

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

FILED

AUG 31 1995

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

ENTERED ON DOCKET

DATE AUG 31 1995

CIVIL CASE NO. 94-C-944-BU

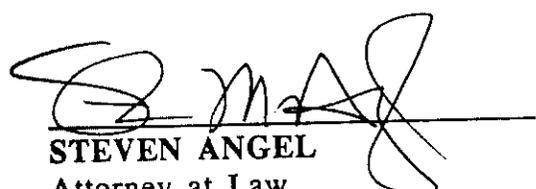
WALTER WILLIAMS,)
)
 Plaintiff,)
)
 v.)
)
 TOGO D. WEST, JR., Secretary of the)
 Army,)
)
 Defendant.)

STIPULATION OF DISMISSAL

The plaintiff, Walter Williams, by his attorney of record, Steven Angel, and the defendant, Togo D. West, Jr., Secretary of the Army, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 31st day of August, 1995.


PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
333 West 4th Street
Tulsa, OK 74103
Attorney for the Defendant


STEVEN ANGEL
Attorney at Law
KLINE & KLINE
720 N.E. 63rd St.
Oklahoma City, OK 73105
Attorney for Plaintiff

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting 10 pounds and prolonged standing or walking. He concluded that claimant was unable to perform her past relevant work as a glasspacker, but had the residual functional capacity for the full range of sedentary work. He noted that claimant was 35 years old, which is defined as a younger individual, had a high school equivalent education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. Having determined that claimant's impairments did not prevent her from performing sedentary work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ erred by not accepting the treating physician's opinions concerning claimant's medical condition.
- (2) The ALJ did not properly evaluate claimant's residual functional capacity.
- (3) The ALJ failed to meet his burden of identifying specific jobs claimant could perform.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

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

There is no merit to claimant's first contentions that the ALJ erred in not accepting the treating physician's opinion concerning claimant's medical condition and did not properly evaluate her residual functional capacity. The ALJ summarized the medical records accurately. He noted that Dr. Robert Sonnenschein wrote on March 11, 1992 that claimant had mitral valve prolapse and severe mitral regurgitation (TR 229-231). The doctor opined that there was a strong possibility that her symptoms of chest pain and shortness of breath with activity, dizzy spells, and occasional blurry vision were related to her mitral valve prolapse (TR 229-230).

Claimant had a cardiac catheterization during a March 24-26, 1992 hospitalization (TR 244-267). The tests showed moderate to severe mitral regurgitation, mitral valve prolapse, and normal coronary arteries (TR 250, 252). Dr. Sonnenschein determined she was a candidate for a mitral valve replacement and noted she had no other problems than the valvular disease with significant regurgitation and a mild decrease in overall systolic function (TR 242). She underwent a mitral valve replacement during a June 10-26, 1992 hospitalization (TR 269-328).

On July 1, 1992, claimant was examined by Dr. Sonnenschein and her blood pressure was 114/74 (TR 332). She complained of left arm numbness, which appeared to be improving, and her shortness of breath was better (TR 332). She was again examined on July 15, 1992, when her blood pressure was 90/60, and she seemed to be

improved and her shortness of breath was stable (TR 331).

On October 13, 1992, Dr. Sonnenschein evaluated claimant by performing an echocardiogram and found:

[n]ormal left ventricular size, normal wall thickness. Diastolic compliance could not be assessed. There is mild left ventricular dysfunction with the only wall motion abnormality being postoperative septal change. Ejection fraction of 45-50%. The aortic valve is normal. Mitral valve prosthesis appears to be functioning normally without mitral regurgitation, appropriate valve area of 1.9-2.3 cm/sq. Doppler examination only reveals mild tricuspid regurgitation. All chamber sizes are normal. Right ventricular function appears borderline. Right atrial and pulmonary artery pressure are grossly normal.

(TR 377).

On October 28, 1992 and November 25, 1992, Dr. Sonnenschein wrote that claimant was improving with medications (TR 373-374).

On February 4, 1993, Dr. Ronald English completed a form prepared by the claimant's representative containing 73 questions (TR 360-370). The ALJ noted that:

Question 22 indicates a positive response to whether there was evidence of persistent ventricular enlargement or hypertrophy. That, in fact, was not the case, see Exhibit 34 and Exhibit 42, noted subsequently. The claimant was also felt, in questions 35 through 38, to experience dyspnea with exertion and to experience angina. This is despite the fact that in Exhibit 34 the claimant had normal coronary arteries based upon radiographic studies. Questions 39 through 43 also bear upon that same point. Question 52 indicates that Dr. English's assessment is that the claimant has persistent angina, see also question 53. Questions 63 through 70 address the claimant's physical capabilities and generally indicate that stress or physical exertion may cause problems for the claimant in that she should lift no more than 10 pounds.

(TR 17).

The ALJ must give substantial weight to the evidence and opinions of the plaintiff's treating physician. Hargis v. Sullivan, 945 F.2d 1482, 1489-90 (10th Cir. 1991); Ellison

v. Sullivan, 929 F.2d 534, 537 (10th Cir. 1990). The ALJ in this case considered all of the medical evidence in making his decision and determined that more weight should be given to the medical evidence from the plaintiff's treating physician, Dr. Sonnenschein, a cardiovascular specialist, than to the opinion of Dr. English, a general practitioner. (TR 19-20). Since plaintiff's main impairment was cardiovascular, greater weight was to be given to the opinion from her treating specialist. Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990). The ALJ properly concluded that "the cardiologists' opinions with respect to the claimant's heart and matters related thereto are entitled to greater weight than Dr. English's opinion with respect to cardiological matters" (TR 19).

Dr. Sonnenschein, a cardiovascular specialist, was the consulting physician for the plaintiff's heart surgery (TR 275) and rendered post-operative and continuing care (TR 229-243, 305-325, 330-355, 371-411). The ALJ also noted that the objective medical evidence was at variance with Dr. English's estimation of claimant's physical capacities (TR 19).

There was substantial evidence for the ALJ's determination that claimant's heart problem did not preclude her ability to perform sedentary work activity for twelve continuous months. The ALJ considered her statements that she was unable to work and had heart problems (TR 18-19). He noted that her treating physician stated that after her surgery she had improved nicely, had minimal problems and no reports of angina, and the doctor called the plaintiff's chest pain atypical (TR 20, 371). The ALJ pointed out that an echocardiogram done on October 13, 1992, by Dr. Sonnenschein showed that the mitral valve prosthesis was functioning normally without mitral regurgitation (TR 20, 377). The

ALJ concluded that her limitations were "overstated when compared to the objective medical evidence" that her mitral valve was functioning properly (TR 20). Her pain was found to be mild, and he concluded she could only do sedentary work "as that completely takes [care] of her complaints except for her back pain," which had not been diagnosed in the medical records (TR 20).

However, there is merit to claimant's final contention that the ALJ did not meet his burden of identifying specific jobs in the national economy that she could perform. When answering the question posed by the ALJ regarding sedentary jobs which claimant could perform given her age, education, and experience, the vocational expert stated: "Well, there would be unskilled cashiering occupations that would be at a sedentary level. There are 6,000 of those in the regional of Oklahoma. There are unskilled assembly jobs, and would be 3,000 of those in Oklahoma. Office helper at an unskilled sedentary level is approximately 2,500." (TR 47). However, the Dictionary of Occupational Titles ("DOT") classifies these jobs as light work.⁴ The vocational expert did not explain the variance in his testimony.

Once the ALJ placed claimant in the residual functional capacity category of sedentary and found that she could not return to her past relevant work, the burden shifted to him to determine if a significant number of jobs exist in the national economy which she is exertionally capable of performing. 20 C.F.R. §§ 404.1566 and 416.966. Sedentary work is defined as work that involves lifting no more than 10 pounds at a time and

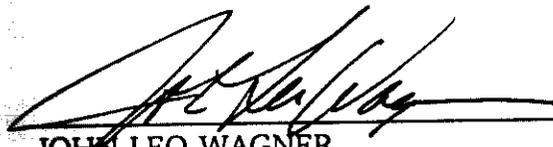
⁴The DOT number for unskilled cashier jobs is 211.462-010, for unskilled small product assembler jobs is 706.684-022 and 739.687-030, and for office helper is 239.567-010. All of these jobs carry the strength requirement of light work. The Secretary has taken administrative notice of the DOT. 20 C.F.R. § 416.966(d).

occasionally lifting or carrying articles like docket files, ledgers, and small tools. 20 C.F.R. §§ 404.1567(a), 416.967(a). On the other hand, light work is defined as work that 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. 20 C.F.R. §§ 404.1567(b), 416.967(b).

The record does not support the ALJ's determination that claimant could actually work in any of the jobs listed by the vocational expert. In these circumstances, the ALJ did not meet his burden of showing that she is capable of performing any jobs in the national economy. It cannot be determined from the record whether there are sedentary jobs that she can perform. The case must be remanded to the Secretary for a determination of whether there are such jobs available in the national economy. See, Campbell v. Bowen, 822 F.2d 1518, 1524 (10th Cir. 1987).

The decision of the ALJ is reversed and the case is remanded for additional testimony by a vocational expert regarding whether there are sedentary jobs available which claimant is able to perform.

Dated this 30th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:coleman

AUG 28 1995

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

FILED

James Downing,
SSN: 440-34-9575,

v.

Shirley S. Chater,
Commissioner of the Social
Security Administration,

Defendant.

Civ. 93-C-746-W

AUG 30 1995

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

ENTERED ON DOCKET

ORDER

DATE AUG 31 1995

The Court, having considered Petitioner's Application and Motion for Final Order for Attorney Fees Under 28 U.S.C. Section 2412, the Equal Access to Justice Act (EAJA), and having reviewed the arguments and representations of counsel, finds:

1) Petitioner requests attorney fees pursuant to 28 U.S.C. Section 2412, based upon a successful challenge of Defendant's decision denying Plaintiff's Social Security Disability benefits (SSD). The parties have stipulated that \$117.75 per hour for \$3,208.68 and compensable expenses in the amount of \$21.60 is a fair and reasonable amount under 28 U.S.C. Section 2412.

2) The Court finds that the Defendant's position was not substantially justified, nor reasonable as to the facts of the case in originally denying the benefits, and that an award under the EAJA is justified, and the Court hereby sustains Petitioner's Motion for attorney fees.

3) That counsel, Mark E. Buchner, for Plaintiff has

expended 27.25 hours in pursuit of the Plaintiff's claim in the United States District Court for the Northern District of Oklahoma and that \$117.75 per hour is a fair and reasonable hourly fee, and that a fee of \$3,230.28 shall be awarded to **Mark E. Buchner, Attorney at Law,**

4) No attorney fee award has yet been made by the Defendant to Plaintiff's representative in the administrative proceedings before the Social Security Administration. Petitioner shall advise the Social Security Administration of this award and any request for fees related to the administrative proceedings, if any.

5) If an award of fees for work performed in this court is sought and awarded under 42 U.S.C. Section 406, Petitioner shall return to the Plaintiff the lesser of the Section 406 award or the amount awarded by this Order, pursuant to Weakley vs Bowen, 803 F.2d 575 (10th Cir., 1986).

IT IS THEREFORE SO ORDERED.

DATED this 30th day of August, 1995.

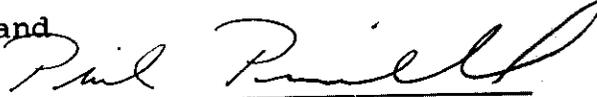
/s/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE
United States Judge

APPROVED:



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Petitioner and Attorney for Plaintiff
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and



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(918) 581-7463

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

F I L E D

AUG 30 1995

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

KENNETH E. BURKE,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

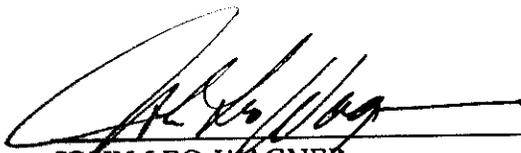
Case No: 93-C-789-W

ENTERED ON DOCKET
AUG 31 1995
DATE _____

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 29, 1995.

Dated this 30th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertion requirements of work, except for those aspects of work over and above those set forth for the full range of medium exertional activity, provided his ability to stoop and bend was limited to only occasionally. He concluded that claimant was unable to perform his past relevant work as an oil field worker and truck driver, but had the residual functional capacity to perform the full range of medium work, reduced by limitations on ability to stoop and to bend only occasionally. He noted that claimant was 54 years old, which is defined as advanced age, had a 9th grade education, which is defined as limited, and did not have any relevant work skills which are transferable to other work activities. Having determined that claimant's impairments did not prevent him from performing certain types of medium work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

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

- (1) The doctrine of res judicata should not bar reopening of claimant's 1986 social security application.
- (2) The ALJ's assessment of claimant's residual functional capacity is not supported by substantial evidence.
- (3) The ALJ did not give proper weight to the opinion of treating physicians.
- (4) The ALJ did not consider claimant's complaints of disabling pain.

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

Claimant was injured on April 29, 1985 when he came in contact with a 7500 watt high voltage line for 20 seconds (TR 252). He lost consciousness, but there was no cessation of respiration or heartbeat (TR 252). He was hospitalized for treatment of minor burns, lacerations, and generalized myalgias and advised to refrain from employment activities for one week (TR 252-253). He was treated during the next year for myalgias and muscle spasms, headaches, whiplash syndrome, and hypertension (TR 258, 269-272, 276-288).

On June 11, 1986, his treating physician, Dr. Diana DeFelice, found him 100% disabled for workers' compensation purposes (TR 331-332) and her conclusion was confirmed by other treating physicians, Dr. Herbert Yates, on July 1, 1986 (TR 408) and Dr. Kenneth Duncan, on August 14, 1986 (TR 399-403). However, on August 4, 1986, he was found to have the capacity to perform a narrow range of medium work and a full

range of light work and not to be entitled to receive social security disability benefits (TR 246-250). The decision was not appealed.

Claimant did not see a doctor from September 1986 until May 17, 1988, when he reported an infection and sinusitis (TR 338). He mentioned no complaints of pain or muscle spasms, but his blood pressure was elevated (TR 338). He did not see a doctor again until January 4, 1989, when he was admitted to the hospital with chest pain (TR 353). A brain scan and echocardiogram were normal (TR 354, 357), but mild bilateral artery disease was found (TR 358). He filed his second claim for social security benefits on March 25, 1990 (TR 200-207).

On June 29, 1990, Dr. David Heck examined claimant for complaints of "multiple areas of arthritis, limited motion" and chest pain (TR 359). The doctor reported that claimant had a family history of hypertension and heart disease, that he smoked a pack of cigarettes a day, that he was overweight, and that he had joint pain and some limitation (TR 359-361). The doctor concluded that claimant had arteriosclerotic heart disease, suspected coronary artery disease with angina pectoris, post traumatic cervical osteoarthritis with limited flexion extension with cervical radiculopathy suspected, hypertensive cardiovascular disease with apparent essential hypertension, and cerebrovascular artherosclerosis with carotid stenosis by history. (TR 361).

Claimant was examined by Dr. Jerry First on September 25, 1990 for complaints of "aching and hurting all over," cerebrovascular accident (CVA), chest pain, and weakness (TR 375). The doctor reported that claimant had lost consciousness while "picking up some logs" to bring in the house (TR 375). The doctor found claimant had a full range of

motion in all joints but his shoulders and concluded that claimant suffered myalgias, probably secondary to electric shock and degenerative arthritis, degenerative arthritis, especially in the shoulders, chest pain, possibly cardiac in origin, and no evidence of peripheral vascular disease by flow dopplers.

Dr. L. Beck did a residual physical functional capacity ("RFC") assessment of claimant on October 12, 1990 (TR 233-240) and concluded that pain did not limit his RFC, he had no postural limitations except minor shoulder pain caused by reaching, and he could lift 20 pounds occasionally, 10 pounds frequently, and sit, stand, and walk about 6 hours in an eight-hour workday (TR 234-238). Another assessment was done on December 6, 1990, and similar conclusions were reached (TR 222-229). Claimant's insured status ended on March 31, 1991 (TR 32).

Dr. E. Joseph Sutton, II, saw claimant on August 16, 1991 (TR 412-422). He told the doctor he only stays home and watches t.v. and takes "multiple aspirin (as many as 15 per day) for pain" (TR 413). The doctor noted that claimant's complaints lacked credibility:

When I attempted to do the shoulder range of motion studies, the patient states that he could not get his arm up very far. Later during the examination, however, the patient asked me to inspect a small cyst in his left axilla and was easily able to put both of his arms above his head. The patient was able to take his boots on and off without difficulty. When he turns, he has a tendency to turn his entire upper body as a fixed unit.

...

He was on and off the examination table without difficulty and didn't seem to have any problem going through these studies.

The patient's symptoms were all quite subjective. I watched the patient as he walked out of our office and across our parking lot. He did not have any

difficulty with shortness of breath, in fact, once he left the front door and was headed towards his car, he almost broke into a run for a short period of time. He was walking considerably faster than a normal speed and pace. When he got to his van, he was able to hop up into it with no difficulty whatsoever.

(TR 414).

Dr. Sutton concluded that claimant had pain caused by arthritis, but no "objective restrictions as far as the range of motion or lack of strength is concerned." (TR 415). The doctor stated "[h]is symptoms are very subjective and far out of proportion to what is seen objectively." (TR 415). He concluded that claimant had hypertension, diffuse pain, chest pain, urological problems, transient ischemic episodes, headaches, and multiple risk factors, including his smoking and family history of heart disease (TR 415). The doctor recommended a heart catheterization but claimant refused because his brother had died during a similar procedure (TR 415).⁴ The doctor concluded:

The patient should be able to sit, stand, or walk 2 hours at a total of any 1 time and 8 hours a total during an entire 8 hour day. The patient should be able to lift and carry any weight that is commensurate with his size and physical stature. He did not demonstrate any limitations with regard to performing repetitive movements in his legs or his hands. He would probably have some difficulty occasionally bending, squatting, crawling, or climbing, just because of his probable arthritic symptoms. I don't think he would have any difficulty reaching, although he seems to have some difficulty with pulling with the left arm because of left shoulder pain. There are no restrictions of activities involving environmental issues.

Mr. Burke seems to have symptoms that are far out of proportion to any objective findings in today's examination. I feel that he probably does have a certain degree of pain, but patient tells me that he almost never drives and that he is short of breath in walking from our office, but when I watched this same patient nearly run across our parking lot and hop into a van and drive off, I think that perhaps the patient's history loses [sic] some of its

⁴The court notes that claimant eventually underwent the angioplasty procedure (TR 23-24, 131, 154). However, this was almost a year after the expiration of his insurance coverage (TR 24).

credibility. Certainly, with his past history, I would think that it would be reasonable that he have some degree of arthritic complaints and structural discomfort, but objectively I see **nothing** to confirm his complaints.

(TR 415).

There is merit to claimant's contention that the doctrine of res judicata does not bar reopening of his 1986 social security application. As a general rule, the doctrine of res judicata applies to all previous social security determinations that have become final. However, the regulations allow the Secretary to reopen and revise a prior unfavorable decision within four years of the notice of initial determination if new and material evidence is furnished or if the evidence considered in the prior determination clearly shows on its face that an error was made. 20 C.F.R. §§ 404.987-89. Claimant's current application was filed within four years of the denial of the 1986 application. The decision not to reopen a prior decision is generally considered to be within the discretion of the Secretary. Califano v. Sanders, 430 U.S. 99 (1977).

The Tenth Circuit has also found that "[a]bsent a colorable constitutional claim . . . , a district court does not have jurisdiction to review the Secretary's discretionary decision not to reopen an earlier adjudication." Nelson v. Secretary of Health & Human Services, 927 F.2d 1109, 1111 (10th Cir. 1990), quoting Torres v. Secretary of Health and Human Services, 845 F.2d 1136, 1138 (1st Cir. 1988). However, in Taylor for Peck v. Heckler, 738 F.2d 1112, 1114 (10th Cir. 1984), the court concluded that, when a claim, which is the same claim for res judicata purposes, is nonetheless reconsidered on the merits to any extent at the administrative level, it is treated as having been reopened even when there is no actual reopening. This exception to administrative res judicata applies even if the

Secretary relies upon the argument that the claim is barred by res judicata. This "Taylor exception" was applied by the court in Taylor v. Bowen, 738 F.Supp. 436, 438 (D. Kan. 1987).

In this case, the ALJ clearly reconsidered the merits of the 1986 decision denying benefits:

The Administrative Law Judge has carefully reviewed all of the medical evidence. This also includes the medical evidence that was presented from April 25, 1985, through claimant's previous denial decision of 1986. This medical evidence concerns the time of claimant's electrical shock. The Administrative Law Judge notes that this medical evidence was compiled and submitted initially in order to determine claimant's eligibility for workmen's compensation benefits in the state of Oklahoma. The rationales and standards used to determine disability for workmen's compensation standards are different from those used to determine disability under Social Security standards. Therefore, any reading of these reports and evidence must be tempered with that idea in mind. Additionally, the Administrative Law Judge is aware that all of these records were compiled in 1985, 1986, and partly in 1987. Over 4 years of time have elapsed. In reviewing claimant's condition, greater weight must be placed on opinions derived in the present rather than in the remote past.

(TR 27). This evidence was pertinent only to the prior application.

The Appeals Council also considered the merits of the 1986 decision, stating in a letter to claimant as follows:

The following reports were used to decide your claim.

Dr. Jerry D. First, report dated 9-25-90
Dr. David M. Heck, reports dated 6-29-90 and 7-31-90
Dr. Richard Hastings, report dated 6-5-85
St. Francis Hospital, reports dated 1-4-89 and 1-18-89
Dr. Diana DeFelice, reports dated 4-30-85 to 5-17-88

(TR 166).

The doctrine of res judicata does not bar reopening of claimant's 1986 social security

application. However, there is no merit to claimant's contentions that the ALJ's assessment of his residual functional capacity was not supported by substantial evidence, that improper weight was given to the opinions of treating physicians, and that the ALJ ignored claimant's complaints of pain.

It is true that the ALJ did not give substantial weight to the statements of the physicians who treated claimant in 1985 and 1986, as required by Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, the ALJ need only give controlling weight to the opinion of such a physician if it is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994).

While a treating doctor may opine that a claimant is totally disabled, that opinion is not dispositive, because final responsibility for determining disability is reserved to the ALJ. Id. As already discussed, the ALJ noted that the physicians in 1986 were finding claimant disabled under workers' compensation standards, which differ from social security standards, and that the reports were over four years old and greater weight should be placed on recent opinions which were written specifically with social security disability regulations in mind (TR 27). He noted that nothing in the medical records contradicted what Dr. Sutton concluded in his evaluation (TR 27, 412-416). The ALJ also noted that 20 C.F.R. § 404.1530 requires a claimant, in order to receive benefits, to obtain treatment if it will return him to the ability to perform work (TR 24). If a claimant does not follow the prescribed treatment, without a good reason, then he cannot be found to be disabled, and if he is already receiving benefits, then benefits can be stopped. The ALJ noted that

claimant refused to undergo a cardiac catheterization prior to the time his insured status ended (TR 24). The court also notes that he continued to smoke a pack of cigarettes a day (TR 55, 413) and was overweight (TR 414).

The ALJ noted that there were "indications the claimant exaggerates his symptoms," citing Dr. Sutton's observations (TR 29). The Tenth Circuit held in Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983), as follows:

Exaggerating symptoms or falsifying information for purposes of obtaining government benefits is not a matter taken lightly by [a] court. As a safeguard against such schemes, the determination of credibility is left to the observations made by the Administrative Law Judge as the trier of fact. His determinations on this issue are generally considered binding on the reviewing court.

The ALJ also properly evaluated claimant's complaints of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner, 754 F.2d at 330. However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical

problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had physical problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ followed the standard set in Luna and expressly addressed the factors in

finding that claimant "exaggerates his symptoms" of pain, citing Dr. Sutton's comments and the fact that claimant takes nothing but over-the-counter mild pain relief remedies, has a sporadic history of seeing his physicians, admitted doing strenuous activities such as lifting hay and throwing it on a truck, is well muscled and developed with good strength and no muscle atrophy, and thus does not seem to have a sedentary lifestyle (TR 29). He concluded claimant, "by stature and by the objective medical evidence," could do a wide range of medium exertional work (TR 30).

There was support in the record for the ALJ's decision that claimant retained the residual functional capacity to perform certain semiskilled jobs at the light and medium levels of exertion (TR 30). The ALJ properly called a vocational expert to determine what limitation claimant's acknowledged limitations might impose on his capacity to do light and medium work and used the grids as a framework to consider further limitations. Thompson v. Sullivan, 987 F.2d 1482, 1491-92 (10th Cir. 1993).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 29th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:burke

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

FILED

AUG 30 1995

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

TEREX CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 LOCAL LODGE NO. 790 OF THE)
 INTERNATIONAL ASSOCIATION)
 OF MACHINISTS AND AEROSPACE)
 WORKERS, AFL-CIO,)
)
 Defendant.)

Case No. 95-C-412-BU

ENTERED ON DOCKET

DATE AUG 31 1995

JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, Local Lodge No. 790 of the International Association of Machinists and Aerospace Workers, AFL-CIO and against Plaintiff, Terex Corporation. Defendant, Local Lodge No. 790 of the International Association of Machinists and Aerospace Workers, AFL-CIO, shall recover of Plaintiff, Terex Corporation, its costs of action, if any.

Dated at Tulsa, Oklahoma, this 29th day of August, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

18

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

FILED

AUG 30 1995

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

TEREX CORPORATION,
Plaintiff,

vs.

LOCAL LODGE NO. 790 OF THE
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,

Defendant.

Case No. 95-C-412-BU

ENTERED ON DOCKET

DATE AUG 31 1995

ORDER

This is an action brought by Plaintiff, Terex Corporation ("Terex"), under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) and section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, to set aside an arbitration award in favor of Defendant, Local Lodge No. 790 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("Local Lodge 790"). Terex filed its complaint against Local Lodge 790 on May 8, 1995. Local Lodge 790 filed its answer to Terex's complaint on June 13, 1995. In addition, Local Lodge 790 filed a counterclaim against Terex under 29 U.S.C. § 185(a) seeking enforcement of the arbitration award and under 28 U.S.C. § 2201 and 2202 seeking a declaration that the arbitration award is final and binding. On July 13, 1995, Terex filed its reply to Local Lodge 790's counterclaim.

Presently before the Court is the motion of Local Lodge 790 for judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. In its motion, Local Lodge 790 contends it is entitled to judgment

as a matter of law based upon the undisputed facts established by the pleadings. Terex has responded to the motion and Local Lodge 790 has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

Rule 12(c) provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). To ensure a litigant a full and fair hearing on the merits of its claim, courts will only grant a motion for judgment on the pleadings if the moving party clearly establishes that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 1368, pp. 517-518; National Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357 (7th Cir. 1987). In considering a motion for judgment on the pleadings, the court is required to view the facts in a light most favorable to the non-moving party. In addition, all well-pleaded factual allegations of the non-moving party are assumed to be true and all contravening assertions in the movant's pleadings are assumed to be false. 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 1368, pp. 519-520. Conclusions of law, however, are not admitted by the moving party for purposes of determining a Rule 12(c) motion. Id. at p. 523; Rosenhan v. U.S., 131 F.2d 932, 934 (10th Cir.), cert. denied, 318 U.S. 790 (1943).

Guided by the foregoing principles, the Court finds the following facts from the pleadings. Terex, through its division,

Unit Rig, manufactures large, off-highway mining vehicles at its plant in Tulsa, Oklahoma. Local Lodge 790, a labor organization, represents approximately 190 of Terex's employees in the production and maintenance bargaining unit. Terex and Local Lodge 790 are parties to a collective bargaining agreement ("Agreement") effective April 29, 1992 to April 30, 1996. The Agreement contains grievance and arbitration procedures for the resolution of disputes and provides that Local Lodge 790 may submit unresolved grievances to an arbitrator for determination. Section 3 of Article 7-A of the Agreement, however, limits the authority of the arbitrator to the application and interpretation of the existing Agreement or any supplements thereto or amendments thereof.

On February 14, 1994, Local Lodge 790 submitted a grievance to Unit Rig with regard to Terex's unilateral implementation of a new "No Fault Attendance Policy." Local Lodge 790 pursued the matter through the various steps of the grievance procedure and Terex denied the grievance. Local Lodge 790 then invoked the arbitration procedure pursuant to the terms of the Agreement.

In accordance with the Agreement, the parties selected W. Edwin Youngblood ("Arbitrator"), to arbitrate the grievance. The Arbitrator conducted a hearing on Local Lodge 790's grievance on October 13, 1994. Both parties presented evidence and argument in support of their respective positions. After the hearing, the parties submitted additional briefs to the Arbitrator. On February 8, 1995, the Arbitrator rendered an opinion and award sustaining Local Lodge 790's grievance. The Arbitrator determined that

Terex's unilateral implementation of a new "No Fault Attendance Policy" violated the Agreement. Thereafter, Terex commenced this action.

It is well-established that judicial review of an arbitration award is narrow in scope. Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692, 694 (10th Cir. 1977). Indeed, the Tenth Circuit in Mistletoe stated:

The courts may not review the merits of a grievance or an award. An arbitration award will be enforced if "it draws its essence from the collective bargaining agreement." In determining whether an award draws its essence from the Union contract, the courts have applied various tests. An arbitrator's award must be upheld unless it is contrary to the express language of the contract, or unless it is so "unfounded in reason and fact, so unconnected with the wording and purpose of the * * * agreement as to 'manifest an infidelity to the obligation of the arbitrator.'" The award does not draw its essence from the agreement if "viewed in the light of its language, its context, and any other indicia of the parties' intention," it is without rational support.

Id. at 694.

In its motion, Local Lodge 790 maintains that judgment in its favor is appropriate as the pleadings and the exhibits appended thereto and incorporated therein plainly establish that the arbitration award draws its essence from the Agreement. Local Lodge 790 asserts that the arbitration award is expressly based upon the Arbitrator's application of the provisions of the Agreement. According to Local Lodge 790, the Arbitrator explicitly refers to and relies upon the Agreement in concluding that Terex's unilateral implementation of the new attendance policy violated the Agreement. Although Local Lodge 790 acknowledges that the Arbitrator also relied upon the parties' past practice with

reference to Terex's attendance policies in making his award, Local Lodge 790 argues that such reliance supports its argument that the Arbitrator's award drew its essence from the Agreement as the "practices of the shop" are part of the Agreement. In light of the fact that the Arbitrator derived his award from the Agreement, Local Lodge 790 contends that its motion should be granted.¹

Terex, in response, contends that the arbitration award fails to draw its essence from the Agreement. Terex asserts that the Arbitrator's very words in the award show that his award was neither based upon nor consistent with the parties' Agreement. According to Terex, the Arbitrator expressly found that the management rights clause of the Agreement, which grants Terex the right "to establish and require employees to observe reasonable Company rules and regulations," gave Terex the authority to make rules governing the workplace. The Arbitrator also concluded that there had been a practice by Terex of making rules governing the workplace and cited as a specific example, Terex's attendance policy. Terex argues that by his own words, the Arbitrator recognized that Terex had a contractual right in the Agreement to implement rules governing the workplace but then ruled that Terex

¹In its motion, Local Lodge 790 also argues that Terex has erroneously relied upon the Federal Arbitration Act, 9 U.S.C. § 1, et seq., as a basis to vacate the arbitration award. Terex has not responded to this argument. The Court finds that Terex's reliance upon the Act is misplaced. The Act excludes from its coverage "contracts of employment of . . . any . . . workers engaged in foreign or interstate commerce." See, 9 U.S.C. § 1. The Act is therefore generally inapplicable to labor arbitration. United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 943-944 (10th Cir. 1989).

could not exercised those rights because such exercise occurred during the term of the Agreement. Terex argues that the Arbitrator improperly exceeded its authority by eliminating the right of Terex which he had found existed in the Agreement. Because the Arbitrator dispensed his own brand of industrial justice in making the award, Terex contends that the award must be vacated.

Notwithstanding the foregoing, Terex also argues that Local Lodge 790's motion should be denied on the basis that this action is not ripe for decision on the merits. Terex contends that the pleadings and the exhibits do not present the Court with a complete record of this action. Terex asserts that, in the context of a motion for summary judgment, it could inform the Court of the parties' awards in prior arbitrations which addressed both Terex's general rights under the management rights clause and its right to implement an attendance policy. Terex contends that these prior arbitration awards are part of the "industrial common law" which governs the parties' Agreement and must be evaluated to determine if the arbitration award at issue is worthy of enforcement. Furthermore, Terex contends that decision on Defendant's motion is not appropriate since its allegation that the arbitration award fails to draw its essence from the Agreement is assumed to be true.

Initially, the Court finds that this matter may properly be adjudicated on Local Lodge 790's motion. Terex has not disputed the material facts set forth in the pleadings. Although Terex has alleged in its complaint that the Agreement fails to draw its essence from the Agreement, such allegation does not preclude a

decision on the pleadings. The Court finds the allegation is a conclusion of law and therefore, not construed to be true for purposes of Rule 12(c). Rosenhan, 131 F.2d at 934. In addition, the Court concludes that a more-developed record is not required. It appears that Terex simply seeks to have the Court re-litigate the grievance, which it has no authority to do.

Having reviewed the arbitration award and the Agreement between the parties, the Court finds that the arbitration award draws its essence from the Agreement. It is clear from the arbitration award that the Arbitrator explicitly referred to and relied upon the Agreement in reaching his decision. Moreover, the Court rejects Terex's argument that the arbitration award did not draw its essence from the Agreement because it was inconsistent with the Arbitrator's own findings. Although the Arbitrator recognized that Terex had a right under the management rights clause of the Agreement to establish rules governing the workplace and that Terex had a practice of doing so, including establishing an attendance policy, the Arbitrator found that a major change in working conditions, such as the new attendance policy required, was a bargainable subject and any unilateral change of a bargainable subject violated the Agreement. The Court concludes that the Arbitrator's findings are consistent with the arbitration award.

Because the Court finds that the arbitration award draws its essence from the Agreement, the Court finds that Local Lodge 790 is entitled to judgment on the pleadings against Terex.

Accordingly, Defendant, Local Lodge 790 of the International

Association of Machinists and Aerospace Workers, AFL-CIO's Motion
for Judgment on the Pleadings (Docket Entry #12) is GRANTED.
Judgment shall issue forthwith.

ENTERED this 29th day of August, 1995



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

T L E

AUG 30 1995

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

WILLIAM D. MARTIN,
Plaintiff,

vs.

STANLEY GLANZ,
Defendant.

No. 94-C-1045-BU

ENTERED ON DOCKET
DATE AUG 31 1995

JUDGMENT

In accord with the Order granting Defendant's motion for summary judgment, the Court hereby enters judgment in favor of Defendant Stanley Glanz and against Plaintiff William D. Martin. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

SO ORDERED THIS 29th day of August, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

17

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

FILED

AUG 30 1995

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

WILLIAM D. MARTIN,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ,)
)
 Defendant.)

No. 94-C-1045-BU

ENTERED ON DOCKET
DATE AUG 31 1995

ORDER

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging that Sheriff Stanley Glanz denied him medical care with regard to his little finger while he was a pretrial detainee at the Tulsa County Jail (TCJ). Defendant Glanz has moved for summary judgment on the basis of the court-ordered Martinez report, see Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983), and Plaintiff has objected. For the reasons stated below, the Court concludes that Defendants' motion for summary judgment should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

The following facts are undisputed.

The Tulsa County Sheriff's Office currently contracts with Correctional Medical Services (CMS) to provide state mandated medical service to inmates incarcerated at the Tulsa County Jail. (Special Report at 4.)

Following an altercation on June 21, 1993, Plaintiff was taken to the emergency room at Doctors Hospital at 12:30 p.m. because of

lacerations on all fingers in his right hand. Plaintiff was returned to the TCJ at about 4:00 p.m. with directions to keep the wound clean and dry and to remove sutures within nine days. A CMS staff member saw Plaintiff at 8:00 p.m. later that day and at 4:00 a.m. the next morning. On June 23, 1993, Plaintiff submitted a sick-call slip requesting a bandage for the stitches in his hand. On June 28, 1993, a CMS staff member changed the dressing, cleaned the wound with hydrogen peroxide, and applied antibiotic ointment. On July 6, 1993, a CMS staff member noted that Plaintiff had removed the stitches himself and that he requested to see a doctor because he could not bend his little finger. Thereafter, on July 23, and August 3, 1993, Plaintiff submitted two sick-call slips requesting medical care for his knees and hips. Dr. Tipton saw Plaintiff on August 4, 1993. Plaintiff refused sick-call on July 26, 1993. (Special Report, docket #9.)

On November 9, 1994, Plaintiff filed the instant civil rights action against Sheriff Glanz, alleging denial of medical care under the Fourteenth Amendment with regard to his little finger which was broken during the attack at the TCJ on June 21. While the lacerations on the finger were treated, Plaintiff alleges Defendant refused to treat the broken bone on his little finger once he discovered it ten or fifteen days after the attack. He seeks compensatory and punitive damages.

II. SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate

"if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to

judgment as a matter of law. See Anderson, 477 U.S. at 250.

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

III. ANALYSIS

Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406. That

test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending official act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

At the outset the Court notes that Plaintiff has failed to allege and show any misconduct on the part of Defendant Glanz resulting in the deprivation of his constitutional rights. Section 1983 requires a degree of causation as an element of liability. 42 U.S.C. § 1983 ("Every person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . shall be liable"). As it is undisputed that the Tulsa County Sheriff's Office contracted with CMS to provide medical services to inmates, Plaintiff has not shown how Defendant Glanz caused him to be improperly denied of medical care for his little finger.

In any event, after reviewing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to make any showing that Defendant Glanz possessed the requisite culpable state of mind in denying the alleged medical care for his little finger after Plaintiff discovered that it had healed in a crooked position. At most Plaintiff differs with the medical judgment of the CMS staff that he needed additional medical care for his little finger after the stitches fall out and he discovered that his little finger had healed in a crooked

position.¹ It is well established, however, that a difference of opinion between the prison's medical staff and the inmate does not support a claim of cruel and unusual punishment. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); McCraken v. Jones, 562 F.2d 22 (10th Cir. 1977), cert denied, 435 U.S. 917 (1978); Smart v. Villar, 547 F.2d 112 (10th Cir. 1976). Nor do Plaintiff's allegations that the CMS staff was negligent in failing to discover that the little finger was broken amount to a constitutional violation. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle, 429 U.S. at 104-05; Ramos, 639 F.2d at 575.

III. CONCLUSION

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

¹ While the CMS staff did not offer to remove the stitches until six days after the nine-day period set out in the emergency room discharge report, Plaintiff verifies in his response that all but one of the stitches had already fallen out by then. (Docket # 10 at 2.)

Accordingly, Defendant Glanz's motion for summary judgment (docket #7-2) is hereby granted.

SO ORDERED THIS 29th day of August, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of
Housing and Urban Development,

Plaintiff,

v.

DAVID W. EVANS;
BEVERLY G. EVANS;
STATESMAN MORTGAGE COMPANY;
PC TECH;
CITY OF BROKEN ARROW;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

AUG 30 1995

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

ENTERED ON DOCKET
AUG 31 1995
DATE _____

CIVIL ACTION NO. 95-C-247-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

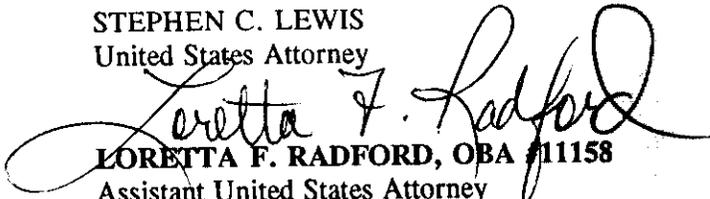
Dated this 30 day of Aug., 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

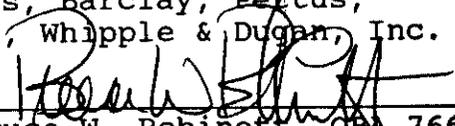


LORETTA F. RADFORD, OBA #11158
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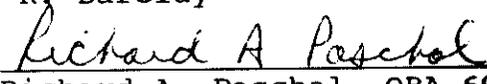
**NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.**

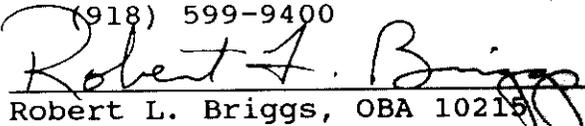
APPROVED:

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

FILED

AUG 29 1995

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

DONALD EUGENE LINVILLE,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 93-C-670-H

ENTERED ON DOCKET

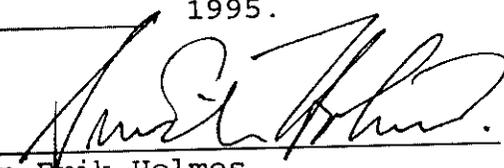
DATE AUG 30 1995

JUDGMENT

In accord with the Order granting Defendant's motion for summary judgment, the Court hereby enters judgment in favor of Defendant Stanley Glanz and against Plaintiff Donald Eugene Linville. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

IT IS SO ORDERED.

This 29TH day of August 1995.


Sven Erik Holmes
United States District Judge

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

FILED

AUG 29 1995

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

DONALD EUGENE LINVILLE,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 93-C-670-H

ENTERED ON DOCKET

DATE AUG 30 1995

ORDER

In July 1993, Plaintiff, a federal inmate, brought this pro se civil rights action under 42 U.S.C. § 1983 against Stanley Glanz, Sheriff of Tulsa County, alleging numerous violations of his first, eighth, and fourteenth amendment rights while he was a pretrial detainee at the Tulsa County Jail (TCJ). On August 29, 1994, the Court entered an order dismissing Plaintiff's eighth amendment claim and granting summary judgment on Plaintiff's claims of denial of group religious services, deprivation of privacy, denial of access to non-lawyers, inadequate medical care, and general conditions of confinement. The Court concluded, however, that there remained genuine issues of material fact with regard to restrictions on publications and visitation by minors, and lack of personal safety, and granted Plaintiff leave to amend his complaint. Defendant Glanz has now filed a second motion to dismiss or, in the alternative, for summary judgment on these remaining claims. Plaintiff has responded to Defendant's motion and filed motions for sanctions, for production of documents, for appointment of counsel and a special investigator, and to stay proceedings pending a ruling on Plaintiff's motions for sanctions.

I. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most

favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

II. ANALYSIS

A. Restrictions on Visitation

In his amended complaint, Plaintiff challenges the constitutionality of the TCJ's policy prohibiting visitation by minors under the age of eighteen. He alleges that during his incarceration at the TCJ he was denied visitation with his minor nephew, who was only one month short of his eighteenth birthday.¹

Prisoners do not possess a substantive liberty interest arising under the Constitution in unfettered visitation. Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989). Accordingly, courts are particularly deferential to prison authorities in matters involving visitation.² Courts have repeatedly recognized that institutions may impose limitations on

¹ The policy at issue reads as follows:

No visitors under the age of 18 are allowed to visit an Inmate in a Detention Facility.

NOTE: The Detention Division Administrator or designee may approve a visit by a minor in exceptional circumstance (Inmate in custody 90 days or longer and sentenced to DOC). Such approval must be in writing and obtained in advance of the visitation day.

(Ex. A attached to Defendant's motion, docket #31, at 2.)

² Policies involving inmate visitation pose particular problems for detention facilities and penal institutions. Cf. Block v. Rutherford, 468 U.S. 576, 585-87 (1984) (detailing potential security problems which can arise from contact visits).

visitation or even ban contact visits altogether. E.g., Thompson, 490 U.S. at 456; Ramos v. Lamm, 639 F.2d 559, 579-81 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). However, the power of corrections officials to restrict detainees' visitation is not unlimited. See Thompson, 490 U.S. at 465 (Kennedy, J., concurring). As with other regulations affecting pretrial detainees, limitations on visitation must not be imposed for purposes of punishment, but must be incident to some other legitimate governmental purpose. Block, 468 U.S. at 584. Where there is no proof of punitive intent, a regulation may be invalid where it is not rationally connected to the assigned interest or appears excessive in relation to that interest. Id. The court may infer an intent to punish if a regulation is arbitrary or purposeless. Id. (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979)). A regulation imposed for either the express or implied purpose to punish is not valid. See id.

Although under existing case law the Court would carefully scrutinize a policy, like the one at issue, which creates a blanket prohibition on visitation by minor children, the Court finds the circumstances in the present case do not warrant such a review.³

³ See Buie v. Jones, 717 F.2d 925, 929 (4th Cir. 1983) (Murnaghan, J., concurring) (absolute prohibition on visitation by detainee's minor children is almost certainly unconstitutional); Robinson v. Palmer, 619 F.Supp. 344, 348 n.6 (D.D.C. 1985) (ban on certain family members from visitation of prisoner may implicate constitutionally protected family rights), affirmed in part and reversed in part on other grounds, 841 F.2d 1151 (D.C. Cir. 1988); McMurry v. Phelps, 533 F.Supp. 742, 764-65 (W.D.La. 1982) (visitation ban on children under 14 abolished), overruled on other grounds by Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985); Nicholson v. Choctaw County, 498 F.Supp. 295 (S.D. Ala. 1980)

Plaintiff was denied visitation with a minor nephew, not a minor child. Viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendant's refusal to allow into the jail Plaintiff's minor nephew for visitation did not violate Plaintiff's constitutional rights. The TCJ's ban on visit by minors (other than minor children) without prior approval is based on legitimate concerns for jail security as well as safety of the juvenile. Moreover, Plaintiff has failed to establish that he sought prior approval for his minor nephew. Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's claim that he was denied visitation with his minor nephew.

B. Restriction on Access to Publications

In his Amended Complaint, Plaintiff challenges the TCJ's policy of not permitting detainees to receive outside newspapers and magazines because they present a fire hazard when allowed to accumulate along with other trash. (Doc. #9 at 10-11.) He contends that the policy infringed on his first amendment right to receive information about the outside world. Plaintiff's only means of obtaining any reading materials was through the library cart provided by Tulsa Metropolitan Ministries which came twice monthly and provided religious and sports related reading material.

(pretrial detainees have the right to reasonable visitation from their children); Valentine v. Englehardt, 474 F.Supp. 294, 298-302 (D.N.J. 1979) (county jail procedures totally banning visitation by inmates' children were unconstitutional); but see Ford v. Beister, 657 F.Supp. 607, 611 (M.D. Pen. 1986) (ban on minor children visitation of inmates in restricted custody was not unreasonable).

On January 26, 1995, more than one year after Plaintiff was transferred to a federal institution, the TCJ implemented a policy in response to McMahon v. Glanz, 94-C-1198-K, permitting inmates to receive, at their own expense, books, magazine, and papers through the mail from legitimate publishers and bookstores.

At the outset, Defendant argues that Plaintiff's first amendment rights were not violated because neither he nor any of his staff ever refused to deliver to Plaintiff any newspapers, magazines, or books sent to him through the mail or otherwise. The question of harm or "injury in fact" is a preliminary inquiry in every case or controversy filed in federal court. Standing to sue is premised upon a personalized injury to a legally cognizable interest of the plaintiff. See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490, 499 (1975); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 218 (1974). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)." Valley Forge, 454 U.S. 464 (1982) (footnote omitted).

Plaintiff has not suffered any injury as a result of

Defendant's policy prohibiting detainees from receiving magazines and newspapers. Although Plaintiff submitted a "grievance" on June 30, 1993, wanting to know why he could not receive newspapers and magazines, he never sought to obtain newspapers and magazines while he was incarcerated at the TCJ. Cf. Thompson v. Patteson, 985 F.2d 202, 204 (5th Cir. 1993) (plaintiff ordered through the mail ten paperback books and four back issues of Penthouse Letters magazine, but only two were approved for plaintiff to receive); Ward v. Washtenaw County Sheriff's Dep't, 881 F.2d 325, 325-326 (6th Cir. 1989) (magazines purchased from jail commissary were confiscated when plaintiff was transferred to Washenaw County Jail and plaintiff was not permitted to receive magazines that his brother brought to him while visiting at the jail); Mann v. Smith, 796 F.2d 79, 82-83 (5th Cir. 1986) (it was undisputed that plaintiff had sought to obtain newspapers and magazines while he was being held at the jail). Confiscation of copies of a crossword puzzles and a pamphlet for back exercises sent to Plaintiff by mail on August 9 and 10, 1993, is insufficient to show injury as a result of the policy regarding magazines and newspapers.⁴ Therefore, the Court must conclude that Plaintiff lacks standing to sue for money damages.

⁴ The Court notes that Plaintiff has not challenged the confiscation of the cross word puzzle and of the Texas Back Institute pamphlet in his complaint.

C. Lack of Personal Safety

Lastly, Plaintiff challenges a number of conditions which violate his interest in personal safety. He alleges that guards did not have enough time to make rounds and there were no means to notify guards in case of emergency. Plaintiff also alleges he lived in constant danger since June 3, 1993, when the cell doors in C-2 and C-3 began opening simultaneously due to a malfunctioning mechanism and the inmates in C-2 rushed into C-3 to attack the inmates there. Plaintiff was brought to the emergency room for stitches to his scalp. Plaintiff further alleges that despite being told about this malfunction, Defendant took no action to correct the problem and the doors opened simultaneously on at least four other occasions. Inmates from C-2 rushed into C-3 on two other occasions but order was restored with no one being hurt.

Pretrial detainees and inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Deliberate indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990). Under the deliberate indifference standard, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

Farmer v. Brennan, 114 S.Ct. 1970, 1984 (1994). Detainees retain at least the constitutional protections of convicted prisoners. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Therefore, if an official's conduct amounts to deliberate indifference, a detainee's Fourteenth Amendment Due Process rights would also be violated.

Here the undisputed facts show no deliberate indifference on the part of prison officials. As soon as the officers knew that the doors to C-2 and C-3 could open simultaneously, they took steps to repair the malfunctioning mechanism and to avert further attacks on the inmates in C-3. The undisputed evidence, reveals that out of the four additional instances in which the doors opened simultaneously, no one was hurt and the inmates in C-2 invaded C-3 on only two occasions.

Therefore, Plaintiff has failed to establish a causal relationship between his injury and the deliberate actions of the prison officials. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (to be entitled to judgment on a failure to protect claim under the Eighth Amendment, a plaintiff must show a causal relationship between his or her injury and the deliberate actions of the defendant prison official). Plaintiff has asserted only conclusory allegations in support of his failure to protect theory and has failed to show how Defendant proximately caused any injury. At best, Plaintiff's complaint states a claim for negligence on the part of prison officials. Negligence alone, however, is insufficient to establish a constitutional violation. Davidson v. Cannon, 474 U.S. 344, 347 (1986). Accordingly, the Court finds

that Defendant is entitled to judgment as a matter of law on Plaintiff's claim of lack of personal safety.

III. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendant has made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendant's summary judgment evidence, and that Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's motion for summary judgment (docket #30-2) is hereby **granted**. Defendant's motion to dismiss (docket #30-1) is **denied**.

In light of this ruling, the Court hereby **denies** Plaintiff's motions for sanctions, for production of documents, for appointment of counsel, for appointment of an investigator, to stay proceedings (to "stop proceedings"), and for ruling on Plaintiff's motions for appointment of counsel and for a special investigator (docket #33, #34, #35, #40, #44, #45, and #46).

IT IS SO ORDERED.

This 29TH day of August 1995.


Sven Erik Holmes
United States District Judge

entitled to habeas relief based solely on delay in adjudicating his or her appeal, unless the petitioner can show actual prejudice to the appeal, itself, arising from the delay." Harris v. Champion, 15 F.3d 1538, 1566 (10th Cir. 1994) (Harris II).

An untainted affirmance of a petitioner's state appeal while his habeas petition is pending makes clear that the petitioner was confined pursuant to a valid judgment of conviction throughout the period of delay. The affirmance establishes that if the delay had not occurred and petitioner's due process right to a timely appeal had been fully satisfied, he would have been subject to exactly the same term of confinement. Because the due process violation did not result in an illegal confinement, it cannot justify granting the habeas remedy of unconditional release.

Id. (quoting Cody v. Henderson, 936 F.2d 715, 720 (2nd Cir. 1991)) (emphasis in original).

Petitioner contends his appeal was prejudiced because Judges Brett and Parks could not participate in the decision as they had already passed away by the time his case was finally decided. Petitioner further contends his appeal was prejudiced because of the intimidating remarks of the Creek County District Attorney's Office, the destruction of possible exculpatory evidence allegedly withheld during his trial, and the fact that one of Petitioner's witnesses has since been convicted of a felony thus rendering her future testimony suspect. Lastly, Petitioner contends (1) the trial transcripts were unavailable for preparing a timely motion for a new trial, (2) his mother is no longer able to help Petitioner with any future appeals or post-conviction application because of a recent heart attack, and (3) Petitioner's "stress disorder" hampers his ability to communicate with the court.

(Docket #52.)

Petitioner's allegations that his direct appeal was actually prejudiced by the delay are patently frivolous. Even if Petitioner's allegations were true, he has not alleged facts which would entitle him to relief. Petitioner has not tied any of his allegations to actual prejudice to his appeal. Additionally, because Petitioner's conviction has been affirmed, he must demonstrate that but for the delay his appeal would have been decided differently. See Harris II, 15 F.3d at 1566.

Because Petitioner has not "show[n] actual prejudice to the appeal, itself, arising from the delay," Harris II, 15 F.3d at 1566, he is not entitled to habeas relief as a result of the delay. Petitioner's appellate delay claim must, therefore, be dismissed with prejudice.

II. MOTIONS FOR LEAVE TO AMEND AND FOR APPOINTMENT OF COUNSEL

On June 7, 1995, Petitioner filed a motion for leave to amend the instant petition to include the eleven grounds of error raised by his retained counsel on direct appeal and some 265 additional claims which he contends were presented to the state courts by way of a petition for habeas relief and mandamus. Due to a clerical error, the Clerk of this Court filed and docketed Petitioner's amended petition for a writ of habeas corpus, three supplements, and a brief in support (docket #58, #59, #60, #61, and #62) without

leave of Court on May 30, 1995.¹

Because the Clerk lacked the authority to file Petitioner's amended petition, supplements, and brief, the Court hereby orders that the same be stricken from the record. After considering Petitioner's motion for leave to amend and the proposed pleadings, the Court concludes the motion for leave to amend should be denied without prejudice to it being reasserted within twenty days along with a proposed amended petition not exceeding twenty pages, including necessary exhibits, and alleging no more than twenty claims. The Court will not consider supplements and/or briefs.

In view of the rulings outlined above, the Court denies Petitioner's motion for appointment of counsel without prejudice to it being reasserted after the Court has ruled on whether Plaintiff should be permitted to amend the instant petition.

III. CONCLUSION

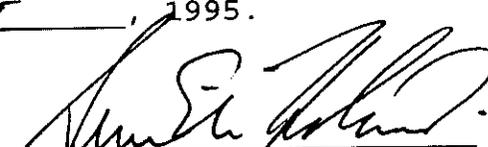
Petitioner's appellate delay claim is hereby dismissed with prejudice. The Clerk shall strike and return to Petitioner his amended petition, supplements, and brief (docket #58, #59, #60, #61, and #62). Petitioner's motion for leave to amend (docket #63) is hereby denied without prejudice to it being reasserted on or before twenty (20) days, from the date of filing of this order, along with a proposed amended petition not exceeding twenty (20) pages and raising no more than twenty (20) claims. Petitioner's

¹ Petitioner submitted his amended petition, supplements, and brief in support on May 30, 1995, and his motion for leave to amend on June 7, 1995.

motion for appointment of counsel (docket #49, and #55) is denied without prejudice. Petitioner's motions for hearing, to compel, for a scheduling order, and to deem confessed (docket #57, #64, #65, and 67) are hereby denied with prejudice.

IT IS SO ORDERED.

This 29TH day of August, 1995.


Sven Erik Holmes
United States District Judge

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

FILED

AUG 29 1995

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

RC

RICKY CHARLES LASLEY,

Plaintiff,

vs.

OTTAWA COUNTY BOARD OF COUNTY
COMMISSIONERS, THERL WHITTLE,
and JERRY COACH,

Defendants.

No. 92-C-1039-H

ENTERED ON DOCKET

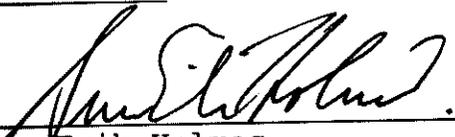
DATE AUG 30 1995

JUDGMENT

In accord with the **Order** granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of Defendants Ottawa County Board of County Commissioners, Therl Whittle, and Jerry Coach, and against Plaintiff Ricky Charles Lasley. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

IT IS SO ORDERED.

This 29TH day of August, 1995.


Sven Erik Holmes
United States District Judge

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

FILED

AUG 29 1995

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

RICKY CHARLES LASLEY,

Plaintiff,

vs.

OTTAWA COUNTY BOARD OF COUNTY
COMMISSIONERS, THERL WHITTLE,
and JERRY COACH,

Defendants.

No. 92-C-1039-H

ENTERED ON DOCKET
DATE AUG 30 1995

ORDER

In this prisoner's civil rights action, Plaintiff, proceeding pro se, alleges that Defendants denied him adequate medical treatment when he fell at the Ottawa County Jail on May 8, 1992, and that the denial of medical treatment aggravated a pre-existing shoulder injury. Defendants have filed an amended motion for summary judgment to which Plaintiff has objected. For the reasons stated below, the Court concludes that Defendants' motion for summary judgment should be granted.

I. BACKGROUND

The following facts are undisputed.

In July 1990 and in March 1991, Plaintiff was charged with two offenses of Feloniously Pointing a Weapon, After Former Conviction of a Felony, and with one offense of Feloniously Carrying a Firearm, after former conviction of a felony. Plaintiff was not arrested until April 27, 1992, because he seriously injured his left shoulder as a result of a gunshot wound on May 2, 1991, and needed extensive reconstructive surgery. Following his arrest

Plaintiff was detained at the Ottawa County Jail where on Friday May 8, 1992, he slipped on the wet concrete floor of the cell and hit his left shoulder against a steel bunk. Because there were no visible signs of injury, an appointment was scheduled with Dr. Bamberl for Monday May 11, 1992. Dr. Bamberl postponed the appointment to May 12, 1992, at which time he found nothing wrong with the shoulder other than the old injury. Consequently, he recommended the continuation of Ibuprofen for pain as needed and prescribed Lodine, a nonsteroidal anti-inflammatory drug.

Because of continued complaints of pain and refusal to take Lodine, Defendants again brought Plaintiff to Dr. Bamberl on June 1, 1992. Dr. Bamberl ordered x-rays and found Plaintiff had an impacted fracture of the left humerus. Although Dr. Bamberl concluded the fracture was healing normally, he referred Plaintiff to Dr. Black, an orthopedic surgeon in Joplin, Missouri. Dr. Bamberl also prescribed Prosom for insomnia.

On June 3, 1992, after taking further x-rays and examining Plaintiff's shoulder, Dr. Black concluded that Plaintiff had an impacted fracture of the left humerus which coincided with Plaintiff's fall at the jail on May 8, that the alignment of the fracture was satisfactory, and that there was no necessity for additional treatment. He prescribed no medication, but gave Plaintiff some samples of Toradol, a nonsteroidal anti-inflammatory drug, to take as he needed for pain.

In November 1992, Plaintiff, brought this civil rights action against the Commissioners of Ottawa County, Sheriff Therl Whittle,

and Deputy Sheriff Jerry Coach. He alleged that the County Commissioners, as "holders of the county budget," prevented the Sheriff from providing Plaintiff timely and adequate medical treatment for the May 8, 1992 injury to his shoulder, and that the delay in providing medical treatment caused him to become disabled to a greater degree. Plaintiff seeks damages and immediate treatment, including a surgery to restore the damage done to the reconstructive surgery in his left shoulder.¹

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied

¹ The Court does not address the claims Plaintiff alleges in his response regarding the denial of pain medication for pre-existing injury and Post Traumatic Stress Syndrome/Disorder and the fact that the medicines were dispensed by jail trustees, as he failed to plead them in his complaint.

Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is

sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

III. ANALYSIS

In considering Defendants' motion for summary judgment, the court has examined the special report. Although Plaintiff has responded to the motion, he has presented no evidence to refute the facts in Defendants' motion and special report. Plaintiff's response merely contains conclusory allegations that the report is inadequate and erroneous, and does not controvert Defendants' summary judgment evidence. Accordingly, because Plaintiff has not presented conflicting evidence, the Court accepts the factual findings of the report. See Hall, 935 F.2d at 1111.

A. Medical Care

Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the

pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to make any showing that Defendants possessed the requisite culpable state of mind in denying him medical care for his shoulder after the fall on May 8, 1992. At most Plaintiff differs with the medical judgment of Dr. Bamberl and Dr. Black that he needed additional medical care for his shoulder injury. It is well established, however, that a difference of opinion between the prison's medical staff and the inmate does not support a claim of cruel and unusual punishment. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); McCraken v. Jones, 562 F.2d 22 (10th Cir. 1977), cert. denied, 435 U.S. 917 (1978); Smart v. Villar, 547 F.2d 112 (10th Cir. 1976). Nor do Plaintiff's contentions that Defendants were negligent in providing medical care and in dispensing medication amount to a constitutional violation. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle, 429 U.S. at 104-05; Ramos, 639 F.2d at 575.

Next the Court addresses Plaintiff's claims that he experienced a four-day delay in receiving emergency medical care following his fall at the jail. Plaintiff bases this allegation of

delay in receiving emergency medical care upon the fact that Dr. Bamberl canceled a scheduled appointment with him on May 11, 1992. Even if a canceled appointment may under certain circumstances constitute wanton infliction of pain, the Court finds that Plaintiff has not demonstrated the requisite culpability in the case at hand. Dr. Bamberl was present at the rescheduled appointment the next day and visited Plaintiff with no delay. "[D]elay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm." Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) (quoting Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993)).

B. Appointment of Counsel

In light of the ruling reflected in this order, the Court denies Plaintiff's motion for appointment of counsel and for a hearing on his motion for appointment of counsel.

III. CONCLUSIONS

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' motion for summary judgment (docket #27) is hereby granted. Plaintiff's motions for appointment of counsel

and for hearing on his motion for appointment of counsel (docket #29-1 and 29-2) are hereby **denied**.

IT IS SO ORDERED.

This 29th day of August, 1995.


Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET

DATE AUG 30 1995

PAUL E. McDANIEL

Plaintiff,

vs.

94-C-109-B

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

FILED

AUG 29 1995

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

J U D G M E N T

In accord with an Order entered April 24, 1995, adopting the Report and Recommendation of the Magistrate Judge, remanding this matter to the Commissioner of Social Security, Judgment is herewith entered in favor of Plaintiff, Paul E. McDaniel, and against Defendant, Shirley S. Chater, Commissioner of Social Security, remanding this matter to the Commissioner for further consideration.

Costs are assessed against the Defendant if timely applied for pursuant to Local Rule 54.1. Plaintiff's Application for attorneys fees is set before the Court on the 11th day of Sept., 1995, at 1:30 P m.

DATED this 29th day of August, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

15

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 29 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MARY M. DAVIDSON; UNKNOWN)
SPOUSE OF Mary M. Davidson, if any;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE AUG 30 1995

) Civil Case No. 95-C-0039-B
)
)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day of Aug., 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, MARY M. DAVIDSON and UNKNOWN SPOUSE OF Mary M. Davidson, if any, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MARY M. DAVIDSON, signed a Waiver of Summons on January 24, 1995.

The Court further finds that the Defendant, UNKNOWN SPOUSE OF Mary M. Davidson, if any, 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 June 19, 1995, and continuing through

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

July 24, 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, UNKNOWN SPOUSE OF Mary M. Davidson, if any, 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, UNKNOWN SPOUSE OF Mary M. Davidson, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through 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 their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on January 24, 1995; and that the Defendants, MARY M. DAVIDSON and

UNKNOWN SPOUSE OF Mary M. Davidson, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Four (4), and the North Ten (10) feet of Lot Five (5),
Block Nine (9), FEDERAL HEIGHTS SECOND ADDITION
to the City of Tulsa, Tulsa County, State of Oklahoma,
according to the recorded Plat thereof.**

The Court further finds that on October 13, 1988, the Defendant, MARY M. DAVIDSON, executed and delivered to NORWEST MORTGAGE, INC. her mortgage note in the amount of \$31,036.00, payable in **monthly** installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that **as security** for the payment of the above-described note, the Defendant, MARY M. DAVIDSON, a single person, executed and delivered to NORWEST MORTGAGE, INC., a mortgage dated October 13, 1988, covering the above-described property. Said mortgage was recorded on October 17, 1988, in Book 5134, Page 1769, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 13, 1988, Norwest Mortgage, Inc., assigned the above-described mortgage note and mortgage to GMAC MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on October 17, 1988, in Book 5134, Page 1774, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 3, 1991, GMAC Mortgage Corporation of Iowa, assigned the above-described mortgage note and mortgage to the Secretary of Housing

and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 11, 1991, in Book 5327, Page 1420, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 14, 1991, the Defendant, MARY M. DAVIDSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, MARY M. DAVIDSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, MARY M. DAVIDSON, is indebted to the Plaintiff in the principal sum of \$44,425.25, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$29.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$16.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$17.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MARY M. DAVIDSON and UNKNOWN SPOUSE OF Mary M. Davidson, if any, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, MARY M. DAVIDSON, in the principal sum of \$44,425.25, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 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 \$62.00, plus costs and interest, for personal property taxes for the years, 1991-1993, plus the costs of this action.

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

MARY M. DAVIDSON and UNKNOWN SPOUSE OF Mary M. Davidson, if any, 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, MARY M. DAVIDSON, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$62.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any

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

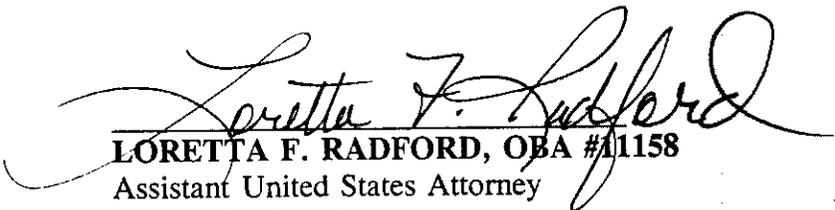
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

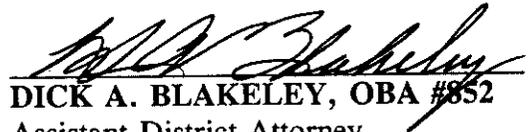
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C-0039-B
LFR:flv

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

F I L E D

AUG 29 1995

OLD REPUBLIC MINNEHOMA)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
TRIAD WARRANTY CORPORATION and)
HAMBURG BROTHERS CORPORATION)
)
Defendants.)

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

Case No. 95-C-451-C

ENTERED ON DOCKET

DATE AUG 30 1995

JUDGMENT

This Judgment is entered by the Court as a result of the Clerk's Entry of Default of Triad Warranty Corporation the hearing held August 28, 1995, on Plaintiff's Request for Entry of a Default Judgment against Triad.

The Court hereby enters judgment in favor of Plaintiff Old Republic Minnehoma Insurance Company (ORMIC) and against Defendant Triad Warranty Corporation specifically making the following findings and orders:

1. The Court finds that (1) Plaintiff ORMIC is an Arizona corporation with its principal place of business in Tulsa, Oklahoma; (2) Defendant Triad is a Texas corporation with its principal place of business in Dallas, Texas.

2. The Court finds that federal jurisdiction is proper pursuant to 28 U.S.C. 1332 by reason of diversity of citizenship between Defendant Triad and Plaintiff, and the fact that the amount in controversy exceeds \$50,000.

3. The Court further invokes its jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202 based on the fact that an actual

controversy exists between Plaintiff and Defendant entitling Plaintiff to a declaratory judgment declaring the rights and other legal relations of the parties to this action.

4. On August 11, 1995, the Court dismissed Defendant Hamburg Brothers Corporation, finding that no actual case or controversy existed at the time between Plaintiff and Hamburg Brothers Corporation.

5. The Court further finds that a substantial part of the events or omissions giving rise to this action occurred in this judicial district. Venue is proper, therefore, under 28 U.S.C. § 1391(a)(2).

6. The Court further finds as follows:

A. ORMIC is an insurance company engaged in the business of providing insurance coverage pursuant to its issued policies.

B. Triad has engaged in the warranty business, specifically offering to purchasers of consumer appliances, electronics, and heating and air conditioning equipment, contracts for repair or replacement service extending beyond the warranties of the manufacturer, commonly known as an extended service contract or agreement. Extended service agreements are customarily prepared in a blank form, having standard terms and conditions, requiring only that the details concerning the purchaser and the equipment or appliance covered be filled in.

C. On October 1, 1989, ORMIC, then known as Minnehoma Insurance Company, issued to Triad a Contractual Liability Insurance Policy with respect to certain service contracts sold or

to be sold by Triad or through Triad by third parties. A copy of the Contractual Liability Insurance Policy ("Policy") issued to Triad is attached to this Judgment as Exhibit A. Triad was named as the insured in the Policy. Triad was also the claims administrator for the extended service contract program. This required Triad to receive claims, investigate and adjust the claims, and approve the claims for payment in strict accordance with the issued service contracts.

D. The Policy covered Triad's losses with respect to extended service contracts sold by Triad from October 1, 1989 through October 31, 1992, the effective date the Policy was cancelled by ORMIC.

E. There was never any novation, substitution, assignment or other agreement whereby ORMIC replaced Triad or assumed any of the duties of Triad to or to the purchasers of Triad's extended service contracts.

F. The Insuring Agreement clause in section A of the Policy attached hereto as Exhibit A obligates ORMIC to reimburse Triad for costs incurred by Triad in fulfilling its legally binding obligations under the extended service contracts sold by Triad during the term of the Policy. It further provides that reimbursement of such costs shall be made directly to Triad. It also provides that ORMIC's obligation to reimburse Triad is subject to all of the terms and conditions of the Policy. This includes the obligation to pay premiums such that only losses associated with extended service contracts for which ORMIC has received premiums are subject to the Policy.

G. The Conditions clause in section D of the Policy requires that four conditions be met before ORMIC is obligated to reimburse Triad:

- (1) The retail purchaser of an extended service contract must submit a claim, either to Triad or to an agent of Triad;
- (2) Triad must determine that the claim is valid and approve it under the extended service contract;
- (3) Triad must incur costs or a loss with respect to such claim in performing its obligations under the extended service contract; and
- (4) As soon as practicable, but not more than 30 days later, Triad must provide ORMIC with written proof of the loss, under oath if requested, with full particulars as to the nature and extent of the loss.

H. Under the terms and conditions of the Policy, ORMIC has not guaranteed that Triad would fulfill its obligations under its extended service contracts, nor that Triad would be and would remain solvent and continue its business operations.

I. Paragraph (4) of section E, General Provisions, of the Policy provides, in part, that ORMIC is not bound by any assignment of interests under the Policy on the part of Triad unless ORMIC has consented to the assignment, and the Policy is endorsed to reflect the assignment. There are no endorsements to the Policy reflecting an assignment of Triad's interests.

7. Based upon the foregoing findings, the Court Orders as follows:

A. A valid extended service contract is one which has been approved by ORMIC pursuant to the Policy and for which premiums have been paid by Triad. ORMIC has no obligation with respect to any extended service contract for which a premium has not been paid.

B. Pursuant to the Policy, ORMIC is not required to make payment to Triad in connection with any validly issued extended service contract until the following conditions have been met:

- (1) The retail purchaser of the extended service contract must submit a claim, either to Triad or to an agent of Triad.
- (2) Triad must determine that the claim is valid and approve it under the extended service contract.
- (3) Triad must incur costs or a loss with respect to such claim in performing its obligations under the extended service contract.
- (4) As soon as practicable, but not more than 30 days later, Triad must provide ORMIC with written proof of the loss, under oath if requested, with full particulars as to the nature and extent of the loss.

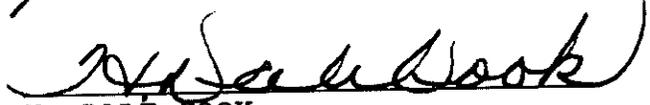
C. ORMIC has not waived or allowed to be altered in any respect the conditions and other provisions of the Policy. ORMIC is not currently obligated to make any payment under the Policy to Triad or any other party with respect to any extended service contract sold on Triad's behalf, except upon full compliance with

the Policy. This is not intended to prevent Triad from invoking benefits under the Policy based upon subsequent full compliance with the Policy as more particularly defined by this Judgment.

D. The parties are to bear their own respective costs and attorneys' fees incurred in this litigation.

IT IS SO ORDERED.

DATED this 28th day of August, 1995.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:


Leonard I. Pataki, OBA No. 6935
Tom Q. Ferguson, OBA No. 12288
DOERNER, SAUNDERS, DANIEL & ANDERSON
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff Old
Republic Minnehoma Insurance Company

CONTRACTUAL LIABILITY INSURANCE POLICY

for Designated Service Contracts

MINNEHOMA INSURANCE COMPANY

**HOME OFFICE
Phoenix, Arizona**

**ADMINISTRATIVE OFFICE:
P. O. Box 478185
Tulsa, Oklahoma 74147**

DECLARATION

POLICY NO: 89-2-002

INSURED: Triad Warranty Corporation

BUSINESS ADDRESS: 740 E. Campbell Road, Suite 600 Richardson, TX 75081

COVERAGE: Loss under Designated Contracts

**EFFECTIVE DATE: Time 12:01 A.M. at the business address
of the Insured.**

**EXPIRATION DATE: One year from date of issuance and continuous
until cancelled.**

A. INSURING AGREEMENT

In consideration of the payment of the premium and subject to all of the terms and conditions of this policy, Minnehoma Insurance Company (the "Company") agrees to reimburse the Insured for designated costs incurred in fulfilling its legally binding obligations under each Designated Service Contract validly and properly issued by the Insured during the Policy Term, in accordance with the terms and conditions of such Designated Contract. The reimbursements of designated costs shall be made directly to the Insured. The amount of the Contractual Obligation shall not exceed the limits under each designated service contract. The Company shall not have any duty to defend the insured in any lawsuit or other judicial or administrative proceeding involving the Insured.

B. DEFINITIONS

(1) **CONTRACTUAL OBLIGATION:** The Insured's obligation as described in Exhibit A.

(2) **INSURED:** The person(s) or organization named as the Insured in the Declaration.

EXHIBIT "A"

(3) DESIGNATED CONTRACT: The service contracts described herein while this policy is in force on a form approved in writing by Minnehoma Insurance Company; and for which the proper premium is timely paid.

(4) DESIGNATED COSTS: Up to an amount not exceeding the replacement cost as defined in Designated Contracts.

(5) CONTRACT HOLDER: The original purchaser of the equipment.

(6) CONTRACT HOLDER CLAIM: A valid claim presented by a Contract Holder and approved by the Insured, which constitutes a Contractual Obligation.

(7) LOSS: Expenses actually incurred by the Insured or on behalf of the Insured in the performance of a valid Contractual Obligation.

(8) REPAIR FACILITY: A person or organization authorized to perform services under a Designated Contract.

(9) INSURED'S CLAIM: A claim by the Insured for benefits under this policy based upon and covered under a Contractual Obligation.

C. EXCLUSIONS

This policy does not insure for any obligation or liability other than a Contractual Obligation, and does not apply to:

(1) Liability for any and all consequential damages, including but not limited to punitive or extra-contractual damages, arising from performance by the Insured, the Insured's agents or employees or any Repair Facility under a Designated Contract:

(2) Any and all obligations and liabilities which may arise by virtue of performance under a Designated Contract by the Insured or anyone else:

(3) breach of any and all implied warranties of merchantability:

(4) breach of any and all implied warranties of fitness:

(5) any and all liabilities for negligence by the insured:

(6) any and all liabilities for defective products, including strict liability:

(7) any and all obligations and liabilities which may arise by virtue of the sale by Insured of the item which is the subject of a Designated Contract, or any part or component of such item.

Among the kinds of obligations and liabilities contemplated by this Exclusion are:

a) any and all implied warranties of merchantability:

b) any and all implied warranties of fitness:

c) any and all liabilities for negligence:

d) any and all liabilities for defective products, including strict liability:

(8) any and all liabilities or obligations extending to anyone other than the Contract Holder:

(9) any and all obligations, liabilities or claims of the Insured arising from any fraudulent, dishonest or criminal act of the Insured or his agents or employees:

(10) any duty to defend the Insured in any lawsuit or other judicial or administrative proceeding involving the Insured.

(11) labor and/or parts performed by or on behalf of the named insured arising out of work or any portion thereof, or out of materials, parts or equipment, as a result of recall of the manufacturer or dealer.

D. CONDITIONS

(1) IMPLEMENTATION OF DESIGNATED CONTRACT: Within 30 days after the date on which a Designated Contract was issued, the Insured shall report the sale to the Company, and forward to the Company or its authorized agent the proper premium. All premiums shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

(2) PREMIUM DETERMINATION: The premium for each Designated Contract shall be in accordance with Attachment 2. These rates shall remain in effect until modified by the Company and/or the insured, and after thirty (30) days, prior written notice of the change shall have been given to the INSURED.

(3) NOTICE OF INSURED'S CLAIM: When a Contract Holder makes a Contract Holder Claim, the Insured shall notify the Company or its authorized agent of the Contract Holder Claim, and provide the Company with the contract number and total cost of covered repair.

(4) PROOF OF LOSS: As soon as practicable (but, in any event, not later than 30 days after the Loss), the Insured shall give to the Company written proof of Loss, under oath if required, including full particulars of the nature and the extent of the Loss and other details entering into the Determination of the amount payable. The Insured shall submit to examination under oath by any person named by the Company and subscribe to same, as often as may reasonably be required. Proof of Loss shall be on forms furnished by the Company unless the Company shall have failed to furnish such forms within 15 days after receiving notice of claim.

(5) **INSPECTION AND AUDIT:** The Company shall be permitted but not obligated to inspect at any reasonable time the Insured's premises, books and records as they pertain to coverage under this policy. This right shall exist so long as Designated Contracts are outstanding. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the Insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

(6) **ACTION AGAINST THE COMPANY:** No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance by the Insured with all of the terms of this policy or until the amount of the Insured's Loss shall have been finally determined either by judgment against the Insured after trial or by written agreement of the Insured, the Contract Holder, and the Company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Company as a party to any action against the Insured to determine the Insured's liability, nor shall the Company be impleaded by the Insured or his legal representative. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations under this policy.

E. GENERAL PROVISIONS

(1) **INSURED'S REPRESENTATIONS IN THE DECLARATIONS:** By acceptance of this policy, the Insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

(2) CANCELLATION:

Prospective Cancellation: The insured may cancel his policy with respect to Designated Contracts by surrendering the policy to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. The Company cancels this policy by mailing to the Insured at the address shown in this policy written notice stating when not less than thirty (30) days thereafter such cancellation shall be effective. If cancellation by the Company is for non-payment of premium, ten (10) days written notice shall be given.

Retrospective Cancellation: The Company and the insured may not cancel the provisions set herein with respect to Designated Contracts which are in effect on the date of cancellation. Service Contract coverage will terminate on these designated contracts upon their natural expiration.

(3) SUBROGATION: In the event of any payment by the Company under this policy, the Company shall be subrogated to all of the Insured's rights of recovery therefor against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever is necessary to secure such rights. The Insured shall do nothing to prejudice such rights.

(4) ASSIGNMENT: Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. No liability of the Company shall exist under this policy until the assignment is accepted and the policy is endorsed.

(5) CHANGES IN THE POLICY: No waiver or change of the terms of this policy shall be made except by endorsement issued to form part of this policy and signed by a duly authorized representative of the Company. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or change in any part of this policy or stop the Company from asserting any right under the terms of this policy.

(6) TERRITORY: This policy applies only to losses which occur while the item covered by a Designated Contract is within the United States of America, its territories or possessions, or Canada.

(7) RECOVERIES: All amounts recovered by the Insured for which he has received benefits under this policy shall belong to, and be paid to the Company by the Insured up to the total amount of benefits paid by the Company.

(8) OTHER INSURANCE: If the Insured has other insurance against a Contractual Obligation covered by this policy, the Company shall not be liable under this policy for a greater proportion of such Contractual Obligation than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such Contractual Obligation.

(9) RENEWAL: This policy is issued as stated in the declarations for a term of one year and is continuous until cancelled.

IN WITNESS WHEREOF, Minnehoma Insurance Company has caused this policy to be signed by its President and Secretary and countersigned by a duly authorized agent of the company.


Secretary


President

10-24-89
Date


Countersignature

FILED

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

AUG 28 1995

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

SCOTT WOLF and BRENDA WOLF,)
)
Plaintiffs,)
)
vs.)
)
THE PRUDENTIAL INSURANCE COMPANY OF)
AMERICA, INC., THE PRUDENTIAL SERVICE)
BUREAU INC., THE PRUDENTIAL LIFE INSURANCE)
COMPANY, INC., THE PRUDENTIAL INSURANCE)
COMPANY OF AMERICA, INC., as Claims)
Administrator for the Employee Benefit Plan known)
as the Southern Baptist Health Plan, and THE)
ANNUITY BOARD OF THE SOUTHERN BAPTIST)
CONVENTION, INC.,)
)
Defendants.)

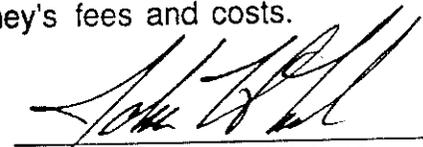
Case No. 92-C-1101-B

ENTERED ON DOCKET
DATE AUG 29 1995

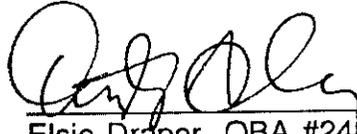
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Scott and Brenda Wolf, and Defendants, The Prudential Life Insurance Company of America, The Prudential Service Bureau, Inc. and The Prudential Life Insurance Company, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

The parties are to bear their own attorney's fees and costs.



John H. Tucker, OBA #9110
Mary Quinn-Cooper, OBA #11966
Catherine C. Taylor, OBA #14331
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
100 W. 5th Street, 4th Floor
Tulsa, OK 74121-1100
ATTORNEYS FOR THE PLAINTIFFS



Elsie Draper, OBA #2482

Timothy A. Carney, OBA #11784

GABLE & GOTWALS

2000 Bank IV Center

Tulsa, OK 74119

ATTORNEYS FOR DEFENDANTS

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

FILED

AUG 28 1995

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

AMERICAN STATES INSURANCE COMPANY,)
an Indiana corporation,)

Plaintiff,)

vs.)

MICHAEL SHUE DeCORTE and CHERYL)
DeCORTE,)

Defendants.)

Case No. 94-C-108-H

ENTERED ON DOCKET

DATE AUG 29 1995

ORDER VACATING ADMINISTRATIVE CLOSING ORDER

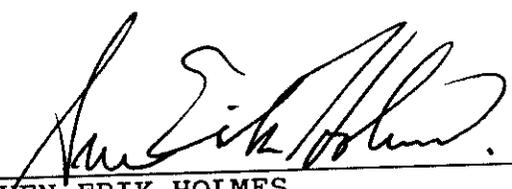
NOW ON THIS 28TH day of August, 1995,

this matter comes on for consideration before the undersigned Judge of the United States District Court on the parties' Joint Application to Vacate the Administrative Closing Order previously entered in this case.

For good cause shown, the Court finds that the Application to Vacate the Administrative Closing Order should be and same is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Administrative Closing Order should be and same is hereby vacated and this matter shall proceed.

IT IS SO ORDERED.


SVEN ERIK HOLMES
United States District Judge

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

FILED

AUG 28 1995

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PEGGY I. THOMPSON aka PEGGY
I. HAYNES aka PEGGY THOMPSON
aka PEGGY IRENE THOMPSON;
et al.,

Defendants.

Case No. 95-C-313-BU ✓

ENTERED ON DOCKET
AUG 29 1995
DATE _____

ORDER

This matter comes before the Court upon the motion of the plaintiff, United States of America, to dismiss the defendant, Marie V. Booth. As it appears from the record that the plaintiff has not obtained service upon Marie V. Booth and the plaintiff has shown good cause for the dismissal of Marie V. Booth, the Court finds that the plaintiff's motion should be granted.

Accordingly, the Motion to Dismiss a Defendant filed on August 25, 1995 is GRANTED. The defendant, Marie V. Booth is hereby DISMISSED from this action pursuant to Rule 41(b), Fed.R.Civ.P.

ENTERED this 25th day of August, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

6

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

ENTERED ON DOCKET

DATE ~~AUG 29 1995~~

GREGORY DALE ENGLISH,)
)
 Plaintiff,)
)
 vs.)
)
 JUDGE EDWARD RANDOLPH TURNBULL,)
 DAVID MOSS, JIM HESLET, AND GLOYD)
 L. McCOY,)
)
 Defendants.)

No. 95-C-752-K

FILED

AUG 28 1995

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

ORDER

Plaintiff, an Oklahoma state inmate, has filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. After reviewing the motion and complaint, the Court concludes that Plaintiff should be granted leave to proceed in forma pauperis, but that his complaint should be dismissed sua sponte as frivolous under 28 U.S.C. § 1915(d).

In this civil rights action, Plaintiff sues Judge Ned Turnbull for failing to order the necessary transcript for his application for post-conviction relief, and District Attorney David Moss for failing to attach the relevant portions of the transcript to the State's response. Plaintiff also sues attorneys Jim Heslet and Gloyd L. McCoy for ineffectively representing him throughout trial and on direct appeal. Plaintiff seeks declaratory and injunctive relief against Judge Turnbull and David Moss. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams,

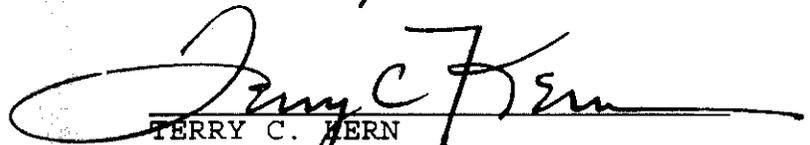
490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff's claims against Judge Ned Turnbull and District Attorney David Moss for violating Oklahoma state law do not amount to a constitutional violation. West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). Moreover, "[t]he conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); see also Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994). Cf., Tower v. Glover,

467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). While Plaintiff may be able to state a malpractice claim under Oklahoma law against Heslet and McCoy that claim does not constitute a federal case.¹ See Lemmons, 39 F.3d at 266; see also Bilal, 904 F.2d at 15; Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). Nor has Plaintiff alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is granted, and Plaintiff's civil rights action is hereby dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). The Clerk shall mail a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 28 day of August, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

¹This comment should not be construed as this court is in any way indicating such claim has merit.

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

PATRICK MCKINNON,
Petitioner,
vs.
MIKE CARR,
Respondent.

No. 93-C-409-K

ENTERED ON DOCKET
DATE AUG 29 1995

FILED

AUG 28 1995

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

ORDER

This matter comes before the Court on Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, through retained counsel, challenges his conviction for rape in the first degree and two counts of forcible oral sodomy entered on April 4, 1986, in Case No. CRF-85-4208 in Tulsa County District Court.¹ Also before the Court is Petitioner's "Motion for Any Exculpatory Semen Evidence or Acid Phosphatase Evidence in Possession of the State or its Agents for Petitioner's Analysis." (Docket #4.) The State has objected. As more fully set out below the Court concludes that the petition and motion for any exculpatory evidence should be denied.

I. BACKGROUND

Following his jury conviction for rape and oral sodomy, Petitioner was sentenced to twenty years on Count 1, five years on Count 2, and five years on Count 3, to run concurrently. On April

¹ The State dismissed the charge of Rape by Instrumentation in Count IV following the close of its case in chief. (Tr. at 135.)

1, 1988, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction by published opinion. McKinnon v. State, 752 P.2d 833 (Okla. Crim. App. 1988). The Court summarized the testimony as follows:

On the evening of November 1, 1985, the appellant escorted D.V. to Illusions, a local nightclub in Tulsa, Oklahoma, where the two drank and danced throughout the evening. The appellant met D.V. at the Crystal Pistol, a topless dance club in Tulsa where she was employed as a stripper. At closing time, D.V. requested the appellant to take her home. However, the appellant first drove to an adult bookstore, where they watched an adult film in the arcade. D.V. again requested that he take her home, but the appellant drove them back to his home at approximately 1:30 a.m., November 2, 1985. The appellant pulled D.V. into his bedroom, seated her on his bed and tried to take her coat off. As D.V. struggled with the appellant, she begged him to take her home, but he continued to take her coat off until it ripped, and then began to take her clothes off. Suddenly, he clipped a handcuff on her right wrist and hooked it to the foot of the bed and tied her other hand to the bedpost. He then blindfolded and gagged D.V. with two bandannas, disrobed her and tied both of her legs to the bedposts, and then momentarily left the room. The appellant returned to the room, completely naked, sat down on D.V.'s chest and forced her to sodomize him. He then clamped clothespins on the nipples of D.V.'s breasts and adjusted them tighter and tighter until she agreed to sodomize him again. The appellant untied her and retied her to the other end of the bed, left her feet untied, and forced D.V. to have intercourse with him. After he removed the clothespins from her breasts, the appellant again forced her to orally sodomize him. He then handcuffed D.V.'s hands behind her back, had intercourse with her again, and told her to stop crying or he would put the clothespins back on her breasts. As D.V. struggled, the appellant then orally sodomized her. Throughout the whole incident D.V. begged the appellant to take her home. The appellant agreed to her requests, but conditioned them on her performing another sex act. The appellant then unhooked the handcuffs in order to escort the victim to the bathroom. He finally agreed that if she would sodomize him five more minutes until he could ejaculate, he would take her home. However, even after this act occurred, the appellant rehandcuffed her to the bed. When the appellant's roommate called him, he momentarily left the room, and D.V. managed to free

herself from the handcuffs. Just as she reached the bedroom door, the appellant caught her and told her to get dressed. He then drove her to the Hollywood Apartment and released her at approximately 5:00 or 5:30 a.m. Subsequently, she notified the police.

McKinnon, 752 P.2d at 833-34.

Petitioner testified on his own behalf at trial. He maintained that D.V. consented to all the sexual activity, including the intercourse and oral sodomy, and never resisted his advances. He denied that D.V. was gagged, blindfolded, or tied in any way with either handcuffs or bandannas. He also denied using clothespins. Lastly, Petitioner testified that he ejaculated only once during the time he spent with the victim and did so in her vagina and not in her mouth. (Tr. at 220, 223, 225-227.)

On rebuttal, the State presented the testimony of Dr. James Mitchell who performed a rape examination on D.V. shortly after the incident in question. He testified that D.V. had bruises and abrasions on her nipples, wrists, ankles, and back, and that her vagina was extremely red and swollen. He also testified that he found only one non-motile sperm on a smear taken from D.V.'s vagina and cervix. (Trial Tr. at 240-245.)

On June 30, 1992, Petitioner sought post-conviction relief on the basis of the following grounds of error:

- 1) The warrantless arrest of Petitioner in his own home was illegal;
- 2) The initial warrantless search of Petitioner's residence was unconstitutionally invalid;
- 3) The search warrant was tainted by evidence previously seized in the illegal warrantless arrest;
- 4) The court erred in admitting the State's physical exhibits which were obtained by virtue of the illegal warrantless arrest and crime scene search;
- 5) The court erred in admitting testimony as to physical

- evidence which was never formally introduced at trial;
- 6) Petitioner was denied the effective assistance of trial and appellate counsel;
 - 7) The court abused its discretion in allowing the testimony of Dr. Mitchell under the guise of rebuttal;
 - 8) The convictions on the two identically worded counts of sodomy are void;
 - 9) Petitioner was denied instructions supporting his theory of defense;
 - 10) It was fundamentally reversible error to not submit "not guilty verdict" forms to the jury; and
 - 11) The improper and prejudicial conduct by the prosecutor denied Petitioner a fair trial.

On July 30, 1992, the court denied relief and Petitioner timely appealed. In his Petition in Error, Petitioner raised the eleven grounds of error mentioned above as well as the following additional four grounds of error:

- 12) The court erred in failing to hold an evidentiary hearing;
- 13) The court erred in denying Petitioner's application for post-conviction relief;
- 14) The court erred in refusing to grant relief upon evidence of material facts not previously presented and heard; and
- 15) The court erred in refusing to sustain relief upon newly discovered evidence which exonerated Petitioner.

The Court of Criminal Appeals affirmed the denial of post-conviction relief and declined to reach propositions of error fourteen and fifteen because they "were not raised in the District Court and cannot, therefore, be reviewed on appeal. Further, these propositions of error [were] not briefed in Appellant's appeal to this Court." (Ex. C at 4 attached to State's response to motion for exculpatory evidence, docket #8.)

In the instant petition for a writ of habeas corpus, Petitioner relies on all fifteen propositions of error raised in state court. (Petition, docket #1.) In his motion for exculpatory evidence, he alleges that he has now discovered that the State had

police laboratory evidence establishing that there was no acid phosphatase in the oral swab; that two external genital swabs and two cervical mucosa swabs were positive for both acid phosphatase and spermatozoa; and that the victim's underwear was positive for both Acid Phosphatase and Spermatozoa. He claims that the State withheld this information at trial and that this information will support his theory of consensual sexual intercourse on his bed and ejaculation in the vagina. Petitioner further requests that the sheets, pillowcase and bedding be released for testing by his expert.

In its objection to Petitioner's motion for exculpatory evidence, the State contends that Petitioner procedurally defaulted his exculpatory-evidence claim when he failed to raise it in his application for post-conviction relief. In the alternative, the State argues that Petitioner's claim that newly discovered evidence casts doubt on his guilt and exculpates him is not cognizable in this habeas corpus proceeding because Petitioner has not made a sufficient showing that the prosecutor deliberately withheld the information from Petitioner at trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). The State also argues that Petitioner has failed to show that the verdict would have been any different had the evidence been made available to him.

II. ANALYSIS

A. Motion for Any Exculpatory Evidence

As an initial matter, the Court addresses the State's argument

that Petitioner's claim is barred by the procedural default doctrine. The alleged procedural default in this case results from Petitioner's failure to raise the exculpatory-evidence claim raised in the instant motion before the district court in the application for post-conviction relief and, in the alternative, from his failure to brief the claim on 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 independent and adequate 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 Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claim is barred by the procedural default doctrine. The state court's procedural bar as applied to

Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in the district court and/or not briefed on appeal. See Rule 5.2(A) of the Rules of the Court of Criminal Appeals ("The appeal to this Court under the Post-conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the district court"); Cooper v. State, 889 P.2d 293, 314 (Okla. Crim. App. 1995) (dismissing claim for failure to properly file supporting citations and authority), petition for cert. filed (July 13, 1995) (No. 95-5207). Therefore, Petitioner procedurally defaulted his exculpatory-evidence claim before the Oklahoma Court of Criminal Appeals.

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 501 U.S. 722, 749-50. 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 attempts to show cause by claiming that the procedural default was caused by the district court's failure to hold an evidentiary hearing prior to issuing its final order denying Petitioner's application for post-conviction relief. Petitioner contends as follows:

Petitioner's Application for Post-Conviction Relief filed before the trial court urged the "convictions or sentences are in violation of the Constitution of the United States ... there exists evidence of material facts, not previously presented and heard, that requires vacation of the convictions or sentences in the interest of justice", adopted the brief in support and set forth the necessity of an evidentiary hearing, as well as all material and exculpatory evidence withheld from Petitioner at trial.

Contrary to the Order Denying Application for Post-Conviction Relief from the District Court on July 30, 1992, "after hearing oral arguments of counsel," there was no hearing, no notice of hearing to either counsel or Petitioner, or no oral argument of counsel presented to the trial court. Counsel's first notice of this final order was the mailing by the District Attorney of the Order itself. . . . Due to the hearing, if in fact there was a hearing, being held in absentia - counsel had no opportunity to additionally present these grounds, which are contained throughout the brief and go to the eleven specific constitutional deprivations. Oklahoma law has no procedure to present them after the trial judge's issuance of its final order.

(Petitioner's response at 1-3, docket #14.)

Petitioner's showing of cause is inadequate. The district court's failure to hold a hearing or to give notice that one would

not be held does not present sufficient cause to excuse counsel's failure to allege the issues in his application for post-conviction relief. At most counsel was ineffective for failing to raise the additional exculpatory claims in the original application or by a motion for an evidentiary hearing. However, Petitioner has no federal constitutional right to effective assistance of counsel at the post conviction level. See Coleman, 501 U.S. at 755-56 (no constitutional right to counsel in a state post-conviction proceeding); see also Carter v. Montgomery, 769 F.2d 1537, 1543 (11th Cir. 1985); Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990). Therefore, any failure on the part of Petitioner's retained counsel who was assisting Petitioner with his state post-conviction petition does not serve as cause to excuse Petitioner's default. Cf. Whiddon v. Dugger, 894 F.2d 1266, 1267 (11th Cir.) (because there is no right to legal counsel in collateral proceedings, poor advice about such proceedings from a state provided attorney or inmate law clerk affords no basis for "cause"), cert. denied, 498 U.S. 834 (1990).

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, has failed to allege that a fundamental miscarriage of justice would result if this Court failed to consider his Brady claim.

Even if the Court were to reach Petitioner's Brady claim upon

an adequate showing of "cause and prejudice" or a fundamental miscarriage of justice, relief is not warranted because the evidence which Petitioner seeks to have produced is not material under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. The Tenth Circuit Court of Appeals recently summarized the legal principles governing review of Brady claims.² See Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' A 'reasonable probability' is a 'probability sufficient to undermine confidence in the outcome.'" Id. 1518.

In evaluating the materiality of withheld evidence, we do not consider each piece of withheld evidence in isolation. Rather, we review the cumulative impact of the withheld evidence; its utility to the defense as well as its potentially damaging impact on the prosecution's case. Furthermore, recognizing that, in the usual case, not "every item of the State's case" will be undercut if the Brady material is disclosed, we evaluate the materiality of withheld evidence in light of the entire record in order to determine if "the omitted evidence creates a reasonable doubt that did not otherwise exist." What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict."

² In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. "In order to establish a Brady violation, a habeas petitioner must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the defense." Banks v. Reynolds, 54 F.3d 1508, 1516 (10th Cir. 1995). While it is questionable whether Petitioner can establish the first and second prong under Brady, the Court presumes, for purposes of this discussion, that Petitioner can establish the first two elements under Brady.

Our materiality review does not include speculation. "The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard." However, we do recognize that evidence in the hands of [a] competent defense attorney may be used "to uncover other leads and defense theories." Thus, we may draw reasonable inferences as to what those other lines of defense may have been.

Id. at 1518-19.

In support of his contention that the newly discovered evidence is material, Petitioner asserts that the evidence would support his theory of consensual sexual intercourse on his bed and ejaculation in the vagina. He alleges in part as follows:

2. Petitioner's defense was consensual sexual intercourse and ejaculation in the vagina on his bed.

3. The State's theory was forcible sodomy and ejaculation in the mouth in the bathroom.

4. The State presented testimony on rebuttal by an unendorsed doctor that the prosecutrix had only one sperm in the vagina, using this to argue their theory.

5. Petitioner has now discovered the State had police laboratory evidence establishing there was no acid phosphatase in the oral swab.

6. Petitioner has now discovered the State had police laboratory evidence establishing the two external genitals swabs and two cervical mucosa swabs were positive for both Acid Phosphatase and Spermatozoa.

7. The State withheld this information at trial and failed to endorse or call their expert lab witnesses.

8. Further petitioner has learned the prosecutrix' black underwear was positive for both Acid Phosphatase and Spermatozoa.

9. Petitioner's testimony was the consensual sexual intercourse occurred on his bed. The Tulsa Police Department seized petitioner's sheets, pillowcase and bedding. Petitioner also requests release of these items for testing by his expert as well as the reports by the State's witness on the bedding.

(Motion for any exculpatory evidence, docket #4, at 1-2.)

The evidence allegedly suppressed is not material to the issue of whether the victim consented to the sexual intercourse or oral sodomy. Under the Brady materiality standard, the swab, underwear,

and bed sheets could not have created a reasonable doubt as to Petitioner's guilt. There was ample evidence introduced to find Petitioner guilty of forcible rape and sodomy. The additional evidence requested could not have borne on the central issue of consent, because penetration, not emission, is proof of sexual intercourse. Cf. Ayres v. State, 436 A.2d 800, 802 (Del. S.Ct. 1981) (where the physical evidence created a reasonable doubt as to whether there had in fact been penetration and sexual intercourse as victim contended; defendant had testified that with the victim's consent he attempted sexual intercourse but was incapable of completing the act because of his physical condition). At trial Petitioner did not deny either the sexual intercourse or oral sex with the victim and the physical evidence corroborated the victim's version of the incident.

At best, analysis of the swab, underwear, and sheets might have revealed the presence of more than one non-motile sperm. While that evidence could have impeached D.V.'s testimony that Petitioner did not ejaculate inside her, that issue is unrelated to the issue of consent and does not challenge the victim's credibility. Cf. Giles v. State of Maryland, 386 U.S. 66 (1967) (where defense counsel learned of the existence of evidence the prosecutor had in his possession which, in all likelihood, would have dramatically affected the credibility of the victim's testimony which was crucial to the convictions; during the appellate process, two police reports also came to light in which the victim was quoted as having stated, in effect, that one of the

three men did not rape her). Therefore, Petitioner could not have cast a reasonable doubt on his guilt by impeaching D.V.'s testimony on this collateral matter. Nor has he established any adverse impact on his trial preparation attributable to this nondisclosure.

Accordingly, this Court holds that the evidence, if admitted, would not have produced a reasonable doubt in the juror's minds as to Petitioner's guilt. Because the evidence is not material, its suppression did not violate Petitioner's due process rights and Petitioner is not entitled to habeas corpus relief.

B. Fourth Amendment Claims and Ineffective Assistance of Trial Counsel for failing to raise the Fourth Amendment Claims

In his first four grounds for habeas relief, Petitioner raises various Fourth Amendment violations. The events which are the basis for these claims are as follows.

After talking to the police around 6:00 a.m., D.V. accompanied the officers to find Petitioner's residence. Rather than obtain an arrest warrant, the officers proceeded to make a warrantless arrest. The officers went to the front door and knocked for several minutes identifying themselves as Tulsa Police officers. When Petitioner opened the door, Corporal Waffle asked him if he was Patrick McKinnon, and Petitioner responded that he was. Then, Corporal Waffle informed Petitioner that he was under arrest for rape. Petitioner then asked to put on some clothing and Corporal Waffle followed him into the house and into his bedroom. (Prelim. Hrg. Tr. at 86-88, 115-123.) In the meanwhile, Officer Walton entered the home for a protective sweep until the arrival of the ID

officer, about ten minutes later, to process the crime scene. The ID officer seized evidence in plain view, took pictures of the exterior and interior of the house and of items in plain view. The ID officer also drew a diagram of Petitioner's bedroom.

Later that afternoon, Corporal Holman prepared an affidavit for a search warrant relying on information he obtained as a result of his conversation with D.V., one of Petitioner's roommates, and the officers involved. The search warrant was issued and Holman served the search warrant on one of Petitioner's roommates about 6:00 p.m. that evening. (Prelim. Hrg. Tr. at 130-138.)

In the instant petition for a writ of habeas corpus, Petitioner alleges that his arrest and initial warrantless search were unconstitutional, and that the search warrant was tainted by evidence previously seized in the illegal warrantless arrest and search. The Court need not analyze Petitioner's fourth amendment claims as free standing claims because the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976), precludes habeas relief on Fourth Amendment grounds if the State has provided Petitioner an opportunity for the full and fair litigation of fourth amendment claims. Id. at 494. Petitioner had an opportunity for the full and fair litigation of his fourth amendment claims. Oklahoma has established a procedure for the suppression of unconstitutionally obtained evidence. In his petition and brief, Petitioner asserts neither that he lacked the opportunity nor that, if he had availed himself of it, he would not have been afforded a full and fair opportunity for litigating his fourth amendment claims. The fact

of the matter is that Petitioner's trial counsel failed to move to suppress and/or to object to the introduction of any of the evidence. Having failed to use the opportunity to litigate his fourth amendment claims in state court, Stone forecloses Petitioner's attempt to pursue them in this federal habeas action.

Petitioner, however, has properly sought federal habeas relief (in ground 6) for ineffective assistance of counsel in connection with the incompetent representation of his Fourth Amendment claims. See Kimmelman v. Morrison, 477 U.S. 365, 377-83 (1986) (holding that restriction of federal habeas review of fourth amendment claims announced in Stone v. Powell does not extend to petitioner's sixth amendment claims of ineffective assistance of counsel).³ To establish ineffective assistance of counsel, Petitioner must show that his attorney's performance "fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and second, that there is a "reasonable probability" that the outcome would have been different had those errors not occurred, id. at 694. See also Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842-43 (1993) (emphasizing that prejudice also requires that errors produced an unfair or unreliable trial). That

³ Although Petitioner asserted this ineffective-assistance-of-counsel claim for the first time in his application for post-conviction relief, this claim is not procedurally barred. In Breechen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994), cert. denied, 115 S.Ct. 2564 (1995), the Tenth Circuit Court of Appeals held that Oklahoma state court's refusal to review ineffective assistance of counsel claim raised in post-conviction proceeding on ground that claim had not been raised on direct appeal, did not provide adequate basis for federal habeas court's finding claim procedurally barred.

proof must overcome the "strong presumption" that counsel was effective. Strickland, 466 U.S. at 689.

"While a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim . . . , a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief." Kimmelman, 477 U.S. at 382. Petitioner "must prove that his Fourth Amendment claims are meritorious and that there is a reasonable probability that the verdict would have been different, absent the excludable evidence, to demonstrate actual prejudice." United States v. Owens, 882 F.2d 1493, 1498 (10th Cir. 1989) (motion to vacate, modify or set aside sentence pursuant to 28 U.S.C. § 2255).

The Court need not belabor Petitioner's claim that the initial warrantless search by the ID Officer was illegal because Petitioner has failed to show actual prejudice as required by Strickland. See United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993) (noting that it is often easier to resolve ineffective assistance claims by addressing the prejudice component first). Neither the photograph of the front of Petitioner's residence nor the photographs of the victim's body taken at the hospital would be excludable as they do not implicate Fourth Amendment issues. Moreover, contrary to Petitioner's assertion, the gold necklace, drumsticks, karate sticks, and wooden sticks were not introduced at trial. See United States v. Hogan, 38 F.3d 1148, 1149 (10th Cir. 1994) (court need not be concerned with items seized during protective sweep if they were not presented as evidence at trial). Thus, the only

excludable evidence introduced at trial were the diagram drawn by the I.D. Officer and the photographs taken by the I.D. Officer of the middle bedroom occupied by Petitioner (Exhibits 3, 5, and 6) and of the victim's necklace on Petitioner's bed (Exhibits 12 and 13). Even absent this evidence, the Court does not believe there is a reasonable probability that the verdict would have been different given the overwhelming evidence of guilt presented at trial.

Next Petitioner argues that the search warrant was tainted by the warrantless arrest and evidence seized during the warrantless arrest and search and therefore that the evidence seized pursuant to the search warrant should have been suppressed as fruit of an illegal search. U.S. ex rel. Dampier v. O'Leary, 595 F.Supp. 747, 748 (N.D. Ill. 1984) (habeas courts may consider the legality of an arrest only if petitioner also challenges introduction at his trial of evidence which was fruit of allegedly illegal arrest).

It is well established that "absent exigent circumstances, police officers may not enter an individual's home without consent to make a warrantless routine felony arrest even with probable cause." Maez, 872 F.2d 1444, 1449 (10th Cir. 1989) (citing Payton v. New York, 445 U.S. 573 (1980)); See also Haley v. Armontrout, 924 F.2d 735, 737 (8th Cir.), cert. denied, 502 U.S. 842 (1991) ("[A]bsent exigent circumstances, an arrest warrant is required in order to arrest a suspect in his home or in any private place in which the suspect has a legitimate expectation of privacy as a

guest or otherwise").⁴ The Fourth Amendment protects a person's reasonable expectation of privacy in a variety of settings, but the chief evil against which the amendment is directed is the physical entry of the home. Payton, 445 U.S. at 585, 589. "In [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. . . ." Id. at 589. Therefore, the Supreme Court held in Payton, the Fourth Amendment draws "a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Id. at 590.⁵

A few years before deciding Payton, the Supreme Court held in United States v. Santana, 427 U.S. 38 (1976), that police officers

⁴ The State argues that the police officers had probable cause to arrest Petitioner. A finding of probable cause alone does not justify a warrantless arrest at a suspect's home. Exigent circumstances which make it impossible or impractical to obtain a warrant must also be present. Vale v. Louisiana, 399 U.S. 30 (1970); Howard v. Dickerson, 34 F.3d 978, 982 (10th Cir. 1994). The exigent circumstances exception encompasses situations such as hot pursuit of a suspect, risk of removal or destruction of evidence, and danger to the arresting officers or the public. United States v. Wicks, 995 F.2d 964, 970 (10th Cir. 1993); Maez, 872 F.2d at 1451-52; United States v. Satterfield, 743 F.2d 827, 843, 44 (11th Cir. 1984). None of these situations is present in this case and the circumstances did not otherwise make it impossible or even imprudent for the police officers to obtain a warrant before arresting Petitioner.

⁵ In Payton, the police who entered Payton's apartment broke through a closed door with crowbars. No one was home, but incriminating evidence seen in plain view was seized and used to convict him. 445 U.S. at 576-77. In Riddick v. New York, the companion case consolidated with Payton, the closed door of Riddick's house on which the police knocked was opened by Riddick's young son. Riddick could be seen sitting inside the apartment on a bed. He was covered by a sheet. Without any behavior on Riddick's part that could be construed as consent, the police entered and arrested him on the spot. Payton, 445 U.S. at 578. In both cases the entries preceded the arrests.

could arrest without a warrant a person standing in the open doorway to her home because the open doorway was a public place. Although Santana retreated into her home as soon as the police officer pulled their van up near her home, exited the van, identified themselves, and approached Santana to arrest her, the Supreme Court upheld the warrantless arrest in the home, because Santana could not thwart an arrest begun in a public place (her open doorway) by retreating into her house. Id. at 40-43.

Since Payton and Santana, the federal and state courts have struggled with cases in which police officers have made warrantless, probable cause arrests at the doorway of a defendant's home following the opening of the door by the defendant in response to a knock on the door by the police. See State v. Santiago, 619 A.2d 1132, 1138-42 (S.Ct. Conn. 1993) (dissenting opinion) and cases compiled therein. The courts have mainly focused on whether the arrest was in a public place in which the defendant had no reasonable expectation of privacy, or whether the arrest was made in the home, or a place in which the defendant had the highest expectation of privacy. The cases can be organized in three principal groups.

The first group of cases holds generally that an arrest of the defendant at the doorway of the defendant's home (or hotel or motel room) is valid under Santana, irrespective of whether the defendant opened the door in response to a police summons (e.g., by knocking on the door) and irrespective of whether the defendant was

precisely on the threshold or just inside it.⁶ The second group of cases holds that what would otherwise be a valid doorway arrest under Santana may be rendered illegal under Payton because the defendant opened the doorway in response to coercive activity of the police outside, such as flooding the home with spotlights and calling the defendant with bullhorns, or in response to deception such as the police misrepresenting their identity when the defendant asked who was there before opening the door.⁷ The last group of cases focuses both on whether the defendant opened the door in response to a summons by the police and on the defendant's

⁶ See, e.g., Duncan v. Storie, 869 F.2d 1100, 1102 (8th Cir.), cert. denied, 110 S.Ct. 152 (1989); United States v. Carrion, 809 F.2d 1120 (5th Cir. 1987); United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); United States v. Mason, 661 F.2d 45 (5th Cir. 1981); People v. Burns, 615 P.2d 686 (Colo. 1980); Byrd v. State, 481 So.2d 468 (Fla. 1985), cert. denied, 476 U.S. 1153 (1986); People v. Morgan, 447 N.E.2d 1025 (Ill. App. 1983); Costillo v. Commissioner of Public Safety, 416 N.W.2d 730 (Minn. 1987); State v. Howard, 373 N.W.2d 596 (Minn. 1985); State v. Patricelli, 324 N.W.2d 351 (Minn. 1982); Edwards v. State, 808 P.2d 528 (1991); see also United States v. Sewell, 942 F.2d 1209 (7th Cir. 1991), cert. denied, 503 U.S. 962 (1992) (defendant arrested at doorway immediately after engaging in drug sale there with undercover agent; defendant had no reasonable expectation of privacy under circumstances); United States v. Burns, 624 F.2d 95, 101 (10th Cir. 1980), cert. denied, 449 U.S. 1954 (1980) (warrantless arrest and search were proper where arrest occurred as defendants were emerging into the motel hallway).

⁷ See, e.g., United States v. Edmondson, 791 F.2d 1512 (11th Cir. 1986); United States v. Al-Azzawy, 784 F.2d 890, 893 (9th Cir. 1985) (coercive behavior), cert. denied, 476 U.S. 1144 (1986); United States v. Morgan, 743 F.2d 1158, 1166 (6th Cir. 1984) (coercive behavior), cert. denied, 471 U.S. 1061 (1985); United States v. Johnson, 626 F.2d 753 (9th Cir. 1980), aff'd on other grounds, 457 U.S. 537 (1982) (deceptive practices); United States v. Houle, 603 F.2d 1297, 1300 (8th Cir. 1979) (deliberate delay); accord Duncan v. Storie, 869 F.2d at 1102; United States v. Davis, 785 F.2d 610, 615 (8th Cir. 1986).

conduct after opening the door. These cases hold generally that, if a defendant voluntarily opens the door in response to a police knock and acquiesces to the ensuing arrest, the arrest is valid under Santana, but that a defendant, by merely opening the door in response to a knock by the police, does not, without more, surrender a reasonable expectation of privacy in the home under Payton. See, e.g., United States v. Vaneaton, 49 F.3d 1423, 14 (9th Cir. 1995); United States v. Berkowitz, 927 F.2d 1376 (7th Cir. 1991); United States v. McCraw, 920 F.2d 224 (4th Cir. 1990); Duncan v. Storie, 869 F.2d 1100 (8th Cir.), cert. denied, 493 U.S. 852 (1989); State v. Schlothauer, 294 N.W.2d 382 (1980).

Although the Tenth Circuit Court of Appeals has not yet addressed this issue, the Court believes that it would find the reasoning in the third group of cases more persuasive and especially Vaneaton and Berkowitz. In Vaneaton, wearing uniforms and with their guns in their holsters, the officers knocked on the door to Vaneaton's motel room. Vaneaton opened the curtains of a window, saw the officers, and opened the door. One of the officers asked him if he was Jack Vaneaton, and when he said he was, he was arrested. At the moment of his arrest, the police officers were standing outside the motel room and Vaneaton was standing at the doorway but just inside the threshold. The Ninth Circuit Court of Appeals held that by voluntarily opening the door after seeing the officers through the window and absent threats or force, "Vaneaton exposed himself in a public place" to a warrantless arrest. Vaneaton, 49 F.3d at 1427. The Court then stated:

[T]his episode does not materially resemble the kinds of "invasions" or "intrusions" against which Payton seeks to guard. Knocking on a door to attempt to contact a person inside is a common event and hardly a hallmark of a police state, and indeed, under these facts the zone of privacy sought by Payton to be protected is not implicated. Accordingly, we hold that Payton was not violated, and that Vaneaton's arrest was proper.

Id.

In Berkowitz, the agents went to the defendant's home to arrest him, armed with probable cause but not with a warrant. It was undisputed that the agents knocked on the defendant's door and that he opened the door in response. 927 F.2d at 1380. The agents and the defendant, however, disputed the remaining events. Id. The agents claimed that immediately after the defendant opened the door they told him he was under arrest, and that the defendant did not resist or attempt to close the door but simply asked if he could have his coat. Id. One of the agents retrieved the coat, which was draped over a chair inside the home. Id. The defendant claimed, however, that immediately after he opened the door, the agent stepped into the house and then told him that he was under arrest. Id. Despite this difference between the two versions of the facts, the trial court did not hold an evidentiary hearing on defendant's motion to suppress the evidence that had been gathered as a result of the agents' entry into the defendant's home. Id.

The Seventh Circuit Court of Appeals held that an evidentiary hearing was necessary, because the arrest was legal under the government's version of the facts but illegal under the defendant's version. Id. at 1385. The Court stated as follows:

Courts have generally upheld arrests such as that described by . . . [the government], where the police go to a person's home without a warrant, knock on the door, announce from outside the home the person is under arrest when he opens the door to answer, and the person acquiesces to the arrest. . . . It is true that Berkowitz was still standing inside his home when [the police] told him he was under arrest. But Payton prohibits only a warrantless entry into the home, not a policeman's use of his voice to convey a message of arrest from outside the home. Moreover, there is nothing in Payton that prohibits a person from surrendering to police at his doorway.

As the Court noted in Payton, there is no place where a person's expectation of privacy is greater than in his own home. A person does not abandon this privacy interest in his home by opening his door from within to answer a knock. Answering a knock at the door is not an invitation to come in the house. We think society would recognize a person's right to choose to close his door on and exclude people he does not want within his home. This right to exclude is one of the most--if not the most--important components of a person's privacy expectation in his home.

When the police assert from outside the home their authority to arrest a person, they have not breached the person's privacy interest in the home. If the person recognizes and submits to that authority, the arrestee, in effect, has forfeited the privacy of his home to a certain extent. At that point, it is not unreasonable for the police to enter the home to the extent necessary to complete the arrest. A person who has submitted to the police's authority and stands waiting for the police to take him away can hardly complain when the police enter his home briefly to complete the arrest.

Id. at 1386-87.

Under the principles set forth in Vaneaton and Berkowitz, the Court concludes that Petitioner's arrest did not violate the Fourth Amendment. Petitioner voluntarily opened the door in response to the knock and announcement that it was the Tulsa Police. At the time the policemen entered the home and followed Petitioner to his bedroom so he could get dressed, the Officers had announced their

authority to arrest Petitioner and Petitioner voluntarily acquiesced. Therefore, Petitioner forfeited his privacy interest in his home at least for the period when the police officers followed him to his bedroom so that he could get dressed. Because the officers were lawfully in Petitioner's residence in order to complete the arrest, the knowledge gained from the entry was properly used by Corporal Holman as the basis for obtaining the search warrant. Therefore, Petitioner's contention that the search warrant was tainted by the initial entry and warrantless arrest is meritless.⁸

C. Prosecutorial Misconduct

In his Fifth and Eleventh grounds of error, Petitioner alleges prosecutorial misconduct.⁹ In analyzing "whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, [a federal habeas court] must . . . determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process." Fero v. Kerby, 39

⁸ Corporal Holman also obtained information from D.V. and Petitioner's roommates.

⁹ In his fifth ground of error, Petitioner alleges that the trial court erred in admitting testimony as to the handcuffs and sexually explicit magazines which were never formally introduced into evidence, but were repeatedly exhibited before the jury for their prejudicial effect. (Petition, docket #1, at 13.) The Court construes this claim as one of the various instances of prosecutorial misconduct. Petitioner's appellate counsel raised this issue only in the context of prosecutorial misconduct and the Oklahoma Court of Criminal Appeals limited its discussion of this issue to that basis as well.

F.3d 1462 (10th Cir. 1994) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)), cert. denied, 115 S.Ct. 2278 (1994); see also Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

The first instance of alleged misconduct was when the prosecutor repeatedly exhibited the handcuffs and mentioned the six sex books before the jury for their prejudicial effect. The Oklahoma Court of Criminal Appeals stated as follows:

The appellant first complains regarding the prosecutor's demonstrative use of handcuffs during his questioning of the prosecutrix as well as testimony of numerous sexually explicit magazines depicting bondage which were discovered in the appellant's home. The handcuffs were never introduced into evidence at trial, but remained in the jury's view throughout the proceedings until defense counsel renewed his objection prior to closing argument. The trial court then admonished the prosecutor to remove the handcuffs from the jury's view. Similarly, the magazines were not introduced into evidence. However, the State elicited information concerning the magazines during cross-examination. The appellant has not established how either of these alleged instances was so prejudicial as to have denied him a fair trial, and how either of them was verdict determinative where other direct evidence proved the appellant's guilt beyond a reasonable doubt.

McKinnon, 752 P.2d 833, at 835.

The second instance of alleged misconduct occurred during closing argument when the prosecutor characterized Petitioner, his defense, and his witnesses as "liars" and "lying through their

teeth," as well as indicated they were sex deviates.

In light of the strong evidence of Petitioner's guilt, the Court cannot conclude that the demonstrative use of the handcuffs, the testimony about the sex books, and the statement that defendant was a liar constitute prosecutorial misconduct. At any rate, in the context of the entire trial, the Court finds that the comments in question do not appear to be "so prejudicial" that they render the trial "fundamentally unfair."

In his last claim of prosecutorial misconduct, Petitioner contends the prosecutor improperly vouched for truthfulness of the prosecutrix and the unbelievability of Petitioner's testimony and his defense. While it amounts to misconduct for a prosecutor to vouch for the credibility of a witness, this Court cannot conclude that the comments at issue individually or in summation constitute misconduct. The "vouching" comments were made by the prosecutor merely to illustrate to the jury that the testimony of the defense was diametrically opposed to the testimony of the victim and that, in order to find a reasonable doubt, the jury would have to conclude that the victim was not credible. Similarly, the Court finds that the comments about the unbelievability of the Petitioner were proper due to the two inconsistent stories presented at trial. Nevertheless, in the context of the entire trial, the Court finds that the "vouching" comments and the comments about the credibility of the Petitioner do not appear to be "so prejudicial" that they render the trial "fundamentally unfair."

D. Procedural Default & Ineffective Assistance of Appellate Counsel

Next the Court addresses Respondent's contention that Petitioner is procedurally barred from raising in this habeas action grounds seven through eleven. In grounds seven, eight, nine, and ten, and in part of ground eleven, Petitioner alleges as follows:

(7) The trial court abused its discretion in allowing the testimony of Dr. James Mitchell under the guise of rebuttal;

(8) The conviction on the two identically worded counts of sodomy is void;

(9) The trial court abused its discretion in failing to instruct the jury with regard to the corroboration of testimony in rape prosecution;

(10) The trial court erred in failing to submit "not guilty" verdict forms to the jury; and

(11) Improper, unethical and prejudicial conduct by the prosecutor during opening arguments and during the testimony of Detective Holman deprived Petitioner of a fair trial.¹⁰

In rejecting Petitioner's motion for post-conviction relief, the Oklahoma state courts found these claims procedurally barred because Petitioner failed to raise them on direct appeal. See Jones v. State, 704 P.2d 1138, 1139-40 (Okla. Crim. App. 1985). Although the state procedural bar in this case is both independent and adequate, the State raised the procedural default doctrine only as to grounds seven through ten. Therefore, the Court will raise the state procedural bar defense sua sponte as to part of ground eleven. See Hardiman v. Reynolds, 971 F.2d 500, 504 (10th Cir. 1992) (district court may raise procedural bar defense to habeas

¹⁰ The Court will address separately the merits of Petitioner's claim as to the impeachment instruction as that issue was raised on direct appeal.

corpus petition sua sponte); see also Mansfield v. Champion, 992 F.2d 1098, 1099 n.2 (10th Cir. 1993).¹¹

To establish ineffective assistance of appellate counsel, Petitioner must show that his attorney's performance "fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and second, that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, Id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 113 S. Ct. 2347 (1993).

In attempting to determine whether appellate counsel's failure to raise a claim constitutes deficient performance, this Court must "examine the merits of the omitted issue." Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995). See also Jones v. Barnes, 463 U.S. 745, 754 (1983).

Failure to raise an issue that is without merit "does not constitute constitutionally ineffective assistance of counsel," because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. Thus, counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. However, "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a dead-bang winner, even though counsel may have

¹¹ Although the Tenth Circuit has held, that a petitioner must be given an adequate opportunity to respond to the state procedural bar issue after it is raised sua sponte, the Court finds that requirement unnecessary in this case where Petitioner is represented by counsel and counsel has alleged ineffective assistance of appellate counsel as an independent claim for relief as well as to establish cause.

presented strong but unsuccessful claims on appeal."

Banks, 54 F.3d at 1515.

After reviewing the record in this case, the Court concludes that appellate counsel's failure to argue on appeal the issues which Petitioner raises in grounds seven through eleven does not fall below the standard of reasonably effective assistance. Petitioner's claims are for the most part weak, and he has failed to establish that the ignored issues were more likely to result in a reversal or new trial than the issues actually raised on appeal. See Gray v. Greer, 800 F.2d 644, 647 (7th Cir. 1986).

In his seventh ground, Petitioner contends that the trial court abused its discretion in allowing the testimony of Dr. James Mitchell over defense objection under the guise of rebuttal. He argues that no testimony had been presented on direct examination to which Dr. Mitchell's testimony could be in rebuttal. This Court does not agree.

Dr. Mitchell's testimony was proper rebuttal to Petitioner's testimony that the victim was sexually aroused and that he ejaculated in the victim's vagina. See Boyd v. State, 743 P.2d 658, 662 (Okla. Crim. App. 1987) (rebuttal evidence may be offered to explain, repel, disprove or contradict facts given in evidence by the adverse party. Hall v. State, 698 P.2d 33, 37 (Okla. Crim. App. 1985) (same). The fact that this evidence could have been presented in the State's case in chief is immaterial. See Boyd, 743 P.2d at 662. Further, Petitioner was not unduly prejudiced by this evidence as defense counsel was able to thoroughly cross-

examine the rebuttal witness. Accordingly, the Court finds that the trial court did not abuse its discretion in admitting the rebuttal testimony and therefore that this issue would not have been successful on direct appeal. See Burney v. State, 594 P.2d 1226, 1229 (Okla. Crim. App. 1979) (admission of such evidence is a matter addressed to the sound discretion of the trial court whose ruling will not be reversed on direct appeal absent a showing of manifest abuse of discretion).

In his eighth ground, Petitioner challenges the sufficiency of the information on the ground that the two counts of sodomy were not sufficient to apprise him of the charges against him. See Miller v. State, 827 P.2d 875 (Okla. Crim. App. 1992) (an information is sufficient if it contains every element of the offense to be charged and it sufficiently apprises the defendant of what he must be prepared to meet). He contends that Counts II and III were identical and did not describe with particularity the various acts of sodomy committed upon the victim, such as whether the act occurred in the bedroom or the bathroom, and whether it preceded or followed the sexual intercourse.¹² Lack of specificity, however is not a jurisdictional defect. As the majority stated in Miller, the test of sufficiency does not focus

¹² Counts II and III read as follows:

"And willfully, with the use of force and violence and by means of threats of immediate and great bodily harm to one Doris Marie Valdetero commit the detestable and abominable crime against nature with the said Doris Marie Valdetero by then and there having forcible, unnatural and carnal copulation per mouth with said Doris Marie Valdetero."

on whether the information could have been made more certain. 827 P.2d at 879. A court must examine an information for practical, rather than technical considerations.

Having done so in this case, the Court finds that Petitioner was properly placed on notice of the relevant criminal offense and the circumstances surrounding its commission and he has not shown that the omission of certain facts in Counts II and III prejudiced his defense. Therefore, this issue would not have been successful on direct appeal.¹³

In his ninth ground, Petitioner contends the trial court erred in refusing to instruct the jury with regard to corroboration of testimony in rape prosecution. Oklahoma case law requires corroboration in lewd molestation, sodomy, and rape cases only "when the victim's testimony is so incredible or has been so thoroughly impeached that a reviewing court must say that the testimony is clearly unworthy of belief." Salyer v. State, 761 P.2d 890, 895 (Okla. Crim. App. 1988) (citing Martin v. State, 747

¹³ Even if Petitioner could show sufficient cause to excuse his default of this claim, he would not be entitled to habeas relief. The sufficiency of an indictment or information is not a matter for federal habeas relief unless the information is so deficient that the convicting court lacked jurisdiction. Heath v. Jones, 863 F.2d 815 (11th Cir. 1989); Uresti v. Lynaugh, 821 F.2d 1099 (5th Cir. 1987). Under the Sixth and Fourteenth Amendments, Petitioner is entitled to fair notice of the criminal charges against him, and claims of due process violations in not providing such fair notice are cognizable in habeas corpus actions. See Hunter v. State of New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991); Franklin v. White, 803 F.2d 416 (8th Cir. 1986), cert. denied, 481 U.S. 1020 (1987). In this case, the Court finds no constitutional error in Counts II and III in the information. The charge adequately established the state court's jurisdiction and sufficiently informed petitioner of the offense.

P.2d 316, 318 (Okla. Crim. App. 1987) (sodomy); Still v. State, 484 P.2d 549, 551 (Okla. Crim. App. 1971) (lewd molestation); Beshears v. State, 738 P.2d 1375, 1377 (Okla. Crim. App. 1987) (rape)); see also Hinkle v. State, 771 P.2d 232, 234 (Okla. Crim. App. 1989). In the instant case, the Court does not believe that the victim's testimony was so inconsistent and contradictory that it required corroboration. In any event, even if the victim's testimony was unreliable and inconsistent, the Court finds that there was sufficient corroborative evidence from the detective and the doctor who conducted the rape exam to sustain Petitioner's conviction.

In his tenth ground, Petitioner contends the trial court committed fundamental error when it failed to provide the jury with "not guilty" verdict forms, citing Dyke v. State, 716 P.2d 693 (Okla. Crim. App. 1986). Petitioner bases this contention upon the fact that the state district court file and record on appeal contains only the verdict forms used by the jury in reaching their verdict, but does not contain "not guilty" verdict forms. Counsel for Petitioner alleges that he personally checked the court files and that on August 6, 1990, Petitioner's mother received a letter from the Tulsa County Clerk's office indicating that "[t]here are no verdict forms filed into [sic] case." (Brief in support of petition at 37.)¹⁴

In Dyke, the defendant was convicted in Oklahoma state court of robbery and unauthorized use of a motor vehicle. On appeal, he

¹⁴ A review of the record also reveals that no objection was entered to the verdict forms at trial.

argued, inter alia, "the trial court committed fundamental error by failing to issue to the jury verdict forms of not guilty,' on each count." 716 P.2d at 698. The Court of Criminal Appeals rejected this claim, relying on the trial judge's affidavit that "not guilty" verdict forms were provided to the jury and simply put in the back of the file after a verdict was reached. Id. The court recognized, however, "that the failure to submit not guilty' verdict forms to the jury constitutes fundamental reversible error." Id. See also Odum v. Boone, ___ F.3d ___, 1995 WL 454140 (10th Cir. Aug. 2, 1995).

Petitioner has failed to demonstrate that the trial court withheld "not guilty" verdict forms from the jury. The fact that they were not formally filed in the file is insufficient in and of itself to establish that they were withheld from the jury. See Dyke, 716 P.2d at 698. Also it is possible that the practice in Tulsa County is to discard the unused verdict forms. See Hammonds v. State, 739 P.2d 525 (Okla. Crim. App. 1987) (appellant acknowledged that the practice in Texas County is to discard unused verdict forms).¹⁵

¹⁵ Even if Petitioner were able to establish ineffective assistance of appellate counsel for failing to raise this issue on direct appeal, the Court concludes the trial court's failure to submit "not guilty" verdict forms was harmless error.

Prior to the Supreme Court's decision in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993), the standard for determining whether a conviction must be set aside because of a federal constitutional error was whether the error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). Under Brecht, the error must now have "'had substantial and injurious effect or influence in determining the jury's verdict.'" 113 S.Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "Under this standard, habeas petitioners may

In his eleventh ground, Petitioner contends that prosecutorial misconduct occurred during the opening statement when the prosecutor argued rape by instrumentation with the drum sticks, and during trial when the prosecutor identified and offered evidence through Detective Holman, leaving the impression it was obtained by search warrant, and presented Dr. Mitchell's testimony in rebuttal. The Court finds that these additional claims of prosecutorial misconduct would not have been successful on direct appeal, and therefore, that counsel was not ineffective for failing to raise them. Petitioner's claim that prosecutorial misconduct occurred during opening statement is patently meritless because the state dismissed the rape by instrumentation count following its case in chief. Moreover, the Court has previously found that the rebuttal testimony and the admission of evidence were proper.

Accordingly, the Court finds that grounds seven through eleven are procedurally barred.

E. Impeachment Instruction

In the first part of ground nine, Petitioner contends the

obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 113 S.Ct. at 1722 (cited case omitted). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, ___ U.S. ___, 113 S.Ct. 2078, 2081 (1993).

Application of the Brecht-Sullivan standard to this case leads this Court to conclude that the failure to submit "not guilty" verdict forms did not have a substantial injurious on the jury's verdict. The evidence against Petitioner was overwhelming.

trial court failed to give an instruction on impeachment testimony with regard to the alleged inconsistencies in the victim's testimony.¹⁶ The Court of Criminal Appeals concluded that "the testimony concerning the rape and sodomy was clear, convincing and unwavering, with only minor inconsistencies," and therefore that Petitioner "ha[d] not shown that he was prejudiced by the omission of the instruction to warrant reversal."

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)), cert. denied, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "'[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854

¹⁶ Petitioner relies on Pettigrew v. State, 346 P.2d 957 (Okla. Crim. App. 1959); Harris v. New York, 401 U.S. 222 (1971); Cloud v. State, 273 P. 1012 (Okla. Crim. App. 1929).

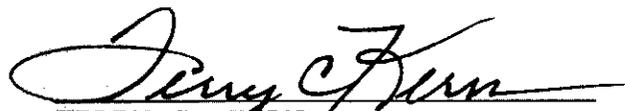
(10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990).

After carefully reviewing the record in this case, the Court finds no fundamental unfairness in Petitioner's trial which would be sufficient to set aside Petitioner's conviction for the crime of rape and sodomy. Accordingly, Petitioner is not entitled to habeas corpus relief on this ground as well.

III. CONCLUSION

Because Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States, Petitioner's application for a writ of habeas corpus (docket #1) and his motion for any exculpatory evidence (docket #4) are hereby denied.

SO ORDERED THIS 28 day of August, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

F I L E D

AUG 25 1995

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

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

MICHAEL E. MOSHER,)
SS# 478-58-1663)

Plaintiff,)

v.)

SHIRLEY S. CHATER,¹)
Commissioner Social Security)
Administration,)

Defendant.)

NO. 94-C-13-M

ENTERED ON DOCKET
AUG 28 1995
DATE _____

ORDER

Plaintiff, Michael E. Mosher, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Mr. Mosher's September 24, 1992 application for disability benefits was denied November 5, 1992, the denial was affirmed on reconsideration, December 4, 1992. A hearing before an Administrative Law Judge was held May 10, 1993. By order dated June 25, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 9, 1993. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the regulatory sequential evaluation process applicable to this case. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

Plaintiff had two previous back surgeries, one in 1975, and one in 1980 [R. 172, 195]. The evidence is that Plaintiff returned to full time heavy work after each of these surgeries. Plaintiff sustained his latest back injury on July 13, 1990. The medical records support Plaintiff's claim that he was unable to work following this latest injury.

The ALJ found that the Plaintiff does not suffer from a totally disabling pain syndrome which would entitle him to benefits [R.18]. In reaching this conclusion the ALJ discounted Plaintiff's credibility and lumped all of the pre and post surgery records together in his analysis. The time from Plaintiff's injury (7/13/90) to the date of the hearing (5/10/93) spans almost three years, during which time Plaintiff underwent back surgery. In the Court's view, analysis of Plaintiff's medical condition should be undertaken in three parts: (1) post-injury/pre-surgery (7/13/90 - 3/13/91); (2) post-surgery/convalescence (3/13/91 - 11/25/91); and (3) post-convalescence/current (11/12/91 - present). It is unrealistic to expect that a single analysis of Plaintiff's pain and limitations would be valid for the entire time encompassed by these 3

discrete periods of time. The medical evidence does not support the finding that Plaintiff was not disabled from the July 13, 1990 date of his injury through the March 13, 1991 date of his surgery and during his convalescent period which lasted, at least, until November 25, 1991.

From July 31, 1990 until December of 1990, the records reflect *frequent* visits to Dr. Muckala for diathermy treatments. Plaintiff visited Dr. Muckala on 7/31/90, 8/_/90, 8/10/90, 8/14/90, 8/16/90, 8/23/90, 8/24/90, 8/27/90, 8/30/90, 9/4/90, 9/7/90, 9/11/90, 9/14/90, 9/18/90, 9/21/90, 10/10/90, 10/17/90, 11/21/90, 11/26/90, 12/10/90. Dr. Muckala's notes reflect Plaintiff had little relief from pain, that he slept on the floor and experienced muscle spasms [R. 157-160]. During this time frame the record also reflects an ongoing discussion between Plaintiff's physicians as to the appropriate course of treatment [R. 192-6]. The medical records thus provide objective support for Plaintiff's allegations of debilitating pain in the months following his injury.

On March 13, 1991 Plaintiff had a **segmental** fixation with pedicle screw fixation at L4-5, L5-S1, performed by neurosurgeon, Benjamin G. Benner, MD. and orthopedic surgeon, Mark A. Hayes, MD. After his surgery he was followed, primarily, by Dr. Hayes whose notes reveal that on June 3, 1991 Plaintiff was having a little bit of leg pain and his fusion was progressing nicely, but the doctor did not see complete consolidation [R. 200]. In July, the doctor notes leg pain and that return to Plaintiff's former occupation would be unsafe. *Id.* On August 5, 1991 Dr. Hayes remarked that Plaintiff's fusion is healing, albeit slowly. August 15, 1991 Plaintiff came to the office for medication. *Id.* On October 7, 1991, Plaintiff was continuing to wear a bone stimulator and he had initially done well at the work hardening program, but had to cut back to half days [R. 199]. On November 25, 1991, Dr. Hayes noted that Plaintiff's fusion

looked satisfactory and that he was not having much back pain but still had some leg pain and had no need for further physical therapy or work hardening. *Id.* The post-surgery medical records, covering the period in which Plaintiff was recovering from this third back surgery reflect that Plaintiff's back had not even completely healed until November 1991.

Plaintiff's testimony that physical therapy was too strenuous is supported by Dr. Hayes' October 7, 1991 note [R. 199]. The medical records document some pain, and, it is certainly reasonable to expect that a person recovering from a third back surgery would experience pain. More important than the pain, however, is the fact that Plaintiff's back was not completely healed after his surgery during the March to November time period. During this time Dr. Hayes refers to Plaintiff as being temporarily totally disabled [R. 198]. Although the term "temporary total disability" pertains to Oklahoma Worker's Compensation criteria, use of the term is an indication that Plaintiff's treating physician viewed him as unable to work for a time following his surgery while his back healed.

According to 20 C.F.R. § 1527(d)(2), if the opinion of a treating physician is well-supported by medically acceptable clinical and diagnostic techniques and is not inconsistent with other substantial evidence in the record, the treating physician's opinion is accorded controlling weight. Observations recorded in correspondence from Dr. Benner during the post-surgery time period are consistent with Dr. Hayes' office notes. Moreover, there is nothing in the record to suggest that Plaintiff was able to work during this period. The medical evidence thus supports the conclusion that Plaintiff was disabled as defined in the Social Security Act., 42 U.S.C. § 401, *et. seq.*, at least for the period of time from July 13, 1990 to November 25, 1991. However the record is not so clear for the time period beyond November 25, 1991.

The Court notes that throughout Dr. Hayes' office records he refers to the desirability of having Plaintiff pursue vocational retraining and, in fact provided Plaintiff with the phone number for the Tulsa County Vocational Rehabilitation office with the Department of Human Services [R. 198-200]. Dr. Hayes last entry, dated March 9, 1992 assesses Plaintiff's range of motion and addresses his residual functional capacity but makes no mention of pain [R. 198], although Dr. Benner documents continuing pain [R. 169-70). Dr. Hayes also stated that Plaintiff "would qualify for, at most the light level of work activities as described under the Department of Labor Guidelines." [R. 198]. Plaintiff's treating physician and surgeon was clearly of the opinion that, by March 9, 1992, Plaintiff was capable of performing some work. And, while the ALJ adopted precisely the same limitations specified by Dr. Hayes on March 9, 1992 for Plaintiff's residual functional capacity ("RFC"), neither Dr. Hayes or the ALJ incorporated any pain limitations in the RFC. The case must be remanded for a re-evaluation of the effect of Plaintiff's alleged pain on his ability to perform work.

The pain and credibility analysis conducted by the ALJ contains several misstatements of Plaintiff's testimony and contains observations from the medical record which do not relate to Plaintiff's post-surgery status. At page 15 of the record, the ALJ relates that Plaintiff said he could walk one and a half hours. Actually, Plaintiff testified that he could walk a quarter of a mile before he would have to sit down. Plaintiff testified that out of an 8 hour day, he could stand maybe 2 hours [R. 53-4]. It is not true, as the ALJ states, that Dr. Martin [R. 208-210] is the only doctor to document muscle spasms. On January 6, 1992, Dr. Hayes prescribed Flexeril for muscle spasms [R. 199]. Dr. Hayes and Dr. Benner both document that after his surgery Plaintiff continued to suffer back and leg pain [R. 166-69, 198-200].

In addition, the medical records cited in the ALJ's pain analysis pre-date the surgery and are primarily from the time frame when Plaintiff's physicians were trying to determine what therapeutic course to take. The Court views it as inappropriate to excerpt these pre-surgery medical findings and apply them to Plaintiff's testimony about his post-surgery condition. Also, the ALJ's comments concerning Plaintiff's lack of motivation to work considering his Worker's Compensation settlement are particularly inappropriate given the Plaintiff's history of returning to heavy work following his two previous back surgeries. The Court finds that the ALJ's analysis of Plaintiff's pain and the resulting findings related to Plaintiff's residual functional capacity are not supported by substantial evidence.

On remand a new pain analysis must be performed focusing on the post-November 25, 1991 time frame in accordance with the requirements of *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987), *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991) and SSR 88-13. However, the court finds that additional factfinding on the issue of Plaintiff's condition during the July 13, 1990 to November 25, 1991 period would serve no purpose. "[O]utright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose." *Dollar v. Bowen*, 821 F.2d 530, 534 (10th Cir. 1987).

Accordingly, the court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case with directions to: (1) award disability benefits to Plaintiff from July 13, 1990 to November 25, 1991; (2) perform a proper pain analysis for Plaintiff's condition after November 25, 1991, including further development of the medical record related to that time frame; and (3) reevaluate Plaintiff's ability to perform work in light of that analysis.

SO ORDERED THIS 25th day of AUG., 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

FILED

ROBERT NOLLEN,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

AUG 25 1995

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

Case No: 94-C-91-W

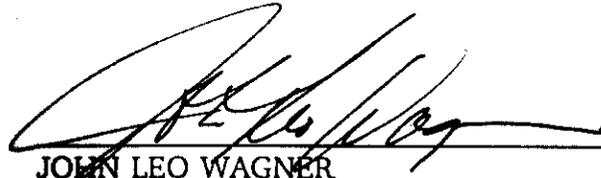
ENTERED ON DOCKET

DATE ~~AUG 28 1995~~

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 25, 1995.

Dated this 25th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

ROBERT NOLLEN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

AUG 25 1995

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

Case No. 94-C-91-W

ENTERED ON DOCKET

DATE AUG 28 1995

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

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

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In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ The ALJ found that claimant has the residual functional capacity for the full range of work, except for lifting 25 to 30 pounds occasionally, and that he has a decrease in range of motion in the neck, pain in the right and left shoulders and hands, and a hearing a loss and ringing in both ears. The ALJ found he could not perform his past relevant work as a roofer. The ALJ noted that claimant does not have any acquired work skills which are transferable to the skilled or semi-skilled work functions of other work, but there are a significant number of light jobs in the national economy which he could perform, such as sales person, shipping and order clerk, dispatcher, crew scheduler, security guard, outside delivery person, bench assembler, and ticket taker. The ALJ concluded that claimant is not under a disability as defined in the Social Security Act. (TR 22-23).

The claimant disputes the findings of the ALJ and alleges the following errors:

- (1) There is not substantial evidence to support the ALJ's evaluation of claimant's residual functional capacity, because he failed to consider the effect of pain on the ability to engage in substantial gainful activity and disregarded and mischaracterized the evidence.
- (2) The ALJ improperly disregarded the finding of claimant's consultative physicians, Dr. Martin and Dr. Goforth.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

- (3) The ALJ did not consider all claimant's impairments, including chronic headaches, dyspnea, dizziness, and allergies.

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

Claimant alleges he became disabled on February 26, 1990. He had been employed as a roofer and was injured when a hot asphalt lugger exploded and he was thrown approximately 20 feet (TR 147). He sustained injuries to the sinuses, back, neck, and upper extremities (TR 370). He has since had multiple surgical procedures, including a cervical fusion at C6-7, excision of the distal clavicle in his right shoulder, bilateral carpal tunnel surgery, and sinus surgery. (TR 163-168, 186-187, 357-360, 368).

Dr. James J. Trusell treated the claimant from November 28, 1989, when the lugger exploded, through July 6, 1992 (TR 370). Claimant complained of constant pain in the right shoulder, radiating from the neck to the shoulder occasionally and also into the arm, and numbness of the right hand. (TR 370). Dr. Trusell's diagnosis was a probable type II sprain of the acromioclavicular joint, right shoulder (TR 370). He recommended that claimant take Advil, alternate ice and heat to the right shoulder, continue actively exercising the shoulder, and return in two weeks (TR 369).

Approximately three weeks later, claimant returned, complaining of the same type of pain and numbness of the hand (TR 369). Dr. Trusell injected the shoulder and advised claimant to apply ice to it and return in three to four weeks. (TR 369). Claimant's symptoms persisted through a second treatment by Dr. Trusell, the diagnosis expanded to include mild carpal tunnel syndrome, and a Mumford procedure (surgical excision of the

distal clavicle) which was performed on February 26, 1990. (TR 368).

After the Mumford procedure, claimant returned for follow ups with Dr. Trusell and displayed excellent range of motion of the right shoulder and was advised to continue exercising the shoulder. (TR 367). On April 12, 1990, he complained of neck pain, popping, muscle spasms, and headaches and was referred to Dr. Mark Hayes. (TR 367). On his next appointment, Dr. Trusell declared that claimant had 5% permanent physical impairment due to weakness in the right shoulder and he was released from care. (TR 366).

Dr. Jeanne Edwards treated the claimant at times concurrently with Dr. Trusell from February 15, 1990 to May 7, 1992, for right shoulder discomfort and paresthesias radiating into the right hand. (TR 229-335). Dr. Edward's examination showed evidence of a right carpal tunnel syndrome, which she opined was probably not related to the accident itself, but which was probably related to the repetitive movement requirements of claimant's occupation. (TR 235). An MRI was performed on May 23, 1990, which showed normal examination of the brain with evidence of maxillary and ethmoid sinusitis. (TR 234). Claimant returned to Dr. Edwards in November of 1990 for left cervical neck and shoulder pain (TR 232). Motor nerve and sensory nerve conduction studies were done, as well as an EMG (TR 232-233). No evidence of radiculopathy, plexopathy, or other peripheral compression neuropathy was found, but the examination was consistent with the diagnosis of bilateral carpal tunnel syndrome (TR 233).

Dr. Hayes treated claimant from April 19, 1990 to July 12, 1990 (TR 145-147). On April 19, 1990, claimant stated he had no arm pain or hand pain, but complained of some

soreness in the neck and severe headaches (TR 147). Dr. Hayes felt there was a cervical strain and started the claimant on a home program and an exercise program in the doctor's office for two weeks, as well as prescribing anti-inflammatory medications (TR 147). On May 3, 1990, Dr. Hayes saw the claimant and recommended that he return to work and return in about a month (TR 147). At this time, claimant was complaining of neck pain, but the doctor noted that he had a full range of motion of his neck and no neurological deficits could be detected (TR 147).

The claimant returned to work for two days, but was unable to remain due to pain in his neck (TR 147). On May 24, 1990, Dr. Hayes stated that he agreed that the MRI that Dr. Edwards requested would be a good idea (TR 146). The claimant returned to Dr. Hayes on June 21, 1990, complaining of numbness in his hands at night (TR 146). On June 29, 1990, claimant's carpal tunnel syndrome was treated in the doctor's office and he was asked to return in three weeks (TR 146). Upon returning to Dr. Hayes' office, claimant continued to complain of neck pain, but an MRI looked satisfactory and lateral views in flexion and extension did not show any abnormal mobility (TR 145). Dr. Hayes noted that he did not think that cervical instability was a reason for the claimant's problem and that he had nothing further orthopedically to do for the claimant. (TR 145).

Claimant was treated by Dr. Michael Smith from May 7, 1990 through June 26, 1992 for urinary function problems, which claimant contended had worsened since the accident in November of 1989 (TR 326-339). Dr. Smith diagnosed a voiding dysfunction, ran tests and found no kidney defect, and prescribed treatment. (TR 334-340).

Dr. Frank Letcher treated claimant from November 7, 1990 to March 7, 1991 (TR

190-192). On November 7, 1990, Dr. Letcher told claimant that the cervical fusion operation performed on August 23, 1990 was no longer keeping him from returning to work, but claimant stated that he was experiencing pain in his hands due to his carpal tunnel injury and felt that he could not return to work (TR 191). In a letter dated March 7, 1991, Dr. Letcher related to Dr. Edwards that claimant's wounds were well healed and his neurological examination was normal with normal sensation and reflexes, but he "has a multiplicity of functional complaints as he has had in the past. I have told him that I feel that at this point he may return to work at full time, unrestricted activity without fear of causing additional injury In my opinion he has suffered a level of permanent partial impairment as a result of his on-the-job accident of 11-3-89 of 5% of the whole person." (TR 190).

Dr. Mowry treated claimant from December 4, 1990 to March 19, 1991 on at least four occasions (TR 195-197). Dr. Mowry related in a letter to Dr. Edwards that claimant was seen in his office apparently to address hearing loss and tinnitus that he noticed approximately five or six months after the explosion at work (TR 196). Claimant complained of ear pain or pain around the ears which seemed to be worsened with motions of the hands and feet, but examination revealed that the ear canals and tympanic membranes were normal, as were the nose and throat (TR 196). An audiogram did show a mild high frequency sensorineural hearing loss in the right ear and a severe high frequency sensorineural hearing loss in the left ear (TR 196).

Dr. Gary Goforth, a consultative physician, examined the claimant on March 19, 1991, and found that the claimant had suffered sprains of the cervical spine with a

herniated disk, sprains of the right shoulder, and bilateral carpal tunnel syndrome, all of which had required surgery (TR 201). The doctor concluded that the claimant had 55% permanent impairment to the whole person, with his right shoulder and wrist comprising 23%, his left wrist comprising 12%, and his cervical spine comprising 20%. (TR 202).

Dr. Thomas Dodson saw claimant from March 13, 1991 to April 6, 1992 (TR 218-219). On March 13, 1991, the doctor determined that claimant suffered from sinusitis, possibly related to the inhalation of asphalt and fumes from the explosion at work (TR 220). All of claimant's visits to Dr. Dodson related to the sinus problem and the endoscopic procedure performed and follow-up (TR 217-227).

On February 3, 1992, Dr. A.B. Follender diagnosed muscle contraction headaches and musculoskeletal neck pain, which did not involve the central nervous system, and stated that claimant "obviously needs to be involved in a pain management program and he needs to return to work" (TR 216).

Dr. Neal Mask, a consultative physician, examined the claimant on May 12, 1992, and concluded that the claimant experienced chronic dyspnea of an undetermined etiology which might be pulmonary in origin (TR 239). The doctor recommended that a cardiopulmonary exercise test be taken to determine the cause of claimant's chronic exercise intolerance, but the test results showed no heart abnormality (TR 239-325). The claimant's predicted maximal oxygen consumption was not achieved, ventilatory response to exercise was normal, no arterial oxygen desaturation occurred, cardiac response to exercise was normal, claimant achieved 94% of maximum heart rate, and the exercise was limited by the heart rate (TR 244).

Dr. Ellen Zanetakis began seeing the claimant on January 27, 1993, and concluded that claimant had cervical strain and fibromyalgia (TR 382). She recommended an aquatics exercise program and other exercise programs since claimant was not getting exercise. (TR 382). She also prescribed physical therapy at the Tulsa Center for Physical Therapy two to three times a week for six weeks. (TR 382). Dr. Zanetakis noted that claimant was taking up to 24 tablets of Ibuprofen daily and that such a high dosage could contribute to his chronic tinnitus. (TR 381).

Dr. Jim Martin, a consultative physician, examined the claimant in August of 1993. He found muscle spasm and tenderness over the posterior cervical muscles, with a limited range of motion, palpable grinding and clicking in the right shoulder, but normal range of motion, tenderness over the anterior synovium and pain with motion of the patella of the left knee, and palpable grinding and clicking in the knee joint with flexion and extension. (TR 10). No tests were run, but Dr. Martin opined that the claimant has a permanent partial impairment of 86% to the whole person. (TR 10).

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987),

discussed what a claimant must show to prove a claim of disabling pain:

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

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had medical problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of

severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

In the instant case, the ALJ found that the claimant's subjective allegations of pain are not credible to the extent alleged (TR 20). There is substantial evidence to support the findings of the ALJ. The ALJ based part of his determination of credibility on the fact that claimant refuses doctor's orders. No less than four physicians recommended or prescribed some type of physical therapy program, biofeedback, exercise program, or work hardening/pain management program for the claimant (TR 147, 216, 369, 382). Claimant has yet to participate in the programs recommended to him. At the hearing, claimant testified that he has had a sinus infection for two months that he does not want to spread to anyone else and, when it clears up, he will go to physical therapy (TR 60). He also testified that he does not have the money to attend biofeedback treatment because his insurance will not pay for it and he only has a few thousand dollars left from a \$58,000 workers compensation settlement (TR 60, 351-352). Many of the doctors stated that he could, and should, go back to work (TR 147, 191, 216).

The ALJ asked claimant about any pain medications he is currently taking and the side effects, if any, in accordance with the Luna decision (TR 47-48). He testified that he was taken off Ibuprofen, and the Tylenol he was taking in conjunction with Elavil and Valtarin also made him groggy and irritable (TR 47). He testified that he sometimes takes 15 to 16 Tylenol in a day's time (TR 48). Dr. Zanetakis had previously asked the claimant

to refrain from taking Ibuprofen, because of concern about its effect on the liver and the correlation between the high doses and claimant's chronic tinnitus (TR 381). Thus, it is difficult to distinguish whether some of the alleged side effects claimant is experiencing are due to claimant's frequent use of over-the-counter painkillers, or whether claimant's frequent use of over-the-counter painkillers are due to severe pain.

In the instant case, the ALJ came to his conclusion after evaluating "claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions and the combined impact on the claimant's daily activities" (TR 21). The ALJ found that claimant's credibility was damaged by some inconsistencies in his testimony. During the hearing the following testimony occurred:

- Q: Have you filed any Workman's Compensation claims since that date?
A: Worker's Comp? No.
Q: Okay. I note that you received some Workman's Compensation.
A: Worker's Comp?
Q: Yes.
A: Yes. In -- I was on Worker's Comp. I thought you said something else, sir.

(TR 35-36).

The ALJ also pointed out that claimant testified that he has problems concentrating (TR 46), yet he reads for 2 to 3 hours a day, can listen to the radio up to 4 hours a day, attends church, and drives (TR 21). The ALJ noted that claimant stated that his medication makes him drowsy and irritable, but he takes over the-counter medication

primarily and the doctors reported he takes too much (TR 21, 47). The ALJ also noted that claimant drives into town, which is a 55 mile drive (TR 21). The ALJ relied on the fact that claimant alleged a sleeping problem, but stated he can sleep up to 6 hours per day (TR 21). The ALJ noted that claimant has no muscle spasms, muscular atrophy that would indicate muscle weakness, difficulties with his appetite, or red irritated areas of the skin or swelling of the joints (TR 21).

Claimant testified that he has had shortness of breath "since. . . ever since the blast, that surgery that they done on my neck, after that when I first started walking, I had shortness of breath" (TR 53). There is no evidence in the medical record, however, that he complained of shortness of breath until 1992, two years after his "neck" surgery and after having returned to work once, when he was examined by Dr. Mask (TR 238).

Claimant also testified that he does not walk and that if he did, he could only walk for about 100 yards (TR 49). However, when his daily activities are examined, the testimony of immobility seems exaggerated. He testified that he is able to do some household chores, such as take the laundry to the laundry room, take his children to school, and go to the store once or twice a week. (TR 40-41). He also testified that he has mowed the lawn 3 or 4 times since his injury, even though it takes him 3 or 4 days to complete the project (TR 42). He regularly starts the lawn mower for his wife and child. (TR 41).

Claimant stated in his pain questionnaire that on an average day he checks the mail at the post office and may water the flowers once a week if he can't get his wife to do it. (TR 127). He is out of the house on a daily basis, goes to church every Sunday if he can,

and rides or drives to visit a relative **twice** a week. (TR 40-41, 45). The inconsistencies and exaggerations of the claimant support the ALJ's finding that the claimant's subjective allegations of pain are not credible.

There is also no merit to claimant's second alleged error that the ALJ improperly disregarded the findings of claimant's **consultative** physicians. Dr. Goforth opined that the claimant had 55% permanent impairment to the whole person, and Dr. Martin opined that the claimant had 86% permanent impairment to the whole person. (TR 10, 202). The court in Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir 1984), stated that, unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician. No such obligation exists for the Secretary when determining the value to be given to **consultative** physicians' opinions. In fact, findings of a nontreating physician based upon **limited** contact and examination are of suspect reliability. Frey v. Bowen, 816 F.2d at 515. Both Dr. Goforth and Dr. Martin saw the claimant only once and did not perform substantial testing on the claimant, as done by his treating physicians. None of the **treating** doctors found him disabled and many recommended he return to work (TR 147, 191, 216).

Finally, there is no merit to claimant's third contention that the ALJ did not consider all his impairments, such as chronic **headaches**, dyspnea, dizziness, and allergies. When a claimant has one or more severe **impairments**, the Secretary must consider the combined effect of the impairments in making a **disability** determination. 42 U.S.C. § 423(d)(2)(C). In this case, the ALJ properly considered the medical evidence and the claimant's testimony, and found that claimant had severe **status post** cervical fusion, had undergone right

shoulder, sinus, and bilateral carpal tunnel syndrome release surgeries, and had neck, shoulder, back, and hand pain. There was no evidence that the additional complaints were seen by claimant's physicians as requiring treatment or recognized by them as causing disability.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 25th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Nollen.or

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

FILED

AUG 28 1995

RC

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

JAMES E. SANDERS and LYDA R. SANDERS,)

Plaintiffs,)

v.)

CLECO LTD. and CLECO SYSTEMS, a)
division of OWEN INDUSTRIES, INC.,)

Defendants.)

Case No. 94-C-1141-H

ENTERED ON DOCKET

DATE AUG 28 1995

ORDER

This matter comes before the Court on a Motion for Summary Judgment, dated January 17, 1995, by Defendant Cleco Systems, a division of Owen Industries, Inc. ("Cleco Systems"). Plaintiffs' lawsuit against Cleco Systems, sounding in strict products liability, alleges that Plaintiff James Sanders was injured on November 11, 1992 because of an unreasonably dangerous and defective product known as the Stacker Crane.¹ In the Complaint, Plaintiffs further allege that Cleco Systems built, constructed, and sold the Stacker Crane. Cleco Systems rests its Motion upon the basis that it did not design, manufacture, assemble, market, distribute, sell, or repair the Stacker Crane.

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

¹ Plaintiffs' second claim is brought by Plaintiff Lyda Sanders for the loss of services, society, and companionship of her husband, Plaintiff James Sanders.

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, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. 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.

Id. 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); Anderson, 477 U.S. at 250 ("there is no issue for trial unless

there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

Defendant Cleco Systems supports its Motion with an Affidavit from Carl W. Harrison, the Vice President of Finance for Owen Industries, Inc. In his Affidavit, Mr. Harrison states that:

Cleco Ltd., not Cleco Systems, is the sole manufacturer and distributor of the Stacker Crane involved in the accident at the Ford Glass Plant in Tulsa, Oklahoma.

Cleco Systems has not owned, at any time, the Stacker Crane involved in the accident at the Plant.

Cleco Systems has never sold any Stacker Cranes to the Ford Glass Plant in Tulsa, Oklahoma.

Cleco Systems did not adjust, modify, or repair the Stacker Crane located at the Ford Glass Plant prior to the accident in question.

Cleco Systems has never owned any rights, licenses or interests in the Stacker Crane located at the Ford Glass Plant. Cleco Systems has never held any patents or pending patents in the design, manufacture, assembly or installation of the Stacker Crane located at the Ford Glass Plant.

Cleco Systems did not operate the Stacker Crane located at the Ford Glass Plant prior to the date of the accident.

Cleco Systems did not provide any training or instruction concerning the use of the Stacker Crane located at the Ford Glass Plant, nor was Cleco Systems requested or required to provide such training prior to the date of the accident.

In Plaintiffs' Response to the Motion, dated February 17, 1995, Plaintiffs do not controvert any fact provided by Cleco Systems which is material to the resolution of the instant Motion. However, Plaintiffs deny that summary judgment is appropriate. Plaintiffs provide the Court with the Affidavit of Robert A. Flynn, attorney for the Plaintiffs, who swears that he has "conducted an investigation into the cause of Mr. Sanders' injury" and that "Cleco Systems . . . ha[s] been involved in the manufacturer [sic], distribution, or repair of the defective product in this case." It is well settled that an affidavit opposing a grant of summary judgment must be made on personal knowledge. Fed. R. Civ. P. 56(e). Mr. Flynn does not offer any evidence supporting his Affidavit but chooses to rest upon one conclusory statement.²

On March 22, 1995, after further discovery, the Court granted Plaintiffs leave to file a Supplemental Response to Defendant's Motion. Plaintiffs' Supplemental Response also fails to controvert

² Also based upon Mr. Flynn's Affidavit, Plaintiffs moved for additional time to conduct discovery. Federal Rule of Civil Procedure 56(f) permits the Court to hold a motion for summary judgment in abeyance while the opposing party conducts discovery. However, the party requesting the continuance "must state with specificity why extra time is needed and how the additional time and material will rebut the summary judgment motion." Int'l Surplus Lines Ins. Co. v. Wyoming Coal Rfq. Systems, Inc., 52 F.3d 901, 905 (10th Cir. 1995). In the instant case, it is unnecessary for the Court to determine whether Plaintiffs have met the required burden in this regard because, in the interim time period, Plaintiffs have conducted some of the requested discovery.

any material fact alleged by Cleco Systems.³ The Court, therefore, concludes that there is no genuine issue of material fact remaining regarding Defendant's Motion.

Defendant Cleco Systems asserts that it is entitled to judgment as a matter of law because Plaintiffs have presented no evidence that Cleco Systems was the manufacturer, designer, distributor, or any such similar title holder of the Stacker Crane.

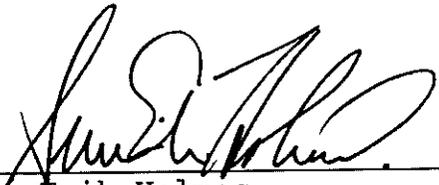
In a lawsuit predicated upon diversity jurisdiction, the Court applies the law of the forum state. See Brown v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984). In Oklahoma, a plaintiff may only state a cause of action sounding in strict products liability against a manufacturer, seller, or supplier of a defective product. Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974); Gonser v. Decker, 814 P.2d 1056, 1057 (Okla. Ct. App. 1991); Muniz v. Masco Corp., 744 F. Supp. 266, 267 (W.D. Okla. 1990). Based upon the uncontroverted facts, it is clear that Cleco Systems neither manufactured, sold, nor supplied the Stacker Crane to the Ford Glass Plant where Plaintiff James Sanders was injured. Therefore, Defendant Cleco Systems is entitled to judgment on Plaintiffs' claim of strict products liability as a matter of law.

³ Further, at a hearing held on August 25, 1995, Plaintiffs still did not possess any evidence controverting the Harrison Affidavit.

The Court hereby grants the Motion for Summary Judgment of Defendant Cleco Systems (Docket # 5).

IT IS SO ORDERED.

This 28TH day of August, 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NABIL NOFAL aka NABIL A. NOFAL;
Wafa NOFAL; CITICORP PERSON TO
PERSON FINANCIAL CENTER, INC.;
BLACKSTOCK, JOYCE, POLLARD &
MONTGOMERY; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

AUG 25 1995

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

ENTERED ON DOCKET
AUG 28 1995

DATE _____

Civil Case No. 95-C 227K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day of August,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Nabil Nofal aka Nabil A. Nofal, Wafa Nofal, Citicorp Person to Person Financial Center, Inc., and Blackstock, Joyce, Pollard & Montgomery, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant Nabil Nofal aka Nabil A. Nofal will hereinafter be referred to as ("Nabil Nofal"). The Defendants, Nabil Nofal and Wafa Nofal are husband and wife.

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

The Court being fully advised and having examined the court file finds that the Defendant, **Citicorp Person to Person Financial Center, Inc.**, acknowledged receipt of Summons and Complaint via certified mail on March 13, 1995; and that the Defendant, **Blackstock, Joyce, Pollard & Montgomery**, acknowledged receipt of Summons and Complaint via certified mail on March 13, 1995.

The Court further finds that the Defendants, **Nabil Nofal and Wafa Nofal**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 7, 1995, and continuing through July 12, 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 Defendants, **Nabil Nofal and Wafa Nofal**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstractor filed herein with respect to the last known addresses of the Defendants, **Nabil Nofal and Wafa Nofal**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, **Stephen C. Lewis**, United States Attorney for the Northern District of Oklahoma, through **Loretta F. Radford**, Assistant United States

Attorney, fully exercised due diligence in **ascertaining** the true name and identity of the parties served by publication with respect to **their present** or last known places of residence and/or mailing addresses. The Court **accordingly** approves and confirms that the service by publication is sufficient to confer jurisdiction **upon this Court** to enter the relief sought by the Plaintiff, both as to subject matter and the **Defendants** served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answer on March 21, 1995; and that the Defendants, **Nabil Nofal, Wafa Nofal, Citicorp Person to Person Financial Center, Inc., and Blackstock, Joyce, Pollard & Montgomery,** have failed to answer and their default has **therefore been** entered by the Clerk of this Court.

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

Lot Seven (7), Block Three (3), BRIARWOOD, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that **on May 15, 1978,** Anita Kay Beu, executed and delivered to MODERN AMERICAN MORTGAGE CORPORATION her mortgage note in the amount of \$38,650.00, payable in **monthly installments**, with interest thereon at the rate of eight and three-quarters percent (8.75%) **per annum.**

The Court further finds that **as security** for the payment of the above-described note, Anita Kay Beu, executed **and delivered** to MODERN AMERICAN MORTGAGE CORPORATION a mortgage **dated** May 15, 1978, covering the above-

described property. Said mortgage was recorded on May 17, 1978, in Book 4328, Page 1444, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 12, 1978, Modern American Mortgage corporation assigned the above-described mortgage note and mortgage to The Richard Gill Company. This Assignment of Mortgage was recorded on June 30, 1978, in Book 4337, Page 1411, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1983, The Richard Gill Company assigned the above-described mortgage note and mortgage to Standard Federal Savings and Loan Association. This Assignment of Mortgage was recorded on February 1, 1984, in Book 4763, Page 1310, in the records of Tulsa County, Oklahoma. ▲

The Court further finds that on June 23, 1988, Standard Federal Savings Bank, formerly Standard Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 14, 1988, in Book 5114, Page 985, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Nabil Nofal, is the current title owner of the property by virtue of a General Warranty Deed dated February 5, 1979, and recorded on February 9, 1979 in Book 4381, Page 931, in the records of Tulsa County, Oklahoma. The Defendant, Nabil Nofal, is the current assumpor of the subject indebtedness.

The Court further finds that on May 27, 1988, the Defendants, Nabil Nofal and Wafa Nofal, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its

right to foreclose. A superseding agreement was reached between these same parties on August 2, 1989, January 3, 1990, December 13, 1990, and March 25, 1991.

The Court further finds that on July 16, 1989, the Defendant, Nabil Nofal, filed his voluntary Chapter 7 petition in Bankruptcy in the United States Bankruptcy Court for the Northern District of Oklahoma, Case number 89-02204-W. The Debtor, Nabil Nofal claimed the real property which is the subject matter of this action to be exempted within Schedule B-1 of said Bankruptcy filing. The Debtor was discharged on November 14, 1989, and the case was closed January 16, 1990.

The Court further finds that the Defendant, Nabil Nofal, 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, Nabil Nofal, is indebted to the Plaintiff in the principal sum of \$55,873.30, plus interest at the rate of 8.75 percent per annum from May 1, 1988 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 liens on the property which is the subject matter of this action by virtue of personal property taxes as follows:

<u>Tax Year</u>	<u>Amount</u>	<u>As of</u>
1993	\$26.00	6-23-94
1992	\$26.00	6-25-93
1991	\$28.00	6-26-92
1989	\$ 6.00	7-2-90
1988	\$ 8.00	7-5-89
1987	\$ 9.00	7-7-88

Business Personal Taxes		
1990	\$146.00	6-20-91
1989	\$109.00	7-2-90
1988	\$139.00	7-5-89
1987	\$112.00	7-7-88

Said liens are inferior to the interest of the **Plaintiff**, United States of America.

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

The Court further finds that the **Defendants, Nabil Nofal, Wafa Nofal, Citicorp Person to Person Financial Center, Inc. and Blackstock, Joyce, Pollard & Montgomery**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Nabil Nofal**, in the principal sum of \$55,873.30, plus interest at the rate of 8.75 percent per annum from May 1, 1988 until judgment, plus interest thereafter at the current legal rate of 5.89 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 \$103.00 for personal property taxes for the years 1987-1989 and 1991-1993, and for business personal taxes, in the amount of \$506.00, for the years 1987-1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Nabil Nofal, Wafa Nofal, Citicorp Person to Person Financial Center, Inc., and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Nabil Nofal, 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 the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$609.00, personal property taxes

and business personal taxes, which are currently due and owing.

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

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

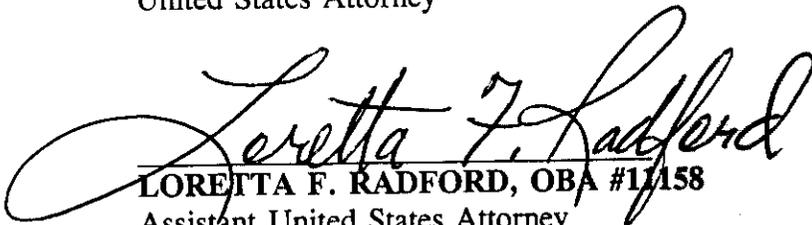
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #17158
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(918) 596-4841

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

Judgment of Foreclosure
Civil Action No. 95-C 227K

LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PRESTON D. GARNER aka Preston Dale)
Garner; JAMIE J. GARNER aka Jamie)
Juanella Garner; UNKNOWN SPOUSE)
OF Preston D. Garner aka Preston Dale)
Garner; UNKNOWN SPOUSE OF)
Jamie J. Garner aka Jamie Juanella)
Garner; JAMES M. GOTT aka James)
Myer Gott; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE AUG 28 1995

FILED

AUG 25 1995

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

Civil Case No. 95-C 282K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day of August,

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, JAMES M. GOTT aka James Myer Gott, appears not having previously filed a Disclaimer; and the Defendants, PRESTON D. GARNER aka Preston Dale Garner, JAMIE J. GARNER aka Jamie Juanella Garner, UNKNOWN SPOUSE OF Preston D. Garner aka Preston Dale Garner, if any, and UNKNOWN SPOUSE OF Jamie J. Garner aka Jamie Juanella Garner, if any, appear not, but make default.

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

The Court further finds that the Defendants, PRESTON D. GARNER aka Preston Dale Garner, JAMIE J. GARNER aka Jamie Juanella Garner, UNKNOWN SPOUSE OF Preston D. Garner aka Preston Dale Garner, if any, and UNKNOWN SPOUSE OF Jamie J. Garner aka Jamie Juanella Garner, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 16, 1995, and continuing through July 21, 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 Defendants, PRESTON D. GARNER aka Preston Dale Garner, JAMIE J. GARNER aka Jamie Juanella Garner, UNKNOWN SPOUSE OF Preston D. Garner aka Preston Dale Garner, if any, and UNKNOWN SPOUSE OF Jamie J. Garner aka Jamie Juanella Garner, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, PRESTON D. GARNER aka Preston Dale Garner, JAMIE J. GARNER aka Jamie Juanella Garner, UNKNOWN SPOUSE OF Preston D. Garner aka Preston Dale Garner, if any, and UNKNOWN SPOUSE OF Jamie J. Garner aka Jamie Juanella Garner, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and

its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

The Court further finds that the Defendant, PRESTON D. GARNER, is one and the same person as Preston Dale Garner, and will hereinafter be referred to as "PRESTON D. GARNER." The Defendant, JAMIE J. GARNER, is one and the same person as Jamie Juanella Garner, and will hereinafter be referred to as "JAMIE J. GARNER." The Defendants, PRESTON D. GARNER and JAMIE J. GARNER, were granted a Divorce in Case No. FD 92-8178, on May 21, 1993, in Tulsa County District Court.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 13, 1995; that the Defendant, JAMES M. GOTT, filed his Disclaimer on June 5, 1995; and that the Defendants, PRESTON D. GARNER, JAMIE J. GARNER, UNKNOWN SPOUSE OF Preston D. Garner, if any, and UNKNOWN SPOUSE OF Jamie J. Garner, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 23, 1992, Preston Dale Garner and Jamie J. Garner, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-B-2228 W. On October 9,

1992, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on January 21, 1993.

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

Lot Seventeen (17), Block Two (2), CARBONDALE THIRD ADDITION, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 7, 1979, Shelly Anne Blanchard, executed and delivered to CHARLES F. CURRY COMPANY, her mortgage note in the amount of \$27,500.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, SHELLY ANNE BLANCHARD, A SINGLE PERSON, executed and delivered to CHARLES F. CURRY COMPANY a mortgage dated September 7, 1979, covering the above-described property. Said mortgage was recorded on September 11, 1979, in Book 4426, Page 180, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 27, 1991, Charles F. Curry Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development c/o Department of Housing and Urban Development, 1516 S. Boston, Suite 110, Tulsa, OK 74119-0432. Assignment of Mortgage was recorded on December 9, 1991, in Book 5366, Page 1608, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 19, 1990, James M. Gott, a single man granted a general warranty deed to Preston D. Garner and Jamie J. Garner (husband and

wife). This deed was recorded with the Tulsa County Clerk on December 20, 1990, in Book 5295 at Page 716 and the Defendants, PRESTON D. GARNER and JAMIE J. GARNER, then husband and wife, assumed thereafter payment of the amount due pursuant to the note and mortgage described above and are the current assumptors of the subject indebtedness.

The Court further finds that on November 15, 1991, the Defendants, PRESTON D. GARNER and JAMIE J. GARNER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, PRESTON D. GARNER and JAMIE J. GARNER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, PRESTON D. GARNER and JAMIE J. GARNER, are indebted to the Plaintiff in the principal sum of \$34,326.06, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount.

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 \$14.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$5.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, PRESTON D. GARNER, JAMIE J. GARNER, UNKNOWN SPOUSE OF Preston D. Garner, if any, and

UNKNOWN SPOUSE OF Jamie J. Garner, if any, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that the Defendant, JAMES M. GOTT, disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, PRESTON D. GARNER and JAMIE J. GARNER, in the principal sum of \$34,326.06, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 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 \$19.00, plus costs and interest, for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JAMES M. GOTT, PRESTON D. GARNER, JAMIE J. GARNER, UNKNOWN SPOUSE OF Preston D. Garner, if any, and UNKNOWN SPOUSE OF Jamie J. Garner, if any, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$19.00, 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 #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4842

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 282K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DEBORAH JANE FINNEY; UNKNOWN)
SPOUSE OF Deborah Jane Finney, if any;)
LLOYD MARK FINNEY; UNKNOWN)
SPOUSE OF Lloyd Mark Finney, if any;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
AUG 28 1995
DATE _____

FILED

AUG 25 1995

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

Civil Case No. 95-C-0020-K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 24th day of July, 1995 and the Judgment of Foreclosure entered herein on the 26th day of July, 1995, are vacated, and the action Dismissed without prejudice.

Dated this 25 day of August, 1995.

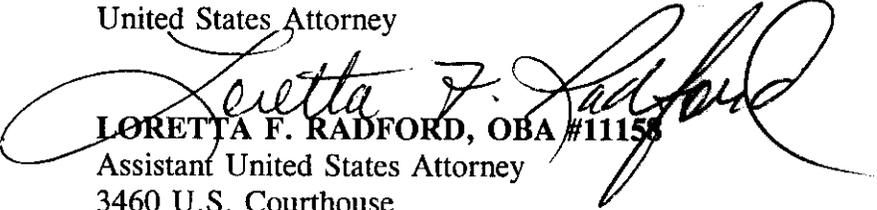
s/ TERRY C. KLEIN

UNITED STATES DISTRICT JUDGE

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

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

LFR:flv

CP
UNITED STATES DISTRICT COURT **RECEIVED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 24 1995

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 91-C-321-C ✓

ONE INLAND, MODEL M1, .30)
CALIBER CARBINE, SERIAL NO.)
5222984; ONE SGW RIFLE,)
MODEL XM15A1, .223 CALIBER,)
SERIAL NO. SNX2606; AND)
ONE STEEL BOLT INCORPORATED)
INTO SGW RIFLE, SERIAL NO.)
SNX2606,)

Defendants.)

FILED

AUG 24 1995 SA

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

EDD 8/25/95

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Catherine Depew Hart, Assistant United States Attorney, and the Claimant, Harold E. Staples, III, and hereby stipulate to dismissal against the Defendant Property known as:

ONE SGW RIFLE, MODEL XM15A1
.223 CALIBER, SERIAL NO.
SNX2606; AND ONE STEEL BOLT
INCORPORATED INTO SGW RIFLE,
SERIAL NO. SNX2606,

without prejudice and without costs.

WE SO AGREE.

16
C2LC
G2BN

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney

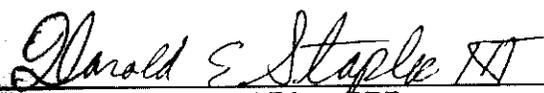
Executed the 24th
day of August, 1995.


CATHERINE DEPEW HART, OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

Executed the 24th
day of August, 1995.


CLARK O BREWSTER
JENNIFER DeANGELIS
Brewster, Shallcross and DeAngelis
2021 South Lewis
Tulsa, Oklahoma 74104
Attorneys for Claimant
Harold E. Staples, III

Executed the 24th
day of August, 1995.


HAROLD E. STAPLES, III

CERTIFICATE OF SERVICE/MAILING

This is to certify that a true and correct copy of the within and foregoing Stipulation of Dismissal was served this 24th day of August, 1995, personally upon either Clark O. Brewster or Jennifer DeAngelis, or was mailed to the following individuals by first class mail, postage fully prepaid thereon:

CLARK O. BREWSTER
JENNIFER DeANGELIS
Brewster, Shallcross and DeAngelis
2021 South Lewis
Tulsa, Oklahoma 74104
Attorney for Claimant
Harold Staples



CATHERINE DEPEW HART

N:\UDD\CHOOK\FC\STAPLES\04744

CP

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

AUG 24 1995

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 91-C-321-C ✓

ONE INLAND, MODEL M1, .30)
CALIBER CARBINE, SERIAL NO.)
5222984; ONE SGW RIFLE,)
MODEL XM15A1, .223 CALIBER,)
SERIAL NO. SNX2606; AND)
ONE STEEL BOLT INCORPORATED)
INTO SGW RIFLE, SERIAL NO.)
SNX2606,)

Defendants.)

FILED

AUG 24 1995

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

ENTERED ON DOCKET

DATE AUG 25 1995

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Catherine Depew Hart, Assistant United States Attorney, and the Claimant, Harold E. Staples, III, and hereby stipulate to dismissal against the Defendant Property known as:

ONE SGW RIFLE, MODEL XM15A1
.223 CALIBER, SERIAL NO.
SNX2606; AND ONE STEEL BOLT
INCORPORATED INTO SGW RIFLE,
SERIAL NO. SNX2606,

without prejudice and without costs.

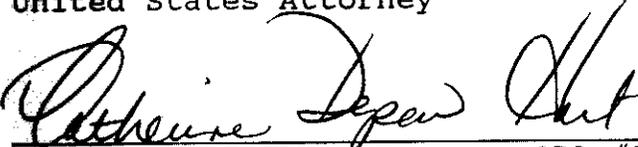
WE SO AGREE.

C2LC
G26N

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney

Executed the 24
day of August, 1995.


CATHERINE DEPEW HART, OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

Executed the 24th
day of August, 1995.


CLARK O BREWSTER
JENNIFER DeANGELIS
Brewster, Shallcross and DeAngelis
2021 South Lewis
Tulsa, Oklahoma 74104
Attorneys for Claimant
Harold E. Staples, III

Executed the 24th
day of August, 1995.


HAROLD E. STAPLES, III

CERTIFICATE OF SERVICE/MAILING

This is to certify that a true and correct copy of the within and foregoing Stipulation of Dismissal was served this 24th day of August, 1995, personally upon either Clark O. Brewster or Jennifer DeAngelis, or was mailed to the following individuals by first class mail, postage fully prepaid thereon:

CLARK O. BREWSTER
JENNIFER DeANGELIS
Brewster, Shallcross and DeAngelis
2021 South Lewis
Tulsa, Oklahoma 74104
Attorney for Claimant
Harold Staples



CATHERINE DEPEW HART

N:\UDD\CHOOK\FC\STAPLES\04744

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

F I L E D

LERROY AUSTIN HANCOCK,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY FIELDS, et al.,)
)
 Defendants.)

AUG 25 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-66-K

ENTERED ON DOCKET
DATE AUG 25 1995

O R D E R

Before the Court are Defendants' Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted (Docket #17), Plaintiff's Motion for Reconsideration of the order denying his motion for a temporary restraining order,¹ and Plaintiff's Motion for Appointment of Counsel (Docket #15).

Plaintiff Leroy Hancock is an inmate at John Lilly Correctional Center in Boley, Oklahoma.² Hancock, who is Jewish, alleges that Defendants suspended Jewish prisoners' right to prepare their own meals in a kosher fashion, refuses to allow them to receive packages of kosher food from sources outside the prison, and refuses to provide kosher meals. He alleges that Defendant Oklahoma Department of Corrections ("ODOC") provides all the

¹Plaintiff's motion for a temporary restraining order was denied by the Court on February 21, 1995.

²At the time this action was filed, Hancock was incarcerated at the Howard McLeod Correctional Center in Atoka, Oklahoma. His claim also covers actions that occurred while he was incarcerated at the Dick Conner Correctional Center in Hominy, Oklahoma.

special dietary requirements for other faiths, but refuses to do so for Jewish prisoners. Other privileges allegedly provided by Defendants to non-Jewish prisoners but not to Jewish prisoners include providing religious leaders, allowing fund raising projects, and allowing receipt of food packages. Hancock also alleges that ODOC is violating its own operational procedures by refusing to allow him "religious freedom." Hancock filed this 42 U.S.C. § 1983 action alleging a violation of his First, Eighth and Fourteenth Amendment rights, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. He also filed a pendent state claim of slander against Defendant Ron Colliver. He seeks injunctive and monetary relief.

I. MOTION TO DISMISS

Defendants filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of the plaintiff. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

Defendants' Motion to Dismiss addresses three primary issues: Hancock's claim under the Religious Freedom Restoration Act ("the Act"), Hancock's pendent state law claim, and Defendants' potential sovereign and qualified immunity. Defendants allege that Hancock's claim under the Act must fail because he "has failed to argue or provide evidence to show that what he is requesting is mandated by his faith." (Defendants' Motion to Dismiss, p. 4.) The Court notes at the outset that Hancock is not required to "provide evidence" at this stage of the proceedings; rather, the issue is whether Hancock has stated a valid claim.

The Act reinstates the "compelling state interest" standard to free exercise of religion claims: the government may substantially burden a person's exercise of religion only if the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling interest. See 42 U.S.C. § 2000bb-1(b)(1), (2).³ A "substantial burden" has been defined as:

where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Thomas v. Review Board, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1432,

³The Act, which went into effect in 1993, has been held to apply to prisoners. Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995). See also Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995), and Brown-El v. Harris, 26 F.3d 68 (8th Cir. 1994).

67 L.Ed.2d 624 (1981). Previously, prisoners' claims were subject to a less stringent standard of review; restraints on religion were valid so long as the prison regulation was reasonably related to a legitimate penological interest. See Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987).

The Tenth Circuit Court of Appeals has held that, in order to state a post-Act prima facie free exercise claim, a plaintiff must allege two elements: (1) that the government's action burdens a religious belief rather than a philosophy or a way of life; and (2) that the burdened belief must be sincerely held by the plaintiff. Werner, 49 F.3d at 1480, n.1. Construing Hancock's *pro se* petition liberally, the Court holds that he has stated a valid claim under the Act.

Defendants, pointing to Bryant, 46 F.3d at 949, state that Hancock also must allege that the governmental action burdens "a tenet or belief that is central to religious doctrine". However, the Court does not believe such allegation is necessary. The Court believes the better view is found in cases such as Muslim v. Frame, 1995 WL 389724 (E.D. Pa. June 30, 1995), in which the court stated:

Although some courts have stated that a RFRA plaintiff must demonstrate that the religious practice or belief is considered central to the plaintiff's religion, ... I conclude that such a showing would unnecessarily place judges in a position of determining questions of religious doctrine. The text of RFRA establishes that a plaintiff must establish that governmental action "substantially burdens the free exercise of religion." ... This language in no way suggests that the right to free exercise is limited to exercises judicially deemed central to the plaintiff's

religion.

Id. at *3 (and cases cited therein). The Muslim court required only that the plaintiff show that the practice at issue is "religiously motivated". Id. at *4. In this case, the Court believes that Hancock has stated a claim under the Act.⁴

Defendants further allege that Hancock's claim should be dismissed because Defendants have a compelling state interest in disallowing kosher meals. However, determining whether an interest is compelling is a question of fact, not properly decided on a Motion to Dismiss. See Sasnett v. Dep't of Corrections of the State of Wisconsin, 1995 WL 379223, *9 (W.D. Wis. June 23, 1995). Therefore, Defendants' Motion to Dismiss is hereby denied as to this issue.

The Court next considers Defendants' Motion to Dismiss the pendent state law claim of slander. Under Oklahoma's Governmental Tort Claims Act, 51 O.S. § 151 *et seq.*, a plaintiff, before filing a lawsuit, must first present the claim to the state via the Office of Risk Management within one year of the loss suffered as a result of his claim. 21 O.S. § 156. If a plaintiff does not comply, his suit is barred. Willborn v. City of Tulsa, 721 P.2d 803 (Okla. 1986). The statements giving rise to the slander claim allegedly were made by Ron Colliver, Programs Director at the Dick Conner

⁴Even assuming the Bryant standard is applicable, the Court finds that Hancock still has stated a claim, due to the deference given to *pro se* complainants.

Correctional Center, in July of 1994.⁵ Therefore, it appears that Hancock has failed to comply with the Governmental Tort Claims Act, and that this cause of action should be dismissed.

However, the Court also notes that Colliver allegedly made repeated slanderous comments over a period of time. Given the ongoing nature of the comments and the fact that the one-year deadline passed only a few weeks ago, the Court dismisses the slander claim without prejudice. The Court will allow the claim to be reasserted if Plaintiff has met the requirements of the Governmental Tort Claims Act and can show that the elements of an action for slander have been satisfied.⁶

Because Plaintiff has requested money damages only with regard to his pendent claim of slander, Defendants' request for sovereign and qualified immunity is moot.

II. MOTION FOR APPOINTMENT OF COUNSEL

Hancock requests that the Court appoint counsel pursuant to 28 U.S.C. § 1915(d). In the case of an indigent plaintiff, the Court has discretion to appoint an attorney to represent the indigent

⁵Plaintiff alleges that Colliver stated, "If you want me to get off your ass, you need to shave your head and beard and proclaim Jesus Christ as your savior." Moreover, Colliver allegedly stated that he would ensure that Plaintiff's drug tests came back positive and that he would call Plaintiff's rabbi and make Plaintiff "look real bad in front of him."

⁶While verbal harassment does not state a claim under § 1983, Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987), such incidents may be admissible as evidence of Hancock's constitutional claims.

person where, under the totality of circumstances of the case, the denial of counsel would result in a fundamentally unfair proceeding. McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985); Swazo v. Wyoming Dep't of Corrections State Penitentiary Warden, 23 F.3d 332, 333 (10th Cir. 1994). The Tenth Circuit Court of Appeals recently reiterated that "if the plaintiff has a colorable claim then the district court should consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts." Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838).

After carefully reviewing the merits of Hancock's claims, the nature of the factual issues involved, Hancock's ability to investigate the crucial facts, the probable type of evidence, Hancock's capability to present his case, and the complexity of the legal issues, the Court believes counsel should be appointed in this case. See Rucks, 57 F.3d at 979 (citations omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981). Therefore, Hancock's Motion for Appointment of Counsel is hereby granted.⁷

⁷The Court does not address here issues related to reasonable costs and expenses incurred by appointed counsel but will examine such questions in the near future and would receive any suggestions or motions from the parties in this regard if and when deemed necessary.

III. MOTION FOR RECONSIDERATION

Lastly, Hancock requests the Court to reconsider its order denying his motion for a temporary restraining order which the Court liberally construes as one for a preliminary injunction. See Fed. R. Civ. P. 65(b); see also Levas and Levas v. Village of Antioch, 684 F.2d 446, 448 (7th Cir. 1982) (where defendant has notice and contests the motion, the application is properly treated as one for a preliminary injunction). After carefully reviewing Plaintiff's motion for reconsideration, the Court concludes that judicial economy would be served if Plaintiff's motion for a preliminary injunction is denied without prejudice to it being reasserted after appointed counsel has had a chance to become familiar with this case. Accordingly, Plaintiff's motion for reconsideration is granted and Plaintiff's motion for a preliminary injunction is denied without prejudice.

IV. CONCLUSION

In summary, Defendants' motion to dismiss for failure to state a claim upon which relief may be granted (Docket #17) is granted as to the pendent claim of slander and denied in all other respects. Plaintiff's pendent claim of slander is hereby dismissed except that the claim may later be reasserted in a manner consistent with this Order. Plaintiff's motion for appointment of counsel (Docket #15) is granted and the Court hereby appoints Maynard Ungerman as Plaintiff's attorney in this matter. The Clerk shall provide appointed counsel a copy of the file in this case, without charge,

as soon as possible. Plaintiff's motion for reconsideration (Docket #15) is granted and the motion for a temporary restraining order (Docket #3), which the Court construed as one for a preliminary injunction, is hereby denied without prejudice to it being reasserted with the aid of appointed counsel.

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


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 24 1995

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

CHARLES A. McCOMBS,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
Secretary of HHS,)
)
Defendant.)

Case No. 93-C-1037-H

ENTERED ON DOCKET

DATE AUG 25 1995

ORDER

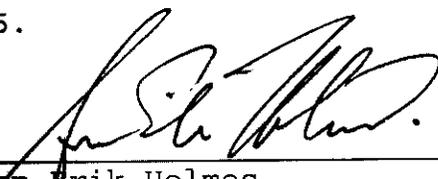
Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts the Report and Recommendation (docket #10) remanding the Secretary's determination that Mr. McComb's disability ended January 20, 1992 for further consideration.

IT IS SO ORDERED.

This 23RD day of August, 1995.


Sven Erik Holmes
United States District Judge

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

THE UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Civil Action No. 95-C-338-H

Judge Sven Erik Holmes

FRANK KEITH, COMMISSIONER OF)
DRAINAGE DISTRICT NO. 12 OF TULSA)
COUNTY and the BOARD OF COUNTY)
COMMISSIONERS OF TULSA COUNTY, on)
Behalf of Tulsa County and as *Ex*)
Officio Commissioners of Drainage)
District No. 12)

ENTERED ON DOCKET

DATE AUG 25 1995

Defendants.)

FILED

AUG 24 1995

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

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

At a conference held August 18, 1995, the Plaintiff, United States of America, appearing by telephone by Counsel, Jeannine R. Lesperance, and the Defendant, Board of County Commissioners of Tulsa County, Oklahoma, appearing by Dick A. Blakeley, attorney for Defendant, Board of County Commissioners of Tulsa County, Oklahoma, respectfully moved the Court to enter judgment against the Board of County Commissioners. The Court finds that the Board of County Commissioners has confessed judgment in this case in favor of the United States in the amount of \$175,000. Based upon that confession of judgment, the Court holds that the United States is entitled to judgment against the Board of County Commissioners in the amount of \$175,000, with interest at the rate prescribed by 28 U.S.C. § 1961.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES OF AMERICA

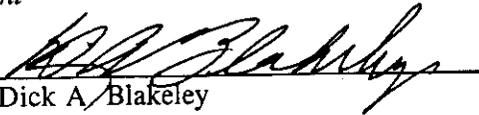
Plaintiff

By: 

Jeanine R. Lesperance, Esq.
Trial Attorney
United States Department of Justice
Civil Division
Commercial Litigation Branch
Attorney for Plaintiff

THE BOARD OF COUNTY COMMISSIONERS
OF TULSA COUNTY, OKLAHOMA

Defendant

By: 

Dick A. Blakeley
Assistant District Attorney
Attorney for Defendant
Board of County Commissioners
of Tulsa County, Oklahoma

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

FILED

AUG 24 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE ROCKLAND CORPORATION,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
EAGLE INVESTMENTS, INC.,)
a foreign corporation,)
)
Defendant.)

Case No.: 95-C-0058-H

ENTERED ON DOCKET

DATE AUG 25 1995

STIPULATION AND ORDER OF DISMISSAL

Pursuant to Fed.R.Civ.P. Rule 41 (a) and (c), plaintiff The Rockland Corporation, and defendant Eagle Investments, Inc., (collectively the "parties"), by their respective attorneys, stipulate and agree that the within action, including each and every claim of the plaintiff therein, be dismissed with prejudice and without costs to any of the parties.

Dated: August 11, 1995

By: 
Gerald L. Hilsher, OBA #4218
RICHARDSON & STOOPS
6846 S. Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674

ATTORNEY FOR PLAINTIFF,
THE ROCKLAND CORPORATION

Dated: Aug 18, 1995

By: 

Richard W. Gable, OBA #3191
GABLE & GOTWALS
2000 Bank IV Center
15 W. 6th Street
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEY FOR DEFENDANT,
EAGLE INVESTMENTS, INC.

IT IS SO ORDERED

Dated: August 24, 1995

SEVEN ERIK HOLMES

JUDGE OF THE UNITED STATES
DISTRICT COURT

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

FILED

AUG 24 1995

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

EDDIE L. ANDERSON,

Plaintiff,

vs.

UNITED STATES FIDELITY AND
GUARANTY COMPANY, a foreign
corporation,

Defendant.

No. 94-C-1193-B

ENTERED ON DOCKET

DATE AUG 25 1995

CERTIFICATION OF QUESTION OF STATE LAW

Pursuant to Okla. Stat. tit. 20, §§ 1601-11 (1991), the United States District Court for the Northern District of Oklahoma certifies the following question to the Supreme Court of the State of Oklahoma, which may be determinative of the above-captioned case now pending before this court, and for which there appears to be no controlling authority:

Does Oklahoma law recognize the tort of bad faith for unjustified denial of workers' compensation insurance coverage or the assertion of a groundless defense, based on alleged damages incurred for the carrier's conduct that predated the claimant's worker's compensation award?

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Eddie L. Anderson ("Anderson") was injured while on the job when an object thrown from a lawn mower struck his left eye. At the time of this injury, Defendant United States Fidelity and Guaranty Company ("USF&G") was the workers' compensation

insurer for Anderson's employer, the L.B. Jackson Drilling Company. Anderson filed a workers' compensation claim and was adjudged on March 18, 1988, to be 100 percent permanently partially disabled in his left eye.¹

On April 1, 1991, Anderson filed a Motion to Reopen his workers' compensation claim, alleging that he had suffered a change of condition for the worse, which required medical treatment for revision of the prosthetic device implanted in his eye. On April 29, 1991, USF&G contested Anderson's claim, and also filed an objection to the medical report attached to the Motion to Reopen. On January 21, 1992, USF&G accepted Anderson's change of condition as compensable, and authorized medical treatment.

Anderson contends that, between April 29, 1991, and January 21, 1992, USF&G committed the torts of bad faith and intentional infliction of emotional distress by contesting his claim. Anderson bases this assertion, in part, on the fact that USF&G's own medical expert found in July 1991 that Anderson's condition had worsened, but USF&G failed to authorize treatment for another six months. Anderson contends that USF&G delayed authorization in order to coerce him into settling his claim via "an unfair joint petition".

On June 17, 1992, the Workers' Compensation Court awarded Anderson temporary total disability benefits ("TTD") of \$2,224.34 for the period of February 26, 1992, through June 1992. The Worker's Compensation Court later awarded Anderson TTD of \$5,450.86

¹The manner in which USF&G handled Anderson's workers' compensation claim from its inception until April 1991 is not at issue in this lawsuit.

for the period of June 1991 through February 1992. USF&G promptly paid the Worker's Compensation Court awards; Anderson's claims of bad faith and intentional infliction of emotional distress arise solely from USF&G's actions taken before the 1992 Worker's Compensation Court awards were issued.²

In Goodwin v. Old Republic Ins. Co., 828 P.2d 431 (Okla. 1992), the court noted that an "insurer's implied-in-law duty of good faith and fair dealing extends to all types of insurance companies and insurance policies" and concluded that a bad faith tort action against an employer's insurance company would not fall within the exclusive purview of the Workers' Compensation Court. Id. at 432-35. The Goodwin court assumed that a workers' compensation insurance company may be subject to a bad faith claim, but held that the facts of the case did not support such an award. Id. at 435.

USF&G alleges that bad faith liability only applies when there is a failure to pay an award of the Workers' Compensation Court. USF&G states that Oklahoma does not recognize a bad faith cause of action arising out of the manner in which an insurer litigates a workers' compensation claim.³

²The issue of intentional infliction of emotional distress is not involved in this certified question.

³The Court acknowledges that it is not bad faith for an insurer to resort to a judicial forum to settle legitimate disputes as to the validity or amount of an insurance claim. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1978). The essence of the tort of bad faith, as it is recognized in Oklahoma, is the unreasonableness of the insurer's actions. McCorkle v. Great Atlantic Ins. Co., 637 P.2d 583 (Okla. 1981). See also Manis

USF&G points to Whitson v. Oklahoma Farmers Union Mutual Ins. Co., 889 P.2d 285 (Okla. 1995), in which the plaintiff sued his employer for bad faith, based upon the employer's conduct before an award was entered in Workers' Compensation Court in the plaintiff's favor. While Whitson involves an employee's suit against his employer instead of against the worker's compensation insurance carrier, Whitson applied the Goodwin rationale. Whitson, in explaining Goodwin, stated that

We also held in Goodwin that "a bad faith claim is separate and apart from the work relationship, and it arises against the insurer only after there has been an award against the employer" ... The same limitation applies where the employer's bad faith in the handling of the claim is concerned.

Id. at 287. The Whitson court then denied the bad faith claim, because the claim "involves [the employer's] conduct before the Workers' Compensation Court entered any award against [the employer]. Thus, [the employer's] acts were not actionable and could not have been so." Id. at 287-88. The Whitson court further noted that

There is no reason to allow a tort cause of action for a too aggressive defense of a workers' compensation claim ... A successful plaintiff in a personal injury action certainly has no cause of action against the defendant for the defendant's unsuccessful attempts to defeat of [sic] action against the defendant for the defendant's unsuccessful attempts to defeat the suit.

The Oklahoma Supreme Court recently addressed a bad faith

v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984); Oulds v. Principal Mutual Life Ins. Co., 6 F.3d 1431 (10th Cir. 1993).

claim against a worker's compensation insurer once more, however. In McGehee v. State Insurance Fund, 1995 WL 422090 (Okla. July 18, 1995), the plaintiff sought damages based on the defendant's pre-award conduct.⁴ The McGehee court, in dicta, stated that:

[a]ssuming that the employee's alleged bad faith claim arose at the latest possible date when he knew or should have known that the [defendant] was acting in bad faith when it denied his claim, it accrued sometime prior to the Workers' Compensation Court's issuance of its order finding that the [defendant] was estopped from denying McGehee's coverage under the ... policy. Id. at *2.

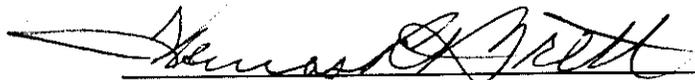
In the McGehee dicta, the Oklahoma Supreme Court appears to recognize a bad faith cause of action for pre-award conduct, although Whitson's construction of Goodwin indicates otherwise. Because of the absence of a controlling state decision providing clear precedent on these issues, the court respectfully requests the Oklahoma Supreme Court to address the question presented, which will govern the ultimate disposition of the case.

The Clerk of this court shall submit a copy of this Certification to the Clerk of the Supreme Court for the State of Oklahoma. The Clerk also shall transmit a copy of this Certification to counsel for all parties to the proceedings in this court. The costs and fees of this Certification shall be equally divided between the parties. Pursuant to Okla. Stat. tit. 20, § 1605, the Supreme Court for the State of Oklahoma may request all or any portion of the record that it deems necessary to answer the

⁴The McGehee court found that the plaintiff's claim was barred by the applicable limitations period.

certified question. Copies of any documents the Oklahoma Supreme Court requests shall be forwarded by the Clerk of this court.

IT IS SO ORDERED this 23rd day of August, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 24 1995

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

EDDIE L. ANDERSON,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES FIDELITY AND)
 GUARANTY COMPANY, a foreign)
 corporation,)
)
 Defendant.)

No. 94-C-1193-B

ENTERED ON DOCKET
DATE AUG 25 1995

ORDER

Before the Court is Plaintiff Eddie L. Anderson's Motion for New Trial or in the alternative Motion to Amend Order (Docket #14). Anderson's Motion for New Trial is granted. The Court hereby sets aside its Order of July 5, 1995, granting summary judgment in favor of Defendant United States Fidelity and Guaranty Company. The Court will reconsider the motion after receiving an answer to the question certified to the Oklahoma Supreme Court in this case.

IT IS SO ORDERED this 23rd day of August, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

ROBERT BELTZ and
LINDA BELTZ,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY
COMPANY,

Defendant.

No. 95-C-327-K

AUG 24 1995

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

ENTERED ON DOCKET

DATE AUG 25 1995

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the Plaintiffs, Robert and Linda Beltz, and the Defendant, State Farm Fire and Casualty Company, and hereby stipulate that the above styled case be dismissed with prejudice. Each party will bear their own costs and attorney's fees.

SELMAN AND STAUFFER, INC.

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PAUL B. HARMON, OBA #14611
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NORTHCUTT, CLARK, GARDNER, HRON
& POWELL
P.O. Drawer 1669
Ponca City, OK 74602-1669

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

FILED

KIMBERLEY DURYEA,

Plaintiff,

vs.

ROYAL VISTA PLASTICS, INC.,
an Oklahoma corporation,

Defendant.

AUG 24 1995

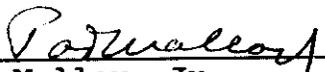
Richard M. Lawrence, Clerk
Case No. 95-1037-E
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 25 1995

JOINT STIPULATION OF PARTIAL DISMISSAL WITH PREJUDICE

In conjunction with the proceedings before Magistrate Judge Joyner, both parties request that Plaintiff's causes of action arising under Title VII of the Civil Rights Act of 1964, as amended, her claim for intentional infliction of emotional distress, her claim for assault and battery, her claim for invasion of privacy, and her claim for false imprisonment be dismissed with prejudice. As such, the only remaining claim is one for the common law tort of wrongful discharge in violation of the public policy.

WHEREFORE, all claims arising in this lawsuit are dismissed with prejudice EXCEPT Plaintiff's claim for wrongful discharge in violation of the public policy.


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Kimberley Duryea
Plaintiff

Attorney for Plaintiff


Kristen L. Brightmire
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320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant

88
8-22-95

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

FILED

AUG 24 1995

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

LC

THE ROCKLAND CORPORATION,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

EAGLE INVESTMENTS, INC.,)
a foreign corporation,)

Defendant.)

Case No.: 95-C-0058-H

ENTERED ON DOCKET

DATE AUG 25 1995

STIPULATION AND ORDER OF DISMISSAL

Pursuant to Fed.R.Civ.P. Rule 41 (a) and (c), plaintiff The Rockland Corporation, and defendant Eagle Investments, Inc., (collectively the "parties"), by their respective attorneys, stipulate and agree that the within action, including each and every claim of the plaintiff therein, be dismissed with prejudice and without costs to any of the parties.

Dated: August 11, 1995

By: 

Gerald L. Hilsher, OBA #4218
RICHARDSON & STOOPS
6846 S. Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674

ATTORNEY FOR PLAINTIFF,
THE ROCKLAND CORPORATION

Dated: Aug 18, 1995

By: 
Richard W. Gable, OBA #3191
GABLE & GOTWALS
2000 Bank IV Center
15 W. 6th Street
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEY FOR DEFENDANT,
EAGLE INVESTMENTS, INC.

IT IS SO ORDERED

Dated: August 24, 1995


JUDGE OF THE UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEBBIE SUE REDMAN aka DEBRA S.
REDMAN aka DEBBIE S. REDMAN aka
DEBBIE SUE PACK; DOROTHY SUE
PACK; EULAN D. PACK; CENTURY
XXI EAST, INC.; COMMONWEALTH
MORTGAGE CORPORATION OF
AMERICA successor by merger to First
Continental Mortgage Co.; FEDERAL
NATIONAL MORTGAGE
ASSOCIATION; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

AUG 24 1995

ENTERED ON DOCKET

DATE AUG 25 1995

Richard M. Lavers, Jr., Clerk
DISTRICT COURT

Civil Case No. 95-C 507K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23 day of August,
~~Sept~~

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 Defendants, Commonwealth Mortgage Corp. of America successor by merger to First Continental Mortgage Co. and Federal National Mortgage Association, appear not, having previously filed their disclaimers; and the Defendants, Debbie Sue Redman aka Debra S. Redman aka Debbie S. Redman aka

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

Debbie Sue Pack, Dorothy Sue Pack, Eulan D. Pack, and Century XXI East, Inc.,
appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Debbie Sue Redman aka Debbie S. Redman aka Debbie S. Redman aka Debbie Sue Pack** will hereinafter be referred to as ("**Debbie Sue Redman**"). The Defendant, **Debbie Sue Redman**, is a single, unmarried person.

The Court being fully advised and having examined the court file finds that the Defendant, **Debbie Sue Redman**, acknowledged receipt of Summons and Complaint on or about July 6, 1995; that the Defendants, **Dorothy Sue Pack and Eulan D. Pack**, each waived service of Summons on June 19, 1995; that the Defendant, **Century XXI East, Inc.**, waived service of Summons on June 6, 1995; and that the Defendant, **Federal National Mortgage Association**, waived service of Summons on June 12, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on June 14, 1995; that the Defendant, **Commonwealth Mortgage Corp. of America** successor by merger to **First Continental Mortgage Co.**, filed their Disclaimer on June 12, 1995; that the Defendant, **Federal National Mortgage Association**, filed its Disclaimer on June 26, 1995; and that the Defendants, **Debbie Sue Redman, Dorothy Sue Pack, Eulan D. Pack, and Century XXI East, Inc.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Two, (2), Block Eight (8), CENTURY 21 EAST, to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on May 24, 1977, the Defendant, Debbie Sue Redman (then Debbie Sue Pack), executed and delivered to FIRST CONTINENTAL MORTGAGE CO. her mortgage note in the amount of \$24,500.00, payable in monthly installments, with interest thereon at the rate of eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Debbie Sue Redman (then Debbie Sue Pack), a single person, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. a mortgage dated May 24, 1977, covering the above-described property. Said mortgage was recorded on June 1, 1977, in Book 4266, Page 2707, in the records of Tulsa County, Oklahoma. This Mortgage was re-recorded on June 17, 1977 in Book 4269, Page 2393, in the records of Tulsa County, Oklahoma to reflect the amount of mortgage in note description.

The Court further finds that on October 27, 1977, FIRST CONTINENTAL MORTGAGE CO. assigned the above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on November 17, 1977, in Book 4295, Page 1242, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 30, 1991, Federal National Mortgage 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 August 19, 1991, in Book 5343, Page 536, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1990, the Defendant, Debbie Sue Redman, 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 June 1, 1991, July 1, 1991, February 1, 1992, August 1, 1992, and May 1, 1993.

The Court further finds that the Defendant, Debbie Sue Redman, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Debbie Sue Redman, is indebted to the Plaintiff in the principal sum of \$31,908.67, plus interest at the rate of 8 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$23.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$9.00 which became a lien as of June 25, 1993; and a lien in the amount of \$9.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that **the Defendants, Debbie Sue Redman, Dorothy Sue Pack, Eulan D. Pack, and Century XXI East, Inc.**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that **the Defendants, Commonwealth Mortgage Corp. of America successor by merger to First Continental Mortgage Co. and Federal National Mortgage Association**, disclaim **any right**, title or interest in the subject property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, **acting on behalf** of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, **Debbie Sue Redman**, in the principal sum of \$31,908.67, plus interest at the rate of 8 percent per annum from March 20, 1995 until judgment, plus **interest** thereafter at the current legal rate of 5.89 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 \$41.00 for personal property **taxes** for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Debbie Sue Redman, Dorothy Sue Pack, Eulan D. Pack, Commonwealth**

Mortgage Corp. of America successor by merger to First Continental Mortgage Co., Federal National Mortgage Association, 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, **Debbie Sue Redman**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be **issued** to the United States Marshal for the Northern District of Oklahoma, **commanding him** to advertise and sell according to Plaintiff's election with or without appraisalment the **real property** involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, **County Treasurer, Tulsa County, Oklahoma, in the amount of \$41.00, personal property taxes** which are currently due and owing.

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

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

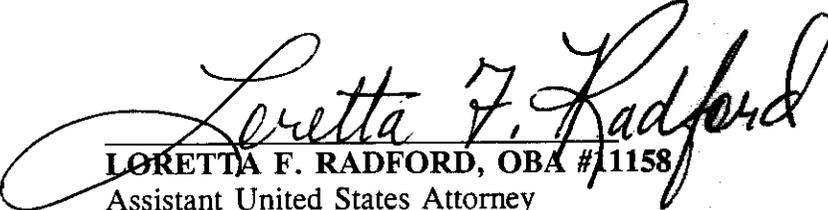
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described **real property**, under and by virtue of this judgment and decree, all of the Defendants and all **persons** claiming under them since the filing of the Complaint, be and they are forever barred **and**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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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

Judgment of Foreclosure
Civil Action No. 95-C 507K

LFR:lg

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

F I L E D

AUG 23 1995

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

LOUIS S. BARRETT,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

Case No. 94-C-17-B

ENTERED ON DOCKET

DATE AUG 24 1995

ORDER

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

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

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

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

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

evaluation process.² He concluded that claimant has the residual functional capacity to perform work related activities, except for work involving lifting more than 20 pounds occasionally or 10 pounds frequently, and suffers occasional chest pain about ten minutes at a time on a daily basis. He concluded that these impairments did not preclude claimant from performing his past relevant work as a painting supervisor.

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

- (1) The ALJ did not apply the correct legal standard when evaluating the claimant's pain.
- (2) The ALJ failed to properly evaluate the claimant's residual functional capacity and consider all his impairments in combination.

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

The claimant alleges disability onset on October 9, 1990. The claimant's insurance expired on December 31, 1990. Thus, the analysis to determine disability is limited to this time period. The ALJ cannot consider any treatment records beyond December 31, 1990 (TR 20-21).

Claimant alleges disability due to diverticulitis and chest pain (TR 106). The

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

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

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

medical evidence presents a history of heart problems beginning in September of 1987 when the claimant suffered a myocardial infarction which resulted in a quadruple coronary artery bypass graft (TR 163-187). On October 7, 1987, his doctor reported his heart rhythm was regular, with no murmurs, gallops, or extrasystoles (TR 239). Claimant reported no problems and the doctor found his heart rhythm regular on November 4, 1987, December 7, 1987, February 22, 1988, May 26, 1988, March 9, 1989, May 17, 1989, July 14, 1989, November 20, 1989, May 16, 1990, and July 23, 1990 (TR 233-238). In July of 1988, his doctor reported he was mowing the grass (TR 236) and on May 17, 1988 his doctor stated he was fishing and mowing the grass (TR 235).

In October 1990, the claimant complained of frequent lower abdominal pain to Dr. Gerald Zumwalt, one of his treating physicians (TR 188). He also complained of lower abdominal pain to Dr. Jerry First, another treating physician, in November 1990, and the doctor suggested that he had diverticulosis (TR 232). X-rays confirmed a diagnosis of diverticular disease of the colon (TR 244). He saw Dr. First in July, September and October of 1991 and reported feeling well and experiencing no pain (TR 230-231).

At the hearing on March 31, 1993, the claimant described the pain he had in 1990 as less severe than in 1991 and 1992 (TR 52). Claimant also admitted that his heart condition could be controlled with Nitroglycerin (TR 53). He contended he could only walk 100 yards without stopping to rest (TR 49) and could only stand for 15 minutes at a time (TR 51).

Claimant's first assertion is that the ALJ did not consider non-disabling pain which causes functional restrictions which could prevent the claimant from performing his past

relevant work. Claimant cites Ragland v. Shalala, 992 F.2d 1056, 1059 (10th Cir. 1993). There is a distinction to be made between the facts in this case and the facts in Ragland. The court in Ragland discussed the Secretary's burden at the fifth step of the sequential process. In this case, the court is concerned with the fourth step of the sequential process and the way in which the claimant's subjective allegations of pain were evaluated by the ALJ. The ALJ assessed claimant's allegations of pain according to the parameters established by Social Security Regulation 88-13:

When claimant indicates that pain is a significant factor of his/her alleged inability to work, and the allegation is not supported by objective medical evidence in the file, the adjudicator shall obtain detailed descriptions of daily activities by directing specific inquiries about the pain and its effects to the claimant, his/her physicians from whom medical evidence is being requested, and third parties who would be likely to have such knowledge.

The ALJ asked the claimant directly about his ability to work in 1990 and what his normal daily activities entail. The claimant related that he showered, drove to town to get the mail, and then watched T.V. for eight to ten hours a day (TR 40-41). He admitted he could ride a lawn mower for an hour or so at a time (TR 42-43). The claimant was asked if he had problems thinking or concentrating, and he answered that it was hard to concentrate for any period of time (TR 47). But when asked if he was able to follow the plot of a T.V. show, he answered in the affirmative, if the program was "worth watching," such as a sporting event (TR 47). The ALJ encountered more inconsistencies in the claimant's testimony when he asked the claimant about his use or non-use of a cane.

ALJ: "Did you use a cane or a crutch --."

Answer: "No, sir."

ALJ: " -- in 1990"?

Answer: "No, sir."

ALJ: "You need to"?

Answer: "I have used a cane **some**, sir. Yes, sir I do use a cane **occasionally**."

ALJ: "Did you use one in 1990"?

Answer: "Some, yes, sir."

(TR 50). The claimant went on to **state** that he used a cane once a week or so during 1990 (TR 51).

The ALJ asked the claimant **about** the pain he experienced during the period in which he was last insured (TR 52). **The claimant** testified that he was having chest pain in 1990, but when the ALJ asked if it was mild, moderate, or severe, the claimant responded that it was not as severe as in 1991 or 1992 (TR 52). As far as abdominal pain is concerned, the claimant testified **that** when he first experienced the pain in 1990, he would have it two to three weeks out **of a month** (TR 59). This testimony by the claimant is inconsistent with the medical record.

Claimant points out that pain, **even** if not disabling, is a nonexertional impairment to be taken into consideration, **unless there** is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments **can support** a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain **must be** accompanied by medical evidence and may be

disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

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

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had abdominal and heart problems producing pain, the ALJ was required to consider the

assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ correctly concluded that the claimant's subjective allegations of pain were not supported by the record (TR 21). The ALJ pointed to inconsistencies in claimant's testimony, such as his claim he can lift no more than 5 pounds, but his admission he lifts his 25-pound grandchild (TR 21, 39). The ALJ noted claimant's heart condition was under control while he was last insured (TR 21). The ALJ noted that Dr. First completed a residual functional capacity evaluation of claimant on February 2, 1993, which found claimant could sit no more than four hours, stand no more than two hours, walk no more than one hour, and lift no more than 21 to 25 pounds infrequently (TR 267-269). However, the ALJ correctly concluded that these findings, even if credible, were made more than two years after claimant's insured status expired (TR 21).

The ALJ questioned the claimant on many of the points outlined in Luna. He repeatedly asked the claimant about his ability to lift, walk, stand, and sit during the course of a normal day in 1990 (TR 39-44). The ALJ asked the claimant about any medications he was taking and their side effects, if any (TR 47-48). Claimant's answers were inconsistent at times, as already noted, and not supported by the medical evidence (TR 50, 56-57).

The ALJ also found that smoking against doctor's orders was one indicator that claimant was not entirely credible (TR 21-22). The courts have found that smoking following a doctor's advice to discontinue will mitigate against a claim of disability. Sias v. Secretary of HHS, 861 F.2d 475, 480 (6th Cir. 1988). In this instance, the ALJ did not cite the claimant's continued smoking (TR 44) as the reason for finding claimant was not under a disability. Rather, he saw it as one factor in a series of discrepancies which discredited the claimant.

The claimant next contends that the ALJ failed to properly evaluate the claimant's residual functional capacity. Specifically, claimant alleges that the ALJ did not consider the limiting effects caused by the claimant's combined impairments. Claimant's second allegation of error deals with the same issue as alleged error one, the issue of credibility. Claimant argues that the ALJ cannot find the claimant's allegations of pain credible and then disregard them because they are not substantiated by the medical evidence and cites Huston v. Bowen, 838 F.2d at 1131. However, the Huston court discussed the issue in relation to the Secretary's burden at the fifth step of the sequential evaluation process, stating:

Although the medical evidence alone may be insufficient to establish the disabling character of the [claimant's] pain, if the nonmedical evidence of pain is credible, it would preclude the mechanical applications of the grids and, in this situation, [would] seem to dictate a finding of disabling pain when combined with the medical evidence. If on the other hand, the nonmedical evidence is contradicted by the medical evidence or is otherwise not credible, then the ALJ would have reason to apply the grids.

Thus, claimant's assertion that the ALJ cannot ignore non-medical evidence is true,

but does not apply to the case at hand. The ALJ in this case found that the non-medical evidence offered by the claimant was not credible and contradicted the medical evidence offered. The claimant in this case did not make a prima facie showing of disability which prevents him from engaging in his prior work activity. The only evidence that claimant experienced pain from his heart condition and pain from his abdominal condition simultaneously is from claimant's testimony at the oral hearing. The inconsistencies in that testimony have already been noted (TR 55-57). There is some evidence that claimant now experiences pain from the two conditions simultaneously, but only the evidence which relates to the period last insured may be considered (TR 21).

Claimant contends that the ALJ failed to consider claimant's age, education, and transferable skills when determining claimant's residual functional capacity and whether he was disabled. The Medical Vocational Guidelines "reflect the analysis of the various vocational factors (i.e. age, education, and work experience) in combination with the individual's residual functional capacity (used to determine his or her maximum sustained work capability for sedentary, light, medium, heavy, or very heavy work) in evaluating the individual's ability to engage in substantial gainful activity in other than his or her vocationally relevant past work" (Part 404, Subpart P, Appendix 2, 200.00 (a)). These guidelines only apply at the fifth step of the evaluation process.³

In the instance case, the ALJ came to his conclusion after evaluating "claimant's

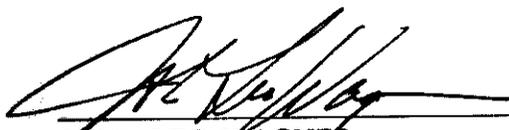
³ In his reply brief, claimant asserts that he is closely approaching advanced age, that his education is limited or less, and that his skills are not transferable, and, according to 201.09, he should be determined disabled. Rule 201.09 pertains to individuals whose maximum sustained work capability is limited to sedentary work. The ALJ concluded that the claimant's maximum sustained work capability was light work (TR 78) and his work as a supervisory painter was determined to be skilled work (TR 68). Thus, the guideline claimant cites does not apply in his case.

signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions and the combined impact on the claimant's daily activities" (TR 22).

It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d at 517. The ALJ properly considered all of the plaintiff's objective complaints of pain, made specific findings, and found the plaintiff's allegation of pain was not consistent with the medical evidence and the medical evidence did not support a finding of disability (TR 22-23).

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

Dated this 22nd day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Barrett

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

FILED

LOUIS S. BARRETT,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

AUG 23 1995

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

Case No: 94-C-17-W

ENTERED ON DOCKET
DATE AUG 24 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 23, 1995.

Dated this 23rd day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

JAMIE K. W. BROWN,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY ALAN GARNER, et al.,)
)
 Defendants.)

No. 94-C-667-BU

AUG 2 8 1995

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

ENTERED ON DOCKET
DATE AUG 24 1995

ORDER

Plaintiff, a prisoner appearing pro se, brings this Bivens¹ action against Larry Alan Garner and William Robert Taylor, Special Agents with the Criminal Investigations Division of the Internal Revenue Service, and Robert L. Thompson, Postal Inspector. He alleges excessive use of force in the course of his arrest by virtue of being held at gunpoint and having his legs repeatedly kicked apart during a search and pat down after he advised the agents of a medical condition. He also alleges failure to stop questioning as soon as Plaintiff asserted his right to counsel under the Fifth Amendment. Defendants have moved for summary judgment to which Plaintiff has objected. For the reasons stated below, Defendants' motion for summary judgment should be granted.

I. BACKGROUND

The following facts are undisputed.

In November 1993, Garner was assigned to investigate Plaintiff's alleged filing of false personal income tax returns

¹ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

with the IRS, and request for false refunds while he was an inmate at the Adair County Jail. On December 14, 1993, Defendants inserted a decoy income tax refund check in the post office box of jailer Janet Fourkiller which Defendants suspected of being involved. Defendants knew that Plaintiff had freedom of movement as he was a jail trustee and that he had access to kitchen utensils by virtue of his work in the jail's kitchen.

At approximately 3:45 p.m., Plaintiff removed the IRS decoy check from the mailbox and headed back to the Courthouse building. As Taylor reached the entrance of the Courthouse, Plaintiff ran past him through the door and up the stairwell, approximately four flights of stairs. Shortly thereafter, Taylor found Plaintiff next to the jail door, tearing open the refund envelope. Taylor drew his weapon, as he was uncertain whether Plaintiff was armed with kitchen knives or other weapons, and advised him that he was a law enforcement officer. Taylor then ordered Plaintiff to put both arms against the wall and to spread his legs apart. Plaintiff refused to comply with the latter request because he had an hernia. Taylor replied that he could not believe Plaintiff was unable to spread his legs because he had just observed him run from the Post Office and up four flights of stairs. Taylor then forcibly spread Plaintiff's leg apart to prevent Plaintiff from escaping and in order to permit Thompson to conduct a pat down. Taylor hooked his right foot around Plaintiff's right ankle and physically moved the right leg apart and back away from the wall. This procedure was repeated on the left leg.

Thereafter, Plaintiff was interviewed in a room within the jail. Thompson advised him of his constitutional rights relating to self-incrimination and right to counsel and Plaintiff signed PS form 1057, indicating that he understood his rights and was willing to answer questions. After answering several questions, Plaintiff informed the agents he did not want to answer any more questions at which time all questioning stopped except for a few comments by Taylor about the discrepancy in Plaintiff's story.

II. SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting

affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

III. ANALYSIS

In seeking summary judgment on Plaintiff's excessive force claim, Defendants rely in part upon the defense of qualified immunity. In Flanagan v. Munger, 890 F.2d 1557, 1567 (10th Cir. 1989), the Tenth Circuit Court of Appeals succinctly explained the qualified immunity standard:

Under Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818, 102 S.Ct. at 2738. The qualified immunity standard articulated above focuses on the objective legal reasonableness of an official's conduct measured against clearly established law at the time he acted. Id. In order to strip an official of qualified immunity for violating an individual's constitutional right, "[t]he contours of the right must be sufficiently clear that a reasonable official would

understand that what he is doing violated that right."
Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034,
3039, 97 L.Ed.2d 523 (1987).

When a defendant moves for summary judgment on the basis of qualified immunity, "the burden is on the plaintiff to marshal facts showing that (1) the defendants' conduct violated the law, and (2) the law was clearly established when the violation occurred." Applewhite v. United States Air Force, 995 F.2d 997, 1000 (10th Cir. 1993), cert. denied, 114 S.Ct. 1292 (1994). Once a plaintiff endeavors to make such a showing, a defendant "must then establish that no material facts preclude summary judgment on the basis of qualified immunity." Id.

In the instant case, Plaintiff has not met his burden of establishing that Defendants' conduct in the course of the arrest violated the "reasonableness" standard of the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 395 (1989). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397.

This Court must examine the particular facts and circumstances of the case, to determine whether the force used exceeded "the . . . force . . . necessary" to effect the arrest from the perspective of an objectively reasonable officer at the scene, with due "allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense,

uncertain, and rapidly evolving." Id. at 397. This inquiry must be made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and with "careful attention to the facts and circumstances of each particular case." Id. at 396. Three criteria have been identified as relevant to this inquiry: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Id. at 396.

Construing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff has not demonstrated a factual issue as to whether the force applied by Taylor was excessive.² Taylor's actions in spreading Plaintiff's legs meet the objective reasonableness test. Taylor was apprehending a county inmate who could have been armed and dangerous by virtue of his trustee status and access to kitchen knives. Plaintiff had twice refused to spread his legs and Taylor found suspect Plaintiff's excuse concerning his hernia because he had just observed him run up several flights of stairs at a rapid pace. Moreover, Taylor's attention at the time of the arrest was diverted to an unknown individual who opened the jail door without an uniform. Based on these circumstances, it is clear that officer Taylor's acts designed to spread apart Plaintiff's legs as quickly as possible were reasonable. Therefore, Defendants are entitled to

² Plaintiff has neither raised any genuine issues of material fact in his response nor submitted counter-affidavits as set out in the April 26, 1995 order.

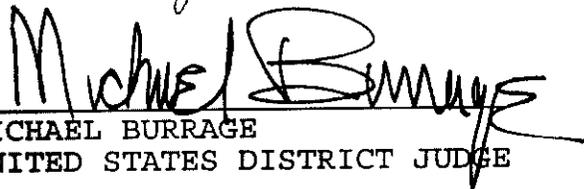
qualified immunity on Plaintiff's claim that his fourth amendment rights were violated during the course of his arrest.

With respect to his second claim, Plaintiff alleges that Defendants did not stop questioning him after he invoked his Fifth Amendment right to counsel. The summary judgment evidence demonstrates otherwise. Taylor stopped all questioning as soon as Plaintiff invoked his right to counsel. Taylor's subsequent comments about the inconsistencies in Plaintiff's story do not amount to questioning. Accordingly, Defendants are entitled to judgment as a matter of law on this claim as well.³

III. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' motion for summary judgment (docket # 10) is hereby granted.

SO ORDERED THIS 21st day of August, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

³ To the extent Plaintiff is challenging the propriety of his questioning or of admitting into evidence his responses, the Court notes that these arguments are not before this Court as this is not a habeas action.

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

FILED

JAMIE K. W. BROWN,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY ALAN GARNER, et al.,)
)
 Defendants.)

No. 94-C-667-BU

AUG 23 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 24 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of Defendants Larry Alan Garner, William Robert Taylor, and Robert L. Thompson, and against Plaintiff Jamie K.W. Brown. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

SO ORDERED THIS 21st day of August, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 23 1995

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

SHIPLEY, INHOPE & STRECKER,)
an Oklahoma partnership,)
)
Plaintiff,)

Case No. 94-C-607-B

v.)

BLUEWATER LEASING, INC.,)
a Michigan corporation;)
ROSS E. LINDSAY, an individual;)
JAY M. MONTROSE, an individual;)
and LARRY L. McANALLY, an)
individual,)
)
Defendants.)

ENTERED IN CLERK'S OFFICE
DATE AUG 24 1995

PARTIES' JOINT STIPULATION OF DISMISSAL

The Plaintiff and each of the Defendants hereby stipulate, pursuant to Rule 41(a)(1)(ii), Fed. R. Civ. P., for the dismissal of this Case with prejudice.

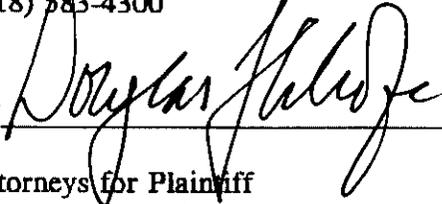
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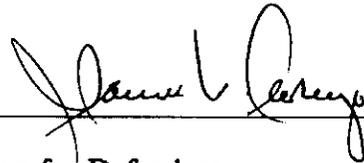
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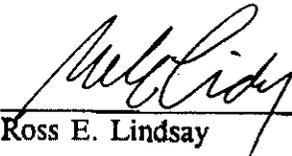
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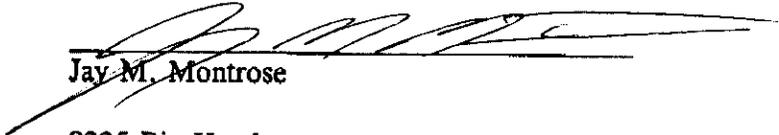
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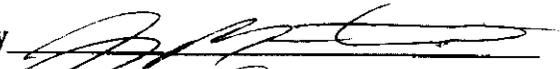
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BLUEWATER LEASING, INC.

By 

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FILED

AUG 23 1995

RL

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

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

MARK HOUSTON WHATLEY,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF BARTLESVILLE,)
 THOMAS R. HOLLAND, and)
 ROBERT E. METZINGER,)
)
 Defendants.)

Case No. 95-C-153-H

ENTERED ON DOCKET

DATE AUG 24 1995

ORDER

This matter comes before the Court on a Motion to Dismiss Plaintiff's claims against Thomas R. Holland ("Holland"), Chief of Police of Bartlesville, and Robert E. Metzinger ("Metzinger"), Bartlesville City Manager, or, in the alternative, a Motion for Summary Judgment, by Defendants Holland and Metzinger. Holland and Metzinger assert that they are entitled to judgment as a matter of law because Plaintiff's claims are barred by the doctrine of res judicata. The Court agrees.

The Oklahoma Supreme Court has explained the doctrine as follows:

a final judgment of a court of competent jurisdiction upon a matter properly before it concludes the matter as to the parties to the litigation and their privies and constitutes a bar to a new action upon the same cause of action, either before the same or any other tribunal. The most often stated rationale for the doctrine is that public policy requires there be an end to litigation.

Dearing v. Commissioners of Land Office, 808 P.2d 661, 664 (Okla. 1991). Whether res judicata bars Plaintiff's claims against Holland and Metzinger in this case turns on the application of a five part test consisting of (1) identity of subject matter; (2)

identity of parties; (3) identity of the cause of action; (4) the original court was of competent jurisdiction; and (5) the original judgment was on the merits. Id. at 664-65.

On August 14, 1992, Plaintiff filed a lawsuit against the City of Bartlesville; Holland; Metzinger; Jerry M. Maddux, Bartlesville City Attorney; Janice Linville, Bartlesville Director of Personnel; John Evans, Captain of the Bartlesville Police Department; and Eric Peterson, Police Officer of the City of Bartlesville alleging, among other things, that Plaintiff was deprived of substantive and procedural due process when his employment with the City of Bartlesville was terminated in violation of 42 U.S.C. § 1983. See Whatley v. City of Bartlesville, et al., Case Number 92-C-719-B.¹ On May 13, 1993, the court granted the Motion for Summary Judgment of Defendants Holland and Metzinger, which motion was based upon their asserted entitlement to qualified immunity. Judgment was entered on August 24, 1993.

In the instant case, Plaintiff has once again sued Defendants Holland and Metzinger for alleged deprivation of Plaintiff's civil rights in violation of 42 U.S.C. § 1983 stemming from Plaintiff's termination from the City of Bartlesville.² There is no dispute that the Court had jurisdiction over the original lawsuit (Case Number 92-C-719-B). Further, the judgment in the original action

¹ There is no dispute with regard to the facts which are material to the Court's res judicata determination.

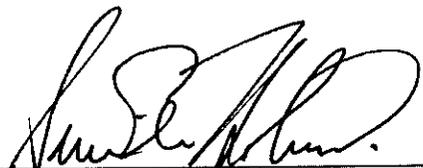
² At a hearing on August 16, 1995, Plaintiff agreed that the instant case poses identical legal and factual issues to the original case with respect to Defendants Holland and Metzinger.

dismissing Defendants Holland and Metzinger was on the merits. Thus, Defendants Holland and Metzinger have satisfied the five part test set out in Dearing, and, therefore, Plaintiff's claims against Defendants Holland and Metzinger in the current lawsuit are barred by the doctrine of res judicata and must be dismissed.

The Court hereby grants, in part, Defendants' Motion to Dismiss Plaintiff's claims against Defendants Holland and Metzinger or, in the alternative, Motion for Summary Judgment (Docket # 10).

IT IS SO ORDERED.

This 22ND day of August, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

AUG 23 1995

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

KIMBERLY DURYEY,)
)
)
Plaintiff(s),)
)
vs.)
)
ROYAL VISTA PLASTICS, INC.,)
)
)
Defendants(s).)

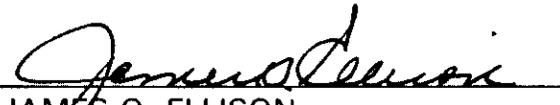
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Case No. 94-C-1037-E
DATE AUG 24 1995

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by March 1, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 22nd day of August, 1995.

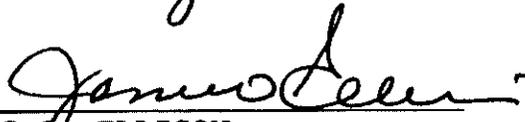


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

After carefully considering the record in this case, the Court concludes that a certificate of probable cause should not issue in this case because Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause is denied, see Fed. R. App. P. 22(b).

SO ORDERED THIS 21st day of August, 1995.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

AUG 21 1995

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

WILLIAM HENRY JAMERSON,)
)
 Petitioner,)
)
 vs.)
)
 DAN REYNOLDS,)
)
 Respondent.)

No. 94-C-291-B

ENTERED ON DOCKET

DATE AUG 23 1995

ORDER

This matter comes before the Court on Petitioner's notice of appeal filed on August 10, 1995. Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus. Petitioner is proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Gallagher v. Hannigan, 24 F.3d 68 (10th Cir. 1994); Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

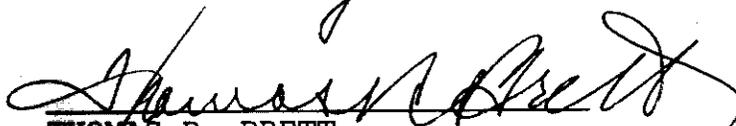
After carefully considering the record in this case, the Court concludes that a certificate of probable cause should not issue in

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this case because Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause (docket #16) is denied. See Fed. R. App. P. 22(b). Petitioner's motion for leave to proceed in forma pauperis on appeal (docket #15) is granted.

SO ORDERED THIS 21st day of Aug, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

GARY MEDLIN and DAWN MEDLIN)
)
 Plaintiffs,)
)
 v.)
)
 SHERWOOD CONSTRUCTION)
 COMPANY, INC. (now Sherwood)
 South, Inc.), MIDWEST)
 ENVIRONMENTAL SERVICES, INC.,)
 SINCLAIR OIL CORPORATION,)
 TEXACO INC., and WILDCAT)
 CONSTRUCTION COMPANY, INC.,)
)
 Defendants.)

Case No. 95-C-0106-H

ENTERED ON DOCKET

DATE AUG 23 1995

AUG 23 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER

This matter comes before the Court on a Motion to Remand to the District Court of Tulsa County by Plaintiffs Gary and Dawn Medlin. Defendant Texaco Inc. ("Texaco") filed the Notice of Removal with the Court on February 1, 1995 alleging that the Court has original jurisdiction over the action because of the complete diversity of citizenship among the parties and the statutory sufficiency of the amount in controversy, see 28 U.S.C. § 1332. On February 21, 1995, Plaintiffs filed the instant Motion to Remand on the basis that Texaco failed to comply with the statutory requirements that would grant the Court removal jurisdiction.

Title 28 Section 1446(b) of the United States Code provides, in pertinent part, that:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332

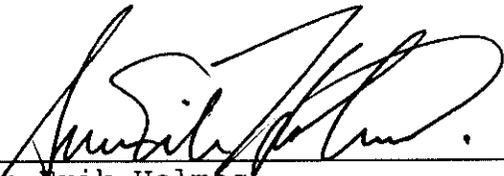
of this title more than 1 year after commencement of the action. (emphasis added)

The parties do not dispute that Plaintiffs commenced this action on May 20, 1993 in the District Court of Tulsa County. Based on the statute, the time for removal expired in May 1994. Thus, it is clear that Texaco's attempt to remove this lawsuit in February 1995 -- nearly two years after the commencement of the action -- was improper.

The Court hereby grants Plaintiffs' Motion to Remand the case to the District Court of Tulsa County (Docket # 6).

IT IS SO ORDERED.

This 22ND day of August, 1995.



Sven Erik Holmes
United States District Judge

FILED

AUG 22 1995

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

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

LENA M. HASLERIG,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 94-C-237-W

ENTERED ON DOCKET
DATE AUG 23 1995

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

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In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting more than 50 pounds occasionally or 25 pounds frequently and more than occasional stooping and crouching. He determined that claimant's past relevant work as a housekeeper and cook did not require the performance of work related activities precluded by these limitations, and therefore her impairments did not prevent her from performing her past relevant work. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's finding that claimant's past relevant work included work as a cook is not supported by substantial evidence, and therefore her only past relevant work is as a hotel housekeeper.
- (2) The ALJ's decision that claimant is not disabled is not supported by substantial evidence.

It is well settled that the claimant bears the burden of proving his disability that

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

prevents him from engaging in any **gainful** work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that the claimant has severe status post cervical surgery with chronic complaints of **back and neck** pain and hypertension with end organ involvement. She hurt her back at work in 1985 (TR 141) and underwent a right L3-4 hemilaminectomy with foraminotomy, a bilateral L4-L5 hemilaminectomy, and foraminotomies for lateral recess stenosis at the L3-4 and L4-5 levels (TR 204). In 1986, she underwent a posterior cervical decompression at C4-C5 by Dr. Chris Covington for neck problems (TR 204). She also underwent a left salpingo-oophorectomy in 1987 (TR 141, 204).

On May 5, 1990, she was in a motor vehicle accident and subsequently suffered pain in her neck, right arm, and right hip (TR 204). Dr. Karl Detwiler examined her and reviewed a magnetic resonance imaging of the cervical spine, finding spondylitic disease at C4-5, C5-6, and C6-C7 (TR 205). He also found foraminal stenosis on the right at C5-C6 and questionable spinal stenosis at C3-4 and C6-C7 (TR 205). A myelogram was performed, which showed a right C4-5 and C5-6 lateral nerve root compression, but no evidence of spinal stenosis (TR 205). A CT scan of the cervical spine following the myelographic procedure showed ventral bars at C4-5 and C5-6, worse at C5-6, which were causing compression, and a small ventral bar at C6-7, but no evidence of spinal stenosis (TR 205). A two-level anterior cervical discectomy at C4-5 and C5-6 with autologous bone graft fusion was done on June 12, 1990 (TR 218). Claimant was discharged four days later with "continued relief of muscle spasm and continued relief of pain." (TR 218).

On June 27, 1990, she was seen on follow-up and x-rays of the cervical spine showed the bone plugs to be in a nice position, but at the superior aspect of C5 there appeared to be a radiographic abnormality which looked "as if her bone may have crumbled a bit." (TR 177). The bone grafts were in excellent position (TR 177). By September 21, 1990, Dr. Detwiler reported the pain in her right arm resolved and improved strength in the arm, the incision was healed, and she was seen as "making an excellent recovery." (TR 199).

Claimant was followed thereafter by Comosu Clinic from April 30, 1991, through January 8, 1992 (TR 237-252). On April 17, 1991, Dr. Detwiler in a "To Whom It May Concern" letter, reported that she had been under his care for treatment of a spondylitic disease in her neck (TR 197). At that point, he stated that she could return to work with the restriction limiting her to lifting no more than 20 pounds (TR 197).

On June 17, 1991, Dr. Thomas Pickard examined her and his impression was that she had a normal exam (TR 246). Her extremities showed "good range in motion," muscle strength was equal bilaterally in the upper and lower extremities, her mentation was intact neurologically, and there were no areas of tension, tenderness, or limited motion of the back (TR 246). On September 17, 1991, she was treated for a cough and reported that her back pain was worse (TR 244). However, on November 8, 1991, she was seen for a cough and reported no pain (TR 240). The doctor reported that she had not had a physical for a year (TR 240).

On December 10, 1991, Dr. Jack Wolfe treated claimant for hypertension, and she did not have any other complaints (TR 238). A consultative examination was done on

February 28, 1992, by Dr. Steven Lee, who found several inconsistencies in the course of the physical history:

She appeared to be nervous and tense during the examination. My general impression was that she was not fully participating in the evaluation. There was some degree of resistance, but when I was able to get her to relax, I found that the examination was quite different. Initially, she tended to resist a great deal. On the passive range of motion evaluation, I obtained essentially normal evaluation by getting her to relax and cooperate. The objective evidence of pain is very difficult for me to evaluate, but at least with her claim of constant low back pain, constant pain in her hand, constant pain in the shoulder, constant pain in the neck, I saw no objective evidence of discomfort or distress. When she walked out of the office, I had an opportunity to observe her from a distance. There was a slight tendency for her to step on the right foot a fraction of a second shorter than she step on the left foot. In this sense, I could say that she demonstrated a very slight limp on the right foot.

(TR 256) (emphasis added). Dr. Lee noted that claimant said she could walk up and down 13 steps in her apartment and did not complain of pain doing so, but said she could walk less than a block (TR 253). He also noted that she claimed she could not drive because she could not turn her head well, and then it was determined that the claimant did not own a car, and her daughter did the driving (TR 253). She was able to go to church and share responsibility for laundering and cleaning her apartment (TR 253).

Claimant went to Hillcrest Medical Center on February 25, 1992 complaining of low back and neck pain which was increased by bending, standing, stooping and relieved somewhat by lying down (TR 263). She was placed on nonsteroidal anti-inflammatory medications and muscle relaxants (TR 263). She was seen back on March 11, 1992 still complaining that her pain had increased (TR 263). She was hospitalized March 16 through March 20, 1992, and received anti-inflammatory medication, muscle relaxants, and physical therapy twice a day (TR 263). She made "marked" progress to the point that she

was ready for discharge (TR 263). On March 19, 1992, an MRI showed:

entirely normal nerve conduction velocity studies in both lower extremities, without evidence of peripheral neuropathy. Needle EMG study is negative for any active, ongoing, radiculopathy, or chronic neurogenic changes.

(TR 267).

Two residual physical functional capacity assessments were done of claimant, one on September 19, 1990 and one on March 12, 1992 (TR 76-83, 112-119). In 1990, she was found able to lift 20 pounds occasionally, 10 pounds frequently, stand, sit, or walk 6 hours in an 8-hour day, and push/pull unlimited amounts (TR 77). In 1992, she was found able to lift 50 pounds occasionally, 25 pounds frequently, and stand, walk, or sit 6 hours in an 8-hour day (TR 113).

There is no merit to claimant's contention that the ALJ erred in finding that her past relevant work included work as a cook, since she worked as a cook until 1977, more than fifteen years ago, and then only for a few weeks in 1984. However, her current application for Title XVI benefits was filed on July 7, 1990 (TR 71). Thus, she clearly performed her past work as a cook within the "relevancy" requirement of fifteen years established by 20 C.F.R. § 416.965. Also, the fifteen year limitation has been seen by many courts as merely creating a "presumption of inapplicability" of skills and abilities acquired in work performed outside the 15-year period. Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Smith v. Secretary of Health & Human Servs., 893 F.2d 106, 109 (6th Cir. 1989). The fifteen years is a guide to assist an ALJ in determining if a claimant who has worked in a job requiring certain skills can still perform the job after the requirements of the workplace have changed. The regulation merely states that work

beyond the fifteen year period is "usually" not considered.

The vocational expert testified that plaintiff had acquired transferrable skills from her past relevant work as a cook, in such areas as food preparation, reading recipes and menus, and using various types of utensils and equipment in the kitchen (TR 65-66, 68). These are not the type of skills one loses over the years. Therefore, the ALJ did not err in determining that claimant was able to perform her past relevant work as a cook, particularly since she worked as a cook for about one month in 1984 (TR 160).

There is also no merit to claimant's contention that the ALJ's decision is not supported by substantial evidence. While claimant alleges she became disabled on May 5, 1990, her treating physician, Dr. Detwiler, released her to return to work with a twenty-pound lifting restriction on April 17, 1991, less than twelve months later (TR 197). Under 42 U.S.C. § 1382c(a)(3)(A), to prove disability, a claimant must show a medically determinable impairment which lasts for a continuous period of not less than twelve months. Claimant argues that, because Dr. Detwiler released her to light work, and work as a housekeeper was at the medium exertional level, he did not release her to her past relevant work. However, it has already been noted that her work as a cook was past relevant work. The fact that he released her was evidence that she did not have an impairment that precluded her from doing light work as a cook. It should also be noted that all of her subsequent examinations after her release did not reference any back complaints (TR 238-253). Although she was hospitalized from March 16, 1992 to March 20, 1992 for low back pain, she had good range of motion of her neck, had a normal EMG, and showed no signs of radiculopathy (TR 263, 266, 267). There was no further evidence

of medical treatment from March 20, 1992 until the June 22, 1993 hearing.

Claimant contends the testimony of the vocational expert was ambiguous and did not support a finding that plaintiff could return to work as a housekeeper, because the expert found that claimant could only do "some of the housekeeping work" (TR 66). The burden of proving disability remained on claimant through the fourth step of the sequential evaluation process. Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990). The ALJ properly made a finding of "not disabled" at this step after concluding claimant could perform one or more of her past jobs as she had performed them or as generally performed in the national economy. Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1051-52 (10th Cir. 1993). Because plaintiff did not fulfill her burden of showing that she could not return to her past relevant work, the burden never shifted to the Secretary and vocational expert testimony was not required. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992).

There is also no medical support for claimant's contention that she could only do sedentary work for a period of more than one year. When Dr. Detwiler released her, he only limited her work efforts to lifting over twenty pounds and put no limits on work involving standing or walking.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 22nd day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

FILED

AUG 23 1995

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

LENA M. HASLERIG,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

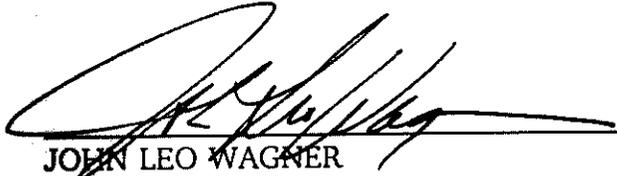
Case No: 94-C-237-W

ENTERED ON DOCKET
DATE AUG 23 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 22, 1995.

Dated this 22nd day of August, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

AUG 22 1995

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

THOMAS HALLER,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

Case No: 94-C-18-W

ENTERED ON DOCKET

DATE ~~AUG 23 1995~~
AUG 23 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 22, 1995.

Dated this 22nd day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

FILED

JAMES TYRONE PENNINGTON,

Plaintiff,

vs.

TULSA COUNTY SHERIFF'S
DEPARTMENT,

Defendant.

No. 95-C-508-BU

AUG 22 1995

W. J. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 23 1995

ORDER

This matter comes before the Court on Defendant's motion to dismiss or in the alternative for summary judgment. 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. In any event, having independently reviewed the motion, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted.

Accordingly, Defendant's motion to dismiss (docket #5-1) is granted and this case is hereby dismissed with prejudice.

SO ORDERED this 21st day of Aug, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

6

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

THOMAS HALLER,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Case No. 94-C-18-W ✓

FILED
AUG 23 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
ENTERED ON DOCKET
DATE AUG 23 1995

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant, during the relevant period, had the residual functional capacity to perform the physical exertion and nonexertional requirements of work, except for lifting more than 15 pounds occasionally or 10 pounds frequently, walking 15 to 30 minutes, sitting 15 to 30 minutes, standing 15 to 30 minutes, frequent crawling, stooping, or bending, climbing, using dangerous machinery, and driving. The ALJ found that claimant had the residual functional capacity for the full range of sedentary work, reduced by alternating between sitting, standing, and walking during a working day. The ALJ concluded that claimant was able to perform his past relevant work as a computer consultant, president of a real estate company, and executive vice president of a television network, since he was, from October 1, 1983, to December 31, 1988, 34 to 39 years old, which is defined as a younger individual, and had a master's degree. Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

- (1) The ALJ failed to properly evaluate claimant's credibility.
- (2) The ALJ did not properly evaluate claimant's subjective complaints of pain.
- (3) The ALJ did not properly evaluate claimant's residual functional capacity.

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

Claimant was last insured for purposes of Title II of the Social Security Act on December 31, 1988. Therefore, the claimant was required to prove that he was disabled after December 1, 1983, the date he claims he became unable to work, and before December 31, 1988, when his insured status expired. 20 C.F.R. § 404.315. Evidence subsequent to December 31, 1988, is not relevant for this purpose. The medical evidence establishes that he had severe low back pain during that period.

The only medical records before December 31, 1988 are treatment notes by Dr. Walter Bramson from November 8, 1988 to December 30, 1988 (TR 154-155). Claimant reported to Dr. Bramson on November 8, 1988 that his pain was no different from what he had felt ten years ago, and that he had not been taking medication for his pain since 1980 (TR 155). He asked for x-rays to be taken, but postponed an actual exam and back x-rays because he was "too busy" (TR 155). He was given prescriptions for pain medication (TR 155). On November 11, 1988, x-rays were taken and revealed:

There has been surgical posterior fusion L4-L5 and L5-S1 levels. There is perhaps some narrowing of the L5 disc space and there may be minimal spondylolisthesis of L5 on S1. Oblique films show a very fine hairline lucency through the right L5 pars questionably representing a spondylolysis

vs possibly a post surgical change.

(TR 151) (emphasis added).

On November 23, 1988, claimant reported that the pain medication was "working on numbing pain" (TR 155). Dr. Bramson found that claimant had some weakness on plantar flexion and numbness over the bottom of his foot, but the rest of the neurological exam was negative (TR 155). Plaintiff repeatedly declined further diagnostic evaluation, including a neurosurgical follow-up, MRI, and EMG. Plaintiff made a request for stronger pain medication on December 30, 1988 (TR 154). There are no other treatment notes for the relevant period of October 1, 1983 to December 31, 1988, but Dr. Bramson wrote a letter at claimant's request on April 11, 1989, stating claimant was having back problems, could not walk without crutches or drive, and had been told to see a neurosurgeon (TR 150, 152).

A medical expert, Dr. Harold Goldman, testified at the hearing on March 18, 1993, that the medical evidence for the relevant period was sparse (TR 72). The doctor noted that claimant had had spina bifida and a fusion performed related to that back in 1966 (TR 73) and maningo encephalitis in 1981 (TR 74). He concluded that in 1988 claimant had no muscular atrophy or reflex loss, but had a severe pain syndrome (TR 75). While emphasizing that he had no medical records to substantiate claimant's complaints, the expert concluded that, back in 1988, he could lift ten pounds frequently, fifteen pounds occasionally, walk fifteen to thirty minutes, alternate sitting and standing for fifteen to thirty minutes in an eight-hour day, and infrequently crawl, stoop, and bend, but could not climb, drive, or use dangerous machinery (TR 77).

Claimant testified at the hearing that in 1988 he needed help out of the shower and with his towels (TR 47). Prior to that time, he was able to sweep the kitchen floor, do some light gardening, and drive ten miles to work (TR 47, 50). He was not able to sleep more than two hours at a time and then had to change positions (TR 50). In 1988, he was married and lived with his wife and three children, and they had a lot of guests visit their home, attended church two times a week, and went to the opera and ballet occasionally (TR 47, 50). He did pelvic floor contractions twice a day (TR 49). He read business journals and magazines 4 to 5 hours a day (TR 48-49). He used crutches to walk (TR 54).

There is no merit to claimant's first contention that the ALJ did not properly evaluate claimant's credibility. The ALJ found that the claimant's credibility was "fair to poor." (TR 24). He noted that under 20 C.F.R. § 404.1512, claimant had the obligation to produce evidence supporting his allegation of disability by signs, symptoms, and laboratory findings (TR 24). The ALJ pointed out that up through October 1988, claimant produced no evidence, so his testimony had to bear the full weight of persuasion in the case (TR 24). The limited medical evidence showed that the claimant has undergone a previous fusion in his lower back, which Dr. Goldman had concluded might be the basis of pain (TR 25). But the ALJ relied on the fact that, at least through 1987, claimant could do some gardening and sweeping, had no neurological deficits upon examination by Dr. Goldman, and testified that he had a brain hemorrhage, which was actually meningitis (TR 25). There is substantial evidence to support the ALJ's evaluation of claimant's credibility. The court notes that the Tenth Circuit held in Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983), as follows:

Exaggerating symptoms or falsifying information for purposes of obtaining government benefits is not a matter taken lightly by [a] court. As a safeguard against such schemes, the determination of credibility is left to the observations made by the Administrative Law Judge as the trier of fact. His determinations on this issue are generally considered binding on the reviewing court.

There is also no merit to claimant's second contention that the ALJ did not properly evaluate his complaints of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

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

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ followed the standard set in Luna and expressly addressed the factors in finding that claimant's pain was "mild to moderate" in 1988 (TR 23-24). Specifically, he considered the nature of claimant's pain, aggravating factors, medications, treatment, functional restrictions, daily activities, and measures for relieving pain in reaching the conclusion that claimant was still able to perform his past sedentary jobs (TR 23-24). Based on the record as a whole, there is substantial evidence for the ALJ's determination

that the pain was not disabling during the relevant period.

Finally, there is no merit to claimant's contention that the ALJ did not properly evaluate claimant's residual functional capacity. The ALJ found that claimant was capable of "between a light and sedentary function as described . . . by Dr. Goldman" and that restrictions, except for the mental ones, were supported in the medical evidence (TR 25). There is substantial evidence to support his conclusion that, in 1988, the claimant's pain "was mild to moderate and did not interfere with his concentration, persistence or pace, or performance of work-related activities in the residual functional capacity assessed. The claimant was able to function fully in his substantial reading and social life." (TR 25).

There was support in the record for the ALJ's decision that claimant retained the residual functional capacity to perform his past relevant work (TR 27). While claimant testified that his pain affected his concentration (TR 52) and that pain medication clouded his judgment (TR 58, 64, 69), he told Dr. Bramson on November 8, 1988 that he did not take medication from 1980 to November 1988 (TR 155). He told the ALJ that he chose not to take medication because he preferred not to pollute his body (TR 58).

In addition, claimant never told Dr. Bramson that the medication he began taking in November 1988 was causing any negative side effects. He rated the pain he felt in 1988 as constant and moderate and testified that it did not get substantially worse until 1990 or 1991 (TR 58-59). He testified that the numbness in his left leg was nominal in 1988 and only became substantial in the last three years (TR 43-44). He was able to drive and maintain an active social life in 1988, entertaining guests, attending the opera and ballet, and going to church (TR 50). Dr. Goldman, the medical expert, after reviewing the

medical evidence and listening to plaintiff's testimony, found that plaintiff could perform work consistent with the requirements of sedentary work (TR 77).

The Tenth Circuit has found that the ALJ has a duty to fully investigate the specific demands of a claimant's past relevant work in order to have enough facts to make a comparison with his limitations. Henrie v. United States Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993). In that case, there was not testimony by a vocational expert, and the court noted that it is not the ALJ's duty to be a claimant's advocate at step four of the sequential evaluation. Id. at 361. Here the ALJ followed the ruling in Henrie: (1) he made findings of claimants' residual functional capacity (TR 27), (2) he asked a vocational expert to assess the physical and mental demands of claimant's prior jobs (TR 80), and (3) he found that claimant had the ability to return to his past relevant job given his residual functional capacity (TR 25-27).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 21st day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:haller

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

CONTINENTAL NATURAL GAS, INC.,)
an Oklahoma corporation;)
COTTONWOOD PARTNERSHIP, an Oklahoma)
general partnership; CONTINENTAL)
GAS MARKETING, INC., a Texas)
corporation; SCOTT C. LONGMORE;)
GARRY D. SMITH; TERRY K. SPENCER;)
and ADAMS ENERGY COMPANY, an)
Oklahoma corporation,)

Plaintiffs,)

vs.)

ASTRA RESOURCES, INC., a Kansas)
corporation,)

WESTERN RESOURCES, INC., a Kansas)
corporation,)

Defendants.)

FILED

AUG 2 2 1995

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

ENTERED ON DOCKET

DATE AUG 23 1995

ORDER

Now before the Court is Plaintiffs' Motion to Reconsider the Order entered by this Court on August 2, 1995. In that Order, the Court addressed the motions for summary judgment filed by Defendants Astra Resources, Inc. ("Astra") and Western Resources, Inc. ("Western") against Continental Natural Gas, Inc. and its shareholders ("CNG"). The Court incorporates the portion of that August 2, 1995 Order setting forth the facts underlying the case.

The Court concluded on August 2, 1995 that, as a matter of law, there was no contract for the purchase and sale of CNG to Astra as evidenced by the November 1993 and December 1993 Letters. At most, the Court found a contract between the parties to negotiate in good faith. At the same time, the Court noted that if

a contract to negotiate in good faith did exist, the terms of that agreement, as reflected in the Letters, demonstrated that any negotiating obligations between the parties ceased on February 28, 1994.

Plaintiffs now ask the Court to reconsider that Order. Whether to grant or deny a motion for reconsideration is committed to the court's discretion. Hancock v. Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). Generally, courts recognize three major grounds for reconsideration: 1) an intervening change in controlling law; 2) availability of new evidence; or 3) the need to correct clear error or prevent manifest injustice. Hamner v. BMY Combat Systems, 874 F. Supp. 322 (D.Ks. 1995).

In this instance, Plaintiffs believe the Court made an error by misapplying legal precedent that is binding on this Court. Most importantly, Plaintiffs argue that the Court should not have decided issues concerning the intention of the parties to enter into a contract but should have placed such questions before the jury. In making this claim, Plaintiffs cite Oklahoma and Tenth Circuit caselaw stating that the question of the existence of a contract is a question of fact for the jury to resolve. See Pl.s' Mot. to Recon., at p.3; Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1445 (10th Cir. 1988).

Plaintiffs misunderstand the August 2, 1995 Order. The Court did in fact preserve the issue of the existence of a contract for the jury. A jury will decide whether both parties intended to be bound by the November and December Letters. Furthermore, a jury

will decide whether the agreement reached by the parties was breached. However, the Court decided that the November and December Letters were unmistakably clear in that they could not be interpreted as a contract for the ultimate purchase and sale of CNG to Astra. To the extent they bound the parties, those Letters could only be read to establish a duty by the parties to negotiate in good faith. See Venture Associates Corp. v. Zenith Data Systems, 987 F.2d 429, 432-433 (7th Cir. 1993).¹

In determining the intention of contracting parties under Oklahoma law, the express language of the contract controls if it is unambiguous, and there is no fraud, accident, or absurdity. Devine v. Ladd Petroleum, 743 F.2d 745, 748 (10th Cir. 1984). If the language of a contract is clear, the Court may interpret it as a matter of law. Corbett v. Combined Communications Corp., 654 P.2d 616, 617 (Okla. 1982). The Letters, by themselves, are unambiguous in that they could not be read to obligate the parties definitively to a formal purchase and sale agreement. As discussed in the August 2, 1995 Order, those Letters explicitly made any agreement between the parties contingent on completion of due diligence as well as future negotiations. Assuming arguendo the existence of a contract, the agreement by the parties could not be interpreted as the ultimate decision by Astra to purchase CNG. At best, the Letters could only be interpreted as an agreement to

¹ This Court's finding that the November and December Letters did not constitute a binding contract for the sale and purchase of CNG was based upon an objective interpretation of those letters, not upon consideration of "extrinsic evidence."

negotiate open terms and a future, definitive purchase and sale agreement in good faith.²

In addition to finding that the parties did not agree to an ultimate purchase and sale agreement, the Court determined in the August 2, 1995 Order that the obligations of the parties ceased on February 28, 1995. Plaintiffs now argue that the Court should interpret the actions of the parties as giving rise to a continuing obligation by the parties to adhere to the obligations allegedly set forth in the November and December Letters. In essence, Plaintiffs seek to argue that the contract was modified by actions by the parties or by parol modification in such a way as to preserve the period of obligatory good faith negotiations beyond the date explicitly stated in the December Letter.

However, Oklahoma law does not sanction the modification of a written contract in this manner. Plaintiffs' assertion conflicts directly with the terms of the November and December Letters. As Oklahoma law states, "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." 15 O.S. § 237 (emphasis added); See Clark v. Slick Oil

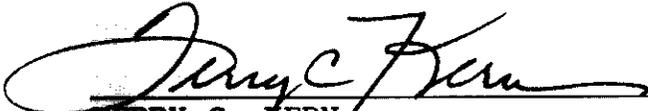
² Plaintiffs discuss in their Brief in Support of the Motion to Reconsider Texaco Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. 1987), cert dismissed, 485 U.S. 994 (1988). Although the Court considered the Texaco litigation when first deciding the summary judgment issue, the August 2, 1995 Order did not cite that decision. Instead, the Court relied more heavily on the logic and rationale of cases such as Teachers Ins. and Annuity Ass'n of America v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987) and Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2d Cir. 1989). This Court believes that the approach used in those cases is preferable and more consistent with the law in Oklahoma and the Tenth Circuit.

Co., 211 P. 496 (Okla. 1923); Emerson-Brantingham Implement Co. v. Ware, 174 P. 1066 (Okla. 1918). That statute has been interpreted by Oklahoma courts to prevent the alteration of a written contract as to some of its terms by an unexecuted parol contract. Additionally, the statute prevents an alteration of a contract as to all of its terms, disallowing a new contract to be substituted for an earlier, written, contract unless the new contract is in writing or is an executed oral contract. Walker v. Johnson, 227 P. 113 (Okla. 1924).

The deadline set forth in the November and December Letters could not have been more certain. After the February 28, 1994 deadline expired, the obligations ceased. Although the parties previously extended the date for resolution of the agreement from December 1993 to February 1994, they decidedly made no such extension after February 28, 1994, either orally or otherwise. The additional contacts made by CNG to potential purchasers after February 1994 further indicates that the parties did not establish a new oral contract renewing all the terms of the November and December Letters. Therefore, the Court adheres to the conclusion reached in its August 2, 1995 Order that no breach could have occurred subsequent to February 28, 1994 between Astra and CNG.

In light of the considerations discussed above, the Motion to Reconsider is denied.

ORDERED this 22 day of August, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 21 1995

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

DOYLE ALLAN CLAGG)
)
 Plaintiff,)
)
 v.)
)
 JOE SMITH, Rogers County)
 Assistant District Attorney.)
)
 Defendant.)

NO. 95-C-375-H

ENTERED ON DOCKET

DATE AUG 22 1995

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff, Doyle Allan Clagg, an inmate in the Rogers County jail seeks to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 on his civil rights complaint filed pursuant to 42 U.S.C. § 1983. In reliance on the representations set forth in the motion to proceed *in forma pauperis* the Court concludes that Plaintiff should be granted leave to proceed *in forma pauperis*. However, the Court now concludes that Plaintiff's claims should be dismissed as frivolous under 28 U.S.C. § 1915(d).

In this civil rights action Plaintiff sues Rogers County Assistant District Attorney, Joe Smith, alleging a violation of his right to due process in that he has been held in the Rogers County jail for 156 days as of April 21, 1995 without having been before a Judge for preliminary hearing. Plaintiff also alleges that an illegal seizure of property belonging to his mother, Shirley Carol Clagg, occurred. Plaintiff seeks return of the seized property.

The federal *in forma pauperis* statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or courts. *Neitzke v. Williams*, 490 U.S. 319, 324, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); 28 U.S.C. § 1915. To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an *in forma*

pauperis suit if the suit is frivolous. A suit is frivolous if "it lacks an arguable basis in either law or fact." *Neitzke*, 490 U.S. at 325; *Malek v. Haun*, 26 F.3d 1013, 1015 (10th Cir. 1994). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." *Denton v. Hernandez*, 504 U.S. 25, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting *Neitzke*, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." *Id.*

Before federal jurisdiction is established in any case, the Court must determine whether the Plaintiff has standing to bring the claims asserted. *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1450 (10th Cir. 1994). "[T]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). Among the Article III Constitutional standing requirements is that Plaintiff show he has personally suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 506, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). In addition, Plaintiff must assert his own legal rights, not those of others. *Valley Forge*, 454 U.S. at 474-75, 102 S.Ct. at 759-60; *Mount Evans*, 14 F.3d at 1450. Plaintiff has asserted that the Defendant illegally seized property belonging, not to him, but his mother. He has no standing to pursue this claim. Consequently, it should be dismissed.

Plaintiff also claims a violation of due process has occurred by reason of having been held in the Rogers Co. jail for over 156 days without having had a preliminary hearing. This same claim, among others, is asserted by Plaintiff against the same defendant, Joe Smith, in case number 95-C-372-H which was filed on the same day as this one. In case number 95-C-375-H

the undersigned United States Magistrate Judge granted Plaintiff leave to proceed *in forma pauperis* and ordered an investigation and a **Martinez** report. Since this claim is duplicative of the issues raised in another currently **pending action** brought by Plaintiff in this Court, this claim may be dismissed under § 1915(d). See *Aziz v. Burrows*, 976 F.2d 1158-59 (8th Cir. 1992).

After liberally construing Plaintiff's **pro se** pleading in accordance with *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct 594, 596, 30 L.Ed.3d 652 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court **concludes** Plaintiff's Complaint should be dismissed as repetitious and, therefore, frivolous under 28 U.S.C. § 1915(d).

Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's Complaint be DISMISSED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 21st day of August, 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

SCW/jch

FILED

IN THE UNITED STATES DISTRICT COURT **AUG 21 1995**
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

SYLVIA RAGSDALE,
Plaintiff,

vs.

THE CONTINENTAL INSURANCE
COMPANY,

Defendant.

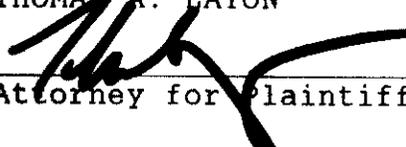
No. 95-C-114-B

ENTERED OF COURT
AUG 22 1995
DATE _____

STIPULATION OF DISMISSAL

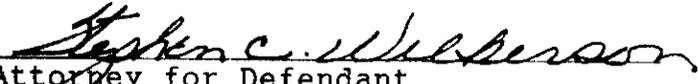
COME NOW the Plaintiff, Sylvia Ragsdale, and the Defendant, The Continental Insurance Company, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

THOMAS A. LAYON



Attorney for Plaintiff

STEPHEN C. WILKERSON



Attorney for Defendant

F I L E D

AUG 21 1995

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

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

CLARA LEANNE CASEBEAR)
ALLRED (HUGHES),)

Plaintiff,)

v.)

SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)

Defendant.)

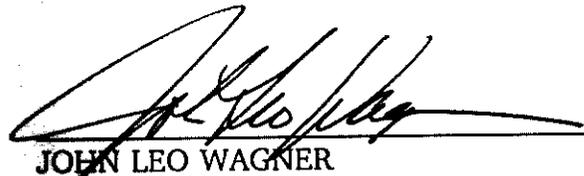
Case No: 94-C-103-W ✓

ENTERED ON DOCKET
DATE AUG 22 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 21, 1995.

Dated this 21st day of August, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

15

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

F I L E D

CLARA LEANNE CASEBEAR)
ALLRED (HUGHES),)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

AUG 21 1995

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

Case No. 94-C-103-W

ENTERED ON DOCKET

DATE ~~AUG 22 1995~~

ORDER

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

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

The report and recommendation of the magistrate judge dated December 19, 1994 (Docket #11) is affirmed. The parties have consented to proceed before the magistrate judge at this time.

The only issue now before the court is whether there is substantial evidence in the

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform sedentary work, except for work involving lifting more than 10 pounds, prolonged standing or walking, and substantial bending of the lumbar spine. He concluded that claimant was able to perform her past relevant work as a bookkeeper. Having determined that claimant's impairments did not prevent her from performing her past work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision that claimant can perform her past relevant work is not supported by substantial evidence because she cannot perform sedentary work.
- (2) The ALJ did not properly address claimant's nonexertional impairment of pain.

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

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

- (3) The ALJ erred in failing to find that claimant met the listings for a somatoform disorder.
- (4) The ALJ did not fulfill his duty to fully document the file.
- (5) The ALJ erred by making a medical conclusion regarding claimant's condition.

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

The medical evidence establishes that claimant has severe arthritis. Dr. Boyd Whitlock evaluated her for disability on February 19, 1992 (TR 112-116). She told him she had had arthritis since she was a child (TR 112). He found she had no limitation of joint motion, redness, or inflammation (TR 113). She was able to walk on her toes and bend laterally 3-4 degrees and back 5 degrees, but was only able to flex back about 10 degrees due to discomfort (TR 113). He found she had "joint pain, 'arthritis,' mainly by history," recurrent sinusitis, and abnormal vision in the right eye (TR 113) (emphasis added). He concluded she had a lot of symptoms, but not too much in findings (TR 113). Dr. J. William Anthamatten was able to correct her vision to 20-20 (TR 124-138).

Dr. Michael Karathanos evaluated her for disability on January 27, 1993 (TR 139-144). He noted that she reported having a "constant headache for about five years," constant low back pain after falling down thirty-five years before, and "arthritis in all joints of her body from the smallest to the largest" (TR 139). The doctor reported that examination showed "she has marked and obvious embellishment of her symptoms" (TR 139). He stated that, when she walked in the room, she walked "in a very deliberate slow

and hesitant way and frequently moans and groans for no apparent reason" and had "periods of hyperventilation" while describing her complaints (TR 139). He found her alert and oriented neurologically, with no motor deficits, and concluded she had "marked functional overlay" with "chronic pain syndrome" (TR 140).

Claimant was psychologically evaluated by Dr. Minor Gordon on January 21, 1993 (TR 145-151). He concluded that she was very bright, had a chronic pain syndrome, appeared depressed, and did not have "a psychological or intellectual impairment which would preclude her from gainful employment" (TR 146). He evaluated her ability to do work-related activities and rated her as "good" or "very good" in all areas (TR 149-151). When claimant's attorney asked the doctor to answer interrogatories relating to the possibility she might have a somatoform disorder, he stated that his education did not allow him to assess neurological problems, but she could be suffering from a somatoform disorder or a physical ailment which caused her pain (TR 156). He stated that he had only evaluated her intellectual capacity (TR 156). He stated that, if claimant had a somatoform disorder, it would affect her ability to concentrate, but that her Wechsler Test scores, which tested concentration, were high and showed little impairment (TR 156). He noted that a review of her medical records would assist his evaluation (TR 156).

There is no merit to claimant's first contention that there is not substantial evidence that claimant can perform her past sedentary work, since she testified she cannot sit more than 3 or 4 hours in a day (Claimant's Brief, Docket #4, pg. 3). There is absolutely no medical evidence that she cannot sit longer than 3 or 4 hours. The vocational expert found that her previous relevant work was semi-skilled and sedentary and she was still capable

of performing that work (TR 57). Where such an expert exhibits cognizance of impairments and makes an individualized assessment, the assessment is valid in determining the jobs available to the plaintiff. Diaz v. Secretary of Health & Human Services, 898 F.2d 774, 777 (10th Cir. 1990).

The Tenth Circuit has found that the ALJ has a duty to fully investigate the specific demands of a claimant's past relevant work in order to have enough facts to make such a comparison with his limitations. Henrie v. United States Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993). However, in Henrie there was no testimony by a vocational expert, and the court noted that it is not the ALJ's duty to be a claimant's advocate at step four of the sequential evaluation. Id. at 361. Here the ALJ followed the ruling in Henrie: (1) he made findings of claimant's residual functional capacity (TR 19), (2) he asked the vocational expert to assess the physical and mental demands of claimant's prior jobs (TR 57), and (3) he found that claimant had the ability to return to certain of his past relevant jobs given his residual functional capacity (TR 19).

There is also no merit to claimant's second contention that the ALJ did not properly consider claimant's complaints of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen,

816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

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

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had arthritis producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A).

However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The record shows that the ALJ properly found that the claimant's claims were overstated (TR 18). Dr. Karathanos concluded that she exhibited "marked and obvious embellishment of her symptoms" and "frequently moans and groans for no apparent reason", while having no neurological deficits (TR 139). Dr. Whitlock found limitation of motion in her back, but normal ranges of motion in her shoulder, ankle, hip, knee, elbow and wrist, concluding that "she seems to have a lot of joint symptoms, but not too much in the way of finding" (TR 113). While she alleged severe pain, claimant's last physical was in 1979 (TR 112). The ALJ analyzed her pain using the factors set out in Luna, noting she takes only aspirin for pain with no side effects, has received no other treatment for the pain, and takes care of household chores and cares for her son (TR 16-17). He discussed the medical and intellectual evaluations done and relied on them in making his decision concerning her pain (TR 18).

There is no merit to claimant's third contention that claimant meets the listing for a Somatoform Disorder, Listing 12.07. To meet this listing, she must meet parts A and B of the Listing, found in 20 C.F.R. Pt. 404, Subpt. P, App. 1. The ALJ found that Part A was met when he completed a psychiatric review technique form, finding factors evidencing somatoform tendencies (TR 21). However, the ALJ correctly concluded that Part B was

not met, which require a claimant to show three of four requirements: "1) [m]arked restriction of activities of daily living; or 2) [m]arked difficulties in maintaining social functioning; or 3) [d]eficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner . . . ; or 4) [r]epeated episodes of deterioration or decompensation in work or work-like settings" Dr. Gordon found that she did not meet the third and fourth factors (TR 156). He stated that if claimant were as severely involved as she claimed, the somatoform disorder would affect her ability to concentrate, and there was very little impairment of her concentration (TR 156). He concluded that she had "[n]o mental or emotional impairment to employment" (TR 147). As to the fourth factor, decompensation on the job, Dr. Gordon found no indication of an inability to cope, follow instructions, remember how to carry out complex tasks, or make social adjustments (TR 149, 150). There was no evidence in the record of work-related decompensation or deterioration. The ALJ therefore had sufficient evidence to support his position that claimant did not meet the listing.

There is also no merit to claimant's contention that the ALJ did not fulfill his duty to fully "document the file." The ALJ allowed the claimant's counsel to ask as many questions as counsel felt were relevant and granted the request for a consultative examination by a psychologist, which was in addition to the evaluation to be performed by a neurologist (TR 58-59). The ALJ started and ended by asking questions of his own (TR 33, 55). There was no objective evidence of claimant's inability to perform past work. There were no treating physicians, so the consultative examiners were sufficient, as there was no argument as to findings. Further assessment by the vocational expert was not

required, because the determination of not disabled at step four precluded the necessity for determination of step five abilities. When the determination is made at the fourth step, the burden of proof is on the plaintiff, not the Secretary. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992). Because she had ample opportunity to present her best evidence of disability, the ALJ fulfilled his duty to develop the record. While claimant argues that the "consultative examiner suggested additional testing would be helpful" in evaluating claimant (Claimant's Brief, Docket #4, pg. 5), in reality Dr. Gordon simply stated that a review of her medical records would assist his evaluation (TR 156).

Finally, there is no merit to claimant's contention that the ALJ made a "medical conclusion regarding claimant's condition." (Claimant's Brief, Docket #4, pg. 6). The ALJ did not "interject his own medical opinion concerning the seriousness of claimant's impairment." (Claimant's Brief, Docket #4, pg. 6). He based his decision on the medical evidence presented to him, the testimony taken, and the vocational expert's opinion (TR 18-19).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 18th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Hughes

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

F I L E D

AUG 21 1995

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

CHARLES A. JORDAN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,²)
)
Defendant.)

Case No: 93-C-865-W

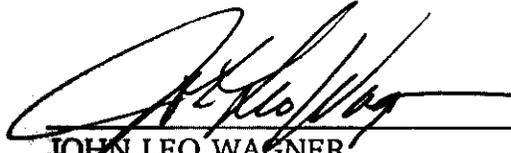
ENTERED ON DOCKET

DATE AUG 22 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Charles A. Jordan, in accordance with this court's Order filed August 21, 1995.

Dated this 21st day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

F I L E D

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

AUG 21 1995

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

CHARLES A. JORDAN,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 93-C-865-W ✓

ENTERED ON DOCKET

DATE ~~AUG 22 1995~~

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

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In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for limitations on lifting/carrying more than 10 pounds and on prolonged standing/walking and frequent bending. He concluded that claimant was unable to perform his past relevant work as a truck driver and delivery driver, but had the residual functional capacity to perform certain types of sedentary work. Having determined that claimant's impairments did not prevent him from performing certain types of sedentary work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision is not supported by substantial evidence because he did not properly evaluate claimant's subjective complaints of pain in his shoulder and back.
- (2) The ALJ did not properly evaluate claimant's mental impairment.
- (3) The ALJ did not properly evaluate claimant's alleged illiteracy.

Claimant alleges an onset of disability on November 15, 1982, and the date he was

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

last insured is September 30, 1987. The ALJ could only consider medical evidence during this period to determine disability.

Claimant injured his left shoulder at work on November 7, 1982, and underwent bilateral rotator cuff repair the next week (TR 310-317). He returned to work as a long-haul dump truck driver and worked until he was injured in an auto accident on July 7, 1986 (TR 112-113, 340). He began to complain of back pain in February of 1983 and was treated conservatively with muscle relaxants (TR 318-320). By September 26, 1983, when he was treated for a rectal abscess, the doctor reported that he had some limitation in his shoulder movement, but "good muscular strength and range of motion" in all other joints (TR 325). He did not receive any medical care from September of 1983 until July of 1986. After the accident in 1986 he was found to have disk herniation at C5-6, C6-7 and L4-5, cervical spondylosis at C3-4, and possible herniation at L5-S1 (TR 339-347). He had back surgeries on September 5 and 12, 1986, including a diskectomy and fusion at C5-6 and 6-7, a hemilaminectomy and diskectomy at L4-5, and a bilateral L4-5 modified hemilaminectomy with bilateral foraminotomies diskectomies (TR 350-365). He underwent a second lumbar laminectomy with lysis of adhesions and diskectomy on December 6, 1986 (TR 369-389). He underwent repair of the anterior cruciate ligament in the left knee in April of 1987 (TR 396-405).

Claimant participated in rehabilitation training several times in August of 1987, but he was discharged because of his dependence on pain medication (TR 408-411). From July 15, 1986 until September 1, 1987, he saw or talked to his treating physician, Dr. M. E. Lins, concerning his back, shoulder, and leg pain several times a month (TR 413-433). He

was given numerous prescriptions for pain medications, such as demerol, valium, nuprin, diazepam, and darvocet (TR 414-433). He also was told to use moist heat packs, ultrasound, whirlpool, and strengthening exercises (TR 414-433). The pain medications were not tolerated well and were changed regularly (TR 351, 352, 372, 396, 418, 427, 428, 430, 433).

The claimant's first contention is that the ALJ did not properly evaluate his pain as a nonexertional impairment when finding that the degree of functional limitation alleged due to pain was not credible. The court in Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988), concluded that pain is a nonexertional impairment if it is present whether or not the claimant is exerting himself or herself in activities related to residual functional strength requirements. In this case, the claimant testified more than one time during the hearing that he experiences pain all the time (TR 114, 115, 117). His wife confirmed his testimony (TR 119).

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

The ALJ recognized that the claimant experienced pain and that he was unable to

continue his past relevant work as a truck driver and delivery driver (TR 92, 96). The ALJ did not find claimant's pain insignificant. In any event, substantial evidence would not support a finding that the pain is insignificant. All the physicians who examined claimant noted that he had some pain (TR 318, 339-347, 350-365, 413-433).

The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

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

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

In this case, the ALJ noted that claimant stopped taking Flexeril because it made him "jittery," but he never told his doctor or obtained anything else because he had a "tendency" not to tolerate pain medication (TR 92). The ALJ also noted that claimant alleged that Diazepam caused him to "shake" more than Valium, while the two medications are in fact the same (TR 92). The ALJ noted that there was an emphasis by doctors that claimant not exceed medication dosages, but the prescriptions were only to be taken every six to eight hours and were for only ten days supply at a time, so "his frequent calls are not excessive

and would not indicate an [un]usual level of pain" (TR 92). The ALJ's observations ignore the fact that physicians recognized that claimant did not tolerate medications well (TR 351, 352, 372, 396, 418, 427, 428, 430, 433). The ALJ is not true to the spirit of the Luna decision. The court in Luna dictated that claimant's persistent attempts to find relief and the pain medication prescribed and taken and the side effects, if any, must be considered.

Claimant's rehabilitation program was interrupted due to his dependence on pain medication (TR 408-411). His persistence in seeking treatment and relief from his pain should have been considered by the ALJ in accordance with the Luna decision. The court in Frey v. Bowen, 816 F.2d at 517, found that a determination of disability could not be precluded by claimant's failure to take pain medication when unrefuted medical testimony indicated that pain medication was contraindicated because of the side effects of stomach irritation. The only distinction between the Frey case and the case at hand is the reason the claimant does not take certain pain medications. In both instances, there is a legitimate reason which is not controverted by records or testimony.

The ALJ took note of claimant's daily activities as outlined by the court in Luna, finding the allegations that claimant cannot perform activities at home or in the garden hard to believe (TR 92-93). The ALJ concluded that "claimant's current level of activity [on April 15, 1992] was irrelevant to determine what the claimant could perform in 1987" (TR 93). The ALJ noted that claimant "was healthy looking and younger appearing than his age and weighed 230 pounds for his height of six feet," so his pain had not "affected his appetite" (TR 93). There was nothing in the medical record to show what his daily

activities were in 1986 and 1987 (TR 93).

The ALJ also discounted the **medical record** in order to come to the conclusion that claimant's complaints of "excess pain" were not credible (TR 92). The ALJ stated that the claimant had "severe status post **bilateral rotator cuff repair, status post cervical diskectomy and fusions, lumbar laminectomy, foraminotomy and diskectomy, left knee arthroscopy and arthrotomy, and non-severe hypertension . . .**" but found "[t]he degree of functional limitation [alleged] due to pain and **other subjective complaints is not credible**" (TR 95). However, the medical record supports **the existence** of a back, shoulder, and leg conditions which could produce the pain alleged (TR 310-317, 339-347, 350-365, 369-389, 396-405).

Pain must interfere with the **ability to work**. Ray, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some **pain**, allegations of disabling pain emanating from that impairment are sufficiently **consistent** to require consideration of all relevant evidence." Huston, 838 F.2d at 1129 (quoting Luna, 834 F.2d at 164). Because there was some objective medical evidence to **show claimant** had back, shoulder, and knee problems producing pain, the ALJ was required to **consider** assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 234(d)(5)(A).

Thus, this court is left with the **question** of whether there was substantial evidence to support the ALJ's determination of **credibility**. The ALJ stated that "[a]lthough the claimant has had impairments diagnosed which would conceivably cause the pain alleged,"

the complaints of pain were "disproportionate to the objective findings" (TR 92). The ALJ found that "the expressions of pain are credible to the extent that the claimant would be limit[ed] to the sedentary exertional level," but the complaints of totally disabling pain were not persuasive (TR 92).

Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988). The ALJ's decision is not supported by substantial evidence for the period ending on September 30, 1987, the date claimant was last insured. The ALJ based the decision on claimant's use of a variety of pain medications and complaints of side effects, the lack of information concerning his level of activity in 1987, the fact he was "healthy looking" and overweight at the April 15, 1992 hearing, and phone calls to his doctor that suggested to the ALJ that the "primary reason for contacting a doctor were for recording symptoms rather than seeking treatment" (TR 92-93). The evidence relied on by the ALJ was not adequate to support his conclusion that claimant's allegations of disabling pain were not credible, given the extensive medical reports of major surgeries, visits to physicians, excessive use of medications, attempts at rehabilitation, and other treatments received prior to September 30, 1987. Having found merit to claimant's first claim of error, it is not necessary for the court to consider his other claims.

Because the ALJ erred in failing to recognize claimant's pain as a nonexertional impairment, he failed to properly evaluate claimant's residual functional capacity. Upon review of the entire record, this court finds that there was not substantial evidence before the ALJ to support his decision to deny claimant disability insurance benefits.

The final decision of the ALJ is **reversed**, and the claimant is found to be disabled and entitled to disability insurance **benefits** under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) **and** 423, and the Secretary is directed to compute and pay benefits accordingly.

Dated this 18th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:jordan.or1

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

FILED

ANDREW BRANDYS,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,²)
)
Defendant.)

AUG 21 1995

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

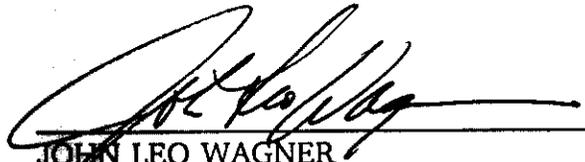
Case No: 93-C-1021-W

ENTERED ON DOCKET
DATE AUG 22 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Andrew Brandys, in accordance with this court's Order filed August 21, 1995.

Dated this 21st day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

F I L E D

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

AUG 21 1995

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

ANDREW BRANDYS,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 93-C-1021-W

ENTERED ON DOCKET
DATE AUG 22 1995

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

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In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ The claimant fulfilled his burden of proving that he has a disability which prevented him from engaging in prior work activity. Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). The burden then shifted to the Secretary to show the claimant can perform jobs existing in the national economy. Id. The ALJ concluded that the claimant had the residual functional capacity to perform the physical exertional requirements of light work. Having concluded that claimant could do light work, the ALJ found that claimant was not under a disability at any time through the date of the decision.

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

- (1) The ALJ failed to recognize claimant's pain as a nonexertional impairment and discounted the limiting effects of claimant's pain on his ability to engage in substantial gainful employment.
- (2) The ALJ failed to evaluate properly the claimant's residual functional capacity and consider all his impairments in combination.

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

Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

The claimant alleges disability onset on June 14, 1991, when he injured his back while trying to pry up sheets of metal with a crowbar. His treating doctor, Dr. Leroy O. Jeske, treated him unsuccessfully with bed rest and rehabilitation through St. John Medical Center's work hardening program (TR 133, 150, 176-78). Dr. Jeske then referred him to Dr. James A. Rodgers for orthopedic surgery (TR 150).

On January 23, 1992, Drs. Rodgers and Framjee performed a lumbar L-5 decompressive laminectomy, lateral mass fusion at L5-S1, instrumentation with the Wiltse system, and foraminotomies of the L5 and S1 nerve roots bilaterally (TR 153-155). Claimant was discharged from the hospital with a diagnoses of a degenerated/herniated disk, L5-S1, mechanical back pain secondary to this problem, hypertension, and obesity complicating the back problem (TR 154).

Claimant alleges that his pain is worse now than it was in the months immediately after surgery (TR 48). He also states that he cannot take pain medication because it may interfere with his hypertension medication (TR 48). He alleges disability due to severe residual pain in his back and hips, which post-trauma surgery has not corrected, continuing and constant pain in his right leg resulting from an attack by fire ants more than 20 years ago, and hypertension (TR 42, 45-48).

The medical evidence presents a history of back problems dating from the June, 1991 injury which resulted in the January 1992 surgery, and phlebitis, caused by the ant bites received in 1972, resulting in significant cutaneous changes and pain in the right lower extremity (TR 134, 151, 176). There is also medical evidence of hypertension which is treated with medication (TR 128-133, 199-200).

After his surgery in January, 1992, claimant did not report severe back pain to his physicians again until August 18, 1992. At this time, claimant reported that he was experiencing pain, and his doctor noted hamstring tightness and popliteal pain and back and hip pain ipsilaterally (TR 188). In between his surgery and August of 1992, there were occasions when claimant visited Dr. Rodgers and complained of some discomfort in his back and hips and some aching discomfort in his back and tailbone (TR 173, 174).

The claimant alleges that the ALJ did not categorize his pain properly as a nonexertional impairment when he found that claimant did not have such an impairment. The court in Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988), concluded that pain is a nonexertional impairment if it is present whether or not the claimant is exerting himself or herself in activities related to residual functional strength requirements.

In this case, the claimant testified more than one time during the hearing that he experiences pain all the time (TR 42, 46, 48). The ALJ specifically asked the claimant if his alleged impairments involved back surgery with continuing and constant pain in the back, hips, and legs and the claimant responded in the affirmative (TR 42). The claimant also testified that his doctors told him that he would have this pain for the rest of his life (TR 50-51). The medical evidence supports claimant's testimony that he was told that his pain is of a permanent nature (TR 188, 189).

Claimant points out that pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner

v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987).

The ALJ recognized that the claimant experienced pain and that he is unable to continue his past relevant work which required frequent lifting and carrying between 50 and 100 pounds (TR 26, 93-98). The ALJ did not find claimant's pain insignificant. In any event, substantial evidence would not support a finding that the pain is insignificant. All the physicians who examined claimant noted that he had some pain (TR 107, 173, 174, 188, 189). The impact of nonexertional pain on his ability to work should have been considered.

The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

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

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

In this case, the ALJ noted that "no pain relief medications are prescribed for claimant" (TR 23). While this statement is true, the ALJ is not true to the spirit of the Luna decision. The court in Luna dictated that claimant's persistent attempts to find relief and the pain medication prescribed and taken and the side effects, if any, must be considered. When asked if he was taking any pain medication, the claimant answered that he was not because he is afraid it would interfere with his blood pressure medicine since the pain medication warns the user not to take it if he has high blood pressure (TR 48). Claimant's history of hypertension is well documented (TR 128-33). Claimant has asked his doctors if there is anything else he can do for the pain, and they have advised him that there is nothing else and he will just have to tolerate it (TR 188).

The record shows that claimant's hypertension interferes with his ability to seek relief from his pain with medications and physical therapy (TR 48, 150, 190). Claimant's work hardening program was interrupted due to the refusal of physical therapists to work with him when his blood pressure is dangerously high (TR 150, 190). Claimant does testify to taking his blood pressure medication every day to combat his hypertension problem (TR 42). Dr. Rodgers noted that claimant "has tried vigorously to go through a work hardening program without benefit" (TR 158). Claimant's persistence in seeking treatment and relief from his pain while at the same time not subjecting himself to dangerously high blood pressure should have been considered by the ALJ in accordance with the Luna decision.

The court in Frey v. Bowen, 816 F.2d at 517, found that a determination of disability could not be precluded by claimant's failure to take pain medication when

unrefuted medical testimony indicated that pain medication was contraindicated because of the side effects of stomach irritation. The only distinction between the Frey case and the case at hand is the reason the claimant does not take pain medication. In both instances, there is a legitimate reason which is not controverted by records or testimony.

The ALJ took note of claimant's daily activities as outlined by the court in Luna. The claimant testified to his activities during a normal day, including eating breakfast, walking to the corner and back, walking to the garage, eating lunch, watching television on the couch or in a chair, another walk to the corner, eating supper, and being on the couch or in a chair (TR 51). Claimant testified that he no longer is able to participate in activities outside the house (TR 51). Mrs. Brandys testified that Mr. Brandys is not able to work around the house or participate in activities outside the house (TR 53).

However, the ALJ did not compare claimant's current daily activities to the activities he has attempted to perform and cannot and the many activities he used to perform recreationally and can no longer perform (TR 49, 50). The court in Ragland v. Shalala, 992 F.2d 1056, 1060 (10th Cir. 1993), addressed this issue and stated that because the record reflected significant limitations on plaintiff's daily activities, those activities did not furnish substantial evidence of nondisability. In addition, the ALJ may not rely on minimal daily activities as substantial evidence that a claimant does not suffer disabling pain. Frey, 816 F.2d at 516-517.

The ALJ also discounted the medical record in order to come to the conclusion that the claimant does not have a nonexertional impairment. The ALJ stated that the claimant "does not present appropriate findings of radicular distribution of significant motor loss

with muscular weakness and sensory and reflex loss" in finding that he was not suffering from a vertebrogenic disorder that was disabling per se. (TR 17). However, the medical record supports the existence of a back injury and surgery and a leg condition which could produce the pain alleged (TR 134, 158).

Pain must interfere with the ability to work. Ray, 865 F.2d at 225. A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston, 838 F.2d at 1129 (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show claimant had back and leg problems producing pain, the ALJ was required to consider assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 234(d)(5)(A).

Thus, this court is left with the question of whether there was substantial evidence to support the ALJ's determination of credibility. The ALJ stated that "[a]ssessment of a residual functional capacity for the claimant, does and must, follow the credibility of the claimant's testimony. The Administrative Law Judge has found the claimant's testimony to be frank and sincere but credible only to the extent that it is reconciled with claimant's abilities to perform light work activities." (TR 20).

The ALJ's decision is not supported by substantial evidence. He based his

assessment of credibility on his findings that: (1) no pain relief medications are prescribed for claimant, (2) claimant's wife testified that claimant has learned to live with his pain, (3) Dr. Rodgers wrote that claimant had to learn to live with his pain as well, (4) claimant has a good fusion, (5) claimant walks daily and does his exercises, (6) claimant visits daily with neighbors, and (7) claimant has a driver's license and drives as he wishes (TR 23). Each of these findings upon which the ALJ based his credibility determination is not supported by substantial evidence.

The ALJ stated that claimant's "etiology is such that while claimant could suffer pain, the pain should not be disabling or debilitating. This is supported by the fact that claimant takes no prescription pain relief medication." (TR 23). The ALJ's belief that the claimant should not have disabling pain is not supported by substantial evidence. Claimant's reason for taking no prescription pain medication has been discussed and is supported by the medical record (TR 48, 150, 182, 190).

Secondly, the ALJ suggests that Mrs. Brandys' testimony contradicts Mr. Brandys' testimony. When asked what happens when her husband tries to do chores or work around the house, Mrs. Brandys testified that, "[h]e gets discouraged and he, he's in too much pain. He can't do it. He has to go and lay down. He, he's learned to pretty much live with his pain, but I can see more than, I guess you're looking out from the outside looking in, than what he can." (TR. 54). Thus, when the ALJ noted that claimant's wife testified that he has learned to live with the pain, the ALJ took Mrs. Brandys' comment out of context. The suggestion that Mr. Brandys is not in pain is not supported by the one comment taken out of context when all of Mrs. Brandys' statements taken within the

context in which they were given, **all of Mr. Brandys' statements**, and the written comments of claimant's doctors state **otherwise** (TR 48, 51-54, 173-174, 188, 189).

The ALJ's finding that Dr. Rodgers wrote that claimant had to learn to live with his pain is, again, taken out of the context in which it was written. Dr. Rodgers commented that "[m]aybe he can be released to **start an exercise program and subsequently work hardening program I think this will be this gentleman's only chance to improve his mobility and learn to tolerate the chronic pain that he will probably be left with permanently**" (TR 188). The comment taken out of context does not show that the claimant is not credible.

The ALJ also found that the **claimant** has a good fusion from the surgery. This finding is supported by **substantial evidence** (TR 188). Yet, good fusion does not preclude the possibility of the type of pain that **the claimant** alleges. The medical record indicates that Dr. Rodgers feels that claimant **can only sit for 4 hours out of an eight hour work day, stand for 2 hours out of an eight hour work day, and walk for 2 hours out of an eight hour work day.** (TR 191-193). Dr. Charles D. Harris, a medical examiner, determined that claimant can sit for 6 hours, stand for **6 hours**, and walk for 6 hours out of an eight hour work day. (TR 109). Thus, even with **good fusion** the claimant is not able to work at any one position for more than **approximately 6 hours** in a sustained eight hour work day.

The Court in Talley v. Sullivan, **908 F.2d 585, 587** (10th Cir. 1990), grappled with the issue of the determination of the **credibility** of the claimant. The plaintiff was found not credible because there was no **explicit confirmation** of her pain by treating physicians and objective observation did not **support her complaints**. Her credibility was jeopardized

by her use of hyperbole, "judged as an attempt to bolster her symptoms," when complaining of her pain. Id. In the case at hand, however, the ALJ stated that he found Mr. Brandys to be frank and sincere. (TR 20). There was no suggestion by the ALJ that the claimant was engaging in the use of hyperbole or somehow exaggerating his claims.

The ALJ found that the claimant is not credible because he walks daily and exercises. Claimant is following his doctors orders to walk daily (TR 154). According to the Luna analysis, the credibility of a claimant who is following doctor's orders and trying every method available to relieve pain is enhanced by such actions. Further, the decisions in Ragland and Frey illustrate that the claimant's performance of minimal or required daily activities is not evidence of nondisability per se.

The ALJ stated that the claimant visits daily with neighbors. There is an important distinction to be made concerning this finding. The claimant stated in his disability questionnaire that his only social contacts were to "walk to neighbors." (TR 96). There was no testimony given by the claimant at the hearing that he visits with neighbors daily. Visits with neighbors were not included in claimant's answer of how he spends an average day. This distinction is important to assess whether there is substantial evidence to support the ALJ's determination of credibility.

The ALJ also noted that claimant has a driver's license and drives as he wishes. When claimant was asked whether he had a driver's license, he responded that he did. (TR 36). When asked how often he drives, the claimant stated, "[r]ight now only when I have to, just like to the store or somewhere like that, to the doctor because it hurt, hurts me to drive a little bit now." (TR 37). It is also important to note that the record includes a

letter from Dr. Rodgers to Dr. David Hicks, stating that one of the reasons Mr. Brandys elected to have his surgery at Hillcrest Medical Center was its proximity to his home considering that his wife is unable to drive. (TR 178). Thus, the statement that claimant drives as he wishes is not a clear representation of the situation. The record reflects that the claimant must drive himself to the store and the doctor because his wife is unable to drive. (TR 37, 178).

The ALJ recognized that claimant alleges he suffers from significant pain (TR 22). Yet, many of the reasons given by the ALJ for not finding claimant credible are not supported by the record when additional facts are taken into consideration.

Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988). The decision of the ALJ that the claimant did not suffer from a nonexertional impairment is not one for which a reasonable mind could find adequate support. The vocational expert present at the hearing testified that, if Mr. Brandys' testimony is credible and reconciled with the medical evidence, he will not be able to be employed due to the pain in his legs and back (TR 64-65). His ability to use foot controls could also be impaired significantly. (TR 64-65).

Because the ALJ erred in failing to recognize claimant's pain as a nonexertional impairment, he failed to properly evaluate claimant's residual functional capacity. Upon review of the entire record, there was not substantial evidence before the ALJ to support his decision to deny claimant disability insurance benefits. The final decision of the ALJ is reversed, and the claimant is found to be disabled and entitled to disability insurance

insurance benefits under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) and 423. The Secretary is directed to calculate and pay benefits accordingly.

Dated this 21st day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Brandys

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

AUG 21 1995

ROBIN SPRINGER,)
)
Plaintiff,)
)
vs.)
)
THE CITY OF BIXBY, JOE)
WILLIAMS, ED STONE, JIM)
BENNETT, VICKI ROBINSON,)
)
Defendants.)

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

Case No. 94-C-469-K

ENTERED ON DOCKET

DATE ~~AUG 22 1995~~
AUG 22 1995

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated and agreed by and between Matt A. Melone, as attorney for Plaintiff, Robin Springer, and Ann C. Fries, as attorney for Defendants, The City of Bixby, Joe Williams, Ed Stone, Jim Bennett, Vicki Robinson, that pursuant to Rule 41(A) of the Federal Rules of Civil Procedure, the above styled and numbered case should be dismissed with prejudice, each party to bear its own costs.

DATED this 17 day of August, 1995.

Matt A. Melone
Matt A. Melone, OBA #11927
ATTORNEY FOR PLAINTIFF

Ann C. Fries
Ann C. Fries, OBA #13040
ATTORNEY FOR DEFENDANTS

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Ann C. Fries
LAW OFFICES OF EARL R. DONALDSON
2504-D East 71st Street
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918/493-6473

F I L E D

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

AUG 21 1995

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

STEVEN MURDY,

Plaintiff,

vs.

**APAC-OKLAHOMA, INC; ACTION
SAFETY SUPPLY CO.; and FLASHER
COMPANY OF OKLAHOMA, INC.,**

Defendants.

Case No. 95-C-516C

ENTERED ON DOCKET

AUG 22 1995

DATE _____

ORDER

On the 8th day of August, 1995, appeared Plaintiff Steven Murdy ("Murdy"), by and through his attorney, David R. Bandy of the law firm of Boettcher, Ryan & Martin and Defendant APAC-Oklahoma, Inc. ("APAC") by and through its attorneys J. Derek Ingle and John R. Woodard, III of the law firm of Feldman, Hall, Franden, Woodard & Farris.

At said Hearing, Plaintiff Murdy, through Counsel, announced, agreed and stipulated that the amount in controversy for the above-captioned matter does not exceed \$50,000.00 exclusive of interest and costs, and that Plaintiff Murdy will never seek in excess \$50,000.00 exclusive of interest and costs. Plaintiff Murdy, through Counsel, also announced, agreed and stipulated that the above-captioned matter should be remanded to the District Court for the State of Oklahoma in Rogers County.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the amount in controversy for the claim by Steven Murdy arising under the facts and circumstances which gave rise to the above-captioned lawsuit, does not and will not exceed \$50,000.00 exclusive of

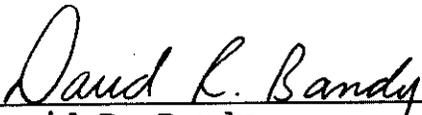
interest and costs and by reason thereby, this Court lacks jurisdiction of said matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above-captioned matter be remanded to the District Court for the State of Oklahoma in Rogers County for further proceedings not inconsistent with this ruling.

(Signed) H. Dale Cook

HONORABLE H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



David R. Bandy
Attorney for Plaintiff Murdy



J. Derek Ingle
Attorney for Defendant APAC

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August 17, 1995

The United States District Court
Northern District of Oklahoma
Court Clerk's Office
United States Courthouse
333 West Fourth Street, Room 411
Tulsa, Oklahoma 74103-3881

Re: Partain v. Fibreboard Corporation, et al.
Case No. 89-C-844-C

RECEIVED
AUG 18 1995
RICHARD M. LAWRENCE, CLERK
U.S. DISTRICT COURT

Dear Sirs:

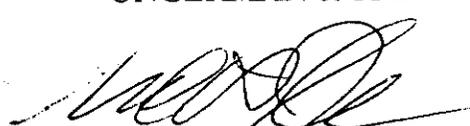
This letter is written in response to an August 15, 1995, Minute Order requesting a status update on the above-referenced case.

Plaintiffs hereby advise the Court that there are no remaining defendants left in this case. This case has been settled and dismissed as to all remaining defendants and can be closed by the Court at this time.

Thank you in advance for your cooperation.

Yours very truly,

UNGERMAN & IOLA


Mark H. Iola

MHI:vb

MHI-110
COM

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

FILED

AUG 18 1995

RONDA FLYNN,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS
OF OTTAWA COUNTY, OKLAHOMA;
STATE OF OKLAHOMA; and CITY
OF MIAMI, OKLAHOMA,

Defendants.

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

Case No. CIV-93-C-1139-B

ENTERED ON DOCKET
DATE AUG 21 1995

STIPULATION OF DISMISSAL WITH
PREJUDICE BY REASON OF SETTLEMENT

Plaintiff, Ronda Flynn, represented by her attorney of record, Steve Hickman with Frasier and Frasier, and the Defendants, the State of Oklahoma and the 13th District Multi-Jurisdictional Drug Task Force, both represented by their attorney of record, W. A. Drew Edmondson, Attorney General, by Lisa Tipping Davis, Assistant Attorney General, the Board of County Commissioners, Ottawa County, by its attorney of record, Gordon Edwards, and the City of Miami, by its attorney of record, James W. Thompson, state that this action has been settled, without an admission of liability on the part of the Defendants, and that the action should be dismissed with prejudice, pursuant to the terms agreed upon by the respective parties.



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Commissioners



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Attorney for City of Miami

ltd/flynn.stp

FILED

AUG 18 1995

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

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

WESLEY C. JACKSON,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

Case No: 94-C-222-W

ENTERED ON DOCKET

DATE AUG 21 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 18, 1995.

Dated this 18th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

WESLEY C. JACKSON,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

AUG 18 1995

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

Case No. 94-C-222-W

ENTERED ON DOCKET

DATE AUG 21 1995

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertion requirements of work, except for lifting more than 25 pounds occasionally or 10 pounds frequently, he could sit, stand, or walk 6 hours in the course of every workday, and he had no nonexertional limitations. He concluded that claimant was unable to perform his past relevant work as a laborer, heavy equipment operator, or pesticide technician, but had the residual functional capacity to perform the full range of light work. He noted that claimant was 36 years old, which is defined as a younger individual, and had a high school education, so the issue of transferability of work skills was not material. Having determined that claimant's impairments did not prevent him from performing light work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision is not supported by substantial evidence because he did not properly evaluate claimant's subjective complaints of pain.
- (2) The ALJ did not properly evaluate claimant's residual functional capacity.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

- (3) The ALJ improperly relied on the findings of one consultative examiner over another.
- (4) The ALJ improperly relied on the grids.
- (5) The Appeals Council disregarded the psychological evaluation of Dr. Robert Spray.

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

The evidence shows that claimant suffers residual discomfort from a back injury in 1977 (TR 29). He returned to work as a construction laborer and worked until 1991 (TR 82). He alleges an onset date for his disability as October 15, 1991 (TR 78). He testified at a hearing on February 10, 1993, that he quit his job as a pest control service technician in 1991 because "the pain got so bad I couldn't work it no more" (TR 45, 48). The only medication he takes is non-prescription ibuprofen (TR 43-44). He stated at the hearing he does not use a crutch or cane (TR 49), and that he had not seen a doctor in over a year (TR 46, 48). He stated he felt depressed "constantly. All the time." (TR 52). While he claimed at the hearing that he can only walk 100 yards, sit 15 minutes, and stand 30 minutes comfortably and he lays around most the day (TR 47-48), he stated in his disability application that he does some yard work, hunts, fishes, and drives vehicles (TR 81).

There is no merit to claimant's contention that the ALJ's decision is not supported by substantial evidence because he did not properly evaluate claimant's complaints of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration,

unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a **disability** claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of **disabling** pain:

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

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

Pain must interfere with the **ability** to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not **required** to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce **some pain**, allegations of **disabling** pain emanating from

that impairment are sufficiently **consistent** to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective **medical** evidence to show that plaintiff had a back problem producing pain, the ALJ was **required** to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective **medical** basis for the degree of severity of pain may affect the weight to be given to the **claimant's** subjective allegations of pain, but a lack of objective corroboration of the pain's **severity** cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need **not** give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ is not required to state **specific** legitimate inconsistencies in the record to reject claimant's complaints of pain. The ALJ here conducted a proper evaluation under Luna (TR 27-28). He noted that claimant **had** not seen a doctor since 1990, and at the last visit to his treating physician in 1990, **there** was no complaint of back pain (TR 27-28, 121). He also has not taken pain medication (TR 27). The ALJ took note of the fact that the plaintiff spontaneously quit working in 1991, simply walking away from his job, never seeking medical aid or advice from a doctor, blaming the lack of treatment on a lack of funds (TR 27). The ALJ noted that it is **normal** for a person in severe pain, such as alleged by the plaintiff, to seek treatment of **some kind** (TR 27). He pointed out that claimant had health insurance through his wife's job, so it was not credible that he would fail to get treatment if he was "in such severe **pain every** day that he has to lie down for these long

periods of time" (TR 27).

There is no merit to claimant's second and third contentions that the ALJ did not properly evaluate claimant's residual functional capacity, but made "a sweeping, unsupported, conclusory determination" (Plaintiff's Brief, pg. 2, Docket #7) by relying on Dr. William S. Dandridge's consultative examination report and disregarding the report of Dr. Kathleen Dahlmann. Dr. Dandridge concluded that claimant could do light work (TR 133-138), while Dr. Dahlmann did not (TR 124-130).

When physicians vary in their opinions regarding a claimant's disability, it is the ALJ's duty to resolve the issues. Tillery v. Schweiker, 713 F.2d at 603. Claimant argues that the ALJ must point to specific problems in order to discredit a consultative examiner. However, several factors support the ALJ's decision to rely upon Dr. Dandridge's opinion instead of the opinion of Dr. Dahlmann. Dr. Dahlmann's specialty is pediatrics (TR 130), while Dr. Dandridge's specialty is orthopedics (TR 130, 138). The injuries involved in this determination are orthopedic in nature. The ALJ may give more weight to the opinion of a specialist. 20 C.F.R. § 404.1527(d)(5); Moore v. Sullivan, 919 F.2d 901, 905 (5th Cir. 1990).

The ALJ noted that Dr. Dahlmann relied heavily on the claimant's demeanor and subjective claims, rather than objective assessment of his residual capabilities, and only Dr. Dandridge made a thorough assessment of the claimant's functional capabilities (TR 28, 135-136). The ALJ also considered that Dr. Dahlmann simply gave a conclusory opinion that the claimant was "unable to participate in the labor force in any capacity . . ." but the report by Dr. Dandridge outlined claimant's abilities for lifting, walking, standing, sitting,

and other relevant objective determinations (TR 27, 126-129). The ALJ had substantial evidence to support his decision to give more weight to the opinion of Dr. Dandridge.

The claimant argues that the ALJ **should** have simply submitted an RFC form to Dr. Dahlmann for reasons of expediency and economy, as Dr. Dahlmann's "findings and diagnoses were completely consistent with plaintiff's testimony" (Plaintiff's brief, Docket #7, pg. 3). However, the ALJ has wide latitude to order consultative examinations, and the duty here was to obtain a qualified **opinion** concerning orthopedic conditions. Diaz v. Secretary of Health and Human Services, 898 F.2d 774, 777 (10th Cir. 1990).

The ALJ properly evaluated claimant's residual functional capacity, relying on Dr. Dandridge's evaluation, the lack of medical treatment and medication, and a determination of his credibility (TR 27-28). The court in Thompson v. Sullivan, 987 F.2d at 1491, stated that, if there is no medical evidence in the medical record of residual functional capacity, the ALJ should order a consultative **examination** to determine a claimant's capabilities.

There is no merit to claimant's **fourth** contention that the ALJ erroneously relied on the "grids." Use of the Medical-Vocational Guidelines ("the grids"), 20 C.F.R. § 404, Subpt. P, App. 2, is predicated on an **impairment** that limits the physical strength or exertional capacity of a claimant. Frey, 816 F.2d at 512. Claimant admits the grids are to be used when a claimant has no significant **nonexertional** impairments such as pain. The ALJ determined that the claimant had no **such** impairments, so his use of the grids was proper. Use of the grids would only have **been** improper if claimant suffered non-exertional limitations, such as mental, sensory, or **skill** impairments, environmental restrictions, or postural and manipulative restrictions. Id. at 515-516.

Finally, there is no merit to **claimant's** contention that the Appeals Council improperly disregarded the October 18, 1993 evaluation of Dr. Robert Spray. Dr. Spray noted that claimant described himself as "depressed all the time anymore." (TR 16). But the doctor reported as follows:

The MMPI-2 was administered by audio tape. This client was unable to produce a valid MMPI-2 profile. He endorsed an exaggerated large variety of problems inconsistent with his verbal report. This may have been due to exaggeration, confusion, or misunderstanding of the inventory items. Similarly, this client reported an extreme number and intensity of depressive symptoms on the Beck Depression Inventory, more than is consistent with his verbal report during interview.

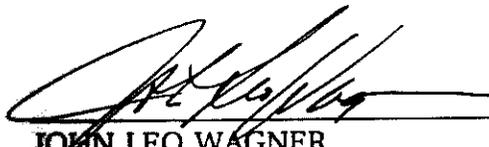
(TR 16). The doctor concluded that **claimant** suffered from "[d]ysthymia, mild, versus Adjustment Disorder with depressed mood [and] [p]assive dependent personality traits; probable upper borderline intellectual functioning." (TR 16).

Dr. Spray's report was not **sufficient** to establish that claimant suffers from a significant mental impairment. There was no valid testing done by Dr. Spray. He stated that the Beck Depression Inventory test results were inconsistent with the plaintiff's verbal reports, and plaintiff could not produce a valid profile for the MMPI-2 (TR 16). His diagnoses indicated impairments that were mild or borderline (TR 16). In addition, the Appeals Council properly held that the report was not relevant to the issue of disability as determined by the ALJ, as it did not show that claimant had significant mental limitations on or before September 14, 1993, the date that the ALJ issued his decision (TR 4). Under 20 C.F.R. § 404.976(b)(1), the Appeals Council may reject new evidence if it does not relate to the period on or before the date of the ALJ's decision.

The decision of the ALJ is supported by substantial evidence and is a correct

application of the regulations. The decision is affirmed.

Dated this 18th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Jackson

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

FILED

AUG 17 1995

IN RE:)

ASBESTOS LITIGATION,)

M-1417)

ASB(I)- 6787)

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

KENNETH COWELL, Individually, and)

CHES COWELL, Individually and as)

Personal Representative of the Heirs)

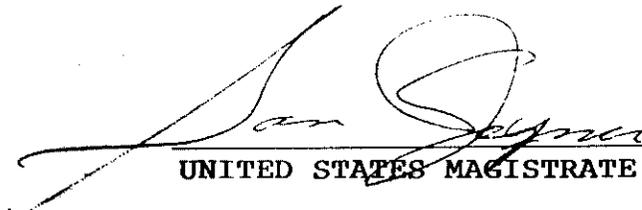
and Estate of CHARLES EUGENE COWELL,)

No. 90-CV-540-J

ENTERED ON DOCKET
DATE AUG 21
AUG 21 1995

ORDER OF DISMISSAL

Upon the stipulation of the parties and for good cause shown, the case is hereby dismissed as to U.S. Mineral Products Company only, with prejudice to refile and the parties are ordered to bear their own costs and attorneys fees.


UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID M. DAWSON aka David Matthew
Dawson aka David Dawson; TERESA
DAWSON GOLDEN fka Teresa S.
Dawson aka Teresa Sue Dawson fka
Teresa S. McVey; RICHARD E.
GOLDEN; UNKNOWN SPOUSE OF
David M. Dawson aka David Matthew
Dawson aka David Dawson, if any;
DESIGN PROPERTIES, INC; STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX
COMMISSION; COUNTY TREASURER,
Tulsa County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

FILED

AUG 18 1995

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

Civil Case No. 95-C 379BU

ENTERED ON DOCKET

DATE ~~AUG 21 1995~~

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

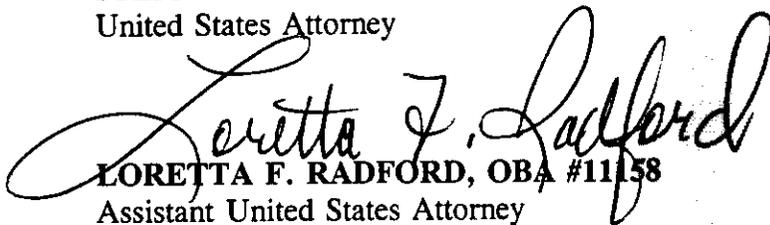
Dated this 17th day of August, 1995.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, stylized handwritten signature in black ink that reads "Loretta F. Radford". The signature is written in a cursive style with large, flowing loops.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 18 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DAN L. GALLAUGHER;)
KATHERINE M. GALLAUGHER;)
BILL F. KONGS; SHIRLEY E. KONGS;)
CITY OF BROKEN ARROW, Oklahoma)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE AUG 21 1995

Civil Case No. 95-C 270BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17th day of August, 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, BILL F. KONGS, appears not having previously filed a Disclaimer; and the Defendants, DAN L. GALLAUGHER, KATHERINE M. GALLAUGHER, SHIRLEY E. KONGS, and CITY OF BROKEN ARROW, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DAN L. GALLAUGHER, was served a copy of Summons and Complaint on June 1, 1995; that the Defendant, KATHERINE M. GALLAUGHER, was served a copy of Summons and Complaint on June 1, 1995; that the Defendant, BILL F. KONGS, signed

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

Waiver of Summons on March 30, 1995; **that** Defendant, SHIRLEY E. KONGS, signed a Waiver of Summons on March 29, 1995; **that** Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons **and** Complaint on or about March 27, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 13, 1995; **that** the Defendant, BILL F. KONGS, filed his Disclaimer on April 5, 1995; and **that** the Defendants, DAN L. GALLAUGHER, KATHERINE M. GALLAUGHER, SHIRLEY E. KONGS, **and** CITY OF BROKEN ARROW, Oklahoma, have failed to answer and their default has **therefore** been entered by the Clerk of this Court.

The Court further finds **that** the Defendants, DAN L. GALLAUGHER and KATHERINE M. GALLAUGHER, are husband and wife. The Defendants, BILL F. KONGS and SHIRLEY E. KONGS, are husband and wife.

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

Lot Eight (8), Block Seven (7), CHIMNEY RIDGE SOUTH, a subdivision to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds **that** on March 30, 1979, the Defendants, BILL F. KONGS and SHIRLEY E. KONGS, **executed** and delivered to WESTERN PACIFIC FINANCIAL CORPORATION, their mortgage note in the amount of \$53,550.00, 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, the Defendants, BILL F. KONGS and SHIRLEY E. KONGS, husband and wife, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION, a mortgage dated March 30, 1979, covering the above-described property. Said mortgage was recorded on April 3, 1979, in Book 4390, Page 1208, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 10, 1979, WESTERN PACIFIC FINANCIAL CORPORATION, assigned the above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on July 9, 1979, in Book 4411, Page 1790, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 17, 1989, FEDERAL NATIONAL MORTGAGE 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 January 27, 1989, in Book 5163, Page 2103-2104, in the records of Tulsa County, Oklahoma.

The Court further finds on July 16, 1987, Bill F. Kongs and Shirley E. Kongs, husband and wife, granted a General Warranty Deed to Dan L. Gallagher and Katherine M. Gallagher, husband and wife. This Deed was recorded with the Tulsa County Clerk on July 27, 1987, in Book 5041, Page 1480, and the Defendants, DAN L. GALLAUGHER and KATHERINE M. GALLAUGHER, husband and wife are the current assumptors of the subject indebtedness.

The Court further finds that on February 23, 1989, the Defendants, DAN L. GALLAUGHER and KATHERINE M. GALLAUGHER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for

the Plaintiff's forbearance of its right to **foreclose**. Superseding agreements were reached between these same parties on February 12, 1990, and March 11, 1991.

The Court further finds that **the Defendants**, DAN L. GALLAUGHER and KATHERINE M. GALLAUGHER, made **default** under the terms of the aforesaid note and mortgage, as well as the terms and **conditions** of the forbearance agreements, by reason of their failure to make the monthly **installments due** thereon, which default has continued, and that by reason thereof the Defendants, DAN L. GALLAUGHER and KATHERINE M. GALLAUGHER, are indebted to the **Plaintiff** in the principal sum of \$90,093.18, plus interest at the rate of 9.5 percent per **annum** from January 1, 1995 until judgment, plus interest thereafter at the legal rate until **fully paid**, and the costs of this action.

The Court further finds that **the Defendants**, DAN L. GALLAUGHER, KATHERINE M. GALLAUGHER, SHIRLEY E. KONGS, and CITY OF BROKEN ARROW, Oklahoma, are in default, and **have no right**, title or interest in the subject real property.

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

The Court further finds that **the Defendant**, BILL F. KONGS, disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, **acting** on behalf of the Secretary of Housing and

Urban Development, have and recover judgment In Rem against the Defendants, DAN L. GALLAUGHER and KATHERINE M. GALLAUGHER, in the principal sum of \$90,093.18, plus interest at the rate of 9.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the **current legal** rate of 5.89 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 Defendants, COUNTY TREASURER and **BOARD OF COUNTY COMMISSIONERS**, Tulsa County, Oklahoma, DAN L. GALLAUGHER, KATHERINE M. GALLAUGHER, BILL F. KONGS, SHIRLEY E. KONGS, **and** CITY OF BROKEN ARROW, Oklahoma, have no right, title, or interest in the **subject real** property.

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

First:

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

Second:

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

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

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

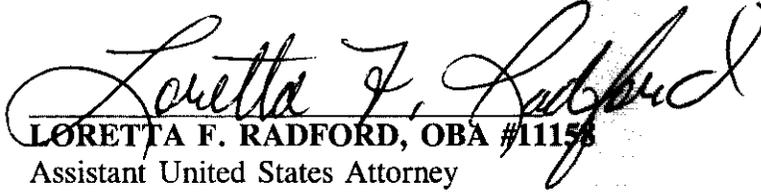
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11153

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DICK A. BLAKELEY, OBA #852

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

Judgment of Foreclosure
Civil Action No. 95-C 270BU

LFR:flv

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

FILED

AUG 18 1995

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

DATE AUG 21 1995

ORDER

This matter comes before the Court upon Defendant, State Farm Fire and Casualty Company's Renewal of Motion for Judgment After Trial as a Matter of Law or in the Alternative Motion for New Trial (Docket Entry #57). Plaintiffs, David G. Taylor and Jessica M. Taylor, have responded to the motions and Defendant has replied thereto. Upon due consideration, the Court makes its determination.

Renewal of Motion for Judgment After Trial as a Matter of Law

At the close of evidence in this case, Defendant moved for judgment as a matter of law under Fed.R.Civ.P. 50(a) as to Plaintiffs' bad faith claim. The motion was denied and the jury rendered a verdict in favor of Plaintiffs. Defendant now renews its motion claiming that it is entitled to judgment as a matter of law because the record is barren of any evidence to support Plaintiffs' bad faith claim.

Rule 50(a)(1) permits a district court to grant a motion for judgment as a matter of law "if the evidence conclusively favors

the moving party and is susceptible to no reasonable inferences that would sustain the nonmoving party's position.'" Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1363 (10th Cir. 1994) (quoting Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 113 S.Ct. 1417 (1993)). In determining a Rule 50 motion, the court may not reweigh the evidence, pass upon the credibility of witnesses, or in any manner substitute its judgment for that of the jury. Id.; Lucas v. Dover Corp., Norris Div., 857 F.2d 1397, 1400 (10th Cir. 1988). In addition, the court must view the evidence most favorably to the nonmoving party and give the nonmoving party the benefit of all reasonable inferences from the evidence. Considine, 43 F.3d at 1363.

Guided by the foregoing principles, the Court finds that Defendant's motion should be denied. The Court concludes that the evidence was susceptible to reasonable inferences which support Plaintiffs' bad faith claim. The Court also concludes that a reasonable jury could find from the evidence that Defendant breached its obligation of good faith and fair dealing to Plaintiffs.

Motion for New Trial

Defendant, in the alternative, moves for new trial on the basis of juror misconduct. Specifically, Defendant contends that Mr. Jeffrey Bigger, who served as foreman of the jury, failed to correctly answer certain questions propounded during voir dire examination. During voir dire examination, the Court asked the following questions of the veniremen,

Have any of you ever had a dispute with any insurance company over a claim or had a lawsuit with any insurance company?

Have any of you ever had an insurance policy canceled or been refused coverage by an insurance company?

* * * * *

Now, in just a moment I am going to ask the attorneys to advise you as to who their potential witnesses in this case may be. Please listen to their names carefully, as they are read, and then I will ask you if you know any of these witnesses or have heard of them or have any type of relationship with any of the witnesses.

* * * * *

Do any of you know any of those witnesses, related them by blood or marriage?

(Ex. A, Defendant's motion, pp. 16, 28-29).

Mr. Cathcart, Defendant's attorney, additionally asked the veniremen,

We have all had various types of insurance claims, be it just for the submission of a medical bill or arising from an automobile accident or under a home owners or renters policy for property damage. Is there anyone else who has had that type of a claim, other than a roof or rain or storm claim?

(Ex. A, Defendant's motion, p. 42).

Mr. Bigger did not respond to any of the questions posed by the Court and Mr. Cathcart. After trial, Defendant checked its records and discovered Mr. Bigger had submitted a theft claim with Defendant on September 3, 1993, which had been closed without payment to him. Defendant also discovered that Mr. Neal Stauffer, one of Defendant's witnesses, conducted an examination of Mr.

Bigger in regard to the claim. Upon investigation, Mr. Stauffer disclosed that the claim had been withdrawn by Mr. Bigger during the examination. Defendant further discovered that a letter of non-renewal had been sent to Mr. Bigger on October 25, 1993.

In its motion, Defendant contends that Mr. Bigger failed to answer the voir dire questions honestly. Defendant asserts that had Mr. Bigger been truthful about his claim history and his knowledge of one of Defendant's witnesses, it would have challenged Mr. Bigger for cause. Because Mr. Bigger failed to honestly respond to the voir dire questions and was presumably biased, Defendant argues that it is entitled to new trial.

Plaintiffs, in response, assert that Mr. Bigger's response to the voir questions relating to insurance claims and cancellation of claims were not dishonest. Plaintiffs contend that Mr. Bigger had not had an insurance claim as he had voluntarily withdrawn his theft claim. Moreover, they state Mr. Cathcart's voir dire question regarding insurance claims was not directed to disclosure of a theft claim. Rather, it was directed to disclosure of filing claims for medical bills, automobile accidents and property damage. Plaintiffs additionally contend that Mr. Bigger's response to the cancellation question was not dishonest since his home owner's policy was not canceled but non-renewed due to the condition of his property. Plaintiffs further argue that Mr. Bigger was not biased by Defendant's non-renewal of the policy since Mr. Bigger continued to be insured by Defendant for his automobiles. Furthermore, Plaintiffs assert that even if Mr. Bigger incorrectly responded to

the voir dire questions, Defendant waived any right to challenge Mr. Bigger's conduct as it could have ascertained during trial with due diligence Mr. Bigger's claim history and knowledge of Mr. Stauffer.

In reply, Defendant contends that the fact Mr. Bigger withdrew his claim does not mean that there was not a claim. Defendant also states that even though Mr. Cathcart did not ask any specific question about a theft claim, it was clear Mr. Cathcart was trying to elicit information about any claim that any venireman had ever made. In addition, Defendant contends that an average person would not recognize a distinction between canceling and non-renewing a insurance policy and therefore should have responded to the cancellation question. Defendant further argues its challenge to Mr. Bigger's misconduct was not waived. According to Defendant, it did not have any information during trial which would have caused it to believe Mr. Bigger did not truthfully respond to the voir dire questions. Defendant argues that simply knowing Mr. Bigger is one of its insured did not give Defendant reason to question Mr. Bigger's truthfulness.

In order to obtain a new trial based upon a juror's non-disclosure during voir dire, a party must first demonstrate that the juror failed to answer honestly a material question on voir dire and then further show that a correct response would have provided a valid basis for a challenge for cause. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984). In the instant case, the Court finds that

Defendant has failed to meet **its** burden under McDonough.

Initially, the Court **notes** that Defendant did not request an evidentiary hearing in regard **its** motion. In addition, Defendant did not submit any affidavit **or** sworn statement from Mr. Bigger with its motion or offer to **submit** any testimony from Mr. Bigger at oral argument of the motion. **Consequently**, the Court does not have any knowledge as to the **reason** or reasons for Mr. Bigger not responding to the questions.

Having reviewed the **evidence** submitted, the Court finds that Defendant has not **sufficiently** shown that Mr. Bigger answered dishonestly to the voir dire **questions** concerning insurance claims and cancellation of claims. It is undisputed that Mr. Bigger voluntarily withdrew his **theft** claim. In the Court's view, it is conceivable Mr. Bigger did **not** interpret Mr. Cathcart's voir dire question as eliciting **information** concerning a claim that had not been pursued. The **responses** made by the veniremen to Mr. Cathcart's question **concerned** claims which were filed with Defendant or other insurance **companies** and resolved. As to the cancellation question, the **evidence** shows that Mr. Bigger's policy was non-renewed rather than **canceled**. Defendant states that the average juror would not know **such** distinction. However, Defendant has not shown that Mr. Bigger **did** not know such a distinction.

As to Mr. Bigger's **knowledge** of Defendant's witness, Neal Stauffer, the Court finds that Defendant has not demonstrated that Mr. Bigger's response was **dishonest**. The Court opines that it is conceivable Mr. Bigger had **forgotten** Mr. Stauffer's name. Mr.

Stauffer had taken Mr. Bigger's examination almost a year and a half before the trial in this case. The Court thus concludes that when Mr. Cathcart read Mr. Stauffer's name to the veniremen, Mr. Bigger's response was honest though inaccurate. Once Mr. Stauffer testified, however, the Court agrees that it was improbable Mr. Bigger did not recognize Mr. Stauffer. Defendant, though, has not shown Mr. Bigger knew he needed to reveal his knowledge of Mr. Stauffer at that time.

Even if the Court were to find Mr. Bigger failed to answer honestly voir dire questions at issue, the Court finds Defendant has not sufficiently shown that a correct response to those questions would have provided a valid basis for a challenge for cause. The Court specifically finds Defendant has not demonstrated actual bias by Mr. Bigger. See, Burton v. Johnson, 948 F.2d 1150, 1156 (10th Cir. 1991); Baca v. Sullivan, 821 F.2d 1480, 1483 (10th Cir. 1987) ("[A] party who seeks a new trial because of non-disclosure by a juror during voir dire must show actual bias"). Actual bias may be shown "by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." Id. Here, Defendant has not presented any express admission of actual bias. Moreover, the Court finds that Defendant has not demonstrated that the circumstances involving Mr. Bigger had such a close connection to the instant case that bias must be presumed. Therefore, the Court concludes that Defendant is not entitled to a new trial based upon nondisclosure by Mr. Bigger during voir dire examination.

Were the Court to find Defendant had satisfied its burden under McDonough, the Court still concludes that Defendant is not entitled to a new trial. In the Court's view, Defendant waived any objection to Mr. Bigger's nondisclosure during voir dire examination. Prior to trial, Plaintiffs moved to remove all of Defendant's insureds from the jury. Defendant objected to the motion and the Court denied Plaintiffs' motion. During voir dire examination, Mr. Bigger admitted that he was an insured of Defendant. As a result, Defendant knew Mr. Bigger was an insured and was able to obtain information from its files concerning his claim history during trial. Defendant maintains that it had no reason to believe Mr. Bigger was untruthful during voir dire and thus had no reason to investigate his claim history. However, Defendant has conceded that during the trial, it perceived Mr. Bigger as the only juror not giving favorable body language to Defendant. Defendant has also conceded that it was surprised when it discovered on the first day of jury deliberations, Mr. Bigger was the jury foreman. Despite its concern of Mr. Bigger, Defendant chose not to investigate Mr. Bigger's claim history until the next business day after the jury rendered its verdict in favor of Plaintiffs. Because Defendant had concern about Mr. Bigger during trial and could have discovered the information concerning Mr. Bigger with the exercise of reasonable diligence, the Court concludes Defendant waived any objection to Mr. Bigger's nondisclosure during voir dire examination.

Based upon the foregoing, the Court DENIES Defendant, State

Farm Fire and Casualty Company's Renewal of Motion for Judgment After Trial as a Matter of Law or in the Alternative Motion for New Trial (Docket Entry #57).

ENTERED this 17th day of August, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

PATRICIA QUILLIN AND RILEY)
QUILLIN, wife and husband,)
)
Plaintiffs,)

v.)

Case No. 94 C-1020-BU ✓

AMERICAN HOSPITAL SUPPLY)
CORP. INC., AMERICAN HEYER-)
SCHULTE, CORP., BAXTER)
HEALTHCARE CORPORATION, INC.,)
DOW CORNING WRIGHT CORPORA-)
TION, DOW CORNING CORPORA-)
TION, and DOW CHEMICAL)
COMPANY, all foreign)
corporation,)
)
Defendants.)

FILE

AUG 18 1995

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

ENTERED ON DOCKET

DATE AUG 21 1995

SUPPLEMENTAL ORDER

This matter came before the Court on July 17, 1995. On that date, an Order was entered dismissing, without prejudice, defendants Dow Corning Wright Corporation and Dow Chemical Company, pursuant to Rule 41(a)(2), Fed.R.Civ.P. The application had inadvertently left off the defendant Dow Corning Corporation and had incorrectly identified Dow Corning Wright Corporation as the defendant when, in fact, the correct title is Dow Corning Corporation, individually, and as successor-in-interest to Dow Corning Wright Corporation.

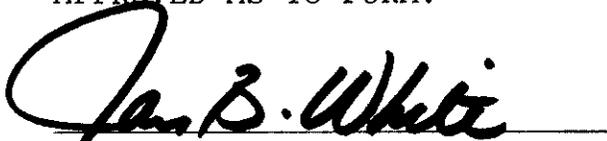
Accordingly, the Order of July 17, is amended as follows:

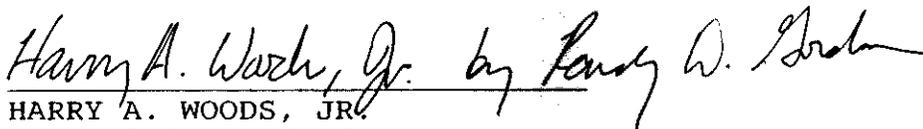
Plaintiffs action against defendants Dow Corning Corporation, individually, and as successor-in-interest to Dow Corning Wright Corporation, and Dow Chemical Company is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED this 17th day of August, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:


JAY B. WHITE
Counsel for Plaintiffs


HARRY A. WOODS, JR.
Counsel for Defendants Dow
Corning Corporation, individually
and as successor-in-interest to
Dow Corning Wright Corporation

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
REBECCA ANN WEST fka Rebecca A.)
Thomason fka Rebecca A. Stroup fka)
Rebecca A. West-Chitwood;)
UNKNOWN SPOUSE OF Rebecca Ann)
West, if any; STATE OF OKLAHOMA,)
ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

FILED

AUG 18 1995

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

ENTERED ON DOCKET
DATE AUG 21 1995

Civil Case No. 94-C-1181-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of August, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer; and the Defendants, REBECCA ANN WEST fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood and UNKNOWN SPOUSE OF Rebecca Ann West fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood, if any, appear not, but make default.

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

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on January 5, 1995, by Certified Mail.

The Court further finds that the Defendants, REBECCA ANN WEST fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood and UNKNOWN SPOUSE OF Rebecca Ann West fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 29, 1995, and continuing through May 3, 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 Defendants, REBECCA ANN WEST fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood and UNKNOWN SPOUSE OF Rebecca Ann West fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, REBECCA ANN WEST fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood and UNKNOWN SPOUSE OF Rebecca Ann West fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood, if any. The Court conducted an inquiry into the sufficiency of the service by publication to

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

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on January 10, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on July 26, 1995; and that the Defendants, REBECCA ANN WEST fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood and UNKNOWN SPOUSE OF Rebecca Ann West fka Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, REBECCA ANN WEST, is one and the same person as Rebecca A. Thomason fka Rebecca A. Stroup fka Rebecca A. West-Chitwood, and will hereinafter be referred to as "REBECCA ANN WEST." The Defendant, REBECCA ANN WEST, was restored to her former name Rebecca Ann West by a Divorce Decree, Dated January 29, 1992, in Case No. FD-91-8089, in District Court, Tulsa County, Oklahoma.

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 15, Block 2, of Lots 1-11, inclusive, Block 1, Lots 1-17, inclusive Block 2, Lots 1-14, inclusive, Block 3, WOODLAND VIEW PARK 2ND, an Addition to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on February 27, 1987, the Defendant, REBECCA ANN WEST, executed and delivered to SECURITY BANK her mortgage note in the amount of \$49,927.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, REBECCA ANN WEST, a single person, executed and delivered to SECURITY BANK, a mortgage dated February 27, 1987, covering the above-described property. Said mortgage was recorded on March 2, 1987, in Book 5005, Page 333, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 5, 1987, SECURITY BANK, assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on March 5, 1987, in Book 5006, Page 365, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 20, 1989, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on

January 23, 1989, in Book 5171, Page 1412, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was Re-recorded on March 13, 1989, in Book 5162, Page 2158, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 11, 1989, the Defendant, REBECCA ANN WEST, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 22, 1990, February 5, 1991, and January 8, 1992.

The Court further finds that the Defendant, REBECCA ANN WEST, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, REBECCA ANN WEST, is indebted to the Plaintiff in the principal sum of \$78,945.55, plus interest at the rate of 9 percent per annum from October 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 \$627.00, 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 \$34.00 which became a lien on the property as of June 26, 1992, in the amount of \$30.00 which became a lien on the property

as of June 25, 1993, and in the amount of \$29.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, REBECCA ANN WEST and UNKNOWN SPOUSE OF Rebecca Ann West, if any, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, REBECCA ANN WEST, in the principal sum of \$78,945.55, plus interest at the rate of 9 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.89 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 \$627.00, 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 \$93.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, REBECCA ANN WEST, UNKNOWN SPOUSE OF Rebecca Ann West, if any, and STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, 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, REBECCA ANN WEST, to satisfy the In Rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$627.00, 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 \$93.00, personal property taxes which are currently due and owing.

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

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

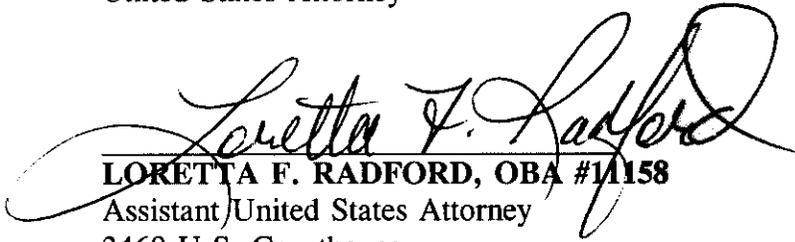
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ **TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 1181K

LFR:flv

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

LARRY PATRICK, An Individual,)
)
) PLAINTIFF,)
)
)
) -vs-)
)
) STATE FARM FIRE AND CASUALTY)
) COMPANY, a foreign corporation,)
)
) DEFENDANT.)

ENTERED ON DOCKET
DATE AUG 21 1995
CASE NO. 93-C-585-K
FILED
AUG 18 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court on the parties' Joint Stipulation of Dismissal Without Prejudice. Upon due consideration, it is hereby

ORDERED, ADJUDGED, AND DECREED that the above entitled action is hereby dismissed without prejudice.

Dated this 17 day of August, 1995.

s/ TERRY C. KERN

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 18 1995

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

CLIFFORD JOHNSON,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

Case No: 93-C-708-W ✓

ENTERED ON DOCKET

DATE AUG 21 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 17, 1995.

Dated this 18th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

CLIFFORD JOHNSON,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

AUG 17 1995

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

Case No. 93-C-708-E

ENTERED ON DOCKET
DATE AUG 21 1995

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ ignored the report of claimant's treating physician that he was totally disabled.
- (2) The ALJ erred in finding that claimant could perform his past relevant work.
- (3) The ALJ failed to consider all of claimant's disabilities in combination, including his mental impairment.
- (4) The ALJ ignored claimant's complaints of pain.

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

Claimant suffered a stab wound to the side of his neck in July of 1988 which severed his left carotid artery, fractured his left clavicle, and caused a left pneumothorax (TR 128). He underwent surgical repair of the left carotid artery, as well as treatment for

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

the other injuries, and returned to work (TR 85, 108-109, 128). At the hearing on August 6, 1992, he stated he had not seen a **doctor** since November 1, 1991 (TR 26), although he alleged on his application for **supplemental** security income he became disabled on August 22, 1991 (TR 57).

Dr. H.R. Howe, Jr. stated on **November 1, 1991** that a review of claimant's systems was "insignificant" and, while he **complained** of shortness of breath and a neck impairment, he had no history of angina, **congestive heart** failure, orthopnea, myocardial infarction, paroxysmal nocturnal dyspnea, **chronic or persistent** upper respiratory tract infections, pneumonia, tuberculosis, or carcinoma (TR 128). The doctor noted that he smoked a half pack of cigarettes daily (TR 128). The **doctor** found that claimant's lungs were clear, heart regular in rate and rhythm, and "[n]eck is **supple** without meningeal signs. He does have a surgical scar on his left anterior **cervical** triangle of his neck from surgical repair of injuries as described above. This area is **tender** to palpation however there is no significant edema, ecchymosis or erythema or **crepittance**" (TR 129). The only limitation of range of motion was his left shoulder extension, **which** was ten degrees compared to thirty on the right (TR 129).

Dr. Lawrence Reed treated **claimant** in 1988 when he was injured and saw him again on July 21 and November 3, 1992, **but not** in between. On November 27, 1992, he wrote that claimant seemed to have **deteriorated**:

He continues to experience **loss of cognitive** ability and now states that he seems to be losing his eyesight. He complains that cool or damp weather seems to affect 'all of my joints,' **but especially** his neck and left shoulder. He continues to complain of **shortness** of breath upon exertion. The patient still complains of **intermittent numbness** in his left arm and hand. He continues to develop slurred **speech** when fatigued. His memory loss has

slowly worsened over the **intervening** four years.

(TR 9). The doctor found claimant's **blood** pressure, pulse, and respiratory rates normal and his lungs clear, but determined that he demonstrated "restricted motion of his cervical spine and left shoulder" (TR 9). **While** providing no documented clinical evidence in support, the doctor concluded:

Presently Mr. Johnson **continues** to demonstrate clinical evidence of significant brain injury. Range of motion of his neck and of his left shoulder continues to be restricted. **Additionally** there is an element of continuing weakness of the left upper **extremity**. Symptomatically and clinically the patient continues to demonstrate **mild** to moderate respiratory deficiency.

It is my opinion that presently **Mr. Clifford Johnson** is permanently and totally disabled to perform any **useful** employment for which he has previous training and/or experience.

(TR 9).

Claimant alleges disability due to **pain** and limitations of his left shoulder, soreness, stiffness, spasms, numbness in his **arms and fingers**, and a lack of grip strength; however, he has not been under a physician's **care or taken** any medications for these conditions (TR 27, 30-34, 150). He testified to **doing** activities inconsistent with the limitations he alleges, including household chores, **vacuuming**, cooking, shopping, fishing, and playing bingo (TR 38-40, 88).

There is no merit to claimant's **first** contention that the ALJ erred in ignoring the November 27, 1992 report of claimant's **treating** physician, Dr. Reed. A physician's opinion may be rejected when it is brief, **conclusory** or unsupported by the medical evidence. Castellano v. Secretary of HHS, 26 F.3d 1027, 1029 (10th Cir. 1994); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

There is also no merit to claimant's second contention that the ALJ erred in finding claimant could perform his past relevant work, because his former job as an apartment manager required maintenance work. A claimant may be found not disabled at the fourth step if he can perform either his actual past job or his past type of job. 20 C.F.R. § 416.920(e); Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987); Tillery, 713 F.2d at 607. The Dictionary of Occupational Titles describes the job of an apartment house manager as follows:

Manages apartment house complex or development for owners or property management firm: Shows prospective tenants apartments and explains occupancy terms. Informs prospective tenants of availability of nearby schools, shopping malls, recreational facilities, and public transportation. Rents or leases apartments, collects security deposit as required, and completes lease form outlining conditions and terms of occupancy when required. Collects rents due and issues receipts. Investigates tenant complaints concerning malfunctions of utilities or furnished household appliances or goods, and inspects vacated apartments to determine need for repairs or maintenance. Directs and coordinates activities of maintenance staff engaged in repairing plumbing or electrical malfunctions, painting apartments or buildings, and performing landscaping or gardening work, or arranges for outside personnel to perform repairs. Resolves tenant complaints concerning other tenants or visitors. May arrange for other services, such as trash collection, extermination, or carpet cleaning. May clean public areas of building and make minor repairs to equipment or appliances.

There is no medical evidence in the record to support the claimant's contention that he cannot perform this job as described.

The Tenth Circuit has found that the ALJ has a duty to fully investigate the specific demands of a claimant's past relevant work in order to have enough facts to make a comparison with his limitations. Henrie v. U.S. Dept. of Health & Human Services, 13 F.3d 359 (10th Cir. 1993). In that case there was not testimony by a vocational expert, and the

court noted that it is not the ALJ's duty to be a claimant's advocate at step four of the sequential evaluation. Id. at 361. Here the ALJ followed the ruling in Henrie, id.: (1) he made findings of claimant's residual functional capacity (TR 13), (2) he asked a vocational expert to assess the physical and mental demands of claimant's prior jobs (TR 41-47), and (3) he found that claimant had the ability to return to his past relevant job given his residual functional capacity (TR 14-18).

There is no merit to claimant's third contention that the ALJ did not consider all his impairments, including brain damage, gastric problems, loss of memory, swelling of his arm and hands, neck spasms, and breathing problems. There is no evidence of these medical problems in the record except for claimant's own self-serving testimony. Complaints must be evidenced by an underlying medical condition and there must be objective evidence of the medical condition to support a claim of disability. Blankenship v. Bowen, 874 F.2d 1116, 1123 (6th Cir. 1989).

Finally, there is no merit to claimant's contention that the ALJ ignored his complaint of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey, 816 F.2d at 515. The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must

show to prove a claim of disabling pain:

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

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had neck and shoulder problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of

severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

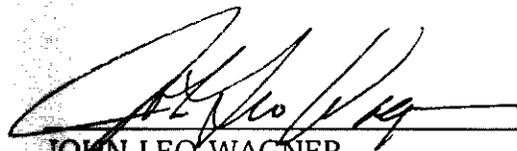
The ALJ considered claimant's complaints of pain and the Luna factors and found no evidence of disabling pain:

The description given by the claimant himself of his daily activities and the pain that he suffers from can best be classified more as a discomfort than pain itself. Considering also the observations and information provided by treating and examining physicians and considering his daily activities, the functional restrictions placed upon his ability to move about, the treatments he has received other than medication for the relief of pain, the fact that he currently takes no pain medication at all, has no side effects from any pain medication, any precipitating and aggravating factors such as movement, activities and environmental conditions as spoken of above, and considering particularly the nature, intensity, location, duration, frequency, radiation, of any of his pain complaint, the Administrative Law Judge simply cannot find evidence here which would support a conclusion that the claimant has disabling pain as such. While it is true he does have some discomfort, it is not shown to be of a disabling type. None of the claimant's treating physicians have classified his pain as disabling and the claimant himself does not describe it as such in his testimony.

(TR 17).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 17th day of August, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Johnson.or