

FILED

NOV 17 1995

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

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

CHARLES DAY,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY CAVE, et al.,)
)
 Defendants.)

No. 94-C-312-B

ENTERED ON DOCKET

DATE NOV 20 1995

ORDER

This matter comes before the Court on Defendants' second motion for summary judgment (docket #25) and Plaintiff's motions to amend complaint and for reconsideration (docket #36 and #49). Also before the Court are the responses to the September 19, 1995 briefing order.

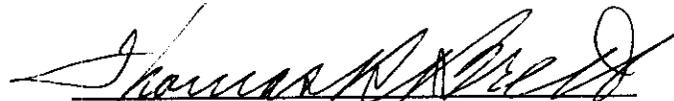
Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue. See Sandin v. Conner, 115 S.Ct. 2293 (1995) (reformulating the test for determining whether a state law creates a protected liberty interest). The deprivation allegedly suffered by Plaintiff, 30 days in disciplinary segregation, is not of the "atypical" or "significant" kind that the Supreme Court has determined constitute deprivations in which a state might create a liberty interest. See Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (fourteen days in disciplinary segregation as a result of a misconduct did not implicate any liberty interest pursuant to Sandin). The conditions in disciplinary segregation are not dramatically different from what prisoners expect to encounter in the general population. Since no liberty interest was implicated, the Court finds that

58

Plaintiff was not even entitled to a hearing. See Brown v. Champion, 1995 WL 433221 (10th Cir. July 24, 1995) (unpublished opinion) (inmate was not entitled to hearing because no constitutional liberty interest was implicated either by his ten-day disciplinary segregation or by his reclassification by prison officials).

Accordingly, Defendants' motion for summary judgment (docket #25) is GRANTED and Plaintiff's motions to amend and for reconsideration (docket #36 and #49) are hereby DENIED.

SO ORDERED THIS 17 day of Nov., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 17 1995

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

RONALD E. ARMSTRONG,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 95-C-145-J ✓

ENTERED ON DOCKET

DATE 11-20-95

ORDER²¹

Plaintiff, Ronald E. Armstrong, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³¹ Plaintiff asserts that the Secretary erred by not adequately considering Plaintiff's non-

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 and supplemental security benefits on July 12, 1991, alleging disability beginning December 30, 1987. *R. at 33-36*. The application was denied initially and upon reconsideration. *R. at 41-44*. Plaintiff filed a second application for supplemental security benefits on May 10, 1993 alleging disability from December 5, 1991. *R. at 51*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held June 13, 1994. *R. at 193*. By order dated August 8, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 17-24*. The Plaintiff appealed the ALJ's decision to the Appeals Council. The Appeals Council denied Plaintiff's request for review. *R. at 4*.

9

exertional impairments. For the reasons discussed below, the Court reverses the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born May 12, 1950, and has an eleventh grade education. *R. at 33, 197.* Plaintiff previously worked as a house painter (self-employed) and as a janitor. *R. at 87, 198.*

Plaintiff was examined by R.D. McCullough, II, D.O., on September 25, 1991. *R. at 138.* The doctor noted that Plaintiff complained of gout, but had not seen a doctor since 1985 due to a lack of funds. Plaintiff's heart was reported as regular, and Plaintiff's lungs were clear. The doctor additionally noted that Plaintiff's great toe was slightly swollen and moderately tender, and Plaintiff walked with a limp. The doctor concluded that Plaintiff's gout and hypertension remained uncontrolled due to a lack of medical care. *R. at 129.*

On December 5, 1991, Plaintiff was treated at the Tulsa Regional Medical Center for complaints of right and lower back pain. Plaintiff stated that he had slipped on an oil spill and landed on his back. *R. at 142.* X-rays revealed no recent fractures, but indicated degenerative changes to Plaintiff's left sacroiliac joint. *R. at 143-44.*

Plaintiff's records from David C. Duncan, M.D., reveal that Plaintiff had numerous complaints of back and knee pain.⁴¹ On May 10, 1993, Dr. Duncan noted

⁴¹ On December 10, 1991, Plaintiff complained that his back hurt and his right knee was painful. *R. at 163.* On December 27 and December 30, 1991, Plaintiff reported that he still experienced back pain. *R. at 161.* On December 23, 1991 Plaintiff reported that he had experienced steady improvement in his pain, and was pain free for 45 minutes. On January 8, 1992, Plaintiff again indicated that his lower back was hurting. *R. at 159.* On January 20, 1992, Plaintiff reported nagging pain in his lower back. *R. at 158.* On January 23, 1992, Plaintiff indicated that his back pain was the same. *R. at 157.*

that Plaintiff's condition required surgery, and he would refer him to Oklahoma Memorial Hospital for evaluation and surgery. *R. at 149.* On May 9, 1993, Dr. Duncan noted that Plaintiff was injured in a December 5, 1991 accident which damaged his right knee. Dr. Duncan recorded that Plaintiff had a degenerating anterior crucial ligament, chondromalacia^{5\}, meniscal tears, and bony changes consistent with fracture or degeneration. *R. at 150.* An MRI of Plaintiff's right knee, interpreted by Thomas B. Summers, M.D., indicated an anterior crucial ligament tear, chondromalacia, and meniscal tears. *R. at 151.*

In his application, Plaintiff noted that Dr. Duncan told Plaintiff that he should not reach over his head to paint and that he should not stand on a ladder *R. at 102.* Plaintiff saw Dr. Duncan from December 1991 through March 1992 for his back injury and for high blood pressure. *R. at 103.*

Records dated August 11, 1993 indicate that during a preoperative evaluation, potential surgeries were discussed with Plaintiff. Scott Bigelow, M.D., noted that he informed Plaintiff that an osteotomy^{6\} is a temporary solution and Plaintiff would probably need further surgical procedures, including arthroplasty^{7\} or arthrodesis^{8\}

^{5\} *Taber's Cyclopedic Medical Dictionary* 379 (17th ed. 1993) defines chondromalacia as "softness of the articular cartilage, usually involving the patella."

^{6\} *Taber's Cyclopedic Medical Dictionary* 1386 (17th ed. 1993) defines osteotomy as "the operation for cutting through a bone."

^{7\} *Taber's Cyclopedic Medical Dictionary* 155 (17th ed. 1993) defines arthroplasty as "the operative procedure of reshaping or reconstructing a diseased joint."

^{8\} *Taber's Cyclopedic Medical Dictionary* 155 (17th ed. 1993) defines arthrodesis as "the surgical immobilization of a joint."

for his knee problems. *R. at 176.* A September 29, 1993 preoperative chest film while indicating that Plaintiff had degenerative arthritis of his knee, showed no significant abnormalities. *R. at 74.*

Plaintiff had knee surgery on October 15, 1993. *R. at 191.* The surgery was performed by Joseph A. Kopta, M.D. Plaintiff's knee was drained and material was extracted. *R. at 121.*

On October 25, 1993, Plaintiff complained of mild pain and swelling, and indicated that he had noticed no improvement to his knee. The doctor noted that Plaintiff's incision sites were healing well, and that the patient was instructed to begin range-of motion and strengthening exercises for his right knee. *R. at 184.*

Plaintiff testified he has a bad knee and back. Plaintiff does not believe that surgery has helped his condition. *R. at 199.* According to Plaintiff, he has used crutches since February 1993. Plaintiff occasionally drives, watches television, and reads. *R. at 202.*

Plaintiff stated that he is still experiencing pain, and is only able to sleep four to four and one-half hours each night. *R. at 203.* Plaintiff testified that he can stand about 30-40 minutes at a time, but that standing increases his pain and causes his knee to swell. *R. at 204.*

Plaintiff's mother testified that she observes her son in pain and that Plaintiff is not as mobile as he should be. She stated that Plaintiff's knee is swollen and he has to take pain pills. *R. at 205.* Plaintiff's brother testified that Plaintiff has pain,

and that he has seen him in so much pain that he could not get out of bed. *R. at 208.*

Plaintiff's medications list indicates that Plaintiff takes hydrocodeine, propoxy, tylenol and advil for pain, and medication for high blood pressure. *R. at 179.*

An RFC Assessment, conducted by Thurma Fiegel, M.D., on November 3, 1993, indicates that Plaintiff was able to occasionally lift 20 pounds, frequently lift 10 pounds, stand/walk for six hours, sit for six hours, and push/pull an unlimited amount. In addition, the doctor noted that Plaintiff complained of knee and back pain, that Plaintiff's right knee showed degenerative changes, that Plaintiff's range of motion was good, and that Plaintiff's pain limits his RFC. *R. at 65.*

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.⁹¹ See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

⁹¹ 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).

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 although Plaintiff could not perform his past relevant work, Plaintiff could perform sedentary work and therefore was not disabled. The ALJ noted that Plaintiff's testimony was credible only to the extent that it was consistent with the performance of sedentary work. The ALJ summarized Plaintiff's complaints of pain, concluding that Plaintiff did not have a "totally disabling pain syndrome," but that Plaintiff's RFC for the full range of sedentary work is reduced by Plaintiff's mild to moderate pain. *R. at 23*. The ALJ applied the Grids^{10\} and determined that Plaintiff was not disabled.

IV. REVIEW

Plaintiff asserts that the ALJ failed to adequately address Plaintiff's non-exertional impairments. Because the ALJ determined that Plaintiff's non-exertional impairments prevented Plaintiff from performing a full range of sedentary work, the ALJ's sole reliance on the Grids, absent additional and specific factual findings, was error.

The ALJ found that Plaintiff's "capacity for the full range of sedentary work is reduced by mild to moderate pain." *R. at 23*. In addition, the ALJ determined that

^{10\} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Supbt. P, App. 2.

Plaintiff's "additional nonexertional limitations"¹¹ do not allow him to perform the full range of sedentary work." Furthermore, the ALJ's finding is supported by the record.¹²

In Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984), the ALJ recognized that the plaintiff had non-exertional impairments. However, the ALJ applied the Grids and concluded that the impairments did not preclude the claimant from performing sedentary work. The Tenth Circuit reversed.

Absent a specific finding, supported by substantial evidence, that despite his non-exertional impairments, Channel could perform a full range of sedentary work on a sustained basis, it was improper for the ALJ conclusively to apply the grids in determining that Channel was not disabled.

* * *

Because the ALJ failed to determine on the record whether Channel could perform a full range of sedentary work despite severe nonexertional impairments, the ALJ's conclusion that Channel's non-exertional limitations did not preclude performance of sedentary work cannot be sustained. Accordingly, we remand to the district court to remand to the Secretary for further proceedings. The Secretary should determine whether Channel's nonexertional impairments are significant enough to limit his ability to perform the full range of jobs requiring sedentary work capability. If she finds that the range of jobs available is so limited, then she may not rely on the grids but instead must give "full consideration" to "all the relevant facts," including expert vocational testimony if necessary. . . .

¹¹ Although the ALJ notes that Plaintiff has "additional nonexertional limitations," the ALJ does not indicate what the "additional" limitations are. On remand, the ALJ should indicate what additional non-exertional limitations are supported by the record and Plaintiff's testimony.

¹² For example, an independent RFC Assessment indicated that Plaintiff's RFC was limited by his pain. *R. at 65.*

Id. at 582 (citations omitted).

The ALJ determined that Plaintiff's RFC was affected by his non-exertional limitations, and the ALJ found that Plaintiff could not perform the full range of sedentary work. On remand, in accordance with Chanel, the Secretary should "not rely on the grids but instead must give 'full consideration' to 'all the relevant facts,' including expert vocational testimony." Id. See also Trimar v. Sullivan, 966 F.2d 1326 (10th Cir. 1992) ("Without the grids, the ALJ must resort to testimony from a vocational expert to establish that a significant number of jobs exist in the national economy which the claimant can perform.").

Plaintiff additionally asserts that the ALJ erred by not obtaining vocational testimony as to whether an individual of Plaintiff's age, schooling, and work experience, who must use crutches, can walk only minimally, and experiences severe pain can work. The Court notes that an ALJ is not required to accept all of a plaintiff's testimony as true, but may pose such restrictions to a vocational expert which are accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In addition, credibility determinations by the trier of fact are given great deference on review. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

On remand, the Court also refers the Secretary to the recent Tenth Circuit decision in Kepler v. Chater, No. 95-5040, ___ F.3d ___, 1995 WL 607022 (10th Cir. Oct. 17, 1995). In Kepler, the Tenth Circuit determined that an ALJ must discuss a

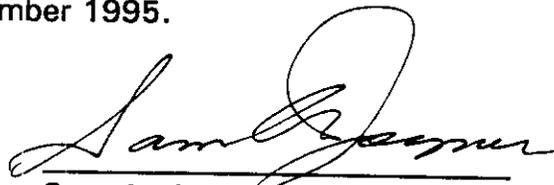
Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 8.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 9. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

Accordingly, the Secretary's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 17 day of November 1995.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 17 1995

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

RONALD E. ARMSTRONG,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 95-C-145-J ✓

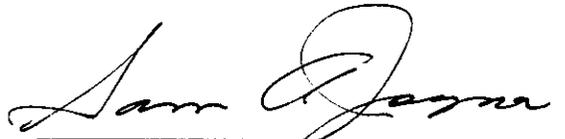
ENTERED ON DOCKET

DATE 11-20-95

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 17 day of November 1995.



Sam A. Joyner

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.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 17 1995

sa

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

M. BERNICE HADA,

Plaintiff,

v.

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

Defendant.

No. ⁵ 94-C-171-J ✓

ENTERED ON DOCKET

DATE 11-20-95

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 17 day of November 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. 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.

8

residual functional capacity. For the reasons discussed below, the Court reverses the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

On October 22, 1992, Plaintiff filed a fairly detailed disability report. Plaintiff asserted that she suffered from fibromyalgia⁴¹ which Plaintiff explained as "a form of rheumatoid arthritis which affects the muscles and tendons instead of the joints." *R. at 79.* Plaintiff claimed that she was unable to work due to "poor memory, confused thinking, nearly constant pain . . . , weakness in [her] hands, arms, and legs, problems digesting foods . . . , soreness of body . . . , stress, muscle spasms . . . , TMJ syndrome, blurred vision, dizzy spells, [and] spastic colon." *R. at 79.*

Plaintiff testified that she worked for the phone company for many years, and retired in 1987 when she was offered an incentive for early retirement. *R. at 183.* Plaintiff stated that at the time she retired she had not felt well for some time. *R. at 183.* Plaintiff noted that on some days her brain has "cobwebs in it" and she cannot comprehend or remember things. Plaintiff also testified that she is much slower at things than she used to be. *R. at 184.* According to Plaintiff, she began to feel this way before she retired *R. at 184.*

Plaintiff testified that she generally stays at home. However, sometimes she will watch one of the neighbor children if they cannot go to their usual babysitter. *R. at 185.* Plaintiff also testified that she does some volunteer work *R. at 185.* Plaintiff

⁴¹ *Taber's Cyclopedic Medical Dictionary* 728 (17th ed. 1993) defines fibromyalgia as "chronic pain in muscles and soft tissues surrounding joints. Efforts to classify this condition have resulted in the American College of Rheumatology criteria for classification of fibromyalgia, published in 1990."

is also able to do her own cooking and some of the house work. *R. at 185.* Plaintiff enjoys reading and crocheting. *R. at 185.*

Plaintiff testified that she was first diagnosed with fibromyalgia in 1992, and that her main symptoms include pain and "fogginess," or an inability to think clearly. *R. at 186-87.* Plaintiff stated that the least amount of pain she experiences is probably a two or three (on a scale from one to ten), with the most pain she experiences rated at probably a seven or eight. *R. at 188.* Plaintiff testified that repetitive motion increases her pain. *R. at 188.* Consequently, Plaintiff cannot vacuum, or do other similar tasks. *R. at 188-89.* Plaintiff believes that she can walk about four blocks without experiencing pain. However, if she continues to walk, the pain increases. *R. at 189.* Plaintiff stated that she also has periods of time where she does not seem to have strength and drops things very easily. *R. at 190.* According to Plaintiff, this weakness happens about two to three times each week *R. at 190.* Plaintiff testified that other problems she experiences include: a problem with her jaw joints (*r. at 192*), forgetfulness (*r. at 192*), and an inability to sit for long periods of time (*r. at 193*). Plaintiff also stated that she frequently has to lay down. On a good day, Plaintiff lays down for only about thirty minutes. On a bad day, Plaintiff sometimes lays down for one-half of the day *R. at 194.*

Plaintiff is able to drive, but does not drive over ten miles. *R. at 195.* According to Plaintiff, her therapist told her she should not ride in a car for very long. *R. at 196.* However, Plaintiff acknowledged that in 1992 she did go on a 5,000 mile trip (in one month). Plaintiff stated that she knew traveling that much would hurt,

and that it did. *R. at 196-97.* Plaintiff also testified that she does not go to the doctor very often because doctors cannot do much for her *R. at 197.*

Plaintiff's treating physician is Thomas Crow, M.D. Plaintiff's records indicate that she experienced various muscle aches, malaise, and fatigue prior to her diagnosis of fibromyalgia.⁵¹ On February 20, 1992, Plaintiff's records indicate she complained of malaise, and fatigue, and had an outbreak of herpes. Plaintiff was tender in the anterior aspect of her neck and had pain in her shoulders with physical activity and exercise. Dr. Crow noted "possible fibromyalgia syndrome." *R. at 130.* By March 4, 1992, Plaintiff's assessment was fibromyalgia syndrome. *R. at 129.* On August 7, 1992 Plaintiff reported to her doctor that she had traveled over 5,000 miles. Plaintiff complained of fatigue and tiredness but generally did fairly well. *R. at 128.* On October 5, 1992, Plaintiff's doctor noted that Plaintiff was doing much better since her appointment with a physical therapist,⁶¹ and that Plaintiff's fibromyalgia seemed much improved. *R. at 126.* Dr. Crow's records do not indicate any further visits from Plaintiff after October 1992, but do note various phone calls and

⁵¹ On September 11, 1991, Plaintiff's records indicate malaise and fatigue. *R. at 132.* Her records from September 19, 1991 indicate a viral, mono-type illness. *R. at 132.* On October 14, 1991, Plaintiff was "still having nocturnal fevers," but her rheumatoid factor was negative. *R. at 132.* On November 20, 1991, the doctor notes "assessment: chronic fatigue type syndrome." *R. at 131.*

⁶¹ Plaintiff's physical therapist, Karen Gilbert, R.P.T., provided an evaluation of Plaintiff's condition on September 8, 1992. *R. at 121.* In her evaluation she noted that Plaintiff has been diagnosed with fibromyalgia, and has had muscle pain since childhood. Plaintiff experiences pain every day, which increases with activity and if the weather changes. Plaintiff also experiences muscle spasms in both feet and legs. The physical therapist noted that Plaintiff walks eight to ten blocks every other day, and that Plaintiff is doing well functionally despite her condition. *R. at 121-122.* According to her physical therapist, driving to Tulsa for treatment could be harmful, and Plaintiff should be taught to do her physical therapy at home. *R. at 123.*

prescriptions sent to Plaintiff. *R. at 126-27.* The last recorded entry from Dr. Crow is dated November 9, 1992. *R. at 125.*

On April 21, 1994, Dr. Crow wrote that fibromyalgia is a new musculoskeletal disorder that has just been diagnosed in the last few years. *R. at 177.* He noted that Plaintiff has had fibromyalgia since at least 1992. *R. at 177.*

Plaintiff was evaluated by Dr. John D. Hesson, M.D., on January 7, 1993. Dr. Hesson diagnosed Plaintiff with fibromyalgia (by history) and depression disorder. *R. at 146.* Dr. Hesson also noted that during the 1970's Plaintiff had extensive psychiatric treatment and attempted suicide. Dr. Hesson suggested that Plaintiff have an indepth psychiatric evaluation. *R. at 146.*

An RFC Assessment was conducted on January 15, 1993. Plaintiff's abilities were indicated as: occasionally able to lift 50 pounds, frequently able to lift 25 pounds, able to stand/walk for about six hours, sit for about six hours, and push/pull an unlimited amount. In addition, the doctor noted that Plaintiff's pain does affect her RFC. *R. at 49-56.*

Carolyn Goodrich, Ph.D., completed a Psychiatric Review Technique on February 25, 1993 and noted that Plaintiff has anhedonia (or pervasive loss of interest in almost all activities), decreased energy, and difficulty concentrating or thinking. *R. at 60.* Plaintiff's difficulty in maintaining social functioning was marked as slight, and Plaintiff's deficiencies of concentration, persistence or pace was indicated as seldom. *R. at 64.* Plaintiff's overall impairment was indicated as not severe. *R. at 57-64.* On June 18, 1993, Janice C. Boon, Ph.D., noted that she reviewed the evidence in

Plaintiff's file, and "the Psychiatric Review Technique of February 25, 1993 is affirmed as written." *R. at 58.*

Plaintiff was examined by Twilah A. Fox, M.D., on February 8, 1993. *R. at 151-153.* Dr. Fox concluded that Plaintiff was depressed and bewildered, but not psychotic. Dr. Fox indicated that Plaintiff had good judgment and would be able to handle her own finances. *R. at 153.*

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.⁷¹ 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

⁷¹ 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).

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 work as a service representative for the telephone company. *R. at 22*. The ALJ noted that Plaintiff's testimony was credible only to the extent it was consistent with a finding that Plaintiff has the RFC to perform light and sedentary work. *R. at 23*. The ALJ additionally found that Plaintiff's pain was controlled by treatment. *R. at 25*. Plaintiff's mental status was described as having a slight limitation on Plaintiff's daily activities, a slight limitation in Plaintiff's social functioning, seldom effecting her concentration, and resulting in no deteriorations or decompensations in work-like settings.⁸¹ *R. at 25-26*.

IV. REVIEW

Plaintiff's last date of eligibility for disability insurance is December 31, 1992. *R. at 20*. To qualify for disability, an individual must be determined "disabled" prior to the expiration of the individual's insured status. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually *disabled* prior to the expiration of her insured status. . . . A retrospective diagnosis without evidence of actual disability is insufficient. This is especially true where the disease is progressive.") (citations omitted, emphasis added).

⁸¹ The ALJ notes that the Psychiatric Review Technique form ("PRT") is appended to the opinion. However, the PRT is not included in the record before the Court. The Secretary's regulations require that the PRT be attached. 20 C.F.R. § 404.1521(d)(2).

Past Relevant Work

The ALJ determined that Plaintiff could perform her past relevant work as a telephone service representative. *R. at 22.* However, the record fails to provide substantial evidence that Plaintiff is able to perform her past relevant work.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

. . . .
[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. 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) (emphasis added); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993). The ALJ failed to make the specific findings necessary to support the ALJ's conclusion that Plaintiff can perform her past relevant work.

Plaintiff's medical records indicate that she had difficulty concentrating and remembering. *R. at 60, 108, 153*. The ALJ additionally determined that Plaintiff had a slight limitation in concentrating and maintaining social functioning. *R. at 25*. Although the ALJ provides a brief description of the physical demands of Plaintiff's past relevant work, the record does not indicate the mental requirements of Plaintiff's prior job. *R. at 25*.

The Court finds that the ALJ's decision that Plaintiff was capable of performing her past relevant work is not supported by substantial evidence. On remand, the ALJ should detail, in accordance with SSR 82-62, Plaintiff's RFC (mental and physical), the physical and mental demands of Plaintiff's past job, and Plaintiff's capability of performing her past job given her exertional and any non-exertional limitations.

Plaintiff additionally alleges that the ALJ erred by failing to consult a vocational expert. However, at Step 4 the burden of proof remains on the individual to establish that he or she cannot perform his or her past relevant work. If the Secretary determines that the individual can perform his or her past relevant work, testimony from a vocational expert is not required. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Mental Impairment

The evaluation of mental impairments is addressed by Social Security Regulation 85-16 and 20 C.F.R. § 1520a. If an individual's impairments meet or are medically equivalent to a Listing, the individual is disabled. 20 C.F.R. § 1520a(c)(2). An individual whose impairments are determined "not severe" is considered not to be significantly restricted in the ability to perform work-related activities. Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 85-16 (West 1985). If an individual's impairments are "severe," but the individual does not meet a Listing, the individual's RFC must be determined. Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 85-16 (West 1985); 20 C.F.R. § 1520a(c)(3). An ALJ must attach a Psychiatric Review Technique form ("PRT") to his decision, detailing the ALJ's assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

If a claimant is determined to have a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas.⁹¹ 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none," "never," "slight," or "seldom," the conclusion is that "the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of [the claimant's] mental ability to do basic work activities." See 20 C.F.R. § 1520a(c)(1). Although the regulations do not specify that a rating above "none" or "slight" is

⁹¹ The four areas are: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3).

presumed "severe," that is the logical inference. See Hargis v. Sullivan, 945 F.2d 1482, 1488 n.5 (10th Cir. 1991).

In this case, with respect to Plaintiff's mental limitations, the ALJ determined the following:

- (1) restrictions of activities of daily living -- slight;
- (2) difficulties in maintaining social functioning -- slight;
- (3) deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner -- seldom;¹⁰¹
- (4) episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms -- never.

R. at 571-72. The ALJ's finding that each of Plaintiff's limitations is slight or never could be interpreted as indicating that Plaintiff's mental impairment is "not severe." However, as noted above, the PRT form which must be attached to the ALJ's opinion has not been included in the record. Consequently, a complete review of the ALJ's findings with respect to Plaintiff's mental status is not possible. Because the Court is reversing on other grounds, the Court declines to further review the ALJ's determination of Plaintiff's mental status absent the requisite PRT.

Residual Functional Capacity

Plaintiff alleges that the ALJ improperly evaluated her RFC and gave improper weight to her exertional and non-exertional capabilities. The Court finds that the ALJ

¹⁰¹ The ALJ notes that "[t]he mental status examination of the claimant demonstrated the claimant functioned normally and did not have any deficiencies in her concentration or memory." *R. at 25.* The ALJ does not explain or elaborate upon this finding. The psychiatric review conducted by Dr. Goodrich on February 25, 1993 indicated that Plaintiff had difficulty concentrating and thinking. *R. at 60.* On remand, the ALJ should provide greater detail.

did appropriately evaluate Plaintiff's RFC as affected by her exertional limitations, but did not properly evaluate the affect of Plaintiff's non-exertional limitations on her RFC.

Plaintiff alleges that the ALJ erred by determining that Plaintiff could perform light and sedentary work (and consequently her past relevant work), when evidence indicated that Plaintiff was unable to perform the exertional requirements required for either light or sedentary work. However, the record contains substantial evidence to support the ALJ's finding that Plaintiff's exertional limitations did not preclude the performance of light or sedentary work.

Initially, although Plaintiff has been diagnosed with fibromyalgia, Plaintiff's records do not reveal any specific exertional restrictions.¹¹⁾ Plaintiff took a 5,000 mile car trip in 1992 (*r. at 128*), attends church (*r. at 82*), and sometimes babysits (*r. at 185*). An RFC Assessment from January 1993 indicates that Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand/walk and sit for six hours (eight hour day) and push/pull an unlimited amount.¹²⁾ *R. at 49-56*. Plaintiff testified that she was only able to walk about four blocks (without pain). *R. at 189*. However, a September 1992 report from Plaintiff's physical therapist indicates that Plaintiff walked eight to ten blocks every other day. *R. at 122*. In addition, Dr. Crow noted on October 5, 1992, that Plaintiff was doing much better since her appointment with a physical therapist, and that Plaintiff's fibromyalgia seemed much improved. *R. at 126*.

¹¹⁾ Dr. Crow's records do indicate that Plaintiff's pain increases with exertion. However, pain is a non-exertional factor and was addressed by the Court above.

¹²⁾ The assessment also indicates that "pain does affect RFC." *R. at 50*.

The record contains substantial evidence to support the ALJ's findings with regard to the affect of Plaintiff's exertional limitations on her RFC. However, the ALJ did not adequately address Plaintiff's complaints of pain.

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.

[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.

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).

In this case, the ALJ briefly discussed Plaintiff's complaints of pain. However, in Kepler v. Chater, No. 95-5040, ___ F.3d ___, 1995 WL 607022 (10th Cir. Oct. 17, 1995), the Tenth Circuit held that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 8.

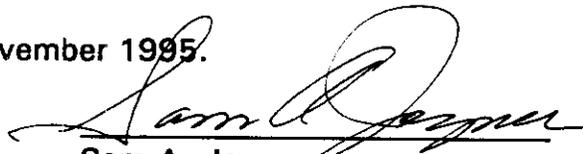
Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 9. The Tenth Circuit remanded Kepler, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

Similarly, in this case, although the ALJ outlines the factors in Luna (*r. at 22*), the ALJ merely summarizes those factors and concludes that "claimant's pain was controlled with Dr. Crow's treatment." Such a conclusory pain analysis is insufficient according to Kepler. On remand, the Secretary should analyze Plaintiff's complaints of pain in accordance with Luna and Kepler, making express findings related to Plaintiff's complaints of pain and the weight given by the ALJ to such complaints.

Accordingly, the Secretary's decision is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 17 day of November 1995.


Sam A. Joyner
United States Magistrate Judge

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

NOV 17 1995

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

CAROLYN SMITH,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner
of Social Security,

Defendant.

No. 95-C-118-J ✓

ENTERED ON DOCKET

DATE 11-20-95

JUDGMENT

This action has come before the Court for consideration. An Order remanding the case to the Administrative Law Judge was entered on November 16, 1995. Judgment is hereby entered pursuant to the Court's November 16, 1995 Order.

It is so ordered this 17th day of November 1995.



Sam A. Joyner
United States Magistrate Judge

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

ENTERED ON DOCKET

DATE 11-20-95

R & S PROPERTIES, INC.)
)
Plaintiff,)
)
v.)
)
LEXINGTON INSURANCE COMPANY,)
)
Defendant.)

No. 95-C-649H

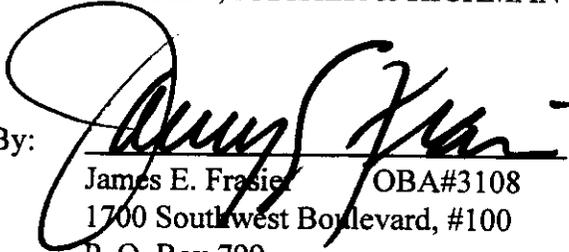
FILED
NOV 17 1995

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

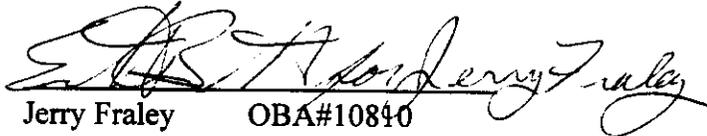
STIPULATION OF DISMISSAL

COME NOW the parties in the above-styled and numbered cause and stipulate to the dismissal of the above-styled and numbered cause.

FRASIER, FRASIER & HICKMAN

By: 
James E. Frasier OBA#3108
1700 Southwest Boulevard, #100
P. O. Box 799
Tulsa, OK 74101-0799
918/584-4724

CATHCART, GOFTON & FRALEY

By: 
Jerry Fraley OBA#10840
2807 Classen Boulevard
Oklahoma City, OK 73106
405/524-1110&

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

FILED

NOV 17 1995

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

RAYMOND W. STRIPLING,)
)
Plaintiff,)
)
vs.)
)
EDWARD WALKER, et al.,)
)
Defendants.)

No. 95-C-503-BU

ENTERED ON DOCKET

DATE NOV 20 1995

ORDER

This matter comes before the Court on Plaintiff's Motion for Appointment of Counsel (docket #12).

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

After carefully reviewing the merits of Plaintiff's claims, the nature of the factual issues involved, Plaintiff's ability to investigate the crucial facts, the probable type of evidence, Plaintiff's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases omitted);

see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court denies Plaintiff's motion for appointment of counsel without prejudice to it being reasserted after the Court has ruled on Defendants' motion to dismiss and/or for summary judgment.

Accordingly, Plaintiff's motion for appointment of counsel (docket #12) is hereby **denied without prejudice**. Plaintiff is **granted** an additional thirty (30) days to supplement his response to Defendants' motion to dismiss and/or for summary judgment (docket #7) if he so wishes.

SO ORDERED this 17th day of November, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

JOHN GRANT,
Petitioner,
vs.
MIKE ADDISON,
Respondent.

No. 94-C-864-BU

~~DATE NOV 20 1995~~

FILED

NOV 17 1995

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

ORDER

Before the Court is Petitioner's notice of appeal filed on November 1, 1995. Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus entered on the docket on October 17, 1995. Petitioner is not proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Gallagher v. Hannigan, 24 F.3d 68 (10th Cir. 1994); Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

26

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

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

SO ORDERED THIS 17th day of November, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1995

Jo

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

RUTH CROSSNO,

Plaintiff,

v.

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

Defendant.

No. 94-C-974-J ✓

~~CONFIDENTIAL ON REQUEST~~
DATE 11-17-95

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Secretary has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 16 day of November 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.

11

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1995 *Ja*

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

RUTH CROSSNO,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹

Defendant.

No. 94-C-974-J ✓

ENTERED ON DOCKET
DATE 11-17-95

ORDER²

Plaintiff, Ruth Crossno, 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 relied on a "lack of evidence" to support a denial of benefits, and (2) the Secretary failed to call a medical expert to establish

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 5, 1992. *R. at 58*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 16, 1993. *R. at 82*. By order dated January 25, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 58-66*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On August 15, 1994 the Appeals Council denied Plaintiff's request for review. *R. at 3-4*.

10

the onset date of Plaintiff's disability. For the reasons discussed below, the Court affirms the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on March 22, 1946, and completed the ninth grade. *R. at 85, 102.* Plaintiff alleges that she has been disabled since March 30, 1990. Plaintiff is insured for benefits only through September 30, 1990. *R. at 60, 85.*

Plaintiff had surgery at Bartlett Memorial Medical Center Inc. on November 23, 1990 for exostosis⁴¹ of her right index finger. *R. at 144.* The surgery was performed by Emil Milo, M.D. *R. at 144.* Dr. Milo noted that Plaintiff's "bony prominence was quite large, lying right next to digital nerve . . . creating pressure on it." *R. at 144.* The growth was removed without incident, and a pathology report indicated that the removed specimen consisted of fragments of bone and attached fibrous membranes. *R. at 147.*

At her hearing on December 16, 1993, Plaintiff testified that she had surgery in November 1990 after she crushed her right index finger. *R. at 87.* Plaintiff stated that she is no longer able to work because her hands cramp, hurt, and tingle, and because she cannot stand for eight hours a day. *R. at 87.* Plaintiff also testified that she has trouble with her legs due to rheumatoid arthritis. *R. at 88.* Plaintiff stated that she has pain, and has problems getting out of her chair and walking because her legs cramp. According to Plaintiff, her condition worsens each day. *R. at 89.*

⁴¹ "Exostosis" is defined in Taber's Cyclopedic Medical Dictionary 691 (17th ed. 1993) as "a bony growth that arises from the surface of a bone, often involving the ossification of muscular attachments."

Plaintiff testified that she previously worked as a housekeeper, which required her to spend approximately eight hours on her feet. Plaintiff worked as a housekeeper for approximately five years. *R. at 86-87.*

Plaintiff testified that she can no longer sew or hold a pencil, and that she cannot run the vacuum or mop. *R. at 91.* However, she is able to do the laundry about every two weeks although it takes her all day to do it. *R. at 91.* Plaintiff testified that she can drive about half a block. *R. at 85.* Plaintiff is also able to visit her mother each day to give her an insulin shot. (Her mother has diabetes.) *R. at 92.*

In her application for disability, Plaintiff noted that she was disabled due to rheumatoid arthritis in her legs and degenerative arthritis in her hands. *R. at 125.*

Plaintiff's records indicate that she had surgery on her right knee on June 22, 1992 for a torn medial meniscus. The surgery was performed by Dr. Milo, who reported Plaintiff in stable condition. *R. at 158.* On August 25, 1992, Dr. Milo operated on Plaintiff's other knee. *R. at 172-73.*

Plaintiff saw Dr. Milo on a fairly regular basis following her knee surgery. *R. at 206-207.* Dr. Milo's entries generally address Plaintiff's progress following her surgery. However, on October 9, 1992 Dr. Milo notes that Plaintiff is "aching all over" due to her degenerative arthritis. Dr. Milo states that Plaintiff has a hard time walking or standing, that both hands hurt her, and she is unable "to work at anything physically." *R. at 206.* Dr. Milo concluded that Plaintiff could look into part-time sedentary work. *R. at 206.*

An RFC Assessment of Plaintiff, conducted on July 21, 1993, indicated that Plaintiff could sit for two hours at a time, stand for a total of one hour, and walk for ten to thirty minutes at a time. During an eight hour day, Plaintiff's restrictions were listed as sitting for a total of four hours, standing for a total of two hours, and walking for a total of two hours. In addition, Plaintiff was reported as being able to lift ten pounds continuously, 11-20 pounds frequently, and 21-25 occasionally. Plaintiff's ability to use her hands was noted as "limited." *R. at 216-218.*

Gerald C. Zumwalt, M.D., evaluated Plaintiff on August 20, 1993. *R. at 219-222.* Dr. Zumwalt noted that Plaintiff was in a car accident about one month prior to his evaluation, and states that she has experienced significantly more pain since the accident. *R. at 219.* Dr. Zumwalt reported that Plaintiff stated that after walking one to two blocks her legs hurt. Plaintiff claimed she could sit for only 15 minutes, but she sat for 45 minutes during his interview with no apparent discomfort. Plaintiff told him that she did most of the cooking at home. *R. at 222.*

Dr. Zumwalt also conducted a Range of Motion evaluation, concluding that Plaintiff can manipulate small objects and can grasp tools. *R. at 223-25.* The RFC Assessment indicates that Plaintiff can sit for a total of eight hours in an eight hour day, stand for three hours in an eight hour day, and walk for one hour in an eight hour day.⁵¹ *R. at 226-28.* Plaintiff was rated as able to lift five to ten pounds continuously, 11-20 pounds frequently, and 21-50 pounds occasionally. *R. at 226.*

⁵¹ Plaintiff is correct in pointing out a discrepancy in the RFC Assessment. Dr. Zumwalt, for the total number of hours Plaintiff can sit, stand, or walk at one time, circled "eight" for each category. However, for the "total during entire eight hour day," eight hours was circled for sit, three hours for stand and one hour was indicated for walk. *R. at 226.*

Plaintiff's use of hands for repetitive movements was determined unrestricted, and her use of her feet for pushing and pulling was determined unrestricted. *R. at 227.*

Plaintiff submitted additional medical records to the Secretary after the decision of the ALJ. The additional records range from September 1993 to April 1994, and generally address Plaintiff's difficulty with allergies. *R. at 9-20.*

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.⁶¹ 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

⁶¹ 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).

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 was able to perform light work with additional requirements to allow Plaintiff to change positions while working. *R.*

at 62. The ALJ found Plaintiff's testimony credible only to the extent consistent with the performance of light work. (The ALJ noted that although Plaintiff testified that she suffered a "crush injury" to her right index finger, Plaintiff's records do not indicate a "crush injury.") The ALJ determined that the medical evidence did not indicate any significant restrictions on Plaintiff's abilities, and the testimony of the vocational expert revealed numerous jobs which Plaintiff could perform in the national economy at both the sedentary and light levels. *R. at 62-64.*

IV. REVIEW

Plaintiff's last date of eligibility for disability insurance is September 30, 1990. *R. at 58, 86.* Plaintiff initially claimed she was disabled as of November 1, 1990, and later amended her "onset date"⁷¹ to September 30, 1990. *R. at 106.* At her hearing, Plaintiff requested that her onset date be corrected to March 30, 1990. *R. at 86.*

To qualify for disability, an individual must be determined "disabled" prior to the expiration of the individual's insured status. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually *disabled* prior to the expiration of her insured status. . . . A retrospective diagnosis without evidence of actual disability is insufficient. This is especially true where the disease is progressive.") (citations omitted, emphasis added).

⁷¹ "The onset date of disability is the first day an individual is disabled as defined in the Act and the regulations." Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 83-20 (West 1983).

"Lack of Evidence"

Plaintiff asserts that the Secretary improperly relied upon a "lack of evidence" in determining that Plaintiff was not disabled. However, a review of the record and the ALJ's decision indicates that substantial evidence exists to support the ALJ's determination that Plaintiff could perform light work.

Initially, very little evidence suggests Plaintiff had any difficulty prior to the expiration of her insured status on September 30, 1990. Plaintiff's records indicate that she first complained of pain in her right hand in November. The pain was determined to be caused by exostosis, and a bony growth was removed by Dr. Milo on November 23, 1990. *R. at 144.*

Plaintiff's first complaints of knee pain were in August of 1991. *R. at 189.* Plaintiff did not undergo surgery for her right knee until June 22, 1992. *R. at 158.* Surgery was performed on Plaintiff's left knee on August 25, 1992.

Plaintiff relies on Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993) as supporting Plaintiff's contention that the ALJ improperly relied on a "lack of evidence" in the record. The Court in Thompson did conclude that an "absence of evidence is not evidence." *Id.* at 1490. As Plaintiff acknowledges however, the facts in Thompson are different from this case.⁸¹ Regardless, the Thompson court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have

⁸¹ The ALJ in Thompson did not call a vocational expert or order a consultative medical exam. *Id.* at 1482. The Thompson court noted that "in making his finding that Ms. Thompson could do the full range of sedentary work, the ALJ relied on the absence of contraindication in the medical records." *Id.* at 1490.

exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities." *Id.*

Unlike Thompson, sufficient evidence exists in this record for the ALJ to determine Plaintiff's capabilities. At least two RFC Assessments indicate that Plaintiff could perform light work. An RFC Assessment (July 21, 1993) indicated that Plaintiff, during an eight hour day, could sit for a total of four hours, stand for a total of two hours, and walk for a total of two hours. Plaintiff's ability to use her hands was noted as "limited." *R. at 216-218.*

On August 20, 1993, Dr. Zumwalt conducted a Range of Motion evaluation on Plaintiff concluding that Plaintiff can manipulate small objects and can grasp tools. *R. at 223-25.* The RFC Assessment (by Dr. Zumwalt) indicates that Plaintiff can sit for a total of eight hours in an eight hour day, stand for three hours in an eight hour day, and walk for one hour in an eight hour day. *R. at 226-28.* Plaintiff's use of her hands for repetitive movements, and her ability to use her feet for pushing and pulling, was rated as unrestricted. *R. at 227.*

In addition, the ALJ consulted a vocational expert with respect to whether work was available which Plaintiff could perform. The ALJ's hypothetical questions included limitations upon Plaintiff's activities based upon arthritis in the hands and feet, chronic pain, and a necessity for changing position from time to time. *R. at 97.* The vocational expert determined that such an individual would be able to perform certain sedentary and light jobs. *R. at 98.*

Contrary to the assertions of Plaintiff, the ALJ's decision is supported by substantial evidence.

Medical Expert

Plaintiff additionally asserts that the Secretary erred because the ALJ did not require testimony from a medical expert in regard to the alleged "onset" date of Plaintiff's disability. However, a review of the record and the ALJ's decision indicates that the testimony of such an expert was not necessary for the ALJ's determination.

Social Security Regulation 83-20 addresses the determination of the date of onset. Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 83-20 (West 1983). In determining the onset date of a disability, consideration is given to (1) the claimant's alleged date of onset, (2) the date the impairment caused the individual to stop working, and (3) the medical reports containing descriptions of examination or treatment. Id. "In determining the date of onset of disability, the date alleged by the individual should be used if it is consistent with all the evidence available." Id. If determination of a date of onset is not possible from a consideration of these factors, or if a reasonable inference permits a finding that a disabling impairment occurred some time prior to the first recorded medical examinations, a medical advisor should be consulted. Id.

In this case, Plaintiff alleges her date of onset as March 30, 1990.⁹¹ On her Social Security Application, Plaintiff noted that her condition forced her to stop

⁹¹ Plaintiff initially claimed an onset date of November 1, 1990, which was later amended to September 30, 1990. *R. at 106.*

working on September 30, 1990. *R. at 125.* However, Plaintiff's medical records do not support an onset date on or prior to September 30, 1990.

Generally, Plaintiff's medical records indicate that the conditions which Plaintiff claims are "disabling," were not present until after the expiration of Plaintiff's disability insurance. An August 12, 1991 note in Plaintiff's medical records indicates that she "wants to get on disability." *R. at 189.* Although Plaintiff saw her doctor fairly regularly, the first notation of arthritic pain is April 1992.^{10\} *R. at 187.* Plaintiff had knee surgery in June and August 1992. *R. at 207.* (The first indication of Plaintiff's knee problems was August 1991.^{11\} *R. at 189.*) In October 1992, Plaintiff's doctor noted that "it is apparent that with this condition, she is unable to work at anything physically. The only thing she could look into would be part-time, temporary sedentary type work." *R. at 206.* However, by February 1993, her doctor noted that Plaintiff "has a full ROM [Range of Motion], no swelling, and is walking." *R. at 215.* In addition, two RFC assessments (July and August 1993) indicate Plaintiff could perform light work. *R. at 216-218, 223-25.* Furthermore, although the ALJ did not find that Plaintiff had arthritis, he posed a hypothetical question to the vocational expert which included limitations based on arthritis, chronic pain, and the necessity of being able to change positions.

Nothing in the medical records indicates that Plaintiff was disabled on or prior to September 30, 1990. The Social Security regulations require the consultation of

^{10\} Notes for May, June and July 1991 indicate Plaintiff "aches all over." *R. at 190.*

^{11\} On August 13, 1991, Plaintiff's medical records note "both knees hurting." *R. at 189.*

a medical advisor only when an inference can (or must) be drawn from the medical evidence. Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 83-20 (West 1983). Where no ambiguity in the medical record exists, an ALJ does not err by failing to call a medical advisor to determine a date of onset.

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

Dated this 16 day of November 1995.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1995 *RL*

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

JAMES D. HISHAW,

Plaintiff,

v.

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

Defendant.

No. 94-C-811-J ✓

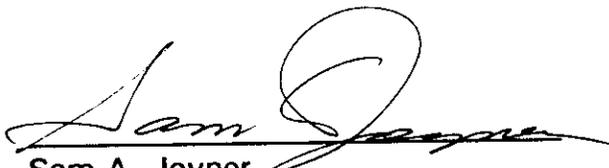
ENTERED ON DOCKET

DATE 11-17-95

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 16th day of November 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, the Social Security Independence and Program Improvements Act of 1994. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

11

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1995 *ja*

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

JAMES D. HISHAW,

Plaintiff,

v.

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

Defendant.

No. 94-C-811-J ✓

DECLINED ON DOCKET

DATE 11-17-95

ORDER^{2/}

Now before the Court is Plaintiff, James D. Hishaw's, appeal of a partially favorable decision by the Secretary.^{3/} The Administrative Law Judge ("ALJ") granted Plaintiff a closed period of benefits beginning November 23, 1988 and ending March 8, 1990. Plaintiff appeals and argues that his disability continues after March 8, 1990. On appeal, Plaintiff argues that the ALJ's decision is not supported by substantial evidence because the ALJ erred (1) by relying only on medical evidence

^{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, the Social Security Independence and Program Improvements Act of 1994. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. 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, filed July 12, 1995.

^{3/} Plaintiff filed his application for benefits on November 21, 1990. The application was denied by the Secretary on March 13, 1991. [R. at 84, 98-99]. Plaintiff's request for reconsideration was denied on May 14, 1991. [R. at 114-116]. A hearing before an ALJ was held on June 7, 1993. [R. at 42-83]. Plaintiff was represented by counsel at this hearing. By an order dated September 10, 1993, the ALJ denied Plaintiff's benefit application. [R. at 17-34]. The Social Security Administration Appeals Council denied Plaintiff's request for review on June 27, 1994. [R. at 4-5]. Plaintiff has, therefore, exhausted his administrative remedies and he is entitled to bring this action seeking judicial review of the ALJ's decision. 42 U.S.C. § 405(g).

10

older than 12 months from the date of the ALJ's decision in violation of 42 U.S.C. § 425(d)(5)(B), (2) by failing to apply the "medical improvement" standard at 20 C.F.R. § 404.1594, and (3) by failing to give proper weight to Plaintiff's treating physician. For the reasons discussed below, the Secretary's decision is affirmed.

I. PLAINTIFF'S BACKGROUND

At the time of the hearing below, Plaintiff was a 42 year old male, who had completed the 11th grade without obtaining his GED. Plaintiff has also had approximately two months of training as a telephone installer and programmer. In the past, Plaintiff worked as a senior telephone technician (14 years) and a truck driver (7 years). All of this past relevant work was performed at the medium to heavy exertional level. [R. at 45-51].

On November 23, 1988, Plaintiff was injured when a 180-200 pound piece of telephone equipment, which he was trying to install, fell. Plaintiff tried to break the equipment's fall by catching it. In the process, he ruptured two disks in his low back. Plaintiff went home, spent the Thanksgiving holiday with his family, and then admitted himself to St. Francis emergency room on November 25, 1988. Plaintiff admitted himself because he was experiencing numbness in his groin and genital area. This numbness resulted in sexual dysfunction, bladder control problems, and constipation. Plaintiff was examined by Dr. Randall Hendricks, an orthopedic surgeon, for possible compression of the *cauda equina*^{4/} by Plaintiff's ruptured discs. After

^{4/} *Cauda equina* interpreted literally means horse's tail. As a medical structure, it is the "terminal portion of the spinal cord and the roots of the spinal nerves below the first lumbar nerve." TABER'S CYCLOPEDIA MEDICAL DICTIONARY 334 (17th ed. 1993).

an MRI and a CAT scan, Dr. Hendricks operated on Plaintiff and removed two ruptured lumbar discs at L4-L5 and L5-S1. During this procedure, Dr. Hendricks specifically found and removed a small piece of disc material, which he believed had been pressing on the *cauda equina* and causing Plaintiff's numbness. [R. at 51-52, 228-236, 258-260].

According to Dr. Hendricks' progress notes, Plaintiff progressed well after his first surgery. Plaintiff began riding a stationary bicycle and walking. Dr. Hendricks also prescribed physical therapy, which Plaintiff did not attend because he said he could not afford the gas needed to get there.^{5/} Despite his favorable progress, Plaintiff reached a plateau in his recovery. He still had some residual numbness, which was causing bladder and bowel control problems. Plaintiff had also begun to experience pain in his lower back. Dr. Hendricks referred Plaintiff to Dr. Benjamin G. Benner, a neurologist, to determine how best to proceed with alleviating Plaintiff's symptoms. Dr. Benner and Dr. Hendricks agreed that Plaintiff needed a second operation to (1) remove additional disc fragments, and (2) stabilize Plaintiff's low back by fusing the vertebra from L4 to S1. This second surgery was performed by Drs. Hendricks and Benner on July 7, 1989. [R. at 154-226, 263-270].

Plaintiff again progressed well after his second surgery. Wearing a brace, he began walking two to three blocks a day. The pain in his back resolved itself, although his back remained sore at the incision site. Plaintiff still had some residual

^{5/} The record reflects that RE/Flex, the rehabilitation center, was willing to work with Plaintiff regarding alternative travel arrangements, but Plaintiff never followed through. In short, the record reflects that Plaintiff did not make a concerted effort to attend the rehabilitation sessions prescribed by Dr. Hendricks. [R. at 247-253].

numbness in his groin and genital area. On January 12, 1990, Dr. Hendricks performed out-patient surgery on Plaintiff to remove an electronic bone growth stimulator that was installed during the fusion surgery in July 1989. During his visits to Dr. Hendricks following this third surgery, Plaintiff denied complaints of pain and indicated that he had built a dog house. Plaintiff indicated, however, that the numbness in his groin continued to cause bladder and bowel problems. It was Dr. Hendricks' opinion at that time that these symptoms may never completely resolve, due to permanent neurological damage. At this time, Plaintiff also told Dr. Hendricks that he wanted a release so he could return to work, but that he did not think he could perform his prior work due to its heavy lifting requirements. Drs. Hendricks and Benner continued to follow Plaintiff's progress and each eventually released him to return to work. [R. at 154-226].

While the record is unclear, sometime during Plaintiff's above-described surgical history, he began seeing Dr. Gary R. Davis, a general practitioner. Dr. Davis apparently treated Plaintiff primarily for his bowel problems by prescribing suppositories and other medications. The record also indicates that Plaintiff stopped seeing Drs. Hendricks and Benner around mid to late 1990 and continued to see Dr. Davis. Plaintiff has apparently complained to Dr. Davis about pain in his lower back, and Dr. Davis has prescribed Vicodin, as had Dr. Hendricks. [R. at 287-291].

The ALJ determined that Plaintiff was disabled from the date of his on-the-job injury (November 23, 1988) to the date he was first released by Dr. Benner (March 8, 1990). The ALJ determined that from November 1988 to March 1990, Plaintiff

experienced a medical improvement such that he was capable of performing the full range of light work. Plaintiff argues that he continues to be disabled after March 1990 due to pain and limited range of motion in his low back.

II. STANDARD OF REVIEW

The Court's review of the ALJ's decision is limited to determining (1) whether the ALJ's factual findings are supported by substantial evidence, and (2) whether the correct legal standards were applied. 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988). The Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. 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.

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.

While evaluating medical evidence, more weight will be given to evidence from a treating physician than will be given to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant. Williams, 844 F.2d at 757-58; Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion may be rejected,

however, "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If the 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).

III. SUFFICIENCY OF THE MEDICAL RECORD

Plaintiff argues that the ALJ erred because his decision is not based on a current medical record. Plaintiff points to 42 U.S.C. § 423(d)(5)(B) and its requirement that a decision to deny Social Security benefits must be based on "a complete medical history of at least the preceding twelve months. . . ." Id. This language is ambiguous because it does not specify what date or event the twelve month period must precede. The time period referred to by § 423(d)(5)(B) could be either the twelve month period prior to the date an application for benefits is filed or the twelve month period prior to the date a decision to deny benefits is rendered. The difference in the time periods produced by either of these options is significant because there is often a long delay between an application for benefits and a decision to deny benefits.

Without citing any authority on point, each party argues for the interpretation of § 423(d)(5)(B) that is most favorable to them. The ALJ's decision to grant partial benefits was rendered on September 10, 1993. There are very few medical records for the twelve month period preceding this date. The only records in this time frame are from Dr. Davis and Plaintiff believes these records establish his continued disability. Plaintiff argues, therefor, that (1) the ALJ could not rely on the medical

records of Drs. Hendricks and Benner, which span from November 1988 to July 1990, and (2) the ALJ was required to obtain additional medical records at least for the September 1992 to September 1993 time period. The Court does not agree.

The Secretary has adopted a regulation that resolves the ambiguity in § 423(d)(5)(B). The pertinent regulation provides as follows:

Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application. . . .

20 C.F.R. § 404.1512(d) (emphasis added).^{6/} Plaintiff's application for benefits was filed on November 21, 1990. The medical records primarily relied on by the ALJ span from November 1988 to July 1990. Thus, the record for the twelve month period preceding the date Plaintiff filed his application was adequately developed.

^{6/} Congress has delegated to the Secretary broad power to adopt regulations "which are necessary or appropriate" to carry out the disability determination provisions of the Social Security Act. 42 U.S.C. § 405(a). Thus, this Court must accord deference to the Secretary's interpretation of the Social Security Act. The Court's review of a regulation "is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute." Everhart v. Bowen, 853 F.2d 1532, 1535 (10th Cir. 1988), rev'd on other grounds, 494 U.S. 83 (1990). Under the circumstances presented by this case, the Court finds no evidence that § 404.1512(d) is arbitrary, capricious, or inconsistent with 42 U.S.C. § 423(d)(5)(B). Given the fact that a determination of disability is to be made as of the time an application for benefits is filed, measuring the twelve month period described in § 423(d)(5)(B) from the date of application is reasonable. The Court finds absolutely no requirement that the ALJ update the medical record to the time of hearing, as Plaintiff seems to argue. See Luna v. Shalala, 22 F.3d 687, 692-93 (7th Cir. 1994).

IV. THE MEDICAL IMPROVEMENT STANDARD

In a typical social security case, benefits are granted for an indefinite period. That is, benefits continue unless they are terminated in a proceeding brought by the Secretary at some later date. After much wrangling in the federal circuit courts of appeal, it is now clear that the "medical improvement" standard, now codified at 20 C.F.R. § 404.1594, is to be applied in a proceeding to terminate benefits. Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990).

A question not yet answered by the Tenth Circuit Court of Appeals is whether the "medical improvement" standard applies in a closed period case.

In a 'closed period' case, the decision maker determines that a new applicant for disability benefits was disabled for a finite period of time which started and stopped prior to the date of his decision. Typically, both the disability and the cessation decision are rendered in the same document.

Pickett v. Bowen, 833 F.2d 288, 289 n.1 (11th Cir. 1987). Plaintiff argues that a closed period case consists of two distinct parts -- a disability determination and a termination of benefits. Plaintiff argues, therefore, that the § 404.1594's medical improvement standard applies to the termination portion of a closed period determination, just as it would in a traditional termination proceeding. There is a split of authority on this issue. Compare Chrupcala v. Heckler, 829 F.2d 1269, 1274 (3rd Cir. 1987) (holding that "[f]airness would certainly seem to require an adequate showing of medical improvement whenever an ALJ determines that disability should be limited to a specific period.") with Ness v. Sullivan, 904 F.2d 432, 434 n.4 (8th Cir. 1990) (holding that the normal sequential evaluation process and not the medical

improvement standard applies in closed period cases).

The Court is not compelled to resolve the issue of whether 20 C.F.R. § 404.1594 applies to closed period cases. As an initial matter, the Court does not perceive that a substantially different result would occur in this case regardless of whether the traditional five step sequential evaluation process⁷¹ is applied or the medical improvement standard is applied. In any event, it appears from the record that whether he was required to or not, the ALJ made the findings required by 20 C.F.R. § 404.1594. The ALJ concludes his decision with the following finding:

The claimant underwent medical improvement such that while from November 23, 1988 [i.e., the date of his on-the-job injury], through March 8, 1990, the claimant was disabled within the meaning of the Social Security Act, thereafter, the claimant's condition improved and he was not disabled within the meaning of the Social Security Act.

[R. at 32, ¶ 15].

⁷¹ To make a disability determination, the Secretary has established a five-step sequential evaluation process. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams, 844 F.2d at 748. 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 the claimant to 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 combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof at 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); and Williams, 844 F.2d at 750-51.

Pursuant to 20 C.F.R. § 404.1594, the following evaluation process must be followed to terminate disability benefits:

1. Is the claimant engaged in substantial gainful activity? [Step one of the traditional sequential evaluation process]. If he is, disability benefits will be terminated.
2. Does the claimant have an impairment which meets or equals the severity of an impairment in the "Listings"? See 20 C.F.R. Pt. 404, Subpt. P, App. 1. [Step three of the traditional sequential evaluation process]. If he does, disability benefits will be continued.
3. Has the claimant experienced "medical improvement"? If not, disability benefits continue.
 - a. Medical improvement is defined as "any decrease in the medical severity" of the claimant's impairments since the last disability determination. "A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with [the claimant's] impairment(s)." 20 C.F.R. § 404.1594(b)(1).
4. Looking only at the impairments present at the last disability determination, has the claimant's medical improvement resulted in an increase in the claimant's residual functional capacity ("RFC") since the last disability determination? If not, disability benefits will continue?
5. Do any exceptions to the application of the medical improvement standard apply? If an exception applies, the Secretary is relieved of her burden of showing medical improvement, and disability benefits will be terminated. None of the exceptions are applicable in this case. See 20 C.F.R. § 404.1594(d) and (e).
6. Looking at all of the claimant's current impairments, not just those present at the last disability determination, are these impairments severe? [Step two of the traditional sequential evaluation process]. If not, disability benefits will be denied.
7. Looking at all of the claimant's current impairments, not just those present at the last disability determination, can claimant perform his past relevant work? [Step four of the traditional sequential evaluation process]. If claimant can, disability benefits will be terminated.

8. Looking at all of the claimant's current impairments, not just those present at the last disability determination, does claimant have the RFC to perform an alternative work activity in the national economy? [Step five of the traditional sequential evaluation process].

20 C.F.R. § 404.1594(f).

V. THE ALJ'S MEDICAL IMPROVEMENT DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In his opinion, the ALJ concludes at the outset that Plaintiff was disabled as of November 23, 1988. The Secretary does not contest this finding. Throughout the remainder -- and the bulk -- of his opinion, the ALJ justifies his determination that Plaintiff gradually improved to the point that as of March 8, 1990 Plaintiff had the RFC to perform light work. [R. at 22-34]. It is this determination to which the medical improvement standard discussed above must be applied.

The only steps of the medical improvement standard with which Plaintiff can take issue are Steps 3 and 4.^{8/} Plaintiff alleges that substantial evidence does not support the ALJ's determination that (1) Plaintiff experienced medical improvement from November 1988 to March 1990 and, (2) Plaintiff's medical improvement increased Plaintiff's RFC. A review of the record indicates, however, that the ALJ's determinations are supported by substantial evidence.

Within a month after his last surgery, Plaintiff saw Dr. Hendricks and told him that he had built a dog house. Plaintiff also told Dr. Hendricks that he wanted to

^{8/} All of the other steps of the medical improvement standard were either resolved in favor of Plaintiff or are not applicable in this case. In this case, the determinations made at steps four and eight would be identical because there are no intervening impairments as there might be in a true termination proceeding. The impairments of which Plaintiff complained at the time of his application for benefits (i.e., pain, numbness in the groin, impotence, bladder problems and bowel problems) are the same impairments which were present in November 1988 when he was found to be disabled by the ALJ.

return to work but that he did not think he could do any heavy lifting. Dr. Hendricks told Plaintiff that he would give him a release. [R. at 170-173]. Dr. Hendricks saw Plaintiff for a few more months, and on May 25, 1990 he signed a release for Plaintiff to return to work with the restriction that Plaintiff not perform any "heavy, strenuous lifting." [R. at 171]. At about the same time, Dr. Benner also drafted a letter stating that: "[Plaintiff] was released on March 8, 1990 in a stable plane and is felt to be at the present time employable." [R. at 256]. Approximately three months later, Dr. Hendricks authored another note, this time removing all restrictions. The note read as follows: "Patient is okay to return to work with no restrictions." [R. at 171].

Almost a year later, Plaintiff was seen by Dr. Paul J. Krautter, a consulting physician. At this examination, Dr. Krautter observed that Plaintiff was walking without difficulty, although with a limp. Plaintiff was able to get on and off the examination table without any assistance. [R. at 274-279]. All of the medical records taken together clearly provide substantial evidence to support the ALJ's determination that Plaintiff experienced medical improvement since November 1988.

The only evidence in the record to rebut a conclusion of medical improvement is a June 2, 1993 letter from Dr. Davis. In his letter, Dr. Davis describes Plaintiff's surgeries and concludes that: "[Plaintiff] remains unemployed secondary to his condition and is in my opinion, unemployable." [R. at 287]. Other than this statement, Dr. Davis places no functional restriction on Plaintiff. Other than an indication that Plaintiff has decreased range of motion in his back, the sparse progress notes by Dr. Davis also do not indicate any functional restrictions on Plaintiff. [R. at

288-290].

It is the ALJ's function, and not this Court's, to resolve any conflicts between the opinions of Plaintiff's treating physicians. 20 C.F.R. § 404.1527; Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983). The opinion of each of Plaintiff's treating doctors may be weighed with and balanced against other evidence of record. Castellano v. HHS, 26 F.3d 1027, 1029 (10th Cir. 1994). The ALJ must, however, give specific reasons for rejecting a particular treating doctor's opinion. Byron, 742 F.2d at 1235. The ALJ did so in this case.

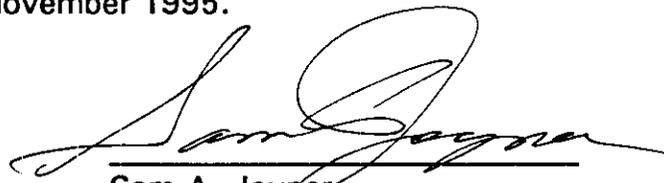
The ALJ rejected Dr. Davis' opinion for essentially three reasons. First, it was in conflict with the specialists who had treated Plaintiff. Dr. Hendricks is an orthopedic surgeon and Dr. Benner is a neurologist, while Dr. Davis is a general practitioner. Goatcher v. Shalala, 52 F.3d 288, 290 (10th Cir. 1995) (recognizing that additional weight may be given to the opinion of a specialist). Second, Dr. Davis' statement about the employability of Plaintiff resembles a vocational opinion rendered by a Vocational Expert, rather than a medical opinion rendered by a doctor. Third, Dr. Davis' report is conclusory and there is no diagnostic evidence in the record to support his conclusions. Frey, 816 F.2d at 513 (holding that treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence."). Thus, the ALJ gave specific and legitimate reasons for giving Dr. Davis' report less weight than that accorded Drs. Hendricks and Benner.

The ALJ's determination that the medical improvement experienced by Plaintiff also increased Plaintiff's functional capacity to do basic work activities (i.e., his RFC)

is also supported by substantial evidence. Because the ALJ found Plaintiff disabled in November 1988, Plaintiff obviously lacked the RFC at that time to perform even sedentary work. Since November 1988 and since the medical improvement noted by the ALJ, two RFC assessments have been performed on Plaintiff -- one on March 1, 1991 and another on April 29, 1991. [R. at 88-97 and 104-113]. Both of the doctors performing these RFC assessments determined that Plaintiff was capable of performing the exertional demands of light work.^{9/} These findings are supported by the medical evidence and nothing is to the contrary, other than Dr. Davis' report, which was discussed above.

The ALJ's determination that Plaintiff experienced medical improvement that increased his RFC is supported by substantial evidence. Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 16th day of November 1995.



Sam A. Joyner
United States Magistrate Judge

^{9/} Light work involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. § 404.1567(b).

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

CHARLES F. MOORE, TERRI L.
MOORE, and MALINDA FRANSISCO,)

Plaintiffs,)

v.)

MUSCOGEE (CREEK) NATION,)
JUDGE PATRICK MOORE, CHARLES)
TRIPP, SCOTT JOHNSON, and)
REDINA MINYARD,)

Defendants.)

-----)
MALINDA M. FRANSISCO,)

Petitioner,)

v.)

MUSCOGEE (CREEK) NATION,)
BILL FIFE, JUDGE PATRICK)
MOORE, CHARLES TRIPP, SCOTT)
JOHNSON, REDINA MINYARD,)
JAMES ROGERS, and MICHAEL)
YEKSAVICH,)

Respondents.)

FILED

NOV 15 1995

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

Case No. 95-236-H

95-395 H ✓

FILED ON DOCKET

DATE 11-17-95

O R D E R

This Court entered an order on July 21, 1995, which instructed Plaintiffs to file an amended complaint within ten (10) days if they possessed facts sufficient to state a claim under the Indian Child Welfare Act. Although Plaintiffs timely filed their amended complaint on July 31, 1995, they failed to assert a claim under the Indian Child Welfare Act. Instead, the amended complaint sets forth the same "petition for writ of habeas corpus" which this court has determined to be subject to dismissal. Therefore, for the reasons stated in the July 21, 1995 order, the Court concludes that it does not have subject matter jurisdiction in the above

5

matter and hereby dismisses this case. See Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

IT IS SO ORDERED.

This 15TH day of November, 1995.



Sven Erik Holmes
United States District Judge

FILED

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

NOV 16 1995

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

GENE MARITAN, appellant)

v.)

PHILLIP GALE HILL, appellee)

Case No. 95-C-135-K

ENTERED ON DOCKET
DATE NOV 17 1995

ORDER

This matter comes before me the undersigned Judge of the District Court for the Northern District of Oklahoma on the Motion of Gene Maritan for dismissal without prejudice. After reviewing the matter and being fully advised in the premises, the court finds that Maritan's motion should be and is hereby granted and this appeal is dismissed without prejudice.

/ TERRY C. KERN
U.S. District Court Judge

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

CHARLES F. MOORE, TERRI L.)
MOORE, and MALINDA FRANSISCO,)
)
Plaintiffs,)
)
v.)
)
MUSCOGEE (CREEK) NATION,)
JUDGE PATRICK MOORE, CHARLES)
TRIPP, SCOTT JOHNSON, and)
REDINA MINYARD,)
)
Defendants.)

MALINDA M. FRANSISCO,)
)
Petitioner,)
)
v.)
)
MUSCOGEE (CREEK) NATION,)
BILL FIFE, JUDGE PATRICK)
MOORE, CHARLES TRIPP, SCOTT)
JOHNSON, REDINA MINYARD,)
JAMES ROGERS, and MICHAEL)
YEKSAVICH,)
)
Respondents.)

FILED

NOV 15 1995

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

Case No. 95-236-H ✓

95-395 H

ENTERED ON BOOKS
DATE 11-17-95

ORDER

This Court entered an order on July 21, 1995, which instructed Plaintiffs to file an amended complaint within ten (10) days if they possessed facts sufficient to state a claim under the Indian Child Welfare Act. Although Plaintiffs timely filed their amended complaint on July 31, 1995, they failed to assert a claim under the Indian Child Welfare Act. Instead, the amended complaint sets forth the same "petition for writ of habeas corpus" which this court has determined to be subject to dismissal. Therefore, for the reasons stated in the July 21, 1995 order, the Court concludes that it does not have subject matter jurisdiction in the above

matter and hereby dismisses this case. See Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

IT IS SO ORDERED.

This 15TH day of November, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

NOV 15 1995

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

WAYNE E. WELLS, and)
DOROTHY E. WELLS,)

Plaintiffs,)

v.)

K.J. SAWYER, District Director,)
JERRY McCULLEY, Revenue Officer,)
and the UNITED STATES OF AMERICA,)

Defendants.)

Case No. 87-C-283-H

CONSOLIDATED

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

WAYNE E. WELLS, DOROTHY E. WELLS,)
FEDERAL LAND BANK, STATE OF)
OKLAHOMA, and ALICE O'NEAL, as)
trustee for the DOW TRUST.)

Case No. 92-C-1010-H ✓

ENTERED ON DOCKET

DATE 11-17-95

STIPULATED JUDGMENT

Plaintiff, the United States of America, and defendants,
Wayne E. Wells, Dorothy E. Wells, and the Dow Trust hereby
stipulate to the following:

1. Judgment is entered in favor of the United States for
the outstanding 1983, 1984 and 1985 federal income taxes, accrued
interest, and penalties according to law, assessed against Wayne
E. Wells, set forth as follows:

	Form 1040 1983	Form 1040 1984	Form 1040 1985
Tax Assessed	\$ 5,657.00	\$ 6,055.00	\$ 5,690.00

8

	Form 1040 1983	Form 1040 1984	Form 1040 1985
Penalties Assessed:			
Delinquency	\$ 1,414.25	\$ 671.52	\$ 539.25
Negligence	\$ 3,041.90	\$ 1,323.36	\$ 904.21
Miscellaneous	\$ 2,500.00	-0-	-0-
Estimated Tax	\$ 346.58	\$ 116.10	-0-
Total Penalties Assessed	\$ 7,302.73	\$ 2,110.98	\$ 1,443.46
Lien Fees	\$ 32.00	-0-	-0-
Interest Assessed	\$ 6,819.80	\$ 5,111.69	\$ 1,549.27
Credits:			
Withholding	(\$ -0-)	(\$ 3,368.92)	(\$ 3,533.02)
Interest Abated	(\$ -0-)	(\$ 2,459.82)	(\$ -0-)
Total Credits	(\$ -0-)	(\$ 5,828.74)	(\$ 3,533.02)
TOTAL DUE	\$ 19,811.53*	\$ 7,448.93*	\$ 5,149.71*

* Plus statutory additions and interest accruing after September 7, 1990.

See Government Exhibits A, B and C.

2. Judgment is entered in favor of the United States for the outstanding 1986 federal income tax, accrued interest, and penalties according to law, assessed against Wayne E. Wells, set forth as follows:

	<u>Form 1040 1986</u>
Tax Assessed	\$ 138.00
Delinquency Penalty Assessed	\$ 100.00
Interest Assessed	\$ 104.09
TOTAL DUE	\$ 342.09*

* Plus statutory additions and interest accruing after September 10, 1990.

See Government Exhibit D.

3. Judgment is entered in favor of the United States for the outstanding 1982 federal income tax, accrued interest, and penalties according to law, assessed against Dorothy E. Wells, set forth as follows:

<u>Form 1040 1982</u>	
Tax Assessed	\$ 4,826.75
Negligence Penalty Assessed	\$ 977.90
Interest Assessed	\$ 1,473.10
Fees and Costs	\$ 20.00
Credits:	
Withholding	(\$ 1,536.00)
Payment	(\$ 314.12)
Total Credits	(\$ 1,850.12)
TOTAL DUE	\$ 5,447.63*

* Plus statutory additions and interest accruing after July 7, 1986.

See Government Exhibit E.

4. Judgment is entered in favor of the United States for the outstanding 1983 federal income tax, accrued interest, and penalties according to law, assessed against Dorothy E. Wells, set forth as follows:

<u>Form 1040 1983</u>	
Tax Assessed	\$ 4,389.00
Penalties Assessed:	
Negligence	\$ 317.25
Estimated Tax	\$ 10.30
Delinquency	\$ 253.10
Total Penalties Assessed	\$ 580.65
Interest Assessed	\$ 242.43
Fees and Costs	\$ 4.00

Form 1040 1983

Withholding Credits (\$ 3,376.60)

TOTAL DUE \$ 1,839.48*

* Plus statutory additions and interest accruing after November 4, 1985.

See Government Exhibit F.

5. Judgment is entered in favor of the United States for the outstanding 1984 and 1985 federal income taxes, accrued interest, and penalties according to law, assessed against Dorothy E. Wells, set forth as follows:

	<u>Form 1040</u> <u>1984</u>	<u>Form 1040</u> <u>1985</u>
Tax Assessed	\$ 5,252.55	\$ 5,474.75
Penalties Assessed:		
Negligence	\$ 1,728.42	\$ 1,352.40
Estimated Tax	\$ 195.20	\$ 313.74
Miscellaneous	\$ 1,313.13	\$ 1,368.69
Addt'l. Misc.	\$ 5,000.00	-0-
Delinquency	<u>\$ 883.38</u>	<u>\$ 1,368.68</u>
Total Penalties Assessed	\$ 9,120.13	\$ 4,403.51
Interest Assessed	\$ 6,948.11	\$ 3,235.98
Credits:		
Withholding	(\$ 1,719.00)	-0-
Interest Abated	<u>(\$ 3,638.87)</u>	-0-
Total Credits	(\$ 5,357.87)	-0-
TOTAL DUE	\$ 15,962.92*	\$ 13,114.24*

* Plus statutory additions and interest accruing after August 4, 1989.

See Government Exhibits G and H.

6. The United States has valid and subsisting federal tax liens, pursuant to 26 U.S.C. Section 6321, upon the subject real located in Creek County, Oklahoma, more properly described as:

The South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) of Section 36, Township 17 North, Range 8 East, containing twenty (20) acres, more or less.

See Government Exhibits I, J, K, L and M.

7. The March 28, 1983 conveyance of one half of the interest in the subject real property, from Dorothy E. Wells to defendant Wayne E. Wells, was made by Dorothy E. Wells without fair and adequate consideration at a time when she was indebted to the United States. This conveyance is therefore set aside.

8. The March 28, 1983 conveyance of the subject real property, from Wayne E. Wells to defendant Alice O'Neal as trustee of the Dow Trust, was made by Wayne E. Wells without fair and adequate consideration at a time when he was indebted to the United States. This conveyance is therefore set aside.

9. Defendants Wayne E. Wells and Dorothy E. Wells continue to have beneficial use of the subject real property. The Dow Trust is the nominee and/or alter ego of Wayne E. Wells and Dorothy E. Wells, who continue to be the true owners of the subject real property.

10. The federal tax liens upon the subject real property, reflecting the income tax liability of Wayne E. Wells and Dorothy E. Wells, are foreclosed and the real property is to be sold pursuant to the provisions of 28 U.S.C. Section 2001, to satisfy

the federal tax liabilities described in paragraphs 1 through 5 above.

11. The Stipulated Judgment resolves, with prejudice, all claims, counterclaims, and defenses litigated by the parties to this action.

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma



F. EUGENE HOUGH
Hough & Wantland
6968 South Utica Avenue
Tulsa, Oklahoma 74135

Telephone: (918) 488-0929

ATTORNEY FOR DEFENDANTS
WAYNE AND DOROTHY WELLS,
AND THE DOW TRUST

Date: October 17, 1995

Virginia M. Navarrete
VIRGINIA M. NAVARRETE
Trial Attorney, Tax Division
U.S. Department of Justice
Box 7238, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6499

ATTORNEY FOR THE UNITED STATES
OF AMERICA

Date: October 17, 1995

IT IS THEREFORE ORDERED AND ADJUDGED that the foregoing stipulations entered into between the plaintiff, United States of America, and the defendants Wayne E. Wells, Dorothy E. Wells, and the Dow Trust are hereby approved and adopted by the Court.

IT IS SO ORDERED this 15th day of November, 1995.

S/ SVEN ERIK HOLMES

HONORABLE SVEN ERIK HOLMES
United States District Court
Northern District of Oklahoma

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Mauly C. Nelson
for

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

EIN OR SSN: 497-38-4101
 Spouse SSN: : 1040
 Form Period : 8312

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
12/30/86	RETURN FILED QUICK ASSESSMENT DELINQUENCY PENALTY NEGLECTANCE PENALTY MISCELLANEOUS PENALTY ESTIMATED TAX PENALTY INTEREST FEES AND COSTS TAX DELINQUENT NOTICE FEES AND COSTS	0.00 5,657.00 1,414.25 3,041.90 2,500.00 346.58 6,819.80 16.00 16.00		18211-017-03053 73251-250-13001	03/09/87 09/07/90 09/07/90 09/07/90 09/07/90 09/07/90 09/07/90 12/31/90
12/31/90					02/18/91

Ending Balance: 19,811.53

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Janette Thuedinger

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page.

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

for *Maury C. Nelson*

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 497-38-4101
 Spouse SSN:
 Form : 1040
 Period : 8412

Date	Explanation of Transactions	Assessment (Abatement)	Credit Reversal (Credit Reversal)	DLN or Account Number	23C Date
12/30/86 04/15/85	RETURN FILED WITHHOLDING CREDITS QUICK ASSESSMENT DELINQUENCY PENALTY NEGLIGENCE PENALTY ESTIMATED TAX PENALTY INTEREST INTEREST ABATED TAX DELINQUENT NOTICE	0.00 6,055.00 671.52 1,323.36 116.10 5,111.69	3,368.92	18211-017-03106 73251-250-13002	03/09/87 09/07/90 09/07/90 09/07/90 09/07/90
10/22/90 12/24/90			2,459.82		

Ending Balance: 7,448.93

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC



Form 4340 Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN OR SSN: 497-38-4101
 Spouse SSN: :
 Form : 1040
 Period : 8512

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
12/30/86 04/15/86	RETURN FILED WITHHOLDING CREDITS QUICK ASSESSMENT DELINQUENCY PENALTY NEGLIGENCE PENALTY INTEREST TAX DELINQUENT NOTICE	0.00 5,690.00 539.25 904.21 1,549.27	3,533.02	18211-017-03054 73251-250-13003	03/09/87 09/07/90 09/07/90 09/07/90 09/07/90
12/24/90					

Ending Balance: 5,149.71

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Janette Threlkova

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 497-38-4101
 Spouse SSN: : 1040
 Form Period : 8612

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
07/07/90	RETURN FILED DELINQUENCY PENALTY INTEREST	138.00 100.00 104.09		18221-195-27715	09/10/90 09/10/90 09/10/90
09/10/90 12/03/90	FIRST NOTICE TAX DELINQUENT NOTICE				

Ending Balance: 342.09

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

Janette Theberge

Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: Form : 1040
 Period : 8212

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
04/15/83	RETURN FILED	0.00		18221-114-57647	06/27/83
	AUDIT DEFICIENCY	4,826.75		18247-567-00548	07/07/86
	NEGLECTANCE PENALTY	977.90			07/07/86
	WITHHOLDING CREDITS		1,536.00		
	INTEREST	1,473.10			07/07/86
07/07/86	FIRST NOTICE				
10/20/86	TAX DELINQUENT NOTICE	4.00			02/09/87
	FEES AND COSTS		314.12		
03/10/88	PAYMENT	16.00			08/10/92
	FEES AND COSTS				

Ending Balance: 5,447.63

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC

Janette Thuedinger

Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page _____

_____ under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: Form : 1040
 Period : 8312

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
01/08/85	RETURN FILED AUDIT DEFICIENCY NEGLIGENCE PENALTY ESTIMATED TAX PENALTY DELINQUENCY PENALTY WITHHOLDING CREDITS INTEREST	0.00 4,389.00 317.25 10.30 253.10		18211-043-16040 18247-689-90012	05/20/85 11/04/85 11/04/85 11/04/85 11/04/85
04/15/84	FIRST NOTICE TAX DELINQUENT NOTICE FEES AND COSTS TAX DELINQUENT NOTICE	242.43	3,376.60		11/04/85
11/04/85 12/30/85		4.00			
12/30/85					02/24/86

Ending Balance: 1,839.48

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC



Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page.

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: :
 Form : 1040
 Period : 8412

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
01/02/87	RETURN FILED QUICK ASSESSMENT MISCELLANEOUS PENALTY DELINQUENCY PENALTY ESTIMATED TAX PENALTY NEGLIGENCE PENALTY INTEREST WITHHOLDING CREDITS INTEREST ABATED MISCELLANEOUS PENALTY	0.00 5,252.55 1,313.13 883.38 195.20 1,728.42 6,948.11		18211-017-02941 73251-216-13106	03/09/87 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89
04/15/85 09/04/89		5,000.00	1,719.00 3,638.87		08/04/89

Ending Balance: 15,962.92

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC



United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson

for
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: : 1040
 Form Period : 8512

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
01/02/87	RETURN FILED QUICK ASSESSMENT MISCELLANEOUS PENALTY DELINQUENCY PENALTY ESTIMATED TAX PENALTY NEGLIGENCE PENALTY INTEREST TAX DELINQUENT NOTICE	0.00 5,474.75 1,368.69 1,368.68 313.74 1,352.40 3,235.98		18211-017-03023 73251-216-13108	03/09/87 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89
11/06/89					

Ending Balance: 13,114.24

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of supervisor (required for certification)
 Certification Unit
 Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

District

Oklahoma City, OK

Serial Number

739017735

For Optional Use by Recording Office

90 14363

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

DEC - 5 1990

Book 270 Page 2177
By BETTY BENTZ, County Clerk
Deputy

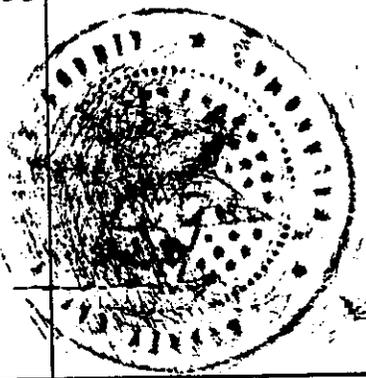
As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer WAYNE E WELLS

Residence PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/83	497-38-4101	09/07/90	10/07/90	19779.53
1040	12/31/84	497-38-4101	09/07/90	10/07/90	7448.93
1040	12/31/85	497-38-4101	09/07/90	10/07/90	5149.71
1040	12/31/86	497-38-4101	09/10/90	10/10/90	342.09



Place of Filing

COUNTY CLERK
CREEK COUNTY
SAPULPA, OK 74066

Total

\$

32720.26

This notice was prepared and signed at Oklahoma City, OK

the 27th day of November, 19 90



Signature

Gerald McCulley
for GERALD MCCULLEY

Title

Revenue Officer
73-01-2521

2177

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien
Rev. Rul. 71-466, 1971 - 2 C.B. 409)

NOMINEE LIEN

Department of the Treasury - Internal Revenue Service

Form 668 (Y)

(Rev. 7-89)

Notice of Federal Tax Lien Under Internal Revenue Laws

For Optional Use by Recording Office

strict

OKLAHOMA CITY

Serial Number

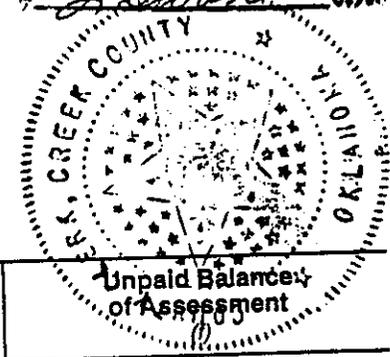
7301-91-025

90 13900

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

12:10 NOV 26 1990
Book 278 Page 1331
DETTY HENTZ, County Clerk
Creek



Name of Taxpayer

DOW TRUST - NOMINEE OF WAYNE E. WELLS

Residence

P. O. BOX 1258
BRISTOW, OKLAHOMA 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment
1040	12-31-83	497-38-4101	09-07-90	10-07-00	19,779.53
1040	12-31-84	497-38-4101	09-07-90	10-07-00	7,448.93
1040	12-31-85	497-38-4101	09-07-90	10-07-00	5,149.71
1040	12-31-86	497-38-4101	09-10-90	10-10-00	342.09

THIS NOTICE OF FEDERAL TAX LIEN IS FILED FOR THE PURPOSE OF GIVING PUBLIC NOTICE THAT BY VIRTUE OF THE UNPAID TAX LIABILITIES ASSESSED AGAINST THE ABOVE NAMED TAXPAYER, THE UNITED STATES CLAIMS AN INTEREST IN THE PROPERTY DESCRIBED BELOW. THOUGH SAID PROPERTY MAY BE TITLED IN THE NAME OF THE DOW TRUST, THE UNITED STATES CONSIDERS THE PROPERTY TO BE OWNED BY THE ABOVE TAXPAYER AND THEREFORE THE TAX LIENS INCLUDED IN THIS NOTICE ATTACH TO SUCH PROPERTY.

LEGAL DESCRIPTION: The South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) of Section 36, Township 17 North, Range 8 East, containing twenty (20) acres, more or less.

Place of Filing
COUNTY CLERK
CREEK COUNTY
SAPULPA, OK 74066

Total \$ 32,720.26

This notice was prepared and signed at TULSA, OKLAHOMA

the 21st day of NOVEMBER, 19 90



Signature

Jerry McCully 7301-2521

Title

REVENUE OFFICER

1331

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax lien Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Notice of Federal Tax Lien Under Internal Revenue Laws

City

OKLAHOMA CITY

Serial Number

75727

For Optional Use by Recording Office

87 908

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

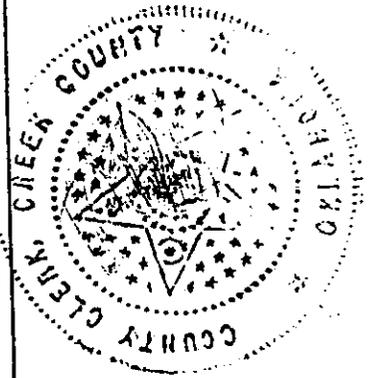
STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON
330 JAN 20 1987
3 o'clock p.m. and duly recorded in
Book 215 Page 1458
ROMA LEE BRANHAM, County Clerk
By *R. Mayo* Deputy

Name of Taxpayer
DOROTHY E WELLS

Residence
PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refilled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12-31-82	441-38-7147	07/07/86	08/06/92	5,745.75



Place of Filing

CREEK COUNTY
COUNTY CLERK

Total

\$

5,745.75

OKLAHOMA CITY, OKLAHOMA

This notice was prepared and signed at _____
the 08 day of JAN, 1987



Signature

GARY L. COLLINS

Gary L. Collins

Title

CHIEF, SPECIAL PROCEDURES

2530

(NOTE: Certificate of Officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971 C.B. 409)

Form 668 (Y)

(Rev. January 1991)

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

City

Oklahoma City

Serial Number

739212753

For Optional Use by Recording Office

92 9269

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

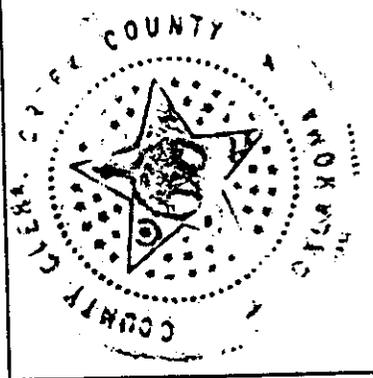
STATE OF OKLAHOMA
 COUNTY OF CREEK
 THIS INSTRUMENT WAS FILED
 FOR RECORD ON
 1240 JUL 20 1992
 o'clock P. M. and duly recorded in
 Book 293 Page 1844
 BETTY BENTZ, County Clerk
 By [Signature] Deputy

Name of Taxpayer DOROTHY E WELLS

Residence PO BOX 1258
 BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a) CORRECTS ORIGINAL DATE IN COL. (e) ***

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/82	441-38-7147	07/07/86	08/06/96	5745.75



Place of Filing COUNTY CLERK
 CREEK COUNTY
 SAPULPA, OK 74066

Total \$ 5745.75

Original Recording Date:

This notice was prepared and signed at Oklahoma City, OK, on this,

the 12th day of July, 1992.

1844

Signature

Gary L. Collins

Title

COLL. MANAGER

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien
 Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Notice of Federal Tax Lien Under Internal Revenue Laws

District
OKLAHOMA CITY

Serial Number **86 2044**
59299

For Optional Use by Recording Office

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer
DOROTHY E WELLS

Residence
PO BOX 1258
BRISTOW, OK 74010

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON
9:15 FEB - 4 1986
o'clock **P** m. and duly recorded in
Book **200** Page **1123**
By **Roma Lee Branham**, County Clerk
Deputy

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refilled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325 (a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12-31-83	441-38-7147	11/04/85	12/04/91	1,839.48



Place of Filing CREEK COUNTY COUNTY CLERK	Total	\$ 1,839.48
---	-------	-------------

This notice was prepared and signed at OKLAHOMA CITY, OKLAHOMA

29 day of JANUARY, 19 86

Signature Gary D. Collins
GARY D. COLLINS

Title
CHIEF, SPECIAL PROCEDURES 2577



Form **668 (Y)**
 (Rev. January 1991)

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

City: **Oklahoma City** Serial Number: **739128238**

For Optional Use by Recording Office
91 12184

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

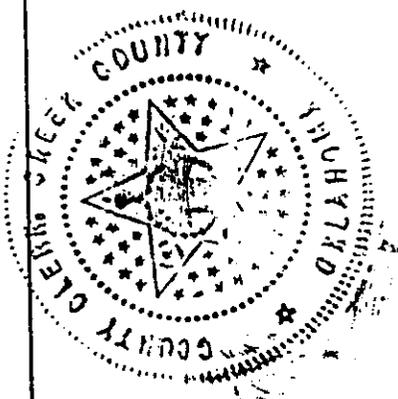
**STATE OF OKLAHOMA
 COUNTY OF CREEK**
 THIS INSTRUMENT WAS FILED
 FOR RECORD ON
330 OCT 28 1991
 o'clock 2 M. and duly recorded in
 Book 282 Page 2077
BETTY BENTZ, County Clerk
 By [Signature] Deputy

Name of Taxpayer: **DOROTHY E WELLS**

Residence: **PO BOX 1258
 BRISTOW, OK 74010**

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a). **CORRECTS ORIGINAL DATE IN COL. (e) *****

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/83	441-38-7147	11/04/85	12/04/95	1839.48



Place of Filing: **COUNTY CLERK
 CREEK COUNTY
 SAPULPA, OK 74066**

Original Recording Data: **0:00 85-2044**

Total \$ 1839.48

This notice was prepared and signed at Oklahoma City, OK., on this, **2077**
 the 20th day of October, 19 91.

Signature: [Signature: Gary L. Collins] Title: **COLL. MANAGER**

Form 668
(Rev. Sept. 1983)

Notice of Federal Tax Lien Under Internal Revenue Laws 87 4453

OKLAHOMA CITY

Serial Number

7301-87-250

For Optional Use by Recording Office

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

12:45 APR - 3 1987
12 o'clock A.M. and duly recorded in
Book 218 Page 1856
ROMA LEE BRANHAM, County Clerk
By *[Signature]* Deputy

Name of taxpayer

Dow Trust NOMINEE OF: Dorothy E. Wells

Residence

P O Box 1250
Bristow, OK 74010

IMPORTANT RELEASE INFORMATION-With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325 (a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12-31-81	441-38-7147	06-04-84	07-04-92	884.96
1040	12-31-82	441-38-7147	07-07-86	08-06-94	5,745.75
1040	12-31-83	441-38-7147	11-04-85	12-04-93	1,839.48
CIV PEN	12-31-82	441-38-7147	09-16-85	10-30-93	500.00

This notice of Federal Tax Lien is filed for the purpose of giving public notice that, by virtue of the unpaid tax liabilities assessed against the above named taxpayer, the United States claims an interest in the property described below. Though said property may be titled in the name of Dow Trust, the United States considers the property to be owned by the above taxpayer and therefore, the tax liens included in this notice attach to such property.

LEGAL DESCRIPTION: The South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE4) of Section 36, Township 17 North, Range 8 East, containing twenty (20) Acres, more or less.

Place of filing

Sapulpa, Creek County Oklahoma

Total \$ 8,970.19

This notice was prepared and signed at Tulsa, Oklahoma

the 31st day of March 19 87.

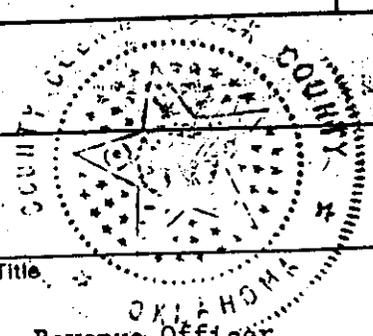
Signature

[Signature]
Jerry McCulley

Jerry McCulley-2530

Title

Revenue Officer



(NOTE: Certificate of officer authorized by law to take acknowledgements is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971-2 C.B. 409.)

Department of the Treasury - Internal Revenue Service

Form 668 (Y)

(Rev. January 1991)

Notice of Federal Tax Lien Under Internal Revenue Laws

City

Oklahoma City

Serial Number

739128281

For Optional Use by Recording Office

91 12182

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

330 OCT 28 1991

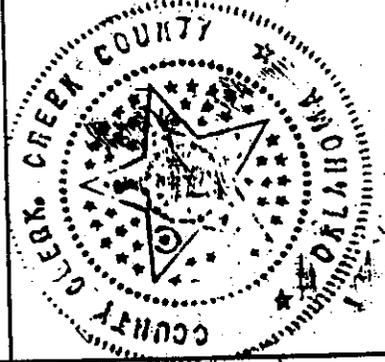
o'clock 1 M. and duly recorded in
Book 282 Page 2075
By Betty Rantz County Clerk
DeMayes Deputy

Name of Taxpayer DOW TRUST
NOMINEE OF: DOROTHY E WELLS

Residence PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a). **CORRECTS ORIGINAL DATE IN COL. (e) *****

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/82	441-38-7147	07/07/86	08/06/96	5745.75
1040	12/31/83	441-38-7147	11/04/85	12/04/95	1839.48



Place of Filing COUNTY CLERK
CREEK COUNTY
SAPULPA, OK 74066

Total \$

7585.23

Original Recording Data:

0.00

This notice was prepared and signed at Oklahoma City, OK. on this,

2075

the 20th day of October, 19 91

Signature

Gary L. Collins

Title

COLL. MANAGER

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien
Rev. Rul. 71-466, 1971-2 C.B. 409)

Form 668 (Y) (Rev. 1-91)

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

St. John Medical Center, Inc.,
an Oklahoma nonprofit corporation;
Hillcrest Medical Center,
an Oklahoma nonprofit corporation;
and Osteopathic Hospital
Founders Association, Inc.,
an Oklahoma nonprofit Corporation,

Plaintiffs,

vs.

United States of America,

Defendant.

FILED

NOV 16 1995

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

Case No. 94 C 163 BU

RECEIVED

NOV 17 1995

JUDGMENT

This matter comes before the Court upon the Motion for Summary Judgment filed by Plaintiffs, St. John Medical Center, Inc., Hillcrest Medical Center and Osteopathic Hospital Founders Association, Inc., and the Motion for Summary Judgment filed by Defendant, United States of America.

For the reasons set forth in this Court's Order filed herein on October 5, 1995, the Court finds that Plaintiffs' Motion for summary Judgment should be granted, and Defendant's Motion for Summary Judgment should be denied.

WHEREFORE, judgment is hereby entered in favor of Plaintiffs and against Defendant in the following amounts, which include interest accrued to November 1, 1995.

St. John Medical Center, Inc.	\$872,483.67
Hillcrest Medical Center	877,614.08
Oklahoma Osteopathic Founders Association	186,907.83

In addition to the above amounts, Plaintiffs are entitled to interest accruing from November 1, 1995, pursuant to 28 U.S. C. § 1961(c)(1).

DATED this 16 day of November, 1995.

of MICHAEL BURRAGE

Michael Burrage
United States District Judge

APPROVED AS TO FORM

Rebecca M. Fowler, OBA #13682
Doerner, Saunders, Daniel & Anderson
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

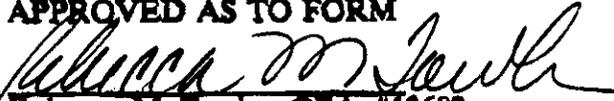
Attorneys for Plaintiffs, St.
John Medical Center, Inc., Hillcrest
Medical Center, and Osteopathic
Founders Association

APPROVED AS TO FORM

Noreene C. Stehlik
Trial Attorney
Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044

Attorneys for Defendant,
United States of America

APPROVED AS TO FORM



Rebecca M. Fowler, OBA #13682
Doerner, Saunders, Daniel & Anderson
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

Attorneys for Plaintiffs, St.
John Medical Center, Inc., Hillcrest
Medical Center, and Osteopathic
Founders Association

APPROVED AS TO FORM



Noreene C. Stehlik
Trial Attorney
Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044

Attorneys for Defendant,
United States of America

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

NOV 16 1995

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

GENE A. FREEMAN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No: 94-C-1107-W

ENTERED
DATE NOV 17 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed November 16, 1995.

Dated this 16th day of November, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

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

FILED

NOV 16 1995

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

GENE A. FREEMAN,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 94-C-1107-W

ENTERED ON THE CLERK'S

DATE NOV 17 1995

ORDER

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

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

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

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

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

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work related activities, except for work involving those aspects of work over and above those set out for light exertional activity. He concluded that claimant's past relevant work as a security guard did not require the performance of work related activities precluded by the above limitation, so the impairment did not prevent claimant from performing his past relevant work. Having determined that claimant could perform his past relevant work, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The decision of the ALJ is not supported by substantial evidence, because he is easily fatigued and becomes light-headed and short of breath when he moves about and bends over.
- (2) The ALJ ignored claimant's claims of fatigue, light-headedness, and shortness of breath.
- (3) The ALJ substituted his own opinion for medical evidence.
- (4) The ALJ failed to base his decision on a properly developed medical record and did not make a record of the demands of

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

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

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

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

claimant's past work and how they mesh with his limitations.

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

Claimant was hospitalized on May 12, 1992 for chest pains which were reduced when he took nitroglycerine (TR 232-238). An electrocardiogram showed a normal sinus rhythm, and chest x-rays and enzymes were normal, and a heart attack was ruled out (TR 173-174, 237-238). He claims he became unable to work six weeks later, on July 1, 1992, when he was seen at a Veterans Hospital for atypical chest pain and atypical left lower extremity pain (TR 172)⁴.

On September 2, 1992, he again complained of chest pain and was put on a low cholesterol diet (TR 169-171). On November 6, 1992, he was hospitalized for chest pain, and a heart attack was again ruled out (TR 150-153, 159-160). On December 1, 1992, he still complained of pain, but there was no change in the enzyme tests or EKG (TR 146). He was hospitalized for a persantine thallium treadmill on December 8, 1992, which showed no defects or evidence of a past heart attack, and the diagnosis was "stable angina." (TR 145). On March 30, 1993, he was given a residual functional capacity assessment, and the medical examiner concluded he could lift 50 pounds occasionally and 25 pounds frequently, stand, walk, and sit about 6 hours in an 8-hour workday, do unlimited pushing and pulling, and stoop occasionally, but should avoid heights and

⁴A medical examination over a year earlier, on January 4, 1991, after he fell on ice and suffered a concussion, showed that his heart had a regular rate and rhythm without murmurs, rubs or gallops (TR 207-213), and a neurological examination on February 19, 1991 was normal (TR 110-111). On December 23, 1991, he was examined for severe claudication (lameness or limping resulting from inadequate blood supply), but the test report showed no evidence of arterial perfusion defect (TR 202-203).

moving machinery.

At a hearing on April 19, 1994, claimant testified that he could no longer work as a security guard because he was "tired all the time, light-headed and [had] shortness of breath" (TR 43, 47). He admitted he visited neighbors, went to church twice a week, and played the guitar (TR 43-44). He claimed he wore a TENS unit for back pain and used a cane (TR 43-45). He testified he could only walk six blocks, sit five to ten minutes, stand five minutes, and lift ten to fifteen pounds (TR 49-51). He said he cannot climb stairs, stoop, or crawl (TR 52).

A vocational expert testified that claimant's past work as a security guard was light work, requiring lifting ten to twenty pounds, reaching, handling, fingering and feeling, and that he would be able to perform the job and also the job of sedentary security system monitor, because of his transferable skills (TR 56-57).

There is no merit to claimant's contentions. The ALJ's determination that he can do light work is supported by medical evidence from his treating physicians, the medical consultant, and the vocational expert. There is no medical evidence that he has a medical condition that precludes him from working. The Tenth Circuit has said that "subjective complaints . . . must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Id. at 517.

The record provides substantial evidence to support a finding that claimant meets

the requirement for light work. The ALJ did not substitute his own opinion for medical evidence to determine what claimant's residual capacity was or ignore his claims of fatigue, light-headedness, and shortness of breath. He noted that there was no evidence that claimant had suffered a heart attack since July 1, 1992, when his pain was described as "atypical," and that on January 4, 1991, he had a normal physical examination with all extremities showing a normal range of motion (TR 22). While there was a diagnosis of stable angina, the ALJ pointed out that the evidence showed that range of motion in all joints was not restricted, x-rays showed his spinal pathology is not significant and does not compromise his ability to work, claudication has been ruled out, the angina has not been shown to cause lightheadedness, and nitroglycerine controls the chest pain (TR 22-23).

The ALJ properly concluded that there was no medically determinable basis for claimant's lightheadedness, shortness of breath, or inability to engage in more than minimal physical activity. The ALJ also correctly determined that, though claimant must not perform physical activity in excess of light work, as to do so would aggravate the stable angina, there was no physical restriction other than the angina which restricted his ability to perform light work (TR 23). The ALJ also properly considered the affects of claimant's pain under the guidelines set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987). (TR 16-19, 21-22).

The ALJ met his obligation to ensure that an adequate record was developed consistent with the issues raised; the ALJ is not required to be the claimant's advocate. Glass v. Shalala, 43 F.3d 1392, 1396 (10th Cir. 1994). While claimant's counsel argues that the ALJ should have asked claimant whether he had sought medical treatment for his

problems since March 1993, the date of the most current medical evidence of record, in order to base his denial of benefits on a complete medical history of the preceding twelve months, there was no reason for the ALJ to suspect there would be additional medical reports since those in the record all showed that claimant had no medically determinable ailments and his angina was controlled by medication, there was no reference in any of the records to documents which were not provided, and claimant did not contend that he had been unable to secure any of his records or that any records existed which had not been provided. See Baker v. Bowen, 886 F.2d 289, 291-92 (10th Cir. 1989). While claimant contends otherwise, the ALJ did hear about the demands of claimant's past work⁵ (TR 45-46) and properly concluded that "they mesh with his limitations"⁶ (TR 23-24). As claimant

⁵ The testimony of claimant went as follows:

A Security work's been what I've been doing for 20 --

Q Now what do you mean by security work?

A Security work is taking and securing buildings down and checking people in and out of the buildings and checking certain areas of the building with a clock that you put a key into. This is required every hour to get up and go about and make the rounds.

Q Okay. So it would be a lot of walking?

A Yes, sir.

Q Standing?

A Yes, sir.

Q There would be some sitting?

A Some, yes, sir. (TR 45-46).

⁶ The ALJ concluded:

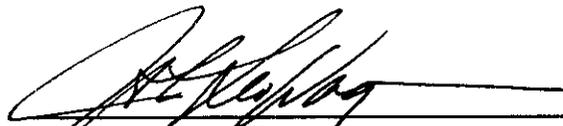
Light work involves lifting or carrying no more than 20 pounds at a time with frequent lifting and carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it involves sitting most of the time with some pushing and pulling of arm or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

....

contends, the Tenth Circuit has found that the ALJ has a duty to fully investigate the specific demands of a claimant's past relevant work in order to have enough facts to make such a comparison with his limitations. Henrie v. United States Dept. of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993). However, in that case there was no testimony by a vocational expert. Id. at 361. Here the ALJ followed the ruling in Henrie, id.: (1) he made findings of claimant's residual functional capacity (TR 22-23), (2) he asked the vocational expert to assess the physical and mental demands of claimant's prior job (TR 56), and (3) he found that claimant had the ability to return to his past relevant job given his residual functional capacity (TR 23-25).

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

Dated this 15th day of November, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:freeman

Step 4 of the sequential evaluation process requires a determination of whether the claimant can perform his past relevant work. Attending the hearing, at the request of the Administrative Law Judge, was the duly qualified vocational expert, Cheryl Mallon. The vocational expert testified that the claimant's past relevant work as a security guard was semiskilled and light as performed.

Based on the fact that the claimant's past relevant work as a security guard is a light occupation and the claimant can perform light work, the Administrative Law Judge finds that the claimant can perform his past relevant work as a security guard. Further, the Administrative Law Judge finds that the claimant is not disabled. (TR 23-24).

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

NOV 16 1995

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

EMILY J. BOLIN,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,¹

Defendant.

Case No: 94-C-1035-W

ENTERED ON COURT
DATE NOV 17 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed November 15, 1995.

Dated this 15th day of November, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

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

F I L E D

EMILY J. BOLIN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

NOV 15 1995

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

Case No. 94-C-1035-**W**

ENTERED ON USDC

DATE NOV 17 1995

ORDER

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

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

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

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

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertion and nonexertional requirements of medium work, except for lifting more than 50 pounds occasionally and 25 pounds frequently. He concluded that she had no past relevant work, was 53 years old, which is defined as closely approaching advanced age, had a high school equivalent education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. He found that, although the claimant's additional nonexertional limitations did not allow her to perform the full range of medium work, there were a significant number of jobs in the national economy which she could perform, such as laundry worker, medium, unskilled, cafeteria attendant, light, unskilled, hand packager, light unskilled, assembler, sedentary, unskilled, and assembler, light, unskilled. Having determined that claimant's impairments did not prevent her from performing those jobs, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's determination that claimant can do medium work is not supported by substantial evidence, because she is unable to

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

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

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

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

stoop and crouch frequently.

- (2) The ALJ erred in using his own expertise to determine claimant's residual functional capacity.
- (3) The ALJ failed to consider the limiting effects of claimant's chest pain.

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

Claimant filed for benefits in February of 1993, claiming disability because of back and heart problems. (TR 106). She testified at a hearing on January 28, 1994, that she ruptured a disc in her back at work as a hospital aide in 1973, leading to two back surgeries. (TR 36, 53). She stated that the doctor told her not to lift more than ten pounds following the surgeries. (TR 54). She claims that she went back to work in 1979, worked nine months then, was laid off, and worked as a solderer in 1988 (TR 36-38, 78, 106).

Claimant was examined on March 19, 1993, by Dr. Kathleen Dahlmann, who found she had minor limitation of range of motion in her hip, no limitation in the shoulders, and some limitation of her lumbosacral spine. (TR 176). She had no sensory loss in her extremities or muscle atrophy or weakness, she could heel and toe walk adequately, her leg lengths and circumferences were equal, and her gait was normal with no assistive device. (TR 176). She had a residual physical functional capacity assessment on April 8, 1993, and the doctor concluded she could occasionally lift fifty pounds, frequently lift 25 pounds, and stand, walk, and sit about six hours in an eight-hour workday, and was

limited to stooping only occasionally. (TR 81-82).

In May of 1992 she underwent a cardiac catheterization after complaining of exertional weakness and substernal tightness. (TR 150-158). The test showed she had a 70% stenosis of the mid left anterior descending coronary artery, mild to moderate aortic regurgitation, and angina. (TR 152). She had a second coronary catheterization on June 9, 1992, which showed insignificant coronary disease of the mid left anterior descending coronary artery having 20-30% stenosis, and normal circumflex, right coronary artery, ejection fraction, and hemodynamic data. (TR 168). The diagnosis on the catheterization report was "chest pain of uncertain etiology" (TR 168), but her doctor concluded on that date that she had "[f]unctionally disabling angina." (TR 167). A recommendation was made to evaluate the claimant for coronary spasms with an ergonovine provocation. (TR 168). The ergonovine provocation study was performed on June 10, 1992, and demonstrated no abnormalities. (TR 194). A barium GI series was also run while the claimant was hospitalized, and tests showed a hiatal hernia with reflux. (TR 198).

In her May 19, 1993 report Dr. Dahlman found that claimant had "[a]therosclerotic heart disease, status post balloon angioplasty by history, residual angina pectoris, [and] [m]urmur of aortic stenosis and pulmonary insufficiency. . ." (TR 176). Significantly, the doctor concluded: "[t]his lady does not appear to have any medical abnormality that would preclude her participation in the labor force at the present time, however, she does have heart murmur which would require further diagnostic study." (TR 177).

Claimant testified that she had not received treatment for her back since 1973 and took only Ibuprofen and aspirin for her pain. (TR 36-37, 40-41). She stated that she takes

nitroglycerin tablets for her chest pain. (TR 51-52). On her disability application she stated that she goes camping and fishing, cares for her three-year old, does housework, cooks three meals a day, washes clothes, grocery shops, gardens, takes 30-45 minute walks, drives short distances, and visits friends and relatives. (TR 109, 114-120). At the hearing she stated that she takes her son to school, takes care of the house, cooks meals, and cares for her son. (TR 40-42).

An old friend, Geri Brewer, testified that she lives about sixty miles from claimant and has known her for seven years. (TR 55). She stated that years ago claimant could go to yard sales and they would do many things together, but now claimant cannot do anything, is unable to sit up and move out of bed, but instead has to roll out, is unable to open jars so her husband has to help her, and once was walking across the living room floor and her legs buckled. (TR 56-57). This testimony is not supported by the medical evidence.

The ALJ asked the vocational expert a hypothetical question about what work an individual can do if she is age 53, has a GED, can lift 50 pounds occasionally and 25 pounds frequently, can stand 6 hours out of an 8-hour day, and has no previous work experience. (TR 60). The vocational expert testified that the hypothetical individual could perform jobs such as laundry worker, cafeteria attendant, hand packager, and assembler. (TR 60-63).

There is no merit to claimant's contentions. The ALJ's determination that she can do medium work is supported by medical evidence from her treating physicians, the medical consultant, and the vocational expert. Dr. Dahlman concluded she could

participate in the work force (TR 177), and there is no medical evidence that she cannot.⁴ A residual functional capacity assessment done on April 8, 1993, found that she could stand, walk, and/or sit (with normal breaks) for six hours in an eight hour workday. (TR 81-82). The ALJ included the requirements of medium work in his hypothetical question to the vocational expert, and the expert concluded that there were many jobs that claimant could perform. (TR 60-63).

The record provides substantial evidence to support a finding that claimant meets the exertional requirements for medium work, even though the medical consultant stated she should only stoop occasionally. The ALJ did not use his own "medical expertise" to determine what claimant's residual capacity was. He noted that there was no physical basis for claimant's complaints of pain. She had no significant blockages so as to cause angina, the ergonovine test showed that she was having no problems with her coronary arteries insofar as spasms were concerned, she had a normal range of motion study of her joints, including the lumbar spine, which had some slight decreases in range of motion because of the prior back surgery, she had no pain on range of motion studies, and there was no other medical evidence demonstrating any diminution in her residual functional capacity because of joint problems. (TR 17).

The ALJ properly considered the limited affects of claimant's pain under the guidelines set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987). (TR 16-19).

⁴Claimant points out that Social Security Ruling 85-15 states that "[s]ome stooping (bending the body downward and forward by bending the spine at the waist) is required to do almost any kind of work, particularly when objects below the waist are involved. If a person can stoop occasionally (from very little up to one-third of the time) in order to lift objects, the sedentary and light occupational base is virtually intact. However, because of the lifting required for most medium, heavy, and very heavy jobs, a person must be able to stoop frequently (from one-third to two-thirds of the time); inability to do so would substantially affect the more strenuous portion of the occupational base." However, there is limited stooping required by most of the jobs listed by the vocational expert, such as cafeteria attendant, packager, and assembler, so claimant's ability to stoop only occasionally would not preclude her from doing these jobs

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

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

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. She must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is

reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

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

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

Dated this 15th day of November, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:bolin.or

FILED

NOV 16 1995

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

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

LINDA DAVENPORT,
Plaintiff

v.

SHIRLEY CHATER,
Commissioner, Social Security
Administration,
Defendant.

CIVIL ACTION NO. 95-C-759-W

ENTERED ON DOCKET

DATE NOV 17 1995

ORDER

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

THUS DONE AND SIGNED on this 15th day of November, 1995.


JOHN LEO WAGNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

9

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

NOV 16 1995

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

LINDA DAVENPORT,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,²)
)
 Defendant.)

Case No: 95-C-759-W

ENTERED ON LOCKET
DATE NOV 16 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Linda Davenport, in accordance with this court's Order filed November 15th, 1995.

Dated this 15th day of November, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 10 1995

David M. Leverage, Court Clerk

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 KENNETH RAY HARRIS; ROSA)
 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
DATE NOV 17 1995

Civil Case No. 95 C 478B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of Nov, 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; the Defendant, HILLCREST MEDICAL CENTER, Corporation, appears by its Attorney, Mark W. Dixon; and the Defendants, KENNETH RAY HARRIS and ROSA HARRIS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, HILLCREST MEDICAL CENTER, a Corporation, signed a Waiver of Summons on May 30, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA

TAX COMMISSION, was served a copy of Summons and Complaint on May 24, 1995, by Certified Mail.

The Court further finds that the Defendants, KENNETH RAY HARRIS and ROSA HARRIS, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 20, 1995, and continuing through August 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, KENNETH RAY HARRIS and ROSA HARRIS, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, KENNETH RAY HARRIS and ROSA HARRIS. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to

jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 26, 1995; that the Defendant, HILLCREST MEDICAL CENTER, a Corporation, filed its Answer on June 6, 1995; and that the Defendants, KENNETH RAY HARRIS and ROSA HARRIS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Seven (7), Block Nineteen (19), SUBURBAN HILLS
ADDITION to the City of Tulsa, County of Tulsa, State of
Oklahoma, according to the recorded plat thereof.**

The Court further finds that on August 25, 1983, the Defendant, KENNETH RAY HARRIS and Ermastine Harris, executed and delivered to HARRY MORTGAGE CO., their mortgage note in the amount of \$29,750.00, payable in monthly installments, with interest thereon at the rate of Thirteen and One-Half percent (13.50%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, KENNETH RAY HARRIS, a single person, and Ermastine Harris, a single person, executed and delivered to HARRY MORTGAGE CO., a mortgage dated August 25, 1983, covering the above-described property. Said mortgage was recorded on August 26, 1983, in Book 4721, Page 993, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 14, 1983, HARRY MORTGAGE CO., assigned the above-described mortgage note and mortgage to PULASKI BANK AND TRUST COMPANY. This Assignment of Mortgage was recorded on September 16, 1983, in Book 4728, Page 692, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 1, 1984, PULASKI BANK AND TRUST COMPANY, assigned the above-described mortgage note and mortgage to SIMMONS FIRST NATIONAL BANK OF PINE BLUFF. This Assignment of Mortgage was recorded on June 3, 1985, in Book 4866, Page 2441, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 17, 1991, SIMMONS FIRST NATIONAL BANK OF PINE BLUFF, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 28, 1991, in Book 5331, Page 1483, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1991, the Defendant, KENNETH RAY HARRIS and Ermastine 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 July 1, 1992, and February 1, 1994.

The Court further finds that the Defendant, KENNETH RAY 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, KENNETH RAY HARRIS, is indebted to the Plaintiff in the principal sum of \$39,684.45, plus interest at the rate of 13.50 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$3.00 which became a lien on the property as of July 2, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, HILLCREST MEDICAL CENTER, a Corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the amount of \$1,141.75, plus interest and attorneys fees, which became a lien on the property as of November 22, 1991. Said lien is 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 \$141.84 which became a lien on the property as of February 4, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KENNETH RAY HARRIS and ROSA HARRIS, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, KENNETH RAY HARRIS, in the principal sum of \$39,684.45, plus interest at the rate of 13.50 percent per annum from May 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, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$3.00, plus costs and interest, for personal property taxes for the year 1989, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, HILLCREST MEDICAL CENTER, a Corporation, have and recover judgment in the amount of \$1,141.75, plus interest and attorneys fees, for its judgment.

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 \$141.84, 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, KENNETH RAY HARRIS and ROSA 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, KENNETH RAY HARRIS, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without 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 \$3.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, HILLCREST MEDICAL CENTER, a Corporation, in the amount of \$1,141.75, plus attorneys fees and interest.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$141.84, plus accrued and accruing interest, for state income taxes.

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

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

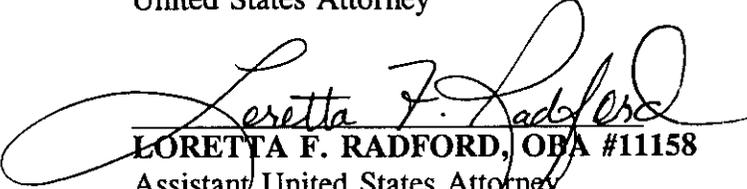
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



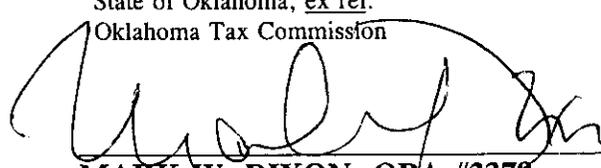
LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



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



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



MARK W. DIXON, OBA #2378
1437 South Boulder, Suite 900
Tulsa, OK 74119
(918) 582-3191
Attorney for Defendant,
Hillcrest Medical Center, a Corporation

Judgment of Foreclosure
Civil Action No. 95-C 478B

LFR:flv

FILED

NOV 16 1995

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

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

WILLIS AND JUANITA YOUNG,)
)
 Plaintiffs,)
)
 vs.)
)
 BURLINGTON NORTHERN RAILROAD,)
)
 Defendant.)

Case No. 95-C-124-K

ENTERED ON DOCKET

ORDER DISMISSING DEFENDANT WITH PREJUDICE DATE ~~NOV 17~~ NOV 16 1995

NOW ON THIS 16 day of Nov, 1995, this matter comes on before me, the undersigned United States District Court Judge of the Northern District of Oklahoma, pursuant to the October 30, 1995 filing of Plaintiff's *Dismissal With Prejudice*, and hereby grant the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant in the above captioned cause is hereby dismissed with prejudice to refileing.

s/ TERRY C. KERN

UNITED STATES DISTRICT COURT JUDGE

ROBERT L. BRIGGS, OBA #10215
BRIGGS, SMITH & CATCHELL
Oil Capital Building
507 S. Main, Suite 605
Tulaz, OK 74103
(918) 599-7780
ATTORNEYS FOR PLAINTIFFS

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

VIRGIL RAY FIELDS,
Petitioner,
vs.
DENISE SPEARS,
Respondent.

)
)
)
)
)
)
)
)
)
)
)

ENTERED ON DOCKET
DATE NOV 17 1995

Case No. 95-C-485-K

FILED

NOV 16 1995

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

ORDER

This matter comes before the Court on a pro se petition for a writ of habeas corpus. Petitioner, currently confined in the Oklahoma Department of Corrections (DOC), alleges that he has been denied the right to earn credits at Level IV following reincarceration in the DOC. He claims that the failure to place him in a higher credit level deprived him of due process. Respondent has filed a Rule 5 response to which Petitioner has replied. For the reasons stated below the petition for a writ of habeas corpus should be denied.

In April 1993, Petitioner's conviction was reversed and remanded to Tulsa County District Court, and Petitioner was transferred to the Tulsa County Jail for further proceedings. At the time his conviction was reversed, Petitioner was earning credits at Level IV and was incarcerated at Joseph Harp Correctional Center (JHCC). On remand, Petitioner pleaded guilty to only one of the charges and was sentenced to twenty-five years instead of forty years. Upon reincarceration in the DOC on

7

November 11, 1993, Petitioner was transported to Lexington Assessment and Reception Center (LARC) and processed as a new arrival, and placed on Level II. He was later transferred to Dick Conner Correctional Center (DCCC) where he remained on Level II until June 1, 1994, at which time he was reclassified and placed on Level IV.

In the instant action, Petitioner contends that he should have been reincarcerated at the same institution and at the same earned credit level. He also contends that he should be awarded those additional credits under Level IV which he was unable to earn from November 11, 1993, through June 1, 1994.

Petitioner's reclassification and transfer claims must fail. Petitioner has no constitutional right to be incarcerated in a particular cell or facility, and his transfer to LARC and then DCCC, in and of itself, does not implicate a constitutional right of Petitioner. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Petitioner may have had in remaining at JHCC is too insubstantial to rise to the level of due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"). Additionally, federal courts do not interfere in classification and placement decisions.

Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983).

In the alternative, the Court finds that Petitioner did not have a liberty interest in remaining at Level IV. In Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974), the U.S. Supreme Court held that the Due Process Clause alone does not create a liberty interest in good-time credits. The Wolff court, however, recognized that once a state creates a right to good-time credits, the Due Process Clause protects this right from being arbitrarily abrogated. Id. at 557. The issue in this case is, therefore, whether Oklahoma law creates a right or justifiable expectation in being reincarcerated at the same credit level.

The Supreme Court recently reformulated the test for determining whether a state law creates a protected liberty interest. See Sandin v. Conner, 115 S.Ct. 2293 (1995).¹ In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnell, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976).² Under Sandin, therefore,

¹ The Supreme Court's decision in Sandin applies retroactively to the instant case because the Court applied the rule announced in Sandin to the parties in that case. See Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993) (no court may refuse to apply rule of federal law retroactively once the Court applies it to the parties before it).

² Under Hewitt, in order for a state law establishing procedural guidelines for prisons to create a liberty interest, the law must use "explicitly mandatory language" that forbids certain outcomes absent "specific substantive predicates." Hewitt, 459

courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301.³

U.S. at 472. This approach focused on the language of the regulation rather than the nature of the deprivation and "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Sandin, 115 S.Ct. at 2299. The methodology of Hewitt has discouraged states from codifying prison management procedures and involved federal courts in the day-to-day management of prisons. Id.

³ In Sandin, the plaintiff was involved in an altercation with a prison guard and was charged with misconduct. The plaintiff appeared before an adjustment committee, which refused his request to present witnesses at the hearing. The committee found him guilty and sentenced him to 30 days disciplinary segregation. Nine months later, an administrator found one of the charges against the plaintiff unsupported and expunged his record of that charge. Id. at 2295-96. Alleging a deprivation of due process related to the disciplinary hearing, the plaintiff sued for injunctive relief, declaratory relief and damages. Id. The Ninth Circuit Court of Appeals found that plaintiff had a liberty interest in remaining free from disciplinary segregation based on a prison regulation that "instructs the committee to find guilt when a charge of misconduct is supported by substantial evidence." Id. at 2296-97.

The Supreme Court applied its new test and reversed. The Court found that segregated confinement of inmates did not implicate the Due Process Clause because it did not "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id. at 2301. The Court noted that disciplinary segregation conditions were substantially similar to those faced by inmates in administrative segregation and protective custody. Id. Therefore, plaintiff's confinement "did not exceed similar, but totally discretionary confinement in either duration or degree of restriction." Id. The Court further noted that even inmates in the general population at the prison in question are subject to significant amounts of "lockdown time." Id. Because the plaintiff's confinement for 30 days in disciplinary segregation "did not work a major disruption in his

Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue in this case. The inability to earn credits at the desired level does not "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301. Petitioner alleges no law or facts that suggest the basis for any reasonable expectation on his part of a right to unearned good-time credits. Nor has the Court found any. Petitioner's reliance on DOC Policy OP-060211 is misplaced. That policy does not provide that upon return to the DOC Petitioner must be placed at the same level. Rather it merely states that "[w]hen a conviction is set aside, the offender is retried, convicted of the same offense, and returned to the Department of Correction's custody, the time served and credit earned and lost under voided conviction must be credited toward the subsequently imposed sentence."

Accordingly, this Court holds that the DOC did not violate Petitioner's due process rights in declining to reclassify him at Level IV. Petitioner's request for habeas corpus relief must, therefore, be DENIED.

SO ORDERED THIS 16 day of November, 1995.


TERRY Q. KERN
UNITED STATES DISTRICT JUDGE

environment," the Court held that the prison regulation had not created a constitutionally protected liberty interest. Id. at 2301-02.

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

FILED

NOV 16 1995

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

LAWRENCE J. HOMOLKA,)
)
Plaintiff,)
)
v.)
)
HARTFORD INSURANCE GROUP,)
Individually and d/b/a)
HARTFORD UNDERWRITERS)
INSURANCE COMPANY,)
)
Defendant.)

Case No. 95-C-727(H) ✓

ENTERED ON DOCKET

DATE 11-17-95

ORDER

This matter comes before the Court on Plaintiff's Motion to Dismiss for Lack of Jurisdiction. The Court treats this Motion as a Motion to Remand. Plaintiff originally brought this action in Tulsa County District Court. Defendant removed the case on the basis of diversity jurisdiction. It is uncontroverted that complete diversity of citizenship exists between the parties. The only question remaining for the Court is whether the jurisdictional amount is satisfied.

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). Here, the face of the petition did not establish that Plaintiff sought in excess of \$50,000. The Tenth Circuit has recently clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$50,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted) The burden is on the party requesting

12

removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." (citation omitted) Moreover, there is a presumption against removal jurisdiction. (emphasis in original)

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995).

Where the face of the petition does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$50,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$50,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction. Laughlin, 50 F.3d at 873. And the Tenth Circuit has clearly stated what is required to satisfy that burden.

Here, Defendant did not comply with the requirements of Laughlin in the Notice of Removal. In addition, Plaintiff filed a Declaration clarifying, under oath, that, in the petition, he did not seek in excess of \$50,000. Because Defendant has not met its burden, as defined by the Laughlin court, and because Plaintiff does not seek in excess of \$50,000 in this case, the Court hereby grants Plaintiff's Motion to Remand (Docket # 8) and orders the

Court Clerk to remand the case to District Court in and for Tulsa County.

IT IS SO ORDERED.

This 15TH day of NOVEMBER, 1995.



Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET
DATE NOV 17 1995

RUTHIE M. MCNEELEY,
Plaintiff,

vs.

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

No. 95-C-73-K

FILED

NOV 16 1995

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

ORDER

On August 1, 1995 Magistrate Judge McCarthy entered his Report and Recommendation, after hearing, regarding defendant's motion to dismiss. The Magistrate Judge recommended the motion be granted. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

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

ORDERED this 16 day of November, 1995.


PERRY C. KERN
UNITED STATES DISTRICT JUDGE

10

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV 17 1995

CAROLYN SMITH,
Plaintiff,

) STATEMENT OF OBJECTION
) Counsel for Plaintiff
) does not object to this motion.

v.

) Case No. 95-C-118-J

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

)
)
)
)
)
)

FILED

NOV 16 1995

Defendant.

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

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action.

DATED this 16th day of Nov, 1995.

S/Sam A. Joyner
U.S. Magistrate

SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

FILED

NOV 15 1995

sa

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

JUDY MAXON,)
)
Plaintiff,)
)
v.)
)
TEXACO REFINING AND)
MARKETING INC.,)
)
Defendant.)

Case No. 95-C-408(H) ✓

ENTERED ON DOCKET

11-16-95

O R D E R

This matter comes before the Court on Plaintiff's Motion to Remand. Plaintiff originally brought this action in Tulsa County District Court. Plaintiff's petition alleges two causes of action and claims actual damages "in excess of \$10,000.00" for each cause of action and punitive damages "in excess of \$10,000.00" for each cause of action.¹ Defendant Texaco Refining and Marketing Inc. ("Texaco") removed the case on the basis that the petition alleged a federal question under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"). Texaco later filed a supplemental notice of removal stating that removal is also proper on the basis of diversity jurisdiction.

¹ In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract.

Okla. Stat. Ann. tit. 12, § 2008(2) (West 1993).

15

Plaintiff has moved to remand on the basis that she does not allege a claim under the ADA and that the jurisdictional amount in controversy is not satisfied. In the petition, Plaintiff did not raise the ADA. Based on the plain language of the petition and on Plaintiff's denial of a claim under the ADA, the Court declines to exercise jurisdiction over this case on that basis.

Texaco further alleges that this case is properly before the Court on the basis of diversity jurisdiction. It is uncontroverted that complete diversity of citizenship exists between the parties. The only question remaining for the Court is whether the jurisdictional amount is satisfied.

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The Tenth Circuit has recently clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$50,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted) The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." (citation omitted) Moreover, there is a presumption against removal jurisdiction. (emphasis in original)

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995).

In Laughlin, the plaintiff originally brought his action in state court. Defendant removed to federal court based on diversity

jurisdiction. The court granted summary judgment to defendant, and plaintiff appealed. On appeal, the Tenth Circuit raised the issue of subject matter jurisdiction and remanded the case to state court. Neither the petition nor the notice of removal had established the requisite jurisdictional amount. The petition alleged that the amount in controversy was "in excess of \$10,000" for each of two claims. The notice of removal did not refer to an amount in controversy, but did contain a reference to the removal statute, 28 U.S.C. § 1441. In its brief on the issue of jurisdiction, Kmart set forth facts alleging that, at the time of removal, the amount in controversy was well above the jurisdictional minimum of \$50,000. However, Kmart failed to include those facts in its notice of removal.

The Tenth Circuit held that:

Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Laughlin, 50 F.3d at 873.

In Laughlin, Kmart attempted to rely on Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993). The Shaw court held that "the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded \$50,000." The Tenth Circuit distinguished Shaw, stating:

[w]e do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that

"subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial power to decide a controversy." (citation omitted)

Laughlin, 50 F.3d at 874.

In the instant case, neither the allegations in the petition nor the allegations in the removal documents, establish the requisite jurisdictional amount. The petition alleges two claims. Plaintiff seeks actual damages "in excess of \$10,000" for each claim and punitive damages "in excess of \$10,000" for each claim. Accordingly, the petition alleges damages "in excess of" \$40,000.

Texaco has not complied with the requirements of Laughlin in the removal documents. Specifically, Texaco offers only a conclusory statement of Plaintiff's damages allegations and does not allege any underlying facts with respect to Plaintiff's claims for damages. Texaco states in its supplemental notice of removal that:

[i]n summary, Plaintiff is seeking in excess of \$40,000 on the face of her petition, including two claims for punitive damages, in excess of \$10,000 each, against one of the largest corporations in the country, with a net worth thousands of times greater than \$10,000; it is beyond all reasonable dispute that more than \$50,000 is in controversy here. (emphasis in original)

Where the face of the petition does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$50,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its

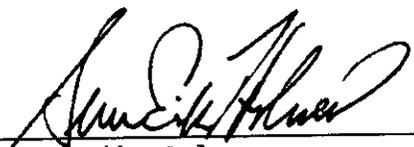
belief that there is more than \$50,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction. Laughlin, 50 F.3d at 873. And the Tenth Circuit has clearly stated what is required to satisfy that burden. Because Texaco has not met its burden, as defined by the Laughlin court, this Court must grant Plaintiff's motion to remand.

Finally, the Court notes that, in Plaintiff's motion to remand, Plaintiff states, "[i]n its' [sic] Amended Notice of Removal, Defendant asserts that the instant action belongs in Federal Court for yet another reason, that there is Diversity, and amount in controversy in excess of \$50,000. There is not." Thus, in a signed motion filed in federal court, Plaintiff has effectively denied that she seeks in excess of \$50,000. On the basis of that denial, the Court believes that Plaintiff's damages in state court should be so limited.

The Court hereby grants Plaintiff's Motion to Remand (Docket # 12) and orders the Court Clerk to remand the case to District Court in and for Tulsa County.

IT IS SO ORDERED.

This 15TH day of NOVEMBER 1995.


Sven Erik Holmes
United States District Judge

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

FILED

NOV 15 1995



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

MICHAEL HENRY MARTIN,)
)
 Plaintiff,)
)
)
)
 v.)
)
 TULSA COUNTY COMMISSIONERS, et al.,)
)
 Defendants.)

Case No: 94-C-193-H ✓

ENTERED ON DOCKET

DATE 11-16-95

REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

This report and recommendation pertains to Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Docket #44)¹, Plaintiff's Objections and Responses to Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Docket #46), and Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (Docket #48).

On April 20, 1995, the court granted summary judgment on all plaintiff's claims in favor of Defendant Fred Cotton, in favor of Defendants Lewis Harris, Robert Dick, and John Selph in their individual capacities, and in favor of all defendants on the claims alleging that plaintiff was attacked in violation of his equal protection, due process, and Eighth Amendment rights (Docket #33). The court declined to grant summary judgment as to plaintiff's claim that defendants violated his Eighth Amendment rights by showing deliberate indifference to his medical needs, finding that questions of fact remained as to

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.

49

whether Defendant Glanz, in both his official and individual capacities, and the Tulsa County Commissioners, in their official capacities, had been deliberately indifferent to such needs and caused substantial harm.

On May 5, 1995, plaintiff filed an amended complaint alleging he was denied proper medical care because of budgetary considerations, that there were policies and procedures in the Tulsa County Sheriff's Department which "established deliberate indifference to the plaintiff's constitutional rights" and violated those rights, and that there was a failure to train and supervise sheriff department employees as to their duty to respect the constitutional rights of inmates. (Docket #34).

Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue as to any material fact, and entitlement to judgment as a matter of law. Rule 56(c), Red.R.Civ.P.²

As the court pointed out in its April 20, 1995 order, the Supreme Court has determined that deliberate indifference to serious medical needs of prisoners falls within

²The court applies the well-established framework for analysis of summary judgment motions. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). 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 nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). 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 (10th Cir. 1988).

the Eighth Amendment proscription against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976), reh'g denied, 429 U.S. 1066 (1977). Pretrial detainees are entitled to the same degree of protection for medical care as that afforded convicted prisoners under the Eighth Amendment. Martin v. Board of County Comm'rs., 909 F.2d 402, 406 (10th Cir. 1990). "Deliberate indifference" may be manifested by "prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104-05.

The Supreme Court later ruled that the test for deliberate indifference set out in Estelle has both an objective component, requiring that pain or deprivation be sufficiently serious, and a subjective component, requiring that offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298 (1991). The Tenth Circuit has held that a delay in medical care can constitute a claim if the delay results in "substantial harm." Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) (citation omitted).

The court has determined that there is no dispute that plaintiff had a serious jaw condition which required surgery, thus satisfying the objective component of the Estelle test. As to the defendants' state of mind, plaintiff claims that his medical treatment was intentionally delayed because of budgetary constraints until he was moved to the State Department of Corrections. He relies on prison medical records, deposition testimony, and an article that appeared in the Tulsa World on August 1, 1992, reporting that Lt. Mark Williamson of the Tulsa Sheriff's Department had said that:

[m]edical costs would have been a lot higher last month if another piece of surgery hadn't been delayed until August . . . surgical costs for a prisoner

with a malignant tumor in his jaw are expected to hit \$22,000 when the operation is performed Authorities said the tumor apparently developed while the inmate was in custody.

In their brief in support of the motion for summary judgment, defendants have presented evidence showing that plaintiff went through medical screening when he entered the Tulsa County Jail on April 30, 1992 and reported he had "some type of tumor below gum line." (Ex. "H" to Defendants' Brief ("Brief"), Docket #45). On May 4, 1992, he was placed on a dental list and x-rays were taken on May 21 and 28, 1992, and revealed a "large nodule" or "large cyst" (Ex. "I" to Brief).

Plaintiff saw Dr. Donal Woodward, an oral surgeon, on June 10, 1992 (Ex. "B" to Brief). Dr. Woodward recommended a biopsy to evaluate the "bony lesion," and on June 15 an appointment was made with the doctor for June 24, 1992, for extraction of teeth (Ex. "L" to Brief).

However, on June 24, 1992, plaintiff was moved to a different cell to "protect" him, and he was seen June 28, 1992, and July 10, 1992, for "light burns" on his face. It is unclear why the dental appointment was changed, but he complained of no jaw pain until July 14 (Ex. "L" to Brief). A biopsy was done on July 16, 1992, by Dr. Woodward, who ordered plaintiff to return in a week (Ex. "B" and "L" to Brief).

According to the doctor's records, plaintiff returned to Dr. Woodward in a week, on July 23, 1992, and was in no pain with no signs of infection and was told the growth was benign (Ex. "B" to Brief). The prison records do not reflect the visit (Ex. "L" to Brief). However, the prison records show on July 25, 1992, "paperwork . . . from Referral physicians report from 7/23/92 to make appointment in one week" and on July 27, 1992,

a "new appointment" was made "per Sgt. Pilant" (Ex. "L" to Brief). Plaintiff reported "yellowish fluid drainage" from his jaw on July 26 and 30, 1992, and August 5, 1992, but told the prison nurse he no longer needed pain pills on July 28, 1992 (Ex. "M" to Brief).

Plaintiff was seen by Dr. Woodward on August 10, 1992, and the doctor reported fluid draining from the surgical site, but no acute infection (Ex. "B" to Brief). The doctor prescribed penicillin and noted that the tooth extractions should be rescheduled "due to time constraints (45 minutes late) ASAP" (Ex. "B" to Brief). Prison notes from August 7 show that Dr. Woodward's office was called to verify the August 10, 1992 visit, and the doctor stated he needed to see plaintiff for sure on the tenth, but the surgery maybe could wait for thirty days (Ex. "L" to Brief).

All records reflect that plaintiff returned to Dr. Woodward on August 17, 1992, and three teeth were extracted (Ex. "B" and "L" to Brief). That was his last visit to Dr. Woodward, who stated in his affidavit that he had planned to do a resection of the right mandible after the jaw healed (Ex. "A" to Brief). Dr. Woodward stated that he scheduled six appointments for plaintiff between June 10 and July 17, 1992, and no appointments "were cancelled or changed" by him or the sheriff's office, but his medical records show only two appointments, on June 10 and July 16 (Ex. "A" and "B" to Brief). He also stated that plaintiff had the growth "for several years" and any delay of surgery, even a delay of several months, "would have had no impact whatsoever on his present condition." (Ex. "A" to Brief).

Plaintiff notes that he was not put on a dental call list until five days after his initial screening, did not see a dentist who could do an x-ray until 29 days after, and did not see

an oral surgeon for two more weeks for a biopsy. During the next 37 days, claimant submitted several sick-call slips, two of which mentioned jaw pain, and on those occasions pain medication was prescribed. A biopsy was done on July 16, 1992, 45 days after the dentist found the cyst and 78 days from when he first informed the Tulsa County Jail officials of his complaint about his jaw.

Plaintiff claims that he was tried and convicted on July 9, 1992, and a week later the biopsy was done, which shows that the procedure only occurred after jail officials knew that the plaintiff would soon be sentenced and released to the custody of the Department of Corrections or to probation, before expensive surgery could be performed.

Plaintiff complains that he did not receive the medications that were ordered post-biopsy, even though he complained several times, beginning on July 26, 1992, of the symptoms of an infection in his jaw. He also points out that on July 27 Sergeant Pilant cancelled his appointments with Dr. Woodward, so 25 days passed from when his "treatment plan was developed (July 23, 1992) until the first procedure of that plan was performed on August 17, 1992." He contends that the course of his treatment after leaving the Tulsa County Jail is irrelevant to the defendants' liability in this case.

In addition to the newspaper article mentioned above, plaintiff's argument is supported by certain statements made by Defendant Sheriff Glanz and a Tulsa County Sheriff, Mark Williamson, in their depositions taken on August 9, 1995, in which they discuss the budgetary constraints on the sheriff department's activities, fiscal shortfalls, and attempts to cut the budget (Ex. "C" & "D" to Brief in Support of Plaintiff's Objection and Response to Defendants' Motion to Dismiss or in the Alternative, Motion for Summary

Judgment ("Plaintiff's Brief"), Docket #47). The Sheriff admitted that budgetary problems could affect the decision-making of his employees (Ex. "C" to Plaintiff's Brief, pgs. 22-24, 27-28, 35-37). Lt. Williamson did not deny that he spoke with the reporter who wrote the newspaper article mentioned above about the budget constraints on jail activities (Ex. "D" to Plaintiff's Brief, pg. 10).

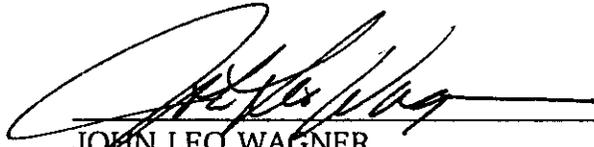
A supervisor of a state agency is liable for civil rights violations if an "affirmative link" exists between the constitutional violation and either the supervisor's "personal participation, his exercise of control or direction, or his failure to supervise." Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988) (quoting McKay v. Hammock, 730 F.2d 1367, 1374 (10th Cir. 1984)). To be liable, a superior must have participated in, or acquiesced in, the constitutional violations. 841 F.2d at 1528. The court in Meade also found that a "[s]heriff is responsible for making medical care available when necessary to pretrial detainees." 841 F.2d at 1530-31. The County Commissioners are required to inspect the jails at least once a year and to fully examine the health, cleanliness, and discipline conditions. Id.; Okla. Stat. tit. 57, § 1. Plaintiff alleges derelictions in these supervisory duties.

Defendants have once again failed to refute the plaintiff's allegations, as discussed in the newspaper article. The events and testimony outlined above show material questions of fact exist as to whether deliberate indifference to his medical needs was shown and whether budgetary considerations resulted in an intentional delay of his treatment, causing him unnecessary suffering, and, thus, whether defendants may have possessed sufficiently culpable states of mind so as to be liable for harm to plaintiff.

Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Docket #44) should be denied.

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 these findings 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 14th day of November, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Martin.TCC

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

F I L E D

NOV 15 1995

TONY LAMAR VANN,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA DEPARTMENT OF HUMAN)
 SERVICES,)
)
 Defendant.)

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

No. 95-C-1103-BU

ENTERED ON DOCKET
NOV 16 1995
DATE _____

ORDER

On November 6, 1995, Tony Lamar Vann, a state inmate, filed a motion for leave to proceed in forma pauperis along with a notice of "Removal of Case from State Court." 28 U.S.C. § 1146(a). Mr. Vann seeks to remove a paternity action which the Oklahoma Department of Human Services brought against him earlier this year in Osage County District Court.

Under 28 U.S.C. § 1447(c), "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Lack of subject matter jurisdiction may be asserted by the Court sua sponte, at any time. Jeter v. Jim Walter Homes, Inc., 414 F.Supp. 791 (W.D.Okla. 1976). The existence of federal question jurisdiction is governed by the "well-pleaded complaint" rule. "Whether a case is one arising under [federal law] ... must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration...." Oklahoma Tax Commission v. Graham, 489 U.S. 838, 840-1, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989). A case is not properly removed to federal court unless it might have been

brought there originally. Id., see also Fajen v. Foundation Reserve Insurance Co., Inc., 683 F.2d 331 (10th Cir. 1982).

This Court lacks subject matter jurisdiction over Mr. Vann's action. Paternity is a matter of state law and Mr. Vann has not mentioned any federal question issue. Moreover, there is no diversity in the instant action. Accordingly, this matter was improvidently removed to federal court and it is hereby REMANDED to the District Court of Osage County, State of Oklahoma. Mr. Vann's motion for leave to proceed in forma pauperis (docket #2) is GRANTED.

IT IS SO ORDERED this 15th day of November, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

INDEXED ON DOCKET
11-16-95

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 KELLY JEAN HILL aka Kelly J. Hill;)
 MICAHA RAY HILL, BENJAMIN)
 FRANKLIN SAVINGS ASSOCIATION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED
NOV 15 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT
Civil Case No. 95 C 476H ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15TH day of NOVEMBER, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, KELLY JEAN HILL aka Kelly J. Hill, MICAHA RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION, appear not, but make default.

The Court further finds that the Defendants, KELLY JEAN HILL aka Kelly J. Hill, MICAHA RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 1, 1995, and continuing through October 6, 1995, as

more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, KELLY JEAN HILL aka Kelly J. Hill, MICAH RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, KELLY JEAN HILL aka Kelly J. Hill, MICAH RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1995; and that the Defendants, KELLY JEAN HILL aka Kelly J.

Hill, MICAH RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, KELLY JEAN HILL, is one and the same person as Kelly J. Hill, and will hereinafter be referred to as "KELLY JEAN HILL." The Defendants, KELLY JEAN HILL and MICAH RAY HILL, are both single unmarried persons.

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 Hundred (200), of Re-Subdivision of Lots 2, 3, 4, 5, 6, 7, 8, 9, and 10, Block Two (2), RODGER'S HEIGHTS SUBDIVISION, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on September 30, 1986, Randell E. Adams and Michelle J. Adams, executed and delivered to Mercury Mortgage Co., Inc. a corporation, their mortgage note in the amount of \$54,806.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Randell E. Adams and Michelle J. Adams, husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated September 30, 1986, covering the above-described property. Said mortgage was recorded on October 3, 1986, in Book 4974, Page 704, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 23, 1990, MERCURY MORTGAGE CO., INC., a 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 February 23, 1990, in Book 5237, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, KELLY JEAN HILL, currently holds title to the property via Warranty Deed, dated April 22, 1988, and recorded on April 26, 1988, in Book 5095, Page 1153, in the records of Tulsa County, Oklahoma, and is the current assumptor of the subject indebtedness.

The Court further finds that on March 1, 1990, the Defendant, KELLY JEAN HILL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 1, 1991, July 1, 1991 and September 1, 1992.

The Court further finds that the Defendant, KELLY JEAN HILL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, KELLY JEAN HILL, is indebted to the Plaintiff in the principal sum of \$79,963.12, plus interest at the rate of 10 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$10.00 which became a lien on the property as of June 25, 1993, a lien in the amount of \$10.00 which became a lien on the

property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KELLY JEAN HILL, MICAH RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, 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 In Rem against the Defendant, KELLY JEAN HILL, in the principal sum of \$79,963.12, plus interest at the rate of 10 percent per annum from May 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, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$20.00, plus costs and interest, for personal property taxes for the years, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, KELLY JEAN HILL, MICAH RAY HILL and BENJAMIN FRANKLIN SAVINGS ASSOCIATION, 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, KELLY JEAN HILL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without 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 \$20.00, personal property taxes which are currently due and owing.

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

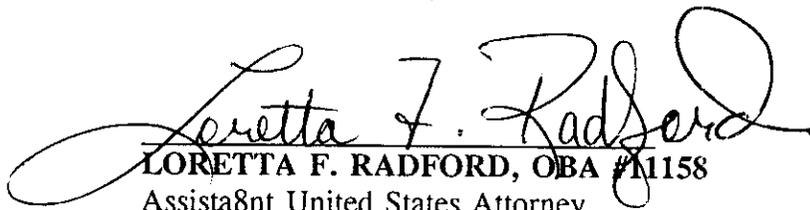
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #1158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4842

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 476H

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 11-16-95

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JERRY HAGGARD aka Jerry Leon)
Haggard aka Jerry L. Haggard;)
PATRICIA HAGGARD aka Patti Haggard)
aka Patricia O. Haggard; PAMELA)
WARD; STATE OF OKLAHOMA, ex)
rel. DEPARTMENT OF HUMAN)
SERVICES; STATE OF OKLAHOMA,)
ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

FILED

NOV 15 1995

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

Civil Case No. 95-C 396H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15th day of November,

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. DEPARTMENT OF HUMAN SERVICES, appears by Tommy Bruce Whitham; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer; and the Defendants, JERRY HAGGARD aka Jerry

Leon Haggard aka Jerry L. Haggard, PATRICIA HAGGARD aka Patti Haggard aka Patricia O. Haggard, and PAMELA WARD, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JERRY HAGGARD aka Jerry Leon Haggard aka Jerry L. Haggard, was served a copy of Summons and Complaint on August 2, 1995, by Certified Mail; that the Defendant, PATRICIA HAGGARD aka Patti Haggard aka Patricia O. Haggard, was served a copy of Summons and Complaint on June 30, 1995, by Certified Mail; that the Defendant, PAMELA WARD, signed a Waiver of Summons on May 8, 1995; that Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on May 2, 1995, by Certified Mail; and that Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on May 2, 1995, by Certified Mail.

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 Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, filed its Answer on May 8, 1995; that Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on May 12, 1995; and that the Defendants, JERRY HAGGARD aka Jerry Leon Haggard aka Jerry L. Haggard, PATRICIA HAGGARD aka Patti Haggard aka Patricia O. Haggard, and PAMELA WARD, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, JERRY HAGGARD, is one and the same person as Jerry Leon Haggard and Jerry L. Haggard, and will hereinafter be referred to as "JERRY HAGGARD." The Defendant, PATRICIA HAGGARD, is one and

the same person as Patti Haggard and Patricia O. Haggard, and will hereinafter be referred to as "PATRICIA HAGGARD." The Defendants, JERRY HAGGARD and PATRICIA HAGGARD, are husband and wife.

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

**Lot Ten (10), Block Two (2), WOODLAND GLEN
EXTENDED TWO, an Addition to the City of Tulsa, County
of Tulsa, State of Oklahoma, according to the Recorded Plat
thereof.**

The Court further finds that on July 14, 1987, Evan C. Russell and Kimberly S. Russell, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., their mortgage note in the amount of \$72,504.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.50%) per annum.

The Court further finds that as security for the payment of the above-described note, Evan C. Russell and Kimberly S. Russell, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP, a mortgage dated July 14, 1987, covering the above-described property. Said mortgage was recorded on July 15, 1987, in Book 5039, Page 826, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 10, 1991, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP, 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 April 22, 1991, in Book 5316, Page 2043, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 12, 1989, Evan C. Russell and Kimberly S. Evans, husband and wife, granted a general warranty deed to Jerry Haggard and Patricia Haggard, husband and wife. This deed was recorded with the Tulsa County Clerk on July 12, 1989, in Book 5194 at Page 153 and the Defendants, JERRY HAGGARD and PATRICIA HAGGARD, assumed thereafter payment of the amount due pursuant to the note and mortgage described above, and are the current assumptors of the subject indebtedness.

The Court further finds that on March 19, 1991, the Defendants, JERRY HAGGARD and PATRICIA HAGGARD, 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 August 13, 1991, September 28, 1992, and February 22, 1993.

The Court further finds that the Defendants, JERRY HAGGARD and PATRICIA HAGGARD, 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, JERRY HAGGARD and PATRICIA HAGGARD, are indebted to the Plaintiff in the principal sum of \$103,215.18, plus interest at the rate of 10.5 percent per annum from May 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, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$2,478.00 which became a lien on the property as of June 25, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JERRY HAGGARD aka Jerry Leon Haggard aka Jerry L. Haggard, PATRICIA HAGGARD aka Patti Haggard aka Patricia O. Haggard, and PAMELA WARD, are in default, and have no right, title or interest in the subject real property.

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

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, JERRY HAGGARD and PATRICIA HAGGARD, in the principal sum of \$103,215.18, plus interest at the rate of 10.5 percent per annum from May 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, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of \$2,478.00 for it judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, JERRY HAGGARD aka Jerry Leon Haggard aka Jerry L. Haggard, PATRICIA HAGGARD aka Patti Haggard aka Patricia O. Haggard, and PAMELA WARD, 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, JERRY HAGGARD and PATRICIA HAGGARD, 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.
DEPARTMENT OF HUMAN SERVICES, in the amount of
\$2,478.00.

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.

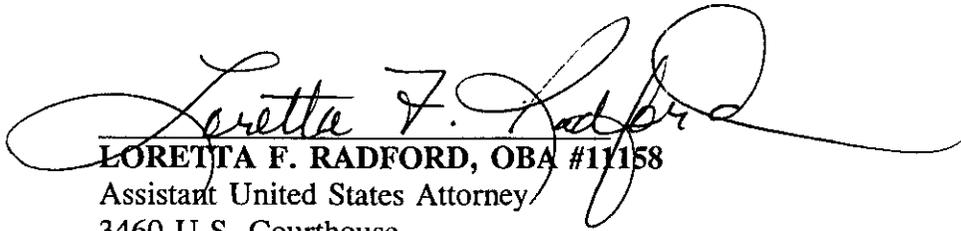
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under and by virtue of this judgment
and decree, all of the Defendants and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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



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



TAMMY BRUCE WHITHAM, OBA firm #44
Department of Human Services
Tulsa District Child Support Ofc.
P.O. Box 3643
Tulsa, OK 74101-3643

Judgment of Foreclosure
Civil Action No. 95-C 396H

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 14 1995 *sa*

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

DAVID COURSEY,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

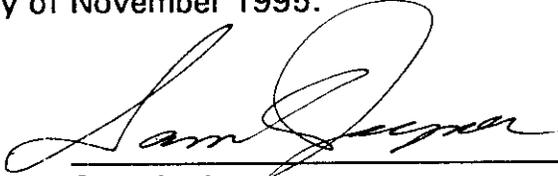
No. 94-C-1160-J ✓

ENTERED ON DOCKET
DATE 11-6-95

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 14 day of November 1995.



Sam A. Joyner

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 Judgment refers to the Secretary because she was the appropriate party at the time of the underlying decision.

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

ENTERED ON DOCKET
DATE 11-16-95

FEDERAL DEPOSIT INSURANCE CORPORATION,)
)
)
Plaintiff,)
)
)
vs.)
)
)
HENRY G. WILL and VIRGINIA C.)
WILL, as husband and wife;)
HENRY G. WILL as personal)
guarantor of the Debts of)
Midtown Properties; COUNTY)
TREASURER OF DELAWARE COUNTY)
OKLAHOMA; MIDTOWN PARTNERS,)
an Oklahoma General Partner-)
ship d/b/a MIDTOWN PROPERTIES;)
DAVID L. SOBEL, as a personal)
guarantor of the Debts of)
Midtown Properties; MARVIN L.)
MORSE, as personal guarantor)
of the Debts of Midtown)
Properties;)

Case No. 92-C-445-~~EH~~ ✓

FILED

NOV 15 1995

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

ORDER

This matter came before the Court upon the joint application of the Parties for the Administrative Closing of this action without prejudice to the reopening if the parties fail to comply with the settlement agreement, and the Court being sufficiently advised;

IT IS HEREBY ORDERED that this action is hereby Administratively Closed, subject to being reopen if Henry G. Will and Virginia Will or the FDIC fail to comply with the settlement agreement.

DATED: November 15, 1995


UNITED STATES DISTRICT JUDGE

24

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

FILED

NOV 15 1995

fr

BEATRICE WILKERSON, individually and as)
Special Administrator of the)
Estate of William E. Wilkerson,)
Plaintiff,)

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

Vs.)

No. 93-CV-886-H ✓

BOARD OF COUNTY COMMISSIONERS OF)
CREEK COUNTY, OKLAHOMA; et al.,)
Defendants.)

ENTERED ON DOCKET

DATE 11-16-95

ORDER SUSTAINING MOTION TO DISMISS WITH PREJUDICE

Now on this 15TH day of November, 1995, this matter comes on for hearing on the Parties' Motion to Dismiss the above styled and numbered matter with Prejudice. After reviewing the file and evidence before this Court, **IT IS HEREBY ORDERED** that the parties' Motion to Dismiss is sustained.

IT IS FURTHER ORDERED that the above styled and numbered matter be Dismissed With Prejudice and forever barred from re-filing of the same.



JUDGE OF THE UNITED STATES DISTRICT COURT

100

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

FILED
NOV 15 1995

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

WAYNE E. WELLS, and)
DOROTHY E. WELLS,)
)
Plaintiffs,)
)
v.)
)
K.J. SAWYER, District Director,)
JERRY McCULLEY, Revenue Officer,)
and the UNITED STATES OF AMERICA,)
)
Defendants.)

Case No. 87-C-283-H

CONSOLIDATED

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
WAYNE E. WELLS, DOROTHY E. WELLS,)
FEDERAL LAND BANK, STATE OF)
OKLAHOMA, and ALICE O'NEAL, as)
trustee for the DOW TRUST.)

Case No. 92-C-1010-H

ENTERED ON DOCKET
DATE 11-16-95

STIPULATED JUDGMENT

Plaintiff, the United States of America, and defendants,
Wayne E. Wells, Dorothy E. Wells, and the Dow Trust hereby
stipulate to the following:

1. Judgment is entered in favor of the United States for
the outstanding 1983, 1984 and 1985 federal income taxes, accrued
interest, and penalties according to law, assessed against Wayne
E. Wells, set forth as follows:

	Form 1040 1983	Form 1040 1984	Form 1040 1985
Tax Assessed	\$ 5,657.00	\$ 6,055.00	\$ 5,690.00

	Form 1040 1983	Form 1040 1984	Form 1040 1985
Penalties Assessed:			
Delinquency	\$ 1,414.25	\$ 671.52	\$ 539.25
Negligence	\$ 3,041.90	\$ 1,323.36	\$ 904.21
Miscellaneous	\$ 2,500.00	-0-	-0-
Estimated Tax	\$ 346.58	\$ 116.10	-0-
Total Penalties Assessed	\$ 7,302.73	\$ 2,110.98	\$ 1,443.46
Lien Fees	\$ 32.00	-0-	-0-
Interest Assessed	\$ 6,819.80	\$ 5,111.69	\$ 1,549.27
Credits:			
Withholding	(\$ -0-)	(\$ 3,368.92)	(\$ 3,533.02)
Interest Abated	(\$ -0-)	(\$ 2,459.82)	(\$ -0-)
Total Credits	(\$ -0-)	(\$ 5,828.74)	(\$ 3,533.02)
TOTAL DUE	\$ 19,811.53*	\$ 7,448.93*	\$ 5,149.71*

* Plus statutory additions and interest accruing after September 7, 1990.

See Government Exhibits A, B and C.

2. Judgment is entered in favor of the United States for the outstanding 1986 federal income tax, accrued interest, and penalties according to law, assessed against Wayne E. Wells, set forth as follows:

	<u>Form 1040 1986</u>
Tax Assessed	\$ 138.00
Delinquency Penalty Assessed	\$ 100.00
Interest Assessed	\$ 104.09
TOTAL DUE	\$ 342.09*

* Plus statutory additions and interest accruing after September 10, 1990.

See Government Exhibit D.

3. Judgment is entered in favor of the United States for the outstanding 1982 federal income tax, accrued interest, and penalties according to law, assessed against Dorothy E. Wells, set forth as follows:

<u>Form 1040 1982</u>	
Tax Assessed	\$ 4,826.75
Negligence Penalty Assessed	\$ 977.90
Interest Assessed	\$ 1,473.10
Fees and Costs	\$ 20.00
Credits:	
Withholding	(\$ 1,536.00)
Payment	(\$ 314.12)
Total Credits	(\$ 1,850.12)
TOTAL DUE	\$ 5,447.63*

* Plus statutory additions and interest accruing after July 7, 1986.

See Government Exhibit E.

4. Judgment is entered in favor of the United States for the outstanding 1983 federal income tax, accrued interest, and penalties according to law, assessed against Dorothy E. Wells, set forth as follows:

<u>Form 1040 1983</u>	
Tax Assessed	\$ 4,389.00
Penalties Assessed:	
Negligence	\$ 317.25
Estimated Tax	\$ 10.30
Delinquency	\$ 253.10
Total Penalties Assessed	\$ 580.65
Interest Assessed	\$ 242.43
Fees and Costs	\$ 4.00

Form 1040 1983

Withholding Credits (\$ 3,376.60)

TOTAL DUE \$ 1,839.48*

* Plus statutory additions and interest accruing after November 4, 1985.

See Government Exhibit F.

5. Judgment is entered in favor of the United States for the outstanding 1984 and 1985 federal income taxes, accrued interest, and penalties according to law, assessed against Dorothy E. Wells, set forth as follows:

	<u>Form 1040</u> <u>1984</u>	<u>Form 1040</u> <u>1985</u>
Tax Assessed	\$ 5,252.55	\$ 5,474.75
Penalties Assessed:		
Negligence	\$ 1,728.42	\$ 1,352.40
Estimated Tax	\$ 195.20	\$ 313.74
Miscellaneous	\$ 1,313.13	\$ 1,368.69
Addt'l. Misc.	\$ 5,000.00	-0-
Delinquency	\$ 883.38	\$ 1,368.68
Total Penalties Assessed	\$ 9,120.13	\$ 4,403.51
Interest Assessed	\$ 6,948.11	\$ 3,235.98
Credits:		
Withholding	(\$ 1,719.00)	-0-
Interest Abated	(\$ 3,638.87)	-0-
Total Credits	(\$ 5,357.87)	-0-
TOTAL DUE	\$ 15,962.92*	\$ 13,114.24*

* Plus statutory additions and interest accruing after August 4, 1989.

See Government Exhibits G and H.

6. The United States has valid and subsisting federal tax liens, pursuant to 26 U.S.C. Section 6321, upon the subject real located in Creek County, Oklahoma, more properly described as:

The South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) of Section 36, Township 17 North, Range 8 East, containing twenty (20) acres, more or less.

See Government Exhibits I, J, K, L and M.

7. The March 28, 1983 conveyance of one half of the interest in the subject real property, from Dorothy E. Wells to defendant Wayne E. Wells, was made by Dorothy E. Wells without fair and adequate consideration at a time when she was indebted to the United States. This conveyance is therefore set aside.

8. The March 28, 1983 conveyance of the subject real property, from Wayne E. Wells to defendant Alice O'Neal as trustee of the Dow Trust, was made by Wayne E. Wells without fair and adequate consideration at a time when he was indebted to the United States. This conveyance is therefore set aside.

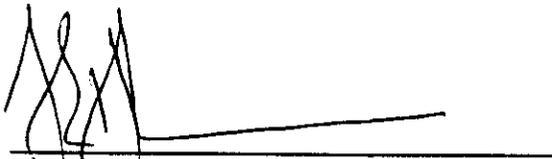
9. Defendants Wayne E. Wells and Dorothy E. Wells continue to have beneficial use of the subject real property. The Dow Trust is the nominee and/or alter ego of Wayne E. Wells and Dorothy E. Wells, who continue to be the true owners of the subject real property.

10. The federal tax liens upon the subject real property, reflecting the income tax liability of Wayne E. Wells and Dorothy E. Wells, are foreclosed and the real property is to be sold pursuant to the provisions of 28 U.S.C. Section 2001, to satisfy

the federal tax liabilities described in paragraphs 1 through 5 above.

11. The Stipulated Judgment resolves, with prejudice, all claims, counterclaims, and defenses litigated by the parties to this action.

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma



F. EUGENE HOUGH
Hough & Wantland
6968 South Utica Avenue
Tulsa, Oklahoma 74135

Telephone: (918) 488-0929

ATTORNEY FOR DEFENDANTS
WAYNE AND DOROTHY WELLS,
AND THE DOW TRUST

Date: October 17, 1995

Virginia M. Navarrete
VIRGINIA M. NAVARRETE
Trial Attorney, Tax Division
U.S. Department of Justice
Box 7238, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6499

ATTORNEY FOR THE UNITED STATES
OF AMERICA

Date: October 17, 1995

IT IS THEREFORE ORDERED AND ADJUDGED that the foregoing stipulations entered into between the plaintiff, United States of America, and the defendants Wayne E. Wells, Dorothy E. Wells, and the Dow Trust are hereby approved and adopted by the Court.

IT IS SO ORDERED this 15th day of November, 1995.

S/ SVEN ERIK HOLMES

HONORABLE SVEN ERIK HOLMES
United States District Court
Northern District of Oklahoma

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 497-38-4101
 Spouse SSN: Form : 1040
 Period : 8312

Page 1

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
12/30/86	RETURN FILED QUICK ASSESSMENT DELINQUENCY PENALTY NEGLIGENCE PENALTY MISCELLANEOUS PENALTY ESTIMATED TAX PENALTY INTEREST FEES AND COSTS TAX DELINQUENT NOTICE FEES AND COSTS	0.00 5,657.00 1,414.25 3,041.90 2,500.00 346.58 6,819.80 16.00 16.00		18211-017-03053 73251-250-13001	03/09/87 09/07/90 09/07/90 09/07/90 09/07/90 09/07/90 09/07/90 12/31/90 02/18/91

Ending Balance: 19,811.53

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Anette Thredginger

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

Form 4340 Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page.

Under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

for *Maury C. Nelson*

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 497-38-4101
 Spouse SSN: : 1040
 Form Period : 8412

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
12/30/86 04/15/85	RETURN FILED WITHHOLDING CREDITS QUICK ASSESSMENT DELINQUENCY PENALTY NEGLIGENCE PENALTY ESTIMATED TAX PENALTY INTEREST INTEREST ABATED TAX DELINQUENT NOTICE	0.00 6,055.00 671.52 1,323.36 116.10 5,111.69	3,368.92	18211-017-03106 73251-250-13002	03/09/87 09/07/90 09/07/90 09/07/90 09/07/90 09/07/90
10/22/90 12/24/90			2,459.82		

Ending Balance: 7,448.93

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Janette Theudinger

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

FORM 4340

Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 497-38-4101
 Spouse SSN: Form : 1040
 Period : 8512

Page 1

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
12/30/86 04/15/86	RETURN FILED WITHHOLDING CREDITS QUICK ASSESSMENT DELINQUENCY PENALTY NEGLIGENCE PENALTY INTEREST TAX DELINQUENT NOTICE	0.00 5,690.00 539.25 904.21 1,549.27	3,533.02	18211-017-03054 73251-250-13003	03/09/87 09/07/90 09/07/90 09/07/90 09/07/90

Ending Balance: 5,149.71

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

Janette Thudinger

FORM 4340 Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: APRIL 19, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for

Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: WAYNE E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 497-38-4101
 Spouse SSN:
 Form : 1040
 Period : 8612

Page 1

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
07/07/90	RETURN FILED DELINQUENCY PENALTY INTEREST	138.00 100.00 104.09		18221-195-27715	09/10/90 09/10/90 09/10/90
09/10/90 12/03/90	FIRST NOTICE TAX DELINQUENT NOTICE				

Ending Balance: 342.09

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Janette Theberge

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 04/19/95 Initials: JF -PEC

Form 4340 Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

for *Maury C. Nelson*
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: Form : 1040
 Period : 8212

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
04/15/83	RETURN FILED AUDIT DEFICIENCY NEGLIGENCE PENALTY WITHHOLDING CREDITS INTEREST	0.00 4,826.75 977.90	1,536.00	18221-114-57647 18247-567-00548	06/27/83 07/07/86 07/07/86
07/07/86	FIRST NOTICE	1,473.10			07/07/86
10/20/86	TAX DELINQUENT NOTICE FEES AND COSTS	4.00	314.12		02/09/87
03/10/88	PAYMENT FEES AND COSTS	16.00			08/10/92

Ending Balance: 5,447.63

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC

Janette Theberge

United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson

for
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

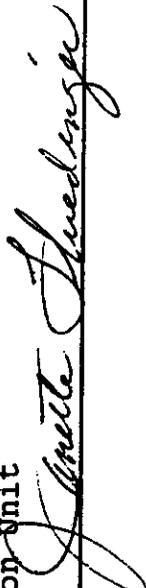
EIN or SSN: 441-38-7147
 Spouse SSN: Form : 1040
 Period : 8312

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
01/08/85	RETURN FILED AUDIT DEFICIENCY NEGLIGENCE PENALTY ESTIMATED TAX PENALTY DELINQUENCY PENALTY WITHHOLDING CREDITS	0.00 4,389.00 317.25 10.30 253.10		18211-043-16040 18247-689-90012	05/20/85 11/04/85 11/04/85 11/04/85 11/04/85
04/15/84	INTEREST	242.43	3,376.60		11/04/85
11/04/85 12/30/85	FIRST NOTICE TAX DELINQUENT NOTICE FEES AND COSTS	4.00			
12/30/85	TAX DELINQUENT NOTICE				02/24/86

Ending Balance: 1,839.48

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit



Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC

Form 4340 Department of the Treasury - Internal Revenue Service

United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page

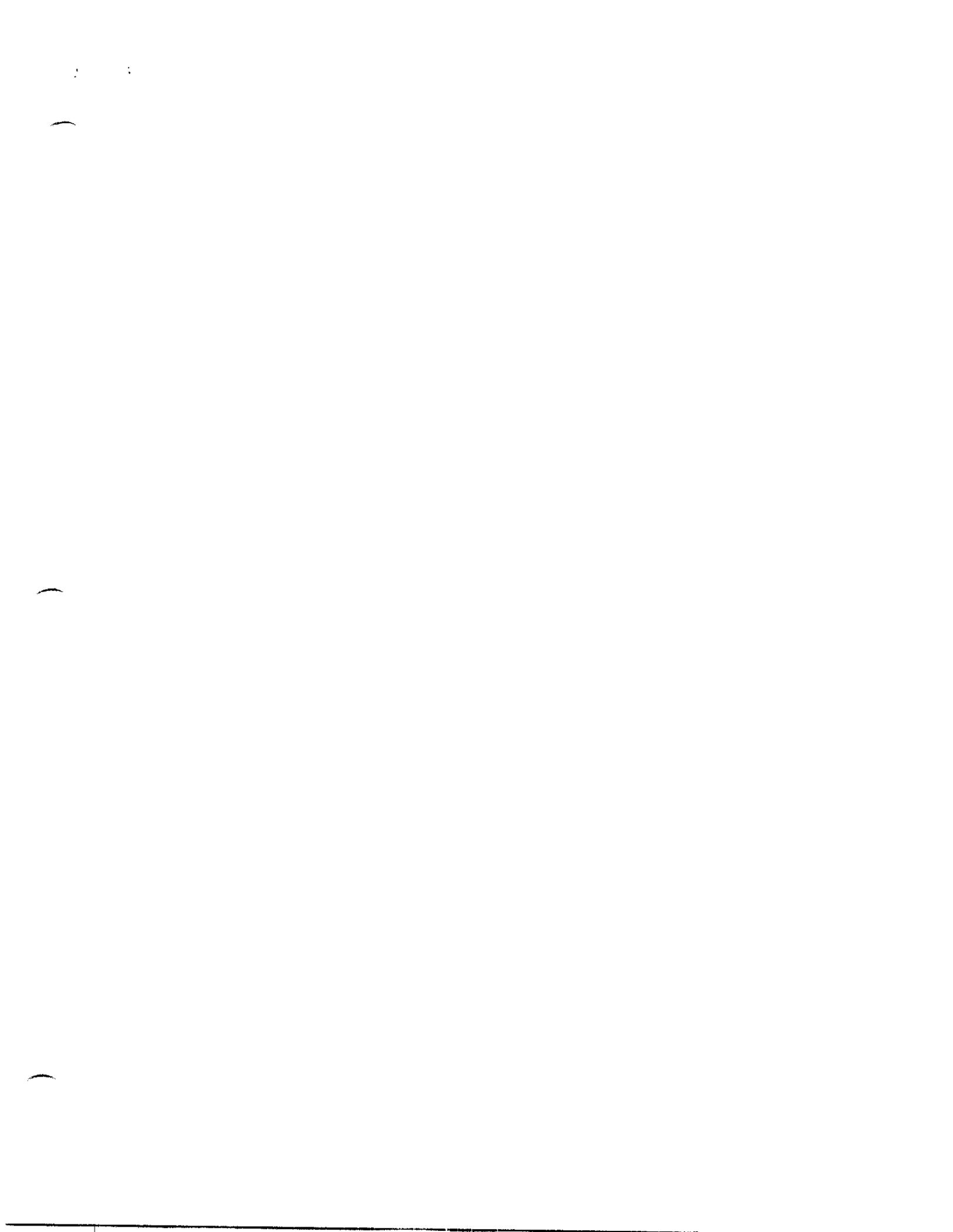
under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson
for
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX





CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: : 1040
 Form Period : 8412

Date	Explanation of Transactions	Assessment (Abatement)	Credit (Credit Reversal)	DLN or Account Number	23C Date
01/02/87	RETURN FILED QUICK ASSESSMENT MISCELLANEOUS PENALTY DELINQUENCY PENALTY ESTIMATED TAX PENALTY NEGLIGENCE PENALTY INTEREST WITHHOLDING CREDITS INTEREST ABATED MISCELLANEOUS PENALTY	0.00 5,252.55 1,313.13 883.38 195.20 1,728.42 6,948.11		18211-017-02941 73251-216-13106	03/09/87 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89
04/15/85 09/04/89		5,000.00	1,719.00 3,638.87		08/04/89

Ending Balance: 15,962.92

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Supervisor (required for certification)
 Certification Unit

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC



United States



of America

Department of the Treasury
Internal Revenue Service

Date: MAY 09, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed transcript of the taxpayer named therein in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interest, abatements, credits, refunds and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification. It consist of 1 page _____

_____ under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Maury C. Nelson

for
Charles J. Peoples, Director
Internal Revenue Service Center
Southwest Region - Austin, TX



CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Name of Taxpayer: DOROTHY E WELLS
 Address: POST OFFICE BOX 1258
 BRISTOW, OKLAHOMA 74010

EIN or SSN: 441-38-7147
 Spouse SSN: _____
 Form : 1040
 Period : 8512

Page 1

Date	Explanation of Transactions	Assessment (Abatement)	Credit Reversal (Credit Reversal)	DLN of Account Number	23C Date
01/02/87	RETURN FILED QUICK ASSESSMENT MISCELLANEOUS PENALTY DELINQUENCY PENALTY ESTIMATED TAX PENALTY NEGLIGENCE PENALTY INTEREST TAX DELINQUENT NOTICE	0.00 5,474.75 1,368.69 1,368.68 313.74 1,352.40 3,235.98		18211-017-03023 73251-216-13108	03/09/87 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89 08/04/89
11/06/89					

Ending Balance: 13,114.24

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of supervisor (required for certification)
 Certification Unit

Jennette Shredinger

Location: INTERNAL REVENUE SERVICE CENTER
 SOUTHWEST REGION, AUSTIN, TX 73301
 Date: 05/09/95 Initials: JF -PEC

FORM 4340 Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

strict

Serial Number

For Optional Use by Recording Office

Oklahoma City, OK

739017735

90 14363

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

3 DEC - 5 1990

Book 270 Page 2177
By BETTY BENTZ, County Clerk
Deputy

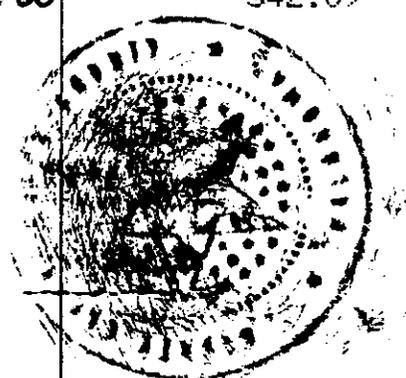
As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer WAYNE E WELLS

Residence PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/83	497-38-4101	09/07/90	10/07/90	19779.53
1040	12/31/84	497-38-4101	09/07/90	10/07/90	7448.93
1040	12/31/85	497-38-4101	09/07/90	10/07/90	5149.71
1040	12/31/86	497-38-4101	09/10/90	10/10/90	342.09



Place of Filing

COUNTY CLERK
CREEK COUNTY
SAPULPA, OK 74066

Total

\$

32720.26

This notice was prepared and signed at Oklahoma City, OK

the 27th day of November, 19 90



Signature [Handwritten Signature]
for GERALD MCCULLEY

Title Revenue Officer
73-01-2521 2177

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971 - 2 C.B. 409)

NOMINEE LIEN

Form 668 (Y)

Department of the Treasury - Internal Revenue Service

(Rev. 7-89)

Notice of Federal Tax Lien Under Internal Revenue Laws

District

OKLAHOMA CITY

Serial Number

7301-91-025

For Optional Use by Recording Office

90 13900

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

12:10 NOV 26 1990

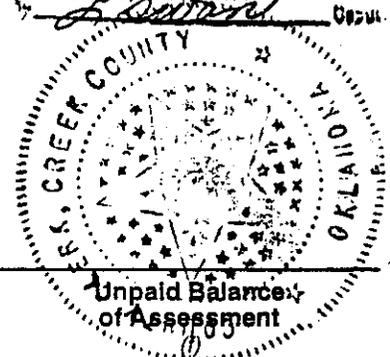
Book 278 Page 133
DETTY RENTZ, County Clerk

Name of Taxpayer

DOW TRUST - NOMINEE OF WAYNE E. WELLS

Residence

P. O. BOX 1258
BRISTOW, OKLAHOMA 74010



IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment
1040	12-31-83	497-38-4101	09-07-90	10-07-00	19,779.53
1040	12-31-84	497-38-4101	09-07-90	10-07-00	7,448.93
1040	12-31-85	497-38-4101	09-07-90	10-07-00	5,149.71
1040	12-31-86	497-38-4101	09-10-90	10-10-00	342.09

THIS NOTICE OF FEDERAL TAX LIEN IS FILED FOR THE PURPOSE OF GIVING PUBLIC NOTICE THAT BY VIRTUE OF THE UNPAID TAX LIABILITIES ASSESSED AGAINST THE ABOVE NAMED TAXPAYER, THE UNITED STATES CLAIMS AN INTEREST IN THE PROPERTY DESCRIBED BELOW. THOUGH SAID PROPERTY MAY BE TITLED IN THE NAME OF THE DOW TRUST, THE UNITED STATES CONSIDERS THE PROPERTY TO BE OWNED BY THE ABOVE TAXPAYER AND THEREFORE THE TAX LIENS INCLUDED IN THIS NOTICE ATTACH TO SUCH PROPERTY.

LEGAL DESCRIPTION: The South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) of Section 36, Township 17 North, Range 8 East, containing twenty (20) acres, more or less.

Place of Filing

COUNTY CLERK
CREEK COUNTY
SAPULPA, OK 74066

Total

\$ 32,720.26

This notice was prepared and signed at TULSA, OKLAHOMA

the 21st day of NOVEMBER, 19 90



Signature

Jerry McCully 7301-2521

Title

REVENUE OFFICER

1331

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax lien Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Form 668 (Y) (Rev. 7-89)

Notice of Federal Tax Lien Under Internal Revenue Laws

City
OKLAHOMA CITY

Serial Number
75727

For Optional Use by Recording Office

87 908

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

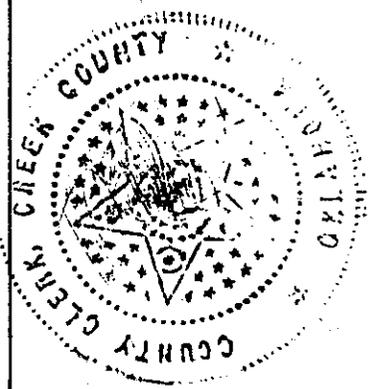
STATE OF OKLAHOMA,
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON
3 30 JAN 20 1987
o'clock **2** m. and duly recorded in
Book **215** Page **1458**
ROMA LEE BRANHAM, County Clerk
By *L. Mayes* Deputy

Name of Taxpayer
DOROTHY E WELLS

Residence
**PO BOX 1258
BRISTOW, OK 74010**

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refilled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12-31-82	441-38-7147	07/07/86	08/06/92	5,745.75



Place of Filing CREEK COUNTY COUNTY CLERK	Total	\$ 5,745.75
---	--------------	--------------------

This notice was prepared and signed at **OKLAHOMA CITY, OKLAHOMA**
the **08** day of **JAN**, 19 **87**



Signature: *Gary L. Collins*
GARY L. COLLINS
Title: **CHIEF, SPECIAL PROCEDURES 2530**

Form 668 (Y)

Department of the Treasury - Internal Revenue Service

(Rev. January 1991)

Notice of Federal Tax Lien Under Internal Revenue Laws

at

Oklahoma City

Serial Number

739212753

For Optional Use by Recording Office

92 9269

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

1240 JUL 20 1992

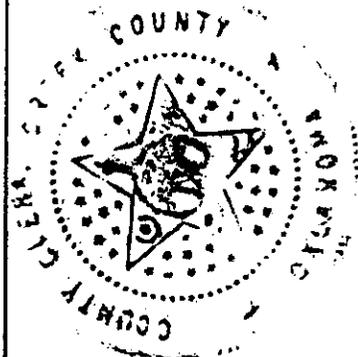
1240 o'clock P. M. and duly recorded in
Book 293 Page 1844
BETTY BENTZ, County Clerk
By *[Signature]* Deputy

Name of Taxpayer DOROTHY E WELLS

Residence PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a). ~~IRRECTS ORIGINAL DATE IN COL. (e) ***~~

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/82	441-38-7147	07/07/86	08/06/96	5745.75



Place of Filing COUNTY CLERK
CREEK COUNTY
SAPULPA, OK 74066

Total \$ 5745.75

Original Recording Data:

This notice was prepared and signed at Oklahoma City, OK., on this,

the 12th day of July, 19 92

1844

Signature *Gary L. Collins*

Title COLL. MANAGER

(NOTE: Certificate of official authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax lien
Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Notice of Federal Tax Lien Under Internal Revenue Laws

District OKLAHOMA CITY	Serial Number 86 2044 59299	For Optional Use by Recording Office
---------------------------	-----------------------------------	--------------------------------------

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer
DOROTHY E WELLS

Residence
PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refilled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325 (a).

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON
9:15 FEB - 4 1986
o'clock 9 m. and duly recorded in
Book 200 Page 1123
ROMA LEE BRANHAM, County Clerk
By [Signature] Deputy

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
40	12-31-83	441-38-7147	11/04/85	12/04/91	1,839.48



Place of Filing CREEK COUNTY COUNTY CLERK	Total	\$ 1,839.48
---	-------	-------------

This notice was prepared and signed at OKLAHOMA CITY, OKLAHOMA

29 day of JANUARY 19 86
Signature [Signature]
GARY COLLINS

Title
CHIEF, SPECIAL PROCEDURES 2577



Form 668 (Y)

Department of the Treasury - Internal Revenue Service

(Rev. January 1991)

Notice of Federal Tax Lien Under Internal Revenue Laws

Dist Oklahoma City	Serial Number 739128238	For Optional Use by Recording Office 91 12184
-----------------------	----------------------------	---

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

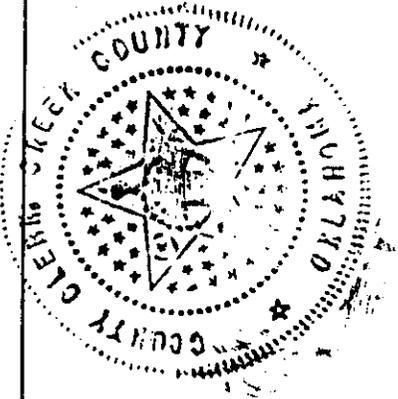
STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON
330 **OCT 28 1991**
at 2:27 o'clock P. M. and duly recorded in
Book 282 Page 2077
BETTY BENTZ, County Clerk
By [Signature] Deputy

Name of Taxpayer DOROTHY E WELLS

Residence PO BOX 1258
BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a). **CORRECTS ORIGINAL DATE IN COL. (e) *****

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)	
1040	12/31/83	441-38-7147	11/04/85	12/04/95	1839.48	
Place of Filing COUNTY CLERK CREEK COUNTY SAPULPA, OK 74066					Total \$	1839.48
Original Recording Data: 0:00 35-2044						



This notice was prepared and signed at Oklahoma City, OK., on this, **2077**
the 20th day of October, 19 91.

Sig [Signature: Gary L. Collins] Title COLL. MANAGER

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax lien
Rev. Rul. 71-100, 1971-2 O.B. 409)

Notice of Federal Tax Lien Under Internal Revenue Laws 87 4453

Dist. OKLAHOMA CITY

Serial Number 7301-87-250

For Optional Use by Recording Office

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON

10:45 APR - 3 1987
at 10:45 o'clock A.M. and duly recorded in
Book 218 Page 1856
ROMA DEE BRANHAM, County Clerk
By [Signature] Deputy

Name of taxpayer
Dow Trust NOMINEE OF: Dorothy E. Wells

Residence
F O Box 1250
Bristow, OK 74010

IMPORTANT RELEASE INFORMATION-With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325 (a).

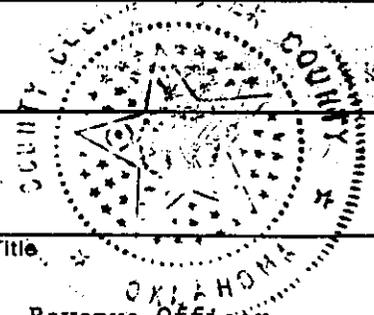
Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12-31-81	441-38-7147	06-04-84	07-04-92	884.96
1040	12-31-82	441-38-7147	07-07-86	08-06-94	5,745.75
1040	12-31-83	441-38-7147	11-04-85	12-04-93	1,839.48
CIV PEN	12-31-82	441-38-7147	09-16-85	10-30-93	500.00

This notice of Federal Tax Lien is filed for the purpose of giving public notice that, by virtue of the unpaid tax liabilities assessed against the above named taxpayer, the United States claims an interest in the property described below. Though said property may be titled in the name of Dow Trust, the United States considers the property to be owned by the above taxpayer and therefore, the tax liens included in this notice attach to such property.

LEGAL DESCRIPTION: The South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE4) of Section 36, Township 17 North, Range 8 East, containing twenty (20) Acres, more or less.

Place of filing
Sapulpa, Creek County Oklahoma
Total \$ 8,970.19

This notice was prepared and signed at Tulsa, Oklahoma on this, the 31st day of March, 19 87.



Signature: Jerry McCulley
Title: Revenue Officer



(NOTE: Certificate of Officer authorized by law to take acknowledgements is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971-2 C.B. 409.)

Form **668 (Y)**
(Rev. January 1991)

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

City Oklahoma City	Serial Number 739128281	For Optional Use by Recording Office 91 12182
------------------------------	-----------------------------------	---

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

STATE OF OKLAHOMA
COUNTY OF CREEK
THIS INSTRUMENT WAS FILED
FOR RECORD ON
330 **OCT 28 1991**
o'clock **1** M. and duly recorded in
Book **282** Page **2075**
By **Betty Rentz** County Clerk
Deputy

Name of Taxpayer DOW TRUST NOMINEE OF: DOROTHY E WELLS
Residence PO BOX 1258 BRISTOW, OK 74010

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a). **CORRECTS ORIGINAL DATE IN COL. (e) *****

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/82	441-38-7147	07/07/86	08/06/96	5745.75
1040	12/31/83	441-38-7147	11/04/85	12/04/95	1839.48
Total \$					7585.23
Place of Filing COUNTY CLERK CREEK COUNTY SAPULPA, OK 74066					
Original Recording Data: 0.00					



This notice was prepared and signed at Oklahoma City, OK., on this, 20th day of October, 19 91.

S. re: Gary L. Collins Title COLL. MANAGER

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-486, 1971-2 C.B. 409)

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

FILED

NOV 15 1995

TONY LAMAR VANN,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA DEPARTMENT OF HUMAN)
 SERVICES,)
)
 Defendant.)

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

No. 95-C-1103-BU

ENTERED ON DOCKET

NOV 16 1995

DATE _____

ORDER

On November 6, 1995, Tony Lamar Vann, a state inmate, filed a motion for leave to proceed in forma pauperis along with a notice of "Removal of Case from State Court." 28 U.S.C. § 1146(a). Mr. Vann seeks to remove a paternity action which the Oklahoma Department of Human Services brought against him earlier this year in Osage County District Court.

Under 28 U.S.C. § 1447(c), "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Lack of subject matter jurisdiction may be asserted by the Court sua sponte, at any time. Jeter v. Jim Walter Homes, Inc., 414 F.Supp. 791 (W.D.Okla. 1976). The existence of federal question jurisdiction is governed by the "well-pleaded complaint" rule. "Whether a case is one arising under [federal law] ... must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration...." Oklahoma Tax Commission v. Graham, 489 U.S. 838, 840-1, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989). A case is not properly removed to federal court unless it might have been

brought there originally. Id., see also Fajen v. Foundation Reserve Insurance Co., Inc., 683 F.2d 331 (10th Cir. 1982).

This Court lacks subject matter jurisdiction over Mr. Vann's action. Paternity is a matter of state law and Mr. Vann has not mentioned any federal question issue. Moreover, there is no diversity in the instant action. Accordingly, this matter was improvidently removed to federal court and it is hereby REMANDED to the District Court of Osage County, State of Oklahoma. Mr. Vann's motion for leave to proceed in forma pauperis (docket #2) is GRANTED.

IT IS SO ORDERED this 15th day of November, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
LORI D. WILKERSON nka Lori D. Lusk;)
UNKNOWN SPOUSE of Lori D.)
Wilkerson nka Lori D. Lusk, if any;)
CITY OF GLENPOOL, Oklahoma;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

NOV 15 1995

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

Civil Case No. 94-C-1147-B

ENTERED ON DOCKET

DATE NOV 16 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of November, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 19, 1995, pursuant to an Order of Sale dated June 26, 1995, of the following described property located in Tulsa County, Oklahoma:

**LOT FIVE (5), BLOCK FIVE (5), KENDALWOOD III, AN
ADDITION TO THE CITY OF GLENPOOL, TULSA
COUNTY, STATE OF OKLAHOMA, ACCORDING TO
THE AMENDED PLAT THEREOF.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, City of Glenpool, Oklahoma, County Treasurer and Board of County Commissioners, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, and to the purchaser of the property, Donald J. Bahmaier, by mail, and to the Defendants, Lori D. Wilkerson nka

Lori D. Lusk and Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Glenpool Post, a newspaper published and of general circulation in Glenpool, Oklahoma, and that on the day fixed in the notice the property was sold to Donald J. Bahmaier, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

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

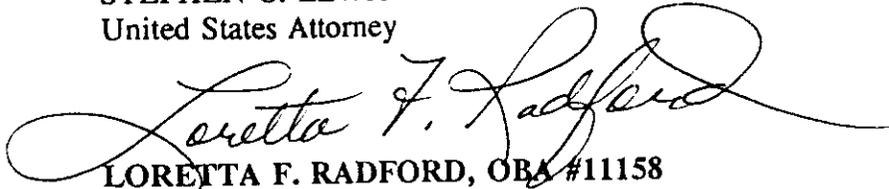
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/Frank H. McCarthy
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

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:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-1147-B

JOE-1
11-16-95

COPY 2

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPECIFIC SYSTEMS, LTD.,
MIKE BOLICK, OSBORN TECHNICAL
SERVICE d/b/a J & D OSBORN
CORPORATION AND JOHN OSBORN,

Defendant.

FILED

NOV 17 1995

U.S. District Court
Northern District of Oklahoma

ENTERED ON DOCKET

DATE NOV 16 1995

Civil Action No. 95-C-1092E

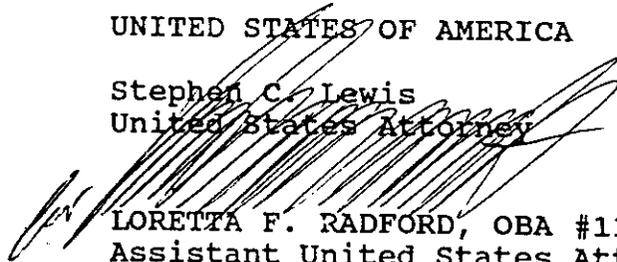
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 15th day of November, 1995.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4TH Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of November, 1995, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

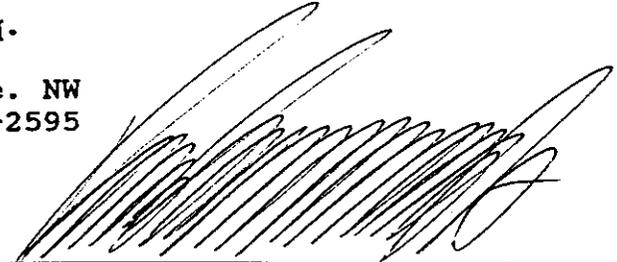
Osborn Technical Services
5511 S. 94 E. Ave.
Tulsa, OK 74145

Specific Systems, Ltd.
5511 S. 94 E. Ave.
Tulsa, OK 74145

John Osborn
11961 N. 202 E. Ave.
Claremore, OK 74017

Mike Bolick
Specific Systems, Ltd.
5511 S. 94 E. Ave.
Tulsa, OK 74145

Kathleen Karelis, Esq.
Crowell & Moring
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595



Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 BUCK T. DAVIS)
 aka Buck Terry L. Davis)
 aka Buck Davis;)
 CINDY S. DAVIS)
 aka Cindy L. Davis)
 aka Cindy Davis;)
 STATE OF OKLAHOMA ex rel.)
 Oklahoma Tax Commission;)
 COUNTY TREASURER, Rogers County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Rogers County, Oklahoma,)
)
 Defendants.)

FILED

NOV 15 1995

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

ENTERED ON DOCKET

DATE NOV 16 1995

CIVIL ACTION NO. 94-C-403-E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of November, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on August 29, 1995, pursuant to an Order of Sale dated June 13, 1995, of the following described property located in Rogers County, Oklahoma:

Lot Four (4), and the Northerly Ten (10) feet of Lot Five (5), Block Sixty-Two (62) of the City of Chelsea, Rogers County, Oklahoma.

Appearing for the United States of America is Wyn Dee Baker, Assistant United States Attorney. Notice was given the Defendants, Buck T. Davis aka Buck Terry L. Davis aka Buck Davis and Cindy S. Davis aka Cindy L. Davis aka Cindy Davis, through their attorney, Joel Hulett; State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant District

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

Counsel; and County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, through Glenna S. Dorris, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

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

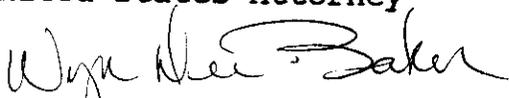
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be

granted possession of the property against any or all persons now in possession.

S/Frank H. McCarthy
U.S. Magistrate
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

WDB/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-403-E

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

BERNICE ALEXANDER,
Plaintiff,
vs.
STATE OF OKLAHOMA, EX REL.
DEPARTMENT OF HUMAN SERVICES,
Defendant.

No. 94-C-146-K

ENTERED ON DOCKET
DATE NOV 16 1995

FILED

NOV 15 1995

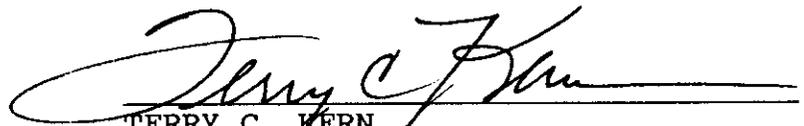
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED this 15 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

44

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

BERNICE ALEXANDER,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA, EX REL.)
 DEPARTMENT OF HUMAN SERVICES,)
)
 Defendant.)

No. 94-C-146-K

ENTERED ON DOCKET
DATE NOV 16 1995

FILED

NOV 15 1995

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

O R D E R

Before the Court is the motion of the defendant for summary judgment. This action was commenced on February 16, 1994, when plaintiff, by and through counsel, filed a complaint. Subsequently, plaintiff agreed to the withdrawal of her counsel, and requested and was granted permission to proceed pro se. In that status, she filed an amended complaint on June 19, 1995. Defendant now seeks judgment in its favor.

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

F.2d 492, 494 (10th Cir. 1992).

Plaintiff purports to bring this action under Title VII, 42 U.S.C. §2000e, et seq. Only the Oklahoma Department of Human Services ("DHS") is named as a defendant, although the body of the amended complaint refers to numerous individuals and organizations and cites a wide variety of incidents. In her response to the present motion, plaintiff states "The Defendant's [sic] who are not the DHS are co-defendants but they are not being sued." It appears plaintiff views her allegations as the detailing of a broad conspiracy of which DHS is the hub.

Plaintiff terms her claim as one for retaliation. To establish a prima facie case of retaliation, plaintiff must show (1) she engaged in opposition to Title VII discrimination; (2) she was subject to adverse employment action subsequent to or contemporaneously with the protected activity; and (3) a causal connection exists between the protected activity and the adverse employment action. Murray v. City of Sapulpa, 45 F.3d 1417, 1420 (10th Cir.1995).

Plaintiff (Bernice Tate at the time) was an employee of DHS in 1985 and brought a sexual harassment suit against her supervisor. The case was filed in the United States District Court for the Western District of Oklahoma and assigned case no. CIV-88-1023-P. The case was tried to a trial judge and an advisory jury. At the conclusion of trial, the judge rejected some of the jury's findings and entered judgment in defendant's favor on June 16, 1989. Apparently, plaintiff did not appeal the decision. Plaintiff has

not been employed by DHS since 1985.¹

Plaintiff's core allegation is that in 1991 she was operating a youth program at the Northside YWCA under a "verbal contract" with that organization. Argie Wallace, a manager of that YWCA, allegedly told plaintiff "someone at DHS" told Wallace to "disassociate" herself from plaintiff or lose licensing for child care or contract for funding. Plaintiff concedes in her deposition she was not being paid for her youth program work, but states she drew up a written contract and presented it to Ms. Wallace. Pursuant to the written contract, plaintiff would have been paid \$30,000 per year. Plaintiff contends the alleged contact from DHS caused the YWCA to fail to agree to the written contract. In her deposition, Wallace denies any such statement attributed to her by plaintiff. Wallace also testified DHS never attempted to influence a YWCA hiring decision relating to plaintiff, and that the YWCA did not have a contract with plaintiff, who was merely a volunteer.

Defendant argues that the alleged statement to Wallace is inadmissible on hearsay grounds. The Court agrees. If Wallace were to testify the statement had been made, this would not constitute hearsay. A statement that one should disassociate oneself from an individual is a directive, not a statement of fact. By its nature, such a statement is not offered for its truth, a requirement of hearsay. See Anderson v. United States, 417 U.S.

¹There is a split of authority as to whether Title VII provides a cause of action by an ex-employee against the former employer for acts of retaliation after the employment has ended. The Tenth Circuit holds that it does. See Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1164-65 (10th Cir.1977).

211, 220 n.8 (1974) ("[E]vidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement.") However, plaintiff seeks to introduce Wallace's alleged statement to plaintiff for the truth of Wallace's statement, i.e., that the conversation between Wallace and DHS took place. As such, it is excludable. Cf. Skillsky v. Lucky Stores, Inc., 893 F.2d 1088, 1091-92 (9th Cir.1990). The Tenth Circuit has recently held "Rule 56 precludes the use of inadmissible hearsay testimony in depositions submitted in support of, or in opposition to, summary judgment." Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir.1995).²

Even if the alleged statement by Wallace were not hearsay, the Court would exclude it on grounds of relevance. The evidence sought to be admitted is that "someone at DHS" spoke to Wallace. Nothing in the record establishes that this unknown declarant was acting on behalf of DHS in making the statement or had authority to carry out the threatened reprisals. As such, the evidence has no probative value as to DHS' liability for retaliation. Even if slight probative value could be found, it is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See 403 F.R.Evid. Only admissible

²The Court is required to construe plaintiff's pro se amended complaint liberally. To the extent plaintiff alleges a civil conspiracy, the Court's review of the record leads to the conclusion plaintiff has not raised a genuine issue of material fact as to the existence of such a conspiracy. Accordingly, the hearsay exception of 801(d)(2)(E) F.R.Evid. does not permit admission of the conversation. Cf. Earle v. Benoit, 850 F.2d 836 (1st Cir.1988).

evidence may be considered regarding a summary judgment motion. See Gross v. Burggraf Const. Co., 53 F.3d 1531, 1541 (10th Cir.1995). Plaintiff's testimony regarding the conversation with Wallace will not be considered regarding proof of a prima facie case.

Plaintiff concedes she has no evidence of retaliation against her in employment decisions after this incident in September, 1991. (Plaintiff's Deposition at 92-94). The other incidents related in her amended complaint relate to such matters as: (1) in 1993, the DHS refused to respond to a 67-page report plaintiff wrote about an ongoing child abuse situation; (2) in 1994, plaintiff organized and conducted a crime prevention workshop and no one attended from DHS; (3) at some unspecified time, DHS staff caused a "scene" in the office of plaintiff's husband "about whether he felt DHS should support his family." None of these incidents relate to adverse employment actions taken by DHS against plaintiff. Cf. Nelson v. Upsala College, 51 F.3d 383 (3rd Cir.1995). In sum, the Court concludes plaintiff has failed to establish a prima facie case of retaliation, having proved only the first element by the requisite burden of proof.

Even if plaintiff had established a prima facie case, summary judgment would be appropriate on a second ground raised by defendant. Plaintiff's administrative charge with the EEOC and the Oklahoma Human Rights Commission was filed February 2, 1993. The September, 1991 incident, upon which plaintiff essentially bases her lawsuit, occurred more than 300 days prior to the filing of her

charge. Pursuant to 42 U.S.C. §2000e-5(e), this action is time-barred.

It is the Order of the Court that the motion of the defendant for summary judgment is hereby GRANTED. All other pending motions are hereby declared moot.

ORDERED this 15 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 14 1995

W. M. Lawrence, Court Clerk
DISTRICT COURT

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife)
)
)
)
)

Plaintiffs,)
)

vs.)

Case No. 95-C-0092-B

AARON SLUYTER and KEN SLUYTER and ARTESIAN SPRINGS, INC.,)
)
)
)

Defendants,)
)

vs.)

ENTERED ON DOCKET

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife, a joint venture or partnership,)
)
)
)
)

DATE NOV 15 1995

Third Party Defendants.)
)

DISMISSAL WITH PREJUDICE

COMES NOW the Defendant Artesian Springs, Inc., and hereby dismisses all of its Claims against the Plaintiffs Ray E. Allen and Georgia Ann Allen, husband and wife and Randall E. Allen and Melinda J. Allen, husband and wife in the above cause with prejudice to the refiling of such Claims.

Dated this 13 day of November, 1995.

Respectfully Submitted,

By:

Tim K. Baker

TIM K. BAKER, OBA #461
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618

Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Mark R. Reents, Esq.
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200



TIM K. BAKER

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Mark R. Reents, Esq.
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200



TIM K. BAKER

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

FILED

NOV 14 1995

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

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife)
)
)
)
)
)

Plaintiffs,)
)
)

vs.)
)
)

Case No. 95-C-0092-B

AARON SLUYTER and KEN SLUYTER and ARTESIAN SPRINGS, INC.,)
)
)
)
)

Defendants,)
)
)

vs.)
)
)

ENTERED ON DOCKET

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife, a joint venture or partnership,)
)
)
)
)

DATE NOV 15 1995

Third Party Defendants.)
)

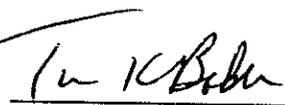
DISMISSAL WITH PREJUDICE

COMES NOW the Defendant Ken Sluyter and hereby dismisses all of his Claims along with the right to file any future Claims against the Plaintiffs Ray E. Allen and Georgia Ann Allen, husband and wife and Randall E. Allen and Melinda J. Allen, husband and wife in the above cause with prejudice to the refiling of such Claims or future Claims.

Dated this 13 day of November, 1995.

Respectfully Submitted,

By:



TIM K. BAKER, OBA #461
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618

Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Mark R. Reents, Esq.
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200



TIM K. BAKER

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

FILED

NOV 14 1995

Sam M. Lawrence, Court Cl.
Tulsa, Oklahoma

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife
Plaintiffs,

vs.

Case No. 95-C-0092-B

AARON SLUYTER and KEN SLUYTER and ARTESIAN SPRINGS, INC.,
Defendants,

vs.

ENTERED ON DOCKET
DATE NOV 15 1995

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife, a joint venture or partnership,
Third Party Defendants.

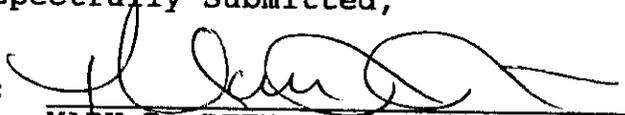
DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs Ray E. Allen and Georgia Ann Allen, husband and wife, and Randall E. Allen and Melinda J. Allen, husband and wife and hereby dismiss all of their Claims against the Defendant Artesian Springs, Inc., in the above cause with prejudice to the refiling of such Claims.

Dated this 13 day of November, 1995.

Respectfully Submitted,

By:



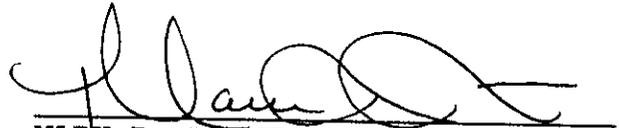
MARK R. REENTS, OBA #7475
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, OK 74135
(918) 496-9200

Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Tim K. Baker
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618


MARK R. REENTS

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Tim K. Baker
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618


MARK R. REENTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARGARET ELAINE BURNS aka)
 Margaret Burns fka Margaret E. Burns)
 Wooden aka Margaret Elaine Burns-)
 Wooden; JAMES EDWARD WOODEN)
 aka James E. Wooden; UNKNOWN)
 SPOUSE OF James Edward Wooden aka)
 James E. Wooden, if any; STATE OF)
 OKLAHOMA, ex rel. OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED ON DOCKET
11-15-95

FILED
NOV 14 1995

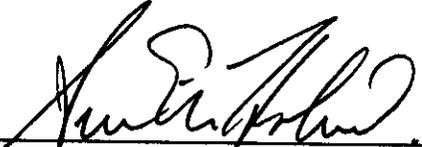
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 982H ✓

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.

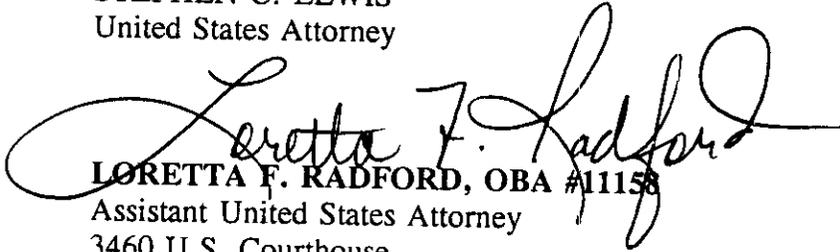
Dated this 14TH day of NOVEMBER, 1995.


UNITED STATES DISTRICT JUDGE

6

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, elegant handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a prominent initial "L" and a long, sweeping tail.

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

LFR:flv

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

FILED

NOV 14 1995

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

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife
Plaintiffs,

vs.

Case No. 95-C-0092-B

AARON SLUYTER and KEN SLUYTER and ARTESIAN SPRINGS, INC.,
Defendants,

vs.

ENTERED ON DOCKET

NOV 15 1995

DATE _____

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife, a joint venture or partnership,
Third Party Defendants.

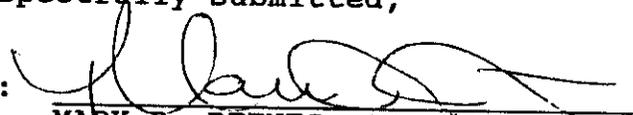
DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs Ray E. Allen and Georgia Ann Allen, husband and wife, and Randall E. Allen and Melinda J. Allen, husband and wife and hereby dismiss all of their Claims against the Defendant Aaron Sluyter in the above cause with prejudice to the refiling of such Claims.

Dated this 13 day of November, 1995.

Respectfully Submitted,

By:



MARK R. REENTS, OBA #7475
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, OK 74135
(918) 496-9200

Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Tim K. Baker
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618


MARK R. REENTS

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

FILED

NOV 14 1995

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

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife
Plaintiffs,

vs.

AARON SLUYTER and KEN SLUYTER and ARTESIAN SPRINGS, INC.,
Defendants,

vs.

RAY E. ALLEN and GEORGIA ANN ALLEN, husband and wife and RANDALL E. ALLEN and MELINDA J. ALLEN, husband and wife, a joint venture or partnership,
Third Party Defendants.

Case No. 95-C-0092-B

ENTERED ON DOCKET

DATE NOV 15 1995

DISMISSAL WITH PREJUDICE

COMES NOW the Third Party Plaintiff Artesian Springs, Inc., and hereby dismisses all of its Claims against the Third Party Defendants Ray E. Allen and Georgia Ann Allen, husband and wife and Randall E. Allen and Melinda J. Allen, husband and wife, a joint venture or partnership in the above cause, with prejudice to the refiling of such Claims.

Dated this 13 day of November, 1995.

Respectfully Submitted,

By: Tim K Baker

TIM K. BAKER, OBA #461
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618

Attorney for Third Party Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Mark R. Reents, Esq.
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200



TIM K. BAKER

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

FILED

NOV 14 1995

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

RAY E. ALLEN and GEORGIA ANN)
ALLEN, husband and wife and)
RANDALL E. ALLEN and MELINDA)
J. ALLEN, husband and wife)

Plaintiffs,)

vs.)

Case No. 95-C-0092-B

AARON SLUYTER and KEN SLUYTER)
and ARTESIAN SPRINGS, INC.,)

Defendants,)

vs.)

ENTERED ON DOCKET

DATE NOV 15 1995

RAY E. ALLEN and GEORGIA ANN)
ALLEN, husband and wife and)
RANDALL E. ALLEN and MELINDA)
J. ALLEN, husband and wife,)
a joint venture or partnership,)

Third Party Defendants.)

DISMISSAL WITH PREJUDICE

COMES NOW the Third Party Plaintiff Aaron Sluyter and hereby dismisses all of his Claims against the Third Party Defendants Ray E. Allen and Georgia Ann Allen, husband and wife and Randall E. Allen and Melinda J. Allen, husband and wife, a joint venture or partnership in the above cause, with prejudice to the refiling of such Claims.

Dated this 13 day of November, 1995.

Respectfully Submitted,

By: T. K. Baker

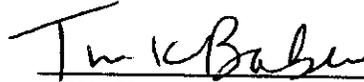
TIM K. BAKER, OBA #461
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464
(918) 456-0618

Attorney for Third Party
Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of November, 1995, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to the following:

Mark R. Reents, Esq.
Clark & Williams
5416 S. Yale Ave., Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200



TIM K. BAKER

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
FRANCES MAE TIGER; RONALD)
MATTHEW TIGER; LELAND MOSE)
TIGER; JEANNIE BLAYLOCK;)
CHERYL RENEE TIGER; NAOMI)
RUTH WAMEGO; LAWANNA TIGER;)
SHAWN DEE TIGER; JEREMY DON)
TIGER; COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)

NOV 14 1995

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

ENTERED ON DOCKET
DATE NOV 15 1995

Civil Case No. 95-C 300B

Defendants.

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day of Nov,

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 not, having claimed no interest in the subject property; and the Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, JEANNIE BLAYLOCK, CHERYL RENEE TIGER, NAOMI RUTH WAMEGO, LAWANNA TIGER, SHAWN DEE TIGER, and JEREMY DON TIGER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JEANNIE BLAYLOCK, acknowledged receipt of Summons and Complaint via

certified mail on May 15, 1995; that the Defendant, NAOMI RUTH WAMEGO, waived service of Summons on April 8, 1995; and that the Defendant, LAWANNA TIGER, acknowledged receipt of Summons and Complaint via certified mail on May 6, 1995.

The Court further finds that the Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, CHERYL RENEE TIGER, SHAWN DEE TIGER, and JEREMY DON TIGER, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 1, 1995, and continuing through October 6, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, CHERYL RENEE TIGER, SHAWN DEE TIGER, and JEREMY DON TIGER, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, CHERYL RENEE TIGER, SHAWN DEE TIGER, and JEREMY DON TIGER. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of

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

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on April 18, 1995; and that the Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, JEANNIE BLAYLOCK, CHERYL RENEE TIGER, NAOMI RUTH WAMEGO, LAWANNA TIGER, SHAWN DEE TIGER, and JEREMY DON TIGER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on February 17, 1976, Mose Tiger and Revennie Mae Tiger were issued a Divorce in case number JFD 75-4616. Mose Tiger subsequently married the Defendant, FRANCES MAE TIGER. The Defendants, FRANCES MAE TIGER; RONALD MATTHEW TIGER; LELAND MOSE TIGER; JEANNIE BLAYLOCK; CHERYL RENEE TIGER; NAOMI RUTH WAMEGO; LAWANNA TIGER; SHAWN DEE TIGER, and JEREMY DON TIGER are all heirs at law of Mose Tiger, deceased, as determined by the District Court of Tulsa County, Oklahoma, in case #P-92-541.

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-Eight (28), Block Nine (9), Rolling Hills Third Addition, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on November 18, 1970, Mose Tiger and Revennie Tiger, executed and delivered to The Lomas & Nettleton Company their mortgage note in the amount of \$16,750.00, 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, Mose Tiger and Revennie Tiger, Husband and Wife, executed and delivered to THE LOMAS & NETTLETON COMPANY a mortgage dated November 18, 1970, covering the above-described property. Said mortgage was recorded on November 19, 1970, in Book 3946, Page 1614, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 18, 1971, THE LOMAS & NETTLETON COMPANY assigned the above-described mortgage note and mortgage to SOUTH BOSTON SAVINGS BANK. This Assignment of Mortgage was recorded on January 22, 1971, in Book 3954, Page 129, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 13, 1987, SOUTH BOSTON SAVINGS BANK 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 November 13, 1987, in Book 5063, Page 2068, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 6, 1987, the Defendant, FRANCES MAE TIGER, 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 29, 1988, June 7, 1989, June 26, 1990, and August 12, 1991.

The Court further finds that the Defendant, FRANCES MAE TIGER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, FRANCES MAE TIGER, is indebted to the Plaintiff in the principal sum of \$9,750.25, plus interest at the rate of 8.5 percent per annum from August 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, JEANNIE BLAYLOCK, CHERYL RENEE TIGER, NAOMI RUTH WAMEGO, LAWANNA TIGER, SHAWN DEE TIGER, and JEREMY DON TIGER, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, FRANCES MAE TIGER, in the principal sum of \$9,750.25, plus interest at the rate of 8.5 percent per annum from August 18, 1994 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 Defendants, FRANCES MAE TIGER, RONALD MATTHEW TIGER, LELAND MOSE TIGER, JEANNIE BLAYLOCK, CHERYL RENEE TIGER, NAOMI RUTH WAMEGO, LAWANNA TIGER, SHAWN DE TIGER, and JEREMY DON TIGER, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, FRANCES MAE TIGER, 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.

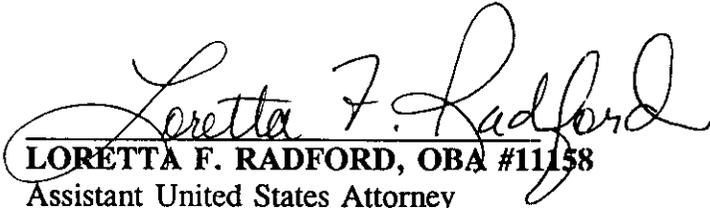
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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 a horizontal line.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

333 W. 4th St., Ste. 3460

Tulsa, Oklahoma 74103

(918) 581-7463

Judgment of Foreclosure
Civil Action No. 95-C 300B

LFR/lg

FILED

NOV 13 1995

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

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

BARBARA BOYD,)
)
 Plaintiff,)
)
 v.)
)
 AMERADA HESS CORPORATION,)
)
 Defendant.)

Case No. 95-C-179B

ENTERED ON DOCKET
NOV 14 1995
DATE _____

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 14th day of November, 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

I. FACTUAL BACKGROUND.

In February 1985, Defendant, Bob E. Walls, executed and delivered to the Citizens Bank of Drumright, Oklahoma ("the Bank") a written guaranty. Pursuant to this guaranty, Bob E. Walls agreed to be responsible for the debts of Defendant, Campbell Drilling Company, Inc. ("Campbell Drilling"). In October 1985, Campbell Drilling executed and delivered to the Bank a \$257,073.82 promissory note. During 1986, after Campbell Drilling had defaulted on the note, the Bank demanded payment of the note from Bob E. Walls. When Mr. Walls refused to honor his guaranty, the Bank brought suit in this Court. Plaintiff, LEC Capital Corporation ("LEC"), was eventually substituted for the Bank as plaintiff in this action.^{3/}

LEC moved for summary judgment against Bob E. Walls based on the unambiguous guaranty contract. In opposition to LEC's Motion, Mr. Walls argued that (1) he had an oral contract with the Bank limiting his liability on the guaranty to 25% of Campbell Drilling's debts, (2) there was no consideration for his guaranty, (3) the guaranty was unenforceable because it was not executed contemporaneously with the note, and (4) the note was unenforceable because it was not properly attested to by Campbell Drilling. This Court rejected Mr. Walls' arguments and found no material issues of fact regarding Mr. Walls' liability under the guaranty contract. Accordingly, on February 3, 1992, this Court entered summary judgment against Bob E. Walls in the amount of \$236,470.56, plus costs of \$76.56, attorney fees of \$17,042.50 and

^{3/} The Bank became insolvent and on September 24, 1987, the Federal Deposit Insurance Corporation ("FDIC") was appointed as the Bank's liquidating agent, pursuant to 6 O.S. § 1205(b). On January 11, 1991, LEC purchased the above-referenced guaranty and note from the FDIC and then substituted itself as the plaintiff in this action.

post judgment interest at the rate of 4.11% *per annum*. [Doc. # 58, 59 & 77].

One year after entry of Judgment against Bob E. Walls, LEC filed garnishment affidavits with this Court, alleging that Garnishees, Jo Ann Walls and Brian D. Walls, had property in their possession belonging to Defendant, Bob E. Walls. [Doc. # 90 & 91]. Jo Ann Walls is Bob E. Walls' wife and Brian D. Walls is his son. Jo Ann and Brian Walls filed answers with this Court, denying that they held any property belonging to Bob E. Walls. [Doc. # 91A & 92A]. Pursuant to 12 O.S. § 1177, LEC filed notice of its intent to take issue with Jo Ann and Brian Walls' answers to the garnishment summons. LEC alleges that Jo Ann and Brian Walls hold property of Bob E. Walls by virtue of certain fraudulent transfers from Bob E. Walls. [Doc. # 92 & 93]. Also pursuant to 12 O.S. § 1177 and Fed. R. Civ. P. 69(a), LEC demands a trial of its fraudulent transfer claims in this Court.

II. DOES THE COURT HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S "GARNISHMENT" ACTION?

Under Oklahoma law,

[a]ny creditor shall be entitled to proceed by garnishment in any court having jurisdiction against any person who shall be indebted to the creditor's debtor or has any property in his possession or under his control belonging to such creditor's debtor. . . .

12 O.S. § 1171(A). Subsection B of section 1171 defines the types of post-judgment garnishments available to a judgment creditor. The only type applicable in this case is the general garnishment. See 12 O.S. § 1173.3.

A general garnishment summons may be issued after the filing of a garnishment affidavit by the plaintiff. This affidavit must contain the averments required by 12

O.S. § 1172. Plaintiff must also provide the garnishee and judgment debtor with notice of certain garnishment exemptions. See 12 O.S. §§ 1172.2 and 1174. Within 10 days from service of a general garnishment summons, the garnishee must file an answer affidavit. 12 O.S. § 1176.

The garnishee's answer will be deemed conclusive of the matters stated therein and the garnishment proceedings will be deemed discontinued, unless within 20 days after the filing of the garnishee's answer plaintiff serves notice that he elects to take issue with the garnishee's answer. 12 O.S. § 1176. If the plaintiff takes issue with the garnishee's answer,

the issue shall stand for trial as a civil action in which the affidavit on the part of the plaintiff shall be deemed the petition, and the garnishee's affidavit the answer thereto. . . . The plaintiff may in all cases move the court, upon the answer of the garnishee, and of the defendant, if he shall also answer, for such judgment as he shall be entitled to thereon, but any such judgment shall be no bar beyond the facts stated in such answer.

12 O.S. § 1177.

The above-described Oklahoma garnishment procedure is the garnishment procedure to be applied by this federal court. The relevant portion of Fed. R. Civ. P. 69(a) provides that

[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Fed. R. Civ. P. 69(a). According to the plain language of Rule 69(a), this court has

the same authority to aid judgment creditors as that provided by the law of Oklahoma, absent a controlling federal statute. International Paper Co. v. Whitson, 595 F.2d 559, 562 (10th Cir. 1979); Duchek v. Jacobi, 646 F.2d 415, 417 (9th Cir. 1981) (quoting United States ex rel. Goldman v. Meredith, 596 F.2d 1353, 1357 (8th Cir. 1979), cert. denied, 444 U.S. 838 (1980)).

LEC has taken all of the appropriate procedural steps under Oklahoma law and Fed. R. Civ. P. 69(a) to bring this garnishment (i.e., fraudulent transfer) action before this Court. Neither Garnishees nor Bob E. Walls argue otherwise. This does not, however, end the Court's inquiry. The Federal Rules of Civil Procedure neither expand nor limit the subject matter jurisdiction of the federal courts. Fed. R. Civ. P. 82; Sandlin v. Corporate Interiors Inc., 972 F.2d 1212, 1215 (10th Cir. 1992). Whether Rule 69(a) provides LEC with a procedural mechanism to assert its fraudulent transfer claims against Garnishees is a separate issue from whether a federal court has subject matter jurisdiction over those claims. Id.; HBE Leasing Corp. v. Frank, 882 F. Supp. 60, 62 (S.D.N.Y. 1995). This is particularly true in light of the fact that federal courts are courts of limited subject matter jurisdiction. There is a presumption that jurisdiction does not exist absent a showing of proof by the party asserting federal jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 114 S. Ct. 1673, 1675 (1994).

LEC argues that because this Court had subject matter jurisdiction over the original action resulting in the judgment against Bob E. Walls, this Court has ancillary subject matter jurisdiction to entertain LEC's garnishment/fraudulent transfer claims.

Garnishees and Bob E. Walls disagree and argue that because LEC's fraudulent transfer action is not a traditional garnishment action, the ancillary jurisdiction doctrine does not apply and an independent basis for subject matter jurisdiction is required.^{4/} A recent case from the Circuit Court of Appeals for the Tenth Circuit has squarely addressed this issue. See Sandlin, 972 F.2d at 1215-18.

In Sandlin, the Court recognized that the power to conduct proceedings to give effect to a judgment is a necessary incident of a federal court's subject matter jurisdiction. Id. at 1216. This type of ancillary jurisdiction might be better termed "enforcement" jurisdiction. See Susan M. Glenn, Federal Supplemental Enforcement Jurisdiction 42 S.C.L. Rev. 469 (1991) [hereinafter Glenn, Enforcement Jurisdiction].

[T]he rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. . . . [T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.

Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187, aff'd 73 U.S. (6 Wall.) 518 (1867). See also Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934). If this were not the case, "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended. . . ." Bank of the United States v. Halstead, 23

^{4/} The common law doctrines of ancillary and pendent jurisdiction have recently been codified and renamed "supplemental" jurisdiction. See 28 U.S.C. § 1367. Section 1367 applies only to those "civil actions commenced on or after [December 1, 1990]." Pub. L. No. 101-650, § 310(c). Because this lawsuit was commenced December 15, 1989, the Court finds that § 1367 is not applicable. See Frank, 882 F. Supp. at 62 n.5. The Court recognizes that under the facts of this case, the above quoted language is ambiguous. The "civil action" language of the statute could be interpreted as referring not to when this lawsuit was originally filed, but to when the garnishment proceedings were begun by LEC in February of 1993 (i.e., after the effective date of § 1367). The Court need not resolve this issue, however, because even if § 1367 was applicable, a different result would not be compelled. See Kelly v. Michaels, 59 F.3d 1055, 1058 (10th Cir. 1995).

U.S. (10 Wheat.) 51, 53 (1825).

In Sandlin, the Court was faced with the often difficult task of trying to apply the broad language of the United States Supreme Court to the facts of a particular case. That is, despite the language quoted above, the Court in Sandlin was forced to define the scope of a Court's enforcement jurisdiction when post-judgment claims are asserted against non-diverse third parties. The Court began by recognizing that

[g]arnishment actions against a third party holding property of a judgment debtor have always been held to be within the ancillary 'enforcement' jurisdiction of the federal court, at least if the garnishee admits the debt.

Sandlin, 972 F.2d at 1216 (emphasis added) (citing several cases). Thus, the Court holds that "traditional" garnishment proceedings are within a federal court's "enforcement"/ancillary jurisdiction. Id. at 1217.

As the above emphasized language of the Court's opinion indicates, a garnishment claim is not "traditional" if the garnishee disputes his obligation to the judgment debtor. See also Skevofilax v. Quigley, 810 F.2d 378, 388 (3d Cir.), cert. denied 481 U.S. 1029 (1987) (*en banc*) (Becker, J., concurring) (recognizing that the "mere fact that federal courts normally have ancillary jurisdiction over garnishment proceedings does not demonstrate that they also have jurisdiction over disputed enforcement actions against third parties not present in the original action."). A garnishment claim is also not "traditional" to the extent that "[t]he district court would have to conduct a new trial or trials between nondiverse parties on state law causes of action . . . with recovery not necessarily measured by the amount of the [original] judgment." Sandlin, 972 F.2d at 1217. See also, Kokkonen, 114 S. Ct. at 1676-77;

and Frank, 882 F. Supp. at 62. If the post-judgment claim involved is not a "traditional" garnishment claim, the claim will require an independent basis for subject matter jurisdiction, unless the claim is based on the same legal theory and arises out of the same set of operative facts that produced the original judgment. Id. at 1216-17.

Applying the Sandlin decision to the facts in this case, the Court finds that LEC's fraudulent transfer action is not a "traditional" garnishment action. First, Garnishees do not admit that they are indebted to or hold any property belonging to Bob E. Walls. This fact is particularly significant in light of the Oklahoma garnishment procedure outlined above. Once a garnishee denies liability to the judgment debtor and once the garnishor takes issue with that denial, the Oklahoma statutes contemplate an independent civil action. See 12 O.S. § 1177. Once a garnishee denies liability to a judgment debtor, Oklahoma law authorizes the initiation of litigation, not a post-judgment procedure in aid of a judgment. Under such circumstances, it would be unfair to force a garnishee to litigate in federal court based solely on the fact that his creditor has suffered a federal judgment. See Skevofilax, 810 F.2d at 391 (Stapleton, Seitz and Mansmann, JJ., dissenting).

Second, this Court will have to conduct a whole new trial between non-diverse parties involving relatively complex issues of Oklahoma fraudulent transfer law. Third, the recovery LEC seeks against the Garnishees may not be limited or measured by the amount of the original judgment. In its notice of intent to take issue with Garnishee's garnishment answer, LEC states that it seeks, *inter alia*, to obtain a direct money

judgment against the Garnishees due to the alleged fraudulent transfers by Bob E. Walls. [Petition attached to and incorporated by reference into Doc. # 92 & 93]. See Glenn, Enforcement Jurisdiction, supra at *12 (recognizing that an independent basis for subject matter jurisdiction is necessary when a judgment creditor seeks to hold a garnishee directly liable) (Westlaw page cite).

Under the circumstances presented by this case, the Court finds that LEC's "garnishment" claims are not traditional. LEC's claims are not, therefore, automatically within the Court's enforcement jurisdiction. LEC admits that there is no diversity of citizenship between itself and Garnishees which would support jurisdiction under 28 U.S.C. § 1332 and there is no federal question which would support jurisdiction under 28 U.S.C. § 1331. Thus, this Court will have subject matter jurisdiction over LEC's fraudulent transfer claims only if the legal theories and operative facts supporting them are the same as those supporting LEC's original judgment against Bob E. Walls. Sandlin, 972 F.2d at 1216-17.

The legal theory underlying LEC's original judgment against Bob E. Walls was the existence of a written contract of guaranty executed by Mr. Walls in favor of the Bank. The legal theory underlying LEC's garnishment action is the existence of fraudulent transfers from Bob E. Walls to Garnishees. Thus, each action is based on a distinct legal theory -- one on contract and the other on tort.

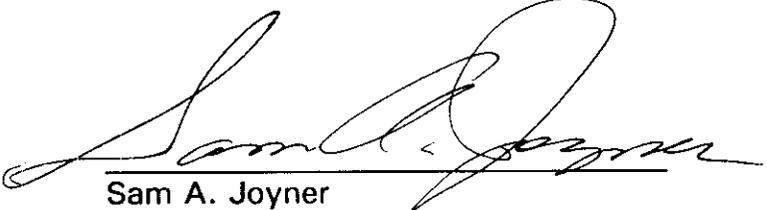
The operative facts underlying LEC's original judgment all involve the execution, interpretation and enforceability of a guaranty contract. In its garnishment action, LEC argues that Bob E. Walls fraudulently transferred his interest in various mortgages,

notes and partnerships to his relatives. None of the facts underlying the original judgment have any relationship to the detailed allegations supporting LEC's fraudulent transfer claims. See Petition attached to Doc. # 92 & 93. Because LEC's garnishment claims are not based on the same legal theories or operative facts underlying its original judgment against Bob E. Walls, this Court lacks subject matter jurisdiction over those claims. Sandlin, 972 F.2d at 1216-17.

WHEREFORE, the Court hereby finds that Garnishees' and Bob E. Walls' Motion to Dismiss [Doc. # 101] is hereby **GRANTED**. The garnishment proceedings begun by Plaintiff [Doc. # 92 & 93] are dismissed.

IT IS SO ORDERED.

Dated this 9th day November 1995.



Sam A. Joyner
United States Magistrate Judge

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

FILED
NOV 13 1995

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

ZELDA GOSSETT,

Plaintiff,

vs.

HARSCO CORPORATION,

Defendant.

Case No. 95-C-793-C ✓

ENTERED ON DOCKET
NOV 14 1995
DATE _____

ORDER

The Court has before it defendant's motion to dismiss plaintiff's Title VII claim as barred by the 90-day statutory period.

Plaintiff filed a claim of sex discrimination with the Oklahoma Human Rights Commission and received a notice of right to sue dated November 5, 1993. Plaintiff has filed two previous actions against the defendant within the 90-day statutory period. The first action was filed in state court on January 10, 1994 and timely removed to federal court. The second action was filed in federal court on February 4, 1994. The cases were later consolidated.

At a case management conference before a magistrate judge on August 24, 1994, the magistrate granted a motion to withdraw filed by plaintiff's original counsel. The magistrate noted that the cases had been on file for some time and that he was inclined to recommend that the cases be dismissed for lack of prosecution. The magistrate indicated that the plaintiff could refile her claim if she retained substitute counsel. Present at the hearing with plaintiff was an attorney who had informally appeared on plaintiff's behalf. The magistrate indicated that if this attorney filed an entry of appearance within ten days

11

that the magistrate would withdraw his recommendation dismissing the cases. On October 21, 1994, the district court entered an order accepting the recommendation of dismissal noting that plaintiff had failed to secure new counsel "as previously directed." Ten months later on August 18, 1995, plaintiff filed the present action which is the subject of defendant's motion to dismiss.

In seeking dismissal, defendant relies on Brown v. Hartshorne Public School District, 926 F.2d 959 (10th Cir.1991) by asserting that neither plaintiff's prior lawsuits nor the Oklahoma savings statute tolls plaintiff's untimely-filed third lawsuit. Although plaintiff argues that the 90-day time restrictions set forth in Title VII should not be considered as a statute of limitations, Brown indicates otherwise. After noting that the 90-day period is the "applicable statute of limitations," the circuit held that "in the absence of a statute to the contrary, the 90-day limitation period is not tolled during the pendency of the dismissed action." Moreover, the circuit stated that the state savings statute --which gives plaintiff one year from a non merit dismissal to refile--could not save the refiled case because the federal claim was controlled by federal statute regardless of state law. Id. at 961.

In relying on Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029 (10th Cir.1994) plaintiff argues that the 90-day period is not a jurisdictional prerequisite and that it is subject to equitable tolling. In Simons the circuit held that a Title VII claim could be equitably tolled upon a showing of "active deception." The court stated,

[A] Title VII time limit will be tolled upon a showing of 'active deception' where, for example, the plaintiff has been 'actively misled' or 'lulled into inaction' by her employer, state or federal agencies or the courts. Id. at 1031.

In her brief, plaintiff claims that she was "actively deceived" by the magistrate's statement that she could refile her claim when she secured substitute counsel. At the hearing held before this Court on November 7, 1995, although plaintiff's new counsel acknowledged that plaintiff's claim was not subject to the state's savings statute, he argued that by plaintiff refiling her case within one year of dismissal should be considered by the Court as reasonable time for plaintiff to secure new counsel and refile. The Court disagrees.

In Balseyro v. GTE Lenkurt, 702 F.2d 857 (10th Cir. 1983), the circuit applied the doctrine of equitable tolling to a Title VII claim which was filed six days following the 90-day limitation period. In Balseyro, the plaintiff received a letter from the Court clerk which declared unambiguously that the "filing of the right-to-sue letter stops the time 'until the individual involved has had an opportunity to obtain counsel.'" Id. at 859. Significantly, the circuit noted that the plaintiff "did not sleep on his rights but diligently attempted to secure the services of an attorney until advised by the clerk to file pro se. He then promptly did so." Id.

In this instance, plaintiff argues that it was reasonable to delay securing substitute counsel for almost one year. Plaintiff's counsel failed to provide the Court with any reasonable explanation for the extended delay except his assumption that his client was relying on advise of prior counsel that the savings statute was applicable. Clearly the state's savings statute is not applicable.

The Court has reviewed the record, and concludes that the statements made by the magistrate indicating that he would withdraw his recommendation of dismissal and that

plaintiff could file a new action if she secured new counsel does not constitute "active deception." The record indicates that plaintiff was informally represented by counsel at the time the statements were made. Further plaintiff had adequate time to consult with another attorney to determine her legal right to refiling her action, but instead plaintiff slept on it and waited nearly a year to refile her case. A claim that plaintiff could have remained "actively deceived" for such an extended period of time is not reasonable under the circumstances of this case.

Accordingly, it is the order of the Court, that defendant's motion to dismiss plaintiff's Title VII claim is hereby granted. The Court clerk is directed to set this case for a case management conference relative to plaintiff's remaining state law claim. Case Management Conference is set for 12/19/95, at 1:45 p.m., Tulsa Fed. Bldg., 224 S. Boulder, 2nd Fl. IT IS SO ORDERED this 10th day of November, 1995.


H. DALE COOK
United States District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 13 1995

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

DAVID COURSEY,

Plaintiff,

v.

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

Defendant.

No. 94-C-1160-J ✓

ENTERED ON DOCKET

DATE 11-14-95

ORDER²⁾

Plaintiff, David Coursey, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³⁾ Plaintiff contends that (1) the decision by the Secretary is not supported by substantial evidence, (2) the Secretary failed to properly consider evidence from Plaintiff's treating physicians, and (3) the Secretary applied the wrong standard in evaluating

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 supplemental security insurance benefits which was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held November 19, 1993, and February 3, 1994. *R. at 120, 128.* By order dated May 12, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 27-36.* The Plaintiff appealed the ALJ's decision to the Appeals Council. On October 24, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 4.*

12

Plaintiff's complaints of pain. Because the ALJ did not adequately present Plaintiff's limitations to the vocational expert, the Court reverses the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

At his hearing on February 3, 1994, Plaintiff testified that he was born on March 3, 1957. *R. at 135.* Plaintiff completed high school, and attended vocational training (for vocational rehabilitation) for two years. *R. at 135.* For the past 22 years, Plaintiff has mowed lawns and landscaped. *R. at 135.* Plaintiff stated that he is busier in the summertime, but he works within a one mile radius of where he lives because he is not permitted to drive. *R. at 135.*

Plaintiff testified that during the summer he worked an average of 20-23 hours per week, and earned between two and three hundred dollars per week. *R. at 136.* Plaintiff also worked in various restaurants (some temporary and/or part-time) for approximately 20 years. *R. at 139.* Plaintiff stated that he previously worked as a janitor for six or seven years. *R. at 137.* In addition, Plaintiff worked as a construction worker (for about eighteen months) when he was about 20 or 21. *R. at 137.*

At the time of the hearing, Plaintiff stated that he was working at the Salvation Army as a janitor. Plaintiff testified that he worked about two days a week for three to four hours each day. *R. at 136.* Plaintiff earns \$4.35 per hour at the Salvation Army. Plaintiff earned \$1390 while ringing bells for the Salvation Army from. *R. at 137.* When he rang bells, he worked ten hours a day, six days per week. *R. at 142.*

Plaintiff testified that if his current job (as a janitor at the Salvation Army) was available for forty hours per week he probably could work. However, Plaintiff stated that when he works full-time he becomes "tensed up" and has seizures. *R. at 140.*

Plaintiff testified that he lives by himself in an apartment complex. *R. at 144.* Although Plaintiff does not have a drivers license, he stated that he can travel around Tulsa using the bus system. *R. at 143-44.* Plaintiff does his own cooking. In addition, Plaintiff has "worked" for Neighbor-for-Neighbor, and that organization assisted him with his rent. *R. at 145.*

Plaintiff testified that he has always been able to get a job, but he has had a hard time staying employed because of his seizures. *R. at 146.* According to Plaintiff, he has an average of five to six seizures each month, and has had two or three seizures on the same day. Sometimes he does not have any seizures for several weeks *R. at 146.*

Plaintiff stated that during a mild seizure, if he is standing, he will collapse and hit the ground. Usually, however, within a few minutes he is "okay." *R. at 147.* According to Plaintiff, when he has a heavier seizure, which does not happen very often, he shakes a lot, and it takes him from one-half of an hour to one hour to recuperate. *R. at 147.* Plaintiff is taking Tegretol (200 mg), but he still has seizures even while on the medicine.

On September 20, 1985, a note in Plaintiff's medical records indicated that Plaintiff was pursuing supplemental security insurance benefits and required documentation of his seizures. Plaintiff told the doctor that he has experienced

seizures since he was an infant. *R. at 52.* In addition, Plaintiff claimed that he was having approximately one to four seizures per month. *R. at 52.* The record contains medical reports from 1987 through 1993 indicating that Plaintiff related accounts of seizures to his doctors.⁴¹

David L. Combs, M.D., by letter dated March 11, 1993, notes that Plaintiff has been a patient at the University of Oklahoma Health Sciences Center Clinic for over five years, and that he has treated Plaintiff for over one year. *R. at 232.* Dr. Combs states that Plaintiff is on anti-epileptic medication, and is relatively stable. However, according to Dr. Combs, Plaintiff's condition is not completely controlled even with the best possible medicine, and Plaintiff experiences approximately five seizures per month. *R. at 232.* Dr. Combs notes that Plaintiff should be restricted from driving,

⁴¹ On October 12, 1987, Plaintiff's records indicate that he had experienced four seizures which Plaintiff attributed to trouble caused by Plaintiff's brother living with him. *R. at 33.* Records from March 3, 1988 indicate Plaintiff was having one seizure per week which Plaintiff attributed to stress. *R. at 32.* On April 29, 1988, Plaintiff reported that he had experienced a mild seizure prior to taking his night time medicine. *R. at 31.* On June 27, 1988, Plaintiff reported two to three seizures. *R. at 30.* On September 16, 1988, Plaintiff reported he had experienced only one mild seizure since his last visit. *R. at 29.* On November 22, 1989, Plaintiff reported that he had experienced a seizure two weeks ago while riding a bicycle, which he thought was caused by sleep deprivation and stress at work. *R. at 24.* On May 11, 1990, Plaintiff reported two seizures the prior week. *R. at 23.* On November 7, 1990, Plaintiff stated that he had experienced two seizures that week. *R. at 22.* On November 29, 1990 the doctor noted that Plaintiff has experienced few seizures since his last visit. *R. at 21.* On December 18, 1990, Plaintiff's doctor noted that because Plaintiff experienced several seizures on Dilantin, Plaintiff, on his own, ceased taking it. *R. at 20.* Plaintiff's January 18, 1991 records indicate that Plaintiff states he was experiencing three to four seizures per week, which was an increase from three to five seizures per month. *R. at 19.* On January 25, 1991, the doctor noted that Plaintiff indicated he had not experienced any seizures since his last visit. *R. at 18.* On November 4, 1991, Plaintiff's doctor noted that Plaintiff was supposed to increase the amount of Depokene he was taking on the previous January, but that Plaintiff still had not increased the amount. *R. at 225.* Plaintiff's February 13, 1992 records indicate that he experienced a seizure thirty days ago, but that he was otherwise doing well. *R. at 224.* On April 10, 1992 Plaintiff reported that he had two seizures in February, experiencing confusion for four to five minutes and weakness for one to two minutes. *R. at 223.* On April 30, 1992, Plaintiff reported having five seizures in one day while he was not taking his medication. *R. at 222.* Plaintiff's medical records on January 19, 1993 note that Plaintiff seizes only rarely, but has seizures if he forgets his medicine. The report notes that otherwise Plaintiff is doing quite well. *R. at 17.* On May 20, 1993, Plaintiff reported another seizure while painting. *R. at 12.* On October 20, 1993, Plaintiff reported that he was doing well and had experienced no seizures in the past few months. *R. at 10.*

should not work at heights, and should not use heavy machinery or power tools. *R. at 232.*

James Hall, D.O., by letter dated November 4, 1993 wrote that Plaintiff has been a patient at the University of Oklahoma Health Sciences Center Clinic since at least 1985. Dr. Hall noted that Plaintiff's seizures are mostly well controlled, but that Plaintiff has no warning prior to having a seizure. Dr. Hall noted that Plaintiff cannot drive and that his day-to-day living activities are significantly impaired. Dr. Hall concluded that because of his seizures, Plaintiff is not suited for traditional employment. *R. at 239.*

A statement signed by five people on April 7, 1993, indicates that Plaintiff has been a volunteer at Neighbor-for-Neighbor, and collapsed on March 17, 1993. Later that same day, Plaintiff collapsed again, requiring approximately one hour to recover. *R. at 233.*

II. THE ALJ'S DECISION

The ALJ's evaluation of Plaintiff's claim terminated at step five of the sequential evaluation process. *R. at 101-110.* The ALJ concluded that Plaintiff retains the RFC to perform work with the limitation of avoiding work around unprotected heights or dangerous machinery. *R. at 107.* The ALJ noted that some of Plaintiff's seizures were caused by Plaintiff's failure to properly take his medications. *R. at 107.* The ALJ observed that Plaintiff does suffer from a seizure disorder, but the disorder did not meet the Listings, and did not preclude employment. *R. at 107-08.* The ALJ determined that Plaintiff's testimony regarding the number of

seizures he experiences was not fully credible. *R. at 107.* The ALJ concluded that although Plaintiff was precluded from performing his past relevant work, a substantial number of jobs in the national economy existed for which Plaintiff was qualified. *R. at 108.*

III. 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. . . .

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 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).

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.

IV. REVIEW

Substantial Evidence

Plaintiff alleges that the decision of the ALJ is not supported by substantial evidence. The ALJ found that although Plaintiff suffered from a seizure disorder,

Plaintiff retained the ability to perform work except for the need to avoid unprotected heights or dangerous machinery. *R. at 107.* The ALJ determined, based on the testimony of a vocational expert and in reliance on the Grids,^{6\} that Plaintiff was qualified for a substantial number of jobs in the national economy and was therefore not disabled. *R. at 108.*

Plaintiff claimed, at his hearing, that he had as many as five to six seizures each month. *R. at 146.* Plaintiff's medical records do indicate that he suffers from seizures. However, Plaintiff's records also indicate that he sometimes has no seizures for several months,^{7\} and that some of his seizures are related to his failure to take proper medication.^{8\} 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 Court, after reviewing the record and the decision of the ALJ finds that the ALJ's determination that Plaintiff does not suffer from as many seizures as Plaintiff claimed at his hearing is supported by the record.

^{6\} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Supbt. P, App. 2.

^{7\} Plaintiff's medical records on January 19, 1993 note that Plaintiff seizes only rarely. *R. at 17.* Plaintiff's February 13, 1992 records indicate that he experienced a seizure thirty days ago, but that he was otherwise doing well. *R. at 224.* On April 10, 1992 Plaintiff reported that he had two seizures in February, experiencing confusion for four to five minutes and weakness for one to two minutes. *R. at 223.* On October 20, 1993, Plaintiff reported that he was doing well and had had no seizures in the past few months. *R. at 10.* See also Note 4, *supra.*

^{8\} On December 18, 1990, Plaintiff's doctor noted that because Plaintiff experienced several seizures on Dilantin, Plaintiff, on his own, ceased taking it. *R. at 20.* On November 4, 1991, Plaintiff's doctor noted that Plaintiff was supposed to increase the amount of Depokene he was taking on the previous January, but that Plaintiff still had not increased the amount. *R. at 225.* On April 30, 1992, Plaintiff reported having five seizures in one day while he was not taking his medication. *R. at 222.* See also Note 4, *supra.*

In analyzing whether Plaintiff could perform his past relevant work, the ALJ relied upon the testimony of the vocational expert. Based on restrictions that Plaintiff needed to avoid dangers such as heavy machinery or unprotected heights, the vocational expert testified that Plaintiff's past work in yard maintenance involved moving machinery, and was therefore unsuitable. The vocational expert additionally testified that Plaintiff's past work as a dishwasher would also be inadvisable because of the danger posed by scalding water. *R. at 151-152.* Consequently, the ALJ determined that Plaintiff could not perform his past work. *R. at 107-108.*

However, the ALJ found that Plaintiff was not disabled because a sufficient number of jobs did exist which Plaintiff could perform. The ALJ's decision was based, in part, on the testimony of the vocational expert. The ALJ posed the following hypothetical to the vocational expert.

I want you, first, to assume a hypothetical person of the same age, education, background, training, and experience of this claimant. And I want you to assume that such a hypothetical person needs to avoid dangers, such as unprotected heights or dangerous machinery. Now with this limitation **and no others**. . . .

* * *

Are there other jobs you would expect such a hypothetical person to be able to perform?

R. at 151-52 (emphasis added). The vocational expert did determine that a sufficient number of jobs existed in the national economy which an individual with the above-described limitations could perform. However, the hypothetical does not adequately relate the Plaintiff's limitations.

As noted, the ALJ determined, and that determination is supported by substantial evidence, that Plaintiff suffered from a seizure disorder. Although the ALJ noted that Plaintiff's testimony was not credible with respect to the number of seizures which Plaintiff experienced, the ALJ nonetheless did find that Plaintiff suffered from some seizures.⁹¹

Epilepsy and the occurrence of "seizures" are recognized as non-exertional impairments. See, e.g., Williams v. Bowen, 844 F.2d 748, 752 (10th Cir. 1988); Channel v. Heckler, 747 F.2d 577, 580 (10th Cir. 1984); 20 C.F.R. § 404.1459(d). The ALJ should have included, in the hypothetical to the vocational expert, the additional limitation that the "hypothetical person" suffers from seizures, and the frequency with which the person experiences such seizures. In addition, the ALJ should have inquired whether or not such seizures could effect or might preclude the employment of that individual.¹⁰¹

Testimony of a vocational expert can certainly constitute substantial evidence. However, hypotheticals posed to the vocational expert must adequately relate all exertional and non-exertional impairments. Hargis v. Sullivan, 945 F.2d 1482, 1491-92 (10th Cir. 1991) ("Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision."), quoting Ekeland v. Bowen, 899 F.2d 719, 724

⁹¹ The medical reports from Plaintiff's treating physicians also support this conclusion. *R. at 232, 239.* No separate RFC evaluations are included in the record.

¹⁰¹ Plaintiff testified, and in his application for disability noted, that he has no trouble finding a job, but "every time I have a seizure I lose my job." *R. at 145-46, 174.*

(8th Cir. 1990). The Court finds that because the hypothetical posed to the vocational expert did not include all of Plaintiff's impairments, the testimony of the vocational expert does not constitute substantial evidence to support the ALJ's conclusion that Plaintiff is not disabled.

The ALJ also references the Grids, finding that the Grids indicate a finding of not disabled for a person of Plaintiff's age who has completed high school, and who has no transferable skills. *R. at 108*. The existence of non-exertional impairments does not automatically preclude reliance on the Grids. However, to the extent a non-exertional impairment limits available jobs, reliance on the Grids is precluded. See Gossett v. Bowen, 862 F.2d 802, 807-08 (10th Cir. 1988). The hypothetical posed by the ALJ to the vocational expert, although limited, included non-exertional limitations which limit the number of available jobs. Consequently, although the ALJ can rely on the Grids for guidance, the Grids alone cannot constitute substantial evidence to support the Secretary's decision.

The Court finds that the record does not include substantial evidence to support the decision of the Secretary.

Treating Physician

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. 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).

Dr. Combs, on March 11, 1993, noted that although Plaintiff's condition is not completely controlled, Plaintiff is relatively stable. *R. at 232*. Dr. Combs additionally noted that Plaintiff experiences approximately five seizures per month and should be restricted from driving, working at heights, or using heavy machinery or power tools. *R. at 232*. Dr. Hall, by letter dated November 4, 1993, noted that Plaintiff's seizures are generally controlled, but do restrict his day-to-day activities. Dr. Hall stated that Plaintiff was precluded from pursuing traditional types of employment. *R. at 239*.

Contrary to Plaintiff's assertion, the ALJ's opinion indicates that the ALJ adequately considered the medical evidence from Plaintiff's treating physicians. Generally, the ALJ accepted the statements of the treating physicians, but determined that the treating physicians' findings were not inconsistent with the ALJ's conclusion that Plaintiff could work. The ALJ did note that Dr. Combs' examination notes reflected that Plaintiff was not experiencing five seizures per month. However, the ALJ adequately discusses Plaintiff's medical records and testimony in his

determination that, when Plaintiff properly took his medication, his records do not indicate that he had five seizures per month.

Evaluation of Pain

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.

[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.

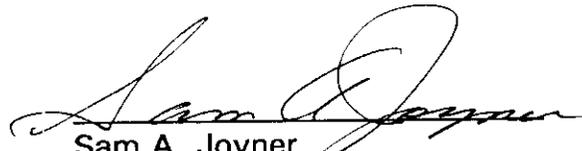
Plaintiff asserts that the ALJ erred by failing to address Plaintiff's complaints of pain. However, the mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than 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 summarized the Plaintiff's medical records, the Plaintiff's testimony, and Luna's requirements.¹¹ *R. at 104-106.* The ALJ's decision indicates that the ALJ adequately considered any complaints of pain, but determined that Plaintiff's pain was not disabling. The ALJ's determination that Plaintiff's pain is not disabling is supported by substantial evidence.

Accordingly, the Secretary's decision is **REVERSED** and **REMANDED** for proceedings consistent with this opinion.

Dated this 13 day of November 1995.


Sam A. Joyner
United States Magistrate Judge

¹¹ The record contains very few references to Plaintiff's "pain."

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

PHAEDRA WEBB, a minor, by and)
through her mother and next friend,)
SUSAN COHEN,)
)
Plaintiff,)

vs.)

JANE PHILLIPS HOSPITAL, INC.,)
d/b/a JANE PHILLIPS EPISCOPAL-)
MEMORIAL MEDICAL CENTER,)
RAYMOND J. LOFFER, M.D.,)
TERRY E. BURGE, M.D., LYNN R.)
TILKIN, D.O., PAUL M. McQUILLEN,)
M.D., AND CRAIG A. WAMSLEY,)
M.D.,)
)
Defendant)

Case No. 95-C-339B

NOV 09 1995

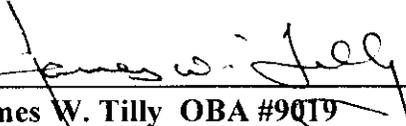
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV 13 1995

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Phaedra Webb, a minor, by and through her mother and next friend, Susan Cohen, ("Webb"), and the defendants Jane Phillips Hospital, Inc., d/b/a Jane Phillips Episcopal-Memorial Medical Center, Raymond J. Loffer, M.D., Terry E. Burge, M.D., Lynn R. Tilkin, D.O., Paul M. McQuillen, M.D., and Craig A. Wamsley, M.D., pursuant to FED. R. CIV. P. 41(a)(1)(ii), jointly stipulate that Webb's claims against defendants Terry E. Burge, M.D. ("Burge"), Lynn R. Tilkin, D.O. ("Tilkin"), and Craig A. Wamsley, M.D. ("Wamsley") in the above captioned action be dismissed with prejudice to refiling, with Webb, Burge, Tilkin, and Wamsley to bear their own respective cost and attorneys' fees.

TILLY & WARD

By 

James W. Tilly OBA #9019
Two West Second Street, Suite 2220
P.O. Box 3645
Tulsa, OK 74101-3645

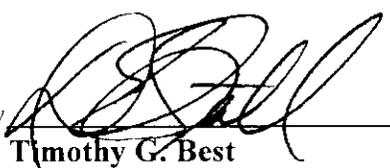
**ATTORNEYS FOR PHAEDRA WEBB
BARKLEY & RODOLF**

By 

Karen Callahan
Stephen J. Rodolf
401 South Boston
Tulsa, OK 74103

**ATTORNEYS FOR JANE PHILLIPS
HOSPITAL**

**BEST, SHARP, HOLDEN, SHERIDAN &
STRITZKE**

By 

Timothy G. Best
Douglas E. Stall
808 OneOk Plaza
Tulsa, OK 74103

**ATTORNEYS FOR RAYMOND J.
LOFFER, M.D., TERRY E. BURGE,
M.D., LYNNE R. TILKIN, D.O., PAUL
M. MCQUILLEN, M.D., AND CRAIG
A. WAMSLEY, M.D.**

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

FILED

NOV 9 1995

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

DON E. CRAVENS,
Plaintiff,

v.

WILLBROS BUTLER ENGINEERS, INC.
Defendant.

No. 93-C-512-B

ENTERED ON DOCKET

DATE NOV 13 1995

ORDER

This matter comes on for consideration of Defendant Willbros Butler Engineers, Inc.'s (Willbros) Motion For Summary Judgment (docket #53) in this age discrimination case brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

WILLBROS' MOTION FOR SUMMARY JUDGMENT

Willbros essentially urges three grounds to support its requested summary judgment herein:

(1) That Plaintiff Donald E. Cravens (Cravens) has failed to meet the administrative prerequisites to bring an ADEA claim by failing to file an EEOC charge within the allowed time;

(2) That Plaintiff is unable to establish a *prima facie* case of age discrimination; and

(3) That assuming Plaintiff could establish a *prima facie* case of age discrimination, Willbros has met its burden of explaining its not-pretextual reasons for terminating Plaintiff's employment.

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); 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). 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 UNDISPUTED FACTS

1. Plaintiff was hired by Willbros as an electrical engineer on May 22, 1989, and reported to Bill Smith (Smith).
2. Plaintiff quit his employment with Willbros on November 14, 1990, to take an overseas job with Crest Engineering.
3. On January 28, 1991, having left the Crest overseas position, Plaintiff was again hired by Willbros. Plaintiff was 61 years old in 1991.
4. Plaintiff's performance was evaluated as marginal in a 1993 performance review. Specifically, Plaintiff was graded poor in the following areas: quantity of work, attitude, planning and organization, initiative, creativity, job knowledge, and technical knowledge. The review indicated Plaintiff had a negative attitude toward company management and needed improvement in this area, had a "don't care" attitude about getting his work done, was neither creating nor designing work but spent most of his time reviewing others' work. The review also indicated Plaintiff needed to develop a strong interest in projects, pay more attention to details of work, and change his attitude toward management and his work.
5. Work noticeably slowed down at Willbros in early 1993 and Plaintiff was working only about 20 hours per week.
6. Plaintiff was terminated from his employment with Willbros on or about March 19, 1993.
7. Plaintiff filed the present action on April 29, 1993.

8. Plaintiff has not filed a complaint with either EEOC or the Oklahoma Human Rights Commission (OHRC) concerning the instant matter.

ARGUMENT AND AUTHORITY

In order to maintain a private right of action under ADEA a complainant must first file a timely charge with the EEOC. Brown v. Federation of State Medical Boards of U.S., 830 F.2d 129 (7th Cir.1987). A complainant is required by 29 U.S.C. §626(d) to file a charge with the EEOC within 180 days after the alleged unlawful practice before he can bring suit. In state like Oklahoma, which has age discrimination statutes paralleling the ADEA, the filing period is extended to 300 days. Id.

Filing with the EEOC allows that agency to effect a conciliation when the grievance is first identified and it also provides the employer with early notice of the charge and the potential of a lawsuit. Posey v. Skyline Corp., 702 F.2d 102 (7th Cir.1983), cert. denied, 464 U.S. 960 (1983); Romain v. Kurek, 836 F.2d 214 (6th Cir.1987); Terrell v. U.S. Pipe & Foundry, 644 F.2d 1112 (5th Cir.1981), cert. granted, 456 U.S. 968 (1982).

Plaintiff was terminated on or about March 19, 1993. It was incumbent upon Plaintiff to file a charge with the EEOC on or before January 13, 1994, to fulfill the condition precedent to instigating a legal action.

Plaintiff alleges that he contacted the EEOC in February, 1994, and was told by a Mr. Dick Henson that he did not have to

file an EEOC charge because he had already filed suit. Plaintiff argues that the condition precedent, filing an EEOC charge, is subject to equitable modification if Plaintiff can plead and prove equitable grounds for tolling, citing General Scanning, Inc., 832 F.2d 96 (7th Cir.1987). Plaintiff further argues that he relied upon his former attorney, Jeff Nix, to correctly file his complaint of age discrimination and that Nix failed to inform Plaintiff of any requirement to file an initial charge with the appropriate administrative agency.

The Court notes that Defendant has offered no evidence to disprove that Plaintiff made an attempt to file an EEOC claim, albeit belatedly, apparently relying solely upon the fact that no claim was filed within the 300 day limitation period by Plaintiff's own testimony. Under scant but relevant case authority this is sufficient. Haupt v. International Harvester Co., 571 F.Supp. 1043 (D.C.Ill.1983); Sprott v. Avon Products, Inc., 596 F.Supp. 178 (D.C.N.Y.1984); Knauth v. North Country Legal Services, 575 F.Supp. 897 (D.C.N.Y.1983).

Plaintiff's testimony that EEOC employee Henson told Plaintiff he need not file a claim because his present suit was already filed is of no avail since it occurred more than 300 days after Plaintiff was terminated.¹ The Court concludes that Plaintiff is indeed

¹ It appears to be uncertain exactly when Plaintiff was terminated but it is clear from the record it occurred in March, 1993. If Plaintiff was terminated as late as March 31, 1993, and contacted the EEOC on February 1, 1994, a period of 306 days would have elapsed. Therefore, Plaintiff's time within which to file an EEOC claim would have already expired.

barred by his failure to file an EEOC claim within the requisite 300 day time limitation.

Notwithstanding Plaintiff's failure to meet a condition precedent necessary to maintaining this suit, the Court concludes Plaintiff has failed to establish a *prima facie* of age discrimination. Having reviewed Plaintiff's 181 page deposition in its entirety the Court concludes that Plaintiff has simply not come forth with sufficient evidence to establish that age was the or even a partial motivating cause of Plaintiff's termination.

Plaintiff, in a chosen profession where job-hopping is apparently the norm rather than the exception,² testified he came back to work for Defendant with the full understanding that he was "reinstated"³ and that he planned to retire with Defendant. Plaintiff "feels" that Defendant's decision to terminate him in March, 1993, was because he was nearing retirement.

There is little evidence in the record to support Plaintiff's "reinstatement", other than his testimony that he discussed reinstatement with Bill Smith and eventually received some additional medical benefits,⁴ and no evidence in the record to

² Plaintiff testified that he took and left, for better opportunities, many engineering jobs, sometimes working for the same company several times at separate periods.

³ Prior to re-employing with Defendant in January, 1991, Plaintiff had worked for Defendant for a period of approximately one and one half years in the preceding two or three year time period.

⁴ Plaintiff testified that he did indeed receive additional medical leave based upon the earlier one and one half years of employment with Defendant.

support Plaintiff's eventual plan to "retire" at Defendant's company. In any event, Plaintiff's linkage of these two issues with alleged age discrimination is not supported in the record which is substantially the deposition of Plaintiff and his evaluation reports.

In reduction-of-force cases a plaintiff may demonstrate a *prima facie* case of age discrimination by showing: (1) that he was within the protected class; (2) that he was adversely affected by the employment decision; (3) that he was qualified for the position at issue; and (4) that he was treated less favorable than younger employees during the reduction in force. Rea v. Martin Marietta Corp., 29 F.3d 1450 (10th Cir.1994). Elements (3) and (4) are not established. Plaintiff received less than favorable performance reviews and refuted these negative assessments by only his own opinion of himself that he well qualified. Plaintiff testified that immediately before his termination Defendant was hiring "younger" people without linking up what positions these new employees, if any, might be placed in.

Even if Plaintiff had not been tarnished by unfavorable performance reviews, the termination of a competent employee when an employer is making a reduction-in-force due to economic necessity is insufficient to establish a *prima facie* case of age discrimination. LaGrant v. Gult & Western Mfg. Co., 748 F.2d 1087 (6th Cir.1984). Neither is an employer required to discharge a younger satisfactory employee in order to retain an older employee. Only neutral, non-preferential treatment of age is required. Furnco

Constr. Corp. v. Waters, 438 U.S. 567; Toussaint v. Ford Motor Co.,
581 F.2d 812 (10th Cir.1978).

The Court concludes that, even if Plaintiff were not barred by his failure to file an EEOC claim within the required 300 day period of limitation as a condition precedent to bringing this action, Plaintiff has failed to make out a *prima facie* case of age discrimination under the record herein. Accordingly, Defendant's Motion For Summary Judgment should be and the same is hereby GRANTED. A Judgment in conformance with this Order will be filed simultaneously herewith.

IT IS SO ORDERED, this 9th day of November, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 09 1995

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

DON E. CRAVENS,

Plaintiff,

v.

WILLBROS BUTLER ENGINEERS, INC.

Defendant.

No. 93-C-512-B ✓

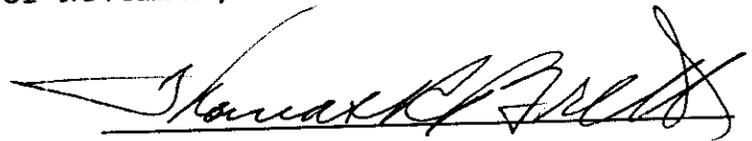
ENTERED ON DOCKET

DATE NOV 13 1995

J U D G M E N T

In accord with an Order entered simultaneously herein, granting summary judgment in favor of Defendant, Willbros Butler Engineers, Inc. and against Plaintiff Don E. Cravens, Judgment is herewith entered in favor of Defendant, Willbros Butler Engineers, Inc. and against Plaintiff Don E. Cravens on all claims. Costs are assessed against Plaintiff if timely applied for pursuant to Local Rule 54.1 and each party is to bear his or its own attorneys fees.

DATED this 8th day of November, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

59

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

ROSE ANNE YOAKUM,
Plaintiff,

vs.

ST. JOHN MEDICAL CENTER, INC.,
a nonprofit corporation
incorporated in the State
of Oklahoma,
Defendant.

Case No. 95-C-963-BU

ENTERED ON DOCKET
DATE NOV 13 1995

FILED

NOV 09 1995

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

ORDER

This matter comes before the Court upon the Motion to Dismiss of Defendant, St. John Medical Center, Inc., wherein Defendant seeks to dismiss the Third Claim for Relief of Plaintiff, Rose Anne Yoakum's Complaint, pursuant to Rule 12(b)(6), Fed.R.Civ.P. From reviewing the Court file, it appears that Plaintiff has not responded to Defendant's Motion to Dismiss within the time prescribed by the Local Rules and has not filed a request for an extension of time to respond to the motion. Therefore, in accordance with Local Rule 7.1(C), the Court deems Defendant's motion confessed.

Having independently reviewed the motion, the Court finds that Plaintiff has failed to state a claim under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., for which relief may be granted and that dismissal of the Third Claim of Relief is appropriate under Rule 12(b)(6).

Accordingly, Defendant, St. John Medical Center Inc.'s Motion to Dismiss (Docket Entry #2) is GRANTED. The Third Claim of Relief

5

of Plaintiff, Rose Anne Yoakum's Complaint is DISMISSED WITH
PREJUDICE.

ENTERED this _____ day of November, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 9 - 1995

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

ASSOCIATED INSURANCE
MANAGEMENT CORPORATION,

Plaintiff,

vs.

ARKANSAS GENERAL AGENCY,
INC., and RICK W. WELCH,

Defendants.

Case No. 95-C-1044-BU

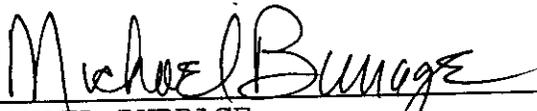
ENTERED ON DOCKET

DATE NOV 13 1995

ORDER

As it appears the Motion for Protective Order filed by Tulsa Refuse, Inc. on October 19, 1995 has been resolved by the parties and deemed moot by Magistrate Judge McCarthy, and there is nothing left for this Court to adjudicate, this Court hereby ORDERS the Clerk of the Court to terminate this action in his records.

ENTERED this 9th day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

6

Plaintiffs, however, allege that the payment was to lease a portion of the land, while acknowledging that an oral agreement was made to sell the land. Defendant claims that he has attempted to make further payments, but that Plaintiffs have refused to accept it. Plaintiffs claim, however, that Defendant has not attempted to make further payments.

I. MOTION FOR PARTIAL SUMMARY JUDGMENT³

Plaintiffs allege that the planned sale is void under Oklahoma's Statute of Frauds, 15 O.S. § 136, because the sales contract was oral and the subsequent written memoranda were insufficient to overcome the Statute of Frauds. Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

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

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

³Although Plaintiffs style their motion as one for partial summary judgment, the motion itself appears to ask for judgment as a matter of law as to all issues currently before the Court.

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

The Tenth Circuit Court of Appeals stated:

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

* * *

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

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

Plaintiffs state that, in order for Defendant to prevail on his counterclaim seeking specific performance, he must first prove that there is a valid sales contract. Further, Plaintiffs allege that, due to the invalidity of the writing under the Statute of Frauds, they are entitled to judgment as a matter of law on all of

Defendants' claims because such claims are premised upon the validity of the written contract. Plaintiffs also seek summary judgment in their favor on their eight claims.

Oklahoma law is clear that oral contracts for the sale of real estate are unenforceable. See 15 O.S. § 136. Further, any written memorandum, in order to be sufficient under the Statute of Frauds, "must be complete in itself, and leave nothing to rest in parol." Hawkins v. Wright, 226 P.2d 957 (Okla. 1951). The Oklahoma Supreme Court has set forth four factors that must be met in order for written memoranda to satisfy the Statute of Frauds: the document must plainly set forth (1) the parties to the contract; (2) the subject matter thereof, (3) the price and consideration, (4) a description of the property, and (5) all of the terms and conditions of the contract. Pettigrew v. Denwalt, 431 P.2d 333 (Okla. 1967). The written payment agreements, one written by Plaintiff Ray E. Allen and one written by Defendant Aaron Sluyter, do not meet this criteria. While each document appears to set out essentially the same payment plan, there is no description, legal or otherwise, of the property to be sold. (See Plaintiffs' Exh. A and B) Nor does either document set forth the parties to the contract. The Court holds that, as a matter of law, the documents written by Ray E. Allen and Aaron Sluyter are unenforceable as sales contracts under the Statute of Frauds.⁴

There remains the issue, however, of whether the doctrine of

⁴Further, there is no evidence that, had Ray E. Allen been acting as a sales agent for the remaining plaintiffs, the agency agreement was in writing as required by the Statute of Frauds.

part performance removes the contract from the purview of the Statute of Frauds. Courts of equity will specifically enforce a vendor's oral promise to convey under certain circumstances. See Pugh v. Gilbreath, 571 P.2d 1241 (Okla. App. Ct. 1977). Good-faith possession of land pursuant to an oral contract, coupled with part payment of the purchase price, can be sufficient part performance. Kirby v. Agra Gin Co., 347 P.2d 223 (Okla. 1959).

The Court determines that there is a factual dispute as to whether an oral contract existed, whether partial performance has occurred, whether Ray E. Allen acted as agent for the remaining Plaintiffs, and as to the meaning of the \$5,000 payment from Sluyter to Ray E. Allen.

Plaintiffs' Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56 (Docket #34) is granted in part and denied in part.

IT IS SO ORDERED this 9th day of November, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ALPHONZO HARBERT; BERTHA)
HARBERT; ASSOCIATES FINANCIAL)
SERVICES COMPANY OF)
OKLAHOMA, INC; NATIONSBANK OF)
NORTH CAROLINA, N.A., successor by)
name change to North Carolina National)
Bank; SERVICE COLLECTION)
ASSOCIATION, INC; STATE OF)
OKLAHOMA, ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

FILED

NOV 9 1995

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

ENTERED ON DOCKET
NOV 13 1995
DATE _____

Civil Case No. 95 C 612B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9 day of Nov,
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; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by
Fred A. Pottorf; the Defendant, NATIONSBANK OF NORTH CAROLINA, N.A., appears
not having previously filed a Disclaimer; and the Defendants, ALPHONZO HARBERT,

BERTHA HARBERT and ASSOCIATES FINANCIAL SERVICES COMPANY OF OKLAHOMA, INC., appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, ALPHONZO HARBERT, signed a Waiver of Summons on July 22, 1995; that the Defendant, BERTHA HARBERT, was served a copy of Summons and Complaint on August 31, 1995, by Certified Mail; that the Defendant, ASSOCIATES FINANCIAL SERVICES COMPANY OF OKLAHOMA, INC., was served a copy of Summons and Complaint on August 10, 1995, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on July 7, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 20, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on July 26, 1995; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on July 31, 1995; that the Defendant, NATIONSBANK OF NORTH CAROLINA, N.A., filed its Disclaimer on October 5, 1995; and that the Defendants, ALPHONZO HARBERT, BERTHA HARBERT and ASSOCIATES FINANCIAL SERVICES COMPANY OF OKLAHOMA, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Defendants, ALPHONZO HARBERT and BERTHA HARBERT, are husband and wife.

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

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

**Lot Ten (10), Block Fifteen (15), SUBURBAN HILLS
ADDITION to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on March 6, 1981, the Defendant, ALPHONZO HARBERT, executed and delivered to CHARLES F. CURRY COMPANY, his mortgage note in the amount of \$19,450.00, payable in monthly installments, with interest thereon at the rate of Thirteen and One-Half percent (13½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, ALPHONZO HARBERT, A SINGLE PERSON, executed and delivered to CHARLES F. CURRY COMPANY, a mortgage dated March 6, 1981, covering the above-described property. Said mortgage was recorded on March 10, 1981, in Book 4530, Page 2259, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 21, 1989, Charles F. Curry Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his/her successors and assigns. This Assignment of Mortgage was recorded on June 28, 1989, in Book 5191, Page 1814, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1989, the Defendant, ALPHONZO HARBERT, 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 July 1, 1990, July 1, 1991, and July 1, 1992.

The Court further finds that the Defendant, ALPHONZO HARBERT, 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, ALPHONZO HARBERT, is indebted to the Plaintiff in the principal sum of \$28,210.45, plus interest at the rate of 13½ percent per annum from May 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, 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 \$373.20 which became a lien on the property as of July 6, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$2,315.94, which became a lien on the property as of October 29, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, ALPHONZO HARBERT, BERTHA HARBERT and ASSOCIATES FINANCIAL SERVICES COMPANY OF OKLAHOMA, 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 the Defendant, NATIONSBANK OF NORTH CAROLINA, N.A., disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, ALPHONZO HARBERT, in the principal sum of \$28,210.45, plus interest at the rate of 13½ percent per annum from May 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$373.20, plus accrued and accruing interest, for state income tax, plus the costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$2,315.94 for its judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, NATIONSBANK OF NORTH CAROLINA, N.A., ALPHONZO HARBERT, BERTHA HARBERT and ASSOCIATES FINANCIAL SERVICES COMPANY OF OKLAHOMA, 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 Defendant, ALPHONZO HARBERT, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$373.20, plus accrued and accruing interest, for state income taxes.

Fourth:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$2, ~~305.94~~, for judgment lien.

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.

Fourth:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$2, ~~305.94~~, for judgment lien.

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

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

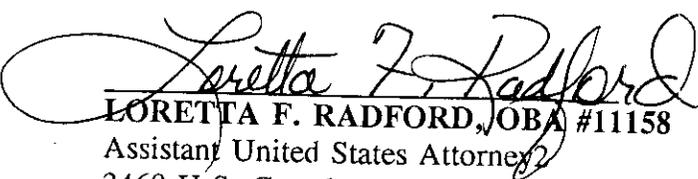
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

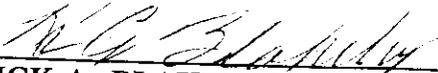
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, JOBA #11158

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



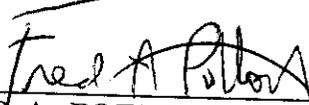
DICK A. BLAKELEY, OBA #852

8Assistant 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



KIM D. ASHLEY, OBA # 14175

Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



FRED A. POTTORF, OBA #7248

1437 South Boulder, Suite 900
Tulsa, Oklahoma 74119-3609
(918) 582-3191
Attorney for Defendant
Service Collection Association, Inc

Judgment of Foreclosure
Civil Action No. 95 C 612B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 BILLY E. McCLELLAN)
 aka Billy Eugene McClellan;)
 LILY D. HARMS)
 fka Lily D. Little Sun)
 fka Lily D. McClellan)
 fka Lily Diane McClellan;)
 TERESA BIBLE)
 fka Teresa McClellan;)
 SPOUSE, if any, of Billy E. McClellan;)
 ROBIN L. HARMS, Spouse of Lily D. Harms;)
 KATHRYN ROBERTA BEARD)
 fka Kathryn Roberta McClellan;)
 BILLY EUGENE McCLELLAN, JR.;)
 COUNTY TREASURER, Pawnee County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Pawnee County, Oklahoma,)
 WILLIAM BEARD, Spouse of Kathryn Roberta Beard;)
 SPOUSE, if any, of Billy Eugene)
 McClellan, Jr.,)
)
 Defendants.)

FILED

NOV 9 1995

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

ENTERED ON DOCKET
DATE NOV 13 1995

) CIVIL ACTION NO. 94-C-853-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9 day of Nov,
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, Pawnee County, Oklahoma, and Board of County
Commissioners, Pawnee County, Oklahoma, appear by Alan B. Foster, Assistant District

Attorney, Pawnee County, Oklahoma; that the Defendant, **Lily D. Harms fka Lily D. Little Sun fka Lily D. McClellan fka Lily Diane McClellan**, appears by her attorney O. Ronald McGee; that the Defendant, **Spouse, if any, of Billy Eugene McClellan, Jr.**, appears not, and should be dismissed from this action; and that the Defendants, **Billy E. McClellan aka Billy Eugene McClellan; Teresa Bible fka Teresa McClellan; Spouse, if any, of Billy E. McClellan; Robin L. Harms, Spouse of Lily D. Harms; Kathryn Roberta Beard fka Kathryn Roberta McClellan; Billy Eugene McClellan, Jr.; and William Beard, Spouse of Kathryn Roberta Beard**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the the Defendant, **Billy E. McClellan aka Billy Eugene McClellan**, was served by certified mail, return receipt requested, delivery restricted to the addressee on December 13, 1994; that the Defendant, **Lily D. Harms fka Lily D. Little Sun fka Lily D. McClellan fka Lily Diane McClellan**, executed a Waiver of Service of Summons on September 19, 1994 which was filed on September 23, 1994; that the Defendant, **Robin L. Harms, Spouse of Lily D. Harms**, executed a Waiver of Service of Summons on March 5, 1995 which was filed on March 10, 1995; that the Defendant, **Kathryn Roberta Beard fka Kathryn Roberta McClellan**, was served with Summons and Complaint by the United States Deputy Marshal on January 26, 1995; that the Defendant, **Billy Eugene McClellan, Jr.**, was served by certified mail, return receipt requested, delivery restricted to the addressee on December 13, 1994; that the Defendant, **William Beard, Spouse of Kathryn Roberta Beard**, was served with Summons and Amended Complaint by the United States Deputy Marshal on May 9, 1995; that the Defendant, **County Treasurer, Pawnee County, Oklahoma**, was served by certified mail, return receipt requested, delivery restricted to the addressee on September 9,

1994; that the Defendant, **Board of County Commissioners, Pawnee County, Oklahoma**, was served by certified mail, return receipt requested, delivery restricted to the addressee on September 9, 1994.

The Court further finds that the Defendants, **Teresa Bible fka Teresa McClellan and Spouse, if any, of Billy E. McClellan**, were served by publishing notice of this action in the Pawnee Chief, a newspaper of general circulation in Pawnee County, Oklahoma, once a week for six (6) consecutive weeks beginning June 14, 1995, and continuing through July 19, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Teresa Bible fka Teresa McClellan and Spouse, if any, of Billy E. McClellan**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Teresa Bible fka Teresa McClellan and Spouse, if any, of Billy E. McClellan**. 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 Cathryn D. McClanahan, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

The Court further finds that Defendant, **Billy Eugene McClellan, Jr.**, is not married; consequently, the Defendant, **Spouse, if any, of Billy Eugene McClellan, Jr.**, has not been served herein as such person does not exist, and should therefore be dismissed as a Defendant herein.

The Court further finds that on January 26, 1995, the Defendant, **Billy E. McClellan aka Billy Eugene McClellan**, stated to the United States Deputy Marshal that he had not remarried when the Deputy Marshal served him Summons and Complaint for Defendant, **Spouse, if any, of Billy Eugene McClellan**. Therefore, the Court finds that Defendant, **Billy E. McClellan aka Billy Eugene McClellan**, is now a single person.

It appears that the Defendants, **Billy E. McClellan aka Billy Eugene McClellan; Teresa Bible fka Teresa McClellan; Spouse, if any, of Billy E. McClellan; Robin L. Harms, Spouse of Lily D. Harms; Kathryn Roberta Beard fka Kathryn Roberta McClellan; Billy Eugene McClellan, Jr.; and William Beard, Spouse of Kathryn Roberta Beard**, 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 promissory note and for foreclosure of a mortgage upon the following described real property located in Pawnee County, Oklahoma, within the Northern Judicial District of Oklahoma:

A Tract of land in Lot 3 of SW $\frac{1}{4}$ of Section 30, Township 22 North, Range 5 East, I.M., described by metes and bounds as follows: Beginning at West Quarter Section corner of Sec. 30-22N-5E; thence East along the Quarter Section line to a distance of 660'; thence South parallel to West Section line a distance of 660'; thence West a distance of 660' to point on West Section line; thence North along the West Section line a distance of 660' to the point of beginning, containing 10 acres, more or less.

Subject, however, to all valid outstanding Easements, Rights-of-way, Mineral Leases, Mineral Reservations, and Mineral Conveyances of record.

The Court further finds that on August 18, 1977, Billy E. McClellan and Lily D. McClellan executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing and Community Development Service, their promissory note in the amount of \$26,400.00, payable in monthly installments, with interest thereon at the rate of 8 percent per annum.

The Court further finds that as security for the payment of the above-described note, Billy E. McClellan and Lily D. McClellan executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing and Community Development Service, a real estate mortgage dated August 18, 1977, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on August 18, 1977, in Book 199, Page 132, in the records of Pawnee County, Oklahoma.

The Court further finds that Defendants, **Billy E. McClellan aka Billy Eugene McClellan and Lily D. Harms fka Lily D. Little Sun fka Lily D. McClellan fka Lily Diane McClellan**, 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 Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$19,474.29, plus accrued interest in the amount of \$4,150.11 as of July 8, 1994, plus interest accruing thereafter at the rate of 8 percent per annum or \$4.2684 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$27.40 (\$17.40 fees for service of Summons and Complaint, \$10.00 fee for recording Notice of Lis Pendens).

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

The Court further finds that the Defendants, **Teresa Bible fka Teresa McClellan; Spouse, if any, of Billy E. McClellan; Robin L. Harms, Spouse of Lily D. Harms; Kathryn Roberta Beard fka Kathryn Roberta McClellan; Billy Eugene McClellan, Jr.; and William Beard, Spouse of Kathryn Roberta Beard**, are in default and therefore have 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 Rural Housing and Community Development Service, formerly Rural Economic and Community Development, formerly Farmers Home Administration, have and recover judgment in rem against the Defendants,

Billy E. McClellan aka Billy Eugene McClellan and Lily D. Harms fka Lily D. Little Sun fka Lily D. McClellan fka Lily Diane McClellan, in the principal sum of \$19,474.29, plus accrued interest in the amount of \$4,150.11 as of July 8, 1994, plus interest accruing thereafter at the rate of 8 percent per annum or \$4.2684 per day until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until fully paid, plus the costs of this action in the amount of \$27.40 (\$17.40 fees for service of Summons and Complaint, \$10.00 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.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Teresa Bible fka Teresa McClellan; Spouse, if any, of Billy E. McClellan; Robin L. Harms, Spouse of Lily D. Harms; Kathryn Roberta Beard fka Kathryn Roberta McClellan; Billy Eugene McClellan, Jr.; County Treasurer, Pawnee County, Oklahoma; Board of County Commissioners, Pawnee County, Oklahoma; William Beard, Spouse of Kathryn Roberta Beard and Spouse, if any, of Billy Eugene McClellan, Jr.**, have no right, title, or interest in the subject real property, and the Defendant, **Spouse, if any, of Billy Eugene McClellan, Jr.**, is hereby dismissed as a Defendant herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court finds that on January 26, 1995, the Defendant, **Billy E. McClellan aka Billy Eugene McClellan**, stated to the United States Deputy Marshal that he had not remarried. Therefore, the Court finds that Defendant, **Billy E. McClellan aka Billy Eugene McClellan**, is now a single person.

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

FILED

NOV 9 1995

DONNA ROGERS,

Plaintiff,

vs.

THE TRUST COMPANY OF OKLAHOMA,
and WILLIAM E. MEYER,

Defendants.

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

Case No. 95-C-909-B

ENTERED ON DOCKET

DATE NOV 13 1995

A JURY TRIAL IS DEMANDED.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

FOR GOOD CAUSE SHOWN, this action is dismissed *without prejudice*.

IT IS SO ORDERED this ___ day of November, 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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.

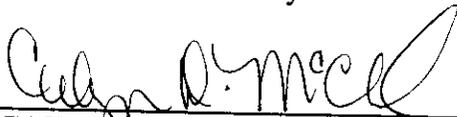
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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 and Amended Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

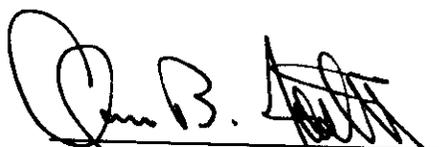
S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



ALAN B. FOSTER, OBA #3046

Assistant District Attorney

Pawnee County Courthouse

Pawnee, OK 74058

(918) 762-2555

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Pawnee County, Oklahoma

Judgment of Foreclosure

Case No. 94-C-853-B

CDM:css

FILED

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

NOV 9 1995

DONNA ROGERS,)
)
 Plaintiff,)
)
 vs.)
)
 THE TRUST COMPANY OF OKLAHOMA,)
 and WILLIAM E. MEYER,)
)
 Defendants.)

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

Case No. 95-C-909-B
ENTERED ON DOCKET
DATE NOV 13 1995
A JURY TRIAL IS DEMANDED.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

FOR GOOD CAUSE SHOWN, this action is dismissed *without prejudice*.

IT IS SO ORDERED this ___ day of November, 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

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

FILED

NOV 9 1995

js

AMERICAN STATES INSURANCE COMPANY,
an Indiana corporation,

Plaintiff,

v.

MICHAEL SHUE DeCORTE and CHERYL
DeCORTE,

Defendants.

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

Case No. 94-C-108-H ✓

ENTERED ON DOCKET

DATE 11-13-95

O R D E R

This matter comes before the Court on a motion for summary judgment by Plaintiff American States Insurance Company (Docket #6).

For purposes of this Order, the Court accepts as true the following statement of facts submitted by Defendant Michael DeCorte in connection with his action filed in Tulsa County District Court and styled Michael DeCorte v. Gary Robinson and the City of Broken Arrow. Such facts are as follows:

"1. On Friday, June 1, 1990, at approximately 9:00 p.m., the Plaintiff, Michael S. DeCorte (hereinafter referred to as DeCorte) and his then wife, Cheryl DeCorte were driving their family automobile, a 1979 Oldsmobile Cutlass, eastbound on the Broken Arrow Expressway traveling from Tulsa to Broken Arrow.

2. At that time, the Defendant, Gary Robinson (hereinafter referred to as Defendant Robinson), and his wife were also eastbound in their personal vehicle on the Broken Arrow Expressway, after leaving a Tulsa restaurant where he consumed two frozen

margaritas. At that time, Defendant Robinson was an off-duty police officer employed by The City of Broken Arrow.

3. Defendant Robinson claims that he observed reckless driving behavior by DeCorte and initiated pursuit in his private vehicle. During this pursuit, Defendant Robinson contacted The City of Broken Arrow Dispatcher by way of his private mobile telephone.

4. Defendant Robinson pursued DeCorte's vehicle as it exited the Broken Arrow Expressway and proceeded through a neighborhood bound for DeCorte's residence. DeCorte and his wife became concerned when they realized they were being followed by an unknown vehicle for unknown reasons and therefore sought a well[-]lighted public place in which to determine the intentions of the operator of the pursuing vehicle.

5. DeCorte drove his vehicle to the Git-N-Go convenience store on the corner of 161st and North Elm and was followed by Defendant Robinson.

6. In the parking lot of the Git-N-Go, Robinson exited his vehicle, approached the DeCorte vehicle while identifying himself as an off-duty Broken Arrow Police Officer.

7. At the time of this confrontation, Robinson is not in uniform and did not have a badge or other identification which would be obvious to DeCorte.

8. DeCorte requested Robinson to provide identification at which point Robinson removed the 9 mm pistol from his ankle holster and aimed it at the DeCorte vehicle.

9. Prior to any confrontation between DeCorte and Robinson, Officer Steve Smith, on-duty patrolman for The City of Broken Arrow, arrived on the scene, in uniform, driving a marked police cruiser.

10. As Smith arrived, Robinson attempted to remove the keys from the DeCorte vehicle, still without having produced the requested identification, and a struggle ensued as Robinson attempted to pull DeCorte from his vehicle. At this point, Officer Smith arrived and assisted in subduing and hand-cuffing DeCorte. During the struggle, Robinson placed a carotid choke hold on Mr. DeCorte placing enough force on DeCorte's neck to cause DeCorte to momentarily lose consciousness.

11. As a result of the carotid choke hold, DeCorte suffered serious injuries resulting in surgery for anterior cervical discectomy with fusion and resulting medical expenses of approximately \$12,000.00.

12. That DeCorte was placed under arrest by Officer Steve Smith and placed in the back seat of Smith's police cruiser. At that time, Robinson entered the back seat of the cruiser and proceeded to punch Mr. DeCorte in the chest while verbally abusing him.

13. That DeCorte was placed under arrest by Officer Smith for driving under the influence of intoxicating beverages, resisting arrest, and reckless driving.

14. DeCorte submitted to the breath test requested by the Broken Arrow Police Department with a result of a B.A.C. .01.

15. After being booked into jail, DeCorte was forced to post a bond and upon his release immediately gave notice of his complaint to the Broken Arrow Police Department.

16. DeCorte then proceeded to the Broken Arrow Medical Center to receive treatment for injuries suffered at the hands of Officer Robinson.

17. That all charges against Mr. DeCorte were dismissed by the City of Broken Arrow Legal Department."

In addition, the Court further accepts as true the following facts set forth in the parties' briefs:

1. Michael Shue DeCorte and his then wife, Cheryl DeCorte, purchased an insurance policy from the Plaintiff, American States Insurance Company, which provided uninsured, underinsured motorist ("UM") benefits to each plaintiff in the amount of \$100,000.00 per person/\$300,000.00 per accident. This policy was in effect from January 27, 1990, through July 27, 1990, and provided coverage for three separate vehicles owned by the DeCortes for which separate premiums for uninsured motorist coverage were paid. One of the insured vehicles under this policy was the 1979 Oldsmobile Cutlass which the DeCortes were occupying at the time they sustained their injuries.

2. The UM insuring agreement of the policy provides:

We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured" or "underinsured motor vehicle" because of "bodily injury" sustained by an "insured" and caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured" or "underinsured" motor vehicle.

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

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

477 U.S. at 322.

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

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

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient;

there must be evidence on which the jury could reasonably find for the plaintiff.

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

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

In the instant case, the parties agree that the controlling law is set forth in Safeco Insurance Company of America v. Sanders, 803 P.2d 688 (Okl. 1990) and Williams v. Preferred Risk Group Insurance Company, 867 P.2d 485 (Okl. App. 1993). The court in Williams stated in applicable part as follows:

Sanders states a four-step test for determining whether UM coverage applies.

1. Does the injury arise out of the use of the motor vehicle as contemplated by 36 O.S. 1981 § 3636?

2. If the injury arose out of the use of a motor vehicle, was there a causal connection between the use of the vehicle and the injury?
 - a. is a use of the vehicle connected to the injury? and,
 - b. is that use related to the transportation nature of the vehicle?
3. If the causal connection existed, do the acts of the tortfeasor constitute acts of independent significance to sever any causal line?
4. Was the tortfeasor an operator of the vehicle during the commission of the wrongful act?

Accordingly, the question before the Court is whether the facts of this case satisfy the four-part test for UM coverage. The Court concludes that no reasonable jury could determine that Defendant has met the above requirements and therefore judgment in favor of Plaintiff is appropriate as a matter of law. The specific findings of the Court with respect to each of the four requirements are set forth below.

1. The Court finds that the injury to Michael DeCorte did not arise out of the use of the motor vehicle. The court in Sanders held that "if the facts establish that a motor vehicle or any part of the motor vehicle is the dangerous instrument which starts the chain of events leading to the injury, the injury arises out of the use of the motor vehicle, as contemplated by 36 O.S. 1981, § 3636." 803 P.2d at 692. In the instant case, the Court believes that the motor vehicle was in no way the dangerous instrument which started "the chain of events leading to the injury." To the contrary, the events leading to the injury

commenced only after the vehicle in question was brought to a stationary position in a parking lot.

2. The Court finds there was no causal connection between the use of the vehicle and the injury. In order to meet the second prong of the Sanders test, the facts must establish that "the use of an uninsured motor vehicle is related to its transportation nature and injury is connected to that use." Id. at 694. The facts in the present case fail to meet this standard. Defendant asserts that Officer Robinson, the alleged uninsured motorist, was "using" the vehicle at the time of the injury. The Court concludes, however, that no reasonable jury could find that reaching into the window of a stationary car, with another individual in the driver's seat, in an attempt to remove the keys from the ignition constitutes "use related to the transportation nature of the vehicle." Therefore, as a matter of law, it is impossible to find the requisite causal connection between the use of the vehicle and the injury.

3. Even if the Court found such a causal connection, the acts of the alleged tortfeasor in this case, if true, constitute acts of independent significance sufficient to sever the causal link between any alleged use of the vehicle and the injury to Mr. DeCorte. In both Williams and Sanders, the courts held that the tortious acts of the alleged "uninsured motorists" were acts of independent significance. Williams, 867 P.2d at 487; Sanders, 803 P.2d at 695. The tortfeasors in both cases inflicted injury on the victims after the vehicles were parked. In the instant case,

Officer Robinson's alleged assault on Mr. DeCorte in the stationary DeCorte vehicle constitutes an "independent act[] of significance unrelated to the transportation nature of the vehicle," thus severing as a matter of law any causal connection between the injury and the alleged use of the vehicle. Williams, 867 P.2d at 487.

4. The Court finds that the alleged tortfeasor in this case was not "an operator of the vehicle" during the commission of the purported wrongful act. Defendants claim that Officer Robinson became an "operator" of the vehicle when he reached through the driver's window in an attempt to remove the keys from the ignition. The Court disagrees.

The Sanders court held that the term "operator" should be given its ordinary meaning and adopted the definition set forth in Webster's Third New International Dictionary of the English Language Unabridged (1963). 803 P.2d at 696. The court thus defined "operator" as "one that produces a physical effect or engages himself in the mechanical aspect of any process or activity." Id. (quoting Webster's at 1581). Based upon this interpretation, the court held that "'operator,' as contemplated by § 3636, includes any person who is engaged in activity related to the transportation nature of the vehicle." 803 P.2d at 696.

In the instant case, the Court believes that no reasonable juror could find that any ordinary meaning of the term "operator" would encompass an individual who reaches through the window of a stationary car, with another individual occupying the driver's

seat, in an attempt to remove keys from the ignition. Therefore, the Court concludes that Officer Robinson was not "engaged in activity related to the transportation nature of a vehicle," and thus, as a matter of law, was never an "operator" of the vehicle.

Based on the above, the Court holds that no reasonable jury could find that UM coverage exists in the present case. See Anderson, 477 U.S. at 250. Plaintiff should therefore prevail as a matter of law. Id. Accordingly, Plaintiff's motion for summary judgment (Docket #6) is hereby granted.

IT IS SO ORDERED.

This 8TH day of November, 1995.


Sven Erik Holmes
United States District Judge