

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

FILED

OCT 30 1995

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

SHIRLEY H. ST. CLAIR,

Plaintiff,

v.

NO. 94-C-244-M ✓

DONNA E. SHALALA
Secretary of HHS,

Defendant.

ENTERED
OCT 31 1995
DATE

JUDGMENT

Judgment is hereby entered for the **Defendant** and against Plaintiff. Dated this 30th day
of Oct., 1995.

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

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

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

SHIRLEY H. ST. CLAIR,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA¹)
Secretary of HHS,)
)
Defendant.)

NO. 94-C-244-M

ORDER

ENTERED
DATE OCT 31 1995

Plaintiff, Shirley H. St. Clair, 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.

Ms. St. Clair, who was 48 years old at the time of her application, completed high school and received some vocational training at a truck driving school [R. 92]. She has not been engaged in substantial gainful employment activity since November, 1988 [R. 100]. Most recently she had been employed as an apartment manager, collecting rent payments, maintaining bookkeeping and accounting records, managing yard and apartment maintenance crews and supervising employees, [R. 94-95, 158-160]. She has also worked as a secretary, an elderly/disabled care provider, and has experience in shop labor and production line work, [R. 93-99]. Ms. St. Clair claims she is disabled within the meaning of the Social Security Act and has been under a disability since December 18, 1988. She claims disability due to osteoarthritis,

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.

lumbar and cervical degenerative disc **disease** with associated pain and also complains of breathing problems due to asthma and obstructive pulmonary disease [R. 192, 258, 265, 395].

Ms. St. Clair's June 12, 1990 **application** for disability benefits was denied September 28, 1990. The denial was affirmed on **reconsideration**. A hearing before an Administrative Law Judge (ALJ) was held on September 9, 1991 in Tulsa, Oklahoma. On behalf of the Secretary, the ALJ concluded that Ms. St. Clair had **the residual** functional capacity for sedentary and light work activities and was not disabled **under the** Appendix 2 guidelines [R. 371-384]. The Appeals Council, upon review, remanded **Ms. St. Clair's** claim for a supplemental hearing for the purpose of taking oral testimony of a **vocational** expert and for further consideration of third party statements (letters from Ms. St. Clair's mother and former mother-in-law) [R. 390-392]. This was done and the ALJ entered his **decision** on August 19, 1993 determining the Plaintiff could not perform her past relevant work **but that** she was capable of performing the full range of sedentary work [R. 57-74]. His **decision was** upheld by the Appeals Council and thus became the Secretary's final decision for purposes of **judicial** review [R. 6-7].

Ms. St. Clair has filed this appeal **contending** that the ALJ's finding that she can perform a full range of sedentary work is not **supported by** substantial evidence in the record and that the record failed to support the ALJ's **finding that** Plaintiff had acquired skills which are transferable to jobs which the vocational expert testified **are** available to Plaintiff.

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). If supported by substantial

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

The undersigned United States **Magistrate** Judge finds that the ALJ has adequately and correctly set forth the relevant facts of **this case** and has properly outlined 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 record of the proceedings **before** the Social Security Administration has been meticulously reviewed by the Court. **Ms. St. Clair's** medical records reflect a lengthy history of treatment for asthma and chronic obstructive pulmonary disease [R. 265,276,429-433]. The records also show successful treatment of **this condition** with medication and Moxair Inhaler [R. 265, 395]. There is some evidence of **complaints** of back pain by Plaintiff as early as 1989 [R. 275]. However, notes regarding Plaintiff's **complaints** of back pain to Bat Shunatona, M.D. during that time period were eclipsed by notes regarding her coughing, "mid-life crisis", ingrown toe nails, moles, warts, cysts, **stomach** problems and hip pain [R. 274-284]. A 1989 MRI showed "vertebral bodies are normal **in alignment**...no evidence of compression deformities or abnormal marrow signal intensity." **There** was disc degeneration and a very small disc herniation which resulted in "some **nerve root** entrapment and disruption of the epidural fat planes" [R.270]. She was prescribed **Ibuprofen** by Dr. Shunatona for treatment of right hip pain [R. 277]. Plaintiff underwent surgery to **remove** four toe-nails in 1990 [R. 285-295]. Since Plaintiff is not claiming disability due to **any** problems stemming from this condition, these

records are of no value in determining this claim.

The first substantive appearance of complaints of back pain appears in the record at page 296 when Dr. Richard G. Cooper, D.O., examined and evaluated the Plaintiff in September, 1990. His examination revealed that she stood erect, walked with a good gait, range of motion of the spine was recorded at 40 degrees, flexion was at full range, extension at 30 degrees and right rotation at 45 degrees. She had full range of motion in her knees, shoulders, hips, ankles, wrists, elbows and fingers. He noted that Plaintiff had filled out the patient information sheet with very neat block printing, that she had normal grip strength, biceps, triceps and shoulder shrug and good sensation and reflexes. His opinion was that she would have impairment in prolonged standing, walking, bending, twisting, and lifting. Dr. Cooper also noted her complaints of asthma and that she smokes a pack of cigarettes a day [R. 296-299].

In 1991, Ellen I. Zanetakis, M.D. examined Ms. St. Clair at Dr. Shunatona's request [R. 300-306, 343]. She found that Plaintiff's gait, muscle strength and neurologic exam were within normal limits. Her finding was "probable osteoarthritis with low back pain and muscle spasm". She prescribed Voltaren 75mg. and Flexeril 10 mg.

Dr. Shunatona then sent Ms. St. Clair to Comprehensive Therapy Consultants for physical therapy [R. 308-321]. Her complaints of discomfort were noted as "subjective only". She was provided with a TENS unit with which she realized dramatic improvement, decreased pain and more freedom of movement [R. 316, 317, 328, 351].

Another evaluative examination was performed by J.M. Bazih, M.D. on March 12, 1991 [R. 338]. He reported that Ms. St. Clair was in good general condition and in no acute distress. Dr. Bazih noted Plaintiff's complaints of pain during range of motion tests for which he

prescribed a muscle relaxant and anti-inflammatory medication to take with antacids.

Residual Physical Functional Capacity Assessments signed by Luther Monroe Woodcock, M.D. and Vallis D. Anthony, M.D. recorded exertional limitations at occasionally lifting 50 pounds, frequently lifting 25 pounds, standing about 6 hours in an 8-hour workday, sitting (with normal breaks) for a total of about 6 hours in an 8-hour workday and with no push and/or pull limitations [R. 246-267]. None of Plaintiff's treating physicians have diagnosed her as having disabling pain and none have prescribed pain medication beyond occasional muscle relaxants.

At the time of the first hearing, September 9, 1991, Ms. St. Clair's medications consisted of Theo-Dur and a Maxair inhaler. She testified that she used an "over-the-counter" pain reliever without aspirin for "relief from back pain for restful sleep" [R. 344]. No other medication list appears in the record and, at the supplemental hearing on June 23, 1993, Plaintiff testified that she uses a heating pad, lays down or rolls up into a ball or just "suffers it out" when she experiences back pain [R. 109, 144-145]. The Plaintiff testified that she was capable of attending crafts classes, playing cards [R. 140], working on crafts and mending [R. 141, 157], working on ceramics [R. 107], running the vacuum [R. 141], doing laundry and dishes [R. 142], lifting 16 pounds [R. 147], going to grocery and department stores and the post office [R. 157], driving [R. 137], climbing a step ladder and washing windows [R. 125-126], and that she could spend fifteen to twenty minutes at a time cross-stitching [R. 106].

The record also contains a "personal log" which appears to be a calendar with notations made, presumably in Plaintiff's handwriting, on a daily basis of Plaintiff's condition and complaints from April, 1991 through September 1991 [R. 345-350]. Plaintiff charted her breathing complaints and rated her days as: "g - good (normal), f-fair (little difficulty), h-heavy

(hard to breathe), I-impossible (stay inside)". The Court notes that the majority of the days Plaintiff noted to be "fair" and that breathing problems were managed with the "inhaler" and "staying inside". Plaintiff's chart for rating her back pain, "bp", were "d-dull (normal), m-moderate, s-severe, u-unbearable". Again most days were recorded as "moderate" and episodes of pain were reported after doing household chores and taking car trips to Ohio, Eureka Springs, Arkansas and Flint Ridge, Oklahoma. She wrote that during her car trips she rode for two hours before taking a break to walk and stretch [R. 347, June 27; R.348, July 6]. Plaintiff's calendar notes also show that back pain was managed with "Equate" at bedtime. On May 30, 1995, Plaintiff recorded that she sat for 30 minutes then laid down and she rated the day as "moderate" for back pain [R. 346]. Plaintiff diaried on August 11, 1991, that she "could only sit 30-45 minutes at a time"; an indication that this was a significant occurrence and a decrease in her expectations as to sitting time.

The record supports the ALJ's finding that Plaintiff is capable of performing sedentary work. Sedentary Work is defined as follows:

20 CFR §404.1567 Physical exertion requirements.

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

The Court finds that the ALJ properly assessed Plaintiff's residual functional capacity to perform the full range of sedentary work as defined in 20 CFR §404.1567(a); Social Security Ruling 83-10. The ALJ considered Plaintiff's complaints, medical records, recitation of her daily activities and her appearance and actions at the hearings. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal

standards established by the Secretary and the courts.

Plaintiff asserts that the evidence in this case does not support a finding that the Plaintiff has acquired skills which are transferable to jobs the Plaintiff is capable of performing. Plaintiff's relevant former work included management of apartment complexes two separate times [R. 94-95, 118-120, 158-160, 199]. One position consisted of essentially a "one-person" operation where she performed the physical work associated with maintaining the apartments as well as the office work, such as collecting rent [R. 119, 158]. The other position consisted of supervising the physical work which was performed by work crews [R. 159]. In this job, she hired and fired employees, collected rent, occasionally showed an apartment and maintained some accounting records [R. 93-99, 159]. Plaintiff listed her basic duties as an apartment manager on the Vocational Report as follows:

Rented out apartments, collected rents; evicted non-paying tenants; did payroll reports, supervised lawn and maintenance crew; did banking deposits; cleaned and painted apartments; supervised cleaning ladies; directed contract labors (such as painters, carpet installers) kept rent rolls; made monthly rental reports; conducted interviews for hiring new employees; discharged employees when necessary; made daily bank deposit reports via telephone to home office; relieved managers at other complexes for time off. I operated typewriter, calculator, 10-key, answering machine, copy machine. I supervised other employees numbering from 5 to 15.

Record, at page 199.

At the supplemental hearing, the ALJ elicited testimony from the vocational expert establishing the prevalence of occupations Plaintiff could perform given her age, education, work experience and residual functional capacity [R. 169-176]. The ALJ considered Plaintiff's impairments and acknowledged her limited ability to sit for prolonged periods. The vocational expert submitted a comprehensive resume for the record and, at the outset of the hearing, acknowledged that she had examined the medical records of Plaintiff and attended her testimony.

The vocational expert specifically referred to the second apartment management job held by the Plaintiff as the foundation for the transferable skills she had acquired [R. 169]. The jobs available that Plaintiff could perform in the sedentary level included billing and accounting clerks, some of the duties performed by Plaintiff in her former position.

The Plaintiff contends that the testimony of the vocational expert was ambiguous and that the ALJ erred in applying the "grids" based upon that testimony. Transferable skills are defined in 20 CFR §404.1568(d) as "skilled or semi-skilled work activities [done] in past work [that] can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs." See *Goatcher v. U.S. Dept. of Health & Human Services*, 52 F.3d 288, (10th Cir. 1995); also *Podedworny v. Harris*, 745 F.2d 210 (3rd Cir. 1984). A skill is knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level. It is practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner, *SSR 82-41, Social Security Rulings*, at 197-98 (Cum.Ed.1982). A vocational expert may be called to determine whether claimant's skills acquired in past employment will transfer to a category of work at the exertional level the ALJ has concluded the claimant can perform, *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991).

There is no requirement that the vocational expert or the ALJ set forth in detail the particular acquired skills which are transferable:

Although appellant did not testify at the hearing about the clerical skills--auditing cash reports, invoicing, and the like--that she acquired while working for TG&Y, she did disclose them in her vocational report. R. at 167-72 (ex. 10). Thus, the VE's testimony was based on evidence of record, and it constitutes substantial evidence to support the ALJ's decision.

Goatcher, supra.

The sedentary jobs in the region identified by the vocational expert as available to Plaintiff using skills transferable from her previous work experience were receptionist, billing clerk and new account clerk. The Descriptions of those jobs found in the Dictionary of Occupational Titles at 205.367-014, 214.362-042 and 237.367-038 include duties listed by Plaintiff on her vocational report [R. 199] and in her testimony [R. 93-99, 159]. The ALJ's questioning of the vocational expert was proper and addressed the impairments he found were supported by substantial evidence, *Talley v. Sullivan*, 908 F.2d 585 (10th Cir. 1990). The vocational expert's responses were based upon evidence of record and constitute substantial evidence to support the ALJ's decision.

The record supports a denial of benefits. The Court finds that the ALJ 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 ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 30th DAY OF OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE

FILED

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

OCT 30 1995 *m*

JOHN W. KEETH,)
)
Plaintiff,)
)
vs.)
)
JACK WRIGHT, an individual,)
and SOUTHWEST LABORATORY OF)
OKLAHOMA, INC., an Oklahoma)
Corporation,)
Defendants.)

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

Case No. 95-C-977-BU ✓

ENTERED
DATE OCT 30 1995

ORDER

This matter comes before the Court upon the motion of Plaintiff, John W. Keeth, to remand this action to the Tulsa County District Court. In response, Defendants, Jack Wright and Southwest Laboratory of Oklahoma, Inc., represent that they do not object to Plaintiff's motion since it appears from the motion that Plaintiff is not relying upon federal law for his claims against Defendants. Because Plaintiff is not relying upon federal law as the basis for his claims against Defendants and the Court otherwise lacks subject matter jurisdiction over this matter, the Court finds that Plaintiff's motion should be granted.

Accordingly, the Court GRANTS Plaintiff's Motion to Remand (Docket Entry #3). This action is REMANDED to the Tulsa County District Court. The Clerk of the Court is DIRECTED to mail a certified copy of this Order to the Clerk of the Tulsa County District Court.

ENTERED this 30 day of October, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 30 1995



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

RUSSELL MCINTOSH,
Plaintiff,

vs.

BOATMEN'S FIRST NATIONAL BANK
OF OKLAHOMA,

Defendant.

CASE NO. 94-C-929-B ✓

ENTERED ON DOCKET

DATE OCT 31 1995

ORDER

This matter comes on for consideration of Defendant Boatmen's First National Bank of Oklahoma's (Boatmen's) Motion For Summary Judgment (docket entry # 71).

BACKGROUND

This is a companion case to Marion Parker v. BancOklahoma Mortgage Co., et al, Case No. 92-C-664-B. Both Parker and the present Plaintiff McIntosh, black males who work as real estate appraisers, alleged in each case that the defendant and other bank and mortgage companies continuously denied their respective applications for employment because of their race. In the present case there is no allegation of conspiracy of action among the defendants¹ as was present in Parker.

Plaintiff Russell McIntosh (McIntosh) attempted to join the Parker case as a party plaintiff but his Motion To Enter Case As

¹ There were originally a number of defendants in the present matter. Boatmen's remains now as the only defendant.



Plaintiff was denied by this Court on August 30, 1994, the Court concluding that the various claims of Parker and McIntosh involved arguably common issues of law but that "said claims factually arise from separate transactions and occurrences or series of transactions and occurrences." McIntosh filed this action on October 3, 1994.²

Boatmen's filed a motion for summary judgment contending plaintiff's claim is time-barred by the Fair Housing Act's two year statute of limitations period. Boatmen's also argues that plaintiff cannot establish a prima facie case of hiring discrimination under the FHA because it is undisputed that Boatman's had no opening for an appraiser. Boatmen's further contends that the FHA does not apply to plaintiff's claim because it is silent as to employment discrimination, does not contain terms of art typically used in employment legislation, and does not provide remedies typically used in employment legislation.

McIntosh responds that he tried to intervene in the Parker case on January 22, 1993, but was not allowed to do so (the Court concluded McIntosh had no standing in the Parker case). Plaintiff further avers that Boatman's had a need for appraisers when it discarded his employment applications at various times between 1988 and March, 1992.

² As the Court stated in an earlier Order, it is not readily understood why counsel for Plaintiff McIntosh would join various defendants under claims which factually are separate and disparate, absent an allegation of conspiracy of action, in view of the Parker rulings.

UNDISPUTED FACTS

The following is Defendant's statement of undisputed facts:³

1. McIntosh, a black male and a residential real estate appraiser, claims that he sought, but was denied, employment or work with Woodland Bank, Boatmen's predecessor, in September, 1987; between 1988 and 1990; in February, 1990, and in March 1992.

2. On each of these occasions, McIntosh claims to have sent Boatmen's his resume and sample appraisals in an attempt to obtain employment as an appraiser for conventional real estate loans made by Boatmen's.

3. McIntosh admits that the materials sent to Boatmen's were not in response to any advertisement or solicitation by Boatmen's. He further admits that he did not know if Boatmen's needed additional appraisers to perform appraisals at the time he submitted his materials.

4. At those times when McIntosh sent a resume, Boatmen's had no opening or need for an additional conventional appraiser and was not seeking applicants for such position.

5. Boatmen's did not employ an in-house staff of conventional appraisers.

6. Over the years, Boatmen's established an ongoing professional relationship with several outside independent

³ Rather than responding to Boatmen's statement of undisputed facts in compliance with Local Rule 56.1, Plaintiff set forth his own statement of undisputed facts. Plaintiff also set forth two "Controverted Facts", based solely upon his own affidavit, stating that (1) Boatmen's was in need of appraisers because of increased business, and (2) it was Boatmen's custom to use in house appraisers or to use outside independent appraisers which denied black appraisers work.

appraisers and utilized these appraisers for its conventional lending needs. Such appraisers were able to perform all of the conventional appraisal work that Boatmen's needed to be done.

7. Any unsolicited resumes were merely thrown away. In this way all "applicants" were treated the same way. They were all summarily rejected because Boatmen's had no need for their services.

8. Boatmen's use of conventional appraisers was in part controlled by the requirements of the secondary mortgage companies whom purchased conventional loans from Boatmen's. Boatmen's did not keep any conventional loans in the bank but sold them as soon as possible. In order to sell them, Boatmen's had to meet the requirements of the companies purchasing loans from it. One requirement was the use of an appraiser approved by them. Boatmen's used appraisers who were on a number of approved lists to insure its conventional loans were readily marketable.

9. McIntosh did not seek employment as a conventional appraiser with Boatmen's after March 1992.

10. McIntosh admits he has not evidence that the independent appraisers utilized by Boatmen's were unable to meet or handle all of Boatmen's conventional appraisal needs.

11. McIntosh admits he has no evidence that he was treated worse than any other person who sought employment at Boatmen's as a conventional appraiser.

12. McIntosh admits he has no evidence, other than his personal belief, that race played any role in his not obtaining employment at Boatmen's as a conventional appraiser.

LEGAL ANALYSIS

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

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

". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

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

THE STATUTE OF LIMITATIONS ISSUE

Section 3613(a)(1)(A) of the Fair Housing Act provides a two year limitations period within which a civil action must be brought by persons making claims as those claimed by McIntosh, as follows:

"An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice"

It is undisputed that Plaintiff did not seek employment as a conventional appraiser with Boatmen's after March, 1992. This action was filed October 3, 1994, approximately two and one-half years after the last alleged incident, clearly beyond the two year permitted period.

Nor does McIntosh's attempt to bootstrap this action to the Parker matter persuade the Court. Plaintiff's Complaint states:

"Comes now the plaintiff, Russell McIntosh, and pursuant to the Tenth Circuit Court ruling and this district court's ruling in Case No. 92-C-664-B does hereby state that his cause of action relates back to the filing of the case previously cited"

Plaintiff argues that the statute of limitations was tolled when Plaintiff filed his Motion To Intervene in the Parker case (on January 22, 1993), or at least when he filed a Complaint in the Parker case (March 3, 1993), citing U.S. for the Use and Ben. of Canion v. Randall & Blake, 817 F.2d 1188 (5th Cir.1987). Randall & Blake addresses the timeliness of an action where a motion to

intervene was filed within the limitations period, was granted after that period expired, and the intervenor then filed a complaint in the action. That is not our case here. McIntosh filed a motion to intervene in another case, which was denied and then he filed, without Court permission, a complaint in the other case, the latter being dismissed by this Court on August 30, 1994, due to lack of McIntosh's standing.

Further, in the absence of a statute to the contrary, a limitations period is not tolled during the pendency of a dismissed action. Courts, in Title VII matters which bare great similarity to the present matter, have routinely held that the filing of a complaint that is dismissed without prejudice does not toll the statutory filing. Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959 (10th Cir. 1991); Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029 (10th Cir.1994); Pipkin v. United States Postal Service, 951 F.2d 272 (10th Cir.1991).

McIntosh also claims Oklahoma's state law tolling/saving statute provides him a protected period within which to file a new complaint after dismissal without prejudice of an existing complaint. When Congress has provided a federal statute of limitations for a federal claim, as herein, state tolling and saving provisions are not applicable. Brown, at 961.

Lastly, Boatmen's argues, and the Court agrees, that McIntosh's claim could not conceivable relate back to the Parker case because McIntosh did not assert a failure to hire claim against Boatmen's in that case.

The Court concludes that McIntosh's claim against Boatmen's is

barred by the two year statute of limitations as provided in the Fair Housing Act. Boatmen's motion for summary judgment on this issue should be and the same is hereby GRANTED.

Notwithstanding the Court's conclusions regarding the statute of limitations issue, the Court will hereinafter discuss the remaining issues brought forth in Boatmen's motion.

PLAINTIFF'S PRIMA FACIE CASE

Boatmen's contends Plaintiff cannot establish a prima facie case of hiring discrimination under the FHA because it is undisputed that Boatmen's had no opening for an appraiser. Boatmen's offers the affidavit of Nicholas E. Fitzgerald⁴ to establish that at the times McIntosh submitted resumes to Boatmen's seeking appraisal work or employment, Boatmen's had no opening or need for additional conventional appraisers and was not seeking applicants for such position.

McIntosh's deposition testimony is the main evidence submitted by him to counter Fitzgerald's statements. McIntosh admitted he had no evidence that Boatmen's needed someone to do conventional appraisals or that the bank was seeking applicants. Failure to prove the existence of a job opening is a fatal defect in a prima facie case of overt discrimination. Chavez v. Temple U. High School Dist. No. 213, 565 F.2d 1087, 1091 (9th Cir.1977); Jones v. Unisys Corp., 54 F.3d 624, 631 (10th Cir.1995). Further, the mailing of unsolicited resumes do not constitute an application for purposes

⁴ Fitzgerald, at the time of the affidavit, was Vice President of Retail Commercial Lending at Boatmen's and previously, during the time period in issue herein, was Senior Vice President (responsible for all aspects of the bank's lending functions) of Woodland Bank, Boatmen's predecessor.

of satisfying the application element of the prima facie case of discrimination. Tagupa v. Board of Directors, 633 F.2d 1309 (9th Cir.1980).

McIntosh also testified that he had no evidence, other than his personal belief, that race played any role in his not getting employment at Woodland Bank, Boatmen's predecessor.

To establish a claim of failure-to-hire race discrimination under FHA a plaintiff must prove: (1) that he belongs to a racial minority; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and, (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of the complainant's qualifications. Faulkner v. Super Valu Stores, Inc., 3 F.2d 1419, 1427 (10th Cir.1993); Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793 (10th Cir.1993)(abrogated on other grounds, 51 F.3d 227).

Plaintiff has failed to meet the burden imposed by Rule 56, Federal Rules of Civil Procedure. Winton Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). Celotex, supra, requires a party, against whom summary judgment supported by competent evidence is sought, to make a showing sufficient to establish the existence of the contested element essential to that party's case, and on which that party will bear the burden of proof at trial. Plaintiff has wholly failed to do so herein. Therefore, the Court concludes Boatmen's Motion For Summary Judgment on this issue should be and the same is hereby GRANTED.

APPLICATION OF THE FHA TO PLAINTIFF'S CLAIM

Boatmen's contends that the FHA does not apply to plaintiff's claim because it is silent as to employment discrimination, does not contain terms of art typically used in employment legislation, and does not provide remedies typically used in employment legislation. This Court, in Parker, decided that issue contrary to Boatmen's position, relying principally upon Favors v. MAQ Management Corp., 753 F.Supp. 941 (N.D.Ga.1990). Favors held "This Court declines to torture §3606⁵ into allowing such a scheme that so undermines the purposes of the Fair Housing Act. There is no reason to assume that Congress did not intend to reach hiring in the housing section because of the existence of Title VII." Id. at 944. While acknowledging a dearth of authority on the issue, the Court sees no reason to depart from its previous conclusions. Accordingly, Boatmen's Motion For Summary Judgment should be and the same is hereby DENIED on such issue.

SUMMARY

In summary, the Court GRANTS Boatmen's Motion For Summary Judgment on the statute of limitations issue, GRANTS Boatmen's Motion For Summary Judgment on the prima facie case issue, and DENIES Boatmen's Motion For Summary Judgment on the issue of the application of the Fair Housing Act to Plaintiff's claims herein. A Judgment in accordance with the Court's Order will be simultaneously entered herein.

⁵ Parker brought his action under 42 U.S.C. §3601 *et seq.*

IT IS SO ORDERED this 30th day of October, 1995.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 30 1995

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

RUSSELL McINTOSH,
Plaintiff,

vs.

BOATMEN'S FIRST NATIONAL BANK
OF OKLAHOMA,
Defendant.

CASE NO. 94-C-929-B ✓

ENTERED ON DOCKET

DATE OCT 31 1995

J U D G M E N T

In accord with the Court's Order, filed simultaneously herewith, granting Boatmen's Motion For Summary Judgment by holding that the statute of limitations bars Plaintiff's claims herein, granting Boatmen's Motion For Summary Judgment on the prima facie case issue by holding that Plaintiff has failed to establish a prima facie case, and denying Boatmen's Motion For Summary Judgment on the issue of the application of the Fair Housing Act to Plaintiff's claims herein by holding that the Fair Housing Act applies to alleged discriminatory hiring practices, the Court grants Judgment in favor of Boatmen's First National Bank of Oklahoma and against Plaintiff on issues one and two and in favor of Plaintiff and against Defendant on issue three.

Costs are assessed against Plaintiff if timely applied for pursuant to Local Rule 54.1, and each party is to bear its own attorneys fees.

IT IS SO ORDERED this 30th day of October, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 30 1995

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

VERNETTA B. CARTER,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-920-J

REMOVED ON DECKET

10-31-95

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Secretary's decision has been entered. Consequently, judgment for the Defendant and against the Plaintiff is hereby entered.

It is so ordered this 30 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

12

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VERNETTA B. CARTER,

Plaintiff,

v.

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

Defendant.

FILED

OCT 30 1995

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

No. 94-C-920-J

RECORDED ON DECKET

10-31-95

ORDER²⁾

Plaintiff, Vernetta B. Carter, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³⁾ Plaintiff asserts error because (1) the Secretary improperly rejected the opinion of Plaintiff's treating physician and failed to consider the severity of Plaintiff's impairments, (2) the Secretary failed to describe how Plaintiff could perform her past relevant work, and

¹⁾ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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⁾ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

³⁾ Plaintiff filed an application for disability and supplemental security insurance benefits on November 14, 1991. *R. at 27*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 9, 1992. *R. at 43*. By order dated February 26, 1993, the ALJ determined that Plaintiff was not disabled. *R. at 27-36*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On November 7, 1994 the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. *R. at 4*.

(3) the Secretary failed to properly consider and evaluate the testimony of the vocational expert. For the reasons discussed below the Court affirms the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born November 21, 1948. *R. at 91.* Plaintiff completed high school, and obtained an associate degree from Oklahoma Junior College in Secretarial Administration. *R. at 47.*

Plaintiff was admitted to Hillcrest Medical Center on July 3, 1991 for aseptic meningitis.⁴¹ *R. at 135.* Plaintiff was discharged on July 10, 1991, after treatment. *R. at 135.* A chest X-ray was interpreted as showing mild pleural scarring of the lungs. *R. at 135.* An MRI performed by Tulsa Magnetic Imaging on July 8, 1991 was reported as "unremarkable." *R. at 158.* On July 3, 1991, a C.T. Brain Scan was interpreted as normal. *R. at 162.*

On July 16, 1991 Plaintiff was admitted to Hillcrest Medical Center on complaints of left leg pain, dizziness, and loss of appetite. *R. at 216.* A left leg venogram conducted July 16, 1991 by Thomas D. Roberts, M.D. revealed extensive

⁴¹ Meningitis is defined as "inflammation of the membranes of the spinal cord or brain." Taber's Cyclopedic Medical Dictionary 1192 (17th ed. 1993). "Acute aseptic" is defined as "a nonpurulent form of meningitis usually running a short, benign course with recovery. Usually due to viral infection." Id.

deep venous thrombosis.⁵¹ *R. at 222.* Plaintiff was discharged and instructed to follow up with her physician within the next week.

On July 27, 1992 Plaintiff was admitted to Hillcrest Medical Center based on complaints of chest pain. *R. at 229.* An X-ray taken July 27, 1992, showed no sign of active heart disease, but indicated some "possible obstructive lung disease." *R. at 229.* Plaintiff was diagnosed with "chest pain, etiology undetermined," and "post phlebitic syndrome of the left leg secondary to previous history of repeated deep venous thrombosis." *R. at 230.* A diagnostic imaging report, on July 28, 1992, noted that the "lack of perfusion defects suggests very low probability of pulmonary embolus." *R. at 242.*

Dr. David Copple, by letter dated December 16, 1992, states that he believes Plaintiff cannot be employed in an effort which requires her to remain on her feet, but that she might be able to be retrained to a sedentary position. Dr. Copple noted that Plaintiff had difficulty ambulating and had swelling in her legs. *R. at 267-77.*

Plaintiff testified that she worked as a medical transcriptionist until July 1991, and that she also previously worked as a secretary and a motel manager. *R. at 47-50.* Plaintiff stated that she stopped working due to her meningitis, encephalitis⁶¹,

⁵¹ Thrombosis is defined as "the formation, development, or existence of a blood clot or thrombus within the vascular system. This is a life-saving process when it occurs during hemorrhage. It is a life-threatening event when it occurs at any other time because the clot can occlude a vessel and stop the blood supply to an organ or a part. The thrombus, if detached, becomes an embolus and occludes a vessel at a distance from the original site; for example, a clot in the leg may break off and cause a pulmonary embolus." Taber's Cyclopedic Medical Dictionary 1990 (17th ed. 1993).

⁶¹ Plaintiff notes that she was admitted for seven days for treatment at Hillcrest for meningitis and encephalitis. Plaintiff's admission diagnosis is listed as aseptic meningitis. *R. at 135.* The consulting physician listed "herpes encephalitis" as a "consideration." *R. at 141.*

and blood clots. *R. at 51-53.* According to Plaintiff she currently sees her doctor every two and one-half months. Plaintiff stated that the farthest she can walk is about fifteen feet, and she must keep her leg elevated or it swells. *R. at 55.* Plaintiff described the current pain in her leg as feeling similar to a tight band around her leg. *R. at 58.* In addition, Plaintiff stated that she has a sharp pain in her calf about four times each day, which will sometimes just go away, but at times she has to put heat on it. Plaintiff testified that the pain lasts, on average, 15 or 20 minutes. *R. at 79-80.* Plaintiff stated that she does cook for two of her children, washes dishes, crochets, needlepoints, watches television, reads newspapers, and attends church (Sundays and one Tuesday per month),⁷¹ *R. at 58-61.*

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.⁸¹ See 20 C.F.R. § 404.1520. Disability under the Social Security

⁷¹ In a disability report submitted to the Social Security Administration, Plaintiff notes "brain surgery 1/18/93" for a "brain aneurysm." *R. at 122.* However, no medical records which are before the Court substantiate this notation.

⁸¹ Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Act is defined as the

inability to engage in **any** substantial gainful activity by reason of any medically **determinable** physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act 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 in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams,

844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff could perform her past relevant work, with some restrictions. The ALJ concluded that although Plaintiff has severe deep venous thrombosis of the left leg, her impairments do not prevent her from working. The ALJ additionally found that Plaintiff should be limited to lifting no more than ten pounds and should elevate her left leg while working. *R. at 33.*

IV. REVIEW

Treating Physician

Plaintiff initially asserts that the ALJ improperly weighed the evidence from Plaintiff's treating physicians. However, the record does not support Plaintiff's assertion.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards

a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

The ALJ's opinion indicates that the treating physician's opinions were considered. The ALJ determined that Plaintiff could perform work at the sedentary level, but with restrictions permitting Plaintiff to have her left leg elevated. *R. at 32-33*. The ALJ, relying upon the vocational expert, decided that Plaintiff could perform her past work as a medical transcriptionist or her past secretarial positions with these restrictions. *R. at 72-73*.

Plaintiff testified that she saw her treating physician, Dr. Copple, approximately every two and one-half months. *R. at 54-55*. Dr. Copple treated Plaintiff for deep venous thrombosis, chest pain, and aseptic meningitis. On December 16, 1992, Dr. Copple, in a letter addressed "to whom it may concern," noted that Plaintiff has difficulties in ambulation and leg swelling. *R. at 267*.

I feel that Ms. Carter's condition is such that she cannot be employed in any gainful occupation, particularly that requiring any effort at being on her feet. I do feel that she can ambulate somewhat, however, she does have pain with walking. In addition, I feel that this patient is disabled for any type of occupation unless she were to be trained in some type of sedentary occupation, however, I would not like her to be in a sitting position continuously.

R. at 267-68. The ALJ noted that the treating physician's advice was consistent with a finding that Plaintiff could perform sedentary work (as a medical transcriptionist or secretary) with some additional limitations. *R. at 31*.

In addition, an RFC assessment, completed by Dr. Copple on March 15, 1993 lists Plaintiff's limitation for lifting (on an infrequent basis) as five to twenty pounds,

and carrying (on an infrequent basis) as five to ten pounds. In addition, Plaintiff's use of her feet for pushing/pulling was marked as limited, but Plaintiff's use of her hands for repetitive movement and grasping was marked as not restricted.⁹¹ *R. at 19-20.*

⁹¹ Dr. Copple additionally completed a **Mental Assessment Form** on Plaintiff, noting that Plaintiff's ability to deal with the public, use judgment with the public, deal with work stresses, and function independently were all "fair" based on Plaintiff's "pain in both legs as well as chronic edema and tenderness." Plaintiff's remaining abilities were all marked "good." *R. at 22-24.* Although Dr. Copple is Plaintiff's treating physician for her venal thrombosis, nothing in the record indicates that he treats Plaintiff with respect to any mental condition.

A separate "mental" assessment was conducted on Plaintiff on February 11, 1992 by Donald R. Inbody, M.D. Although Dr. Inbody did not complete the same form as Dr. Copple, Dr. Inbody notes that Plaintiff's attention, concentration, and judgment appeared intact, that no evidence of memory loss was present, and that no psychotic symptomology was noted. *R. at 172.* In addition, Plaintiff denied any complaints of psychiatric problems. *R. at 171.* Dr. Inbody notes that Plaintiff has minimal memory loss due to her encephalitis, but is recovering with no treatment. *R. at 172.* Dr. Inbody concluded that Plaintiff could handle her own finances. *R. at 172-173.*

The ALJ completed a **Psychiatric Review Technique Form**, noting that Plaintiff had a mild memory impairment, but was recovering. *R. at 34.* The ALJ also marked the following: restrictions of activities of daily living -- slight; difficulties in maintaining social functioning -- slight; deficiencies of concentration - seldom; episodes of deterioration -- never. The ALJ discussed these findings in his opinion. *R. at 31.* To meet a Listing, Plaintiff's abilities must be "marked" in at least two of these four areas. 20 C.F.R. Pt. 404, App. 1 § 12.02.

In *Cruse v. United States Department of Health & Human Services*, 49 F.3d 614 (10th Cir. 1995), the Tenth Circuit Court of Appeals analyzed mental impairments, the listings, degrees of limitation, and the mental assessment form (like the one completed by Dr. Copple). The *Cruse* court noted that the Mental Assessment form does not directly correlate to the four areas in the Listings (i.e., restrictions of daily living, difficulty in maintaining social functioning, deficiencies of concentration, and episodes of deterioration). *Id.* at 618. The Court concluded that a description of "fair" on the form (which was defined as "ability to function in this area is seriously limited but not precluded") is equivalent to the listing definition of "marked." *Id.* at 618.

In this case, Dr. Copple, Plaintiff's physician rated Plaintiff as "fair," or marked, in four of the fifteen "categories" on the Mental Assessment form. The ratings were explained by "patient has pain in both legs as well as chronic edema and tenderness." *R. at 22.* These ratings are relatively close to the social functioning category of the Listings. At best, Plaintiff would qualify for only one "marked" rating. In addition, as noted above, the ALJ determined that Plaintiff's ability to work was limited, and required her to be able to elevate her leg. The vocational expert testified that an additional reasonable accommodation for Plaintiff would include "having individuals provide assistance in performing her job task, of obtaining files, filing and so forth." *R. at 73.* Some of the categories marked "fair" by Plaintiff's doctors are related to these accommodations.

Furthermore, Plaintiff was evaluated by Dr. Inbody who determined that Plaintiff merely had minimal memory loss, and her ability to function was unaffected.

Plaintiff does not allege, as error, the ALJ's failure to correctly evaluate and weigh the evidence related to Plaintiff's mental status. In addition, in her application for disability insurance benefits, Plaintiff alleges disability related only to "phlebitis of left leg" and "brain surgery." *R. at 87.* Regardless, due to the evidence in the record, including the mental assessment by Dr. Inbody, and Plaintiff's own claims that her mental status remains unaffected, the Court finds that the ALJ's conclusions are supported by substantial evidence.

Furthermore, an MRI conducted on July 9, 1991 was interpreted as unremarkable. *R. at 207.* A diagnostic imaging report, conducted on July 28, 1992, was interpreted as indicating that Plaintiff had a "very low probability of pulmonary embolus." *R. at 242.*

Contrary to Plaintiff's assertion, the ALJ's opinion does not indicate that the medical evidence from Plaintiff's treating physicians was "improperly rejected."

Plaintiff additionally asserts that the ALJ failed to consider the "severity of all of Plaintiff's impairments in combination." Plaintiff does not elaborate on exactly what factors the ALJ failed to consider, and a review of the ALJ's opinion indicates he adequately addressed Plaintiff's alleged impairments. Initially, the ALJ summarized the medical records, Plaintiff's testimony (including allegations of pain), and concluded that Plaintiff has deep venous thrombosis which causes significant problems. *R. at 31.* The ALJ determined that the remaining effects from Plaintiff's meningitis were minimal, and were adequately addressed by a restriction requiring Plaintiff to keep her foot elevated while working. *R. at 31.* Although the ALJ found Plaintiff's credibility "good," the ALJ determined that Plaintiff's pain was only moderate and would not interfere with her performance. *R. at 31-32.*

Past Relevant Work

Plaintiff, with no elaboration, alleges that the ALJ failed to make adequate findings of fact to support the conclusion that Plaintiff could work. Although the Social Security Regulations require that the ALJ make certain findings, in this case, the ALJ adequately met that requirement.

The Social Security Regulations provide that an ALJ should make specific factual findings with respect to a claimant's ability to work. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ determined that Plaintiff retained the residual functional capacity to perform sedentary work with the restriction of no lifting over ten pounds, and the requirement that Plaintiff be permitted to keep her foot elevated. *R. at 33*. The ALJ additionally determined that Plaintiff's past relevant work did not require activities which were precluded by these limitations. *R. at 33*. In addition, the ALJ consulted a vocational expert with respect to the availability of jobs for an individual which had the above-described limitations, and inquired as to Plaintiff's ability to perform her prior work. *R. at 72-76*. The ALJ concluded that Plaintiff's impairments did not prevent her from performing her past work. *R. at 33*.

Plaintiff fails to explain how or in what manner the ALJ neglected to adequately make findings as to Plaintiff's ability to work. The ALJ's decision and the testimony of the vocational expert indicate that the ALJ adequately satisfied the regulations.

Vocational Expert

Plaintiff additionally alleges that the ALJ failed to adequately consider the vocational expert's testimony. Although the ALJ determined that Plaintiff's credibility was "good," the ALJ is not bound to **accept** all of Plaintiff's testimony as true. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990) (ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ); Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992) (credibility determinations by the trier of fact are given great deference on review).

In this case, the ALJ evaluated Plaintiff's complaints of pain in accordance with Luna¹⁰⁾ and determined that Plaintiff's pain was mild and would not interfere with her performance of work-related activities. *R. at 32*. The ALJ additionally evaluated Plaintiff's testimony concerning her limitations, and determined that Plaintiff should be permitted to elevate her foot and **should** be restricted to lifting no more than ten pounds. The ALJ's conclusion is **supported** by the record.¹¹⁾

Additionally Submitted Records

Plaintiff requests that the Court consider the medical evidence "attached in Exhibit A." The brief submitted to the Court contains no attachment, and no "Exhibit A." Consequently, the Court is at a loss to determine exactly what "additional"

¹⁰⁾ Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

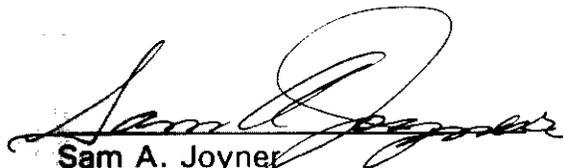
¹¹⁾ Dr. Copple, Plaintiff's treating physician, noted on December 16, 1992, that Plaintiff might be able to perform sedentary activities. Plaintiff testified that she was able to lift a gallon of milk. *R. at 62*. Plaintiff additionally testified that she sat eight hours during the day but needed to keep her leg elevated to prevent swelling. *R. at 57*.

evidence Plaintiff requests the Court to consider. Regardless, a court cannot consider evidence which is not included in the record. Selman v. Califano, 619 F.2d 881, 885 (10th Cir. 1980).

A court can order a remand, requesting the Secretary to consider new and material evidence which was not available at the time of the Secretary's decision. 42 U.S.C. § 405(g). A remand can be granted if Plaintiff establishes that (1) the failure to submit the evidence to the ALJ/Appeals Council was justified,¹²⁾ and (2) the evidence is material (likely to effect the outcome of the decision). Plaintiff does not address why the omitted Exhibit A was not presented below, and Plaintiff does not explain how it is material. Plaintiff merely "prays" that the Court will consider the evidence. However, since the evidence was not attached to Plaintiff's brief, the Court cannot consider it. Regardless, Plaintiff fails to meet the standard for a remand to permit consideration of the evidence by the Secretary.

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 30 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

¹²⁾ Although the Exhibit is not attached, Plaintiff is apparently referring to a May 24, 1994 letter by Dr. Copple. However, by transmittal letter dated August 23, 1994, Plaintiff's attorney sent a copy of a neurological evaluation to the Social Security Administration, which is included in the record on appeal. Plaintiff provides no explanation for the failure to include the May 24, 1994 letter.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLARENCE KING, JR.,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

FILED

OCT 30 1995

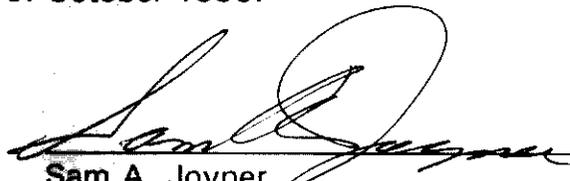
Richard M. Lawrence, Court Clerk
No. 94-C-586-J U.S. DISTRICT COURT

IN CHIEF CLERK
10-31-95

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Secretary's decision has been entered. Consequently, judgment for the Defendant and against the Plaintiff is hereby entered.

It is so ordered this 30 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

12

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

OCT 30 1995

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

LASHAUN D. JOSEPH,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,^{1/})
)
 Defendant.)

No. 94-C-354-J ✓

FILED ON DOCKET
10-31-95

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Secretary's decision has been entered. Consequently, judgment for the Defendant and against the Plaintiff is hereby entered.

It is so ordered this 30 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 30 1995

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

MARILYN DICKERSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

No. 94-C-332-J ✓

ENTERED ON DOCKET

DATE 10-31-95

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Secretary's decision has been entered. Consequently, judgment for the Defendant and against the Plaintiff is hereby entered.

It is so ordered this 30 day of October 1995.



Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

12

RECEIVED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 30 1995

JACK CLARK,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

SAM A. JOYNER
U. S. DISTRICT COURT
MAGISTRATE JUDGE

No. 94-C-770-J ✓

FILED

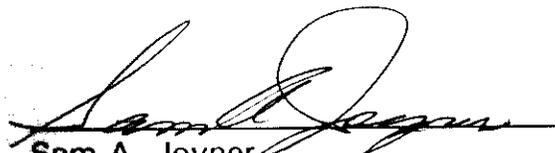
OCT 30 1995

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

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Secretary's decision has been entered. Consequently, judgment for the Defendant and against the Plaintiff is hereby entered.

It is so ordered this 30 day of October 1995.



Sam A. Joyner
United States Magistrate Judge

FILED ON DOCKET

10-31-95

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

capabilities to work either as an owner or an operator of such a restaurant, or it could mean Plaintiff could be an owner and operator. According to the court, if the statement is interpreted to mean that Plaintiff could return to work as an owner and operator of a hot dog restaurant but he did not have, or could not raise, the money to purchase such a venture, then in reality Plaintiff could not return to such work. The case was remanded to more fully develop the record concerning Plaintiff's past relevant work as the owner/operator of a hot dog restaurant and whether in fact Plaintiff could financially afford to buy such an enterprise [R. 191].

The hearing on remand was held November 5, 1992. No additional medical evidence was tendered. Plaintiff's counsel represented that Plaintiff had not received additional treatment [R. 142-3]. Plaintiff was questioned about his job functions as "operator" of Teddy's Coney House. He made the chili, the coneys, and cooked all of the food that was served there, sometimes he worked as cashier [R. 148-9]. He also took care of all the ordering, filled pop cups and kept the place clean [R. 152]. Lifting of supplies was limited to 20 or 30 pounds [R. 161]. Plaintiff's current activities include taking his kids to school, taking care of the yard, cooking and cleaning [R. 151]. In addition, he is building a room onto his house by himself and can lift 50-60 pounds frequently, 100 pounds once in a while [R. 155-6].

The ALJ concluded that Plaintiff has the physical and mental capabilities to perform the work of an owner, owner/operator, and operator of a hot dog restaurant [R. 128]. The ALJ also found that as the owner and/or operator of a hot dog restaurant Plaintiff performed the work of a food service worker [R. 130]. Plaintiff's residual functional capacity of medium work, except for work requiring binocular vision, does not preclude the performance of his past relevant work as a food service worker or the owner/operator of a hot dog restaurant [R. 131].

Plaintiff argues that the case should be remanded because: (1) the Secretary refused to develop the record on the issue of Plaintiff's financial ability to buy a hot dog restaurant; (2) the Secretary failed to consider the availability of Plaintiff's past relevant work; and (3) the finding that Plaintiff can return to his former work is not supported by substantial evidence.

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.

The ALJ questioned Plaintiff about the tasks included in his former capacity, both as owner and as operator of Teddy's Coney House. Based on Plaintiff's testimony, the absence of medical evidence to the contrary, and the testimony of a vocational expert, the ALJ concluded that Plaintiff retained the residual functional capacity to perform the work he performed either as owner or as operator of a hot dog restaurant. He also concluded Plaintiff could engage in the same type work he formerly performed, namely food service worker. Consequently, the ALJ

determined that Plaintiff is not disabled. The Court finds that the ALJ's determination is supported by substantial evidence.

The finding that Plaintiff can return to his prior relevant work as a hot dog restaurant operator (or food service worker) renders any inquiry concerning Plaintiff's ability to purchase a hot dog restaurant irrelevant. Moreover, the record amply supports the determination that Plaintiff possesses the physical and mental capacity to do the actual hands-on work of cooking, serving and cleaning. Accordingly, the Court finds that Plaintiff's financial status is irrelevant to the disability determination.

Availability of past relevant work is not a consideration at step-4 of the sequential analysis. The Tenth Circuit has held that a claimant could return to past relevant work, even though the former job was no longer available. *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045, 1051 (10th Cir. 1993, citing *Jozefowicz v. Heckler*, 811 F.2d 1352, 1356 (10th Cir. 1987)). The appropriate inquiry is not whether the particular job is available, but whether claimant can do the "type" of job performed in the past. *Tillery v. Schweiker*, 713 F.2d 601, 602 (10th Cir. 1983). See also *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 556-7 (6th Cir. 1995); SSR 82-61. The record contains substantial evidence to support the conclusion that light miscellaneous food preparation and supervisory food preparation is the "type" of job Plaintiff formerly performed. Moreover, the record contains substantial evidence of significant numbers of such jobs available in the State of Oklahoma [R. 164-5]. Thus, there is no merit to Plaintiff's argument that the alleged non-availability of Plaintiff's past relevant work requires remand.

The Court finds that the ALJ 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 ALJ's decision. Accordingly, the undersigned United States Magistrate Judge recommends that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED THIS 30th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES E. HARRIS; STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX
COMMISSION; COUNTY TREASURER,
Tulsa County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

ENTERED ON DOCKET

OCT 31 1995

DATE _____

FILED

OCT 31 1995

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

Civil Case No. 95-C 679BU

JUDGMENT OF FORECLOSURE

This matter comes on for **consideration** this 30 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; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendant, CHARLES E. HARRIS, appears not, but makes default.

The Court being fully **advised** and having examined the court file finds that the Defendant, CHARLES E. HARRIS, signed a Waiver of Summons on July 29, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on August 14, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on August 15, 1995; and that the

Defendant, CHARLES E. HARRIS, has **failed** to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that **the Defendant**, CHARLES E. HARRIS, is a single unmarried person.

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 Five (5), Block Three (3), OAK RIDGE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that **on** January 9, 1987, the Defendant, CHARLES E. HARRIS, executed and delivered to **SEARS MORTGAGE CORPORATION**, his mortgage note in the amount of \$40,850.00, payable **in** monthly installments, with interest thereon at the rate of Eight and One-Half percent **(8.5%)** per annum.

The Court further finds that **as** security for the payment of the above-described note, the Defendant, CHARLES E. HARRIS, a single person, executed and delivered to **SEARS MORTGAGE CORPORATION**, a mortgage dated January 9, 1987, covering the above-described property. Said mortgage **was** recorded on January 13, 1987, in Book 4994, Page 2493, in the records of Tulsa County, **Oklahoma**.

The Court further finds that **on** November 30, 1987, **SEARS MORTGAGE CORPORATION**, assigned the above-described mortgage note and mortgage to **INDEPENDENCE ONE MORTGAGE CORPORATION**. This Assignment of Mortgage was recorded on February 5, 1988, in **Book 5078**, Page 2466, in the records of Tulsa County, **Oklahoma**.

The Court further finds that on July 6, 1988, INDEPENDENCE ONE MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 12, 1988, in Book 5113, Page 1915, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 16, 1988, the Defendant, CHARLES E. HARRIS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on June 12, 1989, April 16, 1990, and April 26, 1991.

The Court further finds that the Defendant, CHARLES E. HARRIS, 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, CHARLES E. HARRIS, is indebted to the Plaintiff in the principal sum of \$58,792.36, plus interest at the rate of 8.5 percent per annum from March 23, 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 \$6.00 which became a lien on the property as of July 5, 1989, a lien in the amount of \$5.00 which became a lien on the property as of July 2, 1990, a lien in the amount of \$23.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$9.00 which became a lien on the property as of

June 25, 1993, and a lien in the amount of \$9.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of \$170.27, plus accrued and accruing interest, which became a lien on the property as of October 13, 1988. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CHARLES E. HARRIS, is in default, and has no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, CHARLES E. HARRIS, in the principal sum of \$58,792.36, plus interest at the rate of 8.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 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 \$52.00, plus costs and interest, for personal property taxes for the years, 1988, 1989, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$170.27, plus accrued and accruing interest, for state income taxes, plus the costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and CHARLES E. HARRIS, 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, CHARLES E. HARRIS, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, **STATE OF OKLAHOMA**, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$170.27,
plus accrued and accruing **interest**, for state income taxes.

Fourth:

In payment of Defendant, **COUNTY TREASURER**, Tulsa
County, Oklahoma, in the **amount** of \$52.00, 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.

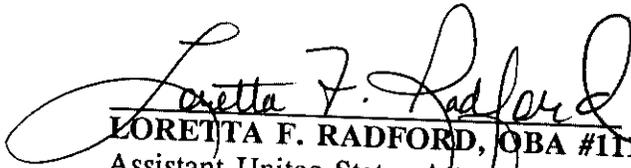
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described **real property**, under and by virtue of this judgment
and decree, all of the Defendants and all **persons** claiming under them since the filing of the
Complaint, be and they are forever **barred and foreclosed**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

s/ MICHAEL BURRAGE

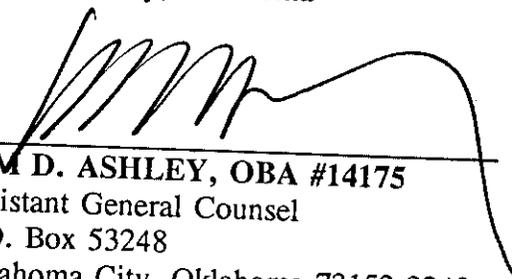
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Board of County Commissioners,
Tulsa County, Oklahoma


KIM D. ASHLEY, OBA #14175
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(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95 C 679BU

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)

Plaintiff,)

v.)

PAUL A. FROESE;)
ELIZABETH FROESE;)
COUNTY TREASURER, Rogers County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Rogers County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET
OCT 31 1995
DATE _____

FILED

OCT 31 1995

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

CIVIL ACTION NO. 95-C-637-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 day of Oct, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, Paul A. Froese and Elizabeth Froese, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Paul A. Froese, executed a Waiver of Service of Summons on August 14, 1995 which was filed on August 21, 1995; and that the Defendant, Elizabeth Froese, executed a Waiver of Service of Summons on July 19, 1995 which was filed on July 24, 1995.

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

It appears that the Defendants, **County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma**, filed their Answer on or about August 30, 1995; that the Defendants, **Paul A. Froese and Elizabeth Froese**, 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 Rogers County, **Oklahoma**, within the Northern Judicial District of Oklahoma:

The North 110 feet of the East 396 feet of the N/2 of the SE/4 of the NE/4 of Section 8, Township 19 North, Range 17 East of the I. B. & M., according to the U.S. Government survey thereof.

The Court further finds that on October 29, 1979, Leonard Ray Castleberry and Robin Lynn Castleberry executed and delivered to Turner Corporation of Oklahoma, Inc., their mortgage note in the amount of **\$26,300.00**, payable in monthly installments, with interest thereon at the rate of **11.5 percent per annum**.

The Court further finds that as security for the payment of the above-described note, Leonard Ray Castleberry and Robin Lynn Castleberry executed and delivered to Turner Corporation of Oklahoma, Inc., a real estate mortgage dated October 29, 1979, covering the above-described property, situated in the **State of Oklahoma, Rogers County**. This mortgage was recorded on October 31, 1979, in **Book 568, Page 77**, in the records of Rogers County, Oklahoma.

The Court further finds that on October 31, 1979, Turner Corporation of Oklahoma, Inc., assigned the above-described mortgage note and mortgage to Federal

National Mortgage Association. This Assignment of Mortgage was recorded on November 1, 1979, in Book 568, Page 165, in the records of Rogers County, Oklahoma.

The Court further finds that on July 27, 1988, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to the Administrator of Veterans Affairs, now known as the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on August 31, 1988, in Book 791, Page 387, in the records of Rogers County, Oklahoma.

The Court further finds that Defendants, Paul A. Froese and Elizabeth Froese, currently hold the fee simple title to the property via mesne conveyances.

The Court further finds that the Defendants, Paul A. Froese and Elizabeth Froese, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Paul A. Froese and Elizabeth Froese, are indebted to the Plaintiff in the principal sum of \$22,729.88, plus administrative charges in the amount of \$418.00, plus penalty charges in the amount of \$66.00, plus accrued interest in the amount of \$850.16 as of May 3, 1995, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs,

have and recover judgment in rem against the Defendants, Paul A. Froese and Elizabeth Froese, in the principal sum of \$22,729.88, plus administrative charges in the amount of \$418.00, plus penalty charges in the amount of \$66.00, plus accrued interest in the amount of \$850.16 as of May 3, 1995, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

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

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

First:

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

Second:

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

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

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

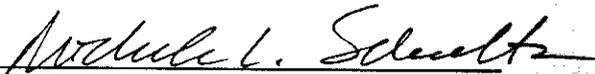
S/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



MICHELE L. SCHULTZ, OBA #13771
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219 South Missouri, Room 1-111
Claremore, Oklahoma 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Case No. 95-C-637-K

PP:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 31 1995

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 MARTY T. BABCOCK;)
 KIMBERLY D. DAKE)
 fka Kimberly D. Babcock;)
 CONNIE MICHELLE BABCOCK;)
 COUNTY TREASURER, Craig County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Craig County, Oklahoma;)
 STATE OF OKLAHOMA ex rel.)
 Oklahoma Tax Commission,)
)
 Defendants.)

FILED

OCT 31 1995

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

CIVIL ACTION NO. 94-C-926-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 day of Oct,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, appear by Clint Ward, Assistant District Attorney, Craig County, Oklahoma; the Defendant, Marty T. Babcock, appears by his attorney Kent Ryals; the Defendant, Connie Michelle Babcock, appears not, having previously filed her Disclaimer; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; and the Defendant, Kimberly D. Dake fka Kimberly D. Babcock, appears not, but makes default.

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

The Court being fully advised and having examined the court file finds that the Defendant, **Marty T. Babcock**, was served by certified mail, return receipt requested, delivery restricted to the addressee on **September 11, 1995** and executed a Waiver of Service of Summons on **September 22, 1995**; that the Defendant, **Connie Michelle Babcock**, executed a Waiver of Service of Summons on **October 4, 1994**; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Entry of Appearance on or about **February 8, 1995**; that the Defendant, **County Treasurer, Craig County, Oklahoma**, was served by certified mail, return receipt requested, delivery restricted to the addressee on **October 3, 1994**; and that the Defendant, **Board of County Commissioners, Craig County, Oklahoma**, was served by certified mail, return receipt requested, delivery restricted to the addressee on **October 3, 1994**.

The Court further finds that Defendant, **Kimberly D. Dake fka Kimberly D. Babcock**, was served by publishing notice of this action in the **Vinita Daily Journal**, a newspaper of general circulation in **Craig County, Oklahoma**, once a week for six (6) consecutive weeks beginning **April 10, 1995**, and continuing through **May 15, 1995**, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by **12 O.S. Section 2004(C)(3)(c)**. Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Kimberly D. Dake fka Kimberly D. Babcock**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last

known address of the Defendant, **Kimberly D. Dake fka Kimberly D. Babcock**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, **United States of America**, acting on behalf of the **Rural Housing and Community Development Service**, formerly **Rural Economic and Community Development**, formerly **Farmers Home Administration**, and its attorneys, **Stephen C. Lewis**, **United States Attorney for the Northern District of Oklahoma**, through **Phil Pinnell**, **Assistant United States Attorney**, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Craig County, Oklahoma**, and **Board of County Commissioners, Craig County, Oklahoma**, filed their Answer and Cross-Petition on or about October 5, 1994; that the Defendant, **Connie Michelle Babcock**, filed her Disclaimer on October 11, 1994; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Answer on or about February 8, 1995; and that the Defendant, **Kimberly D. Dake fka Kimberly D. Babcock**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 30, 1995, **Marty T. Babcock** filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. **95-01599-W**. On July 27, 1995, the United States

Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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

Lot Four (4), in Block Six (6), in Northgate, an addition to the City of Vinita, Oklahoma, according to the recorded plat thereon on file and of record in the office of the County Clerk of Craig County, Oklahoma.

The Court further finds that on October 2, 1986, Theresa J. Cook executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of \$39,000.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Theresa J. Cook, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated October 2, 1986, covering the above-described property, situated in the State of Oklahoma, Craig County. This mortgage was recorded on October 2, 1986, in Book 355, Page 402, in the records of Craig County, Oklahoma.

The Court further finds that on September 5, 1989, Theresa J. Cook, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that on August 10, 1990, the United States of America, acting through the Farmers Home Administration, executed a Release From Personal Liability releasing Theresa J. Cook, a single person, from personal liability for the indebtedness and obligations evidenced by or incurred under the terms of the above-described note, mortgage, and reamortization and/or deferral agreement executed by Theresa J. Cook, a single person.

The Court further finds that on August 15, 1990, Marty T. Babcock and Kimberly D. Babcock executed and delivered to the United States of America, acting through the Farmers Home Administration, their Assumption Agreement thereby assuming the indebtedness of the above described note and mortgage. This Assumption Agreement was in the amount of \$31,215.44, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described assumption agreement, Marty T. Babcock and Kimberly D. Babcock executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated August 15, 1990, covering the above-described property, situated in the State of Oklahoma, Craig County. This mortgage was recorded on August 15, 1990, in Book 377, Page 616, in the records of Craig County, Oklahoma.

The Court further finds that on May 4, 1993, the United States of America, acting through the Farmers Home Administration, executed a Release From Personal Liability releasing Kimberly D. Babcock from personal liability for the indebtedness and obligations evidenced by or incurred under the terms of the above-described assumption agreement and mortgage executed by Kimberly D. Babcock.

The Court further finds that **the Defendant, Marty T. Babcock**, made default under the terms of the aforesaid note, reamortization and/or deferral agreement, assumption agreement, and mortgages by reason of **his failure** to make the monthly installments due thereon, which default has continued, and **that** by reason thereof the Defendant, **Marty T. Babcock**, is indebted to the Plaintiff in the principal sum of \$32,185.66, plus accrued interest in the amount of \$4,614.64 as of **September 12, 1994**, plus interest accruing thereafter at the rate of 9.5 percent per annum or \$8.3771 per day until judgment, plus interest thereafter at the legal rate until **fully paid**, and the costs of this action in the amount of \$18.00 (fee for recording Notice of Lis Pendens).

The Court further finds that **the 1993 and 1994 ad valorem taxes** on the subject real property have been paid.

The Court further finds that **Defendant, County Treasurer, Craig County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of 1993 personal property taxes in the amount of \$20.95 which became a lien on the property as of June 24, 1994. Said lien is inferior to **the** interest of the Plaintiff, United States of America.

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

The Court further finds that **Defendant, Kimberly D. Dake fka Kimberly D. Babcock**, is in default and therefore has **no right**, title or interest in the subject real property.

The Court further finds that **Defendant, Connie Michelle Babcock**, disclaims any right, title or interest in or to the **subject real** property.

The Court further finds that Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$358.60 together with interest and penalty according to law by virtue of Tax Warrant No. ITI9401898500 dated October 13, 1994 and filed for record on November 3, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Department of Housing and Urban Development has a lien upon the property by virtue of an Assignment of Mortgage to the Department of Housing and Urban Development of a real estate mortgage dated July 15, 1992 and recorded in Book 408, Page 36, in the records of the County Clerk of Craig County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Department of Housing and Urban Development is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Farmers Home Administration.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Rural Housing and Community Development Service, formerly Rural Economic and Community Development, formerly Farmers Home Administration, have and recover judgment in rem against the Defendant, Marty T. Babcock, in the principal sum of \$32,185.66, plus accrued interest in the amount of \$4,614.64 as of September 12, 1994, plus interest accruing thereafter at the rate of 9.5 percent per annum or \$8.3771 per day until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action in the amount of \$18.00 (fee for recording Notice of Lis Pendens), plus any additional sums

advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Craig County, Oklahoma**, have and recover judgment in the amount of \$20.95 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$358.60 together with interest and penalty according to law by virtue of Tax Warrant No. ITI9401898500 dated October 13, 1994 and filed for record on November 3, 1994.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Kimberly D. Dake fka Kimberly D. Babcock; Connie Michelle Babcock; and Board of County Commissioners, Craig 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, **Marty T. Babcock**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Craig County, Oklahoma;

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission.

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

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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Kent Ryals

KENT RYALS, OBA #7853

217 South Wilson
Vinita, Oklahoma 74301-0114
(918) 256-2274
Attorney for Defendant,
Marty T. Babcock

Judgment of Foreclosure
Case No. 94-C-926-K


KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

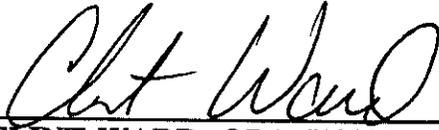
(918) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel. Oklahoma Tax Commission

Judgment of Foreclosure

Case No. 94-C-926-K



CLINT WARD, OBA #12027

Assistant District Attorney
301 West Canadian Avenue
Vinita, Oklahoma 74301
(918) 256-2286

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

Judgment of Foreclosure
Case No. 94-C-926-K

PP:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOE ALAN DUNSWORTH; JUDY G.)
 DUNSWORTH aka Judy Gale Dunsworth;)
 MARSHA GAYL CARSON; UNKNOWN)
 SPOUSE OF Marsha Gayl Carson, if any;)
 SECURITY PACIFIC FINANCIAL)
 SERVICES, INC; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE OCT 31 1995

FILED

OCT 31 1995

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

Civil Case No. 95-C 380K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 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; the Defendants, JOE ALAN DUNSWORTH and JUDY G. DUNSWORTH aka Judy Gale Dunsworth, appear by their attorney, Gary W, Wood; and the Defendants, MARSHA GAYL CARSON, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any, and SECURITY PACIFIC FINANCIAL SERVICES, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MARSHA GAYL CARSON, was served a copy of Summons and Complaint on

NOTE: THIS DOCUMENT IS FILED
BY THE CLERK OF COURT AND
PRO SE SUBMITTERS IMMEDIATELY
UPON RECEIPT

July 10, 1995, by Certified Mail; that the Defendant, SECURITY PACIFIC FINANCIAL SERVICES, INC., was served a copy of Summons and Complaint on May 2, 1995 by Certified Mail.

The Court further finds that the Defendant, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 18, 1995, and continuing through September 22, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to their present or last known place of residence and/or

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

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 11, 1995; that the Defendants, JOE ALAN DUNSWORTH and JUDY G. DUNSWORTH, filed their **Appearance** on June 5, 1995; and that the Defendants, MARSHA GAYL CARSON, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any, and SECURITY PACIFIC FINANCIAL SERVICES, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, JOE ALAN DUNSWORTH and JUDY G. DUNSWORTH, are husband and wife.

The Court further finds that the Defendants, JOE ALAN DUNSWORTH and MARSHA GAYL CARSON, were granted a Divorce on February 28, 1990, in Case No. FD-90 00958, in Tulsa County, Oklahoma.

The Court further finds that on April 30, 1992, Joe Alan Dunsworth and Judy Gale Dunsworth, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-B-1520-C. On December 8, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on August 31, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Two (2), WATTERS SUBDIVISION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on February 27, 1980, Dennis R. Wright and James Button, executed and delivered to CHARLES F. CURRY COMPANY, their mortgage note in the amount of \$25,250.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Dennis R. Wright, a single person and James Button, a single person, executed and delivered to CHARLES F. CURRY COMPANY a mortgage dated February 27, 1980, covering the above-described property. Said mortgage was recorded on February 29, 1980, in Book 4461, Page 659, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 28, 1990, CHARLES F. CURRY COMPANY, assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on April 9, 1990, in Book 5246, Page 634, in the records of Tulsa County, Oklahoma.

The Court further finds on January 28, 1982, Dennis R. Wright, a single person, and James Button, a single person, granted a general warranty deed to Joe Alan Dunsworth and Marsha Gayl Carson, then Husband and Wife. This deed was recorded with the Tulsa County Clerk on January 28, 1982, in Book 4592 at Page 1357 and Joe Alan Dunsworth and Marsha Gayl Carson, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on March 13, 1990, the Defendant, JOE ALAN DUNSWORTH, 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 the Defendants, JOE ALAN DUNSWORTH and JUDY G. DUNSWORTH, and the Plaintiff on March 11, 1991.

The Court further finds that the Defendants, JOE ALAN DUNSWORTH and MARSHA GAYL CARSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JOE ALAN DUNSWORTH and MARSHA GAYL CARSON, are indebted to the Plaintiff in the principal sum of \$36,277.55, plus interest at the rate of 12 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, MARSHA GAYL CARSON, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any, and SECURITY PACIFIC FINANCIAL SERVICES, INC., are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JOE ALAN DUNSWORTH and MARSHA GAYL CARSON, in the principal sum of \$36,277.55, plus interest at the rate of 12 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.6% percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JOE ALAN DUNSWORTH, JUDY G. DUNSWORTH, MARSHA GAYL CARSON, UNKNOWN SPOUSE OF Marsha Gayl Carson, if any, and SECURITY PACIFIC FINANCIAL SERVICES, INC., have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

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

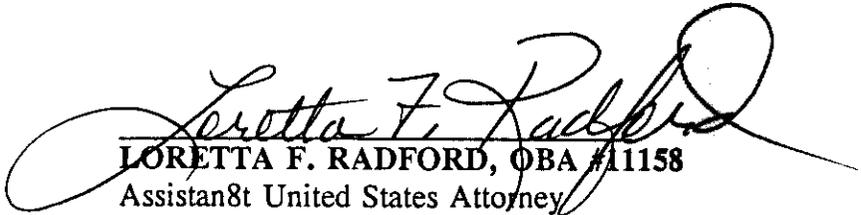
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described **real property**, under and by virtue of this judgment and decree, all of the Defendants and all **persons** claiming under them since the filing of the Complaint, be and they are forever barred **and foreclosed**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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

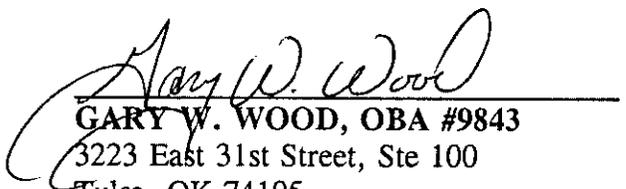
STEPHEN C. LEWIS
United States Attorney



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



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



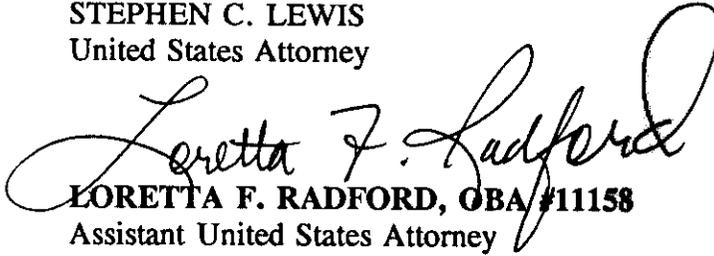
GARY W. WOOD, OBA #9843
3223 East 31st Street, Ste 100
Tulsa, OK 74105
(918) 744-6119
Attorney for Defendants,
Joe Alan Dunsworth and
Judy G. Dunsworth

Judgment of Foreclosure
Civil Action No. 95 C 380K

LFR:flv

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

JAMES R. GILBERT, JR.;
LINDA T. GILBERT aka Linda Gilbert;
FIDELITY FINANCIAL SERVICES, INC.;
FLEET REAL ESTATE FUNDING CORP.
fka Security Pacific Mortgage Corporation;
MANUFACTURERS HANOVER
MORTGAGE CORPORATION;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission,

Defendants.

ENTERED
OCT 30 1995

FILED

OCT 27 1995

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

CIVIL ACTION NO. 95-C-430-H

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 26th day of October, 1995.

SV SVEN ERIK HOLMEE

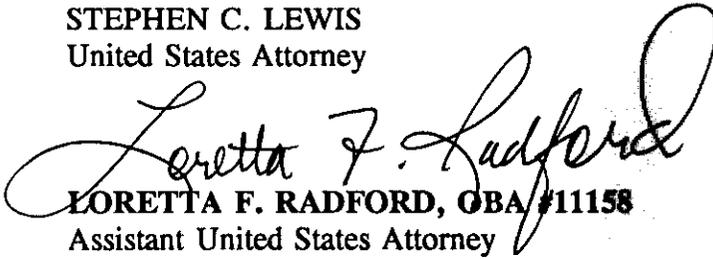
UNITED STATES DISTRICT JUDGE

NOTE:

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UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

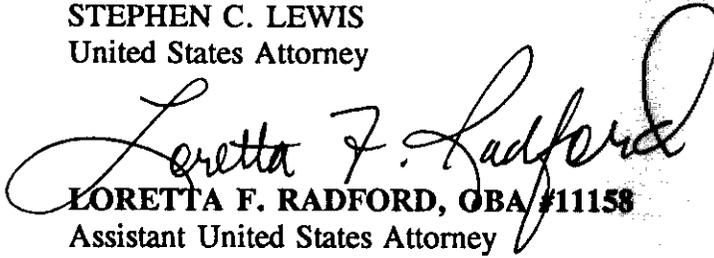
A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large loop at the end of the last name.

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

LFR:css

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, elegant handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned over the typed name and title of the signatory.

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

LFR:css

FILED

OCT 27 1995

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

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

SAUL HOLDINGS LIMITED)
PARTNERSHIP,)
)
Plaintiff,)
)
v.)
)
TANDY CORPORATION, a Delaware)
corporation d/b/a RADIO SHACK,)
)
Defendant.)

Case No. 95-C-254-B

EXT. OF CLERK DOCKET
OCT 30 1995

ORDER

Before the Court is the parties' Joint Motion to Dismiss this action with prejudice. The Court, being fully advised in the premises and for good cause shown, finds that the parties' Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the parties' respective claims in this action are dismissed with prejudice to the refiling of same.

THOMAS R. BRETT

Thomas R. Brett
United States District Judge

APPROVED AS TO FORM:

Jeffrey H. Contreras
Jeffrey H. Contreras, OBA #11270
KIRK, ERDOES, PECK & CONTRERAS, P.A.
105 N. Hudson, Suite 204
Oklahoma City, OK 73102-4801
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Attorneys for Plaintiff

James C. Pinkerton
James C. Pinkerton, OBA #7167
PINKERTON & PINKERTON
1722 S. Boston
Tulsa, OK 74119
Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 27 1995

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

JERRY ISAACS,

Appellant,

v.

PARK FRIENDS, INC.,

Appellee.

No. 95-C-687-H ✓

ENTERED
DATE OCT 30 1995

ORDER

Now before the Court is Appellee's motion [Doc. # 3] for an order dismissing this action due to Appellant's failure to file a response to Appellee's motion to dismiss [Doc. # 2]. For the following reasons, the Court hereby dismisses Appellant's appeal for failure to prosecute:

1. Appellant filed this appeal on July 24, 1995.
2. Appellee filed its motion to dismiss the appeal on September 7, 1995.
3. Appellant's response to Appellee's motion to dismiss was due on or about September 25, 1995.
4. To date, Appellant has not filed a response to Appellee's motion to dismiss.
5. To date, Appellant has not designated the appellate record, pursuant to Bankr. R. 8006.
6. On October 25, 1995, the Court telephoned Appellant's counsel, Todd M. Henshaw, to determine if Appellant intended to file a

response to Appellee's motion to dismiss. Appellant's counsel informed the Court that no response would be filed. Appellant's counsel further informed the Court that Appellant no longer had the funds to prosecute this action, but that Appellant did not wish to confess anything.

Due to Appellant's complete failure to prosecute this appeal, the Court hereby dismisses this action with prejudice. See Fed. R. Civ. P. 41(b); Bankr. R. 8001(a) & 8018; and N.D. LR 1.1(D) & 7.1(C). See e.g., Fed. R. App. P. 3(a).

IT IS SO ORDERED.

Dated this 25TH day of October 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)

Plaintiff,)

v.)

WILLIAM ALVA RUTLEDGE)
aka William A. Rutledge;)

ANNA B. RUTLEDGE;)

STATE OF OKLAHOMA ex rel.)

Oklahoma Tax Commission;)

COUNTY TREASURER, Tulsa County,)

Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Tulsa County, Oklahoma,)

Defendants.)

CIVIL ACTION NO. 95-C-561-H

RECEIVED
10-30-95

FILED

OCT 27 1995

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day of October, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; and the Defendants, William Alva Rutledge aka William A. Rutledge and Anna B. Rutledge, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, William Alva Rutledge aka William A. Rutledge, was served with Summons

and Complaint on August 1, 1995; and that the Defendant, **Anna B. Rutledge**, was served with Summons and Complaint on August 1, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on July 11, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Disclaimer on or about July 10, 1995; and that the Defendants, **William Alva Rutledge aka William A. Rutledge and Anna B. Rutledge**, 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:

The East One Hundred (100) Feet of Lot Five (5), FOSTER LEWIS ACREAGE, an Addition to the Town of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on September 12, 1979, William Alva Rutledge and Anna B. Rutledge executed and delivered to Midland Mortgage Co. their mortgage note in the amount of \$45,000.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, William Alva Rutledge and Anna B. Rutledge executed and delivered to Midland Mortgage Co. a real estate mortgage dated September 12, 1979, covering the above-described property, situated in the **State of Oklahoma**, Tulsa County. This mortgage was recorded on September 18, 1979, in **Book 4427, Page 1577**, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 16, 1979, Midland Mortgage Co. assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage of Real Estate was recorded on October 31, 1979, in Book 4437, Page 1036, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 23, 1994, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on November 1, 1994, in Book 5668, Page 1003, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 16, 1994, William A. Rutledge and Anna B. Rutledge executed and delivered to the United States of America on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due was made principal and the interest rate was changed to 8 percent.

The Court further finds that the Defendants, William Alva Rutledge aka William A. Rutledge and Anna B. Rutledge, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, William Alva Rutledge aka William A. Rutledge and Anna B. Rutledge, are indebted to the Plaintiff in the principal sum of \$40,955.17, plus administrative charges in the amount of \$475.00, plus penalty charges in the amount of \$230.00, plus accrued interest in the amount of \$1,365.60 as of March 7, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$21.24 (\$13.24 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens).

Rutledge, 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.

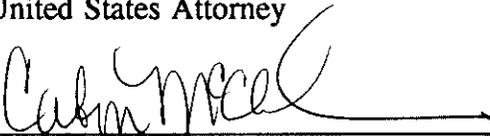
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of 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) 596-4835

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure

Case No. 95-C-561-H

CDM:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM W. SMITH aka WILLIAM)
 WALLACE SMITH; CONNIE R. SMITH)
 aka CONNIE RUTH SMITH; STATE OF)
 OKLAHOMA ex rel OKLAHOMA TAX)
 COMMISSION; CITY OF BROKEN)
 ARROW, Oklahoma; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
 Defendants.)

FILED

OCT 27 1995

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

Civil Case No. 95-C 355H

SEARCHED ON DECKET
DATE 10-30-95

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day of October,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by City Attorney Michael R. Vanderburg; the Defendant, MID-CONTINENT CONCRETE COMPANY appears by its attorney Michael DeCarlo; the Defendant, MOODY'S JEWELRY, INC. appears by its attorney H. I. Aston; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears not having previously filed its disclaimer; and the Defendants, WILLIAM W. SMITH aka WILLIAM

WALLACE SMITH and CONNIE R. SMITH aka CONNIE RUTH SMITH, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, WILLIAM W. SMITH aka WILLIAM WALLACE SMITH will hereinafter be referred to as ("WILLIAM W. SMITH"); and the Defendant, CONNIE R. SMITH aka CONNIE RUTH SMITH will hereinafter be referred to as ("CONNIE R. SMITH"). The Defendants, WILLIAM W. SMITH and CONNIE R. SMITH are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, WILLIAM W. SMITH, acknowledged receipt of Summons and Complaint via certified mail on May 3, 1995; that the Defendant, CONNIE R. SMITH, acknowledged receipt of Summons and Complaint via certified mail on May 27, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on April 24, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on April 25, 1995; and that the Defendant, MID-CONTINENT CONCRETE COMPANY, acknowledged receipt of Summons and Complaint via certified mail on July 31, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on May 30, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Disclaimer on August 24, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on May 4, 1995; that the Defendant, MID-CONTINENT CONCRETE COMPANY, filed its Answer on August

23, 1995; that the Defendant, MOODY'S JEWELRY, INC., filed its Answer on August 30, 1995; and that the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, 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 Fifteen (15), Block Seven (7), WEDGEWOOD III, An Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 29, 1985, Charles E. Brecht and Gladys M. Brecht, executed and delivered to First Security Mortgage Company their mortgage note in the amount of \$78,765.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles E. Brecht and Gladys M. Brecht, Husband and Wife, executed and delivered to First Security Mortgage Company a mortgage dated March 29, 1985, covering the above-described property. Said mortgage was recorded on April 4, 1985, in Book 4854, Page 326, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1985, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to CS MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on March 11, 1986, in Book 4929, Page 443, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 22, 1989, Commercial Federal Mortgage Corporation f/k/a CFS Mortgage Corporation 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 25, 1989, in Book 5209, Page 1510, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, are the current title owners of the property by virtue of a General Warranty Deed dated September 27, 1988, and recorded on September 30, 1989 in Book 5131, Page 1323, in the records of Tulsa County, Oklahoma. The Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, are the current assumptors of the subject indebtedness.

The Court further finds that on October 1, 1989, the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, 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 November 1, 1991.

The Court further finds that on April 12, 1989, the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, Case number 89-949. The case was discharged on July 26, 1989 and closed on September 11, 1989.

The Court further finds that the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to

make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, are indebted to the Plaintiff in the principal sum of \$141,863.04, plus interest at the rate of 12 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, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject property except insofar as it is the holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendant, MID-CONTINENT CONCRETE COMPANY, has an interest in the subject property by virtue of a judgment in the amount of \$1,826.80, plus interest and additional court costs of \$75.00.

The Court further finds that the Defendant, MOODY'S JEWELRY, INC. has an interest in the subject property by virtue of a judgment in the amount of \$4,177.12 plus pre and post judgment interest and a reasonable attorney's fee in the amount of \$1,235.00.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, disclaims any right, title or interest in the subject property.

The Court further finds that the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, in the principal sum of \$141,863.04, plus interest at the rate of 12 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 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, MID-CONTINENT CONCRETE COMPANY, have and recover judgment in the amount of \$1,826.80 plus addition court costs of \$75.00 for a judgment, plus the costs of this action and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, MOODY'S JEWELRY, INC., have and recover judgment in the amount of \$4,177.12 together with pre and post-judgment interest and a reasonable attorney fee in the amount of \$1,235.00 for a judgment, plus the costs of this action and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title, or interest in the

subject property except insofar as it is the lawful holder of certain easements according to the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, WILLIAM W. SMITH, CONNIE R. SMITH, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, 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 Defendants, WILLIAM W. SMITH and CONNIE R. SMITH, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or **without** appraisalment the real property involved herein and apply the proceeds of the sale **as follows**:

First:

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

Second:

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

Third:

In payment of Defendant, **MOODY'S JEWELRY, INC.** in the amount of \$4,177.12 plus attorney fee of \$1,235.00, plus costs, for a judgment.

Fourth:

In payment of Defendant, **MID-CONTINENT CONCRETE COMPANY,** in the amount of \$1,826.80, plus costs of \$75.00, for a judgment.

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

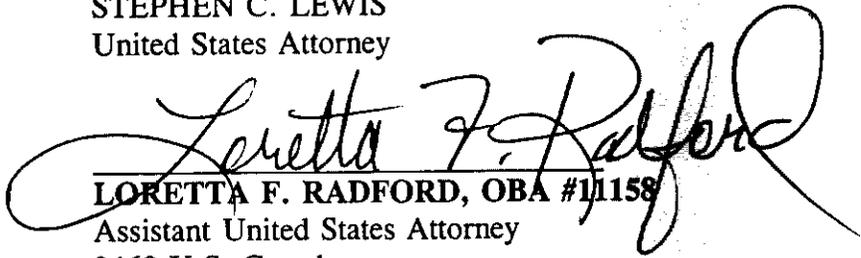
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

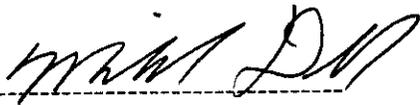
APPROVED:
STEPHEN C. LEWIS
United States Attorney



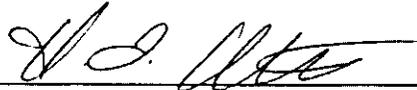
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Judgment of Foreclosure
Civil Action No. 95-C 355H

LFR/lg

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

OCT 27 1995

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

CLARENCE KING, JR.,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-586-J ✓

ENTERED ON DOCKET

10-30-95

ORDER²¹

Plaintiff, Clarence King, Jr., pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³¹ Plaintiff contends that (1) the Secretary erred in determining that Plaintiff could perform light work; (2) the Secretary erred in not fully crediting Plaintiff's complaints of pain; and (3) the case should be remanded for consideration of new evidence.

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

²¹ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed July 12, 1995.

³¹ Plaintiff filed an application for disability and supplemental security insurance benefits on May 21, 1992. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held on June 7, 1993. *R. at 56*. By order dated August 19, 1993, the ALJ determined that although Plaintiff could not perform his past relevant work, he was not disabled. *R. at 37-46*. The Plaintiff appealed the ALJ's decision, and the Plaintiff's request for review was denied by the Appeals Council on April 22, 1994. *R. at 3*.

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A decision by the Secretary will be upheld on appeal if it is supported by substantial evidence and follows applicable legal standards. See Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). For the reasons outlined below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on March 16, 1950. *R. at 61.* Plaintiff completed the tenth grade, and does not have a G.E.D. *R. at 62.* Plaintiff's records indicate that he claims disability beginning June 29, 1991. *R. at 96.*

Plaintiff testified that his work has consisted of heavy construction jobs for the past 15 years (including concrete construction and steel work). *R. at 62.* Plaintiff was a labor foreman supervising 12 people for three years. *R. at 63.*

Plaintiff's Testimony

Plaintiff worked until June of 1991. *R. at 63.* Plaintiff testified that he hurt his back while at a steel foundry, and that when he finally went to a doctor (January 1992) the doctor said he had more than just a strained back. *R. at 65.*

Plaintiff testified that he is able to drive, but cannot sit down very long. According to Plaintiff he has not driven a car since 1991 when he last drove home from work. *R. at 65.* Since that time, the longest trip Plaintiff has taken is back and forth to visit his doctors. Plaintiff lives in Kinwood, which is about 33 miles away from his doctors. *R. at 66.*

Plaintiff testified that since 1991 his "activity" has consisted of "sit[ting] in [his] chair all day long." *R. at 67, 80-81.* Plaintiff lives in a house with his wife and

three children. *R. at 67.* (Plaintiff later testified that he is staying with a friend. *R. at 70.*) Plaintiff noted that laying down does not help him very much. *R. at 81.*

Plaintiff testified that his main problem is his back, although he also has had a heart problem since he was 20. *R. at 68.* Plaintiff stated that his heart feels like a muscle strain/pain. *R. at 69.* In addition, Plaintiff testified that he recently blacked out, and has blacked out "a time or two." *R. at 69-70.*

According to Plaintiff, his lower back hurts, and his medication makes him feel as though he is sitting in a drum. *R. at 71.* Plaintiff also stated that his medicine makes him dizzy. *R. at 71.* Plaintiff testified that he told his doctor about the dizziness, but his doctor still gave him the same medicine. *R. at 72.*

Plaintiff believes that he cannot walk more than 50 feet, that he can only stand for about five to ten minutes, and that he can sit about 20-30 minutes. *R. at 72-73.* Plaintiff believes that he might be able to lift a ten pound bag of flour. *R. at 74.*

Plaintiff additionally testified that his eyes are bad, and he has "classic migraine syndrome." *R. at 74-75.* Plaintiff also stated that he cannot bend his knuckles without pain from arthritis, and that it is hard for him to grip a glass of water because of the arthritis. *R. at 76, 81.*

At the time of the hearing, Plaintiff was taking tylenol with codeine and ibuprofen. *R. at 76.*

Medical Evidence

Plaintiff's records indicate that he first sought treatment for his back in January of 1992. *R. at 164, 189.* By March 25, 1992, his doctors' notes report that Plaintiff's back pain was 25% better. *R. at 157, 160.*

A Residual Functional Capacity Assessment, completed on September 22, 1992, indicates that Plaintiff could occasionally lift 50 pounds and frequently lift 25 pounds. *R. at 108-09.* Plaintiff's stand/walk limitation is described as about six hours in an eight hour day; his sit limitation is listed as six hours in an eight hour day; and his push/pull limitation is described as unlimited. The examining doctor reported that Plaintiff exhibited no muscle atrophy or weakness, but some muscle spasm. The doctor additionally noted that Plaintiff's pain does not limit his RFC. *R. at 109-14.*

A "Medical Examination Form," completed by one of Plaintiff's doctors at the Claremore Indian Hospital on March 17, 1992, states Plaintiff is medically unable to work. The approximate time for the disability was listed as one month. *R. at 158.* A "Medical Examination Form" completed on April 1, 1991 by Kenneth Jovern, M.D., indicates that Plaintiff is "unable to work." However, Dr. Jovern additionally noted that Plaintiff was currently able to perform sedentary and light work. *R. at 156.*

Kathleen A. Dahlman, M.D. examined Plaintiff on September 11, 1992. *R. at 168.* Dr. Dahlman determined that Plaintiff had the ability to perform work related activities at the sedentary or light duty levels. *R. at 168.* Dr. Dahlman additionally noted that Plaintiff exhibited some signs of osteoarthopathy, and that Plaintiff's lumbosacral spine had some limitation of range of motion caused by pain. In addition,

Plaintiff had some motor sensory loss. Plaintiff's gait was reported as stable without the use of assistive device, and Plaintiff's heart murmur was determined not significant. *R. at 168.*

On November 17, 1993, an MRI of Plaintiff's lumbar spine revealed that vertebral heights were well maintained, and that disc spaces at the L1-2, L2-3, and L3-4 levels showed narrowing. *R. at 28.* The report concludes that Plaintiff has a probable herniated disc at the L3-4 level, disc bulging at the L2-3 level, and either spurring or a hardened disc at the L4-5 level. *R. at 28.*

On June 10, 1993, a residual functional capacity evaluation⁴¹ indicated that Plaintiff could sit two to three hours in an eight hour day, stand two to three hours in an eight hour day, and walk two to three hours in an eight hour day. *R. at 23-25.* Plaintiff's combined total limitation for sit/stand/walk was also marked as two to three hours in an eight hour day. *R. at 23-25.* Plaintiff's lift and carry limitations were noted as 21-25 pounds occasionally,⁵¹ six to ten pounds frequently,⁶¹ and five pounds continually.⁷¹ *R. at 23-25.* In addition, Plaintiff's ability to use his feet for repetitive movements (pushing/pulling) was marked as frequent. *R. at 24.*

⁴¹ This evaluation is not a "standard" RFC Assessment. Although the name of the reviewing doctor is illegible, Plaintiff asserts that it was conducted by one of his treating doctors, a Dr. Chubbs. This evaluation was not submitted to the ALJ, but was submitted by Plaintiff to the Appeals Council after the ALJ issued his decision.

⁵¹ Occasionally is defined in the evaluation as two to three hours in an eight hour day.

⁶¹ Frequently is defined in the evaluation as four to five hours in an eight hour day.

⁷¹ Continually is defined in the evaluation as six to eight hours in an eight hour day.

II. THE SEQUENTIAL EVALUATION PROCESS

The Secretary has established a five-step process for the evaluation of social security claims.⁸¹ See 20 C.F.R. § 404.1520. A claimant is disabled under the Social Security Act if

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 in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The ALJ's evaluation of Plaintiff's claim in this case terminated at step five of the sequential evaluation process. The ALJ determined that Plaintiff had the RFC to perform light work, and that a substantial number of jobs in the national economy exist to permit a finding of non-disability. *R. at 45-46*.

III. STANDARD OF REVIEW

The Secretary's disability determinations are reviewed to determine if (1) the correct legal principles have been followed, and (2) the decision is supported by

⁸¹ Step one requires the claimant to **establish** that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Williams, 844 F.2d at 750. The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993).

Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

IV. REVIEW

Light Work: Substantial Evidence

Plaintiff initially asserts that the ALJ erred in finding that Plaintiff had the Residual Functional Capacity ("RFC")⁹¹ to perform light work, and that the ALJ improperly evaluated the opinions of Plaintiff's physicians.

The regulations define "light work" as

lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be

⁹¹ Residual Functional Capacity is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs." 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c).

considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . .

20 C.F.R. § 404.1567(b). The ALJ found that Plaintiff had the ability to do light work, but that Plaintiff should be permitted to alternate between sitting and standing at will. *R. at 40*. The ALJ's determination is supported by substantial evidence.

Although Plaintiff claims an onset date of June 1991, Plaintiff's medical records indicate that Plaintiff did not seek treatment for his back until January 1992. *R. at 164, 189*. By March of 1992, Plaintiff's back pain was described as 25% better. *R. at 157, 160*.

Plaintiff's doctors at Claremore Indian Hospital completed "Medical Examination Forms" which indicated Plaintiff's ability to perform work. Kenneth Jovern, M.D., noted on a form in April of 1992 that Plaintiff was unable to work. However, Dr. Jovern listed Plaintiff's "current work tolerance" at sedentary and light. *R. at 156*. A similar form completed by one of Plaintiff's doctors in March of 1992, listed Plaintiff's approximate length of disability at one month. *R. at 158*. In addition, two separate RFC assessments indicate that Plaintiff has the ability to do light or sedentary work.¹⁰¹

¹⁰¹ A September 22, 1992 Residual Functional Capacity Assessment reported that Plaintiff could occasionally lift 50 pounds and frequently lift 25 pounds. *R. at 108-09*. Plaintiff's stand/walk and sit limitations were listed as six hours in an eight hour day. Plaintiff's push/pull limitation is described as unlimited. *R. at 109-14*.

Plaintiff was examined by Kathleen A. Dahlman, M.D. on September 11, 1992. *R. at 168*. Dr. Dahlman determined that Plaintiff had the ability to perform work related activities at the sedentary or light duty levels. *R. at 168*.

Plaintiff additionally asserts that the ALJ improperly weighed the evidence from Plaintiff's treating physicians. However, the record does not support Plaintiff's assertion.

A treating physician's opinion is entitled to great weight. Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

Contrary to Plaintiff's assertion, the ALJ's opinion does not indicate that the medical evidence from Plaintiff's treating physicians was ignored. Plaintiff first sought treatment for his back at Claremore Indian Hospital. As noted above, the forms which Plaintiff's doctors completed at the Claremore Indian Hospital indicated that Plaintiff could perform sedentary or light work. *R. at 156*. In addition, the notes of Plaintiff's physicians indicated that Plaintiff was improving. *R. at 157, 160*.

The record also contains a June 10, 1993 residual functional capacity evaluation¹¹⁾ of Plaintiff which was not submitted to the ALJ, but was submitted by Plaintiff to the Appeals Council after the ALJ's decision. Although Plaintiff asserts that the evaluation was performed by a "treating" physician, the record is not clear.

¹¹⁾ This evaluation is not a "standard" RFC Assessment. Although it is not possible to decipher the name of the reviewing doctor, Plaintiff asserts that it was conducted by one of his treating doctors, a Dr. Chubbs.

Regardless, the evaluation's support of Plaintiff's claim is, at best, tenuous. The evaluation indicates that Plaintiff **can sit two to three hours in an eight hour day, stand two to three hours in an eight hour day, and walk two to three hours in an eight hour day.**¹²¹ *R. at 23-25.* The "combined" total limitation for sit/stand/walk was also marked as two to three hours in an **eight hour day.** *R. at 23-25.* Plaintiff asserts that this evaluation establishes that Plaintiff **lacks** the RFC to perform the prolonged sitting required for sedentary work and the **prolonged** standing or walking required for light work.

The Appeals Council evaluated the submitted evidence and found that it was generally consistent with the other medical evidence in the record that supported Plaintiff's ability to perform light work. *R. at 4.* In addition, Plaintiff testified at the hearing that he spent most of the day "with a bunch of pillows behind me and sitting in a chair that I kind of molded to the way I want to sit." *R. at 80.* Furthermore, the ALJ determined that Plaintiff could perform light work with the restriction of being able to sit/stand at will. *R. at 40.* The evaluation which was submitted to the Appeals Council does not require a contrary finding.

Pain Evaluation

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment

¹²¹ In addition, Plaintiff's lift/carry limitations were noted as 21-25 pounds, for two to three hours in an eight hour day; six to ten pounds, for four to five hours in an eight hour day; and five pounds continually. *R. at 23-25.* Plaintiff's ability to use his feet for repetitive movements (pushing/pulling) was marked as frequent (defined as four to five hours out of an eight hour day). *R. at 24.*

must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164.

Initially, the ALJ summarized Luna and its requirements, Plaintiff's medical record, and Plaintiff's testimony. *R. at 40-45.* The ALJ noted that although Plaintiff claimed disability from June of 1991, Plaintiff's initial visit to a doctor did not occur until January 1992. The ALJ observed that Plaintiff does not participate in activities to relieve his pain, takes limited pain medications, and has no record of atrophy or weight loss. The ALJ also noted some inconsistencies in Plaintiff's testimony. For example, Plaintiff testified that he lived with his wife and children and later testified that he lived with a friend. In addition, one of Plaintiff's doctors noted that Plaintiff could perform light and sedentary work. Two RFC assessments indicate that Plaintiff retains the RFC for light or sedentary work, and that Plaintiff's pain does not limit his RFC.

Plaintiff asserts that the ALJ erred by not finding that Plaintiff was disabled due to pain, and by discounting Plaintiff's complaints of pain. However, the mere

existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

The ALJ determined that Plaintiff had the RFC to perform light work with the limitation of sitting/standing at will. The ALJ's finding is supported by Plaintiff's medical records, and Plaintiff's testimony does not dictate a finding of disabling pain.

Consideration of "New" Evidence

Plaintiff contends that because the June 10, 1993 medical evaluation (the "Evaluation") of Plaintiff was not presented to the ALJ, the Court should remand the case to the Secretary for additional consideration. However, the Evaluation has already been presented to the Secretary.¹³ Plaintiff submitted the Evaluation (along with additional evidence) to the Appeals Council after the ALJ completed his decision. After consideration of the newly submitted evidence, the Appeals Council determined that this evidence was not inconsistent with the medical records presented to the ALJ. *R. at 4.*

¹³ Plaintiff urges the Court to remand to the Secretary because the evidence is "material" and the Court has the authority to remand to the Secretary to consider new and material evidence. However, Plaintiff's argument fails to recognize that the Secretary has already considered this evidence. Although the evidence was not presented to the ALJ, it was presented to the Appeals Council. Even under the materiality standard urged by Plaintiff, the additional evidence does not dictate that the case be remanded.

In O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994), after the determination by the ALJ of non-disability, the claimant submitted additional evidence to the Appeals Council. The Appeals Council decided that the new evidence did not provide a basis for changing the ALJ's decision. The claimant appealed, and the district court affirmed the decision of the Secretary. On appeal from the decision of the district court, the Tenth Circuit held that the evidence, presented for the first time to the Appeals Council, is "part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." Id. at 859. The Court reviewed the record, including the new evidence, and affirmed the district court's (and the Secretary's) decision because the ALJ's determination (after considering the "new" evidence) remained supported by substantial evidence. Id.

Similarly, in this case, the ALJ's determination that Plaintiff was not disabled remains supported by substantial evidence, even when considering the "new" evidence. Consequently a remand to the Secretary for further consideration of such evidence is not necessary.

Accordingly, the Secretary's decision is AFFIRMED.

Dated this 27 day of October 1995.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 27 1995

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

LASHAUN D. JOSEPH,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-354-J ✓

ENTERED ON BOOKET

10-30-95

ORDER²¹

Plaintiff, Lashaun D. Joseph, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³¹ Plaintiff contends that the Secretary erred because (1) the Secretary did not find Plaintiff disabled at step three, (2) the Secretary incorrectly determined that Plaintiff could

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

²¹ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

³¹ Plaintiff filed an application for disability insurance benefits on October 7, 1991. *R. at 91-94*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 3, 1992. By order dated April 13, 1993, the ALJ determined that Plaintiff was not disabled, and could perform her past relevant work. *R. at 16-21*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On September 29, 1993, the Appeals Council denied Plaintiff's request for review. *R. at 5-7*. The Appeals Council granted an extension of time to Plaintiff until April 1, 1994 to file a civil action. *R. at 3*.

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perform her past relevant work, and (3) the Secretary conclusively applied the Grids.⁴¹ For the reasons discussed below the Court affirms the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was twenty-four at the time of her hearing, and was born June 8, 1968. *R. at 33.* Plaintiff completed the twelfth grade. *R. at 34.*

At her hearing on December 3, 1992, Plaintiff testified that her previous work experience includes work at a day-care camp as a baby sitter (approximately three months) and work at Wal-Mart. *R. at 28, 34.* In addition, Plaintiff worked at a nursing home for about two months. *R. at 34.*

Plaintiff testified that she has a learner's permit to drive, but has not driven in a long time. *R. at 36.* According to Plaintiff, she has not stayed overnight in a hospital since the date of her application for social security (October 1991). *R. at 37.*

Plaintiff testified that she has asthma, and cannot work because she is short of breath and her medicine makes her shaky. *R. at 41.* Plaintiff testified that since October 1991 her breathing problems have occurred on a daily basis. *R. at 41.* According to Plaintiff, when she takes her medicine her problems go away for about three to four hours. Plaintiff testified she currently takes her medicine every three to four hours. Plaintiff takes proventil (a solution she puts in a breathing machine). *R. at 42.* She takes theophylline (pill form) for shortness of breath, vanceril (inhaler), and

⁴¹

See 20 C.F.R. Pt. 404, Supbt. P, App. 2.

prednisone. *R. at 42-43.* Plaintiff testified that as long as she does the things the doctor tells her to do she gets along pretty well. *R. at 44.*

Plaintiff lives with her husband and three children (ages three, seven, and nine at the time of the hearing). *R. at 37.* Plaintiff testified that her activities are limited. *R. at 38.* She has gone with her husband to pick up the kids; she has tried to visit her family; and she tried to go to the store. *R. at 38.* Plaintiff can take things out for cooking, but her sister cooks for her. *R. at 39.* Plaintiff stated that she mainly just tries to keep from doing strenuous activities. *R. at 38.*

Plaintiff stated that she is supposed to wear a mask (and that she does) if there is "cooking involved, or she cleans, or when she is outside." *R. at 44.* According to Plaintiff, her asthma has been about the same since October 1991, but she is currently better able to deal with it. *R. at 46.* Plaintiff testified that she can walk about one block without problems, and that she can sit for as long as she wants. *R. at 47-48.* Plaintiff does not believe that she would be able to lift a twenty pound bag of potatoes. *R. at 48.*

Plaintiff uses a "breathing machine" to treat her asthma. Plaintiff testified that she takes a treatment every three to four hours, and that each treatment takes about twenty minutes. *R. at 54.* Plaintiff takes her breathing machine with her wherever she goes and is able to carry it. *R. at 50.*

According to the Plaintiff, she was going to a doctor every week, but for the two weeks prior to the hearing went every other week due to a lack of money. *R. at 63.*

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.⁵¹ See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act 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 in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

⁵¹ Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. THE ALJ'S DECISION

The ALJ's evaluation of Plaintiff's claim in this case terminated at step four of the sequential evaluation process. The ALJ determined that Plaintiff could perform her past relevant work. The ALJ concluded that although Plaintiff has "severe asthma," Plaintiff's impairments do not meet or equal an impairment in the Listings. The ALJ additionally found that Plaintiff's allegations of chest pain and shortness of breath were not fully credible, and that Plaintiff had the RFC to perform work related

activities except for lifting more than fifty pounds occasionally or twenty pounds frequently, and that Plaintiff should work in a clean air environment. *R. at 40-45.*

IV. REVIEW

The Listings

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equalled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51.

Plaintiff argues that the ALJ erred in determining that Plaintiff's injuries were not medically equivalent to Listing 3.03B. Listing 3.03B provides:

Asthma. With:

* * *

Attacks (as defined in 3.00C), in spite of prescribed treatment and requiring physical intervention, occurring at least once every 2 months or at least six times a year. Each in-patient hospitalization for longer than 24 hours for control of asthma counts as two attacks, and an evaluation period of at least 12 consecutive months must be used to determine the frequency of attacks.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.03B (italics in original). "Attack" is defined in 3.00C as "prolonged symptomatic episodes lasting one or more days and requiring intensive treatment, such as intravenous bronchodilator or antibiotic administration or prolonged inhalational bronchodilator therapy in a hospital, emergency room or equivalent setting." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00C.

Plaintiff's medical records do not support a finding that Plaintiff meets or equals a Listing. Plaintiff was treated three times in September 1991⁶¹ at Tulsa Regional Medical Center for "difficulty breathing" and asthma. *R. at 134, 138, 143.* Each time Plaintiff's asthma was controlled and Plaintiff was released without having to be admitted. Plaintiff additionally testified that on at least one occasion she went to her doctor's office (because of breathing difficulty), and received two shots which required her to sit at her doctor's office for approximately forty minutes between shots. *R. at 46.* Even if each of Plaintiff's visits to the emergency room constituted an "attack"⁷¹ Plaintiff's condition still would not meet or equal the Listings, which requires at least six attacks per year.

Plaintiff's records do indicate that she saw her doctor on a regular basis.⁸¹ However, her asthma remained under control. In addition, X-rays taken on September 27, 1991, and interpreted by J.E. Trujillo, M.D., revealed that Plaintiff's "lungs are clear of active infiltrates; [her] cardiac silhouette is normal; [her] osseous structures are unremarkable; [and there was] no active pulmonary disease." *R. at 145.* A

⁶¹ The dates of treatment are: September 8, 1991; September 19, 1989; and September 28, 1991.

⁷¹ Nothing in the record or Plaintiff's testimony indicates that she suffered "prolonged symptomatic episodes lasting one or more days" which is required to meet the Listing definition of "attack." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00C.

⁸¹ The records indicate that Plaintiff visited her doctor approximately one time per week in October and December of 1991, and at least twice in November 1991. *R. at 149, 151-157.* (Not all of Plaintiff's visits were solely for her asthma. Some records of visits note ear aches, sore throats, and the flu. *R. at 148, 149, 150, 151, 154, 156, 176, 177, 178.*) Plaintiff saw her doctor every three to five months from January through September of 1992. *R. at 171-176.*

spirometry⁹¹ was conducted at St. John's Medical Center's Pulmonary Laboratory on January 27, 1992. Plaintiff was noted to have a "mild obstructive lung defect." *R. at 189.*

The ALJ's decision that Plaintiff **did** not meet or equal a Listing is supported by substantial evidence, and the ALJ **did not** err in concluding that Plaintiff's medical impairments do not meet or equal Listing 3.03B.

RFC/Pain Evaluation

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164.

⁹¹ Spirometry is defined in *Taber's Cyclopedic Medical Dictionary* (17th ed. 1993), as "measurement of air capacity of the lungs."

Initially, the ALJ summarized the requirements in Luna, Plaintiff's medical records, and Plaintiff's testimony. *R. at 40-45*. The ALJ determined that Plaintiff does have occasional chest pain associated with her asthma, but her pain is not disabling.

Plaintiff asserts that the ALJ erred in determining Plaintiff could perform her past relevant work because the ALJ did not give adequate consideration to Plaintiff's complaints of pain. However, the mere existence of pain is insufficient to support a finding of disability. The pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment.").

Plaintiff testified that she has chest pain which her doctor told her is related to her asthma. *R. at 48*. Neither the medical records, nor Plaintiff's testimony, support a finding of "disabling" pain. The ALJ determined that Plaintiff's complaints of pain were not credible to the full extent alleged by Plaintiff. Although Plaintiff correctly points out that some of the reasons for the ALJ's conclusion are not supported in the record¹⁰¹, the ALJ's determination that Plaintiff was not disabled is supported by substantial evidence. Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Plaintiff did testify that she can walk about one block without

¹⁰¹ For example, the ALJ states that Plaintiff testified that she went shopping, went to the mall, took her children to school, and went to the park. However, the record does not indicate that Plaintiff, at the time of the hearing, testified that she currently did these activities. *R. at 36-40*.

problems, and that she can sit for as long as she wants. *R. at 47-48.* Plaintiff additionally testified that she sometimes "drove with [her] husband to take [her] kids to school or I'll pick them up." *R. at 38.*

Virtually nothing in the record supports Plaintiff's claim of disabling pain. A Residual Functional Capacity Assessment conducted on January 31, 1992 indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand/walk for at least six hours (in an eight hour day), and sit for at least six hours (in an eight hour day). *R. at 123.* The Assessment notes that Plaintiff has asthma with infrequent exacerbations, and no severe or recurrent exacerbations have been reported. *R. at 123.* A spirometry was interpreted as indicating that Plaintiff had a "mild obstructive lung defect." *R. at 161.*

Application of the Grids

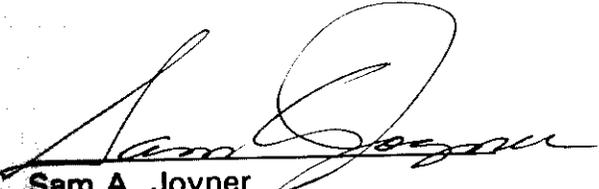
Plaintiff asserts that because she has both exertional and non-exertional impairments, and because she could not perform a "full range of activities," the ALJ was precluded from applying or relying upon the Grids.¹¹ However, the record does not indicate that the ALJ applied the Grids. The ALJ determined Plaintiff's residual functional capacity, and additionally determined that Plaintiff should "work in a clean air environment and avoid fumes, dust and smoke." *R. at 20.* The ALJ consulted a vocational expert, and based on the testimony of the vocational expert determined

¹¹ The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Supbt. P, App. 2.

that a sufficient number of jobs existed in the national economy which Plaintiff could perform.^{12\} *R. at 70-86.*

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 27 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

^{12\} The vocational expert testified that numerous jobs existed in the national economy that Plaintiff could perform. The ALJ additionally asked the vocational expert for the potential job base for Plaintiff, assuming that all of the testimony given was true. The vocational expert noted that such an assumption would reduce the job base by about 50%. *R. at 76.* The vocational expert also testified that an employer would be required to make a reasonable accommodation to permit Plaintiff to complete her asthma treatment (which takes 15-20 minutes) every three to four hours. *R. at 76.*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MARILYN DICKERSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

OCT 27 1995

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

No. 94-C-332-J

FILED ON DOCKET
10-30-95

ORDER

Plaintiff, Marilyn Dickerson, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.²¹ Plaintiff contends that the Secretary erred because: (1) the Secretary's decision is not supported by substantial evidence; (2) Plaintiff's impairments meet or equal a Listing; and (3) the Secretary failed to consider Plaintiff's complaints of pain.

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

²¹ Plaintiff filed an application for disability and supplemental security insurance benefits on January 10, 1989. *R. at 39* The application was denied initially and upon reconsideration. *R. at 39*. A hearing before an Administrative Law Judge ("ALJ") was held on December 8, 1989. *R. at 70*. By order dated May 25, 1990, the ALJ determined that although Plaintiff could not perform her past relevant work, she was not disabled. *R. at 16-24*. The Plaintiff appealed the ALJ's decision, and by order of the Appeals Council, dated February 5, 1992, the case was remanded to the ALJ for further proceedings and clarification of the vocational expert's testimony. *R. at 404*. On February 25, 1993, after a second hearing, the ALJ found that Plaintiff was not disabled and denied benefits. *R. at 404-420*.

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A decision by the Secretary will be upheld on appeal if it is supported by substantial evidence and follows applicable legal standards. See Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). For the reasons outlined below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 20, 1948, and was 44 years old at the time of her second hearing. *R. at 40, 405.* Plaintiff obtained her GED in 1979 or 1980. *R. at 41.*

In August of 1988, Plaintiff was injured in a car accident. Plaintiff's leg was broken in several places, and her knee was shattered. *R. at 42.* Plaintiff testified that she had three plates and 26 screws and bolts placed in her leg by Dr. Allen Lewis. *R. at 43.*

At her hearing, Plaintiff testified that she had not worked since her injury, and that she still cannot walk without support (walker or cane). *R. at 43.* Plaintiff is not currently undergoing any physical therapy for her leg, although she had physical therapy three times per week from September 1988 through January 1989. *R. at 231-84.*

At Plaintiff's December 8, 1988 hearing, Plaintiff walked with a walker for support, and testified that she can walk to wherever she needs to go. *R. at 44.* Plaintiff also testified that her legs swell. *R. at 45.* In addition, Plaintiff stated that her back hurts all of the time. *R. at 47.* At her hearing on September 21, 1992, Plaintiff was able to walk with the assistance of a cane. *R. at 436.*

Plaintiff was a nurse's aide for three years, and was a teacher's aide prior to working as a nurse's aide. *R. at 53-54.* Plaintiff also worked serving hot meals. *R. at 56.*

Plaintiff testified that her pain is the main problem. *R. at 65.* According to Plaintiff, on a scale of one to ten, her pain is a fairly constant 9. *R. at 65.* Plaintiff is 5'7" tall and weighs 240 pounds. *R. at 40-41.*

II. THE SEQUENTIAL EVALUATION PROCESS

The Secretary has established a five-step process for the evaluation of social security claims.³¹ See 20 C.F.R. § 404.1520. A claimant is disabled under the Social Security Act if

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 in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

³¹ Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987); *Williams v. Bowen*, 844 F.2d 748, 750-51 (10th Cir. 1988).

The ALJ's evaluation of Plaintiff's claim in this case terminated at step five of the sequential evaluation process. The ALJ determined that Plaintiff had the RFC to perform some sedentary work, and that a substantial number of jobs in the national economy exist to permit a finding of non-disability. *R. at 418-20.*

III. STANDARD OF REVIEW

The Secretary's disability determinations are reviewed to determine if: (1) the correct legal principles have been followed, and (2) the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Williams, 844 F.2d at 750. The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993).

Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

IV. REVIEW

Substantial Evidence

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than

to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

Plaintiff initially asserts that the decision of the ALJ is not supported by substantial evidence. Plaintiff states that the "ALJ based his decision on one consulting exam, discounting the majority of medical evidence, including evidence submitted by Plaintiff's treating physicians." See Plaintiff's Brief at 2. Plaintiff's statement is not supported by the ALJ's opinion.

Dr. Lewis, one of Plaintiff's treating physicians, noted on June 27, 1989, that Plaintiff "should be trained primarily to some sort of sedentary occupation with brief periods of standing or walking." *R. at 320.* Dr. Lewis believed that it was unlikely that Plaintiff would be able to return to the type of duties she performed prior to the accident. *R. at 320.* On June 27, 1989, Dr. Lewis noted that Plaintiff continued to make poor progress with her rehabilitation, but "I do not have a physical reason for this." *R. at 323.* Dr. Lewis indicates in his records, on May 1, 1989, that Plaintiff will be disabled for at least one year from the date of her accident, and that Plaintiff would probably not be able to return to her former duties within two to three years of her accident, if ever. *R. at 309.*

A Residual Functional Capacity Assessment conducted by Dr. Vallis D. Anthony on June 9, 1989 indicated that Plaintiff could lift ten pounds, sit about six hours (in an eight hour day), push/pull an unlimited amount, and stand or walk about two to four hours (in an eight hour day). *R. at 153-54.* Plaintiff's strength was described as "normal," but the doctor noted that Plaintiff "gives poor effort." *R. at 154.*

A Residual Functional Capacity Assessment dated March 15, 1989 indicated that Plaintiff could lift a maximum of twenty pounds, frequently lift ten pounds, stand about six hours (in an eight hour day), sit about six hours (in an eight hour day), and push/pull an unlimited amount. *R. at 158-59.*

Plaintiff was examined by Dr. Shashi Husain on March 15, 1990. Plaintiff's limitations were described as: standing/walking--one to two hours; sitting--an

unlimited amount; carrying--less than one-third of the number of hours in an eight hour day. *R. at 331-337.*

A Residual Functional Capacity Assessment conducted by Dr. William S. Dandridge on June 30, 1992 indicated that Plaintiff could lift/carry a maximum of 15 pounds infrequently and five pounds frequently. *R. at 605-06.* In addition, Plaintiff's stand/walk limitations were described as a total of one hour in an eight hour day--only fifteen minutes without interruption. *R. at 605.* Plaintiff's ability to sit was described as unlimited. *R. at 606.*

On April 15, 1992, a letter from Dr. Kenneth A. Muckala, who began treating Plaintiff some time in 1990, stated that Plaintiff's symptoms have continued to become worse. *R. at 560, 660, 616.* Dr. Muckala noted that Plaintiff states she is limited to walking no more than one block and has difficulty in climbing a flight of stairs. Dr. Muckala's opinion was that Plaintiff is totally and permanently disabled within the guidelines of the SSA. *R. at 616.* In his opinion Plaintiff qualifies for Section 1.03A and 1.05C1 of the Listings. *R. at 618.* In addition, Plaintiff cannot stand more than 15 minutes without assistance, and occasionally has difficulty lifting small objects. *R. at 618.* Dr. Muckala noted that Plaintiff takes Doxepin, Paragon Forte DSC, four times per day, Naprosyn two times per day, and intermittently takes Tylox or Percodan for pain.

At Plaintiff's second hearing, on September 21, 1992, Plaintiff testified that she walks with a cane (an improvement from a walker). *R. at 437.* Plaintiff stated that her knee goes out every other day or so, and that the pain in her knee is about an

eight (on a scale of one to ten), on a continual basis. *R. at 439, 441.* Plaintiff is supposed to take her medication (Naprosyn and Parafon Forte) every four hours. However Plaintiff testified that she **does not** like to take her medicine during the day so she sometimes takes a double or triple dose at night before bed. *R. at 444-45.* According to Plaintiff, she can walk **approximately** one block without resting. *R. at 445.* To cope with her pain, Plaintiff **states** that she has to lay flat on her back about five to six times each day. *R. at 446.* Plaintiff additionally testified that she goes to church once each week (*r. at 452*), **drives** about ten miles to go to her doctor (*r. at 453*), and cooks about one meal each week. *R. at 455.* In addition, on some days (usually one day per week), Plaintiff **cleans**. *R. at 455.* However, Plaintiff is unable to vacuum, mop, or clean tubs. *R. at 455.* Plaintiff also testified that she attends church, visits friends, and sometimes **goes** out to eat. *R. at 596.*

Contrary to the Plaintiff's assertion, the ALJ specifically notes that he gave "particular consideration" to the opinions of Dr. Muckala, a treating physician, and Dr. Dandridge, an examining physician. *R. at 413.* Dr. Muckala and Dr. Dandridge differ on Plaintiff's ability to sit and perform work consistent with a sedentary job. The ALJ noted that although consideration was given to Dr. Muckala's opinion, some of the limitations described by Dr. Muckala were inconsistent with the medical record. (For example, Dr. Muckala emphasized Plaintiff's back problems, but such problems were not supported by Plaintiff's medical records. X-rays from 1992 indicate no spinal abnormalities. *R. at 603.*) The ALJ also noted that Dr. Dandridge, a board certified

orthopedic surgeon, was a specialist.⁴¹ In addition, at Plaintiff's second hearing, on September 21, 1992, Plaintiff sat for approximately 55 minutes before having to stand. *R. at 415*. Plaintiff testified that she drove herself to the hearing, drives herself to her doctor's office, and can sit for approximately thirty minutes to one hour before having to move around. *R. at 415-416, 502*. Although Plaintiff testified that she was sometimes drowsy, the ALJ discredited Plaintiff's drowsiness because Plaintiff doubles up on her medicine at night, taking none during the day. *R. at 416*.

The ALJ followed the correct legal standard in determining the weight to give to Plaintiff's treating and examining medical doctors. Substantial evidence supports the ALJ's determination that Plaintiff is able to perform some work at the sedentary level.

Listings 1.11

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equalled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51.

Plaintiff argues that the ALJ erred in determining that Plaintiff's injuries were not medically equivalent to Listing 1.11. Listing 1.11 provides:

⁴¹ Whether or not a doctor is a specialist is one of the factors which can be considered in deciding the weight to give a doctor's opinion. Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995); 20 C.F.R. § 404.1527(d)(2)-(6).

Fracture of the femur, tibia, tarsal bone of pelvis with solid union not evident on X-ray and not clinically solid, when such determination is feasible, and return to full weight-bearing status did not occur or is not expected to occur within 12 months of onset.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.11 (italics in original).

Plaintiff asserts that her condition is medically equivalent to Listing 1.11. Plaintiff's medical records do indicate that Plaintiff suffered a fracture of her femur and tibia, and Plaintiff testified at her hearing that she was unable to return to full weight-bearing status. *R. at 43, 437.* However, Plaintiff's medical records additionally indicate that Plaintiff had a solid union of all of her fractures.

Plaintiff was injured in August of 1988. *R. at 42.* At an examination on May 1, 1989, Plaintiff's treating physician, Dr. Alan G. Lewis noted that although Plaintiff complained of right foot pain, Plaintiff's X-rays did not show a fracture or dislocation. *R. at 299.* Plaintiff's records on March 10, 1989 indicate that the X-rays showed a good fusion at all fracture sites. *R. at 300.* On January 4, 1989, according to Dr. Lewis, Plaintiff's X-rays revealed maintenance of good alignment and healing. *R. at 301.* Plaintiff was additionally examined by Richard G. Cooper, D.O. on March 2, 1989. *R. at 292.* Plaintiff's knee was reported as stable, and Plaintiff's X-ray showed maintenance of good alignment and signs of healing on the leg. *R. at 292.*

Plaintiff additionally suggests (in a footnote) that her injuries are medically equivalent to Listing 1.05B or 11.00C. Plaintiff has the burden of proof to establish that a Listing is met or equalled, and Plaintiff's medical records do not suggest that Plaintiff met or equalled these Listings. Dr. Muckala, one of Plaintiff's doctors, in a

letter on behalf of Plaintiff stated that he believes Plaintiff qualifies for Section 1.03A and 1.05C1. *R. at 618*. However, as adequately detailed by the ALJ in his opinion, Plaintiff does not meet or equal these Listings. *R. at 412-13*.

The ALJ's decision that Plaintiff did not meet or equal a Listing is supported by substantial evidence, and the ALJ did not err in concluding that Plaintiff's medical impairments do not meet or equal a Listing.

Pain/Vocational Expert

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. *Id.* at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." *Id.* Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility. *Id.* at 164. In assessing a claimant's complaints of pain, the following factors may be considered.

For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.

Id. at 165.

However, the mere existence of pain is insufficient to support a finding of disability; the pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). In addition, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff asserts that the ALJ erred because the ALJ did not adequately consider Plaintiff's pain in determining that Plaintiff was not disabled. The ALJ summarized Plaintiff's medical records, Plaintiff's testimony, and Luna's requirements. *R. at 415-16*. In evaluating Plaintiff's complaints of pain, the ALJ observed that Plaintiff sat for 55 minutes at the hearing before having to stand, that Plaintiff drove herself to the hearing, that Plaintiff drives to her doctor's office, and that Plaintiff does some limited housework. *R. at 415-416*. The ALJ additionally noted that Plaintiff does not take medications in accordance with her prescriptions, preferring to take none during the day and doubling up at night. *R. at 416*. The ALJ also observed that the medical records do not attribute any physical changes such as premature aging, weight loss, progressive deterioration or atrophy to Plaintiff. *R. at 416*.

The ALJ determined that Plaintiff's pain does limit her to standing no more than fifteen minutes at a time (one hour total in an eight hour day), walking no more than one block, and that Plaintiff does need the assistance of a cane. *R. at 415-16*. However, the ALJ found Plaintiff's testimony that she could not engage in any

sedentary work activity was unsupported by the medical record and not sufficiently credible. *R. at 416*. The ALJ's determination is supported by substantial evidence, and credibility determinations by the ALJ are given substantial deference on appeal.

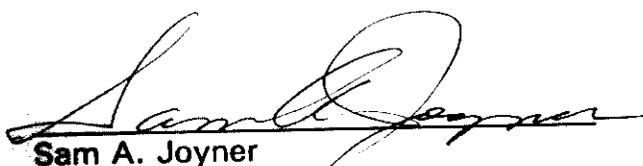
Plaintiff's records from Dr. Lewis in May of 1989 note that, although Plaintiff complained of right foot pain, the X-rays do not show a fracture or dislocation. *R. at 299*. In June of 1989, Dr. Lewis reported that Plaintiff continues to make poor progress, but the doctor had no "physical reason" to explain this. *R. at 323*. Plaintiff was additionally evaluated by Cullen J. Mancuso, Ph.D. on June 23, 1992. Dr. Mancuso's report concludes that "[w]hatever impairments she may have which might prevent her from working are not of a psychological or psychiatric nature." *R. at 597*.

At the hearing testimony on September 21, 1992, Plaintiff testified that she has knee and back pain each day, and sees a doctor at least once per month. *R. at 435-36*. Plaintiff described her pain as about an eight, on a continual basis. *R. at 441*. She takes Naprosyn and Parafon Forte, but does not like to take them during the day so she sometimes takes a double or triple dose at night before bed. *R. at 444-45*. Plaintiff testified that she can walk approximately one block without resting. *R. at 445*. Plaintiff stated that to cope with her pain she has to lay flat on her back, sometimes five to six times each day. *R. at 446*. Plaintiff attends church once each week. Plaintiff drives about ten miles to go to her doctor, and she cooks about one meal each week. *R. at 452-53, 455*. Plaintiff cleans on some days, usually one day per week. *R. at 455*. However, she does not vacuum, mop, or clean tubs. *R. at 455*.

The ALJ asked the vocational expert whether an individual with Plaintiff's background, with lifting restrictions of five pounds on a frequent basis, and fifteen pounds on an occasional basis, standing and walking limited to fifteen minutes at a time, and one hour for an entire day, and no ability to climb, stoop, kneel, balance, crouch or crawl would be able to perform work in the national economy. *R. at 463-68.* The vocational expert determined that an adequate number of jobs existed for such a person. *R. at 465-68.* In addition, the vocational expert testified that a sufficient number of jobs would still be available if the individual could only sit for thirty minutes at a time, and needed to alternate between sitting and standing at will. *R. at 468-69.* The record contains substantial evidence to support the ALJ's holding that Plaintiff was not disabled.⁵¹

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 27 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

⁵¹ Plaintiff additionally alleges that the ALJ's determination that Plaintiff can perform some sedentary work when Plaintiff cannot perform the full range of sedentary activities is error. However, an individual is not automatically disabled merely because the individual cannot perform the full range of a particular category of work. The regulations require that a vocational expert be consulted, and the individual's limitations presented to the expert. Reliance on a vocational expert can constitute substantial evidence that an individual is not disabled. See, e.g., *Kelley v. Chater*, 62 F.3d 335, (10th Cir. 1995).

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

JACK CLARK,)
)
 Plaintiff,)
)
 v.)
)
)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,¹⁾)
)
 Defendant.)

OCT 27 1995 *RL*

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

No. 94-C-770-J ✓

ENTERED ON DOCKET
DATE 10-30-95

ORDER

Plaintiff Jack Clark, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary which denied Social Security benefits.²⁾ Plaintiff contends that: (1) the ALJ did not apply the correct legal standard in evaluating Plaintiff's complaint of pain, and (2) the ALJ failed to consider all of the evidence in evaluating Plaintiff's Residual Functional Capacity ("RFC").³⁾

¹⁾ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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⁾ Plaintiff filed an application for supplemental security income on September 25, 1991, claiming disability due to heart problems, pain in both legs, and arm swelling. *R. at 367*. Plaintiff's application was denied initially and upon reconsideration. *R. at 371, 376*. A hearing before an Administrative Law Judge ("ALJ") was held May 11, 1993. *R. at 47*. By order dated November 2, 1993, the ALJ determined that Plaintiff was not disabled and was not entitled to supplemental security income. *R. at 22-30*. On June 9, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 4*.

³⁾ Residual Functional Capacity is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs." 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c).

9

A decision by the Secretary will be upheld on appeal if it is supported by substantial evidence and follows applicable legal standards. See Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). For the reasons outlined below, the Court affirms the decision of the ALJ.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on January 31, 1940, and has a ninth grade education. *R. at 52, 53.* Plaintiff testified that he has not worked since September 12, 1977, at which time he was a forklift operator.⁴¹ *R. at 54, 382.*

On November 16, 1985, Plaintiff was admitted for acute inferior myocardial infarction and uncontrolled hypertension. *R. at 258.* A cardiac catheterization and angioplasty was performed on Plaintiff during his hospitalization. *R. at 284, 292.* An x-ray was interpreted as "negative for active disease. Slight pulmonary vascular congestion and borderline cardiomegaly are noted." *R. at 270.*

Dr. David Sholl noted on Plaintiff's discharge report that "[a]fter controlling the blood pressure the patient became pain free." *R. at 260.* Plaintiff's discharge report additionally indicates that Plaintiff's blood pressure was controlled during his hospital stay and was not a problem. *R. at 283.*

Plaintiff's medical records from Dr. David Sholl indicate that Plaintiff occasionally experiences sharp pains. *R. at 322, 349, 350.* Numerous entries

⁴¹ A November 16, 1985 hospital admission report indicates that Plaintiff is "self employed and works as a mechanic repairing and selling automobiles." *R. at 259.*

indicate Plaintiff is without pain, or **denies any difficulty**. *R. at 322, 323, 326, 426-29, 457.*

An April 10, 1986 letter from **Dr. Steve Schneider** indicates that Plaintiff's chest pain and angina pectoris has **been controlled**. *R. at 324.* Plaintiff's records from Dr. Sholl additionally indicate **Plaintiff's condition as stable**. *R. at 419-20*

Treadmill tests performed on **December 23, 1985** and April 14, 1986 revealed no abnormalities and "recovery electrocardiograms [were] within normal limits." *R. at 302.* Plaintiff's blood pressure **response to the treadmill test** was also reported as normal. *R. at 303.*

Dr. Richard G. Cooper examined Plaintiff on March 13, 1986. Dr. Cooper reported that Plaintiff's **respiratory rate was normal**, his lungs were clear, and his muscle strength of adductor, abductors (of hips), quadriceps, and hamstrings was full and equal (on both sides). *R. at 319-20.* Plaintiff's range of motion of the thoracolumbar spine was normal, but **Plaintiff complained of pain at the extremes of the range of motion**. *R. at 320.* No muscle atrophy was observed in Plaintiff's upper extremities, and Plaintiff's **grip strength in both hands** was full and equal. *R. at 320.* Dr. Cooper noted in his summary that **Plaintiff had myocardial infarction in November 1985**, some old injuries which **produced some stiffness in the neck and tenderness in the ribs**, and might have some **weakness in the dorsiflexor of the large right toe**. *R. at 320.*

Plaintiff's Residual Physical **Functional Capacity Assessment** was conducted on February 13, 1992. *R. at 408-415.* The examining doctor noted that Plaintiff has

had myocardial infarction, that chest pain was not anginal, that Plaintiff's lungs sounded normal and that Plaintiff had a normal motion and gait. The doctor concluded that Plaintiff's pain did not limit his Residual Functional Capacity ("RFC"), and Plaintiff's RFC was assessed at medium. *R. at 409.*

Plaintiff was examined by Dr. Michael Farrar on January 29, 1992. *R. at 423.* Dr. Farrar noted that Plaintiff was fully ambulatory without any assistive devices, had a history of coronary artery disease with stable angina pectoris, and a history of a crushed right foot. *R. at 424.*

On August 1, 1992, Plaintiff was again admitted to the hospital on complaints of chest pain. *R. at 431.* The hospital report indicates that Plaintiff has a "history of hypertension for 20 years and had been doing well except for occasional brief and sharp chest pains for the last several years." *R. at 431.* The report states that Plaintiff experienced no further chest pains for the remainder of his hospital stay and was doing fine. *R. at 431.* Dr. Jeffrey Black determined that Plaintiff did not experience a myocardial infarction, and Plaintiff was discharged on August 2, 1992. *R. at 431.*

At the hearing, Plaintiff testified that since his heart attack in 1985 he has experienced severe chest pains three to four times each week, and takes nitroglycerine for the pain. *R. at 57-58, 68.* According to Plaintiff, he experiences chest pain, similar to a burning in his chest, on a more frequent basis. *R. at 60.* He can only walk about a block before he experiences shortness of breath, and his legs start hurting if he has been walking too long. *R. at 61.* His arms sometimes go to

sleep on him, or feel numb, and if he sits for a long period of time his feet begin to swell. *R. at 62-63.* He was able to carry a twenty pound bag of dog food, but he sometimes drops bags of groceries because his arm will simply stop functioning. *R. at 65.* Plaintiff stated that he feels sick or nauseous if he bends over. *R. at 70.*

II. THE SEQUENTIAL EVALUATION PROCESS

The Secretary has established a five-step⁵¹ sequential process for the evaluation of social security claims. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988). A claimant is disabled under the Social Security Act if:

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 in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The ALJ's evaluation of Plaintiff's claim in this case terminated at step five of the sequential evaluation process. The ALJ determined that Plaintiff had the RFC to

⁵¹ Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal to or the medical equivalence of an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

perform a wide range of medium work (and therefore, presumptively, light and sedentary work), and that a substantial number of jobs in the national economy exist to permit a finding of non-disability. *R. at 29-30.*

III. STANDARD OF REVIEW

The Secretary's disability determinations are reviewed, on appeal, to determine if: (1) the correct legal principles have been followed, and (2) the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Williams, 844 F.2d at 750. The Court, in determining whether the decision of the Secretary is supported by substantial evidence does not reweigh the evidence or examine the issues *de novo*. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993).

Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

IV. REVIEW

Legal Standard: Evaluation of Pain

Plaintiff initially asserts that the ALJ erred because the ALJ did not follow the correct legal standard in evaluating Plaintiff's pain. Plaintiff asserts that the ALJ

required medical proof of "totally disabling pain syndrome," which is contrary to the legal standard for evaluating pain.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529, 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented, and any objective or subjective indications of the pain, must assess the claimant's credibility. In assessing a claimant's complaints of pain, the following factors may be considered.

For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.

Id. at 165.

If a nexus exists, the ALJ should consider all relevant evidence which supports the plaintiff's allegations of pain.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Luna at 164. However, the mere existence of pain is insufficient to support a finding of disability; the pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). In addition, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

The ALJ summarized the Plaintiff's medical records, the Plaintiff's testimony, the testimony of the hearing witnesses (Plaintiff's wife), and Luna's requirements. *R. at 25-28*. In evaluating Plaintiff's complaints of pain, the ALJ observed that Plaintiff's treating physician, Dr. Sholl, has noted no further chest complaints since at least August 11, 1992, that Plaintiff's EKG was negative, and Plaintiff's recent hospital stay indicated Plaintiff's pain was controlled, and remained controlled. *R. at 27*. The ALJ determined, from the medical testimony, that Plaintiff had no detectable physical limitations.

Plaintiff's RFC was reported as medium, and the ALJ found Plaintiff's testimony with respect to Plaintiff's pain consistent to the extent of a RFC of medium. Plaintiff testified that three to four times each week he has severe pain, and that he experiences a burning sensation more frequently than that. Plaintiff additionally testified that he takes nitroglycerin for his pain and experiences no side effects from the medication. After an evaluation of Plaintiff's testimony in accordance with the

Luna factors, the ALJ determined that Plaintiff's pain was not a "totally disabling pain." *R. at 28.*

The ALJ's decision indicates that the ALJ considered Plaintiff's testimony regarding his pain, but determined that Plaintiff's pain was not disabling. *R. at 27, 29.* Numerous entries in Plaintiff's medical records indicate Plaintiff's heart condition was under control and Plaintiff was not experiencing any difficulty. *R. at 322, 323, 326, 426-29, 457.* An RFC assessment indicated Plaintiff has the capability of performing work at the medium level, and none of Plaintiff's treating doctors indicate a degree of impairment consistent with a finding of disabled. *R. at 408-415.*

The ALJ examined the relevant evidence with respect to Plaintiff's complaints of pain. However, the ALJ determined that Plaintiff's testimony concerning his pain was credible only to the extent that it was consistent with a residual functional capacity of medium, and that the medical evidence did not support a finding that Plaintiff had disabling pain. *R. at 27-28.* The ALJ followed the correct legal standard in evaluating Plaintiff's complaints of pain.⁶¹

⁶¹ The ALJ's language choice of "totally disabling pain" may have caused some confusion. In accordance with Luna, the amount of pain a plaintiff experiences does not have to be "totally disabling" before the ALJ is required to consider all of the evidence. However, to justify a finding of disabled, a plaintiff must experience "disabling pain."

In this case, the record clearly reflects that the ALJ did consider the medical evidence and Plaintiff's testimony regarding pain. The ALJ determined that Plaintiff's pain was not disabling, and did not further limit Plaintiff's RFC. Plaintiff was therefore not experiencing "totally disabling pain." However, the ALJ came to this conclusion after evaluating all of the medical evidence, and did not utilize "totally disabling pain" as the legal standard to determine whether to consider the relevant evidence.

RFC: Consideration of Pain

Plaintiff additionally asserts that the ALJ erred because the ALJ's determination of Plaintiff's RFC was not based on all of the relevant evidence, and the ALJ failed to adequately consider Plaintiff's pain.

Initially, as discussed above, the ALJ's opinion indicates that the ALJ did consider Plaintiff's testimony and the medical evidence relating to Plaintiff's pain in determining Plaintiff's RFC. The medical records from Plaintiff's treating doctors do not indicate any functional restrictions, and the only RFC assessment performed indicated that Plaintiff had the capability of working at the medium⁷¹ level. Although Plaintiff testified that he was unable to walk very far or do very much, the ALJ determined that Plaintiff's testimony was credible only to the extent that it was consistent with a RFC of medium, and that Plaintiff's claims were not substantiated by the medical evidence. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992) (credibility determinations by ALJ given great weight on review).

Under 20 C.F.R. § 416.966 an ALJ can take administrative notice that a significant number of sedentary, light, and medium jobs exist in the national economy. *R. at 28.* The ALJ determined that Plaintiff's age (53, or closely approaching advanced age), his education (ninth grade, or limited), and his skill level (no

⁷¹ "Medium work" requires "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work." 20 C.F.R. § 404.1567(c).

transferable skills)⁸¹, dictated a finding of non-disability in accordance with Rule 203.18, 20 C.F.R. Pt. 404, Subpt. P, Appendix 2, (the "Grids").⁹¹

The ALJ additionally determined that because Plaintiff could perform medium work, Plaintiff could also perform light¹⁰¹ and sedentary work. *R. at 27*. The Grids additionally indicate a finding of non-disability for an individual with a RFC of "light" for the characteristics attributed by the ALJ to Plaintiff. 20 C.F.R. Pt. 404, Subpt. P, Appendix 2, Rule 202.11.

Plaintiff's RFC assessment indicated that Plaintiff could perform work at the medium level. Nothing in Plaintiff's medical records indicate that Plaintiff would be unable to meet the requirements for performing work at the medium or light levels. Although Plaintiff testified that he experienced pain and other difficulties, the ALJ determined that Plaintiff's testimony was credible only to the extent consistent with a finding that Plaintiff could perform medium work. The record does not reveal that

⁸¹ Because Plaintiff has not worked in the past fifteen years, the ALJ decided that Plaintiff had no past relevant work experience. *R. at 28*.

⁹¹ Plaintiff does not specifically allege the ALJ's reliance on the Grids as error. In this case, the ALJ specifically found that Plaintiff's RFC was not impaired by his pain. The ALJ's decision is supported by the relevant case law. Gossett v. Bowen, 862 F.2d 802, 807-08 (10th Cir. 1988) ("The mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. The presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant.").

¹⁰¹ "Light work" requires "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567(b).

the ALJ failed to consider the evidence, and the ALJ's findings are supported by substantial evidence.

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 27 day of October 1995.


Sam A. Joyner
United States Magistrate Judge

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

OCT 27 1995

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

JOSEPHINE G. CRITTENDEN,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

No. 93-C-131-J ✓

FILED ON DOCKET

DATE 10-30-95

ORDER

On July 12, 1995, this Court remanded the above-captioned case to the Administrative Law Judge ("ALJ") pursuant to an Order and Judgment entered by the United States Court of Appeals for the Tenth Circuit. Plaintiff's motion for attorney fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) is currently before this Court.

The EAJA requires the United States to pay attorney fees and costs to a "prevailing party" unless the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). The United States has the burden of proof to establish that its position was substantially justified. Kemp v. Bowen, 822 F.2d 966, 967 (10th Cir. 1987).

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

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In Pierce v. Underwood, 487 U.S. 552, 565 (1988), the Supreme Court defined "substantially justified" as "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." "Substantially justified" is more than "merely undeserving of sanctions for frivolousness." Id.

[A] position can be justified even though it is not correct, and . . . it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

Id. at n.2. See also Hadden v. Bowen, 851 F.2d 1266, 1267 (10th Cir. 1988).

Furthermore, a reversal based upon a lack of substantial evidence in the record does not automatically translate into an award of attorney fees. In Hadden, the Tenth Circuit Court of Appeals noted that the circuits which have addressed the issue "have all concluded that a lack of substantial evidence indicates, but does not conclusively establish, that the government's position concerning a claim was not substantially justified." Hadden, 851 F.2d 1266, 1269 (10th Cir. 1988). The Tenth Circuit adopted the majority rule and held that "a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." Id.

In this case, the Tenth Circuit determined that the record did not contain substantial evidence to support the ALJ's conclusion that the Plaintiff could lift two pounds with her right arm, and remanded the case for further consideration. Although the record fails to contain substantial evidence to support the ALJ's conclusion, a lack of substantial evidence does not automatically mean that the United States' position was not substantially justified. Upon review of the record and the positions of the

parties, the Court finds that the position of the United States was substantially justified. Plaintiff is therefore not entitled to fees or costs under the EAJA.

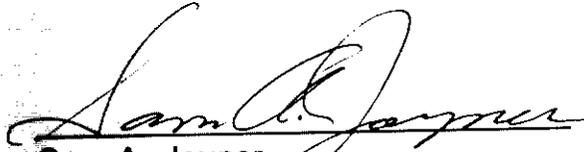
Initially, one of Plaintiff's treating physicians reported that Plaintiff had "improved," and on May 2, 1990 could lift two pound dumbbells with her right hand. *R. at 155*. However, by May 30, 1990 (three months after her right arm surgery) Plaintiff's doctor notes that Plaintiff was having more difficulty than she did two months after her operation, and her doctor requested that she discontinue her exercises. *R. at 154*. In addition, Plaintiff's grip strength was reported as weak on June 27, 1990 (*r. at 151*), and by August 28, 1990 her doctor recorded her grip strength in her right hand as not registering, compared to 64 pounds on her uninjured side. *R. at 145*. The vocational expert, however, testified that Plaintiff's grip strength was "not really a consideration because the grip strength would be such [as] is necessary to hold a pencil and a paper" *R. at 64*.

The record indicates that Plaintiff was able, at one point, to lift two pounds with her right arm. However, the record also suggests that Plaintiff's condition deteriorated, and no records after May 2, 1990 specifically relate that Plaintiff was able to lift two pounds with her right arm. However, as pointed out by Defendant, Plaintiff's treating physician concluded on August 28, 1990 that Plaintiff's right arm had a permanent partial impairment of twenty percent. *R. at 145*. Plaintiff's doctor "recommend[ed] [that] she be retrained for a more sedentary occupation. She will be unable to do heavy lifting, squeezing, grasping, or repetitive activity with her right hand." *R. at 146 (emphasis added)*. The Court agrees with Defendant that one

reasonable interpretation of the treating physician's recommendation is that an impairment of 20% is not severe, and that a limitation of no "heavy" lifting would not preclude the lifting of two pounds. In addition, as pointed out by Defendant, Plaintiff participates in some activities which could lead to a reasonable conclusion that Plaintiff can lift two pounds with her right hand. For example, Plaintiff does some light housework (cleaning and laundry), some cooking, and grocery shops (with a friend).^{2/}

After a review of the record and the briefs submitted by the parties, the Court finds that the position of the United States was substantially justified, and Plaintiff's request for fees and costs pursuant to the EAJA is denied.

It is so ordered this 27 day of October 1995.



Sam A. Joyner
United States Magistrate Judge

^{2/} The record does indicate that Plaintiff performs some of these activities with her left hand, and/or not as readily as she did prior to her injury. Plaintiff noted that cooking takes her about twice as long as it did prior to her injury. *R. at 110*. Although she does some grocery shopping, Plaintiff wrote that she can only "lift very light objects on good days - so I take someone with me to buy groceries." *R. at 111*. Although she does some laundry, Plaintiff noted that sometimes the clothes are too heavy for her to lift. *R. at 111*. Plaintiff also takes care of her personal hygiene. *R. at 107*.

FILED

OCT 25 1995

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

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

CAROLE POTTS AND JAMES
POTTS,

Plaintiffs,

v.

SAM'S WHOLESALE CLUB,

Defendant.

Case No: 94-C-184-W ✓

ENTERED ON BOOKS
OCT 27 1995

JUDGMENT

This action came on before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS THEREFORE ORDERED that judgment is entered in favor of the defendant, Sam's Wholesale Club, and against the plaintiffs, Carole Potts and James Potts.

Dated this 25th day of October, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:pott.jud

14

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

OCT 26 1995

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

STANLEY K. CLARK,

Plaintiff,

v.

JOHN HALL, d/b/a HALLCO
PRODUCTIONS, INC.,

Defendant.

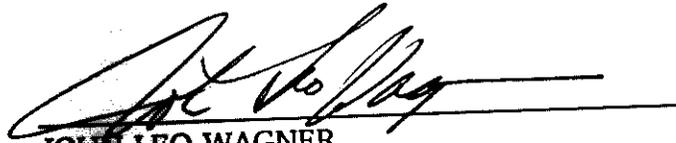
Case No. 93-C-916-W

ENTERED ON RECORD
DATE OCT 27 1995

JUDGMENT

Plaintiff is granted judgment for attorney's fees in the amount of \$12,000.00.

Dated this 26th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Clark.3

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

FILED

OCT 25 1995

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

STANLEY K. CLARK,

Plaintiff,

v.

JOHN HALL, d/b/a HALLCO
PRODUCTIONS, INC.,

Defendant.

Case No. 93-C-916-W ✓

FILED ON DOCKET
OCT 27 1995

ORDER GRANTING ATTORNEY'S FEES

This order pertains to Plaintiff's Motion for Attorney's Fees (Docket #36)¹. Plaintiff is awarded attorney's fees in the amount of \$12,000.00 pursuant to the Stipulation of Settlement Agreement of the Parties attached hereto as Exhibit A. Defendant's Motion for Relief from Judgment (Docket #52) is moot as a result of the parties' agreement.

The court retains jurisdiction to enforce the settlement agreement of the parties.

Dated this 25th day of October, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Clark.2

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.

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JOHN B. RUDOLPH
VERA C. NEINAST
JOSEPH R. MEMBRINO
LISA M. TONERY
*NOT ADMITTED IN OKLAHOMA

WALTER B. HALL (923-1985)
FRED S. NELSON (928-1987)

JAMES C. T. HARDWICK
THOMAS D. GABLE
HAS F. GOLDEN
W. SANDEL
DND B. KELLY
ZW M. WOLOV
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WRITER'S DIRECT DIAL NUMBER:
(918) 594- 0447

OF COUNSEL
JOHN S. ESTILL, JR.
GRAYDON D. LUTHEY ROSS O. SWIMMER

October 23, 1995

C. Rabon Martin
403 South Cheyenne Avenue, Suite 1300
Tulsa, Oklahoma 74103

RE: Clark v. Hall

Dear Rabon:

This letter will formalize the terms of the agreement reached Friday, October 20, 1995, in this matter. We have agreed to the following:

1. John Hall will stipulate to an award of attorneys' fees to Stanley K. Clark in the amount of \$12,000.00 and Clark's pending cost application.
2. Stanley K. Clark agrees to release the judgment (including the award of attorneys' fees) upon Hall's payment to Clark of \$5,447.00, with payment to be made in the following manner: \$1,250.00 now and the remainder, \$4,197.00, paid in certified funds on or before March 1, 1996.
3. Stanley K. Clark will forbear any collection efforts on the judgment (except for filing a judgment lien) until March 1, 1996. If payment of the \$4,197.00 is not received on or before that date, Stanley K. Clark may begin efforts to collect the outstanding balance of the entire judgment (including the award of attorneys' fees).
4. Stanley K. Clark will dismiss his pending appeal.
5. John Hall will withdraw his pending motion for relief from judgment and further agrees not to appeal.

Exhibit A

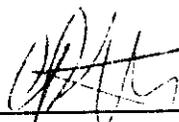
C. Rabon Martin
October 23, 1995
Page 2

If you agree to these terms on behalf of your client, please sign below.

Sincerely,



Fred M. Buxton
for Stanley K. Clark



C. Rabon Martin
for John Hall

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

FILED

OCT 26 1995

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

ROBERT MCELHATTAN,)
)
 Plaintiff,)
)
 v.)
)
 AMERADA HESS CORPORATION,)
)
 Defendant.)

Case No. 94-C-1065K

ENTERED ON DOCKET
DATE OCT 27 1995

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorney fees.

DATED this 26th day of October, 1995.

Respectfully submitted,

By: Leslie C Rinn
Jeff Nix, Esq.
Leslie C. Rinn, Esq.
2121 South Columbia, Suite 710
Tulsa, OK 74114-3521

ATTORNEYS FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: Patrick Cremin
J. Patrick Cremin/OBA #2013
Steven A. Broussard/OBA #12582
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT
AMERADA HESS CORPORATION

FILED

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

OCT 26 1995

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

BRENDA OLIVER,)
)
 Plaintiff,)
)
 v.)
)
 AMERADA HESS CORPORATION,)
)
 Defendant.)

Case No. 94-C-1124K

ENTERED ON DOCKET

DATE ~~OCT 27 1995~~

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 20th day of October, 1995.

Respectfully submitted,

By: Leslie C. Rinn
Jeff Nix, Esq.
Leslie C. Rinn, Esq.
2121 South Columbia
Suite 710
Tulsa, Oklahoma 74114-3521

ATTORNEYS FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: J. Patrick Cremin
J. Patrick Cremin, OBA #2013
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ROBERT M. AMENT aka Bob Michael)
Ament; JUDY M. AMENT aka Judy)
Marie Ament; WINSTON C. JOHNSON;)
MARCELYN L. JOHNSON; CITY OF)
BROKEN ARROW, Oklahoma;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
Defendants.)

FILED

OCT 25 1995

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

Civil Case No. 95 C 477B

ENTERED ON DOCKET

DATE OCT 26 1995

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 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; CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, ROBERT M. AMENT aka Bob Michael Ament, JUDY M. AMENT aka Judy Marie Ament, WINSTON C. JOHNSON and MARCELYN L. JOHNSON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, ROBERT M. AMENT aka Bob Michael Ament, was served with process a copy

of Summons and Complaint on August 29, 1995; that the Defendants, MARCELYN L. JOHNSON and WINSTON C. JOHNSON, each signed a Waiver of Summons on June 16, 1995; that the Defendant, JUDY M. AMENT aka Judy Marie Ament, was served a copy of Summons and Complaint on July 27, 1995, by Certified Mail; and that Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on May 24, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 8, 1995; and that the Defendants, ROBERT M. AMENT aka Bob Michael Ament, JUDY M. AMENT aka Judy Marie Ament, WINSTON C. JOHNSON and MARCELYN L. JOHNSON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, ROBERT M. AMENT, is one and the same person as Bob Michael Ament, and will hereinafter be referred to as "ROBERT M. AMENT." The Defendant, JUDY M. AMENT, is one and same person as Judy Marie Ament, and will hereinafter be referred to as "JUDY M. AMENT." The Defendants, ROBERT M. AMENT and JUDY M. AMENT, are husband and wife. The Defendants, WINSTON C. JOHNSON and MARCELYN L. JOHNSON, are husband and wife.

The Court further finds that on March 14, 1991, Bob Michael Ament and Judy Marie Ament, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-798C. On April 11, 1991, the plan was reaffirmed with HUD, and on April 25, 1991, the Chapter 7 was converted to a Chapter 13. On February 11, 1994, the United States Bankruptcy Court for the Northern

District of Oklahoma filed its Discharge of Debtor and on July 25, 1994 the case was subsequently closed.

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-two (22), Block Three (3), CENTRAL PARK ESTATES FIRST, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on October 27, 1978, Michael Schwartz and Ruth Ann Schwartz, executed and delivered to Mager Mortgage Company, their mortgage note in the amount of \$38,500.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9½%) per annum.

The Court further finds that as security for the payment of the above-described note, Michael Schwartz and Ruth Ann Schwartz, husband and wife, executed and delivered to Mager Mortgage Company a mortgage dated October 27, 1978, covering the above-described property. Said mortgage was recorded on October 31, 1978, in Book 4362, Page 2378, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 5, 1990, Brumbaugh & Fulton Company, formerly known as Mager Mortgage Company, assigned the above-described mortgage note and mortgage to The Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on June 6, 1990, in Book 5257, Page 1297, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, ROBERT M. AMENT and JUDY M. AMENT, currently hold title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 1990, the Defendants, ROBERT M. AMENT and JUDY M. AMENT, 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 April 1, 1992.

The Court further finds that the Defendants, ROBERT M. AMENT and JUDY M. AMENT, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, ROBERT M. AMENT and JUDY M. AMENT, are indebted to the Plaintiff in the principal sum of \$53,122.91, plus interest at the rate of 9½ percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$32.00 which became a lien on the property as of June 25, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, ROBERT M. AMENT aka Bob Michael Ament, JUDY M. AMENT aka Judy Marie Ament, WINSTON C. JOHNSON and MARCELYN L. JOHNSON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, 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 In Rem against the Defendants, ROBERT M. AMENT and JUDY M. AMENT, in the principal sum of \$53,122.91, plus interest at the rate of 9½ percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5 1/2 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 \$32.00, plus costs and interest, for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, ROBERT M. AMENT aka Bob Michael Ament, JUDY M. AMENT aka Judy Marie Ament, WINSTON C. JOHNSON and MARCELYN L. JOHNSON, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$32.00, personal property taxes which are currently due and owing.

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

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

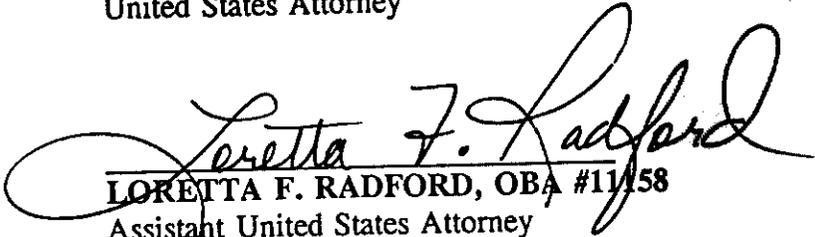
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

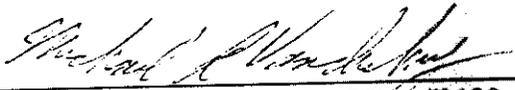
STEPHEN C. LEWIS
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Board of County Commissioners,
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Broken Arrow, OK 74012
(918) 251-5311
Attorney for Defendant
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 477B

LFR:flv

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

ENTERED ON BOOKS

10-26-95

RONALD WILLIAMS,
Plaintiff,

v.

Case No. 95-C-614-H ✓

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

Defendants.

FILED

OCT 25 1995

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

ORDER

This matter comes before the Court on the Motion to Remand by Plaintiff Ronald Williams. In the instant case, Plaintiff Williams has sued Shoney's, Inc., d/b/a Captain D's ("Shoney's") and Kathy Williams for injuries he allegedly received on November 12, 1992 from an accident at Shoney's in Sapulpa, Oklahoma.

On November 22, 1993, Plaintiffs Ronald Williams and his wife, Kathy Williams, filed suit against Shoney's in the District Court for Creek County for injuries received by Ronald Williams in the accident of November 12, 1992. Kathy Williams asserted a claim for loss of consortium. On June 20, 1994, Defendant filed a Notice of Removal based upon diversity jurisdiction. The Court upheld that removal on September 26, 1994. Subsequently, on October 25, 1994, the parties stipulated to the dismissal of Kathy Williams' claim. Ronald Williams then dismissed his claims against Shoney's on March 9, 1995.

On June 19, 1995, Plaintiff Ronald Williams refiled his action in the District Court for Creek County. In addition to Shoney's,

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Plaintiff sued his wife, Kathy Williams, in her capacity as manager of Shoney's. On July 5, 1994, Shoney's filed a Notice of Removal. On or about August 4, 1995, Plaintiff Ronald Williams moved for remand of his action to the District Court for Creek County.

The statute governing procedure after removal provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Plaintiff asserts that Shoney's removal, on the basis of diversity jurisdiction, is patently defective because complete diversity between the parties does not exist. Kathy Williams is an Oklahoma citizen. In response, Shoney's alleges that, in the refiled action, Plaintiff fraudulently joined Kathy Williams, Plaintiff's wife and a former Plaintiff in a lawsuit involving the same facts, as a Defendant.¹

If the plaintiff fails to state a cause of action against the resident defendant who defeats diversity jurisdiction, then the Court may find that joinder was improper, dismiss the non-resident defendant, and retain jurisdiction over the dispute. See Dodd v. Fawcett Pubs., Inc., 329 F.2d 82, 85 (10th Cir. 1964); e.g., Frontier Airlines, Inc. v. United Air Lines, Inc., 758 F. Supp. 1399, 1404-1411 (D. Colo. 1989). "Where a defendant does not allege fraud in the pleading of jurisdictional facts, the sole issue before the court is whether plaintiff has stated a basis for

¹ Although Shoney's has not formally moved to dismiss Kathy Williams as a Defendant for improper joinder, the Court treats its response to Plaintiff's Motion to Remand as a constructive Motion to dismiss Kathy Williams for improper joinder.

recovery against resident defendant[] under state law." Frontier Airlines, Inc., 758 F. Supp. at 1404.

Defendant bears the burden of proving fraudulent joinder. Id. Moreover, in making its determination, "[t]he court must resolve all disputes of fact or uncertain legal issues in favor of the plaintiff." Id. at 1405. Here, Shoney's maintains that Plaintiff could not recover against Kathy Williams under Oklahoma law because, among other things, the applicable statute of limitations on Plaintiff's claim has run. Plaintiff has asserted a negligence claim against Kathy Williams. Oklahoma law provides that Plaintiff had two years after the cause of action accrued to sue Mrs. Williams on this claim. Okla. Stat. tit. 12, § 95(3) (West Supp. 1995). Therefore, Plaintiff's time to sue Kathy Williams expired in November 1994.

Plaintiff, however, asserts that the Oklahoma "Savings Statute" operates to preclude the failure of his claim against Mrs. Williams. The pertinent statute provides that:

[i]f any action is commenced within due time . . . [and] if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Okla. Stat. tit. 12, § 100 (1988). Shoney's disagrees that the statute "saves" Plaintiff's claim.

Shoney's argues that, in order for the statute to apply, the parties in the "new action" must have an identity of interest with the parties in the dismissed action. See, e.g., Clark v. Phillips Petroleum Co., 677 P.2d 1092, 1095 (Okla. Ct. App. 1984) ("The

general rule concerning subject statute is that the second suit must allege substantially the same cause of action and feature substantially the same parties as the first one." (quoting Haught v. Continental Oil Co., 136 P.2d 691 (Okl. 1943)). In Clark, the plaintiff originally filed a products liability action against three Ohio corporations. She subsequently dismissed that lawsuit and, relying on the savings statute, refiled against one corporation, which she alleged was the corporate successor to the original defendants. The court concluded that she could maintain the action because the allegations of her pleadings stated that the new corporate defendant had acquired the assets and assumed the liabilities of the original defendants so that there was an "identity of interest". Accord McCain v. KTVY, Inc., 738 P.2d 960, 962 (Okl. Ct. App. 1987) ("party plaintiff in a new action must be substantially the same, suing in the same right . . .").

Although the savings statute "is remedial and should be liberally construed", C & C Tile Co. v. Independent School District No. 7, 503 P.2d 554, 559 (Okl. 1972), the Court concludes that, under the circumstances of the case presented here, the savings statute does not cure the expiration of the statute of limitations as to a new defendant, who was formerly a plaintiff.²

² "The theory of the limitation statutes is that a defendant be given notice within a certain period that he will be called upon to defend a certain action, and that he be given sufficient notice to adequately prepare. If this is done within the statutory period, the bringing of a subsequent action in the name of correct party plaintiff which does not substantially change the claim or allege a new cause of action does not harm defendant." C & C Tile Co., 503 P.2d at 559. In the instant case, the Court rejects the assertion that former Plaintiff Kathy Williams had

Finally, the Court notes that Plaintiff has the burden, in supporting its Motion for Remand, of presenting factual materials to support its complaint where necessary to controvert defendant's submissions. Frontier Airlines, Inc., 758 F. Supp. at 1405. Here, Plaintiff has not attempted to argue that Kathy Williams has an "identity of interest" with Shoney's. Further, Plaintiff's bare complaint does not allege that Kathy Williams had any involvement in Plaintiff's accident. The Court has no choice but to conclude that, under these circumstances, Plaintiff's intent in joining Kathy Williams was solely to defeat diversity jurisdiction.

In conclusion, the Court holds that any claim which Plaintiff may have had against Kathy Williams is time-barred. As a result, Plaintiff has failed to state a cause of action against resident Defendant Kathy Williams under Oklahoma law. Plaintiff improperly joined Kathy Williams, and she must be dismissed from the lawsuit. The lawsuit is now properly before this Court. Plaintiff's Motion for Remand (Docket # 3) is hereby denied. Plaintiff is directed to

notice that, after she dismissed her claim, her husband would sue her in her capacity as manager of Shoney's in his refiled action against the restaurant. Further, Plaintiff Ronald Williams' claim against Kathy Williams for negligence constitutes a "new cause of action". Thus, the new action does not fall within the contemplation of the savings statute.

file an Amended Complaint consistent with this order within two weeks from the filing of the order.

IT IS SO ORDERED.

This 25TH day of ~~April~~ 1995.


Sven Erik Holmes
United States District Judge

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

FILED

OCT 25 1995 *RL*

RUSSELL GORDON WOODS,)
)
Petitioner,)
)
v.)
)
)
DENISE SPEARS and the)
ATTORNEY GENERAL OF THE)
STATE OF OKLAHOMA,)
)
Respondents.)

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

Case No. 95-C-308-H

INDEXED ON DOCKET

10-25-95

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)¹. An evidentiary hearing was held on September 22, 1995 to receive evidence regarding petitioner's claim of ineffective assistance of counsel. Sworn testimony was taken of the petitioner, his mother, and Mr. Kenneth Todd, counsel who represented the petitioner in the two criminal cases at issue. The petitioner is presently an inmate in the Oklahoma Department of Corrections, serving two ten-year sentences for the crimes of Larceny of Merchandise from a Retailer in the Amount of \$50.00 to \$500.00 After Former Conviction of One Felony ("Larceny of Merchandise AFCF").

PROCEDURAL HISTORY

The petitioner was charged in Tulsa County in two separate cases with the offense of Larceny of Merchandise AFCF. (Case Nos. CRF-93-5420 and 94-327). He entered guilty

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.

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pleas in both cases. The district court sentenced him to ten years in prison in each case, the sentences to run consecutively. One of his prior convictions was used to enhance his punishment.

The petitioner sought post-conviction relief from the Tulsa County District Court, alleging his attorney rendered ineffective assistance of counsel. The court affirmed the conviction and sentence in Woods v. Oklahoma, Case No. CF-93-5420, on October 26, 1994. The district court's denial of relief was affirmed by the Oklahoma Court of Criminal Appeals in Case No. PC-94-1257 on January 3, 1995. The petitioner subsequently filed a Petition for Writ of Habeas Corpus in this court.

STIPULATIONS

The court accepted the following stipulations of the parties:

(1) A copy of Okla. Stat. tit. 21, § 1731 (as amended), copied from the 1994 pocket-part of the Oklahoma Statutes, was found in Mr. Todd's personal file containing the petitioner's state case information.

(2) Mr. James Michael Withrow, an inmate in the Tulsa County Adult Detention Center at the same time as the petitioner, plead guilty to Larceny of Merchandise from a Retailer in the amount of \$50-\$500 and received a nine month jail sentence. All of his prior convictions on page two of the Information were dismissed. (CRF 93-1773);

(3) Plaintiff's exhibit #1 (a Southwestern Bell telephone bill) documents a charge for a collect telephone call from the Tulsa County Adult Detention Center made by the petitioner to his mother on March 28, 1994; and

(4) The petitioner at no time contested his guilt to the offenses and did not want

to proceed to trial on either case.

FINDINGS OF FACT

1. On November 29, 1993, the petitioner was charged with Larceny of Merchandise (AFCF) in Tulsa County District Court in Case No. CRF-93-5420. The Information alleged that he carried away merchandise valued at no less than \$50 and no more than \$500 without permission of the merchant. He was released from custody after posting a bond.

2. The petitioner hired Attorney Kenneth Todd to represent him. Mr. Todd was paid a retainer of \$1,500.00 and agreed to accept the case. Mr. Todd had been licensed to practice law since 1978 and specialized in bankruptcy cases. He had previously handled only eight to twelve criminal cases and had never taken a felony case to trial.

3. On January 20, 1994, while out on bond, the petitioner was again charged with Larceny of Merchandise (AFCF). The Information alleged that merchandise valued at no less than \$50 and no more than \$500 was taken without permission of the merchant. He made bond on this new offense, and asked Mr. Todd to represent him on the second case also and paid an additional retainer of \$1,000.00.

4. After meeting with the assistant district attorney, Mr. Todd informed the petitioner that, if he entered guilty pleas, he would receive a ten year sentence on both cases and the two sentences would run concurrently. Mr. Todd advised the petitioner that ten years was the minimum sentence he could receive on both cases, because he had several prior felony convictions, and he would risk receiving a minimum sentence of two ten-year sentences to run consecutively (twenty years) and a maximum sentence of life in

prison if convicted by a jury under the larceny of merchandise from a retailer and the felony enhancement statutes. The petitioner decided to accept the plea agreement.

5. On March 10, 1994, the petitioner appeared before Judge Clifford Hopper on a pretrial matter. Although the petitioner arrived in court on time, Mr. Todd was almost two hours late. As a result, Judge Hopper increased the petitioner's bond significantly. Because the petitioner could not afford to pay the new bond, he was returned to the custody of the Tulsa County Jail.

6. The petitioner was sentenced on March 24, 1994. At the sentencing hearing, the assistant district attorney advised Judge Hopper of the plea agreement of ten year sentences on each case to run concurrently with each other. The agreement also called for dismissal of all but one prior conviction from the second page of the Information. Judge Hopper ordered the assistant district attorney and Mr. Todd to visit with him in his chambers. The petitioner remained in his seat in the courtroom.

7. According to Mr. Todd, Judge Hopper explained to both attorneys that he believed the proposed plea agreement was too lenient and therefore was not acceptable. He told Mr. Todd that he would set both cases for trial unless the petitioner accepted two ten-year sentences running consecutively with each other. This decision shocked Mr. Todd, but he returned to the courtroom and advised the petitioner of the judge's statements. Believing that ten years was the absolute minimum sentence he could receive, the petitioner accepted the amended offer and pled guilty to both offenses. He was informed by the judge of his right to appeal.

8. Immediately after he was sentenced, the petitioner asked Mr. Todd to visit

him in the jail. Mr. Todd stated that he would come by to see him. The petitioner never saw Mr. Todd again.

9. Approximately three days after his sentencing, the petitioner discussed his sentence with a fellow inmate, Mr. James M. Withrow. He learned from Mr. Withrow that the law regarding punishment for the crime of Larceny of Merchandise from a Retailer had recently been amended. Mr. Withrow explained that the maximum sentence for the crime had been changed to just one year in the county jail. He also revealed that he had received a nine month jail sentence after pleading guilty to that offense.

10. On March 28, 1994, the petitioner made a collect telephone call to his mother, Mrs. Betty Hitchcock. He explained to her that he was concerned about the sentences he received, the effect of the new law, and the possibility of getting his sentences modified. He asked his mother to call Mr. Todd and ask him to come to the jail to discuss appealing the sentences. Mr. Todd was not in his office on either of the two occasions when Mrs. Hitchcock called, so she left messages asking him to visit her son. Her calls were made within the first week after her son was sentenced. Mr. Todd admitted at the evidentiary hearing that he received the messages, but did not return the calls or contact Mr. Woods.

11. Mr. Todd did not realize the punishment for Larceny of Merchandise from a Retailer had been modified at the time he was counseling the petitioner. He did not file a notice of intent to appeal, did not receive written notice from the petitioner that he wished to appeal, and did not realize he had an obligation to advise the petitioner of his appellate rights. He stated that he believes that the district attorney and judge took

advantage of his ignorance of the law and of his client.

12. The petitioner filed a pro se appeal in the state district court. He was denied post-conviction relief because of the failure to file notice of intent to appeal within ten days of his sentencing date. The Oklahoma Court of Criminal Appeals affirmed the lower court's decision without addressing the merits of the appeal.

13. Mr. Todd put the copy of Okla. Stat. tit. 21, § 1731, as amended, in his personal file containing the petitioner's state case information after he received notice of the hearing to be held by the court in this habeas case. The amended statute was not in the file during the time he was representing the petitioner.

APPLICABLE LAW

1. Whether a defendant received effective assistance of counsel in a state court proceeding is a mixed question of law and fact, allowing for de novo review in a federal habeas challenge. Strickland v. Washington, 466 U.S. 668, 698 (1984).

2. The Sixth Amendment of the United States Constitution guarantees an accused the effective assistance of counsel at trial, which extends to effective assistance of counsel for purposes of appeal. Evitts v. Lucey, 469 U.S. 387, 392-94 (1985). Because there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, a defendant making an ineffectiveness claim on a counseled guilty plea must identify particular acts and omissions of counsel tending to prove that counsel's advice was not within the wide range of professional competence. Hill v. Lockhart, 474 U.S. 52 (1985); Strickland, 466 U.S. at 687, 689. The defendant must also show that there is "a reasonable probability that, but for counsel's errors, he would

not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. The performance inquiry is made with deference to counsel's assistance, but in recognition that the validity of a guilty plea depends upon a defendant's knowing and voluntary choice among alternatives. Id. at 56.

3. Prior to September 1, 1993, under Okla. Stat. tit. 21, § 1731, the punishment for larceny of merchandise from a retailer in the event the value of the goods exceeds fifty dollars was "confinement in the penitentiary for not less than one (1) year nor more than five (5) years." This punishment could be enhanced under Okla. Stat. tit. 21, § 51, which applies to "second and subsequent offenses after conviction of offense punishable by imprisonment in penitentiary" if the second and subsequent offense is punishable by imprisonment in the penitentiary.

4. On September 1, 1993, the Oklahoma State Legislature amended the punishment for the crime of larceny of merchandise from a retailer, §1731, and the amended statute now states in pertinent part:

4. In the event the value of the goods, edible meat or other corporeal property is Fifty Dollars (\$50.00) or more, but is less than Five Hundred Dollars (\$500.00), the defendant shall be guilty of a felony and shall be punished by incarceration in the county jail for not more than one (1) year or by incarceration in the county jail one or more nights or weekends pursuant to Section 991a-2 or Title 22 of the Oklahoma Statutes, at the option of the court, and shall be subject to a fine of not more than Five Thousand Dollars (\$5,000.00) . . .

This statute was amended prior to the date petitioner was charged, November 29, 1993, and almost seven months before petitioner plead guilty on March 24, 1994.

5. Although the amended statute still uses the term "felony", the maximum punishment for larceny of merchandise worth \$50.00 to \$500.00 does not mandate

incarceration in a state penitentiary. Under Title 21 of the Oklahoma Statutes, § 5, a felony is defined as "a crime which is, or may be, punishable with death, or by imprisonment in the State Penitentiary." Under Oklahoma case law, it is not the actual punishment imposed, but the extent to which punishment may be imposed, which controls the point whether the crime is a felony. Braly v. Wingard, 326 P.2d 775 (Okla. 1958). Because the amended statute only sets a maximum sentence of one year in the county jail, larceny of merchandise worth \$50.00 to \$500.00 is a misdemeanor under Oklahoma law, but the state legislature did not recognize this inconsistency when drafting the statute.

6. Because Title 21 of the Oklahoma Statutes, § 51, pertains to enhancement of a defendant's punishment based on prior criminal convictions "after conviction of an offense which is punishable by imprisonment in the state penitentiary," the offense of larceny of merchandise from a retailer in the event the values of the goods exceeds \$50.00 is no longer enhanceable, because it is not punishable by imprisonment in the state penitentiary. "[P]enal statutes are to be interpreted strictly against the State and liberally in favor of the accused and words not found in the text of a criminal statute will not be read into it for the purpose of extending it or giving it an interpretation in conformity with a supposed policy." State v. District Court of Cleveland Cty., 816 P.2d 552 (Okla. Crim. App. 1991).

7. Under Tenth Circuit law, an attorney has no absolute duty in every case to advise a defendant of his right to appeal after a guilty plea; however, "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right, counsel has a duty to inform him." Laycock v.

New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989). This duty arises when counsel knows or should have known of the client's claim or of the relevant facts giving rise to that claim. Id.

8. In Coleman v. Thompson, 501 U.S. 722, 754 (1991), the United States Supreme Court found that an attorney error which constitutes ineffective assistance of counsel establishes "cause," excusing a petitioner's failure to follow state procedural rules. The court stated: "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." Id. (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).

9. A federal court is vested with "the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus." Hilton v. Braunskill, 481 U.S. 770, 775 (1987) (citation omitted). In issuing a writ of habeas corpus, a federal court has the power and authority to dispose of habeas corpus matters "as law and justice require." 28 U.S.C. §2243. The habeas corpus statute's "mandate is broad with respect to the relief that may be granted." Carafas v. La Vallee, 391 U.S. 234, 239 (1968). A federal court "possesses power to grant any form of relief necessary to satisfy the requirement of justice." Levy v. Dillon, 415 F.2d 1263, 1265 (10th Cir. 1969) (emphasis added).

RECOMMENDATION

An attorney acting in a diligent manner, as required by the Supreme Court cases cited above, ascertains that the statute under which his client is to plead guilty when sentenced is the current, applicable law. Petitioner was prejudiced by Mr. Todd's failure

to conduct basic research on the applicable law and his reliance on the representations of the assistant district attorney. Petitioner was also prejudiced by Mr. Todd's failure to file an appeal when the petitioner became concerned that he might have received an illegal sentence, which raised a constitutional issue, and was unable to inform his counsel of the possibility of a challenge to the sentences. Had Mr. Todd conducted research of the applicable statutes following petitioner's sentencing, he would have been alerted of a possible issue to be raised in an appeal. Finally, the petitioner was prejudiced by Mr. Todd's deficient representation, because the Oklahoma Court of Criminal Appeals would not consider his application for post-conviction relief since he did not file an appeal. Judge Chapel recognized this dilemma in his dissenting opinion: "The appellant, Woods, challenges only his sentence. He says it exceeds the maximum authorized by law. If he is right, his sentence is void. There has to be a way to reach this issue." Woods v. Oklahoma, No. PC-94-1257 (Ct. App. Okla. Jan. 3, 1995). Petitioner was denied his right to have the Oklahoma Court of Criminal Appeals consider the validity of his sentences and the application of the enhancement statute, Okla. Stat. tit. 21, § 51, to amended § 1731.

The court should order the State to assign new counsel and grant an out-of-time appeal to petitioner. Mathis v. Hood, 937 F.2d 790 (2nd Cir. 1991); Bradshaw v. McCotter, 785 F.2d 1327 (5th Cir. 1986). The court should deny the Motion to Certify Question of Law (Docket #21) filed by the Respondent's counsel, because the question to be certified is unrelated to the issue of whether petitioner received effective assistance of counsel and would not be determinative of the petition for habeas corpus.²

² Respondent asks to certify the question of whether it was the intent of the Oklahoma legislature, in amending Okla. Stat. tit. 21, § 1731, to exclude it from the enhancement provisions in Okla. Stat. tit. 21, § 51 (A).

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to this report and recommendations. Failure to object ~~within~~ that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 25th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:wood.rr

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

JOHNATHAN MARTIN WARWICK,)

Plaintiff,)

vs.)

Case No. 95-C-454-B ✓

PHILLIP EDWARD SNOW, individually,)
and in his official capacity as a)
police officer of the City of)
Tulsa, Oklahoma; BRYAN KEITH SMITH,)
individually, and in his official)
capacity as a police officer of)
the City of Tulsa; JOHN CRAWFORD,)
individually, and in his official)
capacity as a police officer of)
the City of Tulsa; and other)
presently unknown officers and)
officials, individually and in)
their official capacities as)
employees of the Tulsa Police)
Department,)

Defendants.)

FILED

OCT 24 1995 *Le*

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

ENTERED ON DOCKET

DATE OCT 25 1995

ORDER

This matter comes on for consideration of various Defendants' motions as follows:

- (1) City of Tulsa's Motion to Partially Dismiss (docket #7);
- (2) Officer Snow's Motion for Summary Judgment (docket #17);
- (3) Officer Smith's Motion for Summary Judgment (docket #19);
- (4) Officer Crawford's Motion for Summary Judgment (docket #21);

By Order entered October 6, 1995, the Court, advising the parties that it concluded it is prudent to consider matters outside the pleadings in resolving the City of Tulsa's Motion To Dismiss,

thereby treating such motion as one for summary judgment, granted the parties until October 16, 1995, to file any supplement to the pleadings filed herein. As of the date of this Order no additional pleadings have been submitted for the Court's consideration. Therefore, the Court will proceed with deliberation of the above motions.

History of the Case

This is an alleged excessive force action brought pursuant to 42 U.S. § 1983 against Defendant City of Tulsa police officers Phillip Edward Snow (Snow), Bryan Keith Smith (Smith) and John Crawford (Crawford) individually and in their official capacities. Plaintiff alleged in a fifty-three paragraph complaint¹ that Defendants used excessive force in violation of the Fourth Amendment by shooting him and roughly handcuffing him after he was shot. In the Complaint Plaintiff admitted he had consumed alcohol the night and early morning of the event (4 a.m., November 29, 1993). Plaintiff further admitted that when confronted by Defendant police officers Snow and Smith in the eighth floor hallway of the LaFortune Towers Apartments (1725 SW Blvd, Tulsa, Oklahoma) he was holding a loaded hand gun to and in his mouth. Earlier, the police had received a call from the Towers reporting a suicide threat by a man who had been drinking, was wandering about with a gun in his mouth and had stated he was going to kill himself. Plaintiff

¹ Plaintiff's Complaint is in obvious violation of the Federal Rules of Civil Procedure in that it is not a "short and plain statement of the claim showing that the pleader is entitled to relief" as required by Rule 8, F.R.C.P.. Plaintiff's Complaint pleads copious allegations of fact, compares factual disputes and contains argumentative rhetoric and case citations.

alleged the actions of the police were objectively unreasonable and that the officers had improper training and supervision. Plaintiff alleged defendant Crawford was aware of the suicide nature of the two police calls and failed to take reasonable actions to safeguard plaintiff's constitutional rights by sending a rookie officer (Snow) to the scene. Plaintiff also alleged a conspiracy existed among the police officers to cover up how many shots officer Snow actually fired at plaintiff. Plaintiff admitted that he has a prior weapons conviction in his background. Plaintiff also claimed his Fourteenth Amendment rights were violated when Plaintiff was convicted of feloniously pointing a weapon as a result of a plea bargain.

Plaintiff seeks actual and punitive damages against all defendants in their individual as well as official capacities, alleging physical injuries resulting from the bullet wounds including laceration of the liver.

The City of Tulsa filed pleadings herein acknowledging that although not named as a Defendant herein it is in reality a Defendant since the Defendant officers were sued in their official capacity. The City filed its answer, generally denying any wrongdoing on it or its officers part. The City alleges that plaintiff was intoxicated, noncooperative, suicidal and pointing a firearm at its officer in close proximity at the time of this event. The City also states that plaintiff was convicted of pointing a gun at the officers which precludes re-litigating that issue.

MOTIONS

The City of Tulsa has filed a Motion to Dismiss pursuant to Rule 12 (b)(6), Federal Rules of Civil Procedure, urging that Plaintiff's Complaint fails to state a claim upon which relief can be granted, which the Court will treat as a Motion for Summary Judgment pursuant to Rule 56, F.R.C.P..

City argues, and the Court agrees, that although not named as a Defendant herein, to the extent Plaintiff seeks damages from the Defendant officers in their official capacity, this case is an action against the City of Tulsa. Kentucky v. Graham, 473 U.S. 159 (1985). Griess v. Colorado, 841 F.2d 1042 (10th Cir.1988). The City further argues that there is no respondeat superior liability under 42 U.S.C. § 1983, citing Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and that a Court may not infer a "policy" or "custom" of constitutional violation from a single incident, citing City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In his response Plaintiff agrees with City as to prevailing case precedent regarding respondeat superior liability and "single incident" liability. However, Plaintiff argues that a single decision made by a city official can be unconstitutional and a basis of § 1983 liability, citing Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986).

City argues, and the Court agrees, that Plaintiff's Complaint is significantly lacking², despite its excessive volume, of

² Plaintiff's allegations regarding improper training and supervision relate principally to an alleged failure on the part of police supervisory personnel, being aware of the suicide nature of the two police calls, to send their special team of specially trained officers to deal with the crisis, and that Officer Snow, a "rookie" was sent despite his inexperience and having been involved along with Officer Smith in "two critical incidents" within a

allegations relating to "custom" and "policy" which might or may expose the City to § 1983 liability based upon training and supervision, or lack thereof, of its police officers. Monell, at 694; City v. Tuttle, *supra*. Given this deficiency Plaintiff's Complaint against the City of Tulsa must rise or fall in reference to his allegations of a conspiracy existing among and within the police department to cover up the number of shots fired at Plaintiff on the early morning in question.

Defendant Snow and the City argue it is immaterial whether four, five or six shots were fired³, since it is undisputed that Officer Snow fired multiple shots at Defendant who was struck multiple times. The principal "excessive force" herein complained of is "one shot was too many." ¶ 23, Complaint.

The Court is of the view that Plaintiff's Complaint is insufficient to state a claim of "conspiracy" against City of Tulsa police officers acting under color of law in their official capacities which might or could impose § 1983 liability against the City. Lower Courts now routinely decide qualified immunity issues not only by the traditional inquiry into qualified immunity itself but also decide whether a Plaintiff has stated a claim under Rule 12 (b)(6), F.R.C.P.. Mazochi v. Borden, 959 F.2d 1174 (2nd

period of thirty days. The Court finds these inadequate to state a "customs" and "policy" claim against the City.

³ Officer Snow has stated under oath that he believes four shots were fired by him. Plaintiff offers the hearsay statement of Dr. Diane Miller-Hardy, a professor on the staff of the Oklahoma College of Osteopathic Medicine and Surgery, who told Plaintiff's counsel over that telephone that it is her opinion, based on the records furnished her, that Plaintiff was struck with five bullets.

Cir.1992; Hunter v. District of Columbia, 943 F.2d 69 (D.C.Cir. 1991). The question of immunity necessarily assumes the question of whether a Plaintiff has even stated a claim against the Defendant. Siegert v. Gilley, 111 S.Ct. 1789 (1991). However, as the Court has stated earlier, City's Motion To Dismiss will be treated herein as a motion for summary judgment.

QUALIFIED IMMUNITY ISSUES

Defendant Snow, in his individual capacity, has filed a Motion for Summary Judgment based upon a qualified immunity defense, arguing that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable police officer on the scene rather than the 20/20 vision of hindsight.

Defendants Smith and Crawford have each filed a Motion to Dismiss And Alternative Motion For Summary Judgment, alleging that Smith only shouted commands to plaintiff and that Crawford was not even on the scene and that neither, by plaintiff's own pleadings, could have been guilty of excessive force.

In their Case Management Plan filed September 14, 1995, the parties stipulated to the following facts:

1. On November 29, 1993, while acting within the course and scope of his employment as a Tulsa Police Officer, Officer Snow was assigned a call in reference to a suicidal subject with a gun at the LaFortune Towers Apartments, 1725 Southwest Boulevard, in Tulsa, Oklahoma. Officer Snow was dressed in his Tulsa police uniform which included his breast badge.

2. Upon arrival, Officer Snow met with the complaining witness who stated there was a suicidal subject with a gun in the

building. The witness further advised Officer Snow that the subject had had the gun in his mouth and had threatened to kill himself and his girlfriend.

3. Officer Snow and Officer B.K. Smith proceeded to the eighth floor of the apartment building to look for the subject.

4. At approximately 4:20 a.m., Officer Snow and Officer Smith were preparing to check an apartment when they heard someone approaching them from behind.

5. Officer Snow and Officer Smith turned and observed Jonathan Warwick walking down the hallway toward them.

6. Warwick had a gun in his hand and had the barrel of the gun in his mouth.

7. Warwick was mumbling that he had no reason to live and wanted to die.

8. Warwick had been drinking alcohol.

9. Officer Snow and Officer Smith took positions at the end and on the corners of the hallway.

10. The hallway was lined with residential apartments. While Officer Snow and Officer Smith were yelling for Warwick to stop and to not point the gun at them, two apartment residents opened their door into the hallway. Officers Snow and Smith yelled for them to get back inside and shut their door, which they did.

11. At that point, Warwick still had the gun in his mouth. He then leaned against the wall on Officer Snow's side of the hallway and crouched down.

12. Warwick then pulled the gun out of his mouth and pointed

it at Officer Snow.⁴

13. Officer Snow immediately fired his weapon at Warwick.

14. All shots fired by Officer Snow were fired in rapid succession which took no more than a couple of seconds.

15. Warwick was hit by the shots fired by Officer Snow and dropped the gun. Warwick was down but conscious and it appeared to the officers he was trying (to) grab the gun.

16. Officer approached Warwick and kicked the gun to Officer Smith.

17. Officer Snow then placed handcuffs on Warwick. In doing so, Officer Snow used only minimal force and no more than was necessary to get Warwick's hands behind his back and secure the handcuffs.

18. Warwick subsequently pled guilty, while represented by counsel, and was convicted in state district court of the offense of feloniously pointing a deadly weapon at Officer Snow during the encounter described in paragraphs 1 through 17 above.

19. On February 2, 1994, at preliminary hearing on Plaintiff's criminal charge of feloniously pointing a weapon, Officer Snow testified that his first shot struck Plaintiff in the stomach or abdomen.

⁴ At the Pre-Trial Conference held September 12, 1995, the Court made specific inquiry regarding this issue, as follows:

"THE COURT: Does our record in this case undisputed reflect that Officer Snow was responding to a loaded weapon, at least what he thought was a loaded weapon, being pointed at him 15 or 20 feet away and that's the reason he fired? Is that what our record, uncontroverted establishes?

MR. LOW (Counsel for Plaintiff): Yes."

20. Officers Snow and Smith had cover of an "outside corner" in a building, while Plaintiff was fully exposed, with no retreat but a fully open hallway.

21. Plaintiff had stopped and no longer continued his approach toward police.

22. Plaintiff was not attempting to flee.

23. Officers Snow and Smith had requested backup, knew additional police were in the building and expected them to arrive shortly.

LEGAL ANALYSIS

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical

doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

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

" . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

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

In Tennessee v. Garner, 471 U.S. 1 (1985) the Supreme Court, in striking down a state statute authorizing the use of deadly force against fleeing suspected felons, addressed the issue of when officers may reasonably use deadly force:

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."

Graham v. Connor, 490 U.S. 386 (1989) holds that:

"all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under the 'substantive due process' approach." *Id.* at 395 (emphasis in original).

The Supreme Court has used the same "objectively reasonable" standard in describing both the constitutional test of liability

set forth in Graham and the Court's standard for qualified immunity set forth in Anderson v. Creighton, 483 U.S. 635 (1987). In Anderson, the Court addressed qualified immunity in the context of an alleged Fourth Amendment violation using as its standard the "reasonable officer" and what "could reasonably have been thought lawful" by such an officer. Id. at 638.

Police officers are entitled to qualified immunity unless, on an objective basis, it is obvious that no reasonable officer would have concluded the conduct was lawful. If officers of reasonable competence could disagree as to whether the conduct was lawful, immunity should be recognized. Malley v. Briggs, 475 U.S. 335 (1986). See, also Wilson v. Meeks, 52 F.3d 1547 (10th Cir.1995) and cases cited therein.

The issue of "qualified immunity" is not a fact question for the fact finder but is always a purely legal question based on the facts. Siegert v. Gilley, 500 U.S. 226 (1991).

Under the admitted facts herein, specifically admitted facts 12, 13 and 14, there is absolutely no question in the Court's mind that Officer Snow acted reasonably under the circumstances. Further, Plaintiff's "conspiracy" allegations against Snow fail for the same reasons as stated above regarding the City of Tulsa's putative liability under § 1983.

Nor is the Court persuaded by Plaintiff's recent theory supplied by his Supplemental Response filed September 19, 1995, that Officer Snow "had" qualified immunity but lost it because "[T]he evidence suggests, however, Officer Snow did not immediately fire when Warwick was facing Officer Snow. Warwick then turned away

from Officer Snow and was thus no longer a reasonable threat." This position is directly in conflict with facts stipulated to by all parties to this case, specifically facts numbered 12 (Warwick then pulled the gun out of his mouth and pointed it at Officer Snow) and 13 (Officer Snow immediately fired his weapon at Warwick). Tenth Circuit Court of Appeals rulings are consistent with Supreme Court decisions that on-the-spot police choices in dangerous situations require significant latitude. Wilson v. Meeks, *supra*; Hidahl v. Gilpin, 938 F.2d 1150 (10th Cir.1991).

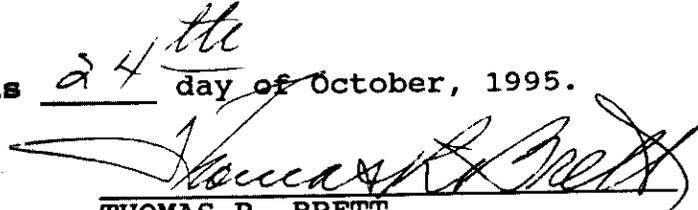
Defendant Officers Smith and Crawford are also accorded recognition of qualified immunity herein for the reasons enumerated above. Likewise, the allegations of conspiracy as to these Defendants is equally lacking as stated *supra*.

The Court concludes the City of Tulsa's Motion to Dismiss converted to a Motion for Summary Judgment should be and the same is herewith GRANTED. The Court further concludes that Defendant Officers Snow, Smith and Crawford's Motions For Summary Judgment should be and the same are hereby GRANTED for the reasons stated.

All Defendants' Motions for Rule 11 sanctions for filing a frivolous action are herewith DENIED.

A Judgment in accord with this Order will be entered simultaneously herewith.

IT IS SO ORDERED this 24th day of October, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JOHNATHAN MARTIN WARWICK,)

Plaintiff,)

vs.)

Case No. 95-C-454-B ✓

PHILLIP EDWARD SNOW, individually,)
and in his official capacity as a)
police officer of the City of)
Tulsa, Oklahoma; BRYAN KEITH SMITH,)
individually, and in his official)
capacity as a police officer of)
the City of Tulsa; JOHN CRAWFORD,)
individually, and in his official)
capacity as a police officer of)
the City of Tulsa; and other)
presently unknown officers and)
officials, individually and in)
their official capacities as)
employees of the Tulsa Police)
Department,)

Defendants.)

FILED

OCT 24 1995 *KC*

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

ENTERED ON DOCKET

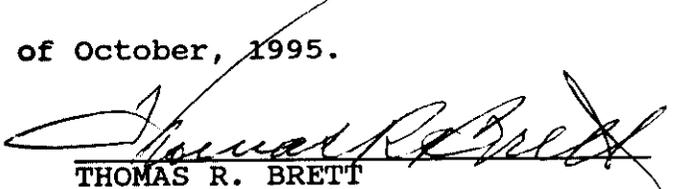
DATE OCT 25 1995

J U D G M E N T

In accord with an Order entered simultaneously herewith, granting Summary Judgment in favor of Defendants Phillip Edward Snow, Bryan Keith Smith and John Crawford, and against the Plaintiff Jonathan Martin Warwick, and granting a Motion to Dismiss converted into a Motion for Summary Judgment filed by the City of Tulsa against the Plaintiff Jonathan Martin Warwick, Judgment is herewith entered in favor of Defendants, Phillip Edward Snow, Bryan Keith Smith and John Crawford, and against the Plaintiff Jonathan Martin Warwick, and Judgment is herewith entered granting a Motion for Summary Judgment in favor of the City of Tulsa and against the Plaintiff Jonathan Martin Warwick.

Costs are assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1. Each party is to bear its own respective attorneys fees.

DATED this 24 day of October, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
M. ALI DJAHEDIAN aka MOHAMAD A.)
DJAHEDIAN; JOYCE A. DJAHEDIAN)
aka JOYCE DJAHEDIAN; FEDERAL)
NATIONAL MORTGAGE ASSOCIATION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

OCT 24 1995

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

ENTERED ON DOCKET

DATE OCT 25 1995

CIVIL ACTION NO. 93-C-519-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23rd day of Oct,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathy McClanahan, Assistant United States Attorney; the Defendants, M. Ali Djahedian aka Mohamad A. Djahedian; Joyce A. Djahedian aka Joyce Djahedian; Federal National Mortgage Association; and County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not since summary judgment was entered on October 17, 1995.

The Court being fully advised and having examined the court file finds that the Defendant, Joyce A. Djahedian aka Joyce Djahedian, was served with Summons and Complaint on July 30, 1993; that the Defendant, Federal National Mortgage Association, acknowledged receipt of Summons and Complaint on June 15, 1993; that the Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and

Complaint on June 8, 1993; and that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 9, 1993.

It appears that the Defendant, M. Ali Djahedian aka Mohamad A. Djahedian, filed his Answer on July 15, 1993; that the Defendant, Federal National Mortgage Association, filed its Answer, Counterclaim and Cross-Claim on June 21, 1993; that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on June 28, 1993.

The Court further finds that on August 4, 1988, Mohamad A. Djahedian and Joyce A. Djahedian filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 88-02282-W. On November 25, 1988, a Discharge of Debtor was entered releasing the debtors from all dischargeable debts. On February 3, 1989, Case No. 88-02282-W, the United States Bankruptcy Court, Northern District of Oklahoma, was closed.

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

Lot One (1), Block Fourteen (14), WOODLAND VIEW SECOND ADDITION, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 20, 1987, M. Ali Djahedian, as President of Ashley's Restaurant, Inc., and Joyce A. Djahedian, as Secretary of Ashley's Restaurant, Inc., executed and delivered to Metro Bank of Broken Arrow, their promissory

note in the amount of \$57,000.00, payable in monthly installments, at the rate of 9.75 percent per annum New York prime plus 2.25 percent adjusted quarterly on the unpaid balance.

The Court further finds that as security for the payment of the above-described note, M. Ali Djahedian and Joyce A. Djahedian executed and delivered to Metro Bank of Broken Arrow, a real estate mortgage dated March 20, 1987, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on April 2, 1987, in Book 5012, Page 2242, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 3, 1988, Metro Bank of Broken Arrow assigned the above-described note and mortgage to the Small Business Administration. Interest on the unpaid balance accrued at the note rate from the date of default until November 11, 1987, on which date the note rate became fixed at 11 percent per annum. This Assignment of Mortgage was recorded on May 18, 1988, in Book 5100, Page 881, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, M. Ali Djahedian aka Mohamad A. Djahedian and Joyce A. Djahedian aka Joyce Djahedian, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, M. Ali Djahedian aka Mohamad A. Djahedian and Joyce A. Djahedian aka Joyce Djahedian, are indebted to the Plaintiff in the principal sum of \$53,529.66, plus accrued interest in the amount of \$31,889.82 as of April 8, 1993, plus interest accruing

thereafter at the rate of 11 percent per annum or \$16.13 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, Federal National Mortgage Association, has a lien on the property which is the subject matter of this action by virtue of an Assignment of Mortgage, dated June 30, 1975, and recorded on July 23, 1975, in Book 4174, Page 2242 in the records of Tulsa County, Oklahoma. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Small Business Administration, have and recover judgment in rem against the Defendants, M. Ali Djahedian aka Mohamad A. Djahedian and Joyce A. Djahedian aka Joyce Djahedian, in the principal sum of \$53,529.66, plus accrued interest in the amount of \$31,889.82 as of April 8, 1993, plus interest accruing thereafter at the rate of 11 percent per annum or \$16.13 per day until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Federal National Mortgage Association, have and recover in rem judgment in

the amount due and owing on the Assignment of Mortgage, dated June 30, 1975, and recorded on July 23, 1975, in Book 4174, Page 2242 in the records of Tulsa County, Oklahoma, plus interest, costs and reasonable attorney fees.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer 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 Defendants, M. Ali Djahedian aka Mohamad A. Djahedian and Joyce A. Djahedian aka Joyce Djahedian, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of the judgment rendered herein in favor of the Defendant, Federal National Mortgage Association;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff, United States of America on behalf of the Small Business Administration.

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

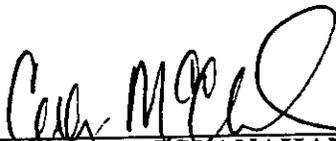
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described **real property**, under and by virtue of this judgment and decree, all of the Defendants and all **persons** claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



CATHY MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-519-E

CM:css

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

SUPERIOR FEDERAL BANK, F.S.B.)
)
 Plaintiff,)
)
 vs.)
)
 MELISSA G. BELL,)
)
 Defendant.)

ENTERED ON DOCKET

DATE OCT 25 1995

Case No. 95-C-802C ✓

FILED
OCT 25 1995

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

JUDGMENT

Now on this 24th day of October, 1995, comes on for hearing the Plaintiff's Motion for Default Judgment, and the Court, being well and sufficiently advised in the premises, finds:

I.

Plaintiff, Superior Federal Bank, F.S.B., filed the above styled cause based on fraud and conversion against the Defendant, Melissa G. Bell, on August 21, 1995.

II.

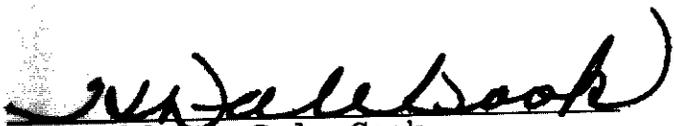
The Defendant was duly served with process by certified mail, return receipt requested, delivery restricted to addressee, in accordance with F.R.C.P. 4(e)(1). The Court finds that Defendant is neither an infant nor an incompetent person, and the method and manner of service against the Defendant are proper herein.

III.

The Court finds that the Defendant has not served an Answer or other responsive pleading within twenty days from the date of service, as required by law, and the Defendant is in default. The Plaintiff's claim against the Defendant is for a particular sum certain, that sum being \$77,120.89. Accordingly, the Motion of the Plaintiff, Superior Federal Bank, F.S.B., for Default Judgment, in the sum and amount of \$77,120.89 against the Defendant is hereby granted.

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff, Superior Federal Bank, F.S.B., is entitled to a Default Judgment in the sum of \$77,120.89 against the Defendant, Melissa G. Bell, for all of which execution may issue.

IT IS SO ORDERED.


Honorable H. Dale Cook
United States District Judge

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

TONY LAMAR VANN,
Petitioner,
vs.
MIKE ADDISON,
Respondent.

ENTERED ON DOCKET

DATE OCT 25 1995

No. 95-CV-518-C

FILED

OCT 24 1995

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

ORDER

Respondent has moved to dismiss Petitioner's petition for a writ of habeas corpus for failure to exhaust state court remedies. Petitioner does not dispute that his direct criminal appeal is presently pending, but argues that unless this Court hears the present petition he will be denied due process of law. He contends that his appointed counsel has refused to raise on direct appeal all of the issues which Petitioner wanted to present to the Court of Criminal Appeals.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by

allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted his state remedies as he has a pending direct criminal appeal. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (even if the claim petitioner raises in federal court has been fairly presented once to the highest state court, petitioner has not exhausted his state remedies if he has a pending direct appeal in state court); Parkhurst v. State of Wyoming, 641 F.2d 775, 776 (10th Cir. 1981) (court properly denied habeas corpus relief for failure to exhaust state remedies because direct criminal appeal was pending). While the Court understands Petitioner's frustration with his appellate counsel and his alleged refusal to raise certain issues on direct appeal, this Court cannot review the alleged Sixth Amendment violation until Petitioner has "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. As petitioner is well aware, ineffective assistance of counsel claims are often not reviewable until the filing of a post-conviction proceeding because they require additional fact finding. See Breechen v. Reynolds,

The Court also notes that Petitioner has not pled any facts demonstrating any delay in the processing of his state appeal which may justify this Court's intervention in a pending state appeal. See Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994). Therefore, the Court concludes that the instant petition should be dismissed

without prejudice for failure to exhaust state remedies.

Accordingly, Respondents' motion to dismiss (docket #9) is granted and the petition is hereby dismissed without prejudice to it being reasserted when the Petitioner has exhausted all his state remedies. Petitioner's motion for default judgment (docket #18) is denied.

SO ORDERED THIS 24th day of October, 1995.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 24 1995

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

GERALD C. SPYBUCK,
Petitioner,

vs.

STATE OF OKLAHOMA, and the
OKLAHOMA DEPARTMENT OF
CORRECTIONS,

Respondents.

No. 95-C-958-C

ENTERED ON DOCKET

DATE OCT 25 1995

ORDER

This matter comes before the Court on Petitioner's Motion to Dismiss Without Prejudice. Petitioner alleges that he needs to exhaust state remedies before proceeding with the present habeas corpus action.

Accordingly, Petitioner's Motion to Dismiss Without Prejudice (docket #4) is hereby GRANTED.

SO ORDERED THIS 24 day of Oct., 1995.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

OCT 24 1995

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

SHERRELL JULIAN,)
)
 Plaintiff,)
)
 vs.)
)
 HEA MANAGEMENT GROUP,)
)
 Defendant.)

Case No. 95-C-833-BU

ENTERED ON DOCKET
DATE OCT 25 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 24th day of October, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

OCT 24 1995

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

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

PATRICK OSEI,)
)
Plaintiff,)
)
vs.)
)
KIMBERLY-CLARK CORPORATION,)
)
Defendant.)

Case No. 95-C-910-BU ✓

ENTERED

DATE OCT 25 1995

ORDER

On October 17, 1995, the Court entered an Order remanding the above-captioned matter to the Tulsa County District Court on the basis that the Court lacked subject matter jurisdiction over the matter. Presently before the Court is Defendant's Unopposed Motion to Reopen and for Reconsideration filed on October 19, 1995. In the motion, Defendant states that its counsel did not receive a copy of Plaintiff's Motion to Remand and therefore did not respond to the Motion. Defendant now seeks an opportunity to so respond. Upon due consideration of the unopposed motion, the Court finds that Defendant's motion should be granted.

Accordingly, the Court hereby GRANTS Defendant's Unopposed Motion to Reopen and for Reconsideration (Docket Entry #9). The Court hereby VACATES its October 17, 1995 Order and hereby REOPENS this case. The Clerk of the Court is DIRECTED to mail a certified copy of this Order to the Tulsa County District Court. Defendant is DIRECTED to file a response to Plaintiff's Motion to Remand on or before November 8, 1995 and Plaintiff is DIRECTED to file his reply on or before November 17, 1995. The case management conference is hereby rescheduled for December 18, 1995 at 2:20 p.m.

ENTERED this 24th day of October 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED
OCT 24 1995

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

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

Plaintiff,)

vs.)

No. 95-C-117-BU ✓

PUBLIC SERVICE COMPANY OF)
OKLAHOMA, GARY KNIGHT,)
SCOTT QUAID & TRACY BABST,)

Defendants.)

ENTERED ON DOCKET
OCT 25 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 24th day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JUDITH FOX,

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER
SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 92-C-749-BU

ENTERED ON DOCKET
DATE OCT 26 1995

FILE

OCT 26 1995

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

JUDGMENT

This matter comes before the Court upon Plaintiff's Motion Requesting Entry of Judgment. Upon due consideration of the motion, the Court finds that Plaintiff's motion should be and is hereby GRANTED.

Judgment is hereby entered in favor of Plaintiff, Judith Fox, and against Defendant, Shirley S. Chater, Commissioner of the Social Security Administration, and this action is remanded to Defendant for further administrative proceedings.

ENTERED this 24 day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 25 1995

UNITED STATES OF AMERICA,

Plaintiff,

v.

FOX RUN APARTMENTS, LORRAINE
DRAKE, CHRISTINA BROWN,
SPRADLIN & ASSOCIATES, INC.,
NORTHCORP REALTY ADVISORS,
INC., CIMARRON FEDERAL
SAVINGS,

Defendants.

CASE NO. 95-C-443-K

FILED

OCT 24 1995

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

ORDER

The Amended Joint Motion to grant a voluntary dismissal of the Defendant, Resolution Trust Corporation ("RTC") as Receiver for Cimarron Federal Savings Association, Muskogee, Oklahoma in the above named action, to which there is no objection, comes on for consideration.

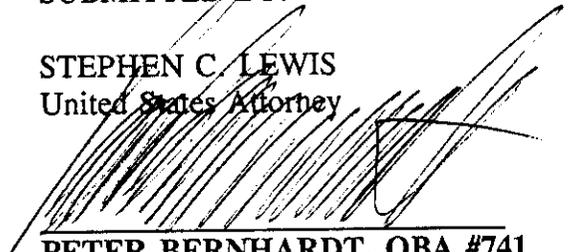
The Plaintiff, United States of America, and Defendant, RTC, have moved to dismiss the RTC as Receiver for Cimarron Federal Savings Association, Muskogee, Oklahoma (Receiver) in the above styled action. The Court, deeming the terms and conditions of the dismissal proper, finds good cause to grant such relief pursuant to Fed.R.Civ.P. 41(a)(2), hereby orders that the Defendant, Resolution Trust Corporation as a Receiver for Cimarron Federal Savings Association, Muskogee, Oklahoma (Receiver) is dismissed with prejudice and that the Motion to Dismiss filed by the RTC on August 22, 1995 is hereby withdrawn.

Dated this 23 DAY of October 1995.

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

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 25 1995

HECTOR B. HOWARD,

Plaintiff,

v.

UNITED STATES POSTAL
SERVICE, MARVIN T. RUNYON,
Postmaster General of the
United States,

Defendants.

CASE NO. 94-C-217-K

FILED

OCT 24 1995

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

ORDER

1. On September 18, 1995, this court granted the motion of the defendant to enforce settlement agreement (#23). The court directed the Defendant to prepare an Order of Dismissal with Prejudice in the above named action once the terms of the November 16, 1994 settlement agreement, as they appeared in the Report and Recommendation of the Magistrate, had been fulfilled.

2. Hector B. Howard and Marvin T. Runyon have agreed to fully and finally to settle all claims of any nature against the Defendant and the United States Postal Service, their agents, and their employees arising out the subject matter of this suit, whether or not these claims are all known to the parties and whether or not these claims have all yet matured.

3. Pursuant to the settlement agreement, the United States Postal Service has made payment in full to Hector B. Howard (SSN 191-34-2520) the lump sum of six thousand dollars (\$6,000.00) in full compromise of all his monetary and other claims (including costs but excluding attorney's fees) which he makes or could make as outlined in paragraph 2. Payment was made by U.S. Postal Service Check No. 06345836, dated September 29, 1995, made payable to Hector B. Howard and mailed to his attorneys of record, Oklahoma Disability Law Center, 4510 S. 100th East

Avenue, 210 Cherokee Building, Tulsa, Oklahoma, 74146-3661, on October 20, 1995.

4. The United States Postal Service has also made a payment to Oklahoma Disability Law Center in the sum of two-thousand five hundred dollars (\$2,500.00) in full compromise of all claims for attorney's fees. Payment was made by U.S. Postal Service Check No. 06346748, dated September 29, 1995, made payable and mailed to Oklahoma Disability Law Center, 4510 S. 100th East Avenue, 210 Cherokee Building, Tulsa, Oklahoma, 74146-3661, on October 20, 1995.

5. Per the settlement agreement, Hector B. Howard shall not be barred from the opportunity to apply for United States Postal Service employment in the future.

6. The parties do not admit to and the settlement agreement does not constitute an admission of any error, fault, or legal violation of any nature by either party, its agent, or its employees with respect to the subject matter outlined in paragraph 2.

7. The settlement agreement of November 16, 1994, binds Hector B. Howard and the Postal Service and their assigns, agents, and successors.

The Court, finding the terms of the settlement agreement to have been fulfilled, hereby orders that the above named action be dismissed with prejudice.

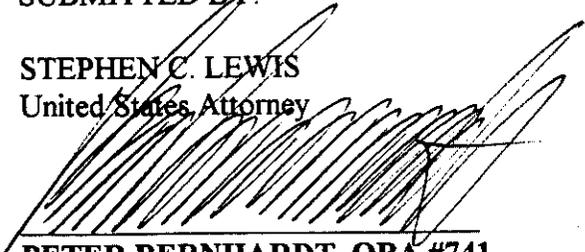
Dated this 23 DAY of October, 1995.

s/ TERRY C. KERN

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741

Assistant United States Attorney
3460 U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

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

ENTERED ON DOCKET
DATE OCT 25 1995

ROBERT LEE DUFFY,
Plaintiff,
vs.
DAVID G. BARNETT, et al.,
Defendant.

No. 95-C-884-K

FILED

OCT 24 1995

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

ORDER

This matter comes before the Court on Plaintiff's "Motion for Rehearing en Banc." Plaintiff requests the Court to reconsider its order dismissing sua sponte this civil rights action as frivolous.

Having reviewed Plaintiff's motion and his original complaint, the Court concludes that the motion for reconsideration should be denied. Accordingly, Plaintiff's "Motion for Rehearing en Banc" is hereby DENIED.

IT IS SO ORDERED this 23 day of October, 1995.

Terry C Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

JUDITH FOX,

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER
SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 92-C-749-BU

ENTERED ON DOCKET
DATE 10/25/95

FILE

OCT 24 1995

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

ORDER

As the Court has entered judgment in this case, Plaintiff is hereby granted leave to file an amended motion for attorney fees, along with an itemization of services rendered, a supporting brief and other supporting documentation. Plaintiff shall file her amended motion and all supporting materials on or before November 6, 1995.

ENTERED this 24 day of October, 1995.

Michael Burrage

**MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE**

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

BRENDA MOORE,

Plaintiff,

vs.

WALGREEN, INC.
an Illinois Corporation

Defendant(s).

ENTERED ON DOCKET

Case No. CIV-95-746-BU

FILED

OCT 2 1995

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

**ORDER REMANDING CASE TO THE DISTRICT COURT
IN AND FOR TULSA COUNTY, OKLAHOMA**

This matter comes on for consideration this 24 day of Oct, 1995 upon the Motion to Remand filed by the Plaintiff, BRENDA MOORE, and the Court being fully advised finds and orders as follows:

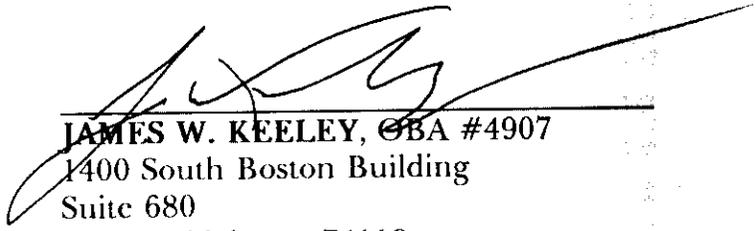
1. The Court finds that the Plaintiff, BRENDA MOORE, has filed a Motion to Remand which includes a judicial declaration and stipulation by the Plaintiff that Plaintiff's claims, and therefore the amount in controversy in this case does not exceed the sum of \$50,000.00, and that Plaintiff will not seek to recover an amount in excess of \$50,000.00 in other court proceedings.

2. The Court finds that based upon Plaintiff's Motion to Remand that this Court does not have jurisdiction of the subject matter of this claim as required by 28 U.S.C. § 1332 A.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Remand be and is hereby **sustained**, and that this case be remanded to the District Court in and for Tulsa County, **Oklahoma**, case number CJ-95-03012.


MICHAEL BURRAGE
DISTRICT COURT JUDGE

APPROVED:


JAMES W. KEELEY, CBA #4907
1400 South Boston Building
Suite 680
Tulsa, Oklahoma 74119
(918) 587-1988


RICHARD CARPENTER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT

OCT 2 1995

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

SUN COMPANY, INC., (R & M), a)
Delaware corporation, and TEXACO INC.,)
a Delaware corporation,)

Plaintiffs,)

vs.)

Case No. 94-C-820-K

BROWNING-FERRIS, INC., a Delaware)
corporation, successor in interest to Tulsa)
Container Services, Inc.; et al.)

Defendants.)

ENTERED ON DOCKET
DATE OCT 24 1995

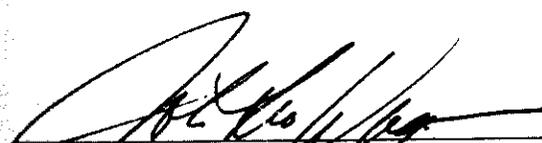
ORDER

NOW on this 23rd day of October, 1995, comes on for hearing the Application for Attorney Fees for Group II Counsel which was filed by Terence P. Brennan, Liaison Counsel for the Group II Defendants, on September 18, 1995.

No objections have been filed with respect to said Application and no objection is made in open Court.

The Court finds that said Application is in compliance with the rules of this Court; that the fees and charges set forth therein are reasonable and proper in all respects; and that said Application should be approved.

IT IS THEREFORE ORDERED that the above-referenced Application be and the same is hereby approved, and Liaison Counsel is hereby authorized and ordered to pay the same forthwith from the Group II Defendants' Liaison Counsel Trust Account.


John Leo Wagner, United States Magistrate Judge

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IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

BS&B SAFETY SYSTEMS, INC.)

Plaintiff,)

v.)

CONTINENTAL DISC CORPORATION,)

Defendant.)

OCT 21 1995

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

CASE NO. 94-CV-1027-H ✓

FILED ON DOCKET

10-24-95

MAGISTRATE'S REPORT AND RECOMMENDATION

Two motions filed by Plaintiff, BS&B Safety Systems, Inc. (BS&B), have been referred to the undersigned United States Magistrate **Judge** for report and recommendation. The motions are: BS&B's MOTION TO PRECLUDE DEFENDANT CDC FROM RELYING UPON TESTIMONY OF RULE 26(a)(2)(B) WITNESSES [Dkt. 129] filed August 29, 1995 and BS&B's MOTION UNDER RULE 37(c)(1) TO EXCLUDE CDC'S INVALIDITY/UNENFORCEABILITY DEFENSES OR, IN THE ALTERNATIVE, MOTION UNDER RULE 56 FOR SUMMARY JUDGMENT THAT CDC'S DEFENSES ARE DEFICIENT AS A MATTER OF LAW [Dkt. 143] filed September 22, 1995.

The Court has reviewed the briefs related to both motions¹ and has heard argument of counsel related to both motions at an October 11, 1995 hearing.

CHRONOLOGY

The following dates and events are relevant to understanding and resolving both motions.

CDC's Answer pled invalidity of the patent using the statutory language of 35 U.S.C. §§102(a), 102(b), 103, and 112. [Dkt. 7].

¹ Dkt. 130, 132, 137, 138, 139 related to Dkt. 129 and Dkt. 144, 168, 170, 178 related to Dkt. 143.

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December 7, 1994, Plaintiff, BS&B, served Interrogatories seeking the factual basis for any invalidity defenses asserted under 35 U.S.C. §§102, 103 and 112. Although CDC had not plead inequitable conduct, BS&B also asked for the factual basis for any contention that the patent was unenforceable because of any inequitable conduct of the inventors, BS&B or its patent attorneys [Interrogatories 5-8, Dkt. 144, Exhibit "B"].

January 9, 1995, CDC answered these Interrogatories as follows: "CDC is currently investigating the subject matter of this Interrogatory. CDC will supplement this answer as information becomes available to it through investigation and discovery." [Dkt. 144, Exhibit "C", Nos 5-7]. "CDC's investigation is continuing; it does not presently have sufficient information to respond to this Interrogatory. CDC reserves the right to supplement this answer based on the results of its investigation and discovery." *Id.*, No. 8.

March of 1995, BS&B wrote several letters seeking answers to its Interrogatories [Dkt. 144, Exhibit "D"].

March 24, 1995, BS&B served its First Amended Interrogatories. The Interrogatories were amended to resolve some definitional disputes. These Interrogatories sought the same information as the original Interrogatories [Dkt. 144, Exhibit "E"].

May 1, 1995, CDC answered, as follows:

CDC objects to Interrogatories 5 through 8 for the reason that they are "contention" interrogatories, and premature at this time. In addition, these Interrogatories call for the expert opinion of patent counsel, and CDC has not yet retained a patent law expert.

This lawsuit was only filed on November 3, 1994. CDC's investigation is continuing; and when CDC concludes its discovery on its invalidity defenses, CDC will then submit responsive answers to these Interrogatories. [Dkt. 144, Exhibit "F", page 7].

Although CDC essentially stated it **would** not provide a statement of the basis for its contentions of invalidity and unenforceability, in response to Amended Interrogatory No. 4, which sought the basis of CDC's position **that its SANITRX and STARTRX products do not infringe the patent-in-suit**, CDC included **the following** statement in its answer: "CDC believes the '133 patent to be invalid, or invalid as **applied**." [Dkt. 144, Exhibit "F", page 6]. By letter dated June 6, 1995, BS&B notified CDC **that its answers to the Amended Interrogatories were insufficient** [Dkt. 144, Exhibit "G"].

May 24, 1995, Robert M. Mozley (developer of CDC's allegedly infringing products) was deposed and questioned about prior art as a basis for patent invalidity [Dkt. 144, Exhibit "I"].

June 8, 1995, Judge Holmes conducted a status hearing at which time the parties informed the Court regarding the products at issue and outlined their positions in the lawsuit on infringement and invalidity. During its presentation, counsel for BS&B advised the Court:

[A]lthough CDC in their answer to the complaint alleged that the patent was invalid, in their responses to our production requests and our interrogatory answers they have not set forth any basis for that invalidity, and both Mr. Doelling, the vice-president of CDC, and Mr. Mozley, the person who made these discs and by his own admission is the person who had 21 years in the industry and is most knowledgeable about reverse buckling discs, they both have admitted they have no basis at present to set forth and believe why the patent is invalid.

[Page 9, lines 5-14, Transcript filed under seal, 6/26/95; see also page 31, line 23 through page 32, line 3]. CDC's counsel stated that it is his "style" or preference to develop the case concerning infringement first rather than pursue patent invalidity. He explained to the Court he would like to put off the invalidity case until the Court can rule on CDC's summary judgment

motions addressing infringement and asked that invalidity be bifurcated until the Court could rule on the summary judgment motions. CDC's counsel stated: "I can, I'll take a look and when I think the invalidity case is ready to move you'll hear from me. If I feel like I can't make it, I won't push it." [*Id.*, at page 24, lines 16-19].

The Court did not bifurcate invalidity as requested by CDC. The Court entered a scheduling order which set the following deadlines:

Amendments to Pleadings:	7/5/95
Exchange of Trial Exhibits, Witness Lists and Expert Witness Exchange:	8/4/95
Discovery Cutoff:	9/1/95
Dispositive Motion Deadline:	9/8/95

The discovery deadline was set later than BS&B thought necessary, given the amount of discovery already conducted. The Court stated the reason for the September 1 discovery deadline was to avoid the panoply of problems that would result from running out of discovery time while the parties awaited the Court's ruling on the motions for summary judgment. [*Id.* at page 29]. The discovery cutoff was later extended to 9/15/95 by Magistrate Judge McCarthy to allow CDC further time to present its witnesses for deposition, and to accommodate CDC's counsel's schedule. The extension was not granted to permit CDC to add new defenses. Because of the extension of the discovery deadline, the dispositive motion deadline was extended to 9/22/95, the response and reply dates were abbreviated and set on September 29, 1995 and October 6, 1995, respectively [Minutes 8/23/95].

June 14-16, 1995, the inventors of the BS&B '133 patent (Mundt and Farwell) were deposed.

June 17, 1995, Robert Doelling, CDC Vice President of Engineering, was deposed and testified he had no factual basis to claim the '133 patent was invalid [Dkt. 144, Exhibit "I"].

July 7, 1995, the deadline for Amendment to Pleadings passed without any amendments.

August 4, 1995, in accordance with the Court's scheduling order, BS&B provided CDC its witness list [Dkt. 107], trial exhibit list and expert witness exchange [Dkt. 130, Exhibits "B", "C", "D"].

August 11, 1995, after the deadline, CDC filed a "preliminary witness list" which advised: "CDC contemplates calling one technical expert and one patent law expert. The technical expert has not been selected as yet." [Dkt. 113, page 2]. Paul Johnson, patent attorney, was identified as CDC's patent law expert. CDC advised it "contemplates that Mr. Johnson will to [sic] testify about infringement and invalidity, but he has not as yet concluded his study and review of the relevant materials. Defendant will tender a copy of Mr. Johnson's expert report as soon as it is available." *Id.*

August 23, 1995, a hearing was held before the undersigned Magistrate Judge in which CDC's Motion To Stay Discovery Pending Ruling on the Motion For Summary Judgment was denied [Dkt. 122]; discovery cut-off was extended to September 15, 1995.

August 29, 1995, BS&B filed its Motion To Preclude CDC from Relying Upon the Testimony of Rule 26(a)(2)(B) Witnesses, who are the unnamed technical expert and attorney, Paul H. Johnson [Dkt. 129].

September 1, 1995, CDC served a "Preliminary Expert Report of Davis M. Egle, Ph.D., P.E. (Defendant's Technical Expert)" [Dkt. 144, Exhibit "M"]. The report outlined Mr. Egle's testimony concerning infringement and stated that he "may also give expert opinion

relevant to the invalidity of the '133 patent." *Id.* The report contains no specific opinion concerning invalidity or any hint at a possible factual basis for such an opinion. Also on September 1, 1995, CDC provided the expert statement of attorney, Paul H. Johnson. With regard to invalidity of the patent, Johnson stated his opinion "if the scope of the [patent] claims are deemed of sufficient breadth to encompass the rupture discs manufactured by CDC then Patent 5,082,133 is invalid" [Dkt. 144, Exhibit "N", page 1]. The factual basis for that opinion is not outlined in the report.

September 11, 1995, CDC provided Supplemental Responses to Certain of BS&B's Interrogatories wherein it listed the bases for contesting the validity of the patent-in-suit: prior art (anticipation or obviousness); inadequate/inoperative disclosure/improper claiming; best mode; statutory bar; prior invention; unenforceability based upon inequitable conduct (fraud on the patent office) [Dkt. 144, Exhibit "O"]. Alleged inequitable conduct (fraud on the patent office), best mode, claim indefiniteness and prior invention had not been pled or otherwise revealed as possible defenses to BS&B throughout discovery.

September 12 and 13, 1995, Depositions of Mr. York (CDC Product Development Manager) and Mr. Shaw (CDC President). BS&B represents these witnesses testified they were not aware of any basis that the BS&B patent is obvious in view of prior art or otherwise invalid [Dkt. 144, p. 6].

September 22, 1995, amended dispositive motion deadline.

September 22, 1995, BS&B filed its Motion to Exclude CDC's Invalidity/Unenforceability Defenses [Dkt. 143].

September 22, 1995, CDC filed two **Motions For Summary Judgment** [Dkt. 147, 150]. Those motions seek summary judgment based upon prior art and prior invention. CDC's Fifth Motion For Summary Judgment [Dkt. 147] raises the existence of prior art as the basis for invalidity of the patent. CDC relied on 12 prior art references that had not been previously disclosed to BS&B until it received the summary judgment filings. CDC's Fourth Motion for Summary Judgment [Dkt. 150] was based on prior invention which had not been pled as a defense and was first identified as a defense on September 11, 1995 in the Supplemental Responses To Interrogatories. Regarding prior invention (35 U.S.C. §102(g)), CDC's entire Supplemental Interrogatory Response was:

In the event that the accused CDC STARTRX and/or similar "hexagonal-indentation" are found to fall within the structural scope of the '133 patent, then it appears that CDC's conception and reduction to practice thereof antedates BS&B's conception and reduction to practice of the '133 invention.

[Dkt. 144, Exhibit "O", page 3]. No factual basis for this claim was provided. The factual basis of that claim was not provided until **September 22, 1995**, when CDC filed its Fourth Motion For Summary Judgment. The deposition excerpts CDC proffered in support of its prior invention summary judgment were taken **6/16/95** (Arnold L. Mundt), 6/13 and 14 (Stephen Paul Farwell), May 24, 1995 (Robert Mozley) and **August 24, 1995** (Tom Carey) [Dkt. 150, Exhibits "A"- "D"].

**BS&B'S MOTION UNDER RULE 37(c)(1) TO EXCLUDE CDC'S
PURPOSELY CONCEALED INVALIDITY/UNENFORCEABILITY
DEFENSES [DKT. 143]**

BS&B claims that CDC has concealed its theories of defense from BS&B by failing to properly answer or supplement interrogatories specifically seeking the factual basis of any prior art or invalidity defenses, by failing to fully and timely identify its trial exhibits, and by failing to provide meaningful expert reports addressing the various invalidity theories. BS&B seeks an order precluding CDC from asserting its invalidity/unenforceability defenses at trial. BS&B cites Fed.R.Civ.P. 37(c) as authority for its request.

Rule 37(c) provides:

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion, any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

The additional sanctions Rule 37(c) refers to are found at Rule 37(b)(2)(A),(B) and (C) include:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

The Court must first determine whether there has been a failure to disclose information required by Rule 26(a) or 26(e)(1). Rule 26(e)(1) requires a party who has responded to a request for discovery to supplement its disclosures "if the party learns that in some material respect the information disclosed is *incomplete* or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing" [emphasis supplied]. The Court finds that CDC's January 9, 1995 and March 24, 1995 responses to BS&B's Interrogatories 5-8 were incomplete, and that the information sought was not otherwise made known to BS&B until after the discovery deadline when BS&B filed its motions for summary judgement on September 22, 1995. Accordingly, this motion is properly resolved under Rule 37(c).

CDC maintains that its actions are "substantially justified," that BS&B will not suffer harm and therefore, BS&B's motion should be denied.

As justification for its actions, CDC argues that it is actually early in notifying BS&B of its defenses because the Patent Code, 35 U.S.C. §282, requires a party asserting invalidity or non-infringement of the patent to give notice of the details to the adverse party only 30 days before the trial. CDC also argues that its actions were substantially justified because BS&B has "stonewalled" CDC's attempt to conduct discovery.

The Court rejects CDC's claim of justification. CDC has cited no authority, nor has the Court found any, to suggest that the 30 day provision of 35 U.S.C. §282 excuses compliance with the discovery provisions of the Federal Rules of Civil Procedure and the Court's specific pre-trial orders. Congressional intent that the Federal Rules of Civil Procedure apply to all civil suits, save those few exceptions in Rule 81, is unequivocally stated in Fed.R.Civ.P. 1. CDC's

argument that actions by BS&B justify CDC's failure to respond to discovery is similarly unavailing. The Court is not aware of any such exception to compliance with the Federal Rules of Civil Procedure.

The Court notes: (1) the statement by CDC's counsel at the status hearing before Judge Holmes that he preferred to focus on the infringement aspects of the suit first, (2) CDC's request at that same hearing to bifurcate infringement and invalidity, and (3) counsel's statement that "when I think the validity case is ready to move, you'll hear from me". Months ago, CDC made a decision to focus its energy on defending the infringement claim, rather than pursue invalidity defenses. CDC did not provide even a cursory response to the interrogatories directed at discovery of the factual basis of its generally pled invalidity defenses. However, in the same May 1, 1995 Answers to Interrogatories where CDC effectively refused to provide any information concerning its invalidity claims, it asserted invalidity in response to another of the interrogatories. The very fact that CDC asserted invalidity in answer to an interrogatory seeking information concerning infringement on May 1, 1995, suggests that either CDC had, at that time, some factual basis for its invalidity defense which it was withholding from BS&B or that CDC was completely ignoring its obligations under Rule 26(g).²

² Rule 26(g)(2) requires the signature of an attorney of record or party on each discovery response. The signature "constitutes certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is . . . (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

For purposes of the Rule 37(c)(1) analysis, it matters not whether CDC's failure to disclose was tactical, strategic, conscious or inadvertent. The question is whether the failure to disclose is substantially justified. The Court finds it is not. Having found no substantial justification for CDC's failure to disclose, the Court must consider whether the failure was harmless.

CDC argues that its actions could not harm BS&B because 35 U.S.C. §282 requires notice of prior art only thirty days in advance of trial and because the 30-day requirement may be waived by the court "upon such terms as the court requires". Citing the words of Justice Story in *Philadelphia & Trenton Railroad Co. v. Stimpson* (1840) 14 Pet. 448, 459, 39 U.S. 448, 459, 10 L.Ed. 535, CDC argues essentially that because the underlying purpose of the 30-day notice requirement is to "prevent patentees being surprised," notice given in advance of the 30 days is *a fortiori* incapable of causing harmful surprise. The Court notes that § 282 refers only to the disclosure of information concerning the defenses based on prior art and prior invention. Thus § 282 cannot address or justify CDC's late assertion of the defenses of inequitable conduct (fraud on the patent office), best mode and claim indefiniteness. Moreover, CDC's assertion that § 282 relieves it of adherence to the discovery procedures of the Federal Rules of Civil Procedure is untenable. The precursor to § 282 (Patent Act of 1836) was a very early recognition of the need for full disclosure and avoidance of trial by ambush, which concepts are now fully embodied in the liberal discovery afforded by the Federal Rules. The contention that § 282 somehow trumps the Federal Rules is insupportable. *Eaton Corp. v. Appliance Values Corp.*, 790 F.2d 874 (Fed.Cir 1986).

CDC argues that its offer to now **make its** witnesses available for deposition even though discovery has closed eliminates any source of harm. The Court finds otherwise. The most striking example of harm to BS&B is that **CDC filed** two motions for summary judgement based on its newly articulated invalidity defenses [Dkt. 147, 150] on the last day for filing dispositive motions and then sought to default BS&B for **failing** to respond to the motions when BS&B had no discovery and no opportunity for discovery on these new defenses.

Further, the District Court has set a **trial date** of December 18, 1995. Throughout this litigation, BS&B has expressed that the **trial date** is an important element in its quest to cut off the harm it alleges as the result of the **purported** infringement.³ BS&B has propounded interrogatories seeking the factual basis for the defenses pled and received no answer until the eve of the discovery deadline, as extended to accommodate CDC's witnesses. When CDC finally provided some answer to the interrogatories, it also added several new defenses, then, within days, it filed two summary judgment motions. Regardless of the reason for CDC's actions, it is no stretch to say that the **effect is not** harmless.

BS&B was entitled to rely upon its **discovery**, to expect that CDC would adhere to the scheduling order set by the Court, and to **plan** its trial preparation accordingly. If CDC is permitted to proceed with its heretofore **undisclosed** invalidity defenses, BS&B will have to substantially alter its trial preparation **schedule** to focus its attention on the newly asserted defenses. In this way, CDC has attempted to **wrest** control of the pre-trial schedule from the

³ *Continuance of the trial would enable BS&B to prepare for trial as if the facts related to CDC's invalidity defenses had been properly disclosed. However, a continuance would be a detriment to BS&B in that if CDC's products infringe the patent, BS&B would suffer further harm, and CDC would receive a corresponding benefit. Unless CDC were willing to withdraw the allegedly infringing products from the market, continuance of the trial is not an acceptable means to alleviate the harm caused by BS&B's actions.*

Court and place it in its own hands, to the **detriment** of BS&B. This CDC cannot be permitted to do.

CDC argues that BS&B is not **harmed** because "[m]ost of the evidence of invalidity has come 'right from the horse's mouth', that is, from the BS&B witnesses themselves (to include Messrs. Farwell and Mundt, the two '133 co-inventors), and from BS&B's own document production." [Dkt. 170, page 5]. However, at the October 11, 1995 hearing and in a brief filed October 6, CDC's counsel stated that he "is probably the only person who truly understands CDC's invalidity theory," and that he **only lately** "snapped on" to the significance of certain information [Dkt. 180, p. 16]. Given those representations and CDC's failure to respond to discovery, it is disingenuous to argue, as CDC does, that its plea of "not guilty" to patent infringement implies a validity challenge. CDC plead patent invalidity in its answer, so BS&B has known that an invalidity defense was a **possibility**, what BS&B didn't know and what CDC was obligated to disclose is the **factual basis** for the assertion of that defense. In addition, the Court notes that Messrs. Farwell and Mundt were deposed June 13, 14 and 16, 1995. Given the July 5 deadline for amendments to **pleadings**, and the long outstanding BS&B discovery, it was incumbent on CDC's counsel to **seriously consider** its defenses and "snap" sooner.

If, in fact, it is true that CDC just **recently** garnered the facts and analyzed them with an eye toward patent invalidity, the Court **wonders** on what basis invalidity was pled in its answer. Realizing that CDC has changed counsel **since** filing its answer, it none-the-less had the duty either to respond to discovery, or strike the **invalidity** defense. CDC was not privileged to plead defenses for which it had no **factual support**, Fed.R.Civ.P. 11. Consequently, in the Court's view, the motion that should actually be **pending** before the Court is a motion by CDC seeking

permission to amend its pleadings to assert the **invalidity** defenses, for the first time. Obviously, given the history of this litigation such a **motion** would be denied.

The advisory committee notes **addressing** Rule 37(c)(1) characterize it as an automatic sanction for failure to make the disclosures **required** by Rules 26(a)⁴ and 26(e)(1). The notes suggest that the exception for "harmless" **violations** is needed to avoid harsh penalties in situations where, for example, the name of a **witness** known to all parties is inadvertently omitted from disclosure, or a party fails to **list** a witness listed by another party. The Court finds that CDC's failure to answer or **timely** supplement its interrogatory answers is not harmless.

The Court therefore recommends **that** BS&B's Motion To Preclude Defenses be **SUSTAINED**. CDC is precluded from **introducing** evidence of invalidity of the patent-in-suit. CDC's defense of invalidity is stricken **from the** pleadings and CDC is precluded from relying, in any manner, on invalidity or **unenforcability** of the patent-in-suit at trial.

The Court's recommendation **obviates the** necessity of considering BS&B's alternative request for summary judgment on the **issue of** invalidity. It will also have the practical effect of granting BS&B's Motion [Dkt. 165] to **strike** CDC's fourth and fifth motions for summary judgment [Dkt. 147 and 150].

From CDC's perspective, the result **may seem** harsh. It is, however, the result mandated by Rule 37(c). The Court **acknowledges the** tension between the preference for resolving disputes on the merits and the imposition of **sanctions**. However, it is fundamentally unfair for

⁴ CDC has argued that this district has opted out of the provisions of Rule 26(a). However, Local Rule No. 26.3(A) states that this district has opted out of only some of the subdivisions of Rule 26, namely 26(a)(1)(A)(B) and (C). The remaining provisions of Rule 26(a) apply. The district has not opted out of 26(a)(2) requiring identification of experts and disclosure of their testimony via report.

one party to disregard discovery obligations and court deadlines while its opponent adheres to them. Any adverse consequences flowing from such actions should be borne by the party disregarding its obligations. The Court would not recommend exclusion of evidence and defenses if the improper action had no adverse effect on the opponent. However, where harm does occur, the matter must be resolved in favor of the party abiding by the rules. The Court has recommended the least onerous sanction responsive to CDC's actions. Rule 37(c)(1) permits the Court to levy other sanctions which have not been recommended. CDC appropriately responded to discovery seeking information on its infringement defenses and they are unaffected by this recommendation.

**BS&B'S MOTION TO PRECLUDE
DEFENDANT CDC FROM RELYING ON
TESTIMONY OF RULE 26(a)(2)(B)
WITNESSES [DKT. 129]**

BS&B seeks to preclude CDC from introducing testimony of two expert witnesses who were identified after the August 4, 1995 witness deadline: attorney, Paul H. Johnson, and technical expert, Davis M. Egle, Ph.D., P.E. When the witnesses were identified on August 11, 1995, CDC's technical expert was yet un-named and no expert reports were provided at that time. The expert reports were provided on September 1, 1995. BS&B complains of prejudice because the expert reports were late and disclosed no substantive information on any invalidity defense. BS&B also presents arguments concerning the qualifications and impartiality of attorney Johnson as a witness, given his prior representation of CDC in this case.

The Court finds that the expert reports were late and did not contain the degree of detail envisaged by the requirements of Rule 26(a)(2)(B). However, BS&B has always been aware that CDC intended to defend this suit on the basis of non-infringement. Likewise, throughout discovery, BS&B has been provided the factual basis for CDC's defenses to infringement. While BS&B may not have known the precise identity of CDC's expert witnesses on the subject of non-infringement, it cannot be said that the late identification of the witnesses approaches the same harmful result caused by the failure to respond to or supplement discovery requests seeking the basis of the invalidity defense. For the most part, the Court's recommendation precluding the assertion of CDC's invalidity defense eliminates the harm to BS&B occasioned by the late identification of experts and the inadequate expert reports. The Court does not countenance CDC's disregard of deadlines and submission of inadequate expert reports. However, excluding CDC's witnesses would amount to a strict procedural default, not accompanied by harm to BS&B.

Accordingly, the Court recommends that BS&B's Motion To Preclude the Testimony of CDC's Expert Witnesses [Dkt. 129] be OVERRULED, in part. CDC shall, within 10 days of the date of this Report, file expert reports which comply with Rule 26(a)(2)(B) in all respects. CDC is required to make its witnesses, Johnson and Egle, available for deposition. The scope of Dr. Egle's testimony is limited to the question of infringement. Attorney Johnson's testimony is limited to patent law and the operation of the patent office, as the parties agree, those subjects are properly addressed by patent attorneys [Dkt. 132, p. 4-5; Dkt. 139, p. 4-5]. Infringement issues and claim construction are properly addressed by those skilled in the relevant art, not patent attorneys, unless the attorney is trained and skilled in the particular art in question. See

Smithkline Diagnostics Inc. v. Helena Labs Corp., 859 F.2d 878, 882 (Fed. Cir 1988). The Court declines to recommend exclusion of Attorney Johnson on the basis of his status as former counsel for CDC. *Orr v. Edens*, 861 P.2d 331 (Okla.App 1993).

CONCLUSION

The undersigned United States Magistrate Judge recommends that BS&B's MOTION TO PRECLUDE DEFENSES [Dkt. 143] be **SUSTAINED**. BS&B should be precluded from relying on invalidity of the patent as a defense.

The undersigned United States Magistrate Judge recommends that BS&B's MOTION TO PRECLUDE THE TESTIMONY OF CDC'S EXPERT WITNESSES [Dkt. 129] be **OVERRULED** in part. CDC is required to submit expert reports **complying** with Rule 26(a)(2)(B) within 10 days of the date of this Report. CDC is to make its **witnesses**, Attorney Johnson and Dr. Egle, available for deposition. The scope of their testimony is limited as outlined in this Report.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be **filed with the** Clerk of the Court within ten (10) days of the receipt of this Report. Failure to **file objections** within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Dated this 23 day of October, 1995.


FRANK H. McCARTHY
United States Magistrate Judge

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

FILED

THOMAS GORDON TULL,)
)
 Debtor.)
)
 UNITED STATES OF AMERICA,)
)
 Appellant,)
)
 vs.)
)
 THOMAS GORDON TULL,)
)
 Appellee.)

OCT 23 1995

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

Case No: 93-01318-C
Adv. No: 93-0159-C
Case No: 94-C-900-B

ENTERED ON DOCKET

DATE OCT 24 1995

ORDER

This order pertains to the appeal of the United States from the final judgment entered by the Bankruptcy Court for the Northern District of Oklahoma on September 13, 1994. Appellee has not responded and counsel for appellee acknowledges that, under Rule 7.1(C) of the Local Rules of this court, failure to respond will authorize the court to deem the matter confessed and enter the relief requested.

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate view of bankruptcy rulings with respect to findings of fact. In re Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988). This appeal challenges the bankruptcy court's holding that Thomas Gordon Tull ("Tull") did not willfully fail to truthfully collect, account for, or pay over the employment taxes of Speed Space, Inc., ("Speed Space") pursuant to 26 U.S.C. Section

6672, a legal conclusion drawn from the facts presented at trial, so de novo review is proper.

The parties stipulate to the following facts: (1) Speed Space was in the business of selling pre-fabricated buildings; (2) on July 23, 1983, Tull began working for Speed Space; (3) on the date that Tull began working for Speed Space, the corporation's bank accounts showed a balance of \$3,606.00; (4) on the date that Tull began working for Speed Space, he was aware that the corporation was having financial difficulties and having a difficult time paying its creditors; (5) Tull had an ownership interest in Speed Space; (6) Tull was a director of Speed Space; (7) Tull was an officer of Speed Space; (8) Tull served as President of Speed Space; (9) Tull hired and fired employees of Speed Space; (10) Tull was authorized to sign checks on bank accounts of Speed Space; (11) Tull signed checks in payment of corporate obligations; (12) Tull was responsible for the day-to-day operations of the corporation; (13) Tull signed the corporation's Forms 941, Employer's Federal Employment Tax Returns; (14) Tull signed payroll checks; and (15) after July 23, 1983, Tull was a person required to collect, account for, and pay over the employment taxes of Speed Space.

On May 26, 1993, Tull commenced an adversary proceeding against the United States under 11 U.S.C. §§ 505 and 523 to determine whether he was liable for certain taxes, penalties, and interest owed to the Internal Revenue Service as a "responsible person" who had "willfully" failed to collect, account for, or pay over the employment taxes of Speed Space, for the tax periods ended December 31, 1982, March 31, 1983, and June 30, 1983. The issue was tried, and at the conclusion of the trial, the bankruptcy court concluded:

. . . [T]he question is whether [Tull's] failure to investigate, when [Tull] knew the company was in financial difficulty, when [Tull] knew there was over \$100,000 in unpaid bills, [Tull's] failure to inquire . . . is that a reckless disregard of a known risk that employment taxes had not been paid. This is the issue and I am ruling, no, it isn't.

(Transcript ("TR"), pg. 63). The court based this decision on its finding that the individual

who hired debtor, Marvin Morse ("Morse"), a CPA, who took care of the books of the

corporation, failed to discuss the past due employment taxes with Tull, so Tull did not act in reckless disregard of an obvious risk that the corporation's employment taxes had not been paid. The judge admitted it was "a very close case." (TR, pg. 62).

Appellee argues that if Morse had discussed these past due employment taxes with Tull, Tull would have had actual knowledge concerning their nonpayment, but this is not the only test for "willfulness." Since Speed Space was having severe financial difficulties and had over \$100,000 in unpaid bills, appellee claims that Tull acted in reckless disregard of an obvious or known risk when he failed to investigate whether the employment taxes had been paid. Appellee points out that Tull was an experienced business owner and therefore aware that employment taxes need to be paid in a timely manner. Appellee also argues that Tull should have stopped paying other creditors once he became aware of the unpaid taxes.

The Internal Revenue Code of 1986 requires an employer to deduct and withhold income and social security taxes from wages paid to its employees. 26 U.S.C. §§ 3102(a) and 3402(a). The taxes are to be held in trust for the United States for the exclusive use of the United States. 26 U.S.C. §§ 3102(b), 3403, 7501(a).

A penalty is assessable against a person who, though "responsible" for seeing that

the employer withholds and pays over employment taxes to the United States, willfully fails to ensure that the employer complies with these laws, which is separate and distinct from the employer's liability for the taxes. Denbo v. United States, 988 F.2d 1029, 1032 (10th Cir. 1993). A "responsible person" acts "willfully" when the person makes a "voluntary, conscious and intentional decision to prefer other creditors over the Government," or shows a reckless disregard of a known risk that trust funds may not be remitted to the government, including the "failure to investigate or to correct mismanagement after being notified that withholding taxes have not been paid. . ." Id. at 1033 (citing Burden v. United States, 486 F.2d 302, 304 (10th Cir. 1973), cert. denied, 416 U.S. 904 (1974) and Mazo v. United States, 591 F.2d 1151, 1154 (5th Cir.), cert. denied, 444 U.S. 842 (1979)).

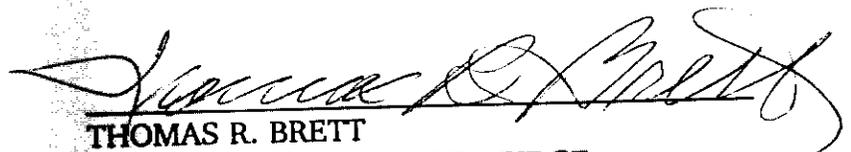
In this case, the evidence showed that, when Tull assumed day-to-day control of the corporation, he knew that it was behind in paying creditors in the normal course of its business. (TR, pgs. 24-25). He failed to investigate or make inquiry concerning whether quarterly employment taxes had been timely paid (TR, pg. 28). Thus, the bankruptcy court erred in failing to hold that debtor acted in reckless disregard of an obvious risk that the corporation's employment taxes were not paid. The court admitted that, when someone takes over a failing business as president, he should investigate what liabilities are due and owing at that point, but found that Tull's failure to do so was merely negligent, not grossly negligent. (TR 64-65).

The bankruptcy court also should have found that Tull acted willfully when he learned of the employment tax delinquency and continued to prefer other creditors over the government. Muck v. United States, 3 F.3d 1378, 1381 (10th Cir. 1993). The

evidence showed that Tull learned that the corporation was behind in paying its employment taxes "about two months" after he was hired (TR, pg. 25), but after learning this he continued to sign checks and pay creditors in preference to paying the taxes (TR, pg. 26, 29, 49-50). To disprove willfulness, he had to demonstrate that any funds disbursed after learning of the employment tax delinquency related solely to "after-acquired cash unrelated to the withholding taxes." Slodov v. United States, 436 U.S. 238, 255 (1978). Tull failed to produce any evidence to show that when he learned of the employment tax delinquency, there were no longer any "unencumbered assets" to satisfy the employment taxes in issue, such as cash or accounts receivables.

The bankruptcy court's determination that debtor did not "willfully" fail to collect, account for, or pay over the employment taxes of Speed Space for the periods ended December 31, 1982, March 31, 1983, and June 30, 1983 is reversed.

Dated this 20th day of Oct, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

S:tull

sf

United States District Court
for Northern District of Oklahoma
October 23, 1995

ENTERED ON DOCKET
DATE OCT 23 1995

Richard B Wilkinson, Esq.
Oklahoma Education Association
P O Box 18485
Oklahoma City, OK 73154-0485

C I V I L M I N U T E S

4:94-cv-00874

Robbins v. Craig Sch Dist I-006

DOCKET ENTRY

JTE ORDER: Granting motion to dismiss (joint stipulation
of dismissal) [12-1]; dismissing case (cc: all counsel)

Hon. Sven Erik Holmes, Judge

THIS NOTICE SENT TO ALL COUNSEL

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

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

In this case Plaintiff demonstrated that she can no longer perform her past relevant work as a nurses aid and landscaper. Having made such a showing the burden shifted to the Secretary to show, by substantial evidence, that the claimant retains the capacity to perform an alternative work activity and that the type of job exists in the national economy. *Turner v. Heckler*, 754 F.2d 326, 328 (10th Cir. 1985). The ALJ determined that although Plaintiff's impairments prevent her from performing her past relevant work, she retains the residual functional capacity for sedentary work. The ALJ relied upon the medical-vocational guidelines ("grids") which direct that given Plaintiff's age, education and capacity for sedentary work, Plaintiff is not disabled. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.27. 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 alleges that the ALJ failed to properly assess her subjective complaints and failed to properly weigh the opinion of her treating physician.

By letter dated September 3, 1993, Plaintiff's treating physician, Dr. David L. Smith, D.O., offered the opinion that, due to the extensive list of Plaintiff's various diagnosis³, that she is unable to work at this time [R. 202]. A treating physician's 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 is entitled to controlling weight if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). However, such an 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). See *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).

In this case the ALJ stated that there are no specific functional restrictions given in the medical evidence and that Dr. Smith's report was brief and conclusory [R. 19]. The Court agrees that Dr. Smith's report was brief and conclusory. However, the Court notes that the record contains 36 pages of Dr. Smith's office notes on Plaintiff, spanning the period of time from May, 1990 to December, 1993 [R. 203-238]. The ALJ mentioned these notes and found them to be illegible [R. 15]. The Court has examined the notes and also finds them illegible. Since the notes are illegible it is not possible for the Court to determine whether Dr. Smith's

³ According to Dr. Smith's report, Plaintiff's diagnosis are: " (1) Mitral Value Prolapse [sic], Tricuspid Valve Prolapse [sic], (2) Severe Chronic Obstructive Pulmonary Disease, (3) Chronic Bronchitis With Debilitating Cough, (4) Cigarette Addiction, (5) Recurrent Urinary Tract Infections, (6) Right Uretero-Pelvic Junction Obstruction With Placement of Indwelling Right Ureteral Stint [sic] on 2/2/91, (7) Right Hydronephrosis Secondary To #7, (8) Chronic Lumbar Dysfunction With Previous Lumbar Disectomy [sic]." [R. 202].

report is supported by clinical findings, nor was it possible for the ALJ to do so. Dr. Smith's notes are crucial to Plaintiff's claim because they would likely demonstrate the severity and frequency of Plaintiff's kidney and urinary tract problems, whether she has recently sought treatment for her back problems and mitral valve prolapse, and whether she has complained to her physician about extreme fatigue or the side effects of her medications. These questions bear directly on Plaintiff's residual functional capacity as well as the analysis of her pain and credibility.

The ALJ has a basic obligation in every case to ensure that an adequate record is developed, consistent with the issues raised. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992), *Henrie v. U.S. Dept. of Health and Human Services*, 13 F.3d 359, 360-1 (10th Cir. 1993). In particular, 42 U.S.C. § 423(d)(5)(B) requires:

In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner or Social Security . . . shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician . . . all medical evidence. . . [emphasis supplied].

The ALJ was therefore required to make a reasonable effort to obtain the substance of Dr. Smith's illegible records. There are a number of methods at the ALJ's disposal, including the ability to subpoena the doctor to testify. 42 U.S.C. § 405(d). The Court also notes that Plaintiff was represented by counsel who, presumably was also unable to decipher Dr. Smith's records. There is nothing in the record or Plaintiff's brief to suggest that she or her attorney made any effort to obtain legible notes. Despite the fact that the Secretary bears the burden at

step-5, because Dr. Smith's notes will **impact** directly upon the credibility of Plaintiff's subjective complaints, Plaintiff shares the **responsibility** to obtain legible notes from Dr. Smith. Moreover, the Court is of the opinion that **Plaintiff's** attorney should have taken measures to do so before this point, as it is not the ALJ's **duty** to be Plaintiff's advocate. Plaintiff's attorney does a disservice to his client by **failing to secure** legible information needed to resolve Plaintiff's case.

The Court finds that because the **office notes** of Dr. Smith are of central importance to the determination of Plaintiff's disability, **the illegibility** of the notes warrants a remand of this case. See *Bishop v. Sullivan*, 900 F.2d 1259 (8th Cir. 1990). The Commissioner of Social Security is directed to undertake **reasonable effort** to obtain legible records from Dr. Smith and to re-evaluate Plaintiff's claim in light of **those** records.

The cause is REVERSED and REMANDED for further development of the record and evaluation in accordance with this order.

SO ORDERED THIS 20th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

OCT 20 1995

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

JASON EDWARD HENDERSON and
DONNA S. HENDERSON, husband
and wife,

Plaintiffs,

vs.

CONTINENTAL EMSCO,

Defendant.

No. 94-C-515-K

ENTERED ON DOCKET
DATE OCT 23 1995

O R D E R

The sole remaining defendant in this case, Continental Emsco Company ("CECO"), moves for summary judgment as to all claims set forth by Plaintiffs Jason Edward Henderson and Donna S. Henderson in their First Amended Complaint. On February 11, 1994, Jason Henderson was allegedly injured while operating an industrial press built by CECO. Plaintiffs sue CECO on two theories of common law negligence: defective design and failure to warn.¹

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir.

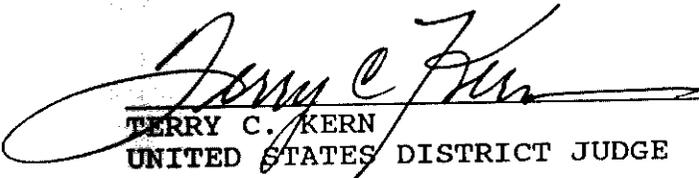
¹ Although the First Amended Complaint appeared to include a cause of action based on strict products liability, parties have stipulated that the sole remaining causes of action are based on common law negligence. Agreed Pretrial Conference Order at 4.

1986), cert. den., 480 U.S. 947 (1987). In their Response to Defendant Continental EMSCO's Reply under Defendant's Motion for Summary Judgment, Plaintiffs concede,

Absent the ability of plaintiffs to pigeonhole their case under a strict liability theory, plaintiffs are persuaded that they cannot, in good conscience, represent to this court that they will make out a prima facie case at trial under a negligent warnings theory, or a negligent design theory.

Id. at 2. In light of this concession, this Court finds that CECO is entitled to judgment as a matter of law. CECO's Motion for Summary Judgment is therefore GRANTED.

ORDERED this 20 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE