

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

FILED

APR 28 1995

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

MELVIN FITCH,
Plaintiffs,

vs.

KIMBALL'S PRODUCE, INC.,
an Oklahoma Corporation,
Defendant.

Case No. 95-C-52-K

EDD 4/28/95

ORDER OF DISMISSAL WITH PREJUDICE

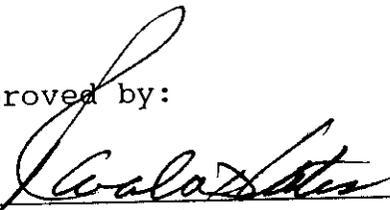
NOW, on this 21 day of April, 1995, there comes before the Court the Joint Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., and Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulates that the complaint should be dismissed as to such Defendant.

The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed, with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation.

SO ORDERED

/s/ TERRY C. KERN
UNITED STATES DISTRICT
JUDGE

Approved by:



Ronald D. Cates
Attorney for Defendant



H. I. Aston
Attorney for Plaintiff's

FILED
IN OPEN COURT

APR 28 1995

PL

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

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

DAVID G. TAYLOR and JESSICA)
M. TAYLOR,)
)
Plaintiffs,)
)
vs.)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendant.)

Case No. 94-C-253-BU ✓

ENTERED ON DOCKET
APR 28 1995
DATE _____

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiffs, David G. Taylor and Jessica M. Taylor, recover of the defendant, State Farm Casualty and Fire Company, actual damages in the sum of \$39,002.25, with interest thereon at the rate provided by law, and their costs of action.

Dated at Tulsa, Oklahoma, this 28th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE APR 28 1995

PAUL K. CARR, JR.,
Plaintiff,
vs.
ALLWASTE RECYCLING, INC.,
Defendant.

No. 95-C-147-K ✓

FILED
APR 7 1995
Richard M. [unclear]
[unclear]

ORDER

Now before the Court is the Motion of Defendant, Allwaste Recycling, Inc., to dismiss for Plaintiff's failure to state a claim upon which relief can be granted, or in the alternative, to require Plaintiff to make a more definite statement. By Order of April 4, 1995, the Court granted plaintiff 20 days in which to file an Amended Complaint providing more factual detail of his alleged claims or face dismissal. Twenty days have passed and the more definite statement has not been provided.

It is the Order of the Court that the motion of the defendant to dismiss is hereby GRANTED.

ORDERED this 27 day of April 1995.


PERRY C. KERN
UNITED STATES DISTRICT JUDGE

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training in welding as well as one and one-half years in welding technology at Tulsa Junior College. His work history included grinder, tack welder, shop welder, custodian (mowing lawns), and truck driver. (Tr. 130-134, 141-142.) Plaintiff testified he is unable to work because of physical impairments to his knees, back, neck, shoulder and hand, along with nonexertional complaints of pain, headaches, stiffness, and numbness. (Tr. 56-69.)

DISCUSSION

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. §423(a)(1)(D). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than 12 months." Id. §423(d)(1)(A). An individual ...

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

Id. §423(d)(2)(A).

The Secretary 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).

Finding at step five that claimant was not disabled, the ALJ determined there were a significant number of jobs in the national economy which Mr. Lewis could perform. In reaching this decision, the ALJ found:

1. Lewis had not engaged in substantial activity since September 10, 1989.
2. Lewis has severe chondromalacia of right knee status post

right knee arthroscopy, right shoulder strain, cervical strain, lumbar strain, corn removal both feet (1983), but did not have an impairment or combination of impairments listed in, or medically equal to, one listed in Appendix 1, Subpart P, Regulations No. 4.

3. Lewis' alleged functional limitations due to pain and other subjective complaints were not supported by, nor consistent with, the medical records.
4. Lewis has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for lifting/carrying 20 pounds occasionally and 10 pounds frequently, occasional climbing.
5. Lewis was unable to perform his past relevant work as grinder, tack welder, shop welder, custodian, or truck driver.

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.

As grounds for reversing the ALJ's denial of benefits, plaintiff argues that he is unable to perform the standing/walking requirements of light work. Mr. Lewis testified he can walk 15-20 minutes, stand "maybe" 5 minutes before alternating position, sit 1 hour, and lift 15 pounds. (Tr. 71, 73, 81.) Furthermore, plaintiff argues there is no specific medical evidence in the Record which indicates Mr. Lewis can perform the walking/standing demands of light work. This argument is unavailing.

To determine the physical exertion requirements of work in the national economy, the Secretary has classified jobs as *sedentary*, *light*, *medium*, *heavy* and *very heavy*. Light work is defined as work which ...

involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. §404.1567, §416.967.

Other than mild degenerative changes at T-3 and L4-5, there is no evidence of nerve root impingement nor bony abnormalities of claimant's spine. (Tr. 301.) X-rays of the cervical and dorsal spine have been consistently negative with the vertebral bodies aligned, and the vertebral body heights well maintained. The thoracic vertebral bodies and intervertebral discs spaces of the dorsal spine were normal. (Tr. 242-244, 281-284, 285-295, 323-340.) CT scans of the cervical spine confirmed there was no

evidence of fracture, and the neural arch was well maintained. (Tr. 247.) During an independent medical examination by Dr. Young in January 1992, this consulting physician recorded claimant "stated he had no problems with his upper back ... denied numbness or tingling in his upper extremities ... stated he had no problems with his lower back ... denied numbness or tingling in his lower extremities." (Tr. 390-394.) The ALJ determined that there had been no significant diagnosis of back impairment or treatment, and no proposed or suggested back surgery by any of the physicians. The ALJ also pointed out that according to the report by Dr. Young, Mr. Lewis did not have back pain until "lifting over seventy (70) pounds." (Tr. 391.)

Additionally, WorkMed Center physicians and physical therapist treated claimant for injuries to his back and shoulder during the period of January 15, 1988 through September 12, 1989. (Tr. 188-228, 356-366.) According to Dr. Small in his letter of October 9, 1989, initial x-ray of claimant's shoulder was essentially negative for any evidence of fracture or dislocation. (Tr. 193, 209.) It was reported from the "work hardening" (i.e., physical therapy) unit St. John Medical Center that "patient was unable to lift over 35 lbs. above shoulder range" on the August 17, 1989 Cybex evaluation. However, progress in range and strength continued to improve although "patient's performance with tasks as compared to patient's subjective statements reveal[ed] inconsistencies. Patient continues to demonstrate poor body mechanics and poor pacing with activities as he attempts to complete his program within the 1st

hour and take frequent breaks for long periods of time thereafter."
(Tr. 239.)

Additionally, Claimant was referred to an orthopedic, Dr. Tanner, for evaluation of his right shoulder. (Tr. 232-235, 372.) Dr. Tanner felt Mr. Lewis had satisfactory range of motion in the right shoulder. Additional x-ray of his shoulder indicated a small osteophyte of the acromion which was not outside a normal process. Dr. Tanner talked to Mr. Lewis about an injection into the subacromial space, but claimant did not want that done. (Tr. 197.) Mr. Lewis was released to his regular work duties without restrictions on September 6, 1989, but instructed to continue exercises and anti-inflammatory medication. (Tr. 194, 232-235, 372.)

In November 1989, at the request of the State Insurance Fund, Mr. Lewis was examined by Dr. W. Gillock. (Tr. 368-372.) Examination of the right shoulder revealed no deformities, swelling or hemorrhages. Ranges of motion for both right and left shoulders were evaluated, the results of which were within normal limits. Dr. Gillock opined Mr. Lewis had sustained no permanent impairment to his shoulder. (Tr. 370.)

For rehabilitation of his right knee, Mr. Lewis was referred to Glass-Nelson Clinic. (Tr. 345-355.) He was treated with physical therapy for cervical strain and post contusion and post arthroscopy of the right knee. On October 17, 1988, Mr. Lewis was re-evaluated by Dr. Smith who offered to refer claimant to Dr. Holderness for evaluation of the knee, but "advised him that, at

this point, the knee looks to be essentially normal." Tandem walking was within normal limits although there was some mild cervical strain present. (Tr. 216.) Claimant was dismissed from these services on November 14, 1988, and the doctor noted that Mr. Lewis "has been less than compliant with PT and our other plans. I suspect but cannot prove that he has been less than compliant in his exercise program." (Tr. 345.)

Furthermore, Dr. Bobek's examination of claimant's knee on November 1, 1991, showed full range of motion, no ligament laxity, no evidence of cartilage injury. (Tr. 256-259.) This was substantiated by the opinion of Dr. Young in his examination of January 1992. This examination revealed flexion of 150 degrees and extension of zero; no crepitation; negative Drawer's test; negative McMurray's test; the medial and lateral collateral ligaments were intact. X-rays were obtained of the right knee which revealed mild hypertrophic changes with no fractures or dislocations. Dr. Young opined "this person's period of temporary total disability has long since ended and he may return to employment. He is in no further need of medical care." Dr. Young imposed no restrictions upon claimant's returning to the work force. (Tr. 390-394.)

Furthermore, the physical examinations have consistently shown intact neurological exams, adequate reflexes, normal sensation and normal motor strength. (Tr. 18, 193-194, 197, 232-233.) The only restriction of which the claimant consistently complained is inability for frequent climbing. (Tr. 22, 346, 368.) Assessments by two reviewing agency physicians, Dr. Fiegel and Dr. Anthony, in

April and September 1992 further documented claimant's functional capacity to lift/carry 20 pounds occasionally; lift/carry 10 pounds frequently; sit/stand and/or walk about 6 hours in an 8-hour workday; occasional climbing, frequent balancing, stooping, kneeling, crouching, crawling; unlimited ability to push and/or pull with no further restrictions because of pain; and no manipulative, visual, communicative, or environmental limitations. (Tr. 164-175, 176-177.)

Although plaintiff argues that the opinions of chiropractor, G.D. Snitker, and Jimmy Martin, M.D., sustained plaintiff's burden, the ALJ is not bound by these conclusions. See 20 C.F.R. §404.1527(e)(1). The ALJ properly discounted the weight given these health care providers in finding these opinions are unsupported, inconsistent and contrary to the Record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988).

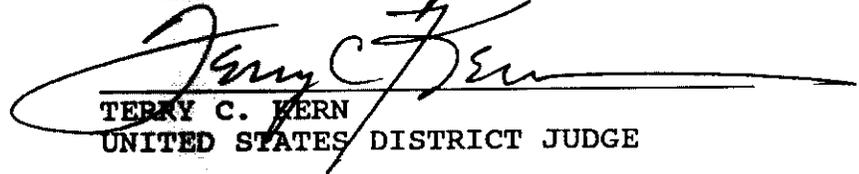
Appropriately considering claimant's residual functional capacity to fall within the light exertional work level, the ALJ concluded Mr. Lewis could not perform his past work. (Tr. 24.) These former jobs were characterized by the vocational expert as medium to heavy exertional level, except for delivery truck driver which ranged from light to medium. (Tr. 88-89.) The vocational expert also testified there were skills transferable. (Tr. 24, 92-93.) The burden now shifted to the Secretary to determine if there were a significant number of jobs that claimant could perform. (Tr. 24.) In response to a hypothetical question posed by the ALJ, consistent with claimant's medically determinable impairment,

functional limitations, age, education and work experience, the vocational expert identified these jobs which claimant could still perform: chauffeur - "877 in Oklahoma, 136,533 in the United States"; production checker -- "2,330 in Oklahoma, 235,082 in the United States"; dispatcher -- "2,060 in Oklahoma and 132,839 in the United States"; and cashier -- "5,331 in Oklahoma, 40,602 in the United States." (Tr. 25, 93-94.) Thus, considering the claimant's exertional and nonexertional limitations and the vocational expert's testimony, and using the "Grids" as a framework for decision-making, the ALJ concluded there were a significant number of jobs the claimant could still perform, and therefore, he was "not disabled" within the intent and meaning of the Social Security Act, as amended, under §404.1520(f) or §416.920(f) of the Regulations. (Tr. 25.)

In conclusion, there is substantial relevant evidence to support the ALJ's conclusion that plaintiff has the residual functional capacity for the full range of light work, reduced by occasional climbing. (Tr. 26.) Plaintiff has not sustained his burden proving his impairment or impairments prevent him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984). This Court determines the Secretary's findings are supported by such relevant evidence to support the conclusion that claimant is "not disabled." See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). Applying the appropriate standard of review previously detailed above, the decision of the Secretary will not be disturbed.

It is the Order of the Court that the referral to the United States Magistrate Judge is hereby withdrawn. The Secretary's decision is AFFIRMED.

IT IS SO ORDERED THIS 26 DAY OF April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE APR 28 1995

TERRY V. BLAIR,

Plaintiff,

vs.

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

Defendant.

Case No. 94-C-194-B ✓

FILED

APR 27 1995

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

ORDER

Before the Court for consideration are the objections of the Plaintiff, Terry V. Blair, to the Magistrate Judge's Findings and Recommendation ("F & R") to affirm the Administrative Law Judge's ("ALJ") denial of Supplemental Security Income benefits.

Plaintiff filed an application for Supplemental Security Income benefits (hereinafter "benefits") with the Defendant on June 29, 1992, based on his allegation that he could not work because of injuries received when he was run over by an automobile on June 25, 1992.

Plaintiff's application was denied and he was so notified by letter dated August 13, 1993. Plaintiff appealed this decision to the social security Appeals Council which denied, by letter dated January 3, 1994, Plaintiff's request for a review.

The Plaintiff filed this action on March 2, 1994, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under the Social Security Act. This matter was referred to the Magistrate Judge, who entered his F & R

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on April 4, 1995, recommending that the denial of benefits be affirmed.

Plaintiff filed his objections to the F & R on April 17, 1995, and set forth objections to the Findings and Recommendations of the Magistrate Judge. Plaintiff contends the decision of the Administrative Law Judge (ALJ) was not supported by substantial evidence and that the ALJ erred by failing to consider the effect of Plaintiff's alcohol abuse when determining the severity of the headaches he allegedly suffers as residuals of injuries sustained in an automobile accident.

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

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

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. See, Bowen v. Yuckert, 482 U.S. 137,

107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988), proceed as follows:

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

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

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

- 1) There was no evidence that Plaintiff had performed substantial gainful activity since July 1, 1992¹;

¹ While Plaintiff's application was actually filed June 29, 1992, he specifically requested in writing that it not become effective until July 1, 1992.

2) That Plaintiff does have a vocationally severe impairment in that his headaches and chest pain are expected to interfere slightly more than minimally with the Plaintiff's work-related activities.

3) That although Plaintiff's impairments are found to be vocationally severe, he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, subpart P, Regulations No. 4;

4) That step 4 of the sequential evaluation process requires a determination of whether the claimant can perform his past relevant work; that claimant's past relevant work consisted of receiving cash for various jobs as tree service, mowing lawns, or as a carpet layer; and that it was therefore impossible to determine whether the claimant actually performed substantial gainful activity and the ALJ finds that, in fact, he did not.

5) That, considering the claimant's vocational profile, Medical Vocational Guidelines Rule 203.25 strongly recommends a finding of not disabled; that the medical evidence indicates that the claimant has no significant restrictions on his physical capabilities and that his complaints are not such as would prevent him from performing work even considering claimant's alcoholism in the context of expert opinion, and that the claimant's impairment is therefore nonsevere.

The ALJ concluded Plaintiff was not under a disability as defined in the Social Security Act, and was not eligible for Supplemental Security Income under sections 1602 and 1614(a)(3)(A) of the Social Security Act.

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

conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown v. Bowen, 801 F.2d 361 (10th Cir. 1986).

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

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

The Court, having examined the transcript and the ALJ's findings, concludes that Plaintiff's objections are not well taken.

The Court notes the ALJ found the Plaintiff, a 27 year old male, to have a limited education and lacking of any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. The ALJ further found that the Plaintiff has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for lifting more than 50 pounds occasionally or 25 pounds frequently (20 CFR 416.945). The ALJ also found that Plaintiff's capacity for the full range of medium work has not been significantly compromised by his additional nonexertional limitations and that Plaintiff was not under a disability as defined in the Social Security Act, at any time through the date of the ALJ's decision denying benefits.

Plaintiff argues that some courts have placed an affirmative duty on ALJs to develop the medical evidence in cases where there is some evidence of substance abuse. The Court notes the Plaintiff's failure to cite any Tenth Circuit Court of Appeals authority in support thereof and in fact acknowledges the lack of same. Additionally, in the present case, Plaintiff has denied alcoholism, arguing that his disability is a result of injuries received in the June 25, 1992, accident.²

Plaintiff was examined at the Defendant's request by Dr. Thomas A. Goodman, a consultative psychiatrist, who found that Plaintiff had no intellectual or sensory restrictions related to alcohol abuse. Plaintiff told Dr. Goodman that his drinking had "considerably decreased" since the accident. Dr. Goodman concluded that Plaintiff has retained his basic intellectual abilities and should be able to carry on the same level of work psychologically that he was doing prior to his accident, and may even function better because of his decreased drinking.

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

The quest at this level of a social security appeal is an examination of the record to determine if substantial evidence

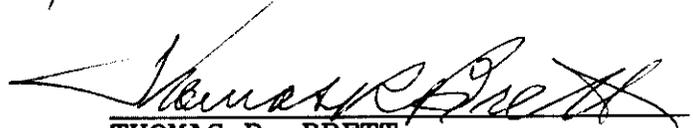
² Plaintiff was intoxicated at the time of the accident.

exists to support the ALJ's decision whatever that decision might. The Court concludes such substantial evidence exists herein.

The Magistrate Judge found no error in the ALJ's evaluation and findings. Likewise, this Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that the Plaintiff is not disabled.

The Court concludes the Magistrate Judge's Findings and Recommendations should be and the same are herewith approved and affirmed. Plaintiff's objections thereto are overruled. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 27th DAY OF APRIL, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

KENNETH TAYLOR,)
)
Plaintiff,)
)
vs.)
)
SMITHCO ENGINEERING,)
Wayne Pyle,)
in his representative)
capacity & individually,)
Jeffrey McLain,)
in his representative)
capacity & individually,)
)
Defendants.)

ENTERED ON DOCKET
DATE APR 28 1995

No. 95-C-111-K. ✓

F I L E D
APR 7 1995
Richard M. Clark
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before the court is plaintiff's application to remand. On January 13, 1995, plaintiff filed his petition against defendants in the District Court of Creek County. On February 3, 1995, Defendants filed their notice of removal in this court based on the inclusion of a violation of the Family Medical Leave Act, 29 U.S.C. § 101 et seq. as one of the plaintiff's causes of action. Defendants then filed their answer to plaintiff's original petition in this court on February 9, 1995. On March 13, 1995, plaintiff filed an amended complaint, with leave of court, which deletes any allegations regarding the Family Leave Act. The remaining claims are based upon solely upon state law.

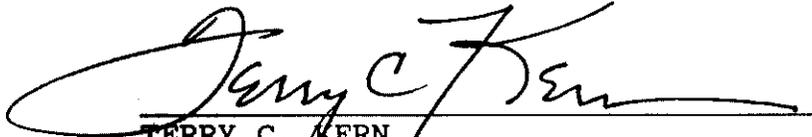
Defendant initially filed an objection to remand, but on April 21, 1995 has filed a withdrawal of that objection.

It is the order of this court that the plaintiff's application to remand is hereby GRANTED. This action is hereby

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remanded to the District Court of Creek County, Oklahoma.

ORDERED this 26 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

APR 27 1995

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

TOBBIN DON LEMMONS,)
)
 Plaintiff,)
)
 vs.)
)
 BRANT GREEN, et al.,)
)
 Defendants.)

No. 93-C-363-B

ENTERED ON DOCKET
APR 28 1995
DATE _____

ORDER

Before the Court is the motion to dismiss of Defendant David Bates, filed on March 17, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendant's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event the Court concludes that Plaintiff's claim against Mr. Bates should be dismissed for failure to prosecute this case against Mr. Bates in a diligent manner.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant David Bates's motion to dismiss (doc. #74) is **granted** and the above captioned

¹Local Rule 7.1.C reads as follows:

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

case is **dismissed with prejudice** as to Defendant Bates.

SO ORDERED THIS 27 day of Apr, 1995.

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

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILED

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

APR 27 1995 *RL*

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

JEAN DAVIS,)
)
Plaintiff,)
)
vs.)
)
CITY OF LOCUST GROVE and)
RONNIE BENIGHT,)
)
Defendants.)

Case No. 94-C-965-BU ✓

ENTERED ON DOCKET
DATE APR 28 1995

JUDGMENT

This matter came before the Court upon the Motion by Defendant City of Locust Grove for Summary Judgment and the Motion by Defendant Ronnie Benight for Summary Judgment and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that judgment is entered in favor of Defendants, City of Locust Grove and Ronnie Benight, and against Plaintiff, Jean Davis, and that Defendants, City of Locust Grove and Ronnie Benight, recover of Plaintiff, Jean Davis, their costs of action.

DATED at Tulsa, Oklahoma, this 27th day of April, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 27 1995 *RC*

JEAN DAVIS,)
)
Plaintiff,)
)
vs.)
)
CITY OF LOCUST GROVE and)
RONNIE BENIGHT,)
)
Defendants.)

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

Case No. 94-C-965-BU ✓

ENTERED ON DOCKET
APR 28 1995
DATE _____

ORDER

This matter comes before the Court upon the Motion by Defendant City of Locust Grove for Summary Judgment and the Motion by Defendant Ronnie Benight for Summary Judgment filed on March 27, 1995. From reviewing the Court file, it appears that Plaintiff has not responded to Defendants' motions for summary judgment within the time prescribed by the Local Rules and has not filed a request for an extension of time to respond to the motions. Therefore, in accordance with Local Rule 7.1(C), the Court deems Defendants' motions confessed.

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

Accordingly, the Court hereby GRANTS the Motion by Defendant City of Locust Grove for Summary Judgment (Docket No. 19) and the Motion by Defendant Ronnie Benight for Summary Judgment (Docket No. 21). The Court also declares MOOT the Motion in Limine by

Defendants City of Locust Grove and Ronnie Benight (Docket No. 24).
Judgment shall issue forthwith.

ENTERED this 27th day of April, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 24 1995

WAYNE LEE TAYLOR,)
)
Plaintiff,)
)
v.)
)
RON CHAMPION,)
)
Defendant.)

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

Case No. 95-C-324-B

APR 23 1995

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

- (1) That the Petitioner was convicted in Brevard County, Titisville, Florida.
- (2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.
- (3) In the furtherance of justice this case should be transferred to Brevard County Circuit Court, Titisville, Florida.

IT IS THEREFORE ORDERED:

- (1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the Brevard County Circuit court, Titisville, Florida for all further proceedings.
- (2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

114 4-26

IT IS SO ORDERED THIS 24 day of Apr., 1995.

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

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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

LINDA FERN WALKER, Surviving)
Spouse of BARRY ALLEN)
WALKER, Deceased,)

Plaintiff,)

vs.)

FARMERS INSURANCE COMPANY,)
INC.,)

Defendant.)

ENTERED ON DOCKET

DATE APR 28 1995

No. 93-~~P~~^F897-K FILED

APR 27 1995

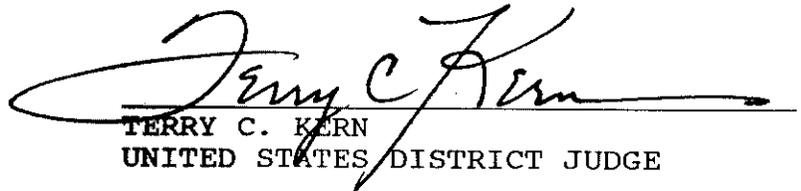
Richard M. Lawless, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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 25 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

CM 4-27

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

FILED

APR 24 1995

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

MARJORIE WALLACE,

Plaintiff,

v.

ATLANTA CASUALTY COMPANY,

Defendant.

No. 95-C-207-B

APR 2 1995

Wagoner County Case No. CJ-95-59

ORDER

Upon consideration of Defendant's Unopposed Motion Withdrawing Petition for Removal, the Court hereby remands this case to the District Court in and for Wagoner County, Oklahoma for further proceedings.

SO ORDERED this 24th day of April, 1995.

S/ THOMAS R. BRETT

C. Law

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

F I L E D

APR 24 1995

PAUL E. MCDANIEL,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, Donna Shalala, Secretary,

Defendant.

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

94-C-0109-B

APR 28 1995

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed April 4, 1995 in which the Magistrate Judge recommended that the case be remanded for further consideration. It was further recommended that the ALJ (1) order that Plaintiff undergo a consultative examination that includes an RFC evaluation; and (2) allow Plaintiff the opportunity to have Dr. Wash testify and/or provide additional evidence explaining her findings; and, in addition hold a supplemental hearing where a Vocational Expert testifies, taking into full consideration the additional findings and opinions, above. The ALJ should re-examine the evidence in toto to determine if Plaintiff can return to work.

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

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

Chen 4-21

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

SO ORDERED THIS 24 day of April, 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

APR 24 1995

ULYSSESS ADAIR,)
)
 Petitioner,)
)
 vs.)
)
 MICHAEL CODY,)
)
 Respondent.)

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

No. 94-C-257-B

EW.

DATE APR 23 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County for rape in the first degree, Case No. CRF-89-5123. Respondent has filed a Rule 5 response to which Petitioner has replied. For the reasons stated below the Court concludes the petition should be denied.

I. BACKGROUND

In March 1991, after the state had stricken counts 2 through 5, Petitioner pled guilty to rape in the first degree, and in accordance with the plea agreement, the state court sentenced him to life in prison. Although Petitioner did not appeal his conviction or seek to withdraw his guilty plea, he filed a petition for post-conviction relief in the district court of Tulsa County, raising the following grounds: (1) that the Court improperly relied on an inexistent prior conviction; (2) that the sentence was excessive; (3) that counsel's failure to investigate the alleged

Copy-26

prior conviction amounted to ineffective assistance of counsel; and (4) that the State Court failed to follow King v. State, 553 P.2d 529 (Okla. Crim. App. 1976), in accepting his guilty plea.

The district court denied relief, finding Petitioner's claims, except for his ineffectiveness claim, procedurally barred because the Petitioner had failed to provide any reason to excuse his failure to file a timely direct appeal of his guilty plea conviction. As to ineffective assistance of counsel, the court stated that counsel acted as a reasonably competent attorney under the facts and circumstances of the case and that any reference to any prior conviction was meritless because no second page alleging any prior conviction was ever filed in Petitioner's case. Petitioner timely appealed and the Oklahoma Court of Criminal Appeals affirmed.

In the present petition for a writ of habeas corpus, Petitioner raises the following grounds for relief: (1) denial of meaningful access to the Courts; (2) denial of due process in trial and appellate courts; (3) ineffective assistance of counsel during the plea proceedings and during the ten days following the imposition of sentence to preserve the right to withdraw his guilty plea and file a timely appeal; (4) want of jurisdiction by the trial court; (5) improper enhancement of his sentence via a non-existent prior conviction; (6) prosecutorial misconduct; (7) failure of the appellate court to follow its procedural rules; and (8) failure of the appellate court to conduct a hearing.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Respondent contends that Petitioner has failed to exhaust his claims of prosecutorial misconduct and general denial of due process as well as his allegation that the Oklahoma courts failed to follow their local rules. Because these claims are either procedurally barred or fail to state a federal constitutional claim, as more fully set out below, see Granberry v. Greer, 481 U.S. 129, 131, 135 (1987) (failure to exhaust does not preclude consideration of merits when no colorable federal claim is raised); Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993) (failure to exhaust does not preclude consideration of merits where claim would be procedurally barred), the Court will forgo the needless "judicial ping-pong" of dismissing this habeas corpus petition as a mixed petition.

The Court also finds that an evidentiary hearing is not

necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992).

A. Ineffective Assistance of Counsel

Petitioner's primary contention is that he was denied the effective assistance of counsel (1) when counsel failed to investigate his prior conviction, and (2) when he failed to contact Petitioner to determine if he desired to withdraw his guilty plea and file a timely direct appeal during the ten-day period following the entry of the Judgment and Sentence.¹

To establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 309 (10th Cir. 1994) (quoting Laycock v. New

¹The Court will not address the additional grounds of ineffective assistance of counsel which Petitioner raises for the first time in his reply to Respondent's Rule 5 response. (Petitioner's reply, doc. #10, at 2.) Petitioner has not moved for leave to amend his petition for a writ of habeas corpus to allege any of these new claims. Moreover, the state court records attached to Respondent's response reveal that Petitioner has not presented any of these claims to the Oklahoma courts.

Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

To establish the second prong, a petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 113 S. Ct. 838, 842-44 (1993) (holding counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable"). There is no reason to address both components of the Strickland inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

Petitioner's contention that Counsel failed to investigate a prior conviction from Kansas does not suffice to establish that counsel's performance was unreasonable under the first prong of the Strickland test. No prior conviction was ever used to enhance Petitioner's sentence in the state court. Nor was any second page filed in Petitioner's case alleging any prior conviction.

Accordingly, Petitioner is not entitled to habeas corpus relief on this ground.

In support of his second ground of ineffective assistance of counsel, Petitioner alleges that his counsel failed to help him file a motion to withdraw his guilty plea during the ten-day period following the entry of the Judgment and Sentence. Petitioner relies exclusively on Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991).

To prove ineffective assistance of counsel under these circumstances, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner can establish prejudice under the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992).

Petitioner's reliance on Baker v. Kaiser, 929 F.2d 1495, is misplaced. Unlike Baker, Petitioner's conviction was obtained following a guilty plea. As a result, Petitioner's appointed counsel had no absolute duty to file a motion to withdraw the guilty plea or advise Petitioner whether he had meritorious grounds to withdraw his plea. Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock v. New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989); see also Shaw v. Cody, No. 94-6172, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion).

Petitioner has not alleged a constitutional claim of error which could result in setting aside his guilty plea or that he asked counsel to appeal his guilty plea during the ten-day period following the entry of the Judgment and Sentence and that counsel failed to do so. See Laycock, 880 F.2d at 1188. Moreover, Petitioner was fully advised of his right to appeal at the time of sentencing. Therefore, this Court must conclude that Petitioner cannot establish any factual basis for his ineffective assistance of counsel claim.²

²The Court finds this case distinguishable from Randall v. State, 861 P.2d 314 (Okla. Crim. App. 1993), where the Oklahoma Court of Criminal Appeals held that a hearing on an application to withdraw a guilty plea is a "critical stage" which invokes a defendant's constitutional right to counsel.

B. Enhancement and Trial Court's Lack of Jurisdiction

In grounds four and five, Petitioner alleges that the trial court lacked jurisdiction by failing to follow the guilty plea guidelines set forth in King v. State, 553 P.2d 529 (Okla. Crim. App. 1976), and that his sentence was improperly enhanced with a non-existent prior conviction. Respondent argues that Petitioner is procedurally barred from raising these issue in the instant petition because he failed to raise them on direct appeal.

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

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a

petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner does not dispute that he defaulted these claims pursuant to an independent and adequate state procedural rule. He argues, however, that ineffective assistance of counsel in failing to help him file a motion to withdraw his guilty plea, during the ten-day period following the entry of the Judgment and Sentence, is sufficient cause to excuse his default.

Although ineffective assistance of counsel may provide sufficient cause to excuse a procedural default, the Court concludes that Petitioner falls far short of meeting that standard. As noted above, Petitioner's appointed counsel had no absolute duty to file a motion to withdraw the guilty plea or advise Petitioner whether he had meritorious grounds to withdraw his guilty plea, and Petitioner has not alleged that he asked counsel to file an appeal and that counsel failed to do so. See Laycock, 880 F.2d at 1188.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence, but contests only his counsel's failure to file a direct appeal. Accordingly, Petitioner is procedurally barred from raising grounds four and five.

C. Prosecutorial Misconduct and Due Process Claims

In Grounds one, two, six, seven, and eight, Petitioner alleges prosecutorial misconduct, a general due process claim, and various errors on the part of the Oklahoma state courts. As noted above, Respondent contends that these claims are unexhausted and therefore that the petition should be dismissed as a mixed petition. Petitioner replies that there are no state remedies presently available to him to exhaust his claim of prosecutorial misconduct.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. "If, however, it is obvious that the unexhausted claim would be procedurally barred in state court, [the court] will forego the needless 'judicial ping-pong' and hold the claim procedurally barred from habeas review. Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993) (citing Coleman v. Thompson, 501 U.S. 722, 735 at n.1; Harris v. Reed, 489 U.S. 255, 269-70 (1989) (O'Connor, J., concurring)).

This Court is positive that the Oklahoma courts will apply the same procedural default rule to Petitioner's claim of prosecutorial misconduct, if brought today in an application for post-conviction relief, that they applied to Petitioner's other claims. Accordingly, Petitioner's claim of prosecutorial misconduct must be dismissed as procedurally barred because Petitioner has neither shown cause and prejudice nor a fundamental miscarriage of justice.

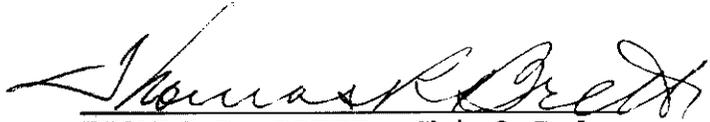
As to Petitioner's claims in grounds one, two, seven, and

eight--that he was denied meaningful access to the Courts, that he was deprived of due process protection in the trial and appellate courts, that the appellate court failed to follow its procedural rules, and that the appellate court failed to conduct a hearing-- the Court finds that these claims are not cognizable in this federal habeas proceeding.

III. CONCLUSION

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

SO ORDERED THIS 24 day of Apr., 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

APR 25 1995

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

LARRY LAUGHLIN,

Plaintiff

v.

KMART CORPORATION,

Defendant.

EOD: 4-28-95

Case No. 93-C-97-B

ORDER

This matter comes on pursuant to the recent mandate from the Tenth Circuit Court of Appeals directing this Court to vacate its summary judgment in favor of Defendant KMART Corporation (KMART) on Plaintiff Larry Laughlin's second cause of action and remand such action to the Oklahoma state court based upon a lack of jurisdiction of the district court to hear same.¹

Background of Case

Plaintiff, a former automotive sales manager of Defendant, brought an action against KMART alleging in his first cause of action a breach of his employment contract with KMART by its failure to pay Plaintiff earned bonuses and raises based upon performance. Plaintiff alleged KMART encouraged and required employees, including Plaintiff, to illegally overcharge certain automotive fleet customers and that when Plaintiff failed to

¹ After the Court granted summary judgment on Plaintiff's second cause of action the parties stipulated and agreed as to the dismissal with prejudice of Plaintiff's first cause of action. Prior to the dismissal Plaintiff had lodged an appeal of the Court's ruling as to the second cause of action.

104-27

continue to participate in such activities his sales figures were not sufficient to entitle him to raises and bonuses.

In his second cause of action Plaintiff alleged a constructive discharge/wrongful termination claim based upon Plaintiff's allegations that he warned KMART supervisors against the illegal overcharging of automotive fleet customers and was retaliated against as a result of such warning.

In its mandate the Tenth Circuit Court of Appeals raised the issue of lack of jurisdiction *sua sponte* because neither Laughlin's petition nor KMART's notice of removal established the requisite jurisdictional amount in this case, the petition merely alleging that the amount in controversy is in excess of \$10,000 for each of the two claims. In the district court neither KMART nor Plaintiff raised an issue as to jurisdictional amount.

In its opinion the Tenth Circuit Court of Appeals stated:

"In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). "A court lacking jurisdiction . . . must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." Tuck v. United Services Auto. Ass'n, 859 F.2d 842, 844 (10th cir. 1988) (quoting Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)), cert. denied, 489 U.S. 1080 (1989).

Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings. See Ins. Corp. v. Compagnie des Bauxites; 456 U.S. 694, 702 (1982). Moreover, if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter. Tuck, 859 F.2d at 844. "[T]he rule . . . is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United

States, in all cases where such jurisdiction does not affirmatively appear in the record.'" Compagnie des Bauxites, 456 U.S. at 702 (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. Lonnquist v. J.C. Penney Co., 421 F.2d 597, 599 (10th Cir. 1970). The burden is on removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992). Moreover, there is a presumption against removal jurisdiction. Id.

* * *

Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice."

Based upon the foregoing the Court vacates its Order granting summary judgment herein and REMANDS this matter to the district court in and for Tulsa County, State of Oklahoma.

IT IS SO ORDERED, this 25 day of April, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

COPY

FILED

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

APR 21 1995

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

UNITED STATES OF AMERICA

versus

ROY GLOVER,

Defendant.

No. 95-CV-335-C

ENTERED ON DOCKET

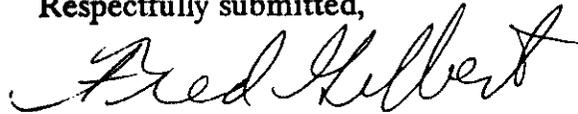
DATE APR 28 1995

[Criminal No. 91-CR-050-005-C]

DISMISSAL WITHOUT PREJUDICE

COMES NOW Defendant, ROY GLOVER, and hereby Dismisses and Withdraws, without Prejudice, his "Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and/or Motion for New Trial (Newly-Discovered Evidence)," filed herein on April 13, 1995

Respectfully submitted,



FRED P. GILBERT
830 Beacon Building
Fourth and Boulder
Tulsa, Oklahoma 74103
(918) 583-4276

Attorney for Roy Glover, Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing pleading to counsel for the Government, to wit, upon:

Mr. Scott Woodward
Assistant U.S. Attorney
3600 United States Court House
Tulsa, Oklahoma 74103

by forwarding said copies to him at his above-stated office this 21st day of April, 1995, by personal delivery or by U.S. Mail with first-class postage thereon fully prepaid.



Fred Gilbert

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

AMY SKIFF,

Plaintiff,

v.

CITY OF BIXBY, JIM BENNETT,
VICKIE ROBINSON, ED STONE,
and CHERYL POWELL,

Defendants.

Case No. 94-CV-100-H ✓

FILED

ENTERED ON DOCKET
APR 24 1995
DATE APR 28 1995

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

ORDER

FOR GOOD CAUSE shown, and Defendants' attorney having no objection it is hereby Ordered that the Order entered herein on April 13, 1995, sustaining Defendants' Motion for Summary Judgment be rescinded.

IT IS FURTHER ORDERED that Plaintiff be given ten (10) days from this date to file a response to Defendants' Motion for Summary Judgment.

DATED this 24TH day of APRIL, 1995.


UNITED STATES DISTRICT JUDGE

Submitted by:
Pat Malloy, Jr.
MALLOY & MALLOY, INC.
1924 South Utica, Suite 810
Tulsa, Oklahoma 74104
Telephone: (918) 747-3491
ATTORNEYS FOR TRUSTEE

29

Copies
made

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

FILED

APR 28 1995

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

THOMAS LEE PRICE,)
)
Plaintiff,)
)
v.)
)
DICKIE SNEED, et al.,)
)
Defendants.)

Case No. 94-C-127-H

ENTERED ON DOCKET
APR 28 1995
DATE _____

J U D G M E N T

This matter came before the Court on a motion for summary judgment by Defendants. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 26, 1995.

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

IT IS SO ORDERED.

This 28TH day of APRIL, 1995.



Sven Erik Holmes
United States District Judge

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

FEDERAL DEPOSIT INSURANCE
CORPORATION,

Plaintiff,

vs.

Case No. 92-C-445-~~E~~^H

HENRY G. WILL and VIRGINIA C.)
WILL, as husband and wife;)
HENRY G. WILL as personal)
guarantor of the Debts of)
Midtown Properties; COUNTY)
TREASURER OF DELAWARE COUNTY)
OKLAHOMA; MIDTOWN PARTNERS,)
an Oklahoma General Partner-)
ship d/b/a MIDTOWN PROPERTIES;)
David L. SOBEL, as a personal)
guarantor of the Debts of)
Midtown Properties; Marvin L.)
Morse, as personal guarantor)
of the Debts of Midtown)
Properties;)

ENTERED ON DOCKET

APR 28 1995

DATE

FILED

APR 27 1995

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

STIPULATED DISMISSAL

COMES now the Plaintiff, Federal Deposit Insurance Corporation, in its corporate capacity as successor to certain assets of the Bank of Commerce and Trust Company, Tulsa, Oklahoma and the Defendants, Henry G. Wills, Virginia C. Wills and Marvin Morse, hereby stipulate the following:

1. That the Defendant, David L. Sobel, filed a Chapter 7 Bankruptcy Petition with the United States Bankruptcy Court for the Northern District of Oklahoma on August 28, 1992.

2. On October 28, 1992, this action was stayed by the Magistrate pending action by the United States Bankruptcy Court.

3. On December 28, 1992, the Defendant, David L. Sobel, was discharged by the United States Bankruptcy Court of all

dischargeable debts. See Exhibit "A" Bankruptcy Docket Sheet

4. That Pursuant to the Defendant, David L. Sobel, being discharged by the United States Bankruptcy Court of all dischargeable debts, the Plaintiff hereby moves this Court to dismiss the Defendant, David L. Sobel, from the above styled action and the Defendants hereby agree and stipulate to David L. Sobel's being dismissed from this action.

Respectfully Submitted,



Tom Colbert, OBA #10046
4020 N. Lincoln Blvd.
Suite 204
Oklahoma City, Oklahoma 73105
(405) 424-8808

ATTORNEY FOR PLAINTIFF

Benjamin Abney
Riggs, Abney, Neal & Turpen
Attorneys and Counselors at Law
Frisco Bldg.
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
(918) 587-9708

ATTORNEY FOR DEFENDANT,
MARVIN L. MORSE

Lee I. Levinson
Bodenhammer & Levison
5310 E. 31st Street
Suite 900
Tulsa, OK 74135
(918) 663-5327

ATTORNEY FOR DEFENDANTS,
HENRY G. WILL AND
VIRGINIA C. WILL

Case Number: 92-03054-W SOBEL, DAVID L.

=====
Case Information
=====

341 Meeting: 09/24/92, 9:30 p.m. at location #14
Claim Deadline: 05/17/93 523(c)/727 Complaint Deadline: 11/23/92
Case was actually discharged on 12/28/92
District: OKLAHOMA N (District Code: 1085) Office: TULSA [4]
Original Filing Date: 08/28/92 Original Chapter: 7

Judge: Wilson, Mickey D. [A301]

Type of Filing: Voluntary

Assets available to creditors.

Fee of 120.00 fully paid.

Nature of Debt: Business

=====
Debtor Information
=====

Type of Debtor: Individual

Debtor:
SOBEL, DAVID L.

SSN:448-46-1512 EIN:

Address:
1388 EAST 26TH PLACE
TULSA, OK 74114

City: TULSA [40143]

=====
Attorney Information
=====

Attorney for Debtor:
JARBOE, John B.
1810 Mid-Continent Bldg.
Tulsa, OK 74103
918-582-6131

Trustee:
KIRTLEY, Scott P.
P.O. Box 1046
Tulsa OK 74101
918-587-3161

=====
Statistical Information
=====

Estimated Number of Creditors: 1 to 15
Estimated Assets: \$100,000 to \$499,999
Estimated Liabilities: \$1,000,000 to \$9,999,999
Form of Business Organization: Individual
Type of Business: Professional
Number of Employees: unknown
Number of Equity Security Holders: unknown
Receipt Number: 19763

EXHIBIT "A"

Docket for Case No. 92-03054-W

SOBEL, DAVID L. (printed 04/25/95 at 15:41)

Filing Date	No.	Entry
08/28/92	1	VOLUNTARY petition under chapter 7 @12:55pm, R#19763, \$120.00pd [EOD 08/28/92][] SCHEDULES and Statement of Affairs w/Statement of Intention [EOD 08/28/92][PS]
08/28/92	2	ATTORNEY Statement of Compensation [EOD 08/28/92][PS]
08/28/92	3	MATRIX filed. [EOD 08/28/92][PS]
08/31/92	4	ORDER Entered For Meeting Of Creditors on 09/24/92 at 9:30 a.m. at U.S. Trustee's office[EOD 08/31/92][] & Fixing last day to file obj to dischrq/complnts to determ dischrqblty of debt on 11/23/92[EOD 08/31/92][ps]
08/31/92	5	CERTIFICATE of Mailing Re: Item # 4. (22 copies)[EOD 08/31/92][ps]
09/16/92	6	NOTICE OF APPOINTMENT OF TRUSTEE & DESIGNATION OF REQUIRED BOND [EOD 09/17/92][PS]
09/23/92	7	MOTION for Relief from Stay by Tulsa National Bank.R#20424 \$60.00pd. [Disposed][EOD 09/24/92][PS]
09/28/92	8	TRSTEE MTG RPT:Dbtr(s) appr'd,swrn & exmnd.Trste adpts schds as invntry.Intrm trustee to srv as trustee.Mtg cncl'd. Re: Item # 4.[EOD 09/29/92][PS]
10/08/92	9	ENTRY of Appearance and Request for Notice(s) by Gary G. Lyon for Fed. Deposit Insurance Group. [EOD 10/13/92][PS]
10/14/92	10	REQUEST FOR ORDER from relief from stay and abandonment of by Tulsa National Bank. Re: Item # 7.[EOD 10/15/92][PS]
10/15/92	11	ORDER GRANTING Relief from Stay & abandonmnet by Tulsa Nat'l Bank. Re: Item # 7.[EOD 10/15/92][PS]
11/19/92	12	APPLICATION for Order extending time of Deadline for Objection to Discharge by Tulsa Nat'l Bank [EOD 11/20/92][NM]
11/23/92	13	ORDER Granting Extension of Time to 12-23-92 for Tulsa Nat'l Bank of file complaint objecting to discharge or determine dischargeability of certain types of debts Re: Item # 12.[EOD 11/24/92][NM]
11/30/92	14	APPLICATION for Extension of Time by Debtor to read & execute deposition of Debtor taken 10-28-92 [EOD 12/01/92][NM]
12/02/92	15	ORDER Granting Extension of Time until 12-23-92 to read & execute deposition Re: Item # 14.[EOD 12/03/92][NM]
12/11/92	16	REAFFIRMATION Agreement w/Frontier Federal Savings & Loan Association & affidavit of atty. [EOD 12/15/92][3P]
12/21/92	17	REQUEST to set case for sec. 524(d) hearing. [EOD 12/22/92][PS]

EXHIBIT "A"

Docket for Case No. 92-03054-W

SOBEL, DAVID L. (printed 04/25/95 at 15:41)

Date	No.	Entry
12/22/92	18	NOTICE OF Setting Section 524(d) Hearing on 01/19/93 at 3:00 p.m. at Courtroom 1 Re: Item # 17.[EOD 12/22/92][PS]
12/28/92	19	DISCHARGE OF DEBTOR Re: Item # 1.[EOD 12/28/92][NM]
12/29/92	20	ORDER Setting 524(d) hearing on 01/19/93 at 3:00 p.m. at Courtroom 1 Re: Item # 18.[EOD 12/31/92][PS]
12/29/92	21	AFFIDAVIT of Mailing Order & Notice of Hrg. 524(d). Re: Item # 20.[EOD 12/31/92][PS]
01/05/93	22	CERTIFICATE of Mailing Re: Item # 19. (21 copies)[EOD 01/05/93][PS]
01/19/93	23M	MIN:SEC 524D HRG HELD. DEBTOR PRESENT. Re: Item # 20.[EOD 01/21/93][SE]
02/08/93	24	NOTICE of Asset Case. [EOD 02/09/93][PS]
02/17/93	25	NOTICE to File Claims due on 05/17/93 Re: Item # 24.[EOD 02/17/93][PS]
02/17/93	26	CERTIFICATE of Mailing Re: Item # 25. (21 copies)[EOD 02/17/93][PS]
04/12/93	27	TRUSTEE'S report of no distribution. [EOD 04/13/93][PS]
04/12/93	28	APPLICATION of T'ee to withdraw Notice of asset case. Re: Item # 24.[EOD 04/13/93][SE]
04/14/93	29	ORDER WITHDRAWING Notice of Asset Case. (re pl/28). [EOD 04/15/93][NM]
04/15/93	30	FINAL Decree [EOD 04/15/93][BD]
		CASE CLOSED. [EOD 04/15/93][BD]

DOCKET END

EXHIBIT "A"

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

RENALDO WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA COUNTY PUBLIC)
 DEFENDER'S OFFICE, et al.,)
)
 Defendants.)

No. 93-C-1027-H

FILED

APR 26 1995

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

ENTERED ON DOCKET

DATE APR 27 1995

ORDER

On April 4 and 6, 1995, the Court notified Plaintiff (1) that it would dismiss the Tulsa County Public Defender's Office, the Tulsa County District Attorney's Office, Johnnie O'Neal, and Mark Lyons for failure to serve pursuant to Fed. R. Civ. P. 4(m), and (2) that it would dismiss this action as to Defendant Marvin Heart for lack of prosecution. Plaintiff has not responded within the eleven days set out in the Court's orders.

Accordingly, the Tulsa County Public Defender's Office, the Tulsa County District Attorney's Office, Johnnie O'Neal, and Mark Lyons are hereby **dismissed for lack of service** and Marvin Heart is **dismissed for lack of prosecution**.

SO ORDERED THIS 26TH day of April, 1995.


Sven Erik Holmes
United States District Judge

9

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

FILED

APR 26 1995

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

RL

THOMAS LEE PRICE,)
)
Plaintiff,)
)
v.)
)
DICKIE SNEED, et al.,)
)
Defendants.)

Case No. 94-C-127-H

ENTERED ON DOCKET
DATE APR 27 1995

O R D E R

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket #21) (pertaining to Defendants' Joint Motion for Summary Judgment (Docket # 18)) and Plaintiff's Response to Report and Recommendation of the United States Magistrate Judge (Docket #22).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

The Report and Recommendation recommends granting Defendants' Motion for Summary Judgment because there are no disputed material questions of fact and Defendants are entitled to judgment as a matter of law. Despite a court-ordered extension of time for Plaintiff to respond to Defendants' motion, Plaintiff declined to do so. Plaintiff then submitted a letter in response to the Report and Recommendation. In the letter, Plaintiff repeats his original

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allegations of injury and fails to offer the Court any evidence controverting Defendants' contentions.

Based on a review of the Report and Recommendation of the Magistrate Judge and the Response thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge granting Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

This 26TH day of APRIL, 1995.



Sven Erik Holmes
United States District Judge

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

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

93-C-885-E

ML
FILED

APR 25 1995

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

ENTERED ON DOCKET

DATE APR 27 1995

ORDER

Plaintiff Helen Hurst seeks judicial review of a decision by the Secretary of Health and Human Services. The Secretary's decision denied Social Security disability benefits to Plaintiff, concluding that she could return to her past relevant work as a sales clerk. Hurst challenges that decision, claiming that substantial evidence does not support the Secretary's decision.¹

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).² A finding of "no

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

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

substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).³

After a review of the record, the Court finds the case should be remanded for further consideration. The Administrative Law Judge ("ALJ") found that Hurst could return to her past relevant work as a sales clerk. However, in making that determination, the ALJ apparently did not consider a January 29, 1992 Order from the Workers' Compensation Court of the State of Oklahoma.⁴ That Order, a copy of which is attached to the court file, found that Hurst was permanently and totally disabled and awarded her compensation for injuries to her neck, face, arms, lungs and psychological overlay. *See, Hurst v. Special Indemnity Fund, 90-12017-H.*

In remanding the case, the Court finds that "the ALJ has a duty to hear and evaluate all relevant evidence in order to determine whether an applicant is entitled to disability benefits." *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981). Little question exists that

governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).

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

⁴ The ALJ briefly notes the Workers Compensation case, but it appears he did not consider much, if any, of the evidence supporting it. On remand, the ALJ must review all the evidence submitted by Hurst to the Compensation court.

different statutory tests exist for disability under workers' compensation and under the Social Security Act.⁵ However, the evidence leading to the Order is relevant and should be discussed as one court explains:

An ALJ could rationally conclude that workers' compensation reports are in some cases less reliable, especially as to their ultimate conclusions on the Plaintiff's ability to work...I do not believe, however, that such reports may be totally ignored because they contain conclusory language suggestive of workers' compensation...such reports are ordinarily entitled to some weight. *Winston v. Heckler*, 585 F.Supp. 362, 367 (D.N.J. 1984).

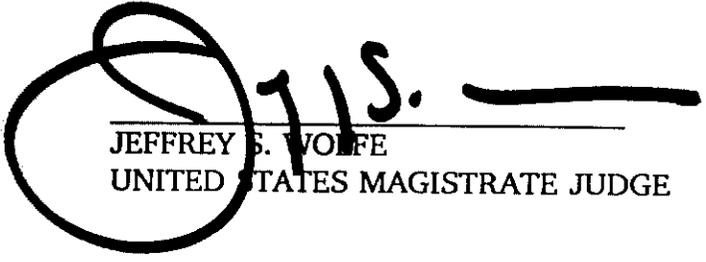
The Court also questions the ALJ's handling of the reports from Dr. William Reid, who examined Hurst on April 20, 1992. Dr. Reid found that Hurst was disabled because of "schizophrenia disorder". *Record at 1067*. He noted that Hurst had evidence of social withdrawal, "vague and circumstantial" speech, anxiety and a lack of initiative and energy. *Id.*

The ALJ, however, rejected that finding and instead relied on a report consulting psychiatrist Dr. Thomas Goodman. It appears that one reason the ALJ rejected Dr. Reid's findings was because Dr. Goodman questioned Dr. Reid's objectivity.⁶ That issue must be clarified on remand. Therefore, for the reasons discussed above, the Court REMANDS the case to the Secretary for further consideration.

⁵ 20 C.F.R. § 404.1504 reads: "A decision by any nongovernmental agency or any other governmental agency about whether you are disabled or blind is based on its rules and is not our decision...We must make a disability or blindness determination based on social security law. Therefore, a determination made by another agency that you are disabled or blind is not binding on us."

⁶ Dr. Goodman questioned Dr. Reid's objectivity because Dr. Reid submitted his report to Hurst's workers' compensation attorney. *Record at 1086*. Dr. Goodman's "hunch" infers that Dr. Reid acted improperly in his examination. No evidence of such conduct exists in the record and the ALJ should not give any weight to what Dr. Goodman believes took place (without sufficient evidence). In addition, certain comments by the ALJ are suspect when discussing Dr. Reid's examination. The ALJ stated that Dr. Reid's opinions are based on "erroneous findings." While he attempts to cite other medical evidence to support such a conclusion, the language sounds like he is attempting to interpose his opinion over that of a medical expert -- something he should not do. *Record at 763*. Also, see, *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). The Court acknowledges that evidence in the record (i.e., the examinations of Drs. Allen and Goodman) support the Secretary's decision to deny disability benefits, but some of the ALJ's language suggests that he did not follow proper procedures in his decision. On remand, these issues should be, at a minimum, clarified.

SO ORDERED THIS 25th day of April, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

LINDA FERN WALKER, Surviving)
Spouse of BARRY ALLEN)
WALKER, Deceased,)
)
Plaintiff,)
)
vs.)
)
FARMERS INSURANCE COMPANY,)
INC.,)
)
Defendant.)

ENTERED ON DO.)
APR 27 1995)
No. 93-C-897-K ✓

FILED
APR 27 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court are various motions of the parties. Defendant had previously filed a motion for summary judgment. By Order entered April 6, 1995, the Court denied the motion because the parties had not provided copies of the relevant insurance policies, despite being requested to do so. Defendant has now filed (1) a motion to reconsider the summary judgment motion and (2) a motion for leave to file an additional supplement to the summary judgment motion. The supplement consists of the insurance policies in question. Plaintiff does not object to either motion. For her part, plaintiff has filed (1) a motion to dismiss her bad faith claim without prejudice and (2) a motion to reconsider remand, arguing that without the bad faith claim, her cause of action does not implicate the requisite jurisdictional amount of 28 U.S.C. §1332.

On September 4, 1988, plaintiff's spouse, Barry Walker, was involved in an automobile accident with the son of Wayne Enloe. At the scene of the accident, Wayne Enloe shot and killed Barry

Walker. Enloe was charged with First Degree Murder and was ultimately found not guilty by reason of insanity. Enloe had no insurance. At the time of the accident plaintiff and her husband held two automobile insurance policies issued by defendant. Policy Number 08 10093 69 51 included uninsured motorist coverage of \$25,000.00 per person, \$5,000.00 of medical payment coverage as well as comprehensive and collision coverage on a 1982 Chevrolet Van. Policy Number 08 10090 15 41 provided for uninsured motorist coverage of \$10,000.00 per person, \$5,000.00 medical payment coverage as well as comprehensive and collision coverage. Plaintiff made demand on defendant for payment under the uninsured motorist provisions and medical payment provisions of the policies and defendant denied payment. Plaintiff brings this action for breach of contract and bad faith.

From the portions of the criminal trial transcript provided to this Court, the relevant events took place as follows. Much animosity had developed between Wayne Enloe and Walker, who were neighbors, regarding a property dispute. The culmination took place on September 4, 1988, when decedent drove his van to take his daughter to church. The van was stopped at the church entrance. A blue pick-up truck, driven by Perry Enloe, hit the van broadside. Another truck, driven by Wayne Enloe stopped directly behind decedent's van. Wayne Enloe exited his truck and ran over to the driver's side of the blue pick-up truck driven by his son. Wayne Enloe then fired one shot from a pistol into the van. Walker exited the passenger side of the van and began running down the

street. Wayne Enloe chased him, firing rounds from the gun. It appeared to one witness Walker was struck by one round and fell to the ground on all fours. Wayne Enloe walked to within 8-10 feet of Walker and fired a final shot into Walker's head.

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

Both parties have discussed at length Safeco Ins. Co. of America v. Sanders, 803 P.2d 688 (Okla.1990). In Safeco, Laura Sanders and Michael Houghton were sitting in Sanders' father's automobile when they were subdued by Scott Hain and Robert Lambert. Sanders and Houghton were then locked in the vehicle's trunk. The vehicle was driven to an isolated area and set afire, killing Sanders and Lambert. The Sanders' vehicle was insured under an automobile policy issued by Safeco, which included uninsured motorist (UM) coverage. The personal representative of the estates of Sanders and Houghton filed claims for UM benefits.

The Supreme Court of Oklahoma set forth a four-step test for determining whether UM coverage applies: (1) Does the injury arise out of the use of the motor vehicle as contemplated by 36 O.S. §3636? (2) If the injury arose out of the use of a motor vehicle, was there a causal connection between the use of the vehicle and the injury? (a) is a use of the vehicle connected to the injury? and, (b) is that use related to the transportation nature of the vehicle? (3) If the causal connection existed, do the acts of the tortfeasor constitute acts of independent significance to sever any causal line? (4) Was the tortfeasor an operator of the vehicle during the commission of the wrongful act? See also Estate of Williams v. Preferred Risk Ins. Co., 867 P.2d 485, 486 (Okla. Ct. App.1993).

As to the first prong, the Supreme Court of Oklahoma held "if the facts establish that a motor vehicle or any part of the motor vehicle is the dangerous instrument which starts the chain of events leading to the injury, the injury arises out of the use of the motor vehicle, as contemplated by 36 O.S.1981, §3636." Safeco, 803 P.2d at 692. Under this extremely broad test, it can be said Enloe's driving of his vehicle to the point of attack started the chain of events leading to the injury. The Court finds the first prong satisfied for purposes of summary judgment.

Next, the Supreme Court of Oklahoma in Safeco stated §3636(B) requires "there be a connection between the motoring or transportation use (use related to the inherent nature of a motor vehicle) by an uninsured motorist and the injury to the insured."

Id. As already stated, the Safeco court set forth a separate two-step test in making this determination: (1) is the use of the vehicle connected to the injury; and (2) is that use related to the transportation nature of the vehicle. Id. After stating whether a use of an uninsured motor vehicle is related to the transportation nature of the vehicle is necessarily a question of fact, id. at 693, the Oklahoma Supreme Court went on to state the acts of cutting the fuel line and lighting the fuel after the car was parked were so contrary to the transportation nature of the vehicle, as a matter of law, the court held the injuries were not within UM coverage. Id. at 695.

In the case at bar, this Court similarly holds, as a matter of law, the acts of exiting a vehicle, chasing a man down the street while firing shots, and ultimately killing him, are contrary to the transportation nature of the vehicle. Taking account of the third prong of the Safeco test, the acts of Enloe as tortfeasor constitute acts of independent significance, severing any causal connection. The Oklahoma Court of Appeals reached the same conclusion in Williams, 867 P.2d at 487, finding UM coverage not applicable to an attack and beating inflicted by a passenger upon a driver of the driver's insured car.

It is not necessary under these facts to reach the fourth prong of the Safeco test, and address whether Enloe was an operator of an uninsured vehicle at the time of the commission of the wrongful act. Under controlling precedent, UM coverage is unavailable under the facts of this case.

Regarding payment of medical benefits, the parties extensively discuss Willard v. Kelley, 803 P.2d 1124 (Okla.1990). In that case, a police officer spotted a vehicle driven by a robbery suspect. After a chase, the suspect's vehicle came to a halt. The patrol car stopped behind it and the officer stepped out beside his car, where he was shot by the suspect. The Supreme Court of Oklahoma indicated the two relevant inquiries were whether the injury was accidental and whether the insured was "occupying" the covered auto at the time. The court held medical payment coverage insures against injuries "caused by accident", which includes harm which is unprovoked, unforeseen and unintended from the insured's point of view. The court concluded a question of fact existed as to whether the police officer expected or should have expected to be fired upon by the gunman. Id. at 1130. A similar question of fact exists here.

Summary judgment may still be granted if no genuine issue of material fact exists as to whether Walker was "occupying" his vehicle when the injury took place. The Willard court said the term "occupying" includes "alighting from" and "entering into" an automobile. Although the initial shot was fired while Walker occupied the van, his death took place a considerable distance away after a chase on foot. The evidence does not support the conclusion Walker was occupying the vehicle at the time of the injury. Summary judgment is proper regarding the medical benefits provision of the policies as well. The Court has reviewed the two policies involved in this litigation, as contained in defendant's

proposed additional supplement, and finds no provision which contradicts the analysis detailed above. No breach of contract having occurred, the bad faith claim fails as well.

As mentioned, plaintiff has moved to dismiss her bad faith claim without prejudice pursuant to Rule 41(a)(2) F.R.Cv.P. This motion has been made very late in the case, with discovery completed and an established pretrial conference date rapidly approaching. Considering all factors, the Court declines to grant the motion to dismiss. See Shaffer v. Evans, 263 F.2d 134, 135 (10th Cir.1958), cert. denied, 359 U.S. 990 (1959) (listing factors for court's discretionary decision). See also Case v. Southern Express Co., 409 F.2d 331, 334 (7th Cir.1969). In view of this ruling, the motion of the plaintiff to reconsider remand is also denied.

It is the Order of the Court that the motion of the defendant to file additional supplement is hereby GRANTED. The motion of the defendant to reconsider and the motion of the defendant for summary judgment are also GRANTED. The motions of the plaintiff to dismiss without prejudice and to reconsider remand are hereby DENIED.

ORDERED this 25 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

INTEREST ON \$0.

DATE APR 27 1995

ELLEN A. TAYLOR,
Plaintiff,

vs.

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

Defendant.

No. 93-C-223-K ✓

FILED

APR 26 1995

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

ORDER

Before the Court is the motion of the plaintiff (docket #14) for attorney fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d)(1)(A).

On November 28, 1994, the Court reversed and remanded the denial decision of the Secretary with instructions to conduct a supplemental administrative hearing in accordance with the Court's order. Plaintiff filed the present motion February 3, 1995, contending she is entitled to an award of attorney fees and costs. The government has not responded to the motion.

A motion for attorney fees under the EAJA must be filed within 30 days after the judgment becomes final. 28 U.S.C. §2412(d)(1)(B). A final judgment is one that is no longer appealable. 28 U.S.C. §2412(d)(2)(G). The appeal limitation in a social security case is sixty days. Federal Rule of Appellate Procedure 4(a). Therefore, a plaintiff has ninety days from the date judgment is entered in which to file for EAJA fees. The present motion was timely filed on February 3, 1995.

When a district court remands a matter to the secretary, it necessarily does so pursuant either to sentence four or sentence six of 42 U.S.C. §405(g). The remand in this case was pursuant to sentence four. A sentence four remand is a final judgment, and a party who wins a sentence four remand order is a prevailing party under 28 U.S.C. §2412(d)(1)(B). Shalala v. Schaefer, 113 S.Ct. 2625, 2632 (1993). Fees are to be awarded unless the position of the government was "substantially justified." 28 U.S.C. §2412(d)(1)(A). The government bears the burden on this issue. Estate of Smith v. O'Halloran, 930 F.2d 1496, 1501 (10th Cir.1991). Since the government has not responded to the pending motion, obviously the burden has not been met.

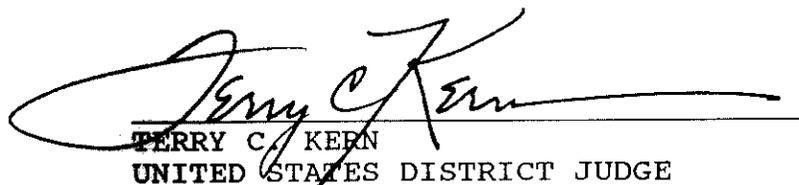
The only remaining issue is plaintiff's request for an upward adjustment of fees. The EAJA provides, in relevant part, "attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." 28 U.S.C. §2412(d)(2)(A)(ii). The decision whether to exceed the \$75 per hour rate is within the discretion of the district court. Chynoweth v. Sullivan, 920 F.2d 648, 649 (10th Cir.1990). Plaintiff has presented statistics from the Consumer Price Index relating to increased cost of living. Such presentation does not mandate fee enhancement. "Congress is quite capable of requiring mandatory fee increases to account for changes in the Consumer Price Index and, as the statute quoted above shows, this it has not done." May v. Sullivan, 936 F.2d 176, 178 (4th Cir.1991), cert.

denied, 502 U.S. 1038 (1992). Plaintiff has also presented documentation of his attorney's expertise in Social Security litigation. Such expertise is insufficient to justify an enhanced fee. Chynoweth v. Sullivan, 920 F.2d 648, 650 (10th Cir.1990). The statutory rate of \$75 per hour will be followed.

Plaintiff's counsel presents a fee request reflecting 23 hours spent. At \$75 per hour, this results in a fee of \$1725.00. Plaintiff also requests 2 hours of clerk time at \$20 per hour. Time spent by law clerks and paralegals is compensable under the EAJA. Jean v. Nelson, 863 F.2d 759, 778 (11th Cir.1988), aff'd, 496 U.S. 154 (1990). However, plaintiff also seeks \$7.10 in postage for certified mail used in serving the defendants. Costs for postage fees are not recoverable. Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir.1986). The total fee awarded is \$1765.00.

It is the Order of the Court that the motion of the plaintiff for attorney fees is hereby GRANTED in the amount of \$1765.00.

ORDERED this 25 day of April, 1995.


PERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED

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

APR 26 1995

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
CHARLOTTE W. SCHUMAN, et al.,)
)
Defendants.)

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

Case No. Civ. 94-C-796-K

ENTERED ON DOCS
APR 26 1995

STIPULATION OF DISMISSAL

The parties, by undersigned counsel, hereby stipulate and agree that the above captioned case be dismissed with prejudice, the parties to bear their own costs and expenses of litigation.

Because of this stipulation, the issues in the United States' Motion to Strike and Motion to Dismiss are moot, and the parties request that the Court refrain from ruling thereon.

APPROVED FOR ENTRY:

Dated this 26th day of April, 1995.

Stephen P. Kranz
STEPHEN P. KRANZ, ESQUIRE
Trial Attorney, Tax Division
U.S. Department of Justice
555 - 4th Street N.W.
P.O. Box 7238
Washington, D.C. 20044

Dated this 26th day of ~~March~~ April, 1995.

Frederic Dorwart
FREDERIC DORWART, ESQUIRE
Old City Hall
124 East Fourth Street
Tulsa, Oklahoma 74103-5010

ENTERED APRIL 26th 1995.

UNITED STATES DISTRICT JUDGE

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

EOD: 4.27.95

ERVIN HAWKINS,
Petitioner,
vs.
EDWARD L. EVANS, et al,
Defendants.

Case No. 94-C-178-B

FILED

APR 25 1995

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

ORDER

The Court has for consideration the matter of a Certificate of Probable Cause being issued to the Petitioner herein. Petitioner's Notice of Appeal was filed on March 31, 1995, from an order denying Petitioner's petition for writ of habeas corpus.

Fed.R.App.P. 22(b) provides in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district court or a circuit judge issues a certificate of probable cause. The test for granting a certificate of probable cause is stricter than for allowing an appeal *in forma pauperis*. The test appears to be that a certificate of probable cause should be granted as long as the issue raised is "not frivolous" and more recently it has required a question of some "substance" before issuing a certificate. Gardner v. Pogue, 558 F.2d 548, 551

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(9th Cir. 1977). In Clements v. Wainwright, 648 F.2d 979, 981 (5th Cir. 1981), the Court said:

"... The test for granting a certificate of probable cause is stricter. Justice (then Judge) Blackmun has stated:

"My own reaction is that the cases [of the several circuits], taken as a whole, do indicate that the standard of probable cause requires something more than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement of §2925."

"Blackmun, Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases, 8 Cir., 43 F.R.D. 343, 352 (1967), quoted in Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977)"

This Court has applied the test for granting a certificate of probable cause and finds such certificate should be issued pursuant to Fed.R.App.P. 22(b), the issue raised by Petitioner being not frivolous and of some substance. The Court also notes Petitioner's financial status and concludes Petitioner should be allowed to proceed *in forma pauperis* pursuant to Fed.R.App.P 24(a).

IT IS THEREFORE ORDERED a certificate of probable cause is hereby issued pursuant to Fed.R.App.P. 22(b), and the Petitioner be allowed to proceed *in forma pauperis*.

DATED this 25 day of April, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 25 1995

MICHAEL HILDEBRANT,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

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

93-C-1113-K

EOD: 4-27-95

ORDER

Plaintiff Michael Hildebrant seeks judicial review of a decision by the Secretary of Health and Human Services. The Secretary's decision denied Social Security disability benefits to Hildebrant, concluding that he could return to work as a telephone answerer, hand packager, data entry person and/or in bench assembly. Hilderbrant challenges that decision, claiming that his pain resulting from cerebral palsy prevents him from working.¹ A review of the record, however, shows that the Secretary's decision should be affirmed.

I. Standard of Review

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

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." The United States Magistrate Judge is reviewing the appeal because the parties consented to proceed under 28 U.S.C. §636(c)(3).

Chen 4-27

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

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

II. Summary of Evidence

At the time of the hearing before the ALJ, Hilderbrant was 35 years old and had previously worked in rental car reservations for Avis. He has a GED. Hilderbrant claims that he became disabled on December 7, 1990 because of pain, "residuals" of cerebral palsy³, a chronically infected foot, depression and alcohol abuse. *Hilderbrant's Brief at page 2 (docket #5)*.

Several doctors examined Hilderbrant and, for the most part, the findings were consistent. On December 5, 1990, Hilderbrant entered the Laureate Psychiatric Center in Tulsa for alcohol dependence. He told the staff that he had been drinking "approximately 36 beers" a night. The facility treated Hilderbrant for 35 days and discharged him on

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

³ According to the medical evidence, Hilderbrant has had cerebral palsy since birth, especially in his right leg.

January 11, 1991. When the Center discharged Hilderbrant, they described him as "medically stable" and "highly motivated to maintain his sobriety." *Record at 195*. During his stay, the facility also performed a physical examination of Hilderbrant. They noted that Hilderbrant had "chronic difficulty with ambulating on his right leg as a result of cerebral palsy and multiple surgeries" and that his right leg was "externally rotated" and [had] severe genu valgus deformity." *Id. at 198-202*.

On December 19, 1991, Dr. Donald R. Inbody examined Hilderbrant. Dr. Inbody, a consultant for the Secretary, indicated that Hilderbrant "dragged his right leg in a sweeping movement". *Id. at 211*. Dr. Inbody also indicated that he believed Hilderbrant had moderate chronic depression but that his alcohol abuse was under control. *Id. at 212*.

Dr. Ashok Kache examined Hilderbrant on June 17, 1992. Dr. Kache noted that Hilderbrant had problems flexing his right leg and knee. The doctor said that Hilderbrant did not need assistance to walk unless he was on an uneven surface or rough terrain. *Id. at 216-218*. Dr. Kache also indicated that Hilderbrant lacked "some" coordination and dexterity in his fingers and could not perform rapid alternating movement of the fingers. *Id.*

Dr. Ronald Passmore, a consulting doctor, examined Hilderbrant on June 29, 1992. Dr. Passmore opined that Hilderbrant had functioned poorly in the past because of his heavy drinking. He also noted depression. *Id. at 224*. Dr. Thomas Goodman examined Hilderbrant on October 29, 1992. Dr. Goodman noted that Hilderbrant denied use of alcohol. Dr. Goodman indicated that Hilderbrant had retained his basic intellectual abilities and was "psychologically" qualified to perform, at a minimum, simple type repetitive work.

Id. at 241.

On December 1, 1992, Dr. Joseph Sutton examined Hilderbrant and found that he walked with a "marked limb and weakness" in the right leg. Dr. Sutton opined that Hilderbrant could stand for up to two hours and walk up to two hours in an eight-hour work day. He found some "minor" difficulty with the right hand and suggested that Hilderbrant -- because of problems with balance -- not work around unprotected heights and moving machinery. Dr. Sutton also wrote that "I am somewhat surprised that the patient would not be able to perform such jobs such as he had been doing for Avis in the past. I would think that any type of office or clerical work would certainly be possible for this man." *Id. at 231-234.*

The other evidence consists, for the most part, of the testimony of Hilderbrant and of the Vocational Expert. Hilderbrant testified that he worked for Avis Rentals for about 10 years as a reservation agent. He said he was fired because of excessive absences, which, according to Hilderbrant, resulted from his alcoholism. Hilderbrant, 6-foot-1 and 175 pounds, also testified that he has poor balance, falls down four times a day and told the ALJ that the wind sometimes knocks him over. He said he can no longer work because of the pain resulting from his cerebral palsy. *Record at 69-72.*

The Vocational Expert testified, in response to the ALJ's hypothetical questioning, that Hilderbrant could work as a data entry keyer, telephone answerer, hand packager and bench assembler. *Record at 85-87.*

III. Legal Analysis

A claim for benefits under the Social Security Act requires a five-step evaluation: (1)

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

In the instant case, the ALJ found, at step 4, that Hilderbrant could not work in his past work as a clothes helper and/or a reservationist. But the ALJ found, at step 5, that Hilderbrant could perform the full range of medium work but could not do the following: (1) carry more than 20 pounds; (2) use his feet for hand and feet controls; (3) squatting or crawling; (4) work at unprotected heights or moving machinery; and (5) have extreme contact with the public. Given those limitations, the ALJ concluded that Hilderbrant could work as telephone answerer, data entry person, hand packager and bench assembler. *Record at 37.*⁴

At step 5, the burden of proof shifts to the Secretary. *Bowen v. Yuckert*, 107 S.Ct. 2287 (1987). This means that, if the Secretary must establish that the claimant retains the capacity to perform an "alternative work activity" and that this specific type of job exists in the national economy. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). To meet this burden, the Secretary may rely on the Medical-Vocational Guidelines ("Grids"). The

⁴ Plaintiff challenges the ALJ's decision on two grounds. First, Plaintiff contends that substantial evidence does not support the ALJ's decision that Plaintiff can do medium-level work. Second, Plaintiff asserts that substantial evidence does not support the ALJ's determination that Plaintiff can work as a telephone answerer, hand packager and/or bench assembler

Grids consider a claimant's RFC in relation to his age, education, and work experience. *Id.* at 578. A claimant's RFC to do work is what the claimant is still functionally capable of doing on a regular and continuous basis, despite his impairments: the claimant's maximum sustained work capability. *Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1988).

Once a claimant is placed in a particular RFC category, the decision maker turns to the Grids which direct a conclusion as to whether the claimant is or is not disabled, depending on the claimant's RFC category and his vocational factors. However, if a claimant's RFC is diminished by both exertional and nonexertional impairments, the Secretary must produce expert vocational testimony to establish the existence of jobs in the national economy. *Channel*, 747 F.2d at 580.

In this case, the ALJ used the Grids as framework for his decision and then solicited the testimony of a Vocational Expert to determine if Hilderbrant could work in the national economy. While the Court finds problems with part of the ALJ decision, a review of the record shows that substantial evidence supports the decision that Hilderbrant is not disabled.

The Court agrees that substantial evidence does not support the ALJ's determination that Hilderbrant can do medium-level work. Social Security Ruling 83-10 requires those performing medium work to stand and walk, off and on, for approximately six hours in an eight-hour workday. However, the medical evidence shows, as the ALJ acknowledged in his decision, that Hilderbrant can stand and/or walk up to two hours a day -- far below the six hours mandated in Rule 83-10.

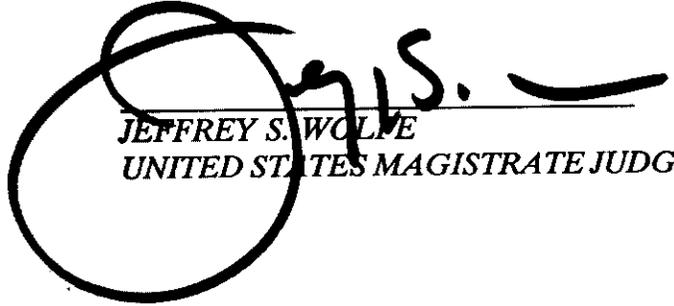
Despite that error, however, the ALJ's decision that Hilderbrant can do certain types of other work is supported by substantial evidence. Of particular importance is the testimony of the vocational expert who said that Hilderbrant, despite his impairments, can work in the aforementioned jobs. In addition, the medical reports of Drs. Sutton, Kache, Passmore and Inbody support such a finding.

Hilderbrant argues that the hypothetical question was improper because the ALJ did not include Dr. Kache's notation that Hilderbrant had some difficulties with finger dexterity and manipulation. 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). Precision is not defined but this case indicates that uncontradicted expert conclusions that are corroborated by evidence must be included in the hypothetical. *Ekeland v. Bowen*, 899 F. 2d 719, 722 (8th Cir. 1990). *Sumpter v. Bowen*, 703 F.Supp 1485 (D.Wyo. 1989).

The ALJ, however, is required to set forth only those physical and mental impairments in the hypothetical which he accepts as true. Here, the ALJ apparently gave more weight to the examination of Dr. Sutton, who opined that the difficulties with Hilderbrant's right hand were minor. The Court will not review that evidence *de novo*. See, generally, *Tillery v. Schweiker*, 713 F.2d 601 (10th Cir. 1983) (Court acknowledged that "the evidence is such as to permit varying inferences...[but] the ALJ came to grips with the problem, and, on such state of the record, for us to disturb his finding would simply put us into the fact-finding business. This we should not do.") Therefore, since substantial evidence supports the ALJ's finding that Hilderbrant can return to work, the Court

AFFIRMS the Secretary's decision.

SO ORDERED THIS 25th day of April, 1995.

A large, stylized handwritten signature in black ink, appearing to read 'J.S.', is written over the printed name and title.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

CLIFFORD B. RISLEY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	94-C-808-K
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

EOD: 4-27-95

FILED

APR 25 1995

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

ORDER

The Internal Revenue Service is appealing a decision by the United States Bankruptcy Court For the Northern District of Oklahoma pursuant to 28 U.S.C. §158(a). The Bankruptcy Court reduced the Debtor's secured claim by \$784, which prompted the instant appeal. For the reasons given below, the Court reverses the Bankruptcy Court's decision.

The pertinent facts are summarized as follows: Debtors Clifford and Christine Risley ("Debtors") filed Chapter 13 bankruptcy on April 28, 1994. On May 31, 1994, the Internal Revenue Service ("IRS") filed an amended proof of claim for \$17,140.28. In the claim, the IRS contended that \$15,274 of the claim was secured and \$1,866.28 was not secured. On June 10, 1994, Debtors objected to the IRS claim. They did not object to the amount of the claim -- only how much of it should be secured.¹ Debtors claimed that only \$12,529 was secured and the rest of the \$17,140.28 should be an unsecured claim.² After considering both sides' arguments, the Bankruptcy Court reduced the IRS' secured claim from \$15,274 to \$14,490. The \$784

¹ As the Bankruptcy Court noted, a chapter 13 debtor must satisfy the full amount of a secured claim.

² The figures used here are the ones cited by the Bankruptcy Judge in his August 19, 1994 Memorandum Opinion.

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reduction was what the Bankruptcy Court found, under 26 U.S.C. §6334, to be exempt from levy. That statute exempts certain specified personal property from levy. However, the IRS argued that the exemption from levy does not prevent the imposition of a federal tax lien. Two courts of appeals have addressed the issue, and both have agreed with the government's position. United States v. Barbier, 896 F.2d 377 (9th Cir.1990); Matter of Voelker, 42 F.3d 1050 (7th Cir.1994). The bankruptcy court below stated it was following the Barbier rationale, but found another purported distinction. The Bankruptcy Court wrote:

The inquiry into the value of the IRS's secured claim does not end with the Court's finding that its lien attaches to property which is exempt from levy. Pursuant to §506(a) of the Bankruptcy Code, the amount of an allowed secured claim is equal to the amount of the creditors' interest in the debtor's property...Here the IRS's interest in Debtors' property which is exempt from levy is zero. It has no value to the IRS because the IRS cannot levy against it and hence cannot realize any value from the property. The Court notes that § 506(a) provides that property should be valued in light of its proposed use and disposition. The property at issue in this case is designed for personal consumption rather than disposition and is of little value even if sold. Memorandum Opinion, page 5.³

The IRS then appealed the Bankruptcy Court's decision to this Court -- albeit over \$784.⁴ It argues that the Bankruptcy Court should not have reduced the secured claim under the facts of the case under Section 506(a) of the Bankruptcy Code.⁵ Instead, the IRS contends that, while the \$784 is exempt from levy, the property is not exempt from an IRS lien.

³ The \$784 of property was classified as follows: Wages, \$100; Household Goods, \$400; Books and Pictures, \$100; Clothing, \$50; Gun, \$50; Tools, \$40; Goat, \$12; Nine Rabbits, \$20; 12 Chickens \$12.

⁴ Little question exists that the time spent on this appeal by both counsel is more costly than \$784. However, counsel for the IRS maintains that the agency is concerned about any precedent that might be set by the Bankruptcy Court's decision.

⁵ Section 506(a) reads, in part: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting creditor's interest."

Neither the Bankruptcy Court nor Debtors offer any case authority for such a reduction under Section 506(a). The assumption upon which it is based is the faulty one that the personal property will retain the same form and never be converted to cash. As the Barbier court noted: "A lien enables the taxpayer to maintain possession of protected property while allowing the government to preserve its claim should the status of property later change. If, for instance, the debtor later sells his exempt personal property for cash, the IRS would be entitled to obtain such proceeds." 896 F.2d at 379. The bankruptcy court's surmise that the personal property would be of "little value" even if sold does not permit a court to alter the statutory law.

Therefore, the Court **REVERSES** the decision of the Bankruptcy Court. The IRS is granted secured status to the extent of \$15,274.00 and unsecured status to the extent of \$1,866.28.

SO ORDERED THIS 25 day of April, 1995.


PERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

DAVID QUEEN,

Plaintiff,

vs.

Case No. 93-C-980-B

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

Defendant.

EOD: 4-27-95

FILED

APR 26 1995

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

ORDER

Before the Court for consideration are the objections of the Plaintiff, David Queen, to the Magistrate Judge's Findings and Recommendation ("F & R") to affirm the Administrative Law Judge's ("ALJ") denial of disability insurance benefits.

Plaintiff filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on January 27, 1992, based on his allegation that he was under a disability. Plaintiff's application was denied and he was so notified by letter dated May 26, 1993.

The Plaintiff filed this action on November 2, 1993, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under §§216(i) and 223 of the Social Security Act. This matter was referred to the Magistrate Judge, who entered his F & R on December 29, 1994, recommending that the denial of benefits be affirmed.

Plaintiff filed his objections to the F & R on January 9, 1995, and set forth four objections to the Findings and

Apr 4 1995

Recommendations of the Magistrate Judge:

1) The Administrative Law Judge's findings concerning the plaintiff's limited ability to walk and stand, visual limitations, and seizure disorder are incomplete, impermissibly vague, and otherwise inconsistent with the body of the opinion and the hypothetical posed to the vocational expert.

2) The Report and Recommendation of the Magistrate Judge violates F.R.C.P. 52 in that it fails to provide an (sic) legal analysis of the legal sufficiency of the Administrative Law Judge's findings, other than to make a conclusive statement that the arguments against them are without merit.

3) The administrative Law Judge erred by relying on the Medical-Vocational Guidelines to meet the Secretary's burden of proof to produce substantial evidence of the availability of alternative work which the plaintiff could do despite his limitations.

4) The testimony of the vocational expert was flawed in that it was elicited by hypotheticals which did not reflect the plaintiff's true characteristics and is otherwise contrary to the descriptions found in the *Dictionary of Occupational Titles*.

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

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

if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. See, Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988), proceed as follows:

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

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

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

1) There was no evidence that Plaintiff had performed substantial gainful activity since January 20, 1992;

2) That Plaintiff does have a vocationally severe impairment but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, subpart P, Regulations No. 4;

3) That Plaintiff has the residual functional capacity (RFC) to perform the physical exertion requirements of work except for those aspects of work over and above those set forth for exertional activity with restrictions on claimant's ability to walk and stand due to his knee impairment (20 CFR 404.1545 and 416.945).

4) That Plaintiff is not capable of performing his past relevant work as a truck driver and that Plaintiff's residual functional capacity for the full range of light work is reduced by restrictions on his ability to walk and stand due to his knee complaints.

5) That, although Plaintiff's exertional limitations do not allow him to perform the full range of light work, there are a significant number of jobs in the national economy which he could perform, such as: custodian, light, 170,000; service station attendant, light 160,000; toll booth attendant, light, 81,000; car wash attendant, light, 54,000; bench assembly, light 619,000; and dispatcher, sedentary, 28,000.

The ALJ concluded Plaintiff was not under a disability as defined in the Social Security Act, at any time through the date of the ALJ's decision (20 CFR 404.1520(f) and 416.920(f)).

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown v. Bowen, 801 F.2d 361 (10th Cir. 1986).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983), Bernal, 851 F.2d at 299, a burden which Plaintiff sustained herein. Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

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

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

The findings of the Secretary as to any fact are conclusive

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

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

The Court, having examined the transcript and the ALJ's findings, concludes that Plaintiff's first objection is not well taken. The Court does not read the record as to Plaintiff's "limited ability to walk and stand, visual limitations, and seizure disorder" to be "incomplete, impermissibly vague, and otherwise inconsistent with the body of the opinion and the hypothetical posed to the vocational expert." The Court notes the ALJ found the Plaintiff, a 40 year old male who lives alone and fixes all his own meals, to be a person who supports himself by plasma sales, takes care of his own residence, hunts, fishes, and bowls. The Court agrees with the ALJ's conclusion that "[T]hese are not the activities of a person that is debilitated or disabled by pain."

As to Plaintiff's second objection, that the Magistrate Judge failed to provide a legal analysis of the legal sufficiency of the ALJ's findings, the Court notes the Plaintiff's failure to cite any authority in support thereof other than Rule 52, F.R.Civ.P.. As stated above, the findings of the Secretary as to any fact are

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

The quest at this level of a social security appeal is an examination of the record to determine if substantial evidence exists to support the ALJ's decision whatever that decision might. The Court concludes Plaintiff's second objection is also not well taken.

Plaintiff's third and fourth objections are equally ineffective. Where, as here, a claimant's functional limitations do not specifically fit the grids, a proper determination of disability requires expert vocational testimony as to the number of jobs available in the economy. Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984). Where a vocation expert is aware of a claimant's impairments, and makes an individualized assessment, such an assessment is valid in determining the jobs available to the claimant. Diaz v. Secretary of HHS, 898 F.2d 774 (10th Cir. 1990). The grids may be used to approximate the abilities of a claimant, but the wide range of light duty may be limited and better defined by the testimony of a vocational expert, as done in the instant matter. This testimony assisted the ALJ in determining what jobs were available to Plaintiff.

The Magistrate Judge found no error in the ALJ's evaluation and findings. Likewise, this Court finds that there is sufficient

relevant evidence in the record to support the ALJ's ruling that the Plaintiff is able to perform light work, subject to the limitations of knee condition, which light work exists in the national economy.

The Court concludes the Magistrate Judge's Findings and Recommendations should be and the same are herewith approved and affirmed. Plaintiff's objections thereto are overruled. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 26th DAY OF APRIL, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

F I L E D

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

APR 25 1995

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

In Re :

HOME-STAKE PRODUCTION COMPANY
SECURITIES LITIGATION

M.D.L. 153

All Cases

ENTERED ON DOCKET

DATE APR 26 1995

JUDGMENT

Pursuant to the Order of the Tenth Circuit entered October 23, 1992, the Court rendered Findings of Fact and Conclusions of Law concerning the issue of prejudgment interest remanded to the Court by the Tenth Circuit. (Docket No. 3249, dated March 30, 1994). By subsequent Order, the Court has denied the motion and supplement thereto of Defendant Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr. to alter or amend the judgment. (Docket No. 3267, dated March 16, 1995) In accordance with the said findings and conclusions,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the amounts of prejudgment interest previously awarded by the Court in its Final Judgment entered November 16, 1989 (Docket No. 2713) are hereby confirmed for the reasons set forth in the Findings of Fact and Conclusions of Law docketed March 31, 1994, and in the Order docketed March 17, 1995 (Docket No. 3267).

In order to reflect the prior decisions of the Tenth Circuit in these cases, the Final Judgment entered November 16, 1989, is amended in the following respects:

(1) The judgments entered in M.D.L. 153, including but not limited to Case Nos. 73-C-382 and 73-C-377 (Consolidated) against defendants E. M. Kunkel, Robert S. Trippet, the Estate of Norman C. Cross, Jr. and the Estate of Frank E. Sims under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, in favor of the plaintiff investors in the 1964 through

1972 Home-Stake programs are vacated in their entirety and the claims on which those judgments were based are dismissed with prejudice; and

(2) The judgments entered in Case Nos. 74-C-224 through 74-C-230 and Case No. 74-C-180 against all defendants are vacated in their entirety and such cases are dismissed with prejudice.

Pursuant to intervening settlements approved by the Court, the judgments in M.D.L. 153, including but not limited to Case Nos. 73-C-382 and 73-C-377 (Consolidated), against defendants in the Estate of Norman C. Cross, Jr., Cross and Company, and Kothe & Eagleton, Inc. in favor of the plaintiff investors in the 1971 and 1972 Home-Stake programs and against the defendant E. M. Kunkel in favor of the plaintiff investors in the 1969 and 1970 Home-Stake programs have previously been vacated in their entirety by order entered September 27, 1993 (Docket No. 3231).

The remaining judgments contained in the Final Judgment entered November 16, 1989, as modified with regard to costs on September 27, 1993, in Case Nos. 73-C-382 and 73-C-377 (Consolidated) against defendants Robert S. Trippet, the Estate of Frank E. Sims and the Estate of Norman C. Cross, Jr., under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240, 10b-5, shall remain in full force and effect in their entirety, subject to rights of appeal.

DATED: Tulsa, Oklahoma
April __, 1995

S/ JAMES O. ELLISON

United States District Judge

COPY

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

FILED

WALTER LEON WILSON,)
)
 Plaintiff,)
)
 v.)
)
 LIEUTENANT EDWARDS, et al.,)
)
 Defendant.)

94-C-0026-BU

APR 25 1995

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

ENTERED ON DOCKET

DATE APR 26 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff, Walter Leon Wilson, a prisoner currently incarcerated at the Muskogee Correctional Center, brings this action pursuant to 42 U.S.C. § 1983. He alleges violations of his constitutionally protected rights while serving as a Department of Corrections ("DOC"). Trustee at the Tulsa County Jail. Plaintiff appears *pro se* and in forma pauperis.

Plaintiff's original complaint named five defendants: Lieutenant Brian Edwards (employed by the Tulsa County Sheriff's Department); Susan Esmond (a registered nurse employed by Correctional Medical Systems, Inc.); Corporal Bernard Klingler (employed by the Tulsa County Sheriff's Department); Curtis Samuel (a cook employed by the Tulsa County Sheriff's Department); and Lovie Davis (a case manager for the Department of Corrections.) Plaintiff amended his complaint on March 11, 1994 to include Sergeant Denise Corley (employed by the Tulsa County Sheriff's Department), as an additional defendant. In his Complaint, Plaintiff makes the following allegations: (1) denial of prescribed medication in violation of the Eighth Amendment's prohibition against cruel and unusual punishment; (2) denial of First Amendment right to practice religion; (3) disparate

652 (1972). This rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. *Id.* However, it is not the proper function of the court to assume the role of advocate for the *pro se* litigant. *Id.* The broad reading of the plaintiff's Complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. Conclusory allegations without factual supporting averments are insufficient to state a claim on which relief can be based. *Id.*

On December 9, 1993, Plaintiff was transported by the DOC to an outside dentist to have a tooth extracted. Upon completion of this procedure, DOC transported Plaintiff back to the Tulsa County Jail. The DOC also transported 30 tablets of 800 milligram Motrin which had been prescribed for Plaintiff. The treating physician, Dr. Moon, instructed that Plaintiff was to be given Motrin three times per day as needed for pain.

On December 10, 1993, Plaintiff contends he requested a Motrin tablet for tooth pain, and his request was refused by Defendant Esmond.¹ Viewing the evidence in the light most favorable to Plaintiff, the undersigned must accept Plaintiff's allegation as true. Plaintiff contends Nurse Esmond's refusal to provide him with a Motrin tablet constitutes a violation of his rights protected by the Eighth Amendment. To establish an unconstitutional denial of medical care, the Plaintiff must demonstrate deliberate

¹The medication records in Plaintiff's medical records indicate that Plaintiff was given two dosages of Motrin 800 milligrams on December 10, 1993. The medical records indicate that based on Dr. Moon's instructions, Plaintiff was eligible to receive one more dose of Motrin on December 10.

indifference to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291-92, 50 L.Ed.2d 251 (1976). Under the Eighth Amendment, this requires a showing of "unnecessary and wanton infliction of pain." *Daniels v. Gilbreath*, 668 F.2d 477, 481 (10th Cir. 1982). Where there are allegations based on inadequacy of treatment, the complaint fails to state a claim of "deliberate indifference." *Id.* at 482. At most, an allegation of failure to diagnose or adequately treat a condition states a claim for medical malpractice, which does not raise a cognizable constitutional violation. *Daniels*, 668 F.2d at 482 (citing *Estelle v. Gamble*, 429 U.S. at 105-06, 97 S.Ct. at 291-92). Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious". *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L. Ed.2d 156 (1992).

In the present case, Plaintiff has not stated a claim for deliberate indifference. Discomfort from a tooth extraction does not rise to the level of "serious medical need" required for a deliberate indifference finding. In addition, denying Plaintiff a pain reliever for this type of discomfort does not constitute "unnecessary and wanton infliction of pain." At most, Plaintiff might have a claim for negligence. However, negligence alone is not enough to sustain a cause of action for unconstitutional denial of medical care. Plaintiff has not stated a claim upon which relief can be granted. Therefore, Plaintiff's case against Defendant Esmond should be dismissed for failure to state a claim upon which relief can be grant pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. Defendant Tulsa County Sheriff's Office

Defendant Tulsa County Sheriff's Office has filed a Motion for Summary Judgment (docket #23). Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Federal Rule of Civil Procedure 56(c)*. The court views the evidence and the inferences to be drawn therefrom in the light most favorable to the non-moving party. *Manders v. State of Oklahoma ex rel. Department of Mental Health*, 875 F.2d 263, 264 (10th Cir. 1989) (citing *Barber v. General Electric Company*, 648 F.2d 1272, 1276 (10th Cir. 1981)). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." *Id.* Factual disputes which are irrelevant or unnecessary will not be counted. *Id.* A motion for summary judgment that is supported by affidavits or other materials provided under oath gives the adverse party notice that summary judgment is possible. The adverse party must respond with affidavits or other evidence to show a genuine issue of material fact. *Jaxon v. Circle K. Corp.*, 773 F.2d 1138 (10th Cir. 1985). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L. Ed.2d 202 (1986).

A. Plaintiff's Claim for First Amendment Religious Discrimination

Plaintiff contends that his First Amendment rights regarding the practice of religion have been violated. Plaintiff alleges that Sergeant Denise Corley confiscated his Bible when he was locked up on January 16, 1994.² This is the only incident Plaintiff points to in support of his contention that his First Amendment rights have been violated. In response to the Motion for Summary Judgment, Plaintiff offers no additional evidence to support his allegation.

The nonmoving party may not rest upon mere conclusory allegations or denials. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue for trial. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990). Plaintiff merely restates his extremely broad allegation that his First Amendment rights have been violated. He offers no case law, and this court has been unable to locate any case law, which states that a one-time temporary deprivation of a prisoner's Bible constitutes a constitutional cause of action. Therefore, the undersigned finds, on these facts, that Plaintiff has not stated facts sufficient to overcome a summary judgment motion. Accordingly, the undersigned recommends that summary judgment be granted in favor of Defendant Corley.

B. Plaintiff's Claim for Racial Discrimination

In his Complaint, Plaintiff contends that Lieutenant Brian Edwards, Corporal Bernard Klingler, and other members of the Tulsa County Sheriff's Department have violated his 14th Amendment rights against discrimination based upon race. In support of his claim,

² Plaintiff was locked in his cell after engaging in a verbal altercation with Sergeant Corley.

Plaintiff states that black trustees do not have the same privileges as white trustees. He also makes the following allegations: (1) White trustees are allowed to take showers whenever they wish whereas black trustees are not accorded this same privilege; (2) White trustees are allowed to roam freely about the jail whereas this privilege is denied to black trustees; (3) White trustees are allowed to have microwave ovens and televisions whereas black trustees are not allowed to possess these items; (4) White trustees are housed at the Adult Detention Center (ADC) with telephones by their beds whereas black trustees are housed in a DOC holding tank at the Tulsa County Jail with no telephone privileges; and (5) Black trustees are harassed by jail personnel.

Viewing the evidence in the light most favorable to Plaintiff, his claim of a Fourteenth Amendment violation is also without merit. The undersigned ordered the Tulsa County Sheriff's Department to prepare a *Martinez* report to determine whether Plaintiff's allegations have any factual or legal basis. *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). On summary judgment a *Martinez* report is treated like an affidavit, and the court is not authorized to accept its fact findings if the prisoner has presented conflicting evidence. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). In the present case, Plaintiff's allegations do not contradict the *Martinez* report submitted by the Tulsa County Sheriff's Department.

Plaintiff offers nothing more than conclusory allegations to contradict the *Martinez* report. He offers no additional evidence to support his allegations of disparate treatment of trustees based on race. According to this Report, the Tulsa County Jail does not discriminate between white and black trustees. Trustees are assigned a particular housing

location based solely upon the trustee assignment given to them by the Department of Corrections. The only difference in treatment of trustees results solely from the individual job assignments which they receive. For instance, trustees assigned to do maintenance work have access to more areas within the Tulsa County Jail system while trustees assigned to the kitchen only have access to the kitchen area. *Record at 12.* DOC assigned Plaintiff to work in the kitchen at the Tulsa County Jail. Therefore, when he was not working in the kitchen, Plaintiff was required to be inside his cell. Since he was not assigned to a maintenance position, Plaintiff was not allowed access to other portions of the jail.

Plaintiff's allegations regarding microwave ovens and televisions provided to white, as opposed to black trustees do not create a no genuine issue of material fact. According to the *Martinez* report, Tulsa County Jail policy allows DOC trustees access to a television and microwave oven when they bring these items with them to the jail. *Record at 12.* In fact, Plaintiff possessed his own television set while serving as a DOC trustee at the Tulsa County Jail. This allegation is patently frivolous.

Plaintiff's allegations concerning telephone privileges also do not present a genuine issue of material fact. Plaintiff does not dispute the fact that he was provided access to a telephone on a daily basis. This telephone is located in the kitchen office of the jail. Rather, Plaintiff seems to be arguing that black trustees should be provided with telephones by their beds. However, this argument is also without merit. According to the *Martinez* report, the ADC does not have free telephones by the beds of DOC trustees. *Record at 12.*

Plaintiff's final allegation concerning disparate treatment of DOC trustees is that black trustees are harassed by jail personnel. Again, viewing the evidence in the light most

favorable to Plaintiff, he has not presented a genuine issue of material fact. Plaintiff offers no concrete evidence of specific incidents regarding harassment of black DOC trustees. Looking beyond Plaintiff's Complaint, the record contains some instances of Plaintiff being disciplined by Tulsa County Jail personnel. However, in each instance Plaintiff was disciplined for violating one of the jail rules. Even when viewing these instances, Plaintiff has not sufficiently stated a case for harassment.

When the evidence is viewed in the light most favorable to Plaintiff, it is evident that he has failed to state a viable claim for violation of his Fourteenth Amendment rights. He has presented no genuine issue of material fact concerning disparate treatment of inmates based on race at the Tulsa County Jail; and particularly as relates to the named individual Defendants. Therefore, the undersigned recommends that summary judgment be granted in favor of Defendant Edwards and Defendant Klingler.

C. Plaintiff's Claims of Retaliation

Plaintiff contends Lieutenant Brian Edwards had him transferred from the Tulsa County Jail to the Pawnee County Jail in retaliation for filing this action. It is beyond dispute that inmates must not be subject to retaliation or harassment for the pursuit of their legal claims. *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990). However, bare allegations of retaliation will not avoid summary judgment. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). To prevail on a claim of retaliation, plaintiff must do more than allege retaliatory conduct due to his exercise of a constitutionally protected right; rather, he must show that prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or were not tailored narrowly enough to achieve such goals.

Id. at 531.

After the Motion for Summary Judgment was filed, Plaintiff offered no additional evidence to support this contention. Attached to the Motion for Summary Judgment was the affidavit of Special Services Commander Harry Wakefield stating that he was responsible for Plaintiff's transfer to the Pawnee County Jail. Mr. Wakefield stated that the reason for Plaintiff's transfer was his lack of willingness to work. In addition, Mr. Wakefield stated that he did not designate Plaintiff as a program failure so he would not lose any good time credits with the DOC. *Record at 16.* Plaintiff has not met his burden of bringing forth additional evidence sufficient to overcome summary judgment. Therefore, the undersigned recommends that **summary judgment be granted** in favor of defendants.

D. Plaintiff's Claim of Disparate Treatment Re: Exercise

Plaintiff further contends that Defendant Curtis Samuel has violated his constitutional rights because he has not taken Plaintiff out for exercise when he has requested it. Accepting this contention as true, Plaintiff's allegation still does not present a material question of fact. Plaintiff does not argue that he has received inadequate exercise. Rather, Plaintiff asserts that Defendant Curtis Samuel did not take him out for exercise *when requested*. Plaintiff admits that John Pennington, an employee of the Tulsa County Sheriff's Department, has taken him out for exercise and to the store when requested. Thus, Plaintiff received adequate exercise. Prisoners have a constitutional right to an adequate amount of exercise. However, they do not have a constitutional right to select the individual that takes them out for exercise, or to dictate the time. Therefore, the undersigned recommends that **summary judgment be granted** in favor of Defendant Curtis

treatment of DOC trustees based on race; (4) transfer from the Tulsa County Jail to the Pawnee County Jail in retaliation for filing this action; (5) deprivation of legal materials; (6) inadequate physical exercise while incarcerated; (7) violation of due process rights; and (8) violation of Fourth Amendment rights. Defendant Esmond has filed a Motion to Dismiss Or In The Alternative, Motion For Summary Judgment (docket #23). The remaining defendants have filed a Motion For Summary Judgment (docket #15). Defendant Davis has filed a Motion to Stay Proceedings (docket #19). For the reasons stated below, the undersigned recommends that these Motions be granted and the case against Defendant Davis be dismissed.

I. Plaintiff's Claim Against Nurse Esmond

The court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *Federal Rules of Civil Procedure 12(b)(6)*. The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L. Ed.2d 80 (1957)). A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. *Id.* (citing *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986)).

Pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L. Ed.2d

Samuel.

E. Plaintiff's Claim that His Due Process Rights were Violated

Plaintiff alleges that his due process rights have been violated. However, Plaintiff offers no evidence to support this claim, and the undersigned is unable to ascertain the nature of Plaintiff's Complaint. Therefore, the undersigned recommends that this claim against the Tulsa County Sheriff's Department be **dismissed** for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

F. Plaintiff's Claim of Violation of Fourth Amendment Rights

Plaintiff's final allegation is that his Fourth Amendment rights have been violated. However, Plaintiff offers no evidence to support this claim. As a result, the undersigned is unable to ascertain the nature of the claim. While some latitude must be given a *pro se* litigant, the court cannot ignore the law. For this reason, the undersigned recommends that this claim against the Tulsa County Sheriff's Department be **dismissed** for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. Plaintiff's Claim Against Lovie Davis

Plaintiff has also filed a Complaint against Lovie Davis, a case manager with the DOC. In order to establish a claim under 42 U.S.C. § 1983, Plaintiff must allege that the Defendants have deprived him of a **federally** protected right and that the person who deprived him of that right acted under **color of state law**. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572, 577 (1980). In addition, before liability may be imposed under 42 U.S.C. § 1983, there must be an affirmative link between the conduct

of a specific defendant and the wrongs alleged to have caused the deprivation of the constitutional rights of the plaintiff. *Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 46 L.Ed.2d 561, 569 (1976). In his Complaint, Plaintiff makes no allegations of deprivation of constitutional rights by Defendant Davis, nor does he contend that she was involved in any of the alleged incidents. As no facts are alleged against Defendant Davis, there are, therefore, no genuine issues of material fact yet to be resolved. Defendant failed to meet his burden to show the existence of such a genuine issue. In light of this, the undersigned recommends that **summary judgment be granted** in favor of Defendant Davis.

IV. Conclusion

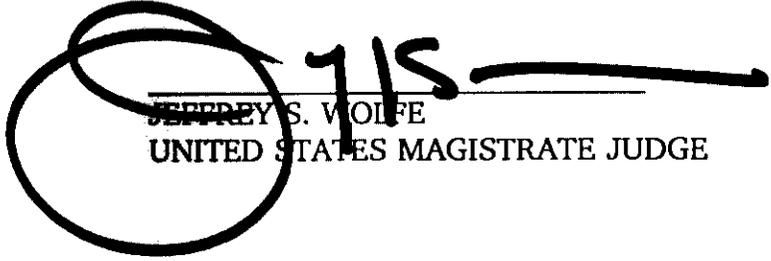
Plaintiff contends that several of his constitutional rights have been violated. Specifically, Plaintiff makes the following allegations: (1) denial of prescribed medication in violation of the Eighth Amendment's prohibition against cruel and unusual punishment; (2) denial of First Amendment right to practice religion; (3) disparate treatment of DOC trustees based on race; (4) transfer from the Tulsa County Jail to the Pawnee County Jail in retaliation for filing this action; and (5) violation of constitutional due process.

Plaintiff has been unable, however, to state a cognizable claim concerning any of these allegations. Therefore, the undersigned recommends that Plaintiff's case against Defendant Esmond be **dismissed**. **Summary judgment should be granted** in favor of Defendants Edwards, Klingler, Samuel, Corley, and the Tulsa County Sheriff's Department. Plaintiff's case against Defendant Davis should also be **dismissed**.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within

the specified time waives the right to appeal the District Court's order.

Dated this 25th day of April, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

APR 24 1995

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

DEANNA K. McSWAIN,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

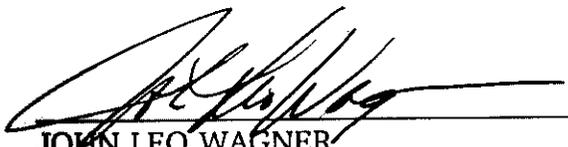
Case No: 93-C-743-W ✓

ENTERED ON DOCKET
APR 26 1995
DATE _____

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed March 20, 1995.

Dated this 21st day of April, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

13

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

FILED

APR 25 1995

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

GILBERT R. SUITER,)
)
Plaintiff,)
)
v.)
)
MITCHELL MOTOR COACH SALES,)
INC., ROBERT E. DESBIEN,)
and NORMA J. DESBIEN,)
)
Defendants,)
)
v.)
)
BLUE BIRD BODY COMPANY, INC.,)
)
Third-Party Defendant.)

Case No. 93-C-815-H

ENTERED ON DOCKET
DATE APR 26 1995

ORDER

This matter comes before the Court on a motion for summary judgment by Third-Party Defendant Blue Bird Body Company, Inc. ("Blue Bird"); a motion by Defendants Robert E. Desbien ("Robert Desbien" or "Mr. Desbien") and Norma J. Desbien ("Norma Desbien" or "Mrs. Desbien") (collectively, the "Desbiens") to amend their answer to assert a claim against Blue Bird; a motion for summary judgment by Defendant Mitchell Motor Coach Sales, Inc. ("Mitchell"); and a motion for summary judgment by Norma Desbien.

Plaintiff Gilbert R. Suiter ("Suiter") brought this action under the Motor Vehicle Information and Cost Savings Act (the "Odometer Act"). The following material facts are undisputed. Suiter purchased a used motor coach from Mitchell on September 19, 1992 for \$150,000. Pursuant to a consignment agreement, Mitchell received \$25,000 of the sale proceeds, and the Desbiens, the former owners of the coach, received \$125,000. Mrs. Desbien testified

66

that the Desbiens' \$125,000 was placed into their joint checking account. Shortly after the purchase, Suiter reviewed the motor coach service records kept inside the vehicle and discovered that the odometer statement he received from Mitchell was inaccurate. That statement, executed by Mark Molder ("Molder"), Vice President of Mitchell, certified that, as of September 19, 1992, the coach had travelled 46,520 miles.

The Desbiens purchased the motor coach in August 1988. Several months later, in the course of performing repairs on the motor coach, Blue Bird replaced the odometer at the request of the Desbiens. Neither Blue Bird nor the Desbiens affixed a notice of the odometer replacement to the motor coach. During the summer of 1992, the Desbiens attempted to sell the coach on a consignment basis through Holland Motor Homes ("Holland"), a California dealership. In its advertisements, Holland represented the estimated mileage of the coach as 85,000 miles, and asked \$194,995 for the coach. After Holland failed to sell the coach, the Desbiens arranged for Mitchell to sell the coach on consignment.

Mitchell did not review the service records inside the vehicle. According to Mitchell, Molder executed an odometer statement based solely on the oral and written representations of Mr. Desbien. Harvey Mitchell, President of Mitchell, has testified that Robert Desbien represented that the mileage on the certified odometer statement was accurate. Further, Molder submitted an affidavit stating that he and Mr. Desbien had discussed the significance of the odometer statement. Mr. Desbien now resides in

a nursing home and is unable to communicate at this time. Therefore, he did not provide testimony in connection with the instant motions.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court 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.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The Odometer Act imposes liability upon a party who violates the provisions of the Act with the "intent to defraud". 15 U.S.C. § 1989(a) (1988).¹ The Act requires the transferor of a motor vehicle to disclose the actual mileage of the vehicle in writing to the transferee. 49 C.F.R. § 580.5 (1992). In addition, the Act requires that, in the event an odometer is replaced, the "owner or his agent" affix a sticker to the motor vehicle indicating the replacement. 15 U.S.C. § 1987.

Mitchell impleaded Blue Bird, the repairer of the vehicle, claiming that Blue Bird violated the Act by failing to affix a sticker to the motor coach after it replaced the odometer. Thereafter, Suiter interposed an identical claim against Blue Bird. The Desbiens have moved to amend their answer to assert a claim against Blue Bird under the Odometer Act.

Blue Bird moved for summary judgment on the basis that (1) the Odometer Act does not apply because Blue Bird was neither the "owner" of the motor coach nor the "agent" of the owner; (2) Blue Bird did not act with "intent to defraud" under the statute; (3) the statute of limitations bars the claims against it; and (4) Mitchell, as an alleged wrongdoer, is barred from pursuing a claim against Blue Bird. Because the Court holds that the parties have not adduced any evidence that Blue Bird acted with the "intent to defraud", the Court does not reach Blue Bird's other arguments.

¹ The Odometer Act was repealed and recodified at 49 U.S.C. 32701-11 on July 5, 1994.

It is settled law in the Tenth Circuit that the "intent to defraud" requirement prescribed by the Odometer Act may be satisfied by a finding of either a "specific intent to deceive or cheat" or "reckless disregard". Haynes v. Manning, 917 F.2d 450, 452-53 (10th Cir. 1990). Here, no party has alleged facts to support a finding that Blue Bird intended to deceive or cheat the owner or purchaser of the motor coach or even that Blue Bird had a motive for misrepresentation. As the court stated in Hill v. Bergeron Plymouth Chrysler, Inc., 456 F. Supp. 417, 418 (E.D. La. 1978) (summary judgment granted to dealer who replaced odometer because plaintiff presented no evidence of intent to defraud):

in clear cases when the plaintiff has totally failed to produce any evidence of intent, and it appears that plaintiff could not under any circumstances produce such evidence, summary judgment is a viable means for the swift conclusion of this part of the litigation.

In view of the facts of this case and based on this authority, the Court hereby grants Blue Bird's motion for summary judgment against the claims of Mitchell and Suiter and denies the Desbien's motion to amend their answer to assert a claim against Blue Bird under the Odometer Act.

Mitchell has moved for summary judgment against Suiter on the basis that Suiter has not established that Mitchell had an "intent to defraud". Plaintiff has not alleged facts supporting any specific intent to deceive. However, Plaintiff may prevail on the intent requirement if he can show that Mitchell "display[ed] a reckless disregard for the truth". Haynes, 917 F.2d at 453

(quoting Tusa v. Omaha Auto Auction, Inc., 712 F.2d 1248, 1253-54 (8th Cir. 1983)).

The Haynes court stated:

[t]he federal odometer law imposes an affirmative duty on automobile dealers to discover defects. (citation omitted). A transferor of a vehicle may be found to have intended to defraud if he had reason to know the mileage on the vehicle was more than was reflected by the odometer or certification of the previous owner and nevertheless failed to take reasonable steps to determine the actual mileage. (citations omitted).

917 F.2d at 453. It is undisputed that, if Mitchell had reviewed the motor coach's service records which were inside the motor coach, Mitchell could have discovered the mileage discrepancy. Further, there is a question of fact as to whether Mitchell could have discovered the mileage discrepancy from an examination of the engine hour meter. Under these circumstances, a material question of fact exists as to whether Mitchell's conduct in the course of the sale of the motor coach to Suiter satisfied the standard of conduct for dealers required by the Odometer Act. The Court hereby denies Mitchell's motion for summary judgment against Suiter.²

Norma Desbien moves for summary judgment against Suiter and Mitchell on the basis that there is no evidence that she possessed the requisite intent to defraud under the Odometer Act. As stated above, according to Haynes, conduct evidencing a reckless disregard for the truth satisfies the intent to defraud standard for purposes of the Odometer Act. Here, a question of material fact exists as

² Mitchell also moves for summary judgment on its cross-claim against Mr. Desbien. The Court declines to rule on that portion of Mitchell's summary judgment motion at this time.

to whether Mrs. Desbien possessed the statutory "intent to defraud". A question of material fact also exists as to whether Mr. Desbian was acting as Mrs. Desbien's agent when he executed the odometer statement and, alternatively, as to whether Mrs. Desbien ratified Mr. Desbien's conduct in connection with the odometer statement by her subsequent actions. These questions preclude summary judgment. Accordingly, the Court hereby denies Mrs. Desbien's motion for summary judgment.

In conclusion, the Court hereby grants Blue Bird's motion for summary judgment against Suiter and Mitchell (Docket # 40). The Court hereby denies the Desbiens' motion to amend their answer to assert a claim against Blue Bird (Docket # 38). The Court hereby denies Mitchell's motion for summary judgment against Suiter and declines to rule at this time on Mitchell's motion for summary judgment against Mr. Desbien (Docket # 18). Finally, the Court denies Mrs. Desbien's motion for summary judgment against Suiter and Mitchell (Docket # 58).

IT IS SO ORDERED.

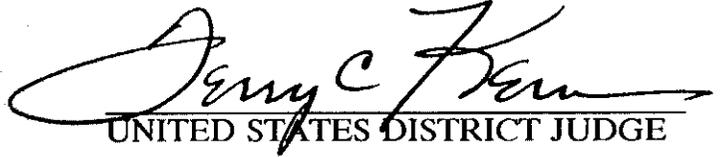
This 25TH day of APRIL, 1995.



Sven Erik Holmes
United States District Judge

WHEREFORE, IT IS STIPULATED AND AGREED by and between the parties, through their respective attorneys, and IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court that: in instances where Plaintiffs' tanks are not being offered to or considered by a prospective purchaser, as determined by Defendant's inquiry of such purchaser, and as verified by Plaintiff's counsel in writing after notification, Defendant may dispose of its remaining inventory tanks, by sale or otherwise, as it is able on or before December 31, 1995.

SO ORDERED this the 21 day of April, 1995.


UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:


R. Alan Weeks, OK Bar No. 016,051

HEAD & JOHNSON, P.A.
Moore Manor
228 West 17th Place
Tulsa, Oklahoma 74119-4694
(918) 587-2000

ATTORNEYS FOR DEFENDANT


George M. Schwab, CA Bar No. 058,250
K.T. Cherian, CA Bar No. 133,967

TOWNSEND AND TOWNSEND
KHOURIE AND CREW
Steuart Street Tower, 20th Floor
One Market Plaza
San Francisco, California 94105
(415) 543-9600

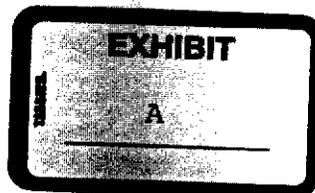
ATTORNEYS FOR PLAINTIFFS

EXHIBIT "A"

3-20-95 INVENTORY

CONCRETE ENCASED AGS TANKS

1	500 GALLON SINGLE COMPARTMENT	UL-529652
1	1000 GALLON DUAL (500/500) COMPARTMENT	UL-706936
1	2000 GALLON SINGLE COMPARTMENT	UL-461574
1	3000 GALLON SINGLE COMPARTMENT	UL-706946
1	2000 GALLON SINGLE COMPARTMENT	UL-706949



END

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. E. WALKER, III aka WALTER E.
WALKER, III; CITY OF BIXBY,
Oklahoma; COUNTY TREASURER,
Tulsa County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

FILED

APR 2 1995

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

ENT.

APR 25 1995

Civil Case No. 94-C 1022K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of April,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma,** appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the **Defendant, City of Bixby, Oklahoma,** appears not having previously filed its Disclaimer and being dismissed; and the Defendant, **W. E. Walker, III aka Walter E. Walker, III,** appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **W.E. Walker, III aka Walter E. Walker, III** will hereinafter be referred to as ("W. E. Walker, III"); and that the Defendant, **W.E. Walker, III,** is a single, unmarried person.

NOTE

COPIES OF THIS ORDER SHALL BE
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, **City of Bixby, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified Mail on November 4, 1995.

The Court further finds that **the Defendant, W. E. Walker, III**, was served by publishing notice of this action in the **Tulsa Daily Commerce & Legal News**, a newspaper of general circulation in Tulsa County, **Oklahoma**, once a week for six (6) consecutive weeks beginning January 26, 1995, and continuing through March 2, 1995, 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, **W. E. Walker, III**, 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, **W. E. Walker, III**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of **Housing** and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of **the party** served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly

approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answer on November 16, 1995; that the Defendant, **City of Bixby, Oklahoma,** filed its Disclaimer on December 6, 1994, and was subsequently dismissed as a party on December 28, 1994; and that the Defendant, **W. E. Walker, III,** has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

Lot Seven(7), Block Three (3), SPRINGTREE, an Addition to the Town of Bixby, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on July 3, 1986, Brian C. Snyder and Mary M. Snyder, executed and delivered to **BANK OF GLENPOOL, GLENPOOL, OKLAHOMA** their mortgage note in the amount of **\$80,808.00**, payable in monthly installments, with interest thereon at the rate of nine and **one-half** percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Brian C. Snyder and Mary M. Snyder, husband and wife, executed and delivered to **BANK OF GLENPOOL, GLENPOOL, OKLAHOMA** a mortgage dated July 3,

1986, covering the above-described property. Said mortgage was recorded on July 14, 1986, in Book 4955, Page 26, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 16, 1986, BANK OF GLENPOOL, GLENPOOL, OKLAHOMA assigned the above-described mortgage note and mortgage to VICTOR FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was re-recorded on April 6, 1987, in Book 5013, Page 1194, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 7, 1987, VICTOR FEDERAL SAVINGS & LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to MIDFIRST SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on March 14, 1988, in Book 5086, Page 2577, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was re-recorded on May 18, 1990 in Book 5253, Page 2430, in the records of Tulsa County, Oklahoma in order to follow the correct chain of title.

The Court further finds that on January 26, 1990, Midfirst Savings and Loan Association assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 5, 1990, in Book 5234, Page 1242, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was re-recorded on May 18, 1990 in Book 5253, Page 2431 in the records of Tulsa county, Oklahoma in order to follow the correct chain of title.

The Court further finds that the Defendant, W. E. Walker, III, a single man, is the current title owner of the property by virtue of a General Warranty Deed dated

November 12, 1988, and recorded on November 15, 1988 in Book 5139, Page 2249, in the records of Tulsa county, Oklahoma. The Defendant, W. E. Walker, III, is the current assumptor of the subject indebtedness.

The Court further finds that on August 11, 1992, the Defendant, W. E. Walker, III, filed his petition for Chapter 7 relief in the United State Bankruptcy Court for the Northern District of Oklahoma, Case number 92-02841-W, which was discharged on December 14, 1992 and was closed on April 6, 1993.

The Court further finds that on December 27, 1989, the Defendant, W. E. Walker, III, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 4, 1990 and December 5, 1991.

The Court further finds that the Defendant, W. E. Walker, III, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, W. E. Walker, III, is indebted to the Plaintiff in the principal sum of \$117,341.73, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$1,042.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that **the Defendant, County Treasurer, Tulsa County, Oklahoma**, has a lien on the **property** which is the subject matter of this action by virtue of personal property taxes in the **amount** of \$64.00 which became a lien on the property as of June 23, 1994; a lien in the **amount** of \$63.00 which became a lien as of June 25, 1993; a lien in the amount of \$67.00 **which** became a lien as of June 26, 1992; a lien in the amount of \$17.00 which became a **lien as** of June 20, 1991; a lien in the amount of \$20.00 which became a lien on July 2, 1990; and a lien in the amount of \$15.00 which became a lien on July 7, 1988. Said liens **are** inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that **the Defendant, W. E. Walker, III**, is in default, and have no right, title or interest in the **subject** real property.

The Court further finds that **the Defendant, City of Bixby, Oklahoma**, disclaims any right, title or interest in the **subject** property and has been dismissed from the case.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, **acting** on behalf of the Secretary of Housing and Urban Development, have and recover **judgment in rem** against the Defendant, **W. E.**

Walker, III, in the principal sum of \$117,341.73, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.41 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$1,042.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$246.00 for personal property taxes for the years 1987, 1989-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **W. E. Walker, III, City of Bixby, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **W. E. Walker, III**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, **County** Treasurer, Tulsa County, Oklahoma, in the amount of \$1,042.00, plus penalties and interest, for ad valorem **taxes** which are presently due and owing on said real property;

Third:

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

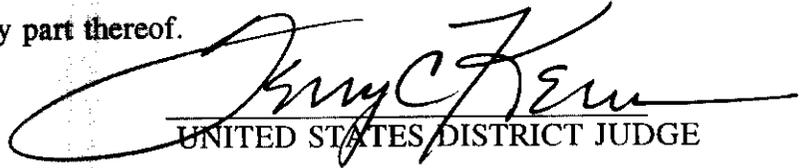
Fourth:

In payment of Defendant, **County** Treasurer, Tulsa County, Oklahoma, in the amount of \$246.00, personal property taxes which are currently due **and** owing.

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

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

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11758
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


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

Judgment of Foreclosure
Civil Action No. 94-C 1022K

LFR:lg

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

FILED

APR 24 1995

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

le

HERBERT R. WILLIS,)
)
 Plaintiff,)
)
 v.)
)
 RON CHAMPION,)
)
 Defendant.)

Case No. 95-C-315-H ✓

ENTERED ON DOCKET
DATE APR 24 1995

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

- (1) That the Petitioner was convicted in Oklahoma County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma.
- (2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.
- (3) In the furtherance of justice this case should be transferred to the United States District Court for the Western District of Oklahoma.

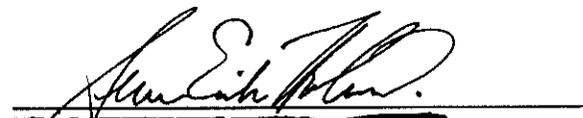
IT IS THEREFORE ORDERED:

- (1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the United States District Court for the Western District of Oklahoma for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

IT IS SO ORDERED THIS 24TH day of APRIL

1995.



A handwritten signature in cursive script, appearing to read "Sven Erik Holmes", is written over a horizontal line. Below the signature, a thick black rectangular redaction covers several lines of text.

Sven Erik Holmes
United States District Judge

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

FILED

UNITED STATES OF AMERICA for the)
use of MILL CREEK LUMBER & SUPPLY)
COMPANY, an Oklahoma corporation,)

Plaintiff,)

vs.)

MJD CONSTRUCTION CORPORATION,)
a Pennsylvania corporation, and)
INTERNATIONAL FIDELITY INSURANCE)
COMPANY, a New Jersey corporation,)

Defendants.)

APR 21 1995

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

No. 94-C-768-B

FILED IN DOCKET
DATE APR 21 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiff, Mill Creek Lumber & Supply Company by its attorney, Jeffrey T. Dunn, and Defendants, MJD Construction Corporation and International Fidelity Insurance Company, by their attorney, Eugene Robinson, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate that this matter be dismissed with prejudice for the reason that all issues have been fully settled, each party to bear their own attorneys' fees and costs.

DATED this 18th day of April, 1995.



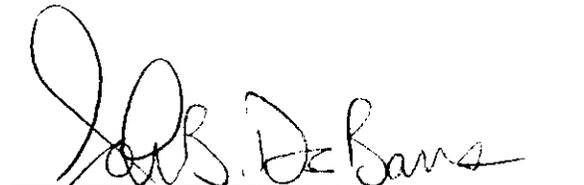
Jeffrey T. Dunn, OBA #15223
1630 E. 26th Place
Tulsa, OK 74114
(918) 742-2738
Attorney for Plaintiff,
Mill Creek Lumber


Eugene Robinson, OBA #10119
John B. DesBarres, OBA #12263
McGIVERN, SCOTT, GILLIARD,
CURTHOYS & ROBINSON
P.O. Box 2619
Tulsa, OK 74101-2619
Attorney for Defendant,
MJD Construction

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing instrument was mailed this 21st day of April, 1995, with proper postage thereon fully prepaid to the following:

Jeffrey T. Dunn
1630 E. 26th Place
Tulsa, OK 74114


Eugene Robinson
John B. DesBarres

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

UNITED STATES OF AMERICA for the use of WOOD SYSTEMS, INC., an Oklahoma corporation,
Plaintiff,

vs.

MJD CONSTRUCTION CORPORATION, a Pennsylvania corporation, and INTERNATIONAL FIDELITY INSURANCE COMPANY, a New Jersey corporation,
Defendants.

APR 21 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-769-B

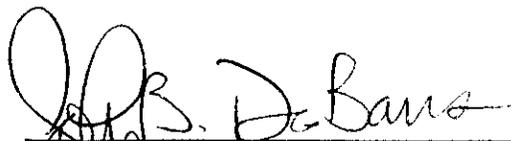
ENTERED DOCKET
APR 24 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiff, Wood Systems, Inc., by its attorney, Jeffrey T. Dunn, and Defendants, MJD Construction Corporation and International Fidelity Insurance Company, by their attorney, Eugene Robinson, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate that this matter be dismissed with prejudice for the reason that all issues have been fully settled, each party to bear their own attorneys' fees and costs.

DATED this 18th day of April, 1995.


Jeffrey T. Dunn, OBA #15223
1630 E. 26th Place
Tulsa, OK 74114
(918) 742-2738
Attorney for Plaintiff,
Wood Systems, Inc.



Eugene Robinson, OBA #10119
John B. DesBarres, OBA #12263
McGIVERN, SCOTT, GILLIARD,
CURTHOYS & ROBINSON
P.O. Box 2619
Tulsa, OK 74101-2619
Attorney for Defendant,
MJD Construction

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing instrument was mailed this 21st day of April, 1995, with proper postage thereon fully prepaid to the following:

Jeffrey T. Dunn
1630 E. 26th Place
Tulsa, OK 74114



Eugene Robinson
John B. DesBarres

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

APR 19 1995

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

EOD: 4-20-95

CIVIL ACTION NO. 94-C 450B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 18, 1995, pursuant to an Order of Sale dated October 28, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Twenty-five (25), Block Ten (10), SHANNON PARK SIXTH, An Addition in Tulsa County, City of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Bradley L. Richardson aka Bradley Lamont Richardson; and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Dick A. Blakeley, by mail; and to the Defendants, Thomas E. Glover, Linda J. Glover, and Charlotte M. Smith aka Charlotte

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

Marie Smith aka Charlotte Marie Richardson, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

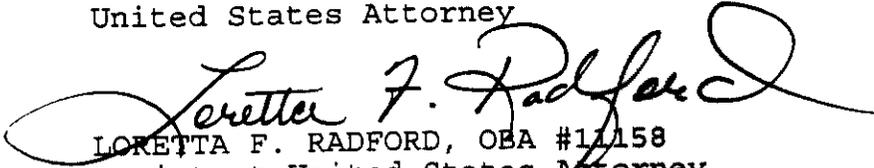
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with large loops and flourishes.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
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LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 450B