

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

JOYCE L. LANTOW)
 SS# 449-80-5431)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner, ¹)
 Social Security Administration)
)
 Defendant.)

NO. 95-C-404-M ✓

FILED

OCT 0 1995

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

ENTERED ON DOCKET

DATE 10-10-95

ORDER

Plaintiff, Joyce L. Lantow, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits. 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.

Plaintiff's May 18, 1992 application for disability benefits was denied September 17, 1992, the denial was affirmed on reconsideration, November 23, 1992. Plaintiff requested an on-the-record decision by an Administrative Law Judge ("ALJ") based on the evidence in the case, without a hearing [R. 60]. By decision dated August 16, 1993 the ALJ entered the findings that are the subject of this appeal. Following receipt of the ALJ's decision, Plaintiff submitted additional evidence for consideration by the Appeals Council [R. 6, 178-200]. The Appeals Council affirmed the findings of the ALJ on March 21, 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.

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.

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

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 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 originally alleged May 18, 1990 as the date of onset of her disability. On appeal she "concedes that the ALJ's decision is supported by the evidence from May 19, 1990 up to November 10, 1992." [Plaintiff's Brief, Dkt. 6, p. 3]. Plaintiff alleges that the record does not support the Secretary's determination of non-disability by substantial evidence for the time period following November 10, 1992. Specifically, Plaintiff claims that the evidence fails to support the findings regarding her residual functional capacity ("RFC") and that the ALJ failed to properly evaluate her past relevant work.

In this case Plaintiff claims to be disabled due to chest and joint pain, shortness of breath and headaches. Conceding that the ALJ's decision is supported by substantial evidence to November 10, 1992, Plaintiff claims that there is a marked contrast in her condition from the time she filed her initial disability report on June 9, 1992 and when her reconsideration disability report was filed November 10, 1992, as evidenced by the information concerning her activities. These reports were completed by Plaintiff herself and contain wholly subjective information concerning her condition. It is well-settled that subjective complaints alone are not sufficient to establish disability. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993). Thus, the medical evidence must be evaluated to determine whether it documents a significant change in Plaintiff's condition after November 10, 1992.

The record reflects that Plaintiff saw Dr. Korgan in January, 1993, after her new alleged date of onset of disability. At that time Plaintiff was diagnosed with tendonitis of the right shoulder and left elbow. However, the doctor noted that Plaintiff had good range of motion. He also noted complaints of pain in right shoulder, left arm and left leg but stated that as long as Plaintiff takes medication she does pretty well, although the medication bothers her stomach. Dr. Korgan prescribed medication to alleviate the stomach problem [R. 171]. Aside from a visit to have a cyst removed in March, 1993, Plaintiff did not see Dr. Korgan again until May, 1993. At that time Plaintiff complained of dizzy spells and pain in her hand and fingers. The doctor found that Plaintiff had some tenderness, and that her hands were a little puffy and red, but not hot. Her wrist was tender but hardly swollen at all. Dr. Korgan diagnosed acute labyrinthitis and non-specific arthritis [R. 169]. The Court has meticulously examined the entire record and finds that the ALJ's decision is supported by substantial evidence. Focusing only on those

records submitted to the ALJ which were generated after the new November 10, 1992 date of onset, the Court comes to the same conclusion.

Plaintiff submitted additional medical evidence to the Appeals Council, as permitted by the relevant regulations. 20 C.F.R. § 404.970(b). In *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994) the Tenth Circuit ruled that such "new evidence becomes part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." Accordingly, the Court has reviewed Plaintiff's additional submissions to the Appeals Council, consisting of pages 178 through 200 of the record. The Court has determined that, even with those additional submissions, the ALJ's decision of non-disability is supported by substantial evidence.

The Court finds that some of the additional materials are duplicative of Dr. Korgan's notes already found elsewhere in the record [R. 194-198]. The additional records of Dr. Korgan are dated May 24, June 2, and July 15, 1993 [R. 191-193]. The May 24 record documents that the visit was prompted by a complaint of non-cardiac chest pain which the doctor felt was related to a possible rib fracture, sprain or breast pathology. During that visit Plaintiff also complained of right wrist pain [R. 192]. On June 2, Plaintiff returned to Dr. Korgan to discuss a recent mammogram. At that time she also complained of hip pain, which she had apparently never mentioned to Dr. Korgan, although she stated her hip had been bothering her for 20 years. Dr. Korgan documented his plan to change Plaintiff's medications, to start Plaintiff on physical therapy, and to obtain a consultation by a rheumatologist [R. 191]. On July 15 Dr. Korgan documents Plaintiff's complaints of weakness, sweats, and dizziness. Noting Plaintiff's blood sugar and that she frequently skips lunch, the doctor discussed better diet habits. *Id.*

Some of the remaining records are those of Dr. Sara Newell. It appears that on July 8, 1993, Dr. Newell diagnosed probable fibromyalgia syndrome, which is "chronic pain in muscles and soft tissues surrounding joints." *Tabor's Cyclopedic Medical Dictionary*, (Clayton L. Thomas, M.D., M.P.H., ed.) (17th ed.). Dr. Newell documents that Plaintiff declined an injection for her shoulder and "Doesn't want surgery or injection." [R. 188]. The record also contains July 8, 1993 x-ray reports of Plaintiff's shoulder, "Impression: Negative" [R. 187], and lumbosacral spine, "Impression: mild scoliosis and degenerative change" R. 186]. A lab report reflects a "non-specific change associated with acute inflammatory processes" [R. 185]. An EMG report dated July 19, 1993 reflects that the EMG was within normal limits and that there was no evidence of carpal tunnel syndrome [R. 183]. These additional materials do not document a significant change in Plaintiff's condition, nor are the findings so remarkable that they overwhelm the other evidence in the record so as to require a different result.

There is one additional item to be discussed. Plaintiff submitted a document entitled "Medical Assessment of Ability to do Work-Related Activities (Physical)" which was completed by Dr. Newell [R. 178-80]. In her brief Plaintiff relies heavily on this assessment which indicates that Plaintiff is not able to perform even sedentary work. To support the assessment Dr. Newell stated:

Mrs. Lantow has fibromyalgia--chronic pain syndrome of soft tissue affecting arms, chest wall, shoulders, back, hips, legs. She has marked limitations therefore of most physical activity. Chronic Pain affects her ability to concentrate. Pain interferes with her sleep. Full-time employment not possible. [R. 180].

Plaintiff claims that as a treating physician, Dr. Newell's assessment should be accorded controlling weight.

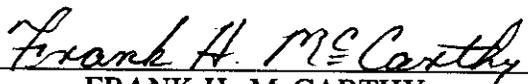
A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physicians' opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987). And, while a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected).

Although the ALJ did not have the opportunity to review Dr. Newell's assessment, the Appeals Council did. The Court has no doubt that the Appeals Council applied the correct legal analysis of this assessment and having done so found that the treating physician's assessment provided no basis for changing the decision of the ALJ. This Court has undertaken an independent review of Dr. Newell's assessment and finds it to be brief, conclusory, and unsupported by the medical evidence. Therefore, the Court finds that Dr. Newell's assessment is not entitled to controlling weight. There is substantial evidence in the record to support the decision of the Appeals Council that there is no basis for changing the decision of the ALJ.

The Court finds that the evaluation of Plaintiff's past relevant work was appropriate. The ALJ's information concerning the demands of Plaintiff's past work was taken entirely from the description she supplied on her vocational report.[R. 67-72]. According to SSR 82-62, 1982 WL 31386*3 (S.S.A.), "The claimant is the primary source for vocational documentation and statements by the claimant regarding past work are generally sufficient for determining skill level, exertional demands and non-exertional demands of such work." The ALJ did all that was required of him by the regulations and the relevant Social Security rulings.

After meticulously examining the record, the Court finds that the Secretary evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the Secretary's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 6th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

WILLIAM N. CONN)
SS# 440-34-6456,)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner, ¹)
Social Security Administration,)
Defendant.)

NO. 94-C-488-M ✓

FILED

OCT 07 1995

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

ENTERED ON DOCKET

DATE 10-10-95

ORDER

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

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

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

² Plaintiff's June 26, 1992 application for disability benefits was denied November 6, 1992, the denial was affirmed on reconsideration, February 4, 1993. A hearing before an Administrative Law Judge ("ALJ") was held August 19, 1993. By decision dated September 28, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 20, 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 Plaintiff was not properly informed of his right to representation by counsel, that the evidence supports a finding that Plaintiff cannot perform the actual demands of his past work and, that the record was not properly developed concerning the nature of Plaintiff's past work.

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

The Court does not agree that Plaintiff'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. 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). 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).

In this case, the "Request For Hearing" form which Plaintiff signed 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. 90] 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 copies of the Supplemental Security Income Notice and Reconsideration Notice [R. 71-73, 87-89] which both contain 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. [R. 72, 88].

Plaintiff was asked by the ALJ if he wished to proceed at the hearing without counsel [R. 30-31]. He indicated that he did [R. 36]. The Court finds that the Social Security Administration did all that was required of it concerning notifying Plaintiff of his right to be represented by counsel.

The Court finds that the ALJ's determination concerning Plaintiff's residual functional capacity for light work is supported by substantial evidence. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045, 1047 (10th Cir. 1993). There are several places in the medical records where the Plaintiff's capacity to work is

addressed. On May 13, 1992, Dr. James A. Rodgers stated "It is possible that this gentleman, at 57 years of age, may not ever be able to return to gainful employment in a position that requires the vigorous use of his body and he may need to apply for social security." [R. 129]. Dr. Ashok Kache recommended that Plaintiff pursue a work hardening program. However, the records reflect that Plaintiff did not undertake such a program due to his concerns about his wife's health [R. 130]. On October 19, 1992, Dr. Kache released Plaintiff from his office, remarking on his limitations, as follows:

[H]e continues to have residual problems in the neck and back areas secondary to the myofascial syndrome and has significant activity limitations and restrictions in that he is not able to perform strenuous physical activity to include repetitive bending; stooping; kneeling; pushing; pulling; carrying; and prolonged sitting standing or walking type of activity. In other words, Mr. Conn has permanent partial residuals from his work related injury. At this time, I do not believe he will be able to return to his previous work. As such, I feel that he should receive a permanent partial impairment rating for the work related injury. [R. 156].

Notably, Dr. Kache did not indicate that Plaintiff had a total disability. The ALJ fully discussed the medical evidence and the various opinions of Plaintiff's physicians concerning his ability to work. The ALJ's finding of greater medical evidence to support a determination that the Plaintiff was able to perform the full range of light work is supported by substantial evidence.

Plaintiff has raised a question about the ALJ's reliance on the *Dictionary of Occupational Titles* ("DOT") to establish the demands of Plaintiff's past work as a security guard. Such reliance has been expressly approved by the Secretary and by the 10th Circuit. SSR 82-61, 1982 WL 31387 *2; *Andrade*, 985 F.2d at 1051-2. However, a disability claimant "may overcome the presumption that the *Dictionary's* entry for a given job title applies to him by demonstrating that the duties in his particular line of work were not those envisaged by the drafters of the

category." *Andrade*, 985 F.2d at 1051-2 (quoting *Villa v. Heckler*, 797 F.2d 794, 798 (9th Cir. 1986)). In this case the ALJ failed to question Plaintiff about the duties he performed as a security guard. Rather than a due process problem, as Plaintiff suggests, the Court finds this to be a failure to develop the record concerning Plaintiff's past work as required by SSR 82-62; 1982 WL 31386 *3 (S.S.A.), which provides:

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision. Since this is an important and, in some instances, a controlling issue, **every effort** must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit. [emphasis supplied]

In this case there was no effort made to determine the demands of Plaintiff's past work. The relevant information was not provided on the vocational report [R. 93-98] and there was no information obtained from Plaintiff at the hearing beyond determining that he last worked for 3 months as a "security officer" [R. 40]. Consequently, there is no information in the record which would enable this Court to determine whether the DOT description is, or is not, applicable to Plaintiff. Indeed, there may be something about Plaintiff's only three months of experience as a security guard that prevents the DOT definition from being applicable. For instance, with Plaintiff's limited education, he may not have achieved the level of language development suggested by the DOT listing as required for a security guard. See DOT 372.667-034 and Appendix C. There is no way to tell from this record.

According to SSR 82-62 and *Henrie v. U.S. Dept. of Health & Human Services*, 13 F.3d 359 (10th Cir. 1993), it is the duty of the ALJ to ensure that an adequate record is developed

consistent with the issues raised. In this case the record has not been so developed. Accordingly, the case must be remanded for further proceedings.

The decision of the Secretary finding Plaintiff not disabled is REVERSED, and the cause is REMANDED to the Secretary to develop the record concerning the actual demands of Plaintiff's last work as a security guard and the applicability of DOT Section 372.677-034 to Plaintiff.

SO ORDERED THIS 5th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

CLARA B. BERRY,)
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Plaintiff,)
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v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,²)
)
Defendant.)

OCT 06 1995

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

Case No: 94-C-424-W ✓

ENTERED ON DOCKET

DATE 10-10-95

JUDGMENT

Judgment is entered in favor of the Plaintiff, Clara B. Berry, in accordance with this court's Order filed October 5, 1995.

Dated this 5th day of October, 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.

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

OCT 05 1995 *[Signature]*

CLARA B. BERRY,)
)
 Plaintiff,)
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 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

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

Case No. 94-C-424-W ✓

ENTERED ON DOCKET
DATE 10-10-95

ORDER

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

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("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

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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 work-related activities, except for work involving lifting/carrying over 20 pounds occasionally or 10 pounds frequently and had mildly decreased lumbar and cervical range of motion. He concluded that claimant's past relevant work as a cashier and escort did not require the performance of work-related activities precluded by the above limitations, so her impairments did not prevent her from performing her past relevant work. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision that claimant can return to her past relevant work is not supported by substantial evidence because he ignored significant evidence and discredited her treating doctor's findings concerning the severity of her back and neck

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).

problems.

- (2) The ALJ mischaracterized claimant's medication usage.
- (3) The ALJ failed to consider the limitations caused by hives and chronic fatigue.

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

Claimant contends she became disabled on January 8, 1992 as a result of back and neck pain that has been progressive in nature since a 1985 motor vehicle accident, a thyroid condition, hives, and mitral valve prolapse (TR 140, 297). On January 8, 1992, Dr. Kent Towsley excised an enlarged parathyroid tumor in her neck and she was put on medication for hyperthyroidism (TR 174-176). On April 17, 1992, her treating physician reported that she had "[s]light decreased internal rotation of the left shoulder with other signs of rotator cuff tear when trying to perform internal and external rotation," but no point tenderness or crepitation and full range of motion (TR 221).

On June 24, 1992, she was seen for an internist consultative examination (TR 199-201). The doctor noted that in the lumbar spine there was "mild limitation of lateral bending to the left and right; however, heel and toe walking are performed well with both feet and straight leg raising signs are negative in the sitting and lying position Cervical spine exam; there is limitation of rotation to the left in examination of the cervical spine with pain on forward flexion and rotation to the left." (TR 200). No motor, sensory, or reflex deficit was noted in the extremities (TR 200). He concluded she had no hyper- or hypothyroidism, but had traumatic osteoarthropathy in her lumbosacral spine and

cervical spine with no cervical or lumbosacral radiculopathy noted (TR 201).

Dr. Thomas Goodman did a mental status examination of claimant on August 13, 1992 to determine if she had a somatoform disorder related to some of her physical complaints (TR 212-214). The doctor noted that her major complaint was hives caused by an allergic reaction to codeine in June of 1992, but that she did not complain of hives at an examination in June of 1992 (TR 212). The doctor stated that she has no symptoms of a panic disorder, so her hives might possibly be the result of a psychosomatic or somatoform disorder (TR 214). His diagnosis was "Axis I. (1) Somatiform disorder, NOS, provisional. (2) Psychological factors affecting physical symptoms, provisional." (TR 214). He concluded: "[c]laimant otherwise has retained her intellectual abilities. If her somatic symptoms can be corrected or resolved to the point that she can work physically, I see no reason why psychologically she could not return to at least moderately complicated work activities. She is oriented, has adequate memory, is intelligent, can do calculations and use abstract thinking and judgment." (TR 214).

No further mention of neck pain occurred until March 10, 1993, when claimant told her doctor, Dr. Casey Truett, that she was feeling fatigue from her heart condition and couldn't do things like housework that she could previously do because of "old age wear and tear arthritis." (TR 256). The doctor reported she had crepitus on range of motion in her back (TR 256). The next day Dr. John Waters, a cardiologist, reported to Dr. Truett that he had examined claimant for reported fatigue and weakness (TR 257). Dr. Waters reported:

Recent chest x-ray reveals borderline cardiomegaly. Lung fields are otherwise clear. Thoracic spine reveals evidence of degenerative disc and

joint disease. She is noted to have disc space narrowing in the mid thoracic spine. Moreover she has kissing osteophytes in the lower thoracic spine . .

IMPRESSIONS:

1. Her hypertension is presently well-controlled.
2. I cannot help but wonder if her symptoms of fatigue are, in part, related to her osteoarthritis which is preventing her from exercise and also in part secondary to her Inderal. I had a discussion with her about the fact that many individuals on Beta blockers for hypertension, do not necessarily have the same quality of life scores as individuals treated with other medicines.

(TR 257-58). Dr. Waters noted that claimant needed to continue Inderal for her heart condition, because it was necessary to lower her dosage of Synthroid for her thyroid condition, but the two medications together might be causing some of her problems (TR 258).

On April 19, 1993, Dr. James Snipes examined claimant concerning her complaints of inability to sleep and hives which disturb her sleep (TR 281). Dr. Snipes concluded: "Her review of systems is negative as reocrded [sic] except for irregular heart beat and shortness of breath reportedly secondary to mitral valve prolapse and some feeling disorders on the right upper and right lower extremity She is felt to be over medicated. Her Seldane is not important in any way and is therefore deleted for the present time." (TR 281).

On that date, an ANA test was positive (TR 283) and x-rays showed as follows:

CERVICAL SPINE:

No compression deformities of the vertebral bodies are noted. There is disc

space narrowing at the C5-6, C6-7 and C7-T1 levels. Moderate sized anterior osteophytes are present which displaces the precervical soft tissue somewhat anteriorly. There also appear to be large posterior osteophytes, particularly at the C5-6 level. These would better evaluated with oblique views. The odontoid is intact. I see no evidence of acute injury.

....

LATERAL LUMBAR SPINE:

No compression deformities of the vertebral bodies are noted. The disc interspaces are well maintained except for slight narrowing and degeneration at the L4-5 level. I see no evidence of acute injury. There are moderate sized osteophytes present at the L4-5 level and at the L1-2 level. The SI joints are normal. No evidence of acute injury.

(TR 282).

On July 7, 1993, Dr. Randall Hendricks examined claimant for back, neck, and leg pain (TR 297). X-rays showed spondylotic changes at L5-S1, severe spondylotic changes at C5-6 and C6-7, degenerative spondylolisthesis at L4-5 with 5 mms. subluxation on flexion extension views, and on the lateral view she was 7 mms. anteriorly subluxed (TR 297). The doctor concluded:

She has arthritic changes of the neck at two levels which would be producing her neck pain but I do not see an significant instability on radiographs nor any neurologic deficits on physical exam and have recommended conservative management of her cervical spine with exercises and an anti-inflammatory. With respect to her lumbar spine, the patient has a 5 mm. translation on flexion and extension and I am concerned about this producing more problems with respect to relative spinal stenosis and neurologic impingement.

(TR 298). The doctor ordered that cervical and lumbar MRIs be done and concluded on July 16, 1993, as follows:

This patient definitely has problems. She has a very significant dynamic instability at the L4-5 level due to spondylolisthesis. The disk, however, is mildly bulging. There is significant foraminal impingement due to spondylotic changes. In the cervical spine both the C5-6 and C6-7 areas are

degenerative in nature. C5-6 demonstrates a disk herniation. The C6-7 disk is bulging and once again there is foraminal impingement due to spurs. I have talked to Belle about this. We have placed her on a nonsteroidal anti-inflammatory. In fact, we have given her some samples of Feldene to see if that would be assistive. I have also recommended that the patient obtain and wear a chairback brace to see if that will be helpful. I have given her some information on operative stabilization of the lumbar spine and asked her to give this some consideration should the brace and the anti-inflammatory not be assistive.

(TR 298, 299).

There is merit to claimant's contentions. The ALJ's decision that claimant can return to her past relevant work is not supported by substantial evidence. The ALJ dismissed significant evidence of severe back and neck problems shown by x-rays, MRIs, and doctors' reports (TR 23, 25, 200-201, 257-58, 282-83, 297-299). While there is probably not enough evidence to conclude that claimant has had a severe impairment as defined in 1.05C (other vertebrogenic disorders)⁴ since January 8, 1992, the combination of the severe neck problems and fatigue caused by medications would preclude claimant from doing her past relevant work as a cashier and escort, as the vocational expert concluded.⁵

⁴ The Listing of Impairments includes the following impairment, 1.05(C), which would preclude a claimant from engaging in work:

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

1. Pain, muscle spasm, and significant limitation of motion in the spine;
and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

⁵ The vocational expert testified as follows:

Q. Let's assume that the testimony of the claimant as given at the hearing today was found to be credible, and substantially verified by third party medical evidence, which is a part of the record, without any significant contradictions. Would this individual be able to return to any of her past relevant work?

A. No.

Q. Can you identify any occupations, at any exertional or skill level, which such an individual could perform?

A. Well, I believe that there would be some jobs that, that a person could perform. The jobs require that the

The ALJ erred in substituting his own opinion for the conclusions of claimant's cardiologist and Dr. Snipes in suggesting that claimant could eliminate her fatigue by reducing her Inderal (TR 27). He also erred in concluding that claimant's hives and tachycardia were well controlled by medications, but disregarding the side effects caused by these medications (TR 22-23, 257-58, 281).

No consultative medical expert has expressed an opinion as to claimant's residual functional capacity, taking into consideration the combination of her fatigue (which the record suggests was caused jointly by her established mitral valve prolapse, and by the combination of medications prescribed), chronic hives from her documented allergic reaction to codeine,⁶ and severe orthopedic spinal impairments.⁷ As it stands, the record provides an insufficient basis on which to accurately determine claimant's residual

person be able to perform them on a sustaining, consistent basis, and be productive, and I'm making specific reference to the comments that I heard regarding fatiguability, and, and inability to carry out work-like activities on a consistent basis. Therefore, my response is, for short duration, but not as these jobs customarily exist in the national economy.

Q. Okay. Thank you, Dr. Young. No further questions.

ALJ: Mr. White?

EXAMINATION OF VOCATIONAL EXPERT BY ATTORNEY:

Q. The -- excuse me, would these jobs require the individual to have good range of motion, as far as their, their neck is concerned, from looking down, left, right?

A. Yes.

Q. And would these jobs also require good use of the arms, in terms of being able to reach and handle items?

A. Yes, they would.

Q. Okay. And likewise, if the individual was distracted by itching from hives, so that it interfered with their ability to remain attentive to the task at hand, would, would that prevent them possibly from performing these jobs?

A. Yes, it would.

(TR 74-75).

⁶Dr. Goodman's report dated August 13, 1992 states, in reference to the allergic reaction to codeine, that "she was informed that this reaction could last up to a period of 5 years." Presumably, this came from Dr. Ashley, the claimant's dermatologist, although the court has not found any report so stating.

⁷Under 20 C.F.R. § 404.1519(a)(B)(4) & (5), a consultative exam is required if "a conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved, and we are unable to do so by recontacting your medical source; or there is an indication of a change in your condition that is likely to affect your ability to work, but the current severity of your impairment is not established."

functional capacity for purposes of the fifth stage of the sequential evaluation process.

On remand, the ALJ should obtain an opinion from a consultative medical expert which takes into consideration the combination of Claimant's severe impairments, as well as the opinion of a vocational expert expressed in response to a hypothetical question based upon the medical expert's conclusions as to Claimant's residual functional capacity. Such supplementation of the record is necessary to determine whether the combination of Claimant's severe impairments precludes her from any substantial gainful activity available in the national economy.

This case is reversed and remanded for further action in accordance with this opinion.

Dated this 5th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Berry.or

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

ROBERT LEE DUFFY,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID G. BARNETT,)
)
 Defendant.)

ENTERED ON DOCKET
OCT 10 1995

DATE _____

No. 95-C-884-K ✓

FILED

OCT 06 1995

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

ORDER

On September 18, 1995, the Court granted Plaintiff, a state inmate, leave to file this civil rights action in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this action should be dismissed as frivolous.

In his pro se complaint, Plaintiff sues Officer David G. Barnett for mistakenly reporting a 1938 prior conviction from Texas during the 120-day review of Plaintiff's sentence. Plaintiff alleges that, after the 120-day review, Barnett discovered the mistake and reported it to the trial court. The trial court, however, declined to modify its decision. Plaintiff seeks \$500,000 for pain and suffering. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v.

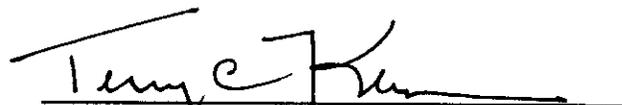
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Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleading, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff's allegations of negligence and incompetence are inarguable as a matter of law and do not amount to a fourteenth amendment violation. See, e.g., Daniels v. Williams, 474 U.S. 327 (1986).

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby **dismissed without prejudice** pursuant to 28 U.S.C. § 1915(d). The Clerk shall **mail** a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 6 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

ROBERT COFFELT,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,²)
)
 Defendant.)

OCT 06 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

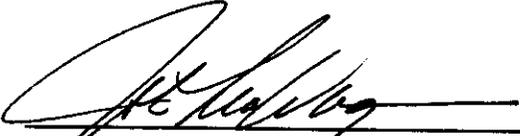
Case No: 94-C-843-K

ENTERED ON DOCKET
DATE OCT 10 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Robert Coffelt, in accordance with this court's Order filed October 6, 1995.

Dated this 6th day of October, 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.

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

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

OCT 06 1995

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

Case No. 94-C-843-K

ENTERED ON DOCKET

DATE OCT 10 1995

ORDER

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

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

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

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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the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity ("RFC") to perform the physical exertion requirements and nonexertional requirements of medium work, except for the following limitations: lifting more than 50 pounds only occasionally and no more than 25 pounds frequently; standing or walking, off and on, for no more than 6 hours in an 8-hour work day; and performing tasks requiring no more than mild limitations on attention and concentration, dealing with the public and having more than superficial dealings with co-workers. The claimant had no limitations on performing tasks requiring understanding, remembering, and carrying out detailed and complex job instructions. The claimant's pain and other symptoms were found to not affect his concentration or prevent the performance of medium work with the above limitations. The ALJ concluded the claimant is unable to perform his past relevant work as a fast food manager, convenient store assistant manager, sales person, shipping and receiving clerk,

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).

and counter-helper. The ALJ noted the claimant was 45 years old, which is defined as a younger individual, and had a high school education, so the issue of transferability of work was not material. Having determined that the claimant's additional nonexertional limitations did not allow him to perform the full range of medium work and using "the grids"⁴ as a framework for decision making, the ALJ determined that there were a significant number of jobs in the national economy which claimant could perform. The ALJ concluded the claimant was not under a disability under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision is not supported by substantial evidence because there is no medical evidence that supports the assertion the claimant retain the RFC to perform medium work with some limitations.
- (2) The ALJ erred in finding the claimant's medical impairments do not meet the Listings of 12.04 and 4.04(c).

The claimant also asserts that the case should be remanded for consideration of new 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).

The new evidence issue will be considered first, because, if the new evidence meets the requirements for remand, then this court will not have to consider the claimant's other issues. Section 405(g) of Title 42 of the United States Code provides that this court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming,

⁴ Medical-Vocational Guidelines ("the grids"), 20 C.F.R. Pt. 404, Subpt. P, App. 2.

modifying, or reversing the decision of the Secretary, with or without remanding for a rehearing The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary" Under that section, a claimant may submit new evidence regarding a disability, but several requirements must be met before the court remands the case for reconsideration. The evidence must be new and not merely additional and cumulative of what is already in the record, because a plaintiff may not relitigate the same issues. Bradley v. Califano, 573 F.2d 28, 30-31 (10th Cir. 1978). The evidence must also be material, that is, relevant and probative.

The courts have also found that there must be a reasonable possibility that the new evidence would have changed the Secretary's decision had it been before him. Cagle v. Califano, 638 F.2d 219, 221 (10th Cir. 1981), cert. den. 451 U.S. 993 (1982). Implicit in the materiality requirement is the idea that new evidence should relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. Haywood v. Sullivan, 888 F.2d 1463, 1471-72 (5th Cir. 1989) (citing Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985)). The final requirement is that plaintiff must demonstrate good cause for not having incorporated the new evidence into the administrative record. Id.

This court may only consider the new evidence proffered to determine whether the case should be remanded under 42 U.S.C. § 405(g). Selman v. Califano, 619 F.2d 881, 885 (10th Cir. 1980). Upon remand, the Secretary can then consider the limiting effect of all the current impairments to decide if claimant is able to engage in substantial gainful

activity. 20 C.F.R. § 404.1545.⁵

The new evidence attached to Plaintiff's Brief on his Statement of Position with Authorities (Docket #5) shows that on December 9, 1994, the claimant suffered another heart attack.⁶ This reporting physician's diagnosis does not represent additional or cumulative information, but was made after the ALJ made his original determination on October 29, 1993, and was not in existence at the time of the administrative hearing; thus, the medical record report is new evidence.

This new evidence is material to a decision regarding the claimant's disability, because it confirms much of the previous evidence, expands upon it, and is not cumulative of evidence already in the record. The ALJ noted that the claimant had suffered two previous acute myocardial infarctions in 1989 and 1990 (TR 34). The ALJ also found that the claimant had 70% lesion of the first diagonal branch of the left anterior descending artery (LAD) and a 40% lesion in the midportion of the right coronary artery (RCA), and that the claimant's disability included anteroapical hypokinesis with mild left ventricular dysfunction (TR 34). Dr. Samant's report in the new evidence shows that the claimant had a heart catheterization on December 16, 1994 "which showed abnormal LV function with anteroapical hypokinesis, mildly depressed overall LV function LAD with multiple - greater than 50% lesions. RCA 75% mid- and distal lesions, and 50% PDA-1 [posterior descending artery]; left circumflex multiple greater than 50% lesions." The new evidence

⁵The ALJ found that Plaintiff met the insured status requirements of the Social Security Act on February 5, 1991, the date he asserts he became unable to work, and will continue to meet them through December 31, 1996.

⁶ Claimant has a medical record report dated 12-17-94 from Priya P. Samant, M.D. The report states the claimant was diagnosed with a "status post non-Q-wave myocardial infarction."

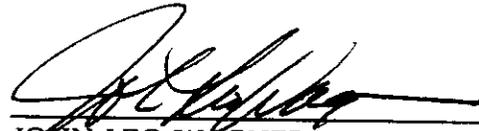
states that the claimant suffered his third heart attack, and he may or may not have suffered cardiac vessel restinosis. This evidence is material as to whether he meets Listing 4.04(c) of the Social Security Listings in 20 C.F.R. Pt. 404, Subpt. P, App. 2. and may affect the Secretary's decision that the claimant was not disabled and that he can engage in substantial gainful activity.⁷

The final prong for remand on the basis of new evidence is a showing of good cause which is met here. The claimant suffered his third heart attack on December 9, 1994, over thirteen months after the ALJ had closed the record. The court believes this suffices as good cause for why the claimant did not incorporate the information into the administrative record.

For the foregoing reasons, the case is remanded pursuant to 42 U.S.C. § 405(g) for a rehearing addressing whether claimant is disabled. On remand, the Secretary must make every reasonable effort to reconsider the entire record in light of the new medical evidence and must seek assistance of a medical consultant to assess the claimant's physical condition given the new evidence.

⁷ Listing 4.04(c) of the Social Security Listings found at 20 C.F.R. Pt. 404, Subpt. P, App. 2 provides:
4.04 Ischemic heart disease, with chest discomfort associated with myocardial ischemia, as described in 4.00E3, while on a regimen of prescribed treatment (see 4.00A if there is no regimen of prescribed treatment). With one of the following:
....
C. Coronary artery disease, demonstrated by angiography (obtained independent of Social Security disability evaluation), and an evaluating program physician, preferably one experienced in the care of patients with cardiovascular disease, has concluded that performance of exercise testing would present a significant risk to the individual, with both 1 and 2:
1. Angiographic evidence revealing:
a. 50 percent or more narrowing of a nonbypassed left main coronary artery; or
b. 70 percent or more narrowing of another nonbypassed coronary artery; or
c. 50 percent or more narrowing involving a long (greater than 1 cm) segment of a nonbypassed coronary artery; or
d. 50 percent or more narrowing of at least 2 nonbypassed coronary arteries; or
e. Total obstruction of a bypass graft vessel; and
2. Resulting in marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea, or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest.

Dated this 6th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:coffelt

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

LOUIS DELEON,)
)
 Plaintiff,)
)
 vs.)
)
 SHIRLEY S. CHATER, Commissioner)
 of Social Security,)
)
 Defendant.)

ENTERED ON DOCKET
DATE OCT 06 1995

Case No. 95-C-370-BU

FILE

OCT 5 - 1995

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

ORDER

This matter comes before the Court upon the Motion to Dismiss Without Prejudice filed by Plaintiff, Louis Deleon, on September 25, 1995. Defendant's counsel has orally represented that Defendant has no objection to Plaintiff's motion. Upon due consideration of the unopposed motion, the Court finds that the motion should be granted.

Accordingly, the Motion to Dismiss Without Prejudice (Docket Entry #3) filed by Plaintiff, Louis Deleon, is hereby GRANTED. This action is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED this 5th day of October, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 5 1995

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

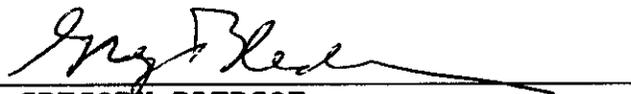
MARK A. MAYER,)
)
Plaintiff,)
)
v.)
)
TULSA JUNIOR COLLEGE,)
GARY MINNERATH, MIKE RUSK,)
MELINDA CARTER, HERMAN)
ROBBINS, BOB MELOTT,)
DEAN VAN TREASE,)
)
Defendants.)

No. 94-C-1140 BU

ENTERED ON DOCKET
DATE OCT 6 1995

STIPULATION OF DISMISSAL WITH PREJUDICE AND
REQUEST TO SEAL COURT FILE

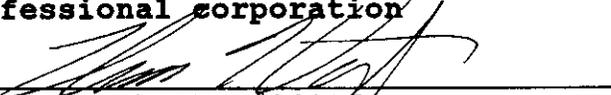
Pursuant to Rule 41(a)(1), Fed. R. Civ. P., this case having been amicably settled, the parties stipulate to its dismissal with prejudice to refiling. Pursuant to the settlement, the parties jointly request that the Court file be sealed.



D. GREGORY BLEDSOE
Attorney at Law
1717 South Cheyenne
Tulsa, OK 74119-4664

ATTORNEY FOR PLAINTIFF

JONES, GIVENS, GOTCHER & BOGAN, a
professional corporation



By
THOMAS L. VOGT, #10995
JONES, GIVENS, GOTCHER & BOGAN
15 East 5th Street, #3800
Tulsa, OK 74103
918/581-8200

ATTORNEYS FOR DEFENDANTS TULSA
JUNIOR COLLEGE, GARY MINNERATH, MIKE
RUSK, MELINDA CARTER, HERMAN
ROBBINS, BOB MELOTT, and DEAN VAN
TREASE



F I L E D

OCT 5 - 1995

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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JIMMY D. KING

vs.

Case No.95-C-486

PLAINTIFF
ENTERED ON DOCKET

DATE OCT 06 1995

RICK NAPIER

DEFENDANT

JUDGMENT

Now on this 22nd day of September, 1995, came on for hearing the Motion for Default Judgment filed herein by Plaintiff Jimmy D. King, Mr. King appearing in person and by and through his attorney of record, Michael E. Stubblefield. Although properly served with a copy of the Petition and Summons in the case, Defendant Rick Napier failed to answer or enter his appearance in this matter in the time allowed by law, after which, and upon request of the Plaintiff, the Court Clerk made an Entry of Default upon the record pursuant to Local Rule 55.1A. After hearing testimony of the Plaintiff, reviewing the Plaintiff's documents introduced into evidence in this matter, and upon consideration of other facts and matters before the Court, the Court finds:

1. That the Plaintiff filed a Petition in the United States District Court, Northern District of Oklahoma, on May 25, 1995 alleging breach of contract in the sum of Fifty Two Thousand Dollars (\$52,000.00);
2. That the Defendant was served with the Complaint and Summons prescribed by the laws of Oklahoma on June 12, 1995 and proof of service was filed on June 13, 1995;

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3. That the Defendant has been duly served with the summons for more than thirty (30) days before the date of the motion and has neither filed an answer nor entry of appearance in response to the claims against him.
4. That the Defendant is not an infant or incompetent person, nor is he presently a member of the armed services of the United States.
5. The Plaintiff's proofs established in court that the Defendant is indebted to the Plaintiff in the amount of Fifty Four Thousand Dollars (\$54,000.00), plus interest thereon from date of default until date of judgment at the rate of ten percent (10%), plus interest from date of judgment until paid at the maximum rate allowed by Oklahoma law.
6. That, pursuant to Okla. Stat. Ann. tit. 12, §727, the applicable interest rate on judgments for the year 1995, which will be in effect until the first regular business day of January, 1996, is 8.31%.
7. That, in addition, the Plaintiff is entitled to a reasonable attorney's fee in the sum of Three Thousand Dollars (\$3,000.00); and that the Plaintiff is entitled to costs and filing fees in the sum of One Hundred Fifty Five Dollars (\$155.00).

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Plaintiff Jimmy D. King is awarded judgment against Defendant Rick Napier in the principal sum of Fifty Four Thousand Dollars (\$54,000.00), plus interest thereon from date of default until date of judgment at the rate of ten percent (10%), and interest from date of judgment until paid in full at the maximum rate allowed by Oklahoma law, such rate being 8.31% until the first

business day of January, 1996, at which time the applicable rate shall be adjusted in accord with Oklahoma law.

IT IS FURTHER ORDERED, that the Plaintiff is hereby awarded an attorney's fee of Three Thousand Dollars (\$3,000.00) plus his costs and fees of One Hundred Fifty Five Dollars (\$155.00).

IT IS SO ORDERED for all of which execution may issue.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

concludes that a certificate of probable cause should not issue in this case because Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause is denied. See Fed. R. App. P. 22(b).

SO ORDERED THIS 5th day of Oct, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ST. JOHN MEDICAL CENTER, INC.,)
an Oklahoma nonprofit)
corporation, HILLCREST MEDICAL)
CENTER, an Oklahoma nonprofit)
corporation, and OSTEOPATHIC)
HOSPITAL FOUNDERS ASSOCIATION,)
INC., an Oklahoma nonprofit)
corporation,)

Plaintiffs,)

vs.)

UNITED STATES OF AMERICA,)

Defendant.)

FILED

OCT 5 - 1995

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

Case No. 94-C-163-BU ✓

ENTERED ON DOCKET

DATE 10-6-95

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Plaintiffs, St. John Medical Center, Inc., Hillcrest Medical Center and Osteopathic Hospital Founders Association, Inc., and the Motion for Summary Judgment filed by Defendant, United States of America. Based upon the parties' submissions and the following stipulated and undisputed facts, the Court makes its determination.

1. The time period relevant for the claims and defenses at issue herein, and the further facts set forth below, is April 1, 1987 through December 31, 1990.

2. Plaintiff, St. John Medical Center, Inc. ("St. John"), is an Oklahoma nonprofit corporation described in Internal Revenue Code ("IRC") (Title 26 U.S.C.) §§ 501(c)(3) and 170(c)(2).

3. Plaintiff, Hillcrest Medical Center ("Hillcrest"), is an Oklahoma nonprofit corporation described in IRC §§ 501(c)(3) and

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170(c)(2).

4. Plaintiff, Oklahoma Osteopathic Hospital Founders Association, Inc., is an Oklahoma nonprofit corporation described in IRC §§ 501(c)(3) and 170(c)(2). Prior to 1989, Oklahoma Osteopathic Founders Association, Inc., did business as Oklahoma Osteopathic Hospital. After that time, it did business as Tulsa Regional Medical Center. It will be referred to hereinafter as Tulsa Regional.

5. St. John, Hillcrest and Tulsa Regional (referred to collectively as the "Hospitals"), are tertiary care hospitals located in Tulsa, Oklahoma.

6. In 1986, the Hospitals formed AirEvac for Tulsa, Inc., ("AirEvac"). AirEvac is an Oklahoma nonprofit corporation described in IRC §§ 501(c)(3) and 170(c)(2).

7. The Hospitals formed AirEvac in order to provide emergency medical care during transportation of seriously ill or injured persons. The service consists primarily of transporting patients by helicopter and ground ambulance from remote hospitals or, in some cases, injury sites, to the Hospitals. In some cases, patients are transported to other tertiary care hospitals in the Tulsa area.

8. The relationship between AirEvac and the Hospitals is governed by a Membership Agreement. The first AirEvac Membership Agreement is dated December 12, 1986. Paragraph 3 of this Agreement provided as follows:

3. Capital Contributions. It is understood that from time to time, AirEvac of Tulsa, Inc., may require

additional capital contributions from members to (either) fund (operating deficits or) capital expenditures. It is the express intention of the Members that capital contributions voted by the Board of Directors shall be required or requested equally from the Members. Additional capital contributions to fund operating deficits may be required or requested from members from time to time based on the proportionate number of patients delivered to member hospitals during the preceding fiscal year * * *.

9. St. John, Hillcrest and Tulsa Regional remained the members and operators of AirEvac until August 15, 1988. At that time, Tulsa Regional relinquished its membership interest in AirEvac to St. John and Hillcrest. In exchange for the relinquishment of its interest in AirEvac, Tulsa Regional received relief from its potential liability pursuant to the Membership Agreement. Tulsa Regional received no other payments or compensation.

10. On December 21, 1988, a second Membership Agreement was executed between St. John and Hillcrest.

a. Paragraph 6.2 of the second Membership Agreement provided that the member Hospitals will pay their proportionate share of AirEvac's "operating expenses." Pursuant to Paragraph 6.1 of the second Membership Agreement, the term "operating expenses" does not include depreciation on the helicopter airframe or the furniture and equipment owned by AirEvac.

b. Pursuant to Paragraph 6.2 of the second Membership Agreement, a member's proportionate share of Operating Expenses for any given month is determined by "dividing the Projected Monthly Operating Expenses for the month by the Member's Projected Monthly Number of Transports for the same month." The term "Transports"

refers to the number of patients transported to a member hospital on AirEvac helicopters.

11. After August 15, 1988, Tulsa Regional continued to transport its patients using AirEvac's services. From August 1988 to January 1990, AirEvac charged Tulsa Regional \$1,250.00 per patient transported plus \$12 per one way patient mile for every one way mile over 50. Beginning in January 1990, AirEvac began to allow a reduced rate from the general contract price when a larger number of passengers were transported.

12. St. John and Hillcrest continue to fully fund the operations of AirEvac. This includes a monthly payment to AirEvac for each hospital's proportionate share (as that term is defined in paragraph 10 above) of AirEvac's transportation expenses. For example, if AirEvac transported 25 patients during a month, with St. John's patients accounting for 10 of those transports, and AirEvac's monthly net transportation expenses were \$75,000, St. John would fund \$30,000 of AirEvac's net operating expenses for that month (10 divided by 25 times \$75,000).

13. St. John and Hillcrest also make what has been designated in the second Membership Agreement as periodic capital contributions to AirEvac.

14. As dictated by AirEvac's Membership Agreement, the Board of Directors of AirEvac is composed of representatives of St. John and Hillcrest. The Board establishes the rates to be charged by St. John and Hillcrest to their patients for emergency medical helicopter service. During the period April 1, 1987 through

December 31, 1990, the following rates were set by the AirEvac Board:

4/7/87 - 4/1/88	\$250 plus \$10 per one way patient mile
4/1/88 - 9/1/89	\$400 plus \$12 per one way patient mile
9/1/89 - 12/31/90	\$500 plus \$15 per one way patient mile

15. The Hospitals bill all patients/passengers who are transported by AirEvac's helicopters for use of the emergency medical transportation services.

16. All requests for emergency medical transportation by AirEvac's helicopters are initiated by or on behalf of the patients/passengers.

17. AirEvac's offices and hangar facilities are located on property owned by the City of Tulsa. The City leases the property to the Tulsa Airports Improvement Trust. The Tulsa Airports Improvement Trust subleases the property to International Business Aircraft, Inc. ("IBA"). IBA subleases the offices and hangar facilities to AirEvac.

18. IBA is a privately owned, for-profit corporation providing services as a fixed base operator.

19. AirEvac's headquarters and hangar facilities are located less than 100 yards from an active taxiway at Tulsa International Airport.

20. AirEvac's helicopters are stored and maintained at the hangar facilities located on the IBA leasehold. Portions of the IBA leasehold, which are adjacent to the AirEvac hangar facilities and from which AirEvac takes off and lands, are within a security

fence installed at Tulsa International Airport.

21. AirEvac's helicopters never took off from nor landed at the IBA leasehold, or areas adjacent thereto, with a patient on board the helicopter, except under rare emergency conditions.

22. Whether helicopters take off from, or land at, the IBA facility, or a facility located anywhere within 5 miles of the Tulsa International Airport control tower, the contact with the control tower is the same.

23. St. John filed Federal Excise Tax Returns (IRS forms 720) for the quarters ended June 30, 1987, through September 30, 1988. On these returns, St. John reported and remitted the federal air transportation excise tax imposed by IRC § 4261(a) on amounts collected from its patients for emergency medical helicopter transportation.

24. Hillcrest filed Federal Excise Tax Returns (IRS forms 720) for the quarters ended September 30, 1987, through June 30, 1988. On these returns, Hillcrest reported and remitted the federal air transportation excise tax imposed by IRC § 4261(a) on amounts collected from its patients for emergency medical helicopter transportation.

25. Amounts collected by the Internal Revenue Service ("IRS") under the federal air transportation excise tax imposed by IRC § 4261 are appropriated to the "Airport and Airway Trust Fund" established by IRC § 9502. Improvements have been made to the Tulsa International Airport with federal funds appropriated from the "Airport and Airway Trust Fund" created by IRC § 9502.

26. In December 1992, a delegate of the Secretary of the Treasury assessed federal transportation excise tax deficiencies imposed by IRC § 4261(a), and interest and penalties against the Hospitals. The assessed amounts were subsequently paid by the Hospitals, who then filed timely claims for refund with the IRS. Those claims for refund were denied.

27. The payments to AirEvac made by St. John, Hillcrest and Tulsa Regional during the period April 1987 through December 1990, included payments for the services of paramedics and medical supplies used during the emergency medical transportation provided. Paramedics providing services on AirEvac flights are employees of AirEvac. Payments for the medical services provided by the paramedics as well as the medical supplies provided during the period April 1987 through December 1990 were approximately \$480,000.00. Transportation excise tax, penalties and interest were assessed on this amount.

28. The nurses providing care to AirEvac transports are employees of the Hospitals. In addition, the Hospitals provide certain medical supplies used during the emergency medical transportation. During the period April 1987 through December 1990, the cost of these medical services and supplies exceeded \$1,500,000.00. Transportation excise tax, penalties and interest were assessed on this amount.

29. The payments to AirEvac made by the Hospitals during the period April 1987 through December 1990 included capital contributions for the purchase of a helicopter. The helicopter was

purchased in December 1987, at a price of \$3,304,199.00, with Oklahoma excise tax paid in the amount of \$108,200.00. Transportation excise tax, penalties and interest were assessed on these capital contributions.

29. AirEvac did not collect the federal air transportation excise tax contained in IRC § 4261(a) from either the Hospitals or the patients/passengers transported.

30. The assessments made by the IRS against the Hospitals for the tax, penalties and interest were made pursuant to IRC § 4261(a), 6651(a), 6653, 6656(a), 6662(a).

31. On February 22, 1994, St. John, Hillcrest and Tulsa Regional filed this action seeking a refund of the federal air transportation excise taxes assessed by the delegate of the Secretary of the Treasury and paid under protest.

In this action, Plaintiffs assert that they are not the parties liable for payment of the assessed federal air transportation excise taxes under IRC § 4261(a). They maintain that the patients/passengers paying for the medical air transportation provided by AirEvac are the parties responsible for the excise taxes. In addition, Plaintiffs assert that the medical air transportation provided by AirEvac is exempt from transportation excise taxes under IRC (Title 26 U.S.C.) § 4261(f).

From review of the parties' motions, the primary issues for determination are (1) whether Plaintiffs are parties subject to the federal air transportation excise tax set forth in IRC § 4261(a); and (2) whether the exemption to the IRC § 4261(a) federal air

transportation excise tax contained in IRC § 4261(f) is applicable to the medical air transportation provided by AirEvac.

The specific taxing statute at issue provides:

(a) In general. There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

26 U.S.C. § 4261(a).¹ The taxing statute also designates the party for paying the tax:

(d) By whom paid. Except as provided in section 4263, the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

26 U.S.C. § 4261(d).

The exemption at issue in this case arises under IRC § 4261(f) which provides:

(f) Exemption for certain emergency medical transportation. No tax shall be imposed under this section or section 4271 on any air transportation by helicopter for the purpose of providing emergency medical services if such helicopter--

(1) does not take off from, or land at, a facility eligible for assistance under the Airport and Airway Development Act of 1970 during such transportation, and

(2) does not otherwise use services provided pursuant to the Airport and Airway Improvement Act of 1982 during such transportation.

¹The tax imposed by this section was increased to ten percent by amendment effective November 30, 1990.

26 U.S.C. § 4261(f).

Upon review of the statute and consideration of the stipulated and undisputed facts, the Court finds that the medical air transportation provided by AirEvac falls within the exemption of IRC § 4261(f). The Court finds that AirEvac satisfies the first criteria of the statutory exemption because it does not take off from, or land at, a facility eligible for funding under the Airport and Airway Development Act of 1970 ("the 1970 Act"). The undisputed evidence reveals that AirEvac bases its operations on the leasehold held by IBA, a fixed base operator. The IBA leasehold consists of approximately 4.55 acres of land adjacent to the operations area of the Tulsa International Airport. When AirEvac's helicopters leave and return to their base of operations, they take off from and land at the IBA leasehold. Although the taxing statute does not define the term "facility," the Supreme Court has instructed that words in a statute are to be taken by their ordinary, contemporary and common meaning. Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, _____ U.S. ____, 113 S.Ct. 1489, 1495, 123 L.Ed.2d 74 (1993). "Facility" is defined in Webster's Dictionary as "something (as a hospital) that is built, installed or established to serve a particular purpose." Webster's Ninth New Collegiate Dictionary 440 (1983). The IBA leasehold clearly falls within such definition. It is undisputed that IBA serves a particular purpose, namely, providing products and services to aircrafts, such as fuel and needed repairs.

Under the 1970 Act, facilities eligible for federal funding

are public airports. Airport and Airway Development Act of 1970, Pub. L. No. 91-258 § 14(a) 260. A public airport is defined as "any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned." Id. at § 11(12) 255. The IBA facility, where AirEvac's operations base, is not a public airport. It is a privately owned facility. Indeed, under the express terms of the sublease between the Tulsa Airports Improvement Trust and IBA, IBA's constructed offices, hanger facilities, a tie down area for aircrafts and apron are privately owned by IBA. In addition, the leasehold is under the control of the IBA rather than the Tulsa Airports Improvement Trust, which is the public agency that controls the Tulsa International Airport. The sublease between IBA and the Trust specifically provides that IBA has peaceful possession and quiet enjoyment of the IBA leasehold. Under Oklahoma law, IBA's leasehold interest is equivalent to absolute ownership. Ferguson v. District Court of Oklahoma County, 544 P.2d 498, 499 (Okla. 1975). Consequently, the IBA leasehold does not fall within the definition of "public airport" for purposes of the 1970 Act.

Moreover, the undisputed evidence reveals that the IBA leasehold is not eligible for federal funding under the 1970 Act. Indeed, the representatives of the Tulsa Airports Improvement Trust have testified that the Trust cannot utilize federal funds to make any improvements to the IBA leasehold. [Deposition of David T. Hellen, Exhibit F, p. 30, line 18 to p. 40, line 7, Plaintiff's

motion].

The Court rejects Defendant's argument that the IBA leasehold is actually part of the Tulsa International Airport, a facility eligible for federal funding. Although the sublease between the Trust and IBA states that the leasehold is within the Tulsa International Airport, such fact does not establish, as argued by Defendant, that the IBA leasehold is part of the Tulsa International Airport. As stated, the IBA leasehold is private and under the exclusive control of the IBA. IBA holds title to all improvements constructed on its leasehold, including the surfaces from which AirEvac takes off and lands. The IBA leasehold is thus separate and distinct from the Tulsa International Airport. While other provisions in the sublease do make reference to the Tulsa International Airport, as argued by Defendant, none of these provisions operate to divest IBA of its ownership of the IBA leasehold.

Defendant also argues that anything inside the Tulsa International Airport security fence is a federally-funded facility. The cited testimony relied upon by Defendant to establish such argument, however, is incomplete. While Defendant claims that Mr. Carl Pritchett testified that anything in the fence is the Airport, Mr. Pritchett actually testified: "[I]f it's inside the airport, we routinely say what's inside the fence is inside the airport. Now, legally whether that's accurate or not, . . . I don't know." [Deposition of Carl Pritchett, Exhibit D, p. 15, line 12 to p. 16, line 10, Plaintiffs' reply; Defendant's memorandum in

support of amended motion]. Therefore, Mr. Pritchett's testimony does not establish that the IBA leasehold is part of the Tulsa International Airport.

The Court further rejects Defendant's argument that contact between AirEvac's helicopters and the Tulsa International Airport's control tower prior to taking off and landing at the IBA leasehold demonstrates that the IBA leasehold is part of the Tulsa International Airport. As the undisputed evidence shows, any aircraft flying within five miles of the control tower must make contact with the control tower and must be at the control tower's discretion. Thus, contact with the Tulsa International Airport control tower only establishes that AirEvac's helicopters take off and land within five miles of the control tower. It does not establish, as argued by Defendant, that AirEvac's helicopters take off from, or land at, a federally-funded facility.

While the Court is mindful that exemptions from taxation statutes are to be construed narrowly, see, Bingler v. Johnson, 394 U.S. 741, 751-52 (1969), the Court, upon review of the undisputed evidence, finds that AirEvac's helicopters do not take off from, or land at, a facility eligible for funding under the 1970 Act. As stated, the IBA leasehold, where AirEvac takes off from and lands at, is not a public airport. It is not under the control of a public agency, nor does it have a publicly owned landing area. Therefore, because AirEvac does not take off from, or land at, a facility eligible for assistance under the 1970 Act, the Court concludes the emergency medical transportation provided by AirEvac

falls within the statutory exemption of IRC § 4261(f) and is exempt from the federal air transportation excise tax under section 4261(a).² The tax, penalties and interest were therefore assessed in error and should be refunded.

Even if the Court were to find that the medical air transportation provided by AirEvac was not exempt from federal air transportation excise tax, the Court finds that Plaintiffs are not the parties liable for payment of the taxes under IRC § 4261(a). IRC § 4261(a) provides that the transportation excise tax is to be paid "by the person making the payment subject to the tax." 26 U.S.C. § 4261(a). The Court finds that the "person making the payment subject to the tax" is the patient/passenger being transported by AirEvac. Although Plaintiffs bill the patients/passengers for the emergency medical transportation services and transmit the payments to AirEvac, the Court does not conclude that they are the persons making the payment subject to the excise tax.

In addition, the Court finds that the legislative history of IRC § 4261, a federal regulation under that statute, 26 C.F.R. § 49.4261-7(h)(2), and the IRS rulings, namely, Rev. Rul. 55-534, 1955-2 C.B. 665, Rev. Rul. 68-286, 1968-1 C.B. 489, and Rev. Rul. 74-570, 1974-2 C.B. 363, confirm that the ultimate consumers or the passengers paying for the transportation are the parties liable for

²Defendant has not challenged that the emergency medical transportation provided through AirEvac satisfies the second criteria of 4261(f). In any event, the Court finds that AirEvac does not use services provided pursuant to the Airport and Airway Improvement Act of 1982.

the transportation excise tax under IRC § 4261(a).

In Rev. Rul. 74-570, the IRS had to determine who was responsible for payment of the communications excise tax under IRC (Title 26 U.S.C.) § 4251. The facts revealed that a local communications company furnished taxable communication services to its subscribers. When those subscribers desired communication services outside the local area, they were required to utilize the services of a long distance communications company. The long distance communications company billed the local communications company for its services and then the local communications company billed the subscribers for both long distance and local services.

IRC § 4251, having similar language to IRC § 4261, required that the communications excise tax be "paid by the person paying for the services." The IRS determined that the long distance communication services provided by the long distance company were furnished to the subscribers. It also determined that because the subscribers were billed for the long distance services, the subscribers were the person paying for the services. The IRS thus held that the communications excise tax was to be applied to the amounts paid by the subscribers.

In the instant case, Plaintiffs bill the patients/passengers for the emergency air transportation services provided by AirEvac. The Court finds that the patients/passengers, rather than Plaintiffs, are the persons making the payment subject to the excise tax and are liable for that tax.

Defendant argues that IRC § 4261(c) supports its position that

Plaintiffs are responsible for the excise tax. IRC § 4261(c) provides that when the transportation tax is not paid at the time payment for transportation is made, the tax "shall be paid by the person paying for the transportation or by the person using the transportation." 26 U.S.C. § 4261(c). Defendant contends that by virtue of this section, it has the option of taxing Plaintiffs, whom it considers to be the persons paying for the transportation by AirEvac, or the patients/passengers, whom it considers to be the persons using of the transportation. The Court, however, disagrees. The legislative history of IRC § 4261, the previously cited federal regulation and the previously cited IRS revenue rulings clearly indicate that the ultimate consumers who are paying for the transportation are liable for the transportation excise tax. Moreover, it is undisputed that the patients/passengers of AirEvac paid for the emergency medical transportation provided by Plaintiffs. The patients/passengers were therefore both the persons paying for the transportation and the persons using the transportation. Thus, there is no option, as argued by Defendant, of assessing transportation excise taxes against either Plaintiffs or the patients/passengers. The patients/passengers were the parties subject to and liable for the federal air transportation excise tax.³

³In its briefing, Defendant argues that Plaintiffs self-assessed transportation excise taxes by the filing of IRS forms 720 for the periods June 30, 1987 through June 30, 1988. According to Defendant, this "self-assessment" leaves Plaintiffs in an anomalous position of having previously reported themselves subject to the excise tax without claiming a refund and now claiming that the excise tax is not applicable to them. The Court, however,

Plaintiffs' responsibility in regard to the federal air transportation excise tax, if any, was to collect the tax from the patients/passengers and remit that tax to the IRS. Although the IRS may impose a penalty for failure to collect and remit taxes, see, IRC (Title 26 U.S.C.) § 6672, the IRS has made no such penalty assessment against Plaintiffs.

Similarly, Plaintiffs do not have any penalty liability under IRC (Title 26 U.S.C.) § 4291, the statute which imposes a duty to collect excise taxes. Even if IRC § 4291 authorized a penalty assessment, the IRS did not make such an assessment against Plaintiffs. Plaintiffs are therefore entitled to a refund of the assessed federal excise tax, penalties and interest.

The Court notes that the assessment made by the IRS included amounts expended by AirEvac for paramedic services and medical supplies used on AirEvac during emergency medical transportation and amounts expended by Plaintiffs for nursing services and medical supplies used on AirEvac during emergency medical transportation. The Court, however, finds that Plaintiffs are not liable for these in-flight medical costs under IRC § 4261(a). Indeed, the IRS, in Rev. Rul. 77-75, 1977-1, C.B. 344, specifically held that the amounts paid for the in-flight medical costs are not subject to the excise tax imposed by IRC § 4261(a). Although Defendant contends that Plaintiffs' charges are not exempt from the excise tax since

disagrees. From the record, it appears that Plaintiffs have always claimed that they were responsible for collecting the transportation excise tax due from their patients and filed the tax returns in question as persons collecting the tax. Plaintiffs have never claimed that they were liable for the tax.

the in-flight medical charges were not separable from the transportation charges, the Court finds that the in-flight medical charges are exempt. 26 C.F.R. § 49.4261-2(c) states that nontransportation services may be excluded in computing the tax if such charges are "separable and shown in the exact amounts thereof in the records pertaining to the transportation charge." The undisputed evidence shows that the records of AirEvac relating to in-flight medical services reflect charges which are separable and exact. Therefore, the Court finds that the charges for in-flight medical services are not subject to the federal air transportation excise tax and the tax paid on those amounts must be refunded.

Based upon the foregoing, the Motion for Summary Judgment (Docket Entry #28) of Plaintiffs, St. John Medical Center, Inc., Hillcrest Medical Center and Osteopathic Hospital Founder's Association, Inc., is GRANTED and the Motion for Summary Judgment (Docket Entry #23) of Defendant, United States of America, is DENIED. Plaintiffs are DIRECTED to submit an agreed as to form judgment for the Court's approval on or before October 16, 1995.

ENTERED this 5th day of October, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA OCT - 5 1995

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

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

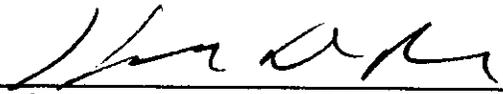
Case No. 92-C-1156-B

ENTERED
DATE OCT 06 1995

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41, Plaintiff, Oklahoma Gas and Electric Company, and Defendant hereby stipulate to a dismissal of their mutual claims with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

RAINEY, ROSS, RICE & BINNS

By 

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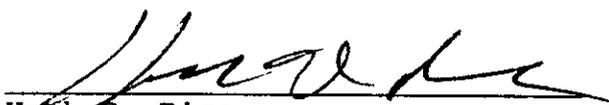
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Attorneys for Vernon E. Faulconer,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of October, 1995
a copy of the foregoing Joint Stipulation of Dismissal With
Prejudice was mailed to:

Tom Q. Ferguson, Esq.
DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
320 South Boston Ave., Ste. 500
Tulsa, Oklahoma 74103


Hugh D. Rice

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

FILED

OCT - 5 1995

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

PUBLIC SERVICE COMPANY OF)
OKLAHOMA and OKLAHOMA GAS AND)
ELECTRIC COMPANY,)

Plaintiffs,)

vs.)

VERNON E. FAULCONER, INC.,)

Defendant.)

Case No. 92-C-1156-B

ENTERED ON FILE
OCT 06 1995
DATE _____

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41, Plaintiff PSO and Defendant hereby stipulate to a dismissal of their mutual claims with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

DOERNER, SAUNDERS, DANIEL
& ANDERSON

By: _____

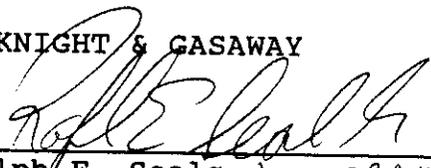
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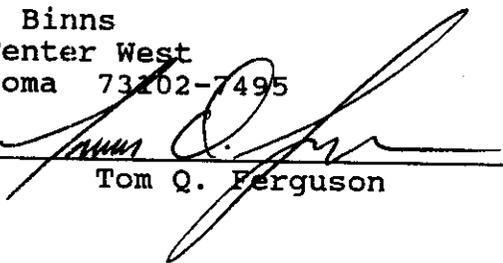
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Attorneys for Defendant Vernon E.
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CERTIFICATE OF SERVICE

I certify that on October 5, 1995, a copy of the foregoing Joint Stipulation of Dismissal With Prejudice was mailed to:

Hugh D. Rice, Esq.
Rainey, Ross, Rice & Binns
735 First National Center West
Oklahoma City, Oklahoma 73102-7495


Tom Q. Ferguson

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

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,

Plaintiff,

vs.

JENNIFER LYNN HUNT, a minor,
DELORES HUNT and EVA JONES,
CO-Guardians of the Estate of
JENNIFER LYNN HUNT, a minor;
HAROLD D. JOHNSON, JUDY K.
JOHNSON; GREER JOHNSON, a minor;
EVA D. JONES, individually and as
Personal Representative of
the Estate of Sheila Ann
Johnson, deceased; and
PHILLIP JONES,

Defendants.

FILED
OCT 0 6 1995
DATE

Case No. 94-C-977-H

FILED

OCT 5 1995

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

STIPULATED ORDER OF DISMISSAL AND DISCHARGE

COMES NOW Ron Wasinger, attorney for the Plaintiff, Prudential Insurance Company of America; Therese Buthod, attorney for Jennifer Lynn Hunt, a minor and Dolores Hunt, Co-Guardian of the Estate of Jennifer Lynn Hunt; Sean McKee, attorney for Eva Jones, Co-Guardian of the Estate of Jennifer Lynn Hunt and Eva D. Jones, individually and as Personal Representative of the Estate of Sheila Ann Johnson and Karen Leonard, attorney for Harold D. Johnson, Judy K. Johnson, Greer Johnson and hereby stipulate to this Order of Dismissal.

The parties stipulate that the funds that have been interpled by Plaintiff as result of the death of the Decedent, Michael D. Johnson, through his group life insurance policy issued by the Plaintiff under group policy no. 6-32000 shall be paid to the Estate of Sheila Ann Johnson.

That the Plaintiff has tendered funds into the United States District Court for the Northern District of Oklahoma in the amount of \$203,550.00.

By this agreement of dismissal, the parties agree that those funds, excluding the attorneys' fees and costs that are stated herein, shall be paid to the estate of Sheila Ann Johnson through the probate case filed in Tulsa County, entitled In the Matter of the Estate of Sheila Ann Johnson, deceased, Case No. P94-528.

The parties also stipulate that those funds transferred from the United States District Court to the probate case shall be distributed to the minor child, Jennifer Lynn Hunt, as the sole heir of Sheila Ann Johnson. The funds may be immediately distributed to the guardianship estate of Jennifer Lynn Hunt as the proceeds from the Prudential Life Insurance policy are not subject to claims of creditors.

The parties agree and the Court orders that each of the Defendants in the above-captioned interpleader, and any entity, person, or persons claiming under or through any of said Defendants, are hereby permanently enjoined and restrained from instituting or prosecuting any proceeding, or from proceeding with any action pending against the Plaintiff, The Prudential Insurance Company of America, in any state or United States court affecting the property, instruments or obligations involved in this interpleader action, including the insurance proceeds of \$203,550.00, with interest accruing derived from the life insurance policy of the Decedent, Michael D. Johnson. The Plaintiff, The

Prudential Insurance Company of America, is hereby discharged from this case and from any and all further liability to any of the Defendants, including with respect to any property, instruments, obligations, or the life insurance policy involved in this action.

The parties agree and the Court orders that the firm of Crowe and Dunlevy, the law firm representing the Plaintiff shall be granted attorneys' fees and costs in the amount of \$4,000.00; the firm of James R. Gotwals and Associates, Inc., the attorneys for Jennifer Lynn Hunt and Dolores Hunt shall be granted attorneys' fees and costs in the amount of \$8,500.00 and that the firm of Woodstock and McKee, the attorney for Eva Jones shall be granted \$1,300.00 in attorneys' fees and costs. Said sums are to be paid from those funds tendered into the Court prior to the disbursement of funds to the probate action pending in State Court.

That the remaining principal amount of \$189,750.00 plus interest, less appropriate registry fee shall be paid to the probate court for the estate of Sheila Ann Johnson, and shall then be distributed to the guardianship estate of the minor child, Jennifer Lynn Hunt.

These disbursements shall be made by the Court Clerk at the next renewal date of the interest bearing account which is scheduled for October 13, 1995.

Following the disbursement of funds from the Court Clerk of the Northern District of Oklahoma to the Estate of Sheila Ann Johnson as outlined herein, the matter shall be dismissed with prejudice.

IT IS SO ORDERED this 5th day of October, 1995.

S/ SVEN ERIK HOLMES

HONORABLE SVEN HOLMES
UNITED STATES DISTRICT JUDGE

Approved As to Form and Content:

ORIGINAL SIGNED BY
Therese Buthod

Therese Buthod, OBA #10752
JAMES R. GOTWALS & ASSOCIATES, INC.
525 S. Main, Suite 1130
Tulsa, Oklahoma 74103-4512
(918) 599-7088

Attorneys for Jennifer Lynn Hunt,
a minor; and Dolores Hunt

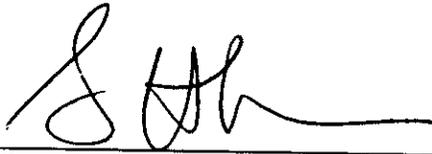
Approved As to Form and Content:

Ronald A. Wasinger

Ronald Wasinger, OBA #15896
CROWE & DUNLEVY
320 S. Boston
500 Kennedy Building
Tulsa, Oklahoma 74103-3313
(918) 592-9818

Attorneys for Plaintiff

Approved As to Form and Content:



Sean McKee, OBA #14277
Charles L. Woodstock, OBA #9870
1518 S. Cheyenne
Tulsa, Oklahoma 74119
(918) 583-1511

Attorneys for Eva Jones,
Co-Guardian of the Estate of
Jennifer Lynn Hunt, a minor;
Harold D. Johnson; and
Judy K. Johnson

Approved As to Form and Content:



Karen J. Leonard, OBA #12750
WYATT AUSTIN & ASSOCIATES
P. O. Box 333
Ada, Oklahoma 74820
(405) 436-2300

Attorney for Greer Johnson,
a minor; Eva D. Jones,
individually and as Personal
Representative of the
Estate of Sheila Ann Johnson;
Sheila Ann Johnson; Sheila
Johnson; and Phillip Jones

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

E D

OCT 5 - 1995

MONSI L'GGRKE,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF TULSA, et al.,)
)
 Defendants.)

No. 95-C-801-BU

CLERK
DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE ~~OCT 06 1995~~

ORDER

On September 13, 1995, the Court granted Plaintiff leave to proceed in forma pauperis. The Court now reviews Plaintiff's allegations and concludes this civil rights actions should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

In his pro se complaint, Plaintiff challenges the practice of incarcerating indigent defendants for failure to pay fines and costs as violative of the Ninth Amendment of the U.S. Constitution. He seeks an order directing his release from custody.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal

16

theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff cannot attack the fact of his state court conviction or confinement in this civil rights action. Such claims must be raised in a habeas action. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

Accordingly, this action is hereby **dismissed without prejudice** pursuant to 28 U.S.C. § 1915(d). Plaintiff's motions for injunctive relief, for class certification, and for a writ of habeas corpus (docket #2, #3, and #5) are hereby **denied**. The Clerk shall mail a copy of this order to David Pauling, Tulsa City Attorney.

IT IS SO ORDERED this 5th day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SHELLY SLADE YEARGAIN aka
SHELLY RENEE YEARGAIN aka
SHELLY R. YEARGAIN; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

OCT 5 - 1995

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

Civil Case No. 95-C 694BU

ENTERED ON DOCKET
OCT 06 1995

JUDGMENT OF FORECLOSURE

DATE _____

This matter comes on for consideration this 5th day of Oct,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendant, SHELLY SLADE YEARGAIN aka SHELLY RENEE YEARGAIN aka SHELLY R. YEARGAIN, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, SHELLY SLADE YEARGAIN aka SHELLY RENEE YEARGAIN aka SHELLY R. YEARGAIN will hereinafter be referred to as ("SHELLY SLADE YEARGAIN"). SHELLY SLADE YEARGAIN is a single, unmarried person.

The Court being fully advised and having examined the court file finds that the Defendant, SHELLY SLADE YEARGAIN, waived service of Summons on July 31, 1995.

NOTE: THIS COURT FILED BY PRO SE BY THE PLAINTIFF UPON RECEIPT

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 14, 1995; and that the Defendant, SHELLY SLADE YEARGAIN, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

Lot Eight (8), Block Thirteen (13), RE-SUBDIVISION OF
BLOCK 6 AND LOTS 1, 2, AND 3 OF BLOCK 4,
TERRACE DRIVE ADDITION to Tulsa, Tulsa County,
Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 14, 1986, Johnny E. Yeargain and the Defendant, SHELLY SLADE YEARGAIN, executed and delivered to SAVERS MORTGAGE COMPANY their mortgage note in the amount of \$55,896.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Johnny Yeargain and the Defendant, SHELLY SLADE YEARGAIN, then Husband and Wife, executed and delivered to SAVERS MORTGAGE COMPANY a mortgage dated August 14, 1986, covering the above-described property. Said mortgage was recorded on August 15, 1986, in Book 4963, Page 1172, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 14, 1986, SAVERS MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to SAVERS

FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on August 18, 1986, in Book 4963, Page 2051, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1989, Resolution Trust Corporation acting as Receiver of Savers Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to First Commercial Mortgage Company. This Assignment of Mortgage was recorded on December 11, 1989, in Book 5224, Page 1981, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 13, 1990, First Commercial Mortgage Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 5, 1990, in Book 5274, Page 2406, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, SHELLY SLADE YEARGAIN and Johnny Yeargain, were granted a divorce, case #FD 89-5849, in Tulsa County, Oklahoma.

The Court further finds that on July 13, 1990, the Defendant, SHELLY SLADE YEARGAIN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on May 28, 1991, November 26, 1991, November 20, 1992, and May 20, 1993.

The Court further finds that the Defendant, SHELLY SLADE YEARGAIN, made default under the terms of the aforesaid note and mortgage, as well as the terms and

conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, SHELLY SLADE YEARGAIN, is indebted to the Plaintiff in the principal sum of \$79,829.18, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, SHELLY SLADE YEARGAIN, is in default, and has no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, SHELLY SLADE YEARGAIN, in the principal sum of \$79,829.18, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.52 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, SHELLY SLADE YEARGAIN, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

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

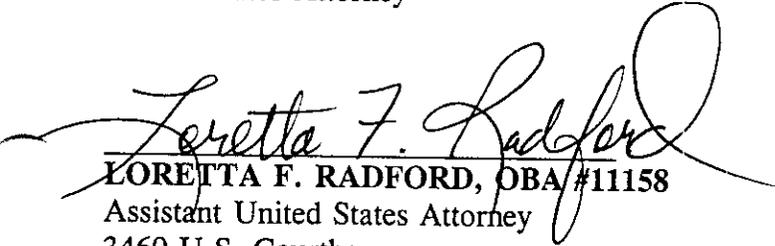
instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney


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


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

Judgment of Foreclosure
Civil Action No. 95-C 694BU
LFR/lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 05 1995

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 SCOTT EDMISTON aka Scott J.)
 Edmiston; STACEY EDMISTON; STATE)
 OF OKLAHOMA, ex rel. OKLAHOMA)
 TAX COMMISSION; SERVICE)
 COLLECTION ASSOCIATION, INC.;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

OCT 5 1995

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

Civil Case No. 95-C 291H

ORDER

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

Dated this 5th day of October, 1995.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

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

F I L E D

RICHARD A. BUSH,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

OCT 05 1995

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

Case No. 95-C-256-W

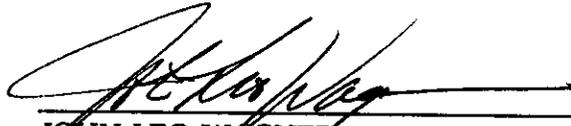
ENTERED ON DOCKET

DATE OCT 06 1995

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

Dated this 5th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:bush.or

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

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

FILED

RICHARD A. BUSH,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,²)
)
Defendant.)

OCT 05 1995

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

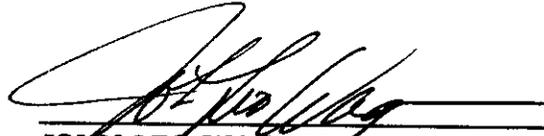
Case No: 95-C-256-W

ENTERED ON BOOKS
DATE OCT 06 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Richard A. Bush, in accordance with this court's Order filed October 4, 1995.

Dated this 5th day of October, 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.

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

F I L E D

OCT 5 - 1995 *SL*

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 10-6-95

ORDER

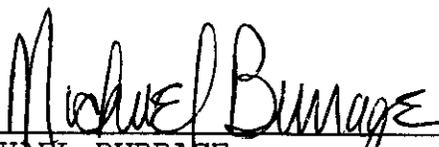
On August 18, 1995, the Court granted Plaintiffs, David G. Taylor and Jessica M. Taylor's Motion to Tax Costs and Attorney Fees Pursuant to F.R.C.P. 54(D), Local Rule 54.1 and 54.2 to the extent that the Court found that Plaintiffs were entitled to costs and attorney fees under Okla. Stat. tit. 36, § 3629(B). The Court directed the parties to advise the Court whether or not an evidentiary hearing was necessary to determine the reasonableness of the costs and attorney fees requested by Plaintiffs. On September 1, 1995, Plaintiffs filed an application for a hearing on the reasonableness of costs and attorney fees.

Presently before the Court is the parties' Stipulation Regarding Amount of Attorney's Fee filed on October 2, 1995, wherein the parties stipulate that a reasonable attorney's fee for the prosecution of this case through September 20, 1995 is \$126,000.00, including costs. Having reviewed the stipulation and having reviewed the record herein, the Court finds that a reasonable attorney's fee, including costs, is \$126,000.00.

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Accordingly, the Court hereby AWARDS Plaintiffs, David G. Taylor and Jessica M. Taylor, a reasonable attorney's fee, including costs, in the amount of \$126,000.00. The Court declares MOOT Plaintiffs, David G. Taylor and Jessica M. Taylor's Application for Hearing on Fees (Docket Entry #73).

ENTERED this 5^m day of October, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 04 1995

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

PHOENIX GROWTH CAPITAL)
CORPORATION,)
)
Plaintiff)
)
v.)
)
N.D. HENSHAW)
)
Defendant.)

Case No. 94-C-530-B

ENTERED OCT 05 1995
DATE

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER FOR JUDGMENT

NOW on the 11th day of September, 1995, this matter comes on for trial before the undersigned United States Magistrate/Judge, pursuant to written consent of the parties. Dianne L. Smith and David R. Guthery appeared for Plaintiff. Todd Maxwell Henshaw appeared for Defendant. Jury having been waived, the court proceeded to take evidence. The parties having rested, and being duly advised in the premises, the Court makes the following findings of facts and conclusions of law:

1. Defendant N.D. Henshaw ("Henshaw") owns a commercial building at 2720 North Hemlock Court, Broken Arrow, Oklahoma ("Leased Premises").
2. From 1988, Henshaw leased the Leased Premises to Symex Corporation ("Symex"). During 1993, rent under the Symex lease was \$ 9,055/month.
3. Plaintiff, Phoenix Growth Capital Corporation ("Phoenix") leased certain laboratory and computer equipment to Symex by Master Equipment Lease dated May 1, 1990 ("Phoenix Equipment"). Symex used the Phoenix Equipment on the Leased Premises.

4. On June 28, 1990, Henshaw signed a Consent to Removal of Personal Property ("Consent"), which permitted Phoenix to remove the Phoenix Equipment in the event Symex failed to pay Phoenix the required lease payments. In the Consent, Henshaw subordinated to Phoenix his interest, as Symex's landlord, in the Phoenix Equipment. The Consent did not provide a period of time within which Phoenix was obligated to remove the Leased Equipment.

5. The relationship between Plaintiff and Defendant is governed by the Consent.

6. Where an agreement fails to provide a time for performance, a reasonable time is implied. Two months, from November 1, 1993 to December 31, 1993, was a reasonable time for Plaintiff to remove its property from the Leased Premises.

7. The Consent gives Plaintiff a right of entry, for the purpose of removing its equipment, but the Consent did not establish a tenancy, and Plaintiff never became a tenant of Defendant.

8. Defendant scheduled a sale of the Phoenix Equipment for January 26, 1994. Plaintiff objected to the sale, as a result of which Defendant canceled the sale. Because no tenancy arose, the provisions of 41 O.S. § 52, do not apply to the relationship between Plaintiff and Defendant.

9. Plaintiff and Defendant both breached the agreement embodied in Consent.

10. Defendant breached by failing to provide Plaintiff a reasonable time, *i.e.*, between November 1, 1993 and December 31, 1993, to remove the Phoenix equipment without payment of rent.

11. As a result of Defendant's breach, Plaintiff suffered damages in the amount of \$ 2,000.00, being the use value of the Phoenix Equipment, based on a fair market value of \$ 20,000.00 (the highest offer received for the equipment) at 6% *per annum*, for the period from January 1, 1994 through August 31, 1995. Plaintiff may use these damages as a setoff against the judgment granted Defendant herein.

12. Plaintiff breached by failing to remove the Phoenix Equipment from the Leased Premises within a reasonable time, *i.e.*, by January 1, 1994.

13. Plaintiff is responsible for the detriment accruing to the Defendant, or for the reasonable benefit accruing to the Plaintiff, during the time that Plaintiff's property was left in the Leased Premises after a reasonable time to remove, *i.e.*, from and after January 1, 1994, in an amount set forth below.

14. As a result of Plaintiff's breach, Defendant suffered, and continues to suffer, damages measured by the rental value of the space in the Leased Premises which would be sufficient for storage of the Phoenix Equipment. The Phoenix Equipment could be stored in one thousand (1,000) square feet. The rental value of the Leased Premises is the amount of rent being paid by Symex when it vacated the property, *i.e.*, \$ 9,055.00/month, or \$ 108,660.00/year, or \$ 10.70 per square foot, per year, based on a building size of 10,152 square feet, the size of the Leased Premises as measured by Plaintiff's expert witness. The rental value of the 1,000 square feet within which the Phoenix Equipment could be stored, is \$ 10,703.00/year or \$ 891.91/month. Subject to its right to setoff, Plaintiff is liable to Defendant in the amount of \$ 17,838.33 for the period from January 1, 1994 through August 31, 1995, and for additional rents accruing thereafter, at the rate \$ 891.91/month, until the

Phoenix Equipment is removed, pursuant to the Consent. If the Phoenix Equipment is removed at any time other than the end of a calendar month, the rent due shall be pro rated on a daily basis, through the date of removal.

15. The parties having both breached the Consent, neither is entitled to prejudgment interest, and each shall bear its own costs.

16. Post-judgment interest shall accrue from and after the date of filing these Finding of Fact, Conclusions of Law and Order for Judgment, as provided by law.

17. The Court incorporates herein, by reference, its ruling announced September 11, 1995.

It is therefore

ORDERED, ADJUDGED AND DECREED, that

1. Judgment should be, and it hereby is, granted to Plaintiff against Defendant in the amount of \$ 2,000.00, which is hereby set off against the judgment granted Defendant, below;

2. Judgment should be, and it hereby is, granted to Defendant against Plaintiff in the amount of \$ 17,838.33, as rent for the period of time from January 1, 1994 through August 31, 1995, and for such further rent which accrues at the rate of \$ 891.91/month, beginning September 1, 1995, pro rated daily, until the Phoenix Equipment is removed. Defendant's judgment against Plaintiff is hereby reduced by setoff of Plaintiff's judgment against Plaintiff, leaving a balance of \$ 15,838.33 as of August 31, 1995;

3. Plaintiff shall be allowed to remove the Phoenix Equipment from the Leased Premises, pursuant to and in accordance with the terms of the Consent to Removal of Personal Property;

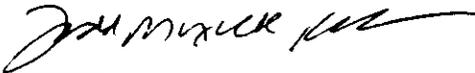
4. Pre-judgment interest is denied to both parties;

5. Post-judgment interest shall accrue as provided by law; and

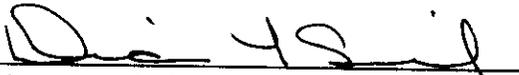
6. The parties shall bear their own costs.

/S/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE
JOHN LEO WAGNER
UNITED STATES MAGISTRATE/JUDGE

APPROVED AS TO FORM:



TODD MAXWELL HENSHAW OBA# 4114
SUITE 1130, 320 SOUTH BOSTON
TULSA, OKLAHOMA 74103
(918) 583-7500
ATTORNEY FOR DEFENDANT



Dianne L. Smith
Guthery & Smith
2502 E. 21st Street
Tulsa, Oklahoma 74114-1706
(918) 743-5151
ATTORNEYS FOR PLAINTIFF

FILED

SEP 28 1995

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

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

CARL E. JUSTICE,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

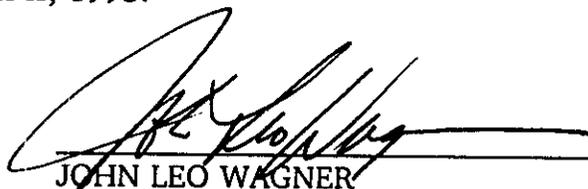
Case No: 94-C-765-W ✓

ENTERED
OCT 05 1995
DATE _____

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 21, 1995.

Dated this 21st 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.

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

FILED

SEP 21 1995

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

CARL E. JUSTICE,
Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 94-C-765-W

ENTERED
DATE OCT 0 8 1995

ORDER

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

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

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

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

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

In the case at bar, the ALJ made his decision at the second step of the sequential evaluation process.³ He found that on and prior to December 31, 1987, claimant's impairments, singularly or in combination, mental and/or physical, represented no more than a slight abnormality having such a minimal affect on him that they would not be expected to interfere with his ability to work, irrespective of age, education, or work experience. The ALJ concluded that therefore the claimant did not have a severe impairment and was not under a "disability" as defined in 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 failed to accord the proper weight to the disability findings of the Veterans Administration.
- (2) The ALJ erred in making his decision at step two and in failing to find that plaintiff's impairment was severe enough to require the full sequential evaluation.

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 contends he is disabled due to continuous pain in his lower back, hips, and

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).

knees. He stated that he became unable to work on March 1, 1983, and he met the insured status requirements for social security benefits through December 31, 1987, but not thereafter. Therefore, the ALJ was limited to consideration of medical records for this period only to find that a severe impairment existed (TR 35). The ALJ found that, prior to December 31, 1987, claimant did not have such an impairment, although his condition worsened after that time (TR 35).

The medical records show that on October 4, 1979, claimant had a disabling left knee condition and back condition evaluated by the Veterans Administration ("VA") as less than ten percent disabling (TR 282). On March 13, 1982, he received a temporary 100% disability rating from the VA from the date of his March 19, 1982 hospital admission for knee surgery and treatment of a back condition (TR 270). This temporary evaluation continued for a period of convalescence until October 1, 1982, and thereafter his disability evaluation was 40% (TR 270, 276). His disability rating remained 40 percent from October 1, 1982, until he was approved for an increase on August 8, 1985 to 60 percent and on April 28, 1990 to 70 percent (TR 274-275).

On July 26, 1985, a physical therapist reported she saw claimant for complaints of back pain and right knee swelling and found as follows:

Initial evaluation of the back revealed spasm of the lumbar paraspinals. There were areas of exquisite tenderness along the left sciatic nerve path. Babinski was questionable, although lateral bending to the left appeared to illicit pain toward the end of range and forward bending is slowed and apprehensive. One leg standing on the left leg appeared to cause moderate pain and apprehension about falling.

Initial evaluation of the left knee reveals mild swelling. There is a slight drawer sign and mild crepitus during some motions. There is a surgical arthroscopy scar indicating a partial or total menisectomy [sic].

Evaluation of the left knee reveals crepitus during movement. There is mild inflammation today. Patient states it is worse during periods of long standing or weight bearing such as walking any distance.

(TR 10).

On October 17, 1985, claimant was seen again for these complaints (TR 11). He had a right knee brace and was unable to fully flex or extend the knee when he walked (TR 14). The knee was not swollen and no degeneration was noted; but there was a "marked decrease" in range of motion (TR 14). There was no abnormality to the back noted, but range of motion was also limited (TR 14). X-rays of the lumbar spine showed "some loss of the normal lordotic curve with slight posterior wedging L5 S1," but no fracture or subluxation and possible "slight degenerative changes of the right sacroiliac joint as compared to the left." (TR 18). X-rays of the right knee showed "medial narrowing of the joint space with early symmetrical osteophyte formation," but no acute fracture and normal patella (TR 18).

There is no merit to claimant's contentions. While a determination of another agency such as the VA is entitled to weight and must be considered, it is not binding on the ALJ. Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 480 (10th Cir. 1993). The ALJ reviewed claimant's VA records and the disability determinations of the VA were weighed by the ALJ in his decision (TR 36).

At step two of the sequential evaluation process, the relevant analysis is whether the claimant has demonstrated that he was actually disabled prior to the expiration of his insured status; a retrospective diagnosis without evidence of actual disability is not sufficient. Flint v. Sullivan, 951 F.2d 264, 267 (10th Cir. 1991); Potter v. Secretary of

Health & Human Servs., 905 F.2d 1346, 1348-49 (10th Cir. 1990). An impairment or combination of impairments is only disabling if they significantly limit the ability to perform any kind of jobs which exist in the national economy for a period of twelve months or more. Flint, 951 F.2d at 267. In order to be found to be disabled within the meaning of the Social Security Act, an individual's physical or mental impairments must result from anatomical, physiological, or psychological abnormalities which can be shown by medically-acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1520. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, and not solely by claimant's statement of symptoms.

The records after October 17, 1985, through December 31, 1987, do not show that claimant sought treatment for musculoskeletal pain or stiffness in any part of his body. He actually sought medical treatment only three times in 1986, and was seen twice for laboratory testing and dietetic training for weight loss (TR 219-224). His sole complaints were severe sore throat, a history of a hiatal hernia, and mid-epigastric pain. (TR 219-224). Medications were prescribed, and an upper gastrointestinal series was within normal limits (TR 221). He was referred to a dietician on December 15, 1986 because he was 6 feet tall and weighed 185 pounds, and the doctor commented that he should maintain his weight in the 157-170 pound range (TR 219).

Claimant received medical treatment eight times in 1987, primarily for control of blood pressure (TR 213-218). On most of the visits he reported that he "felt well," except on May 19, 1987 when he claimed that HCTZ which he was taking for hypertension was

causing chest pain and on December 2, 1987, when he complained of occasional dizziness and/or headaches (TR 214, 216). On December 30, 1987, he told the examining physician he was leaving on vacation (TR 213). His insured status ended at that time.

Claimant also did not seek medical treatment for back or knee pain in 1988. The medical records show that during that year he was treated for venereal disease, an ingrown hair, neck muscle spasms, vision problems, a stiff neck, and hypertension (TR 205-213). On February 17, 1988, he told his doctor that he would be out of town three or four months (TR 211). Beginning in March of 1989, he began to complain of knee problems (TR 204).

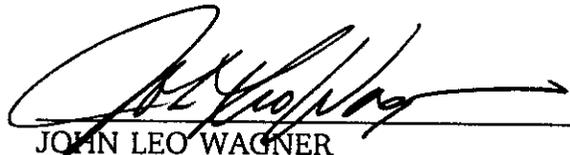
While claimant was disabled for several months following his knee surgery in 1982 and suffered knee and back pain in 1985, none of the pertinent records show that he experienced a significantly limiting knee or back impairment or pain from October 17, 1985 through December 31, 1987. There is also evidence that he continued to work as a hair stylist part-time in 1989 and 1990, went to beauty school in 1989, worked part-time in a tailor shop as a cutter and tailor in 1990 and 1991, and owned his own beauty shop for three months in 1992 (TR 136, 145, 271). While Dr. Lawrence Reed reported on March 31, 1993, that claimant had degenerative joint disease affecting his spine, had had knee surgery on both knees, utilized braces, a back support, and crutches, and was 100% disabled, Dr. Reed only began treating plaintiff on November 17, 1989, almost two years after plaintiff's insured status expired, and the 1993 letter did not indicate that plaintiff was disabled before December 31, 1987 (TR 261). While plaintiff might be disabled as of 1993, the objective medical evidence does not support a finding of disability before

December 31, 1987 and the ALJ correctly determined that Dr. Reed's opinion was not dispositive (TR 41).

There is substantial evidence to support the decision of the ALJ that claimant was not disabled prior to December 31, 1987.

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

Dated this 21st day of September, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:justice

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

CHERYL JASON,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,¹¹)
)
 Defendant.)

OCT 3 1995

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

No. 92-C-1170-J

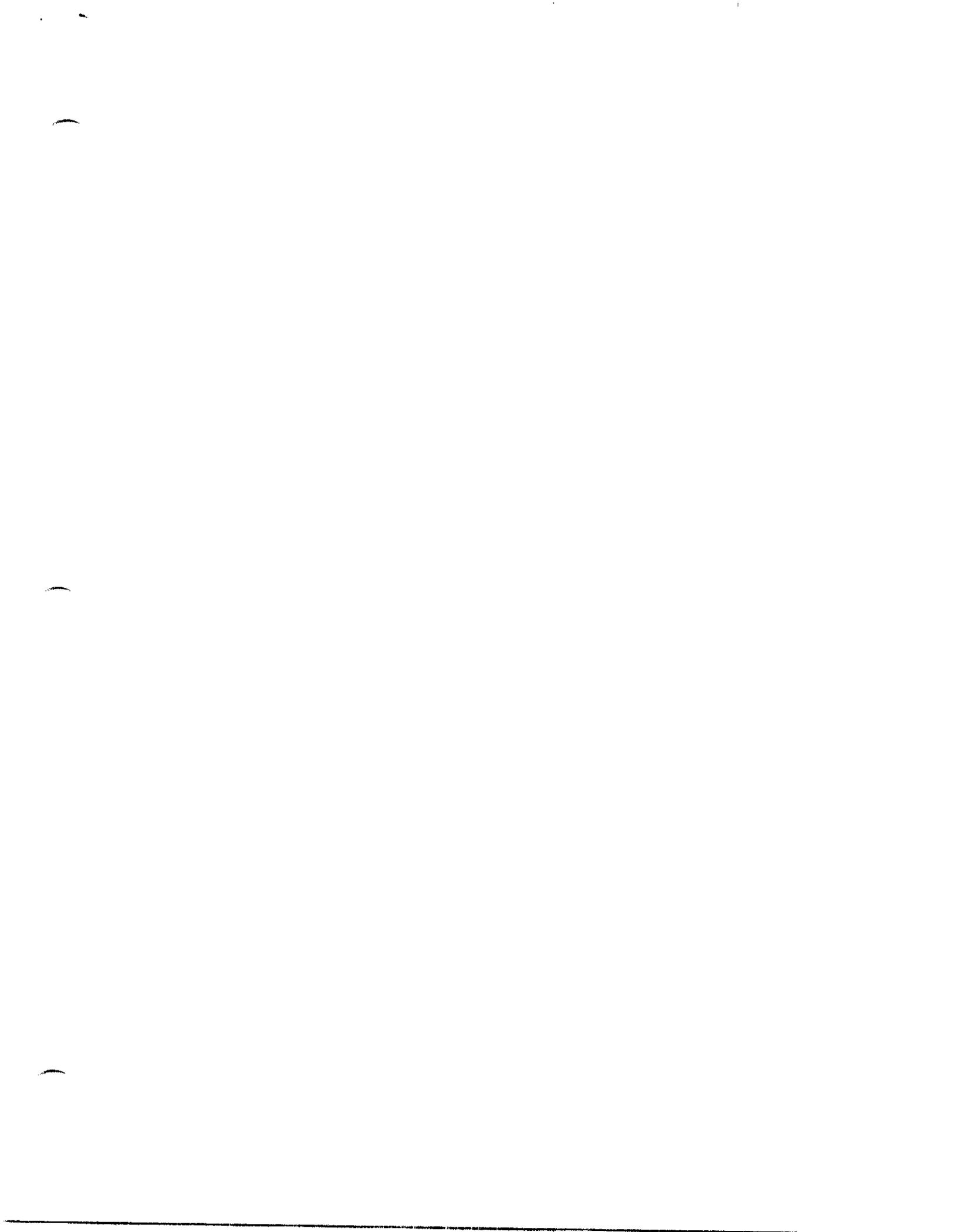
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OCT 05 1995
DATE

ORDER

On this 3rd day of October 1995, the Court has before it Plaintiff's Motion for Attorney's Fees Under the Equal Access to Justice Act (docket #17-1 and 17-2). Defendant filed a response stating that it had no objection to the Court approving attorney fees and costs pursuant to the Equal Access to Justice Act ("EAJA"). The parties agree, therefore, that under 28 U.S.C. § 2412 Plaintiff's counsel is entitled to be paid \$4,386.98 for the attorney fees and costs incurred during the prosecution of the appeal in this Court and in the United States Court of Appeals for the Tenth Circuit. This figure includes \$4,284.65 for attorney services at \$118.20 per hour and \$102.23 as costs.

The parties have not stipulated as to any fees recoverable under 42 U.S.C. § 406(b)(1). However, should Plaintiff's counsel at any time be granted fees pursuant

¹¹ 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, the Social Security Independence and Program Improvements Act of 1994. 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.



to 42 U.S.C. § 406(b)(1), he shall refund the smaller award to Plaintiff pursuant to Weakley v. Brown, 803 F.2d 575, 580 (10th Cir. 1986).

WHEREFORE, IT IS ORDERED that Plaintiff's counsel be awarded attorney fees and costs under the Equal Access to Justice Act in the amount of \$4,386.98.

IT IS SO ORDERED.

Dated this 3 day of October 1995.



Sam A. Joyner
United States Magistrate Judge

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

FILED

OCT 04 1995

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

PHOENIX GROWTH CAPITAL)
CORPORATION,)
)
Plaintiff,)
)
v.)
)
N.D. HENSHAW,)
)
)
Defendant.)

Case No: 94-C-530-W ✓

ENTERED ON DOCKET
DATE OCT 05 1995

JUDGMENT

This action having come on for hearing before the court, the Honorable John Leo Wagner, United States Magistrate Judge, presiding, and the issues having been duly heard and a decision having been duly rendered:

1. Judgment is granted to Plaintiff against Defendant in the amount of \$2,000.00, which is hereby set off against the judgment granted Defendant, below;

2. Judgment is granted to Defendant against Plaintiff in the amount of \$17,838.33, as rent for the period of time from January 1, 1994 through August 31, 1995, and for such further rent which accrues at the rate of \$891.91/month, beginning September 1, 1995, prorated daily, until the Phoenix Equipment is removed. Defendant's judgment against Plaintiff is hereby reduced by setoff of Plaintiff's judgment against Plaintiff, leaving a balance of \$15,838.33 as of August 31, 1995;

3. Plaintiff is allowed to remove the Phoenix Equipment from the Leased Premises, pursuant to and in accordance with the terms of the Consent to Removal of Personal Property;

4. Pre-judgment interest is denied to both parties; and

5. The parties shall bear their own costs.

Handwritten mark

Dated this 4th day of October, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE

S:Henshaw

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

FILED

OCT - 3 1995

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

HELEN SUE BROWN and)
JAMIE A. BROUSSARD,)
)
Plaintiffs,)
)
v.)
)
CITGO PETROLEUM CORPORATION,)
)
Defendant.)

Case No. 94-C-717-B

ENTERED ON CLERK'S OFFICE
OCT 03 1995

DATE _____

ORDER

THIS MATTER, having come on to be heard this 3 day of Oct., 1995, upon "Motion to Dismiss on Behalf of Plaintiff, Helen Sue Brown Counts III, VI, VII and VIII of the Amended Complaint", with prejudice. This Court finds good cause shown for dismissing Counts III, VI, VII and VIII of the amended complaint with prejudice and Plaintiff's Motion should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Counts III, VI, VII and VIII of the Amended Complaint are hereby dismissed with prejudice.

DATED this 3 day of Oct., 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

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

Secretary's action.

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

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

Id. § 423(d)(2)(A).

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

The Secretary meets this burden if the decision is supported

by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

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

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

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

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one

of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920. In this case, the ALJ entered a decision at the fifth level of the inquiry, finding that the Plaintiff could not perform his past work as an automotive mechanic, but could perform other work available in the national economy. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g).

Plaintiff argues that he cannot perform work due to limitations from a combination of a number of impairments. The Plaintiff contends he has a narrowing of the disc in the lumbar-sacral region in his back, varicose veins in his legs, arthritis and carpal tunnel syndrome in his hands, migraine-like headaches, possible seizures, blackouts, and a personality disorder that does not allow him to get along with others. The Plaintiff contends in his appeal that the Secretary did not meet this burden of

affirmatively establishing the Plaintiff can perform relevant work available in the national economy.

In determining whether there is substantial evidence that there is work in the national economy the Plaintiff can perform, the Secretary must consider the age, education, past work experience, and residual functional capacity of the Plaintiff. See 20 C.F.R. § 416.920(f). The Plaintiff was born in 1954 and is considered "younger" in a proper analysis of a determination of a disability. The ALJ noted that the Plaintiff has a high school education and two years of college education. (Record, p. 45) The ALJ found the Plaintiff could not perform his past work as an automotive mechanic, machinist or alarm installer due to both a painful weakening in his hands that occurs after he works a short time and pain in his legs and back. (Record, p. 26)

The Plaintiff alleges his residual function capacity will not allow him to work. Under 20 C.F.R. § 404.1529, the "Administration will never find a claimant 'disabled' based on symptoms, including pain, unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce these symptoms." The ALJ noted there was a lack of objective evidence to support the Plaintiff's contentions of many of his symptoms. This is but one step in the Secretary's analysis to show there is work in the national economy the Plaintiff can perform.

The medical evidence establishes the claimant does have varicose veins in his lower legs and was prescribed stockings to help this affliction. (Record, p. 206) The evidence further

establishes the Plaintiff has a congenital fusion of the C2-3 vertebra and a minimal narrowing of the C5-6 lumbar sacral vertebra. (Record, p. 233) Objective medical evidence further supports the Plaintiff has an old fracture of the right fifth metacarpal. The medical evidence also supports his claim to suffer from "dysthymia with anxieties and depression." (Record, p. 228) There is also evidence in the record indicating that the Plaintiff can get along with co-workers and supervisors. (Record, p. 179) Objective evidence also supports that the Plaintiff suffers from alcohol and drug addictions, but those addictions are in remission. (Record, p. 59) The Plaintiff has not had a drink in more than seven years and is not presently abusing drugs, including prescription drugs a medical expert deems potentially very addictive. The ALJ found that addiction was no longer a significant problem and there is substantial evidence to support that finding.

Medical evidence indicates that Plaintiff had weak hand strength, but the examining physician recommended retraining (Record, p. 225), suggesting the Plaintiff can still work in fields other than his past work. The ALJ found the Plaintiff's claim of the extent to which those ailments impair his residual functions not credible.

Ron Smallwood, Ph.D., did find the Plaintiff had substance abuse disorders, persistent disturbances of mood or affect, pathological dependence, passivity, or aggressivity and intense and unstable interpersonal relationships and impulsive and damaging

behavior (Record, pp. 173-74), but the doctor also said the Plaintiff had only slight restriction of daily living and moderate difficulties in maintaining social function. (Record, p. 175) There is also medical evidence he can interact with co-workers and supervisors, although Dr. Smallwood does not believe the Plaintiff should interact with the public. (Record, pp. 178-79) The ALJ also found no objective evidence in the record to support the Plaintiff's claim that he suffers from Post-Traumatic Stress Syndrome due to his activity in Vietnam. Further, there is no credible evidence in the record that the Plaintiff ever served in Vietnam.²

William D. Young, Ed.D., the vocational expert, testified that the Plaintiff could not return to his past work (Record, p. 80), a conclusion with which the ALJ agreed in his findings. Mr. Young, however, did testify that, based on a limitation of simple and complex tasks, that the Plaintiff could perform sedentary, light or medium assembly work, of which there are 8,000 jobs available in Oklahoma; light kitchen helper, of which there are 5,000 jobs available in the state; janitorial jobs and other jobs in the economy. (Record, p. 81) Young further testified that the Plaintiff might be able to perform other jobs involving occasional

²As noted by the Magistrate Judge, Plaintiff was born on June 1, 1954, and testified that he was discharged from the Army in January 1971. (Record, p. 52) Plaintiff told his therapist he served in the military for two years. (Record, p. 257) This means the Plaintiff would have been 16 1/2 years old at the time of discharge, and 15 years old when he served in Vietnam. There is no documentation in the record to support the Plaintiff's claim of military service.

stooping, such as a parts clerk or order clerk. (Record, p. 82) The Plaintiff contends that his inability to get along with supervisors or the public would prevent him from the types of work suggested by Mr. Young, but there is objective evidence that, while the Plaintiff might not get along in a job dealing with the public, he can get along with supervisors and co-workers. (Record, pp. 178-79)

It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). The ALJ cited a number of discrepancies in Plaintiff's statements during testimony and to doctors and psychological examiners. The ALJ also noted the Plaintiff engages in many activities that suggest he is not disabled. Among the activities noted was the Plaintiff's work in a body shop to help a friend and a joint venture to produce kit cars. (Record, pp. 50, 72) The Court concludes that the ALJ properly determined that the Plaintiff was not disabled. Talbot v. Heckler, 814 F.2d 1456, 1462 (10th Cir. 1987).

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent him from performing relevant work in the national economy and the Court disagrees the ALJ substituted his own judgment for that shown by the evidence. The findings of the Secretary as to any fact are

conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). The Court agrees with the Magistrate Judge's Report and Recommendation and the same is hereby adopted and ratified. The Court concludes that the Secretary's decision should be and the same is hereby AFFIRMED.

IT IS SO ORDERED THIS 4th DAY OF OCTOBER, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT - 3 1995

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

ROBERT LOUIS WIRTZ, JR.,)
)
 Plaintiff,)
)
 v.)
)
 RON CHAMPION and)
)
 JOE WHATLEY,)
)
 Defendants.)

Case No. 93-C-920-B

ENTERED ON CLERK'S OFFICE
DATE OCT 06 1995

ORDER

In this prisoner civil rights action, plaintiff, pro se and in forma pauperis, alleges that defendant Joe Whatley violated plaintiff's Eighth Amendment rights in using excessive force when placing shackles tightly around plaintiff's ankles after a fight occurring while plaintiff was an inmate at Dick Conner Corrections Center (DCCC). Plaintiff also alleges that defendant Ron Champion, the warden at DCCC, was deliberately indifferent to the medical needs of the ankle injuries plaintiff sustained from the shackles. Defendants have moved to dismiss and/or for summary judgment, and plaintiff has objected to those motions. Plaintiff has moved for summary judgment, and defendants have objected to his motion.

I. Factual Background.

Plaintiff was a prisoner at DCCC at the time he filed this action. On September 19, 1993, plaintiff was involved in a fight instigated by another inmate. After plaintiff and the other inmate were separated, defendant Whatley shackled plaintiff and escorted

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him to DCCC's medical unit for treatment of injuries plaintiff received from the fight.

This action is based upon plaintiff's claim that Whatley used excessive force in clamping the shackles too tightly on plaintiff's bare legs and in forcing plaintiff to walk some distance to the medical unit, from which plaintiff alleges he sustained injuries to his ankles and Achilles tendon. Plaintiff alleges that when he complained that the shackles were too tight and hurt his ankles, Whatley refused to loosen the shackles, told plaintiff to be quiet, and then pushed and pulled plaintiff by his handcuffed wrists to the medical unit. While at the medical unit, plaintiff alleges that he requested again that Whatley remove or loosen the shackles, but that Whatley still refused, telling plaintiff that the shackles would be removed when plaintiff was in his cell at the Restrictive Housing Unit (RHU). Plaintiff alleges that he refused pain medication offered to him in the medical unit, because he believed that obtaining that medication would take too long, and thereby delay his arrival at RHU and the removal of the shackles. After plaintiff's fight-related injuries were treated at the medical unit, Whatley then escorted plaintiff to RHU, where Whatley removed the shackles. Plaintiff alleges that when Whatley removed the shackles, five deep cuts around plaintiff's ankles were visible and bleeding.

Whatley denies that he placed the shackles too tightly on plaintiff or that the shackles caused any injury to plaintiff. Whatley denies that plaintiff made any complaint about the shackles

being too tight either en route or while at the medical unit. Whatley denies that he saw any bleeding or other evidence of injury to plaintiff's ankles when he removed the shackles in RHU.

During his stay in RHU, plaintiff alleges that he requested medical attention, but was seen only by a nurse who gave him gauze and bandaids for his ankle wounds. Plaintiff alleges that while he was in RHU, he sent defendant Champion a written request for a doctor's examination of his ankle, but that Champion never responded to that request. Plaintiff alleges that after he left RHU, he was able to see a physician's assistant on October 1, 1993. On that visit, he received only a topical antibiotic ointment to treat his ankle injuries. Plaintiff complains that his ankle is scarred, and that he has recurring numbness in his right foot and toes, and pain in his Achilles tendon when walking up stairs and hills. Plaintiff argues that defendant Champion has been deliberately indifferent to plaintiff's ankle problems, in that his ankle has never received what plaintiff characterizes as prompt or proper medical treatment.

Defendant Champion denies that plaintiff sustained any serious injury to his ankles or Achilles tendon from the shackles used by Whatley. Champion denies that he has been deliberately indifferent to any serious medical need presented by plaintiff.

II. Procedural History.

In response to plaintiff's original complaint, defendants filed a motion to dismiss and/or for summary judgment (docket #15). This Court ruled on that motion in its Order issued September 2,

1994 (docket #26). There, the Court dismissed plaintiff's due process claim against defendant Champion, finding that Champion's alleged failure to investigate and respond to plaintiff's grievance against Whatley did not contravene any of plaintiff's constitutional rights. However, the Court held that plaintiff had sufficiently stated a claim for excessive use of force in violation of his Eight Amendment rights. The Court also found that plaintiff had not properly alleged deliberate indifference to a serious medical need. The Court allowed plaintiff to amend his complaint to allege such deliberate indifference to his ankle injuries.

Plaintiff then filed his amended complaint on December 19, 1994 (docket #34), alleging again that defendant Whatley used excessive force when shackling plaintiff, thereby causing plaintiff's ankle and tendon injuries. Plaintiff also added a claim against defendant Champion, alleging deliberate indifference by Champion to plaintiff's medical needs from his ankle and tendon injuries. On February 9, 1995, defendants responded to plaintiff's amended complaint with another motion to dismiss and/or for summary judgment (docket #37). On August 16, 1995, plaintiff filed a motion for summary judgment on the issue of the cause of his ankle injuries and the subsequent tendon problems (docket #45), to which defendants have objected (docket #46). The Court now considers defendants' second motion to dismiss and/or for summary judgment and plaintiff's motion for summary judgment.

II. Analysis.

A. Dismissal for Failure to State a Claim.

In determining whether to grant a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court's focus is upon the plaintiff's amended complaint. That complaint is construed in the light most favorable to plaintiff, and its allegations are taken as true. Since plaintiff is proceeding pro se, the Court construes his amended complaint more liberally than it would formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). A motion to dismiss will be denied unless it appears beyond all doubt that plaintiff can prove no set of facts in support of his claims to entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).

1. Use of Excessive Force.

In a §1983 action, the Court's initial inquiry is whether plaintiff has alleged two essential elements: that the defendants deprived him of a right secured by the Constitution and laws of the United States, and that the defendants acted under color of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

In responding to plaintiff's amended complaint, defendant Whatley has renewed his argument that plaintiff has failed to state

a claim against him for excessive use of force. From its review of plaintiff's amended complaint, the Court finds that plaintiff has sufficiently stated a claim for excessive use of force in violation of his Eighth Amendment rights. Plaintiff's amended complaint specifically alleges deprivation of those rights, supported by sufficient facts. Plaintiff also has attributed those deprivations to defendant Whatley's acting under color of law. Accordingly, the Court therefore will deny defendant Whatley's portion of the motion to dismiss for failure to state a claim for excessive use of force.

2. Deliberate Indifference to Medical Needs.

In Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court held that the Eighth Amendment's prohibition of cruel and unusual punishment applies to the inadequate provision of medical care to prison inmates. However, because only the "'unnecessary and wanton infliction of pain'" implicates the Eighth Amendment, a prisoner advancing such a claim must allege "deliberate indifference" to "serious" medical needs. Id. at 104, 106 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The Eighth Amendment's deliberate indifference standard under Estelle has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298 (1991). With regard to the subjective component, "allegations of 'inadvertent failure to provide adequate medical care' or of a 'negligent ... diagnos[is]'" simply fail to establish the requisite culpable state of mind. Id.

at 297.

In his amended complaint, plaintiff's claim of deliberate indifference is partly based upon the alleged delay in treatment of his ankle injury while he was in RHU. Plaintiff acknowledges that he received gauze and band-aids for his ankle wounds from the nurse visiting the RHU. However, plaintiff complains that he did not see a doctor about his ankle until nearly two weeks after he sustained the wounds. Plaintiff contends that if the wounds had been stitched by a doctor immediately, the wounds would not have become infected or left scars upon his ankle.

Plaintiff also alleges in his amended complaint that defendant Champion failed to provide "proper" medical treatment of his ankle wounds and tendon problems after plaintiff was released from RHU. Plaintiff complains that his ankle has not been x-rayed, and that no procedure has been performed to find and repair any damage to the tendons and ligaments around his ankle. Plaintiff acknowledges that he was given a splint to help his ankle in January, 1994. Plaintiff also acknowledges that a doctor examined his ankle and tendon in May, 1994 and recommended exercise of the tendon and ligaments before any surgery was performed. Plaintiff, however, contends that if he had received "proper" medical treatment, he would not have problems with his Achilles tendon.

After examining plaintiff's amended complaint, the Court finds that plaintiff has not stated a claim that defendant Champion was deliberately indifferent to the medical needs of plaintiff's ankle and tendon. Plaintiff's amended complaint does not allege a lack

of treatment, but rather treatment which plaintiff perceives to be inadequate or improper. A complaint fails to state a claim of "deliberate indifference" when its allegations are based on inadequacy of treatment. Daniels v. Gilbreath, 668 F.2d 477, 482 (10th Cir. 1982). An allegation of failure to diagnose or adequately treat a condition states a claim for medical malpractice, which does not raise a cognizable constitutional violation. Estelle, 429 U.S. at 105-06.

Likewise, the delay in the treatment of plaintiff's ankle wounds while plaintiff was in RHU does not state a claim for deliberate indifference. Plaintiff acknowledges that he received gauze and bandaids for his wounds while in RHU. The delay in treatment of the infection which developed in those wounds at most states a claim for inadequate or negligent medical care. Accordingly, the Court will grant defendant Champion's motion to dismiss for failure to state a claim for deliberate indifference.

B. Summary Judgment

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

Where a pro se plaintiff is a prisoner, a court-authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). On summary judgment, the Court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the Report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the Court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The Court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972). When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

1. Defendant's Motion for Summary Judgment

A remaining issue raised by this motion is whether defendant Whatley used excessive force when he shackled plaintiff and forced him to walk to the Medical Unit and then to RHU without loosening the shackles as plaintiff repeatedly requested. In order to recover on this claim, plaintiff must prove that defendant Whatley used force resulting in the "'unnecessary and wanton infliction of

pain.'" Hudson v. McMillian, 503 U.S. 1, 5 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)). A de minimis use of physical force does not qualify as "wanton and unnecessary" unless it is of the sort "repugnant to the conscience of mankind." Hudson, 503 U.S. at 9-10 (citations omitted). While it is accepted that prison officials must occasionally resort to physical force to maintain and restore institutional order, they nevertheless must balance the institutional interest against the risk of harm to the inmates. Id. at 6 (quoting Whitley, 475 U.S. at 321-22). Therefore, the "core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 7.

After viewing the evidence in the light most favorable to plaintiff, the Court concludes that genuine issues of material fact remain as to whether defendant Whatley used excessive force in shackling plaintiff's legs and in making plaintiff walk to the Medical Unit and then to RHU without loosening the shackles as plaintiff repeatedly requested. The Court notes a number of conflicts in the evidence offered by plaintiff and defendant Whatley about what occurred after the fight on September 19, 1993. The Court therefore concludes that defendants' motion for summary judgment as to plaintiff's excessive force claim must be denied.

3. Immunity Defenses.

Defendant Whatley contends he is entitled to qualified immunity as an employee of the Oklahoma Department of Corrections. "An official is protected from personal liability if his alleged

unlawful official action was objectively reasonable when assessed in the light of legal rules that were clearly established when the action was taken." Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993)(citing Anderson v. Creighton, 482 U.S. 635, 639 (1987)). The "contours" of the right violated by the official must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Chapman, 989 F.2d at 397. Government officials are charged with "presumptive knowledge of and respect for 'basic, unquestioned constitutional rights'". Walsh v. Franco, 849 F.2d 66, 68 (2d Cir. 1988). An official may be held liable for a violation of those constitutional rights when he "knew or reasonably should have known" that his actions would have violated those rights. Id.

Here, plaintiff claims defendant Whatley violated his Eighth Amendment right to be free from cruel and unusual punishment by the excessive use of force. This right was clearly established at the time of the alleged violation. Prior to Whatley's alleged actions taken on September 19, 1993, the United States Supreme Court and the Tenth Circuit had ruled that prison officials may be held liable under the Eighth Amendment for applying force "maliciously and sadistically to cause harm." See Hudson v. McMillian, 503 U.S. 1, 7 (1992); Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990). Therefore, defendant Whatley is not entitled to a qualified immunity defense for his actions in issue in this case. The Court will deny Whatley's motion for summary judgment as to this issue.

Defendant Whatley also contends that he is entitled to

immunity under the Eleventh Amendment of the United States Constitution, since his alleged actions were taken in his official capacity as an employee of the Oklahoma Department of Corrections. Whatley contends that the amended complaint contains no allegations sufficient to implicate him as an individual. The Court agrees. To the extent that plaintiff's cause of action for excessive use of force attempts to state a claim for damages against defendant Whatley in his capacity as an employee of the Oklahoma Department of Corrections, such a claim is barred under the Eleventh Amendment to the United States Constitution. See Welch v. Texas Highways & Public Transp. Dept., 483 U.S. 468, 472 (1987). Defendant Whatley's motion for summary judgment as to the Eleventh Amendment immunity defense thus will be granted.

2. Plaintiff's motion for summary judgment.

Plaintiff's motion for summary judgment seeks the Court's ruling on the issue of whether plaintiff's ankle and Achilles tendon injuries were caused by defendant Whatley's improper shackling of plaintiff on September 19, 1993. Defendants respond that summary judgment in favor of plaintiff on this issue would be improper, contending that Whatley properly shackled plaintiff and thus did not cause any of the ankle or tendon problems plaintiff claims.

After considering the evidence presented by the parties, the Court concludes that genuine issues of material fact remain that preclude granting the plaintiff's motion for summary judgment. The Court notes conflicting evidence offered as to the propriety of how

the shackles were placed upon plaintiff, and whether plaintiff's Achilles tendon problems derive from the use of those shackles or from plaintiff's back problems. Accordingly, the Court will deny plaintiff's motion for summary judgment.

IV. Conclusion.

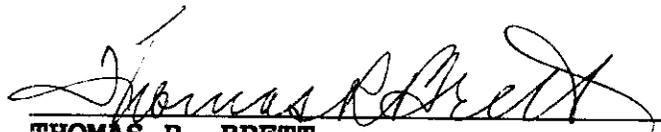
To summarize, the Court finds as follows:

(1) Defendants' motion to dismiss for failure to state a claim (docket #37) is **granted** as to plaintiff's claim of deliberate indifference by defendant Champion, and is **denied** in all other respects:

(2) Defendants' motion for summary judgment (docket #37) is **granted** as to the issue of Eleventh Amendment immunity, and is **denied** in all other respects;

(3) Plaintiff's motion for summary judgment (docket #45) is **denied**.

IT IS SO ORDERED this 3rd day of October, 1995.


THOMAS R. BRETT
United States District Judge

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

FILED

OCT - 4 1995

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

OKLAHOMA OFFSET, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 SANDLER & WORTH, INC., et al)
)
 Defendant.)

Case No. 94-C-1142-B /

ENTERED ON DOCKET
OCT 0 5 1995
DATE _____

ADMINISTRATIVE CLOSING ORDER

The defendant Sandler & Worth, Inc. having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 4th day of October, 1995.


THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

05

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

FILED

OCT 04 1995

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

TOMMIE S. BALL,)
)
Plaintiff,)
)
vs.)
)
SHIRLEY CHATER, COMMISSIONER)
OF HEALTH AND HUMAN)
SERVICES,)
Defendant.)

Case No. 93-C-742-W

EOD 10/5/95

AMENDED ORDER

This order pertains to the Application by Plaintiff and Motion for A Final Order and for Attorney's Fees and Expenses Under the Equal Access to Justice Act ("EAJA") (Docket #23)¹, Defendant's Response to Plaintiff's Motion for Equal Access to Justice Act Fees (Docket #25), and Plaintiff's Reply to "Defendant's Response to Plaintiff's Motion For Equal Access to Justice Act Fees (Docket #27). On May 31, 1995, this court entered judgment in favor of the plaintiff in accordance with its Order filed the same date (Docket #26).

On September 19, 1995, the court entered an order finding Plaintiff was a prevailing party within the meaning of the EAJA and entitled to an award of attorney's fees for both federal court work and administrative procedure work in the amount of \$3,214.57 for 27.30 hours at the enhanced rate of \$117.75 per hour plus \$133.50 in costs. In its response, Defendant argued that the amount of fees Plaintiff's counsel requested was excessive, because he is an experienced social security attorney familiar with the law of the

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Tenth Circuit, and yet requested fees for 9.5 hours of research in this case. The court agreed that this amount of time for research was excessive and reduced the amount of time by half to 4.75 hours.

Plaintiff's counsel argues that the court's issuance of its order of September 19, 1995, preempting his "time to respond" is "an abuse of discretion" and cites two cases in support, Gutierrez v. Sullivan, 953 F.2d 579, 585 (10th Cir. 1992) and Hadden v. Bowen, 851 F.2d 1266, 1268 (10th Cir. 1988). However, neither of these cases discusses such a situation, but rather they pertain to the complete denial of fees under the EAJA. In the case at bar, the court did not deny an award of attorney's fees under the EAJA, but merely reduced the amount sought by claimant's counsel by \$559.31. Under Local Rule 7.2(C), a reply brief is not permitted, except to address new matter raised in the response. One could quibble over whether Defendant's challenge to the amount of research hours charged constitutes "new matter" when the opening brief asked for those hours, but the fact remains that counsel felt he had more to say on the subject, and under the local rule the initial exercise of discretion in determining if "new matter" is involved resides with counsel, not the court. Plaintiff's attorney was deprived of an opportunity to reply, because of the court's overly-prompt ruling.²

Plaintiff contends that Defendant's response was absurd and foundationless, because some research was clearly necessary to prepare a brief in a case involving an impairment

²The court is happy to be in a position where it can once again issue prompt rulings, after a trying period where a dearth of judicial resources allowed the accumulation of a substantial backlog in Social Security Appeals. However, the court appreciates the desirability of full due process, and is particularly sensitized to the circumstances presented by a ruling before the time for reply has run, having been subjected to the same treatment while in practice at the hands of my predecessor. Thus, I shall do the same thing now as he did then - entertain the Reply and readdress the merits in light of its contents. The court apologizes to counsel for any inconvenience or hardship caused by the premature ruling, and resolves not to duplicate the error in future cases.

of speech where fifteen cases, one ruling, and three regulations were cited. Claimant cites two cases where attorneys were awarded fees for 101.8 total hours and 24 research hours under the EAJA, Meyer v. Sullivan, 958 F.2d 1029 (11th Cir. 1992) and Dunn v. Shalala, 1995 U.S. Dist. Lexis 475 (N.D. Ill. 1995).

The court is cognizant that it has the discretion to award substantial attorney's fees if the hours expended on a case are reasonable. However, the court, applying what Plaintiff describes as the "use of Solomon's wisdom,"³ closely examined Plaintiff's Opening Brief ("Brief") (Docket #10) to determine the amount of research time that was involved in its preparation, before proceeding to "cleave the babe (fee) in half."⁴

The court had reviewed many similar briefs prepared by Plaintiff's counsel over the

³ Plaintiff's counsel cites the Revised Standard Version of the Holy Bible at I Kings Chapter 3 verses 16-28, which reads as follows: Then two prostitutes came to the king and stood before him. "If it please you, my lord," one of the women said, "this woman and I live in the same house, and while she was in the house I gave birth to a child. Now it happened on the third day after my delivery that this woman also gave birth to a child. We were alone together; there was no one else in the house with us; just the two of us in the house. Now one night this woman's son died; she overlaid him. And in the middle of the night she got up and took my son from beside me while your servant was asleep; she put him to her breast and put her own dead son to mine. When I got up to suckle my child, there he was, dead. But in the morning I looked at him carefully, and he was not the child I had borne at all." Then the other woman spoke. "That is not true! My son is the live one, yours is the dead one"; and the first retorted, "That is not true! Your son is the dead one, mine is the live one." And so they wrangled before the king. "This one says," the king observed, "'My son is the one who is alive; your son is dead,' while the other says, 'That is not true! Your son is the dead one, mine is the live one.' Bring me a sword," said the king; and a sword was brought into the king's presence. "Cut the living child in two," the king said, "and give half to one, half to the other." At this the woman who was the mother of the living child addressed the king, for she burned with pity for her son. "If it please you, my lord," she said, "let them give her the child; only do not let them think of killing it!" But the other said, "He shall belong to neither of us. Cut him up." Then the king gave his decision. "Give the child to the first woman," he said, "and do not kill him. She is his mother." All Israel came to hear of the judgment the king had pronounced, and held the king in awe, recognizing that he possessed divine wisdom for dispensing justice.

⁴This resulted in a modest reduction in the overall fee, but was still sufficient to give recognition to the government's concern about the amount of research time involved in putting forth "boilerplate" arguments. If the court were to reduce the research time on an issue by issue basis, and make reductions for those deemed "boilerplate" as opposed to those that are novel, new to counsel, or the result of a recent change in the law, a greater reduction would have been made, because counsel claims only one issue as being unfamiliar. However, even familiar cases serving as the foundation of "boilerplate" arguments need to be shepardized and checked, and some research time should be allowed for this. Counsel's reliance upon the number of cases cited as justifying the claimed research time is misplaced. Frankly, the last thing the court should do in awarding fees, especially with public monies, is to compensate counsel on a dollar-per-cite basis, as this builds in an undesirable incentive to multiply the number of cases cited, whether pertinent or helpful or not. Such a message would be contrary to the objective we are seeking to reach with the use of the new 5-page briefing format, which is to highlight only the cases most useful to the court, which are the ones that are new, or otherwise obscure. In short, recognizing that the setting of a "reasonable fee" is an inexact science, the court thought, and still thinks, that the "Solomon solution" employed gives a just result here.

past decade and therefore was familiar with arguments which he has made in the past in other social security cases. His discussion of the court's role in such cases (Brief, pg. 2), the Application of the Listing of Impairments (Brief, pg. 5, 7), the impropriety of the ALJ using his own "medical expertise" (Brief, pg. 6) or relying too extensively on observations of a claimant's behavior at the hearing (Brief, pg. 6-7) or ignoring the opinions of treating physicians (Brief, pg. 7-8), the requirement that a court consider impairments in combination and assess mental condition if there is evidence of such (Brief, pg. 8), and the importance of a proper hypothetical question to the vocational expert and an individualized determination of a claimant's ability to work (Brief, pg. 9) have been used repeatedly in other briefs in other cases. It is not original research done for this case.⁵

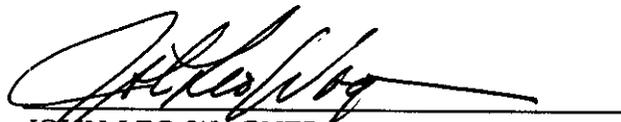
If, indeed, this is the "first case in which counsel has encountered an impairment of speech," as he contends, then the original research done to prepare the Brief is included in one paragraph consisting of twelve lines on the bottom of page five and top of page six, which discusses Social Security Listing Section 2.09 relating to loss of speech, the associated Social Security Ruling 82-57, and one 1982 case, Raisor v. Schweiker, 540 F.Supp 686 (S.D Ohio 1982). The court was required to do additional research to gain an understanding of Listing 2.09 and claimant's particular speech problem in coming to its conclusion regarding disability and drafting its order awarding disability benefits. See

⁵The use of "boilerplate" arguments with regard to frequently argued issues such as these is appropriate, because the court's decision on the merits usually turns on the unique facts presented by each case. Of course, the court and competent counsel concentrating their practices in this area should keep apprised of changes in the law resulting from recent United States Supreme Court and 10th Circuit decisions and periodically update the boilerplate to reflect those changes.

Order, Docket #19, pgs. 8-10.⁶

The Plaintiff's reply brief, while colorful, caustic, and clever, is not convincing. Plaintiff's counsel is only entitled to fees for 4.75 hours of research. The court's order of September 19, 1995, is amended to add an additional two hours of fees at the rate of \$117.75 per hour for "research and preparation" of Plaintiff's ingenious and original reply brief, which included extensive citing of the Holy Bible.⁷ Plaintiff is entitled to fees in the amount of \$3,583.58 for 29.30 hours at the enhanced rate of \$117.75 per hour plus \$133.50 in costs.

Dated this 3rd day of October, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:ball.or

⁶The court's comment here is not meant critically. Due to the 10 page brief limitation imposed in Social Security appeals at the time, exhaustive recitation and discussion of authorities was neither possible nor desired. Experience prior to the 10 page limitation demonstrated that exhaustive briefing was more detrimental than assistive in the efficient disposition of these appeals. They are factually intensive, and most of the applicable law is boilerplate that the court has seen time and time again. The court's time is best spent reviewing the record itself, rather than an exhaustive recitation and characterization of the record in the briefs, and then the record. From the court's perspective, the new five-page limitation (with a liberal view to expansion when requested) is even more helpful in efficiently highlighting the factual issues on appeal, and in highlighting any new or obscure case law with which the court may still be unfamiliar. It is hoped that the new format provides counsel with new efficiencies too, and ultimately results in the faster processing of appeals.

⁷When applicable, the court generally takes judicial notice of the Holy Bible, and routine citation is not necessary. The court appreciates a little spice in the argument, but it should be recognized that a fine brief can be overspiced and ruined just as easily as a fine dish. Counsel should use sufficient restraint to ensure that the use of zesty seasoning results in judicial satisfaction, and not heartburn. In this instance, due to the unfortunate timing of the court's initial ruling, some measure of righteous indignation must be digested.

Copy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

RICHARD R. REID AND KATHLEEN)
M. REID, husband and wife,)
))
Plaintiffs,)
))
vs.)
))
THE RESOLUTION TRUST)
CORPORATION, AS RECEIVER FOR)
WILLIAMSBURG FEDERAL SAVINGS &)
LOAN ASSOCIATION,)
GOVERNMENT NATIONAL MORTGAGE)
ASSOCIATION, MIDLAND MORTGAGE)
CO., and MIDFIRST BANK, S.S.B.,)
))
Defendants.)

SEP 15 1995

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

Case No. 94-C-708-JLW

ENTERED

DATE OCT 05 1995

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Richard R. Reid and Kathleen M. Reid, Plaintiffs, the Resolution Trust Corporation as Receiver for Williamsburg Federal Savings and Loan Association, Defendant, Midland Mortgage Co., Defendant, MidFirst Bank, S.S.B., Defendant, the Government National Mortgage Association, Defendant and Third Party Plaintiff, Triad Bank, Third Party Defendant, and American Title Insurance Company, Third Party Defendant, by and through their attorneys of record, and pursuant to Fed. R. Civ. P. 41(a)(1) enter this stipulation to the dismissal of, and do hereby dismiss the above-captioned action with prejudice, each party to bear its own costs and attorneys' fees. Additionally, all parties stipulate that only Defendant, MidFirst Bank, S.S.B., has an interest in the interpleader funds deposited with this Court and they ask the Court to order disbursement of the interpleader funds to MidFirst and dissolve the Order of Interpleader.

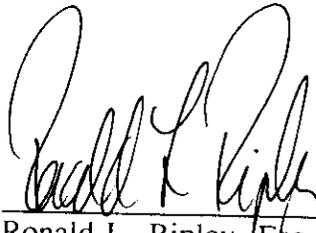
Respectfully submitted,



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Melinda J. Martin, OBA #5737
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Attorneys for Defendant Resolution
Trust Corporation as Receiver for
Williamsburg Federal Savings and
Loan Association

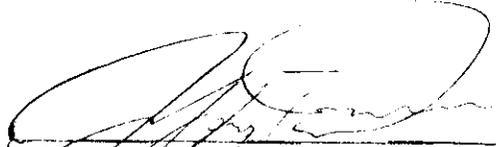
Dated September 8, 1995



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Attorneys for Defendants
Midfirst Bank, S.S.B. and
Midland Mortgage Co.

Dated September 6, 1995



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Attorney for Plaintiffs Richard and
Kathleen Reid

Dated September 15, 1995

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Civil Division
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Attorneys for Defendant Government
National Mortgage Association

Dated September 13, 1995



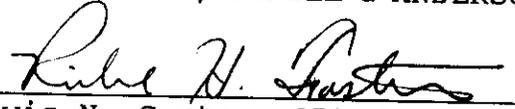
Andrew S. Hartman, Esq.
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Attorneys for Third Party Defendant
Triad Bank, N.A.

Dated 9/14, 1995

DOERNER, SAUNDERS, DANIEL & ANDERSON

By:



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Attorneys for Third-Party
Defendant American Title
Insurance Company

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

FILED

OCT - 4 1995

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

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)

Plaintiff,)

v.)

THE JOHN W. WALDEN COMPANY,)
aka The John Walden Company,)
JOHN W. WALDEN, and BARBARA K.)
WALDEN,)

Defendants.)

Case No. 94-C-1036-H

ENTERED ON DOCKET
DATE OCT - 5 1995

REPORT AND RECOMMENDATION
THAT DEFENSES AND PROOF BE PRECLUDED

This report and recommendation pertains to Plaintiff's Motion to Exclude Evidence pursuant to this court's previous orders of September 7, 1995 and September 14, 1995 (Docket #17)¹.

On September 7, 1995, this court held a hearing regarding Plaintiff's Motion to Compel and sanctioned Defendants \$750.00 payable to Plaintiff by September 17, 1995, such amount reflecting reasonable costs and attorneys' fees suffered by Plaintiff in prosecuting its Motion to Compel. The court also directed that Defendants retain local counsel by September 17, 1995.

The Order also provided that if Defendants failed to comply with either deadline, then the court would consider entering an order precluding the Defendants from offering any defense to Plaintiff's claims against Defendants and precluding Defendants from

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

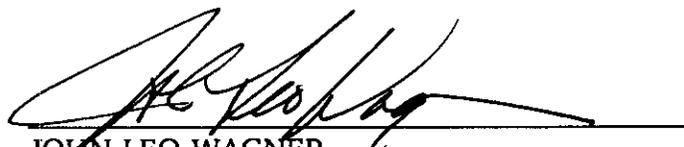
offering proof of their counterclaims against Plaintiff.

Defendants have failed to comply with the court's orders of September 7, 1995 and September 14, 1995 and have neither paid the sums required of them nor caused local counsel to make an appearance in this case. By their failure, Defendants have engaged in further conduct demonstrating a consistent course of delaying tactics and disobedience to the directive of this court in contravention of the Federal Rules of Civil Procedure and the Local Rules of the Northern District.

In light of the considerations discussed above, the undersigned magistrate judge recommends that the court preclude the Defendants from offering any defense to Plaintiff's claims against Defendants and precluding Defendants from offering proof of their counterclaims against Plaintiff.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Defendant is allowed 13 days from the date of filing of this Report and Recommendation in which to file a written objection.²

Dated this 4th day of October, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Thrifty.rr2

²The 13 day period includes the 10 days provided by Rule 72(b), and the additional 3 days provided by Rule 6(e) when service is made by mail.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

-----X
UNITED STATES OF AMERICA, :
 :
 :
 Plaintiff, :
 :
 v. :
 :
 BARTLESVILLE INVESTMENT :
 CORPORATION, :
 :
 Defendant. :
-----X

ENTERED CASE DOCKET
DATE OCT 04 1995

Civil Action No.86-C-575 E
Judge James O. Ellison

FILED

OCT 3 1995

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

FINAL ORDER

Upon full consideration of the Receiver's Petition for a Final Order approving and confirming that the U.S. Small Business Administration ("SBA" or "Receiver") as Receiver for Bartlesville Investment Corporation ("BIC") and its agents have complied with the Orders of the Court dated June 12, 1986 ("Receivership Order") and August 1, 1995 ("Wind-Up Order"),

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court approves and confirms the Final Receiver's Report, and acts and transactions and receipts and disbursements reported therein.
2. Within ninety (90) days of receiving notification of entry of this Final Order, the Receiver is ordered to perform tasks necessary to finalize and close out the accounting records of the Receivership.
3. Within ninety (90) days of receiving notification of entry of this Final Order,

NOTE: THIS ORDER IS TO BE FILED
WITH THE COURT AND THE SBA AND
PTO BY THE RECIPIENTS IMMEDIATELY
UPON RECEIPT.

COPY

the Receiver is ordered to return to the shareholders of BIC the pre-receivership books and accounting records of the corporation and the post receivership accounting records which are necessary for the preparation and filing of tax returns, as well as all other pre-receivership documents provided by BIC to the Receiver at the inception of the receivership.

4. After one year from the date of entry of this Final Order, the SBA shall dispose of the books, records and files of BIC and the Receivership that are not returned to the shareholders of BIC and that are not necessary to liquidate, prosecute, or resolve the assets assigned to the SBA.

5. The Receiver shall return to the shareholders of BIC the control of the corporation. However, transfer of control of BIC to its shareholders shall not take effect until other provisions of this Final Order are implemented, including discharging the Receiver, authorizing the SBA to revoke the small business investment company license of BIC, and the transfer of the assets of the receivership to the SBA.

6. The Receiver is hereby authorized to surrender the license of BIC to operate as a small business investment company to the SBA, and the SBA is hereby authorized to revoke said license.

7. Within ninety (90) days of receiving notification of the entry of this Final Order, and after payment of all administrative expenses of the receivership, the Receiver is ordered to pay the balance of all cash remaining in the bank and investment accounts of the receivership to the United States Small Business Administration in partial satisfaction of the Consent Judgment awarded by this Court in its Order dated June 12, 1986.

8. Either M. Elizabeth Smith, Principal Agent for the Receiver, or Michele Long

Pittman, Acting Chief, Branch I, Office of Liquidation, or such other agent or employee as SBA in its sole discretion shall designate, are hereby appointed and authorized to sign on behalf of, and as agent for, the Receiver, any and all documents necessary to carry out the provisions of this Order and to wind up the affairs of the BIC receivership;

9. All claims against and obligations of BIC, its subsidiaries, the receivership estate, the Receiver and its current and former agents and attorneys, arising from or relating in any way to this Receivership shall be discharged ninety (90) days after the Receiver receives notification of entry of this Final Order, with the exception that the Consent Judgment awarded by Order of this Court to the SBA, dated June 12, 1986, shall not be discharged.

10. Following the termination of this receivership and discharge of the Receiver, BIC's shareholders, affiliates, subsidiaries, parent, officers and directors are enjoined from the use of any tax benefits accrued or accruing, pursuant to the SBA judgment herein, for the benefit of BIC, its successors or assigns, or parent, affiliates or subsidiaries.

11. Ninety (90) days after the Receiver receives notification of entry of this Final Order, the receivership shall be terminated, SBA shall be discharged as Receiver and the SBA, its employees, officers, agents and attorneys, shall be discharged of and released from any and all claims or obligations against them and any liability arising from or relating to the activities, conduct, management and operation of BIC, its subsidiaries, its partnerships and portfolio concerns, the receivership and the receivership estate.

12. The stay imposed by this Court pursuant to its Order dated June 12, 1986,

shall be and is hereby lifted in its entirety ninety (90) days after the Receiver receives notification of entry of this Final Order.

S/ JAMES O. ELLISON

DATE: _____

UNITED STATES DISTRICT COURT JUDGE

Copies to:

Mark W. Vita, Chief Counsel SBIC
Claims and Commercial Transactions
U.S. Small Business Administration
475 Allendale Road, Suite 201
King of Prussia, PA 19406

M. Elizabeth Smith
SBA, Receiver for Bartlesville Investment
Corporation
666 11th Street, N.W., Suite 900
Washington, D.C. 20001-4542

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

CONTINENTAL NATURAL GAS, INC.,)
an Oklahoma corporation;)
COTTONWOOD PARTNERSHIP, an Oklahoma)
general partnership; CONTINENTAL)
GAS MARKETING, INC., a Texas)
corporation; SCOTT C. LONGMORE;)
GARRY D. SMITH; TERRY K. SPENCER;)
and ADAMS ENERGY COMPANY, an)
Oklahoma corporation,)

Plaintiffs,)

vs.)

ASTRA RESOURCES, INC., a Kansas)
corporation,)

Defendant.)

ENTERED ON DOCKET

DATE OCT 04 1995

FILED

OCT 03 1995

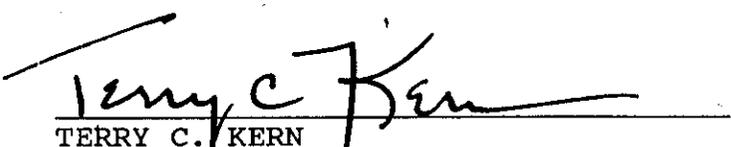
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

No. 94-C-485-K

JUDGMENT

In accordance with the jury verdict rendered on September 12, 1995, judgment is hereby entered in favor of the defendant Astra Resources and against plaintiffs regarding plaintiffs' fourth cause of action for alleged breach of confidentiality agreement, and that plaintiffs take nothing by that cause of action.

ORDERED this 29 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

133

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 04 1995

ROBERT B. REICH, Secretary of)
Labor, United States Department)
of Labor,)

Civil Action

Plaintiff,)

vs.)

No. 94-C-134-K

PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)

FILED

Defendant.)

OCT 03 1995

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

ORDER

The Court, upon consideration of the parties' Joint Stipulation of Dismissal With Prejudice, finds that the parties' Joint Stipulation should be, and the same hereby is GRANTED.

The Court further finds that the parties shall bear their own respective attorneys' fees and costs incurred in connection with this action, and the same is hereby ORDERED.

The Court further finds that this Court shall retain jurisdiction of this matter in order to enforce the Settlement Agreement between the parties, if required, and the same is hereby ORDERED.

IT IS SO ORDERED this 29 day of SEPTEMBER, 1995.

s/ TERRY C. KERN

United States District Judge

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

ENTERED ON DOCKET

DATE OCT 04 1995

TEDDY FOWLER,)
)
Petitioner,)
)
vs.)
)
CLIFFORD HOPPER,)
)
Respondent.)

No. 95-C-878-K

FILED

OCT 03 1995

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

ORDER

This matter comes before the Court on a pro se petition for writ of mandamus and motion for leave to proceed in forma pauperis. On September 18, 1995, the Court granted Petitioner leave to proceed in forma pauperis. The Court now considers whether the petition is frivolous pursuant to 28 U.S.C. § 1915(d).

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

4

The common law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a petitioner only if he has exhausted all other avenues of relief and only if the respondent owes petitioner a clear nondiscretionary duty. Heckler v. Ringer, 466 U.S. 602, 616 (1984). A party seeking the issuance of a writ of mandamus pursuant to 28 U.S.C. § 1651 must also satisfy the burden of showing that his right to the issuance of the writ is clear and undisputable. Kerr v. United States District Court, 426 U.S. 394, 402-403 (1976).

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack any arguable basis in law. Petitioner cannot meet the burden of establishing that he has exhausted all other avenues of relief and that he is entitled to a writ of mandamus. Accordingly, Petitioner's request for a writ of mandamus is hereby **denied** and the petition is hereby **dismissed as frivolous**.¹ The Clerk shall mail to Petitioner a copy of his petition for writ of mandamus.

SO ORDERED THIS 3 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

¹ To the extent Petitioner seeks relief in the nature of habeas corpus, he should file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

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

JEROME DELL RUCKER, JR,)
)
 Plaintiff,)
)
 vs.) No. 95-C-98-K ✓
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

ENTERED ON DOCKET
DATE OCT 04 1995

FILED

OCT 03 1995

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

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on April 17, 1995. On June 12, 1995, the Court directed the Defendants to mail Plaintiff, a pro se litigant, a second copy of their motion to dismiss and granted Plaintiff a twenty-five-day extension of time within which to file a response. As of the date of this order, Plaintiff has yet to respond or file a second motion for an extension of time.

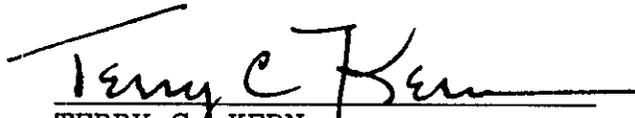
Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ Accordingly, Defendants' motion to dismiss (doc. #4) is hereby **granted** and the above captioned case is hereby **dismissed with**

¹Local Rule 7.1.C reads as follows:

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

prejudice at this time.

SO ORDERED THIS 3 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
OCT 04 1995
DATE _____

TEDDY WAYNE FOWLER,)
)
) Petitioner,)
)
 vs.)
)
) STANLEY GLANZ,)
)
) Respondent.)

No. 95-C-708-K

FILED

OCT 03 1995

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

ORDER

This matter comes before the Court on Respondent's motion to dismiss (docket #6) and Petitioner's motion for expansion of record (docket #4). Petitioner has not objected to Respondent's motion to dismiss.

Petitioner's failure to respond to Respondent's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ Accordingly, Respondent's motion to dismiss is granted and this action is hereby **dismissed with prejudice**. Plaintiff's motion to expand the record is **denied as moot**.

SO ORDERED THIS 3 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

¹Local Rule 7.1.C reads as follows:

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

9

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

ENTERED ON DOCKET

DATE ~~OCT 04 1995~~

CONTINENTAL NATURAL GAS, INC.,)
an Oklahoma corporation;)
COTTONWOOD PARTNERSHIP, an Oklahoma)
general partnership; CONTINENTAL)
GAS MARKETING, INC., a Texas)
corporation; SCOTT C. LONGMORE;)
GARRY D. SMITH; TERRY K. SPENCER;)
and ADAMS ENERGY COMPANY, an)
Oklahoma corporation,)

Plaintiffs,)

vs.)

ASTRA RESOURCES, INC., a Kansas)
corporation, and WESTERN RESOURCES,)
INC., a Kansas corporation,)

Defendants.)

FILED

OCT 03 1995

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

No. 94-C-485-K

JUDGMENT

In accordance with the Court's granting of a Motion for Judgment as a Matter of Law pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, such Motion having been granted at the close of the Plaintiffs' case, Judgment is hereby entered in favor of Western Resources, Inc., and against the Plaintiffs, pursuant to which Judgment the Plaintiffs are to take nothing by reason of their causes of action against the Defendant Western Resources, Inc.

ORDERED this 3 day of October, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

132

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

ENTERED ON DOCKET
DATE OCT 02 1995

ROBERT L. WIRTZ,)
)
 Plaintiff,)
)
 vs.)
)
 LINDA LAZELLE, et al.,)
)
 Defendants.)

No. 93-C-1143-H

FILED

SEP 29 1995

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

ORDER

Plaintiff Robert Louis Wirtz ("Plaintiff"), an inmate presently incarcerated at the Tulsa County Jail, brings this pro se action pursuant to 42 U.S.C. § 1983, against the following prison officials at the Oklahoma Department of Corrections (DOC): Linda Lazelle, Unit Manager at Dick Conner Correctional Center (DCCC) Minimum Security Unit (MSU); Don Alexander, Case Manager at DCCC; Diane McGee, Unit Manager at Howard McLeod Correctional Center (HMCC); Ron Ward, Warden at HMCC; and Bobby Boone, Warden at Mack Alford Correctional Center (MACC). Plaintiff alleges (1) that Defendants forced him to hold his bodily functions to the point of pain on a regular basis at "lock-down count" time in violation of his Eighth Amendment rights, (2) that Defendants conspired to inflict pain by causing him to hold his bodily functions, and (3) that Defendants retaliated against him for exercising his right of access to the courts. Plaintiff seeks actual and punitive damages.

Defendants have moved for summary judgment on the basis of the court-ordered Martinez report. For the reasons stated below, the Court concludes that Defendants' motion should be granted in part and denied in part.

I. SUMMARY JUDGMENT STANDARD

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

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

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

[t]he mere existence of a scintilla of evidence in

support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

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

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

possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. Plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

II. ANALYSIS

A. Cruel and Unusual Punishment

In Count I of his amended complaint, Plaintiff alleges Defendants forced him to hold his bodily functions to the point of pain on a regular basis at "lock-down count" time in violation of his Eighth Amendment rights.

At the MSU facility at DCCC, bathrooms are separate from the cells. At "lock-down count" all inmates are required to go to their assigned cell as soon as the correctional officers call "lock-down count," shut the door, and remain inside their cell until the officers announce "count clear." The inmates are required to plan in advance whether or not they will need to use the bathroom facilities. (Exs. B, F, and G to Special Report.)

On December 1, 1993, Sargent Gary Shedd issued an offense report for Individual Disruptive Behavior because Plaintiff was at the drinking fountain outside his cell after count had been announced. Plaintiff was found guilty and sentenced to fifteen days of disciplinary segregation and fined \$10.00. Plaintiff

appealed and on December 28, 1993, the warden denied the appeal. (Exs. C and D to Special Report.)

On December 6, 1993, Alexander issued an offense report for Disobedience to Order because Plaintiff refused a direct order to return to his cell. Plaintiff proceeded to the bathroom during a medical emergency involving a staff person. Following a disciplinary hearing, Plaintiff was found guilty and sentenced to fifteen days of disciplinary segregation. (Ex. E to Special Report.)

The Eighth Amendment ban against cruel and unusual punishment bars punishments

which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976), or are grossly disproportionate to the severity of the crime. Among "unnecessary and wanton" infliction of pain are those that are "totally without penological justification." Gregg v. Georgia, supra, at 183; Estelle v. Gamble, 429 U.S. 97, 103 (1976).

Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (some citations omitted). In Hudson v. McMillan, the Supreme Court explained as follows:

extreme deprivations are required to make out a conditions-of-confinement claim. . . . Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation."

503 U.S. 1, 9 (1992) (quotations and quoted cases omitted).

In support of his Eighth Amendment claim, Plaintiff relies on United States Ex Rel. Wolfish v. Levi, 439 F.Supp. 114 (D.C.N.Y. 1977), affirmed, 573 F.2d 118, reversed on other grounds, 441 U.S.

520 (1979). In Wolfish female inmates were detained in cells with sinks but no toilets and had to seek permission to use the toilets located at the end of each corridor. When a woman was in segregation or the entire unit was locked in, inmates were dependent upon the guards to check periodically whether any of them needed to use the toilet and were often locked for many hours without being released to use the toilet. The court held that cells without a toilet were unacceptable for locked confinement because it "falls below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet." Wolfish, 439 F.Supp at 157.

Wolfish is distinguishable from the case at hand. Plaintiff was not confined in a locked cell without a toilet other than during the daily nine "lock-down" counts.¹ (Ex. C to Special Report.) Otherwise, Plaintiff was free to go to the restroom at any time from 6:30 a.m. until 10:30 p.m. at night. (Id.) After 10:30 p.m., Plaintiff was required to stay in his cell for the night except with permission from the officer for bathroom needs. (Id.) The 11:45 a.m. count lasted on the average about twenty minutes. (Ex. H to Special Report). Plaintiff disputes that all counts lasted only twenty minutes, and attests that some lasted for as long as one and one-half hours. He further attests he was forced "to hold [his] urine or bowel movement in painful, inhumane discomfort." (Plaintiff's Affidavit, docket #14.)

¹ Count times are as follows: 6:15 a.m., 11:15 a.m., 4:15 p.m., Head Count at Dusk, 9:15 p.m., 10:30 p.m., 12:15 a.m., 2:15 a.m., and 4:15 a.m. (Ex. C. to Special Report.)

Viewing the summary judgment evidence in a light most favorable to Plaintiff, the Court finds that Plaintiff's temporary confinement in a cell without a toilet six times during waking hours did not amount to a sufficiently serious deprivation to be considered cruel and unusual punishment. While it is unfortunate that Plaintiff had to hold his urine and bowel movement over short periods of time during his incarceration at MSU, such occurrences cannot be considered a serious deprivation amounting to punishment. Therefore, Defendants' motion for summary judgment must be granted.

B. Conspiracy to Inflict Cruel and Unusual Punishment

In Count II of his amended complaint, Plaintiff alleges that Defendants conspired to inflict pain by causing him to hold his bodily functions or receive a disciplinary violation for using the restroom.

To establish a prima facie case of a conspiracy to violate constitutional rights, "a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights." Snell v. Tunnel, 920 F.2d 673, 701 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (quoting Dixon v. City of Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990)); see also Scherer v. Balkema, 840 F.2d 437, 441 (7th Cir.), cert. denied, 486 U.S. 1043 (1988). The gist of a civil conspiracy is the deprivation and not the conspiracy. The conspiracy is merely the mechanism by which to obtain the necessary state action or to impose liability on one defendant for the acts of others performed in pursuance of the conspiracy.

Plaintiff cannot recover on his claim of conspiracy because he cannot establish an actual deprivation of his Eighth Amendment rights for having to hold his bowel movements during "lock-down count" times. Therefore, Defendants' motion for summary judgment must be granted as to this claim as well.

C. Retaliation

In Count III of his amended complaint, Plaintiff alleges numerous instances of retaliation for filing four civil actions against DOC officials. Specifically, he alleges that Defendants (1) fired him from his prison job; (2) removed a state issued typewriter from his cell; (3) denied copy and notary services at MSU; (4) charged him with bogus disciplinary violations; (5) transferred him on three different occasions; (6) placed him in segregated confinement in the Restrictive Housing Unit (RHU); (7) deprived him of constitutional rights during disciplinary proceedings; (8) denied him access to legal material and to the prison law library; (9) tampered with his mail; (10) confiscated his legal materials; and (11) denied him shampoo and subjected him to extreme cold temperatures while in RHU at MACC.

Plaintiff was incarcerated at DCCC between October 21, 1992, and December 15, 1993; at HMCC between December 15, 1993, and March 10, 1994; and at MACC between March 10, 1994, and August of 1994.

The following is a chronology of the events:

(1) On October 13, 1993, Plaintiff filed a civil rights action against Warden Ron Champion and Officer Joe Whatley for excessive use of force, failure to investigate the excessive use of force, and deliberate

indifference to his serious ankle condition. See Wirtz v. Champion, 93-C-920-B.

(2) On October 19, 1993, Lazelle fired Plaintiff from his inmate law clerk job. Lazelle also removed a state-issued typewriter from Plaintiff's cell.

(3) On October 19 and 20, 1993, Plaintiff was exposed to toxic fumes from fresh paint while the day-room floors of his unit were being painted and suffered severe headaches, breathing difficulties, and nausea for the next couple of days. On October 29, 1993, Plaintiff filed a civil rights action against Champion and Lazelle, alleging a violation of his Eighth Amendment rights. Wirtz v. Champion, 93-C-970-E.

(4) On November 12, 1993, Plaintiff initiated a Mandamus action in Osage County seeking restoration of Statutory good time credits.

(5) In late November and early December 1993, Lazelle and Alexander prevented Plaintiff from placing third-party billed telephone calls to a New Mexico state court judge who was handling Plaintiff's child custody case.

(6) On December 1, 1993, Officer Gary Shedd issued an offense report for Individual Disruptive Behavior because Plaintiff was at the drinking fountain outside his cell after count had been announced. Plaintiff was found guilty and sentenced to fifteen days of disciplinary segregation and fined \$10.00.

(7) On December 6, 1993, Alexander charged Plaintiff with a misbehavior report for failing to abide by a direct order not to use the restroom.

(8) On December 9, 1993, Alexander and Lazelle submitted a transfer request for Plaintiff.

(9) Plaintiff was transferred to HMCC on December 15, 1993.

(10) On December 27, 1993, Plaintiff initiated the instant action against Lazelle and Alexander.

(11) On March 7, 1994, Plaintiff was grabbed by the arms by another inmate. Both inmates were placed in segregation and charged with battery. Following a hearing on March 10, 1994, Plaintiff was found guilty of battery and sentenced to 30 days of punitive segregation. Plaintiff was transferred to MACC the same day.

(12) While in punitive segregation at MACC, Plaintiff received four additional misconducts, resulting in an additional 90 days of solitary confinement.

(13) On May 4, 1994, Plaintiff prepared a motion for leave to amend the instant action to name McGee, Boone, and Ward as defendants.

While prisoners have no independent expectation that they will never be transferred, placed in segregated confinement, or fired from a prison job during incarceration, prison officials nevertheless deprive an inmate of his constitutional rights by transferring him to another prison, by placing him in segregated confinement, or by firing him from his prison job in retaliation for exercising his constitutionally protected rights. Smith v. Maschner, 899 F.2d 940, 947-48 (10th Cir. 1990). Plaintiff's retaliation claims are controlled by Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Therefore, to make out a prima facie case of retaliation, Plaintiff bears the burden of demonstrating that his conduct was constitutionally protected and that the retaliation was a substantial or motivating factor behind Defendants' action. The burden then shifts, and Defendants must prove by a preponderance of the evidence that they would have taken the same action in the absence of the protected conduct. Id. at 287. If the undisputed facts "demonstrate that the challenged action would have been taken on the valid basis alone, and such a conclusion will frequently be readily drawn in the context of prison administration where we have been cautioned to recognize that 'prison officials have broad administrative and discretionary authority over the institutions they manage,'" the

Court should find that the prisoner was not denied his constitutional right. Sher v. Coughlin, 739 F.2d 77, 82 (2d Cir. 1984) (quoting Hewitt v. Helms, 459 U.S. 460 (1983)).

The filing of a lawsuit is a constitutionally protected act. The constitutional right of access to the courts is guaranteed by the First Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments. Green v. Johnson, 977 F.2d 1383, 1389 (10th Cir. 1992); Smith, 899 F.2d 940, 947. Thus, Plaintiff has satisfied part of his initial burden under Mount Healthy, 429 U.S. at 287.

1. Firing from Prison Job and Transfer from DCCC to HMCC

Plaintiff's first claim of retaliatory conduct regards the termination of his prison job as an inmate law clerk less than a month after filing his first civil rights action, Wirtz v. Champion, 93-C-920-B.² Plaintiff has raised a question of fact as to whether the suit was a motivating or "but for" factor in the termination of his prison job as an inmate law clerk. See McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979). He has countered Lazelle's affidavit (attached to Defendants' Motion to Supplement, docket #39) that he was fired for smuggling non-legal papers in RHU, for becoming abusive and attempting to intimidate staff members, and for continuing to work on his personal legal matters.

² Prisoners have no liberty or property interests in receiving or retaining a job while in prison. Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991).

(Affidavits attached to Plaintiff's Response to Motion to Supplement, docket #44.) Moreover, it remains undisputed that the October 1993 Monthly Inmate Evaluation reveals that Plaintiff was "fired by Lazelle [on] October 18, 1993" for no reason at all. (Special Report, attachment J.) The firing, therefore, calls Lazelle's intent into question. (Ex. J to Special Report). "Where defendants' motives are seriously at issue, trial by affidavit is . . . inappropriate." Smith, 899 F.2d at 949. Lastly, Plaintiff's allegations and the difference in timing are enough to require more than summary judgment. See Harris v. Fleming, 839 F.2d 1232, 1236-38 (7th Cir. 1988).

Plaintiff also has raised a genuine issue of material fact as to his claims of retaliatory transfer from DCCC to HCCC and placement in segregated confinement for exercising his constitutional right of access to the courts. The circumstantial evidence in this case leads the Court to conclude that a jury could reasonably find that Defendants Lazelle and Alexander took disciplinary actions against Plaintiff and transferred him to HCCC at least in part on improper motives. Plaintiff has supported his allegation of retaliatory disciplinary action and transfer on the basis of suspicious timing of disciplinaries and transfer. (Ex. L to Special Report.) Therefore, the Court concludes that on the present record summary judgment is improper on Plaintiff's claims of retaliatory firing from prison job, retaliatory transfer to HMCC, and retaliatory filing of disciplinary charges at DCCC.

3. Denial of Typewriter and Copy Services at MSU

While Plaintiff's right of access to the courts may have been a motivating factor in the removal of the state-issued typewriter from his cell and denial of copy and notary services at MSU, the summary judgment evidence reveals that Defendants would have reached the same decision in any event. Warden Ron Champion prohibited all inmates from having typewriters in their cells.³ (Special Report at 4.) Additionally, Plaintiff had access to copy and notary services at the DCCC's Medium Security Unit law library as all other minimum security inmates at MSU. (Ex. K to Special Report.) The fact that Plaintiff was subject to strip searches every time he sought access to the law library is immaterial to his retaliation claim since all minimum security inmates were routinely strip searched prior to entering the law library at the Medium Security Unit. Therefore, Defendants are entitled to judgment as a matter of law on Plaintiff's retaliation claim with regard to the typewriter and the denial of notary services.

3. Transfer from HMCC to MACC and Battery Charge

Plaintiff has not shown his rights of access to the courts were a motivating factor in his battery charge and subsequent transfer to MACC on March 10, 1994. Under Mount Healthy, Plaintiff must do more than simply show that an unconstitutional motive

³ In any event, removal of a typewriter is too insubstantial to give rise to a claim of constitutional consequence. Typewriters are not constitutionally mandated. See Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989).

played some part in an otherwise legal action; he must show that but for the unconstitutional motivation, the action would not have been taken. Since Plaintiff has not met his burden in the instant case, causation fails and there is no constitutional deprivation. In any event, Defendants have demonstrated that they would have reached the same decision with regard to the transfer.

On March 7, 1994, Plaintiff was grabbed by the arms by another inmate. Both inmates were placed in segregation and charged with battery. Following a hearing on March 10, 1994, Plaintiff was found guilty of battery and given thirty days of punitive segregation, loss of 365 earned credits, and a \$15.00 fine. Plaintiff was transferred to RHU at MACC the same day. On March 29, 1994, Warden Ron Ward overturned the loss of 365 earned credits as the punishment received by both parties was uneven. Dolores Ramsey, Director Designee, affirmed the decision on April 11, 1994. (Exs. T, W, Z, AA, BB, CC, and DD to Special Report.)

Mindful of the "broad range of discretion" afforded prison officials, Hewitt v. Helms, 459 U.S. 460, 467 (1982), and of the prudence of not second-guessing administrative findings, the Court concludes that this charge alone was an adequate basis justifying Plaintiff's transfer. Thus, Defendants are entitled to judgment as a matter of law on Plaintiff's retaliatory transfer claim to MACC.

Defendants are also entitled to judgment as a matter of law to the extent Plaintiff contends that his due process rights were violated during the disciplinary hearing. Plaintiff alleges he did not have the necessary information to prepare a defense to the

bogus battery charge and he was denied the right to call witnesses. (Ex. Y to Special Report.) To determine if Plaintiff's procedural due process rights were violated in connection with the March 10, 1994 disciplinary hearing, the Court must first determine whether Plaintiff had a liberty or property interest with which the State has interfered. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Because the Due Process Clause, itself, does not create a protected liberty interest in remaining in the general population, Plaintiff must show that state law created such an interest. See Hewitt, 459 U.S. 460, 468-69.

The Supreme Court recently reformulated the test for determining whether a state law creates a protected liberty interest. See Sandin v. Connor, 115 S.Ct. 2293 (1995).⁴ In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnell, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976).⁵ Under Sandin, therefore,

⁴ The Supreme Court's decision in Sandin applies retroactively to the instant case because the Court applied the rule announced in Sandin to the parties in that case. See Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993) (no court may refuse to apply rule of federal law retroactively once the Court applies it to the parties before it).

⁵ Under Hewitt, in order for a state law establishing procedural guidelines for prisons to create a liberty interest, the law must use "explicitly mandatory language" that forbids certain outcomes absent "specific substantive predicates." Hewitt, 459 U.S. at 472. This approach focused on the language of the regulation rather than the nature of the deprivation and "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Sandin, 115 S.Ct. at 2299.

courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id.

Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue in the case at hand. The deprivation allegedly suffered by Plaintiff, 30 days in disciplinary segregation for the battery charge, is not of the "atypical" or "significant" kind that the Supreme Court has determined constitute deprivations in which a state might create a liberty interest. See Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (fourteen days in disciplinary segregation as a result of a misconduct did not implicate any liberty interest pursuant to Sandin). The conditions in disciplinary segregation are not dramatically different from what prisoners expect to encounter in the general population. Since no liberty interest was implicated, the Court finds that Plaintiff was not even entitled to a hearing. See Brown v. Champion, 1995 WL 433221 (10th Cir. July 24, 1995) (unpublished opinion) (inmate was not entitled to hearing because no constitutional liberty interest was implicated either by his ten-day disciplinary segregation or by his reclassification by prison officials).

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim of retaliatory transfer from HMCC to

MACC.

4. Disciplinary Charges and Retaliatory Actions at MACC

Finally, Plaintiff broadly asserts numerous instances of retaliatory conduct on the part of prison officials at MACC. He alleges that he was (1) charged with four disciplinaries shortly after his arrival at MACC, (2) deprived of his legal materials, direct access to the courts, mail, shampoo, and pens, and (3) subjected to extreme cold temperatures and frequent "shake downs." It is beyond dispute that inmates must not be subject to retaliation or harassment for the pursuit of their legal claims. See Smith, 899 F.2d 940, 947. However, Plaintiff must do more than merely allege retaliatory conduct due to his exercise of a constitutionally protected right. Rather, Plaintiff must show that "prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985). Plaintiff has failed to make such showing as to these last claims of retaliatory conduct. The mere fact that officials at MACC knew of his civil rights actions against officials at DCCC does not necessarily imply that they took any retaliatory action.

Even if Plaintiff could demonstrate that his exercise of protected rights was a factor in his continued confinement in RHU at MACC, there remain no genuine issues of material facts that segregation would have continued in the absence of the protected

rights. From March 13 through April 29, 1994, Plaintiff was charged with two misconducts for Destruction of State Property, and one misconduct each for Disrespect to Staff and Disobedience to Orders. Plaintiff received an additional ninety days in punitive segregation for these misconducts. Plaintiff has offered no proof to support his contention that these actions were a pretext for retaliation. He pled guilty to two of the misconducts and at no time challenged the other two misconducts on the ground that they were in retaliation for exercising his constitutional right of access to the courts. In any event, the charges alone were sufficient to justify continued confinement in RHU. Accordingly, summary judgment is proper on this claim. (Ex. JJ to Special Report.)

Defendants are also entitled to summary judgment on Plaintiff's claims of denial of legal material and direct access to the prison law library while in RHU at MACC. Plaintiff received assistance from Law Library Supervisor Troy Henry and four trained inmate research assistants. Even though MACC's RHU space limitations restrict inmates on RHU to only one cubic foot of legal materials, Plaintiff was allowed to select the materials he wished to retain in his cell from the large amount of legal materials he had accumulated. He was then allowed to exchange materials at a later date. Therefore, Plaintiff cannot demonstrate that his legal materials were confiscated but for his legal activities. (Exs. X, FF, GG, II, OO, QQ, SS to Special Report.)

Similarly, Plaintiff cannot demonstrate that his legal mail

was opened and that his personal mail was not delivered but for his legal activities. The fact that Plaintiff's legal mail was opened on two occasions is insufficient to establish that there was a pattern and practice of opening Plaintiff's incoming legal mail outside his presence. At the most Plaintiff's allegations, viewed in a light most favorable to Plaintiff, amount to no more than negligence. Moreover, the summary judgment evidence reveals that Plaintiff received personal mail on a regular basis while in RHU. (Exs. NN and PP to Special Report.)

Lastly, summary judgment is proper as to Plaintiff's claims that Defendants denied him shampoo and pens, and subjected him to extreme cold temperatures and frequent "shake downs" while in RHU at MACC. Plaintiff was not the only inmate denied shampoo and pens, as he implies. Rather all RHU inmates were denied possession of shampoo containers and pens. Similarly, DOC policy provides for frequent, random "shake downs" of inmates' cells for security reasons. Moreover, all RHU inmates at MACC were subjected to the same temperatures as Plaintiff due to the unseasonal cold weather. The steam boiler in the RHU is turned off annually from April 15 until October 15. (Exs. TT and UU to Special Report.)

D. Qualified Immunity

In seeking summary judgment, Defendants in part rely upon the defense of qualified or "good faith" immunity. In Flanagan v. Munger, 890 F.2d 1557, 1567 (10th Cir. 1989), the Tenth Circuit Court of Appeals succinctly explained the qualified immunity

standard:

Under Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818, 102 S.Ct. at 2738. The qualified immunity standard articulated above focuses on the objective legal reasonableness of an official's conduct measured against clearly established law at the time he acted. Id. In order to strip an official of qualified immunity for violating an individual's constitutional right, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

When a defendant moves for summary judgment on the basis of qualified immunity such as the Defendants do here, "the burden is on the plaintiff to marshal facts showing that (1) the defendants' conduct violated the law, and (2) the law was clearly established when the violation occurred." Applewhite v. United States Air Force, 995 F.2d 997, 1000 (10th Cir. 1993), cert. denied, 114 S.Ct. 1292 (1994). Once a plaintiff endeavors to make such a showing, a defendant "must then establish that no material facts preclude summary judgment on the basis of qualified immunity." Id.

Plaintiff's retaliation claims which survive summary judgment identify a clearly established constitutional right. It has long been established that "[p]rison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts." Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) and cases compiled therein. Therefore, qualified immunity does not protect Defendants for their actions.

E. Eleventh Amendment Immunity

To the extent Plaintiff has sued Defendants in their official capacities, Defendants are not "persons" within the meaning of section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 (1989); Croft v. Harder, 927 F.2d 1163, 1164 (10th Cir. 1991). This protection flows from the State's Eleventh Amendment Immunity. See Will, 491 U.S. at 66. Therefore, Defendants are entitled to judgment as a matter of law as to all claims asserted against them in their official capacities.

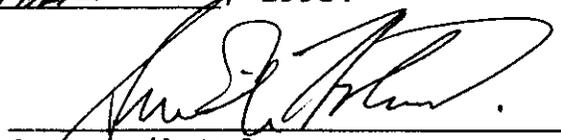
III. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants are entitled to judgment as a matter of law as to all claims alleged against them in their official capacities and as to the following claims alleged against them in their individual capacities: cruel and unusual punishment, conspiracy to inflict cruel and unusual punishment, and all retaliation claims except for retaliatory firing from prison job and transfer from DCCC to HMCC. Accordingly, Defendants' motion for summary judgment (docket #33) is hereby **granted in part and denied in part**. Plaintiff's motions to vacate protective order and to extend time to submit affidavits (docket #66 and #67) are

granted. Defendant's motion to strike (docket #70) is granted.

IT IS SO ORDERED.

This 29TH day of SEPTEMBER, 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID WAYNE LAWSON aka DAVID)
 W. LAWSON aka DAVID WAYNE)
 LAWSON, SR.; JOANN MCGREW fka)
 JOAN MARIE LAWSON aka JOANN M.)
 LAWSON aka JOANN MARIE)
 LAWSON; SOONER FEDERAL)
 SAVINGS ASSOCIATION through its)
 conservator RESOLUTION TRUST)
 CORPORATION as receiver for SOONER)
 FEDERAL SAVINGS; ROLLING OAKS)
 AMENDED OWNERS ASSOCIATION)
 INC.; CITY OF SAND SPRINGS,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
 Defendants.)

FILED

SEP 29 1995

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

Civil Case No. 95-C 238H

ENTERED IN CLERK'S OFFICE
OCT 02 1995
DATE _____

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of Sept,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; the Defendant, SOONER FEDERAL SAVINGS
ASSOCIATION through its conservator Resolution Trust Corporation as receiver for Sooner
Federal Savings, appears not having previously filed its disclaimer; and the Defendants,
DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON,

FILED IN CLERK'S OFFICE IMMEDIATELY
UPON RECEIPT.

SR.; JOANN MCGREW fka JOAN MARIE LAWSON aka JOANN M. LAWSON aka JOANN MARIE LAWSON; ROLLING OAKS AMENDED OWNERS ASSOCIATION, INC., and CITY OF SAND SPRINGS, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON, SR. will hereinafter be referred to as ("DAVID WAYNE LAWSON"); and the Defendant, JOANN MCGREW fka JOAN MARIE LAWSON aka JOANN M. LAWSON aka JOANN MARIE LAWSON will hereinafter be referred to as ("JOANN MCGREW"). The Court further finds that the Defendant, DAVID WAYNE LAWSON, is a single, unmarried person, and has been so since taking title to the real property which is the subject matter of this action as stated in his affidavit filed on July 28, 1995 with the Court Clerk.

The Court being fully advised and having examined the court file finds that the Defendant, DAVID WAYNE LAWSON, acknowledged receipt of Summons and Complaint via certified mail on July 7, 1995; that the Defendant, JOANN MCGREW, acknowledged receipt of Summons and Complaint via certified mail on June 13, 1995; that the Defendant, SOONER FEDERAL SAVINGS ASSOCIATION through its conservator Resolution Trust Corporation as receiver for Sooner Federal Savings, acknowledged receipt of Summons and Complaint via certified mail on March 17, 1995; that the Defendant, ROLLING OAKS AMENDED OWNERS ASSOCIATION, INC., acknowledged receipt of Summons and Complaint via certified mail on May 24, 1995; and that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on March 20, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on March 30, 1995; that the Defendant, SOONER FEDERAL SAVINGS ASSOCIATION through its conservator Resolution Trust Corporation as receiver for Sooner Federal Savings, filed its Disclaimer on March 31, 1995; and that the Defendants, DAVID WAYNE LAWSON, JOANN MCGREW, ROLLING OAKS AMENDED OWNERS ASSOCIATION, INC., and CITY OF SAND SPRINGS, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

LOT TWENTY-FIVE (25), BLOCK TWO (2), ROLLING OAKS AMENDED, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on September 6, 1985, the Defendants, DAVID WAYNE LAWSON, SR. and JOAN MARIE LAWSON, executed and delivered to NORWEST MORTGAGE, INC. their mortgage note in the amount of \$67,450.00, payable in monthly installments, with interest thereon at the rate of eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DAVID WAYNE LAWSON, SR. and JOAN MARIE LAWSON, then Husband and Wife, executed and delivered to NORWEST MORTGAGE INC. a mortgage dated September 6, 1985, covering the above-described property. Said

mortgage was recorded on September 9, 1985, in Book 4890, Page 83, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 6, 1985, NORWEST MORTGAGE, INC. assigned the above-described mortgage note and mortgage to GMAC MORTGAGE CORPORATION OF IOWA. This Assignment of Mortgage was recorded on September 9, 1985, in Book 4890, Page 87, in the records of Tulsa County, Oklahoma. A correct Assignment was filed on September 12, 1985 in Book 4891, Page 907, in the records of Tulsa County, Oklahoma. Said Assignment was further corrected and filed on September 12, 1985, in Book 4948, page 219, in the records of Tulsa County, Oklahoma; and was further corrected and filed on June 11, 1985, in Book 4949, Page 2165 in the records of Tulsa County, Oklahoma.

The Court further finds that on January 5, 1989, GMAC Mortgage Corporation of Iowa assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, DC, his successors and assigns. This Assignment of Mortgage was recorded on January 12, 1989, in Book 5161, Page 118, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1989, the Defendant, DAVID WAYNE LAWSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1990 and September 1, 1990.

The Court further finds that the Defendant, DAVID WAYNE LAWSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and

conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DAVID WAYNE LAWSON, is indebted to the Plaintiff in the principal sum of \$124,487.41, plus interest at the rate of 11 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$50.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$47.00 which became a lien as of June 25, 1993, and a lien in the amount of \$46.00 which became alien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DAVID WAYNE LAWSON, JOANN MCGREW, ROLLING OAKS AMENDED OWNERS ASSOCIATION INC., and CITY OF SAND SPRINGS, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, SOONER FEDERAL SAVINGS ASSOCIATION through its conservator Resolution Trust Corporation as receiver for Sooner Federal Savings, disclaims any right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, DAVID WAYNE LAWSON, in the principal sum of \$124,487.41, plus interest at the rate of 11 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$143.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, DAVID WAYNE LAWSON , JOANN MCGREW, SOONER FEDERAL SAVINGS ASSOCIATION through its conservator Resolution Trust Corporation as receiver for Sooner Federal Savings, ROLLING OAKS AMENDED OWNERS ASSOCIATION INC., CITY OF SAND SPRINGS, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$143.00, personal property taxes which are currently due and owing.

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

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

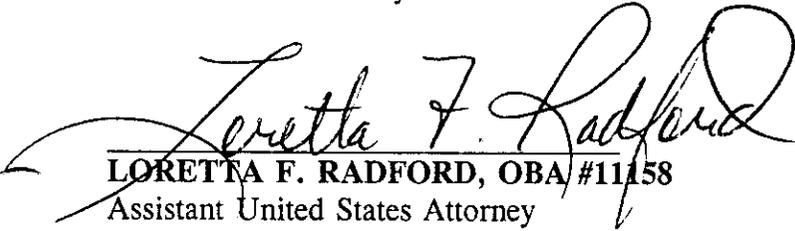
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ SVEN ERIK HOLMES

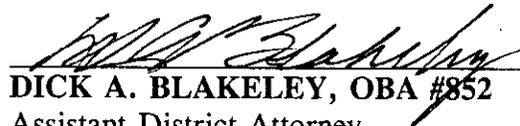
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 238H
LFR/lg

SEP-2

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID WAYNE LAWSON aka DAVID)
 W. LAWSON aka DAVID WAYNE)
 LAWSON, SR.; JOANN MCGREW fka)
 JOAN MARIE LAWSON aka JOANN M.)
 LAWSON aka JOANN MARIE)
 LAWSON; SOONER FEDERAL)
 SAVINGS ASSOCIATION through its)
 conservator RESOLUTION TRUST)
 CORPORATION as receiver for SOONER)
 FEDERAL SAVINGS; ROLLING OAKS)
 AMENDED OWNERS ASSOCIATION)
 INC.; CITY OF SAND SPRINGS,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.

FILED
SEP 14 1995

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

Civil Case No. 95-C 238H

APPLICATION FOR
ENTRY OF DEFAULT JUDGMENT

The Plaintiff, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, shows to the Court that Defendant, DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON, SR., acknowledged receipt of Summons and Complaint via certified mail on July 7, 1995; the Defendant, JOANN MCGREW fka JOAN MARIE LAWSON aka JOANN M. LAWSON aka JOANN MARIE LAWSON, acknowledged receipt of Summons and Complaint via certified mail on June 13, 1995; the Defendant, ROLLING OAKS AMENDED OWNERS ASSOCIATION INC., acknowledged receipt of Summons and

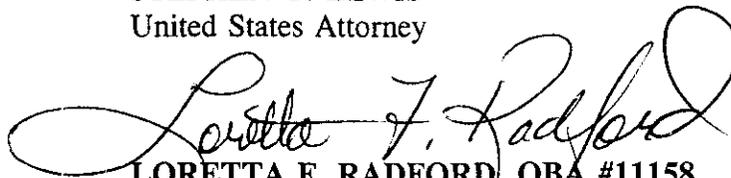
Complaint on May 24, 1995; and the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on March 20, 1995.

The time within which the Defendants could have answered or otherwise moved has expired and has not been extended. The Defendants, DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON SR.; JOANN MCGREW fka JOAN MARIE LAWSON aka JOANN M. LAWSON aka JOANN MARIE LAWSON; ROLLING OAKS AMENDED OWNERS ASSOCIATION INC., and CITY OF SAND SPRINGS, Oklahoma, have not answered or otherwise moved and default has, therefore, been duly entered.

The Plaintiff, United States of America, is therefore entitled to recover the amounts shown in the Complaint, and upon failure to pay the same, Plaintiff is entitled to foreclosure of its mortgage and sale of the subject property as prayed for in the Complaint.

WHEREFORE, Plaintiff prays that the Court enter default judgment against the Defendants, DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON SR.; JOANN MCGREW fka JOAN MARIE LAWSON aka JOANN M. LAWSON aka JOANN MARIE LAWSON; ROLLING OAKS AMENDED OWNERS ASSOCIATION INC., and CITY OF SAND SPRINGS, Oklahoma, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure as prayed for in the Complaint, including the costs of this action.

UNITED STATES OF AMERICA
STEPHEN C. LEWIS
United States Attorney



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LFR/lg

SPEAKER & MATTHEWS, P.C.

Susan J. Speaker

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(918)584-3539
Attorney for the Federal Deposit
Insurance Corporation

FILED

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

SEP 29 1995

ja

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

CONAGRA FERTILIZER COMPANY, d/b/a)
THE CATOOSA FERTILIZER TERMINAL, a)
Nebraska corporation,)

Plaintiff,)

vs.)

TRUCKERS EXPRESS, INC., a Delaware)
corporation,)

Defendant.)

Case No. 94-C-766-E ✓

ENTERED ON DOCKET
OCT 02 1995
DATE

J U D G M E N T

In accord with the Findings of Fact and Conclusions of Law filed this date, the Court hereby enters judgment in favor of the Plaintiff, ConAgra Fertilizer Company, and against the Defendant, Truckers Express, Inc., in the amount of \$61,843.20, plus interest from this date forward at the legal rate. Costs and attorney fees may be awarded upon proper application.

DATED this 29th day of September, 1995.

James O Ellison

JAMES O ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

29

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA SEP 29 1995**

CHARLES A. McCOMBS,)
)
 Plaintiff,)
)
 vs.)
) **Civil Action No. 93-C-1037-H**
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security)
 Administration,)
)
 Defendant.)

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

**ENTERED ON DOCKET
DATE OCT - 2 1995**

ORDER

Before the Court for consideration is Plaintiff, CHARLES A. McCOMBS' Motion for Award of Attorney's Fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

Plaintiff asks for an award of attorney's fees in the amount of \$1,755. Defendant has no objection to an award of \$1,390.43 in attorney's fees, plus costs of \$140.00, for a total of \$1,530.43. According to Plaintiff's Reply Brief, Plaintiff has no objection to the lower amount.

Therefore, the Court hereby awards attorney's fees in the amount of \$1,390.43, plus costs of \$140.00, for a total of \$1,530.43. The Bill of Costs hearing set for October 11, 1995 at 10:00 a.m. is hereby stricken.

IT IS SO ORDERED this 28 day of September, 1995

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE