

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

FILED

SEP - 7 1995

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

JO ANN MITCHELL,
for SANCHEZ MITCHELL,

PLAINTIFF,

vs.

CASE NO. 94-C-162-M

SHIRLEY S. CHATER,
Commissioner of the Social
Security Administration,¹

DEFENDANT.

EOD 9/8/95

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this 7th day
of September, 1995.

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

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.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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Richard M. Lawrence, Court Clerk
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JO ANN MITCHELL,
for SANCHEZ MITCHELL,

PLAINTIFF,

vs.

SHIRLEY S. CHATER,
Commissioner of the Social
Security Administration,¹

DEFENDANT.

CASE NO. 94-C-162-M

ORDER

Plaintiff, Jo Ann Mitchell, on behalf of her son, Sanchez Mitchell, 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*

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 Mitchell's September 30, 1992 application for disability benefits was denied February 11, 1993, the denial was affirmed on reconsideration, March 26, 1993. A hearing before an Administrative Law Judge ("ALJ") was held September 14, 1993. By decision dated October 20, 1993, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 20, 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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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 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.

Sanchez Mitchell ("Sanchez") was represented by his mother, Jo Ann Mitchell, ("Ms. Mitchell), pro se, through the Social Security administrative process. Sanchez is now represented by counsel. Plaintiff alleges that the ALJ failed to fully and properly advise Ms. Mitchell of the right to representation. According to Plaintiff, this rendered any waiver of counsel at the commencement of the hearing ineffective. That failure, Plaintiff claims, coupled with the ALJ's inadequate development of the record, prejudiced Sanchez's case. Plaintiff also claims that after finding Sanchez was not disabled, the ALJ continued through all the "steps" of the required analysis. Plaintiff asserts that this procedure was improper, contradictory and violative of Social Security regulations.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the 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. Likewise, the Court incorporates the

ALJ's statement of facts, findings and legal analysis into this Order.

The Court does not agree that Ms. Mitchell's waiver of the right to be represented by counsel was ineffective, or that any prejudice resulted from the absence of counsel at the hearing. A person may certainly waive the right to counsel in Social Security hearings, *Ware v. Schweiker*, 651 F.2d 408 (5th Cir. 1981); *Smith v. Schweiker*, 677 F.2d 826 (11th Cir. 1982). If the claimant has been previously advised of that right by notice, the ALJ is not required to advise the claimant at the hearing. *Dixon v. Heckler*, 811 F.2d 506 (10th Cir. 1987). Notwithstanding this rule, the ALJ did inquire if Ms. Mitchell desired an attorney [R. 30].

In this case, the "Request For Hearing" form which Ms. Mitchell signed on her son's behalf advises: "You have a right to be represented at the hearing. If you are not represented but would like to be, your Social Security Office will give you a list of legal referral and service organizations." [R. 76] On that form box no. 12, "Claimant not represented - list of legal referral and service organizations provided" is checked. Plaintiff does not contend that the information was not provided. The record also contains a copy of the Supplemental Security Income Notice [R. 74] which contains the following language:

If You Want Help With Your Appeal

You can have a friend, lawyer, or someone else help you. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security Office has a list of groups that can help you with your appeal.

If you get someone to help you, you should let us know. If you hire someone, we must approve the fee before he or she can collect it.

Ms. Mitchell was asked by the ALJ if she wished to proceed at the hearing without counsel [R. 30-31]. She indicated that she did. The lack of legal representation standing alone does not

warrant reversal. *Born v. Secretary of Health & Human Services*, 923 F.2d 1168, 1172 (6th Cir. 1990).

Plaintiff claims that the ALJ failed in his duty to develop the record, as evidenced by the brevity of the hearing which lasted 11 minutes. However, the length or brevity of a benefits hearing is not dispositive of whether or not the ALJ met the obligation to adequately develop the record. The 10th Circuit has held that the more important inquiry is whether sufficient questions were asked to ascertain the nature of the claimant's alleged impairments, what ongoing treatment and medication claimant is receiving and the impact of the impairment on claimant's daily routine and activities. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992); *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th Cir. 1993).

In this case Sanchez has been diagnosed with attention deficit disorder and hyperactivity. During the hearing the ALJ ascertained that Sanchez attends developmental first grade on a daily basis, and is "kind of smart" but is hyperactive. He forgets easily and is constantly moving and into something and is never still. When he takes Ritalin he is calmer for a few hours, but his mother stopped giving it to him because he had headaches. Twice during the hearing Ms. Mitchell was asked if there was anything else she wanted to tell the ALJ [R. 35]. She replied that she only wanted to tell him that Sanchez is hyperactive. *Id.* The Court agrees that the hearing was brief. However, aside from complaining about the length of the hearing Plaintiff, now represented by counsel, has not pointed to any specific information that would have been obtained had more thorough questioning taken place. Further, the fact that a potential line of questioning was not pursued does not mandate reversal. The Tenth Circuit has held that the ALJ's basic obligation to ensure an adequate record is not a panacea for claimants and does not

require reversal where the ALJ fails to exhaust every potential line of questioning. *Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court finds that Sanchez was not prejudiced by the lack of counsel or the length of the hearing.

The record is uncontradicted that, although Sanchez is hyperactive, his condition is controlled by Ritalin [R. 34, 134, 139]. When an impairment can be reasonably controlled with medication or is reasonably amenable to treatment, it cannot serve as a basis for a finding of disability. See *Pacheco v. Sullivan*, 931 F.2d 695, 698 (10th Cir. 1991); *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir. 1985); 20 C.F.R. § 404.1530.

The paperwork filed by Ms. Mitchell mentions that Sanchez has speech problems and that he attended a language enriched kindergarten program. The kindergarten screening profile dated September 14, 1992 reflects that Sanchez demonstrated a problem with verb tenses, sentence structure and articulation, but that he was cooperative and eager to please [R. 110]. The speech problem is not mentioned by the evaluating psychologist, Dr. Lee, in his January 20, 1993 report. In fact, Sanchez was described as being a "very verbal youngster." Testing conducted by Dr. Lee demonstrated that Sanchez had low average verbal abstract reasoning abilities and verbal social judgment but that he has "above average vocabulary abilities" [R. 111-112]. Dr. Lee stated that it was his clinical impression that Sanchez has a severe attention deficit disorder with associated hyperactivity and would benefit from Ritalin. Dr. Lee specifically noted that "no other problems were found in the testing or in the interview." *Id.* Documentation from his school advises that Sanchez's behavior is the only concern, and it is helped by Ritalin [R. 139]. When asked at the hearing, his mother stated that Sanchez's only problem is hyperactivity [R. 35]. The kindergarten teacher noted that Sanchez is doing very well knowing his letters and

numbers and with coloring skills and following directions. There is substantial support in the record for the ALJ's determination that Sanchez is not under a disability as that term is defined in the Social Security Act as applied to children. 42 U.S. § 401, et seq; *Sullivan v. Zebley*, 493 U.S. 521, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990); 20 C.F.R. § 416.924.

Plaintiff argues that the ALJ's finding that Sanchez's impairments have only a minimal effect on age appropriate activities and do not constitute a severe impairment is not supported by substantial evidence. The ALJ's finding that Sanchez's hyperactivity does not constitute a severe impairment would terminate the analysis at step-2 of the sequential evaluation process. However, despite that finding, the ALJ proceeded through the remaining steps. Sanchez's hyperactivity does not meet or equal the listing in 20 C.F.R. part 404, Subpt. P, App. 1, § 112.11 for that condition. According to the testimony of the vocational expert, the same characteristics of I.Q. level and hyperactivity would not preclude employment for an adult [R. 35-36]. Thus, even if the Court were to disagree with the ALJ and find that Sanchez's hyperactivity does constitute a severe impairment, the finding that Sanchez is not disabled is none-the-less supported by substantial evidence.

The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 7th day of September, 1995.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

FILED

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

SEP 07 1995

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

JAMES M. MILLER,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,²

Defendant.

Case No: 93-C-442-W

ENTERED ON DOCKET

DATE SEP 08 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, James M. Miller, in accordance with this court's Order filed September 6, 1995.

Dated this 7th day of September, 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.

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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-related activities, except that he should not work around dangerous moving machinery because of his possible partial seizure disorder and he could not be expected to perform complex work instructions. The ALJ concluded that claimant's past relevant work as substance abuse counselor trainee did not require the performance of work-related activities precluded by the above limitations and therefore the impairments did not prevent him from performing this past relevant work. 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 erred in failing to include claimant's limited ability to "think on his feet" in his assessment of claimant's residual

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).

functional capacity.

- (2) The ALJ erred in failing to make specific findings concerning the mental demands of claimant's past relevant work as a substance abuse counselor.
- (3) The ALJ erred in concluding that claimant could do his past relevant work as a substance abuse counselor and failing to find work in the national economy that he could perform.

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 disability resulting from head injuries that he received in a motorcycle accident on November 16, 1990 (TR 149-151). He was treated by Dr. Karl Detwiler for neurologic control, Dr. John Clark for facial fractures, and Dr. Mateo Bosquez for abdominal injuries (TR 140). He was released from the hospital on Dilantin to control seizures (TR 150, 155). On December 26, 1990, Dr. Detwiler noted that claimant was making a "good recovery," although he complained of lack of smell and taste and problems with his short and long term memory (TR 194). He was advised to remain on Dilantin (TR 194).

A brain scan done on February 5, 1991 yielded normal results (TR 201). On March 22, 1991, claimant told Dr. Detwiler that he was having memory problems, felt lethargic and apathetic, and was having frequent mood changes (TR 204). Examination showed that he was alert and oriented, with clear appropriate speech, symmetrical motor strength, intact sensation, and normal reflexes (TR 204). The doctor concluded that he was making a "good recovery" and that his symptoms were common after a head trauma and "should

subside with time" (TR 204).

Seven months after his injury, on May 13, 1991, claimant was examined by Dr. Donald Inbody (TR 207-209). Although plaintiff complained of speech problems, mood swings, and memory loss, the doctor observed that his speech was logical, coherent, and sequential, with no affective disturbances or associational defects in thinking (TR 208). Dr. Inbody stated that, although he had no reason to doubt plaintiff's memory problems right after the accident, he could detect "no major disturbances in memory for either recent or remote events" or speech problems relating to clearness or in terms of twisting words around or misusing them (TR 207-208). The doctor found no psychotic symptomatology, clinical depression, or psychomotor retardation and found claimant oriented in all spheres (TR 208). There were no disturbances in attention and concentration, and judgment was felt to be intact (TR 209). On July 8, 1991, Dr. Detwiler saw claimant again and, while his mother reported that he was having memory difficulties and was quite clumsy, the doctor reported his speech had improved and his recovery was normal (TR 212).

On January 20, 1992, Dr. Detwiler reported that a neurological exam demonstrated claimant to be alert and fluent and there were no evident language deficits (TR 221). However, he appeared to have a partial sixth nerve palsy, no smell or taste, a slight afferent pupillary defect, and slight decrease in fine motor movement of the right upper extremities (TR 221). An EEG was completely within normal limits, but the doctor expressed concern that there might be a partial complex seizure disorder (TR 221).

At the ALJ's request, Dr. Larry Vaught examined plaintiff on April 10, 1992, and administered a variety of tests to determine mental capabilities. Claimant was found to

exhibit mild neuropsychological dysfunction, to have difficulty with visual spatial analytic processes, coordination, non-verbal **problem** solving, and higher level tactile perceptual processes, and to exhibit some **difficulty with memory**, especially proactive and retroactive interference (TR 228-229). The doctor **found** that claimant's ability to do work related activities was generally either very good **or good**, but his mild memory problems precluded his ability to perform "**extremely complex**" tasks or instructions requiring him to "think on his feet." (TR 231-232). The doctor **noted** he had "difficulty remembering in various situations" throughout the evaluation (TR 224).

The ALJ noted that claimant **was** undergoing a special training program in automotive restoration and basic **electronics**, enjoyed tinkering in his garage, rides his bicycle 2 hours weekly, and joined a **bike club** which regularly goes on 6 hour weekend bike trips (TR 18, 45-46). He rides **45 to 50 miles** three times per week (TR 18, 47). He lives with his parents and takes **responsibility** for keeping his room clean, mowing the lawn, and planting and working in the **garden** (TR 18, 45). He enjoys socializing with his friends, listening to bands play, going **through** his football cards, playing his guitar, and watching "a lot" of television (TR 18, 45). The ALJ concluded that this mental and physical activity level was consistent **with a finding** of a substance addiction disorder, in remission, and an organic mental **disorder** which did not impose more than a slight restriction on activities of daily living **or social** functioning. (TR 18).

The ALJ then made a **determination regarding** claimant's ability to return to his past relevant work as a fast food worker, **line food** worker, line cook, counselor trainee, stocker, or machinist (TR 20). He noted that **the** medical record did not impose restrictions and

that claimant's testimony showed he could perform at least the full range of sedentary level work activity, since he had no problems sitting, only minor problems with balance and coordination when walking, no problem lifting and carrying 20 pounds, and no significant problem using his arms and legs for repetitive action (TR 20).

He concluded as follows:

Although the claimant probably should not return to his work as a cook or fast food operator because of his loss of smell and taste, he has the residual functional capacity to return to his past relevant work as a substance abuse counselor's trainee. His organic brain syndrome is very mild and pursuant to Exhibit 33, not a severe mental impairment. The medical record and the claimant's testimony consistently reflects that he is progressively improving and the claimant evidences physical stamina to the extent that he can ride weekend bicycle trips 6 to 7 hours at a time. The claimant's possible partial seizure disorder, pursuant to Dr. Webb's opinion, would preclude him from working around areas where the occurrence of a seizure may endanger persons or property. His work as a counselor would not place him in harms way in the event of a seizure.

(TR 20).

There is merit to claimant's contentions that the ALJ erred in his conclusions. The Dictionary of Occupational Titles ("DOT") describes the job of a substance abuse counselor as follows:

045.107-058 Substance Abuse Counselor. Counsels and aids individuals and families requiring assistance dealing with substance abuse problems, such as alcohol or drug abuse: Interviews clients, reviews records, and confers with other professionals to evaluate condition of client. Formulates program for treatment and rehabilitation of client, using knowledge of drug and alcohol abuse problems and counseling and treatment techniques. Counsels clients individually and in group sessions to assist client in overcoming alcohol and drug dependency. Counsels family members to assist family in dealing with and providing support for client. Refers client to other support services as needed, such as medical evaluation and treatment, social services, and employment services. Monitors condition of client to evaluate success of therapy, and adapts treatment as needed. Prepares and maintains reports and case histories. May formulate and conduct programs to promote

prevention of alcohol and drug abuse. May prepare documents for presentation in court and accompany client to court as needed.

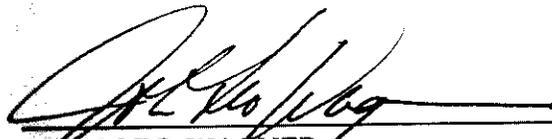
The ALJ has a basic obligation in a social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised. Henrie v. U.S. Dept. of Health & Human Welfare, 13 F.3d 359, 360 (10th Cir. 1993). At the fourth step of the sequential evaluation process, this duty requires the ALJ to review the claimant's residual functional capacity "and the physical and mental demands of the work done in the past." Id. 20 C.F.R. § 404.1520(e). Social Security Ruling 82-62 addresses the ALJ's role more specifically, requiring him to make findings regarding (1) the individual's residual functional capacity, (2) the physical and mental demands of prior jobs or occupations, and (3) the ability of the individual to return to the past occupation given his or her residual functional capacity. S.S.R. 82-62, Soc. Sec. Rep. 809, 812.

Here there was no inquiry regarding the nature of, and physical and mental demands associated with, the position of substance abuse counselor or comparison of the work with claimant's residual abilities. There is reason to suspect that claimant's memory problems, which Dr. Vaught concluded would preclude complex tasks requiring claimant to "think on his feet," will preclude claimant from performing several of the tasks of a substance abuse counselor, as listed in the DOT, especially individual, group, and family counseling. The ALJ should have called a vocational expert to determine what limitation claimant's acknowledged neuropsychological dysfunction might impose on his capacity to do his past relevant work as a counselor.

The finding of the ALJ that claimant can do his past relevant work as a substance abuse counselor is not supported by substantial evidence. This case is remanded in order

to secure the testimony of a vocational expert to determine whether claimant can do this past relevant work and, if not, whether jobs exist in the national economy which he can perform.

Dated this 6th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Miller

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

SEP 7 - 1995 *lc*

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 SEP - 8 1995

AMENDED JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs, David G. Taylor and Jessica M. Taylor, recover of the defendant, State Farm Casualty and Fire Company, actual damages in the sum of \$39,002.25, prejudgment interest in the sum of \$16,608.14, and post-judgment interest and costs to be determined at a later date.

Dated at Tulsa, Oklahoma, this 6th day of September, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(74)

FILED

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

SEP - 7 1995

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

RAYMOND LANE,
SS# 430-68-6368

v.

SHIRLEY S. CHATER,
Commissioner of the Social Security
Administration,

Defendant.

NO. 94-C-429-M

ENTERED ON DOCKET

DATE SEP 08 1995

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this 7th day
of September, 1995.

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

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

RAYMOND LANE,)
SS# 430-68-6368)

Plaintiff,)

v.)

SHIRLEY S. CHATER,)
Commissioner of the Social)

Security Administration,¹)

Defendant.)

NO. 94-C-429-M

SEP - 7 1995

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

ENTERED ON DOCKET

DATE SEP 08 1995

ORDER

Plaintiff, Raymond Lane, 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

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. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Mr. Lane's November 9, 1991 application for disability benefits was denied December 22, 1992, the denial was affirmed on reconsideration, January 22, 1993. A hearing before an Administrative Law Judge ("ALJ") was held August 12, 1993. By decision dated September 16, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 25, 1994. 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.

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.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff claims that the ALJ did not appropriately evaluate the medical evidence or conduct an appropriate pain and credibility analysis. Plaintiff also argues that there is no support in the record for the ALJ's finding that Plaintiff is literate.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court finds that the ALJ has adequately and correctly set forth the facts and 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.

The record establishes that Plaintiff suffered a back injury on May 28, 1991 and underwent surgery on August 23, 1991 [R. 124]. He was released by his surgeon, Dr. Sami Framjee, on May 18, 1992 at which time Dr. Framjee noted that Plaintiff was not able to do his previous heavy labor and recommended vocational counseling [R. 134]. The ALJ found that Plaintiff could not return to his former occupation of heavy construction work and that he was limited to light work. The Court finds that the medical records support this finding. Having reached the conclusion that due to his back condition Plaintiff is capable of only light work, the

remaining analysis concerning pain and the duration of Plaintiff's current problems becomes irrelevant, given Plaintiff's age, educational background and work experience as hereafter explained.

The Court agrees with Plaintiff that there is no basis in the record for a finding that Plaintiff is literate. The ALJ found that Plaintiff's claim of an inability to read and write was not credible. The ALJ based this decision on the fact that Plaintiff was apparently able to respond to the questions on the disability application forms [R. 22]. However, at the hearing Plaintiff testified that his wife does all the paperwork [R. 67]. Both Plaintiff and his wife testified to Plaintiff's inability to read [R. 67, 60]. Subsequent to the ALJ's decision Plaintiff's wife submitted a letter stating that she, not Plaintiff, had written the answers on the disability application. There is absolutely no evidence in the record to contradict Plaintiff's claim of illiteracy. The Court finds that the ALJ's conclusion that Plaintiff is literate is not supported by substantial evidence.

Since the ALJ's finding concerning Plaintiff's literacy is not supported in the record, neither is his conclusion based on the grids. The ALJ relied upon Rule 202.11, Table No. 2; 20 C.F.R. Pt. 404, Subpt. P, App. 2. which directs a finding of not disabled for a person of Plaintiff's age, 50-54, with limited or less education, and skilled or semi-skilled work experience which is not transferable to light work. However, given Plaintiff's illiteracy, Rule 202.11 is not applicable. Rather, Rule 202.09 applies. That Rule directs a finding that Plaintiff is disabled.

Although Plaintiff testified to having completed the 6th grade, the Secretary's Regulations recognize that the numerical grade level completed in school may not represent actual educational abilities 20 C.F.R. § 404.1564(b). The numerical grade level will determine

educational abilities, "if there is no other evidence to contradict it." *Id.* The regulations place a person, like Plaintiff, with a 6th grade education in the "limited, or less" educational category. 20 C.F.R. §404.1564(b)(2),(3). However, in this case there is evidence to contradict placing Plaintiff at this educational level. The record is uncontradicted that Plaintiff is illiterate, thus, Plaintiff's placement at the "limited, or less" educational category is not supported by substantial evidence.

For those persons of Plaintiff's age who, like Plaintiff, are illiterate, application of the grids directs a finding of disabled. Rule 202.09. The narrative portion of the regulations which accompanies the rules for light work confirms that Rule 202.09 is the one applicable to Plaintiff. Section 202.00(c), referring to conditions concerning persons of "advanced age" (55 and older), states that a finding of disabled is warranted for individuals who (1) can no longer perform past relevant work, (2) are limited to light work, and (3) have no work experience, only unskilled work experience, or no transferrable work experience. Section 202.00(d) provides that the § 202.00(c) factors are also applicable to those in the 50-54 age group. In addition, a finding of disabled is warranted when an individual's vocational scope is further limited by illiteracy.

In this case, there is no question that Plaintiff cannot perform his past relevant work, and that he is limited to light work. The record establishes that Plaintiff has no transferable work skills [R. 72-73]. Since Plaintiff is also illiterate, a finding of disabled is warranted according to the Secretary's own regulations.

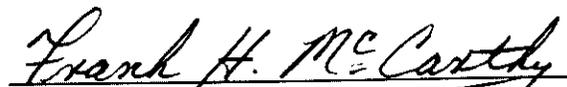
The ALJ's conclusion is not saved by the vocational expert's testimony. At 20 C.F.R. § 404.1569a(d) the Regulations provide that when exertional and non-exertional limitations are combined, the grids will not be applied, "unless there is a rule that directs a conclusion that you

are disabled based upon your strength limitations." Here there is such a Rule, 202.09. Application of that Rule directs a finding of disability based on Plaintiff's exertional limitation to light work, his age and illiteracy. Thus, analysis of Plaintiff's alleged pain limitations, the possible duration of his new health concerns, and the vocational expert's testimony is irrelevant.

When a decision of the Secretary is reversed on appeal, it is within the court's discretion to remand either for further administrative proceedings or for an immediate award of benefits. 42 U.S.C. § 405(g). *Ragland v Shalala*, 992 F.2d 1056, 1060 (10th Cir. 1993). "[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). The Court finds that additional fact finding would not be useful.

Accordingly, the court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case for an immediate award of disability benefits.

SO ORDERED THIS 7th day of SEPT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

entered
9/7/95

FILED

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

SEP 6 - 1995

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

JOHN SCOTT KILMAN,
Plaintiff,
vs.
DIANNE HENDERSON,
Defendant.

Case No. 95-C-867-BU

ORDER

Plaintiff has filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and has filed a complaint. In reliance upon the representations and information set forth in Plaintiff's motion, Plaintiff is hereby permitted leave to file and maintain this action to conclusion without prepayment of fees, costs or security.

When a complaint is filed in forma pauperis, the Court may test the complaint under 28 U.S.C. § 1915(d). If found to be frivolous, improper or obviously without merit, the complaint may be subject to summary dismissal. Henriksen v. Bentley, 644 F.2d 852, 853 (10th Cir. 1981). As the Supreme Court explained in Neitzke v. Williams, 490 U.S. 319 (1989), section 1915(d)

"accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, see, e.g., Williams v. Goldsmith, 701 F.2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist. . . . Examples of the latter class are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar."

Id. at 327-328.

In his complaint, Plaintiff has named Dianne Henderson as Defendant. Construing Plaintiff's allegations liberally, see, Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), Plaintiff claims that Defendant recorded telephone conversations between Plaintiff and his girlfriend, Susan Arrate, in violation of his federal constitutional rights. Testing the complaint under section 1915(d), the Court finds that dismissal of Plaintiff's claim is appropriate.

Plaintiff has failed to allege any facts in his complaint tending to show that Defendant, Dianne Henderson, was a "state actor." Section 1983 of Title 42 of the United States Code provides that "[e]very person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages. 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must show in part that the alleged violation of a constitutional right was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 928 (1982), the United States Supreme Court noted that if a defendant's conduct satisfies the requirement of "state action" under the fourteenth amendment, it also satisfies the "under the color of state law" requirement for § 1983. The Lugar Court made clear that for conduct of a private party to constitute "state action" it must be "fairly attributable to the State." 457 U.S. at 937. Thus, to be a state actor, the defendant must be a state official or have acted

together with or obtained significant aid from a state official or have done something otherwise chargeable to the state. Id.

In this case, Plaintiff has failed to allege any facts which demonstrate that Defendant, Dianne Henderson, was a state official or that she acted together with or obtained significant aid from a state official or did something otherwise chargeable to the state. Therefore, Plaintiff's claim for alleged violation of his federal constitutional rights is subject to dismissal under section 1915(d).

To the extent Plaintiff has simply alleged a claim against Defendant, Diane Henderson, for invasion of privacy under Oklahoma state law, the Court finds that dismissal is appropriate for lack of subject matter jurisdiction. Diversity of citizenship jurisdiction under 28 U.S.C. § 1332 "attaches only when all parties on one side of the litigation are of different citizenship from all parties on the other side of the litigation." Depex Reina Partnership v. Texas International Petroleum, 897 F.2d 461, 463 (10th Cir. 1990). Moreover, it attaches only where the matter in controversy exceeds the sum of \$50,000.00, exclusive of interest and costs. See, 28 U.S.C. § 1332. It is clear from the face of the complaint that Plaintiff and Defendant are both citizens of Oklahoma. It is also clear that the amount in controversy between the parties does not exceed \$50,000.00. As a result, diversity of citizenship jurisdiction does not exist for the Court to adjudicate

Plaintiff's complaint.¹

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis is GRANTED. However, Plaintiff's complaint is DISMISSED in its entirety.

ENTERED this 5th day of September, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹To the extent the Court could exercise supplemental jurisdiction over Plaintiff's state law claim under 28 U.S.C. § 1367(a), the Court declines to do so pursuant to 28 U.S.C. § 1367(c)(3).

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

F I L E D

WALTER WILLIAMS,

Plaintiff,

v.

TOGO D. WEST, JR., Secretary of the
Army,

Defendant.

SEP 6 - 1995

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

CIVIL ACTION NO. 94-C-944-BU

ENTERED ON DOCKET
DATE SEP 07 1995

ORDER

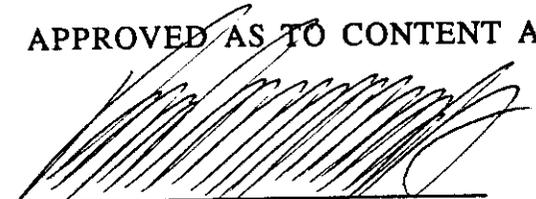
This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Walter Williams, against the defendant, Togo D. West, Jr., Secretary of the Army, are hereby dismissed with prejudice.

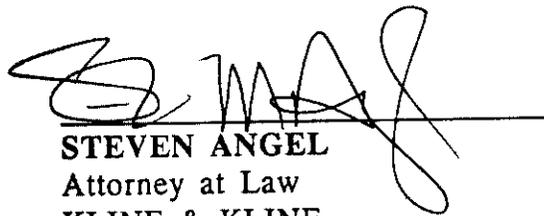
Dated this 5th day of Sept, 1995.

s/ MICHAEL BERNHARDT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:


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Attorney for Plaintiff

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

FILED

SEP - 5 1995

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

TERRI LYNN PAUL,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner
of the Social Security
Administration,

Defendant.

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Case No. 95-C-32-B

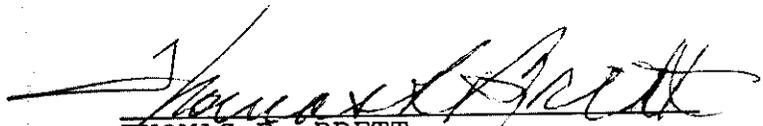
ENTERED ON DOCKET

DATE SEP - 6 1995

O R D E R

Before the Court is Plaintiff's Motion to Dismiss without prejudice (Docket #3), because another claim was filed on Plaintiff's behalf by another attorney.¹ Plaintiff states that the first case is being actively pursued. Therefore, Plaintiff's Motion is granted.

IT IS SO ORDERED THIS 15th DAY OF Sept. ~~AUGUST~~, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹See Case No. 95-C-30-B.

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

FILED

SEP - 5 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

T.R. O'GANS,
Plaintiff,
vs.
KEY TEMPORARY PERSONNEL, INC.,
and RED MAN MEASUREMENT COMPANY,
Defendants.

Case No. 94-C-848-B

ENTERED ON DOCKET
DATE SEP - 6 1995

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Key Temporary Personnel, Inc., and Red Man Measurement Company, and against the Plaintiff, T.R. O'Gans. Plaintiff shall take nothing of his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 4th day of Sept. August, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

SEP - 5 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

T.R. O'GANS,)
)
 Plaintiff,)
)
 vs.)
)
 KEY TEMPORARY PERSONNEL, INC.,)
 and RED MAN MEASUREMENT COMPANY,)
)
 Defendants.)

Case No. 94-C-848-B

ENTERED ON DOCKET
DATE SEP - 6 1995

ORDER

Before the Court are **Motions** for Summary Judgment pursuant to Fed. R. Civ. P. 56, filed by Defendant Key Temporary Personnel, Inc. (Docket #18), and Defendant Red Man Measurement Company (Docket #16).

Plaintiff T.R. O'Gans ("O'Gans") was placed by Defendant Key Temporary Personnel, Inc. ("Key"), in a temporary job at Red Man Measurement Company ("Red Man"). He alleges that he was terminated from Red Man on the basis of his race and religion, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* He also alleged a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

Key and Red Man filed **Motions** for Summary Judgment on July 7, 1995. O'Gans failed to file a response to the motions, but did write a letter to the defendants, essentially contending that he disagreed with the motions, and alleging that certain affiants lied in the affidavits supporting the motions. He provided no evidence

to refute the defendants' motions.

O'Gans failed to timely appear at a Pre-Trial Conference set for August 4, 1995, at 9:30 a.m. At that time, the Court sustained the Motions for Summary Judgment as to O'Gans' ADA claim, as there was no evidence in the record that O'Gans had a disability covered by the ADA. However, the Court gave O'Gans an additional 20 days from the date of the hearing¹ in which to properly create a material factual question as to his race and religion claims. O'Gans appeared in Court more than an hour after his scheduled Pre-Trial Conference; the Court notified him both orally and in writing of the additional 20 days he had in which to properly respond to the Motions for Summary Judgment.² On August 18, 1995, O'Gans mailed to the Court thirteen improperly executed subpoena forms. He has made no further attempt to respond to the motions.

I. UNDISPUTED FACTS

1. Red Man is an Oklahoma corporation engaged in the business of manufacturing and selling oil and gas measurement equipment. (Red Man's Exh. A and Key's unnumbered exhibit, Affidavit of Kent Pearson, at ¶ 1)

2. Red Man's business fluctuates due to the orders it receives for its metering equipment. (Red Man's Exh. A, Pearson Affidavit, at ¶ 2; Red Man's Exh. B, Deposition of T.R. O'Gans, at p. 35, l.

¹The hearing date, in itself, was significantly beyond the time in which O'Gans should have filed a response brief.

²Further, the Court attached copies of Fed. R. Civ. P. 56 and Local Rule 56.1 to its Order of August 4, 1995.

9-16)

3. Due to the fluctuations in Red Man's business, Red Man's personnel needs can change every month. (Red Man's Exh. A and Key's unnumbered exhibit, Pearson Affidavit, at ¶ 3)

4. Red Man operates its business with a core group of 12-15 permanent employees, and uses temporary employees when increasing business so requires. (Red Man's Exh. A, Pearson Affidavit, at ¶ 4)

5. Red Man has utilized Key for its temporary staffing needs for several years. (Red Man's Exh. A, Pearson Affidavit, at ¶ 5)

6. Key is a temporary personnel service that provides temporary employees to its customers in the Tulsa area, ranging from clerical to industrial positions. (Red Man's Exh. C and Key's unnumbered exhibit, Wright Affidavit, at ¶ 1)

7. O'Gans became an employee of Key on September 23, 1992. (Key's Exh. A, entry 1)

8. In the fall of 1992, Red Man needed additional staff to fill an influx of orders from its customers. (Red Man's Exh. A, Pearson Affidavit, at ¶ 6)

9. In late fall and early winter of 1992, Red Man requested six temporary workers from Key because of the increase in orders. The workers hired, their hire date and job title are:

<u>Name</u>	<u>Hire Date</u>	<u>Job Title</u>
Holcomb	6-18-92	Grinder/MIC
O'Gans	9-23-92	Shop help
McDaniel	10-13-92	Skid assembly
Goodfellow	10-16-92	Skid welder
Sweden	11-9-92	Skid assembly
Huddleston	12-11-92	Grinder/MIC

(Red Man's Exh. A, Pearson Affidavit, at ¶ 7)

10. Key provided O'Gans to Red Man for the position of shop helper. He initially was hired to perform janitorial duties, but later was asked by Red Man to perform various other tasks, such as running errands within the plant and operating a metal cutting machine. (Red Man's Exh. A, Pearson Affidavit, at ¶ 8; Red Man's Exh. B, O'Gans Deposition, at p. 17, l. 17-25; p. 18, l. 1-15; and p. 83, l. 1-11)

11. During his employment with Red Man, which lasted from October 16, 1992, to January 19, 1993, O'Gans reported directly to Rodney Rotert. (Red Man's Exh. B, O'Gans Deposition, at p. 21, l. 12-17; Key's Exh. A, entry 3 and 8)

12. After O'Gans was hired, Red Man's sales, and its corresponding need for temporary help, declined. In November 1992, Red Man had sales of \$330,473.00. In December 1992, Red Man had sales of \$211,148.00. In January 1993, Red Man's sales fell to \$117,345.00. (Red Man's Exh. A and Key's unnumbered exhibit, Pearson Affidavit, at ¶ 9)

13. Because of declining sales, Red Man decided in early January 1993 to release certain temporary employees provided by Key. (Red Man's Exh. A, Pearson Affidavit, at ¶¶ 10, 12, 13)

14. The decision to release some of the temporary workers was made by Kent Pearson, Red Man's general manager. The decision as to which specific employees to release was made by Brian Ketchum, Red Man's plant manager. (Red Man's Exh. A and Key's unnumbered exhibit, Pearson Affidavit, at ¶ 11)

15. The decision as to which temporary employees to release was made based upon Red Man's business needs. O'Gans was selected for release because he had the most limited job functions of any of the temporary employees, and officials believed that his janitorial and other duties easily could be performed by other employees. (Red Man's Exh. D, Affidavit of Brian Ketchum, at ¶ 2)

16. O'Gans alleges that Will Rotert, a non-managerial employee at Red Man, called him a "Haitian" on one occasion, worked him harder than other employees, and would avoid him except to give him a work assignment, when O'Gans began to talk to his Red Man co-workers about religion. (Red Man's Exh. B and Key's unnumbered exhibit, O'Gans Deposition, at p. 24-28; 47-48; and 53-54)

17. O'Gans never notified or complained to Key about alleged discriminatory acts and has no evidence that Key learned of the alleged discriminatory act from Red Man or any other source. (Red Man's Exh. B and Key's unnumbered exhibit, O'Gans Deposition, at p. 130, l. 9-13; p. 123, l. 7-25; p. 24, l. 12-15; Red Man's Exh. C and Key's unnumbered exhibit, Wright Affidavit, at ¶¶ 8, 10)

18. O'Gans alleges that he was injured by slipping on ice and falling down at work on Thursday, January 14, 1993. (Red Man's Exh. B and Key's unnumbered exhibit, O'Gans Deposition, at p. 61, l. 12-15)

19. After the alleged fall, O'Gans worked the rest of the day, as well as the following day of Friday, January 15, 1993, and Monday, January 18, 1993. (Red Man's Exh. B, O'Gans Deposition, at p. 62, l. 13-20)

20. Red Man notified Key that it would be releasing O'Gans on January 19, 1993. Key then notified O'Gans of his release during the morning of January 20, 1993. (Red Man's Exh. A, Pearson Affidavit, at ¶ 14; Key's Exh. A, entry 8)

21. On the same day O'Gans was released, two other Key temporary employees (Brent Goodfellow and Kenneth Holcomb) were released by Red Man. Goodfellow and Holcomb are caucasian. (Red Man's Exh. A, Pearson Affidavit, at ¶ 15; Red Man's Exh. B, O'Gans Deposition, at p. 31, l. 24-25; p. 32, l. 1-25; and p. 33, l. 1-19; Key's Exh. B, entry 1; Key's Exh. C, entry 1)

22. Approximately one month later, two additional Key temporary employees (Allen Goodger and Don McDaniel) also were released by Red Man. Goodger and McDaniel are caucasian. (Red Man's Exh. A, Pearson Affidavit, at ¶ 16; Key's Exh. F, entry 1; Key's Exh. G, entry 1)

23. O'Gans' alleged fall occurred after Red Man officials decided to release O'Gans. (Red Man's Exh. A, Pearson Affidavit, at ¶ 17; Red Man's Exh. D, Ketchum Affidavit, at ¶ 3)

24. O'Gans does not believe that Red Man's decisionmakers, Mr. Ketchum and Mr. Pearson, discriminated against him. (Red Man's Exh. B, O'Gans Deposition, at p. 79, l. 25; p. 80, l. 1-7)

25. Once Key became aware of O'Gans' alleged injury, it arranged and paid for O'Gans to be examined by Dr. Keith A. Abney on January 20, 1993. O'Gans received a full release to return to work with no restrictions. (Red Man's Exh. E and Key's unnumbered exhibit, Affidavit of Katona Taylor, at ¶¶ 2, 3; Red Man's Exh. F;

Key's Exh. E)

26. On January 21, 1993, Key placed O'Gans on the "available" list for other temporary assignments. (Red Man's Exh. E and Key's unnumbered exhibit, Taylor Affidavit, at ¶ 4; Key's Exh. A, entry 8)

27. At O'Gans' request, he was examined again by Dr. Abney on January 25, 1993, and again received a full release to return to work with no restrictions. (Red Man's Exh. E, Taylor Affidavit, at ¶ 5; Red Man's Exh. G)

28. On January 25, 1993, Key again placed O'Gans on the "available" list for other temporary assignments. (Red Man's Exh. E, Taylor Affidavit, at ¶ 6)

29. On February 5, 1993, Katona Taylor contacted O'Gans and informed him that his name would go to the top of the "available" list for future temporary assignments. O'Gans stated that he could not work due to his physical injuries and refused to take more assignments. Key and O'Gans had no further direct contact. (Red Man's Exh. E and Key's unnumbered exhibit, Taylor Affidavit, at ¶ 8-9; Red Man's Exh. B and Key's unnumbered exhibit, O'Gans Deposition, at p. 87, l. 17-22)

30. On May 12, 1995, Dr. John Hallford rendered his opinion that O'Gans was capable of working without any restrictions. (Red Man's Exh. H)

31. O'Gans never provided Key with any medical documentation indicating that he could not work or was medically restricted in the type of work he could do. (Red Man's Exh. E and Key's

unnumbered exhibit, Taylor Affidavit, at ¶ 10; Red Man's Exh. B and Key's unnumbered exhibit, O'Gans Deposition, at p. 109)

32. O'Gans admits that Key never thought he was injured and always considered him able and available for work. (Red Man's Exh. B and Key's unnumbered exhibit, O'Gans Deposition, at p. 109, l. 20-24)

33. O'Gans filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter. (Key's Exh. I)

II. SUMMARY JUDGMENT STANDARD

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

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v.

Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

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

* * *

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

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

III. LEGAL ANALYSIS

Construing O'Gans' petition liberally, his Title VII claim could be considered either a hostile work environment claim or a disparate treatment claim, based on his race (African American) and

his religion (Christian). The Court, therefore, will consider both theories.

A. Hostile Work Environment

In order for O'Gans' claim to survive summary judgment, his facts must support the inference of a racially or religiously hostile environment and support a basis for liability. Bolden v. PRC Inc., 43 F.3d 545 (10th Cir. 1994). O'Gans must show that: (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus. Id. at 551. "Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." Id. See also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412-13 (10th Cir. 1987) ("[P]laintiffs must prove more than a few isolated incidents of racial enmity ... Title VII is violated only where the work environment is so 'heavily polluted with discrimination as to destroy the emotional and psychological stability of the minority [employee]'" [citations omitted]). The same standards apply to claims of hostile work environment due to religious discrimination.

O'Gans alleges that Will Rotert, a non-managerial Red Man employee, called O'Gans a "Haitian" once, worked him harder than other employees, and avoided him, except to give him a work assignment, when O'Gans began to talk to Red Man co-workers about religion. Considering the totality of the circumstances, it appears to the Court that O'Gans suffered neither a racially

hostile work environment nor a religiously hostile work environment. Even assuming that being called a "Haitian" is a racial slur, there is no evidence of "a steady barrage of opprobrious ... comments" that is required to show a hostile work environment.

Further, there appears to be no evidence, other than O'Gans' unsupported allegations, that Will Rotert worked him harder than other employees. His basis for this allegation is that Rotert would direct him to stop working on a machine and tell him to run errands instead. (Red Man's Exh. B, O'Gans Deposition, at p. 48, l. 6-8) These errands consisted of telling other employees that they had a telephone call, and carrying packages. (Red Man's Exh. B, O'Gans Deposition, at p. 83, l. 25; p. 84, l. 1-25) However, running errands was part of O'Gans' job description. (Red Man's Exh. B, O'Gans Deposition, at p. 44, l. 20-22) In addition, O'Gans admits that he only speculates that the reason he was told to run errands instead of work a machine was his race. (Red Man's Exh. B, O'Gans Deposition, at p. 42, l. 20-25; p. 48, l. 19-22) The Court concludes that O'Gans' allegation that he was worked harder than other employees is unsupported by the evidence in the record.

O'Gans, a Christian who states that he is an unlicensed minister, alleges that Will Rotert avoided him, except to give him a work assignment, when O'Gans began to talk to Red Man co-workers about religion. However, O'Gans admits that no one at Red Man or Key prohibited him from talking about religion, nor sanctioned him in any way for doing so. (Red Man's Exh. B, O'Gans Deposition, at

p. 54, l. 9-14) Therefore, the Court concludes that O'Gans did not suffer a hostile work environment at Red Man.³

B. Disparate Treatment

In Title VII cases, in order for a plaintiff to withstand a motion for summary judgment, he must first establish a *prima facie* case of employment discrimination. O'Gans must prove that: (1) he is a member of a class protected by Title VII; (2) the employer discriminated against him in an employment decision; and (3) he was qualified for the position at issue, and (4) he was replaced by a person outside the protected group. McDonnell-Douglas Corp. v. Green, 93 S.Ct. 1817 (1973); Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

Once a plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the defendants to articulate a legitimate, non-discriminatory reason for its employment decision. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993); St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993) (quoting Burdine, 450 U.S. at 254). If a reason is so articulated, the burden shifts back to the plaintiff to prove that the articulated reason was a pretext for discriminatory action. In ruling on a motion for summary judgment, the Court must determine whether the evidence of discrimination brought forward by the plaintiff, interpreted favorably to the plaintiff, "could persuade

³O'Gans does not claim that he suffered a hostile work environment at Key.

a reasonable jury that the employer discriminated against the plaintiff." Hooks, 997 F.2d at 798.

Even making the broad assumption that O'Gans has stated and proved a *prima facie* case of racial discrimination for the purposes of these motions, the Court holds that Defendants have articulated a legitimate non-discriminatory reason for the employment decision. O'Gans was released due to an economic reduction in force. O'Gans was chosen to be released because he had the most limited job functions of any of the temporary employees. The company determined that O'Gans' duties could be easily absorbed by other employees. On the same day O'Gans was released, two caucasian employees also were released for the same reason.

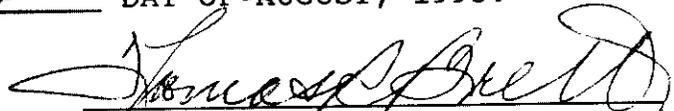
Further, O'Gans stated at his deposition that he believed that Kent Pearson and Brian Ketchum did not discriminate against him; they were the sole decisionmakers regarding O'Gans' release from Red Man. O'Gans has not provided evidence that Defendants' articulated nondiscriminatory reason for his discharge is pretextual.

His only evidence of discrimination is being called a "Haitian" on one occasion, being worked harder than other employees, and Will Rotert avoiding him when he discussed religion. Assuming once more that being called a "Haitian" is racially derogatory, that one statement by a non-managerial employee (who was not involved in the termination process) does not prove that O'Gans was terminated due to discriminatory reasons. "Stray remarks" are insufficient to create a jury question. Cone v.

Longmont United Hospital Association, 14 F.3d 526, 531 (10th Cir. 1994). Further, as stated above, there is no evidence beyond O'Gans' unsupported allegation that he was worked harder than other employees.

As to O'Gans' religious discrimination claim, the Court determines as a matter of law that he has not made a *prima facie* case. A plaintiff must establish that: (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he informed the employer of his belief; and (3) he suffered an adverse employment consequence for failure to comply with the conflicting requirement. Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (10th Cir. 1989). O'Gans stated in his deposition that no one at Red Man told him not to talk about his religion at work. (Red Man's Exh. B, O'Gans Deposition, at p. 54, l. 9-22) O'Gans has not shown that his religious beliefs conflicted with an employment requirement, or that he suffered an adverse employment consequence for failure to comply with a conflicting employment requirement. Therefore, Defendants are entitled to summary judgment on O'Gans' religious discrimination claims.⁴ Defendants' Motions for Summary Judgment are hereby GRANTED.

IT IS SO ORDERED THIS 4th DAY OF Sept. ~~AUGUST~~, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴O'Gans' Complaint does not contain any allegation that Key employees discriminated against him based on his race or religion.

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

FILED

SEP 05 1995
05 1995

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

THE HOME-STAKE OIL & GAS)
COMPANY and THE HOME-STAKE)
ROYALTY CORPORATION,)

Plaintiffs,)

vs.)

Case No. 93-C-303-H ✓

HOME-STAKE ACQUISITION)
CORPORATION, a Delaware)
corporation, ENVIROMINT HOLDINGS,)
INC., a Florida corporation)
f/k/a TRI TEXAS, INC.,)
INTERNATIONAL INSURANCE INDUSTRIES)
INC., a Delaware corporation,)
SUMMIT PARTNERS MANAGEMENT CO.,)
a corporation, CHARLES S.)
CHRISTOPHER, an individual, and)
MICHAEL J. EDISON, an individual)
sometimes d/b/a International)
Insurance Industries, Inc.,)
MADERA PRODUCTION COMPANY, a Texas)
corporation, AGO COMPANY, a Texas)
corporation, and AGR CORPORATION,)
a Texas corporation,)

Defendants.)

ENTERED ON DOCKET

DATE SEP - 6 1995

**ORDER DISMISSING CLAIMS WITH PREJUDICE
AND ORDER CONTINUING JURISDICTION FOR
PURPOSES OF ENFORCING SETTLEMENT AGREEMENT**

Pursuant to the terms of that certain Settlement Agreement and Release dated as of September 1, 1995 between and among The Home-Stake Oil & Gas Company, The Home-Stake Royalty Corporation and Robert C. Simpson, Summit Partners Management Co., Madera Production Company and Don V. Ingram (the "Settlement Agreement"), the Court hereby orders and decrees as follows:

1. All claims asserted by the Plaintiffs The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation in their

Second Amended Complaint against Summit Partners Management Co. and Madera Production Company are dismissed with prejudice and all claims asserted by the Defendant Summit Partners Management Co. in its Counterclaim against The Home-State Oil & Gas Company and The Home-Stake Royalty Corporation are dismissed with prejudice.

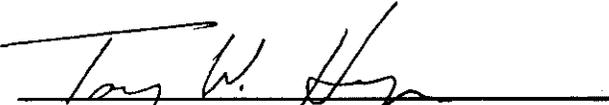
2. Until September 1, 199~~5~~⁷, The United States District Court for the Northern District of Oklahoma shall continue to have jurisdiction in Case No. 93-C-303-H to adjudicate any and all claims brought with respect to the Settlement Agreement in a breach proceeding. Claims shall be made by filing an Application with the Court setting forth the grounds for the claim under the caption of Case No. 93-C-303-H.

SO ORDERED this 5TH day of SEPTEMBER, 1995.



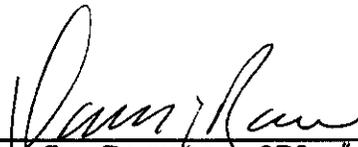
HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AND ACCEPTED:



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P. Scott Hathaway, OBA #13695
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Attorneys for Defendants Summit
Partners Management Co. and
Madera Production Company

40

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

~~AUG 30 1995~~
FILED

SEP - 5 1995

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

RTC MORTGAGE TRUST 1994-S1,
a Delaware business trust,

Plaintiff,

-vs.-

COLONIAL TERRACE CARE CENTER, INC.,
an Oklahoma corporation,

Defendant.

Case No. C-95-189H

ENTERED ON DOCKET
DATE SEP - 6 1995

NOTICE OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule 41(a)(1)(ii) of Civil Procedure, Plaintiff, RTC Mortgage Trust 1994-S1, a business trust, and Defendant, Colonial Terrace Care Center, Inc., an Oklahoma corporation, being all parties appearing in the above-entitled cause, hereby give notice that the captioned cause is **DISMISSED, WITH PREJUDICE** to the refileing of same, and each party herein shall bear its own attorney fees and costs.

Respectfully submitted,

Ricki V. Sonders
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Telephone: (405) 239-2121
Telecopier: (405) 236-1012
ATTORNEY FOR PLAINTIFF, RTC
MORTGAGE TRUST 1994-S1, a
Delaware business trust

- and -

6

Thomas E. English

Thomas E. English

ENGLISH & WOOD, P.C.

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Tulsa, OK 74119-5466

Telephone: (918) 582-1564

ATTORNEYS FOR DEFENDANT,
COLONIAL TERRACE CARE CENTER,
INC.

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

LORI A. SMITH

Plaintiff,

v.

LOWRANCE ELECTRONICS, INC.

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Case No. 94-C-881K

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) and the Joint Stipulation of Dismissal with Prejudice filed by the parties, the Court hereby orders that this case be dismissed with prejudice, with no finding of discrimination or other misconduct on the part of Defendant Lowrance Electronics, Inc.

JUDGE OF THE DISTRICT COURT

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

FILED

SEP 05 1995

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

BETTY L. HURD,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

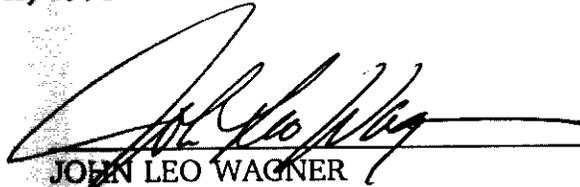
Case No: 93-C-911-W ✓

ENTERED ON DOCKET
DATE SEP 06 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 5, 1995.

Dated this 5th day of September, 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.

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

F I L E D

BETTY L. HURD,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

SEP 05 1995

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

Case No. 93-C-911-E

ENTERED ON DOCKET
DATE SEP 06 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." 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 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 those aspects over and above those set forth for sedentary exertional activity, as of September 30, 1991, the date she was last insured for social security disability benefits. He concluded that claimant's past relevant work as an employment interviewing clerk did not require the performance of work-related activities precluded by the above limitations, so she was not prevented from performing this 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 erred in concluding that claimant's work as a salad clerk in 1991 was not an unsuccessful work attempt.
- (2) The ALJ did not properly evaluate claimant's allegation of depression.
- (3) The ALJ did not properly evaluate the medical evidence.
- (4) The ALJ did not properly evaluate claimant's credibility.

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).

- (5) The ALJ's decision that claimant can return to her past relevant work is not supported by substantial evidence.

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 that she has disabling arthritis. On her application for social security benefits and at the hearing on August 21, 1992, she alleged her onset date of disability was September 6, 1991, but in a letter dated September 21, 1992, she asked to amend her onset date to December of 1988. However, claimant admitted that she performed work in the months of May, June, July, August, and September of 1991, working as a cook's assistant at Shangri La Hotel (TR 36-37, 78, 84). Her attorney alleged in the September 21, 1992 letter that this was an unsuccessful work attempt (TR 171).

There is no merit to claimant's first contention that the ALJ erred in concluding this was not an unsuccessful work attempt. The social security regulations provide that work can be considered an unsuccessful work attempt when a claimant is unable to perform it for more than a short time and is forced to quit the work due to an impairment. 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1). Under Social Security Ruling 84-25, the Secretary has generally presumed that a work attempt for less than three months can be an unsuccessful work attempt, and that such attempts may continue for up to six months under special circumstances, for example, if the claimant obtained help from other employees. Social Security Ruling 84-25 provides:

2. Work Effort of Between 3 and 6 Months.

If work lasted more than 3 months, it must have ended or have been reduced

to the non-SGA [substantial **gainful activity**] level within 6 months due to the impairment or to the removal of special conditions . . . related to the impairment that are essential to the further performance of work and:

- a. There must have been frequent absences due to the impairment; or
- b. The work must have been unsatisfactory due to the impairment; or
- c. The work must have been done during a period of temporary remission of the impairment; or
- d. The work must have been done under special conditions.

The ALJ discussed 20 C.F.R. § 404.1574(a)(1) and Ruling 84-25 (TR 11). He noted that "[t]he unsuccessful work attempt **concept** was designed as an equable [sic] means of disregarding relatively brief work attempts that do not demonstrate sustained substantial gainful activity." (TR 11). He went on to properly conclude as follows:

For [claimant's] work to be an **unsuccessful** work attempt it must have ended or have been reduced to the non substantial gainful activity level within 6 months due to the impairment or to the removal of the special conditions that allowed claimant to perform the work. There must also have been either frequent absences due to the impairment; or the work must have been unsatisfactory due to the impairment; or the work must have been done during a period of temporary remission of the impairment; or the work must have been done under special conditions. There is no indication or evidence that claimant performed her work under special conditions. There is no indication or evidence from claimant's employer that claimant's work was unsatisfactory or that there were frequent absences. Claimant has alleged that she was under no temporary remission of her impairment. The Administrative Law Judge also notes, interestingly enough, that claimant had not seen any treating physician, nor sought medical care, from March 8, 1991 until August 6, 1991. The Administrative Law Judge notes that claimant filed for her current application of benefits on August 12, 1991. However, for most of the period of time that claimant was actively engaged in her work activity, in the months of May, June, and July of 1991, claimant sought no medical attention whatsoever.

(TR 12).

Having reached this conclusion that claimant had engaged in gainful activity since her alleged December 1988 onset date of disability, the ALJ properly concluded that September 6, 1991 was the proper onset date of disability (TR 12-13).

The ALJ noted that the medical record indicated that claimant's arthritic condition gradually worsened in the year 1992, but only evidence prior to September 30, 1991 was applicable to his decision. He did observe that on December 16, 1991, claimant's treating physician, Tom Crosby, submitted a medical evaluation of claimant's condition, describing claimant as a 60 year old female patient who had "a long history of back pain" (TR 112). The doctor reported a recent increase in low back pain, an inability to tolerate nonsteroidal anti-inflammatory drug therapy, and little relief provided by mild analgesics (TR 112). The doctor took x-rays, which showed old partial anterior wedging of T11 through L4 of vertebral bodies, degenerative disc changes at multiple levels, particularly L3-4 and L5-S1 levels, and degenerative arthritis of the lower lumbar apophyseal joints and the sacroiliac joints (TR 112, 118). The doctor concluded:

At the current time, her physical exam regarding this is remarkable for low back pain with decreased motion of the lumbar spine. She has subjective complaints of aching and some numbness and tingling in the leg and has an obviously antalgic gait [sic]. Her reflexes at this time are 2+ and symmetrical and there is no muscle wasting. From my standpoint, she should be considered disabled from any type of work which would involve standing for long periods of time or lifting, pushing or pulling. I feel that she could do some sedentary type work, but that would be about it.

(TR 112).

The next week claimant saw Dr. Ronald Forristall, who found as follows:

She has cervical spine with full ROM. Upper extremity neurologic intact.

Lumbar spine shows a flattening of the lumbar lordosis, restricted flexion to 70 degrees, restricted extension to 20 degrees producing increased pain. Straight leg raising is positive on the right producing pain in the posterior thigh and calf. Deep tendon reflexes 2+ at the knees, absent at the right ankle, 1+ on the left. There is no detectable motor or sensory deficit in the lower extremities. On close questioning her symptoms become more severe when she has been walking.

Repeat x-rays were taken of the lumbar spine showing osteoarthritis with significant osteophyte formation at L3-4, L4-5 and L5, S1 with some posterior encroachment on the neuro-canal. Obliques show a moderate foraminal stenosis at the 5-1 and S1 root levels. Cervical spine films are relatively unremarkable.

ASSESSMENT: Low back and right leg pain with findings most suggesting a spinal stenosis with a L5 and S1 radiculopathy.

(TR 121).

On February 11, 1992, she underwent nerve conduction studies and Dr. Harold Goldman found that "the raw data on nerve conduction velocities reveal normal nerve conduction velocities and normal terminal latency times The results of this patient's electromyographic and electroneurographic examination disclosed the presence of an S-1 radiculopathy on the right. There were no further abnormalities elicited." (TR 123).

On July 23, 1992, Dr. Benjamin Benner reviewed a myelogram and CT scan of claimant's spine, found "degenerative changes . . . but no evidence of ruptured disk," and concluded surgery would not improve her condition (TR 129).

There is no merit to claimant's contentions that the ALJ did not properly evaluate claimant's allegation of depression, the medical evidence, or claimant's credibility. After thoroughly reviewing the medical evidence, he noted there were no findings of a gross anatomical deformity of the hip or knee, no x-rays of significant joint space narrowing or significant bony destruction, no markedly limited ability to walk and stand, except for long

periods of time, no history of reconstructive surgery or surgical arthrodesis, no x-rays of significant joint space narrowing in either the upper or lower extremities, no evidence of abnormal motion of an affected joint or marked limitation in the motion of an affected joint of the upper extremities, and no limitation in abduction and forward flexion, of the arms at the shoulders, of 90 degrees or less.

The ALJ noted that claimant alleged that she experiences depression and a nervous condition (TR 19). However, there was absolutely no medical evidence to support this allegation. A psychoactive medication, Amitriptyline, was prescribed by Dr. Crosby when he noted she told him she was depressed because of her low back pain and inability to fall asleep (TR 136). As the ALJ noted, claimant did not relate a history of depression, anxiety, or any other mental impairment to her treating or consulting physicians, and there are no notations of such in the treatment records (TR 20). Claimant's comment to Dr. Crosby and complaints of depression at the hearing are the only evidence of such an ailment in the record (TR 53).

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 508, 517 (10th Cir. 1987). The ALJ 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 sedentary work activities. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledger, and small tools." (TR 17). The ALJ recognized that she experienced some degree of pain and discomfort, but that mild to moderate pain is not, in

itself, incompatible with the performance of sustained work activity (TR 19). He properly concluded that the objective medical evidence and her testimony did not establish that her ability to function was so severely impaired as to preclude all types of work activity prior to September 30, 1991 (TR 19). He relied largely on Dr. Crosby's determination in December of 1991 that she could do sedentary work (TR 17, 112). He also noted that claimant had no muscle wasting or atrophy, had good muscle strength, and drives 3 times a week, can sit for two hours at a time, and grocery shops (TR 18).

Finally, there is no merit to claimant's contention that the ALJ's conclusion is not supported by substantial evidence. The Dictionary of Occupational Titles describes the job of an employment interviewer as follows:

166.267-010 EMPLOYMENT INTERVIEWER (profess. & kin.) alternate titles: personnel interviewer; placement interviewer.

Interviews job applicants to select people meeting employer qualifications: Reviews employment applications and evaluates work history, education and training, job skills, compensation needs, and other qualifications of applicants. Records additional knowledge, skills, abilities, interests, test results, and other data pertinent to selection and referral of applicants. Reviews job orders and matches applicants with job requirements, utilizing manual or computerized file search. Informs applicants of job duties and responsibilities, compensation and benefits, work schedules and working conditions, company and union policies, promotional opportunities, and other related information. Refers selected applicants to person placing job order, according to policy of organization. Keeps records of applicants not selected for employment. May perform reference and background checks on applicants. May refer applicants to vocational counseling services. May conduct or arrange for skills, intelligence, or psychological testing of applicants. May evaluate selection and placement techniques by conducting research or follow-up activities and conferring with management and supervisory personnel. May specialize in interviewing and referring certain types of personnel, such as professional, technical, managerial, clerical, and other types of skilled or unskilled workers. May search for and recruit applicants for open positions [PERSONNEL RECRUITER (profess. & kin.) 166.267-038]. May contact employers in

writing, in person, or by telephone to solicit orders for job vacancies for clientele or for specified applicants and record information about job openings on job order forms to describe duties, hiring requirements, and related data.

Claimant described the job as "interview[ing] people" and "interview[ing] employer" while sitting at a desk or counter (TR 81). She also stated she wrote reports and operated check machines (TR 81).

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 Dept. of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993). 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 prior to September 30, 1991 (TR 17-21), (2) he reviewed the claimant's description of her past relevant work as an employment interviewing clerk (TR 20-21, 81) and (3) he found that claimant had the ability to return to that past relevant job given her residual functional capacity (TR 21-22). The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 5th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Hurd

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

FILED

SEP 01 1995

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

GUADALUPE TORRES,)

Plaintiff,)

v.)

Case No. 95-C-403-H

UNARCO COMMERCIAL)
PRODUCTS DIVISION OF UNR)
INDUSTRIES, INC., a corporation,)

Defendant.)

ENTERED ON DOCKET
SEP 05 1995
DATE

STIPULATION OF DISMISSAL

COME NOW Plaintiff and Defendant and stipulate to the dismissal of the above
styled and numbered cause.

Respectfully submitted,

FRASIER & FRASIER

By:



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and

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By:



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Attorneys for Defendant

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

WILLIAM A. EPPERSON,
Plaintiff,

vs.

PROTEIN TECHNOLOGIES
INTERNATIONAL, INC., a Delaware
corporation, doing business in
the State of Oklahoma, and a
subsidiary of Ralston-Purina
Company,

Defendant/Third-Party
Plaintiff,

and

TIC GUMS, INC., a Maryland
corporation doing business in
the State of Oklahoma,

Defendant,

vs.

MID-CONTINENT CASUALTY COMPANY,
an Oklahoma insurance company,

Third-Party Defendant.

Case No. 94-C-842-^B~~*~~

ENTERED ON DOCKET
DATE SEP 01 1995

STIPULATION OF DISMISSAL

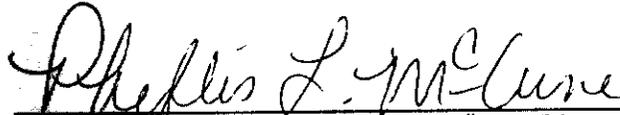
COME NOW, all parties of record in the above action, by and through their respective attorneys of record, and in accordance with Rule 41 of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of the above action with prejudice to the refiling of same.

Respectfully submitted,



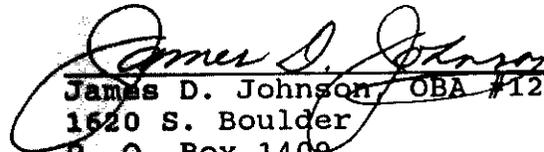
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ATTORNEY FOR THIRD-PARTY DEFENDANT,
MID-CONTINENT CASUALTY COMPANY

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

HOWARD I. IDDINGS, GEORGE C. LOEBER,)
DORIS J. LOEBER, NATHAN E. HODGES, JR.,)
PATRICK M. HODGES, DR. ALEX L. GRAD,)
TRUSTEE OF THE DR. ALEX L. GRAD RLT U/A,)
PAMELA LEE GRAD, TRUSTEE OF THE PAMELA)
LEE GRAD RLT U/A, KEVIN A. GUTTMAN,)
SABRENA L. GUTTMAN, RUSSELL C. GOURLEY,)
III, MONA M. GOURLEY, ROBERT M. RAY, JR.,)
DIANA J. RAY, RICHARD D. WOODALL, DONIS)
C. WOODALL, J. HERBERT PEDDICORD,)
R. CORINALDI, CFP AND DR. A. MERCER,)
TRUSTEES OF THE R. CORINALDI AND A.)
MERCER RLT U/A and ROBERT F. ZIEGENFUSS,)

Plaintiffs,)

vs.)

BENEFUND, INC., a Colorado corporation, VERNON)
TWYMAN, JOHN C. EDWARDS, PETER G. FUTRO,)
FUTRO & ASSOCIATES, P.C., a Colorado)
corporation, PAT GUEST and GUEST & COMPANY,)
an Oklahoma professional corporation,)

Defendants.)

FILED

AUG 31 1995

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

ENTERED ON DOCKET
SEP 01 1995
DATE _____

No. 94-C-1056B

STIPULATION OF DISMISSAL

COME NOW the parties in the above-styled action and pursuant to FRCP 41(a)(1)(ii) hereby stipulate to the dismissal of the action against Defendants Pat Guest and Guest & Company.

Dated this 31st day of August, 1995.

A handwritten signature in cursive script, reading "Steven K. Balman", is written over a horizontal line.

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BOND & BALMAN
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Attorney for Plaintiffs



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Attorney for Pat Guest and Guest & Company



WILLIAM K. OSMOND
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Attorney for Defendants Benefund, Inc.,
Vernon Twyman, John C. Edwards,
Peter G. Futro, and Futro & Associates, P.C.

540-12.022:nw

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

BRINTON B. LANG and SUSAN)
B. LANG,)
)
Plaintiffs,)
)
v.)
)
OKLAHOMA TAX COMMISSION and)
UNITED STATES OF AMERICA,)
ex rel.,)
INTERNAL REVENUE SERVICE,)
)
Defendants.)

ENTERED ON DOCKET

DATE ~~SEP 1 1995~~
SEP 1 1995

Case No. 95-C-296-DK

FILED

AUG 31 1995

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

ORDER ALLOWING DISMISSAL OF PLAINTIFFS WITH
PREJUDICE

THIS MATTER came on this 12th day of July, 1995, before the undersigned United States District Court Judge, upon the Plaintiffs' request to be dismissed, with prejudice, from any further proceedings in this case.

Present for the Plaintiffs was Therese Buthod of James R. Gotwals and Associates, Inc; present for the Oklahoma Tax Commission was Leisa Gebetsberger; and present for the United States, ex rel. Internal Revenue Service, was John Russell of the United States Attorneys' Office for the Northern District of Oklahoma, appearing on behalf of Dennis Duffy, attorney assigned responsibility for representing the United States in this case.

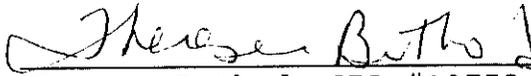
The Court finds that there is no objection by any of the parties that the Plaintiffs, Brinton B. Lang and Susan B. Lang, be allowed to be dismissed from this case as to all remaining issues regarding the lien priorities of the United States and Oklahoma Tax Commission in the funds paid into the Court registry in this case.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED by this Court that the Plaintiffs, Brinton B. Lang and Susan B. Lang, are hereby dismissed from this case and neither their appearance nor their attorneys' appearance is required in any further proceedings in this matter.

s/ TERRY C. KERN

TERRY C. KERN,
UNITED STATES DISTRICT JUDGE

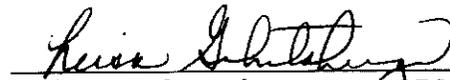
APPROVED AS TO FORM AND CONTENT:



Therese Buthod, OBA #10752
James R. Gotwals, OBA #3499
JAMES R. GOTWALS & ASSOCIATES, INC.
525 South Main, Suite 1130
Tulsa, Oklahoma 74103-4512
**ATTORNEY FOR PLAINTIFFS,
BRINTON B. LANG and
SUSAN B. LANG**

STEPHEN C. LEWIS
United States Attorney


Dennis M. Duffy, OBA #13030
Trial Attorney
United States Department of Justice
Tax Division
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**ATTORNEY FOR
UNITED STATES OF AMERICA,
ex rel., INTERNAL REVENUE SERVICE**


Leisa Gebetsberger, OBA #10308
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ATTORNEY FOR OKLAHOMA TAX COMMISSION

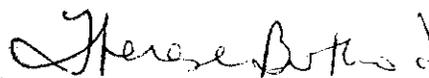
CERTIFICATE OF MAILING

The undersigned does hereby certify that on the ____ day of August, 1995, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Dennis M. Duffy, Esq.
Trial Attorney
Tax Division
U.S. Department of Justice
P. O. Box 7238
Washington, D.C. 20044
Attorney for The United States of America

Ms. Leisa Gebetsberger
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Oklahoma Tax Commission
States of Oklahoma
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Attorney for Defendant,
Oklahoma Tax Commission



Therese Buthod
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