have a grommet at the opening as does PX 23. (See Kimbrough at pp.755-762.)

91. Robbins, at the time of the trial, was employed by Robbins Design, Inc. of Derby, Kansas. Robbins had, in the early 1980's, designed Zebco's "shape of the 80s" reels -- the Zebco 2020, 2010, and 2030. Robbins had worked on various other Zebco designs since the late 1970s.

92. Robbins was the principal outside industrial designer of the Zebco BULLET reels. (See Findings of Fact Nos. 23-29.)

93. Robbins compared the shape of the BULLET reels to the reel shape in the '621 patent (PX 23). From the top and side views, Robbins found a vertical break (front to back) indicating a front cover/back cover approach to configuration on the BULLET

reel, as opposed to a horizontal break indicating a clam shell or flip-top reel as depicted in PX 23. From each view (front, top, back, side, and bottom), Robbins found very substantial differences in shape between PX 23 and the shape of the BULLET reels. (See Robbins at pp.835-846.)

94. Robbins found essentially the same differences as Kimbrough at Finding of Fact No. 90.

Opinions of Experts

95. Baugh, an industrial designer in Wichita, Kansas, testified by video deposition as an expert for Swede. Baugh testified that the shape of the BULLET reels was substantially similar to the shape of the Swede production reel. However, with respect to the first prong of the design infringement test -- whether a hypothetical purchaser of fishing reels would be induced to purchase the BULLET reels being deceived believing it to be the shape of the ornamental design of the patent, Baugh does not reach an infringement conclusion.

- Q. And is it your testimony that if this Exhibit 17 was put into a working form, that someone would purchase the BULLET thinking it was Exhibit 17?
- A. That's difficult for me to say because I have no knowledge of how the average person would perceive it, but I say that there is enough similarities that they could be confused.
- Q. Confused as to what?
- A. As to who was making that particular reel.
- Q. As to the source of the particular reel you mean?

- A. Yes.
- Q. They would not mistake one reel for the other?
- A. They might.
- Q. But you don't know whether they would or not?
- A. No.

(Baugh Trial Video at pp.191-192.)

96. In fact, Baugh acknowledged on cross-examination many of the differences described by Kimbrough and Robbins at Findings of Fact Nos. 89 and 93, *infra*. (See Baugh Trial Video generally at pp.149-195.)

97. Richard Ten Eyck ("Ten Eyck") is an industrial designer from Wichita, Kansas. Baugh and Robbins formerly were employed by Richard Ten Eyck & Associates. Ten Eyck testified as an expert witness on behalf of Zebco Corporation.

98. Ten Eyck testified that, based on his review of the shape of the BULLET reels and the shape of PX 23, very substantial differences exist. From each view (front, top, back, side and bottom), Ten Eyck found substantial differences in shape. (See Ten Eyck at pp.895-902.)

99. Ten Eyck's observations concerning differences in shape from each view are essentially the same as those of Kimbrough and Robbins. (See Findings of Fact Nos. 89 and 93.)

100. Ten Eyck testified that in his professional opinion an ordinary purchaser would not be induced to purchase the BULLET reel being deceived into believing it to be the fishing reel in the '621 patent. (See Ten Eyck at pp.901-902.)

101. Ten Eyck believes that the fundamental shape depicted in PX 23 is that of a wedge and that the fundamental shape of the BULLET reels is that of a paraboloid. He testified these two shapes are very different and would be obviously perceived to be different to a consumer. (See Ten Eyck at pp.897-898.)

102. Jerry Dunlap testified as an expert for Swede that the BULLET reels infringe the '621 patent, in that they incorporate what he believes to be the novel feature in the design patent, which is the shape of the front cover. (See Dunlap at pp.586-587). However, Dunlap conceded differences in shape. (See Dunlap at pp.622-633, 677-680.)

103. Harris Zimmerman testified as an expert for Zebco that the BULLET reels do not infringe the '621 patent. Zimmerman compared the shape of the BULLET reels to the shape in the '621 patent and found substantial differences. (See Zimmerman at pp.1015-1030.) At one point, he described the BULLET reel as resembling a .45 caliber round of ammunition, and the Swede design as more like a .30 caliber rifle round. (Id. at 1018).

104. Zimmerman further testified that based on these differences he did not believe an ordinary purchaser would be induced to purchase the BULLET reel being deceived into believing it to be the reel in the '621 patent. (See Zimmerman at pp.1020-1021.)

105. The Court has also had an opportunity to view the shape of the BULLET reels and compare that shape to the shape of the fishing reel in the '621 patent. The Court has considered the

testimony of the witnesses, and has utilized its own observations and has concluded that there are substantial differences in shape between the BULLET reels and the reel in the '621 patent.

106. The Court finds that there is sufficient evidence of difference in shape between the BULLET reels and the shape of the reel in the '621 patent to find that an ordinary purchaser would not be induced into purchasing the BULLET reel being deceived that it was the reel in the '621 patent and therefore the BULLET reels do not infringe the '621 design patent. The Court is persuaded and finds that there are substantial differences in the shape of the Swede Production model (PX 57) and the PX 23 drawings.⁴

⁴ Plaintiff sought to introduce testimony regarding what certain declarants had told the witness regarding the declarants' purported "confusion" of the Swede and "BULLET" reels. The Court sustained Defendants' objection on grounds of hearsay and relevance. Plaintiff filed a written response (docket #280), essentially arguing for application of the "state of mind" exception to the hearsay rule. As the Court stated at trial, many of the statements constituted double hearsay, and were therefore inadmissible in any event. As the Court also stated, to the extent any of the statements were excepted from the hearsay rule, they were irrelevant. "Likelihood of confusion as to the source of the goods is not a necessary or appropriate factor for determining infringement of a design patent." Unette Corp. v. Unit Pack Co., Inc., 785 F.2d 1026, 1029 (Fed.Cir.1986). See also Conclusion of Law no.8. Even if admissible, the statements are of little probative value, in that it is unclear to what extent color and graphics may have influenced the purported confusion. For the same reasons, the Court sustains defendants' objections to similar statements in Ralph Lafferty's deposition.

**The Existence of Four Other Swede
Design Patents Including the '390 Patent**

107. While Swede's application for the '621 patent was pending in the Patent Office, Swede filed applications for four additional design patents (PX 24-27).

108. The '621 patent was granted on May 1, 1990 (PX 23); the other four patents were granted in 1991 (PX 24-27).

109. Peterson (the claimed sole inventor of each patent) testified that it should be "obvious" that each of the five design patents differ in appearance and should be afforded its own patent. (See Peterson at pp.152-153.)

110. Peterson admits that the only substantial difference in shape between the reel in the '621 patent (PX 23) and the reels in the other four design patents (PX 24-27) is at the back area and the foot area. (See Peterson at pp.161-163.)

111. Based on admission of Finding of Fact No. 109, *infra*, and the Court's own observation, the Court finds that the reel shapes depicted in the '621 design patent (PX 23) and the other four design patents (PX 24-27) look substantially similar at the front cover area of the reels.

112. Peterson admits that the shape of the back and foot area of the BULLET reels is different than the shape of the back and foot area of the reel in the '621 design patent (PX 23). (See Peterson at p.164).

113. Zimmerman believes that the shape depicted in PX 27, the '390 design patent, is closer to the reel in the '621 patent (PX 23) than the BULLET reels are to the reel in the '621 patent (PX

23). (See Zimmerman at p.1023.)

114. The Court has had an opportunity to view: (a) the differences in shape between the reels depicted in PX 23 and PX 27, and (b) the differences in shape between the BULLET reels and the reel in PX 23. It is apparent to the Court that Peterson sought and received a patent from the Patent & Trademark Office on a reel shape (PX 27) which is much closer to the reel shape in the '621 patent (PX 23) than the BULLET reel shape is to the reel shape in the '621 patent.

115. Zimmerman has testified and the Court further finds that the comparison made at Finding of Fact No. 112 is probative of the non-infringement since Peterson believed and the Patent & Trademark Office agreed that the '390 shape (PX 27) was not obvious from prior art including the reel in the '621 patent.

Functionality

116. Functional elements in a fishing reel such as a handle, drag knob and thumb button have a similar overall shape to allow the parts to perform a specific function. However, the appearance of these elements can nonetheless change significantly while retaining the same function. In this case, these functional elements are considered in a design patent infringement analysis. (See Dunlap at pp.703-704; Zimmerman at pp.1024-1025.)

117. The Court finds that the very substantial differences in shape between the BULLET reels and the shape of the reel in the '621 patent relating to the handle, drag knob, thumb button and

foot are appropriate considerations in a design patent analysis.

Points of Novelty

118. The Court finds that the second prong of the design infringement analysis concerns the point(s) of novelty of the reel shape in the '621 patent over prior art and an inquiry must be made as to whether or not the point(s) of novelty are incorporated in the alleged infringing product.

119. Swede did not seek to establish through the prosecution of the '621 patent (PX 23) any points of novelty. Further, the Patent & Trademark Office did not at any time during the prosecution of the '621 patent (PX 23) identify any point(s) of novelty. Therefore, any testimony relating to this issue is an after-the-fact look during the pendency of litigation. (See Dunlap at p.1026.)

120. Swede's expert, Baugh, testified that there are seven (7) points of novelty with respect to PX 23: (1) elliptical non-round shape; (2) forward extended portion; (3) tapered style line; (4) progressive curve; (5) matching curvatures; (6) rear elliptical shape; (6) aerodynamic-streamlined. (See PX 288 and PX 290.)

121. PX 290, on its face, is illustrative of the fact that three of the seven alleged points of novelty existed in the prior art.

122. PX 288, on its face, indicates that the tapered style line is not a feature of the BULLET reel if graphics are not to be considered. Dunlap, Swede's patent lawyer expert, testified that color and graphics are not to be considered in this regard. (See

Dunlap at p.608.)

123. The other alleged points of novelty stated by Baugh are so generic as to apply to any streamlined shaped fishing reel. (See Zimmerman at pp.1027-1029, 1035.)

124. In contrast to Baugh, Dunlap testified that there were really only two (2) points of novelty to the '621 patent (PX 23), namely, a streamlined shape and the shape of the front cover.

125. The Court finds that a point of novelty must be more specific than a streamlined shape. The Court further finds based on the Findings of Fact, *supra*, that the shape of the front cover of the BULLET reels is substantially different from that of PX 23. Thus, the second prong of the test for design patent infringement is not met.

The Chromium Plating Drawings

126. A Zebco vendor, Chromium Plating, was approached by Swede via an unsolicited letter requesting a quotation on parts. Chromium Plating received in this solicitation blue prints of four Swede component parts stamped confidential property of Swede (PX 243).

127. Bill Tabler of Chromium Plating sent the drawings to Jim Dawson, Zebco's president (PX 243). Dawson in turn sent the drawings to Tommy Cocanougher only to determine whether or not Swede was infringing any Zebco patents. (PX 243 at pp.1-2.)

128. Cocanougher caused a review of the blue prints to be made at Zebco, found no infringement, and reported back to Dawson. (PX

243 at p.2.)

129. Kirby testified and the Court finds that the four drawings in question do not have anything to do with the relationship between the inner and outer housing as claimed in the '547 patent or the external shape of the Swede product as in the '621 patent. (See Kirby at pp.286-289.)

The Andrew Couvault Concept Drawings

130. In the Fall of 1987, Robbins interviewed a former Baugh Design employee Andrew Couvault ("Couvault") who was looking for work. (See Robbins at pp.854-855.)

131. DX 516 are contemporaneous time records of Couvault which establish his first work for Robbins Design, Inc. occurred on Friday, October 23, 1987. (See Robbins at pp.856-857.)

132. Couvault was interviewed by Robbins a week or two weeks before Couvault began doing design work for Robbins' clients. (See Robbins at pp.856-857.)

133. At the interview of Couvault in October of 1987, Couvault showed Robbins his portfolio of design work. Drawings shown by industrial designers in their portfolio are generally not confidential. Among the drawings Couvault showed Robbins was PX 203, a side view of the '621 shape with the name Swede on the drawing. Robbins' impression was that this was a flip-top design very similar to the Shimano Aerocast reel. (See Robbins at pp.857-859.)

134. Robbins saw Jackson at a meeting at Zebco and informed

him that he had heard a company in Oklahoma may be making a reel that looked like a Shimano Aerocast. (See Robbins at p.858.)

135. Several months later, in February of 1988, Jackson at the request of Gene Howard at Zebco called Robbins and requested Robbins to sketch out the drawings Robbins had seen in October of 1987. (See Robbins at pp.858-859, 864; Jackson at p.512; Howard at p.549.)

136. Robbins was busy and had forgotten the exact shape of the drawing he had seen in October so he requested an employee Meister to ask Couvault for a copy of the drawing Robbins had seen in the portfolio. (See Robbins at p.859.)

137. Zebco received a copy of PX 203 and Howard believed it to be a shape "strikingly similar to the Shimano Aerocast." (See Howard at p.549.)

138. Robbins testified that the BULLET reel shape had been selected by Zebco before Robbins saw PX 203. (See Finding of Fact Nos. 23-27.) Further, his subsequent viewing of PX 203 had no effect on the ultimate shape of the BULLET reels. (See Robbins at pp.866-867.)

139. Based on the evidence in this record, the Court finds no legal significance in Zebco receiving the Couvault drawings.

The Gene Howard Meeting with Robert Peterson

140. Gene Howard ("Howard") is a Vice-President of Administration at Zebco. He saw a picture of the Swede spincast reel in a front page advertisement of a fishing magazine in late January or early February of 1990. (See Howard at p.550.)

141. Howard had been the liaison within Zebco to outside counsel. Howard was concerned that Swede might be infringing Zebco patents. (See Howard at pp.540, 556.)

142. Howard telephoned Peterson on February 5, 1990, about exchanging drawings of reels because he wanted to make sure that if Zebco had a problem with the Swede reel that it could be addressed early and without the expense of lawyers. (See Howard at p.556.)

143. Howard was not concerned about Swede having any problem with the shape of the BULLET reels but offered to show the BULLET reel design to Peterson. (See Howard at pp.554-556.)

144. Peterson advised Howard he would meet him the following day for lunch in Claremore, Oklahoma. (See Peterson at p.72; Howard at p.553.)

145. At the lunch in Claremore, Howard brought with him drawings of the Zebco BULLET reel but Peterson brought nothing except his accountant. (See Howard at p.555; Peterson at pp.72-73.)

146. Peterson, when shown the drawings of the BULLET reel, declared the Zebco BULLET reel "confusingly similar." Howard responded "Those are not the words I wanted to hear." (See Howard at p.555; Peterson at pp.72-73.)

147. The Court concludes, based on the evidence in the record, the meeting reflects no more than Zebco's attempt to resolve potential disputes with Swede without incurring legal expenses. (See also Howard at p.556).

**The Use of Screws to Secure the Swede
Production Reel Body to the Back of the Reel**

148. Swede intended to develop a fishing reel with a flip-top feature. (See Peterson at pp.124, 127; Kirby at pp.259-261.) The first prototypes of Swede reels were flip-top designs made by Prototype Technologies in Elk Grove, Illinois. (See Peterson at pp.56-57; PX 18, PX 19.)

149. On February 21, 1989, Swede was informed by James Head, Esq. that Shimano had secured a patent on a flip-top design. (See Kirby at pp.302-304, 317; Peterson at pp.60, 142; PX 90 at p.363.)

150. On February 24, 1989, Peterson and Kirby met with Baugh to make necessary design changes to go to a front-to-back design (PX 90 at p.364).

151. Between February of 1989 and January of 1990, Swede was having difficulty securing the reel body to the back of the reel. (See Kirby at pp.315-318.) Zebco had earlier solved this problem by using screws to hold the body and back of the reel together in the BULLET reel.

152. On January 4, 1990, Harold Trimmell of STS Mold Builders ("STS") (a long-time Zebco vendor and a vendor making injection molds for plastic parts on the BULLET reels for Zebco and a vendor for Swede working on the Swede reel) requested a Zebco employee provide STS a working BULLET reel prototype. (See Livingston at pp.796-797; DX 228.)

153. Ron Livingston ("Livingston"), a Zebco employee, air mailed the BULLET reel prototype to STS on January 4, 1990 (DX 229). On January 8, 1990, Harold Trimmell sent the BULLET reel

prototype back to Zebco. (See Livingston at pp.799-800; DX 230.)

154. The only time Zebco sent a prototype of the BULLET reel to STS prior to the introduction of the BULLET reel in the marketplace in the Summer of 1990 was on or about January 4, 1990. (See Livingston at pp.799-800.)

155. Peterson admits seeing a BULLET reel at STS in early 1990 before it entered the marketplace. (See Peterson at pp.206-207.) STS was a supplier to Swede and Swede owed STS substantial sums of money. (See Peterson at p.204.)

156. Kirby admits seeing a BULLET reel at STS in early 1990. Kirby further admits taking off the front cover of the reel and looking inside. (See Kirby at p.314.)

157. Nothing would have prevented Kirby from seeing screws securing the body of the Zebco reel to the back of the reel. (See Kirby at p.315.)

158. On January 24, 1990, Kirby writes in his inventor's notebook that Swede "voids tab locking system and go with four (4) screws -- body to back cover and use locking system similar to Zebco's" (PX 90 at p.127).

159. Kirby testified that his entry in his inventor notebook on January 24, 1990, refers to a tab locking system already known to him.

Prosecution History of the '547 Utility Patent

160. On June 12, 1989, Swede filed an application for a utility patent on a closed-face fishing reel having a speed cone.

Peterson and Kirby were listed as co-inventors (PX 34).

161. In its initial office action, the U.S. Patent & Trademark Office rejected all originally filed claims 1-10 (PX 34 at p.29).

162. Claims 1-9 of the application were rejected under 35 U.S.C. §112, "as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention" (PX 34 at p.30). In particular, the patent examiner noted that in claim 1, line 8, the recitation "speed cone means" was vague and indefinite because it was not in a proper means plus function form, because there is no function set forth to be performed by the means (PX 34 at p.30).

163. Claims 1-4 and 6 were also rejected under 35 U.S.C. §102(b) as being anticipated by a prior U.S. patent "Puryear." The examiner noted that Puryear teaches "the housing 11 is separate from the speed cone in figure 8 because it is formed of a different material and adhered to the housing, rather than formed monolithically therewith" (PX 34 at p.31). [The number 11 refers to the numbered members in a patent drawing].

164. In response to the rejections by the examiner at the U.S. Patent & Trademark Office, Head, Peterson and Kirby arranged to travel to Washington, D.C. for a face-to-face examiner interview. The interview occurred on March 13, 1990. (See Peterson at pp.192-193; Kirby at p.320; PX 34 at p.81.)

165. Head, Peterson and Kirby brought with them to the interview a proposed amendment to the patent application and a working prototype (PX 36) embodying what Swede hoped to patent.

(See Peterson at pp.192-194; Kirby at pp.325-326; PX 34 at p.81.)

166. At the interview, the examiner was shown how the outer housing of PX 36 could be taken off the reel independent of the speed cone. The examiner was further shown how the speed cone could be removed from the reel and the outer housing placed on the reel without the speed cone. The parts were independent. The prototype (PX 36) did not utilize glue or other adhesive to secure the speed cone to the outer housing and thus the speed cone was readily separable from the outer housing. (See Peterson at pp.194-196; Kirby at pp.326-327.)

167. On March 14, 1990, Swede through its counsel, James Head, caused to be filed an Amendment and Response to the Office Action of December 18, 1989.

168. Defendants' expert Zimmerman testified as follows: rather than addressing the examiner's rejections and correcting the "speed cone means" language by including an appropriate functional recitation, Swede added further ambiguity to its amendment by changing in claim 1 the word "spool" to "spool means" without a statement of function coupled to the means function (PX 34 at 90). (See Zimmerman at pp.976-980.)

169. Claim 1 was also amended to include: "[a separate] an outer housing removably supported relative to said reel body, said outer housing [and] encompassing and spaced from said [speed] cone means, said outer [the] housing having a forward opening therein [in register] co-axial with said [speed cone] opening of said cone means." (Bracketed language was deleted in this amendment while

underlined language was added.)

170. The word "removably" was also added to a claim by applicant with respect to the outer housing. Not only was the word "removably" not in the original claim, the specification describes the outer housing as secured to the reel body. (PX 34 at p.8).

171. The amendment contains a Remarks section which constitute arguments by Swede's counsel relating to the amended claim language and distinctions between the claimed reel and the cited prior art Puryear patent. (See Dunlap at pp.602-603.)

A. The Remarks section of the amendment includes:

Claims 1-4 and 6 had been rejected by the Examiner under 15 USC 102(b) as being anticipated by Puryear. Reconsideration of this rejection is respectfully requested, especially in light of the extensive amendments now made to the claims, and the following remarks:

Perhaps the greatest distinction over the Puryear reference is the fact that Applicant's cone means, as now claimed, is supported relative to the reel body in such a manner so as to be separated and spaced from the outer housing. Puryear makes it clear when referring to his Figure 8. "The sleeve 412 may be retained within the front cover 11 by means of adhesive or other suitable bonding agent." (Column 6, lines 22-24) (Emphasis added). Such a teaching is totally foreign to the key concept of Applicant's invention. Using Applicant's cone means creates a situation wherein there is no limitation on what size, shape or kind of outer housing shall that can be applied to the reel. The use of the cone means permits a manufacturer to make a variety of interchangeable cone means and a variety of outer housings, whether the latter be functional, i.e., aerodynamically streamlined, or whether they be of ornamental design that would be appealing to the fisherman. Such a concept allows a great deal of manufacturing

flexibility rather than the two-piece bonded and fixed concept of Puryear.

(PX 34 at p.95.)

172. On September 5, 1990, after the Patent Office interview, filing of the amendment by Swede, and consideration of the Remarks, the Patent & Trademark Office issued its notice of allowance (PX 34 at p.99).

The Construction of the BULLET Reel Front Cover

173. Initially the front cover of the BULLET reel was specified at Zebco to be one metal piece. However, it was decided that a metal front cover construction would be too heavy. To satisfy Zebco's marketing personnel, who wanted a metal front cover to give the reel a heavy and more expensive look, the BULLET reel was modified to provide an internal plastic front cover insert covered by a thin, light metal front outer housing. (See Cocanougher at p.728.)

174. The plastic front cover insert of the BULLET reel fits within and conforms to the metal outer housing. The insert has a flange on its rear portion conforming precisely to the rear portion of the metal outer housing. The metal outer housing has three locking tabs that fit within three slots on the flange, permanently locking the outer housing to the insert. Also, four "crush ribs", extending forwardly from the rear flange on the plastic front cover insert, are "crushed" and deformed as the insert is pressed into its operative position within the metal outer housing. To further permanently unify the plastic front cover insert with the metal

outer housing, and prevent any movement between the outer housing and insert that would cause a "rattle", the insert is permanently glued to the outer housing. Use of the three locking tabs, the four crush ribs and the glue provides a permanent, homogeneous unit defined by the plastic front cover insert and the metal outer housing that functions identically to a one-piece front cover yet is light in weight. The end user cannot separate the insert and outer housing without destroying the integrity of the reel. (See Cocanougher at pp.728-732.)

175. The fact that Zebco utilizes industrial glue to unitize the inner and outer cover is alone sufficient to distinguish the BULLET reels from the '547 patent such that the BULLET reels do not infringe the '547 patent. The prosecution history and the Remarks section thereof create an estoppel that precludes Swede from arguing otherwise.⁵ (See Zimmerman at pp.986-989.)

The '547 Patent Claims, When Properly Interpreted, Do Not Cover the BULLET Reel

176. The '547 patent discloses and claims a fishing reel having a "speed cone" within an outer housing wherein the speed cone is independent of the outer housing which permits the end user to remove the speed cone and replace the same or a different speed

⁵Plaintiff wishes the Court to find "the two piece front cover of the Bullet reels perform[s] substantially the same overall function and work, in substantially the same way, to obtain the substantially same overall result as the claimed invention." (Plaintiff's Proposed Findings of Fact and Conclusions of Law, #297, at p.28). The concept of replaceable speed cones, which is contained in the patent application, makes such a finding impossible.

cone within the same outer housing. Also disclosed are a variety of speed cones which may be used interchangeably by an end user on a single outer housing, permitting the alleged casting characteristics of the fishing reel to be changed while maintaining the same outer housing.

177. The original claims of the '547 patent application were rejected by the U.S. Patent Office as anticipated by and/or obvious over prior art U.S. Patent No. 4,448,367 (the Puryear patent). That is, because of the Puryear patent, the Patent Office rejected claims of the '547 patent application. The prior art Puryear patent which Swede was required to distinguish over discloses an outer housing having an insert or sleeve which, in one form, is described to be permanently bonded to the outer housing. To distinguish over the Puryear patent, Swede took the position, in a response to the initial Patent Office rejection, that the speed cone claimed in the '547 patent application is "separated and spaced" from the outer housing and that the use of an adhesive to bond the insert to the outer housing is "totally foreign to the key concept of [Swede's] invention which permits interchangeable cones" to be used selectively in an outer housing.

178. However, contrary to how it described its invention in distinguishing over the Puryear patent in the U.S. Patent Office, Swede now argues in this forum that the "spaced from" limitation in its claims is met by the BULLET reel even though the BULLET reel insert a) conforms to the outer housing, b) has a rear flange that conforms to the outer housing, c) has cooperating slots and tabs

which lock the front housing to the insert, d) uses four crush ribs and e) uses an adhesive which permanently bonds the insert to the outer housing - a fact which Swede admitted is "totally foreign to a key concept of [Swede's] invention."

179. Because the outer housing and plastic front cover insert of the accused BULLET reels are not "separated or spaced" from each other as required by the '547 patent but are rather permanently unified into a single piece, they cannot be separated without destroying the reel.

180. The '547 patent only discloses details of a clamshell housing, i.e. where a top part hinges relative to a bottom part of the housing with a horizontal parting line. The '547 patent, if interpreted to cover separable front and back housings that have a vertical parting line such as that in the BULLET reel, is lacking a disclosure sufficient to enable one skilled in the art to make this construction with a "speed cone" removably connected to a back housing part, a front housing part, and a reel body.

The Claims of the '547 Patent are Not Anticipated by Zebco's Can Reel

181. Defendants propose that because the can reels (Coca Cola, DX 259), (Natural Light, DX 260) and (Budweiser, DX 262), had been in alleged "public use" and "offered for sale" by Zebco in 1978, the '547 patent is invalid.

182. Plaintiff's position is that the can reels are not prior art because (1) they have not been reduced to practice under conditions of their intended use, and (2) they were not cited by

the Defendants as prior art in the two piece front cover patent application of Hlava (PX 206) and were not cited as prior art in the Puryear patent (DX 256) (Dunlap at pp.1046-1051).

183. It is clear from an inspection of the can reels they represent "mock-ups" and not viable products. The Natural Light can reel has a cardboard outer sleeve and could not be used for fishing. The Defendants' own documentary evidence supports the lack of clear and convincing evidence that the can reels were sufficiently reduced to practice to invalidate the '547 patent.

184. For example, John Charvat, Zebco executive at that time, testified the reels were "mocked up" because "We were selling concepts." Further, "it might not even have been a working prototype." (Charvat depo. at pp.25-26). Bryan Collins, former Zebco employee, testified the can reel "was not ever commercially available to the public." (Collins depo. at 39). Gordon Holland, also a former Zebco employee, testified "We never offered a particular reel for sale." (Holland depo. at 22).

To the extent that any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

CONCLUSIONS OF LAW

Jurisdiction and Venue

1. This is a civil action arising under 35 U.S.C. §§1 et seq. The Court has subject matter jurisdiction under 28 U.S.C. §1338(a).

2. The Court has personal jurisdiction over the parties and

venue is proper under 28 U.S.C. §1391(b).

Alleged Infringement of the '621 Design Patent

3. Design Patents are issued pursuant to 35 U.S.C. §171, which provides a patent may be obtained for "any new, original and ornamental design for an article of manufacture. . . ."

4. A patent holder bears the burden of proving infringement by a preponderance of the evidence. Lee v. Dayton-Hudson Corp., 838 F.2d 1186, 1187 (Fed.Cir.1988).

5. To prove infringement of a design patent, the patent holder must establish two elements. First, it must show "'in the eye of an ordinary observer giving such attention as a purchaser usually gives, [the] two designs are substantially the same [and] the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.'" Avia Group Int'l, Inc. v. L.A. Gear California, Inc., 853 F.2d 1557, 1565 (Fed.Cir.1988) (quoting Gorham Co. v. White, 81 U.S.(14 Wall.) 511, 528 (1871)). Second, the patent holder must prove the accused infringing device appropriates the point of novelty in the patented design that distinguishes the design from the prior art. Avia, 853 F.2d at 1565.

6. Patent infringement can be found for a design that is not identical to the patented design. Braun Inc. v. Dynamics Corp. of America, 975 F.2d 815, 820 (Fed.Cir.1992). However, such designs must be equivalent in their ornamental, not functional, aspects. Lee, 838 F.2d at 1190. Where the field is crowded with many references relating to the design of the same type of device, the

range of equivalents must be construed very narrowly. Litton Systems, Inc. v. Whirlpool Corp., 728 F.2d 1423, 1444 (Fed.Cir.1984). See also In Re Mann, 861 F.2d 1581, 1582 (Fed.Cir.1988) ("Design patents have almost no scope").

7. Color and graphics which are not part of the claimed design may not serve as a valid basis for comparison in a design patent infringement analysis. See Payless Shoesource, Inc. v. Reebok Intern. Ltd., 998 F.2d 985, 990 (Fed.Cir.1993).

8. For purposes of determining design patent infringement, the legal analysis and factual comparison must be between the drawings of the '621 design patent and the accused Zebco BULLET reels. Proper application of the Gorham test requires that an accused design be compared to the claimed design, not to a commercial embodiment. Payless, 998 F.2d at 990. Models and photographs depicting the patented design may be considered to the extent that they are accurate embodiments of the drawings in the design patent. That is, accurate three-dimensional models are relevant to enable the trier of fact to compare a three-dimensional model to the three-dimensional accused device. See Lee, 838 F.2d at 1189.

9. For the reasons set forth in these Findings of Fact and Conclusions of Law, the Court finds that a hypothetical ordinary observer, giving such attention as a purchaser usually gives, would not find the reel design in the '621 patent and the BULLET reels resemblance to be such as to deceive an observer, inducing him to purchase the BULLET reel believing it to be the reel design in the

'621 patent.

10. The Court further finds for the reasons set forth in these Findings of Fact and Conclusions of Law, that Swede has failed to meet its burden that the BULLET reels "incorporate the novelty in the '621 patent which distinguishes the '621 patent from the prior art."

11. The Court's conclusions of law are made independently of an analysis of fishing reel design patents obtained by Swede other than the '621 patent.

12. The Court having observed the design for a fishing reel as shown in the '390 patent (PX 27) and compared the same to the design for a fishing reel in the '621 patent (PX 23) concludes that Swede itself has requested and established in the U.S. Patent & Trademark Office that the range of protection afforded the '621 patent is narrow. In viewing PX 27, PX 23 and the BULLET reels the Court concludes that the shape of the BULLET reel is further from the design of the fishing reel in the '621 patent (PX 23) than Swede's '390 patent (PX 27) is from the reel in the '621 patent.

13. The Court concludes that Swede, having requested and received patent protection on the design of the fishing reel in the '390 patent (PX 27), is equitably estopped from claiming that the design of the fishing reel in the '390 patent (PX 27) infringes the design of the fishing reel in the '621 patent (PX 23). Since the design of the fishing reel in the '390 patent is closer to the design of the fishing reel in the '621 patent than a BULLET reel, the Court concludes on this additional basis that the '621 patent

is not infringed by the BULLET reels.

Advertising and Marketing of the BULLET Reel

14. The Court concludes, based on a totality of the evidence including the Findings of Fact, and independent of its analysis of comparison of the design of the BULLET reels to the design of a fishing reel in the '621 patent, that Zebco sales are attributable to an extensive advertising and marketing budget along with a national name brand.

15. The Court concludes that the design of the fishing reel in the '621 patent or any other fishing reel design, if produced by Swede and placed in the marketplace would have limited acceptance without a substantial advertising budget and a recognized name brand. The Court further concludes that, with the vast majority of the fishing tackle market concentrated in the large discounters, catalogues and category killers who expect the manufacturer to supply the advertising and name recognition it is difficult for new fishing reel manufacturers without a large budget to enter the market.

16. The fact that K-Mart began buying the Swede 2000 reel only when labeled as an Eagle Claw product and is now selling the Eagle Claw and the BULLET reels at the same time in the same stores belies Swede's argument that Swede was refused an opportunity to sell its product because of an alleged similarity of shape of the BULLET reel to the Swede product.

17. In reaching the above conclusion relating to advertising

and marketing, the Court is mindful that the Swede 2000 reel differs in shape from the shape depicted in the '621 drawings.

Alleged Invalidity of Design Patent

18. Zebco also contends the '621 Design Patent is invalid. All patents are presumed valid. 35 U.S.C. §282. The party asserting invalidity must overcome the statutory presumption by clear and convincing evidence establishing facts which support the conclusion of invalidity. Intel Corp. v. U.S. Int'l Trade Comm'n, 946 F.2d 821, 834 (Fed.Cir.1991).

19. If the single named inventor of a design patent is not the sole inventor of the patented design, the patent is invalid for failure to name the proper inventive entity if the absence of its additional inventor(s) resulted from deceptive intent. See 35 U.S.C. §256.

20. The Court concludes, based on the totality of the evidence including the cross-examination testimony of Swede's own expert, Dunlap, that Peterson is not the sole inventor of the '621 patent.

21. The Court concludes, based on the Findings of Fact, the Defendants have not presented clear and convincing evidence to overcome the presumption of validity of the '621 Design Patent. However, the Court further finds Mark Kimbrough should be recognized as co-inventor; pursuant to 35 U.S.C. §256, the Court hereby orders such change on the part of the Commissioner of Patents. Despite this amendment, all patent rights regarding the

'621 patent are to remain with Swede Industries Inc., per the assignment agreement with Baugh Design.

Alleged Infringement of the '547 Utility Patent

22. Utility patents are issued pursuant to 35 U.S.C. §101, which provides that a patent may be obtained for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. . . ." The claims of a patent define the metes and bounds of the invention entitled to the protection of the patent system. In Re Warmerdam, 33 F.3d 1354, 1360 (Fed.Cir.1994). Proper interpretation of the scope of a patent claim begins with an examination of the language of the claim. North Am. Vaccine, Inc. v. American Cyanamid Co., 7 F.3d 1571, 1575 (Fed Cir.1993), cert.denied, 114 S.Ct. 1645 (1994).

23. To interpret a claim, courts properly consult the patent specification, the prosecution history and the prior art. Intervet America v. Kee-Vet Laboratories, 887 F.2d 1050, 1053 (Fed.Cir.1989). Correct analysis involves two steps: first, the claims must be properly construed to determine their scope; then it must be determined whether the properly interpreted claims encompass the accused structure. Read Corp. v. Portec, Inc., 970 F.2d 816, 821 (Fed.Cir.1992); LaBounty Mfg., Inc. v. United States Int'l Trade Comm'n, 867 F.2d 1572, 1574 (Fed.Cir.1989). A claim covers or "reads on" an accused device if the device embodies every limitation of the claim, either literally or by a substantial equivalent. Read, 970 F.2d at 822.

24. The terms in a claim are given their ordinary meaning to one of skill in the art unless it appears from the patent and file history that the terms were used differently by the inventor. Intellicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1387 (Fed.Cir.1992).

25. Swede's '547 application was initially rejected *inter alia* under 35 U.S.C. §102(b) as anticipated by prior art -- the Puryear patent. Swede made claim amendments and arguments during prosecution to distinguish its invention from Puryear. (See Finding of Fact Nos. 158-170.) Prosecution history limits the scope of claims by excluding any interpretations of the claim language that may have been disclaimed or disavowed during prosecution in order to obtain claim allowance, Zenith Labs, Inc. v. Bristol-Myers Squibb Co., 19 F.3d 1418, 1421 (Fed.Cir.1994).

26. The Court concludes that Swede's amendments to the '547 patent application, including the Remarks section of the amendment, along with discussions held in a face-to-face interview with the examiner, have imparted a meaning to the patent claims that precludes infringement by the BULLET reels and that this is directly analogous to what was stated by the court in Haynes Int'l, Inc. v. Jessop Steel Co., 8 F.3d 1573, 1579 (Fed. Cir. 1993):

There is of course the classic example of prosecution history estoppel -- an amendment in response to a prior art rejection. See 4 Chisum §18.05[2] at 18-157, 18-158 (1992).

27. Zebco, as all other persons, has a right to rely on what Swede told the Patent Office in an amendment to the patent application during prosecution concerning glue or other adhesive

being totally foreign to the key concept of Swede's invention as well as the removability feature discussed above. That is, once Swede argued that its claimed invention does not use glue or other adhesive binding the inner and outer housing to obtain its patent, Swede cannot argue that a fishing reel utilizing glue binding the inner and outer housing does infringe its patent. The court in Kinzenbaw v. Deere & Co., 741 F.2d 383, 389 (Fed.Cir.1984) concludes:

Deere attempts to avoid the doctrine of prosecution history estoppel on the ground that Pust's limitation of his claims to devices in which the gauge wheels had a smaller radius than the discs was unnecessary to distinguish the prior art. Cf. *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 219 USPQ 473 (Fed. Cir. 1983). Deere points out that the Rasmussen device, the prior art over which the examiner found Pust unpatentable, also contained a gauge wheel with a smaller radius than that of the discs. Thus, Deere contends, only that portion of the limitation that provided that the radius of the gauge wheels must exceed the distance from the axes of the wheels to the rear edges of the discs was necessary to render the claims patentable over Rasmussen.

We decline to undertake the speculative inquiry whether, if Pust had made only that narrowing limitation in his claim, the examiner nevertheless would have allowed it. The file on Pust's patent, to which the public had access, explicitly showed that in response to the examiner's rejection, Pust had narrowed his claims to a planter in which 'the radius of the wheel . . . [is] less than the radius of the disc.' Deere offers no convincing reason why a competing manufacturer was not justified in assuming that if he built a planter in which the radius of the wheels was greater than that of the disc, he would not infringe the Pust patent.

See also, Prodyne Ent., Inc. v. Julie

Pomerantz, Inc., 743 F.2d 1581 (1984).

The Court concludes that Zebco has established prosecution estoppel. Swede clearly made claim amendments and took positions to avoid an examiner's rejection over prior art -- the Puryear patent. Swede cannot now ignore those amendments or make statements inconsistent with those arguments.

28. The Court finds that Swede voluntarily amended its patent application after an initial rejection from the U.S. Patent & Trademark Office and is now estopped to argue that the glue utilized by Zebco to bond the inner and outer covers does not remove the BULLET reels from the protection of the '547 patent. The United States Supreme Court stated in ITS Rubber Co. v. Essex Rubber Co., 272 U.S. 429, 444 (1926):

The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specific elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers . . . The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto . . . So where an applicant whose claim is rejected on reference to a prior patent, without objection or appeal, voluntarily restricts himself by an amendment of his claim to a specific structure, having thus narrowed his claim in order to obtain a patent, he 'may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments, which amount to a disclaimer.'

29. The ordinary meaning of the claim language "spaced from," in each claim alleged to be infringed by Swede, as confirmed by the prosecution history of the '547 patent, is that the cone means is separated from and independent of the outer housing; that is, it does not conform to the outer housing and is neither bonded nor otherwise adhered to the outer housing.

30. The Court construes the term "housing" in the '547 patent claims according to its ordinary meaning, confirmed by the prosecution history, to mean an outer shell of any size, shape or kind.

Non-Infringement

31. To find infringement, every claim limitation, or its substantial equivalent, must be present in the accused device.

Perkin-Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528, 1533 (Fed. Cir. 1987); Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931, 935, 939, 949, 953 (Fed. Cir. 1987) (in banc).

It is axiomatic that dependent claims cannot be found infringed unless the claims from which they depend have been found to have been infringed. Wahpeton Canvas Co. v. Frontier, Inc., 870 F.2d 1546, 1553 (Fed.Cir.1989). Therefore, if the Court finds Claim 1 (undisputedly the independent claim) of the '547 patent is not infringed by defendants' reel, the Court need proceed no further.⁶

32. The "spaced from" limitation of the claims of the '547

⁶In view of the Court's conclusion regarding Claim 1, therefore, the Court will not address dependent claims 4, 5, 7, 11 and 12.

patent is not met by the accused Zebco BULLET reel. The Zebco reel front cover insert is not "spaced" from but conforms to, depends on, and is permanently adhered to the housing. The Zebco reel utilizes glue and crush ribs, means of attachment not addressed in the '547 patent application.

33. Nor can the attachment of the Zebco reel front cover insert nor its shape be considered to be substantially equivalent to the claim limitations. First, Swede has not met its burden of proving that these elements in the Zebco reel are equivalent to the claimed elements, or that the Zebco elements do not substantially change the way in which the claimed invention is performed. Second, because of prosecution history estoppel, the claimed elements may not embrace equivalents broad enough to cover the elements of the Zebco reel. The essence of the '547 patent application was independent inner cone and outer housing.⁷ (See Zimmerman at p.986). The accused Zebco reels do not infringe the '547 patent.

Alleged Invalidity

34. Defendants have alleged two grounds for invalidity of the '547 patent: (1) the claims are indefinite under 35 U.S.C. §112 and (2) because of the alleged prior art can reels under 35 U.S.C. §102(b). The burden is upon the Defendants to prove either ground

⁷Contrary to the description in the '547 patent application, the Swede reel as it exists in the marketplace does not utilize replaceable speed cones. However, "[i]nfringement is determined on the basis of the claims, not on the basis of a comparison with the patentee's commercial embodiment of the claimed invention." ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1578 (Fed.Cir.1984).

by clear and convincing evidence.⁸

35. The test for definiteness is whether one skilled in the art would understand the bounds of the claim when read in the light of the specification. If the claims read in light of the specification reasonably apprise those skilled in the art of the scope of the invention, §112 demands no more. The degree of precision necessary for adequate claims is a function of the nature of the subject matter. Miles Laboratories, Inc. v. Shandon Inc., 997 F.2d 870, 875 (Fed.Cir.1993), cert. denied, 114 S.Ct. 943 (1994).

36. The Court rejects Defendants' argument that the terms "cone means" and "spool means" are necessarily rendered indefinite by the failure to state a function to be performed by those means. See Waterloo Furniture Components, Ltd. v. Haworth, Inc., 798 F.Supp. 489, 493-494 (N.D.Ill.1992). Plaintiff's expert Dunlap testified such procedure was common practice and was not contrary to §112. (Dunlap at p.1041). By approving the amended application, the PTO examiner obviously found §112 had been satisfied. Defendants have not presented sufficient evidence to overcome the presumption of validity.

37. Defendants also contend the '547 utility patent is invalid because "the invention was . . . in public use or on sale"

⁸It should be noted defendants only presented evidence as to the alleged invalidity of Claim 1 of the '547 patent. Dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. 35 U.S.C. §282. Therefore, even if defendants had met their burden of proof as to Claim 1, which the Court rules infra they did not, they necessarily did not meet their burden of proof as to the remaining claims.

in this country more than one year before the patent application was filed, citing 35 U.S.C. §102(b). Defendants view the can reels as prior art for purposes of this defense. The section 102(b) "public use" and "on sale" bars are not limited to sales or uses by the inventor or one under the inventor's control, but may result from activities of a third party which anticipate the invention, or render it obvious. In re Epstein, 32 F.3d 1559, 1564 (Fed.Cir.1994).

38. Whether or not an invention was in public use or placed on sale within the meaning of section 102(b) is a question of law, which is based upon underlying issues of fact. See Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 549 (Fed.Cir.1990); Keystone Retaining Wall Systems v. Westrock, Inc., 997 F.2d 1444, 1451 (Fed.Cir.1993) (sale).

39. The party asserting the public use bar or the on-sale bar has the initial burden of showing by clear and convincing evidence facts which support the existence of a public use or an offer of sale within the meaning of section 102(b). See Manville, 917 F.2d at 549.

40. The on-sale bar requires: (1) the complete invention claimed must have been embodied in or obvious in view of the subject matter of the sale; (2) the invention must have been tested sufficiently to verify its operability; and (3) the sale must have been primarily for profit rather than experimental purposes. See Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831, 835-37 (Fed.Cir.1984).

41. In order to determine whether an invention was in public use within the meaning of section 102(b), a court must consider how the totality of the circumstances of the case comports with the policies underlying the public use bar. Id. These policies are: (1) discouraging the removal, from the public domain, of inventions that the public reasonably has come to believe are freely available; (2) favoring the prompt and widespread disclosure of inventions; (3) allowing the inventor a reasonable amount of time following sales activity to determine the potential economic value of a patent; and (4) prohibiting the inventor from commercially exploiting the invention for a period greater than the statutorily prescribed time. Tone Bros., Inc. v. Sysco Corp., 28 F.3d 1192, 1198 (Fed.Cir.1994). Evidence of experimentation is part of the totality of the circumstances considered in a public use inquiry. Id.

42. The Court finds defendants have failed to meet their burden of proof on invalidity by clear and convincing evidence. The evidence demonstrates the can reels were experimental. Insufficient testing was done to verify operability. Further, viewing the totality of the circumstances, the Court concludes a finding of public use under these facts would not comport with the policies underlying the public use bar. The history of the can reels shows the defendants at the stage of "selling concepts", not placing an operable invention within the public domain. These highly limited activities conducted by third parties do not implicate the principle that an inventor should not gain excessive

time in which to commercially exploit his own invention.

Attorney Fees

43. Finally, Defendants seek an award of attorney fees pursuant to 35 U.S.C. §285, which provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

44. Defendants bear the burden of proving by clear and convincing evidence that this is an exceptional case. There must be some finding of unfairness, bad faith or inequitable conduct on the part of the unsuccessful patentee. Even if the case is found to be exceptional, the district court in its discretion may decline to award attorney fees. Badalamenti v. Dunham's, Inc., 896 F.2d 1359, 1364-65 (Fed.Cir.1990).

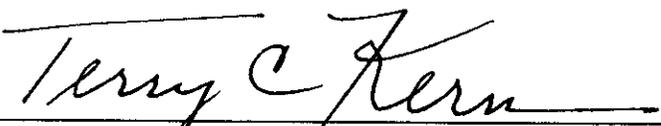
45. Defendants herein have made no attempt to satisfy the requisite burden of proof beyond their bare request for attorney fees. The issues involved were difficult and disputable; both sides were represented by reputable, competent counsel. No unfairness, bad faith or inequitable conduct has been manifest in the conduct of this litigation. The Court does not find this to be an exceptional case.

To the extent that any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that judgment be entered in favor of the defendants and against the plaintiff.

It is the further Order of the Court that the motion of the plaintiff to strike the testimony of Gene Howard is hereby denied; the testimony was admissible, not objected to at the time, and in any event its exclusion would not alter the Court's decision on the merits detailed above.

ORDERED this 13 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

returned into custody and a probable cause hearing was held on March 20, 1992. An executive revocation hearing was held four months later on July 23, 1992. On September 4, 1992, the Governor revoked Petitioner's parole in its entirety and ordered that Petitioner be reincarcerated to serve the remaining portion of his sentence with no credit for street time.

On February 3, 1994, Petitioner filed a petition for a writ of habeas corpus in the District Court of Muskogee County, alleging that his sentence was fully satisfied before the July 23, 1992 Parole Revocation hearing and therefore that the Governor did not have any authority to revoke his parole. In support of his contention that he had fully served his parole as of July 15, 1992, Petitioner argued that he was entitled to receive credits for days served on parole from March 3, 1983, to July 15, 1992, despite the fact that he had been arrested on March 20, 1992.

On March 2, 1994, the district court of Muskogee County denied relief, finding that "precedents demonstrated that Petitioner [was] not entitled to credit on his sentence for the time he was free on parole, where this parole ha[d] been revoked." The state court relied in part on 57 O.S. 1991, § 350 which provides that an inmate may be entitled to "a deduction from his sentence for all time during which he has been or may be on parole," but that such provision "shall at the discretion of the paroling authority apply to time on a parole which has been or shall be revoked." (Emphasis added.) The Court of Criminal Appeals affirmed on April 8, 1994.

On May 4, 1994, Petitioner filed the present petition for a

writ of habeas corpus which the Court has liberally construed in accordance with Petitioner's pro se status. Petitioner alleges that Respondent is illegally detaining him because his fifty-year sentence was fully satisfied on July 15, 1992, when Petitioner had "served day for day 9 years, 4 months, and 12 days" since his parole date of March 3, 1983. He argued that Respondent had violated his Due Process rights when they failed to provide him an Executive Revocation Hearing prior to July 15, 1992, citing Morrissey v. Brewer, 408 U.S. 471 (1972). Petitioner further argued that the State Court erred in interpreting the clause in section 350 which grants the paroling authority the discretion to apply street time to the time to be served on a parole which has been revoked. Lastly, he argued that the 1987 amendments to section 516 were ex post facto as applied to him and that he was entitled to due process protection prior to the expiration of his earned credits.

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). The granting of such a hearing is within the discretion of the court, and this Court finds that a hearing is not necessary.

A. Ex Post Facto Law

In his petition, Petitioner argues, among other issues, that the 1987 amendments to section 516 are an ex post facto law as applied to him. He alleges that the amendments to section 516 should not have been used to prohibit him from accruing earned credits from March 20, 1992, until July 23, 1992, (the period he was re-incarcerated as a result of his parole violation) because he was initially convicted in 1983 prior to the effective date of those amendments. The Court disagrees.

Prior to November 1, 1987, parolees who were awaiting a decision by the Governor on their parole revocation were incarcerated in a county jail and were allowed to earn credits. Okla. Stat. tit. 57, § 516 (1986 Supp.). In 1987, the Oklahoma Legislature amended section 516 to provide that a parolee after

arrest shall be incarcerated in the nearest county jail as well as a facility of the Department of Corrections to await action of the Governor. Okla. Stat. tit. 57, § 516 (1987 Supp.). Section 516 was also amended to provide that "earned credits shall not be accrued during the period of time that the parolee is incarcerated pending action by the Governor."

Because the 1987 amendments to section 516 do not affect acts which occurred before they came into force, that section is not an ex post facto law as applied to Petitioner. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a statute to be ex post facto, it must be applied retrospectively and it must disadvantage the offender affected by it). Petitioner's parole violation and the resulting incarceration for which he seeks earned credits occurred in 1991, well after the legislature enacted the 1987 amendments to section 516. The fact that Petitioner was initially convicted in 1971 is irrelevant to the time he violated his parole.

Accordingly, Petitioner is not entitled to habeas relief on this ground of error.

B. Revocation Hearing

Next Petitioner argues that he was denied due process by the holding of his parole revocation hearing after July 15, 1992, the date that he would have discharged his parole if he had been credited with all street time and day-for-day credits. In Morrissey v. Brewer, 408 U.S. 471, 482 (1972), the United States

Supreme Court held that in addition to a preliminary probable cause hearing, minimum due process requires a full revocation hearing before a neutral and detached hearing body for which the parolee has been given written notice of the claim of violations of parole, disclosure of the evidence against him, and an opportunity to be heard in person, to present witnesses, and to confront and cross-examine adverse witnesses. The Court also held that a revocation hearing must be held within a reasonable time after the parolee is taken into custody and found that a two-month delay was not unreasonable. Id. at 488.

In the present case, Petitioner was arrested and taken into custody on March 20, 1992. His revocation hearing was not held until four months later on July 23, 1992. The Court does not find such a delay unreasonable in this case. See Parker v. State, 795 P.2d 68, 70 (Kan. App. 1990) (holding that a delay of three and one-half months was neither unreasonable nor prejudicial).

Even if a four-month delay in providing a revocation hearing were unreasonable under Morrissey, habeas corpus relief is available to Petitioner only if he establishes that the delay was also prejudicial. Sutherland v. McCall, 709 F.2d 730, 732 (D. C. Cir. 1983); Carolton v. Keohane, 691 F.2d 992, 993 (11th Cir. 1982); Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981), reh. denied, 668 F.2d 536 (11th Cir. 1982). Petitioner argues that the delay was prejudicial in this case because of his inability to earn day-for-day credits. The Court finds that the inability to earn day-for-day credits during the delay does not constitute a

sufficient showing of prejudice to warrant relief. The state law in effect at the time of Petitioner's parole violation specifically provided that earned credits shall not be accrued during the period of time that a parole violator is incarcerated pending action by the governor. Okla. Stat. tit. 57, § 516 (1987 Supp).

C. Interpretation of Oklahoma Statutes

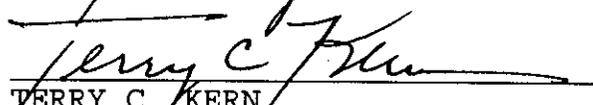
In his last ground, Petitioner contends that the state courts improperly construed Okla. Stat. tit. 57, § 350 and § 516 (1991), in determining that he had not in fact discharged his sentence prior to the revocation of his parole. Respondent initially submits that the above claim raises only a question of state law which is insufficient to invoke the jurisdiction of this federal habeas court. The Court agrees. "The interpretation of [a] state statute and its applicability to the facts [are] questions for the State Court and present no federal constitutional question for a federal habeas case." Bond v. State of Oklahoma, 546 F.2d 1369, 1377 (10th Cir. 1976).

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** and that Petitioner's motion "for summary judgment/or in the alternative notice of intent to petition

for writ of mandamus" (doc. #8) is denied.

SO ORDERED THIS 13 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED
FEB 13 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

United States District Court

Northern DISTRICT OF Oklahoma

Donna Prothro,
SSN: 448-36-9997,
Plaintiff v.

Donna E. Shalala,
Secretary of Health &
Human Services,
Defendant.

**JUDGMENT IN A CIVIL CASE
ENTERED ON DOCKET**

DATE **FEB 13 1995**

CASE NUMBER: 93-C-410-B ✓

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

IT IS ORDERED AND ADJUDGED that this case be remanded to the Secretary for further consideration per Order signed by Judge Thomas R. Brett on September 26, 1994 and entered on docket on September 27, 1994.

FEB 13 1995

Richard M. Lawrence, Clerk

Date

Clerk

R. Hallam

(By) Deputy Clerk

18

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

FILED

FEB 13 1995

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

DEMONTE LAMONZ OUSELY,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 94-C-849-B ✓

ENTERED ON DOCKET

DATE FEB 13 1995

ORDER

Before the Court are Defendants' motions to dismiss, or in the alternative for summary judgment, filed on December 16, 1994 and Decemer 19, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions, and a confession of the matters raised by the motions. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motions to dismiss or for summary judgment (doc. #8 and #11) are **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 13th day of Feb, 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

FEB 13 1995

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

ANTHONY BRANNON,)
)
 Plaintiff,)
)
 vs.)
)
 RON CHAMPION,)
)
 Defendants.)

No. 94-C-338-B

ENTERED ON DOCKET

DATE FEB 13 1995

ORDER

In this prisoner's civil rights action, Plaintiff, pro se and in forma pauperis alleges that his placement in the Restrictive Housing Unit following a prison misconduct hearing but prior to the resolution of his appeals violated his due process rights. The Defendant has moved to dismiss or for summary judgment on the basis of the court-ordered Martinez report and the Plaintiff has objected. For the reasons stated below, the Court concludes that Defendants' motion for summary judgment should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

On February 8, 1994, Plaintiff received a misconduct for "Disrespect to Staff," code 11-2. After investigating the charges, taking statements from the witnesses, and offering Plaintiff the assistance of a staff representative, prison officials afforded Plaintiff a hearing on February 15, 1994. Plaintiff was found guilty of the misconduct and his punishment was set at twenty-five days of disciplinary segregation in the Restrictive Housing Unit (RHU). On February 25, 1994, prior to the resolution of his appeal before Warden Ron Champion, Plaintiff was transferred to RHU to

begin serving his punishment for the misconduct. Plaintiff did not receive notice that the Warden had denied his appeal until March 2, 1994. Thereafter, Plaintiff appealed to the Appellate Review Authority who affirmed the finding of Plaintiff's guilt. Plaintiff was released from RHU on March 21, 1994.

On April 6, 1994, Plaintiff filed the instant action against Warden Ron Champion, alleging that his placement in the Restrictive Housing Unit on February 25, 1994, following a prison misconduct hearing but prior to receiving the resolution of his appeals violated his due process rights.

II. ANALYSIS

A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported

only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

The Plaintiff in this case has sufficiently stated a claim as to deprivations of his Fourteenth Amendment Due Process rights to avoid dismissal under Rule 12(b)(6). Plaintiff's complaint alleges deprivations of his Fourteenth Amendment rights supported by facts alleged to have deprived him of those rights. Furthermore, Plaintiff has attributed these deprivations to Defendant acting under color of law through his capacity as Warden of Dick Conner Correctional Center. Therefore, construing Plaintiff's complaint liberally in accord with his pro se status, the Court concludes that Plaintiff has sufficiently stated a claim upon which relief can be granted for deprivation of his Fourteenth Amendment rights. Defendant's motion to dismiss for failure to state a claim is accordingly denied.

B. Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party

may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se

prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. Due Process

Prison disciplinary hearings are not part of a criminal prosecution and the full panoply of rights due a defendant in such a prosecution do not apply. Wolff v. McDonnell, 418 U.S. 539 (1974). The minimum due process requirements for prison disciplinary hearings are: (1) written notice of the charges brought against the inmate at least twenty-four hours before the hearing; (2) the opportunity to call witnesses and present evidence at the hearing; and (3) a written statement by the fact-finder as to the evidence relied upon and the reason for any action taken. Id. Once an inmate receives this due process, the Supreme Court has instructed in Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 454-55 (1985), that the findings of the prison disciplinary board need only be supported by "some evidence in the record."

After carefully reviewing the record in this case, the Court concludes that Plaintiff's segregation pending a ruling on his appeal did not violate Plaintiff's due process rights. As stated in Walker v. Bates, 23 F.3d 652, 658-59 (2nd Cir. 1994), petition

III. CONCLUSION

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendant is entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to dismiss for failure to state a claim (doc. #6-1) is **denied** and that Defendant's motion for summary judgment (doc. #6-2) is **granted**.

SO ORDERED THIS 13th day of Feb., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILED

FEB 13 1995 *le*

United States District Court

Northern

DISTRICT OF Oklahoma

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

Kevin Bales,
SSN: 441-70-5158,
Plaintiff,

v.

Donna E. Shalala,
Secretary of Health &
Human Services,
Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92-C-927-E ✓

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

IT IS ORDERED AND ADJUDGED that the case be remanded to the Secretary for further consideration of the claim per Order signed by Judge James O. Ellison on January 14, 1994 and entered on docket on January 18, 1994.

ENTERED ON DOCKET
DATE FEB 13 1995

FEB 13 1995

Date

Richard M. Lawrence, Clerk

Clerk

Richard M. Collins

(By) Deputy Clerk

③

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

ENTERED ON DOCKET
FEB 13 1995
DATE

JOHNATHAN W. NEAL,)
)
 Petitioner,)
)
 vs.)
)
 STANLEY GLANZ,)
)
 Respondent.)

No. 94-C-1169-K

FILED

FEB 10 1995

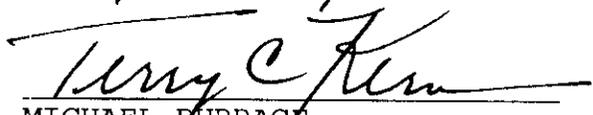
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254, but has not submitted the proper \$5.00 filing fee or a court-approved motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Although the Clerk notified Plaintiff of the above deficiencies and mailed him the court-approved motion for leave to proceed in forma pauperis on January 9, 1995, the Plaintiff has not responded.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis (not on the Court approved form, doc. #2) is **denied** and that the petition for a writ of habeas corpus is **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

SO ORDERED THIS 9 day of February, 1995.


MICHAEL FURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 10 1995

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

HAROLD BERNSTEIN,

Plaintiff,

vs.

Case No. 94-C-1042-BU

SELMA BERNSTEIN,
Personal Representative of the
Estate of Raymond Bernstein,

Defendant.

ENTERED ON DOCKET

DATE FEB 13 1995

DISMISSAL WITHOUT PREJUDICE

Plaintiff, Harold Bernstein, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby voluntarily dismisses the captioned action without prejudice to refileing the same.

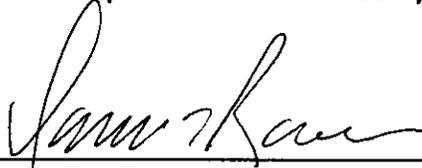


Dana L. Rasure, OBA No. 7421
Victor E. Morgan, OBA No. 12419
BAKER & HOSTER
800 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-5555

Attorneys for Plaintiff
Harold Bernstein

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of February, 1995, a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed, postage prepaid, to Max K. Naegler, 15 West Sixth Street, Suite 1700, Tulsa, Oklahoma 74119, attorney for Defendant.



Dana L. Rasure

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

F I L E D

FEB 10 1995

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

BRIAN STANBERRY,)
)
 Plaintiff,)
)
 v.)
)
 L.L. YOUNG and the ATTORNEY)
 GENERAL OF THE STATE OF OKLAHOMA,)
)
 Defendants.)

Case No. 94-C-99-B

ENTERED ON DOCKET

DATE 2-13-95

ORDER AND REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

This order and report and recommendation pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)¹ and the Response to Petition for Writ of Habeas Corpus (Docket #6).

Petitioner was convicted in Tulsa County District Court, Case Nos. CF-93-1313 and CF-92-4274, of burglary of an automobile after former conviction of a felony and reckless use of a firearm, and sentenced to twelve years imprisonment. The convictions were not appealed.

Petitioner now seeks federal habeas relief on the alleged grounds that the Oklahoma Prison Overcrowding Emergency Powers Act ("the Act"), Okla. Stat. tit. 57, §§ 570-576, arbitrarily and capriciously prohibits the awarding of emergency time credits to violent offenders, those classified as higher than "medium security," and repeat offenders like himself and operates to deny equal protection to defendants whose cases are prosecuted

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

①

differently.

ORDER

Respondent points out that the Attorney General is not a proper party to this action and should be dismissed as a respondent. The court agrees and orders the dismissal of the Attorney General from this case.

Under Rule 2(a) of the Rules Governing Section 2254 cases, the state officer having custody of the applicant should be named as respondent. When a habeas corpus petitioner seeks relief from state custody, he must direct his petition against those state officials holding him in restraint. Moore v. United States, 339 F.2d 448 (10th Cir. 1964). However, petitioner's pro se pleadings will be held to a less stringent standard than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972).

In Spradling v. Maynard, 527 F.Supp. 398, 404 (W.D. Okla. 1981), the court held that the Attorney General of the State of Oklahoma is not a proper party respondent in a habeas corpus action brought by a state prisoner already in custody.² The court stated:

The Attorney General of Oklahoma is simply legal counsel for the Oklahoma Department of Corrections and its employees. He is not the custodian of any prisoner incarcerated in any Oklahoma correctional institution. In the circumstances, he could not respond to a writ of habeas corpus on behalf of a prisoner even if one was issued to him.

Id.

The court is aware that the model form for use by petitioners making § 2254 habeas

²The magistrate judge notes that Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Courts pertaining to applicants subject to future custody requires the joinder of the state Attorney General: "If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents."

corpus applications includes the state attorney general as an additional respondent. Practically speaking, the Attorney General of Oklahoma, as legal counsel for the Oklahoma Department of Corrections and its employees, benefits by receiving immediate notice of a habeas corpus action filed when named as an additional respondent. However, the court concludes that the respondents' request for dismissal of the Attorney General of the State of Oklahoma as a party respondent should be granted pursuant to Rule 2(a).

REPORT AND RECOMMENDATION

In the court's order of October 20, 1994, it found that petitioner's claims were to be considered under the exception to the exhaustion doctrine requiring a habeas petitioner to exhaust state remedies before coming to federal court, discussed in Alvarez v. Turner, 422 F.2d 214, 216 n.3 (10th Cir.), cert. denied, 399 U.S. 916 (1970). The court noted that in Kinnard v. State of Oklahoma, No. H-89-1768 (Okla. Crim. App. Aug. 22, 1989), the Oklahoma Court of Criminal Appeals found that Okla. Stat. tit. 57, § 570-576 was patently reasonable, so petitioner was foreclosed from relief in state court and it was not necessary for him to exhaust state remedies. The court should now find that there is no merit to this claim.

The Act is intended to provide the Governor with an administrative option to reduce overcrowding in the Oklahoma prison system. It allows the Department of Corrections to request the Governor to declare a state of emergency in state prisons whenever the population of the prison system exceeds 95% of the capacity for thirty consecutive days. Under the Act, a prison overcrowding state of emergency goes into effect unless the Governor finds otherwise within fifteen days of the request. On the emergency date, the

Director of the Oklahoma Department of Corrections grants sixty days of Emergency Time Credit to any person confined in the prison system who is: (1) classified as medium security or any lower security level; (2) incarcerated for a nonviolent offense; and (3) not incarcerated for a second or subsequent offense under the provisions of Okla. Stat. tit. 21, §§ 51 and 52, which provide for enhanced punishment for repeat offenders.

Plaintiff's claim that his equal protection rights are being violated because he is being denied Emergency Time Credits while other similarly situated inmates are receiving them is without merit. Plaintiff does not contend that he qualified for and was denied credits. Rather, he complains that his constitutional rights are violated because he did not satisfy the statutory criteria for Emergency Time Credits. He cannot maintain a claim under the Equal Protection Clause, which does not guarantee that state laws have an identical effect on all citizens. Such laws may have a differing impact on various groups without violating the constitutional guarantee of equal protection.

Although no precise formula has been developed, the Supreme Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect groups of citizens differently than others. McGowan v. Maryland, 366 U.S. 420, 425 (1961). "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." Id. A statutory discrimination will not be set aside if there are facts which reasonably may be conceived to justify it. Id.

The traditional standard of review is whether the challenged law has a rational relationship to a legitimate state purpose. San Antonio Independent School District v.

Rodriguez, 411 U.S. 1 (1973). That standard applies unless the plaintiff is a member of a "suspect" class or the right asserted is a fundamental right mandating review under a heightened level of scrutiny. Id. Plaintiff does not satisfy either category. Convicted felons are not a constitutionally recognized suspect class. Baer v. City of Wauwatosa, 716 F.2d 1117, 1125-26 (7th Cir. 1983).

Entitlement to Emergency Time Credits is not a fundamental right. Therefore, the Act does not violate equal protection guarantees if it satisfies the rational relationship test. It was enacted to alleviate prison overcrowding by authorizing additional time credits against the sentence to be served for those inmates who are not classified above the medium security level, are incarcerated for violent offenses, or incarcerated for a second or subsequent offense under the provisions of Okla. Stat. tit. 21, §§ 51 and 52. The Oklahoma legislature could rationally determine that inmates classified as above medium security level, violent offenders, or repeat offenders should remain incarcerated because they present a greater threat to society than inmates who qualify for the allowable Emergency Time Credits, and the Act furthers that purpose. It is rationally related to legitimate penological concerns, and therefore does not violate the Equal Protection Clause. Since the petitioner is clearly not similarly situated to the inmates who may receive emergency time credits under the Act, he may not state a valid claim for denial of equal protection.

The court notes that, in a series of unpublished dispositions, the Tenth Circuit has already rejected similar equal protection claims by other Oklahoma inmates who are also ineligible for the Act's Emergency Time Credits. Aaron v. Fields, No. 94-6143, 1994 WL

548928, at 1-2 (10th Cir. Oct. 7, 1994) (unpublished disposition); Wilkinson v. Fields, 30 F.3d 142, No. 94-6016, 1994 WL 408146, at 1 (10th Cir. Aug. 3, 1994); (unpublished disposition); Brennan v. Fields, 30 F.3d 141, No. 94-6014, 1994 WL 363546, at 1 (10th Cir. July 13, 1994) (unpublished disposition); Martin v. State of Oklahoma, 21 F.3d 1121, No. 94-6004, 1994 WL 131754, at 1 (10th Cir. Apr. 15, 1994) (unpublished disposition); Day v. Reynolds, No. 93-6367, 1994 WL 118204, at 2 (10th Cir. Apr. 5, 1994) (unpublished disposition).

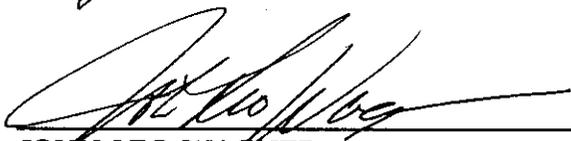
The respondent argues that petitioner has not exhausted his claim that the Act is unconstitutional because some non-violent repeat offenders are allowed the benefits of the law because of the arbitrary decision of the prosecutor to dismiss the second page of the information alleging a prior conviction in their cases and other such offenders whose cases are assigned to more "hard-line" prosecutors who do not dismiss the second page of the information do not receive the benefits. The cases cited earlier in this brief do not address this claim that unfettered discretion of the prosecutor regarding prior convictions operates to deny equal protection of the laws. The respondent has asked the court to reconsider its Order of October 20, 1994, and allow the state courts to consider whether petitioner's prosecutor acted arbitrarily in not dismissing Page Two of his information in Case No. CF-93-1313.

The court should find that petitioner has not exhausted this claim in state court and the claim should be dismissed for this failure. The Tenth Circuit has noted that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised by federal habeas

petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 10th day of February, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:stanberry

ENTERED ON DOCKET

DATE ~~FEB 13 1995~~

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

ROBERT HICKS,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF
CREEK COUNTY, OKLAHOMA; DOUG
NICHOLS, CREEK COUNTY SHERIFF;
DEPUTY SHERIFF GEORGE ELLIOT;
DEPUTY SHERIFF RON POWERS and OTHER
UNKNOWN DEPUTIES OF THE CREEK
COUNTY SHERIFF'S OFFICE,

Defendants.

Case No. 93-C-549-K ✓

FILED

FEB 10 1995

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

JUDGMENT

In accordance with the jury verdict rendered on January 19, 1995, entered in favor of the defendant Doug Nichols and against the plaintiff, Robert Hicks, judgment is hereby entered in favor of defendant Doug Nichols on all claims.

ORDERED this 10 day of February, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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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).

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.

Claimant filed applications for supplemental income and disability insurance benefits on September 12, 1991, alleging disability since September 23, 1990. (Tr. 115-121). Ms. Wand last met the disability insured status requirements on June 30, 1992. (Tr. 10, 27, 42, 138). Applications were denied through the initial and reconsideration stages. On May 22, 1992, Claimant filed a request for rehearing, the same being held on September 29, 1992. The decision of the ALJ was upheld by the Appeals Council when it affirmed the denial of benefits on May 20, 1993. (Tr. 6-7). Thus, the decision of the Secretary issued on December 30, 1992, became the final decision in this case and from which Plaintiff now seeks judicial review.

Jeannine Wand was born on August 11, 1968 and is currently 26 years old. (Tr. 27, 49). She has a high school education and approximately two years of college. (Tr 17, 49). In the past, she has worked as a receptionist, sales clerk, and rehabilitation aide. (Tr. 50-53). Claimant asserts she is disabled due to a multiplicity of emotional problems and migraine headaches. She has been diagnosed as suffering from recurrent major depression (Tr. 201, 501, 527, 555, 785), borderline personality disorder, multiple

personality disorder and post traumatic stress syndrome. (Tr. 67-77). From September 28, 1990 through October 11, 1991, Ms. Wand was hospitalized more than five times for emotional problems and suicide attempts. (Tr. 2-3). She has been under psychotherapy since July 1991. Due to stress problems and headaches, Plaintiff contends she is unable to engage in any substantial gainful activity on a sustained basis. (Tr. 60-61).

Plaintiff's basis for review lies exclusively on whether the ALJ failed to give substantial weight to the opinion of her treating therapist. Claimant argues the ALJ improperly discounted the therapist's testimony that she suffered from a multiple personality disorder. In declining to rely on the therapist's findings the ALJ explained:

Moreover, although there has been a diagnosis of multiple personality disorder by Susan Hays, M.A., there has been no official diagnosis of such disorder by the claimant's treating physicians or psychologist at any of her hospitalizations. (Tr. 27). Citing Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984), Plaintiff contends the ALJ's decision is contrary to the weight of evidence contained in the Record. Further, Plaintiff says the ALJ improperly relied upon the "findings of a nontreating physician" and upon the fact that certain tests were not performed. Such a basis for decision, according to the Claimant, is contrary to decisions of the Tenth Circuit. See Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987).

A careful review of the record indicates that the consensus of opinions from Claimant's treating sources, i.e. Glennbrook Hospital and Mental Health Center, Brookhaven Hospital, St. Luke's Hospital,

Hillcrest Medical Center, St. Francis Hospital, and the objective findings are consistent with the ALJ's determination. (Tr. 28). As defined in the Act, "treating source" means a physician or psychologist who has provided medical treatment or evaluation and who has or has had an ongoing treatment relationship with the claimant. 20 CFR §404.1502. Claimant was seen by several treating physicians, none of whom made a diagnosis similar to therapist Susan Hays. In each of these instances, the final diagnosis was (1) Nov. 1990: acute benzodiazepine overdose, migraines related to depression; (2) Nov. 1990: major depression, recurrent with suicide attempt; (3) Jan. 1991: major depression, single episode, without psychotic features, with history of migraines; (4) March 1991: depression, suicidal, migraines; (5) Sept. 1991: drug overdose with Fiorinal; (6) Oct. 1991: depressive disorder with suicidal attempt; borderline personality disorder; histrionic personality disorder; drug abuse, episodic; classical migraine headache.

In contrast, Susan Hays, Claimant's therapist, provided the diagnosis of multiple personality disorder (MPD) and post traumatic syndrome, neither of which are documented anywhere at any other time by any clinical testing. (Tr. 69) Significantly, in January 1992, Dr. John S. Karns, a psychiatric consultant with whom Ms. Hays works, diagnosed Claimant with dissociative disorder NOS; borderline personality disorder; and migraines. As outlined by Dr. Goodman, a psychiatric consultant who assisted at the 1992 hearing and whose opinion was relied upon by the ALJ, there is (1) no

objective verifiable data which would support such a diagnosis as MPD independent of any other illness, (2) "total lack of evidence" Claimant functions as two or more personalities, (3) no identifiable periods of amnesia apart from the drug abuse, (4) such "parts" of Claimant's personality do not appear to be separate, independent personalities previously unknown to the host, (5) the history of Claimant is one of manipulation, resistant and histrionic behavior, and (6) the MPD diagnosis is not consistent with the other substantial evidence of Record.

While the opinion of a treating source is generally entitled to more weight than the opinion of a nonexamining physician, the ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion. See 20 CFR 404.1526. Significantly, the Tenth Circuit has noted that an acceptable medical opinion must contain more than a mere conclusory statement and must be supported by clinical or laboratory findings. Williams v. Bowen, 844 F.2d 748 (10th.Cir. 1988). In this case, the consulting physician's opinion [Dr. Goodman] was not contrary to the findings of more than five other physicians and/or psychologists, all of whom had treated the Claimant during the relevant time period. Therefore, the Court finds that the ALJ was justified in accepting the opinion of a qualified consulting physician that was supported by the evidence, and in rejecting the therapist's conclusory statement, that was contrary to the evidence. Thus, there is substantial evidence to support the ALJ's finding that the Claimant has severe depression, borderline

personality disorder, and migraine headaches, but that Ms. Wand does not have an impairment or combination of impairments listed in, or medically equal to, one listed in Appendix 1, Subpart P, Regulation No. 4.

The critical question, however, involves the Claimant's ability to function in work-type settings or to perform work-like activity given her severe impairment(s). The regulations require the ALJ to follow a special procedure when evaluating the severity of mental impairments. See 20 CFR 404.1520a. This special procedure requires the ALJ to use a form to list the signs, symptoms and other medical findings which establish the existence of a mental impairment. These listings, known as the "A" criteria, correspond to paragraph A for the various categories of mental disorders. Part "B" criteria lists four areas of functional loss which have been found especially relevant to the ability to work. These four areas are: activities of daily living; social functioning; concentration, persistence and pace; and deterioration or decompensation in work or work-like settings.

Plaintiff contends that even if she does not meet or equal a listing for mental disorders, she is unable to engage in any substantial gainful activity on a sustained basis. Pointing to the assessment of Dr. Adams and the testimony of the vocational expert, Ms. Wand argues she has met listing 12.06(A)(5), Part "A" criteria, as well as Part "B." While the Plaintiff argues that Dr. Adams indicated Claimant "is not able to function in a work setting" due to her inability to deal well with "supervisory pressure," the

report gives no evidence to support this conclusion or to justify such an opinion. (Tr. 267).

Relying instead upon the Record as a whole, the ALJ contrasts the opinions of Dr. Karns and Dr. Passmore. Dr. Karns diagnosed Ms. Wand as having dissociative disorder NOS and borderline personality and as a result would "likely" produce conflicts with coworkers "as she [Claimant] tends to blame others for difficulties and also tends to idealize or devalue others excessively. She often has difficulty responding to authority figures and views them suspiciously or with hostility." However, Dr. Karns also noted Claimant was alert, oriented, neat, attractive and appropriate, and her intellectual functioning appeared to be average. (Tr. 268). Further, Claimant's activities included attending church functions, teaching Sunday School, visiting friends from church, attending school, and caring for her daughter, even though there were occasions of sexually "acting out" when Claimant's daughter was away. In conjunction with Karns' opinion, the ALJ relied upon the opinion of Dr. Passmore, a psychiatric consultant, who examined Claimant on January 14, 1992. Dr. Passmore found Claimant had full range of affect, no looseness of association, flight of ideas, hallucinations or delusions. Other than Claimant's complaints of sleep disturbance, bad dreams, weight loss, fatigue, tearfulness, and fast heartbeat, there were no other neurological symptoms. He felt her stressors were minimal "from the psychosocial standpoint," and diagnosed Claimant with depression and headaches. (Tr. 272).

Furthermore, the testimony of the vocational expert supported,

rather than contradicted, the ALJ's conclusion that Claimant retained the ability to perform her past relevant work as a rehabilitation aide or receptionist. (Tr. 32). The vocational expert indicated that an individual limited to only simple tasks but with no physical limitations could perform jobs as a health aide, retail sales clerk, and secretary-receptionist. (Tr. 102, 108). Plaintiff argues that the hypothetical posed by her Counsel substantiates her inability to work. However, there is no evidence in the Record which would support the limiting factors (such as inability to deal with coworkers) included by her lawyer in posing the hypothetical. (Tr. 33). Instead, the Record specifically includes description of Claimant as extroverted, gregarious friendly, cooperative, outwardly bright, and upbeat. Claimant continually participated in team sports and church activities, particularly as a teacher of Sunday School. These manifestations, activities and responsibilities do not indicate an individual who is depressed to the extent she would be unable to deal appropriately with authority figures and supervisors.

Appropriately, the ALJ concluded that Claimant met Part "A" criteria under 12.04, Affective Disorders, and 12.08, Personality Disorder but failed to meet the criteria necessary in Part "B." Under Part "B", the ALJ found Claimant experienced slight restriction in activities of daily living; moderate difficulty in maintaining social functioning due to "acting out"; and seldom had deficiencies of concentration, persistence or pace that resulted in failure to complete tasks in a timely manner. Claimant was

responsible for the household, cared for her 4 year old daughter and attended school. She only had one or two episodes of deterioration or decompensation in work or work-like settings which caused her to withdraw from that situation or to experience exacerbation of signs and symptoms. (Tr. 38-39).

There is substantial evidence to support the ALJ's finding that Ms. Wand has the residual functional capacity to perform work-related activities except for work involving very high stress or close supervision, and understanding, remembering, and carrying out detailed and/or complex job instructions.

Taking the Record as a whole, the Court determines there is sufficient relevant evidence to support the ALJ's conclusion that Plaintiff is able to perform her past relevant work. Therefore, the decision of the Secretary is AFFIRMED.

SO ORDERED THIS 10 DAY OF February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

DATE FEB 13 1995

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

DONALD F. MCGEHEE, SR,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 94-C-928-K

FILED

FEB 17 1995

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

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on December 16, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss or for summary judgment (doc. #5) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

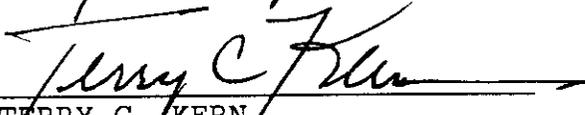
¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

8

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 9 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL JAMES RAE aka)
 MICHAEL J. RAE; DEBBIE S.)
 RAE; GLENDA E. HELLER; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
 Defendants.)

FILED

FEB 13 1995

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

RECORDED ON DOCKET
FEB 13 1995
DATE _____

CIVIL ACTION NO. 94-C-718-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day
of Feb., 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Cathy McClanahan, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear not, having previously claimed no right, title
or interest in the subject property; and the Defendants, Michael
James Rae aka Michael J. Rae, Debbie S. Rae, and Glenda E.
Heller, appear not, but make default.

The Court, being fully advised and having examined the
court file, finds that Defendant, Michael James Rae aka Michael
J. Rae, signed a Waiver of Service of Summons on August 12, 1994,
which was filed on August 16, 1994; that Defendant, Debbie S.
Rae, signed a Waiver of Service of Summons on August 12, 1994,
which was filed on August 16, 1994; that Defendant, Glenda E.

Heller, was served with Summons and Complaint on August 29, 1994, as shown on the U.S. Marshal's service.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on August 16, 1994, disclaiming any right, title or interest in the subject property; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on August 16, 1994, disclaiming any right, title or interest in the subject property; and that the Defendants, Michael James Rae aka Michael J. Rae, Debbie S. Rae, and Glenda E. Heller, 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 1, Block 6, OAK CREST THIRD ADDITION to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on March 25, 1987, the Defendants, Michael James Rae aka Michael J. Rae and Debbie S. Rae, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$38,700.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Michael James Rae aka Michael J. Rae and Debbie S. Rae, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated March 25, 1987, covering the above-described property. Said mortgage was recorded on March 27, 1987, in Book 5011, Page 470, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Michael James Rae aka Michael J. Rae and Debbie S. Rae, 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, Michael James Rae aka Michael J. Rae and Debbie S. Rae, are indebted to the Plaintiff in the principal sum of \$34,274.51, plus interest at the rate of 9 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$7.80 for fees for service of Summons and Complaint.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Michael James Rae aka Michael J. Rae, Debbie S. Rae, and Glenda E.

Heller, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Michael James Rae aka Michael J. Rae and Debbie S. Rae, in the principal sum of \$34,274.51, plus interest at the rate of 9 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$7.80 for 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 Defendants, Michael James Rae aka Michael J. Rae, Debbie S. Rae, Glenda E. Heller, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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



CATHY McCLANAHAN, OBA #14853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
USA v. Michael James Rae, et al.
Civil Action No. 94-C-718-B

CM/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOYCE MARZETT aka JOYCE ANN)
 MARZETT; FORD CONSUMER)
 CREDIT COMPANY; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
 Defendants.)

FEB 13 1995

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

ENTERED ON DOCKET

DATE FEB 13 1995

CIVIL ACTION NO. 94-C-631-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13th day of Feb., 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathy McClanahan, Assistant United States Attorney; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears through Dick A. Blakeley, Assistant District Attorney; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously claimed no right, title or interest in the subject property; and the Defendants, Joyce Marzett aka Joyce Ann Marzett and Ford Consumer Credit Company, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Joyce Marzett aka Joyce Ann Marzett, was served with Summons and Complaint on July 27, 1994, as shown on the U.S. Marshal's service; and that the Defendant, Ford Consumer Credit Company, was served with Summons and Complaint on September 6, 1994, as shown on the U.S. Marshal's service.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on July 26, 1994; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on July 26, 1994, claiming no right, title or interest in the subject property; and that the Defendants, Joyce Marzett aka Joyce Ann Marzett and Ford Consumer Credit Company, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 31, 1990, George Marzett, Jr. and Joyce Ann Marzett filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-01474-W; the case was dismissed on May 28, 1993; and the case was closed on September 24, 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 Twenty-six (26), Block Five (5), in NORTHRIDGE, an addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on December 12, 1975, George Marzett, Jr. and Diantha Marzett, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$12,200.00, 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, George Marzett, Jr. and Diantha Marzett, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 12, 1975, covering the above-described property. Said mortgage was recorded on December 31, 1975, in Book 4197, Page 1513, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 8, 1982, a Decree of Divorce, No. JFD 80-2502, was filed in the District Court In and For Tulsa County, State of Oklahoma, between George Marzett, Jr. and Diantha Marzett; and on July 8, 1983, Diantha Marzett conveyed her interest in the subject property by means of a Quit-Claim Deed recorded on July 14, 1983 in Book 4706, Page 1299 in the records of Tulsa County, Oklahoma.

The Court further finds that George Marzett, Jr. died intestate on August 24, 1992, and Letters of Administration in Case No. P-92-806 were filed on October 22, 1992, appointing Joyce Marzett Administratrix of the Estate of George Marzett, Deceased.

The Court further finds that a Deed of Administratrix was executed on March 22, 1993, granting the subject property to Joyce Marzett. This Deed was recorded on March 24, 1993, in Book 5486, Page 2655 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Joyce Marzett aka Joyce Ann Marzett, made default under the terms of the

aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Joyce Marzett aka Joyce Ann Marzett, is indebted to the Plaintiff in the principal sum of \$7,908.93, plus interest at the rate of 9 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$13.18 for 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 \$8.00 which became a lien on the property as of June 25, 1993; and by virtue of personal property taxes in the amount of \$41.00 which became a lien on the property as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Joyce Marzett aka Joyce Ann Marzett and Ford Consumer Credit Company, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Joyce Marzett aka Joyce Ann Marzett, in the principal sum of \$7,908.93, plus interest at the rate of 9 percent per annum from February 1,

1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$13.18 for 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 \$8.00 for personal property taxes for the year 1992 and in the amount of \$41.00 for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Joyce Marzett aka Joyce Ann Marzett, Ford Consumer Credit Company, 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, Joyce Marzett aka Joyce Ann Marzett, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real 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 \$49.00, 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 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


CATHY McCLANAHAN, OBA #14853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
USA v. Joyce Marzett, et al.
Civil Action No. 94-C-631-B

CM/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOUGLAS H. POLK aka DOUGLAS H.
POLK, SR.; GAYLE J. POLK aka
GAYLE JUNE POLK; CITY OF
BROKEN ARROW, Oklahoma; STATE
OF OKLAHOMA ex rel DEPARTMENT
OF HUMAN SERVICES; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

FEB 13 1995

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

Civil Case No. 94-C 898B

ENTERED ON DOCKET

FEB 13 1995

DATE _____

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13th day of Feb,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendant, **City of Broken Arrow, Oklahoma**, appears by City Attorney Michael R. Vanderburg; the Defendant, **State of Oklahoma ex rel Department of Human Services**, appears by its Attorney Karen S. Smith; and the Defendants, **Douglas H. Polk aka Douglas H. Polk, Jr. and Gayle J. Polk aka Gayle June Polk**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Douglas H. Polk aka Douglas H. Polk, Sr.** will hereinafter be referred to as ("**Douglas H. Polk**"); and the Defendant, **Gayle J. Polk aka Gayle June Polk** will hereinafter be referred to as ("**Gayle June Polk**"). The Defendants, **Douglas H. Polk and**

Gayle June Polk were divorced in Tulsa County District Court, Tulsa County, Oklahoma, Case Number 82-2317. However, the Defendant, **Gayle June Polk**, claimed to be the wife of the Defendant, **Douglas H. Polk**, as shown on the U.S. Marshal Service.

The Court being fully advised and having examined the court file finds that the Defendants, **Douglas H. Polk and Gayle J. Polk**, were each served with process on December 13, 1994, as shown on the U.S. Marshal Service; that the Defendant, **State of Oklahoma ex rel Department of Human Services**, acknowledged service of Summons and Complaint via Certified Mail on October 28, 1994; and that the Defendant, **City of Broken Arrow, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified Mail, which was filed on September 29, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on November 22, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on October 20, 1994; that the Defendant, **State of Oklahoma ex rel Department of Human Services**, filed its Answer on November 22, 1994; and that the Defendants, **Douglas H. Polk and Gayle J. Polk**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on October 21, 1991, Gayle J. Polk filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-03682-W. On September 15, 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 TWENTY (20), BLOCK ONE (1), OAK CREST 4TH ADDITION, AN ADDITION IN TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on April 1, 1988, Barbara Holcomb, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP her mortgage note in the amount of \$36,797.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Barbara Holcomb, a single person, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP a mortgage dated April 1, 1988, covering the above-described property. Said mortgage was recorded on April 8, 1988, in Book 5092, Page 1346, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 29, 1990, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on August 9, 1990, in Book 5270, Page 281, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Douglas H. Polk and Gayle J. Polk, currently hold record title to the property by virtue of a General Warranty Deed dated December 1, 1989, and recorded on December 4, 1989 in Book 5223, Page 749, in the records of Tulsa County, Oklahoma; and the Defendants, Douglas H. Polk and Gayle J. Polk, are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 1990, the Defendants, Douglas H. Polk and Gayle J. Polk, then husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on February 19, 1991, the Defendants, Douglas H. Polk and Gayle J. Polk, filed their petition for Chapter 13 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 91-00442-C. This case was dismissed on October 21, 1991, and closed on March 19, 1993.

The Court further finds that the Defendants, Douglas H. Polk and Gayle J. Polk, 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, **Douglas H. Polk and Gayle J. Polk**, are indebted to the Plaintiff in the principal sum of \$55,224.97, plus interest at the rate of 9.5 percent per annum from June 14, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$9.36, fees for service of Summons and Complaint.

The Court further finds that the Defendant, **State of Oklahoma ex rel Department of Human Services**, has a lien on the property which is the subject matter of

this action by virtue of a judgment in the amount of \$2,707.99, plus interest, penalties and costs, which became a lien on the property as of July 29, 1994. Said lien is inferior to the interest of the plaintiff, United States of America.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property.

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

The Court further finds that the Defendants, **Douglas H. Polk and Gayle J. Polk**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Douglas H. Polk and Gayle J. Polk**, in the principal sum of \$54,244.97, plus interest at the rate of 9.5 percent per annum from June 14, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$9.36, 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, **State of Oklahoma ex rel Department of Human Services**, have and recover judgment in the amount of \$2,707.99, plus penalties and interest, for a judgment.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Douglas H. Polk, Gayle J. Polk, County Treasurer 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, **Douglas H. Polk and Gayle J. Polk**, 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, State of Oklahoma ex rel
Department of Human Services, in the amount of
\$2,707.99, for a judgment.

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.

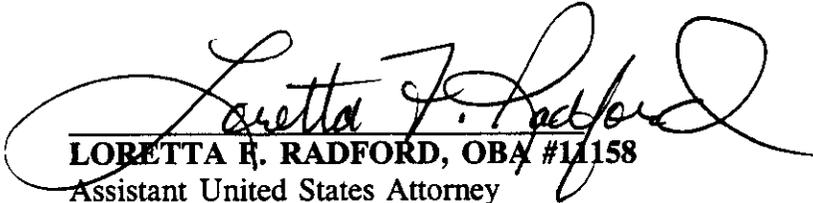
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

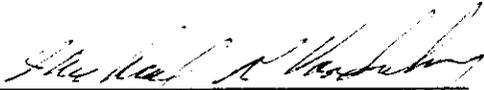
UNITED STATES DISTRICT JUDGE

APPROVED:

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State of Oklahoma ex rel
Department of Human Services

Judgment of Foreclosure
Civil Action No. 94-C 898B

LFR:lg

F I L E D

FEB 10 1995 *Re*

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

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

GUAN WILLIAMS,)
)
Plaintiff,)
)
v.)
)
STANLEY GLANZ,)
)
Defendant.)

Case No. 94-C-441-B

RECEIVED ON DOCKET
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REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Docket #1)¹ and Defendant's Motion to Dismiss or in the Alternative Summary Judgment (Docket #5). A Special Report (Docket #7) has been prepared, as ordered by the court on May 5, 1994.

Plaintiff contends that the conditions of his confinement from November 1993 to June 1994 at the Tulsa County Jail and Adult Detention Center violated his constitutional rights. Plaintiff claims that he was denied the right to exercise his religion, was denied access to the law library, smoking privileges, physical exercise, and a clean jail uniform, and was subjected to cell overcrowding and unsafe living conditions due to inadequate fire alarms, smoke detectors, fire extinguishers or a sprinkler system, all at the direction of Sheriff Stanley Glanz, the Sheriff of Tulsa County.

In order to establish a claim under 42 U.S.C. § 1983, plaintiff must allege that the defendant deprived him of a federally protected right and that the person who deprived

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

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him of the right acted under color of state law. Gunkel v. Emporia, 835 F.2d 1302, 1303 (10th Cir. 1987). Defendant argues that plaintiff's allegations fail to state a claim for deprivation of a constitutional right and amount to nothing more than a "laundry list" of complaints relating to his confinement.

A pro se plaintiff must be allowed the opportunity to offer proof to establish the merits of his allegations, no matter how unartfully pleaded. Haines v. Kerner, 404 U.S. 519, 520 (1972). Plaintiff has attempted to plead his case complaining about the conditions of his confinement and is held to a less stringent standard than formal pleadings drafted by lawyers. Id. at 520.

The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

The submission of the Special Report and the reliance of the defendant upon it in his motion requires denial of the motion to dismiss and consideration of the alternative motion for summary judgment.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.²

FIRST AMENDMENT CLAIM

Plaintiff argues he is being denied the right to practice his religion by being deprived of the use of the prison chapel. Defendant Glanz maintains that the limitations placed on the use of the chapel are necessary to maintain order and security (Special Report, Exhibits "A" and "B").

In Turner v. Safley, 482 U.S. 78, 89 (1987), the court held: "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . . , and not the courts [are] to make the difficult judgments concerning institutional operations.'" (citation omitted). The Supreme Court in Turner held that, in determining the reasonableness of a prison restriction, the court consider whether alternative means of exercising the right exist despite the regulation. Id. at 90.

² A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "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." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). 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 (10th Cir. 1988).

Despite the limitations imposed on use of the chapel, prisoners are allowed alternatives to practice their religion. Inmates have access to personal visits by ministers, priests, or authorized representatives of recognized religious groups. (Special Report, Exhibits "A" and "B"). This court has recognized this policy as constitutional, finding it does not deprive the inmates of their First Amendment rights. (Clayton v. Thurman, Case No. 79-C-723-B, Order entered on September 10, 1982, at pgs. 26, 27 and 41).

Plaintiff's allegation fails to establish a constitutional violation because the restriction on chapel use is rationally connected to the legitimate interest in prison security, and alternative means of exercising the right to practice religion are available to prisoners. Defendant's Motion for Summary Judgment as to this claim should be granted.

ACCESS TO COURTS

Plaintiff alleges that he has been "denied access to law library." States have an affirmative obligation to assure prisoners have meaningful access to courts. Bounds v. Smith, 430 U.S. 817, 824 (1977). The Supreme Court in Bounds held that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with an adequate law library or adequate assistance from persons trained in the law. Restricted access to legal materials in a reasonable manner may be constitutionally permissible in light of legitimate security considerations. Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978); Oltarzewski v. Ruggiero, 830 F.2d 136, 138 (9th Cir. 1987); Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986). In order to state a claim for relief, a complaint of lack of access to a library must be accompanied with a showing of specific

harm or an actual injury to the prisoner's attempts at litigation. Petrick v. Maynard, 11 F.3d 991, 994-996 (10th Cir. 1993); Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987).

The Tulsa County Jail policy restricts prisoner's physical use of the law library, because of claimed breaches of security and prisoner destruction of legal materials. (Special Report, pp. 9 and 10). The policy requires prisoners to fill out request forms and await the librarian's copying of the requested materials to be furnished. If a prisoner does not know exactly what he needs, he explains his charges to the librarian and she will gather all the information needed in the particular subject. (Special Report, pp. 9, 10, 65 and 66).

Petitioner has not stated a specific instance where he was denied access to legal assistance or suffered actual injury or specific harm because of his limited access to the jail library. He has failed to present a claim for relief for denial of access to the courts by his conclusory allegation. Defendant's Motion for Summary Judgment as to this claim should be granted.

SMOKING PRIVILEGES

Plaintiff asserts that his right to smoke is being violated by the fact that smoking in certain parts of the jail is prohibited. There is no constitutional right to smoke in prisons or jails. Doughty v. Bd. of County Comm'rs, 731 F.Supp. 423, 426 (D. Colo. 1989). In Bell v. Wolfish, 441 U.S. 520 (1979), the court held that the first step in inquiring whether a policy violates the Fourteenth Amendment is a determination as to whether the policy is punishment. Id. at 535. A policy is not punishment if there is no showing of intent to punish, and it is reasonably related to a legitimate government objective. Id. at 538-39.

The smoking restriction protects the rights and health of non-smoking guards and inmates, eliminates potential fire hazards, provides for a clean living environment, and is therefore reasonably related to the county's goals. In the absence of substantive criteria or mandatory language in the Resolution of the Tulsa County Board of County Commissioners allowing the sheriff to establish prison smoking policies, which would create a liberty interest protected by due process, plaintiff had no constitutional right to smoke in the jail. Grass v. Sargent, 903 F.2d 1206, 1207 (8th Cir. 1990), citing Williams v. Armontrout, 852 F.2d 377, 379 (8th Cir.), cert. denied, 488 U.S. 996 (1988). Defendant's Motion for Summary Judgment as to this claim should be granted.

RIGHT TO EXERCISE AND RECREATION

Plaintiff alleges that he was denied the right to exercise, except for two times in five months, while incarcerated, which violates his constitutional right to be free from cruel and unusual punishment.

The courts have held that a deprivation of exercise may constitute an impairment of health and rise to the level of an Eighth Amendment violation in certain circumstances. In Ruiz v. Estelle, 679 F.2d 1115, 1151-52 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983), the court observed that "confinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment." Id. at 1152. The Ruiz court refused, however, to find that deprivation of exercise was per se unconstitutional. When determining an inmate's need for regular exercise, it looked to the particular facts of each case.

The Tenth Circuit has found that allowing prisoners only one hour of exercise per

week does not violate the Eighth Amendment. Bailey v. Shillinger, 828 F.2d 651, 653 (10th Cir. 1987). The Bailey court stated:

There is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates, and some courts have held a denial of fresh air and exercise to be cruel and unusual punishment under certain circumstances. None, however, has ruled that such a denial is per se an Eighth Amendment violation. Plaintiff admits that since he brought this suit, the prison officials have constructed an outdoor exercise facility which he is allowed to use for one hour per week. Although this amount of exposure to exercise and fresh air is still restrictive, we cannot say, without more, that it fails to satisfy the demands of the Eighth Amendment.

Id. (Citations omitted). See also Caldwell v. Miller, 790 F.2d at 601 (finding that one hour of exercise daily does not violate the Eighth Amendment); Spain v. Procnier, 600 F.2d 189, 199 (9th Cir. 1979).

The Tenth Circuit has concluded that what constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates. Housley v. Dodson, 1994 WL 664511 (10th Cir. 1994). This court has recognized as constitutional a policy allowing inmates in the Tulsa County Jail system incarcerated for more than 30 days to participate in exercise unless they are escape risks or disciplinary problems. (Clayton v. Thurman, Case No. 79-C-723-B, Order entered on September 10, 1987, at pgs. 24-25). The exercise program in place today is the same one approved by the court in that order. (Special Report, Exhibit "D" and "E"). The order noted that there is adequate space within most of the cells for inmates to do calisthenics.

Plaintiff was determined to be an escape risk because of his prior felony convictions and was disciplined for a number of jail policy infractions and for failure to cooperate.

(Special Report, Exhibit "F"). These activities prevented plaintiff's regular participation in the exercise program.

Considering that plaintiff was only incarcerated in the Tulsa County system for seven months and had at least two opportunities to exercise and that there was room in most cells to do calisthenics, plaintiff's allegations fall short of proving a constitutional deprivation and his claim should be dismissed. Defendant's Motion for Summary Judgment as to this claim should be granted.

EIGHTH AMENDMENT OVERCROWDING CLAIM

The Eighth Amendment prohibits punishments "which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain', or are grossly disproportionate to the severity of the crime. Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (citations omitted). In Rhodes, the Supreme Court rejected the argument of Justice Marshall, who would have found an eighth amendment violation whenever prison conditions "if left unchecked, [would] cause deterioration in [the prisoners'] mental and physical health." Id. at 375. Eight justices found that although 38 percent overcrowding and double-celling in fifty-five square foot cells were not desirable, these conditions did not "inflict unnecessary or wanton pain," were not "grossly disproportionate to the severity of the crimes," and did not rise to the level of an Eighth Amendment violation. Id. at 348-50 and n.15. In addition, where pain inflicted is not formally meted out as punishment by statute or the sentencing judge, a culpable state of mind must be attributed to the defendant before actions can qualify as an Eighth

Amendment violation. Wilson v. Seiter, 501 U.S. 294 (1991).

Plaintiff asserts that he was forced to share an overcrowded jail cell, denied clean clothing, and subjected to unsafe fire hazards. Plaintiff states that in the Adult Detention Center a 60-man holding tank held as many as 78 people and in the county jail a 12-man holding tank held as many as seventeen. Overcrowding in a jail or prison is not per se unconstitutional, for the Supreme Court has refused to prescribe a constitutional permissible minimum number of square feet per person. Bradford v. Gardner, 578 F.Supp. 382, 384 (E.D. Tenn. 1984) (citing Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)).

Plaintiff presents no facts establishing defendant acted with deliberate indifference subjecting plaintiff to conditions of overcrowding and thus fails to show cruel and unusual punishment. Defendant's Motion for Summary Judgment should be granted as to this claim.

CLEAN UNIFORM

Plaintiff's allegation that he was denied a clean uniform is not sufficient to establish a constitutional deprivation. The current jail system provides inmates with a clean uniform once a week, but places a burden on the inmate to obtain these benefits by presenting his dirty clothing when the laundry cart makes its rounds to gain clean uniforms. (Special Report, Exhibit "G").

Plaintiff has failed to show that his lack of clean clothing constitutes cruel and unusual punishment or conduct amounting to deliberate indifference on the part of jail officials. Defendant's Motion for Summary Judgment as to this claim should therefore be

granted.

UNSAFE LIVING CONDITIONS
DUE TO INADEQUATE FIRE PROTECTIONS

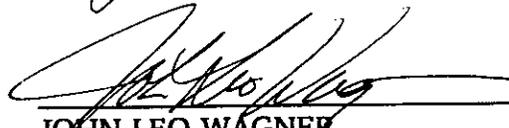
Plaintiff also asserts that he was subjected to unsafe living conditions in violation of the Eighth Amendment because the jail lacks adequate fire alarms, fire extinguishers, and a sprinkler system. Fire protection is a basic necessity of life. Battle v. Anderson, 447 F.Supp. 516, 526 (E.D. Okla. 1977).

Although the Tulsa County Jail has no sprinkler system, its absence alone does not sustain an Eighth Amendment claim. The county jail is equipped with smoke detectors, fire extinguishers, and has in place an evacuation plan. (Special Report, p. 16 and Exhibit "J"). Plaintiff admits he was present during a jail fire in 1994 and suffered only smoke inhalation as a result. Plaintiff has failed to show that his Eighth Amendment rights have been violated in this respect. Defendant's Motion for Summary Judgment as to this claim should be granted.

In summary, Defendant's Motion for Summary Judgment should be granted in its entirety.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 10th day of February, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:williams.rr
ctck