

*PL*

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

RONALD WILLIAMS, and KATHY  
WILLIAMS, individually and  
as husband and wife,

Plaintiffs,

v.

SHONEY'S INC., d/b/a CAPTAIN  
D'S,

Defendant.

Case No.: 94-C-629-E ✓

**FILED**

MAR - 9 1995 *RC*

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

**STIPULATION OF DISMISSAL**

COME NOW all parties and dismiss the above-entitled action pursuant to Rule 41(1) of  
the Federal Rules of Civil Procedure.

Dated this 9<sup>th</sup> day of March, 1995.

*CORLEY & GANEM*

BY: *[Signature]*  
ATTORNEY FOR THE PLAINTIFF

*BEST, SHARP, HOLDEN, SHERIDAN, BEST & SULLIVAN*

BY: *[Signature]*  
ATTORNEY FOR THE DEFENDANT

ENTERED ON DOCKET  
DATE MAR 10 1995

(21)

ENTERED ON DOCKET  
DATE MAR 10 1995

23.11

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

DONALD LEE HUDSON,

Plaintiff,

-vs-

CITY OF COLLINSVILLE, OKLAHOMA,  
a municipal corporation,

Defendant.

No. 93-C-706-K

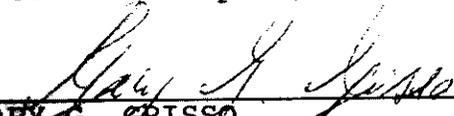
**FILED**

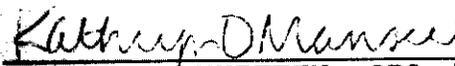
MAR -9 1995

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

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the attorneys for Plaintiff and Defendant, respectively, and hereby stipulate and agree that the above-captioned cause may, upon order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein and state that a compromise settlement covering all claims involved in the above captioned cause has been made between the parties, and the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.

  
GARY G. GRISSO  
1719 West Broadway  
Collinsville, Oklahoma 74021  
ATTORNEYS FOR PLAINTIFF

  
REGGIE N. WHITTEN OBA #9576  
KATHRYN D. MANSELL OBA #12788  
MILLS & WHITTEN  
Suite 500, One Leadership Square  
211 N. Robinson  
Oklahoma City, Oklahoma 73102  
(405) 239-2500  
ATTORNEYS FOR DEFENDANT

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

**FILED**

MAR - 9 1995

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

STANDARD INSURANCE COMPANY,  
an Oregon corporation, and  
SECURITY LIFE INSURANCE COMPANY  
OF AMERICA, a Minnesota  
corporation,

Plaintiffs,

v.

DONALD A. MCCANCE and  
NEVA DAVIS RICHARDSON,

Defendants.

Case No. 94-C-1062-B ✓

ORDER

Now before the Court for its consideration is the Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56, filed by Defendant Donald A. McCance (McCance) to establish his right to receive the proceeds of two life insurance policies tendered into the registry of this Court pursuant to the interpleader action filed by the Plaintiffs, Standard Insurance Company (Standard) and Security Life Insurance Company of America (Security). The Plaintiffs, both foreign corporations, filed a civil action in interpleader pursuant to 28 U.S.C. §§ 1335 and 1397.

The following undisputed facts appear from the pleadings or are deemed admitted by Plaintiffs' and Co-Defendant's failure to controvert movant's facts. See Local Rule 56.1.

### Undisputed Facts

1. Loretta Faye McCance, an employee of Avetech, Inc., who is now deceased, was an insured participant under Avetech's group insurance plan (Plan). (McCance's Answer #5 and Richardson's Answer #1).

2. The Plan provides certain life insurance benefits (policies) to a participant totalling One Hundred Thousand Dollars (\$100,000) plus interest:

a. Security issued group policy no. 3188, Certificate No. SLO-8000125-11 in the total amount of Twenty Thousand Dollars (\$20,000);

b. Standard issued group policy no. 61555364-01 in the total amount of Eighty Thousand Dollars (\$80,000).

(McCance's Answer #5, McCance's Motion for Summary Judgment Undisputed Facts #1, and Richardson's Answer #1).

3. Plaintiffs acknowledge indebtedness under the policies. (Plaintiff's Complaint #12).

4. Loretta Faye McCance designated her husband, Defendant McCance, as her beneficiary under the policies. McCance resides in Tulsa, Oklahoma. (Plaintiff's Complaint #3 and #8, McCance's Answer #3 and #5, and Richardson's Answer #1).

5. Under the policies, if no designated beneficiary is entitled to benefits, the Plaintiffs may pay such benefits to: (a) spouse; (b) children; (c) parents; or (d) brothers and sisters. (Plaintiff's Complaint #8 and McCance's Answer #5, and Richardson's Answer #1).

6. At the time of her death, Loretta Faye McCance was survived by one child from a former marriage, defendant Neva Davis Richardson (Richardson), who is now of majority age and residing in Waco, Kentucky. (Plaintiff's Complaint #10, McCance's Answer #7, and Richardson's Answer #1).

7. Loretta Faye McCance died on or about October 13, 1993. The cause of death was undetermined, with a pathological diagnosis of: (1) charred body parts; and (2) no anatomic cause of death. The manner of death was ruled a homicide. (Plaintiff's Complaint #9, McCance's Answer #6, and Richardson's Answer #1).

8. The Sheriff's Department of Wagoner County, Oklahoma, who is investigating this homicide, has not charged anyone in connection with the death of Loretta Faye McCance but has not ruled out anyone as a suspect, including McCance. Therefore, McCance may be disqualified as a life insurance beneficiary of the life insurance benefits of Loretta Faye McCance under the Policies. (Plaintiff's Complaint #9 and Richardson's Answer #1).

9. McCance has submitted a claim to the Plaintiffs requesting payment of benefits under the policies. (Plaintiff's Complaint #11 and McCance's Answer #8).

10. Although Richardson has not submitted a claim to Plaintiffs, she has filed a Cross-Claim against McCance to claim the benefits of the policies if McCance is disqualified as the beneficiary. (Plaintiff's Complaint #11 and #12, McCance's Answer #7 and Richardson's Cross-Claim #5).

11. By reason of the potential of conflicting claims among

the Defendants, the Plaintiffs are in doubt and cannot make a determination as between the claims of the Defendants to the policies. Plaintiffs recognize they could be subject to vexatious litigation and possibly subjected to double or multiple liability as a result of the actual and potential claims of the Defendants. (Plaintiff's Complaint #12).

12. The Plaintiffs have no interest in the proceeds to the benefits of the Policies and have deposited the benefit proceeds into the registry of this Court, to be paid to the claimant, or claimants, who might be adjudged entitled to the benefits by the Court. (Plaintiff's Complaint #12, ORDER and RECEIPT dated January 25, 1995.)

#### Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment,

nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

As demonstrated by the Undisputed Facts Nos. 2, 3, 6 and 12, the mandatory requirements exist for interpleader relief: (1) the

interpleader action be brought by a stakeholder who has custody or possession of the funds to be distributed; (2) the action must concern a minimal value of \$500; (3) the adverse claimants must be of diverse citizenship; and, (4) the full amount disputed must be deposited into the court registry. 28 U.S.C. 1335.

The fifth requirement, that there be two or more adverse claimants asserting a right to the fund, can be satisfied by not only adverse claimants who actually file a claim, but also by two or more adverse claimants who could file a claim, thereby providing a real risk to the stakeholder of vexatious, conflicting claims. Knoll v. Socony Mobil Oil Co., 369 F.2d 425 (10th Cir. 1966), cert. denied 87 S.Ct. 1173, reh'g denied 87 S.Ct. 1490, reh'g denied 88 S.Ct. 18. As the decedent's daughter, Richardson would be entitled to the benefits under the terms of the policies in the event the named beneficiary, McCance, is declared ineligible. (Undisputed Facts No. 5 and 10).

Under Oklahoma's statutory provision known as the "slayer statute", a beneficiary is precluded from recovering proceeds of life insurance when such beneficiary has taken, caused or procured another to take the life of an individual. 84 O.S. 1994 § 231. The beneficiary need not be convicted of the insured's murder or manslaughter to be precluded from recovery. Rather, it need only be proved, by a preponderance of the evidence in a civil action, that the beneficiary took, or caused to be taken, the insured's life in such a manner as to constitute felonious, intentional and unjustified homicide. State Mutual Life Assurance Co. of America

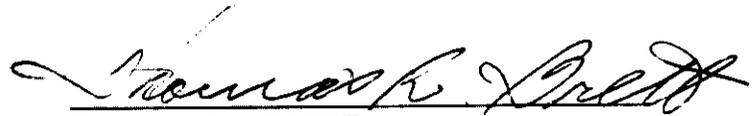
v. Hampton, 696 P.2d 1027 (Okla. 1985). Moreover, the beneficiary's acquittal on charges of killing the insured does not per se entitle that beneficiary to recover proceeds of decedent's insurance policy. Id. In this case, the named beneficiary being declared ineligible persists as a possibility. The insured's death was caused by a homicide which remains unsolved and for which the beneficiary, McCance, has not been ruled out as a suspect. Thus, as an action in equity, an interpleader action is appropriate in this case, because the statutory provisions have been met and there exists two or more adverse claimants who may claim the insurance proceeds, providing a real risk of vexatious, conflicting claims.

Through the cross-claim, interpleader action and Motion for Summary Judgment, all parties have prevailed upon this Court to make a determination as to the rightful beneficiary entitled to the proceeds of decedent's life insurance. The named beneficiary, McCance, has the burden of making a prima facie showing that he has a right to recover under the insured's policy. Hampton, supra. McCance has established, and neither Richardson nor the Plaintiffs challenge, the prima facie case: (1) existence of the insurance contract, (2) the death of the insured covered by the policy, (3) that McCance is the beneficiary. Upon this showing that McCance has a right to recover as a named beneficiary, Richardson may make an affirmative showing that McCance took or caused to be taken the life of decedent in such a way as to constitute felonious, intentional and unjustifiable homicide, thereby disqualifying him as a beneficiary. Matter of Estates of Young, 831 P.2d 1014

(Okla.App. 1992). Richardson's cross-claim makes no such affirmative defense but rather asserts in the alternative that, should McCance be disqualified as a beneficiary, Richardson would be entitled to the proceeds. Additionally, neither Richardson nor Plaintiffs responded to McCance's Motion for Summary Judgment; therefore the facts supporting McCance's Motion are deemed admitted. See Local Rule 56.1.

However, the Court believes that, due to the facts and circumstances of this case, an evidentiary hearing should be held. Therefore, McCance's Motion for Summary Judgment is hereby overruled. The hearing will be held on the 31st day of March, 1995, at 10:30 a.m. Proposed Findings of Fact and Conclusions of Law should be filed three days before the hearing date.

IT IS SO ORDERED THIS 9<sup>th</sup> DAY OF MARCH, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DA MAR 10 1995

**FILED**

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

MAR - 9 1995

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

JAMES E. GILES )  
 )  
VS. )  
 )  
YMCA OF GREATER TULSA and )  
JOHN W. SWIFT, an individual )  
 )

CASE NO. 94-C-661-B ✓

ORDER

This matter comes on for consideration of Defendants' Motion for Summary Judgment (docket entry # 15). Also for consideration is Defendants' Application To File Amended Witness List (docket entry # 21).

This is an Age Discrimination case brought under the ADEA, 29 U.S.C. § 621. Plaintiff also alleged an ERISA claim, 29 U.S.C. §§ 1001-1461, and a claim under the common law of Oklahoma (a public policy/wrongful discharge claim, i.e. a Burk tort) both apparently now abandoned since not included in the jointly executed Pretrial Order.

Plaintiff, a 54 year old male, alleges that he was employed by the YMCA for 17 years when, in 1993, he was terminated for no cause and because of his age. Plaintiff alleges that John Swift, hired as the Director of the Tulsa YMCA in 1991, began a systematic removal of employees over 50 because of his view that "older staff lack the energy to run a YMCA".

Defendants move for summary judgment arguing that Plaintiff's termination "was a reasoned business decision" and that Plaintiff cannot establish a prima facie case of age discrimination because

he cannot show that he was replaced by a younger person, one of the four requisites to be shown.<sup>1</sup> Alternatively, Defendants aver that even if Plaintiff makes a prima facie showing of age discrimination he cannot establish that Defendants' stated reason for termination was merely a pretext, citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981) and MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115 (10th Cir.1991).

Plaintiff argues that statements made by Defendant Swift such as instructing YMCA employee Don Boatman to "have Giles circulate his papers. He is too old and I don't want to keep him until he retires"<sup>2</sup> and telling Boatman in August, 1991, that "I (Swift) have inherited an old staff" and that he (Swift) prefers having younger people employed because they had a higher energy level, help establish that age was the motivating factor in Swift's termination of Giles in July, 1993. Plaintiff further argues that Swift's stated reason, that Giles management style did not fit into the future of the YMCA, was but a pretext for the age-motivated termination.

Defendants argue that Plaintiff's employment was terminable at will by either party; that when then Executive Director Don Boatman left in April, 1993, a search committee of eight (John Swift was

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<sup>1</sup> In order to prove a prima facie case of age discrimination, a plaintiff must establish the following: (1) that he is "within the protected age group"; (2) that he "was doing satisfactory work"; (3) that he "was discharged"; and (4) that his position was filled by a younger person.

<sup>2</sup> Within the YMCAs nationally this is a phrase to describe an active job search.

not one of the eight) picked eight semi-finalists out of 33 applicants but did not pick Plaintiff.<sup>3</sup>

In response, Plaintiff avers that in less than a two year span nine YMCA employees experienced adverse employment decisions at the hand of Defendant Swift because of their ages.<sup>4</sup> Plaintiff argues that "[E]ach of these persons was terminated, demoted to menial jobs, such as reassignment from a position as Camp Director to maintenance/lawn man, or "encouraged" to retire by John Swift." (Affidavit of James E. Giles). In counterpoint, Defendants argue that Plaintiff's factual allegations regarding aged employees suffering adverse employment decisions are without material, admissible evidentiary support and Plaintiff's legal arguments thereon are misguided and incorrect.

While the Court recognizes that some if not most of Giles' factual revelations regarding these older employees is hearsay and therefore arguably excludable in their present posture, the Court

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<sup>3</sup> Plaintiff makes no allegations regarding this in his Complaint. Apparently Defendants include it in their motion for summary judgment to show that eight unbiased members of the search committee failed to pick Plaintiff as a semi-finalist and/or that Plaintiff's former position has not been filled and his former duties have been spread around through restructuring.

<sup>4</sup> These employees and their ages are:

Sam Wilson	Age 56
James Giles	Age 54
Marilyn Wilson	Age 53
Julia Giles	Age 53
Emanuel Palmer	Age 52
Don Boatman	Age 60
Janet Myers	Age 45
Jay V. Logan	Age 61
Roger Bell	Age 69

also is aware that under cross-examination of Defendant Swift<sup>5</sup> much of the factual data may become acceptably formulated.

At summary judgment stage, affidavits must "set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56 (e); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1526 n. 11 (10th Cir.1992) ("In opposing a motion for summary judgment, the nonmovant must make a showing that, 'if reduced to admissible evidence,' would be sufficient to carry the nonmovant's burden of proof at trial." (quoting Celotex, 477 U.S. at 327) (emphasis added)).

Further, Defendants' argument that Swift's admitted remarks<sup>6</sup> regarding the factor of age in relation to employment are mere "stray remarks", see Cone v. Longmont United Hospital Association, 14 F.3d 526 (10th Cir.1994), do not convince the Court that a fact-finder might well concludes such comments are indeed indicia of age discrimination.

Lastly, Defendants argue that in any event summary judgment should be granted in favor of Defendant Swift on the theory that ADEA liability is not imposed upon an individual making employment decisions for and on behalf of a company, corporation or other employer. Birbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.1994). The Court agrees. Under the ADEA, an individual employee

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<sup>5</sup> The Court will, infra, grant Defendants' Application to amend their witness list to include Defendant Swift.

<sup>6</sup> Defendants acknowledge that Swift, while asking for all personnel files be updated with copies of college degrees and diplomas, queried to Don Boatman: "Are you sure they kept records before World War II?"

may not be held liable for employment decisions. The Court concludes partial summary judgment should be granted in favor of Defendant Swift.

The Court concludes that factual issues remain precluding summary judgment in favor of Defendant YMCA particularly as to the issue of whether Plaintiff's position was filled by a younger person or never filled but merely redistributed among existing staff. Accordingly, Defendants' Motion for Summary Judgment is DENIED as to the YMCA but GRANTED as to Defendant Swift. Any liability imposed upon Defendant Swift will be in his official capacity only.

As indicated earlier herein, the Court, in the exercise of its discretion, grants Defendants' Application to Amend its witness list to include Defendant John Swift as a witness on behalf of Defendants.

IT IS SO ORDERED this 9<sup>th</sup> day of March, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

lx

MAR 09 1995

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

**FILED**

MAR - 9 1995

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

LOUIS LEVY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DALE L. WOODWARD and )  
ANN WOODWARD STERLING, )  
 )  
Defendants. )

Case No. 94-C-571-B

STIPULATION OF DISMISSAL

PURSUANT TO Fed. R. Civ. P. 41(a)(1)(ii) the parties stipulate that this action should be dismissed with prejudice as to all pending claims and counterclaims and hereby request the Clerk of the Court to enter their joint dismissal with prejudice forthwith.

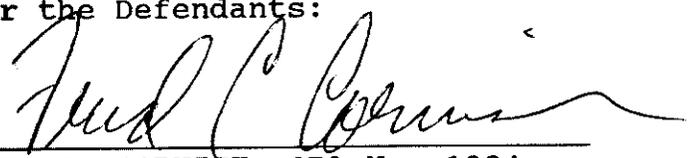
DATED: March 1, 1995.

For the Plaintiff:



SCOTT W. BRADSHAW, OBA No. 1051  
1717 East 15th Street  
P.O. Box 14130  
Tulsa, Oklahoma 74159-1130  
Telephone: (918) 749-3338  
Attorney for Plaintiff

For the Defendants:



FRED C. CORNISH, OBA No. 1924  
Cornish & Zieren, Inc.  
321 South Boston, Suite 917  
Tulsa, Oklahoma 74103-3321  
Telephone: (918) 583-2284  
Attorney for Defendants

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any event, the Court determines that Plaintiff has failed to allege that the exposure to the paint fumes posed an unreasonable risk of serious damage to his health. Although Plaintiff alleges that he "will show sufficient facts that he was unreasonable risk [sic] of serious damage to his future health," he fails to provide any facts to substantiate this claim. Mr. Castro merely alleges that he has had a history of asthma and that since breathing the paint fumes has had difficulty in breathing. Accordingly, even liberally construing the motion for leave to amend in accordance with Mr. Castro's pro se status, he fails to state a claim upon which relief can be granted.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Plaintiff Castro's motion for leave to amend (doc. #18) is granted;
- (2) Defendants' motion to dismiss (doc. #20) is granted;
- (3) Plaintiff Tony Castro is dismissed with prejudice from this consolidated action; and
- (3) The Clerk shall close case no. 94-C-0016-E.

SO ORDERED THIS 8<sup>th</sup> day of March, 1995.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

**FILED**

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

MAR 8 1995

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

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

No. 93-C-970-E  
(Base File)  
consolidated with  
94-C-0016-E

ENTERED ON DOCKET  
MAR 09 1995

DATE \_\_\_\_\_

**ORDER**

On September 19, 1994, the Court granted Defendants' motion to dismiss the above consolidated action and granted Plaintiffs an additional twenty days to file a motion for leave to amend and a proposed amended complaint, curing the defects noted in the order. On December 20, 1994, following several motions for an extension of time, Plaintiff Robert L. Wirtz notified the Court that he did not wish to pursue this case any further. Mr. Wirtz, however, requested that Exhibit B to his individual complaint be returned to him for use in state proceedings. The Defendants have not objected.

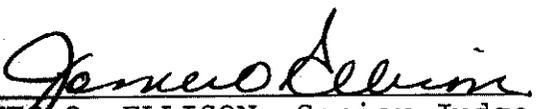
**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The claims of Plaintiff Robert L. Wirtz are **dismissed with prejudice** from this consolidated action, and
- (2) The Clerk shall **return** to Plaintiff Robert L. Wirtz the paint sample which he submitted as exhibit B to his

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complaint (filed in a brown envelope behind the file).

SO ORDERED THIS 8<sup>th</sup> day of March, 1995.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

DATE MAR 08 1995  
**FILED**

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

MAR - 9 1995

DENNIS & SHARON HAMBLIN,  
husband and wife,

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

Plaintiffs,

vs.

Case No. 93-CV 813 K

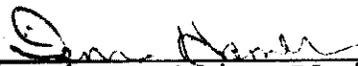
FARMERS INSURANCE COMPANY,  
INC., a foreign corporation,

Defendant.

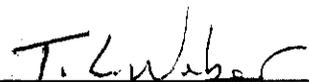
**RELEASE AND SATISFACTION OF JUDGMENT**

The undersigned do hereby acknowledge receipt from the Defendant, Farmers Insurance Company, Inc., a foreign corporation, in the above-entitled causes of action, Twenty-Four Thousand One Hundred Eighty-Six Dollars and Sixty-Seven Cents (\$24,186.67), for the remaining issues of attorney fees, costs, and interest.

The sum received is accepted in full payment and satisfaction of judgment, including costs and interest, and the undersigned do hereby release, acquit, and forever discharge the said Defendant of and from all liability to, and demand or claim of the undersigned, or either of them, in respect to said cause and judgment.

  
Dennis Hamblin, Plaintiff

  
Sharon Hamblin, Plaintiff

  
Terry L. Weber  
Attorney for Plaintiffs

IN RE: ASBESTOS PRODUCTS LIABILITY  
LITIGATION (NO. VI)

6747

This Document Relates To:

Civil Action No. MDL 875

United States District Court For The  
NORTHERN DISTRICT OF OKLAHOMA  
AT TULSA

WILLIAM C JONES  
4:90-292

JUNIOR B WORSHAM  
4:90-293

**FILED**

MAR 8 1995

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

JEROLD T BRANHAM  
4:90-537

WILBURN BRASELTON  
4:90-538

HUBERT HUMPHREYS  
4:90-541

ORAN L KELLY  
4:90-542

BILL MCGOUGH  
4:90-543

EASTON M NEWTON  
4:90-544

NOLEN E STIMSON  
4:90-545

TRAVIS H WELCH  
4:90-546

DONALD J GRODEN  
4:90-649

HAROLD D BAKER  
4:91-399

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BETTIS L HARGROVE  
4:91-400

VIRGIL E MARTIN  
4:91-401

JACK ROBINSON  
4:91-402

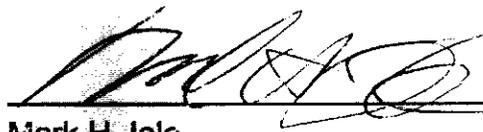
LEONARD M HARDISON  
4:91-472

DELVA L BOYER  
4:91-473

JOE E DEATHERAGE  
4:91-474

**STIPULATION OF DISMISSAL**

COMES NOW plaintiffs herein, by and through their attorneys, and defendant Babcock & Wilcox Company, by and through its attorneys, and stipulate and agree that the above-entitled causes have been fully compromised and settled as to Babcock & Wilcox Company only and the cases should be and hereby are dismissed as to defendant Babcock & Wilcox Company only with prejudice, and the parties to bear their own costs.

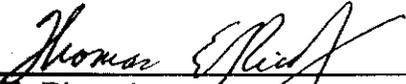


Mark H. Iola

**UNGERMAN & IOLA**  
1323 E. 71st Street  
Suite 300  
Tulsa, OK 74136  
918/495-0550

**ATTORNEYS FOR PLAINTIFFS**

and

  
\_\_\_\_\_  
Thomas E. Rice, Jr.  
James S. Kreamer

**BAKER STERCHI & COWDEN, L.L.C.**  
2100 Commerce Tower  
P.O. Box 13566  
Kansas City, Missouri 64199  
(816) 471-2121  
FAX (816) 472-0288

ATTORNEYS FOR DEFENDANT  
THE **BABCOCK & WILCOX** COMPANY

IT IS SO ORDERED.

  
\_\_\_\_\_  
THE HONORABLE CHARLES R. WEINER

Dated: 2/16/95

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ENTERED ON DOCKET  
DATE MAR 09 1995

IN RE: ASBESTOS PRODUCTS LIABILITY  
LITIGATION (NO. VI)

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6747

This Document Relates To:

Civil Action No. MDL 875

United States District Court For The  
NORTHERN DISTRICT OF OKLAHOMA  
AT TULSA

WILLIAM C JONES  
4:90-292

JUNIOR B WORSHAM  
4:90-293

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4:90-546

DONALD J GRODEN  
4:90-649

HAROLD D BAKER  
4:91-399

**FILED**

MAR 8 1995

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

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4:91-400

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4:91-401

JACK ROBINSON  
4:91-402

LEONARD M HARDISON  
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DELVA L BOYER  
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JOE E DEATHERAGE  
4:91-474

**STIPULATION OF DISMISSAL**

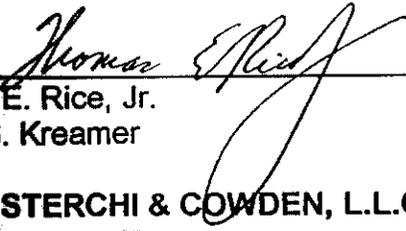
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918/495-0550

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FAX (816) 472-0288

ATTORNEYS FOR DEFENDANT  
THE BABCOCK & WILCOX COMPANY

IT IS SO ORDERED.

  
\_\_\_\_\_  
THE HONORABLE CHARLES R. WEINER

Dated: \_\_\_\_\_

2/16/95

ENTERED ON DOCKET  
DATE MAR 09 1995

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY  
LITIGATION (NO. VI)

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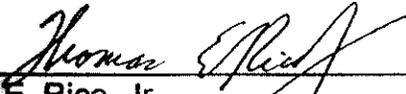
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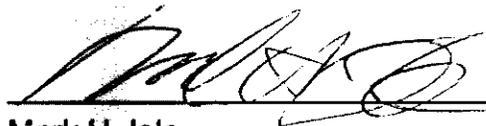
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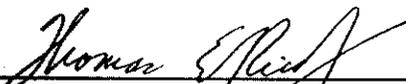
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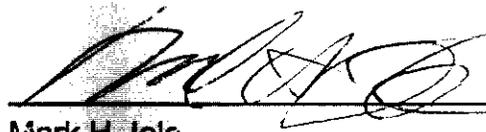
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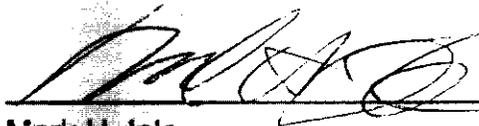
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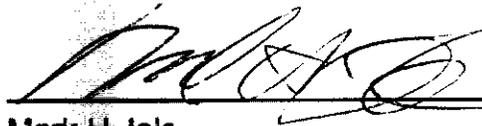
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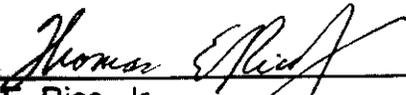


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JOSEPH F. CLARK, JR., as Guardian )  
Ad Litem for THOMAS D. KIEFER, a )  
minor and WILLIAM KIEFER, natural )  
father and custodian, )

Plaintiffs, )

vs. )

OCCIDENTAL PETROLEUM CORPORATION )  
MEDICAL PLAN, )

Defendants. )

Case No. 94-C-30-K ✓

FILED

MAR 9 1995

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

ORDER

Now before the Court is the Motion by Defendant, the Occidental Petroleum Corporation Medical Plan ("Plan") for summary judgment in its favor against Plaintiffs Joseph Clark, guardian ad litem for Thomas Kiefer, and William Kiefer ("Plaintiffs") as to all claims and allegations set forth by them.

Plaintiffs originally filed their claims for breach of contract, bad faith, declaratory judgment and injunctive relief under Oklahoma law, seeking both compensatory and punitive damages. Defendants removed this action, asserting that the claims arise under the Employee Retirement Security Act of 1974 (ERISA) and that complete diversity exists between the parties. Defendant now seeks summary judgment alleging that as a matter of law Plaintiffs cannot demonstrate that the Plan acted arbitrarily or capriciously or abused its discretion in denying Plaintiffs' request for coverage.

I. Facts

Plaintiffs bring this claim for failure to pay benefits under a health insurance plan. William Kiefer is a member of the Plan as a result of his employment with Occidental Petroleum. The benefits are sought on behalf of Thomas D. Kiefer ("Thomas"), minor child of William Kiefer who is covered under the Plan. On October 21, 1988, Thomas Kiefer, then age 9, was injured when a dollar bill change machine fell on his head, causing multiple skull and facial fractures and a brief coma. He was treated at a Tulsa hospital and released on October 30, 1988. Almost five years after that incident, in March 1993, Thomas Kiefer was admitted for psychiatric treatment at Belle Park Hospital in Houston, Texas. His treating doctor indicated at that time that his problems could be secondary to the injury he suffered in 1988.

During late March and early April 1993, treating doctors for Thomas caused several tests and evaluations to be performed to determine the type of medical treatment plan which would be suitable for Thomas. Based upon these evaluations, two facilities, including Brookhaven Hospital in Tulsa, proposed that Thomas be admitted into a rehabilitation program to provide certain types of behavioral modification services. Brookhaven proposed an initial two-week inpatient evaluation followed by up to twelve months of inpatient treatment. Defendant has characterized this recommendation as a proposal for inpatient residential treatment.

Pursuant to the terms of the Plan, William Kiefer sought precertification for the treatment program proposed by Brookhaven

by contacting Aetna Life Insurance Company ("Aetna"). Aetna is contracted to, among other things, review requests for certification of hospitalization and medical benefits under the Plan and to review denials of benefits. Aetna referred the matter to a panel of medical consultants to determine whether the proposed treatment program would be considered as acute rehabilitation hospital level of care ("RHLOC"), or medically necessary inpatient rehabilitation designed to restore physical function and abilities lost due to an acute medical condition. According to the Defendant, the Plan provides coverage for medically necessary inpatient rehabilitation services designed to restore physical functions and abilities to an acute medical condition, but not for inpatient residential care.

The consultants for the Plan concluded that the treatment proposal called for residential care and did not meet the criteria for "acute RHLOC", or rehabilitation hospital level of care designed to restore physical function lost due to an acute medical condition. Upon reconsideration, this decision was confirmed. After another review, a new consultant concluded that no evidence showed that the proposed residential treatment program would be any more beneficial than an outpatient program. Subsequent to this determination, Aetna affirmed its decision to deny precertification for the Brookhaven program.

After the Aetna review, William Kiefer, through his attorney, presented an appeal to the Occidental Petroleum Corporation Employee Benefits Committee, as the Named Fiduciary of the Plan.

The Committee reviewed the medical reports and the Summary Plan Disposition before making its decision to uphold the denial of certification. The Plaintiffs challenge this decision as a violation of the terms of the Plan and the fiduciary obligations owed to them.

## II. Discussion

Although not explicitly stated in the Complaint, Kiefer's allegations arise out of 29 U.S.C. § 1132(a)(1)(B) which allows participants and beneficiaries of ERISA plans to bring an action to recover benefits and enforce rights under such plans. The Summary Plan Description ("SPD") at issue in this litigation sets forth the fiduciary duty owed to Plan participants with regard to claims for coverage. The SPD provides:

The Medical Plan is covered under Title I of the Employee Retirement Income Security Act of 1974 (ERISA). In accordance with section 503 of Title I of ERISA, the Plan Administrator has designated one or more Named Fiduciaries (which may include itself) under the Medical Plan, each with complete authority to review all denied claims for benefits under the Medical Plan with respect to which it has been designated as a Named Fiduciary (including, but not limited to, the denial of coverage or certification of the medical necessity of hospital, medical, or dental treatment). In exercising its fiduciary responsibilities, a Named Fiduciary shall have discretionary authority to determine whether and to what extent covered Medical Plan participants and Dependents are eligible for benefits, and to construe disputed or doubtful Medical Plan terms. A Named Fiduciary shall be deemed to have properly exercised such authority unless it has abused its discretion hereunder by acting arbitrarily and capriciously.

Def.'s Mot. for Summ. J., Exh. A, para. 3. (emphasis added).

The contractual language of the SPD articulates a broad range

of discretion afforded to the Named Fiduciary, limited only by arbitrary and capricious behavior. This range of authority is mirrored in caselaw. Where the Plan gives its administrators discretionary authority, the courts have reviewed the decisions under a deferential standard, overturning such decisions only when they are either arbitrary or capricious. Winchester v. Prudential Life Ins. Co., 975 F.2d 1479, 1483 (10th Cir. 1992); Sandoval v. Aetna Life Ins. Co., 967 F.2d 377, 380 (10th Cir. 1992); Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452, 1457 (10th Cir. 1991). In the case at hand, the Committee, as the fiduciary, should be judged by this same standard and overruled only if there is a showing that it acted arbitrarily or capriciously.

Plaintiffs do not dispute the use of the arbitrary and capricious standard, in general, but believe that this standard should be construed narrowly. Pl.'s Resp. at 6. While the standard should not be changed, this Court must consider as a factor that the fiduciary is acting under a conflict of interest. Pitman v. Blue Cross and Blue Shield, 24 F.3d 118, 121 (10th Cir. 1994). In situations such as the one at hand, the Plan is funded by the employer, and the costs of the Plan rise and fall as benefit decisions are made. While the Court must factor in any conflict of interest with which the fiduciary operates, this, by itself, does not create an issue of fact or alter the arbitrary and capricious standard under which the conflict should be decided.

Plaintiffs raise various arguments in their attempt to defeat Defendant's Motion for Summary Judgment. Although the arbitrary

and capricious standard is a difficult one for the Plaintiffs to overcome, there exist issues of fact to be resolved in this litigation that are relevant to the Court's inquiry.

First, Plaintiffs argue that the Plan never explicitly denies coverage for inpatient residential programs of the type allegedly proposed for Thomas. This observation by Plaintiffs appears to be accurate. In the Employee Benefits Handbook, which is devoted to explaining the Occidental Medical Care Plan, there is a section titled "Expenses Not Covered Under The Medical Plan." Pl.'s Resp., Exh. E. This list does not include any reference to the type of services sought by Thomas and makes no reference to exclusions for inpatient residential care. While Defendant asserts that the Plan does not provide coverage for inpatient residential care, the best evidence for this position comes from guidelines used by Aetna (the administrator) for addressing coverage criteria for hospitalization and rehabilitative care. Pl.'s Mot. for Summ. J., Exh. C, para. 8. This rule is not established in the Plan itself. As the Ninth Circuit has held, "Plan administrators act arbitrarily and in abuse of their discretion if they render a decision . . . in a way 'that clearly conflicts with the plain language of the plan.'" Bogue v. Ampex Corp., 750 F. Supp. 424, 429 (N.D.Cal. 1990), citing Johnson v. Trustees of W. Conf. of Teamsters Pension Trust Fund, 879 F. 2d 651, 654 (9th Cir. 1989). Therefore, the question of the scope of coverage offered by the Plan, as it relates to Thomas' treatment needs, remains a factual issue that deserves further evaluation.

Second, Plaintiffs challenge the diagnoses of the physicians

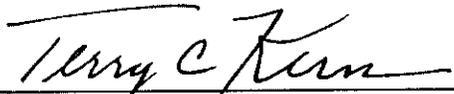
employed by the Plan to evaluate the recommendations made by Thomas' treating physicians. None of those physicians personally examined Thomas. In contrast, Plaintiffs cite the independence of treating physicians Dr. DeFoy and Dr. Wardell, arguing that they could not receive any benefit for their recommendations that Thomas be placed in a hospital in Tulsa or elsewhere. Furthermore, while the physicians for the Plan indicate they consulted with Dr. DeFoy (a treating physician), the record reflects that Dr. DeFoy wrote a letter regarding treatment options for Thomas a week after the physicians for the Plan wrote their opinions. By challenging the opinions of the consultants, Plaintiffs argue that substantial evidence does not exist to support their medical conclusions. Insufficient evidence provides an appropriate basis for a finding of an abuse of discretion. Sandoval, 967 F.2d at 380, n.4.

While the standard of review under the arbitrary and capricious standard is a difficult one for the Plaintiff to overcome, a motion for summary judgment must be viewed in the light most favorable to the non-moving party. The motion can only be granted if there is no genuine issue of material fact in dispute and the moving party should prevail as a matter of law. Applied Genetics Int'l. v. First Affiliated Secur., Inc, 912 F.2d 1238, 1241 (10th Cir. 1990). In the case at bar, Plaintiff has raised issues of fact that require further consideration. These issues include the scope of treatment suggested by Thomas' treating physicians, the range of treatment covered by the Plan, and the quality of the evaluation by the doctors used by the Plan to assess

Thomas' medical needs.

For the reasons discussed above, the Motion for Summary Judgment is denied.

IT IS SO ORDERED THIS 9 DAY OF MARCH, 1995.

  
\_\_\_\_\_  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAR 09 1995

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

Oklahoma Disability Law  
Center, Inc.

Plaintiff,

vs.

Dillon Family and Youth  
Services, Inc. d/b/a Shadow  
Mountain Institute

Defendant.

**FILED**

MAR 09 1995

No. 94-C-532-K

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

ORDER

Now before this Court are motions for summary judgment filed by Defendant Dillon Family and Youth Services, Inc., d/b/a Shadow Mountain Institute ("SMI") and by Plaintiff Oklahoma Disability Law Center, Inc. ("ODLC"). Both parties agree that there are no material facts as to which genuine issues of fact exist and that the only issues remaining in this matter are ones of law which are appropriate for summary judgment.

The ODLC is the protection and advocacy system for the state of Oklahoma designated by the Governor of the State of Oklahoma to carry out activities under the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (PAMII), 42 U.S.C. § 10801 et seq. ODLC was contacted on behalf of Michael C. and Mandy S., former patients of SMI, a private for-profit psychiatric institution located in Tulsa, Oklahoma, concerning allegations of abuse and neglect suffered while confined at SMI.

Michael C. and Mandy S. were in inpatient treatment at SMI

from May 25, 1993 to approximately December 1, 1993. On or about January 20, 1994, the ODLIC requested, in writing, any and all documents pertaining to the two patients. The request was accompanied by a consent form signed by their mother, Anita Brumley. SMI refused to provide all documents pertaining to Michael C. and Mandy S. to ODLIC without a court order. ODLIC filed a complaint in the United States District Court requesting declaratory and injunctive relief.

The ODLIC, an advocacy system established by the Governor of Oklahoma, seeks to gain access to their clients' psychiatric records from Defendant pursuant to the PAMII. The clear language of 42 U.S.C. § 10805(a)(4) provides that a system established in a state under §10803 "shall have access to all records of any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal guardian, has authorized the system to have such access." This authority is consistent with the investigatory role the Act envisions for the ODLIC. The purpose of the Act is clear:

1) to ensure that the rights of individuals with mental illness are protected; and 2) to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will A) protect and advocate the rights of such individuals. . . .; and B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

42 U.S.C. § 10801.

Citing state law embodied in 76 O.S. § 19, SMI refuses to provide ODLIC with all the records to which it is entitled under the

PAMII without a court order. The Oklahoma statute states:

Any person who is or has been a patient of a doctor, hospital or other medical institution shall be entitled to obtain access to the information contained in all his medical records upon request. . . . In the case of psychiatric records, the patient shall not be entitled to copies unless access to said records is ordered by a court of competent jurisdiction upon a finding that it is in the best interest of the patient.

76 O.S. § 19(A). Thus, SMI argues that the ODLC must get a court order from a state judge before gaining access to the records ODLC seeks.

The conflict between these two statutes implicates the Supremacy Clause of the Constitution. According to the Supreme Court, there are three circumstances in which a federal law preempts a state statute. First, Congress can adopt express language setting forth preemption. Second, state law is preempted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. Third, "state law is pre-empted to the extent that it actually conflicts with federal law." Gade v. National Solid Wastes Mngnt. Ass'n, 112 S.Ct. 2374, 2389 (1992), citing, English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-2275 (1992). This third form of preemption has been raised by the instant litigation.

The PAMII directs systems such as the ODLC to have ready access to an institution's psychiatric records so as to serve effectively as an advocate for those individuals with mental illnesses. Defendant's interpretation of 76 O.S. § 19 thwarts the purposes of the PAMII and serves as an obstacle to the accomplishment and execution of the purposes of PAMII. The Supreme



Court has held:

If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted) (emphasis added). Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers, 27 F.3d 1499, 1504 (10th Cir. 1994).

Given the meaning of the word "access" as used in 42 U.S.C. § 10805, recourse to 76 O.S. § 19 in this instance would act as an obstacle to the fulfillment of the Congressional objectives of the PAMII and is preempted to the extent it impairs the ODLIC's ability to obtain the records it seeks without a court order. As one district court has written, "Access to patient records is necessary for [protection and advocacy systems] to serve its clients, evaluate its clients' concerns, and determine whether a client has a legal claim." Robbins v. Budke, 739 F. Supp. 1479, 1488 (D.N.M. 1990). The timely access guaranteed by the Act should not be stripped of all meaning by requiring advocacy hearings to survive an application for a court order. It should also be noted that the Oklahoma statute applies to the ability of the patient to access psychiatric records. The PAMII, on the other hand, deals with systems (such as the ODLIC) to obtain patient records. Therefore, it would be particularly inappropriate to use the Oklahoma statute to frustrate the ends of this federal law.

Furthermore, the Congress established confidentiality safeguards in the PAMII to deal with concerns similar to those addressed by the Oklahoma statute. For example, the ODLIC is required to maintain the confidentiality of the records to the same extent as is required by the provider of services. 42 U.S.C. § 10806(a). Also, the ODLIC may not disclose the records to its client if the mental health professional responsible for supervising the provision of the client's mental health services has provided the system with a written determination that such disclosure would be detrimental to the individual's health. 42 U.S.C. § 10806(b)(1). Protection of the patient from potentially harmful information about his or her mental health is at the heart of the Oklahoma statute requiring a court order before patients can obtain their psychiatric records.

In light of the considerations discussed above, this Court concurs with the ODLIC that SMI's refusal to provide copies to the ODLIC of the records in question is in violation of federal law. The Court therefore grants the summary judgment motion of the Plaintiff and declares that 76 O.S. § 19 is unenforceable to the extent it interferes with the full implementation of PAMII.

In addition to the declaratory relief expressing that SMI is in violation of federal law, Plaintiff requests this Court to direct SMI to produce records and prohibit SMI from interfering with ODLIC's access to records. SMI challenges the breadth of the requested injunction, arguing that it encompasses future conduct unrelated to the present action. This Court grants injunctive

relief in that SMI is directed to turn over all treatment records specifically involving Michael C. and Mandy S. while patients at SMI. Since an injunction is regarded as an extraordinary remedy, this Court refrains from issuing a blanket injunction that would pertain also to all future request for records by the ODLIC.

In keeping with the general reluctance of federal courts to exercise their equitable discretion and award injunctions in the absence of a compelling need for that form of relief, plaintiff must demonstrate that there is a real danger that the act complained of will take place.

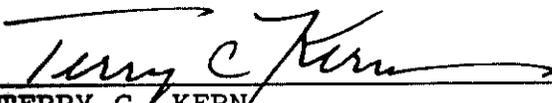
11 Wright & Miller, Federal Practice and Procedure: Civil §2942. To justify the requested permanent injunction, Plaintiff needs to make a sufficient showing that future violations are likely to occur. S.E.C. v. Pros International, Inc., 994 F.2d 767, 769 (10th Cir. 1993). While Plaintiff has shown a consistent reluctance to turn over the records of Michael C. and Mandy S. for which no adequate remedy at law exists, no such showing has been made regarding future patients of SMI.

Furthermore, this Court's Order, declaring that SMI has a legal obligation to release the documents pertaining to Michael C. and Mandy S. and requiring all such records to be released, should be sufficient to end the instant controversy.

In light of the considerations discussed above, this Court grants injunctive relief in that SMI is directed to produce the records of Michael C. and Mandy S. and finds 76 O.S. § 19 unenforceable in this instance, because it impermissibly frustrates the federal law mandate of 42 U.S.C. § 10805. Therefore, to the extent consistent with the determinations discussed in this Order,

Defendant's Motion for Summary Judgment is denied and Plaintiff's motion for Summary Judgment is granted.

ORDERED this 9 day of March, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

THE UNITED STATES DISTRICT COURT FOR

DATE MAR 8 1995

THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAR 8 1995

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

CELIE COURAGE (a pseudonym);  
REPRODUCTIVE HEALTH SERVICES,  
on behalf of itself and its Medicaid-  
eligible patients,

Plaintiffs,

v.

Case No. 94-C-356-K ✓

CHARLES McFALL, Chairperson of the  
Oklahoma Health Care Authority;  
GARTH SPLINTER, Chief Executive Officer  
of the Oklahoma Health Care Authority;  
JIM IGO, State Medicaid Director,  
Oklahoma Health Care Authority, in their  
official capacities and their successors,

Defendants.

**AGREED ORDER**

Pursuant to the request of the parties, the Court has reviewed the pleadings and enters the following agreed order.

The parties agreed and the Court so finds that there exists a clear conflict in law between the state funding restriction found at 56 Okla. Stat. § 206 (C) (1991) and the 1994 Hyde Amendment enacted by Congress. Because a clear conflict exists, the Court finds that the Supremacy Clause of the United States Constitution pre-empts the state law funding restriction. Reynolds v. Sims, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed. 2d 506, (1964), King v. Smith, 392 U.S. 309, 333, 88 S.Ct. 2188, 20 L.Ed.2d 1118 (1968); Hodgson v. Bd. of County Comm'rs., 614 F.2d 601, 605 (8th Cir. 1980); See Roe v. Casey, 623 F.2d

829, 836-837 (3rd Cir. 1980); Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (8th Cir. 1979);  
See also Hern v. Beye, Case No. 93-2350, (D.Colo. May 12, 1994); Further, the Court  
finds that at the time of this Order the **state law** funding restriction limiting the funding of  
abortion to circumstances where a woman's **life is endangered** is void. The Court finds that  
the rules promulgated by the Oklahoma Health Care Authority at OAC 317: §§ 30-3-  
59(1)&(10), 30-3-60(a)(7), 30-5-2(a)(2)(T), 30-5-2(b)(7)(k), 30-5-6(a), 30-5-50(a) shall  
remain in effect so long as the Federal **Hyde Amendment** requires Medicaid funding for  
abortions where the pregnancy is a result of **rape** or incest.

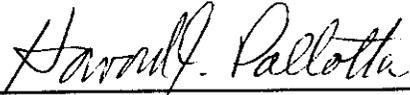
Therefore, it is ORDERED ADJUDGED and DECREED that the state law funding  
restriction found at 56 Okla. Stat. § 206(C) is void. Further, the rules promulgated by the  
Oklahoma Health Care Authority **referenced above** shall remain in effect so long as the  
Federal Hyde Amendment requires Medicaid funding for abortions where the pregnancy is  
a result of rape or incest.

The Court finds that this Agreed Order resolves all matters between the parties and  
orders that this case be administratively closed. The case may be reopened for purposes  
of enforcing the parties' Settlement Agreement or this Agreed Order.

This is so Ordered this 8<sup>th</sup> day of March, 1995.

  
John Leo Wagner  
United States Magistrate

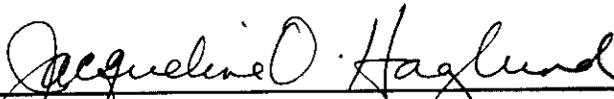
Approved as to form and Substance:



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Howard J. Pallotta  
General Counsel  
Oklahoma Health Care Authority  
4545 N. Lincoln, Suite 124  
Oklahoma City, OK 73105  
(405) 530-3439

Attorney for Defendants  
Charles McFall, Garth Splinter,  
and Jim Igo



---

Jacqueline O'Neil Haglund  
FELDMAN, HALL, FRANDEN, WOODARD  
& FARRIS  
525 S. Main, Suite 1400  
Tulsa, OK 74103  
(918) 583-7129

Attorneys for Plaintiffs  
Celie Courage and Reproductive Health  
Services, Inc.

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

**FILED**  
MAR - 7 1995  
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

RICHARD LEE MURRAY,  
Plaintiff,  
vs.  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE CO., et al.,  
Defendants.

Case No. 94-C-837-B

MAR 08 1995

**ORDER**

Before the Court for consideration is a Motion for Summary Judgment (Docket #10) filed by Defendant State Farm Mutual Automobile Insurance Co. ("SFMA"), who alleges it is not a proper party to this litigation.

Plaintiff Richard Lee Murray ("Murray") sued SFMA for breach of his insurance contract for underinsured motorist coverage<sup>1</sup>, and for a violation of the implied covenant of good faith and fair dealing in the insurance contract. SFMA has filed a motion for summary judgment, alleging that it did not issue any policy of insurance to the plaintiff; rather, the proper party should be State Farm Fire & Casualty Co. ("SFFC"). Murray amended his Complaint on February 2, 1995, to add SFFC as a defendant, but did not drop SFMA from the case.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

<sup>1</sup>Policies No. S35156-A12-36 and S315066-F23-36.

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Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Murray objects to SFMA's motion on two grounds: that SFMA failed to timely object to the alleged defect in the Complaint regarding proper defendants, and that SFMA failed to provide sufficient proof that both insurance policies were issued by SFFC and not by SFMA. The Court notes at the outset that Murray has failed to comply with Local Rule 56.1(B)<sup>2</sup> by not providing the Court with a list of material facts in dispute. Rather, Murray only alleges that SFMA has failed to meet its burden of proof. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by

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<sup>2</sup>The Rule states that "[t]he response brief . . . shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed."

Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

SFMA provided an affidavit from Tamara Poulton, claim superintendent at SFMA, that states that Murray was not insured by SFMA under the automobile insurance policies Nos. S35156-A12-36 and S315066-F23-36, and that SFMA did not issue such policies (See Defendant's Exhibit C). To dispute this claim, Murray has provided two letters from SFMA attorney Paul T. Boudreaux, one of which indicates that SFMA is an improper party to this case<sup>3</sup> (See Plaintiff's Exhibit A-1). Neither letter disputes Poulton's affidavit, even assuming the letters are admissible evidence for such a purpose.

Because no contractual relationship exists between SFMA and Murray, SFMA cannot be liable for breach of that contract. Further, the duty of good faith and fair dealing arises from a contractual relationship between the insured and the insurance carrier. "In the absence of a contractual or statutory relationship, there is no duty which can be breached." Allstate Ins. Co. v. Amick, 680 P.2d 362, 364 (Okla. 1984). See also Scivally v. Time Ins. Co., 724 F.2d 101, 104 (10th Cir. 1983).

Further, Murray's claim that SFMA failed to timely object to the alleged defect in the Complaint regarding proper defendants is

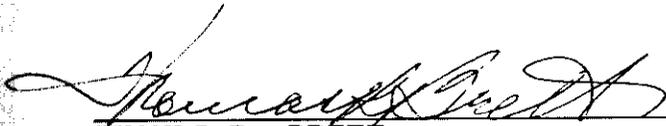
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<sup>3</sup>In opposing a motion for summary judgment, the nonmovant must make a showing that, if reduced to admissible evidence, would carry the nonmovant's burden of proof at trial. Celotex, 477 U.S. at 327. See also Committee for the First Amendment, 962 F.2d at 1526 n.11.

obviously without merit. Murray states that the claim that SFMA is not a proper party was waived because it was not brought in SFMA's Motion to Dismiss for failure to state a claim upon which relief may be granted.<sup>4</sup> Fed.R.Civ.P. 12(b)(6), however, merely tests the legal sufficiency of the pleadings and does not consider evidence outside the pleadings.<sup>5</sup> See Jackson v. Integra, Inc., 952 F.2d 1260 (10th Cir. 1991). SFMA properly brought up the issue in a Motion for Summary Judgment. Further, SFMA raised the issue in its Answer, filed on November 30, 1994, although Murray alleges that he was "only recently advised" that the policies were not issued by SFMA (See Plaintiff's Response Brief, at p. 2).

Because there is no genuine dispute in the record before the Court as to the fact that SFMA did not issue the policies under which Murray has filed suit, SFMA's Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED THIS 7<sup>th</sup> DAY OF MARCH, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>4</sup>This motion was denied by the Court on November 16, 1994.

<sup>5</sup>"If matters outside of the complaint are presented to and not excluded by the court, then the court should treat the motion as one for summary judgment under Rule 56 and not as a motion to dismiss." Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).

ECD-3-8-95

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

**FILED**

CURT MASSENGALE, O.D.;  
DERRICK SKAGGS, O.D.; LARRY  
GREENHAW, O.D.; LENS CRAFTERS,  
INC.; AND PEARLE VISION, INC.,

MAR - 7 1995

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

Plaintiffs,

vs.

Case No. 92-C-584-B ✓

OKLAHOMA BOARD OF EXAMINERS IN  
OPTOMETRY; V. DUANE MOORE, O.D.;  
GEORGE E. FOSTER, O.D.; AND LLOYD  
PECK, O.D.; individually and in  
their capacities as members of  
the OKLAHOMA BOARD OF EXAMINERS  
IN OPTOMETRY,

Defendants.

**ORDER**

This court, on January 21, 1993, dismissed plaintiffs' complaint filed against the Oklahoma Board of Examiners of Optometry and the individual board members Defendants Duane Moore, George E. Foster and Lloyd Peck on the ground that the claims were unripe for failure to exhaust state administrative remedies. This court also invoked the abstention doctrine as set out in Railroad Commission v. Pullman Company, 312 U.S. 496 (1941).

This matter comes on for consideration of Defendants' pending Motion for Attorney fees (#52) and Defendants' Motion to Partially Overturn the Clerk's Order Taxing Costs. (#67)

Plaintiffs oppose the attorneys fee motion (seeking over \$77,000) on the ground that no attorney fee is appropriate since plaintiffs' complaint was dismissed on procedural grounds and no attorneys fee is available under 42 U.S. § 1988 because this was

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not a civil rights case.

Defendants, in their attorneys fee motion, failed to cite any authority to support the award of attorneys fees.<sup>1</sup> Plaintiffs urge that none is available because, under either state or federal law, Defendants are not entitled to an award of attorneys fees.

An award of attorneys fees under Oklahoma law implicates the "American Rule" which, generally stated, is that in order for attorneys fees to be properly awardable there must be either a contractual or a statutory provision which explicitly justifies the award. Oklahoma Publishing Co. v. Miskovsky, 654 P.2d 596 (Okla.1982). There is no allegation herein that contracts, oral or written, exist between or among the parties.

Further, Oklahoma's attorney fee award statutes, 12 O.S. §§ 936-941 (1991), fail to support Defendants instant motion. None of the provisions therein comport with the issues as pled in the instant matter. Likewise, none of Oklahoma's statutes relating to the practice of optometry, 59 O.S. §§ 581 et seq (1991), authorize an award of attorneys fees under the circumstances as alleged herein.

Lastly, the federal anti-trust statutes, implicated by Plaintiffs' Complaint and Amended Complaint, fail to support an award of attorneys fees to Defendants under the record herein.

The Court concludes Defendants Motion For Attorneys Fees should be and the same is hereby DENIED.

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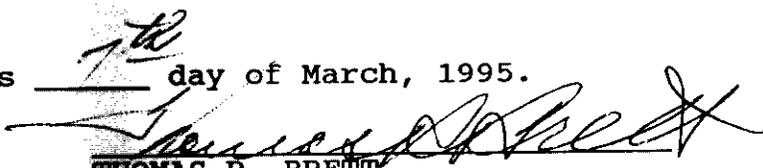
<sup>1</sup> At the recent status hearing, February 24, 1995, Defendants were given an opportunity to file any additional pleadings on the issues herein but declined to do so.

The Court next considers Plaintiffs' objection to the Clerk's awarding of \$804.60 for copying expenses. Plaintiffs argue the expenses were not necessary for the decision rendered by the Court.

28 U.S.C. § 1920 provides that a judge or clerk may tax as costs "(4) Fees for exemplification and copies of papers necessarily obtained for use in the case". Other than Plaintiffs' bald assertion that the copies were unnecessary to the Court's decision herein, this Court has nothing in the record to guide it in making a determination of the correctness of the Clerk's decision in awarding such costs to Defendants.

Therefore, the Court concludes that the Clerk's assessment of costs against Plaintiffs for \$804.60 for copying expenses has not been shown to be inappropriate. Accordingly, Plaintiffs' objection to the Clerk's assessment of \$804.60 for copying expenses is DENIED.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 7 - 1995 *R*

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

HYDROHOIST INTERNATIONAL, INC., )  
an Oklahoma corporation, )

Plaintiff, )

vs. )

JAMES A. PRITCHETT, and )  
ADVANCE BOAT LIFTS, INC., )  
an Oklahoma corporation, )

Defendants. )

Case No. 93-C-429-BU

ENTERED ON DOCKET

DATE MAR 13 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 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 6<sup>th</sup> day of March, 1995.

*Michael Burrage*  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE MAR 08 1995

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

DEBRA A. EAVES, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 INDEPENDENT SCHOOL DISTRICT NO. 1 )  
 OF PAWNEE COUNTY OKLAHOMA, a/k/a )  
 THE PAWNEE PUBLIC SCHOOLS, )  
 VIC BRUNS, in his individual and )  
 official capacity, SHEILA PERRY, )  
 in her individual and official )  
 capacity, DON SPEICHER, in his )  
 individual and official capacity, )  
 and KENNETH SCOTT, in his )  
 individual and official capacity, )  
 Defendants. )

94-C-  
No. ~~6-94~~-465-K

**F I L E D**

MAR 1995

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

**ORDER**

Upon application of the plaintiff and without objection by the defendants, and for cause shown, plaintiff's claim(s) against the defendants, and each of them, in the above styled and numbered cause are dismissed with prejudice to the future maintenance of any action thereon, all parties to bear their respective costs and fees incurred.

IT IS SO ORDERED this 7 day of March, 1995.

*Terry C. Klein*  
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET  
DATE MAR 08 1995

FREEDOM RANCH, INC., d/b/a )  
FREEDOM HOUSE, an Oklahoma )  
non-profit corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THE CITY OF TULSA, OKLAHOMA, )  
an Oklahoma municipal )  
corporation; THE BOARD OF )  
ADJUSTMENT OF THE CITY OF )  
TULSA; BRENDA MILLER, )  
Director of the Department )  
of City Development; and )  
SUSAN SAVAGE, Mayor of the )  
City of Tulsa, )  
 )  
Defendants. )

No. 93-C-96-K

FILED

MAR 1995

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

ORDER

The Court has before it for consideration the parties' joint application for settlement order and order granting injunction. By Order entered September 30, 1994, this Court granted the motion of the defendants for summary judgment. On October 20, 1994, plaintiff filed its notice of appeal. The parties represent that, with the appeal pending, the parties reached settlement terms which require this Court's enforcement. On March 2, 1995, the parties filed the pending application; accompanying the application is a proposed order which, no later than September 5, 1995, would dispose of this action and the companion case, 94-C-223-K.

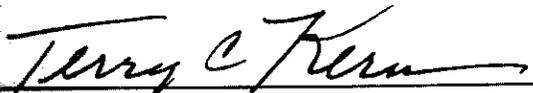
The Court has reviewed the proposed order and finds it appropriate to resolve the dispute between the parties. The Court also concludes the proposed order may not be entered given the present posture of the case. The governing principle is: "Filing

a timely notice of appeal . . . transfers the matter from the district court to the court of appeals. The district court is thus divested of jurisdiction. Any subsequent action by it is null and void." Garcia v. Burlington Northern R. Co., 818 F.2d 713, 721 (10th Cir.1987). This Court is without jurisdiction to enter the proposed order, absent a remand for that purpose from the United States Court of Appeals for the Tenth Circuit.<sup>1</sup> Cf. Coastal Petro. Co. v. Secretary of the Army, 547 F.2d 288, 289 (5th Cir.1977). Such a limited remand may be requested by application to the appellate court.

As stated, the Court has reviewed the proposed Order and finds the language appropriate. The parties are advised that, should a limited remand be sought and obtained, the proposed order in its present form will be expeditiously entered upon remand and the parties need not file a second application before this Court.

It is the Order of the Court that the joint application for settlement order is hereby DENIED without prejudice.

ORDERED this 7 day of March, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup>In the alternative, this Court would also have jurisdiction to enter a consent decree in the companion case, 94-C-223-K, because a notice of appeal has not been filed in that case. However, the currently proposed order would have to be slightly re-drafted at paragraph 4 to reflect the order was serving as a final order in 94-C-223-K and the pending motions in that case were rendered moot.

ENTERED ON DOCKET  
DATE ~~MAR 02 1995~~

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

**F I L E D**

MAR 8 1995

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

CELIE COURAGE (a pseudonym); )  
REPRODUCTIVE HEALTH SERVICES, )  
on behalf of itself and its )  
Medicaid-eligible patients, )

Plaintiffs, )

v. )

Case No. 94-C-356-K

FRANK KEATING, Governor of )  
the State of Oklahoma; DREW )  
EDMONDSON, Attorney General of )  
the State of Oklahoma; CHARLES )  
ED McFALL, Chairperson of the )  
Oklahoma Health Care Authority; )  
GARTH SPLINTER, Chief )  
Executive Officer of the )  
Oklahoma Health Care Authority )  
JIM IGO, Acting Administrator )  
for Oklahoma Division of )  
Medical Services, in their )  
official capacities and their )  
successors, )

Defendants. )

**STIPULATION OF DISMISSAL**  
**OF DEFENDANTS KEATING AND EDMONDSON**

Pursuant to Fed. R. Civ. P. 41, the parties stipulate that the Defendants Frank Keating, Governor of the State of Oklahoma, and Drew Edmondson, Attorney General of the State of Oklahoma, are hereby dismissed from this action with prejudice to refiling of an action against them arising from the same operative facts.

Respectfully submitted,

**DREW EDMONDSON**  
**ATTORNEY GENERAL OF OKLAHOMA**

*Andrew Tevington*

**ANDREW TEVINGTON, OBA #11545**  
**ASSISTANT ATTORNEY GENERAL**  
4545 N. Lincoln Blvd., Suite 260  
Oklahoma City, Oklahoma 73105  
(405) 521-4274

**ATTORNEYS FOR DEFENDANTS KEATING and EDMONDSON**

*Catherine Albisa*

**CATHERINE ALBISA  
KATHRYN KOLBERT**  
The Center for Reproductive Law  
and Policy  
120 Wall Street - 18th Floor  
New York, New York 10005  
(202) 514-5534

and  
*Jacqueline O. Haglund*  
**JACQUELINE O'NEIL HAGLUND**  
Feldman, Hall, Franden, Woodard  
& Farris

525 South Main Street  
Suite 1400  
Tulsa, Oklahoma 74103  
(918) 583-7129

**ATTORNEYS FOR PLAINTIFFS**

*Howard Pallotta*

**HOWARD PALLOTTA**  
General Counsel  
Oklahoma Health Care Authority  
4545 North Lincoln Boulevard  
Suite 124  
Oklahoma City, Oklahoma 73105  
(405) 530-3432

**ATTORNEY FOR DEFENDANTS McFALL,  
SPLINTER, and IGO**

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

ENTERED ON DOCKET  
DATE MAR 7 1995

MAR 7 1995

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, in its corporate )  
capacity, )

Plaintiff, )

vs. )

No. 94-C-728-K ✓

PAUL HINCH, individually, )  
et al. )

Defendant. )

FILED

MAR 10 1995

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

ORDER

This is a suit by the FDIC as a judgment creditor to set aside certain "trusts" and partnerships as shams that were allegedly created by or for the benefit of judgment debtor Paul D. Hinch as part of a scheme to defraud creditors. The judgment debts at issue arose out of real estate related transactions entered into in 1984 and 1985 by Plaintiff's predecessors in interest and Paul Hinch, among others. The FDIC holds two judgments against Paul Hinch and has filed this suit against him, his wife, sons, and their companies, as well as three family trusts, attempting to collect the debt under 12 U.S.C. § 1821 (d)(17)-(19), as well as fraudulent transfer and alter ego theories.

Now before the Court are a Motion to Dismiss and two motions for Summary Judgment. The Defendants who have filed the Motion to Dismiss and the first Motion for Summary Judgment are: Mary C. Hinch, individually; Phillip D. Hinch individually and as Trustee for the Hinch Life Insurance Trust, the Mary C. Hinch Management Trust, and the Hinch Family 1988 trust; Grant Hinch, individually

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and as Trustee for the Hinch Life Insurance Trust, the Mary C. Hinch Management Trust and the Hinch Family 1988 Trust Number Two; Oklahoma Columbia Property Limited Partnership ("Columbia Property Company"); Hinch Partners, a Texas Partnership; Property Company of America Realty, Inc. ("PCA Management"); and Property Company of America Services Corporation ("PCA Services"). For purposes of this Order, the "Defendants" refers to those individuals and entities listed above but excluding Paul Hinch.

In addition, Defendant Paul Hinch has filed a Motion for Summary Judgment. When Paul Hinch is referred to, the Court will state, "Defendant Hinch" or "Paul Hinch." In this Order, the Court considers a Motion by the Defendants to Dismiss, a Motion by Defendants for Summary Judgment, and a Motion by Defendant Hinch for Summary Judgment.

#### I. Facts

The judgment debts at issue arise out of commercial transactions entered into in 1984 and 1985, between Plaintiff's predecessors in interest and Paul Hinch, among others. Paul Hinch was for many years in the business of investing in and developing real estate in Oklahoma, Texas, and surrounding areas, and was a principal of Property Company of America, Inc. ("PCA"). The debts incurred by Paul Hinch, as evidenced by the judgments held by the FDIC, arose through execution by Paul Hinch of certain notes and/or guaranty agreements previously held by a financial institution then called First Republic Bank Dallas, N.A. ("FRB Dallas").

On July 29, 1988, the Comptroller of the Currency declared FRB-Dallas insolvent and appointed the FDIC as receiver for FRB-Dallas ("FDIC-Receiver"). FDIC-Receiver then assigned certain assets of FRB-Dallas by way of a purchase and assumption agreement to JRB Bank, N.A., on July 29, 1988. On that same day, JRB Bank, N.A. changed its name to NCNB Texas National Bank ("NCNB Texas"). Various assets were transferred to NCNB Texas, including the various loans and all claims and causes FRB-Dallas had against Paul Hinch. NCNB Texas initiated litigation against Paul Hinch and others to collect on these loans after the principal obligors defaulted on them. NCNB Texas obtained judgments against Paul Hinch in two cases that were pending in Dallas County, Texas.

In 1988, NCNB Texas was chartered as a "bridge bank" under 12 U.S.C. § 1821(i) (recodified at 12 U.S.C. § 1821(n)) to assume over \$30 billion in deposits and substantially all of the assets of forty failed First RepublicBanks in Texas, including the judgments referenced above upon which this action is based. The FDIC, in its corporate capacity ("FDIC-Corporate"), in turn, entered into an assistance agreement with NCNB Texas pursuant to 12 U.S.C. § 1823(c). This assistance agreement included an option which allowed NCNB Texas, in its sole discretion, to "put" to FDIC-Corporate assets that NCNB Texas had acquired from First RepublicBanks. Subsequent to the initiation of this litigation, NCNB Texas exercised its option under the assistance agreement, and FDIC-Corporate acquired on November 30, 1991 over 60,000 assets, including NCNB Texas' judgments which form the basis for this lawsuit.

The FDIC alleges that Paul Hinch and the other Defendants have taken a series of actions designed to defraud their creditors. The FDIC asserts that Paul and Mary Hinch "orchestrated" a purported move to Texas in order to designate as their "homestead" property located in Kerrville, Texas. Similarly, the FDIC asserts that Paul and Mary Hinch wrongfully tried to partition community property into separate property. The FDIC challenges the creation of various trusts by Paul and Mary Hinch as illusory as well as the partition and transfer of assets to those trusts. The FDIC further contests Paul Hinch's supposed transfer of assets to the Columbia Property Company in light of the fact that he continues to enjoy the full use, benefit, and control of those assets. The FDIC urges that all the partnerships and corporate defendants named in the Complaint are alter egos of Paul Hinch and their assets should be made available to Plaintiff for satisfaction of its judgments.

## II. Motion to Dismiss by Defendants

The Defendants have filed a Motion to Dismiss, arguing that: a) the FDIC may not rely on 12 U.S.C. § 1821(d)(17)-(19) for fraudulent conveyances occurring before the effective date of the statute; b) the FDIC lacks standing in its corporate capacity to bring its causes of action under 12 U.S.C. § 1821(d)(17)-(19); c) Phillip and Grant Hinch have no individual liability; d) the FDIC has no cause of action against these Defendants for allegedly failing to pay adequately for services rendered by Paul Hinch to them; and e) the FDIC's alter ego claims do not entitle them to

recover the assets of the alleged alter ego entity.

A complaint should not be dismissed unless it appears that the Plaintiff cannot prove facts entitling him to relief. Curtis Ambulance of Fla., Inc. v. Board of County Comm'ners, 811 F.2d 1371, 1374 (10th Cir. 1987).

A. *Retroactivity of 12 U.S.C. § 1821(d)(17)-(19)*

The Defendants assert that the FDIC is unable to bring any action against the Defendants based on the Omnibus Crime Control Act of 1990 which is codified at 12 U.S.C. § 1821(d)(17)-(19). The Defendants point out that this legislation did not become effective until May 28, 1991, and all allegations in this case involve acts taken before that date. However, the FDIC urges this Court to find that the Act should be applied retroactively.

The Supreme Court has long embraced a presumption against retroactivity, giving voice to principles articulated in the Constitution prohibiting *ex post facto* laws and legislation impairing "the Obligations of Contracts." See Landgraf v. USI Film Products, 114 S.Ct. 1483, 1500-01 (1994). This presumption is strongest when there is no clear indication in the statute that Congress intended the Act to have retroactive effect. The relevant portions of the Crime Control Act for this case do not clearly state whether the courts should interpret them in a retroactive fashion. Thus, this Court must determine whether the general presumption against retroactivity has been overcome.

In the most recent analysis by the U.S. Supreme Court of the

problem of retroactivity, Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994), the Supreme Court instructed courts to look at the issue of retroactive "operation" or "effect" rather than retroactive "application." Where a statute would have a retroactive effect, meaning that it would increase a party's liability for past conduct, the traditional presumption should govern.

[T]he court must determine whether the new statute would have retroactive effect, i.e., whether it would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent a clear congressional intent favoring such a result.

114 S.Ct. at 1505. In Landgraf, the plaintiff brought suit under the Civil Rights Act and attempted to invoke certain provisions regarding recovery of compensatory and punitive damages and the right to a jury trial. The Supreme Court held that absent clear Congressional intent to the contrary, a federal statute enacted after the occurrence of the conduct at issue should not be applied if it would increase a party's liability for past conduct.

The provisions at issue allow the FDIC or RTC to avoid transfers of interests in property made by "institution-affiliated parties" or debtors of the financial institution within five years of the date of the appointment of a receiver or conservator. The transfers must be made with the intent to hinder, delay, or defraud the institution or its conservator or receiver, or any other appropriate Federal banking agency.

In an analogous decision concerning a fraudulent transfer, one

district court found that retroactive application of the statute was proper. FDIC v. Yemelos, 778 F. Supp. 329 (E.D. La. 1991). Although the statute itself is silent on the issue of retroactivity, the court in Yemelos found that Congress intended the statute to be applied retroactively because such an interpretation was consistent with the FDIC's need to protect its solvency so that the FDIC would remain available to protect the deposits of the insured depositors in the nation's banks. Id. at 332. In so holding, the court found the provision more of a procedural tool for the FDIC, since the statute did not change any of the substantive rights of those charged with making fraudulent conveyances. Id.

Despite this holding by the District Court in Yemelos allowing retroactive application, there is extremely little evidence of Congressional intent with regard to retroactivity. Given the recent Landgraf case, the important inquiry necessarily involves a determination of whether Congress' enactment of § 1821(d)(17)-(19) may "impair rights," "increase a party's liability," or "impose new duties." Although fraudulent transfers have always been subject to attack, Sections 1821(d)(17)-(19) provide new tools for enforcing obligations owed to the FDIC, including asset freezes and the setting aside of transfers which occurred five years before a receiver was appointed whether or not the conveyance was intended to defraud that particular depository institution.

Although neither party has provided the Court with any guidance as to Congressional intent, what little evidence this

Court has discovered appears to weigh toward non-retroactivity of the statute. The House Report on the statute clearly states that:

The legislation is intended to grant the Federal Deposit Insurance Corporation authority in addition to that already existing under Section 11(e)(3)(B) of the Federal Deposit Insurance Act (which grants the Corporation the authority to exercise any state law powers granted to a receiver or conservator to avoid fraudulent conveyances), and Section 11(c)(2)(B) of the Federal Deposit Insurance Act (which grants the corporation the authority to avoid any fraudulent conveyance that could otherwise be avoided by a conservator or receiver for any Federal depository institution).

H.R. Rep 101-681, 101st Cong., 2d Sess. 1990, 1990 WL 18857, at p.486-487 (emphasis added). According to the legislative history, the statute was designed to enhance the powers of the FDIC in avoiding fraudulent transfers and thereby to increase potential liability of those who make fraudulent transfers. Since the Act is designed to strengthen the hand of the FDIC, retroactive application would have a retroactive effect as defined by the Supreme Court. Therefore, the traditional presumption of nonretroactivity should apply. One might also find that Congress explicitly intended non-retroactive application, since Congress presumptively understood that the courts would only apply the law in a prospective fashion if it heightened liability for those engaged in unlawful transfers.

Moreover, this Court's decision is consistent with the holdings of the Tenth Circuit on retroactivity as expressed most recently in Oklahoma Radio Associates v. FDIC, 987 F.2d 685, 695 (10th Cir. 1993). There, the Tenth Circuit held, "a statute is deemed to be effective only for the future unless a contrary intent appears. Id. (citing Bowen v. Georgetown Univ., 488 U.S. 204

(1988) and DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990), cert. denied, 111 S.Ct 794 (1991)). Although the Oklahoma Radio decision was issued before Landgraf, the Bowen decision, on which the Tenth Circuit relied, remains good law as does the presumption for prospectivity. Landgraf, 114 S.Ct. at 1501.

This conclusion does not mean, however, that the FDIC is prevented from seeking prospective relief based on application of the new provisions of the Crime Control Act. Landgraf, 114 S.Ct. at 1501. For instance, 12 U.S.C. § 1821(d)(18) allows a court, at the request of the Corporation, to issue an injunction that would place assets of a person under the control of the court. In one recent case, the Fifth Circuit explicitly reserved ruling on the retroactivity of 12 U.S.C. (d)(18)-(19) but upheld a preliminary injunction authorized under the law to restrain defendants from dissipating their property without prior approval of the court. FDIC v. Faulkner, 991 F.2d 262, 266 (5th Cir. 1993). The court held, "Here, the application on the preliminary injunction provisions of the [Act] implicates future conduct, in the sense that the asset freeze applies only to future transfers of . . . assets." Id. Future application of the Act law would not alter the consequences of past conduct and thus would not raise the same difficulties associated with retroactive application.

Therefore, the Court grants summary judgment with regard to any claims based on provisions of the Omnibus Crime Control Act, as codified at 12 U.S.C. § 1821(d)(17)-(19), that would avoid asset

transfers made before the effective date of the legislation.

*B. Standing Under 12 U.S.C. § 1821(d)(17)*

The Defendants argue that, in order to have standing under 12 U.S.C. § 1821(d)(17)-(19), the FDIC must be suing in its capacity as a *conservator or receiver*. In the events leading up to this litigation, the FDIC has been acting in its *corporate* capacity.

Such a limitation appears at first blush to be consistent with the express language of the relevant statutory provisions. However, 12 U.S.C. § 1823(d)(3)(A) states that "With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all the rights, powers, privileges, and authorities of the Corporation as receiver under Sections 1821 and 1825(b) of this title." Therefore, if FDIC-Corporate is acting under 12 U.S.C. § 1823, it would have the powers given to it by 12 U.S.C. § 1821.

Plaintiff provides a history of FDIC related actions relevant to the banks and judgments at issue. According to this chronology, FDIC-Corporate agreed to provide open bank assistance to First RepublicBank Dallas, N.A. ("FRB Dallas") and its Houston sister bank, First RepublicBank Houston, N.A. ("FRB Houston"), in the form of a \$1 billion loan in March of 1988. Eventually, the Office of the Comptroller of the Currency declared all of the First RepublicBanks in Texas insolvent in July, 1988 and appointed FDIC as receiver for FRB Dallas and FRB Houston. As a result, FDIC-Receiver succeeded to the judgments against Paul Hinch.

Simultaneously, a "bridge bank" was chartered under 12 U.S.C. § 1821(n) to assume the liabilities of the failed banks. The bridge bank, JRB Bank, N.A., was thereafter acquired by NCNB Texas. FDIC-Corporate provided financial assistance to NCNB Texas pursuant to 12 U.S.C. § 1823(c). In November of 1991, NCNB Texas conveyed to FDIC-Corporate over 60,000 non-performing assets, including the judgments against Paul Hinch. Although accomplished in an indirect manner, FDIC-Corporate received the judgments while acting under 12 U.S.C. § 1823. Therefore, FDIC-Corporate has the same rights under 12 U.S.C. § 1821 as it would have had it been acting in its capacity as receiver or conservator.

Plaintiff points to two cases where courts have allowed the FDIC in its corporate capacity to take advantage of these provisions of the Crime Control Act, as codified at 12 U.S.C. § 1821(17)-(19). FDIC v. NIBLO, 821 F. Supp. 441, 461 (N.D.Tex. 1993); FDIC v. Yemelos, 778 F. Supp. 329 (E.D. La. 1991). Defendants, however, try to distinguish those cases by saying that FDIC-Corporate obtained the liabilities in the those situations directly from FDIC-Receiver rather than from a bridge bank as was the situation in this case.

However, this distinction is not persuasive. FDIC-Corporate acquired these judgments pursuant to the assistance given to NCNB Texas under 12 U.S.C. § 1823(c), the statutory section authorizing assistance to insured depository institutions. According to 1823(d)(3)(A), the FDIC is granted the same rights, powers, privileges, and authorities with respect to any asset acquired or

liability assumed from the FDIC as conservator or receiver. The statute gives the FDIC in its corporate capacity the same power to avoid fraudulent transfers under § 1821(d)(17)(a) as the FDIC would have as conservator or receiver. The mere fact that FDIC-Corporate acquired the judgments by means of a "bridge bank" should have no bearing on the FDIC's power to pursue those judgments. Defendants provide no principled argument for such a conclusion. Therefore, this Court finds that the FDIC has standing to sue under 12 U.S.C. § 1821(d)(17)(a) where the statute is otherwise applicable.

*C. Individual Claims Against Phillip and Grant Hinch*

The critical question with regard to individual liability for Phillip and Grant Hinch involves a determination of the individual interests of these defendants in the lawsuit. According to the Plaintiffs, Phillip and Grant Hinch are the beneficiaries of the Hinch Family 1988 Trust, the Mary C. Hinch Management Trust and the Hinch Life Insurance Trust ("the Trusts"). Furthermore, they are general partners of the Columbia Property Company, and are alleged to have been integrally involved in many of the conveyances complained of in the FDIC Complaint.

In this case, the FDIC seeks to recover assets of the Trusts as well as properties alleged to have been fraudulently transferred to the Columbia Property Company and other entities. The relief requested by the FDIC would require that Phillip and Grant Hinch be added in their individual capacities. Further, Phillip and Grant Hinch face potential individual liability based on any

participation in the fraudulent transfers to various trusts. In FDIC v. Martinez-Almodovar, 671 F. Supp. 851 (D.P.R. 1987), the court held a daughter and son-in-law liable in a similar context for damages for fraudulently conveying property to family corporations for which they served as directors and officers.

In response, Defendants cite Walsh v. Centeio, 692 F.2d 1239 (9th Cir. 1982), to state that trust beneficiaries can only be joined in their individual capacities in certain types of actions. However, the Walsh case does not stand for the proposition asserted by Defendants. Walsh does not hold that beneficiaries of a trust can only be joined in an accounting or removal action but simply notes that beneficiaries typically are joined in those types of actions. Given the alleged role played by Phillip and Grant Hinch, claims against them in their individual capacities should not be dismissed.

*D. Services Rendered by Paul Hinch*

Plaintiffs rely on 12 O.S. § 850 to request this Court to determine the value of services rendered by Paul Hinch to the defendant entities. The statute provides that if salary or compensation is determined to be inadequate for the services rendered, the court may direct the debtor to make payment on account of the judgment based upon a reasonable value of the services rendered by the debtor. 12 O.S. § 850. As is clear from this statute, the FDIC may have an action against Paul Hinch for services he rendered without adequate compensation. The statute

states:

Where the judgment debtor claims or is proved to be rendering services to or employed by a relative or other person or by a corporation owned or controlled by a relative or other person, without salary or other compensation, or at a salary or compensation so inadequate as to satisfy the court that such salary or compensation is merely colorable and designed to defraud or impede the creditors of such debtor, the court may direct such debtor to make payments on account of the judgment, in installments, based upon reasonable value of the services rendered by such judgment debtor. . . .

Id. (emphasis added). While the statute contemplates an action against the judgment debtor, Paul Hinch, it does not authorize an action against the other Defendants, none of whom are judgment debtors. Therefore, any action against the Defendants based on 12 O.S. § 850 should be dismissed.

*E. Alter Ego Theory*

The Defendants allege that alter ego theory only applies to render individuals responsible for business debts but not to make business entities liable for individual debts. However, it is clear that alter ego doctrine also holds true in reverse piercing situations. Permian Petroleum Co. v. Petroleos Mexicanos, 934 F.2d 635 (5th Cir. 1991). Moreover, there is no requirement under Oklahoma law that Paul Hinch be a stockholder of the other entities in order to justify piercing the veil. Home-Stake Production Company v. Talon Petroleum, 907 F.2d 1012, 1018-20 (1990). Under Oklahoma law, a corporation may be deemed to be the mere instrumentality of an individual if the corporation is undercapitalized, without separate books, its finances are not kept separate from individual finances, individual obligations are paid

by the corporation or vice versa, corporate formalities are not followed, or corporation is merely a sham. Id. at 1018. Given this range of factors, it is not appropriate to dismiss the alter ego claims against Paul Hinch simply because he is not a stockholder in the company.

### III. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment with regard to the following issues. They argue that: the partition agreement entered into by Paul and Mary Hinch is valid; the Hinch's homestead designation is binding on the FDIC; and the FDIC's claims of fraudulent transfer are barred by the statute of limitations.

It should be noted that this Court is asked to grant summary judgment on several claims where intent is an important element. Although the role of intent does not preclude a summary judgment award, the courts have been directed to be particularly cautious in granting summary judgment where intent and motivation are at issue. Gallo v. Prudential Residential Services, 22 F.3d 1219, 1224 (2d Cir. 1994).

#### A. *Depositions Used in Response to Summary Judgment Motion*

As a preliminary matter, there is an evidentiary question that must be resolved before analyzing the following issues raised by the summary judgment briefs. In its Response to Defendants Motion for Summary Judgment, the FDIC has submitted eight deposition transcripts from two different proceedings. Exhibits A, D, E, G,

and H were taken in a case pursued in state court in Tulsa, Oklahoma, while the deposition transcripts attached as Exhibits B, C, and F were taken in a federal court action in Texas. According to the Defendants, these deposition excerpts are inadmissible because: the Defendants, with one exception, were not parties to the two cases; were not represented at the depositions; and there was not sufficient identity of issues to allow use of the depositions.

In evaluating a motion for summary judgment, the Court has the duty to view the non-movant's case in its "most favorable light." Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). Given this obligation, the Court must consider the evidence of a non-moving party--even if it would be inadmissible in the form submitted--if it could be reduced to an admissible form for trial. Cook v. Babbitt, 819 F. Supp. 1, 25 (D.D.C. 1993). In Diamonds Plus, Inc. v. Kolber, 960 F.2d 765 (8th Cir. 1992), the Eighth Circuit pointed out that a deposition need not be admissible at trial in order to be considered in opposition to a motion for summary judgment. These depositions are not being used to bolster a motion for summary judgment but to defeat one. Therefore, this Court will review the depositions offered by the Plaintiff in determining whether the Defendants' Motion for Summary Judgment should be granted. This conclusion is consistent with the Court's obligation to view a motion for summary judgment in the light most favorable to the non-moving party.

*B. The Partition Agreement*

The sole basis for the claims against the Mary C. Hinch Management Trust is a February 14, 1986 marital property partition agreement between Paul and Mary Hinch and the subsequent transfer of the properties partitioned to Mary Hinch to the Mary C. Hinch Management Trust. The FDIC has alleged that the partition agreement should be set aside as a fraud on creditors, and, alternatively, that it is invalid under Oklahoma law. The FDIC challenges the partition agreement as an unenforceable contract, since it was allegedly created for unlawful purpose. An-Co, Inc. v. Reherman, 835 P.2d 93, 96 (Okla. 1992).

Whether or not the partition was made for an unlawful purpose depends upon whether the partition was made with an intent to defraud. In turn, this determination of intent involves factual questions which have yet to be determined. Further questions that have been raised involve whether Paul Hinch was insolvent at the time he executed the partition agreement and whether Paul Hinch received fair consideration for the transfer of assets and the obligations incurred under the partition agreement. The affidavit of Paul Hinch does not eradicate questions of intent with regard to the partition agreement. Therefore, summary judgment would not be appropriate with regard to the partition agreement.

*C. The Homestead Designation*

The FDIC has challenged the validity of the designation by Paul and Mary Hinch of a Texas homestead. FDIC urges either that

Paul and Mary Hinch never really changed their residence from Oklahoma to Texas or they abandoned their Texas homestead. According to the FDIC, Paul and Mary Hinch cannot legally own a Texas homestead and that the designation was done to defraud creditors.

Presently, Paul and Mary Hinch claim to live in Texas although they also lease a home in Tulsa from the Columbia Property Company. According to both Oklahoma and Texas courts, the issue of whether property has been established as a homestead is an issue of fact, depending upon overt acts and the intention of the owner to claim the land as a homestead. Kunauntubbee v. Greer, 323 P.2d 725, 731 (Okla. 1958); Lifemark Corp. v. Merritt, 655 S.W.2d 310, 314 (Tex. Civ. App. 1983).

While the initial burden of establishing the homestead character of a property in Texas is a low hurdle, Matter of Bradley, 960 F.2d 502, 507 (5th Cir. 1992), cert. denied, 113 S.Ct 1412 (1993), the FDIC may disprove the existence of the homestead by challenging the intentions of Paul and Mary Hinch and their actual residence at the times relevant to the FDIC's claims. Questions of fact remain to be addressed with regard to the homestead designation of Paul and Mary Hinch, since they currently lease a house in Tulsa, Oklahoma where Mr. Hinch maintains a place of business.

Although courts should be wary to disturb a person's homestead designation, Matter of Bradley, 960 F.2d at 507, it would be premature to grant summary judgment on this claim. The FDIC

charges that the homestead designation was merely a purported change of residency in order to take advantage of favorable Texas law and thereby protect personal and real property from creditors. Because these allegations involve factual determinations that are yet to be resolved, summary judgment is denied to the Defendants with respect to FDIC claims based on the homestead designation of Paul and Mary Hinch.

#### *D. Statute of Limitations*

Almost all the claims in the Complaint require the FDIC to prove a fraudulent transfer. This action is subject, pursuant to 12 U.S.C. § 1821(d)(14), to either a six-year statute of limitations if the FDIC is pursuing a contract claim or a three-year statute of limitations if this action represents a tort claim. The statute states:

##### **(A) in general**

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--

- (i) in the case of any contract claim, the longer of--
  - (I) the 6-year period beginning on the date the claim accrues; or
  - (II) the period applicable under state law; and
  
- (ii) in the case of any tort claim, the longer of --
  - (I) the 3-year period beginning on the date the claim accrues; or
  - (II) the period applicable under State law.

12 U.S.C. § 1821(d)(14)(A). The statute further explains that a claim accrues on the later of the date of the appointment of the receiver or the date on which the cause of action accrues. 12

U.S.C. § 1821(d)(14)(B). While the FDIC argues that a fraudulent transfer claim should be considered a contract action, the Defendants urge this Court to interpret the suit as an action in tort.

Although there is very little case law on this point, it appears that the weight of authority suggests that a claim such as this should be analyzed as a contract action. Several courts have reasoned that the essence of this type of action is that of a creditor seeking payment from a debtor. FDIC v. Martinez-Almodovar 671 F. Supp. 851, 871 (D.P.R. 1987); United States v. Franklin Nat.'l Bank, 376 F. Supp. 378 (E.D.N.Y. 1973). In Franklin, the court held:

The gravamen of the cause of action of the case at bar is the ordinary right of a creditor to receive payment; this right has been implemented by the protection of legislation concerning the circumstances under which the creditor may avail himself of assets which the debtor has transferred to others.

671 F. Supp. at 871.

The logic of Franklin applies equally to the FDIC in this action. Moreover, as a general policy rule, it makes sense to use the longer statute of limitations when both may be applicable, and one of the limitations periods would prohibit the action. Hughes v. Reed, 46 F.2d 435, 440 (10th Cir. 1931).

As acknowledged by the Plaintiffs, the FDIC filed suit two days prior to the end of the six-year statute of limitations period. The date on which the claim accrues, according to § 1821(d)(14) is the later of a) the date of the appointment of the Corporation as the conservator or receiver; or b) the date on which

the cause of action accrues. The FDIC was appointed receiver for the FRB-Dallas, N.A., on July 29, 1988.

Therefore, this statute of limitations defense of the Defendants fails as a matter of law, and summary judgment is inappropriate on this basis.

#### IV. Summary Judgment Motion by Defendant Hinch

Defendant Paul Hinch has also filed a Motion for Summary Judgment. In this Motion, Defendant Hinch urges this Court to consider many of the issues already discussed in this Order.

First, Defendant Hinch argues that some of FDIC-Corporate's fraudulent transfer claims are barred by the statute of limitations. However, this Court has determined that the proper limitations period as set forth in § 1821(d)(14) is a six-year period rather than the time period asserted by Defendant Hinch. Supra Section III(D).

Second, Defendant Hinch argues that the fraudulent conveyance/asset freeze provisions of the Omnibus Crime Control Act cannot be applied retroactively. In fact, this Court has held that the relevant provisions increase the liability imposed on wrongdoers and thus should not be applied retroactively. Supra Section II(A).

Third, Defendant Hinch further argues that FDIC-"Corporate" has no standing under 12 U.S.C. § 1821(d)(17)-(19). Although the Court has rejected this argument concerning standing with regard to prospective application of the statute, this argument is moot

insofar as it concerns retroactive application. Supra Section II(B).

Fourth, Defendant Hinch moves for summary judgment on the FDIC's claims relating to the partition of certain marital property of Paul and Mary Hinch as set forth in the Partition Agreement of February 14, 1986. As discussed above, the Court finds that factual disputes are involved in determining whether this 1986 agreement constituted a fraudulent transfer. These factual issues involve the intent of the parties in executing the partition agreement, the consideration paid by the parties, and the fair market value of the assets partitioned, thereby precluding the entry of summary judgment. Supra Section III(B).

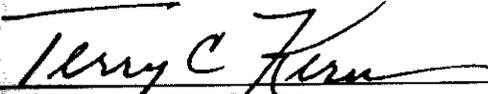
Finally, the Court finds that material issues of fact exist with regard to the homestead designation of Defendant Paul Hinch. The Hinch family currently leases a home in Tulsa, Oklahoma where Mr. Hinch maintains his business and also has property in Texas. In light of issues of fact involving the actual and intended residence of Paul and Mary Hinch, the Court denies the Motion for Summary Judgment on this claim. Supra Section III(C).

#### V. Conclusion

In light of the considerations discussed above, the Court dismisses all causes of action that seek to apply 12 U.S.C. § 1821(d)(17)-(19) to transactions made before the effective date of the legislation. Furthermore, claims against the Defendants based on 12 O.S. § 850 should be dismissed. The Motion to Dismiss by

Defendants and the Motions for Summary Judgment filed by Defendants and by Defendant Hinch are denied in all other respects.

ORDERED this 6 day of March, 1995.

  
\_\_\_\_\_  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE MAR 07 1995

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

MAR 07 1995

SERVICE COLLECTION  
ASSOCIATION,  
  
Plaintiff,  
  
vs.  
  
THE GREAT-WEST LIFE  
ASSURANCE COMPANY,  
  
Defendant.

No. 93-C-1106-K

**FILED**

MAR

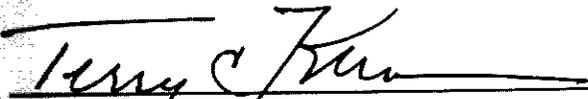
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**JUDGMENT**

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

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

ORDERED THIS DAY OF 3 MARCH, 1995

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

22

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

**FILED**

MAR 6 1995

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

PUBLIC SERVICE COMPANY OF  
OKLAHOMA, an Oklahoma  
corporation, et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, et al.,

Defendants.

No. 90-C-812-E

**FILED**

MAR 6 1995

ENTERED ON DOCKET  
MAR 07 1995  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DATE \_\_\_\_\_

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 6<sup>th</sup> day of March, 1995.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

FILED

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

MAR 6 1995 *RL*

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

KATHRYN SOLIZ, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DONNA SHALALA, SECRETARY OF HEALTH )  
AND HUMAN SERVICES, )  
 )  
Defendant. )

No. 90-C-841-E

ENTERED ON DOCKET  
MAR 07 1995  
DATE \_\_\_\_\_

ORDER

Before the Court is the objection of the Plaintiff Kathryn Soliz (Soliz) to the Report and Recommendation of the United States Magistrate Judge affirming the Defendant Secretary's denial of Social Security Disability Benefits and Supplemental Security Income Disability Benefits.

Soliz initially appealed the Secretary's denial of benefits, claiming that the decision that she could perform light or sedentary work was not supported by substantial evidence and that the hypothetical question asked of the vocational expert was incomplete. The matter was remanded, and her claim was denied on remand. After having exhausted her administrative remedies, Soliz brings this appeal, claiming that the testimony of the vocational expert does not support the decision of the ALJ and does not take into account Social Security Ruling 83-12.<sup>1</sup>

<sup>1</sup> That ruling provides in part:

In some disability claims, the medical facts lead to an assessment of [residual functional capacity] which is comparable with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. the individual may be able to sit for a time, but then must get up and stand or walk for a while before returning to sitting. Such a person is not functionally capable of doing either the prolonged

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In his Report and Recommendation, the Magistrate Judge found that the decision of the Secretary should be affirmed, because substantial evidence supports the determination of no disability. He also found that the vocational expert's testimony, as well as that of Dr. Gray and Dr. Vosburgh, support a finding and are consistent with the mandates of Social Security Ruling 83-12. Plaintiff then filed this objection, arguing that the vocational expert supported her position, and that Social Security Ruling 83-12 "holds that unskilled sedentary and light jobs do not allow for a sit/stand option."

#### 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

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sitting, contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. . . . There are some jobs in the national economy-- typically professional and managerial ones--in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of transferring work skills to such jobs, he or she would not be found disabled. However most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In case of unusual limitation of ability to sit or stand, a [vocational expert] should be consulted to clarify the implications for the occupational base."

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.

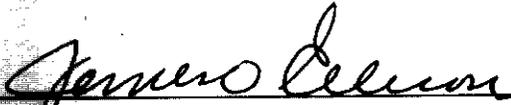
In this case, Plaintiff is 44 years of age, has completed high school plus one and one half years of college, and has worked at numerous sedentary and light jobs. The examining physician, Dr. Vosburgh, concluded that Plaintiff could perform work that did not require lifting weights in excess of 20 pounds, and which would enable her to sit for 50 percent of the work day. Dr. Gray, a medical expert in the field of psychiatry, testified that Plaintiff did not experience difficulties in concentration, did not have a listed impairment, and had a very good or good ability to perform work-related activities, with the exception of having a fair ability to deal with work stresses and function independently.

The vocational expert, when asked a hypothetical based on the opinion of Dr. Vosburgh, testified that plaintiff could perform semi-skilled light clerical jobs such as administrative or general office clerk. When asked to add the assumption that "she has such severe pain that, that she cannot concentrate for any length of time and also she has a lack of sleep which causes her to lose concentration as well, also she must alternate positions every 20

minutes," the expert testified that Plaintiff could not perform any job, "primarily because of the inability to concentrate."

Plaintiff argues that the ALJ erroneously held that the Plaintiff could perform sit/stand unskilled jobs, despite the vocational expert's testimony that she could not engage in substantial gainful activity if she had to alternate between sitting and standing every twenty minutes. Plaintiff misconstrues both the testimony of the vocational expert and the findings of the ALJ. The ALJ found that Plaintiff did not experience pain of such intensity that she was prevented from engaging in all work. He found that she had pain, analyzed it in light of the criteria of Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), and determined that she had the residual physical and mental abilities found by Drs. Vosburgh and Gray. He did not find, nor did any expert testify that Plaintiff needed to shift positions every twenty minutes. The Court finds that the findings of the ALJ are supported by the opinions of both the physicians and the vocational expert, and these opinions constitute substantial evidence. Moreover, the ALJ's findings are not in conflict with Social Security Ruling 83-12, in light of the opinion of the vocational expert.

The Report and Recommendation of the Magistrate Judge should be adopted and affirmed and the Objections of the Plaintiff (Docket #24) should be denied.

  
\_\_\_\_\_  
JAMES J. ELLISON  
UNITED STATES DISTRICT JUDGE

**FILED**

MAR 6 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**

MAGGIE B. HYNES, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONNA E. SHALALA, SECRETARY OF )  
 HEALTH AND HUMAN SERVICES, )  
 )  
 Defendant. )

Case No. 93-C-681-E

ENTERED ON DOCKET  
DATE MAR 07 1995

**ORDER**

Now before the Court is the appeal of Plaintiff Maggie Hynes (Hynes) of the Secretary's denial of her application for disability benefits under the Social Security Act.

**Procedural History**

Hynes' claim for Social Security benefits was denied on January 2, 1990. Her Request for Reconsideration was denied on June 26, 1990. Plaintiff then had a hearing before an administrative law judge on February 7, 1991. The ALJ denied Hynes' claim on March 26, 1991. The Appeals Council granted Hynes' request for review on March 16, 1993, but issued a decision affirming the ALJ June 2, 1993.

**Facts**

Plaintiff alleges the following errors on appeal: (1) the ALJ improperly assessed Hynes' residual functional capacity by (a) improperly rejecting the assessment by Hynes' long-term treating

physician, and (b) failing to consider the severity of all her impairments in combination; (2) the ALJ failed to make specific findings of fact as to the actual physical demands of Hynes' former work, and; (3) the ALJ failed to compare Hynes' individual residual functional capacity with the actual demands of her former work. Plaintiff's Opening Brief at 1. The Court will consider each of these assertions in determining whether to reversal or remand of the ALJ's decision is warranted

### 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 at 750 (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.

1. The ALJ improperly assessed Hynes' residual functional capacity by (a) improperly rejecting the assessment by Hynes' long-term treating physician, and (b) failing to

consider the severity of all her impairments in combination.

Dr. Russell was Plaintiff's treating physician for the time period at issue. The ALJ's consideration and dismissal of Dr. Russell's assessments is limited to one paragraph of the decision:

Dr. Russell has also stated plaintiff had congestive heart failure and had developed an anginal type pattern of chest discomfort secondary to coronary artery disease. However, Dr. Zumwalt noted the claimant's heart size was unremarkable. He opined that plaintiff's chest pain was more like a neuropathy than an angina. A review of the echocardiogram relied on [by] Dr. Russell shows the test was found to be essentially within normal limits with only borderline left ventricular hypertrophy. An EKG on July 22, 1986 was also normal. There were therefore specific, legitimate reasons for rejecting Dr. Russell's entire opinion.

Brief in Support of Defendant's Administrative Decision Denying Benefits to Plaintiff at 4 (citations omitted).

The Court has scrutinized the record in this case, to find the "review of the echocardiogram relied on [by] Dr. Russell." Id. The only candidate is the "echocardiographic report" prepared by Dr. William C. Burnett on July 23, 1986. The two-page report concludes: "summary: probable mild concentric left ventricular hypertrophy." Tr. at 188-189. On that same date, Dr. Russell wrote that Plaintiff's echocardiogram (as performed by Dr. Burnett) was "essentially within normal limits only borderline left ventricular hypertrophy." Tr. at 182. Thus, Dr. Burnett's summary of Hynes' condition is the basis for Dr. Russell's diagnosis. Dr. Russell's diagnosis of borderline left ventricular hypertrophy is consistent with the medical evidence.

A chest x-ray, taken July 30, 1991, revealed to Dr. Hicks that Plaintiff's heart was enlarged. Tr. at 268. This finding is not contradictory to Dr. Russell's reading of the 1986 echocardiogram. Another echocardiogram was administered to Plaintiff on August 6, 1992. It was interpreted by Dr. Burnett as follows:

Mild to moderate concentric LVH is noted. Subjectively. Global LV function is near the lower limits of normal: all segments appear to contract however there is a septal contraction abnormality consistent with bundle branch block. Diastolic compliance is decreased.

Tr. at 270.

From this interpretation of the echocardiogram, Dr. Burnett deduced Plaintiff's condition: "[m]ild to moderate concentric LVH. LV systolic function is at the lower limits of normal primarily due to contraction abnormality due to bundle branch block." Tr. at 274. The conclusions of Dr. Burnett's 1992 echocardiographic examination are not inconsistent with those reached in 1986, nor are they inconsistent with any Dr. Russell's conclusions.

The ALJ chose to rely upon Dr. Zumwalt's Disability Determination Evaluation of Plaintiff. Dr. Zumwalt's examination of December 19, 1989, apportioned minor attention to Plaintiff's heart condition. Dr. Zumwalt noted Plaintiff's comment that "she does not think she has ever had an echocardiogram," but that "[s]he did have some sort of test done while she was hospitalized in 1986 that sounds like an echocardiogram." Tr. at 190. Dr. Zumwalt did research Plaintiff's medical records to review any prior echocardiogram. He did not administer an echocardiogram to

Plaintiff in the course of his investigation. Dr. Zumwalt's examination of Plaintiff's heart reports: "[h]eart size is unremarkable and no murmurs are heard. There are good peripheral pulses." Tr. at 192. From this finding, Dr. Zumwalt concluded, "[t]he pain in the feet sounds more like diabetic neuropathy than it does like gout, as the pain in the chest sounds more like a neuropathy than (sic) it does an angina." Id.

Dr. Zumwalt's cavalier characterization of Plaintiff's heart condition, without performing so much as an echocardiogram, is supported by inexplicably meager evidence. Under the standard defined in Frey v. Bowen, Dr. Zumwalt's opinion appears far more brief, conclusory, and unsupported by the evidence than the opinion of Dr. Russell. Id., 816 F.2d 508, 513 (10th Cir. 1987). On the basis of the evidence in the Record, the Court determines that the ALJ erred in finding that there were specific, legitimate reasons for rejecting Dr. Russell's medical opinion. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

The ALJ's decision contains a paragraph of boilerplate language concerning the means by which a claimant's residual functional capacity ("RFC") is to be determined. Tr. at 37. Plaintiff protests that, despite the boilerplate language, the ALJ did not actually consider the severity of all Hynes' impairments in combination.

The ALJ found Plaintiff's RFC was limited to light work through September 23, 1989:

the Administrative Law Judge finds that while claimant

had severe impairments, and that they did have an effect on her ability to perform work, she was reduced no further in her residual functional capacity, prior to her husband's (sic) death on September 23, 1989, than the full range of light exertional activity. However, following claimant's husband's death on September 23, 1989, claimant suffered from severe depression. The addition of this severe depression, to her other impairments, acted to reduce her residual functional capacity to only that of the full range of sedentary exertional activity.

Decision at 8-9; Tr. at 37-38.

The ALJ's determination was based entirely on evidence contained within exhibits 22 and 23 (echocardiographic report, Tr. at 188-189, and Disability Determination Evaluation of Dr. Zumwalt, Tr. at 190-192). Tr. at 37. The Court has addressed the 1986 echocardiographic report, and found that it is not inconsistent with Dr. Russell's diagnosis of borderline left ventricular hypertrophy." Tr. at 182, *Supra* at 4. Dr. Zumwalt's examination report cannot be construed as determinative of Plaintiff's condition. *Supra* at 6. The opinion of Plaintiff's treating physician, Dr. Russell, was entirely and improperly discounted by the ALJ in his formulation of Plaintiff's RFC. Therefore, the Court finds that the Secretary's computation of Hynes' RFC is not supported by substantial evidence.<sup>1</sup>

IT IS THEREFORE ORDERED THAT this matter is remanded to Secretary for further findings consistent with this opinion.

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<sup>1</sup> The nature of the issues on remand precludes the Court from addressing Plaintiff's second and third claims for relief at this time.

IT IS SO ORDERED THIS 6<sup>TH</sup> DAY OF MARCH, 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 MAR 07 1995

RICHARD A. GRAINGER,  
Plaintiff,

vs.

ES'SANUS ENVIRONMENTAL  
ENTERPRISES, LTD.,

Defendant.

No. 95-C-41-K

FILED

MAR 07 1995

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

ORDER

Before the Court is the motion of the plaintiff to remand. Plaintiff commenced this action in the District Court of Tulsa County on December 1, 1994, alleging breach of contract and promissory estoppel arising out of an employment agreement. On January 11, 1995, defendant filed notice of removal to this Court. The notice of removal states "[s]ervice of the . . . Summons and Petition were had upon Defendant on December 12, 1994."

28 U.S.C. §1446(b) provides the notice of removal of a civil action must be filed within "thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ". It is recognized "[t]he time limitations in Section 1446 are mandatory and must be strictly construed." 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §3732 at 527 (2d Ed.1985). The thirty day period allowed for removal is mandatory, and remand is required if the deadline is not met. Luce v. Lloyd's of London, 868 F.Supp. 625, 626 (D.Vt. 1994).

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Plaintiff filed the present motion to remand on February 9, 1995, which is timely under the thirty-day limitation imposed by 28 U.S.C. §1447(c). Defendant has not responded to the motion within fifteen days.<sup>1</sup> Pursuant to Local Rule 7.1(C), the motion is deemed confessed; nonetheless, the Court has independently reviewed the record. Attached to plaintiff's brief are copies of certified mail receipts, indicating defendant was served with the state court petition on December 7, 1994. In the absence of contrary evidence, the Court concludes the notice of removal, filed January 11, 1995, is untimely.

It is the Order of the Court that the motion of the plaintiff to remand is hereby GRANTED. This action is remanded to the District Court of Tulsa County. Plaintiff's request for costs and fees is DENIED.

ORDERED this 6 day of March, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup>The Court has reviewed a letter received by the Court Clerk's office from Richard B. Lapp, counsel for Defendant, stating no response would be filed to plaintiff's motion, but arguing any award of costs and fees is unwarranted because a good-faith error as to the date of service was made. On the latter point, the Court agrees.



ENTERED ON DOCKET

DATE MAR 07 1995

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

JESSE LEE HOWELL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant and Counterclaim  
Plaintiff,

v.

DANIEL L. NICHOLS, and SYDNEY  
NICHOLS,

Counterclaim Defendants.

No. 92-C-81-K ✓

FILED

MAR 1995

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

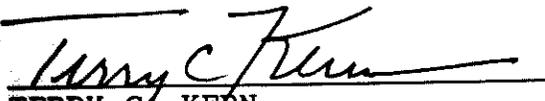
**JUDGMENT**

This matter came before the Court for consideration of the Defendant United States of America's Motion for Summary Judgment against Daniel L. Nichols, Sydney Nichols, and Jesse Lee Howell.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff and Counterclaim Defendants.

ORDERED THIS DAY OF 3 MARCH, 1995

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAR 07 1995

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

FILED

MAR 1995

DELBERT HARRY DEAN, III,  
Plaintiff,

Richard M. Le...  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

vs.

Case No. 94 CV-559-K

PAPER CONVERTING MACHINE COMPANY  
and FLUOR DANIEL, INC.,

Defendants.

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE  
OF THE CROSS-CLAIMS OF FLUOR DANIEL, INC.  
AND PAPER CONVERTING MACHINE COMPANY

Fluor Daniel, Inc. and Paper Converting Machine Company jointly stipulate and agree, pursuant to Fed. R. Civ. P. Rule 41(a)(1), through their respective counsel, that the cross-claims filed in the above-referenced case should be dismissed with prejudice as against Fluor Daniel, Inc., and Paper Converting Machine Company, and each party to bear its own costs and attorneys' fees.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN

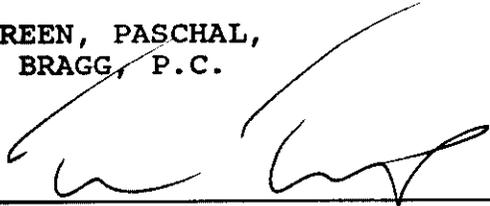
By:

Kathryn A. Keppel  
2400 Milwaukee Center  
111 East Kilbourn Avenue  
Milwaukee, Wisconsin 53202  
(414) 271-1440

AND

38

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

By: 

James E. Green, Jr., OBA #3582  
Timothy T. Trump, OBA #10684  
15 East 5th Street, Suite 3700  
Tulsa, Oklahoma 74103-4344  
(918) 599-9400

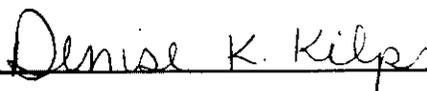
ATTORNEYS FOR DEFENDANT FLUOR DANIEL, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 28<sup>th</sup> day of February, 1995, a true and correct copy of the foregoing was placed in the United States mail in Tulsa, Oklahoma, postage prepaid, addressed as follows:

Joseph F. Bufogle, Esq.  
3105 East Skelly Drive, Suite 600  
Tulsa, OK 74103

C. Bart Fite, Esq.  
501 Commercial Bank Building  
P. O. Box 707  
Muskogee, OK 74402-0707

  
\_\_\_\_\_

Original

ENTERED ON DOCKET

MAR 06 1995

FILED

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

NOV 21 1994

ARNOLD J. SCHMIDT AND THOMAS J. )  
 ZELUFF, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 FEDERAL DEPOSIT INSURANCE )  
 CORPORATION AS RECEIVER FOR )  
 HEARTLAND FEDERAL SAVINGS AND )  
 LOAN ASSOCIATION, a federally )  
 chartered savings and loan )  
 association, )  
 )  
 Defendant. )

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

Tulsa County District  
Court Case No. CJ 92-3256

Case No. 93-C-930-E

KV

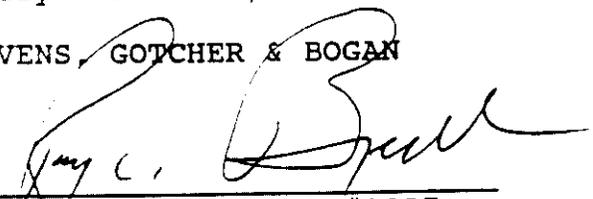
JOINT STIPULATION OF DISMISSAL

It is hereby stipulated, pursuant to Fed.R.Civ.P. 41(a)(1), that the Plaintiffs, Arnold J. Schmidt and Thomas J. Zeluff dismiss with prejudice the claims set forth in their Complaint on file herein. Each party is to bear its own costs and attorneys fees.

Respectfully submitted,

JONES, GIVENS, GOTCHER & BOGAN

By:

  
 Roy C. Breedlove, OBA #1097  
 15 East 5th Street, Suite 3800  
 Tulsa, Oklahoma 74103-4309  
 (918) 581-8200

ATTORNEYS FOR FEDERAL DEPOSIT  
INSURANCE CORPORATION AS RECEIVER  
FOR HEARTLAND FEDERAL SAVINGS AND  
LOAN ASSOCIATION

RIGGS, ABNEY, NEAL, TURPEN, LEWIS &  
ORBISON

By: *Kenneth M. Smith*  
Kenneth M. Smith, OBA # 8374  
502 West 6th  
Tulsa, Oklahoma 74119-0110  
(918) 584-3171

ATTORNEYS FOR ARNOLD J. SCHMIDT AND  
THOMAS J. ZELUFF

ENTERED ON DOCKET  
MAR 06 1995  
DATE

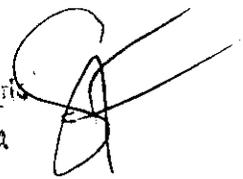
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

Case No. 93-C-627-K ✓

ORDER

U.S. District Court  
Northern District of Oklahoma



Now before the Court is the Motion for New Trial (Docket #42) of the Defendant William Riley filed pursuant to Fed.R.Civ.P 59. On October 18, 1994, this Court entered Judgment in favor of the Plaintiff Applied Energy Systems, Inc. ("Applied") and against Riley in the amount of \$270,018.44, plus pre- and post-judgment interest thereon.

In the Motion for New Trial, Defendant argues that this Court improperly relied on 15 O.S. 1991 § 170, which provides that ambiguous agreements should be construed against the drafter, before applying other rules of construction.<sup>1</sup> According to the Defendant, the Court failed to consider other statutory sections involving contractual interpretation and also ignored other

---

<sup>1</sup>The language of § 170 requires the Court only to consider the issue of who drafted a contract when an ambiguity has not been resolved by other rules of contractual interpretation. The statute states, "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

evidence at trial.<sup>2</sup> Therefore, this Court supposedly placed the burden of persuasion on the Defendant, rather than the Plaintiff, simply because counsel for the Defendant drafted the document at issue.

Fed.R.Civ.P. 59 is designed to allow the trial court to correct manifest errors of law and/or fact as well as to offer a forum for newly discovered evidence. Geshwind v. Garcia, 738 F. Supp. 792, (S.D.N.Y. 1990), aff'd, 927 F.2d 594 (2d Cir. 1991), cert. denied, 112 S.Ct. 58 (1991). Instead, the Motion submitted by the Defendant is simply an effort to relitigate the case in the hope that the trial court will change its mind. This is not the purpose of Fed.R.Civ.P. 59. In re Lionel Corp., 29 B.R. 694, 695 (S.D.N.Y. 1983).

The Court's ruling of October 18, 1994 squarely recognized its duty to construe the contract in such a manner as to give effect to the mutual intentions of the parties. In order to do so, the Court determined that it was proper to consider extrinsic evidence, since the term "refinancing" was ambiguous in the context of the "Substitution Agreements" at issue in the dispute.

Contrary to the Defendant's statements, the Court considered evidence in addition to the fact that the Substitution Agreements were drafted by Defendant's attorney. As noted by the Plaintiff in

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<sup>2</sup>Defendant alleges that the Court did not apply 15 O.S. 1991 § 160 which provides that words should be understood in their ordinary meaning unless terms are used in their technical sense. Similarly, the Court allegedly did not consider 15 O.S. 1991 § 161 which sanctions the use of expert testimony to determine the meaning of technical terms as used in the profession to which they relate.

its Response to the Motion for a new Trial, the Court found the following facts important for determining the intention of the parties:

- (1) The parties refer to the 1991 Credit Agreement as a refinancing;
- (2) the 1993 Credit Agreement provides for new loan terms;
- (3) new notes were executed;
- (4) the interest rate, maturity of the notes and the Guaranty Agreement were changed;
- (5) additional money could be advanced under new conditions.

Findings of Fact, ¶ ¶ 15-19 and Conclusions of Law ¶ 4.

In addition, the Court found in its Order that Defendant's attorney, Raymond Kelley, testified that he could have included language making it clear that refinancing would only trigger an obligation to repay if Defendant received value from the refinancing. Nonetheless, Kelley chose not to include this language to clarify the term because he could not be sure the parties would have agreed to it. Finding of Fact, para. 14.

Furthermore, in trying to assess the intention of the parties and the meaning of the term "refinancing" the Court evaluated the full range of testimony offered at trial as to the meaning of that term. The Court's evaluation included consideration of the testimony of two experts concerning the meaning of "refinancing" within the business community as used in this particular context.

In light of the considerations discussed above, this Court did not solely consider 15 O.S. § 170 in reaching its result. Instead, the Court considered the intention of the parties, the language of

the contract, and the definition of the term "refinancing" in addition to the question of who drafted the contract. Because ambiguity still existed after considering all the other factors, it was appropriate for the Court also to apply the Oklahoma provision allowing ambiguities to be interpreted against the party who drew it. King-Stevenson Gas & Oil v. Texam Oil Corp., 466 P.2d 950 (Okla. 1970).

No error of law has been committed nor has any new evidence been submitted warranting a new trial. Therefore, the Defendant's Motion for New Trial is denied.

IT IS SO ORDERED THIS 2nd DAY OF MARCH, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

MIDWEST FIRST FINANCIAL )  
LIMITED PARTNERSHIP III, )

Plaintiff, )

v. )

Case No. 95-C-0049-B

CHARLES I. MURPHY, MARILYN )  
C. MURPHY, STEPHEN M. MURPHY, )  
NORMA K. MURPHY, MURPHY )  
PROPERTIES, INC., MURPHY )  
BROTHERS CONSTRUCTION, INC. )  
JOSEPHINE MURPHY, Custodian for )  
Stephanie Kay Murphy, Rebecca )  
Anne Murphy, Laura Morine )  
Murphy and Mollie Katheryn )  
Murphy, under the Oklahoma )  
Uniform Transfer to Minors Act, )  
and BANK OF OKLAHOMA )  
NATIONAL ASSOCIATION )

Defendants. )

**FILED**

MAR 3 1995

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

ORDER FOR DISMISSAL WITHOUT PREJUDICE

Upon the Plaintiff's Stipulation of Dismissal filed pursuant  
to Rule 41(a)(1) F.R.C.P., the above action is

ORDERED dismissed, without prejudice.

Done this 3<sup>rd</sup> day of March, 1995.

S/ THOMAS R. BRETT

United States District Judge

THOMAS R. BRETT  
MAR 3 1995

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

THRIFTY RENT-A-CAR SYSTEM, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DONALD R. POTEAT, et al., )  
 )  
 Defendants. )

Case No. 93-C-850-K

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

S  
✓  
*[Handwritten signature]*

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed January 27, 1995, in which the Magistrate Judge recommended that pursuant to Fed.R.Civ.P. 16(f) and Fed.R.Civ.P. 37 judgment should be entered in favor of the plaintiff and against the defendants on the plaintiff's claims against the defendants and on the defendants' claims against the plaintiff as follows:

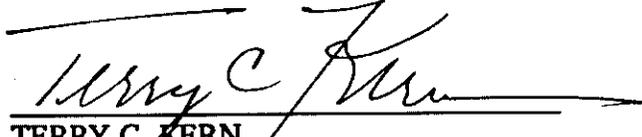
- a. A judgment in favor of Thrifty and against the defendant, Donald R. Poteat, in the amount of \$127,339.67, plus interest at \$62.80 per day from June 16, 1994, to the date of judgment;
- b. a judgment in favor of Thrifty and against the defendants, Roadrunner Car Rental & Sales, Inc., Donald R. Poteat and Annabell S. Poteat, in the amount of \$29,113.74, plus interest at \$14.36 per day from June 16, 1994, to the date of judgment;
- c. a judgment in favor of Thrifty and against the defendants, Donald R. Poteat and Annabell S. Poteat, in the amount of \$63,767.56, plus interest at \$31.45 per day from June 16, 1994, to the date of judgment; and
- d. a judgment in favor of Thrifty and against the defendants on the counterclaims of the defendants against Thrifty.

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

objections has expired.

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

Dated this 3 day of March, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DATE MAR 06 1995  
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,

Plaintiff,

v.

DONALD R. POTEAT, et al.,

Defendants.

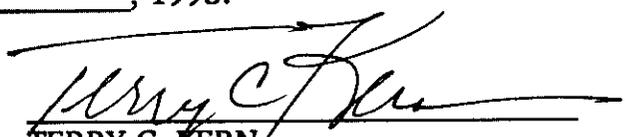
Case No. 93-C-850-K

JUDGMENT

Judgment is entered in favor of the plaintiff and against the defendants on the plaintiff's claims against the defendants and on the defendants' claims against the plaintiff as follows:

- a. A judgment in favor of Thrifty and against the defendant, Donald R. Poteat, in the amount of \$127,339.67, plus interest at \$62.80 per day from June 16, 1994, to the date of judgment;
- b. a judgment in favor of Thrifty and against the defendants, Roadrunner Car Rental & Sales, Inc., Donald R. Poteat and Annabell S. Poteat, in the amount of \$29,113.74, plus interest at \$14.36 per day from June 16, 1994, to the date of judgment;
- c. a judgment in favor of Thrifty and against the defendants, Donald R. Poteat and Annabell S. Poteat, in the amount of \$63,767.56, plus interest at \$31.45 per day from June 16, 1994, to the date of judgment; and
- d. a judgment in favor of Thrifty and against the defendants on the counterclaims of the defendants against Thrifty.

Dated this 3 day of March, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE MAR 06 1999

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

SERVICE COLLECTION  
ASSOCIATION,  
  
Plaintiff,  
  
vs.  
  
THE GREAT-WEST LIFE  
ASSURANCE COMPANY,  
  
Defendant.

No. 93-C-1106-K

F I L E D

MAR 11 1999

FEDERAL DISTRICT COURT  
TULSA, OKLAHOMA

ORDER

Now before the Court is the Motion by Defendant Great-West Life Assurance Company ("Great-West") for summary judgment against Plaintiff Service Collection Association ("Service" or "Plaintiff").

Plaintiff filed suit in the District Court of Tulsa County in November, 1993 to recover payment it claims it is due under a health benefit plan provided by the Defendant Great-West. Great-West provided "stop loss" coverage for a now defunct company, Health Concepts IV, Inc., ("Health Concepts") to protect that company from losses which exceeded a pre-determined amount. Additionally, Great-West processed and initially paid the self-funded claims of Health Concepts and electronically accessed the claims account established by Health Concepts.<sup>1</sup>

---

<sup>1</sup>While Great-West did fully insure some benefits, the benefits at issue in this case were the responsibility of Health Concepts. Under the section demarcated as Health Benefits, Great-West described its services by stating, "Your Employer is fully responsible for the Alternate Funded Benefits. Great-West will administer the payment of claims of these claims for your Employer but Great-West Life does not guarantee these benefits." Def.'s Mot. for Summ. J., Exh. A, p. 2.

Saint Francis Hospital provided services to a patient, Ouida Hardison, who was an employee of Health Concepts. Payment has not been made for the services rendered by Saint Francis. The hospital has now assigned all rights concerning this matter to Plaintiff. Plaintiff claims that Great-West owes \$120,260.00 for services rendered under an ERISA-governed employee welfare benefit plan.

Great-West removed this action to the federal court pursuant to diversity jurisdiction. 28 U.S.C. § 1441; 28 U.S.C. §1331. In an earlier ruling, the court ruled that the Plaintiff's claim should be treated as an ERISA action. (Docket #10, Order of Feb. 24, 1994). Health Concepts is currently seeking relief under Chapter 11 Bankruptcy in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 92-00243-W.

I. Standard of Fed.R.Civ.P 56 Motion for Summary Judgment.

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

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

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

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

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

## II. Discussion

In order for Service to maintain an action against Great West, it must be established that Great-West is a fiduciary of the ERISA plan, since ERISA does not regulate the duties of non-fiduciary plan administrators. Baker v. Big Star Div. of the Grand Union Co., 893 F.2d 288 (11th Cir. 1989). Therefore, it is critical to the outcome of the case to determine if Great-West is a fiduciary and therefore a proper party to an ERISA claim for benefits.

The statute as well as case law helps illuminate the range of behavior constituting fiduciary status. 29 U.S.C. §1002(21)(A) provides the following definition of fiduciaries:

a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

In interpreting this provision, a Department of Labor bulletin explains that a person serving purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits, is not a fiduciary under ERISA. 29 C.F.R. § 2509.75-8 D-2.

Great-West served as a claim processor and claim administrator for Health Concepts' self-funded benefits plan ("the Plan"). Although the Tenth Circuit has not addressed this issue, several appellate courts have held that ERISA cannot be used to impose liability upon third-party claim administrators who are not acting as fiduciaries under ERISA. Kyle Rys., Inc. v. Pacific Admin. Servs., Inc., 990 F.2d 513 (9th Cir. 1993); Pohl v. National Benefits Consulting, Inc., 956 F.2d 126 (7th Cir. 1992); Baxter v. C.A. Muer Corp., 941 F.2d 451 (6th Cir. 1991); Baker v. Big Star, Light v. Blue Cross & Blue Shield, Inc., 790 F.2d 1247 (5th Cir. 1986).

The first area for examination is the actual agreement between the parties. According to this agreement, Great-West was not a fiduciary under the ERISA statute. In the Certificate of Coverage issued by Great-West to Health Concepts, the Agreement specifically stated that "under no circumstances" should Great-West be

designated either as the plan or as a fiduciary of the plan. See Def.'s Mot. for Summ. J., Exh. D, at p. 7. In the portion of the document entitled "Administrative Services and Fees," the contract states:

The Employer [Health Concepts] acknowledges that he has authority to control and manage the operation of the Plan. *It is expressly agreed that under no circumstances will the company [Great-West] be designated as plan administrator or a fiduciary of the Plan.* Nothing herein shall be deemed to constitute the Company as party to the Plan, or to confer upon the Company any authority or control respecting management of the Plan, authority or responsibility in connection with administration of the Plan or responsibility for the terms of the validity of the Plan.

Where the company merely processes and pays claims in accordance with a benefits plan, the company cannot be construed as a fiduciary of the plan. Baxter v. C.A. Muer Corporation, 941 F.2d 451, 455 (4th Cir. 1991).

In response, Plaintiff rightly points out that this Court must examine more than simply the specific delineation of duties discussed in the contract language. Indeed, there must be closer examination of the relationship between Great-West and the Plan in order to confirm the nonexistence of a fiduciary relationship.

The Certificate of Coverage issued by Great-West to Health Concepts is illustrative in this effort to confirm the absence of a fiduciary relationship. Great-West offered a schedule list of services provided under the agreement. The list sets forth the following services to be performed by Great-West: booklet preparation; I.D. card preparation; late applicant underwriting; claim form preparation; check preparation; benefit determination

and payment in accordance with the Plan; direct payment of benefits to Plan participants, claim reports, preparation of physician payment reports; actuarial cost estimates; and health conversion privilege. None of these services could be construed as rising to the level of fiduciary duties as defined and interpreted at 29 C.F.R. § 2509.75-8 D-2.<sup>2</sup>

Plaintiff, however, points to a variety of representations in an employee handbook issued by Great-West explaining the benefits program. Allegedly, these select references indicate discretionary powers of Great-West that give rise to a fiduciary status. Defendant refers to four sections in the "Definitions" section of that publication as significant for deciding whether Great-West acted as a fiduciary. Pl.'s Resp. at 4; See Def.'s Mot. for Summ. J., Exh. B. First, the booklet states that an accident "does not include harm from disease or sickness and will be determined by [Great-West]." Second, in determining when a service is "medically necessary", the definitions provide that such determination will be made solely by Great-West. Third, for a program to qualify as a rehabilitation program, any plan must be approved by Great West. Finally, the terms "Great-West" doctor and "Great-West" physician suggest a role for Great-West in selecting doctors and hospitals on certain occasions.

On close examination, these definitional distinctions fit

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<sup>2</sup>29 C.F.R. § 2509.75-8 is titled: Questions and answers relating to fiduciary responsibility under the Employment Retirement Income Security Act of 1974. Question D-2 explores the distinction between a fiduciary and an administrator.

under the rubric of administrative services outlined in 29 C.F.R. § 2509.75-8. The regulations address the distinction between a fiduciary and an administrator in an interpretive bulletin from the Department of Labor. In a "Question and Answer" section, the C.F.R. answers in the negative the following question:

Are persons who have no power to make any decision as to plan policy, interpretations, practices or procedures, but who perform, the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices, and procedures made by other persons, fiduciaries with respect to the plan:

- (1) Application of rules determining eligibility for participation or benefits;
- (2) Calculation of services and compensation for credits for benefits;
- (3) Preparation of employee communication material  
. . .
- (11) Making recommendations to others for decisions with respect to plan administration?

In the context of this plan as a whole, distinct determinations with respect to the definition of "medically necessary", "rehabilitation program", and "accident" should not be sufficient to make a claims administrator a fiduciary of the plan. Similarly, the role played by Great-West in doctor selection does not rise to the fiduciary level according to this interpretive bulletin.

First, these determinations simply give Great-West the ability to apply rules set out in the policy provided by Health Concepts to assess eligibility for benefits. Although a claims processor or administrator will have to make decisions and resolve questions that involve uncertainty, Health Concepts ultimately retained the

authority to control and manage the Plan. Def.'s Br. for Summ. J., Exhibit C, Certificate of Coverage, at p. 7. Indeed, the "Plan" is defined as "the benefits which an Employer [Health Concepts] chooses to provide for his employees." Id., Exh. B, Definitions at p. 8. Therefore, Health Concepts had the power to write and interpret rules that would bind any assessment made by Great-West. Just because the information booklet provided to Health Concepts employees represented that certain applications of the rules will be made by Great-West, this does not turn a claims administrator into a fiduciary under ERISA law.

Second, whatever discretion is offered under these definitions, Great-West can only make recommendations to others for decisions with respect to plan administration. The Plaintiff has ignored that all claims decisions made by Great-West are subject to review by the Plan Administrator of the Health Concepts Plan. Under the contract, the Plan Administrator was a Vice-President of Health Concepts IV, Inc. The procedure established by the Plan provides that:

If there are any questions about a claim payment, the claimant should contact the Plan Administrator. If the claimant disagrees with the reasons for a claim denial, he can initiate a claim review procedure by giving written notice to the Plan Administrator within 60 days after receipt of the written denial. A request for a claim review and examination of any pertinent documents can be made by the claimant or anyone authorized to act on the claimant's behalf.

Notice of the final decision will be given 60 days after receipt of a request for a review.

Id., General Information at p. 2. In a recent Fourth Circuit decision, the court assessed the argument that a party providing

administrative benefit services was a fiduciary. Because disappointed beneficiaries could appeal any determination made by the administrative services company to the Trustees of the Benefit Plan, the Fourth Circuit held that the administrative services company could not be held to be a fiduciary. Givens v. American Benefit Corporation, 993 F.2d 1536 (4th Cir. 1993), 1993 WL 165002 at \*3. Similarly, the Sixth Circuit found that a company hired to administer a health benefit plan was a fiduciary precisely because the administrator, according to plan documents, had the "sole authority" to determine the benefits to which an insured person under the Plan may be entitled. Tregoning v. American Community Mut. Ins. Co., 12 F.3d 79, 83 (6th Cir. 1993), cert. denied, 114 S.Ct. 1832 (1994). In Tregoning, the court implicitly said that the key distinction involved the issue of "sole authority" to grant or deny benefits. Where sole authority lies with the administrator, the administrator is a fiduciary. If not, the relationship is not a fiduciary one.

Finally, Plaintiff also relies on broad statements made by Great-West in its booklet suggesting that Great-West held itself out as a fiduciary. Specifically, an employee handbook stated:

Your employer [Health Concepts] carefully elected the best possible coverage for you through this plan. Great-West Life and your employer are committed to providing you with top-quality benefits to meet your changing lifestyle. . . All claims will be processed by Great-West life.

Pl.'s Resp. to Def.'s Mot. for Summ. J., citing Def.'s Exh. A at p.1. These general remarks however only reassert the primary role that the Employer, Health Concepts, played in the benefits package.

Great-West, in its booklet, is holding itself out as capable of performing its functions in a professional manner. Similarly, Plaintiff quotes language from the Employer Information Book. The Book states, "the people who operate your plan, called 'fiduciaries' of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries." Pl.'s Resp. at 4-5, citing Def.'s Exh. B, at p. 3. Again, this selected remark is unhelpful to establishing Great West as a fiduciary. The remark comes under a heading that explains in general terms the protections offered to plan participants under ERISA. The mere fact that the operators are called fiduciaries does not mean that *Great-West acted as an operator* as that term is used in the ERISA statute. The argument that this sentence is evidence of fiduciary status for Great-West is completely circular. The precise question for this Court to determine is whether Great-West served as an operator in a manner requiring it to be held a fiduciary.

The Agreement between Great-West and Health Concepts shows that Great West was not afforded the discretionary control necessary to constitute a fiduciary within the meaning of ERISA. At all times, Health Concepts retained the ultimate control and authority over the Plan and its assets. In a similar case assessing whether a company hired to administer an ERISA plan could be held to a fiduciary, Judge Posner found no such status. He wrote:

A fiduciary is an agent who is required to treat his principal with the utmost loyalty and care--treat him ,

indeed, as if the principal were himself. The reason for the duty is clearest when the agent has broad discretion the exercise of which the principal cannot feasibly supervise, so that the principal is at the agent's mercy. . . If the agent has no discretion and the principal has a normal capacity for self-protection, ordinary contract principals should apply.

Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 128-129 (7th Cir. 1992). Notwithstanding the absence of a contractual fiduciary duty between the parties, the Plaintiff has not pointed to any act by Great-West showing that a fiduciary relationship arose between the parties. The plain language of the Agreement and the absence of any actions to counteract the terms of that Agreement show that Great West served as a claims administrator rather than a fiduciary.

As Judge Posner wrote, ordinary contract principals should suffice as protection when no fiduciary duty exists. In this case, Service has no direct contractual relationship with Great-West nor does St. Francis Hospital or Ouida Hardison. Joint Stip. of Facts, Facts 4-6. Although Plaintiff may well have a remedy against Health Concepts, the ERISA statute does not provide Plaintiff with a federal court action against a claims processor/ administrator such as Great-West in the absence of a fiduciary status.

For the reasons discussed above, the Defendant's Motion for Summary Judgment is granted.

ORDERED THIS DAY OF 3rd March FEBRUARY, 1995

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET  
DATE MAR 06 1995

JESSE LEE HOWELL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant and Counterclaim  
Plaintiff,

v.

DANIEL L. NICHOLS, and SYDNEY  
NICHOLS,

Counterclaim Defendants.

No. 92-C-81-K

FILED

MAR 6 1995

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

ORDER

NOW BEFORE THE COURT are the Motions for Summary Judgment of the United States of America (IRS) (Docket #33) and of Jesse Lee Howell and Daniel and Sydney Nichols (Docket #30). Plaintiff Jesse Howell filed this action on January 29, 1992. He seeks to recover \$868.92, plus interest, that was paid to the Government with respect to a 100-percent penalty assessed against him pursuant to § 6672 of the Internal Revenue Code. Howell also seeks to have the balance of the penalty abated. Section 6672 of the Internal Revenue Code states:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

I.R.C. § 6672.

The Government brought a counterclaim against Howell for the unpaid balance of the penalty assessment, in the amount of \$31,890.05, plus interest and statutory costs. The Government also brought counterclaims against Daniel Nichols and Sydney Nichols, in order to obtain the balance of identical 100-percent penalties assessed against them, in the amount of \$31,890.05, plus interest and statutory costs. The Government also filed a counterclaim against Dolores Howell, which has since been settled. On November 4, 1994, Delores Howell was dismissed with prejudice from this action.

I. Facts.

J.D.S. Systems, Inc., was a commercial printing and typesetting business which operated in Tulsa, Oklahoma, and did business as "Speedprint No.1." In 1981, Jesse Lee Howell purchased Speedprint No.1 from the owner of the Speedprint franchise, M.W. Pickett. The business was incorporated as J.D.S. Systems, Inc. Jesse Howell served as President and sole shareholder of JDS. Daniel Nichols was promoted from salesman to vice-president in 1983. Delores Howell was treasurer.

Jesse Howell entered into a series of agreements to sell all of the stock of J.D.S. Systems, Inc. ("JDS") to Daniel Nichols and Sydney Nichols (Howell, Daniel Nichols and Sydney Nichols are hereinafter collectively referred to as "taxpayers") for \$120,000. On January 1, 1984, taxpayers executed a Sales Contract and

Purchase Agreement ("Purchase Agreement"). The Purchase Agreement served to transfer 50-percent of the stock of JDS from the Howells to the Nichols. Daniel Nichols became president of JDS, and Jesse Howell ("Howell") became vice-president and also remained on the Board of Directors of JDS. The Purchase Agreement provided a consulting salary to Howell and provided for the sale of the remaining 50% of the stock after a ten year period. The sale of the additional stock never took place.

The Purchase Agreement was amended on September 7, 1984, by a Modification of Sales Contract and Purchase Agreements and Amended Sales Contract and Purchase Agreement ("Modification"). The Modification reduced the amount of Howell's salary and provided him with a car allowance.

On January 31, 1986, the Howells and the Nichols executed a third agreement, titled Modification of Sales Contract and Purchase Agreements and Amended Sales Contract and Purchase Agreement, dated January 31, 1986 ("Second Modification"). The Second Modification acknowledged financial difficulties of the company. Howell agreed to waive any further salary and agreed to resign from the Board of Directors as of the date of the agreement. The parties agreed to release Howell from any obligations to serve as a consultant for a JDS and also provided that Howell would release remaining stock for payment of \$165,000. There is no evidence that such a release ever took place.

An annual meeting of JDS shareholders was held January 31, 1986. At that meeting, Jesse Howell resigned from his position as

vice-president of JDS, and Delores Howell resigned her position as Secretary of JDS. The Howells' resignations were concurrent with their removal from the Board of Directors of JDS.

According to the government, the financial decline of JDS Systems reached a point during the third quarter of 1985 that the company stopped paying over a significant portion of the federal trust fund withholding taxes due to the United States. The IRS assessed the taxpayers for three consecutive quarters of unpaid withholding taxes of JDS, from September 30, 1985, until March 31, 1986, for a total of \$31,890.05. The assessment was made on July 28, 1986.

On July 28, 1986, a delegate of the Secretary of the Treasury made assessments in the amount of \$31,890.15 against the taxpayers as persons responsible under I.R.C. § 6672 for the unpaid trust fund portion of JDS System's outstanding employment tax liabilities. In 1988, after the 100-percent penalty assessment was made against the taxpayers, the Nichols attempted to file amended Form 941 tax returns on behalf of JDS Systems. The amended returns attempted to eliminate the entire liability that is the subject of the present suit by omitting the amount of income and social security taxes withheld from Howell's wages which the company failed to pay over in 1985 and 1986. The omission was based on a recharacterization of the amounts paid to Howell as a result of the sale of JDS to Nichols. Notwithstanding the contractual agreements, the corporate books, and records and tax returns submitted to the government, taxpayers contend in the amended

returns that the company "erroneously" reported as wages amounts paid to Howell that should have been characterized as proceeds from the sale of stock. The amended returns state that the tax liability of JDS should be reduced by \$45,306.42.

Howell thereafter commenced this refund action under 28 U.S.C. § 1346(a)(1). The government filed a counterclaim which asserted that Howell was a responsible party who willfully failed to pay over federal employment taxes that JDS withheld from employee wages during the period in issue. Similarly, the government added the additional Defendants, Daniel Nichols and Sydney Nichols.

## II. Discussion

For Summary Judgment to issue in favor of the Government, it must prove that taxpayers have failed to show: 1) they were not "responsible persons" for JDS as defined by 26 I.R.S. § 6672; and (2) they did not willfully fail to pay JDS's employment taxes. Hochstein v. United States, 900 F.2d 543, 546 (1991), cert. denied 112 S.Ct. 2967 (1992).<sup>1</sup>

Jesse Lee Howell and the Nichols can prevail on their motion for summary judgment if they establish that the tax returns filed by JDS during the period at issue erroneously classified payments

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<sup>1</sup> Under 26 U.S.C. § 6672, the individual against whom the assessment is made bears the burden at trial of proving by a preponderance of the evidence that one or both of these elements is not present. Hochstein, 900 F.2d at 546; Gustin v. United States, 876 F.2d 485, 491 (5th Cir. 1989). The government, as the moving party, must show that there is no material issue of fact that might enable the taxpayers to show either that they were not responsible parties or did not willfully fail to pay their taxes.

made for the purchase of stock as payments made for salary. Taxpayers must also prove that the IRS is obliged to accept the amended returns.

Summary judgment is authorized only if the movant establishes that there is no genuine dispute about any material fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970). In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court stated that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Id. at 322, 106 S.Ct. at 2552. The moving party, of course, must shoulder "the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which [it] believes demonstrate the absence of a genuine issue of fact." Id. at 323, 106 S.Ct. at 2553.

**A. Were Daniel and Sydney Nichols "Responsible Persons" as Defined by § 6672?**

During the time period at issue, the IRS states that there is "no doubt" that the Nichols were "responsible persons" with respect

to the company. Memorandum of the United States in Support of Its Motion for Summary Judgment at 22. According to the statute, the term "person" includes "an officer. . . who . . . is under a duty to perform the act in respect of which the violation occurs." I.R.C. § 6671(b). This clause is generally referred to as the "responsible person" test.

In examining the role played by the Nichols in the company, the IRS describes the Nichols' responsibilities. Daniel Nichols served as President, hired and fired employees, dealt with customers and suppliers, ordered supplies, and generally ran the business. Sydney Nichols served as the company's treasurer, performed the company's accounting and bookkeeping work, and computed the payroll. Both of the Nichols served as directors of the company, together owned 50-percent of the company's stock, held signature authority (without a co-signor) over the company's bank account, and signed corporate tax returns.

The Nichols do not challenge their characterization as "responsible persons," and offer no evidence to the contrary. "The Nichols do not dispute that they are 'responsible parties' as that term is defined under relevant case law." Separate Response of Third Party Defendants on the Issue of Willful Failure at 2. Therefore, the Court finds that the Nichols were responsible persons.

**B. Was Jesse Lee Howell a "Responsible Person" as Defined by Section 6672?**

The IRS emphasizes that Howell, during the time period at issue, was a director and vice-president of JDS, as demonstrated by Howell's attendance at a director's meeting held on January 25, 1985. At that meeting, the corporate officers for that year were elected. Howell's connections to the company included check-signing authority over the company's account, authority to borrow funds on behalf of the corporation along with Delores Howell, and his ownership of 50-percent of the company's stock.

Howell's association with JDS included the control over company affairs that was granted to Howell by the Purchase Agreement. The agreement provided: (1) all profit distributions were at the discretion of both the Howells and the Nichols (Purchase Agreement, Condition No. 1); (2) Howell had the right to examine and inspect at reasonable times the books, records and accounts of the company (Id.); (3) Howell was to be furnished a monthly recap report sheet from the Nichols by the 15th day of each month (Id.); (4) all money borrowed by the company was to be agreed upon in advance and in writing by both the Howells and the Nichols (Id., Condition No. 3); and (5) any purchases (excluding materials and supplies) were to be agreed upon in advance by the parties (Id.).

M.W. Pickett, owner of the Speedprint franchise in Oklahoma, testified that Howell maintained that he controlled JDS during the time at issue:

Q. So your testimony is that during the time period, during the period at issue here, Jesse controlled the financial affairs of J.D.S. Systems?

- A. Well, he told me he did. I have no proof of that.  
You know, I don't know.  
Q. But he told you he did?  
A. Yes, said he had control of it.

Deposition of M.W. Pickett at 20.

Daniel Nichols agreed that Howell controlled JDS during the time at issue:

- Q. Beginning in that time period, what -- who was making the financial decisions of the company?  
A. Jesse.  
Q. And how was that done?  
A. Telephone calls.  
Q. And how did the telephone calls go?  
A. At the end of each month, we would get a phone call from Mr. Howell, telling us to pay him, and then I would question him about various other bills that needed to be paid, and his comment notoriously was, that's up to you. You pay me, and the rest is up to you.  
Q. So there was a phone call every month?  
A. Approximately.  
Q. Was there a phone call every time the bills had to be paid?  
A. Yes, I would say so.

\* \* \*

- Q. So in your opinion and based on your personal knowledge, Mr. Howell controlled what bills had to be paid?  
A. Absolutely.

Deposition of Daniel Nichols at 31-33.

Howell asserts that he did not wield extensive control over the company. Howell states that at no time after January 1, 1984, "did [he] ever sell or work for JDS, either part or full time, nor did he act as a consultant to the Nichols on how to run the business." Jesse Howell's Separate Response to the Government's Motion for Summary Judgment at 2. Howell's contention is both

supported and contradicted by the record.

Howell's own affidavit simply states, "I performed no services under the contract and thus received no compensation for my services." Howell Affidavit at 3. Howell's deposition offers more substantial disavowals of his involvement with JDS during the time at issue:

- Q. Who was running the company in that period at issue?  
A. Danny Nichols ran the company from the time I sold him and he became president, in that period.  
Q. Okay. What was your role in the company?  
A. Really I had no role in the company whatsoever. I had told Danny Nichols that I would help him with any problems that I could, and I lived on the farm and took care of and was trying to build my place up there, is what I was trying to do in this period of time.

Deposition of Jesse Howell at 37.

Daniel Nichols testified that Howell did not do any "consulting or selling" on behalf of JDS, and that Howell did not make use of his check-signing authority on the JDS account. Deposition of Daniel Nichols at 35-38, 45. The Government has not proffered any evidence to contradict Nichols' testimony. Thus, it must be determined whether Howell's aforementioned ties to JDS -- assuming he did no consulting, selling, or signing of corporate checks -- were sufficient to label him a "responsible person."

A recent article in the Oklahoma Bar Journal examined the scope of Section 6672. It noted that in early cases, many taxpayers suggested a strict interpretation of "person" under § 6671(b). Such taxpayers typically claimed they were either stockholders or directors, not officers or employees. Reece B.

Morrel, Jr., The IRS's Knockout Punch: The 100 Percent Penalty for Failure to Collect or Pay Over Tax, 65 Okla. Bar J. 3141 (November 30, 1994). The article found that "this avenue of escape was quickly closed:"

The term "person" does include officer and employee, but certainly does not exclude all others. Its scope is illustrated rather than qualified by the specified examples. In our judgment the section must be construed to include all those so connected with a corporation as to be responsible for the performance of the act in respect of which the violation occurred.

Id. at 3141-42, citing United States v. Graham, 309 F.2d 210 (9th Cir. 1962).

Testimony has been offered by several witnesses alleging that Howell was responsible for the non-payment of taxes by JDS. Sydney Nichols stated in her deposition that she had discussed with Howell the problems JDS suffered, in that sufficient funds were not available for JDS to pay both the IRS and Howell. In response, Sydney Nichols testified that Howell became irate:

- A. So then he threatened to shoot my husband.  
Q. [Howell] threatened to kill him?  
A. (Nodding head.)  
Q. He said if you didn't -- correct me if I'm wrong -- if you didn't make these payments, he would shoot Dan?  
A. He told me -- he did not tell that directly to me. What he said to me concerning threatening my husband was just basic things, like he was going to get -- he said, I'll get Dan. You will make this payment or I'll show up out there on your doorstep, and I was frightened.

Deposition of Sydney Nichols at 35-36. Sydney Nichols stated that as a result of Howell's threats, JDS made its scheduled payments to

Howell. Id. at 36-37.

Daniel Nichols related a particular occasion when Howell threatened him: "[h]e was slamming his fist down on the desk, and he was threatening to cause severe bodily damage." Deposition of Daniel Nichols at 34. Howell recalled a discussion he and Daniel Nichols had about the company:

I'd come over to talk to [Daniel Nichols], and he told me, he said, well, we've been having some, you know, cash flow has been a little bit slow, but he told me that he wasn't going -- that there were some things that I hadn't done right, and anyway, we got in a discussion back and forth, and finally I told him, I said, well, if you want to go outside, we'll just go outside and settle it...

Deposition of Jesse Howell at 45. Howell clarified what it meant to "go outside" later in his testimony: "...you go outside and just punch it out toe to toe, you know." Id. at 60.

Sydney Nichols' account of Howell's intimidation is confirmed by the testimony of M.W. Pickett:

- Q. Were you ever threatened at gunpoint by Mr. Howell?  
A. Yes.  
Q. Did Mr. Howell ever tell you that he was going to kill Dan Nichols?  
A. Yes.

Deposition of M.W. Pickett at 29.

Mortal threats by a director and vice-president of a company against the president of that company are indicative of an effort to control the payment of funds to creditors. The testimony of the witnesses does not support a finding that Howell was merely a passive investor devoid of influence over the company's payment of creditors. Instead, the evidence shows that Howell was an active participant in corporate affairs and wielded influence over the

company's decisions to pay creditors, including the Government.

Testimony has also been offered which postulates that Mr. Larry Jemison of Western National Bank was responsible for JDS's non-payment of taxes. Deposition of Sydney Nichols at 58-61. Howell asserts that Jemison was the proximate cause of some of the required tax payments not being made to the IRS.

When Sydney Nichols would take the money to the Bank to make the IRS deposit, Jemison, acting on behalf of the Bank would not honor the JDS check to the IRS, even though there were sufficient funds to do so... The willful act of not paying the IRS was the act of Jemison and the Bank, not Howell. Jemison, not Howell, decided that the IRS would not be paid.

Jesse Howell's Separate Response to the Government's Motion for Summary Judgment at 21.

It is significant that Nichols does not claim that Jemison precluded JDS from making all payments to the IRS, but that he allegedly interfered with only some of the payments. Deposition of Daniel Nichols at 51-52. The only evidence that Jemison acted to block JDS's payments to the IRS is Sydney Nichols' deposition testimony. No depositions were offered of Jemison, or any Western National Bank employees. Jemison and the Western National Bank are not parties to this action, and there is no separate action pending against them.

Even if there is merit to this argument, it does not rescue Howell from liability as a responsible person. Delegation of the duty to turn over taxes does not relieve a responsible person from liability. Bowlen v. United States, 956 F.2d 723, 728 (7th Cir. 1992); McDonald v. United States, 939 F.2d 916, 919 n.6 (11th Cir.

1991), cert. denied, 112 S.Ct. 1669 (1992). Section 6672 "applies to all responsible persons, not just to the most responsible person." Gustin v. United States, 876 F.2d 485, 491 (5th Cir. 1989).

Howell's Response to the Government's Motion for Summary Judgment declares, "Howell did not have access to any books or records to JDS." *Id.* at 20. His deposition testimony described how he was unaware of any tax delinquency because he did not have access to any corporate records and knew nothing about the daily operations of the business or its financial stability. Howell Deposition at 47, 49. This assertion is inimical to the unambiguous clause in the Purchase Agreement which conferred upon Howell the very access he denies: "Seller and Purchaser agree that the Seller has the right to examine and inspect at any and all reasonable time, the books, records and accounts of the Corporation." Purchase Agreement, Condition No. 1. Howell acknowledges the existence and validity of the inspection clause, but claims that "in reality" he did not have access to any of JDS's books or accounts, since they were kept by the Nichols at their office. Jesse Howell's Separate Response to the Government's Motion for Summary Judgment at 13-14. However, a company's office is a reasonable place for a company to maintain its books and accounts. Thus, the Court finds that Howell did have access to the company's records as specified in the Purchase Agreement.

In actuality, for much of a year, Howell may have enjoyed greater access to JDS's records than its owners. In response to a

question about the clause in the Purchase Agreement that granted seller and buyer access to the books, records, and accounts of JDS, Daniel Nichols stated:

- A. Reality was Jesse still had control of the books. He never gave the books over to us.
- Q. And when you say books, what do you mean, what books?
- A. Accounts receivables, accounts payables, checking accounts, all of those things.
- Q. They were retained by Jesse?
- A. For a period they were, yes.
- Q. What period was that?
- A. Probably till the second or the third sales contract...

\* \* \*

- Q. So from January 1st, 1984, the time the original contract was signed, until September 7th or September of '84, Mr. Howell retained the books and records?
- A. I believe so, to the best of my memory, okay?

Deposition of Daniel Nichols at 22-23. There is no evidence in the Record, outside of Howell's own deposition, which indicates that Howell did not have access to records of JDS.

Section 6672 "must be construed to include all those so connected with a corporation as to be responsible for the performance of the act in respect of which the violation occurred." Dudley v. United States, 428 F.2d 1196, 1201 (9th Cir. 1970), quoting United States v. Graham, 309 F.3d at 212. "[R]esponsibility under section 6672 encompasses all those connected closely enough with the business to prevent the default from occurring." Bowlen, 956 F.2d at 728; accord Fidelity Bank, N.A. v. United States, 616 F.2d 1181, 1185 (10th Cir. 1980). The evidence in this case shows that the Nichols consulted with Howell,

the company's vice-president and director, about which creditors to pay. The evidence further shows that Howell instructed JDS to give payment priority to his salary, with other creditors receiving a lower priority. Howell could have instructed JDS to pay the IRS first, and then his salary, but he did not. Howell was in a position to prevent the default from occurring, as described in Bowlen. Thus, under Bowlen, Howell was a responsible person within the meaning of § 6672.

Howell implores the Court to adopt the opinion in O'Connor v. United States, 956 F.2d 48 (4th Cir. 1991). In that case, O'Connor and Voight created a partnership to run a business. Voight was responsible for daily business decisions, preparing tax returns, hiring and firing employees, and paying creditors. O'Connor's role was primarily one of providing capital. He held 50-percent of the company's stock. O'Connor had authority to write checks on the company's account, but did not exercise that authority. His title of vice-president was described by the court as a "figurehead." Id. at 51. The court held that O'Connor was not a responsible person.

O'Connor is easily distinguished from the present case. Unlike Mr. O'Connor, Howell assumed a more active role in the affairs of his company. Mr. Howell was consulted as to the payment of creditors, and expressed a preference as to which should be paid. Howell attempted to influence the Nichols' decision-making by means of violent threats -- a fact not present in O'Connor. Because Howell did not confine himself to the limited role assumed

by Mr. O'Connor in O'Connor, Howell crossed the threshold of \$ 6672. Instead of a mere investor, he became a "responsible person."

**C. Did the Responsible Persons of JDS Systems Willfully Fail to Pay the Company's Employment Taxes?**

The Court has found that JDS failed to pay employment taxes for the time period at issue. The Court has further found that the Nichols are responsible persons. The Court now considers whether the taxpayers' failure to pay was "willful."

Liability is imposed on a responsible person under § 6672 only if the person "willfully" fails to collect, account for, or pay over the withheld taxes. "Evidence that the responsible person had knowledge of payments to other creditors after he was aware of the failure to pay withholding tax is sufficient for summary judgment on the question of willfulness." Mazo v. United States, 591 F.2d 1151, 1155 (5th Cir. 1979), cert. denied by Lattimore v. United States, 100 S.Ct. 82 (1979).

There is substantial evidence that the Nichols had knowledge that employment taxes were past due, yet declined to pay them. During the time at issue, each of the Nichols signed payroll tax returns for the company. The returns indicated that withholding taxes were owed, but had not been paid. Furthermore, the evidence shows that the Nichols used corporate funds to pay other creditors when they were aware that withholding taxes owing to the Government were past due. This alone is enough to support a finding of

willfulness. See Muck v. United States, 3 F.3d 1378, 1381 (10th Cir. 1993) (citing Olsen v. United States, 952 F.2d 236, 240 (8th Cir. 1991)).

The Nichols profess that their failure to pay the IRS was not voluntary, because they were coerced by Howell to make payments to him, instead. They cite the threats of violence by Howell against Daniel Nichols, discussed *supra*. "These threats and control amounted to extraordinary circumstances excusing the Nichols from nonpayment. In essence, the Nichols argue that because their failure to pay was not voluntary, their actions did not amount to a 'willful failure.'" Separate Response of Third Party Defendants on the Issue of Willful Failure at 4.

The Nichols and the Government agree that Howell did threaten the Nichols with harm if his payments were not made. 26 I.R.C. § 6672(a) does not include an exclusion for a "responsible person" who is coerced into not paying over any tax. Thus, the Nichols ask the Court to find that such an exception is implicit within the term "willfully" as used in the section. The Court does not find that threats negate willfulness as used in § 6672.

Intimidation of one corporate officer by another is insufficient to negate the Nichols' willful payment of other creditors in preference to the Government. Fontenot v. United States, 547 F.Supp. 496, 500-02 (M.D. La. 1982), *aff'd*. 705 F.2d 448 (5th Cir. 1983). Where an employee has been threatened with termination by a superior in an attempt to prevent the payment of withholding taxes, the employee has not been able to avoid summary

judgment on the fact that the non-payment of taxes was unwilling.

Faced with the possibility of leaving the frying pan with only minor burns, Howard chose instead to stay on in the vain hope of avoiding the fire. While we appreciate the difficulty of his position, we cannot condone his abdication of the responsibility imposed on him by law.

He could have paid the taxes, accepted the consequences, and thus, avoided the penalty.

Howard v. United States, 711 F.2d 729, 734, 735 (5th Cir. 1983) (citations omitted); See also Roth v. United States, 779 F.2d 1567 (11th Cir. 1986); In re Terrell, 75 B.R. 291, 298 (N.D. Ala. 1987) (court granted summary judgment against debtor, noting "[t]his is not the first time taxpayers have raised the Nuremberg defense of 'just following orders' to a 26 U.S.C., Section 6672 penalty").

The Nichols had many avenues of action available to them when confronted with Howell's threats. For starters, they could have opposed Howell. Instead, the Nichols chose the course of least resistance, and submitted to his demands. The Nichols' choice was voluntary, conscious, and intentional. The evidence of Howell's threats is not sufficient to support the Nichols' theory, that "[they] literally had a gun to their heads and [their] action was not voluntary." Separate Response of Third Party Defendants on the Issue of Willful Failure at 9. The Record compels the finding that the Nichols' failure to pay over taxes was willful within the context of § 6672.

The deposition testimony of the Nichols reveals that Howell had notice of the company's payroll tax delinquency. Daniel Nichols testified that he specifically told Howell that the company had a payroll tax deficiency:

- Q. Okay. Did Jesse know that the taxes weren't being paid?  
A. Yes.  
Q. How did he know that?  
A. We told him, we being my wife and I.

Deposition of Daniel Nichols at 40. Daniel Nichols stated that he discussed with Howell the company's inability to pay taxes on a regular basis, and that insufficient funds had become a problem. *Id.* at 40-41. Sydney Nichols testified that every month she sent Howell income statements and balance sheets which reflected the outstanding accounts payable, including the withholding tax delinquency. Deposition of Sydney Nichols at 20. She also testified that Howell had knowledge of the tax delinquency:

Normally I would call him and say, I have so much money in the bank, X number of dollars, and I cannot make your payment right now because I need to make this other payment to the IRS because we're behind on these taxes, and that's when he would tell me, "I don't care. You have to make this payment to me."

*Id.* at 37. She stated that discussions such as this transpired on more than five occasions. *Id.* at 38.

Sydney Nichols' testimony is supported by that of M.W. Pickett. In response to a question of why JDS was in financial difficulties, Pickett answered, "[Daniel Nichols] always had to pay Jesse first, and then Jesse would tell Danny who to pay next. The reason I know that is because I was on the bottom of the list, and I didn't get paid." Deposition of M.W. Pickett at 22.

Howell, meanwhile, asserts that he did not have knowledge of JDS's tax liabilities: "[w]ithout access to any of JDS' books or records, Howell was totally unaware of JDS' tax delinquencies until March of 1986." Jesse Howell's Response to the Government's Motion

for Summary Judgment at 20. The Court has found, *supra*, that Howell had access to the company's books and accounts, and that he had notice of the tax delinquencies.

Howell correctly notes "[his] titular positions of director and vice-president imposed no liability on Howell to collect and pay taxes." Jesse Howell's Response to the Government's Motion for Summary Judgment at 21. Nonetheless, it was the combination of factors, including Howell's role in determining the company's payment of creditors, which requires the Court to impose responsibility on him. Howell's conclusory denials of involvement with JDS are not sufficient to controvert established facts.

**D. Did the Amended Tax Returns Submitted by the Company Effectively Reclassify Salary Payments to Howell as Payments for Stock?**

As an affirmative defense, Howell and the Nichols assert that JDS submitted amended tax returns to the IRS on or about June 9, 1988. They state that the amended returns were prepared upon the discovery by the Nichols that amounts paid to Howell as a result of the sale of the company to the Nichols had been erroneously reported by the company as wages paid to Howell rather than for the sale of stock. The taxpayers seek to disregard the form of their transaction as evidenced by the sale contracts, corporate books and records, and the tax returns presented to the government to argue that the amounts paid to Howell for services rendered during the relevant time period should not have been classified as wages. The

taxpayers claim that income and social security taxes had been improperly withheld from those amounts which, if now excluded, would eliminate the outstanding liability at issue.

Howell and the Nichols urge the Court to look to the substance rather than the form of the transaction to determine the tax consequences. Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945). They argue that the agreements which controlled the transaction at issue were "indecipherably vague." Brief in Support of Motion for Summary Judgment by [Taxpayers]. The taxpayers ask the Court to pierce their form to find the true intent of the parties and the actual nature of the payments to Howell.<sup>2</sup> Taxpayers offer no evidence in support of their contention that the agreements are indecipherably vague but say that the agreements so misconstrued their actual intentions that the agreements must themselves be vague. The Court finds this argument disingenuous, as the Record is entirely devoid of evidence of ambiguity.

Upon review of these agreements, the Court finds that the intent of the parties and the nature of the payments is obvious. The Purchase Agreement and Modification provide that an annual "salary" will be paid to Howell. The Second Modification terminates JDS's obligation to pay a "salary" to Howell. Daniel Nichols testified as to the payment terms of the Purchase Agreement:

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<sup>2</sup> The agreements at issue are the "Sales Contract & Purchase Agreement" (January 1, 1984); the "Sales Contract & Purchase Agreement Amendments" (September 7, 1984); and the "Modification of Sales Contract and Purchase Agreements and Amended Sales Contract and Purchase Agreement" (January 31, 1986).

I don't remember the exact number, but it was well over a million dollars. It was to be broken up in a lot of different ways for [Howell] to receive money. There was to be a stock purchase. There was to be a payment to Howell Equipment for rental of the equipment. There was to be salaries.

Deposition of Daniel Nichols at 16-17.

Further evidence of Howell's salary is found in the company's check register, which lists payroll checks issued to Howell during the third and fourth quarters of 1985. The fact that a salary was paid to Howell is also reflected in the company's treatment of the transactions on its Form 1120 (U.S. Corporate Income Tax Return), wherein JDS claimed a deduction for the amounts paid to Howell as salary. The company's Form 941s (Employer's Quarterly Employment Tax Return) list amounts withheld from employees' salaries, including Howell's. Howell's personal income tax return for 1985 lists \$23,103 as a deduction for federal income and social security tax withholding by JDS. The taxpayers' handling of the JDS check register and their characterization of the transactions as salary payments on both the JDS corporate tax returns and Howell's personal tax returns are consistent with the terms of the agreements. The Court finds that the agreements are not vague, but operate as clear statements of the parties' intent.

The Government also contests taxpayers' amended returns, arguing that they are nothing more than an attempt to reclassify or disguise the original transaction so as to avoid the tax consequences of the original transaction. The Government cites numerous cases which sustain its position, including authority from

the United States Supreme Court and the Tenth Circuit Court of Appeals. This Court finds that these opinions are relevant and are persuasive in this action. See Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945) (true nature of a transaction cannot be disguised by mere formalisms which exist solely to alter tax liabilities); Commissioner v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149 (1974) ("[w]hile a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not ... and may not enjoy the benefit of some other route he might have chosen to follow but did not."); Goatcher v. United States, 944 F.2d 747, 752 (10th Cir. 1991) (court rejected taxpayer's request that the court disregard the form of the transaction and look to its substance). The law is clear that the taxpayers in this action cannot disregard the form of their own transactions, but are bound by their actions and the quarterly tax returns they initially filed showing wages and withholding.

Confronted with adverse precedent from the Supreme Court, taxpayers respond that the entire series of transactions did not reflect the intent of the parties: "[t]he tax treatment established by the JDS accountant was one huge mistake from the beginning." Joint Response of [Taxpayers] on the Legal Issue of Amended Returns at 6. Whether the accountant erred in establishing the payments as salary, or whether the accountant had other reasons for doing so, is not an issue before the Court. The transactions evidence reflects taxpayers' intent, expressed in the agreements,

that a salary would be paid to Howell.

The final blow to taxpayer's argument urging acceptance of their amended returns is the fact that the returns are not valid. The returns offered as evidence by taxpayers in support of their motion are incomplete and unsigned. Section 6061 of the Internal Revenue Code states that any return required to be made under any provision of the Code shall be signed. Because they were not signed, the returns are invalid, and the Court cannot order the IRS to accept them.

### III. Conclusion.

The Court finds that Daniel L. Nichols, Sydney Nichols, and Jesse Lee Howell were responsible persons as described in 26 U.S.C. § 6672. The Court further finds that taxpayers willfully failed to pay the employment taxes of J.D.S. Systems, Inc. The Court also finds that the amended tax returns proffered by JDS fail to reclassify salary payments made by JDS to Jesse Lee Howell as payments for stock.

IT IS THEREFORE ORDERED that Defendant United States of America's Motion for Summary Judgment as against Daniel L. Nichols, Sydney Nichols, and Jesse Lee Howell (Docket #33) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff Jesse Lee Howell's and Counterclaim-Defendants Daniel L. Nichols and Sydney Nichols' Motion for Summary Judgment (Docket #30) is DENIED.

IT IS FURTHER ORDERED that Defendant United States of America's Request for Submission of Questions to Prospective Jurors

(Docket #26) is DENIED as MOOT.

ORDERED this 3 day of <sup>March</sup>~~January~~, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOE D. SCOTT; BARBARA A. SCOTT;  
COUNTY TREASURER, No  
Oklahoma;  
BOARD OF COUNTY COM  
Nowata County, Oklahoma,

Defendants.

*WJD*

**FILED**

MAR - 3 1995

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

RECEIVED  
MAR 06 1995

ACTION NO. 94-C-1076-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 3 day of March,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, Joe D. Scott; Barbara A. Scott; County Treasurer, Nowata County, Oklahoma; and Board of County Commissioners, Nowata County, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Joe D. Scott, was served with Summons and Complaint on January 6, 1995, by certified mail, return receipt requested, delivery restricted to the addressee; that the Defendant, Barbara A. Scott, executed a Waiver of Service of Summons on December 3, 1994 which was filed with the Court on December 8, 1994; that Defendant, County Treasurer, Nowata County, Oklahoma, was served with Summons and Complaint on November 18, 1994, by certified mail, return receipt requested, delivery restricted to the

NOTE: This document is a true and correct copy of the original as filed with the court. It is not a certified copy. The original is on file in the clerk's office.

addressee; and that Defendant, **Board of County Commissioners, Nowata County, Oklahoma**, was served with Summons and Complaint on November 18, 1994, by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, **Joe D. Scott; Barbara A. Scott; County Treasurer, Nowata County, Oklahoma; and Board of County Commissioners, Nowata County, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**The SW $\frac{1}{4}$  of the NW $\frac{1}{4}$ ; and the N $\frac{1}{2}$  of the SW $\frac{1}{4}$ ; and the S $\frac{1}{2}$  of the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 16, Township 29 North, Range 15 East of the Indian Meridian, containing 140 acres, more or less.**

**Subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.**

The Court further finds that this is a suit for the further purpose of foreclosure of security agreements securing certain promissory notes on personal property (chattels) located in **Nowata County, Oklahoma**, within the Northern District of Oklahoma.

The Court further finds that **Joe D. Scott** or **Joe D. Scott and Barbara A. Scott** executed and delivered to the **United States of America**, acting through the **Farmers Home Administration**, now known as **Rural Economic and Community Development**, the following promissory notes.

Loan Number	Original Amount	Date	Interest Rate
	\$81,700.00	08/31/79	9.50%
	89,764.64	04/09/82	14.25%
	116,118.56	05/01/84	10.25%
29-03	50,000.00	10/12/79	9.00%
29-15	71,311.06	07/07/89	9.00%
29-01	20,000.00	10/12/79	9.00%
29-17	28,536.93	07/07/89	9.00%
	16,100.00	05/05/80	11.00%
44-06	15,642.99	04/09/82	14.25%
44-12	16,559.60	05/01/84	10.25%
44-19	10,603.91	07/07/89	6.50%
44-08	58,800.00	12/29/82	11.50%
44-13	64,072.06	05/01/84	10.25%
44-14	94,749.85	07/07/89	6.50%
29-09	31,870.00	06/05/84	10.25%
29-16	27,927.23	07/07/89	9.50%
43-10	14,720.00	06/05/84	5.00%
43-18	18,283.04	07/07/89	5.00%

The Court further finds that on July 7, 1989, Joe D. Scott and Barbara A. Scott executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Economic and Community Development, a

Shared Appreciation Agreement pursuant to which Farmers Home Administration, now known as Rural Economic and Community Development, restructured the loans.

The Court further finds that as security for the payment of the above-described notes, Joe D. Scott or Joe D. Scott and Barbara A. Scott executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Economic and Community Development, the following real estate mortgages.

Instrument	Dated	Filed	County	Book	Page
Real Estate Mortgage	10/12/79	10/16/79	Nowata	508	595
Real Estate Mortgage	12/29/82	12/29/82	Nowata	540	463
Real Estate Mortgage	06/05/84	06/05/84	Nowata	552	416
Real Estate Mortgage*	07/21/89	07/25/89	Nowata	586	343

\*This real estate mortgage secures shared appreciation agreement only.

These mortgages cover the above-described real property, situated in the State of Oklahoma, Nowata County.

The Court further finds that as collateral security for the payment of the above-described notes and shared appreciation agreement, Joe D. Scott or Joe D. Scott and Barbara A. Scott executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Economic and Community Development, the following financing statements and security agreements thereby creating in favor of the Farmers Home Administration, now known as Rural Economic and Community Development, a security interest in certain crops, livestock, farm machinery and motor vehicles described therein.

<b>Instrument</b>	<b>Dated</b>	<b>Filed</b>	<b>County</b>	<b>File Number</b>
Financing Stmt.		08/29/79	Nowata	2438
Continuation Stmt.		03/19/84	Nowata	329
Continuation Stmt.		03/10/89	Nowata	129
Financing Stmt.		12/19/88	Nowata	888187
Continuation Stmt.		08/12/93	Nowata	888187 C
Motor Vehicle Lien	05/03/84			L2871473
Motor Vehicle Lien	04/22/82			L2035327
Security Agreement	08/31/79			
Security Agreement	05/05/80			
Security Agreement	01/22/82			
Security Agreement	02/15/83			
Security Agreement	12/23/83			
Security Agreement	04/11/85			
Security Agreement	05/20/86			
Security Agreement	09/11/87			
Security Agreement	06/03/89			
Security Agreement	06/06/90			
Security Agreement	01/21/91			
Security Agreement	11/25/91			
Security Agreement	10/16/92			

The Court further finds that the Defendants, **Joe D. Scott** and **Barbara A. Scott**, made default under the terms of the aforesaid notes, shared appreciation agreement, mortgages and security agreements by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Joe D. Scott** and **Barbara A. Scott**, are indebted to the Plaintiff in the principal sum of \$251,428.02, plus accrued interest in the amount of \$90,906.05 as of June 2, 1994, plus

interest accruing thereafter at the rate of **\$53.1578** per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that **the Defendants, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma**, are in default and have no right, title or interest in the subject real and personal property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, **acting** through Rural Economic and Community Development, formerly known as the **Farmers Home Administration**, have and recover judgment against the Defendants, **Joe D. Scott and Barbara A. Scott**, in the principal sum of \$251,428.02, plus accrued interest in the amount of \$90,906.05 as of June 2, 1994, plus interest accruing thereafter at the rate of **\$53.1578** per day until judgment, plus interest thereafter at the current legal rate of 6.57 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject real and personal property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **County Treasurer and Board of County Commissioners, Nowata County, Oklahoma**, have no right, title, or interest in the subject real and personal property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, **Joe D. Scott and Barbara A. Scott**, 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 appraisalment the **real** and personal property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real and personal 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** and personal property, under and by virtue of this judgment and decree, all of the **Defendants** and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject **real** and personal property or any part thereof.

**ROBERT**  

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**UNITED STATES DISTRICT JUDGE**

APPROVED:

**STEPHEN C. LEWIS**  
United States Attorney

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

Judgment of Foreclosure  
Civil Action No. 94-C-1076-B

PB:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

KENNETH LEE KNIGHT aka  
KENNETH L. KNIGHT; JANET  
LEE KNIGHT aka JANET L. KNIGHT;  
THE PACESETTER CORPORATION;  
COUNTY TREASURER, Rogers  
County, Oklahoma; and BOARD OF  
COUNTY COMMISSIONERS,  
Rogers County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-703-B

**FILED**

MAR 3 1995

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

ENTERED COURT CLERK  
MAR 03 1995

JUDGMENT OF FORECLOSURE

This matter comes  
of March, 1995. Th  
Lewis, United States Attorney  
Oklahoma, through Wyn Dee Bak  
Attorney; the Defendants, Cou  
Oklahoma, and Board of County Commissioners, Rogers County,  
Oklahoma, appear by Michele L. Schultz, Assistant District  
Attorney, Rogers County, Oklahoma; and the Defendants, Kenneth  
Lee Knight aka Kenneth L. Knight, Janet Lee Knight aka Janet L.  
Knight and The Pacesetter Corporation, appear not, but make  
default.

this 3rd day  
by Stephen C.  
istrict of  
States

*90P*

The Court, being fully advised and having examined the  
court file, finds that the Defendant, Janet Lee Knight aka Janet  
L. Knight, had an Entry of Appearance filed on August 30, 1994,  
by her attorney, Dale L. Jackson; the Defendant, The Pacesetter  
Corporation, through the Assistant Vice President, signed a

Waiver of Service of Summons on August 11, 1994, which was filed on August 19, 1994; the Defendant, County Treasurer, Rogers County, Oklahoma, was served by certified mail, restricted delivery, on July 20, 1994, the return being filed on August 25, 1994; and the Defendant, Board of County Commissioners, Rogers County, Oklahoma, was served by certified mail, restricted delivery, on July 20, 1994, the return being filed on August 25, 1994.

The Court further finds that the Defendant, Kenneth Lee Knight aka Kenneth L. Knight, was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning November 20, 1994 and continuing through December 25, 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, Kenneth Lee Knight aka Kenneth L. Knight, 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, Kenneth Lee Knight aka Kenneth L. Knight. 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 Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on July 26, 1994; and that the Defendants, Kenneth Lee Knight aka Kenneth L. Knight, Janet Lee Knight aka Janet L. Knight and The Pacesetter Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on March 18, 1994, Kenneth Lee Knight filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 94-00804-W. On July 5, 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 Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North 417.4 feet of the South 1252.2 feet of the West 209 feet of the East 1254 feet of the SW/4 of SW/4 and West 65.43 feet of North 417.4 feet of South 1252.2 feet and West 418 feet of East 1045 feet of North 417.4 feet of South 1252.2 feet of SW/4 of SW/4 of Section 16, Township 23 North, Range 15 East of IB&M, Rogers County, Oklahoma, according to the U.S. Government Survey thereof.

The Court further finds that on February 21, 1989, the Defendants, Kenneth L. Knight and Janet L. Knight, 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 \$46,000.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Kenneth L. Knight and Janet L. Knight, 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 February 21, 1989, covering the above-described

property. Said mortgage was recorded on February 21, 1989, in Book 802, Page 396, in the records of Rogers County, Oklahoma.

The Court further finds that the Defendants, Kenneth L. Knight aka Kenneth L. Knight and Janet Lee Knight aka Janet L. Knight, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Kenneth L. Knight aka Kenneth L. Knight and Janet Lee Knight aka Janet L. Knight, are indebted to the Plaintiff in the principal sum of \$44,999.61, plus interest at the rate of 10 percent per annum from December 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$315.02 (\$7.02 for service of Complaint and Summons, \$300.00 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Rogers County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$17.21 which became a lien on the property as of June 16, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Kenneth Lee Knight aka Kenneth L. Knight, Janet Lee Knight aka Janet L.

Knight and The Pacesetter Corporation, 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 against the Defendants, Kenneth L. Knight aka Kenneth L. Knight and Janet Lee Knight aka Janet L. Knight, in the principal sum of \$44,999.61, plus interest at the rate of 10 percent per annum from December 1, 1993 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 \$315.02 (\$7.02 for service of Complaint and Summons, \$300.00 publication fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Rogers County, Oklahoma, have and recover judgment in the amount of \$17.21 for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Kenneth Lee Knight aka Kenneth L. Knight, Janet Lee Knight aka Janet L. Knight, The Pacesetter Corporation, and Board of County Commissioners, Rogers 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, Kenneth L. Knight aka Kenneth L.

Knight and Janet Lee Knight aka Janet L. Knight, 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 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, Rogers County, Oklahoma, in the amount of \$17.21, 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

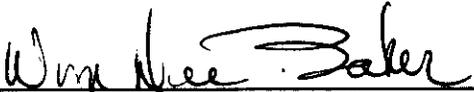
right, title, interest or claim in or to the subject real property or any part thereof.

**S/ THOMAS R. BRETT**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



MICHELE L. SCHULTZ, OBA #13771  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Rogers County, Oklahoma

Judgment of Foreclosure  
USA v. Kenneth Lee Knight, et al.  
Civil Action No. 94-C-703-B

WDB/esf

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

**FILED**

MAR 3 1995

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

SMS FINANCIAL, L.L.C., an )  
Arizona limited liability )  
company, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FRED G. LATHAM, JR., )  
 )  
Defendant. )

Case No. 94-C-1074-B

JUDGMENT

This matter comes on for consideration this 3<sup>rd</sup> day of March, 1995 on the Motion for Default Judgment filed herein by Plaintiff SMS Financial, L.L.C. ("SMS Financial"). This Court, being fully advised in the premises, finds as follows:

1. Defendant Fred G. Latham, Jr. ("Latham") has been properly served with the summons and Complaint and has failed to enter an appearance or file an answer herein. As a result of Latham's failure to enter an appearance or answer herein, this Judgment, by default, should be entered.

2. On or about November 30, 1987, Latham, for good and valuable consideration, executed and delivered to North Side Bank a certain promissory note in the principal sum of \$150,000 (the "Note").

3. The Note and all rights relating thereto have been sold and assigned to SMS Financial and SMS Financial is the owner and holder of the Note and all rights relating thereto.

4. Latham has defaulted under the terms and conditions of the Note in that he has failed to pay the indebtedness evidenced thereby. The principal balance currently outstanding under the Note is \$75,024.73, together with accrued interest through November

15, 1994, in the sum of \$52,498.24, together with continuing interest from November 15, 1994 until paid at the rate of \$24.67 per day.

5. As a result of the default of Latham under the Note, SMS Financial is entitled to a judgment against Latham for the full amount outstanding under the Note together with all costs of this action, including reasonable attorneys' fees.

IT IS THEREFORE ORDERED that Judgment is hereby entered in favor of SMS Financial and against Latham for the sum of \$75,024.73 together with accrued interest through November 15, 1994, in the sum of \$52,498.24, together with continuing interest from November 15, 1994, until paid at the rate of \$24.67 per day, together with all costs of this action, including reasonable attorneys' fees to be determined upon application.

S/ THOMAS R. BRETT

---

United States District Court Judge

UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE MAR 06 1995

<b>BRENDA CATOZZI,</b>	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No.
	:	94-C-77-K
<b>ZEP MANUFACTURING COMPANY,</b>	:	
an unincorporated operating	:	
division of NATIONAL SERVICES	:	
<b>INDUSTRIES, INC.,</b>	:	
	:	
Defendant.	:	

VOLUNTARY STIPULATION OF DISMISSAL WITH PREJUDICE  
OF PLAINTIFF'S COMPLAINT AGAINST DEFENDANT

COME NOW Plaintiff Brenda Catozzi ("Plaintiff") and Defendant ZEP Manufacturing Company ("Defendant") and pursuant to the provisions of Federal Rule of Civil Procedure 41(a) hereby move this Court to dismiss the above-captioned matter with prejudice to Plaintiff. Plaintiff and Defendant are to bear her and its own respective costs.

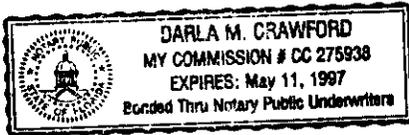
Plaintiff fully understands that this dismissal will fully and finally end all of her claims herein against Defendant and that she will not be entitled to bring any such claims ever in the future. Plaintiff understands the settlement allocation and agrees it is fair and appropriate. Plaintiff represents and warrants that she has been given a full and fair opportunity to consider this action and to consult with whomever she wished, including, but not limited to, her undersigned legal counsel in this action.

SO AGREED, this 21 day of February, 1995.

Sworn to and subscribed  
before me this 21 day  
of February, 1995.

Darla M. Crawford  
Notary Public

My commission expires:  
\_\_\_\_\_



SO AGREED AND APPROVED  
FOR BRENDA CATOZZI:

Melvin C. Hall

MELVIN C. HALL  
RIGGS, ABNEY, NEAL, TURPIN,  
ORRISON & LEWIS  
8801 N. Broadway, Ste. 101  
Oklahoma City, OK 73118  
(405) 843-9909

Attorneys for Brenda Catozzi

Nancy E. Rafuse

Wayman T. Johnson, Jr.  
Nancy E. Rafuse

PAUL, HASTINGS, JANOVSKY  
& WALKER  
Suite 2400  
600 Peachtree Street, N.E.  
Atlanta, GA 30308  
(404) 815-2400

Attorneys for  
RHP Manufacturing Company

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hill.dis  
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ENTERED ON DOCKET  
DATE MAR 06 1995  
**FILED**

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

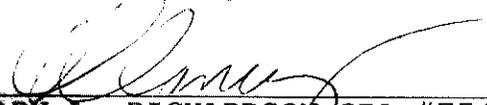
MAR - 3 1995  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

KEVIN E. HILL, individually, and )  
CATHERINE HILL, individually, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
TEXAS FARM BUREAU INSURANCE, )  
 )  
Defendant. )

No. 94-C 754K ✓

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the attorneys for the Plaintiffs, Keven E. Hill and Catherine Hill, Plaintiffs and the attorneys for Defendant, respectively, and hereby stipulate and agree that the above captioned cause may, upon order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein and state that a compromise settlement covering all claims involved in the above captioned cause has been made between the parties, and the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.

  
GARY L. RICHARDSON OBA #7547  
TIMOTHY P. CLANCY OBA #14199  
RICHARDSON, STOOPS & KEATING  
6846 South Canton, Suite 200  
Tulsa, Oklahoma 74136-3414  
(918) 492-7674  
ATTORNEYS FOR PLAINTIFF

3

not LC  
EWD  
EPM

*W. Wayne Mills*

W. Wayne Mills - OBA #10405  
Brian E. Dittrich - OBA #14934  
Mills & Whitten  
Suite 500, One Leadership Square  
Oklahoma City, Oklahoma 73102  
(405) 239-2500  
ATTORNEYS FOR DEFENDANT

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

MAR 02 1995

FLOYD HAMILTON,  
Plaintiff,

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

v.

Case No. 93-C-884-W ✓

ENTERED ON DOCKET

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

DATE MAR - 3 1995

Defendant.

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 claimant is not disabled within the meaning of the Social Security Act.<sup>1</sup>

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

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<sup>1</sup> 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).

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evaluation process.<sup>2</sup> He found that claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting/carrying 20 pounds occasionally or 10 pounds frequently, decreased grip bilaterally, and decreased bending/stooping. He found that claimant is unable to perform his past relevant work as a vactor operator at a waste water plant, janitor, body-fender repairman, and furnace charger.

The ALJ found that claimant's residual functional capacity for the full range of light work is reduced by decreased grip bilaterally and decreased bending/stooping. He found claimant is 51 years old, which is defined as "closely approaching advanced age," and has a seventh grade, "limited," education. In addition, he found that claimant does not have any acquired work skills which are transferable to the skills or semiskilled work functions of other work. Based on an exertional capacity for light work and the claimant's age, education, and work experience, the ALJ concluded that there were a significant number of jobs in the national economy that he could perform, such as delivery-driver, office cleaner, and sedentary assembly line worker. The ALJ determined that claimant 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:

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<sup>2</sup> 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 assessed claimant's RFC by improperly rejecting the assessment by claimant's treating physician.
- (2) That the ALJ improperly assessed claimant's RFC by failing to consider the severity of all his impairments in combination.
- (3) That the ALJ failed to make specific findings of fact as to how claimant could make a vocational adjustment to other work.
- (4) That the ALJ failed to give sufficient consideration to the totality of the vocational expert's testimony.

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).

The medical evidence establishes that the claimant has very mild degenerative disk disease of the lumbar spine, minimal degenerative joint disease of first CMC joints, left third and right third MCP joints, and "some" of the DIP joints, degenerative spurring of first PIP joints without erosive changes, some minimal asymmetric loss of joint space in the left hip, chronic lumbar strain, and obesity. He first complained of back pain to his doctor, D.S. Caughell, M.D., in February of 1990. A back x-ray was taken on February 14, 1990, and showed mild degenerative changes:

There is noted very mild narrowing of the intervertebral disc space between L5-S1. I do not see any evidence of acute fractures or acute subluxations. Very mild degenerative changes are seen throughout the lumbar spine, greatest at the L4-5 level. No bony destruction is seen. The sacroiliac joints are normal.

(TR 163).

He was referred to a rheumatologist, Dr. Timothy L. Huettner, on June 4, 1990 for the pain and swelling in his hips, lower back, wrists, elbows, and shoulders. The doctor

found slight swelling and tenderness in the hands, but normal range of motion in the wrists and hands (TR 176). Cervical and thoracic spine were normal (TR 176). He had tenderness in the lumbar spine and fairly good forward flexion, but marked limitation of lateral flexion and extension (TR 176). Ankles and knees were unremarkable. (TR 176). The doctor diagnosed degenerative joint disease (TR 176). He prescribed Motrin and exercises (TR 177). When claimant injured his left wrist in October of 1990, Dr. Caughell ordered an x-ray which showed "normal left wrist showing no evidence of acute bony injury." (TR 186).

Claimant complained of pain and morning stiffness in his hands, arms, lower legs, and thoracic and lumbar spine areas when he saw Dr. Huettner on April 19, 1991 and requested pain medication (TR 171). The doctor found "some tenderness in the upper midline lumbar spine," and swelling in the MCP joints of the hands and wrists, "although ROM and grip remain good." (TR 171). Shoulders, elbows, and ankles were unremarkable, and knees were not swollen or tender and had good range of motion. (TR 171). The doctor prescribed Darvocet and Voltaren (TR 171).

Claimant has not worked since October 14, 1991. He saw Dr. Huettner on October 17, 1991, complaining of pain in his hands, hips, knees, and ankles (TR 170). He told the doctor he thought "the Darvocet did help his arthritis symptoms although he continues to have problems . . . ." (TR 170). The doctor found that his "[k]nees, ankles and hips were unremarkable as were the shoulders and elbows. Hands and wrists I think had some minimal swelling in the MCP joints but ROM in his hands and wrists remains good as does grip strength." (TR 170). The doctor continued him on Darvocet, prescribed Skelaxin for

muscle spasms, and started him on Zostrix cream applied to the affected areas of the hands, wrists, knees, and ankles 3 or 4 times a day. (TR 170). He was to return in six months (TR 170).

On October 30, 1991, Dr. Caughell ordered an x-ray of claimant's back and no evidence was found of spinal stenosis or intrinsic massing. The impression was as follows: "[n]ormal CT scan of the lumbar spine showing no acute or significant chronic abnormality on this occasion. In particular, no evidence of herniated disc disease changes are present." (TR 142). At no time did Dr. Caughell or Dr. Huettner find claimant disabled.

On May 7 and July 23, 1992, Dr. Lawrence A. Reed saw claimant at the request of his attorney to rate his impairment and concluded:

The patient was found to have tenderness and restricted motion of his cervical spine, lumbar spine, thoracic spine, both shoulders, both elbows, both wrists, diminished grip strength both hands, tenderness and restricted motion of both hips, both knees, both ankles, etc. Selected areas were evaluated.

There was no compelling evidence of radicular pain suggesting nerve root impingement extending out of his neck into his upper extremities or out of his lumbar spine into his lower extremities. Restricted motion of the cervical spine, as well as most other structures of his body, were found to be either within normal limits or positive at the extremes of flexion, extension and rotation. An exception was found upon forward flexion of his lumbar spine, his cervical spine and of his left elbow. There was diminished grip strength of both hands. The grip strength of his hands was recorded repeatedly. The dial was blocked from his vision so that the patient could not determine what he had managed to accomplish upon previous examinations. The grip strength was found to be within 5% on his maximum and minimal efforts.

A straight-leg-raising test was found to be positive, when measured with a goniometer, at about the 68° level bilaterally . . . . He had been previously instructed by Dr. Giddens that he should lose weight in order to alleviate his lower back discomfort. There continued to be mild edema noted of both wrists and of both hands. (emphasis added)

(TR 192-93). Dr. Reed found small percentages of impairment in claimant's elbows and wrists (TR 196-199). He concluded that claimant had 15.5% impairment to the whole person due to restricted motion of his spine and 35% due to loss of strength in his hands.

Dr. Reed concluded that: "[i]t is my opinion that the patient is permanently and totally disabled to perform any employment for which he is reasonably suited based upon his training, education and experience and, which considering his past education and work history, he will not be able to be retrained and, in my opinion, he is permanently and totally economically 100% disabled." (TR 195). However, the doctor was not qualified to make such an evaluation of claimant's vocational prospects.

Dr. Jerry Patton also evaluated claimant on September 11, 1992 and concluded:

It is my impression that the patient does have a chronic lumbar pain and probably osteoarthritis of his hands. He does have good strength, however, he does state that it is reduced from what is used to be. He walks with a minimal amount of gait disturbance. He does have some difficulty in changing positions while lying on the examination table.

His range of motion activities are somewhat reduced, especially of the lumbar spine and some in the hands. He appears to have no trouble in getting around. His gait is swift. He appears to be stable and safe. He does not appear to have any disturbance of his dexterity in the use of his hands or fine manipulation, but does state he has decreased grip strength. However, his strength is what I consider good. He has no significant joint deformity, redness or swelling or heat of any affected joints or areas. It is noteworthy that he does have some reduced function of the interphalangeal joints and it is noteworthy that he has some swelling of his hands and fingers without the redness. It is my impression that he has degenerative joint disease of the lumbar spine and probable cervical spine and some in the hands and fingers.

(TR 203-204).

Claimant was evaluated in November of 1992 two more times by Dr. Reed and on December 29, 1992, the doctor once again reiterated that claimant had weakness of grip

strength in both hands, approximately 40% in the right and 30% in the left (TR 227). Consequently, the doctor concluded claimant's loss of function of both upper extremities resulted in a functional impairment of 35% to the whole man. (TR 227).

Claimant first asserts that the ALJ improperly rejected the assessment by claimant's treating physician, Dr. Lawrence A. Reed. While it is true that the ALJ considered Dr. Reed to be an examining physician rather than a treating physician, this determination is supported by the record. Thus, claimant's claim has no merit.

A treating source is defined in 20 C.F.R. §§ 404.1502 and 416.902 as a claimant's own physician who has provided claimant with medical treatment or evaluation and who has had an "ongoing treating relationship" with the claimant. In this case, claimant was injured on the job on October 14, 1991, the date on which he claims he became disabled (TR 34). Yet he did not begin seeing Dr. Reed until seven months after this injury, on May 7, 1992 (TR 36). Claimant has only seen Dr. Reed on four occasions (TR 216). In addition, claimant continued to see and receive treatment from Dr. D.S. Caughell, his family doctor, through November of 1991 (TR 35). Thus, the ALJ was correct to consider Dr. Reed an examining physician.

If Dr. Reed is considered to be a treating physician, the ALJ's decision is nevertheless correct. The ALJ is required to give substantial weight to the opinions of the claimant's treating physician. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). If the ALJ disregards the opinions of the treating physicians, specific, legitimate reasons must be given for such a finding. Id. Claimant claims the ALJ gave no good cause for his decision regarding Dr. Reed (Plaintiff's Opening Brief, Docket #6, pg. 7).

The ALJ, however, did clearly state his reasons for "declin[ing] to accord great weight to [Dr. Reed's] determination." (TR 14). Because the ALJ's reasons are specific and consistent with the record, he was correct in giving little weight to the opinion of Dr. Reed.

Claimant's second assertion is that the ALJ failed to consider all of claimant's impairments in combination. When a claimant has one or more severe impairments, 42 U.S.C. § 423(d)(2)(B) requires the Secretary to consider the combined effect of the impairments in making a disability determination. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987).<sup>3</sup>

In the instant case, as already stated, the ALJ found that the medical evidence established that the claimant had "very mild degenerative disk disease of the lumbar spine, minimal degenerative joint disease of first CMC joints, left third and right third MCP joints, 'some' of the DIP joints, degenerative spurring of first PIP joints without erosive changes, some minimal asymmetric loss of joint space in left hip, chronic lumbar strain, and obesity." (TR 20). The ALJ then stated that the claimant "does not have an impairment or combination of impairments listed in, or medically equal to one listed in" the Social Security Regulations (emphasis added). (TR 20). In addition, the ALJ addressed the various impairments of the claimant throughout his opinion (TR 12-19). Thus, the ALJ clearly considered claimant's impairments in combination in determining that claimant is not able to perform the full range of light work (TR 20-21).

Claimant's third assertion is that the ALJ failed to make specific findings of fact as to how the claimant could make a vocational adjustment to other work. At the fifth step

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<sup>3</sup>The court notes that § 423(d)(2)(C) was changed to (d)(2)(B) after the Campbell case was decided.

of the evaluation process, 20 C.F.R. § 404.1520(f) mandates that the Secretary consider the claimant's residual functional capacity, age, education, and past work experience in determining whether the claimant can perform other work in the national economy. Thus, the Secretary has the burden of proof at this stage. Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988). In addition, "[t]he Secretary faces a more stringent burden when denying disability benefits to older claimants." Emory v. Sullivan, 936 F.2d 1092, 1094 (10th Cir. 1991) (quoting Terry v. Sullivan, 903 F.2d 1273, 1275 (9th Cir. 1990)).

"Advanced age (55 or over) is the point where age significantly affects a person's ability to do substantial gainful activity." 20 C.F.R. § 404.1563(d). For a claimant of advanced age, "there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry." 20 C.F.R. § 404, Subpt. P, App. 2, § 202.00(f). Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). Conversely, this strict standard is not applied to a claimant who is closely approaching advanced age (50-54). The regulations at 20 C.F.R. § 404.1563(c) provide that the Secretary will consider that age, in addition to a severe impairment and limited work experience, may seriously effect a claimant's ability to adjust to a significant number of jobs in the national economy when a claimant is closely approaching advanced age. Therefore, the Secretary is required only to consider these factors and does not have to prove a claimant's ability to make a vocational adjustment in this situation.

The claimant in the present case, at 51 years old, is closely approaching advanced age. Thus, in determining disability § 404.1563(c) must be followed. The ALJ applied this standard in determining that the claimant can perform a significant number of jobs in the

national economy. The ALJ stated that he considered the claimant's exertional and nonexertional limitations, the vocational expert's testimony, and Rules 202.10 and 202.11 of 20 C.F.R. § 404, Subpt. P, App. 2 in reaching his decision (TR 20). In questioning the vocational expert, the ALJ presented hypothetical questions which took into account the claimant's age, education, past relevant work experience, and impairments (TR 73-76). As a result, the vocational expert concluded that there are a significant number of jobs in the national economy which the claimant is able to perform (TR 74-75, 79). Therefore, as the ALJ applied the correct legal standards and determined that there are jobs that the claimant can perform, there is no merit to claimant's third assertion.

Claimant finally asserts that the ALJ failed to give sufficient consideration to the totality of the vocational expert's testimony. "Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 724 (8th Cir. 1990)). Thus, the ALJ should consider the vocational expert's responses to hypothetical questions which accurately reflect the situation of the claimant.

The ALJ presented three hypothetical questions to the vocational expert in this case (TR 73-76). In response to the first hypothetical,<sup>4</sup> the vocational expert concluded that

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<sup>4</sup>The hypothetical asked was:

Q Let's go to hypothetical question. If I have an individual who's fifty-one years of age, has completed the seventh grade, can only read his name and does simple addition, that's about the limitation of his, ability of his math ability, has a past relevant work you just talked about what. Let's assume this individual can perform sedentary or light work with these additional restrictions. Exhibit 23, restrictions first off here, well the primary restriction looks like the chronic lumbar pain and arthritis in the hands but he does have good strength although it may be reduced from what he had before. He can walk okay with a minimum amount of disturbance. He had difficulty in changing positions while lying on the examination table. His range of motion is somewhat reduced in the lumbar spine and the hands. He has no trouble getting around, his gait is swift, stable and safe. No, there's no disturbance in the dexterity of the use of his hands or fine manipulation but does have decreased, says he has decreased grip strength but the measuring

jobs exist in the regional and national economy which an individual in such a position could perform, such as 17,000 light delivery driving jobs, 21,000 unskilled office cleaning jobs, and 23,000 sedentary assembly work jobs (TR 74-75). Considering the second and third hypotheticals, involving more serious limitations, the vocational expert determined that an individual in these situations would not be able to perform significant jobs in the economy (TR 76). Because the record supports the information presented in the first hypothetical, the ALJ properly relied on the vocational expert's response to this question (TR 19). In addition, the ALJ was correct to disregard the answers to hypotheticals two and three, as the more serious limitation presented to the vocational expert in these questions were not supported by medical evidence. Thus, the ALJ did give sufficient consideration to the totality of the vocational expert's testimony, and the plaintiff's final claim has no merit.

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

Dated this 2<sup>nd</sup> day of March, 1995.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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apparently by the doctor, who considers his strength good. The range of motion in the back is fifteen, extension and flexion was like eighty. The, the wrist has full, looks like full extension. The thumb had reduction, slight reduction from normal of ninety to about eighty, say about a ten degree restriction there. Fingers look, flexion is okay but the hyperextension is reduced from thirty to ten and the middle finger is also reduced to, from a hundred and twenty to ninety degrees. So slight reductions in all the, most of the use of the fingers but he is able to oppose his thumb to finger tips and manipulate small objects and hold tools such as a hammer, he's able to do those things okay. All right. With those restrictions that I've given you, would there be any jobs in the regional or national economy that such a person could perform? (TR 73-74).

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

ENTERED ON DOCKET  
DATE MAR 03 1995

JANINE MASON A/K/A JANINE  
SCRAPPER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

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FILED  
MAY 1995  
Richard M. ... Clerk  
U.S. District Court  
Tulsa, Oklahoma

CIVIL ACTION NO. 94-C-401-K

**ORDER**

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

Dated this 1st day of March, 1995.

**s/ TERRY C. KERN**  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

Wyn Dea Baker  
**WYN DEE BAKER, OBA # 465**  
Assistant United States Attorney  
U.S. Courthouse  
333 West 4th Street, Suite 3460  
Tulsa, OK 74103  
(918) 581-7463  
Attorney for the Defendant

Gary Grisso  
**GARY GRISSO**  
Attorney at Law  
1154 E. 61st St.  
Tulsa, OK 74136  
(918) 749-5531  
Attorney for Plaintiff

ENTERED ON DOCKET  
DATE MAR 03 1995

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

MARGARET LANSMAN,  
Plaintiff,  
vs.  
GARY LANSMAN,  
Defendant.

Case No. 95-C-0045K

FILED IN DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now on this 28 day of Feb., 1994, Plaintiff's Motion for Dismissal Without Prejudice comes on for consideration by the undersigned Judge and the Court being fully advised of the premises, finds that Plaintiff's said Motion for Dismissal Without Prejudice should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff's Motion for Dismissal Without Prejudice is granted.

**s/ TERRY C. KERN**

United States District Judge  
for the Northern District of  
Oklahoma

ENTERED ON DOCKET  
MAR 03 1995

THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SHIRLEY AIKINS,  
  
Plaintiff,  
  
v.  
  
CIMARRON TELEPHONE CO.,  
  
Defendant.

Case No. 94-C-536BK

*[Faint handwritten notes and stamps]*

ORDER OF DISMISSAL WITH PREJUDICE

Upon Joint Motion by the parties, this Court hereby dismisses the captioned action with prejudice.

IT IS SO ORDERED.

DATED this 1st day of March, 1995.

s/ TERRY C. KERN

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

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

**F I L E D**

MAR 02 1995

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

TERRY L. SPENCE, )  
)  
Plaintiff, )  
)  
v. )  
)  
DONNA E. SHALALA, )  
SECRETARY OF HEALTH AND )  
HUMAN SERVICES, )  
)  
Defendant. )

Case No. 93-C-864-E *WAGNER*

ENTERED ON DOCKET  
DATE MAR 03 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.<sup>1</sup>

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

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<sup>1</sup> 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).

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evaluation process.<sup>2</sup> He found that the degree of functional limitation the claimant alleged due to pain and other subjective complaints was credible between December 17, 1987 and November 13, 1991 (TR 24). He concluded that during this period claimant had the residual functional capacity to perform the physical exertional requirements of work, except for lifting/carrying over 10 pounds, frequent/repetitive bending/stooping, and prolonged standing/walking/sitting (TR 24). He determined that claimant was unable to perform his past relevant work as a laborer/pump runner, top finisher, tree trimmer, and welder, and his residual functional capacity for the full range of sedentary work from December 17, 1987 to November 13, 1991, was reduced by limitations on prolonged sitting and frequent/repetitive bending/stooping (TR 24). He noted that claimant was 30 years old at onset, which is defined as a "younger person," had a high school education plus 1 year of college and welding training, and did not have any acquired work skills which were transferable to the skilled or semiskilled work activities of other work (TR 24). Considering the claimant's exertional limitations, the ALJ found that there were not a significant number of jobs in the national economy which he could perform and he was therefore "disabled," as defined in the Social Security Act, after December 17, 1987 until November 13, 1991 (TR 25).

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<sup>2</sup> 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).

The ALJ went on to conclude that the medical evidence established that there had been improvement in claimant's medical condition, which was related to his ability to work (TR 25). He determined that claimant currently had an impairment or combination of impairments which was severe (TR 25). However, he found that the degree of functional limitation alleged due to pain and other subjective complaints was not credible after November 13, 1991 (TR 25). He concluded that, since that date, claimant has had the residual functional capacity to perform the exertional and nonexertional requirements of work, except for lifting/carrying over 20 pounds occasionally or 10 pounds frequently and frequent/repetitive bending/stooping, and required a sit/stand option every 20-60 minutes (TR 25). Therefore, he found that claimant was not able to perform his past relevant work as a laborer/pump runner, top finisher, tree trimmer, and welder (TR 25).

Beginning November 13, 1991, the ALJ concluded that claimant had the residual functional capacity to perform the full range of light work, reduced by a requirement for alternating sitting and standing (TR 25). He noted that, as of November 13, 1987, the claimant was 33 years old, which is defined as a "younger person," and did not have any acquired work skills, transferable to the skilled or semiskilled work functions of other work (TR 25-26). While the ALJ found that claimant's additional nonexertional limitations did not allow him to perform the full range of light work, he concluded that claimant can perform other jobs which exist in significant numbers in the national economy, such as light production welder, light delivery driver, and security system monitor. Therefore, the ALJ found that claimant's disability ceased on November 13, 1991.

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

- (1) That the ALJ erred in assessing claimant's residual functional capacity by improperly rejecting the assessment by claimant's treating physician and failing to consider the severity of all claimant's impairments in combination.
- (2) That the ALJ did not make specific findings of fact as to how claimant could make a vocational adjustment to other work.
- (3) That the ALJ failed to give sufficient consideration to the totality of the vocational expert's testimony.

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).

The medical evidence establishes that the claimant has severe recurrent herniated nucleus pulposus, status post laminectomy and fusion (X2), hepatitis C, and an old right hand injury resulting in non-severe permanent partial contracture of his little finger. Claimant's treating physician, Dr. Anthony C. Billings, performed several surgeries on claimant's back. On November 13, 1991, he listed the diagnoses he had made and procedures performed relating to claimant:

- DIAGNOSES:
- 1) HERNIATED NUCLEUS PULPOSA L2-3 UNOPERATED.
  - 2) HERNIATED NUCLEUS PULPOSA L4-5 OPERATED.
  - 3) HERNIATED NUCLEUS PULPOSA L5 OPERATED.
  - 4) HERNIATED NUCLEUS PULPOSA L5-S1 OPERATED.
  - 5) SEGMENTAL INSTABILITY L4 TO S1 OPERATED.
  - 6) HERNIATED NUCLEUS PULPOSA C5-C6 OPERATED.
  - 7) HERNIATED NUCLEUS PULPOSA C6-C7 OPERATED.
  - 8) HERNIATED NUCLEUS PULPOSA T9-10 UNOPERATED.

PROCEDURES PERFORMED:

- 1) Decompressive lumbar laminectomy with excision of herniated nucleus pulposa L4-5, L5-S1 bilateral.
- 2) Medial facetectomy L4-5, L5-S1 bilateral.
- 3) Foraminotomy L4-5, L5-S1 bilaterally.

- 4) Fusion posterior lateral L4 to the sacrum.
- 5) Harvest iliac bone graft.
- 6) Implantation bone growth stimulator.
- 7) Anterior cervical disectomy C5-6, C6-7.
- 8) Anterior cervical fusion C5-6, C6-7.

(TR 240).

Dr. Billings concluded that claimant suffered a 65% total physical impairment on that date as a result of these procedures (TR 240). Earlier, on June 3, 1991, Dr. Billings concluded that claimant was "TEMPORARILY TOTALLY DISABLED during the interval 12-14-1987 to the present time. His prognosis is good, but he will remain TEMPORARILY TOTALLY DISABLED for an additional three to six months." (emphasis added) (TR 248). Around the same time, on July 29, 1991, another treating physician, Dr. R. Clio Robertson, reported:

The patient is 9 weeks postop ACDF at the C5-6 and C6-7 levels. His preoperative bilateral arm pain is completely relieved since surgery. He is experiencing some interscapular pain and trapezius pain. He also notices occasional tingling of his fingers. Today his DTR are equal bilaterally. There is no sensory loss or muscle weakness. He does have tenderness of his paracervical and interscapular musculature. His x-rays demonstrate satisfactory appearance of the fusion. At this stage he will discontinue the Philadelphia collar. He will begin wearing a soft collar during the day and no collar at night. We will begin rehabilitation exercises. I will see him again in six weeks. In four weeks he will discontinue all immobilization.

Claimant testified that he does housework, including vacuuming and dusting (TR 53). He helps his wife with grocery shopping, pushes the pull cart, and carries the bags of groceries into the house from the car (TR 53). He drives occasionally for up to an hour and a half and visits elderly people and does odd jobs for them, such as painting (TR 54). He works around the house or painting for 30-45 minutes, then takes a break, and works

another 30 minutes (TR 62). He has successfully put up a wall made of 25 pound blocks and he mows the lawn (TR 46). He can walk a mile and does not use a cane or crutches (TR 48). He admits that his treating physician, Dr. Billings, has released him (TR 45) and has not restricted his activities (TR 66).

The ALJ noted all these facts in concluding that after November 13, 1991, when claimant was released by Dr. Billings, he could do at least light exertional work. He observed certain inconsistencies in claimant's testimony, such as the claim of being able to sit only twenty minutes without leg numbness and the statement that he can drive up to 1 1/2 hours before needing a break. He observed that loss of range of motion was not consistent from one examination to another - on March 14, 1990 he had 45 degrees flexion and on June 28, 1990 he had 28 degrees of flexion (TR 201-202). The ALJ noted that "[i]nconsistencies in testimony are grounds for discounting subjective complaints of pain." (TR 20).

The ALJ also noted that while claimant has taken medications for pain in the past, the medical records show that Dr. Billings refused to refill prescriptions for Lortab and Flexeril on August 9, 1991 and August 12, 1991 (TR 243) and to refill prescriptions for Motrin and Flexeril on January 3, 1992 and Ibuprofen and Flexeril on January 6, 1992 (TR 24) because claimant had not been in to see the doctor. This suggests that he was not suffering disabling pain.

Claimant points out that Dr. Boyd O. Whitlock found that he had "[d]isc disease, multiple levels, including cervical, thoracic and lumbosacral spine," some limitation of neck movement, pain on neck flexion and extension, and right hand deformity on March 30,

1992 (TR 279). However, the doctor also noted: "In general, there is no evidence of any joint deformity, redness, swelling, etc." (TR 279). And the doctor stated: "[g]ait is slow. There is no problem with stability. Patient can heel and toe walk very well. There is no need for any assistive device such as cane or crutch." (TR 279). He did not conclude claimant could not work.

Claimant also points out that Dr. Michael D. Farrar concluded he was "100 percent permanently and totally disabled" on November 15, 1991:

It is also my opinion, that Mr. Spence as the way he stands this date, is 100 percent permanently and totally disabled. He does have education through college of six months but essentially only has worked manual labor throughout his life time. It is my opinion, based upon the way that he stands at this time that he is unable to earn any wages in any employment for which he is or could become physically suited or reasonably fitted by education, training, or experience, and therefore qualifies as being 100 percent permanently and totally disabled.

(TR 239). However, the doctor only found "impairment quantified at 32 percent to the body as a whole as contributed by the cervical spine and 44 percent to the body as a whole as contributed by the lumbar spine." (TR 239). The decision that claimant could not work was based in large part on the doctor's opinion that there was no employment for which he is or could become physically suited or reasonably fitted by education, training, or experience. These conclusions were not within the expertise of the doctor.

The ALJ asked the vocational expert the following question:

Q) All right. Let's go to a hypothetical question. Let's say we have an individual who is 35 years of age, completed high school and one semester of college plus welding school, and let's assume he has the work history that you just described, and further find this person could still perform let's say light or sedentary work with these additional restrictions. Let's say he'd have the ability to only lift up 20 pound occasionally, can only bend, stoop, knee [sic], crouch, crawl or climb occasionally, would need to alternate sitting and standing every let's say 20 to 60 minutes, and you would have to, would have to avoid cold rainy damp type weather because it

aggravates his pain. And he would also have limitation in the use of his hands, particularly his right hand. He testified that during all times of the year he'd have trouble using a screwdriver or something of that nature, and showed us his fingers, the baby finger being curled in a drawn position, pretty much fully drawn, fourth finger about half drawn and the other fingers better use but weaker, so have problem with fine manipulation and a problem with weakness in the grip. Particularly worse in the wintertime. Is able to use a hammer for a certain length of time but not all day. I think those are the primary problems. And these are primarily related to the back. Also problems related to the back and neck pain that he has. With those restrictions would there be any jobs in the national or regional economy that such a person could perform? (TR 75-76).

The vocational expert responded there were 13,000 welding jobs, 17,000 light delivery driver jobs, and 5,500 security systems monitoring jobs available in the region that claimant could perform. (TR 77). The expert stated that claimant could not do these jobs if he had to lie down 30 minutes two or three times a day, as he claimed (TR 78), but the ALJ concluded that this claim had no credibility, as "claimant stated that he sleeps about 5 hours per night, and this would be expected to have some effect on daytime drowsiness. A change of sleep habits so that more sleep was obtained at night could affect a positive change." (TR 23).

There is no merit to claimant's arguments that the ALJ erred in his conclusions by rejecting the treating physician's assessment and failing to consider all impairments. Claimant's treating physician only found him totally disabled as of June 3, 1991 and for an additional three to six months. The ALJ fully considered all of Dr. Billings' reports (TR 21). The ALJ did not reject Dr. Billings' assessment and he did consider claimant's multiple impairments of back and neck pain and a contracture of one finger (TR 24).

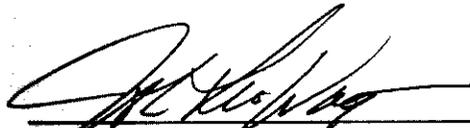
There is also no merit to the claim that the ALJ did not state how claimant could make an adjustment to other work. Because the ALJ found that claimant had no acquired

work skills that were transferable to **other work** does not mean he could not do unskilled jobs that exist in the national economy, such as light delivery driver or security system monitor, which do not require special **skills**, experience, or training. Since claimant was only 33 (TR 25), and he had a residual functional capacity for some light work, the ALJ was not required to make findings **regarding** plaintiff's ability to make an adjustment to other light jobs as is necessary for **individuals age 60 to 64**. 20 C.F.R. Part 404, Subpart P, § 202.00(f).

Finally, there is no merit to **claimant's** contention that the ALJ did not consider the totality of the vocational expert's **testimony**. He did consider it and discussed it fully (TR 22-23), but determined that claimant's **testimony** that he could only work for two or three hours without having to lay down for **thirty** minutes several times a day was not credible (TR 23). Therefore the vocational **expert's** testimony regarding the effect of this requirement on ability to work was **not part** of the ALJ's final determination.

The Secretary's decision that **claimant** was disabled after December 17, 1987 until November 13, 1991, but not thereafter, is supported by substantial evidence and is a correct application of the pertinent **regulations**. The Secretary's decision is affirmed.

Dated this 2<sup>nd</sup> day of March, 1995.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

**F I L E D**

MAR 2 1995

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

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

TROY JACKSON,  
  
Plaintiff,  
  
vs.  
  
DONNA E. SHALALA, SECRETARY OF  
HEALTH AND HUMAN SERVICES,  
  
Defendant.

Case No. 93-C-721-E ✓

ENTERED ON DOCKET  
DATE MAR 03 1995

**ORDER**

Now before the Court is the appeal of Plaintiff Troy Jackson (Jackson) of the Secretary's denial of his application for Social Security Disability and Supplemental Security Income benefits.

**Procedural History**

Jackson's claim for Social Security benefits was denied on February 25, 1992. His Request for Reconsideration was denied on March 30, 1992. Plaintiff then had a hearing before an administrative law judge on August 21, 1992. The ALJ denied Jackson's claim on January 8, 1993. The Appeals Council denied Jackson's request for review on June 10, 1993.

**Facts**

Plaintiff alleges the following errors on appeal: (1) his back impairment is the same or medically equivalent to the impairment described in the Secretary's "Listing of Impairments,"

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§ 1.05C; (2) the ALJ's determination that Jackson had the residual functional capacity to perform the full range of sedentary work is not supported by substantial evidence; (3) Plaintiff Jackson's nonexertional impairments precluded mechanical application of the medical-vocational guidelines; and (4) the ALJ failed to hear required vocational testimony. Plaintiff's Opening Brief at 2. The Court will consider each of these assertions in determining whether to reverse the decision of the ALJ.

### 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 at 750 (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.

1. Jackson's back impairment is the same or medically equivalent to the impairment described in the Secretary's "Listing of Impairments," § 1.05C.

Plaintiff must show that his impairment meets all of the

criteria set forth in a listing. Back impairments are listed under 20 C.F.R. § 404, Subpt. P, App. 1, § 1.05 (Disorders of the Spine).

Section 1.05C reads:

Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected 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.

Plaintiff contends that his symptoms meet the requirements of the listing. The government argues that Jackson did not suffer from a vertebrogenic disorder, such as a herniated disk. Plaintiff offers the September 23, 1982, report of Dr. Rounsaville, which found "he apparently did have a herniated nucleus pulposus," at some time prior to his comprehensive examination by Dr. Rounsaville on September 23, 1982. Tr. at 220. Plaintiff also offers brief reports, based on sparsely-documented examinations, which directly diagnose herniated nucleus pulposus on July 17, 1979, October 29, 1979, October 14, 1980, April 29, 1981, November 30, 1981, and March 9, 1983.<sup>1</sup> Tr. at 208, 210, 212, 214, 216, 217. The ALJ noted that Plaintiff's evidence stems from examinations conducted prior to December 31, 1982, which is the last date that Plaintiff was

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<sup>1</sup> The four most recent reports (beginning October 14, 1980) were prepared by doctors of osteopathic medicine. The doctors specific diagnosis, on all four examinations, was "extruded nucleus pulposus." Tr. at 208, 210, 212, 214.

insured for disability benefits.

The government seeks to rebut this documentary evidence with the fact that Plaintiff has undergone two laminectomies (November 1977 and May 1979). The laminectomies were followed by x-rays which "have repeatedly shown that there is no significant vertebrogenic disorder" following the surgeries. Brief in Support of Defendant's Administrative Decision Denying Disability Benefits to Plaintiff at 3; Tr. at 31-33. During the time period at issue, Plaintiff was examined by doctors who did not diagnose nucleus pulposus. Tr. at 237, 246-263.

The Court recognizes the requirement that treating physicians' opinions must be given more weight than those of other physicians, providing the opinions are based upon evidence in the record. Judging from the record, it is evident that Dr. Donnelly must be designated as Plaintiff's treating physician through December 31, 1982. The Court notes that his opinions are supported by evidence in the record.

The Court also finds that the opinions of Dr. Rounsaville are substantially supported by evidence in the record. The Court considers the opinions of other attending physicians, but with somewhat less weight than that accorded to Dr. Rounsaville. Dr. Rounsaville's opinions are based on thorough examinations with appropriate accompanying documentation. The Court's consideration of Dr. Rounsaville's opinions is mitigated, however, by the fact that he was not Plaintiff's treating physician.

The Court finds that there is some evidence that Plaintiff

suffered from herniated nucleus pulposus prior to December 31, 1982. The Court also finds, however, that there is substantial evidence in the record to support the ALJ's finding that Plaintiff did not suffer from herniated nucleus pulposus prior to December 31, 1982. When substantial evidence exists in the record which supports the ALJ's findings, the Court will not substitute its opinion for that of the ALJ.

The Court applies the same analysis to the requirement in § 1.05C(2), that there be evidence of "significant limitation of motion in the spine." For the same reasons, the Court must reach the same result: substantial evidence exists in the record to support the ALJ's conclusion. The ALJ's finding that Plaintiff did not demonstrate significant limitation of motion in the spine, prior to December 31, 1982 must stand.

Plaintiff's back condition fails to fulfill two requirements of the listings. Therefore, the Court finds that Plaintiff's back condition, as it existed prior to December 31, 1982, does not entitle him to Social Security disability benefits under the listings.

2. **The ALJ's determination that Jackson had the residual functional capacity to perform the full range of sedentary work is not supported by substantial evidence.**

Plaintiff's appeal of this finding is based on the ALJ's analysis of Dr. Rounsaville's examinations of Plaintiff. The ALJ noted that Dr. Rounsaville stated that Plaintiff "should be considered disabled to perform manual labor at the present time"

(Tr. at 222), and "[i]t is very unlikely that this patient will be able to go back to doing any sort of manual labor where use of his back is required" (Tr. at 220) (cited in ALJ's decision at Tr. 34). The ALJ then concluded:

Sedentary exertional activity, by its very definition, excludes the performance of manual labor, or labor that requires significant use of the back. Consequently, a finding that claimant could perform sedentary exertional activity is consistent with the limitations placed upon claimant by Dr. Rounsaville in his two contemporaneous evaluation-based opinions.

Tr. at 34.

The ALJ offered no justification, other than that discussed above, for his finding that Plaintiff has the residual functional capacity to perform the full range of sedentary work. The ALJ's findings are inconsistent with his burden of proof, which is to produce evidence that Plaintiff had the residual functional capacity to perform other work. Harris v. Sec'y of HHS, 821 F.2d 541, 544 (10th Cir. 1987) (citing Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987) and Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984)).

On the issue of Plaintiff's ability to perform the full range of sedentary work, the Court remands. The ALJ is to determine whether substantial evidence exists in support of the finding that Plaintiff had the residual functional capacity to perform the full range of sedentary work, through December 31, 1982. Should another hearing on this matter be held, the Court recommends that testimony from a vocational expert be sought. The evidence on appeal

indicates that Plaintiff suffered from significant nonexertional impairments related to his back condition.

IT IS THEREFORE ORDERED THAT this matter is remanded to Secretary for further findings consistent with this opinion.

IT IS SO ORDERED THIS 2<sup>d</sup> DAY OF MARCH, 1995.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

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

FILED

MAR 02 1995

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

HERSCHEL L. RITCHIE,

Plaintiff,

v.

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

Defendant.

Case No. 93-C-728-B

ENTERED ON DOCKET

DATE MAR 03 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.<sup>1</sup>

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

<sup>1</sup> 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).

(B)

evaluation process.<sup>2</sup> He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting greater than 20 pounds at a time occasionally, or 10 pounds at a time frequently, or repetitive bending or stooping. He found that claimant is unable to perform his past relevant work as a machinist for a heat exchanger manufacturer. He concluded that claimant had the residual functional capacity for the full range of light work, was 29-34 years old, which is defined as a younger individual, had the equivalency of a high school education, and did not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work.

Based on claimant's exertional capacity for light work, age, education, and work experience, the ALJ concluded claimant was not disabled and could perform a significant number of jobs in the national economy, such as assembler, hand grinder, cashier, self service station attendant, and telephone answerer. It is important to note that the ALJ found that the claimant met the disability insured status requirements of the Social Security Act on June 11, 1983, the date he stated he became unable to work, but only continued to meet them through December 31, 1988, and not thereafter. Thus any medical evidence concerning his condition after 1988 cannot be considered in determining his disability

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<sup>2</sup> 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).

status during that time.

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

- (1) That the ALJ erred in failing to find that claimant met the disability listing for obesity accompanied by low back pain and limitation of motion in his spine and hypertension.
- (2) That the ALJ's decision that claimant can perform the full range of light exertional activity is not supported by substantial evidence.
- (3) That the ALJ erred in giving the vocational expert a hypothetical question that did not precisely relate all of claimant's impairments.

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). The ALJ found that the medical evidence establishes that the claimant has severe obesity, mild scoliosis, and diffuse bulging annulus of moderate hypertrophy at L4-L5.

Claimant contends that the medical evidence shows that he met the disability listing for obesity prior to December 31, 1988 and therefore should be found automatically disabled. Section 10 of the Listings, entitled "Multiple Body Systems," covers impairments involving more than a single body system. Listing 10.10 deals with obesity:

Weight equal to or greater than the values specified in Table 1 for males, Table II for females (100 percent above desired level) and one of the following:

A. History of pain and limitation of motion in any weight bearing joint or spine (on physical examination) associated with X-ray evidence of arthritis in a weight bearing joint or spine; . . .

Claimant bears the burden of establishing this disability. A review of the medical

record during the relevant time period shows that Dr. James Trusell reported that claimant was 6'3" and weighed 312 lbs. on June 23, 1983. (TR 125). On August 23, 1983, Dr. James D. Harris stated claimant was 6'4" and weighed 315 lbs. On April 25, 1984, Dr. Rounsaville reported claimant was 6'4" and 337 pounds. (TR 145). These are the only measurements in the record during the relevant time period, July 11, 1983 to December 31, 1988. While claimant argues that he currently weighs more than 350 lbs. and Dr. David Combs found he was 6'0" tall on October 18, 1992, this evidence cannot be considered. Under the table for males, claimant would have to weigh 364 lbs. in order to meet the weight requirement of 10.10 of the listing at 6'3" in height. At a height of 6'2" he would have to weigh 356 lbs. to meet the listing. At either 312 lbs. or 315 lbs., plaintiff clearly did not meet this part of the listing during the relevant period. There is no merit to his claim that he meets the listing.<sup>3</sup>

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<sup>3</sup>Claimant asserts that the ALJ apparently discounted his obesity because he failed to lose weight. However, his failure to lose weight does not preclude a finding of disability. The general rule is that an impairment that can be remedied by treatment with reasonable effort and safety cannot support a finding of disability. Johnson v. Secretary of Health & Human Services, 794 F.2d 1106, 1111 (6th Cir. 1986).

The current regulation provides as follows:

Need to follow prescribed treatment (a) What treatment you must follow. In order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work. (b) When you do not follow prescribed treatment. If you do not follow the prescribed treatment without a good reason, we will not find you disabled . . . .

20 C.F.R. § 404.1530. This provision describes good reasons for not following prescribed treatment, including religious beliefs and the magnitude or danger of surgery.

The listing for obesity is quite specific and includes no reference to types of obesity. It reflects an agency decision that obesity can be a disabling impairment when it is severe and is accompanied by certain complications. Id. at 1113. It would not make sense for the regulatory scheme to include a specific regulation on obesity if a general regulation on treatment could entirely negate it. Id. It is also a well established rule of construction that a later, more specific, provision prevails over an earlier, more general provision if there appears to be a conflict. Id. Few if any claimants could satisfy section 10.10 if the mere possibility of losing weight, however remote or theoretical, could render the claimant ineligible. It is impermissible to presume that obesity can be remedied. Id.

A physician's recommendation to lose weight does not necessarily constitute a prescribed course of treatment, nor does a claimant's failure to accomplish the recommended change constitute a refusal to undertake such treatment. Id. Obesity, of itself, does not justify the conclusion that she has refused treatment nor the consequent denial of disability benefits. Id., McCall v. Bowen, 846 F.2d 1317, 1319 (11th Cir. 1988).

There is also no merit to claimant's argument that the ALJ erred in finding that claimant can perform the full range of light exertional work. He points out that Dr. Combs found that he could stand only two hours, walk for thirty minutes, had limited use of leg controls, and could never bend, squat or climb. However, the reports on which he relies (TR 168-170, 205-207) were completed in 1992 and cannot be considered. At the pertinent time from 1983 until 1988 no doctor reported that he had such limitations.

On June 23, 1983, Dr. Trusell examined him for complaints of hip pain. (TR 125). He told the doctor he did no heavy lifting at work, because he had devices to do the lifting for him. (TR 125). The doctor found:

He has remarkably good flexion without apparent discomfort. However, extension and side-bending to the right causing pain, side-bending to the left relieve his pain. He walks on his toes fairly well, but has difficulty walking on his heels because of weakness of dorsi-flexion of the right foot. He has good plantar flexion strength. He has weakness of dorsi-flexion on the right; although, he can dorsi-flex the foot. He inverts it when he does so; suggesting particular weakness of the peroneal muscles. Deep tendon reflexes for the patella and Achilles tendons are a plus four on a plus six and bilaterally equal.

(TR 125). The doctor told him to rest and recommended pelvic traction, physical therapy, and anti-inflammatory medications. (TR 125).

A CT scan of his spine the following day showed: "At the L-5, S-1 level diffuse bulging of the annulus fibrosis is noted. Mild bulging is again noted at the L-4, L-5 level and at the L-3, L-4. There is moderate facet hypertrophy identified at the L-4, L-5 levels. Due to the large size of the patient resolution is suboptimal." (TR 134).

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Claimant also argues that he has diabetes, but this was not diagnosed until 1992. (TR 193). He also relies on visits made in 1992 to his "treating physician," Dr. David Combs, to show he meets the listing for obesity. This evidence cannot be considered.

On August 23, 1983, Dr. James Harris reported that the traction had given relief for claimant's pain and allowed him to decrease his pain medication. (TR 135). The doctor found:

His deep tendon reflexes are symmetrical and decreased. He has negative straight leg raising signs bilaterally. He has bilateral symmetrical strength in his lower extremities. He has a rather exaggerated lumbar lordosis to help carry his increased abdominal fat pad. He relates that he has not lost much weight. He talked to the dietician, and she did not recommend him losing more than 30 pounds, but he is significantly overweight.

(TR 135). The doctor concluded claimant had "L5 radicular symptoms on the right, multiple lumbar disc bulging by CAT scan," nutritional obesity, hypertension, and "a transitional L5 lumbar vertebra with lumbar lordosis." (TR 135). He recommended more pelvic traction, exercises, and weight reduction. He concluded:

with his increased abdominal fat pad he is only exaggerating his back pain problems, as well as his hypertension and his very positive family history of diabetes. I think the conservative approach to this gentleman at the present time is indicated. We will schedule to see this gentleman back in one week, but I feel he will need major encouragement to get after his weight loss. I think that this will significantly improve his present health problems and also decrease his health problems in the future, for he is only 29 years of age, but this weight is a major problem.

(TR 136). On August 30, 1983, Dr. Harris reported that claimant was having pain in his right sacroiliac joint and hip and found that the sacral base was fairly well balanced with some point tenderness. (TR 138). Straight leg raising was negative bilaterally. He was treated with gentle osteopathic soft tissue technique and the right sacroiliac joint and right piriformis muscle were injected. (TR 138). He was told to continue with his medications, low back exercise, and pelvic traction.

By September 6, 1983, Dr. Harris reported claimant had been feeling fairly good,

but had experienced severe back pain after "ambulating a little bit." (TR 139). His leg pain was gone, his deep tendon reflexes were symmetrical, and he had negative straight leg raising signs. He was treated with gentle osteopathic mobilization and the doctor was able to mobilize the sacroiliac joint bilaterally. (TR 139). He was told to continue with his medication, and an exercise program was reviewed with him. (TR 139). He was told to discontinue his straight leg raises. (TR 139).

On September 12, 1983, Dr. Harris said claimant was feeling a little better and had no radiating pain, just generalized soreness, in his lower back. (TR 140). His sacral base was well balanced, muscle guarding in the back was decreased, and he had no piriformis tightness. (TR 140). He was treated with osteopathic mobilization and it went well. (TR 140). Dr. Harris referred him back to his treating physician, Dr. Berkenbile, saying: "I feel I have done as much as I can for this gentleman at the present time. Would strongly recommend a weight reduction program, and a strengthening program of his low back area." (TR 140).

Dr. Berkenbile prescribed Rufin on August 31, 1983 and refilled it on September 14, 1983. (TR 185). He referred claimant to Dr. Eugene Field, an orthopedic surgeon, on September 22, 1983. (TR 184). On July 12, 1994, he refused to evaluate claimant's ability to return to work since he was being treated by another doctor. (TR 148).

Dr. Field performed an EMG, which revealed "mild symptoms in the L4-5 area, [which] would be consistent with the facet hypertropia and diffuse bulging noted at L4-5 on the CT scan . . . ." (TR 181). The doctor stated:

I have suggested to the patient that he may expect a full recovery and I have suggested certain progressive rehabilitation maneuver such as returning his

wheel chair and cane but continuing home traction and starting on a stretching and walking program. My diagnosis is for traumatic aggravation of pre-existing degenerative changes. With his negative Lasague, I see no indication at this time for performance of a myelogram or other invasional studies. He will recheck with us in several weeks in further conservative follow up.

(TR 181). Later in November 1983, Dr. Field reported: "This patient returns with gratifying rehabilitation. He is walking a mile twice a day. The Lasegue is tight at 75 on the right and 80 on the left. We will continue with exercises 3 and 4 and gradually escalate walking to 2 miles twice per day." (TR 181). There is no evidence that claimant returned to the doctor's office again.

On January 10, 1994, Dr. Paul Atkins reported that he saw claimant at the request of his attorney and x-rays revealed "arthritis of the lumbar spine." (TR 141). The doctor concluded:

Physical examination of the lumbar spine revealed paravertebral muscle spasm and limitation of motion in the region of the lumbar spine. When the limitation of motion in the region of the lumbar spine was measured with the goniometer a 15° bilateral reading was found on rotation. A 10° bilateral reading was found on lateral flexion. Flexion revealed a 15° reading and extension of the dorsolumbar spine revealed a 10° reading when measured with the goniometer. When these measurements were checked with the tables in the "Guides to the Evaluation of Permanent Physical Impairment" by the American Medical Association it was found that Herschel Ritchie has a 19½% of total physical impairment to the whole man as a result of the limitation of motion incurred from a chronic lumbosacral strain resulting from an accident . . . due to the fact that this injury also aggravated a pre-existing arthritic condition of the lumbar spine, it is my opinion that Herschel Ritchie has a 24% of total physical impairment to the whole man as a result of the chronic lumbosacral strain incurred to his lumbar spine as a result of the accident of June, 1983 at the Shell and Tube, Inc. in Tulsa, Oklahoma.

(TR 141). The ALJ noted that this report was in "direct conflict" with the report of an examination and report done by Dr. Robert Rounsaville on April 25, 1984, at the request

of an insurance company. (TR 17). Dr. Rounsaville stated:

He complains of tenderness in the lumbosacral area. However, he can flex forward 80°, reversing the lumbar lordosis without paraspinal muscle spasm. The last ten degrees of flexion is possibly restricted by his overweight status. He can extend backward 30° and to either side 30° without limitations at all. Again, there is no muscle spasm and not much tenderness produced on the various ranges of motion.

...

X-Rays:

Lumbar Spine (AP/Lateral/Two Obliques/Spot): There is no narrowing of intervertebral spaces. There are no arthritic changes noted. There is no evidence of congenital defect.

IMPRESSION: It is my opinion that this patient may have sustained a lumbosacral sprain, involving the right lumbosacral area. I am unable to demonstrate physical findings consistent with disc lesions at this examination to produce the neurological findings into the right leg. There is no evidence of muscle involvement. It is suggested that his difficulties may be related more to a postural type back pain secondary to the obesity. As far as can be determined, the CAT scan only revealed a bulging, which could be expected in view of his weight range. It would be difficult to fit this patient with a brace. He should be able to return to work. He informs me that he is laid off at the present time, which possibly is the reason he is not working. I do not feel that his back complaints would preclude employment. His prognosis for full recovery is good.

(TR 145-146). The ALJ properly gave less weight to Dr. Atkins' and Dr. Rounsaville's conflicting reports and greater weight to the reports of doctors who examined, evaluated, and treated claimant. The last medical report during the relevant time period is from Dr. R. Mahaffey, who stated that claimant was his patient and taking naprosyn "to control his arthritis and back problem" and mentioned claimant was going to travel. (TR 152). At the hearing, claimant stated he moved to Mexico in 1986 and returned in 1991. (TR 58). Dr. Marco Mendez reported that he saw claimant in Mexico for "arthropathy of the spine" and prescribed naprosyn and metocarbamol from June 1986 until an unknown date. (TR 151).

Dr. Mendez did not refer to any medical tests or x-rays he performed.

The ALJ noted that there was no evidence that claimant suffered debilitating pain, since he was not prescribed narcotic-type pain medication, a cane, or wheelchair and was told to walk, do back-strengthening exercises, and lose weight. (TR 18). There was no evidence of atrophy or muscle wasting. (TR 18).

The ALJ pointed out that the testimony by claimant and his wife that he fell two or three times a day after 1983 (TR 53) was not supported by any medical evidence. (TR 18). He also concluded that it was "inconceivable" that claimant's wife helped a man of his height and weight get up, cleaned up, and to the bathroom. (TR 18).

There was sufficient medical evidence to support the decision of the ALJ that claimant could do light work during the relevant time period, since he was only 29-34 years old, had a high school education, and was only restricted from bending, stooping, and squatting due to his weight problem.

Finally, there is no merit to claimant's argument that the ALJ erred in giving the vocational expert a hypothetical question that did not include all of claimant's impairments.<sup>4</sup> Claimant contends the ALJ should have mentioned claimant's obesity,

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<sup>4</sup>The questioning of the vocational expert by the ALJ went as follows:

Q Let me give you a hypothetical. Let's assume that we have a male individual, individual, who is 34 years of age, had a GED education with the ability to read and write and use numbers. Let's assume further that this individual in general has the physical capacity to perform sedentary or light work with the following functional and mental limitations. This individual weighs 312 pounds and has a symptomatology from a variety of sources, including chronic back pain, which is of a sufficient severity as to be noticeable to him at all times. And for which he is taking medication. He also has high blood pressure, and is taking medication for the high blood pressure. And the medication for this symptomatology will not preclude him from functioning at the sedentary or light level. And he can remain reasonably alert to perform functions presented by his work setting. Now let's assume further that this individual functioning from the sedentary and light level would find it necessary to change positions from time to time to relieve his symptomatology. And that his lifting would be in an area of normally at 10 pounds and with the occasional up to 20 to 25 pounds on lifting. He'd be restricted as to bending and stooping and squatting, due to the weight problem. Now, based upon the hypothetical I'm giving you, obviously this individual could not return to his past relevant work as it was in excess of light or sedentary, is that not correct?

hypertension, and diabetes. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the vocational expert had been present for all of the testimony and studied the record. (TR 60). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated. (TR 64-65). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). It was proper for the ALJ to limit the hypothetical questions to those impairments which were actually supported in the record. Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

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A Correct, Judge.

Q Now with these restrictions in this hypothetical situation, you've also indicated that he'd have no skills which would be transferrable to other jobs in the national economy of a less, lesser exertional level, but assuming the hypothetical can you identify any jobs which you believe could be performed by such an individual?

A Yes, sir, He could function as an assembler, which is an SVP two or three, nationally sedentary 211,000, light 1,072,000. Utilizing the state of Oklahoma as a geographical region, sedentary 1,324, light, 3,815. He could function as a hand grinder, nationally sedentary 24,000, light 163,000. Within the state of Oklahoma, sedentary 155 and light 913. He could function as a self service gas station attendant, nationally light, 240,000, within the state of Oklahoma 1,191. He could function as a telephone answering person, sedentary nationally 137,000, light 48,000, sedentary within the state of Oklahoma, 2,439, light, 812. He could function as a cashier, sedentary nationally 615,000, light 922,000, within the state of Oklahoma 4,024 and light 6,037. This is just a representation of the jobs, it's not exhaustible certainly. (TR 61-63).

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

Dated this 1<sup>st</sup> day of March, 1994.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:Ritchie

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT ~~DATE~~ MAR 03 1995  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM McLAURIN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONNA E. SHALALA, SECRETARY )  
 OF HEALTH AND HUMAN SERVICES, )  
 )  
 Defendant. )

No. 93-C-858-K

*[Handwritten initials]*  
1995  
Richard W. ... Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

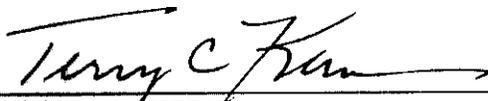
Before the Court is the motion of the plaintiff for extension of time to appeal. By Order entered November 21, 1994, the Court denied plaintiff's complaint for social security benefits. Federal Rule of Appellate Procedure 4(a)(1) requires in a case in which the United States or an officer or agency thereof is a party, the notice of appeal must be filed within sixty days after the date of the entry of the judgment appealed from. Plaintiff's notice of appeal was not filed until January 23, 1995, more than sixty days after the entry of a final order. Plaintiff has demonstrated through his motion and brief that, through inadvertence, the deadline was missed.

Plaintiff relies upon Federal Rule of Appellate Procedure 4(a)(5), which states in pertinent part "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed in Rule 4(a)." The present motion was filed on February 15, 1995 and therefore is

timely under Rule 4(a)(5). Defendant does not object to the motion; upon review, it shall be granted. Hinton v. City of Elwood, Kan., 997 F.2d 774, 777-779 (10th Cir.1993) holds a district court's approval of a subsequent timely motion under Rule 4(a)(5) validates a prior untimely filed notice of appeal. Accordingly, plaintiff need not file a second notice of appeal.

It is the Order of the Court that the motion of the plaintiff for extension of time to appeal is hereby GRANTED.

So ordered this 1<sup>st</sup> day of March, 1995.

  
\_\_\_\_\_  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE



person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

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

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

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

In this case, the review concluded at Step 4 after the ALJ determined that Plaintiff could perform sedentary exertional activity. The ALJ found that Claimant has the residual functional capacity to perform work-related activities except for work involving lifting more than 10 pounds at a time; lifting/carrying

more than occasionally articles like docket files, ledgers, and small tools; walking/standing more than 2 hours in an 8-hour day; and doing any significant stooping. The ALJ found that Ms. Leggett's past relevant work as a purchasing agent (as performed within the national economy at the sedentary level) did not require the performance of work-related activities precluded by the above limitations. (Tr. 19).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The first objection raised by Plaintiff is that her degenerative arthritis of the right knee joint is so severe as to

meet or equal the criteria listed in Appendix 1, in particular, §1.03, titled "Arthritis of a major weight-bearing joint (due to any cause)." According to this listing, the claimant must show a history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination for this determination. In addition the Listing requires either:

(A) Gross anatomical deformity of hip or knee (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) supported by x-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand; or

(B) Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

See 20 CFR Part 404, Subpart P, Appendix 1, §1.03.

The ALJ properly noted that the medical evidence clearly demonstrates that Plaintiff did not satisfy all the medical criteria of §1.03(A) as she did not have marked limitation of knee motion for the required period of twelve continuous months and did not have markedly limited ability to walk and stand. Moreover, Plaintiff did not satisfy all the medical criteria of §1.03(B) since it appears that she had full-weight bearing status within 12 months of January 29, 1991, her alleged disability onset date. (Tr. 18). On July 16, 1991, Dr. Simmons reported her knee motion had stabilized at 120 degrees. (Tr. 153). In September 1991, Plaintiff was in school and "functioning well as long as she is careful with the knee." (Tr. 152). In October 17, 1991, Claimant

was ambulatory although on occasion she used a "brace for 2-3 days." (Tr. 152). Dr. Simmons noted on December 18, 1991, "she walks with a limp, although in watching her, once she works out the stiffness, she does fairly well with her gait with only a mild antalgic gait. She demonstrates full extension, flexion to 115 degrees." (Tr. 151). On January 31, 1992, x-rays of Claimant's knee revealed medial compartment narrowing but no bone-on-bone contact. The examination revealed 0-120 degrees of motion in the knee and also that the knee was stable. (Tr. 151). Thus, Plaintiff did not meet her burden in showing that her condition satisfies the requirements of §1.03 of Appendix 1, Listing of Impairments.

Next, Plaintiff contends the ALJ improperly evaluated her complaints of pain. The Tenth Circuit has held that the medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and determined that Claimant's allegations of inability to work, including pain, are not credible or supported by the medical documents in evidence. (Tr. 15). There is no evidence the ALJ disregarded Plaintiff's subjective allegations of pain or that he failed to consider all the evidence presented that could reasonably produce the pain so alleged. Id. at 165. In fact, the ALJ's decision properly discusses: Plaintiff's daily activities; her medication along with its

effectiveness and side effects; her use of a cane and prescription knee brace; and any other functional restrictions. Furthermore, the ALJ's questions at the hearing also indicate his consideration of the location, duration, frequency and intensity of Claimant's pain. The fact that Plaintiff cannot work without some pain or discomfort is not controlling nor does it determine that Claimant's pain is totally disabling. See Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991). Plaintiff's treating physician did not consider her pain to be disabling. In fact, Dr. Simmons' statements regarding Claimant's ability to perform sedentary work substantiates rather than undermines the ALJ's decision. Dr. Simmons consistently maintained Claimant was "a candidate for sedentary vocational activity." (Tr.148-149). Even Plaintiff's testimony does not substantiate her argument that the pain was "totally disabling." She testified she was attending school in anticipation of "working for somebody again." (Tr. 48). Therefore, substantial evidence supports the ALJ's conclusion that Claimant's subjective complaints of pain are not of such intensity, frequency, and duration to affect her concentration or prevent the performance of sedentary work activity and are not credible to the extent that they precluded her from performing sedentary work. Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988).

Lastly, Plaintiff claims the vocational expert misclassified Plaintiff's past work as a purchasing agent as one which can be

performed at the sedentary level. To establish a disability, a "claimant bears the burden of proving [her] inability to return to [her] former job and to [her] former occupation as that occupation is generally performed through the national economy." Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1051 (10th Cir. 1993). The vocational expert testified that the position of purchasing agent entails the performance of light, sedentary or medium work, depending upon the employer. "In [Claimant's] case, it was medium as she was unloading and stocking shelves and things like 10 to 20 pounds of lifting. They all required reaching, handling, fingering and feeling, and they would be semi-skilled jobs." (Tr. 50). According to the expert, this "type" of work, "purchasing clerk," is classified at the sedentary exertional level under §249.367-066 of the Dictionary of Occupational Titles. (Tr. 130). The vocational expert identified the following positions at the sedentary exertional level which Plaintiff could perform:

Purchasing Clerk	122,000 nationally	15,000 regionally
Receptionist	160,000 nationally	20,000 regionally
Order Clerk	89,000 nationally	11,000 regionally

(Tr. 54). Although Claimant's previous job, as she performed it, may have been medium, exertional level, there are a sufficient number of sedentary exertional level, purchasing "type" jobs existing in the national economy. Claimant, therefore, has not demonstrated her inability to return to her former "type" of work, as that job is generally performed in the national economy. See Andrade, 985 F.2d at 1052. Further, because the vocational expert's opinion was based both on Claimant's vocational records

and Claimant's testimony at the hearing, there is no evidence the vocational expert disregarded the Claimant's job duties in assessing Claimant's former "type" of employment as "sedentary." This Court finds there is sufficient relevant evidence in the Record to support the ALJ's ruling that Plaintiff "is able to perform her past relevant work as purchasing agent as that work is performed within the national economy at the sedentary level" subject only to the limitations previously listed above. (Tr. 19).

In conclusion, this Court determines there is sufficient relevant evidence to support the ALJ's determination that Claimant is capable of performing her past relevant work as a purchasing agent, as that work is performed within the national economy. The Secretary's decision is, therefore, AFFIRMED.

SO ORDERED THIS 14 DAY OF MARCH, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

**FILED**

MAR - 1 1995

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

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

LINDA S. GOINS, surviving spouse )  
and next of kin of CORDELL G. )  
GOINS, JR., Deceased, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MEADOW GOLD DAIRIES, INC., a )  
Delaware corporation; and BORDEN, )  
INC., a New Jersey corporation, )  
 )  
Defendants. )

Case No. CIV 94-993-K

**JOINT STIPULATION OF  
DISMISSAL WITH PREJUDICE**

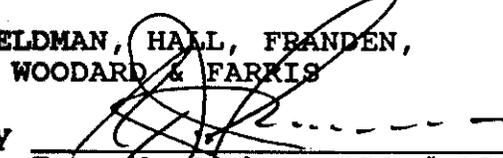
Come now the Plaintiff, Linda S. Goins, and the Defendants, Meadow Gold Dairies, Inc., and Borden, Inc., by their respective counsel, and pursuant to Rule 41 (a)(1)(ii), hereby stipulate that the above-entitled cause be dismissed with prejudice.

MERRITT & ROONEY, INC.

By:   
John W. Merritt, OBA # 6146  
Michael T. Rooney, OBA # 7746  
P. O. Box 60708  
Oklahoma City, OK 74146  
Tel: 405-236-2222

ATTORNEYS FOR PLAINTIFF(S)

FELDMAN, HALL, FRANDEN,  
WOODARD & FARRIS

By   
Tony M. Graham, OBA # 3524  
John R. Woodard, III, OBA # 9853  
R. Jack Freeman, OBA # 3128  
Douglass R. Elliott, OBA # 15152  
525 South Main, Suite 1400  
Tulsa, OK 74103-4523  
Tel: (918) 583-7129  
Fax: (918) 584-3814

ATTORNEYS FOR DEFENDANT,  
BORDEN, INC.

ENTERED ON DOCKET  
DATE MAR 02 1995

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

**FILED**

L. DWIGHT PAYNE,

Plaintiff,

v.

FURMANITE AMERICA,  
INC.,

Defendant.

MAR - 1 1995

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

Case No. 92-D-1031-E

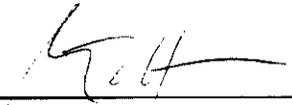
**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW Plaintiff and Defendant, by and through undersigned counsel, and stipulate to the dismissal of the above styled and numbered cause with prejudice to any future action.

Respectfully submitted,

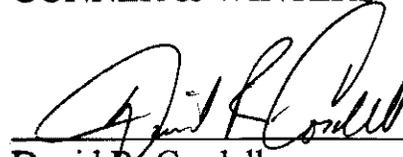
FRASIER & FRASIER

By:

  
\_\_\_\_\_  
Steven R. Hickman OBA#4172  
1700 Southwest Blvd., Suite 100  
P.O. Box 799  
Tulsa, OK 74101-0799  
918/584-4724  
Attorney for Plaintiff

CONNER & WINTERS

By:

A handwritten signature in black ink, appearing to read "David R. Cordell", written over a horizontal line.

David R. Cordell

2400 First National Bank Building

Tulsa, OK 74103

918/586-8995

Attorney for Defendant

ENTERED ON DOCKET

DATE MAR 02 1995

FILED

MAR 1 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

MICHAEL W. MARTIN and LOU ESTHER )  
 NICKELL, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA, ex rel. )  
 MANUEL LUJAN, JR., Secretary of the )  
 Interior for the UNITED STATES )  
 DEPARTMENT OF INTERIOR, )  
 )  
 Defendants. )

Case No. 92-C-88-E

ORDER

Now before the Court is the Motion To Reconsider and Amend Judgment (Docket #22) of the Plaintiffs Michael W. Martin (Martin) and Lou Esther Nickell (Nickell) regarding the Order of this Court affirming the determination of the Secretary of the Interior as to the validity of the will of Winona Anderson (Anderson), an Osage Indian.

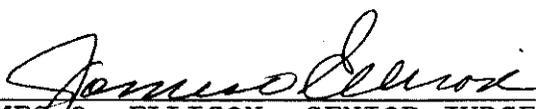
Prior to this Court's initial determination, the parties agreed that no discovery was necessary and that the matter should be submitted on the administrative record. This Court then found that the conclusion that Lou Walter Brock (Brock) was of Osage blood was not against the clear weight of the evidence, and denied the appeal the Plaintiffs wherein they sought to vacate the decision of the Secretary of the Interior finding that Brock is of Osage Indian Blood and an heir of Anderson. Plaintiffs now seek reconsideration of this Court's Order of January 3, 1995, arguing that the Court improperly failed to consider the blood type of

Brock or the Judgment of the Dallas County Probate Court, State of Texas, Cause Number 89-782-P2, dated May 8, 1990 wherein it was determined that Brock was not an heir of Anderson.

Neither of Plaintiffs' arguments has merit. The Court considered the argument regarding Brock's blood type and determined that it was not relevant to this matter because it was not evidence submitted within the time period prescribed by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1661. Similarly the judgment of the Probate Court of the state of Texas was not submitted in a timely manner and cannot be considered. It was determined that Brock was an heir of Anderson and that the will should be approved on February 2, 1990. It was not until after that time that the probate court made its determination. Clearly, §5(a) was enacted in order that there would be some finality to the determination of the Secretary. Plaintiffs failed to submit the evidence they wish the Court to consider within the prescribed time period, and cannot circumvent that section merely because they appealed the administrative determination. Moreover, Plaintiffs' authority is inapplicable because it does not address the credit given to a judgment of another state after the time prescribed for the presentation of evidence within an administrative proceeding.

Plaintiffs' Motion to Reconsider is denied.

IT IS SO ORDERED THIS 1<sup>st</sup> DAY OF MARCH, 1995.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

RICHARD E. TYLER, II; LANA C. )  
TYLER; REGINA L. MEIGS; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma; TULSA ADJUSTMENT )  
BUREAU, INC., a corporation; )  
MARK FRAZIER MEIGS, )

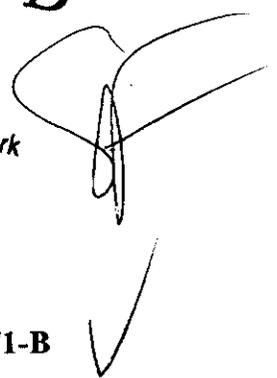
Defendants. )

CIVIL ACTION NO. 93-C-971-B

FILED

MAR 1 1995

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



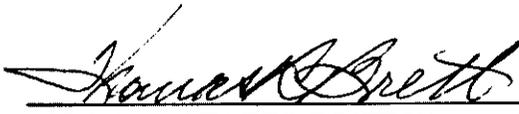
ORDER FOR SUMMARY JUDGMENT

Before the Court is the Plaintiff's Motion For Summary Judgment against the Defendant, Regina L. Meigs. The Defendant has not opposed the Motion with the requisite period of time set forth in Local Rule 15, thereby admitting that she is has no right, title or interest in the subject real property.

It is uncontested that under the terms of the note, mortgage and modification of promissory note, upon default of payments due, the Plaintiff is entitled to declare the balance due and payable in its entirety. It is also uncontested that such balance consists of the principal sum of \$66,372.78, plus accrued interest in the amount of \$8,991.55 as of October 7, 1993, plus interest accruing thereafter at the rate of 4 percent per annum or \$7.27 per day until judgment, plus interest thereafter at the legal rate until fully paid. The Plaintiff seeks foreclosure of the real estate mortgage on the above-mentioned property and sale of the premises to satisfy the note, mortgage, modification of promissory note, expenses and costs.

As there exists no genuine issue of material fact, the Court grants the Plaintiff's Motion for Summary Judgment, entitling the Plaintiff to judgment in the amount of \$66,372.78, plus accrued interest in the amount of \$8,991.55 as of October 7, 1993, plus interest accruing thereafter at the rate of 4 percent per annum or \$7.27 per day, plus interest thereafter at the legal rate until fully paid. The Court directs the Plaintiff to submit to the Court a Judgment of Foreclosure in accordance with this Order.

IT IS SO ORDERED, this 1<sup>st</sup> day of Mar, 1995.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



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

Order For Summary Judgment  
Civil Action No. 92-C-286-B

PP:css

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

**FILED**

MAR 01 1995

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

DALE F. MCDANIEL, individually and )  
doing business as MCDANIEL & )  
ASSOCIATES, )  
  
Plaintiff, )  
  
vs. )  
  
UNITED STATES OF AMERICA, )  
  
Defendant. )

Case No. 94-C-1190-B

ENTERED ON DOCKET  
DATE MAR - 2 1995

ORDER

Before the Court for consideration is a Motion to Dismiss filed by Defendant United States of America (Docket #5). Defendant alleges a lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), and failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6).

Plaintiff Dale F. McDaniel, individually and doing business as McDaniel and Associates ("McDaniel") alleges that the Internal Revenue Service ("IRS") intends to seize certain property of his, without regard for both a landlord-tenant lien that allegedly has priority and a security agreement in favor of Farmers and Merchants Bank. He also alleges that the IRS has not arranged for a professional appraiser to appraise the property to be seized, and has ignored the statutory exemptions in favor of McDaniel. McDaniel seeks a stay of any seizure proceedings until the lien priorities can be determined, a proper appraisal of any seized property, and enforcement of statutory exemptions in McDaniel's

favor, after a proper appraisal. Defendant alleges that these proceedings are barred by the Anti-Injunction Act, 26 U.S.C. § 7421. The Anti-Injunction Act states, in pertinent part:

Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

This section permits the United States to assess and collect taxes without judicial intervention, and to require that the legal right to disputed sums be determined in a suit for refund. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 82 S.Ct. 1125 (1962). Because McDaniel is seeking an injunction preventing the IRS from seizing his property in satisfaction of his outstanding tax debt, the Court believes that § 7421 is applicable to this case. Therefore, unless McDaniel meets one of the statutory exceptions listed in § 7421, this case must be dismissed. McDaniel did not allege in his Complaint that he met one of the § 7421 exceptions, and did not respond to this Motion.

One group of exceptions deals with notice to the taxpayer. The Anti-Injunction Act does not apply if the IRS fails to send a notice of deficiency, or if the taxpayer has filed a Tax Court petition in response to the notice of deficiency. See §§ 6212(a) and (c). The Act also does not apply if the IRS assesses taxes or levies the property during the 90-day period during which the taxpayer is allowed to file a petition in Tax Court, or if it does

so during the pendency of a Tax Court case. See § 6213(a).

This group of exceptions does not apply to McDaniel, because notice is not required to a self-assessed federal tax. Meyer v. C.I.R., 97 T.C. 555, 562-563 (1991).<sup>1</sup>

Other statutory exceptions are found in §§ 6672(b),<sup>2</sup> 6694(c),<sup>3</sup> 7426(a) and (b)(1)<sup>4</sup>, and 7429(b)<sup>5</sup>. None of these exceptions apply to McDaniel.

Further, the judicial exception to the Anti-Injunction Act also is not applicable. This exception applies only if: under no circumstances can the government ultimately prevail, and equity jurisdiction exists due to a threat of irreparable harm to the taxpayer. James v. United States, 970 F.2d 750, 757 (10th Cir. 1992), citing Williams Packing, 370 U.S. at 6-8. McDaniel did not allege irreparable harm in his Complaint; therefore, McDaniel fails the second prong of the test.

For the reasons cited above, Defendant's Motion to Dismiss is

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<sup>1</sup>The IRS accepted McDonald's tax returns as filed; however, McDonald did not remit any payments with his returns.

<sup>2</sup>This section applies to trust fund recovery penalties.

<sup>3</sup>This section applies if the IRS assesses penalties under § 6694.

<sup>4</sup>This section applies to cases in which a third party--not the taxpayer--claims that the IRS has wrongly seized his property. However, in this case, the suit is brought by the taxpayer, not by a third party.

<sup>5</sup>This section involves a jeopardy or termination assessment made under §§ 6851(a), 6852(a), 6861(a), or 6862. No such assessment was made against McDaniel.

hereby GRANTED for lack of **Subject Matter Jurisdiction**.

IT IS SO ORDERED THIS 28<sup>th</sup> DAY OF FEBRUARY, 1995.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE MAR 02 1995

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

**FILED**

JAMES DOWNING,

Plaintiff,

v.

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

Defendant.

MAR 01 1995

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

Case No. 93-C-746-B

ORDER REMANDING FOR SUPPLEMENTAL HEARING AND RECONSIDERATION

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.<sup>1</sup>

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

<sup>1</sup> 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.<sup>2</sup> He found that claimant's testimony was credible only to the extent that it reconciled with his ability to perform medium exertional activity and return to his past relevant work. He concluded that claimant had the residual functional capacity to perform work related activities, except for work involving those aspects of work over and above those set forth for medium exertional activity, for all times relevant to the decision. He found that claimant's past relevant work as a maintenance man did not require the performance of work-related activities precluded by the above limitation, and therefore his impairments did not prevent him from performing his past relevant work during the relevant time period. Having determined that claimant's impairments did not prevent him from performing his past work during the relevant time period, the ALJ concluded that he was not disabled under the Social Security Act at any time relevant to the decision.

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

- (1) That the ALJ ignored the treating physician rule.
- (2) That the ALJ erred in finding that claimant could do his past relevant work without obtaining vocational expert testimony and ascertaining the work requirements of a maintenance man.
- (3) That the ALJ ignored the fact that claimant's condition had continuously deteriorated from 1979 to 1992.

---

<sup>2</sup> 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).

- (4) That the ALJ's finding that plaintiff's allegations of pain were not credible to the extent that they precluded work was in error.

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).

It is important to note that the ALJ recognized that claimant was last insured for disability insurance benefits on December 31, 1990. He was required to show that he was disabled prior to the expiration of his disability insurance coverage. Therefore, the ALJ properly limited his examination to the evidence showing a disability existed prior to December 31, 1990, only. (TR 10).

The medical evidence shows that claimant has "some vocationally significant impairments," such as degenerative arthritis in the spine and hypertension. (TR 13-14, 109, 145). However, the ALJ concluded that these did not preclude claimant from doing medium work and his past relevant work as a maintenance man did not require the performance of activities beyond the parameters of medium work.

Claimant alleges that he suffers from arthritis in the back causing low back pain. His treating physician, Dr. Paul Russell, stated on November 16, 1992, that in 1985 he possibly "may have a gouty arthritis." (TR 145). Dr. Russell reported in a letter on January 7, 1992, that claimant's x-rays showed "minimal degenerative osteophyte formation" in the spine and "osteophytosis involving C-4" in 1979 and showed "mild degenerative osteophytosis" present in the lumbar spine in 1981. (TR 109). However, as noted by the ALJ, there is little medical evidence dated prior to 1992 in the medical file.

(TR 12). There are two pages of treatment notes for the year 1991. (TR12). Reports for the time beginning January 15, 1990 through January 7, 1992 demonstrate little in the way of objective findings, other than blood pressure readings. (TR 109-113). On March 12, 1990, claimant's blood pressure was 142/80, on July 20, 1990, it was 130/86, and the other treatment notes merely recite claimant's medications and prescription renewals. (TR 109-113).

Letters from Dr. Russell reviewed claimant's medical history. (TR 109, 145-46). According to Dr. Russell, claimant was treated by him starting in November of 1979 when he was injured in an automobile accident. In 1984, he began to have complaints of high blood pressure, and in 1985 he complained of back pain and exhibited wheezing and the diagnosis of gouty arthritis was made. His blood pressure was noted to be under control. In 1987, the doctor found no swelling or redness of any joint. Claimant was not seen by Dr. Russell again until February 1989. At that time, a blood work-up was normal except for elevated cholesterol. Claimant complained again of back pain, and the doctor observed that his weight and pain caused him difficulty getting out of a chair. In March 1990, he had some reflux symptoms and was placed on Raglan, and his blood pressure continued to be controlled by blood pressure medication. In August 1991, he was placed on Lasix for edema. (TR 12).

Claimant's cardiac complaints, including hypertension, congestive heart failure with pulmonary edema, atrial fibrillation with rapid ventricular response, bilateral pleural effusions, mitral/tricuspid regurgitation, aortic/pulmonary insufficiency, deep vein thrombus in the left leg, septal panniculitis-right thigh, and stasis dermatitis were not noted

until February 1992 after claimant's date of last coverage for disability insurance. (TR 116-128). Claimant's shortness of breath was related to his hypertension. (TR 116). As the ALJ noted, there has been no finding of chronic obstructive pulmonary disease or chronic pulmonary insufficiency or severe damage to one or more of four end organs -- the heart, the brain, the kidneys, or the eyes. (TR 14). As the ALJ properly concluded, the records previously discussed showed that claimant's high blood pressure was adequately controlled by medication and he was not suffering from hypertensive vascular disease, congestive heart failure, ischemia, or deep venous thrombus that would be disabling per se at any time prior to December 31, 1990. (TR 14).

Claimant contends that the ALJ erred in failing to follow the opinions of his treating physician, Dr. Russell. The doctor's opinion was that claimant "would not be able to maintain any type of occupation requiring any physical endurance" (TR 109), and "[d]ue to Mr. Downing's hypertension and back complaint it is unlikely that he could be employed in the same type of work he had done in the past" (TR 146). The ALJ noted that these opinions were not supported by any treatment notes. (TR 13). The ALJ also noted that there is no medical evidence prior to December 31, 1990 to indicate that claimant did not have good muscle tone or strength, good reflexes, and good range of motion of all his joints, including the spine. (TR 15).

An ALJ may reject a treating physician's opinion if specific, legitimate reasons are given. Talbot v. Heckler, 814 F.2d 1456, 1464 (10th Cir. 1987). A legitimate reason for rejecting a treating physician's opinion is that it is without foundation. Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988). While the ALJ gave specific, legitimate reasons for

rejecting the treating physician's opinion, there is merit to claimant's contention that the ALJ erred in disregarding the opinion when deciding whether claimant could do medium work. The ALJ must demonstrate that plaintiff had the exertional and nonexertional capacity to perform his past relevant work during the relevant time period, despite the pain he suffered and the type and degree of limitations that restricted his occupational opportunities. Ragland v. Shalala, 992 F.2d 1056, 1060 (10th Cir. 1993).

Plaintiff was given a consultative examination in March of 1992, and the consulting physician noted "there is probably not enough info to find him disabled" prior to December of 1990 and concluded it was questionable whether there was sufficient information to rate him in 1992. (TR 99-100).

The ALJ found plaintiff had the ability to perform medium work activities for all times prior to December 31, 1990. However, "[p]ain, even if not disabling, is still a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant." Thompson v. Sullivan, 987 F.2d 1482, 1490-91 (10th Cir. 1993). The ALJ recognized that claimant experienced some degree of pain and discomfort. (TR 17). The physicians who examined plaintiff noted that he had some pain. (TR 99, 109).

Claimant's low back pain originated with a car wreck in 1979. (TR 39-40). He went back to work in 1981, and worked through 1983, when the plant closed. (TR 47). There is nothing in the record that indicates claimant suffered any additional injury or aggravation of the 1979 back injury between 1983 and December of 1990. He has never had any back surgery. (TR 43). He claims he did not see his doctor often during the

period after the plant closing and December of 1990 because he could not afford the expense (TR 55).

The claimant argues that the ALJ failed to fully develop the record because he did not ascertain the exertional level required of a maintenance man in accordance with the Dictionary of Occupational Titles and failed to call a vocational expert to testify as to claimant's ability to do medium work. "Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 416.967(c). Social Security Ruling 83-10 further defines medium work as requiring considerable lifting, frequent bending-stooping, and standing or walking off or on for approximately six hours a day. The ALJ determined that claimant's past relevant work as a maintenance man was a medium level occupation, based upon the vocational history contained in the Disability Report form (exhibit No. 8, found at TR 79-80) filled out by claimant on November 11, 1991 (TR 17). The vocational history indicates that claimant held this job from 1976 to 1983. The form asks for the "heaviest weight lifted" and the "weight frequently lifted/carried", and the claimant checked "50 lbs." and "up to 25 lbs." for these respective categories. It can reasonably be inferred from this that the claimant worked at a medium exertional level at least until he was injured in 1979. However, the claimant also explained that once he injured his back in 1979, he was unable to perform exertional activity at the medium level and avoided the heavier lifting once he returned to work:

Q When did Dr. Russell try to get you back on light duty?

A That was back in '80, I went back to work in '81.

Q '81?

A Yes, sir. And the plant closed in '83.

Q And you worked up until '83?

A '83, yes, sir, but it wasn't without complications, as I explained you know.

Q What was the heaviest thing you had to do back in 1983? What was some of the work?

A Men on maintenance crew, they carried a little old pouch around and you worked on electrical stuff for, you know machine and stuff like that.

Q Did it involve any heavy lifting?

A Not very much, I tried to, well, when they did come something like that, I tried to, you know, share it, whatever, what you would call it, I guess, try to get lost or they started back. When it's something I seen is heavy, before I start, you know, I didn't tell them what was going on.

Q What was the most you had to lift?

A Oh, maybe 10 pounds maybe or something.

Q So you didn't have to lift anymore?

A There no, no real heave, well, there was times that they did have to lay more than that, but you know, I, I would try to get out of --

Q Did you have people helping you do that then?

A Yes, they had, they had men under, I had, I was lead man so I, you're right, I could definitely do it, you know.

Q Okay. You were like a supervisor then, is that correct?

A Similar, very similar. It's a, it's a responsibility job.

Q What type of work did you do now, you were lead man for --

A I was lead man in and **before then**, early, I was, worked in a shop, I welded for 15 years, which is not good on your health.

Q Now, you have down here that you had to lift up to 50 pounds and then you frequently had to lift up to 25 pounds, is that correct?

A Well, that, that's when, where the job I had in the welding shop, I was, I worked as a welder for about 15 years.

Q But as a, as a lead man you didn't have to lift --

A I didn't, I could get out of it, a lot of it, heavy lifting. There was some heavy lifting, but I, you know what I mean.

Q But you had to lift --

A I, I steered from on account of my back.

Q Okay, I, I'm going to say then as a lead man you didn't have to lift over how many pounds?

A Oh, probably 10 or 15, something like that, you know, but there was times that they had heavier stuff than that, but you know like I'm saying, I, I tried to --

Q You got people to do the work?

A Yeah, I'd let someone else, younger person or something to take a hold because I had been there a number of years. In fact, I worked there 29 years.

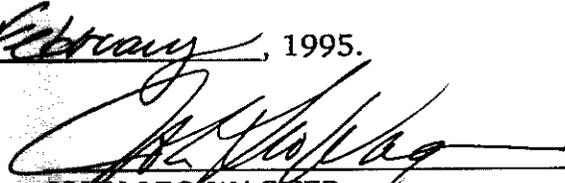
Based on the record, particularly claimant's testimony and the opinion of his treating physician, the court finds that there is not substantial evidence to support the opinion of the ALJ that claimant could perform medium exertional activity and return to his past relevant work.

While the ALJ was not required to obtain the testimony of a vocational expert at the fourth step of the sequential evaluation process, such testimony is required to perform the

fifth step.

This case is remanded to the **Secretary** for supplemental hearing to obtain the testimony of a vocational expert regarding the claimant's residual functional capacity to do light or sedentary work prior to **December 31, 1990**, and to perform other jobs which existed in the national economy as of **that date**. In considering the claimant's RFC, the vocational expert should be instructed to **take** into consideration the pain experienced by claimant prior to December 31, 1990, **but is not** to take into consideration any disabling condition that did not exist prior to **that date**. The Secretary is directed to reconsider the question of claimant's disability once **the record** has been supplemented by the vocational expert's testimony.

Dated this 28<sup>th</sup> day of February, 1995.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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ENTERED ON DOCKET

DATE MAR 01 1995

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

RONALD OUSELY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STANLEY GLANZ, et al., )  
 )  
 Defendants. )

**FILED**

FEB 28 1995

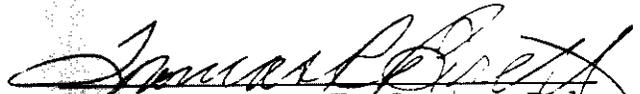
No. 94-C-256-B

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

**JUDGMENT**

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of Defendants Dr. Tipton, Russell Lewis, and Linda Caldwell and against the Plaintiff, Ronald Ousely. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 28 day of Feb, 1995.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE MAR 01 1995



(filled out upon booking in the county jail) indicates that Plaintiff had back surgery about one year previously and that both his legs and back gave him problems.

On November 2, 1993, Plaintiff submitted a "sick call slip," stating that he had back trouble. On November 3, 1993, a nurse saw Plaintiff for his back pain. During the examination, Plaintiff stated that his back was hurting and asked for something to help him relax and sleep. The nurse offered Tylenol but Plaintiff refused. On November 7, 1993, Plaintiff submitted another "sick call slip," complaining of head and chest congestion, runny nose, and back problem. On November 8, 1993, the nurse saw Plaintiff for the complaints and Dr. Tipton prescribed Sudafed and Motrin.

On December 21, 1993, Plaintiff slipped while getting into the shower and the nurse on duty, Linda Caldwell, was notified immediately. When the nurse arrived on the scene a few minutes later, she found the Plaintiff lying across the catwalk between a jail cell and the shower area. Plaintiff's head and neck were lying against some cell bars and his left foot was lying on the lip of the shower stall. Plaintiff told Ms. Caldwell that he was experiencing pain in his back and that he could not move his legs. Ms. Caldwell immediately checked Plaintiff's vital signs and determined they were normal. She next contacted Russell Lewis, RN, the administrator of the Tulsa City-County Jail, to assist her. Upon his arrival, Lewis conducted a neurological examination of Plaintiff and determined that Plaintiff could in fact move his lower extremities.

Because the catwalk between the cells where Plaintiff was lying was only three to four feet wide, Lewis and Caldwell determined that there was insufficient room for sheriff's deputies to safely pick up the Plaintiff on a back board. Therefore, Lewis and Caldwell placed Plaintiff on a blanket and dragged him to a hallway where he could be placed on a back board. Plaintiff was dragged feet first with his feet slightly elevated in the air and his back and neck flat against the floor. Plaintiff was thereafter placed on a back board and transported to the Ninth floor, where the medical facility is located.

Upon arrival at the medical facility Dr. Tipton and Home X-Ray Service were notified immediately. Dr. Tipton approved pain medication but Plaintiff refused to take it. X-rays were taken shortly thereafter. At five p.m., Home X-Ray notified the nurse that the result of the x-rays were negative, and that there were no broken bones or fractures and no acute distress. At 5:30 p.m., Plaintiff requested to return to his cell. Although it was explained to him that it was important to wait for Dr. Tipton's call before returning to his cell, Plaintiff stated "I know my own body, I've had this before. I want to go back to my cell and wait for the doctor to call." At 6:00 p.m. the doctor ordered that Plaintiff be given Motrin 800 mg twice a day for 7 days. Plaintiff refused the medication.

The next day, the nurse visited the Plaintiff although he had not submitted a "sick call slip." The Plaintiff informed the nurse that he was "doing Ok, but having back pain." The nurse noted that

the Plaintiff was ambulating **without** holding his back and appeared normal. On December 23, 1994, the doctor visited the Plaintiff, finding the vital signs to be **normal**, no "neuro deficit," and no nerve damage. Because the Plaintiff complained of pain, although he was ambulatory and walked **around** normally, the doctor prescribed Flexoral (a pain medication) **in addition** to the Parafon Forte (a muscle relaxer) previously prescribed.

On January 2, 1994, Plaintiff submitted another "sick call slip," complaining that he was **not** getting relief from his back pain. Dr. Osea saw Plaintiff **that** same day and after reviewing the x-rays and examining the Plaintiff, ordered that Plaintiff continue taking the pain medication **and** muscle relaxer Parafon Forte. On January 4, 1994, Plaintiff was **seen** by the medical staff and the pain medication was continued **as** prescribed.

On January 15, 1994, Plaintiff submitted two "sick call slips" complaining about back pain. On January 19, 1994, the Doctor extended the Parafon Forte 500 milligrams for five more days and on January 19, 1994, the Doctor **added** Motrin 800 milligrams for the next 5 days.

In May 1994, Plaintiff **filed** this action against Sheriff Stanley Glanz, Jail Inspector **Freddie** Hall, Doctor Tipton, Medical Administrator Russell Lewis, **and** Nurse Linda Caldwell. He alleged that Defendants were **deliberately** indifferent to his serious back condition and that Defendants' **failure** to comply with state Health and Safety Codes amounted to **cruel** and unusual punishment.

Plaintiff sought actual and punitive damages.<sup>2</sup>

## 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, 1526 (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.

Initially, the Court notes that the Fourteenth Amendment Due Process Clause, and not the Eighth Amendment Cruel and Unusual Punishment Clause, applies to a pretrial detainee such as the Plaintiff. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). Accordingly, Plaintiff's Eighth Amendment claims must be dismissed

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<sup>2</sup>Plaintiff's request for injunctive relief is now moot as he is no longer at the Tulsa City/County Jail.

for failure to state a claim and Plaintiff's complaint should be liberally construed, in accordance with his pro se status, to allege the violation of his Fourteenth Amendment rights.

After reviewing Plaintiff's allegations, the Court concludes that Plaintiff has sufficiently stated a claim against Defendants Lewis, Caldwell, and Tipton as to his medical condition under the Fourteenth Amendment. Plaintiff's complaint specifically alleges deprivations of his Fourteenth Amendment rights with regard to his medical condition supported by sufficient facts alleged to have deprived him of those rights. Furthermore, Plaintiff has attributed these deprivations to Defendants acting under color of law. Accordingly, the motion to dismiss of Defendants Lewis, Caldwell, and Tipton must be denied.

With regard to Plaintiff's conditions-of-confinement claim, the Court concludes that Plaintiff has not sufficiently stated a claim against Sheriff Glanz for housing him in an unsafe area of the jail and for failing to repair the leaking shower. The Court notes that Plaintiff barely mentioned that claim in his complaint and supporting brief and that he did not focus on that issue until he filed his response. Because the Haines rule requires this Court to construe Plaintiff's pro se complaint liberally, see Haines v. Kerner, 404 U.S. 519, 520 (1972), and to grant him a reasonable opportunity to amend defects in his pleadings, see Hall, 935 F.2d at 1110 n.3 (citing Reynoldson v. Shillinger, 907 F.2d 124, 126 (10th Cir. 1990), Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985)), the Court will grant Plaintiff an opportunity to

amend his complaint to allege a violation of his Fourteenth Amendment rights as a result of the unsafe conditions of his cell at the Tulsa County Jail. Defendant Glanz's motion to dismiss must, therefore, be denied on this ground.

Defendant Freddie Hall, the Jail Inspection Supervisor for the Oklahoma State Department of Health, has also moved to dismiss for failure to state a claim. He argues that Plaintiff has failed to establish an affirmative link between the alleged constitutional violations and any conduct on his part. The Court agrees. Even reading Plaintiff's complaint liberally, and construing all allegations in Plaintiff's favor, the Court finds no allegation to show the personal involvement of Defendant Hall. Ruark v. Solano, 928 F.2d 947 (10th Cir. 1991) (personal involvement in the alleged constitutional deprivation is a prerequisite to section 1983 liability). Accordingly, Plaintiff's claim against Defendant Hall must be dismissed for failure to state a claim.

## 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) (citing Grey v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "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. (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). 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. Medical

In considering the motion for summary judgment of Defendants Lewis, Caldwell, and Tipton, the Court has examined the special report prepared by the Tulsa County Jail. Although Plaintiff has responded to the motion, he has **presented** no evidence to refute the facts in Defendants' motion and special report. Plaintiff's response merely contains **conclusory** allegations that the special report is inadequate and **erroneous**, and does not controvert Defendants' summary judgment evidence. Therefore, because Plaintiff has not presented **conflicting** evidence, the Court accepts the factual findings of the **special** report. See Hall, 935 F.2d at 1111.

Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the **same** degree of protection regarding medical care as that afforded **convicted** inmates under the Eighth

Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

After reviewing the record in this case, the Court concludes the Plaintiff has failed to make any showing that Defendants Tipton, Caldwell, and Lewis possessed the requisite culpable state of mind. He does not allege that he did not receive effective treatment shortly after his fall in the shower and for the next twenty days. He only alleges that the treatment which he received was inadequate because he was still in pain.

The undisputed facts demonstrate that as soon as Lewis and Caldwell were notified of Plaintiff's fall, they immediately reported to the scene and began assessing Plaintiff's medical condition. As there was no room for the Plaintiff to be carried through the catwalk on a backboard, they dragged him on a blanket to a larger hallway taking every precaution so that the Plaintiff would not suffer a spinal injury. Upon arrival at the medical unit, pain medication was prescribed and x-rays were taken.

Even if Lewis's and Caldwell's actions of dragging the

Plaintiff to a larger hallway on a blanket fell below the appropriate standard of care, Defendants are still entitled to judgment as a matter of law. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause. Estelle, 429 U.S. 97, 104-05; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Similarly, Plaintiff's disagreement with the medical judgment of the nurse and doctor at the Tulsa County Jail is insufficient to establish a violation of his Fourteenth Amendment rights. It is well established that a difference of opinion between the prison's medical staff and the inmate does not support a claim of cruel and unusual punishment. Ramos, 639 F.2d at 575; McCraken v. Jones, 562 F.2d 22 (10th Cir. 1977), cert. denied, 435 U.S. 917 (1978); Smart v. Villar, 547 F.2d 112 (10th Cir. 1976).

Accordingly, the Court concludes that Defendants Tipton, Caldwell, and Lewis are entitled to judgment as a matter of law on Plaintiff's medical claim.

### III. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Defendant Hall's motion to dismiss for failure to state a claim should be granted and that the motion to dismiss of Defendants Tipton, Caldwell, Lewis, and Glanz should be denied. With regard to Defendants' motion for summary judgment, the Court concludes that Defendants Tipton, Caldwell, and Lewis 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) Defendant Glanz's motion to dismiss or for summary judgment (doc. #7) is denied.
- (2) Plaintiff is granted twenty (20) days to file a motion for leave to amend and a proposed amended complaint with regard to his conditions-of-confinement claim against Defendant Glanz. Otherwise, the Court will presume that Plaintiff no longer wishes to pursue this litigation and will proceed to dismiss his condition-of-confinement claim against Defendant Glanz for failure to state a claim.
- (3) The motion for summary judgment of Defendants Tipton, Lewis, and Caldwell (doc. #10) is granted.
- (4) Defendant Hall's motion to dismiss (doc. #13) is granted, his motion for summary judgment (doc. #13) is denied as moot, and Defendant Hall is dismissed as a defendant in this case.

SO ORDERED THIS 28<sup>th</sup> 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

JOHN FRANCIS ROURKE,  
Plaintiff,  
vs.  
ATTORNEY GENERAL OF THE  
UNITED STATES, et al.,  
Defendants.

No. 94-C-454-B

**FILED**

FEB 28 1995

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

ENTERED ON DOCKET  
DATE MAR 01 1995

**ORDER**

Since the December 15, 1994 dismissal of this case for lack of prosecution, the Plaintiff has moved to alter or amend judgment, for default judgment, for a hearing, and for a temporary restraining order. The Defendants have objected to Plaintiff's motion and moved to dismiss.

In this civil action, the Plaintiff challenges an order of the Federal Aviation Administration (FAA) which revoked Plaintiff's Airline Transport Pilot's Certificate and Mechanic Certificate as of July 18, 1986. Plaintiff alleges that the FAA's order violates his rights under the Due Process and Equal Protection Clauses. Plaintiff seeks damages and injunctive relief.

After reviewing Plaintiff's motions, the Court concludes that his motions to alter or amend judgment should be granted and that the Clerk should reinstate this case on the active docket so that the Court can review Defendants' motion to dismiss on the merits. The Court concludes, however, that Plaintiff's motions for default judgment, for hearing, and for a temporary restraining order should be denied.

To obtain a temporary restraining order (TRO), a plaintiff must demonstrate that he has a substantial likelihood of success on the merits, that he will suffer irreparable injury absent the injunction, that the threatened injury to him outweighs any damage the injunction may cause his opponent, and that the injunction would not be adverse to the public interest. SCFC ILC, Inc. v. Visa Usa, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991); Lundrign v. Claytor, 619 F.2d 61 (10th Cir. 1980).

After reviewing Plaintiff's complaint, his motion for a TRO, and the Defendants' response, the Court concludes that Plaintiff's request for a TRO should be denied. In order to meet the threshold burden of showing some likelihood of success on the merits, the Plaintiff need only establish that his chances are "better than negligible." See Kellas v. Lane, 923 F.2d 492, 494 (7th Cir. 1990); Somerset House, Inc. v. Turnock, 900 F.2d 1012, 1015 (7th Cir. 1990). Despite this low standard, the Court finds that the Plaintiff has not demonstrated even a negligible likelihood of success on the merits of his claim.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Plaintiff's motions to alter or amend judgment (docs. #7 and #11) are **granted** and that his motions for default judgment, for hearing, and for a temporary restraining order (docs. #8-1, #8-2, and #9-1) are **denied**; and

(2) The Clerk shall **reinstate** this case.

SO ORDERED THIS 27<sup>th</sup> day of Feb, 1995.

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

THOMAS R. BRET, Chief Judge  
UNITED STATES DISTRICT COURT